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February 17, 1998

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PROTHONOTARY'S OFFICE

James McNulty, Prothonotary  
PA Public Utility Commission  
PO Box 3265  
Harrisburg, Pennsylvania 17105-3265

DOCUMENT  
FOLDER

RE: Pennsylvania Power & Light Company's Restructuring  
Plan at Docket No. R-00973954

Dear Mr. McNulty:

On February 12, 1998, copies of the Main Brief for The Center for Energy and Economic Development were served on all parties by fax and by mail. Several of the faxed copies were missing page 5 of the Brief. All parties were also mailed a copy of the Brief, which did include the missing page. In order to ensure that the Commission's filed copies also include the missing page 5, I am enclosing another original and 9 copies of the Brief, as well as sending another copy of the Brief to Judge Kashi.

My apologies for any inconvenience this may have caused.

Sincerely,



Susan M. Shanaman

cc: Hon. George Kashi

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133377

BEFORE THE  
COMMONWEALTH OF PENNSYLVANIA  
PUBLIC UTILITY COMMISSION

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APPLICATION OF PENNSYLVANIA POWER :  
& LIGHT COMPANY FOR APPROVAL OF :  
ITS RESTRUCTURING PLAN UNDER :  
SECTION 2806 OF THE PUBLIC UTILITY :  
CODE :

DOCKET NO. R-00973954

**DOCUMENT  
FOLDER**

MAIN BRIEF  
OF THE  
CENTER FOR ENERGY AND ECONOMIC DEVELOPMENT

**DOCKETED**  
FEB 19 1998

Susan M. Shanaman, Esquire  
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Dated: February 12, 1998

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Center for Energy and Economic Development ("CEED") is nonprofit organization formed in 1992 to educate the public and policymakers about the new technologies and broad economic benefits of coal when used to generate electricity. Many of CEED's members are directly involved in generating power, and supplying fuel and fuel transportation services to electric power generators serving electric customers in the Commonwealth of Pennsylvania.

As an intervenor in the restructuring proceedings of Pennsylvania Power & Light Company, CEED appreciates the opportunity to submit this brief on the environmental issues raised in this proceeding.

Based upon a review of the record, CEED generally finds that the record addresses many of the issues that will be key to a successful electric industry restructuring effort. However, there are a number of areas in the record that CEED believes deserve the very careful scrutiny of the Commission due to the economic impact on emerging markets and, ultimately, upon the State's electric consumers. Positions have been put forth that would suggest that the Commission become the arbitrator in Pennsylvania for the maintenance of environmental quality. It is CEED's belief that the newly enacted Consumer Choice legislation does not give the Commission any direct authority to regulate the implementation of clean air standards through the guise of restructuring the electric utility industry; nor does the Act of 1996 give the Commission any indirect authority to become a superboard of directors for

environmental policies.

#### ARGUMENT

1. The Commission, lacking any clear legislative authority, should not embark into potentially costly and duplicative efforts to promote environmental goals.

Although the goal of promoting environmental improvement is a worthy one, the goal of restructuring should be to increase the economic efficiency of electric service markets.

In its Declaration of Policy, the General Assembly has stated as follows:

"The General Assembly finds and declares as follows:

...

(3) Because of advances in electric generation technology and federal initiatives to encourage greater competition in the wholesale electric market, it is now in the public interest to permit retail customers to obtain direct access to a competitive generation market as long as safe and affordable transmission and distribution service is available at levels of reliability that are currently enjoyed by the citizens and businesses of this Commonwealth.

...

(12) The purpose of this chapter is to modify existing legislation and regulations and to establish standards and procedures in order to create direct access by retail customers to the competitive market for the generation of electricity, while maintaining the safety and reliability of the electric system for all parties. Reliable electric service is of the utmost importance to the health, safety and welfare of the citizens of the Commonwealth. Electric industry restructuring should ensure the reliability of the interconnected electric system by maintaining the efficiency of the transmission and distribution system." 66 Pa. C.S. § 2802(3) and (12).

Thus, it is clear that the Legislature believed that

competition can be, and should be, implemented in a manner that ensures that all customers are no worse off than under the present system. Imposing requirements on the emerging competitive market that go well beyond any regulation or law - economic or environmental - that currently underscores the operations of today's electric services industry will represent a wide departure from the way in which markets work today. Such actions will only burden competition and promote higher electric prices before there is any real evidence that the proposed environmental measures will be necessary or will produce any measurable environmental benefits. The generation of such economic impacts will directly contradict the stated legislative goal that customers be no worse under competition than they are under the present system of economic regulation.

CEED strongly urges the Commission to rely on markets first to pursue a market-oriented approach to support additional environmental proposals before the Commission determines that regulation is warranted due to a market failure to address these issues effectively.

2. The imposition of environmental standards on competitors in the Pennsylvania energy market is counterproductive to the goal of increased economic efficiency.

In order to promote effective, efficient competition, the price and performance implications of environmental initiatives must be balanced through a careful and comprehensive review of the impacts of these initiatives on Pennsylvania's economy as well as

its environment. The potential value of broader competition should not be sacrificed by putting artificial and inappropriate barriers on the Pennsylvania market without creating any significant environmental or pricing benefit for the State's consumers.

The primary goal of any market structure adopted by the Pennsylvania Commission for the electric service industry should be to obtain and sustain an electric industry that promotes competitive pricing, and reliable and inovative product and service options. CEED points out that it is the primary jurisdictional responsibility of the Commission to implement economic regulatory policies that ensure that customers are provided with reliable supplies of electricity at a reasonable cost.

CEED respectfully suggests that the Commission take its cue from the Federal Energy Regulatory Commission's ("FERC") Order 888, and the Final Environmental Impact Statement in that proceeding, and defer environmental regulation to the Pennsylvania Department of Environmental Protection and the EPA who possess the resources, knowledge and statutory authority to impose environmental regulations that are found to be efficient and effective. The PDEP and the EPA do, and should, have primary jurisdictional responsibility for ensuring that utility environmental performance is consistent with requirements, such as the nitrogen dioxide emission reductions prescribed by the Ozone Transport Commission ("OTC") in its existing Memorandum of Understanding ("MOU") between the twelve northeastern states, attainment and maintenance of National Ambient Air Quality Standards ("NAAQS"), and so forth. In

the absence of any market failure at this time, the Commission should not be imposing unnecessary regulation upon the emerging marketplace.

Developing sound and reasonable policies for assuring the economic benefits of utility restructuring in Pennsylvania need not require the Commission to engage in backdoor environmental regulation. The Commission should resist the entreaties of interest groups who may seek to distract attention from the real purpose of this proceeding by introducing issues that properly lie within the jurisdiction of sister agencies, such as the PDEP.

For the Commission to assert jurisdiction over the environmental performance of the Pennsylvania electric market invites just the kind of regulatory duplication and jurisdictional conflicts that FERC successfully avoided in Order 888. In addition, CEED cautions the Commission that the imposition of equal environmental standards on participants in the electric supply market by the State will encourage an interstate commerce challenge<sup>1</sup> that could significantly delay State efforts to implement restructuring, thus compromising the Commission's

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<sup>1</sup> When a state regulation is challenged as a violation of the dormant Commerce Clause, it will be subjected to one or two tests, depending upon the discriminatory nature of the statute. The first test applies if a statute is discriminatory on its face or in practical effect. The state bears the burden of justifying the discrimination by showing the following: (1) the statute has a legitimate local purpose; (2) the statute serves this interest; and (3) non-discriminatory alternatives, adequate to preserve the legitimate local purpose, are not available. See Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353 (1977); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).

objectives in this regard.

Finally, it is not economically efficient for the Commission to adopt policies that isolate electric generation as an emissions source,<sup>2</sup> or that isolate Pennsylvania's electric service industry through the imposition of requirements that apply solely to State generators, retail suppliers and their customers. These type of requirements only impede the development of competition within the State, discouraging participation in the State's competitive power industry and potentially generating significant additional costs for Pennsylvania consumers before it is even determined that such policies are required or that these policies will produce the desired environmental improvements in a cost-effective manner.

Respectfully submitted,



Susan M. Shanaman, Attorney for  
The Center for Energy and Economic  
Development

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Dated: February 12, 1998

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<sup>2</sup> In addition to the NOx MOU Pennsylvania has demonstrated a commitment to a number of other programs to reduce ozone levels: an enhanced vehicle inspection and maintenance program in nonattainment areas in the state; additional industrial air pollution controls through RACT (Reasonable Achievable Control Technology) requirements and New Source Review requirements for all major sources; Title V operating permits for major sources at the lowered thresholds to inventory, monitor and control emissions of NOx and volatile organic compounds; and Stage II gasoline volatility requirements, or other alternative fuel strategies throughout the state.

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February 25, 1998

REPLY TO: PAOLI

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KJR

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FEB 25 1998

PA PUBLIC UTILITY COMMISSION  
PROTHONOTARY'S OFFICE

**Re: Application of Pennsylvania Power & Light Company  
For Approval of Its Restructuring Plan  
Docket No. R-00973954**

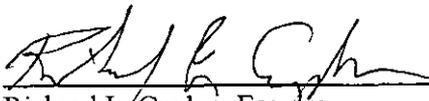
Dear Mr. McNulty:

Enclosed for filing in the above-referenced proceeding, please find an original and nine (9) copies of the Reply Brief of Schuylkill Energy Resources, Inc. and Gilberton Power Company in Opposition to the Application of Pennsylvania Power & Light Company For Approval of Its Restructuring Plan. A disk containing the brief is also enclosed.

Kindly date stamp and return the additional copy of the first page in the self-addressed envelope provided.

Very truly yours,

CAPLAN & LUBER, LLP.

  
Richard L. Caplan, Esquire

RLC\dmf

Enclosures

cc: Honorable George M. Kashi  
All parties on Certificate of Service

ORIGINAL

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Pennsylvania Power &  
Light Company for Approval of Its  
Restructuring Plan Under Section 2806  
of the Public Utility Code

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Docket No. R-00973954

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FEB 25 1998

PA PUBLIC UTILITY COMMISSION  
PROTHONOTARY'S OFFICE

REPLY BRIEF OF SCHUYLKILL ENERGY RESOURCES, INC. AND  
GILBERTON POWER COMPANY IN OPPOSITION TO THE  
APPLICATION OF PENNSYLVANIA POWER & LIGHT COMPANY  
FOR APPROVAL OF ITS RESTRUCTURING PLAN

DOCKETED  
FEB 27 1998

DOCUMENT  
FOLDER

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## INTRODUCTION

Schuylkill Energy Resources, Inc. and Gilberton Power Company, intervening non-utility generators (collectively referenced hereinafter as “objectors”), submit the following brief in reply to the main brief of PP&L, Inc., formerly Pennsylvania Power & Light Company (referenced hereinafter as “PP&L”), in this restructuring proceeding. Rather than buttress the painstakingly meticulous assessments of the suitability and correctness of the details of PP&L’s proposed competitive metamorphosis, offered by those institutional intervenors charged by law with protecting ratepayer interests, the objectors use this opportunity to advance three fundamental policy positions capable of resolving several pivotal issues in dispute.

The appearance within the briefs of a reasoned discrepancy of nearly 3.5 billion dollars between PP&L’s claim for owned generation stranded costs and the OCA’s independent assessment of PP&L’s appropriate entitlement in this regard gives rise to the first issue of paramount concern to the objectors: whether a periodic true-up of projected stranded costs, initially approved by the commission in a restructuring proceeding for recovery by an electric utility, to those actually incurred by that utility is necessary both to protect the utility’s customers from paying unconscionable CTC charges in the future (based upon phantom stranded costs) and to deny windfall profits to the incumbent monopoly provider that could subsidize its predatory manipulation of the emerging competitive market during the transition period.

PP&L’s effort in its main brief to justify material departures, both in methodology and operative assumptions, from the precedents established by the commission’s order approving the restructuring of PECO Energy, a fellow PJM utility with a geographically adjacent service territory, implicates the second of these overarching issues: whether a common strategy for

restructuring all of Pennsylvania's regulated electric utilities is essential to ensure long term equitable treatment of all stakeholders as well as the genesis of a robust, fair retail electric market.

Finally, PP&L's failure to squarely address, let alone dispel, the credible concerns, voiced by many intervenors, that several of PP&L's proposed changes to its retail tariff appear unabashedly intended to facilitate PP&L's vigorous defense of its monopoly market share against inroads by competitive suppliers invites the commission to decide generically whether it should emphasize considerations of long term competitive fairness when assessing the reasonableness of questionable tariff provisions justified as benefiting current ratepayers.

I

**ONLY A SUBSTANTIVE CTC TRUE-UP PROCEDURE, BEYOND THE  
MERE RECONCILIATION OF COLLECTIONS, CAN  
AVOID GROSS FUTURE INEQUITIES THAT COULD  
VITIATE THE ACT'S INTENDED BENEFITS.**

If any doubts remained as to the extraordinary level of uncertainty inherent in quantifying an electric utility's future stranded costs attributable to its generating assets, operating within a competitive retail electric market that does not yet exist, they have been put to rest by the gross disparity between the academically-derived estimates championed by parties to this proceeding. In addition to PP&L's \$3.63 billion claim and OCA's \$138 million rejoinder, OCA Main Brief at p. 25, PP&L's "large customers" have independently determined the appropriately recoverable amount of generation-related stranded costs to be \$798 million. Joint Main Brief of Large Customers at p. 22. All of these parties, presumptively acting in good faith, have marshaled what they steadfastly maintain to be compelling evidence which they contend supports the

accuracy of their respective work products. Can such divergent assessments of PP&L's ultimate economic success, as a marketer of its own electric generation in a developing competitive environment, all be true?

The problem for the commission is that there is little likelihood that *any* of these figures will be proven correct in the long run. PP&L virtually admits this by contending that it "in fact faces significant risk in recovering its full stranded costs" and then identifying four risk factors including "(2) the many assumptions that necessarily were used to calculate the stranded costs upon which the CTC is based; [and] (3) *the lack of any true-up under the Act of actual costs against the estimated costs used to calculate stranded costs.*" PP&L Brief at 95 (emphasis added).<sup>1</sup> Furthermore, every proponent of comprehensive stranded cost calculations tacitly acknowledges the wildly speculative nature of the undertaking by failing to qualify its estimates by postulating any numerical margin of error or other measure of statistical probability.

This state of affairs places the commission in the unenviable position of having to pick a number (whether one of the alternatives in the record or a construct or compromise of its own design), which it has every reason to believe will be shown in the future to have been substantially erroneous. That being said, the issue becomes whether the commission has an obligation to mitigate any inequitable consequences of this likely outcome and, if so, whether the Act affords it the tools or the discretion to accomplish this.

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<sup>1</sup> One might question why, if PP&L actually believes there is a substantial risk that it ultimately may not be able to recover all of its legitimately incurred stranded costs, for want of a CTC true-up procedure, it actively opposes the implementation of such a procedure, as requested by many of the intervenors. PP&L Brief at p. 141. One credible explanation is that PP&L has so thoroughly padded its stranded cost claim that it would prefer to never be called upon to account for the excessive recovery that is likely to be produced.

The objectors submit that the commission could not sit idly by, if a significant portion of a utility's previously authorized CTC were to be revealed, during the transition period, as unsupported by stranded costs *actually incurred*. In that predictable circumstance, if the commission's inaction were legally challenged, it is likely that the Commonwealth Court would deem the CTC to be a "rate" subject to the "just and reasonable" standard articulated in section 1301 of the Public Utility Code. 66 Pa. C.S. §1301. Furthermore, the Act itself imposes a legal duty upon the commission to ensure that "[t]he transition to a competitive generation market shall . . . be fair to ratepayers and provide the investors in Pennsylvania electric utilities with a fair opportunity to fully recover the amount of transition or stranded costs that the commission determines to be just and reasonable." 66 Pa. C.S. §2804 (14). Were the commission to countenance the continued payment of a CTC component that it had reason to believe was undeserved, it would abdicate its responsibility to protect the public interest.

To suggest that the Pennsylvania Legislature anticipated that the commission watchdog responsibilities would be fully satisfied, by the commission's scrutiny and approval of a utility's gross stranded cost recovery request within its restructuring plan, is incompatible with the Legislature's policy declaration that "[i]n moving toward greater competition in the electricity generation market, the Commonwealth must resolve certain transitional issues in a manner that is fair to customers . . . and other affected parties," 66 Pa. C.S. §2802 (8), and its determination that the transition process should last up to nine years. 66 Pa. C.S. §2808 (b). It is also inimical to the duty, imposed upon Pennsylvania's electric utilities "[d]uring the transition period," by section 2808 (c)(4) of the Act, "to mitigate generation-related transition or stranded costs to the extent practicable." 66 Pa. C.S. §2808 (c)(4). If future substantive adjustments to the CTC were

not anticipated, as appropriate responses to changed circumstances, the mitigation of stranded costs, *after a utility's restructuring plan was approved*, would benefit only the utility. This certainly could not be the result intended by the Legislature when it imposed the obligation.

Similarly, by making the recovery of stranded costs “associated with existing generating facilities . . . contingent on [their] *continued operation* at reasonable availability levels . . .,” 66 Pa. C.S. §2808 (a) (emphasis added), the Legislature unequivocally expected that the commission would enforce this contingency by reducing a utility’s CTC to back out stranded costs already recovered attributable to any (otherwise economic) generating plant that ceases, at any time during the transition period, to maintain reasonable levels of availability. To say that an approved CTC is sacrosanct would effectively read this salutary provision out of the Act.

The cited elements of the Act confirm by implication the commission’s power and duty to adjust a utility’s CTC over time to prevent the utility from receiving, and to free its customers from any obligation to contribute to, windfall profits in the form of CTC revenues unmatched by *bona fide* stranded costs actually incurred during the transition process. In contrast, the Act is replete with express remedies for the utility that incurs extraordinary costs, while adjusting to the rigors of competition, including stranded costs that were unanticipated during its restructuring proceeding. Section 2804 (4) (iii) sets forth seven circumstances which would justify a utility’s application to the commission to permit it to recover such costs by relaxing the rate caps imposed by section 2804 (4) (i) and (ii) of the Act. 66 Pa. C.S. §2804(4).

Reciprocity and fundamental fairness dictate that those customers, who may find themselves burdened with an unjust and indefensible CTC obligation, be afforded a remedy, comparable to a utility’s claim for relief from the Act’s rate caps. A substantive (rather than a

mere collections reconciliation) true-up of the CTC represents such a remedy.

The true-up procedure contemplated by the objectors would not unreasonably burden the commission or the utilities. It would not automatically require annual hearings. Rather, a recipient of CTC revenues would be required to file with the commission an annual report containing sufficient financial information to allow interested parties to assess whether the level of stranded costs actually incurred was commensurate with projected amounts upon which the commission-approved CTC was originally predicated. Only if discrepancies exceeded a certain threshold percentage (to be determined by the commission in a generic proceeding) would a hearing be required to reconsider the propriety the CTC.

The foreseeable adverse consequences, should the commission fail to adopt a CTC true-up procedure, are dire indeed. As PP&L itself argues, in support of accelerating as much as possible the collection of CTC revenues (which would reciprocally reduce the commission's opportunity to correct CTC over recoveries), any CTC, regardless of its validity, will distort competitive electric market prices. PP&L Brief at p. 137. What PP&L fails to acknowledge, however, is that unjustified, excessive CTC recoveries will unfairly place its customers in the position of subsidizing market retention and development activities that competitive suppliers, including Pennsylvania utilities denied the benefit of bloated CTC's, would have to finance out of operating revenues. No provision of the Act suggests a legislative intent to afford the incumbent monopoly providers this unfair competitive advantage.

PP&L also fails to admit that any methodology, which would permit it to retain rather than disgorge future CTC over recoveries, creates an incentive to exploit future opportunities to inflate these unearned amounts. While one can posit strategies to accomplish this self-serving

result that are within the realm of sound business judgment, such as finding a buyer for a generating facility, originally deemed to be uneconomic under competitive market assumptions, that is willing to pay substantially more than book value (which has recently been demonstrated to be feasible by generation-asset-divesting New England and California utilities), efforts to take advantage of this anomaly could give rise to improper, oppressive conduct.

Of particular concern to the objectors and other NUGs is the possibility that PP&L might be tempted, by the prospect of pocketing hundreds of millions of dollars with no business risk, to put economic pressure on its independent wholesale suppliers, whether operationally or through bogus regulatory compliance litigation, to force them into compromising their PURPA contract rights for sums substantially less than PP&L's aggregate CTC income attributable to these contracts. Under such a scenario, unless the commission were to step in and disallow PP&L's further recovery of stranded costs attributable to NUG contract avoidance, the utility would reap unconscionable financial rewards.

In sum, where billions of dollars in alleged stranded cost recovery are in issue, even a modest forecasting error favorable to a utility could seriously impede the development of meaningful competition in the nascent retail electric market and thereby undermine the appeal of Pennsylvania, as a favorable environment for commerce and industry, that the Act seeks to foster. 66 Pa. C.S. §2802 (6). It is therefore incumbent upon the commission to require that all electric utilities including PP&L be exposed to the prospect of periodic CTC true-up procedures as a condition of receiving any substantial award of stranded costs.

## II

### **A COMMON RESTRUCTURING METHODOLOGY IS ESSENTIAL TO AVOID GROSS INEQUITIES THAT WILL DISTORT THE RESULTING RETAIL MARKET.**

In assessing the compliance of PECO Energy's proposed restructuring plan with the requirements of the Act, as required by 66 Pa. C.S. §2806(f), the commission made certain informed choices that must be afforded precedential value in the restructuring proceedings of the remaining Pennsylvania electric utilities, if a coherent transition to meaningful retail competition is to be achieved with proper deference to the interests of all stakeholders. Unfortunately, PP&L fails to recognize that only through the application of uniform standards can the commission both equitably accommodate the valid, individual differences of each Pennsylvania electric utility and promote a grand design that best realizes the broad policy objectives of the Act.

PP&L's main brief is schizophrenic in its treatment of the commission's PECO Order. Where a provision of that order is plainly compatible with PP&L's parochial objectives, PP&L cites the commission's pronouncement on the subject with approval, as though bound by that disposition. For example, despite the Act's requirement that stranded costs be "known and measurable," 66 Pa. C.S. §2803, PP&L simplistically asserts that, because the commission awarded PECO 73% of its total stranded cost claim, its request to be allowed "to recover 70% of its gross stranded costs and approximately 90% of its net stranded costs . . . is clearly reasonable and conservative ." PP&L Brief at p. 7. PP&L similarly embraces the commission's acceptance of PECO's proposed method of recovering nuclear decommissioning costs, PP&L Brief at p. 112, as well as its refusal to require PECO to unbundle its customer metering and billing services for exposure to competition. PP&L Brief at p. 177.

In contrast, where PP&L accurately perceives that application of the PECO model to its stranded cost claims would produce a markedly less desirable outcome, albeit more consonant with the Act's intent to promote robust and fair competition, PP&L disingenuously argues that the issue is essentially one of first impression that should be resolved without deference to earlier adjudications. Despite the commission's express approval of PECO's use of an asset value methodology for estimating generation-related stranded costs, PP&L contends that "the PECO Order should not be interpreted as supporting the use of the asset value method over PP&L's proposed regulatory method," primarily because, "when properly applied, both the regulatory and asset value methods should produce comparable results because they theoretically measure the same costs." PP&L Brief at p. 46.

PP&L further justifies its departure from the PECO precedent on grounds that "the regulatory method simply was not at issue in the PECO Restructuring case" and therefore "the Commission's brief mention of the regulatory method in the PECO Order is dicta . . . ." PP&L Brief at p. 47. However, in a crowning irony, PP&L's effort to demonstrate the functional equivalence of both methods is subject, by its own admission, to the same criticism that it has leveled against the commission's choice of method in the PECO case: namely, that Tables C and D annexed to PP&L's Brief, which purport to show application of the asset value method in PP&L's case, are artifacts, dated February 12, 1998, that do not appear in the record. That these analyses were never subject to scrutiny or cross-examination by the intervenors is confirmed by PP&L itself: "[a]pplication of the asset value model is problematic here *because it is not in the record.*" *Id.* (emphasis added).

Even less defensible are PP&L's efforts to rationalize its refusal to be bound by projected

electric market price and cost values that the commission determined to be reasonable in the PECO restructuring. Despite PP&L's begrudging acknowledgment, in footnote 21 of its main brief (at p. 48), that the commission approved in its PECO Order OCA witness Smith's *projections of long term energy and capacity prices within the PJM power pool*, of which both utilities are members, PP&L champions major deviations from these figures in its own case. PP&L Brief at pp. 49 and 54. In so doing, PP&L asks the commission to accept the extraordinary proposition that stranded costs for two PJM member utilities serving adjacent regions of the Commonwealth could reasonably be predicated upon divergent forecasts of wholesale prices within a unified market treated by PP&L's own expert witness, Jones, as homogeneous.

These examples leave little doubt that gross inequities to customers and competitors alike would inevitably arise, should the commission elect to address each utility's restructuring proceeding *sui generis*, with no concern for uniformity of method or communality of variables. Having seen fit in the PECO Order to accelerate by one year the schedule for the introduction of retail competition across the Commonwealth, the commission cannot reasonably accede to PP&L's request to revert in its case alone to the Act's original time line, PP&L Brief at p. 159. To do so would selectively insulate one-third of PP&L's customer base from competition to the detriment of PECO (who would be denied the reciprocal benefit) and other competitive suppliers. If the commission has correctly denied PECO's request to recover in the CTC its "future understated projected energy costs" as a regulatory asset, PP&L Brief at p. 100, it would be inequitable to honor PP&L's comparable claim. If the commission has decided to accept a long term inflation forecast in the PECO restructuring (as a component of fuel price and variable

O&M cost forecasts), any subsequent deviation from it, such as the one requested by PP&L at page 77 of its main brief, would be extremely difficult to justify, absent a showing that geography or some other unique factor materially affected an individual utility's susceptibility to an otherwise pervasive inflation rate.

In sum, the commission should not countenance the repetitive litigation of global issues in each restructuring proceeding.

### III

#### **PP&L HAS FAILED TO DISPEL THE ANTI-COMPETITIVE AURA OF A NUMBER OF ITS PROPOSED RETAIL TARIFF MODIFICATIONS.**

Many of the intervenors in this proceeding have decried PP&L's blatant strategy to sustain a monopolistic market share by structuring its proposed retail tariff to either disadvantage those customers who exercise their right, secured by the Act, to choose an alternative provider of electricity or preferentially reward those customers who forego the opportunity to shop. PP&L has failed to squarely address or convincingly dispel these concerns, preferring instead to emphasize the economic benefits to ratepayers promised by the challenged provisions.

PP&L's myopic policy defense of its tariff presents the commission with an opportunity to confirm, as a general matter, that, where rate terms and conditions appear capable of facilitating anti-competitive manipulation of the market, their arguable economic benefit to qualifying customers will normally not sustain them.

#### 1) The CTC Applicable To Interruptible Service Customers

PP&L devotes more than three pages of its main brief to attempting to refute claims by certain intervenors that PP&L's proposed retail tariff would unfairly penalize interruptible

service customers. PP&L Brief at pp. 144-147. However, notable for its absence is any mention of what the objectors and other intervenors contend is the most egregious aspect of PP&L's proposal, namely, the application to any existing interruptible service customer, who ultimately deigns to exercise its right to choose a competitive electricity provider, of the substantially *higher* CTC associated with the firm rate schedule applicable to that customer's level of load. See, for example, Joint Main Brief of Large Customers at pp. 71 *et seq.*. PP&L's failure to meet this objection head on adds credence to claims that PP&L's ulterior motive is protectionist. Customers should not be punished economically by an EDC merely for taking advantage of competitive market opportunities.

2) PP&L's Customized Rate Design ("CRD")

PP&L admits at the outset the characteristic of its "innovative" CRD most troubling to the bulk of the intervenors:

If . . . a customer were to use more electric energy per year during the transition period than in 1996, the customer would pay less under the CRD than under the traditional rate design . . . PP&L's proposed CRD would recover less stranded cost from customers that increase energy usage.

PP&L Brief at pp. 148-149. However, PP&L again avoids squarely addressing the intervenors' primary objection. PP&L's claim that the Act does not prohibit a CRD type of rate design, Id. at 149, sidesteps the inherent anti-competitive impact of this provision. The reduction in non-bypassable CTC promised by the CRD would provide existing customers a potent incentive to continue buying electricity from PP&L that would be denied to those that availed themselves of supplier choice. The commission should not permit such flexibility in rate design when it would have such predictable, market-skewing consequences.

### 3) Preservation Of Existing Economic Incentive Rates

PP&L fails miserably in its defense of its proposal to extend substantially the period of availability of economic incentive rate riders, rate schedules and preferential billing options (beyond their presently scheduled termination dates) only for existing customers who continue to take service from PP&L's regulated Electric Delivery Group ("BUS Service"). PP&L Brief at pp. 150 *et seq.* That a consequence of the discontinuance of these options "would be that affected customers would pay more for service than they would pay if the incentive rates were continued," PP&L Brief at pp. 151-152, should not blind the commission to the anti-competitive impact of PP&L's proposal.

PP&L would like nothing better than to be able to offer its existing customers prolonged, economically subsidized rates to buy their continued loyalty during the transition period. For PP&L to claim that completing the previously scheduled termination of these temporary, preferential programs would burden those customers now benefiting from them with higher energy costs erroneously discounts the positive impact upon energy market prices of the anticipated, vigorous competition among suppliers. Ironically, PP&L challenges, on precisely this basis, the validity of the energy and capacity price forecasts relied upon by OCA's experts: "the most telling criticism of these witnesses' projections is that their sharply increasing market price scenarios are contrary to the reasonably expected and intended results of electric deregulation . . . Simply stated, *deregulation and competition produce lower prices.*" PP&L Brief at p. 49 (*emphasis added*).

There is absolutely no evidence in the record of this proceeding that vigorous competition will fail to afford PP&L's customers economic benefits at least equivalent to, if not greater than,

those conveyed by existing economic incentive rates and billing options. Furthermore, those customers currently enjoying economic incentive rates knew, when they initially qualified for these special benefits, that the rewards would be transitory. PP&L cannot credibly argue that the currently anticipated termination of these rates would vitiate any prior service commitment.

Given the substantial probability that the gratuitous extension of such preferential programs will impermissibly skew the development of the competitive market, the commission should not approve these tariff provisions.

#### 4) Service To Customers Without A Competitive Generation Supplier

Many intervenors, including the objectors, have protested PP&L's proposal to have its competitive Generation Supply Group (rather than its regulated Electric Delivery Group) provide service to customers not yet eligible for choice, who refrain from exercising this right or who return to PP&L for service during the transition period after selecting a competitive supplier. PP&L's sole defense of this questionable role reversal, i.e., that these customers, though served by an unregulated vendor, would be charged "traditional regulated rates," PP&L Brief at p. 179, again begs the question of whether assigning these customers to PP&L's competitive arm would unfairly subsidize that entity during the early years of its struggle to win market share.

PP&L's claim that its approach is "consistent with the PECO Order," *Id.*, is also misleading. While the commission confirmed in the PECO Order the obligation upon the EDC, imposed by section 2807(e)(1) of the Act, to serve such customers "until it is no longer collecting a CTC/ITC," PECO Order at p.131, the commission never suggested that this obligation could appropriately be transferred to the EDC's unregulated competitive supplier affiliate, even if regulated rates were charged for service. Again, the overt propensity of PP&L's proposal to

economically enhance its competitive operations during the transition period requires the commission to reject it out of hand.

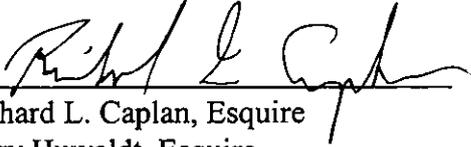
#### IV

#### CONCLUSION

For the foregoing reasons, PP&L's restructuring plan should not be approved in its present form.

Respectfully submitted,  
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Dated: February 25, 1998

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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In the Matter of Pennsylvania Power & :  
Light Company's Restructuring Plan : Docket No. R-00973954

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**CERTIFICATION OF SERVICE**

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I hereby certify that I have this day served a true copy of the foregoing documents upon the participants, listed below, in accordance with the requirements of §1.54 (relating to service by a participant):

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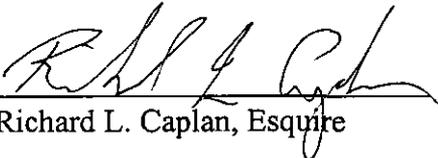
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KJR ORIGINAL

Re: Pennsylvania Power & Light Company's  
Restructuring Plan  
Docket No. R-00973954

Dear Mr. McNulty:

Enclosed for filing please find an original and nine (9) copies of the Reply Brief of the International Brotherhood of Electrical Workers, Local 1600, in the above-referenced proceeding. A copy of this document has been served on Administrative Law Judge Kashi and all parties of record, as shown on the attached certificate of service.

Sincerely,

  
Scott J. Rubin, Esq.

Enclosures

cc: Hon. George Kashi, ALJ (with diskette)  
All parties of record

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BEFORE THE  
COMMONWEALTH OF PENNSYLVANIA  
PUBLIC UTILITY COMMISSION

ORIGINAL

APPLICATION OF PENNSYLVANIA POWER AND :  
LIGHT COMPANY FOR APPROVAL OF ITS : DOCKET No. R-00973954  
RESTRUCTURING PLAN UNDER SECTION 2806 :  
OF THE PUBLIC UTILITY CODE :

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REPLY BRIEF  
OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,  
LOCAL 1600

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DOCUMENT  
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DATED: FEBRUARY 27, 1998

COUNSEL FOR:  
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## INTRODUCTION

International Brotherhood of Electrical Workers, Local 1600 (“IBEW”), submits this Reply Brief to respond to a few erroneous assertions made by other parties to this case. IBEW’s Main Brief fully discusses the issue on which IBEW has focused its attention: the Marketers’ proposals to require PP&L to let non-utilities provide billing and metering services.

IBEW will not repeat its arguments on this issue here. Indeed, there is nothing in the briefs filed by the other parties that would lead IBEW to change its position.

None of the other parties addressed the legal authority for the Commission to allow a non-utility to provide billing and metering services. The reason for this is clear: the Commission has absolutely no authority to permit non-utilities to own or control utility meters or to bill for services that are provided by a public utility. See IBEW Main Brief at 3-10.

Consequently, regardless of the merits of the various factual and policy arguments that are made by the Marketers (and they do not have merit, as IBEW explained in its Main Brief), the Commission is prohibited from ordering the relief that the Marketers request. The Commission cannot permit a non-utility to provide metering or billing services.

The Marketers did not provide any legal analysis of the Commission’s authority on this issue and, as a result, there is little to which IBEW needs to respond. However, the Joint Main Brief of Competitive Intervenors (“C.I. Main Brief”) contains a few arguments that might lead to an inaccurate impression if they were not corrected. Therefore, IBEW will briefly address a few points made by the Marketers. IBEW’s silence on an issue, or its failure to address an argument made by another party, should not be construed as acceptance. Rather, it should be construed for what it is: the irrelevance of those arguments given the limits of the Commission’s legal authority.

## ARGUMENT

### X. CODE OF CONDUCT AND COMPETITION ISSUES

#### D. ADDITIONAL COMPETITIVE RESTRICTIONS PROPOSED

8. THE COMMISSION SHOULD NOT PERMIT ALTERNATE SUPPLIERS TO BILL FOR DISTRIBUTION SERVICES AND BE THE SOLE CONTACT FOR CUSTOMER SERVICE

The Marketers leave the impression in their Main Brief that California already has competitive billing and metering for utility services, and that such competition is necessary in order to have a competitive market for electric generation. C.I. Main Brief at 43-45. In fact, though, California has only issued an order that permits such competition for residential and small commercial customers to begin in 1999. There is no experience in that state with the provision of billing and metering services to small customers by non-utilities.

Moreover, while California's order may be of some academic interest to the Commission, the Commission already has ruled on this issue and found that competitive billing and metering is not required in order for competition in electricity supply to occur. As IBEW stated in its Main Brief, the Commission held in its PECO decision that it is not necessary to unbundle metering and billing in order to have a competitive generation market. See IBEW Main Brief at 11, citing *Application of PECO Energy Company for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code and Joint Petition for Partial Settlement*, Docket No. R-00973953 (Pa. PUC Dec. 23, 1997), slip op. at 139.

Interestingly, the New York Public Service Commission has reached precisely the same conclusion. In *Opinion and Order Establishing Regulatory Policies for Competitive Metering, In the Matter of Competitive Opportunities Regarding Electric Service*, Case 94-E-0952, Opinion No. 97-13 (NY PSC Aug. 1, 1997), that commission concluded that "competitive metering is not

a necessary precondition for the introduction of retail electric competition.” *Id.*, slip op. at 3.<sup>1</sup>

The New York commission, therefore, refused to allow anyone other than an electric utility to provide metering services to residential and small business customers.

Finally, on pages 46-47 of their Brief, the Marketers cite to this Commission’s Customer Services Order. *Final Order Re: Guidelines for Maintaining Customer Services at the Same Level of Quality Pursuant to 66 Pa. C.S. §2807(D), and Assuring Conformance with 52 Pa. Code Chapter.56 Pursuant to 66 Pa. C.S. §2809(E) and (F)*, Docket No. M-00960890 F. 0011 (Pa. PUC July 11, 1997). In so doing, however, they cite to the Commission order of July 11, 1997, rather than to the Commission’s order in that same docket on August 21, 1997, *Final Order Re: Guidelines for Maintaining Customer Services at the Same Level of Quality Pursuant to 66 Pa. C.S. §2807(D), and Assuring Conformance with 52 Pa. Code Chapter 56 Pursuant to 66 Pa. C.S. §2809(E) and (F)-Petition for Reconsideration, Clarification, Rescission, and Amendment of the International Brotherhood of Electrical Workers’ Pennsylvania Utility Caucus*, Docket No. M-00960890 F. 0011 (Pa. PUC Aug. 21, 1997) (a copy of which is attached hereto as Appendix A). In its August 21<sup>st</sup> Order, the Commission acknowledged that IBEW’s Petition for Reconsideration, Clarification, Rescission, and Amendment raised several legal issues that the Commission had not considered. As the Commission stated: “[W]e do recognize that all of the arguments presented by IBEW have not been considered by the Commission in setting up these guidelines or in any other electric competition proceeding. Rather than being addressed here, we anticipated that metering and billing issues would be addressed in each restructuring case.” *Id.*, at 3-4.

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<sup>1</sup> A copy of the New York decision is included on the diskette that is being provided to the Administrative Law Judge. Paper or electronic copies will be made available to other parties upon request.

The Commission then concluded its Reconsideration Order by stating that it intended only to direct the parties to “consider this guideline” in the restructuring cases, concluding that the July 11<sup>th</sup> Order “is not a final disposition on these issues.” *Id.*, at 5.

Consequently, the Commission’s July 11<sup>th</sup> Order, on which the Marketers rely, is without legal significance. The Commission subsequently acknowledged that it had not considered all of the relevant legal issues and that it was merely asking the parties to do so in each restructuring case. That is precisely what IBEW has done in this case, where it has demonstrated that the Marketers’ proposals would violate numerous provisions of the Public Utility Code.

CONCLUSION

For the reasons set forth in this Reply Brief and in its Main Brief, *International Brotherhood of Electrical Workers, Local 1600*, respectfully requests the Pennsylvania Public Utility Commission to issue an order that prohibits any entity other than Pennsylvania Power and Light Company from providing and maintaining electric meters and from rendering bills for electric distribution service within the service territory of Pennsylvania Power and Light Company.

Respectfully submitted,



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Counsel for:  
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Dated: February 27, 1998

PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17105-3265

Public Meeting held August 21, 1997

Commissioners Present:

John M. Quain, Chairman  
Robert K. Bloom, Vice-Chairman  
John Hanger,  
David W. Rolka,  
Nora Mead Brownell,

Final Order Re: Guidelines for  
Maintaining Customer Services at  
the Same Level of Quality Pursuant  
to 66 Pa. C. S. § 2807 (D), and Assuring  
Conformance with 52 Pa. Code Chapter 56  
Pursuant to 66 Pa. C. S. § 2809 (E) and (F)-  
Petition for Reconsideration, Clarification,  
Rescission, and Amendment of the International  
Brotherhood of Electrical Workers' Pennsylvania  
Utility Caucus

Docket No. M-00960890 F 0011

ORDER

BY THE COMMISSION:

On July 11, 1997, the Commission issued an order setting guidelines for  
maintaining customer services at the same level of quality under retail competition, as  
required by the *Electricity Generation Customer Choice and Competition Act (Act)*<sup>1</sup>, and  
for assuring conformance with the standards and billing practices for residential service at

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<sup>1</sup> The Act revised the Public Utility Code, 66 Pa. C. S. §§ 101, *et seq.*, by, *inter alia*, adding Chapter 28, relating to restructuring of the electric utility industry.

52 Pa. Code, Chapter 56 (hereinafter referred to as *Guidelines Order*).<sup>2</sup> On July 25, 1997, the International Brotherhood of Electrical Workers' Pennsylvania Utility Caucus (IBEW) filed the subject petition requesting that the Commission reconsider, clarify, rescind, and amend the July 11, 1997 order to make clear that the following services must be provided by electric distribution companies (EDC) and cannot be provided by electric generation suppliers: disconnecting and meter reading services; billing for distribution-related charges; distribution-related complaint resolution and related customer service functions; and other similar functions. On August 11, 1997, Enron Power Marketing, Inc., filed an answer opposing IBEW's petition.

In support of its petition, IBEW first notes that it did not file comments in this proceeding because it believed that metering issues would be addressed in the Commission's metering docket and billing issues would be addressed in each restructuring case. Then, IBEW cites certain provisions in the *Guidelines Order* (pages 10-11) allowing the implementation of the supplier single bill option and supplier complaint handling in all restructuring cases. Also, IBEW notes that the *Guidelines Order* (page 23) provides for other entities (other than EDCs) performing nonphysical meter reading.

In reaching these conclusions, IBEW argues that the Commission failed to consider the legal requirements imposed by the Act and other provisions of the Public

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<sup>2</sup> On April 25, 1997, we issued a *Tentative Order* at this docket proposing guidelines and soliciting comments on the proposed guidelines.

Utility Code (Code), and the Commission's regulations. Thereafter, the petitioner lays out its basic position that generation suppliers are not public utilities and certain legal requirements imposed in the Code and Commission regulations, involved in providing electric service, cannot be met by a generation supplier or other non-utility entity.

In particular, IBEW maintains that there are certain legal obligations for metering and billing customers and providing customer service that are placed on a public utility. IBEW submits that it is not possible for an EDC to satisfy these obligations if it does not own, maintain, and read the meter and issue the resulting bill for service. Further, IBEW asserts that both the Act and the Commission's regulations state that meter reading must be performed by the EDC. Finally, the petitioner contends that Section 2807 (d) of the Act requires the EDC to continue to provide complaint resolution and collection services. IBEW requests that the Commission grant its petition.

In considering the subject petition seeking reconsideration pursuant to 66 Pa. C. S. § 703 (g), the Commission will follow the well-established standard enunciated in Quick v. Pennsylvania Gas and Water Company, 56 Pa. PUC 553, 559 (1982); where we will find merit with petitions raising "new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission." Here, we do recognize that all of the arguments presented by IBEW have not been considered by the Commission in setting up these guidelines or in any other electric competition proceeding. Rather than being addressed here, we anticipated that

metering and billing issues would be addressed in each restructuring case. Therefore, we have not overlooked the issues raised by IBEW.

Although we declined to open up generic proceedings on these and other issues because of the limited time period allowed for hearing and resolution of the restructuring proceedings, we did recognize that the proceeding on the electric utility restructuring plans would examine transition issues, such as metering and billing, that involve employees of EDCs.<sup>3</sup> In fact, the content of the restructuring plans required under Section 2806 (d)<sup>4</sup> must discuss the impacts of the proposed plan on the utility's employees. See 66 Pa. C. S. § 2806 (e). We specifically noted that this issue along with other important issues would be explored in the restructuring proceedings (*Filings Order*, pages 6-7).

Furthermore, one of the issues to be explored -- permitting generation suppliers to bill all charges -- is contemplated in Appendix A (page 34), which sets forth the information to be supplied with the plan and is attached to the *Filings Order*. Therefore, Guideline II. B. in the *Guidelines Order* which requires utility restructuring plans to provide for suppliers to render a consolidated bill and engage in complaint handling, and is opposed by IBEW, is entirely consistent with the Commission's *Filings Order* issued

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<sup>3</sup> *Order Re: Electric Utility Restructuring Filings Made Pursuant to 66 Pa. C. S. § 2806 (e)*, (hereinafter referred to as *Filings Order*), Docket No. M-00960890 F. 0003 (Pa. PUC Feb. 13, 1997) at page 3 and Appendix A, page 31.

<sup>4</sup> A provision of the Act at 66 Pa. C.S. §2806(d) requires that each electric utility in the Commonwealth submit to the Commission a restructuring plan between April 1, 1997 and September 30, 1997. The plan will, in effect, restructure the rates, rules, regulations and practices of each jurisdictional electric utility in accordance with the intention of the Act and meet the new market structure.

almost five full months before on February 13, 1997. As stated in our *Tentative Order* (page 2), “[t]he Guidelines are intended to assist the parties in the preparation, litigation and resolution of the Restructuring Filings of each utility by setting forth the Commission’s current views regarding how those issues should be addressed in the restructuring proceedings.” Therefore, our resolve to have the parties consider this guideline and Guideline III. G. on Metering/Meter Reading is not a final disposition on these issues and, on this basis, we hold that the subject petition is premature.

Finally, we have analyzed the effect that participation may have in these restructuring proceedings:

Those parties with limited resources are not shut out of the process. They may still participate in the earliest filed restructuring plan proceedings and advance their views. If adopted, and of meaningful precedential value and applicability, such resolution will be applied to other cases in the same manner as any other adjudication.

*Filings Order*, page 10. Clearly, IBEW has had the opportunity to address the issues in the restructuring proceeding that it is attempting to raise here. Although the restructuring proceedings involving a few companies may be near completion,<sup>5</sup> IBEW can still attempt to intervene in recently filed restructuring plan proceedings,<sup>6</sup> or plan to intervene in future restructuring proceedings<sup>7</sup> and raise the issues it presently is attempting to raise through

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<sup>5</sup> PECO Energy and Pennsylvania Power and Light Company (PP&L) filed their plans on April 1, 1997. IBEW intervened in the PP&L proceeding.

<sup>6</sup> On June 1, 1997, GPU Energy filed its plan. Allegheny Power and Duquesne Light Company have only recently filed their respective plans on August 1, 1997. UGI Utilities, Inc., filed its plan on August 7, 1997.

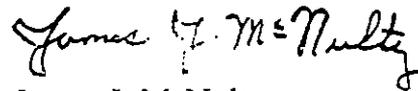
<sup>7</sup> On September 30, 1997, Citizens Electric Company, Penn Power, Pike County Light & Power Company and Wellsboro Electric Company will file their plans.

this petition. In the restructuring proceedings, we will have the benefit of a full briefing schedule and an administrative law judge's initial decision before having to decide these issues; THEREFORE,

IT IS ORDERED:

That the petition for reconsideration, clarification, rescission and amendment filed by the International Brotherhood of Electric Workers' Pennsylvania Utility Caucus is hereby denied on the merits.

BY THE COMMISSION,



James J. McNulty  
Acting Secretary

(SEAL)

ORDER ADOPTED: August 21, 1997

ORDER ENTERED: **AUG 21 1997**

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

ORIGINAL

In the Matter of Pennsylvania Power :  
and Light Company's Restructuring : Docket No. R-00973954  
Plan :  
:

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CERTIFICATE OF SERVICE

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I hereby certify that I have this day served a true copy of the Reply Brief of the International Brotherhood of Electrical Workers, Local 1600, upon the active participants, listed on the following pages, by first class mail in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

  
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Dated: February 26, 1998

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DOCUMENT  
FOLDER

February 26, 1998

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

Re: Pennsylvania Power & Light Company's  
Restructuring Plan  
Docket No. R-00973954

Dear Mr. McNulty:

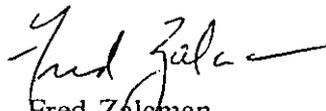
KJR

Enclosed for filing please find an original and nine (9) copies of the Reply Brief of the Environmentalists in the above-referenced proceeding.

Please note that in lieu of a separate Reply Brief Mr. Eric Epstein joins in Section IV of the Environmentalists' Reply Brief.

A copy of this document has been served on Administrative Law Judge Kashi and all parties of record, as shown on the attached certificate of service.

Sincerely,

  
Fred Zalcmán  
Senior Attorney

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enc.

cc: Hon. George Kashi, ALJ  
All parties of record

**ORIGINAL**

COMMONWEALTH OF PENNSYLVANIA  
BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Power & Light Company ) Docket No. R.-00973954  
Restructuring Plan )

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**REPLY BRIEF**  
**OF THE ENVIRONMENTALISTS<sup>1</sup>**

**I. Introduction**

In its Initial Brief, Environmentalists offered a number of recommendations, which, if adopted will further the interests of adequate, efficient, equitable, and environmentally sustainable energy services to Pennsylvania Power & Light's (PP&L) existing customers. In advancing these recommendations, Environmentalists have, for the most part anticipated and responded to the arguments in opposition. Therefore, this Reply Brief will be limited to three issues raised in the main briefs of other parties, and not fully briefed to this point.

First, Environmentalists respond to the positions taken by PP&L and the Center for Energy and Economic Development (CEED) on the Environmentalists' recommendations to level the competitive playing field between older (generally dirtier) and newer (generally cleaner) generators. The opposing parties' contentions that the Environmentalists' recommendations on "environmental comparability" are beyond the scope of the Commissions' authority and risks a Commerce Clause challenge cannot be sustained.

Second, Environmentalists argue herein that PP&L's proposal to assign an increasing percentage of capacity to jurisdictional customers now dedicated to the

<sup>1</sup> Eric Epstein joins in Section IV. of this brief.

**DOCKETED**  
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fulfillment of wholesale contracts violates traditional ratemaking principles a fundamental fairness.

Third, Environmentalists respond to the rationale underlying PP&L's proposal for recovery of nuclear decommissioning costs through a wires charge. Specifically, PP&L's position is a misreading of the Commission's PECO decision which assigns post-restructuring nuclear decommissioning costs to the plant owner.

## **II. Environmental Comparability**

In our direct case, the Environmentalists called on the Commission to consider the many linkages between economic and environmental policy as it undertakes a restructuring of the electric industry. In particular, we urged the Commission to be vigilant to the threats that differential environmental regulatory standards will have on the development of a robust and competitive generation market, and on the environmental health and sustenance of the Commonwealth. We called on the Commission, in exercising its authority to license and regulate "electricity suppliers", to require a certification by such suppliers that the power they sell has been generated by plants meeting Pennsylvania's more exacting standards applicable to new sources (hereinafter referred to as "emissions portfolio standard" or "EPS")<sup>2</sup>.

This recommendation is challenged by PP&L and CEED.<sup>3</sup> PP&L offers three arguments for rejecting Environmentalists' proposal for an emissions portfolio standard. First, PP&L contends that the Commission lacks jurisdiction to implement an EPS.<sup>4</sup> Second, PP&L points to the significant capital expenditures that PP&L anticipates

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<sup>2</sup> Environmentalists' Statement No. 1 (Schoengold), pp. 34-37.

<sup>3</sup> CEED was organized to "educate the public and policymakers about the new technologies and broad economic benefits of coal when used to generate electricity." Main Brief of CEED, p. 1. CEED sponsored no witnesses in the proceeding; nor did it participate in the cross-examination of Environmentalists' or other parties' witnesses.

<sup>4</sup> PP&L Main Brief, p. 195.

making in the near future to meet applicable environmental regulations.<sup>5</sup> Third, PP&L argues that there is no evidence supporting a "claim that existing plants enjoy a competitive advantage under the current environmental regulatory scheme."<sup>6</sup>

CEED's objections<sup>7</sup> rest on three primary grounds. First, CEED contends that the Commission lacks the authority to promote environmental goals. Second, CEED invokes the Commerce Clause as a bar to Commission action to secure environmental improvement. Third, CEED argues that the imposition of an environmental standard on competitors in the Pennsylvania market is counterproductive.

As set forth below, the arguments raised by PP&L and CEED lack merit.

A. The Record Evidence Demonstrates that a Lack of Environmental Comparability Hurts Competition and the Environment.

Contrary to PP&L's assertion, there is ample record evidence to support the Environmentalists' claim that older plants derive a significant competitive advantage by virtue of their exemption from more stringent Clean Air Act requirements. PP&L's argument is especially hollow, insofar as the evidentiary record on this point includes the prior sworn testimony of its own witness, Susan Tierney, in a regulatory proceeding before the New Jersey Board of Public Utilities. Indeed, the whole thrust of Dr. Tierney's New Jersey testimony was to suggest ways of eliminating a "gross distortion in the present market [represented by] the subsidy enjoyed by older plants in New Jersey and

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<sup>5</sup> *Id.*, p. 196.

<sup>6</sup> *Id.*, p. 196.

<sup>7</sup> CEED's brief nowhere specifically identifies the proposals it is urging the Commission to reject. Rather, the brief raises nebulous complaints with respect to "positions [that] have been put forth" (p. 1) and "entreaties of interest groups" (p.5). Any other reference in the CEED brief that can be inferred to apply to the Environmentalists' proposal for a emissions portfolio standard seriously mischaracterizes the proposals means and ends.

elsewhere in the region that have been grandfathered from the full effect of clean air laws."<sup>8</sup> Dr. Tierney elaborates on the problem that PP&L is quick to dismiss:

Newer generating plants...operate according to much more stringent standards. Many older plants have been sheltered from modern environmental standards, under the expectation that these plants would be retired before long, and would be replaced over time by a fleet of cleaner plants. This assumption no longer is valid as we stand on the eve of a more competitive electricity market. We now expect that many existing plants, because of their economics and their insulation from clean air laws, will continue to operate well beyond their original retirement dates. Without an incentive to induce electric generators to operate under comparable emissions standards, those generators that are subject to less stringent environmental standards will have an undue advantage in the competitive generation market -- an advantage that we think the Board should remove.<sup>9</sup>

That the problem of environmental comparability is real and not simply conjectural is borne out by the Competition Act, which sets forth the General Assembly's findings that:

Under Federal and State clean air laws and regulations, electricity generators located in states to the west and south of this Commonwealth are not subject to requirements as stringent as those which apply to generators...operating in this Commonwealth and that different regions within the Commonwealth are subject to varying emissions requirements. Under some scenarios, competition among electricity generators located in different states and different regions within this Commonwealth could make it more difficult for areas in this Commonwealth to demonstrate attainment with Federal and State air quality standards.<sup>10</sup>

The Clean Air Act Amendment's (CAAA) phase-in of additional control requirements that affect PP&L's generation improves, but does not eliminate, the imbalance between

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<sup>8</sup> Exhibit DS-6 (Testimony of Dr. Susan F. Tierney, on behalf of Intercontinental Energy Corporation, New Jersey Board of Public Utilities Docket No. EX94120585Y, In the Matter of the Energy Master Plan Phase I Proceeding to Investigate the Future Structure of the Electric Power Industry, July 26, 1996.).

<sup>9</sup> Id., p. 8.

<sup>10</sup> 66 Pa.C.S. § 2803 (21).

old and new generation. Significant disparities in control costs and emissions rates will continue notwithstanding the CAAA.

B. An Emissions Portfolio Standard is Well Within the Plenary Authority Granted to the Commission to Regulate the Terms and Conditions of Service Offered by Electricity Suppliers in the Competitive Marketplace.

PP&L and CEED both argue that the PUC lacks the authority to implement an EPS. These contentions flow from the parties' mischaracterization of the Environmentalists' proposal as tantamount to establishing the PUC as a "superboard of directors for environmental policies."<sup>11</sup> CEED's depiction of the Environmentalists' proposal as "regulat[ing] the implementation of clean air standards"<sup>12</sup> is clearly a straw man which bears no resemblance to the actual proposal Environmentalists' have offered for the PUC's consideration; namely, to ensure that electricity suppliers serving the Pennsylvania market construct portfolios that meet the Commonwealth's more stringent new source standards. Similarly, PP&L's contention that the EPS would impose new environmental requirements "above and beyond compliance with current law and regulation from environmental regulators" is similarly misplaced.<sup>13</sup>

In drawing attention to the problem of "environmental comparability" Environmentalists did not advocate (nor was it was it our intention to suggest) that the Commission act as an environmental regulatory agency and impose new or more stringent emissions requirements on older generators. Clearly, such actions are the province of the USEPA and the Department of Environmental Protection.

Rather, Environmentalists' proposal amounts to no more than an additional condition on electricity suppliers in order to receive a license to do business in

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<sup>11</sup> CEED Main Brief, pp. 1-2.

<sup>12</sup> *Id.*, p. 1.

<sup>13</sup> PP&L Main Brief, p. 196.

Pennsylvania.<sup>14</sup> Such a condition falls squarely within the PUC's purview under 66

Pa.C.S. § 2809 (Requirements for electric generation suppliers); to wit:

(b)...

A license shall be issued to any qualified applicant, authorizing the whole or any part of the service covered by the application, if it is found that the applicant is fit, willing and able to perform properly the service proposed and to conform to the provisions of this title and the lawful orders and regulations of the commission under this title, including the commission's regulations regarding standards and billing practices, *and that the proposed service, to the extent authorized by the license, will be consistent with the public interest and the policy declared in this chapter...*<sup>15</sup>

As already noted above, the General Assembly has declared, as a matter of state policy, the elimination of disparate environmental standards and the concomitant environmental and economic impacts.

The cases cited by PP&L for the proposition that the PUC has limited authority in the environmental area are readily distinguishable. In both *Country Place Waste Treatment Co., Inc. v. Pa. P.U.C.*, 654 A. 72 (Pa. Commonwealth Ct. 1995) and *Rovin v. Pa. P.U.C.*, 502 A. 2d 785 (Pa. Commonwealth Ct. 1986) the Commission was acting on complaints filed by the respective petitioner to abate nuisances emanating from the respondents' facilities. In both cases, the Commonwealth Court found that the Commission lacked broad environmental enforcement authority.

By contrast, Environmentalists' requested relief is not for the remediation of violations of existing environmental regulations. Instead, Environmentalists are asking the Commission to exercise its wide authority to set the rules for the restructured electric industry in a way that minimizes the attendant environmental impacts. In this respect,

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<sup>14</sup> See, Docket No. M-00960890, f. 0004.

<sup>15</sup> 66 Pa.C.S. § 2809 (b) [italics added].

Environmentalists' recommendation is more akin to the steps taken by the Commission to require electricity suppliers to fully disclose their energy sources.<sup>16</sup>

The jurisdictional constraints PP&L and CEED would impose on the Commission should be resisted. As PP&L witness Tierney forcefully stated in her New Jersey testimony:

While the Board may not have direct authority over environmental problems, the Board should not lose sight of the potential for industry restructuring to foster a cleaner environment.<sup>17</sup>

C. An Emission Portfolio Standard Does Not Run Afoul of the Commerce Clause.

CEED next contends that "imposition of equal environmental standards on participants in the electric supply market by the State will encourage an interstate commerce challenge that could significantly delay State efforts to implement restructuring."<sup>18</sup> CEED does not, however, favor the Commission with a constitutional analysis tending to show that such a challenge is even colorable. Rather, the harm identified by CEED is delay brought about by court review. Environmentalists submit that the Commission has not buckled under to similar threats of delay brought about by constitutional challenges to allowed stranded cost recovery, and the Commission should rebuff such threats here.

The objective of the dormant Commerce clause is to prevent state protectionism. This idea is that the relevant trade unit is the nation and not individual states. "[O]ne state in dealing with another may not place itself in a position of economic isolation."

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<sup>16</sup> Order, Docket No. M.-00960890, f.0008 (Chapter 28 Electric Generation Customer Choice and Competition Act--Customer Information--Interim Requirements), July 10, 1997, p. 19. While the Commission declined to require emissions disclosure "at this time", the Commission based its decision on the merits. Its discussion of emissions disclosure reveals no hint that the Commission considered its adoption of such a requirement to be *ultra vires*.

<sup>17</sup> Exhibit DS-6, p. 6.

*Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935). The test for violations of the dormant Commerce Clause vary depending on whether a statute is facially neutral and has only an incidental burden on interstate commerce or whether it discriminates against interstate commerce either on its face or in practical effect. See *Pike v. Bruce Church, Inc.* 397 U.S. 137 (1970); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1981).

Facially neutral statutes which appear to place a merely incidental burden on interstate commerce will be reviewed for dormant Commerce Clause violations under the less exacting test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970):

[W]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits....If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a less impact on interstate activities.

397 U.S. at 137. Though a statute is facially neutral, it will be scrutinized to ensure that it does not discriminate in its practical effect. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1981).

As an initial matter, the emissions portfolio standard is not facially discriminatory. Such a mechanism requires all electricity suppliers wishing to sell power in Pennsylvania, regardless of whether they (or the generators with whom they have contracted) are located inside or outside the state, to demonstrate that they meet Pennsylvania's air quality standards. The fact that both in-state and out-of-state sources will be under the same obligation to meet Pennsylvania air quality standards if they wish to sell power in Pennsylvania militates against a finding of discrimination. This is predicated on the theory that an equal burden on both in-state and out-of-state entities "is

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<sup>18</sup> CEED Main Brief, p. 5.

a powerful safeguard" against legislative discrimination. See *Minnesota Clover Leaf Creamery Co.*, 449 U.S. 456, 473, n. 17 (1981).

The purpose of protecting health and safety of Pennsylvania's environment and citizens is clearly legitimate. The Supreme Court has "consistently rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety." H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 535 (1949):

[B]urdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected . . . But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach, the general contours of which were outlined in Pike v. Bruce Church. . . .

City of Philadelphia v. New Jersey, 437 U.S. at 623; 98 S.Ct. at 2535.

Under Pike, the protection of the legitimate state interests embodied by the environmental comparability provisions must then be balanced against the burden that will be placed upon interstate commerce. Without a much more detailed analysis of the market conditions in Pennsylvania and surrounding states, it should not be assumed that the EPS will impose any burden upon commerce, much less a burden that is *interstate* in nature.

It should be noted that suppliers could come into compliance through a variety of actions, such as increasing their percentage of renewable resources and other clean technologies, or by purchasing credits. By contrast, absent an EPS, the Commonwealth has little recourse but to bring a lawsuit under § 126 of the Clean Air Act against a sister

state for permitting pollution that impairs Pennsylvania's ability to meet ambient air quality standards.

The analogous case of *Exxon v. Maryland*, 437 U.S. 117 (1978) suggests that the EPS would not be prohibited by the dormant Commerce Clause. In this case Maryland prohibited producers or refiners from operating retail service stations within the State after accumulating evidence that gasoline stations operated by producers and refiners had received preferential treatment during the energy crisis. Exxon, a gasoline producer which operated retail service stations in Maryland, argued that the law impermissibly burdened interstate commerce because it would cause several refiners to stop selling in Maryland and would therefore deprive the Maryland consumer of certain special services only they provided. *Id.* at 127. Even if true, the Court held that neither consequence constituted an impermissible burden upon interstate commerce. First, the Court stated that an otherwise valid regulation was not made invalid because it "causes some business to shift from one interstate supplier to another." *Id.* Second, the Court rejected the notion that the Commerce Clause protects the particular structure of or methods used in a retail market. "It may be true that the consuming public will be injured by the loss of the high-volume, low-priced stations operated by the independent refiners, but again that argument relates to the wisdom of the statute, not to its burden on commerce." *Id.* at 128.

D. Failure to Impose an Emissions Portfolio Standard Will Skew the Competitive Generation Market.

Finally, CEED contends that the "potential value of broader competition should not be sacrificed by putting artificial and inappropriate barriers on the Pennsylvania market..."<sup>19</sup> Environmentalists agree. Unfortunately, as recognized by the General Assembly, we are not writing on a blank slate; the disparate environmental standards

places newer (and downwind) sources at "an undue competitive disadvantage".<sup>20</sup>

Without first addressing these market distortions, opening major markets to distant and relatively dirty generators will only exacerbate the economic and environmental harm identified by the legislature.

Moreover, CEED seems to believe it is possible to keep environmental and economic policy separate. In fact, environmental and economic policies are very thoroughly intertwined, especially insofar as the production and delivery of electric energy are concerned.<sup>21</sup>

### **III. Jurisdictional Allocation**

PP&L's stranded cost methodology presupposes that as its wholesale contracts expire, the dedicated capacity *automatically* becomes the cost responsibility of Pennsylvania jurisdictional customers. Environmentalists and OCA have strenuously opposed the Company's proposal to impose an ever-mounting stranded cost burden on retail customers as the Company's bulk power contracts expire. Such an unwarranted shift in cost responsibility will saddle PP&L's jurisdictional customers with an even greater stranded cost burden, while subsidizing PP&L's wholesale business.<sup>22</sup>

The Company complains that Environmentalists and OCA would deny them stranded cost recovery for resources "which would have been needed to serve such increased load if regulation had continued."<sup>23</sup> There are at least three problems with this analysis. First, PP&L has not demonstrated that the capacity represented by these *wholesale* contracts will be necessary to serve *retail* load under the principles of

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<sup>19</sup> *Id.*, p. 4.

<sup>20</sup> 66 Pa.C.S. § 2802 (21).

<sup>21</sup> Environmentalists' Statement No. 1-S (Schoengold), p. 7.

<sup>22</sup> Environmentalists' Statement No. 1 (Schoengold), p. 18.

<sup>23</sup> PP&L Main Brief, at 89.

traditional regulation.<sup>24</sup> Second, especially as regards potentially stranded costs, a retrospective analysis of cost responsibility is appropriate. Here, we are dealing with assets that were built to serve certain loads. As OCA witness La Capra remarked, "to the extent costs that had been allocated to the wholesale jurisdiction becomes stranded in the future, it is inappropriate to charge these costs to retail customers."<sup>25</sup>

Finally, to assert as PP&L does here, that the resources now dedicated to the wholesale market should be assimilated in the retail revenue requirement, is to fundamentally ignore the paradigm shift engendered by the Competition Act. As Environmentalists' witness Schoengold stated in response to the Company's proposal:

This position ignores the important point that stranded costs are not generating assets, but rather economic losses of no value. Therefore, it makes much more sense to make a jurisdictional allocation of those costs based on the last point at which they did represent generating assets--that is the point in time at which the decision was made to end the generation monopoly, restructure the utilities, and move towards competition.<sup>26</sup>

The Company's argument that intervenors apply an inconsistent standard--recognizing future load growth for stranded cost recovery purposes, but ignoring the impact of such load growth on the need for new capacity--is spurious. The sales forecast *is* relevant to stranded cost recovery. The amount of stranded costs the Company recovers should, at the end of the day, be no more and no less than established in the instant proceeding.<sup>27</sup> By contrast, the the sales forecast has been rendered largely *irrelevant* as a resource planning tool by the Competition Act, which establishes the framework for load growth to be anticipated, and ultimately satisfied by a competitive

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<sup>24</sup> OCA Statement No. 1 (La Capra), p. 9.

<sup>25</sup> *Id.*, p. 9.

<sup>26</sup> Environmentalists' Statement No. 1-S (Schoengold), p. 7.

<sup>27</sup> Cite to Competition Act

generation market. The Company's anachronistic use of the sales forecast to support a greater retail share of stranded cost recovery should not be sanctioned.

For the foregoing reasons, the Commission should reject PP&L's proposal for an escalating jurisdictional allocation.

#### **IV. Nuclear Decommissioning Costs**

PP&L has proposed that it recover its nuclear decommissioning costs, estimated at \$724 million<sup>28</sup>, through a distribution charge.<sup>29</sup> The Company maintains that this proposal is consistent with the Commission's recent decision in the PECO restructuring case.<sup>30</sup> However, there is an important distinction between the Company's proposal and the mechanism adopted by the Commission in PECO.

In PECO, the Commission established a bright line between "that portion of nuclear decommissioning expense associated with the period in which the plants were in service to the public, through January 1, 1999"<sup>31</sup>, and those nuclear decommissioning costs incurred in the post-restructuring period. As to the former, the Commission agreed with the Company's "basic proposal" that consumers shoulder the cost burden. As to the latter, the Commission again agreed with the PECO position that "it, or its affiliate or future owners of each plant, should be responsible for that portion of the decommissioning costs related to its remaining useful life."<sup>32</sup> Thus, the Commission allowed PECO to recover its existing under-collections through an annuity collected through regulated distribution rates.

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<sup>28</sup> Reported in 1993 dollars. Environmentalists' Statement No. 2 (Biewald), p. 30 (citing to PP&L Response to Environmentalists' Interrogatories, Set III, Q. 139).

<sup>29</sup> PP&L Statement No. 3 (Schadt), p. 12.

<sup>30</sup> PP&L Main Brief, p. 112.

<sup>31</sup> PECO Order, p. 78.

<sup>32</sup> Id.

Here, PP&L proposes to collect not only its existing under-recovery but all estimated decommissioning costs over the remaining life of the Susquehanna nuclear facility.<sup>33</sup> Environmentalists' witness Bruce Biewald underscored the problems associated with writing the Company a blank check as to its nuclear decommissioning costs:

It may be reasonable to have a "wires charge" for a portion of the decommissioning funding. It is not reasonable, however, to have the wires charge be the sole means for funding the Company's nuclear decommissioning obligations. This would, in effect, provide a subsidy to the continued operation of the plant. It would also relieve the plant operator from the burden of controlling decommissioning costs.<sup>34</sup>

For these reasons, Environmentalists recommend a sharing of decommissioning costs between the customers (in a wires charge) and the generation portion of the company.

The Company's concerns that placing a share of the nuclear decommissioning cost responsibility on the generation owner is overblown. The Nuclear Regulatory Commission has proposed regulations to address the changing landscape caused by deregulation. The NRC's proposed amended regulations on Financial Assurance Requirements for Decommissioning Nuclear Power Plants<sup>35</sup> recommends a definition of electric utilities which will largely avoid the situation where restructuring will trigger a pre-funding or surety requirement:

...the NRC is proposing to revise its definition of "electric utility" to introduce additional flexibility to address potential impacts of electric industry deregulation. The Commission notes that the key component of the revised definition is a licensee's rates being established either through cost-of-service mechanism *or through other non-bypassable charge mechanisms, such as wire charges, non-bypassable customer fees, including securitization or exit fees, by a rate-regulating authority...*<sup>36</sup>

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<sup>33</sup> PP&L Statement No. 3 (Schadt), p. 14.

<sup>34</sup> Environmentalists' Statement No. 2 (Biewald), pp. 36-37.

<sup>35</sup> *Federal Register*, September 10, 1997, Volume 62, Number 175, Proposed Rules, pp. 47588-476060.)

<sup>36</sup> *Id.*, pp. 47593-47594 (italics added).

Clearly, the NRC has anticipated PP&L's financial apprehension, and has taken steps to ameliorate the concerns expressed at the time of the utility's filing.

**V. Conclusion**

For the reasons stated herein and in the Initial Brief of the Public Interest Parties, the Commission should: 1) adopt Environmentalists' proposal for an emissions portfolio standard applicable to all electricity suppliers in the Pennsylvania market; 2) reject the Company's proposal to shift a greater stranded cost burden on jurisdictional customers as it wholesale contracts expire; and 3) reject the Company's proposal to collect all current and future nuclear decommissioning costs as a distribution charge. For the reasons previously stated in the Initial Brief of Public Interest Parties, the Environmentalists' recommendations set forth therein should be adopted.

Respectfully submitted,

Attorney for Environmentalists  
by:

A handwritten signature in cursive script, appearing to read "Fred Zalcman", is written over a horizontal line.

Dated: February 26, 1998

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CERTIFICATE OF SERVICE

ORIGINAL

I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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**Docket No. R-00973954**

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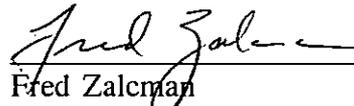
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**Page 4**

**Docket No. R-00973954**

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Fred Zalcman  
Senior Counsel

Dated this 26th day of February, 1998, at White Plains, New York.

COMMONWEALTH OF PENNSYLVANIA  
BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

ORIGINAL

Pennsylvania Power & Light Company )  
Restructuring Plan )

Docket No. R.-00973954

**REPLY BRIEF**

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Hon. George M. Kashi  
Administrative Law Judge  
Pa. Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

**Re: Application of Pennsylvania Power & Light Company  
For Approval Of Its Restructuring Plan Under  
Section 2806 the Public Utility Code  
Docket No. R-00973954**

KJR

Dear Judge Kashi:

The views of the Office of Small Business Advocate on those issues in PP&L's restructuring proceeding that are of particular interest to this Office were fully developed in the Main Brief of the Office of Small Business Advocate that was filed and served earlier this month. Resisting the temptation to take another "bite of the apple" by responding in detail to each contrary contention in PP&L's and other parties' main briefs, the OSBA will forego its opportunity to file a Reply Brief in this case. We would note, however, that the concerns we previously expressed about PP&L's initial proposal for a Customized Rate Design (see pages 35-37 of the OSBA's Main Brief) are now moot. On page 148 of its Main Brief (in footnote 72), PP&L unequivocally states that the Customized Rate Design would be optional for all customers, as the OSBA had proposed.

Sincerely yours,

*Bernard A. Ryan, Jr.*  
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cc: James McNulty, Prothonotary

Parties of Record

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Pennsylvania :  
Power & Light Company For :  
Approval Of Its Restructuring :  
Plan Under Section 2806 Of : Docket No. R-00973954  
The Public Utility Code :

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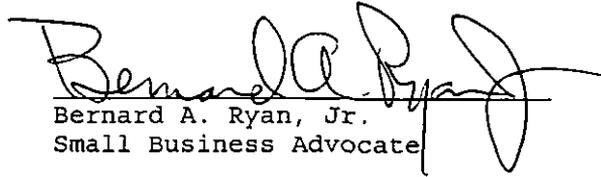
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Re: Pennsylvania Public Utility Commission  
v.  
Pennsylvania Power and Light Company  
Docket No. R-00973954

Dear Secretary McNulty:

KJP

Enclosed please find an original and nine (9) copies of the Reply Brief of the Office of Trial Staff for filing in the above-captioned proceeding. Copies are being served upon all active parties of record.

Very truly yours,

Johnnie E. Simms  
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Office of Trial Staff

JES:sjh

c: Honorable George Kashi  
Parties of Record

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

**ORIGINAL**

PENNSYLVANIA PUBLIC UTILITY :  
COMMISSION :

v. :

PENNSYLVANIA POWER AND :  
LIGHT COMPANY :  
(RATE RESTRUCTURING) :

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REPLY BRIEF  
OF  
THE OFFICE OF TRIAL STAFF

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BEFORE  
ADMINISTRATIVE LAW JUDGE  
GEORGE KASHI

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Dated: February 27, 1998

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## I. INTRODUCTION

On February 12, 1998, the Office of Trial Staff ("OTS"), filed its Main Brief in this proceeding setting forth the evidence and law in support of Pennsylvania Power & Light Company ("PP&L" or "Company"), recovering no more than \$3,171,875,000 in stranded costs. Main Briefs were also filed by PP&L and several other active parties in the proceeding.

OTS' Reply Brief is limited to those matters raised by the other participants in their Main Briefs, and not specifically addressed by OTS in its Main Brief, and to those matters previously addressed by OTS, but which require additional discussion as a result of the Main Briefs of the other participants. For ease of review, OTS will, for the most part herein, use the same heading as utilized in its Main Brief.

## II. LEGAL AND POLICY FOUNDATIONS OF STRANDED COST RECOVERY

### E. Allocation of Stranded Costs

#### OTS Sharing of Stranded Costs Recommendation

In its testimony on the record as well as in its Main Brief, the Office of Trial Staff (OTS) has proposed a 90% ratepayer/10% stockholder sharing of the finally determined stranded costs associated with net generating plant. As effectively explained in the OTS Main Brief, a sharing of the stranded costs between the ratepayers and the stockholders of the Company is reasonable because of the “intent” of stranded costs. As OTS witness Gruber contended, if you find it true that stranded costs are a utility’s uneconomic costs left over in a competitive environment, and that only after they are removed from the utility’s cost of generation can the utility be competitive, and thus requiring the “ratepayer” to absorb **all** stranded costs, a move that would essentially reward the Company for being an inefficient producer of electricity. It is the sharing mechanism that holds the Company to a much stronger future mitigation position than it might otherwise take.

In its Main Brief, PP&L mentions the OTS stranded cost sharing recommendation and then proceeds to combat a position taken by the Office of Consumer Advocate. Nowhere in its Brief has the Company responded to the

position taken by the OTS or any other party except for the OCA. OTS contends that the Company has completely failed to understand and respond to the “reasonableness” of the OTS sharing recommendation.

PP&L denoted several paragraphs in its introduction concerning how separate, distinct and special this restructuring case is from each and every other restructuring filing, including the PECO restructuring. The Company describes to the Judge how important it is to view this case as separate and apart from the PECO decision before it.

How ironic that when the Company turned to this section on allocation of stranded costs, it argues, at Page 39 of its Main Brief, that the PECO restructuring order should control in the determination of a just and reasonable level of stranded costs to be recovered. The Company cannot have it both ways in this case and as such, the Commission should provide some incentive for the utility to mitigate stranded costs. The OTS 90%/10% sharing mechanism recommendation is just and reasonable and the Commission should find in favor of the OTS position in this matter. A 10% absorption by the stockholders will lower the Competitive Transition Charge (CTC for stranded costs associated with generation plant) by **\$234,545,000**. See OTS Exhibit No. 1, Schedule 4.

### III. STRANDED COST CALCULATION METHODOLOGY

#### A. Regulatory Method

To respond to the recommendations and positions taken by PP&L in their Main Brief are akin to returning to a traditional electric utility base rate case. On Page 45 of the Company's Main Brief, in explaining why it used the regulatory method to calculate stranded costs, PP&L notes that "...the regulatory method prevents an electric utility from deriving an unfair benefit from the transition to competition." As explained above, the regulatory method is designed to ensure that, at worst, a utility may only receive the level of revenues that it would have recovered under current Commission-approved rates.

As stated in the OTS Main Brief on Page 14, stranded costs exist because of the differences between a regulated and a competitive market. What PP&L has suggested in its filed stranded cost methodology is a continuation of the world as it was.

OTS has stated that it has accepted the methodology used by the Company to calculate the stranded cost amounts. The one contention OTS has is that one of the inputs used by the Company, the Company's use of the Common Equity return allowed by the Commission in its last rate case, that being 11.5%, is too high and hence inappropriate and should be disallowed for purposes of usage in the stranded cost methodology. From the old regulation framework, in the Company's

calculation of the Common Equity component of the cost of capital, the Commission allows for a certain amount of risk. Using PP&L's Common Equity return of 11.5% for purposes of determining the stranded cost recovery, the Company will be guaranteed recovery of all of its stranded costs and the risk involved will drop to zero. As stated by OTS witness Gruber and left unrefuted by the Company, the Company's 11.5% Common Equity return will have no effect on competition and will have an adverse affect on the price that current Company ratepayers will pay for electricity. See OTS Main Brief p. 16-21.

OTS contends that a **6.6%** return for common equity is fair, just and reasonable, and reflects the currently projected interest on a 9 year Treasury note.

*One component of the common equity return allowed in a traditional rate case is an allowance for risk. It is the OTS position that PP&L faces near zero risk in recovering its stranded costs and therefore, the common equity return should reflect a near zero risk.*

## V. REVENUE UNDER REGULATION

### B. Cost of Capital

#### 1. Equity

##### a. Introduction

At pages 21 through 39 of its Main Brief, OTS discussed that based upon the Discounted Cash Flow ("DCF") results, the utilization of sound judgment and considering current and future economic conditions, OTS' witness determined that a reasonable and appropriate cost of common equity for PP&L is 10.25 percent. For the reasons set forth in OTS' Main Brief and in this Reply Brief, OTS believes that the evidence of record conclusively establishes that 10.25 percent on cost of common equity is appropriate, especially considering current and future economic conditions. OTS' proposed cost of common equity should be reflected in PP&L's restructuring of its rates and the recommendations of PP&L, which are hereinafter addressed under separate headings, and should be rejected.

##### b. Opposing Parties' Cost of Equity Recommendations

This section flows directly from the previous argument and is a continuation of the argument regarding the appropriate common equity return component for the stranded cost methodology.

On pages 94-96 of the Company's Main Brief, they analyze the OTS' Cost of Equity recommendations.

Regarding OTS witness Kevan Deardorff's recommendations of a **10.25%** cost of equity allowance, the Company suggests that the Commission should reject it because it understates PP&L's cost of capital. PP&L witness Moul is wrong. The 10.25% return reflects normal business conditions and normal risks on equity absent any consideration of the stranded assets return.

Regarding OTS witness Michael Gruber's recommendation that the Commission adopt a 6.6% return on common equity, the Company suggests that such is inappropriate and should be rejected. PP&L further suggested that Mr. Gruber's 6.6% recommendation was at odds with Mr. Deardorff's proposed cost of equity allowance of 10.25%.

OTS contends that PP&L's argument is incorrect, without merit and a clear attempt to mislead the calculations in question. This inconsistency argument demonstrates PP&L's confusion or intentional misrepresentation of OTS' recommendations in order to create confusion before this Commission. Mr. Deardorff's and Mr. Gruber's results are mutually exclusive and PP&L would like the Commission to gloss over this most critical step in order to assure itself of a 100% stranded cost recovery at any price.

e. Cost of Common Equity

1. PP&L Witness Moul's Cost Of Equity Recommendation Is Overstated And Should Be Rejected.

In its Main Brief at pages 21 through 48, OTS addressed the reasons its cost of common equity should be adopted. In its Main Brief, OTS made specific cited references to the evidence of record not only in support of its recommendation(s), but also in providing the critical aspects of PP&L's recommendation(s). In contrast, PP&L, in its Main Brief as set forth in footnote 42 on page 94, presented what could best be described as bald assertions without any citation to the evidence of record, fact or case law(s). OTS respectfully submits that PP&L's cost of common equity recommendation should be rejected on this basis alone.

Additionally, a closer review of PP&L's comments in footnote 42 on page 94 of their Main Brief, reveals that the comments are without merit. For example, PP&L suggests that nuclear generating capacity is not a determinative consideration in selecting companies for inclusion in the Barometer Group. OTS submits that no party in this proceeding has suggested that nuclear generating capacity is the "sole" factor, but it is a significant factor in forming a Barometer Group, as are a number of other factors; however, if the selected Barometer Group is skewed due to the failure to recognize the difference in nuclear generating capacity between PP&L and a potential Barometer Group, then the issue must be addressed by the Commission. There

should be no dispute that the selected Barometer Group in this proceeding must be similar to PP&L. In that regard, as discussed on pages 29 through 30 of OTS' Main Brief, PP&L witness Moul's Barometer Group has 15 percent nuclear generation compared to PP&L's generation mix of 31 percent. OTS respectfully submits that it is nonsensical for PP&L to suggest in its Main Brief that Mr. Moul's selected proxy group, with 15 percent nuclear generation, adequately captures the operating and financial characteristics of PP&L with 31 percent nuclear generating. After all, one of the purposes of this proceeding is to determine PP&L's stranded costs, and one of the components of stranded costs is the Company's nuclear generation. Notably, PP&L's own rate of return witness acknowledged on page 2 of PP&L Exhibit PRM 1, that generation mix is an element of risk. Consequently, as OTS witness Deardorff did in this proceeding, selecting a Barometer Group that has nuclear generation in the range of 31 percent, which is similar to PP&L will adequately capture the operating and financial characteristics and/or risk associated with the Company, and will be of assistance in this proceeding.

Another example of PP&L presenting argument with no merit is its assertion in footnote 42 on page 94, that "Mr. Deardorff deleted five companies from the Barometer Group he used in PP&L's last base rate case, and the deleted companies are plainly relevant to an analysis of PP&L's cost of equity." First of all, PP&L's last base rate case occurred over four years ago, the financial and operating characteristics

between PP&L and the deleted companies, which had previously been similar, changed over the course of four years. Additionally, as previously referenced, PP&L asserted that "the deleted companies are plainly relevant to an analysis of PP&L's cost of equity", in responding OTS submits that PP&L failed to present any record evidence to support its assertion about the relevancy of the "deleted companies". A careful review of the record evidence suggests that PP&L has not provided any credible evidence about the relevancy of the "deleted companies" other than the assertion itself, and without any credible evidence, such a bald assertion should have no evidentiary weight and should be rejected.

With respect to PP&L's criticism that Mr. Deardorff's Barometer Group includes companies that have cut their dividends, OTS submits that such criticism is unfounded. As Mr. Deardorff correctly pointed out, Value Line indicated in its June report on PP&L that "the stock's high yield reflect worries about a dividend cut." See Value Investment Survey, June 13, 1997. Based upon the Value Line information there is no justification to exclude companies from the Barometer Group that have, from a historical perspective, cut dividends in the past. More importantly, once again, PP&L has made an assertion without providing any substantiative credible evidence to support the assertion. Accordingly, PP&L's assertion should be rejected.

Finally, on page 93 of its Main Brief, PP&L criticizes Mr. Deardorff because his proposal will result in a 3.44 times pre-tax interest coverage. In its Main Brief,

PP&L argues that its "pre-tax interest coverage must be above the 3.5 times threshold for the "A" rating for an electric utility with an average business position."<sup>1</sup> PP&L Main Brief at 93; PP&L St. 6-R, at 8. The Company's arguments regarding the appropriate pre-tax interest coverage is contradictory and unsubstantiated as it relates to issue of cost of common equity. In that regard, as previously noted above, PP&L has based its argument for an appropriate pre-tax interest coverage by focusing on an "A" rated electric utility, however, its cost of common equity witness, Mr. Moul acknowledged on cross-examination, in pertinent part, as follows:

Q. Mr. Moul, what is PP&L's current rating?

A. "A-" by Standard & Poor's

Q. Now, can we agree that Standard & Poor's publish "A" rating and "BBB" rating?

A. That is correct. The benchmark criteria for those ratings, correct.  
(Emphasis Added).

See Tr. 1887 on August 28, 1997.

OTS respectfully submits that the above quoted acknowledgment is significant because the Company is aware that PP&L's rating is "A-" and not "A" as presented in its Main Brief.<sup>2</sup> Moreover, the argument is seriously flawed when the Company

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<sup>1</sup> Revised to 3.39 times pre-tax interest coverage. See OTS SR-3, at 4, OTS Exh. SR-3, Sched. 6 updated.

<sup>2</sup> Additionally, Mr. Moul acknowledged that Standard & Poor's publish "A" rating and "BBB" rating.

presents argument choosing the "A" rating as the threshold point when, in fact, PP&L's rating is "A-". The comment may arise that, on the surface, it does not appear to be a major difference between "A" or "A-" electric utility ratings. OTS submits that there is a major difference as it relates to pre-tax interest coverage as illustrated as follows:

Rating	Midpoint	Range
A	3.50	3.34-3.66
A-	3.17	3.01-3.33
BBB+	2.83	2.67-3.00
BBB	2.50	2.34-2.66

"Standard & Poor's Corporate Rating Criteria; OTS St. SR-3 at 4.

There are several conclusions that should be reached based upon the above illustration. First of all, there are two increments between the BBB and A ratings, the range between the two points must be trisected in order to arrive at an appropriate comparison for PP&L's "A-" rating. *Id.*, at 3-4. Second, by virtue of consistency, if PP&L is wedded to the midpoint range, then PP&L should have recommended a pre-tax interest coverage of 3.17 as presented for "A-" electric utilities, like PP&L. Finally, it is clear that Mr. Deardorff's recommended return on equity of 10.25 percent results in an overall pre-tax return that affords an opportunity to achieve a pre-tax

interest coverage ratio of 3.39 times, which is consistent with an "A" rating and exceeds the range for an "A-" rating.

A review of the evidentiary record in this proceeding clearly demonstrates that the Company has not produced any credible evidence either factually, published financial documents (e.g. Value Line Investment) or Commission Orders to support its cost of common equity recommendation in this proceeding. In contrast, OTS, through its Main and Reply Brief, has presented credible evidence both factually, published financial documents and Commission Orders to support its recommendation of a 10.25 percent cost of common equity for PP&L.

C. Regulatory Assets And Liability

3. Taxes Other Than Income

As discussed in OTS' Main Brief at pages 49 through 54, PP&L has assumed an inflation factor to its Taxes Other Than Income in this proceeding. To a large degree, OTS has fully addressed this issue in its Main Brief. However, in its Main Brief on page 105, PP&L argued that "the opposing parties' recommendation would freeze capital stock and PURTA tax revenues to the Commonwealth at 1996 levels." OTS submits that the rates for all electric utilities were frozen effective December 31, 1996. The "revenue neutrality", as set forth in Section 2810 of the Act, was established as of December 31, 1996. 66 Pa. C.S. §2810. A review of Section 2810 of the Act reveals that there is no reference either explicitly or by implication, which

defines the tax rate calculation as a factor for inflation. PP&L witness Schadt testified as follows:

Q. Would I not be correct that in Section 2810 there is no reference to inflation?

A. It does not specifically reference the term "inflation".

See Tr. 1592-August 26, 1997.

OTS submits that if the General Assembly intended that revenue neutrality included an inflation adjustment, such an adjustment would have been provided for in the Act. In the absence of any reference to inflation, PP&L should be prohibited from including inflation in its calculation for Taxes Other Than Income. If the Commission adopts the recommendation of PP&L, the obvious question arises, as to what occurs when the Commonwealth does not increase taxes in a particular year or years, does PP&L refund the money to its customers or give the additional funds to its shareholders? Not surprisingly, PP&L did not answer the question or provide a method to address an obvious question, because the method proposed by PP&L will only increase its stranded cost claim, and will have no effect on the taxes owed by PP&L to the Commonwealth. Accordingly, for the reasons presented in OTS' Main and Reply Brief, OTS' recommendation, as it relates to Taxes Other Than Income, should be adopted.

4. Fossil Plant Decommissioning

With regard to the Company's claim for fossil fuel decommissioning, OTS witness Mr. Gruber did not recommend any adjustment to the level of the Company's decommissioning claim, but did recommend that if the Commission allowed such decommissioning recovery, that PP&L be ordered to aggregate the money collected in a separate non-qualified trust fund.

PP&L finds OTS' recommendation "inappropriate, inconsistent with Section 2806(A) of the Act." Once again, the Company is using the tactic of confusion of the Act in order to support its own position without justifying its position in law or fact.

OTS has made no adjustment in its review of the Company's filed requests for fossil decommissioning costs.

This means that the OTS agrees with the Company! It seems absurd that PP&L would object to a simple and straightforward tracking system for following the fossil decommissioning collections in order to protect the Company, and any *future fossil fuel plant owner from complications when such decommissioning must take place.* The Company should not be allowed the unfettered control of funds specifically designated for decommissioning so that it can "utilize [such amounts] in conducting ongoing business activities." PP&L St. 3-R, pp. 34-35.

Additionally, in Footnote 55 on page 109 of PP&L's Main Brief, the Company, in one of its (many detailed footnotes laced throughout its brief) questions the clarity of Mr. Gruber's position, asking whether the OTS recommendation also means the segregation of recorded amounts into separate funds for each fossil generating facility. The answer for the Company is a hardy "yes". One particular plant's funds for decommissioning should be earmarked for that specific facility. Unlike the Company's flimsy argument that such a proposal is *inappropriate and contrary to the public interest*, the OTS contends that such a recommendation is absolutely appropriate and in the public interest because it assumes that each fossil generating plant will individually have funds to accommodate the required decommissioning that must be done when a facility shuts down. The Company's notion of some kind of "borrowing system" of funds is just the kind of dangerous money changing that could potentially leave a particular facility unfunded or underfunded.

## VI. APPROPRIATE DISCOUNT RATE

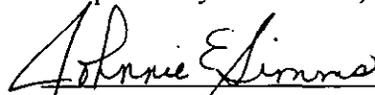
- A. Appropriate Discount Rate
- B. Application of Discount Rate

The appropriate discount rate and its application, as set forth in OTS witness Deardorff's Direct and Surrebuttal Testimonies identified as OTS Statement No. 2 and Statement No. SR-3 and explained again in the OTS Main Brief are unrefuted by the Company and the OTS position should be adopted as just and reasonable by this Commission.

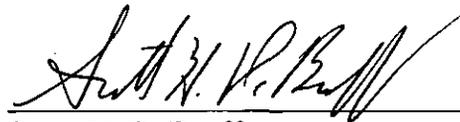
XIV. CONCLUSION

For all the foregoing reasons as set forth in this OTS Reply Brief, as well as the OTS Main Brief, the Office of Trial Staff respectfully requests that this Commission find in favor of those positions submitted by this office in this restructuring filing before the Commission.

Respectfully submitted,



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Office of Trial Staff  
Pennsylvania Public Utility Commission

Dated: February 27, 1998

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Pennsylvania Public Utility  
Commission**

v.

**Pennsylvania Power & Light Company**

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**Docket No.  
R-00973954**

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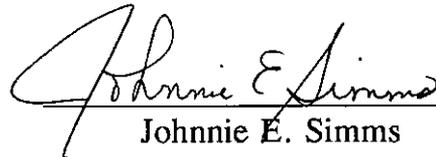
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Date: February 27, 1998  
R-00973954

ORIGINAL

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February 27, 1998

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VIA HAND DELIVERY

James McNulty, Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

RE: Application of Pennsylvania Power & Light Company  
For Approval of its Restructuring Plan Under Section 2806  
of the Public Utility Code;  
Docket No. R-00973954

Dear Mr. McNulty:

Enclosed please find the original and nine copies of the Joint Reply Brief of the Competitive Intervenors in the above-referenced matter. As indicated on the attached Certificate of Service, copies of this document are being served this day on the parties in the manner indicated.

If you have any questions, please contact the undersigned.

Respectfully,

Alan Kohler

For WOLF, BLOCK, SCHORR and SOLIS-COHEN, LLP

AK/cln  
Enclosures  
cc: All Parties of Record  
Hon. George M. Kashi (w/disk)

DSH:11441.1

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**ORIGINAL**

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of PP&L for Approval of :  
its Restructuring Plan Under Section 2806 : Docket No. R-00973954  
of the Public Utility Code :

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**DOCUMENT FOLDER** JOINT REPLY BRIEF OF COMPETITIVE INTERVENORS<sup>1</sup>

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**DOCKETED**  
MAR 03 1998

<sup>1</sup> The Competitive Intervenors are Enron Power Marketing, Inc., New Energy Ventures, the Mid Atlantic Power Supply Association, and the Pennsylvania Petroleum Association.

## **I. STATEMENT OF THE CASE**

Following hearings in the above-referenced electric restructuring proceeding, a briefing schedule was established under which main briefs were due on February 12, 1998 and reply briefs due on February 27, 1998. This Reply Brief is submitted on behalf of the Competitive Intervenors<sup>2</sup> in accord with the proscribed briefing schedule.

## **II. INTRODUCTION AND SUMMARY OF ARGUMENT**

Through its Main Brief, Pennsylvania Power and Light Company ("PP&L") "sticks to its guns" and advocates implementation of an anti-competitive market structure and rate design which would attempt to erect every barrier to entry imaginable. Simply put, if permitted to do so, PP&L will assure that there is no competition for the foreseeable future. At the same time, PP&L seeks to recover approximately \$4 billion from ratepayers, which under the Electricity Generation Consumer Choice and Competition Act<sup>3</sup> ("Act") can be recovered only if a fully competitive market is implemented.

Through this Reply Brief, the Competitive Intervenors respond to the various arguments made in the briefs of PP&L and several other parties. Summarily, the

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<sup>2</sup> As set forth above, the Competitive Intervenors are Enron Power Marketing, Inc. ("Enron"), New Energy Ventures ("NEV"), the Mid Atlantic Power Supply Association ("MAPSA"), and the Pennsylvania Petroleum Association ("PPA").

<sup>3</sup> 66 Pa.C.S. §2801 et seq.

Competitive Intervenors advocate that the Commission continue its march towards implementation of the meaningful competitive environment that the Act demands.

### III. ARGUMENT

#### A. PP&L's CTC Rate Design Methodology is Violative of the Act as Interpreted by the Commission.

The rate design methodology applicable to the CTC has become one of the most crucial issues to be determined in EDC restructuring proceedings since the rate design of the CTC has a direct and substantial impact on the level of the shopping or energy and capacity credit ("ECC").<sup>4</sup> Because the level of this credit is critical both to the development of a meaningful competitive retail electric environment and to the level of savings available to shopping customers, the CTC must be designed carefully in furtherance of the pro-competitive objectives of the Act.<sup>5</sup>

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<sup>4</sup> The credit applicable to customers who shop is also frequently referred to as the "generation credit".

<sup>5</sup> As the Commission stated in its PECO Restructuring Order:

Setting the EEC below price levels at which even the most efficient competitors could sell electricity or below market prices strangles competition by making it impossible to compete for retail customers. Simply put, if set too low, the ECC will mean that electric customers in PECO's service territory will have few or no competitors for their business. To use witness Silkman's term, PECO would be a "de facto monopoly."

PECO Restructuring Order, p. 16.

Most importantly, in the PECO Restructuring Order,<sup>6</sup> the Commission determined that the EDC's rates and the competitive transition charge ("CTC") must be established from the "top down" rather than from a "bottom up" in order to comply with the spirit and letter of the Act. By designing EDC rates from the "top down" rather than from the "bottom up," the shopping credit becomes the residual of present, tariffed rates following establishment of transmission and distribution ("T&D") rates and the CTC.<sup>7</sup>

Although the Commission's determinations in its PECO Restructuring Order are only directly applicable in PECO's service territory, the principles and standards governing the rate design of the CTC and the shopping credit are clearly generic determinations which were intended as the Commission's interpretation of the Act and are not distinguishable between EDC service territories. While the level of T&D rates and the amount recovered by the CTC will vary significantly from EDC to EDC, the

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<sup>6</sup> Application of PECO Energy Company for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code, ("PECO Restructuring Order") R-00973953 (December 23, 1997); Reconsideration Order (January 16, 1998); Compliance Filing Order (February 5, 1998).

<sup>7</sup> As the Commission explained:

The shopping consumer pays only the T&D rate and the CTC to the EDC when purchasing generation in the competitive market. The addition of the T&D rate and the CTC produces a total sum of charges that when compared to the customer's rate in effect as of January 1, 1997, gives rise to the concept of a "shopping credit." The shopping credit is not a selected number. It is the number that results from the difference between a particular customer's total rate as of January 1, 1997 and the sum of T&D and CTC rates established pursuant to this order.

PECO Restructuring Order, p. 42 (emphasis added).

Commission should require adoption of the methodology endorsed in the PECO Restructuring Order for all EDC restructuring proceedings.<sup>8</sup>

Unfortunately for PP&L, it proposed a "bottom-up" approach to design its CTC as described in its Main Brief.<sup>9</sup> Under its approach, the shopping credit is calculated first by "pegging" the shopping credit at PP&L's projection of prevailing market price, which market prices are "largely wholesale prices" being applied to a retail market.<sup>10</sup> The CTC then becomes the residual of its prevailing market price projections and the generation rate cap.<sup>11</sup>

Under PP&L's proposal, it would then recover the CTC from customers for whatever period is necessary to recover its Commission approved level of transition and stranded costs,<sup>12</sup> subject to any constraints imposed by the rate cap.<sup>13</sup> Reconciliation for actual sales is proposed by PP&L to occur through adjustment of the duration of CTC

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<sup>8</sup> The Competitive Intervenors described the five-step "top down" methodology endorsed by the Commission in great detail in their Joint Main Brief, pp. 10-13.

<sup>9</sup> PP&L Main Brief, pp. 135-36. The Large Customers also proposed a "bottom up" approach to CTC design in their Joint Brief. The Large Customers' proposed methodology is generally subject to the same criticisms as PP&L's approach, as set forth below. Large Customers' Joint Main Brief, pp. 65-68.

<sup>10</sup> PP&L Main Brief, pp. 135-36, Tr. 835 (August 19, 1997).

<sup>11</sup> PP&L Main Brief, pp. 135-136.

<sup>12</sup> PP&L Main Brief, p. 136.

<sup>13</sup> PP&L Main Brief, pp. 138-39.

recovery.<sup>14</sup> The intended result is that, regardless of the level of Commission-approved transition and stranded costs, the shopping credits in PP&L's service territory will never depart from its projections of "largely wholesale," prevailing market prices until every dime of transition and stranded costs is recovered by PP&L.

To the amazement of the Competitive Intervenors, PP&L claims that its proposed rate structure is designed in a manner to promote the overall purpose of the Act, which is to establish an active and viable retail market for electric generation.<sup>15</sup> Equally amazingly, PP&L describes and supports its proposed rate design methodology without a single reference to the methodology established by the Commission in the PECO Restructuring Order.<sup>16</sup> As fully explained in the Competitive Intervenors' Joint Main Brief, PP&L's proposed "bottom-up" rate design is blatantly anti-competitive and, if adopted, would result in establishment of PP&L as a "de facto monopoly" — a result which the Commission is committed to avoiding.<sup>17</sup>

In contrast, following the Commission's five-step methodology established by the Commission in the PECO Restructuring Order allows PP&L to recovery an

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<sup>14</sup> Tr. 835 (August 19, 1997).

<sup>15</sup> PP&L Main Brief, p. 135. While the Competitive Intervenors are amazed that PP&L claims that its intent "is to establish an active and viable retail market for electric generation," it is good to hear that PP&L understands that the development of such a market is the overall purpose of the Act.

<sup>16</sup> PP&L Main Brief, pp. 134-140.

<sup>17</sup> Competitive Intervenors Joint Main Brief, pp. 8-11.

appropriate level of transition and stranded costs while at the same time designing PP&L's rates to enable the development of a meaningful competitive market. For illustrative purposes, the Commission's five step approach, as applied to PP&L, should be implemented as follows:<sup>18</sup>

- Step 1 — Allocate Costs and Determine T&D rates: 1.70¢/kwh<sup>19</sup>
- Step 2 — Identify the known and measurable level of transition and stranded costs: \$1.08 billion.<sup>20</sup>
- Step 3 — Calculate annual CTC Revenue Requirement: \$209,381,000.<sup>21</sup>
- Step 4 — Calculate a levelized CTC: 0.63¢/kwh (1999 system wide average).<sup>22</sup>

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<sup>18</sup> The methodology itself is described in detail in the Competitive Intervenors Joint Main Brief, pp. 11-12.

<sup>19</sup> OCA St. 4 (L. Smith), LS-3. This represents OCA's calculation of the system-wide average of PP&L's T&D rates. As set forth in the testimony of Enron witness Reising, in the Competitive Intervenors' view, even under the OCA analysis, the T&D rates include a dramatic overallocation of costs to T&D — costs that should be reallocated to generation — reducing the resulting T&D rates. Enron St. 3.0, 3.1.

<sup>20</sup> OCA St. 1-S (LaCapra), p. 7.

<sup>21</sup> The CTC revenue requirement includes PP&L's long term cost of debt (7.89%) as the cost of capital. The revenue requirement is calculated by applying the 7.89% cost of capital to OCA's total CTC revenue requirement as reflected in OCA St. 4-S (L. Smith), LS-10. The adjustment is necessary because OCA has proposed that no cost of capital be applicable to stranded cost recovery.

<sup>22</sup> This figure is reached by taking the CTC annual Revenue Requirement and dividing that figure by total projected sales for each year of the recovery period. Because of the presumed growth in sales, the CTC per/kwh would decline slightly over the transition period and would reach a low of 5.78 cents/Kwh in 2005. The calculation presumes a 7 year recovery period which appears to be appropriate given the relatively low level of

(continued...)

Step 5 — Calculate shopping credit: \$5.21¢/kwh (1999 system wide average).<sup>23</sup>

This 5-step "top down" approach closely tracks the Act by unbundling and designing distribution, transmission and generation rates in a manner which promotes, rather than impedes, the development of meaningful competition. There is absolutely no distinction which could reasonably justify departure from this approach in this restructuring proceeding. Although the above example is illustrative and the inputs are subject to modification, the Commission should consider the methodology itself binding on this and other restructuring proceedings.

In its Main Brief, PP&L does comment on the Commission adoption of the long-term debt rate as the appropriate cost of capital for recovery of stranded costs and argues that under the PECO Restructuring Order, its long term debt rate of 7.89% should be adjusted upward to take into account the fact that the equity earnings of that return would be subject to income tax.<sup>24</sup> However, PP&L fails to recognize that the Commission has already rejected PECO's attempts in its compliance filing to adjust upwardly the EDC's long-term debt rate. As the Commission stated in determining that

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<sup>22</sup>(...continued)

transition or stranded costs for PP&L. If the Commission were to adopt a significantly higher level of transition or stranded costs for PP&L, the Commission should consider a longer CTC recovery period as it did in the PECO Restructuring Order.

<sup>23</sup> This calculation is reached by adding T&D rates (1.70¢/kwh) to the CTC (0.63¢/kwh) and subtracting the sum from the total average revenue per kwh (7.54¢/kwh).

<sup>24</sup> PP&L Main Brief, p. 134.

the long term debt rate itself — no higher or no lower — is the appropriate cost of capital, it stated:

In its Compliance filing PECO uses a 10.31% return for calculating the CTC. Conectiv, NEV, OCA, OSBA, Enron and PAIEUG note that the Commission's orders grant PECO a 7.47% return on the unamortized balance of recoverable stranded costs. The parties are correct that PECO's Compliance filing does not use the authorized return of 7.47% that the Commission ordered. See our December Order at page 108 and our Reconsideration Order at page 25.

The Commission's CTC return contains a return floor of 7.47% and a ceiling that is limitless. The 7.47% return is not, as PECO apparently believes, an authorized maximum return on its stranded investment. The 7.47% return is a return on the unamortized balance of recoverable stranded costs and is to be used in calculating the monthly CTC amount: however, PECO is free, commencing with the imposition of the CTC on 1/1/99, to earn as great a return as it may from the marketing of its generating portfolio.

\* \* \*

Consistent with the December Order and the Reconsideration Order, PECO must use a return of 7.47%, inclusive of all revenue requirements, in computing the CTC in its Compliance filing.

PECO Compliance Filing Order, pp. 5-6 (emphasis added).<sup>25</sup>

The OCA also ignores the clear dictate of the PECO Restructuring Order.

Undeterred by the Commission's outright rejection of tariffed rate decreases as a

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<sup>25</sup> The PECO Compliance Order was issued seven days prior to the filing of main briefs in this proceeding.

component of restructuring,<sup>26</sup> the OCA continues to argue that tariffed rate reductions are appropriate in lieu of the level of discounts otherwise provided through the competitive market.<sup>27</sup> However, OCA has not claimed that this restructuring proceeding is in any way distinguishable from the PECO restructuring as to this rate design issue. Instead, OCA merely reasserts arguments rejected in the PECO proceeding and requests the Commission "to re-examine that approach in this case."<sup>28</sup>

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<sup>26</sup> As the Commission stated in reaching this determination:

Relying principally on changing rate tariffs to deliver price benefits to ratepayers will not foster the competitive retail electric market that the Act requires for all customers, not just the largest users. In fact, providing temporary rate cuts through tariffed generation rate reductions will leave the customers without a competitive market that is their only real protection under the Act. Indeed, once the temporary rate cuts expire, customers would experience the equivalent of a horrible hangover if little or no competition exists to provide the competitive benefits the Act intends.

PECO Restructuring Order, p. 43.

<sup>27</sup> OCA Main Brief, pp. 81-83.

<sup>28</sup> OCA's arguments claim that the Commission's approach is unfair to customers who do not participate in the competitive marketplace. However, OCA continues to fail to recognize that the purpose of the Act is to bring benefits to consumers through competition, not through regulation. As the General Assembly stated in setting forth the Act's declaration of policy at 66 Pa.C.S. §2802(5):

(5) Competitive market forces are far more effective than economic regulation in controlling the cost of generating electricity.

And again at 66 Pa.C.S. §2802(7):

(7) The purpose of this chapter is to modify existing

(continued...)

**B. Any Modifications to PP&L's Existing Rates For  
Its PLR Service Must be Subject to a Rulemaking.**

In their Main Brief, the Competitive Intervenors comprehensively addressed the issue of the level of rates charged by PP&L as the provider of last resort ("PLR") serving default customers. Consistent with the General Assembly's intent through enactment of Section 2807(e) and the Commission's application of this subsection in the PECO Restructuring Order and Order on Reconsideration, PP&L, as the PLR, must charge its present tariffed rates unless modified through either a rulemaking proceeding or a Chapter 13 ratemaking proceeding.

PP&L claims that its Purchase Generation Cost Rate ("PGCR") scheme is consistent with Section 2807(e) and the Commission's PECO decisions.<sup>29</sup> However, as fully set forth in the Competitive Intervenors' Main Brief,<sup>30</sup> the transition to charging default customers the 2807(e)(3) standard of prevailing market prices plus all reasonable costs must be implemented through regulations not through PP&L's restructuring

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<sup>28</sup>(...continued)

legislation and regulations and to establish standards and procedures in order to create direct access by retail customers to the competitive market for the generation of electricity . . . .

The General Assembly recognized that while it could assure the provision of direct access to a competitive market, it could not force customers to participate. However, it is clear throughout the Act that all customers must be provided the opportunity to receive the benefits of the marketplace if they do choose to participate.

<sup>29</sup> PP&L Main Brief, pp 158-159.

<sup>30</sup> Pages 16-22.

proceeding.<sup>31</sup> How PP&L thinks it is compliant with either Section 2807(e) or the Commission's PECO decisions is a complete mystery to the Competitive Intervenors.

OCA takes a more straightforward approach and admits its proposal to implement Section 2807(e) through this or any other restructuring proceeding is inconsistent with the Commission's interpretation of Section 2807(e)(2) in the PECO decisions. While OCA admits that under Section 2807(e)(2), the Section 2807(c)(3) standard (prevailing market price plus all reasonable costs) cannot be applied until after the phase-in period, it fails to recognize that under Section 2807(e)(2), the standard can only be implemented through the promulgation of regulations and cannot be implemented through this restructuring proceeding. Furthermore, as noted by the Commission in its Order on Reconsideration in the PECO proceedings, "no party provided evidence that PECO's regulated rates should be reduced under traditional rate regulation."<sup>32</sup> This statement is equally true in this case and the OCA position should likewise be rejected.

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<sup>31</sup> Section 2807 (e)(2) expressly requires that the subsection(e)(3) standard be implemented through the promulgation of regulations. Furthermore, in the PECO Restructuring Order, the Commission stated, "Pursuant to Section 2807(e)(2), the Commission will adopt regulations defining the terms and conditions of service for the provision of PLR service at market prices."

<sup>32</sup> Order on Reconsideration, p. 22.

**C. The Commission Should Require PP&L to Submit a Well-Designed Supplier Tariff.**

In its Main Brief, PP&L has not addressed the Supplier Tariff proposed by Enron witness Coles<sup>33</sup> nor has it addressed the Commission's requirement in the PECO Restructuring Order that EDCs submit a supplier tariff to govern the relationship between the EDC and suppliers providing service in the EDC's service territory.<sup>34</sup> As set forth in the Competitive Intervenors' Joint Main Brief, the Enron sponsored Supplier Tariff is the only supplier tariff supported by the record of this proceeding and the Commission should direct that PP&L submit such a tariff in its compliance filing.

**D. The Commissioner's Decision to Accelerate the Phase-In is Consistent with the Statute.**

Through the Commission's PECO Restructuring Order, the Commission set the precedent for design of the transition to direct access for all Pennsylvanians by accelerating the phase-in to enable all customers to choose by January 2, 2000. The Competitive Intervenors have asserted in their Joint Main Brief that it would cause unnecessary customer confusion to allow the duration of the phase-in period to vary from service territory to service territory and that the consumer benefits which justified acceleration of the phase-in in the PECO Restructuring Order are also present in the instant case.

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<sup>33</sup> Enron St. 7.0 (Coles ) Exhibit 7.

<sup>34</sup> PECO Restructuring Order, Ordering ¶176; Compliance Filing Order, pp. 37-38; Competitive Intervenors' Joint Main Brief, pp. 23-26.

In their Initial Brief, the Electric Distributors<sup>35</sup> argue that the Commission's decision in its PECO Order to accelerate the phase-in is "contrary to the plain language of Section 2806(b) of the Competition Act" and should not be applied to the case at hand.<sup>36</sup>

The subsection in question provides as follows:

(b) Schedule. — Recognizing that approximately 5% of the peak load will have retail access through pilot programs, the following schedule for phased implementation of retail access shall be adhered to unless a determination is made by the commission under subsection (c):

(1) As of January 1, 1999, a maximum of 33% of the peak load of each customer class shall have the opportunity for direct access.

(2) As of January 1, 2000, a maximum of 66% of the peak load of each customer class shall have the opportunity for direct access.

(3) As of January 1, 2001, all customers of electric distribution companies in this Commonwealth shall have the opportunity for direct access.

(4) The commission shall establish regulations specifying that, within each customer class, the customers that

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<sup>35</sup> The Electric Distributors are Allegheny Power ("Allegheny"), PECO and GPU Energy ("GPU").

<sup>36</sup> Electric Distributor's Initial Brief, p. 7. The Electric Distributors apparently accept the Competitive Intervenors' assertion that the duration of the phase-in period should not vary between service territories since they do not assert that a longer phase-in is appropriate in service territories other than PECO's. Instead, they simply argue that this aspect of the PECO Restructuring Order is illegal and should be reversed through the Commission's decision in this proceeding. Given the fact that each member of the Electric Distributor's group was an active litigant in the PECO's restructuring case, they should take their argument to an appellate forum rather than burdening the record in this proceeding.

are eligible for direct access prior to full direct access shall be determined on a first-come-first-served basis unless otherwise determined by the commission through regulation, in the context of restructuring plans, or in other appropriate administrative proceedings, to prevent competitive disadvantages among similarly situated customers within a customer class.

66 Pa.C.S.A. § 2806(b).

While Section 2806(b) certainly restricts the Commission's implementation of direct access, the plain language of the subsection provides the Commission with discretion to both accelerate the phase-in or extend the phase-in under certain circumstances. As to acceleration of the phase-in, Section 2806(b), by its express terms, establishes the maximum "peak load of each customer class" which can be provided the opportunity for direct access "as of"<sup>37</sup> or not later than January 1, 2001. Despite the claim of the Electric Distributors, the plain meaning of the statutory language does not state that 33% of the peak load of each customer class be provided the opportunity for direct access beginning on January 1, 1999 or 66% beginning on January 1, 2000.<sup>38</sup> Instead, the plain language states that "as of" a date certain, the maximum penetration of direct access shall not exceed a certain level. It follows by any reasonable reading, that at any time after that

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<sup>37</sup> Emphasis added.

<sup>38</sup> If the General Assembly had intended to preclude Commission discretion to accelerate the phase-in, it could have easily adopted language for Section 2806(b) which reads "Beginning on January 1, 1999, 33% of the peak load of each customer class shall be provided the opportunity for direct access," or "Beginning on January 1, 2000, 66% of the peak load of each customer class shall be provided the opportunity for direct access."

date certain, the Commission has discretion to increase the penetration as long as it does not exceed the next cap. The claim of the Electric Distributors that the phrase "as of" should be interpreted as meaning "beginning on" is completely inconsistent with the plain language of the Act as the phrase "as of" is normally understood.<sup>39</sup>

Furthermore, the Electric Distributors claim that Section 2807(c) establishes the initial implementation date for direct access as January 1, 1999 and precludes the Commission from advancing the January 1, 1999 date reads meaning into Section 2807(c) which is not supported by the statutory language. Section 2807(c) is the subsection which allows the Commission to extend the initiation date for customer choice and has no bearing on the clear language of Section 2806(b) which provides the Commission with clear discretion to accelerate the January 1, 1999 date.<sup>40</sup> Section 2807(c)(1) merely requires that the first phase of direct access be implemented by January 1, 1999 unless the Commission extends that date for a "six month transition period" for the reasons set forth in the subsection.<sup>41</sup>

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<sup>39</sup> *Webster's II New College Dictionary* defines the term "as of" as "On" not as "beginning on." Accordingly, the plain language of Section 2807(a) establishes the maximum penetration for direct access "on" January 1, 1999 and does not affect the Commission's discretion to advance the initiation of direct access or to accelerate the phase-in.

<sup>40</sup> Interpretation of the phrase "as of January 1, 1999" contained in Section 2806(b)(1) as meaning "beginning on January 1, 1999" is critical to its argument since its argument is based on the premise that the term "as of" should be interpreted consistently. While Enron agrees the term should be interpreted consistently, it is clear that the Electric Distributors consistently misinterpret the term.

<sup>41</sup> Postponement of the implementation of direct access until after January 1, 1999 can only  
(continued...)

Additionally, the statement of the Electric Distributors that, "There is no dispute over this point. No one in this proceeding or elsewhere has advocated that the phase-in to direct access may begin before January 1, 1999,"<sup>42</sup> is blatantly false and an incredible statement particularly given the fact that PECO joined in the statement. On October 7, 1997, Enron Energy Services Power, Inc. ("EESPI") filed a petition with the Commission requesting approval of its Choice Plan for the restructuring of PECO.<sup>43</sup> As part of the Choice Plan, Enron proposed not only to accelerate the phase-in but also to advance the initiation of direct access to September 1, 1998.<sup>44</sup> Each of the Electric Distributors participated actively in the PECO proceedings and each EDC filed a comprehensive brief which identified areas where each believed the Choice Plan was in

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<sup>41</sup>(...continued)

occur if the Commission makes such a determination by no later than November 16, 1998. Technically, the Commission could still postpone the date for implementation of the phase-in if circumstances so dictate.

<sup>42</sup> Electric Distributors' Initial Brief, p. 10.

<sup>43</sup> Petition of Enron Energy Services Power, Inc. for Approval of an Electric Competition and Choice Plan and for Authority Pursuant to Section 2887(E)(3) of the Public Utility Code to Serve as the Provider of Last Resort in the Service Territory of PECO Energy Company, P-00971265. Shortly after filing, EESPI's petition was consolidated by the Commission with the PECO restructuring proceedings for litigation and decision making purposes.

<sup>44</sup> As paragraph 23(f) of EESPI's Choice Plan Petition stated:

(f) The phase-in of direct access to competitive generation services will be accelerated as follows:

9/1/1998 - 33% of load per class is eligible.  
1/2/1999 - 66% of load per class is eligible.  
1/2/2000 - 100% of load is eligible.

violation of the Act. Neither PECO, Allegheny nor GPU raised a legal objection to Enron's proposal to advance the initiation of direct access in their respective briefs. Furthermore, while the Commission did not adopt the Choice Plan, the only legal inadequacy identified by the Commission was the Choice Plan's requirement that the Commission direct PECO to enter into a power purchase agreement and a meter, billing and collecting agreement with EESPI — an action which the Commission determined it lacked authority to direct.

Overall, despite the contentions of the Electric Distributors, the legality of advancement of the January 1, 1999 direct access date is disputed, was raised by Enron in the PECO proceeding and was litigated by Enron and the other parties to that proceeding, including each of the Electric Distributors. The fact that the Commission did not comment on the legality of advancement has no bearing on whether such advancement is permitted by the Act. In fact, given the common language between the subsections of Section 2807(a), and the plain meaning of the term "as is" used in each subsection, one can only presume that the Commission accepts the legality of advancement but determined that it was not necessary or appropriate given the applicable time constraints in the PECO and other restructuring proceedings.

Finally, the legality of the Commission's accelerated phase-in contained in its PECO Restructuring Order is supported by the fact that the exact accelerated phase-in was included in PECO's Partial Settlement -- since it is beyond reasonable dispute that entering into a partial settlement does not excuse the settlement parties from complying

with applicable law in all respects. In fact, the mere existence of a partial settlement has no impact on the legal requirements which govern the Commission's decision making process.<sup>45</sup> A settlement is not a legal determination of the matters in controversy but is merely an agreement between the parties.<sup>46</sup> In sum, a partial settlement which does not include all of the parties in a proceeding does not relieve the agency of any applicable procedural requirements and the resulting adjudication must comply with all aspects of the agency's enabling statute and the Administrative Agency Law.<sup>47</sup>

Accordingly, every provision of the Act, including Section 2806(b) was directly applicable to PECO's Partial Settlement and could not be evaded by its signatories.<sup>48</sup> As a result, PECO, through its participation in the Partial Settlement, has accepted the Commission's authority to order an accelerated phase-in. Furthermore, GPU

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<sup>45</sup> Consolidate Gas Supply v. Federal Energy Regulatory Commission, 606 F.2d 323, 330 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980) (Neither a partial settlement nor a summary judgment motion provide evidentiary or legal weight and merely represent a request for dispositive relief given the record before the agency). *See, Mobil Oil Corp. v. FPC*, 417 U.S. 283 (1974).

<sup>46</sup> GPU Industrial Intervenors v. Pennsylvania Public Utility Commission, 628 A.2d 1187, 1194 (Pa. Cmwlth.1993).

<sup>47</sup> LaFarge Corp. v. Commonwealth Insurance Department, 690 A.2d 826 , 838-39 (Pa. Cmwlth. 1997). (Vacating the adoption of a partial settlement because the Pennsylvania Insurance Department failed to comply with the Administrative Agency Law).

<sup>48</sup> The Commission agreed with the applicability of the Act in its PECO Restructuring Order, pp. 26-29. The statement of the Electric Distributors on page 12 of their Initial Brief that "an EDC may agree to an expedited phase-in pursuant to settlement with its customers" is simply unsupported unless the Act permits acceleration of such a phase-in. Nothing in the Act can be interpreted to provide the EDC authority to accelerate the phase-in which is not provided to the Commission.

and Allegheny both filed briefs in the PECO proceeding which raised various concerns with the Partial Settlement but did not mention one word regarding the accelerated phase-in.<sup>49</sup>

Finally, no party has suggested that the Commission's acceleration of the phase-in is not in the public interest. It is undisputed that the sooner customers have the opportunity to shop, the sooner they will receive the far-reaching benefits provided by the competitive market. Overall, the Act authorizes the Commission to accelerate the phase-in as provided for in the PECO Restructuring Order and the Commission should expand its phase-in policy to all EDC service territories since such a policy is undeniably in the best interests of Pennsylvania's consumers and businesses.

**E. PP&L's Proposed Code of Conduct is Inadequate and Requires Modification.**

While Section 2804(5) of the Act precludes the Commission from requiring an EDC "to reorganize its corporate structure" to structurally separate its monopoly functions from its competitive functions, PP&L's continued refusal to voluntarily implement such separation remains troublesome and creates the very real potential for anti-competitive conduct. On page 28 of their Main Brief, the Competitive Intervenors pointed out that both Enron witness Dirmeier, an expert on competitive market structure

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<sup>49</sup> Amazingly, on page 12, fn. 9, of the Electric Distributors Initial Brief, they claim that the accelerated phase-in statutory construction issue was not briefed in the PECO proceeding. Given the fact that an accelerated phase-in was a component of both the Choice Plan and the Partial Settlement, the only reason the issue was not briefed in that case was because PECO, GPU and Allegheny chose not to brief the issue.

issues, and the Commission agreed that structural separation was preferable, but that absent structural separation, functional separation of equal effect is necessary.<sup>50</sup>

OCA agrees. As OCA stated in its Main Brief, "By proposing that its distribution and generation/sales businesses operate within the same corporate structure, the Company [PP&L] is setting the stage for potential cross subsidies and unfair trade practices."<sup>51</sup> OCA goes on to propose far-reaching modifications to PP&L's proposed code of conduct which, by the Competitive Intervenors' reading, would bring PP&L's proposed code up to the quality of the Code of Conduct approved by the Commission for PECO in the PECO Restructuring Order.

PECO's Code of Conduct applicable to the implementation of direct access is now finalized.<sup>52</sup> PP&L acknowledges that "uniform, statewide standards of conduct"

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<sup>50</sup> As the Commission stated the PECO Restructuring Order, p. 128, "Structural separation through the establishment of fully independent entities is preferable, whenever possible . . . . Functional separation without legal separation must not provide a basis for any competitive advantage or opportunities for the marketing entity." For example, the Commission required that transactions between an EGS and an affiliated supplier should be subject to the same level of Commission scrutiny whether or not the affiliate is structurally separated from the EDC. PECO Restructuring Order, p. 128. This requirement is equally applicable to PP&L and should be included in its final restructuring plan.

<sup>51</sup> OCA Main Brief, p. 107. As OCA witness Alexander testified, "This approach [to PP&L's common corporate structure proposal] has the significant potential for cross-subsidy and unfair trade practices which will mean that the Code of Conduct will be crucial to the prevention of these charges." OCA St. 5 (Alexander), p. 50.

<sup>52</sup> At the time of filing of the main briefs, adoption of the Commission ordered PECO Code of Conduct was still in the compliance filing stage. However, at the Public Meeting of February 26, 1998, the PECO Code, as substantively set forth on pages 32-33 of the Competitive Intervenors Main Brief was finalized. See PECO Tariff Electric Pa. P.U.C.

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should be adopted by the Commission.<sup>53</sup> However, in contradictory fashion, it argues that the Commission should adopt its company specific code on an interim basis pending promulgation of final regulations. However, PP&L offers no reason why it should have a more "watered down" code of conduct than PECO in the early stages of direct access prior to promulgation of final rules. As set forth above, if anything, a stronger code of conduct is appropriate for PP&L due to its insistence on not structurally separating its monopoly and competitive business.<sup>54</sup>

The early stages of marketing activity leading up to direct access on January 1, 1999 are critical and will determine the market structure which evolves in Pennsylvania as competition develops. Simply put, the need for a uniform code of conduct starts now and the PECO model should be applied to PP&L and other EDCs pending the promulgation of final regulations.<sup>55</sup>

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<sup>52</sup>(...continued)

No. 3, Original Page No. 89.

<sup>53</sup> PP&L Main Brief, p. 176.

<sup>54</sup> In addition, a weaker code of conduct for PP&L than PECO is unfair to PECO, since PECO affiliates will likely be attempting to attract customers in PP&L's service territory and vice versa. See PECO Main Brief, p. 5, where it states, "It is absolutely critical that all electric generation suppliers adhere to the set of competitive safeguards and rules regarding the unbundling of metering and billing services. PECO assures that such issues will be resolved on a generic basis and that the restrictions imposed on it will also apply to PP&L's and other incumbent utilities."

<sup>55</sup> Any arguments made by PP&L that Annex A to the Commission's recently issued proposed rulemaking order (see Notice of Proposed Rulemaking Regarding the Establishment of Competitive Safeguards for the Pennsylvania Electric Industry, L-980132 (February 13, 1998)) should be adopted as the "interim" code should not be

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PP&L's inherently unreasonable attitude and its belief that its affiliated supplier(s) should be advantaged by its relationship to the monopoly is best summarized by reference to a statement in its Main Brief. As PP&L claims:

Enron witness Dirmeier is simply wrong when he argues that: "My position does not handicap anyone; rather it is intended to place all competitors on the same initial footing recognizing that, in reality, PP&L has a decided advantage that it seeks to prolong." Enron St. 6.1, p. 8. To make all competitors equal at the outset, the Commission would have to take into account the numerous inherent advantages and disadvantages of competitors, some based on efficiency and some based on basic cost differences.

PP&L Main Brief, p. 164.

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<sup>55</sup>(...continued)

considered seriously. First, a proposed rulemaking order has no legal weight and will not be applicable to anyone now or in the future. Second, as Commissioner Hanger concluded in his Statement adopting the proposed rulemaking order:

. . . I truly appreciate the time and effort provided by the members of the Working Group to define issues and ascertain common ground. This common ground is an appropriate starting point for the rulemaking.

It would be inappropriate, however, to assume that such common ground reflects a complete set of competitive safeguards that fulfill the Commission's responsibility to serve fully the public interest as defined in the Act. To the contrary, the common ground by definition reflects the most non-controversial matters, or the "least common denominator" of the issues considered.

Third, the PECO Code of Conduct is the only code which is presently applicable to any EDC and the need for uniformity requires its application to others. Accordingly, adoption of the proposed rulemaking as an "interim" code for anyone is completely inappropriate.

PP&L completely misses the point. Mr. Dirmeier is not recommending that all competitors (including PP&L's affiliated supplier(s)) be identical; he is pointing out that in order to have meaningful competition, EDC affiliates must not be able to take advantage of their unique relationship to the monopoly EDC.<sup>56</sup>

PP&L's proposed code of conduct reflects its determined attempt to have its competitive business inherit advantages from its EDC monopoly. Consistent with the Act and the Commission's recent actions, such an attempt must be rejected and the Code of Conduct adopted for application to PECO, at a minimum, should be incorporated into PP&L's final restructuring plan.<sup>57</sup>

**F. Unbundling of and Competitive Entry into PP&L's Revenue Cycle Services is Critical to the Transition to Competition and is Supported by the Record.**

The Competitive Intervenors introduced almost one hundred pages of testimony in support of Commission action to unbundle and allow competitive entry into "non-wire" and revenue cycle services.<sup>58</sup> As set forth in that testimony and in the Competitive Intervenors' Main Brief, requiring unbundling of and competitive entry into

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<sup>56</sup> Of course, the Commission disagrees with PP&L and agrees with Mr. Dirmeier. See PECO Restructuring Order, p. 130, in which the Commission recognizes that affiliated and unaffiliated suppliers must be placed on a "level playing field."

<sup>57</sup> On a brighter note, the Competitive Intervenors are pleased to see that PP&L agrees that joint marketing between PP&L and its affiliated supplier(s) should be prohibited unless comparable opportunities are provided to other EGSs. PP&L Main Brief, pp. 173-74.

<sup>58</sup> See Enron Sts. 1.0, 4.0, 4.1, 5.0, 5.1; NEV St. 2.

these services areas will add value for customers and is absolutely critical to the full development of the competitive retail electricity market mandated by the Act.

Nevertheless, PP&L has dedicated only two pages of its Main Brief to this crucial issue.<sup>59</sup> Summarily, PP&L argues that these issues should not be decided in this restructuring case but instead should be deferred to generic rulemaking dockets.

On the other hand, the International Brotherhood of Electrical Workers, Local 1600 ("IBEW") has dedicated virtually its entire brief to opposing unbundling of and competitive entry into revenue cycle services.<sup>60</sup> IBEW's arguments range from arguing that unbundling and competitive entry into these service areas are illegal to claiming that such competition would not be in the best interests of customers in PP&L's service territory. All of these argument lack merit and should be rejected by the Commission.

IBEW claims to have a special understanding of the adverse impacts on electric customers if competitive revenue cycle services are implemented by the Commission. However, it is noteworthy at the start to point out that the OCA, the true representative of residential customers, does not agree with the IBEW. As OCA stated in its Main Brief in addressing the unbundling and competitive entry into billing:

PP&L has proposed a number of billing procedures which it intends to implement under its restructuring plan.

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<sup>59</sup> PP&L Main Brief, pp. 77-78.

<sup>60</sup> IBEW is a collective bargaining unit which represents PP&L employees engaged in billing and collection, metering and customer service activities.

See PP&L Exhibit BJB 1. As will be explained below, there are numerous shortcomings regarding the Company's proposed billing procedures and these shortcomings must be rectified prior to implementation of PP&L's restructuring plan.

Initially, the Company currently has plans to replace its current information system with a "new, state-of-the-art" information system which will result in "improved levels of customer satisfaction regarding billing accuracy, timely resolution of customer inquiries, and increased billing options consistent with customer choice." PP&L St. 15 at 5. Implementation of this system is set for 1999. While it is able to, the OCA submits that the Company should incorporate the ability of alternate supplier billing, i.e., an alternate supplier's ability to bill on behalf of PP&L, into the framework of its new system.

OCA Main Brief, pp. 99-100.

And as to metering, the OCA advocated:

In its restructuring plan, the Company included proposals for future metering and meter reading services. While the company acknowledges that under the Act, customers can obtain alternative meters, PP&L witness Bujonowski asserts that the Company will perform the upgrades and continue to own and maintain meters while billing the customer directly for additional costs associated with the alternative meters. PP&L St. 15 at 4. The Company also intends to prohibit other parties from providing meters or meter reading services and does not intend to unbundle any part of its current metering costs even when a customer seeks the installation of a new meter. Id. Such restrictive proposals by the Company do not reflect the current trends in exploring competitive metering and billing and could foreclose future developments in this area. Consequently, many of the metering proposals as currently set forth by the Company should be rejected. Instead, adherence to the following provisions is appropriate:

- The Company's current short-term policies should at least be compatible with the possibility of competition in the provision of metering services in the future;
- Regarding open architecture standards, these standards should be developed by stakeholders, including developers of new metering technology. Furthermore, approval by the Commission of such standards will be necessary as well;
- The Company should be prepared to unbundle the current cost of some features associated with metering;
- The Company should be prepared for installation and billing for alternative meters;
- If PP&L uses load profiles for customers with standard mechanical meters, it would be appropriate to update these load profiles frequently and with approval by the Commission;
- The Company's customers should be able to obtain their historical usage history over the past twelve months without charge by merely calling PP&L.

OCA Main Brief, pp. 98-99.

As to the specific arguments raised by PP&L and IBEW, PP&L claims that resolution of these issues should be handled generically through Commission rulemaking proceedings, such as the rulemaking initiated by the Commission's Customer Services

Order<sup>61</sup> and its Advanced Meter Order.<sup>62</sup> PP&L also relies on the PECO Restructuring Order, where the Commission determined not to require PECO to unbundle those services at this time based on the record before it.<sup>63</sup> In its Main Brief, the Competitive Intervenors' addressed in detail the Commission's treatment of revenue cycle services in the PECO Restructuring Order and demonstrated why revenue cycle services should now be unbundled in PP&L's service territory based on the record of this proceeding.

The fact of the matter is that the Commission has expressly determined that the appropriateness of unbundling and competitive entry into revenue cycle services should be decided on the record of each restructuring proceeding. In the Commission's Customer Services Order, the Commission stated just that:

Utility restructuring plans should provide for the contingency of allowing suppliers to (1) render at the customer's request a consolidated bill that includes both EDC and supplier charges, and (2) engage in complaint handling.

Customer Service Order, Appendix B, Section II.B.

And again, as the Commission specifically concluded pertaining to supplier billing:

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<sup>61</sup> Final Order re: Guidelines for Maintaining Customer Services at the Same Level of Quality Pursuant to 66 Pa. C.S. §2807(D) and Assuring Conformance with 52 Pa. Code Chapter 56 Pursuant to 66 Pa. C.S. §2809(E) and (F), M-00960890F.0011 (July 11, 1997) ("Customer Services Order").

<sup>62</sup> Rulemaking re: Advanced Meter Deployment for Electricity Providers; 52 Pa.C.S. §57.250-57.257, L-00970128 (Nov. 24, 1997) ("Advanced Meter Order").

<sup>63</sup> PECO Restructuring Order at 138-40.

We will not repeat our prior comments in their entirety, but we will reiterate some of the key points which we believe make it appropriate, both legally and as a matter of policy, to sustain this guideline so that parties may continue to explore in the Restructuring Filing of each utility the contingency of allowing a supplier single bill.

Customer Services Order, p. 30.<sup>64</sup>

Notwithstanding PP&L's assertions to the contrary, the Commission's determinations not only support, but require, that revenue cycle service issues be addressed in each EDC restructuring filing and in each litigated restructuring proceeding. PP&L cannot be permitted to avoid these issues in this case and the Commission's determinations must be based on the specific record of this proceeding.

IBEW, on the other hand, presents a frontal attack on the Commission's legal authority to require the unbundling and competitive provisioning of non-wire services, notwithstanding the fact that the Commission has already determined these legal issues adversely to IBEW's position in the Customer Services Order. As the Commission conclusively stated:

Regarding the legal interpretational issues in comments about this guideline, we simply disagree with the conclusions reached that only EDCs can provide these customer service functions. We submit that there is nothing in the Act that would prohibit the supplier single bill option and supplier

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<sup>64</sup> See also Customer Services Order at 10-11, Appendix B, Section II.B. and II.H.I. In its Customer Services Order, the Commission further stated that provision of these services by EGSs would be dependent on their conformance with Commission regulations and guidelines applicable to these customer service functions and expressed its intent that the EGS's performance of these services must maintain the same level of quality. Customer Services Order, pp. 7-8.

complaint handling. Although §2807(C) recognizes that the EDC "may be" responsible for the billing of all electric services, there is nothing in this passive provision or anywhere else in the Act that makes the EDCs the exclusive provider of these customer functions.

We believe that the Act's reference to the EDC's responsibility to provide customer service functions under §2807(D) is intended to maintain the status quo and is merely a reflection that the EDC must stand ready to provide these customer service functions. However, concerning the two specific customer service functions at issue; namely, billing and complaint resolution, we do not read this provision or any other provision of the Act as excluding suppliers from providing these functions. In fact we believe this interpretation is consistent with the declared policy of the Act to create a competitive market for the generation of electricity.

Customers Services Order, pp. 10-11. The Commission's determination regarding legality is consistent with the Act and should be affirmed here.

In order to understand the legality of the Commission's authority to unbundle and permit competitive entry into non-wire or revenue cycle services, it is necessary to consider the impact of the Act on pre-existing provisions of the Public Utility Code. So long as the furnishing of electricity was entirely a regulated utility service, no fine lines were necessary regarding the classification of those services. Admittedly, the Code was drafted with the presumption that all electric service, and related services, would be provided by the franchised monopoly. Indeed, as IBEW

asserts, the terms “services” and “facilities” were defined broadly in the Code to include the vast majority of activities conducted by public utilities, including EDCs.<sup>65</sup>

However, the “competition” overlay that was introduced by the Act — which requires a comprehensive restructuring of the electric industry — has completely revamped the statutory rules under which the restructured industry will operate. To make a competitive retail electric market a reality as required by that Act competition must be permitted in every aspect of the retail electric business that is not a natural monopoly in order to maximize value to consumers. Only transmission and distribution service — the wires service — are required to be maintained as EDC monopoly services. Accordingly, all pre-existing provisions of the Code, as applied to the electric industry, must be understood and interpreted in light of the newly enacted amendments to the Code embodied in the Act. From this perspective, billing and metering are clearly not part of the monopoly utility service because they have nothing to do with physical distribution of electricity.<sup>66</sup> Instead, they are service functions, which are essential components of both

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<sup>65</sup> 66 Pa. C.S. § 102; see IBEW Main Brief at 4-5. The fact that the statutory term “services” is defined broadly in 66 Pa. C.S. §102 is irrelevant to interpretation of the statutory phrase “transmission and distribution of electricity” in 66 Pa. C.S. §§ 2802 and 2803 which the General Assembly has found should remain subject to regulation as a “natural monopoly.” The record in this proceeding is undisputed that revenue cycle services are not “natural monopolies” and are provided by a wide variety of entities in other industries. Enron St. 1.0 (Mayo), p.27; Enron St. 1.0 (Jacobson), p. 9; Enron St. 5 (Bowen), p. 5-6. In fact, as IBEW acknowledges (IBEW Main Brief, p. 14-15), the Act expressly authorizes suppliers to provide billing services.

<sup>66</sup> Enron St. 3.0, p. 27.

the delivery and sale of the commodity and fully associated with and support the distribution, transmission and generation supply service categories.

Consistent with the avowed purposes of the Act, to develop retail electric competition to the greatest extent possible,<sup>67</sup> only those services or facilities which remain natural monopolies and for which unbundling is not technically feasible or for which it is shown that competition will sacrifice system safety and reliability should be permitted to justify the continuance of the utility's monopoly status.<sup>68</sup> The only utility service that meets this standard is the actual "wire" distribution network of each utility. All other services and service functions should be unbundled to the extent technically feasible so that competitive alternatives can become available.

IBEW's arguments interpret the pro-competitive provisions of the Act as if they are restricted by the traditional view that utility services are subject to a monopoly and attempt to apply pre-existing provisions of the Code in a manner which would defeat the Act's intent. Instead, these statutory provisions must not be read in isolation but must be interpreted consistent with the General Assembly's overriding objective to restructure the electric industry in a manner which brings the full benefits of retail competition to Pennsylvania's consumers and businesses.

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<sup>67</sup> See 66 Pa. C.S. §§ 2802(5), (7), (8), (12), (14) and (15).

<sup>68</sup> The Commission can obtain policy guidance by following the policies reflected in the federal law governing the development of telecommunications competition, which recognizes that marketplace development cannot occur unless the monopoly is required to unbundle its services to the greatest extent that is technically feasible. Section 251(c)(3) of the Telecommunications Act of 1996, 47 U.S.C. § 251(c)(3).

The second gross error in IBEW's rationale is its failure to consider §2804(3) of the Act. Indeed, it is not surprising that reference to this important subsection is noticeably absent from IBEW's brief. Section 2804 of the Act delegates responsibility to the Commission to define standards and assure compliance with a utility's unbundling obligation in the context of its review of each utility's restructuring plan. This subsection then provides as follows in relevant part:

(3) The Commission shall require the unbundling of electric utility services, tariffs and customer bills to separate the charges for generation transmission and distribution. The Commission may require the unbundling of other services. (Emphasis added.)

The General Assembly's delegation of discretionary authority to unbundle "other" services in addition to the three primary service categories clearly establishes that there must be services other than the three types mentioned that can be unbundled. Furthermore, this clause provides ample authority for the Commission to establish standards requiring and implementing the unbundling of non-wire services. In fact, the statutory reference to "the unbundling of other services" is almost certainly a direct reference to such services.<sup>69</sup> Furthermore, § 2804(3) makes it clear that required

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<sup>69</sup> The declaration of policy found at 66 Pa.C.S. § 2802(14) creates two distinct mandatory obligations on the part of EDCs: "to unbundle their rates and services and to provide open access over their distribution and transmission systems." (Emphasis added.) Compliance with both obligations is absolutely necessary for compliance with the Act and the meaningful development of retail competition. Moreover, while costs of non-wire services and service functions are presently included in PP&L's rates, those services and functions themselves are not part of PP&L's energy delivery system. Enron St. 3.0, p. 27. Accordingly they are subject to the unbundling requirement of "other

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unbundling should extend not only to services,<sup>70</sup> but also to "tariffs" and "bills." IBEW completely ignores this important provision and the authority it confers on the Commission. The truth of the matter is that the General Assembly has expressly provided the Commission with discretionary authority to unbundle revenue cycle services. None of IBEW's creative, but unreasonable, arguments can change this simple fact.

Essentially, IBEW parses the provisions of the Act and the other provisions of the Public Utility Code in such a way — reading them in isolation — to fabricate an argument that the unbundling and competitive provision of non-wire services is unlawful. As demonstrated above, IBEW's arguments have no merit and are no more than an attempt to revisit issues the Commission has already conclusively decided. Its newly developed arguments are no more convincing than previous arguments already raised before and correctly rejected by the Commission.

IBEW asserts that EGSs are not public utilities, but that only public utilities can provide non-wire services.<sup>71</sup> IBEW is half right. It is true that EGSs are not "public

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<sup>69</sup>(...continued)  
services" imposed by the General Assembly.

<sup>70</sup> The only conceivable purpose of unbundling services is to allow the competitive provisioning of those services subject to unbundling. The only exception to this general rule is the unbundling of services like distribution and transmission which is necessary to define jurisdictional lines (i.e., distribution services are regulated by state and a transmission services are regulated by the FERC).

<sup>71</sup> IBEW Brief, pp. 3-4.

utilities” except for the limited purposes described in §§ 2809 and 2810.<sup>72</sup> However IBEW's contention that only a "public utility" can provide non-wire services, because those services were traditionally provided by public utilities prior to the enactment of the Act is simply concocted from whole cloth. Such a view completely ignores the requirements of § 2802(14), which requires electric utilities to unbundle their rates and services and to provide open access, as well as § 2804(3), which explicitly delegates to the Commission the authority to require the unbundling of services other than generation, distribution and transmission service, which would include non-wire services. If this argument were current, suppliers wouldn't be able to provide generation services or any other service "traditionally" provided by "public utilities."

IBEW also overlooks the fact that while the definition of an EDC is narrowly constructed in the Act as “providing facilities for the jurisdictional transmission and distribution of electricity to retail customers,” an EGS is defined with a broader scope as one that sells “electricity or related services” to end-use customers.<sup>73</sup> By definition, therefore, an EGS may additionally provide retail customers with “related” services,

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<sup>72</sup> 66 Pa. C.S. § 102 defines “public utility” in part as follows:

“(2) The term [public utility] does not include:

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(vi) Electric generation supplier companies except for the limited purposes as described in sections 2809 . . . and 2810 . . . .”

<sup>73</sup> 66 Pa. C.S. § 2803 (emphasis added).

which clearly includes and is specifically intended to reference non-wire services. While IBEW may be correct that jurisdictional T&D services must be provided by an EDC,<sup>74</sup> that begs the question as to non-wire services, because they are not T&D services but are “other services” under § 2804(3).<sup>75</sup>

IBEW ignores the objectives and definitions contained in the Electric Competition Act, and relies instead on a misreading of 66 Pa. C.S. §102 which contains the broad definition of “service” and “facilities.”<sup>76</sup> As noted above, the scope of these terms must be interpreted within the context of the overlay of the Act, and any restrictions on unbundling or competitive entry are expressly limited to services involving the transmission and distribution of electricity -- they do not apply to all EDC services and facilities as IBEW argues.

IBEW points to a number of sections of the Code<sup>77</sup> that it claims require public utilities only to bill and meter utility services.<sup>78</sup> These provisions, however, merely contain certain billing, collection, termination and metering procedures that must be met by public utilities for service to customers (except for bills for installation charges).

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<sup>74</sup> IBEW Main Brief, pp. 4-5.

<sup>75</sup> The fact that the term "facilities" is defined broadly in Section 102 also has no bearing on interpretation of the definition of "electric distribution company" in Section 2803 since under § 2803 only those facilities which pertain directly to the "transmission and distribution" or delivery function are within the scope of the definition.

<sup>76</sup> IBEW Main Brief, pp.5-6.

<sup>77</sup> 66 Pa. C.S. §§ 317(b), 1504, 1507, 1509, and 1521-33.

<sup>78</sup> IBEW Main Brief at 11-13.

However, none of these sections specifically direct that only "public utilities" may provide any of these functions, nor do they preclude EGSs from doing so subject to similar regulations by the Commission.<sup>79</sup>

IBEW also incorrectly states that allowing the unbundling of non-wire services would remove the protections provided by relevant Commission regulations,<sup>80</sup> especially Chapters 57 and 58, because they are not specifically required to be applicable to EGSs under the Act.<sup>81</sup> This argument is ludicrous. There is nothing to preclude the Commission — which, after all, promulgated all of these requirements — from imposing all necessary standards on EGSs as a condition of competitive entry. In fact, the Competitive Intervenors have consistently advocated, and continues to agree, that the relevant portions of Chapters 57 and 58 of the Commission's regulations should be applied to generation suppliers that wish to provide metering services. This could be accomplished as part of the Commission's final order in this case as well as in its metering docket.

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<sup>79</sup> In fact, virtually all of the requirements in the provisions of the Code identified by IBEW are repeated in Chapter 56, which as IBEW points out already govern suppliers. For example, the statutory due date for payments provided for in 66 Pa.C.S. §1509 is codified by regulation at 52 Pa. Code §56.21; and the landlord-tenant provisions of 66 Pa.C.S. §§1521-1523 are codified almost verbatim at 52 Pa. Code §§56.121 et seq.

<sup>80</sup> IBEW Main Brief, pp. 8-9.

<sup>81</sup> See 66 Pa. C.S. §§ 2809(e),(f).

IBEW relies on various "purpose" provisions of § 2802 of the Act to argue that EGSs should not be permitted to provide billing and metering services.<sup>82</sup> However, IBEW misapprehends these provisions. As demonstrated above, the primary purpose of the Act is to create a competitive retail electricity market. While this is accomplished primarily by unbundling and introducing competition into the generation supply market, the General Assembly empowered the Commission with discretion to unbundle (and introduce competition) in other services consistent with the public interest. In addition to this explicit statutory language, the Commission has implicit authority to carry out its statutory duties.<sup>83</sup> Under its implicit authority, the Commission is authorized to act in furtherance of the statutory objectives identified in the Act.<sup>84</sup> For all the reasons set forth

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<sup>82</sup> IBEW Main Brief at 15-16.

<sup>83</sup> As an agency of delegated powers, the Commission has both those powers explicit in its enabling statute and implicit as necessary to exercise of those express powers. Pennsylvania Public Utility Commission v. Philadelphia Electric Company, 460 A.2d 734 (Pa. 1984); Metropolitan Edison Co. v. Pennsylvania Public Utility Commission, 437 A.2d 76 (Pa. Cmwlth. 1981).

<sup>84</sup> The fact that an administrative agency or other governmental unit is a creature of statute does not mean that all details of its scope of delegated authority must be expressly or separately enumerated in the enabling statute, but only that the basic policy choices must be made by the Legislature which guides and restrains the exercise of administrative functions. Gilligan v. Pennsylvania Horse Racing Commission, 422 A.2d 487 (Pa. 1980); Hospital Association v. MacLeod, 410 A.2d 731 (Pa. 1980); William Penn Parking Garage, Inc. v. City of Pittsburgh, 346 A.2d 69 (Pa. 1975); Charters Valley Joint School District v. County Board of School Directors, 211 A.2d 487 (Pa. 1965); Pennsylvania Builders Association v. Pennsylvania Public Utility Commission, 483 A.2d 1025 (Pa. Cmwlth. 1984); Western Pennsylvania Water Company v. Pennsylvania Public Utility Commission, 311 A.2d 370 (Pa. Cmwlth. 1973).

herein, and in the Customer Services Order, such unbundling is necessary and should be permitted.

Finally, IBEW recites statements from the hearings regarding how the sale and provision of various products and services, including non-wire services, would be conducted in a competitive environment.<sup>85</sup> Overall, IBEW's discussion represents nothing more than a complete misunderstanding of the workings of a competitive market and a unabiding loyalty to the status quo. The bottom line is that if customers want a product or service provided in a certain manner, market participants will design their products or services accordingly or they will not attract business.<sup>86</sup>

The crux of IBEW's argument is that a regulated monopoly model is preferable to the competitive model for the provision of service to customers. While IBEW's view may be shared by some, it is certainly not shared by any of the economists which testified in this proceeding, including PP&L's, and is completely inconsistent with the views of the General Assembly as reflected in the Act. Time and again, IBEW

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<sup>85</sup> IBEW Main Brief, pp. 12-21.

<sup>86</sup> If customers want a bundled product, EGSs will offer a bundled product. If customers do not want a bundled product, the marketplace will respond and some or most market participants will offer unbundled services. The statements by Enron witnesses cited by IBEW merely reflects the fact that in most markets, customers have consistently indicated a preference for a bundled product or "one stop shopping." The Competitive Intervenors see no reason why electric customers would have different preferences. However, if it turns out that they do, the market will respond accordingly.

implies that less competition is better than full competition or that strictly controlled competition is better than free markets.<sup>87</sup>

Unfortunately for those who would continue the status quo, the General Assembly has made the clear choice between competition and regulation. In the end, IBEW shows little trust in the ability of customers to exercise choice and believes that the Government, not the marketplace, can better decide what is in the best interests of consumers. While the choice is a fundamental one — the Competitive Intervenors believe the choice has already been made.

**F. The Commission has Endorsed the Notion of EGSs Acting as Agents for Customers.**

In their Main Brief, the Competitive Intervenors advanced a market structure in which EGSs could, upon customer authorization, act as agent for the customer to fulfill all of the customer's electricity needs. In its PECO Compliance Filing Order, the Commission endorsed such a market structure through review of PECO's proposed tariff. As the Commission stated:

. . . However, we believe MAPSA's recommendation to include language stating that an EGS may act as an agent for an end use customer will add clarity to the definition. PECO is

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<sup>87</sup> Amazingly, IBEW includes a long cite from the testimony of its witness Schmidt regarding the benefits of a regulated monopoly in assuring low cost, high quality service. IBEW Brief, p. 15. In the view of its witness, competition can only lead to "cream skinning" and rate increases for high cost customers. However, on cross-examination, it became clear that Mr. Schmidt had no idea whether such circumstances would occur in a competitive retail electric market. Tr. 1278-85 (August 21, 1997). Mr. Schmidt's statements are not credible and should be disregarded.

directed to add the following language to its definition of "customer":

**In addition, unless explicitly prohibited by the Public Utility Code or the Commission's Rules and Regulations, an EGS may act as agent for an end use customer upon written authorization to PECO which may be part of the notice of EGS selection.**

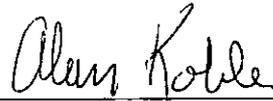
Compliance Filing Order, pp. 12-13.

Again, the Commission's determination is a policy decision which should be applied to all EDC service territories. Such a determination is clearly supported by the record in this proceeding and should be adopted by the Commission in PP&L's final restructuring plan.

### III. CONCLUSION

For all of the foregoing reasons, the Competitive Intervenors respectfully request the Commission to approve a restructuring plan for PP&L consistent with the foregoing discussion.

Respectfully submitted,



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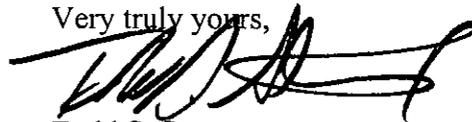
**RE: Application of Pennsylvania Power & Light Company for Approval of its  
Restructuring Plans; Docket No. R-00973954; SUPPLEMENTAL REPLY  
BRIEF OF THE MID-ATLANTIC POWER SUPPLY ASSOCIATION**

Dear Mr. McNulty:

Enclosed, for filing with the Commission, please find an original and nine (9) copies of the Supplemental Reply Brief of the Mid-Atlantic Power Supply Association in the above-referenced docket. As reflected on the Certificate of Service attached to the brief, all parties to this proceeding have been served with a copy of this document.

If you have any questions regarding filing, please direct them to me.

Very truly yours,



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Counsel for  
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TSS/bes

Enclosure

cc: Attached Certificate of Service  
Honorable George M. Kashi (Via Hand Delivery) (3 copies and diskette)

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

**RIGINAL**

Application of Pennsylvania Power & Light :  
Company for Approval of its Restructuring Plan : Docket No. R-00973954  
Under Section 2806 of the Public Utility Code :

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**SUPPLEMENTAL REPLY BRIEF  
OF THE MID-ATLANTIC  
POWER SUPPLY ASSOCIATION**

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Dated: February 27, 1998

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## I. INTRODUCTION

In its Main Brief, PP&L states that it has been an “active proponent of retail electric competition.” PP&L goes on to state that without “a fair and orderly transition from regulation to competition...effective competition will not develop.” (PP&L Main Brief, p. 1-2). PP&L then states four principles which, in its view, are “critical to the transition to competition.” (*Id.*) PP&L’s four principles, however, fail to acknowledge the axiomatic principle that, for competition to exist, there must be competitors in the market, with a reasonable opportunity to compete. Incredibly, PP&L’s Brief fails to acknowledge the obvious, namely, that in order to have competitors in the marketplace, its restructuring proposal must include a generation credit component<sup>1</sup> which will guarantee the development of a robust competitive market for retail sales of electric energy.

PP&L consumes a substantial amount of space in its Main Brief attempting to justify its stranded costs. It fails, however, to acknowledge that without competition, which would be guaranteed by an acceptable shopping credit, there are no stranded costs.<sup>2</sup> PP&L’s perspective appears to be that there will be no competition until it has collected its stranded costs. In fact, PP&L remarkably does not believe that it must lose market share in order for competition to occur. Tr. 473 (August 18, 1997) (Kalt). If PP&L does not lose market share, the result is that suppliers will gain no customers and the market will fail. In short, PP&L’s position ignores the

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<sup>1</sup> In various restructuring proceedings, the component of a utility’s fully-bundled rate which remains after subtracting the unbundled transmission and distribution charges, and a calculated competitive transition charge (“CTC”) has been labeled in various ways. MAPSA’s testimony in this proceeding labeled this component as an implicit generation rate. In other proceedings it has been called a “shopping credit,” a competitive generation charge, or, a generation credit. For purposes of this Reply Brief, it shall be referred to as a “shopping credit.”

<sup>2</sup> Stranded Costs are defined as “a utility’s known and measurable net electric generation-related cost, determined on a net present value basis over the life of the asset or liability...which traditionally would not be recoverable under a regulated environment, but which may not be recoverable in a competitive electric generation market...”. 66 Pa. C.S. §2803.

Competition Act's<sup>3</sup> and this Commission's clear mandate that restructuring plans guarantee the development of a competitive market. Therefore, PP&L's Plan must be modified to correct the deficiency.

**1. PP&L Has Failed To Acknowledge Substantial Evidence Presented In This Case By MAPSA Regarding The Level Of Shopping Credit Necessary To Sustain A Competitive Generation Market.**

PP&L's Main Brief failed to address specific evidentiary points which were raised on the record by MAPSA in this proceeding; therefore, PP&L has failed to meet its burden of proof and persuasion on those particular issues. The Commission's regulations at 52 Pa. Code §5.501(a)(3), specifically require that "the party with the burden of proof shall, in its main or initial brief, completely address, to the extent possible, every issue raised by the relief sought and the evidence adduced at hearing." Even the most liberal reading of PP&L's Main Brief will indicate that it not only has failed to address the key evidentiary issue raised by MAPSA in this proceeding -- the level of shopping credit which will be sufficient to allow for the development of a robust competitive market -- PP&L simply has failed to acknowledge the existence of this component of MAPSA's case. While it might be true that parties, even those with the burden of proof, are not required to anticipate every possible argument that an opponent might raise, they are, at a minimum, required to address substantive issues adduced on the evidentiary record by opposing parties. In this case, PP&L has had adequate notice that MAPSA would address the shopping credit issue, not only because MAPSA's testimony focused on the issue, but also because MAPSA previously had put all parties on notice that it would address this issue in its Supplemental Brief. At the very least, PP&L's failure even to acknowledge MAPSA's

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<sup>3</sup> Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. §§2801, et seq. ("Competition Act").

substantial evidentiary position should disqualify PP&L from arguing against MAPSA's position in its Reply Brief. Further, this Commission should adopt the evidence that MAPSA presented as to what constitutes an appropriate shopping credit. If PP&L is allowed to "sandbag," it would leave MAPSA no practical means of defending its position, and this Commission should not countenance such behavior on PP&L's part.

**2. PP&L's Main Brief Has Failed To Address And/Or Adopt The Methodology For Assuring The Development Of Competitive Market That Was Adopted By This Commission In The Decision In PECO.**

PP&L, in its Main Brief, does acknowledge the decision of this Commission in the recent Opinion and Order in PECO Restructuring Proceeding. Application of PECO Energy Company for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code, Docket No. R-00973953, (Order entered December 23, 1997) ("PECO"). However, in the most critical section of its Main Brief, PP&L fails to acknowledge that PECO is controlling. Particularly in the areas of stranded cost quantification and the determination of the appropriate level of shopping credit, PP&L ignores the mandate of the PECO decision and attempts to set a shopping credit which will be inadequate to allow for the development of a competitive market. PP&L's arguments that the PECO decision does not control in this case are without merit, and its failure even to acknowledge the Commission's methodology for ensuring the development of competition, render PP&L's argument quite inconsequential. PP&L's arguments which ignore or disregard the PECO mandate should not be considered.

## II. ARGUMENT

### **A. PP&L Has Failed To Develop A Residual Shopping Credit In This Proceeding Which Is Capable Of Allowing For The Development Of A Robust Competitive Market For Retail Sales Of Electric Energy In PP&L Service Territory And, Therefore Its Plan Must Be Rejected And/Or Modified.**

From MAPSA's perspective, PP&L's Main Brief is most instructive in what it has failed to say, rather than what actually was argued. Particularly, PP&L failed to state the need for, or to provide any support for, a competitive generation component which will allow for the development of a robust competitive market for the retail sales of electric energy in its service territory. PP&L's failure to address its burden of proof with regard to the adequacy of shopping credit is ironic, since in several places in its Main Brief PP&L mentions the statutory requirement that its restructuring proposal establish a "active and viable retail market for electric generation." *See, e.g.,* PP&L Main Brief, p. 135. As argued by MAPSA in its Supplemental Brief (and still unaddressed by PP&L), it is the implicit generation rate or "shopping credit" which is the bellwether of whether a restructuring plan will allow for the development of a competitive retail market as stated by the Commission in PECO. (PECO, p. 16). While PP&L pays "lip service" to the need for competition, it fails to acknowledge the most significant aspect of ensuring the development of competition. And, while PP&L goes to great lengths to justify its alleged level of stranded costs and the appropriateness of its competitive transition charge, which is designed to recover those stranded costs, it fails to acknowledge the fact that it is the recovery mechanism (CTC) that has the most significant impact upon the development of competition.

As argued in the Competitive Intervenors' Joint Main Brief, this Commission is faced with a schizophrenic task. On one hand, PP&L must be allowed an opportunity to recover its

known and measurable stranded costs (and the CTC is the mechanism for that recovery); on the other hand, the statute creates a clear mandate that a restructuring plan must guarantee the development of a robust competitive market. Indeed, one cannot exist without the other, that is, it is by reason of competition that a utility has any stranded costs in the first instance. Therefore, it is absolutely essential that a restructuring plan allow for competition if the corollary stranded costs are to occur.<sup>4</sup>

**B. Many Of PP&L's Proposed Findings Of Fact And/Or Conclusions Of Law Are Not Based On Substantial Evidence, Are Contrary To Evidence Found In The Record Of This Proceeding, Are Contrary To Law, And Must Be Rejected.**

Accompanying PP&L's Main Brief in this proceeding, was a separate volume labeled "Proposed Findings of Fact and Conclusions of Law on Behalf of PP&L, Inc." This volume contained 459 separately-numbered proposed Findings of Fact and 5 proposed Conclusions of Law, along with several tables purporting to support PP&L's various positions. MAPSA specifically objects to Proposed Findings of Fact Nos. 24, 33, 34, 35, 36, 60, 87, 88, 90, 91, 92, 93, 94, 95, 106, 184, 207, 308, 309, 310, and 365. MAPSA's objections are based on a variety of principles including, but not limited to, the fact that: PP&L's assertions are not supported by evidence of record; are contrary to law; are based upon evidence not in record in this proceeding; and/or, are simply incorrect. These proposed Findings of Fact should be rejected. Likewise, PP&L's proposed Conclusions of Law Nos. 2 (and subparts d through h), 3, 4 and 5, as well as its Tables "C", "D", and "E", should be disregarded.

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<sup>4</sup> PP&L's failure to address MAPSA's substantial evidentiary position on what level of generation credit is required in order to sustain the development of a robust competitive market in PP&L's service territory can reasonably be considered to be an acquiescence to MAPSA's position. Regardless of whether PP&L has acquiesced or simply failed to address MAPSA's evidentiary position, the mere existence of MAPSA's position makes the Commission's task clear. A review of PP&L's proposed CTC, as compared to MAPSA's testimony concerning the necessary level of a shopping credit, yields

**C. Several Specific Proposed Findings Of Fact And/Or Conclusions Of Law Require Specific Comment.**

Several of PP&L's Proposed Findings of Fact, however, require specific comment. First, in PP&L's proposed Finding of Fact No. 95, PP&L attempts to explain the components which will be involved in the future price of electric energy; namely, energy and capacity. PP&L goes on to state that the payments customers are willing to make for the two components are an important factor in evaluating the competitive market value of PP&L's generation assets. What is most significant about this proposed Finding of Fact is that it fails to recognize that PP&L's proposed market price is a wholesale market price. Further, PP&L's wholesale market price is a short-term "market clearing price." PP&L's "market price" does not reflect the costs incurred by suppliers in delivering electric energy to retail customers; this latter fact is supported by the record in this case. It is essential that a distinction be drawn between a wholesale market price and a retail market price. While the former may be appropriate in some instances for determining a utility's stranded cost, it is not relevant to setting the appropriate shopping credit. Rather, it is the retail market price which takes into consideration all of the costs that are necessarily incurred by suppliers in providing electric energy at retail, which is the critical market price for purposes of determining whether or not a competitive retail market will ever develop. (PECO, p. 44).

Second, in PP&L's proposed Findings of Fact Nos. 307, 308, 309, and 310, it refers to a "retail market price of electric energy" in explaining its attempt to derive a CTC. PP&L's description of the market price used in this computation as a "retail market price," is contrary to the record in this case. (See, MAPSA Main Brief, p. 3). Any attempt by PP&L to describe the

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the conclusion that PP&L's CTC must be adjusted to allow for a larger shopping credit. PECO.

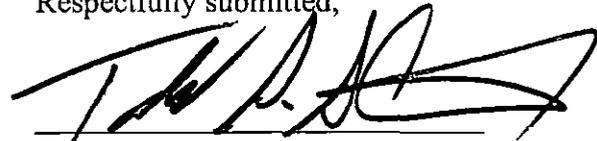
market price that it has used as being a "retail market price" should be disregarded. PP&L obviously is attempting to create the appearance that it actually has developed a CTC which considers a real "retail" price. Rather, what PP&L has done is to use a wholesale market price in order to determine its alleged stranded costs, and designed a CTC in order to collect those costs, and ended the analysis at that point. PP&L's approach is contrary to the procedures set forth by this Commission in PECO which require an examination of the residual shopping credit. This credit is equal to the difference between PP&L's current fully-bundled rates, and the sum of the unbundled transmission and distribution rates and the CTC. The resulting shopping credit must be examined to determine whether it is large enough to allow for competition. And, the benchmark to determine the adequacy of the shopping credit is the fully-delivered retail price of power. PP&L's analysis conveniently avoids this critical step and should be modified accordingly.

### III. CONCLUSION

PP&L's Restructuring Plan, as proposed, develops unbundled transmission and distribution charges uses a wholesale market price to estimate its stranded costs, and then develops a CTC designed to recover those stranded costs. The remainder between those components and PP&L's current fully-bundled rate is the shopping credit. This Commission clearly has mandated that the shopping credit component must be sufficient to allow for the development of a competitive retail market. MAPSA has introduced evidence into the record in this proceeding, unchallenged by PP&L in its Main Brief, which sets forth a level of shopping credit which would be required to allow for the development of competition in PP&L's service territory. MAPSA Witness Johnstone testified that, at a minimum, this shopping credit should be

approximately 3.8¢/kWh, without including charges for the additional and ancillary services that suppliers will be required to purchase in order to complete a retail transaction. (MAPSA Exh. No. 1). Comparing MAPSA's proposed number with the "fall-out" number from PP&L's proposal requires that this Commission adjust the CTC recovery mechanism for PP&L, according to the methodologies provided for in PECO in order to guarantee the development of a competitive retail market. MAPSA urges this Commission to modify PP&L's proposal accordingly.

Respectfully submitted,



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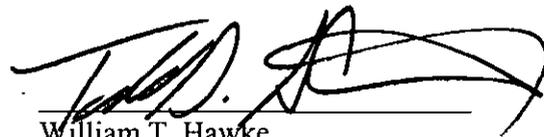
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**Re: Application Of Pennsylvania Power  
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Restructuring Plan Under Section 2806  
Of The Public Utility Code,  
Docket No. R-00973954**

Dear Mr. McNulty:

Enclosed for filing in the above-captioned proceeding are an original and nine copies of the Reply Brief of Allegheny Power.

Also enclosed is an additional copy to be stamped and returned to us in the enclosed self-addressed envelope. Thank you for your assistance.

Very truly yours,



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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**APPLICATION OF PENNSYLVANIA POWER AND :  
LIGHT COMPANY FOR APPROVAL OF ITS :  
RESTRUCTURING PLAN UNDER SECTION 2806 : DOCKET NO. R-00973954  
OF THE PUBLIC UTILITY CODE :**

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OF ALLEGHENY POWER**

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**APPLICATION OF PENNSYLVANIA POWER AND :  
LIGHT COMPANY FOR APPROVAL OF ITS :  
RESTRUCTURING PLAN UNDER SECTION 2806 : DOCKET NO. R-00973954  
OF THE PUBLIC UTILITY CODE :**

**REPLY BRIEF OF ALLEGHENY POWER**

Pursuant to 52 Pa. Admin. Code §§ 5.501, 5.502, Allegheny Power hereby submits its Reply Brief. Some parties have argued that principles of fairness and reasoned decisionmaking require the Commission to apply the same rulings that were made in the restructuring proceeding of PECO Energy Company ("PECO") to this Pennsylvania Power & Light Company ("PP&L") proceeding and other utility proceedings. Allegheny Power submits that just the opposite is true: it would be unfair and unreasonable to rigidly superimpose the PECO rulings on all other utilities without considering the different facts, evidence, and legal arguments that have been presented in each individual proceeding.

PECO is the highest cost utility in Pennsylvania. In contrast, Allegheny Power's operating subsidiary, West Penn Power Company ("West Penn"), is the lowest cost utility. If the Commission were to adhere blindly to the rulings that were made based on the record in PECO's proceeding, West Penn's financial integrity would be destroyed. The Electricity Generation Customer Choice and Competition Act ("Competition Act"), was intended to lower costs to consumers by creating competition, not by destroying a utility that has operated efficiently and provided "extremely low rates."<sup>1/</sup>

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<sup>1/</sup> Legislative Journal - Senate, No. 62, at 2686, 2693 (Nov. 25, 1996).

**IT WOULD BE UNJUST, UNREASONABLE AND A VIOLATION OF THE CONSTITUTIONAL DUE PROCESS AND PROPERTY RIGHTS OF OTHER UTILITIES IF THE COMMISSION WERE TO FORECLOSE CONSIDERATION OF THEIR INDIVIDUAL RESTRUCTURING PLANS BASED UPON THE RULINGS MADE IN PECO'S PROCEEDING**

PECO, the PP&L Industrial Customer Alliance ("PPLICA"), the Office of Consumer Advocate ("OCA"), and other parties argue that the Commission must make the same rulings in PP&L's case that were made in PECO's case. They claim that:

- the same rulings made by the Commission in PECO's proceeding with respect to the generation shopping credit and CTC recovery period must be made in the restructuring proceedings of all utilities;
- stranded costs must be calculated for all utilities using the same "asset value" method that was adopted in PECO's case;
- stranded costs must be calculated for all utilities operating in the PJM market using the same OCA-sponsored market price projections that were adopted in PECO's case;
- all utilities' requests to recover stranded fossil fuel decommissioning costs must be denied because PECO's request to recover these costs was denied; and
- the reduced rate of return on stranded generation costs that was adopted in PECO's case similarly must be adopted for all utilities.

*See, e.g.*, Main Br. of PECO at 1-5; Jt. Main Br. of Large Customers at 3, 6, 10, 13, 15, 19, 22- 24, 28, 29, 37; Main Br. of OCA at 16, 20, 42-43.

While these parties' requests for consistent treatment may have superficial appeal, their arguments must be rejected. As the Commission stated repeatedly in the *PECO Opinion*, its rulings were based on the "record" presented in that proceeding.<sup>2/</sup> It would be unjust and unreasonable, and indeed a denial of other utilities' constitutional due process and property rights, if the Commission were to foreclose consideration of their individual restructuring plans by imposing upon all other utilities rulings that were made based solely upon the record presented in PECO's proceeding.

The restructuring process created by the Legislature and the Commission was intended to provide each utility with a fair opportunity to have its individual plan considered based upon the record established in that utility's proceeding. Before it "looks" at the hearing records established in the individual restructuring proceedings of other utilities, the Commission should not "leap" to apply its *PECO* conclusions to all other utilities.

---

<sup>2/</sup> See, e.g., *Opinion and Order*, Application of PECO Energy Company for Approval of Its Restructuring Plan Under Section 2806 of the Public Utility Code and Joint Petition for Partial Settlement and Petition of Enron Energy Services Power, Inc. for Approval of an Electric Competition and Choice Plan and for Authority Pursuant to Section 2807(E)(C) of the Public Utility Code to Serve as the Provider of Last Resort in the Service Territory of PECO Energy Company, Docket Nos. R-00973953 and P-00971265, at 16, 17, 18, 44, 50, 53, 57, 58, 59, 61, 82, 87, 88, 90, 92, 98, 105 (December 23, 1997) ("*PECO Opinion*").

## **I. CONTEXT OF RESTRUCTURING**

### **B. LEGAL AND LEGISLATIVE BACKGROUND**

#### **THE RESTRUCTURING PROCESS CREATED BY THE LEGISLATURE AND THE COMMISSION WAS INTENDED TO PROVIDE EACH UTILITY WITH A FAIR OPPORTUNITY TO HAVE ITS INDIVIDUAL PLAN CONSIDERED BASED UPON THE EVIDENTIARY HEARING RECORD ESTABLISHED IN THAT UTILITY'S PROCEEDING**

When the Legislature passed the Competition Act, it recognized that significant differences existed among Pennsylvania's electric utilities. 66 Pa. C.S.A. § 2802 (4). West Penn, in particular, was recognized to be unique among Pennsylvania's electric utilities because it had -- and continues to have -- "extremely low rates." Legislative Journal - Senate, No. 62, at 2686, 2693 (Nov. 25, 1996). The Legislature did not envision that the Commission would issue a single decision that would apply uniformly to all utilities. Instead, it envisioned that "each" utility would submit its own individual "restructuring plan" for review by the Commission. 66 Pa. C.S.A. §§ 2804, 2806 (f). The Commission was then expected to hold an evidentiary hearing on each plan, with the opportunity for input from all parties, and to issue an order acting on that individual plan. 66 Pa. C.S.A. § 2806 (f).

In its "Report and Recommendation to the Governor and General Assembly on Electric Competition," which served as the blueprint for the Competition Act, the Commission recognized that:

each public utility could have a unique financial transition plan because: (1) each has different types and levels of stranded costs, (2) each has undertaken varying efforts to avoid or reduce stranded costs, and (3) each has undertaken varying efforts to bear the burden of uneconomic costs.

Docket No. I-940032, at 17 (July 1996).

When the Commission issued its Order directing electric utilities to submit their restructuring plans, it again acknowledged that a one size fits all approach was not required. The Commission ruled that Allegheny Power could "file an alternative competitive transition plan to meet its unique circumstances." *Re Electric Utility Restructuring Filings*, Docket No. M-00960890 F.003, 1997 Pa. PUC LEXIS 11, at 36; 176 P.U.R. 4th 45 (Feb. 13, 1997).

Having made these commitments, it would be unfair for the Commission to now foreclose meaningful consideration of other utilities' restructuring plans by rigidly adopting the rulings made in PECO's proceeding without considering all of the evidence that has been presented in the proceedings of other utilities.

**THE GENERATION CREDIT ADOPTED BY THE COMMISSION IN THE PECO PROCEEDING CANNOT BE APPLIED UNIFORMLY TO OTHER UTILITIES**

An issue of critical importance in this case, as well as in the restructuring cases of West Penn and other Pennsylvania utilities, is the appropriate level of the "generation credit" or "shopping credit." The credit equals the difference between the utility's overall rate cap and its recoverable T&D and CTC charges. For customers choosing competitive generation suppliers, the credit represents the highest price that the customer may pay for generation without resulting in an overall bill that exceeds the utility's bundled rate.

In *PECO*, the Commission ordered generation credits which, in the aggregate, equal 4.59¢/kwh.<sup>3/</sup> PECO, in its Brief in this case, notes that such "artificial" credits "far exceed" and "bear no relationship to" any near term projections of market price, but asserts that since these artificial credits were imposed on PECO, they "must be imposed on the other utilities, as well." Main Br. of PECO at 4. It is unclear whether PECO proposes imposition of the specific 4.59¢/kwh credit ordered in the Commission's *PECO Opinion* here or merely credits which "far exceed" projected market prices. The Mid-Atlantic Power Supply Association ("MAPSA") proposes a shopping credit of 3.87¢/kwh, or higher, which it asserts to be necessary to foster competition. Main Br. of MAPSA at 9.

The Commission should not attempt to impose a uniform generation credit throughout the Commonwealth as PECO suggests but, consistent with the methodology employed in *PECO*, should base its decision regarding the PP&L generation credit on the record evidence developed in this proceeding. In *PECO*, the Commission calculated the generation credit by determining what it considers to be a just and reasonable level for PECO's CTC and T&D charges and subtracting the sum of those two charges from PECO's overall rate cap. Thus, the generation credit was the "residual" that resulted after full consideration of PECO's CTC and T&D costs. Application of this methodology to PP&L and other Pennsylvania utilities would necessarily result

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<sup>3/</sup> *Opinion and Order on Compliance Filing*, Application of PECO Energy Company for Approval of Its Restructuring Plan Under Section 2806 of the Public Utility Code and Joint Petition for Partial Settlement and Petition of Enron Energy Services Power, Inc. for Approval of an Electric Competition and Choice Plan and for Authority Pursuant to Section 2807(E)(C) of the Public Utility Code to Serve as the Provider of Last Resort in the Service Territory of PECO Energy Company, Docket Nos. R-00973953 and P-00971265, Appendix D (Feb. 5, 1998) ("*PECO Opinion and Order on Compliance Filing*").

in different generation credits because their respective rate caps, CTC costs and T&D costs differ markedly.

PECO's extraordinarily high bundled rates permitted application of this approach to result in a residual generation credit that was, in the Commission's view, sufficient to promote competition. PECO is the highest cost utility in the Commonwealth and one of the highest cost utilities in the country. Its bundled rates and, thus, its overall rate cap, are nearly 10 ¢/kwh; its generation rate cap alone is roughly 7.5 ¢/kwh.<sup>4/</sup> Stated simply, there was sufficient "room" under PECO's high rate structure to permit such a large residual generation credit. It follows that there will be less room to permit such credits under the rate caps of lower cost Pennsylvania utilities, such as PP&L and West Penn.

The West Penn example demonstrates conclusively that uniform application of a generation credit of the magnitudes proposed by PECO and MAPSA is not only unreasonable, but impossible. West Penn is the lowest cost utility in the Commonwealth. Its overall rates are roughly 45 percent lower than PECO's. West Penn's generation rate cap is only 3.7 cents. *Even assuming for purposes of argument that West Penn were entitled to no CTC recovery*, it is impossible to fit the 4.59 ¢/kwh PECO credit, or even MAPSA's proposed 3.87 ¢/kwh credit, within West Penn's smaller generation rate cap. It cannot be done.

Of course, the proper calculation of West Penn's shopping credit, pursuant to the PECO methodology, would consider a just and reasonable level of CTC recovery, as well, thereby reducing further the maximum generation credit that could be applied. The essential point, however, is that uniform generation credits cannot be imposed throughout the Commonwealth.

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<sup>4/</sup> PECO Opinion and Order on Compliance Filing, Appendix D.

Other reasons support rejection of the PECO and MAPSA proposals. As suggested, application of the *PECO* methodology for determining generation credits will necessarily lead to different levels of credits for different utilities because the credits are derivative of the utilities' unique cost characteristics. Further, the Commission has not mandated uniform application of that methodology throughout the Commonwealth, but instead has left open the possibility that other methodologies, such as that proposed by PP&L here or those proposed by West Penn in its own restructuring proceeding, may be employed.<sup>5/</sup> Such methodologies, too, are likely to produce different results. Finally, while there is a dispute as to what price level is necessary to foster competition, there is no dispute that two separate competitive generation markets exist in Pennsylvania: one in PJM and one in the western portion of Pennsylvania that is part of the ECAR region. The latter market is characterized by excess capacity and lower prices. To the extent that characteristics of competitive markets are used to determine or adjust utility generation credits, the ECAR utilities necessarily will have different credits than the PJM utilities.

### **III. STRANDED COST CALCULATION METHODOLOGY**

#### **THE COMMISSION MUST CONSIDER FULLY THE EVIDENCE PRESENTED IN EACH INDIVIDUAL UTILITY'S RESTRUCTURING PROCEEDING BEFORE REACHING A DETERMINATION ON THE APPROPRIATE METHOD TO USE TO CALCULATE THAT UTILITY'S STRANDED COSTS**

In this proceeding, PP&L used a "regulatory" or "lost revenues" method to calculate its stranded costs. Consistent with the Competition Act's definition of stranded costs as those costs

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<sup>5/</sup> For this reason, Allegheny Power also disagrees with the suggestion of the Competitive Intervenors that the PECO methodology be considered "binding precedent." Jt. Main Br. of Competitive Intervenors at 13.

“which traditionally would be recoverable under a regulated environment but which may not be recoverable in a competitive electric generation market,” PP&L compared, on a present value basis, the generation revenues it could earn under traditional regulation over the life of its generation assets with the generation revenues it could earn in a competitive market.<sup>6/</sup>

Other parties assert, however, that the Presiding Judge cannot even consider PP&L's method, or any other method, because the Commission approved an "asset value" method in the PECO proceeding. Jt. Main Br. of Large Customers at 22, 23; Main Br. of OCA at 20. According to PPLICA, the asset value method is "the only method" that can be used. Jt. Main Br. of Large Customers at 22. Allegheny Power disagrees.

The Commission must consider fully the evidence presented in each individual utility's restructuring proceeding before reaching a determination on the appropriate method to be used to calculate that utility's stranded costs. Significantly, PECO itself proposed the use of an asset value method in its proceeding. *PECO Opinion* at 80. Thus, the issue of whether or not the regulatory method or some other method should be used to calculate a utility's stranded costs was not even fully aired and litigated in PECO's case. Moreover, OCA -- the party which proposed the use of an asset value method in the *PECO* proceeding -- has proposed the use of a lost revenues method in West Penn's proceeding. A decision on the appropriate method to use in West Penn's proceeding must await the outcome of the litigation in that proceeding. It cannot be determined here, nor in PECO's proceeding.

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<sup>6/</sup> See 66 Pa. C.S.A. § 2803; PP&L St. 3-R at 3-7; PP&L St. 8-R at 2-18.

In any event, if the asset value method is applied correctly and consistently, it should produce approximately the same results as the regulatory method.<sup>7/</sup> OCA and PPLICA, however, have not applied the asset value method correctly and consistently in this proceeding. *See* Initial Br. of PP&L at 45-46, PP&L St. 8-R at 3. Among other things, they failed to take into account the income taxes that will have to be paid to the government on the CTC revenue stream. The "value" of a utility's assets to an investor is based upon an after tax cash flow. Once the net book value is determined, an investor can only be made whole if the CTC amount is grossed up for income taxes -- which OCA and PPLICA failed to do. *See* PP&L St. 19-R at 7, 11-13.

Thus, even if the Commission determines that an asset value method should be used in PP&L's proceeding, important issues remain about how to implement that method properly. The Commission should await a full airing of these issues in each individual utility's restructuring proceeding, before reaching any final decision that would apply broadly to all utilities.

#### **IV. MARKET PRICE OF ELECTRICITY**

**IF, AFTER FULLY CONSIDERING ALL OF THE EVIDENCE IN PP&L'S PROCEEDING, THE COMMISSION DECIDES TO ADOPT THE SAME PJM MARKET PRICES IT ADOPTED IN THE PECO PROCEEDING, IT CANNOT APPLY THOSE PROJECTIONS TO OTHER UTILITIES OPERATING IN THE ECAR MARKET**

OCA, PPLICA, and PECO contend that the same market price projections that were adopted in PECO's proceeding also should be adopted in PP&L's proceeding.<sup>8/</sup> They reason that

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<sup>7/</sup> *See* Initial Br. of PP&L at 46; PP&L St. 8-R at 3; PP&L St. 19-R at 5, 14.

<sup>8/</sup> Jt. Main Br. of Large Customers at 23, 30; Main Br. of OCA at 16, 42-43; Main Br. of PECO at 2.

both PECO and PP&L are members of the PJM power pool and will be competing in the same PJM market. Moreover, the witnesses in both PECO's and PP&L's proceedings forecasted future energy prices based upon the PJM market.<sup>9/</sup> This reasoning does not apply to West Penn. West Penn operates in the ECAR market, not the PJM market. In West Penn's case, the parties have submitted forecasts based upon the ECAR market. Thus, the PJM market price projections adopted in PECO's proceeding cannot be applied to West Penn's proceeding.

Nor should those projections be applied to PP&L's proceeding without first engaging in a full and fair consideration of all of the evidence PP&L has submitted. As the Commission acknowledged in its *PECO Opinion*, it "has the responsibility to consider all of the objective information provided by the parties in this proceeding as well as the assumptions and other judgments made by those parties in order to assess their credibility and reach an informed judgment." *PECO Opinion* at 82-83. That same "responsibility" applies to PP&L's proceeding.

Importantly, the Commission's adoption of OCA's market price projections in the PECO proceeding was based solely upon the evidence submitted in that proceeding. *PECO Opinion* at 87-90. The Commission adopted OCA's projections because it found that PECO's multiple studies, which had been frequently changed to produce different results, were flawed. *PECO Opinion* at 84-85, 87. PP&L's market price study, however, may not suffer from this same problem.

Moreover, in the *PECO* proceeding, the Commission did not endorse the broad scale application of each and every market price assumption made by OCA. *PECO Opinion* at 90. It

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<sup>9/</sup> *Id.*

simply found that, on balance, OCA's proposal was the most reasonable one in the record of that proceeding. *Id.* at 88-90. The Commission stated:

*Though there is no single proposal that we find completely convincing on every component of its analysis, we adopt the testimony of OCA witness Smith as the most reasonable determination of future market value in the record* and therefore determine a market value of PECO's stranded generation plants of \$3.96 billion as of 12/31/98. Witness Smith's testimony is the most credible, and least criticized of any of the other market value witnesses, and produces a result approximately midway between the other two most credible models.

*PECO Opinion* at 88 (emphasis added). There is a different record in PP&L's proceeding that could lead to a different result.

**THE PARTIES INCONSISTENTLY ARGUE THAT THE COMMISSION'S STRANDED COST RULINGS IN *PECO* WHICH BENEFIT THEM SHOULD BE APPLIED TO PP&L, BUT NOT THOSE RULINGS WHICH BENEFIT PP&L AND ITS INVESTORS**

Further demonstrating the unreasonableness of their positions, the parties inconsistently argue that the Commission should uniformly impose upon PP&L the stranded cost rulings made in PECO's proceeding which inure to their benefit, but not the stranded cost rulings which would benefit PP&L and its investors. In *PECO*, the Commission did not grant the stranded cost disallowances proposed by many of the same parties that are now active in PP&L's proceeding. *PECO Opinion* at 100, 107. Yet, OCA and PPLICA continue to advocate here that the Commission should disallow PP&L any common equity return on its stranded generation plant costs.<sup>10/</sup> The Office of Trial Staff ("OTS"), the Environmentalists, and the American Association of Retired Persons ("AARP") also continue to advocate the adoption of stranded cost sharing

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<sup>10/</sup> Main Br. of OCA at 73; Jt. Main Br. of Large Customers at 11.

mechanisms that would disallow anywhere from 10% to 57.3% of PP&L's stranded generation costs.<sup>11/</sup>

As discussed in Allegheny Power's Supplemental Initial Brief, the arbitrary stranded cost disallowances advocated by these parties are unjust and unreasonable and violate the Competition Act. The fact that some of these same parties are now arguing that the Commission should apply the rulings made in PECO's case regarding the type of stranded costs that are recoverable, the method to be used to calculate those costs, and the market price projections to be included in such calculations, but should not apply the Commission's companion ruling denying their proposed stranded cost disallowances, undercuts their own arguments.

## **V. REVENUE UNDER REGULATION**

### **B. COST OF CAPITAL**

#### **THE APPROPRIATE RATE OF RETURN FOR EACH UTILITY MUST BE EXAMINED ON A CASE-BY-CASE BASIS**

The purpose of the CTC, mandated by the Competition Act, is to allow utilities to recover costs which traditionally would be recoverable in a regulated environment, but which may not be recoverable in the competitive market. 66 Pa. C.S.A. § 2803. Therefore, when PP&L calculated its stranded costs, PP&L used the 11.6% return on common equity authorized by the Commission in PP&L's last rate case. OTS, PECO and others argue that the Commission should reduce PP&L's rate of return, just as it did in the PECO proceeding,

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<sup>11/</sup> Main Br. of OTS at 10-11; Main Br. of Public Interest Parties at 23; Supp. Br. of AARP at 8-12.

because the risk faced by the Company in recovering its stranded costs is near zero. *See, e.g.,* Main Br. of OTS at 18-20; Main Br. of PECO at 4.

OTS further asserts that the Commission, when determining the appropriate rate of return on common equity for a utility, need only be concerned about the recovery of stranded costs through the utility's CTC. Main Br. of OTS at 19-20. According to OTS, the Commission "should not be concerned that the newly formed generation company does not earn the common equity return permitted by this Commission for a regulated utility in the Company's last rate proceeding" because the Commission "will have no interest or involvement in the degree of profits which an electric generation company will garner in a deregulated competitive environment." Main Br. of OTS at 19.

Allegheny Power disagrees with these arguments. First of all, any determination on the appropriate rate of return to be applied to a particular utility must be based upon the facts and evidence presented in that individual utility's restructuring proceeding. Different risks may be faced by different utilities. For example, some utilities may be able to fully collect their stranded costs under their rate caps, while other utilities -- such as West Penn -- may not. In *PECO*, the Commission examined the particular facts presented in that proceeding and concluded:

the record in this proceeding supports adopting PECO's revised long-term debt rate of 7.47% to calculate the revenue requirement for the recovery of the CTC over the 8 ½ year transition period. This result is between the low range proposed by OCA, PAIEUG, Navy and IPALCO and the 9.52% proposed by PECO. It is close to the 7.53% proposed by NEV. Our proposal of 7.47% reflects the low risk associated with the CTC and therefore achieves a just

and reasonable result. We shall use 7.47% for calculating the CTC revenue recovery in this proceeding.

*PECO Opinion* at 108. The record in PP&L's proceeding and the proceedings of other utilities may produce a different result.

Moreover, in so far as the Competition Act continues to require utilities to provide generation service during the transition period, and to maintain the safety and reliability of their transmission and distribution systems, the Commission should be greatly concerned about their financial health, not unconcerned as OTS suggests. *See, e.g.,* 66 Pa. C.S.A. §§ 2807 (e), 2804. Until the transition to competition is completed, the generation rate cap will remain in place and a utility's generation charges will continue to be regulated by the Commission. 66 Pa. C.S.A. § 2806(a). As part of this regulation, each utility should be provided with a fair opportunity to earn rates that enable the utility to operate successfully, to maintain its financial integrity, and to compensate its investors for the risks they have assumed. *See, e.g., FPC v. Hope Natural Gas Company*, 320 U.S. 591 (1944); *Jersey Central Power & Light Company v. FERC*, 810 F.2d 1168 (D.C. Cir. 1987).

As the Commission acknowledged in its *PECO Opinion*, it must act "carefully" to ensure that the reliability of Pennsylvania's electric system is not jeopardized. *PECO Opinion* at 58. In order to ensure that this reliability is not jeopardized, the Commission must consider the effect that its rulings, as a whole, would have on each individual utility's financial integrity. This determination of the "end result" of the Commission's rulings on a utility's financial integrity necessarily must be made on a case-by-case basis.

**C. REGULATORY ASSETS AND LIABILITIES**

**4. Fossil Plant Decommissioning**

**THE COMPETITION ACT ALLOWS THE RECOVERY OF FUTURE FOSSIL PLANT DECOMMISSIONING COSTS AND EACH UTILITY'S REQUEST TO RECOVER THESE COSTS MUST BE GIVEN FAIR CONSIDERATION BASED ON THE RECORD IN THAT UTILITY'S PROCEEDING**

OCA, PPLICA and PECO argue that because the Commission denied PECO's claim for stranded fossil plant decommissioning costs, it must also deny PP&L and other utilities any opportunity to recover this type of cost. Main Br. of OCA at 46-47; Jt. Main Br. of Large Customers at 58-60; Main Br. of PECO at 2-3. OCA and PPLICA contend that it was proper for the Commission to deny PECO any recovery of fossil plant decommissioning costs because the future costs of decommissioning fossil plants have not traditionally been recoverable in utility rates. Main Br. of OCA at 47; Jt. Main Br. of Large Customers at 57-58. PECO argues that recovery of these costs is authorized by the Competition Act but, because the Commission denied PECO any opportunity to recover these costs, it must similarly penalize all other utilities. Main Br. of PECO at 3.

As discussed in the Joint Initial Brief of the Electric Distributors, it is unlawful for the Commission to deny a utility any opportunity to recover stranded fossil plant decommissioning costs simply because these costs will be incurred in the future. When the Legislature enacted the Competition Act, it recognized that Pennsylvania utilities constructed generating plants to meet their existing service obligations and that the utilities would need to spend money to retire these plants in the future. Therefore, the Legislature included a provision in the

Competition Act to allow for the recovery of these future retirement costs in a utility's CTC. See 66 Pa. C.S.A. §§ 2802 (15), 2803 (3) (iv). If a utility were precluded from recovering fossil plant decommissioning costs simply because these costs will be incurred in the future, as OCA and PPLICA purport, Section 2803 (3) (iv) of the Competition Act would be rendered meaningless.

In any event, each utility's request to recover fossil plant decommissioning costs must be given fair consideration based upon the evidence presented in the record of that particular utility's proceeding. In *PECO*, the Commission found that the costs PECO proposed to recover were not "known and measurable" because "the record contain[ed] no evidence that any particular existing fossil plant will in fact have to be decommissioned at all, when such decommissioning might occur, the extent of decommissioning that will be required, the future use of the plant and its site, or the cost of the decommissioning found to be needed." *PECO Opinion* at 92. Unlike the PECO proceeding, the hearing records in other proceedings may contain evidence demonstrating that the utility's costs are known and measurable.

## VII. RECOVERY OF STRANDED COST

### D. CTC AND RATE CAP EXTENSION

**THE COMMISSION MUST EXAMINE THE EFFECT THAT ANY EXTENSION OF THE CTC RECOVERY PERIOD OR ANY REQUIREMENT FOR LEVELIZED RECOVERY OF CTC REVENUES WOULD HAVE ON THE FINANCIAL HEALTH OF AN INDIVIDUAL UTILITY, ALONG WITH ALL OTHER RELEVANT FACTORS, BEFORE REACHING ANY DECISION ON THESE ISSUES**

PECO and other parties further argue that, as the Commission did in PECO's proceeding, it should extend the CTC recovery period in PP&L's proceeding and require levelized recovery of

CTC revenues. *See, e.g.*, Main Br. of PECO at 4; Supp. Br. of MAPSA at 6-7. Allegheny Power objects to the application of these rulings to other utilities.

Section 2808(b) of the Competition Act requires the Commission, when establishing the length of the period for collection of a utility's CTC, to consider the effect the collection period "would have on the ability of the Commonwealth to compete in attracting industry and jobs, on the financial health of the electric utilities and other relevant factors." 66 Pa. C.S.A. § 2808(b). The effect that an extension of the CTC recovery period and a levelized CTC revenue collection requirement would have on the financial health of PP&L and other utilities, along with all other relevant factors, must be examined based on the record presented in the restructuring proceeding of each individual utility. Indeed, West Penn's financial health could be seriously harmed if the Commission were to apply these same *PECO* rulings to it. West Penn is projected to suffer significant revenue losses during the first few years of the transition period and needs every bit of the CTC revenues, to which it is entitled during those beginning years, to maintain its financial integrity.

WHEREFORE, Allegheny Power requests that the Presiding Judge reject the parties' arguments that the Commission's rulings in *PECO* must be applied rigidly to PP&L and base his decision upon the facts and evidence presented in the record of this PP&L proceeding.

Respectfully submitted,



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February 27, 1998

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Application Of Pennsylvania Power :  
And Light Company For Approval Of Its :  
Restructuring Plan Under Section 2806 : Docket No. R-00973954  
Of The Public Utility Code :**

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing document upon the participants, listed below, in accordance with the requirements of § 1.54 (relating to service by a participant).

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