



May 3, 2021

**VIA E-File**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
400 North Street, Filing Room  
Harrisburg, PA 17120

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

***Exceptions of CAUSE-PA***

Dear Secretary Chiavetta:

Enclosed, please find the **Exceptions of the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA)** in the above-noted proceeding.

Pursuant to the Commission's Emergency Order issued on March 20, 2020, and as indicated on the attached Certificate of Service, service on the parties was accomplished by email only.

Respectfully submitted,  
**PENNSYLVANIA UTILITY LAW PROJECT**  
*Counsel for CAUSE-PA*

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**CC:** *Secretary Rosemary Chiavetta (Via E-File)*  
*Honorable Mary D. Long, Administrative Law Judge*  
*Commission's Office of Special Assistants (OSA) at [ra-OSA@pa.gov](mailto:ra-OSA@pa.gov)*  
*Certificate of Service*

**BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**CERTIFICATE OF SERVICE**

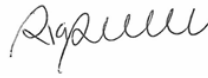
I hereby certify that I have this day served copies of the **Exceptions of the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA)** upon the parties of record in the above-captioned proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party), and consistent with the Commission’s Emergency Order issued on March 20, 2020, in the manner and upon the persons listed below.

**VIA EMAIL**

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May 3, 2021

**BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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**EXCEPTIONS OF  
THE COALITION FOR AFFORDABLE UTILITY SERVICES AND ENERGY  
EFFICIENCY IN PENNSYLVANIA**

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**May 3, 2021**

**TABLE OF CONTENTS**

**I. INTRODUCTION..... 3**

**II. EXCEPTIONS..... 6**

**1. CAUSE-PA EXCEPTION 1: The Initial Decision erred by finding that the Joint Settlement provision was not clear and unambiguous on its face in requiring PECO to revise the FCO’s energy burden standards in line with the Final CAP Policy Statement. .... 6**

*A. The plain language of the Joint Settlement provision was clear on its face, and the parties to the proceeding have admitted to clear language of the provision..... 6*

*B. The Initial Decision erred in finding that the language of the Joint Settlement provision was not clear, given that the provision clearly did not require further Commission approval prior to implementation of the revised energy burden standards in the Final CAP Policy Statement..... 9*

*C. Whether the Joint Settlement provision was “central” to the Joint Settlement is irrelevant to whether PECO had an obligation to revise the FCO’s energy burdens in line with the standards in the Final CAP Policy Statement..... 13*

**2. CAUE-PA EXCEPTION 2: The Initial Decision erred in finding that PECO was not in violation of the Joint Settlement and its 2016-2018 USECP..... 18**

*A. The Initial Decision erred in finding that PECO did not violate the terms of the Joint Settlement and its 2016-2018 USECP, given clear evidence that PECO willfully failed to implement the revised energy burdens in the Final CAP Policy Statement..... 18*

*B. The Initial Decision erred in finding that PECO substantially complied in good faith with the terms of the Joint Settlement through other filings related to its CAP..... 22*

**3. CAUSE-PA EXCEPTION 3: The Initial Decision erred when it failed to find any bill affordability benefits to revising the energy burden standards in the FCO in line with the Final CAP Policy Statement. .... 25**

**4. CAUSE-PA EXCEPTION 4: The Initial Decision erred in not ordering the appropriate relief to fulfill the terms of the Joint Settlement and PECO’s 2016-2018 USECP in order to remedy harm caused by PECO’s clear and unambiguous breach of the Commission-approved Joint Settlement. .... 29**

*A. The Initial Decision erred when it failed to order PECO to immediately revise the FCO’s energy burden standards in compliance with the terms of the Joint Settlement and its 2016-2018 USECP. .... 29*

*B. The Initial Decision erred when it failed to order PECO to provide retroactive bill credits and arrearage forgiveness to CAP participants..... 31*

**III. CONCLUSION ..... 33**

## I. INTRODUCTION

By Secretarial Letter dated April 13, 2021, the Office of Administrative Law Judge issued the Initial Decision of Administrative Law Judge (ALJ) Mary D. Long in the above-captioned matter. The Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA), through its counsel at the Pennsylvania Utility Law Project, files these Exceptions to the Initial Decision.

CAUSE-PA intervened in the present case in support of the Complaint of the Tenant Union Representative Network (TURN) to enforce a clear and undisputed provision of the 2015 Joint Settlement, approved by the Commission at Docket No. M-2012-2290911 and mirrored in PECO's subsequently approved 2016-2018 Universal Service and Energy Conservation Program (USECP).<sup>1</sup> In relevant part, the Joint Settlement clearly and unambiguously requires PECO to revise its applicable energy burden standards in its Final CAP Policy Statement: *"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."*<sup>2</sup> CAUSE-PA takes exception with the Initial Decision, which concluded that PECO was not required to automatically update the calculation of the customer assistance benefits of its Fixed Credit Option (FCO) without further review of the Commission, following the revision of the maximum energy burden tiers in the Commission's Final CAP Policy Statement.<sup>3</sup>

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<sup>1</sup> CAUSE-PA Main Brief at 1.

<sup>2</sup> PECO Energy Company Universal Service and Energy Conservation Plan for 2013-2015 Submitted in Compliance with 52 Pa. Code §§ 54.74 and 62.4, Joint Petition for Settlement, Docket No. M-2012-2290911, at Exhibit A, p. 2, fn. 3 (Term Sheet) (filed March 20, 2015).

<sup>3</sup> Initial Decision at 1.

First, the Initial Decision erred in finding that the language of the Joint Settlement provision at issue was not clear in requiring PECO to implement the revised energy burden standards in the Commission's Final CAP Policy Statement.<sup>4</sup> The plain language of the Joint Settlement provision was unambiguous on its face and uncontested by the parties in this case.<sup>5</sup> The Joint Settlement unambiguously does not require the Commission to review or approve again before PECO revises the FCO's energy burden standards.<sup>6</sup> Nor does the Joint Settlement require any other analysis or obligation to be met before the changes take place.<sup>7</sup> The only condition precedent to the Joint Settlement is the issuance of the Final CAP Policy Statement with revised energy burden standards.<sup>8</sup> The placement of the provision within the Joint Settlement and whether the parties explicitly discussed the provision in their Statements in Support of the Joint Settlement is not relevant to whether the provision itself is enforceable. Indeed, the provision was within the four corners of the approved Settlement, and is an enforceable provision to which the parties to the Joint Settlement intended to be bound.

Second, the Initial Decision erred in finding that PECO did not violate the terms of the Joint Settlement and its 2016-2018 USECP, as there is clear evidence in the record that PECO willfully failed to implement the revised energy burden standards in the Commission's Final CAP Policy Statement. PECO admits, through its expert witness, that PECO was aware of its obligations under the Joint Settlement but unilaterally chose to disregard its Joint Settlement and USECP obligations.<sup>9</sup> The Initial Decision also erred in finding that PECO substantially complied in good

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<sup>4</sup> Id. at 21-22.

<sup>5</sup> CAUSE-PA Main Brief at 22-23.

<sup>6</sup> Id. at 14.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id. at 23.

faith with the terms of the Joint Settlement.<sup>10</sup> While PECO has proposed to implement a PIPP CAP, PECO does not suggest that it will fully implement the Commission’s revised energy burden standards, specifically with respect to CAP participants between 101-150% of the Federal Poverty Level (FPL).<sup>11</sup> While PECO also filed a Petition in its current 2019-2024 USECP proceeding on September 25, 2020 to utilize the energy burdens in the Final CAP Policy Statement in the FCO,<sup>12</sup> this Petition was filed subsequent to the Complaint being filed in this matter and only serves to further delay critical bill savings for low income FCO participants.

Third, the Initial Decision erred when it failed to find that there were no bill affordability benefits from implementing the revised energy burden standards in the Final CAP Policy Statement.<sup>13</sup> CAUSE-PA does not contest that there are flaws inherent in the FCO – a model borne of extensive compromise between parties to the Joint Settlement – or the need to implement a PIPP CAP to address these flaws.<sup>14</sup> Changing the structure of the FCO is not a condition precedent in the Joint Settlement to PECO implementing the Commission’s revised energy burden standards.<sup>15</sup> While implementing a PIPP CAP is a desirable long-term goal necessary to reach truly affordable bills for CAP participants, most CAP participants will see critical bill savings improvements from implementation of the energy burden standards in the Final CAP Policy Statement.<sup>16</sup>

Finally, the Initial Decision erred by not ordering the appropriate relief to fulfill the terms of the Joint Settlement and PECO’s 2016-2018 USECP in order to remedy the harm caused by

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<sup>10</sup> Initial Decision at 21.

<sup>11</sup> Id. at 10-11, ¶ 38.

<sup>12</sup> Id. at 11, ¶ 39.

<sup>13</sup> See Initial Decision at 11, ¶ 41.

<sup>14</sup> CAUSE-PA Main Brief at 18.

<sup>15</sup> Id. at 18-19.

<sup>16</sup> See id.

PECO's blatant and willful breach of the Joint Settlement and the terms of its Commission-approved USECP. Specifically, CAUSE-PA respectfully requests that the Commission amend the Initial Decision to order PECO to immediately revise the FCO's calculations to implement the revised energy burden standards in the Final CAP Policy Statement.<sup>17</sup> CAUSE-PA also respectfully requests that the Commission amend the Initial Decision to order PECO to provide FCO participants with retroactive bill credits and arrearage forgiveness in order to rectify PECO's willful delay in implementing the energy burden standards in the Final CAP Policy Statement.<sup>18</sup>

## II. EXCEPTIONS

1. **CAUSE-PA EXCEPTION 1: The Initial Decision erred by finding that the Joint Settlement provision was not clear and unambiguous on its face in requiring PECO to revise the FCO's energy burden standards in line with the Final CAP Policy Statement.**

*A. The plain language of the Joint Settlement provision was clear on its face, and the parties to the proceeding have admitted to clear language of the provision.*

In CAUSE-PA's Main Brief and Reply Brief, CAUSE-PA explained that the terms of the Joint Settlement clearly and unambiguously require PECO to revise its applicable energy burden standards for its Customer Assistance Program (CAP) if and when the Commission modifies the standards in its Final CAP Policy Statement: "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."<sup>19</sup> CAUSE-PA explained that PECO clearly violated the Joint Settlement provision – as well as the terms of the USECP which subsequently incorporated the provision – when it failed to revise the FCO's energy burden standards following the issuance of the

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<sup>17</sup> CAUSE-PA Main Brief at 24-26, CAUSE-PA Reply Brief at 22.

<sup>18</sup> *Id.* at 26-29.

<sup>19</sup> CAUSE-PA Main Brief at 1, citing PECO Energy Company Universal Service and Energy Conservation Plan for 2013-2015 Submitted in Compliance with 52 Pa. Code §§ 54.74 and 62.4, Joint Petition for Settlement, Docket No. M-2012-2290911, at Exhibit A, p. 2, fn. 3 (Term Sheet) (filed March 20, 2015).

Commission’s Final CAP Policy Statement.<sup>20</sup> Nothing in the Joint Settlement indicated that PECO had to seek further Commission approval to adhere to the terms of the Joint Settlement.<sup>21</sup>

Despite this clear and unambiguous language of the provision, the Initial Decision held that the Joint Settlement did not require PECO to automatically update the FCO’s energy burden standards in line with the Final CAP Policy Statement without further Commission review.<sup>22</sup> The Initial Decision erroneously found that additional language was needed in the provision to clarify that PECO was required to utilize the new energy burden standards “immediately, upon entry of a final order of the Commission revising the Policy Statement” and “without seeking further approval by the Commission.”<sup>23</sup>

Given the clear, straightforward, and unambiguous language of the Joint Settlement provision, the Initial Decision erred in concluding that the Joint Settlement provision did not clearly require PECO to revise the FCO’s energy burden standards in line with the Final CAP Policy Statement. Indeed, no expert witness in this matter has contested the clear language or intended effect of the Joint Settlement provision.<sup>24</sup> As discussed more fully in CAUSE-PA’s Main Brief, PECO and Office of Consumer Advocate’s (OCA) expert witnesses concede that the plain language of the Joint Settlement requires PECO to implement the revised energy burden standards in the Final CAP Policy Statement.<sup>25</sup> PECO’s expert witness, Mr. Kehl, admitted in Rebuttal Testimony:

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<sup>20</sup> CAUSE-PA Main Brief at 1, citing 2019 Amendments to Policy Statement on Customer Assistance Program, 52 Pa. Code §69.261-69.267, Final Policy Statement and Order, Docket No. M-2019-3012599 (order entered Nov. 5, 2019), (hereinafter Final CAP Policy Statement).

<sup>21</sup> CAUSE-PA Main Brief at 5-6.

<sup>22</sup> Initial Decision at 1.

<sup>23</sup> Id. at 20.

<sup>24</sup> CAUSE-PA Main Brief at 22-23.

<sup>25</sup> Id.; CAUSE-PA Reply Brief at 13.

Several inputs are necessary to determine the customer credit under the FCO, including household income as a percentage of federal poverty level (“FPL”) guidelines, the number of household members, utility usage, and the allowable EBs set forth in the Commission’s CAP Policy Statement. The Settlement provided that if the Commission changes the EBs, PECO will utilize the new maximum allowable EBs for each poverty level in calculating the FCO credit to be given to each customer.<sup>26</sup>

Similarly, OCA’s expert witness, Mr. Roger Colton, acknowledges the plain language of the Joint Settlement, and what it requires of PECO, explaining: “the Settlement provides that should the PUC change the ranges within which CAP energy burdens must fall, PECO would continue to use the ‘maximum allowable energy burden ‘provided in each range.’”<sup>27</sup>

In line with the findings of the Initial Decision, following the approval of the Joint Settlement, PECO incorporated the provision at issue into its currently active 2016-2018 Universal Service and Energy Conservation Plan (2016-2018 USECP).<sup>28</sup> As discussed below, the fact that PECO is currently obligated to operate its CAP FCO according to the terms of its approved USECP strongly reinforces PECO’s obligations to utilize the revised energy burden standards in the Final CAP Policy Statement – especially since PECO agreed to do so as a condition of implementing the FCO.

Given that no expert witness in this matter has contested the clear language or intended effect of the Joint Settlement provision, the Initial Decision erred when it imposed superfluous language into the Joint Settlement provision and reasoned that the provision was unclear without this additional language.<sup>29</sup> The language of the Joint Settlement provision is clear – PECO was

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<sup>26</sup> CAUSE-PA Main Brief at 22-23, citing PECO St. 1-R at 3:9 – 3:16; 52 Pa. Code § 69.265 (emphasis added); see also TURN St. 1-SR at 4: 1-10.

<sup>27</sup> OCA St. 1-R at 6: 9-12; see also TURN St. 1-SR at 4: 11-14.

<sup>28</sup> Initial Decision at 7, ¶ 15.

<sup>29</sup> See id. at 20.

required to revise the FCO's energy burden standards when the Commission amended its Final CAP Policy Statement. As discussed more fully below, PECO's failure to revise its maximum energy burden standards should therefore be found as a clear violation of the terms of the Joint Settlement and PECO's 2016-2018 USECP, and to constitute unreasonable service pursuant Section 1501 of the Public Utility Code.

***B. The Initial Decision erred in finding that the language of the Joint Settlement provision was not clear, given that the provision clearly did not require further Commission approval prior to implementation of the revised energy burden standards in the Final CAP Policy Statement.***

In its Main Brief, CAUSE-PA describes how the Joint Settlement – including the provision at issue in this case – has already been approved on two occasions by the Commission.<sup>30</sup> The provision contains no language requiring further Commission approval, nor is it reasonable to insert such a requirement. The purpose of a settlement is to resolve issues without further court intervention, not to require the parties to engage in endless monitoring, intervention, and litigation over previously agreed to terms. Refusing to enforce settlement terms that are clear on their face will have a chilling effect on the willingness of parties to agree to future settlement, thus contradicting the Commission's policy to encourage settlements.<sup>31</sup>

The Initial Decision erroneously found that it was not reasonable to interpret the Joint Settlement provision to require an immediate adjustment to the energy burden standards, without further review by the Commission.<sup>32</sup> To the contrary, CAUSE-PA asserts that it is unreasonable to read the contested provision to require additional Commission approval. If the parties intended further approval, the provision would have stated that it was the intent of the parties that PECO

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<sup>30</sup> CAUSE-PA Main Brief at 6.

<sup>31</sup> See 52 Pa. Code § 5.231(a).

<sup>32</sup> Initial Decision at 21.

file a petition or take further action to obtain Commission approval. Indeed, this is standard practice in settlements before the Commission – including in the terms of the Joint Settlement at issue, which elsewhere describes in detail PECO’s requirements to make additional filings with the Commission in furtherance of a settlement commitment.<sup>33</sup> If the parties intended for the provision in dispute in this proceeding to be subject to further Commission approval, they certainly knew how to indicate that intent – but they instead chose not to include any conditional language that would require further process before the Commission.

Further Commission approval would be redundant, and further delay implementation of the Commission’s revised energy burden standards – at great expense to the Commission and all of the parties. The provision at issue here has already been approved by the Commission on two separate occasions. On June 11, 2015, Administrative Law Judge (ALJ) Cynthia Williams Fordham issued a Recommended Decision approving the Joint Petition for Settlement without modification.<sup>34</sup> In recommending that the Joint Settlement be approved without modification, ALJ

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<sup>33</sup> See, e.g., PECO Energy Company Universal Service and Energy Conservation Plan for 2013-2015 Submitted in Compliance with 52 Pa. Code §§ 54.74 and 62.4, Joint Petition for Settlement, Docket No. M-2012-2290911, at Exhibit A, p. 3, fn. 7; 9, para B.1; 10 para 5; 12 para. 3; (Term Sheet) (filed March 20, 2015).

For example, with regard to further adjustments to PECO’s annual maximum CAP credit limit, the parties were explicit in describing the subsequent steps for review before the Commission – requiring PECO to file an amendment to its USECP – or to otherwise make a proposal in its next USECP.

Contrast that provision with the plain language of the provision at issue in this proceeding, which contains no requirements that PECO make an additional filing with the Commission. In fact, the provision in question requires no revision to PECO’s USECP because – in addition to being approved as part of the Settlement – the term is already incorporated directly into PECO’s currently-approved USECP.

Later in the Settlement, the parties agreed to the following, which clearly contemplated further Commission engagement:

In a separate petition or in its next base rate case, in either case, to be filed on or before the first calendar quarter of 2016 to permit PUC review to occur before FCO program implementation in October 2016, PECO will propose an in-program arrearage forgiveness program...

Id. Clearly, the parties knew how to include requirements to engage in further process for approval before the Commission, and chose not to do so with regard to the conditional effectiveness of the provision at issue in this proceeding.

<sup>34</sup> CAUSE-PA Main Brief at 6, citing Recommended Decision (RD) at 36.

Fordham noted with regard to the FCO: “although the methodology is more complicated than the PIP advocated by TURN et al. and CAUSE-PA, it reflects a reasonable compromise to improve the affordability for PECO’s CAP participants.”<sup>35</sup> On July 8, 2015, the Commission adopted ALJ Fordham’s Recommended Decision without modification.<sup>36</sup> PECO subsequently incorporated the CAP FCO design, including the provision at issue in this proceeding, into its 2016-2018 USECP, which was also approved by the Commission.<sup>37</sup> Thus, the Commission has examined and approved on the provision at issue on two separate occasions, and there is simply no justification for requiring additional Commission approval - at great expense of the Commission and the parties.

PECO previously acknowledged directly, through formal Comments to the Commission, that, if the applicable energy burden standards were amended by the Commission, *PECO’s CAP FCO program has a “pass through’ clause allowing for automatic implementation.”*<sup>38</sup>

As discussed above, there is no ambiguity in the language of the Joint Settlement provision. In agreeing to the terms of the Joint Settlement, and subsequently incorporating the Joint Settlement language into its 2016-2018 USECP, PECO obligated itself to utilize the energy burdens as set forth in the Final CAP Policy Statement, and to revise those energy burdens if later amended by the Final CAP Policy Statement. The Joint Settlement clearly does not require the Commission to review or approve again before PECO revises the FCO’s energy burden standards. Nor does the Joint Settlement require any other analysis or obligation to be met before the changes take place. The only condition precedent to the term in dispute in this proceeding is the issuance

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<sup>35</sup> CAUSE-PA Main Brief at 6, citing RD at 23.

<sup>36</sup> PECO Energy Company Universal Service and Energy Conservation Plan for 2013-2015 Submitted in Compliance with 52 Pa. Code §§ 54.74 and 62.4, Order, Docket No. M-2012-2290911 (Order entered July 8, 2015).

<sup>37</sup> CAUSE-PA Main Brief at 6.

<sup>38</sup> CAUSE-PA Main Brief at 23, citing CAUSE-PA St. 1-SR at 9: 7-15, citing Energy Affordability for Low-Income Customers, Initial Comments of PECO Energy Company. Docket No. M- 2017-2587711, at 8 (Initial Comments filed May 11, 2019).

of the Final CAP Policy Statement with revised energy burden standards. As TURN’s expert witness, Mr. Philip A. Bertocci, explained: “The changes to the CAP Policy Statement itself triggered PECO’s obligation to use those updated Energy Burdens.”<sup>39</sup>

While the Initial Decision emphasized the need for Commission review given the cost implications of implementing the revised energy burden standards, the Initial Decision erred in ignoring the cost containment measures contained in the Joint Settlement. PECO’s expert witness, Mr. Mark Kehl, stated that updating the customer bill calculations to reflect the energy burden standards in the Final CAP Policy Statement would cost nearly \$9 million for the first few months of 2021.<sup>40</sup> CAUSE-PA does not contest that implementing the revised energy burden standards to provide low income customers who struggle to afford their utility bills with critical bill savings will come at a cost. This is an inevitability of adjusting the energy burden standard, and was plainly contemplated in agreeing to the terms of the Joint Settlement – which includes a number of provisions addressing costs, cost-containment, and cost-recovery.<sup>41</sup> However, the cost of complying with the agree-to settlement terms is irrelevant. Even if the cost of complying with a settlement provision were relevant, the Joint Settlement provides a number of protections against unbridled universal service costs.

As discussed in TURN’s Main Brief Mr. Bertocci’s testimony, the Joint Settlement contains two cost containment mechanisms in the form of monthly minimum billing amounts and maximum Annual Credits, aimed at controlling the costs of additional revisions to the FCO.<sup>42</sup> As

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<sup>39</sup> CAUSE-PA Main Brief at 14, citing TURN St. 1 at 20: 8-9.

<sup>40</sup> Initial Decision at 21.

<sup>41</sup> See, e.g., PECO Energy Company Universal Service and Energy Conservation Plan for 2013-2015 Submitted in Compliance with 52 Pa. Code §§ 54.74 and 62.4, Joint Petition for Settlement, Docket No. M-2012-2290911, at Exhibit A, p. 10, para. B.1.5 (Term Sheet) (filed March 20, 2015).

<sup>42</sup> TURN St. 1 at 16-17.

PECO noted in its Statement in Support of the Joint Settlement, “[t]he Term Sheet improves affordability while simultaneously imposing controls on overall program costs...”.<sup>43</sup> Therefore, while the Joint Settlement provides for periodic and automatic updates to the FCO, it also provides cost control mechanisms to ensure that the FCO’s costs are reasonably controlled. ALJ Fordham’s RD explicitly recognized the cost containments mechanisms built into the FCO and noted OCA’s Statement in Support of the Joint Settlement, which described how the FCO model presented in the Joint Settlement “achieves the goal of **affordability** for CAP customers, and at the same time, also balances the costs to be paid by non-CAP residential ratepayers.” (emphasis added).<sup>44</sup>

Overall, the Joint Settlement, including the Joint Settlement provision at issue, represents a balanced compromise between settling parties that was approved on multiple occasions by the Commission. Given the Commission’s approval of the Joint Settlement and the balanced nature of the Joint Settlement, including cost containment mechanisms to control adjustments to the FCO, the Initial Decision erred in finding that the clear language of the Joint Settlement provision did not require PECO to implement the revised energy burden standards in the Final CAP Policy Statement without further Commission approval, and must be reversed.

***C. Whether the Joint Settlement provision was “central” to the Joint Settlement is irrelevant to whether PECO had an obligation to revise the FCO’s energy burdens in line with the standards in the Final CAP Policy Statement.***

In its Main Brief, CAUSE-PA described how PECO filed the Joint Settlement after years of comments, litigation consisting of discovery, testimony, hearings, negotiation, facilitated

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<sup>43</sup> TURN Main Brief at 3, citing PECO Energy Company Universal Service and Energy Conservation Plan for 2013-2015, Docket No. M-2012-2290911, PECO Energy Company’s Statement in Support of Joint Petition for Settlement at 12 (April 30, 2015), <https://www.puc.pa.gov/pcdocs/1357456.pdf> (“The Term Sheet is a comprehensive settlement among the aforementioned parties ...”). PECO further stated in its Statement in Support that “[t]he Term Sheet improves affordability while simultaneously imposing controls on overall program costs...” Id. at 10.

<sup>44</sup> RD at 22, 25-27.

mediation, and renewed mediation.<sup>45</sup> As a result of compromises between the competing interested of the settling parties, the Fixed Credit Option (FCO) was developed.<sup>46</sup> On June 11, 2015, ALJ Cynthia Williams Fordham issued a Recommended Decision which approved the Joint Settlement *without modification* and noted about the FCO that “although the methodology is more complicated than the PIP advocated by TURN et al. and CAUSE-PA, it reflect a reasonable compromise to improve the affordability for PECO’s CAP participants.”<sup>47</sup>

As explained in the Initial Decision, settlement agreements before the Commission are “contracts which have been sanctioned by the Commission.”<sup>48</sup> As such, principles of contract interpretation may be applied to settlement agreements. As the Initial Decision explained, “[t]he fundamental rule in contract interpretation is to ascertain the intent of the contracting parties from the writing.”<sup>49</sup> “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.”<sup>50</sup>

Similarly, the Commonwealth Court has found:

Unless ambiguous, in order to determine the intent of the parties to a contract, a court should look to the four corners of the document and its express language, Midomo Co, Inc. v. Presbyterian Housing Development Co., 1999 PA Super 233, 739 A.2d 180, 186 (Pa. Super, 1999). See also, Washington Hospital v. White, 889 F.2d 1294, 1300 (3d Cir, 1989). The question of whether a contract provision is ambiguous is a question of law, See American Flint Glass Workers v. Beaumont Glass Co., 62 F.3d 574, 581 (3d Cir. 1995). In deciding whether a contract is ambiguous, a court must determine if there are objective criteria that make the terms of the contract susceptible of different meanings. see In re New Valley Corp., 89 F.3d 143, 150 (3d Cir. 1996), cert. denied, 519 U.S. 1110,

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<sup>45</sup> CAUSE-PA Main Brief at 4.

<sup>46</sup> Id. at 4-5.

<sup>47</sup> Id. at 6, citing Recommended Decision at 23.

<sup>48</sup> Initial Decision at 16, citing Cf. Commonwealth by Shapiro v. UPMC, 208 A.3d 898, 909-10 (Pa. 2019).

<sup>49</sup> Initial Decision at 17, citing Waggle v. Woodland Hills Ass’n, Inc., 213 A.3d 397, 405-06 (Pa. Cmwlth. 2019).

<sup>50</sup> Id.

117 S. Ct. 947, 136 L. Ed. 2d 835 (1997), When the terms of the contract are clear and unambiguous, the intent of the parties is to be ascertained solely from the writing, as a matter of law without reference to any external testimony or other evidence, Hutchison v. Sunbeam Coal Corp., 513 Pa. 192, 519 A.2d 385, 390, 389 (Pa. 1986).

Considine v. Reliance Ins. Co., 35 A.3d 1232, 1238-1239 (Pa. Cmwlth. 2011).

As discussed above, the language of the Joint Settlement provision at issue is clear and unambiguous on its face. It is uncontested that the plain language of the Joint Settlement requires PECO to revise the FCO's energy burden standards upon the revision of the energy burden standards in the Final CAP Policy Statement. The intent of the settling parties is manifestly expressed in the language of the provision – which contains no language requiring any additional Commission procedure or review. As such, the Initial Decision erred by analyzing whether or not the provision at issue was “central” to the Joint Settlement – and concluding that the provision was not enforceable because of its placement in a footnote, rather than in the body of the Joint Settlement.<sup>51</sup> Given the clear language of the Joint Settlement provision, the Initial Decision unnecessarily reached outside the four corners of the Joint Settlement when it analyzed the parties' Statements in Support consider the centrality – and thus enforceability – of the provision.

While the procedural history of the Joint Settlement is helpful to provide context about the FCO's development through negotiation and compromise of the settling parties, the placement of the provision at issue within the Joint Settlement is ultimately irrelevant. The placement of the provision central to this matter in a footnote does not make it any less clear in its plain language, and should not affect the enforceability of Joint Settlement terms that were agreed to after years of extensive negotiation and litigation. The footnote at issue was to a table expressing the applicable

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<sup>51</sup> Initial Decision at 20.

energy burden, so it is perfectly reasonable for the parties to include a provision further modifying the energy burden standards in a footnote to that table.

To the extent that the placement of the provision at issue is relevant to its enforceability, CAUSE-PA contests the ALJ's conclusion that placement of provisions in footnotes of the Joint Settlement diminishes their importance or enforceability. Indeed, several provisions can be found in footnotes throughout the Joint Settlement that serve as important components of the overall Joint Settlement:

- Because of the quarterly recalculations discussed in [Section related to the Periodic Recalculation and adjustment of annual credit], [the] pro forma calculations will start to be replaced by data on the customer's actual usage three months after the pro forma calculation is done;<sup>52</sup>
- 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;<sup>53</sup>
- If PECO is granted an electric base rate increase, the maximum allowable credits [for electric non-heating] will be increased by a percentage equal to the system-wide residential distribution rate increase, applied to the portion of the Maximum Credit that is attributed to distribution rates;<sup>54</sup>
- If PECO is granted an electric base rate increase, the maximum allowable credits [for electric heating] will be increased by a percentage equal to the system-wide

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<sup>52</sup> Joint Settlement at 1, footnote 1.

<sup>53</sup> Id. at 2, footnote 2.

<sup>54</sup> Id. at 4, footnote 8.

residential heating distribution rate increase, applied to the portion of the Maximum Credit that is attributed to the distribution rates;<sup>55</sup>

- If PECO is granted a gas base rate increase, the maximum allowable credits [for electric with gas heating] will be increased by a percentage equal to the system-wide residential distribution rate increase, applied to the portion of the Maximum Credit that is attributed to distribution rates.<sup>56</sup>

The Joint Settlement thus clearly included actionable and enforceable provisions in footnotes that were meant to adjust PECO's low income program procedures. The placement of these key provisions within footnotes rather than the body of the Joint Settlement does not diminish their importance or effect. Rather, the placement of these provisions in footnotes emphasizes that these provisions are meant to modify the calculations and procedures in light of future changes impacting low income programs. Similarly, the Joint Settlement provision at issue contained in footnote 3 is so placed to emphasize its modifying effect on Step 3 of the FCO calculation, in which PECO determines a household's allowable energy burden utilizing the household's FPL.<sup>57</sup> As more fully explained in CAUSE-PA's Main Brief and Reply Brief, weakening the enforceability of settlements has broader detrimental consequences for consumers and parties litigating before the Commission.<sup>58</sup> Finding that clear terms in a Commission-approved Joint Settlement are not enforceable will have a chilling effect on the willingness of future parties before the Commission to enter into settlements if parties cannot guarantee that settlement terms will be honored and enforced. Similarly, failure to comply with Commission-approved USECPs and rules

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<sup>55</sup> Id. at 4, footnote 9.

<sup>56</sup> Id. at 4, footnote 10.

<sup>57</sup> Id. at 2.

<sup>58</sup> CAUSE-PA Main Brief at 25; CAUSE-PA Reply Brief at 21.

governing universal service enforcement could harm the confidence of low income consumers who rely on the transparent process in which utilities abide by the required terms of their universal service programs.<sup>59</sup> This is especially salient as PECO is one of the largest utilities in Pennsylvania.<sup>60</sup>

For the forgoing reasons, and as explained in its Main Brief and Reply Brief, CAUSE-PA strongly urges the Commission to amend the Initial Decision to find that PECO was obligated under the terms of the Joint Settlement and its 2016-2018 USECP to revise the FCO's maximum energy burden standards when the Commission revised the energy burden standard in the Final CAP Policy Statement. As discussed below PECO's failure to revise the FCO's energy burden standards in line with the Final CAP Policy Statement should be found to be a clear violation of the terms of the Joint Settlement and PECO's 2016-2018 USECP, constituting unreasonable service and creating excessive rates under Section 1501 of the Public Utility Code.

**2. CAUE-PA EXCEPTION 2: The Initial Decision erred in finding that PECO was not in violation of the Joint Settlement and its 2016-2018 USECP.**

**A. *The Initial Decision erred in finding that PECO did not violate the terms of the Joint Settlement and its 2016-2018 USECP, given clear evidence that PECO willfully failed to implement the revised energy burdens in the Final CAP Policy Statement.***

To date, PECO has failed to revise the FCO energy burden standards in line with the Final CAP Policy Statement, as required by the terms of the Joint Settlement and its 2016-2018 USECP. Despite clear and unambiguous language in the Joint Settlement and PECO's failure to implement the revised energy burden standards in the Final CAP Policy Statement, the Initial Decision held that PECO was not required to update the FCO's calculations following the Final CAP Policy

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<sup>59</sup> CAUSE-PA Main Brief at 25.

<sup>60</sup> Id.

Statement without further Commission approval.<sup>61</sup> The Initial Decision erred in finding that PECO has not violated the terms of the Joint Settlement and its 2016-2018 USECP.

In its Complaint, TURN alleges that PECO is in willful violation on the terms of the parties' Joint Settlement. TURN also alleges in its Complaint that PECO is in willful violation of its Commission approved 2016-2018 USECP. The Electricity Generation Customer Choice and Competition Act<sup>62</sup> and Natural Gas Choice and Competition Act<sup>63</sup> require the Commission to ensure that “universal service and energy conservation policies, activities and services are appropriately funded and available” in Electric Distribution and Natural Gas Distribution service territories.<sup>64</sup> Under the terms of these Acts, Universal Service programs are, *by definition*, designed to ensure that low income households can maintain service to their home, and explicitly include CAPs.<sup>65</sup> The Commission oversees CAP policies and procedures of regulated electric and gas distribution companies' USECPs. Regulated EDCs and NGDCs are required to submit USECPs to the Commission for review and approval at least every 5 years – recently extended from the prior triennial filing requirement.<sup>66</sup> The terms of a regulated utilities' Commission approved USECP is binding on the utility, and directs the policies, procedures, eligibility, and enrollment of universal service programs.<sup>67</sup>

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<sup>61</sup> Initial Decision at 1.

<sup>62</sup> 66 Pa. C.S. § 2801, *et seq.*

<sup>63</sup> 66 Pa. C.S. § 2201, *et seq.*

<sup>64</sup> 66 Pa. C.S. § 2804 (9); 66 Pa. C.S. § 2203 (8).

<sup>65</sup> 66 Pa. C.S. § 2202 (defining “universal service and energy conservation”); 66 Pa. C.S. § 2803 (defining “universal service and energy conservation”).

<sup>66</sup> 52 Pa. Code § 54.74(a); 52 Pa. Code § 62.4(a)(2); see also Universal Service and Energy Conservation Plan (USECP) Filing Schedule and Independent Evaluation Filing Schedule, Order, Docket No. M-2019-3012601 (order entered Oct. 3, 2019) (temporarily extending the filing schedules to every 5 years).

<sup>67</sup> See TURN St. 1 at 9.

The Complaint also alleges that PECO's failure to revise the FCO's maximum energy burden standards constitutes unreasonable service under Section 1501 of the Public Utility Code.<sup>68</sup> Section 1501 requires that a public utility's services and facilities shall be in conformity with the regulations and orders of the Commission."<sup>69</sup> This Section further obligates utilities to provide efficient, safe, and reasonable service and facilities. Such service is required to be reasonably continuous and without unreasonable interruptions or delay.

Through its expert witnesses, PECO has acknowledged that it willfully chose to not implement the energy burden standards in the Final CAP Policy Statement. Mr. Kehl admits through Rebuttal Testimony that PECO was aware and fully capable of implementing the revised energy burden standards in compliance with its Joint Settlement and USECP obligations, but chose to unilaterally disregard its obligations in favor of a different approach.<sup>70</sup> In particular, Mr. Kehl testified as to PECO's conscious decision to breach the Joint Settlement terms in favor of PECO's unilaterally decided and preferable approach:

“Given the time that will be required to transition to a PIPP, PECO concluded that it would now be reasonable, with Commission approval, to incorporate the revised EBS in the FCO as a “bridge” to the PIPP.<sup>71</sup>

It is also particularly telling that PECO previously acknowledged its ability and intention to implement its Joint Settlement obligation in Comments submitted to the Commission regarding a possible Commission ordered energy burden change, and that, if the established energy burdens

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<sup>68</sup> 66 Pa. C.S. § 1501.

<sup>69</sup> See also DeSantis v. Pa. Power Co., Initial Decision, Docket No. C-2019-3013652, at 10 (April 27, 2020) (holding, in the context of an individual formal complaint, that “failure to apply all the criteria from the most current universal service plan is a violation of Section 1501 of the Public Utility Code.”).

<sup>70</sup> CAUSE-PA Main Brief at 23, citing PECO St. 1-R at 15: 20 - 16: 2.

<sup>71</sup> CAUSE-PA Main Brief at 23, citing PECO St. 1-R at 15: 20 - 16: 2. (emphasis added); CAUSE-PA St. 1-SR at 9: 12-19.

are changed, *PECO's CAP FCO program has a "pass through' clause allowing for automatic implementation."*<sup>72</sup>

As discussed below, the Initial Decision erred in conflating PECO's unilateral actions with the ongoing review process for USECPs. The Initial Decision found 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 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."<sup>73</sup> CAUSE-PA agrees that the process of USECP evaluation and review allows the Commission, utilities, and stakeholders to hone the effectiveness of USECP programs and guidelines to ensure that program terms are effectively designed to meet the needs of low income customers. However, PECO's actions in this case are clearly distinct and separate from the collaborative process of USECP evaluation and revision which is overseen by the Commission. Here, PECO chose to unilaterally abandon its clear Joint Settlement obligations – which had been previously approved by the Commission through the Joint Settlement and the 2016-2018 USECP – without approval of the Commission or the settling parties. As discussed below, PECO's willful disregard of its clear Joint Settlement and USECP obligations in favor of its other CAP-related filings was not a reasonable interpretation of its Joint Settlement obligations and did not relieve PECO of its obligations to revise the FCO's energy burden standards in line with the Final CAP Policy Statement. PECO's failure to revise its maximum energy burden standards should be found as a clear violation of the terms of the Joint

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<sup>72</sup> CAUSE-PA Main Brief at 23, citing CAUSE-PA St. 1-SR at 9: 7-15, citing Energy Affordability for Low-Income Customers, Initial Comments of PECO Energy Company. Docket No. M- 2017-2587711, at 8 (Initial Comments filed May 11, 2019).

<sup>73</sup> Initial Decision at 21.

Settlement and PECO's 2016-2018 USECP, constituting unreasonable service and creating excessive rates under Section 1501 of the Public Utility Code.

***B. The Initial Decision erred in finding that PECO substantially complied in good faith with the terms of the Joint Settlement through other filings related to its CAP.***

PECO's expert witness, Mr. Kehl, acknowledged that PECO was aware of its obligations to implement the revised energy burdens in the CAP Policy Statement, but unilaterally chose to disregard the Joint Settlement in favor of a different approach.<sup>74</sup> PECO also acknowledged its ability and intention to implement its Joint Settlement obligations in Comments submitted to the Commission indicating that, if the established energy burdens in the Final CAP Policy Statement were changed, the FCO program has a "pass through" clause allowing for automatic implementation."<sup>75</sup> Given that PECO has acknowledged the automatic nature of the Joint Settlement provision, the Initial Decision erred in holding that PECO "substantially complied with the words and spirit of the [S]ettlement" through its various other filings related to its CAP.<sup>76</sup> In particular, the Initial Decision erred in emphasizing the following actions taken by PECO as evidence of its good faith in implementing the obligations under the Joint Settlement: (1) that, on January 16, 2020, PECO filed a letter describing the portions of the Final CAP Policy Statement the Company was already implementing and intended to implement;<sup>77</sup> (2) that, 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 to address the Final CAP Policy Statement and the redesign of the

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<sup>74</sup> CAUSE-PA Reply Brief at 13-14.

<sup>75</sup> Id., citing CAUSE-PA St. 1-SR at 9: 7-15, Energy Affordability for Low-Income Customers, Initial Comments of PECO Energy Company, Docket No. M- 2017-2587711, at 8 (Initial Comments filed May 11, 2019).

<sup>76</sup> Initial Decision at 21.

<sup>77</sup> Id. at 9, ¶ 29.

CAP;<sup>78</sup> and (3) that, on July 8, 2020, PECO filed an amended proposed 2019-2024 USECP which proposed a CAP PIPP design.<sup>79</sup>

It is unreasonable to find that PECO's Letters filed on January 16, 2020 and March 26, 2020, and its amended proposed 2019-2024 USECP filed on July 8, 2020, show that PECO acted in good faith to implement the Joint Settlement provision central to this case. Contrary to the findings in the Initial Decision, PECO does not propose to implement the revised energy burden standards into its PIPP design.<sup>80</sup> Instead and as clearly explained in the Initial Decision, the Company proposed in its 2019-2024 revised USECP filing that a PIPP would utilize the energy burdens in the Final CAP Policy Statement for participants with household incomes at 0-50% FPL and 51-100% FPL.<sup>81</sup> However, the Company did not propose to revise its existing energy burdens for participants with household incomes between 101-150% FPL.<sup>82</sup> As such, PECO has failed to propose a PIPP that would utilize the revised energy burden standards set forth in the Final CAP Policy Statement.

Further, PECO's January 16, 2020 filing with the Commission did not relieve PECO of its obligations under the Joint Settlement. As explained more fully in CAUSE-PA's Main Brief and Reply Brief, the Commission's November 5, 2019 Order pursuant to the Final CAP Policy Statement required that each utility state whether and how it intended to implement the Final CAP Policy Statement.<sup>83</sup> However, the November 5 Order in no way relieved PECO of its obligations

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<sup>78</sup> Id. at 9, ¶ 30.

<sup>79</sup> Id. at 10, ¶ 37.

<sup>80</sup> See Initial Decision at 9, ¶ 31.

<sup>81</sup> Id. at 10-11, ¶ 38.

<sup>82</sup> Id.

<sup>83</sup> CAUSE-PA Main Brief at 7-8; CAUSE-PA Reply Brief at 19-20.

under the terms of the Joint Settlement or PECO's USECP. PECO's obligations to revise the FCO's energy burden standards in line with the Final CAP Policy Statement were established well before the Commission directed the utilities to provide a filing indicating whether and how each utility intended to comply with the Final CAP Policy Statement. Moreover, years prior to the November 5 Order, PECO had – on October 2, 2015 – filed its USECP for 2016-2018. PECO's USECP, including all subsequently filed revisions, included the terms of the Joint Settlement – including the provision at issue in this case. Given these independent obligations which were approved by the Commission, PECO's January 16, 2020 compliance filing should have stated that - pursuant to the terms of its existing USECP and the terms of the 2015 Settlement, PECO intended to implement the revised energy burden standards in the Final CAP Policy Statement.

The Initial Decision also points to the fact that, on September 25, 2020, PECO filed a Petition in its current 2019-2024 USECP proceeding to utilize the energy burden standards in the Final CAP Policy Statement in its FCO.<sup>84</sup> PECO's filing was wholly unnecessary given the Commission's prior approval of the Joint Settlement and 2016-2018 USECP and only served to further delay implementation of the revised energy burden standard in the Final CAP Policy Statement.<sup>85</sup> As discussed above and at length in CAUSE-PA's Main Brief and Reply Brief, the Joint Settlement provision was clear on its face and did not require any further approval or action by the Commission prior to PECO implementing the revised energy burden standards in the Final CAP Policy Statement.<sup>86</sup> Indeed, the Commission approved the Joint Settlement prior to issuing its Final CAP Policy Statement and thus were already aware of the effect on PECO's FCO rates

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<sup>84</sup> Initial Decision at 11, ¶ 39.

<sup>85</sup> CAUSE-PA Reply Brief at 20.

<sup>86</sup> Id. at 20-21; CAUSE-PA Main Brief at 14.

when it issued the Final CAP Policy Statement. The only condition precedent to the Joint Settlement provision was for the Commission to revise its energy burden standards in the Final CAP Policy Statement. As TURN's expert witness, Mr. Bertocci, explained: "The changes to the CAP Policy Statement itself triggered PECO's obligations to use those updated Energy Burdens."<sup>87</sup>

For the forgoing reasons, CAUSE-PA urges the Commission to amend the Initial Decision to find that PECO violated its obligations under the terms of the Joint Settlement and its 2016-2018 USECP to revise the FCO's maximum energy burden standards in line with the Final CAP Policy Statement. Similarly, CAUSE-PA respectfully requests that the Commission amend the Initial Decision to find that PECO's failure to implement the revised energy burden standards in the Final CAP Policy Statement constituted unreasonable service and created excessive rates under Section 1501 of the Public Utility Code.

**3. CAUSE-PA EXCEPTION 3: The Initial Decision erred when it failed to find any bill affordability benefits to revising the energy burden standards in the FCO in line with the Final CAP Policy Statement.**

CAUSE-PA maintains the position in its Main and Reply Briefs, and advanced by CAUSE-PA's expert witness Harry Geller, that structural revision of the FCO to rectify the issues identified in the APPRISE evaluation is not a condition precedent to PECO revising the FCO's energy burdens in compliance with the Joint Settlement and PECO's 2016-2018 USECP.<sup>88</sup>

The Initial Decision erroneously placed emphasis in its findings on the flaws inherent in the FCO. Specifically, the Initial Decision found that, on June 28, 2019, PECO filed the APPRISE evaluation, which showed that during 2017 and 2018 approximately 80% of customers with

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<sup>87</sup> CAUSE-PA Reply Brief at 21, citing TURN St. 1 at 20: 8-9.

<sup>88</sup> CAUSE-PA Main Brief at 18-19; CAUSE-PA Reply Brief at 8-9.

household income at or below 50% FPL received unaffordable bills under the FCO.<sup>89</sup> The Initial Decision also found that, in the Spring of 2020, PECO held a series of stakeholder calls, in which the Company presented its analysis of different alternatives to PECO's CAP design.<sup>90</sup> The Company's analysis showed that incorporating the revised energy burden standards into the FCO would make no improvement to bill affordability but would result in substantially increased universal service costs.<sup>91</sup>

This is a fundamental misunderstanding of what the Company's analysis showed. In short, the analysis looked on a systemwide basis at whether and to what extent the FCO was exceeding Commission energy burden standards – particularly for the lowest income customers.<sup>92</sup> Reducing the energy burden standards would not fix the problem that some customers would still exceed the maximum energy burden standards as a result of the FCO design. But even those exceeding the maximum energy burden standard under PECO's current energy burden standards would see a reduction in their bill if the energy burden standards were further reduced.<sup>93</sup>

CAUSE-PA and its expert witness do not dispute the inherent complexity involved in developing effective CAP programs, or the flaws inherent in the FCO's design, which must be addressed.<sup>94</sup> While developing a comprehensive, affordable PIPP CAP is a desirable long-term goal that CAUSE-PA supports, and in fact was proposed as a better option in negotiations over the FCO, it is not a condition precedent for PECO to comply with the Joint Settlement related to the

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<sup>89</sup> Initial Decision at 8, ¶ 24.

<sup>90</sup> Id. at 10, ¶ 32.

<sup>91</sup> Initial Decision at 10, ¶ 34.

<sup>92</sup> TURN St. 1-SR at 5: 4-13; TURN Reply Brief at 15-17.

<sup>93</sup> CAUSE-PA Reply Brief at 11.

<sup>94</sup> CAUSE-PA Main Brief at 18-19.

current FCO.<sup>95</sup> As TURN’s expert witness, Mr. Bertocci explains, “this proceeding is not about the ability or the efficiency of the CAP FCO structure to provide all CAP customers with bills that reflect percentages of household income.”<sup>96</sup>

CAUSE-PA has explicitly recognized that the FCO was an imperfect solution put in place as a result of extensive settlement negotiations and compromise.<sup>97</sup> Indeed, the parties were aware of the FCO’s limitations, and included provisions in the Joint Settlement that would *both* improve affordability immediately upon any change to the energy burden standards *and* create a process for evaluation to allow for additional CAP changes as necessary based on a third-party evaluation.<sup>98</sup>

The Initial Decision also erred in finding that “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 exceed the target burdens, would remain the same, if not increase.”<sup>99</sup> As discussed in CAUSE-PA’s Main Brief and Reply Brief, reducing the FCO’s energy burden standards will absolutely improve bill affordability for CAP participants at all levels of income, as it will necessarily increase the CAP credit amount applied to their bill.<sup>100</sup> This is basic math. If you reduce the percentage of income in the FCO calculation, the result will be a higher credit, which will decrease the amount a CAP customer is charged for electric and gas

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<sup>95</sup> *Id.* at 18-19.

<sup>96</sup> *Id.* at 19, *citing* TURN St. 1-SR at 7: 7-9.

<sup>97</sup> CAUSE-PA Main Brief at 19.

<sup>98</sup> *Id.* at 18-19.

<sup>99</sup> Initial Decision at 11, ¶ 41.

<sup>100</sup> CAUSE-PA Main Brief at 17, *citing* “Reducing the maximum percentage of income used to calculate a CAP participant’s applicable fixed credit will necessarily improve affordability.” TURN St. 1-SR at 7: 17-18; 8: 1-2; CAUSE-PA Reply Brief at 11.

services.<sup>101</sup> Indeed, the Initial Decision finds that “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.”<sup>102</sup>

Again, the inherent structural flaws in the FCO – especially for those at the lowest income levels – must be addressed ultimately through the creation of a CAP PIPP. However, the need to remediate structural affordability issues is not a relevant to PECO’s obligations to comply with the terms of the Joint Settlement. Rather, PECO must comply with the unambiguous provision of the Joint Settlement requiring immediate steps to reduce the applicable energy burden standards within the FCO, consistent with the Commission’s revised energy burden standards. Reducing the energy burden standards of the FCO may not fix all the structural issues inherent in the FCO, but it will narrow the affordability gap for all CAP customers by increasing the CAP credit amount applied to their bills. This interim step was clearly contemplated by the parties to the Joint Settlement as a way to immediately improve affordability while further review of the FCO was in process.

While CAUSE-PA supports the desirable goal of implementing a CAP PIPP, immediate improvements to help PECO’s customers cope with high bills are needed now as a result of PECO’s failure to revise the FCO’s energy burden standards – and were in fact needed through the pandemic, which has had a tremendous and destabilizing impact on low income communities. As of August 2020, PECO estimated that 115,384 households were enrolled in CAP.<sup>103</sup> As described more fully in CAUSE-PA’s Main Brief and Reply Brief, PECO’s failure to comply with

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<sup>101</sup> CAUSE-PA Reply Brief at 11.

<sup>102</sup> Initial Decision at 11, ¶ 42.

<sup>103</sup> CAUSE-PA Main Brief at 30, citing TURN St. 1 at 10: 6-9, citing PECO Response to TURN-I-1(b) and (c). See also PECO Response to TURN-I-(d) (disaggregating CAP customers by FPIG tier); Reply Brief at 12.

its Joint Settlement and USECP obligations has caused CAP customers to have significantly higher bills than they would otherwise have received if PECO had timely implemented the revised energy burden standards in line with the Final CAP Policy Statement, and as clearly directed by the Joint Settlement.<sup>104</sup> Low income customers, even at the best of times, face untenable choice in light of high utility bills and often forgo other basic necessities – such as rent, food, and medicine – in order to afford utility bills.<sup>105</sup> With the spread of COVID-19, low income customers are struggling more than ever and continue to face disproportionate and profound economic harm – amassing unprecedented levels of arrears over the past year.<sup>106</sup> As such, CAUSE-PA urges the Commission to amend the Initial Decision to find that that PECO violated its obligations under the Joint Settlement and its 2016-2018 USECP to revise the FCO’s maximum energy burden standards when the Commission revised the energy burden standard in the Final CAP Policy Statement. As discussed below, PECO should be ordered to immediately implement the revised energy burden standards in the Final CAP Policy Statement to improve bill affordability without delay for PECO’s CAP participants.

**4. CAUSE-PA EXCEPTION 4: The Initial Decision erred in not ordering the appropriate relief to fulfill the terms of the Joint Settlement and PECO’s 2016-2018 USECP in order to remedy harm caused by PECO’s clear and unambiguous breach of the Commission-approved Joint Settlement.**

**A. *The Initial Decision erred when it failed to order PECO to immediately revise the FCO’s energy burden standards in compliance with the terms of the Joint Settlement and its 2016-2018 USECP.***

Given the clear violation of the terms of the Joint Settlement and the 2016-2018 USECP, CAUSE-PA supports the relief requested in TURN’s Complaint and recommended by TURN’s

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<sup>104</sup> CAUSE-PA Main Brief at 30-31; CAUSE-PA Reply Brief at 12.

<sup>105</sup> CAUSE-PA Reply Brief at 12, citing TURN St. 1 at 28: 4-10.

<sup>106</sup> CAUSE-PA Reply Brief at 12.

expert witnesses, Mr. Bertocci and Mr. Philip Lord.<sup>107</sup> Specifically, CAUSE-PA urges the Commission to amend the Initial Decision to require PECO to immediately utilize the revised energy burden standards, as set forth in the Commission’s Final CAP Policy Statement, by incorporation into its FCO design.

PECO’s willful failure to implement the revised energy burden standards in the Final CAP Policy Statement has affected the parties to the Joint Settlement and low income CAP customers across PECO’s service territory.<sup>108</sup> CAUSE-PA’s expert witness, Mr. Geller, testified as to how low income communities continue to struggle to afford services, especially since the spread of the COVID-19 pandemic.<sup>109</sup> By failing to adjust the FCO’s energy burdens, PECO has caused economic harm to low income customers who participate in CAP.<sup>110</sup> As TURN’s expert witness, Mr. Bertocci, explains this harm has disproportionately affected Black and Brown Philadelphian households.<sup>111</sup>

As previously discussed, PECO’s failure to comply with its Joint Settlement and USECP obligations has broader implications on Commission policy. PECO’s failure to comply with its Joint Settlement obligations will have a chilling effect on the willingness of future parties to settle matters before the Commission if the Commission cannot guarantee that Settlement terms will be honored or enforced.<sup>112</sup> Moreover, if utilities are not required to follow the terms of USECPs and the rules governing universal service enforcement, consumers – especially low income consumers

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<sup>107</sup> TURN St. 1 at 24-25.

<sup>108</sup> See, generally, TURN St. 2.

<sup>109</sup> CAUSE-PA Main Brief at 25, citing CAUSE-PA St. 1-SR at 4: 8-10.

<sup>110</sup> CAUSE-PA Main Brief at 25.

<sup>111</sup> Id., citing TURN St. 1 at 25: 20 – 26: 2.

<sup>112</sup> CAUSE-PA Main Brief at 25.

who rely of the terms of USECPs – cannot guarantee that they can receive assistance through a transparent process.<sup>113</sup>

For these reasons and the reasons detailed in CAUSE-PA’s Main Brief and Reply Brief, CAUSE-PA urges the Commission to amend the Initial Decision to require PECO to immediately adjust its FCO’s calculations to utilize the revised energy burden standards in the Final CAP Policy Statement. CAUSE-PA respectfully requests that the Commission amend the Initial Decision to require PECO to utilize the energy burden standards in the Final CAP Policy Statement for so long as the FCO operates, as directed by the clear and undisputed terms of the Joint Settlement.

***B. The Initial Decision erred when it failed to order PECO to provide retroactive bill credits and arrearage forgiveness to CAP participants.***

In its Main Brief and Reply Brief, CAUSE-PA argued that, in order to remedy PECO’s conscious delay and failure to revise the FCO’s energy burden standards, PECO should be required to provide CAP participants with retroactive bill credits and arrearage forgiveness.<sup>114</sup> Providing CAP participants with retroactive bill credits and arrearage forgiveness would help to remedy the harm done to CAP customers as a result of PECO’s willful failure to promptly implement the energy burden standards in the Final CAP Policy Statement.<sup>115</sup> While retroactive bill credits would bring CAP participants bills to the amount participants should have been billed, retroactive arrearage forgiveness would allow for any partial payments that would have otherwise been full payments to be recalculated so that CAP customers could receive full arrearage forgiveness benefits, as required by PECO’s 2016-2018 USECP.<sup>116</sup>

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<sup>113</sup> Id.

<sup>114</sup> Main Brief at 26, citing TURN St. 1 at 26: 5-10; CAUSE-PA Reply Brief at 21-22.

<sup>115</sup> CAUSE-PA Main Brief at 26.

<sup>116</sup> Main Brief at 26, citing TURN St. 1 at 26: 15-18.

The Initial Decision found that, if retroactive bills relief is warranted in this current proceeding, applying a systemwide average bill adjustment for every CAP customer consistent with PECO's proposal set forth in Exhibit MK-1RJ is appropriate.<sup>117</sup> The Initial Decision also makes a series of findings related to PECO's inability to provide individual-by-individual retroactive CAP credits, as originally requested in TURN's Complaint.<sup>118</sup>

As explained in CAUSE-PA Main Brief, PECO's failure to develop the systems necessary to provide individual-by-individual retroactive bill credits to CAP participants should not prevent CAP customers from receiving required bill savings.<sup>119</sup> CAP participants should be adequately compensated for PECO's unilateral and willful decision to not implement the energy burden standards in the Final CAP Policy Statement. As Mr. Geller points out in his Surrebuttal testimony, PECO was on notice that it would need systems in place to automatically pass lower energy burdens to CAP participants when it agreed to the Joint Settlement in 2015.<sup>120</sup> The implementation of the Commission's Investigation and Rulemaking regarding energy affordability and maximum energy burdens should have put PECO on further notice that the Company would potentially need data and systems to implement revised energy burden standards.<sup>121</sup> PECO's decision to delay complying with the Joint Settlement once the CAP Policy Statement was amended, which now requires a retroactive passthrough, was a conscious decision by PECO.

However, in light of PECO's IT limitations, CAUSE-PA has previously accepted PECO's proposal that PECO can provide systemwide average adjustments to CAP participants, as set forth

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<sup>117</sup> Initial Decision at 13, ¶ 53.

<sup>118</sup> *Id.* at 11, ¶ 43 – 13, ¶ 54.

<sup>119</sup> CAUSE-PA Main Brief at 27.

<sup>120</sup> *Id.* at 27, citing CAUSE-PA St. 1-SR at 12: 6-15.

<sup>121</sup> *Id.*

in Exhibit MK-1RJ to Mr. Kehl's Rejoinder Testimony.<sup>122</sup> While CAUSE-PA has generally accepted the methodology set forth in Exhibit MK-1RJ, we continue to note that Mr. Kehl's calculations must be updated to the date that PECO actually implements the revised energy burden standards.<sup>123</sup> Given that PECO's proposed methodology utilizes system averages to provide retroactive credits, it is also important that each individual CAP customer is given the right to request an individualized calculation of retroactive credits.<sup>124</sup> Further, PECO should be directed, when providing retroactive arrearage forgiveness, to account for bills and payments that were counted as partial but would have been full if PECO timely implemented the revised energy burden standards.<sup>125</sup>

For the forgoing reasons, CAUSE-PA respectfully requests that the Commission amend the Initial Decision to order PECO to (1) revise the FCO's calculations to implement the updated energy burden standards set forth in the Final CAP Policy Statement, and require PECO to utilize the energy burden standards in the Final CAP Policy Statement so long as the FCO operates; and (2) provide CAP customers with retroactive bill credits and arrearage forgiveness as outlined in these Exceptions.

### **III. CONCLUSION**

For the reasons set forth above, and as more fully explained in CAUSE-PA's Main Brief and Reply Brief, CAUSE-PA urges the Commission to amend ALJ Long's Initial Decision consistent with these Exceptions and the underlying Complaint filed by TURN. By finding that

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<sup>122</sup> CAUSE-PA Main Brief at 28.

<sup>123</sup> CAUSE-PA Main Brief at 28-29.

<sup>124</sup> Id. at 29.

<sup>125</sup> Id.

PECO was in clear violation of its Joint Settlement and USECP obligation to revise the energy burden standards of the FCO and ordering PECO to immediately revise the FCO's energy burdens and provide FCO participants with retroactive bill credits and arrearage forgiveness, the Commission can help ensure that low income customers can afford and maintain critical utility services.

Respectfully submitted,  
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