



March 5, 2021

Via Efiling

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

**Re: Tenant Union Representative Network (TURN) v. PECO Energy Company,
Docket No. C-2020-3021557**

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Main Brief of the Tenant Union Representative Network (TURN) in the above-referenced case.

Due to the ongoing COVID-19 pandemic, this Motion and Stipulation are being served via email as indicated on the attached Certificate of Service.

Sincerely,

Joline R. Price, Esquire
Attorney ID No. 315405

Enclosures

Cc: Certificate of Service
Administrative Law Judge Mary Long (via email to malong@pa.gov)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Tenant Union Representative Network	:	
Complainant	:	
v.	:	Docket No. C-2020-3021557
PECO Energy Company	:	
Respondent	:	

Certificate of Service

I hereby certify that I have this day served copies of the **Main Brief of the Tenant Union Representative Network (TURN)** upon the parties of record in the above captioned proceeding in accordance with the requirements of 52 Pa. Code §1.54 and consistent with the Commission’s March 20 Emergency Order at Docket M-2020-3019262.

VIA ELECTRONIC MAIL

Anthony E. Gay, Esq.
Jack R. Garfinkle, Esq.
Jennedy Johnson, Esq.
PECO Energy Company
2301 Market Street
Philadelphia, PA 19101
Anthony.gay@exeloncorp.com
Jack.garfinkle@exeloncorp.com
Jennedy.johnson@exeloncorp.com

Christy M. Appleby, Esq.
Office of Consumer Advocate
555 Walnut Street
Forum Place, 5th Floor
Harrisburg, PA 17101-1923
Cappleby@paoca.org

Elizabeth R. Marx, Esq.
John W. Sweet, Esq.
Ria M. Pereira, Esq.
Pennsylvania Utility Law Project
118 Locust Street
Harrisburg, PA 17101
pulp@palegalaid.net

Administrative Law Judge Mary Long
Pennsylvania Public Utility Commission
Piatt Place
Suite 220
301 5th Avenue
Pittsburgh, PA 15222
malong@pa.gov

Kenneth M. Kulak, Esq.
Catherine G. Vasudevan, Esq.
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103
Ken.kulak@morganlewis.com
Catherine.vasudevan@morganlewis.com



Joline R. Price, Esquire (PA ID: 315405)
Counsel for TURN
COMMUNITY LEGAL SERVICES, INC.
jprice@clsphila.org
(215) 981-3756

March 5, 2021

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Tenant Union Representative Network	:	
Complainant	:	
v.	:	Docket No. C-2020-3021557
PECO Energy Company	:	
Respondent	:	

MAIN BRIEF

ON BEHALF OF THE TENANT UNION REPRESENTATIVE NETWORK (TURN)

March 5, 2021

Attorneys for TURN

Joline R. Price, Esq.
Robert W. Ballenger, Esq.
Josie B. H. Pickens, Esq.
Kintéshia S. Scott, Esq.

COMMUNITY LEGAL SERVICES, INC.
1424 Chestnut Street
Philadelphia, PA 19102
215-981-3700

TABLE OF CONTENTS

I.	INTRODUCTION AND STATEMENT OF THE CASE.....	1
II.	PROCEDURAL HISTORY.....	3
A.	Creation of the Customer Assistance Program Fixed Credit Option (CAP FCO) by Settlement	3
B.	Adoption of the CAP FCO in PECO’s Universal Service and Energy Conservation Plan for 2016-2018 (2016-2018 USECP).....	4
C.	Amendments to the CAP Policy Statement	4
D.	TURN’s Complaint	6
III.	BURDEN OF PROOF	8
A.	PECO bears the burden of proof to show Compliance with Commission Orders approving CAP FCO Settlement and 2016-2018 USECP	8
B.	TURN must show that PECO provided unreasonable service in violation of 66 Pa. C.S. §1501.9	
IV.	SUMMARY OF THE ARGUMENT	10
V.	ARGUMENT.....	11
A.	The Commission Order approving the CAP FCO Settlement requires PECO to use the updated energy burdens in the CAP Policy Statement as amended on November 5, 2019.....	11
B.	The Commission Order approving PECO’s 2016-2018 USECP requires PECO to use updated energy burdens	14
C.	PECO has not met its burden to show compliance with Commission Orders	14
D.	By failing to use updated energy burdens, PECO is providing unreasonable service in violation of 66 Pa. C.S. §1501	15
E.	PECO should be directed to use the updated energy burdens for as long as its 2016-2018 USECP is in effect	17
F.	PECO should be required to provide retroactive relief to all affected CAP Customers....	17
G.	The Commission should fine PECO for its willful violation of a Commission Approved Settlement and USECP	20
i.	PECO’s conduct is of a serious nature	21
ii.	The consequences of PECO’s actions were of a serious nature	22
iii.	PECO’s conduct was intentional, and no efforts were made to comply with the Settlement and USECP	24
iv.	PECO’s actions impacted more than 100,000 low-income CAP Customers over the course of more than a year	25

v. A substantial fine is necessary to deter future violations 25

vi. The egregiousness of PECO’s conduct is amplified by the ongoing COVID-19 pandemic, its resulting economic crisis, and the evidence that PECO has not complied with other provisions of the Settlement 27

VI. CONCLUSION..... 31

- Appendix A – Proposed Findings of Fact
- Appendix B – Proposed Conclusions of Law
- Appendix C – Proposed Ordering Paragraphs

TABLE OF AUTHORITIES

Cases

DeSantis v. Pennsylvania Power Company, 2020 WL 2487413, Pa. PUC Docket No. C-2019-3013652 (Final Order entered June 15, 2020) 15

McCloskey v. Hidden Valley Utility Services, Docket Nos. C-2014-2447138 and C-2014-2447169, Initial Decision at 20 (August 23, 2016)..... 9, 11, 20

McCloskey v. Hidden Valley Utility Services, Docket Nos. C-2014-2447138 and C-2014-2447169, Opinion and Order (Jan. 18, 2018). 9

Morgan v. Pa. Gas & Water Co., 1973 WL 36724 (order entered January 30, 1974)..... 20

Morrissey v. Pa. Dept. of Highways, 424 Pa. 87, 225 A.2d 895 (1967) 9, 10

Pa. Pub. Util. Comm’n Bureau of Investigation & Enft v. Jetway Transport Inc., Docket No. C-2017-2634219, 2019 WL 3470746 (July 12, 2019)..... 9

Pa. Public Utility Comm’n, Bureau of Investigation and Enforcement v. HIKO Energy LLC, Docket No. C-2014-2431410 (Opinion and Order entered December 3, 2015)..... 20

U. S. Steel Corp. v. Pa. Pub. Util. Comm’n, 69 Pa. Cmwlt. 134, 139, 450 A.2d 1073 (1982)..... 9

Statutes

66 Pa. C.S §2802(17) 22

66 Pa. C.S. § 1501 passim

66 Pa. C.S. § 3301 10, 20

66 Pa. C.S. § 332(a) 8, 9

66 Pa. C.S. § 501(c) passim

66 Pa. C.S. §2203(8) 22

66 Pa. C.S. §2802(9) 22

66 Pa. C.S. §315(b) 9, 10

66 Pa. C.S. §3301(a) 30

66 Pa. C.S. §3301(b) 30

Regulations

52 Pa. Code § 5.231 26

52 Pa. Code § 69.265 12

52 Pa. Code §§69.261-.267 1, 4

52 Pa. Code §56.11(a) 16

52 Pa. Code §69.1201(c)(10) 27

52 Pa. Code §69.1201(c)(2) 22

52 Pa. Code §69.1201(c)(3) – (4) 24

52 Pa. Code §69.1201(c)(5) 25

52 Pa. Code §69.1201(c)(8) 25

52 Pa. Code §69.265(2)(i) 1, 10, 31

52 Pa. Code §69.401 26

Other Authorities

2019 Amendments to Policy Statement on Customer Assistance Program, 52 Pa. Code §69.261-69.267, Docket No. M-2019-3012599, Order (Nov. 5, 2019)..... 5, 6

2019 Amendments to Policy Statement on Customer Assistance Program, 52 Pa. Code §69.261-69.267, Docket No. M-2019-3012599, Order in re Petition of the Energy Association of Pennsylvania for Stay (Feb. 6, 2020)..... 5

PECO Energy Company Universal Service and Energy Conservation Plan for 2013-2015, Docket No. M-2012-2290911, Order (July 8, 2015) 1, 4

PECO Energy Company Universal Service and Energy Conservation Plan for 2013-2015, Docket No. M-2012-2290911, Recommended Decision of Administrative Law Judge Cynthia Williams Fordham (June 11, 2015) 3, 4

PECO Energy Company Universal Service and Energy Conservation Plan for 2016-2018 Submitted in Compliance with 52 Pa. Code § § 54.74 and 62.4, Docket No. M-2015-2507139, Final Order (Aug. 11, 2016) 2, 14

Universal Service and Energy Conservation Plan (USECP) Filing Schedule and Independent Evaluation Filing Schedule, Docket No. M-2019-3012601 (Order entered Oct. 3, 2019)... 4, 17

I. INTRODUCTION AND STATEMENT OF THE CASE

In this Complaint, the Tenant Union Representative Network (TURN) alleges that PECO Energy Company (PECO) has failed to implement the lower percentages of income which the Commission considers affordable for low-income customers (referred to as the “energy burdens”) set forth in the Public Utility Commission (PUC or Commission) Customer Assistance Program (CAP) Policy Statement at 52 Pa. Code §§69.261-69.267. Specifically, the CAP Policy Statement, as amended on November 5, 2019, sets forth energy burdens for utility Customer Assistance Programs to use, as follows:¹

Federal Poverty Income Guidelines (FPIG)	Electric Nonheating	Natural Gas Heating	Electric Heating or Natural Gas Heating and Electric Nonheating Combined
0-50% FPIG	2%	4%	6%
51-100% FPIG	4%	6%	10%
101-150% FPIG	4%	6%	10%

The program design for PECO’s Customer Assistance Program, as approved by the Commission, requires PECO to use the percentages of income that are set forth in the CAP Policy Statement, and specifically requires PECO to adopt any changes to these percentages of income by the Commission. By failing to implement these lower energy burdens in its CAP FCO, PECO has failed to comply with two Commission Orders. The first Order, in the proceeding for PECO’s Universal Service and Energy Conservation Plan (USECP) for 2013-2015,² approved a multi-

¹ 52 Pa. Code §69.265(2)(i).

² PECO Energy Company Universal Service and Energy Conservation Plan for 2013-2015, Docket No. M-2012-2290911, Order (July 8, 2015), <https://www.puc.pa.gov/pcdocs/1370232.doc> (hereinafter “Final FCO Settlement Order”).

party Settlement³ creating a Fixed Credit Option (FCO) design for PECO's Customer Assistance Program (CAP FCO). The second Order approved the incorporation of the CAP FCO program design into PECO's 2016-2018 USECP.⁴ TURN submits that, as a result of PECO's failure to comply with the Commission Orders approving the CAP FCO Settlement and PECO's 2016-2018 USECP, PECO is failing to provide reasonable service to its CAP customers, in violation of 66 Pa. C.S. § 1501.

As set forth below, PECO has not met its burden to show that it complied with the Commission's Orders, and further has not presented specific evidence to rebut TURN's showing that it failed to provide reasonable service to its CAP customers. TURN's Complaint seeks orders directing PECO to: (1) comply with the Settlement and its 2016-2018 USECP by immediately implementing the lower energy burdens; and (2) provide retroactive adjustments to CAP bills. Finally, TURN also requests the Commission impose a fine on PECO for willful violation of the Commission Orders approving the CAP FCO Settlement and its 2016-2018 USECP.⁵

³ PECO Energy Company Universal Service and Energy Conservation Plan for 2013-2015, Docket No. M-2012-2290911, Joint Petition for Settlement (March 20, 2015), <https://www.puc.pa.gov/pcdocs/1349218.pdf>. Note that the Joint Petition includes a Petition (hereinafter "Joint Petition") and attaches an "Exhibit A: PECO CAP Mediation Settlement Term Sheet" (hereinafter "CAP FCO Settlement").

⁴ PECO Energy Company Universal Service and Energy Conservation Plan for 2016-2018 Submitted in Compliance with 52 Pa. Code § 54.74 and 62.4, Docket No. M-2015-2507139, Final Order (Aug. 11, 2016), <https://www.puc.pa.gov/pcdocs/1490676.docx>.

⁵ PECO has a statutory obligation to comply with Commission orders. See 66 Pa. C.S. §501(c) ("Every public utility, its officers, agents, and employees, and every other person or corporation subject to the provisions of this part, affected by or subject to any regulations or orders of the commission or of any court, made, issued, or entered under the provisions of this part, shall observe, obey, and comply with such regulations or orders, and the terms and conditions thereof.").

II. PROCEDURAL HISTORY

A. Creation of the Customer Assistance Program Fixed Credit Option (CAP FCO) by Settlement

The procedural history of this case extends beyond the initiation of this Complaint, back to the creation of PECO's CAP FCO by Settlement. TURN witness Philip Bertocci described in detail the process that led to the creation of the CAP FCO.

PECO's FCO arose from a contested proceeding involving PECO's Petition for Approval of its Proposed 2013-2015 USECP. Ultimately, on March 20, 2015, PECO, TURN, Action Alliance, CAUSE-PA and the OCA filed a Joint Petition for Settlement. As noted in the Joint Petition, the proposed Settlement "sets forth a comprehensive proposal to revise PECO's Customer Assistance Program." This Settlement followed extensive negotiations among the parties.

TURN St. 1 at 12:10-15 (internal citations omitted).

As noted by Mr. Bertocci, the Joint Petition for Settlement reflected a comprehensive proposal as to the structure of PECO's CAP program. TURN St. 1 at 13.⁶ The Joint Petition for Settlement, was signed by counsel for all parties, with the following statement in conclusion:

WHEREFORE, the Joint Petitioners, intending to be legally bound, respectfully request that the Commission approve this Joint Petition, including all terms and conditions set forth in the Term Sheet.⁷

On June 11, 2015, Administrative Law Judge Cynthia Williams Fordham issued a recommended decision approving the Joint Petition for Settlement without modification, stating:⁸

The parties have presented clear and reasonable reasons for approval of the FCO program. After considering the Joint Petition for Settlement, including the affordability of the new program, the cost containment, the cost recovery,

⁶ Joint Petition at ¶1. See also PECO Energy Company Universal Service and Energy Conservation Plan for 2013-2015, Docket No. M-2012-2290911, PECO Energy Company's Statement in Support of Joint Petition for Settlement at 12 (April 30, 2015), <https://www.puc.pa.gov/pcdocs/1357456.pdf> ("The Term Sheet is a comprehensive settlement among the aforementioned parties ..."). PECO further stated in its Statement in Support that "[t]he Term Sheet improves affordability while simultaneously imposing controls on overall program costs..." *Id.* at 10.

⁷ Joint Petition at 4.

⁸ PECO Energy Company Universal Service and Energy Conservation Plan for 2013-2015, Docket No. M-2012-2290911, Recommended Decision of Administrative Law Judge Cynthia Williams Fordham (June 11, 2015) at 36, <https://www.puc.pa.gov/pcdocs/1366474.docx> (hereinafter ALJ Recommended Decision).

arrearrange forgiveness, usage reduction, the proposed evaluation after two years and the ongoing collaborative to address issues that arise and the savings achieved by not litigating the case fully, it is my opinion that the Settlement is fair, just, reasonable and in the public interest. Accordingly, I recommend that the Joint Petition for Settlement be approved.⁹

On July 8, 2015, the Commission adopted ALJ Fordham’s Recommended Decision without modification, approving the Settlement.¹⁰ Central to this Complaint, the Settlement requires PECO to update the FCO to correspond to any changes to the energy burdens set forth in the Commission’s CAP Policy Statement. TURN St. 1 at 14-15.

B. Adoption of the CAP FCO in PECO’s Universal Service and Energy Conservation Plan for 2016-2018 (2016-2018 USECP)

On August 11, 2016, the Commission approved PECO’s 2016-2018 USECP, which incorporated the CAP FCO Design set forth in the Settlement. TURN St. 1 at 14. The Commission has not yet approved PECO’s next USECP, so the 2016-2018 USECP remains in effect. See Universal Service and Energy Conservation Plan (USECP) Filing Schedule and Independent Evaluation Filing Schedule, Docket No. M-2019-3012601 (Order entered Oct. 3, 2019) (“An existing USECP will remain in effect until a new one is approved and implemented.”); TURN St. 1 at 17. Also central to this Complaint, the 2016-2018 USECP requires PECO to update the FCO to correspond to any changes to the energy burdens set forth in the Commission’s CAP Policy Statement. Complaint ¶46.

C. Amendments to the CAP Policy Statement

The Commission’s CAP Policy Statement is codified at 52 Pa. Code §§ 69.261-.267. On November 5, 2019, the Commission entered an Order approving final changes to its CAP Policy

⁹ Id.

¹⁰ See Final FCO Settlement Order.

Statement.¹¹ Among other changes, the Commission adopted reduced energy burdens, as described in Mr. Bertocci’s direct testimony. See TURN St. 1 at 18-20. In the same Order that the Commission changed the energy burdens, the Commission provided specific instructions. In those instructions, the Commission required each Electric Distribution Company and Natural Gas Distribution Company to make a filing that indicated how the utility intended to adopt the various changes to the CAP Policy Statement in its USECP.¹² Petitions for Reconsideration to the CAP Policy Statement were filed by the Energy Association of Pennsylvania (EAP) and the Office of Consumer Advocate (OCA) on November 20, 2019. EAP also filed a Petition to Stay specific to those ordering paragraphs directing utilities to make filings – but that Petition to Stay did not apply to the content of the CAP Policy Statement itself.¹³ The Commission granted EAP’s Petition to Stay, and issued an Order on EAP’s Petition for Reconsideration on February 6, 2020. In that Order, the Commission clarified that the provisions of the CAP Policy Statement itself are not binding on utilities by its terms.¹⁴ The CAP Policy Statement was published in the Pennsylvania Bulletin on March 21, 2020.¹⁵

While the Commission was clear that the CAP Policy Statement on its own is not binding, but rather guidance to utilities, as set forth in this Complaint, PECO is nonetheless

¹¹ 2019 Amendments to Policy Statement on Customer Assistance Program, 52 Pa. Code §69.261-69.267, Docket No. M-2019-3012599, Order (Nov. 5, 2019), available at <https://www.puc.pa.gov/pcdocs/1643025.docx> (hereinafter “November CAP Policy Statement Order”).

¹² Id. at 106 (Ordering Paragraphs 6-8). See also 2019 Amendments to Policy Statement on Customer Assistance Program, 52 Pa. Code §69.261-69.267, Docket No. M-2019-3012599, Order on Reconsideration and Clarification (Feb. 6, 2020) at 8-11, <https://www.puc.pa.gov/pcdocs/1653749.docx> (hereinafter Commission Order on EAP Reconsideration of CAP Policy Statement).

¹³ 2019 Amendments to Policy Statement on Customer Assistance Program, 52 Pa. Code §69.261-69.267, Docket No. M-2019-3012599, Petition of the Energy Association of Pennsylvania for Stay of Ordering Paragraphs Six, Seven and Eight of Final Policy Statement Order Entered on November 5, 2019 (Nov. 20, 2019), <https://www.puc.pa.gov/pcdocs/1644882.pdf>.

¹⁴ Commission Order on EAP Reconsideration of CAP Policy Statement at 8-11.

¹⁵ See 50 Pa.B. 1652-1695.

bound to use the energy burdens listed in the CAP Policy Statement by the terms of the CAP FCO Settlement and its 2016-2018 USECP. As discussed by TURN witness Bertocci,

PECO had the same obligation to respond to the Commission's November 5, 2019 CAP Policy Statement Order as other EDCs and NGDCs, with one critical exception. In the Settlement establishing the FCO, PECO bound itself to incorporate, without further proceedings, the Commission's revised Energy Burdens in the calculation of CAP bills. PECO's 2016-2018 USECP and the CAP FCO Settlement cite directly to the CAP Policy Statement, specifically noting that the targeted Energy Burdens in the FCO calculation would update to reflect the Energy Burdens in the CAP Policy Statement at 52 Pa. Code § 69.265(2)(i). The change to the CAP Policy Statement itself triggered PECO's obligation to use those updated Energy Burdens. By contrast, PECO would have to make a filing to adopt other changes made in the CAP Policy Statement and obtain Commission approval.

TURN St. 1 at 20 (internal citations omitted).¹⁶

D. TURN's Complaint

On August 25, 2020, TURN filed this Complaint, asserting that PECO has failed to implement the lower energy burdens set forth in the current CAP Policy Statement as part of its CAP FCO, and therefore has not complied with the Commission Orders approving the CAP FCO Settlement and PECO's 2016-2018 USECP.¹⁷ TURN also alleged that as a result, PECO was failing to provide reasonable service to its CAP customers, in violation of 66 Pa. C.S. § 1501. TURN's Complaint seeks Orders directing PECO to: (1) comply with the Settlement and its 2016-2018 USECP by immediately implementing the lower energy burdens; and (2) provide retroactive adjustments to CAP bills. Finally, TURN also requests the Commission impose a

¹⁶ Mr. Bertocci notes that "after the Settlement and the incorporation of the Settlement into the 2016-2018 USECP, PECO represented to the Commission that its USECP incorporates Energy Burden changes automatically in Comments to the Commission, stating 'PECO notes, however, that if the Commission-established energy burden is changed, PECO's CAP FCO program has a 'pass through' clause allowing for automatic implementation.'" TURN St. 1 at 20 n.58 (citing Energy Affordability for Low-Income Customers, Docket No. M-2017-2587711, Initial Comments of PECO Energy Company (May 11, 2019) at 8, <https://www.puc.pa.gov/pcdocs/1618633.pdf>).

¹⁷ PECO has a statutory obligation to comply with Commission Orders. 66 Pa. C.S. §501(c) ("Every public utility, its officers, agents, and employees, and every other person or corporation subject to the provisions of this part, affected by or subject to any regulations or orders of the commission or of any court, made, issued, or entered under the provisions of this part, shall observe, obey, and comply with such regulations or orders, and the terms and conditions thereof.").

fine on PECO for willful violation of Commission Orders approving the CAP FCO Settlement and 2016-2018 USECP.

On September 14, 2020, the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA) filed a Petition to Intervene and Answer. On September 15, 2020, PECO filed an Answer to the Complaint. On September 23, 2020, the Office of Consumer Advocate (OCA) filed a Notice of Intervention. On September 25, 2020, Administrative Law Judge Mary Long issued a Prehearing Notice setting a prehearing conference for October 20, 2020. On September 28, 2020, ALJ Long issued a prehearing Order directing parties to file prehearing memoranda by October 19, 2020 at 12 noon.

On September 25, 2020, PECO filed a Motion to Stay the Proceeding. On October 15, 2020, TURN filed an Answer in Opposition to that Motion.

On October 6, 2020, TURN filed Preliminary Objections to PECO's Answer, alleging PECO failed to properly designate parts of its Answer as New Matter. On October 15, 2020, PECO filed an Answer to TURN's Preliminary Objections, and on October 19, 2020, PECO filed an Amended Answer and New Matter.

At the prehearing conference on October 20, 2020, ALJ Long denied PECO's Motion to Stay, granted CAUSE-PA's Petition to Intervene, and dismissed TURN's Preliminary Objections as moot in light of PECO's Amended Answer. On October 22, 2020, ALJ Long issued a Prehearing Order reflecting those decisions and setting forth a schedule for the filing of written testimony, setting an evidentiary hearing date of February 9, 2021, and setting due dates for main briefs as March 5, 2021 and reply briefs as March 24, 2021.

On November 10, 2020, TURN filed an Answer to PECO's New Matter.

On December 10, 2020, TURN served TURN Statement 1, the Direct Testimony of Philip A. Bertocci, and TURN Statement 2, the Direct Testimony of Philip M. Lord. No other party filed direct testimony.

On January 7, 2021, PECO served PECO Statement 1-R, the Rebuttal Testimony of Mark Kehl, and the OCA served OCA St. 1-R, the Rebuttal Testimony of Roger Colton.

On January 21, 2021, TURN served TURN Statement 1-SR, the Surrebuttal Testimony of Philip A. Bertocci and CAUSE-PA served CAUSE-PA Statement 1-SR, the Surrebuttal Testimony of Harry Geller.

On February 5, 2021, PECO served PECO Statement 1-RJ, the written Rejoinder Testimony of Mark Kehl.

Following agreement among the parties for mutual waiver of cross examination, ALJ Long issued a hearing cancellation notice on February 5, 2021. On February 11, 2021, the parties filed a Joint Motion to Admit Written Testimony and Exhibits into the Formal Evidentiary Record and a Joint Stipulation for Admission of Testimony. On February 11, 2021, ALJ Long issued an Interim Order granting the Joint Stipulation for the Admission of Evidence and admitting the testimony and accompanying exhibits of the parties into the formal evidentiary record.

III. BURDEN OF PROOF

A. PECO bears the burden of proof to show Compliance with Commission Orders approving CAP FCO Settlement and 2016-2018 USECP

Generally, a Complainant seeking an order from the Commission bears the burden of proof pursuant to 66 Pa. C.S. § 332(a). However, in cases where a utility is alleged to be violating a lawful determination or order of the Commission, the burden of proof lies with the

utility to show that the utility is in compliance with the order or determination of the Commission. See 66 Pa. C.S. §315(b).¹⁸ The Commission has recognized that Section 315(b) applies to a failure of a utility to comply with Commission Orders approving settlements.¹⁹

TURN's Complaint alleges that PECO has failed to abide the obligations imposed upon it by the clear language of the CAP FCO Settlement and its 2016-2018 USECP, both of which were approved by Commission Orders and made binding upon PECO. PECO bears the burden to show that it is in compliance with the CAP FCO Settlement and the 2016-2018 USECP. If PECO satisfies its initial burden of proof, then it must be determined whether the opposing parties have submitted evidence of "co-equal" value or weight to refute PECO's evidence. *Morrissey v. Pa. Dept. of Highways*, 424 Pa. 87, 225 A.2d 895 (1967).

B. TURN must show that PECO provided unreasonable service in violation of 66 Pa. C.S. §1501

A Complainant seeking an order from the Commission bears the burden of proof pursuant to 66 Pa. C.S. § 332(a). TURN's Complaint alleges that by failing to implement the Commission's revised energy burdens in accordance with the CAP FCO Settlement and its 2016-2018 USECP, PECO has provided unreasonable service. TURN bears the initial burden of proof

¹⁸ See also *U. S. Steel Corp. v. Pa. Pub. Util. Comm'n*, 450 A.2d 1073, 1076 n.8 (1982) ("A reading of the pleading clearly indicates that the gravamen of USS' complaint was a *failure* on the part of Peoples *to comply with the provisions of the October 27th order.*")(emphasis in original); *Pa. Pub. Util. Comm'n Bureau of Investigation & Enf't v. Jetway Transport Inc.*, Docket No. C-2017-2634219, 2019 WL 3470746, at *4 (July 12, 2019) ("Usually, as the participant seeking an order of the Commission, I&E would bear the burden of proof, pursuant to the provisions of 66 Pa.C.S. § 332(a). However, in this case, Jetway has the burden of proving that it complied with the Commission's orders and regulations and the Public Utility Code. Section 315(b) of the Public Utility Code, 66 Pa.C.S. § 315(b), provides that in a case involving an alleged violation of a determination or order of the Commission by a public utility, the burden of proof shall be upon the public utility to show that it has complied with the determination or order of the Commission.") (internal citations omitted).

¹⁹ *McCloskey v. Hidden Valley Utility Services*, Docket Nos. C-2014-2447138 and C-2014-2447169, Initial Decision at 20 (August 23, 2016) (holding, in the context of a Complaint alleging violation of a settlement agreement approved by Commission Order, that the utility had the burden of proof to show compliance). The Commission adopted this Initial Decision, with modifications, on January 18, 2018. *McCloskey v. Hidden Valley Utility Services*, Docket Nos. C-2014-2447138 and C-2014-2447169, Opinion and Order (Jan. 18, 2018).

to show that PECO provided unreasonable service. Once TURN meets its initial burden, then the analysis shifts to whether opposing parties have submitted evidence of “co-equal” value or weight to refute TURN’s evidence. *Morrissey*, 424 Pa. 87, 225 A.2d 895 (1967).

IV. SUMMARY OF THE ARGUMENT

There is no factual dispute that the CAP FCO Settlement and PECO’s 2016-2018 USECP require PECO to use the energy burden percentages set forth in the Commission’s CAP Policy Statement at 52 Pa. Code §69.265(2)(i). Those energy burden percentages were modified by the Commission in November 2019, and PECO was required to utilize them in its FCO CAP. Nevertheless, PECO has not implemented the lower energy burdens and continues to use outdated energy burdens in calculating bill discounts for its CAP customers. PECO is in direct violation of the Commission-approved CAP FCO Settlement and 2016-2018 USECP. The Public Utility Code requires that public utilities shall comply with orders of the Commission. See 66 Pa. C.S. § 501(c). As such, PECO cannot meet its burden, pursuant to 66 Pa. C.S. §315(b), to show that it is in compliance. In addition, because PECO has failed to use updated energy burdens, PECO is providing unreasonable service to its CAP customers in violation of 66 Pa. C.S. §1501. Violation of the terms of its 2016-2018 USECP reverberates through PECO’s Tariff which explicitly incorporates the CAP rates set pursuant to the 2016-2018 USECP. The Commission should order PECO to immediately implement the Commission’s revised energy burdens in its FCO CAP, provide retroactive relief to CAP customers, and hold that PECO has provided unreasonable service in violation of law.

Finally, the Commission should impose a substantial civil penalty on PECO, pursuant to its authority under 66 Pa. C.S. § 3301, for PECO’s willful violation of the Commission Orders

approving the CAP FCO Settlement and 2016-2018 USECP.²⁰ Both the conduct and the consequences of PECO's actions are serious – made worse by the fact that PECO's conduct was intentional, and impacted more than 100,000 CAP customers over the course of more than a year, during a deadly pandemic.

V. ARGUMENT

- A. The Commission Order approving the CAP FCO Settlement requires PECO to use the updated energy burdens in the CAP Policy Statement as amended on November 5, 2019

The CAP FCO Settlement created a fixed credit program for PECO's Customer Assistance Program. As discussed by TURN witness Bertocci, the calculation of a CAP customer's fixed credit involves several steps and inputs, including a customer's income, household size, usage, and a targeted energy burden, or percentage of income considered affordable to that customer. TURN St. 1 at 14-17; see also PECO St. 1-R at 3. Specifically, the CAP FCO Settlement set forth a table showing the maximum allowable energy burdens set forth in the CAP Policy Statement at the time of the Settlement. TURN St. 1 at 15. That table has a footnote (footnote 3), which states as follows:

If the Commission changes the energy burden ranges set forth in its Policy Statement, PECO will utilize the new maximum allowable energy burden for each poverty level.

CAP FCO Settlement at 2 n. 3 (emphasis added). See also TURN St. 1 at 15.

²⁰ A violation of PECO's obligation pursuant to 66 Pa. C.S. § 501(c) to comply with Commission Orders gives rise to liability pursuant to 66 Pa. C.S. § 3301. See McCloskey v. Hidden Valley Utility Services, Docket Nos. C-2014-2447138 and C-2014-2447169, Initial Decision at 19 (August 23, 2016).

The plain language of footnote 3 requires PECO to use the ranges in the CAP Policy Statement. PECO does not dispute that the Commission did update the maximum allowable energy burdens in its CAP Policy Statement. In addition, both PECO witness Mark Kehl and OCA witness Roger Colton acknowledge that footnote 3 requires PECO to implement the energy burdens as set forth in the Commission’s CAP Policy Statement at 52 Pa. Code § 69.265. See TURN St. 1-SR at 4. Mr. Kehl states:

Several inputs are necessary to determine the customer credit under the FCO, including household income as a percentage of federal poverty level (“FPL”) guidelines, the number of household members, utility usage, and **the allowable EBs set forth in the Commission’s CAP Policy Statement**. The Settlement provided that if the Commission changes the EBs, **PECO will utilize the new maximum allowable EBs** for each poverty level in calculating the FCO credit to be given to each customer.

PECO St. 1-R at 3:9-3:16 (citing 52 Pa. Code § 69.265)(emphasis added).

Similarly, Mr. Colton states that “[a]s can be seen, in this footnote, the Settlement provides that should the PUC change the ranges within which CAP must fall, PECO would continue to use the ‘maximum allowable energy burden’ provided in each range.” OCA St. 1-R at 6:9-12.²¹

Even before adoption of the new energy burdens by the Commission, PECO represented to the Commission that its USECP would require it to incorporate Energy Burden changes automatically. In Comments to the Commission, PECO stated that “PECO notes, however, that if the Commission-established energy burden is changed, PECO’s CAP FCO program has a ‘pass through’ clause allowing for automatic implementation.” Energy Affordability for Low-Income

²¹ As discussed further below, neither Mr. Kehl nor Mr. Colton acknowledges that footnote 3 of the Settlement is also fully set forth in the Universal Service and Energy Conservation Plan (USECP) for 2016-2018 under which PECO is currently obligated to operate the CAP FCO.

Customers, Docket No. M-2017-2587711, Initial Comments of PECO Energy Company (May 11, 2019) at 8.²²

The CAP FCO Settlement was submitted to the Commission by Joint Petition of TURN, PECO, OCA, CAUSE-PA and Action Alliance of Senior Citizens of Greater Philadelphia (Action Alliance), together with Statements in Support. TURN St. 1 at 12-13. As explained by TURN witness Bertocci, “the Settlement reflected a comprehensive proposal as to the structure of PECO’s CAP program.” TURN St. 1 at 13:2-3. Mr. Bertocci further explained:

The Statements in Support of Settlement filed by the parties reflect the comprehensive nature of the Settlement. For example, in its Statement in Support, PECO stated that “PECO avers that this comprehensive settlement is in the public interest and, therefore, requests that the Commission approve the settlement in its entirety.” Similarly, the OCA stated that the “terms and conditions of the Settlement represent the result of extensive negotiations between the parties, are in the public interest and should be approved.” CAUSE-PA stated that “the FCO design satisfactorily addresses the varied interests and issues in this proceeding.”

TURN St. 1 at 13:6-13 (internal citations omitted).

As discussed above, following submission of the Joint Petition for Settlement and the Statements in Support, Administrative Law Judge Cynthia Williams Fordham issued a recommended decision approving the Joint Petition for Settlement without modification. On July 8, 2015, the Commission adopted ALJ Fordham’s recommended decision without modification, approving the Settlement. The Commission then amended the CAP Policy Statement to update energy burdens on November 5, 2019. Despite the clear language of footnote 3, PECO is not currently using updated energy burdens in calculating FCO bills. There is no factual dispute regarding PECO’s refusal to implement the revised energy burdens as required by footnote 3. Indeed, PECO specifically acknowledges it has not complied with footnote 3 of the Settlement,

²² Available at <https://www.puc.pa.gov/pcdocs/1618633.pdf>.

but has instead filed a petition in a separate proceeding, to “utilize the [energy burdens] from the Revised CAP Policy Statement as part of the FCO until the Company transitions from the FCO to the PIPP.” PECO St. 1-R at 13.

B. The Commission Order approving PECO’s 2016-2018 USECP requires PECO to use updated energy burdens

Following approval of the CAP FCO Settlement, PECO incorporated the terms laying out the calculation of FCO credits into its proposed 2016-2018 USECP, including footnote 3. That plan was approved by the Commission on August 11, 2016, without amendment to the terms of the CAP FCO design.²³ Again, there is no factual dispute regarding PECO’s refusal to implement the revised energy burdens as required by footnote 3, which is included in the terms of its USECP. Indeed, as discussed above, PECO’s witness statements specifically acknowledge that it has not implemented the revised energy burdens in the CAP Policy Statement.

C. PECO has not met its burden to show compliance with Commission Orders

This case involves a direct violation of Commission Orders. As described above, the language of footnote 3 in the CAP FCO Settlement and the 2016-2018 USECP clearly require PECO to use updated energy burdens. That language was adopted without modification by the Commission via two separate Orders – one approving the CAP FCO Settlement, and the other approving PECO’s 2016-2018 USECP.

There is no factual dispute that PECO is not utilizing the revised energy burdens, as it is required to do, and so PECO cannot produce any evidence that it is using those revised energy burdens in its CAP FCO. While PECO’s witness claimed in testimony that PECO has complied

²³ See generally PECO Energy Company Universal Service and Energy Conservation Plan for 2016-2018 Submitted in Compliance with 52 Pa. Code § § 54.74 and 62.4, Docket No. M-2015-2507139 (Order entered Aug. 11, 2016).

with the Settlement, he also acknowledged that PECO is obligated to use energy burdens as reflected in the CAP Policy Statement – and is not doing so.²⁴ PECO St. 1-R at 14, see also PECO St. 1-R at 3. Instead, PECO argues that it has complied with other terms of the Settlement, and is now proposing to abandon the FCO and shift to a PIPP CAP program. See PECO St. 1-R at 3-14. Neither of these arguments are relevant to, nor call into question, the fact that PECO is not complying with the requirement to implement the Commission’s revised energy burdens. PECO has not met its burden because PECO has not implemented the revised energy burdens pursuant to footnote 3, as specifically required by the two Commission Orders approving the Settlement and the 2016-2018 USECP.

D. By failing to use updated energy burdens, PECO is providing unreasonable service in violation of 66 Pa. C.S. §1501

Section 1501 of the Pennsylvania Utility Code requires public utilities like PECO to “furnish and maintain adequate, efficient, safe, and reasonable service and facilities,” and further requires that:

Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service.²⁵

Failure to apply the criteria from a current universal services plan constitutes unreasonable service in violation of Section 1501. See DeSantis v. Pennsylvania Power Company, Pa. PUC Docket No. C-2019-3013652, 2020 WL 2487413, at *6 (Final Order entered June 15, 2020).

²⁴ As noted above, neither PECO nor the OCA put forth any testimony or evidence stating that PECO was complying with the requirement of its 2016-2018 USECP to utilize the Commission’s revised energy burdens.

²⁵ 66 Pa. C.S. §1501.

In addition, as described by TURN witness Bertocci, “PECO customers take service from PECO in reliance upon PECO charging the amounts it is lawfully permitted to charge.” TURN St. 1 at 23. Indeed, PUC regulation requires PECO to bill residential customers “in accordance with approved rate schedules.” 52 Pa. Code §56.11(a). PECO’s Tariffs set forth that Customer Assistance Program rates will be set in accordance with the 2016-2018 USECP.²⁶ As a result, PECO’s failure to abide by its 2016-2018 USECP means that PECO is also failing to deliver legally permissible rates to CAP customers, in violation of law.

PECO also represents to its customers that it is running its CAP in accordance with PUC guidelines. As described by TURN witness Bertocci:

PECO provides information to customers about its Customer Assistance Program in a number of different ways, including through brochures, information on its website, outreach events in the community, and by providing information when customers call PECO. Importantly, in response to a discovery request, PECO provided a portion of its “2020 CAP Supervisor Training”, specifically the section related to CAP bills. According to that training, PECO’s suggested script for the calculation of Energy Burdens specifically states that “[t]he Energy Burden is a percentage of your annual income and is the amount that you are reasonably able to afford to pay for utility service per the PUC’s affordability guidelines.”

TURN St. 1 at 24:5-12 (internal citations omitted)

CAP customers are entitled to the benefit of the CAP rates PECO is required to charge pursuant to its Tariff – which incorporates the terms of its 2016-2018 USECP. But PECO has failed to calculate CAP credits pursuant to the specific requirements of its USECP. As a result, PECO has not provided CAP customers the appropriate rates. By failing to adhere to the requirements of its

²⁶ See Customer Assistance Program (CAP) Rider to PECO Energy Company Electric Service Tariff, Supplement No. 45 (January 1, 2021) at 77, <https://www.peco.com/SiteCollectionDocuments/CurrentTariffElec.pdf> (“Customers must apply for the rates contained in this rider.... Based on the applicable level of income, number of household members, and their historical usage CAP customers will receive a Fixed Credit Option (“FCO”) based upon that individual household’s need. The details of the FCO calculation can be found in the PECO Universal Service and Energy Conservation Plan at Docket No. M-2015-2507139.”). PECO’s Gas Tariff contains this same language. See Customer Assistance Program (CAP) Rider to PECO Energy Company Gas Service Tariff, Supplement No. 35 (March 1, 2021) at 83, <https://www.peco.com/SiteCollectionDocuments/CurrentGasTariff.pdf>.

2016-2018 USECP and its Tariffs, PECO has provided unreasonable service in violation of Section 1501 of the Public Utility Code.

- E. PECO should be directed to use the updated energy burdens for as long as its 2016-2018 USECP is in effect

While PECO's USECP is dated for the years 2016-2018, it remains in effect. The PUC has said explicitly that "[a]n existing USECP will remain in effect until a new one is approved and implemented." See Universal Service and Energy Conservation Plan (USECP) Filing Schedule and Independent Evaluation Filing Schedule, Docket No. M-2019-3012601 (Order entered Oct. 3, 2019). PECO filed a new Universal Service and Energy Conservation Plan on November 1, 2018, and has since filed several updates and amendments to that proposed plan, on November 26, 2019, January 16, 2020, and most recently on July 8, 2020.²⁷ However, the PUC has not yet approved PECO's proposed USECP for 2019-2024. As a result, PECO's 2016-2018 USECP remains in effect and PECO is required to operate the FCO according to its terms.

PECO should be directed to implement the Commission's revised energy burdens immediately and to continue to operate the FCO according to its terms (including the revised energy burdens) unless and until it is modified or supplanted by a future Commission order.

- F. PECO should be required to provide retroactive relief to all affected CAP Customers

In addition to requiring PECO to implement the energy burdens in the CAP Policy Statement, PECO must be required to provide retroactive relief, in the form of both retroactive bill credits and retroactive arrearage forgiveness. Doing so will begin to remedy the harm done to CAP customers by PECO's failure to implement the Commission's revised energy burdens as

²⁷ See generally PECO Energy Company's 2019-2024 Universal Service and Energy Conservation Plan, Docket Nos. M-2018-300579, P-2020-3020727.

required by footnote 3 in the Settlement and the 2016-2018 USECP. See TURN St. 1 at 26:12-13.

TURN Witness Philip Lord explained the impact high utility bills can have on low-income customers, specifically the tenants TURN represents:

In my experience, unaffordable utility bills present a major challenge to tenants, particularly low-income tenants who possess limited financial resources. Unaffordable utility bills lead to shut offs, evictions, and housing displacement. When tenants receive unaffordable bills, they may divert limited resources, redirecting funds that they would use to pay for rent or other essential needs, such as food or medicine, to pay down utility balances. If tenants are not able to keep up with their utility bills, they face the risk of utility termination. Utility shut offs jeopardize the health and safety of the household and increase the likelihood of housing instability.

TURN St. 2 at 8:11-18.

Due to the coronavirus pandemic, PECO CAP customers have not been subject to termination since the fall of 2019. However, protections against termination are set to expire on March 31, 2021. PECO's actions in failing to implement lower energy burdens directly contributed to higher bills for CAP customers, potentially placing those customers unnecessarily at risk of termination in the near future.

Retroactive relief should date back to November 5, 2019, the date that the PUC adopted lower energy burdens. As explained by TURN witness Bertocci,

Mr. Kehl appears to imply that the proper beginning date for calculating retroactive credits, should the Commission determine doing so is appropriate, is March 21, 2020. This is the date the CAP Policy Statement was published in the *Pennsylvania Bulletin*. However, the language of footnote 3 states solely "if the Commission **changes** the energy burden ranges..." By agreeing to that Settlement provision, PECO bound itself to implement amended Energy Burdens when and if the Commission took action to "change" them. The Energy Burdens were indeed "changed" by the Commission's Final Order issued on November 5, 2019.

TURN St. 1-SR at 11:13-20 (internal citations omitted).

Likewise, the 2016-2018 USECP specifically provides for adjustment to the energy burdens based solely on the Commission's changes to them.²⁸ TURN submits that the clear language of both the Settlement and the 2016-2018 USECP tie PECO's obligation to implement revised energy burdens solely to the Commission's action, and not to the subsequent date on which the Commission's CAP Policy Statement was published. In the event the Commission disagrees, however, TURN notes that this should serve only to reduce, not eliminate, the period for which PECO is obligated to provide retroactive relief.

PECO has testified that its customer information system is not capable of recalculating CAP customer bills to reflect the revised energy burdens. See PECO St. 1-R at 16. Instead, PECO submits that if it is directed to provide retroactive bill credits, it should do so on a system-wide average basis. Id. at 17. As discussed by TURN witness Bertocci, this would not be an exact remedy, as "the purpose of the remedy should be to put CAP customers, to the extent reasonably possible, in the position they would have been in had PECO complied with the Settlement and its 2016-2018 USECP." TURN St. 1-SR at 12:11-13. In Rejoinder testimony, PECO witness Kehl explained that to do the calculations necessary, PECO would need to make modifications to its customer information system, or do approximately half a million manual calculations. PECO St. 1-RJ at 10-13. He suggests that a retroactive bill credit using a system-wide average adjustment could be separately allocated by rate type and federal poverty income guideline tier. PECO St. 1-RJ at 13; see also PECO Exhibit MK-1RJ.

In the interests of delivering some relief effectively and quickly to CAP customers, PECO's proposal as set forth in Mr. Kehl's Rejoinder may be appropriate to provide retroactive

²⁸ 2016-2018 USECP at 32.

bill relief to CAP customers. While Mr. Kehl’s Rejoinder provides calculations as of December 31, 2020, any bill credits should be calculated as of the date that PECO implements the lower energy burdens. In addition, all CAP customers must retain the ability to challenge whether PECO’s credits are adequate on the basis of their individual CAP billings. Any decision in this case should not – and cannot – resolve an individual CAP customer’s claim to have their individual bill adjusted based on the lower energy burdens that were required.²⁹ Additionally, PECO must be required to provide the arrearage forgiveness a customer would have received if their partial payments would have been full payments using the lower energy burdens.

G. The Commission should fine PECO for its willful violation of a Commission Approved Settlement and USECP

The Public Utility Code and Commission Regulations allow for the imposition of civil penalties when utilities violate orders of the Commission.³⁰ Failure to comply with a Commission order as required by 66 Pa. C.S. §501(c) gives rise to liability under 66 Pa. C.S. §3301.³¹ The Commission has established standards and policies to be considered in evaluating violations of the Public Utility Code, a Commission Order, and a Commission Regulation to determine whether a fine would be appropriate.³² That regulation sets forth 10 factors that the Commission must consider in determining whether a fine is appropriate:

- (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

²⁹ The Commission has consistently recognized that, as a statutory creature, it has only the powers granted to it. See Morgan v. Pa. Gas & Water Co., 1973 WL 36724 (Order entered January 30, 1974). Because the Commission lacks class action authority, it cannot foreclose individual complainants from pursuing particularized relief from PECO.

³⁰ See 66 Pa.C.S. § 3301; see also 52 Pa. Code § 69.1201; Pa. Public Utility Comm’n, Bureau of Investigation and Enforcement v. HIKO Energy LLC, Docket No. C-2014-2431410 (Opinion and Order entered December 3, 2015), <https://www.puc.pa.gov/pcdocs/1398667.docx>.

³¹ McCloskey v. Hidden Valley Utility Services, Docket Nos. C-2014-2447138 and C-2014-2447169, Initial Decision at 9 (August 23, 2016).

³² 52 Pa. Code § 69.1201.

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).

TURN witness Bertocci reviewed these factors and testified to those most relevant in this case, applying them to PECO's violations and supporting the Commission's imposition of civil penalties. See TURN St. 1 at 27-30.

i. PECO's conduct is of a serious nature

The first factor the Commission must consider is whether the conduct at issue was of a serious nature. 52 Pa. Code §69.1201(c)(1). In looking at this factor, Mr. Bertocci stated:

PECO has been overcharging more than 100,000 CAP customers since November 5, 2019, over the course of more than a year, and continues its failure to implement the new Energy Burdens. This is not an inadvertent or one-time violation. Despite previously acknowledging to the Commission its obligation to do so, PECO made no attempt to comply with the new Energy Burdens when they were established or after they were published. Even after the filing of this Complaint, PECO has refused to implement the new Energy Burdens or to recognize its obligation to make all the retroactive adjustments required by its erroneous billing.

TURN St. 1 at 27:6-14.

PECO, like any electric or gas distribution company, is required to operate a CAP based not just on Commission policy, but based on the General Assembly's recognition of the importance of utility affordability as a matter of policy in the Commonwealth.³³ The conduct at issue in TURN's complaint is not merely a technical violation of the terms of the Settlement and the 2016-2018 USECP. PECO's conduct amounts to a willful failure to charge low-income CAP customers the correct amount for service as required by its Tariffs, which incorporate the rates calculated by the FCO CAP. PECO has continued in this course of conduct over an extensive period of time. PECO's conduct is clearly of a serious nature.

ii. The consequences of PECO's actions were of a serious nature

The second factor the Commission must consider is whether the consequences of PECO's conduct were of a serious nature. 52 Pa. Code §69.1201(c)(2). The Commission specifically sets forth that "[w]hen consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty." *Id.* In looking at this factor, Mr. Bertocci stated:

In evaluating the consequences of PECO's actions, the inquiry should start with how much CAP customers were overcharged, in total and on a per CAP customer basis. In response to a discovery request, PECO estimated the total increase in CAP Credits if PECO had implemented the updated Energy Burdens on either

³³ See, e.g., 66 Pa. C.S. §2203(8); 66 Pa. C.S. §2802(9), (17).

November 5, 2019, or March 21, 2020, through September 15, 2020, as set forth in the table below:

Implementation Date	Estimated Total Increase in CAP Credits (through September 15, 2020)	Number of CAP Customers (August 2020)	Estimated Average Increase per CAP Customer
November 5, 2019	\$22,175,260	115,834	\$191
March 21, 2020	\$11,824,148	115,834	\$102

I note that the average increase is a calculation based on PECO’s responses to discovery. However, it shows that over time, PECO’s failure to reduce Energy Burdens contributes to significant economic harm, even at a calculated average. It is also impossible to know how a reduced bill might have benefited individual CAP customers – but in my experience, low-income customers are always facing higher bills and costs than they have the ability to cover. Money paid to PECO could have been spent on rent, food or other necessities.

TURN St. 1 at 27:15-28:10 (internal citations omitted).

In Rejoinder testimony, PECO witness Kehl presented an exhibit that sets forth the average increase in CAP credit using a March 21, 2020 start date, through the end of 2020. See PECO St. 1-RJ, Exhibit MK-1RJ. Those numbers can also be used to demonstrate the devastating economic harm experienced by CAP customers. Indeed, based on PECO’s calculations, the lowest income residential electric and residential electric heating CAP customers would have received approximately \$350 or more in additional discounts if PECO had implemented the revised energy burdens for that period. That is a considerable sum for a low-income household, supporting the finding that the consequences of PECO’s failure were of a serious nature.

iii. *PECO's conduct was intentional, and no efforts were made to comply with the Settlement and USECP*

The third and fourth factors the Commission must consider are whether the conduct at issue was deemed intentional or negligent, whether efforts were made to modify internal practices to address the conduct, and the length of time it took the utility to correct the conduct once discovered. 52 Pa. Code §69.1201(c)(3) – (4). In looking at the third factor, Mr. Bertocci stated:

In this case, PECO has knowingly violated an unambiguous term of the FCO Settlement, which was incorporated in its USECP. Indeed, prior to the Commission's adoption of the reduced Energy Burdens, PECO acknowledged to the Commission that any change in Energy Burdens would be automatically incorporated in its USECP.

TURN St. 1 at 28:11-29:2.

As noted by Mr. Bertocci, PECO had previously stated in Comments to the Commission that its FCO design included an automatic pass through of any updates to energy burdens in the CAP Policy Statement.³⁴ Counsel for TURN notified PECO that it was in violation of the Settlement and the 2016-2018 USECP on July 31, 2020 and again on August 19, 2020 prior to filing this Complaint.³⁵ PECO had multiple opportunities to address its failure to comply with the Settlement and 2016-2018 USECP by implementing the Commission's revised energy burdens, but has persisted in its failure to take appropriate action. The Commission should find that PECO has intentionally disregarded the terms of the CAP FCO Settlement and its 2016-2018 USECP and that civil penalties are warranted.

³⁴ Energy Affordability for Low-Income Customers, Docket No. M-2017-2587711, Initial Comments of PECO Energy Company (May 11, 2019) at 8, <https://www.puc.pa.gov/pcdocs/1618633.pdf> (“PECO notes, however, that if the Commission-established energy burden is changed, PECO’s CAP FCO program has a ‘pass through’ clause allowing for automatic implementation.”).

³⁵ Complaint ¶75.

- iv. *PECO's actions impacted more than 100,000 low-income CAP Customers over the course of more than a year*

The next factor the Commission must consider is the number of customers affected and the duration of the violation. 52 Pa. Code §69.1201(c)(5). In looking at this factor, Mr. Bertocci stated

As previously noted, PECO has been overcharging all of its CAP customers, more than 100,000 low-income customers, for more than a year. Even if you were to go by the date of publication of the CAP Policy Statement, rather than the date the Energy Burdens were adopted by the Commission, PECO has been overcharging CAP customers for almost nine months, as of the date of this testimony.

TURN St. 1 at 29:3-8.

Accordingly, not only has PECO's violation of the Settlement and its 2016-2018 USECP proceeded for a long duration, but it has impacted more than 100,000 CAP customers over an extended period of time. All the more concerning is that PECO's violation coincides with an ongoing public health crisis, when hundreds of thousands of customers are facing increased economic hardship. Again, the Commission should find that these factors weigh heavily in favor of imposing civil penalties.

- v. *A substantial fine is necessary to deter future violations*

The next factor the Commission must consider is “[t]he 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.” 52 Pa. Code §69.1201(c)(8). In looking at this factor, Mr. Bertocci stated:

[T]his case arises from the violation of a settlement agreement and the terms of a USECP. This violation could have a chilling effect on the willingness of parties to enter into settlement with PECO and trust that those terms will be honored. Similarly, failure to abide by the rules governing its universal service programs could harm the faith that PECO's low-income customers have that PECO will hold up their end of the bargain when they enroll in CAP or any of PECO's universal service programs. PECO is one of the largest utilities in Pennsylvania. I believe any fine should be substantial enough to send a message to PECO and

Electric and Natural Gas Distribution Companies across the state that these violations are not acceptable to the Commission.

TURN St. 1 at 29:10-19 (internal citations omitted).

As Mr. Bertocci noted, PECO is one of the largest utilities in Pennsylvania, with a large low-income population. In 2019, PECO had 1,488,812 electric customers and 484,678 Natural Gas Customers.³⁶ In addition, PECO's estimated low-income customers made up 26.4% of its residential Electric customer base, and 15.5% of its residential Natural Gas customer base.³⁷

TURN participated in PECO's 2013-2015 USECP proceeding on behalf of its low income members, advocating for improvements that can help reduce the cost of utility service for all low-income Philadelphians in need. TURN, like all parties, joined in supporting the Settlement in recognition of, and in reliance upon, strong Commission policy in favor of settlements.³⁸ That Settlement reflected compromise by all parties. As TURN Witness Bertocci explained:

[S]ettlements are the result of negotiations between parties to litigation, and are, at their core, the result of compromise whereby parties' concerns are addressed in some fashion, with the aim of avoiding expensive litigation. A settlement is a binding contract/statement of what parties will do. Importantly, parties do not get to pick and choose which terms to honor. Such a practice violates a promise and totally undermines the principle of settlement. A failure of any party to comply with its settlement obligations represents, in effect, a breach of contract. Such a breach affects all settling parties and those they represent. In the case of TURN, as a representative of the interests of its membership, the impact of PECO's failure to comply with the Settlement is felt by the low-income tenants TURN represents, as described more fully by TURN witness Lord.

TURN St. 1 at 20:17-21:8.

³⁶ See Pa. PUC Bureau of Consumer Services, Report on 2019 Universal Service Programs & Collections Performance of the Pennsylvania Electric Distribution Companies & Natural Gas Distribution Companies at 4-5, https://www.puc.pa.gov/General/publications_reports/pdf/EDC_NGDC_UniServ_Rpt2019.pdf.

³⁷ *Id.* at 6-7.

³⁸ See 52 Pa. Code §§ 5.231, 69.401.

The CAP FCO Settlement ensured that FCO credits for all CAP participants would be calculated based on the Commission’s energy burdens, even if those energy burdens changed after the FCO was implemented. TURN relied on the language of the Settlement in its advocacy around the Commission’s CAP Policy Statement. TURN St. 2 at 7. If left uncorrected, PECO’s actions would discourage parties from entering into settlements with PECO in future proceedings – increasing litigation costs and unnecessarily straining resources. Simply ordering PECO to comply with the Settlement and its 2016-2018 USECP is insufficient. Civil penalties are necessary to signal to all stakeholders that serious consequences flow from a utility’s violation of Commission orders approving settlements and Universal Service and Energy Conservation Plans.

- vi. *The egregiousness of PECO’s conduct is amplified by the ongoing COVID-19 pandemic, its resulting economic crisis, and the evidence that PECO has not complied with other provisions of the Settlement*

Finally, the Commission must consider other relevant factors. 52 Pa. Code §69.1201(c)(10). In this case, one important and highly relevant factors is the current societal context of the COVID-19 pandemic. As discussed by Mr. Bertocci, the “COVID-19 pandemic and economic crisis has amplified the harm caused by PECO. While PECO’s violations began prior to the COVID-19 pandemic, the ongoing refusal to take action even in the face of economic harm to its CAP customers should be considered in the context of calculating a fine.” TURN St. 1 at 30:1-5.

TURN witness Lord expanded on the impact the COVID-19 pandemic has had on low-income Pennsylvania tenants:

TURN members and individuals throughout the state are dealing with the financial impact of the pandemic. Since the start of the pandemic, more than two million Pennsylvanians have applied for unemployment benefits. The pandemic is

continuing to wreak economic havoc in Philadelphia. According to the Census Bureau's Household Pulse Survey, 36% of adults in the Philly-Camden-Wilmington metro area expect someone in their household to have a loss in employment income in the next four weeks. At the same time, Philadelphia tenants are facing an eviction crisis Tenants are struggling to keep up with their rent. Rental assistance is grossly inadequate to meet the need and the programs are typically difficult for many tenants to access. Many landlords have no interest in cooperating with the rental assistance programs because of the program compliance requirements. I am very concerned about a coming wave of evictions. It is essential that tenants receive affordable utility bills because unaffordable bills will compound the devastating impact of this pandemic.

TURN St. 2 at 10:10-11:9 (internal citations omitted).

Discussing how PECO's actions have exacerbated the ongoing harm caused by the COVID-19 pandemic, Mr. Lord stated:

PECO is adding to this economic crisis by overcharging CAP customers. In disregarding its obligation to calculate CAP bills using the Commission's revised energy burden guidelines, PECO has intentionally billed CAP customers amounts that are above what the Commission considers affordable. I find it unconscionable that PECO is still engaging in this practice during an economic crisis and on the eve of a possible eviction tsunami. Since November 2019, PECO has been overcharging CAP customers, including tenants and members of TURN. PECO's behavior is likely to contribute to tenants facing shut offs, evictions, and housing displacement.

TURN St. 2 at 11:14-12:2 (internal citations omitted).

Mr. Lord further explained that the harms perpetuated by PECO in failing to provide lower bills have a racial justice impact as well:

[R]esearch conducted by the American Council for an Energy Efficient Economy (ACEEE) has found that low-income Black and Hispanic households face high energy burdens, nationally and in the Philadelphia metro area. PECO's CAP customers have household incomes at or below 150% of the federal poverty level. In Philadelphia, Hispanic and Black households have the highest poverty rates. It is reasonable to conclude that a significant number of PECO's CAP participants are Black people and other people of color. TURN members are overwhelmingly Black people and other people of color. Given Philadelphia's demographic makeup, I believe that PECO, as a Philadelphia business that provides services to low-income communities, has an obligation to ensure that their policies and practices do not contribute to systemic racial inequality.

TURN St. 2 at 12:5-14 (internal citations omitted).

PECO witness Kehl, responding to the testimony of TURN witnesses Bertocci and Lord, asserts that PECO has acted in good faith. See PECO St. 1-R at 14-15; PECO St. 1-RJ at 13-14. Further, Mr. Kehl responded PECO has not terminated CAP customers due to Commission orders suspending terminations during the COVID-19 pandemic. PECO St. 1-R at 16. However, Mr. Kehl did not respond to the testimony of Mr. Lord that PECO’s actions caused harm to CAP customers – imposing higher costs for CAP bills, raising the likelihood of future housing insecurity and disproportionately harming communities of color in PECO’s service territory. In addition, contrary to the assertion that PECO has acted in good faith, record evidence in this case reveals that PECO has also violated other aspects of the Settlement. As explained by Mr. Bertocci:

[T]he Settlement requires that, if PECO is granted a base rate increase, the “portion of each Rate R customer’s Annual Credit that is attributable to distribution rates will be increased by a percentage equal to the system-wide residential distribution rate increase.”

TURN St. 1-SR at 10:10-13.

When asked to identify when PECO had made these adjustments, PECO explained that it has simply made quarterly adjustments as it is required to do pursuant to the FCO calculation methodology.³⁹ Accordingly, as observed by Mr. Bertocci, PECO did not undertake a distinct process to adjust CAP customers’ annual credits when it was granted a base rate increase. Mr. Bertocci explained that this additional violation should weigh in to the analysis of whether the Commission should fine PECO:

While not the subject of this Complaint, PECO’s disregard for a separate requirement in the Settlement concerns me, and underscores my Direct Testimony that PECO has not acted in good faith and should be fined for violation of the Commission approved Settlement and 2016-2018 USECP.

³⁹ TURN St. 1-SR (Appendix A); PECO Response to TURN-IV-1(a).

TURN St. 1-SR at 11:7-10.

The Public Utility Code allows for up to \$1000 per violation. 66 Pa. C.S. §3301(a). In addition, each and every day that a violation continues could be a separate and distinct offense. 66 Pa. C.S. §3301(b). Each customer harmed could be considered a separate violation as well. Given the number of customers impacted and the length of time PECO has violated Commission Orders, these provisions could allow for a civil penalty in the billions of dollars. However, after reviewing these factors, Mr. Bertocci recommended a civil penalty be calculated by taking a percentage (5-10%) of the value of discounts PECO failed to provide to CAP customers. See TURN St. 1 at 30:6. This would result in a much more reasonable penalty – at the time of direct testimony, this calculation would have resulted in a penalty of between \$600,000 and \$2.2 million. TURN St. 1 at 30:9. PECO provided no testimony to dispute this suggested calculation and did not suggest an alternative formula for calculating civil penalties.

VI. CONCLUSION

For the reasons set forth in this brief, PECO has not met its burden to show that it has complied with Commission Orders that require it to use the lower energy burdens currently in the CAP Policy Statement at 52 Pa. Code § 69.265(2)(i). In turn, PECO has provided its CAP customers with unreasonable service, in violation of §1501 of the Public Utility Code. As such, TURN requests that PECO be directed to implement the lower energy burdens for as long as it operates its CAP as a Fixed Credit Option, that PECO be directed to provide retroactive bill credits and arrearage forgiveness to all CAP customers, and that the Commission impose a civil penalty on PECO for its willful violation of the Commission Orders approving the CAP FCO Settlement and the 2016-2018 USECP.

Respectfully Submitted,



Joline R. Price, Esq.
Robert W. Ballenger, Esq.
Josie B. H. Pickens, Esq.
Kintéshia S. Scott, Esq.

COMMUNITY LEGAL SERVICES, INC.
1424 Chestnut Street
Philadelphia, PA 19102
215-981-3700

Counsel for TURN

APPENDIX A

Proposing Findings of Fact

1. PECO operates a statutorily mandated and Commission approved Customer Assistance Program (CAP), which provides a bill discount to eligible low-income customers. TURN St. 1 at 6-7.
2. On March 20, 2015, TURN, PECO and other parties entered into a comprehensive settlement in the matter of PECO Energy Company Universal Service and Energy Conservation Plan for 2013-2015, Docket No. M-2012-2290911, creating a Fixed Credit Option program design for PECO's CAP (CAP FCO Settlement). TURN St. 1 at 12.
3. The parties filed a Joint Petition for Settlement on March 20, 2015, attaching the Settlement as a term sheet, seeking Commission approval of the CAP FCO Settlement. TURN St. 1 at 12.
4. On June 11, 2015, Administrative Law Judge Cynthia Williams Fordham issued a recommended decision approving the Joint Petition for Settlement. TURN St. 1 at 13.
5. The Joint Petition was approved, without modification to the CAP FCO Settlement or recommended decision, by the Commission on July 8, 2015. TURN St. 1 at 14.
6. The terms of the CAP FCO Settlement created a fixed credit program for PECO's Customer Assistance Program. PECO St. 1-R at 3.
7. The terms of the CAP FCO Settlement were incorporated into PECO's Universal Service and Energy Conservation Plan for 2016-2018, which was approved by Commission Order on August 11, 2016. TURN St. 1 at 14.
8. PECO transitioned its CAP customers to the CAP FCO in October 2016. TURN St. 1 at 14.

9. PECO's 2016-2018 USECP remains in effect. TURN St. 1 at 17.
10. The CAP FCO provides a fixed credit to CAP customers, using several inputs, including household income as a percentage of federal poverty income guidelines, the number of household members, utility usage, and the allowable energy burdens in the Commission's CAP Policy Statement at 52 Pa. Code §69.265(2)(i). TURN St. 1 at 13-17; PECO St. 1-R at 3.
11. Allowable energy burdens are the maximum percentage of income a household should be spending on utility bills. TURN St. 1 at 16.
12. When the Commission approved the CAP FCO Settlement and the 2016-2018 USECP, the Commission's CAP Policy Statement listed the maximum allowable energy burdens as between 5% and 7% for electric non-heating and 13% and 17% for electric heating and electric with gas heating. TURN St. 1 at 15.
13. The CAP FCO Settlement specifies that "[i]f the Commission changes the energy burden ranges set forth in its Policy Statement, PECO will utilize the new maximum allowable energy burden for each poverty level." TURN St. 1 at 15.
14. On November 5, 2019, the Commission amended its CAP Policy Statement and changed the energy burden ranges in the Policy Statement. TURN St. 1 at 19.
15. The revised CAP Policy Statement lists the maximum allowable energy burdens as between 2% and 4% for electric non-heating and 6% and 10% for electric heating and electric with gas heating. TURN St. 1 at 19.
16. In the CAP FCO Settlement, PECO bound itself to incorporate, without further proceedings, any changes by the Commission to the CAP Policy Statement maximum allowable energy burdens. TURN St. 1 at 20.

17. PECO's 2016-2018 USECP requires PECO to use the updated maximum allowable energy burdens in the CAP Policy Statement when the Commission changes those energy burdens. TURN St. 1 at 23.
18. PECO's Electric and Gas Service Tariffs specifically incorporate the CAP FCO methodology in PECO's 2016-2018 USECP. TURN St. 1 at 10.
19. The PUC's regulations require public utilities to render bills to residential customers in accordance with approved rate schedules. TURN St. 1 at 10.
20. PECO continues to use the old energy burdens in calculating CAP customer credits. TURN St. 1 at 17; PECO St. 1-R at 16.
21. As of the end of December 2020, PECO had 115,007 households enrolled in CAP. PECO St. 1-RJ, Exhibit MK-1RJ.
22. PECO represents to its customers that it calculates CAP bills using the PUC's affordability guidelines. TURN St. 1 at 24.
23. The Covid-19 pandemic is wreaking economic havoc on Philadelphia and the surrounding area. TURN St. 2 at 10-11; TURN St. 1 at 30.
24. PECO estimates that the lowest income residential electric and residential electric heating CAP customers (0-50% FPIG) would have received, on average, between \$340 and \$380 more in CAP credits if PECO had used the updated energy burdens from March 21, 2020 through December 31, 2020. PECO St. 1-RJ, Exhibit MK-1RJ.
25. Low-income households consistently face higher bills and costs than they have the ability to cover – money paid to PECO could have been spent on rent, food or other necessities. TURN St. 1 at 28; TURN St. 2 at 8.
26. PECO's actions are likely to contribute to tenants facing shut offs, evictions and housing

displacement. TURN St. 2 at 11-12.

27. PECO has violated other aspects of the CAP FCO Settlement, including a requirement to adjust annual credits following a base rate increase. TURN St. 1-SR at 10-11.

APPENDIX B

Proposed Conclusions of Law

1. PECO has not met its burden to show that it is in compliance with the Commission Order approving the CAP FCO Settlement, in violation of 66 Pa. C.S. § 501(c).
2. PECO has not met its burden to show that it is in compliance with the Commission Order approving PECO's 2016-2018 USECP, in violation of 66 Pa. C.S. § 501(c).
3. Because PECO has failed to use the updated energy burdens required by the CAP FCO Settlement, the 2016-2018 USECP, and its Tariffs, PECO is providing unreasonable service to its CAP customers pursuant to 66 Pa. C.S. §1501.
4. Because the conduct and consequences of PECO's actions are serious, PECO's conduct was intentional, and PECO's conduct impacted more than 100,000 CAP customers over the course of more than a year – during a deadly pandemic – the Commission should exercise its authority to impose a substantial civil penalty pursuant to 66 Pa. C.S. §3301.

APPENDIX C

Proposed Ordering Paragraphs

1. PECO is directed to implement the lower energy burdens set forth in the CAP Policy Statement at 52 Pa. Code § 69.265 (2)(i) as a part of its CAP FCO within 30 days of this Order.
2. PECO is directed to provide retroactive relief to its CAP customers as follows:
 - a. PECO shall recalculate its proposed system-wide average bill credits set forth in Exhibit MK-1RJ to PECO Statement 1-RJ based on a start date of November 5, 2019 and an end date that coincides with the date PECO implements the lower energy burdens as required by Ordering Paragraph 1.
 - b. PECO shall credit to CAP customer accounts the amounts determined pursuant to the recalculation set forth in Ordering Paragraph 2(a).
 - c. PECO shall provide retroactive arrearage forgiveness, back to November 5, 2019, to any CAP customer whose partial payments since that date would have been sufficient to earn arrearage forgiveness, but for the fact that PECO failed to implement the lower energy burdens since that date.
 - d. PECO shall file confirmation that it has provided this retroactive relief within 60 days of this Order on this docket.
3. PECO shall suspend any termination activity with respect to CAP customers until after it has completed the directives set forth in Ordering Paragraphs 1 and 2 above.
4. PECO is directed to pay a civil penalty equal to 10% of the total value of the discounts PECO is directed to provide to CAP customers pursuant to Ordering Paragraph 2(a).

5. Nothing herein shall preclude individual CAP customers from seeking individualized relief from PECO.