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DEMOCRATIC COMMITTEE ON APPROPRIATIONS

December 2, 1997

Via Hand Delivery

James J. McNulty, Acting Prothonotary
Pennsylvania Public Utility Commission
Room 206, North Office Building
Harrisburg, Pennsylvania 17105-3265

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Office of Prothonotary
Public Utility Commission

**Re: In Re The Matter Of The Application Of PECO Energy Company For
Approval Of Its Restructuring Plan Under Section 2806 Of The Pennsylvania
Public Utility Code. PUC Docket No. R-00973953.**

Dear Mr. McNulty:

Pursuant to Order of the Presiding Officers, enclosed for filing is an original and two (2) copies of the Brief of Senator Fumo, CEPA, *et al.*, in the above captioned matter. In addition, one 3.5" diskette containing a copy of the brief has been included for the convenience of the Commission.

In addition, a copy of the brief and a diskette has been served to each of the Commissioners and to all counsel of record.

Sincerely,


Christopher B. Craig
Counsel

ORIGINAL

cc: The Honorable John M. Quain, Chairman
The Honorable Robert K. Bloom, Vice-Chairman
The Honorable John Hanger
The Honorable David W. Rolka
The Honorable Nora Mead Brownell
Cheryl Walker Davis, Office of Special Assistants
All counsel of record.

DOCUMENT
FOLDER

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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DEC 02 1997

Docket Number R-00973953

ORIGINAL

Office of Prothonotary,
Public Utility Commission

In Re the Application of PECO Energy Company for Approval
of its Restructuring Plan Under Section 2806 of the
Pennsylvania Public Utility Code

MAIN BRIEF OF STATE SENATOR VINCENT J. FUMO,
CEPA, TAG, ACORN AND JOHN W. LONG, JR.

DOCKETED
DEC 04 1997

In Support of the Joint Petition for Partial Settlement of the Proposed
Restructuring Plan and Application for a Qualified Rate Order

DOCUMENT
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December 2, 1997

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I. INTRODUCTION

A. Prefatory Remarks Of Senator Fumo And CEPA Et Al.

The involvement and advocacy of Senator Vincent J. Fumo, CEPA, TAG, ACORN and Lance Haver in electric deregulation issues on behalf of the ratepayers in the Philadelphia area did not begin with the filing of the PECO securitization and restructuring cases.¹ During the short period of time during which the General Assembly hastily considered and enacted the provisions of the Electricity Generation Consumer Choice and Competition Act, over a year ago, Senator Fumo attempted to provide real benefits for consumers. It was during this time that the provisions of the proposed Act were touted as an effective means of lowering the high electrical costs in Southeastern Pennsylvania. Unfortunately, the efforts by Senator Fumo and others to amend the Act to ensure significant rate relief to consumers in exchange for utility stranded costs recovery failed. Since that time, it has remained the sole objective of Senator Fumo and CEPA, *et al.*, to hold the Commission and the proponents of the Act to the promises of consumer benefits during the transition to a competitive market for electricity generation.

Unfortunately, the manner in which the General Assembly enacted the Act made apparent to Senator Fumo and CEPA, *et al.*, the importance of aggressively participating in all aspects of this litigation in order to protect the interests of ratepayers. However, this zeal was tempered with the understanding that protracted litigation would only serve to delay or prevent necessary rate-relief and other benefits in the Philadelphia area. As such, Senator Fumo and CEPA, *et al.*,

¹ CEPA, TAG, ACORN, and Lance Haver began their efforts on behalf of ratepayers in the late 1970's with their opposition to PECO rate increases and the construction of the Limerick Nuclear plants which are the source of a substantial portion of PECO's claimed stranded costs.

assumed the initiative and fostered the development of the Joint Settlement with PECO Energy Company and the other leading consumer advocates in order to create an equitable resolution of the pending litigation. The Joint Settlement is the result of a lengthy and difficult negotiation process, which provides to this Commission a convenient mechanism by which the provisions of the Act may be implemented in a manner that is fair to the utility company, its customers, and other parties.

While the presentation of the Joint Settlement to this Commission offers the promise of an equitable resolution of pending litigation, the only likely outcome of the Enron Petition will be further litigation and delayed implementation of the Act. Though the choice between the Joint Settlement and the Enron Petition is relatively easy, the decision by the Commission as to the manner in which the Joint Settlement is to be implemented is not. Importantly, **Commission consideration of the Joint Settlement should be guided by an understanding of the strong concerns of Senator Fumo and CEPA *et al.*:**

- ▶ **First, the Joint Settlement should not be modified. The Commission must bear in mind that modification risks detracting from or reducing the substantial benefits obtained by the consumers in the agreement with PECO Energy Company, and**
- ▶ **Secondly, the Joint Settlement should not be modified because any change may compel PECO Energy Company to appeal a final Commission order in this matter, thereby frustrating and delaying rate-relief and other important benefits.**

On a final note, we made a conscious decision to limit the length and scope of this brief in an effort to ensure its careful consideration and review. While an attempt has been made to present a complete and cogent review of the issues before the Commission, in an effort to

preserve applicable appellate rights, Senator Fumo and CEPA, *et al.*, wish to join in support of, and incorporate by reference, as if set forth at length, the brief and findings of fact and conclusions of law filed on behalf of the Pennsylvania Office of Consumer Advocate.

B. Summary Of Position.

Dreams as a part of daily life can be productive, stimulating people to move ahead to realizable, useful goals. When, however, people indulge in fantasy related to goals which cannot be achieved, then that fantasy is not productive and can, instead, be harmful. The Enron Proposal and its revision both fall into the second category because they are not achievable (Fumo/CEPA Exhibit 3 at 2) and because they have misled the public to expect rate reductions which are nothing more than pie in the sky.²

The Enron presentation has so distorted the public discussion and understanding of benefits which are achievable under the Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S.A. Section 2801 et seq. (the Act) that it has also masked the effect that adoption of that proposal would have - to squeeze out competitive generation at the end of the transition period when that competition should be blossoming if deregulation of generation supply is to produce benefits for consumers.

² The irony of the Enron fantasy is that it was filed after Enron ignored concrete opportunities to achieve real benefits for consumers. Having failed to file testimony on any of the key issues in this proceeding, Enron was nevertheless invited to participate in the settlement negotiations. The only two demands made by Enron - exclusion of code of conduct and billing and metering from the settled issues - were accepted and written into the settlement document. Partial Settlement at paragraphs 9, 37.

By contrast, the Partial Settlement delivers real benefits to consumers which are better, as a package, than any of the alternatives available. Every active consumer party in this proceeding has made the decision that the settlement is not only worth signing, but better than the alternatives, all of which ensure protracted litigation and significant delay of any benefits. It is very important to consumers that many provisions of the settlement are effective upon Commission approval of the settlement and that all provisions of the settlement except for a portion of the rate reductions take effect even if there is a legal impediment to securitization. The immediate opening of enrollment in the CAP Rate program is of particular importance to Senator Fumo and the low-income consumer parties, Consumers Education and Protective Association (CEPA), Tenant Action Group (TAG), Association of Community Organizations for Reform Now (ACORN), and John W. Long, Jr. (hereafter, collectively, CEPA *et al.*)

The guaranteed and immediate nature of these benefits under the Partial Settlement stands in sharp contrast to the Enron Proposal which, by its own terms, can be withdrawn *even after Commission approval and for reasons not even articulated on the record.* Fumo/CEPA Statement 3, Responsive Testimony of Richard H. Silkman at 3; Tr. at 1979.

Senator Fumo and CEPA *et al.* urge the Commission to approve the Partial Settlement. In doing so, we must emphasize that, in signing the Partial Settlement, we consciously chose to focus on the benefits received by consumers in that settlement and how those benefits compared with all of the alternatives. In our judgment, ratepayers were ultimately going to be required to pay a substantial portion of PECO's claimed stranded costs. In these circumstances, we sought to obtain concrete benefits for ratepayers which would be consistent with a transition to real competition.

We further urge the Commission to approve the Partial Settlement³ in a manner that makes very clear to the public that the Enron proposal is neither achievable under the law nor good for electric competition. It is essential that the Commission provide the public with a realistic understanding of what to expect under competition.

II. THE PARTIAL SETTLEMENT IS IN THE PUBLIC INTEREST AND CONSISTENT WITH THE PROVISIONS OF THE ELECTRICITY GENERATION CUSTOMER CHOICE AND COMPETITION ACT.

The Partial Settlement provides important benefits to consumers which are balanced by benefits to PECO while providing an opportunity for competition to grow. This balancing is significant for several reasons. First, it is consistent with the Commission's policy encouraging settlements and directly meets the test that the Commission must apply in its decisions which requires a balancing of the interests of the parties in determining whether or not the public interest is served.⁴ Second, in providing agreed-upon benefits to both the company and the customers while still allowing for the growth of competition, it ensures that there will be no protracted litigation which would delay benefits, waste resources of all of the parties, and which could produce a court decision holding the Act unconstitutional.

³ The Partial Settlement provides that the settlement shall be void if modified. Should the Commission consider any changes, it is imperative to Senator Fumo and CEPA *et al.* that the Commission be mindful of the risk that any significant change may provoke litigation which would destroy or long delay the consumer benefits achieved in the Settlement.

⁴ Prior to passage of the Act, the Commission had to balance the interests of ratepayers and investors. With passage of the Act, that balancing must, in some measure, consider the interests of alternative suppliers.

It is very important that the Commission focus on the issue of whether competition can thrive at the end of the ten year transition period, just before full competition, rather than merely at the beginning of the transition period. If the CTC is too large at the end of the transition period, which is also when energy prices will be significantly higher⁵, one can predict that competition will not thrive, that consumers will face an unregulated monopoly, and the central purpose of the Act will have been thwarted.

The Partial Settlement imposes a relatively high CTC at the beginning of the transition period, but it declines toward the end of the period specifically to ensure that there will be room for competition at that critical time. Fumo/CEPA Statement 3, Responsive Testimony of Richard H. Silkman at 9. The Enron Proposal imposes the opposite pattern and thus is inconsistent with the intent of the legislature because it will create Enron as an unregulated monopoly and stifle competition. Fumo/CEPA Statement 3, Responsive Testimony of Richard H. Silkman at 8-9, 11.⁶ As set forth more fully in Section IV, below, the intent of the Act is not to *guarantee* the success

⁵ All parties in this proceeding project increasing energy prices during the transition period. See, for example Fumo/CEPA Exhibit 3 at 4-5 in which Dr. Silkman states that the 3% per year energy price escalation rate assumed by the Commission Interrogatories, Set III are too low and, since they are also lower than those projections submitted by PECO, would increase stranded cost estimates submitted by PECO.

⁶ As stated by Dr. Silkman at pages 10-11 of Fumo/CEPA Statement 3, Responsive Testimony of Richard H. Silkman:

...the Partial Settlement Agreement may result in a delay of competition in the PECO service territory, but potential marketers that do decide to compete can be reasonably certain that the market will become increasingly competitive over the transition period and fully competitive by the end of the transition period.

The opposite will be true for the Choice Plan. Under this option, there may be opportunities for competitors prior to 2001, but these opportunities will begin to disappear beginning January 1, 2001 as the market becomes increasingly anti-competitive over the balance of the transition period.

of all (or any) who would compete as soon as they enter the arena. The Act creates a period of transition from regulation to competition with the goal that competition should be sufficiently healthy by the end of the period to provide consumers with benefits. While consumers would obviously prefer to receive those benefits as soon as possible, a declining CTC such as contained in the Partial Settlement is the only way to provide near term benefits and ensure that competition will continue beyond the transition period.

The Partial Settlement provides numerous, significant benefits to the parties in this proceeding which are in the public interest. Those benefits are as follows:

A. The Benefits Are Guaranteed and Predictable.

The terms of the Partial Settlement produce benefits which are predictable and guaranteed and, with the exception of a portion of the rate reductions, contingent on nothing but Commission approval. Even the contingent portion of the rate reductions is subject only to there being no legal impediment⁷ to securitization.

B. Low-Income Customers Will Have Dramatically Improved Access To Affordable Electric Service.

In PECO's service territory, as of December 31, 1996, there were over 41,000 low

⁷ The term "legal impediment" is narrowly defined in the settlement agreement to refer only to statutory changes and court actions or decisions that preclude securitization. Partial Settlement at paragraph 10, footnote 5. PECO assumes the risk for SEC and IRS approvals and unfavorable market conditions which are not considered legal impediments which would limit the rate reductions. Ibid.

income⁸ customers in total enrolled in PECO's CAP and CAP Rate programs. PECO Energy Statement No. 16, at 12. These programs are the only truly affordable programs for those customers who are most vulnerable, and the only programs which provide even a modest assurance that the customer will be able to meet his/her responsibility and maintain electric service.

There were also approximately 29,000 low income customers not included in existing customer assistance programs who had payment agreements that extended beyond 48 months. As OCA witness Nancy Brockway testified, if the CAP and CAP rate programs were accepting new participants, these customers would have been eligible to be included in those programs. OCA Statement 6, at 15; see also PECO Energy Statement No. 16, at 11,12.

The Act requires that, in reviewing a proposed Restructuring Plan, the Commission must ensure that "universal service and energy conservation policies, activities and services are appropriately funded...." 66 Pa.C.S.A. §2804(9). The Act does not define what constitutes "appropriate" funding, but the Act's Declaration of Policy declares that "at a minimum," "protections, policies and services that now assist customers who are low-income to afford electric service" are to be continued. 66 Pa.C.S.A. §2804(10); see also 66 Pa.C.S.A. §2802(17) ("The public purpose is to be promoted by continuing universal service and energy conservation policies, protections and services..." [emphasis added]). Reviewing these provisions, the Commission has itself stated the view there is nothing in the Act which mandates an "inherent increase or decrease in spending" for universal service programs. Final Order Re: Guidelines for

⁸ The term "low income" has been defined as being at or below 150% of the federal poverty standard.

Universal Service and Energy Conservation Programs Made Pursuant to 66 Pa.C.S.A. §§ 2803, 2802(17), 2804(8) and 2804(9), P.U.C. Docket No. M-00960890F0010.

When viewed against this factual and statutory background, the Partial Settlement greatly expands access to affordable electric service for low-income customers in two ways, thereby significantly increasing the likelihood that those customers and their families will be able to avoid disruption of electric service.

First, the Partial Settlement envisages that PECO's CAP Rate program, which is currently closed to additional customers, will be allowed to more than double in size to an "initial maximum" of 100,000 low income participants. Partial Settlement, at Paragraph 26. The parties to the settlement believe that level of enrollment effectively provides for open enrollment in this program for at least several years. Furthermore, the Partial Settlement provides that, as enrollment approaches 100,000 participants, further negotiations will take place among the parties with the goal of maintaining open enrollment and containing program costs. Ibid.

Second, by expanding the definition of eligibility, the Partial Settlement expands the definition of eligibility for PECO's universal service programs. Customers at or below 150% of the federal poverty standard currently must, in order to be eligible for these programs, demonstrate an inability to pay as shown by "payment troubled" status. 52 Pa. Code Section 69.261; see also PECO Energy Company Customer Assistance Program (Effective Date: April 1, 1996), p. 2 of 9, in PECO Statement No. 16. The term "payment troubled" has been defined to refer to customers who have been past due on five of their last six bills. PECO Statement No. 16 at 11.

The Partial Settlement provides that a low income customer need only show "inability to pay" as demonstrated by failure to make at least two payments of his/her electric bill. Partial Settlement at Paragraph 23.

Not only does the Partial Settlement provide a means of more adequately meeting the life-essential needs of low income customers, but PECO, and not customers, is at risk for any increase in the cost of the expansion of the program, which is held at \$50 million at least until CAP Rate enrollment exceeds 90,000 customers. Partial Settlement at paragraph 26.

C. Transmission and Distribution Charges Are Capped For An Additional Two And One-Half Years.

The Partial Settlement caps transmission and distribution (T & D) charges at current levels for two and one-half years longer than they would be under the Act, from June 30, 2001, as provided in the Act, to January 1, 2004. Partial Settlement at Table A, footnote (c). Dr. Silkman states that he believes that there is no other state that has imposed such a lengthy stay-out provision on any of its utilities. Fumo/CEPA Statement 2, Rebuttal Testimony of Richard H. Silkman at 15. Without such a stay-out provision, it is reasonable to assume an annual increase in those costs of 3%, offset by a 1% productivity adjustment. Fumo/CEPA Exhibit 3, Response to Commission Interrogatories, Set III at 8.

D. The Generation Rate Caps Are Extended For Three Years.

The Partial Settlement extends the generation rate caps for three years beyond 2005, the end of the Act's rate cap. Partial Settlement at paragraph 9. This provision, though it allows for

modest increases, is a valuable insurance for ratepayers against significant energy price increases.

Fumo/CEPA Statement 2, Rebuttal Testimony of Richard H. Silkman at 15.

E. Customers Who Do Not Choose A Generation Supplier
Receive Important Protections.

Residential customers who do not or cannot choose an alternative electric supplier cannot, under the Partial Settlement at paragraph 36, be charged a rate greater than the all hours residential rate for residential customers offered by PECO through its separate marketing division or affiliate. Consumers argued for this protection because of their experience in telephone deregulation in which many residential customers, particularly low and middle income customers, never chose or took many years before choosing an alternative long distance company.

This protection is substantially better than the Enron Proposal which would charge this group of customers a price constrained only by the generation rate cap. Under the settlement, by contrast, it is believed that competition will force the price charged to these customers to a level below the cap.

F. PECO Will Be Required To Transfer All Generation
Assets To A Separate Entity Or Entities.

Pursuant to Paragraph 16 of the Partial Settlement, PECO will be required to transfer all generation assets to a separate corporate entity or entities. Consumers demanded this transfer to provide, with a strong code of conduct⁹, a greater likelihood that competitive market forces will

⁹ The Partial Settlement, at ¶37 provides that dealings between PECO's T & D operations and the generation or marketing affiliates will be governed by a code of conduct through December 31, 2008. The terms of that code are left for the Commission to define after

provide benefit to consumers, preventing PECO from using its control of generation for anti-competitive purposes. The Act does not authorize the Commission to require such transfer without PECO's consent.

G. Guaranteed And Significant Rate Reductions Will Provide Customers With Stability, Relief And Access To Competition Four Months Early.

The Partial Settlement provides consumers with predictable rate reductions, beginning at 10%, that compare favorably with any imposed on a utility by any state or commission during the recent transition to competition. Partial Settlement at paragraph 8, 9, and Table A; Fumo/CEPA Statement 2, Rebuttal Testimony of Richard H. Silkman at 18. The fact that these rate reductions are also guaranteed further distinguishes them from the benefits afforded consumers in other jurisdictions.

The Partial Settlement imposes the rate reductions and accelerates the time when all customers can choose their electric supplier four months earlier than would have been possible under the Act, without PECO's consent. Fumo/CEPA Statement 2, Rebuttal Testimony of Richard H. Silkman at 15.

H. Consumers Will Have Joint Control, With PECO, Of Funds Allocated For Consumer Education.

Senator Fumo and CEPA *et al.* were well aware during negotiations of the Partial Settlement that many consumers, particularly low and moderate income consumers, often do not

participation by other stakeholders, including other competitors. Senator Fumo and CEPA *et al.* believe that their interests are identical with those of alternative suppliers on this issue.

have adequate information to take full advantage of opportunities such as those that might become available under the transition to electric competition. Other consumer parties have agreed.¹⁰ It was for that reason that the Partial Settlement provides for joint control over the \$25 million PECO Consumer Education Program. Partial Settlement at paragraph 29. This provision gives consumers the opportunity to design and help implement a consumer education program that will reach those who otherwise would likely be excluded from informed participation in electric competition for many years.

The Act does not authorize the Commission to require such shared control without PECO's consent. This provision is absent from the Enron Proposal.

I. PECO Will Be Required To Write Off
At Least \$2 Billion Of Stranded Costs.

Under paragraph 17 of the Partial Settlement, PECO agrees not to seek recovery of at least \$2 billion of its total stranded costs and assets. No regulatory decision has yet required such a large write off of stranded assets during the transition to electric competition. Indeed;

“In virtually every state where restructuring legislation has been enacted or where restructuring settlements have been reached, consumers have generally received no real rate relief. This would include California, Rhode Island, Montana, Nevada and Massachusetts, where no utility write-offs of stranded costs are required.”¹¹

¹⁰ For example, AARP strongly supported Senator Fumo and CEPA *et al.* on this issue. Interestingly, so do the Environmentalists who did not, ultimately, sign the Partial Settlement. See Environmentalists Statement 3E, Testimony of Roger E. Colton.

¹¹ Dr. Silkman further catalogues the activities in New Hampshire, Maine and New York in that same section of his testimony. In those three states 90-100% of stranded cost recovery was the result. Fumo/CEPA Statement 2, Silkman Rebuttal Testimony at 4.

Fumo/CEPA Statement 2, Silkman Rebuttal Testimony at 4.

J. PECO Must Assume The Risk That Lower Sales Will Further Reduce Recovery Of Stranded Cost Allowed Under The Partial Settlement.

As set forth in greater detail in Section III below, the Partial Settlement imposes on PECO the risk associated with a decline in sales in the service territory (as well as the benefit of larger than projected sales growth). Partial Settlement at paragraph 11; Fumo/CEPA Statement 2, Rebuttal Testimony of Richard H. Silkman at 6, 15.

Given the flat sales growth in the PECO territory during the last ten years (Id. At 7.) and the greater likelihood of increased conservation and other energy efficiency activity during the transition period (Id. At 7, 8.), it is likely that this shifting of sales risk to PECO will accrue to the benefit of consumers.

K. The Settlement Will Encourage Renewable Energy Generation Under A New Tariff.

Paragraph 40 of the Partial Settlement requires PECO to prepare and file for Commission approval new tariff provisions which would allow customers to install and operate renewable energy generation facilities under 10 kw. The new tariff language would broaden the existing tariff provisions from only solar to also include hydro, wind, biomass, and methane field generation.

The Act does not authorize the Commission to require submission of such tariff language without PECO's consent.

III. THE SETTLEMENT'S PROVISION OF A NON-RECONCILABLE CTC IS REASONABLE AND IN PUBLIC INTEREST.

Consumers bargained for a non-reconcilable CTC in the Settlement in order to shift risk of sales to PECO and to create value for PECO (from possible increase in sales levels) in exchange for the various benefits received by consumers in the settlement. Fumo/CEPA Statement 2, Rebuttal Testimony of Richard H. Silkman at 6. As set forth by Dr. Silkman:

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

Fumo/CEPA Statement 3, Responsive Testimony of Richard H. Silkman at 15.

As distinct from the non-reconcilable CTC which is part of the Partial Settlement, a reconcilable CTC would guarantee that PECO would recover 100% of the stranded costs allowed. OCA Response to Commission Interrogatories, Set III.

As a result, both the risk and the value to the parties to the settlement - and to all other parties - is reflected in the settlement and is fully acknowledged by the settling parties who have

created the settlement as a package whose benefits might not have been attainable separately.

Partial Settlement at ¶11.

These benefits provide the good cause required under the Public Utility Code, thus allowing a non-reconcilable CTC. Section 2808(F) of the Competition Act refers to Section 1307(e) of the Code which provides that, for good cause shown, the Commission need not adjust rates to recover under-collections or refund over-collections in a prior period.

IV. AS AN ALTERNATIVE TO THE JOINT SETTLEMENT, THE ENRON PETITION IS CONTRARY TO THE PUBLIC INTEREST AND TO THE PROVISIONS OF THE ELECTRICITY GENERATION CUSTOMER CHOICE AND COMPETITION ACT.

The Enron Petition stands in stark contrast to the Joint Settlement — a product of a willing compromise between PECO Energy Company, Senator Fumo, CEPA, *et al.*, and all of the active consumer parties in the pending litigation.¹² As such, the Joint Settlement represents an equitable, achievable, and satisfactory resolution of the pending matter. By comparison, the Enron Petition is neither achievable, nor in the public interest, nor consistent with the provisions of the Act, nor a compromise among any of the litigants. It does not offer the prospect that, if accepted by this Commission, it would resolve the protracted litigation and prevent further delay of the advent of rate-relief and other important benefits to PECO customers.

¹² The active consumer parties in this litigation include Senator Fumo, CEPA, TAG, ACORN, John W. Long, Jr., the Pennsylvania Office of Consumer Advocate, the Pennsylvania Office of Small Business Advocate, the American Association of Retired Persons, the Philadelphia Area Industrial Users Group, the United States Department of Navy and the Public Utility Commission - Office of Trial Staff.

The Enron Petition never received the benefit of any consumer participation or direct input in its development. In fact, Steven Kean, Senior Vice President for Governmental Affairs for Enron, whose responsibility it is to discuss Enron objectives and concerns with public policy makers, conceded that the Enron Petition was never discussed or shared with any of the consumer advocacy groups or state agencies that represent ratepayers, prior to the submission of the plan. Cross-Examination of Kean, Tr. at 1261-1264. Considering the fact that the provisions of the Act require a balancing of the interests in a “manner that is fair to **customers**, electric utilities, investors, the employees of electric utilities, **local communities**, nonutility generators of electricity and other affected parties,” the failure of Enron to achieve the support of any of the consumer parties and local communities is a significant omission. (Emphasis added) 66 Pa.C.S.A. § 2803(8). Unfortunately, the only guaranteed legal and economic result of the Enron Petition will be to undermine the efforts of ratepayers to achieve a workable compromise with PECO that ensures an orderly transition to a competitive marketplace for electricity generation for all parties — including the utility and its ratepayers.

Contrary to the provisions of the Act, Enron has premised its Petition upon the claim that in order for any utility company to recover its claimed stated costs, a competitive marketplace must first take hold. Enron Petition, at 17, ¶ 21. However, the General Assembly has clearly stated that the emergence of a competitive marketplace is one of transition, not immediate imposition, and that stranded costs recovery at a just and reasonable level is a mechanism for achieving the legislative goal of “greater competition.” 66 Pa.C.S.A. § 2802 (7), (8) and (15). Furthermore, the ultimate objective of the Act was never envisioned by the legislature to benefit solely electricity marketers, but rather the ratepayers of the Commonwealth — residential,

industrial and small business. 66 Pa.C.S.A. § 2802(7); 180 *Legislative Journal of the Senate* 2674 - 2705 (November 25, 1996); 180 *Legislative Journal of the House of Representatives* ____ (November 25, 1996). Marketers and alternative suppliers only serve as the means of achieving the legislative objective of lower rates.

Despite this fact, Enron has proffered a last-minute proposal that significantly benefits Enron and forces consumers to assume significant economic risks not contemplated by the Act in exchange for conditional promises of rate relief. Furthermore, because the Enron Petition is inextricably linked with several misapplications of the provisions of the Deregulation Act, it effectively ensures delay or prevention of the emergence of a competitive marketplace and promised consumer benefits by predictable appellate litigation.

A. The Enron Petition Is Contrary To The Provisions And Legislative Intent Of The Electricity Generation Customer Choice And Competition Act.

The provisions of the Enron Petition are expressly conditioned on this Commission issuing a Qualified Rate Order which exceeds the Commission's statutory authority. Specifically, Enron's proposal includes the following preconditions that are contrary to the Act:

- ▶ The Commission will designate Enron as the Provider of Last Resort to supply default customers within PECO Energy Company's service territory. Enron Petition, at 20, ¶23(b).
- ▶ The Commission will issue a Qualified Rate Order requiring PECO Energy Company to issue transition bonds in a face amount of \$5.461 billion at an interest rate of 9.31%. Enron Petition, at 38, ¶35(b); Enron Statement 1-R, at 39.
- ▶ The Commission will order PECO Energy Company to enter into a Power Purchase Agreement and Metering, Billing and Collection Services Agreement with Enron, as composed by Enron and included within their Petition. Enron Petition, at 28, ¶35(c).

It is Enron's assertion that though the Act fails to explicitly authorize the Commission to issue any of these orders, it may do so as a condition for permitting PECO's recovery of its stranded costs. Enron's justification for this interpretation of the Commission's authority is that it is the only means of ensuring a competitive marketplace. However, this assertion overlooks the important fact that the General Assembly never envisioned a single Commission order that would instantly establish a competitive marketplace, but rather a transition period that would allow the emergence of a competitive marketplace at its end. 66 Pa.C.S.A. §§ 2802 (7), (8) and (15) (the legislative declaration of policy explicitly states that it is a "**transition from regulation** to greater competition," "**moving toward greater competition**," and a "**transition to and creation of a** competitive electric market.") (Emphasis added); § 2804(14) (the standards for shaping the utility's restructuring includes the statement that "[t]he **transition to a competitive generation market shall be orderly, protect system reliability, be fair to ratepayers . . .**") (Emphasis added); § 2808(c)(4) (the recovery of stranded costs is during the "**transition period**.") (Emphasis added).

It is important to recognize that the drafters of the Act envisioned a transitory period during which certain consumer protections are imposed, such as a rate cap to prevent market driven price escalations, limitations on recovery of transmission and distribution charges, and even the assured recovery of universal service and energy conservation costs. 66 Pa.C.S.A. § 2804(4)(9). By definition, each of these consumer protections is "anti-competitive," in the sense that each either limits the ability or guarantees the ability of the utility to recover certain costs during the transition period. In other words, the principle objective of the General Assembly was

to provide for an orderly and manageable transition to a competitive marketplace, not, as suggested by Enron, that a competitive marketplace must be guaranteed before stranded cost recovery is permitted.

Enron's demand that it be designated by this Commission as the Provider of Last Resort as a precondition for PECO's recovery of its stranded costs, as outlined in the Joint Settlement, is contrary to the provisions of the Act. Section 2807(e)(1) explicitly states that:

“[w]hile 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.” (Emphasis added).

It is only at the end of the transition period that the Commission may issue regulations that redefine the electric utility's obligation to serve as the Provider of Last Resort. 66 Pa.C.S.A. § 2807(e)(2). In this case, PECO - the electric distribution company, has a statutory obligation to remain as the Provider of Last Resort until either 100% of its customers have choice, or it has fully recovered its stranded costs, whichever is longer. In fact, less than 5% of PECO's customers presently have the ability to choose alternative electrical suppliers. Furthermore, Section 2802(e)(2) states that prior to any Commission designation of a Provider of Last Resort, the Commission is statutorily required to promulgate regulations that define the obligations to deliver electricity. To date, the Commission has not developed these regulations. As the Pennsylvania Rules of Statutory Construction mandate, when the words of a statute are clear and free from ambiguity, the letter of that law should not be disregarded. 1 Pa.C.S.A. § 1921(b). Acceptance of Enron's contention that the Commission may designate Enron as the Provider of

Last Resort prior to the end of the transition period and before the promulgation of any Commission regulations, would effectively disregard the plain language of the statute and be contrary to the sound principles of public policy that guided the legislature to ensure an orderly transition period. 1 Pa.C.S.A. §1922(1) (the “General Assembly does not intend a result that is absurd”).

Enron has conceded that if it were to become the Provider of Last Resort at this time, Enron would not own or operate any facilities in Pennsylvania, it would have no employees, and no corporate assets in the Commonwealth. Kean Cross-Examination, Tr. at 1320 - 1332. In other words, Enron seeks to have consumers assume the risk that Enron is even capable of assuming the responsibility of being the Provider of Last Resort.¹³ From a consumer viewpoint, this risk is unacceptable. Enron’s designation as the Provider of Last Resort prior to the end of the transition period is not consistent with the orderly transition, system reliability, or customer protections otherwise required under the Act.

Enron’s second demand, that PECO Energy Company be obligated, pursuant to Commission order, to issue \$5.461 billion in transition bonds at a set interest rate of 9.31% is equally contrary to the provisions of the Act. Section 2812(a)(1) provides that a “qualified rate order may be adopted by the commission **only** upon the application of an electric utility.” (Emphasis added). Enron’s Petition appears to put forth the claim that a non-regulated energy company may submit an application for a QRO on behalf of a regulated utility and dictate the

¹³ It is particularly interesting to note that while Enron seeks to be prematurely designated as the Provider of Last Resort by the Commission, it also seeks acknowledgment, as a precondition to providing rate reductions, that it would remain an unregulated utility. Enron Petition, page 30, ¶ 35(h). The Joint Settlement contains no such precondition.

manner in which the utility may finance and recover its stranded costs. However, the legislature's purposeful use of the phrase "a utility may apply to the commission for a qualified rate order, under section 2812, for some or all of its transition or stranded costs" clearly evidences a discretionary action on the part of the applicant utility. 66 Pa.C.S.A. § 2807(e); § 2812(a)(2). The Act explicitly indicates that the manner in which the utility may recover the stranded costs pursuant to an issued QRO is unconditional and within the "sole discretion" of the applicant utility, in this case — PECO. 66 Pa.C.S.A. § 2812(a)(1).¹⁴

The effect of the Enron Petition is to remove any statutory discretion PECO possesses concerning whether or not to even issue any transition bonds, and whether or not to assign, sell or transfer the intangible property. Enron's attempt to seek a Commission QRO on behalf of PECO in this manner places the interests of consumers at risk, since the rate relief allegedly offered by Enron is preconditioned on PECO's consent to abide by the requested QRO. Enron Petition, at 28, ¶ 35(b). Based on the public statements from PECO as well as PECO's Answer to the Enron Petition, there is no reason to believe that PECO will acquiesce to Enron's proposed QRO, thereby leaving consumers to suffer the consequences of Enron's gambit. *See, Answer of PECO Energy Company to the Enron Petition.*

Enron next conditions the promise of rate relief on the Commission ordering PECO to enter into the contractual agreements outlined in the Enron Petition. Enron has argued that in

¹⁴ Section 2812(a)(1) of the Act provides:

"After issuance of a qualified rate order, the electric utility retains the **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." (Emphasis Added).

order for it to satisfy its obligations as a Provider of Last Resort, (something that Enron is otherwise impotent to do), PECO must be ordered by the Commission to enter into a Power Purchase Agreement and a Metering Billing and Collection Service Agreement with Enron. Enron Petition, at 28, ¶35(c). Significantly, Enron has drafted the exact wording of these agreements and has included them as part of its Petition. *See*, Enron Petition, Exhibits 2 and 3. Unlike the provisions of the Joint Settlement, these contracts were not the product of any type of negotiation with PECO — rather they were dictated by the business interests of Enron. Nowhere in the Act is there any provision that would otherwise permit this Commission to compel a state utility company to enter into power purchase or billing and metering contracts with an electrical marketer that is not subject to state regulatory jurisdiction.

The real effect of these proposed contracts will be to establish the ability of Enron to gain significant market-share or electric ratepayers in Southeastern Pennsylvania, on the corporate back of PECO, without placing any asset of Enron at risk. In fact, to permit such an action would invite immediate legal challenge by PECO or others to the Commission's underlying authority. It cannot be imagined that PECO would permit another corporation to dictate the terms and conditions upon which it would provide electricity or billing and metering services. Once again, *the only realistic outcome under these circumstances will be for PECO to appeal any Commission order pursuant to the Enron Petition, thereby leaving consumers to shoulder the consequences of delayed rate relief.*

B. The Enron Petition Is Neither Just And Reasonable, Nor In The Public Interest.

The primary purpose of the legislature's consideration and enactment of the Act was to remedy the problem of high electricity generation costs in the Commonwealth. 180 *Legislative Journal of the Senate* 2674 - 2705 (November 25, 1996); 180 *Legislative Journal of the House of Representatives* ___ (November 25, 1996). Stated more clearly, the "occasion and necessity" for the Act was the reduction of energy costs to ratepayers, and as such, this Commission is statutorily mandated to apply the provisions of the Act in a manner that "effectuate[s] the intent of the General Assembly." 1 Pa.C.S.A. § 1921(a), (c)(1); *Commonwealth v. Davis*, 421 Pa. Super. 454, 618 A.2d 426, *appeal denied*, 535 Pa. 630, 631 A.2d 1004 (1992). Therefore, it should be the goal of this Commission to apply the Act in a manner that breaths life into this legislative intent. A critical element in achieving this objective is to resolve the consideration of PECO's restructuring application in such a way that "is fair to customers." 66 Pa.C.S.A. § 2802(7).

Unfortunately, by this "fairness-to consumers" standard, the Enron Petition is a failure. The primary benefit claimed by Enron — guaranteed substantial rate relief — is illusory and uncertain. In addition to the failure to provide guaranteed rate relief, Enron has failed to include protections for consumers against potential increases of the imposed Intangible Transition Charges due to potential electrical load decline. Furthermore, if approved by the Commission, the Enron Petition may result in the establishment of Enron as an unregulated electrical service provider monopoly within the PECO service territory. Each of these deficiencies places customers in an untenable position of facing the possibility of permitting Enron to undermine a workable settlement in return for the promise of higher rate reductions, regardless of the

improbability of their realization by ratepayers. In combination, these deficiencies create a compelling reason for the rejection of the Enron Petition.

When first unveiled, the Enron Petition claimed to provide guaranteed and immediate rate reductions to PECO's customers at twice the level offered by the Joint Settlement. Enron Petition, at 18, ¶ 23(a); Enron Statement 1, at 3. However, upon closer examination, it was discovered that 100% of the so called "guaranteed" rate reductions were conditioned on the premise that there "arises no legal impediment to the issuance of the transition bonds pursuant to section 2812 of the Act." Enron Petition, at 29, ¶ 35(g).¹⁵ In fact, pending legal challenges to the constitutionality of the Act, including the complaint filed by Senator Fumo, CEPA, *et al.*, clearly indicated that Enron's promise of guaranteed rate reductions was empty.

In response to these real concerns, Enron's Senior Vice-President for Governmental Affairs provided testimony that indicated Enron would provide rate reductions of 14%, from the originally promised level of 20%, if any legal impediments existed that would prevent full securitization. Enron Statement 1-R, at 23, Table B.¹⁶ However, as with the original Enron

¹⁵ At the time the Enron Petition was filed with this Commission, there existed at least three separate challenges to the constitutionality of the Act, all of which would constitute a "legal impediment" in as much as an adverse decision by Commonwealth Court in any of the pending cases would eliminate the legal right of a utility company to collect an Intangible Transition Charge. *See, Fumo, et al. v. The Pennsylvania Public Utility Commission*, 267 M.D. 1997 (Cmwlth. Ct.); *Indianapolis Power & Light Company v. The Pennsylvania Public Utility Commission*, 1597 C.D. 1997 (Cmwlth. Ct.); *Utility Workers Union of America v. The Public Utility Commission*, 760 M.D. 1997 (Cmwlth. Ct.).

¹⁶ It should be noted that Enron has presented testimony of Susan Voorhees from Chase Securities that the existing legal challenges to the constitutionality of the Act are "without merit" and thereby do not present a legal impediment to the issuance of the transition bonds. However, under cross-examination, Ms. Voorhees conceded that she had no personal opinion concerning the effect of the pending litigation, and that she was relying on the "advise of counsel." Voorhees Cross-Examination, Tr. at 1915. She also admitted that the opinion was not

Petition, close examination revealed that Enron has again conditioned its obligation to provide the promised rate relief on the elimination of all legal impediments that may prevent the issuance of the transition bonds by December 31, 2000. Enron Statement 1-R, at 40.¹⁷ Enron has admitted that if this condition were not met, "any obligation of Enron under the Choice Plan would terminate." Enron Statement 1-R, at 41; Kean Cross-Examination, Tr. at 1254 - 1256. In other words, unless the pending litigation is favorably and finally resolved by December 31, 2000, and PECO chooses not to appeal any Commission approval of the Enron settlement, the promised consumer benefits, including expansion of Universal Service and rate reductions as well as Enron's obligation as a Provider of Last Resort would be eliminated, thereby leaving consumers exposed to the whim of Enron.

In contrast, the Joint Settlement contains no such precondition. Kean Cross-Examination, Tr. at 1254. Under the terms of the Joint Settlement, if PECO is unable, for whatever reason, to issue the transition bonds, consumers will only lose 3% of the guaranteed rate savings, but still realize all the other important benefits obtained through the settlement.

Enron's failure to timely file an Intangible Transition Charge Shortfall Agreement that would provide necessary protection to consumers if electrical loads declined in the PECO service territory is a very real concern to ratepayers and is another shortcoming of the Enron proposal. Customers may be forced to pay higher ITC charges since Enron's petition is conditioned upon full securitization of \$5.461 billion in stranded costs through the issuance of transition bonds.

based on a review of the briefs filed in the cases, and that it was not a written opinion, but rather a simple oral statement pursuant to a conference call. *Id.*, at 1916 - 1930.

¹⁷ Enron also added a new condition: that the securitization bonds achieve a AAA rating. Tr. 1972. With pending litigation, such a rating would be virtually impossible.

This condition necessitates the need for a mechanism that would annually adjust the ITC level in order to ensure sufficient revenue to recover the qualified transition expenses. Enron Petition, at 23, ¶ 23(o); Exhibit 5, ¶ 6; Enron Statement 1, at 17. Enron did file such a document after the last hearing date, but no party has been able to review it or provide record comments and it is therefore the subject of several parties' challenge. The problem that exists is that Enron has provided testimony that states that the ITC Shortfall Agreement will "virtually eliminate the risk to ratepayers of increased payments due to the load decline." Enron Statement 9, at 8. There is simply no proof for Enron's claim. The potential risk posed to consumers due to load decline is significant and could result in the elimination of all ratepayer savings. Fumo/CEPA Statement 3, Silkman Responsive Testimony, at 3 - 4.

Probably the most insidious aspect of the Enron Petition is the anti-competitive affect it will have in the PECO service territory — ironically the same complaint Enron has leveled against the Joint Settlement. Enron has significantly overstated the market price for electricity generation for 1999 though 2003. The problem is that in combination with Enron being designated as the Provider of Last Resort and forcing PECO to provide electricity at or below market rates pursuant to the Power Purchase Agreement, Enron will be able to maximize its profit margin on each sale, at the same time forcing competitors to purchase and sell electricity at market prices. Fumo/CEPA Statement 3, Silkman Responsive Testimony, at 11. Further compounding this disastrous effect is the fact that the market price caps set by Enron during the years, 2005 through 2008 are significantly understated, thereby compelling customers to return to the Provider of Last Resort — Enron. This dynamic is contrary to the "transition to competition" that was intended by the Act.

Additionally troublesome to consumers is the admission by Enron that the statutory limitation on transmission and distribution charges would **not** apply to consumers who choose an alternative generation supplier — the end user. Kingerski Cross-Examination, Tr. at 1690. Not only is this contrary to the clear language of the Act, but it effectively permits Enron to pass on to customers additional charges hidden in transmission and distribution increases, regardless of the actual transmission and distribution costs. Section 2804(i)(B) of the Act explicitly states:

“for customers who purchase generation from a supplier other than the electric distribution utility, the charges of the utility for non-generation services that are regulated as of the effective date of this chapter, exclusive of the competitive transition charge and intangible transition charge, shall not exceed the non-generation charges that have been approved by the commission for such service as of the effective date of this chapter.”

By contrast, the Joint Settlement not only provides this protection in a manner that is consistent with the Act, it extends the transmission and distribution cap protection for an additional thirty (30) months.

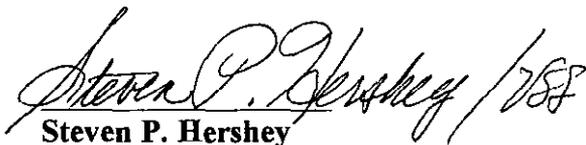
Each of these deficiencies which exist within the Enron Petition independently provide ample reasons for its rejection as being contrary to the public interest. However, when considered together and compared to the important consumer protections within the Joint Settlement, it is abundantly clear that the Enron Petition was never offered as a means of satisfying the needs of ratepayers. Rather, the Enron Petition was offered as a means of addressing the business needs of Enron Corporation. The only guaranteed result of any Commission approval of the Enron Petition would be an immediate legal challenge by PECO — the party with the most to lose if it were approved and others. Unfortunately, it is neither PECO nor Enron that would shoulder the consequences of any further delay of needed rate relief in Southeastern Pennsylvania, it would be

the consumers. It is for that simple reason that the Joint Settlement, a willing compromise among most of the parties involved in this litigation, offers the only real prospect for a fair and equitable implementation of the provisions of the Act.

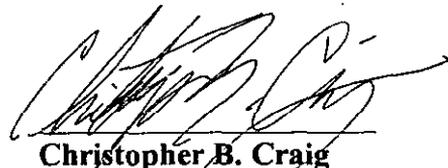
V. CONCLUSION.

WHEREFORE, for the reasons set forth herein, Senate Senator Vincent J. Fumo, CEPA, *et al.*, respectfully requests this Honorable Commission to apply the provisions of the Electricity Generation Customer Choice and Competition Act in a manner that is consistent with the intention of the legislature to provide meaningful benefit to consumers, reject the Enron Petition and approve, in the clearest and strongest terms possible, the Joint Settlement as part of PECO Energy Company's comprehensive restructuring filing.

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Dated: December 2, 1997



**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**In re the Application of PECO Energy
Company for Approval of its Restructuring
Plan Under Section 2806 of the Pennsylvania
Public Utility Code**

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Docket No. R-00973953

CERTIFICATION OF SERVICE

I Christopher B. Craig, attorney for Senator Vincent J. Fumo, hereby certify that a copy of the foregoing document has been served in person or by first class mail at the addresses indicated below. I further certify that the manner of service satisfied the requirements of 52 PA.Code §§ 5.75 and 1.54.

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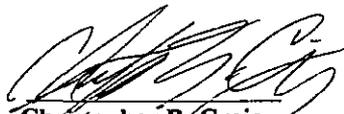
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