May 3, 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

Exceptions of TURN

Dear Secretary Chiavetta:

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

Due to the ongoing COVID-19 pandemic, these exceptions 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)
Commission's Office of Special Assistances (via email to ra-OSA@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 **Exceptions 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	:	

EXCEPTIONS OF COMPLAINANT TENANT UNION REPRESENTATIVE NETWORK (TURN)

May 3, 2021

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I. INTRODUCTION

The Tenant Union Representative Network (TURN) alleges in this Complaint 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. PECO is obligated to implement the energy burdens as set forth at 52 Pa. Code § 69.265 (2)(i) pursuant to clear language in both a Settlement Agreement creating PECO's CAP Fixed Credit Option (FCO) (CAP FCO Settlement) [1] and PECO's currently effective Universal Service and Energy Conservation Plan (2016-2018 USECP).[2]

Specifically, the language of footnote 3, contained in both the CAP FCO Settlement and the 2016-2018 USECP, states that "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] Administrative Law Judge (ALJ) Long finds in her Initial Decision (I.D.) that PECO's actions "reasonably complied" with the CAP FCO Settlement and 2016-2018 USECP. I.D. at 23. This is clear error. As set forth in these exceptions, a plain reading of the

[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 Joint Petition was approved without modification by Commission Order 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 (Feb. 17, 2017), https://www.puc.pa.gov/pcdocs/1510970.pdf (hereinafter 2016-2018 USECP). PECO's 2016-2018 USECP was approved by Commission Order on August 11, 2016. 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).

[3] CAP FCO Settlement at 2 n.3; 2016-2018 USECP at 30 n.3.

language of footnote 3 in both the CAP FCO Settlement and the 2016-2018 USECP requires PECO to implement the lower energy burdens. By failing to do so, PECO has provided unreasonable service in violation of section 1501 of the Public Utility Code.

II. BACKGROUND

TURN incorporates by reference the background set forth in its main and reply briefs.

III. EXCEPTIONS

a. TURN Exception 1: The ALJ erred in concluding that PECO substantially complied with the Commission's Order approving the CAP FCO Settlement because the plain language of the Settlement requires PECO to automatically update its CAP credit calculations.

The ALJ concluded that "[r]eviewing the 2015 Settlement and subsequent USECP Plan in totality, PECO has substantially complied with the words and the spirit of the settlement" and therefore met its burden to show compliance with the Commission's Order approving the CAP FCO Settlement. I.D. at 21. As set forth more fully below, the ALJ erred in concluding that the plain language of footnote 3 does not require PECO to automatically update its calculations.

As the ALJ recognized, interpretation of the CAP FCO Settlement is governed by rules of contract interpretation. I.D. at 16-17. At its core, a settlement is a contract between parties. As the ALJ noted, "where the language of the contract is clear and unambiguous, the focus is upon the terms of the agreement as manifestly expressed." I.D. at 17 (citing Waggle v. Woodland Hills Ass'n, Inc., 213 A.3d 397, 405-406 (Pa. Cmwlth. 2019)).

The language of footnote 3 is clear and unambiguous. It 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).

Indeed, the ALJ found as fact that "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**." I.D. at 6 (Finding of Fact 7) (emphasis added); Cf. PECO St. 1-R at 3; OCA St. 1-R at 6. As of November 5, 2019, the "allowable Energy Burdens" set forth in the Commission's CAP Policy Statement are as follows:[4]

Household Income	Electric nonheating service	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%

While the parties have disputed when these numbers were effective,[5] no party disputes that the above numbers are indeed the numbers currently set forth in the Commission's CAP Policy Statement at 52 Pa. Code § 69.265(2)(i). There is also no factual dispute that PECO is not utilizing the allowable energy burdens.

[4] 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) (hereinafter CAP Policy Statement Order).
[5] It is TURN's assertion that the new Energy Burdens were changed as of the date of the Commission's Order updating the CAP Policy Statement – November 5, 2019. TURN R.B. at 21; TURN M.B. at 18-19. PECO has argued that the new Energy Burdens were only effective as of March 21, 2020 – the date the CAP Policy Statement was published in the Pennsylvania Bulletin. PECO I.B. at 16.

Nevertheless, in her Initial Decision, the ALJ stated that TURN's interpretation, that footnote 3 currently obligates PECO to use the energy burdens as set forth in the CAP Policy Statement, is not reasonable, and for TURN's interpretation to be reasonable, it should have stated as follows:

> 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***.
>
> I.D. at 20 (emphasis in original).

Contrary to the ALJ's holding, TURN's interpretation of the footnote is reasonable. Importantly, the requirements of footnote 3 should be read as self-executing. In Core Communications, Inc. v. Verizon Pennsylvania LLC, the Commission addressed which rates were appropriate for one party to charge another based on a contract between the parties. Core Communications, Inc. v. Verizon Pennsylvania LLC, No. C-2014-2406550, 2018 WL 4953048, at *31, *35 (Oct. 4, 2018). A footnote in the Pricing Appendix to an agreement between Core Communications and Verizon Pennsylvania stated that "listed rates and services are available to Core . . ." and that "the rates and charges set forth . . . shall apply until such time as they are replaced by new rates as may be approved or allowed into effect . . . ." Id. In ruling on whether Core Communications was obligated to utilize subsequently approved rates, the Commission held that "[i]n our view, the *2004 Compliance Order* constitutes an affirmative order of the Commission, which replaced the rates listed in the Pricing Appendix with new lower . . . rates, as contemplated in Footnote 1. We find that this underscores the self-executing nature of Footnote 1." Id. at *36.

Footnote 3 should be read similarly. Footnote 3 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."[6] The Commission's CAP Policy Statement Order is also an affirmative order. The Commission took a specific action to change the energy burdens in its CAP Policy Statement. The only reasonable interpretation of footnote 3 is that if and when the energy burdens are updated, those new energy burdens would supersede the previously used energy burdens. Because the Commission updated the energy burdens in its CAP Policy Statement, PECO is necessarily required to use the updated energy burdens in calculating CAP customer FCO credits.

Additional phrases are not necessary to indicate that footnote 3 is self-executing and requires automatic implementation. Neither is additional language required to ascertain the clear meaning of the language. By ignoring the plain language of footnote 3, the ALJ violated principles of contract interpretation, including that the contract must be construed only as written, and its plain meaning may not be modified under the guise of interpretation. See Szymanowski v. Brace, 987 A.2d 717, 722 (Pa.Super. 2009) (quoting Abbott v. Schnader, Harrison, Segal & Lewis, LLP, 805 A.2d 547, 553 (Pa.Super. 2002) (internal citations omitted)).

To the extent that any ambiguity exists in the language of footnote 3, the ALJ erred in failing to look at other provisions in the settlement that did require future filings to implement a change to the FCO. For example, footnote 7 in the CAP FCO Settlement sets forth that PECO will put changes in a future filing, stating that

> The maximum Annual Credit levels set forth above will remain at these levels for four years after the program is implemented in October 2016. After four years, PECO will confer with the other signatories to determine whether there is a consensus new maximum Annual Credit level. If so, PECO will adopt that new

[6] CAP FCO Settlement at 2 n.3; 2016-2018 USECP at 30 n.3.

> level in its next-filed Three-Year Plan. If no consensus is reached, PECO may propose a new maximum Annual Credit level in its next-filed Three-Year Plan.
>
> CAP FCO Settlement at 3, n.7.

In contrast to the language of footnote 3, footnote 7 does specifically discuss future filings. The logical implication would be that because footnote 3 does not include language about future filings, no such filings are required – supporting the interpretation that the adjustment would happen automatically.

Additionally, other footnotes operate to modify the calculation of a CAP customer's FCO credit without further Commission action. For example, footnote 2 in the CAP FCO Settlement requires an automatic adjustment in the calculation of CAP credits. Footnote 2 states that "a customer's Federal Poverty Level percentage will be determined by reference to the then-current version of the Federal Poverty Guidelines published by the Federal Department of Health and Human Services." CAP FCO Settlement at 2 n.2. The federal government updates its Federal Poverty Guidelines every year, and PECO automatically uses those new numbers to determine CAP customer eligibility.[7]

Likewise, PECO updates the calculation of a CAP customer's FCO credit if that customer has a change in household income or size. CAP FCO Settlement at 2. Here too, the change of each CAP customer's FCO credit calculation is due to a change in input. Importantly, PECO itself has acknowledged the self-executing nature of footnote 3. In Comments to the Commission, PECO represented to the Commission that its USECP incorporates Energy Burden changes automatically, 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***

[7] See, e.g., Dep't of Health and Human Services, Annual Update of the HHS Poverty Guidelines, 86 Fed. Reg. 7732 (Feb. 1, 2021), https://www.govinfo.gov/content/pkg/FR-2021-02-01/pdf/2021-01969.pdf.

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) (emphasis added)).

The ALJ almost entirely ignores this comment from PECO. However, it is clear evidence that not only is TURN's interpretation of footnote 3 reasonable – it is an interpretation that PECO acknowledged and shared. For the reasons set forth above, the plain language of footnote 3 clearly requires PECO to use the energy burdens that are set forth in the CAP Policy Statement without further Commission approval.

b. TURN Exception 2: The ALJ erred in dismissing the language of footnote 3 due to its placement as a footnote

In her Initial Decision, the ALJ dismisses TURN's argument that footnote 3 was central to the CAP FCO Settlement by pointing out that it is a footnote and not in the main text. I.D. at 20. The Initial Decision states

> 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.
>
> I.D. at 20.

The ALJ cites no legal authority for distinguishing between the import of language in the body of a settlement and language in a footnote contained in the settlement. TURN has likewise located no legal authority for this distinction, which is unsupported by principles of contract interpretation. See, e.g., In re Whiters, 2016 WL 635020, at *3 (Pa. Super. Ct. Feb. 17, 2016; non-precedential) (examining settlement language, including footnotes, to ascertain that parties reached a "meeting of the minds"). See also Core Communications, Inc. v. Verizon Pennsylvania

LLC, No. C-2014-2406550, 2018 WL 4953048, (Oct. 4, 2018) (interpreting the meaning and import of a specific footnote in an agreement between Core Communications and Verizon Pennsylvania).

The ALJ's focus on the placement of the language is misguided. Contrary to the ALJ's assertion that "generally, the footnotes include explanatory comments regarding definitions and the subject of future discussion regarding the design of PECO's CAP program," I.D. at 20 n.22, several other footnotes in the CAP FCO Settlement require PECO to take specific actions to modify the calculations and/or operations of the FCO.

For example, footnote 2 states "a customer's Federal Poverty Level percentage will be determined by reference to the then-current version of the Federal Poverty Guidelines published by the Federal Department of Health and Human Services." CAP FCO Settlement at 2 n.2. As noted above, the Federal Poverty Guidelines update every year, and PECO updates those new numbers to determine CAP customer eligibility.

Similarly, footnote 7 lays out specific actions to be taken, stating:

> The maximum Annual Credit levels set forth above will remain at these levels for four years after the program is implemented in October 2016. After four years, PECO will confer with the other signatories to determine whether there is a consensus new maximum Annual Credit level. If so, PECO will adopt that new level in its next-filed Three-Year Plan. If no consensus is reached, PECO may propose a new maximum Annual Credit level in its next-filed Three-Year Plan.
>
> CAP FCO Settlement at 3, n.7.

As discussed above, it is notable that in this footnote, specific next steps are laid out, requiring PECO to include or propose changes in a future filing. By contrast, footnote 3 contains no such requirement. Three additional footnotes also contain automatic adjustments. Footnotes 8, 9 and 10 each set forth that if PECO is granted a base rate increase, the maximum allowable individual

CAP credits will increase by a specific percentage equal to the system-wide rate increase. CAP FCO Settlement at 4, n. 8-10.

Reading the CAP FCO Settlement in its entirety, including the footnotes, leads to the inescapable conclusion that the footnotes are more than simply explanatory. Language in specific footnotes requires PECO to make adjustments CAP customers' credit calculation and maximum CAP credit limits. Cf. I.D. at 20. The ALJ's interpretation is simply incorrect; the parties utilized the footnotes to document specific and important agreements about the future operation of the FCO, and how it would respond to events that occurred between Commission-approval of revisions to PECO's CAP. Instead of applying sound principles of contract interpretation, the ALJ's Initial Decision undermines the mutual intention of the parties at the time the CAP FCO Settlement was formed. See Penn–America Ins. Co. v. Peccadillos, Inc., 27 A.3d 259, 264 (Pa.Super.2011) (quoting American and Foreign Ins. Co. v. Jerry's Sport Center, Inc., 606 Pa. 584, 2 A.3d 526, 540 (2010)) ("[T]he rules of contract interpretation provide that the mutual intention of the parties at the time they formed the contract governs its interpretation."). The intent of the parties is expressed most clearly in the written provisions of the contract, which specifically accounted for changes to the calculation of CAP customer FCO credits without necessity of Commission action. Id.

c. TURN Exception 3: The ALJ erred in holding that footnote 3 was not central to the design of the FCO

The ALJ notes that

> 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. . . . 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.
>
> I.D. at 21.

In contrast to the ALJ's conclusions, the Statements in Support of the CAP FCO Settlement and the Recommended Decision of Administrative Law Judge Fordham[8] specifically acknowledged the intrinsic link between the energy burdens to be used in FCO calculations and the energy burdens set forth in the CAP Policy Statement. In fact, while TURN's Statement in Support of CAP FCO Settlement did not cite to footnote 3 specifically, it did reference both the specific incorporation of energy burdens contained in the Commission's CAP Policy Statement and the need to lower the energy burdens in the Commission's CAP Policy Statement.

TURN's Statement in Support stated that "TURN *et al*. support this settlement because it is intended to more closely target affordable bills for CAP participants pursuant to the Commission's CAP Policy Statement, 52 Pa. Code § 69.261, et seq. . . ." TURN Statement in Support at 3.[9] TURN's Statement in Support then noted that "[a]lthough reference to such maximums may be referred to herein as targeting 'affordability,' TURN *et al*. continue to submit that the Commission should undertake revision and review of this CAP Policy Statement 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.

Similarly, CAUSE-PA's Statement in Support referenced the Commission's standards of affordability – not the specific energy burden numbers in the CAP FCO Settlement – at a minimum implying that those numbers could change. PECO Energy Company Universal Service and

[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) (hereinafter Recommended Decision of ALJ Fordham).
[9] TURN's Statement in Support is attached to TURN St. 1 at Exhibit C.

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 at 5 (April 22, 2015), https://www.puc.pa.gov/pcdocs/1355720.pdf ("It is critical that PECO's CAP be designed in a manner that ensures low income customers will receive a bill that does not exceed the energy burdens prescribed in the Commission's standards."). These statements within TURN and CAUSE-PA's Statements in Support are reinforced by unrebutted record evidence in this proceeding that TURN relied on the language of footnote 3 in its advocacy. TURN Witness Philip Lord stated that

> 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.
>
> TURN St. 2 at 7 (citing Energy Affordability for Low-Income Customers, Docket No. M-2017-2587711).

CAUSE-PA Witness Harry Geller similarly stated that "[t]he provision contained in footnote 3 of the Settlement relating to mandatory implementation by PECO of Commission reduced maximum energy burdens was an essential element in arriving at settlement compromise and was relied upon by CAUSE-PA in order to address continuing unaffordability in the FCO design . . . ." CAUSE-PA St. 1-SR at 6. Importantly, as Mr. Geller notes, Mr. Geller was lead Counsel for CAUSE-PA at the time of the CAP FCO Settlement and therefore familiar with the factual and policy issues affecting their agreement to enter into the CAP FCO Settlement. CAUSE-PA St. 1-SR at 6. Like TURN's testimony, Mr. Geller's testimony to the importance of footnote 3 was unrebutted.

Moreover, ALJ Fordham, in her decision recommending Commission approval of the Joint Petition for Settlement, directly quotes the entirety of the Term Sheet, including footnote 3. Recommended Decision of ALJ Fordham at 8. ALJ Fordham's Recommended Decision further

references that the energy burdens in the Term Sheet are consistent with the affordability burdens set forth in the Commission's CAP Policy Statement – which can and should be read as an understanding that the energy burden used in calculating an FCO credit would be directly tied to the numbers in the CAP Policy Statement. See Recommended Decision of ALJ Fordham at 23 ("These energy burdens are consistent with the affordability burdens set forth in the Commission's CAP Policy Statement."), 24 ("[I]t is critical that PECO's CAP be designed in a manner that ensures low income customers will receive a bill that does not exceed the energy burdens prescribed in the Commission's standards.").

Taken together, it is clear that the energy burdens to be utilized in PECO's CAP was a primary concern for TURN and CAUSE-PA and central to their ability to negotiate a settlement agreement. In the underlying USECP proceeding that gave rise to the FCO, TURN and CAUSE-PA advocated for the adoption of a PIPP design for PECO's CAP, foreshadowing concerns about the FCO's ability to deliver bills that achieved the Commission's energy burdens. See TURN R.B. at 10. The CAP FCO Settlement carefully balanced the interest of the parties and compelled them to forego their litigation positions. In holding that footnote 3 was not central to the design of the FCO, the ALJ allows PECO to selectively comply with its obligations under a settlement agreement and undermines the Commission's policy encouraging settlement. The Commission's regulations set forth that settlements which serve the public interest are desirable and encouraged in PUC proceedings.[10] As the Commission has recently explained, "a settlement, whether whole or partial, benefits not only the named parties directly, but, indirectly, all of the customers of the

[10] See 52 Pa. Code § 5.231; 52 Pa. Code § 69.401.

case. It is for these reasons, that settlements are encouraged by long-standing Commission policy."[11]

The ALJ also states that "[t]he 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." I.D. at 21. But the ALJ fails to evaluate this cost in the context of other language of the CAP FCO Settlement.

The language of the CAP FCO Settlement specifically includes a table that describes both a $110.2 million dollar ceiling on electric CAP program costs and the calculation utilized to develop that limitation.[12] CAP FCO Settlement at 8. The record in this case shows that the cost of implementing PECO's CAP consistent with footnote 3 would not exceed the maximum cost set forth in the CAP FCO Settlement. As described by TURN Witness Bertocci,

> Moreover, the 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.
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> TURN St. 1-SR at 8 (citing CAP FCO Settlement at 7-8).

A footnote to the table setting forth the system-wide annual limits states that "the maximum total program cost changes with inflation and the number of CAP participants." CAP FCO Settlement at 8 n.13. Even if the language of footnote 3 itself did not signal possible increased costs to the ALJ or Commission, the maximum cost control provisions reflected the parties clear

[11] Pa. P.U.C. v. Philadelphia Gas Works, R-2020-3017206, *et al.*, Opinion and Order at 13 (Nov. 19, 2020), *available at* https://www.puc.pa.gov/pcdocs/1684745.docx.

[12] The CAP FCO Settlement also notes no individual maximums for gas program costs, continuing PECO's existing practice at the time. CAP FCO Settlement at 4 n.11.

understanding, expressed to ALJ Fordham and the Commission, that the costs of the program could change for a variety of reasons.

ALJ Fordham referenced the maximum overall program cost, stating that "the FCO program includes several other important cost-containment mechanisms," including that "PECO will continue its current Commission-approved practice of limiting the cost of its overall program by applying the maximum credit allowed by 52 Pa. Code § 69.265(3)(i) on a system-wide average basis" – a reference to the $110.2 million dollar maximum in the CAP FCO Settlement. Recommended Decision of ALJ Fordham at 26. ALJ Fordham further stated that "the system-wide average maximum CAP credit . . . ensures that the potential cost of the program will not exceed the current potential cost of the program." Recommended Decision of ALJ Fordham at 27. ALJ Fordham concluded that the CAP FCO Settlement was fair, just, reasonable and in the public interest, specifically citing cost containment. Recommended Decision of ALJ Fordham at 35.

The potential cost of implementation of footnote 3 is necessarily covered by the maximum program costs set forth explicitly in the CAP FCO Settlement. ALJ Fordham and the Commission were clearly aware of the direct connection between the energy burdens in the CAP Policy Statement and the energy burdens used in the FCO calculation and of the potential total cost of the program.

d. TURN Exception 4: PECO's filings to implement a new CAP design and utilize the current energy burdens in the FCO in the future are irrelevant to current obligations.

The ALJ errs in holding that PECO has "substantially complied with the words and the spirit of the settlement." I.D. at 21. In so holding, the ALJ specifically cites PECO's actions in proposing a new CAP program and PECO's filings following the CAP Policy Statement Order.

These filings should not excuse noncompliance with a specific provision of the CAP FCO Settlement while PECO still operates its FCO. Neither of PECO's proposals has been approved by the Commission and, even if approved, neither proposal addresses the harm caused to PECO's CAP customers who have received and continue to receive unaffordable CAP bills during the period between the Commission's adoption of its new energy burdens and the Commission's action on PECO's proposals.

By way of background, the CAP FCO Settlement required an external evaluation,[13] which was completed in June 2019 and filed with the Commission.[14] The evaluation found that the FCO was not working to bring customer bills down to the targeted energy burdens. Importantly, this issue with the FCO is separate and distinct from what those targeted energy burdens are. PECO held a series of stakeholder meetings and ultimately proposed a new program design in its pending USECP. See I.D. at 9-10. PECO's proposed new CAP design is a straight percentage of income payment program (PIPP), and adopts the energy burdens currently reflected in the CAP Policy Statement for two of the three FPL tiers. I.D. at 10.

The ALJ's Initial Decision does not specifically hold that the CAP Policy Statement Order and subsequent Orders on Reconsideration required PECO to make a filing with the Commission prior to implementing the lower energy burdens.[15] Rather, the ALJ describes the filings PECO made following the CAP Policy Statement Order, and concludes that PECO's actions are "reasonably compliant" with footnote 3. The ALJ reaches this conclusion based on

[13] CAP FCO Settlement at 9.
[14] APPRISE PECO Energy Universal Services Program Final Evaluation Report, Docket Nos. M-2012-2290911 & M-2015-2507139 (June 2019).
[15] 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.

two filings. First, the ALJ recognized that PECO made a proposal to incorporate some of the new energy burdens in its new proposed PIPP. Second, the ALJ recognized that PECO filed a request with the Commission – only **after** TURN filed the Complaint in this case – asking for Commission permission to use the energy burdens in the CAP Policy Statement in the FCO. These actions by PECO do not excuse noncompliance with the terms of the CAP FCO Settlement nor reflect the reality that PECO repudiated the CAP FCO Settlement provisions leaving TURN no alternative but to file its Formal Complaint. PECO is currently operating the FCO using outdated energy burdens in violation of the plain language of the CAP FCO Settlement. 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.").

e. TURN Exception 5: PECO has not shown that it is complying with the language of its 2016-2018 USECP.

The ALJ merges her analysis and conclusion that PECO showed compliance with the CAP FCO Settlement and that PECO showed compliance with the 2016-2018 USECP. See I.D. at 20-23. However, these are distinct arguments, and require separate analysis.

PECO's 2016-2018 USECP is currently in effect. Absent Commission waiver of requirements in the USECP, PECO is obligated to operate its universal service programs consistent with the terms of the USECP. The plain language of the USECP states that PECO will use the Commission's updated energy burdens. And, as detailed above, there is no dispute

amongst the parties or in the ALJ's Initial Decision that energy burdens contained in the Commission's CAP Policy Statement are a specific input into the calculation of a CAP customer's FCO credit. The ALJ inexplicably concludes that PECO has sustained its burden to show compliance with its 2016-2018 USECP, by taking actions to incorporate the Commission's updated energy burdens in a future, proposed USECP. The ALJ's holding would establish an unacceptable and dangerous precedent that a utility can comply with a provision in its currently operable USECP simply by making a proposal to comply in a future USECP.

The ALJ also overlooked specific evidence on the record that PECO 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).

Moreover, the terms of PECO's 2016-2018 USECP are explicitly incorporated into PECO's tariffs. CAP customers – and all customers – take service in reliance on the terms of those tariffs. 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.[16] As a result,

[16] See Customer Assistance Program (CAP) Rider to PECO Energy Company Electric Service Tariff, Supplement No. 46 (March 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

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. The ALJ failed to address these violations in the Initial Decision.

f. TURN Exception 6: TURN met its burden to show that PECO provided unreasonable service.

By failing to adhere to the terms of its currently active USECP, PECO provided unreasonable service to its CAP customers, in violation of section 1501 of the Public Utility Code. 66 Pa. C.S. § 1501, see also DeSantis v. Pennsylvania Power Company, Docket No. C-2019-3013652, 2020 WL 2487413 (Final Order entered June 15, 2020). While the ALJ states that "TURN has failed to sustain its burden of proving that PECO failed to render reasonable service," the Initial Decision provides little analysis of the evidence presented by TURN to show such unreasonable service.

First and foremost, failure to calculate CAP discounts pursuant to the terms of a USECP is by itself unreasonable service. In the DeSantis case, the Commission held that Penn Power failed to render reasonable customer service, in violation of section 1501, when it failed to review a hardship grant application under the criteria of the then-effective USECP. DeSantis at *7. Here too, PECO is not applying the terms of its currently effective USECP in calculating CAP customer FCO credits.

Perhaps even more importantly, PECO is representing to its customers that the energy burdens it uses reflect the PUC's affordability guidelines. As discussed by TURN's witnesses, PECO's training materials include specific direction to inform customers that the energy burdens

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.

used in PECO's CAP program would adjust if the Commission amended its CAP Policy Statement, and that the energy burdens used reflect the PUC's affordability guidelines. TURN St. 2 at 7. PECO has represented to its customers in multiple ways that it uses energy burdens as reflected in the PUC's guidelines – in its USECP, in its tariffs, and directly to its customers. Taken together, this evidence is substantial to show that PECO has provided unreasonable service to its CAP customers. As a result, the ALJ erred in holding that TURN failed to meet its burden to show PECO has provided unreasonable service in violation of § 1501.

g. TURN Exception 7: The ALJ's Findings of Fact 31 and 38 are inconsistent

The ALJ erred in finding in Finding of Fact 31 that the proposed, redesigned CAP program, which PECO included in its next USECP filing and which has yet to be approved by the Commission, incorporates the Commission's new maximum energy burdens. I.D. at 9. However, PECO's proposal does not incorporate the new maximum energy burdens for the 101% - 150% FPL tier. This Finding of Fact directly contradicts Finding of Fact 38, which states that "[t]he 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. I.D. at 10-11.

h. TURN Exception 8: The ALJ's Findings of Fact 41 and 42 are inconsistent

Finding of Fact 41, which states that reducing the energy burdens would not improve affordability, conflicts with Finding of Fact 42, which states that the lowest income residential electric CAP customers would have received, on average, between $340 and $380 more in CAP credits. I.D. at 11. The ALJ failed to acknowledge that reducing the energy burden targets within the CAP FCO will provide greater discounts to many CAP participants, to their benefit. As noted

by TURN witness Bertocci, "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." TURN St. 1-SR at 7-8.

i. TURN Exception 9: The ALJ erred in failing to fine PECO for its willful violation of a Commission Approved Settlement and USECP.

As set forth above, the ALJ erroneously concluded that PECO complied with its burden to show that it was in compliance with the CAP FCO Settlement and 2016-2018 USECP. Given this initial determination, the ALJ did not address TURN's request to fine PECO for its intentional violation of the Commission-approved CAP FCO Settlement and USECP. TURN continues to submit that PECO must be fined by the Commission for its violations, for all the reasons set forth in its Main and Reply Briefs.

IV. CONCLUSION

For the reasons set forth in these exceptions, the ALJ erred in holding that PECO reasonably complied with the plain language of footnote 3 in the CAP FCO Settlement and 2016-2018 USECP. To the contrary, 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 CAP FCO 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.

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