March 24, 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 Reply Brief of the Tenant Union Representative Network (TURN) in the above-referenced case.

Due to the ongoing COVID-19 pandemic, this brief is 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 **Reply 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.

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY BRIEF

ON BEHALF OF THE TENANT UNION REPRESENTATIVE NETWORK (TURN)

March 24, 2021

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I. INTRODUCTION AND PROCEDURAL HISTORY

The Tenant Union Representative Network (TURN), filed its Main Brief (Main Brief) on March 5, 2020 submitting that TURN's August 25, 2020 Formal Complaint against PECO Energy Company (PECO) should be granted in all respects. TURN incorporates by reference the background and procedural history set forth in its Main Brief. Main Briefs were also filed by the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA) and the Office of Consumer Advocate (OCA), and an Initial Brief was filed by PECO. This Reply Brief responds to the Main Brief of OCA and the Initial Brief of PECO, neither of which materially challenge the conclusion that PECO has failed to fulfill its obligations pursuant to the Commission-approved Settlement[1] establishing the terms of PECO's CAP FCO and PECO's Commission-approved 2016-2018 USECP.[2]

II. BURDEN OF PROOF

TURN incorporates by reference the statement concerning burden of proof set forth in its Main Brief. By way of reply, OCA erroneously contends that TURN, as the complainant, has the burden of proof to show that PECO is in violation of the Commission-approved CAP FCO Settlement and 2016-2018 USECP. OCA M.B. at 5-6 ("[A] complainant, to establish a sufficient

[1] 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"). The CAP FCO Settlement was approved by the Commission on July 8, 2015. 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").

[2] 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; 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 (Feb. 17, 2017), https://www.puc.pa.gov/pcdocs/1510970.pdf (hereinafter 2016-2018 USECP).

case against a utility and satisfy the burden of proof, must show that the utility should be held responsible or accountable for the problem described in the complaint."). Because this Complaint alleges that PECO is violating the lawful orders of the Commission, it is PECO, and not TURN, that bears the burden of proof to show that PECO is in compliance with the Commission Orders approving the CAP FCO Settlement and the 2016-2018 USECP.[3] TURN M.B. at 8-9 (citing 66 Pa. C.S. § 315(b)); see also CAUSE-PA M.B. at 9-12. As noted by CAUSE-PA, this means that "PECO must satisfy its burden of proof by a preponderance of the evidence." CAUSE-PA M.B. at 12 (citing NRG Energy Inc. v. Pennsylvania Pub. Util. Comm'n, 233 A.3d 936, 948 (Pa. Commw. Ct. 2019)).

III. SUMMARY OF REPLY ARGUMENT

A. PECO has not met its burden to show compliance with the Commission Orders approving the CAP FCO Settlement and the 2016-2018 USECP

As set forth throughout TURN's Main Brief, PECO put forth no evidence in testimony to show that it complies with footnote 3 of the CAP FCO Settlement and the 2016-2018 USECP. TURN M.B. at 11-17; see also CAUSE-PA M.B. at 13-14. As described by CAUSE-PA, the CAP FCO Settlement is clear on its face – and by agreeing to the terms of the CAP FCO Settlement, "PECO obligated itself to utilize the energy burdens as set forth in the CAP Policy Statement for the FCO, and revise those energy burdens if changed by the CAP Policy Statement." CAUSE-PA M.B. at 14. PECO's Initial Brief makes no effort to show that it is in fact complying with footnote 3, and instead asserts that "the [energy burden] footnote cannot be

[3] Moreover, even if TURN had the burden of proof as suggested by OCA, TURN has satisfied it. TURN has demonstrated, by a preponderance of substantial evidence, that (1) PECO entered into a settlement agreement; (2) PECO committed itself to the terms of that settlement; (3) PECO modified its USECP to include the terms of that settlement; and (4) PECO is now flagrantly in violation of at least one of those terms.

viewed in isolation from other terms within the Settlement." PECO I.B. at 5. This argument is a distraction and attempts to excuse PECO's clear violation on the basis of other, irrelevant events and actions.

As set forth more fully below, both the CAP FCO Settlement and the 2016-2018 USECP require PECO to comply with footnote 3 while it operates the FCO – regardless of any planning it may be doing (with or without stakeholder input) to change the structure of its CAP going forward. For these reasons, PECO has not met its burden to show compliance with the Commission Orders approving the CAP FCO Settlement and the 2016-2018 USECP.

B. The record contains substantial, unrebutted evidence that PECO intentionally violated the terms of the CAP FCO Settlement and its 2016-2018 USECP, and therefore provided unreasonable service in violation of Section 1501 of the Public Utility Code

TURN does have the burden to prove that PECO provided unreasonable service pursuant to 66 Pa. C.S. § 1501. TURN M.B. at 9-10; see also CAUSE-PA M.B. at 12. As set forth in TURN's Main Brief, TURN has met that burden. TURN M.B. at 15-17. PECO argues that it has complied with the CAP FCO Settlement and 2016-2018 USECP because "the [energy burden] Footnote cannot be viewed in isolation from other terms within the Settlement or from subsequent Commission orders regarding the implementation of the Revised CAP Policy Statement and the [energy burdens]." PECO I.B. at 5. As set forth more fully below, PECO's argument that it complied with other settlement provisions is irrelevant to the main issue of this case. As a result, PECO cannot be found to have submitted any evidence – much less substantial evidence – to refute TURN's evidence that PECO provided unreasonable service.

IV. ARGUMENT

A. A plain reading of footnote 3 requires PECO to lower energy burdens in calculating CAP Credits

The language of footnote 3 is unambiguous – while PECO operates its Customer Assistance Program pursuant to the Commission Orders approving the CAP FCO Settlement and 2016-2018 USECP, PECO must use the maximum energy burdens set forth in the Commission's CAP Policy Statement.[4] It is PECO's burden to show compliance with the Commission Orders approving the CAP FCO Settlement and its 2016-2018 USECP. TURN M.B. at 11-13. PECO has not met its burden. Nowhere in PECO's brief does PECO purport to be actually using the energy burdens that are set forth in the CAP Policy Statement. Rather, PECO makes vague statements claiming to have met obligations under the CAP FCO Settlement and 2016-2018 USECP because the broad intent of the settlement was to achieve bill affordability. See PECO I.B. at 5-9. OCA, for its part, seems to argue that PECO has no obligation to comply with footnote 3, stating that "the footnote provides no basis to conclude that any change to the energy burdens must happen 'immediately' or without regard to the other provisions of the Settlement." OCA M.B. at 12. These attempts to bypass the clear language of the CAP FCO Settlement should be rejected.

PECO's arguments reflect a fundamental misunderstanding of TURN's Complaint. The Complaint is intentionally narrow in its focus. It is about how PECO is currently operating its

[4] The current numbers in the CAP Policy Statement at 52 Pa. Code § 69.265(2)(i) sets forth energy burdens for utility Customer Assistance Programs to use, as follows:

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%

CAP, and whether PECO is using the correct numbers in calculating CAP customer credits. As explained in further detail below, it is not relevant to this Complaint whether PECO's CAP is consistent with the goals of the CAP FCO Settlement or meets broader policy objectives.

Furthermore, these arguments run contrary to the plain language of footnote 3.[5] Footnote 3 is clear that when a specific event happens (the Commission changes the energy burdens), that triggers a specific action on PECO's part (use of the Commission's changed energy burdens in FCO calculations). PECO also acknowledges in its brief – as it did in testimony – that the calculation of a customer's FCO credit includes use of the allowable energy burdens set forth in the Commission's CAP Policy Statement. PECO I.B. at 4 ("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 [energy burden]s set forth in the Commission's CAP Policy Statement."); see also PECO St. 1-R at 3. OCA's brief also acknowledges that the Commission changed the CAP Policy Statement, and that footnote 3 requires use of the energy burdens in the CAP Policy Statement. See OCA M.B. at 9 ("The Final CAP Policy Statement Order eliminated the energy burden ranges set forth in the prior CAP Policy Statement and established new energy burdens."); OCA M.B. at 8 (explaining that the steps to calculate the FCO Credit include "the allowable EBs [energy burdens] set forth in the Commission's CAP Policy Statement.")(citing PECO St. 1-R at 3).

[5] In the context of statutory interpretation, courts look first to the plain language, and only when the words of the statute are not explicit should a court look to the intent behind the language. See, e.g., McCloskey v. Pennsylvania Pub. Util. Comm'n, 225 A.3d 192, 203 (Pa. Commw. Ct. 2020) (citing Slippery Rock Area Sch. Dist. v. Pa. Cyber Charter Sch., 612 Pa. 486, 31 A.3d 657, 663 (Pa. 2011)).

i. Use of the correct energy burden percentages is consistent with the intent of CAP FCO Settlement

To make the argument that its actions are consistent with the intent behind the CAP FCO Settlement, PECO cites to language in the Statements in Support of the CAP FCO Settlement filed by TURN and CAUSE-PA. PECO I.B. at 6-7. Those Statements in Support referenced the importance of an evaluation requirement and the expected improvements in bill affordability. Id. However, PECO's failure to implement the lower energy burdens is inconsistent with the CAP FCO Settlement. As Administrative Law Judge Fordham noted in her recommended decision approving the CAP FCO Settlement, TURN and CAUSE-PA had sought a PIPP structure, but agreed to a fixed credit option instead – with the understanding that an evaluation would be done to verify whether this fixed credit was working to properly lower CAP customer bills.[6] As CAUSE-PA noted in its Statement in Support, the FCO model represented a negotiated compromise.[7] Indeed, footnote 3 was an essential piece of that compromise. TURN St. 2 at 7 ("For TURN, a material term of the Settlement was the agreement that PECO's CAP program would automatically adjust if the Commission changed those energy burdens. As a result, TURN's advocacy for lower energy burden targets, including in the Commission's Energy Affordability proceeding, has relied upon this automatic incorporation of updated energy burdens into the PECO CAP Structure."). Further, TURN specifically noted its concerns with the energy burdens contained in the CAP Policy Statement at the time of the CAP FCO Settlement, and

[6] 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 at 23, 36 (June 11, 2015), https://www.puc.pa.gov/pcdocs/1366474.docx.

[7] PECO Energy Company Universal Service and Energy Conservation Plan for 2013-2015, Docket No. M-2012-2290911, Statement of the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania in Support of Settlement (April 22, 2015), https://www.puc.pa.gov/pcdocs/1355720.pdf (hereinafter CAUSE-PA Statement in Support). See also TURN Statement in Support at 4 (attached to TURN St. 1 as Exhibit C)("Although this methodology is more complicated than the PIP advocated for by TURN et al. and CAUSE-PA in the underlying proceeding, it reflects a reasonable compromise…").

urged the Commission to review those energy burdens "to reduce the maximum affordability standards in order to provide bills which are actually affordable to low-income families." TURN Statement in Support at 3 n.1 (attached to TURN St. 1 as Exhibit C).

ii. Use of the correct energy burden percentages is consistent with the 2016-2018 USECP.

As set forth at length in TURN's Main Brief, PECO must comply with the rules set forth in its USECP and incorporated by reference into its Tariffs. TURN M.B. at 14-15; see also TURN St. 1 at 9. As CAUSE-PA described in its Main Brief, regulated Electric Distribution and Natural Gas Distribution Companies, like PECO, are required to submit USECPs to the Commission for review and approval, which must determine whether universal service policies, activities and services like CAP are appropriately funded and available. CAUSE-PA M.B. at 9-10 (citing 66 Pa. C.S. § 2804 (9) and 66 Pa. C.S. § 2203 (8)).[8]

PECO fails to substantively address in its brief how its actions conform to the clear language of the 2016-2018 USECP. Nor has PECO made any showing that it is properly calculating CAP credits as required by the clear language of the 2016-2018 USECP. Indeed, failure to apply the terms of its USECP, and therefore the terms of its Tariff, is not only a violation of the Commission Order approving that plan, but constitutes unreasonable service pursuant to 66 Pa. C.S. § 1501. See TURN M.B. at 15 (citing DeSantis v. Pennsylvania Power Company, Docket No. C-2019-3013652, 2020 WL 2487413, at *6 (Final Order entered June 15,

[8] The Commission has temporarily extended filing schedules from 3 years to 5 years. 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).

2020)); see also TURN St. 1 at 23 ("PECO customers take service from PECO in reliance upon PECO charging the amounts it is lawfully permitted to charge.").

The Commission reviewed, and approved, PECO's 2016-2018 USECP, which incorporates in Addendum B the steps required for calculation of FCO credits, including footnote 3.[9] PECO has not complied with footnote 3's requirement to modify the energy burdens, persisting over a period of 16 months (and counting) in issuing FCO bills which are knowingly overstated. PECO has not presented any reasonable basis upon which it should be excused from complying with its 2016-2016 USECP.

B. Compliance with footnote 3 does not constitute a change to PECO's USECP, nor raise implementation concerns

i. Compliance with footnote 3 does not constitute a change to PECO's USECP

PECO relies heavily on the language of the Commission's CAP Policy Statement Order and subsequent Orders on Reconsideration to argue that it is required to make a filing with the Commission prior to implementing the lower energy burdens.[10] As PECO notes, the Commission specified that utilities were required "to file a cover letter, an addendum reflecting extended terms of a USECP, and an addendum reflecting CAP changes." See PECO I.B. at 10 (citing EAP Order on Reconsideration at 9). PECO argues, therefore, that it was required to make a filing

[9] See 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 at 3 (Aug. 11, 2016) (explaining that "[t]he General Assembly has acknowledged the importance of helping low-income customers maintain utility service. Under the Competition Acts, universal service programs are subject to the administrative oversight of the Commission, which must ensure that the utilities run the programs in a cost-effective manner. 66 Pa. C.S. §§ 2203 (8) and 2804 (9). Although the Competition Acts do not define "affordability," the Commission's Policy Statement provides guidance on affordable payments. 52 Pa. Code §§ 69.261-69.267.").

[10] PECO I.B. at 9-10. See also 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; 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), *available at* https://www.puc.pa.gov/pcdocs/1653749.docx (hereinafter EAP Order on Reconsideration).

seeking to change the energy burdens in its FCO calculations. PECO I.B. at 11. PECO's argument is incorrect.

Critically, use of the new energy burdens in compliance with footnote 3 is not a change to PECO's 2016-2018 USECP. As explained by CAUSE-PA in its Main Brief

> [Y]ears prior to the Commission's November 5, 2019 Order, PECO had – on October 2, 2015 – filed its USECP for 2016-2018. PECO's Plan, including all subsequently filed revisions, included the terms of the FCO Joint Settlement, including footnote 3. The Commission gave final approval to PECO's 2016-2018 USECP on August 11, 2016. Nevertheless, to date, PECO still has not incorporated the Commission's revised energy burden standard in the FCO . . . . Instead, in an action causing further delay, PECO filed an unnecessary Petition with the Commission seeking approval to implement the terms of the Joint Settlement, despite the fact that the Commission already approved PECO to do so on two separate occasions years earlier – in the Commission's review and approval of the Joint Settlement, and again when it reviewed and approved PECO's USECP.
>
> CAUSE-PA M.B. at 7-8.

Implementing lower energy burdens in the calculation of FCO credits does not require any modification to the language of the 2016-2018 USECP, nor does it constitute a change to the FCO CAP twice approved by the Commission.[11] Indeed, under the terms of PECO's 2016-2018 USECP, which requires PECO to use the revised energy burdens, PECO would need to modify its USECP to utilize the outdated energy burdens no longer set forth in the CAP Policy Statement. Again, PECO is required to comply with the language of footnote 3 pursuant to the Commission Orders approving the CAP FCO Settlement and the 2016-2018 USECP.

[11] All of the inputs used to calculate a customer's FCO credit can change – a customer's household income, size, usage, or even the weather normalization of that usage. See TURN St. 1 at 16. Adjustments to these inputs do not require filings with the commission – and neither does the required adjustment to the allowable energy burden percentage.

PECO's brief details the letters PECO filed with the Commission pursuant to the CAP Policy Statement Order, which explained how the Company was implementing or intended to implement the CAP Policy Statement.[12] PECO I.B. at 11. PECO also refers to a series of stakeholder conversations intended to address the future of PECO's CAP, given an evaluation finding that the FCO failed to deliver bills at the targeted percentages of income. While PECO wants to conflate these stakeholder conversations with its compliance with footnote 3, the future design of PECO's CAP is not relevant to assessing whether PECO has violated its existing obligations pursuant to the CAP FCO Settlement and 2016-2018 USECP. The record clearly establishes that PECO has not utilized the Commission's revised energy burdens. As a result, PECO is in violation of two Commission Orders.

ii. OCA's concerns about implementation are misplaced

In its Main Brief, the OCA argues that there are "implementation issues" that must be considered. OCA M.B. at 20-21. OCA appears to argue that there is a conflict between the annual energy burdens in the CAP Policy Statement as revised by the Commission and the monthly credit provided by PECO according to the CAP FCO. The OCA cites to language in the Commission's CAP Policy Statement Order that "Each CAP payment plan should be designed to ensure the household's monthly payment . . . will not exceed this energy burden threshold…" OCA M.B. at 20 (citing OCA St. 1-R at 19-20). The "implementation issues" OCA purports to identify are nonexistent. Indeed, OCA's witness simply identifies three different ways in which a Fixed Credit Option could theoretically apply to reduce CAP customer bills. But this theoretical exercise is completely unnecessary because the FCO currently operates according to

[12] Contrary to PECO's implications, the fact that PECO failed to indicate in these letters it had an obligation to use the new energy burdens does not relieve it of the obligation to do so.

one of the "methods" OCA's witness identifies – providing bills that reflect underlying consumption but adjusting the credits seasonally based on usage. See CAP FCO Settlement at 4-5; 2016-2018 USECP at 32-33.

There is no implementation issue presented in this case because TURN has not proposed any change to PECO's current 2016-2018 USECP – which has already been implemented. TURN simply contends that PECO must, as it has acknowledged, "pass through" the revised energy burdens by incorporating them in the calculation of the FCO CAP credits.[13]

C. The CAP FCO Evaluation by APPRISE and its findings are irrelevant to PECO's obligation to use lower energy burdens

i. The CAP FCO Settlement's requirement for an external review is a separate and distinct settlement term that has no bearing on PECO's current obligation to lower energy burdens

The CAP FCO Settlement required an external evaluation (external review requirement), as follows:

> Expert external evaluation of the new FCO program will require two full calendar years of operational data, plus a six-month period for data analysis and evaluation. With a nominal start date of October 2016, this timeline will require until December 2018 for operational data collection, and until June 30, 2019 to complete data analysis and evaluation. PECO's periodic six-year evaluation is currently required to be filed with the Commission on October 1, 2018. As part of its filing, PECO will therefore request that its six-year evaluation be rescheduled for filing on June 30, 2019. The evaluator's report will be provided to the Commission and to each member of PECO's USECP Advisory Committee and the signatories to this agreement at that time.
>
> CAP FCO Settlement at 9.

PECO and the OCA rely heavily on this requirement and the subsequent evaluation to make an argument that footnote 3 is "inconsistent" with the broad goals of the CAP FCO

[13] TURN notes that this will not ensure that PECO's CAP provides bills which meet the Commission's revised energy burdens. But PECO's CAP did not provide bills which met the Commission's energy burdens prior to their revision and no implementation issue existed then either.

Settlement. PECO I.B. at 5-9; OCA M.B. at 11-13. But it is important to recognize that this external review requirement of the CAP FCO Settlement focused on the future of PECO's CAP program.[14] The referenced evaluation was completed by APPRISE and filed with the Commission in June 2019.[15] As discussed by PECO and the OCA, the evaluation showed that the FCO program was not working to reach the targeted percentages of income, ultimately undermining the goal of providing CAP customers "affordable" bills.

In contrast to the external review requirement, footnote 3 is embedded in a series of steps that describe the ongoing operation of the CAP FCO program. See TURN St. 1 at 14-16. The external review requirement does not suggest that PECO immediately cease operating the CAP FCO while the evaluation is considered. Nor does PECO read it this way. PECO has engaged stakeholders in conversations about the appropriate next phase of its CAP and made filings to move away from the FCO because of its ineffectiveness. At the same time, however, almost two years after the evaluation was completed, PECO continues to operate its CAP pursuant to the terms of the CAP FCO Settlement and the 2016-2018 USECP,[16] despite the evaluation's negative review of the FCO. PECO and OCA appear to infer that the APPRISE evaluation functions as a "trip-wire" of sorts, that once tripped, suspends PECO's obligations to operate the FCO CAP in compliance with Commission Orders. This is clearly not correct.

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[14] Indeed, PECO's 2016-2018 USECP does not even include this term – rather, PECO's 2016-2018 USECP only incorporates terms that describe the operation of the FCO. See Addendum B to 2016-2018 USECP (incorporating the following sections of the CAP FCO Settlement: Determination of Credits; Customers who do not receive an annual credit; and cost containment).

[15] APPRISE PECO Energy Universal Services Program Final Evaluation Report, Docket Nos. M-2012-2290911 & M-2015-2507139 (June 2019).

[16] With of course the notable exception that PECO is not using the required lower energy burdens in the CAP Policy Statement.

This Complaint concerns PECO's ongoing and unreasonable violation of the specific provision of the CAP FCO Settlement and 2016-2018 USECP that requires PECO to utilize the Commission's revised energy burdens in calculating CAP credits. The simple fact is that PECO is not utilizing the Commission's revised energy burdens, and neither the APPRISE evaluation nor the future changes that may be made to PECO's CAP excuse such noncompliance. The result of this noncompliance is considerable harm to CAP FCO participants who continue to receive incorrect bills from PECO. See TURN St. 2 at 8 ("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."); TURN St. 1-SR at 7 ("Reducing the Energy Burden targets within the CAP FCO will provide greater discounts to many CAP participants, to their benefit."). While the CAP FCO remains in operation, according to the CAP FCO Settlement and 2016-2018 USECP, PECO must utilize the Commission's maximum energy burdens. Because it has failed to do so, PECO is in violation of Commission Orders and providing unreasonable service to its CAP customers.

ii. PECO's obligation to implement footnote 3 is distinct from any questions of "affordability"

Both PECO and OCA focus extensively on the APPRISE evaluation's finding that the FCO, as implemented, is not "affordable." See PECO I.B. at 5-9; OCA M.B. at 14-18. It is important to define what PECO and OCA mean by affordability in this context – that the FCO calculations set forth in the CAP FCO Settlement and 2016-2018 USECP do not work to bring customer bills down to the targeted percentage of income. To be clear, this concept of affordability (the ability of a program to provide CAP participants bills that reflect the target percentage of income) is important as a broader policy matter. As PECO references, because of

these fundamental problems with the CAP FCO, TURN has indicated support in other proceedings for PECO's proposal to move to a Percentage of Income Payment Plan (PIPP). See PECO Initial Brief at 8.

Contrary to PECO's implications,[17] TURN is not asking PECO to continue operating the FCO indefinitely. This Complaint is narrowly focused on PECO's noncompliance with the current requirements for operating its CAP. As discussed above, this proceeding is not meant to address the broad policy issues of how PECO should operate a CAP in the future that can better serve low-income customers. See TURN St. 1-SR at 7 ("Whether the FCO structure is adequate to accomplish affordability goals is not the subject of this proceeding."). Instead, this Complaint simply seeks to require PECO to use the revised energy burdens set forth in the CAP Policy Statement, as required by the Commission-approved CAP FCO Settlement and the 2016-2018 USECP.[18] The relief sought by TURN would result in an immediate adjustment to CAP customer bills. For customers who have been harmed by PECO's practices, a favorable outcome will result in additional CAP credits and arrearage forgiveness.

iii. PECO's obligation to implement footnote 3 is distinct from any questions of cost

OCA, in its Main Brief, argues that "spending $9 million to 'fix' the affordability of a program that cannot be fixed by the FCO design would not be a cost-effective use of ratepayer dollars." OCA M.B. at 18. Similarly, PECO states that "[u]tilizing the revised [energy burdens]

[17] See PECO Initial Brief at 13 ("At no time during these stakeholder meetings did TURN propose that PECO first pursue one of the CAP FCO alternatives before transitioning to a PIPP.").
[18] Putting aside all of PECO and OCA's protests about affordability, using lower energy burdens in the calculation of the FCO credit will provide most CAP customers with a lower bill. See TURN St. 1-SR at 7-8 ("Reducing the Energy Burden targets within the CAP FCO will provide greater discounts to many CAP participants, to their benefit. With some exceptions, most CAP customers will receive lower bills. In my experience, the lower the bill, the less difficulty low-income households have paying those bills.").

would, however, result in substantial additional universal service costs to be recovered from all residential customers." PECO I.B. at 13. Contrary to the OCA and PECO's assertions, the cost implications of lower energy burdens should not be determinative in this proceeding. As described by TURN Witness Bertocci, the CAP FCO design incorporates safeguards related to costs:

> [T]he Settlement itself envisaged a system-wide annual limit on CAP credits. Based on PECO's projections, CAP credits with revised Energy Burdens would still be approximately $30 million dollars less than the $110.2 million dollar system-wide annual limit on electric CAP credits set forth in the Settlement and approved by the Commission.
>
> TURN St. 1-SR at 8:8-12.

Indeed, given that the PUC found PECO's projected costs to be reasonable in approving the implementation of the program when it approved the CAP FCO Settlement, it hardly stands to reason that the costs associated with compliance with that CAP FCO Settlement (which remain well below the amount the parties anticipated) are now impermissible.

In addition, the failures of the FCO to provide appropriately lower bills to CAP customers has actually saved non-CAP residential customers money, as residential customers have paid less for PECO's CAP than they would have if the FCO delivered appropriate lower bills. Indeed, OCA appears intent upon continuing this benefit to non-CAP customers at the expense of providing the actual discounts to CAP customers that PECO's FCO is required to provide as a result of the Commission's revised CAP Policy Statement. Furthermore, the Commission acted with full awareness that changes to the energy burdens would impact CAP credits, limited by program cost control mechanisms. As explained by TURN Witness Bertocci, the CAP FCO Settlement explicitly included a cost control in the form of an annual maximum on CAP Credits. TURN St. 1-SR at 8. Similarly, PECO specifically raised to the Commission that

changing the energy burdens would increase CAP program costs.[19] As such, the Commission was necessarily aware of the cost impacts in PECO's program that would result from reducing the energy burdens in its CAP Policy Statement.

Requiring PECO to utilize the lower energy burdens will not "fix" the FCO. However, the notion that CAP FCO participants must simply absorb the cost of PECO's months' long noncompliance and that PECO can continue to overcharge CAP FCO participants until PECO fixes the FCO is untenable. TURN's objective is not to fix the FCO but to compel PECO's compliance with the negotiated and Commission-approved Settlement and the Commission-approved 2016-2018 USECP, which will deliver higher discounts to residential customers who participate in CAP without exceeding the projected costs the FCO was expected to generate.

D. TURN's requests for relief are warranted

i. PECO should be required to provide retroactive relief

PECO sets forth in its Initial Brief, as it did in testimony, that it would not be able to calculate the individual retroactive credits requested in TURN's Complaint. See PECO I.B. at 17 – 19. TURN explained in its Main Brief that PECO's proposal to use system-wide average bill credits, as set forth in the Rejoinder of PECO Witness Mark Kehl, while not ideal, could be appropriate in the interest of delivering relief effectively and quickly. TURN M.B. at 19-20. TURN reiterates that even if a system-wide average credit is used, PECO must recalculate that relief up to the billing cycle in which PECO implements the required energy burdens. Furthermore, PECO must be required to provide retroactive arrearage forgiveness where

[19] Energy Affordability for Low-Income Customers, Docket No. M-2017-2587711, Initial Comments of PECO Energy Company at 8 (May 11, 2019), 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.").

appropriate. Finally, individual CAP customers must retain the ability to challenge whether PECO's credits are adequate based on their specific circumstances. Id.

ii. Retroactive relief should date back to the Commission's CAP Policy Statement Order on November 5, 2019

PECO submits in its brief that any retroactive relief should only date back to March 21, 2020, the date the Revised CAP Policy Statement was published in the Pennsylvania Bulletin. For the reasons set forth in TURN's Main Brief, TURN submits that the language of footnote 3 requires retroactive relief back to the date the Commission "changed" the CAP Policy Statement – when it adopted its Final Order on November 5, 2019. See TURN M.B. at 18-19.

iii. Fines are warranted

PECO asserts that it has acted in good faith, relying on its actions in response to the APPRISE evaluation to reevaluate the FCO program design and propose a PIPP program design. PECO I.B. at 19-20. These arguments gloss over the actual relief sought in this case. As described at length above, the APPRISE evaluation and the overarching problems with the structure of the FCO are not the subject of this Complaint. This Complaint has a narrow focus – enforcement of a clear, unambiguous provision of the CAP FCO Settlement and PECO's 2016-2018 USECP. For all the reasons set forth in TURN's Main Brief, PECO has not acted in good faith, and fines and penalties are warranted in this case. See TURN M. B. at 21-30; see also 66 Pa. C.S. § 3301; 52 Pa. Code § 69.1201(c).

V. CONCLUSION

For the reasons set forth in this brief and TURN's Main 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). As a result of PECO's noncompliance with Commission Orders, 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 the CAP FCO pursuant to the Commission-approved Settlement and 2016-2018 USECP. TURN further submits that PECO must be directed to provide retroactive bill credits and arrearage forgiveness to all CAP customers. Finally, TURN submits that the Commission should 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,

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