

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

KA at Fairless Hills, LP	:	
	:	
v.	:	C-2017-2592335
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Eranda Vero
Administrative Law Judge

INTRODUCTION

This Initial Decision grants KA at Fairless Hills, LP’s Complaint against PECO Energy Company at Docket No. C-2017-2592335 after finding that the Complainant successfully carried its burden of proving that the Respondent failed to comply with the provisions of 66 Pa.Code §§ 1501 and 1303. This Initial Decision orders the Respondent to refund \$22,000 to KA at Fairless Hills, LP, plus interest at the legal rate from the date of each excessive payment. In addition, the Respondent is assessed a penalty of \$4,000.00 for its violations of the Public Utility Code and the Commission’s regulations.

HISTORY OF THE PROCEEDING

On February 20, 2017, KA at Fairless Hills, LP (Complainant or KA), through its counsel, filed a Complaint with the Pennsylvania Public Utility Commission (Commission) against PECO Energy Company (PECO, Respondent or Company) alleging that there are incorrect charges on its electricity bills from PECO. In particular, the Complainant alleged that Respondent failed to assist the Complainant in choosing the correct rate after the Complainant’s

tenant, a Pathmark store, vacated the Complainant's property at 500 Lincoln Highway, Fairless Hills, PA. As relief, the Complainant requested a refund of any overcharges paid to PECO for electric service from January 1, 2016, to the present.

On March 22, 2017, PECO filed its Answer denying the material allegations of the Complaint.

A Hearing Notice dated March 27, 2017, notified the parties that an initial hearing was scheduled for Friday, May 5, 2017, at 10:00 a.m. and that the matter was assigned to me.

On March 28, 2017, the Complainant through its counsel, filed a Petition for Interim Emergency Order (Petition) with the Commission pursuant to 52 Pa.Code § 3.6. The Complainant requested an emergency order to restore its electric service. According to the Petition, lack of electric service and operating fire safety equipment presented an ongoing threat to the health and safety of the consumers who visit other stores in the shopping center as well as residents who live near the shopping center. The Complainant expressed its willingness to pay its current bills and maintained that PECO would suffer no prejudice if the Commission ordered the Respondent to immediately restore electric service to the vacant store.

By Notice dated March 31, 2017, a hearing was scheduled to address the Complainant's Petition. A Prehearing Order was issued on April 3, 2017.

The hearing on the Petition was held at the Philadelphia Regional Office, 801 Market Street, on April 7, 2017, at 2:00 p.m. The Complainant was represented by Hope Bosniak, Esq. The Respondent was represented by Shawane Lee, Esq. Prior to the hearing, the parties engaged in settlement discussions and were able to reach a settlement agreement on the Complainant's request for emergency relief in the form of restoration of its electricity service. Ms. Lee stated the terms of the agreement on the record at the hearing. Specifically, the Complainant agreed to pay \$11,068.00 of its outstanding balance of \$25,736.95 in cash or certified check. Tr. 4-5. In exchange for the payment of \$11,068.00, Respondent agreed to restore power to Complainant's premises located at 500 Lincoln Highway, Fairless Hills, PA. *Id.*

In addition, the parties agreed that, if the Complainant fails to pay current undisputed charges going forward, the Respondent is authorized to suspend or terminate its electricity service in accordance with the Commission's statute and regulations. *Id.*

Because the settlement agreement gave the Complainant the relief it requested in its Petition, on April 11, 2017, I issued an Order denying the Petition as moot.

The matter proceeded to evidentiary hearings which convened as scheduled on May 5, 2017. David S. Dessen, Esq. represented the Complainant and presented the testimony of Olga Gilfedder, Martha Maik, and Mark P. Kessler. The Complainant sponsored 16 exhibits (Complainant's Exhibits 1-5, 5A, 6-9, 11-14, and 16-17) which were admitted into the record. Shawane L. Lee, Esq. represented the Respondent, and presented the testimony of Christopher Cavaliero who is a Senior Account Manager for PECO's Large Customer Services. The Respondent sponsored 16 exhibits which were admitted into the record.

The record in this matter closed upon receipt of the hearing transcript on June 6, 2017.

FINDINGS OF FACT

1. The Complainant is KA at Fairless Hills, L.P., which mailing address is 25A Hanover Road, Suite 350, Florham Park, NJ 07932. Tr. 26.
2. The Respondent is PECO Energy Company.
3. The Klein Group is the managing partner and the managing agent for KA. Tr. 109.
4. The Klein Group is also located at 25A Hanover Road, Suite 350, Florham Park, NJ 07932. Tr. 26.

5. The Klein Group owns and operates 27 properties which include shopping centers in New Jersey, retail condominiums in New York City, and two shopping centers in Pennsylvania. Tr. 86.

6. Complainant owns the Fairless Hills Shopping Center at 500 Lincoln Highway, Fairless Hills, PA (Service Address). Tr. 86.

7. Complainant bought the Fairless Hills Shopping Center in or about 2013, and that is when The Klein Group added Pennsylvania properties to its real estate portfolio. Tr. 110-11.

8. The Great Atlantic & Pacific Tea Company, better known as A&P, owned and operated a Pathmark store at the Service Address. Tr. 90.

9. The Pathmark stores in PECO's service territory, including the one which vacated the Complainant's building, were on PECO's high-tension power rate (HT). Tr. 146-47, 151.

10. The HT rate is a discounted rate on the distribution side that PECO offers to commercial or industrial customers which have high tension service installed and own and maintain their own electrical equipment, and transformer switch gear. Tr. 146-47.

11. Because it is discounted on the distribution side, the HT rate is a lower rate than PECO's general service rate (GS). Tr. 147.

12. According to the PECO tariff, all customers who choose the HT rate must do so by entering into an initial three-year contract with PECO. Tr. 150-51, PECO Exhibit 4.

13. The only way for a customer to get out of the three-year contract would be by closing the account. Tr. 150.

14. The HT rate requires that a customer be locked into “contract limits,” which represent the maximum/minimum demand that PECO will reserve for that customer’s capacity on the line. Tr. 148.

15. The minimum is calculated as 40% of the maximum demand and the customer cannot be charged for less than the contractual minimum even if its usage is much lower. Tr. 149.

16. A commercial customer on PECO’s HT rate will be billed based on its usage or measured load, as long as that load does not fall below the minimum load contracted. Tr. 158.

17. There is no penalty for an HT customer that goes over the contracted maximum demand, but the customer runs the risk of power quality problems as it is pulling more than what PECO has reserved for it. Tr. 149.

18. PECO asks its HT customers to provide the Company with information on how much electricity they anticipate using. Tr. 149.

19. PECO’s engineering team verifies that the requested capacity is available and then reserves it for the HT customer. *Id.*

20. PJM Interconnection LLC (PJM) oversees the electrical grid on most of the East Coast. Tr. 159.

21. During a specific five-day period, usually in July, PJM will review each electric commercial customer’s peak demand and determine the Peak Load Contribution (PLC) value for that customer’s account. Tr. 160-61, 242-43.

22. The new PLC becomes effective in May of the following year. Tr. 60, 243.

23. In January of 2016, Pathmark's existing PLC at the Service Address was 494 kW as determined by its peak demand during a five-day period in July of 2014. Tr. 161-62.

24. In the summer of 2015, A&P filed for bankruptcy. Tr. 90.

25. Following A&P's bankruptcy discharge, Pathmark rejected the lease it had with KA and vacated the Service Address in late December of 2015. Tr. 90.

26. In late 2015, Pathmark contacted PECO requesting to have electric service disconnected at all previous Pathmark locations. Tr. 151-52.

27. Electric service was scheduled to be disconnected from all the locations previously occupied by Pathmark in early January of 2016. Tr. 152.

28. Because Christopher Calaviero had been Pathmark's account manager at PECO, Pathmark provided his contact information to the owners of the locations that the company vacated. Tr. 152.

29. In January of 2016, Martha Maik was a part-time clerical employee of The Klein Group working just one day per week. Tr. 23, 28.

30. In January of 2016, Ms. Maik contacted Mr. Cavaliero at PECO requesting that electric service at the Service Address be placed in KA's name. Tr. 23-24, 166, 241, 277.

31. The bills were to be sent to the KA's and The Klein Group's office at 25A Hanover Road, Suite 350, Florham Park, NJ 07932. Tr. 26.

32. Ms. Maik declined to engage in a rate selection for KA with Mr. Cavaliero, asking instead that everything be kept "as is" until a supervisor from KA or The Klein Group could get back to PECO. Tr. 168-69, 238, 277.

33. On January 11, 2016, PECO placed the account for the Service Address under KA's name keeping Pathmark's rate, procurement class and PLC value in place. Tr. 174.

34. PECO's tariff rules for designation of procurement class demand that a new customer in an existing facility be assigned to the same procurement class as the last customer in that facility unless it can provide PECO with an engineering estimate of their diversified peak demand for an existing facility with a substantially different use. Tr. 163-65, PECO Exhibit 4.

35. Between January 2016 and July 2016, KA received and paid the following PECO bills:

Billing period	Usage (kWh)	Distribution/Transmission (kW per Contract)	Amount
1/11/2016-2/4/2016	57,984	113	\$6,309.19
2/4/2016-3/4/2016	68,534	113	\$8,222.58
3/4/2016-4/4/2016	62,224	121	\$7,352.56
4/4/2016-5/4/2016	74,208	122	\$8,481.95
5/4/2016-6/2/2016	79,005	140	\$7,380.94
Total	15,455	129	\$37,747.22

Tr. 174-76, Complainant Exhibit 1, PECO Exhibit 1.

36. In April of 2016, the accountant for The Klein Group, Olga Gilfedder, noticed that the electric bills for the Service Address were abnormally high for a vacant property. Tr. 33-34, 70.

37. A property manager was sent to the Service Address to make sure that all unnecessary electrical equipment was turned off. Tr. 92-93, 114, 125-26.

38. The property manager turned off the HVAC equipment at the Service Address, but the Complainant's bills from PECO remained high. Tr. 93, 114.

39. On July 1, 2016, PECO issued another bill to KA for electric service during the period June 2, 2016 to July 1, 2016, in the amount of \$5,800.52. PECO Exhibit 1.

40. On July 13, 2016, Ms. Gilfedder contacted Mr. Cavaliero disputing KA's electric bill for the Service Address as abnormally high for a vacant property. Tr. 93, 176.

41. During the July 13, 2016 discussion with Ms. Gilfedder, Mr. Cavaliero suggested that KA would be better served under PECO's GS rate. Tr. 177, 189.

42. PECO's GS rate has no contract limit, and no reserved capacity. Tr. 158.

43. A PECO customer under the GS rate would be billed strictly based on the measured load. Tr. 158, PECO Exhibit 4.

44. The contract term for the GS rate is one year, instead of three years for the HT rate. Tr. 159, PECO Exhibit 4.

45. On July 15, 2016, Mr. Cavaliero drafted a contract and sent it to KA to sign. Tr. 177, PECO Exhibit 7.

46. The new contract included KA's information and contract terms preselected by PECO. PECO Exhibit 7.

47. Under KA's new contract with PECO, the rate for service was GS, the contract term was one year commencing on the first day of July 2016, and the default service procurement class was Procurement Class 3 (101-500 kW measured or estimated peak demand). PECO Exhibit 7.

48. The new contract identified KA as an “Existing Customer” with current established PLC at 433 kW. Tr. 50, PECO Exhibit 4.

49. PECO’s selection of KA’s procurement class was based on KA’s usage history since January of 2016, whereas the contract PLC value reflected Pathmark’s PLC as determined in July of 2015. Tr. 179-81, PECO Exhibit 1.

50. KA remained on Pathmark’s PLC value of 433 kW for two billing periods: July 1, 2016 – August 1, 2016, and August 1, 2016 – August 31, 2016. Complainant Exhibit 2.

51. KA’s usage and charges during the period July 1, 2016 to August 31, 2016, were as follows:

Billing period	Usage (kWh)	Distribution/Transmission (kW per Contract)	Amount
7/1/2016-08/02/2016	22,066	73	\$6,773.42
8/2/2016-8/31/2016	16,921	33	\$3,444.24

Complainant Exhibit 2, PECO Exhibit 1.

52. In early September 2016, KA’s attorney contacted Mr. Cavaliero to dispute the Complainant’s PLC value. Tr. 192.

53. By September of 2016, PECO’s energy acquisition group was able to review KA’s usage for July and August of 2016, and determined that KA’s PLC value was 50 kW. Tr. 193, 198, 247.

54. On September 21, 2016, Mr. Cavaliero e-mailed Ms. Gilfedder a Transfer of Information Form with instructions to have it sent back to PECO under the Complainant’s letterhead. Tr. 208-209, PECO Exhibit 10.

55. On September 22, 2016, the Complainant sent the completed Transfer of Information Form back to PECO. Tr. 210.

56. The new PLC took effect on September 1, 2016, and was reflected in KA's electricity bill issued on September 30, 2016. Tr. 194.

57. KA's usage and charges during the period August 31, 2016 to February 27, 2017 were as follows:

Billing period	Usage (kWh)	Distribution/Transmission (kW Measured)	Amount
8/31/2016-9/30/2016	13,000	22	\$1,096.52
9/30/2016-10/31/2016	15,320	22	\$1,423.60
10/31/2016-12/01/2016	15,386	22	\$653.02
12/01/2016-1/6/2017	16,117	56	\$1,498.58
1/6/2017-2/3/2017	21,362	46	\$1,690.90
02/3/2017-2/27/2017	23,613	45	\$1,524.54

Complainant Exhibit 3, PECO Exhibit 1.

58. KA did not make any payments towards its account with PECO during the period July 2016 to April 2017. Tr. 213, PECO Exhibit 1.

59. On November 14, 2016, PECO issued a ten-day termination notice to KA for a past due balance of \$17,247.59. Tr. 216-17, PECO Exhibit 3.

60. On November 21, 2016, PECO issued a 72-hour termination notice to the Complainant. Tr. 217-18, PECO Exhibit 3.

61. A second 72-hour notice was mailed to the Complainant on December 5, 2016. *Id.*

62. On December 30, 2016, PECO terminated KA's service and left a post-termination notice at the Service Address for a past due balance of \$18,921.91. Tr. 221, PECO Exhibit 3.

63. On January 5, 2017, KA filed an informal complaint with the Commission's Bureau of Consumer Service (BCS) at BCS Case # 3498641, alleging a high billing dispute. Tr. 224-25, PECO Exhibit 15.

64. In response to the informal complaint, PECO offered to restore service to Complainant provided KA paid its outstanding balance of now \$20,128.87, minus a \$5,000.00 credit towards its account. Tr. 227.

65. On January 10, 2017, BCS closed the informal complaint based on PECO's terms to restore service. Tr. 228-29.

66. On January 11, 2017, PECO turned the power back on at the Service Address without receiving a payment from KA. Tr. 230, PECO Exhibit 3.

67. On February 21, 2017, PECO resumed collection activities on KA's account by posting a 72-hour termination notice. PECO Exhibit 3.

68. On March 7, 2017, PECO terminated KA's service at the taps for a past due balance of \$24,212.41 and left a post-termination notice at the property. PECO Exhibit 3.

69. On April 11, 2017, KA paid PECO \$11,068.00 of its outstanding balance of \$25,736.95 in accordance with an agreement reached on April 7, 2017. PECO Exhibit 2.

70. The Service Address was vacant from January 2016 through the day of the hearing. Tr. 92.

DISCUSSION

In the present formal Complaint, KA alleged that there are incorrect charges in its electricity bills from PECO. In particular, the Complainant alleged that Respondent failed to assist the Complainant in choosing the correct rate after the Complainant's tenant, a Pathmark store, vacated the Complainant's property at 500 Lincoln Highway, Fairless Hills, PA. As relief, the Complainant requested a refund of any overcharges paid to PECO for electric service from January 1, 2016, to the present.

As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Public Utility Code (Code), 66 Pa.C.S. § 332(a). In *Waldron v. Philadelphia Electric Company*, 54 Pa. PUC 98 (1980) (*Waldron*), the Commission explained the process for initially meeting the burden of proof. A complainant must first establish a *prima facie* case, showing that the utility breached some duty owed to the complainant, in that the utility violated the Public Utility Code or a regulation or order of the Commission. 66 Pa.C.S. § 701. If the complainant establishes a *prima facie* case, then the burden of going forward with the evidence, but not the ultimate burden of proof, shifts to the utility to rebut the *prima facie* case with evidence which is at least co-equal. If the utility presents co-equal evidence, the burden of going forward shifts back to the complainant, to rebut the utility's case by a preponderance of the evidence. *Poorbaugh v. West Penn Power Company*, 1994 Pa. PUC LEXIS 95 (*Poorbaugh*). Preponderance of the evidence means that the party with the burden of proof has presented evidence that is more convincing than that presented by the other party. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa.Cmwlt. 1990) *alloc. den.*, 529 Pa. 654, 602 A.2d 863 (1992). In addition, the Commission's decision must be supported by "substantial evidence," which consists of evidence that a reasonable mind might accept as adequate to support a conclusion. A mere "trace of evidence or a suspicion of the existence of a fact" is insufficient. *Norfolk and Western Railway Co. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by the complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the

complainant shifts to the respondent. If the evidence presented by the respondent is of co-equal weight, the complainant has not satisfied its burden of proof. The complainant would be required to provide additional evidence to rebut the evidence of the respondent. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa.Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa.Cmwlth. 2001).

At the hearing, the Complainant presented the testimony of Martha Maik. Prior to 2017, Ms. Maik was a part time clerical employee for The Klein Group working only one day a week, covering for another employee of The Klein Group who had that day off. Tr. 23, 28. She testified that in January of 2016, she was asked to contact PECO in order to place electricity service at the Service Address in KA's name. Tr. 23-24. The bills were to be sent to KA's and the Klein Group's office at 25A Hanover Road, Suite 350, Florham Park, NJ 07932. Tr. 26. Ms. Maik was instructed to inform PECO that Pathmark had gone out of business and was closing its store at the Service Address. Tr. 24. She needed to make sure that the power would not be turned off at the location. Tr. 24-25, 29. Ms. Maik did not recall who she spoke with at PECO or any details of the conversation. Tr. 25-28, 30. According to her, it was a routine and unremarkable request to switch electric service at the Service Address from Pathmark's name to KA's. Tr. 30.

Next, the Complainant presented the testimony of Olga Gilfedder, who is an accountant with The Klein Group in charge of paying all the bills that come in for all the properties that the group owns, including KA's. Tr. 32-33. Ms. Gilfedder was first employed by The Klein Group in March of 2016. Tr. 33. In April of 2016, she noticed that the electric bills for the Service Address were abnormally high for a vacant property. Tr. 33-34, 70. She first contacted the property manager for the Service Address to ensure that only the necessary electrical equipment was on. Tr. 39-40. The electric bills, however, did not decrease, so in July

of 2016 Ms. Gilfedder contacted Mr. Cavaliero, whose name appeared in KA's bill from PECO. Tr. 39-40, Complainant Exhibit 1. During that first conversation, Mr. Cavaliero informed her that Pathmark had a contract with PECO and that the Complainant had inherited that contract. Tr. 40-41.

On July 26, 2016, Mr. Cavaliero informed Ms. Gilfedder via e-mail that he had been unable to locate the original Transfer of Information Form from KA, nor the initial contract. Tr. 45-46. Attached to Mr. Cavaliero's July 26, 2016 e-mail, there was a pre-filled contract for service at the Service Address. Tr. 47, Complainant Exhibit 5. The contract listed KA under Procurement Class 3 (101-500 kW measured or estimated peak demand) and as an "Existing Customer" with current established PLC at 433. Tr. 47-50, Complainant Exhibit 5. On August 11, 2016, KA sent PECO the signed contract, then requested that it be rebilled for usage during the period January to July 2016. Tr. 52-53. On August 26, 2016, Mr. Cavaliero communicated to KA that PECO's policy prevented the new contract terms from becoming effective retroactively. Tr. 51.

Ms. Gilfedger testified that KA's electricity bills remained high even after the new contract came into effect. Tr. 55-56, Complainant Exhibit 2. She explained that after reviewing the bills, she began to suspect that it was the peak load contribution (PLC), then set at 433 kW, which was responsible for the high charges. Tr. 56-60. She contacted Mr. Cavaliero, who sent her an e-mail about changing the PLC value on the account, along with an attached Transfer of Information Form to be sent back on the Complainant's company letterhead. Tr. 60-61. The Transfer of Information Form had a PLC value set at 50 kW. Tr. 61-62, Complainant Exhibit 7.

Ms. Gilfedder testified that KA's bills following the new PLC effective date of September 1, 2016, have been substantially lower from what they were before. Tr. 63. Ms. Gilfedder testified that, once KA saw the lower electric bills, it asked PECO for a rebilling based on the new rate and PLC value. Tr. 66-69. The Complainant's request was rejected by PECO. *Id.*

During cross-examination, Ms. Gilfedder explained that the Complainant had not approached PECO with questions about the distribution charges and the PLC because the Complainant did not know what they were. Tr. 71-72. She stated that her request to Mr. Cavaliero during her communications with him in July of 2016 was for the Complainant to be billed on usage. Tr. 72. She did not discuss the PLC or the other charges with him because she did not know what they were. Tr. 72. “We did not know that ... we’ve been billed those set numbers months after months after months.” Tr. 72. Mr. Cavaliero on his end, did not mention the PLC, the distribution charges, transmission charges and procurement class when talking to her in July of 2016. Tr. 72-73. Ms. Gilfedder insisted however that, from her first communication with Mr. Cavaliero in July of 2016, she had explained to him that the Service Address was vacant and that the bills were abnormally high for a vacant property. Tr. 73, 82.

Next, the Complainant presented the testimony of Mark Kessler, who is the Asset Manager for The Klein Group. Tr. 88. In his position, Mr. Kessler is responsible for overseeing the daily operation of the group’s portfolio of commercial real estate in three states, New York, New Jersey and Pennsylvania. Tr. 86. He explained that the Complainant owns the Fairless Hills Shopping Center where the Service Address is located, and that The Klein Group is the managing partner and the managing agent for KA. Tr. 109. He explained that the group owns and operates 27 properties, which include shopping centers in New Jersey, retail condominiums in New York City, and two shopping centers in Pennsylvania. Tr. 86.

Mr. Kessler testified that A&P, who is the owner of Pathmark, filed for bankruptcy in the summer of 2015. Tr. 90. A&P had 456 stores under different name brands across three or four different states. The Service Address was one of those stores. Tr. 90. The bankruptcy discharge gave Pathmark the right to reject the lease it had with KA, so in late December of 2015 Pathmark vacated the Service Address. Tr. 90. Mr. Kessler testified that, when one of its tenants vacates one of its properties, The Klein Group’s standard practice is to walk through the property to ensure that it is secure and that unnecessary equipment is turned off. Tr. 88, 91. Next, the group would place the utilities in its own name. Tr. 88, 90-91. The same procedure was followed for the Service Address. However, in April of 2016, Ms. Gilfedder brought to his attention the electricity bills that the Complainant was paying for

the Service Address. Tr. 92, 114. According to Mr. Kessler, “the bill seems high for a vacant 65,000 square foot box.” Tr. 92. A property manager was sent to the Service Address to make sure all unnecessary electrical equipment was turned off. Tr. 92-93, 114, 125-26. He found that the HVAC equipment at the location was still on and corrected the situation, but the bills from PECO remained high. Tr. 93, 114. Ms. Gilfedder contacted Mr. Cavaliero at PECO to question the high bills that the Complainant was receiving. Tr. 93.

Mr. Kessler testified that from January 2016 to July 2016, the Complainant had paid over \$37,000 to PECO. Tr. 94. An additional amount of \$11,000 was paid in April of 2017 in order to have service reconnected at the Service Address. Tr. 108.

Mr. Kessler explained that Complainant bought the Fairless Hills Shopping Center in or about 2013, and that is generally when The Klein Group added the Pennsylvania properties to its real estate portfolio. Tr. 110-11. He stated that the Complainant and the group never had an account with PECO before Pathmark vacated the Service Address. Tr. 110. Before that, The Klein Group did not have any vacancies in its Pennsylvania shopping centers. Tr. 111. He testified that the group had dealt with various utilities in New Jersey and New York without encountering the problems they faced with the electricity service for the Service Address. Tr. 112. Mr. Kessler stated that prior to the dispute with PECO, he was not aware that there was a rate structure in Pennsylvania or that there were different rates available for the same service. Tr. 112-14. More importantly, he stated that PECO did not tell the Complainant about the pre-existing rates that the Complainant would inherit from the previous tenant. Tr. 112-13, 126-27.

When asked whether the Complainant had assigned an employee to manage, negotiate or discuss rates with PECO, Mr. Kessler responded in the negative, “We don’t have someone like that because there’s nobody we ever had to discuss rates with. There’s never been a utility that we’ve discussed rates with. Just put into our name and we get billed for usage. So, it had never come up before. That was the problem.” Tr. 115-16.

PECO presented the testimony of Christopher Cavaliero, who is a Senior Account Manager for PECO’s Large Customer Services in charge of managing the accounts of PECO’s

large commercial customers. Tr. 143. He handles the accounts of all generating stations, nuclear power plants, supermarkets and fast food restaurants. Tr. 144. With close to 50 Pathmark and affiliated Super Fresh stores in PECO's service territory, Pathmark's accounts were among those managed by Mr. Cavaliero. Tr. 145. Mr. Kessler testified that Pathmark was on PECO's high tension power rate (HT), which is a discounted rate on the distribution side that PECO offers to commercial or industrial customers that have high tension service installed and that own and maintain their own electrical equipment, and transformer switch gear. Tr. 146-47. Because it is discounted on the distribution side, the HT rate is a lower rate than PECO's general service rate (GS). Tr. 147. However, the HT rate has a higher customer charge than the GS rate. Tr. 148.

Another characteristic of the HT rate is that it requires a customer to be locked into "contract limits," which represent the maximum/minimum demand that PECO will reserve for that customer's capacity on the line. Tr. 148. Mr. Cavaliero explained that PECO will ask customers to provide the Company with information on how much electricity they anticipate using. Next, PECO's engineering team will verify that the requested capacity is available, and then reserve it for them. Tr. 149. The "catch," according to Mr. Cavaliero, is that the customer will be held to its contract limits. *Id.*

Mr. Cavaliero explained that a customer will be billed on its usage or measured load, as long as that load does not fall below the minimum load contracted. Tr. 158. The minimum is calculated as 40% of the maximum demand, and the customer cannot be charged for less than the contractual minimum even if the customer's usage is much lower. Tr. 149. There is no penalty for a customer that goes over the contracted maximum, but the customer would run the risk of power quality problems as it is pulling more than what PECO has reserved for it. Tr. 149.

Mr. Cavaliero further explained that all customers who choose the HT rate must do so by entering into a three-year contract with PECO. Tr. 150. The only way for a customer to get out of the three-year contract would be by closing the account. Tr. 150. Pursuant to PECO's Tariff, the initial contract term for a customer under PECO's HT rate is three years. Tr. 151, PECO Exhibit 4.

Mr. Cavaliero testified that all the Pathmark stores in PECO's service territory, including the one which vacated the Complainant's building, were on PECO's HT rate. Tr. 151. He confirmed the Complainant's testimony that Pathmark declared bankruptcy in 2015 and closed all their stores in PECO's service territory. He explained that, in late 2015, Pathmark contacted PECO requesting to have electric service disconnected at all previous Pathmark locations. Tr. 151-52. Electric service was scheduled to be disconnected from all these locations in early January 2016. Tr. 152. Because Mr. Calaviero had been Pathmark's account manager, Pathmark provided his contact information to the owners of the locations that the company vacated. Tr. 152.

Mr. Cavaliero explained that, when he was contacted by applicants trying to establish service in the locations vacated by Pathmark, he would take their information, find out what they were, and more importantly he would discuss contract limits with the applicants because these locations were previously served under the HT rate. Tr. 152. Mr. Cavaliero explained that he would try to find out what the new load is going to be in the location in order to determine whether the contract limits needed to be adjusted. Tr. 152.

According to Mr. Cavaliero, it is not PECO's responsibility or obligation to recommend the most advantageous rate to new applicants, e.g, HT or GS. Tr. 153, 155. More specifically, he testified that he will assist applicants with the rate selection, but only if he is asked. Mr. Cavaliero explained that he will present the applicant with PECO's rate options, point the applicant to PECO's tariff to show them how each rate is set up, but "ultimately the decision is theirs." Tr. 154-55.

In support of his position, Mr. Cavaliero pointed to PECO Tariff Section 11 – Tariff and Contract Options, which states that, "... a customer shall select the Base Rate on which the customer will be billed. The Company upon request will, to a reasonable extent, assist customers in selecting the most advantageous Base rate or Rate application (i.e. Base rate together with applicable riders)." Tr. 154, PECO Exhibit 4. Mr. Cavaliero explained that rate analysis is a difficult and time consuming process if it is to be performed by PECO for every new

applicant. Tr. 157. Consequently, PECO begins the process by informing the applicant of the available rate options and expects the customer to make the selection. Tr. 157.

With that explanation in place, Mr. Cavaliero testified that, when approached by applicants trying to put in their name service that was previously rendered under the HT rate, he always asks them whether they will need new contract limits. Tr. 153, 156-57. If the person calling on behalf of the applicant is an electrical engineer, they will know what they are doing and will have no questions for Mr. Cavaliero. However, if the applicant is unaware of PECO's rate structures and riders, he expects his question regarding contract limitations to prompt the applicant to seek further assistance from PECO. Tr. 152-53. Mr. Cavaliero explained that at this stage, he would try to determine the needs of the applicant and go over the rate options with the applicant in to order to assist them in making the decision. Tr. 154.

Mr. Cavaliero testified that in order to serve the store at the Service Address, Pathmark had the option of choosing between the HT rate and the general service rate (GS). The GS rate is higher than the HT rate, but the GS rate has no contract limit, and no reserved capacity. Tr. 158. The customer under the GS rate would be billed strictly based on the measured load. Tr. 158, PECO Exhibit 4. The contract term for the GS rate is one year, instead of three years for the HT rate. Tr. 159, PECO Exhibit 4.

Next, Mr. Cavaliero testified with regard to PECO's peak load contribution (PLC). He stated that PJM Interconnection LLC oversees the electrical grid on most of the East Coast. Tr. 159. According to Mr. Cavaliero, during a specific five-day period, usually in July, PJM will look into each electric commercial customer's peak demand and establish the PLC for that customer's account. Tr. 160-61, 242-43. According to Mr. Cavaliero, PECO is not involved in the determination of the PLC, but gets that information directly from PJM. Tr. 160-243. The new PLC becomes effective in May of the following year. Tr. 160, 243.

In January of 2016, Pathmark's existing PLC at the Service Address was 494 kW, as determined by their peak demand during a five-day period in July of 2014. Tr. 161-62. According to Mr. Cavaliero, any new customer who came in at the location vacated by Pathmark

would “inherit” Pathmark’s PLC load (from July of 2014), unless it could provide PECO with information showing that their PLC should be lowered. Tr. 162-63. In support of his statement, Mr. Cavaliero pointed to PECO Tariff Section 22 – Rules for designation of Procurement Class. More specifically, he read Section 22.1(g) of the PECO Tariff, which states, “A new customer in an existing facility shall be assigned to the same procurement class as the last customer in that facility unless rule 22.1f applies.” In turn, Section 22.1(f) of the PECO Tariff states, “New customers procurement class shall be based upon an engineering estimate of their diversified peak demand for a new facility or an existing facility with a substantially different use.” Tr. 163-65, PECO Exhibit 4. However, Mr. Cavaliero explained that “it rarely happens” that a new customer can show that their demand is going to be less (than that of the previous tenant) “because a lot of customers can’t really provide enough information to justify it.” Tr. 165.

Mr. Cavaliero further testified that in January of 2016, he got a call from Martha Maik from The Klein Group. Tr. 166. She informed him that The Klein Group was taking over the Service Address from Pathmark as Pathmark was moving out, and she needed the electric service placed in KA’s name. Tr. 166, 241, 277. Mr. Cavaliero testified that he informed Ms. Maik of the contract limits associated with the account and asked if the applicant wanted to keep them as they were, or adjust them. Tr. 168-69. Ms. Maik indicated that she was not familiar with contract limits, that she had to talk to her boss before making a decision, but that she needed to place service at the Service Address in KA’s name. Tr. 168-69, 238. In the meantime, PECO was to keep everything as it was until KA or The Klein Group reached back to discuss the rates at a different date. Tr. 169, 238, 277. Mr. Cavaliero maintained that Ms. Maik did not inform him during their January conversation that the Service Address was vacant. Tr. 169.

Mr. Cavaliero explained that normally, if he had the applicant’s decision on the rate, he would complete an electric service release (ESR) with the applicant’s information and Pathmark’s information and send the form to PECO’s billing group, who would then process the transfer. Next, PECO would mail a contract to the new customer with the selected rate and contract limits. Tr. 170. Mr. Cavaliero admitted that in the Complainant’s case, he did not send out a contract following the conversation with Ms. Maik. Tr. 170-71. He explained that the reason for not sending out a contract to KA was because, although Ms. Maik had asked him to

keep everything “as is,” KA had not actually decided on a rate. Ms. Maik had indicated that there would be a follow up call from her boss to discuss and determine the rate, so Mr. Cavaliero held off on sending out a contract to KA with Pathmark’s existing terms (HT rate and contract limits). He explained that, had KA signed the contract without fully understanding it, KA would have been locked inadvertently into a three-year contract. Tr. 170-71. Instead, Mr. Cavaliero argued that receiving service without a contract gave KA some leeway to call back in a few days, or weeks, to adjust the terms. Tr. 172. However, no one from the Complainant called Mr. Cavaliero back until July of 2016. Tr. 171.

Electric service was initiated in KA’s name on January 11, 2016. Tr. 174. Between January 2016 and July 2016, KA received and paid the following PECO bills:

Billing period	Usage (kWh)	Distribution/Transmission (kW per Contract)	Amount
1/11/2016-2/4/2016	57,984	113	\$6,309.19
2/4/2016-3/4/2016	68,534	113	\$8,222.58
3/4/2016-4/4/2016	62,224	121	\$7,352.56
4/4/2016-5/4/2016	74,208	122	\$8,481.95
5/4/2016-6/2/2016	79,005	140	\$7,380.94
Total	15,455	129	\$37,747.22

Tr. 174-76, Complainant Exhibit 1, PECO Exhibit 1. On July 1, 2016, PECO issued another bill to KA for electric service during the period June 2, 2016 to July 1, 2016, in the amount of \$5,800.52. PECO Exhibit 1. The bill was due on July 20, 2016. *Id.* On July 13, 2016, Mr. Cavaliero received a call from Ms. Gilfedder, who challenged KA’s electric bill for the Service Address as abnormally high for a vacant property. Tr. 176. At this time, Mr. Cavaliero suggested that KA would be better served under the GS rate, which carried no contract limits and allowed KA to be billed strictly on usage. Tr. 177, 189.

Mr. Cavaliero testified that he e-mailed the contract to Ms. Gilfedder on July 15, 2016, and informed her that PECO’s billing procedures did not allow him to backdate a rate

change. Tr. 177, 187, PECO Exhibits 6 and 7. The new contract was essentially PECO’s form contract for commercial/industrial class electric service (rates GS, PD, and HT) with KA’s information and contract terms selected by PECO. PECO Exhibit 7. The rate for service was GS, the contract term was one year commencing on the first day of July 2016, and the default service procurement class was Procurement Class 3 (101-500 kW measured or estimated peak demand). Lastly, under the peak load contribution section, PECO selected the classification “Existing Customer” with current established PLC at 433 kW. Tr. 50, PECO Exhibit 4. Mr. Cavaliero explained that PECO’s selection of KA’s procurement class was based on KA’s usage history from the time they were at the Service Address (Tr. 179, PECO Exhibit 1), whereas the contract PLC reflected Pathmark’s PLC as determined in July of 2015. Tr. 179-81.

When asked why the contract sent to KA on July 15, 2016 reflected Pathmarks’ PLC, Mr. Cavaliero responded that Pathmark’s PLC was kept for two reasons: “One was that the contract was a quicker way to drop a bill down a little. So something I could do relatively fast, because all it takes is just a customer agreeing to rate change and we can switch them over. But also because, again, we didn’t have that summer load...” Tr. 261-62.

KA was left on Pathmark’s 433 PLC for two billing periods (July 1, 2016 – August 1, 2016, and August 1, 2016 – August 31, 2016.) Complainant Exhibit 2. The usage and charges during this period were as follows:

Billing period	Usage (kWh)	Distribution/Transmission (kW per Contract)	Amount
7/1/2016-08/02/2016	22,066	73	\$6,773.42
8/2/2016-8/31/2016	16,921	33	\$3,444.24

Complainant Exhibit 2, PECO Exhibit 1.

In early September 2016, Mr. Cavaliero was contacted by Douglas Maloney, Esq, who was KA’s attorney at the time. According to Mr. Cavaliero, this was the first time that KA disputed the PLC to PECO. Tr. 192. Because in September of 2016, PECO’s energy acquisition group was able to review KA’s usage for July and August 2016, it was able to determine that

KA's PLC value was 50 kW. Tr. 193, 198, 247. On September 21, 2016, Mr. Cavaliero e-mailed to Ms. Gilfedder a Transfer of Information form with instructions to have it sent back on the customer's letterhead. Tr. 208-209, PECO Exhibit 10. The Complainant complied with his instructions on September 22, 2016. Tr. 210. The new PLC took effect on September 1, 2016, and was reflected in KA's electricity bill issued on September 30, 2016. Tr. 194. From that point on, KA was in the most advantageous position for the account. Tr. 195.

Billing period	Usage (kWh)	Distribution/Transmission (kW Measured)	Amount
8/31/2016-9/30/2016	13,000	22	\$1,096.52
9/30/2016-10/31/2016	15,320	22	\$1,423.60
10/31/2016- 12/01/2016	15,386	22	\$653.02
12/01/2016-1/6/2017	16,117	56	\$1,498.58
1/6/2017-2/3/2017	21,362	46	\$1,690.90
02/3/2017-2/27/2017	23,613	45	\$1,524.54

Complainant Exhibit 3, PECO Exhibit 1.

Mr. Cavaliero testified that KA did not make any payment towards its account with PECO during the period July 2016 to April 2017. Tr. 213. On November 14, 2016, PECO issued a ten-day termination notice for a past due balance of \$17,247.59. Tr. 216-17, PECO Exhibit 3. A 72-hour notice followed on November 21, 2016. Tr. 217-18, PECO Exhibit 3. A second 72-hour notice was sent out on December 5, 2016. *Id.* On December 30, 2016, PECO terminated KA's service and left a post-termination notice at the Service Address for a past due balance of \$18,921.91. Tr. 221, PECO Exhibit 3. On January 5, 2017, KA filed an informal complaint with the Commission's Bureau of Consumer Service (BCS) at BCS Case # 3498641 alleging a high billing dispute. Tr. 224-25, PECO Exhibit 15. In response to the informal complaint, PECO offered to restore service to the Complainant provided KA paid its outstanding balance of \$20,128.87, minus a \$5,000.00 credit towards its account. Tr. 227. On January 10, 2017, BCS closed the informal complaint based on PECO's offer. Tr. 228-29. Mr. Cavaliero

testified that on January 11, 2016, PECO turned the power back on at the Service Address without receiving a payment from KA. Tr. 230, PECO Exhibit 3.

On February 21, 2017, PECO resumed collection activities on KA's account by posting a 72-hour termination notice. PECO Exhibit 3. On March 7, 2017, PECO terminated service at the taps for a past due balance of \$24,212.41 and left a post-termination notice at the property. PECO Exhibit 3. On April 11, 2017, KA paid PECO \$11,068.00 of its outstanding balance of \$25,736.95 in accordance with an agreement reached on April 7, 2017.

The Commission's statute addresses situations when customers of utilities have multiple rates that apply to the service rendered. Section 1303 of the Public Utility Code states, in relevant part, that "Any public utility, having more than one rate applicable to service rendered to a patron, shall, after notice of service conditions, compute bills under the rate most advantageous to the patron." 66 Pa.C.S. § 1303.

PECO Tariff Electric Pa.P.U.C. No. 5, Original Page No. 20 states,

11. TARIFF AND CONTRACT OPTIONS 11.1 CHOICE OF RATE. When the class of service-supply or conditions of use are such that two or more Base Rates are available, a customer shall select the Base Rate on which the customer will be billed.

11.2 COMPANY ASSISTANCE. The Company upon request will, to a reasonable extent, assist customers in selecting the most advantageous Base Rate or rate application (i.e., Base rate together with applicable riders).

PECO Exhibit 4. This tariff became effective January 1, 2016. Consequently, this tariff is approved by the Commission.

Where a Complaint involves an existing, Commission-approved tariff, the burden falls upon the customer to prove that the charge or rule is no longer reasonable. *Brockway Glass Co. v. Pa. Pub. Util. Comm'n*, 437 A.2d 1067, 63 Pa.Comm. 238 (Pa.Cmwlt. 1981). A Commission-approved tariff is prima facie reasonable, has the full force of law and is binding on

the utility and the customer. *Id.*; 66 Pa.C.S. § 316; and *Kossman v. Pa. Pub. Util. Comm'n*, 694 A.2d 1147 (Pa.Cmwlth. 1997). The burden of proof is on the Complainant to show that the application of the existing tariff at issue is applied unreasonably.

Furthermore, the Commonwealth Court emphasized in *Springfield Twp. v. Pa. Pub. Util. Comm'n*, 676 A.2d 304 (Pa. Cmwlth. 1996), that public utilities are not required to bill customers on the most advantageous rate until after the utilities receive notice of service conditions. Moreover, in *The Victory Condominium Association v. PECO Energy Co.*, Opinion and Order, Docket No. C-2011-2268126, entered September 27, 2012, at 9-10 (*Victory Condo*), the Commission stated,

Utilities do not have an affirmative obligation to monitor the usage characteristics of their ratepayers and determine therefrom the proper rate to be charged. Instead, the responsibility is upon the ratepayer to provide the utility company with actual notice of a change in service conditions before the utility must determine and supply service at the most advantageous rate.

(Emphasis added.) The Commission further cited *City of Pittsburgh v. Duquesne Light Co.*, 54 Pa. PUC 460 (1980) as stating,

The more correct, sensible, and practical interpretation of § 1303 is that actual, not constructive, notice is required before a utility is required to determine and apply the most advantageous rate. We adopt this interpretation. The term "actual notice" includes such notice as is affirmatively proved to have been given to a party directly, and also such notice as a party is presumed to have received personally because facts within its knowledge were sufficient to place upon the party the duty to inquire about the fact or condition in question. The former is to express actual notice -- e.g., written or oral notice -- and the latter is implied actual notice.

Victory Condo, at 10, citing, *Springfield Twp. v. Pa. Pub. Util. Comm'n*, 676 A.2d 304 (Pa. Cmwlth. 1996); and *Mauro v. Duquesne Light Co.*, 69 Pa. PUC 105 (1989). (Emphasis added.)

Mr. Cavaliero admitted that PECO had actual notice of Pathmark vacating all its store locations within PECO's service territory in December 2015, or January 2016. Ms. Maik did not recall the details of her conversation with Mr. Cavaliero, so it cannot be determined whether or not she informed him that the Service Address was vacant. However, Mr. Cavaliero's recollection of the same conversation reveals that she imparted to him the following: 1) The Klein Group purchased the property in question; 2) the electricity account was to be placed in the name of KA at Fairless Hills, LP; 3) the billing address was C/O The Klein Group, 25A Hanover Rd, Florham Park, NJ 07932, and 4) the Service Address was previously occupied by Pathmark. See PECO Exhibit 5. These facts within PECO's knowledge were sufficient to give PECO implied actual notice of changes in service conditions at the Service Address and place upon the Respondent the duty to inquire about the condition in question. See *Victory Condo*, at 10.

Mr. Cavaliero admitted that when he was contacted by applicants trying to establish service in the locations vacated by Pathmark, he would take their information and find out what they are. Tr. 132. He testified that, after his conversation with Ms. Maik, he understood that the Service Address was taken over by the landlord or the tenant; however, there is no indication in the record that he found out or tried to find out what the landlord or the tenant "were," i.e. what their use of the Service Address was at the time of the conversation or what it would be in the near future. Even if Ms. Maik did not mention in that initial conversation that the Service Address was vacant and no longer being used as a full service supermarket, and even if she asked Mr. Cavaliero to leave everything "as is" until someone else from the Klein Group or the Complainant had a chance to get back to PECO, the Respondent still has a duty to complete its inquiry about any changes in service conditions at the Service Address. See *Victory Condo*, at 10. The easiest way to do that would be by sending the Complainant the Contract for Commercial/Industrial Class Electric Service, and the Transfer of Information Form, along with directions to PECO's tariff. This would have been a more effective way of opening the door to communications between PECO and the new customer. Faced with multiple rate options and procurements classes, a new customer would either contact PECO with questions and seek its assistance in determining the most advantageous rate, or it would make its own determination on rates and procurement classes and submit to PECO a contract which PECO may have deemed

unacceptable or questionable, thus assisting the customer in determining the most advantageous rate for the service it required.

PECO's actions, or lack thereof, after that first conversation with Ms. Maik, left the Complainant without a contract in place for a period of over six months. What is worse, PECO provided service to the Complainant under Pathmark's rate HT, Pathmark's contract limits, Pathmark's default service procurement class and even Pathmark's PLC as measured in July of 2014. The contract that was finally sent to the Complainant in July of 2016 had all the options pre-selected by PECO: the Rate was GS (after conversations with Complainant); the procurement class was Procurement Class 3 (based on records from six months of usage); but most importantly, the Peak Load Contribution was that of an "Existing Customer" with Pathmark's PLC as measured on July of 2015. By July of 2016, the contract options for establishing "New Service" or for "Transfer[ing] Service at Existing Premise with Significant Change in Load from previous customer" were no longer available to Complainant. Two more billing cycles went by before PECO, at Complainant's inquiry, would send out a Transfer of Information Form with a pre-filled PLC value of 50 kW.

The parties agree that KA's new GS rate and the new PLC value reflect more realistically Complainant's service needs, usage and demand. Yet the process that the Complainant had to go through to get the first undisputed bill on September 30, 2016, demonstrates that the Respondent holds tight control over the process and the information it provides to its applicants and customers. Because of this stark information asymmetry, a new applicant, who enters PECO's service territory for the first time and who does not know all that he does not know, is only left with the option of learning through its errors. The financial consequences of such errors, as in the case of KA, are considerable.

It is every public utility's duty to "furnish and maintain adequate, efficient, safe, and reasonable service and facilities" in conformity with the regulations and orders of the Commission. 66 Pa.C.S. § 1501. "The term "service" is [u]sed in its broadest and most inclusive sense, [and] includes any and all acts done, rendered or performed and any and all things furnished or supplied, and any and all facilities used, furnished or supplied...in the

performances of their duties...." 66 Pa.C.S. § 102. The statutory definition of "service" is to be broadly construed. *Country Place Waste Treatment Co., Inc. v. Pa. Pub. Util. Comm'n*, 654 A.2d 72 (Pa.Cmwlth. 1995). Thus, the term "service" is clearly broad enough to include PECO's actions in entering into a service contract with the Complainant.

After considering the evidence collected in this case, I find that PECO had implied actual notice of a new applicant at an existing service address from the conversation between Ms. Maik and Mr. Cavaliero in January of 2016. I find that PECO failed to provide the Complainant with reasonable service when it failed to send the Complainant the Contract for Commercial/Industrial Class Electric Service, and the Transfer of Information Form following the January 2016 conversation with Ms. Maik. By its failure to act, PECO deprived the Complainant of its right to choose the most advantageous rate for its service, or to determine what its load would be as a new customer at an existing premises. These actions had financial consequences that were detrimental to the Complainant. By PECO's own calculations, had it placed the Complainant under its current contract terms since January of 2016, it would have charged the Complainant approximately \$22,000 less for the service provided. See Tr. 266, 269. Of this difference in charges, \$2,800 would have resulted from the rate change from HT to GS, and over \$19,000 would have resulted from the PLC value change from 494 kW and 433 kW to 50 kW. Tr. 189-91, 196-97, 265.

In view of the above, I find that the Complainant successfully carried its burden of proving that PECO violated the provisions of 66 Pa.C.S. §§ 1501 and 1303 in connection with its contract for service at the Service Address. The Complainant is entitled to a refund of the excessive charges.

Section 1312(a) of the Public Utility Code governs refunds and provides in pertinent part as follows:

If, in any proceeding involving rates, the commission shall determine that any rate received by a public utility was...in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective

tariff of such public utility, the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron...within four years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment.

66 Pa.C.S. § 1312(a).

The legal rate of interest is fixed by law at 6 percent. Act of January 30, 1974, P.L. 13, No. 6, § 202, 41 P.S. § 202, *The Electric Materials Company v. North East Heat & Light Company*, Docket No. C-00913544, 1992 Pa. PUC LEXIS 175. In accordance with the provisions of 66 Pa.C.S. § 1312(a), PECO shall issue to Complainant a refund in the amount of \$22,000, plus the legal rate of interest calculated from the date of each such excessive payment.

Under Public Utility Code Sections 3301(a) and (b), “the Commission may levy a fine of up to \$1,000 per day for continuing violations of the Public Utility Code.” 66 Pa.C.S. § 3301.

The Commission has set forth, in a statement of policy, the factors and standards for evaluating proceedings involving violations of the Public Utility Code for purposes of determining appropriate civil penalty amounts. See, 52 Pa.Code § 69.1201(c). These factors and standards are as follows:

- (1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.
- (2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.
- (3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated

cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.

(4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

(5) The number of customers affected and the duration of the violation.

(6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

(7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.

(8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

52 Pa.Code § 69.1201(c). These factors, relative to this proceeding, are examined below.

The first factor is whether the conduct was of a serious nature. There is not sufficient evidence on the record to conclude that PECO's failure to send the Complainant the Contract for Commercial/Industrial Class Electric Service, and the Transfer of Information Form following the January 2016 conversation with Ms. Maik, was a willful or fraudulent act on the part of PECO. More likely, the failure resulted from PECO's negligence in realizing that the difference in information and expertise between the Company and a new applicant for commercial service requires that the Company set in place procedures that facilitate communication and exchange of information between the utility and the consumer. Sending the applicant or the customer a pre-

filled contract, or waiting for the account to create a usage history before addressing the PLC value, is not conducive of transparency on the part of PECO, nor fair to the customer.

The second factor is whether the consequences of the utility's conduct were of a serious nature resulting in damages to property or injury to persons. There is no evidence that PECO's failure to comply with 66 Pa.C.S. §§ 1501 and 1303 had any consequences of a serious nature. There were also no damages to property or injury to persons, yet the Complainant's Petition for Emergency Order indicated that the threat of such damages was real.

The third factor is whether the offending conduct was intentional or negligent. Mr. Cavaliero testified that following his conversation with Ms. Maik in January of 2016, he did not send to Complainant a contract reflecting the HT rate because, if signed inadvertently, it would have locked the Complainant into an unfavorable rate for a period of three years. While I find his testimony credible, I fail to see why Respondent could not send KA a contract without a set rate, thus truly giving the Complainant a choice of rates. I find that PECO's practice as described by Mr. Cavaliero is geared towards minimizing the expenditure of PECO's resources, but the record does not support a finding that the offending conduct was intentional.

The fourth factor is whether the utility has modified its internal practices and procedures to address the offensive conduct at issue to deter and prevent similar conduct in the future. In this case, PECO defended the practices which this Initial Decision finds to be in violation of the Commission's statutes and regulations. In particular, Mr. Cavaliero defended PECO's failure to send out a Contract for Commercial/Industrial Class Electric Service, and the Transfer of Information Form based on the Company's uncertainty of the applicant's or customer's ability to evaluate their load demand. *See* Tr. 156.

The fifth factor is the number of customers affected and the duration of the violation. There was only one customer affected by PECO's violations, but the record indicates that any new applicant for commercial service with PECO, who lacks prior knowledge of PECO's rate structure, would face similar hurdles in establishing a service contract with the Respondent. I note that the

pervasive theme in Complainant's testimony was that they did not know enough about PECO's rate structure to ask the appropriate questions.

The sixth factor is the compliance history of the offender, PECO. The record does not include a history of PECO's past offenses. Neither party provided evidence of a compliance history.

The seventh factor is whether the actions of the regulated entity were cooperative or discordant with a Commission investigation. This standard is not applicable to this proceeding because the Commission did not conduct an investigation.

The eighth, ninth and tenth factors are inter-related in this case and they are, respectively: the amount of a civil penalty required to deter future violations; prior Commission decisions in similar cases; and the catch-all "other relevant factors."

After reviewing the evidence collected in this matter, I conclude that a civil penalty in the amount of \$4,000.00 (\$500.00 for every month that the Respondent failed to send a non-pre-filled Contract for Commercial/Industrial Class Electric Service, and the Transfer of Information Form to Complainant following the January 2016 conversation with Ms. Maik) is appropriate to deter PECO from committing similar actions in the future.

Within 30 days of the Commission's Final Order in this case, PECO shall pay a civil penalty in the amount of \$4,000.00 by sending a certified check or money order payable to the Commonwealth of Pennsylvania. In addition, PECO shall cease and desist from further violations of the Public Utility Code, 66 Pa.C.S. §§ 101 *et seq.*, and the regulations of the Pennsylvania Public Utility Commission, 52 Pa.Code §§ 1.1 *et seq.*

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding. 66 Pa.C.S. § 701.

2. The Complainant seeking affirmative relief from the Commission has the burden of proving the Complaint allegations by producing evidence which establishes material facts by a preponderance of the evidence. 66 Pa.C.S. § 332(a).

3. To satisfy the burden of proof, the Complainant must demonstrate that the Respondent was responsible for the problems alleged in the Complaint through a violation of the Code or a regulation or order of the Commission. This must be shown by a preponderance of the evidence. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990).

4. Preponderance of the evidence means that the party with the burden of proof has presented evidence that is more convincing than that presented by the other party. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa.Cmwlth. 1990) *alloc. den.*, 529 Pa. 654, 602 A.2d 863 (1992).

5. The Commission's decision must be supported by "substantial evidence," which consists of evidence that a reasonable mind might accept as adequate to support a conclusion. A mere "trace of evidence or a suspicion of the existence of a fact" is insufficient. *Norfolk and Western Railway Co. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980).

6. Any public utility, having more than one rate applicable to service rendered to a patron, shall, after notice of service conditions, compute bills under the rate most advantageous to the patron. 66 Pa.C.S. § 1303.

7. Public utilities are not required to bill customers on the most advantageous rate until after the utilities receive notice of service conditions. *Springfield Twp. v. Pa. Pub. Util. Comm'n*, 676 A.2d 304 (Pa. Cmwlth. 1996).

8. The ratepayer is required to provide actual or implied actual notice before a utility is required to determine and apply the most advantageous rate. *The Victory Condominium Association v. PECO Energy Co.*, Opinion and Order, Docket No. C-2011-2268126, entered September 27, 2012; *Springfield Twp. v. Pa. Pub. Util. Comm'n*, 676 A.2d 304

(Pa. Cmwlth. 1996); *Mauro v. Duquesne Light Co.*, 69 Pa. PUC 105 (1989); *City of Pittsburgh v. Duquesne Light Co.*, 54 Pa. PUC 460 (1980).

9. If, in any proceeding involving rates, the Commission shall determine that any rate received by a public utility was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron within four years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment. 66 Pa. C.S. § 1312(a).

10. The legal rate of interest is fixed by law at 6 percent. Act of January 30, 1974, P.L. 13, No. 6, § 202, 41 P.S. § 202.” *The Electric Materials Company v. North East Heat & Light Company*, Docket No. C-00913544, 1992 Pa. PUC LEXIS 175.

11. It is every public utility’s duty to “furnish and maintain adequate, efficient, safe, and reasonable service and facilities” in conformity with the regulations and orders of the Commission. 66 Pa.C.S. § 1501.

12. The term "service" is used in its broadest and most inclusive sense, and includes any and all acts done, rendered or performed and any and all things furnished or supplied, and any and all facilities used, furnished or supplied in the performances of their duties. 66 Pa.C.S. § 102.

13. The Commission may levy a fine of up to \$1,000 per day for continuing violations of the Public Utility Code. 66 Pa.C.S. § 3301.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the formal Complaint filed by KA at Fairless Hills, LP against PECO Energy Company at Docket No. C-2017-2592335 is granted.
2. That PECO Energy Company shall refund \$22,000 to KA at Fairless Hills, LP, plus interest at the legal rate from the date of each excessive payment.
3. That PECO Energy Company is hereby assessed the penalty of Four Thousand Dollars (\$4,000.00) for its violations of the Public Utility Code and the Commission's regulations.
4. That PECO Energy Company shall pay a civil penalty in the amount of Four Thousand Dollars (\$4,000.00) by sending a certified check or money order payable to the Commonwealth of Pennsylvania, within thirty (30) days from the entry of the Final Commission Order to:

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

5. That PECO Energy Company shall cease and desist from further violations of the Public Utility Code, 66 Pa.C.S. §§ 101 *et seq.*, and the regulations of the Pennsylvania Public Utility Commission, 52 Pa.Code §§ 1.1 *et seq.*

6. That the Secretary mark this docket closed.

Dated: December 8, 2017

_____/s/
Eranda Vero
Administrative Law Judge