

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE REVIEW OF A )  
RETAIL COMPETITION RESTRUCTURING )  
PLAN FILED BY DELMARVA POWER & )  
LIGHT COMPANY AND THE ) PSC DOCKET NO. 99-163  
DETERMINATION OF TRANSITION )  
PERIOD RATES PURSUANT TO )  
26 DEL. C. ••1005(a) AND 1006(a)(1) )  
(FILED APRIL 15, 1999) )

OPINION AND ORDER NO. 5231

BEFORE COMMISSIONERS: JOSHUA M. TWILLEY, Vice Chairman  
JOHN R. McCLELLAND, Commissioner ARNETTA McRAE, Commissioner

APPEARANCES:

For the Applicant, Delmarva Power & Light Company:

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I. NATURE OF THE PROCEEDINGS

1. On March 30, **1999**, the Delaware General Assembly enacted House Bill No. 10, the "Electric Utility Restructuring Act of **1999**" (hereafter, the "Act"). The policy underlying House Bill No. 10 was to encourage a competitive market for the supply of electricity and the availability of customer choice, as well as to deregulate the generation, supply and sale of electricity. (House Bill No. 10, •2). The Act provides that Delmarva Power & Light Company ("Delmarva" or the "Company") is to initiate retail competition effective October 1, **1999**, and that by October 1, 2000, all customers will have the right to choose their electric supplier.

2. The Act instructed Delmarva to file with the Delaware Public Service Commission (the "Commission") on or before April 15, **1999** "a detailed plan for implementing Retail Competition . ." Id. •1005(a)(1). That plan was to include:  
? separate prices or rates for Electric Supply, Transmission, Distribution and other Services;  
? procedures for providing Direct Access for all Electric Suppliers;  
? revised tariffs and rate schedules;  
? an optional residential time of use rate with three daily time of use periods to be available for any residential Customer that elects such a rate structure; and  
? standards for reliability sufficient to measure variations in service reliability after the implementation of Retail Competition.

3. On April 15, **1999**, Delmarva filed its proposed restructuring plan and the prefil direct testimony of six witnesses: (1) J. Mack Wathen, the Director of Regulatory Affairs for Delmarva; (2) Wayne W. Barndt, the Manager of Regulated Pricing and Services for Conectiv, Delmarva's parent company; (3) C. Ronald McGinnis, a Regulatory Analyst in Conectiv's Regulatory Affairs department; (4) Joseph Bartolone, Jr., President of Utility Services Corporation, a management consulting company; (5) J. David Vargo, the Supervisor of Electric Pricing and Support Services in Conectiv's Regulatory Affairs department; and (6) Tsion M. Messick, Conectiv's Director of Power Delivery Asset Management.

4. By Order No. 5066, dated April 27, **1999**, the Commission initiated this docket. The Commission appointed G. Arthur Padmore and Robert F. Haynes as Hearing Examiners for this docket and directed them to conduct such evidentiary hearings as were necessary to develop a full and complete record on this matter, and to report to the Commission their proposed findings and recommendations.

5. The following parties moved for and were granted leave to intervene in the proceedings: the Delaware Energy Users Group ("DEUG"); West Penn Power Company, doing

business as Allegheny Energy ("Allegheny"); the Delaware Electric Cooperative ("DEC"); Horizon Energy Company, doing business as Exelon Energy, and Exelon Management & Consulting (together, "Exelon"); FirstEnergy Services Corp. ("FirstEnergy"); Mid-Atlantic

Power Supply Association ("MAPSA"); The E Cubed Company, L.L.C. ("E Cubed"); PP&L Energy Plus ("PP&L"); and Enron Capital and Trade Resources, Inc. ("Enron"). The Division of the Public Advocate ("DPA") exercised its statutory right to intervene pursuant to 29 Del. C •8808(g).

6. On June 11, 1999, Staff and certain of the Intervenors submitted prefiled direct testimony addressing the issues raised by Delmarva's proposed restructuring plan. Staff submitted the prefiled testimony of six witnesses: (1) Rajnish Barua, Ph.D., the Commission's regulatory policy administrator; (2) Brian Kalcic, the principal of Excel Consulting; (3) Richar A. Latourette, a Commission utility analyst; (4) Kevin S. Neilson, a Commission utility analyst; (5) D. Kevin Sigafoos, the Commission's regulatory economist; and (6) Jennifer J. S. Tietbohl, a Commission utility analyst. The DPA submitted the testimony of two witnesses: (1) Andrea C. Crane, a principal with The Columbia Group; and (2) Brian P. Gallagher, a regulatory policy advisor with the DPA. DEUG submitted the testimony of Alan Rosenberg, Ph.D., a principal in Brubaker Associates. DEC submitted the prefiled testimony of John D. Rainey, the Director of Rates and Regulation for Old Dominion Electric Cooperative. Allegheny submitted the testimony of John F. Hose, the external liaison for West Penn Power Company, d/b/a Allegheny Energy. MAPSA submitted the prefiled testimony of John Hanger, a partner in Hanger & Adels, L.L.P. PP&L submitted the prefiled testimony of John F. Brodbeck, Energy Manager for PP&L Energy Plus Co. Neither FirstEnergy nor Enron submitted any prefiled direct testimony.

7. On June 23, 1999, Delmarva submitted the prefiled rebuttal testimony of the same six witnesses that had sponsored direct testimony. Exelon also submitted the prefiled rebuttal testimony of R. Scott Brown, the Vice President of Commercial and Industrial Services for Exelon.

8. Pursuant to the procedural schedule approved by the Hearing Examiners, a prehearing conference was held on June 25, 1999, at which time the active parties identified a number of issues that would be the subject of litigation. The active parties also noted at that prehearing conference that a resolution of numerous other issues had been reached in principle, and that such resolution would be reduced to writing in a partial settlement to be filed at a la date. Evidentiary hearings on the litigated issues were conducted in Dover on July 1 and 2, 1999. Pre-filed testimony of Ms. Messick and Messrs. McGinnis, Vargo, Gallagher, Hose, and Neilson were entered into evidence by stipulation without cross-examination. All other witnesses were made available for cross-examination with the exception of MAPSA witness Hanger, whose testimony was adopted by Mr. Peter Meadows-Adels. Mr. Adels was subject to cross-examination. At the conclusion of the evidentiary hearings, the record, consisting of 32 exhibits and 558 pages of transcript, was closed. The parties filed opening and reply briefs.

9. On August 2, 1999, a proposed "Partial Settlement" was filed that was executed by, or by letter explicitly not opposed, by all parties except MAPSA, which reserved its rights.

10. On August 4, 1999, the Hearing Examiners issued their proposed Findings and Recommendations.

11. Staff, Delmarva, the DPA, DEC, DEUG, E Cubed, Enron, MAPSA and PP&L filed exceptions to the Hearing Examiners' proposed Findings and Recommendations on August 16, 1999.

12. On August 19, 1999, PP&L filed a motion seeking the recusal of any member of the Commission that was involved in the development of the Side Letter on the grounds that the involvement of those Commissioners in the deliberations would be a denial of due process.

13. The Commission met on August 23, 1999 to consider the record, the Hearing Examiners' proposed Findings and Recommendations, and the parties' exceptions thereto, and to deliberate in open session regarding Delmarva's proposed restructuring plan. Chairman McMahan and Commissioner Puglisi recused themselves from the deliberations and decisions made on August 23, 1999.

14. On August 31, 1999, the Commission issued an Order setting forth the resolution of the issues before it regarding Delmarva's proposed restructuring plan. That Order noted that the Order would be supplemented at a later time. This is the Commission's Opinion and Order supplementing its August 31, 1999 Order.

II. STATEMENT OF FACTS

A. Background.

15. In 1997, the Delaware House of Representatives passed House Resolution 36 urging the Commission to initiate a docket to address the restructuring and deregulation of the electric industry. (Exh. 17 (Wathen) at 6). In response to that resolution, in July 1997, the Commission opened Docket No. 97-229. Several parties participated in that docket, which culminated in a report by the Commission that was sent to the General Assembly in January 1998. (Id.).

16. In 1998, the House of Representatives introduced and passed House Bill No. 570, which sought to deregulate the generation function of the electric industry. Although the bill supported by the Alliance for Fair Electric Competition Today ("AFFECT"), which included Delmarva, neither the Commission Staff, the DPA nor the Governor's Office endorsed that bill. The 1998 legislative session ended before House Bill No. 570 was introduced in the Senate. However, in June 1998, the Governor committed his office and the Commission Staff to work with AFFECT to develop legislation that would have an even broader base of support. (Id.).

17. Throughout the rest of 1998, the members of AFFECT, representatives of Governor Carper's administration, and the Commission Staff worked together to craft what eventually became the Act. According to Mr. Wathen, the legislation is enabling legislation which addresses the key policy components of electric restructuring.

18. Some issues requiring resolution, but which were not included in the Act, were addressed in a "Side Letter" negotiated by members of AFFECT and representatives of the Governor's office. (Id. at 6-7, 10). The Side Letter contains the following provisions applicable to Delmarva:

? All residential rate classes shall receive a 7.5% electric rate reduction effective October 1, 1999. Under the terms of the Side Letter, if Delmarva settled its restructuring docket then pending before the Maryland Public Service Commission on terms that were more favorable than those agreed to in Delaware, the Commission had the ability to further decrease Delmarva's electric rates for Delaware residential customers to reflect the economic equivalent of the Maryland settlement.

? A rate freeze for all Delmarva's customers would go into effect on October 1, 1999 and remain in place for residential class customers through September 30, 2003. For all other classes, a rate freeze would remain in effect through September 30, 2002. The only exceptions to this rate freeze are : (1) the true-up of the deferred fuel credit or charge for the 12-month period ending September 30, 1999; and (2) any Commission-approved adjustment for "extraordinary costs" as provided in Section 1006(a)(1)(ii) of the Act.

? The estimated "shopping credits" for each customer class and the mechanism for developing the final shopping credits.

? The amount of stranded costs that Delmarva claimed was estimated as \$50 million on a systemwide basis. The Delaware retail portion of that amount would be \$34 million. Under the Side Letter, Delmarva would be permitted to recover approximately \$16 million of stranded costs (or less than half of the claimed Delaware retail stranded costs) from customers served under all non-residential and non-SGS-S rate classes through the imposition of a non-bypassable Competitive Transition Charge ("CTC"). Pursuant to the Side Letter, Delmarva agreed to forego any recovery of the remaining \$18 million of stranded costs from residential and small commercial customers.

? Delmarva may sell, transfer, lease or otherwise alienate its generating units without Commission approval after October 1, 1999, and no change in electric rates will occur as a result of any such transfer.

? Pursuant to Section 1006(a)(1)(ii) of the Act and subject to the requirements of 26 Del. C. §303, if for the 12 months beginning October 1, 2002, Delmarva's average fuel cost based on its then-current fuel prices is estimated to be greater than 115% of the actual average fuel cost for the 12 months ended September 30,

1999 included in residential rates, the Commission shall treat the portion of such difference above 115% as an "extraordinary cost," and shall increase residential rates to provide for the recovery of such "extraordinary costs" subject to further true-up based on actual fuel costs for the 12 months ended September 30, 2003.

(Exh. 17 (Wathen) at Schedule JMW-3).

19. Senator Harris McDowell, who was a key proponent of the restructuring legislation that eventually became the Act, made a presentation prior to the Commission's deliberations on August 23, 1999. Senator McDowell stated that the development of the Side Letter was "[a] key to passage of [the Act]." (Tr. at 591). He stated that the Side Letter was openly discussed on the Senate floor during the Senate's consideration of the Act, and that he had the Side Letter read into the legislative record. (Id. at 592). As far as he was concerned General Assembly intended the Side Letter to "be administered as agreed to by all parties, subject to [the Commission's] review of the reasonableness of the settlement, of course." (Id).

B. Delmarva's Proposed Restructuring Plan.

1. Separate Prices for Electric Supply, Transmission, Distribution and Other Services (Section 1005(a)(1)(i)).

a. Stranded Costs

20. Company witness Barndt developed Delmarva's unbundled retail rates, as required by Section 1005(a) of the Act. (Exh. 13 (Barndt) at 4-5 and Schedule WWB-6). He described the steps that he took to develop those rates, the development of the shopping credits and the rebundling of the rates for inclusion in the retail electric tariff. (Id. at 5-22). Mr testified that the unbundled rates set forth in Schedule WWB-6 were consistent with Exhibit B of the Side Letter after taking certain adjustments into account. (Id. at 22). He further testified the Electric Supply Service rates for each customer class shown on Schedule WWB-6 were based upon and representative of market prices. (Id. at 23).

21. As noted previously, Delmarva sought to recover approximately \$16 million of stranded costs from the large commercial and industrial customers through a Competitive Transition Charge ("CTC"). The CTC is not an additional charge to be assessed to these customers. Rather, the Company's existing Commission-approved rates were unbundled, and a small portion of those rates was characterized as recovering \$16 million in costs that otherwise would have been "stranded" by the transition to competition. In the absence of the Act, those costs would have been recovered through the Company's bundled rates. (Delmarva BOE at 15).

22. Many of the parties in this docket (primarily the suppliers) took issue with Delmarva's recovery of any stranded costs. PP&L and Enron asserted that the Act did not give Delmarva any right to recover stranded costs - although the Act specifically provided for DEC to recover stranded costs, it did not so provide for Delmarva. (PP&L OB at 19-20; Enron OB at 3-4). Furthermore, PP&L, Enron and MAPSA contended that Delmarva had not provided any support for the level of stranded costs that it sought to recover. (PP&L OB at 17-19; Enron OB at 3; MAPSA OB at 11; MAPSA RB at 3). Additionally, Enron and MAPSA contended that in light of the Company's announced intent to sell half of its generation assets on the open market any determination of its stranded costs should await that sale so that a more accurate estimation could be made. (Enron OB at 3; MAPSA RB at 3).

23. Delmarva and Staff contended that there was sufficient record support for the level of stranded costs in the Side Letter. They noted that Company witness Wathen had testified that Delmarva had performed a study which concluded that its stranded costs on a systemwide basis were as high as \$217 million. (Exh. 18 (Wathen - R) at 14-15). Additionally, Mr. Wathen testified that a 1996 study by Moody's Investor Services had estimated Delmarva's systemwide stranded costs at \$235 million. (Id. at 13-15). They further argued that Mr. Wathen was an expert witness, and as such was permitted to rely on facts not in evidence in reaching his conclusions. (Staff BOE at 19; Delmarva BOE at 18 and n.13). Staff and Delmarva also contended that no party had introduced any evidence that the \$16 million of stranded cost recovery was unreasonable. (Staff OB at 13; Delmarva BOE at 18).

b. Shopping Credits

24. A number of parties also took issue with the level of shopping credits proposed by the Company. Essentially, those parties contended that the shopping credits were inconsistent with the Act and were too low to foster robust competition when compared with the shopping

credits approved for other utilities within the PJM region. (Exh. 11 (Brodbeck) at 4-7; PP&L OB at 9-15; Enron OB at 25; MAPSA OB at 15-16; MAPSA RB at 4-5; Exelon OB at 4). In addition, MAPSA argued that Section 1006(a)(1)(i) required the Commission to explicitly determine the retail margin included in Delmarva's rates prior to the advent of competition. (MAPSA OB at 15-16). E-Cubed took the position that the shopping credits were "minimally acceptable" to permit suppliers to recover their cost of doing business plus a reasonable return and to provide a level of savings for customers that will induce them to shop. (E-Cubed OB at 45).

25. Delmarva and Staff contended that the shopping credits were reasonable in comparison to the shopping credits approved for Pennsylvania utilities, and that evidence introduced by PP&L showed that customers were shopping even in the service territories of the utilities that had lower shopping credits. (Exh. 12; Exh. 15 (Kalcic) at 11-13; Exh. 14 (Barndt R) at 3-6 and Schedule WWB-1R; Delmarva OB at 21-25; Delmarva RB at 17; Staff RB at 6-7). They also noted that the shopping credits of lower cost utilities will tend to be lower than the shopping credits of higher-cost utilities. (Delmarva OB at 27-28). Delmarva further contended that the Act did not require an explicitly stated (rather than implicitly embedded) retail margin to be included in rates; instead, the Act provided only that the Commission shall establish a price based on and/or representative of the regional wholesale market price plus a retail margin. (Delmarva RB at 16-17).

c. Application of the 7.5% Residential Rate Reduction to the Supply Function Only.

26. MAPSA took issue with Delmarva's application of the 7.5% residential rate reduction solely to the supply component of rates, and argued that the rate reduction should be applied to both the supply and wires components of rates (which would increase the level of the shopping credit). (MAPSA OB at 16-18). On exceptions, E-Cubed took the position that the rate reduction should be applied only to the wires charge. (E Cubed BOE at 3-7). Delmarva and Staff contended that the 7.5% residential rate reduction was appropriately applied only to the supply component of rates. Delmarva argued that there was no basis for modifying its regulated wires charges in the absence of a base rate case, and there was no record that its wires charges were excessive. (Exh. 14 (Barndt-R) at 15). Furthermore, the price reduction benefits of competition will come from the supply component of rates. (Delmarva RB at 18 n.7; Staff BOE at 24). Staff pointed out that the increase in the shopping credit that would result from such reallocation was relatively small and would not have a material impact on a customer's decision to switch suppliers. (Exh. 15 (Kalcic) at 6; Staff RB at 9).

d. Recovery of Stranded Costs from SGS-Space and Water Heating Customers.

27. Staff witness Kalcic challenged the Company's attempt to recover stranded costs from SGS - Space Heating and SGS - Water Heating customers, noting that under the Side Letter, no CTC was to be recovered from either the Residential or the SGS customers. (Exh. 15 (Kalcic) at 8). Delmarva witness Barndt claimed that the SGS - Space Heating and SGS - Water Heating services are provided on a separate circuit and are separately metered, and the Company considers them to be separate customers. Thus, Mr. Barndt asserted, under the Side Letter, the Company did not consider these services to be exempt from the CTC and stranded costs were recoverable from these customers. (Exh. 14 (Barndt - R) at 9-10).

e. Recovery of Fuel Costs In Year 4 Under the "Extraordinary Cost" Provision of Section 1006(a)(1)(ii).

28. The Side Letter contained a provision allowing Delmarva to petition the Commission for an increase in rates if, for the twelve months beginning October 1, 2002, its average fuel cost based on then-current fuel prices is estimated to be greater than 115% of the actual average fuel cost for the twelve months ended September 30, 1999 that is included in residential rates. (Exh. 17 (Wathen) at Schedule JMW-3). The Side Letter provides that the Commission "shall" treat such costs over and above 115% as "extraordinary under •1006(a)(1)(ii); however, it also states that the Commission shall evaluate the Company's application "using the procedures and standards currently set forth in 26 Del. C. • 303 ." (Id) Paragraph 6 of the proposed Partial Settlement explicitly states that any review by the Commission pursuant to this provision shall include "consideration of the effects of Delmarva's sale or transfer of power plants" and that "[a]ny such consideration of effects of such sales or transfers shall assume that all of Delmarva's generation plant was retained." (Proposed Partial Settlement, 6). No party opposed that section of the proposed Partial Settlement.

2. Procedures for Providing Direct Access for All Electric Suppliers (Section 1005(a)(1)(ii)).

29. Company witness Bartolone testified regarding the Company's proposed procedures for providing direct access for all electric suppliers. His testimony described:  
? the process by which Electric Suppliers would enroll customers during the phase-in period and the information that would be provided in the enrollment package (Exh. 19 (Bartolone) at 7-12);

? the process by which customers would be permitted to switch suppliers after the initial enrollment period (id. at 12-13);

? the process by which proposed data transactions between Delmarva and the Electric Suppliers would take place (id. at 13-14);

? the determination of the date a customer would begin receiving energy supply from its selected Electric Supplier (id. at 14-16);

? whether a customer should be permitted to receive energy supply from more than one Electric Supplier (id. at 16-17);

? whether a customer returning to Delmarva's Electric Supply and Delivery Service ("ES&D") would be required to remain with Delmarva for some minimum period before being able to switch suppliers again (id. at 18);

? whether an Electric Supplier can drop a customer and the repercussions of such a drop (including dispute resolution) (id. at 18-20);

? the recommendations for meeting the metering needs for retail competition (id. at 21-22)

? billing choices (i.e., a consolidated bill from Delmarva; a consolidated bill from the Electric Supplier; or separate bills from the Electric Supplier and Delmarva) and the processes steps for each of those billing choices (id. at 23-26);

? reporting requirements (id. at 26)

? prequalification of Electric Suppliers for creditworthiness (id. at 26);

? the planned bill format and content (id. at 26-27);

? how electric receivables should be maintained by Delmarva and the Electric Suppliers for the "bill ready" and "rate ready" bills (id. at 27-28);

? the posting sequence for partial customer payments when a consolidated bill is rendered (id. at 28-29); and

? cost support for potential fees and charges. (Id. at Sch. JB-1).

30. By the time of the evidentiary hearings, the parties had resolved most of their objections to Delmarva's proposed direct access procedures. The only remaining issue was whether the Company should be permitted to impose a retention period upon returning customers in order to prevent "gaming" during the transition period.

31. "Gaming" occurs when a customer switches to a competitive supplier during non-summer months (when prices tend to be low) and switches back to the default supplier during the summer months (when costs tend to be higher). (Tr. 311). Delmarva contended that it would be harmed by such behavior, because the electric supply component of its rates (which are to be frozen during the transition period) is set to cover average costs incurred over the course of a entire year. (Id). Delmarva cannot plan for the needs of customers that may switch back and forth between competitive suppliers and the default supplier because the timing of when such switching may occur will depend in any given month on actual market price patterns during a given year. (Exh. 22 (Rainey) at 9). Customers that return to default service in higher-than-average-cost summer months and leave that service in lower-than average-cost non-summer months cause higher-than-average costs to be incurred, but only pay rates based on average annual electricity supply costs. Delmarva is a summer-peaking utility, and electricity costs in summer months can be two to three times greater than electricity costs in non-summer months.

(Exh. 22 (Rainey) at 4). Because rates are frozen during the transition period, the Company would be unable to increase its rates during the transition period to recover the higher costs incurred by having to supply these customers during the higher cost summer months. (Delmarva BOE at 33-34). Therefore, the Company proposed that the Commission impose either a 12-month retention period for returning customers, or that the Commission require returning customers to pay market price based on the PJM prices. (Exh. 18 (Wathen - R) at 16-19). The Company also pointed out that the Commission had previously identified this issue and recommended certain "anti-gaming" provisions in its Report to the General Assembly in Docket No. 97-229. (Delmarva BOE at 35-36).

32. Many of the parties objected to Delmarva's proposal. Some argued that the Act does not allow the Commission to impose any conditions upon returning customers during the retention period. (MAPSA OB at 6-8). Others argued that the imposition of any conditions upon returning customers would stifle competition - a result contrary to what the General Assembly intended in enacting the Act. (MAPSA OB at 6-8; Exh. 23 (Crane) at 26-27; Exh. 21 (Rosenberg) at 5-6). It was also contended that a quid pro quo for the imposition of stranded costs upon large commercial and industrial customers was the right to return to frozen rates during the transition period without penalty. (Exh. 21 (Rosenberg) at 7-8). Finally, it was asserted that Delmarva had not established any evidence that gaming would occur, but rather that gaming was only a possibility. (DPA OB at 6-8; DEUG OB at 8; Tr. at 270-71).

33. Staff acknowledged that the Company's fear about gaming was a real one, but was concerned that smaller commercial and residential customers would be unduly burdened by the imposition of conditions on their return to the default supplier. Thus, Staff proposed the following:

? Returning customers with a peak monthly load of 300 kW or more must either remain with the default supplier for a minimum of 12 months or pay market rates for supply. A customer that elected to pay market rates could later decide to remain with the default supplier for a minimum of 12 months.

? Returning customers with a peak monthly load of less than 300 kW may return one time without having to take service from the default supplier for a minimum period of time or having to pay market price; however, if such a customer leaves the default supplier for another supplier and then returns again to the default supplier, the customer would be required to remain with the default supplier for a minimum of six months.

? A customer that is dropped by its supplier and returned to the default supplier without the customer's consent shall have one billing cycle to enroll with another supplier without a minimum period requirement. If the customer does not elect an alternative supplier within this time, the customer will be required to take service from the default supplier for a minimum of six months.

(Staff's Proposed Regulations, as revised, in Regulation Docket No. 49 at 18; Tr. at 152-55).

3. Revised Tariffs and Rate Schedules (Section 1005(a)(1)(iii)).

34. The Company provided revised tariffs and rate schedules with its proposed restructuring plan. Certain recommendations made by other parties regarding the Company's tariff language were incorporated into the Partial Settlement or deferred by the Partial Settlement for resolution at a later date. The only remaining issues regarding the revised tariffs and rate schedules involved the treatment of stranded costs, shopping credits, and application of the residential rate reduction addressed supra.

4. Optional Residential Time-of-Use Rate (Section 1005(a)(1)(iv)).

35. The Company proposed an optional time-of-use rate for residential customers having three daily time of use periods. (Exh. 4 (Vargo) at 5 and Schedule JDV-1). Staff supported the Company's proposed residential time-of-use rate. (Exh. 24 (Tietbohl) at 6), and no other party challenged the proposed time-of-use rate.

5. Standards for Reliability Sufficient to Measure Variations in Service Reliability After Implementation of Retail Competition (Section 1005(a)(1)(v)).

36. Company witness Tsion Messick described the Company's proposed standards for reliability. (Exh. 2 (Messick) at 13-18). No party filed testimony in opposition to those

standards. The Commission notes that it is not precluded from revisiting these standards at a later date.

6. Divestiture of Generation Assets

37. MAPSA advocated that the Commission require the Company to divest its generation assets. According to MAPSA, divestiture is the fairest and most accurate way to determine the level of stranded costs that actually exist." (Exh. 26 (Hanger) at 33). MAPSA also contended that divestiture was necessary in order to protect the competitive market from anti-competitive behavior. (MAPSA OB at 9).

7. Code of Conduct.

38. The Company did not propose any revisions to the Code of Conduct ("Code") approved by the Commission in Docket No. 97-65. Other witnesses, however, contended that the Code adopted in Docket No. 97-65 should be substantially revised in light of the deregulation of the supply function.

39. Staff witness Latourette testified that the existing Code was adequate for the time being, but that the Commission should order Delmarva to file a revised Code addressing the changes brought by deregulation of the generation function on or before March 1, 2000. (Exh. 30 (Latourette) at 3-4, 12-13).

40. The DPA contended that the current Code was no longer relevant, given that it was developed in the context of the unregulated heating/ventilation/air conditioning/telephone businesses, and that the Commission had expressly recognized in Docket No. 97-65 that the Code may need to be revisited when the generation function was deregulated. (Exh. 23 (Crane) at 20). Ms. Crane testified that the current Code was inadequate in several respects. First, it permitted Delmarva or its affiliates to engage in joint advertising. Given that the Company had admitted that its generation affiliate planned to actively market generation service, Ms. Crane testified that it was likely that an unfair advantage could accrue to the Company if its regulated wires service and competitive generation service were jointly marketed. (Exh. 23 (Crane) at 20-21). Ms. Crane expressed similar concerns regarding the current Code's provisions that permitted Delmarva to provide sales leads to its competitive businesses and to engage in joint sales calls. (Id. at 21).

41. Ms. Crane proposed that the Commission approve the Maryland Code of Conduct for the Company, as augmented by the provisions of the Delaware Code of Conduct regarding reporting of employee transfers and pledging of financial assets. She further proposed that the Commission open a proceeding in October 1999 to review the Code issue in greater detail and determine whether any revisions or additions to the Maryland Code are required, and that such proceeding should be completed by October 2000, when the majority of the Company's customers will be eligible for customer choice. (Id. at 22-23).

42. PP&L argued that the current Code was deficient in several respects, and urged the Commission to adopt the Code of Conduct applicable to PP&L's affiliated utility, PP&L Inc. ("PP&L Code"). First, PP&L contended that the current Code was inconsistent with codes of conduct adopted in neighboring states; this was important because the retail market would inevitably become larger. Second, the current Code was too long and complex. Third, the current Code provided Delmarva with too much discretion and too many loopholes with respect to its implementation. Finally, PP&L contended that the current Code failed to address significant areas of potential competitive abuse by Delmarva in the deregulated electric industry (Exh. 11 (Brodbeck) at 9-18).

43. With respect to this last point, Mr. Brodbeck asserted first that the current Code unfairly permits the Company to use regulated utility bill inserts to market affiliated services whereas the PP&L Code flatly prohibits the use of regulated utility bill inserts by affiliated marketers. Second, the current Code allows joint marketing between the affiliated supplier and the utility, whereas the PP&L Code precludes such joint marketing. Third, the current Code permits the affiliated supplier to use the utility's name in marketing and to exploit the affiliated relationship to the utility. The PP&L Code does not prohibit the use of the utility's name and logo by the affiliated supplier, but it does require the affiliate to inform consumers that the affiliate is not the same entity as the regulated utility. Fourth, the current Code fails to require the utility to make any information that is not in the public domain available to competitive suppliers at the same time that it is made available to affiliated suppliers; specifically, the Code permits "sales leads" to the affiliated supplier without requiring that such leads be provided to competitive suppliers. Fifth, the current Code does not require functional separation of

affiliated supplier employees from utility employees, and access to customer- and market-sensitive information is not limited. Sixth, the current Code does not provide for prohibitions against cross-subsidization between the utility and the unregulated affiliate. Finally, the current Code lacks a dispute resolution procedure acceptable to PP&L. (Id. at 14-16). All of these deficiencies were asserted to be addressed "directly and succinctly" in the PP&L Code. (Id. at 16).

44. Mr. Brodbeck testified that it was important for codes of conduct to be consistent with those adopted in surrounding states because new competitors in the retail market would come from throughout the region using generation assets located throughout PJM. Mr. Brodbeck advocated that the Commission approve for Delmarva the PP&L Code which was "virtually identical" to the Codes adopted for other Pennsylvania utilities, and which was the result of compromise between the utility and the potential suppliers. (Id. at 11-12). According to Mr. Brodbeck, the PP&L Code addressed the deficiencies in Delmarva's current Code, and was also familiar to the likely competitors and customers in the Delaware market. (Id. at 11).

45. In addition, Mr. Brodbeck also advocated adopting a "Genco" Code of Conduct if Delmarva divests its generation to an affiliate. (Id. at 16). He testified that Pennsylvania agreed to a "Genco" Code of Conduct that governs the relationship between an affiliated entity to which the utility's generation has been transferred and the utility and any affiliated supplier. The purpose of a "Genco" Code of Conduct is to protect the competitive process from any advantage that may accrue to the affiliates of the new "genco" through their affiliation with the entity controlling the generation assets and to prevent cross-subsidization. The "Genco" Code of Conduct that Mr. Brodbeck proposed for adoption prohibits the genco from providing either the affiliated utility or retail supplier with a preference in the purchase of goods and services and a broad range of energy and transmission-related products, and requires the genco to treat its affiliates the same as non-affiliates in the provision of tariffed services. It also prohibits the genco from offering retail service in the utility's service territory for several years. (Id. at 18).

46. Enron also argued that a new utility Code was necessary in light of deregulation as well as a "genco" Code of Conduct. Enron supported PP&L's arguments in this regard. (Enron OB at 9-21).

47. MAPSA also contended that a new Code was necessary, but did not provide any specific recommendations as to what provisions should be included therein. (MAPSA OB at 18-20).

48. The Company disagreed that the current Code of Conduct, adopted in 1998 in Docket No. 97-65, required revision. It noted that the current Code is not limited to any particular industry. (Delmarva OB at 34). It pointed to various sections of the Code that addressed each of the issues that the other parties identified as potential problems regarding the relationship between the utility and an affiliate. (Id. at 30-33). However, Company witness Wathen testified that if the Commission believed that any revision was necessary, it would support Staff's proposal. (Exh. 18 (Wathen-R) at 14).

49. Delmarva also raised jurisdictional concerns regarding the implementation of a Genco Code of Conduct that would involve the relationship between an entity owning generation assets and an entity performing competitive retail electric marketing, i.e., Delmarva noted that the Act expressly provided that the Commission would have no jurisdiction over the Company's generation assets after October 1, 1999, and that the Federal Energy Regulatory Commission would have jurisdiction over any sale made by the entity owning generation assets to the retail electric marketer for resale. (Delmarva RB at 22-23).

#### 8. Status of Off-Tariff Contracts.

50. The Company currently has twelve customers taking service under contracts entered into pursuant to the Negotiated Contract Rider ("NCR") or the Economic Development Rider ("EDR"). (Exh. 32). Of those 12 customers, eleven would be eligible to choose an electric supplier on October 1, 1999, and the remaining customer would be able to choose on January 15, 2000, but for the contract terms. (Tr. 556). Most of these contracts were entered into in 1997 and 1998, when Delmarva was actively attempting to deregulate the electric industry. (Exh. 17 (Wathen) at 5-7; Exh. 32).

51. PP&L, MAPSA, and Enron contended that these customers should be eligible for retail competition on their eligibility dates, notwithstanding that they had entered into long-t

contracts with Delmarva. PP&L contended that ••1002(a)(2) and 1003(a) specifically provide that customers shall have the right to choose their electric supplier on and after the dates set in the Act, and that these sections brook no exceptions. (PP&L OB at 28). It argued that the provision in the Act regarding abrogation of contracts was not determinative, because contracts entered into with customers are subject to regulation and changes in regulation. (Id. at 29). further contended that Delmarva's position was contrary to the public interest. (Id.). Enron a MAPSA asserted similar arguments. (Enron OB at 25-28; MAPSA OB at 3-6).

52. Delmarva contended that the Act specifically preserved these contracts. It poin to Section 1002(a)(3), which provides that "[n]othing contained herein shall have the effect of abrogating or amending contracts between public utilities and any of their customers in place on February 1, 1999." 26 Del. C. • 1002(a)(3). Delmarva argued that the General Assembly's inclusion of this provision in the Act demonstrated that Delmarva's contracts with these customers are not affected by the Act's eligibility dates and that these contracts remain valid notwithstanding the provision of the Act concerning the eligibility dates for competition. (Delmarva OB at 7; Delmarva RB at 4-6).

C. The Hearing Examiners' Proposed Findings and Conclusions.

53. The Hearing Examiners recommended:

? that the Commission deny Delmarva recovery of any stranded costs (HER at 15);  
? that the Commission order Delmarva to implement the 7.5% residential rate decrease pro rata on the basis of relative cost to the unbundled generation and wires components of base rates (HER at 20);  
? that the Commission direct Delmarva to recalculate its proposed Electric Supply Service rate component for each rate class to eliminate any allocation for stranded cost recover and to apply the residential rate decrease on a pro rata basis to the generation and wires porti of base rates (which will result in somewhat higher shopping credits than those reflected in the Side Letter) (HER at 21);  
? that the Commission initiate a new docket (to be completed by mid-2000) to promulgate a new Code of Conduct for Delmarva, and until such new Code of Conduct is approved, that Delmarva be subject to certain restrictions (HER at 23-25);  
? that the Commission decline to impose any conditions on returning customers with respect to length of stay and/or price of energy (HER at 28-34);  
? that the Commission decline to order Delmarva to divest its electric generation capacity (HER at 34-36);  
? that, with respect to off-tariff contracts, if the Commission finds that the contracting parties agree or it should otherwise be determined that choice is available prior to termination of those contracts, each customer shall be entitled to the retail market price applicable to the tariff class into which its service would ordinarily fall (HER at 38-40);  
? that the proposed recovery of CTC charges from certain SGS customers is moot in light of the denial of any stranded cost recovery (HER at 40);  
? that the Commission reject the Company's proposal for the recovery of additional fuel costs from residential customers during the fourth year of the Transition Period (HER at 41  
? that the Company's proposals in its restructuring plan regarding procedures for providing direct access for electric suppliers, an optional time-of-use rate, and standards to measure and ensure service reliability should be adopted (HER at 42-44); and  
? that the proposed partial settlement attached to the Findings and Recommendations as Exhibit A be approved. (HER at 46).

54. As our deliberations made clear, we declined to follow the Hearing Examiners' recommendations on the majority of the issues identified herein.

III. FINDINGS AND OPINION

A. The Side Letter.

55. The parties spent a great deal of time in their briefs to the Hearing Examiners in their exceptions explaining why the Side Letter should or should not be approved. The resolution of disputes by settlement is encouraged under the Public Utilities Act and the restructuring Act. 26 Del. C. •• 512(a) and 1015(b). The Commission may approve the settlements even if all of the parties are not in agreement, as long as the settlement is in the public interest. 26 Del. C. • 512(c). As will be seen from the discussion infra, the Commissi recognizes the Side Letter as a partial settlement permitted under 26 Del. C. •512, the economic terms of which have been incorporated into our decision. (Unanimous).

B. Rate-Making Standards in General.

56. Rate-fixing by the Commission is primarily a legislative function, with the Commission required to fix rates that are just and reasonable. Application of Wilmington Suburban Water Corp., Del. Supr., 211 A.2d 602, 605 (1965); 26 Del. C. • 311. "[T]here is no single cost-recovering rate, but a zone of reasonableness." Federal Power Commission v. Conway Corp., 426 U.S. 271, 278 (1976).

C. The Commission's Responsibility Under The Act.

57. The Act instructs the Commission to review the restructuring plan submitted by Delmarva and, after an evidentiary hearing, issue an order by August 31, 1999 adopting the plan as filed or modifying the plan as appropriate. 26 Del. C. • 1005(a)(2). The Act also directs the Commission to determine the rates that will be in effect during the Transition Period on an unbundled revenue-neutral basis, without conducting a base rate case. Id. •1006(a)(1). Therefore, the rates that are currently in effect (and which were previously approved by the Commission) will be the rates that will be effective during the Transition Period; the only difference is that they will be unbundled into their component parts.

D. Unbundled Rates.

58. On the approach taken here, three contested matters relating to the unbundling of Delmarva's rates are resolved together: the size of the "shopping credits," the amount of stranded cost recovery by Delmarva, and the allocation of the 7.5% residential rate cut between supply charges and "wires" charges.

59. Delmarva took its currently-approved rates and unbundled those rates into the separate components as required by the Act. (Exh. 13 (Barndt) at 9-19). Mr. Barndt then made three minor rate design changes. First, he eliminated the monthly 5 kWh allowance included in the customer charge for the residential class, because, as customers choose other suppliers, it not be possible for the customer to receive this allowance. (Id. at 20-21). Second, he made a change to reflect the change in the interest rate on customer deposits. Third, he removed the Power Plant Performance reward from base rates. (Id. at 21). No party took issue with any of those adjustments, nor did any party seriously contest the manner in which the rates were unbundled. Parties to the Side Letter endorsed the resulting rates as Exhibit B thereto (Exh. 1 (Barndt), pp. 22-23; Exh. 17 (Wathen at 10)). The shopping credits were further adjusted to reflect a degree of stranded cost recovery from commercial and industrial customers and an allocation to the supply charges of the 7.5% rate reduction for residential customers. These shopping credits are to be further adjusted to reflect actual fuel costs for the period October 1998, through September 30, 1999. (Act •3, adding 26 Del. C. •• 1006(a)(ii) and (v)).

60. The unbundled rates proposed by the parties, including the shopping credits, are reasonable and comport with the evidence in this case. The shopping credit is, with relatively minor adjustments, the cost of electric supply that is being deregulated; that is, it is the cost of Delmarva's electric supply. Section 1006(a)(1)(i) of the Act provides that the retail market price for electric supply "shall be based upon and/or representative of regional wholesale electric market prices, plus a reasonable allowance for retail margin..." Section 1006(a)(1)(iii) also requires that this price reflect the unbundled supply component of rates. The shopping credits proposed by Delmarva do exactly that: they reflect the unbundled cost of supply with minor adjustments as described above and including the removal of stranded costs from the supply component and, for residential customers, to reflect the 7.5% rate reduction. Witnesses for Delmarva testified that the rates, including shopping credits, on Sch. JMW-3, Exhibit B, have been unbundled consistent with the statute (Exh. 13 (Barndt), esp. pp. 22-23; Exh. 17 (Wathen at 10)). There is no dispute that the rates were unbundled properly and that the shopping credits reflect the unbundled supply component with the adjustments noted above.

61. We observe that overall, Delmarva's proposed shopping credits compare favorably to the shopping credits established for other utilities in the PJM region, such as PP&L Inc., Met Ed and Penelec. (Exh. 12; Exh. 14 (Barndt-R) at Sch. WWB-1R; Exh. 15 (Kalcic) at 13 and Schedule BK-4). PP&L witness Brodbeck testified that Pennsylvania has achieved "very good rates of participation and supplier change," (Exh. 11 (Brodbeck) at 5), and both Mr. Brodbeck of PP&L and Mr. Brown of Exelon testified that their companies had acquired customers within the service territories of all Pennsylvania utilities within the PJM region - including the utilities that have lower approved shopping credits. (Tr. 399-400, 404-05). Indeed, the evidence demonstrates that Delmarva's proposed shopping credits for the transmission level customers are higher than PECO's (although Delmarva's industrial rates pre-deregulation were substantially lower than PECO's), and that Delmarva's proposed residential shopping credits are higher than Met Ed's, PP&L's and Penelec's. (Exh. 14 (Barndt-R) at WWB-1R). Moreover,

Delmarva's proposed shopping credits are higher than Met Ed's, Penelec's and PP&L's for all customer groups except the Primary Distribution customer group - and even there, they are not substantially lower than the shopping credits approved for the Pennsylvania utilities. As Staff witness Kalcic explained (Exh. 15 at 11-13), the foregoing comparison of Delmarva shopping credits with those of Pennsylvania companies provides a basis to conclude that the shopping credits "shall be based upon and/or representative of regional wholesale electric market prices, plus a reasonable allowance for retail margin to be determined by the Commission," as required by the Act. 26 Del. C. • 1006(a)(1)(i).

62. The parties who are potential competitive suppliers within the Delaware retail electric market would understandably prefer higher shopping credits, which would make it easier for them to sell their electricity into Delaware at a greater profit. But these parties have not presented substantial evidence to justify their positions. Their prefiled testimony that the shopping credits proposed by Delmarva are too low to promote competition is contradicted by their testimony during cross-examination and the evidence provided by other parties that lower shopping credits than are proposed here are promoting competition in Pennsylvania in territories served by Pennsylvania Power & Light Company and by General Public Utilities subsidiaries Metropolitan Edison and Pennsylvania Electric Company. (E.g., Tr. 399-400 (Brodbeck); Tr. 404-05 (Brown); Exh. 12; Exh. 14 (Barndt-R) at Sch. WWB-1R; Exh. 15 (Kalcic) at 13 and Sch. BK-4). Their testimony regarding shopping credits approved for PECO or utilities in New Jersey fails to consider that, prior to deregulation, PECO and the New Jersey utilities had some of the highest rates in the region, if not in the country. (Cf. Exh. 14 (Barndt-R) at Sch. WWB-1R, p.1). Thus, we do not believe that the shopping credits approved for PECO and the New Jersey utilities are an appropriate benchmark for the shopping credits that should be approved for Delmarva. To do so would be to create an artificially high shopping credit that bears no reasonable relationship to Delmarva's cost of supply.

63. If the shopping credits (i.e., the rates for energy supply service) are appropriate then the correlative wires charges are just and reasonable by definition, since the shopping credit and wires charge together equal the existing bundled rate which is the starting point under the law, and which has been found to be just and reasonable by prior Order of the Commission.

64. The shopping credits and wires charges set forth on Exhibit B of the Side Letter are adopted as a reasonable division of the existing bundled rates and in the public interest.

65. In making its findings here, the Commission is cognizant of testimony presented by Delmarva regarding studies that its system-wide stranded costs are in excess of \$200 million (Exh. 18 (Wathen-R) at 14-16), a figure substantially higher than the system-wide \$50 million proposed here or the approximately \$16 million that Delmarva seeks to recover from Delaware retail customers. The Commission further notes that no record evidence was presented by other parties to the case to establish a different level of stranded costs. (Staff OB at 13). The Commission declines to rule with respect to whether the appropriate level of stranded cost recovery is \$16 million or some other value. The Commission notes, however, that the \$16 million figure is not an additional charge that Delmarva seeks to recover from ratepayers, but is instead an amount that is currently part of the previously-approved bundled rates. (Delmarva BOE at 25). As such, and given the lack of record evidence to support a disallowance of costs, and in conjunction with the Act's directive to unbundle rates without a base rate case, there is no basis for a Commission ruling precluding Delmarva from continuing to recover these costs through its unbundled rates.

66. Application of 7.5% Residential Rate Reduction to Supply and Wires Functions. We have already found that the rates proposed by Delmarva are just and reasonable. Those rates include the application of the 7.5% residential rate reduction solely to the generation function rather than to both the generation and wires functions. The Act does not specify how the rate reduction was to be allocated. In this regard, we are persuaded by Delmarva's argument that the price reduction benefits of competition come from the supply component of rates, not the wires component. (Delmarva RB at 7). Thus, applying the rate reduction to both the wires and supply components distorts the market price of generation by artificially inflating it. Moreover, as we pointed out, there is a negligible effect on the shopping credit if the rate reduction is applied to both the generation and wires components. (Exh. 15 (Kalcic) at 6; Staff RB at 9; Staff BOE at 24). Consequently, we find that the residential rate reduction should be applied only to the generation component of rates. (Unanimous).

67. Having found here that the proposed estimated shopping credits and the methodology for establishing final shopping credits are reasonable, that the application of the 7.5% residential rate reduction applied to generation only is supportable, and in light of prior Orders finding that the overall base rate charges are reasonable, the Commission finds that the

unbundled rates represent a reasonable end-result that resolves the statutory task of unbundling rates into energy supply on the one hand and wires charges on the other. Attached as Exhibit A is a revised schedule demonstrating the unbundled rates and the approved shopping credits, which rates and shopping credits are subject to adjustment for actual fuel costs for the year ending September 30, 1999.

68. SGS Customers. In the Side Letter, the Company agreed that it would not recover any stranded costs from SGS customers. We agree with Staff that the Company agreed in the Side Letter that it would not recover stranded costs from SGS customers, and we do not find the Company's attempt to distinguish SGS-Space and Water Heating customers from other SGS customers persuasive. The Company's tariff - which is, of course, the only source available to customers to determine their rate classification -- makes no such distinction, and nothing in the tariff informs the customer of the rate class under which Delmarva is billing it. We hold, therefore, that all SGS customers shall be exempt from the payment of stranded costs. (Unanimous).

69. 115% Fuel Cost Provision. We do not believe that this provision is an unreasonable one, especially given the limitation in the proposed Partial Settlement that the Commission shall take into consideration the effects of Delmarva's sale of its power plants. However, this should not be interpreted as a guarantee that Delmarva will be permitted to recover fuel costs over and above the 115% floor. We do not believe that an increase in fuel costs that may occur as a result of the sale of the Company's generation assets and consequent reliance on purchased power or spot market purchases would be considered an "extraordinary" cost. We hereby place the Company on notice that if it requests relief under this provision, it must demonstrate that the increased fuel costs were beyond the Company's reasonable opportunity to anticipate and/or control, and that such costs are related to unanticipated and uncontrollable increases in the cost of fuel used for the generation of electricity, as opposed purchasing the power from another generator or on the spot market. (Unanimous).

70. Retention Period. We concur with DEC that the Act gives the Commission the authority to impose conditions on customers returning to default service during the retention period. Section 1006(a)(1)(v) provides that:

For Customers who do not choose an alternate Electric Supplier or have returned to obtaining their electric supply from DP&L, the above-specified retail market price shall be the rate paid for Electric Supply Service for the Transition Period, subject to such regulations as the Commission may adopt pursuant to 1010(c) of this chapter for returning customers.

Section 1010(c) provides:

The Commission shall promulgate rules and regulations governing the amount of notice that a Customer who desires to return to the Standard Offer Service Supplier must provide, the minimum amount of time that a Customer must take service from a Standard Offer Service Supplier, and the amount of charges that may be assessed against a Customer who leaves the Standard Offer Service Supplier and later returns to the Standard Offer Service Supplier, including the appropriate retail market price, which may be higher than the Standard Offer Service Price.

71. The two sections are related to each other by the reference made in 1006(a)(1)(v). As DEC contends, the General Assembly must have intended for the Commission to be able to adopt regulations regarding returning customers during the Transition Period; otherwise, the language "subject to such regulations as the Commission may adopt pursuant to 1010(c) of this chapter for returning customers" would be superfluous. (DEC RB at 6). Furthermore, if the two sections are not so interpreted, the result would be that the section to which the Commission is referred for the types of conditions that the Commission could impose upon returning customers would preclude the Commission from imposing such conditions. (Id.). Finally, the General Assembly clearly intended that there be a transition to competition over time, and intended by sections 1006(a)(1)(v) and 1010(c) that the Commission have the same flexibility to impose conditions on returning customers during the transition period as it has after the Transition Period has ended. (Id.). Indeed, it makes little sense for the Commission to promulgate regulations regarding returning customers after the Transition Period has ended, and when prices presumably will be truly market based, but to forbid such regulations during the Transition Period, when the default supplier has no ability to increase rates.

72. We have considered the arguments for and against imposing a retention period or requiring returning customers to pay market price. We believe that this is a policy matter, and that "hard evidence" of gaming (or lack thereof) is not necessary for us to make this policy determination. Common sense and experience tells us that customers will act in their economic interest and, if it is in their economic interest to switch back and forth between the competitive supplier and the default supplier in the more expensive summer months, there is a substantial potential that they will do so. While we are sympathetic to the arguments made by some of the parties that imposing conditions on returning customers may retard competition, this is a result that this Commission previously balanced against the potential harm that could result from "gaming" in Docket No. 97-229. The General Assembly clearly responded to the Commission's concerns and authorized the Commission in the Act to promulgate regulations regarding returning customers. Thus, the General Assembly must have also had concerns that customers might try to game the system at a time when the default supplier's rates were frozen.

73. Moreover, we observe that there are no restrictions on a customer's ability to switch from one competitive supplier to another at any time. The issue here is not whether competition will exist at all; it is whether customers can switch back and forth between the default supplier and a competitive supplier when the default supplier has no way under the Act of protecting itself. In this regard, we are persuaded by Staff's argument that it is entirely possible that the economic effects of gaming will be visited upon those customers least able to protect themselves - the residential customers who will not be eligible to choose their suppliers until October 1, 2000, and the non-switching customers.

74. We believe that the large commercial and industrial customers that will be eligible to choose their electric suppliers on October 1, 1999 are the most likely to engage in gaming. They are also better able to fend for themselves. Thus, we find that customers with monthly peak load of 300kW or greater who leave the default supplier to take service from a competitive supplier and later return to the default supplier will be required to commit upon its return to purchase from the default supplier for a period of twelve months, or pay market prices with no minimum term commitment other than the standard restrictions requiring 15-days notice prior to the next scheduled meter read to switch suppliers.

75. We do not believe that any restrictions, other than the standard notice requirement should be imposed upon customers with peak monthly loads of less than 300 kW, however. We understand Delmarva's argument that smaller customers may be gathered together by an aggregator, but we believe that the potential for gaming is substantially lower for such customers than for the larger commercial and industrial customers. (Unanimous).

76. Code of Conduct. This issue was one of the more hotly contested issues in the proceeding. The current Code of Conduct was developed in the context of Delmarva's entry into the unregulated businesses of heating, ventilation and air conditioning, and telecommunications. In the electric supply business, however, Delmarva is the incumbent, and the other marketers will be the new entrants. In light of the many issues that have been raised by the parties regarding provisions that should be added or particular portions of the current Code that should be changed in light of deregulation, we believe that a new Code of Conduct may be necessary in light of the transition to retail competition in the electric generation industry.

77. We are not inclined, however (even on an interim basis), to adopt provisions from Codes of Conduct applicable to utilities in other states without a full review of the potential benefits or detriments of those proposed provisions. In that regard, we note that one of the provisions that the Hearing Examiners recommended for implementation on an interim basis involved access by all suppliers to customer information. In Docket No. 97-65, we rejected such a requirement based on our belief that the customer's information belongs to the customer, not to Delmarva or to any supplier, and that customer should control the dissemination of his or her information. We continue to adhere to that view. Thus, the fact that a customer may authorize Delmarva to disclose his or her information to one competitor (regardless of whether that competitor is a Delmarva affiliate or not) does not allow Delmarva to disclose that information to all competitors. The interim Code provisions recommended by the Hearing Examiners, however, would allow that to occur. Thus, we specifically find that the current Code should be followed until the Commission approves a new Code applicable to the Company and its regulated affiliates. However, if any supplier believes that Delmarva is violating the Code or engaging in unfair competition, the Commission's complaint procedures are available to it.

78. We will initiate a new proceeding to consider the adoption of a new Code of Conduct. That proceeding shall be concluded by June 30, 2000, so that there is sufficient time to become familiar with its provisions before the majority of customers become eligible for

competition on October 1, 2000. (Unanimous).

79. Divestiture of Generation Assets. MAPSA was the only party to advocate the mandatory divestiture of Delmarva's generation assets. The Act does not prohibit Delmarva from engaging in the retail generation business in Delaware; indeed, it specifically provides that the Company's generation function shall be deregulated. 26 Del. C. • 1003. Moreover, the Act authorizes the Commission to order divestiture "only as a last resort," and only after it has been demonstrated that the market has been "adversely affected by market power arising from the ownership or control of facilities and equipment used to provide Electric Supply Service." In the absence of any showing of market power, divestiture is not contemplated under the Act. 26 Del. C. • 1013.

80. Since we have determined that Delmarva's wires charges and shopping credits are just and reasonable, MAPSA's argument with respect to stranded costs is moot. With respect to MAPSA's contention that divestiture is necessary to prevent anti-competitive behavior, we note that the adoption of an effective Code of Conduct can remedy that problem. We have already initiated a new proceeding to investigate Code of Conduct issues thoroughly, and we expect that many of the parties to this proceeding will participate in that docket and will advance whatever provisions they believe are necessary to prevent anti-competitive behavior. We, therefore, do not believe that divestiture is warranted on the record presented here. (Unanimous).

81. Status of Off-Tariff Contracts. We believe that the General Assembly has addressed this issue directly in the Act. Section 1002(a)(3) specifically provides that "[n]othing contained [in the Act] shall have the effect of abrogating or amending contracts between public utilities and any of their Customers in place on February 1, 1999." In our view, none of the more general language concerning the implementation dates for retail competition and the eligibility dates for particular customer groups negates this very specific provision, which applies to customers taking service under contracts rather than tariffs. Moreover, we note that we have reviewed and approved each of these contractual arrangements.

82. The customers taking service under these contracts are in the best position to challenge the contracts; therefore, it is neither necessary nor appropriate for the Commission to determine whether the EDR or NCR arrangements preclude customer choice. Each of these contracts should be judged by its own terms, and in the first instance, by the parties thereto. They are the ones that will determine whether they believe that they should have the option of choosing their supplier. However, if the parties should agree that choice is available to the customer prior to the termination of the contractual arrangement, then the customer shall be entitled to the retail market price applicable to the tariff class into which its service would ordinarily fall. (Unanimous).

83. Uncontested Issues. Some parties challenged some portions of the proposed restructuring plan dealing with procedures for providing direct access for electric suppliers, the optional residential time-of-use rate, and the standards to measure reliability; however, since these issues primarily related to residential customers, they were deferred for resolution prior to October 1, 2000, when residential customers become eligible for customer choice. We approve the proposed portions of the restructuring plan that are not deferred for resolution.

84. Proposed Settlement. The Hearing Examiners recommended approval of a partial settlement filed on August 2, 1999, which was executed or not opposed by every party to the proceeding, with the exception of MAPSA. It was a partial settlement because it did not resolve the specific issues litigated before the Hearing Examiners and also identified a number of issues that were deferred for consideration at a later date. MAPSA did not oppose the partial settlement as a whole, but took exception with four provisions of the partial settlement.

85. The Commission finds that the partial settlement is in the public interest and adopts the Hearing Examiners' recommendation to approve the partial settlement (Unanimous).

86. Initially, we note that the partial settlement contains a condition that if the Commission fails to grant approval of any provision of the partial settlement, the entire partial settlement will terminate unless all of the settling parties waive the application of this condition. Partial Settlement, Section II.G.11. MAPSA apparently does not want the partial settlement rejected, but seeks modifications to a few provisions, which modifications, if made, could cause the partial settlement as a whole to be terminated. Because the partial settlement resolves literally dozens of issues that, if left unresolved as customer choice begins, could increase uncertainty and thus impede the development of the competitive market, MAPSA's request is inconsistent with the public interest.

87. Moreover, the Commission notes that, on a substantive basis, MAPSA's exceptions are not well-founded. MAPSA asserts that the fees set forth in Partial Settlement Section II.B.11 are not supported by record evidence, but the prefiled direct testimony of Delmarva witness Joseph Bartolone (Exh. 19, Sch. JB-1) provides cost support for these fees and MAPSA neither sponsored testimony in opposition to these fees, nor cross-examined Mr. Bartolone regarding these fees. MAPSA further asserts that Delmarva has reserved a unilateral right to change a posting payment sequence set forth in the partial settlement as the result of discussions with gas marketers, but, in fact, Delmarva has filed modifications to its tariff that correspond with the sequence set forth in the partial settlement and that filing will be reviewed by the Commission -- no unilateral power has been asserted by Delmarva.

88. MAPSA also objects to the deferral of an issue identified and deferred in Section II.D of the Partial Settlement and asserts that, at a minimum, a date certain for resolution of the issue should be established. Section II. D provides that the deferred issue will be resolved in a proceeding that will be initiated by a prehearing conference on or about October 30, 1999. Finally, MAPSA objects to a \$.25 charge for consolidated billing services. In this regard, the Commission notes that the \$.25 charge is reciprocal and, thus, appears fair on its face -- if an Electric Supplier provides consolidated billing, Delmarva will pay the \$.25 charge. Moreover, the Partial Settlement explicitly permits a complaint to be filed on or after February 1, 2000 with respect to this charge. That would permit MAPSA to challenge this fee prior to the time when significant numbers of customers will be eligible for retail choice. Prior to that time, only a 500 customers are expected to be eligible, so the amount at issue with respect to this charge is most, about \$125 per month -- an insignificant amount that hardly justifies placing the entire partial settlement in jeopardy.

IV. ORDER

AND NOW, this 28th day of September, 1999, for the reasons set forth herein, IT IS

HEREBY ORDERED:

1. That Delmarva Power & Light Company's proposed restructuring plan, as amended herein, is approved.
2. That Delmarva Power & Light Company's proposed unbundled rates, as modified herein, are approved.
3. That customers with peak monthly loads of 300 kW or greater that leave Delmarva Power & Light Company to take electric service from a competitive electric supplier but later return to the default supplier (Delmarva Power & Light Company) during the transition period shall be required to commit to take service from Delmarva Power & Light Company for a twelve-month period, or pay market rates based on PJM prices; and that all other customers shall not be subject to any special restrictions on their ability to return to the default supplier (Delmarva Power & Light Company) during the transition period.
4. That the Partial Settlement filed on August 2, 1999 and recommended for approval by the Hearing Exrs is approved.
5. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

Chairman

/s/ Joshua M. Twilley  
Vice Chairman

/s/ Arnetta McRae  
Commissioner

Commissioner

/s/ John R. McClelland  
Commissioner

ATTEST:

/s/ Karen J. Nickerson  
Secretary

Retail competition will be phased in for Delmarva customers. See 26 Del.C. •1003(b)(1).

Capitalized terms have the meaning ascribed to them in the Act.

References to the prefiled direct testimony introduced at the evidentiary hearings will be cited as "(witness' name) at \_\_\_;" references to the prefiled rebuttal testimony introduced at those hearings will be cited as "Exh. \_\_\_ (witness' name-R at \_\_\_;" references to the transcript of the evidentiary hearings will be cited as "\_\_\_;" and references to any other exhibits introduced at those hearings will be cited as "Exh. \_\_\_ the parties' opening briefs to the Hearing Examiners will be cited as "[Party} OB at \_\_\_;" references to the parties' opening briefs to the Hearing Examiners will be cited as "[Party's] RB at \_\_\_:" and references to the briefs to the Hearing Examiners' report will be cited as "[Party] BOE at \_\_\_."

AFFECT is comprised of the Delaware Municipal Electric Corporation and its 9 municipal utility customers: DAFFC, the Low Income Electric Consumers Group, the Delaware Electric Cooperative, the Delaware Association of Alternative Energy Providers, the Delaware Alliance for Fair Competition, DEUG, the Old Dominion Electric Cooperative, various union locals and Conectiv. (Exh. 17 (Wathen) at 7).

This provision also appears in •1006(a)(1)(ii) of the Act.

Delmarva's case in Maryland was resolved on terms "similar" to those reached here; however, St. James testified that Delaware consumers may actually have fared better than Maryland consumers. (Exh. 17 (Wathen) at 7).

Delmarva witness Wathen testified that there is a small degree of seasonality built into the cost of electricity but its supply rates are based on average annual cost and are not seasonally differentiated. (Exh. 17 (Wathen) at 7).

DEC also supported a retention period for returning customers for the same reasons. (DEC OB at 4-21). However, DEC argued that it was differently situated than Delmarva, and urged the Commission to decide this issue as it may affect DEC, and so allow DEC to present its own evidence and arguments in its course of its restructuring proceeding. (DEC RB at 9).

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