

1424 Chestnut Street, Philadelphia, PA 19102-2505
Phone: 215.981.3700, Fax: 215.981.0434
Web Address: www.clsphila.org

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

James J. McNulty
Secretary
Pennsylvania Public Utility Commission
North Office Building, Room B-20
Commonwealth Ave. and North St.
Harrisburg, PA 17105

By Federal Express

Re: Application of PECO Energy Company ... 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-110550F0147

Dear Mr. McNulty:

Enclosed please find an original and nine (9) copies of the Main Brief of Consumers Education and Protective Association (CEPA), Association of Community Organizations for Reform Now (ACORN), Action Alliance of Senior Citizens of Greater Philadelphia, and Tenants' Action Group (TAG), (collectively "CEPA et al.") in the above-captioned matter.

Copies of this filing have been sent this date to parties listed on the Certificate of Service by First Class U.S. Mail, postage prepaid.

Sincerely,


PHILIP A. BERTOCCI

33

cc: Administrative Law Judge Charles E. Rainey, Jr.
Service List

Enclosures

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Docket No. A-110550F0147

In Re: 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

MAIN BRIEF OF CONSUMERS EDUCATION AND PROTECTIVE
ASSOCIATION (CEPA), ASSOCIATION OF COMMUNITY ORGANIZATIONS
FOR REFORM NOW (ACORN), ACTION ALLIANCE OF SENIOR CITIZENS
OF GREATER PHILADELPHIA, AND TENANTS' ACTION GROUP (TAG)

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In Support of the Joint Petition for Settlement

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Philip A. Bertocci
Edward A. McCool
COMMUNITY LEGAL SERVICES, INC.
1424 Chestnut Street
Philadelphia, PA 19102
(215) 981-3702
Counsel for CEPA, et al.

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

May 16, 2000

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I. Introduction

CEPA et al., a coalition of low income consumer organizations, filed a Protest and Intervention in this proceeding on December 20, 1999 and, as in PECO Energy Company's prior securitization and restructuring cases at Docket Nos. R-00973953 and P-00971265, have actively participated in the extended and complex settlement negotiations that resulted in the Joint Petition for Settlement. These consumer organizations submit on the basis of this experience and the testimony filed in this case, that the proposed settlement (hereinafter "Settlement") assures that between 2001 and the end of 2006, PECO ratepayers and the public at large will substantially benefit from the proposed merger in a wide variety of ways, and that the sum of the benefits exceeds the dollar value of the net savings to be achieved by PECO Energy as a regulated distribution company resulting from merger related synergies. CEPA et al. further submit that the Settlement has provided a wide range of parties with greater value than would be achievable through extended litigation of this case, and therefore urge the Commission to approve the Settlement without modification.

CEPA et al. are membership advocacy organizations whose mission is to speak up for the interests of low income consumers in a wide variety of contexts. For such consumers, the cost of utility service is not just a rather small portion of their monthly budget, but rather *often constitutes between 10 and 25 % of the household budget. It is beyond is dispute that electricity is a fundamental necessity of life in modern society, not just for lighting and communications, but assuring that heating systems will work in winter, and that necessary*

cooling, especially for Senior Citizens, is available in the summer.

In this proceeding, the parties have already set forth in some detail via Statements in Support of the Settlement why they believe that the proposed merger, if approved on the basis of this Settlement, would affirmatively promote the public interest and would not have an adverse effect on retail electricity competition in Pennsylvania. In this Main Brief, CEPA et al. will not present an exhaustive discussion of all aspects of this case, but will focus particularly upon how the Settlement serves the public interest with respect to benefits of special interest to PECO's low income customers. In general, CEPA et al. support the positions that have been ably set forth in the Office of Consumer Advocate's Main Brief, which is therefore incorporated by reference in the Brief.¹ CEPA et al. also refer the Commission to the briefs submitted by a wide variety of parties, representing environmentalists, electricity generation suppliers, the City of Philadelphia, commercial and industrial users, and small business users which describe in appropriate detail the benefits which the settlement provides to these particular parts of the social and economic spectrum.

¹ In addition to supporting OCA's views concerning the manner in which various aspects of the Settlement affirmatively promote the public interest and are not likely to result in anticompetitive and discriminatory conduct detrimental to the retail competitive electricity generation market, CEPA et al. seek to give added weight to the need for the Commission to firmly reject PPL's request that any approval of the Joint Settlement be conditioned on the agreement of the parties that no signatory to the Settlement will propose that a provision of the Settlement be adopted in any other proceeding based on the fact that such provision was included in the Settlement and that no party to the Settlement will seek to reopen another Pennsylvania public utility's settlement of its retail restructuring proceeding to make any provision therein consistent with the current Settlement. See Section V, infra.

The standards which the Commission must apply in reviewing this Settlement are not in dispute. The Commission must determine whether 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, 141, 295 A.2d 825, 828 (1973). And it must assure that the Settlement does not contain provisions which would undermine the proper functioning of the retail markets for electricity and natural gas. 66 Pa.C.S. §§ 2811(e)(2), 2210(b). As this Main Brief and others submitted by the signatory parties demonstrate, the record contains ample evidence to support such a finding and requires approval of the Settlement by the Commission without modification.

II. The Settlement Affirmatively Promotes the Public Interest Because It Provides Rate Reductions Which Are Equal to the Full Dollar Value of the Merger Related Synergies to Be Achieved by the PECO Energy Distribution Company.

CEPA et al. regard the \$200 million in rate reductions provided for in the Settlement as a critical element in assuring that tangible merger related synergies are passed through directly to the consuming public. The rate reductions provided in Section 10 and 11 must be viewed in conjunction with the \$60 million reduction in CTC for the year 2001 that has been achieved through settlement of issues associated with the recent additional issuance of a QRO for the securitization of stranded costs. Coupled with this CTC reduction, the Settlement assures that PECO’s Transmission and Distribution rates, instead of rising 6% next year to return to January 1, 1997 levels, will remain for residential customers at least

2.3% below January 1, 1997 levels for the years 2001, 2002 and 2003, and at 1.5% to 1.75% below those levels during the years 2004 and 2005. Moreover, due to the extension of the Transmission and Distribution rate cap through 2006, customers will pay no more in 2006 than they paid as of January 1, 1997.

The measure of whether the rate cuts are adequate is whether the synergies which are to be achieved with the use of assets funded through T&D rates have been passed through to customers. There is strong evidence in the record that the Commission should regard the rate cuts contained in the Settlement as significant. The strongest statement is contained in the testimony of Richard Silkman, the expert witness sponsored by CEPA et al. and Senator Vincent J. Fumo. Dr. Silkman states that the rate provisions in the Settlement “provides for recovery by PECO ratepayers of what I estimate to be the full dollar value of merger-related synergies with the T&D component of PECO.” Fumo & CEPA et al. St. 1 at 5,6. He further explains that in net present value terms, PECO’s share of the regulated merger related savings are worth \$150 million in the period 2001 through 2006, as compared with rate reductions with a present value of \$152 million. Fumo & CEPA St. 1, at 7-10.

This view is supported in more general terms by Richard LaCapra, OCA witness, who testifies that the level of rate reductions provided in the Settlement overcame initial concerns the there was not an “equitable share of projected merger benefits” being passed through to

rate payers in the form of rate reductions. OCA St. 1, at 9.²

In light of these analyses, the objection of PPL that the rate reductions contained in the Settlement would jeopardize PECO's ability to provide adequate service should be rejected as without merit. As Kevan Deardoff has testified, on behalf of the Office of Trial Staff, such concerns are not warranted, because cost savings reasonably to be anticipated from merger related synergies for PECO's electricity distribution operations will support rate reductions without inducing pressures for a concomitant reduction in service quality. OTS St.1, at 2,3. See also PECO St. 3-S, at 8 (Thomas P. Hill, Jr.). Indeed, in the view of some witnesses, like Councilman David Cohen, PECO's distribution rates, which are the highest in the state, could be cut much more without negative consequences. Cohen St. 1, at 4.

III. The Settlement Affirmatively Promotes the Public Interest Because It Provides Significant Improvements for PECO's Universal Service Programs.

In addition to seeking reductions in rates for all customers, CEPA et al. sought in these negotiations to focus attention on the most obvious deficiencies in PECO's CAP Rate

² In addition, the modification of the Restructuring Full Settlement provisions concerning PECO's recovery of its universal service costs will save customers as much as \$15 million in charges not subject to the rate cap between 2001 and the end of 2006. See *Joint Petition for Settlement, Paragraph 35*.

On the electricity generation side, the provisions contained in Sections 45 through 56 of the Settlement, designed to enhance retail electric generation competition, may lead to additional opportunities for cost savings by customers who exercise their right to shop for electricity generation.

program, a discount program for customers with household incomes at or below 150% of the federal poverty level. Recent expert evaluations and analyses of PECO's CAP Rate program have expressed the concern that the tariffed rates for customers below 100% of poverty (approximately 50% off the standard residential rates for the first 500 kWh) are not affordable under PUC affordability standards for many households with incomes below 50% of federal poverty. See Peach, H. Gil, Process Evaluation of the PECO Energy "CAP-Rate" Pilot, Beaverton, Oregon: H. Gil Peach & Associates/Scan America, 1998, Monograph 981-2, pp. xxi; "Direct Testimony and Exhibits of Roger D. Colton. Universal Service and Energy Efficiency Issues," OCA Statement No. 4, Docket No. R-00994787. This "special needs" part of the low income population is typified by the household whose sole source of income is TANF, an income which is approximately 35% of the federal poverty standard.

The Settlement addresses problems posed by the energy needs of this portion of the low income population in several ways, some as part of the class of low income customers generally, and some directly as a distinct subgroup within that class. The significance of these benefits for the public interest are noted specifically by Dr. Silkman, and by Richard LaCapra. Fumo & CEPA St. 1, at 13; OCA St. 1, at 9-10.

At Section 34 of the Settlement, PECO reaffirms that the CAP Rate Program is an "open enrollment" program, open to all payment troubled customers with household incomes at or below 150% of federal poverty. The initial maximum participation level in the

existing CAP Rate electric program is raised from 90,000 customers to 125,000 customers. This measure ensures that no otherwise eligible customer will be denied the benefits of CAP Rate solely because the Program is "full."

At Section 30, PECO commits to the prompt development and implementation of a computerized customer "Data Warehouse" which is critical for the rational development and refinement of programs to meet the needs of the low income population in general and the low income population below 50% of federal poverty.

At Section 31, PECO commits to working with its LIURP Advisory Committee to assess the energy circumstances of households at 50% of poverty and below, and to develop as necessary program enhancements to meet their "special needs."

At Section 29, PECO agrees to provide support above its existing support to the fuel funds in the five county area in the amount of \$1.3 million annually in 2001 and 2002; in the event that a "special needs" program is not in place by 2003, PECO commits to providing an additional \$400,000 to these fuel funds in that year. Under this Section, the Philadelphia fuel fund, the Utility Emergency Services Fund ("UESF"), will receive \$1 million per year in the next two years to assist low income households who are threatened with termination

of utility service or whose utility service has already been terminated.³

IV. The Settlement Affirmatively Promotes the Public Interest Because It Provides Assurances That Are Important for Maintenance of Employment in Philadelphia and the Five County Region.

CEPA et al. have traditionally attached high importance to economic development and the preservation of jobs in Philadelphia and the five county area generally. The Settlement contains provisions which will further employment and economic development in the Philadelphia region. Several expert witnesses have recognized the public interest value of those provisions. See Fumo & CEPA St. 1, at 15; OCA St. 1, at 16.

At Section 82 of the Settlement, PECO commits to maintaining 1250 jobs at its headquarters at 2301 Market Street, Philadelphia, through 2003, more than 90% of the jobs currently there.⁴ The Company has also committed to maintaining the headquarters of the PECO Energy distribution company at 2301 Market Street, Philadelphia, for a substantial period of time. While CEPA et al. share Councilman Cohen's desire that the merger result in no job loss whatsoever in Philadelphia, future ratepayers should not be burdened with

³ Approximately 70% of UESF's available funds are distributed to households with incomes below 50% of federal poverty.

⁴ In order to obtain the City of Philadelphia's support for the Settlement, PECO has subsequently made additional commitments on these issues, namely a commitment to maintain higher levels of employment through 2003, a commitment to maintain at least 1100 headquarters jobs through 2007, and to maintain PECO Energy's corporate headquarters for its distribution business in Philadelphia through 2007. Although these commitments have not been included in the Settlement itself, they are enforceable before the Commission. See letter of Thomas P. Hill, Jr. to James J. McNulty, Secretary, Pennsylvania Public Utility Commission, dated April 27, 2000.

maintaining staffing levels for PECO's distribution services which are greater than necessary to provide high quality service. Cohen St. 1, at 4,5; PECO St. 3-S, at 6.

In addition, Section 43 of the Settlement provides for acceleration of the \$9.98 million otherwise due to the Sustainable Development Fund (SDF) between the present and 2005 under the Restructuring Full Settlement. This acceleration, which has a value of several million dollars, provides added resources to a fund whose mission is "to promote the development and use of renewable energy and clean energy technologies, energy conservation and efficiency, and economic development projects which promote clean energy." Joint Petition for Full Settlement of PECO Energy Company's Restructuring Plan and Related Appeals and Application for a Qualified Rate Order and Application for Transfer of Generation Assets (April 29, 1998), Dockets Nos. R-00973953 and P-00971265(emphases added).

V. The Settlement Affirmatively Promotes the Public Interest in That It Expresses a Consensus Achieved by a Broad Range of Parties Immediately Affected by the Merger as PECO Customers, and as Such, Is Superior to an Adjudicated Settlement in Which the Commission Is Limited in What May Be Ordered.

The Pennsylvania Public Utility Commission has formally recognized that "the results achieved from a negotiated settlement or stipulation, or both, in which the interested parties have had an opportunity to participate are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa.Code §69.401; see also, 52 Pa. Code

§69.391. The Settlement which is currently before the Commission for approval demonstrates the wisdom of that policy. Settlements serve the public interest because they inevitably are capable of commanding wider acceptance, and the resulting savings from the avoidance of delays caused by litigation, and by appeals. Settlements provide the possibility of provision of a greater range of value to all parties than may be achieved through litigation, where the Commission has a relatively limited number of legally available powers that it may use.

Throughout these negotiations, as the record shows, PPL has posed objections which impair this policy in favor of settlements. These positions are most recently reflected in Paragraph 2 of PPL's Objection ...to the Joint Petition for Settlement, which requests that any approval of the Joint Settlement be conditioned on the agreement of the parties that no signatory to the Settlement will propose that a provision of the Settlement be adopted in any other proceeding based on the fact that such provision was included in the Settlement and that no party to the Settlement will seek to reopen another Pennsylvania public utility's settlement of its retail restructuring proceeding to make any provision therein consistent with the current Settlement. PPL's objections go not so much to the substance of what was being given and taken in negotiation, as to the so-called precedential effect that PPL believes a settlement of this case might have for future, speculative cases in which PPL might be directly involved. These claims have been continuously advanced notwithstanding the fact that it is hornbook law that Commission or Court approved settlements are not binding

precedent.

CEPA et al. agree with the Office of Consumer Advocate that these demands are unreasonable, and should be rejected. For the purposes of brevity, we will assume the doubtful proposition that such requirements lend themselves to fair and equitable enforcement by the Commission. CEPA et al. are particularly concerned because the PPL demands would particularly restrict the ability of OCA, SBA, and OTS to bring their experience in PECO's service territory to bear in assessing and discussing proposed settlement proposals in other parts of the state. OCA, SBA and OTS, each in its own way, provides representation state-wide for those who, like the persons represented by CEPA et al., do not have the resources to actively participate in proceedings before the Commission. They should not be foreclosed from arguing the wisdom of adopting provisions in other jurisdictions which are similar to those contained in this Settlement.

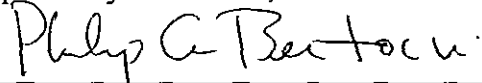
For these reasons, CEPA et al. specifically endorse the portions of OCA's Main Brief which address PPL's objections on this subject.

VI. Conclusion.

In this Settlement, PECO and the participating parties attempted to accommodate and harmonize all the diverse interests articulated by all the parties who filed Protests and/or

intervened. PECO has been induced to put substantial value on the table in many forms to meet the particularized needs of this region. CEPA et al., like all other parties, did not obtain everything that they hoped to obtain through these negotiations. They recognized that their needs had to be reconciled with the needs of other parties and of PECO itself, and that their bargaining power was limited by the relatively meager leverage provided by the Public Utility Code, existing legal precedent and the Electricity Generation Customer Choice and Competition Act. For these reasons, CEPA et al. request that the Commission approve the Settlement without modification.

Respectfully submitted,



PHILIP A. BERTOCCI, ESQUIRE
EDWARD A. MCCOOL, ESQUIRE
Attorneys for CEPA, ACORN,
Action Alliance and TAG

Date: May 16, 2000

COMMUNITY LEGAL SERVICES, INC.
1424 Chestnut Street, 4th Floor
Philadelphia, PA 19102
(215) 981-3702

CERTIFICATE OF SERVICE

Re: 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-110550F0147

I hereby certify that I have this day served a true copy of the foregoing Main Brief of Consumers Education and Protective Association (CEPA), Association of Community Organizations for Reform Now (ACORN), Action Alliance of Senior Citizens of Greater Philadelphia and Tenants' Action Group (TAG) upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 16th day of May 2000

FIRST CLASS U.S. MAIL POSTAGE PREPAID

Kenneth L. Mickens, Esquire
Kandy Melillo, Esquire
Office of Trial Staff
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Thomas P. Gadsden, Esquire
Anthony DeCusatis, Esquire
Morgan, Lewis & Bockius
1701 Market Street
Philadelphia, PA 19103-2921

Hon. Allyson Y. Schwartz
Senate Box 203004
Main Capital Bldg.
Room 182
Harrisburg, PA 17120

Patricia McNamara
6048 Ogontz Avenue
Philadelphia, PA 19141

Dennis Winters
2314 Delancey Place
Philadelphia, PA 19103

Gregory Lawrence, Esquire
C.A. Weiser, Esquire
Sutherland, Asbill & Brennan, LLP
1275 Pennsylvania Avenue, NW
Washington, DC 20004-2415

Peter Meadows-Adels, Esquire
Charles McPhedran, Esquire
Suite 1801
117 S. 17th Street
Philadelphia, PA 19103

John Hanger
Citizens for Pennsylvania's Future
Suite 410
212 Locust Street
Harrisburg, PA 17101

Michael Fiorentino, Esquire
Joseph Otis Minott, Esquire
Clear Air Council
Suite 106
105 N. Front Street
Harrisburg, PA 17101

Brian P. Downey, Esquire
John A. Greenbaum, Esquire
Pepper Hamilton, LLP
200 One Keystone Plaza
North Front and Market Streets
P.O. Box 1181
Harrisburg, PA 17108-1181

Gerald Gornish, Esquire
Wolf, Block, Schorr and Solis-Cohen, LLP
1650 Arch Street
Philadelphia, PA 19103-2097

Amy Hammersmith
2312 Parrish Street
Philadelphia, PA 19130

Joseph A. Dworetzky, Esquire
Hangley, Aronchick, Segal & Pudlin
27th Floor
One Logan Square
Philadelphia, PA 19103-6933

James H. Cawley, Esquire
Rhoads & Sinon
12th Floor
One South Market Street
Dauphin Building
P.O. Box 1146
Harrisburg, PA 17108

Norbert Smith, Esquire
Patricia J. Clark, Esquire
Allegheny Energy Supply
Roseytown Road
RR 12, Box 1000
Greensburg, PA 15601

Amy Gold
P.O. Box 4402
Houston, TX 77210

John L. Hall, Esquire
Unruh Turner Burke & Frees PC
P.O. Box 515
West Chester, PA 19381-0515

Irwin A. Popowsky, Esquire
Tanya McCloskey, Esquire
Office of Consumer Advocate
555 Walnut Street
Forum Place, 5th Floor
Harrisburg, PA 17101

Greg Pastore
619 Pemberton Street
Philadelphia, PA 19147

John Will Ongman, Esquire
Marc D. Machlin, Esquire
Pepper Hamilton, LLP
600 Fourteenth Street, NW
Washington, DC 20005

John S. Halstead, Esquire
Gawthrop, Greenwood & Halsted
119 North High Street
West Chester, PA 19381-0562

Kenneth M. Barna, Esquire
Rubin & Rudman, LLP
50 Rowes Wharf
Boston, MA 02100

Donald A. Kaplan, Esquire
Leanne M. Bober, Esquire
Preston, Gates, Ellis & Rouvelas Meeds
Suite 500
1735 New York Avenue, NW
Washington, DC 20006

Daniel Clearfield, Esquire
Kevin Moody, Esquire
Wolf, Block, Schorr and Solis-Cohen
Suite 300
212 Locust Street
Harrisburg, PA 17101

Andrew Altman
400 S. Camac Street
Philadelphia, PA 19147

Robert Jaffe, Esquire
City of Philadelphia, City Council
Room 588 City Hall
Philadelphia, PA 19107

Carville B. Collins, Esquire
Piper Marbury Rudick & Wolfe, LLP
36 South Charles Street
Baltimore, MD 21201-3018

David Kleppinger, Esquire
Charis M. Burak, Esquire
McNees Wallace & Nurick
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166

Craig A. Doll, Esquire
214 State Street
Harrisburg, PA 17101
Christopher B. Craig, Esquire
Senate Democratic Appropriations
Committee
Room 545 Main Capitol Bldg.
Harrisburg, PA 17120

William T. Hawke, Esquire
Malatesta Hawke & Mckeeon, LLP
Harrisburg Energy Center
100 North Tenth Street
Harrisburg, PA 17101

Paul Russell, Esquire
Pennsylvania Power & Light Co.
Two North Ninth Street
Allentown, PA 18101

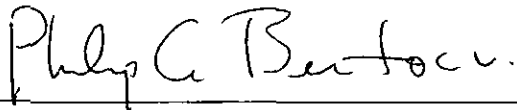
Bernard A. Ryan, Jr., Esquire
Small Business Advocate
Suite 1102 Commerce Bldg.
300 North Second Street
Harrisburg, PA 17101

John L. Munsch, Esquire
Allegheny Power
800 Cabin Hill Drive
Greensburg, PA 15601

Eric J. Epstein, Esquire
4100 Hillsdale Road
Harrisburg, PA 17112

SERVICE BY FACSIMILE AND FIRST CLASS MAIL, POSTAGE PREPAID

Paul Bonney, Esquire
Ward Smith, Esquire
Kent D. Murphy, Esquire
PECO Energy Company
2301 Market Street
P.O. Box 8699
Philadelphia, PA 19101-8699



PHILIP A. BERTOCCI

Counsel for CEPA, ACORN
Action Alliance and TAG

COMMUNITY LEGAL SERVICES, INC.
1424 Chestnut Street, 4th Floor
Philadelphia, PA 19102
(215)-981-3702



CITY OF PHILADELPHIA
CITY COUNCIL

DAVID COHEN
Room 588 City Hall
Philadelphia, Pennsylvania 19107
686-3446-3447
Fax No. 686-1927
COUNCILMAN-AT-LARGE

May 16, 2000

COMMITTEES
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James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Room 206
North Office Building
Harrisburg, Pennsylvania 17120

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PA PUBLIC UTILITY COMMISSION
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Re: Application of PECO Energy, 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 # A110550F0147

Dear Secretary McNulty:

Please find enclosed an original and three (3) copies of the Brief of Councilman David Cohen in Opposition to the Approval of the Settlement Agreement.

Copies are served upon all parties of record as indicated on the attached Certificate of Service.

Sincerely,

Robert Jaffe, Esquire
Special Counsel to
Councilman David Cohen

cc: Service List
Honorable Charles Rainey

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

MAY 16 2000

Application of PECO Energy Company,	:	PA PUBLIC UTILITY COMMISSION
Pursuant to Chapters 11, 19, 21, 22	:	SECRETARY'S BUREAU
and 28 of the Public Utility Code for	:	
Approval of (1) a Plan for Corporate	:	Docket No. A-110550F0147
Restructuring, Including the Creation	:	
of a Holding Company and (2) the	:	
Merger of the Newly Formed Holding	:	
Company and Unicom Corporation	:	

**Brief of Councilman David Cohen in Opposition to Approval of
Settlement Agreement**

I. Summary

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In order to prevail in its merger petition to the Commission, PECO Energy has the burden to demonstrate that the proposal will serve the public interest. PECO has failed to sustain this burden either on safety or economic grounds. Accordingly, its merger petition should be denied pending the production of additional detailed information, or if approved, only upon the conditions set forth in Section IV of this brief.

II. PECO's proposal, even as modified by the proposed settlement, must be rejected because it poses grave risks to public safety.

It is uncontroverted in the record that the operation of nuclear power plants in general, and PECO's Limerick plants in particular, constitute a severe danger to the public health, even when operated within "normal limits." See written Direct Testimonies of Dr. Ernest Sternglass, Janette Sherman, and Joseph Mangano, and oral testimony of Dr. Sternglass at tr. 430-439. For instance, Dr. Sternglass, in his direct written testimony, stated explicitly that:

the recent 36% rise in childhood cancer incidence across the U.S. and 16% in Great Britain between 1980 and 1993 described by Mangano in a 1999 article in IJHS is most likely due to releases from nuclear power plants and leakage from underground testing that continued until 1993. It therefore appears that neither chemicals, pesticides, herbicides and ordinary air pollution acting alone without the synergistic action of fission products on the immune and hormonal systems can explain the rise in cancer incidence or mortality. This conclusion is further supported by a

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sharp decline in all causes of child mortality in four counties downwind from the Rancho Seco nuclear plant within a few years after it ceased operation in 1989 as reported by Mangano in the March 2000 issue of the journal Environmental Epidemiology and Toxicology. Sternglass written testimony at page 5.

Amplifying the danger, Joseph Mangano stated in his direct testimony that according to his research:

In areas near each of seven plants, infant mortality dropped at about three times the national rate in the first two years after nuclear plant closings. (at page 2)

Of particular relevance to this proceeding, Dr. Sternglass provided concrete and un rebutted evidence that the dangers of nuclear radiation directly and severely damage the health of Philadelphia-area residents, by supplying eight charts (attached to his testimony) documenting increases in local disease and death rates tied to nuclear emissions. Although some characteristics of these graphs differ from one another, they all show serious spikes in disease and mortality immediately after the Three Mile Island incident, commencement of Limerick low-power testing, and the Chernobyl accident. Thus, it is clear that operation of these plants has vast potential for causing grave harm to area residents.

Furthermore, this Commission may take judicial notice of the overwhelming threat to human health posed by the mounting stockpile of spent fuel, and both high level and low level radioactive waste, caused by the ongoing operation of nuclear plants.¹ The growing stockpile is especially dangerous in the Philadelphia area because several of PECO's plants are reaching the limits of their capacity to store the material. (See PECO's response to Eric Epstein's Interrogatories, number 1-12, showing Oyster Creek to already have reached capacity, and Peach Bottom 2 and 3 rapidly approaching that point.)

The proposed merger clearly increases the dangers that already exist from PECO's heavy reliance on nuclear energy. As Councilman Cohen pointed out in his written direct testimony, none of which has been contradicted:

the NRC has inexplicably decided to disregard the potential health effects posed by applications to extend the lives of existing nuclear plants. And last month, without considering such effects, the Commission approved the first such request that came before it to extend the life of a nuclear facility.

¹ Public references to this hazard are frequent and recurring in the national press. See attachments for a sample of recent articles on this subject.

Both PECO and Unicom derive much of their nuclear energy from plants whose useful lives may well be extended under these new rules. In addition, PECO is aggressively seeking to purchase additional plants, thus making clear its long-term commitment to nuclear energy. The merger will further increase the incentive to continue plants in operation since the amount of nuclear assets held under common ownership will immediately multiply upon completion of the regulatory process. Because new plants are being purchased at bargain-basement prices, operating profits from continued operation of these plants will be enormous and will grow for each year they are allowed to remain on-line. On top of that, reserves for decommissioning will continue to be amassed and earn interest. Together, these income sources create powerful incentives to continue the operation of these dangerous plants long into the future. At p. 3²

These dangers may clearly be considered by the Commission in determining whether PECO's proposed merger is "in the public interest" and therefore should be approved. Section 1103(a) of the Public Utility Code states that:

A certificate of public convenience shall be granted by order of the commission, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public. The commission in granting such a certificate, may impose such conditions as it may deem to be just and reasonable.

The Pennsylvania Supreme Court made clear that this section imposes a substantial burden on the proponent of any utility merger, when it held:

Section [1103] of the Public Utility Law requires that those seeking approval of a utility merger demonstrate more than the mere absence of any adverse effect upon the public. Section [1103] requires that the proponents of a merger demonstrate that the merger will affirmatively promote the "service, accommodation, convenience or safety of the public" in some substantial way. *City of York v. PUC*, 449 Pa. 136, 295 A. 2d 825, 828 (1972).

Importantly, *City of York* expressly overruled an earlier case, *Northern Pennsylvania Power Co. v. Pennsylvania Public Utility Commission*, 333 Pa. 265, 5 A. 2d 133 (1939) which put the burden on parties opposing a merger to demonstrate "by competent evidence, that the sale will adversely affect the public

² As further evidence of the intention to emphasize its nuclear character, see also the September 23, 1999 Press Release jointly issued by PECO and Unicom, which states at page 2: "We intend to be the premier nuclear operator in the nation." (Response to OCA Interrogatory V-4)

in some substantial way.” 5 A.2d at 134. That burden is now reversed and is squarely on PECO to show affirmative and “substantial” benefits from this merger. Given PECO’s aggressive posture to increase its reliance on nuclear power – a policy direction which would be greatly enhanced by the merger – PECO has clearly not sustained this burden.³

III. PECO’s proposed merger should be rejected because it inadequately shares merger profits with the public.

In its 8-K filing with the SEC on the proposed merger, (provided in response to OCA Interrogatory III-12) PECO included a section entitled “Cost Savings”. After describing those savings in some, though modest, detail, PECO concluded with the following sentence:

In addition, as a result of the combination, the companies expect to achieve revenue enhancements. (p. 3)

Throughout this proceeding, PECO has been willing to quantify only its “savings” from the proposed merger, but has never estimated what is probably the far larger scope of its “revenue enhancements.” Clearly, however, it believes these enhancements to be significant, devoting two pages of its Application⁴ in describing aspects of the merger which will generate these new sources of revenue. Included among the growth opportunities set forth in its application are:

- 1) Expanded Generation Capacity
- 2) Expanded Marketing and Trading Business
- 3) Broadened Distribution Platform
- 4) Strategic Fit and Compatibility
- 5) Foundation for Future Growth

³ There is one element of the proposed settlement that addresses nuclear health issues, namely the side agreement between PECO and intervenor Eric Epstein, attached as Appendix B to the Joint Petition for Settlement. However, that agreement is expressly not made a part of the overall settlement, and no third party, including the Commission, has any rights under it. (See Joint Petition paragraph 18; Appendix B, paragraph 18.) Moreover, the terms of the side agreement itself fail to provide any but the most modest protections from the nuclear threat, and the vast bulk of them relate solely to reporting and monitoring mechanisms at PECO’s Peach Bottom plants. (The far larger scope of the nuclear waste problem is described in substantial detail in Eric Epstein’s Statement of the Issues, filed prior to settlement.)

⁴ See pages 64-65.

Direct testimony of expert Richard La Capra submitted by the Office of Consumer Advocate, in fact illustrates and supports the position of Councilman Cohen that this merger generates revenue enhancements not adequately addressed by parties to the Settlement. For example, the OCA submission states,

I see electric utilities using their utility assets more and more as a springboard to enter lucrative non-electric markets. For example, with valuable assets such as telecommunications systems, rights-of-way, frequent contacts with customers through billing and advertising, and large amounts of market data on every customer, telecommunications affiliates of transmission and distribution utilities have entered markets to utilize competitive advantages that may not be available to their competitors.

Testimony of Richard La Capra, OCA, Page 4, lines 9-14

The OCA submission further states that Peco and Unicom have indicated an intention to expand the scale of current operations as well as expand into new regulated and unregulated businesses. Again, this predictable business expansion and commensurate revenue enhancements are inadequately defined and addressed by the proposed Settlement Agreement.

Information contained in testimony and discovery responses in this proceeding indicates that the PECO/Unicom management have expressed interest in expanding the scale of their operations. Moreover, they are clearly attracted to opportunities to expand both their regulated and unregulated businesses.

Testimony of Richard La Capra, OCA, Page 4, lines 9-14

In addition, the Direct testimony filed by Kevan Deardorff for the Office of Trial Staff of the Pennsylvania Public Utilities Commission, states that it is common for utility merge cost savings to exceed estimates. The OTS submission illustrates the propensity for utility mergers to underestimate savings by reference to the Bell Atlantic/NYNEX merger.

We have indentified about \$1.8 billion in annual expense synergies, capital savings and incremental revenue opportunities to be achieved by 2000-nearly twice what we believed possible before closing the merger in August 1997.

OTS quoting the Chairman and Vice Chairman of the Board of Directors, Bell Atlantic. Page 4, lines 13-23

Although Councilman Cohen believes the financial elements of the Settlement certainly have value, it is by no means clear that they provide “substantial” value, as required by *York, supra*. On its website,⁵ Funk and Wagnalls defines the term to mean “of ample or considerable amount, quantity, size, etc”. These words, in turn, can only have meaning in relation to some known quantity. For some purposes, under some circumstances, \$1, 000, or even \$100, may be “of ample, or considerable amount”. This would clearly be true of one poor person giving to another. However, these two companies are not poor. Their admitted savings alone over three years from the merger is in the neighborhood of \$380 million.⁶ The true value of the merger, however, is contained within the growth opportunities appropriately highlighted, but never quantified, in PECO’s application. Do the benefits constitute 50%, 10% or 1% of PECO’s total value potential from this merger? In light of PECO’s failure to provide any inclusive estimate of the overall value of this transaction, the record fails to disclose the answer. But this Commission *must* know what PECO’s probable return on its growth opportunities are to know how substantial is the sharing contained in the Joint Petition.

A variety of intervenors have obtained agreements set forth in the Joint Petition that they find valuable. And indeed, they may well be. But none of these intervenors is in a position to determine whether the benefits are substantial in relation to the benefits that PECO will accrue if the Joint Petition is granted. The views of the intervenors cannot substitute for the informed judgment of the Commission under the appropriate standard. To satisfy the *York* standard⁷, the Commission should either demand that PECO quantify its benefits prior to a final determination of the adequacy of its sharing with the public, or demand that PECO immediately increase that sharing along the lines suggested in Councilman Cohen’s Objections to Joint Settlement Petition.

IV. Proposed Commission Action.

In view of the infirmities presented by the Joint Petition, Councilman Cohen calls upon the Commission to reject it as filed. Thereupon the Commission should either:

- 1) offer to approve the merger subject to additional terms and conditions that PECO would be required to accept; and/or

⁵ funkandwagnalls.com

⁶ See application, page 65.

⁷ In the *York* case, it is not clear whether the PUC engaged in the exact analysis proposed here. Nothing in the case suggested that merger opponents were interested in a sharing or quantification of benefits; rather, it appeared that they simply opposed the merger in its entirety.

2) remand the matter to the Administrative Law Judge for further proceedings to amplify the record with the financial data that is now missing.

In the event that the Commission believes the record as it stands is adequate, Councilman Cohen suggests that the following additional terms and conditions should be added:⁸

- 1) PECO must agree not to extend the useful lives of its current and future mix of nuclear facilities beyond the period of their initial licensure;
- 2) early retirement of any nuclear facility found to be unsafe as a result of the inspection and monitoring regimes proposed in the testimony of Joseph Mangano;
- 3) consumers should not be asked to pay any more for decommissioning expenses than they already are;
- 4) No sharing of excess decommissioning funds with PECO should be allowed. All such excess should be repaid to customers from whom they were received;
- 5) PECO should commit to limit its use of nuclear power at the retail level using 1999 as a benchmark;
- 6) PECO must commit to maintaining at least its current 1,440 staff at 2301 Market Street for as long as it owns the distribution system;
- 7) PECO's commitment on charitable giving should not be allowed to expire in three years, but should remain the long-term charitable and civic role in Philadelphia that it has historically played. This commitment should be tied to its profitability and should increase (not decrease in real terms) over time as its profits rise;
- 8) The distribution rate cap provided in paragraph 11 of the Joint Settlement Petition should be lengthened at least five years, and the dollar rate reductions offered in paragraph 10 through 2005 should

⁸ consistent with the proposals previously made in the document entitled "Comments And Objections of Philadelphia City Councilman David Cohen As To The Proposed Settlement Agreement"

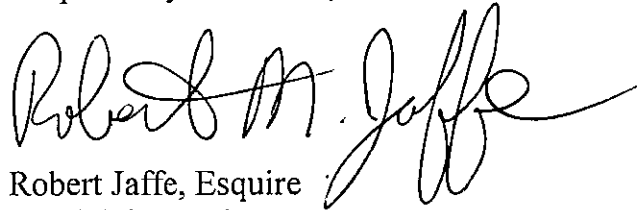
be at least doubled, and then maintained at the lowest level established in the year 2005 for another five years;

- 9) The Commission should reserve the right to further reduce PECO's distribution rates in the absence of real price competition emerging over the next several years despite the measures to promote competition that are contained in the Joint Settlement;
- 10) PECO should be required to have ongoing educational materials contained within its customer bills or on bill stuffers, concerning the Matching Energy Assistance Fund (MEAF);
- 11) PECO should immediately increase the number of kilowatt hours ("kwh's") per month from 500 to 600 that are billed at the Customer Assistance Program (CAP) rates;
- 12) PECO should regularly (four times each year) educate its rate payers about the Customer Assistance Program (CAP) and about the utility Emergency Services Fund ("UESF");
- 13) PECO should increase its donation to the UESF from \$1.3 million each year for three years to \$4 million annually indefinitely;
- 14) the Commission should explore whether some additional portions of the corporate structure should be required to locate here, given the complete failure of any corporate move to remotely benefit ratepayers;
- 15) PECO should, through an endowment or otherwise, provide payment for the salaries of at least two attorney positions at the Community Legal Services Utility Unit and provide to that Unit an amount up to at least \$150,000 annually to hire experts, as needed, for research and testimony in PECO-related regulatory matters;
- 16) PECO should be required to offer a special tariff providing a 20% discount to small start-up technology businesses which stay in Philadelphia for at least five years.

It is very likely that the above list of conditions could readily be incorporated into the merger approval with little relative cost to PECO given the extraordinary benefits PECO would receive from its new corporate status.

However, as indicated above, neither Councilman Cohen, nor any party other than PECO, currently possesses specific information regarding the value of the merger. A remand to the ALJ for further fact-finding, therefore, might well be the most appropriate interim outcome of these proceedings.

Respectfully submitted,

A handwritten signature in cursive script that reads "Robert M. Jaffe". The signature is written in black ink and is positioned above the typed name and title.

Robert Jaffe, Esquire
Special Counsel to
Councilman David Cohen

Dated

5-16-00

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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, : **Docket # A110550F0147**
including the Creation of a Holding :
Company and (2) the Merger of the Newly :
Formed Holding Company and :
Unicom Corporation :

Certificate of Service

I hereby certify that I have this day had served a true and correct copy of a Brief of Councilman David Cohen in Opposition to the Approval of the Settlement Agreement, on the following active participants and parties of record by first class mail, postage paid.

Kenneth L. Mickens, Esquire
PA Public Utility Commission
Office of Trial Staff
P.O. Box 3256
Harrisburg, PA 17105-3265

David Kleppinger, Esquire
McNees, Wallace & Nurick
P.O. Box 1166
Harrisburg, PA 17108-1166

Christopher B. Craig, Esquire
Democratic Committee on Appropriations
Room 545, Main Capitol Building
Harrisburg, PA 17120

Irwin A. Popowsky, Esquire
Office of Consumer Advocate
555 Walnut Street
Forum Place, 5th Floor
Harrisburg, PA 17101

Daniel Clearfield, Esquire
Wolf, Block, Schorr & Solis-Cohen LLP
Locust Court Bldg., Suite 300
Harrisburg, PA 17101

Gerald Gornish, Esquire
Wolf, Block, Schorr & Solis-Cohen
1650 Arch Street, 22nd Floor
Philadelphia, PA 19103

Paul Russell, Esquire
Pennsylvania Power & Light Co.
Two North Ninth Street
Allentown, PA 18101

Craig A. Doll, Esquire
214 State Street
Harrisburg, PA 17101

John L. Munsch, Esquire
Allegheny Power
800 Cabin Hill Drive
Greensburg, PA 15601-1689

Michael L. Kessler, Esquire
Vice Pres., General Counsel
American Energy Solutions, Inc.
1781 Duffield Lane
Alexandria, VA 22307-1174

Phillip Bertocci, Esquire
Community Legal Services, Inc.
1424 Chestnut Street, 5th Floor
Philadelphia, PA 19102

Craig Goodman
National Energy Marketers Assoc.
3333 K Street, N.W.
Suite 425
Washington, DC 20007

Andrew S. Tubbs
Pennsylvania Rural Election Assoc.
212 Locust Street
Harrisburg, PA 17108

Thomas Schmidt, III, Esquire
Pepper Hamilton LLP
200 One Keystone Plaza
North Front & Market Streets
Harrisburg, PA 17108-1181

Eric Joseph Epstein
4100 Hillsdale Road
Harrisburg, PA 17112

John Hanger, Esquire
212 Locust Court, Suite 410
Harrisburg, PA 17101

Paul R. Forshay, Esquire
Gregory J. Lawrence, Esquire
Sutherland Asbill & Brennan LLP
1275 Pennsylvania Avenue, N.W.
Washington, DC 20004-2415

John Halsted, Esquire
Gawthrop, Greenwood & Halsted
119 North High Street
West Chester, PA 19381

Peter Meadows Adels, Esquire
117 South 17th Street, Suite 1801
Philadelphia, PA 19103

Amy Gold
Shell Energy Services Co., L.L.C.
P.O. Box 4402
Houston, TX 77210

Donald A. Kaplan, Esquire
Preston Gates Ellis
& rouvelas Meeds LLP
1735 New York Ave., N.W., Suite 500
Washington, DC 20006

Joseph Otis Minott, Esquire
135 South 19th Street, Suite 300
Philadelphia, PA 19103

Kenneth M. Barna, Esquire
Wayne R. Frigard, Esquire
Rubin and Rudman LLP
50 Rows Wharf
Boston, MA 02110

Michael Fiorentino, Esquire
105 North Front Street, Suite 106
Harrisburg, PA 17101

John Will Ongman, Esquire
Marc Machlin, Esquire
Pepper Hamilton LLP
6000 Fourteenth Street, N.W.
Washington, DC 20005

Patricia J. Clark, Esquire
Allegheny Energy Supply Co., LLC
Roseytown
RR 12, Box 1000
Greensburg, PA 15601

Patricia McNamara
6048 Ogontz Avenue
Philadelphia, PA 19141

John Hall, Esquire
Unruh, Turner, Burke & Frees
17 West Gay Street
West Chester, PA 19381

James H. Cawley, Esquire
Rhoads & Sinon
One South Market Street, 12th Floor
Harrisburg, PA 17108

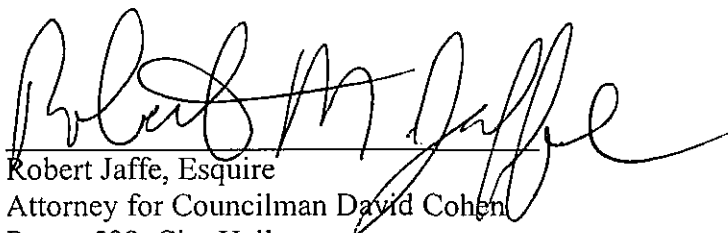
Bernie Ryan, Esquire
Office of Small Business Advocate
Commerce Bldg., Suite 1102
300 North Second Street
Harrisburg, PA 17101

Thomas P. Gadsden, Esquire
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-3921

Greg Pastore
619 Pemberton Street
Philadelphia, PA 19147

Paul R. Bonney, Esquire
PECO Energy Company
2301 Market Street
Philadelphia, PA 19103

Joseph Dworetzky, Esquire
Matthew Hamermesh, Esquire
Hangley & Aroncheck
One Logan Square, 27th F1
Philadelphia, PA 19103



Robert Jaffe, Esquire
Attorney for Councilman David Cohen
Room 588, City Hall
Philadelphia, PA 19107

Dated: 5-16-00

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

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May 17, 2000

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

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SECRETARY'S BUREAU

Re: Application of PECO Energy Company 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-110550F0147

Dear Secretary McNulty:

Enclosed for filing please find an original and nine (9) copies of the Main
Brief of the Office of Trial Staff in the above-captioned proceeding.

Copies are being served on all active parties of record.

Sincerely,

Kenneth L. Mickens
Senior Prosecutor
Office of Trial Staff

KLM:pae
c: Parties of Record
Hon. Charles E Rainey, Jr.

48

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPLICATION OF PECO ENERGY :
COMPANY, PURSUANT TO CHAPTERS :
11, 19, 21, 22 AND 28 OF THE PUBLIC :
UTILITY CODE, FOR APPROVAL OF : APPLICATION
(1) A PLAN OF CORPORATE : DOCKET NO.
RESTRUCTURING, INCLUDING THE : A-110550F0147
CREATION OF A HOLDING COMPANY :
AND (2) THE MERGER OF THE NEWLY :
FORMED HOLDING COMPANY AND :
UNICOM CORPORATION :

MAIN BRIEF
OF THE
OFFICE OF TRIAL STAFF

DOCUMENT
FOLDER

DOCKETED
MAY 18 2000

Kenneth L. Mickens
Senior Prosecutor

Kandace F. Melillo
Prosecutor

Office of Trial Staff
Pennsylvania Public
Utility Commission

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SECRETARY'S BUREAU

P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-1976

Dated: May 17, 2000

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I. INTRODUCTION

On November 22, 1999, PECO Energy Company (“PECO” or the “Company”) filed an Application with the Pennsylvania Public Utility Commission (“Commission”) requesting that the Commission authorize: (1) the formation of a holding company and the transfer of certain assets and common facilities from PECO to its newly established corporate affiliates; and (2) the merger of the newly formed holding company with Unicom Corporation (“Unicom”). In addition, PECO sought approval of various affiliated interest agreements between it and other members of the new holding company system. Finally, PECO asked the Commission to make findings needed for its new generating company affiliate to obtain “exempt wholesale generator” (“EWG”) status and to engage in certain affiliated power sales under Sections 32(c) and 32(k) of the Public Utility Holding Company Act of 1935.

Various parties, including the Office of Trial Staff (“OTS”), intervened and/or filed Notices of Appearance in this proceeding.

In furtherance of the Commission policy favoring settlements of proceedings, the parties worked diligently, over many weeks, in an effort to achieve a full and complete settlement of all issues. These efforts resulted in the filing, on March 23, 2000, of a Joint Petition for Settlement (“Settlement”), which was signed or not opposed by almost all of the parties.

Subsequent to the filing of the Settlement, public input hearings were held in PECO's service territory on the following dates: March 27, 2000 (Philadelphia), March 28, 2000 (Trevose), March 29, 2000 (Norristown), March 30, 2000 (Glenmore), March 31, 2000 (Media), and April 4, 2000 (York). Since the public input hearings were convened after the Settlement had been filed, the parties were able to summarize the Settlement terms at these public hearings and elicit comments from the public.

By Order dated March 28, 2000, ALJ Rainey established a procedural schedule for the filing of Comments and Objections and Replies to Comments and Objections regarding the Settlement. Only two parties filed Objections to the Settlement—PPL Electric Utilities Corporation ("PPL") ("PPL Objections") and Philadelphia City Councilman David Cohen ("Councilman Cohen") ("Cohen Objections").

In Prehearing Order #2, issued on April 25, 2000, ALJ Rainey determined, in light of the Objections, that technical evidentiary hearings would be convened. Accordingly, hearings for the purpose of presenting testimony either in favor of or in opposition to the Settlement were held in Philadelphia, PA, on May 10, 2000. The record closed on May 10, 2000, with Main Briefs due on May 17, 2000, and Reply Briefs due on May 24, 2000.

On May 2, 2000, PECO filed a Petition for Certification of the Record, pursuant to 66 Pa. C.S. §335(a). PECO's Petition requests that the Commission

exercise its authority to dispense with an initial decision in this matter, and certify the record for final decision. A decision on this request was denied by the Commission at Public Meeting on May 11, 2000.

II. SUMMARY OF ARGUMENT

OTS submits that ALJ Rainey and the Commission should approve the Settlement because it is in the public interest. The Settlement contains many benefits to ratepayers and the public in general. These benefits include a \$200 million distribution rate reduction, an extension of the rate cap, protection for PECO's ratepayers from expenses of the decommissioning of Unicom's nuclear units, the sharing of any future increases in nuclear decommissioning costs between shareholders and customers, reliability and customer service enhancements, promotion of competition, provision of environmental benefits, protection for customers from unregulated risks and the maintenance by PECO of a strong corporate presence in Southeastern Pennsylvania.

OTS believes that the Objections to the Settlement filed by PPL and Councilman Cohen should be rejected for the reasons summarized as follows:

Initially, OTS observes that PPL lacks the requisite standing to raise arguments concerning the precedential impact of certain provisions of the Settlement. Under administrative law, standing is largely a matter within the discretion of the agency. However, the Commission has historically relied upon the rule followed in determining standing to appeal in court proceedings. Under this rule, it is clear that any harm alleged by PPL in the instant case is too remote to provide the necessary "aggrievement" required for standing.

The law in Pennsylvania is also clear that despite PPL's allegation, settlements cannot be used as precedent in other proceedings. Moreover, the very terms of the Settlement provide that its terms may not be used in a precedential fashion. Consequently, PPL's claim that the terms of the Settlement will limit its ability to negotiate favorable terms in a future PPL merger or restructuring proceeding, should be rejected.

PPL's request in its Objections that the Commission condition approval of the Settlement, which provides for the issuance of a certificate of public convenience, on the forbearance of non-utilities from certain conduct, should be rejected. The Public Utility Code provides broad powers to the Commission to supervise and regulate public utilities, but provides no authorization for directly regulating the conduct of non-utilities.

In its testimony, PPL requests that the Commission issue a "policy statement" proscribing use of the Settlement by the Commission and any Commission litigant in any future proceeding. PPL also requests that the "policy statement" indicate that all future proceedings will be decided "on their own merits"; i.e., presumably without regard to prior Commission decisions in either settled or fully-litigated cases.

PPL's request is for a binding, generic Commission rule, which necessitates, inter alia, publication and opportunity for comments. PPL has not

accounted for any of these requirements in its proposal and furthermore, a merger application is not an appropriate forum for a rulemaking.

Also, PPL's proposal would unlawfully limit the Commission's discretion to consider its past decisions, and provide for consistency in future litigation. Such restriction on the Commission's power to regulate public utilities is not within the Commission's power to grant.

Notwithstanding PPL's assertions to the contrary, the record herein contains substantial evidence that the Settlement, including all rate reductions and nuclear decommissioning benefits, are in the public interest. PECO has met the statutory requirement that its proposed merger, under the conditions provided in the Settlement, is "necessary or proper for the service, accommodation, convenience, or safety of the public." 66 Pa. C.S. §1103(a)

In addition, PECO has met the requirements of 66 Pa. C.S. §2811(e), in that the proposed merger has been shown not to likely result in the unlawful exercise of market power, which would prevent customers from obtaining the benefits of competition. The PECO Settlement should be approved.

III. ARGUMENT

A. PPL Lacks Standing To Object To The Presumed Impact Of A Settlement Agreed To By PECO.

At pp. 29-33 of its Objections, PPL argues that even if the Commission determines that the Settlement is lawful and in the public interest, it should condition its approval upon the agreement of all settling parties that the Settlement “will not be used to justify relief in subsequent proceedings before the Commission involving other Pennsylvania public utilities, including efforts to reopen their restructuring settlements.” PPL Objections, p. 29.¹ PPL adds that public utilities that do not actively participate in the settlement proceedings, find themselves forced to defend against provisions that are justified on the basis that they were agreed to by another utility. PPL Objections, p. 30.

However, OTS submits that even under the more liberal standard applied to administrative law², PPL lacks the requisite standing to raise such an argument. Under administrative law, standing is largely a matter within the discretion of the agency involved, to be exercised in each individual case. See, W.J. Dillner Transfer Company v. Pennsylvania Public Utility Commission, 175 Pa. Super. Ct.

¹ A similar claim is made by PPL witness Paul L. Gioia at pp. 7-9 of PPL St. 1.

² For example, standing to appeal in court proceedings is governed by Rule of Appellate Procedure 501, which provides that any party who “is aggrieved by an appealable order ... may appeal therefrom.” The requirements of “aggrievement” are discussed in William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975) (“William Penn”). Here the Supreme Court found that a person seeking to appeal must have a direct and substantial interest in the subject matter of the litigation and must show a sufficiently close causal connection between the challenged action and the asserted injury to qualify the interest as immediate rather than remote.

461, 107 A.2d 159 (1954); Arsenal Board of Trade v. Pennsylvania Public Utility Commission, 166 Pa. Super. Ct. 548, 72 A.2d 612 (1950); City of Pittsburgh v. Pennsylvania Public Utility Commission, 153 Pa. Super. Ct. 83, 33 A.2d 641 (1950). However, in applying its discretion, the Commission has primarily adhered to the principles of standing established by Pennsylvania's appellate courts. In this regard, see, Re L & H Trucking Company v. Pennsylvania Public Utility Commission, 55 Pa. P.U.C. 469 (1982) ("L & H Trucking"). In L & H Trucking the Commission found that a "protestant" should "have an immediate interest in the subject matter of the proceeding. The adverse impact ... cannot be remote. Although this is similar to the test for standing to appeal, it should be a vital element in any test for standing." Order at p. 471. Similarly, in AES Beaver Valley v. West Penn Power Company, 58 Pa. P.U.C. 729 (1985), the Commission dismissed exceptions to a proposed settlement for lack of standing because the party was not a customer of West Penn Power Company. Order at pp. 730-731.

PPL's claim should also fail because any hypothetical consequences that PPL might incur as a result of the instant Settlement are far too remote to be considered "substantial" under the requirements discussed in William Penn or L & H Trucking. PPL apparently believes it has the right to "step into the shoes" of PECO for the purpose of protecting its perceived interest, which may be impacted by the Settlement terms. However, PPL has failed to cite any case, statute or regulation, which bestows such status upon it. Moreover, PPL has not articulated

any argument, which suggests that it in some way represents PECO ratepayers. Even under the latter circumstance, PPL would need to prove that it had standing in its own right in order to represent such a group. See, Pennsylvania Natural Gas Association v. T.W. Phillips Gas and Oil Company, Docket Nos. C-902909 & C-913239 (entered December 20, 1991).

Consequently, the record clearly indicates that PPL has failed to demonstrate that it has standing to argue that the terms of the Settlement will result in harm to PPL.

B. PPL's Objections Should Be Dismissed Because The Settlement Will Have No Precedential Impact Upon Subsequent Proceedings.

Presumably, PPL, an electric public utility in Pennsylvania, was admitted as a party in this proceeding solely because of the possibility that it might be impacted by certain competitive issues that could arise during the course of the proceeding. Instead, PPL argues that it must be allowed to protect itself against arguments that "might" be raised in settlement discussions by parties to the instant Settlement in a "hypothetical" future proceeding involving PPL. Moreover, PPL is not only alleging that such arguments might be made to the Commission to reopen its electric restructuring proceeding, but might be used in settlement negotiations to obtain a similar result. See, PPL Objections, p. 32; PPL St. 1, pp. 7-9.

OTS submits that PPL's claim is absurd. First, the law in Pennsylvania clearly states that settlements cannot be used as precedent in other proceedings.

See, Joint Petition of the Frontier Companies for a Streamlined Form of Regulation and Plan for Network Modernization, 1996 Pa. PUC LEXIS 107, 129-130 (Docket No. P-00951005) (September 11, 1999). Second, PPL acknowledges that the Settlement's very terms indicate that the Settlement cannot be used as controlling precedent.³ PPL Objections, p. 29. In spite of the identified safeguards, PPL seeks to bind the settling parties in the areas of both legal argument and action.

OTS believes that PPL's Objections should be denied because PPL can avoid the result it fears, by simply refusing to agree to terms that it believes would place it at a competitive disadvantage. Moreover, PPL should not fear that a settling party would use the instant Settlement to reopen PPL's electric restructuring proceeding because such action is specifically barred under the terms of the Settlement. PPL alleges that it will be pressured to adhere to the settlement terms agreed to in previous settlements. However, there are certain factors that affect every negotiation between parties. A party must weigh these factors and determine whether it would be "better off" under the "known" settlement terms or under the "unknown" litigated result. PPL retains the option to fully litigate its case if it cannot obtain the desired result through settlement negotiation. PPL's

³ The Joint Petition states:

Acknowledging that it is expressly understood and agreed that the Settlement constitutes a negotiated resolution solely of issues addressed herein, the Merger and the Corporation Restructuring, the Joint Petitioners agree that this Settlement shall not constitute or be cited as controlling precedent in any other proceeding, including a proceeding involving a merger or an acquisition by another Pennsylvania electric utility.

attempt to isolate the impact upon it of any previous settlement agreed to by an unaffiliated public utility, should be rejected. Were this Commission to honor PPL's request, where would the speculation end as to the possible impact of one settled proceeding upon another? PPL's argument is also "patronizing" in that it presumes that the Commission will "rubber-stamp" future merger settlements in robotic fashion. OTS submits that such an inference is improper.

For the foregoing reasons, PPL's claim that the terms of the Settlement could have a precedential impact on a future PPL merger or restructuring proceeding, should be rejected.

C. The Commission Lacks The Statutory Authority To Grant The Relief Requested In PPL's Objections.

In its Objections, at pages 33-34, PPL requests that the Commission condition any approval of the Settlement on the agreement of the parties: (1) not to propose that a provision of the Joint Petition be adopted in any other proceeding based on the fact that such provision was included in the Joint Petition; and (2) not to seek to reopen another Pennsylvania public utility's settlement of its retail restructuring proceeding to modify any provision of such settlement in order to make it consistent with a provision of the Joint Petition.

Even if these requested conditions were reasonable, which they are not, they are not lawful and should be rejected. The Commission, as a creation of the Legislature, has only such powers as are expressly or impliedly granted to it.

Joint Petition at p. 41.

Rogoff v. Buncher Co., 395 Pa. 477, 151 A.2d 83 (1959). There is no authority granted to the Commission to condition approval of a Settlement, which provides for the issuance of a certificate of public convenience, on the forbearance of non-utility parties from taking certain action. The Public Utility Code authorizes the Commission to supervise and regulate all public utilities doing business within the Commonwealth, but provides no authorization for directly regulating the conduct of non-utilities. See, e.g., 66 Pa. C.S. §501(b)

The Courts have also recognized limitations on the Commission's statutory authority to condition the approval of certificates of public convenience. For example, in Western Pennsylvania Water Co. v. Pennsylvania Public Utility Commission, 10 Pa. Cmwlth. Ct. 533, 311 A.2d 370 (1973), the Commonwealth Court rejected a condition attached to a water company certificate, on the grounds that, inter alia, it was not based on any statutory authority or power.

Accordingly, PPL may not appropriately request that the Commission condition the approval of a certificate of public convenience on the future conduct of non-utilities, and its request should be denied.

D. PPL's Request For A "Policy Statement" Concerning Evidentiary Treatment Of A Prior Settlement Or Commission Action Is Improperly Raised In This Proceeding And Is Also In Derogation Of Law.

In its direct testimony, PPL has perhaps retreated from the position set forth in its Objections. PPL witness Paul L. Gioia now contends that the Commission should, in effect, issue a "policy statement" concerning precedential and evidentiary treatment of prior settlements and other Commission action. PPL St. 1, p. 4.⁴ Under PPL's requested "statement of policy", the Commission would expressly state, presumably as part of any Order approving the PECO merger, that its approval "does not render the individual terms of the [Settlement] agreement precedent or relevant or material evidence in any subsequent proceeding, and that the terms of any subsequent proposed reorganization, merger or other action will be considered on its own merits." PPL St. 1, p. 9.

OTS has previously addressed PPL's request that prior settlement agreements not be used as precedent. As indicated earlier, settlement agreements clearly have no precedential value under Pennsylvania law, and it is unnecessary for the Commission to reiterate this in an Order approving the merger.

However, PPL also asks for a generic evidentiary rule, which would be applicable to all parties in all proceedings before the Commission. Under this rule, characterized as a policy statement by PPL, none of the PECO Settlement provisions could effectively be used as evidence by any Commission litigant, in

any future proceeding before the Commission. Furthermore, any subsequent proposed merger, reorganization, or any other action must be considered totally on its own merits (i.e., without regard to prior Commission decisions⁵). Thus, the Commission would be unable to use any of its prior decisions as guidance in future proceedings (regardless of whether the decision resolved a settlement or a litigation).

There are several fatal legal problems with PPL's evidentiary request. First of all, while PPL has characterized its request as an articulation of "policy", PPL is actually requesting a generic and binding change in the Commission's evidentiary practice and procedure (i.e., a regulation)⁶. The view that PPL is requesting a new regulation is supported by the definition of regulation in the Commonwealth Documents Law, 45 P.S. §1102:

"Regulation" means any rule or regulation, or order in the nature of a rule or regulation, promulgated by any agency under statutory authority in the administration of any statute administered by or relating to the agency, or prescribing the practice or procedure before such agency. (emphasis supplied)

Also, in R.M. v. Pennsylvania Housing Finance Agency, 740 A.2d 302 (1999), the Commonwealth Court addressed whether an agency pronouncement is

⁴ In Mr. Gioia's view, there are sound reasons for the Commission to "articulate a clear policy that the specific terms of a settlement agreement will not be accorded precedential effect or evidentiary weight in any subsequent proceeding." PPL St. 1, p. 4.

⁵ The PPL proposal does not limit the use of past Commission decisions to only those which approve settlements. Thus, the proposal must be interpreted as broadly proscribing the use of all prior Commission decisions in future proceedings.

a “statement of policy” or a “regulation.” As stated by the Court therein, a touchstone of an agency regulation, as opposed to a statement of policy, is that it establishes a binding norm, which restricts the agency’s discretion. 740 A.2d at 307. In the instant case, PPL is clearly requesting a “binding norm” that would restrict the Commission’s ability to admit evidence of settlements. It also would restrict the Commission’s discretion to consider its past decisions in future deliberations, regardless of whether those past decisions resulted from settlements or litigation. Thus, PPL is requesting that the Commission promulgate a regulation.

The Court in R.M. v. Pennsylvania Housing Finance Agency, 740 A.2d at 306 also addressed the legal requirements, as set forth in the Commonwealth Documents Law, which must be satisfied before a regulation can become valid.

Under these requirements, the agency must:

- (1) give public notice of its intention to promulgate, amend or repeal any administrative regulation, 45 P.S. §1201;
- (2) accept, review and consider any submitted written comments, 45 P.S. §1202;
- (3) obtain legal approval of the proposed regulation, 45 P.S. § 1205; and
- (4) deposit the text of the regulation with the Legislative Reference Bureau for publication, 45 P.S. §1207.

⁶ For example, the Commission currently has procedural rules addressing the admissibility of evidence. See, e.g., 52 Pa. Code §5.401. Under PPL’s proposal, these regulations would presumably be modified to provide for the exclusion of prior settlement agreements.

PPL has not accounted for any of these requirements in its proposal. Furthermore, a merger application is clearly not the appropriate forum for instituting a rulemaking, such as would be required to effectuate PPL's request. PPL's request should therefore be denied.

Moreover, PPL's proposal would restrict the Commission's discretion to regulate public utilities in accordance with its statutory responsibilities. For example, as stated previously, PPL's proposal, that all future proceedings be considered on their own merits, does not simply limit the Commission's discretion to consider prior settlements in its decisions. It is broadly stated to also restrict the Commission's use of its prior decisions in fully litigated proceedings. In both situations, the PPL proposal runs afoul of Section 501 of the Public Utility Code, 66 Pa. C.S. §501. Section 501 provides broad authority to the Commission to regulate public utilities in the Commonwealth, and to rescind or modify prior orders. PPL, in derogation of Section 501, would restrict the powers of the Commission to issue, rescind or modify orders, using the guidance of past decisions (whether settled or litigated) for consistency purposes. Thus, PPL's proposal is in derogation of law and should be rejected.

Furthermore, as stated previously, the Commission has those powers which are expressly or impliedly given to it by the Legislature. Rogoff v. Buncher Co., supra. Nowhere in the Code is the Commission given the authority to restrict its

discretion, in derogation of Section 501 of the Code, in the manner sought by PPL.

Thus, PPL's proposal is ultra vires and should be rejected.

In conclusion, for all the foregoing reasons, PPL's request that the Commission restrict itself and all future litigants in the use of the PECO merger Settlement and in the use of all prior Commission decisions, must be rejected.

E. The Record Herein Provides Substantial Evidence That The Settlement Is In The Public Interest.

At pp. 14-19 of its Objections, PPL argues that in the case of contested settlements, the Commission must find that each provision of the settlement is in the public interest⁷, consistent with applicable law and supported by substantial evidence of record.⁸ PPL further alleges that the Commission does not have "a body of evidence responsive to the Merger Application that it can weigh against that submitted with the Merger Application to determine if the provisions of the Joint Petition represent a reasonable accommodation of the parties' positions."

PPL Objections, p. 18.

⁷ Incidentally, PPL's Objections lack sufficient support for this allegation. The Commission recently approved a merger between Bell Atlantic Corporation and GTE Corporation that was conditioned upon a Memorandum of Understanding ("MOU") between the merging parties and the Commonwealth's Office of Attorney General. Among other concessions, the MOU provided for rate reductions. In approving the merger and the MOU, the Commission did not require the settling parties in a contested settlement to prove that every provision of the proposed settlement was in the public interest. See, Joint Application of Bell Atlantic Corporation and GTE Corporation for Approval of Agreement and Plan of Merger, Docket Nos. A-310200F.002, et al. (entered November 4, 1999).

⁸ Substantial evidence has been defined by the Courts as "that quantum of evidence which a reasonable mind might accept as adequate to support a conclusion." Dutchland Tours, Inc. v. Pennsylvania Public Utility Commission, 19 Pa. Cmwlth. Ct. 1, 337 A.2d 922 (1975), as quoted in Norfolk & Western Railway Co. v. Pennsylvania Public Utility Commission, 489 Pa. 109, 128 (1980).

Contrary to PPL's assertions, the record herein does contain a substantial body of evidence that the settling parties' concerns have been accommodated and that the provisions of the Settlement are in the public interest.⁹ This evidence may be broadly categorized as follows: (1) evidence presented at the technical evidentiary hearings in Philadelphia, PA on May 10; and (2) Public Input Hearing testimony.

1. Evidence presented at the May 10 technical hearings

At the May 10 hearings in Philadelphia, several of the settling parties presented evidence in support of the Settlement, with particular emphasis on those portions providing significant benefit to the interests of that party. OTS presented the testimony of OTS Fixed Utility Financial Analyst Kevan Deardorff (OTS St. 1 & OTS Ex. 1) to support the \$200 million rate reduction provided for in the Settlement, and the testimony of OTS Fixed Utility Valuation Engineer Paul J. Metro (OTS St. 2) to support the nuclear decommissioning provisions of the Settlement and PECO's market power analysis.¹⁰

Mr. Deardorff testified that the \$200 million rate reduction is well within the range of potential merger cost savings. OTS St. 1, pp. 2-4. Recognition of these savings in rates, as provided for in the Settlement, will assure that the merger provides a readily identifiable benefit to customers, in furtherance of the legal

⁹ OTS has previously demonstrated herein that it is PPL's proposal, not the Settlement, which is inconsistent with applicable law.

¹⁰ OTS will address the market power issue in the next section of this Main Brief.

requirement that the merger produce public benefit.¹¹ Mr. Deardorff also dispelled PPL's concern that the reflection of these savings in rates might negatively impact PECO's service. OTS St. 1, pp. 2-4; PPL Objections, pp. 20-22.

Other settling parties also provided evidence in support of the \$200 million rate reduction in the Settlement. For example, the Office of Consumer Advocate (OCA) witness Richard La Capra testified that, in contrast to PECO's original proposal submitted with the Merger Application, the Settlement provides essential enhancements "to ensure that ratepayers will receive concrete, immediate, affirmative benefits in the form of rate reductions." OCA St. 1S, pp. 8-9. Senator Fumo, et al.¹² witness Richard H. Silkman, Ph.D., testified that the Settlement provides for the recovery by PECO ratepayers of what he estimates to be the full dollar value of merger-related synergies associated with the T&D (transmission and distribution) component of PECO, and that he believes the Settlement, as a whole, is in the public interest. Fumo and CEPA St. 1, pp. 5-6. Also, PECO witness Thomas P. Hill, Jr. testified that, contrary to PPL's assertions, merger-related rate reductions are not contrary to Commission policy and would not impair PECO's service. PECO St. 3S, p. 8; PPL Objections, pp. 20-22.

¹¹ Section 1103(a) of the Public Utility Code, 66 Pa. C.S. §1103(a), requires merger applicants to show that the transaction is "necessary or proper for the service, accommodation, convenience, or safety of the public." The Pennsylvania Supreme Court in City of York v. Pennsylvania Public Utility Commission, 449 Pa. 136, 295 A.2d 825 (1972), interpreted this statutory requirement to mean that the Commission must find affirmatively that public benefit will result from the merger and that the Commission should consider the impact of the proposed merger on future rates to consumers.

¹² Dr. Silkman testified on behalf of Senator Fumo, the Consumers Education and Protective Association (CEPA), the Association of Community Organizations for Reform Now (ACORN), the Action Alliance of Senior Citizens of Greater Philadelphia and the Tenant's Action Group.

Mr. Metro presented testimony that the nuclear decommissioning provisions in the Settlement are in the public interest. These provisions include financial concessions by PECO to obviate some of the rate impact of potential future decommissioning cost increases. OTS St. 2, pp. 3-4. In addition, the Settlement includes language designed to protect PECO ratepayers from Unicom's decommissioning obligations. Joint Petition For Settlement, p. 10. Mr. Metro has also dispelled PPL's concerns that PECO's financial concessions will somehow lead to an underfinanced or incomplete decommissioning fund. OTS St. 2, pp. 3-4; PPL Objections, p. 23.

Other settling parties also offered testimony in support of the nuclear decommissioning provisions of the Settlement. For example, PECO witness Thomas Hill testified that the Nuclear Regulatory Commission ("NRC") has the enforcement power to ensure that sufficient funds have been set aside to safely decommission PECO's nuclear facilities. PECO St. 3S, p. 10. Dr. Silkman testified that the nuclear decommissioning provisions represented concessions that provide value to ratepayers. Fumo & CEPA St. 1, p. 14. OCA witness LaCapra testified that it is appropriate for PECO to set aside some of its merger benefits, in the form of nuclear decommissioning concessions, to mitigate the risk of future cost increases. OCA St. 1S, p. 11. Intervenor Eric J. Epstein also testified in support of the Settlement's nuclear decommissioning cost provisions. Epstein St. 1, pp. 1-8.

2. Public Input Testimony

In addition to the evidence supplied in the testimony in support of the Settlement submitted by the settling parties on May 10, 2000, the Commission has the Public Input testimony available to it for review. Public Input hearings were held in Philadelphia (March 28, 2000), Norristown (March 29, 2000), Glenmore (March 30, 2000), Media (March 31, 2000) and York (April 4, 2000).

At the Public Input hearings, people testified representing a broad spectrum of customer classifications. More importantly, these customers testified at a point after the Settlement had been filed and reported upon in the media. At the beginning of each Public Input hearing, the parties summarized the Settlement and solicited questions and or comments about its terms. In this regard, at the Philadelphia hearing, Blane Stoddart, Executive Director of The Partnership CDC, stated "I was happy to come to the knowledge that PECO has entered into an agreement with a number of parties, and that PECO has made assurances that they are remaining in the City, and that we all will be guaranteed savings of \$200 million as a result of the merger." Tr. 168. His appreciation for the \$200 million rate reduction to distribution rates was echoed by residential ratepayer Maris Menin (also representing Consumers Education Protective Association) (Tr. 116) and Al Taubenberger, President of the Greater Northeast Philadelphia Chamber of Commerce. Tr. 119. In addition, in Media, William R. Taylor, a small business owner, supported the rate reduction provided under the Settlement. Tr. 341-342.

Similarly, at the Trevoise hearing, residential customer Larry Abramovitz inquired about the details of the \$200 million decrease to distribution rates and expressed satisfaction. Tr. 200-201. Finally, at the York hearing, Eric Epstein, representing EMFR Monitoring Group, testified that the provision of the Settlement that ensures that PECO ratepayers will never have to pay the decommissioning costs for Unicom nuclear generating units, makes the Settlement good for both current and future ratepayers. Tr. 375.

3. Conclusion concerning substantial evidence

Clearly, there is substantial evidence of record to support the Settlement's rate benefits and nuclear decommissioning protections. Moreover, while PPL has raised assertions in its Objections, these Objections are not supported by the testimony of its witness. Accordingly, all PPL contentions that the record does not support the Settlement, should be rejected.

Since the record herein contains substantial evidence that the proposed Settlement will provide public benefit and is in the public interest, the Settlement should be approved. PECO has met its burden of proof that its proposed merger, under the conditions provided in the Settlement, is "necessary or proper for the service accommodation, convenience, or safety of the public." 66 Pa. C.S.

§1103(a).

F. The Record Herein Contains Substantial Evidence That The Proposed Merger Will Not Likely Result In The Unlawful Exercise Of Market Power.

Pursuant to Section 2811(e) of the Public Utility Code, 66 Pa. C.S. §2811(e), the Commission, in approving merger applications, is required 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 from obtaining the benefits of retail competition.

On the market power issue, PECO witness William H. Hieronymus, Ph.D., performed an analysis of the competitive impact of the PECO/Unicom merger on electricity markets as part of the Application to the Federal Energy Regulatory Commission (FERC) for approval of the merger. Dr. Hieronymus concluded that the proposed merger will not lead to material increases in market concentration or lead to increases in PECO and Unicom's market share in any relevant market. PECO St. 5, p. 4. OTS witness Paul Metro reviewed Dr. Hieronymus' analysis and agreed with those conclusions in light of the concessions PECO has agreed to in the Settlement. OTS St. 2, pp. 6-8. No party herein disputed PECO's conclusions.

Accordingly, the record contains substantial evidence that, as required by 66 Pa. C.S. §2811(e), the proposed merger will not likely result in the unlawful exercise of market power, which would prevent customers from obtaining the benefits of retail electric competition in Pennsylvania.

IV. CONCLUSION

For all of the foregoing reasons, the Office of Trial Staff of the Pennsylvania Public Utility Commission respectfully requests that the Settlement herein be approved.

Respectfully submitted,



Kenneth L. Mickens
Senior Prosecutor
Office of Trial Staff



Kandace F. Melillo
Prosecutor
Office of Trial Staff

Pa. P.U.C.
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-1976

Dated: May 17, 2000

APPENDIX

OTS Proposed Findings of Fact

&

OTS Proposed Conclusions of Law

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OTS PROPOSED
FINDINGS OF FACT

1. On November 22, 1999, PECO Energy Company (“PECO” or the “Company”) filed an Application with the Pennsylvania Public Utility Commission (“Commission”) requesting that the Commission authorize: (1) the formation of a holding company and the transfer of certain assets and common facilities from PECO to its newly established corporate affiliates; and (2) the merger of the newly formed holding company with Unicom Corporation (“Unicom”). In addition, PECO sought approval of various affiliated interest agreements between it and other members of the new holding company system. Finally, PECO asked the Commission to make findings needed for its new generating company affiliate to obtain “exempt wholesale generator” (“EWG”) status and to engage in certain affiliated power sales under Sections 32(c) and 32(k) of the Public Utility Holding Company Act of 1935. Application, pp. 1-2.
2. PPL intervened in the PECO merger proceeding as a competitor of PECO.
3. Various other parties, including the Office of Trial Staff (OTS) intervened and/or filed a Notice of Appearance in this proceeding.
4. The parties worked diligently, over many weeks, in an effort to achieve a full and complete settlement of all issues. These efforts resulted in the

filing, on March 23, 2000, of a Joint Petition for Settlement (“Joint Petition” or “Settlement”), which was signed or not opposed by almost all of the parties.

5. Only two parties—PPL Electric Utilities Corporation (PPL) and Philadelphia City Councilman David Cohen (Councilman Cohen)—filed Objections regarding the Settlement.
6. In its Objections, PPL contended that there was insufficient record evidence in support of the Settlement. PPL expressed concern about whether the rate reductions might negatively impact service and whether the nuclear decommissioning concessions might hinder safety. PPL Objections, pp. 18, 20-23. PPL also requested that conditions be placed on approval of the Settlement. These conditions are that the Commission should condition approval on the agreement of the parties (a) not to propose that a provision of the Joint Petition be adopted in any other proceeding based on the fact that such provision was included in the Joint Petition; and (b) not to seek to reopen another Pennsylvania public utility’s settlement of its retail restructuring proceeding to modify any such provision of such settlement in order to make it consistent with a provision of the Joint Petition. PPL Objections, pp. 33-34.
7. PPL also requested a Commission pronouncement that the Settlement would not constitute precedent, and that the terms of the Settlement

would not be considered for evidentiary purposes in other Commission proceedings. In addition, requested that the Commission determine all future cases “on their own merits.” PPL St. 1, p. 9.

8. Public Input Hearings and technical evidentiary hearings were held subsequent to filing of the Settlement. At these hearings, testimony was given primarily in support of the Settlement.
9. The Settlement provides for a \$200 million dollar rate reduction over the next five years. This is well within the range of potential merger cost savings. OTS St. 1, pp. 2-4. These merger-related rate reductions will not negatively impact PECO’s service. OTS St. 1, pp. 2-4; PECO St. 3S, p. 8.
10. PECO ratepayers testified in favor of the rate reductions in the Settlement. Tr. 116, 119, 168, 200-201, 341-342.
11. The Settlement provides for nuclear decommissioning cost concessions to obviate some of the rate impact of future cost increases. These financial concessions will not impair the safety of decommissioning the nuclear plants. OTS St. 2, pp. 3-4; PECO St. 3S, p. 10.
12. No PPL witness testified in opposition to the rate reductions and nuclear decommissioning cost concessions agreed to by PECO in the Settlement.

13. PECO witness William H. Hieronymus, Ph.D., conducted a market power study concerning the proposed PECO/Unicom merger, which was admitted into the record herein. This study concluded, and in light of the concessions made by PECO in the Settlement, I/we concur, that the proposed merger will not lead to material increases in market concentration or lead to increases in PECO and Unicom's market share in any relevant market. PECO St. 5, p. 4.

14. No party herein disputed the findings of Dr. Hieronymus.

OTS PROPOSED
CONCLUSIONS OF LAW

1. Under administrative law, standing is largely a matter within the discretion of the agency involved, to be exercised in each individual case. W.J. Dillner Transfer Company v. Pennsylvania Public Utility Commission, 175 Pa. Super. Ct. 461, 107 A.2d 159 (1954); Arsenal Board of Trade v. Pennsylvania Public Utility Commission, 166 Pa. Super. Ct. 548, 72 A.2d 612 (1950); City of Pittsburgh v. Pennsylvania Public Utility Commission, 153 Pa. Super. Ct. 83, 33 A.2d 641 (1950).
2. PPL lacks the requisite standing to argue that the Commission should find that the settling parties cannot use provisions of the instant *Settlement in settlement negotiations in subsequent proceedings* involving other Pennsylvania public utility companies. Since PPL is not an “aggrieved” party, standing to raise such a claim must be denied. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975); AES Beaver Valley v. West Penn Power, 58 Pa. P.U.C. 729 (1985); Re L & H Trucking Company v. Pennsylvania Public Utility Commission, 55 Pa. P.U.C. 469 (1982).
3. If PPL is arguing that it is representing PECO customers in this proceeding, it must first show that it has standing in its own right. Pennsylvania Natural Gas Association v. T.W. Phillips Gas and Oil

Company, Docket Nos. C-902909 & C-913239 (entered December 20, 1991).

4. The law in Pennsylvania clearly states that settlements cannot be used as precedent in other proceedings. Joint Petition of the Frontier Companies for a Streamlined Form of Regulation and Plan for Network Modernization, 1996 Pa. PUC LEXIS 107, 129-130 (Docket No. P-00951005) (September 11, 1999).
5. The Commission, as a creation of the Legislature, has only such powers as are expressly or impliedly granted to it. Rogoff v. Buncher Co., 395 Pa. 477, 151 A.2d 83 (1959). There is no authority granted to the Commission to condition approval of a Settlement, which provides for the issuance of a certificate of public convenience, on the future conduct of non-utility parties. Therefore, PPL's request for this condition must be rejected .
6. PPL's request, that the terms of the Settlement not be considered for evidentiary purposes in other Commission proceedings and that the Commission determine all future cases "on their own merits", is a request for a rulemaking. A merger application proceeding is not a proper proceeding to institute a rulemaking. Also, PPL has not provided for compliance with the notice, publication, and other requirements of the Commonwealth Documents Law, 45 P.S. §§1201,

1202, 1205 and 1207, with respect to this requested rulemaking. PPL's request should be rejected.

7. PPL's request that the Commission decide all future proceedings on their own merits, is broadly stated to proscribe the Commission's use of its prior decisions, regardless of whether that prior proceeding was settled or fully litigated. In both instances, the requested restriction is violative of Section 501 of the Public Utility Code, 66 Pa. C.S. §501, as it unreasonably seeks to limit the Commission's discretion to regulate public utilities, using the guidance of prior decisions. Also, the Commission is not empowered to relinquish this discretion, and PPL's request is therefore ultra vires. Rogoff v. Buncher Co., supra. PPL's request should be rejected.
8. The record herein contains substantial evidence that the proposed Settlement will provide public benefit and is in the public interest, as required by 66 Pa. C.S. §1103(a).
9. PECO has met its burden of proof that its proposed merger, under the conditions provided in the Settlement, is "necessary or proper for the service accommodation, convenience, or safety of the public." 66 Pa. C.S. §1103(a).
10. In addition, PECO has met the requirements of 66 Pa. C.S. §2811(e), in that the proposed merger has been shown not likely to result in the

unlawful exercise of market power, which would prevent customers from obtaining the benefits of competition.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of PECO Energy	:	
Company to Chapters 11, 19, 21,	:	
22 and 28 of the Public Utility Code,	:	
for Approval of (1) A Plan of	:	Docket No.
Corporate Restructuring, including	:	A-110550F0147
the creation of a Holding Company	:	
and (2) the Merger of the Newly	:	
Formed Holding Company and	:	
Unicom Corporation	:	

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing, the **Main Brief of the Office of Trial**, dated May 17, 2000, either personally, by fax upon the persons addressed below:

Thomas P. Gadsden, Esquire
Morgan, Lewis & Bockius, LLP
1701 Market Street
Philadelphia, PA 19103-2921

Paul R. Bonney, Esquire
PECO Energy Company
2301 Market Street
P. O. Box 8699
Philadelphia, PA 19103-8699

Honorable Allyson Y. Schwartz
Senate of Pennsylvania
Senate Box 203004
Harrisburg, PA 17120-3004

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00 MAY 16 PM 2:53
PA.P.U.C.
SECRETARY'S BUREAU

John Hanger
Citizens for Pennsylvania's Future
212 Locust Court
Suite 410
Harrisburg, PA 17101

Peter Meadows Adel
Charles McPhedran
PennFuture
117 South 17th Street
Suite 1801
Philadelphia, PA 19103

Eric Joseph Epstein, Pro Se
4100 Hillsdale Road
Harrisburg, PA 17112

Christopher B. Craig, Esquire
Senate Democratic Appropriations
Committee
Room 545 Main Capitol Building
Harrisburg, PA 17120

Daniel C. Clearfield, Esquire
Gerald Gornish, Esquire
Kevin Moody, Esquire
Wolf, Block, Schorr & Solis-Cohen, LLP
212 Locust Street
Suite 300
Harrisburg, PA 17101

Amy Gold
Shell Energy Services Company
P. O. Box 4402
Houston, TX 77210

Paul F. Forshay, Esquire
Gregory K. Lawrence, Esquire
Sutherland, Asbill & Brennan, LLP
1275 Pennsylvania Avenue, NW
Washington, DC 20004-2415

David M. Kleppinger, Esquire
Charis M. Burak, Esquire
McNees, Wallace and Nurick
100 Pine Street
P. O. Box 1166
Harrisburg, PA 17108-1166

Paul E. Russell, Esquire
PP&L Inc.
Two North Ninth Street
Allentown, PA 18101

Donald A. Kaplan, Esquire
Leanne M. Bober, Esquire
Preston Gates Ellis & Rouvelas Meeds, LLP
1735 New York Avenue NW
Suite 500
Washington, DC 20006

Craig A. Doll, Esquire
214 State Street
Harrisburg, PA 17101-1108

John S. Halsted, Esquire
Gawthrop Greenwood & Halsted
119 North High Street
West Chester, PA 19381-0562

Joseph Otis Minott, Esquire
Clean Air Council
135 South 19th Street
Suite 300
Philadelphia, PA 19103

Michael Fiorentino, Esquire
Clean Air Council
105 North Front Street
Suite 106
Harrisburg, PA 17101

Brian P. Downey, Esquire
Thomas B. Schmidt, III, Esquire
John A. Greenbaum, Esquire
Pepper Hamilton, LLP
200 One Keystone Plaza
North Front and Market Streets
Harrisburg, PA 17108-1181

John Will Ongman, Esquire
Marc D. Machlin, Esquire
Pepper Hamilton, LLP
660 Fourteenth Street, NW
Washington, DC 20005

Kenneth M. Barna, Esquire
Wayne R. Frigard, Esquire
Rubin & Rudman, LLP
50 Rowes Wharf
Boston, MA 02110

John L. Hall, Esquire
P. O. Box 515
West Chester, PA 19381-0515

Joseph A. Dworetzky, Esquire
Matthew A. Hamermesh, Esquire
Hangley Aronchick Segal & Pudlin
One Logan Square
27th Floor
Philadelphia, PA 19103

Tanya J. McCloskey, Esquire
Office of Consumer Advocate
555 Walnut Street
5th Floor Forum Place
Harrisburg, PA 17101-1923

Gregory J. Pastore
619 Pemberton Street
Philadelphia, PA 19147

Brian Kalcic
Excel Consulting
Suite 720-T
225 South Meramec Avenue
St. Louis, MO 63105

David Cohen, Member
Philadelphia City Council
Room 588 City Hall
Philadelphia, PA 19107

Robert Jaffe, Esquire
Room 588 City Hall
Philadelphia, PA 19107

John L. Hall, Esquire
Unruh, Turner, Burke & Frees, PC
P. O. Box 515
17 West Gay Street
West Chester, PA 19381-0515

Judith L. Mondre, President
Mondre Energy, Inc.
1601 Market Street
Suite 1750
Philadelphia, PA 19103

John Will Ongman, Esquire
Marc D. Machlin, Esquire
Wayne R. Frigard, Esquire
Pepper Hamilton, LLP
600 Fourteenth St. NW
Washington, DC 20005-2004

Philip A. Bertocci, Esquire
Edward A. McCool, Esquire
Community Legal Services, Inc.
1424 Chestnut Street, 4th Floor
Philadelphia, PA 19102

John L. Munsch, Esquire
Deborah J. Henry, Esquire
Allegheny Power
800 Cabin Hill Drive
Greensburg, PA 15601

Patricia J. Clark, Esquire
Norbert J. Smith, Esquire
Allegheny Energy Supply Company, LLC
Roseytown
RR 12 Box 1000
Greensburg, PA 15601

James H. Cawley, Esquire
Rhoads & Sinon
12th Floor
One South Market Street
P. O. Box 1146
Harrisburg, PA 17108

Stanford L. Levin, Ph.D.
Southern Illinois University at Edwardsville
Room 3130, Building III
Edwardsville, IL 62026-1102

Bernard A. Ryan, Jr., Esquire
Office of Small Business Advocate
Suite 1102 Commerce Building
300 North Second Street
Harrisburg, PA 17101

Carville B. Collins, Esquire
Piper, Marbury, Rudnick & Wolfe
6225 Smith Avenue
Baltimore, MD 21209-3600

Hon. Charles E. Rainey, Jr.
Administrative Law Judge
Pa. Public Utility Commission
1302 State Office Building
1400 W. Spring Garden Street
Philadelphia, PA 19130



Kenneth L. Mickens
Senior Prosecutor
Office of Trial Staff

Docket No. A-110550F0147
Date: May 17, 2000



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FOLDER

May 17, 2000

James McNulty, Secretary
Pennsylvania Public Utility Commission
Post Office Box 3265
Harrisburg, PA 17105-3265

RE: Application of PECO Energy
Docket No. A-110550F0147

Dear Secretary McNulty:

Enclosed for filing please find an original and three copies of the Main Brief of the PennFuture Parties in the referenced proceeding.

Copies of these documents have been served on all parties of record as indicated on the attached Certificate of Service.

Sincerely,



Peter Meadows Adels
General Counsel
PennFuture

cc. Administrative Law Judge Rainey

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MAY 17 2000

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

33

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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 : APPLICATION
CREATION OF A HOLDING COMPANY : DOCKET NO. A-110550F0147
AND (2) THE MERGER OF THE NEWLY :
FORMED HOLDING COMPANY AND :
UNICOM CORPORATION :

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Main Brief Of the PennFuture Parties

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

After engaging in extensive formal and informal discovery and negotiations concerning the referenced Application (the "merger"), PECO Energy Company ("PECO") and almost all parties in the referenced proceeding ("Joint Petitioners") filed a Joint Petition for Settlement ("Settlement") on March 23, 2000. Joint Petitioners include a diverse group of parties including the Office of Consumer Advocate and Office of Trial Staff, and the Office of Small Business Advocate, as well as intervenors on behalf of residential, business and industrial consumers, competitive market suppliers, municipalities, and environmentalists. PennFuture and the ten named individuals joining in its Petition and Protest ("PennFuture Parties") are signatories to the Joint Petition.¹

The Settlement represents a significant achievement of diverse parties to transform the proposed merger and restructuring into one providing significant benefits to public service. The PennFuture Parties respectfully submit that it should be adopted without modification because the Settlement itself and the record in this proceeding

¹ PennFuture and the ten named individuals were granted intervenor status as formal parties by Order of ALJ Rainey dated January 23, 2000.

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provide substantial evidence to demonstrate that approval of the Application, as modified by the Settlement, is necessary and proper for the public service.

In contrast, only two parties, PPL Electric Utilities Corporation (“PPL”) and Philadelphia City Councilman David Cohen (“Councilman Cohen”), filed Objections to the Settlement. While these parties clearly do not want the Settlement to be approved, they have raised no issues related to PECO, the merger or the Settlement, and the Settlement cannot be considered contested on the merits. Moreover, neither objecting party has presented any factual or legal basis to indicate that approval is not in the public interest. Similarly, they have offered no suggested modifications to the Settlement that the Commission could require that would render approval more in the public interest. For these reasons, the Objections should be dismissed and the Joint Petition granted.

I. The Record Provides Substantial Evidence that Approval of the Settlement Is In the Public Interest.

Public Utility Code Section 1103(a) identifies the legal standard applicable to approval of the proposed merger: the PUC shall grant a certificate of public convenience approving the merger “if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience or safety of the public.” (hereafter, “the public interest”). The substantial record in this proceeding supports such a finding.

The record includes substantial evidence that approval of the Settlement is in the public interest. The evidence includes:

1. The Application of PECO Energy, Testimony and Exhibits, filed November 22, 1999.
2. Supplemental Testimony to PECO’s Application filed February 2, 2000.

3. The Joint Petition for Settlement filed March 23, 2000.
4. Supplements and revisions to the Joint Petition, filed April 3, 2000, April 14, 2000, and April 27, 2000.
5. Statements in Support of the Joint Petition filed by PECO, PennFuture, the Office of Consumer Advocate (OCA), the Office of Trial Staff (OTS), the Office of Small Business Advocate (OSBA), the Mid-Atlantic Power Supply Association (MAPSA), the City of Philadelphia, the Industrial Energy Consumers, Amtrak, CEPA, Clean Air Council (CAC), and Eric Epstein.
6. Testimony admitted into the record on May 10, 2000 after having been filed by
 - a. PECO Statement 3S, Supplemental Testimony of Thomas P. Hill, Jr.
 - b. PennFuture Statement 1, Testimony of John Rohrbach.
 - c. Fumo and CEPA Statement 1, Testimony of Richard Silkman.
 - d. Epstein Statement 1.
 - e. East Brandywine Township Statement 1, Testimony of Scott Piersol.
 - f. City of Philadelphia Statement 1, Testimony of Kent Miller.
 - g. OCA Statement 1S, Testimony of Richard LaCapra.
 - h. PAIEUG Statement No., 1, Testimony of Lane Kollen.
 - i. OTS Statement 1, Testimony of Kevan Deardorff and OTS Statement 2, Testimony of Paul Metro.
 - j. CAC Statement 1, Testimony of Andrew Altman.
 - k. MAPSA Statement 1, Testimony of James McCormick.
 - l. Amtrak Statement 1, Testimony of Stanley Forczek.

7. At the Public Input Hearings conducted in Philadelphia on March 27, 2000, Trevoise, Bucks County on March 28, 2000, Norristown, Montgomery County on March 29, 2000, Glenmore, Chester County on March 30, 2000, Media, Delaware County on March 31, 2000, and the City of York on April 4, 2000, numerous parties testified in support of the Settlement and provided testimony that the Settlement should be approved consistent with the public interest.

In addition to the foregoing evidence, the record includes the Replies to the Objections of PPL and Councilman Cohen filed by PECO, PennFuture, OCA, OTS, OSBA, MAPSA, the Industrial Energy Consumers, Amtrak, CEPA, CAC, and Epstein.

The record evidence provides expert opinions from PECO, former Commission staff, and experts with substantial credibility based on regular participation in Commission proceedings as well as numerous ratepayers of PECO.

II. The Environmental, Competitive Market and Nuclear Decommissioning Terms of the Settlement Are in the Public Interest.

PennFuture presented the Testimony of John Rohrbach (PennFuture Statement 1) explaining how the environmental, competitive market, and nuclear decommissioning provisions of the Settlement make electricity in the PECO service territory cleaner, safer, and more affordable. CAC presented the Testimony of Andrew Altman (CAC Statement 1) addressing the environmental provisions of the Settlement.² The Settlement enables improvement to PECO's service to the public and the quality of life, health and the economy in PECO service area. Such public interest benefits, of course, help make

² Other Joint Petitioners address other substantive terms of the Settlement in their testimony and briefs.

PECO a more productive and more competitive utility in its regulated service territory, and provide the required basis for approval of the merger.

In its Objections, PPL suggests at paragraph 21 and paragraphs 30-41³ that it somehow is inappropriate to include such public interest benefits in the Settlement. There is no legal foundation for PPL's suggestion, which was specifically raised by other parties and rejected in PPL's own restructuring settlement. The Commission's unanimous Final Order approving the PPL's restructuring plan settlement (Docket No. R-00973954, entered August 27, 1998) stated at pages 6-7:

"Several commenters questioned the public policy issues of a set aside for clean energy technology and low-income energy assistance. To the extent the comments recommended eliminating funding for these purposes, they are denied. Encouraging the development of clean energy technology and providing energy assistance to Pennsylvania's low-income consumers benefits our society as a whole and adheres to the letter and spirit of the Electric Competition Act."

Of course, PPL has not actually objected to any substantive terms of the Settlement in this proceeding, as discussed in Part III. There is nothing in the record even remotely suggesting that any terms of the Settlement are contrary to the public interest. PPL's Objections merely insinuate some impropriety or suggest that the record that existed prior to the May 10 hearings did not support such terms of the Settlement.

Moreover, the Settlement terms in this proceeding are fully consistent with the letter and spirit of the Electric Competition Act as well as the Public Utility Code in general. Perhaps some provisions are not legally required for the Commission to approve the Settlement, but there is no basis for any suggestion that PECO may not agree to provide such benefits or make such investments out of corporate funds that are not

³ Excluding Paragraph 39, which PPL has withdrawn pursuant to the Stipulation Between The PennFuture Parties and PPL, admitted to the record on May 10, 2000 as Joint PennFuture/PPL Exhibit 1.

ratepayer dollars. Similarly, there is no basis for any suggestion that the Commission may not approve a Settlement that includes these voluntary commitments and investments by PECO.

A. The Renewable Energy Terms of the Settlement Present Significant Public Interest Benefits.

The renewable energy provisions of the Settlement may enable Pennsylvania, a state with virtually no clean energy history, to take the regional lead in developing renewable electricity that will provide long-term economic, environmental and health benefits to all Pennsylvanians. The renewable electricity provisions benefit economic development in the Commonwealth by placing Pennsylvania on the cutting edge of new industries and by avoiding air pollution that causes global warming, acid rain, smog and respiratory and cardiac problems. These benefits in turn will make Pennsylvania a more desirable place to live and work. As indicated in the Settlement and summarized in the Testimony of John Rohrbach at page 9-11, under the Settlement:

- PECO will provide a total of \$32 million in support of renewable energy, of which \$24 million will be newly committed funds and the remainder is an accelerated payment of funds already committed to the Sustainable Development Fund pursuant to the terms of the Restructuring Settlement.
- PECO will contribute \$15.5 million to support new wind energy development — enough to build turbines to produce more than 30 mW of wind power.

As Mr. Rohrbach testified, 30 mW of wind generation will power 7,500 homes each year, and will avoid emission of 51,000 tons of carbon dioxide into our air, reducing

global warming. For cleaner air, it's the equivalent of planting 7.2 million trees or not driving 126 million miles

- PECO will provide \$4 million for installation of rooftop photovoltaic panels to provide personal solar power.
- PECO will provide \$2.5 million to fund public education on renewable electricity.

As indicated in Mr. Rohrbach's testimony, these provisions help reduce air pollution, improve the environment and public health generally, provide construction and permanent employment, assist farmers to develop "second crops by leasing land for wind development that may still be used productively for agriculture, provide consumers with greater choices of electricity products, and increase local tax revenue. As Mr. Altman testified (CAC Statement 1 at 4), development of new wind generation "also helps diversify the generation mix in Pennsylvania and provides a mitigation strategy against higher fuel prices or tighter environmental regulations." Thus, new wind generation development provides reliability benefits in addition to environmental, health and economic benefits.

It is difficult to understand how such agreements and investments with PECO's corporate, not ratepayer, dollars could not be found to be in the public interest. Indeed, no party in this proceeding suggests, and there is no evidence in the record to support, a finding that these terms of the Settlement are not in the public interest.

While not objecting to inclusion in the Settlement, PPL does suggest in its Objections that it somehow is inappropriate for the funding and investments to be

administered through the Sustainable Development Fund and Community Energy. A total of \$28.5 million of the funding will be provided directly to the Sustainable Development Fund (SDF) for investment in the identified program areas. The Reinvestment Fund, an organization with a respected history of community economic development, manages SDF. As indicated in Mr. Rohrbach's testimony, SDF, which was founded pursuant to Commission Order as part of the PECO Restructuring Settlement, will provide grants, loans and other investments as determined by its Board that has been approved by the Commission.

As both Mr. Rohrbach and Mr. Altman testified at pages 5-6 of their testimony, Community Energy is a uniquely qualified and committed organization that is able to deliver the public benefit of PECO's decision to invest in the development of its "wind block" program. Brent Alderfer, the President of Community Energy helped develop pioneer wind block programs while a Public Utility Commissioner in Colorado. The program, which has since been replicated successfully by other utilities in other states, directly facilitates consumer choice to support new wind development by paying a small premium to buy a block of new wind. The Settlement requires that the program be made available through multiple competitive suppliers and is subject to public reporting.

The Settlement also provides significant improvement in the terms and procedures for new renewable and distributed generation facilities to interconnect with PECO's facilities. As indicated in the Settlement and described by Mr. Rohrbach at pages 9-11 of his testimony:

- PECO's "net metering" tariff has been improved to make customer installation of solar PV, fuel cells, or other personal power simpler and more economic. The new tariff includes annualized net metering, eliminates most distribution charges, and simplifies connection. It treats customers the same regardless of whether they sell their excess power to PECO or to a competitive supplier.
- PECO will engage in a cooperative process to develop streamlined technical requirements and procedures for the interconnection of renewable and distributed generation facilities. The review is designed to maximize pre-certification of various facilities, avoid individualized reviews, and include system benefits to offset developer payment of system costs.
- PECO will not charge interconnecting generators for any distribution or transmission unless the Pennsylvania Public Utility Commission (PUC) or the Federal Energy Regulatory Commission (FERC) approves such charges for all generation, including utility generation.

As Mr. Rohrbach concluded, "since private installation of distributed generation closer to the customer will reduce the need for consumers to fund distribution system improvements and avoid line losses, there is an improvement in the overall distribution system integrity and generation diversity." "The Settlement's provisions in these areas should reduce uncertainties and expenses for developers of new renewable generation facilities, while improving the safety, reliability and efficiency of PECO's distribution system."

The forgoing provisions of the Settlement directly support the public policy of Pennsylvania as reflected in the Standards for Restructuring of the electric industry in the Restructuring Act. Section 2804(2) specifically provides that customers should be able to choose among "...alternate generation sources, including reasonable and fair opportunities to self-generate and interconnect."

B. The Competitive Market Terms of the Settlement Present Significant Public Interest Benefits.

All of the foregoing opportunities for new renewable and distributed generation directly assist the development of a key sector of the competitive market that is a fundamental part of Pennsylvania's public policy. As Mr. Rohbach testified, about 80,000 customers in Pennsylvania have chosen cleaner electricity, and new supply is necessary to meet demand without raising prices. The renewable provisions described above provide a clean and safe source of generation that previously was barely available in the market, improve customer product choices, are likely to reduce the price of such products, and make interconnection and make net metering much simpler and less costly. In addition, several other provisions of the Settlement directly increase the competitiveness of the generation market, as stated in the Settlement and summarized in Mr. Rohrbach's testimony at 11-12:

- PECO will provide 600mW of installed capacity (ICAP) for three years on a first-come/first-served basis to licensed suppliers, providing them with capacity and price certainty.

As Mr. Rohrbach testified, “at roughly \$20 per kW-year, the agreement provides enough ICAP to allow over 50,000 new Philadelphia-area customers to participate in the competitive market.” The lack of available capacity at reasonable prices has been one of the biggest thorns in the development of the competitive market to date.

- Until January 1, 2004, PECO agrees not to market, advertise or promote its Provider of Last Resort service.
- PECO will reconcile transition charge revenues for all commercial and industrial accounts as a single class, minimizing volatility of the charges.
- Large industrial customers are granted a one-time option to terminate their PECO contract and switch to a competitive supplier.
- PECO and competitive suppliers will identify contact personnel to quickly resolve electronic data exchange problems. PECO will provide licensed electric and natural gas suppliers twelve-month historical usage and billing data without charge, and will review and revise customer load profiles for customers with significant over or under deliveries relative to their load profile over a six-month period.
- The Competitive Default Supply provisions of the restructuring settlement will be modified to improve the opportunity for successful competitive bidding. The RFP will be issued on April 1, 2000, covering electric generation supply and capacity only, while excluding customer care functions such as call center, collections and billing. Bids must be received by May 1, 2000, and the winning bidder will be selected by the PUC by July 1, 2000. The surety requirements will be reduced,

and the settlement establishes a process of bilateral negotiations in the event that no winning bidder is selected.

As described by Mr. Rohrbach at 12, these provisions are important adjustments to help make Pennsylvania's retail choice program the most successful in the country, a cornerstone of the public policy of the Commonwealth.

C. The Terms of the Settlement Concerning Nuclear Decommissioning are in the Public Interest.

As provided in the Settlement and summarized by Mr. Rohrbach in his testimony at 13-14, the nuclear decommissioning provisions of the Settlement:

- Firmly insulate PECO customers from having to pay decommissioning costs for Unicom plants, those co-owned by PECO's unregulated affiliates, or those purchased in the future.
- Limit consumer exposure to nuclear decommissioning cost increases for PECO plants. PECO will forego consumer payment for the first \$50 million of increased decommissioning costs and 5 percent of any additional increases.

As Mr. Rohrbach testified at 14, these provisions strike an appropriate balance between assuring decommissioning when needed and not piling on decommissioning costs to future generations of consumers that are not responsible for such costs.

III. The Record Is Devoid of Evidence that Approval of the Settlement is not in the Public Interest.

While most parties support the Settlement and a few have indicated that they do not oppose the Settlement, two parties have identified themselves as objecting to the Settlement. Yet, the objections of Councilman Cohen and PPL, as well as the testimony they have submitted in this proceeding, do not address the merger or the Settlement and are not even marginally related to PECO. These non-settling parties provide no evidence and have attempted no argument to suggest that approval of the Settlement is not in the public interest. Rather, both PPL and Councilman Cohen raise matters that are unrelated to this proceeding. In the absence of any party substantively opposing the Application as modified by the Settlement, this proceeding is not truly contested.

Councilman Cohen's testimony largely supports the various components of the Settlement but suggests that they should be increased in scale. In addition, Councilman Cohen suggests that PECO shutdown or commit to early retirement of its nuclear facilities. PPL objects to the Settlement on various grounds, none of which are related to the merger, none of which are related to PECO, and none of which are related to the Settlement. It appears that PPL's Objections are solely related to its concerns about some hypothetical future proceeding involving PPL (PPL Objections, Section V). As such, neither PPL nor Councilman Cohen have provided any basis for rejection of the Settlement or any decision contrary to the substantial evidence in support of the Settlement in the record of this proceeding.

A. The Objections of Councilman Cohen Should Be Dismissed.

Councilman Cohen's Objections do not challenge a conclusion that the Settlement is in the public interest or assert that any aspect of the Settlement is not in the public

interest. In fact, not a word in the pre-filed or oral testimony presented May 10, 2000 by or on behalf of the Councilman suggest any such thing, let alone providing a factual basis or convincing argument to support such a conclusion.

Rather, the bulk of Councilman Cohen's Objections and his pre-filed testimony (Cohen Statement 1) presented on May 10, 2000 suggest his view that PECO can and should be doing more of the same sort of things as it committed to do in the Settlement. Councilman Cohen does not criticize any aspect of the settlement, but indicates his belief that PECO should demonstrate an even stronger commitment to renewable energy and take greater steps to improve the health and economy of the Philadelphia region.

Many signatories to the Settlement probably agree with one or more of Councilman Cohen's concerns. Perhaps more might have been better, but the Settlement represents the best efforts of a diverse group of parties to reach a single agreement on a core of provisions that all could agree are in the public interest. The scope of the Settlement and the breadth of the parties in support of the Settlement attest to the power of direct negotiation to yield results that strongly support the public interest. In fact, Councilman Cohen's suggestion that PECO should have committed to greater public benefits supports a finding that the nature of the benefits included in the Settlement are in fact in the public interest.

The pre-filed testimony of Dr. Sternglass (Cohen Statement 2), Dr. Sherman (Cohen Statement 3), and Mr. Mangano (Cohen Statement 4) and the oral testimony on May 10, 2000 by the Councilman and Dr. Sternglass present interesting information about nuclear energy and public health, but add nothing to this proceeding. PECO is not

required to agree, and the Commission has no authority to order the shutdown or early retirement of PECO's nuclear facilities.

B. PPL's Objections Should Be Dismissed.

PPL objects to approval of the Settlement on several grounds, none of which are relevant to PECO, the merger, or the Settlement. PPL's arguments and behavior in this proceeding may only be rationally explained in two ways: PPL has convinced itself of the merits of its stated concern about the issues, arguments, and results of some indeterminate future case that may involve PPL, or alternatively, that PPL is determined to delay and/or scuttle the Settlement at almost any cost.

PPL's first "objection" to the settlement, which included several variations, was its conclusion that the record in this proceeding was inadequate to support approval of the Settlement. These fundamentally procedural and legal "arguments" are not "objections" to the terms of the Settlement at all. PPL's second "objection" is directed towards its goal to narrow the issues, arguments and decisions that may be appropriate in indeterminate future cases involving PPL. Without doubt, such concerns, even if genuine from PPL's viewpoint, are neither ripe, relevant, nor subject to adjudication in this proceeding, and are moot.

1. PPL has no standing to raise its procedural and legal "Objections," which do not contest the Settlement, and are without merit.

PPL's initial "objection" was that the record in this proceeding was not sufficient to support approval of the Settlement because it was reached prior to evidentiary hearings. When raised, PPL's allegation fundamentally suggested that settlements could not be adopted in order to avoid time consuming and expensive litigation. Even if absurd when raised, PPL's argument is moot at this point in time. As summarized in Part I,

numerous parties filed additional testimony thereafter in support of the Settlement. The record includes substantial evidence in support of approval of the Settlement and no evidence to the contrary.

PPL raises several sub-“arguments” that are equally specious. PPL’s sub-arguments must be dismissed in part because they stand on a false factual and legal assumption that the instant proceeding is a “contested” case. The Settlement and this proceeding are “contested” solely from the vantage point of those offering “objections” to the Settlement. PPL’s attempt to characterize the Settlement as “contested” is disingenuous at best. PPL has not asserted that the merger or the Settlement are not in the public interest and has provided no evidence or argument that the Settlement is not in the public interest. Notwithstanding the opportunity to do so at great inconvenience to the parties that settled this case to avoid time consuming, expensive and unproductive litigation, PPL presented no testimony or other evidence related to this proceeding.

PPL’s participation in this proceeding does not give it standing to contest the Settlement, let alone to raise procedural and legal concerns about the quality of the record. The Joint Petitioners legitimately are concerned with the quality of the record, and only the ALJ and the Commissioners make such a judgment. PPL is not a PECO ratepayer and is not aggrieved in any way by the merger or the terms of the Settlement. Indeed, PPL is not an interested party in this proceeding. Rather, PPL is aggrieved that PECO has settled this case and concerned that it might be an interested party in other future cases. PPL’s Objections, Testimony, and behavior in this proceeding betray that it has no concern with whether this merger is in the public interest.

At paragraph 23 of its Objections, PPL states that the “Commission must find that each provision is in the public interest, consistent with applicable law, and supported by substantial evidence in the record.” PPL’s statement is nonsense and contrary to the Code and repeated Commission precedent. Even if PPL were contesting the Settlement on the merits, Section 1103 identifies the legal standard for approval, and only contemplates whether the merger taken as a whole is in the public interest. The Commission is not required to find that the merger will result in any particular level of savings for the company; the Commission is not required to find that any particular level of rate reductions or rate cap extension is necessary for the merger to be in the public interest; the Commission is not required to find that the merger will result in any particular level of economic development or improvement to the competitive market; the Commission is not required to find that the merger will result in any particular improvement to the environment, health safety, or reliability.

Rather, the Commission need only find that the merger is a positive step forward in these and/or other measures of the public interest. Specific findings would only be issues in this proceeding if parties contested whether the merger savings, for example, will be \$100 million or \$500 million. However, no party, including PPL and Councilman Cohen, contests any terms of the Settlement. Even if the merger savings were in dispute, the Commission need not determine precise anticipated merger savings so long as it may find that the rate reductions and other provisions of the Settlement, taken as a whole, are in the public interest.

PPL also raises a sub-“argument” in its Objections that some provisions of the Settlement are not related to the merger and are therefore somehow inappropriate. These

suggestions, such as at paragraph 21, are the closest that PPL comes to addressing the Settlement, although PPL refrains from objecting that any provisions are contrary to the public interest or that the merger and Settlement as a whole are not in the public interest.

Without belaboring the point, the legal standard for approval of the merger and therefore the factual issues raised by the merger is how PECO can maintain and improve the quality and lower the cost of its service to the public. The Settlement provisions address such issues directly: lower rates, service quality improvements, consumer education, enhanced programs for the competitive market, new renewable development, public health and safety improvements, and the other provisions of the Settlement. As summarized in Part I, the record amply illustrates the public service benefits of the Settlement.

2. PPL raises no cogent concerns about precedent that are relevant or may be addressed in this proceeding.

PPL's primary "objection" to the Settlement is its concern that it not be considered precedent in some future proceeding that may involve PPL. However, it is undisputed as a matter of law, and not contested by any party in this proceeding, that the fact of settlement in one case cannot serve as binding precedent in another case. The Settlement itself explicitly recites the same black letter legal principle:

Acknowledging that it is expressly understood and agreed that the Settlement constitutes a negotiated resolution solely of issues addressed herein, the Merger and the Corporate Restructuring, the Joint Petitioners agree that this Settlement shall not constitute or be cited as controlling precedent in any other proceeding, including a proceeding involving a merger or an acquisition by another Pennsylvania electric utility.

To the extent that PPL has a legitimate concern in this regard, it is wholly moot.

However, PPL takes this basic, undisputed statement of the law and elevates it to become an absurd demand that the Commission could not address in this proceeding as a matter of law.

PPL requests that the Commission issue an order telling potential parties what they may not propose in some hypothetical, future case. PPL is well aware that the Commission cannot and would not stifle other parties' speech, that other parties are not utilities regulated by the Commission, and that the Commission may not now decide any aspect of an unknown case, decide any aspect of a case not before the Commission, decide any issue that is not relevant to this proceeding, or bind the decisions of future Commissions.

Moreover, it is entirely within PPL's power to alleviate its purported concern in the future: PPL need not agree to settle any issue on terms that it does not support. The Commission may always reject or accept any proposal of any party on the merits, whether or not it is similar to an issue or Settlement term in this proceeding. Lastly, if and when a future proceeding involving PPL develops, and if and when a party proposes in negotiations or litigation a position that is similar to one in this proceeding, PPL will have every opportunity to argue on the merits that such a position should not be adopted in the future proceeding solely because it may be similar to a term of the instant Settlement. Of course, the fact that an issue was raised and/or resolved in some prior proceeding does not mean that the issue may not be raised or resolved on the merits, based on the record of some future case. At that point in time, and only at that point, in time, will PPL's concern be ripe for adjudication. .

Moreover, the sole “evidence” presented by PPL in this proceeding, the Testimony of Paul Gioia (PPL Statement 1), does not support PPL’s request in this proceeding because it seeks a Commission policy statement that the Commission may not adopt in this adjudicatory proceeding.

At page 3 of his Testimony, Mr. Gioia directly states that his testimony addresses “the regulatory and public policy considerations related to the settlement of a contested proceeding, with specific reference to according precedential effect or evidentiary weight to the terms of the settlement agreement in future proceedings.” At page 3, Mr. Gioia specifically disclaims any effort to address the provisions of the Settlement. Rather, at page 4, Mr. Gioia expressly states that the Testimony presents Mr. Gioia’s opinion “that there are sound and compelling regulatory and public policy grounds for the Pennsylvania Public Utility Commission to articulate a clear policy that the specific terms of a settlement agreement will not be accorded precedential effect or evidentiary weight in any subsequent proceeding.” In fact, Mr. Gioia’s testimony refers generically to the use of a settlement, **not this** settlement, in future proceedings, and his testimony is irrelevant to this proceeding on that basis alone.

Thus, Mr. Gioia’s testimony concerns adoption of a Commission policy statement that the Commission could not address in this proceeding as a matter of law. Adoption of or revision to a policy statement in this proceeding would not be effective, as parties have not had proper notice and opportunity to comment on any new policy statement or any modification of an existing policy statement. The adoption of any new or modified policy statement without publication, an opportunity to comments and other process that have not occurred in this proceeding would deprive many parties throughout the

Commonwealth of their due process rights and violate the administrative procedures law of Pennsylvania. Thus, the Commission is without the ability to implement PPL's recommendation in this proceeding.

For the foregoing reasons, the PennFuture Parties submit that the Joint Petition should be approved without modification and that the Objections of PPL and Councilman Cohen should be dismissed.

Respectfully submitted,

A handwritten signature in cursive script that reads "Peter Meadows Adels". The signature is written in black ink and is positioned above the printed name.

Peter Meadows Adels

DATED: May 17, 2000

Certificate of Service

I hereby certify that I have this day served the foregoing document on the following in the Matter of PECO Energy Company's Application 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 by e-mail and overnight delivery, or U.S. mail.

Paul Bonney
PECO Energy Company
2301 Market Street
P.O. Box 8699
Philadelphia, PA 19101-8699
(Counsel for PECO)

Christopher B. Craig
Senate Democratic Appropriations Committee
Room 545, Main Capitol Building
Harrisburg, PA 17120
(Counsel for Senator Fumo)

Paul R. Forshay
Gregory K. Lawrence
Sutherland Asbill & Brennan LLP
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2415
(Counsel for Shell Energy Services Company, L.L.C.)

Amy Gold
Shell Energy Services Co., L.L.C.
P.O. Box 4402
Houston, TX 77210
(Counsel for Shell Energy Services Company, L.L.C.)

David Kleppinger, Charis M. Burak
McNees, Wallace & Nurick
100 Pine Street
Harrisburg, PA 17108
(Counsel for Philadelphia Area Industrial Energy Users
Group & Counsel to the Industrial Energy Consumers of
Pennsylvania)

Eric Epstein
4100 Hillsdale Road
Harrisburg, PA 17112

Paul E. Russell
PP&L, Inc.
Two North Ninth Street
Allentown, PA 18101
(Counsel for PP&L)

Donald A. Kaplan
Leanne M. Bober
Preston Gates Ellis & Rouvelas Meeds LLP
Suite 500
1735 New York Ave., NW
Washington, DC 20006
(Counsel for PP&L)

Gerald Gornish
Wolf, Block, Schorr and Solis-Cohen LLP
1650 Arch Street - 22nd Fl.
Philadelphia, PA 19103
(Counsel for Enron Energy Services, Inc.)

Daniel Clearfield
Kevin Moody
Wolf, Block, Schorr and Solis-Cohen LLP
1650 Arch Street - 22nd Fl.
Philadelphia, PA 19103
(Counsel for Enron Energy Services, Inc.)

John Halsted
Gawthrop, Greenwood & Halsted
119 North High Street
West Chester, PA 19381
(Counsel for East Brandywine Township)

Tanya McCloskey, Irwin A. Popowsky
Office of Consumer Advocate
555 Walnut Street
Forum Place, 5th Floor
Harrisburg, PA 17101
(Counsel for Office of Consumer Advocate)

Joseph Otis Minott, Andrew Altman
Clean Air Council
135 South 19th Street- Suite 300
Philadelphia, PA 19103
(Counsel for Clean Air Council)

Thomas Schmidt, III, Brian P. Downey
Pepper Hamilton LLP
200 One Keystone Plaza
North Front and Market Streets
Harrisburg, PA 17108
(Counsel for Amtrak)

Kenneth M. Barna, Wayne R. Frigard
Rubin and Rudman LLP
50 Rowes Wharf
Boston, MA 02110
(Counsel for Amtrak)

Phil Bertocci
Community Legal Services, Inc.
1424 Chestnut Street, 4th Fl.
Philadelphia, PA 19102
(Counsel for CEPA, et al.)

Joe Dworetzky, Matthew Hamermesh
Hangley Aronchick Segal & Pudlin
One Logan Square - 27th Fl.
Philadelphia, PA 19103
(Counsel for Mid-Atlantic Power Supply)

John L. Munsch, Deborah J. Henry
Allegheny Power
800 Cabin Hill Drive
Greensburg, PA 15601-1689
(Counsel for Allegheny Power)

Kenneth L. Mickens
PAPUC Office of Trial Staff
P.O. Box 3265
Harrisburg, PA 17105-3265
(Counsel for Office of Trial Staff)

Craig A. Doll
214 State Street
Harrisburg, PA 17101-1108
(Counsel for Conectiv Energy)

Michael Fiorentino
Clean Air Council
105 North Front Street; Suite 106
Harrisburg, PA 17101
(Counsel for Clean Air Council)

John Will Ongman, Marc Machlin
Pepper Hamilton LLP
600 Fourteenth St., NW
Washington, DC 20005
(Counsel for Amtrak)

Patricia J. Clark, Norbert J. Smith
Allegheny Energy Supply Company, LLC
Roseytown Road
RR 12, Box 1000
Greensburg, PA 15601
(Counsel for Allegheny Energy)

Patricia McNamara
6048 Ogontz Avenue
Philadelphia, PA 19141

James H. Cawley
Rhoads & Sinon - 12th Fl.
One South Market Street
Harrisburg, PA 17108
(Counsel for Mid-Atlantic Power Supply)

John Hall
Unruh, Turner, Burke & Frees
17 West Gay Street
West Chester, PA 19381
(Counsel for Wallace Township)

Greg Pastore
619 Pemberton Street
Philadelphia, PA 19147

Robert Jaffe
Room 588 City Hall
Philadelphia, PA 19107

Carville Collins
Piper Marbury Rudnick S Wolfe
6225 Smith Avenue
Baltimore, MD 21209-3600



Peter Meadows Adels, Esq.
Citizens for Pennsylvania's Future
117 S. 17th St., Suite 1801
Philadelphia, PA 19103
215-569-9695
meadowsadels@pennfuture.org

Dated: May 17, 2000

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF SMALL BUSINESS ADVOCATE

Suite 1102, Commerce Building
300 North Second Street
Harrisburg, Pennsylvania 17101

DOCUMENT
FOLDER

Bernard A. Ryan, Jr
Small Business Advocate

(717) 783-2525
(717) 783-2831 (FAX)

May 17, 2000

HAND DELIVERED

James J. McNulty, Secretary
Pa. Public Utility Commission
North Office Building
P. O. Box 3265
Harrisburg, PA 17105

RECEIVED
MAY 17 PM 1:02
PA. P.U.C. BUREAU
SECRETARY'S BUREAU

Re: Application of PECO Energy Company
Docket No. A-110550F0147

Dear Mr. McNulty:

Enclosed for filing are the original and nine (9) copies of the Main Brief on behalf of the Office of Small Business Advocate in the above-docketed proceeding. As evidenced by the enclosed certificate of service, two copies have been served on all active parties in this case.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Bernard A. Ryan, Jr.
Bernard A. Ryan, Jr.
Small Business Advocate

Enclosures

cc: Hon. Charles E. Rainey, Jr.
Administrative Law Judge

Parties of Record

44

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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 : Docket No. A-110550F0147
Corporate Restructuring, Including :
the Creation of a Holding Company :
and (2) the Merger of the Newly :
Formed Holding Company and Unicom :
Corporation :

MAIN BRIEF
OF THE
OFFICE OF SMALL BUSINESS ADVOCATE

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PA.P.U.C.
SECRETARY'S BUREAU

DOCUMENT
FOLDER

Bernard A. Ryan, Jr.
Small Business Advocate

DOCKETED
MAY 18 2000

Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101
(717) 783-2525

Date Served: May 17, 2000

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I. PRELIMINARY STATEMENT

The Office of Small Business Advocate (“OSBA”) is a signatory to the Joint Petition For Settlement of this proceeding that was filed with the Commission on March 23, 2000 (the “Joint Petition”). The following day the OSBA filed the Office of Small Business Advocate Statement in Support of Joint Petition For Settlement in which it explained how that settlement was in the public interest, and especially in the interests of small business customers of PECO Energy Company (“PECO”). The OSBA’s Statement in Support is incorporated by reference into this brief.

On April 18, 2000, pursuant to the schedule established by Administrative Law Judge Charles Rainey for the filing of objections to the proposed settlement and replies to such objections, the OSBA filed the Reply Comments of the Office of Small Business Advocate. The OSBA’s Reply Comments responded to objections to the Joint Petition that PPL Electric Utilities Corporation (“PPL”) submitted earlier under Judge Rainey’s schedule. The OSBA’s Reply Comments are also incorporated by reference into this brief.

The OSBA now submits this post-hearing brief¹ pursuant to the later schedule established by Judge Rainey in his Prehearing Order #2. This brief will summarize (and reiterate) the positions previously taken by the OSBA as to (1) how the proposed settlement so clearly is in the public interest, and (2) why the objections raised by PPL should be rejected². This brief will also include

¹See Sections 1-9 of the Joint Petition for a more detailed statement of the background of this proceeding, including a description of the several Commission approvals that were sought by PECO in this application.

²Philadelphia City Councilman David Cohen also filed objections to the Joint Petition. The OSBA adopts the positions taken by the Office of Consumer Advocate and PECO in their respective Reply Comments filed April 18, 2000 as to why the Councilman’s objections should also be rejected. In particular, the OSBA notes that the thrust of Mr. Cohen’s objections, as clearly revealed by the four testimonial statements he submitted that were admitted into evidence at the hearings [Councilman Cohen Statements No. 1 (Cohen), 2 (Sternglass), 3 (Sherman) and 4

references to certain additional evidence that was admitted into the record at the hearing held by Judge Rainey on May 10, 2000.

II. ARGUMENT

A. The Public Interest Standard Is Fully Satisfied By The Joint Petition

Perhaps one point on which the Joint Petitioners, PPL and Councilman Cohen can all agree is that the principal basis on which the Commission must decide to approve or to reject the Joint Petition is whether or not implementing its terms would be “in the public interest.” See Chapter 11 of the Public Utility Code and the Pennsylvania Supreme Court’s decision in City of York v. Pa. PUC, 449 Pa. 136, 295 A2d 825 (1972).

This proposed settlement undoubtedly satisfies that public interest test. By virtue of the many revisions to PECO’s initial corporate restructuring and merger proposals that are called for in the Joint Petition, all of PECO’s customers, including its small business customers, would be benefitted in at least the following ways if that Joint Petition is approved by the Commission.³

1. Distribution rate reductions

All of PECO’s customers will receive reductions in their distribution service charges during the period from January 1, 2002 through December 31, 2005. See Section 10 of the Joint Petition.

(Mangano)] addressed only health and safety issues related to the operation of nuclear power stations, matters that are clearly outside the jurisdiction of the Pennsylvania Public Utility Commission.

³This enumeration of certain customer benefits under the Joint Petition focuses on the interests of PECO’s small business customers. Other Joint Petitioners representing parties with different concerns and interests, including representatives of residential customers, large industrial customers, municipalities, environmentalists, nuclear activists and competitors, will undoubtedly describe in their briefs how the Joint Petition advances the interests of their respective constituents.

In the aggregate, \$200 million in rate reductions will accrue to PECO's customers under the Joint Petition, reductions that are to be shared equitably among the various rate classes.

Expert witnesses who appeared at the settlement hearing to testify on behalf of a number of the Joint Petitioners expressed very strong support for this critical feature of the Joint Petition. For example, Dr. Richard Silkman, testifying for Senator Fumo and CEPA, flatly stated that this provision calls for PECO's ratepayers to receive "...the full dollar value of merger related synergies associated with the T&D component of PECO." Prefiled Direct Testimony of Richard H. Silkman, Ph.D., Senator Vincent J. Fumo and Consumers Education and Protective Association Statement No. 1, pp. 5-6.

In his discussion of these rate reductions, the witness for the Office of Consumer Advocate, Richard LaCapra, testified that:

"The Settlement introduces an appropriate change to the ratemaking treatment of the merger, to ensure that ratepayers will receive concrete, immediate, affirmative benefits in the form of rate reductions.... These [rate reductions and the rate cap extension] represent important improvements to the benefits-sharing mechanisms of the merger proposal, and offer ratepayers a level of benefits that is well beyond that encompassed by PECO's initial proposal."

OCA Stmt. No. 1S, p. 9.

After noting that PECO's original application had offered no rate reductions or sharing with ratepayers of the anticipated merger savings, Lane Kollen, testifying for the Philadelphia Area Industrial Energy Users Group, pointed out that without the \$200 million in rate reductions over the four year period provided by the Joint Petition, the rates to be charged PECO's customers during that time period would actually increase by \$60 million. Mr. Kollen concluded that the Joint Petition

was in the public interest because of those rate reductions, plus a number of other features in the Joint Petition that also produce real benefits for PECO's customers. PAIEUG Stmt. No. 1, pp. 5-6.

2. Distribution rate cap extension

The Joint Petition includes an extension of the existing cap on PECO's transmission and distribution rates for an additional year and a half, that is, until December 31, 2006. See Section 11 of the Joint Petition. Mr. Kollen specifically mentioned that rate cap extension as supporting his conclusion that the Joint Petition was in the public interest. PAIEUG Stmt. No. 1, p. 6. With that rate cap extension in place, PECO customers will experience a decade of rate stability in that PECO's distribution service rates throughout that period would either be lower than or the same as those in effect on December 31, 1996.

3. Reliability and customer service enhancements

PECO commits, in Sections 19-28 of the Joint Petition, to adopt a Quality of Service plan to enhance service quality and reliability for the benefit of all of PECO's customers. That plan will include meaningful and specific measurement areas where PECO will be required in future years to demonstrate that it is, in fact, providing the higher levels of service promised here to all of its customers. See Sections 20-22 of the Joint Petition.

The improvements in system reliability called for in the Joint Petition will assure minimum levels of reliable service for all customers, with compliance to be measured by well-recognized indices of reliability in the electric industry. Those minimum reliability standards are spelled out in detail in Section 23 of the Joint Petition. In addition, this settlement calls for more stringent standards for customer service pursuant to Section 24 of the Joint Petition. Annual performance reports are to be submitted by PECO to the Commission, the Public Advocates and other interested

parties. Finally, the consequences of non-compliance by PECO with the new Quality of Service Plan are spelled out in Sections 27 and 28 of the Joint Petition.

The dramatic enhancements in the levels of reliability and customer service that would be established under the Joint Petition were favorably commented upon by the following witnesses (at the pages noted) in their direct testimony:

Dr. Silkman (Sen. Fumo & CEPA Stmt. No. 1, p. 14)

Scott T. Piersol (East Brandywine Twp. Stmt. No. 1, p. 2)

Lane Kollen (PAIEUG Stmt. No. 1.0, pp. 7-8)

Perhaps the expert witness for the OCA, Richard LaCapra, best expressed the significance to PECO's customers of these improved reliability and customer service commitments:

“The Settlement also introduces important provisions that will significantly improve the likelihood that service quality will continue to improve in the years following the merger. The Settlement would commit PECO to implement a Quality of Service Plan designed to provide ‘higher levels’ of reliability and customer service in its service territory. In particular, to implement the Company’s commitment in its testimony to continue to enhance reliability, the Company has agreed to a level of reliability that is ten percent higher than its five-year historic average. Additionally, the Company has committed to reduce the number of customers with repeat outages and to address service problems on its five worst circuits each year. These commitments will help to ensure that management attention is appropriately focused on PECO’s service territory.

The Company has also committed to targets for its customer service that reflect higher levels of performance than its recent past, or maintains already high levels of performance. These customer service commitments are also important in the context of a merger that could result in the consolidation of some of these customer service functions.

The Settlement anticipates a collaborative effort among affected parties to achieve this end. The Settlement indicates that a number of indices focusing on key aspects of distribution reliability and customer service will be measured and reported. The Settlement also specifies the steps to be taken in the event that its performance falls short of established standards.”

OCA Stmt. No. 1S, p. 13.

**4. Strengthening the developing competitive market
for generation service**

PECO has made very important concessions in the Joint Petition that will give the embryonic competitive generation market in Pennsylvania a significant boost. See Sections 45-55 of the Joint Petition. The commitments by PECO to provide greater access to installed capacity (the so-called "ICAP" provisions) to competitive generation suppliers, the expanded availability to the new competitors of historic billing data for customers, the agreed-upon changes to existing procedures for revising customer load profiles and for electronic data interchange, as well as PECO's promise to forbear until January of 2004 from marketing or promoting its Provider of Last Resort Service, all will be beneficial to the new generation suppliers who enter the competitive market in PECO's service territory.

Several of the experts whose prepared testimony was admitted into the record at the hearing on May 10, 2000 commented favorably about these provisions. See, for example, the statements of Dr. Silkman (Sen. Fumo/CEPA Stmt. No. 1, p. 15) and Richard LaCapra (OCA Stmt. No. 1S, pp. 14-15). The importance to competitors of these market-opening provisions was acknowledged and explained by James McCormick in the testimony he submitted for the Mid-Atlantic Power Supply Association, a trade association of competitive generation suppliers operating in PECO's service territory. Mr. McCormick specifically named PECO's ICAP commitments, the expanded availability to competitors of customer historic billing data, the improvements called for in electronic data interchange between PECO and the competitors and PECO's agreement not to market its provider of last resort services as features of the Joint Petition that clearly "...will help improve competition." MAPSA Stmt. No. 1, p. 4.

These market-expanding provisions are not only beneficial to the new EGSs entering PECO's service territory. The stronger competitive market that these measures will encourage ultimately will benefit all of PECO's customers.

5. PECO's commitments to its employees and the communities it serves

Under Sections 64-66 of the Joint Petition, and the additional commitments that PECO made to the City of Philadelphia (as recorded in the letter dated April 27, 2000, from Thomas Hill of PECO to the Secretary of the Commission, admitted into the record at the hearing on May 10, 2000), PECO has agreed to:

- (1) Maintain the corporate headquarters for its distribution business in Philadelphia at least until January 1, 2008;
- (2) Not reduce its line forces in Philadelphia as a result of its merger with Unicom; and
- (3) Maintain employment levels at its headquarters at 2301 Market Street in Philadelphia at the levels specified in the company's letter to Mayor Street dated April 11, 2000, a copy of which is attached to Mr. Hill's letter of April 27, 2000.

These important commitments by PECO to its employees and to the community are described in the Supplemental Testimony of Thomas P. Hill (PECO Stmt. No. 3-S), at pages 6 and 7. Testifying for Senator Fumo and CEPA, Dr. Silkman stated convincingly and concisely just how these provisions of the Joint Petition are of real benefit to PECO's employees, its customers and the region it serves:

"Finally, the Joint Petition for Settlement imposes a requirement that PECO's activities within Philadelphia remain relatively comparable after the merger to what they have been historically. Specifically, the Joint Petition for Settlement addresses employment obligations, maintenance of a corporate headquarters in Philadelphia and continuation of charitable and civic giving and general contributions. These provisions will ensure that the impact of the

merger on Philadelphia outside of the provision of electric service will be minimal during the next five years. This level of stability and certainty will ease the transition from PECO to the newly created company and will provide important benefits to the Philadelphia economy.”

Senator Fumo/CEPA Stmt. No. 1, p. 15.

In sum, the public benefits that will follow Commission approval of the Joint Petition, many of which are not achievable if this matter must be fully litigated to a decision by the Commission, are very real and very significant to PECO’s customers. Under any reasonable approach to the “public interest” test that the Commission must apply in this case, the Joint Petition for Settlement merits the approval of the Commission.

B. PPL’s Objections To The Joint Petition Are Totally Without Merit, Assuming Arguendo That PPL Has Legal Standing to Assert Them In The First Place

The OSBA stands on the Reply Comments that it filed April 18, 2000 in response to the objections raised by PPL to the Joint Petition. It is particularly important to note that none of PPL’s objections address the merits of PECO’s proposed corporate restructuring and merger that are the actual subjects of this proceeding.

As previously noted in the OSBA’s Reply Comments, the objections raised by PPL should be summarily rejected by the Presiding Officer and by the Commission because:

1. PPL’s standing (or lack thereof) to object

PPL has no legal standing to object to a settlement by which it is not bound and which can cause that company no substantial, direct and immediate injury. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A2d 269 (1975). Moreover, a nonsettling party like PPL has been found in numerous judicial decisions to lack standing to object to the approval of a partial settlement precisely because the nonsettling party is not bound by the terms of that settlement. See,

for example, *Zupnick et al. v. Fogel et al.*, 989 F2d93, 1993 US App. Lexis 5765 (U.S. Ct. of Appeals for Second Circuit, 1993), cert. denied 510 US 945 (1993), and the cases that are discussed therein.

2. PPL's collateral attack on the Commission's settlement process

The PPL objections constitute a direct and inappropriate attack on the Commission's long-established practice of encouraging negotiated settlements in complex cases such as this. Representatives of a host of varied interests that are directly impacted by PECO's proposals negotiated a comprehensive resolution to their disputes, only to have PPL, a corporate interloper in these proceedings, then try to hold their agreement hostage unless it received "protection" from possible future interventions by some of the Joint Petitioners when (and if) PPL later required PUC approval for similar transactions of its own. PPL's strident effort to mount such a preemptive strike at the settlement process itself must be rejected.

3. The proposed settlement would be no precedent in future Commission cases

Despite PPL's repeated assertions to the contrary, approval of the Joint Petition would have no precedential effect whatsoever and could not be cited by anyone as controlling precedent. PPL's irrational concerns in this regard have no basis because (a) the Joint Petition expressly states (in Section 72) that it is to have no such effect, and (b) the Commission has firmly rejected previous efforts to accord settlements any precedential effect. *Pa. PUC v. The Bell Telephone Co. of Pennsylvania*, 1988 Pa. PUC LEXIS 572 (1988) ["We vigorously, and without equivocation, reject considering a settlement as precedent, as to any subsequent issue, in any proceeding."]

4. Settlement negotiations are voluntary for the parties

If PPL someday finds itself in a position comparable to PECO's here, with PPL trying to obtain Commission approval for a proposed transaction of its own and other parties (perhaps including the OSBA) during settlement discussions asking for concessions PPL is unwilling to make, all PPL has to do is "just say no." PPL and the other parties will then litigate that as-yet-hypothetical case to a decision by the Commission. In other words, intervenors in such a future case may very well ask for commitments from PPL similar to those made here by PECO, but none of those other parties can rely on this Joint Petition as support for their contentions in that later case (if it ever occurs). This Joint Petition obviously will be irrelevant in such a future case, and reference to it would be subject to a successful objection by PPL if any party there tried to use this settlement to support its claim.

5. Commission policy on the effect of a settlement

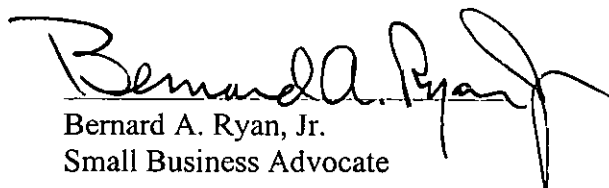
The testimony of the only witness for PPL at the May 10 hearing recommends, on public policy grounds, that the PUC "...articulate a clear policy that the specific terms of a settlement agreement will not be accorded precedential effect or evidentiary weight in any subsequent proceeding." Testimony of Paul L. Goia, PPL Stmt. No. 1, p. 4. The OSBA submits that the Commission in the Bell Telephone decision (noted in subparagraph 3 above) has already done exactly that. What Mr. Goia endorses in his testimony as "good public policy" is (and has long been) the policy of the Pennsylvania Public Utility Commission. Furthermore, that policy has been specifically incorporated into the Joint Petition itself in this case, a practice that has been followed in almost all settlements this Office has entered into during the last decade or so.

It is clear that PPL has no substantial, direct and immediate interest at all in the PECO corporate restructuring and merger proposals that are the subjects of this proceeding. None of the particulars of those proposed transactions are discussed either in the PPL Objections filed April 12, 2000, or in the expert testimony PPL introduced at the hearing on May 10, 2000. Instead, PPL asks the Commission not to approve several specific commitments made here by PECO, presumably because PPL would not be willing to make similar commitments if it, not PECO, were the party needing PUC approval for one of its own proposed transactions. But that is not what is before the Commission at this time and in this case. None of the Joint Petitioners has asked PPL to make any such commitments. PPL's objections are thus both speculative and overreaching. Even if PPL had the right to assert them in this proceeding (which it does not), those objections should be peremptorily dismissed by the Presiding Officer and by the Commission as inappropriate and premature.

III. CONCLUSION

The Office of Small Business Advocate respectfully asks the Presiding Officer and the Commission to approve the Joint Petition for Settlement presented here on behalf of all but two of the active parties. That Joint Petition is very much in the public interest and deserving of Commission approval. There is no reason to delay any longer the implementation of the many benefits that PECO's customers will receive after the Commission approves the Joint Petition for Settlement.

Respectfully submitted,


Bernard A. Ryan, Jr.
Small Business Advocate

Dated: May 17, 2000

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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 : Docket No. A-110550F01
Corporate Restructuring, Including :
the Creation of a Holding Company :
and (2) the Merger of the Newly :
Formed Holding Company and Unicom :
Corporation :

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I certify that I am serving a copy of the Main Brief on behalf of the Office of Small Business Advocate in the manner indicated upon the persons addressed below:

Hon. Charles E. Rainey, Jr.
Administrative Law Judge
Pa. Public Utility Commission
1302 Philadelphia State Office Bldg.
Broad and Spring Garden Streets
Philadelphia, PA 19130
(215) 560-2105
(215) 560-3133 - Fax
(overnight mail 5/16)

Donald A. Kaplan, Esquire
Leanne M. Bober, Esquire
Preston, Gates, Ellis &
Rouvelas, Meeds
1735 New York Avenue, NW, Suite 500
Washington, DC 20006
(202) 662-8466
(202) 331-1024 (fax)
(overnight mail 5/16)

Paul Russell, Esquire
Pennsylvania Power & Light Co.
Two North Ninth Street
Allentown, PA 18101-1179
(610) 774-4254
(610) 774-6726 (fax)
(overnight mail 5/16)

Craig A. Doll, Esquire
214 State Street
Harrisburg, PA 17101-1108
(Conectiv)
(717) 230-9555
(717) 230-9750 (fax)
(hand delivered 5/17)

Tanya J. McCloskey, Esquire
Office of Consumer Advocate
555 Walnut Street 5th FL Forum Place
Harrisburg, PA 17101-1923
(717) 783-5048
(717) 783-7152 (fax)
(hand delivered 5/17)

Thomas P. Gadsden, Esquire
Morgan, Lewis & Bockius
1701 Market Street
Philadelphia, PA 19103-2921
(215) 963-5448
(215) 963-5299 (fax)
(overnight mail 5/16)

Kenneth L. Mickens, Esquire
Office of Trial Staff
Pa. Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105
(717) 787-1976
(717) 772-2677 (fax)
(hand delivered 5/17)

Peter Meadows Adels, Esquire
Adels, Charles, McPedran
117 S. 17th Street, Suite 1801
Philadelphia, PA 19103
(overnight mail 5/16)

Paul R. Bonney, Esquire
PECO Energy Company
2301 Market Street
P.O. Box 8699
Philadelphia, PA 19101
(215) 841-5544
(215) 568-3389 (fax)
(overnight mail 5/16)

Eric Joseph Epstein
4100 Hillisdale Road
Harrisburg, PA 17112
(overnight mail 5/16)

David M. Kleppinger, Esquire
Charis M. Burak, Esquire
McNees, Wallace & Nurick
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
(PAIEUG, IECPA, DII & City of Phila.)
(717) 232-8000
(717) 236-2665 (fax)
(hand delivered 5/17)

John L. Munsch, Esquire
Allegheny Power
800 Cabin Hill Drive
Greensburg, PA 15601-1689
(724) 837-3000
(724) 838-6177 (fax)
(overnight mail 5/16)

John S. Halsted, Esquire
Gawthrop, Greenwood & Halstead
119 North High Street
West Chester, PA 19381-0562
(610) 696-8225
(overnight mail 5/16)

Carol A. Weiser, Esquire
Paul F. Forshay, Esquire
Gregory K. Lawrence, Esquire
Sutherland, Asbill & Brennan
1275 Pennsylvania Avenue NW
Washington, DC 20004-2415
(overnight mail 5/16)

Daniel Clearfield, Esquire
Gerald Gornish, Esquire
Wolf, Block, Schorr & Solis-Cohen
Locust Court Building, Suite 300
212 Locust Street
Harrisburg, PA 17101
(Enron)
(717) 237-7160
(717) 237-7161 (fax)
(hand delivered 5/17)

Joseph A. Dworetzky, Esquire
Matthew A. Hamermesh, Esquire
Handley, Aronchick Segal & Pudlin
One Logan Square 12th Floor
Philadelphia, PA 19103
(MAPSA)
(215) 496-7014
(215) 568-0300 (fax)
(overnight mail 5/16)

John L. Hall, Esquire
Unruh, Turner, Burke & Frees
P.O. Box 515
West Chester, PA 19381-0515
(610) 692-1371
(610) 918-1361 (fax)
(overnight mail 5/16)

Amy Gold
Shell Energy Services
1221 Lamon
Houston, TX 77010
(overnight mail 5/16)

Patricia J. Clark, Esquire
Norbert J. Smith, Esquire
Allegheny Energy Supply Company
Roseytown
RR 12, Box 1000
Greensburg, PA 15601
(724) 838-6217
(724) 830-5184 (fax)
(overnight mail 5/16)

Philip A. Bertocci, Esquire
Edward A. McCool, Esquire
Community Legal Services, Inc.
1424 Chestnut Street, 4th Floor
Philadelphia, PA 19102
(CEPA)
(215) 981-3702
(215) 981-0434 (fax)
(overnight mail 5/16)

Dennis Winters
2314 Delancey Place
Philadelphia, PA 19103
(overnight mail 5/16)

Andrew Altman
400 S. Camac Street
Philadelphia, PA 19147
(overnight mail 5/16)

Michael Fiorentino, Esquire
Clean Air Council
105 N. Front Street, Suite 106
Harrisburg, PA 17101
(717) 230-8807
(717) 230-8808 (fax)
(hand delivered 5/17)

Patricia McNamara
6048 Ogontz Avenue
Philadelphia, PA 19141
(overnight mail 5/16)

John Will Ongman, Esquire
Marc D. Machlin, Esquire
Pepper Hamilton
600 Fourteenth Street NW
Washington, DC 20005
(Amtrak)
(202) 220-1415
(202) 220-1665 (fax)
(overnight mail 5/16)

Kenneth M. Barna, Esquire
Wayne R. Frigard, Esquire
Rubin & Rudman LLP
50 Rowes Wharf
Boston, MA 02110
(Amtrak)
(617) 330-7006
(617) 549-9556 (fax)
(overnight mail 5/16)

John Hanger, Esquire
Citizens for Pennsylvania's Future
212 Locust Court, Suite 410
Harrisburg, PA 17101
(hand delivered 5/17)

Christopher B. Craig, Esquire
Senate Democratic Appropriations
Committee
Room 545, Main Capitol Building
Harrisburg, PA 17120
(hand delivered 5/17)

William T. Hawke, Esquire
Malatesta, Hawke & McKeon LLP
100 North Tenth Street
P.O. Box 1778
Harrisburg, PA 17105
(717) 236-1300
(717) 236-4841 (fax)
(hand delivered 5/17)

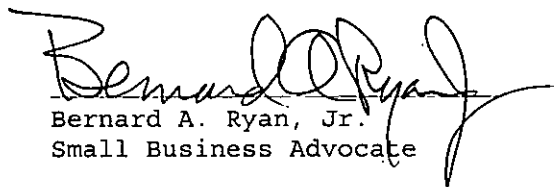
Steven P. Hershey, Esquire
Connolly, Epstein, Chicco, Faxman
1515 Market Street, 9th Floor
Philadelphia, PA 19102-1909
(overnight mail 5/16)

Robert Jaffe, Esquire
City of Philadelphia, City Council
Room 588 City Hall
Philadelphia, PA 19107
(overnight mail 5/16)

Carville B. Collins, Esquire
Piper Marbury Rudick & Wolfe
36 South Charles Street
Baltimore, MD 21201-3018
(overnight mail 5/16)

Hon. Allyson Y. Schwartz
Senate Box 203004
Room 182, Main Capitol Building
Harrisburg, PA 17120
(hand delivered 5/17)

James H. Cawley, Esquire
Rhoads & Sinon
12th Floor, Dauphin Building
One South Market Street
P.O. Box 1146
Harrisburg, PA 17108
(hand delivered 5/17)


Bernard A. Ryan, Jr.
Small Business Advocate

Dated: May 17, 2000

DOCUMENT
FOLDER

MCNEES, WALLACE & NURICK
ATTORNEYS AT LAW

100 PINE STREET
P. O. BOX 1166
HARRISBURG, PA 17108-1166
TELEPHONE (717) 232-8000
FAX (717) 237-5300

<http://www.mwn.com>

RECEIVED
00 MAY 17 AM 10:30
PA.P.U.C.
SECRETARY'S BUREAU

CHARIS M. BURAK

DIRECT DIAL: (717) 237-5437

E-MAIL ADDRESS: CBURAK@MWN.COM

May 17, 2000

VIA HAND DELIVERY

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Room B-20, North Office Building
Harrisburg, PA 17120

Re: 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-110550F0147

Dear Secretary McNulty:

Enclosed for filing with the Commission are the original and nine (9) copies of the Main Brief on behalf of the Philadelphia Area Industry Energy Users Group ("PAIEUG") in the above-referenced proceeding.

As shown by the attached Certificate of Service, all parties to this proceeding are being duly served. Please date stamp the extra copy of this transmittal letter and kindly return it for our filing purposes.

Very truly yours,

MCNEES, WALLACE & NURICK

By *Charis M. Burak*
Charis M. Burak

42

CMB/lhe

c: Administrative Law Judge Charles E. Rainey, Jr. (via federal express)
Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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-110550F0147

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MAIN BRIEF OF
THE PHILADELPHIA AREA
INDUSTRIAL ENERGY USERS GROUP

Bethlehem Steel Corporation
The Boeing Company
The Budd Company
Ford Motor Company
Franklin Mills Associates Limited
Partnership

Kimberly-Clark Corporation
Nabisco, Inc.
Rohm and Haas Company
Sunoco, Inc. (R&M)
Temple University
Thomas Jefferson University

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FOLDER

DOCKETED
MAY 18 2000

David M. Kleppinger
Charis M. Burak
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
(717) 232-8000 (phone)
(717) 237-5300 (fax)

Counsel to the Philadelphia Area Industrial
Energy Users Group

Dated: May 17, 2000

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I. INTRODUCTION

On November 22, 1999, PECO Energy Company ("PECO" or "Company") filed an Application with the Pennsylvania Public Utility Commission ("PUC" or "Commission") requesting 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 ("Unicom"), the parent company of Commonwealth Edison Company ("ComEd").

On December 16, 2000, the Philadelphia Area Industrial Energy Users Group ("PAIEUG") filed a Petition to Intervene in PECO's merger proceeding. PAIEUG is an ad hoc association of energy-intensive industrial customers receiving electric and natural gas utility services from PECO. PAIEUG members use substantial volumes of electricity and natural gas in their manufacturing and operational processes. These energy costs are a significant element of the member companies' respective costs of operation. PAIEUG member companies are listed on the cover page of this Main Brief.

After intensive settlement negotiations among the parties, PECO filed a Joint Petition for Settlement ("Joint Petition" or "Settlement") on behalf of the Company and the majority of the parties to this proceeding, including PAIEUG. Thereafter, PAIEUG filed a Statement in Support of the Joint Petition. On March 28, 2000, Administrative Law Judge Charles E. Rainey, Jr. ("ALJ Rainey") issued an Order Revising Procedural Schedule, which permitted parties to file Objections or Comments to the Settlement by April 13, 2000. Two parties to the proceeding, PPL Electric Utilities Corporation ("PPL") and Philadelphia City Councilman David Cohen, filed Objections to the Joint Petition. On April 17, 2000, PAIEUG filed Reply Objections requesting that PPL and Councilman Cohen's Objections be dismissed.

Pursuant to ALJ Rainey's April 28, 2000 Prehearing Order No. 2, establishing evidentiary hearings regarding the Joint Petition, PAIEUG filed its Prehearing Memorandum on May 2, 2000 and attended the one-day evidentiary hearing held May 10, 2000. PAIEUG now submits this Main Brief in support of the Joint Petition for Settlement. Specifically, PAIEUG posits that the Joint Petition should be approved by the PUC because it is in the public interest.

II. ARGUMENT

A. **The Standard for Approving a Settlement Before the Public Utility Commission is Whether the Settlement is in the Public Interest.**

The PUC "encourages parties to seek negotiated settlements of contested proceedings in lieu of incurring the time, expense and uncertainty of litigation." 52 Pa. Code § 69.391. In accepting prior proposed settlements, the Commission has cited the avoidance of the time, expense, and uncertainty of litigation before the Commission and the Pennsylvania appellate courts as evidence of why approval was in the public interest. See, e.g. Pa. Pub. Util. Comm'n v. PECO Energy Company, Docket No. M-00960820, 1996 WL 482997, *1; Pa. Pub. Util. Comm'n v. Peoples Natural Gas Company, Docket No. M-00930487, 1995 WL 809947, *2; Pa. Pub. Util. Comm'n v. Pa. Gas & Water Company, Docket No. M-00940514, 1995 WL 262342, *3; Pa. Pub. Util. Comm'n v. Pa. Power & Light Co., Docket No. M-0930487, 1995 WL 809973, *3; Pa. Pub. Util. Comm'n v. Member Coin Tel. Owners of the Cent. Atl. Payphone Ass'n, Docket No. M-00930448, 1993 WL 495641.

B. PECO's Joint Petition for Settlement Should be Approved Because it Meets the Necessary Public Interest Requirements.

Because PAIEUG members use substantial volumes of electricity and natural gas in their manufacturing and operational processes, PAIEUG was concerned with the effects of the proposed merger on retail competition and the retail market in Pennsylvania, as well as the effect on transmission and distribution rates. Additionally, PAIEUG was interested in the calculation of savings created by the synergy of the merger, and the allocation of these savings among customers. PAIEUG believes that the Joint Petition addresses the aforementioned concerns, as well as providing additional benefits to all PECO customers. As a result, PAIEUG concludes that the Joint Petition is in the public interest.

As noted by PAIEUG witness Lane Kollen, the Joint Petition is in the public interest for numerous reasons.

The Settlement provides significant rate benefits, enhanced reliability and customer service, further promotion of competition, protection from the risks and costs of affiliate cross-subsidization, local management accountability and employment, continued community involvement, and the avoidance of the cost and time necessary for further litigating all issues raised by various parties.¹

See Direct Testimony of Lane Kollen (hereinafter, "Kollen Testimony"), p. 5.

PECO's Application for Merger failed to offer any rate reductions, sharing of anticipated merger savings, or extension of the transmission and distribution ("T&D") rate cap. Conversely, the Joint Petition provides for \$200 million in rate reductions over a four year period from 2002

¹PAIEUG submits that PECO's Joint Petition is in the public interest based upon its numerous provisions that address the various concerns of the intervening parties. PAIEUG's Main Brief, however, will focus upon those provisions of the Joint Petition providing significant benefit to PAIEUG members.

through 2005. The Settlement also extends the existing T&D rate cap, which would have otherwise expired on June 30, 2005, by an additional eighteen months to December 31, 2006. See id. at 6.

The Joint Petition also protects PECO ratepayers from responsibility for nuclear decommissioning expense obligations related to Unicom's nuclear plants. As a result, these protections provide incentives for the Company to aggressively manage and minimize the nuclear decommissioning costs. The limit on cost increases to ratepayers and the resulting incentives represent significant benefits to ratepayers. See id. at 6-7. The merger savings will also result in lower distribution charges after the rate cap expires while the costs of the merger will be incurred in the years immediately following the merger. As a result, PECO is fully responsible for the costs of the merger as well as the guaranteed rate reductions. Thus, the Joint Petition ensures that PECO will implement the necessary structure changes and achieve the efficiencies and savings addressed throughout the Joint Petition. See id. at 7.

Enhanced reliability and customer service benefits are also addressed in the Joint Petition through the establishment of a Quality of Service Plan, which requires PECO to meet a series of reliability measurements and standards that are 10% higher than otherwise would be required by the Commission. See id. at 7-8. Additionally, PECO agrees to commit to various reporting requirements, and be held accountable if these standards are not met. Thus, these provisions ensure continued improvement in safe and reliable service for all PECO ratepayers. See id.

As part of the merger, PECO will form a holding company and structurally separate its unregulated businesses from its regulated businesses, further assuring compliance with the Code of Conduct and Competitive Safeguards adopted in PECO's Electric Restructuring Settlement.

As a result, PECO ratepayers will be benefitted by being better insulated from the risks associated with the unregulated businesses. See id. at 8-9.

Finally, the Joint Petition contains numerous provisions that promote competition and further development in the competitive market. Among other commitments, PECO agrees to allow customers currently party to an existing "special contract" with PECO to have a unilateral, one-time option to terminate their contract with PECO for competitive energy supply. As a result, "special contract" customers are provided an additional opportunity to participate in the competitive market. In addition to enlarging the competitive market, this provision is of significant benefit to large industrial customer currently receiving service from PECO under a "special contract." See id. at 9-10.

The Joint Petition also resolves significant issues between the parties while avoiding the costs and time commitments of more extensive litigation before the Commission and through the courts. In addition, the Joint Petition represents a compromise between knowledgeable parties that avoids the "all or nothing" process of fully litigating the issues. See id. at 11.

For these reasons, PAIEUG proposes that PECO's Joint Petition provides significant benefits to all parties to this proceeding, including PAIEUG members. Moreover, the Joint Petition represents a fair and reasonable compromise among the parties, which may not have been achieved if this proceeding had been fully litigated. Finally, the time and costs associated with a regulatory proceeding have been significantly diminished as a result of settlement negotiations and the resulting Joint Petition. Therefore, PAIEUG submits that the Joint Petition is in the public interest and should be approved by the PUC.

III. CONCLUSION

WHEREFORE, the Philadelphia Area Industrial Energy Users Group respectfully requests that the Pennsylvania Public Utility Commission approve PECO Energy Company's Joint Petition for Settlement in full without modification.

Respectfully submitted,

McNEES, WALLACE & NURICK

By Charis M. Burak
David M. Kleppinger
Charis M. Burak
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
(717) 232-8000
(717) 237-5300

Counsel to the Philadelphia Area Industrial
Energy Users Group

Dated: May 17, 2000

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 52 Pa. Code § 1.54 (relating to service by a participant).

VIA HAND DELIVERY

Tanya J. McCloskey, Esq.
Office of Consumer Advocate
555 Walnut Street
Forum Place, Fifth Floor
Harrisburg, PA 17101

Bernard A. Ryan, Jr., Esq.
Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101

Kenneth L. Mickens, Esq.
Office of Trial Staff
PA Public Utility Commission
901 Rear North 7th Street
P.O. Box 3265
Harrisburg, PA 17105-3265

Michael Fiorentino, Esq.
Clean Air Council
105 N. Front Street
Suite 106
Harrisburg, PA 17101

Honorable Allyson Y. Schwartz
4th District
Senate Box 203004
Harrisburg, PA 17120

John Hanger, Esq.
212 Locust Court, Suite 410
Harrisburg, PA 17101

Christopher B. Craig, Esq.
Room 545 Main Capitol Building
Harrisburg, PA 17120

Daniel Clearfield, Esq.
Gerald Gornish, Esq.
Kevin Moody, Esq.
Wolf, Block, Schorr & Solis-Cohen LLP
212 Locust Street, Suite 300
Harrisburg, PA 17101

Craig A. Doll, Esq.
214 State Street
Harrisburg, PA 17101-1108

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PA.P.U.C.
SECRETARY'S BUREAU

CERTIFICATE OF SERVICE

Docket No. A-110550F0147

Page 2

VIA FEDERAL EXPRESS
(overnight for delivery 5/17/00)

Peter Meadows Adels, Esq.
PennFuture
117 S. 17th Street, Suite 1801
Philadelphia, PA 19103

Thomas P. Gadsden, Esq.
Morgan, Lewis & Bockius, LLP
1701 Market Street
Philadelphia, PA 19103-2921

Eric Joseph Epstein
4100 Hillsdale Road
Harrisburg, PA 17112

Paul R. Bonney, Esq.
2301 Market Street
P.O. Box 8699
Philadelphia, PA 19101-8699

John S. Halsted, Esq.
Gawthrop, Greenwood & Halsted
119 North High Street
West Chester, PA 19381-0562

Kenneth M. Barna, Esq.
Wayne R. Frigard, Esq.
Rubin & Rudman LLP
50 Rowes Wharf
Boston, MA 02110

Gregory K. Lawrence, Esq.
Sutherland, Asbill & Brennan LLP
1275 Pennsylvania Avenue NW
Washington, DC 20004-2415

John Will Ongman, Esq.
Pepper Hamilton LLP
600 Fourteenth Street NW
Washington, DC 20005-2004

John L. Hall, Esq.
Unruh, Turner, Burke & Frees, PC
P.O. Box 515
17 West Gay Street
West Chester PA 19381-0515

Joseph A. Dworetzky, Esq.
Hangle, Aronchick Segal & Pudlin
One Logan Square 27th Floor
Philadelphia, PA 19103

John L. Hall, Esq.
Unruh, Turner, Burke & Frees, P.C.
P. O. Box 515
West Chester, PA 19381-0515

Joseph Otis Minott, Esq.
135 S. 19th Street,
Suite 300
Philadelphia, PA 19103

Amy Gold
Shell Energy Services Co., L.L.C.
P.O. Box 4402
Houston, TX 77210

Dennis Waters
2314 Delancey Place
Philadelphia, PA 19103

Paul E. Russell, Esq.
PP&L Inc.
Two North Ninth Street
Allentown, PA 18101-1179

Donald A. Kaplan, Esq.
Leanne M. Bober, Esq.
Preston, Gates, Ellis & Rouvelas, Meeds LLP
Suite 500
1735 New York Avenue NW
Washington, DC 20006

CERTIFICATE OF SERVICE

Docket No. A-110550F0147

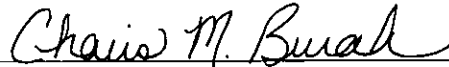
Page 3

John L. Munsch, Esq.
Allegheny Power
800 Cabin Hill Drive
Greensburg, PA 15601

Philip A. Bertocci, Esq.
Community Legal Services, Inc.
1424 Chestnut Street, 4th Floor
Philadelphia, PA 19102

Patricia J. Clark, Esq.
Allegheny Energy Supply
800 Cabin Hill Drive
Greensburg, PA 15601

Andrew Altman
400 S Camac Street
Philadelphia, PA 19147



Charis M. Burak

Dated this 17th of May, 2000, in Harrisburg, Pennsylvania.

MCNEES, WALLACE & NURICK
ATTORNEYS AT LAW

100 PINE STREET
P. O. BOX 1166
HARRISBURG, PA 17108-1166
TELEPHONE (717) 232-8000
FAX (717) 237-5300

<http://www.mwn.com>

DOCUMENT
FOLDER

RECEIVED
MAY 17 AM 10:31
PENNSYLVANIA
SECRETARY'S BUREAU

CHARIS M. BURAK

DIRECT DIAL: (717) 237-5437

E-MAIL ADDRESS: CBURAK@MWN.COM

May 17, 2000

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James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Room B-20, North Office Building
Harrisburg, PA 17120

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Dear Secretary McNulty:

Enclosed for filing with the Commission are the original and nine (9) copies of the Main Brief on behalf of the City of Philadelphia in the above-referenced proceeding.

As shown by the attached Certificate of Service, all parties to this proceeding are being duly served. Please date stamp the extra copy of this transmittal letter and kindly return it for our filing purposes.

Very truly yours,

MCNEES, WALLACE & NURICK

By *Charis M. Burak*
Charis M. Burak

41

CMB/lhe

c: Administrative Law Judge Charles E. Rainey, Jr. (via federal express)
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I. INTRODUCTION

On November 22, 1999, PECO Energy Company ("PECO" or "Company") filed an Application with the Pennsylvania Public Utility Commission ("PUC" or "Commission") requesting 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 ("Unicom"), the parent company of Commonwealth Edison Company ("ComEd").

On March 3, 2000, the City of Philadelphia ("City") filed a Petition to Intervene in PECO's merger proceeding. The City receives service from PECO under a broad number of rate schedules. As a result, the City was concerned with the impact of the merger on these rates, as well as the effect of the merger on the reliability of PECO's services and the continued interpretation of the City's contracts with PECO. In addition, PECO's corporate headquarters are located in Philadelphia, and PECO employs a large number of Philadelphians.

After intensive settlement negotiations among the parties, PECO filed a Joint Petition for Settlement ("Joint Petition") on behalf of the Company and the majority of the parties to this proceeding, including the City of Philadelphia. Thereafter, the City filed a Statement in Support of the Joint Petition. On March 28, 2000, Administrative Law Judge Charles E. Rainey, Jr. ("ALJ Rainey") issued an Order Revising Procedural Schedule, which permitted parties to file Objections or Comments to the Settlement by April 13, 2000. Two parties to the proceeding, PPL Electric Utilities Corporation ("PPL") and Philadelphia City Councilman David Cohen, filed Objections to the Joint Petition. On April 18, 2000, the City submitted the testimony of Kent R. Miller to ALJ Rainey, in lieu of Reply Objections.

Pursuant to ALJ Rainey's April 28, 2000 Prehearing Order No. 2, establishing evidentiary hearings regarding the Joint Petition, the City filed its Prehearing Memorandum on May 2, 2000. The City also attended the one-day evidentiary hearing held May 10, 2000. The City now submits this Main Brief in support of the Joint Petition for Settlement. Specifically, the City posits that the Joint Petition should be approved by the PUC because it is in the public interest.

II. ARGUMENT

A. The Standard for Approving a Settlement Before the Public Utility Commission is Whether the Settlement is in the Public Interest.

The PUC "encourages parties to seek negotiated settlements of contested proceedings in lieu of incurring the time, expense and uncertainty of litigation." 52 Pa. Code § 69.391. In accepting prior proposed settlements, the Commission has cited the avoidance of the time, expense, and uncertainty of litigation before the Commission and the Pennsylvania appellate courts as evidence of why approval was in the public interest. See, e.g. Pa. Pub. Util. Comm'n v. PECO Energy Company, Docket No. M-00960820, 1996 WL 482997, *1; Pa. Pub. Util. Comm'n v. Peoples Natural Gas Company, Docket No. M-00930487, 1995 WL 809947, *2; Pa. Pub. Util. Comm'n v. Pa. Gas & Water Company, Docket No. M-00940514, 1995 WL 262342, *3; Pa. Pub. Util. Comm'n v. Pa. Power & Light Co., Docket No. M-0930487, 1995 WL 809973, *3; Pa. Pub. Util. Comm'n v. Member Coin Tel. Owners of the Cent. Atl. Payphone Ass'n, Docket No. M-00930448, 1993 WL 495641.

B. PECO's Joint Petition for Settlement Should be Approved Because it Meets the Necessary Public Interest Requirements.

As noted above, the City intervened in PECO's merger proceeding due to several concerns, including the continuing interpretation of the City's contract with PECO.¹ The City's current contract with PECO took effect July 1, 1996, with an initial four-year term. The City exercised its option to extend the contract through June 30, 2001 and holds yearly options to extend the contract through June 30, 2004. See Direct Testimony of Kent R. Miller on Behalf of the City of Philadelphia, (hereinafter, "Miller Testimony"), p. 2. As a result of the City demonstrating its ability to implement specific energy competitive alternatives, and agreeing to forego those alternatives, the City was eligible to receive discounts with respect to its Rule 4.6 contract. See id. at 3. Since mid-1996, the City received an 8.65% discount on service taken under Rates HT, PD, GS and the SL-P tariff. On July 1, 2000, this discount will increase to 11.2%, with the discount increasing every year through the remainder of the City's option years, reaching a high of 14.55% beginning July 1, 2003. See id. at 2-3; see also Joint Petition for Settlement (Volume I), Appendix G, p. 2. Prior to the Joint Petition, the City and PECO had not resolved several interpretation issues with respect to the contract as those issues also involved interpretation of the PECO Restructuring Settlement and the Electricity Generation Customer Choice and Competition Act.

¹In its Main Brief, the City addresses only those provisions of the Joint Petition that are of most direct interest and greatest concern to the City. As to the remaining provisions, the City agrees that the settlement generally represents a reasonable compromise and as such is in the public interest.

The Joint Petition also addresses the City's concern that the current rate structure for street lighting discriminates against the City. Currently, the City is the only customer to pay for street lighting under Rate SL-P, since all other municipalities pay for substantially identical service under PECO's SL-E tariff. See Miller Testimony, p. 3. Significantly, the SL-P rate has a substantially higher customer charge, and each street light is a separate "customer." Moreover, after the City entered into its contract, the SL-E tariff was reduced to an effective rate almost 20% lower than the base SL-P tariff. See id. The Joint Petition addresses these concerns by permitting the City to take Rule 4.6 Streetlight Service, pursuant to tariff Rate SL-P, with an 11.2% discount applied to the total charges for Streetlight Service each month from the close of the merger until June 30, 2001. During this time, PECO will file, with the PUC, a request to eliminate tariff Rate SL-P, and on July 1, 2001, the City's Rule 4.6 Streetlight Service will be switched to tariff Rate SL-E. See Joint Petition for Settlement (Volume I), Appendix G, p. 1.

The Joint Petition provides additional benefits by allowing the City to install combined natural gas/electric chillers, under certain conditions, without penalty or reduction to the City's current Rule 4.6 contract discounts. See id. at p. 3. Moreover, PECO has made certain commitments regarding employment and maintenance of its distribution company headquarters. PECO will maintain the corporate headquarters for its distribution business in Philadelphia through at least January 1, 2008, not reduce its line forces in Philadelphia County, and maintain certain minimum employment levels at the Company's current headquarters at specific levels through the end of 2007. See Letter Regarding Commitments from PECO to the City of Philadelphia, April 27, 2000.

The aforementioned issues were of great concern to the City, and having them addressed in the Joint Petition provides benefit to the City. Currently, PECO is not expected to file a base rate proceeding until 2007. Without a base rate proceeding, however, the City would have been required to file a formal complaint before the PUC in order to obtain relief from the SL-P rate. See Miller Testimony, p. 4. The City was also concerned that the merger and resulting change in control could make it more difficult for the parties to resolve some difficulties, including the appropriate discount level and other contractual interpretation issues. See id. As a result of the Joint Petition, which reflects a compromise by both parties, the City and PECO have been able to avoid lengthy and costly regulatory litigation, and instead have amicably reached agreement on several outstanding issues. See id.

The Joint Petition provides significant benefit to the City, as well as the City's taxpayers, who are also PECO ratepayers. The settlement resolves issues surrounding the interpretation of the City's 4.6 contract. The Joint Petition also eliminates discrimination against the City with respect to the application of PECO's street lighting rates. Finally, PECO's commitment to employment levels within Philadelphia successfully address additional merger concerns. As a result, the provisions of the settlement provide important benefits to PECO's ratepayers. For these reasons, the City submits that PECO's Joint Petition is in the public interest and should be approved by the PUC.

III. CONCLUSION

WHEREFORE, the City of Philadelphia respectfully requests that the Pennsylvania Public Utility Commission approve the Joint Petition for Settlement in full without modification.

Respectfully submitted,

McNEES, WALLACE & NURICK

By Charis M. Burak
David M. Kleppinger
Charis M. Burak
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
(717) 232-8000
(717) 237-5300

Counsel to the City of Philadelphia

Dated: May 17, 2000

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 52 Pa. Code § 1.54 (relating to service by a participant).

VIA HAND DELIVERY

Tanya J. McCloskey, Esq.
Office of Consumer Advocate
555 Walnut Street
Forum Place, Fifth Floor
Harrisburg, PA 17101

Bernard A. Ryan, Jr., Esq.
Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101

Kenneth L. Mickens, Esq.
Office of Trial Staff
PA Public Utility Commission
901 Rear North 7th Street
P.O. Box 3265
Harrisburg, PA 17105-3265

Michael Fiorentino, Esq.
Clean Air Council
105 N. Front Street
Suite 106
Harrisburg, PA 17101

Honorable Allyson Y. Schwartz
4th District
Senate Box 203004
Harrisburg, PA 17120

John Hanger, Esq.
212 Locust Court, Suite 410
Harrisburg, PA 17101

Christopher B. Craig, Esq.
Room 545 Main Capitol Building
Harrisburg, PA 17120

Daniel Clearfield, Esq.
Gerald Gornish, Esq.
Kevin Moody, Esq.
Wolf, Block, Schorr & Solis-Cohen LLP
212 Locust Street, Suite 300
Harrisburg, PA 17101

Craig A. Doll, Esq.
214 State Street
Harrisburg, PA 17101-1108

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Docket No. A-110550F0147

Page 2

VIA FEDERAL EXPRESS
(overnight for delivery 5/17/00)

Peter Meadows Adels, Esq.
PennFuture
117 S. 17th Street, Suite 1801
Philadelphia, PA 19103

Thomas P. Gadsden, Esq.
Morgan, Lewis & Bockius, LLP
1701 Market Street
Philadelphia, PA 19103-2921

Eric Joseph Epstein
4100 Hillsdale Road
Harrisburg, PA 17112

Paul R. Bonney, Esq.
2301 Market Street
P.O. Box 8699
Philadelphia, PA 19101-8699

John S. Halsted, Esq.
Gawthrop, Greenwood & Halsted
119 North High Street
West Chester, PA 19381-0562

Kenneth M. Barna, Esq.
Wayne R. Frigard, Esq.
Rubin & Rudman LLP
50 Rowes Wharf
Boston, MA 02110

Gregory K. Lawrence, Esq.
Sutherland, Asbill & Brennan LLP
1275 Pennsylvania Avenue NW
Washington, DC 20004-2415

John Will Ongman, Esq.
Pepper Hamilton LLP
600 Fourteenth Street NW
Washington, DC 20005-2004

John L. Hall, Esq.
Unruh, Turner, Burke & Frees, PC
P.O. Box 515
17 West Gay Street
West Chester PA 19381-0515

Joseph A. Dworetzky, Esq.
Hangley, Aronchick Segal & Pudlin
One Logan Square 27th Floor
Philadelphia, PA 19103

John L. Hall, Esq.
Unruh, Turner, Burke & Frees, P.C.
P. O. Box 515
West Chester, PA 19381-0515

Joseph Otis Minott, Esq.
135 S. 19th Street,
Suite 300
Philadelphia, PA 19103

Amy Gold
Shell Energy Services Co., L.L.C.
P.O. Box 4402
Houston, TX 77210

Dennis Waters
2314 Delancey Place
Philadelphia, PA 19103

Paul E. Russell, Esq.
PP&L Inc.
Two North Ninth Street
Allentown, PA 18101-1179

Donald A. Kaplan, Esq.
Leanne M. Bober, Esq.
Preston, Gates, Ellis & Rouvelas, Meeds LLP
Suite 500
1735 New York Avenue NW
Washington, DC 20006

CERTIFICATE OF SERVICE

Docket No. A-110550F0147


Page 3

John L. Munsch, Esq.
Allegheny Power
800 Cabin Hill Drive
Greensburg, PA 15601

Philip A. Bertocci, Esq.
Community Legal Services, Inc.
1424 Chestnut Street, 4th Floor
Philadelphia, PA 19102

Patricia J. Clark, Esq.
Allegheny Energy Supply
800 Cabin Hill Drive
Greensburg, PA 15601

Andrew Altman
400 S Camac Street
Philadelphia, PA 19147



Charis M. Burak

Dated this 17th of May, 2000, in Harrisburg, Pennsylvania.



PECO ENERGY

PECO Energy Company
2301 Market Street
PO Box 8699
Philadelphia, PA 19101-8699
215 841 5544
Fax 215 568 3389

James W. Durham
Senior Vice President
and General Counsel

Edward J. Cullen, Jr.
Deputy General Counsel

Sandra H. Byrne
Legal Administrator

Paul R. Bonney
Ellen M. Cavanaugh
Jessica N. Cone
Todd D. Cutler
Harvey B. Dikter
Susan Sciamanna Foehl
Vilna Waldron Gaston
Gregory Golazeski
John C. Halderman
Mary McFall Hopper
Conrad O. Kattner
Kristopher Keys
Jeffrey J. Norton
Mark B. Peabody
Roslyn G. Pollack
H. Alfred Ryan
Wendy Schermer
Richard S. Schlegel
Jenny P. Shulbank
Ward L. Smith
Delia W. Stroud
Ronald L. Zack
Assistant General Counsel

May 17, 2000

HAND DELIVER

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
North Office Building, Room B-18
Commonwealth Avenue and North Street
Harrisburg, Pennsylvania 17105-3265

RE: Application of PECO 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-110550F0147

Dear Secretary McNulty:

Enclosed for filing with the Commission are an original and nine copies of PECO Energy Company's Initial Brief in the above-captioned matter.

Sincerely,


Paul R. Bonney

PRB/mbo

Enclosures

cc: Administrative Law Judge Charles E. Rainey, Jr.
Certificate of Service

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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 : APPLICATION
CREATION OF A HOLDING COMPANY : DOCKET NO. A-110550F0147
AND (2) THE MERGER OF THE NEWLY :
FORMED HOLDING COMPANY AND :
UNICOM CORPORATION :

INITIAL BRIEF OF
PECO ENERGY COMPANY

Paul R. Bonney, Esquire
Ward L. Smith, Esquire
Kent D. Murphy, Esquire
Delia W. Stroud, Esquire
Assistant General Counsel
PECO Energy Company
2301 Market Street
P.O. Box 8699
Philadelphia, PA 19101-8699
215-841-4252 (Telephone)
215-568-3389 (Fax)
pbonney@peco-energy.com (E-mail)
Counsel for PECO Energy Company

DOCKETED
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Dated: May 17, 2000

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I. INTRODUCTION

On March 23, 2000, a Joint Petition for Settlement (“Settlement”) was filed in the above-captioned proceeding. Subsequently, two additional parties, the City of Philadelphia and New Energy East, L.L.C., signed the Settlement and, as a consequence, all but two parties have either joined in the Settlement or stated they do not oppose it. The two holdouts are PPL Electric Utilities Corporation (“PPL”) and Philadelphia City Councilman David Cohen, who filed Objections to the Settlement on April 13, 2000. PECO Energy Company (“PECO” or the “Company”) and other settling parties submitted Replies to those Objections.

On April 25, 2000, Administrative Law Judge Charles E. Rainey, Jr. issued Prehearing Order No. 2, which established a schedule for hearings and briefing in this case. Pursuant to that Order, the parties submitted written testimony on or before May 3, 2000, and an evidentiary hearing was held on May 10, 2000. A complete procedural history of this case is set forth in Prehearing Order No. 2.

II. ARGUMENT

A. The Proposed Settlement Unquestionably Is In The Public Interest

The relief sought in this case was spelled out in PECO’s Application (pp. 8-16) filed on November 22, 1999. In short, and as the caption of this proceeding attests, PECO requests 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. To

effectuate these transactions, PECO has asked that certain additional findings required by Chapters 21, 22, and 28 of the Public Utility Code also be made.

The Settlement would grant PECO the regulatory approvals it seeks subject to certain terms and conditions. The question therefore is whether the Settlement, viewed in its entirety, is “necessary or proper for the service, accommodation, convenience, or safety of the public” (66 Pa. C.S. § 1103(a)) -- i.e., is it “in the public interest”? PECO respectfully submits that the Settlement fully satisfies this legal standard.

The plan of corporate restructuring is described in the Application and its accompanying testimony. As discussed by Messrs. Lawrence (PECO St. 1) and White (PECO St. 2), the holding company structure is an established form of corporate organization for those companies conducting multiple lines of business. Indeed, PECO is one of the very few major utilities in Pennsylvania (and the only major electric utility) that has not heretofore structured its operations in this fashion. The benefits of the proposed restructuring and functional disaggregation are well-known to the Commission and include: (1) increased financial and operational flexibility; (2) enhanced accountability; (3) the insulation of utility customers from unregulated business risks; and (4) reduction of the potential for cross-subsidization (Application, pp. 18-20). Moreover, the separation of electric generation and generation marketing functions from regulated delivery services was expressly anticipated and supported by the parties to PECO’s 1998 Electric Restructuring Settlement at Docket No. R-00973953, where the Commission approved the creation of a separate PECO affiliate to own and operate generating assets.

The proposed merger with Unicom is also described in the Application and its accompanying testimony. With the active encouragement of Chairman Quain and others, the parties were able to develop a comprehensive settlement package that addresses the various concerns that have been aired about the merger. Although PECO remains convinced that its initial merger proposal was "in the public interest," there can no longer be any serious doubt on that score given the numerous concessions made by PECO in the Joint Petition:

Rates Will Be Reduced. The Settlement provides for \$200 million of rate reductions over a four-year period commencing January 1, 2002. As noted by Mr. Hill (PECO St. 3-S, p. 8), these rate reductions are made possible, at least in substantial part, by the projected synergies to be produced by the restructuring and merger and would not be available but for the proposed transactions.

Transmission And Distribution Charges Will Be Capped For An Additional Eighteen Months. The Settlement extends the cap on PECO's transmission and distribution charges, which otherwise would expire on June 30, 2005 under the 1998 Electric Restructuring Settlement, until December 31, 2006. As a consequence, customers are assured a minimum ten year period (January 1, 1997 - December 31, 2006) during which they will see no increase in the charges for regulated delivery services. In addition, PECO is confident that post-rate cap increases will be mitigated through purchasing economies and the elimination of duplicative functions (PECO St. 4).^{1/}

^{1/} See Separate Statement of John M. Quain, issued March 2, 2000.

Increases In Nuclear Decommissioning Costs Will Be Shared. PECO has also agreed to share the risk of future increases in the costs of decommissioning its “pre-existing nuclear interests” (Joint Petition, p. 11).^{2/} Absent the Settlement, PECO would be entitled to request recovery of such costs in full.

Reliability And Customer Service Will Be Enhanced. Another obvious public benefit of the Settlement is PECO’s commitment to implement a Quality of Service Plan designed to provide higher levels of reliability and customer service than it has achieved in the past (Joint Petition, pp. 13-15). Detailed reporting requirements will ensure the parties’ ability to monitor compliance with the Plan.

Competition Will Be Promoted. The separation of regulated and unregulated functions will facilitate compliance with the Code of Conduct and Competitive Safeguards (GenCo Code of Conduct) adopted as part of the 1998 Electric Restructuring Settlement. In addition, the Settlement promotes increased retail electric competition in PECO’s service area by making reasonably-priced installed capacity available to electric generation suppliers; granting special contract customers a sixty-day “fresh start” period during which they may exercise a unilateral, one-time option to terminate their contracts with PECO; facilitating the exchange of information between PECO and third party suppliers; imposing restrictions on PECO’s promotion of its provider of last resort (PLR) service; implementing an Abbreviated Dispute Resolution Process; and establishing transition cost reconciliation procedures designed to reduce annual swings in

^{2/} PECO has expressly committed not to seek recovery of decommissioning costs associated with “acquired nuclear interests,” i.e. those that it did not hold on December 31, 1999 (Joint Petition, p. 10),

shopping credits. As observed by OCA witness LaCapra (OCA St. 1, p. 14), these provisions are “fully consistent with the terms of Section 2811(e)” and ensure that the competitive retail electricity market that has developed in PECO’s service territory will not only be preserved, but, in fact, will be improved.

Universal Service Coverage Will Be Expanded. The Settlement removes the 100,000 customer limit on the CAP Program, reduces the level of cost recovery of the Universal Service Program, calls for evaluation of the need for a “special needs” program and provides for additional contributions by PECO to county fuel fund agencies in PECO’s service territory. As noted by Fumo/CEPA witness Silkman (p. 13), low income customers will benefit from these enhancements.

The Environment Will Benefit. The Settlement promotes the use of renewable energy sources through the funding of one of the largest investments in wind generation in the Eastern United States; educational outreach; the development and/or funding of a retail wind block program; the development of photovoltaic generation; expanded availability of Rate RS for renewable energy installations; and the acceleration of payments to the Sustainable Development Fund. These provisions, according to Clean Air Council witness Altman (p. 4), will not only yield direct environmental benefits, but will help further diversify Pennsylvania’s generation mix.

Customers Will Be Protected Against Unregulated Risk And Cross-Subsidization. As previously noted, one of PECO’s objectives in adopting a holding company structure is to insulate utility customers from the risks attendant to unregulated businesses. Consistent with that

objective, the Settlement provides that the determination of regulated rates shall not be affected by the success or failure of nonregulated businesses; requires PECO to adhere to reasonable accounting controls and pricing protocols in its dealings with affiliates; imposes conditions on PECO's extension of credit; and ensures reasonable access to the books, records and personnel of affiliated entities.

PECO Will Maintain A Strong Corporate Presence In Southeastern Pennsylvania.

The Settlement, as augmented subsequent to the filing of the Joint Petition, ensures that PECO will maintain a strong corporate presence in Southeastern Pennsylvania. As explained by Mr. Hill (PECO St. 3-S, pp. 6-7), PECO has agreed that (1) the merger with Unicom will not result in any reduction in line forces in Philadelphia County ; (2) the employment at 2301 Market Street, Philadelphia will be no less than 1325 through 2001, 1300 through 2002, 1275 through January 1, 2004 and 1100 through January 1, 2008; and (3) the corporate headquarters for PECO's distribution business will remain in Philadelphia through at least January 1, 2008. PECO has also committed to maintaining charitable and civic giving in Pennsylvania at no less than current levels for at least the next four years (through December 31, 2003).

Substantial Litigation And Associated Costs Will Be Avoided. The Settlement amicably and expeditiously resolves a number of important and contentious issues. The administrative and appellate burden and costs to litigate these matters to conclusion would be substantial.

In view of the foregoing, it is not surprising that a broad coalition of interested parties has enthusiastically endorsed the proposed Settlement. Perhaps more revealing, however, is the fact

that no one has stepped forward and complained that the proposed Settlement is not in the public interest. Instead, Councilman Cohen would favor even more concessions, while PPL contends that the concessions agreed to by PECO should have no binding effect. These objections, as discussed next, provide no basis in law or in fact for rejecting the Joint Petition.

B. The Objecting Parties' Have Presented No Valid Basis For Rejecting The Proposed Settlement

1. PPL's Objections Lack Merit And Should Be Rejected

PPL does not object to the Commission's granting the relief requested in PECO's Application, namely, approving PECO's proposed corporate restructuring, which will create a holding company structure, and the merger of Unicom into the new holding company. Rather, in its Objections and Prehearing Memorandum, PPL disagreed with other terms and conditions of the Settlement, which address interests and concerns raised by other parties, such as rate reductions, extending the transmission and distribution rate cap and establishing objective measures for customer service and service improvement. Specifically, PPL claimed that the Settlement should not be approved because the settling parties had not presented substantial evidence demonstrating that these additional terms are in the public interest. In addition, PPL presented the testimony of Paul L. Gioia, who testified that, if the Commission approves the Settlement, it should expressly state that its individual terms do not constitute "precedent or relevant or material evidence in any subsequent proceeding" (PPL St. 1).

As more fully explained below, PPL does not have standing to object to the Settlement and the bulk of its objections are premised upon an erroneous understanding of the law.

Moreover, after PPL filed its Objections, the settling parties submitted extensive testimony and exhibits addressing each element of the Settlement, which provides a solid evidentiary record demonstrating that the Settlement as a whole -- and each of its constituent parts -- promotes the public interest and should be approved. Finally, PPL's concerns about the future precedential value of the Settlement in proceedings involving other utilities is unwarranted. Both Section 72 of the Settlement and prior Commission decisions provide that settlements do not constitute legal precedent. Additionally, PPL's recommendation concerning the evidentiary value to be accorded settlements in future proceedings is not consistent with the rules of evidence and Commission procedure and should not be adopted.

a. PPL Does Not Have A Substantial, Direct And Immediate Interest In The Outcome Of The Issues It Purports To Raise And, Therefore, Does Not Have Standing To Object To The Settlement

The PUC has discretion to determine an entity's right to challenge Commission action, including the Commission's resolution of disputed issues. In exercising that discretion, the Commission has adhered to the principles of standing and aggrievement established by Pennsylvania's appellate courts for civil and appellate proceedings. *See Re L & H Trucking Company v. Pa. P.U.C.*, 55 Pa. P.U.C. 469 (1982). The definitive statement of those principles was made by the Pennsylvania Supreme Court in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975).

In *William Penn*, the Court adopted a tri-partite test that a party must satisfy to prove that it is or may be "aggrieved" and, therefore, has standing to litigate an issue. Specifically, the party must establish that it has an interest that is substantial, direct and immediate. As to what

constitutes substantiality, the Court held: “[T]he individual’s interest must have substance -- there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.” 346 A.2d at 269. The test for what is a “direct” interest “means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains.” 346 A.2d at 282. To satisfy the immediacy test, the one claiming standing must show “a sufficiently close causal connection between the challenged action and the asserted injury to qualify the interest as ‘immediate’ rather than ‘remote’.” 346 A.2d at 286. Elaborating on this concept, the Court stated: “[I]t is clear that the possibility that an interest will suffice to confer standing grows less as the causal connection grows more remote.”

Pennsylvania appellate courts have applied the principles of *William Penn* to proceedings before the PUC in two very recent and notable decisions. First, in *George v. Pa. P.U.C.*, 735 Pa. A.2d 1282 (Pa. Cmwlth. 1999), the Commonwealth Court held that a party to a proceeding that received adequate notice thereof lacked standing to raise the issue of whether other affected parties were properly notified. 735 A.2d at 1286. Second, in *Mid-Atlantic Power Supply Association v. Pa. P.U.C.*, 746 A.2d 1196 (Pa. Cmwlth. 2000) (“*MAPSA*”), the Court held that a utility did not have standing to raise issues pertaining to the possible infringement of its customers’ constitutional rights by a Commission order directing the utility to release customers’ private billing data. Additionally, the Court held that assent by customers’ statutorily designated representative assured that customers’ interests were not compromised:

PECO does not represent the interests of its ratepayers. A party may not claim standing to vindicate the rights of a third party who has the opportunity to be heard. *Pennsylvania Dental Assoc. v.*

Commonwealth of Pennsylvania, Department of Health, 75 Pa. Cmmw. 7, 461 A.2d 329 (Pa. Cmwlth. 1983). Additionally, Section 902-A of the Administrative Code statutorily provided for the OCA to represent the interests of consumers before the PUC, and the OCA, as intervenor, submitted its brief in support of the PUC's Final Order.

Based upon the principles articulated by the Pennsylvania Supreme and Commonwealth Courts, as summarized above, there is no doubt that PPL lacks standing to raise the issues set forth in its Objections, which fall into seven broad categories: (1) the proposed rate reductions and rate cap extension may impair PECO's ability to maintain or improve its transmission and distribution system and its level of customer service to the detriment of PECO's retail customers (PPL Objections, pp. 20-22); (2) all interested parties may not have received proper notice that benchmarks for service reliability and improvement would be adopted in this case (PPL Objections, p. 21); (3) the mechanism for recovery of nuclear decommissioning costs may not "strike the proper balance" between protecting customers from the costs of decommissioning and protecting society from the hazard and long-run costs of incomplete or under funded decommissioning (PPL Objections, pp. 23-24); (4) the settling parties have not demonstrated that PECO's customers and the public as a whole will benefit from the environmental provisions incorporated in the Settlement (PPL Objections, pp. 24-25); (5) the modifications to the CDS process may constitute a form of "slamming" because PECO customers may have their default supplier changed without their consent (PPL Objections, pp. 26-27); (6) all interested parties may not have received proper notice that CDS modifications would be addressed in this case (PPL Objections, p. 26); and (7) the settling parties have not demonstrated that changes in contractual

provisions for Amtrak and the City of Philadelphia are reasonable and non-discriminatory (PPL Objections, p. 28).^{3/}

In none of the areas addressed in PPL's objections does it have a substantial, direct and immediate interest that is adversely affected by the terms of the proposed Settlement. In each instance, PPL is asserting the interests of someone else, i.e., (1) PECO's customers; (2) PECO itself; and (3) in the case of its "notice" arguments, unidentified parties that allegedly may have an interest in this proceeding but are not participating. As the Court made clear in *George and MAPSA, supra*, standing cannot be established by asserting the rights of others. Indeed, in *MAPSA*, the Court went so far as to state that a utility does not have standing to assert the rights of its *own* customers. Here, PPL's interests are even further attenuated, because it purports to assert the interest of the retail customers of another utility altogether. There is no precedent for finding standing on this basis.^{4/} Rather, PPL's position is similar to that of the dissenting parties (an *ad hoc* group of industrial customers) in *AES Beaver Valley v. West Penn Power Company*, 58 Pa. P.U.C. 729, 730-731 (1985), whose exceptions to a proposed settlement were dismissed

3/ At page 28 of its Objections, PPL stated that its list of allegedly "unsupported" settlement provisions is "not exhaustive" but provides "good examples of the reasons why the Joint Petition must be rejected." PPL had an obligation to present all of its alleged reasons for contesting the Settlement in its written objections so that PECO and other settling parties would have a reasonable opportunity to present evidence addressing those points. PPL cannot, hereafter, attempt to raise other alleged issues, which have been waived by its failure to identify them in its written submission.

4/ PPL does not assert, nor could it claim, standing as a representative of PECO's customers. Representational status is only permitted, for example, by an association that has one or more members with standing in their own right and is authorized and empowered by its members to speak on their behalf. *See Pennsylvania Natural Gas Association v. T.W. Phillips Gas and Oil Company*, Docket Nos. C-902909 and C-913239 (December 20, 1991), 1991 Pa. PUC LEXIS 195.

for lack of standing because they were not served by the affected utility, which had reached an amicable resolution of a non-utility generator's complaint regarding "avoided cost."

For the same reasons discussed above, PPL's attempt to interject itself into this proceeding as an arbiter of the "public interest" fails the substantiality test of *William Penn*. PPL's alleged interest is no different from the "abstract interest of all citizens in having others comply with the law," which the Supreme Court expressly stated is inadequate to confer standing.

Finally, PPL's concern that the Settlement not become a "precedent" is also insufficient to confer standing. Apart from PPL's refusal to acknowledge the body of law holding that settlements are not "precedent," an entity that otherwise would not be aggrieved by an administrative or judicial decision cannot gain standing simply because the outcome may establish what it views as an undesirable precedent. See *AES Beaver Valley v. West Penn Power Company, supra*. The status of *amicus* permits entities in that position to express their views. However, an *amicus* cannot, as PPL seeks to do here, overturn the negotiated resolution of a contested matter by the real parties in interest.

b. PPL's Objections Are Based On Positions That Are Contrary To The Law

For the most part, the positions expressed by PPL in its Objections are based upon a misunderstanding or misapplication of the law and, therefore, should be rejected on those grounds alone. As more fully explained below, each substantive objective raised by PPL flows from a premise that is flawed as a matter of law.

Rate Reductions And Other Concessions. A theme running throughout PPL's Objections is that the rate reductions and other concessions made by PECO in the Settlement are "contrary to Commission policy" allegedly expressed in *PG Energy, Inc.*, Docket No. A-120011F.002 (1999). PPL's interpretation is not correct. *PG Energy* holds that such concessions cannot be imposed *unilaterally*. However, that decision clearly does not preclude such concessions if made with the utility's agreement, as evidenced by the Commission's amended order in *PG Energy* entered on October 18, 1999. *See also Joint Application of Bell Atlantic Corporation and GTE Corporation*, Docket No. A-310200F.002 (November 4, 1999).

Transmission System Improvements. PPL also contends that PECO's proposed rate reductions and rate cap extension could affect PECO's ability to construct transmission system improvements ordered under the PJM Operating Agreement or distribution system improvements needed to maintain safe and reliable service (PPL Objections, pp. 21-22). This argument is wrong as a matter of law. Section 11 of the Settlement states that "other provisions of Paragraph 21 of the 1998 Electric Restructuring Settlement will remain in full force and effect." Paragraph 21 of the 1998 Electric Restructuring Settlement, in turn, states that "the rate cap exceptions set forth in Section 2804(4) of the Electric Competition Act shall apply. . . ." Section 2804(4)(iii)(E) of the Competition Act provides a specific exception where: "The electric distribution utility is directed by the commission or an independent system operator or its functional equivalent to make expenditures to repair or upgrade its transmission or distribution system." Accordingly,

the hypothetical “inconsistency” PPL purports to find between PECO’s rate reductions and rate cap extension and its service obligations simply does not exist.^{5/}

Nuclear Decommissioning. PPL also expresses concern about the Settlement’s provisions dealing with the recovery of nuclear decommissioning expense in excess of the level currently embedded in PECO’s rates. Specifically, PPL questions whether PECO’s agreement not to seek to recover a portion of such expenses in excess of current rate-embedded levels will adversely impact the safe decommissioning of PECO’s nuclear units (PPL Objections, pp. 23-24). Overlooked by PPL is the fact that issues relating to the safety of PECO’s nuclear plants and its ability to fund its nuclear decommissioning obligations lie within the primary and exclusive jurisdiction of the NRC.^{6/} *See Pacific Gas & Electric Corp. v. State Energy Resource Conservation And Development Commission*, 461 U.S. 190, 212-213 (1983). Moreover, the

5/ PPL also contends there is no “evidence” on which to ascertain whether the proposed rate cuts and rate cap extension would harm PECO’s financial health and whether the rate reductions are commensurate with the level of likely merger savings (PPL Objections, pp. 20-22). However, PPL ignores that PECO presented extensive testimony and detailed exhibits as part of the supporting data for its Application regarding its level of merger savings and also presented current and pro forma post-merger financial statements, which provide ample basis for the Commission to assess the likely impact of the rate and rate cap provisions of the Settlement. *See* PECO Statement No. 4 and Exhibit Nos. TJF-2 and TJF-3; PECO Statement No. 3 (p. 11) and Exhibit No. TPH-4; Application Exhibits I through N. Furthermore, both Dr. Silkman and Mr. LaCapra presented analyses demonstrating that the Settlement’s rate concessions reasonably reflect the level of “synergy” savings PECO is likely to experience in the regulated portions of its business as a consequence of its proposed merger with Unicom (CEPA/Fumo Statement 1; OCA Statement 1S).

6/ PPL’s alleged concerns are inexplicable, inasmuch as provisions of the Settlement limiting PECO’s right to request recovery of decommissioning expense in excess of rate-embedded levels are modeled after similar provisions in PPL’s Restructuring Settlement. PPL’s claim that this provision may not be in the public interest would, on its face, seem to impugn settlement terms that PPL itself has previously approved.

adequacy of the Settlement's rate recovery mechanism to assure the safe decommissioning of PECO's nuclear plants is an issue that will have to be addressed and resolved by the NRC in connection with PECO's request for approval to transfer its NRC operating licences as part of the proposed corporate restructuring. PPL's attempt to interject these issues into a proceeding before the Commission, whose authority is preempted by federal law, should be rejected.

CDS Auction. Finally, PPL argues that changes in PECO's CDS auction process may violate the Competition Act as a "forced assignment" of customers to an EGS, contrary to the "anti-slamming" provisions of the Competition Act. At the outset, the principal change to the CDS process made by the Settlement would be to permit an auction of the obligation to provide generation service, while keeping the customer care functions with PECO. If anything, this revision would make implementing CDS even more transparent, and less like a "forced assignment," than the original provisions of PECO's 1998 Electric Restructuring Settlement, which PPL signed. Moreover, PPL's argument is the same as that advanced by a dissenter to GPU's Electric Restructuring Settlement. In *George v. Pa. P.U.C.*, *supra*, the Commonwealth Court rejected that argument and found that "the competitive bidding process [for CDS] does not violate the Competition Act." 735 A.2d at 1288.

c. The Settling Parties Have Presented Substantial, Unrebutted Evidence Supporting Every Element Of The Settlement

In this case, there is ample basis for the Commission to determine that the Settlement is in the public interest. A complete explanation of how the Settlement promotes the public interest is set forth in the Settlement itself, which is augmented by the Statements in Support filed by the settling parties and the endorsement of numerous witnesses at the public input hearings.

Additionally, the settling parties submitted written testimony that supports both the Settlement as a whole and each element thereof. The following table outlines the testimony submitted in support of the Settlement by each settling party and identifies specific components of the Settlement or other issues addressed by each.

Party	Witness	Statement(s)	Exhibit(s)	Issues Addressed
PECO	Kenneth G. Lawrence	1		Effects of the proposed merger on PECO's distribution operations and employees and PECO's commitment to the local community.
PECO	Richard G. White	2 and 2S	A-H Appended to PECO's Application; D, F, J/K and J2 Supplemental; P and Q	The business rationale for the proposed merger and description of the merger and corporate restructuring (St. 2). Explaining an update to the Merger Agreement and affiliated interest agreements.
PECO	Thomas P. Hill, Jr.	3 and 3-S	TPH-1 through TPH-4	Effects of the merger on PECO's 1998 Restructuring Settlement and rates (St. 3). Explanation of why the Settlement is in the public interest and why the objections of PPL and Councilman Cohen provide no basis for rejecting the Settlement (St. 3-S).
PECO	Thomas J. Flaherty	4	TJF-1 through TJF-3	Explanation of the cost savings anticipated to arise in the regulated operations of the merger involving PECO and Unicom.
PECO	William H. Hieronymus	5	WHH-1	Potential competitive impact of the proposed merger of PECO and Unicom on electric and natural gas markets.
OCA	Richard LaCapra	1	RLC-1	Assessment of the Settlement including merger savings and rate reductions and other enhancements provided by the Settlement.

OTS	Kevan Deardorff	1	1	Explaining that the rate reductions provided under the Settlement are justified by the expected level of merger savings.
OTS	Paul J. Metro	2		Explaining why the decommissioning provisions of the Settlement are reasonable and appropriate and why the proposed merger does not raise any market power concerns.
CEPA Senator Fumo	Richard H. Silkman	1	RHS-1 and RHS-2	Comparing the value of the ratepayer/consumer benefits contained in the Settlement to the regulatory value of the merger transaction and concluding that the proposed rate reductions capture the full value of regulated merger savings.
PennFuture	John Rohrbach	1		Explaining why the Settlement comports with the public interest with specific reference to the environmental, electric choice and nuclear decommissioning aspects of the Settlement. The testimony also responds to the objections of PPL and Councilman Cohen.
Clean Air Council	Andrew Altman	1	AA-1	Explaining why the environmental provisions of the Settlement are in the public interest.
City of Philadelphia	Kent R. Miller	1		Explaining why the provisions of the Settlement dealing with changes to the Rule 4.6 contract between PECO and the City of Philadelphia are justified, fully supported and in the public interest.
Amtrak	Stanley R. Forczek	1		Explaining why the Settlement is in the public interest with specific reference to the provision granting Amtrak the option to elect to make a single payment buy-out of its ITC/CTC obligations.

MAPSA	James McCormick	1		Explaining why the portions of the Settlement providing competitive market enhancements are in the public interest and fully supported.
PAIEUG	Lane Kollen	1	LK-1	Reviews and addresses each substantive component of the Settlement and explains why each component and the Settlement as a whole are in the public interest.
Eric J. Epstein	Eric J. Epstein	1		Explanation of why the provisions of the Settlement dealing with nuclear decommissioning and monitoring are in the public interest
East Brandywine Twp.	Scott T. Piersol	1		Explaining why the Joint Petition Regarding Issues Raised By Wallace Township and East Brandywine Township as well as the Settlement overall properly address reliability issues and are in the public interest.

The statements and exhibits submitted by PECO and the other settling parties, as well as their Supporting Statements and the testimony presented at the numerous public input hearings in this case, are substantial, un rebutted evidence that the Settlement is in the public interest. It is particularly noteworthy that the Settlement is supported by parties representing the entire spectrum of residential, commercial, industrial and public authority customers, PECO's competitors, environmentalists, nuclear activists, municipal governments and other stakeholders. The breadth of support for the Settlement is itself compelling evidence that the Settlement is fair, balanced and promotes the public interest.

d. PPL's Concern That The Settlement's Terms Would Be Applied To PPL In The Future Are Unfounded

PPL's position was articulated in the testimony of Mr. Gioia, as follows:

[T]he fact that a particular term was part of a settlement agreement approved by the Commission should not be considered in any way as a binding precedent in a subsequent proceeding nor should it be admitted as evidence in a subsequent proceeding.

* * *

[T]he consideration of those [settlement] terms in any subsequent proceeding should be on their own merits, in the context of the facts and circumstances of that proceeding. The mere fact that the terms were included in a settlement agreement that resolved a different proceeding should not be accorded any precedential value or evidentiary weight.

* * *

I would respectfully recommend that, if the terms of the settlement agreement are acceptable to the Commission, the Commission would respectfully recommend that, if the terms of the settlement agreement are acceptable to the Commission, the Commission expressly state that the terms taken as a whole satisfy the public interest standard, but that the fact of the Commission's approval does not render the individual terms of the agreement precedent or relevant or material evidence in any subsequent proceeding, and that the terms of any subsequent proposed reorganization, merger or other action will be considered on its own merits. Such a statement by the Commission would give a clear signal to the utilities in Pennsylvania, and interested parties in Pennsylvania and other states, that the Commission will not mandate any specific terms in a future transaction merely because they were accepted in a previous settlement, and will consider any proposed transaction on its own merits.

PPL St. 1, pp. 7-9.^{7/}

^{7/} Mr. Gioia's recommendation differs from the position articulated by PPL in its Objections (pp. 33-34), where it asked that the Commission "condition" any approval of
(continued...)

Mr. Gioia contends that the terms of a Settlement should be afforded neither precedential nor evidentiary value. As to the first point, Mr. Gioia's position^{8/} has already been embodied in the Settlement, which provides, in Section 72 thereof, as follows:

Acknowledging that it is expressly understood and agreed that the Settlement constitutes a negotiated resolution solely of issues addressed herein, the Merger and Corporate Restructuring, the Joint Petitioners agree that this Settlement shall not constitute or be cited as controlling precedent in any other proceeding, including a proceeding involving a merger or acquisition by another Pennsylvania electric utility.

While the Settlement itself provides ample protection to PPL against the terms and conditions thereof being used or cited as precedent in any PPL proceeding, PPL would have that protection in any event because Commission precedent on this point is clear and well-established:

7/(...continued)

the Settlement upon "the agreement of the parties: (1) not to propose that a provision of the Joint Petition be adopted in any other proceeding based on the fact that such provision was included in the Joint Petition; and (2) not to seek to reopen another Pennsylvania public utility's settlement of its retail restructuring proceeding to modify any provision of such settlement in order to make it consistent with a provision of the Joint Petition." In its Objections, PPL did not address the "evidentiary weight" to be accorded settlement terms, which is an issue raised for the first time by Mr. Gioia. That issue is addressed herein. However, the position articulated in PPL's Objections is, in other respects, much broader than Mr. Gioia's recommendation because it conceivably could prohibit parties from proposing terms or conditions of this Settlement as bargaining positions in private negotiations with PPL in subsequent proceedings. As explained in PECO's Reply To The Objections of PPL Electric Utilities Corporation and David Cohen (p. 19), PPL's position would seem to infringe upon protected speech and raise First Amendment issues.

8/ However, Mr. Gioia fails to recognize that a settlement constitutes the "law of the case" as to issues in the proceeding resolved by that settlement. Stated another way, once a settlement has been approved, no party may collaterally attack it in a subsequent proceeding or otherwise attempt to reopen matters put to rest by the settlement.

We vigorously, and without equivocation, reject considering a settlement as precedent, as to any subsequent issue, in any proceeding.

Pa. P.U.C. v. The Bell Telephone Company of Pennsylvania, 1988 Pa. PUC LEXIS 572 (November 10, 1988). *Accord Application of West Penn Power Company For Approval Of Its Restructuring Plan Under Section 2806 Of The Public Utility Code*, Docket No. R-00973981 (March 13, 1998), 1998 Pa. P.U.C. LEXIS 166 (Mimeo at p. 138) (Rejecting the position offered by a witness on the grounds that he attempted to support it on the strength of a settlement in another utility's case which provided that it "shall not constitute precedent as to any matter of law or fact.")

Mr. Gioia's second recommendation, that the Commission find and determine that the terms of a settlement may be accorded no evidentiary weight in a subsequent proceeding, would be a significant departure from accepted administrative procedure and should not be adopted. The decision to admit or withhold evidence should be made, in the first instance, by the presiding officer, by applying accepted rules of evidence to the facts and circumstances of the specific case in order to determine relevance and materiality. Obviously, the Commission cannot foresee every future scenario in which a settlement might be offered in evidence and, therefore, it cannot assess the issues of relevance and materiality that such proffers may raise. Evidentiary issues are case and fact sensitive and should not be decided by a Commission edict issued in a factual vacuum. In short, the Commission should reject Mr. Gioia's request that it establish an unbending rule that attempts to prejudge the admissibility of evidence in future proceedings.

Additionally, concerns expressed in PPL's Objections about the possibility of "reopening" its Electric Restructuring Settlement are *unfounded*. The Restructuring Settlements are binding and enforceable in accordance with their terms, and they cannot be "reopened" without the agreement of the parties thereto -- including the affected utility -- unless those settlements specifically provide for it. Simply stated, there is no way *this* Settlement could modify the terms and conditions of the Restructuring Settlements of *other* Pennsylvania electric utilities.

In summary, the Commission should find and hold that: (1) Mr. Gioia's recommendation that the terms of a settlement be afforded no precedential value in subsequent proceedings (except where the settlement represents the "law of the case") is embodied in Section 72 of the Settlement and consistent with existing law in this Commonwealth; and (2) Mr. Gioia's *recommendation that the terms of a settlement should be accorded no evidentiary weight in subsequent proceedings is contrary to evidentiary principles applied in Commission proceedings, represents a significant departure from accepted administrative procedure and should not be adopted.*

2. Councilman Cohen's Objections Lack Merit And Should Be Disregarded

In large measure, the issues raised by Councilman Cohen are addressed in one form or another in the proposed Settlement, which represents a reasonable and balanced accommodation of competing interests by parties who negotiated in good faith and at arms-length. Unlike PPL, which argued that the settling parties should make some further demonstration that PECO's concessions are in the public interest, Councilman Cohen does not dispute that the Settlement

will benefit consumers. He just thinks PECO has not gone far enough. Councilman Cohen's comments represent, at most, after-the-fact criticism of the negotiated outcome. Moreover, his criticism lacks substance given that all of the stakeholders -- including those just as committed to the issues raised by Councilman Cohen as the Councilman himself -- believe that the Settlement represents the best achievable outcome.

Additionally, the bulk of Councilman Cohen's evidentiary presentation expresses concerns about the safety of PECO's existing nuclear power plants in Pennsylvania. As more fully explained below, the testimony presented by and on behalf of Councilman Cohen deals with issues that are totally unrelated to PECO's proposed merger and corporate restructuring and outside of the Commission's jurisdiction and expertise.

Finally, many of PECO's settlement concessions are extra-statutory and could not be imposed without PECO's agreement. *See Joint Petition of PG Energy, Inc. et al.*, Docket No. A-120011 (Order entered September 15, 1999); *Joint Application of Philadelphia Suburban Water Co. et al.*, Docket No. A-212370.F0018 (Order entered March 31, 1995). In short, they are not something that could be placed at issue if this proceeding were fully litigated, but rather are achievable only through the settlement process. As a consequence, Councilman Cohen's desire for more and larger concessions does not present any legally sufficient basis to disapprove the Settlement. Moreover, PECO's concessions provide benefits to customers, competitors and other stakeholders that they did not have -- and could not obtain -- in either the pre-merger or a non-merger scenario.

- a. **The Commission Is Not The Proper Forum And This Is Not The Proper Proceeding In Which To Raise The Nuclear Issues**

Addressed By Councilman Cohen And His Witnesses

The centerpiece of Councilman Cohen's presentation consists of three recommendations concerning the safety and health aspects of nuclear power plant operation. Specifically, Councilman Cohen wants the Commission to: (1) ban the operation of PECO's nuclear units beyond an assumed thirty-year life^{9/}; (2) require the "early retirement of unsafe nuclear facilities;" and (3) conduct extensive health monitoring of the general population in the vicinity of operating nuclear power plants (Councilman Cohen St. 1, p. 5).

All of Councilman Cohen's recommendations ask the Commission to take action directly related to the alleged safety and health effects of operating nuclear facilities. The Commission does not have jurisdiction or authority in these areas because it has been preempted by a pervasive scheme of federal regulation. The NRC has exclusive jurisdiction, power and authority to decide safety and public health issues relating to the construction and operation of nuclear power plants. As a consequence, this Commission has in the past rejected arguments similar to those advanced by Councilman Cohen. Thus, in *Pa. P.U.C. v. Metropolitan Edison Co.*, 54 Pa. P.U.C. 276, 37 PUR4th 77, 82 (1980), which grew out of the accident at TMI-2, the Commission refused to limit or revoke the authority of Metropolitan Edison Company ("MetEd") to operate the undamaged generating facility at TMI-1 and held, as follows:

^{9/} Councilman Cohen's recommendation is based upon a flawed premise. Nuclear generating facilities are granted an operating license by the NRC for an initial term of 40 years and may be relicensed for longer periods. See *Pa. P.U.C. v. Philadelphia Electric Company*, 1990 Pa. PUC LEXIS 155, 256 (May 16, 1990). Councilman Cohen's assumption that nuclear generating facilities have a useful life of only 30 years is simply wrong.

The commission is acutely aware of the substantial, continuing public debate over whether or not radiological dangers exist at Three Mile Island. This record contains many allegations concerning Met Ed's responsibility for the construction, maintenance, operation and cleanup of the Three Mile Island nuclear units. *To the extent that these allegations relate to the safety of the people of Pennsylvania, this commission is required to recognize that the federal government has completely preempted the states in the licensing and regulation of the commercial use of nuclear reactors and in the protection of the public from radiologic hazards. Northern States Power Co. v. Minnesota, (CA8th 1971) 90 P.U.R.3d 401, 447 F.2d 1143, affd mem (1972) 405 U.S. 1035. (Emphasis added.)*

Similarly, in *Re Petition of Metropolitan Edison Co. For An Order Authorizing Use Of Saxton Nuclear Decommissioning Trust Funds*, 65 Pa. P.U.C. 190, 197 (1987), the Commission rejected complainants' requests that it review and approve MetEd's plans for the decommissioning of the Saxton facility and hire an independent inspector to monitor decommissioning work. In so doing, the Commission reiterated its lack of jurisdiction in these areas:

[T]he various proposals for an independent inspector are troublesome, particularly since this Commission has no jurisdiction over the safety aspects of the Saxton decommissioning program. The federal government has occupied the field of nuclear safety via the Atomic Energy Act, thus preempting state regulation of the same subject matter. *Pacific Gas & Electric Co. v. State Energy Resource Conservation And Development Commission*, 461 U.S. 190, 212-213 (1983).

In summary, the issues Councilman Cohen seeks to interject cannot properly be presented to this Commission.^{10/} Indeed, even if the Settlement had not been achieved and this case

^{10/} For this reason, PECO did not present evidence rebutting the merits of Councilman
(continued...)

proceeded to full litigation, Councilman Cohen's nuclear issues would be outside the scope of both this proceeding and the Commission's authority and expertise.

Additionally, Councilman Cohen would have this Commission re-regulate an aspect of PECO's business -- the operation of generating facilities -- that was removed from the Commission's regulatory authority by the Electricity Generation Customer Choice and Competition Act (66 Pa. Code Chapter 28). Councilman Cohen's recommendations are contrary to both the letter and the spirit of that Act.

Finally, Councilman Cohen's claims are unrelated to any aspect of the proposed merger or corporate restructuring. Rather, they constitute a broad-based criticism of nuclear power that has no connection conceptually or factually to the relief requested by PECO or the relevant issues raised in this proceeding. The Commission is not the proper forum, and this is not the proper proceeding, in which to introduce those issues.

10/(...continued)

Cohen's claims even though it fundamentally disagrees with such claims and believes that there is abundant evidence that the studies relied upon by the Councilman and his witnesses are flawed and inaccurate and do not support the conclusions the witnesses purport to draw from them.

b. The Settlement Protects Customers From Excessive Decommissioning Costs More Effectively Than Pre-Merger Statutory And Regulatory Safeguards And, Therefore, Councilman Cohen's Criticisms Are Meritless

The Settlement institutes far-reaching protection that insulates customers from bearing any decommissioning costs for nuclear units that PECO did not own as of December 31, 1999. In addition, the Settlement provides incentives for PECO to conduct decommissioning safely and cost-effectively by requiring PECO to bear a meaningful share of any increase in the cost to decommission those units. Finally, the Settlement makes clear that the recovery of future purchased power costs will be consistent with market-based pricing principles. Like other aspects of the Settlement, the terms dealing with decommissioning expenses give customers a higher level of protection than they could have achieved under prevailing law.

Councilman Cohen wants the Commission to condition approval of PECO's Application on a "commitment" that customers "not be burdened by paying more for decommissioning expenses than they already are" (Councilman Cohen St. No. 1, p. 5). Mandating that kind of "commitment" would be tantamount to barring PECO from recovering *any* future increase in the cost of decommissioning nuclear facilities that were used and useful in providing service to customers prior to the advent of deregulation. Such a prohibition is contrary to law and beyond the PUC's authority to impose.

Section 2804(4)(iii)(F) of the Public Utility Code provides a specific exception to the statutory rate caps in order to allow utilities to recover increases in decommissioning expenses that satisfy enumerated criteria. That provision imparts a statutory right to utilities that cannot be revoked by Commission fiat. Consequently, Councilman Cohen's criticism of the Settlement's

decommissioning provisions is meritless. Rejecting the Settlement would not produce Councilman Cohen's intended result since the Commission could not grant the relief he requests under any circumstances. Moreover, rejecting the Settlement would deprive customers of the additional protection, outlined above, that is available only through a negotiated resolution of this proceeding.

Additionally, allowing the recovery of potential future increases in decommissioning costs represents sound public policy because of the need to assure proper funding for the complete and timely decommissioning of nuclear facilities. This public policy principle is well-established and has been recognized by the Commission since well before the enactment of Section 2804. *See, e.g., Pa. P.U.C. v. Philadelphia Electric Company, supra*, 1990 Pa. PUC LEXIS at 255-257 (May 16, 1990); *Pa. P.U.C. v. Pennsylvania Electric Company*, 51 Pa. P.U.C. 649, 669 (1978) (“[R]ejection of the claim [for decommissioning expense] would ignore the vital issues of health and safety which are reasonably foreseeable.”) Indeed, because of these public policy implications, the decommissioning provisions of the Settlement have received the strong support of nuclear watchdogs and environmental activists such as Mr. Epstein and the Clean Air Council.

c. PECO Made Substantial Commitments To The Philadelphia Community That Are Available Only Through The Negotiated Settlement Of This Proceeding And, Therefore, Councilman Cohen's Claims That More And Greater Commitments Should Be Mandated By The Commission Are Meritless

Under the Settlement, PECO has agreed to keep the headquarters of its distribution business in Philadelphia through at least January 1, 2008 and to maintain specified employee levels at 2301 Market Street through January 1, 2008. Additionally, PECO has agreed to maintain current levels of civic and charitable contributions through at least December 31, 2003. Taken together these provisions reaffirm PECO's strong commitment to the Philadelphia area. Significantly, these provisions have a direct and immediate impact on the City of Philadelphia, which is a strong supporter of the Settlement.

Councilman Cohen takes issue with the Settlement because he claims PECO's commitments should be far greater. Specifically, he contends that PECO should maintain the current level of jobs at 2301 Market Street "for as long as it owns the distribution system." This is akin to a requirement that both PECO's current headquarters and current employment levels remain unchanged in perpetuity. No business enterprise could make such a far-reaching commitment. Any number of factors unrelated to the proposed merger and corporate restructuring could affect employment decisions in the future. The reasonable assurance of continued employment levels and a physical presence in the City agreed to by PECO in the Settlement are clearly supportable. However, PECO should not be foreclosed for the indefinite future from appropriately addressing changes in economic conditions, the continuing evolution of the electric industry and advancements in technology that increase worker productivity and reduce costs. Yet, that is precisely what Councilman Cohen's proposal would do.

Similarly, Councilman Cohen's assertion that PECO should commit to ever increasing levels of civic and charitable giving is unrealistic and not in the long-term best interest of PECO's customers or the Philadelphia community. Over its long history, PECO has been an exemplary corporate citizen, and it has no intention of reducing its contributions of money, time and resources to the Philadelphia region. However, no business enterprise could agree to the kind of iron-clad commitment that Councilman Cohen seeks to extract.

Finally, the additional concessions that Councilman Cohen advocates are extra-statutory and not related to the proposed merger or corporate restructuring. There is no presumptive legal basis to obtain those kinds of concessions in a litigated proceeding. They could be obtained, if at all, only in a negotiated settlement. As previously noted, the City took a key role in negotiating these provisions of the Settlement, which it and all other settling parties fully support as the best outcome that could be achieved.

d. The Settlement Provides For Significant Rate Reductions, And Further Reductions Of The Magnitude Proposed By Councilman Cohen Are Unsupportable.

Councilman Cohen proposes that the Commission require PECO to implement rate reductions of 20% for three years because rate reductions of that level and duration were implemented by Commonwealth Edison ("ComEd") pursuant to Illinois' electric deregulation legislation (Councilman Cohen St. 1, p. 5).^{11/}

^{11/} Mr. Cohen's testimony departs from the position expressed in his Comments and Objections (p. 4) filed on April 12, 2000, where he called for rate reductions of "double" those provided in the Settlement and a five-year extension of the rate cap. These
(continued...)

There is no factual basis or legal justification for the Commission to impose rate reductions of the magnitude proposed by Councilman Cohen. As Councilman Cohen acknowledges, ComEd's rate reductions were implemented pursuant to the terms of Illinois' electric restructuring legislation and not in connection with the proposed merger of PECO and Unicom.^{12/} Consequently, Mr. Cohen is drawing an "apples and oranges" comparison which is improper on its face. Simply stated, there is no decision by the Illinois Commerce Commission requiring rate reductions by ComEd in connection with the proposed merger.

Furthermore, extensive, unrebutted testimony was presented by Mr. LaCapra and Dr. Silkman on behalf of the OCA and CEPA/Senator Fumo, respectively, which establishes that the rate reductions called for by the Settlement capture fully the synergy savings that could reasonably be expected from the proposed merger of PECO and Unicom. No further reductions are warranted.

e. Various Other Proposals Listed In Councilman Cohen's Comments And Objections Are Unsupported And Should Be Rejected

In his Comments and Objections (pp. 5-7), Councilman Cohen lists a grab bag of concessions he would like to obtain from PECO, which include provisions as diverse as requiring that 15% of all energy sales to the City of Philadelphia to be "Green-e" certified; requiring PECO

^{11/}(...continued)

proposals, which are inconsistent with Mr. Cohen's testimony, are also unsupported by any record evidence.

^{12/} See Section 6-111 of the Illinois Public Utilities Act (220 ILCS 5/16-111).

to pay the salaries for two attorney positions at Community Legal Services plus \$150,000 per year to fund expert witnesses in PECO regulatory proceedings; and requiring that PECO offer a special discounted tariff rate for “small start-up technology businesses” in Philadelphia.

Obviously, these proposals are far afield from the issues raised by PECO’s Application and the Settlement. Moreover, these proposals are not supported by any evidence in the record and were not even discussed in the testimony of Councilman Cohen or witnesses appearing on his behalf.

Accordingly, the miscellaneous proposals listed in Councilman Cohen’s Comments and Objections should be summarily rejected.

C. The Commission Should Adopt The Settling Parties’ Proposed Ordering Paragraphs

The parties to the Settlement are in full agreement that the proposed Ordering Paragraphs attached as Appendix “A” hereto should be adopted by the ALJ and the Commission. In addition, PECO proposes that the following additional Ordering Paragraphs should be adopted to address the issues raised by PPL and Councilman Cohen:

(1) PPL does not have a substantial, direct and immediate interest in the outcome of the issues it purports to raise and, therefore, does not have standing to object to the Settlement.

(2) Notwithstanding PPL’s lack of standing, its objections to the Settlement should be rejected on their merits because they are based upon a misunderstanding or misinterpretation of the applicable law and, contrary to PPL’s contentions, all elements of the Settlement are fully supported by substantial evidence, are in the public interest and should be approved.

(3) In accordance with Section 72 of the Joint Petition and prior decisions of this Commission, it is well established that the terms of a settlement are not precedent in subsequent proceedings, although settlements do constitute the “law of the case” with respect to the specific matters and proceedings resolved thereby.

(4) The evidentiary value to be accorded the terms of a settlement must be determined, in the first instance, by the presiding officer, subject to Commission review, based upon the facts, circumstances and particular issues of the proceeding where the settlement is offered in evidence. Consequently, PPL’s recommendation that the Commission direct that the terms of a settlement can never be relevant or material evidence in any subsequent proceeding is contrary to law and Commission procedure and, therefore, is rejected.

(5) PPL has presented no valid basis for rejecting or modifying the Settlement.

(6) As this Commission has held repeatedly in prior cases, it is “required to recognize that the federal government has completely preempted the states in the licensing and regulation of the commercial use of nuclear reactors and in the protection of the public from radiologic hazards.” (*Pa. P.U.C. v. Metropolitan Edison Co.*, 54 Pa. P.U.C. 276, 37 PUR4th 77, 82 (1980)). Accordingly, the Commission does not have jurisdiction, authority or the requisite expertise to address and decide the nuclear safety and health issues that Councilman Cohen attempted to interject in this proceeding. Additionally, Councilman Cohen’s proposals are not related to any issues properly raised in this proceeding and represent an attempt to re-regulate the

generation component of PECO's business in a manner inconsistent with the terms of the Electricity Generation Customer Choice and Competition Act ("Electric Competition Act").

(7) The Settlement contains provisions that protect customers from bearing unwarranted increases in the cost to decommission PECO's nuclear generating units and provide for PECO to bear a meaningful share of any increase in decommissioning expense related to units that were used and useful in providing service to customers under the prior regulatory regime. A prohibition against PECO recovering any future increases in nuclear decommissioning expenses is unwarranted, unsupported by record evidence and contrary to the terms of the Electric Competition Act (66 Pa.C.S. §2804(4)(iii)(F)).

(8) The settlement concessions made by PECO with regard to the location of its distribution headquarters building, levels of employment in the City of Philadelphia and levels of civic and charitable giving are available only through the negotiated settlement of this proceeding. Councilman Cohen's proposal to require larger concessions by PECO cannot be mandated by this Commission and are not a valid basis for rejecting or modifying the Settlement.

(9) The Settlement provides for rate reductions and an extension of the rate cap that are justified by, and properly reflect, the level of synergy savings reasonably expected from the merger of PECO and Unicom. Additional rate reductions and further lengthening of the rate cap, as proposed by Councilman Cohen, are not supported by the record evidence, are unwarranted and, therefore, are rejected.

(10) The miscellaneous proposals for additional concessions by PECO listed in Councilman Cohen's Comments and Objections have not been supported by any record

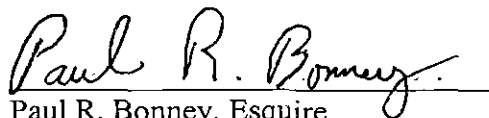
evidence, are unrelated to the relief requested by PECO herein or the relevant issues raised thereby and, therefore, are rejected. None of those proposals constitute a valid basis for the Commission to reject or modify the Settlement.

(11) Councilman Cohen has presented no valid basis for rejecting or modifying the Settlement.

III. CONCLUSION

For the reasons set forth herein and in PECO's Reply To The Objections Of PPL Electric Utilities Corporation and Councilman Cohen, the Commission should enter an Order approving the Settlement and dismissing the objections of PPL and Councilman Cohen.

Respectfully submitted,



Paul R. Bonney, Esquire
Ward L. Smith, Esquire
Kent D. Murphy, Esquire
Delia W. Stroud, Esquire
Assistant General Counsel
PECO Energy Company
2301 Market Street
P.O. Box 8699
Philadelphia, PA 19101-8699
215-841-4252 (Telephone)
215-568-3389 (Fax)
pbonney@peco-energy.com (E-mail)
Counsel for PECO Energy Company

Dated: May 17, 2000

APPENDIX "A"

Proposed Ordering Paragraphs

PROPOSED ORDERING PARAGRAPHS

Upon consideration of the record and the parties' positions and arguments in this proceeding, it is hereby found and determined that the proposed Settlement is just, reasonable and in the public interest, and the Settlement is approved without modification; THEREFORE,

IT IS ORDERED AND FOUND:

1. That, in consideration of, and reliance upon, the representations, mutual promises and undertakings of the parties to the proposed Settlement, including the express agreement of each signatory to be legally bound by its terms and the certification of the signatories that they have authority to enter into the Settlement and to act on behalf of their respective parties, the proposed Settlement set forth in the Joint Petition and its Appendices shall be and is hereby approved without modification or condition as to each of the terms and conditions (exclusive of Sections 18 and 45 and Appendices B and C, which have not been submitted for Commission approval, but which are part of the Settlement and are enforceable in accordance with their terms).

2. That the proposed corporate restructuring of PECO and merger with Unicom Corporation, as modified by the Settlement, will affirmatively promote the service, accommodation, convenience or safety of the public and are hereby approved.

3. That Certificates of Public Convenience are hereby authorized, and shall be issued with the Commission's final Order, evidencing approval under Chapter 11 of the Public Utility Code (66 Pa.C.S. §§1101 et seq.) of transactions in connection with PECO's formation of a holding company structure, PECO's corporate restructuring, and the merger of the new holding

company ("NewCo") and Unicom Corporation, including, without limitation: (1) the share exchange between PECO and its proposed holding company (NewCo) and any associated changes in control; and (2) the transfer of used and useful utility property from PECO to NewCo and to any existing or newly created corporate affiliates, including GenCo, recognizing that PECO's transfer of generation assets, liabilities and power contracts was previously approved by the Commission in its Order entered May 14, 1998 at Docket No. R-00973953.

4. That, upon consideration of the factors set forth in Sections 2210 and 2811(e) of the Public Utility Code (66 Pa.C.S. §§ 2210 and 2811(e)) and the concessions agreed to in the Settlement, PECO's corporate restructuring and the merger of PECO with Unicom Corporation will not result in any anticompetitive or discriminatory conduct, including the unlawful exercise of market power, which will prevent either electric or gas customers in this Commonwealth from obtaining the benefits of properly functioning and workable competitive retail electric and natural gas markets.

5. That PECO's assignment of debt obligations to a corporate affiliate as part of the transfer of property that will effect PECO's proposed corporate restructuring does not constitute the issuance or assumption of securities and, therefore, does not trigger the requirements of Chapter 19 of the Public Utility Code (66 Pa.C.S. §§1901 et seq.).

6. That the contracts between PECO and affiliated interests submitted for approval under Chapter 21 of the Public Utility Code (66 Pa.C.S. §§ 2101 et seq.), forms of which were provided as Exhibits H-1, H-2, H-3, P and Q to the Application, are hereby approved to the extent such approval is required.

7. That the findings required under Section 32(c) of the Public Utility Holding Company Act ("PUHCA") (15 U.S.C. § 793-5a(c)) for the GenCo to be eligible for Exempt

Wholesale Generator (“EWG”) status are hereby made, namely, that PECO’s transfer of generating assets, liabilities and power contracts to a newly formed corporate affiliate GenCo (1) will benefit customers, (2) is in the public interest, and (3) does not violate Pennsylvania law.

8. That the findings required under Section 32(k) of the Public Utility Holding Company Act (“PUHCA”) (15 U.S.C. § 793-5a(k)) with respect to purchases of power from GenCo, as governed by the Competitive Safeguards set forth in Appendix G to PECO’s 1998 Electric Restructuring Settlement, are hereby made, namely, that (1) the Commission possesses sufficient regulatory authority, resources and access to books and records of PECO and any relevant associate, affiliate or subsidiary company to exercise its duties under Section 32(k), and (2) the purchase by PECO of energy and capacity from an affiliated EWG GenCo will benefit customers, does not violate Pennsylvania law, would not provide the EWG GenCo an unfair competitive advantage, and is in the public interest.

9. That PECO shall file on one day’s notice tariff supplements in the forms attached as Appendices A and D to the Joint Petition for Settlement revising PECO’s current Distribution Tariff and Supplier Coordination Tariffs, respectively.

10. That the Agreement between PECO and the National Railroad Passenger Corporation (“Amtrak”) granting Amtrak an option to execute a lump-sum buy-out of its Transition Charges, as set forth in Appendix F to the Joint Petition for Settlement, is hereby approved.

11. That the rights and options granted to the City of Philadelphia under its existing Rule 4.6 Contract between the City and PECO, as set forth in Appendix G to the Joint Petition for Settlement, are hereby approved.

12. That the Joint Petition Regarding Issues Raised by Wallace Township and East

Brandywine Township is hereby approved without modification.

13. That, except as expressly modified by the terms of the Joint Petition for Settlement, the terms and conditions of PECO's 1998 Electric Restructuring Settlement, approved by the Commission's Order of May 14, 1998 at R-00973953, remain in full force and effect.

14. That all other approvals necessary for the proposed PECO corporate restructuring and merger with Unicom, including but not limited to those granted in Ordering Paragraphs numbers 1-12, are hereby granted.

15. That the Commission's proceeding at Docket No. A-1100550F0147 be terminated and the docket marked closed.



Certificate of Service

I hereby certify that I have this day served the foregoing document on the following in the matter of PECO Energy Company's Application 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; by hand deliver, fax, email and first class mail:

John Hanger
212 Locust Court, Suite 410
Harrisburg, PA 17101
email: hanger@pennfuture.org
(Counsel for Citizens for Pennsylvania's Future)

Peter Meadows Adels
Charles McPhedran
117 South 17th St., Suite 1801
Philadelphia, PA 19103
email: meadowsadels@pennfuture.org
(Counsel for Citizens for Pennsylvania's Future)

Christopher B. Craig
Senate Democratic Appropriations Committee
Room 545, Main Capitol Building
Harrisburg, PA 17120
email: ccraig@dem.pasen.gov
(Counsel for Senator Fumo)

Eric Epstein
4100 Hillside Road
Harrisburg, PA 17112
email: eepstein@jgc.apc.org
(Pro Se)

Paul R. Forshay
Sutherland Asbill & Brennan LLP
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2415
email: pforshay@sablaw.com
(Counsel for Shell Energy Services Company, L.L.C.)

Amy Gold
Shell Energy Services Co., L.L.C.
P.O. Box 4402
Houston, TX 77210
(Counsel for Shell Energy Services Company, L.L.C.)

Charis M. Burak
McNees, Wallace & Nurick
100 Pine Street
Harrisburg, PA 17108
email: cburak@mwn.com
(Counsel for Philadelphia Area Industrial Energy Users Group & Counsel to the Industrial Energy Consumers of Pennsylvania)

David M. Kleppinger
McNees, Wallace & Nurick
100 Pine Street
Harrisburg, PA 17108
email: dkleppin@mwm.com
(Counsel for Philadelphia Area Industrial Energy Users Group & Counsel to the Industrial Energy Consumers of Pennsylvania)

Paul E. Russell
PP&L, Inc.
Two North Ninth Street
Allentown, PA 18101
email: perussell@papl.com
(Counsel for PP&L)

Donald A. Kaplan
Leanne M. Bober
Preston Gates Ellis & Rouvelas Meeds LLP
Suite 500
1735 New York Ave., NW
Washington, DC 20006
email: donk@prestongates.com
(Counsel for PP&L)

Gerald Gornish
Wolf, Block, Schorr and Solis-Cohen LLP
1650 Arch Street - 22nd Fl.
Philadelphia, PA 19103
email: ggornish@wolfblock.com
(Counsel for Enron Energy Services, Inc.)

Daniel Clearfield, Esquire
Kevin Moody, Esquire
Wolf, Block, Schorr and Solis-Cohen LLP
1650 Arch Street - 22nd Fl.
Philadelphia, PA 19103
email: dclearfield@wolfblock.com
kmoody@wolfblock.com
(Counsel for Enron Energy Services, Inc.)

John Halsted, Esquire
Gawthrop, Greenwood & Halsted
119 North High Street
West Chester, PA 19381
email: gghlaw@gawthrop.com
(Counsel for East Brandywine Township)

Bernie Ryan
Office of Small Business Advocate
Suite 1102, Commerce Bldg.
300 North Second Street
Harrisburg, PA 17101
(Counsel for Small Business Advocate)

Tanya McCloskey/ Irwin A. Popowsky, Esquire
Office of Consumer Advocate
555 Walnut Street
Forum Place, 5th Floor
Harrisburg, PA 17101
email paoca@ptd.net
(Counsel for Office of Consumer Advocate)

Craig A. Doll, Esquire
214 State Street
Harrisburg, PA 17101-1108
email: cdoll76342@aol.com
(Counsel for Conectiv Energy)

Joseph Otis Minott, Esquire
135 South 19th Street- Suite 300
Philadelphia, PA 19103
email: joe_minott@cleanair.org
(Counsel for Clean Air Council)

Thomas Schmidt, III, Esquire/
Brian P. Downey, Esquire
Pepper Hamilton LLP
200 One Keystone Plaza
North Front and Market Streets
Harrisburg, PA 17108
email: downeyb@pepperlaw.com
(Counsel for Amtrak)

Kenneth M. Barna, Esquire
Wayne R. Frigard, Esquire
Rubin and Rudman LLP
50 Rowes Wharf
Boston, MA 02110
email: wfrigard@rubinrudman.com
(Counsel for Amtrak)

Phil Bertocci, Esquire
Community Legal Services, Inc.
1424 Chestnut Street, 4th Fl.
Philadelphia, PA 19102
email: pbertocci@clsphila.org
(Counsel for CEPA, et al.)

Joe Dworetzky, Esquire/Matthew Hamermesh, Esquire
Hangley Aronchick Segal & Pudlin
One Logan Square - 27th Fl.
Philadelphia, PA 19103
email: jad@hangley.com
mah@hangley.com
(Counsel for Mid-Atlantic Power Supply)

John L. Munsch, Esquire
Deborah J. Henry, Esquire
Allegheny Power
800 Cabin Hill Drive
Greensburg, PA 15601-1689
email: jmunsch@alleghenyenergy.com
dhenry1@alleghenyenergy.com
(Counsel for Allegheny Power)

Kenneth L. Mickens, Esquire
Pennsylvania Public Utility Commission
Office of Trial Staff
901 North 7th Street, 3rd Fl.
Harrisburg, PA 17102
email: mickens@puc.state.pa.us
(Counsel for Office of Trial Staff)

Robert Jaffe, Esq.
City Hall - Room 588
Philadelphia, PA 19107
email: lagranger@aol.com
(counsel of Councilman David Cohen)

Christopher J. Townsend, Esq.
Piper Marbury Rudnick & Wolfe
203 N. LaSalle St, #1500
Chicago, IL 60601
email: chris.townsend@piperrudnick.com

Michael Fiorentino, Esquire
105 North Front Street; Suite 106
Harrisburg, PA 17101
email: mfioren@paonline.com
(Counsel for Clean Air Council)

John Will Ongman
Marc Machlin
Pepper Hamilton LLP
600 Fourteenth St., NW
Washington, DC 20005
email: ongmanj@pepperlaw.com
machlinm@pepperlaw.com
(Counsel for Amtrak)

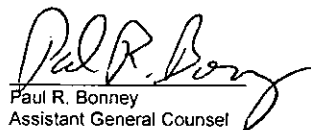
Patricia J. Clark, Esquire
Norbert J. Smith, Esquire
Allegheny Energy Supply Company, LLC
Roseytown
RR 12, Box 1000
Greensburg, PA 15601
email: pclark@alleghenyenergy.com
nsmith2@alleghenyenergy.com
(Counsel for Allegheny Energy)

Patricia McNamara
6048 Ogontz Avenue
Philadelphia, PA 19141
email: cepa1966@aol.com

John Hall, Esquire
Unruh, Turner, Burke & Frees
17 West Gay Street
West Chester, PA 19381
email: jhall@utbf.com
(Counsel for Wallace Township)

Greg Pastore
619 Pemberton Street
Philadelphia, PA 19147
email: gregpastore@yahoo.com

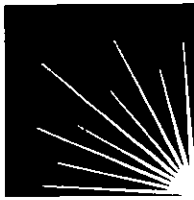
Carville B. Collins, Esq.
Piper Marbury Rudnick & Wolfe
6225 Smith Ave
Baltimore, MD 21209-3600
email: carville.collins@piperrudnick.com



Paul R. Bonney
Assistant General Counsel
PECO Energy Company
2301 Market Street, S23-1
Philadelphia, PA 19103
(215) 841-4252

Dated: May 17, 2000

Clean Air Council



May 17, 2000

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

Philadelphia
135 South 19th Street
Suite 300
Philadelphia, PA 19103
215-567-4004
Fax 215-567-5791
E-Mail members@cleanair.org
www.cleanair.org

Harrisburg
105 N. Front St.
Suite 106
Harrisburg, PA 17101
717-230-8807
Fax 717-230-8808

Wilmington
Community Service Building
100 W. 10th St.
Suite 704
Wilmington, DE 19801
302-691-0112 ext. 226

**RE: Application of PECO Energy Company
Docket No.: A-110550F0147**

Dear Mr. McNulty:

Enclosed for filing please find an original and nine (9) copies of the Main Brief of Clean Air Council, et al, in the above-referenced proceeding.

Copies of this document has been served on the parties of record as required by rule and as shown on the attached certificate of service.

Sincerely,

Michael Fiorentino, Esq.
Staff Attorney

Enclosures

cc: Honorable Charles E. Rainey, Jr.
See Certificate of Service

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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-110550F0147

DOCKETED
MAY 18 2000

MAIN BRIEF
OF
CLEAN AIR COUNCIL
Regarding
the Joint Petition for Settlement

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Attorney for Clean Air Council:

Michael Fiorentino
105 N. Front St.
Suite 106
Harrisburg, PA 17101
(P) (717)-230-8806
(F) (717)-230-8808
mfioren@cleanair.org

May 17, 2000

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B. The Joint Petition is consistent with applicable law and public policy and should be approved by the Commission without modification.

C. PPL's speculative concern about precedential effect in a future non-existent proceeding does not provide grounds upon which to deny the Joint Petition for Settlement.

D. PPL has not established any legally cognizable interest from which to challenge any provision of the Joint Petition for Settlement.

E. The issues raised by Councilman Cohen do not prevent the Commission from finding that the Joint Petition is in the public interest.

V. Conclusion

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I. Statement of the Case

Procedural History

On November 22, 1999, PECO Energy Co. ("PECO") filed with the Pennsylvania Public Utility Commission ("PUC") its Application for Restructuring and Merger with Unicom Corporation. On December 20, 1999, Clean Air Council, et al, filed a Protest and Petition to Intervene. Twenty-two additional parties intervened in this matter, and the Office of Trial Staff also entered its appearance.

At a Prehearing Conference before Administrative Law Judge Charles E. Rainey, Jr., on January 20, 2000, all parties were granted formal intervenor status. Extensive formal and informal discovery took place both prior to and subsequent to the Prehearing Conference. March 1-2, 2000, were set aside by Judge Rainey for Settlement Negotiations. On January 25, 2000, PECO filed a Petition to Certify the Record. Clean Air Council, Consumers Education and Protective Association ("CEPA"), the Association of Community Organizations for Reform Now ("ACORN"), Action Alliance of Senior Citizens of Greater Philadelphia ("Action Alliance"), Tenants Action Group ("TAG") CEPA and Pennfuture opposed the Petition. The Commission denied PECO's Petition on March 2, 2000.

Following several weeks of negotiations, PECO and nearly all the intervenors had reached an agreement. On March 23, 2000, the parties filed a Joint Petition for Settlement. PPL, Councilman Cohen and a number of parties which had not participated actively in the litigation or the negotiations did not sign on to the Joint Petition. Most of these parties indicated they would neither support nor oppose the settlement. PPL and Councilman Cohen, however, filed Objections to the Joint Petition on April 12, 2000, and requested that evidentiary hearings be held. On April 18, 2000, the Clean Air Council Replied to the Objections, as did most of the signatory parties.

Pursuant to Judge Rainey's Prehearing Order #2 of April 25, 2000, parties filed direct

testimony in support or opposition to the Joint Petition by May 3, 2000. The Council submitted the expert testimony of Andrew Altman on that date.

Also on May 3, 2000, PECO filed a second Petition to Certify the Record, citing the changed circumstances in the case, specifically the Joint Petition for Settlement. Clean Air Council and most other parties, including PPL, notified the Commission of non-opposition or support for the May 3 Petition. To the best of the Council's knowledge, Councilman Cohen was the only party to oppose it.

On May 10, 2000, Judge Rainey convened an evidentiary hearing to receive into evidence testimony submitted throughout the case as well as exhibits and support statements for the Joint Petition. Additional oral testimony was provided at the hearing on behalf of Councilman Cohen by Dr. E.J. Sternglass and the Councilman himself, and by Eric Epstein on his own behalf. On Motion by PECO, the Record was Closed at the conclusion of the Hearing.

On May 12, 2000, this Commission entered an Order denying PECO's Petition, and thus *continuing to require the issuance of an initial Recommended Decision from the Honorable Administrative Law Judge Charles E. Rainey, Jr.*

Factual History:

On November 22, 1999, PECO filed its Application requesting the PUC to authorize: 1) the formation of a new holding company and the transfer of certain assets and facilities from PECO to this newly established corporate entity, and 2) the merger of the newly founded holding company with Unicom Corporation. The Application and supporting testimony described the manner in which this merger and restructuring would be accomplished. In its Application, PECO offered adoption of "best practices" which PECO believed would improve service and reliability and business synergies to create merger savings which would forestall potential future rate

increases. Such savings and improvements were not quantified or assured in any way in the original Application. Intervenors in this action have sought to guarantee that the improvements and savings would be passed on to ratepayers.

The original Application included no provisions for environmental improvements. Clean Air Council and Pennfuture successfully negotiated for provisions which would advance clean energy in Pennsylvania and spark competition by creating greater interest in shopping. As a consequence of improved opportunities for consumers to obtain clean power, incremental improvements in environmental quality are expected. The environmental provisions of the Joint Petition provide roughly \$24 million in new funding which is distributed to projects in the following manner: \$12 million to the Sustainable Development Fund (SDF) for wind power generation projects; \$4 million to the SDF to fund a minimum of 450 roof-top solar photovoltaic installations; \$2.5 million to the SDF to fund renewable energy education; and roughly \$2 million more to the SDF generally as a result of a front-loading of PECO's existing obligation from the 1998 Restructuring Settlement and the extension of the distribution rate cap. \$3.5 million is provided for a wind-block marketing program. As an additional result of Clean Air Council and Pennfuture's negotiations with PECO, the Joint Petition contains changes to Rate RS tariff and interconnection rules which make net metering more economically viable, encouraging environmentally advantageous self-generation.

The Joint Petition contains substantial consumer benefits in the form of rate reductions and a rate cap extension. The rate reduction of some \$200 million over five years will apply to all customer classes and is greater than the regulated-side savings estimated by PECO to be achieved by the merger and restructuring. PECO has also agreed to extend by eighteen (18) months the rate cap on transmission and distribution charges established in the Restructuring Settlement of 1998.

Another significant consumer benefit pertains to nuclear decommissioning. In the Joint Petition, PECO has agreed to absorb the first \$50 million of any cost-overruns from current

decommissioning funding for its nuclear facilities which were in rate base in 1999, as well as 5% of decommissioning funding needs above that \$50 million. PECO has also promised to not seek funding for decommissioning or other needs associated with nuclear facilities it acquires through its joint venture with British Energy, Amergen, or by virtue of merger with Unicom, or any other means of acquisition.

Procedures to ensure that reliability is maintained and improved have been established in a Quality of Service Plan set forth in the Joint Petition. Improvements to Customer Service have also been agreed upon in that Plan, and specific compliance targets are included. Among several improvements to Universal Service is an increase in the number of eligible participants in the Customer Assistance Program from 100,000 to 125,000.

A further improvement from PECO's original Application relates to the availability of installed capacity ("ICAP"). Competition has been hindered by marketers' inability to acquire the necessary quantities of ICAP at reasonable terms to enable them to enter contractual arrangements with customers. PECO has agreed to make specified quantities of ICAP available to EGSs. Competition also benefits from PECO's agreements concerning release of customer historical billing data, customer load profiles, forbearance of provider of last resort (PLR) marketing activities and improvements to the upcoming competitive default supplier (CDS) process.

Despite the good faith negotiation process, PPL and Councilman Cohen both have opposed the Joint Petition, albeit for very different reasons. Essentially, PPL argues it would be harmed by approval of the Joint Petition because its terms could be treated as precedent in a future case involving PPL. The basic contentions of Councilman Cohen are that this merger is risky from a nuclear safety perspective and that the intended rate reductions are too low.

II. Issues Presented

1. Whether PECO Energy's Application for Merger and Restructuring, as modified by the Joint Petition for Settlement, should be approved by the Commission.
 - (a) Whether the Application and Joint Petition, taken together, affirmatively promote the service, accommodation, convenience, or safety of the public.
 - (b) Whether the Joint Petition is consistent with applicable law and public policy.
2. Whether a request to strike down a settlement may be based on a speculative concern about precedential effect in a future non-existent proceeding.
3. Whether PPL has a legally cognizable interest from which to challenge any provision of the Joint Petition for Settlement.
4. Whether issues raised by Councilman Cohen prevent a finding that the Joint Petition is in the public interest.

III. Summary of Argument

The Application of PECO Energy, as amended by the commitments made in the Joint Petition for Settlement, affirmatively promotes the public interest and should be approved by the Commission.

The modified Application improves rates, market openness, environmental benefits, universal service, interconnection rules, nuclear decommissioning funding and nuclear safety. With the exception of Councilman Cohen, all active intervenors with cognizable interests in the substance of the settlement agree that the Joint Petition is in the public interest or have chosen not to oppose it. These intervenors represent a broad spectrum of societal interests and their agreement should be accorded considerable weight. Alterations of the Joint Petition could result in the withdrawal of a party or parties from the Settlement, ongoing litigation and the further delay of the commencement of the benefits contained within the Joint Petition. Therefore, the public interest is best served by an Approval of the Joint Petition for Settlement without modification.

PPL's Objection to the Joint Petition is not based on any legitimate claim that its interests are directly harmed by the substance of the Settlement. PPL asserts no cognizable interest and submits no testimony that challenges the overwhelming evidence that the Joint Petition is in the public interest. PPL merely makes the baseless argument that its potential future actions may be somehow adversely affected, not by the outcome of this case, but rather by its alleged precedential impact. PPL cites no authority to support this claim. Indeed, such a claim is contrary to established interpretations of the effects of settlements before the PUC, and contrary to the express language of the Settlement itself. With no evidence to demonstrate how the Joint Petition fails the public interest test, PPL offers no basis upon which it could be entitled to relief. Furthermore, the conditional approval which addresses PPL's precedential concerns must also be rejected because it has no basis in law or fact and impermissibly impinges upon the constitutional

due process and free speech rights of other parties to this proceeding and to as yet unidentified members of the public who would be restricted by PPL's requested relief.

Without challenging Councilman Cohen's concerns regarding the safety of nuclear power, the Clean Air Council believes that a finding that the Merger and Restructuring are in the public interest is justified. This proceeding before the PUC is not the appropriate forum to argue against re-licensure. Furthermore, the Joint Petition contains sufficient protections against ratepayer liability for decommissioning of non-PECO rate base nuclear facilities and decommissioning cost overruns.

Many of the Joint Petitioners have argued that the Joint Petition itself, the statements filed in support thereof, and testimony offered at public input hearings comprise substantial evidence that this settlement is in the public interest. There is now unimpeached expert testimony from more than a dozen witnesses who vigorously maintain the Joint Petition with its numerous consumer-friendly provisions serves the public interest. The environmental provisions are also supported as public interest driven by several experts, including PECO's Tom Hill and OCA's Richard LaCapra.

In sum, this evidence compels a finding that the Joint Petition is supportable by the law and Commission policy and that it be approved without modification.

IV. Argument

A. PECO Energy's Application for Merger and Restructuring, as modified by the Joint Petition for Settlement, should be approved by the Commission because together they affirmatively promote the service, accommodation, convenience or safety of the public.

The standard by which an Application for issuance of certificates of public convenience must be judged is set forth both in the Pennsylvania Statutes and in controlling case law.

The Public Utility Code identifies the legal standard applicable to approval of the proposed merger. A certificate of public convenience should only be issued if the proposed merger is "necessary or proper for the service, accommodation, convenience, or safety of the public." 66 Pa. C.S. §1103(a). The Pennsylvania Supreme Court has interpreted the "necessary or proper" clause of §1103(a) to mean more than an absence of an adverse effect on the public. To meet the standard, an Applicant 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 PUC, 449 Pa. 136, 141, 295 A.2d 825, 828 (1972). It is believed that this appropriate legal standard is met where the concerns of the full spectrum of intervening interest have been reasonably addressed by the Joint Petition.

The affirmative promotion of service, accommodation, convenience or safety of the public is certainly met by the numerous provisions of the Joint Petition addressing customer rates, *environmental benefits, service quality, competitiveness, and nuclear financial liability.*

The public interest profile of this settlement is significantly enhanced by its environmental, net metering and interconnection provisions. These provisions primarily benefit Pennsylvanians in two ways: by leading to a cleaner environment and by fostering a more competitive market for retail electric service. Clean Air Council believes these two benefits are

inextricably entwined in Pennsylvania's energy future.

The Council submitted the testimony of Andrew Altman, its Deputy Director since 1992, who has been closely involved with most aspects of electric restructuring in Pennsylvania since 1996. In addressing the wind energy funding contained in the settlement (Joint Petition, ¶s #38 at p.22-23 and #41 at p. 25), Mr. Altman described wind power as an "environmentally benign energy resource which is renewable and largely untapped in Pennsylvania." Mr. Altman noted that "Pennsylvanians are greatly in need of relief from health-threatening air pollution," and referenced nitrogen oxides, sulfur dioxide and mercury specifically. These pollutants are released in substantial quantities from coal-fired power plants, which account for large percentages of the pollutants' statewide totals.

"Since coal-fired power production is a major source of such pollution it follows that wind generation displacing a more polluting source of energy will benefit the public health."

(CAC Exh-2, Altman, p. 3, ll. 9-27) The financial commitments to wind power in this Joint Petition will enable the building of wind turbines with a capacity of 30 mW. (Rohrbach, p. 9, ll. 8-11) These wind turbines will provide:

"Sufficient renewable power for 7,500 homes each year, and will remove 51,000 tons of carbon dioxide from the air, reducing global warming. This is the equivalent of planting 7.2 million trees or not driving 126 million miles."

(Rohrbach, p. 9, ll. 11-14) The wind power commitments also achieve an impressive amount of emissions reductions from air pollutants which have direct health impacts, such as nitrogen oxide (NO_x) and sulfur dioxide (SO_x). In Pennsylvania,

"(A) single wind turbine (1.3 mW) would prevent the emissions of as much as 6,720 pounds of NO_x annually, and as much as 30,235 pounds of SO_x annually."

(CAC Exh-2, Altman, p. 8, ll. 21-28)

Mr. Altman also addressed the solar photovoltaic (“PV”) provision of the Joint Petition which calls for funding the purchase and installation of 450 rooftop units over a four year period. (Joint Petition, ¶ #39 at pp. 23-24). Describing PV as an “environmentally benign renewable energy resource which continues to become more efficient and more affordable,” Mr. Altman identified its public benefits as displacement of air pollution from centralized power plants and a tendency to reduce demand on those plants at peak times. (CAC Exh-2, Altman, p. 7, li. 1-16)

Richard LaCapra, a renowned electric power and regulatory expert from Boston, testified on behalf of OCA and characterized the environmental, net metering and interconnection provisions as likely to improve competition in PECO service territory.

“The Settlement contains provisions intended to facilitate the interconnection of distributed and renewable energy sources. Among other things, these provisions seem likely to enhance the range of choice in generation supplies for customers.”

(LaCapra, p. 15, li.1-6) The expansion of that range of choice will improve the environmental characteristics of electric power in Pennsylvania even beyond the amount of renewable resources directly enabled by the Settlement funding. A climate of marketplace openness would attract new investors resulting in dirtier old facilities being replaced by cleaner, modern ones.

Through the settlement (Joint Petition, ¶ #39 at pp. 23-24), PECO will enable electric customers to obtain wind-blocks to meet portions of their electrical need. PECO’s contracting for such an environmentally beneficial program would ordinarily be entitled to some presumption that it is in the public interest. That is particularly true where the program serves to expand retail market choices and is already demonstrated as viable. The Community Energy program offers specified amounts of kilowatt hours of wind power for a monthly premium to willing participants.

“The program finances new renewables through the market, using

market forces to pay the higher costs of wind power and produce new wind resources in direct proportion to market demand.”

(CAC Exh-2, Altman, p. 4, ll. 24-28)

Another important way in which the Settlement would expand electric generation options is by further developing the demand for new renewables and cleaner power through funding for a needed program of renewables education.

“Most Pennsylvanians do not have a good understanding of where their electricity comes from. The efforts at consumer education in the era of deregulation have provided the public with very little information regarding the environmental factors which may affect personal decisions about retail electric choice.”

(CAC Exh-2, Altman, p. 6, ll. 20-26) This provision is consistent with the Commission’s recognition of consumer education as a priority in the transition from a regulated electric power system.

As required by the terms of the Joint Petition, the funding for these programs will be accounted for to the PUC, OCA and PECO through semi-annual reports.

The merger of PECO and Unicom involves the transfer of their massive generating assets into a new holding company. The manner in which these assets are transferred and the effect this combining of generation will have on the marketplace is in issue in this proceeding. It is therefore relevant and appropriate for renewable forms of generation to be addressed in the Joint Petition. The Commission is on record as supporting the encouragement of clean energy technology as consistent with the intent of the Electricity Generation Customer Choice and Competition Act.

Although the Council will not address at any length the non-environmental provisions of the settlement, the nuclear issues warrant brief discussion because they have been directly raised

in the Objections and testimony sponsored by Councilman Cohen. The financial risks associated with PECO's expanding nuclear generation fleet can be mitigated, according to Mr. LaCapra, and the settlement contains improvements in this area. (LaCapra, p. 10, ll. 38-42) Mr. Rohrbach also had concerns regarding nuclear acquisitions, but the settlement "firmly insulates" PECO ratepayers from decommissioning costs of those facilities. (Rohrbach, p. 13, ll.20-22) On the issue of decommissioning for the pre-existing PECO plants, the settlement contains a concession of fifty million and more by PECO.

"The settlement protects future generations from bearing the risk that nuclear decommissioning costs obligations will (*sic*) be inappropriately foisted on (them) (*sic*) due to cost escalations that are unforeseen today."

(Rohrbach, p. 13, ll.26-28)

B. The Joint Petition is consistent with applicable law and public policy and should be approved by the Commission without modification.

The law is generally satisfied when complex legal matters are resolved by settlement. The Joint Petition represents the best compromise possible among a diverse group of parties. Good public policy favors settlement. Indeed, a Policy Statement of the Commission indicates as much:

In the Commission's judgment, the results achieved from a negotiated settlement or stipulation, or both, in which the interested parties have had an opportunity to participate are often preferable to those achieved at the conclusion of a fully litigated proceeding.

52 Pa. Code 69.401. This agreement in particular serves public policy effectively because it re-shapes a major corporate transformation which initially offered very little to the public good into a proposal for substantial improvements to the relationship PECO has with its customers and

host communities.

Clean Air Council submits that the environmental provisions are consistent with applicable law and policy. This is demonstrated by the Commission's policy on Sustainable Energy as found in the Joint Motion of Chairman Quain and Commissioner Brownell, May-1999-C-7 (May 21, 1999) issued in the dockets R-0097353, R-00973981, R-00974008, and R-00974009, Electric Distribution Companies Sustainable Energy Funds. The Motion stated that the establishing of the Funds reinforced Pennsylvania's commitment to a greener environment and that cooperation between the boards of the Funds could make Pennsylvania a national leader in renewable technologies.

C. PPL's speculative concern about precedential effect in a future non-existent proceeding does not provide grounds upon which to deny the Joint Petition for Settlement.

PPL places itself in the ironic position of arguing that the approval of this settlement will deter future settlement processes, when in fact it is PPL's very act of Objecting to the Settlement which creates such a deterrent. PECO and the intervenors entered into the negotiations in good faith, investing substantial resources in the settlement process. Parties made concessions on their positions in order to reach resolution more quickly and avoid the extensive resources required in litigation. Because of PPL's actions, the savings in both time and resources have been nearly extinguished. The very real consequence of PPL's obstruction on future complex proceedings is to inhibit future settlement attempts. Any entity with even a tenuous claim to intervenor status could disrupt a settlement and deprive the real parties in interest of the aforementioned benefits of settlement, and thereby encourage continued litigation. As a matter of policy, the Commission encourages settlement rather than litigation, particularly in complex cases. Therefore, the outcome PPL will achieve by its obstruction is not in the public interest.

The argument PPL advances through Paul Gioia is strained. Mr. Gioia states:

"(I)t is important that parties feel free to accept a settlement agreement, including some terms with which they might not agree, with the assurance that their acceptance of those terms will not be cited as precedent, or be introduced as evidence, in a subsequent proceeding."

(Gioia, p. 5, II.9-13) The underlying assumption of this statement is flawed. PPL's acceptance of terms is not required in this instance. Like several other intervenors, PPL could have chosen to stand aside and neither support nor oppose the settlement. Indeed, with little identifiable interest in this proceeding, PPL could have decided not to intervene at all and avoided the need to justify an inconsistent company stand in some future proceeding.

PPL implies that a mere reference to a settlement provision approved in a prior case before the Public Utility Commission would spellbind the PUC into applying it in a subsequent matter, without regard to the independent merits. PPL accords surprisingly little faith in the wisdom and deliberative processes of the Commission. Clearly, settlements do not constitute precedent, and the Commission follows the law and its own policy in this regard. Furthermore, the Joint Petition itself reaffirms this approach, as it contains a provision specifically declaring that Settlement items cannot be cited as controlling precedent. Nevertheless, to prevent parties from even referencing a settlement provision, as PPL requests, is incompatible with the constructs of due process and free speech. It is not hard to imagine how under PPL's view, a party with a useful or innovative concept for advancing the public interest could be denied the ability to promote that concept in the future because of the sheer misfortune that it was adopted in a previous matter. PPL's request for additional conditions to the Joint Petition concerning precedent should therefore be fully rejected.

D. PPL has not established any legally cognizable interest from which to challenge any provision of the Joint Petition for Settlement.

PPL lacks the requisite substantial, direct or immediate interest in the provisions of the

Joint Petition for standing under William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). PPL is neither a ratepayer nor does it allege any immediate harm. PPL does not maintain in its testimony or in Objections to the Joint Petition any interest of its own, relevant to this proceeding, which will be affected by any provision of the settlement. Consequently, PPL should not be permitted to challenge any provision thereof. Organizations and entities who have fought over many years in many different venues for public interest concerns should be the rightful arbiters of the public interest value of this settlement package. PPL is simply not a stakeholder empowered in this process to argue what is in the public interest.

E. The issues raised by Councilman Cohen do not prevent the Commission from finding that the Joint Petition is in the public interest.

Councilman Cohen stands alone among the public interest and consumer parties in his opposition to the Joint Petition. The public interest parties include OCA, the Office of Small Business Advocate (“OSBA”), CEPA, ACORN, Action Alliance, TAG, Clean Air Council, three individuals represented by Clean Air Council, Pennfuture, ten individuals represented by Pennfuture, Eric Epstein, and Patricia McNamara.

Councilman Cohen’s Objections and testimony that nuclear power is a safety risk does not provide a basis upon which the Commission may decide against the Settlement. The merger will not change the fact that PECO derives the great majority of its electricity from nuclear power plants. Likewise, the Councilman’s concerns about jobs in the City of Philadelphia cannot be addressed here by the Commission. Compelling PECO to maintain a certain number of employees at a certain location for a certain period of time does not appear to be an action the Commission could strictly require in this case. Nevertheless, despite the fact that the Councilman finds the commitments inadequate, the Joint Petitioners were able to establish commitments from PECO in these areas through the settlement negotiations.

Councilman Cohen seeks substantially deeper rate reductions than those contained in the settlement. Although PECO continues to maintain rates higher than the national average, the Commission is only in the position to see that this Merger and Restructuring is in the public interest, not to roll-back PECO's rates on a scale which is unrelated to the actions *sub judice*. Clean Air Council is concerned that without this Joint Petition for settlement, rate relief provided through full litigation could be substantially less. The relief requested by the well-intentioned Councilman should be denied.

V. Conclusion

“Major components of the settlement bear mention. Consumers will enjoy \$200 million in rate reductions over five years across all customer classes. Additionally, the first \$50 million in excess costs for nuclear decommissioning will be borne by shareholders under this agreement, rather than by ratepayers. This is a tangible benefit, since historically decommissioning funding needs have been underestimated...The Council believes that these environmental commitments will lead to a cleaner energy future for Pennsylvania, an outcome which will provide better air quality for healthier lives. This is undoubtedly in the public interest.”

(CAC Exh. 1, p. 2, Support Statement)

The Joint Petition for Settlement represents the hard work of a cross-section of the affected interests in Southeastern Pennsylvania and is an acceptable framework for maintaining and improving public benefits associated with electric service in the face of corporate merger and restructuring. Clean Air Council respectfully requests, for the reasons stated in this document, that the Joint Petition for Settlement be approved without modification.

Respectfully submitted,



Michael Fiorentino, Esquire
Atty. ID# 73576
Counsel for Protestants and Petitioners
Clean Air Council
105 N. Front St.
Suite 106
Harrisburg, PA 17101

Joseph Otis Minott, Esquire
Atty. ID# 36463
Counsel for Protestants and Petitioners
Clean Air Council
135 S.19th St.
Suite 300
Philadelphia, PA 19103

Dated: May 17, 2000

APPENDIX A:

Proposed Findings of Fact:

1. Power plants account for 29% of Nitrogen Oxide (NOx) emissions nationally. (CAC Exh-2, Altman, p. 3, ll. 17-18)
2. NOx is a precursor to ozone smog, a pollutant harmful to the human respiratory system. NOx also contributes to acid rain. (CAC Exh-2, Altman, p. 3, ll. 20-21)
3. Power plants account for 66% of Sulfur dioxide (SO2) emissions nationally. (CAC Exh-2, Altman, p. 3, ll. 17-18)
4. Sulfur Dioxide is the main cause of emissions of acid rain. (CAC Exh-2, Altman, p. 3, l. 21)
5. Fossil-fuel fired electric power production has a negative environmental impact.
6. Each 1.3 mW wind turbine erected in Pennsylvania will avoid 6,720 pounds of NOx annually, and as much as 30,235 pounds of SOx annually. (CAC Exh-2, Altman, p. 8, ll. 24-28)
7. Wind and solar power are environmentally benign forms of electric power production. (CAC Exh-2, Altman, p. 3, l. 12; p. 7, l. 4)
8. Electric choice includes the opportunity to choose an environmentally sustainable energy source.

Proposed Conclusions of Law:

1. Pursuant to the Public Utility Code (Title 66 of Pennsylvania Statutes) Chapters 11, 19, 21, 22, and 28, the Commission has jurisdiction over this matter and the provisions of the Joint Petition.
2. The Joint Petition is a reasonable and valid resolution of the issues raised by the parties intervening in the Application for Merger and Restructuring proceeding.
3. The Joint Petition affirmatively promotes the service, accommodation, convenience or safety of the public.
4. The Rate Reductions and Extension of Transmission and Distribution Rate Cap provisions of the Joint Petition affirmatively promote the service, accommodation, convenience

or safety of the public.

5. The Recovery of Nuclear Costs, Including Decommissioning Expense; Nuclear Monitoring and Waste Storage provisions of the Joint Petition affirmatively promote the service, accommodation, convenience or safety of the public.
6. The Environmental provisions of the Joint Petition affirmatively promote the service, accommodation, convenience or safety of the public.
7. The Universal Service provisions of the Joint Petition affirmatively promote the service, accommodation, convenience or safety of the public.
8. The Reliability and Customer Service provisions of the Joint Petition affirmatively promote the service, accommodation, convenience or safety of the public.
9. The Promoting Competition provisions of the Joint Petition affirmatively promote the service, accommodation, convenience or safety of the public.
10. The Corporate Presence and Commitment to Local Communities provisions of the Joint Petition affirmatively promote the service, accommodation, convenience or safety of the public.
11. The Large Customer provisions of the Joint Petition affirmatively promote the service, accommodation, convenience or safety of the public.
12. The Corporate Structure provisions of the Joint Petition affirmatively promote the service, accommodation, convenience or safety of the public.
13. PPL does not have standing to challenge any substantive provision of the Joint Petition.

Proposed Ordering Paragraphs:

Clean Air Council hereby adopts and incorporates by reference the proposed Ordering Paragraphs attached to PECO's Second Prehearing Memorandum.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

In re: 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 : Application Docket
Merger of the Newly Formed Holding : No. A-110550F0147
Company and Unicom Corporation :

CERTIFICATE OF SERVICE

I hereby certify that I have, this 17th day of May 2000, served a true and correct copy of the foregoing Protestants/Intervenors Clean Air Council, et al's Main Brief on the following parties of record as indicated:

The Honorable Charles E. Rainey (By Hand, Fed Ex)
Administrative Law Judge
Pennsylvania Public Utility Commission
1302 Philadelphia State Office Building,
1400 West Spring Garden St.
Philadelphia, PA 19130

Kenneth L. Mickens, Esquire (By Hand)
Pennsylvania Public Utility Commission
PA Public Utility Commission
Office of Trial Staff
P.O. Box 3256
Harrisburg, PA 17105-3265

David Kleppinger, Esquire (By Hand)
Derrick Williamson, Esquire
Charis M. Burak, Esquire
McNees, Wallace & Nurick
P.O. Box 1166
Harrisburg, PA 17108-1166

Christopher B. Craig, Esquire (By Hand)
Democratic Committee on Appropriations
Room 545, Main Capitol Building
Harrisburg, PA 17120

Irwin A. Popowsky/Tanya McCloskey, Esquire
Office of Consumer Advocate (By Hand)
555 Walnut Street
Forum Place, 5th Floor
Harrisburg, PA 17101

Paul R. Bonney, Esquire (By Hand)
PECO Energy Co.
2301 Market St.,
P.O. Box 8699
Philadelphia, PA 19101-8699

Daniel Clearfield, Esquire (By Hand)
Wolf, Block, Schorr and Solis-Cohen LLP
Locust Court Bldg., Suite 300
Harrisburg, PA 17101

Gerald Gornish, Esquire (By Hand)
Wolf, Block, Schorr and Solis-Cohen
1650 Arch Street, 22nd Floor
Philadelphia, PA 19103

Paul Russell, Esquire (By Fax, Fed Ex)
Pennsylvania Power & Light Company
Two North Ninth Street
Allentown, PA 18101

Craig A. Doll, Esquire (By Hand)
214 State Street
Harrisburg, PA 17101

John L. Munsch, Esquire (By Fax, 1st Class)
Allegheny Power
800 Cabin Hill Drive
Greensburg, PA 15601-1689

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PA.P.U.C. BUREAU
SECRETARY'S

Michael L. Kessler, Esquire (By Fax, 1st Class)
Vice President, General Counsel
American Energy Solutions, Inc.
1781 Duffield Lane
Alexandria, VA 22307-1174

Philip Bertocci, Esquire (By Fax, 1st Class)
Community Legal Services, Inc.
1424 Chestnut Street, 5th Floor
Philadelphia, PA 19102

Thomas Schmidt, III, Brian P. Downey,
John A. Greenbaum (By Hand)
Pepper Hamilton LLP
200 One Keystone Plaza
North Front and Market Streets
P.O. Box 1181
Harrisburg, PA 17108-1181

Eric Joseph Epstein, Pro Se (By 1st Class)
4100 Hillsdale Road
Harrisburg, PA 17112

John Hanger, Esquire (By Hand)
212 Locust Court, Suite 410
Harrisburg, PA 17101

Gregory J. Lawrence, Esquire (By Fax, 1st Class)
Sutherland Asbill & Brennan LLP
1275 Pennsylvania Avenue, N.W.
Washington, DC 20004-2415

John Halsted, Esquire (By Fax, 1st Class)
Gawthrop, Greenwood & Halsted
119 North High Street
West Chester, PA 19381

Peter Meadows Adels, Esquire (By Hand)
Charles McPhedran, Esquire
117 South 17th Street, Suite 1801
Philadelphia, PA 19103

Amy Gold (By Fax, 1st Class)
Shell Energy Services Co., L.L.C.
P. O. Box 4402
Houston, TX 77210

Donald A. Kaplan, Esquire (By Fax, 1st Class)
Leanne M. Bober, Esquire
Preston Gates Ellis & Rouvelas Meeds LLP
Suite 500
1735 New York Avenue, N.W.
Washington, DC 20006

John Will Ongman, Esquire (By Fax, 1st Class)

Pepper Hamilton LLP
6000 Fourteenth Street, NW
Washington, DC 20005

Patricia J. Clark, Esquire
Norbert J. Smith, Esquire (By Fax, 1st Class)
Allegheny Energy Supply Company, LLC
Roseytown
RR 12, Box 1000
Greensburg, PA 15601

Patricia McNamara (By Fax, 1st Class)
6048 Ogontz Avenue
Philadelphia, PA 19141

John Hall, Esquire (By Fax, 1st Class)
Unruh, Turner, Burke & Frees
P.O. Box 515
West Chester, PA 19381-0515

James H. Cawley, Esquire (By Hand)
Rhoads & Sinon - 12th Floor
One South Market Street
Harrisburg, PA 17108

Bernard A. Ryan, Jr., Esquire (By Hand)
Office of Small Business Advocate
Suite 1102, Commerce Bldg.
300 North Second Street
Harrisburg, PA 17101

Robert Jaffe, Esquire (By Hand)
City Hall - Room 588
Philadelphia, PA 19107

Greg Pastore (By Fax, 1st Class)
619 Pemberton Street
Philadelphia, PA 19147

Carville B. Collins, Esquire (By Fax, 1st Class)
Piper, Marbury, Rudnick & Wolfe
6225 Smith Avenue
Baltimore, MD 21209-3600

Joseph Dworetzky, Esquire (By Fax, 1st Class)
Matthew A. Hamermesh, Esquire
Hangley, Aronchick, Segal & Pudlin
One Logan Square -- 27th Floor
Philadelphia, PA 19103



Michael Fiorentino
Joseph Otis Minott
Attorneys for Protestants

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street 5th Floor, Forum Place
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048

IRWIN A. POPOWSKY
Consumer Advocate

FAX (717) 783-7152
E-Mail: paoca@ptd.net

May 17, 2000

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PA.P.U.C.
SECRETARY'S BUREAU

James J. McNulty, Secretary
PA Public Utility Commission
Room B-20, North Office Bldg.
Harrisburg, PA 17105-3265

Re: Application of PECO Energy Company, Pursuant
To Chapter 11, 19, 21, 22 & 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-110550F0147

Dear Secretary McNulty:

Enclosed please find for filing an original and nine (9) copies of the Office of
Consumer Advocate's Main Brief in the above-captioned proceeding.

Copies have been served upon all parties of record as shown on the attached
Certificate of Service.

Sincerely,

Tanya J. McCloskey

Tanya J. McCloskey
Senior Assistant Consumer Advocate

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Enclosures

cc: All parties of record
Honorable Charles E. Rainey, ALJ (Federal Express)

56004

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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 : Docket No. A-110550F0147
RESTRUCTURING, INCLUDING THE :
CREATION OF A HOLDING COMPANY :
AND (2) THE MERGER OF THE NEWLY :
FORMED HOLDING COMPANY AND :
UNICOM CORPORATION :

MAIN BRIEF
OF THE OFFICE OF CONSUMER ADVOCATE

RECEIVED
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PA.P.U.C.
SECRETARY'S BUREAU

Tanya J. McCloskey
Senior Assistant Consumer Advocate

Stephen J. Keene
Assistant Consumer Advocate

For:
Irwin A. Popowsky
Consumer Advocate

DOCKETED
MAY 18 2000

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Office of Consumer Advocate
555 Walnut Street, 5th Floor Forum Place
Harrisburg, PA 17101-1923
(717) 783-5048

Date: May 16, 2000

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I. INTRODUCTION

On November 22, 1999, PECO Energy Company filed an Application with the Pennsylvania Public Utility Commission (PUC) requesting Commission 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. In addition, PECO sought approval of various affiliated interest agreements between it and other members of the newly formed holding company with Unicom. PECO also asked the Commission to make findings necessary for its new generating affiliate to obtain exempt wholesale generator (EWG) status and to engage in certain affiliated power sales under Sections 32(c) and 32(k) of the Public Utility Holding Company Act of 1935 (PUHCA). In its Application, PECO averred that the proposed merger is in the public interest. PECO averred that the combined enterprise, by virtue of its greater resources and sharing of “best practices” will be better positioned to meet future customer demands and ensure high quality service. PECO stated that its rates, rules and regulations will not change and its commitment to the community will continue. PECO also averred that the proposed merger will have a positive impact on competition by facilitating the separation of generation and delivery functions and furthering the development of new energy-related goods and services.

On December 20, 1999, the Office of Consumer Advocate (OCA) filed a Protest and Notice of Intervention in this matter. In its Protest, the OCA raised its concern that, as filed, the proposed merger did not provide substantial affirmative ratepayer benefits and was not in the public interest, as required by Pennsylvania law. City of York v. Pennsylvania Public Utility Commission, 449 Pa. 136, 141, 295 A.2d 825, 828 (1973). In addition, the OCA raised concern about the potential increased risks for PECO’s ratepayers related to PECO’s merger with Unicom. The OCA

requested that the Commission only approve this merger if (1) it is found to be in the public interest, (2) it provides substantial, affirmative benefits for PECO's ratepayers, (3) it does not adversely affect retail competition in Pennsylvania, and (4) it is in accordance with the Public Utility Code.

In addition to the Protest filed by the OCA, Protests were filed by Citizens for Pennsylvania's Future (PennFuture); Eric Epstein; Consumers Education and Protective Association, Association of Community Organizations for Reform Now, Action Alliance of Senior Citizens of Greater Philadelphia, and Tenants' Action Group (CEPA, et al.); Clean Air Council (CAC); Mid-Atlantic Power Supply Association (MAPSA); East Brandywine Township; Wallace Township; Councilman David Cohen; Patricia McNamara; and Gregory Pastore. Petitions to Intervene or Notices of Intervention in the proceeding were also filed by the Office of Small Business Advocate (OSBA); Senator Fumo; City of Philadelphia; Philadelphia Area Industrial Energy Users Group (PAIEUG); Industrial Energy Consumers of Pennsylvania (IECPA); National Railroad Passenger Corporation (Amtrak); Enron Energy Services (Enron); Conectiv Energy (Conectiv); Shell Energy Services (Shell); NewEnergy; PPL Electric Utilities Corporation (PPL); Allegheny Energy Supply; and Allegheny Power Company. The Office of Trial Staff also entered its appearance and participated in this proceeding. After the prehearing conference and the establishment of a procedural schedule, the parties to the proceeding engaged in extensive settlement negotiations.

On March 23, 2000, a diverse group of Joint Petitioners consisting of parties representing PECO Energy ratepayers, PECO Energy, the City of Philadelphia, and parties working on a variety of issues both within and affecting PECO's service territory such as environmental groups and competitors, filed with the Commission a Settlement that seeks to resolve this matter in a manner that benefits PECO's ratepayers and service territory, enhances the environment, and

advances competition in PECO's service territory. The OCA fully supports this Settlement and submits that this Settlement should be approved by the Commission as in the public interest.

Two parties, Councilman David Cohen and PPL Electric Utilities Corporation (PPL), filed Objections to the Settlement. Councilman Cohen, while recognizing the many positive aspects of the Settlement, raises principled concerns that additional protections and conditions may be needed for this merger to be considered in the public interest. The OCA respectfully submits that this comprehensive Settlement, joined in by a broad array of diverse interests, fairly resolves the many concerns regarding the merger.

PPL, on the other hand, filed Objections challenging each of the provisions of the Settlement, arguing that the settlement is not supported by substantial evidence, and arguing for the imposition of further conditions on the Joint Petitioners. Importantly, however, although its request for hearings was granted, PPL never submitted evidence that the merger should not go forward, or that the substantive provisions of the settlement are not in the public interest. When provided the opportunity to present evidence regarding the settlement provisions, PPL did not present any evidence challenging any of the substantive settlement provisions or the overall settlement of this proceeding. As will be set forth in detail below, PPL's attempt to derail the settlement should be rejected in the strongest terms.

As the Commission's recent experience demonstrates, it is difficult enough to achieve just and reasonable settlements among truly interested parties in a complex and difficult case such as this one. It would be impossible to achieve settlement, however, if wholly disinterested parties were allowed to challenge such settlements because of the possibility that some term from the

settlement might be suggested by some party in an as yet unfiled or uncontroverted proceeding involving another set of parties.

At hearings on the Settlement, numerous parties submitted testimony in support of the Settlement. In addition to the Application, PECO's testimony, the Settlement, and the Statements in Support of the Settlement, testimony in support of the settlement was filed by the PECO, OCA, OTS, PAIEUG, City of Philadelphia, Senator Fumo and CEPA, et al., PennFuture parties, Clean Air Council, Eric Epstein, Amtrak, MAPSA, and East Brandywine Township. In addition, there was significant public input testimony in support of the Settlement. See, Tr. 99-102 (Witness for Citizens for Pennsylvania's Future); Tr. 102-104 (Witness for Action Alliance for Senior Citizens); Tr. 110-111 (Witness representing a bank in Bucks County); Tr. 112-114 (Witness for South Street Penthouse Special Service District); Tr. 114-118 (Witness for CEPA); Tr. 118-120 (Witness for the Greater Northeast Philadelphia Chamber of Commerce); Tr. 120-122 (Witness for the Variety Club of the Delaware Valley); Tr. 167-170 (Witness for The Partnership for Community Development Corporation).¹ The OCA submits that this testimony provides substantial evidence of record in support of the Settlement.

The OCA submits that the wide array of parties with a direct and substantial interest in this proceeding and in PECO's service territory have come together to forge a Settlement that is

¹ The above referenced testimony was taken from the first day of public input hearings. Other examples of testimony which provide support for the conclusion that the Settlement is in the public interest are as follows: Tr. 185-187 (Witness for Bensalem Township); Tr. 243-247 (Witness for East Brandywine Township); Tr. 259-263 (Witnesses for West Goshen Township); Tr. 269-272 (Witness for Chester County Chamber of Business and Industry); Tr. 294-298 (Witness for City of Coatesville).

in the public interest and fully in accord with Commission policy and applicable law. As one member of the public testifying in Philadelphia stated:

I'm amazed at the fact that this settlement has been able to be put together with all of the people involved in the settlement.

Tr. 111. The OCA urges the ALJ and the Commission to expeditiously approve this comprehensive settlement.

The OCA hereby submits its Main Brief in support of the Settlement. The OCA's proposed Findings of Fact, Conclusions of Law, and Ordering Paragraphs are attached hereto as Appendix A.

II. ARGUMENT

A. The Settlement Is In The Public Interest, Is Fully Supported By Substantial Evidence of Record, And Is Consistent With Pennsylvania Law and Policy.

1. Introduction

As noted above, Councilman Cohen and PPL filed Objections to the Settlement. Councilman Cohen also filed testimony seeking additional conditions before the merger is approved. The OCA appreciates Councilman Cohen's concerns and agrees that he has raised important concerns for PECO's ratepayers and its service territory. As set forth below, however, the OCA respectfully submits that these concerns are reasonably addressed by this comprehensive settlement that brought together such a wide array of interested parties and reconciled such a diverse set of interests.

In contrast to Councilman Cohen, who sought to build upon the Settlement, PPL argued that the Settlement was not supported by substantial evidence of record and is inconsistent with applicable law and Commission policy. PPL also argued that the provisions of the Settlement are not directly related to the merger. As set forth in the OCA's previously filed Reply to PPL's Objections, the OCA disagrees strongly with PPL's contention. The OCA would also note that at no time during this proceeding has PPL submitted any evidence that the substantive provisions of the Settlement are not in the public interest.

The OCA submits that the Settlement is in the public interest and is fully consistent with applicable law and Commission policy. This conclusion is fully supported by the evidence of record in this proceeding, particularly the testimony in support of the Settlement by the OCA, PECO, OTS, PAIEUG, City of Philadelphia, Senator Fumo and CEPA, et al., PennFuture parties, Clean

Air Council, Eric Epstein, Amtrak, MAPSA, and East Brandywine Township. In addition, as set forth above, there was significant public input testimony in support of the Settlement. This Settlement, joined in by parties representing the ratepayers of PECO, the City of Philadelphia, competitors of PECO, and environmental advocates, resolves this matter in a manner that benefits PECO's ratepayers, protects the environment, benefits the community, and advances competition in PECO's service territory.

PPL's argument that the provisions of the settlement have no bearing on the merger simply ignores the many impacts that a reorganization and merger will have on a company. See, OCA St. 1-S at 5-6. Additionally, PPL's argument ignores the relevant legal test in evaluating this settlement and the merger—the public interest. The public interest is defined broadly and the Settlement here brings together a broad and diverse group of Joint Petitioners who—in contrast to PPL—have a direct and substantial interest in these proceedings, and addresses a wide variety of public interest considerations.

For the reasons set forth in the OCA's Statement in Support, its Reply Comments, and below, the OCA submits that this Settlement should be approved. The Settlement, through all of its provisions, is in the public interest and is supported by substantial evidence of record.

2. The Rate Reductions and Rate Cap Extension Are Reasonable In The Context Of The Settlement As A Whole And Provide An Appropriate Means Of Providing Affirmative Benefits To Ratepayers Associated With This Merger.

The Joint Settlement provides for \$200 million in rate reductions for customer's distribution rates from 2002 through 2005.² As set forth in Appendix A to the Settlement which provides the revised tariffs and proof of revenues, for a residential customer, the rate reductions result in a 7% reduction in the distribution portion of the customer's rate in 2002 and 2003, with a 2.72% overall rate reduction from 1998 rate levels if the customer continues to purchase generation service from PECO. See, Joint Petition, Appendix A, Summary Sheet on Proof of Revenues.³ In 2004 and 2005, the distribution charges for a residential customer will be reduced approximately 4.4% from today's distribution rates, with an overall rate reduction of 1.78% from 1998 rate levels if the customer continues to purchase generation service from PECO. Id. If the customer purchases generation from a competitive supplier, the overall savings could be greater.

In addition, PECO has agreed to an extension of the rate cap on its regulated transmission and distribution rates through 2006. As PECO witness Hill confirmed, with this extension of the rate cap, PECO's customers will have nearly a decade of rate stability in the

² Customers will also see a rate reduction in 2001 of \$60 million in securitization savings pursuant to the terms of a separate settlement which was approved by the Commission on March 16, 2000 at Docket No. R-00005030.

³ On the summary sheet showing the 2002 Unbundled Unit Rates, the average distribution rate for Rate R customers is reduced from 5.58 cents/kwh to 5.19 cents/kwh—a reduction of 0.39 cents/kwh or 7%. The summary sheet for the 2004 Unbundled Unit Rates shows the Rate R average distribution rate being reduced from 5.58 cents/kwh to 5.33 cents/kwh—a reduction of 0.25 cents/kwh or 4.4%. Joint Petition, Appendix A, Proof of Revenues.

regulated portion of their rates since the passage of the Electricity Generation Customer Choice and Competition Act, with reductions in those rates from 1996 levels for the majority of this time. PECO St. 3S at 6.

The OCA submits that this rate reduction and rate cap extension are reasonable and fully consistent with applicable law and Commission policy. Under PECO's original filing, PECO did not propose to flow any benefits of this merger through to its ratepayers. Rather, PECO proposed to retain the merger benefits through the rate cap period (June 30, 2005). OCA witness LaCapra explained the problem with PECO's original filing:

As initially proposed, the allocation of merger benefits was too one-sided. The merger is made possible by a restructuring of regulated markets, the costs of which ratepayers have largely underwritten. The Company predicts substantial financial benefits to result from the merger, but had proposed to retain the lion's share of those benefits for itself. As suggested above, the merger would bring to ratepayers a number of risks. While the Companies and their shareholders might profit handsomely through the ventures that they are planning to pursue, the initial proposal offered little to ratepayers by way of fair compensation for imposed risks. Ratepayers were to receive none of the savings generated during the period of the rate cap (i.e., through June 30, 2005).

OCA St. 1-S at 8-9.

In the Settlement, the parties were able to agree on a level of rate reductions and a rate cap extension as one means within the Settlement of addressing the merger benefits for customers.

As OCA witness LaCapra testified:

The Settlement introduces an appropriate change to the ratemaking treatment of the merger, to ensure that ratepayers will receive concrete, affirmative benefits in the form of rate reductions. . . . These represent important improvements to the benefits-sharing mechanisms of the merger proposal and offer ratepayers a level of

benefits that is well beyond that encompassed by PECO's initial proposal.

OCA St. 1-S at 9. See also, Senator Fumo/CEPA St. 1 at 6-11.

PAIEUG witness Kollen also explained the importance of the rate reductions and rate cap extensions to ratepayers as a means of addressing and securing the merger benefits both in the short term and in the long term. After noting the value of the rate reductions and rate cap extension, Mr. Kollen testified as to the long term benefit:

Finally, the merger savings will result in lower distribution charges after the rate cap expires. The costs of the merger will be incurred in the years immediately following the merger. Consequently, the Company is fully at risk for the costs of the merger as well as for the guaranteed rate reductions. This will ensure that the Company will actually implement structural changes, and that efficiencies and savings actually will be achieved. Consequently, costs will be lower going forward and distribution charges, to the extent they are adjusted by the Commission in the future, necessarily will be lower than if the merger and the Settlement were not approved.

PAIEUG St. 1 at 7.⁴

The use of rate reductions and rate cap extensions as a means of providing affirmative merger benefits to ratepayers is completely consistent with applicable law and Commission policy. In the Commission's Order regarding the proposed merger of Allegheny Power Company (APS) and Duquesne Light Company (Duquesne), the Commission specifically directed that 100% of the identified merger savings for distribution and generation be flowed back to the ratepayers of Duquesne and APS. Joint Application of DQE, Inc., Allegheny Power Systems, Inc. and AYP Sub,

⁴ The OCA would note that the Settlement also provides that the costs to achieve the merger will be expensed as incurred and will not be subject to future recovery from ratepayers. Similarly, the Company has agreed that there will be no acquisition premium claimed in a future rate case. Joint Settlement at Paragraph 11.b.

Inc. For Approval Of The Transfer By Merger Of The Property Rights Of Duquesne Light Company To Allegheny Power Systems, 186 PUR 4th 39, 57-58 (Order entered May 29, 1998). For the distribution-related merger savings, the Commission directed both Duquesne and West Penn to reduce their distribution rates beginning in the year of merger consummation. For the generation-related savings, the Commission directed that it be used as an offset to stranded cost in each utility's then pending restructuring proceeding. Id.

The OCA submits that the rate reductions and the rate cap extension called for in the Settlement are fully consistent with applicable law, Commission policy and are in the public interest. These provisions improve PECO's original proposal and as part of the Settlement, are a reasonable means of addressing merger benefits.

3. The Universal Service Provisions Are Reasonable And Provide An Appropriate Means Of Sharing Merger Benefits.

The Settlement includes several provisions that provide for the enhancement and expansion of PECO's universal service programs for both electric and gas customers, particularly in the area of addressing payment problems for the very low income customer. Initially, PECO has agreed to contribute up to \$3 million over three years to the local hardship funds throughout its service territory so that those hardship funds are better able to address the needs of payment-troubled customers. PECO also will coordinate other universal service programs with these contributions to assure that customers are reached. The Settlement also increases the participation levels in PECO's Customer Assistance Program for electric customers, and contains agreements regarding cost recovery to ensure that the costs of these programs for both electric and gas customers are reasonable. Joint Petition for Settlement, ¶¶ 29-37.

Specifically, as to the electric CAP, for up to 90,000 customers, PECO will receive no additional recovery of CAP costs beyond what is already included in its rates. For additional customers that are enrolled in the CAP, PECO's recovery of costs, which was permitted under the 1998 Electric Restructuring Settlement, is limited. PECO has also agreed that it will recover only the revenue shortfall associated with customers above the 90,000 level and will forego any right to recover any other costs of its universal service program. Joint Petition, ¶35. See also, OCA St. 1-S at 9-10.

PECO also agreed to limit the recovery of its CAP costs for natural gas customers through its Universal Service Fund Charges. PECO has agreed that it will not seek recovery of its gas CAP costs for the first 17,500 customers enrolled in the program. Joint Petition for Settlement, ¶36. This will allow PECO's gas CAP to expand to 17,500 customers without a potential deferral that customers may have been required to pay in the future. Id. For each customer over 17,500, PECO will recover only the revenue shortfall amount, and will not seek to recover any additional costs of the program. Id.

As OCA witness LaCapra testified, these provisions also provide a sharing of the merger benefits with customers. OCA St. 1-S at 9. In regard to the \$3 million contribution to the hardship fund, Mr. LaCapra identified the importance of this contribution as follows:

PECO has agreed to contribute up to \$3 million over three years to local hardship funds throughout its service territory so that those hardship funds are better able to address the needs of the very low income customers. This contribution is intended to reach a group of customers who most require assistance even after a rate reduction.

OCA St. 1-S at 9. See also, Senator Fumo/CEPA St. 1 at 13.

As to the expansion of the CAP programs, Mr. LaCapra summarized the importance of these provisions as follows:

This provision will allow the universal service programs to serve significantly more customers—again customers who most require assistance beyond the rate reductions provided—and helps to ensure that the needs of these customers are not overlooked as the Company merges and increases in size.

For the gas CAP, PECO has agreed not to seek recovery of any costs of this program for the first 17,500 customers. For those customers over 17,500, PECO has again agreed to only seek recovery of the revenue shortfall amount from ratepayers through its Universal Service Fund Charge (“USFC”) mechanism. This provision will eliminate a potential deferral that PECO’s gas customers may have been required to pay in the future. It also allows this program to further expand as the Company merges.

OCA St. 1-S at 10.

Again, these provisions improve upon PECO’s original filing which did not propose any improvements or expansion of these programs and in fact, did not address PECO’s universal service programs at all. In his Objections, Councilman Cohen recommended that PECO do more in regard to its universal service programs. The OCA does not disagree that there are areas of PECO’s universal service programs that should be the subject of continuing work among the interested parties. The OCA intends to continue to work with PECO and participate in PECO’s Advisory Group on universal service issues to continue to address the needs of low income customers in PECO’s service territory. The agreements of PECO in the settlement, however, significantly advance PECO’s universal service programs, resolve uncertainties for ratepayers regarding program cost recovery arising out of the electric and gas restructuring proceedings, and allow these programs to continue to develop at reasonable costs. The Settlement also requires

PECO's CARES program to coordinate with the hardship funds to ensure that these funds reach customers in need.

The OCA submits that universal service provisions are reasonable and provide an appropriate mechanism for the sharing of merger-related benefits. The inclusion of these provisions within the Settlement is reasonable and in the public interest.

4. The Reliability Provisions Provide An Essential Protection And Important Public Benefit.

The Settlement contains provisions regarding a Quality of Service Plan designed to provide higher levels of reliability and customer service to PECO's ratepayers. Joint Petition for Settlement, ¶¶19-29. The Settlement also includes a separate Joint Petition addressing specific matters regarding reliability between PECO and East Brandywine Township and Wallace Township. The overall Quality of Service Plan provides specific benchmarks and targets for the Company to achieve or maintain that reflect higher levels of service quality. The Plan addresses areas such as the frequency and duration of service interruptions, storm management, emergency response, worker safety, customer call center availability, billing and meter reading, and compliance with Commission requirements. The Plan also calls for PECO to include overall performance under the Plan in the performance appraisals and compensation of its management and supervisory employees as one means of ensuring compliance with the Plan. In addition, the Plan identifies a Commission process for ensuring PECO's continued compliance with the Plan.

The OCA submits that these provisions are a necessary and appropriate means to address a particular concern with this type of merger that could result in management attention and funds being diverted out of Pennsylvania. PECO acknowledged this issue in its direct testimony and

generally committed to continue to improve reliability and customer service. PECO St. 1 at 3-9. These provisions of the Settlement, however, secure this commitment and provide a reasonable means for the Commission to measure the commitment as well as continue to address reliability and customer service issues.

As OCA witness LaCapra explained, a number of factors related to this merger raised concerns that service quality could have degraded or at least failed to improve at rates that would otherwise be expected. OCA St. 1-S at 12. For example, it is well known that ComEd has experienced significant reliability problems that will require a sizeable commitment of management time and financial resources. Id. Additionally, as workforces are combined and reduced, or perhaps as employees expand to other career offerings now available, there is an increased risk for ratepayers that there will be a loss in operational efficiencies at the distribution level. Id. OCA witness LaCapra explained:

[R]atepayers could be at increased risk for suffering a loss in operational efficiencies at the distribution level, as employees moved within the Company or positions are combined and eliminated. This loss could be made manifest in the form of reductions in service quality, customer service, or a diminished rate at which productivity or distribution service quality might otherwise improve.

OCA St. 1-S at 12-13.

The OCA submits that the Settlement provisions regarding the Quality of Service Plan mitigate these potential risks and ensure PECO's commitment to continue to improve the quality of service in its service territory. Specifically, under the Quality of Service Plan, PECO has committed to move to a level of reliability, measured by certain reliability indices, that is 10% higher than its historic average. In addition, the Company has agreed to reduce the number of customers

with repeat outages and to bring a higher level of service reliability to its five worst circuits each year. Joint Settlement, ¶23. As to customer service, PECO has committed to respond to customer calls at a higher level of performance than its historic average, and to maintain its current level of performance regarding gas emergency calls by continuing to respond to 99% of all calls within one hour. Joint Settlement, ¶24. PECO also has committed to worker safety, and committed to remain in the top 10% of EEI comparable utilities for OSHA standards on loss work day cases. Id. PECO has also agreed to include performance under this Plan in the annual performance appraisal and compensation for responsible management and supervisory employees. These provisions, taken together, will help to ensure that management attention is focused on PECO's service territory. OCA St. 1-S at 12-13.

East Brandywine Township witness Scott Piersol also addressed the importance of the reliability provisions, including the specific commitments to the Township, of this Settlement.

Mr. Piersol first explained the Townships concern:

Over the past several years, PECO's electric service reliability to the Township has not been at acceptable levels. The Township was concerned that the proposed merger with Unicom might take financial resources from PECO, or that the merger might cause a reorientation of PECO's focus away from local service reliability. In either case, the Township was concerned that the merger would limit PECO's ability to upgrade service to the Township or cause electric service to degrade further.

East Brandywine Township St. 1 at 1-2.

Mr. Piersol then described the public benefit from PECO's commitments to reliability contained within the Settlement. Mr. Piersol testified:

The Township and its residents will be beneficiaries of the general commitments to system-wide reliability and of the focused

commitment to enhance reliability in the Townships. In addition, we have the benefit of a public commitment by PECO of Commission oversight of this effort. The increased commitments and resources, coupled with ongoing Commission oversight, provide an important public benefit to the residents of East Brandywine Township.

East Brandywine Township St. 1 at 2-3.

The OCA submits that these provisions secure an essential protection and an important public benefit of this merger for PECO's ratepayers. As such, the provisions are reasonable and in the public interest.

5. The Nuclear Provisions Are Reasonable And In The Public Interest.

As PECO testified in this proceeding, one of the motivating factors of this merger is to bring together two utilities with substantial nuclear capacity and develop synergies on operations for the generation markets. PECO St. 2 at 2-3. Several parties raised concern with nuclear issues involved in this merger, particularly Eric Epstein, Councilman Cohen and the OCA. OCA witness LaCapra identified the OCA's concerns and testified that there are concerns related to the various risks to ratepayers that could be presented by a merger which expanded the amount of nuclear generation brought under one corporate control. Mr. LaCapra identified some of the potential risks as follows:

These risks include those related to extended nuclear plant outages, unanticipated capital additions, nuclear incidents, and escalating decommissioning costs. . . . I was concerned that these various risks might ultimately manifest in the form of increased capital costs to PECO Energy Distribution, or diversions of capital away from distribution operations.

OCA St. 1-S at 10.

The Joint Settlement contains numerous provisions that provide protections for PECO's ratepayers from these risks. As to the non-PECO nuclear plants, the Joint Settlement secures a specific commitment from PECO that PECO's distribution ratepayers will be insulated from costs associated with those units. Additionally, the Settlement ensures that PECO's ratepayers will only be responsible for nuclear decommissioning costs associated with PECO's share of the nuclear units it owned at December 31, 1999. As to those units, if there is an increase in the nuclear decommissioning liability associated with those units above the levels currently included in rates, PECO shareholders will absorb the first \$50 million of those increased costs, and will pay 5% of the remainder of any additional increased costs.⁵ PECO has also entered into an agreement designed to address issues regarding nuclear monitoring and waste storage, the safe operation of Peach Bottom 2 and 3, and robotics research in the area of nuclear decommissioning and nuclear plant radiation exposure management. Additionally, PECO agreed to increase its level of community involvement and spending in the area near the Peach Bottom Station. PECO both serves customers in that area and serves as a major employer at its Peach Bottom Station.⁶

⁵ Under PECO's 1998 Electric Restructuring Settlement, PECO's ratepayers remained responsible for additional nuclear decommissioning cost obligations. PECO was permitted to recover these costs through a Nuclear Decommissioning Adjustment Clause (NDAC). OCA St. 1-S at 11. Under this Settlement, PECO has agreed to a limitation on this recovery.

⁶ The provisions regarding nuclear monitoring and waste storage with EFMR as well as the increased commitment to the community surrounding Peach Bottom were fully addressed in the testimony of Eric Epstein. Eric Epstein St. 1. The OCA anticipates that Mr. Epstein will address these provisions in additional detail, but the OCA fully supports these commitments. The OCA would note that EFMR is a recognized group that has worked on these issues for many years. PECO has agreed to work closely with the Group and has assured that contributed funds are appropriately spent and documented.

The OCA would also note that the Settlement provides a measure of protection for ratepayers associated with the possibility of significant problems at any of the nuclear facilities. In the event of an incident at any nuclear facility owned by PECO or an affiliate that results in uninsured damage claims in excess of \$1 billion, PECO must demonstrate that its net cash flows are sufficient to support the continued provision of safe, adequate, continuous, reliable, efficient and reasonable distribution service to Pennsylvania customers at reasonable rates. Joint Petition, ¶17.

The OCA submits that it is reasonable and in the public interest to provide these benefits to ratepayers. As OCA witness LaCapra succinctly explained:

[T]he PECO/Unicom corporate strategy appears focused on pursuing an expanding nuclear fleet, which does create risks for ratepayers. As a quid pro quo, it is fair to expect the Companies to set aside a portion of the benefits that they project to mitigate the concomitant risks.

OCA St. 1-S at 11.

The OCA appreciates Councilman Cohen's testimony requesting additional conditions related to the nuclear power plants. The OCA submits that the settlement provisions provide important public benefits. The Settlement provisions ensure that PECO's ratepayers will not be burdened with additional nuclear costs associated with Exelon's nuclear fleet. The settlement clarified that PECO's ratepayers only remain responsible for nuclear costs that they were already obligated to pay under PECO's Restructuring Settlement or the Electricity Generation Customer Choice and Competition Act. *Even as to costs which ratepayers were required to bear under PECO's restructuring settlement*, such as potential increases in nuclear decommissioning costs that were to be flowed through the Nuclear Decommissioning Adjustment Clause (NDAC) contained in

PECO's restructuring settlement, PECO has agreed to a *further* limitation of ratepayer responsibility by agreeing to share responsibility for these additional costs.

As such, the OCA submits that the nuclear provisions are reasonable and in the public interest. These provisions fairly resolve these issues in the context of the entire settlement and all of the benefits it brings to the public.

6. The Corporate Protections Provide Important And Necessary Conditions.

In addition to protections from the risks associated with Unicom's nuclear plants and increased decommissioning costs for PECO's plants, the Settlement also provides a number of other corporate protections designed to ensure that PECO's distribution ratepayers are protected from the risks associated with PECO's diversified businesses, including its nuclear businesses; avoid cross-subsidization of other affiliates; ensure the Commission's continuing jurisdiction; and ensure the Commission's access to the books, records and personnel necessary to the Commission's regulatory oversight responsibility. Joint Petition for Settlement, ¶¶57-63.

The OCA submits that given the corporate restructuring of PECO and the subsequent merger, these corporate protections are reasonable and in the public interest. First, the Settlement provisions remove any uncertainty regarding the Commission's jurisdiction in various matters. As OCA witness LaCapra explained, as the Company is restructured and certain functions are performed by the corporate service company pursuant to a contract governed by the Securities and Exchange Commission, uncertainty exists as to whether the Company would seek to argue that the Commission was preempted by the SEC. The Settlement removes this uncertainty. OCA St. 1-S at 15-16.

Second, the Settlement assures that ratepayers are not required to pay rates that reflect the risk associated with the nuclear operations or with other diversified business operations. The Settlement also limits the PECO EDC ability to invest in or guarantee the debt of the unregulated affiliates or diversified businesses. These provisions will help to mitigate the risks associated with diversified businesses. OCA St. 1-S at 11. See also, PAIEUG St. 1 at 8-9.

The OCA submits that these corporate protections are reasonable and in the public interest. As such, the Settlement including these protections should be approved.

7. The Competition Provisions Help To Ensure That The Merger Meets The Requirements Of Sections 2811 and 2210 Of The Public Utility Code.

Under both the Electricity Generation Customer Choice Act and the Natural Gas Competition Act, the Commission is required to consider the competitive effects of this merger under Sections 2811(e) and 2210 of the Public Utility Code. As OCA witness LaCapra testified, critical issues related to PECO's opportunity to engage in anti-competitive conduct in Pennsylvania retail electricity markets were of concern. OCA St. 1-S at 13. Mr. LaCapra explained his concern as follows:

Absent suitable controls designed to protect nascent competition, the merger could tend to consolidate PECO's dominant position in retail markets and inhibit the Commission's efforts to foster a robust competitive market in Pennsylvania.

OCA St. 1-S at 13.

To avoid the possibility that the merger could diminish competition, the parties were able to negotiate numerous conditions to ensure a competitive balance. Id. These provisions are intended to improve the competitive landscape in PECO's service territory and guard against any

potential negative effects of the merger. The OCA would note that these provisions should help to eliminate barriers for licensed electric generation suppliers, facilitating their ability to serve retail customers.

Of particular importance, the Settlement introduces a mechanism to provide specific quantities of installed capacity credits at a specified price to electric generation suppliers pursuant to PECO's FERC Electric Market-Based Rate tariff. OCA witness LaCapra explained the importance of this agreement as follows:

The Settlement introduces a mechanism that will give alternate suppliers access to installed capacity within the Company's control. Appendix C to the Settlement provides that, at a price of \$52 per MW-day, PECO will make available to licensed electric generation suppliers 600 MW per day of capacity. This capacity will be made available on a contract basis, each year, for three years, beginning January 1, 2001. Access to reasonably priced installed capacity is essential if alternate suppliers are to compete effectively for retail load. Moreover, PECO's capacity should be surplus to it to the extent that its customers begin to take advantage of competitive options. Thus, the access to installed capacity achieved through the Settlement represents an enhancement to the merger proposal. It *should bolster competition in the retail market.*

OCA St. 1-S at 14.

The OCA submits that numerous other provisions of the Settlement will help to enhance competition in PECO's service territory. For example, PECO has agreed to distribute to its residential customers at least twice per year the OCA's shopping guide, which will enable residential customers to directly compare prices of alternative suppliers relative to PECO's price to compare. Additional provisions related to customer billing data and business interactions with competitive suppliers of both electric and natural gas service should also serve to assist competitive

suppliers in their efforts to serve retail electric and retail natural gas customers in PECO's service territory. OCA St. 1-S at 15. See also, MAPSA St. 1.

Furthermore, PECO has agreed to modifications in its process for obtaining a competitive default supplier in accordance with its 1998 Electric Restructuring Settlement, to provide a better opportunity for a successful process. As PECO witness Hill confirmed, these changes were designed to avoid the problems encountered by GPU Energy when it sought unsuccessfully to attract bidders for its Competitive Default Service bid. PECO St. 3S at 11. The OCA submits that this agreement is important in working toward a successful competitive default service in Pennsylvania. Additionally, the Settlement establishes a process for securing competitive default service in the event that PECO's modified bid process is unsuccessful.

The OCA submits that these provisions are reasonable and in the public interest. These provisions help to ensure that the merger is consistent with the requirements of Sections 2811(e) and 2210.

8. The Environmental Provisions Are Reasonable And In The Public Interest.

The Joint Settlement includes a significant investment in renewable energy and in education regarding renewable resources. The Settlement provides that PECO will contribute more than \$20 million to the development of wind and solar-powered projects and education on renewable resources over the next several years. Joint Petition for Settlement, ¶¶38-44. Several other Joint Petitioners have filed extensive testimony in support of the environmental provisions, and the OCA anticipates that these Joint Petitioners will address these provisions in detail in their Main Briefs. For the reasons set forth in Penn Future witness John Rohrbach's direct testimony and in the direct

testimony of Clean Air Council witness Andrew Altman, the OCA fully supports these provisions. PennFuture St. 1 ; Clean Air Council St. 1.

The OCA would note that many of the environmental provisions in the Settlement place the funding and program development under the auspices of PECO's Sustainable Energy Fund. The OCA submits that these provisions will further the Commission's stated policy of garnering further support for these Funds. The Commission, in approving the Boards for the regional Sustainable Energy Funds and in setting up the Statewide Board for the Sustainable Energy Fund has recognized that these Funds are an investment in the Commonwealth and that further support for their initiatives must be garnered. See, Electric Distribution Companies Sustainable Energy Funds, Docket Nos R-00973953, R-00973954, R-00973981, R-00974008, R-00974009, Joint Statement of Chairman Quain and Commissioner Brownell, May-1999-C-7 (May 21, 1999)(Appendix B).

For all of these reasons, the OCA submits that these provisions are reasonable and in the public interest.

9. PECO's Commitment To Maintain Its Corporate Presence and Charitable And Civic Giving Provides Enhanced Value To Communities In PECO's Service Territory.

The Joint Settlement also secures PECO's commitment to maintain its corporate presence in Philadelphia for an extended period of time, and secures PECO's commitment to maintain its charitable and community giving following the merger. The OCA submits that these commitments are critical as the operations of the two companies are combined. As OCA witness LaCapra noted, Exelon—the holding company—will be located in Chicago. OCA St. 1-S at 5. The

OCA submits that under these circumstances, the commitments made by PECO to retain its corporate presence and charitable and civic giving are critical to the community.

PAIEUG witness Kollen also discussed the importance of these provisions. As to the provision to retain local employment levels and the provision to retain corporate headquarters at 2301 Market Street through 2007, Mr. Kollen testified:

These two provisions of the Settlement ensure that there will be local management and accountability for the portion of the business that most directly affects customer reliability and service levels.

PAIEUG St. 1 at 10.

Councilman Cohen also raises a concern regarding the retention of jobs in the Philadelphia region. As set forth in the testimony of PECO Witness Hill, PECO has been able to make additional commitments regarding its Philadelphia headquarters beyond those contained in the Settlement. Mr. Hill testified:

I would note, however, that PECO had made additional commitments regarding job retention since the Joint Petition was filed. As recently reported in the press, PECO, following further discussions with Mayor Street and his staff, has agreed that (1) the merger with Unicom will not result in any reduction in line forces in Philadelphia County; (2) employment at 2301 Market Street, Philadelphia will be no less than 1325 through 2001, 1300 through 2002, 1275 through January 1, 2004 and 1100 through January 1, 2008; and (3) the corporate headquarters for PECO's distribution business will remain in Philadelphia through at least January 1, 2008.

PECO St. 3S at 7. At the hearings, Councilman Cohen acknowledged that this was a move in the right direction, although he would still prefer a further commitment from PECO. Tr. 419.

The OCA submits that these provisions are valuable to the community and enhance the merger proposal. PECO's original proposal created uncertainty regarding its commitment to the

community, particularly when coupled with its plan to have its corporate headquarters in Chicago. OCA St. 1-S at 5-6, 12. These provisions offer additional value to the communities and reduce the uncertainty for the community associated with this multi-state merger. As such, the OCA submits that these provisions are reasonable and in the public interest.

10. The Large Customer Provisions Are Reasonable And In The Public Interest.

The Settlement also contains provisions negotiated with certain of PECO's large customers, including the City of Philadelphia. The OCA anticipates that these customers will address these provisions in detail. As OCA witness LaCapra testified, the corporate restructuring and merger will affect the regulated operations of PECO in many ways such as reassignment of supervisory roles, combining of best practices and operations, moving routine functions to other separate business entities. OCA St. 1-S at 5-6. With these many changes in corporate operations, the OCA submits that it is reasonable and appropriate to address these large customer issues.

Amtrak witness Forczek succinctly summarized the reasons for addressing such issues in this merger proceeding:

Amtrak decided to negotiate a lump sum buy-out in this proceeding, because the railroad recognized that the proposed merger and restructuring would result in a change in corporate control, potentially affecting PECO's future implementation of the buy-out provision. Amtrak recognized that under the proposed merger and restructuring, although PECO's distribution and transmission unit still would have local management, executives based in Illinois would have final authority over the combined company's wires business. For that reason, Amtrak concluded that it would be prudent to negotiate and lock in specific buy-out amounts prior to consummation of the merger.

Amtrak St. 1 at 4. Amtrak witness Forczek also explains why these provisions are reasonable, consistent with PECO's 1998 Restructuring Settlement, and in the public interest. The OCA will not repeat Amtrak's arguments here, but the OCA supports the provisions relating to Amtrak.

City of Philadelphia witness Kent Miller expressed similar concerns regarding the City's Rule 4.6 contracts with PECO. As witness Miller testified:

The City was concerned that the merger and resulting change in control could make it more difficult for the parties to resolve their differences amicably. Without a base rate case opportunity, the City would have needed to file a formal complaint before the Public Utility Commission to obtain relief from the SL-P rate. Instead of costly and lengthy regulatory litigation, PECO and the City have agreed to place the City on the same footing as other municipalities in mid-2001.

City of Philadelphia St. 1 at 4. City witness Miller also explains in detail why these provisions are reasonable and in the public interest. For the reasons set forth in the testimony of City witness Miller, the OCA supports these provisions of the Settlement.

11. Conclusion

As set forth above, the merger between PECO and Unicom raised numerous concerns that the parties sought to address through the Settlement process. The OCA appreciates the concerns raised by Councilman Cohen and the OCA stated many of these concerns in its Protest in this proceeding. The OCA submits, however, that these concerns are reasonably addressed by this comprehensive settlement that brought together such a wide array of interested parties and reconciled such a diverse set of interests. The OCA submits that the Settlement, taken as a whole, is in the public interest and should be expeditiously approved.

B. The Commission Should Reject PPL's Attempt To Challenge The Provisions Of A Settlement In Which It Has No Direct Or Substantial Interest.

In its Objections to the Settlement, PPL challenged each provision of the Settlement.

In the OCA's Reply to the Objections, the OCA questioned whether PPL had a direct, substantial, legally cognizable interest in the provisions of the Settlement to raise such a challenge and jeopardize the significant benefits of this Settlement for PECO ratepayers and the PECO service territory. OCA Reply Comments. The OCA submits that PPL has no recognizable interest in the provisions of this Settlement and it should not be permitted to disrupt this Settlement or the Settlement process.

The Pennsylvania Supreme Court has clearly enunciated the principles of standing which have been applied in proceedings before the Pennsylvania Public Utility Commission. William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975)(William Penn). In William Penn, the Court adopted a three part test that must be satisfied to demonstrate that a party is or may be aggrieved and thus, has standing to litigate an issue. The Court held that a party must have an interest that is substantial, direct and immediate. The requirement of a "substantial" interest has been described by the Court as follows:

Thus, the requirement of a "substantial" interest simply means that the individual's interest must have substance--there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.

William Penn, 346 A.2d at 282. A "direct" interest has been described by the Court as follows:

The requirement that an interest be "direct" simply means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains.

Id. Finally, the Court described the "immediate" requirement as follows:

The remaining requirements of the traditional formulation of the standing test are that the interest be “immediate” and “not a remote consequence of the judgment.” As in the case of “substantial” and “pecuniary,” these two requirements reflect a single concern. Here that concern is with the nature of the causal connection between the action complained of and the injury to the person challenging it.

Id. at 283.

These principles have been applied by the Commonwealth Court in two recent cases involving a question of standing before the Public Utility Commission. In George v. Pa. PUC, 735 A.2d 1282, 1286 (Pa. Cmwlth. 1999), the Commonwealth Court held that a party to the proceeding who was a ratepayer that had received adequate notice lacked standing to raise the issue of whether other ratepayers had received proper notice from the utility. In Mid-Atlantic Power Supply Association v. Pa. PUC, 746 A.2d 1196 (Pa. Cmwlth. 2000), the Court held that a utility does not have standing to raise issues regarding the possible infringement of its customers’ rights.

Here, PPL’s interest in the provisions of the settlement are far more tenuous and remote than in any of the cases cited above. Indeed, PPL has not stated on the record of this proceeding what interest it has in the provisions of the settlement. In particular, the OCA asks what is PPL’s legally recognizable interest in the rate reductions for PECO’s customers, the rate cap extension for PECO’s customers, the decommissioning funding for PECO’s nuclear plants, the universal service provisions regarding the CAP for PECO’s customers, the environmental benefits provided for PECO’s service territory and customers, the competitive benefits that will benefit PECO’s customers, or the contract provisions with certain of PECO’s customers. As can be clearly seen from the Settlement, this Settlement addresses the risks and benefits to PECO’s customers and the public interest from PECO’s corporate restructuring and merger with Unicom. PPL’s real

complaint seems to be that it does not want to even be asked to provide comparable public interest benefits some day in the future in some as yet unfiled Commission proceeding. The OCA submits that this remote interest in the possible outcome of a proceeding that has not yet occurred, and may never occur, does not confer standing on PPL to disrupt this Settlement.

If PPL someday files a merger case and *if* one of the parties to this proceeding intervenes, and *if* someone in that case suggests a similar term, *then* PPL will have every right and opportunity to object, litigate and defend its case on the merits. But here, PPL's interest, at best, is one of a remote consequence of judgment—the very interest that the Courts have held does not confer standing on a party. William Penn, 346 A.2d at 283.

As such, the OCA submits that the Commission should find that PPL does not have standing to challenge the provisions of this settlement. This proceeding is not a rulemaking. It is a proceeding with specific parties for a specific case. For these reasons, PPL's attack on the settlement provisions should be rejected.

C. The Commission Should Reject PPL's Attempt To Attach Additional Conditions To This Settlement Or To Establish A Policy That Would Impair The Commission's Settlement Process In General.

PPL has opposed the approval of this Settlement and taken the position that additional conditions must be attached to the Settlement if it is to be approved. Specifically, PPL, in its Objections to the Settlement, has taken the position in its pleadings and in the policy testimony of its witness, that the Commission should impose the following terms and conditions on the Joint Petitioners to the Settlement:

- (1) no party to the settlement will propose that a provision of the Joint Petition be adopted in any other proceeding based on the fact that such provision was included in the Joint Petition; and

(2) no party to the settlement will seek to reopen another Pennsylvania public utility's settlement of its retail restructuring proceeding to modify any provision of such settlement in order to make it consistent with a provision of the Joint Petition.

PPL Objections at 32. PPL, in its Objections and the testimony of its witness, requested the Commission to declare a policy that its approval of the settlement does not render the individual terms of the agreement precedent or relevant or material evidence in any subsequent proceeding.

PPL St. 1 at 7, PPL Objections at 32-33. As PPL's witness stated:

[I]f the terms of the settlement agreement are acceptable to the Commission, the Commission should expressly state that the terms taken as a whole satisfy the public interest standard, but that the fact of the Commission's approval does not render the individual terms of the agreement precedent or relevant or material evidence in subsequent proceeding, and that the terms of any subsequent proposed reorganization, merger or other action will be considered on its own merits.

PPL St. 1 at 9 (emphasis added). As noted below, the parties have already agreed that they would not cite this settlement as controlling precedent. The OCA submits, however, that the decision as to whether evidence of this Settlement is relevant, or material, and what weight it should be accorded in any future hypothetical proceeding, is one that this Commission and the ALJ's are fully capable of deciding in that future proceeding. To restrict the Commission's future consideration of evidence at this time is simply improper. PPL's proposed conditions are unnecessary, a violation of the due process rights of the parties, and bad regulatory and public policy. In essence, PPL is asking this Commission to determine now that it will never consider the relevance or give any evidentiary weight in any future case to any provision of this settlement and will not consider its Order or decision approving this settlement in any matter. See, e.g. PPL St. 1 at 7.

The OCA would note that it has addressed PPL's claims thoroughly in its Reply to PPL's Objections and will not repeat all of its arguments herein. Additionally, the OCA would note that the Settlement is clear that this Settlement will not constitute *controlling* precedent. The Settlement provides:

Acknowledging that it is expressly understood and agreed that the Settlement constitutes a negotiated resolution solely of issues addressed herein, the Merger and Corporate Restructuring, the Joint Petitioners agree that this Settlement shall not constitute or be cited as controlling precedent in any other proceeding, including a proceeding involving a merger or an acquisition by another Pennsylvania electric utility.

Joint Petition, ¶72. The OCA does not dispute that this settlement will not constitute controlling precedent and the settlement and the law provides adequate support in this regard.

Through policy testimony of its witness, PPL seeks to go further and control all other potential uses of this settlement in the future. Thus, PPL's witness stated:

[T]he fact that a particular term was part of a settlement agreement approved by the Commission should not be considered in any way as a binding precedent in a subsequent proceeding nor should it be admitted as evidence in a subsequent proceeding.

PPL St. 1 at 7 (emphasis added). Although as noted above, the OCA agrees that the settlement is not *controlling* precedent, the OCA submits that to preclude the Commission from ever being informed of the existence of a settlement or accepting evidence of a settlement—evidence to which the Commission can give proper weight—is bad public policy. The OCA respectfully submits that future Commissions must be able to make determinations as to what evidence may be relevant in a given proceeding and must be permitted to give appropriate weight to all evidence before it. PPL's

proposal could eventually prevent the creation of a full record for consideration by the ALJ and the Commission.

If in a future proceeding, a party seeks to introduce evidence of a settlement, the utility, or other aggrieved party, can present evidence as to why the settlement provision is not relevant, should be accorded no weight, or should not be applied to it. If the aggrieved party feels that the Commission gave the evidence improper weight, or improperly admitted the evidence, that party can always challenge that decision. But, the parties to the Settlement should not be precluded from ever referring to the terms of the settlement for whatever value they may have in a future proceeding, or during future settlement negotiations. To do so would be to infringe upon the due process rights of the Joint Petitioners in future cases. Indeed, the OCA can envision cases where the Commission might wish to be informed of prior settlements in order to determine whether consistency among similarly situated companies with respect to certain issues is appropriate.

The OCA submits that PPL's proposal proves too much. PPL and its witness seem to be suggesting that this or a future Commission cannot be relied upon to consider each case on its merits and to determine what condition or relief is appropriate based on all of the facts of record in a case. What PPL is really suggesting is that this Commission and the Joint Petitioners be circumscribed by a condition that presupposes the irrelevance of these settlement provisions to a future, hypothetical case. The OCA submits that this approach constitutes poor regulatory and public policy and could derail the settlement process that has worked so well in electric and natural gas restructuring in Pennsylvania. This Commission has developed a useful paradigm for settling complex cases and the Commission should not allow that process to be scuttled.

As noted above, it is difficult enough to achieve just and reasonable settlements among truly interested parties in a complex and difficult case such as this one. It would be impossible to achieve settlement, however, if wholly disinterested parties were allowed to challenge such settlements because of the possibility that some term from the settlement might be suggested in some as yet unfiled or unanticipated proceeding involving another set of parties.

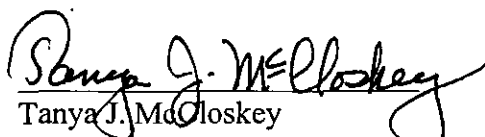
PPL has also requested that the Commission rule now that this settlement cannot be used to reopen another electric utility's restructuring proceeding. The OCA submits, however, that PPL's concern is unfounded. The restructuring proceeding settlements are settlements in their own right and the terms of their reopening would be governed by the settlements themselves or the agreement of the parties to the settlement. The OCA submits that there is simply no need for the Commission to direct such a condition when those settlements have been concluded, approved by the Commission, and are in the process of being implemented. If, indeed, any request is made to reopen any of the settlements, the Commission can rule on the merits of that request at the time it is made based on the facts at the time. PPL's request for additional conditions should be rejected.

The OCA submits that the conditions sought by PPL should be rejected. The OCA submits that imposing these types of conditions on the Joint Petitioners or the settlement process will simply stifle the settlement process that has worked so well in Pennsylvania.

III. CONCLUSION

For the reasons set forth above, and the reasons set forth in the Joint Settlement, the OCA's Statement in Support, and the OCA's Reply to Objections, the OCA submits that the Joint Settlement reaches a fair balance of the myriad of issues and interests in this proceeding. This comprehensive settlement that is the product of intense and detailed negotiations that brought together a wide array of diverse parties, is in the public interest and should be approved.

Respectfully submitted,


Tanya J. McCloskey
Senior Assistant Consumer Advocate
Stephen J. Keene
Assistant Consumer Advocate

Counsel for:
Irwin A. Popowsky
Consumer Advocate

Office of Consumer Advocate
555 Walnut Street 5th Floor, Forum Place
Harrisburg, PA 17101-1923
(717) 783-5048

Dated: May 16, 2000
58242

APPENDIX A

OCA PROPOSED FINDINGS OF FACT

1. The corporate restructuring and merger will affect many areas of PECO's regulated operations. OCA St. 1-S at 5-6.
2. As work forces are combined and reduced, as well as career offerings expanded, ratepayers could be at increased risk for loss in operational efficiencies such as reductions in service quality, customer service, or a diminished rate at which productivity or distribution quality might otherwise improve. OCA St. 1-S at 12-13.
3. The merger is expected to produce net savings during the first five years. PECO St. 4.
4. The merger will bring together two utilities with substantial nuclear capacity. PECO St. 2 at 2-3.
5. The Settlement provides for affirmative and immediate benefits for PECO's ratepayers and PECO's service territory.
6. PPL's interest in the individual provisions of the Settlement is not direct, substantial or immediate.

OCA PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Chapters 11, 19, 21, 22 and 28 of the Public Utility Code.
2. *The Joint Petition for Settlement is reasonable and in the public interest.*
3. The proposed corporate restructuring of PECO and merger with Unicom, as modified by the Settlement, will provide affirmative benefits to ratepayers.
4. The rate reductions and the rate cap extension provisions of the Settlement provide an appropriate means of providing affirmative merger benefits to ratepayers.
5. The universal service provisions are reasonable and provide an appropriate mechanism for sharing merger benefits.
6. The reliability provisions secure an essential protection and an important public benefit of this merger for PECO's ratepayers.
7. The nuclear provisions are reasonable and in the public interest.
8. The corporate protections are reasonable and in the public interest.
9. The environmental provisions are reasonable and in the public interest.
10. PECO's commitment to maintain a corporate headquarters in Philadelphia, employment levels at the corporate headquarters, and to maintain its charitable and civic giving is reasonable and in the public interest.
11. The competitive provisions are reasonable and in the public interest.
12. The large customer provisions are reasonable, non-discriminatory and in the public interest.
13. PPL Electric Utilities Corporation does not have standing to challenge the individual settlement provisions.

PROPOSED ORDERING PARAGRAPHS

The Office of Consumer Advocate adopts the proposed ordering paragraphs attached by PECO Energy to PECO Energy's Second Prehearing Memorandum.

APPENDIX B

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17105-3265

**Electric Distribution Companies'
Sustainable Energy Funds**

**Public Meeting
May 21, 1999
May-1999-C-7***

**Docket Nos.
R-00973953; R-00973954;
R-00973981; R-00974008;
R-00974009**

JOINT MOTION
OF
CHAIRMAN QUAIN AND COMMISSIONER BROWNELL

Today marks a significant milestone in establishing Pennsylvania as a national leader in the development of renewable and clean energy technologies. The establishment of the structure for the Sustainable Energy Funds, which were created in several of the electric restructuring cases approved last year, is one of the most exciting, innovative and potentially rewarding outcomes of that process. Through the development of these initiatives, Pennsylvania has reinforced its commitment to a leadership role in technology and to a greener environment. The Commission applauds the work of all the parties including the environmentalists, consumers, Electric Distribution Companies, and marketers who have worked so hard to make this a model to stimulate the growth of technology for tomorrow.

The successful operation of these initiatives requires a partnership between the regions and the state. Towards that end, the Commission directs a cooperative approach. First, the Commission is announcing the creation of a statewide board which will provide oversight, guidance and technical assistance to the regional boards approved by today's action. The statewide board will work in conjunction with the regional boards to ensure that the Sustainable Energy Funds work in concert to promote a consistent plan which leverages the investment in new technologies. Of equal importance is the establishment of the regional boards. This approach envisions a bi-lateral coordinated effort. Through the local regional boards, projects and initiatives may be identified as well as potential sources of additional support and expertise.

The statewide board will consist of representatives with diverse expertise to guarantee that adequate technical and leveraging assistance is provided. The board will be comprised of a representative from each of the regional boards as well as representatives of the Public Utility Commission, the Department of Environmental Protection, the Department of Community and Economic Development, the Office of Consumer Advocate and the Pennsylvania Environmental Council.

The statewide coordination of the Sustainable Energy Funds will help to guarantee the establishment of Pennsylvania as the leader in renewable technologies. When viewed as a statewide initiative, the Sustainable Energy Funds represent a significant investment in the Commonwealth by the customers, the companies and by the Commonwealth.

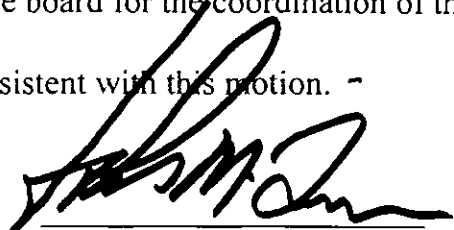
There is a great deal of work yet to be done. The regional boards, in conjunction with the statewide board, must identify potential opportunities, prioritize the Funds' objectives and develop an outreach plan to garner further support for the initiatives. These efforts will benefit by prudently leveraging funds which will enhance the opportunity for success. Through cooperative efforts the regional funds will serve to create new opportunities to make Pennsylvania a national leader not only in competitive energy markets, but also in new technology for renewable and sustainable energy.

For the foregoing reasons, we believe that creation of a statewide board is in the public interest and will further provide for the accomplishment of the goals originally set forth in the restructuring settlements.

THEREFORE, WE MOVE THAT:

1. The Commission shall establish a statewide board for the coordination of the sustainable energy funds; and,
2. That the Law Bureau prepare an order consistent with this motion.

DATE: May 21, 1999



**John Quain
Chairman**

DATE: May 21, 1999



**Nora Mead Brownell
Commissioner**

CERTIFICATE OF SERVICE

Re: 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-110550F0147

I hereby certify that I have this day served a true copy of the foregoing document OCA's Main Brief upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 17th day of May, 2000

SERVICE IN PERSON 5/17/00

Kenneth L. Mickens, Esq.
Kandy Melillo, Esq.
Office of Trial Staff
PA Public Utility Commission
P.O. Box 3265
Harrisburg, Pa 17105-3265

Hon. Allyson Y. Schwartz
Senate Box 203004
Main Capital Bldg.
Room 182
Harrisburg, PA 17120

Daniel Clearfield, Esq.
Kevin Moody, Esq.
Wolf, Block, Schorr and Solis-Cohen
Suite 300
212 Locust Street
Harrisburg, PA 17101

Bernard A. Ryan, Jr., Esq.
Small Business Advocate
Suite 1102 Commerce Bldg.
300 North Second Street
Harrisburg, PA 17101

David Kleppinger, Esq.
Charis M. Burak, Esq.
McNees Wallace & Nurick
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166

Christopher B. Craig, Esq.
Senate Democratic Appropriations
Committee
Room 545 Main Capitol Bldg.
Harrisburg, PA 17120

William T. Hawke, Esq.
Malatesta Hawke & Mckeeon, LLP
Harrisburg Energy Center
100 North Tenth Street
Harrisburg, PA 17101

John Hanger
Citizens for Pennsylvania's Future
Suite 410
212 Locust Court
Harrisburg, PA 17101

James H. Cawley, Esq.
Rhoads & Sinon
12th Floor
One South Market Street
Dauphin Building
P. O. Box 1146
Harrisburg, PA 17108

Michael Fiorentino, Esq.
Clean Air Council
Suite 106
105 N. Front Street
Harrisburg, PA 17101

Eric J. Epstein, Esq.
4100 Hillsdale Road
Harrisburg, PA 17112

SERVICE BY FEDERAL EXPRESS 5/16/00

Robert Jaffe, Esq.
City of Philadelphia, City Council
Room 588 City Hall
Philadelphia, PA 19107

Gregory Lawrence, Esq.
C. A. Weiser, Esq.
Sutherland, Asbill & Brennan, LLP
1275 Pennsylvania Avenue, NW
Washington, DC 20004-2415

Paul Bonney, Esq.
Ward Smith, Esq.
Kent D. Murphy, Esq.
PECO Energy Company
2301 Market Street
P.O. Box 8699
Philadelphia, Pa 19101-8699

Patricia McNamara
6048 Ogontz Avenue
Philadelphia, PA 19141

Greg Pastore
619 Pemberton Street
Philadelphia, PA 19147

Paul Russell, Esq.
Pennsylvania Power & Light Co.
Two North Ninth Street
Allentown, PA 18101

John Will Ongman, Esq.
Marc D. Machlin, Esq.
Pepper Hamilton, LLP
600 Fourteenth Street, NW
Washington, DC 20005

Donald A. Kaplan, Esq.
Leanne M. Bober, Esq.
Preston, Gates, Ellis & Rouvelas Meeds
Suite 500
1735 New York Avenue, NW
Washington, DC 20006

Kenneth M. Barna, Esq.
Rubin & Rudman, LLP
50 Rowes Wharf
Boston, MA 02110

Thomas P. Gadsden, Esq.
Anthony DeCusatis, Esq.
Morgan, Lewis & Bockius
1701 Market Street
Philadelphia, PA 19103-2921

Phil Bertocci
Community Legal Services, Inc.
1424 Chestnut Street
Philadelphia, PA 19102

John L. Munsch, Esq.
Allegheny Power
800 Cabin Hill Drive
Greensburg, PA 15601

Peter Meadows-Adels
Charles McPhedran
Suite 1801
117 S. 17th Street
Philadelphia, PA 19103

John L. Hall, Esq.
Unruh Turner Burke & Frees PC
P. O. Box 515
West Chester, PA 19381-0515

Amy Hammersmith
2312 Parrish Street
Philadelphia, PA 19130

John S. Halstead, Esq.
Gawthrop, Greenwood & Halsted
119 North High Street
West Chester, PA 19381-0562

Norbert Smith, Esq.
Patricia J. Clark, Esq.
Allegheny Energy Supply
Roseytown Road
RR 12, Box 1000
Greensburg, PA 15601

Joseph A. Dworetzky, Esq.
Hangley, Aronchick, Segal & Pudlin
27th Floor
One Logan Square
Philadelphia, PA 19103-6933

Carville B. Collins, Esq.
Piper Marbury Rudick & Wolfe, LLP
36 South Charles Street
Baltimore, MD 21201-3018

Steven P. Hershey
Connolly, Epstein, Chicco, Faxman, et al
9th Floor
1515 Market Street
Philadelphia, PA 19102-1909

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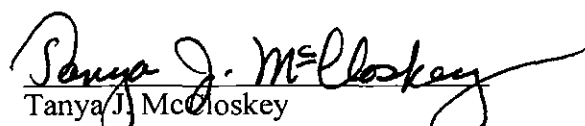
Amy Gold
P. O. Box 4402
Houston, TX 77210

Andrew Altman
400 S. Camac Street
Philadelphia, PA 19147

Dennis Winters
2314 Delancey Place
Philadelphia, PA 19103

Craig A. Doll, Esq.
214 State Street
Harrisburg, PA 17101

Brian P. Downey, Esq.
John A. Greenbaum, Esq.
Pepper Hamilton, LLP
200 One Keystone Plaza
North Front and Market Streets
P. O. Box 1181
Harrisburg, PA 17108-1181


Tanya J. McCloskey
Senior Assistant Consumer Advocate

Counsel For
Office of Consumer Advocate
555 Walnut Street, 5th Floor Forum Place
Harrisburg, PA 17101-1923
(717) 783-5048

55995