

1 A. Yes, by a corresponding level.

2 Q. Would Enron proceed with that plan?

3 A. Yes, assuming that's all that is changed  
4 in the proposal.

5 MR. DWORETZKY: I have nothing further, Your  
6 Honor.

7 JUDGE CHESTNUT: Mr. Clark.

8 **CROSS-EXAMINATION**

9 BY MR. CLARK:

10 Q. Mr. Kean, I'm Roger Clark. I'm an attorney  
11 for the environmentalists.

12 I just want to clear up what may be a  
13 misunderstanding. I want to find that out. On Page  
14 10 of your rebuttal testimony, Lines 13 and 14,  
15 you're talking about the proposal introduced by the  
16 witnesses for the environmentalists. "I agree that  
17 the PLR should be competitively selected." Are you  
18 referring to the testimony there of Environmentalist  
19 Witness Biewald?

20 A. I looked at that testimony. I did not  
21 look at the individual's names. It was the packet  
22 that was filed at the time. It was the testimony  
23 that was included in this package.

24 I was not trying to be specific as to  
25 individual witnesses or the individual elements of

1 their proposal. I was just picking up on the concept  
2 of competitive provision of the service.

3 Q. One of the confusions I want to clarify  
4 here is, Would you agree that the environmentalists  
5 are, in fact, not suggesting that the provider of  
6 last resort be contracted out or competitively  
7 selected?

8 A. I think, if I remember correctly, the  
9 environmental witnesses made a distinction between  
10 two types of what we are referring to in our proposal  
11 as default customers. I believe there was a class of  
12 customers who could switch but simply did not elect  
13 to switch and a class of customers who simply could  
14 not find another alternative.

15 Is that -- I'm asking you, I guess.  
16 That's my understanding.

17 Q. We'll let Mr. Biewald's testimony speak  
18 for itself. I just want to clarify. Do you agree  
19 that the environmentalists are, in fact, making the  
20 recommendation that PECO remain as the provider of  
21 last resort?

22 A. Well, again, to clarify, what I'm  
23 interpreting when I cite favorably that testimony,  
24 what I was picking up on was the competitive  
25 provision of service to customers who otherwise don't

1 make a choice. Now, in our proposal that's a larger  
2 class, perhaps, than in the environmentalists'  
3 testimony.

4 Q. Is that what we would call the default  
5 supplier?

6 A. Right.

7 Q. In your original testimony on Page 3, you  
8 speak of the level of competition envisioned by the  
9 act. Would that level of competition be provided by  
10 one monopoly supplier?

11 A. No. Well, one monopoly supplier of what?

12 Q. Of electricity.

13 A. A single monopoly supplier of electricity,  
14 no.

15 Q. Would that level of competition be  
16 provided by a dual-opoly, a two supplier market?

17 A. Probably not.

18 Q. Do you have a sense of how many suppliers

19 --

20 A. I don't know how many it takes.

21 Q. Final point. In your original direct  
22 testimony at Page 28, you make the statement on Line  
23 6 that Enron will be filing shortly with the  
24 Commission an amendment to the petition to address  
25 the issue of universal service.

1 A. Could you give me the line again?

2 Q. Page 28, Line 6.

3 A. Okay.

4 Q. Talking about a universal service program  
5 amendment.

6 A. Yes.

7 Q. Did that ever get filed?

8 A. I believe that in rebuttal testimony -- I  
9 would have to look for the specific provision.  
10 Certainly we intended our rebuttal testimony to serve  
11 as the amendment that would provide that extension of  
12 the benefits of the universal service program. I  
13 would have to look through the rebuttal testimony to  
14 find it.

15 MR. CLARK: If counsel would let us know that,  
16 I would appreciate that.

17 That's all I have, Your Honor.

18 JUDGE CHESTNUT: Does anybody else have  
19 questions for this witness?

20 (No audible response.)

21 JUDGE CHESTNUT: Do you have redirect,  
22 Mr. Clearfield?

23 MR. CLEARFIELD: Your Honor, could we take a  
24 moment?

25 JUDGE CHESTNUT: Why don't we have a 10-minute

1 break.

2 (Recess taken.)

3 **REDIRECT EXAMINATION**

4 BY MR. CLEARFIELD:

5 Q. In no particular order, Mr. Kean, you were  
6 asked some questions with respect to a reference in  
7 your direct testimony regarding the universal service  
8 program that was reflected in the partial settlement  
9 and Enron's intention under the Choice Plan to  
10 continue that program. There was a specific question  
11 as to where, if at any place, Enron has made its  
12 intentions clear about the continuation of that  
13 program. Do you remember those questions?

14 A. Yes.

15 Q. Is there a reference you can provide to  
16 the Court?

17 A. Yes. There is not a separate amendment.  
18 I believe I said in my cross-examination testimony  
19 that I thought it was in the Kingerski rebuttal  
20 testimony; but, in fact, it's in the direct testimony  
21 and exhibits of Harry Kingerski, Statement Number 5  
22 in this proceeding. Particularly, on Page 12 is  
23 where we agree to pick up the consumer protection and  
24 low-income assistance provisions.

25 Q. Mr. Steinmetz of the OCA asked you some

1 questions with respect to the applicability of a  
2 true-up provision to the contingency plan that you  
3 proposed in your rebuttal testimony. Do you remember  
4 those questions?

5 A. Yes.

6 Q. If the PUC were to determine that a true-  
7 up were necessary or appropriate to be applied to the  
8 CTC or ITC recovery, what would Enron's position be  
9 on that?

10 A. Well, we have proposed a true-up mechanism  
11 that would apply in the event of securitization.  
12 With respect to the question of a true-up mechanism  
13 to operate in the contingency when CTCs are being  
14 collected, we would not oppose nor reject a  
15 Commission order which put in place such a true-up  
16 mechanism for the contingency plan.

17 Q. This would be in the context of the  
18 contingency plan continuing even after Enron no  
19 longer acted as PLR or securitized the stranded  
20 costs?

21 A. Yes.

22 Q. You were asked, I think, very early in the  
23 day some questions with respect to the level of rate  
24 decreases that would go into effect if there was  
25 determined to be an impediment to securitization, and

1 I think they were by Mr. Craig.

2 What does the plan provide with respect to  
3 rate decreases if, in fact, there's an impediment,  
4 determined to be an impediment to securitization in  
5 September 1998, for example?

6 A. I believe I answered the question in light  
7 of rate decreases that were proposed assuming  
8 securitization. But in the event there isn't  
9 securitization, there are rate decreases,  
10 nevertheless, provided under the plan. They are set  
11 forth on Attachment B, and they range from 7.44  
12 percent in 2003 to 14.45 percent for the first 28  
13 months of the proposal.

14 Q. And what part of the plan does Attachment  
15 B depict?

16 A. That depicts the contingency plan in the  
17 event there's not securitization. Discounts still  
18 apply.

19 Q. There were a number of questions with  
20 respect to EESP's level of assets and employees at  
21 the present time, and you confirmed that at the  
22 present time EESP was not capitalized and did not  
23 have employees. Why is that?

24 A. Well, we haven't been selected as provider  
25 of last resort yet. If we were selected as provider

1 of last resort and our plan were approved, we would  
2 ensure there was sufficient capitalization, assets,  
3 and people staffing that organization in order to  
4 live up to our obligations.

5 Q. In your view, is that an unusual process  
6 to undertake in this type of an environment?

7 A. No. We typically as a company have  
8 staffed up in those places where our business grows  
9 and where the market opportunities grow. We have  
10 increased staff in our Ohio office as well as our  
11 California office in response to the market opening  
12 up in those states.

13 MR. CLEARFIELD: If I may just have a moment,  
14 Your Honor.

15 (Pause.)

16 MR. CLEARFIELD: I have no further questions.  
17 Thank you.

18 JUDGE CHESTNUT: Is there any recross based on  
19 the redirect examination?

20 (No audible response.)

21 JUDGE CHESTNUT: Thank you very much. You're  
22 excused, Mr. Kean.

23 Mr. Steinmetz, did you want to move in  
24 your cross-examination exhibit, or did you want to  
25 forget it?

1 MR. STEINMETZ: No, Your Honor.

2 JUDGE CHESTNUT: We're going to go with  
3 Mr. Baron next, I believe.

4 MR. KLEPPINGER: Yes, Your Honor. PAIEUG  
5 calls Steve Baron to the stand. In order to expedite  
6 matters, I would ask counsel to stipulate to the  
7 authenticity of the testimony so we don't have to go  
8 through the direct examination, if that's okay.

9 JUDGE CHESTNUT: Sure. Just identify --

10 MR. KLEPPINGER: I would like to mark for  
11 identification as PAIEUG Statement 1-E the direct  
12 testimony and exhibit of Stephen J. Baron, which has  
13 one exhibit and 17 pages of text.

14 JUDGE CHESTNUT: Did you say that was 1-A?

15 MR. KLEPPINGER: 1-E. I believe that's the  
16 convention we've been using as Enron.

17 Your Honor, I would move for the admission of  
18 PAIEUG Statement 1-E at this time, subject to any  
19 timely motions.

20 JUDGE CHESTNUT: Anybody object?

21 (No audible response.)

22 JUDGE CHESTNUT: This document is admitted.

23 (PAIEUG Statement 1-E was marked and  
24 admitted.)

25 MR. KLEPPINGER: As soon as the witness is

1 seated, he's available for cross-examination.

2 JUDGE CHESTNUT: Mr. Baron, you've already  
3 been sworn. That oath continues.

4 STEPHEN J. BARON, called as a witness, being  
5 duly sworn, testified as follows:

6 JUDGE CHESTNUT: Is there an order in terms of  
7 who is going first with Mr. Baron?

8 Mr. Gornish.

9 MR. GORNISH: Yes. Thank you, Your Honor.

10 **CROSS-EXAMINATION**

11 BY MR. GORNISH:

12 Q. Mr. Baron, good afternoon.

13 A. Good afternoon.

14 Q. My name is Gerald Gornish. I'm counsel  
15 for Enron in this matter. I have some questions for  
16 you, if I can find them.

17 Mr. Baron, you oppose the Choice Plan and  
18 support the partial settlement; is that correct?

19 A. Yes. That's correct.

20 Q. Is that because the Choice Plan does not  
21 adopt all the features of the partial settlement?

22 A. With respect to -- If I understand your  
23 question, with respect to tariff issues, I focused on  
24 that; and that's true, in part, with respect to  
25 tariff issues. Obviously, the totality of the plan

1 is the plan that PAIEUG supports, including all  
2 aspects, not just the tariff issues.

3 Q. Well, if the Choice Plan, the Enron Choice  
4 Plan had similar features to the partial settlement,  
5 would that change your position?

6 A. When you say similar, do you mean with  
7 respect to the tariff provisions; for example, some  
8 of those that I addressed in my testimony? Are you  
9 talking about identical provisions, or what do you  
10 mean by similar?

11 Q. Let's take identical first.

12 A. The answer is no. The reason, if I could,  
13 is that with respect to tariff provisions if you make  
14 the assumption that everything is equal--and I have  
15 some concerns that it may not be equal--I still have  
16 concerns and PAIEUG has concerns regarding whether  
17 the Choice Plan really is viable, given that PECO  
18 appears not to be in concert with that plan.

19 Obviously, I can't discuss the legal  
20 issues that were laid out in the PAIEUG answer, but  
21 that has some concerns. There's other aspects other  
22 than tariff provisions as well.

23 Q. Let me ask you. Who are members of  
24 PAIEUG?

25 MR. KLEPPINGER: Your Honor, if we want to

1 save time, that list is in the record. For God's  
2 sake.

3 JUDGE CHESTNUT: Do you have somebody specific  
4 you wanted to focus on?

5 MR. GORNISH: How many members does it have?  
6 Is that in the record?

7 JUDGE CHESTNUT: I think there is a list of  
8 all the members in the record.

9 MR. KLEPPINGER: Appendix A to our pleading  
10 has all the members identified.

11 BY MR. GORNISH:

12 Q. Do any of your members, members of the  
13 organization, take service under the HT rate?

14 A. I believe they all take service in one  
15 form or another under HT.

16 Q. Some of them take HT without any of the  
17 special riders or contracts?

18 A. I do not know that. I know that many of  
19 them take HT. They take LILR. They take riders. I  
20 don't know the mix.

21 Q. Does the Enron plan have larger discounts  
22 for the HT rate than the partial settlement does?

23 A. The main Enron plan, the contingency plan,  
24 either one, are you speaking?

25 Q. Yes.

1           A. My understanding is that, based on the  
2 numbers that were provided, those discounts on CTC or  
3 overall bill would appear to be larger, yes.

4           Q. But that doesn't change your position as  
5 to still not endorsing the Enron plan?

6           A. That's correct.

7           Q. Now, if I read your testimony correctly, I  
8 believe you say on Page 10 that the first and most  
9 significant change that will impact PAIEUG members is  
10 the elimination of the large interruptible load  
11 rider, LILR. Is that correct?

12          A. Yes, that's what it says.

13          Q. What is the LILR?

14          A. The large interruptible load rider. It's  
15 a rider wherein customers during the on-peak period  
16 purchase their power at the PJM billing rate plus one  
17 cent and plus gross receipts taxes. During the off-  
18 peak hours, it would be based on Rate HT.

19          Q. Now, have you reviewed Mr. Kingerski's  
20 rebuttal testimony in this case?

21          A. Yes, I have.

22          Q. Is there any difference between the Enron  
23 Choice Plan and the partial settlement regarding  
24 LILR?

25          A. Based on his rebuttal testimony, it

1 appears that Enron's position is that they have  
2 adopted the partial settlement provisions with  
3 respect to LILR.

4 I should point out that in, obviously, the  
5 initial filing of Enron in the plan and in the direct  
6 testimony there certainly were -- And I pointed  
7 these out in my testimony. There was a significant  
8 amount of confusion, if not inconsistency--I'll just  
9 leave it at confusion--as to what exactly Enron was  
10 proposing with respect to this issue as well as some  
11 of the others.

12 Q. Right now Mr. Kingerski has clarified  
13 that, and there are no differences; is that correct?

14 A. With respect to LILR and the tariff rate,  
15 it appears that there are no differences. There was  
16 one issue I had addressed in my direct testimony  
17 regarding the treatment of power factor. I don't  
18 recall whether he addressed that.

19 Q. We'll get to that. Can you turn to Page  
20 11 of your testimony. On Lines 16 through 18, you  
21 talk about Enron will not offer the LILR service to  
22 customers who choose to continue as full-service  
23 customers of PECO. Do you see that?

24 A. Yes.

25 Q. What do you mean by full-service

1 customers?

2 A. What I meant by full service was basically  
3 default service customers; in other words, who  
4 continue to be LILR customers. I think, by  
5 definition, they would have to be default service  
6 customers.

7 Q. And at this point that's not your  
8 testimony anymore; is that correct?

9 A. Based on Mr. Kingerski's rebuttal  
10 testimony, it appears that Enron has adopted the  
11 provisions of the partial settlement with respect to  
12 this issue.

13 Q. Now, you mentioned the power factor, and I  
14 think if you look at Page 14 that's where your  
15 testimony is regarding that.

16 A. Yes.

17 Q. Now, again, have you looked at  
18 Mr. Kingerski's rebuttal testimony on that issue?

19 A. I honestly don't recall his response on  
20 that issue.

21 Q. Do you have his testimony there, sir?

22 A. Yes, I do.

23 Q. Can I direct you to Page 6, Lines 15  
24 through -- Well, Page 6, Line 15, through Page 7,  
25 Line 1.

1 A. Yes, I see it. I've read it.

2 Q. Specifically, he suggests inserting the  
3 words "for all on-peak energy associated with end  
4 user interruptible load." Do you see that?

5 A. Yes.

6 Q. Would that satisfy your concern about the  
7 power factor issue?

8 A. I believe. I'd have to actually -- I'd  
9 want to just defer my answer until I had a chance to  
10 think about it. Assuming that in all aspects it  
11 doesn't change the nature of the LILR tariff as it  
12 stands now with respect to this issue, I would agree.

13 MR. GORNISH: Can we accept that subject to  
14 check? Would that be fair, Mr. Kleppinger?

15 MR. KLEPPINGER: Yes.

16 BY MR. GORNISH:

17 Q. You go on to talk about the EER and Rule  
18 4.6 special contract customers; is that correct?

19 A. Yes.

20 Q. How is the Enron Choice Plan different  
21 than the partial settlement of these?

22 A. My understanding is, with respect to the  
23 4.6 contracts, for example, that even under the  
24 rebuttal testimony that new contracts would not  
25 continue to be offered, unlike the partial

1 settlement, wherein such contracts would be offered.

2 Q. What about EER?

3 A. I'm assuming the same would be true in  
4 EER. I honestly don't know. There is still --  
5 Again, in my direct testimony in which I responded to  
6 these issues, I was basing it, in particular, on the  
7 citation to the Enron tariff that included proposals  
8 to eliminate these provisions. There was, obviously,  
9 some very strong concerns about those proposals.

10 Q. Are you familiar with Section 4.1 as  
11 proposed in the Enron tariff, the Enron revision to  
12 the PECO tariff?

13 A. I don't have that in front of me. Perhaps  
14 you could show that to me.

15 MR. KLEPPINGER: Is this in the original  
16 petition, Counsel?

17 MR. GORNISH: This would be in, I guess, most  
18 recently Attachment A to Mr. -- I do have it. I'm  
19 sorry. If I can show it to the witness.

20 JUDGE RAINEY: Mr. Gornish, that's Attachment  
21 A to --

22 MR. GORNISH: Attachment A to Mr. Kingerski's  
23 direct testimony.

24 A. Yes, I'm familiar with that provision.

25 BY MR. GORNISH:

1 Q. That states that any special contracts  
2 that exist on September 1, 1998 shall continue to  
3 remain in effect?

4 A. Yes, that's correct. That's my  
5 understanding. My concern or the point I was trying  
6 to make was that my understanding of Enron's proposal  
7 now does include that provision but does not include  
8 a provision that would permit new contracts to be  
9 entered.

10 Q. These contracts that we're talking about  
11 are contracts with PECO; is that correct?

12 A. Yes. Well, certainly in the context of  
13 the partial settlement they would be contracts with  
14 PECO.

15 Q. Is there anything that would prevent  
16 special contracts from being entered into with any  
17 EGS after competition starts?

18 A. No. I would agree with that. But in that  
19 context, PECO would be -- Your reference is PECO as  
20 a competitive supplier like Enron, Southern Company,  
21 any other supplier.

22 Q. That's correct. That would be available;  
23 is that correct?

24 A. Yes. I would agree.

25 Q. Are you familiar with the issue that's

1       been raised by Enron of wishing to have customers  
2       subject to long-term contracts have a fresh start?  
3       Is that a familiar phrase to you?

4               A.   Yes, it is.

5               Q.   Is it your position that PAIEUG members  
6       should not be given a fresh start with respect to  
7       these contracts?

8               A.   No.  I think that would be a wonderful  
9       proposal.  I have no objection to it, in other words.  
10       Whether it's a feasible change, I don't know.  But,  
11       obviously, it's a benefit.

12              Q.   And Enron has recommended that; is that  
13       correct?

14              A.   Yes.

15              Q.   Is that an improvement over the partial  
16       settlement?

17              A.   With respect to that issue, yes.  There's  
18       other issues that certainly counter that.

19              Q.   Now, at the bottom of Page 14 and the top  
20       of Page 15, you talk about, I think, what you just  
21       said, that you're not clear that Enron would accept  
22       at least 4.6 and EER customers as default customers.  
23       Then you state on Page 15, "As a result, it would  
24       appear that if PECO honors these contracts as a  
25       competitive supplier, these customers could continue

1 under their contracts; Enron, however, will not serve  
2 them." You have that underlined. Is that correct?

3 A. Yes.

4 Q. If the contract is with PECO, why would  
5 Enron have to serve them?

6 A. At the time that I wrote this, what I was  
7 responding to was a provision in the Enron proposed  
8 tariff, a recommendation to eliminate these  
9 contracts. My understanding of that provision was  
10 that even existing contracts would be eliminated.

11 Now, obviously, PECO or any other party,  
12 including Enron as a competitive supplier, can serve  
13 that. The question is whether the prices that those  
14 customers had previously contracted for and were  
15 expecting to receive during the term of the contract  
16 would be available.

17 Q. Based on your review of Section 4.1 as  
18 proposed by Enron, they would be available; is that  
19 correct?

20 A. Based on that provision, the existing  
21 contracts would be available.

22 Q. Finally, you also object to several areas  
23 where Enron is proposing to change some riders by  
24 either eliminating them or taking out a generation  
25 component; is that correct?

1           A. That's correct.

2           Q. I believe you say on Page 16, Line 5, that  
3 in all these cases this will result in rate increases  
4 for customers who took service under these riders on  
5 January 1, 1997. Is that correct?

6           A. That's correct.

7           Q. In stating that, you're assuming, are you  
8 not, that a customer who takes service under these  
9 riders will not be able to negotiate a better rate in  
10 the competitive environment?

11          A. I think that's implicit in my statement,  
12 yes. But I think certainly from a customer's  
13 standpoint, when that customer is taking service on  
14 certain riders and those riders are no longer  
15 available and the customer is subject to paying a  
16 CTC, because we're in a transition during this period  
17 -- Obviously, once the CTC is paid off and the only  
18 charges customers have are basically delivery charges  
19 and a competitive generation rate, things are  
20 different.

21                   But during the period of CTC collection  
22 where customers are still paying for stranded costs,  
23 I think it's reasonable for the customer to be  
24 concerned about losing certain tariff provisions that  
25 the customer has.

1 Q. Because the customer will not be able to  
2 negotiate a contract at a lower rate?

3 A. Yes, perhaps. I mean simply the fact that  
4 it's not available is a change in the risk profile  
5 that the customer faces in the future.

6 MR. GORNISH: May I just have a minute, Your  
7 Honor?

8 JUDGE CHESTNUT: Certainly.

9 (Pause.)

10 MR. GORNISH: That's all I have, Your Honor.  
11 Thank you very much.

12 JUDGE RAINEY: Is there any other cross for  
13 this witness?

14 (No audible response.)

15 JUDGE CHESTNUT: Any redirect?

16 MR. KLEPPINGER: Briefly, Your Honor.

17 **REDIRECT EXAMINATION**

18 BY MR. KLEPPINGER:

19 Q. Mr. Baron, do you understand whether or not all  
20 PAIEUG members will have access in the first phase of  
21 the phase-in January 1, 1999?

22 A. They will not.

23 Q. So, insofar as there is any increase in  
24 any rider provision, those customers may not have the  
25 ability to access the competitive market?

1 A. That's right.

2 MR. KLEPPINGER: Thank you. That's all I  
3 have, Your Honor.

4 JUDGE RAINEY: Any recross based on the  
5 redirect?

6 MR. GORNISH: No, Your Honor.

7 JUDGE CHESTNUT: Thank you very much,  
8 Mr. Baron. You're excused.

9 I guess we're going to go with  
10 Mr. Biewald next.

11 MR. CLARK: Your Honor, the  
12 environmentalists call Bruce Biewald.

13 (Transcript continues on Page 1458.)

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1 JUDGE CHESTNUT: Mr. Biewald, would you please stand  
2 and raise your right hand.

3 BRUCE E. BIEWALD, called as a witness, having been  
4 duly sworn, was examined and testified as follows:

5 DIRECT EXAMINATION

6 JUDGE CHESTNUT: Please sit down and give and spell  
7 your name for the reporter.

8 THE WITNESS: Bruce Edward Biewald, B-i-e-w-a-l-d  
9 (Environmentalists Statement No. 2-E was produced  
10 and marked for identification.)

11 MR. CLARK: Your Honor, we have marked  
12 Environmentalists 2-E, Prepared Testimony and Exhibits of  
13 Bruce Biewald. I have handed two copies to the Court  
14 Reporter. Everybody else has received those. May we also  
15 dispense with the questions?

16 JUDGE CHESTNUT: Your Honor, I do have, if I may, a  
17 couple, three issues that I would very briefly like to  
18 explore on the nature of a rebuttal, surrebuttal testimony  
19 to some comments made by Mr. Hill in response to Mr.  
20 Biewald's testimony. May I go into those quickly?

21 JUDGE CHESTNUT: Yes.

22 BY MR. CLARK:

23 Q Mr. Biewald, Mr. Hill in his statement 1, PECO  
24 Statement 1-ER called the proposal you are making  
25 anticompetitive. How would you respond to that?

1           A I think the proposal is pro competitive. It  
2 allocates default customers on the basis of free choices of  
3 those customers who do make their choices. The proposal  
4 would not allocate customers against their will or  
5 customers who choose one supplier to another supplier;  
6 rather it would allocate only those customers who don't  
7 choose and it would allocate them on the basis of the  
8 choices of those customers who do choose.

9           So I see it as pro competitive and I believe the  
10 environmental provisions in the proposal are entirely  
11 consistent with competitive markets as well.

12           Q Another charge made by Mr. Hill is that the  
13 proposal is unfair to PECO. How would you respond to  
14 that?

15           A I think the proposal is fair. It differentiates  
16 between what we have called default customers and what we  
17 have called the last resort, provider of last resort  
18 function and to the extent that we would still have PECO  
19 serving as the provider of last resort, I think that is  
20 fair because there is universal service funding would cover  
21 the extra costs of serving those customers.

22           Q And the third charge made by Mr. Hill, and I am  
23 not asking for a legal opinion, by you, but he says the  
24 better Choice Plan is unworkable statutorily. What is your  
25 general response to that?

1           A Well, the conditions listed in my testimony for  
2 being allocated for suppliers to be allocated default  
3 customers are not conditions to enter the marketplace.

4           Suppliers could enter the marketplace if they  
5 satisfy the requirements that the Commission puts on them  
6 generally but to be allocated default customers we see as a  
7 special privilege and there would be some extra conditions  
8 placed upon suppliers in order for them to be allocated  
9 default customers.

10           That does seem, again, entirely consistent with the  
11 Commission's role and goal here of providing a competitive  
12 marketplace. We -- I'd also note that the some of the  
13 conditions, the Fund for Clean Energy Resources and the  
14 Portfolio Standard for Renewables mentioned than my  
15 testimony are -- have been proposed by commissions in other  
16 states and legislatures.

17           So it is the case that at least in other states the  
18 policy makers believe that this is within their -- within  
19 the realm of possibility.

20           MR. CLARK: Thank you, Your Honor. The witness is  
21 now available for cross.

22           JUDGE CHESTNUT: No, he's not. Do you want to move  
23 in his statement?

24           MR. CLARK: I'd like to move subject to any motions  
25 to strike the testimony and exhibits of Bruce Biewald?

1 JUDGE CHESTNUT: Any objection?

2 (No response.)

3 JUDGE CHESTNUT: The documents are admitted.

4 (Environmentalists Statement No. 2-E was admitted in  
5 evidence.)

6 JUDGE CHESTNUT: Is there anybody who wants to go  
7 first?

8 MR. BONNEY: We have some cross, Your Honor.

9 JUDGE CHESTNUT: Mr. Bonney?

10 MR. BONNEY: Thank you.

11 CROSS EXAMINATION

12 BY MR. BONNEY:

13 Q Good evening. I am Paul Bonney, counsel for  
14 PECO. How are you?

15 A (No audible response.)

16 Q Just referring to the Better Choice proposal  
17 being workable from a statutory standpoint, are there any  
18 particular provisions of the Competition Act that you are  
19 relying upon as providing your opinion in that regard?

20 A I am referring generally to the act and the  
21 pieces that I am familiar with in general have to do with  
22 promoting the competitive marketplace and there's a section  
23 that talks about the pollution from out of state suppliers  
24 and so on, but I am not referring to specific -- I don't  
25 have the specific sections or citations to the act in my

1 head.

2 Q Again, I am not looking for a legal opinion, but  
3 does the act draw the distinction between provider of last  
4 resort and default customers that I think you have drawn?

5 A To my knowledge, it does not draw that specific  
6 distinction. I think the distinction is consistent with  
7 the act.

8 Q To your knowledge, has notice of the better  
9 Choice Plan, your proposal, been provided to customers or  
10 other marketers?

11 A Only in this case.

12 Q Now, under your plan you have some requirements  
13 that providers that are going to participate in this  
14 allocation of provider of last resort customers meet  
15 certain renewable power standards. Is that correct? More  
16 particularly, that they offer a generation mix which  
17 includes at least 1 percent renewable resources.

18 A That's correct. Are you referring to page 20?

19 Q Yes.

20 A Item 4?

21 Q Yes, I am. Thank you. Are you familiar with how  
22 much renewable power is available at this time to satisfy  
23 this particular condition that you set forth?

24 A Well, the amount would depend upon how broadly  
25 you draw the region. I understand that the supply in the

1 State of Pennsylvania is now mainly coal and nuclear and to  
2 have existing renewables that would satisfy this  
3 requirement we may have to go into a broader market.

4 I don't see a problem with that. I think the policy  
5 is most effective on a larger geographic scale so that PJM  
6 or perhaps even neighboring regions could ideally  
7 participate in this sort of proposal.

8 Q Is it your understanding that renewable resources  
9 would have to be, generation resources would have to be  
10 constructed to satisfy this provision? On a global basis?  
11 I am talking about for the entire market. Or have you not  
12 examined that?

13 A Well, I would hope that some do. I haven't done  
14 a detailed study of this requirement, what it would cause  
15 to happen in the market. Perhaps David Schoengold, who I  
16 understand is testifying later this week, may have more to  
17 say about this.

18 I have analyzed this policy in the context of --  
19 similar policies in the context of New England in terms of  
20 what it will cost and what it might cause to happen and I  
21 have reviewed some analyses on a national basis of  
22 renewable portfolio standards.

23 In this case I haven't done a specific study of the  
24 -- of this specific work place.

25 Q So you don't know how much your proposal 4 on

1 page 20 might cost in Pennsylvania?

2 A Well, like I said, I haven't done a specific  
3 study so I can't -- it would need the caveats, right, that  
4 I -- I do feel comfortable that the saying that the cost  
5 would be small. The standard here is quite small.

6 It's a 1 percent requirement and if you imagine that  
7 being implemented, say with a tradable credit system so  
8 that suppliers can meet the standard in an efficient way  
9 and imagine that the above market costs of the renewables  
10 is, say, a penny a kilowatt hour, relative to the non-  
11 renewable marginal generation option, a penny a kilowatt  
12 hour and if it had to make up 1 percent of the mix it would  
13 be one one hundredth of that or one one hundredth of a  
14 penny per kilowatt.

15 It would be for the cost in the overall supply. If  
16 you think the additional cost of the renewables is two  
17 cents per kilowatt hour it would be double that. So it's  
18 the very small amount in the context of the overall  
19 generation supply cost and in my view, well worth it, in  
20 terms of preparing to provide low cost clean power in the  
21 next century.

22 Q A jump start, if you will?

23 A Getting the infrastructure in place, some of the  
24 know-how, some of the manufacturing capability and so on,  
25 so that these resources are available when we need them.

1 Ten, 15 years from now.

2 Q Have you quantified the costs associated with the  
3 condition number 3 on page 20, the environmental base line  
4 proposal that you have made?

5 A Again, not specific to a state-specific  
6 requirement in Pennsylvania at this time. I am doing a  
7 study right now for the National Association of Regulatory  
8 Utility Commissioners of this policy at a national level  
9 that is environmental comparability, bringing the old  
10 grandfather power plant under the Clean Air Act under  
11 Nusource standards for SO-2 and NOX.

12 Those results will be available within two or three  
13 months. But I don't have results for this right now; at  
14 least not final results and I haven't analyzed specifically  
15 a Pennsylvania proposal. But I have looked at it in other  
16 states and I am looking at it on a national basis.

17 I have a sort of broad familiarity with how much the  
18 control technologies cost and so on. But to answer your  
19 specific question, I haven't done a specific study of  
20 Pennsylvania under this regulation.

21 Q Am I correct that the environmentalists do not  
22 support the ENRON Choice Plan as filed?

23 A That's correct.

24 MR. BONNEY: That's all I have, Your Honor.

25 JUDGE CHESTNUT: Does anyone else have any questions

1 for this witness?

2 (No response.)

3 JUDGE CHESTNUT: Any redirect?

4 REDIRECT EXAMINATION

5 BY MR. CLARK:

6 Q Mr. Biewald, under point number 3, the  
7 environmental, the baseline, aren't power plants in  
8 Pennsylvania already meeting that environmental baseline?

9 A Well, since we are referring to Pennsylvania  
10 laws, I certainly would hope so.

11 MR. CLARK: Okay. No further questions.

12 JUDGE CHESTNUT: Any cross based on redirect?

13 MR. BONNEY: No questions.

14 JUDGE CHESTNUT: Thank you very much. You are  
15 excused, Mr. Biewald.

16 Okay. Where does that leave us in terms of -- Mr.  
17 Boonin's going to go next? Mr. Boonin, would you stand and  
18 raise your right hand, please.

19 DAVID MAGNUS BOONIN, called as a witness, having  
20 been duly sworn, was examined and testified as follows:

21 DIRECT EXAMINATION

22 JUDGE CHESTNUT: Please sit down and give and spell  
23 your name.

24 THE WITNESS: B-o-o-n-i-n, Boonin.

25 BY MR. DWORETZKY:

1 Q Mr. Boonin, you have in front of you NEV  
2 Statement Number DMB Number 2.

3 JUDGE CHESTNUT: Do we want to stipulate? To the  
4 authenticity.

5 MR. DWORETZKY: Yes.

6 (NEV Statement No. DMB-2 was produced and  
7 marked for identification.)

8 BY MR. DWORETZKY:

9 Q I want to call to your attention that Exhibits 8  
10 and 9 contain confidential information is subject to  
11 confidentiality agreement?

12 A That's correct.

13 MR. DWORETZKY: I will have the Court Reporter mark  
14 these as confidential.

15 JUDGE CHESTNUT: You supply it with it removed and  
16 filed separately.

17 MR. DWORETZKY: I will do that. Thank you, Your  
18 Honor. Based on that, Your Honor, I would move the  
19 admission of NEV Statement Number DMB Number 2.

20 JUDGE CHESTNUT: Any objection?

21 (No response.)

22 JUDGE CHESTNUT: The document's admitted.

23 MR. DWORETZKY: And Mr. Boonin is available for  
24 cross examination.

25 JUDGE CHESTNUT: Does anyone have cross for this

1 witness.

2 MR. HERSHEY: I do, Your Honor.

3 JUDGE CHESTNUT: Okay.

4 CROSS EXAMINATION

5 BY MR. HERSHEY:

6 Q Mr. Boonin, you are not a lawyer and so it's  
7 beyond the scope of your testimony to offer any opinion  
8 concerning legal impediments which might exist to  
9 securitization. Isn't that right?

10 A I don't believe I did offer any and I don't know,  
11 I have not -- if not being a lawyer would prohibit me from  
12 offering an opinion on that. But I did not.

13 Q And it's also beyond the scope of your testimony  
14 to offer any opinion as to whether or not the PUC has  
15 authority to order adoption of the various elements of what  
16 we have come to know as the ENRON plan. Isn't that right?

17 A Again, I did not, as past chief economist of the  
18 Pennsylvania Public Utility Commission, though, if I were  
19 asked an opinion, I could probably give an educated and  
20 informed answer.

21 Q I am sure you could, but in fact you didn't offer  
22 such an opinion and --

23 A But I did not -- I am trying to clarify I did not  
24 offer such an opinion. Not because I am not qualified to,  
25 but because I chose not to.

1 JUDGE CHESTNUT: Regardless.

2 MR. HERSHEY: Indeed. Thank you very much.

3 JUDGE CHESTNUT: Does that complete --

4 MR. RYAN: I have one question.

5 JUDGE CHESTNUT: Are you finished, Mr. Hershey?

6 MR. HERSHEY: That's all I have.

7 JUDGE CHESTNUT: Mr. Ryan?

8 BY MR. RYAN:

9 Q Would I be correct in characterizing your  
10 testimony here, one of the features being that you have  
11 serious questions about the part of the ENRON Choice Plan  
12 that designated ENRON in place of PECO as the provider of  
13 last resort?

14 A I wouldn't say that it's a serious concern. I  
15 would say that the concern was that they designated only  
16 ENRON as an alternative provider of last resort.

17 Q Were you here today, this afternoon, in this  
18 hearing room when I asked Mr. Kean some questions about the  
19 differences between the October 10 -- October 7 plan as set  
20 forth in their petition and the revised plan that's  
21 described in their rebuttal testimony and I specifically  
22 asked him a little bit about the PLR role that ENRON wanted  
23 to play. Did you hear that?

24 A I was in the room.

25 Q I thought I saw you there. Did you understand

1 what he was saying as to what difference there is now in --  
2 under what circumstances the Choice Plan would at least  
3 accept the possibility that someone other than ENRON would  
4 be the PLR in the PECO territory? Did you understand that  
5 part of the response?

6 A I understand that in their rebuttal testimony --  
7 rebuttal testimony, that they raised that as a possibility;  
8 yes. I wasn't following your cross examination. I am  
9 sorry.

10 Q I am sorry, Mr. Boonin. I am shattered, but -- a  
11 lot of people probably had better things to do. But the  
12 point is in that rebuttal testimony, that's basically a  
13 significant revision to the original ENRON Choice Plan,  
14 some of them have to do with this provider of last resort  
15 role and who will play it?

16 A Yes.

17 Q Is that right?

18 A Yes.

19 Q Are you more satisfied with the rebuttal  
20 testimony version of the Choice Plan in that regard, in  
21 regard to the provider of last resort, than you were with  
22 the original Choice Plan where I think it was all -- they  
23 just got it and that was it?

24 A Yes. I am more satisfied.

25 Q And why?

1           A I believe in order for there to be an active  
2 competitive marketplace, the introduction of multiple  
3 providers of last resort or as I refer to them in my  
4 testimony, default suppliers, will abet competition.

5           Q Do you think that's part of the revised plan in  
6 any scenario other than a no securitization scenario? Is  
7 that part of what ENRON has said in its revised plan?  
8 There would be multiple PLRs?

9           A I agree that's only limited to a no  
10 securitization plan. But that is better than what they had  
11 before.

12          Q They moved a little bit your way and you are a  
13 little happier than you were before?

14          A That's all --

15          Q You are not smiling. I am assuming you are not  
16 terribly enthusiastic. Thank you very much, Your Honor?

17          JUDGE CHESTNUT: Does anyone else have questions?  
18 Mr. Bonney?

19          MR. BONNEY: I have some clarification, Your Honor  
20 BY MR. BONNEY:

21          Q You are appearing here on behalf of NEV. Not on  
22 behalf of PECC. Am I correct?

23          A Yes.

24          Q Is it true that the there are certain responses  
25 set forth in your testimony?

1           A    That would be one satisfactory outcome of this  
2 case.

3           Q    What is it you are asking the Commission to  
4 approve?

5           A    I am asking the commission to approve a series of  
6 standards and rates which will allow for competition to  
7 occur and for customers to save money.

8           Q    And in your opinion, are those generation credits  
9 that meet your standard those set forth by PECC on  
10 September 29th or those set forth in either of the ENRON  
11 Choice Plan filings?

12          A    I don't think that the first ENRON Choice Plan  
13 filing, as I stated in my testimony, in this case, I don't  
14 believe their generation credits were sufficient to allow  
15 for competition. The second one, it's difficult to say. I  
16 have always wanted a variable approach to this. I have  
17 always wanted the Commission to be able to keep a watchful  
18 eye to make sure that we don't have to predict the future  
19 ten years out.

20          The ENRON revised proposal is better than their  
21 previous one. As Mr. Mitnick testified to, his proposal  
22 was based solely on PECO's generation cost witnesses. I  
23 believe that there could be other factors and so something  
24 slightly below Mr. Mitnick's out year numbers and something  
25 above Mr. -- I can't remember whose testimony it is.

1 I guess it was Mr. Kean's testimony, earlier years  
2 number would probably be a reasonable strip given what we  
3 know today.

4 MR. BONNEY: Thank you. That's all I have, Your  
5 Honor.

6 JUDGE CHESTNUT: Mr. Kleppinger.

7 MR. KLEPPINGER: Thank you. Good afternoon, Mr.  
8 Boonin.

9 THE WITNESS: Good afternoon.

10 BY MR. KLEPPINGER:

11 Q Page 6 of your testimony you assert that there  
12 are problems of price discrimination present in the I  
13 believe the joint petition for settlement is what you mean  
14 there. Do you see that reference?

15 A Yes.

16 Q And is it your understanding that the legal  
17 standard and I am not asking you for an opinion, but that  
18 it is not whether there's discrimination. It's whether  
19 there's undue discrimination. Do you recall that language  
20 from your days at Public Utility Commission?

21 A Yes, I do.

22 Q With the enactment of the Competition Act hasn't  
23 the Legislature now endorsed the Commission's authority to  
24 actually approve flexible pricing rates and negotiated  
25 contract based tariffs?

1 A Yes, they have.

2 Q And by their very nature wouldn't such flexibly  
3 priced contracts or negotiated tariffs be, quote,  
4 discriminatory, close quote under the way you have used the  
5 term in your testimony?

6 A That's not the way I meant it in my testimony.  
7 The discriminatory aspects of the partial settlement deal  
8 more with PECO's ability to set as the provider of last  
9 resort, a rate that diverges more from the market price for  
10 one class of customer or even for one customer than for  
11 another class of customer.

12 I think there should be some sort of universal  
13 standard there to prevent that type of discrimination.

14 If you don't have that sort of standard, you won't  
15 have competition because PECO could come in, pick and  
16 choose who they want to offer a special rate to after a  
17 marketer put a great deal of time and efforts and money  
18 into developing a relationship with a company and a  
19 customer only to have it stripped right out from underneath  
20 them at the last second by a PECO lowball offer. That's  
21 what I mean by discrimination.

22 Q Does Section 2806 (H) of the statute actually  
23 contemplate such contract based tariffs to address  
24 competitive alternatives in the statute, yourself?

25 A I'll have to take a look at 2806 (H). I think

1 the authority is there but in the context, overall context  
2 that you still need to create an environment that will  
3 allow for competition, I think the Commission would have to  
4 apply that judiciously.

5 Q So if I understand your answer, absent an abuse  
6 of this flexible tariff wherein the incumbent utility,  
7 whether it's PECO or another utility in the state, absent  
8 an abuse, such contracting to meet competitive alternatives  
9 is acceptable.

10 A Yes.

11 MR. KLEPPINGER: Thank you. I have nothing  
12 further.

13 JUDGE CHESTNUT: Does anybody else have questions  
14 for Mr. Boonin. Mr. Clearfield.

15 BY MR. CLEARFIELD:

16 Q Mr. Boonin, as between the revised ENRON Choice  
17 Plan and the partial settlement. Which would you recommend  
18 to the Commission to adopt if those are the two choices?

19 A If those were my two choices I would adopt the  
20 ENRON revise the Choice Plan. However, I don't believe  
21 those are the only two options open to the Commission.

22 Q What are the other options?

23 A There are many other options open to the  
24 Commission. Every day, the Commission, through these  
25 hearing processes, learns more and more and I would hope

1 that the Commission would take advantage of all this  
2 knowledge and put together a well thought out order that  
3 would create a vibrant economy, rate savings and under a  
4 competitive environment in the state.

5 MR. CLEARFIELD: No other questions.

6 JUDGE CHESTNUT: Anyone else have any questions on  
7 cross examination for Mr. Boonin?

8 (No response.)

9 JUDGE CHESTNUT: Do you have redirect.

10 MR. DWORETZKY: I don't.

11 JUDGE CHESTNUT: Okay. Thank you very much, Mr.  
12 Boonin.

13 THE WITNESS: Thank you, Your Honor.

14 JUDGE CHESTNUT: Moving along here.

15 MR. BONNEY: Mr. Hill is, I believe, scheduled next  
16 but I wonder if it would be better to go with some of the  
17 out of town witnesses first. We are prepared to go ahead  
18 with Mr. Hill but I offer that for whatever --

19 MR. KOHLER: We would prefer if we could get to some  
20 of the out of town witnesses.

21 JUDGE CHESTNUT: If we have to go over with Mr.  
22 Hill, we can. He will be available.

23 JUDGE CHESTNUT: Who do you want to call next?

24 MR. KOHLER: Is Mr. Dirmeier next on the list?

25 JUDGE CHESTNUT: Would you raise your right hand,

1 please.

2 MICHAEL D. DIRMEIER, called as a witness, having  
3 been duly sworn, was examined and testified as follows:

4 DIRECT EXAMINATION

5 JUDGE CHESTNUT: Please sit down. Spell your name  
6 for the record, when you are ready.

7 THE WITNESS: My name is Michael D. Dirmeier,  
8 D-i-e-r-m-e-i-e-r.

9 MR. KOHLER: Your Honor, I take it we are making it  
10 a practice to skip the foundation.

11 JUDGE CHESTNUT: Yes.

12 BY MR. KOHLER:

13 Q Mr. Dirmeier, do you have any --

14 MR. KOHLER: Your Honor, Mr. Dirmeier is sponsoring  
15 ENRON Statements 6.0. 6.0SR and Statement Number 10-R. I  
16 note on your matrix that it indicates that his direct  
17 testimony, which would be Statement 6 has been stippled in?

18 JUDGE CHESTNUT: Let me see. I have to find that  
19 first. I am sorry.

20 MR. KOHLER: But not his surrebuttal.

21 JUDGE CHESTNUT: His Statement 6 that was submitted  
22 on behalf of EPMI?

23 MR. KOHLER: That's right.

24 JUDGE CHESTNUT: Uh-huh.

25 MR. KOHLER: And that same matrix indicates that the

1 Statement 6-SR has not been admitted. Mr. Dirmeier would  
2 be sponsoring that testimony as well.

3 JUDGE CHESTNUT: You are saying this is incorrect or  
4 simply that you are going to move in 6-SR.

5 MR. KOHLER: I am not sure at this point, Your  
6 Honor. But regardless.

7 JUDGE CHESTNUT: Regardless. The fact is you want  
8 to move in EPMI, 6, 6-SR and was EESPI 10-R.

9 MR. KOHLER: That's right.

10 BY MR. KOHLER:

11 Q Mr. Dirmeier do you have any corrections to any  
12 of those three pieces of testimony?

13 A I have one very small correction on Statement  
14 Number 10-R. Page 9, line 5 after the word personnel there  
15 should be a comma inserted.

16 MR. KOHLER: Your Honor, with that correction, I  
17 would move those exhibits into evidence subject to timely  
18 motions and objections.

19 JUDGE CHESTNUT: Any objections?

20 (No response.)

21 JUDGE CHESTNUT: The documents are admitted.

22 (EESPI Statements Nos. 6, 6-SR and 10-R were  
23 produced and marked for identification and admitted  
in evidence.)

24 MR. KOHLER: The witness is available for cross,  
25 Your Honor.

1 JUDGE CHESTNUT: Okay. Does anybody have cross  
2 examination for Mr. Dirmeier? Mr. Trask?

3 MR. TRASK: Thank you, Your Honor.

4 CROSS EXAMINATION

5 BY MR. TRASK:

6 Q Mr. Dirmeier, my name is Noel Trask and I am one  
7 of the attorneys representing PECO in this matter. In  
8 reviewing your resume, Mr. Dirmeier, which you produced, I  
9 counted close to a hundred cases in which you have  
10 testified in regulatory proceedings. Does that sound about  
11 right?

12 A Yes.

13 Q Would it be accurate to characterize the majority  
14 of your testimony having to do with revenue requirements,  
15 energy adjustment clauses and the like?

16 A Yes. That would be correct. A number of,  
17 significant number of those testimonies were involved in  
18 policy issues. While they were policy issues in the  
19 context generally in the context of traditional rate  
20 making.

21 Q Do you have any formal training in the field of  
22 economics?

23 A I don't have a degree in economics. I have some  
24 economic courses but not a degree in economics.

25 Q Do you know what subspecialty within the field of

1 economics is concerned with the study of market structure  
2 and market performance and competition?

3 A You mean as a subcategory of economics? Because  
4 all of economics --

5 Q As a discipline within the field --

6 A All economics is involved with competition and  
7 competitiveness in one form or another.

8 Q You to now what specialty within the profession  
9 of economics referred to by members of that profession as  
10 having to do with the study, specific study of market  
11 structure and market performance?

12 A No, I don't know the word.

13 Q Am I correct that you believe that PECO Energy's  
14 -- switching now to your testimony about whether PECO  
15 ought to be able to use its trade name. Am I correct that  
16 you believe PECO Energy's competitive operation should be  
17 allowed to use the PECO Energy name because you don't think  
18 that PECO's competitive operations should be able to  
19 benefit from the goodwill that the name provides the  
20 company?

21 A Well, I think that's not the only reason but  
22 that's certainly part of it.

23 Q Is part of your belief based on your concepts of  
24 rate payers to finance economic acquisition of that name  
25 recognition?

1           A   Certainly, when I wrote the testimony, I  
2 certainly suggested that there seems to be an ownership  
3 interest, but I recognize fully that rate payers do not own  
4 the name or in fact any asset of the company. I think it's  
5 more important to recognize that the name is a name that  
6 was developed in the monopoly markets and the company is  
7 attempting to extend the effect of that name into a market  
8 that is not competitive, but that we hope will become  
9 competitive but that will be much less likely to become  
10 competitive and which will have a delayed effect of  
11 competitiveness if the company is available to proceed on  
12 this issue.

13           Q   If you could refer to your testimony, the  
14 Statement 10-R if you look at line 10?

15           A   Of page?

16           Q   Your testimony? Page 3?

17           A   Page 3.

18           Q   Line 10.

19           A   Yes.

20           Q   And there it states that you previously testified  
21 that the assets we are talking about goodwill were not  
22 obtained by PECO in the competitive marketplace but were  
23 financed virtually entirely by rate payers. Do you see  
24 that testimony?

25           A   Yes.

1 Q Are you saying that is no longer your testimony?

2 A No. That's my testimony.

3 Q Okay. And you contend then that PECO acquired  
4 this name recognition through the provision of monopoly  
5 electric service. Is that a fair characterization of the  
6 answer you gave to the question before last?

7 A That's part of the characterization. I don't  
8 think that was everything I said. But it was part of it.

9 Q Would you agree that Pennsylvania Public Utility  
10 Commission has on allowed PECO to recover prudently  
11 incurred expenses in reference to what the Commission  
12 determined were prudent investments?

13 A I don't I know every order that the Commission  
14 has done in general I would certainly agree that that's  
15 probably the likely scope of most of the Commission's  
16 orders.

17 Q And these expenses and investments, would you  
18 agree that in fact, they were only incurred or made to  
19 enable PECO to fulfill its public utility function of  
20 providing electric service?

21 A Are you saying that PECO's expenditures in the  
22 past have always only been dedicated to that.

23 Q The expenditures are subject to the used and  
24 useful standard?

25 A You would be asking me to characterize the

1 expenses that the Commission has allowed in rates, you  
2 know, or however many rate cases there have been and in  
3 general, I would hope that the Commission felt that that  
4 was the case.

5 Q And you would expect that that would be what the  
6 Commission felt in each case?

7 A Okay, yes.

8 Q Would you agree that placing the PECO name on an  
9 asset, for example, a sign on a headquarters building or a  
10 logo on the trucks, did not increase the cost of any of the  
11 assets that the Commission allowed us to earn a return on  
12 or any of the expenses. None of those increased either?

13 A Only by a de minimis amount.

14 Q Are you aware of the fact that many utilities  
15 around the country have changed their names recently?

16 A I am aware that some have, yes.

17 Q Would you agree then that it's possible that some  
18 utilities don't think that they necessarily have the  
19 greatest reputation in their historic -- their name?

20 A Yes, I do. But I think it indicates it's a one  
21 way street. If the name has value, then the utility would  
22 like to keep its name and use it. If the name doesn't have  
23 value, then the utility is quite happy not to use its  
24 name.

25 Q If a utility that is happy to use its name,

1 nonetheless, isn't it true that some of the customers of  
2 the utility may not like that utility or its name?

3 A Yes.

4 Q With respect to those customers don't you think  
5 that ENRON or other suppliers might have a relative  
6 advantage over PECO with a competitive agreement?

7 A For those customers but I think on balance if a  
8 utility decides it wants to use its name derived in a  
9 monopoly and in an environment where competition is allowed  
10 then the utility is making the decision that on balance,  
11 its name has positive value in that market.

12 Q Since you have admitted that some utilities have  
13 customers that don't like their name, you wouldn't have to  
14 also admit that positive image that a utility has isn't  
15 necessarily caused by a utility's historic role as the sole  
16 monopoly provider of service?

17 A I think if a utility has a positive image with  
18 respect to its name, then it is from its monopoly provision  
19 of services. If the utility's name does not have a  
20 positive image then likely that also is the result of  
21 perhaps poor performance or high rates in a monopoly  
22 environment.

23 Q So you can be a sole provider of monopoly service  
24 and not necessarily end up with a name that has any value?

25 A That's correct.

1 Q Is that your testimony?

2 A Yes.

3 Q Let's assume that the PECO name is one to which  
4 consumers attach positive attributes. Wouldn't the value  
5 in that name be something that the consumer determined?

6 A Are you saying that each respective customer is  
7 the one who would make the decision whether the name has  
8 value to that customer?

9 Q Yes.

10 A Yes.

11 Q And a prohibition on the use of that name by a  
12 PECO competitive group or affiliate, wouldn't that remove  
13 the PECO brand from the available choices that those  
14 consumers have in a competitive market?

15 A It would remove the brand. It certainly would  
16 not remove the capacity or energy services.

17 Q So it would remove the brand?

18 A Just the brand.

19 Q And wouldn't that mean that the information  
20 conveyed in the PECO name, some consumers like would not be  
21 available to those consumers when making choices about  
22 their supplier?

23 A Yes, but it would also have beneficial effects on  
24 the market. For example, it would remove customer  
25 confusion. It would also remove employees' confusion.

1           One of the goals here and I think the primary goal  
2 here is to create a competitive market and if employees all  
3 believed that we are all part of the same family, then  
4 restrictions about transfers of information become very  
5 difficult to sustain or enforce because we all work for the  
6 same company.

7           Whereas if one fellow has some name on his badge and  
8 another fellow has PECO's name on his badge, it intends to  
9 enforce and remind the employers that they don't work for  
10 the same company anymore.

11           The same is true for customers. Without question  
12 there are customers who would have value in that name or  
13 for whom that name would communicate something. But what I  
14 am saying to you is that on balance, I believe that the  
15 progression towards a competitive market would be advanced  
16 by not allowing PECO to use its name.

17           Q    Would you?

18           A    PECO to use its name in the competition or to  
19 be --

20           Q    Would you agree, Mr. Dirmeier, that in a  
21 regulated environmental firm that has a positive reputation  
22 with constituents will try to profit from that fact to the  
23 extent that it can?

24           A    Yes.

25           Q    Isn't it true, however, that unlike nonregulated

1 firms a utility that developed a positive reputation and  
2 goodwill with consumers during the time when it was the  
3 sole provider was limited in its ability to profit from  
4 that because its rate of return was limited by regulation?

5 A Yes.

6 Q Would you agree that PECO has not historically  
7 benefitted from the name recognition it may have to the  
8 extent it could have, had it not been subject to rate of  
9 return regulation?

10 A If PECO hadn't been subject to rates of return  
11 regulation, we wouldn't be here today and you are asking us  
12 to remake all of the past. I think PECO has received  
13 benefits from its name if its name has value and we  
14 wouldn't be arguing about it if it didn't have value and  
15 PECO certainly seeks to reap value from that name when  
16 perhaps a better use of that name would have been to  
17 mitigate stranded costs.

18 Q Mr. Dirmeier, I'd like to turn to your testimony  
19 on the utility of the antitrust laws as a default  
20 safeguard. I believe you state in your testimony that you  
21 agree with Mr. Sidak who is PECO's witness that the  
22 antitrust laws are an appropriate safeguard against  
23 anticompetitive conduct?

24 A I think -- yes, I do disagree with him on that.  
25 I think the antitrust laws would be the last line of

1 defense and hopefully not the only line of defense in  
2 protecting against anticompetitive behavior. So I disagree  
3 with him on that.

4 Q Okay. Just so the record is clear, in your  
5 testimony you say that the reliance on them is  
6 problematic. Is that a fairway of summarizing what you  
7 have just testified to? This is on page 7, lines 3 and 4?

8 A Yes, I do.

9 Q Okay. And this is because you think it's a  
10 problem that it takes years, in your view, anyway, to  
11 detect, prosecute and punish violations of those laws?

12 A I think there's evidence, not just my view, that  
13 it does take many years in some instances to detect and  
14 prosecute those laws and it's a very expensive undertaking  
15 and all the time while that's occurring the abuse could  
16 continue and the lack of competition in the electric market  
17 in Pennsylvania could continue.

18 Q Are you familiar with the penalties and remedies  
19 that are available under the antitrust laws? Federal  
20 antitrust laws?

21 A I am not intimately familiar with them except  
22 that I do know that certainly the settlement in AT&T forced  
23 with to break up that company, whether the court could  
24 order a settlement -- and I believe they could -- and I  
25 believe there are also findings and other penalties.

1 Q So I am going to run through some of these with  
2 you and see if you are familiar with these?

3 A I aware that private parties can bring actions  
4 certain of the antitrust laws.

5 Q And obtain treble damages and attorney fees?  
6 Treble meaning --

7 A I am not aware of that. I'll accept it subject  
8 to check.

9 Q Are you also aware that or are you aware that the  
10 Justice Department, United States Justice Department can  
11 bring a criminal action which can mean fines for businesses  
12 and jail time for the individuals involved in the  
13 violations?

14 A Yes. After however long it takes to prosecute  
15 the case it could do that.

16 Q When the Justice Department brings an action did  
17 you know that the FBI and other federal agency  
18 investigators can get involved? And do get involved?

19 A No. I didn't do that but I'll accept it subject  
20 to check.

21 Q Do you think PECO managers are aware of these  
22 facts, Mr. Dirmeier?

23 A Well, they probably are now if they weren't five  
24 minutes ago.

25 Q Do you think they were six minutes ago?

1           A I don't know.

2           Q Wouldn't --

3           A But being aware, you are suggesting that being  
4 aware of a law prohibits, keep people from violating the  
5 law and I don't think the prisons in this country  
6 substantiate your position on that point.

7           Q Would you agree that a PECO manager would want to  
8 avoid a claim that could result in treble damages even if  
9 today he knew that he might not have to pay or she might  
10 not have to pay treble damages until three years from now.  
11 Do you think it's possible him or her --

12          A I think it's possible for him or her. The  
13 question is the difficulty of proving the violation. You  
14 are assuming that hey, if a manager is sitting there and  
15 saying if I do this, they are going to prove in three years  
16 from now we'll be taking treble damages and I suggest to  
17 you that it could be a lot more than three years from now  
18 and I also suggest to you that it could be no damages at  
19 all because proving is difficult and time consuming.

20          Q So are you testifying that because of those facts  
21 that the PECO managers would remain unconcerned about the  
22 potential for having to pay a substantial sum to a private  
23 claimant and that they would just completely ignore that  
24 fact in conducting their business. Is that what you are  
25 saying here?

1           A   No I am not saying that.   But I think I did say  
2 that reliance on the antitrust law should be as the last  
3 line of defense, not the first, and only line of defense.

4           Q   Whether or not, in fact the treble damages would  
5 be, in your view a deterrent to anticompetitive behavior or  
6 is a violation of the antitrust laws?

7           A   A deterrent, but not necessarily a deterrent that  
8 prevents.   There is a difference.

9           Q   Wouldn't a PECO manager sitting here today,  
10 knowing that he or she could go to jail, gee, maybe he's  
11 not worried that in 2002 I am going to go to jail?   Do you  
12 think that that would not have any impact on their behavior  
13 today when it comes to --

14           JUDGE CHESTNUT:   Mr. Trask, you have asked this a  
15 number of times.

16           MR. KOHLER:   He's asked at least five times.

17           JUDGE CHESTNUT:   Would you please move on.

18           MR. TRASK:   All right.   I am not sure what you mean  
19 by move on.

20           JUDGE CHESTNUT:   Move on to another line of  
21 questions.

22           MR. TRASK:   Okay.

23           JUDGE CHESTNUT:   Conclude your cross examination.

24           MR. TRASK:   Okay.   I have no other lines of  
25 questions.   There are other questions about various

1 features of antitrust laws that I think would be  
2 appropriate to ask Mr. Dirmeier if he thinks they would be  
3 a deterrent to anticompetitive behavior. There are many  
4 other features of the antitrust laws that --

5 JUDGE CHESTNUT: I don't want to hear more  
6 speculation about what that hypothetical manager will or  
7 will not do. There's no basis for that. I think we can  
8 take as a given that no manager will deliberately attempt  
9 to break the law and I think we can take it as a given that  
10 there are people who do undertake actions when they weigh  
11 in their own minds the factors. But I don't think it gets  
12 us anywhere.

13 MR. TRASK: Then I have no further questions.

14 JUDGE CHESTNUT: He stated his opinion as to the  
15 efficacy of the antitrust laws and I think you have asked  
16 him about it and you have asked him about this hypothetical  
17 manager that will not get anywhere. If you want to ask  
18 about something else, that's a different kind of question.

19 MR. TRASK: I have nothing further, Your Honor.

20 JUDGE CHESTNUT: Does anybody else have any  
21 questions then for Mr. Dirmeier?

22 (No response.)

23 JUDGE CHESTNUT: Is that no? Any redirect?

24 MR. KOHLER: Just one minute, Your Honor.

25 (Pause.)

1 JUDGE CHESTNUT: Is there redirect for Mr.  
2 Dirmeier?

3 MR. KOHLER: Just two questions, Your Honor.

4 REDIRECT EXAMINATION

5 BY MR. KOHLER:

6 Q Mr. Dirmeier, I believe you answered one of Mr.  
7 Trask's questions that you didn't -- rate payers did not  
8 assert ownership over a brand name or any other facility.  
9 And you also referenced a portion of your testimony that  
10 talked about financing of the name. Can you explain the  
11 difference between financing and ownership?

12 A Well, rate payers have financed the name through  
13 the payment of their rates for day in day out utility  
14 service. They don't have title to that name. But they  
15 have certainly paid for it.

16 Q You also answered some questions about name  
17 recognition under a rate of return environment. In your  
18 opinion, could there be -- could name recognition assist  
19 the company in any way in a rate of return environment?

20 A Yes, it could. There are two ways. One is  
21 certainly name recognition could improve the probability of  
22 a utility earning its rate of return or increased speed  
23 with which it gets to earning rate of return, and in fact,  
24 when a utility over-earns they don't have to give the money  
25 back they may be subject to reduction in rates but they

1 don't have to give the money they earned in excess of the  
2 required rate of return back.

3 So in both ways, a utility could benefit from a  
4 positive name brands recognition in a monopoly environment.

5 MR. KOHLER: Nothing further.

6 JUDGE CHESTNUT: Any further recross based on  
7 redirect examination.

8 MR. TRASK: No recross.

9 JUDGE CHESTNUT: Thank you very much, Mr. Dirmeier.  
10 You are excused.

11 Are we going to go to Mr. Sidak.

12 MR. CLARK: May I go off the record.

13 (Discussion off the record.)

14 JUDGE CHESTNUT: Would you stand please, raise your  
15 right hand.

16 J. GREGORY SIDAK, called as a witness, having been  
17 duly sworn, was examined and testified as follows:

18 DIRECT EXAMINATION

19 JUDGE CHESTNUT: Would you please sit down and spell  
20 your name for the reporter.

21 THE WITNESS: My name is J. Gregory Sidak,  
22 S-i-d-a-k.

23 MR. TRASK: Your Honor, I believe the procedure we  
24 have adapted is to stipulate to the testimony which is  
25 marked Statement 10-E which has been previously submitted

1 Mr. Sidak has also prepared two other statements which have  
2 already been either moved into evidence or stipulated into  
3 evidence and those are PECO Statements 10 and I think  
4 10-R.

5 JUDGE CHESTNUT: Okay. Do you want to move in  
6 Statement 10-E.

7 MR. TRASK: I'd like to move admission of 10-E into  
8 the record.

9 JUDGE CHESTNUT: Any objection?

10 (No response.)

11 JUDGE CHESTNUT: The document is admitted

12 (PECO Exhibit No. 10-E was produced and marked for  
13 identification and admitted in evidence.)

14 MR. TRASK: Your Honor, the witness is now available  
15 for cross.

16 JUDGE CHESTNUT: Okay.

17 MR. TRASK: Also Mr. Sidak reminded me there's one  
18 housekeeping item there was a table included within Mr.  
19 Sidak's testimony, I believe that was Statement 10-R which  
20 listed licensed suppliers in connection with a point Mr.  
21 Sidak was making and he has updated that and he has brought  
22 copies with him.

23 I am not sure how many copies you have there but we  
24 would like that table to replace the table that is in the  
25 testimony. We'll give original and two to the reporter and

1 one to you and we'll get one over here to the parties. We  
2 could make copies of this tomorrow and bring it to you  
3 tomorrow.

4 JUDGE CHESTNUT: That will be fine.

5 MR. TRASK: There's one you can look at.

6 BY MR. TRASK:

7 Q Do you have any other corrections to your  
8 testimony, Mr. Sidak that's moved into the record before I  
9 gave you an opportunity to tell the court or Commission  
10 whether there's any corrections?

11 A Yes. In PECO Statement 10-R on page 10, there  
12 are two pages that correspond to the revised table that had  
13 just been introduced. On line 18 of page 10, the word  
14 twenty should be stricken and replaced with the word  
15 forty.

16 In line 19, the date June 24th should be stricken  
17 and replaced with November 3, those are all the changes  
18 that I have.

19 MR. TRASK: We'll provide a number of copies of the  
20 new table tomorrow, Your Honor.

21 JUDGE CHESTNUT: Okay. Does anybody have cross for  
22 Mr. Sidak?

23 MR. KOHLER: We have brief cross, Your Honor.

24 JUDGE CHESTNUT: Mr. Doll, do you want to go first?

25 MR. DOLL: I have very limited. In fact, it relates

1 to one line, three words on one page.

2 JUDGE CHESTNUT: That's 25 minutes right there.

3 CROSS EXAMINATION

4 BY MR. DOLL:

5 Q Good evening. My name I Craig Doll. I represent  
6 Connectiv Energy in this proceeding. Would you please turn  
7 to your Statement 10-E, page 6. At the top of that page,  
8 line 4 you refer to Connectiv Delmarva Power and it is --  
9 is it your testimony that Delmarva Power has concluded that  
10 the brand name Delmarva Power is less advantageous and  
11 that's why it changed its name to Connectiv?

12 A I have to conclude that that's what they did  
13 because they changed the name.

14 Q You are saying Connectiv, not Connectiv Energy,  
15 not Connectiv Communications; just Connectiv?

16 A I wasn't trying to make a fine distinction  
17 between the different variations on Connectiv.

18 Q Are you aware that Connectiv is a holding company  
19 that was formed when Delmarva Power and Atlantic Energy  
20 merged and that Delmarva Power still exists and provides  
21 service within the states of Delaware, Maryland and  
22 Virginia?

23 A I wasn't aware of that when I wrote this but I  
24 don't think it changes the basic point that I was trying to  
25 make here.

1 Q What evidence, documentary or otherwise, do you  
2 have that Delmarva has changed its name to Connectiv? That  
3 Delmarva Power, itself, has changed its name to Connectiv?

4 A I don't have any.

5 Q And you are a practice -- you are an attorney.  
6 Am I correct?

7 A Yes.

8 Q Are you aware of Horizon Energy?

9 A Yes.

10 Q And from your statement there, can we also  
11 conclude that PECO changed its marketing division name to  
12 Horizon because their former brand name was less  
13 advantageous?

14 A That's one possibility. There could be others.  
15 Just as there could be other explanations for why your  
16 clients conducted a completely new name.

17 Q Would you accept, subject to check that the first  
18 statement that Connectiv is a holding company that was  
19 formed that the other companies still exists would you  
20 accept that subject to check?

21 A I'll accept that.

22 Q And therefore, would you agree that there are  
23 legitimate business reasons other than brand name, to form  
24 either subsidiaries or holding companies?

25 A Could you repeat that question?

1 Q Would you agree that there are other legitimate  
2 business reasons for forming a holding company such as  
3 Connectiv, rather than merely a desire to change a brand  
4 name?

5 A I don't think that your question is asking me  
6 whether the subsidiaries are created with or without a  
7 different name. If that's so, with that understanding of  
8 what you are asking me, I'd say yes. There could be all  
9 kinds of reasons to create a subsidiary.

10 MR. DOLL: I have nothing further, Your Honor. Mr.  
11 Kohler, do you want to do cross?

12 MR. KOHLER: Thank you. Good evening, Mr. Sidak. My  
13 name is Alan Kohler and I'll be doing the cross examining.

14 THE WITNESS: Good evening.

15 BY MR. KOHLER:

16 Q I think you indicated in response to Mr. Doll's  
17 questions that you are trained as a lawyer. Is that  
18 right?

19 A Yes, I am.

20 Q And you are also trained as an economist. Is  
21 that right?

22 A Yes. And not only are you trained, you have  
23 worked in both capacities. Is that right?

24 A That's correct.

25 Q Is it fair to say that as both a lawyer and

1 economist you have focused your attention now mainly on the  
2 antitrust laws and antitrust economic principles?

3 A I have done a great deal of work in that area and  
4 in regulated industries.

5 Q And you're testifying as an economic expert  
6 today. Is that right?

7 A That's correct.

8 Q Now, in your view, are state specific competitive  
9 safeguards really necessary to open up a competitive  
10 market?

11 A I think that safeguards like the code of conduct  
12 developed by the PUC's Competitive Safeguards Working Group  
13 are important means to protect consumer welfare but I think  
14 that it's important to consider the role of a code of  
15 conduct relative to other safeguards that already exist.

16 The first and most important safeguard is actual and  
17 potential competition presented by entrants of employees to  
18 come into the market.

19 The second line of defense is the specific and  
20 general deterrent effect of antitrust and consumer  
21 protection laws, whether they are state or federal and then  
22 the third line of defense is the one that I think that the  
23 code of conduct offers which I think to a large extent,  
24 reiterates the preexisting legal standards of antitrust  
25 law, consumer protection laws and public utility laws.

1 I think it's useful in a code of conduct to say how  
2 do we make these general principles applicable to the  
3 specific undertaking of opening up the electric power  
4 market. Because that's what a court otherwise would do in  
5 the absence of code of conduct. It would apply general  
6 principles to specific factual circumstances. And so I  
7 think it's a useful undertaking for the Competitive  
8 Safeguards Working Group to have done that in this state.

9 Q Let me ask the question a different way. Do you  
10 support state-specific safeguards that are more stringent  
11 than the antitrust laws?

12 A As general, I'd say no.

13 Q If I could refer you to your Statement 10-R.  
14 Page 19, lines 3 to 7?

15 MR. TRASK: Is that 10-R or 10-E?

16 MR. KOHLER: It's 10-E?

17 MR. TRASK: 10-E?

18 MR. KOHLER: I have to refer -- this is your  
19 original rebuttal testimony.

20 JUDGE CHESTNUT: He does have a 10-R.

21 JUDGE RAINEY: What page is that, again, Mr.  
22 Kohler?

23 MR. KOHLER: What page again?

24 THE WITNESS: Page 19, lines 3 to 7.

25

1 JUDGE CHESTNUT: Go ahead, Mr. Koehler.

2 BY MR. KOEHLER:

3 Q Is it fair to characterize your testimony  
4 there that in your view, the code of conduct that  
5 PECO originally proposed in its restructuring  
6 filing contained unnecessary or even excessive  
7 provisions?

8 A I am expressing here my view of what I  
9 think is necessary in light of the lines of defense  
10 that I just outlined before, competition the  
11 background of anti-trust and consumer protection  
12 law and public utility law, and the point I am  
13 trying to make in this page of testimony at the  
14 lines that you indicate is that there are real  
15 sacrifices to consumer welfare from structural  
16 separations.

17 Consumers lose the benefit of economies of  
18 vertical integration or economies of scope, and  
19 that that is a price that has to be paid for  
20 enclosing those kinds of safeguards, and it -- in  
21 my opinion, having worked in a number of regulated  
22 industries, I think that the balance very  
23 frequently tips against consumers in terms of any  
24 kind of additional competitive protection that is  
25 given to them because of structural separation.

1           Now, having said that, my -- that is my  
2           personal view.

3           I think that the code of conduct that PECO  
4           has supported in this proceeding is more -- is more  
5           than efficacious in providing the kind of  
6           safeguards from competitive abuse that gave rise to  
7           the drafting of the code of conduct in the first  
8           place, so I think that PECO has done more than what  
9           pure economic theory and regulatory practice would  
10          suggest --

11          Q I think that was --

12          A -- that was essential.

13          Q I think that was a yes for the most part.

14                 And is the reason you believe they are  
15                 unnecessary or even excessive -- do you want to  
16                 stick with unnecessary -- is because, it is the  
17                 fact that they are structural, and they go beyond  
18                 normal requirements of the anti-trust law, as you  
19                 understand them?

20                 A Oh, I think that the likelihood that the  
21                 competitive harm that structural separation seeks  
22                 to prevent is low, and that other kinds of  
23                 anti-trust and regulatory mechanisms exist to  
24                 detect and prosecute and deter that kind of  
25                 behavior.

1           In addition, I think that the cost to  
2 consumers of losing the efficiencies of integrated  
3 operation are real and significant, and when you  
4 calculate the expected value of one and weigh it  
5 against the expected value of the other, I think  
6 that the magnitude of the welfare lost from  
7 restricting vertical economies out-weigh the  
8 welfare gains that might be achieved by deterring  
9 behavior that you think otherwise would not be  
10 detected.

11           Q Now, you feel particularly strongly about  
12 the use of the brand name -- is that true --  
13 restrictions on the use of the brand name?

14           A Yes, yes.

15           Q And you don't believe that an incumbent  
16 should have any regulatory restriction on the use  
17 of the brand name -- is that right -- an incumbent  
18 or its affiliates?

19           A I don't think there should be any  
20 restriction on top of what already exists in a  
21 competitive market.

22           Even a competitive firm cannot use its  
23 brand name to engage in false and misleading  
24 advertising, for example.

25           Q Certainly. And it is your view that any

1 proposed restrictions on the use of the brand name  
2 are inconsistent with market efficiency? Is that  
3 right?

4 A Yes.

5 Q Let me give you a hypothetical.

6 If a state regulatory agency barred the  
7 competitive affiliate of an incumbent from using  
8 the incumbent's logo in marketing activity, would  
9 that be an appropriate restriction on the use of  
10 the brand name?

11 A Let me make sure I understand your  
12 hypothetical.

13 The State Regulatory Commission is  
14 prohibiting a competitive affiliate from using the  
15 logo of --

16 Q Of the incumbent.

17 A -- of a regulated utility, and you are  
18 asking me, is that anti-competitive?

19 I forget.

20 Q Would that be an appropriate restriction  
21 on the use of the brand name?

22 A It would not be an appropriate restriction  
23 on the use of the brand name.

24 Q Would it be extreme and unsupportable, as  
25 I think you have described some restrictions?

1           A Yes, and I would add that it would be  
2 harmful to consumer welfare.

3           Q If a regulatory agency barred activity in  
4 a competitive affiliate or division which was in  
5 business for one year, claiming the benefit of the  
6 incumbent's benefit fifty years of experience in  
7 providing service to a customer, would you find  
8 such a restriction to be appropriate?

9           A I'm sorry. It was a long question.

10          Q I'm sorry.

11          A The first phrase was, "If" --

12          Q If a regulatory agency --

13          A Yes.

14          Q -- barred activity in which a competitive  
15 or affiliate or a division, which was in business  
16 for one year, claimed the benefit of the affiliated  
17 incumbent's fifty years of experience in providing  
18 service to the customer, would that action by the  
19 agency restricting that activity be appropriate?

20          A I'm not sure I understand what you mean in  
21 the hypothetical by saying "claiming the benefits  
22 of the fifty years of operation."

23          Q In my hypothetical, let's say --

24          A Now, are you asking about using the brand  
25 name?

1           Q -- an affiliate or division places --  
2           that's been in operation for one year places an ad  
3           or provides information to consumers in some format  
4           that conveys the notion that it has fifty years of  
5           experience, if an agency barred that type of  
6           activity, would that be appropriate?

7           A I think it would be harmful to consumer  
8           welfare, and I think it would be a violation of the  
9           First Amendment of the Constitution.

10           I think that in that occasion, the  
11           incremental costs to rate payers of the use of the  
12           brand name is nil, so there is no objection that  
13           can rest on those grounds, and I think it is useful  
14           to compare the hypothetical that you just posed to  
15           other kinds of situations in American jurisprudence  
16           where it is certainly not the case that the use of  
17           a brand name would be restricted in that way.

18           Think of a patent, for example.

19           Here you have the grant of a lawful  
20           monopoly for a term of years.

21           If I received a patent for a product with  
22           a particular name, there is no restriction on my  
23           ability to use that name in another context for a  
24           product that is not subject to patent protection.

25           A different analogy would be antitrust

1 law.

2 It is possible under anti-trust law to  
3 have a lawful unregulated monopoly, a monopoly  
4 acquired through learned hands, through superior  
5 business acumen, but that lawful monopoly in no way  
6 is -- anti-trust law in no way imposes on the  
7 lawful monopolies a restriction on its ability to  
8 use its brand name in competitive markets, so I  
9 don't see why, given those general rules in  
10 American law, that we would come to a different  
11 conclusion here.

12 Q Okay. And again, if an agency did that,  
13 in your view it would be extreme and unsupported?  
14 Is that fair?

15 A Well, and I cite cases in my testimony  
16 that document the conclusion that agencies have  
17 come to to that effect, or, I'm sorry, state  
18 supreme courts have come to.

19 Q So it would be extreme and unsupported?

20 A In my view, it is extreme, and it is  
21 against the weight of authority, yes.

22 Q Okay. One last hypothetical. If a  
23 regulatory agency mandated that every time a  
24 competitive affiliate uses the incumbent's brand  
25 name, it had to affirmatively inform customers that

1 the affiliate and the incumbent were not the same  
2 entity, would you find such a restriction to be  
3 appropriate?

4 Do you understand the question?

5 A I do, and your question is, do I think it  
6 would be appropriate?

7 Q Yes, the action by the agency.

8 A That's an easy question. I think it is  
9 inappropriate.

10 I can explain why.

11 I think that even though this is a case of  
12 degree, it is in-between polar cases of absolute  
13 prohibition on the use of the name on the one hand,  
14 and unrestricted use of the name on the other, we  
15 still have the situation of raising the cost to the  
16 competitive affiliate of the incumbent firm of  
17 using the brand name that already exists, so the  
18 fractal effect of that is to deter on the margin  
19 some of the gains from vertical integration from  
20 economies of scope and to raise the cost for the  
21 competitive affiliate of the incumbent firm to  
22 brand its product and inform consumers of services  
23 that it offers, so in that sense, it is not, it is  
24 different only in degree, not in time.

25 The other point, too, that your hypo

1 presents is whether by forcing the -- well, what  
2 -- you were essentially putting words in the mouth  
3 of the utility.

4 You are forcing the utility to engage in a  
5 certain kind of commercial speech that it would not  
6 otherwise engage in, and I think that raises an  
7 interesting question under Central Hudson, a 1980  
8 decision, whether that under the Constitution can  
9 be done.

10 Q That is it with the hypotheticals.

11 Thanks.

12 I would like to refer you to Page 8 of  
13 your most recent testimony, where you cite the DOE  
14 report.

15 Do you have a copy of that report  
16 available?

17 A No, I don't.

18 MR. KOEHLER: May I approach the witness,  
19 Your Honor?

20 JUDGE CHESTNUT: Certainly.

21 BY MR. KOEHLER:

22 Q Is that the report you were referring to?

23 A Yes.

24 Q There's a part you quoted there found on  
25 Page 66, and there's also, I think, a cite at 68

1 and 69.

2 Can you check that?

3 A Right. The block quote is found on Page  
4 66, and then -- right -- and the quote at lines  
5 twenty-three to twenty-nine, or twenty-four are  
6 found on Page 69, Footnote 35.

7 Q Now, I will leave you with the report for  
8 the moment.

9 Doesn't the subject of this section relate  
10 to problems which might occur when a utility  
11 diversifies into markets in which it previously  
12 didn't provide service?

13 A Yes. I would have to go back and re-read  
14 the section.

15 Q Would you accept it, subject to check?

16 A I will, yes.

17 Q And those would be in markets where it had  
18 a zero percent market share at the time of entry?  
19 Is that right?

20 A Yes, by definition.

21 Q The section doesn't address new entrants  
22 entering traditional utility markets? Is that  
23 right?

24 A Subject to check --

25 Q Okay.

1 A -- I will agree with that.

2 Q If I could refer you to Page 68, under the  
3 heading -- do you see the heading, "Diversification  
4 may encourage increased investment and good will"?

5 A Yes.

6 Q Could you read just the first paragraph  
7 there into the record?

8 A "Another difficult issue is the treatment  
9 intangible assets, such as reputation or good  
10 will."

11 Q Just through the end of the paragraph.

12 A Oh, I'm sorry. "Purchasers of energy  
13 efficient replacement windows might believe that a  
14 window installer with the utility's name is more  
15 likely to provide adequate services than a  
16 comparable firm without that name.

17 "The utility's reputation could increase  
18 the profit of its installation subsidiary.

19 "Once again, the question for regulators  
20 is whether the utility's rate payers are made worse  
21 off by such use of the utility's reputation."

22 Q Okay. Now, I think your other reference  
23 to the report is in footnote thirty-five on Page  
24 69? Is that right?

25 A Yes.

1 Q And just so the record is complete, I  
2 think you left off the first sentence of that  
3 footnote.

4 Could you put that into the record?

5 A "Consumers are not necessarily made worse  
6 off by the subsidiary's use of the parent firm's  
7 reputation."

8 MR. KOEHLER: Okay. Nothing further, Your  
9 Honor.

10 JUDGE CHESTNUT: Does anybody else have any  
11 cross for this witness?

12 (No response.)

13 JUDGE CHESTNUT: Any redirect?

14 MR. TRASK: May I have just a moment, Your  
15 Honor?

16 JUDGE CHESTNUT: Sure.

17 (Discussion off the record.)

18 MR. TRASK: Your Honor, we have no redirect.

19 JUDGE CHESTNUT: Thank you very much. You  
20 are excused, sir.

21 THE WITNESS: Thank you.

22 (Witness excused.)

23 JUDGE CHESTNUT: Are we going to go to Mr.  
24 Crowe next?

25 I would like to put Mr. Hill off, if we can,

1 unless people --

2 MR. TRASK: Very well.

3 JUDGE CHESTNUT: -- will limit the cross  
4 tonight, just because he is going to be available,  
5 you know, and there may be time later for him.

6 MR. CLARK: We will call Mr. Crowe, then.

7 JUDGE CHESTNUT: Would you raise your right  
8 hand, please?

9 BRIAN D. CROWE, called as a witness, having  
10 been duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 JUDGE CHESTNUT: Would you please sit down  
13 and give and spell your name for the record?

14 THE WITNESS: Brian D. Crowe, C-r-o-w-e.

15 JUDGE CHESTNUT: Do you want to stipulate it  
16 in the way you have been doing?

17 MR. TRASK: Yes, Your Honor. The statement  
18 number is 29-E, PECO Statement No. 29-E, and in  
19 addition, Mr. Crowe has adopted as his own  
20 testimony the prior testimony of Mr. Gregory Cuchi  
21 on the so-called non-settled issues, the unbundling  
22 of billing and metering and code of conduct  
23 implementation.

24 I believe all of those testimonies are either  
25 already in the record or were submitted, or it was

1 agreed to that they would go in by stipulation.

2 JUDGE CHESTNUT: That is what? 15, I think?

3 MR. TRASK: That's 15-R, sections of 15-R and  
4 sections of 15-12.

5 Those sections of those testimonies were not  
6 entered into the record in connection with the  
7 hearings last month on the partial settlement, but  
8 the documents were in the possession of the court  
9 reporter already, since we gave them all the  
10 documents, and so the appropriate pages have  
11 already either been stipulated into the record, or  
12 it has been agreed to do that.

13 JUDGE CHESTNUT: Well, 15 is in.

14 MR. TRASK: 15 is in in its entirety?

15 JUDGE CHESTNUT: 15-S and 15-R are not.

16 MR. TRASK: All right. 15-S, I believe, was  
17 in the packet that was given to the court reporter.

18 That has to do -- I think that was  
19 Commissioner Hanger's questions, or one of them  
20 from --

21 JUDGE CHESTNUT: It may have been, but I  
22 don't have that listed as being admitted.

23 MR. TRASK: It is not admitted, so I guess we  
24 will have to move it into the record at this time.

25 JUDGE CHESTNUT: Is that 15-S?

1 MR. TRASK: I believe it is 15-S, 15-S --

2 JUDGE CHESTNUT: Okay.

3 MR. TRASK: -- and the Section of 10-R that  
4 was not moved into the record last month, in  
5 addition --

6 JUDGE CHESTNUT: Well, no. If a part of a  
7 document has been moved in, the whole document is  
8 in.

9 MR. TRASK: Oh, it was? I apologize, Your  
10 Honor.

11 JUDGE CHESTNUT: Yes. I should have  
12 clarified that earlier, but yes.

13 MS. HOPPER: Excuse me, Your Honor. This is  
14 Miss Hopper.

15 I believe 15-R was already moved in --

16 JUDGE CHESTNUT: Okay.

17 MS. HOPPER: -- but it is not on your list.

18 JUDGE CHESTNUT: It isn't? Do you know when  
19 it was moved in, or how the was moved in?

20 MS. HOPPER: I believe it was the last day of  
21 those hearings, on the 16th of November -- or  
22 October.

23 JUDGE CHESTNUT: Was that part of Appendix H?  
24 I have it here, and I can check it later, but I  
25 just want to be sure --

1 MS. HOPPER: Yes. I think --

2 JUDGE CHESTNUT: -- it is accurate.

3 MR. TRASK: It was at the end, at the  
4 conclusion of the hearings on the 16th of October.

5 JUDGE CHESTNUT: It was not a part of  
6 Appendix H?

7 MR. TRASK: I am not sure that it was part of  
8 Appendix H or not.

9 MS. HOPPER: Well, if it was not, we will  
10 bring you a copy.

11 JUDGE CHESTNUT: All right. But at this  
12 point, it is your intention that --

13 MR. TRASK: Everything.

14 JUDGE CHESTNUT: -- all of the --

15 MR. TRASK: Both of the Cuchi statements and  
16 29-E, which is the current statement for Mr. Crowe.

17 JUDGE CHESTNUT: All right.

18 MR. TRASK: And I guess with that, Your  
19 Honor, with that stipulation, the witness is  
20 available for cross.

21 JUDGE CHESTNUT: Well, you have to move it in  
22 first.

23 MR. TRASK: I have to move it in first?

24 JUDGE CHESTNUT: Yes.

25 MR. TRASK: I move the admission of statement

1 of PECO Statement 29-E.

2 JUDGE CHESTNUT: Any objection to the  
3 admission of the document?

4 (No response.)

5 JUDGE CHESTNUT: The documents are admitted.  
6 (Thereupon, PECO Statement 29-E was  
7 marked for identification and admitted in  
8 evidence.)

9 JUDGE CHESTNUT: Does anybody have cross for  
10 Mr. Crowe?

11 Mr. Clark?

12 MR. CLARK: I just have a couple of  
13 questions, Your Honor.

14 CROSS EXAMINATION

15 BY MR. CLARK:

16 Q Mr. Crowe, Friday was the deadline for the  
17 first round of customers participating in the pilot  
18 program to indicate a generation supplier? Is that  
19 correct?

20 A That's correct.

21 Q Friday, November 14th?

22 A That's correct.

23 Q Do you know how many of the eligible  
24 customers have in fact chosen an alternative  
25 supplier at this point?

1           MR. TRASK: Your Honor, I object. It is not  
2 relevant to any of the issues that Mr. Crowe is  
3 here to testify about, which are code of conduct  
4 and whether or not billing and metering should be  
5 unbundled.

6           JUDGE CHESTNUT: The objection is overruled.

7           A We do not yet know how many customers are  
8 enrolled, because the suppliers have until the 19th  
9 to let us know how many customers they have  
10 enrolled in the pilot, so until that time, until  
11 such time, we can't do any further lotteries or  
12 make any determinations about the five percent.

13          Q In your testimony on Page 6, line nine,  
14 actually, lines eight through ten, you address  
15 customer choice for generation supply, calling it  
16 confusing, and raising many questions and concerns.

17                   What are some of those questions and  
18 concerns that you were talking about there?

19           A We mailed, according to the pilot program,  
20 to 1.5 million customers a description of the  
21 program.

22                   The customers have obviously seen the  
23 advertisements.

24                   We have gotten and continue to get a  
25 number of letters from customers who say that the

1 time schedule is too quick, that the issues around  
2 how to choose and just who the suppliers are has  
3 created customer confusion.

4 The fact that some suppliers are not  
5 serving residential customers has added to that  
6 confusion, and customers are still in the early  
7 stages of learning what their options are and  
8 learning about some companies.

9 Q Based on that, are you expecting, then,  
10 that some of these pilot program customers are not  
11 going to be choosing an alternative supplier?

12 A Some may not.

13 Q Do you have a guess of what that might be?

14 A I do not, because the methodologies for  
15 selecting the customers was to identify people who  
16 self selected themselves.

17 We received 400,000 applications for  
18 approximately seventy-five thousand slots in the  
19 pilot program, but at this point, we don't know how  
20 many customers are going to actually participate of  
21 those customers that were selected to initially  
22 participate.

23 Q You call this a self-selected group,  
24 because they volunteered to be in the pilot  
25 program?

1 Is that correct?

2 A That's correct. If you recall, PECO's  
3 original pilot program proposal was to have random  
4 selection of all customers.

5 When the PUC orders came out at the end of  
6 August, it was indicated that all the utilities  
7 should mail to every customer information about the  
8 pilot program and give all customers an opportunity  
9 to self identify themselves as being interested in  
10 the pilot, at which point, if it was over  
11 subscribed, the utilities would have a lottery, and  
12 that is the methodology which PECO used in its  
13 pilot program.

14 Q Is it reasonable to assume that if this  
15 self-selected, obviously very interested group of  
16 customers are having problems picking a supplier,  
17 peco rate customers in general will have even more  
18 problems?

19 MR. TRASK: I object to the form, Your Honor.

20 MR. CLARK: I asked if that is a reasonable  
21 assumption.

22 MR. TRASK: I don't think Mr. Crowe testified  
23 that customers were necessarily having problems.

24 BY MR. CLARK:

25 Q Okay. If these customers have problems,

1 do we think that the general population of PECO  
2 customers will have even more of a difficult time  
3 in picking an alternative supplier?

4 A I don't believe so.

5 I think what is contributing to the fact  
6 that customers are trying -- are having some  
7 concerns is that there is a very short period of  
8 time for customers to sign up.

9 Customers had about two weeks to identify  
10 themselves as being interested in the pilot  
11 program, and they have really only had four or five  
12 weeks to make a selection.

13 I think what contributed to some customers  
14 having trouble is that the marketers were not  
15 established.

16 I think that the schedule which the  
17 Commission laid out caught some of the marketers by  
18 surprise.

19 The general concern that we get from  
20 customers is, "When I call a marketer, they either  
21 can't answer my questions, or if they can answer  
22 what my price should be, and I ask them more  
23 questions, they are not yet in a position to answer  
24 all of my questions."

25 Q Do you think all those problems will be

1 resolved by January of '99?

2 A I think a number of the marketers'  
3 problems are being resolved now, and I think a  
4 significant number of them will be resolved by that  
5 point.

6 MR. CLARK: Okay. No further questions, Your  
7 Honor.

8 JUDGE CHESTNUT: Does anybody after any  
9 others?

10 Mr. Doll?

11 MR. DOLL: It's not that I don't like  
12 Charlie, but I am going to sit on this side for a  
13 change.

14 CROSS EXAMINATION

15 BY MR. DOLL:

16 Q Good evening, Mr. Crowe. My name is Craig  
17 Doll, and I represent Conectiv Energy.

18 Real quickly, in your testimony on Page 8,  
19 lines fifteen through eighteen, and again at Page  
20 9, lines seventeen through nineteen, you generally  
21 speak of the ability to answer questions  
22 immediately and not going through alternative or  
23 various providers?

24 Is that correct?

25 A That's correct.

1 Q As a general proposition, would you agree  
2 with me that direct customer contact is important  
3 to any provider of service?

4 A It may be.

5 Q And would you agree with me that placing  
6 anyone between that provider of service and the  
7 customer could lead to customer confusion and  
8 dissatisfaction?

9 A I think, to the extent that you have  
10 created some inefficiency for customers, it can  
11 contribute to dissatisfaction.

12 Q Thank you.

13 MR. DOLL: I have nothing further, Your  
14 Honor.

15 JUDGE CHESTNUT: Does anybody else have any  
16 questions?

17 Mr. Clearfield?

18 MR. CLEARFIELD: I just have a couple.

19 CROSS EXAMINATION

20 BY MR. CLEARFIELD:

21 Q Mr. Crowe, can you testify as to the  
22 customer credit that is available, the total  
23 customer credit that is available to the PECO pilot  
24 residential customers?

25 A For residential customers, the total

1 credit, I believe, is 4.45 cents. If you --

2 Q And how about -- I'm sorry. And do you  
3 know what the overall customer credit is on a  
4 system average basis?

5 A For?

6 Q For all, all customer classes that would  
7 be -- that would have the pilot rates available.

8 A I do not have that average number.

9 Q Would you accept, subject to check, it is  
10 three point seven cents?

11 A Subject to check, yes.

12 Q Thank you. Now, this is in the pilot,  
13 right, that you are giving me?

14 These are the numbers that you are giving  
15 me for the pilot?

16 A I gave you the 4.45, yes, subject to  
17 check, with 3.7 to be the overall.

18 Q Again for the pilot?

19 A For the pilot.

20 Q Thank you. That's all I have.

21 JUDGE CHESTNUT: Anybody else?

22 (No response.)

23 JUDGE CHESTNUT: Redirect?

24 MR. TRASK: Nothing, Your Honor.

25 JUDGE CHESTNUT: Thank very much, Mr. Crowe.

1 You are excused.

2 THE WITNESS: Thank you.

3 (Witness excused.)

4 JUDGE CHESTNUT: Well, that leaves us with  
5 Mr. Hill.

6 Do we want to do him now, or recall him? I  
7 know --

8 MR. STEINMETZ: No. It is 6:00 o'clock.

9 JUDGE CHESTNUT: Can I have some idea about  
10 how much cross people have for Mr. Hill?

11 MR. CLEARFIELD: Your Honor, probably a half  
12 hour, maybe a little less.

13 JUDGE CHESTNUT: A real half hour, or a  
14 billable half hour?

15 MR. CLEARFIELD: Well, if I had the  
16 opportunity, I think I could finish him if we  
17 schedule him tomorrow.

18 JUDGE CHESTNUT: Well, I mean, if it is not  
19 going to take more than maybe an hour, I wouldn't  
20 mind, I think maybe we should do him tonight, but  
21 if it is going to take longer, then I would like to  
22 push him off

23 MR. CLEARFIELD: It could take longer, Your  
24 Honor.

25 There are several issues.

1 JUDGE CHESTNUT: Because I know that he is an  
2 important issue.

3 Do you have a preference, Mr. Bonney?

4 MR. BONNEY: We are prepared either way, Your  
5 Honor.

6 JUDGE CHESTNUT: Does anybody else have cross  
7 for Mr. Hill besides Mr. Clearfield?

8 MR. CLARK: I have just a few minutes.

9 JUDGE CHESTNUT: A few minutes.

10 How about you, Mr. Doll?

11 MR. DOLL: About fifteen minutes --

12 JUDGE CHESTNUT: That's too much.

13 MR. DOLL: -- assuming I get the right  
14 answers.

15 JUDGE CHESTNUT: Does anybody else have  
16 questions for him besides the people I have  
17 indicated?

18 Oh, Mr. Dworetzky. I'm sorry.

19 I missed you.

20 MR. DWORETZKY: We have a short ten minutes.

21 JUDGE CHESTNUT: So do you think you really  
22 do have half an hour?

23 I don't want you to feel constrained to  
24 shorten it.

25 If you would feel more comfortable doing him

1 tomorrow, because we do have an opening in the  
2 schedule tomorrow with Mr. Schoengold not -- Dr.  
3 Schoengold --

4 MR. CLEARFIELD: Could I just confer?  
5 (Discussion off the record.)

6 JUDGE CHESTNUT: Would that be a problem  
7 going tomorrow, since there is an opening?

8 MR. BONNEY: Not at all, Your Honor.

9 In light of the number of witnesses tomorrow,  
10 and I notice that there are out-of-town folks  
11 coming in as well, perhaps he could take Mr.  
12 Schoengold's place, or wherever it is most  
13 appropriate.

14 MR. TRASK: Is there a matrix for tomorrow in  
15 regards of how much cross for the witnesses?

16 MR. BONNEY: There is one that's in  
17 existence.

18 I don't think it has been filled in, Your  
19 Honor.

20 JUDGE CHESTNUT: Well, yes. We have the one  
21 that is not filled in.

22 I mean --

23 MR. STEINMETZ: We could fill it in right  
24 now.

25 JUDGE CHESTNUT: Why don't we take him

1 tomorrow, then?

2 I mean, it seems like they are kind of  
3 uncertain here.

4 I don't want to -- I mean, we are here. Can  
5 we start --

6 MR. STEINMETZ: What time are we starting  
7 tomorrow?

8 JUDGE CHESTNUT: We are going to start at  
9 9:00 tomorrow, and I figure we won't have the  
10 procedural matters that took up an hour this  
11 morning.

12 MR. BONNEY: Would you prefer that Mr. Hill  
13 can go later, because he can carry over to  
14 Wednesday, if necessary.

15 JUDGE CHESTNUT: Well, that's what I am  
16 thinking, maybe, or even start him tonight and have  
17 maybe Mr. Dworetzky do him tonight, at least get  
18 that out of the way.

19 No, I guess it makes more sense to have it  
20 all together, doesn't it? Yes.

21 Why don't we take him tomorrow, then. That  
22 would be fine.

23 Okay. Is there anything further, then,  
24 before we adjourn for this evening?

25 (No response.)

1 JUDGE CHESTNUT: Okay. We will reconvene at  
2 9:00 o'clock tomorrow.

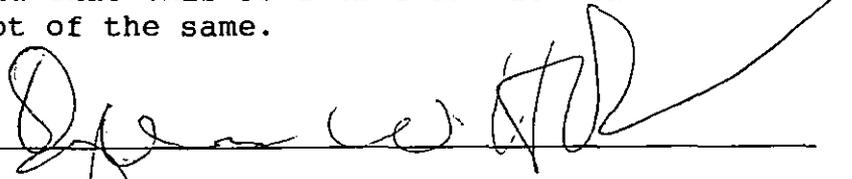
3 Thank you.

4 - - -

5 (Thereupon, the hearing was adjourned at 6:03  
6 o'clock PM.)

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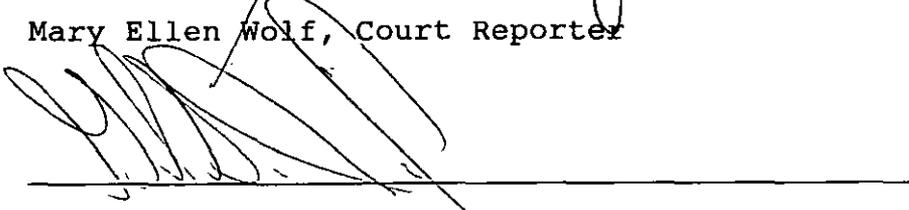
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4 evidence are contained fully and accurately in the  
5 notes taken by us during the hearing of the within  
6 cause, and that this is a true and accurate  
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