BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

David Hatchigian	:	
	:	
v.	:	C-2020-3021199
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Darlene Heep
Administrative Law Judge

INTRODUCTION

PECO Electric Tarif Section 9.2 provides that PECO reserves the right to refuse the introduction of service unless a written certificate of approval has been received from a competent inspection agency. PECO implements Tarif Section 9.2 through a policy of requiring an underwriter's certificate before reintroducing service to a service address that was not energized for six months or longer. The Complainant contends that Tariff Section 9.2 is unreasonable on its face and that PECO unreasonably applied its underwriter's certificate policy. The Complainant also contends that he was not notified of a shut off of service at the service address.

This decision finds in favor of the Complainant's claim that PECO's application of the underwriter's certificate policy pursuant to Tariff Section 9.2 was unreasonable. PECO will be ordered to pay a penalty of $100 per day for eight (8) days of violation, for a total of $800. This decision dismisses Complainant's direct challenge of the reasonableness of Tariff Section 9.2 itself under the doctrine of *res judicata* and dismisses the Complainant's claim of inadequate shut off notice because he did not meet his burden of proof.

HISTORY OF THE PROCEEDING

On July 16, 2020, David Hatchigian, Complainant, filed a formal complaint against PECO Energy Company with the Pennsylvania Public Utility Commission ("Commission" or "PUC"). The Complainant is the landlord/owner of 7512 Brentwood Road, Philadelphia, Pennsylvania 19151 ("service address"). In his Complaint, Mr. Hatchigian alleged that PECO was threatening to shut off his service or had already shut it off and that he was having a reliability, safety or quality problem with his utility service. The Complainant also referred to a complaint he filed in the Court of Common Pleas of Philadelphia County, and he attached various documents related to that civil action to this Complaint.[1]

Mr. Hatchigian is challenging PECO's application of PECO Electric Tariff Section 9.2, which requires an inspection agency's certificate of approval before electric service is introduced at a service address. Mr. Hatchigian contends that, without notice, PECO shut off the service of two of his tenants in error and that, subsequently, PECO claimed that the service address had been unoccupied for six months and therefore a certificate from an electrical underwriter firm was required before service could be restored. He further alleged that after paying $130 for the inspection and certificate, PECO then refused to connect service until there was a re-inspection of all electric wiring at the service address. As a result, the Complainant alleged, due to service interruption, he was in violation of various Philadelphia municipal codes and tenants were unable to move into the apartments on time.

On August 19, 2020, PECO filed an Answer to the Complaint. PECO denied all material allegations of fact. PECO asserted that the Complainant is not the customer or ratepayer of record at the service address. PECO further stated that the electrical service at the service

[1] The documents that Complainant attached to his formal Complaint show that Mr. Hatchigian initially sought relief against PECO in the Court of Common Pleas of Philadelphia County, which action was docketed in that court at Civil Action, No. 16080065 (August 2016). On August 6, 2019, the Superior Court of Pennsylvania, found that the trial court erred in dismissing Complainant's fourth amended complaint with prejudice and remanded the action to the trial court for the entry of an order transferring the case to the PUC for certain claims it found the PUC has primary and exclusive jurisdiction. (No. 142 EDA 2018) (Pa.Super. 2019). On February 19, 2020, the Supreme Court of Pennsylvania denied Complainant's petition for an allowance of an appeal. (No. 442 EAL 2019) (Pa. 2020).

address was disconnected on August 18, 2014, and the request to connect service was made on February 26, 2015. PECO asserts that it was within its rights pursuant to the PECO Electric Tariff No. 9.2 to request an underwriter's certificate before service would be rendered at the property.

PECO further asserts in its Answer that the underwriter's certificate is required when service has been disconnected for six months or more, or if there has been a fire or other property damage, and that the certificate is requested as a safety precaution for both the resident and the property. PECO also averred in its Answer that PECO Energy's Tariff has been reviewed and approved by the PUC and that tariffs that have been approved by the Commission have the full force and effect of law and are binding on both the utility and its customers, *citing Brockway Glass Co. v. Pa. Pub. Util. Comm'n*, 437 A.2d 1067 (Pa. Cmwlth. 1981).

On August 27, 2020, this matter was referred to the Office of Administrative Law Judge's Mediation Unit. However, the parties could not resolve the matter.

On October 20, 2020, an Initial Telephonic Hearing Notice was issued, setting a hearing for January 6, 2021. A Prehearing Order was issued on December 1, 2020.

The hearing began as scheduled on January 6, 2021. Mr. Hatchigian appeared *pro se*. He testified on his own behalf and offered 30 exhibits, C-1 through C-5 and P-1 through P-25, as pre-marked by the Complainant. During the hearing, the Complainant was directed to resubmit to me and send to PECO an exhibit previously emailed to the Commission and PECO that was not received due to email attachment size restrictions. [2]

PECO was represented by Khadijah Scott, Esquire. She presented two witnesses, Renee Tarpley, PECO Senior Regulatory Assessor, and Danielle Green, a PECO New Business

[2] On at least four occasions, email sent by the Complainant containing his exhibits was rejected due to the large size and an unreadable format. The Complainant was directed to provide the documents in an accessible form. An email with the Complainant's exhibits was subsequently received but the attached exhibits could not be opened or read. Complainant's exhibits were eventually converted to documents in a readable format and filed and accepted into evidence as marked by the Complainant in that readable format.

Manager. PECO also offered 3 exhibits, PECO 1 through PECO 3. PECO Exhibits 1, 2 and 3 were admitted into the record.

PECO objected to admission of P-9 (Copy of City Code requiring fire alarms) as irrelevant, P-11 and P-12 (a 2- page document regarding fire alarm certification) as illegible, P-14 and P-15 (notarized affidavits of two tenants stating that they did not receive a ten-day shut off notice from PECO) as hearsay and P-16 (City of Philadelphia License and Inspection letter re: Rental Suitability Certificate) as irrelevant.

In ruling on the objections, the Complainant was directed to file legible copies of P-11 and P-12, the objection to P-9 was overruled, and objections to P-14 and P-15 were taken under advisement until receipt of additional documents from the Complainant. No ruling was made with respect to P-16. [3]

During the hearing, PECO was directed to provide customer records for both apartments at the service address for the year 2016 and shut off records for the service address for the year 2016. The Complainant was directed to file legible copies of P-11 and P-12 and copies of the relevant leases. Both parties were to file these documents no later than January 29, 2021.

On January 10, 2021, the Complainant submitted Complainant Late-filed Exhibits 1-5. On January 11, 2021, the Complainant submitted copies of P-11 and P-12. On January 28, 2021, PECO submitted customer account records and contacts for both service address apartments. PECO Late-filed Exhibit 4 and PECO Late-filed Exhibit 5. Also on January 28, 2021, PECO submitted a letter objecting to Complainant Late-filed Exhibit 2 (letter from City of Philadelphia Department of Licenses and Inspections regarding fire alarm requirements) and Complainant Late-filed Exhibit 3 (City of Philadelphia Document regarding alarm systems for rental units) as irrelevant.

[3] See fn. 2.

After review of the record, it was determined that a Further Hearing was required. On April 12, 2021, a Further Telephonic Hearing Notice was issued, setting the further hearing for May 5, 2021. A Prehearing Order for the Further Telephonic Hearing was issued on April 14, 2021.

The Further Hearing was held as scheduled on May 5, 2021. The Complainant testified on his own behalf. PECO was represented by Attorney Scott. Ms. Tarpley and Ms. Green again testified on behalf of PECO.

On May 5, 2021, the Complainant sent an email objecting to PECO Late-filed Exhibit 5 from PECO archives.

The record closed on May 21, 2021, upon receipt of the transcript. The record consists of a 156-page transcript and exhibits as set forth below.

Ruling on Exhibits

The Complainant filed legible copies of P-11 and P-12. They will be admitted into evidence.

Exhibit P-14 is a notarized affidavit from Jaclyn Mahoney stating that she resided at the service address on May 18, 2016, when the service was shut off, and that she did not receive a ten-day shut off notice from PECO. Exhibit P-15 is a notarized affidavit from Brijitte Cannady stating that she resided at the service address on May 18, 2016, when the service was shut off and that she did not receive a ten-day shut off notice from PECO. PECO objected to admission of these exhibits, contending that they were inadmissible hearsay. *See* Tr. at 108.

In *Norman v. PECO Energy Co.*, the Commission stated:

> [A]n affidavit is inadmissible hearsay unless it is corroborated by other evidence or falls within an exception to the hearsay rules. *In re Farnese I*, citing *Dale v. Philadelphia Board of Pensions and Retirement*,

> 702 A.2d 1160 (Pa. Cmwlth. 1997), *appeal denied*, 556 Pa. 696, 727 A.2d. 1123 (1998); *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Cmwlth. 1976); Pa. R.E. 802. The notarization of an affidavit does not negate the hearsay nature of the affidavit, *i.e.*, notarization does not make the affidavit admissible evidence. The notarization does not convert the hearsay statements within an affidavit into proof of the truth of those statements. *In re Farnese I.*

Docket Number F-2018-2640713 at 26-27 (Order entered June 18, 2020). In the instant matter, PECO's testimony that Jaclyn Mahoney and Brijitte Cannady were not issued ten-day shut off notices corroborates the affidavits. *See* Tr. at 68-69. Therefore, the objection is overruled and P-14 and P-15 will be admitted into the record.

P-16 is a letter from the Philadelphia Department of Licenses and Inspections indicating that it is granting a license to the Complainant to rent the service address. The letter also states that the license is subject to immediate cancellation for violations of City Ordinances and Regulations. Complainant Late-filed Exhibit 2 is a letter the from City of Philadelphia Department of Licenses and Inspections regarding fire alarm requirements and Late-filed Exhibit 3 is City of Philadelphia Document regarding alarm systems for rental units. PECO objected to these documents as irrelevant.

The Complainant contends here that PECO's application of PECO Electric Tariff Section 9.2 and the underwriter's certificate policy is unreasonable in part because when the service is shut off without notice, and an inspection agency's written certificate of approval is required, he is subject to cancellation of his license to rent the service address. As explained by the Complainant, the disconnection of the electric service causes noncompliance with a City of Philadelphia ordinance that requires a landlord to maintain a 120-volt electric fire alarm system and smoke detector and carbon monoxide detectors. Tr. at 9-10. Complainant Exhibit P-16, Complainant Late-filed Exhibit 2 and Complainant Late-filed Exhibit 3 are relevant to that allegation and therefore the objections are overruled, and the exhibits will be admitted into the record.

Therefore, the record consists of the hearing transcript and the following exhibits:

C-1 Complaint
C-2 Decision
C-3 March 9 Cover Letter
C-4 February 19, 2020 Order
C-5 4th Amended Complaint
P-1 Shut Off Notice
P-2 Second Page of Notice
P-3 Municipal Inspection
P-4 Copy of Check
P-5 Receipt
P-6 Copy of Check
P-7 Giant Receipt
P-8 Giant Receipt
P-9 February 1998 Letter
P-10 Second Page of Letter
P-11 Attachment to Letter
P-12 PUC Document
P-13 Second Page of P-12
P-14 Affidavit
P-15 Affidavit
P-16 L&I Letter
P-17 March 8, 2014 Letter
P-18 Copy of Envelope
P-20 Commission [4]
P-21 PUC Document
P-22 PUC Document
P-23 PUC Document
P-24 PUC Document
P-25 PUC Document

[4] P-19 was omitted by the Complainant.

Complainant Late-filed 1 - Brijette Cannady & Tyrone Zachary & Leticia S. Marks and Jaclyn Mahoney, Joseph J. Branconi, & Michele D. Mahoney residential lease's

Complainant Late-filed 2 - City of Philadelphia Department of Licenses and Inspections to Electrical Contractors date February 1998 requiring that all apartment owners install a hard wire fire alarm system

Complainant Late-filed 3 - Partners for Good Housing Requirements for one and two-family dwellings are required to install smoke alarms powered by the building's primary power or a non-removable (sealed) 10-year battery

Complainant Late-filed 4 - PECO LOI TO Plaintiff dated March 6, 2014

Complainant Late-filed 5 - Pa. Energy Consumer Bill of Rights

PECO Exhibit 1 - Tariff

PECO Exhibit 2 - Underwriter Certification Information

PECO Exhibit 3 - Inspection record

PECO Late-filed Exhibit 4 - Customer Service Information

PECO Late-filed Exhibit 5 - Account Transaction History[5]

FINDINGS OF FACT

1. The Complainant is David Hatchigian, the owner of the service address at issue, 7512 Brentwood Road, Philadelphia, Pennsylvania 19151. Tr. at 8.

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

3. The service address is a duplex with two apartments, a first-floor and a second-floor apartment. Tr. at 8.

[5] In an email dated May 5, 2021, the Complainant objected to a statement in the cover letter sent by PECO with its late filed exhibits. The cover letter is not evidence and therefore any statement offered as fact will not be considered in the decision here.

4. PECO Electric Tariff, Section 9.2, provides that PECO reserves the right to refuse the introduction of service unless a written certificate of approval, satisfactory to the Company, has been received from a competent inspection agency authorized to perform this service in the specific locality in which service is to be provided.

5. One method by which PECO implements Tariff Section 9.2 is through a policy of requiring an underwriter's inspection certificate to re-energize a service address that was not energized for six months or more. Tr. at 70, 72, 92. Exhibit P-17.

6. Beginning November of 2015, the tenants on the lease for the first floor of the service address were Jacyln Mahoney, Joseph J. Branconi, and Michelle D. Mahoney. Tr. at 117.

7. Beginning March of 2016, the tenants on the second-floor lease of the service address were Brijette Cannady, Tyrone Zachary and Leticia Marks. Tr. at 118.

8. PECO electric service was on when the tenants moved into the service address in November 2015 and March 2016. Tr. at 119.

9. On April 4, 2016, a ten-day shut off notice was issued to PECO's customer of record, a Ms. Walker, for the second floor of the service address. PECO Exhibit 3. Tr. at 137; PECO Late-filed Exhibit 4.

10. PECO shut off electricity to the service address on May 18, 2016. Tr. at 14-15.

11. Tenants from each apartment at the service address called the Complainant on the day of the shut off. Tr. 14-15.

12. Subsequent to the shut off, the Complainant called PECO and was told that money was owed and that he needed an underwriter's certificate to have service restored for both apartments at the service address. Tr. at 14-15,150.

13. Both units at the service address were occupied and had electric service on May 18, 2016, the day PECO shut off electric service. Tr. at 120-121.

14. The tenants for the second-floor apartment at the service address - Cannady, Zachary and Marks - were not PECO customers of record at the time of the shut off on May 18, 2016. Tr. at 64-65.

15. PECO did not have a customer of record for the first floor at the time of the shut off at the service address on May 18, 2016. Tr. at 67.

16. On the day of the shut-off, May 18, 2016, PECO issued a "YOUR ELECTRIC/GAS SERVICE HAS BEEN SHUT OFF" notice to its customer of record on the second floor of the service address, which stated that the service was shut off because "You did not pay your past due bill." Exhibit P-1.

17. PECO records dated May 18, 2016, and May 19, 2016, indicate that the Complainant and the tenant on the first floor contacted PECO and were advised by PECO that an underwriter's certificate was needed to reintroduce service. PECO Late-filed Exhibit 4.

18. On May 19, 2016, the Complainant, at his expense, had both units at the service address inspected to obtain an underwriter's certificate to reintroduce service. Exhibits P-5, P-6; Tr. at 120

19. PECO received an underwriter's certificate for the first floor of the service address on May 19, 2016. Tr. at 131; PECO Late-filed Exhibit 4.

20. From 2015 to 2017, PECO electric service at the service address was not off for a period of six months or more. Tr. at 121.

21. PECO records show that for the first floor of the service address, there was a PECO customer of record until March 2015; that between March 2015, and May 4, 2016, there was no PECO customer of record; and that from May 20, 2016 through October 15, 2018, there was a different customer of record. PECO Exhibit 4; Tr. at 130.

22. PECO records show that there was a PECO customer of record on the second floor of the service address through August 18, 2014, and then no customer of record until March of 2015. Tr. at 131, 132.

DISCUSSION

As the proponent of a rule or order, the Complainant bears the burden of proof pursuant to Section 332(a) of the Code. 66 Pa.C.S. § 332(a). To satisfy this burden, the Complainant must demonstrate that the Respondent was responsible for the problems alleged in the Complaint through a violation of the Public Utility Code or a regulation or order of the Commission.

The Pennsylvania Public Utility Code requires each public utility to provide reasonable service as follows:

> Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, . . . Such service and facilities shall be in conformity with the regulations and orders of the commission.

66 Pa.C.S. § 1501.

The statutory definition of "service" is to be broadly construed. *Country Place Waste Treatment Co., Inc. v. Pa. Pub. Util. Comm'n*, 654 A.2d 72 (Pa.Cmwlth. 1995). The Code defines "service" as:

> "Service, used in its broadest and most inclusive sense, includes any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities, or contract carriers by motor vehicle, in the performance of their duties under this part to their patrons, employees, other public utilities, and the public, as well as the interchange of facilities between two or more of them."

6 Pa.C.S.A. § 102.

To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the respondent public utility violated either its duty under the Public Utility Code or the orders or regulations of the Commission, 66 Pa.C.S. § 701, or that the utility is responsible or accountable for the problem described in the Complaint. *Griggs v Phila. Gas Works*, Docket Number F-2020-3021754 (Order entered July 21, 2021) (*citing Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. PUC 196 (1990)); *Feinstein v. Phila. Suburban Water Co.*, 50 Pa. PUC 300 (1976). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa.Cmwlth. 1990), *alloc. den.*, 602 A.2d 863 (Pa. 1992).

Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa.Cmwlth. 1982); *Edan Transp. Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa.Cmwlth. 1993); 2 Pa.C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & W. Ry. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 194 Pa.Super. 278, 166 A.2d 96 (1960); *Murphy v. Pa. Dep't of Pub. Welfare, White Haven Ctr.*, 480 A.2d 382 (Pa.Cmwlth. 1984).

A public utility's Commission-approved tariff is *prima facie* reasonable, has the full force of law and is binding on the utility and the customer. 66 Pa. C.S. § 316, *Kossman v. Pa. Pub. Util. Comm'n*, 694 A.2d 1147 (Pa. Cmwlth. 1997); and *Stiteler v. Bell Tel. Co. of Pa.*, 379 A.2d 339 (Pa. Cmwlth. 1977)

Upon the presentation by the Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the Complainant shifts to the Respondent. If the evidence presented by the Respondent is of co-equal weight, the Complainant has not satisfied his burden of proof. The Complainant would be required to provide additional evidence to rebut the evidence of the Respondent. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa.Cmwlth. 1982), *aff'd*, 461 A.2d 1234 (Pa. 1983).

While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa.Cmwlth. 2001).

The Complainant presents the following claims: 1) that PECO Electric Tariff Section 9.2 is itself unreasonable; 2) that, under the circumstances here, PECO unreasonably applied its policy under Tariff Section 9.2 of requiring an underwriter's inspection certificate before re-energizing a service address that was not energized for six months or more; and 3) that the Complainant did not receive notice of the May 18, 2016 shut off.

PECO Electric Tariff Section 9.2 is itself unreasonable

The PECO Electric Tariff, Section 9.2 states:

> INSPECTION. The Company reserves the right to refuse the introduction of service unless a written certificate of approval, satisfactory to the Company, has been received from a competent inspection agency authorized to perform this service in the specific locality in which service is to be provided.

Currently effective tariffs are *prima facie* reasonable. 66 Pa. C.S. § 316, *Pa. Pub. Util. Comm'n v. PECO Energy Co.*, Docket Number C-2018-3006242 (Order entered June 17, 2021); *Kossman v. Pa. Pub. Util. Comm'n*, 694 A.2d 1147 (Pa. Cmwlth. 1997). The Commission has previously affirmed the reasonableness of PECO Electric Tariff Section 9.2. *See Hatchigian v. PECO Energy Co.*, Docket Number C-2015-2477321 (Order entered December 8, 2016).

The doctrine of *res judicata* prevents a suit between the same parties on the same cause of action after a court of competent jurisdiction has rendered a final judgment on the merits. *See Day v. Volkswagonwerk Aktiengesellschaft*, 464 A.2d 1313 (Pa. Super. 1983) (*Day*). For the doctrine of *res judicata* to apply, all of the following four requirements must be met: (1) identity of the issues; (2) identity of the causes of action; (3) identity of the persons and parties to the action; and (4) identity of the quality or capacity of the parties. *Mendozav. Peoples Nat. Gas Co. LLC*, Docket Number F-2019-3015189 (Order entered July 15, 2021) (*citing Winston v. Phila. Gas Works*, Docket C-2010-2181504 (Order entered April 16, 2012)); *Day*, 464 A.2d 1313. In Docket Number C-2015-2477321, the Complainant, as here, challenged the reasonableness of PECO Tariff Section 9.2 itself before the Commission. Therefore, all four requirements are met. This claim will be dismissed under the doctrine of *res judicata*.

Application of Tariff Section 9.2 and underwriter's certificate policy

One manner in which PECO implements Electric Tariff Section 9.2 is requiring an underwriter's inspection certificate to re-energize a service address that was not energized for six months or more. The Complainant objects to PECO requiring an underwriter's certificate under the circumstances presented here.

The evidence established the following: The Complainant is the owner of the service address, a building with a first-floor apartment and a second-floor apartment. Tr. at 8. PECO shut off the electric service at the service address on May 18, 2016. Tr. at 14-15; PECO Late-filed Exhibit 4; Complainant Exhibits P-14 and P-15. The day that PECO shut off the electric service at the service address, both units at the service address were occupied and had PECO electric service. Tr. at 117, 118; 120, 121; Complainant Late-filed Exhibit 1; PECO Late-filed Exhibit 4. On the day of the shut off, May 18, 2016, PECO issued a "YOUR ELECTRIC/GAS SERVICE HAS BEEN SHUT OFF" notice to its customer of record at the service address, stating that the service was shut off because "You did not pay your past due bill." Exhibit P-1. The Complainant had to pay for inspection and an underwriter's certificate to have both apartments at the service address energized. PECO Exhibit 4; Tr. at 150. The

Complainant has established a *prima facie* case that PECO misapplied its underwriter certificate policy.

In response, PECO presented testimony and evidence establishing the following: PECO's underwriter policy is to assure safety and that the facility meets the requirements to restart electricity. Tr. at 73, 92. At the time of the shut off on May 18, 2016, the tenants on the leases for the service address were not listed as PECO customers in PECO records. Tr. at 64-65, Tr. at 67, 131,132; PECO Exhibit 4. There was no PECO customer of record for the first-floor apartment at the service address March 2, 2015, to May 20, 2016. Tr. at 130. As for the second floor, there was no customer of record for the period August 18, 2014, to March 2015. Tr. at 131-132. PECO essentially contends that because there was no customer of record for a six-month or more period, the company was within its rights to require an underwriter's certificate to re-energize the apartments at the service address.

PECO has not sufficiently rebutted the Complainant's *prima facie* case. The bare Tariff Section 9.2 is not unreasonable, as previously determined by the Commission. However, PECO's application of the underwriter's certificate policy was unreasonable under the present circumstances.

Neither the tariff provision nor the underwriter policy calls for an underwriter's certificate when there is no customer of record for six months. Under the PECO policy, as explained by PECO, an underwriter's certificate is required when a service address is not energized for six months. Tr. at 63. Further, the substantial evidence established that the service address was energized at the time of the shut off on May 18, 2016.

The Complainant's credible testimony was that both apartments were energized on May 18, 2016, the day the service was shut off, and that he received calls from tenants in both apartments when the service was shut off. Tr. at 14-15, 120-121. PECO issued a shut of notice for the second-floor apartment and acknowledges that the company shut off service on the second floor on May 18, 2016. PECO also did not directly dispute that an underwriter's certificate was requested for the second floor.

PECO records show that tenants who were in the first-floor apartment since November of 2015 were told by PECO in May of 2016 that an underwriter's certificate was needed. Tr. at 117; Complainant Late-filed Exhibit 1; PECO Late-filed Exhibit 4. It is implausible that the tenants were without electric service from November of 2015 until May of 2016, when the underwriter's certificate was requested by PECO.

There was also the testimony of the Complainant that there was no period from 2015-2017 that the apartments at the service address were not energized. Tr. at 121. PECO, the company that controls the energy switches and records, presented no substantial evidence to the contrary. [6] Nevertheless, PECO required the Complainant to obtain an underwriter's certificate to re-energize both apartments after the company shut off the service on May 18, 2016. Tr. at 150.

The evidence presented by the Complainant outweighed that presented by PECO. It is unreasonable for PECO to equate absence of a customer of record with absence of electricity at a service address. It is also unreasonable to require an underwriter's certificate to restore service where the company just shut off service for nonpayment. PECO unreasonably applied its underwriter policy here in violation of 66 Pa.C.S. § 1501.

Notice of Shut-off

The Complainant also contends that he did not receive a ten-day notice of the shut off on May 18, 2016. Section 1406 of the Code provides, in pertinent part:

> **§ 1406. Termination of utility service**
>
> **(a) Authorized termination.**--A public utility may notify a customer and terminate service provided to a customer after notice as provided in subsection (b) for any of the following actions by the customer:
> (1) Nonpayment of an undisputed delinquent account.
> (2) Failure to comply with the material terms of a payment agreement.

[6] PECO submitted PECO Late-file Exhibit 5, the Account Transaction History of one first floor tenant and customer of record with an entry dated 6/8/2016 showing zero kWh used. This document is given no weight on the issue of whether the apartments at the service address were energized at the time in question because the document dates are inconsistent, the document appears to be a compilation of information with unknown original sources, there was no supporting testimony, and it pertains to one customer in one apartment.

(3) Failure to complete payment of a deposit, provide a guarantee of payment or establish credit.

(4) Failure to permit access to meters, service connections or other property of the public utility for the purpose of replacement, maintenance, repair or meter reading.

(b) Notice of termination of service.--

(1) Prior to terminating service under subsection (a), a public utility:

(i) Shall provide written notice of the termination to the customer at least ten days prior to the date of the proposed termination. The termination notice shall remain effective for 60 days.

. . .

(2) The public utility shall not be required by the commission to take any additional actions prior to termination.

(c) GROUNDS FOR IMMEDIATE TERMINATION.--

(1) A public utility may immediately terminate service for any of the following actions by the customer:

(i) Unauthorized use of the service delivered on or about the affected dwelling.

(ii) Fraud or material misrepresentation of the customer's identity for the purpose of obtaining service.

(iii) Tampering with the meters or other public utility's equipment.

(iv) Violating tariff provisions on file with the commission so as to endanger the safety of a person or the integrity of the public utility's delivery system.

(2) Upon termination, the public utility shall make a good faith attempt to provide a post termination notice to the customer or a responsible person at the affected premises, and, in the case of a single meter, multiunit dwelling, the public utility shall conspicuously post the notice at the dwelling, including in common areas when possible.

66 Pa.C.S. § 1406(a) - (c)

That PECO did not send the Complainant notice before the May 18, 2016 shut off of both the first and second floor apartments is not in dispute. On April 4, 2016, PECO issued a shut-off notice to its customer of record for the second-floor apartment. PECO Exhibit 3. Tr. at 137; PECO Late-filed Exhibit 4. The Notice remained effective for 60 days. 66 Pa.C.S § 1406 (b)(1). The service was shut off on May 18, 2016, within the 60-day period. PECO did not issue

a shut off notice for the first-floor apartment because at the time of the shut off, PECO had no customer of record for the first-floor apartment. Tr. 67.

There is no requirement in the Public Utility Code, regulations or Commission Order that PECO notify the owner or landlord prior to shut off under these circumstances.[7] Therefore, that PECO did not issue a ten-day shut off notice to the Complainant is not a violation of the Public Utility Code, the regulations or a Commission Order. The Complainant cannot prevail on this claim.

Accordingly, the Complaint is granted, in part, with respect to PECO's application here of Electric Tariff Section 9.2 and its policy requiring an underwriter's certificate when a service address was not energized for six months or more. The remaining claims are denied.

Penalty

Penalties may be imposed where violations of the Code and Commission Regulations or a Commission Order are found. *See* 52 Pa. Code § 69.1201; *See also Rosi v. Bell-Atlantic Pa., Inc.*, Docket No. C-00992409 (Order entered March 16, 2000). Under the factual circumstances presented in this case, PECO is found to have violated Section 1501 in its application of Electric Tariff Section 9.2 and its policy requiring an underwriter's certificate when a service address was not energized for six months or more.

The Commission's Policy Statement sets forth ten factors that the Commission may consider in evaluating whether a civil penalty for violating a Commission order, regulation, or statute is appropriate, as well as whether a proposed settlement for a violation is reasonable and in the public interest. 52 Pa. Code § 69.1201.

[7] Given that electricity is needed for safety equipment, such as fire alarms and smoke and carbon monoxide detectors, PECO should consider whether a shut off notice should be sent to the owner/landlord when there is a shut off at a service address for which it has no customer of record or when service is shut off to require an underwriter's certificate. *See* P-9, Tr. at 9.

These factors are: (i) Whether the conduct at issue was of a serious nature; (ii) Whether the resulting consequences of the conduct at issue were of a serious nature; (iii) Whether the conduct at issue was deemed intentional or negligent; (iv) Whether the regulated entity made efforts to modify internal policies and procedures to address the conduct at issue and prevent similar conduct in the future; (v) The number of customers affected and the duration of the violation; (vi) The compliance history of the regulated entity that committed the violation; (vii) Whether the regulated entity cooperated with the Commission's investigation; (viii) The amount of the civil penalty or fine necessary to deter future violations; (ix) Past Commission decisions in similar situations; and (x) Other relevant factors. 52 Pa. Code § 69.1201(c).

The first factor considers whether the conduct at issue was of a serious nature, and, if so, whether the conduct may warrant a higher penalty. 52 Pa. Code § 69.1201(c)(1). "When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty" *Id.* The violation here was not willful fraud or misrepresentation and therefore a lower penalty is warranted.

The second factor considers whether the resulting consequences of the conduct in question were of a serious nature. 52 Pa. Code § 69.1201(c)(2). There is no credible dispute that the service address apartments were occupied at the time of the shut off. The violation here was of a serious nature in so far as the tenants were without service for 3-5 days. Also, because of lack of electricity, the tenants were without the protection equipment required by the City of Philadelphia, which include a fire alarm and smoke and carbon monoxide detectors. Tr. 9. This supports a higher penalty.

The third factor considers whether the conduct at issue was deemed intentional or negligent. 52 Pa. Code § 69.1201(c)(3). This case involves a negligent application of a PECO policy pursuant to a tariff provision and therefore is not intentional for purposes of this section. As the company providing the electric service, PECO should have been aware that the service address was not without energy for a six-month or more period. The facts suggest that PECO’s

demand here for underwriter's certificates to reenergize the apartments was made in error, which supports a lower penalty.

The fourth factor to be considered is whether PECO made efforts to modify internal policies and procedures to address the alleged conduct at issue and to prevent similar conduct in the future. 52 Pa. Code § 69.1201(c)(4). This factor is not applicable here.

The fifth factor considers the number of customers affected and the duration of the violation. 52 Pa. Code § 69.1201(c)(5). Here, two apartments at one service address were affected for up to eight days.

The sixth factor considers the compliance history of the company. 52 Pa. Code § 69.1201(c)(6). The provision provides that "An isolated incident from an otherwise compliant company may result in a lower penalty." *Id.* PECO generally has a favorable Compliance history which warrants a lower penalty.

The seventh factor to be considered is whether the regulated entity cooperated with the Commission's investigation. 52 Pa. Code § 69.1201(c)(7). This factor is not applicable here.

The eighth factor is the amount of the civil penalty or fine necessary to deter future violations. 52 Pa. Code § 69.1201(c)(8). A penalty here should encourage PECO to revisit its policy of requiring an underwriter's certificate based on customer enrollment dates rather than whether a service address is not energized and for how long. PECO may also consider enacting a policy of notifying an owner/landlord prior to disconnecting service under Tariff Section 9.2.

The ninth factor examines past Commission decisions in similar situations. 52 Pa. Code § 69.1201(c)(9). No similar situations were found.

Finally, the tenth factor considers any other relevant factor. 52 Pa. Code § 69.1201 (c)(10). There are no other relevant factors to consider.

A penalty of $100 per day for each day that an apartment at the service address was without electric service is reasonable here. According to the evidence presented by the Complainant, PECO service was shut off for five days on the second floor and three days on the first floor. Tr. at 120, Exhibits P-14, P-15. PECO presented testimony that the service was shut off on the second floor until about May 25, 2018. Tr. 88. PECO will be ordered to pay a penalty of $100 per day for eight days, or a total of $800.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties of this proceeding. 66 Pa.C.S. § 701.

2. The party filing the Complaint bears the burden of proving by a preponderance of the evidence that he is entitled to relief from the Commission. 66 Pa.C.S.§ 332(a).

3. A Commission decision must be supported by "substantial evidence," which consists of evidence that a reasonable mind might accept as adequate to support a conclusion; A "trace of evidence or a suspicion of the existence of a fact" is insufficient. *HIKO Energy, LLC v. Pa. Pub. Util. Comm'n*, 163 A.3d 1079, 1094 (Pa. Cmwlth. 2017) (quoting *Lyft, Inc. v. Pa. Pub. Util. Comm'n*, 145 A.3d 1235, 1240 (Pa. Cmwlth. 2016)), *aff'd*, 209 A.3d 246 (Pa. 2019).

4. Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities and such service and facilities shall be in conformity with the regulations and orders of the commission. 66 Pa.C.S. § 1501.

5. PECO reserves the right to refuse the introduction of service unless a written certificate of approval, satisfactory to the Company, has been received from a competent inspection agency authorized to perform this service in the specific locality in which service is to be provided. PECO Energy Tariff, Section 9.2 Inspection.

6. PECO Electric Tariff Section 9.2 is presumed reasonable. 66 Pa. C.S. § 316, *Kossman v. Pa. Pub. Util. Comm'n*, 694 A.2d 1147 (Pa. Cmwlth. 1997); and *Stiteler v. Bell Tel. Co. of Pa.*, 379 A.2d 339 (Pa. Cmwlth. 1977).

7. The Complainant has established by a preponderance of the evidence that, under the current circumstances, PECO's application of PECO Electric Tariff Section 9.2 requiring an underwriter's certificate when the service address was not without energy for six months or more is unreasonable in violation of 66 Pa.C.S. § 1501.

8. The Commission has previously ruled that PECO Electric Tariff Section 9.2 is reasonable and therefore the claim challenging PECO Electric Tariff Section 9.2 on its face is dismissed based on the doctrine of *res judicata*. *Hatchigian v. PECO Energy Co.*, Docket Number C-2015-2477321 (Order entered December 8, 2016); *Mendoza v Peoples Nat. Gas Co. LLC*, Docket Number F-2019-3015189 (Order entered July 15, 2021); *Day v. Volkswagonwerk Aktiengesellschaft*, 464 A.2d 1313 (Pa. Super. 1983).

9. The Complainant has not met his burden of establishing that PECO Energy Company violated the Public Utility Code, regulations or a Commission Order by not issuing a shut off notice to him regarding the shut off at the service address in May 2016.

ORDER

THEREFORE,

IT IS ORDERED:

1. That Complainant Exhibits P-11, P-12, P-14, P-15 and P-16; Complainant Late-filed Exhibits 1-5 and PECO Late filed Exhibits 4 and 5 are admitted into the record.

2. That the Complaint of David Hatchigian against PECO Energy Company at Docket No. C-2021-3021199 is granted in part and denied in part.

3. That the claim that PECO Energy Company's application here of Electric Tariff Section 9.2 and its policy requiring an underwriter's certificate when a service address was not energized for six months or more was unreasonable in violation of 66 Pa.C.S. § 1501 is granted.

4. That all other claims are denied and dismissed.

5. That the Respondent, PECO Energy Company, shall pay a total civil penalty of eight hundred dollars ($800.00) as provided for in Section 3301 of the Public Utility Code, 66 Pa.C.S. § 3301, by sending a certified check or money order payable to the Commonwealth of Pennsylvania, within twenty (20) days from entry of the Final Commission Order to:

Secretary
Public Utility Commission
400 North Street
Harrisburg, PA 17120

6. That upon payment of the penalty, the Secretary shall mark this docket closed.

Date: August 16, 2021

/s/
Darlene Heep
Administrative Law Judge