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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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**DOCKETED**  
MAR 20 2000

Application of PECO Energy Company :  
Pursuant to Chapters 11, 19, 21, 22 and 28 of :  
the Public Utility Code for Approval of (1) a :  
Plan of Corporate Restructuring, Including :  
the Creation of a Holding Company and (2) :  
the Merger of the Newly Formed Holding :  
Company and Unicom Corporation :

Docket No.

A-00110550F0147

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ORDER DENYING MID-ATLANTIC POWER SUPPLY ASSOCIATION'S  
MOTION TO COMPEL RESPONSES TO DISCOVERY REQUESTS

Motion and Answer

On February 25, 2000, Mid-Atlantic Power Supply Association (MAPSA), filed a "Motion to Compel Responses to Discovery Request" (Motion to Compel). In its Motion to Compel, MAPSA asserts that PECO Energy Company should be required to provide answers to MAPSA's third set of interrogatories, which consists of 11 questions. Those interrogatories seek detailed information from PECO regarding its "plans to acquire public utilities and utility assets located between Chicago and Philadelphia." Motion to Compel at ¶6. Specifically, MAPSA requests responses to the following questions:

MAPSA-III-1 Does PECO or Unicom have any plans, general or specific, however tentative and initial, to acquire any transmission, distribution or generation assets located in the geographical area between PECO's and Unicom's present operating regions, including, without limitations, the states of Indiana and Ohio? If so, describe any such plans in detail.

MAPSA-III-2 Identify any communication PECO has had, direct or indirect, with any utility or other entity of the sort described in Interrogatory MAPSA-I-118

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[sic], with regard to the possibility of acquiring or otherwise purchasing such entities or any or all of their transmission, distribution or generation assets?

MAPSA-III-3 Identify any communication PECO has had with any individuals of the sort identified in Interrogatory MAPSA-I-11 concerning the possibility of acquiring entities or assets of the sort described in the preceding interrogatories and in Interrogatory MAPSA-I-118 [sic]?

MAPSA-III-4 Identify any proposals, general or specific, however tentative and initial created by PECO, Unicom or any individuals of the sort identified in Interrogatory MAPSA-I-11, concerning the possibility of PECO and/or Unicom acquiring or otherwise purchasing any of the assets or entities of the sort described in the preceding Interrogatories and in Interrogatory MAPSA-I-118 [sic]?

MAPSA-III-5 Have any employees of either PECO or Unicom considered, analyzed, or otherwise examined, in any way, no matter how general or specific, the possibility of acquiring or otherwise purchasing any assets or entities of the sort described in the preceding interrogatories and in Interrogatory MAPSA-I-118 [sic]. If so, identify such employees, and describe their efforts and the results thereof.

MAPSA-III-6 Identify all entities and assets of the sort described in the preceding interrogatories and in Interrogatory MAPSA-I-118 [sic] which PECO or Unicom has considered acquiring or otherwise purchasing.

MAPSA-III-7 Identify all entities and assets of the sort described in the preceding interrogatories and in Interrogatory MAPSA-118 [sic] which PECO or Unicom might consider acquiring or otherwise purchasing.

MAPSA-III-8 In response to Interrogatory OCA-V-I, PECO has stated that its officials have expressed interest in acquiring entities and assets of the sort described in the preceding interrogatories and in Interrogatory MAPSA-I-118 [sic] "in a very general sense." Identify all entities and transmission, distribution or generation assets which are of

the sort PECO officials have expressed an interest in acquiring “in a very general sense.”

MAPSA-III-9 Identify and produce all documents relating to any of the preceding Interrogatories.

MAPSA-III-10 Identify all documents relating to, and all persons with knowledge of, the matters to which the preceding interrogatories refer.

MAPSA-III-11 Identify all persons who answered, assisted in answering, or in any other way contributed to the answering of these Interrogatories.

Motion to Compel at Exhibit D:

MAPSA states that it asked the following similar question in its first set of interrogatories (MAPSA-I-18) – “Do PECO and Unicom have any plans, general or specific, however tentative and initial, to acquire any entities located in the geographical area between PECO’s and Unicom’s present operating regions, including, without limitation, the states of Indiana and Ohio?” Motion to Compel at ¶4. To which PECO responded, “PECO and Unicom currently have no plans to acquire any entities located in the geographical area between PECO’s and Unicom’s present operating regions. To the extent that such plans are announced publicly, PECO will update this response.” Motion to Compel at ¶4.

MAPSA also noted that the Office of Consumer Advocate (OCA) posed the following similar interrogatory (OCA-V-1): “Please indicate whether any PECO Energy official has, in the period since the merger was announced, publicly expressed an interest in acquiring other utilities or power plants between Philadelphia and Chicago. Please identify any such utilities or power plants to which PECO Energy has given specific consideration.” Motion to Compel at ¶5. To which PECO responded:

Yes. Such interest was expressed in a very general sense. No specific utilities or power plants have been given specific consideration. To the extent that the information changes in the future, PECO would consider that information Highly Confidential and Proprietary and it will not be provided to the

parties. PECO will inform the parties of any publicly available information pertinent to this request.

Motion to Compel at ¶5. MAPSA argues that its request in its third set of interrogatories for more detailed information regarding PECO's plans, is relevant to this proceeding because any purchases by PECO of utilities located between Chicago and Philadelphia will have at least some effect on market power. Motion to Compel at ¶s 13 and 14.

On February 29, 2000, PECO filed an "Answer in Opposition to Mid-Atlantic Power Supply Association's Motion to Compel Responses to Discovery Requests" (Answer). In its Answer PECO argues that MAPSA's Motion to Compel should be denied because MAPSA seeks information which: (1) is irrelevant and not reasonably calculated to lead to admissible evidence; (2) is overly broad and would require an unduly burdensome effort on the part of PECO; and (3) would cause more commercial harm to PECO and Unicom Corporation (Unicom) as compared to its value to the public. Answer at ¶s 4-29.

In support of its argument that the information which MAPSA seeks is irrelevant, PECO states, inter alia, as follows:

9. The subject interrogatories and data requests, if compelled for disclosure, would require PECO and Unicom to disclose highly cherished corporate secrets concerning the potential business dealings of two companies that are currently immersed in the highly competitive energy business. As noted at paragraph 4, *supra.*, MAPSA requests the identity of all entities (with utility or generation assets located between Philadelphia and Chicago) with whom PECO has made initial inquiries concerning acquisitions, to whom PECO has made an offer or proposal concerning potential acquisitions, and about whom PECO has received information concerning the possibility of acquisitions. In addition, if compelled, PECO and Unicom would be required to disclose all of the proposals, and all communications its employees and agents have made concerning efforts to purchase or acquire distribution, transmission, and generation companies or assets located between Philadelphia and Chicago.

10. PECO submits that the information requested by MAPSA in MAPSA-III-2 through MAPSA-III-11 is entirely irrelevant to the matters posed in these application proceedings. While the information may be useful to such competitors as MAPSA's membership, and possibly stock investors, speculation about events which may or may not occur at some indefinite time in the future is no basis upon which an application before this Commission should be adjudged.

\* \* \*

18. Removing speculation concerning potential future transactions from a merger analysis also brings certainty to the analytical process. To require otherwise, the agency's task would be fraught with endless speculation concerning the possibility that the applicant may be considering a transaction that might affect the agency's market power analysis. Therefore, PECO submits that the matters MAPSA seeks to review are not relevant to the retail market power issues presented in the transaction posed for approval by PECO in this case and not reasonably calculated to lead to admissible evidence.

Answer at ¶s 9-10, 18.

#### Analysis

The Commission's regulations regarding the scope of discovery, provides as follows in pertinent part:

(c) *Scope.* Subject to this subchapter, a participant may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim of defense of the party seeking discovery or to the claim or defense of another party or participant, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at hearing if the

information sought appears reasonably calculated to lead to the discovery of admissible evidence.

52 Pa. Code §5.321(c). The Commission's regulations regarding admissible evidence reads as follows in pertinent part:

**§5.401. Admissibility of evidence.**

(a) Relevant and material evidence is admissible subject to objections on other grounds, but there shall be excluded evidence that is repetitious or cumulative, or evidence that is not the kind which would affect reasonable and fair-minded persons in the conduct of their daily affairs.

52 Pa. Code §5.401.

In regard to the matters which the Commission must determine in this case, I note that PECO's proposed merger with Unicom will require a certificate of public convenience because it involves the transfer and acquisition of "tangible or intangible property used or useful in the public service." See, 66 Pa. C.S. §1102(a)(3). A certificate of public convenience may be granted by the Commission only if it finds or determines that "the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public." 66 Pa. C.S. §1103(a). Moreover, case law provides that PECO must "demonstrate that the merger will affirmatively promote the 'service, accommodation, convenience, or safety of the public' in some substantial way." City of York v. Pennsylvania Public Utility Commission, 449 Pa. 136, 295 A.2d 825, 828-829 (1972). Additionally, the Electricity Generation Customer Choice and Competition Act requires the Commission "to consider whether the proposed merger . . . is likely to result in anticompetitive or discriminatory conduct, including the unlawful exercise of market power, which will prevent retail electricity customers in this Commonwealth from obtaining the benefits of a properly functioning and workable competitive retail electricity market." 66 Pa. C.S. §2811(e). See also, Joint Application of DQE, Inc., Allegheny Power System, Inc. and AYP Sub, Inc. for Approval of the Transfer by Merger of the Property and Rights of Duquesne Light Company to APS, A-110150F0015, slip op. at 5 (Opinion and Order entered August 29, 1977).

In its third set of interrogatories MAPSA, posed 11 questions for the purpose of eliciting from PECO detailed information regarding its plans to acquire public utilities and utility assets located between Chicago and Philadelphia. In response to prior interrogatories propounded by both MAPSA and the OCA, PECO stated that it currently has no plans, but that it has expressed a “very general” “interest” in acquiring other utilities and power plants located between Philadelphia and Chicago, and that, “No specific utilities or power plants have been given specific consideration.” Motion to Compel at ¶s 4-5. PECO further stated that it would update its response “to the extent such plans are announced publicly” and inform the parties “of any publicly available information pertinent to this request.” Motion to Compel at ¶s 4-5.

Black’s Law Dictionary defines “plan” as follows:

**Plan.** A delineation; a design; a draft, form or representation. The representation of anything drawn on a plane, as a map or chart; a scheme; a sketch. Also, a method of design or action, procedure, or arrangement for accomplishment of a particular act or object. *Shainwald v. City of Portland*, 153 Or. 167, 55 P.2d 1151, 1156. Method of putting into effect an intention or proposal.

Black’s Law Dictionary 1036 (5<sup>th</sup> ed. 1979).

Based on PECO’s responses to MAPSA’s Set I interrogatory (MAPSA-I-18) and the OCA’s interrogatory (OCA-V-1), PECO has no present plans, but only a very general interest in the acquisition of power plants or utilities between Philadelphia and Chicago. I do not believe that detailed information regarding PECO’s very general interest in acquiring power plants, utilities or utility assets between Philadelphia and Chicago aids the Commission in its determination of whether PECO’s proposed merger with Unicom affirmatively benefits the public interest.<sup>1</sup> Such information would be much too speculative, indefinite and uncertain, and too far removed from a likely or actual occurrence or transaction. Therefore, I will deny MAPSA’s motion to compel

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<sup>1</sup> “Public interest” as used here encompasses the Commission’s determination regarding the impact of the proposed merger on retail electric competition.

responses to its Set III interrogatories. However, PECO is directed to immediately amend and update its responses to MAPSA's interrogatory MAPSA-I-18 and the OCA's interrogatory OCA-V-1 if PECO publicly expresses interest in the acquisition of specific power plants, utilities or utility assets between Philadelphia and Chicago. See, 52 Pa. Code §§5.332(2) and 5.332(3). The parties to this proceeding are further reminded that they are encouraged to use their best efforts to amicably resolve discovery disputes among themselves. See my Prehearing Order dated January 28, 2000 at page 4.

ORDER

THEREFORE,

IT IS ORDERED:

1. That Mid-Atlantic Power Supply Association's Motion to Compel Responses to Set III Interrogatories is denied.

2. That PECO Energy Company is directed to immediately amend and update its responses to Mid-Atlantic Power Supply Association's interrogatory MAPSA-I-18 and the Office of Consumer Advocate's interrogatory OCA-V-1, if PECO Energy Company publicly expresses interest in the acquisition of specific power plants, utilities or utility assets between Philadelphia and Chicago.

3. That the parties to this proceeding are under a continuing duty to use their best efforts to amicably resolve discovery disputes among themselves.

March 10, 2000  
DATE

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CHARLES E. RAINEY, JR.  
Administrative Law Judge

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