





NOVEMBER 30, 2000

A-110550F0147

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**DOCKETED**  
DEC 05 2000

**In Re: PECO Energy Company Competitive Default Service Program Bidding: Joint Petition  
for approval of Competitive Default Service Coordination Agreement**

To Whom It May Concern:

This is to advise you that the Commission in Public Meeting on November 29, 2000 in the above-entitled proceeding has adopted an Order.

An Order has been enclosed for your records.

**DOCUMENT  
FOLDER**

Very truly yours,

James J. McNulty  
Secretary

smk  
Enclosure  
cert. Mail

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg PA 17105-3265**

Public Meeting held November 29, 2000

Commissioners Present:

Robert K. Bloom, Vice-Chairman  
Nora Mead Brownell  
Aaron Wilson, Jr.  
Terrance J. Fitzpatrick

In Re: PECO Energy Company  
Competitive Default Service Program      Docket No. A-110550 F0147  
Bidding: Joint Petition For Approval Of  
Competitive Default Service  
Coordination Agreement

**DOCUMENT  
FOLDER  
BY THE COMMISSION:**

**ORDER**

**DOCKETED  
DEC 05 2000**

On October 18, 2000, PECO Energy Company ("PECO" or "the Company") and the New Power Company Inc. ("New Power") (together referred to as the Joint Petitioners) filed the above-captioned petition seeking approval of their Competitive Default Service Coordination Agreement ("PECO-New Power CDS Agreement"). Pursuant to the agreement, New Power will provide CDS to a portion of PECO's residential electric customers. Additionally, the Joint Petitioners request that the Commissioners approve their petition expeditiously and without modification.

On October 23, 2000, Green Mountain Energy Company (“GME”) filed an answer and protest to the Joint Petition. On October 27, 2000, PECO filed a response to GME’s Protest and Answer.

On October 30, 2000, New Power filed an answer to GME’s protest and answer and a preliminary motion to strike or dismiss GME’s protest and answer. On November 3, 2000, GME filed a reply to PECO’s response to GME Answer and Protest. On November 6, 2000, GME filed an answer to New Power’s Preliminary Motion to Dismiss.

On November 6, 2000, Shell Energy Services Company, Inc. (“Shell”) filed an answer opposing the Joint Petition. On November 8, 2000, the Clean Air Council (“CAC”) filed an answer and protest to the Joint Petition. On November 14, 2000, New Power filed responses to the CAC’s answer and protest and to Shell’s answer and protest. On November 17, 2000, PECO filed its Responses to Shell’s and CAC’s Answers to the Joint Petition for Approval of the CDS Agreement.

## **DISCUSSION**

### **Background**

Paragraph 38 of the Company’s Joint Petition for Full Settlement of PECO’s Restructuring Plan (“Restructuring Settlement”), which was approved by Commission order entered May 14, 1998, required that twenty percent (20%) of all PECO’s residential customers, determined by random selection, be assigned to

a provider of last resort default supplier other than PECO ("CDS Provider"). The CDS Provider was to be selected by the Commission on the basis of a Commission-approved energy and capacity market price bidding process. As established by that paragraph, CDS included all customer care functions.

On June 22, 2000 the Commission approved PECO's Merger Settlement. Application of PECO Energy Company, Pursuant to Chapters 11, 19, 21 and 28 of the Public Utility Code, for Approval of 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, Order entered June 22, 2000 at Docket No. A-110550F0147. Paragraph 52 of that settlement revised the CDS bidding process by requiring that the Company issue a Request For Proposal ("RFP") for electric generation and capacity only, excluding customer care functions. Under Paragraph 52a the Commission was to select a winning bidder by July 1, 2000. The Commission's April 29, 1999 Order establishing the rules for PECO's CDS provided that CDS would be awarded to the qualified bidder with the lowest price.

Under Paragraph 52b of the Merger Settlement, in the event no winning bidder was selected under the RFP process described above, the Company agreed to engage in good faith negotiations with a qualified supplier to enter into a bilateral CDS agreement for provision of electric generation supply and capacity to the percentage of PECO's residential customers included in the CDS bid process.

The Merger Settlement further required that the CDS Agreement:

- (1) include a schedule for implementation;
- (2) not require CDS Customers to pay generation rates in excess of the otherwise applicable shopping credits; and
- (3) not impose additional costs to PECO as compared to costs PECO would have incurred if the CDS load had been awarded in accordance with the terms of the Restructuring Settlement.

On April 6, 2000, the Company issued an RFP for electric generation supply and capacity only. A copy of the RFP was attached to the Joint Petition as Appendix A.

On August 22, 2000 the Commission issued a Secretarial letter stating that the bid it received in response to the April 6, 2000 RFP was non-conforming and directing PECO to proceed with the bilateral CDS negotiations.<sup>1</sup>

On August 24, 2000, the Company issued an RFP containing the Company's rules for bilateral CDS agreements. A copy of this document was attached to the Joint Petition as Appendix B. That RFP established the deadline of September 8, 2000 for submission of CDS bids.

By the September 8 deadline, three bidders submitted generally conforming bids, each to supply the entire CDS load. PECO then entered into separate discussions with each of those three bidders.

Based on those discussions, and an evaluation of each bidder's overall bid package, on October 3, 2000, PECO selected New Power, the qualified bidder

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<sup>1</sup> On September 19, 2000, Shell filed a petition for reconsideration from this Secretarial Letter. By order entered October 27, 2000, the Commission denied Shell's petition.

offering the lowest CDS price, as the winning bidder to serve the entire CDS load.

The agreement was attached to the Joint Petition as Appendix C.

#### PECO-New Power CDS Agreement

Under the CDS Agreement, New Power will offer Rate R CDS Customers a 2.02% discount off of PECO's shopping credit, and will offer Rate RH customers a 1.02% discount off of the shopping credit.

The CDS Agreement has the following additional major components:

(1) New Power will provide no less than two percent (2%) of its offered energy supply for CDS from renewable sources as required by Paragraph 38b of the Restructuring Settlement.

(2) New Power will provide electric generation supply to CDS Customers at the prices from the period commencing on the first meter reading date occurring after January 1, 2001 through the last meter reading date occurring prior to February 1, 2004 ("CDS Term").

(3) The Company will assign to CDS 299,300 residential customers, representing approximately twenty two percent (22%) of its total number of residential customers. The customers assigned to CDS will be randomly selected from non-shopping residential customers, meaning those who have not chosen an alternate electric generation supplier ("EGS"). Customers assigned to CDS shall have the right to opt out of participating in CDS and, at any time during the CDS Term, may also return to PECO or switch to another EGS without penalty or charge. PECO will provide consolidated billing for all CDS Customers.

(4) If, on October 15, 2002, the number of CDS Customers served by New Power as CDS Provider is less than twenty percent (20%) of all of PECO's residential customers as of that date, PECO will perform a further random selection of the number of non-shopping residential customers which, when added to the number of CDS Customers served by New Power as of October 15, 2002, equals twenty percent (20%) of all PECO's residential customers.

In the Joint Petition, PECO and New Power request expedited treatment of this petition and approval of the CDS Agreement.

PECO's Request for Specific Rulings

In the Joint Petition, PECO and New Power also request that the Commission issue a ruling interpreting Paragraph 39 of the Restructuring Settlement. Paragraph 39 of the Restructuring Settlement provides that “[I]f, on January 1, 2001, less than 35% of all PECO’s residential and commercial customers by class are obtaining generation service from an alternate EGS or PECO Supplier affiliate or division (including those customers assigned to . . . CDS pursuant to the competitive bid. . . ) then the number of remaining customers, necessary to reach the 35% target. . . shall be assigned an EGS. . . .” In accordance with Paragraph 39A, the Joint Petitioners seek confirmation that all 299,300 residential customers assigned to CDS under the CDS Agreement shall be included in calculating the required thirty five percent (35%) market share threshold.

Furthermore, the Joint Petitioners seek confirmation that: (1) New Power, by reason of the exercise of its rights and performance of its obligations as a CDS Provider shall not be considered a “public utility” within the meanings of 66 Pa. C.S.A. § 102, but rather shall be subject to those rules and regulations applicable to an EGS within the meanings of 66 Pa. C.S.A. § 2803, as modified by the CDS Agreement; and (2) that the proposed operational procedures contained in Exhibit

A to the CDS Agreement are consistent with those provisions of the competitive safeguards and/or code of conduct set forth in 52 Pa. Code §54.122.

Finally, the Joint Petitioners state that the CDS Agreement is contingent upon approval by the Commission without modification. If the Commission rejects the CDS Agreement, the Agreement automatically will terminate and be null and void. If the Commission, in approving the CDS Agreement, should modify any terms or conditions or add any conditions either Joint Petitioner may elect to withdraw from the Agreement by filing a notice thereof with the Commission and other Joint Petitioner by facsimile or overnight delivery served within five business days of entry of the Commission order. Upon the Commission's issuance of a final order approving the Petition and the CDS Agreement without modification, the CDS Agreement shall be implemented and enforceable.

#### Answer and Protest of GME

In its answer and protest, GME states that approval of the proposed agreement between New Power and PECO is not in the public interest because PECO had inappropriately rejected a proposal submitted by GME. GME claims that its proposal sets a lower price at 2% below the shopping credit for all CDS customers served under rates R, RH and OP as compared to New Power that uses a weighted average for those same customers, which is only 1.83% below the shopping credit. GME also claims its proposal provides for power that is

environmentally cleaner as the 98% of the power provided under the CDS program which is not required to be from renewable resources would be from sources that are substantially cleaner than the system-wide power, coming from hydro and gas-fired sources that New Power would use.

GME also states that there is nothing preventing the Commission from accepting its proposal and that the Commission can approve multiple CDS suppliers. Under the Phase II process adopted by the Commission, GME argues that PECO was obligated to negotiate in good faith with qualifying suppliers and submit to the Commission the results of those negotiations. See Merger Settlement, ¶52.b, and the Commission's June 22, 2000 Opinion and Order Approving the Settlement. GME claims that PECO had determined that GME is a qualifying supplier, yet PECO refused to negotiate in good faith with GME concerning its current proposal and refused to submit GME's proposal to the Commission

GME explains that on September 14, 2000, it was notified by PECO that its original proposal was in conformance with the requirements of PECO's August 24, 2000 RFP. GME states that although PECO entered into discussions with the three qualifying bidders, these discussions merely clarified PECO's RFP requirements, by filling in the details, and were not good faith negotiations intended to elicit the best proposal from each of the qualifying suppliers.

GME states that on October 3, 2000, it was notified by PECO that it would no longer consider GME's proposal and instead would enter negotiations with

another supplier. GME claims that PECO's failure to negotiate with GME is inconsistent with the requirement that PECO "negotiate" with all qualified suppliers.

In response to PECO's October 3 notification discontinuing negotiations, on October 12, 2000, GME submitted an amended proposal that PECO refused to consider although PECO continued its negotiations with New Power. GME claims that it was both improper and unjust for PECO to continue negotiations with one party while refusing to consider the amended proposal submitted by GME.

#### PECO's Response to GME's Protest and Answer

In its answer, PECO labels GME's protest as an attempt to circumvent a legitimate competitive bid process. PECO claims that it created an equitable, workable process that treated all bidders fairly and equally and that in the process clearly and uniformly communicated the rules and the deadlines to all parties.

PECO explains that in advance of the September 15, 2000 deadline contained in Section N5 of the August 24, 2000 RFP, PECO notified each bidder electronically on September 14, 2000 that it had received three generally conforming bids and would pursue discussions with all three qualified bidders. The September 14, 2000 e-mail also provided that as a result of conference calls and meetings with each bidder and PECO's further evaluation of the bids, PECO

would select one successful bidder with whom the Company would negotiate a definitive CDS Bilateral Agreement.

In advance of the Wednesday September 20 deadline, PECO held conference calls with each of the three bidders on September 19, 2000. PECO then afforded all bidders the opportunity to revise their CDS price by September 29, 2000. PECO explains that it had advised the three conforming bidders participating in the bilateral process that they had until September 29, 2000 to revise the pricing of their original bid. Both New Power and a second bidder submitted discounted bids in compliance with the deadline. PECO explains further that GME did not submit an amended proposal until October 12, 2000, thirteen days after the deadline and nine days after the selection of the successful bidder.

PECO explains that its deadlines were not artificial as claimed by GME but the delay in deadline from the one that appeared in the RFP was to allow bidders the opportunity to revise their CDS price. This additional price revision opportunity in turn delayed PECO's selection of the winning bidder and its initiation of negotiations for a more definitive CDS bilateral agreement.

PECO states that under the first stage, the PUC was to select a winning CDS bidder by July 1, 2000. This stage was not completed until August 22, 2000. To try to meet the January 1, 2001 date for initiation of CDS service, PECO was compelled to set extremely aggressive deadlines for submission, review, evaluation and negotiation of bilateral CDS bids. PECO recognized that the tight

time frame created problems for the bidders and for PECO. Accordingly, after holding conference calls and meetings with each bidder, PECO allowed them additional opportunities to respond to issues that had been raised in face to face meetings. As a result of such accommodations, PECO was not able to render its final decision as to the winning bidder until end of business Tuesday, October 3, 2000.

PECO states that the final decision selecting a CDS supplier in the bilateral negotiation stage was reserved to PECO in the settlement agreement. For the first stage of the bidding process, the settling parties made it clear that the Commission would select the winning bidder. Merger Settlement, ¶ 52.a. In contrast, the Commission's role in the bilateral negotiation phase of the bidding was that "the Commission could modify, reject or fail to approve any bilateral CDS agreement. Merger Settlement, ¶ 52. c.

#### GME Reply to Response of PECO to GME's Answer and Protest

GME replies that PECO's response challenges GME on only one issue -- whether PECO refused to negotiate with GME. GME claims that PECO did not engage in good faith discussions concerning GME's proposals but that the discussion held were designed to merely clarify the terms of the RFP and GME's initial proposal. GME states that the question of whether there were good faith negotiations between itself and PECO is an issue of fact and that it would not be opposed to evidentiary hearings. In conclusion, GME requests that the

Commission award the CDS function to GME, or alternatively apportion the CDS customers among bidders in a reasonable fashion.

New Power's Answer to GME's Protest  
New Power's Preliminary Motion to Strike

In its answer, New Power echoed many of the same arguments advanced by PECO in its answer. However, in addition, New Power argues that under the process approved by the Commission in the PECO-Unicom Settlement, neither PECO nor New Power have legal authority to submit GME's revised proposal to the Commission and a disappointed bidder has no legal authority to submit a revised bid to the Commission for its consideration. New Power also argues that the established bidding process does not support GME's requested relief that the Commission order PECO to enter into negotiations with GME.

In its preliminary motion to dismiss GME's Protest, New Power argues that the answer/protest was not verified in violation of the Commission's rules at 52 Pa. Code § 1.36 (relating to verifications), that the protest was insufficient as to substance and that GME does not have standing as a disappointed bidder to file a protest to the petition as it cites no legal authority for this proposition.

GME's Answer to New Power's Preliminary Motion

In its answer, GME provided a verification for its earlier protest and answer. GME also indicated that it was a party aggrieved by the CDS selection

process, that it was an associational party to the PECO-Unicom merger proceeding, and is “party” under 52 Pa. Code § 1.8 (relating to definitions) because it is “[a] person who appears in a proceeding before the Commission who has a direct interest in the subject matter of the proceeding.”

GME also argued that the procedures and the evaluation process that PECO employed without Commission oversight denied GME due process of law and the direct, immediate and pecuniary benefits of being awarded the right to provide competitive default service. GME requests that New Power’s Preliminary Motion to Dismiss should be denied.

#### Shell’s Answer and Protest

In its answer, Shell complains that the bilateral negotiations should not have commenced until the Commission’s ruled on Shell’s Petition for Reconsideration. It claims that the existence of other bidders in the bilateral negotiation process could have influenced its decision regarding Shell’s Petition for Reconsideration.

Shell also argued that the bilateral rules were changed at the eleventh hour without sufficient time for the other bidders to react appropriately. Shell explains that at the request of one of three finalists, to change its bid price, PECO announced by e-mail on September 25, 2000 a rebidding of the CDS price terms. Shell claims that bidders were allowed until noon on September 28 (later extended

to noon, September 29) to respond. Shell claimed that this re-bid of price terms did not give it sufficient time to react.

Shell also argues that there were no meaningful negotiations between itself, a qualified bidder, and PECO. Shell claimed that PECO proposed the terms for the CDS program and there was no opportunity for it to present CDS implementation alternatives that it proposed. Shell finally states that under the terms of the Merger Settlement that the Commission has the authority to reject, modify or fail to approve any such CDS bilateral agreement and that Shell's bid should have been presented to the Commission for its determination of whether multiple bidders should provide CDS service to PECO customers. It proposes that if the Commission approves the Joint Petition, it should convene discussions on the provision of CDS service or it should order a division of CDS among qualified bidders that followed PECO's bidding rules, with Shell serving a substantial portion of CDS customers.

#### CAC's Answer and Protest

In its answer, the CAC claims standing as a signatory to the Restructuring Settlement and the Merger Settlement. CAC also argues that the Commission has the authority to select the winning bidder under Paragraph 52a of the Merger Settlement while PECO has the authority to make recommendations and should not fail to submit qualified bids for the Commission's consideration.

The CAC expresses concern over the allegations made by GME about rolling deadlines or anything less than full good faith negotiations that may have prejudiced GME in the bilateral negotiations phase.

The CAC expresses the belief that the public interest is best served by a competitive default supplier that brings the cleanest possible energy generation to its customers because of environmental benefits. CAC states that it is clear that GME's non-renewable components of its supply will be environmentally cleaner than the non-renewable 98% of New Power's supply. CAC urges the Commission to consider the environmental impact of the supply of all qualifying bidders when evaluating their proposals.

The CAC supports GME's position that the Commission divide PECO's CDS customers between New Power and GME. CAC believes that the entrance of multiple suppliers will enhance competition and increase the quantity of renewable supply in Pennsylvania.

#### New Power's Answer to CAC's Answer and Protest

In its answer, New Power asserts that under the process established in the Restructuring Settlement and the Merger Settlement, the Commission's role is to review the contract submitted by PECO and its selected supplier of competitive default supply.

New Power also asserts that CAC's concerns do not merit any consideration. PECO complied with the process set out in the settlements in the

restructuring and merger proceedings, and New Power's bid complied with the environmental requirements established in the August 24, 2000 RFP. New Power contends that the public interest lies in approving the instant contract that will assure that PECO customers begin receiving CDS service on January 1, 2001.

#### New Power's Answer to Shell's Answer and Protest

In its answer to Shell's Answer and Protest, New Power states that PECO complied with the auction process established in the Joint Settlements in the PECO Restructuring and PECO-Unicom Merger proceedings. New Power states that Shell already litigated the first phase of the CDS auction process and the Commission rejected its claims. The public interest lies in the implementation of a CDS program. Consistent with the process set forth in the settlements, PECO selected one CDS provider, entered into a contract with that bidder and submitted that contract to the Commission.

New Power characterizes Shell as a disappointed bidder with no standing to challenge the award of a contract to another qualifying bidder. PECO contends that it engaged in meaningful negotiations with all qualifying bidders and denies that the second phase of the auction involved a discriminatory price rebid. PECO states that all bidders had the opportunity to participate in the auction process and the result was that New Power submitted the best bid.

New Power also points out that because Shell does not agree to all of the terms and conditions agreed to by PECO and New Power, it is unclear whether

PECO and Shell could arrive at a mutually satisfactory agreement if given another opportunity to do so. PECO argues that the Joint Settlement allows PECO to contract with a single CDS provider and that PECO did not need prior Commission approval to contract with a single CDS supplier.

New Power claims that PECO followed the process mandated by the settlement agreements. PECO points out that all bidders had an opportunity to submit bids. Shell submitted a revised proposal. As such, Shell is a merely a disappointed bidder with no standing to complain that the party awarding the contract chose another bidder.

As to allegations that Shell was disadvantaged by the rebid, New Power states that Shell's argument seems to be that it could have offered PECO an even better deal that it did if it had been given more time to do so and if it knew exactly what other bidders were bidding. However, PECO gave bidders a second opportunity to submit bids in order to obtain the best deal for PECO's customers. New Power points out that even now, Shell requests additional time to negotiate a deal with PECO. New Power references paragraph 4(b) of Shell's filing, and notes that Shell is not willing to accept certain terms in the contract negotiated by PECO and New Power, but according to Shell's paragraph 5, Shell is "ready and willing to discuss a division of CDS function". New Power concludes that at some point, the bidding and the negotiating must cease and PECO must be permitted to enter into an agreement with a CDS provider. Accordingly, New Power asks that the Commission expeditiously approve the instant contract.

PECO's Response to the CAC's Answer and Protest

PECO denies that the CAC has standing to protest the CDS Default Services agreement between itself and New Power.

PECO states that while the Commission had the authority to select the winning bidder in the first stage of the CDS program pursuant to paragraph 52a of the Merger Settlement, the settlement at paragraphs 52b and 52c contemplates a PECO-designed and administered process in which PECO would attempt to negotiate a definitive CDS Agreement. As such, PECO is not required to submit all qualified bids to the Commission for its independent consideration.

PECO asserts that it complied with the process established in the Merger Settlement, and that the process it utilized treated all bidders fairly and maintained strict confidentiality regarding specifics of each bidder's bid. PECO established clear rules and deadlines that were communicated equally to all participants. All participants were given an equal opportunity to hold conference calls and/or face to face meetings with PECO.

PECO also asserts that it was in compliance with the Commission established 1998 Electric Restructuring Settlement in that it required not less than 2% of New Power's energy for CDS customers be generated from renewable resources. Therefore, there is no basis to claim that New Power's bid is environmentally inferior.

PECO asks that the Commission dismiss the CAC's answer and protest.

### PECO's Response to Shell Answer

In its response, PECO contends that the process complied with Commission approved Restructuring and Merger Settlements. PECO also denies that the Commission should have halted the bilateral negotiation phase until it ruled on Shell's petition for reconsideration. PECO notes that the Commission (i) rejected Shell's bid to its April 6, 2000 Request for Proposal and (ii) directed PECO to proceed with the bilateral CDS stage. On November 1, 2000, the Commission denied Shell's Petition for Reconsideration and those claims should not be allowed to be re-litigated.

PECO also denies that it conducted no meaningful negotiations with Shell. PECO explains that the price rebid opportunity that was provided uniformly to all bidders did not act to the detriment of Shell. PECO states that it held with each of the three bidders conference calls and/or face to face meetings at the bidder's option to enable PECO to evaluate the respective bids and select the winning bidder.

PECO also denies that under the Merger Settlement that it should have presented Shell's bid to the Commission. The CDS bilateral process established under Paragraph 52(b) of the Commission-approved Merger Settlement contemplated that a PECO established process pursuant to which PECO would enter into good faith bilateral negotiations in an attempt to reach a definitive CDS Agreement. The Merger Settlement did not require it to enter into a CDS

agreement, but committed PECO to file with the Commission any CDS Agreement that did result.

### Resolution

We have reviewed the Joint Petition, the Joint Petitioners' CDS Agreement, and the subsequent filings made by PECO, New Power, Shell, GME and the CAC.

As a preliminary matter, we will dismiss all objections to the participation of CAC, GME and Shell in this proceeding. We believe that the importance of this program outweighs any technical argument that would prevent this Commission from hearing from all interested parties.

#### A. Joint Petition

As to the Joint Petition, we find that the Joint Petitioners' CDS Agreement complies with the requirements set forth in the Company's Restructuring Settlement as modified by its Merger Settlement. In approving the Joint Petition and CDS Agreement, we reject GME's and Shell's arguments regarding PECO's failure to continue its negotiations with them as a breach of its duty under the Merger Settlement to negotiate in good faith with all qualified suppliers. The circumstances surrounding the September 25 re-bid request demonstrates that Shell was not placed at any disadvantage. At the same time as the other qualified bidders, Shell was notified of the re-bid of the CDS price term request by September 25, 2000 and like all other qualified bidders, was given until September

29, 2000 to respond. We note that PECO did not deprive Shell of an equal opportunity to submit a re-bid of the pricing term during this time period; Shell just did not avail itself of the opportunity to continue its participation in the process.

We likewise dismiss Shell's allegations about PECO's refusal to discuss implementation alternatives. In order for each bidder to have an equal opportunity, it is essential that there be a uniform CDS program proposal upon which bids may be submitted and evaluated. Implementation alternatives offered by one bidder introduce variables that not only complicate the negotiation process, but also compromise the integrity of that process.

As to GME's allegations, the schedule of events surrounding the negotiations demonstrates that, although GME was notified on October 3 that PECO was discontinuing negotiations, it did not submit a revised proposal to PECO until October 12, 2000. This means that PECO was not aware of GME's willingness to negotiate until 9 days later, only six days before the Joint Petitioners had reduced their CDS agreement to writing on October 18, 2000. Considering this chain of events in context, we cannot agree that PECO breached its duty under the settlement by failing to negotiate in good faith with GME.

On the questions that have arisen involving the interpretation of Paragraphs 52.b and 52.c. of the Merger Settlement, we shall rule that while the Commission could accept, reject or modify any filed bilateral CDS agreement, PECO, and not the Commission, would negotiate the CDS agreement with a

supplier or suppliers that it selected. Merger Settlement, ¶¶ 52.b, 52.c. PECO would then submit any negotiated CDS agreement or agreements for Commission action. Merger Settlement, ¶ 52.c. We note that the settlement language at 52.b gives PECO discretion to negotiate a CDS agreement with one or more CDS suppliers, provided that it exercise good faith in its negotiations. Based on our interpretation of these paragraphs, we cannot state that PECO breached its duty under the Merger Settlement by failing to submit GME's proposal to the Commission for review.

From a practical standpoint, a bidder submitting a different bid after it has been notified that its original bid was not selected for further consideration/negotiation leads to an unwieldy bid selection process that could continue indefinitely. Tying further negotiations to an original bid serves to encourage bidders to submit their best offers in the first round of bidding so that a finalist or finalists can be selected so that negotiations can proceed in an efficient manner. Unless GME's original bid was clearly comparable to the one submitted by New Power with whom PECO continued negotiations, we see no lack of good faith in PECO's dealings with GME, and cannot fault PECO for rejecting GME's original bid and continuing negotiations exclusively with New Power.

## B. Specific Rulings

As to the Joint Petition's requests for specific rulings<sup>2</sup>, we find that it is reasonable under the language at Paragraph 39a of the Restructuring Settlement, and the protracted time frame associated with the initial phase of CDS bidding that all 299,300 residential customers assigned to CDS under the CDS Agreement be included in calculating the required thirty five percent (35%) market share threshold<sup>3</sup>. We also believe that this interpretation is consistent with paragraph 52.d of the Merger Settlement. This section provides that if a CDS provider is not selected by January 1, 2001 for reasons beyond PECO's reasonable control, then the 20% of customers who would otherwise be in the CDS program could be counted toward calculating the 35 percent market share threshold.

Regarding the Joint Petitioners' other requests, we will state that New Power, by reason of the exercise of its rights and performance of its obligations as a CDS Provider will not be considered to be a "public utility" within the meanings of 66 Pa. C.S. § 102 (relating to definitions). Instead it will be subject to those rules and regulations applicable to an electric generation supplier within the meanings of 66 Pa. C.S. § 2803 (relating to definitions), as modified by the CDS Agreement.

We also have examined the proposed operational procedures contained in Exhibit A to the CDS Agreement and find that they are consistent with those

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<sup>2</sup> We note that no comments were filed in opposition to any of the Joint Petitioners' requested rulings.

provisions of the competitive safeguards and/or code of conduct set forth in 52 Pa. Code §54.122.

C. BCS Issues

Because of the tight implementation schedule involved, we believe that it is necessary to resolve certain issues raised by the Commission's Bureau of Consumer Services (BCS) in advance of the CDS program's start date. In order to provide accurate and understandable information about the CDS program to customers in PECO's service territory, we will direct that all customer information mailings and notices relating to the CDS program be provided to BCS for its review. Such customer information mailings or notices shall be provided to BCS no later than five working days before the proposed distribution dates.

We also direct that bills for those customers enrolled in the CDS program shall be conspicuously labeled "Competitive Default Service" or with such other name that may be adopted for the program. The purpose of this label is to allow customers when contacting PECO or the Commission to inform the customer service representative whether they are with the CDS program or the EGS under the typical supplier agreement. This will help PECO and the BCS properly classify the contact as being EGS or CDS related. Finally, PECO is directed to place the Commission's toll-free number on CDS customer information notices

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<sup>3</sup> Failure to have 35% of customers in PECO's territory receiving generation service from an alternate EGS, PECO supplier affiliate or division would trigger individual customer assignment at random to other EGSs serving in PECO territory up to the 35% level under paragraph 53.c. Merger Settlement, p. 32.

with the direction that customers may contact the Commission by calling 888-PUC-FACT or 888-782-3228.

Finally, to insure that customers are not disadvantaged by their participation in the CDS program, we direct PECO to negotiate payment arrangements for customer CDS balances pursuant to Commission regulations at 52 Pa. Code § 56.97 (b)(relating to procedures upon ratepayer or occupancy contact prior to termination) and § 56.151(3)(relating to utility company dispute procedures - general rule); THEREFORE,

IT IS ORDERED:

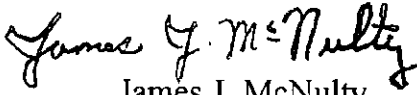
1. That the Joint Petition for Approval of Competitive Default Service Coordination Agreement in PECO Energy Company's Competitive Default Service Program Bidding is approved.

2. That the Preliminary Motion to Strike or Dismiss the Protest and Answer of Green Mountain Energy Company filed by New Power Company is denied.

3. That protests filed by Green Mountain Energy Company, Shell Energy Services Company, Inc. and the Clean Air Council are denied.

4. That a copy of this order be served on all parties of record.

By the Commission,

  
James J. McNulty  
Secretary

(SEAL)

ORDER ADOPTED: November 29, 2000

ORDER ENTERED: **NOV 30 2000**

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HONORABLE LEANNA WASHINGTON  
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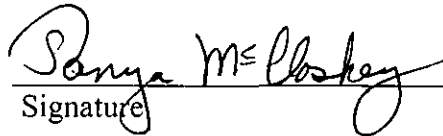
ACKNOWLEDGEMENT OF RECEIPT & ACCEPTANCE OF SERVICE

AND NOW, to wit, this 30<sup>th</sup> day of November, 2000,

the undersigned, as evidence by execution hereof, acknowledges receipt and accepts service of **COPY ORDER** an official Commission document entered, issued, or otherwise promulgated under date of **NOVEMBER 29, 2000**, at Docket No. **A-110550F0147** on behalf of:

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PA P.U.C.

**TANYA J MCCLOSKEY**  
**OFFICE OF CONSUMER ADVOCATE**

  
Signature

Kindly sign and date this acceptance of service and acknowledgement of receipt, and, return the same for filing to:

SECRETARY'S BUREAU FILE RETENTION SECTION  
PA PUBLIC UTILITY COMMISSION  
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HARRISBURG PA 17105-3265

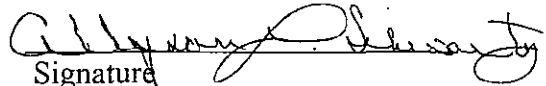
ACKNOWLEDGEMENT OF RECEIPT & ACCEPTANCE OF SERVICE

AND NOW, to wit, this 4 day of December, 2000

the undersigned, as evidence by execution hereof, acknowledges receipt and accepts service of **COPY ORDER** an official Commission document entered, issued, or otherwise promulgated under date of **NOVEMBER 29, 2000** at Docket No. **A-110550F0147** on behalf of:

**HONORABLE ALLYSON Y SCHWARTS**  
**PENNSYLVANIA STATE SENATE**

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PA PUBLIC UTILITY COMMISSION  
B-20 NORTH OFFICE BUILDING  
HARRISBURG PA 17105-3265

ACKNOWLEDGEMENT OF RECEIPT & ACCEPTANCE OF SERVICE

AND NOW, to wit, this 30<sup>th</sup> day of Nov., 2000,

the undersigned, as evidence by execution hereof, acknowledges receipt and accepts service of **COPY ORDER** an official Commission document entered, issued, or otherwise promulgated under date of **NOVEMBER 29, 2000** at Docket No. **A-110550F0147** on behalf of:

**KENNETH MICKENS ESQUIRE**  
**PA PUC OFFICE OF TRIAL STAFF**

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OFFICE OF TRIAL STAFF

*Elaine C. Messinger*  
Signature

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HARRISBURG PA 17105-3265

ACKNOWLEDGEMENT OF RECEIPT & ACCEPTANCE OF SERVICE

AND NOW, to wit, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_,

the undersigned, as evidence by execution hereof, acknowledges receipt and accepts service of COPY ORDER an official Commission document entered, issued, or otherwise promulgated under date of NOVEMBER 29, 2000 at Docket No. A-110550F0147 on behalf of:

BERNARD A RYAN ESQUIRE  
OFFICE OF SMALL BUSINESS ADVOCATE

OFFICE OF SMALL  
BUSINESS ADVOCATE  
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C. Updegraff  
Signature

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