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May 17, 2000

VIA MESSENGER 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) 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 four (4) copies of each of the following documents:

1. Brief of the National Railroad Passenger Corporation in Support of the Joint Petition for Settlement;

2. Proposed Findings of Fact and Conclusions of Law of the National Railroad Passenger Corporation.

Please return one time-stamped copy of each document with our messenger.

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Thank you for your attention in this matter.

Sincerely,

John A. Greenbaum

Enclosures

cc: Charles E. Rainey, Jr., Administrative Law Judge (via fax & messenger delivery, w/enc.)
Mr. John M. Quain, Chairman (via messenger delivery, w/enc.)
Mr. Robert K. Bloom, Vice-Chairman (via messenger delivery, w/enc.)
Ms. Nora Mead Brownell, Commissioner (via messenger delivery, w/enc.)
Mr. Terrance J. Fitzpatrick, Commissioner (via messenger delivery, w/enc.)
Mr. Aaron Wilson, Jr., Commissioner (via messenger delivery, w/enc.)
All counsel of Record (via email and first class mail, w/enc.)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

ORIGINAL

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-1105550147

BRIEF OF THE
NATIONAL RAILROAD PASSENGER CORPORATION
IN SUPPORT OF THE JOINT PETITION FOR SETTLEMENT

Pursuant to the order issued April 25, 2000 by Administrative Law Judge Charles E. Rainey, Jr., the National Railroad Passenger Corporation ("Amtrak") hereby submits this Brief in Support of the Joint Petition for Settlement. The Joint Petition for Settlement ("Joint Petition" or "Settlement") reflects the efforts of dozens of parties, including PECO Energy Company ("PECO"), State agencies, customer groups, individual customers, power marketers, counties, municipalities, and other advocacy groups. It is no accident that a broad cross-section of parties have joined in the Settlement and are seeking its approval. This Settlement unquestionably serves the public interest, and it should be approved by the Commission.

I. BACKGROUND AND PROCEDURAL HISTORY

On November 22, 1999, PECO filed an application seeking approval of its proposed corporate restructuring and merger with Unicom Corporation ("Unicom"). Over the next three months, more than fifty (50) parties sought and were granted permission to intervene in this case. The parties engaged in substantial discovery. Consistent with the Commission's strong policy of encouraging settlements, *See* 52 Pa. Code §5.231(a), the parties simultaneously worked to achieve an amicable global resolution of the issues raised in this proceeding.

On March 24, 2000, PECO and the other signatories filed the proposed Settlement with the Commission. The Commission then solicited comment on the Settlement. The only two parties to oppose the Settlement were PPL Electric Utilities Corporation ("PPL") and Councilman David Cohen. These parties asked the Commission either to reject the Joint Petition or, in the alternative, to impose additional conditions.

On April 18, 2000, and on May 3, 2000, the signatories to the Joint Petition filed extensive testimony supporting the Settlement. In addition, on May 4, 2000, PPL filed testimony by a New York lawyer urging the Commission to limit the precedential effects of the Settlement. The other opponent of the Settlement, Councilman Cohen, filed testimony on the same day focusing principally on the alleged health effects of nuclear power plants.

Then, on May 10, 2000, Judge Rainey presided over a hearing on the objections to the Joint Petition. At that hearing, the pre-filed testimony of various witnesses and related documents were admitted into evidence. Councilman Cohen then presented his own testimony, along with that of Ernest J. Sternglass. Both of these witnesses expressed safety or health-related concerns regarding nuclear power. (Testimony of David Cohen of May 10, 2000, at pp. 415-16; Testimony of Ernest J. Sternglass of May 10, 2000, pp. 431-39).

II. LEGAL STANDARD FOR APPROVAL OF PECO'S APPLICATION

A public utility must apply for a "certificate of public convenience" from the Commission whenever it desires "to acquire from, or to transfer to, any person or corporation, including a municipal corporation, by any method or device whatsoever, including . . . merger. . . , any tangible or intangible property used or useful in the public service." 66 Pa.C.S. § 1102(a)(3). The certificate of public convenience may be granted 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 certificate, may impose such conditions as it may deem to be just and reasonable.

66 Pa.C.S. § 1103(a).

Ordinarily, the applicant (here, PECO) must "demonstrate that the [corporate action] will affirmatively promote the 'service, accommodation, convenience, or safety of the public' in some substantial way." City of York v. Pa. Pub. Util. Com., 449 Pa. 136, 141, 295 A.2d 825, 832 (1972). In this case, PECO is seeking to accomplish two goals in one proceeding -- corporate restructuring and merger -- and the utility needs certificates of public convenience for both actions. To obtain approval, PECO, either alone or with the other settling parties, must demonstrate that under the terms of the Settlement, the proposed merger and restructuring is in the public interest. *See, e.g.*, In re DQE, Inc., 186 PUC 4th 39, 1998 WL 406768 at *6 and *10-11 (it is the applicants' "burden to show that the merger will be in the public interest" and merger will only be permitted if the Commission finds it "is necessary or proper for the service, accommodation, convenience, or safety of the public").

The Commission has set forth the following factors as relevant when determining whether a proposed merger is in the public interest:

a. economies giving rise to a stronger utility for financing costs;

b. economies giving rise to reductions in operating expenses;

c. economies giving rise to a stronger utility through the elimination of duplicative tasks favorably impacting service; and

d. economies giving rise to lower rates than otherwise over time.

In re Newtown Artesian Water Company, 76 Pa. P.U.C. 260 (April 7, 1992) *citing* City of York v. Pa. Pub. Util. Com., 449 Pa. 136, 295 A.2d 825 (1972). The Commission has also provided guidance for opponents of such transactions, suggesting that it may not be sufficient for an opposing party to claim that *it individually* will be harmed by the proposed action. The Commission has stated that the benefits and detriments of the merger will be measured under the public interest test as they impact on "all affected parties." Middletown Township v. Pa. Pub. Util Comm'n, 482 A.2d 674, 682 (Pa. Cmwlth. 1984).

In the DQE merger proceeding, the Commission found that, in the absence of evidence that the merger will have harmful effects, the public interest test may be satisfied if the applicant can demonstrate that its ratepayers will benefit from the merger. As the Commission stated:

> [t]he savings noted [as a result of the proposed merger] are substantial. In addition to the monetary savings, we also note that the ratepayers and merged company will benefit in many other ways from the synergies created by the merger. . . No party has challenged the Applicants' merger proposal or agreements to achieve integrated operations. Accordingly, absent market power concerns, the merger is in the public interest.

In re DQE, Inc., at *25.

The Electricity Generation Customer Choice and Competition Act also provides a statutory requirement for Commission approval of electric utility mergers. Section 2811(e)(2) of the Act provides:

> [i]f the commission finds, after hearing, that a proposed merger, consolidation, acquisition or disposition is likely to result in anticompetitive or discriminatory conduct, including the unlawful exercise of market power, which will prevent retail electricity customers in this Commonwealth from obtaining the benefits of a properly functioning and workable competitive retail electricity market, the commission shall not approve such proposed merger, consolidation, acquisition or disposition, except upon such terms and conditions as it finds necessary to preserve the benefits of a properly functioning and workable competitive retail electricity market.

66 Pa.C.S. § 2811(e)(2). In considering the competitive effects of a merger, the Commission follows the FERC guidelines implementing the 1992 United States Department of Justice and Federal Trade Commission Horizontal Merger Guidelines as revised on April 8, 1997. 57 Fed. Reg. 41, 552 (1992), revised 4 Trade Reg. Rep. (CCH) p 13, 104 (April 8, 1997). In re DQE, Inc., at * 11. In this case, however, neither PPL nor Councilman Cohen have argued that the proposed Settlement or the merger will have anti-competitive effects. Consequently, the only question is whether the Settlement is otherwise in the public interest.

III. ARGUMENT

A. THE JOINT PETITION SHOULD BE APPROVED BECAUSE IT IS IN THE PUBLIC INTEREST

As set forth above, the Commission should approve the proposed merger and restructuring if it determines that such action "is necessary or proper for the service, accommodation, convenience, or safety of the public." 66 Pa.C.S. § 1103(a). The evidence in this case establishes that under the terms of the Settlement, the proposed transaction "will affirmatively promote the 'service, accommodation, convenience, or safety of the public' in some substantial way." City of York v. Pa. Pub. Util. Com., 449 Pa. 136, 141, 295 A.2d 825, 832 (1972). As explained below, this Settlement serves the public interest by reducing PECO's rates, expanding universal service programs for low-income consumers, requiring PECO to improve the reliability of its service, and enhancing the ability of power marketers to compete in PECO's service territory. The Settlement also gives Amtrak the option to pay a lump sum and buy out any remaining obligation to pay competitive transition charges ("CTCs"). Both the General Assembly and the Commission have already determined that it is in the public interest to provide utility customers with such "alternative" payment options. (See 66 Pa. C.S. § 2808(b); 1998 Restructuring Petition at 21 (April 29, 1998).)

1. PECO Rate Reductions and Rate Cap Extension

The proposed Settlement requires PECO to reduce its rates by $200 million over a period of approximately four years. Assuming that the merger is consummated, the savings to customers in the form of rate reductions are substantial and guaranteed. (See Testimony of Richard LaCapra, p.9 and Testimony of Richard Silkman, p.7.)

Additionally, PECO's current rate cap on transmission and distribution service will be extended for another 18 months, or until December 2006. (Testimony of Richard LaCapra p.9, lines 16-24.) Subject to very limited exceptions, then, PECO is prohibited from requesting increased rates for a very substantial period of time. This itself provides a substantial benefit to consumers and therefore is in the public interest.

2. Reliability Improvements By PECO.

The Joint Petition also requires PECO to improve its system-wide reliability. Specifically, PECO must implement a quality of service plan, reduce the number of customers with repeat outages, and correct service problems on its five worst circuits each year. In addition, the Settlement imposes stricter quantitative benchmarks for evaluating PECO's reliability, and it establishes various enforcement mechanisms. (Testimony of Scott Pierrol, p.2; LaCapra, p. 13.) Under this Settlement, then, PECO's customers will reap the benefits of improved reliability, which is certainly in the public interest.

3. Expansion In PECO's Universal Service Programs.

The Joint Petition provides substantial benefits for low-income ratepayers. It enhances and expands PECO's universal service programs for PECO's electric and gas customers. (LaCapra, p. 9, lines 29-34). It also requires PECO to provide an additional $3 million for low-income fuel funds. In addition, PECO has agreed to improve the monitoring of universal service programs to determine whether "special needs" programs are necessary to address the unmet needs of the target population. (Silkman p.13, lines 17-22). Overall, the Joint Petition will allow the universal service program to serve significantly more customers and will ensure that the needs of these customers are not overlooked. (LaCapra pp.9-10, lines 36-16).

4. Strengthening The Ability Of Power Marketers To Compete.

As explained above, neither PPL nor Councilman Cohen have argued that the proposed merger or the Settlement will have anti-competitive effects. They have focused on other, less fundamental issues.

In any event, the proposed Settlement includes many provisions that are designed to strengthen the ability of power marketing firms to compete in PECO's service territory. To start with, for industrial and commercial ratepayers, the proposed Settlement alters the mechanism for reconciling PECO's CTC revenue each year. For CTC reconciliation purposes, the industrial and commercial classes will be combined into a

larger group, thereby reducing year-to-year volatility in CTCs. By creating a higher level of economic certainty, this will enhance the ability of power marketers to compete for customers in PECO's service territory. (*See* Testimony of John Rohrbach p. 11.)

Furthermore, 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 installed capacity ("ICAP"). (Joint Petition, Appendix C; LaCapra Testimony, p. 4, lines 25-28.) This capacity will be made available on a contract basis for three years beginning on January 1, 2001. Effectively, PECO must sell off enough ICAP to allow over 50,000 Philadelphia area customers to obtain generation service from new suppliers. (Rohrbach, p. 11, lines 11-14; Testimony of James McCormick, p. 3; LaCapra, p. 14, lines 22-37.) By forcing additional sales of installed capacity under defined terms, the Settlement will again enhance the ability of power marketers to compete in PECO's service territory. (*Id.*)

Finally, the Settlement is designed to enhance and expedite the flow of customer information to power marketing firms. (*See* McCormick at pp. 4-5.) Customer billing procedures and procedures for electronic data interchange ("EDI") will be improved. In addition, the Settlement establishes an expedited dispute resolution process to resolve disputes relating to the speed or quality of the customer data supplied by PECO. (*Id; See also* La Capra, pp. 14-15.) All of these changes are designed to strengthen the ability of power marketing firms to compete. Ultimately, to the extent that

competition intensifies, consumers will be the ultimate beneficiaries. For that reason, these provisions are certainly in the public interest.

5. Authorization For Amtrak To Obtain A Lump Sum CTC Buy-Out.

As explained above, the Settlement gives Amtrak the option to buy out any remaining obligation to pay CTCs to PECO. The lump sum buy-out clause implements provisions in PECO's 1998 Electric Restructuring Settlement and in the Electricity Generation Customer Choice and Competition Act. (Testimony of Stanley R. Forczek, p. 9, lines 12-28). PECO's 1998 Restructuring Settlement was itself approved by the Commission and found to be in the public interest. (Forczek p. 3, lines 6-11).

Ultimately, if Amtrak is able to use one of the buy-out options granted by this Settlement, and if this action reduces Amtrak's energy costs, this cost reduction would be in the public interest. In providing intercity passenger service, Amtrak itself serves the public. Simultaneously, Amtrak supplies traction power to commuter authorities, which also serve the public. In addition, any actions which reduce Amtrak's operating costs are consistent with federal law, which encourages Amtrak to move toward self-sufficiency and reduce its dependence on government subsidies. (Forczek p. 10, 3-8).

Neither PPL nor Councilman Cohen have introduced any testimony or other evidence questioning this aspect of the Settlement. At this point, even these

opponents of the Settlement appear to acknowledge that the lump sum buy-out provision is in the public interest.

B. PPL'S OBJECTIONS TO THE JOINT PETITION SHOULD BE REJECTED.

1. PPL's Objection Related To The Precedential Effect Of The Settlement Is Contrary To The Terms Of The Joint Petition And To Established Law.

PPL's fundamental objection to the Settlement is that it may be given "precedential effect" or "evidentiary weight" in a later proceeding. PPL's witness argues that "[t]here are sound and compelling regulatory and public policy grounds 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." (Testimony of Paul L. Gioia, on behalf of PPL Electric Utilities Corporation, p.4, lines 3-10).

PPL's policy argument, however, does not justify rejection or modification of the proposed Settlement. First, it is already well-established that settlements of matters before this Commission cannot be used as precedent in subsequent matters before this body. Pa. PUC v. The Bell Telephone Company of Pennsylvania, 1988 Pa. PUC LEXIS 572 (November 10, 1988). *See also* 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, 1996). Second, the Joint Petition specifically provides that it "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). Third, although PPL expresses concern about the "evidentiary weight" that could be given to the Settlement, this Settlement could not be considered as "evidence" on disputed facts in another proceeding. Moreover, in any future proceeding, PPL is free to object to the admission of such "evidence" on any appropriate grounds.

In essence, PPL argues that the Commission should force the dozens of parties involved in this proceeding to litigate all of the issues raised herein to preserve what is already a well-established and agreed upon principle of law. The Commission, which has expressed a strong policy to encourage settlements, should summarily reject this argument. 52 Pa. Code §5.231(a); 52 Pa. Code §69.391; 52 Pa. Code §69.401.

2. Since PPL Does Not Have A Direct, Immediate, And Substantial Interest, It Does Not Have Standing To Challenge The Settlement.

As Amtrak has previously explained, PPL lacks standing to challenge the Settlement now before this Commission. Under established principles of standing, any complaint filed with the Commission must demonstrate that the party seeking regulatory

relief has a "direct, immediate and substantial interest" in the subject matter.[1] In this case, PPL is an intervenor rather than a complainant, but the basic principles should be the same. An intervenor should not be permitted to challenge a multi-party settlement unless it can demonstrate that it has a "direct, immediate and substantial interest."

PPL has failed to meet this basic test. In its new testimony, PPL does not establish that the PECO-Unicom merger or the Settlement will result in any direct or immediate injury. Its only interest here is abstract and hypothetical. PPL has previously argued that it could at some future date propose a merger of its own, and this hypothetical transaction could be opposed by parties attempting to rely upon the PECO-Unicom settlement as a precedent. Under PPL's own theory, any potential injury is in the future and is highly uncertain.

As Amtrak has previously explained, PPL is a sophisticated electric utility that has the ability to defend its interests in any future merger proceeding. If PPL does in the future propose a merger with another electric utility, it would be free to oppose the imposition of any proposed conditions which are not "just and reasonable" or necessary to

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[1] See L.G. Spielvogel, P.E. v. PECO Energy Co., Docket No. R-00963728C0001 (Order by Administrative Law Judge Rainey entered January 17, 1997) at 4 ("Spielvogel Order") (citing Investigation Into Equitable Gas Company's Revenue Allocation Among Transportation Customers, I-900009 (order entered January 16, 1992); Re L&H Trucking Company, Inc., 55 Pa. PUC 469 (1982); Pennsylvania Petroleum Association v. Pennsylvania Power & Light Company, 32 Pa. Commw. Ct. 19, 377 A.2d 1270 (1977), aff'd 488 Pa. 308, 412 A.2d 522 (1980)). See also Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975).

establish a competitive market. Consequently, PPL is not facing any direct or immediate injury that gives it standing here to contest a settlement strongly supported by PECO and nearly all of the intervenors.

3. The Amtrak-Specific Provision In The Settlement Is Just And Reasonable.

In its Objections to the Settlement, which were filed in mid-April, PPL argued that the lump sum buy-out provision had not been shown to be "just and reasonable" and "non-discriminatory." Amtrak subsequently provided testimony explaining and strongly supporting the buy-out provision. (See Forczek Testimony at pp. 1-11.) This testimony, which was admitted into evidence by Judge Rainey, provides full evidentiary support for this aspect of the Settlement.

At this point, PPL appears to have abandoned its challenge to the lump sum buy-out provision. Consequently, it should not be necessary to offer any further argument on this point. For the record, however, Amtrak incorporates by reference its Reply to PPL's Objections, which was filed last month.

Furthermore, as Mr. Forczek's testimony suggests, the buy-out provision is just and reasonable. This provision simply implements existing provisions in the 1998 Restructuring Settlement and in the Electric Competition Act.[2] The Commission itself

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[2] See 66 Pa C.S. § 2808(b); 1998 Restructuring Petition at 21 (April 29, 1998). Amtrak's lump sum buy-out options were calculated using a projected traction (continued...)

approved the buy-out clause in the 1998 Restructuring Petition and recognized that it was in the public interest to offer a lump sum payment option. The proposed Settlement now provides specific buy-out amounts for Amtrak, but does not preclude other eligible customers from negotiating such buy-outs with PECO on reasonable terms. Accordingly, there is nothing even remotely discriminatory about this provision.

C. COUNCILMAN COHEN'S OBJECTIONS SHOULD BE REJECTED BECAUSE THEY ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND ARE CONTRARY TO LAW.

1. Councilman Cohen's Request That This Commission Become Entangled In the Regulation of Nuclear Energy Safety Issues Is Contrary To Applicable Law.

At the May 10, 2000, hearing, Councilman Cohen presented his own testimony along with that of Ernest J. Sternglass. Both of these witnesses expressed safety concerns regarding nuclear power, a form of energy which Councilman Cohen described as "dirty." (Testimony of David Cohen of May 10, 2000, at pp. 415-16; Testimony of Ernest J. Sternglass of May 10, 2000, pp. 431-39.) Whatever the validity

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[2](...continued)
power growth rate of 0.4 percent per year. In accordance with the 1998 Restructuring Petition, which was approved by the Commission, the revenue stream was then discounted back using PECO's after-tax cost of capital. (Forczek Testimony p. 9 lines 1-9.) If Amtrak is able to finance a buyout by borrowing funds at an interest rate which is less than PECO's after-tax cost of capital, it will be able to achieve cost savings. At the same time, however, since PECO's CTCs initially were established using PECO's higher pre-tax cost of capital, there is a substantial margin of protection for all ratepayers grouped with Amtrak for CTC reconciliation purposes.

of the Councilman's claims, it is apparent that he has raised them in the wrong forum. Councilman Cohen's concerns regarding the safety of nuclear power and the re-licensing of nuclear power plants are beyond the jurisdiction of this Commission. Regulatory authority over these safety issues is vested exclusively in the Nuclear Regulatory Commission. Pacific Gas & Elec. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 212 (1983) ("The Federal Government has occupied the entire field of nuclear safety concerns. . . ." ; "[T]he Federal Government maintains complete control of the safety and 'nuclear' aspects of energy generation"); *see also* In re TMI, 67 F.3d 1103, 1108 (3d Cir. 1995) (same). Accordingly, Councilman Cohen's objections to the Settlement should be rejected.

2. Councilman Cohen Has Failed To Introduce Any Evidence That The Merger Will Increase The Perceived Dangers From Nuclear Power.

Even assuming that nuclear power were as dangerous as the Councilman contends and that this Commission has the authority to regulate these safety issues, the Councilman has not provided any evidence which even suggests that those dangers are increased in any way as a result of this merger. For example, the Councilman has not provided any evidence that the merger will increase the number of nuclear power plants in Pennsylvania, or, for that matter, anywhere else. In the absence of such evidence, there

is simply no basis for the Commission to disapprove the merger or reject the proposed Settlement.

3. The Nuclear Power Elements Of The Joint Petition Are In The Public Interest.

The Joint Petition contains several provisions related to nuclear power and nuclear decommissioning. (Testimony of Paul J. Metro p. 4, 11-13). One very significant concession made by PECO relates to future cost of capital determinations for the utility. PECO has agreed that the cost of capital that will be used for ratemaking purposes will not reflect any risk adjustment attributable to the nuclear operations of the utility or its affiliates. (*See* LaCapra, p. 11, lines 3-6). The Settlement also provides that in the event any nuclear generating plant owned by PECO or an affiliate has an accident that results in uninsured damage claims in excess of $1 billion, PECO is required to notify the Commission. (LaCapra, at p. 11, lines 16-20.) PECO must then demonstrate that its net cash flows are sufficient to support the provision of safe, adequate, and reliable service "at reasonable rates." (Id.)

In addition, the Settlement provides that PECO will not seek to recover through its regulated distribution rates the costs associated with the ownership and operation of any nuclear generating plants (or any fractional interests in such nuclear generating plants) that it did not own on December 31, 1999. (Metro pp. 2-3, lines 19-1; (Rohrbach p. 13, lines 20-22; LaCapra pp. 10-11, 40-7.) Effectively, this provision

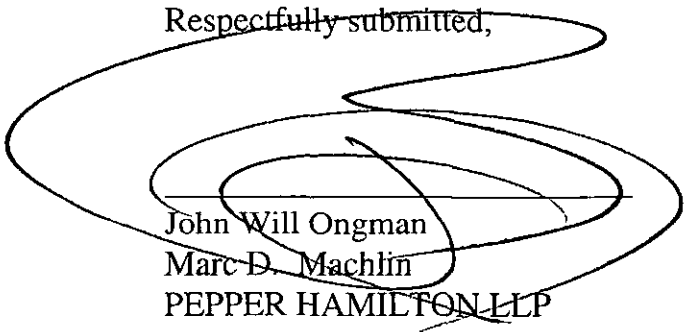
ensures that PECO's ratepayers will never be asked to bear decommissioning costs associated with Unicom's plants or other nuclear plants acquired in the future by PECO or its affiliates.

With respect to increases in decommissioning costs that potentially would be recoverable, PECO has also agreed to forego any rate recovery for the first $50 million of additional costs and for five percent of any additional increases. To some extent, this aspect of the Settlement shields ratepayers from the risk that future decommissioning costs will be substantially greater than can be foreseen today. (Rohrbach p. 13, lines 20-29; LaCapra p. 11, lines 9-14.) Taken as a whole, these provisions in the Settlement, when weighed against the lack of evidence that there will be any increase in the alleged dangers of nuclear power, confirm that this Settlement is in the public interest.

IV. Conclusion

For the reasons stated above, the proposed Settlement covering PECO's merger and restructuring should be approved.

Respectfully submitted,



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Dated: May 17, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of May, 2000, served the foregoing document upon the parties listed below via email and first class mail delivery, postage prepaid:

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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-1105550147

**PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF THE
NATIONAL RAILROAD PASSENGER CORPORATION**

Pursuant to the order issued April 25, 2000 by Administrative Law Judge Charles E. Rainey, Jr., the National Railroad Passenger Corporation ("Amtrak") hereby submits its Proposed Findings of Fact And Conclusions of Law in support of the Joint Petition For Settlement ("Joint Petition" or "Settlement"). Amtrak's Proposed Findings of Fact are based upon both the prepared testimony and the testimony presented at the hearing held on May 10, 2000.[1]

[1] Written testimony will be cited herein in the following way: "Forczek Testimony p.3, line 4." Oral testimony will be cited herein as "Cohen Tr. p. 415, line 12." If there is no citation to a specific line, the reference is to the entire page of testimony.

I. PROPOSED FINDINGS OF FACT

A. Rate Reductions, Reliability Improvements, and Benefits For Low-Income Consumers

1. The Joint Petition is designed to ensure that ratepayers will receive concrete, immediate and affirmative benefits. It requires $200 million in rate reductions over the years from 2002 to 2006. If approved, the Settlement also will extend the transmission and distribution rate cap by 18 months, or until December 31, 2006. (Richard LaCapra Testimony, p. 9, lines 16-24.)

2. If consummated, the merger will provide cost savings through the elimination of duplicate functions in both the regulated and non-regulated businesses of PECO and Unicom Corporation ("Unicom"). (Richard G. White Testimony, p. 3, lines 19-23.)

3. The Settlement includes many provisions that would require PECO Energy Company ("PECO") to improve the quality of its service. Specifically, the Settlement requires PECO to implement a quality of service plan, maintain a level of reliability that is ten percent higher than its five-year historic average, reduce the number of customers with repeat outages, and 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. (LaCapra Testimony, p. 13, lines 8-16.)

4. In the Settlement, PECO has made commitments to improve its system-wide reliability beyond its current levels, as determined by certain Commission-approved measures of reliability. Additionally, the Settlement Agreement contains provisions to implement these reliability measures and establishes enforcement mechanisms should PECO fail to follow through. (Scott T. Piersol Testimony, p. 2.)

5. The Settlement provides for enhancements to and expansion of universal service programs for PECO's electric and gas customers. Additionally, PECO will contribute up to $3 million over three years to local hardship funds in its service territory so that those funds are better equipped to address the needs of low income customers. (Joint Petition ¶¶ 29-37; LaCapra Testimony, p. 9, lines 29-34.)

6. The Settlement will allow the universal service program to serve additional customers. (LaCapra Testimony, pp. 9-10.)

B. Competitive Effects

1. The proposed merger and restructuring will not lead to material increases in market concentration in any relevant market. (Paul Metro Testimony, p. 7, lines 5-13; William Hieronymous Testimony, p. 4, lines 17-20.)

2. The Settlement requires PECO to provide sufficient access to installed capacity ("ICAP") to allow over 50,000 new Philadelphia area customers to participate in the competitive retail market. (John Rohrbach Testimony, p. 11, lines 11-14; James McCormick Testimony, pp. 3-4; LaCapra Testimony, p. 14, lines 22-37.)

3. PECO's agreement to reconcile competitive transition charge ("CTC") revenues for all commercial and industrial accounts as a single class, will minimize the year-to-year volatility of the CTCs, and therefore should enhance the ability of power marketers to compete in Southeastern Pennsylvania. (Rohrbach Testimony, p. 11, lines 23-25.)

4. The Settlement provisions related to PECO's handling of customer billing data and its business interactions with competitive suppliers will lessen obstacles for such suppliers in their efforts to expand into PECO's service territory. (LaCapra Testimony, p. 15, lines 6-9.)

5. The Joint Petition contains a number of provisions which will spur the development of renewable energy in Pennsylvania and enhance the range of choice in generation supplies for customers. (Richard Silkman Testimony, p. 15, lines 1-4; LaCapra Testimony, p. 15, lines 4-6.)

6. The release of historic customer billing data as provided in the Settlement will strengthen the ability of competing suppliers to operate in PECO's service territory. (McCormick Testimony, p. 4.)

7. Improvements to the electronic data interchange ("EDI") process will strengthen the ability of competing suppliers to operate in PECO's service territory. (McCormick Testimony, p. 4-5.)

C. Nuclear Decommissioning

1. Decommissioning is the dismantlement, decontamination, removal and disposal of the components of a generating facility at the end of its useful life. (Metro Testimony, p. 4, lines 11-13.)

2. The Settlement prohibits PECO from seeking to recover through its electric distribution rates the costs associated with the ownership and operation of any nuclear generating plants, or any fractional interests in such nuclear generating plants, that the utility or its affiliates did not hold on December 31, 1999. (Metro Testimony, pp. 2-3; Rohrbach Testimony, p. 13, lines 20-22; LaCapra Testimony, pp. 10-11, lines 40-7.)

3. To the extent that there are increases in decommissioning costs for which ratepayers would potentially remain responsible, PECO has in the Settlement agreed to forego recovery from ratepayers for the first $50 million of increased decommissioning costs and for five percent of any additional increases. (Rohrbach Testimony, p. 13, lines 20-28; LaCapra Testimony, p. 11, lines 9-14.)

4. The financial concessions made by PECO in the Settlement in no way impact the Commission's ability to review the appropriate level of the decommissioning fund and/or PECO's ability safely to decommission its nuclear plants. (Metro Testimony, pp. 3-4.)

D. Amtrak Specific Provisions

1. The proposed Settlement would give Amtrak the option to buy out any continuing obligation to pay competitive transition charges ("CTCs") to PECO. (Joint Petition ¶ 67; Stanley R. Forczek Testimony, p. 8, lines 23-28.)

2. The lump sum buy-out amounts specified in the Settlement were negotiated based upon the framework established in PECO's 1998 Restructuring Settlement, which was approved by this Commission. The buy-out amounts were calculated using a projected traction power growth rate of 0.4 percent per year and then estimating the present value of the Amtrak's expected CTC payments to PECO. Under the methodology set forth in the 1998 Restructuring Petition, the projected CTC revenue stream was then discounted back using PECO's after-tax cost of capital. (Forczek Testimony, p. 9, lines 2-9.)

3. If Amtrak is able to reduce its energy costs, the beneficiaries would include not only Amtrak itself, but also members of the public who rely upon Amtrak, SEPTA, and the other commuter authorities purchasing traction power from Amtrak. (Forczek Testimony, p. 10, lines 15-17.)

4. Amtrak provides rail service and operates intercity passenger trains serving approximately 500 destinations in the continental United States and Canada. (Forczek Testimony, p. 5, lines 9-10.)

5. A substantial percentage of Amtrak's ridership occurs in an area known as the Northeast Corridor between Washington, D.C. and Boston, which is approximately 500 miles in length. Almost fifty percent (50%) of Amtrak's ridership takes place on the Northeast Corridor, which includes the line running from Harrisburg to Philadelphia. (Forczek Testimony, p. 5, lines 9-18.)

6. The Northeast Corridor segment between Washington D.C. and New York City is Amtrak's most active service area, and Amtrak owns the right-of-way and the 25 Hertz transmission system in that area. (Forczek Testimony, p. 5, lines 15-18.)

7. PECO is one of four utilities that deliver power used for traction purposes to Amtrak's Northeast Corridor between Washington, D.C. and New York City. The four utilities are: PECO, PPL, Baltimore Gas And Electric Company ("BGE"), and Consolidated Edison of New York ("ConEd"). In the last several years, PECO has been the largest supplier of electric power to this part of the Northeast Corridor, delivering approximately sixty percent (60%) of Amtrak's traction load. (Forczek Testimony, p. 5-6, lines 22-2.)

8. Amtrak owns and operates its own electrical infrastructure, which includes approximately 1200 miles of catenary lines and over 970 miles of transmission lines. This infrastructure is used not only to deliver power to the Amtrak track segments where it is required, but also to supply power to various commuter authorities for operations on and off the Northeast Corridor. Furthermore, Amtrak's transmission

system forms a fully connected grid. Power is supplied to the grid at a number of delivery points, but is commingled over a single set of Amtrak lines. (Forczek Testimony, p. 6, lines 6-13.)

9. In July, 1994, this Commission issued an order granting a letter petition filed by PECO, which requested approval of a special contract for electric service for Amtrak pursuant to PECO's Tariff Rule 4.6. Pennsylvania Public Utility Commission v. PECO Energy Co., P-00940832 (July 7, 1994). In granting PECO's letter petition, the Commission explicitly recognized certain attributes of Amtrak's operating practices and electric transmission system. Specifically, the Commission noted that:

> Amtrak's operating practices have recently permitted the company to take advantage of competitive alternatives to much of the service PECO Energy has historically supplied to Amtrak . . . . Amtrak owns and operates electric power lines that are like PECO Energy's transmission lines. These transmission lines pass through PECO Energy's service territory, as well as passing through and interconnecting with other electric utility service territories in the Northeast corridor. Amtrak's internal transmission system allows Amtrak to purchase electricity from any utility to which it is interconnected and to transmit or wheel power to its main load centers. In order to efficiently supply its system, Amtrak must continuously wheel power throughout its system.

Forczek Testimony, pp. 6-7, lines 18-5.

10. On the interconnected grid between Washington, D.C. and New York City, which includes the line from Harrisburg to Philadelphia, Amtrak uses approximately 50 percent of the traction power that it purchases. The remaining 50

percent of this pooled power is sold to the various commuter authorities, including SEPTA. (Forczek Testimony, p. 7, lines 8-12.)

11. Both Amtrak and the commuter authorities purchasing power from Amtrak operate their trains on 25 Hertz, single-phase power. Except for a portion of the power generated for Amtrak at the Safe Harbor hydroelectric facility, the utilities serving Amtrak generate and supply their electricity as 60 Hertz, three-phase power. That electric power then has to be converted to the special 25 Hertz, single-phase traction power needed for Amtrak's and the commuter railroads' operations. This is done through seven frequency converter facilities (two of which are owned by Amtrak and five of which are owned by electric utilities or their affiliates, including the unit at Safe Harbor). Each frequency converter facility interconnects with 60 Hertz transmission lines owned by the utilities and ranging in size from 13.2 kV to 60 kV to 138 kV to 230 kV. (Forczek Testimony, p. 7, lines 16-27.)

12. SEPTA, New Jersey Transit, DelDOT (for extended SEPTA service), and the Maryland Department of Transportation ("MDOT" or "MARC") all purchase 25 Hertz traction power from Amtrak. The power supplied by Amtrak is used for commuter operations on and off the Northeast Corridor. SEPTA and all of the commuter authorities other than DelDOT also purchase traction power from or through their local electric utilities for operations on other lines off the Northeast Corridor. (Forczek Testimony, p. 8, lines 2-8.)

13. In order to ensure that the railroad obtained the full benefit of the Pennsylvania legislation and the 1998 Restructuring Settlement, Amtrak concluded that it would be beneficial to negotiate and lock in the terms for lump sum buy-out now, before the change in management control occurs. (Forczek Testimony, p. 10-11, lines 26-2.)

14. The Amtrak lump-sum buyout element of the Settlement is not discriminatory. Other eligible customers are free to negotiate with PECO for a lump sum buy-out. (*See generally* Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. § 2808(b); 1998 Restructuring Petition at 21 (April 29, 1998)). Furthermore, the only parties even possibly affected by this buy-out provision are other industrial and commercial customers of PECO, which are or will be grouped with Amtrak for CTC reconciliation purposes. All representatives of those parties support the Settlement. (Forczek Testimony, p. 11, lines 5-15.)

II. PROPOSED CONCLUSIONS OF LAW

1. It is the policy of the Commission to encourage settlements. 52 Pa. Code § 5.231(a); 52 Pa. Code § 69.391; 52 Pa. Code § 69.401.

2. PPL lacks standing to object to the Joint Petition because it lacks a direct, immediate and substantial interest in the subject matter. *See* L.G. Spielvogel, P.E. v. PECO Energy Co., Docket No. R-00963728C0001 (Order by Administrative Law Judge Rainey entered January 17, 1997) at 4 *citing* Investigation Into Equitable Gas

Company's Revenue Allocation Among Transportation Customers, I-900009 (Order entered January 16, 1992); Re L&H Trucking Company, Inc., 55 Pa. PUC 469 (1982); Pennsylvania Petroleum Association v. Pennsylvania Power & Light Company, 32 Pa. Cmwlth. 19, 377 A.2d 1270 (1977), *aff'd* 488 Pa. 308, 412 A.2d 522 (1980); *see also* Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975).

3. PECO is required to obtain a "certificate of public convenience" from the Commission to consummate the transactions proposed in its application. 66 Pa.C.S. § 1102(a)(3).

4. A certificate of public convenience may be granted 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 certificate, may impose such conditions as it may deem to be just and reasonable.

66 Pa.C.S. § 1103(a).

5. It is necessary and proper for the service, accommodation, convenience, and safety of the public to grant a certificate of public convenience in this proceeding.

6. The proposed corporate restructuring and merger will affirmatively promote the service, accommodation, convenience, or safety of the public in substantial ways.

7. PECO's ratepayers and their customers will benefit substantially from the rate reductions required by the Joint Petition.

8. PECO's ratepayers and their customers will benefit substantially from the improved reliability standards which will be imposed by the Joint Petition.

9. Settlements of matters before the Commission cannot be used as precedent in subsequent matters before this body. Pa. PUC v. The Bell Telephone Company of Pennsylvania, 1988 Pa. PUC LEXIS 572 (November 10, 1988) ("We [the Commission] vigorously, and without equivocation, reject considering a settlement as precedent, as to any subsequent issue in any proceeding"); *see also* 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, 1996).

10. Councilman Cohen's concerns regarding the safety of nuclear power and the re-licensing of nuclear power plants are outside the jurisdiction of this Commission. Regulatory authority over these issues is vested exclusively in the Nuclear Regulatory Commission. Pacific Gas & Elec. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 212 (1983) ("the Federal Government has occupied the entire field of nuclear safety concerns. . . ."; "the Federal Government maintains complete control of the safety and 'nuclear' aspects of energy generation"); *see*

also In re TMI, 67 F.3d 1103, 1108 (3d Cir. 1995) (same) *cert. denied* 516 U.S. 1154 (1996).

11. Even if Councilman Cohen's concerns relating to nuclear power were properly before this Commission, the Councilman has not presented any evidence which establishes that the Settlement or the proposed merger and restructuring would have any impact on the risks associated with nuclear energy.

12. PECO's 1998 Electric Restructuring Settlement expressly authorizes PECO and customers to negotiate a mutually acceptable lump sum buy-out of transition charges. (*See* 1998 Restructuring Petition at 21 (April 29, 1998)). PECO's 1998 Restructuring Settlement was approved by the Commission and found to be in the public interest; PPL was itself a signatory to that 1998 Petition.

13. The Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S. § 2808(b), authorizes "alternative" payment methodologies. The Act provides that CTCs generally may be collected for a maximum of nine (9) years after the effective date of the Act, but this does not apply if "an alternative payment methodology is mutually agreed upon by the customer and the utility . . . ." (Id. § 2808(b)).

14. Paragraph 67 and Appendix F of the Joint Petition give Amtrak options to buy out any remaining obligation to pay CTCs to PECO. Under these provisions, any buy-out by Amtrak would be completely voluntary. Amtrak may elect

either to take a buy-out or not to take a buy-out. If a buy-out is taken, the amount paid to PECO would depend upon the date on which the option was exercised.

15. If Amtrak is able to use one of the options granted by this Settlement, and if this action reduces Amtrak's energy costs, this cost reduction would be in the public interest. In providing intercity passenger service, Amtrak itself serves the public. Furthermore, Amtrak supplies traction power to commuter authorities, which also serve the public. Lastly, any actions which reduce Amtrak's operating costs are consistent with federal law, which encourages Amtrak to move toward operating self-sufficiency and reduce its dependence on government subsidies.

16. Amtrak is a national passenger railroad which was established by the Rail Passenger Service Act of 1970 (Pub. L. No. 91-518, recodified at 49 U.S.C. § 24101, *et seq.*). In this legislation, which has been amended from time to time, Congress has declared that: "Public convenience and necessity require that Amtrak, to the extent its budget allows, provide modern, cost-efficient, and energy-efficient intercity rail passenger transportation between crowded urban areas and in other areas of the United States." (49 U.S.C. § 24101(a).) Congress also declared that: "By using innovative operating and marketing concepts, Amtrak shall provide intercity and commuter rail passenger transportation that completely develops the potential of modern rail transportation to meet the intercity and commuter passenger transportation needs of the United States." (Id. § 24101(b).)

17. Amtrak has been directed by the United States Congress "to make agreements with the private sector and undertake initiatives that are consistent with good business judgment and designed to maximize its revenues and minimize Government subsidies." (49 U.S.C. § 24101(d).)

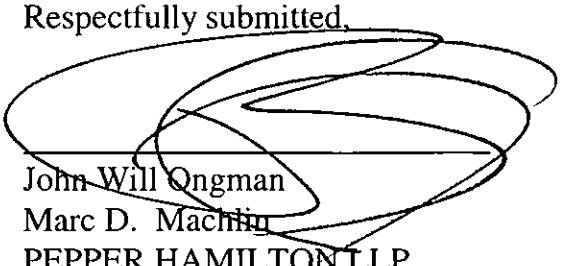
18. In enacting the Amtrak Reform and Accountability Act of 1997, Congress found that although "intercity rail passenger service is an essential component of a national intermodal passenger transportation system," "immediate action is required to improve Amtrak's financial condition if Amtrak is to survive." Section (2), Pub. L. No. 105-134, 111 Stat. 2570, 2571 (1997), codified at 49 U.S.C. § 24101 (Historical Note).

19. The lump sum buy-out provision is lawful and reasonable. This provision would benefit Amtrak, commuter authorities such as SEPTA, and members of the public. Approval of this provision is therefore in the public interest.

III. CONCLUSION

For the reasons stated above, the Joint Petition should be approved.

Respectfully submitted,



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May 17, 2000

VIA FEDERAL EXPRESS

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 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-110550 F0147

Dear Secretary McNulty:

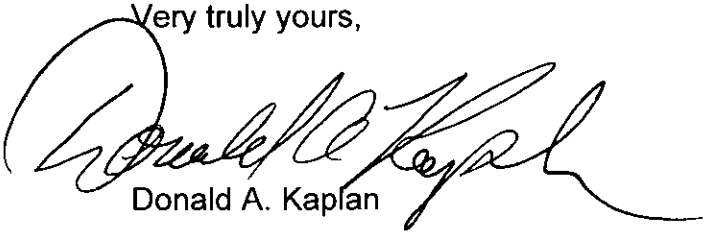
Pursuant to Administrative Law Judge Charles E. Rainey, Jr.'s April 25, 2000 Prehearing Order #2 in the above-captioned case, enclosed for filing are an original and three (3) copies of the Initial Post-Hearing Brief of PPL Electric Utilities Corporation.

Pursuant to 52 Pa. Code § 1.11, the enclosed documents are to be deemed filed on May 3, 2000, which is the date they were deposited with an overnight express delivery service as shown on the delivery receipt attached to the mailing envelope. As evidenced by the attached Certificate of Service, all parties to the proceeding are being served by overnight delivery and facsimile with a copy of these documents.

In addition, please date and time-stamp the enclosed extra copies of these filings and return them to me in the envelope provided.

If you have any questions regarding the enclosed, please call.

Very truly yours,



Donald A. Kaplan

Enclosures

cc: John M. Quain, Chairman
Nora Mead Brownell, Commissioner
Aaron Wilson, Jr., Commissioner
Terrance J. Fitzpatrick, Commissioner
Robert K. Bloom, Commissioner
Administrative Law Judge Charles E. Rainey, Jr.
All parties to this proceeding (per the 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-110550-F0147

CERTIFICATE OF SERVICE

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

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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-110550 F0147

INITIAL POST-HEARING BRIEF OF PPL ELECTRIC UTILITIES CORPORATION

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Dated: May 17, 2000

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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INITIAL POST-HEARING BRIEF OF PPL ELECTRIC UTILITIES CORPORATION

PPL Electric Utilities Corporation (formerly PP&L, Inc.) ("PPL Utilities") submits this Initial Post-Hearing Brief of PPL Electric Utilities Corporation pursuant to Administrative Law Judge Charles E. Rainey, Jr.'s ("ALJ Rainey") Prehearing Order #2 dated April 25, 2000.

I. SUMMARY OF ARGUMENT

As public utility proceedings have grown more complex and involved larger numbers of intervenors, the Pennsylvania Public Utility Commission ("Commission") and other regulatory agencies have increasingly turned to settlements to resolve these cases. While settlements provide many advantages and should be encouraged, a number of participants in Commission proceedings have sought to use of settlements entered into with one public utility to support similar relief against other utilities.

PECO Energy Company ("PECO") and the other Joint Petitioners have entered into a far-reaching settlement of its application for approval of its corporate

reorganization and merger with Unicom Corporation ("Unicom"). That settlement contains numerous concessions addressing the concerns raised by particular intervenors. It also alters in several respects PECO's 1998 Restructuring Settlement. Although the Joint Petition provides that it may not be cited as legal precedent, several parties have indicated an intention to use provisions of the Joint Petition as a model for seeking similar relief against other Pennsylvania public utilities. Unless the Joint Petition is modified to preclude its use as evidence or as legal precedent, they may be able to do so.

By law, irrelevant and immaterial evidence is not admissible in Commission proceedings. The testimony of the Joint Petitioners demonstrates that the Joint Petition was crafted to address a series of concerns that are unique to PECO and have no relevance to the activities of other public utilities. As such the provisions of the Joint Petition can be neither relevant nor material evidence that similar relief is appropriate or warranted in proceedings involving other Pennsylvania public utilities.

In addition to the legal bases for excluding evidence of settlement provisions in subsequent proceedings involving other public utilities, there are strong policy reasons for doing so as well. If public utilities are not protected against this practice, they will be more likely to intervene in important proceedings, such as this one, and to resist settlements provisions that would be undesirable if applied to them. To protect their interests public utilities may be forced to treat all proceedings like rulemakings, thereby slowing the administrative process. In addition, public utilities may be reluctant to undertake important competition and

efficiency-enhancing mergers or reorganizations if they perceive that the terms of a previous settlement which they consider onerous or inappropriate will be given evidentiary weight.

To address these concerns, PPL Utilities urges the Commission to amend the Joint Petition to preclude the use of its terms as evidence, as well as precedent, in other proceedings. Accordingly, PPL Utilities proposes that the following provision be added to the Joint Petition:

> The fact that a provision is included in the Joint Petition shall not constitute or be cited as relevant or material evidence in support of the adoption of such provision in any other proceeding, including, but not limited to, a proceeding to reopen or modify another Pennsylvania public utility's settlement of its retail restructuring proceeding under the Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. § 2801, *et seq.*

Such a provision will protect the procedural rights of other public utilities and promote the use of settlements to resolve important and complex public utility proceedings.

II. BACKGROUND

A. PECO's Application for Approval of the Proposed Restructuring and Merger

On November 22, 1999, PECO filed its Merger Application pursuant to Chapters 11, 19, 21, 22 and 28 of the Public Utility Code ("Code"), for approval of the transactions associated with (1) a plan of corporate restructuring, including the formation of a holding company, and (2) the merger of the newly formed holding company and Unicom. PECO seeks a certificate of public convenience pursuant to Section 1102(a)(3), 66 Pa. C.S. § 1102(a)(3), to "acquire from, or transfer to, . . .

the title to, or the possession or use of, any tangible or intangible property used or useful in the public service." Merger Application at 8-9. PECO also seeks a certificate pursuant to Section 1103(a), which provides that such a certificate shall be issued only upon a showing that its granting is "necessary or proper for the service, accommodation, convenience, or safety to the public." Merger Application at 9. PECO submits that its Merger Application demonstrates that the proposed restructuring is in the public interest and therefore a certificate of public convenience should be issued. Merger Application at 10. PECO also requests that the Commission issue any necessary certificates of public convenience pursuant to Section 1102 to transfer generating assets and liabilities in accordance with the Commission's May 14, 1998 Order approving PECO's Restructuring Settlement (hereinafter "1998 Restructuring Settlement"). Merger Application at 10-11.

In addition, PECO requests that the Commission pre-approve the transfer of various assets to implement PECO's reorganization, with the understanding that PECO will file with the Commission an itemized list of such assets and liabilities after the transfers have been completed. Merger Application at 11. PECO also requests various Commission approvals of contracts among affiliated interests, contracts in which entities within the corporate group provide or receive non-power goods and services from PECO, and wholesale purchased power agreements. Merger Application at 12-14.

PECO also seeks the requisite approvals under both Chapter 22 (Natural Gas Choice and Competition Act ("Gas Competition Act")), 66 Pa. C.S. § 2201, *et seq.*, and Chapter 28 (Electricity Generation Customer Choice and Competition Act

("Electric Competition Act")), 66 Pa. C.S. § 2801, *et seq.*, which require the Commission to consider whether a proposed merger, consolidation, acquisition or disposition "is likely to result in anticompetitive or discriminatory conduct, including the unlawful exercise of market power, which will prevent retail [gas] [electricity] customers in this Commonwealth from obtaining the benefits of a properly functioning and workable competitive retail [natural gas] [electricity] market." 66 Pa. C.S. §§ 2210(a)(1) (Gas Competition Act), 2811(e)(1) (Electric Competition Act).

B. The Joint Petition

After several weeks of pretrial discovery, the parties entered into settlement negotiations on March 9, 2000. On March 23, 2000, PECO filed with the Commission, on behalf of itself and a number of other parties, a Joint Petition for

Settlement ("Joint Petition").[1] Statements of support were filed subsequently by many of the signatories to the Joint Petition.[2]

The Joint Petition, in addition to granting the requested certificates and findings sought in the Application, provides for, among other things, rate reductions, Joint Pet. at 8-9; extensions of the rate cap on PECO's regulated transmission and distribution rates, Joint Pet. at 10; reliability and customer service improvements, Joint Pet. at 13-18; and provisions to enhance universal service programs, Joint Pet. at 18-22. It also contains provisions to protect ratepayers from increases in the cost of decommissioning PECO's nuclear units, and prevents the merged company from seeking decommissioning funds for non-PECO plants. Joint Pet. at 10-13. PECO also commits to improve reliability and service for the communities of Southeastern Pennsylvania. Joint Pet. at 13. The Joint Petition earmarks funds for particular renewable energy projects. Joint Pet. at 22-26. It also modifies the 1998

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[1] The signatories to the Joint Petition for Settlement are: PECO; the Office of Trial Staff ("OTS"); the Office of Consumer Advocate ("OCA"); the Office of Small Business Advocate ("OSBA"); Citizens of Pennsylvania's Future and the ten named individuals that joined in its Protest and Petition to Intervene (collectively, "PennFuture"); Senator Vincent J. Fumo; the City of Philadelphia; Clean Air Council and the three named individuals that joined in its Protest and Petition to Intervene ("CAC"); the Consumers Education and Protective Association et al. ("CEPA") (which includes the Association of Community Organizations for Reform Now ("ACORN") and the Tenants' Action Group ("TAG")); Enron Energy Services, Inc. ("Enron"); the Philadelphia Industrial Energy Users Group ("PAIEUG"); the Industrial Energy Consumers of Pennsylvania ("IECPA"); Conectiv Energy ("Conectiv"); Eric Joseph Epstein; Patricia McNamara; the National Railroad Passenger Corporation ("Amtrak"); and the Mid-Atlantic Power Supply Association ("MAPSA"). NewEnergy East, LLC ("NewEnergy") subsequently agreed to sign the Joint Petition. *See* April 3, 2000 Filing of PECO (containing signature page of NewEnergy). Also in PECO's April 3, 2000 filing was a Joint Petition regarding Issues Raised by Wallace Township and East Brandywine Township that independently addressed the concerns of those parties. *See id.*

[2] Twelve parties filed Statements in Support of the Joint Petition including: OTS; OSBA; Eric Epstein; IECPA; CEPA, et al; PAIEUG; OCA; PennFuture; PECO; CAC; Amtrak; MAPSA.

Restructuring Settlement requirements regarding Competitive Default Supplier ("CDS") service, and makes other changes to the rules governing the relationship between PECO and Electric Generation Suppliers ("EGSs"). Joint Pet. at 30-33. Finally, the Joint Petition seeks to reduce risks to PECO's distribution ratepayers associated with PECO's diversified businesses and to avoid cross-subsidization of other affiliates, Joint Pet. at 35-36.

C. PPL Utilities' Objections to the Joint Petition

Pursuant to ALJ Rainey's March 28, 2000 Order revising the original procedural schedule established in this case, PPL Utilities filed Objections to the Joint Petition ("PPL Objections") on April 13, 2000. In its Objections, PPL Utilities maintained that the Joint Petition had not been shown to be in the public interest or consistent with Commission policy and applicable law.[3]

PPL Utilities argued that despite terms in most settlements, including the Joint Petition,[4] providing that the settlement cannot be cited as precedent, intervenors in subsequent cases routinely use terms from prior settlements to require other utilities to defend against the relief proposed simply on the basis that it would be consistent with that prior settlement. PPL Utilities stated that as a result of this use of settlements, it has been required to intervene in other utilities' cases to protect its interests.[5]

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[3] *See* Objections of PPL Electric Utilities Corporation to the Joint Petition for Settlement ("PPL Objections") at 13-17 (filed April 12, 2000).

[4] *See* Joint Petition for Settlement ("Joint Petition") at 41 (filed March 23, 2000).

[5] *See* PPL Objections at 13-14.

PPL Utilities argued that such non-contextual use of negotiated settlement provisions to justify relief in other proceedings is improper and contrary to established public policy. For this reason, PPL Utilities requested in its Objections that the Commission adopt a policy against considering evidence or arguments by participants in proceedings before the Commission which justify relief on the grounds that such relief was incorporated in a settlement with another public utility.[6] Noting that this policy will not preclude parties from advocating similar relief provided that they can justify that relief based wholly on legitimate evidentiary or policy reasons apart from the fact that it was included in a prior settlement, PPL Utilities argued that such a policy was necessary to permit other Pennsylvania utilities to address proposed relief on the merits of their own cases rather than a compromise of another utility's proceeding, to ensure that the Commission's policy encouraging settlements will not have adverse, unintended effects, and to protect due process rights.

D. The Joint Petitioners' Replies to PPL Utilities' Objections

Fourteen Joint Petitioners filed replies to the PPL Objections,[7] consisting for the most part of attacks on PPL Utilities' standing,[8] arguments disputing the validity

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[6] *See* PPL Objections at 31-32.

[7] The following parties filed Replies to the Comments and/or Objections of PPL Utilities and/or Councilman Cohen: the Office of Consumer Advocate ("OCA"); the Office of Small Business Advocate ("OSBA"); the Office of Trial Staff ("OTS"); Philadelphia Area Industrial Energy Users Group ("PAIEUG"); Industrial Energy Consumers of Pennsylvania ("IECPA"); Clean Air Council, et al; Eric Joseph Epstein; Consumer Education and Protective Association, et al. ("CEPA"); and the National Railroad Passenger Corporation ("Amtrak"); PECO; and Citizens for Pennsylvania's Future, et al ("PennFuture").

of the factual issues raised in the PPL Objections,[9] and mischaracterizations of PPL Utilities' arguments.[10]

Joint Petitioners claimed that PPL Utilities seeks to undermine the Commission's settlement process.[11] They also claimed that PPL Utilities proposes to restrict what can be proposed or negotiated in settlement discussions,[12] despite the fact that the policy PPL Utilities proposes is directed at evidence submitted in Commission proceedings, not settlement discussions. *See* PPL Objections at 31-32. Finally, Joint Petitioners argued that PPL Utilities seeks to limit their First Amendment rights under the U.S. Constitution.[13]

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[8] *See, e.g.*, PECO Energy Company's Reply to the Objections of PPL Electric Utilities Corporation and David Cohen ("PECO Reply") at 13 (filed April 18, 2000) (PPL lacks substantial, immediate, and direct interest in proceeding).

[9] *See, e.g.*, Reply of the PennFuture Parties to the Objections of PPL Electric Utilities Corporation and Councilman David Cohen to the Joint Petition for Settlement ("PennFuture Reply") at 7 (filed April 18, 2000) (contesting that factual issues remain regarding whether Joint Petition provisions are related to merger or are in public interest).

[10] *See, e.g.*, Reply Comments of the Office of the Small Business Advocate ("OSBA Reply") at 3 (filed April 18, 2000)(PPL Objections constitute attack on Commission).

[11] *See, e.g.*, Philadelphia Area Industrial Energy Users Group Reply Objections to PPL Electric Utilities Corporation and Councilman David Cohen ("PAIEUG Reply") at 2 (filed April 17, 2000) (PPL Objections are attempt to frustrate PECO's merger and restructuring proceeding).

[12] *See, e.g.*, OSBA Reply at 3 ("t]his effort to establish in advance a set of new and onerous restrictions on just what various interested parties might propose or negotiate for in that as yet unknown future proceeding must be summarily rejected by the Presiding Officer and the Commission.").

[13] *See, e.g.*, Clean Air Council, et al's Reply to Objections of PPL Electric Utilities Corporation and Councilman David Cohen to the Joint Petition for Settlement ("CAC Reply") at 2 (filed April 18, 2000) (PPL Objections attempt to violate parties' First Amendment rights).

On April 25, 2000, ALJ Rainey ordered evidentiary hearings to be held on May 10 and 11, 2000, based upon requests for evidentiary hearings and his "belief that evidentiary hearings would be necessary and helpful in the adjudication of the matter . . . ." Prehearing Order #2 (April 25, 2000) at 2.

E. Testimony Submitted in Support of the Parties' Positions

1. Joint Petitioners

Joint Petitioners filed written testimony of seventeen witnesses in support of the Joint Petition.[14] PECO submitted the written testimony that was submitted in support of the Application as well as the supplemental testimony of Thomas P. Hill in support of the Joint Petition. PECO's written testimony in support of the Application provides descriptions of the merger agreement, restructuring, and affiliated interest agreements, as well as business reasons for the merger, estimated cost savings for regulated operations, and competitive effects of the merger.[15] PECO's witnesses also discuss the potential effects of the merger on PECO's 1998 Restructuring Settlement and the operations and employees of its

[14] The following parties submitted written testimony in support of the Joint Petition: PECO (Kenneth G. Lawrence; Richard White (direct testimony and supplemental testimony); Thomas P. Hill (direct testimony and supplemental testimony); Thomas J. Flaherty; William H. Hieronymus); Amtrak (Stanley R. Forczek); PAIEUG (Lane Kollen); MAPSA (James McCormick); OTS (Kevan Deardorff; Paul J. Metro); Clean Air Council (Andrew Altman); OCA (Richard LaCapra); PennFuture (John Rohrbach); Eric Joseph Epstein (Eric Joseph Epstein); Senator Fumo and CEPA (Richard H. Silkman); East Brandywine Township (Scott T. Piersol); and the City of Philadelphia (Kent R. Miller).

[15] *See* PECO Statement Nos. 2 (Direct Testimony of Richard G. White), 2S (Supplemental Testimony of Richard G. White) (filed Nov. 22, 1999).

Electric Distribution Company ("EDC"), and emphasize PECO's commitment to the local community.[16]

In response to the PPL Objections and those of Councilman Cohen, PECO witness Hill cites potential consumer benefits anticipated to result from the settlement, including rate reductions and the effects on the electricity competition in Pennsylvania, the safety of nuclear power and protection of ratepayers from the costs associated with decommissioning nuclear power plants.[17]

The written testimony filed on behalf of the other Joint Petitioners primarily describes provisions of the Joint Petition,[18] and is similar to that of PECO witness Hill in supporting the Joint Petition, although with emphasis on the specific provisions of interest to the particular Joint Petitioner submitting the testimony.[19]

2. PPL Utilities

PPL Utilities submitted the written testimony of Paul L. Gioia, a former chairman of the New York State Public Service Commission, in support of its objections to the Joint Petition. His testimony demonstrates why terms of a

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[16] *See* PECO Statement No. 1 (Direct Testimony of Kenneth G. Lawrence) (filed Nov. 22, 1999).

[17] *See* PECO Statement No. 3S (Supplemental Testimony of Thomas P. Hill) (filed April 18, 2000).

[18] *See* PennFuture Statement No. 1 (Testimony of John Rohrbach), pp. 9, 10 (filed April 18, 2000).

[19] *See, e.g.,* OTS Statement No. 1 (Direct Testimony of Kevin Deardorff) (filed May 3, 2000) (regarding cost savings of merger); MAPSA Statement No. 1 (Direct Testimony of James McCormick) (filed May 3, 2000) (stating that provisions of Joint Petition relating to competitive market for retail electrical services are in the public interest and supported by substantial evidence); and Senator Vincent J. Fumo and CEPA Statement No. 1 (Prefiled Direct Testimony of Richard H. Silkman, Ph.D.) (filed April 18, 2000) (regarding proposed ratepayer benefits and regulatory value of the merger).

settlement should not be accorded precedential effect or admitted as evidence in future proceedings. *See* PPL Utilities Statement No. 1 (Testimony of Paul L. Gioia)(filed May 3, 2000). Gioia cites to the fact-based nature of compromises made by parties to reach agreement as a reason why settlements are unfit for use as evidence in an unrelated proceeding to justify identical or similar relief. *See* PPL Utilities St. 1, p. 5.

Gioia points out that fairness and due process concerns arise from the use of settlement provisions as evidence in other proceedings, due to the difficulty, if not impossibility, of affording parties reasonable notice and a fair opportunity to be heard before being bound by a regulatory decision. *See* PPL Utilities St. 1, pp. 6-7. He testifies to the chilling effect on settlements that according such precedent or admissibility creates, and the increase in interventions caused by parties' efforts to protect themselves from settlement provisions that would be undesirable if applied to them in future proceedings. *See* PPL Utilities St. 1, p. 5.

Finally, Gioia testifies that while terms identical or similar to those in a settlement agreement could be part of a subsequent agreement or Commission decision, consideration of such terms should be on their own merits and in the context of the facts and circumstances of the proceeding at hand. *See* PPL Utilities St. 1, pp. 7-8.

3. Councilman Cohen

Councilman David Cohen prefiled his own written testimony and the testimony of three additional witnesses, including Dr. E. J. Sternglass, Dr. Janette D.

Sherman, and Joseph J. Mangano. This testimony focused upon human health and public safety policy issues associated with nuclear power.[20]

F. The May 10, 2000 Evidentiary Hearing

On May 10, 2000, pursuant to ALJ Rainey's Prehearing Order #2, an evidentiary hearing was held at the Commission's hearing room in Philadelphia. All parties except Councilman David Cohen and Eric Joseph Epstein waived cross-examination and oral testimony. All parties offered into evidence the exhibits identified in their prehearing memoranda. Councilman Cohen and Dr. Sternglass testified orally on the issues contained in their written testimony, and were cross-examined by Eric Epstein.[21] Mr. Epstein also presented rebuttal testimony.[22]

III. THE JOINT PETITION SHOULD BE CONDITIONED OR MODIFIED TO PROVIDE THAT IT MAY NOT BE CITED AS EVIDENCE IN ANY PROCEEDING INVOLVING ANOTHER PENNSYLVANIA ELECTRIC UTILITY

The Commission should modify the Joint Petition to include a provision preventing its use to justify relief in subsequent proceedings involving other Pennsylvania public utilities, including efforts to reopen their retail restructuring settlements. Such a modification is necessary to protect the due process rights of other Pennsylvania public utilities and to prevent a misuse of the Commission's policy favoring settlements of large and complex proceedings. The Commission

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[20] *See* Councilman Cohen Statement No. 1 (Direct Testimony of Councilman David Cohen); Councilman Cohen Statement No. 2 (Direct Testimony of Dr. E. J. Sternglass); Councilman Cohen Statement No. 3 (Direct Testimony of Dr. Janette D. Sherman); and Councilman Cohen Statement No. 4 (Direct Testimony of Joseph J. Mangano) (filed May 3, 2000).

[21] *See* Tr. 409 – 440.

[22] *See* Tr. 440-443.

should also declare as a matter of policy that relief against a Pennsylvania public utility must be justified on independent evidentiary or policy grounds and that it is neither relevant nor material that the relief sought was incorporated in a settlement with another public utility. By doing so, the Commission can ensure that its policy encouraging settlements will not have the unintended adverse effect of harming other Pennsylvania public utilities. It will also protect the due process rights of those utilities to a decision on the merits.

A. Several of the Joint Petitioners Intend to Use Provisions of the Joint Petition in Proceedings Involving Other Pennsylvania Electric Utilities

Settlements have become the predominant means by which major cases before the Commission, such as the instant proceeding, are resolved.[23] Even though most settlements, including the Joint Petition, provide that they may not constitute or be cited as controlling precedent in future proceedings,[24] in practice settlements have become one of the principal means by which various interest groups advocate specific proposals. Once they secure agreement to a favored settlement provision by a utility anxious to avoid a contested proceeding, they seek

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[23] PPL Utilities fully supports the Commission's policy to encourage settlements of contested cases, particularly in large, complex proceedings.

[24] 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.

Joint Pet. at 41.

to characterize that settlement provision as the "model" which all other utilities must follow. All too often utilities that did not actively participate in the settled proceedings find themselves forced to defend against provisions that are justified on the basis that they already were agreed to or implemented by another utility. This case is no exception.

Several of the Joint Petitioners have indicated an intention to use this settlement as a model for seeking similar concessions from other Pennsylvania public utilities. Thus, PennFuture, in its Statement in Support, applauds the "unprecedented" nature of the $32 million that will be provided by PECO to support renewable energy projects, and describes the Joint Petition as a "landmark Settlement."[25] Eric Joseph Epstein states that "all of the issues defined in the proceeding paragraph [summarizing the various issues he advocated in the settlement negotiations] were fully addressed; and, in some instances, *established a constructive and innovative paradigm for other Pennsylvania communities and nuclear utilities . . . .*"[26]

Similarly, OCA states with respect to the changes in the CDS program that "this agreement is important in working toward a successful competitive default service in *Pennsylvania*."[27] MAPSA explicitly sets forth its intended use of the Joint Petition in its letter in support of the Joint Petition. It notes that Paragraph 46 of the

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[25] Statement of PennFuture in Supp. of Joint Pet. for Sett., at 1-2 (filed Mar. 30, 2000).

[26] Statement in Supp. of Joint Pet. for Sett. of Eric Joseph Epstein, at 2 (filed March 28, 2000) (emphasis added).

[27] Statement in Supp. of the Office of Consumer Advocate, at 6 (filed Mar. 29, 2000) (emphasis added).

Joint Petition, regarding the release of additional customer historical billing data in addition to that provided under the 1998 Restructuring Settlement, "will provide a *model* for the development of competition throughout Pennsylvania and the nation."[28] MAPSA goes on to state that certain other provisions in the Joint Petition *concerning the retail market* "will provide a model for the market throughout Pennsylvania and the nation."[29]

Finally, even after PPL Utilities' expressed concern over the use of the settlement agreement in this proceeding as evidence justifying similar terms in other proceedings, several parties reaffirmed their intentions to do so. On May 10, 2000, in oral testimony before ALJ Rainey, Eric Epstein described PECO's agreement to share a percentage of cost overruns as "great precedent and good law." Tr. 442. Similarly, OCA in its Reply Comments stated:

> The OCA submits, however, that there is nothing inappropriate in parties proposing terms in one case that have been successfully implemented in a prior settlement. Indeed, without such a process, the OCA submits that neither electric restructuring nor gas restructuring would have been accomplished in Pennsylvania in the timely manner in which they were accomplished. PPL's argument goes directly to the heart of the process which the Commission has utilized, and encouraged, to resolve large complex cases.[30]

Accordingly, unless the Commission modifies the Joint Petition as requested herein, PPL Utilities and other Pennsylvania public utilities can expect to see the

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[28] Statement of MAPSA in Supp. of Joint Pet., at 1-2 (filed Apr. 7, 2000) (emphasis added).

[29] *Id.* at 2.

[30] OCA Reply at 11-12. *See also id.* at 5 ("PPL seeks to eliminate from Commission practice what has become a useful paradigm for settling complex cases.").

Joint Petition cited as evidence in support of relief sought against them, even though, by its terms, the Joint Petition may not be cited as legal precedent.

B. The Commission Should Not Permit A Settlement to Be Cited As Evidentiary Support For Relief in Proceedings Regarding Other Electric Utilities

1. The Law Requires that Irrelevant and Immaterial Evidence Be Excluded From Commission Proceedings

Under 66 Pa C.S. § 332(b), the Commission "shall as a matter of policy provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence." Evidence is irrelevant if it has no "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[31] Evidence is immaterial if it has "some probative value upon an issue in the action but of such slight value as not to be worth the time, expense and inconvenience which the process of proving it would require,"[32] Section 332(b) also provides that "[n]o sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party *and as supported by and in accordance with the reliable, probative and substantial evidence.*"). 66 Pa C.S. § 332(b) (emphasis added).

Settlement provisions meet none of these standards. Settlements involve compromises and trade-offs specifically crafted in order to reach agreement which, if taken out of the context of the particular proceeding settled, are neither relevant

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[31] Pa. R. Evid. 401; *accord*, Fed. R. Evid. 401 (identical to Pa. R. Evid. 401).

[32] Morgan, Basic Problems in Evidence 183 (1962).

nor probative of the issues in controversy in other proceedings. The very nature of settlements require that parties accept some aspects of the settlement to which they may be opposed in order to gain support for other aspects of the settlement with which they agree. Settlements thus often reward each settling party with provisions that address their specific concerns, even if those concerns bear little relationship to the major issues raised by the matter pending before the Commission.

As stated by PennFuture in its Second Prehearing Memorandum, "no evidence in this PECO case, including provisions of the Settlement, can be legally relevant to a future PPL case that does not yet exist."[33] As discussed below, the testimony in this proceeding in support of the Joint Petition demonstrates that PennFuture is correct. None of the terms of the Joint Petition should be considered "*reliable, probative and substantial evidence*"[34] *in any subsequent proceeding* involving another Pennsylvania public utility.

2. The Evidence Submitted in Support of the Joint Petition Demonstrates That The Settlement Is Relevant Only to PECO and its Merger With Unicom

In its Objections, PPL Utilities focused on five areas in which the Joint Petition raised serious questions of whether it was consistent with law or in the public interest. In particular, PPL Utilities pointed out that the Joint Petition contains provisions relating to these areas "that have absolutely no relation to the

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[33] PennFuture Second Prehearing Memorandum at 6.

[34] 66 Pa C.S. § 332(b).

proposed restructuring and merger, that bear little or no relationship to PECO's Merger Application."[35] PPL Utilities further stated that "[t]he Commission has here, in effect, a bare request for relief by some, but not all, parties to a proceeding . . ."[36]

After PPL Utilities filed its objections, the Joint Petitioners submitted a number of evidentiary statements. Those statements and the rest of the record demonstrate that the Joint Petition is unique to PECO and should not be considered relevant or material to any issue in a proceeding involving another Pennsylvania public utility. As PPL Utilities' witness Gioia observed:

> The specific facts and circumstances in a subsequent proceeding will almost certainly be different from the proceeding in which the settlement was achieved. Consequently, terms that were acceptable and appropriate as part of a settlement in one proceeding may be inappropriate and unacceptable in a subsequent proceeding. Once the terms of a settlement are taken out of the context of the specific facts and circumstances in which the settlement was made, there is no rational basis for presuming that they are reasonable and appropriate in a subsequent proceeding.[37]

An examination of the evidence submitted by the parties in the five areas identified in the PPL Objections makes clear that this settlement is only relevant in its specific context.

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[35] PPL Objections at 12.

[36] *Id.* at 18.

[37] PPL Statement No. 1, p. 6.

a) Rate and Reliability Provisions

The Settlement contains substantial rate reductions and an extension of the cap on PECO's retail transmission and distribution charges.[38] *See* Joint Pet. at 8-10. The evidence submitted by the Joint Petitioners to support the rate reductions and extension of the rate cap does not establish a link between the distribution cost savings flowing from the merger and these rate reductions. As such, the rate reduction provisions of the Joint Petition have no probative value in any other proceeding and, as PPL Utilities has requested, should be limited as both an evidentiary and policy matter to this case. Indeed, the difference between the rate reductions and the expected savings demonstrates why the Commission's policy against rate reductions in the context of a proposed merger is manifestly correct.[39]

Four witnesses testified in support of the $200 million in distribution rate reductions from 2002 through 2005. None of those witnesses could demonstrate

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[38] As stated in the Joint Petition, PECO has agreed to reduce its retail electric distribution rates by $60 million annually beginning on January 1, 2002. *See* Joint Pet. at 8. The Commission had previously approved of a $60 million reduction for the duration of 2001. *Id.* Such $60 million decrease will remain in effect until January 1, 2004, when the annual rate decrease will become $40 million. *Id.* PECO will also extend the cap on its retail transmission and distribution charges agreed upon in PECO's 1998 Restructuring Settlement, which would otherwise expire on June 30, 2005, for an additional eighteen months, or through December 31, 2006. *Id.* at 10.

[39] *See PG Energy, Inc.*, Docket No. A-120011F.002, et al. (Pa. PUC 1999) (citing cases), the Commission restated its policy in merger proceedings that requests for reductions in rates and for pass-throughs and allocation of merger savings to ratepayers "does not address whether the merger itself is in the public interest but rather, . . ., is more properly addressed in a future ratemaking case when the savings are real and not speculative as they are now." In that case, the Commission rejected the OCA's "attempts to obtain future ratemaking concessions in a merger application proceeding instead of in a rate case." *Id.* In *PG Energy, Inc.*, the Commission subsequently approved a settlement that contained *voluntary* rate reductions. *See PG Energy, Inc.*, Docket No. A-12-11F.002 et al. (Amended Order entered October 18, 1999).

that the proposed merger yielded $200 million in distribution cost savings. Thus, using PECO information provided in discovery, OTS witness, Deardorff, could find no more than $113.1 million over the first five years of the merger.[40] Similarly, OCA's witness, LaCapra, estimates 30% of $66 million per year in PECO-related distribution savings, or $99 million.[41] Silkman, sponsored by several parties, shows $94 million in distribution savings over the same period.[42] Each of these witnesses then cites reports by stock market analysts to argue that the actual merger synergies will be even greater, thus capable of supporting $200 million in rate cuts.[43] However, the correctness of these witnesses' initial estimates is confirmed by the supplemental testimony of PECO's witness Hill, who states:

> Regarding PPL's second point, PECO expects to "pay for" the rate reductions, *at least in substantial part*, with synergies generated by the restructuring and merger.[44]

These witnesses have demonstrated that PECO and Unicom are voluntarily sharing some of the merger savings attributable to sources other than savings in PECO distribution expenses. Those sources of those funds are, of course, normally beyond the Commission's jurisdiction. PECO's voluntary decision to fund these rate cuts is unique to this proceeding and says nothing about Commission policy or the obligation of any other public utility.

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[40] *See* OTS Statement No. 1, pp. 2-3.

[41] *See* OCA Statement No. 1S, pp. 6-7.

[42] *See* Senator Vincent J. Fumo and CEPA Statement No. 1, p. 8.

[43] *See* OTS Statement No. 1, pp. 3-4; OCA Statement No. 1S, pp. 6-7; Senator Vincent J. Fumo and CEPA Statement No. 1, pp. 8-9.

Similarly, the issue of service and reliability is addressed rom the unique perspective of this proceeding. OCA witness LaCapra notes that PECO's merger partner, Unicom, is investing over $1.6 billion to improve "significant reliability problems at the distribution level across the last few years" and expresses concern that given the relative size of the merging partners, "an imbalance exists that could lead to outcomes that adversely affect quality of service enjoyed by Pennsylvania ratepayers."[45] In this context, LaCapra finds that the service and reliability improvement commitments mitigate the risks that service quality might experience a degradation as a consequence of the proposed merger. The only conclusion that can be drawn from this testimony is that when a large out-of-state utility in which "outages have occurred at an unacceptable rate in certain areas for several years"[46] merges with a Pennsylvania utility, commitments to protect Pennsylvania ratepayers from service degradation may be appropriate.

If any more evidence is necessary that the reliability provisions of the Joint Petition should not be admissible in future proceedings, one need only look at the Public Input Hearing testimony. Numerous witnesses sharply contrasted the reliability and service available from PECO with that offered by PPL Utilities. For example, Joseph P. Lewis, a customer of PECO, testified at the public input hearing on March 30, 2000 in Glenmoore, Pennsylvania that:

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[44] *See* PECO Statement No. 3S, p. 8 (emphasis added).

[45] *See* OCA Statement No. 1S, p. 12.

[46] *Id.* at 12 (quoting the response to Interrogatory OCA-1-7).

> Two-thirds of our area is covered by PECO and one-third is covered by [PPL Utilities] and the response time to emergencies is drastically different. [PPL Utilities] is a pleasure to deal with. They respond promptly.[47]

Several additional witnesses expressed great frustration with PECO's reliability and service, in comparison to their experience with PPL Utilities.[48]

Finally, none of the witnesses except Hill addressed the concern in the PPL Objections that the extension of the rate cap may be inconsistent with PECO's obligations to the PJM to finance new transmission. PPL Objections at 21-22. Hill's defense of this provision was that an exception to the rate cap was available under the Electricity Competition Act if such facilities were mandated, citing 66 Pa. C.S. § 2804(4)(iii)(E). *See* PECO St. 3S, p. 9. Clearly this provision and the related potential for a request to exceed the rate caps is premised upon PECO-specific factors and should be given no weight in future public utility proceedings.

b) Nuclear Provisions

The Joint Petition provides for limitations on the level of recovery through retail electric distribution rates of PECO's preexisting nuclear decommissioning costs. *See* Joint Pet. at 10-13. PECO agreed in the Joint Petition that when it

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[47] Tr. 302-03.

[48] *See, e.g.,* Tr. 304 (Joseph Lewis) ("...I would like to see the township petition PECO or the Public Utility Commission to let our township and maybe East Brandywine if they are interested sell their lines to PP&L and let them take care of us and we would be totally out of PECO if possible. I don't know if it is a reality or a possibility. I don't knowwho to talk to [to] find out, but I would like to."); Tr. 308 (Albert Greenfield) ("And I echo Joe Lewis' earlier testimony about joining with PP&L because I have had a very satisfactory relationship with PP&L."); Tr. 320 (Marvin Shapanka) ("So I for one – Mr. Lewis' suggestion if there is a viability to having PP&L buy this end of the line service from PECO and switch over, it would certainly get my vote...").

seeks to increase its annual nuclear decommissioning expense allowance above the accrual level used to determine the Nuclear Decommissioning Cost Adjustment Charge, it will under certain circumstances voluntarily forego recovery of $50 million of its total decommissioning cost obligations, plus 5% of any additional increase in the annual accrual level above the accrual level. *See* Joint Pet. at 11. Numerous witnesses testified in support of this provision.[49] That testimony, however, also demonstrates why this provision is unique to the PECO-Unicom merger with no relevance to the situation facing any other Pennsylvania public utility.[50]

The PPL Objections asked the Commission to consider whether PECO's agreement to forego recovery of $50 million of its total decommissioning cost obligations represents a correct balance between protecting consumers from the costs of nuclear decommissioning and protecting society (including some of these same consumers) from the dangers and long-run costs of an incomplete or under-financed decommissioning effort. The Joint Petitioners' responses clearly apply only to a company with a corporate strategy of acquiring a substantial portfolio of nuclear generating plants. Thus, LaCapra cites a PECO press release announcing the merger which states that the combined company intends "to become the

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[49] *See* Tr. at 442, lines 5-9 (oral testimony of Eric Joseph Epstein); PAIEUG St. 1, p. 6: OTS St. 2, p. 3; OCA St. 1S, p. 11; PennFuture St. 1, p. 13; Eric Epstein St., p. 8; Senator Vincent J. Fumo and CEPA St. 1, p. 14; PECO St. 3S, p. 10.

[50] PECO's witness, Thomas P. Hill, cited a provision of PPL Utilities' Restructuring Settlement, s*ee*, PECO St. 3S, p. 10, to support this provision which amends PECO's 1998 Restructuring Settlement. *See Re PECO Energy Co.*, R-00973953, P-00971265, 186 PUR 4th 105, 1998 WL 420175 (Pa. PUC May 14, 1998). The two provisions differ significantly, however, in that the PPL Utilities' Restructuring Settlement does not require PPL Utilities to bear the first $50 million (or any sum) in decommissioning cost overruns before sharing the additional expense with ratepayers.

premier nuclear operator in the nation."[51] He goes on to testify that the combined company presents special risks that warrant unusual ratepayer protection and notes that, but for PECO's agreement in the Joint Petition, ratepayers would be responsible for increased decommissioning costs.[52] A question and answer provided by LaCapra summarizes this unique concern:

> Q. Is it appropriate to assign a portion of the anticipated merger benefits to protect ratepayers from the risk that decommissioning costs might exceed the total amount that is currently being collected through rates?
>
> A. As is discussed above, the 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 projected to mitigate the concomitant risks.[53]

Given PECO/Unicom's unique strategy, there is simply no basis for permitting the provisions regarding nuclear decommissioning to become part of the record of any other electric utility proceeding in Pennsylvania.

c) Environmental Provisions

Through the Joint Petition, PECO has agreed to provide a direct grant of $3.5 million to one environmental organization, Community Energy, Inc., "for its Pennsylvania Wind Energy Program." Joint Pet. at 22-23. In addition, PECO has agreed to contribute to the Sustainable Development Fund ("SDF") $12 million

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[51] OCA St. 1S, p. 10.

[52] *See* OCA St. 1S, p. 11, n. 6. Eric Epstein provides extensive evidence that the cost of decommissioning PECO's nuclear facilities will likely increase dramatically. *See* Eric Epstein St. 1, pp. 1-7, 21-22, however, he does not address the impact of the $50 million foregone cost recovery.

[53] *Id.* at 11.

specifically to fund new wind facilities and $4 million for a photovoltaic project. *See* Joint Pet. at 22-26.

These direct grants bypass the SDF which was established under the 1998 Restructuring Settlement. The SDF process does not prejudge which clean or renewable technologies should receive direct subsidies. It leaves those decisions to a neutral board.[54] By earmarking funds, the Joint Petition creates an environmental program unique to PECO and supported by the facts unique to PECO's circumstances. As such, it provides no support for seeking comparable relief in other Commission public utility proceedings.[55]

None of the testimony submitted by the Joint Petitioners justifies for bypassing the SDF process. Witness Altman, notes that CEI is a partnership between his sponsor, the Clean Air Council, and a Colorado environmental group that had launched a wind block program. CAC St. 1, p. 5. The rest of his testimony

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[54] Use of SDF funds for renewable resource development is determined by a seven-member board of directors nominated by the PECO retail restructuring settlement parties and approved by the Commission. Such funds are to be used 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. *See* 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, filed in Docket No. R-00973953 (April 29, 1998), at 39.

[55] Contrary to the assertions in testimony submitted by PennFuture, PennFuture St. 1, p. 4-5, and CAC, CAC, et al, St. 1, p. 4, PPL Utilities did not criticize the Joint Pet. for supporting renewable resources or increasing the funding for the SDF. Indeed, the role of the SDF is to provide support for emerging technologies that would not be funded by the market today, but which could survive in a competitive market if given a chance. Witness Altman fails to recognize this distinction, thus confusing the utilization of market mechanisms to provide subsidies for emerging technologies with a demonstrated market demand for those technologies. The fact that it is necessary for the Joint Petition to finance new wind facilities means, by definition, that market forces with not "produce new wind resources in direct proportion to market demand." CAC, et al, St. 1, p. 4.

on the subject simply discusses the benefits and history of wind block programs. But the history and benefits of wind block programs are not at issue in this proceeding. Rather, at issue are the implications of bypassing a neutral Commission-approved process for allocating funds for renewable resources. Even if the Commission is willing to approve a compromise in this proceeding under which neither it nor the SDF board will have an opportunity to consider alternatives to the allocation of funds in the Joint Petition, that compromise offers no relevant guidance for other Commission proceedings.

d) Electric Generation Supplier Benefits

The Joint Petition contains a number of provisions addressing the concerns of Electric Generation Suppliers ("EGSs"). In particular, the Joint Petition would alter the CDS program negotiated in the 1998 Restructuring Settlement transforming it into a generation and capacity supply service only.[56] This revision would appear to be inconsistent with the Electric Competition Act. However, even if such a revision is accepted by PECO and approved by the Commission, the Joint Petitioner provides no basis for imposing this revised CDS construct on the customers of any other public utility.

The goal of the CDS program is to promote the transition from traditional monopoly service by substituting an alternative Provider of Last Resort ("PLR"). it was intended to be a substitute utility service for residential customers that for

[56] Joint Pet. at 31. The CDS rules which the Joint Petition seeks to change were considered by the PECO CDS collaborative and approved by the Commission just last year. *See Re Full Settlement Competitive Provider of Last Resort,* R-00973953, P-00971265, 1999 WL 632808 (Pa. PUC Apr. 30, 1999).

whatever reason did not exercise their right to choose, not a substitute EGS service.[57]

The record of this proceeding does not contain a cogent explanation for altering the CDS concept that emerged from the 1998 Retail Restructuring Settlements.[58] For that reason, it particularly important that the Commission severely limit the impact of the Joint Petition in this area. Although PECO witness Hill claims that the Joint Petition "does not create a new CDS 'contruct,'" PECO St. 3S, p. 11, the Commission should ensure that result by specifically limiting the evidentiary and precedential use of this provision.

e) Large Customer Agreements

The Joint Petition also contains specific agreements with Amtrak and the City of Philadelphia. *See* Joint Pet. at 38. In particular, PECO has offered Amtrak the option of, executing a lump-sum buyout of its Transition Charges. *See id.* and

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[57] Only by substituting an alternative utility service for PECO PLR service could CDS arguably be consistent with the statute which provides customers with the right to choose — and the right not to choose. *See, e.g.,* 66 Pa. C.S. § 2807(d)(1). *George v. Pennsylvania Public Utility Commission,* 735 A. 2d 1282, 1287-89 (1999), which upheld the Commission's power under the Electric Competition Act to approve an alternative PLR, did not reach the issue of whether the Commission could assign PLR customers to what is, effectively, an EGS. The CDS provision of the Metropolitan Edison Company and Pennsylvania Electric Company retail restructuring settlements upheld in *George* was essentially identical to the CDS provision of the PECO retail restructuring settlement.

[58] MAPSA witness McCormick states that the CDS provision is necessary "because PECO will no longer be able to leverage its monopoly distribution system into the market for generation." MAPSA St. 1, p. 6. However, PECO's Interim Code of Conduct was supposed to prevent such leveraging, s*ee RE PECO Energy Co.*, R 00973953, P-00971265, 186 PUR 4th 105, 1998 WL 420175 (Pa. PUC May 14, 1998), and there has been no allegation that the Interim Code of Conduct has failed to do so. Interestingly, while OCA witness LaCapra cited several provisions of the settlement that "offset" the possibility of "a further consolidation of PECO's dominant position in its service territory...," OCA St. 1S, p. 14, the CDS provision was not one of them.

Appendix F. PECO has also offered, and has asked the Commission to approve, a *grant to the City of Philadelphia* of additional rights and options under its Rule 4.6 contract. *See id.* and Appendix G.

Both Amtrak and Philadelphia submitted testimony to support their respective agreements, as did PECO.[59] In each case, the testimony reinforced the uniqueness of their respective situations, although it is hard to argue that the electric power requirements of the nation's only interstate passenger railroad and the Commonwealth's largest city are not unique. In any case, the Joint Petition provisions pertaining to these agreements, along with the others discussed above, argue strongly for the limitations PPL Utilities has requested.

C. It Would Be Contrary to the Public Interest To Permit Relief Negotiated In Settlements to Be Cited As Evidentiary Support in Contested Proceedings Involving Other Electric Utilities

Sound and compelling reasons exist for the Commission to articulate a clear policy that the specific terms of a settlement agreement *will not be accorded* precedential effect and will not be admitted as evidence in any subsequent proceeding on the basis of prior approval of those terms in a settlement. The relief sought by PPL Utilities would encourage settlements, prevent delay and unnecessary costs, and protect the rights of all interested parties to reasonable notice, a fair opportunity to be heard, and an appropriate decision-making process before being bound by a regulatory decision.

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[59] *See* Amtrak St. 1, pp. 8-11; City of Philadelphia Statement No. 1 (Testimony of Kent R. Miller), pp. 2-5 (filed April 18, 2000); PECO St. 3S, p. 11.

Settlements conserve valuable resources and enable the Commission, its staff and other parties to put their limited time and funds to more productive uses. Settlements also often produce a more creative and balanced resolution of issues than would result from a fully litigated proceeding. However, as witness. Gioia has testified,

> [F]or the potential benefits of the settlement process to be achieved, it 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.

PPL Utilities St. 1, p.5.

If such assurances are not provided, parties will be "reluctant to agree to a settlement that includes terms they would not otherwise support," *id.*, and will be "more likely to intervene in proceedings where they otherwise might not do so in order to protect themselves against settlement provisions that would be undesirable if applied to them in other proceedings." *Id.* Such otherwise unnecessary interventions will make complex proceedings tremendously more so, and will reduce the chances of amicable settlement among the parties. *See id.* Such effects run counter to the Commission's policy in favor of settlements.

Moreover, considerations of fairness and due process require the relief requested by PPL Utilities. As clearly stated by OCA, Eric Epstein, MAPSA, PennFuture, and others, the consenting parties to the Joint Petition intend to use the provisions of the Joint Petition as a model to justify identical or similar relief in

other proceedings against other Pennsylvania public utilities.[60] However, as witness. Gioia points out, no amount of speed and efficiency justifies elimination of parties' rights to reasonable notice, a fair opportunity to be heard, and an appropriate decision-making process before being bound by a decision:

> Those requirements are extremely difficult, if not impossible, to achieve with respect to the terms that come out of a negotiated settlement. First, unless the Commission has characterized the proceeding as a generic or rule-making proceeding at the outset, parties may not have adequate notice that the Commission's decision will be accorded precedential effect or have evidentiary value in a subsequent proceeding. Second, the final terms of a settlement agreement often could not have been anticipated at the beginning of negotiations and may address matters beyond the scope of the original filing. Thus, according precedential effect or evidentiary value to the terms of a settlement agreement raises fairness and, possibly, due process issues with respect to third parties.[61]

Finally, it is not only the rights of the parties to subsequent proceedings that may be at stake if the Commission permits evidentiary reliance on settlement provisions. Rather the restructuring of the electric power industry necessary "to provide electricity consumers with the maximum benefits of competition, including the lowest prices and widest range of choices[,]" may be discouraged.[62] The Commission should encourage utilities to consider actions that could provide benefits to the public that would otherwise not be obtainable. If parties perceive that the terms of a previous settlement which they consider onerous or inappropriate will be given evidentiary weight just because someone else agreed to

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[60] *See supra* notes 22-27 and accompanying text.

[61] PPL Utilities St. 1, pp. 6-7.

[62] *Id.* at 8.

those terms, they may be discouraged from proceeding with a proposed transaction even though that transaction, under its specific terms, would be in the public interest.[63]

IV. CONCLUSION

For the above stated reasons, PPL Utilities respectfully requests that the Commission modify the Joint Petition to include the following provision:

> The fact that a provision is included in the Joint Petition shall not constitute or be cited as relevant or material evidence in support of the adoption of such provision in any other proceeding, including, but not limited to, a proceeding to reopen or modify another Pennsylvania public utility's settlement of its retail restructuring proceeding under the Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. § 2801, *et seq.*

[63] *Id.* at 9.

In addition, the Commission should establish a policy that it will not entertain evidence or arguments by participants in proceedings before the Commission justifying relief on the grounds that such relief was incorporated in a settlement with another public utility.

Respectfully submitted,

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Caryn Blythe Houck, Esq.
Preston Gates Ellis &
Rouvelas Meeds LLP
Suite 500
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Paul E. Russell, Esq.
Associate General Counsel
PPL Electric Utilities Corporation
Two North Ninth Street
Allentown, Pennsylvania 18101
Ph: (610) 774-4254
Fax: (610) 774-6726

By: _____
Attorneys for PPL Electric
Utilities Corporation

Dated: May 17, 2000

ATTACHMENT A

PROPOSED FINDINGS OF FACT AND LAW OF PPL ELECTRIC UTILITIES CORPORATION

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-110550 F0147

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF PPL ELECTRIC UTILITIES CORPORATION

PPL Electric Utilities Corporation (formerly PP&L, Inc.) ("PPL Utilities") submits these Proposed Findings of Fact and Conclusions of Law of PPL Electric Utilities Corporation pursuant to Administrative Law Judge Charles E. Rainey, Jr.'s ("ALJ Rainey") Prehearing Order #2 dated April 25, 2000.

PROPOSED FINDINGS OF FACT

1. On March 23, 2000, PECO Energy Company ("PECO") filed with the Pennsylvania Public Utilities Commission ("Commission"), on behalf of itself and a number of other parties, a Joint Petition for Settlement ("Joint Petition") in which, in exchange for its various provisions agreed to by PECO in the Joint Petition, the other Joint Petitioners withdrew their objections to PECO's proposed corporate reorganization, merger with Unicom Corporation ("Unicom") and the other relief requested in its Application in this matter.

2. Several of the Joint Petitioners have indicated an intention to use provisions of the Joint Petition as a model to support relief requested in

proceedings involving other Pennsylvania electric utilities. Statement of PennFuture in Supp. of Joint Pet. for Sett., at 1-2 (filed Mar. 30, 2000); Statement in Supp. of Joint Pet. for Sett. of Eric Joseph Epstein, at 2 (filed March 28, 2000); Statement in Supp. of the Office of Consumer Advocate, at 6 (filed Mar. 29, 2000); Statement of MAPSA in Supp. of Joint Pet., at 1-2 (filed Apr. 7, 2000).

3. The evidence submitted in this proceeding demonstrates that the provisions of the Joint Petition have meaning only in the context of the specific facts and circumstances relating to PECO's proposed corporate reorganization, its merger with Unicom and the other relief requested in the Application. OTS Statement No. 1, pp. 2-4; OCA Statement No. 1S, pp. 6-7, 10-12, 14; Senator Vincent J. Fumo and CEPA Statement No. 1, p. 8-9; PECO Statement No. 3S, pp. 8, 11; Eric Epstein Statement Nos. 1, pp. 1-7, 21-22; Clean Air Council, et al, Statement No. 1 at 4-5; PennFuture Statement No. 1 at 4-5; MAPSA Statement No. 1, p.6; Amtrak Statement No. 1, pp. 8-11; City of Philadelphia Statement No. 1, pp. 2-5; Tr. 304; Tr. 308; Tr. 315; Tr. 320.

4. Settlements conserve valuable resources and enable the Commission, its staff and other parties to put their limited time and funds to more productive uses. Settlements also often produce a more creative and balanced resolution of issues than would result from a fully litigated proceeding. PPL Utilities Statement No. 1, p. 4.

5. For the potential benefits of the settlement process to be achieved, it 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. If such assurances are not provided, parties will be reluctant to agree to a settlement that includes terms they would not otherwise support and will be more likely to intervene in proceedings where they otherwise might not do so in order to protect themselves against settlement provisions that would be undesirable if applied to them in other proceedings. PPL Utilities Statement No. 1, p. 5.

6. If utilities perceive that the terms of a previous settlement which they consider onerous or inappropriate will be given evidentiary weight just because someone else agreed to those terms, they may be discouraged from proceeding with a transaction that could provide benefits to the public that would otherwise not be obtainable, even though the proposed transaction, under terms suitable to that transaction, would be in the public interest. PPL Utilities Statement No. 1, p. 8-9.

PROPOSED CONCLUSIONS OF LAW

1. The Commission as a matter of policy excludes irrelevant, immaterial or unduly repetitious evidence.

2. Evidence is irrelevant if it has no tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

3. Evidence is immaterial if it has some probative value upon an issue in the action but of such slight value as not to be worth the time, expense and inconvenience which the process of proving it would require.

4. No sanction shall be imposed or rule or order be issued by the Commission except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative and substantial evidence.

5. Once the terms of a settlement are taken out of the context of the specific facts and circumstances in which the settlement was made, there is no rational basis for presuming that they are reasonable and appropriate in a subsequent proceeding.

6. The fact that a provision is included in the Joint Petition does not constitute and may not be cited as relevant or material evidence in support of the adoption of such provision in any other proceeding, including, but not limited to, a proceeding to reopen or modify another Pennsylvania public utility's settlement

of its retail restructuring proceeding under the Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. § 2801, *et seq.*

DOCUMENT FOLDER

BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

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RECEIVED
SECRETARY'S BUREAU

Application of PECO Energy Company, Pursuant to Chapters 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	**Application Docket No. A-110550F0147**

DOCKETED
MAY 18 2000

MAIN BRIEF
TO THE JOINT PETITION FOR SETTLEMENT

ERIC JOSEPH EPSTEIN, *Pro se*
4100 Hillsdale Road
Harrisburg, PA 17112

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

ORIGINAL

Dear Secretary McNulty:

Enclosed please find an original and three copies Eric Joseph Epstein's main Brief to the Joint Petition for Settlement.

1) Eric Joseph Epstein, ("Petitioner") *Pro se,* filed a Petition to Intervene and a Petition of Protest in the above captioned proceeding on December 13, 1999;

2) Mr. Epstein filed Two Sets of Interrogatories on January 4 & 18, 2000, and a subsequent Set of Oral Interrogatories on February 15, 2000. Please note that neither party opposing the Joint Petition for Settlement ("Settlement"), PPL Electric Utilities ("PPL") and Councilman David Cohen ("Cohen"), filed any written or oral interrogatories. In addition, neither party conducted discovery;

3) Epstein proposed a Public Hearing schedule in his Pre-Hearing Memo dated January 7, 2000;

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4) PPL filed Pre-Hearing comments stating: "PPL is not at this time separately raising specific issues... does not expect to present witnesses and/or testimony in this proceeding." (**Prehearing Conference Memorandum of PPL, Inc.**, January 12, 2000, Page 2, Points 4 & 5);

5) Mr. Epstein participated in the Pre-Hearing Conference held on January 27, 2000. Robert Jaffee, Esquire, representing Councilman Cohen, attended the Pre-Hearing conference to announce Cohen's *Nunc pro tunc* filing;

6) Mr. Epstein submitted a Witness List on February 14, 2000. Neither PPL or Cohen submitted a Witness List;

7) Contrary to PPL's assertion in their Objections that Joint Petitioner's "have provided no information concerning the group", Mr. Epstein included a description of the non-profit, nonpartisan EFMR Monitoring Group as an attachment to his Witness List (PPL, Page 24, Lines 5-6). (1) Moreover, PPL's Associate General Counsel, Paul E. Russell, and Lynn Ratzell form the Environmental Division, have been receiving the "EFMR Monitor" since 1995. PPL has been actively engaged in dialogue (2) and discussions with EFMR since 1996 (3);

8) Mr. Epstein actively participated in Settlement Negotiations conducted in Philadelphia, and advocated for resolution of the following issues: nuclear decommissioning; planned operating life of PECO's nuclear generating stations; Spent Fuel Isolation; "Low-Level" Radioactive Waste Isolation; rate payer equity; and, community investment in south central Pennsylvania;

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1 Despite Mr. Epstein's corrective, PPL reiterated verbatim the same line of argument in STATEMENT BY PPL ELECTRIC UTILITIES CORPORATION INS SUPPORT OF THE PETITION OF PECO ENERGY COMPANY FOR CERTIFICATION OF THE RECORD PURSUANT TO 66 PA. C.S. § 335 (a), **Appendix A, B. Nuclear Provisions**, 36.pp. 23-24, May 8, 2000.

2 Please see *Enclosure* in Eric Joseph Epstein's Main Brief to the Joint Petition for Negotiated Settlement which features a correspondence from PPL (Richard L. Doty, Ph.D, Supervisor, Operations Technology, PPL Electric Utilities Corporation) to EFMR (Eric Epstein, Coordinator, dated **April 20, 2000.**

3 See *Enclosures* to Eric Joseph Epstein's Response to PPL Electric Utilities & Councilman David Cohen Objections to the Joint Petition for Settlement.

9) Mr. Epstein testified at a Public Hearing in York on April 4, 2000, on behalf of Three Mile Island Alert Incorporated, 315 Peffer Street, Harrisburg, Pennsylvania 17102, Web site: http://www.tmia.com, and the EFMR Monitoring Group, http://www.envirolink.org/orgs/efmr.TMIA and EFMR believes all of the issues defined in the proceeding paragraph were fully addressed; (4)

10) Neither PPL or Councilman Cohen testified in any of the Pub;c Input hearings;

11) Eric Joseph Epstein contends that PPL's Objections are frivolous and without merit, and designed to impede and delay the implementation of Settlement sanctioned by the Public Utility Commission. Moreover, Mr. Epstein suggests that PPL has no direct interest in this proceeding, and has failed to establish standing;

12) The Negotiated Settlement process is predicted on the premise that it will supplant protracted litigation; thereby, saving all parties an enormous amount of time, money, and effort. PPL's Objections circumvent this process. In light of the resources which were devoted in responding and preparing testimony to PPL's Objections, Mr. Epstein strongly suggest sanctions be imposed on PPL by the Pennsylvania Public Utility Commission equal to the aggregate amount expended by the Joint Petitioners to prepare, testify, and respond to PPL's capricious and reckless legal maneuverings.

> (a) General rule. - If any person or corporation shall do or cause to be done any act, matter, or thing prohibited or declared to be unlawful by this part, or shall refuse, neglect, or omit to do any act, matter or thing enjoined or required to be done by this part, such person or corporation shall be liable to the person or corporation injured thereby in the full amount of damages sustained in consequence thereof.
> (§ 3309, Amended Title 66(Public Utilities) of the Pennsylvania Consolidated Statutes. Also refer to § 3315. Disposition of fines and penalties.)

13) Councilman David Cohen's Objections seek to infuse numerous issues that were not raised during the process;

14) Mr. Epstein submitted Pre-Hearing Memorandum #2 on April 28, 2000;

---

4 Please refer to Eric Joseph Epstein's Petition in Support of the Negotiated Settlement, and Eric Joseph Epstein's Testimony Statement No. 1, Regarding Nuclear Decommissioning, Planned Operating Life of PECO's Nuclear Generating Stations, Spent Fuel Isolation, Low-Level Radioactive Waste Isolation and Rate payer Equity & Community Investment. Both documents were entered into Evidence at the Evidentiary Hearing held on May 10, 2000.)

15) Mr. Epstein participated in the Evidentiary Hearing on May 10, 2000, and cross-examined Councilman Cohen. Although Mr. Cohen is sincere and compassionate, the Councilman clearly does not possess the requisite knowledge that would classify him as an expert on nuclear issues as defined in the Joint Petition for Negotiated Settlement;

16) Mr.Epstein believes the existing record clearly demonstrates that the Joint petition for Settlement is in the public interest, and should be expeditiously approved so that all affected Pennsylvanians can enjoy the benefits of the Settlement without further delay.

Copies have been served upon all parties of record as shown on the attached Certificate of Service.

Respectfully submitted,

Eric Joseph Epstein, *Pro se*
4100 Hillsdale Road
Harrisburg, PA 17112

DATED: May 15, 2000
Enclosure

4/26/00: copy sent to new address per Mr. Epstein's request 4100 Hillsdale Rd, Harrisburg, PA 17112

Richard L. Doty
Supervisor – Operations Technology

PPL Electric Utilities Corporation
Two North Ninth Street
Allentown, PA 18101-1179
Tel. 610.774.7932 Fax 610.774.7205
rldoty@papl.com

ppl

April 20, 2000

Mr. Eric Epstein, EFMR Coordinator
EFMR Monitoring Group
2308 Brandywine Drive
Harrisburg, PA 17110

Dear Mr. Epstein:

PPL received your letter with follow-up questions on my September 1999 letter to you. First, let me apologize for being delayed in responding to you. The amount of work preparing for the 1999-2000 transition and the ongoing Unit 1 refueling and inspection outage was quite large. I regret that the workload delayed my responding to your note.

Responding in the order written in your letter:

1. We would not characterize our environmental radiological monitoring program as being "overly dependent on TLDs". Rather, we believe that use of TLDs as integrating dosimeters provides an effective means of determining any plant-related dose at a fairly large number of locations around the Susquehanna Steam Electric Station (SSES). Further, as you are aware, there are multiple other components to the radiological environmental monitoring programs for SSES.

   The plant's effluent monitoring system is designed to measure releases of radionuclides from SSES. The environmental monitoring program provides confirmation that effluent monitoring and control systems have been effective.

   The basis for measuring very small variations in environmental radionuclide concentrations or radiation fields on a daily basis via environmental monitoring is not clear. Radiation protection standards are developed based on the presumption that increments in dose may be associated with increments in risk. Those standards are generally written to limit annual (and in some cases, quarterly) doses to individuals. To our understanding, dose rate variations on the order of a few nanorem or microrem per hour have not been shown to be risk significant and their measurement is not called out in standards for monitoring and control purposes.

Your reference to "planned releases" is not clear. The intention is of course to properly plan and schedule all work. Effluent monitoring and control and environmental monitoring continue through periods of operation or outage. Being in an outage does not in and of itself imply changes in the commitment to effluents control or changes in governing standards.

2a. The system described is our Emergency Remote Monitoring System. The fixed-location components of that system include site perimeter monitors (16) and population center monitors (2). The distribution of the perimeter monitors was developed using historical site-specific meteorology to provide high probability of detection of a release from the plant. The monitors are capable of continuous monitoring of gamma radiation levels using G/M detectors. The units are radio-linked through a repeater to the data collection, analysis, and display systems (base stations) which poll them at regular intervals. The system was developed to our specifications by Nuclear Research Corporation. To our knowledge, SSES is the first commercial power reactor at which the system has been deployed.

At this time, the system continuously collects and stores data, but there are no requirements for routine, formal data analysis or reporting. As its name implies, the system was procured to enhance monitoring during declared emergency situations. To serve that purpose, results are displayed at the on-site Technical Support Center and off-site Emergency Operations Facility, for use by PPL and governmental representatives at those facilities. No commitment to its use as a supplemental routine environmental monitoring system has been made. The cost-benefit of such use has not been demonstrated to the satisfaction of all affected parties.

2b. As you may be aware from your review of the "safety-net" annual report provided to you, both Dr. Patrick and Dr. Palms have been heavily involved in the "safety net" monitoring program for the SSES. Their expertise was used in developing program scope and in reviewing data from the environmental monitoring. Both their comments and those of other independent academically based scientists were sought over a period of years before and during plant operations, to enhance the environmental monitoring program.

3. The Independent Spent Fuel Storage Installation (ISFSI) contains a temperature monitoring system. The signal is provided to a programmable-logic-controller-based system capable of displaying and recording the concrete roof slab temperature for each module. A local temperature gauge is also installed to provide a backup in the event of thermocouple or controller failure.

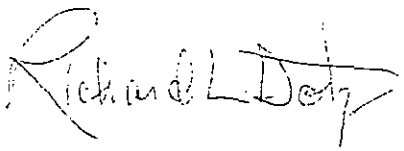
Based on system design and dose evaluations performed, TLD monitoring was judged to be sufficient for the ISFSI radiological environmental program. While you characterize that as not being "pro-active", we believe a reasoned judgement was made.

4. The PA BRP conducts air monitoring and direct radiation monitoring around SSES, maintaining their own systems and doing their own analyses. The Commonwealth also performs independent analyses of samples from media such as water, fish, sediment, and milk. Commonwealth personnel decide the scope of their program and provide their results to appropriate parties. Should you wish to suggest additional program scope, we believe that those comments should be addressed to PA BRP personnel. From our perspective, we are

appreciative that the Commonwealth performs independent monitoring and/or analyses and is able to provide the results of that monitoring to interested parties. We take seriously the results of that monitoring and are pleased to consider those results as we continually evaluate ways to make our program better.

Again, thank you for your comments and your patience in awaiting a response. At PPL, we set our standards *high in terms* of protection of public health and safety, and we will ensure that public health and safety will always be the foundation for our *decisionmaking*. As noted in my previous letter, the radiological environmental monitoring programs for SSES, as conducted internally and by the Academy of Natural Sciences, go beyond that required by NRC. We believe the combination of PPL and governmental programs should provide for a high level of confidence that radiological impacts are being properly evaluated.

Sincerely,



Richard L. Doty, Ph.D.

Copy to:

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Mr. W. Kirk	PA DEP, BRP
Mr. S. Maingi	PA DEP, BRP
L. I. Ratzell	GENTW8
B. C. Nagle	GENTW8
H. D. Woodeshick	NUCIN

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ORIGINAL

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May 17, 2000

VIA HAND DELIVERY

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

Re: Application of PECO Energy for Issuance of a Qualified Rate Order Under Section 2812 of the Public Utility Code
Docket No. R-00005030

Dear Secretary McNulty:

DOCUMENT FOLDER

Enclosed for filing are the original and ten copies of the Brief of Mid-Atlantic Power Supply Association in the above-captioned proceeding. Please date-stamp one of the copies and return it to me in the enclosed, self-addressed, stamped envelope. Thank you.

Very truly yours,

Matthew A. Hamermesh

RECEIVED
00 MAY 17 PM 3:05
PA.P.U.C.
SECRETARY'S BUREAU

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MAH/tg
Enclosures

cc: certificate of service (method as indicated)
Honorable Charles E. Rainey (via hand delivery)

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 Merger of the Newly Formed Holding Company and Unicom Corporation	:	Application Docket No. A-110550F0147

BRIEF OF
MID-ATLANTIC POWER SUPPLY ASSOCIATION

Mid-Atlantic Power Supply Association ("MAPSA"), by its counsel, hereby submits this brief requesting that the Administrative Law Judge recommend to the Commission that (a) the Joint Petition for Settlement in the above-captioned matter be approved as filed and without modification, and (b) that the Objections of PPL Electric Utilities Corporation ("PPL") and Philadelphia City Councilman David Cohen be overruled.

STATEMENT OF THE CASE

This action concerns PECO Energy Company's ("PECO") Application, 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 (the "Application"). PECO filed the Application on November 22, 1999. Numerous parties filed protests and petitions to intervene in the proceedings relating to the Application, including MAPSA. These parties were permitted to intervene in this preceding at the Prehearing Conference held by Administrative Law Judge Charles Rainey in January, 2000.

Subsequent to the Prehearing Conference, the parties engaged in extensive discovery of PECO concerning the facts and evidence supporting the Application. In addition, and pursuant to

the direction of the Commission and Judge Rainey, the parties began to conduct meetings in pursuit of a settlement of the proceeding. Ultimately, almost all of the parties participated in a series of meetings held throughout March. These meetings culminated in the drafting and signing of the Joint Petition for Settlement, filed with the Commission on March 23, 2000. The Joint Petition was signed by almost all of the parties, except for a few who filed statements stating that they would neither sign nor oppose the Settlement, and PPL and Councilman Cohen, who objected to it.

With and after the filing of the Joint Petition, the parties to the Settlement filed letters stating their support for it. Shortly thereafter, Judge Rainey issued a new Scheduling Order, setting forth deadlines for filing objections to the Joint Petition and responses to the objections. Pursuant to that Order, PPL and Councilman Cohen filed Objections to the Settlement, to which the parties to the Settlement responded in due course. Because of these objections, Judge Rainey scheduled hearings on the Joint Petition held on May 8, 2000, at which the parties submitted testimony and other exhibits, and established a briefing schedule.

SUMMARY OF ARGUMENT

In order to approve an application for a merger, the Commission must find that the proposed merger is in the "public interest." As a result of recent changes in the provision of retail electrical services in Pennsylvania, particularly the deregulation of the generation market, the competitive impact of a proposed merger is an integral part of this "public interest" test. The Joint Petition for Settlement contains a number of provisions designed to promote the competitive market for retail electric services. MAPSA submits that these provisions in fact will promote competition, and therefore the Settlement should be approved.

Furthermore, MAPSA believes that the Objections of PPL and Councilman Cohen are meritless and should be overruled.

ARGUMENT

I. The Settlement, and Particularly the Provisions Relating to the Competitive Market, are in the Public Interest

The Settlement set forth in the Joint Petition contains numerous provisions designed to promote the public interest. This brief will focus solely on the provisions principally relating to the competitive market, as those are the provisions in which MAPSA is primarily interested.[1] The Public Utility Code requires that a merger, or settlement proposing the approval thereof, be in the "public interest," and particularly that the merger not have any anticompetitive effect. The provisions of the Settlement relating to the competitive market will ensure that the proposed merger will not have an anticompetitive effect, and will in fact promote competition within PECO's service area.

A. Legal Standard

The Commission may only grant an application for approval of a merger, or a settlement proposing modifications to such an application, if the merger is in the "public interest." A proposed merger must be "necessary or proper for the service, accommodation, or safety of the public," in order for the Commission to approve it. 66 Pa. C.S. § 1103(a). The Supreme Court has interpreted this requirement to mean "that those seeking the approval of a utility merger demonstrate more than the mere absence of any adverse effect upon the public. [It] requires that

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[1]MAPSA believes that the Settlement as a whole is likewise in the public interest, and incorporates herein by reference the arguments to that effect of the other parties supporting the Settlement.

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. Pennsylvania PUC, 449 Pa. 136, 141, 295 A.2d 825, 828 (1972).

The recently enacted electric deregulation statute must be considered in determining the "public interest" in the context of electric utilities. The deregulation act was designed to promote and protect the competitive market for electric generation in Pennsylvania. Accordingly, one of the public interests that the Commission should consider in determining whether a proposed merger is in the public interest is the interest in electric competition. Under City of York, therefore, the Commission should take into account whether the proposed merger will "affirmatively promote" competition. City of York, 449 Pa. at 141, 295 A.2d at 828.

The deregulation act also states that, in the context of a merger proceeding, the Commission should consider "whether the proposed merger, consolidation, acquisition or disposition is likely to result in anticompetitive or discriminatory conduct, including the unlawful exercise of market power, which will prevent retail electricity customers in this Commonwealth from obtaining the benefits of a properly functioning and workable competitive retail electricity market." 66 Pa. C.S. § 2811(e)(1); see also In re DQE, Inc., Docket No. A-110150F0015, 1998 WL 406768 (Pa. P.U.C. May 29, 1998). Accordingly, the Commission can approve the proposed merger if it concludes that the proposal, as modified by the Settlement, will not "result in anticompetitive or discriminatory conduct."

B. The Joint Petition for Settlement Will Ensure that the Proposed Merger does not have an Anticompetitive or Discriminatory Effect

The Joint Petition for Settlement contains a number of provisions designed to ensure that the proposed merger promotes competition and will not have an anticompetitive or discriminatory effect.

Paragraph 45 of the Settlement ("Access to Install Capacity ('ICAP')") provides an initial step toward remedying the detrimental impact of the installed capacity requirement on electric competition. The PJM Interconnection, LLC currently requires that all load serving entities contract for a specified amount of capacity, in addition to the firm energy the entity must purchase. See Direct Testimony of James McCormick on Behalf of Mid-Atlantic Power Supply Association ("McCormick Test.") at 4. This requirement, coupled with an ICAP market that is subject to the exercise of market power, has inhibited the development of a robust market for retail electrical services in Pennsylvania. See McCormick Test. at 4. Accordingly, one of MAPSA's goals in this proceeding was to ensure that the proposed restructuring and merger provides some remedy for this problem. While Paragraph 45 does not solve the problem, it represents a first step toward such a remedy, by providing electric generation suppliers ("EGSs") an option to purchase a guaranteed quantity of ICAP at a fixed price. See Joint Petition ¶ 45 & App. C; McCormick Test. at 4.

Paragraph 46 of the Joint Petition ("Release of Customer Historical Billing Data") will also encourage competition in the retail electrical services market. Section (a) ensures that, in addition to the information currently provided, EGSs will receive twelve individual months of usage and twelve individual months of billing demand for all customers who have not restricted

the release of this information. See Joint Petition ¶ 46(a) & App. D. In addition, the customer lists will be updated quarterly, and will be provided until at least 2004. See Joint Petition ¶ 46(a) & App. D. As a result, EGSs and customers will have access to substantially more and more accurate information, and will therefore be better able to participate in the market. See McCormick Test. at 4. Furthermore, section (b) ensures that, for individual, customer-authorized requests for account information, PECO will respond in a timely manner. See Joint Petition ¶ 46(b); McCormick Test. at 4-5.

Paragraph 48 ("Customer Load Profile Revisions") is another step toward the improvement of the competitive market. EGSs are required to use electric distribution company-supplied load profiles for their non-interval metered customers, even when such load profiles are known to be inaccurate. See McCormick Test. at 5. As a result, EGSs cannot necessarily schedule the correct amount of energy for the customers' energy requirements, and are forced to rely on the hourly energy market to balance their supply against their customers' requirements. See McCormick Test. at 5. This increases the risks and costs that EGSs must bear in serving retail customers; these costs are ultimately born by the customers themselves. See McCormick Test. at 5. Paragraph 48 attempts to remedy this situation by providing a mechanism whereby EGSs will be able to obtain revised, and hopefully more accurate, prospective customer load profiles. See Joint Petition ¶ 48; McCormick Test. at 5.

Paragraph 49 ("EDI") ensures that PECO will comply with all of its electronic data interchange ("EDI") standards and protocols. In the past, EGSs have had some difficulty in maneuvering through the EDI system as implemented and used by PECO. See McCormick Test. at 5. Paragraph 49 embodies a commitment by PECO to comply with all of its EDI obligations,

and provides a mechanism for the resolution of any problems that may arise. See Joint Petition ¶ 49; McCormick Test. at 5-6.

Paragraph 50 ("Dispute Resolution"), and the accompanying Appendix E, provide an effective mechanism for the resolution of any problems that may arise with PECO relating to electric competition. It creates a speedy dispute resolution mechanism involving mediation and/or arbitration before an ALJ, along with faster submission of any disputes that cannot be resolved through this mechanism to the Commission. See Joint Petition ¶ 50. Likewise, Paragraph 55 of the Joint Petition ("Information Reporting") will also protect the nascent retail electrical services market by enabling competitive EGSs to ensure that PECO is complying with its various code-of-conduct obligations. See Joint Petition ¶ 55.

Paragraph 51 ("PLR Marketing") is an additional measure to promote competition in the market for retail electrical services. See McCormick Test. at 6. PECO has agreed not to market, advertise, or promote its Provider of Last Resort ("PLR") service. See Joint Petition ¶ 51. This measure will enhance the development of a robust market for retail electrical services. See McCormick Test. at 6.

These provisions represent appropriate modifications to the Application that will promote electric competition within PECO's service area and therefore are in the public interest. Additionally, these provisions will ensure that PECO does not engage in anticompetitive and nondiscriminatory conduct. For these reasons, the Administrative Law Judge should recommend that the Commission find that the Settlement is in the "public interest" and approve the Joint Petition.

II. PPL's and Councilman Cohen's Objections Should be Overruled

PPL's and Councilman Cohen's Objections to the Joint Petition for Settlement are meritless and should be overruled. These objections have already been addressed at length in the responses of the parties supporting the Settlement to the Objections, as well as the briefs of those parties, which are incorporated herein by reference to that extent.

CONCLUSION

Because the Objections of PPL and Councilman Cohen are meritless, and because the Application as modified by the Joint Petition for Settlement is in the "public interest," MAPSA submits that the Administrative Law Judge should recommend that the Commission approve the Settlement as modified.

HANGLEY, ARONCHICK, SEGAL & PUDLIN

By: _____

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DATED: May 17, 2000

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 Merger of the Newly Formed Holding Company and Unicom Corporation	:	Application Docket No. A-110550F0147

CERTIFICATE OF SERVICE

I hereby certify that on May 2 , 2000, I served true and correct copies of the foregoing Brief of Mid-Atlantic Power Supply Association in the above-captioned proceeding on the following active participants and parties of record by either telecopier and first-class mail or Federal Express:

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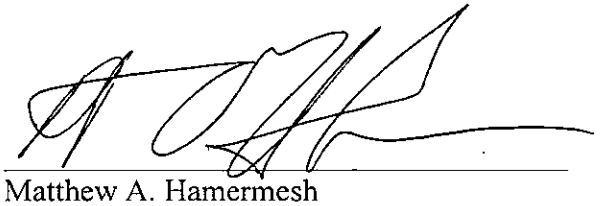

Matthew A. Hamermesh

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 Merger of the Newly Formed Holding Company and Unicom Corporation	:	Application Docket No. A-110550F0147

AMENDED CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2000, I served true and correct copies of the Brief of Mid-Atlantic Power Supply Association in the above-captioned proceeding on the following active participants and parties of record by either telecopier and first-class mail or Federal Express:

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May 18, 2000

DOCUMENT
FOLDER

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

Dear Ms. Trout:

Enclosed is the signed original of the Brief of Mid-Atlantic Power Supply Association. We filed it yesterday along with ten copies, but unfortunately the original, rather than a copy, was returned to us as a stamped copy for our files. I would very much appreciate if you could file this appropriately.

Also enclosed is an Amended Certificate of Service for the Brief, along with nine copies thereof, as the Certificate of Service accompanying the Brief had an error in it. Please file this appropriately as well. Thank you for your assistance.

Very truly yours,

Matthew A. Hamermesh

MAH/tg
Enclosures

cc: all counsel (with Amended Certificate of Service only)

BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

ORIGINAL

Application of PECO Energy Company, Pursuant to Chapters 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	:	**Application Docket No. A-110550F0147**

REPLY BRIEF TO THE JOINT PETITION FOR SETTLEMENT

ERIC JOSEPH EPSTEIN, *Pro se*
4100 Hillsdale Road
Harrisburg, PA 17112

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

Dear Secretary McNulty:

Enclosed please find an original and nine (9) copies of Eric Joseph Epstein's Reply Brief to PPL Electric Utilities and Councilman David Cohen's Main Briefs to the Joint Petition for Settlement.

1) Eric Joseph Epstein, ("Petitioner") *Pro se,* filed a Petition to Intervene and a Petition of Protest in the above captioned proceeding on December 13, 1999;

2) Mr. Epstein filed Two Sets of Interrogatories on January 4 and 18, 2000, and a subsequent Set of Oral Interrogatories on February 15, 2000. Please note that neither PPL Electric Utilities ("PPL") or Councilman David Cohen ("Cohen") filed any written or oral interrogatories. In addition, neither party conducted discovery;

3) Epstein proposed a Public Hearing schedule in his Pre-Hearing Memo dated January 7, 2000;

4) PPL filed Pre-Hearing comments stating: "PPL is not at this time separately raising specific issues... does not expect to present witnesses and/or testimony in this proceeding." (**Prehearing Conference Memorandum of PPL, Inc.**, January 12, 2000, Page 2, Points 4 & 5);

5) Mr. Epstein participated in the Pre-Hearing Conference held on January 27, 2000. Robert Jaffee, Esquire, representing Councilman Cohen, attended the Pre-Hearing conference to announce Mr. Cohen's *Nunc pro tunc* filing;

6) Mr. Epstein submitted a Witness List on February 14, 2000. Neither PPL or Cohen submitted a Witness List;

7) Mr. Epstein actively participated in Settlement Negotiations conducted in Philadelphia, and advocated for resolution of the following issues: nuclear decommissioning; planned operating life of PECO's nuclear generating stations; spent fuel Isolation; "low-level" radioactive waste isolation; rate payer equity; and, community investment in south central Pennsylvania;

8) Mr. Epstein testified at a Public Hearing in York on April 4, 2000, on behalf of Three Mile Island Alert Incorporated and the EFMR Monitoring Group at Three Mile Island;

9) Eric Joseph Epstein contends that PPL's Objections are frivolous and without merit, and designed to impede and delay Settlement Negotiations sanctioned by the Public Utility Commission. Moreover, Mr. Epstein suggests that PPL has no direct interest in this proceeding, and has failed to establish standing;

10) Mr. Epstein submitted Pre-Hearing Memorandum #2 on April 28, 2000;

11) Epstein entered into Evidence at the Evidentiary Hearing held on May 10, 2000: Eric Joseph Epstein's Petition in Support of the Negotiated Settlement and Eric Joseph Epstein's Testimony No. 1 Regarding Nuclear Decommissioning; Planned Operating Life of PECO's Nuclear Generating Stations, Spent Fuel Isolation, "Low-Level" Radioactive Waste Isolation and Rate Payer Equity & Community Investment;

12) Additionally, Mr. Epstein's Objections to the oral presentation of Dr. Ernest Sternglass and Councilman David Cohen were denied at the Evidentiary hearing. Epstein cross-examined Cohen, and submitted Rebuttal Testimony;

13) Mr. Epstein filed a Main Brief to the Joint Petition for Negotiated Settlement on May 15, 2000;

14) PPL's Main Brief is a recitation of a previously discredited line of argument, which seeks to undermine the statutory authority of the PUC, OCA, OTS, OSBA, and obligate other parties to spectator status during future legal cases before the Commission. Moreover, PPL's "arguments" collapse under the weight of their own monumental hypocrisy. For example, after PP&L reached settlement in their own restructuring case, the Company's Chairman & CEO proudly proclaimed:

> This settlement provides a **blue print** (bold face type added) for the development of new relationships among consumers, businesses, their electricity delivery company and their electricity generation supplier. (*Settlement is Reached in PP&L, Inc. Restructuring Case*, PP&L Press Release, August 12, 1998. See *Enclosure*.)

In addition, PPL willfully misconstrues and omits facts (1) to suit its own parochial interests (2). For example, PPL's footnote 50 conveniently ignores that PP&L is the fist electric utility in Pennsylvania to accept the concept of rate payer equity (3).

---

1 For more discussion, please refer to to Eric Epstein's Response to PPL Electric Utilities and Councilman David Cohen's Objections to the Joint Petition for Settlement, 12) p. 4.
PPL is inexplicably seeking to undermine the same type of rate payer relief for PECO customers that it pioneered for PP&L rate payers. (Joint Petition for Full Settlement of PP&L, Inc.'s Restructuring Plan and Related Court Proceedings, D. Nuclear Decommissioning, August 12, 1998.) By any measure of common sense, it is clear that Mr. Epstein and the other parties would not have signed a Settlement that jeopardized PECO Energy's ability to finance nuclear decommissioning. (See PPL's, Main Brief, Footnote 52.) This provision of the Settlement, like a similar provision in PPL's Settlement (Page 21, Lines 1-12), recognizes rate payer equity and implements additional benefits for PECO rate payers. PPL has yet to explain why it so intent on depriving PECO customers of the rate relief they provided for their own hostage rate payers.

2 Mr. Epstein, who strongly supports the environmental provisions of the Negotiated Settlement, is also a founding member of PP&L's Sustainable Energy Fund (SEF). PPL's SEF is charged with managing and distributing a portion of rate payer collections to similar programs specified in Present the Joint Petition for Negotiated Settlement. PPL's vituperative opposition to the environmental provisions is in stark contrast to its self-laudatory comments expressed on August 12, 1998: "This settlement also underscores PP&L Inc.'s commitment to environmental improvements by providing an estimated $3.2 million per year for the 'development and use of renewable energy and clean energy technologies, energy conservation and efficiency.' " An independent seven member board of directors will manage the fund. (See *enclosure* for full text of PP&L's, August 12. 1998, Press Release.)

3 Please note that Mr. Epstein's Petition for Rule Making before the Nuclear Regulatory Commission, (Eric Joseph Epstein's Testimony, Page 6, Paragraph 3 and Footnote 5), cleared the NRC review process on May 8, 2000, and is Docket Number PRM-50-70, Federal Register, Volume 65, Number 93, pages 30550-30553. PPL's resources would be more constructively utilized trying to resolve problems with its current nuclear decommissioning estimates, pp. 30500-30522. (See *enclosure*).

15) **PPL has displayed the unprovoked behavior of a quintessential spoiled child making petulant threats and fawning for attention**;

16) Councilman Cohen's Main Brief, an anti-nuclear treatise prepared at the expense of the taxpayers of the City of Philadelphia, is more appropriately filed before the Nuclear Regulatory Commission. While Mr. Epstein is sympathetic to Councilman Cohen's views, Epstein does not believe the PUC is an appropriate forum to make political speeches or launch a reelection campaign;

17) The "back-bench" attacks on the PUC Settlement process orchestrated by PPL and Councilman Cohen have exhausted all reasonable and legal avenues afforded by the Public Utility Commission's adjudicatory process. Furthermore, the legal maneuvering of PPL and Mr. Cohen has diverted limited resources that need to be devoted to other pending matters before the Commission;

18) Mr. Epstein hopes that in the future both PPL and Councilman Cohen will embrace "common sense" approaches to resolving complex disputes. Mr. Epstein suggests that both parties take the words of the Swiss philosopher Henri-Frederic Amiel to heart:

> "Common sense is the measure of the possible; it is composed of experience and prevision; it is calculation applied to life"
> (*Journal Intime,* November 12, 1852);

19) Mr.Epstein believes the existing record clearly demonstrates that the Joint Petition for Settlement is in the is in the public interest, and should be expeditiously approved so that all affected Pennsylvanians can enjoy the benefits of the Settlement without further delay.

Respectfully submitted,

Eric Joseph Epstein, *Pro se*
4100 Hillsdale Road
Harrisburg, PA 17112

DATED: May 22, 2000

Enclosures

news

PPL Corporation

Contact:

Settlement is Reached in PP&L, Inc. Restructuring Case

A settlement in the PP&L, Inc. restructuring case provides for a balanced transition to a competitive electricity generation marketplace that holds the promise of benefits for consumers, businesses and the state's economic development efforts, the company said Wednesday (8/12).

The settlement, which is signed by all the major parties in the PP&L, Inc. restructuring case, was filed with the state Public Utility Commission Wednesday for review and approval.

"We are very pleased that we have been able to reach an agreement that offers customers significant benefits and lessens the burden on our shareowners in the transition to a competitive electricity marketplace," said William F. Hecht, PP&L, Inc. chairman, president and chief executive officer.

Hecht said the settlement is a significant step forward in the implementation of customer choice in Pennsylvania.

"This settlement is the result of the good faith efforts -- and the hard work -- of the numerous parties in the case and PUC Chairman John Quain and Commissioner Nora Brownell," said Hecht. "This plan is good news for all Pennsylvanians.

"This restructuring settlement is an important element in the ongoing effort to create a competitive market for electricity generation in Pennsylvania,"said Hecht.

Under the settlement, which must be approved by the PUC, all PP&L,Inc. customers would receive a 4 percent rate decrease in 1999. Customers would receive this reduction whether or not they shop for competitively priced electricity. In addition, the prices that customers pay for electricity delivery service would be capped through the year 2004. And, customers who continue to buy electricity from PP&L, Inc.'s distribution company would have the prices they pay for that electricity capped through 2009.

"This settlement provides significant new protections for customers in the transition to a competitive marketplace. Customers have the opportunity to shop for generation and they have a guarantee that the charges for the delivery of electricity will not increase for at least six more years,"said Hecht.

He pointed out that customers who are still buying electricity from PP&L, Inc. at the end of 2004 will be paying essentially the same price as they were paying in 1986. "This is a remarkable record of price stability that is unmatched in Pennsylvania," said Hecht.

Also under the settlement, PP&L, Inc. would be permitted to recover $2.97 billion in transition costs over an 11-year period. Hecht said the improvement in transition cost recovery is a key provision of the agreement.

"We are particularly pleased that the settlement improves the company's transition cost recovery while providing customers with upfront savings and with the opportunity to secure additional savings in the marketplace," said Hecht.

The settlement increases the first-year shopping credit to an average of 3.81 cents per kilowatt-hour. The shopping credit can be used by customers for comparison as they shop for a generation supplier.

Hecht said the settlement, if approved by the PUC, will mark the beginning of a new era for PP&L, Inc.

"We are very much looking forward to putting the regulatory debate behind us and competing in the new marketplace," said Hecht. "Weare confident that our years of providing high-quality electricity services to customers at

reasonable prices will serve us very well as we pursue the many new opportunities that are now open to us."

The settlement also underscores PP&L, Inc.'s commitment to environmental improvements by providing an estimated $3.2 million per year fund for the"development and use of renewable energy and clean energy technologies, energy conservation and efficiency." An independent seven-member board of directors will manage this fund.

The company also commits to more than $15 million per year in assistance and energy conservation programs for low-income customers.

"This settlement provides a blueprint for the development of new relationships among consumers, businesses, their electricity delivery company and their electricity generation supplier," said Hecht. "There is much work to be done, but this agreement sets a solid foundation."

In addition to setting prices for PP&L, Inc. services in the customer choice transition period, the settlement would:

- Allow two-thirds of PP&L, Inc. customers to shop for electricity supply on Jan. 2 of next year.
- Give customers the option to choose another licensed supplier to provide some metering and billing services.
- Permit PP&L, Inc. to issue bonds to "securitize" up to $2.97 billion in transition costs and provide 75 percent of the associated savings to customers.
- Require PP&L, Inc. to transfer its retail marketing function to a separate, affiliated corporation.
- Allow for competitive bidding, beginning in 2002, for the right to provide "last resort" service to 20 percent of PP&L, Inc. residential customers. (Last resort service is the provision of electricity supply to customers who cannot or choose not to shop in the competitive marketplace.)

Hecht said if the settlement is approved, PP&L, Inc. will withdrawall its legal challenges to PUC actions in its restructuring case. On July 15, the company appealed the order to Commonwealth Court and filed suits regarding the PUC action in state and federal courts.

The PUC is expected to take preliminary action on the settlement on Thursday(8/13). Thursday's vote will be followed by a public comment period and an anticipated final commission vote on Aug. 27.

Full text of settlement agreement

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

May 8, 2000

Mr. Eric Joseph Epstein
4100 Hillsdale Road
Harrisburg, PA 17112

Dear Mr. Epstein:

This letter is in reference to the petition for rulemaking that you filed with the Commission. The petition was docketed on January 3, 2000. In the petition, you requested that the Commission amend its financial assurance requirements for decommissioning nuclear power reactors to: (1) require uniform reporting and recordkeeping for all entities that have a proportional interest in nuclear generating stations; (2) modify and strengthen current nuclear decommissioning accounting requirements; and (3) require proportional owners of nuclear generating stations to conduct a prudency review to determine a balanced formula for decommissioning funding that includes not only ratepayers and taxpayers but shareholders and board members of rural electric cooperatives as well.

Your petition has been docketed pursuant to 10 CFR 2.802 to recognize your request for amendment of the Commission's regulations. The petition has been assigned Docket Number PRM-50-70. The enclosed notice acknowledging receipt of the petition and requesting public comment will be published in the Federal Register.

Your petition, the NRC Federal Register notice of receipt, and any public comments received on your petition also will be made available on the NRC's rulemaking website at http://ruleforum.llnl.gov. Questions regarding this website may be directed to Carol Gallagher of my staff at 301-415-5905 or e-mail: CAG@NRC.gov.

As staff review progresses on your petition, it may be necessary to request additional information. Please reference the assigned docket number on any correspondence you may have concerning the petition. Any questions regarding this proceeding may be directed to me or Alzonia Shepard on our toll-free number 1-800-368-5642, extension 7162 or 6864. Upon expiration of the comment period, we will provide you with copies of any comments that have been received in response to the notice of receipt for your petition for rulemaking.

Sincerely,

David L. Meyer, Chief
Rules and Directives Branch
Division of Administrative Services
Office of Administration

Enclosure: As stated

Before the

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of PECO Energy Company, Pursuant to Chapters 11, 19, 21 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	**Application No. A-110550F0147**

CERTIFICATION OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing document upon the active participants named below by US mail or hand delivery in accordance with the requirements of 52 Pa. Code § Section 1.54.

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Respectfully submitted,

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DATE: May 22, 2000

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

IN REPLY PLEASE
REFER TO OUR FILE

May 23, 2000

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

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 Reply 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.

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	:	APPLICATION DOCKET NO. A-110550F0147

REPLY BRIEF OF THE OFFICE OF TRIAL STAFF

Kenneth L. Mickens
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Kandace F. Melillo
Prosecutor

Office of Trial Staff
Pennsylvania Public
Utility Commission

P.O. Box 3265
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(717) 787-1976

Dated: May 23, 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").

Various parties, including the Office of Trial Staff ("OTS"), intervened and/or filed Notices of Appearance in this proceeding. Following complex settlement discussions among all parties, a Joint Petition for Settlement ("Settlement"), which was signed or not opposed by almost all of the parties, was filed with the Commission on March 23, 2000. 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").[1]

[1] The Cohen Objections differ from the PPL Objections in that the former objections acknowledge that the Settlement improves upon the terms provided in PECO's original Application from a ratepayer prospective, but seeks even greater concessions from the Company. OTS submits that while it understands Councilman Cohen's concerns, OTS believes that the Settlement is the best that could have been negotiated under the circumstances presented in this proceeding. Consequently, the Cohen Objections should be denied. OTS responds herein to PPL's Initial Brief.

On May 17, 2000, OTS filed its Main Brief in this proceeding, setting forth the evidence and law in support of its recommendation that the Settlement be approved in its entirety. OTS' Reply Brief is supplemental to its Main Brief and is limited to those matters raised by PPL in its Initial Brief which relate to issues previously identified by OTS.

In its Initial Brief, PPL presses its claim that the Commission should insert language in any order approving the Settlement which provides that the terms of a settlement should not be admissible as evidence in any other proceeding, whether such proceeding is fully litigated or settled. OTS submits that such a provision is unwarranted for several reasons. First, the Commission is granted the authority under the Public Utility Code to determine what evidence is competent on the question of mergers. Second, the Commission has broad authority to determine what mitigation measures are appropriate in merger applications. Third, PPL's request for a policy statement or generic Commission rulemaking is inappropriate in the context of this application proceeding.

Accordingly, for the reasons stated in its Main Brief and this Reply Brief, OTS submits that the Settlement should be approved in its entirety.

II. SUMMARY OF ARGUMENT

PPL's contention, that it is denied due process if the Commission refers to settlement terms in other proceedings, is meritless. PPL is not being denied its right, either in litigation or settlement discussions, to point out distinctions between its circumstances and the circumstances surrounding the prior settlement. Furthermore, in settlement discussions, PPL retains the right to refuse to agree to a provision, whether or not it was ever included in a prior settlement. Its due process rights are thereby protected.

Also, the Commission has broad statutory discretion in determining appropriate mitigation measures regarding merger applications. 66 Pa. C.S. §1103(a) and 66 Pa. C.S. §2811(e)(2). PPL's requested restriction on the use of prior settlements would severely limit the kind of information that the Commission could consider; thereby unlawfully restricting the Commission's ability to perform its statutory duties.

PPL's request for the insertion of language in the Joint Petition and issuance of a "policy statement" forbidding the use of prior settlement provisions in other proceedings, in addition to being unwarranted, is also an inappropriate request for a new evidentiary regulation in an application proceeding. In fact, such a procedure would fail to provide due process to future litigants.

Finally, despite PPL's assertions to the contrary, the evidence of record clearly supports the Settlement provisions. PPL's contention that the

Commission has decided to reject ratemaking concessions in merger applications is also flawed.

In conclusion, for the reasons set forth herein and in the OTS Main Brief, the Settlement should be approved.

III. ARGUMENT

A. PPL Is Not Denied Due Process If The Commission Refers To Settlement Terms In Other Proceedings.

At p. 12 of its Initial Brief, PPL argues that the fact-based nature of compromises made by parties to a settlement, make such terms "unfit for use as evidence in an unrelated proceeding to justify identical or similar relief." While PPL acknowledges that terms identical or similar to those in a settlement agreement could be part of a subsequent agreement or Commission decision, such terms must be considered on their own merits and in the context of the facts of that proceeding. Id.

In response, OTS first submits that PPL's acknowledgement that the Commission will at times be presented with identical or similar fact situations involving different public utilities is disingenuous, because it surmises that even in such situations, the Commission should not apply the same terms. If the fact situations are identical, the same result can be reasonably applied. Both logic and the law dictate that in such situations, the Commission could employ the same terms without violating either utility's due process rights. PPL would undoubtedly counter that it is concerned about the situation that may appear on the surface to be similar, but is actually different. OTS submits that in the latter circumstance, PPL would have the right to point out the differences either in testimony (if the proceeding is litigated) or during settlement discussions (if the matter is settled).

If the matter were fully litigated, the Commission would make the decision as to the competency of the evidence. In settlement discussions, PPL would decide whether it was in its best interest to agree to the terms being offered by the other parties. This procedure provides PPL, or any other utility, with a full opportunity to be heard on the merits of the dispute.

Moreover, it is important to realize that through its authority to grant certificates of public convenience, the Commission has broad discretion in determining appropriate mitigation measures involving merger applications.[2] In this regard, Section 1103(a) of the Public Utility Code, 66 Pa. C.S. §1103(a)[3], provides that the Commission, in granting certificates of public convenience, "may impose such conditions as it may deem just and reasonable." This broad authority to consider the evidence and fashion appropriate remedies to ensure that the proposed merger will be in the public interest, has been acknowledged by the Pennsylvania Commonwealth Court. Rheems Water Company v. Pennsylvania Public Utility Commission, _Pa. Commonwealth Ct. _, 620 A.2d 609 (1993). In considering the proposed merger of electric utilities, the Commission is authorized to approve such merger only "upon such terms and conditions as it

[2] In the instant proceeding under Chapter 11 of the Public Utility Code, PECO seeks a certificate of public convenience to "acquire from, or transfer . . . the title to, or the possession or use of, any tangible property used or useful in the public service." 66 Pa. C.S. §1102(a)(3). Merger Application, pp. 8-9. PECO also seeks a certificate pursuant to Section 1103(a). Merger Application, p. 9.

[3] This statute requires merger applicants to show that the transaction is "necessary or proper for the service, accommodation, convenience, or safety of the public." 66 Pa. C.S. §1103(a). The Pennsylvania Supreme Court in City of York v. Pennsylvania Public Utility Commission, 449 Pa. 136, 295 A.2d 825 (1972) ("City of York"), 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.

finds necessary to preserve the benefits of a properly functioning and workable competitive retail market." 66 Pa. C.S. §2811(e)(2). PPL's request to limit the kind of information that could be considered evidence, would only serve to limit the Commission's ability to review these merger requests as it is required to do by statute. Accordingly, PPL's claim of a violation of due process should be rejected.

B. PPL's Proposed Inclusion Of Additional Restrictive Language In The Joint Petition Should Be Rejected.

In its Initial Brief, PPL requests that the Commission modify the Joint Petition to include a paragraph which further restricts the use of the Joint Petition in future Commission proceedings. Specifically, PPL requests that the Joint Petition state that its provisions do not constitute relevant or material evidence and that these provisions may not be cited by any future litigant in other Commission proceedings. PPL Initial Brief, p. 32. These modifications to the Joint Petition should be rejected. Similarly, PPL's additional request at p. 33 of its Initial Brief for issuance of a "policy statement" concerning the use of prior settlements, should likewise be rejected for the reasons previously stated in the OTS Main Brief at pp. 13-17.

As indicated in the OTS Main Brief, PPL's proposed language addition to the Joint Petition is actually a request for promulgation of a new evidentiary regulation in an application proceeding. This is totally inappropriate. Also, while PPL frequently complains in its Initial Brief that the use of a prior settlement as guidance in future proceedings would violate parties' due process rights, it is PPL's

proposal which would deprive future litigants of due process. PPL would have the Commission essentially promulgate a new evidentiary rule regarding use of prior settlements, which would be binding on all future litigants, without providing for publication and opportunity to submit comments. This is violative of the Commonwealth Documents Law, which requires notice of proposed rules, an opportunity to submit written comments, approval of legality by the Department of Justice and publication by the Legislative Reference Bureau. See, 45 P.S. §§1201, 1202, 1205, and 1207.

For all the foregoing reasons and the reasons stated in the OTS Main Brief, PPL's request to restrict the Commission's and future litigant's use of provisions in prior settlements should be rejected.

C. The Settlement Terms Relate Directly to the Evidence In The Record In This Proceeding.

1. $200 Million Distribution Rate Reduction.

At pp. 20-23 of its Initial Brief, PPL argues that the testimony provided by the settling parties does not fully support the $200 million distribution rate reduction provided for under the settlement. Specifically, PPL alleges that OTS witness Kevan Deardorff "could find no more than $113.1 million over the first five years of the merger." PPL Initial Brief, p. 21. In addition, PPL argues that the Commission in Joint Application of PG Energy, Inc., et al., for Approval of the Merger into Southern Union Company, Docket No. A-120011 et al., (entered September 15, 1999) ("PG Energy"), rejects an attempt to obtain future

ratemaking concessions in a merger application proceeding instead of in a rate case. PPL Initial Brief, p. 20, f n 39.

First, OTS submits that PPL has failed to accurately characterize OTS witness Mr. Deardorff's testimony. Mr. Deardorff did identify $113.1 million of merger savings over a five year period. However, he indicated that this amount is conservative in nature because the merger savings analysis was performed by PECO. Mr. Deardorff testified that "[i]t was in the best interest of PECO's shareholders to provide conservative cost saving synergy estimates." OTS St. 1, p. 3. Support for his opinion is found in the record. Mr. Deardorff offered a Value Line sheet for Unicom that estimates the merger savings in the third year to be $180 million. OTS Ex. 1, Sched. 3. PECO estimates the third year savings to be $156.3 million. OTS Ex.1, Sched. 1. Mr. Deardorff has also testified that in the recent Bell Atlantic/NYNEX merger, the actual cost savings greatly exceeded initial estimates. In fact, the Chairman of the Board of Directors of Bell Atlantic stated in its 1997 Annual Report that actual synergy savings were nearly twice the level originally estimated. OTS St. 1, p. 4.

PPL's argument that the Commission has decided to reject ratemaking concessions in merger application proceedings as found in PG Energy is also flawed. In fact, the Commission further explained its PG Energy ruling in Joint Application of Bell Atlantic Corporation and GTE Corporation for Approval of Agreement and Plan of Merger, Docket No. A-310200F0002 (entered November 4, 1999) ("Bell/GTE") as follows:

> The Joint Applicants rely on [the] PG Energy Order and other recent merger decisions by this Commission for the proposition that the pass through of merger savings to ratepayers is not necessary nor relevant in determining whether a proposed merger will provide a public benefit. Id. However, in citing the PG Energy Order, the Joint Applicants ignore our further discussion that such a pass through may be a necessary "mitigation measure where the merger raises anti-competitive concerns and involves two horizontal competitors that are actual or potential competitors in the same relevant markets."

Order at p. 27.

Thus, it is clear that the Commission has not broadly stated that ratemaking concessions are not appropriate in a merger proceeding, as argued by PPL. Instead, the Commission has found that such concessions may be appropriate in certain instances. It is important to note that the Commission in the Bell/GTE Order approved both rate reductions and rate caps. Order at pp. 31-33. In Bell/GTE, as in the instant proceeding, the merging parties are potential horizontal competitors.

Accordingly, it is clear that PPL is incorrect when it claims that the record does not support a $200 million distribution rate reduction. The record reflects a conservative estimate, which is less than $200 million, but also reflects probative record evidence, which demonstrates that the actual merger savings will likely be considerably higher. Moreover, the record and applicable law indicate that the Commission can approve the rate concessions found in the Settlement. Consequently, PPL's allegations should be rejected.

2. Nuclear Decommissioning

Similarly, at pp. 23-25 of PPL's Initial Brief, PPL questions whether PECO's agreement "to forego recovery of $50 million of its total decommissioning cost obligations represents a correct balance between protecting consumers from the costs of nuclear decommissioning and protecting society (including some of these same consumers) from the dangers and long-run costs of an incomplete or under-financed decommissioning effort." PPL Initial Brief, p. 24.

However, the financial concessions agreed to by PECO in the Settlement in no way impact this Commission's (or the Nuclear Regulatory Commission's) ability to review the appropriate level of the decommissioning fund and/or PECO's ability to safely decommission its nuclear plants. OTS witness Paul J. Metro has testified that PECO "will continue to provide the appropriate level of decommissioning funding. In addition, PECO will still be responsible to file actuarial reports which assist the Commission in monitoring the condition of the decommissioning fund as it always has." OTS St. 2, p. 4. Moreover, PECO witness Thomas P. Hill has testified that all of the safety concerns raised by PPL fall under the jurisdiction of the federal Nuclear Regulatory Commission. PECO St. 3S, p 10. Accordingly, PPL's speculative safety allegation should be rejected.

IV. CONCLUSION

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

Respectfully submitted,

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Dated: May 23, 2000

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 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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I hereby certify that I am serving the foregoing, the **ReplyBrief of the Office of Trial,** dated May 23, 2000, either personally, by fax upon the persons addressed below:

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Kenneth L. Mickens
Senior Prosecutor
Office of Trial Staff

Docket No. A-110550F0147
Date: May 23, 2000

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May 23, 2000

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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 for filing an original and nine (9) copies of the Letter Reply Brief of Councilman David Cohen in Opposition to the Approval of the Settlement Agreement.

DOCUMENT FOLDER

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

Sincerely,

Robert M. Jaffe

Robert Jaffe, Esquire
Attorney for Councilman David Cohen

cc: Service List
Honorable Charles Rainey

42

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May 23, 2000

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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 for 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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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Dear Secretary McNulty, Chairman Quain and Commissioners of the *Pennsylvania Public Utility Commission:*

Please find enclosed a letter that is the reply of Councilman Cohen to the Briefs filed in this matter and in opposition to the proposed settlement.

Parties to the proposed settlement such as AMTRACK and PECO make an overly expansive and incorrect argument that the PUC is preempted from issues of public safety stemming from this proposed settlement. The Pennsylvania Public Utility Code empowers the Pennsylvania Public Utility Commission to determine whether a utility merger enhances the safety of the public. Public Utility Code, Section 1103(a); City of York v. PUC, 449 Pa. 136, 295 A.2d 825, 828 (1972). Councilman Cohen asserts that the PUC has the discretion within this statutory grant of power to impose conditions upon PECO within the procedural framework of this settlement to a utility merger.

In effect, PECO is coming to the PUC for a benefit instead of the PUC mandating or regulating PECO. The PUC may address issues and impose the modifications to the merger raised by Councilman Cohen because PECO simply could withdraw or cancel conditions of the proposed settlement. The PUC is not initiating regulations and imposing requirements by responding to the terms of a proposed settlement voluntarily adopted by the parties and brought to the PUC.

PECO misconceives the procedural stance of this matter in the Brief submitted by PECO to the PUC by relying upon Court Opinions that did not concern approval of a settlement merger in Pennsylvania. The legal citations of PECO concern anomalous issues such as the limitation on the operation of nuclear power plant after the TMI accident and the shutdown of a nuclear facility.

At issue is whether the proposed settlement of a merger creates risks to the public safety and not the direct regulation of nuclear power generation.

Assuming that the Commission *is* pre-empted from regulating PECO's nuclear activity relating to safety matters in a settlement, even in the present context, the Commission is fully empowered to regulate PECO's nuclear activity with respect to its economic impact. Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190, 205 (1983).

And if regulation of economic impacts requires inquiry into safety issues, that inquiry is clearly *not* pre-empted. It is clear that the damage to the health and safety of Pennsylvania residents will be enormously expensive to both the Commonwealth itself as a medical insurer and to Commonwealth residents. Consequently, it is well within the Commission's power to inquire into such matters and to remedy them.

Finally, a series of recent Opinions by the United States Supreme Court reaffirm that the PUC as a state regulatory body may not be readily preempted without a basis that is of a Constitutional basis. For example, in New York v. United States, 505 U.S. 144 (1992), the Supreme Court struck down a law requiring States to participate in radioactive waste programs. The following cases, among other decisions, again reaffirm the power of a State, instead of Federal law, to regulate issues involving residents of the state. See also, United States v. Morrison, 2000 U.S. LEXIS 3422, 68 U.S.L.W. 4351 (2000); Kimel v. Florida Bd. of Regents, 145 L. Ed. 2d 522, 2000 U.S. LEXIS 498, 120 S. Ct. 631 (2000); Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank, 527 U.S. 627, 144 L. Ed. 2d 575 (1999); College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd., 527 U.S. 666, 144 L. Ed. 2d 605, 1999 U.S. LEXIS 4375, 119 S. Ct. 2219 (1999); Alden v. Maine, 527 U.S. 706, 144 L. Ed. 2d 636 (1999); Printz v. United States, 521 U.S. 898, 138 L. Ed. 2d 914, 1997 U.S.LEXIS 4044, 117 S. Ct. 2365 (1997); City of Boerne v. Flores, 519 U.S. 1088, 136 L. Ed. 2d 709, 1997 U.S.LEXIS 509, 117 S. Ct. 762 (1997) and Seminole Tribe v. Florida, 517 U.S. 44, 134 L. Ed. 2d 252, 1996 U.S. LEXIS 2165, 116 S. Ct. 1114(1996).

As a result, any preemptive language in cases cited within Briefs by the parties to the proposed settlement must be narrowly construed and viewed with considerable doubt as to continuing legal validity.

Respectfully submitted,

Robert M. Jaffe

Robert Jaffe, Esquire
Attorney for Councilman David Cohen

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 # A110550F0147**

Certificate of Service

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

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Filed by FedEx
8145-8926-9851

ORIGINAL

Re: Application of PECO Energy Company, Pursuant To Chapters 11, 19, 21, 22 and 23 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:

I represent four low income consumer organizations, the Consumers Education and Protective Association (CEPA), the Association of Community Organizations for Reform Now (ACORN), Action Alliance of Senior Citizens of Greater Philadelphia and the Tenants' Action Group (TAG) (collectively "CEPA et al.") in the above-captioned matter.

On May 16, 2000, CEPA et al. filed their Main Brief in support of the Petition for Settlement. The Petition for Settlement is opposed by PPL and by Councilman David Cohen, who have filed Main Briefs in opposition.

In lieu of filing a separate Reply Brief in response to these briefs, CEPA et al. by this letter (with 9 copies), incorporate by reference the Reply Brief of the Office of Consumer Advocate.

Very truly yours,

Philip A. Bertocci

PHILIP A. BERTOCCI

cc: Administrative Law Judge Charles E. Rainey, Jr. (Hand Delivered)
Certificate of Service

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Enclosures

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 letter 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 23rd day of May 2000

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May 23, 2000

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MAY 23 2000

PA PUBLIC UTILITY COMMISSION
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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 Reply Brief in the above-captioned matter.

Sincerely,

Paul R. Bonney

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

REPLY BRIEF OF
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Dated: May 24, 2000

TABLE OF CONTENTS

I. INTRODUCTION

On May 17, 2000, PECO Energy Company filed its Main Brief in this proceeding, as did ten other parties. PECO and eight other parties fully supported the Joint Petition for Settlement ("Settlement") filed with the Commission on March 23, 2000. In addition, PPL reiterated its recommendation that the Commission find and determine that the terms of a settlement have no precedential value and should be accorded no evidentiary weight in subsequent proceedings. However, based upon the extensive evidence presented by the settling parties, PPL no longer contends, as it did in its April 12 Objections, that the record lacks sufficient basis for the Commission to find that *this* Settlement is in the public interest based upon the facts and circumstances presented in *this* case.[1/] As a consequence, Councilman David Cohen is the only party that opposes the Settlement.

The arguments advanced in Councilman Cohen's Main Brief, in large measure, have been addressed in PECO's Main Brief and in its Reply to Councilman Cohen's Comments and Objections. Accordingly, this Reply Brief contains only a limited discussion of the principal errors of law and fact underlying the Councilman's positions. In addition, a short response to PPL's Main Brief is provided.

1/ *Compare* Objections Of PPL Electric Utilities Corporation To The Joint Petition For Settlement (pp. 33-34) and Initial Post-Hearing Brief Of PPL Electric Utilities Corporation (p. 32 and Attachment A).

II. ARGUMENT

A. Councilman Cohen's Objections Are Contrary To Law, Unsupported By Record Evidence And Should Be Rejected

1. The Nuclear Safety Issues Councilman Cohen Is Attempting To Interject In This Proceeding Are Outside The Commission's Jurisdiction, Authority And Expertise

The principal argument advanced in Councilman Cohen's Main Brief is an expression of his belief that the normal operation of nuclear generating facilities poses a threat to public health and, therefore, existing nuclear power plants should be phased out as soon as possible. As a consequence, Councilman Cohen has attempted to transform this proceeding into a forum for his anti-nuclear views by contending that because both PECO and Commonwealth Edison own and operate a number of nuclear generating facilities, the merger of their respective parent companies will magnify the public health risks allegedly posed by those plants. The purported connection between the PECO/Unicom merger and the nuclear issues Councilman Cohen hopes to interject in this proceeding has no factual basis or evidentiary support. Indeed, the PECO nuclear units -- which the Commission has already authorized be placed in a separate generating company -- are expected to continue to operate with or without the merger with Unicom (1998 Electric Restructuring Settlement ¶ 28). In short, the Councilman's nuclear safety concerns are entirely extraneous to the matters properly presented for the Commission's consideration by PECO's Application and the Settlement.

Additionally, as explained in detail in PECO's Main Brief (pp. 24-27), Councilman Cohen is asking the Commission to take action that would unlawfully usurp the primary and exclusive jurisdiction of the Nuclear Regulatory Commission ("NRC") to regulate the health and safety aspects of nuclear power.[2/] By assigning to the NRC the authority to decide safety and public health issues relating to the construction and operation of nuclear power plants, the federal government preempted all state regulation in those areas. *See Pa. P.U.C. v. Metropolitan Edison Co.*, 54 Pa. P.U.C. 276, 37 PUR4th 77, 82 (1980) ("[T]he 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.") Simply stated, Councilman Cohen is asking the Commission to exercise jurisdiction, authority and expertise it does not have.[3/]

2/ Contrary to Councilman Cohen's unsupported contention that the NRC "eliminated the health factor" as a basis for agency action (Tr. 416), the NRC has recently reaffirmed that protecting the public from radiologic risks during normal nuclear plant operation is a "cornerstone" of its oversight process for commercial reactors. *NRC Reactor Oversight Process*, NUREG-1649, Rev. 2.

3/ As noted in PECO's Application (p. 25), the transfer of operating licenses for PECO's and Commonwealth Edison's nuclear generating plants to a separate generating company ("Genco") in connection with the proposed merger and corporate restructuring requires NRC approval. In connection with the license transfers, the NRC will consider all relevant issues of nuclear safety and public health raised by the proposed corporate transactions. Moreover, concerns regarding relicensing of nuclear units can be brought to the NRC's attention if and when such license extensions are sought.

2. The Settlement's Rate Reductions And Other Concessions Reasonably Reflect The Financial Benefits To Be Created In The Regulated Portions Of The Merging Companies' Businesses, And Councilman Cohen Has Had Numerous Opportunities To Fully Explore That Issue

Councilman Cohen would have the Commission believe that: (1) the record lacks substantial evidence from which it may ascertain whether PECO's proposed rate reductions are adequate in light of the synergies and "revenue enhancements" likely to be created by the proposed merger; and (2) additional hearings are necessary to explore this issue. Councilman Cohen is wrong on both counts.

Substantiality Of The Evidence. Contrary to Councilman Cohen's contentions, Mr. LaCapra and Dr. Silkman, the economic experts presented by the OCA and CEPA/Senator Fumo, respectively, carefully analyzed both synergy savings and the potential for "revenue enhancements" likely to be created by the proposed merger. For example, Mr. LaCapra examined the ways in which the merger could enhance the financial position of PECO, including "new sales opportunities" (OCA St. 1, p. 7). However, as Mr. LaCapra pointed out, the opportunities for revenue growth lie mostly, if not entirely, in the generation and other unregulated components of the Company's business. *Id.* ("[T]he best growth opportunities are in the generation part of the business. . . . The Companies believe that the complementary nature of the unregulated businesses will jumpstart growth into a national company. . . .").[4/] Likewise, Dr.

4/ Synergy savings and revenue enhancements accruing to the unregulated portions of PECO's business remain within the unregulated sphere and should not be considered in determining the merger benefits that may be allocated to customers of PECO's regulated

(continued...)

Silkman considered all of the financial opportunities the merger may create, including "sales growth" and the potential for further synergies through technological advancements (CEPA/Fumo St. 1, pp. 11-13).

Significantly, both Mr. LaCapra and Dr. Silkman concluded that the rate reductions to which PECO agreed properly reflect the merger savings and other financial benefits that will accrue to PECO's regulated lines of business as a result of the proposed merger. *See* CEPA/Fumo St. 1, p. 11 ("[T]he total rate reduction for PECO's ratepayers in the Joint Petition for Settlement is virtually identical to my estimates of merger-related synergies, and thus I believe the Joint Petition for Settlement's treatment of this issue to be reasonable and in the public interest."); OCA St. 1, p. 9 ("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.")[5/]

Unlike Councilman Cohen, Mr. LaCapra and Dr. Silkman recognized that PECO is also sharing merger benefits with its customers through other Settlement concessions (e.g., the extension of the transmission and distribution rate cap, sharing a portion of the risk of future increases in decommissioning expense, committing to a Quality of Service Plan, funding

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4/(...continued)
retail electric and gas service.

5/ In contrast, Councilman Cohen's recommendation that the rate reductions be "doubled" is completely out of proportion to the expected synergies and other merger benefits likely to accrue to PECO, as Dr. Silkman explained. *See* CEPA/Fumo St. 1, p. 13 ("Councilman Cohen has not provided any analytical or empirical support for this position.")

environmental initiatives, expanding universal service coverage and increasing contributions to county fuel fund agencies) (OCA St. 1, pp. 9-16; CEPA/Fumo St. 1, pp. 13-15). Each of these additional enhancements carries a substantial monetary cost to PECO and, therefore, must also be considered when comparing the benefits customers receive under the Settlement to the financial benefits potentially accruing to PECO from the merger.

Finally, Councilman Cohen's quotations from the testimony of OTS witness Deardorff were taken out of context. Unmentioned by the Councilman is the fact that Mr. Deardorff was responding to the allegations of PPL that the rate reductions provided by the Settlement may be *excessive* because, based upon PPL's assessment, they appeared to be greater than the synergy savings and other benefits accruing to PECO from the proposed merger. Mr. Deardorff concluded that PECO's share of the merger benefits would provide reasonable assurance that the proposed $200 million rate reduction could be implemented without harming PECO's financial health or diminishing service quality (OTS St. 1, pp. 2-4). At no point in his testimony did Mr. Deardorff suggest that the rate reductions are inadequate.

The Councilman's Request For Additional Hearings. Mr. Cohen claims that additional hearings should be held "to determine whether the benefits [to customers from the Settlement] are substantial in relation to the benefits that PECO will accrue if the Joint Petition is granted" (Cohen Main Brief, p. 6). However, Councilman Cohen has already had many opportunities to explore this issue through discovery, cross-examination and submission of testimony, yet produced nothing that would contradict the sound and substantial record evidence

demonstrating that the Settlement's rate reductions properly reflect the merger benefits PECO will likely realize in its regulated lines of business.

Notably, other parties, such as the OCA, OTS, the Mid-Atlantic Power Supply Association, PennFuture and Amtrak, who fully support the Settlement, undertook extensive discovery on a host of issues including potential merger benefits. Councilman Cohen conducted no discovery. Moreover, despite the fact that a hearing was held in this case at Councilman Cohen's insistence, he presented no testimony or other evidence on the issue of merger benefits and conducted no cross-examination on that point of witnesses presented by PECO and other settling parties. Having been afforded numerous opportunities to address this issue, Councilman Cohen's plea for another round of hearings is simply an improper attempt to get another "bite at the apple." His request should be rejected.

The impropriety of Councilman Cohen's position is underscored by repeated references in his brief to matters outside the record. For example, he introduced the issue of potential merger benefits by discussing and quoting from the Company's response to an OCA Interrogatory, which was never introduced in evidence (Cohen Main Brief, p. 4).[6/] As a result,

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6/ Other examples of Councilman Cohen's reliance upon non-record material are sprinkled throughout his brief, such as his discussion of the Company's responses to another OCA interrogatory (p. 3, note 2) and to an interrogatory of Mr. Epstein (p. 2), as well as assorted press clippings (p. 2, note 1). References in briefs to non-record material are improper and should be stricken or disregarded.. *See, e.g., Application of Cambria and Indiana Railroad Company*, Docket No. A-00111716 (Recommended Decision) (January 7, 1996) ("Noram is asking the Commission to base its decisions on criteria or evidence outside the record, something which is prohibited by the Public Utility Code and appellate court decisions and which would be a violation of due process of law."); (continued...)

neither PECO nor any of the other settling parties had the chance to offer evidence expanding on that answer, which responded to an interrogatory on a wholly different issue. It is particularly disconcerting for Councilman Cohen to discuss that interrogatory response for the first time in his brief, because the Company served it upon all parties on January 27, 2000 -- almost four months ago. Since then, Councilman Cohen did no follow up of any kind, either through interrogatories, depositions, cross-examination or presentation of evidence. As a consequence, it is simply too late for Mr. Cohen to claim that this interrogatory response -- or any other matters discussed in his brief -- somehow call into question the adequacy of the rate reductions and other customer benefits provided by the Settlement.

Finally, Councilman Cohen's request for additional hearings assumes that, absent the Settlement, rate reductions could be ordered by this Commission as a condition of approving PECO's Application. That is not the case, as the Commission made clear in its decision in *Joint Application of PG Energy, Inc. et al.*, Docket Nos. A-120011 etc (September 15, 1999) (Order, pp. 8-9 and 11-12).

6/(...continued)
Equitable Gas Co. v. Pa. P.U.C., 45 Pa. Cmwlth. 610, 405 A.2d 1055, 1059 (1979).

3. There Is No Factual Or Legal Basis For The Commission To Impose The "Conditions" Councilman Cohen Requests

As an alternative to rejecting the Settlement and ordering another round of hearings, Councilman Cohen requests that the Commission add 16 additional "terms and conditions" (Cohen Main Brief, p. 7). Of course, if the Commission were to do so, it would be tantamount to rejecting the Settlement because, as provided in Section 69 of the Joint Petition, any attempted modification would give PECO and other parties the right to withdraw from the Settlement entirely.

The additional terms and conditions Councilman Cohen seeks to impose are simply a "wish list" of proposed concessions relating to matters that are extraneous to PECO's Application and the Settlement (e.g., "endowing" two additional attorney positions for Community Legal Services). As more fully explained in PECO's Main Brief (pp. 24-32), Mr. Cohen's proposals are contrary to law, relate to matters outside the Commission's jurisdiction, are not supported by any record evidence and seek relief that is extra-statutory and could not be obtained in a litigated proceeding. Accordingly, these proposals should be summarily rejected.

B. The Commission Can Approve The Settlement Whether Or Not It Grants The Declaratory Relief Requested By PPL

As a direct consequence of the extensive testimony and other evidence presented by the settling parties, PPL no longer contends that the record lacks substantial evidence to support a finding that the Settlement is in the public interest. The evolution of PPL's final position on this issue affirms the substantiality of the evidence demonstrating that this Settlement promotes the

public interest. However, in its Main Brief, PPL continues to pursue its real interest in this proceeding, which is to obtain a declaration by the Commission that the terms of a settlement have no precedential value and should be afforded no evidentiary weight in subsequent proceedings.

At the outset, it must be emphasized that whatever the Commission decides regarding PPL's request for declaratory relief, it can and should approve the Settlement at hand. The question posed by PPL is separate and distinct from the substantive issue of whether this Settlement is in the public interest and should be approved.

As fully explained in PECO's Main Brief (pp. 21-22), Section 72 of the Joint Petition as well as a large body of Commission decisions establishes that the terms of the Settlement do not constitute"precedent" and cannot be cited as such in any subsequent PPL proceeding. Consequently, PPL's concerns that the Settlement would have precedential value in subsequent proceedings involving PPL are unwarranted. In any event, the Commission can easily allay those concerns simply by reiterating its prior holdings on this point.

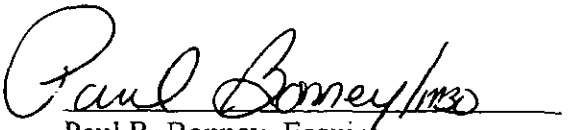
However, PPL's recommendation that the Commission declare the terms of a settlement inadmissible in subsequent proceedings goes too far. In essence, PPL is asking the Commission to prejudge the relevance and materiality of a settlement's terms in future proceedings before the factual scenario and substantive issues are known and before the parties in interest have had the opportunity to present their arguments. Not only is this contrary to sound administrative and evidentiary principles, but it denies due process of law to the parties in future proceedings. Issues

involving the admissibility and weight of evidence are not matters of law or policy only. Rather, they are highly fact sensitive, as PPL itself explained in detail in its Main Brief. Therefore, relevance and materiality should be left to the presiding officer to decide, subject to ultimate Commission oversight, by applying the rules of evidence to the facts and circumstances of the cases where these issues arise. Accordingly, while the Commission may wish to offer guidance on this issue, it should not establish an unbending rule that attempts to prejudge the admissibility of evidence in future proceedings.

III. CONCLUSION

For the reasons set forth herein and in PECO's Main Brief and Reply To The Objections Of PPL Electric Utilities Corporation and Councilman Cohen, the Commission should enter an Order approving the Settlement, without modification or condition.

Respectfully submitted,



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Dated: May 24, 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 email and first class mail:

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Dated: May 24, 2000

COMMONWEALTH OF PENNSYLVANIA

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May 24, 2000

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 Reply 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

Enclosures
cc: All parties of record
Honorable Charles E. Rainey, ALJ (Federal Express 5/23/00)
56004

LD

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

REPLY BRIEF

OF THE OFFICE OF CONSUMER ADVOCATE

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For:

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Date: May 23, 2000

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I. INTRODUCTION

On May 17, 2000, in accordance with the procedural schedule set forth by Administrative Law Judge Rainey, Main Briefs were filed by the parties to this proceeding. The Office of Consumer Advocate (OCA) filed its Main Brief in support of the Joint Settlement in accordance with the procedural schedule. Main Briefs in support of the Joint Settlement were also filed by PECO Energy Company (PECO), the Office of Trial Staff (OTS), the Office of Small Business Advocate (OSBA), the City of Philadelphia, Mid-Atlantic Power Supply Association (MAPSA), PennFutures Parties, Clean Air Council, Eric Epstein, Philadelphia Area Industrial Energy Users Group (PAIEUG), and Consumer Education and Protective Association, Association of Community Organizations for Reform Now, Action Alliance for Senior Citizens of Greater Philadelphia, Tenants' Action Group (CEPA, et. al). Two parties–PPL Electric Utilities Corporation (PPL) and Councilman David Cohen–filed Briefs seeking modifications to the Joint Petition for Settlement. Councilman Cohen in his testimony and Main Brief, asks that additional terms and conditions be added to the Joint Settlement to address issues that Councilman Cohen argues were not adequately addressed by the Joint Settlement. The OCA has addressed many of Councilman Cohen's concerns in its Main Brief. As set forth therein, the OCA submits that the Joint Settlement fairly resolves the myriad of issues that were raised by this merger. The OCA submits that the Joint Settlement is in the public interest and should be approved.

PPL, on the other hand, seeks to impose severe limits on the Commission and the Joint Petitioners regarding any future use or consideration by the Commission of any term in the Joint Settlement. PPL goes so far as to request that the Commission issue a policy statement through this proceeding that a settlement can never be cited as precedent or admitted as evidentiary support

of any kind in any contested proceeding involving an electric utility. Moreover, although less clear, PPL seems to continue to attack the individual provisions of the Joint Settlement, provisions in which the OCA submits PPL has no direct, substantial or immediate interest.

As set forth in its Main Brief in this matter, the OCA submits that PPL's position in this matter should be rejected in the strongest terms by the Commission. PPL's position here is so distant from the underlying concept of the law that it deserves no consideration. Indeed, if PPL's position or fear was correct, then PPL itself (and every other utility in Pennsylvania) should intervene in every single case before the Public Utility Commission, including every merger case.

PPL's arguments here suggest that this or a future Commission will not consider each case on its merits and determine what condition or relief is appropriate based on all of the facts of record in a case. The OCA submits that the Commission has always considered the merits of the cases before it and will continue to do so. What PPL really seems to be suggesting is that the Commission should eliminate from its practice what has become a useful paradigm in settling large and complex cases because of PPL's perception that it has somehow been treated unfairly by this settlement process in the past. The OCA urges the Commission to reject this collateral attack on the Commission's settlement process.

The OCA submits that PPL's arguments should be rejected and this Joint Settlement should be expeditiously approved. The OCA has thoroughly responded to PPL's arguments in its Reply Comments to PPL's Objection to the Settlement and in its Main Brief in this matter. The OCA will limit its Reply Brief to a few key points. The OCA notes, however, that it disagrees with all points set forth in PPL's Brief and in its Objections to the Joint Settlement.

II. REPLY ARGUMENT

A. Introduction

As the Main Briefs and the testimony in this case demonstrate, the Joint Petition for Settlement is in the public interest and should be expeditiously approved. The Main Briefs also resoundingly demonstrate that PPL's position in this proceeding is simply beyond the pale of reasonableness. PPL continues to argue that the Commission must severely limit the rights of the Joint Petitioners in future proceedings. Otherwise, PPL says, "the restructuring of the electric power industry to provide electric consumers with the maximum benefits of competition, including the lowest prices and widest range of choices may be discouraged." PPL Initial Brief at 31. The underlying premise of PPL's argument is that this Commission or a future Commission will not consider a future, as yet hypothetical case, on its own merits or will somehow "force" PPL to accept a settlement provision that it does not want to accept. If the underlying premise of PPL's position was even remotely correct, then every public utility in Pennsylvania would have to intervene in every proceeding before the Commission and force the proceeding to full litigation with no possibility of settlement to protect its future rights. Such a result is absurd. In every future case, PPL retains the right to defend itself fully and to object to any position that it does not want to accept.

Councilman Cohen raises principled concerns regarding the effects of the merger on the City of Philadelphia and its residents and seeks to build upon the Joint Settlement. The OCA respectfully submits, however, that the Joint Settlement reaches a fair balance in resolving the many concerns arising from this merger. In particular, the Joint Petition provides a wide variety of benefits for both PECO's ratepayers and PECO's service territory, including rate reductions, expansion of

universal service programs, protections from the risks of diversified businesses, enhancements to reliability and customer service, enhancements to competition, protection for the environment, protections from the risks and costs of nuclear plant operation including extensive nuclear monitoring, limitations on nuclear waste storage, research into the areas of nuclear decommissioning and nuclear plant radiation exposure management to improve worker safety, commitments to the community in the areas of corporate presence and charitable and civic giving, and commitments to various large customers. This comprehensive settlement brought together a wide array of interested parties and reconciled this diverse set of interests. The OCA submits that this Joint Settlement, taken as a whole, is in the public interest.

As set forth below, and in the OCA's Main Brief, the objections to the Joint Settlement should be dismissed and the Joint Settlement expeditiously approved.

B. PPL's Request For Additional Conditions Which Would Limit The Joint Petitioners In Any Future Proceeding Proves Too Much.

The gravamen of PPL's complaint to this Commission is evident in both its Objections to the Settlement and in its Main Brief. PPL does not actually appear to object to the Joint Settlement, or to PECO's moving forward with this merger as conditioned by the Joint Settlement. PPL objects to what has become a useful paradigm by the Commission in settling large, complex cases that involve large numbers of parties. In its Initial Brief, PPL argues that "settlements have become one of the principal means by which various interest groups advocate specific proposals." PPL Initial Brief at 14-15.

The OCA submits, however, that there is nothing wrong, and certainly nothing illegal, about parties attempting to approach similar cases in a similar manner, whether it be through

litigation or through settlement. The cases now before the Commission, particularly in the electric area, are large cases often with many common issues. The parties will always seek to implement their policy positions through a case, whether in litigation or in settlement. Indeed, the OCA expects that PPL may be the first to complain if in fact the OCA, or another party, entered a similar case with PPL, and sought to impose conditions that were not demanded from PECO under similar circumstances. If PPL does not like the policy or resolution of an issue in a prior case, and a party seeks to advocate a similar condition for PPL, PPL always retains the right to litigate the issue, and to appeal to the Courts if it thinks the Commission has wrongly imposed a condition upon it. PPL has never been, and can never be, forced to settle any case since the decision as to whether to litigate or settle a case will always rest with PPL. PPL's attempt to restrict the Joint Petitioners here from pursuing any position they deem appropriate in a future case must be rejected. PPL always retains the right to fully defend itself in that future, hypothetical case. But to limit Joint Petitioners here in regard to arguments or positions that they may forward in a future case would severely impinge upon the due process rights of the Joint Petitioners.

PPL also continues to argue that the Commission should rule now that the provisions of the Joint Settlement or the fact of the Joint Settlement should not be given any consideration in any future Commission proceeding so that it does not have to defend itself against such request in a future proceeding. PPL Initial Brief at 17-18. PPL goes to great lengths here to argue that in some as yet unknown case, these settlement provisions would not be relevant. PPL, however, should make these arguments in that as yet unknown case when the Commission has all of the facts before it. PPL here seeks to avoid having to defend itself against an as yet unknown claim, by an as yet unknown party, in an as yet unknown future case. PPL's arguments simply prove too much. Every party in

every case before the Commission is always free to present requests for relief and the Company must defend against those requests with which it disagrees. The fact that one such request was included in another settlement makes the burden no less and no more than any other request. The Commission will consider the request, the evidence in support of the request, the evidence in opposition to the request, and decide the case on the merits. The Company's entire argument here presupposes that the Commission will not faithfully perform its review in the future. The OCA strongly disagrees with this supposition.

For the reasons set forth in the OCA's Reply Comments at 5 to 12 and the OCA's Main Brief at 28 to 34, the OCA submits that PPL's arguments should be rejected. PPL's onerous conditions would stifle the settlement process that has worked so well at the Commission and may impede the Commission's ability to create a full record in future proceedings.

C. PPL's Request For The Commission To Enter A Policy Statement Through This Proceeding Should Be Rejected.

In its Brief and through the testimony of its witness, PPL asks the Commission to issue a policy statement that it will never consider any provision of *any* settlement, not just this Joint Settlement, to have any evidentiary weight in any Commission proceeding. PPL Initial Brief at 29-32, PPL St. 1 at 4. Initially, as set forth in the Joint Settlement and discussed in the Briefs in support of the Joint Settlement, the Joint Settlement already contains a provision that says that the Joint Settlement is not controlling precedent. Joint Settlement, ¶72. Additionally, this Commission and the Courts have held the same.

As to PPL's request that the Commission issue a policy statement here that settlements or settlement provisions can never be admitted as evidence in any other proceeding,

PPL's request runs afoul of several legal principles. As set forth above, and in the OCA's Main Brief and Reply Comments, PPL's attempt to restrict other parties actions in a future proceeding impinges upon the due process rights of the parties. OCA M.B. at 31; OCA Reply Comments at 10. Additionally, PPL's attempt to restrict the Commission in the exercise of its decision-making powers in a future case is improper and contrary to the operation of the law. The entire legal system, and the Commission's deliberations, is built on the foundation of applying the facts to the law. Indeed, PPL's restriction would go so far as to preclude a settlement provision from being introduced into evidence in a proceeding to enforce the settlement provision.

Moreover, PPL's attempt here to impose a state-wide policy regarding settlements in the context of this proceeding is improper. PPL seeks a policy directive here that *would* serve as a binding norm in all future cases, yet PPL argues that nothing else that comes out of this proceeding should ever be used by the parties or the Commission in any way. PPL's request does not even allow for parties in some future case to defend against the policy. Clearly, the Commission cannot issue a policy statement without notice and an opportunity to be heard by all parties. For the reasons cogently set forth in the Main Brief of the OTS and PennFutures, the OCA submits that the Commission should not issue the policy statement requested by PPL. OTS M.B. at 13-17; PennFuture M.B. at 21.

At pages 30-31 of its Initial Brief, PPL argues that electric utilities will never settle another case, and electric restructuring in Pennsylvania will be disrupted, if the Commission does not issue the policy statement here that PPL seeks. PPL Initial Brief at 30-31. The OCA submits that PPL's statement here should be taken for what it is–a statement of PPL, not the electric utility industry in Pennsylvania. Indeed, other electric utilities in Pennsylvania have made no such

statement and have not intervened in this proceeding. Only Allegheny Power Supply intervened in the proceeding. Allegheny Power has made no such threatening comments throughout this proceeding and has taken the position that it does not object to the settlement. Allegheny has not sought to turn this proceeding into something that it is not.

D. PPL's Request For A Finding Now That The Settlement Provisions Are Relevant Only To PECO Should Be Rejected.

PPL now argues that based on the evidence presented by the parties in support of the Settlement, the Commission should rule now that each of the substantive settlement provisions have no relevance to any other proceeding that may ever arise before the Commission. PPL Initial Brief at 18-29. The OCA submits that the Commission should reject the notion that this Commission can decide now for a future Commission or a future case that there is nothing of relevance to any other public utility. The OCA submits that PPL's request would require the Commission to prejudge future as yet unfiled cases and limit the Joint Petitioners' (and other non-parties') rights in these future as yet unfiled cases. As set forth above, such a limitation would impinge upon the due process rights of the Joint Petitioners and other potential parties in these future cases and would impair the development of a full record in future cases before the Commission.

In its Initial Brief, PPL runs through each of the areas of the settlement and recites the testimony of the Joint Petitioners in support of this provision. Based on the testimony that it quotes, PPL asks the Commission to conclude that each provision applies only to the circumstances of the PECO/Unicom merger and cannot be applied to any other utility.[1] PPL Initial Brief at 18-29.

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[1] The OCA would note that it is no surprise that the testimony addressed the facts of the PECO/Unicom merger since that is the case that is before the Commission. The facts are (continued...)

This would be a fine Brief in some hypothetical, as yet unfiled, future case to distinguish one case from another. But PPL's Brief here misses two key points. First, the decision it is asking to be made here can only be made in the hypothetical future case by the Commission at that time. In this case, there is no way for the Commission to make the determination as to whether evidence in some future case is relevant or should be accorded any weight, or whether the cases have been properly distinguished since it has no other case before it. Second, PPL's position begs the question of what decision the Commission might make in this hypothetical, future case if in fact, the Commission were faced with substantially similar or identical facts and issues. Might not the Commission want to know how other utilities are addressing a particular issue, even if the issue had been resolved by a settlement? Should parties be precluded from even mentioning such prior resolutions unless these resolutions were the result of full-blown litigation?

The OCA submits that it is simply improper to tie the hands of a future Commission in this case when the facts of the future case–which may never occur–are unknown. When and if the hypothetical, future case that PPL worries about ever becomes a reality, the Commission can consider all of the arguments that PPL has made herein.

As the OCA has discussed, PPL, although calling for evidentiary hearings and substantial evidence regarding the Joint Settlement, never put on testimony that the Settlement was not in the public interest or that the merger should not go forward. It now appears that PPL simply

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[1](...continued)
relevant to the Joint Settlement and to any position that an individual party may have sought to further in the settlement or litigation process. For example, it should also come as no surprise that the OCA has continued to seek to reduce rate burdens for PECO's customers in cases before the Commission based on facts that support such reductions.

wanted evidence from the Joint Petitioners so that PPL could argue that the merger provisions should be limited to PECO. Indeed, at page 29 of its Initial Brief, PPL's purpose is revealed when it asserts that in each case the testimony "reinforced the uniqueness of their respective situations. . ." PPL Initial Brief at 29. Many parties went to substantial expense and effort to provide testimony on an expedited schedule in support of the Joint Petition. But PPL's only point from this exercise is that the settlement is unique. The settlement itself explicitly stated the same. The settlement already provided:

> *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.

Joint Petition, ¶72 (emphasis added). For purposes of the Joint Petition, the terms Merger and Corporate Restructuring refer to the transactions contemplated by the Application, *i.e.* PECO's proposed corporate restructuring and its merger with Unicom. Joint Petition, ¶2.

The OCA submits that PPL's request for declarations at this time that the provisions of this Joint Settlement are not relevant to any other case must be rejected. If and when a provision of this Joint Settlement is ever referred to in a future proceeding, the Commission can decide all of the arguments forwarded by PPL at the time if the utility opposes the admission of any evidence. If at that time, PPL remains concerned that the Commission will not act properly, PPL retains its remedies in the courts.

E. PPL's Challenges To The Substantive Settlement Provisions Are Without Merit And PPL Lacks Standing To Forward Such Challenges.

Although PPL's position is less clear now, PPL seems to continue at least an indirect attack on some of the individual substantive settlement provisions. The OCA continues to question PPL's standing to attack any of the individual substantive settlement provisions. As set forth fully in the OCA's Main Brief, PPL does not have an interest that is direct, substantial and immediate in these substantive provisions to grant it standing to disrupt the agreement between PECO and the real parties in interest. William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). Any attempt by PPL to disrupt these substantive provisions should be rejected.

Additionally, as set forth fully in the OCA's Main Brief, the substantive settlement provisions are reasonable and in the public interest. OCA M.B. at 6-27. The substantive settlement provisions are fully supported by substantial evidence of record. Despite PPL's apparent disagreement with some of the evidence, all of the provisions were supported by substantive, credible evidence of record. PPL did not present any evidence to the contrary. The OCA will not repeat its arguments here on each substantive settlement provision since these provisions were fully discussed in the OCA's Main Brief. OCA M.B. at 6-27. The OCA will respond to certain PPL arguments that require clarification and response.

At page 20 of its Initial Brief, PPL continues to argue that the Commission has a policy against rate reductions in the context of a merger proceeding. PPL again cites PG Energy, Inc., Docket No. A-120011F.002 (Pa. PUC 1999) (PG Energy), but again completely ignores the recent Commission decision in a fully litigated electric utility merger case that required that 100% of the merger related savings be flowed back to customers in the nature of distribution rate

reductions and reductions in stranded cost. Joint Application of DQE, Inc. Allegheny Power Systems, Inc. and AYP Sub, 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)(APS/DQE Merger). Although now recognizing the Commission's Amended Order in PG Energy, PPL continues to attempt to rely upon the original order, which was entered without a hearing and without any substantive litigation. The OCA submits that PPL's reliance upon PG Energy should be rejected. The initial PG Energy Order cannot be relied upon as an expression of Commission policy that rate reductions associated with a merger may not be required by the Commission, and the Commission should make this point clear. On the contrary, the Commission should reiterate the position it took after hearings and full litigation in the Duquesne/APS merger case that merger savings can and should be flowed through to ratepayers where the evidence so warrants. APS/DQE Merger, 186 PUR 4th at 57-58.

At page 25-27, PPL attacks the environmental provisions of the Joint Settlement and argues that the provisions that call for funding of certain projects utilizing PECO's Sustainable Development Fund as the entity to receive the funds and oversee their expenditures are improper. The OCA first questions what interest PPL has in PECO's Sustainable Development Fund. The PECO Sustainable Development Fund is governed by an independent Board of Directors and its decision regarding acceptance of these designated settlement funds and the identified projects is now a matter between the Board and PECO. The Joint Settlement does not bypass the Board as PPL asserts but provides the Board with additional funding and projects. PECO's Sustainable Development Fund Board does not need the assistance of PPL in determining whether or not it wishes to accept these funds and projects. If anything, the settlement provisions support the

Sustainable Development Fund by providing it with funding and additional sustainable projects which it can implement in a manner consistent with the goals of the Fund.

At page 28 of its Initial Brief, PPL requests that the Commission "severely limit" the impact of the provisions in the Joint Settlement regarding PECO's Competitive Default Service Program (CDS). The OCA is very concerned with PPL's request and submits that it should be soundly rejected. CDS is a critical service for Pennsylvania and it will be critical for Pennsylvania customers that a truly successful CDS program is developed and moves forward. The recent failure of the CDS bids in GPU Energy service territory call into question the appropriate design of CDS. It will be particularly important that new methods of obtaining Competitive Default Service be explored and the results of these new methods be shared in the electric industry. The OCA submits that it is irresponsible to ask to "severely limit" the parties, or the Commission in this regard. PPL's proposed "severe limits" can only lead to weeks or months of wrangling over whether any evidence at all of PECO's attempts to secure a competitive default provider can be relevant to another proceeding since PECO proceeded under a provision of the Joint Settlement. The Commission should be able to have ready access to important information regarding securing this critical default service in a timely manner. If the revised PECO CDS program succeeds where the GPU program failed, should the Commission be precluded from receiving evidence of this fact in a future proceeding because it arose from a settlement that the Commission has already declared to be irrelevant and inadmissible? Clearly, the Commission must retain full power to consider all evidence and to act timely in this critical area.[2]

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[2] PPL also argues that the record does not contain a cogent explanation for altering the (continued...)

For the reasons set forth above and in the OCA's Statement in Support of the Settlement, the OCA's Reply Comments to Objections to the Settlement, and the OCA's Main Brief, the OCA submits that the provisions of the Joint Settlement are reasonable and in the public interest. PPL has not raised a single credible argument that the Joint Settlement is not in the public interest. The Joint Settlement and its provisions should be found to be in the public interest and approved.

F. Reply To Councilman Cohen's Request To Expand The Joint Settlement.

In his Main Brief, Councilman Cohen continues his request to add terms and conditions to the Joint Settlement. While recognizing the many positive aspects of the Settlement, Councilman Cohen argues that the Settlement could be improved by adding more terms and conditions to the Settlement addressing the concerns that he has raised.[3] The OCA appreciates the Councilman's concerns and his request to improve upon the Joint Settlement. The OCA submits, however, that the Joint Settlement reaches a fair balance of the diverse interests that are affected by

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[2](...continued)
CDS concept that emerged from the restructuring settlement. But as PECO witness Hill acknowledged, GPU Energy's CDS bid failed to attract bidders. PECO St. 3S at 11. The failure of a major utility's competitive default service bid to attract bidders is certainly a cogent explanation as to why the procedure should be modified.

PPL also tries to counter MAPSA witness McCormick's testimony as to the need for these CDS modifications by asserting that OCA witness LaCapra did not testify that the CDS provision would help to offset the possibility of PECO's dominant market position. PPL Initial Brief at 28,fn.58. But, as OCA witness LaCapra testified at the outset of his testimony, he was not going to address or mention each and every settlement provision. OCA St. 1-S at 8. If successful, the OCA does believe that the CDS will help to mitigate a potential consolidation of PECO's dominant position in the market in its service territory.

[3] Councilman Cohen's request for more consumer protections based on his principled concerns stands in contrast to PPL's request that PECO actually do less, so that PPL will not some day be asked to provide similar public benefits to its ratepayers.

this proposed corporate restructuring and merger. In its Main Brief, the OCA has thoroughly discussed the many benefits of the Joint Settlement and will not repeat these arguments herein. The OCA submits, however, that the Joint Settlement provides appropriate and necessary protections for ratepayers, and the communities in PECO's service territory, from both the risks and the costs of PECO's proposed corporate restructuring and merger. The OCA will briefly respond to a few points raised by Councilman Cohen.

In his Main Brief, Councilman Cohen calls for additional rate reductions, a further rate cap extension, and additional changes in PECO's universal service programs. Councilman Cohen M.B. at 7-8. The OCA does not disagree that PECO's rate levels remain high and that rate relief for the Philadelphia area should remain an important goal. The OCA submits, however, that the rate reductions provided in the settlement and the rate cap extension, in addition to the wide variety of other benefits contained in the settlement, are in the public interest. It is important to recognize that the rate reductions and rate cap extension are only two components of this settlement. In addition to the rate reductions and rate cap extension, the settlement provides for other significant benefits. For example, the settlement permits an expansion of the Company's CAP rate program, which for electric CAP customers already provides 25% and 50% discounts on the first 500 kwh of use per month, to more than 80,000 low income customers. The settlement also addresses various barriers to effective competition in PECO's service territory. As these barriers are addressed and competition develops, there will be additional opportunities for customers to realize rate savings by selecting alternative providers offering prices that are below PECO's price to compare. These provisions, when viewed as a whole, bring great value to PECO's ratepayers. The OCA submits that

the rate reductions and rate cap extension, in the context of the whole settlement, are in the public interest.

Councilman Cohen also recommends that PECO do more in regard to its universal service programs. Councilman Cohen M.B. at 8. The OCA again 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, 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. For these reasons, the OCA submits that the provisions regarding universal service programs, in addition to all other provisions of the settlement, are in the public interest.

As to issues regarding the nuclear plants, Councilman Cohen has raised issues regarding health and safety issues as well as issues relating to financial protections. As to the financial risks and costs of the nuclear plants, the OCA submits that 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 the 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.

The OCA would also note that in addition to the specific provisions regarding nuclear issues, PECO agreed to a number of other corporate protections that are designed to ensure that ratepayers are protected from the risks associated with PECO's diversified businesses and to avoid cross subsidization. In addition, there are provisions that ensure the Commission's continued jurisdiction over PECO.

As to the issues regarding health and safety, the OCA anticipates that other Joint Petitioners will address these arguments in more detail. The OCA would note, however, that the Joint Settlement provides important provisions regarding nuclear monitoring and waste storage, the safe operation of Peach Bottom 2 and 3, an agreement from PECO not to use MOX fuel, and robotics research in the area of nuclear decommissioning and nuclear plant radiation exposure management. As witness Eric Epstein testified, PECO's agreement to these provisions is very beneficial for the community and supported by numerous groups such as the EFMR Monitoring Group, Three Miles Island Alert, the York Environmental Alliance, and the Peach Bottom Alliance. Tr. 371-378; 441-442. Additionally, as witness Epstein testified, the robotics research that PECO has agreed to fund will help to address worker safety issues at nuclear plants. Tr. 441-442. The OCA fully supports these provisions and submits that they further the public interest by providing benefits to the communities and workers that may not otherwise have been possible.

Councilman Cohen also seeks further commitments from PECO regarding maintaining its corporate headquarters in Philadelphia and maintaining staffing levels at its corporate

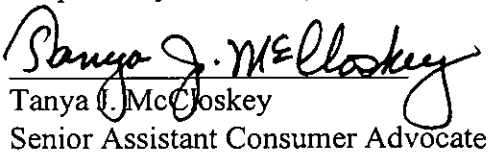
headquarters at levels in excess of PECO's commitment to the City of Philadelphia. Councilman Cohen M.B. at 7. Councilman Cohen recognizes PECO's recent commitments to the City of Philadelphia in this area but requests additional commitments. As PECO witness Hill testified, PECO has made significant commitments in both the Joint Settlement and its agreement with the City of Philadelphia that obligate PECO over the next decade. PECO St. 3S at 7. These commitments provide significant public benefits and should be approved. See, OCA St. 1-S at 16; PAIEUG St. 1 at 10.

The OCA appreciates Councilman Cohen's concerns and submits that he has raised many important concerns for PECO's ratepayers and its service territory. The OCA submits, however, that the Joint Settlement reasonably addressed these concerns as well as the myriad of concerns brought to this case by a wide array of interested parties. The OCA submits that taken as a whole, the Joint Settlement is in the public interest.

III. CONCLUSION

The objections of PPL to this comprehensive settlement are baseless and should be resoundingly rejected by the Commission. The Commission should state in no uncertain terms that it will not allow PPL to derail this Joint Settlement, nor will the Commission limit its ability to make evidentiary rulings in some future case whose parties and whose subject matter can only be imagined at this time. It would be impossible to achieve settlements 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 uncontemplated proceeding involving another set of parties. The OCA submits that a 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 reaches a fair balance of diverse interests, is in the public interest and fully in accord with Commission policy and applicable law. The Commission should reject the objections to the settlement and expeditiously approve this Joint Settlement.

Respectfully submitted,



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58424

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 Reply 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 24th day of May, 2000

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May 24, 2000

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

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 Reply 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

6D

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

REPLY BRIEF

OF

CLEAN AIR COUNCIL

Regarding
the Joint Petition for Settlement

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May 24, 2000

I. INTRODUCTION

Clean Air Council, et al, are intervenors in the above-captioned action, and incorporate by reference the procedural history provided in their Main Brief, which was filed on May 17, 2000, pursuant to Administrative Law Judge Charles E. Rainey, Jr.'s Prehearing Order #2. PPL and Councilman Cohen were among many parties who also filed Briefs on that date.

In its Initial Brief, PPL attacks many of the major provisions of the Joint Petition for their substance and contends that they are unique to PECO and this proceeding. A number of PPL's arguments are restated from its Objections to the Joint Petition for Settlement. Clean Air Council has already responded to many of the Objections in its Main Brief of May 17, 2000. In this Reply, the Council will address PPL's opposition to the environmental provisions in general and its mischaracterization of the testimony of Andrew Altman in particular. The Council will also offer brief counterpoint to PPL's broader legal arguments.

In his Brief, Councilman Cohen urges the rejection of the Application and Joint Petition on grounds of increased public safety risks and an inadequate sharing of merger profits with the public, while arguing in the alternative for 16 additional conditions to be tied to any Commission approval. This Reply will include brief argument against these positions.

II. ARGUMENT

A. REPLY TO PPL:

1. DUE PROCESS

PPL argues repeatedly that "parties" in future, unknown proceedings would be deprived

of reasonable notice and opportunity to be heard should settlement provisions in this case be used as evidence in such proceedings. (PPL Initial Brief, p. 12) PPL suggests that a party's *reference* in an adjudicatory proceeding to a prior settlement provision would, in effect, convert the adjudicatory proceeding to a *rulemaking* proceeding subject to broader due process requirements, such as notice and comment. Such a contention is simply not credible. PPL's concerns in this area appear borne of dissatisfaction with its Restructuring Settlement, some provisions of which bore resemblance to a previous settlement in the PECO Restructuring. This dissatisfaction is remarkable considering the fact that PPL settled for some $4 billion in stranded costs and PPL was at all times free to refuse proposals of intervening parties in that case and litigate instead. In future adjudications, as in the past, PPL will be free to settle on whatever terms it feels are appropriate or opt for litigation. In this case, PPL is ultimately asking the PUC for protection from itself.

2. RELEVANCE

PPL cites the Public Utility Code for the policy that the Commission shall provide for the exclusion of irrelevant or immaterial evidence from proceedings. PPL concludes that settlement provisions can never meet the standards for relevance or materiality and argues that the PUC should bar the citing of them in other proceedings. The provisions of the Joint Petition, if approved, cannot be pre-determined as irrelevant and immaterial as PPL suggests. Relevance and materiality must be decided by the fact finder in a given action. The fact finder would be in the best position to judge the probative value to assign the reference to a settlement provision based on existing similarities.

3. ENVIRONMENTAL

a) PPL's assessment of the environmental provisions

PPL disdainfully opposes any environmental provision which "bypasses the SDF

process" (PPL Initial Brief, p. 26).[1] In PPL's view, all environmental funding initiatives developed by negotiations are pre-empted by the existence of the SDF. PPL reasons that no further funding of renewables should be allowed regardless of the public interest benefits simply because the SDF was established in the Restructuring Settlements of 1998. This is simply preposterous. There is no evidence that the PUC approval of the Restructuring Settlements creating SDF was intended to limit future funding of sustainable energy programs which are developed by agreement or otherwise. If anything, the Commission's efforts to approve and enable the SDF process demonstrates that renewable programs serve the public interest and are consistent with the intent of the Electric Generation Customer Choice and Competition Act (66 Pa.C.S. §2801 et seq).

Notably, in the discussion of the SDF process, PPL finds it reasonable to demand adherence to a settlement provision from the 1998 Restructuring--even where the provision does not require it. Thus, PPL is pleased to argue for the precedential value of a settlement when this suits its decidedly non-public interest goals in this proceeding, which is to retard public interest settlements.

PPL argues against a "precedential" effect for the Joint Petition even in its discussion of specific provisions. In its Initial post-hearing Brief, PPL states:

> "By earmarking funds, the Joint Petition creates an environmental program unique to PECO and supported by the facts unique to PECO's circumstances. As such, it provides no support for seeking comparable relief in other Commission public utility proceedings."

(PPL Initial Brief, p. 26) Certainly, the environmental provisions of the Joint Petition create obligations only between PECO and the intervenors. PECO is the entity seeking PUC action on an Application and therefore the party with whom environmentalists and the other intervenors have negotiated. No one but PPL has claimed otherwise. Yet the fact that "earmarking" of funds

[1] SDF is a reference to the Sustainable Development Funds, established in the Restructuring Settlements of PECO, PPL, and other electric utilities to promote sustainable energy technologies and projects.

to particular environmental programs is done in the Joint Petition does not somehow define such environmental provisions as feasible or supportable only in the PECO proceeding.

b) PPL's assessment of Andrew Altman's testimony

PPL mischaracterizes the testimony of Andrew Altman. Contrary to its claim, Mr. Altman testifies not merely to the benefits of a wind block program, but he also specifically testifies to the benefits of wind and solar energy generally, and to the need for consumer education about renewable energy.

Although it is apparently a *non sequitur,* PPL's footnote 55 (PPL Initial Brief, p. 26) serves only to confuse. It wrongly assesses the function of the wind block program in the Joint Petition (¶38) and misconstrues Mr. Altman's testimony. What PPL claims Mr. Altman "fails to recognize" is in fact a distinction without a difference. Clean Air Council submits that Mr. Altman's testimony in support of both wind generation funds and funding for wind block marketing are fully consistent, but it is PPL that confuses the two. As described in his testimony, the wind block marketing program does indeed enable wind generation to be built through the customer commitments to purchase that power when it becomes available. This is a worthy, *market-driven* effort, compatible with competition, which nevertheless requires funding for administration and growth at this early stage of limited introduction in Pennsylvania. The financial investment provides value by giving PECO an opportunity to have this sustainable energy program extended to its customers more quickly.

4. THE PUBLIC INTEREST

PPL claims it is contrary to the public interest to allow approved programs resulting from settlements to be cited as support in future proceedings and requests the Commission adopt a policy against such uses. This request goes substantially further than PPL's original request that the settlement not be considered precedent. The Joint Petitioners noted that the law reflects that

settlements are not precedent and added specific language acknowledging the same in the Joint Petition itself. PPL's recommendation is ill-advised and the scenario it paints of regulatory gridlock in the absence of the adoption of this "no-citation" policy is clearly overblown.

Furthermore, it is not in the interests of justice for the Commission to pre-ascertain what may or may not be referenced to support a position taken by as-yet-undetermined parties in possible future proceedings.

For these reasons, and those contained in Clean Air Council, et al's Main Brief, it is submitted that PPL's proposed relief should be denied.

A. REPLY TO COUNCILMAN COHEN:

1. RISKS TO PUBLIC SAFETY

Although Councilman Cohen highlights some very disturbing facts regarding the health effects of nuclear power and ongoing problems associated with it, the provisions of this Settlement do nothing but provide relief, albeit modest, from some pressing nuclear concerns. As the Councilman acknowledges in his testimony, the Nuclear Regulatory Commission has jurisdiction over re-licensing over nuclear power plants, not the Public Utility Commission.

2. INADEQUATE SHARING OF MERGER SAVINGS

As Councilman Cohen suggests, it is likely that additional merger savings are estimated beyond those being returned in various forms in the Joint Petition. Otherwise PECO's decision to move forward toward settlement would be irrational. Nevertheless, in the Joint Petition, PECO is committing to an amount perhaps as high as $300 million, all of which will benefit ratepayers in some fashion. This amount is significantly larger than PECO's share of the merger

savings from its regulated operations. The *York* standard calling for affirmative promotion of the public interest "in some substantial way" is certainly met by this $300 million benefit.

3. CONDITIONS FOR APPROVAL

The Councilman proposes sixteen (16) terms and conditions be attached to PUC approval of the Joint Petition. Many of them would in fact serve the public interest if they would have been agreeable to PECO as part of the negotiations. In the present context, however, the addition of the conditions are not in the public interest because the consequence would undoubtedly be PECO's withdrawal from the Joint Petition, and therefore the loss of all the beneficial provisions thereof.

For these reasons, and those contained in Clean Air Council, et al's Main Brief, it is submitted that Councilman Cohen's proposed relief should be denied.

WHEREFORE, Clean Air Council, et al, respectfully request that the proposed relief and Findings of Fact and Conclusions of Law of PPL and Councilman Cohen be rejected and the Commission approve the Joint Petition without modification.

Respectfully submitted,

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Dated: May 24, 2000

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 Merger of the Newly Formed Holding Company and Unicom Corporation	:	Application Docket No. A-110550F0147

CERTIFICATE OF SERVICE

I hereby certify that I have, this 24th day of May 2000, served a true and correct copy of the foregoing Protestants/Intervenors Clean Air Council, et al's Reply Brief on the following parties of record as indicated:

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May 24, 2000

VIA FEDERAL EXPRESS

RECEIVED

MAY 24 2000

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SECRETARY'S BUREAU

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DOCUMENT FOLDER

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-110550 F0147

Dear Secretary McNulty:

Pursuant to Administrative Law Judge Charles E. Rainey, Jr.'s April 25, 2000 Prehearing Order #2 in the above-captioned case, enclosed for filing are an original and three (3) copies of the Post-Hearing Reply Brief of PPL Electric Utilities Corporation.

Pursuant to 52 Pa. Code § 1.11, the enclosed documents are to be deemed filed on May 24, 2000, which is the date they were deposited with an overnight express delivery service as shown on the delivery receipt attached to the mailing envelope. As evidenced by the attached Certificate of Service, all parties to the proceeding are being served by overnight delivery with a copy of the Post-Hearing Reply Brief of PPL Electric Utilities Corporation.

In addition, please date and time-stamp the enclosed extra copies of these filings and return them to me in the envelope provided.

If you have any questions regarding the enclosed, please call.

Very truly yours,

Donald A. Kaplan

Enclosures

cc: John M. Quain, Chairman
Nora Mead Brownell, Commissioner
Aaron Wilson, Jr., Commissioner
Terrance J. Fitzpatrick, Commissioner
Robert K. Bloom, Commissioner
Administrative Law Judge Charles E. Rainey, Jr.
All parties to this proceeding (per the Certificate of Service)

ORIGINAL

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-110550 F0147

POST-HEARING REPLY BRIEF OF
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Dated: May 24, 2000

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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POST-HEARING REPLY BRIEF OF
PPL ELECTRIC UTILITIES CORPORATION

PPL Electric Utilities Corporation (formerly PP&L, Inc.) ("PPL Utilities") submits this Post-Hearing Reply Brief of PPL Electric Utilities Corporation pursuant to Administrative Law Judge Charles E. Rainey, Jr.'s ("ALJ Rainey") Prehearing Order #2 dated April 25, 2000.

I. SUMMARY OF ARGUMENT

Despite the Joint Petitioners' efforts to characterize it as something more, the PPL Objections and its testimony submitted in this proceeding assert two rather unexceptional points: 1) the Joint Petitioners were obligated to demonstrate to the Commission that their settlement is in the public interest, PPL Objections at 14-17, and 2) the fact that a provision is included in the Joint Petition should be neither relevant nor material evidence in other litigation before the Commission. *Id.* at 29-33. PPL clearly has "standing" to raise these issues and seek relief. The Joint

Petitioners' arguments in their Initial Briefs are too late, flawed, and based upon a serious misunderstanding of what PPL actually seeks in this proceeding.

The Parties' replies to PPL Utilities' Initial Post-Hearing Brief challenge PPL's right to participate in this proceeding. Couched in terms of traditional standing, the parties' arguments not only would prevent a full party to these proceedings from exercising its right to object to a partial settlement, but would, in fact, compound the very danger which PPL Utilities seeks to avert. At the same time that these parties seek to limit PPL Utilities' rights to protect its interests, some of these same parties are making it quite clear that they intend to employ the very practice of which PPL Utilities complains.

In their initial briefs, the Joint Petitioners characterized the relief sought in this proceeding by PPL Utilities variously as an affront to the Pennyslvania Public Utility Commission ("Commission"), a violation of their First Amendment rights, a perversion of the regulatory process, and a threat to the role of settlements in resolving complex cases before the Commission. These arguments ignore the limited, sensible nature of the relief sought by PPL Utilities. Indeed, PPL Utilities has asked the Commission to do nothing more than what trial judges do everyday when they exclude evidence in response to a motion *in limine*. In fact, all that PPL Utilities asks this Commission to do is to implement Section 332 (b), of the Public Utility Code (66 Pa.C.S. §332(b)) which establishes the Commission's policy against reliance upon irrelevant or immaterial evidence.[1]

[1] PECO is correct in noting, at p. 20, n. 7 of its Initial Brief, that the relief described in the testimony of PPL Utilities' witness Paul Gioia differs somewhat from that suggested in the

II. THE JOINT PETITIONERS' ARGUMENTS THAT PPL UTILITIES LACKS STANDING ARE FLAWED

A. The Joint Petitioners' "Standing" Arguments Should Have Been Made In Response To PPL Utilities' Petition To Intervene

The Joint Petitioners had every opportunity to challenge PPL Utilities' standing to participate in this proceeding when it petitioned to intervene, but they failed to do so. Only now that PPL Utilities is exercising its rights to object to the Joint Petition do they raise the issue of PPL Utilities' entitlement to participate in this proceeding. The Joint Petitioners were, however, placed on notice of the issues raised by PPL Utilities in its Objections and testimony by its Petition to Intervene. At Paragraph 7 of PPL Utilities' Petition to Intervene, filed in this proceeding on December 16, 1999, PPL Utilities explicitly raised the issue of the broad impact of this case on future PPL Utilities proceedings:

PPL Objections. In the PPL Objections, PPL Utilities sought to add a provision to the settlement agreement that paralleled Section 72 of the Joint Petition, which prohibits the parties from citing the Joint Petition as legal precedent. PPL also asked the Commission to state, as a matter of policy, that it will not entertain evidence of settlements to support granting relief against another public utility. PPL Utilities is not pursuing the first part of the relief sought since it clearly "offends" a number of the Joint Petitioners and has been profoundly misunderstood. PPL Utilities continues to seek in this proceeding a Commission statement of policy pursuant to Section 332(b) determining that settlement provisions are not relevant or material evidence in support of relief sought against another Pennsylvania public utility.

> In addition, Commission rulings in this proceeding could potentially have precedential effects for PP&L. Specifically, the PECO and PP&L Restructuring Settlements pursuant to the Electric Competition Act have many similar terms. Commission rulings in this proceeding that rely on such terms could affect future PP&L proceedings.

Noting that no objections were raised to PPL Utilities' participation as a formal party to the proceeding, ALJ Rainey granted PPL Utilities' Petition to Intervene at the first prehearing conference. Prehearing Order at 2 (Jan. 28, 2000). The Joint Petitioners' failure to object to PPL Utilities precludes any objections at this time to PPL Utilities' standing. *See Public Advocate v. Philadelphia Gas Comm'n,* 161 Pa. Commw. 428; 637 A.2d 676 (1994). Once ALJ Rainey granted that intervention the Joint Petitioners had no choice but to address PPL Utilities' issues on the merits.

B. The Joint Petitioners Have Misapplied The Law Governing Standing In Commission Proceedings

The arguments made by Joint Petitioners on PPL Utilities' standing to raise the concerns it has addressed in this proceeding are based on an overly narrow reading of the law and its applicability to the instant case. Standing to participate in proceedings before an administrative agency is primarily within the discretion of the agency. *See Pennsylvania Natural Gas Assoc. v. T.W. Phillips Gas and Oil Co.*, 75 Pa. P.U.C. 598 (1991). In making its determination, the Commission uses the conventional standard for standing to appeal articulated by the Pennsylvania Supreme Court in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975.) To have standing to appeal (1) a party must have a direct interest in the subject matter, (2) the interest must be immediate and

pecuniary, not a remote consequence of the judgment, and (3) the interest must be substantial. *Id.*

To the extent that the Joint Petitioners suggest that a party's objections to a settlement do not constitute a sufficiently "direct" or "substantial" interest to meet this standing test, they are simply wrong. *See Friends of the Atglen-Susquehanna Trail,* 717 A.2d 581 (Pa. Commw. Ct. 1998) (party which filed objections to settlement approved by the Commission has standing to appeal). An interest is sufficiently "substantial" as long as there is some discernible adverse effect on the party other than the general interest of compliance with the law. *See William Penn* at 282.

The fact that PPL Utilities will not be affected by this settlement in the same way as a customer of PECO[2] is in no way determinative of PPL Utilities' right to object to the Joint Petition. Such arguments demonstrate a profound misunderstanding of the nature of the harm that PPL seeks to avoid. PECO's citations to *George v. Pa. P.U.C.*, 735 A.2d 1282 (Pa. Commw. Ct. 1999), and *Mid-Atlantic Power Supply Association v. Pa. P.U.C.*, 746 A.2d 1196 (Pa. Commw. Ct. 2000)("*MAPSA*") are thus clearly misplaced. Neither the state legislator in *George* nor PECO in *MAPSA* purported to represent their own interests. Rather, they were seeking to protect the interests of others, either constituents or ratepayers. PPL Utilities' concern here is that PPL Utilities, not some third party, will be forced to

[2] *See, e.g.,* PECO I. B. at 11-12 (arguing that PPL Utilities does not have standing and seeks to assert PECO's customers' interests).

defend itself against arguments that it should be subject to rules and obligations similar to the provisions in the Joint Petition.

C. PPL Utilities Has A Direct, Immediate, And Substantial Interest In The Outcome Of This Proceeding

In its Initial Post-Hearing Brief, PPL Utilities demonstrated, and the Joint Petitioners by their own statements confirm, that PPL Utilities has a direct, immediate, and substantial interest in this proceeding. First, PPL Utilities showed that settlements have become an important part of the process by which the Commission resolves complex utility regulation before the Commission.[3] A number of the Joint Petitioners have conceded this point.[4] PPL described how it may be placed in the position of defending against relief proposed in future proceedings based upon the fact that a prior settlement with a different public utility contains critical concessions. PPL was not engaging in idle speculation. It pointed to specific language in the statements in support of the Joint Petition threatening to do precisely what PPL fears.[5]

It is simply irrelevant to PPL Utilities' objections that it may not be subject to PECO's rate cuts or will not have to pay PECO's decommissioning costs. What is relevant is that no party to the settlement has promised that they will not seek relief from PPL Utilities similar to that found in the Joint Petition on the ground that it was

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[3] PPL Objections at 30-31; *See* Gioia at 4.

[4] *See* OCA I. B. at 33-34; OSBA I. B. at 9; City of Philadelphia I. B. at 2; CAC I. B. at 13.

[5] *See* PPL Utilities I. B. at 14-17.

obtained from PECO in the Joint Petition. Only if the Joint Petitioners (or the Commission) can assure PPL that it will not see the Joint Petition cited to support reopening its retail restructuring settlement or seeking a condition to a proposed PPL merger or acquisition can the Joint Petitioners credibly argue that PPL Utilities does not have a "direct, immediate, and substantial interest" in this proceeding.[6]

Of particular concern is OCA's argument in its Initial Brief questioning PPL Utilities' standing by asking a series of rhetorical questions regarding various provisions of the Joint Petition.[7] OCA, however, then provides the answer to each of its questions by requesting that the Commission make precedential rulings of law approving each of those provisions, and thereby demonstrating why PPL Utilities must be a party in this proceeding and must seek to limit the scope of the rulings OCA seeks.[8] Indeed, OCA lays out a roadmap of how it intends to use this settlement as evidence in a future PPL Utilities proceeding:

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[6] *See William Penn.* PECO's citation to *AES Beaver Valley v. West Penn Power Co.,* 58 Pa. P.U.C. 729 (1985), is similarly erroneous, since in that case, as in *George* and *MAPSA,* the objecting party could not allege its interests were at stake. Moreover, PECO has no basis for arguing as it does that *AES Beaver Valley* stands for the proposition that a party "cannot gain standing simply because the outcome may establish what it views as an undesirable precedent." PECO I. B. at 12 (citing *AES Beaver Valley*). There is nothing in that case which clearly states what interest PAIEUG, the party to which PECO refers, was asserting.

[7] "[T]he OCA asks what is PPL's legally recognizable interest in the rate reduction 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 consumers, the competitive benefits that will benefit PECO's customers, or the contract provisions with certain of PECO's customers." OCA I. B. at 29.

[8] OCA Initial Brief, Appendix A, at 2 (Conclusions of Law).

> 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. . . . Indeed, the OCA can envision cases where the Commission may wish to be informed of prior settlements in order to determine whether consistency among similarly situated companies with the respect to certain issues is appropriate.[9]

To prevent PPL Utilities from being heard while OCA attempts to transform this settlement into evidence for use against PPL in future proceedings would truly be a violation of PPL Utilities' due process rights.

PPL Utilities is a member of a limited class of major electric utilities subject to the jurisdiction of the Commission which is uniquely vulnerable to the consequences of the Joint Petition. Any assessment of what has happened in the past, plus the reaffirmance by various parties of their intent to preserve the practice to which PPL Utilities objects, confirms this. PPL Utilities and the other Pennsylvania electric utilities are not, as OCA claims, "wholly disinterested parties."[10] The rulings sought here and the avowed intent by several parties to use the provisions of this settlement as evidence in support of relief against these utilities in future proceedings demonstrate that claim.

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[9] *See* OCA I. B. at 33.

[10] OCA I. B. at 3.

III. THE ARGUMENTS AGAINST LIMITING THE FUTURE EVIDENTIARY USE OF JOINT PETITION PROVISIONS ARE WITHOUT MERIT

A. The Commission Has The Authority To Grant The Relief Requested By PPL Utilities

PPL Utilities is seeking a Commission ruling in this case that the Joint Petitioners may not use settlement concessions by PECO to create their own evidence in support of imposing similar relief on PPL Utilities and other Pennsylvania public utilities. Otherwise, the adoption of settlement provisions in this proceeding would become "substantial evidence" in the next. PPL Utilities' proposed solution is for the Commission to establish a policy against this practice by limiting the evidentiary value of those concessions. This is very narrow and specific relief. It is hardly as dramatic as Joint Petitioners make it out to be.

PPL Utilities is not seeking to prevent the Commission from ever considering relief similar to the provisions of the Joint Petition. The parties to this settlement or anyone else would be free to ask for the very same relief contained in the Joint Petition, only they would be required to justify that relief on its merits — not because another Pennsylvania public utility was willing to make such a concession. The testimony of PPL Utilities' witness Gioia makes this clear:

Q. Do you mean that terms identical or similar to those in a settlement agreement could not be part of a subsequent settlement agreement or Commission decision?

A. No, but the consideration of those 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.[11]

What none of the Joint Petitioners point out is that the Commission already has a statutorily imposed policy of excluding irrelevant and immaterial evidence, 66 Pa. C.S. 332(b).[12] PPL Utilities is seeking, in effect, a ruling *in limine* under Section 332(b) that the fact that one Pennsylvania public utility agreed to some provision in a settlement is neither relevant nor material evidence in a proceeding involving another Pennsylvania public utility. This is not a far reaching, radical request.[13] It does not suggest, as OCA claims, "that this or a future Commission cannot be relied upon to consider each case on its merits to determine what condition or relief is appropriate based on all other facts of record in a case."[14] In fact, at least three Joint Petitioners apparently agree with the principle that PPL Utilities is asking the Commission to state. As noted in PPL Utilities' Initial Post-Hearing Brief, PennFuture stated in its Second Prehearing Memorandum that, "no evidence in this

[11] Gioia at 7-8.

[12] *See also* 52 Pa. Code 5.483 ("The presiding officer will have ...the power to exclude irrelevant, immaterial or unduly repetitive evidence,..."); 52 Pa. Code 5.401 ("[T]here shall be excluded evidence... that is not of the kind which would affect reasonable and fair minded persons in the conduct of their daily affairs.").

[13] Such advance rulings on admissibility of controversial evidence are generally favored. *See, e.g.*, Fed. R. Civ. P. § 16(c)(4).

[14] OCA I. B. at 33.

PECO case, including provisions of the Settlement, can be legally relevant to a future PPL case that does not yet exist."[15] In its Post-Hearing Brief, Amtrak declares: "this Settlement could not be considered 'evidence' on disputed facts in another proceeding."[16] Finally, OSBA in its Main Brief argues:

> [I]ntervenors in such a future [PPL Utilities] 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 . . . . 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.[17]

B. The Relief Sought By PPL Utilities Is Necessary

The relief sought by PPL Utilities is made necessary by the increased use of settlements to resolve complex Commission proceedings and the evidentiary use of those settlements in subsequent Commission proceedings involving other Pennsylvania public utilities. *See* PPL Utilities I. B. at 14-17.

The Joint Petitioners make much of the fact that this settlement has broad support.[18] This "breadth of support" does not necessarily mean that each of the

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[15] PennFuture Second Prehearing Memorandum at 6.

[16] Amtrak I. B. at 13.

[17] OSBA I. B. at 10 (Emphasis added).

[18] "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." PECO I. B. at 19. *See* OCA I. B. at 5.

settlement's provisions is lawful and in the public interest. It does, however, point to the fact that many compromises were clearly necessary to bring it all together. While those compromises may have been important in the context of this proceeding, they should not be exported to proceedings involving other Pennsylvania public utilities. PPL Utilities' witness Gioia warned against taking the terms of a settlement "out of the context of the specific facts and circumstances in which the settlement was made. . . ." Gioia at 6. Yet the ability to do that is precisely what a number of Joint Petitioners are seeking from the Commission and what PPL Utilities is asking the Commission to prevent.

In contrast, PPL Utilities' requested relief makes the Joint Petitioners justify "what condition or relief is appropriate based on all other facts of record in a case."[19] Thus, none of the Joint Petitioners would be able to use the strategy which OCA explains in its Main Brief:

[19] OCA I. B. at 33.

> 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 at decision.[20]

Neither PPL Utilities nor any other Pennsylvania public utility, should be required to prove "why the settlement provision is not relevant, should be accorded no weight, or should not be applied to it."[21]

Finally, PECO cites two cases in its Initial Brief, *Pennsylvania P.U.C. v. Bell Tel. Co. of Pa.*, 1988 Pa. P.U.C. LEXIS 572 (November 10, 1988) and *Application of West Penn Power Co. For Approval Of Its Restructuring Plan Under Section 2806 Of The Pub. Ut. Code*, Docket No. R-00973981, 1998 Pa. P.U.C. LEXIS 166 (March 13, 1998), to argue that PPL Utilities has not raised a concern that the Commission needs to address. Both cases, however, are inapt.[22] First, *Bell,* which was decided more than a decade ago, applied to the citation of settlements as *legal precedent.* PPL Utilities' is concerned with citing settlements

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[20] *Id.*

[21] Neither OCA nor any other Joint Petitioner is entitled to complain that PPL Utilities did not offer evidence on whether the Joint Petition was lawful and in the public interest. *See* OCA I. B. at 3; OSBA I. B. at 8; PennFuture I. B. at 3; OTS I. B. at 22. If the Joint Petitioners desire to "improve upon PECO's original filing," OCA I. B. at 13, they should be required to demonstrate that those "improvements" meet the statutory standard. The conclusory statements in the Joint Petition and the Joint Petitioners' statements in support did not do so and raised more questions than they answered. *See* PPL Objections at 17-28. While PPL Utilities focused on the relief discussed in its witness' testimony during the hearing and in its Initial Post-Hearing Brief, the PPL Objections remain part of the record. Tr. 407. The Commission, of course, will judge whether the Joint Petitioners adequately responded to the questions PPL Utilities raised.

[22] *See* PECO I. B. at 21-22.

as *evidence*.[23] In *West Penn*, the evidence rejected pertained to a settlement of a proceeding before the *Maine* Public Utilities Commission, not this Commission.

C. The Relief Sought by PPL Utilities Upholds The Policy of Encouraging Settlements

A number of Joint Petitioners claim that the relief sought by PPL Utilities in this proceeding will interfere with the Commission's policy to promote settlements of large and complex matters.[24] *See* OCA I. B. at 34; OSBA I. B. at 9; City of Philadelphia I. B. at 2; CAC I. B. at 13. Nothing could be further from the truth. The unrebutted testimony of PPL Utilities' witness Gioia explains how the failure to limit the evidentiary use of settlements could actually make it more *difficult* to achieve settlements in the future:

> [P]arties may be more likely to intervene in proceedings where they otherwise might not do so in order to protect themselves against settlement provisions that would be undesirable if applied to them in other proceedings. These additional interventions would make settlements more difficult to achieve. For these reasons, the regulatory policy in favor of settlements, in the long run, would be adversely affected.[25]

Providing PPL Utilities and other Pennsylvania utilities protection from the improper use of settlements will simplify the settlement process and permit them to safely stand aside without intervening in every proceeding in which a settlement could include concessions that would be costly and unfair if applied to them.

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[23] *See* PPL Utilities I. B. at 29-32.

[24] *See* 52 Pa. Code § 5.231(a); 52 Pa. Code § 69.391; 52 Pa. Code § 69.401.

[25] Gioia at 5.

In order to encourage settlements, the courts and more recently, evidentiary rules, generally prohibit the introduction as evidence of both offers of settlement and settlement agreements. *See* Pa. R. Evid. 408; Fed. R. Evid. 408. The rule is usually applied to prohibit a party's compromise or offer of compromise to be used against it to prove liability, however, the rationale behind the rule is the encouragement of free and frank settlement discussions, "in order to protect the courts against excessive litigation." Weinstein's Federal Evidence § 408.02[3]. That rationale would apply to the use of settlements as evidence to support relief against other Pennsylvania public utilities, since, as described by OCA, parties to a case would be permitted to present evidence as to why a settlement provision is not relevant or should be accorded no wieght. OCA I. B. at 33. Of course, the most obvious way to do that would be to examine "the context of the specific facts and circumstances in which the settlement was made[.]" Gioia at 6. That would invariably mean an examination, perhaps even discovery, into the settlement discussions themselves to learn what the parties intended and why they reached a compromise on a specific provision. If such a practice were permitted, the effect on the Commission's policy of encouraging setlements could be devastating.[26]

Finally, the Joint Petitioners' claim that PPL Utilities is seeking to restrict what may be proposed in settlement discussions is also misleading. *See* OSBA

[26] It bears noting that OCA is not proposing that its decision to compromise may be used against it to defeat relief proposed in a later proceeding that goes beyond the settlement in question. Of course, fundamental fairness and reciprocity require that if OCA and other proponents of using settlements against utilities are protected against the defensive use of settlements, their offensive use of settlements should be precluded as well.

I. B. at 10; OTS I. B. at 10; PennFuture I. B. at 20. The policy PPL Utilities proposes is directed at *evidence submitted in Commission proceedings*. *See* PPL Objections at 32-33; PPL Utilities Initial Brief at 13. Nowhere in its pleadings does PPL Utilities ask that the Commission restrict what parties to a settlement conference may propose.

D. The Commission Can Grant the Relief Requested by PPL Utilities Without Treating This Proceeding As A Rulemaking

A number of the Joint Petitioners argue that PPL Utilities is seeking to have the Commission treat this proceeding as a rulemaking.[27] This is incorrect. PPL Utilities is arguing that it does not want to treat this and other major electric utility proceedings before the Commission as rulemakings, but if settlements can be used to support relief in future proceedings, PPL Utilities may be left with no choice but to protect its interests and intervene in all electric utility proceedings where a settlement may result in provisions that would be unacceptable if applied to PPL Utilities as if they *were* rulemakings.[28] This can only serve to make complex proceedings even more complex and difficult to resolve, whether through litigation or settlement.

OTS' argument that the Commission may not grant the relief PPL Utilities is requesting is based on a mischaracterization of what PPL Utilities seeks. OTS is concerned that PPL Utilities wants the Commission to issue a "regulation" which, of

[27] *See* OCA I. B. at 30; OTS I. B. at 14-16.

[28] *See* Gioia at 5.

course, would be impossible unless the Commission followed the requirements of 45 P.S. § 1201 *et. seq.*[29] PPL Utilities is asking for nothing of the sort. What it seeks is simply a statement of Commission *policy* implementing 66 Pa. C. S. 332(b) — not a regulation binding the Commission.

Since PPL Utilities is seeking to have the Commission issue a statement of policy, not a "binding norm," the case OTS cites in support of its position, *R.M. v. Pennsylvania Housing Finance Agency*,[30] actually undermines it. In that case, the court noted that, "[i]n analyzing whether an agency pronouncement is a statement of policy or a regulation, the starting point is generally the agency's own characterization of the rule." The agency in that case characterized its action as a "statement of policy" and was upheld by the court. Similarly, PPL Utilities is asking the Commission to adopt a statement of policy, not a regulation. The court went on to analyze the plain language of the rule in question, its implementation, and whether it limited agency discretion.[31] Since the relief requested by PPL Utilities is clearly a policy declaration that would not bind the Commission or be implemented as a binding unchangeable regulation,[32] the requirements of 45 P.S. § 1201 would

[29] OTS I. B. at 14-15.

[30] *See R.M. v. Pennsylvania Housing Finance Agency*, 740 A.2d 302, 307; Pa. 1999 Pa. Commw. LEXIS 851 (1999).

[31] *See id.*

[32] As PPL Utilities witness Gioia testified, this policy would not bar parties from proposing provisions from prior settlements, it would simply require that they be justified on their own merits in the later proceeding. *See* Gioia at 7-8.

not apply. In short, what PPL Utilities is asking the Commission to do is issue a statement "interpreting or implementing"[33] Section 332(b).[34]

E. The Relief Requested By PPL Utilities Would Not Abridge Any Party's Constitutional or Statutory Rights

Joint Petitioners' claims that PPL is somehow seeking to limit their First Amendment rights under the U.S. Constitution[35] are clearly wrong and should not be used to prevent PPL from squarely raising a serious issue regarding the role of settlements in the Commission's jurisprudence. There is no constitutional right to offer inadmissible evidence in court or in a Commission proceeding. However, there is a Pennsylvania statute barring the admission of irrelevant and immaterial evidence. *See* 66 Pa. C.S. 332(b). Any party to this proceeding is free to stand on the Commission's front steps and to remind the world that PECO agreed to some provision of the Joint Petition. It has no right, however, to make irrelevant and immaterial matter part of a Commission record. While parties may have a due process, *i.e.,* Fifth Amendment, right to present their case to the Commission, by definition excluding evidence that is irrelevant or immaterial to the issue to be decided does not in anyway diminish that right. On the contrary, a policy clarifying that the statute against irrelevant and immaterial evidence stated in 66 Pa. C.S. 332(b) applies to settlement provisions when used to support similar relief in a Commission proceeding involving another Pennsylvania public utility, no more

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[33] 45 P.S. § 1102.

[34] Because PPL's proposal does not limit the Commission's discretion, it does not, as OTS argues, violate 66 Pa. C.S. § 501. OTS I. B. at 16.

[35] *See, e.g.,* OCA Reply at 9-10.

violates a party's First Amendment rights than a rule excluding any other evidence on similar grounds.

IV. CONCLUSION

PPL Utilities reiterates the relief it described in its Initial Post-Hearing Brief. The Commission should preclude the use of the Joint Petition's terms as evidence, as well as precedent, in other proceedings. Accordingly, PPL Utilities proposes that the following provision be added to the Joint Petition:

> The fact that a provision is included in the Joint Petition shall not constitute or be cited as relevant or material evidence in support of the adoption of such provision in any other proceeding, including, but not limited to, a proceeding to reopen or modify another Pennsylvania public utility's settlement of its retail restructuring proceeding under the Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. § 2801, *et seq.*

In addition, the Commission should establish a policy that it will not entertain evidence or arguments by participants in proceedings before the Commission justifying relief on the grounds that such relief was incorporated in a settlement with another public utility. If the Commission grants this relief, the procedural rights of other Pennsylvania public utilities will be protected and it will promote the future use of settlements to resolve important and complex public utility proceedings.

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Dated: May 24, 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 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-110550 F0147

CERTIFICATE OF SERVICE

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

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