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December 2, 1997

BY HAND

James McNulty, Prothonotary
Pennsylvania Public Utility Commission
North Office Building
P.O. Box 3265
Harrisburg, PA 17105-3265

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

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

Dear Mr. McNulty:

On behalf of Enron Energy Services Power, Inc. and Enron Power Marketing, Inc. enclosed please find for filing in the above-captioned proceedings an original and nine (9) copies of a Brief *(Proprietary Version)* and an original and nine (9) copies of a Brief *(Non-Proprietary Version)*. Also enclosed is a Certificate of Service evidencing the signatories to the Confidentiality Agreement who received a Proprietary Version of the Brief.

In addition, accompanying this letter are two 3.5" diskettes. The hard copy of the brief was generated in WordPerfect 6.1 and this non-proprietary version appears on diskette #1. Pursuant to Pre-Hearing Order #6 issued on November 20, 1997, diskette #2 contains a non-proprietary version of the brief in Word 6.0. Please note that the page numbering of the Word 6.0 version does not correspond with the hard copy.

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If you have any questions or comments concerning this matter, please contact me at your convenience.

Sincerely,

John J. Gallagher

JJG/mas
enclosure
cc: The Honorable Marlane R. Chestnut (*one hard copy of each version*)
The Honorable Charles E. Rainey, Jr.(*one hard copy of each version*)
John M. Quain, Chairman (*two hard copies of each version & diskettes*)
Robert K. Bloom, Vice Chairman (*two hard copies of each version & diskettes*)
John Hanger, Commissioner (*two hard copies of each version & diskettes*)
David Rolka, Commissioner (*two hard copies of each version & diskettes*)
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All Parties on Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PETITION OF ENRON ENERGY SERVICES POWER, INC. FOR APPROVAL OF AN ELECTRIC COMPETITION AND CUSTOMER CHOICE PLAN AND FOR AUTHORITY PURSUANT TO SECTION 2807(e)(3) OF THE PUBLIC UTILITY CODE: TO SERVE AS THE PROVIDER OF LAST RESORT IN THE SERVICE TERRITORY OF: PECO ENERGY COMPANY	:	Docket No. P-00973953
APPLICATION OF PECO ENERGY COMPANY FOR APPROVAL OF ITS RESTRUCTURING PLAN UNDER SECTION 2806 OF THE PUBLIC UTILITY CODE	:	Docket No. R-00973953

BRIEF
OF
ENRON ENERGY SERVICES POWER, INC.
AND ENRON POWER MARKETING, INC.

(Non-Proprietary Version)

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Dated: December 2, 1997

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I. INTRODUCTION.

This is the first case under the Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S. §§ 2801, et seq. (the "Act"). The clear, unequivocally expressed purpose of the Act is to introduce retail competition in the provision of electric generation service in this Commonwealth. In return for opening up their former monopoly service territories to competition, the Act permits electric utilities an opportunity to recover their demonstrated above-market costs of generation facilities (and contracts) that would otherwise be rendered unrecoverable ("stranded") by the transition to a competitive marketplace.

In an effort to satisfy the requirements of the Act, PECO Energy Company ("PECO") and various other parties have presented the Commission with a proposed settlement (the "Partial Settlement"). The Partial Settlement fails to recognize the fundamental *quid pro quo* of the Act — recovery of stranded costs in return for competition. Instead, PECO has structured a "deal" that allows it to recover substantially more than $5.461 billion in stranded costs while simultaneously foreclosing competition in its service territory for years to come. Under the Partial Settlement, PECO's customers would pay PECO this enormous sum for costs supposedly stranded by competition, but would have no choice but to continue to purchase their generation from PECO, which would enjoy unregulated monopoly power in its territory. Fortunately for PECO's customers, the Commission cannot adopt the Partial Settlement because several of its key provisions patently violate the Act.

In response to the blatantly anti-competitive and illegal features of the Partial Settlement, and because it is clearly possible to fashion a better plan for consumers, Enron Energy Services Power, Inc. ("EESPI" or "Enron") presented the Choice Plan as an alternative

to the Partial Settlement.[1] The Choice Plan squarely presents the Commission with the opportunity to approve a plan for the restructuring of electric service that establishes a framework for introducing and maintaining an active and vibrant competitive electric market in PECO's service territory. However, whether the Commission adopts the Choice Plan or charts its own course, the Commission must assure that its final decision includes the following crucial elements:

- The establishment of generation credits which equal or exceed the generation credits included in the Choice Plan (3.48 cents per kWh in 1999), particularly in the early years of the transition. The level of generation credits available to potential customers is particularly important in the early years of the transition when competition will either flourish or die. The generation credits included in the Partial Settlement are well below projected retail market prices and will, by design, thwart competition.

- The allocation of PECO's costs to assure that only transmission and distribution ("T&D") costs, not generation related costs, are recovered in PECO's T&D rates and that only transition or stranded costs are recovered through the competitive transition charge ("CTC") or intangible transition charge ("ITC").

- The required unbundling and competition entry into "non-wires" or revenue cycle services in PECO's service territory.

- The adoption of a strong Code of Conduct which strictly controls the relationship between PECO and its affiliates and divisions engaged in competitive activities.

- The promotion of customer choice by requiring that generation credits serve as both a "floor" and "ceiling" for customers taking service from the provider of last resort ("PLR"). In the alternative, the Commission must carefully define the prevailing market price and accompanying wholesale and retail costs which will be included in establishing the price for these customers and should establish procedures for strict Commission oversight of such price during the transition.

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[1] Prior to filing the Choice Plan, Enron Power Marketing, Inc. ("EPMI"), an affiliate of Enron, submitted testimony in both the original restructuring proceeding as well as in response to the Partial Settlement, as part of the Pennsylvania Electric Competition Coalition ("PECC"). This brief is submitted on behalf of EPMI and Enron.

II. BRIEF DESCRIPTION OF THE CHOICE PLAN.

The Choice Plan is completely responsive to the Act's mandate that competition be introduced into the retail generation market. It is designed to establish a framework for competition in the provision of electric generation and other related services and products to consumers while fully compensating PECO for its stranded costs.

Under the Choice Plan, the Commission would approve a pro-competitive rate structure for PECO's service territory that includes an implicit generation component ("generation credit") sufficient to allow a competitive market to develop. It also includes CTCs for the recovery of stranded costs that are significantly lower than those charges under the Partial Settlement, together with the statutorily mandated "true-up" mechanism to prevent the overrecovery of stranded costs. Finally, the Choice Plan provides T&D rates which recover only the costs properly allocated to those services. These features contrast sharply with the Partial Settlement which proposes generation credits which are suffocatingly low to competitors, CTCs which grossly overrecover stranded costs because there is no true-up and T&D rates which improperly recover generation related costs.

Under the Choice Plan, Enron will act as the PLR in PECO's service territory; that is, as the electric supplier for those customers that cannot choose or "choose not to choose" another supplier, or who, for one reason or another, "return" to PLR service. In order to step into this role, Enron will, in effect, pay PECO the full amount of its agreed-upon stranded costs of $5.461 billion through the purchase of PECO's transition bonds. Enron may earn a profit to the extent that the interest rate it receives on the transition bonds is greater than the

interest rate it pays to finance its investment,[2] but such profit, if any, would be the only return Enron would earn for the efforts and risks it would undertake in Pennsylvania.[3] In the event that securitization is prevented or delayed because of a legal impediment, Enron would operate under a "contingency plan" whereby PECO would collect CTCs (at a rate higher than under the securitization case), and Enron would stand ready until December 31, 2000 to buy PECO's transition bonds in a principal amount equal to the unamortized balance of PECO's stranded costs at the time that securitization takes place.

As PLR, Enron would offer default customers rate reductions that are more than double those offered by PECO under the Partial Settlement. The Choice Plan provides rate reductions of 20% for all rate classes for the period September 1, 1998 through December 31, 2000, and reductions of 12.44%, 9.44% and 7.44% for 2001, 2002 and 2003, respectively. In the event that the contingency plan is in effect, these rate reductions would be lower, but still more than double those offered by PECO.[4] In either case, these rate reductions are far more favorable to default customers than the reductions offered by PECO and are in addition to the competitive alternatives which will also be available to PECO's default customers.

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[2] PECO's contention that Enron would earn $1 billion under the Choice Plan is exaggerated and unsupported. EESPI St. No. 1-R at 14. While Enron could lose money on the transaction if there is load decline, its earnings potentially could be in the range of $100 million, depending on a number of assumptions. Tr. at 1377-78. In any event, Enron's Choice Plan profitability would be at least $500 million less than PECO's profitability under the Partial Settlement. EESPI St. No. 8 at 5.

[3] Enron will not earn a profit in its role as PLR because it will both buy and sell electricity at the generation credit. EESPI St. No. 1 at 20. This fact eliminates any economic incentive that Enron as PLR would have to retain customers on PLR service.

[4] The rate reductions under the contingency plan are: 9/1/98 - 12/31/00: 14.45%; 2001: 9.42%; 2002: 7.43%; 2003: 7.44%. EESPI St. No. 1-R.

Finally, under the Choice Plan, the Commission would approve a pro-competitive distribution tariff for PECO that will allow electric generation suppliers ("EGSs") to interface with customers and allow customer service to become a competitive element of a company's product. The tariff provides, among other things, for the unbundling of many of the formerly utility-only services, such as metering, billing, and collections, thereby providing further competitive benefits to consumers. Finally, the tariff provides competitive safeguards that will prevent PECO's market-based affiliates from unfairly benefiting from PECO's role as the regulated monopolist distribution company.

The competitive advantages of the Choice Plan are demonstrated throughout this brief, and stand in contrast to the anti-competitive and, in certain cases, illegal, provisions of the Partial Settlement. However, even without any consideration of the savings from price competition in a competitive generation market, Enron has demonstrated that PECO's customers would save approximately $767 million more under the Choice Plan (on a net present value basis assuming a discount rate of 8%) than under the Partial Settlement. EESPI St. No. 2, Exh. A at 1; Tr. at 1584.[5]

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[5] Both Senator Fumo and PECO attacked Enron's savings calculations. Senator Fumo's witness Silkman testified that the savings claimed by Enron were "artificial" and subject to generation price risk. Fumo St. No. 3 at 7. Enron's witness Oliver demonstrated, however, that Mr. Silkman's analysis was incomplete. Performing a complete analysis using Mr. Silkman's methodology reveals that the additional savings to customers from the Choice Plan range between $195 million and $909 million, depending on generation prices. EESPI St. No. 2-R at 5. Furthermore, this analysis does not even consider the additional savings under the Choice Plan that result from a return to customers of overcollections due to sales growth and savings due to declines in interest rates prior to the effective date of a securitization of PECO's stranded costs. Id. at 6.

III. THE PARTIAL SETTLEMENT CANNOT BE APPROVED BECAUSE IT VIOLATES THE ACT IN SEVERAL MAJOR WAYS.

A. The Proponents Of The Partial Settlement Have Failed To Provide The Requisite Evidentiary Support.

Consistent with law applicable to a utility requesting an increase in rates or other tariff provisions under the Public Utility Code (the "Code"), the Commission has established that electric utilities have the burden of proof to establish that their proposed restructuring is "in compliance with the essential purpose of the Act."[6] In this proceeding, PECO's statutory burden of proof cannot be avoided or diminished through a stipulation among some parties to the proceeding. Indeed, this Commission has held that its approval of a settlement will only occur after a proposed settlement is evaluated as consistent with the public interest as a whole, balanced with a "provision by provision consideration."[7] Accordingly, PECO and the Partial Settlement's other signatories carry the burden of demonstrating that each provision is (1) in the public interest, (2) supported by substantial evidence and (3) otherwise consistent with the Act.

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[6] Electric Utility Restructuring Filing Order, M-00960890, F-0003 (Feb. 13, 1997, at 2); 66 Pa. C.S. § 315(a).

[7] The Commission has stated as follows:

> The Commission encourages settlements and its authority to review proposed settlements is well settled.... However, notwithstanding the many benefits, settlements will only be approved by the Commission if they are found to be consistent or in conformity with the public interest. While some deference may be accorded to the proposed settlement because of the joinder or participation by the OTS and OSBA as public advocates, *in the final analysis the proposed settlement must be considered and evaluated on its legal and equitable merits as being consistent with the public interest as a whole, balanced with a provision by provision consideration.*

Pennsylvania Public Utility Commission, et al. v. Apollo Gas Co., et al., Docket Nos. R-00953378 *et seq.*, 1995 Pa.PUC LEXIS 155 at *65 (Opinion and Order, entered November 21, 1995) (emphasis added) (footnotes and citations omitted).

The mere existence of a partial settlement, moreover, has no impact on the legal requirements which govern the Commission's decision making process.[8] A settlement is not a legal determination of the matters in controversy but is merely an agreement between the parties.[9] In sum, a partial settlement which does not include all of the parties in a proceeding does not relieve the agency of any applicable procedural requirements and the resulting adjudication must comply with all aspects of the agency's enabling statute and the Administrative Agency Law.[10] As will be demonstrated, the Partial Settlement is fatally flawed because is not supported by record evidence.

1. The Underlying Bases For Critical Assumptions Under The Partial Settlement Are Not Supported By Evidence Of Record.

PECO admits that there is no data or evidence to support the critical elements of the Partial Settlement. For example, when asked to provide supporting data, calculations and analyses used to develop the T&D rates, the CTC/ITC, generation credits and the projected market price for energy and capacity for purposes of the Partial Settlement, PECO was unable to provide any such documentation. Rather than provide support for key provisions of the Partial Settlement, PECO has chosen to hide behind and rely on the assertion that these provisions of the Partial Settlement were developed as a result of settlement negotiations, not

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[8] Consolidated Gas Supply v. Federal Energy Regulatory Commission, 606 F.2d 323, 330 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980) (Neither a partial settlement nor a summary judgment motion provide evidentiary or legal weight and merely represent a request for dispositive relief given the record before the agency). See, Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974).

[9] GPU Industrial Intervenors v. Pennsylvania Public Utility Commission, 156 Pa. Commw. 626, 641, 628 A.2d 1187, 1194 (1993).

[10] LaFarge Corp. v. Commonwealth Insurance Department, 690 A.2d 826, 838-39 (Pa. Commw. 1997). (Vacating the adoption of a partial settlement because the Pennsylvania Insurance Department failed to comply with the Administrative Agency Law).

litigation.[11] Not one shred of support has been set forth for these, and other, key components of the Partial Settlement. Furthermore, the settling parties, including PECO, admit that the terms of the settlement are the result of negotiations which go well beyond the scope of the record. Accordingly, the Commission cannot adopt the Partial Settlement without directly violating both the Administrative Agency Law and the Code.

2. There Is No Evidence Of PECO's Earnings Level Under The Partial Settlement In The Record.

PECO appears likely, for two reasons, to achieve significant revenue overcollections under the Partial Settlement. First, while the CTCs under the Partial Settlement were calculated based on carrying charges for the unamortized balances of stranded costs using PECO's overall rate of return, the Partial Settlement permits PECO to securitize up to $4.0 billion dollars of its stranded cost. Because PECO can likely issue "AAA" rated transition bonds at a much lower interest rate (based on today's interest rates), PECO will be permitted to pocket the difference. This, alone, could provide PECO with a benefit of almost $750 million. PECC St. No. 1 at 14, Exh. SAM-SR1. Second, and even more importantly, under the Partial Settlement PECO is not required to reconcile its actual CTC collections to its projected annual CTC collections. The absence of a reconciliation provision in the Partial

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[11] For example, when asked to explain certain erratic differences between rate classes in its proposed generation caps, PECO responded "The generation cap was negotiated and is based on a compromise of the positions of the signatories." EESPI Cross Exam Exh. 1 (Enron VIII-21). In another example, when asked to provide documentation in support of the average rate decreases in Table A of the Partial Settlement (Enron X-13), PECO responded, "There are no workpapers. The decreases listed in Column 4 of Table A were determined through the negotiations of the signatories." Id. PECO furnished the same non-responsive answers to numerous other interrogatories directed at the underlying economic assumptions of the Partial Settlement. See, EESPI Cross Exam Exh. 1.

Settlement permits PECO to potentially overcollect CTCs by as much as $800 million (on a net present value basis). EESPI St. No. 2-R, Exh. A-R.[12]

Despite the likelihood of overearnings, the record is devoid of any evidence as to the reasonableness of PECO's likely earnings under the Partial Settlement. The Partial Settlement's proponents simply cannot avoid the fact that, while they carry the burden of proof as to the reasonableness of the Partial Settlement, they have not provided any measure of the reasonableness of earnings that are likely under that plan.

While the signatories to the Partial Settlement have avoided the issue of PECO's expected level of earnings under the Partial Settlement, PECO has evaluated its financial impact. Although the information in PECO's possession could inform the Commission as to the likely range of PECO's earnings, PECO has declared that it will never provide it.[13] This

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[12] PECO witness Hill attempted to deflect the fact that the Partial Settlement permits PECO to "pocket" the interest rate arbitrage resulting from calculating CTCs based on PECO's overall rate of return and then securitizing $4.0 billion at a much lower interest rate. He claimed that PECO would obtain a maximum benefit of only $600 million and that such benefit would be required to "fund [PECO's] other obligations under the Partial Settlement (i.e., industrial rate concessions, universal service expansion, early rate reduction and transmission and distribution rate cap extension)." PECO St. No. 1-E at 17, Exh. TPH-35. Even if PECO is correct that its maximum gain would not exceed $600 million, it is impermissible for PECO to claim that it may validly offset this benefit by other "obligations" which PECO has chosen to assume under the Partial Settlement. Mr. Hill's claim that PECO will not overrecover CTCs due to sales increases (PECO St. No. 1-E at 18) is equally unfounded. He based this claim on an assumption that PECO would experience no load growth through 2008. See, EESPI St. No. 2-R at 12. This is not a realistic assumption. Enron witness Oliver testified that the 10% reduction under the Partial Settlement would stimulate increases in the use of electricity by PECO's customers. EESPI St. No. 2 at 13.

[13] PECO tries to turn the law on its head by raising the specter of Enron's possible earnings under the Choice Plan (PECO St. No. 1-E at 8). PECO apparently forgets that Enron is not a public utility which is seeking the recovery of $5.461 billion -- PECO is. While Enron has answered questions about its likely earnings under the Choice Plan (tr. at 1377-78; 1380-81), PECO has adamantly refused to disclose the financial results it believes are likely under the Partial Settlement.

information, however, is clearly relevant and highly probative of PECO's likely earnings level under the Partial Settlement.[14]

Given PECO's outright refusal to produce any evidence of its earnings under the Partial Settlement, there is simply no way that the Commission can find, as it must under the Code, that PECO will not achieve an excessive rate of return under the Partial Settlement.[15] PECO's actions deprive the Commission of the opportunity to assess the reasonableness of the terms and provisions of an agreement that will set rates for electric consumers in PECO's service territory for years to come. Moreover, the parties not aligned with PECO are deprived of their due process right to examine and confront the Partial Settlement's underlying assumptions and calculations.[16] For all of the above reasons, the Commission cannot find the settlement to be just and reasonable and in the public interest.

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[14] So desperate is PECO to avoid inquiry into the financial implications of the Partial Settlement that it withdrew earlier testimony which claimed that the Partial Settlement maintained the financial integrity of the company. Tr. at 2097. And, although PECO's Vice President of Finance and Treasurer, Mr. Mitchell, confirmed that PECO performed several different forecasts, using varying sensitivities, in order to analyze PECO's financial integrity under the Partial Settlement, he conceded that those forecasts have not been provided for the record. Tr. at 2032-33. Refusing to provide this information, PECO's counsel termed the forecasts:

> [T]he most highly confidential documents and information in the company's possession. We can't let anyone see them. We don't let anyone see it, as Mr. Mitchell has said, ever, outside the company.

Tr. at 2121. Although this quotation comes from the confidential portion of the transcript, Enron has reproduced it here because it conveys nothing of a proprietary nature.

[15] Neither may the Commission rely on the Partial Settlement's other signatories to act as guardians of the public interest. Despite their various claims that PECO was not "overcompensated" by the Partial Settlement, the fact is that they have no idea what PECO will earn under that settlement. Tr. at 2004-05.

[16] U.S. Const. amend. XIV; Pa. Const. Art. 1, § 11. Fusaro v. Pa. Public Utility Commission, 34 Pa.Commw. 14, 382 A.2d 794, 797 (1978); Smith v. Pa. Public Utility Commission, 192 Pa. Super. 424, 162 A.2d 80 (1960).

B. The Absence Of A CTC True-Up Mechanism Violates The Act.

Despite the likelihood of growth in electricity demand over the transition period,[17] the Partial Settlement permits PECO to keep all overcollections of CTC revenues associated with load growth by failing to include a CTC true-up mechanism. In addition to the gross inequity of this failing, the absence of a true-up mechanism violates the unambiguous language of the Act. The Act mandates a CTC true-up mechanism in all stranded cost recovery mechanisms:

> Consistent with section 1307(e) (relating to sliding scale of rates; adjustments), the commission ***shall*** establish procedures for the annual review of the competitive transition charge. The review ***shall*** reconcile the annual revenues received from the charge with the annual amortization of transition or stranded costs approved by the commission under this section. The commission ***shall*** adjust the competitive transition charge based upon underrecovery or overrecovery of the annual amortization amount.

Section 2808(f) (emphasis added). This statutory provision contains no less than three mandatory legislative directives to the Commission. No discretion is provided to the Commission in applying the language of the subsection.

PECO, however, would have the Commission believe that it has discovered an excuse for not complying with Section 2808(f). Under its view, the reference to Section 1307(e) is intended to provide that if good reason is shown, the Commission may suspend an annual true-up or reconciliation of electricity cost rates based on actual sales over that period. This distorted interpretation is inconsistent with any reasonable view of Section 2808(f) for the following reasons:

(a) PECO's view would render the mandatory language of Section 2808(f) meaningless, in violation of the rules of statutory construction which require a

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[17] Indeed, all of PECO's previous projections had assumed some level of load growth. EESPI St. Nos. 2 at 12-13 and 2-R at 11-13; Tr. at 499, 830-31, 835, 846.

presumption "that the General Assembly intends the entire statute to be effective and certain."[18]

(b) PECO's view would allow a general statutory provision (Section 1307(e)) to override the more specific statutory provision which directly governs CTC review and reconciliation (Section 2808(f)) in violation of the rules of statutory construction.[19]

(c) PECO's view completely misinterprets Section 1307(e)(3), which specifically addresses and is restricted in its application to Commission discretion to waive a single, annual true-up of automatic adjustment clause revenue,[20] not an entire ongoing reconciliation process for automatic adjustment clause revenue.

(d) Even if PECO's view had merit, neither PECO nor the other settling parties have introduced evidence to demonstrate that "good reason" exists.[21]

(e) The Partial Settlement further does not comply with Section 2808(f), by failing to provide for an "annual review of the competitive transition charge." PECO

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[18] 1 Pa.C.S. § 1922(2). Given the mandatory nature of Section 2808(f), the reference to 66 Pa.C.S. § 1307(e) is intended to adopt the general procedures and time lines contained in the subsection. The reference is not intended to permit evasion of the recent enactment by reference to a prior law. See also, 1 Pa.C.S. § 1936, which requires that when two provisions of different statutes passed by different legislatures are in conflict, the statute latest in date of final enactment shall prevail.

[19] 1 Pa.C.S. § 1933; Olshansky v. Montgomery County Election Board, 488 Pa. 365, 412 A.2d 552 (1980). Under PECO's view, the passing reference to Section 1307(e) would actually negate Section 2808(f) which was intended specifically to govern CTC reconciliation, with the traditional statutory provision governing automatic adjustment clauses.

[20] While the "good reason being shown" exception is rarely addressed by the Commission, where it has, it has been in the context of a single, annual reconciliation for a given utility. See e.g., Community Central Energy Corporation v. Pennsylvania Public Utility Commission, 51 Pa.Commw. 142, 413 A.2d 1197 (1980), *appeal after remand*, 62 Pa.Commw. 518, 436 A.2d 1255 (1981) (Commission has discretion to require less than full refunds in a given year for "good reason being shown", but the Commission is to review "good reason" in a separate hearing). No utility or other party has ever even raised the notion now raised by PECO that the "good reason being shown" reference in Section 1307(e)(3) enables the Commission to completely eliminate a mandatory annual reconciliation process.

[21] As recognized by the Court in Community Central the "good reason" standard is a specific factual issue which must be addressed by the Commission through an evidentiary hearing. 62 Pa.Commw. 518, 436 A.2d 1255. To ignore the evidentiary standard and merely rely on the Partial Settlement violates all non-settling parties' due process rights to defend the reconciliation process as consistent with the public interest.

has no conceivable way to avoid this requirement and noncompliance with this requirement dooms the Partial Settlement.[22]

In view of these arguments PECO's reliance on a completely misplaced and unsupported interpretation of Section 2808(f) fails miserably. The Partial Settlement violates Section 2808(f) and it must be rejected for this reason alone.[23]

C. PECO May Not Lawfully Recover Settlement Concessions As Stranded Costs.

Faced with overwhelming evidence that its proposed CTC/ITC collection would vastly overrecover the agreed upon amount of transition and stranded costs, PECO conjured up an argument that the Partial Settlement allows it to recover through the CTC/ITC cost recovery mechanism the alleged concessions it made in the Partial Settlement (having a claimed value of approximately $500 million).[24]

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[22] Of course, the annual review has little meaning without a subsequent CTC true-up.

[23] In contrast, the Choice Plan contains a CTC/ITC true-up mechanism consistent with the Act which reduces the CTC/ITC payable by consumers to reflect load growth and, in the event securitization can be implemented, would also insulate consumers from any increase in CTC/ITC if load declines. Protecting consumers against increased CTC/ITC resulting from the unlikely scenario of net load decline is not required by the Act; however, the Choice Plan offers this downside protection to customers in the event securitization occurs. EESPI St. No. 8 at 9-11, 20. (If the contingency plan feature of the Choice Plan is operative and it is determined that securitization will not occur, there also would be a true-up of CTCs consistent with the requirements of the Act. EESPI St. No. 1-R at 23-24. Enron would seek the Commission's guidance on whether any true-up should be on a class-by-class or aggregate basis.) More importantly, under the Choice Plan, in the likely event of load growth, customers, not PECO or Enron, will receive the full benefit of load growth through application of the increased net revenue towards the total CTC/ITC obligation. This provision of the Choice Plan fulfills the clear intent of the General Assembly to pass on the expected increases in load growth over the transition period to consumers, not stockholders. Accordingly, such a provision is an essential and legally required element of any restructuring plan adopted by the Commission for PECO.

[24] When asked whether PECO had added the costs of those items that PECO bargained with other parties to the Partial Settlement in calculating the revenue requirement to be recovered by the CTC/ITC mechanism, PECO witness Hill stated:

Section 2803 of the Act contains a detailed definition of "transition or stranded costs" which provides a strict constraint on the costs which can be recovered through the CTC/ITC recovery mechanism. Only those costs which were recoverable in a rate base/rate of return environment but which may not be recoverable in a competitive electric generation market may be considered transition or stranded costs. Under this standard none of the following "concessions" qualify as stranded costs:

1. **10% rate reductions** — PECO claims $112 million for rate reductions provided to consumers for the 9/1/98 to 12/31/98 period. However, these rate reductions would not be recoverable under a regulated environment and do not qualify as transition costs.

2. **Cost of LILR/EER Modifications** — PECO claims between $35 million and $122 million for "concessions" to large industrial customers. Again, such costs would not be recoverable in a regulated environment and do not qualify as transition costs.

3. **Universal Service Program Improvements** — PECO claims $113 million for enhancements to its universal service program. While PECO may recover universal service costs in a regulated environment, it also has a statutory right under Section 2804(a) of the Act to recover such costs in a competitive environment. Such costs are recoverable in a competitive electric generation market and do not qualify as transition costs.

4. **T&D Rate Cap Extension** — PECO claims between $209 million and $314 million for extending the statutorily required T&D rate cap.[25] The costs

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> [W]e have evaluated other costs other than the revenue requirement on the stranded costs. From PECO's perspective, they represent other transition costs and are properly recoverable through the CTC.

Tr. at 1815. Mr. Hill is referring to the costs associated with the 10% reduction in rates effective 9/1/98 (4 months early), the T&D rate cap extension, the expansion of the universal service program and the cost of rate concessions to large industrial customers. PECO St. No. 1-E, Exh. TPH-35. In contrast, the Choice Plan exceeds the rate reductions and matches the universal service enhancements, T&D rate cap extension and industrial rate modifications without recovering such costs as transition or stranded costs.

[25] Under Section 2804(4)(i), a rate cap is imposed on PECO which precludes it from charging T&D rates which exceed current T&D rates to customers who purchase generation

associated with extension of the rate cap are not recoverable under a regulated environment and do not qualify as transition costs. Furthermore, the rate cap relates to T&D rates, not generation rates.

PECO's veiled attempt to recover these "concessions" as stranded costs is not legally permissible and the Commission must reject it.[26] Importantly, all of these items as well as settlement provisions can be included in a properly crafted final order if the Partial Settlement is rejected.

IV. THE CHOICE PLAN CONTAINS THE CRITICAL ELEMENTS NECESSARY TO ESTABLISH A COMPETITIVE MARKET IN PENNSYLVANIA.

A. Enron's Proposed Generation Credits Will Stimulate Competition Immediately While The Partial Settlement Generation Credits Will Stop Competition Until The Middle Of The Next Decade.

The Act mandates that the Commission ensure that the citizens of this Commonwealth obtain "the benefits of a properly functioning and workable competitive retail electricity market." 66 Pa.C.S. § 2811(d). In order for competition to develop, EGSs must be able to offer retail generation for sale at prices which are competitive with the price at which the PLR offers generation.[27] If the generation credit is set too low, competition will be thwarted since no EGS will be able to "beat" the generation credit threshold. To foster competition, the generation credit must be set at levels that cover not only the wholesale price, or theoretical

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from a supplier other than PECO. The statutory rate cap runs through June 30, 2001. Both the Partial Settlement and the Choice Plan extend this rate cap through December 31, 2003.

[26] In addition, PECO's attempt to recover alleged concessions impermissibly shifts costs among classes of customers. 66 P.S. § 2804(7) ("[t]he Commission shall require that restructuring of the electric utility industry be implemented in a manner that does not unreasonably discriminate against one customer class to the benefit of another"). Other provisions of the Act also indicate that CTC/ITC cost-shifting is not permissible. See, 66 P.S. § 2808(a), 66 P.S. § 2812(G). See also, 66 P.S. §§ 2803; 2807(7)(8).

[27] EESPI St. No. 3 at 7.

"all hours" market price, but also the "real world" delivery costs borne by EGSs when they attempt to compete with PECO as the PLR -- such as line losses, load factor adjustments, gross receipts taxes, etc. Most important, the credits must be adequate in the initial years of the transition period when competitive markets are still in their most vulnerable and formative stages.

Table "A" displays the various market price projections/generation credit recommendations of various parties as calculated by Enron.

TABLE A

	PECO Filing	Partial Sett[1]	Hieronymus	OCA[2]	Enviros[3]	PAIEUG[4]	Enron Choice Plan[5]	Enron Slater[6]	NEV Case 1[7]	NEV Sur[8]	Hull[9]	PECC[10]
1998					3.32		3.48					
1999	2.43	2.80	2.68	3.07/3.32	3.35	3.26	3.48	3.53	3.75	3.745	3.80	3.80
2000	2.43	2.80	3.08	3.34/3.61	3.45		3.48	3.53	3.85	3.805	3.90	4.02
2001	2.43	3.20	3.66	3.90/4.12	3.55		3.61	3.58	3.95	3.930	4.00	4.41
2002	2.43	3.50	3.83	4.08/4.41	3.66		3.75	3.62	4.05	4.065	4.10	4.61
2003	2.43	3.70	4.00	4.31/4.68	3.77		3.89	3.67	4.10	4.20	4.20	4.71
2004	2.43	3.97	4.07	4.48/4.84	3.88		4.04	3.72	4.20	4.34		4.93
2005	2.43	4.07	4.35	4.72/5.10	4.00		4.19	3.77	4.30	4.485		5.10
2006	2.43	4.77	4.53	5.04/5.45	4.12		4.35	3.82	4.40	4.64		5.29
2007		5.37	4.72		4.24		4.52	3.87	4.50	4.80		5.48
2008		5.57	4.91		4.37		4.52	3.92	4.50	4.875		5.68

[1] Source: Partial Settlement Agreement at 8, Table A; [2] OCA St. 4S, Ex. LS-10, the second number is adjusted to reflect appropriate calculation of line loss adjustment and load factor consistent with other analyses. See LS-11 which acknowledges differences in OCA methodology from all other analyses referenced. For example, the appropriate delivered price resulting from OCA market projections for 1999 is as follows: 2.164 (Energy 1999 all lines) x 1.088 (Load Factor Adj.) ÷ 0.93 (Line Loss) ÷ 0.956 (Gross Rec. Adj.) = 2.65 Energy Total, $19.72 Capacity (kWh/year market) ÷ 8,760 (all hours divisor) ÷ 0.60 (Load Factor Divisor) x 1.18 (Reserve Margin) ÷ 0.93 (Line Loss) ÷ 0.956 (Gross Rec. Adj.) = .50 Capacity Total = 3.15 cents/kWh Total + .17 A&G adder = 3.32¢; [3] Environmentalists St. 1E (David Schoengold); Ex. DS-1, Schedule 1. Support: Env. St. No.2; [4] PAIEUG St. No. (Baron) Ex. SJB-6 adjusted for delivery costs at PECO Exh. TPH-31; [5] EESPI St. 1-R (Kean), Attachment A. Support: EESPI St. No. 4; [6] EESPI St. 4-R, KJS-4R, EESPI St. 4, KJS-2, calculated by taking LRMC system wide x line loss of 10%. Enron witness Slater's projections generally supports the Choice Plan's proposed generation credits particularly in the early years; [7] NEV St. No. DMB-2, Ex. NEV/DMG-10 (includes 10% rate cut); [8] NEV St. No. 1-SR at 3-4 (average MAPSA and EESPI Choice Plan); [9] B. Jeanine Hull market price + 0.4 cents/kWh for line loss, tax, penalty and administrative costs; [10] PECC Exh. SAM-SR3A @ .8% annual load growth; [11] Add'l Testimony of Donald E. Johnstone 9/97, Schedule A.

As Table "A" graphically depicts, virtually all of the market price projections/generation credit recommendations — including those produced by signatories to the Partial Settlement — produce credits which are higher than the Partial Settlement's generation credits in virtually every year until 2005 or 2006. This provides irrefutable evidence that the Partial Settlement's generation credits will stop competition in its tracks until at least the middle of the next decade. This is supported not only by the "model" based projections presented by OCA, PAIEUG and PECO, but also by the market-based analyses presented by Enron witness Slater and PECC witness Hull.[28] Moreover, the Partial Settlement's generation credits are completely inconsistent with the Commission's determination in the Pilot proceeding to establish a total customer credit for PECO of 3.7 cents per kWh.[29] In contrast, the Choice Plan's generation credits are in the middle of the range of the projected competitive market prices for generation during the entire transition period and, as such, will allow a properly functioning competitive market for generation to develop and persist throughout the period.

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[28] Ms. Hull, an expert in long-term power contracts, projected a market price for a long-term contract for power starting at 3.4¢ per kWh not including delivery and retail sales costs. PECC St. No. 2 at 13. With an allowance for delivery costs and retail administration and general costs, her projected 1999 generation credit of 3.8¢ per kWh amply supports the Choice Plan generation credits.

[29] Tr. at 1524-25. This is a combination of the determined generation credit and the Customer Participation Credit ("CPC"). The Commission's pilot order specifically acknowledged that the CPC was not just an incentive to induce customers to participate in the pilots but was also intended to cover supplier costs "as a marketing margin," in order to allow them to "secure power and to meet the customers' needs." Re: Petition for Approval of Retail Access Pilot Programs - PECO Energy Co., P-00971170, Opinion and Order at 63. As PECO witness Freeman conceded, the generation credits available to residential and commercial customers are in the range of 4.6¢ per kWh. Tr. at 1524-25. The Partial Settlement generation credits are inconsistent with even the determined generation credit in and of itself. The 1999 Partial Settlement generation credit for residential and commercial customers is just 3.02¢ per kWh. Tr. at 1030. In the pilot order, the Commission found that the 1998 generation credit for residential and commercial customers was 3.22¢ per kWh. Obviously, the generation credit in 1999 would be even higher.

Enron witness Slater estimated the competitive market price for generation for the retail customers of PECO as the long-run marginal cost ("LRMC") of generation, which he approximates as the year-by-year cost of owning and operating (at its maximum level) a modern combined-cycle generation unit, expressed in $/kWh of annual production.[30] Mr. Slater's generation market prices, as adjusted for some delivery costs (but not all), form an extremely conservative basis for the Choice Plan generation credits.[31] PECO witness Hieronymus agreed that in the long run, the competitive market price will approximate the LRMC of generation. PECO St. No. 6-E at 3. In addition, both experts agree that the LRMC consists of the total cost, including a return of and on capital, of a new efficient gas-fired combined cycle generating unit.[32] However, despite his acceptance of LRMC as an accurate proxy for market price in the long run, Dr. Hieronymus attempted to undercut the Enron proxy in both the short run and the long run, arguing that prices would be lower in the early years but higher in the later years of the transition period, thereby supporting the more sharply upward tilting generation credits in the Partial Settlement. Dr. Hieronymus is wrong on both counts.

Dr. Hieronymus argued that overcapacity in the PJM system will depress market prices for generation to levels below LRMC until 2001, citing the prices of current transactions as

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30 EESPI St. No. 4 at 5.

31 Mr. Slater only adjusted for line losses and GRT. EESPI St. No. 4-R at 6-7. His LRMC market price is at a 100% load factor, however, and does not include any allowance for retail A&G costs.

32 EESPI St. No. 4, Exh. KJS-4; PECO St. No. 6-E at 3. The credits are, in general, higher in most years to account for these additional delivery costs as well as the retail administration and general costs that most of the parties and the Commission in its Pilot Order acknowledged need to be addressed.

evidence of this fact. PECO St. No. 6-E at 3. He therefore concluded that the competitive market price is not approximated by LRMC, but by current and historic market prices. Id. This argument fails, however, because the current generation market prices are not depressed because of overcapacity; they are distorted because they are subsidized by bundled retail rates. As explained by Mr. Slater:

> Today, most capacity trades in PJM, and elsewhere within the regulated utility industry, are simply sales of capacity which, after loads are met, are surplus to the needs of the selling utility. Because the fixed costs associated with this capacity are already being charged to captive ratepayers, the utility finds it profitable to sell the use of this capacity at any price above zero. The payment does not have to support the continued existence of the capacity.

EESPI St. No. 4-R at 12. Thus, current market prices are set by short-run marginal costs which do not cover fixed costs and, in effect, represent an energy-only price. In a competitive environment this subsidizing effect of cost-based recovery would disappear and an EGS would have to recover fixed costs as well as energy costs in its competitive market prices. PECO witness Pratzon acknowledged that it would be imprudent to sell power at a price that did not recover "the costs of building and maintaining generation." Tr. at 1642. PECO incorrectly bases its "competitive" generation credit on prices arising from today's fully bundled environment.

Ultimately, however, the most credible evidence of the inadequacy of the generation credits in the early years of the Partial Settlement is supplied by its own proponents. Dr. Hieronymus all but concedes this by stating that the "tight price caps [under the Partial Settlement] will make it harder to compete." And the Hieronymus projections are also higher than the Partial Settlement in all years after 1999, until 2006.[33] PECO St. No. 6-E at 11.

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[33] PECO Exh. WHH-11 @ 60% load factor.

Sen. Fumo's witness Silkman goes even further, acknowledging that the generation credits in the Partial Settlement will be below market prices in the early years. Fumo St. No. 3 at 10. Indeed, except for one year's projection by one witness (Hieronymus), which is wrong,[34] every other market price projection and generation credit recommendation is higher in the first three years than those contained in the Partial Settlement. Below market generation credits are simply anti-competitive and inconsistent with the Act.[35]

No one can precisely estimate future market prices. In choosing between estimates, however, the Commission should select the higher generation credits in the Choice Plan because higher generation credits in the early years will promote the creation of a competitive electric market and bring lower prices to consumers through competitive offerings by EGSs. The early year higher generation credits proposed by Mr. Mitnick for PECC, MAPSA and Mr. Boonin, on behalf of NEV, all should be carefully considered as additional supporting evidence for the Choice Plan generation credits. In the end, the Choice Plan's credits produce a reasonable balancing of the various positions and evidence presented and will permit the

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[34] Compare WHH-11 (@ 60% load factor) with PECC Exh. SAM-4. The properly calculated delivered market price in 1999 using only the Hieronymus forecast without allowance for retail A&G costs is $.0288, not $.0268.

[35] Ultimately, PECO's market forecast and the accompanying generation credits in the Partial Settlement do not withstand the test of common sense. The Partial Settlement contains generation credits that exhibit a steep and relentless rise based on an arbitrary projection that natural gas prices will escalate at a compound rate of 5.23%. EESPI St. No. 3 at 15. A steep increase in costs in a market that is undergoing a transition to competition is not what is generally expected. Id. Furthermore, in the absence of any explanation, it is simply not reasonable for the generation credits in the Partial Settlement to increase by as much as 20% in some years and by as little as 3% in others. Id. PECO's market price estimates bear no relation to reality and its generation credits bear no relation to the market.

Commission to satisfy its primary mandate: to enable competition to bring savings and benefits to consumers.

Due to the generation cap under the Act, the generation credits are a "reciprocal" of the CTC/ITC recovery mechanism. The Choice Plan's proposed CTC/ITC recovery mechanism is vastly superior to that under the Partial Settlement since it provides PECO with full recovery of its agreed-upon $5.461 billion in stranded costs, but at the same time provides for significantly lower CTCs/ITCs for consumers, both in gross dollar terms and on a net present value basis. In addition, the "shape" of the CTC curve under the Choice Plan is inherently more pro-competitive than that under the Partial Settlement because it permits a higher generation credit for virtually the entire transition period. In contrast, CTC recovery under the Partial Settlement is front-loaded, producing the dual effect of increasing substantially the net present value cost to consumers of PECO's stranded costs and "squeezing down" the generation credit to the devastatingly low levels described above.

B. Enron's Proposed Distribution Tariff Is Integral to Competition.

The Choice Plan proposes a competitive distribution tariff which has two essential components for the development of a competitive market, and which provides substantial additional benefits to consumers. First, the tariff incorporates the existence of competing EGSs into the framework of the tariff. Second, the tariff provides for the competitive provision of corollary services to competitive generation.

1. <u>Enron's Tariff Provides Rules For EGS Interaction.</u>

The Choice Plan provides a distribution tariff which incorporates the role of the EGS in the furnishing of electric service, while the distribution tariff proposed under the Partial

Settlement does not provide for the role of the EGS. EESPI St. No. 5 at 4. To avoid consumer confusion and frustrating competition, the transition to a competitive market must be guided by well established "rules of the road" which set forth how EGSs will cause electricity to be delivered to the end user through the EDC. Id. at 3. The Choice Plan uses the distribution tariff as a framework for establishing such rules, including guidelines for EGS enrollment of customers and for forecasting, scheduling and reconciliation between the EGS and EDC. These critical rules are addressed by Enron witness Kingerski. See generally, EESPI St. No. 5.

The Choice Plan's proposed distribution tariff also allows the EGS to act as the agent of the customer to arrange for distribution services. While recognizing that the EDC will remain the exclusive provider of distribution services, nothing in the Act precludes consumers from authorizing their EGS to arrange and bill for distribution services. This arrangement is much like any other sale of goods in which the buyer authorizes the seller to arrange for delivery of the goods. Such an agency relationship is not new to the Commission or to Pennsylvania utilities. In fact, this relationship between customer and service provider is now prevalent in the natural gas industry for customers in markets subject to competition. EESPI St. No. 5 at 12-13.

2. Enron's Tariff Provides For Competitive Corollary Services.

The Choice Plan's proposed tariff also provides for the unbundling of "non-wire" services such as metering, billing, and collections, in contrast to the Partial Settlement which would maintain PECO as the monopoly supplier of such services. Under the bundled rate regime, the company having the exclusive right to provide generation and distribution services

performed related services such as metering, billing and collection. However, there is no economic or technical basis to justify the continuance of a monopoly over these services. On an economic level, the cost structure of a firm providing these services is not a natural monopoly. Further, unbundling these services is technically feasible without compromising system safety or reliability. EESPI St. No. 5 at 4-6.

There is substantial benefit to be gained by providing "non-wire" services on a competitive basis. From the point of view of an EGS, providing these corollary services establishes ongoing relationships with customers, allowing them to choose among EGSs based upon their relative responsiveness and product offerings, in addition to prices. EESPI St. No. 1-R at 8. For example, metering is a technology and information-based industry which can provide innovative responses to customers' needs, such as demand-side management services. Id. at 11. Despite the existence of advanced technology, however, such services were not available prior to restructuring. Id. at 10. That is merely one of the many reasons why non-wires services must be made available on a competitive basis, as the Choice Plan does.

C. Enron's Proposed Code Of Conduct Is Critical To The Transition To Competition.

While the General Assembly has set forth a statutory foundation for bringing the full benefits of retail competition to Pennsylvania consumers, unless the Act is implemented in a manner which creates a "level playing field" for all generation suppliers the promise of the Act will not be realized. Although the Commission plans to initiate a rulemaking process to codify a generic statewide Code of Conduct, the Commission should act now to establish a strong interim Code of Conduct to govern the activities of PECO and its affiliates during the period prior to the issuance of binding regulations.

Enron has advocated certain principles which must be included in any Code of Conduct. These principles include specific requirements for functional separation and specific cost allocation rules which require allocation of both direct and overhead costs, no use of the EDC's name by a non-monopoly business unit, prohibitions against joint marketing or agency agreements by the EDC and its affiliate and equal access to EDC customer information shared with affiliates.[36] The Choice Plan embodies these principles in a Code of Conduct reflected in its proposed tariff.[37] There is no question that pro-competition code of conduct rules need to be implemented while the Commission's proposed rulemaking goes forward.

In response to Enron's testimony, PECO modified its prior position to rely on the antitrust laws and minimal company-specific rules and argued for the adoption of what it described as the "consensus" provision of the Competitive Safeguard Work Group ("CSWG") Report to the Commission.[38] While Enron believes the CSWG "consensus" positions are a good starting point, they are not adequate as a Code of Conduct in the initial stages of the transition period.[39] Enron witness Dirmeier summarized Enron's principal concerns with PECO's newly proposed Code of Conduct and recommended modifications incorporating the general principles which Enron believes must be included in PECO's restructuring plan.[40]

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36 EPMI St. No. 6.0 at 4-6.

37 EESPI St. No. 5.0, Exh. A at 35-36 (Rule 23 of the Proposed Electric Delivery Service Tariff); EESPI St. No. 10-R.

38 PECO St. No. 29-E, Exh. BDC-1.

39 This is evidenced by the nature of the CSWG process. Many of the so-called "consensus" provisions in the CSWG report were dissented to by Enron, OCA and others. Furthermore, the numerous participating EDCs were able to block any proposed provision from reaching "consensus" status merely by strength in numbers. See, EESPI St. No. 10-R at 7-8.

40 EESPI St. No. 10-R at 8-9.

Enron's proposal to restrict the use of PECO's brand name drew the most intense opposition from PECO. This restriction, however, is an essential element required to overcome PECO's significant incumbency advantage.[41] The Commission has recognized the importance of restrictions on the incumbent's use of its brand name in a competitive market in the telecommunications area.[42]

Such restrictions are even more important in the electric generation market because competition is in its infancy.[43] Another major difference is the failure of the PECO proposal to include prohibitions against "joint marketing." The Commission, however, is well aware from the experience in the Pilots of the potential for customer confusion and misunderstanding when a competitive supplier markets products or services under the "banner" of the incumbent. Such restrictions should be included in any interim or supplemental rules applied to PECO.

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41 EESPI St. No. 10-R at 3.

42 In Application of Palmerton Long Distance Company, A-310147, 1993 Pa.PUC LEXIS 217 (April 29, 1993), the Commission imposed restrictions on an incumbent local exchange carrier ("ILEC") affiliate's use of the brand name in the affiliate's participation in the competitive long distance market. These restrictions precluded the affiliate from using the logo of the ILEC in any marketing activity and engaging in any activity which could confuse or mislead customers into believing that the long distance provider and the ILEC were the same entity. They also required that if the affiliate used the ILEC's brand name in marketing activities, it must inform customers that the affiliate and the incumbent are not the same entity. In imposing these restrictions, the Commission concluded that these restrictions were necessary "to prevent anti-competitive behavior." These restrictions also bar joint packaging or joint marketing activities between local and long distance services. (See, In re Implementation of the Telecommunications Act of 1996, M-00960799, 168 P.U.R.4th 89 (Order entered June 3, 1996, Reconsideration Order entered September 9, 1996), slip op. at pp. 21-23.

43 When asked whether it would be appropriate for an administrative agency to implement restrictions identical to the Palmerton Restrictions on any incumbent electric utility, PECO's witness Sidak responded that in his view any such action would be "extreme and insupportable." Tr. at 1505-10. Obviously, the Commission and PECO have a much different view about what is necessary to prevent anti-competitive behavior.

D. Enron's Proposed Modifications To PECO's T&D Charges Properly Allocate Regulated and Unregulated Costs.

Both in the Choice Plan and in response to the Partial Settlement, Enron has proposed T&D rates that properly assign expenses to transmission, distribution or generation activities. PECO revised its original T&D rate submission, and revised it again in the Partial Settlement. Despite these revisions, PECO's T&D rates still recover costs that are properly chargeable to unregulated activities, including generation.

Allowing PECO to charge T&D rates that contain costs that are properly associated with providing PECO's generation or other non-T&D services forces captive consumers to pay these costs — regardless of the generation supplier they choose — thereby subsidizing PECO's unregulated services. A corresponding adjustment to the yearly generation credit also needs to be made to include the administrative, general and retail sales costs that are associated with the provision of generation services. The failure to reflect these costs unfairly understates the "generation credit," placing generation suppliers seeking to compete with PECO at a competitive disadvantage. Using the Choice Plan's T&D rates, the "A&G adder" is $.0074 on a system average basis.[44]

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[44] EESPI St. No. 7-R, Exh. D. The T&D rates by class and the associated generation credit (with A&G overhead allowance) by class are shown in EESPI St. No. 6-R, Exh. 1-R. Note that the T&D rates reflected in the Choice Plan are lower, and the A&G adder slightly higher than those proposed by PECC witness Mitnick (PECC St. No. 1, Exh. SAM-7) because of certain differences in applying Enron witness Reising's adjustments on a system average basis by PECC witness Mitnick. EESPI St. No. 7-R at 13. Mr. Mitnick's proposed T&D rates, and corresponding addition to delivered generation market prices were calculated using the lower (30,852,000 kWh) level of energy sales used by PECO to calculate individual class rates, and the inadvertent omission of one of the adjustments proposed by Mr. Reising (sales expense). The Choice Plan's recommended rates are shown on a system average basis (using system average sales) and are virtually identical to the Mitnick recommendation if both are calculated on a consistent basis. Enron recommends the actual T&D rates for each class be calculated using a consistent test year/cost of service study sales level as Ms. Lopez has done in her Exh. 1-R.

The following table lists Enron's proposed T&D rates (which are supported by the testimony of Enron witness Reising) and the PECO "original", "revised" and "Partial Settlement" rates.

	Transmission	Distribution	Total
PECO Original	$0.0049	$0.0283	$0.0332[45]
PECO Revised	$0.0046	$0.0261	$0.0307[46]
Partial Settlement	$0.0047	$0.0264	$0.0311[47]
Enron Recommended	$0.0037	$0.0200	$0.0237[48]

Enron's adjustments to PECO's original and "revised" T&D rates correct for a misallocation of two general areas of costs which had been incorrectly assigned to the monopoly "wires" services: (1) a portion of administrative and general expenses and investments which PECO had allocated 100% to T&D but which also support its generation activities; and (2) PECO's present sales costs and a portion of its uncollectible expenses, both of which were claimed by PECO to be the sole responsibility of its "T&D" business.

1. Administrative And General Overhead Expenses And Investment.

Inexplicably, PECO's original cost of service allocation treated virtually all general administrative and overhead costs as if they were solely associated with T&D service. This original methodology was so obviously unreasonable that PECO submitted "revised" rates

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[45] OCA Exh. LS-4

[46] PECO Exh. RAC-9 at 1 calculated at system average using 33,569,358 kWh. Using the energy levels and revenue requirement calculated in PECO's revised rates actually produces even lower revised rates: $0.0256 distribution and $0.0046 transmission or a total of $.0302. PECC St. No. 3, Exh. PDR-1. This shows that the Partial Settlement T&D rates have no evidentiary basis whatsoever and cannot be adopted.

[47] Partial Settlement, Table A (page 8).

[48] EESPI St. No. 1-R, Att. A. The actual amount of reallocated costs will vary by class and by the use of PECO's lower cost of service study kWh level.

based upon a new "functionalization" study, which claimed to properly allocate administrative and general expenses to the various unbundled elements. PECO St. No. 12-R, Exh. RAC 3, 4, 9, 10. These rates, which surprisingly are actually slightly lower than those proposed in the Partial Settlement,[49] nevertheless continue to drastically overstate those costs that are properly attributable to the unbundled T&D function.

PECO's revised methodology is based on a simplistic — and incorrect — inquiry: would the function or activity be one that would continue even after rates are unbundled and generation is offered on a competitive basis? PECO St. No. 12-RJ at 12-19. If the answer is "yes", the cost is assigned to T&D. This approach obviously ignores the fact that, even if an A&G activity is likely to continue after direct access, the cost nonetheless would continue to be incurred to support all aspects of PECO's business, not merely the regulated T&D functions. PECO's revised functionalization study fails to allocate to generation costs such general overhead categories as "Executive Department", the office of the Chief Financial Officer, "Claims," all customer billing and collection accounts and many more subaccounts related to administrative and general activities and overheads.[50] Such a "study" is unreasonable on its face.

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[49] PECO's revised A&G study reduces T&D functional costs by just 8%. The revised system average rates were never calculated by PECO but can be calculated by dividing the total T&D revenue requirement shown on RAC-9 at 1 by the system average kWh used by PECO (and all parties) to determine system average rates. Once again, there is no evidentiary basis for the higher rates in the Partial Settlement.

[50] Tr. at 1111-14; PECC St. No. 3 at 6-7; PECO Exh. RAC-3, 4. These exhibits provide literally hundreds of examples of A&G subaccounts in accounts 920, 921, 922, 923, 925, 928, 929, 930 and 935 which are allocated 100% to T&D. The descriptions of the accounts are shown in RAC-4; the proposed PECO allocation is shown in RAC-3. Wherever the amount in the "Actual" column and the "T&D Expense" column are the same is an indication that the entire subaccount has been assigned to T&D in the study.

2. Misallocation Of Sales And Uncollectibles.

The T&D rates in PECO's revised claim and the Partial Settlement are further bloated by the misallocation of all of "sales" and uncollectible expenses to T&D. This is indefensible. PECO will not have any sales expense associated with its monopoly T&D operation. Furthermore, uncollectibles will be associated with transmission, distribution and generation. Burdening T&D rates with 100% of these costs is similarly illogical and anti-competitive.[51] Obviously these costs should be assigned to all three functional categories.

3. Adjustments To PECO Cost Allocations And T&D Rates.

The PECO "functionalization" study is clearly deficient as a basis for allocating costs, and simply cannot be used.[52] Enron's approach allocates common overhead/administrative and general costs to all functions using functional labor rates or, as a surrogate, O&M expenses other than fuel, etc. EPMI St. No. 3.0 at 12. The resulting reallocation of A&G and retail sales costs establishes rates that more reasonably reflect the costs that PECO actually will incur

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[51] Id. at 13. PECO's insistence that it will end up with all the bad debts expenses because alternative suppliers will discontinue service to non-payers and the customers will have to be served by the default provider (PECO St. No. 6-RJ at 14-15) is completely unsupported by any evidence. Moreover, it ignores the fact that suppliers are required to apply the same Chapter 56 credit standards as PECO.

[52] In her surrebuttal testimony, OCA witness L. Smith lodged a number of criticisms of the PECO functionalization study and agreed that its results were not valid. OCA St. No. 4S at 2-5. But, despite her recognition that the study "did not ask the correct question," Ms. Smith chose to adjust the PECO functionalization study to allocate to all functions subaccounts deemed to be "clearly general corporate activities" and to account for an error in allocation that she identified. Id. at 4. Her revised recommended T&D Rate is $0.0294 per kWh with a proposed A&G adder of $0.017 per kWh. While Ms. Smith's revision confirms that the PECO study cannot be used, her recommendations continue to fall short. Nowhere in her revised analysis does she attempt to explain why she chose to allocate to all functions a relative handful of additional A&G subaccounts. The error in her approach can be demonstrated simply by referring to accounts such as "secretary" or "claims" which were allocated 100% to T&D in the PECO/Clemmer analysis and which Mr. Smith did not revise. Compare OCA Exh. LS-1 with Exhs. RAC-3, 4.

for the T&D functions starting in 1999. Reallocation of costs related to generation will assure that competition will develop because PECO will bear an appropriate allocation of generation related retail marketing and delivery costs.[53]

E. Enron's Assumption And Treatment Of The PLR Role Will Stimulate Competition.

In establishing the framework for a competitive environment, it is critical that the PLR not have an unfair advantage in competing with other EGSs for the right to serve customers. Rather, the PLR should be the party that is required to "stand ready" to serve those customers that either "choose not to choose" another supplier or who, for whatever reason, revert to default service -- and the Act should be interpreted with that guiding policy of fostering competition in mind. The PLR function should be employed as a means to transition customers to a competitive retail electric market so that consumers can do even better than the

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[53] PECO has argued consistently that any reduction to its proposed T&D rates and corresponding allocation of generation related overheads to the generation component of its unbundled rates would simply add to its "stranded costs," presumably on the assumption that if these generation costs are allocated to the generation part of the rate for unbundling purposes PECO will be incapable of recovering them in a competitive environment and thus they should be considered "stranded." PECO St. No. 6-RJ at 12-14. But the PECO analysis first misidentifies these costs as A&G costs associated with actually running its generation units and sales at wholesale. Id. In fact, these common overheads clearly are and will continue to be associated with PECO's efforts at retail generation sales in a competitive environment, a business that PECO will have to either transfer or separate depending upon the eventual Commission determination in this regard. PECO St. No. 3 at 11-12. Moreover, these ongoing costs of participating in a competitive generation market cannot be considered stranded because they would force competitive customers to reimburse these charges through a revised CTC and provide PECO's unregulated generation business yet another competitive advantage. Id.; Tr. at 852-53. Finally, PECO's entire claim in this regard assumes a "static" environment and makes no provision for cost recovery through the introduction of new products or expanded sales activity. This view is inconsistent with the anecdotal evidence in this record indicating that PECO's present A&G structure will be used to support aggressive and far flung retail energy sales efforts throughout the United States and the world.

prices reflected by the rate caps under the Act. EESPI St. No. 1-R at 38. In this respect, the Choice Plan stands in stark contrast to the Partial Settlement which provides disincentives to customers to exercise choice. Rather than using the PLR as a means to transition such customers to the competitive market as intended by the Act, the Partial Settlement attempts to establish PECO as the permanent supplier. Id.

Section 2807(e)(3) of the Act provides that "[i]f a customer contracts for electric energy and it is not delivered or if a customer does not choose an alternative electric generation supplier, the electric distribution company or commission-approved alternative supplier shall acquire electric energy at prevailing market prices to serve that customer and shall recover fully all reasonable costs." While the statute does not define the phrase "prevailing market prices," consistent with the directive of the Act to stimulate competition, Enron's proposed generation credits are designed to represent reasonable approximations of the projected delivered market prices for energy, including an allowance for retail costs, and are intended to be surrogates for the market price standard. See e.g., EESPI St. No. 3 at 7, 10. Establishing the generation credit as both the "cap" and the "floor" price payable by PLR customers promotes competition by providing an incentive to customers to leave default service if the actual market price falls below the applicable generation credit by choosing competitive suppliers that offer lower prices, while also providing customers with the benefit of the significant rate reductions prior to the time that they may choose an alternative supplier.

Even if it does not approve the Choice Plan, it is imperative that the Commission not apply section 2807(e)(3) in a manner that would thwart electric competition. Interpreting this section to allow PECO, as the PLR, to provide generation at the *lower of* the generation credit

rate or at a rate deemed by PECO to be the "prevailing market price" would stifle the development of a competitive generation market. This would occur because of (1) the inherent incumbency advantage PECO holds as the historic supplier with an "installed" customer base and (2) the fact that customers must take affirmative actions to leave PLR service by selecting an EGS. In such circumstances, PECO could unfairly compete against other EGSs by reducing its generation price just low enough to block competitors from entering the market. Thus, regardless of the reasonableness of the level of generation credits established by the Commission from the standpoint of encouraging competition, no potential EGS will be willing to commit the time and marketing and financial resources necessary to secure customers if PECO (as PLR) is able to predatorily price its generation service to a level that is just enough below the generation credit to keep customers from switching to competitive suppliers. Providing PECO with such an unfair advantage would have the effect of chilling potential competition, thereby preventing customers from realizing the competitive benefits the Act is intended to provide. This effectively would render the Act a nullity.[54]

V. THE CRITICISMS THAT HAVE BEEN MADE OF THE CHOICE PLAN ARE NOT SUPPORTED BY THE ACT OR THE RECORD.

PECO (and certain other parties that are signatories to the Partial Settlement) have made many "attacks" on the Choice Plan. These attacks are incorrect and without merit. Set

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[54] In the alternative, the Commission could order that the "default" rate be established annually after review and approval by the Commission, and be set at the determined generation market price, plus all delivery and generation related A&G costs. This would assure that PECO, as the EDC, would not be able to "flex down" in an anti-competitive manner and would allow EGSs to determine, for a period that allows proper planning, the generation cap and "prevailing market price" levels they need to "beat" in order to provide savings to consumers.

forth below are Enron's responses to the primary attacks. Many of the other criticisms raised are immaterial and do not require responses herein.

A. The Act Vests The Commission With Full Authority To Designate An Alternative PLR Prior To The End Of The Transition Period.

PECO has challenged the legality of the Choice Plan on the basis that the Act bars the Commission from designating an alternative PLR so long as PECO is collecting CTC or ITC payments. PECO St. No. 1-E at 12-13. PECO, however, conveniently has changed its view of Commission's statutory authority under the Act to appoint an alternative PLR to suit its arguments. In the Partial Settlement, PECO acknowledged that the Commission could reassign PLR responsibility prior to December 31, 2008, when the CTC/ITC would cease being collected.[55] However, when addressing the Choice Plan, PECO now contends that under Section 2807(e)(1) the Commission cannot designate an alternative PLR until after CTC/ITC is fully collected. The letter and the spirit of the Act simply do not support PECO's new position.

The Act in at least two instances provides without qualification that the Commission may designate an entity other than the EDC to serve as the PLR.[56] Unlike Section 2807(e)(2) which contains the prefatory clause "at the end of the transition period" and unlike Section 2807(e)(1) which contains the prefatory clause "while an electric distribution company collects

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[55] Paragraph 33 of the Partial Settlement provides:

> PECO agrees that unless the Commission designates an alternative provider of last resort under Section 2807(E)(3) of the Electric Competition Act, it will serve through December 31, 2008 as the provider of last resort for all retail electric customers in its service territory that do not choose or cannot choose to purchase power from alternative suppliers.

[56] 66 Pa.C.S. §§ 2807(e)(3) and 2802(16).

a competitive transition charge or an intangible transition charge," Section 2807(e)(3) contains no such limiting language.[57]

It must be presumed that the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable. 1 Pa.C.S. § 1922(1). To interpret the Commission's authority to designate an alternative PLR under Section 2807(e)(3) as limited by Section 2807(e)(1) would surely insulate PECO from Commission review of the adequacy of its performance as the PLR until the CTC/ITC is collected. Not only is such a result unreasonable and ill-advised from a policy standpoint, but such an interpretation of Section 2807 only serves the private interest of PECO, rather than the public interest. As such, PECO's interpretation is inconsistent with the Pennsylvania rules of statutory construction which provide that the enactment of a statute is made under the presumption that "the General Assembly intends to favor the public interest as against any private interest." 1 Pa.C.S. § 1922(5).

B. An Alternative PLR Under Section 2807(e)(3) Is Not A Public Utility Under The Code.

PECO apparently contends that only an entity certified as a "public utility" can act as PLR, but PECO is wrong. Section 102 of the Code defines an electric "public utility" as any entity which owns or operates equipment or facilities utilized to produce, generate, distribute or furnish electricity for the public for compensation. However, Section (2)(vi) of the

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[57] Moreover, Section 2807(e)(3) is not in any way "subject to" Section 2807(e)(1), as PECO would have this Commission believe. Clearly, in order to reach PECO's interpretation of Sections 2807(e)(3) and 2807(e)(1), this Commission would have to add similar clauses or limiting language to Section 2807(e)(3) -- language which the General Assembly itself did not see fit to include.

definition expressly exempts "electric generation supplier companies" from the definition, except for the very limited purposes provided in Sections 2809 and 2810.

First, as an EGS, Enron does not fall within the statutory definition of "public utility" under Section 102. Enron does not own or operate equipment or facilities utilized to generate, distribute, transmit or furnish electricity to the Pennsylvania public. This is equally true whether, at any given time, Enron is serving as a supplier in the competitive marketplace or a supplier for PLR customers. Accordingly, Enron, as PLR, would not be included in the definition of "public utility" and would not be subject to Commission jurisdiction as such.

To the extent Enron or another entity seeking to serve as PLR is determined to be included within the definition of "public utility," its activities would be subject to the limited application of the Code as set forth for "electric generation supplier companies" under the express limitation to the definition provided for in Section (2)(vi). Such a view is clearly supported by the definition of "electric generation supplier" or "electricity supplier" as set forth in Section 2803.[58] Furthermore, the reference to an alternative PLR (i.e., a PLR other than the EDC) in Section 2807(e)(3) expressly indicates that the Commission may approve an "alternative supplier" to fulfill that role. If the General Assembly intended that alternative PLRs inherited traditional public utility status, it would have expressed such a view in this statutory provision.

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[58] Under Section 2803, an "electric generation supplier" or "electricity supplier" includes entities that "sells to end-use customers electricity or related services utilizing the jurisdictional transmission or distribution facilities of an electric distribution company or that purchases, brokers, arranges or markets electricity or related services for sale to end-use customers utilizing the jurisdictional transmission and distribution facilities of an electric distribution company." Enron, in its proposed role as PLR, falls within this statutory definition.

Overall, given the language of the Code, it is clear that an alternative PLR would not be subjected to traditional public utility status and would be regulated as an "electric generation supplier" under 66 PA.C.S. § 2809. However, as stated in the Choice Plan and supporting testimony, Enron expects that certain additional requirements will be imposed by the Commission as a condition of PLR designation and is prepared to accept and comply with all reasonable requirements.

C. The Commission Has The Authority To Order PECO To Take The Actions And Assume The Obligations In The Choice Plan As A Condition Of Recovering Stranded Costs.

PECO has characterized its Partial Settlement as a "take-it-or-leave-it" proposition. Partial Settlement ¶ 42. If faced with this stark choice, the Commission should clearly "leave it." However, the Commission enjoys inherent power, indeed an inherent duty, to fashion an order for PECO's restructuring that will provide for the welfare of the general public and will fulfill each of the objectives of the Act. While within this context the Commission has only those powers delegated to it in its enabling statute, this does not mean that all detail of the scope of authority of an agency or other governmental unit, including the Commission, must be expressly or separately enumerated in the enabling statute. Instead, the courts have recognized that only the basic policy choice which guides and restricts the exercise of administrative functions must be made by the legislature.[59] Within these policy directives, an agency has the discretion to choose the means necessary to fulfill the General Assembly's

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[59] Gilligan v. Pennsylvania Horse Racing Commission, 492 Pa. 92, 422 A.2d 487 (1980); Hospital Association v. McLeod, 487 Pa. 516, 410 A.2d 731 (1980).

policy choice.[60] Indeed, under 66 Pa.C.S. § 501, the Commission is provided the general power and authority to supervise and regulate public utilities operating in the Commonwealth in furtherance of the Code's objectives. Like other agencies adjudicating matters before it, the Commission enjoys "a wide range of discretion." [61]

While there may be some disagreement about the Commission's authority to impose some of the obligations on PECO which the Choice Plan requires,[62] the Commission does have wide discretion in fashioning a framework to develop a competitive retail generation market and assure that the full benefits mandated by the Act are provided to consumers. In particular, the Commission has before it a complete record sufficient to determine a stranded cost recovery level considerably below $5.461 billion. Accordingly, the Commission can and should condition PECO's recovery of a level of stranded costs assumed in the Choice Plan on compliance with the actions and agreements included in the Choice Plan and, indeed, no stranded cost recovery is justified unless the Commission takes all steps necessary to assure the development of a competitive retail generation market in PECO's service territory.

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[60] Where the General Assembly has established a pervasive system of regulation and supervision of an industry, an agency action is valid as long as it is in furtherance of the statutory purpose. Gilligan, 489-90. See also the Commission's general discussion of the extent of its statutory authority in Rulemaking to Establish a Universal Service Funding Mechanism, L-950105; (Final Form Rulemaking Order entered June 21, 1996).

[61] Popowsky v. Pa. Public Utility Commission, 674 A.2d 1149, 1155 (Pa.Commw. 1996) (*quoting* West Penn Power Co. v. Pa. Public Utility Commission, 147 Pa.Commw. 6, 607 A.2d 1132, 1135 (1992), *appeal denied*, 539 Pa. 661, 651 A.2d 547 (1993)). See also, South River Power Partners v. Pennsylvania Public Utility Commission, 673 A.2d 422, 427 (Pa.Commw. 1996) (noting that "PUC enjoys broad discretion in making determinations in cases which it adjudicates"), *appeal denied*, 546 Pa. 687, 686 A.2d 1315 (1996).

[62] Specifically, the Choice Plan requires the Commission to direct PECO to enter into the power purchase and MBC agreements proposed in the Choice Plan and cause the transition bonds to be issued under the terms and conditions provided in the Choice Plan.

The record in this proceeding supports a wide range of potential stranded cost recovery.[63] Not one dollar of this stranded cost recovery is justified unless a competitive market is created. Whether or not the Commission has the undisputed authority to direct PECO to take the actions required for implementation of the Choice Plan, the Commission has the authority to condition any level of stranded cost recovery, including the $5.461 billion contained in the Partial Settlement, on PECO's acceptance of certain actions and obligations.[64] Simply put, for PECO to recover a relatively high level of stranded costs, it should accept the obligations necessary to permit such recovery. If the Commission endorses the Choice Plan as the necessary means for implementing an appropriate restructuring in PECO's service territory, it has the authority and should exercise the authority to condition stranded cost recovery on the actions and obligations assigned to PECO under the Choice Plan.

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[63] The record addresses a range of $2.14 billion (PAIEUG St. No. 2S) to $6.80 billion (PECO St. No. 1 at 3). Other parties recommended a stranded cost recovery of $0. The $5.461 billion contained in the Partial Settlement is on the high end of this scale. Moreover, the Commission should take administrative notice of three recently announced sales of generation assets by electric utilities pursuant to restructuring proceedings that further question the validity of the Partial Settlement's stranded cost figure. In these cases, the sales contracts for the generation assets provide for sales prices substantially in excess of net book value ("NBV"). (New England Electric System/US Generating, 1.45 times NBV, New England Electric System, Form 8-K filed with the Securities and Exchange Commission (August 6, 1997); Pacific Gas and Electric/Duke Energy, 1.32 times NBV, Pacific Gas & Electric Co., Form 8-K filed with the Securities and Exchange Commission (November 24, 1997); and Southern California Edison/multiple buyers, 2.65 times NBV).

[64] Traditionally, the Commission has utilized the "option order" mechanism to allow utilities to accept or reject a given level of rate recovery in exchange for acceptance of other PUC imposed obligations.

D. PECO's Assertion That Enron Does Not Have The Financial And Commercial Resources And Expertise To Serve As The PLR In PECO's Service Territory Is Incorrect.

PECO asserts that Enron does not have the financial or commercial resources to serve as the PLR and that, in PECO's view, the legislature never anticipated that a corporation such as Enron could become the PLR. See e.g., PECO St. No. 1-E at 13-14. PECO's cross examination of Mr. Kean also focused heavily on the fact that Enron is a recently organized corporation that presently has been nominally capitalized and does not have its own employees to support its position that Enron is not qualified to become the PLR. Tr. at 1322-27.

EESPI has indicated that it is committed to working with the Commission to determine the appropriate level of financial commitment Enron will receive from its ultimate parent corporation, Enron Corp., in connection with its PLR role. EESPI St. No. 1 at 23-24. Enron anticipates that it will undertake those discussions with the Commission immediately after the Choice Plan is approved and that it is confident that an agreement on the appropriate level of parental financial support can be reached promptly.

Enron's proposal that it work with the Commission to determine the necessary level of Enron Corp. credit support is no different than would apply in the case of any other PLR other than an EDC, including what would occur if the Commission determined that the PLR role should be put out to bid to the most qualified bidder or bidders. In each such case, the PLR likely would be an entity that differs significantly from PECO in such areas as corporate presence in southeastern Pennsylvania and owning or operating fixed utility assets in such area. Simply put, under PECO's view, no company other than PECO could meet the "implicit"

statutory requirements necessary to become the PLR. This view is directly contrary to the literal language of the Act.[65]

E. There Is No Reliable Evidence That The Choice Plan Will Adversely Affect PECO's Financial Integrity.

PECO's brief can be expected to reiterate its claim that approval and implementation of the Choice Plan (in particular, its securitization proposal) would have a "catastrophic effect...on...[PECO's] financial integrity" (PECO St. No. 20-E at 2), producing a bond rating of "B or below" in each of the years 1999-2005. Id. at 8. There are several reasons why PECO's claim cannot be taken seriously.

First, the analysis supporting PECO's claim employed patently unreasonable assumptions. These assumptions included, for example, the claim that PECO's O&M expense would increase by **PROPRIETARY** per year, despite evidence that PECO's O&M expense for its electric operations had fallen by an average of **PROPRIETARY** annually for the last two years. EESPI St. No. 11-SRJ at 3.[66] Enron's witness Kinney demonstrated that the persistent theme in PECO's assumptions was to make the financial scenario appear more dire

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[65] PECO's attempt to disqualify Enron as the PLR by emphasizing the absence of its own employees is baseless. Mr. Kean stated that it would not make business sense to staff up until the Commission awards it the PLR role, noting that in those jurisdictions where affiliates of Enron have made a clear commitment to enter electric and other retail markets, such as California and Ohio, those affiliates have undertaken significant increases in staffing levels to accommodate the increased business responsibilities. Tr. at 1441-42.

[66] Another unreasonable assumption employed by PECO is that its sales will be flat for the entire period, despite the price elasticity inherent in the rate reductions under the Choice Plan. Furthermore, PECO calculated that it would receive generation revenue at an average rate of **PROPRIETARY** cents per kWh in the first two years of the Choice Plan, despite the fact that Enron would purchase power from PECO for PLR customers at a rate of **PROPRIETARY** cents per kWh. This means, of course, that PECO has implicitly assumed in its analysis that Enron would serve no customers as the PLR.

under Choice Plan than if reasonable assumptions were employed. EESPI St. No. 11-SRJ at 4.

Second, Enron's approximate replication of PECO's analysis of the Choice Plan reveals that, when the same assumptions are applied to the Partial Settlement, an equally "catastrophic" result would occur. When PECO's analysis is applied to the Partial Settlement, its bond ratings also fall below investment grade ("B" in some years, "BB" in others) and would not leave PECO in a materially better position to access the capital markets. EESPI St. No. 11-SRJ at 5.

Third, PECO's "analysis" of the financial effect of the Choice Plan must be considered in light of the fact that, although PECO routinely forecasts its financial results (tr. at 2031-35) and has based its analysis on such forecasts, PECO refuses to provide those forecasts for the record. Tr. at 2121.

Using the same assumptions that PECO has provided to the parties to evaluate the financial implications of the Choice Plan, Enron has shown that the Partial Settlement would also reduce PECO to "junk bond" status. PECO, however, has embraced the Partial Settlement, even going so far as to submit testimony affirming that the Partial Settlement would maintain its financial integrity.[67] It should be apparent that the information which PECO refuses to divulge must directly contradict the dire assumptions upon which its claims of financial ruin are based. PECO has previously acknowledged that the Partial Settlement would not imperil its financial integrity. Neither will the Choice Plan.

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[67] It is curious, to say the least, that PECO submitted testimony in an earlier phase of this case claiming that the Partial Settlement would maintain its financial integrity but, now, has chosen to withdraw that testimony. Tr. at 2126.

F. The Choice Plan's Securitization Structure Is Workable.

PECO and certain other signatories to the Partial Settlement have asserted that the Choice Plan is not feasible because, in their view, there are existing legal impediments to effecting a securitization of PECO's stranded costs. PECO St. No. 20-E at 2, 14-15. In this respect, such parties have asserted that either the pending lawsuits challenging various aspects of the Act (id. at 14-15) or, perhaps, the restrictions under PECO's existing first mortgage bond indenture (id. at 17-20; PECO St. No. 28-E at 5), currently would block the securitization structure under the Choice Plan.

Enron has been advised by its financial advisor, based on advice of counsel, that its securitization proposal should be able to be implemented even if the pending lawsuits continue to be outstanding on the date that the securitization is to take place. EESPI St. No. 9-R at 2. Indeed, the Commission should take administrative notice of the fact that Pacific Gas & Electric Company ("PGE") last week successfully placed the first issue of transition bonds, in the amount of $2.9 billion at interest rates ranging from 5.94% to 6.48% depending on the issues' weighted average maturity and bearing a "AAA" rating. See, Registration Statement No. 333-30715 ("Post Effective Amendment No.1 to Form S-3) as filed with the Securities and Exchange Commission on November 26, 1997. Such bonds were successfully marketed despite public announcements that certain groups intend to appeal the securitization provisions of the California electric deregulation legislation to the California Supreme Court. Id. Furthermore, such bonds were successfully placed even though the IPALCO lawsuit challenging on U.S. Constitutional grounds certain aspects of the Act which is pending in the

Commonwealth Court, if successful, could have an adverse effect on the PGE securitization transaction as it would have on a PECO securitization.

Enron witness Fastow also submitted testimony that the securitization structure under the Choice Plan should be able to be implemented within the constraints of PECO's first mortgage indenture (the "Indenture"), assuming PECO reasonably cooperates to effect the plan. EESPI St. No. 8-R at 4-7. PECO witness Mitchell's statements that the Choice Plan fails to satisfy the condition of the Indenture that the trustee receive other property as collateral in effecting a release of the lien of the Indenture is misplaced; Mr. Mitchell failed to take into account that such condition should be satisfied by a pledge of the ITC Shortfall Agreement for the benefit of the Indenture Trustee. Id. at 4. Further, Mr. Mitchell's assertions that to defease PECO's first mortgage bonds would require PECO to place with the Indenture Trustee approximately $4.08 billion even though the aggregate amount of outstanding bonds is approximately $3.5 billion (PECO St. No. 20-ERJ at 14), is not supported by the record or the terms of the Indenture. Because Enron would pay PECO $5.461 billion under the Choice Plan in any event, PECO would have sufficient funds to implement a defeasance if it so desired.

PECO witness Sharpe's testimony regarding the tax consequences of Enron's securitization structure was demonstrated to be woefully unsupported during cross examination.[68] As clearly demonstrated by the record, Mr. Sharpe's testimony should be

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[68] Under cross-examination, Mr. Sharpe: (1) admitted that he has no experience in asset-backed securitization transactions involving either stranded cost securitization bonds or other similar financial products (tr. at 2237-44); (2) stated that the PECO securitization "mirrors" the California utilities' securitization proposals while admitting that he had not reviewed either the IRS private rulings received by the California utilities or the offering prospectus or other underlying documentation for those transition bond offerings (tr. at 2239-40; 2248-49) and (3) could cite no legal or other authority for his conclusion that he believed the IRS would be "less comfortable" with the Enron securitization structure than with the PECO securitization plan

given no probative weight. Further, in putting together its securitization plan from a commercial and tax standpoint, Enron was advised by Chase Securities, Inc., a major financial institution and by a major law firm with extensive experience in the tax treatment of asset backed securitization transactions. EESPI St. No. 8-R at 12. Enron witness Fastow testified that such counsel is of the view that the Enron securitization proposal would permit PECO to obtain a favorable IRS ruling that would eliminate any material tax risk to PECO from implementation of the securitization structure under the Choice Plan. Tr. at 2199.

Lastly, the benefits of the Choice Plan are not contingent on securitization of PECO's stranded costs. See e.g., EESPI St. No. 1-R, Att. B. If securitization is blocked by a "legal impediment," the "contingency plan" under the Choice Plan would become effective on September 1, 1998. PECO has put forth no supported challenge to the contingency plan.

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under the Partial Settlement. Tr. at 2245-46 and 2251-52.

VI. CONCLUSION.

The Partial Settlement cannot be seriously considered by the Commission because it violates both the letter and spirit of the Act. Consequently, the Commission is not faced with choosing between the Partial Settlement and the Choice Plan. Rather, the Commission should adopt the Choice Plan in its entirety or, in the alternative, fashion its own plan for the restructuring of PECO that contains those essential features of the Choice Plan that are critical to establishing a competitive electric generation market.

Respectfully submitted,

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PROPOSED FINDINGS OF FACT OF ENRON ENERGY SERVICES POWER, INC. ENRON POWER MARKETING, INC.

(Collectively referred to as "EESPI" OR "ENRON")

I. Burden of Proof

1. Pursuant to Section 315(a) of the Public Utility Code, PECO carries the ultimate burden of proof, which includes producing sufficient, credible and admissible evidence to establish a *prima facie* case regarding each element of the rate and tariff changes proposed pursuant to the Electricity Generation Customer Choice and Competition Act (the "Act").

2. PECO, and the other signatories to the Partial Settlement, carry the burden of demonstrating that each component of such settlement is in the public interest, is supported by substantial evidence and is otherwise consistent with the Act.

3. The Commission finds that PECO's obligation to satisfy its statutory burden of proof under the Public Utility Code can neither be diminished nor obviated through PECO's support of a Partial Settlement.

4. Enron has the burden of going forward with substantial evidence regarding each element of claims made and positions advanced in response to the rate and tariff changes proposed in the Partial Settlement.

5. The Commission finds that record evidence adduced in this proceeding demonstrates that Enron has satisfied its burden of presenting substantial, credible and admissible evidence rebutting the justness and reasonableness of the Partial Settlement.

II. Competition

1. The Commission finds that if competition does not result from the restructuring plan ultimately adopted by the Commission, consumers will have been placed in the unfair position of paying for PECO's stranded costs without receiving the concomitant benefits from a competitive generation market, as required by the Act. EESPI St. No. 1 at 4.

2. The Commission finds that the Partial Settlement, if approved, will prevent the development of competition for retail power services in PECO's service territory. EESPI St. No. 2-R at 8-9.

3. The record developed in this proceeding demonstrates that the Choice Plan is consistent with the Act's mandate to develop a functional and competitive electricity generation market through implementation of the following:

   a. A "generation credit" for PECO which permits entry and competition in the marketplace by competitive suppliers, the effect of which is to permit consumers to do even better than the rate caps established under either the Partial Settlement or the Choice Plan. EESPI St. No. 1-R at 7-8;

   b. The unbundling of other competitive services, such as metering, billing, customer information and collection services and to allow the competitive provision of those services. EESPI St. No. 1-R at 7-8;

   c. A Code of Conduct and other competitive safeguards (*e.g.*, Rule 23) which prevent PECO from using its access and control over transmission and distribution facilities to advantage its sales, its trade/brand name or its competitive affiliates. EESPI St. Nos. 5 and 5-R; EESPI St. No. 10 at 8-9; EESPI St. No. 1-R at 7-8; and EPMI St. Nos. 6.0 and 6-SR; and

   d The implementation of a pro-competitive electric service delivery tariff for PECO (the "Distribution Tariff"). EESPI St. No. 1 at 21-22; EESPI St. No. 5 at 3-20.

4. The Commission finds that the Partial Settlement is inconsistent with the Act because it will prevent competition in the following principal ways:

   a. Under the Partial Settlement, PECO's generation credits are artificially low, particularly in the early years of the transition period and, therefore: (1) potential competitors will not be able to compete for customers; and (2) PECO's default service will have such significant price advantage that competition will be thwarted (if PECO is permitted to be the PLR) because customers will have no incentive to leave default service. EESPI St. No. 1 at 18-19; EESPI St. No. 3 at 12-14;

   b. The generation credits under the Partial Settlement discourage and prevent competition because default customers always receive the lower of the market price or the artificially low generation credits set forth in the Partial Settlement. EESPI St. No. 2-R at 9; PECC St. No. 1 at 35-36;

   c. The Partial Settlement contains inflated Transmission and Distribution ("T&D") charges primarily due to the misallocation of certain costs and the improper inclusion of costs associated with generation or other non-transmission and distribution services. EPMI St. No. 3.0; EESPI St. No. 7-R at 11-12, & Exhs. B & D;

d. The Partial Settlement's inflated T&D rates contribute to the Partial Settlement's artificially low generation credits, thereby enabling PECO to use monopoly T&D charges effectively to subsidize and support its provision of generation service. See e.g., EESPI St. No. 2 at 9; PECC St. No. 1 at 22-25;

e. The Partial Settlement improperly requires PECO's customers to compensate PECO for its "stranded costs" for years before consumers begin to see the benefits from a functioning, competitive generation market. EESPI St. No. 1 at 4-5;

f. The CTC/ITC provisions of the Partial Settlement will enable PECO to overrecover its agreed-upon $5.461 billion in stranded costs -- a measure which when coupled with the interplay with the artificially low generation credits effectively prevents competitors from entering the generation market in Southeast Pennsylvania;

g. The Partial Settlement fails to unbundle metering, billing, customer information and collection services. EESPI St. No. 5 at 3; and

h. The Partial Settlement fails to include and implement a code of conduct to which PECO, and its affiliates, would be required to follow and permits discrimination of potential third party competitors. EESPI St. No. 5 at 8-10.

III. Rate Reductions

1. PECO's residential customers currently pay rates that are more than 40% above the national average. EESPI St. No. 1 at 12.

2. For 1996, the U.S. Energy Information Agency reported a 7.9 cents per kWh average rate for electric service provided by all Pennsylvania electric utilities. EESPI St. No. 2-R at 13-14. The average rate for PECO is 9.95 cents per kWh, which is approximately 26% greater than average statewide electric rates.

3. The Partial Settlement proposes rate reductions of 10% in the first 28 months (i.e., from September 1, 1998 to December 31, 2000) and rate decreases of 5% for 2001 and 2% for 2002.

4. The Commission finds that the rate reductions provided for under the Partial Settlement: (1) foreclose the implementation of a competitive market for the generation of electricity, as required under the Act; and (2) are not as advantageous to consumers as are the rate reductions contained within the Choice Plan.

5. The rate reductions under the Enron Choice Plan are as follows:

	Full Securitization	*Without Securitization*
1998 (Sept.- Dec.)	20%	14.45%
1999	20%	14.45%
2000	20%	14.45%
2001	12.44%	9.42%
2002	9.44%	7.43%
2003	7.44%	7.44%

6. The Commission finds that the rate reductions contained in the Enron Choice Plan (Attachments A and B of EESPI St. No. 1-R) under either the full securitization scenario or without the securitization scenario reasonably enable development of a functional electric generation market.

IV. Generation Credits

1. The Commission finds that it is in the public interest when a portion of the generation charge can be avoided due to competition because competitors offer electricity that is priced lower than the generation credit. EESPI St. No. 1 at 13.

2. The Commission finds that an "artificially low generation credit" is a generation credit that is less than the long run marginal cost for electric generation. EESPI St. No. 1 at 18-19; EESPI St. No. 4 at 5 to 6.

3. The Commission finds that a low generation credit would prevent competitors from participating in the retail electric generation market. EESPI St. No. 1 at 18-19; EESPI St. No. 4 at 5-6; EESPI St. No. 2 at 16.

4. The Partial Settlement proposed generation credits (determined on a system-wide average basis) are as follows:

year	*cents*
1998	n/a
1999	2.80
2000	2.80
2001	3.20
2002	3.50
2003	3.70
2004	3.97
2005	4.07
2006	4.77
2007	5.37
2008	5.57

5. The Commission finds that the generation credits proposed under the Partial Settlement are artificially low and effectively result in an inflated Competitive Transition Charge ("CTC"). EESPI St. No. 1 at 18-19; EESPI St. No. 3 at 9-10.

6. The Commission finds that under the Partial Settlement, it is likely that the generation credits would be less than the actual and the projected market price for electric generation. EESPI St. No. 1 at 18-19; EESPI St. No. 3 at 6-8; EESPI St. No. 4 at 4-6:

   a. The Partial Settlement proposed generation credits are lower in 1999 than every market price projection or generation credit recommendation presented on the record except for the (incorrectly calculated) Hieronymus market price projection. PECO Exh. WHH-11. When correctly calculated, even the Hieronymus 1999 market price is higher than the Partial Settlement proposed credit (without A&G adder). PECC Exh. SAM-4;

   b. After 1999, and until 2005-2006 all of the delivered market price projection are higher than the proposed generation credits in the Partial Settlement. Enron Brief at 16;

   c. The Partial Settlement generation credits are inconsistent with the overall total credit established by the PUC for the PECO pilot of 3.7¢ per Kwh; and

   d. The Partial Settlement residential credit of approximately 3.05¢ per Kwh. (tr. at 1030) is inconsistent with the PUC's determined 1998 Residential and Commercial market price of 3.22¢ per Kwh.

7. The Commission finds that the generation credits proposed under the Partial Settlement would enable PECO to prevent competitors from participating in the retail electric generation market in PECO's service territory for several years. EESPI St. No. 1 at 18-19; EESPI St. No. 3-R at 5-6.

8. The Enron Choice Plan (EESPI St. No. 1-R, Attachments A and B) proposed generation credits as follows:

year	*cents*
1998 (Sept-Dec.)	3.48
1999	3.48
2000	3.48
2001	3.61
2002	3.75
2003	3.89
2004	4.04
2005	4.19
2006	4.35
2007	4.52
2008 (Jan.-Aug.)	4.52

9. The Commission finds that the generation credits contained in the Enron Choice Plan are reasonable and fall within the range of market price estimates adduced in the record in this proceeding. EESPI St. No. 1-R at 9:

   a. Enron witness Slater calculated a market price projection for PECO, based upon the Long Run Incremental Cost of power, starting at 3.53¢ per Kwh in 1999 to 3.92¢ in 2008. EESPI St. No. 4-R, KJS-4R; Enron Brief at 16;

   b. PECC witness Hull, using a market-based approach projected a market price for the purchase of power under a long term contract of 3.4¢ per Kwh, together with an allowance for delivery costs (.2¢) and retail marketing costs (.2¢) producing a total projected market price in 1999 of 3.8¢ trending upward to 4.20¢ in 2003; and

   c. PECC witness Mitnick using the market price projecting produced by the three PECO witnesses, adjusted to delivered prices and including an allowance for A&G costs, produced a 1999 generation credit of 3.80¢ per Kwh in 1999 trending upward consistent with the PECO projection. PECC St. No. 1; Exh. SAM-4.

10. The Commission finds that Enron's proposed generation credits are just and reasonable under the Act because: (1) the Choice Plan generation credits are higher than the Partial Settlement's proposed generation credits for every year through year 2006; and (2) the Choice Plan generation credits enable competitors of PECO to participate immediately in the retail electric generation market in PECO's service territory.

11. The Commission finds that generation credits set forth in the Enron Choice Plan result in a reasonable CTC that is designed to fully recover PECO's $5.461 Billion in stranded costs while fostering a competitive market.

12. The Commission finds that the generation credits proposed in the Enron Choice Plan will benefit all consumers in PECO's service territory and, therefore, are in the public interest.

V. Competitive Transition Charge / Intangible Transition Charge and T&D charges

1. The Partial Settlement (Table A at page 8) contains system-wide average CTC/ITC charges and transmission and distribution ("T&D") charges, inclusive of GRT, as follows:

year	*CTC/ITC* ¢/Kwh	*Total T&D* ¢/Kwh
1998 (Sept-Dec.)	n/a	n/a
1999	3.04	3.11
2000	3.04	3.11
2001	3.14	3.11
2002	3.14	3.11
2003	3.14	3.11
2004	2.87	--
2005	2.77	--
2006	2.57	--
2007	2.47	--
2008 (Jan.-Aug.)	2.27	--

2. The Amended Enron Choice Plan (EESPI St. No. 1-R, Attachments A & B) contains CTC/ITC charges and T&D rates as follows:

year	*Full Securitization* *CTC/ITC* ¢/Kwh	*Without Securitization* *CTC/ITC* ¢/Kwh	*Total T&D* ¢/Kwh
1998 (Sept-Dec.)	2.11	2.66	2.37
1999	2.11	2.66	2.37
2000	2.11	2.66	2.37
2001	2.73	3.03	2.37
2002	2.89	3.09	2.37
2003	2.95	2.95	2.37
2004	2.80	2.80	--
2005	2.65	2.65	--
2006	2.99	2.99	--
2007	3.32	3.32	--
2008 (Jan.-Aug.)	3.32	3.32	--

3. The Commission finds that PECO's projected revenues from CTC charges have been determined assuming no load growth during the transition period. EESPI St. No. 2-R at 17.

4. The Choice Plan contains a just and reasonable CTC reconciliation mechanism (i.e., true-up mechanism). EESPI St. No. 3 at 12; EESPI St. No. 8 at 7-11.

5. The Commission finds that a Competitive Transition Charge ("CTC") reconciliation mechanism included within the Choice Plan offers the potential for a faster recovery of stranded costs as well as the possibility of decreases in future CTCs if a faster recovery of stranded costs is achieved. EESPI St. No. 2 at 11.

6. The Partial Settlement does not provide for a CTC true-up mechanism, either on an annual basis or over the full period that the Partial Settlement would be operative. EESPI St. No. 2 at 11; EESPI St. No. 3 at 12.

7. The Commission finds that the opportunity to recover stranded costs beyond those specifically included in the CTC through the lack of a true-up mechanism violates the Act. EESPI St. No. 2 at 9-10.

8. PECO's 1997 IRP filing to the PUC projects a "base case" sales growth rate of 12.7%. EESPI St. No. 2-R at 12:

   a. PECO's most recent FERC Form 714 filing forecasted an .8% annual growth rate for electric sales. Tr. at 846;

   b. PECO's internal analysis of the financial effects of the Partial Settlement, prepared at the time the settlement was signed, utilized energy sales growth assumption that are consistent with PECO's publicly filed projections. EPMI Cross Exh. 1; Tr. at 499;

   c. The reopening of the Philadelphia Navy Yard by a private ship building firm is likely to increase the load served by PECO, but at this time there is no estimate of the level of the load that will be added. Tr. at 1881-82;

   d. The rate reductions likely to be imposed as part of the restructuring would stimulate increases in the use of electricity by PECO's customers. EESPI St. No. 2 at 13;

   e. The absence of a reconciliation provision in the Partial Settlement will permit PECO to potentially over collect CTC by as little as $342 - 447 million (in 1999 dollars) (PECC St. No. 1 at 14; Exh. SAM-SR1) and as much as $800 million. EESPI St. No. 2-R, Exh. A-R; and

   f. If PECO is able to securitize up to $4.0 billion in stranded costs could allow PECO to obtain savings of $600-750 million on an NPV basis. PECO St. No. 1-E at 17; Exh. TPH-35; PECC St. No. 1 at 14; Exh. SAM-SR1.

9. The Commission rejects PECO's position that the CTC strips agreed upon under the Partial Settlement include non-stranded costs and otherwise funded activities which impose costs beyond the stipulated amount of stranded costs set forth in that settlement. EESPI St. No. 2 at 9-11.

10. The Commission finds that the CTC/ITC charges and the total T&D rates included in the Enron Choice Plan are just and reasonable and are in the public interest:

a. PECO's originally proposed system average transmission rate was $0.0049 and its system average Distribution rate was $.083. OCA Exh. LS-4;

b. PECO's revised T&D rates presented in its rebuttal testimony based upon a newly presented "functionalization study" produced revised T&D rates (on a system average basis) of $0.0046 (Transportation) and $.0261 (Distribution) or $.0307. PECO Exh. RAC-9 at 1;

c. The Partial Settlement system average rates are higher than any of the T&D rates proposed by any party, including PECO;

d. The PECO revised T&D rates continuance to be significantly overstated because they continue to over allocate to T&D PECO's Administration and general overhead expenses and investment by assigning to T&D any overhead cost which PECO believed it would continue to incur after restructuring. PECO St. No. 12-R at 3; PECC St. No. 3 at 6-7; Tr. at 1111-14;

e. PECO's functionalization approach results in overhead costs used by all aspects of PECO's business, e.g., the Executive Department, "Claims" "Public Policy" and "CFO", to be assigned solely to T&D. PECC St. No. 3 at 6-7; EPMI St. No. 4 at 10-12;

f. The PECO functionalization study also improperly assigned 100% of "sales" costs and "uncollectibles" to when, in fact none of sales costs and only a portion of uncollectibles are T&D related. PECC St. No. 12-13;

g. The PECO functionalization study is not usable as means of allocating Administrative and general, sales or uncollectible expenses and investment to the various unbundled rate categories (i.e., Transmission, Distribution and Generation); and

h. Allocating A&G costs on the basis of non-fuel O&M and properly allocating sales and uncollectibles produces the following T&D rates (on a system average basis): Transmission: $0.0037; Distribution $0.0200 and a total rate of $.0237. The associated A&G adder that must be incorporated into the established generation credit is $.0704 per Kwh.

VI. Code of Conduct and other Competitive Safeguards

1. The Commission finds that it is in the public interest to adopt a Code of Conduct in this proceeding. EESPI St. No. 10-R at 2-10. Consumers may be confused when competitive electric services are marketed under the Electric Distribution Company ("EDC") name because both the Electric Generation Supplier, as an affiliate of the EDC, and the EDC will be using the same name (*i.e.*, the EDC name) to market the same product (electricity) in the same service territory where the EDC continues to provide a related monopoly service. Id. at 4, 6, 8-9; EPMI St. No. 6.0 at 4-6.

2. The Commission finds that it is in the public interest to prohibit a competitive supplier from using the trade name, trade mark or logo of its affiliated utility distribution company. EESPI St. No. 10-R at 2-6. Accordingly, the Commission prohibits PECO, as an EDC, from leveraging benefits of its historic incumbent market position (*e.g.*, name recognition, customer relationships) to thwart competition and harm competitors. EESPI St. No. 1-R at 33; EPMI St. No. 6.0.

3. The Commission finds that the continued application of a Code of Conduct to an EDC without PLR responsibility is reasonable and necessary: (1) to restrain the ability of the EDC to take advantage of its historic incumbent market position; (2) after direct access, to prevent the EDC from using its control of the remaining monopoly facilities (transmission and distribution) to benefit its affiliated businesses. EESPI St. No. 1-R at 32-33.

4. The Commission finds that application of a Code of Conduct to EESPI, as the PLR, is reasonable and necessary: (1) to limit Enron's ability to utilize customer information obtained through its role as PLR; and (2) to limit Enron's ability to use its contacts with default customers to jointly market with an Enron affiliate. EESPI St. No. 1-R at 34.

5 PECO, as an EDC, is required to operate according to a Code of Conduct (or comparable provisions) -- regardless of whether PLR authority is transferred to Enron. EESPI St. No. 1-R at 33.

6 EESPI, as a PLR, is required to adhere to a Code of Conduct (or comparable provisions) regarding the utilization of information it obtains as the sole PLR. EESPI St. No. 1-R at 34; EESPI St. No. 3-R at 13.

7 The Commission finds that, in order to foster competition, the Choice Plan contains reasonable competitive safeguards which will assure that no market participant receives an unfair competitive advantage and, therefore, Enron's proposed competitive safeguards should be adopted. EESPI St. No. 1 at 3; EPMI St. No. 6.0.

8. The PECO proposed Code of Conduct is not adequate as a Code of Conduct in the initial stages of competitive transaction because it does not contain sufficient specific provisions and fails to prevent the use of the EDC name by the EDC's unregulated supplier division or affiliate, or the joint marketing by the EDC and the unregulated supplier.

VII. Unbundling of Metering, Billing and Collection Services

1. The Commission finds that the introduction of competition regarding the provision of metering, billing and collection services will (1) increase efficiency; (2) lower costs; and (3) stimulate innovative responses to customer specific requirements. EESPI St. No. 7-E at 11; EPMI St. Nos. 4.0 and 4-SR.

2. The Commission finds that the unbundling of these services will allow efficient electric generation suppliers to differentiate themselves from their competitors and attract customers to their products based on comprehensive and innovative service offerings, while at the same time offering real value and benefits to Pennsylvania's consumers. EESPI St. No. 7-R at 8-9; EPMI St. Nos. 4.0 and 4-SR; EPMI St. No 5.0 at 3-6, 9-11.

3. Accordingly, the Commission finds that the unbundling of such services (i.e., "non-wires services") is in the public interest.

VIII. MBC Agreement and Enron's Proposed Distribution Tariff for PECO

1. The Commission finds that the Enron Choice Plan's Distribution Tariff provides non-discriminatory access and pricing of essential monopoly services by PECO in a manner that ensures fair and equal treatment of all electric generation suppliers. EESPI St. No. 1 at 21-22; EESPI St. No. 5 at 5-20.

2. The Commission finds that the Enron Choice Plan's Distribution Tariff provides consumers real and effective choices with respect to metering, billing and customer care services and undertakes the necessary cost unbundling of those services in order to create the opportunity for additional savings and product choices. EESPI St. No. 5 at 5-8.

3. The Commission finds that the Enron Choice Plan's Distribution Tariff creates a fair and level playing field for all competitors in the marketplace by requiring that PECO participate in competitive service offerings only through an affiliate separated from its distribution company pursuant to competitive safeguards that would not permit PECO's competitive affiliates to have any preferential access in serving customers and would specifically prohibit such affiliates from using PECO's name or logo or otherwise implying that its affiliation with the utility distribution company gives it preferential access to service. EESPI St. No.5 at 5-7.

a. The Choice Plan Distribution tariff incorporates the role of the EGS in the process of the distribution of electricity, establishes "rules of the road" for supplier EDC (PLR) interaction and allows the EGS to act as the agent of the customer. EESPI St. No. 5. EPMI St. No. 5.0 at 12-15; and

b. EGSs providing service pursuant to the Choice Plan distribution Tariff will continue to be required to provide services pursuant to the protections of PUC Chapter 56. EESPI St. No. 1-R at 31-32.

4. The Commission finds that the Enron Choice Plan's Distribution Tariff provision of credits for non-wires services is just and reasonable and should be approved. EESPI St. No. 7-E at 2-12.

5. The Commission approves the Metering, Billing and Collection Agreement as proposed by Enron and finds that it is in the public interest and is otherwise just and reasonable. EESPI Petition of October 7, 1997, at Exh. 3.

6. The Commission finds and approves the Enron Choice Plan Distribution Tariff and finds that it is in the public interest and is just and reasonable under the Act. EESPI Petition of October 7, 1997, at Exh. 1.

IX. Purchase Power Agreement

1. The Commission finds that EESPI's proposal to purchase power from PECO to satisfy EESPI's supply obligation as PLR is in the public interest.

2. The Commission approves the Purchase Power Agreement and finds that it is in the public interest and is just and reasonable under the Act. EESPI Petition of October 7, 1997, at Exh. 2.

X. Provider of Last Resort ("PLR")

1. The Commission finds that the Act permits the Commission to appoint an entity other than PECO to serve as PLR during the period in which stranded costs are collected.

2. The Commission finds that EESPI's proposal to be the PLR in PECO's service territory is reasonably necessary to the development of a competitive market.

3. The Commission finds that if the Partial Settlement is adopted and the generation credits contained within the Partial Settlement are implemented without pro-competitive rules or a specific Code of Conduct, then PECO's retention of the

PLR role would provide it with an advantage (and a benefit) over other power suppliers in PECO's service territory. EESPI St. No. 1-R at 12.

4. The Commission finds that if PECO retains the PLR role, PECO would be able to retain its monopoly over consumers by selectively discounting its prices to PECO's version of the "prevailing market prices" whenever necessary to thwart competitors from securing customers. EESPI St. No. 1-R at 12; PECC St. No. 1 at 35-37; EESPI St. No. 2-R at 8.

5. The Commission finds that the effect of allowing PECO to be the PLR and to adjust notices and prices at which it serves PLR customers would be the elimination of competition and, ultimately, the creation of an unregulated monopoly -- in violation of the Act. EESPI St. No. 1 at 18-19.

6. The Commission finds that Enron's commitment to sell generation to PLR customers at the same price Enron pays PECO for such generation provides Enron with the incentive to encourage customers to migrate off PLR service and choose alternative suppliers that provide generation cheaper is in the public interest.

7. The Commission finds that the approval to eliminate PECO's unfair and subsidized incumbent position arising under the Partial Settlement, and the provision in the Choice Plan for PECO to be replaced as the PLR in PECO's service territory is in the public interest. EESPI St. No. 1 at 19-20.

8. The Commission finds that the approval of Enron as the PLR will create a competitive generation market, which in turn provides the basis for PECO's claim for recovery of stranded costs and will provide an incentive for PECO to sell the required energy and capacity to Enron in its capacity as the PLR. EESPI St. No. 3 at 17.

9. EESPI will be the PLR for only those customers who either do not choose an alternative supplier or who return to PLR service after having chosen an alternative supplier. Customers with competitive alternatives will have the opportunity to migrate to competitive suppliers. EESPI St. No. 1-R at 37.

10. The Commission finds that EESPI's request for the competitive provision of PLR service also is just and reasonable and should be approved if: (1) the Choice Plan is approved by the Commission but a legal impediment precludes securitization prior to December 31, 2000; or (2) the other provisions of the Partial Settlement are approved. EESPI St. No. 1-R at 10-12, 34-35.

11. An entity need not be a public utility as defined by the Code in order to serve as the provider of last resort.

12. An alternative provider of last resort does not become a "Pubic Utility" as statutorily defined in Section 102 by virtue of performing the PLR function.

13. The Commission may condition PECO's stranded cost recovery upon its compliance with the actions and obligations specified in the Choice Plan.

14. Enron has sufficient financial and commercial resources and expertise to enable it to serve as the provider of last resort.

XI. Stranded Costs

1. The Commission finds that the Partial Settlement's proposed recovery of $5.461 billion in stranded costs would inappropriately include recovery of and a return on such stranded costs. Tr. at 1813

2. The Commission finds that additional stranded costs (the "rate concessions") associated with the Partial Settlement's proposed $5.461 billion in stranded costs are not stranded costs under the Act. See, Proposed Conclusions of Law of EESPI and EPMI.

3. The Commission finds that the recovery of stranded costs from all consumers in the manner set forth in the Partial Settlement is unduly discriminatory under the Public Utility Code. 66 Pa.C.S. § 1304.

4. The Commission finds that the recovery of $5.461 billion in stranded costs is conditioned upon PECO's agreement to undertake any and all action necessary to promote a functional and workable competitive generation market in PECO's service territory.

XII. Securitization

1. The Commission finds that Enron has submitted a reasonable financing and securitization plan that provides PECO with a cash payment of $5.461 billion in exchange for the issuance by PECO of $5.461 billion of Transition Bonds with a AAA rating (or its equivalent) or the highest possible rating for their asset type (the "Required Rating") at a standard interest rate of 9.31% (subject to possible adjustment pursuant to EESPI St. 1-R at Revised Exhibit 4. EESPI St. No. 8-R at 2 and tab 4.

2. In order to implement the Enron Choice Plan, the Commission finds that it is in the public interest to issue an irrevocable qualified rate order ("QRO") for $5.461 billion of Transition Bonds, at an interest rate of 9.31%, to finance the recovery of PECO's agreed-upon stranded costs. EESPI St. No. 8 at 2-3.

3. The entire $5.461 billion of Transition Bonds will be deposited in a special purpose entity ("SPE") known as a grantor trust. EESPI St. No. 8 at 3-4.

4. Enron (or its designee) will commit to cause the grantor trust to purchase the $5.461 billion of Transition Bonds. The grantor trust will issue two classes of trust certificates ("Pass-Through Certificates"). The Class A Pass-Through Certificates will be issued to investors and will be backed by the principal and a portion of the interest payments the grantor trust will receive as a result of its purchase of the $5.461 billion of Transition Bonds. EESPI St. No. 8 at 5; EESPI St. No. 9 at 6.

5. The Commission finds that Enron (or its designee) will be issued Class B Pass-Through Certificates backed by the portion of the interest payments not allocable to the Class A Pass-Through Certificates.

6. The Choice Plan properly requires a highly creditworthy party (the "Guarantor") to enter into an agreement with PECO through a the "ITC Shortfall Agreement." The ITC Shortfall Agreement would require the Guarantor to fund shortfalls if the ITC payment stream is not sufficient to meet the amortization schedule of the Transition Bonds. EESPI St. No. 8 at 7.

7. Given the existing legal challenges and potential future legal challenges to the Act, or if securitization could not be implemented on September 1, 1998, the Commission finds as just and reasonable those provisions of the Choice Plan which enable PECO to recover fully its agreed-upon stranded costs (plus GRT) while reducing consumer rates -- without securitization. EESPI St. No. 1-R at 21-26, Att. B. This feature of the Choice Plan will yield generation credits, CTC/ITC charges, T&D rates and rate reductions as follows:

year	*Generation Credits* ¢/Kwh	*CTC/ITC* ¢/Kwh	*Total T&D* ¢/Kwh	*Rate Reductions*
1998 (Sept-Dec.)	3.48	2.66	2.37	14.45%
1999	3.48	2.66	2.37	14.45%
2000	3.48	2.66	2.37	14.45%
2001	3.61	3.03	2.37	9.42%
2002	3.75	3.09	2.37	7.73%
2003	3.89	2.95	2.37	7.44%
2004	4.04	2.80	--	
2005	4.19	2.65	--	
2006	4.35	2.99	--	
2007	4.52	3.32	--	
2008 (Jan.-Aug.)	4.52	3.32	--	

(Source: EESPI St. No. 1-R, Attachment B.)

8. The Commission finds that, under the contingency plan, when legal impediments to securitization are removed, then Enron becomes obligated to purchase Transition Bonds for an amount equal to the unamortized balance of PECO's initial $5.461 billion of stranded costs -- provided that PECO has agreed to undertake all

customary financing commitments, representations and warranties to effectuate the issuance of the Transition Bonds. EESPI St. No. 1-R at 24.

9. If the legal impediment is removed and if Transition Bonds are issued after September 1, 1998 (*i.e.*, "mid-stream"), then the Commission finds that the rate reductions as initially contained in the Choice Plan go into effect as of the date of issuance of the Transition Bonds and will continue for the remaining portion of the transition period initially set forth in the Choice Plan. EESPI St. No. 1-R at 25.

10. Irrespective of when securitization occurs, the Commission finds that a true-up mechanism to the CTC/ITC is necessary under the Act.

11. The Commission finds that the use of an ITC Shortfall Agreement reasonably allows Enron to fulfill its promise to cap the level of rates paid by ratepayers while satisfying the rating agencies' criteria requiring a true-up mechanism in all transition bond financings as a condition of receiving the highest available bond rating as well as what EESPI believes to be required for a favorable Internal Revenue Service ("IRS") ruling. EESPI St. No. 8 at 8.

12. The Commission finds as reasonable the implementation of a true-up proceeding in which PECO will report to the Commission the adequacy of ITC payments during the prior collection period. EESPI St. No. 8 at 8-9.

13. The record demonstrates that Enron's securitization plan provides for the payment to PECO of the full amount of its agreed-upon stranded costs and for the assumption from PECO of significant risk in exchange for an assignment of the ITCs. EESPI St. No. 1-R at 22.

14. The record also demonstrates that this *quid pro quo* between payment to PECO and reassignment of the assumption of the risk away from PECO: (1) is consistent with PECO's first mortgage bond indenture; (2) will enable PECO to obtain a release of the intangible transition property from the lien of the indenture; and (3) will enable PECO to defease the bonds secured by the indenture. EESPI St. No. 1-R at 22-23.

15. The securitization structure proposed by the Choice Plan can be implemented even if there are pending lawsuits challenging the Act on the date of the securitization.

16. The securitization structure proposed by the Choice Plan can be implemented within the constraints of PECO's first mortgage indenture.

17. The pledge of the ITC Shortfall Agreement for the benefit of the Indenture Trustee should satisfy the indenture condition that the trustee receive other property as collateral in effecting a release of the Indenture lien.

18. Under the Choice Plan, PECO would have sufficient funds to implement a defeasance if it so desired.

19. The securitization structure proposed by the Choice Plan would permit PECO to obtain a favorable IRS ruling that would eliminate any material tax risk from implementation of the securitization.

20. The benefits of the Choice Plan are not contingent on securitization of PECO's stranded costs.

XIII. Financial Integrity

1. PECO witness Mitchell in testimony asserted that the Choice Plan would result in a "catastrophic effect" upon PECO's financial integrity. PECO St. No. 20-E at 2, 3-11. Specifically, PECO witness Mitchell analyzed and "calculated" (Id. at 6) the alleged effect of the Choice Plan and concluded as follows:

    1. That PECO's mortgage bond ratings through 2005 would be downgraded from a AAA rating to a "B or below;"

    2. That PECO would experience negative cash flow of $709 million in 1999 and a cumulative negative net cash flow of $2.9 billion through 2005;

    3. That earnings per share and the price of stock would be impacted; and

    4. That the Choice Plan would violate PECO's financial covenant under its $900 million credit facility.

2. The Commission finds that PECO has the burden of proof regarding each component of PECO witness Mitchell's foregoing contentions.

3. PECO has failed to sustain its burden of proof concerning these contentions because PECO has failed to provide adequate disclosure of all assumptions underlying its analysis of the alleged financial impact of the Choice Plan upon PECO. EESPI St. No. 11-SRJ at 6. Accordingly, the Commission finds no credible record evidence in support of PECO's conclusions (PECO St. Nos. 20-E and 20-ERJ) regarding the alleged negative financial impact to PECO from approval of the Enron Choice Plan.

4. Credible and substantial evidence rebutting PECO witness Mitchell's contentions was provided by Enron witness Kinney. EESPI St. Nos. 11-R and 11-SRJ.

5. Based upon the information disclosed by PECO, Enron witness Kinney was unable to replicate and verify completely PECO witness Mitchell's analysis concerning PECO's financial integrity under the Choice Plan. EESPI St. 11-SRJ at 2-3.

6. The record demonstrates that Enron witness Kinney was only able to replicate and verify the following key assumptions supporting PECO witness Mitchell's conclusions:

   1. Assumptions regarding the effect of the accounting entries, the transition bond financing and the use of proceeds on the financial statements of the Company. However, Enron witness Kinney determined that these assumptions were overstated. EESPI St. No. 11-SRJ at 3; and

   2. Assumptions regarding the calculation of the S&P benchmark ratios in Table JBM-1. Id.

   (Source: EESPI St. No. 11-SRJ at 2-3.)

7. The record demonstrates that Enron witness Kinney was not able to replicate and verify the following assumptions employed by PECO witness Mitchell:

   1. Assumptions regarding the projected operating results of the company in the partially deregulated environment envisioned by the Choice Plan; and

   2. Assumptions regarding the application of the benchmark ratios to the final determination of a bond rating.

   (Source: EESPI St. No. 11-SRJ at 2-3.)

8. The record demonstrates that when the assumptions, as were revealed by PECO, where tested by Enron witness Kinney and applied the Partial Settlement, PECO's bond rating would fall to "B" or "BB". EESPI St. No. 11-SRJ at 5. The Commission finds that credible and substantial evidence exists demonstrating that the limited assumptions and supporting data actually revealed by PECO are either: (1) flawed; or (2) are not the same assumptions relied upon by PECO to perform its analysis of the Enron Choice Plan's effect on PECO's financial integrity. Id at 6.

9. The requirements of the due process clause of the Fourteenth Amendment of the U.S. Constitution dictate that parties to an on-the-record adjudication be able to confront evidence presented against them. The Commission finds that Enron has not been accorded process that is due in this proceeding regarding PECO witness Mitchell's assertions concerning PECO's financial integrity under the Choice Plan.

10. The requirements of judicial review require that an administrative agency's findings must be supported by substantial evidence. The Commission finds that PECO has failed to provide credible and substantial evidence in support of PECO witness Mitchell's conclusions that the Choice Plan would generally result in a "catastrophic effect" upon PECO's financial integrity (PECO St. No. 20-E at 2, 3-11) and that, particularly, PECO's mortgage bond ratings through 2005 would be downgraded from a AAA rating to a "B or below."

PROPOSED CONCLUSIONS OF LAW
OF ENRON ENERGY SERVICES POWER, INC.
ENRON POWER MARKETING, INC.

(Collectively referred to as "EESPI" OR "ENRON")

I. Burden of Proof

1. Pursuant to Section 315(a) of the Public Utility Code, PECO carries the ultimate burden of proof, including the production of sufficient, credible and admissible evidence to establish a *prima facie* case regarding each element of proposed rate and tariff changes pursuant to the Electricity Generation Customer Choice and Competition Act. 66 Pa.C.S. § 315(a). Brockway Glass v. Pa. Public Utility Commission, 63 Pa.Commw. 238, 437 A.2d 1067 (1981); Pa. Public Utility Commission v. Equitable Gas Energy Co., 68 Pa.PUC 438, 448 (1988); Electric Utility Restructuring Filing Order, M-00960890.F0003 (February 13, 1997) at 2.

2. Each component of a Partial Settlement must be supported by substantial evidence before an administrative agency can approve, in whole or in part, the Partial Settlement. LaFarge Corp. et al. v. Commonwealth Insurance Department, 690 A.2d 826 (Pa.Commw. 1997); GPU Industrial Intervenors v. Pennsylvania Public Utility Commission, 156 Pa.Commw. 626, 628 A.2d 1187 (1993); Mobil Oil Corp. v. Federal Power Commission, 908 F.2d 998 (D.C. Cir. 1990).

3. Under the Public Utility Code, a proposed settlement must be considered and evaluated "on its legal and equitable merits as being consistent with the public interest as a whole, balanced with a provision by provision consideration." Pa. Public Utility Commission et al. v. Apollo Gas Co. et al. and Carnegie Natural Gas Co., Opinion and Order, entered November 21, 1995, 1995 Pa. PUC LEXIS 155 at *65.

4. Enron has the burden of going forward with substantial evidence that its modifications or adjustments to PECO's proposed rate and tariff changes, as contained in the Choice Plan, are just and reasonable. Pa. Public Utility Commission v. Breezewood Telephone Co., 74 Pa. PUC 431, 437 (1991); Waldron v. Philadelphia Electric Co., 54 Pa.PUC 98 (1980); Replogle v. Pennsylvania Electric Light Co., 54 Pa.PUC 528 (1980).

5. Notwithstanding the shifting to other parties of the burden of going forward with evidence in rebuttal to proposed rate and tariff changes, PECO -- and to that extent the other signatories to the Partial Stipulation -- always retain the ultimate burden of proof throughout the case. Pa. Public Utility Commission v. Breezewood Telephone Co., 74 Pa. PUC 431, 437 (1991); Cup v. Latonka

Water Co., 60 Pa.PUC 662 (1985); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981).

II. Competition

1. The Pennsylvania General Assembly in the Electricity Generation Customer Choice and Competition Act (the "Act") found and declared: "Competitive market forces are more effective than economic regulation in controlling the cost of generating electricity." 66 Pa.C.S. § 2802(5).

2. The Pennsylvania General Assembly also found and declared that the purpose of the Act was "to establish standards and procedures in order to create direct access by retail customers to the competitive market for the generation of electricity, while maintaining the safety and reliability of the electric system for all parties." 66 Pa.C.S § 2802(12).

3. The Act is predicated on the assumption that consumers should reap the benefits of a competitive market for other generation electric services. See, e.g., 66 Pa.C.S. § 2802(3), (7). See also, EESPI St. No. 1 at 4-5.

4. The Act provides that competition, not mandated rate reductions, ultimately will produce lower rates in Pennsylvania. 66 Pa.C.S. § 2802(5); EESPI St. No. 1 at 6-7.

5. The Commission is statutorily vested with the obligation to develop pro-competitive rules and to approve proposals filed under the Act which foster -- rather than prevent -- competition. 66 Pa.C.S. §§ 2804(3) and 2802(5), (14). See also, 66 Pa.C.S. § 2806(f).

6. Competition and pro-competitive rules as required to be implemented under the Act cannot be avoided or settled away and must be developed through the unbundled rates/prices and all other pro-competitive terms and conditions approved by the Commission. 66 Pa.C.S. § 2804(3); 66 Pa.C.S. §§ 2802 (12) and (14); EESPI St. No. 1-R at 7.

III. Generation Credits

1. Below market generation credits prevent competitors from participating in the retail electric generation market, a measure which is inconsistent with the requirement under the Act to develop a functional electric generation market in Pennsylvania. EESPI St. No. 1 at 18-19; EESPI St. No. 4 at 5 to 6; EESPI St. No. 2 at 16. See also, 66 Pa.C.S. § 2806(f) and 2811(a); PECC St. No. 1 at 26-30; Tr. at 869-70.

2. The Partial Settlement includes generation credits which are below market and, therefore, are inconsistent with the Act.

3. The Partial Settlement generation credits are not supported by record evidence.

4. The generation credits contained within the Amended Enron Choice Plan (EESPI St. No. 1-R at Attachments A and B) are just and reasonable under the Act in that the generation credits proposed by Enron enable competitors of PECO to participate immediately in the retail electric generation market in PECO's service territory.

IV. Competitive Transition Charge / Intangible Transition Charge and T&D charges

I. The Electricity Generation Customer Choice and Competition Act (the "Act") requires an annual reconciliation of CTC revenues with the annual amortization of allowed stranded costs. 66 Pa.C.S. § 2808(f); EESPI St. No. 2 at 11.

2. The amended CTC/ITC charges in the Partial Settlement are calculated on a static level of load and do not assume any load growth over the transition period. EESPI St. No. 2-R at 12; PECC St. No. 1 at 15.

3. Under the Partial Settlement, PECO would be allowed to retain all CTC revenues without true-up to the agreed upon level of stranded costs ($5.461 billion). EESPI St. No. 2 at 12.

4. PECO's own projections anticipate that its present load will experience increased sales over the transition period.

6. Due to the lack of a true-up mechanism, the Partial Settlement presents PECO with an unreasonable and improper vehicle for over-recovery of stranded costs, a measure which is clearly inconsistent with the Act's requirement that the Commission approve recovery of a sum-certain level of stranded costs. 66 Pa.C.S. § 2808(f).

7. The Commission rejects PECO's position that CTC charges agreed upon under the Partial Settlement are intended to fund activities which impose costs beyond the stipulated amount of stranded costs set forth in that settlement. EESPI St. No. 2-R at 9-10. As detailed in PECO Exhibit TPH-35, those additional activities include:

   (1) Industrial rate concessions;
   (2) An expanded universal service program;
   (3) Extension of the Transmission and Distribution rate cap through 1/1/2004; and
   (4) A 10% rate reduction for the period from 9/1/98 to 12/31/98.

8. None of the aforementioned items are included among the costs listed in Section 2808 of the Act as costs which are appropriate for recovery through the CTC mechanism. EESPI St. No. 2-R at 9-10.

9. The costs of the concessions at issue are either not of the type that could be recovered in a regulated environment (i.e., rate decreases from September 1998 through January 1999, agreement to extend a rate cap) or have not been demonstrated to be recoverable under regulation (industrial customer concessions) or unrecoverable in a competitive environment (industrial customer concessions, T&D rate cap) or PECO has not proven it will in fact incur them (i.e., T&D rate cap extension). Tr. at 123, 841.

V. Code of Conduct and other Competitive Safeguards

1. The Enron Choice Plan's proposed Code of Conduct reasonably establishes necessary additions and enhancements to the principles adopted by the Competitive Safeguards Working Group in its Final Report to the Commission, dated October 6, 1997. EESPI St. No. 10-R at 2: EESPI St. No. 5 at 9-10.

2. A strong Code of Conduct is a necessary component of ensuring that the benefits of competition accrue to Pennsylvania consumers and, therefore, a Code of Conduct should be implemented and applied to an Electric Distribution Company ("EDC") even if Provider of Last Resort ("PLR") responsibility is transferred to another entity. 66 Pa.C.S. § 2804(6) and § 2806(f); EESPI St. No. 1-R at 32.

3. The Code of Conduct proposed by PECO does not provide sufficient, detailed rules applicable to PECO for cost allocation, fails to prevent joint marketing and does not limit PECO's use of its name and brand by unregulated subsidence or divisions. EESPI St. No. 10-R.

VI. Unbundling of Metering, Billing and Collection Services

1. The unbundling of metering, billing and collection services so as to enable competitive entry by third parties is critical to the opportunity for development of a competitive generation market for direct access by retail customers. 66 Pa.C.S. §§ 2804(2), (3), (6) and § 2806(f); 66 Pa.C.S. §§ 2802(8), (13), (14). See also, EESPI St. No. 1 at 3; EESPI St. No. 5 at 3-20; EPMI St. Nos. 4-0 and 4-SR.

2. The unbundling and competitive entry of third parties regarding metering services as provided for in the Choice Plan are in the public interest and are consistent with the Act. 66 Pa.C.S. § 2804(3), (6) and § 2806(f); EESPI St. No. 1 at 3; EESPI St. No. 5 at 7; EPMI St. Nos. 4.0 and 4-SR.

3. The unbundling and competitive entry of third parties regarding billing services as provided for in the Choice Plan are in the public interest and are consistent with the Act. 66 Pa.C.S. §§ 2804(3), (6) and § 2806(f); EESPI St. No. 1 at 3; EPMI St. No. 5.0 at 3-6, 9-11.

4. The unbundling and competitive entry of third parties concerning collection services as provided for in the Choice Plan are in the public interest and are consistent with the Act. 66 Pa.C.S. §§ 2804(3), (6) and § 2806(f); EESPI St. No. 1 at 3; EPMI St. No. 5.0 at 3-6, 9-11.

VII. MBC Agreement and Enron's Proposed Distribution Tariff for PECO

1. The Commission approves and finds that the Metering, Billing and Collection Agreement as proposed by Enron are in the public interest and are otherwise just and reasonable under the Act. Enron Petition of October 7, 1997 at Exh. 3; 66 Pa.C.S. §§ 2802(8), (13), (14); 66 Pa.C.S. §§ 2804(3), (6); 66 Pa.C.S. § 2806(f).

2. The Choice Plan Distribution Tariff will benefit all electric generation suppliers uniformly, is in the public interest and is otherwise just and reasonable under the Act. 66 Pa.C.S. §§ 2802(8), (13), (14); 66 Pa.C.S. § 2804(6) and § 2806(f); EESPI St. No. 1 at 21-22.

3. The Commission approves the Distribution Tariff proposed in the Choice Plan as in the public interest and as is otherwise just and reasonable under the Act. Enron Petition of October 7, 1997 at Exh. 1; 66 Pa.C.S. §§ 2802 (8), (13), (14); 66 Pa.C.S. § 2804(6) and § 2806(f).

VIII. Purchase Power Agreement

1. The Commission finds that EESPI's proposal to purchase power from PECO to satisfy EESPI's supply obligation as PLR is in the public interest. 66 Pa.C.S. §§ 2806(e), (f) and § 2807(e)(3); 66 Pa.C.S. §§ 2802(12), (13), (14), (19).

2. The Commission approves the Purchase Power Agreement as filed and contained in the Enron Choice Plan. Enron Petition of October 7, 1997 at Exh. 2; 66 Pa. C.S. §§ 2806(e), (f) and § 2807(e)(3); 66 Pa.C.S. §§ 2802(12), (13), (14), (19).

IX. Provider of Last Resort ("PLR")

1. The Act authorizes the Commission to determine and to designate the PLR function. 66 Pa.C.S. §§ 2807(e)(3), 2802 (16).

2. The Act does not preclude or limit the Commission's authority and discretion to appoint an entity other than PECO from serving as PLR during the period in which stranded costs are collected. Id.

3. The rules of statutory construction require that provisions in the Act regarding reassignment of the PLR prior to the end of the transition period must be construed in a manner that serves the public interest, rather than the interests of the incumbent utility. 66 Pa.C.S. § 1922(5).

4. Under the Act, the Commission has the discretion to reassign the PLR role at any point in time after the effective date of the Act, so long as substantial evidence supports the Commission's determination. 66 Pa.C.S. § 2807(e)(3).

5. PECO's continued role as the PLR, as proposed and envisioned under the Partial Settlement, forecloses the development of a functional electric generation market and, therefore, PECO's continuation as the PLR is inconsistent with the Act and is otherwise not in the public interest.

X. Stranded Costs

1. The Act provides for recovery of costs that will become stranded as a result of the introduction of a functional competitive generation market. 66 Pa.C.S. § 2802(15) and § 2808; EESPI St. No. 1-R at 9. See also, 66 Pa.C.S. § 2811.

2. The Act recognizes that competition will produce benefits for the electric utilities' customers and it provides a reasonable opportunity for those utilities to recover stranded costs that may become unrecoverable arising from the transition to competition. 66 Pa.C.S. § 2808.

3. The recovery of stranded costs from all consumers in the manner set forth in the Partial Settlement is unduly discriminatory under the Public Utility Code. 66 Pa.C.S. § 1304 and §§ 2808(a) (c), (f).

4. The recovery of stranded costs in manner set forth in the Partial Settlement will improperly and unlawfully enable PECO to recover additional stranded costs, termed by PECO and the signatories as "rate concessions." See generally, 66 Pa. C.S.§ 2808.

5. In return for allowing PECO to recover $5.461 billion of stranded costs as contained in the Partial Settlement, the Enron Choice Plan properly includes

elements which are necessary for the introduction of competition in the retail generation market. EESPI St. No. 1 at 4.

XI. Securitization

1. Enron's securitization plan is just and reasonable under the Act in that properly provides for the payment to PECO of the full amount of its agreed upon stranded costs and for the assumption from PECO of significant risk in exchange for an assignment of the ITC's. 66 Pa.C.S. § 2808(e); EESPI St. No. 1-R at 22.

2. The Electricity Generation Customer Choice and Competition Act requires "true-up" reviews of the ITC revenue stream by the Commission. 66 Pa.C.S. § 2808(f); EESPI St. No. 8 at 7.

3. The Partial Settlement permits PECO to keep any "over-recovery" of CTCs paid by customers - that is, CTC collections that are determined to be in excess of PECO's stranded costs. In contrast, the Choice Plan is consistent with the directive of the Act that CTCs must be reconciled by giving PECO's customers the benefit of any excess collections of CTC/ITCs. EESPI St. No. 1 at 14-15.

XII. Financial Integrity

1. PECO witness Mitchell in testimony asserted that the Enron Plan would have a "catastrophic effect" upon PECO's financial integrity. PECO St. No. 20-E at 2, 3-11. Specifically, PECO witness Mitchell apparently analyzed and "calculated" (Id. at 6) the alleged effect of the Enron Choice Plan and concluded as follows:

   (1) That PECO's mortgage bond ratings through 2005 would be downgraded from a AAA rating to a "B or below";

   (2) That PECO would experience negative cash flow of $709 million in 1999 and a cumulative negative net cash flow of $2.9 billion through 2005;

   (3) That earnings per share and the price of stock would be impacted; and

   (4) That the Enron Plan would violate PECO's financial covenant under its $900 million credit facility.

2. No credibile record evidence exists in support of PECO's conclusions (PECO St. Nos. 20-E and 20-ERJ) regarding the alleged negative financial impact to PECO from approval of the Enron Choice Plan.

XIII. PARTIAL SETTLEMENT

1. The Pennsylvania Public Utility Commission ("PUC") is not required to accept any or all of the agreements among some of the parties in the Partial Settlement. Duquesne Light Co. v. Pa Public Utility Commission, 96 Pa.Commw. 398, 507 A.2d 1274 (1986) (PUC has authority substantially to accept agreement between utility and OTS, but not to adopt provision determining pricing methodology for certain costs); Glenside Suburban Radio Cab, Inc. v. PA Public Utility Commission, 49 Pa.Commw. 523, 411 A.2d 874 (1980) (PUC has authority to reject, as not in the public interest, stipulation containing restriction that induced withdrawal of protest and to grant authority without restrictions).

2. The PUC retains the authority to order all of the "concessions" referenced by PECO as unattainable unless the PUC approves the Partial Settlement: (1) 10% rate reduction; (2) accelerated direct access; (3) T&D rate cap extensions; (4) generation cap extension; and (5) universal service expansion. PECO St. No. 1-RJ at 7.

3. The PUC has the authority, as part of the Choice Plan or otherwise, pursuant to the Act or the Public Utility Code to: (1) order an expanded universal service program, 66 Pa.C.S. § 2804(8), (9); (2) the speed up of direct access phase-in (as contemplated by the Partial Settlement and the Choice Plan) as 66 Pa.C.S. § 2806(b) allows the PUC to order up to a maximum of 66% direct access any time between January 2, 1999 and January 1, 2000, and 100% participation any time between January 2, 2000 and January 1, 2001; and (3) the extension of the period for CTC collection and the corresponding rate cap protection. See, 66 Pa.C.S. § 2804(4)(ii).

4. The PUC clearly has the authority to order rate reductions to the extent that it finds that PECO's overall rates are or would be unjust and unreasonable. 66 Pa.C.S. §§ 1301, 1304, 2804(4)(v).

5. To the extent that the PUC declares some of PECO's claimed "stranded plant" as unrecoverable through a CTC or ITC that portion is, by definition, no longer used and useful and the PUC has the statutory authority to adjust PECO's rates.

6. The PUC has the legal authority to issue an option order conditioning its allowance of a certain amount of stranded costs on the acceptance by PECO of an extension of the "T&D" cap provisions of the Act, similar to the extension agreed to by PECO in the Partial Settlement.

7. The PUC is fully authorized to issue a restructuring decision that contains all the pro-competition and ratepayer benefits suggested in the Partial Settlement, but is not bound to accept the Partial Settlement in order to achieve those provisions.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that I have on this 2nd day of December, 1997, served a true copy of the foregoing document on behalf of Enron Energy Services Power, Inc. and Enron Power Marketing, Inc. upon the participants, listed below, in accordance with the requirements of 52 Pa.Code § 1.54:

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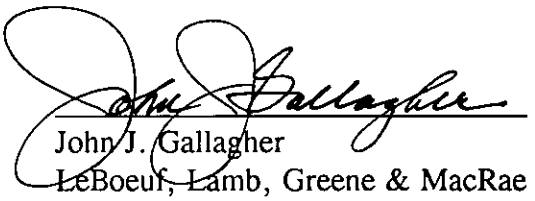

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