

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Tenant Union Representative Network	:	
	:	
v.	:	C-2020-3021557
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Mary D. Long
Administrative Law Judge

INTRODUCTION

A formal complaint filed by a public interest group is dismissed. The language of a settlement agreement, which launched a new customer assistance program design, does not require the utility to automatically update the calculation of the customer assistance benefit without further review by the Commission, following a revision of maximum energy burden tiers by the Commission. Following a review of the record in support of the complaint, the utility did not fail to comply with the language or the spirit of the customer assistance program and is not in violation of an order of the Commission or the utility’s tariff.

HISTORY OF THE PROCEEDINGS

On August 25, 2020, the Tenant Union Representative Network (TURN) filed a Formal Complaint against PECO Energy Company (PECO) with the Pennsylvania Public Utility Commission (Commission) asserting that PECO had failed to comply with the terms of a 2015 settlement regarding the use of the maximum energy burden component for calculating bills for certain customer assistance program (CAP) customers.

The Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA) filed a Petition to Intervene and Answer on September 14, 2020. PECO filed its Answer to TURN's Formal Complaint on September 15, 2020. The Office of Consumer Advocate (OCA) filed a Notice of Intervention and Public Statement on September 23, 2020. TURN filed Preliminary Objections to PECO's Answer on October 5, 2020, in which it argued that PECO's Answer fails to deny specifically material allegations of TURN's Formal Complaint and PECO's Answer fails to conform to the pleading requirements imposed by Chapter 5 of the Commission's Regulations.

The Complaint was assigned to me by hearing notice dated September 25, 2020 and scheduled for a prehearing conference on October 20, 2020. By prehearing conference order entered on September 28, 2020, the parties were directed to file prehearing memoranda on or before October 19, 2020.

Also, on September 25, 2020, PECO filed a Motion to Stay this proceeding because PECO also filed a Petition for Approval of an Amendment to its Proposed 2019-2024 Universal Service and Energy Conservation Plan¹ at Docket Number M-2018-3005795.

TURN filed answers to PECO's Motion on October 15, 2020. Also, on October 15, 2020, PECO filed an Answer to TURN's Preliminary Objections. On October 19, 2020, PECO filed an Amended Answer to TURN's Complaint.

The parties filed prehearing memoranda and appeared at the prehearing conference, which was convened as scheduled. CAUSE-PA's petition to intervene was granted; the preliminary objections filed by TURN were dismissed as moot; and the motion for stay filed by PECO was denied. A litigation schedule was also established which set forth deadlines for the filing of written testimony and scheduled an evidentiary hearing on February 9, 2021.

¹ Docket No. P-2020-3022154.

The parties all served written testimony in support of their positions. By email dated February 4, 2021, the parties informed me that they had mutually agreed to waive cross-examination of witnesses and evidentiary challenges to the pre-served written testimony and accompanying exhibits. The evidentiary hearing was cancelled, and the parties filed a Joint Motion to Admit Written Testimony and Exhibits Into the Formal Evidentiary Record. Attached to the motion were verifications signed by each witness. The motion was granted by interim order entered on February 11, 2021, and the parties were directed to e-file their testimony with the Commission's Secretary's Bureau. The parties filed main and reply briefs. The last brief was filed on March 24, 2021, and the record closed by interim order entered on March 30, 2021.

BACKGROUND: THE 2015 SETTLEMENT

On February 28, 2012, PECO filed its Universal Service and Energy Conservation Plan (USECP) covering the three-year period 2013-15. An amended plan was filed on October 15, 2012. In response to the Commission's April 4, 2013 Order requiring PECO Energy Company to make certain changes to its 2013-2015 USECP, and the April 25, 2014 Secretarial Letter directing the parties in this matter to attempt to reach agreement on a new Customer Assistance Program (CAP) design, the parties engaged in extensive settlement discussions. On March 20, 2015, a Joint Petition for Settlement (2015 Settlement) was filed in this docket by PECO, OCA, TURN, and CAUSE-PA. The Joint Petition changed the design of PECO's CAP from a seven tier CAP Rate program to Fixed Credit Option Percentage of Income Program. The Joint Petition for Settlement was approved by the Commission by order entered July 8, 2015.²

The Fixed Credit Option (FCO), as described in the 2015 Settlement, calculated a customer's CAP credit by evaluating the customer's prior year's energy usage and household income. The final element of the CAP credit evaluation included a determination of the customer's allowable "energy burden," which is a percentage of income that is considered an affordable energy bill. The 2015 Settlement included "Table 1" which set forth the energy burden percentages for three household income tiers:

² Docket No. M-2012-2290911.

FPL	Electric Non-Heating	Electric Heating	Electric with Gas Heating
0-50%	5%	13%	13%
51-100%	6%	16%	16%
101-150%	7%	17%	17%

The 2015 Settlement also provided:

The table is based upon the ranges found at 52 Pa.Code §69.265 (2)(i)(A). In each case, the energy burden listed in the table is the maximum allowable energy burden for that poverty level. 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.^[3]

Following approval of the 2015 Settlement, PECO incorporated the CAP FCO Design into its Universal Service and Energy Conservation Plan for 2016-2018,⁴ and launched the FCO CAP program in October 2016.

On November 5, 2019, the Commission entered a Final Policy Statement and Order, which adopted policy changes related to the design of customer assistance programs, including the allowable energy burdens thresholds⁵ for low-income households:

FPL	Electric Non-Heating	Electric Heating	Electric with Gas Heating
0-50%	2%	6%	6%
51-100%	4%	10%	10%
101-150%	4%	10%	10%

The policy statement was published in the *Pennsylvania Bulletin* on March 21, 2020.⁶

³ Joint Petition for Settlement, Exhibit A, PECO CAP Design Mediation Term Sheet, Footnote 3.

⁴ PECO Energy Company Universal Service and Energy Conservation Plan for 2016-2018 Submitted in Complaint with 52 Pa.Code §§ 54.74 and 62.4, Docket No. M-2015-2507139. (2016-2018 USECP).

⁵ 2019 Amendments to Policy Statement on Customer Assistance Program, 52 Pa.Code § 69.261-69.267 (Final Policy Statement and Order entered November 5, 2019), p. 4. See also 52 Pa.Code §§ 69.265(2)(i).

⁶ 50 Pa.B. 1691-1695 (March 21, 2020).

It is the reduction in energy burden thresholds approved by the Commission in the 2019 policy amendments which forms the basis of the complaint by TURN. As explained in more detail below, according to TURN, the terms of the 2015 Settlement state that the modification of the energy burden thresholds in the FCO calculation is self-executing. By failing to implement the lower thresholds, TURN argues in its complaint, PECO is in violation of the 2015 Settlement.

FINDINGS OF FACT

1. The Complainant, TURN, is a 30-year-old Pennsylvania nonprofit corporation, dedicated to advancing and defending the rights of tenants and homeless people. TURN St. 2, p. 4.

2. The Respondent, PECO Energy Company, is a jurisdictional public utility.

3. On March 20, 2015, after years of comments, litigation, hearings, negotiation, facilitated mediation, and renewed negotiations, PECO, CAUSE-PA, TURN, Action Alliance, and the OCA filed a Joint Petition for Settlement at Docket No. M-2012-2290911. Joint Settlement;⁷ TURN St. 1 at pp.12-13.

4. On June 11, 2015, Administrative Law Judge (ALJ) Cynthia Williams Fordham issued a Recommended Decision approving the Joint Petition for Settlement without modification. Docket No. M-2012-2290911.

5. On July 8, 2015, the Commission adopted ALJ Fordham's Recommended Decision without modification. Docket No. M-2012-2290911.

⁷ By interim order entered on March 10, 2021, the Joint Petition for Settlement at Docket No. M-2012-229091, along with the Statements in Support to the Joint Settlement filed by PECO, OCA and CAUSE-PA were admitted into the record pursuant to 52 Pa.Code § 5.407. The Statement in Support of TURN was already admitted into the record as an exhibit to written testimony. TURN Sts. 1 and 2.

6. PECO currently operates a CAP with a “Fixed Credit Option” or “FCO” design. PECO St. 1-R, pp. 3-4.

7. The FCO provides a fixed credit to CAP customers that was designed to result in an affordable utility bill. 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 Burdens (EB) set forth in the Commission's CAP Policy Statement. PECO St. 1-R, p. 3.

8. Allowable energy burdens are the maximum percentage of income a household should be spending on utility bills. TURN St. 1 at 16.

9. The FCO currently utilizes the maximum energy burdens as stated in Table 1 of the Joint Settlement of March 20, 2015.

10. These energy burden levels were the maximum allowable energy burdens as set forth in the Commission’s CAP Policy Statement at the time of the Joint Settlement 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; OCA St. 1-R at pp. 5-6.

11. Footnote 3 of the 2015 Settlement, in part, provides: “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.” Joint Petition for Settlement, Exhibit A, PECO CAP Design Mediation Term Sheet, Footnote 3 (Hereafter “Footnote 3.”)

12. None of the statements in support of the 2015 Settlement included a discussion of Footnote 3.

13. Under the Settlement, PECO agreed to operate the FCO program for two years, collect data from those two years of operations, have an independent evaluator (APPRISE) assess the program based on those data, and submit the evaluation (the "APPRISE Evaluation") to the Commission and the settling parties in June 2019. PECO St. 1-R, pp. 3-4.

14. Following approval of the 2015 Settlement, PECO incorporated the CAP FCO Design into its Universal Service and Energy Conservation Plan for 2016-2018. E.g., TURN St. 1-R at 4.

15. The Company's USECP for the 2016-2018 period (the "2016-2018 USECP") incorporated the CAP FCO and was approved by the Commission on August 11, 2016. *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 (Order entered Aug. 11, 2016).

16. A number of revisions were made to the 2016-2018 USECP after its initial approval and approved by the Commission. *See, e.g., Petition of PECO Energy Company (PECO) to temporarily amend its current 2016-2018 Universal Service and Energy Conservation Plan*, Docket Nos. P-2020-3022124 and M-2015-2507139 (Secretarial Letter issued Dec. 17, 2020).

17. PECO continues to operate the CAP FCO under the 2016-2018 USECP. TURN St. 1 at p. 14, 17.

18. PECO launched the CAP FCO program in October 2016. TURN St. 1 at p. 14.

19. PECO's 2016-2018 USECP, and compliance tariff included Footnote 3 of the 2015 Settlement.

20. On November 5, 2019, the Commission entered a Final Policy Statement and Order, which adopted policy changes related to the design of customer assistance programs, including the allowable energy burdens thresholds⁸ for low-income households. *2019 Amendments to Policy Statement on Customer Assistance Program, 52 Pa. Code §§ 69.261-69.267, M-2019-3012599 (CAP Policy Statement).*

21. The policy statement was published in the *Pennsylvania Bulletin* on March 21, 2020. 50 Pa.B. 1691-1695 (March 21, 2020).

22. 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.

23. As agreed in the settlement, PECO collected data and submitted it to the third-party evaluator for review.

24. On June 28, 2019, PECO filed the APPRISE Evaluation, which showed that during calendar years 2017 and 2018 approximately 80% of customers with household income at or below 50% of the FPL received unaffordable bills under the FCO. PECO St. 1 at p. 4; TURN St. 1 at Ex. A; *see* APPRISE PECO Energy Universal Services Program Final Evaluation Report (June 2019), Docket Nos. M-2012-2290911 & M-2015-2507139.

25. The result of the evaluation, referred to as the APPRISE study, revealed that the FCO was failing PECO's poorest customers. PECO St. 1-R p. 4.

26. This study was filed with the Commission on June 28, 2019, wherein PECO committed to redesigning its CAP. PECO St. 1-R p. 4.

⁸ 2019 Amendments to Policy Statement on Customer Assistance Program, 52 Pa. Code § 69.261-69.267 (Final Policy Statement and Order entered November 5, 2019), p. 4. *See also* 52 Pa.Code §§ 69.265(2)(i).

27. In response to the APPRISE Evaluation, PECO stated it would continue to investigate the drivers of the unaffordability experienced in 2017 and 2018 for the 0%-50% FPL customer group. PECO St. 1-R p. 4 (citing June 28, 2019 PECO Transmittal Letter accompanying the APPRISE Evaluation, p. 2, Docket Nos. M-2012-2290911 & M-2015-2507139).

28. The Company proposed an action plan for the following nine months, including: (1) completing its analysis of the FCO data and developing preliminary recommendations to improve the FCO; (2) engaging with other signatories to the Settlement to discuss the outcome of PECO's analysis and preliminary recommendations, obtain input on those issues, and determine whether the parties can agree to proposed programmatic changes; and (3) filing a proposal with the Commission to revise the FCO to further improve affordability for its CAP customers with incomes of 50% or less of the FPL. PECO St. 1-R, p. 5.

29. On January 16, 2020, PECO filed a letter that described the portions of the Revised CAP Policy Statement that the Company was already implementing or intended to implement. The Company also noted that it was still considering several provisions of the Revised CAP Policy Statement. PECO St. 1-R, p. 8.

30. On March 26, 2020, PECO filed a letter notifying the Commission that it would be filing a single USECP update to its proposed 2019-2024 USECP,⁹ to address both the revised CAP Policy and a redesigned CAP program to address the failure of the FCO. PECO St. 1-R, pp. 8-10.

31. This new program proposed to incorporate the Commission's new maximum energy burdens. PECO St. 1-R, pp. 10-11; Exhibit MK-1.

⁹ PECO's 2019-2024 USECP was filed for Commission approval on November 1, 2018, before it had the results of the APPRISE evaluation of the FCO data and a year before the Commission's Final Order revising the maximum energy burdens.

32. In the spring of 2020, PECO held a series of calls with stakeholders, including TURN, in which the Company presented its analysis of different alternatives for revising PECO's CAP. Some alternatives retained the CAP FCO framework, while others involved a transition to a percentage of income payment plan (PIPP). PECO St. 1-R, pp. 10-11; Exhibit MK-1.

33. Each of the alternatives was projected to increase annual universal service costs by \$11 million to \$15 million. PECO St. 1-R, pp. 10-11; Exhibit MK-1.

34. The Company's analysis showed that incorporating the EBs from the Revised CAP Policy Statement in the FCO made no improvement in bill affordability but would result in substantial additional universal service costs to be recovered from all residential customers. PECO St. 1-R, pp. 10-11; Exhibit MK-1.

35. After discussions with stakeholders, PECO ultimately stated its intention to stop using the FCO model and instead implement a PIPP in which CAP customers would receive a credit based upon their annual income and a modified version of the Commission's updated EBs. PECO St. 1-R, p. 10.

36. On September 25, 2020, after TURN filed the above complaint, PECO filed a petition to use the new energy burdens for the first few months of 2021, as a transition to the newly proposed CAP program.

37. On July 8, 2020, PECO filed an amended proposed 2019-2024 USECP (the "Amended USECP") which included a transition from the CAP FCO to a PIPP. PECO St. 1-R, p. 12, 15; M-2018-3005795.

38. The Company's proposed PIPP includes reduced minimum bill amounts and utilizes the EBs from the Revised CAP Policy Statement for the 0%-50% FPL and 51%-

100% FPL customer groups and retains the Company's existing EBs for the 101%-150% FPL customer group. PECO St. 1-R, pp. 10-11.

39. On September 25, 2020, PECO filed a Petition in its current 2019-2024 USECP proceeding to utilize the EBs from the Revised CAP Policy Statement as part of the FCO until the Company transitions from the FCO to the PIPP (the "EB Proposal"). P-2020-3022154.

40. As part of that filing, PECO estimated the cost of implementing the EB Proposal for the first few months of 2021 would be approximately \$9 million. PECO St. 1-R at 15.

41. Holding all else equal, by definition, if PECO were to reduce the target burdens by which to define affordability, both the percentage of customers found to have unaffordable bills, and the dollar amount by which actual CAP bills exceeded the target burdens, would remain the same, if not increase. OCA St. 1-R at 9.

42. 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.

43. The individual-by-individual retroactive CAP credit calculations requested by TURN as part of its request for relief in this proceeding cannot be recreated in PECO's Customer Information Management System (CIMS). PECO St. 1-RJ, pp. 10-11.

44. PECO's CIMS has the FCO calculation built as a point-in-time calculation. The FCO calculation pulls from specific data tables that contain the relevant data to calculate the FCO at any given time. PECO St. 1-RJ, pp. 10-11.

45. Those data tables do not store historic billing information beyond what is needed for the point-in-time FCO calculation. PECO St. 1-RJ, pp. 10-11.

46. The rolling nature of the FCO-related data tables prevents the Company from automatically recalculating CAP bills for a prior period. PECO St. 1-RJ, pp. 10-11.

47. The FCO calculation is performed, at a minimum, on a quarterly basis. For this reason, to accurately recalculate CAP bills, PECO would need to recreate each customer's FCO credit at multiple periods for a given year with the point-in-time information at each of those quarterly reassessment dates. PECO St. 1-RJ, pp. 11-12.

48. Other factors such as pro forma estimation of usage (for CAP customers who have not been at an address for twelve months), weather normalization factors, monthly allocation percentages of the annual Fixed Credit, and application of maximum annual CAP credits and minimum bill requirements would all need to be researched and obtained (if available) for each historical point in time for which a prior period calculation would occur. PECO St. 1-RJ, pp. 11-12.

49. Due to the volume of CAP accounts and the potential timeframe covered, a manual recalculation of bills for each CAP customer would be extremely difficult. The CAP program has nearly 100,000 participants and TURN has requested retroactive credits to November 2019 (fifteen months ago). PECO St. 1-RJ, pp. 11-12.

50. Since the calculation would need to be done separately for each three-month period for each customer, a minimum of five calculations per customer would be necessary. Thus, the approach recommended by TURN and CAUSE-PA would require approximately half a million individual, manual calculations. PECO St. 1-RJ, pp. 11-12.

51. PECO could initiate an information technology (IT) project to automate the calculation of retroactive credits, but the full scope of such a project has not been developed

at this time and therefore an estimate of the project cost or implementation timeframe is not available. PECO St. 1-RJ, pp. 12-13.

52. If customers can request individual billings or individualized arrearage forgiveness must be determined, the time and expense of thousands of manual calculations or the time and expense of an IT project will not be avoided. PECO St. 1-RJ, pp. 10-13.

53. If retroactive bill relief is warranted in this proceeding, applying a systemwide average bill adjustment for every CAP customer consistent with what PECO proposed in Exhibit MK-1RJ is appropriate.

54. To develop its bill adjustment proposal, the Company took the average CAP credit and increased the credits, by FPL group and commodity, based on the impact of changing the EBs to the levels in the Revised CAP Policy Statement. This allocation appropriately directs the increased CAP credits in proportion to the EB changes. PECO St. 1-RJ, p. 13.

55. As of August 2020, PECO estimates that 115,384 households were enrolled in CAP – 83,427 electric only customers, 11,929 electric heat customers, and 19,748 dual electric/gas heat customers, and 280 gas only customers. TURN St. 1 at 10: 6-9, citing PECO Response to TURN-I-1(b) and (c), attached hereto in Exhibit B. *See also* PECO Response to TURN-I-(d) (disaggregating CAP customers by FPIG tier).

DISCUSSION

Burden of Proof

Section 701 of the Public Utility Code (Code), provides that any person may complain, in writing, about any act or thing done or omitted to be done by a public utility in

violation, or claimed violation, of any law which the Commission has the jurisdiction to administer, or of any regulation or order of the Commission.¹⁰

The parties agree that PECO bears the burden of proving that it has complied with the terms of the 2015 Settlement, which was approved by an order of the Commission and was further incorporated into PECO's 2016-2018 USECP, which was approved by an order of the Commission.¹¹ However, TURN also contends that PECO has violated Section 1501 of the Public Utility Code. Section 1501 of the Code mandates that a public utility must furnish and maintain adequate, efficient, safe, and reasonable service and facilities.¹² TURN bears the burden of proof as to this claim.¹³ The party with the burden of proof has the duty to establish facts in support of the party's claims by a preponderance of the evidence.¹⁴

Principles and Policies Regarding Universal Service Plans

Universal Service and Energy Conservation Plans are central to the Commission's efforts to achieve energy affordability for the Commonwealth's low-income citizens. In its final order approving (with modifications) PECO's 2016-2018 USECP,¹⁵ the Commission reviewed the history, purpose, and legal requirements of these plans:

The Commission adopted its Customer Assistance Programs (CAP) Policy Statement at 52 Pa. Code §§ 69.261-69.267, initially effective July 25, 1992. The CAP Policy Statement was subsequently amended, in part, effective May 8, 1999, and is applicable to class A Electric Distribution Companies (EDCs) and Natural Gas Distribution Companies (NGDCs) with gross annual operating revenue in excess of \$40 million. The CAP

¹⁰ 66 Pa.C.S. § 701.

¹¹ 66 Pa.C.S. § 315.

¹² 66 Pa.C.S. § 1501.

¹³ 66 Pa.C.S. § 332(a).

¹⁴ *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950); *Feinstein v. Phila. Suburban Water Co.*, 50 Pa. PUC 300 (1976).

¹⁵ 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 entered August 11, 2016), pp. 2-4.

Policy Statement provides guidance on affordable payments and establishes a process for a utility to work with the Commission's Bureau of Consumer Services (BCS) in the development of a CAP. 52 Pa. Code §§ 69.261-69.267.

The Electricity Generation Customer Choice and Competition Act (Electric Competition Act), 66 Pa. C.S. §§ 2801-2812, became effective on January 1, 1997. The Natural Gas Choice and Competition Act (Gas Competition Act), 66 Pa. C.S. §§ 2201-2212, became effective on July 1, 1999. The primary purpose of these Competition Acts was to introduce competition into the retail electric and natural gas generation markets. These two Competition Acts established standards and procedures for the restructuring of the electric and natural gas utility industries. While opening the markets to competition, the Acts also include several provisions relating to universal service to ensure that electric and natural gas service remains available to all customers in the Commonwealth.

The universal service provisions of the Competition Acts, among other things, tie the affordability of electric and natural gas service to a customer's ability to maintain utility service. The Competition Acts define "universal service and energy conservation" as the policies, practices and services that help low-income customers maintain utility service. The term includes customer assistance programs (CAPs), usage reduction programs, service termination protections and consumer education. 66 Pa. C.S. §§ 2202 and 2803. The Competition Acts commit the Commission to continuing, at a minimum, the policies, practices and services that were in existence as of the effective date of the laws. 66 Pa. C.S. §§ 2203(7) and 2802(10). Finally, the Competition Acts require the Commission to ensure that universal service and energy conservation services are appropriately funded and available in each utility distribution territory. 66 Pa. C.S. §§ 2203(8) and 2804(9).

The 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. The Commission balances the interests of customers who benefit from the programs with the interests of the customers who pay for the programs. *See Final Investigatory Order on CAPs: Funding Levels and Cost Recovery Mechanisms*, Docket No. M-00051923 (Dec. 18, 2006), (Final CAP Investigatory Order), at 6-7.

To help meet these requirements, the Commission promulgated the Universal Service and Energy Conservation Reporting Requirements regulations (Reporting Requirements). 52 Pa. Code §§ 54.71- 54.78 (electric) and §§ 62.1 - 62.8 (gas). These Reporting Requirements require each NGDC serving more than 100,000 residential accounts and each EDC serving more than 60,000 residential accounts to submit an updated USECP every three years to the Commission for approval. 52 Pa. Code §§ 54.74 and 62.4.

In reviewing universal service plans, the Commission endeavors to balance the interests of customers who benefit from the programs with the interests of customers who pay for these programs.¹⁶ The development of universal service plans is a complex process, whereby the Commission routinely seeks input from stakeholders. Accordingly, for customer assistance plans (CAPs), Commission guidelines direct a utility should file its CAP proposal with the Commission, before implementing, revising, or expanding a CAP.¹⁷ CAP programs can be costly for a utility to implement and maintain. Therefore, the regulations require regular evaluation and re-evaluation of CAP design to ensure that they are efficient in reaching the customers who qualify to participate in these programs, help these customers to achieve “affordable” bills, and are cost effective.¹⁸

Interpretation of Language in Settlement Agreements and Tariffs

In the Commission context, settlement agreements are contracts which has been sanctioned by the Commission.¹⁹ That is, the Commission reviews the terms of an agreement and determines that the agreement reached by the parties is in the public interest. The courts

¹⁶ E.g., *Peoples Nat. Gas Co. LLC Universal Serv. & Energy Conservation Plan for 2015-2018* Submitted in Compliance with 52 Pa. Code S 62.4., Docket No. M-2014-2432515, 2015 WL 9310196, at *2 (Dec. 17, 2015); 52 Pa.Code §§ 54.73(a)(4), 62.3(a)(4).

¹⁷ 52 Pa.Code § 69.263(c).

¹⁸ 52 Pa.Code §§ 54.76, 62.6 (requiring an independent third-party evaluation of universal service programs at least every six years).

¹⁹ *Cf. Commonwealth by Shapiro v. UPMC*, 208 A.3d 898, 909–10 (Pa. 2019)(A consent decree is a contract which has been given judicial sanction and will be interpreted in accordance with the general principles governing the interpretation of contracts).

have held that the principles of interpretation of contracts are appropriate for the interpreting the language of settlement agreements:

A settlement agreement is in essence a contract binding the parties thereto. Courts construe settlement agreements according to the traditional principles of contract construction. The fundamental rule in contract interpretation is to ascertain the intent of the contracting parties from the writing. Further, the whole instrument must be taken together in arriving at contractual intent. Where the language of the contract is clear and unambiguous, the focus is upon the terms of the agreement as manifestly expressed, rather than as, perhaps, silently intended. A contract is ambiguous where it can be reasonably construed to have more than one meaning.^[20]

Additionally, tariff language is interpreted in accordance with principles of statutory construction when the language of the tariff is unclear.²¹

With the background of universal service plans in mind, and considering the principles of interpretation of settlement agreements, I turn now to consider the arguments of the parties.

Positions of the Parties

According to TURN and CAUSE-PA, the footnote in the 2015 Settlement, which was approved by the Commission and incorporated into PECO's 2016-2018 USECP Plan, requires PECO to automatically update the fixed credits received by each customer participating in PECO's CAP FCO program. TURN contends that both the plain language of the 2015 Settlement and subsequent comments made by PECO support the interpretation that the parties intended the language to mean that PECO would automatically update the FCO calculation without seeking Commission approval to do so. According to TURN, PECO is in violation of the 2015 Settlement Agreement because it failed to automatically update the FCO calculations

²⁰ *Waggle v. Woodland Hills Ass'n, Inc.*, 213 A.3d 397, 405–06 (Pa.Cmwlth. 2019)(cleaned up to omit citations and quotes).

²¹ *PPL Elec. Utils. Corp. v. Pa. Pub. Util. Comm'n*, 912 A.2d 386 (Pa.Cmwlth. 2006).

when the Commission updated the energy burdens for each poverty level. As relief, TURN requests the Commission to order PECO to retroactively calculate the fixed credit due to each participant of the FCO CAP program from the date the Commission approved the revised energy burdens, November 5, 2019.

TURN further contends that the 2015 Settlement Agreement and the 2016-2018 USECP are Commission orders. By failing to automatically update the FCO calculations with new energy burdens, PECO is in violation of Commission orders. TURN also argues that PECO is in violation of Section 1501 of the Public Utility Code and has failed to render reasonable service to FCO CAP customers. As relief, TURN wants the Commission to direct PECO to issue individual retroactive bill credits and arrearage forgiveness to PECO CAP customers, beginning with the date of the Commission's final order revising energy burdens, on November 5, 2019. TURN also argues that a substantial civil penalty for these violations is appropriate, in a range between \$600,000 and \$2.2 million.

CAUSE-PA echoes TURN's arguments. According to CAUSE-PA, there is substantial evidence in the record which leads to the conclusion that PECO intentionally violated the terms of the 2015 Settlement Agreement and 2016-2018 USECP. CAUSE-PA also advocates retroactive bill credits and arrearage forgiveness for CAP FCO customers and asserts that a civil penalty is appropriate, in the amount recommended by TURN.

PECO disagrees that it violated either the 2015 Settlement Agreement or its 2016-2018 USECP. According to PECO, the narrow focus of TURN and CAUSE-PA misses the overall objective of the 2015 Settlement: achieving improved bill affordability for PECO's low-income customers. PECO explains that the FCO was a new program for PECO. At the time of the 2015 Settlement and approval of the 2016-2018 USECP shortly thereafter, there was reasonable optimism that the FCO would improve affordability. However, the APPRISE Evaluation, the study included in the 2015 Settlement to evaluate the effectiveness of the FCO program, shows that bill affordability decreased for customers below the 50% poverty threshold. Therefore, PECO began development of a plan to address this negative outcome by developing

proposals to redesign the program. According to PECO, given the outcome of the APPRISE Evaluation, its subsequent actions are consistent with the intent of the 2015 Settlement.

PECO also contends that the Commission's orders regarding updated energy burdens created a mandatory filing requirement for distribution companies to present proposals for implementing the updated energy burdens. PECO takes the position that it has complied with the direction of the Commission, issued after the orders approving the 2015 Settlement and the 2016-2018 USECP.

Finally, PECO contends that the relief requested by TURN and CAUSE-PA is not supported by the record. PECO argues that individual retroactive CAP FCO credits can only be manually calculated or would require a redesign of PECO's IT system. Although PECO disputes that it is in violation of the 2015 Settlement, PECO takes the position that the effective date of the revised energy burdens should be the date that the Commission's revised policy statement was published in the *Pennsylvania Bulletin*, March 21, 2020, and not the date the order was approved, November 5, 2019. PECO further asserts that if any relief is merited, it would at most be appropriate to apply a systemwide average bill adjustment for every CAP customer, rather than individualized billing.

OCA agrees that the complaint of TURN should be dismissed. According to OCA, TURN has taken the language in the footnote out of context and does not recognize the process for changing universal service programs. OCA points to the failure of the FCO and contends that recalculating the FCO with the revised energy burdens will be very expensive for PECO's customers and will do nothing to improve bill affordability for CAP customers.

TURN and CAUSE-PA argue that the sentence in Footnote 3 of the 2015 Settlement is "clear:"

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.

PECO and OCA agree that the language is “clear,” but in their view, PECO has complied with the sentence by completing the APPRISE evaluation promptly and proposing a new CAP program which utilizes the Commission’s revised energy burdens.

For the reasons discussed below, I agree with PECO and OCA.

Analysis

First, as explained above, to the extent that the words of a contract are clear, it is not appropriate to consider matters extrinsic to the agreement to interpret the meaning of the words. TURN’s interpretation of the words of the footnote is not a reasonable interpretation. In order for TURN’s interpretation to be reasonable, the following words would have to be added to the footnote:

If the Commission changes the energy burden ranges set forth in its Policy Statement, *immediately, upon entry of a final order of the Commission revising the Policy Statement*, PECO will utilize the new maximum allowable energy burden for each poverty level, *without seeking further approval by the Commission.*

Even if the interpretation advanced by TURN and CAUSE was reasonable, there is no persuasive extrinsic evidence which support’s TURN’s interpretation. For example, TURN and CAUSE-PA both argue that the automatic adjustment mechanism was “central” or “essential” to their agreement to the terms of the 2015 Settlement. However, a review of the statements in support to the settlement by TURN and CAUSE-PA reveals no discussion of an automatic adjustment as an essential component of the program. If an automatic adjustment was “central” to the terms of settlement, it should not have been relegated to the explanatory footnotes. Rather, its importance should have been signaled by including the mechanism in the main body of the settlement by including it with the detailed description of the calculation of a CAP customer’s bill.²²

²² I note that generally, the footnotes include explanatory comments regarding definitions and the subject of future discussion regarding the design of PECO’s CAP program.

Importantly, no language in Footnote 3 or discussion in the statements in support of the settlement signaled to the presiding administrative law judge or to the Commission that the adjustment to CAP bills was intended to be immediate and without further review by the Commission. The USECP process is complex. Although the plans have a set term, the reality is that the design of low-income programs is meant to be an ongoing process, where company filings frequently overlap as the Commission reviews plan proposals, analyzes the data, and solicits input from stakeholders to evaluate the effectiveness of a utility's proposed programs as well as the costs related to the programs that are borne by all of a utility's ratepayers. If any aspect of the program was meant to change "automatically" without further review by the Commission, such an important feature of the agreement should have been clearly set out in the 2015 Settlement so that it could be considered by the administrative law judge and the Commission. The importance of Commission review is highlighted here by Mark Kehl's testimony that updating the customer bill calculations to reflect the changed energy burdens approved by the Commission would cost nearly \$9 million for the first few months of 2021.²³

Reviewing the 2015 Settlement and subsequent USECP Plan in totality, PECO has substantially complied with the words and the spirit of the settlement. As set forth below, PECO has proposed a CAP program which incorporates the changes made by the Commission to the household energy burdens in a good faith effort to comply with its obligations from the 2016-2018 USECP.

PECO's FCO was clearly experimental at the time it was first proposed. Although the parties were optimistic that it would be successful, they still agreed to an adjusted evaluation schedule. This adjusted evaluation was a feature of the settlement highlighted by the parties in their statements in support.²⁴ PECO filed the 2016-2018 USECP, which incorporated the 2015 Settlement FCO, on October 1, 2016. Ten months later, by order entered on August 11, 2016, the 2016-2018 USECP was approved, and the FCO launched in October 2016. As agreed in the settlement, PECO collected data and submitted it to the third-party evaluator for review.

²³ PECO St. 1-R at 13.

²⁴ PECO Statement in Support p. 11; TURN Statement in Support, p. 4; CAUSE-PA Statement in Support, p. 10.

The result of the evaluation, referred to as the APPRISE study, revealed that the FCO was failing PECO's poorest customers. This study was filed with the Commission on June 28, 2019, wherein PECO committed to redesigning its CAP.

Within a similar timeframe, in May 2017, the Commission initiated a study regarding home energy burdens across the Commonwealth. The results of the study, as well as input from stakeholders, culminated in the Commission's revised CAP Policy, which established new maximum tiered energy burdens. The final order, entered on November 5, 2019, directed utilities to file addendums to existing or proposed plans setting forth the utility's plan for compliance with the revised CAP Policy.

The order was temporarily stayed while the Commission considered motions for reconsideration filed by OCA and the Energy Association of Pennsylvania. PECO filed its response to the Commission on January 16, 2020. On February 6, 2020, the Commission granted the petitions for reconsideration, in part, to clarify that the incorporation of the provisions of the CAP Policy, including the revised energy burdens, was voluntary, although the filing by the utilities regarding energy affordability plans was not.

On March 26, 2020, PECO filed a letter notifying the Commission that it would be filing a single USECP update to its proposed 2019-2024 USECP,²⁵ to address both the revised CAP Policy and a redesigned CAP program to address the failure of the FCO. This new program proposed to incorporate the Commission's new maximum energy burdens.

PECO's 2019-2024 USCEP has not yet been approved by the Commission. Accordingly, on September 25, 2020, after TURN filed the above complaint, PECO filed a petition to use the new energy burdens for the first few months of 2021, as a transition to the newly proposed CAP program.

²⁵ PECO's 2019-2024 USECP was filed for Commission approval on November 1, 2018, before it had the results of the APPRISE evaluation of the FCO data and a year before the Commission's Final Order revising the maximum energy burdens.

Taken together, and in view of arguably competing obligations, PECO's actions in incorporating the revised energy burdens into its CAP program are reasonably compliant with the plain language of Footnote 3 of the 2015 Settlement and subsequent 2016-2018 USECP. Therefore, PECO has sustained its burden of proving that it has complied with orders of the Commission.²⁶

I also find that TURN has failed to sustain its burden of proving that PECO failed to render reasonable service in the administration of its 2016-2018 USECP. Accordingly, TURN's complaint will be dismissed.

CONCLUSIONS OF LAW

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

2. The utility bears the burden of proving it is in compliance with the Commission's order approving its USECP and tariff. 66 Pa.C.S. § 315.

3. The complainant bears the burden of proving the utility has failed to render reasonable service. 66 Pa.C.S. §§ 332; 1501.

4. The principles of interpretation of contracts are appropriate for the interpreting the language of settlement agreements. *Waggle v. Woodland Hills Ass'n, Inc.*, 213 A.3d 397, 405–06 (Pa.Cmwlth. 2019).

5. PECO met its burden of proving that it did not violate the terms of a settlement agreement, which was incorporated into a Commission-approved universal service plan and PECO's tariff.

²⁶ Of course, this conclusion should not be read as an approval of the proposed new CAP program or PECO's petition to amend the FCO, which is not before me.

6. TURN failed to sustain its burden of proving that PECO rendered unreasonable service in the administration of its universal service plan.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the formal complaint filed by Tenant Union Representative Network against PECO Energy Company at Docket C-2020-3021557 is dismissed.
2. That the Secretary mark the docket closed.

Date: April 9, 2021

/s/
Mary D. Long
Administrative Law Judge