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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

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MAY 17 2000

TESTIMONY OF PAUL L. GIOIA
ON BEHALF OF PPL ELECTRIC UTILITIES CORPORATION

DOCUMENT
FOLDER

Date: May 3, 2000

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2 **TESTIMONY OF PAUL L. GIOIA**
3 **ON BEHALF OF PPL ELECTRIC UTILITIES CORPORATION**
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7 **Q. Please state your name, current position and business address.**

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9 A. My name is Paul L. Gioia. I am Of Counsel in the law firm of LeBoeuf, Lamb,
10 Greene & MacRae, L.L.P., 99 Washington Avenue, Albany, NY 12210.
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13 **Q. What is your educational background?**

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15 A. I received a B.S. degree from Fordham University in 1962 and an LL.B. from the
16 Cornell Law School in 1965.
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18
19 **Q. What is your professional experience, with specific reference to regulatory
20 and public policy matters?**

21
22 A. I served as Chairman of the New York State Public Service Commission for six
23 years. The New York PSC has jurisdiction over all regulated electric, gas, telephone
24 and water utilities in New York State.
25

1 Prior to being appointed to the New York PSC, I served on the legal staff of the
2 Governor of New York State for seven years, in which capacity I was involved in a
3 wide range of public policy matters.

4
5 Over the past three years I have served as lead counsel to the New York Power
6 Pool in both state and federal proceedings with respect to the restructuring of the
7 electricity industry in New York State to establish competitive electricity markets and
8 an Independent System Operator.

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10 A copy of my resume is attached to my testimony.

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13 **Q. Since leaving the New York PSC have you had occasion to address public**
14 **policy matters related to regulated utilities?**

15
16 **A.** Yes. I was appointed by the bankruptcy court to serve as the Examiner in the Public
17 Service Company of New Hampshire bankruptcy proceeding. In that capacity I
18 advised the court on regulatory and public policy issues related to the rates, rate
19 base, financial structure and possible reorganization of a regulated utility. I was
20 appointed to a similar position by the bankruptcy court in the El Paso Electric
21 Company bankruptcy proceeding. I also provided advice to the Hawaii PUC with
22 respect to regulatory and policy issues related to the relationship among companies
23 affiliated to a regulatory utility under a holding company structure.

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Q. As Chairman of the New York PSC did you have occasion to deal with settlement agreements in contested proceedings?

A. Yes. When I became Chairman virtually all proceedings before the New York PSC were fully litigated. I initiated an effort to encourage PSC staff and interested parties to consider settlement in appropriate cases. The PSC adopted settlement guidelines to facilitate this process. By the time I left the Commission the settlement of contested proceedings had become an accepted practice and was used frequently, even in major cases.

Q. What is the nature of your testimony in this proceeding?

A. I have been asked to address the regulatory and public policy considerations related to the settlement of a contested proceeding, with specific reference to according precedential effect or evidentiary weight to the terms of the settlement agreement in future proceedings.

Q. Will you be addressing any of the provisions of the Joint Petition?

A. No, except to the extent that my testimony addresses the precedential effect or evidentiary weight to be accorded its terms in future proceedings.

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Q. Based on your experience in regulatory and public policy matters, do you have an opinion in that regard?

A. Yes. Based on my experience in regulatory and public policy matters it is my opinion that there are sound and compelling regulatory and public policy grounds for the Pennsylvania Public Utility Commission to articulate a clear policy that the specific terms of a settlement agreement will not be accorded precedential effect or evidentiary weight in any subsequent proceeding.

Q. Can you explain the basis for your opinion?

A. First, it is important to consider the settlement process in general. In my judgment, there are sound regulatory and public policy reasons for a regulatory body, such as the Pennsylvania PUC, to encourage the settlement of contested proceedings, in appropriate cases. Litigation is very expensive and time consuming. Settlements save substantial time and money and permit commission staff and other parties to put their limited time and resources to more productive uses. In addition, settlements often achieve a more creative and balanced resolution of issues than would result from a commission decision in a fully litigated proceeding.

1 By their nature, however, settlements almost always involve compromises and
2 trade-offs among the parties in order to reach agreement. Often parties accept one
3 aspect of a settlement to which they are opposed, in order to gain support for other
4 aspects of the settlement with which they agree. In addition, settlements may
5 include terms which, in isolation, might not be acceptable to the parties or the
6 Commission, but are acceptable as part of a total settlement of all of the issues in
7 the proceeding.

8
9 For the potential benefits of the settlement process to be achieved, it is important
10 that parties feel free to accept a settlement agreement, including some terms with
11 which they might not agree, with the assurance that their acceptance of those terms
12 will not be cited as precedent, or be introduced as evidence, in a subsequent
13 proceeding. Without such assurance, parties will be much more reluctant to agree
14 to a settlement that includes terms which they would not otherwise support. In
15 addition, parties may be more likely to intervene in proceedings where they
16 otherwise might not do so in order to protect themselves against settlement
17 provisions that would be undesirable if applied to them in other proceedings. These
18 additional interventions would make settlements more difficult to achieve. For these
19 reasons, the regulatory policy in favor of settlements, in the long run, would be
20 adversely affected.

1 **Q. Are there any other reasons why it would not be sound regulatory policy to**
2 **accord precedential effect or evidentiary value to the terms of a settlement**
3 **agreement?**

4
5 A. Yes. The specific facts and circumstances in a subsequent proceeding will almost
6 certainly be different from the proceeding in which the settlement was achieved.
7 Consequently, terms that were acceptable and appropriate as part of a settlement in
8 one proceeding may be inappropriate and unacceptable in a subsequent
9 proceeding. Once the terms of a settlement are taken out of the context of the
10 specific facts and circumstances in which the settlement was made, there is no
11 rational basis for presuming that they are reasonable and appropriate in a
12 subsequent proceeding.

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15 **Q. Does a policy that clearly provides that the terms of a settlement agreement**
16 **will not have a precedential effect or evidentiary value in a subsequent**
17 **proceeding have any relevance to parties who have not joined in the**
18 **settlement or have not participated in the proceeding?**

19
20 A. Yes. Before being bound by a regulatory decision, parties generally are entitled to
21 reasonable notice, a fair opportunity to be heard and a rational decision-making
22 process. Those requirements are extremely difficult, if not impossible, to achieve
23 with respect to the terms that come out of a negotiated settlement. First, unless the
24 Commission has characterized the proceeding as a generic or rule-making

1 proceeding at the outset, parties may not have adequate notice that the
2 Commission's decision will be accorded precedential effect or have evidentiary value
3 in a subsequent proceeding. Second, the final terms of a settlement agreement
4 often could not have been anticipated at the beginning of negotiations and may
5 address matters beyond the scope of the original filing. Thus, according
6 precedential effect or evidentiary value to the terms of a settlement agreement
7 raises fairness and, possibly, due process issues with respect to third parties.
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10 **Q. What do you mean when you say that the terms of a settlement agreement**
11 **should not be accorded "precedential effect" or "evidentiary value"?**
12

13 A. By those terms I mean that the fact that a particular term was part of a settlement
14 agreement approved by the Commission should not be considered in any way as a
15 binding precedent in a subsequent proceeding nor should it be admitted as evidence
16 in a subsequent proceeding.
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19 **Q. Do you mean that terms identical or similar to those in a settlement agreement**
20 **could not be part of a subsequent settlement agreement or Commission**
21 **decision?**
22

23 A. No, but the consideration of those terms in any subsequent proceeding should be on
24 their own merits, in the context of the facts and circumstances of that proceeding.

1 The mere fact that the terms were included in a settlement agreement that resolved
2 a different proceeding should not be accorded any precedential value or evidentiary
3 weight.

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6 **Q. Are there any specific public policy and regulatory considerations related to**
7 **the granting of precedential effect or evidentiary weight to the terms of the**
8 **settlement agreement in this proceeding?**

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10 **A.** Yes. As the electricity industry is restructured and deregulated, public officials and
11 utilities are exploring ways to provide electricity consumers with the maximum
12 benefits of competition, including the lowest prices and widest range of choices.
13 Sometimes, in order to achieve the maximum benefits of competition, a utility may
14 have to undertake a corporate reorganization, merger or other kind of action. It is in
15 the public interest for the Commission to encourage utilities to consider actions that
16 could provide benefits to the public that otherwise would not be available. It also is
17 important that utilities, and their potential partners, believe that the Commission will
18 give reasonable consideration to any such proposed action, provided that it can be
19 demonstrated that it is in the public interest.

20
21 If the terms of a previous settlement agreement are perceived to be precedential
22 with respect to a future utility action, that may have the effect of discouraging such
23 actions. If, for example, the parties to a possible transaction consider the specific
24 terms of a previous settlement agreement onerous or inappropriate to their proposed

1 transaction they may be discouraged from proceeding, even though the proposed
2 transaction, under terms suitable to that transaction, would be in the public interest.

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5 **Q. In light of your testimony, what is your recommendation with respect to the**
6 **Commission's position in regard to the precedential effect and evidentiary**
7 **weight of the terms of this settlement agreement?**

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

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22 **Q. Does that complete your testimony?**

23

24 A. Yes, it does.

PAUL L. GIOIA

Business Address: One Commerce Plaza
99 Washington Avenue-Suite 2020
Albany, NY 12210-2820
(518) 465-1500

Home Address: 38 Loudon Parkway, Loudonville, NY 12211

Professional Experience:

Of Counsel, LeBoeuf, Lamb, Greene & MacRae, L.L.P.
November 1993 - Present

Provides legal and consulting services to electric, gas, telecommunications and water utilities and energy related companies on a broad range of issues, including regulation, litigation, finance, operations and strategic planning.

Served as lead counsel for the Energy Association of New York State and the New York Power Pool in both state and federal proceedings related to the deregulation of the electricity market in New York State, including the creation of an Independent System Operator ("ISO") and the implementation of locational based marginal cost pricing.

Served as the court appointed Examiner in the Public Service Company of New Hampshire bankruptcy proceeding, and the court appointed Regulatory Expert in the El Paso Electric Company bankruptcy proceeding. Advised the court on regulatory issues and assisted in the process that led to settlement agreements and court approval of the final plans of reorganization.

Member of the Board of Directors of the Energy East Corporation, the New York State Electric & Gas Corporation and Berkshire Energy Resources.

Senior Vice President, First Albany Corporation
May 1987 - October 1993

Senior Vice President with First Albany, a regional brokerage and investment banking firm with offices throughout New York State and New England and a Member of the New York State Exchange. Headed First Albany's Utility and Energy Finance Unit providing investment banking and consulting services to utilities and independent energy

companies. Responsible for the firm's participation in debt and equity offerings by major utilities in the Northeast and for private placements of debt and equity by smaller gas and water utilities and independent power companies. Developed and supervised a research publication providing regular coverage of 30 selected utilities in the Northeast. Provided consulting services to utilities and energy related companies throughout the United States.

Chairman, New York State Public Service Commission

April 1981 - February 1987

Member, New York State Public Service Commission

February 1987 - April 1987

Chairman of the regulatory agency with responsibility for regulation of the rates, operating practices and financial activities of all private electric, gas, telephone and water utilities in New York State. Exercised leading role in the development of policy in all major areas of utility regulation including: the financing, prudence review and cost recovery for major power plants; development of alternate energy sources; restructuring of telephone industry in response to the AT&T divestiture and fostering of greater competition; and the development of flexible pricing and transportation rates for natural gas.

Chief Executive Officer of the Department of Public Service, with a budget of \$40 million and 650 employees. Implemented major administrative changes in the Department including: the establishment of Consumer Services Division, Outreach and Education Unit, Office of Utility Efficiency and Productivity, Office of Energy Conservation and the Environment and Electronic Data Processing Unit. Eliminated the previous backlog of Commission proceedings and substantially reduced time required to conduct major cases. Introduced the extensive use of stipulations and settlements in Commission proceedings.

Ex-officio Chairman of the New York State Board on Electric Generation Siting and the Environment and member of the New York State Energy Research and Development Authority and the State Environmental Board.

First Assistant Counsel to Governor Hugh L. Carey

April 1979 - March 1981

Chief Assistant to the Counsel to the Governor with supervisory responsibility over Governor's legal staff. Provided advice and assistance to the Governor on a wide range of legal, policy and legislative issues. Actively involved in the drafting and negotiation of major legislative proposals.

Assistant Counsel to the Governor

November 1973 - March 1979

Served as a member of the legal staff of Governors Rockefeller, Wilson and Carey with a primary responsibility for areas of criminal justice, special prosecutions and investigations, insurance and environmental conservation.

Special Assistant to United States Senator Jacob K. Javits

January 1973 - November 1973

Senator's representative in New York City. Worked with local government officials, community groups and business organizations to develop programs in areas of housing, economic development, law enforcement, manpower training and education. Senator's representative at public meetings and official functions in New York City.

Assistant District Attorney, New York County

January 1968 - December 1972

Assisted in the investigation and prosecution of cases involving organized crime and official corruption including: corruption in the City's Emergency Repair Program; political abuse of office by appointed city officials; conspiracy to bribe public officials; and abusive practices by officials of municipal employee unions.

Prosecuted approximately 200 felony indictments and conducted 15 trials to jury verdict. Supervised Supreme Court motion practice, extradition and Coram Nobis proceedings.

Tried approximately 300 misdemeanor cases in the Criminal Court of the City of New York, including prosecutions arising out of disorders at Columbia University in 1968. Presented approximately 150 felony cases to the Grand Jury for indictment.

Associate with the firm of Rein, Mound & Cotton

56 Pine Street, New York City

April 1966 - December 1967

Assisted senior partners in major insurance-related litigation in state and federal courts. Responsibilities included trial preparation, drafting of motion papers and pleadings, legal research and the writing of legal memoranda.

Education:

Cornell Law School, Ithaca, New York, LL.B.
June 1965

Fordham University, New York, New York B.S.
June 1962