



February 28, 2022

*Via e filing*

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

**Re: Initial Brief of Complainant Denise Eubanks  
Eubanks v. PECO, C-2021-3025997**

Dear Secretary Chiavetta,

Please find enclosed the Initial Brief of Complainant, Denise Eubanks in the above referenced matter.

A copy is being served upon counsel for PECO, pursuant to the attached Certificate of Service. Please contact me with any questions or concerns. I can be reached at (215) 227-4378 or by email at [jprice@clsphila.org](mailto:jprice@clsphila.org).

Respectfully submitted,

Joline R. Price, Esquire

Enclosure

Cc: Service List  
Administrative Law Judge Darlene Heep (via email to [dheep@pa.gov](mailto:dheep@pa.gov);  
[sdelvillar@pa.gov](mailto:sdelvillar@pa.gov)).



**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>Denise Eubanks</b>	:	
<b>Complainant</b>	:	
	:	
<b>v.</b>	:	<b>C-2021-3025997</b>
	:	
<b>PECO Energy Company</b>	:	
<b>Respondent</b>	:	

**INITIAL BRIEF OF COMPLAINANT DENISE EUBANKS**

February 28, 2022

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## **I. INTRODUCTION AND STATEMENT OF THE CASE**

On May 21, 2021, Denise Eubanks (Complainant or Eubanks) filed a Formal Complaint with the Public Utility Commission (PUC or Commission) against PECO Energy Company (PECO), alleging improper calculation of her Customer Assistance Program (CAP) bill. PECO failed to follow the terms of its Universal Service and Energy Conservation Plan (USECP) in calculating Complainant's CAP credit – both at the time of initial enrollment and over the course of her enrollment in CAP. As a result, PECO provided unreasonable service to Complainant in violation of 66 Pa. C.S. § 1501. Complainant is entitled to a bill adjustment that reflects the difference between what she was charged while enrolled in CAP and what she should have been charged had PECO calculated her CAP credits appropriately.

## **II. PROCEDURAL HISTORY**

On May 21, 2021, Complainant filed a Formal Complaint with the PUC against PECO, alleging improper calculation of her Customer Assistance Program bill. PECO filed its first Answer to the Formal Complaint on June 10, 2021. Following three sets of preliminary objections from Complainant, PECO filed a Third Amended Answer to the Formal Complaint on September 2, 2021. An Initial Hearing was scheduled for October 6, 2021. Following Motions for Continuance by both Complainant and Respondent, an Initial Hearing was held before Administrative Law Judge Darlene Heep on November 12, 2021. Complainant testified on her own behalf, and PECO presented two witnesses: Mark Kehl, Manager of Universal Service Programs, and Richard Schlessinger, Manager of Retail Rates. On January 5, 2022, ALJ Heep issued a briefing order, setting a due date for Main Briefs of February 7, 2022 and setting a due date for Reply Briefs of February 28, 2022. On February 3, 2022, ALJ Heep issued a revised

briefing order, setting a due date for Main Briefs of February 28, 2022 and a due date for Reply Briefs of March 21, 2022.

### **III. FACTS OF THE CASE**

In August 2019, Complainant established service with PECO at 871 N. 31<sup>st</sup> Street, Apartment 1, Philadelphia, PA 19104 (Property or Residence).<sup>1</sup> Complainant uses electricity for cooling, heating, cooking, lighting and medical devices.<sup>2</sup> When Complainant established service in August 2019, she transferred her enrollment in PECO's Customer Assistance Program (CAP) to the new address.<sup>3</sup> Complainant's understanding of PECO's CAP program was that it was supposed to help low income households with a discount based on income and usage.<sup>4</sup> In her first year at 871 N. 31<sup>st</sup> Street, Complainant paid what she could but struggled to keep up.<sup>5</sup> Complainant testified that

The first winter, my bills started coming in at \$100 - - over \$100. By the time the full winter was in, I had calculated a bill of almost \$800. Even with my payments of \$100 or more it wasn't putting a dent in the bill because it was going up every month more and more.<sup>6</sup>

This experience was in sharp contrast to Complainant's experience at her previous address, as she discussed with the ALJ during the hearing.

The Court: What were your bills before this? Do you recall?

The Witness: At my previous address, I was on the CAP program but my electric bills was coming in under \$100 dollars. No more than \$100.<sup>7</sup>

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<sup>1</sup> Hearing Tr. at 14:13-14; Hearing Exh. 1, Joint Stipulation of Facts at ¶¶ 22-23; 30.

<sup>2</sup> Hearing Tr. at 14:17-19; Hearing Exh. 1, Joint Stipulation of Facts at ¶¶ 26, 28.

<sup>3</sup> Hearing Tr. at 14:23-24; 16:18-24.

<sup>4</sup> Hearing Tr. at 15:1-7.

<sup>5</sup> Hearing Tr. at 15:8-21.

<sup>6</sup> Hearing Tr. at 15:11-18.

<sup>7</sup> Hearing Tr. at 16:18-24

According to PECO’s call records, Complainant called PECO in October 2019 to inquire about her CAP credits.<sup>8</sup> At that time, a call center representative told Complainant that CAP credits are based on usage, energy burden and income.<sup>9</sup> PECO’s training for call center representatives states that if a customer calls in with questions about their CAP credit, the representative should explain that “the company calculates the customer’s energy burden based upon the customer’s federal poverty percentage. The energy burden is a percentage of your annual income, and the amount that you are reasonably able to afford to pay for utility service per the PUC’s affordability guidelines.”<sup>10</sup>

#### **A. Calculation of Complainant’s CAP credit**

PECO calculates CAP credits using what is called an “allowable energy burden.”<sup>11</sup> An allowable energy burden is a percentage of income intended to be affordable for the customer, based on PUC guidelines.<sup>12</sup> The calculation of the CAP credit is a multi-step process intended to bring a customer’s bill down to that specific percentage of income.<sup>13</sup>

##### *1. Determining the amount a customer can afford to pay*

The first step in calculating a customer’s CAP credit is to establish their Federal Poverty Level (FPL) by looking at the household income and household size.<sup>14</sup> Based on the CAP

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<sup>8</sup> Hearing Exh. 1, Appendix G.

<sup>9</sup> *Id.*

<sup>10</sup> Hearing Tr. at 44:13 – 45:9; *see also* Hearing Exh. 1, Joint Stipulation of Facts at ¶ 27.

<sup>11</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 12.

<sup>12</sup> Hearing Tr. at 20:14-20.

<sup>13</sup> Hearing Tr. at 19:18-23:13; Hearing Exh. 1, Joint Stipulation of Facts at ¶ 13.

<sup>14</sup> Hearing Tr. at 19:18 – 20:1. PECO’s CAP is operated as a Fixed Credit Option, pursuant to a settlement agreement entered in 2015. That settlement agreement can be found in Appendix Q of Hearing Exhibit 1. The settlement agreement was approved by the Commission on July 8, 2015, and incorporated directly into PECO’s Universal Service and Energy Conservation Plan (USECP). PECO Energy Company Universal Service and Energy Conservation Plan for 2013-2015, Docket No. M-2012-2290911 (order entered July 8, 2015), <https://www.puc.pa.gov/pdocs/1370232.doc>; PECO Energy Company Universal Service and Energy Conservation Plan 2016 to 2018, Docket No. M-2015-2507139 (plan submitted February 17, 2017) (hereinafter USECP); Hearing Tr. at 36:19 – 37:5 (PECO witness Mark Kehl testifying that the settlement term sheet is directly incorporated into PECO’s universal services plan). The basic idea of the Fixed Credit Option is to calculate an annual credit that,

customer's Federal Poverty Level, and whether they are an electric customer, electric heating customer, or gas customer, PECO determines which energy burden percentage to use.<sup>15</sup> The terms of PECO's USECP set forth that PECO will use the maximum percentage of income guidelines set forth in the PUC's CAP Policy Statement.<sup>16</sup> When Complainant enrolled in CAP in August 2019, Complainant's only income was Supplemental Security Income (SSI) totaling \$757 per month, and PECO used this income.<sup>17</sup> This placed Complainant between 51% and 100% of FPL.<sup>18</sup> In August 2019, the maximum allowable energy burden in the PUC's CAP Policy Statement was 16% of household income for this federal poverty level range, and so PECO utilized 16% of Complainant's income to determine her CAP credit.<sup>19</sup> Sixteen percent of income for Complainant, having an income of \$757 per month, is \$121.12 per month or \$1,453.44 per year.<sup>20</sup>

## 2. *Calculating the previous 12 months of charges*

Once PECO establishes the amount that a customer can afford to pay, PECO compares that amount to the previous 12 months of usage (also referred to as the "lookback" period).<sup>21</sup> Ideally, PECO looks at the last 12 months of usage by the CAP customer at their residence and calculates a projected bill amount based on that usage.<sup>22</sup> If that bill amount is higher than the amount PECO calculated that the customer could afford to pay at their allowable energy burden,

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when calculated and applied correctly, brings customer bills down to a targeted percentage of income. *See* USECP at 5 ("Under the FCO, the goal will be to provide each customer with a fixed credit for the year that will result in the customer receiving affordable bills for utility service.").

<sup>15</sup> Hearing Tr. at 20:2-13.

<sup>16</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶¶ 16-18. The maximum energy burdens can be found at 52 Pa. Code § 69.265(2)(i).

<sup>17</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶¶ 29, 32.

<sup>18</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 31.

<sup>19</sup> *Id.*

<sup>20</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 32.

<sup>21</sup> Hearing Tr. at 20:21-23.

<sup>22</sup> Hearing Tr. at 20:21-21:8

the customer receives a credit for the following year.<sup>23</sup> If actual usage for the customer at the property is unavailable, PECO can create a pro forma profile using a prior customer's usage at the property, or using system-wide or average usage.<sup>24</sup>

In this case, when PECO calculated Complainant's CAP credit in August 2019, Complainant had not resided at the property for 12 months. Without usage by the Complainant at the residence, PECO opted to use the usage registered at the property from September 2018 through July 2019 as a proxy, and used a combination of Complainant's usage and the prior usage for August 2019.<sup>25</sup> Notably, from August 2018 through July 2019, the PECO bill had been "switched over" to the property landlord, Parkside LLC, because the prior tenant had moved out.<sup>26</sup> There was no usage at the property for August 2018, and the usage for September 2018 was only 46 kWh, reflecting a six-day billing period.<sup>27</sup> Usage for the months of May and June 2019, respectively, was also remarkably low.<sup>28</sup> In total, PECO used 11 months of usage and a six-day billing period from September 2018 as its proxy in the calculation of Complainant's CAP credit.<sup>29</sup> As reflected in the account history of a prior tenant at the property, usage had been higher at the residence before the account was listed in the landlord's name.<sup>30</sup> PECO's witness testified that its system does not consider, however, whether the property was occupied, continuously or at all, during the time period used as a proxy for the purpose of CAP credit calculation.<sup>31</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> Hearing Tr. at 21:19-22:12.

<sup>25</sup> Hearing Exh. 1, Appendix A.

<sup>26</sup> Hearing Tr. at 58:8-18.

<sup>27</sup> Hearing Tr. at 52:17-53:18; 58:8-18.

<sup>28</sup> Hearing Exh. 1, Appendix C. Usage for May 2019 was 72 kWh and usage for June 2019 was 46 kWh. *Id.* By comparison, usage for May 2018 was 989 kWh and usage for June 2018 was 331 kWh. Hearing Exh. 2.

<sup>29</sup> Hearing Tr. at 52:3-53:18.

<sup>30</sup> Hearing Exh. 2.

<sup>31</sup> Hearing Tr. 58:5 – 59:3.

Using that proxy usage, PECO projected that Complainant's bills for the following year would be \$1,234.51.<sup>32</sup> PECO used the rates that were in effect for each month in the lookback period, without regard to the fact that base rates had increased in January 2019.<sup>33</sup> In addition, one of the lookback months, January 2019, was a unique month, with a significantly lower per kWh charge that reflected a one-time downward adjustment due to a federal tax cut – an adjustment that was not going to repeat the following year.<sup>34</sup> Even so, PECO did not make any adjustment to its calculation of the CAP credit.<sup>35</sup>

### *3. Calculating the amount of Complainant's CAP credit*

Because \$1,234.51 is less than the \$1,453.44 that PECO calculated was “affordable” to Complainant, Complainant did not receive any CAP credit upon initial enrollment in August 2019.<sup>36</sup> CAP credits adjust every 3 months, substituting in 3 months of actual usage for the proxy usage used in PECO's initial calculations.<sup>37</sup> As a result, it took Complainant a full year for her own usage, rather than a proxy, to be fully reflected in her CAP credit calculation.<sup>38</sup> By July 2020, because of the rolling 3 month adjustments, PECO had provided Complainant with CAP credits totaling \$321.12.<sup>39</sup> In that same time frame, PECO had billed Complainant for \$2,361.79, far in excess of the \$1,453.44 it had calculated as an “affordable” bill for Complainant.<sup>40</sup> In total, from August 2019 through July 2020, PECO charged Complainant \$908.35 more than it projected her annual CAP bill would be based on her income, household size, and energy

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<sup>32</sup> Hearing Exh. 1, Appendix A.

<sup>33</sup> Hearing Tr. at 93:2-4; Hearing Exh. 1, Appendix A; Hearing Exh. 1, Appendix K.

<sup>34</sup> Hearing Tr. at 87:4-17; 101:7-24.

<sup>35</sup> Hearing Tr. at 100:4-10; 104:16-105:21.

<sup>36</sup> Hearing Exh. 1, Appendix A.

<sup>37</sup> Hearing Tr. at 50:20-51:2.

<sup>38</sup> *Id.*

<sup>39</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 35.

<sup>40</sup> *Id.*

burden.<sup>41</sup> In August 2020, PECO calculated Complainant's CAP credit for the following year based on Complainant's actual usage at the property.<sup>42</sup> At that time, PECO calculated a CAP credit of \$1,239.17 for the following year.<sup>43</sup> In all, in her second year of enrollment in CAP, PECO billed Complainant \$1,394.86 and she received CAP credits totaling \$1,285.85.<sup>44</sup>

## **B. Change in Energy Burdens**

PECO calculates a CAP customer's credit to bring a customer's bill down to correlate to a specific percentage of income.<sup>45</sup> PECO's USECP requires PECO to use the maximum energy burdens set forth in the Public Utility Commission's CAP Policy Statement.<sup>46</sup> PECO's USECP states that "[i]f 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>47</sup> By Order entered November 5, 2019, the PUC updated its CAP Policy Statement and lowered the energy burdens to between 6% and 10% of income.<sup>48</sup> The updated CAP Policy Statement sets an allowable energy burden for an electric heating customer with income between 51% and 100% of FPL at 10% of income.<sup>49</sup> After the Commission's update to its CAP Policy Statement, however, PECO did not change the energy burden it used to calculate Ms. Eubanks' credit.<sup>50</sup> Instead, PECO continued to use 16% of income, instead of 10%, in calculating Complainant's CAP credit, despite the express language of its USECP incorporating the PUC's

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<sup>41</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 32, 35; Hearing Tr. at 49:11-15 (PECO's witness confirming on cross examination that PECO charged Complainant close to \$1000 more than it projected her annual CAP bill to be).

<sup>42</sup> Hearing Exh. 1, Appendix B; Hearing Exh. 1, Joint Stipulation of Facts at ¶ 35.

<sup>43</sup> Hearing Exh. 1, Appendix B.

<sup>44</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 35.

<sup>45</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 13.

<sup>46</sup> Hearing Tr. at 20:14-20.

<sup>47</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 18 (citing USECP at 30 n. 3).

<sup>48</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 14.

<sup>49</sup> Hearing Tr. at 23:14-24:11; 52 Pa. Code § 69.265(2)(i).

<sup>50</sup> Hearing Tr. at 24:12-14.

revised, lower energy burdens.<sup>51</sup>

#### **IV. BURDEN OF PROOF**

Complainant bears the burden of proof in this Formal Complaint, pursuant to 66 Pa. C.S. § 332(a), to show that PECO violated the terms of its USECP and provided unreasonable service in violation of 66 Pa. C.S. § 1501. To meet her burden, she must establish by a preponderance of the evidence that PECO violated the Public Utility Code or a regulation or order of the Commission.<sup>52</sup> Preponderance of the evidence means that one party has presented evidence which is more convincing, by even the smallest amount, than the evidence presented by the other party.<sup>53</sup> Preponderance does not depend on the number of witnesses testifying on either side but rather on the credibility of the testimony in light of all the evidence in the case.<sup>54</sup> If the Complainant presents evidence sufficient to initially satisfy the burden of proof, the burden shifts to PECO to rebut the evidence of the Complainant, and only if PECO's evidence is of co-equal weight does the Complainant need to present additional evidence to rebut PECO's evidence.<sup>55</sup> Any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence.<sup>56</sup>

#### **V. SUMMARY OF ARGUMENT**

Complainant has shown by a preponderance of the evidence that PECO failed to adhere to the specific terms of its USECP. PECO incorrectly calculated Complainant's CAP credits in three specific ways: by failing to use the appropriate energy burden, by using less than twelve months' usage in calculating Complainant's initial CAP credit, and by failing to adjust

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<sup>51</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶¶ 16-18.

<sup>52</sup> *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990).

<sup>53</sup> *Se-Ling Hoisery v. Margulies*, 364 Pa. 54, 70 A.2d 854 (1950).

<sup>54</sup> *Burch v. Reading Co.*, 240 F.2d 574 (3d Cir. 1957), cert. denied, 353 U.S. 965 (1957).

<sup>55</sup> *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa.Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

<sup>56</sup> *Mill v. Commw., Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (1982).

Complainant's Annual Credit based on an increase in base rates. As set forth below, the evidence shows clear violations of PECO's USECP, and PECO has presented no evidence to rebut Complainant's assertions.

In addition, Complainant has shown by a preponderance of the evidence that PECO's actions were unreasonable, in violation of 66 Pa. C.S. § 1501. First, PECO's violation of the terms of its USECP, which was approved by Commission order and is incorporated into PECO's Tariff, constitutes unreasonable service in and of itself. In addition, PECO's calculation of Complainant's CAP credit was unreasonable because it failed to take into account changes in rates, and because PECO utilized proxy usage it should have known to be unrepresentative of what a tenant's actual usage would be. Furthermore, even if PECO's calculation of Complainant's CAP credit was not directly in violation of its USECP, PECO still provided unreasonable service because it failed to remedy its CAP in operation, continuing to charge Complainant far in excess of her appropriate energy burden. For all of these reasons, PECO provided unreasonable service to Complainant, in violation of 66 Pa. C.S. § 1501.

As relief, Complainant should be provided two retroactive credits on her bill. First, Complainant is entitled to a credit of \$908.35, representing the difference between the amount she was charged between August 2019 and July 2020 (\$2,361.79)<sup>57</sup> and the amount PECO calculated as affordable to her in August 2019, based on 16% of her income (\$1,453.44).<sup>58</sup> Second, Complainant is entitled to a bill credit equal to the additional CAP credit she would have received had PECO implemented a 10% energy burden in November 2019, as required by its USECP.

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<sup>57</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 35.

<sup>58</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 32.

## VI. ARGUMENT

### A. PECO violated the terms of its Universal Service and Energy Conservation Plan in calculating Complainant's CAP credit.

PECO failed in three specific ways to adhere to the terms of its Universal Service and Energy Conservation Plan (USECP) in calculating Complainant's CAP credit. PECO's USECP contains the rules for how PECO's CAP operates, including the mechanisms by which PECO calculates and updates a customer's CAP credit.<sup>59</sup> The Commission's CAP Policy Statement defines Customer Assistance Programs as "alternatives to traditional collection methods for low income customers. Customers participating in CAPs agree to make monthly payments based on household size and gross household income. Customers make regular monthly payments, which may be for an amount that is less than the current tariff bill for utility service including pre-CAP arrearages, in exchange for continued provision of the service."<sup>60</sup> The PUC's CAP Policy Statement states that "[b]efore implementing, revising or expanding a CAP, a utility should file its CAP proposal with the Commission and serve copies on the Bureau of Consumer Services and on stakeholders from the utility's most recent USECP proceeding. This will allow for staff review, comments, discovery and revisions prior to Commission approval of design elements."<sup>61</sup> PUC regulation requires PECO, as an Electric Distribution Company (EDC), to "submit to the Commission for approval an updated universal service and energy conservation plan every 3 years."<sup>62</sup>

PECO's current Universal Service and Energy Conservation Plan (USECP) was first filed

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<sup>59</sup> See generally USECP. PECO's USECP was approved by Commission Order on February 10, 2017.

<sup>60</sup> 52 Pa. Code § 69.261. PUC regulations further state that "Class A electric utilities and natural gas utilities with gross intrastate annual operating revenue in excess of \$40 million should adopt the guidelines in §§ 69.263-69.265 (relating to CAP development; scope of CAPs; and CAP design elements) implementing residential CAPs." *Id.*

<sup>61</sup> 52 Pa. Code § 69.263(c).

<sup>62</sup> 52 Pa. Code § 54.74.

on October 1, 2015.<sup>63</sup> Following a final Commission Order on February 10, 2017, PECO filed its Universal Service and Energy Conservation Plan 2016 - 2018 on February 17, 2017.<sup>64</sup> PECO's 2016-2018 USECP remains in effect.<sup>65</sup>

As described by PECO's Manager of Universal Services, Mark Kehl, the calculation of a customer's CAP credit is a several step process.<sup>66</sup> First, PECO determines what a customer can afford to pay, by determining the customer's Federal Poverty Level (FPL) and type of energy (electric, electric heating and/or gas heating) and identifying the appropriate energy burden (percentage of income that is considered affordable).<sup>67</sup> The appropriate energy burden is set forth in the USECP, and incorporates by reference the PUC's CAP Policy Statement.<sup>68</sup> In this case, based on Complainant's income of \$757 and type of energy (residential electric heating), the energy burden used to calculate Complainant's CAP credit in August 2019 was 16% of income, which comes out to \$121.12 per month and \$1,453.44 per year.<sup>69</sup> Once PECO establishes the amount that a customer can afford to pay, PECO compares that amount to the prior year's undiscounted charges based on customer usage.<sup>70</sup> If the last 12 months of usage corresponds to a billing amount that is higher than the amount PECO calculated that the customer could afford to pay, the customer receives a credit for the following year.<sup>71</sup> If actual usage for the customer at

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<sup>63</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 7.

<sup>64</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 8.

<sup>65</sup> Universal Service and Energy Conservation Plan (USECP) Filing Schedule and Independent Evaluation Filing Schedule, Docket No. M-2019-3012601 (order entered Oct. 3, 2019) ("An existing USECP will remain in effect until a new one is approved and implemented.").

<sup>66</sup> Hearing Tr. at 19:18-23:13.

<sup>67</sup> Hearing Tr. at 20:2-20.

<sup>68</sup> USECP at 30 n.3; see also Hearing Tr. at 20:14-19 (PECO witness Mark Kehl testifying that "[e]nergy burden is essentially a percentage of income that the PUC establishes that states that utility [sic] should charge the customer the percent of income equal to their FPL and commodity choice.").

<sup>69</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 32. As discussed elsewhere in this brief, in November of 2019, the PUC updated its CAP Policy Statement, and the appropriate energy burden going forward is 10% of income. See Hearing Tr. at 23:14-24:11; 52 Pa. Code § 69.265(2)(i); Hearing Exh. 1, Joint Stipulation of Facts at ¶14.

<sup>70</sup> Hearing Tr. at 20:21-23.

<sup>71</sup> USECP at 29-30; Hearing Tr. at 20:21- 21:8.

the property is unavailable, PECO creates a “pro forma profile” which can be based on usage at the residence by prior customers.<sup>72</sup> CAP credits adjust and update every 3 months, substituting in the most recent 3 months of actual usage.<sup>73</sup>

Complainant has shown by a preponderance of the evidence that PECO failed to adhere to the specific terms of its USECP. PECO incorrectly calculated Complainant’s CAP credits in three specific ways: by failing to use the appropriate energy burden, by using less than twelve months’ usage in calculating Complainant’s initial CAP credit, and by failing to adjust Complainant’s Annual Credit to reflect an increase in base rates. As set forth below, the evidence shows clear violations of PECO’s USECP, and PECO has presented no evidence to rebut Complainant’s assertions.

*1. PECO’s USECP requires use of the Commission’s updated energy burdens.*

One of the inputs that PECO used to calculate Complainant’s CAP credit is the Commission’s allowable energy burden, which is a percentage of income intended to be affordable for the customer.<sup>74</sup> PECO’s CAP credit calculation, if done correctly, should bring a customer’s bill down to that specific percentage of income.<sup>75</sup> PECO’s USECP provides that the allowable energy burden that is used to calculate a customer’s CAP credit is based on the maximum energy burden in the Public Utility Commission’s CAP Policy Statement.<sup>76</sup> In setting forth the energy burdens to be used in CAP credit calculations, PECO’s USECP states that “[i]f the Commission changes the energy burden ranges set forth in its Policy Statement, PECO will

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<sup>72</sup> Hearing Tr. at 21:19-22:12.

<sup>73</sup> Hearing Tr. at 50:20-51:2.

<sup>74</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 12. The Commission’s allowable energy burden can be found in the Commission’s CAP Policy Statement at 52 Pa. Code § 69.265(2)(i).

<sup>75</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 13 (citing USECP at 29-35).

<sup>76</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 17 (citing USECP at 30 n. 3).

utilize the new maximum allowable energy burden for each poverty level.”<sup>77</sup>

PECO’s public statements confirm that its USECP requires PECO to utilize the PUC’s approved energy burdens. In October 2019, according to call records, Complainant called PECO to inquire about her CAP credits.<sup>78</sup> She was told by a call center representative that CAP credits are based on usage, energy burden and income.<sup>79</sup> PECO’s training manual for call center representatives states that if a customer calls in with questions about their CAP credit, they are told that “the company calculates the customer’s energy burden based upon the customer’s federal poverty percentage. The energy burden is a percentage of your annual income, and the amount that you are reasonably able to afford to pay for utility service *per the PUC’s affordability guidelines*.”<sup>80</sup>

By Order entered November 5, 2019, the PUC updated its CAP Policy Statement and lowered the energy burdens to between 6% and 10% of income.<sup>81</sup> The updated CAP Policy Statement sets an allowable energy burden for an electric heating customer with income between 51% and 100% of FPL at 10% of income.<sup>82</sup> Despite the express language in its USECP requiring use of the energy burdens in the Commission’s CAP Policy Statement, PECO did not utilize the updated energy burdens. Instead, in direct violation of those terms, PECO continued to use the 16% energy burden that had been superseded by the PUC’s updated policy.<sup>83</sup> Indeed, PECO continues to use the outdated energy burdens to this date. PECO Witness Mark Kehl stated in

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<sup>77</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 16 (citing USECP at 30-31).

<sup>78</sup> Hearing Exh. 1, Joint Stipulation of Facts, Appendix G.

<sup>79</sup> *Id.*

<sup>80</sup> Hearing Exh. 1, Joint Stipulation of Facts, Appendix H; Hearing Tr. at 44:13-45:9 (emphasis added).

<sup>81</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 14 (citing 2019 Amendments to CAP Policy Statement, Docket No. M-2019-3012599, Final Policy Statement and Order (Nov. 5, 2019) (hereinafter CAP Policy Statement Order)).

<sup>82</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶15 (citing CAP Policy Statement Order at 27, 29-30; 52 Pa. Code § 69.265(2)(i)).

<sup>83</sup> Hearing Tr. at 24:12-14.

testimony that no change was made to CAP credit calculations because PECO intended to adopt changes to the energy burden at the same time that it changed the structure of its CAP credit.<sup>84</sup> As noted by Mr. Kehl, while PECO has made filings, the Commission has not acted on those filings.<sup>85</sup> However, Mr. Kehl also acknowledged that the language of PECO's USECP does not require PECO to make an additional filing prior to implementation of the lower energy burdens.<sup>86</sup> By failing to update Complainant's CAP credit following the Commission's change to its CAP Policy Statement, PECO violated the terms of its USECP.

2. *PECO failed to use twelve months of premise usage, as required by its USECP, when calculating Complainant's initial CAP credit.*

As described in PECO's USECP, when customer usage is not available for the prior 12 months of service, PECO can create a pro forma profile based on usage at the residence by prior customers to calculate a customer's credit.<sup>87</sup> To create a pro forma profile using premise usage, PECO must have 12 months of usage.<sup>88</sup> As discussed by PECO's witnesses, at the time PECO calculated Complainant's initial CAP credit in August 2019, Complainant's usage was not available for any months except August 2019.<sup>89</sup> As a result, PECO utilized proxy usage from September 2018 through August 2019, prior to Complainant's residence at the premise when the landlord, Parkside LLC, was the customer of record.<sup>90</sup> However, the usage for September 2018 only reflected a six-day billing period, not a full month of usage.<sup>91</sup> Rather than using a full 12

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<sup>84</sup> Hearing Tr. at 25:10-26:2.

<sup>85</sup> Hearing Tr. at 25:22-26:14.

<sup>86</sup> Hearing Tr. at 77:13-16.

<sup>87</sup> USECP at 29-30; Hearing Tr. at 57:19-22 (PECO witness Mark Kehl answering on cross examination that the program requires 12 months of usage, not 12 bills).

<sup>88</sup> *Id.*

<sup>89</sup> Hearing Exh. 1, Appendix A.

<sup>90</sup> Hearing Tr. at 29:7-20; 51:10-14; *see also* Hearing Exh. 1, Joint Stipulation of Facts at ¶¶ 34,37, Hearing Exh. 1, Appendix A; Hearing Exh. 1, Appendix C.

<sup>91</sup> Hearing Tr. at 53:12-18; Hearing Exh. 1, Appendix C. Note that in addition to the 46 kWh registered in the 6 day billing period in September 2018, the months of May 2019 and June 2019 also registered less than 75 kWh of usage, but were still used by PECO in calculating initial Complainant's CAP credit. *Id.*

months of usage, PECO's calculation only used 11 months and 6 days, in violation of the terms of its USECP. PECO presented no evidence to refute the fact that this proxy usage was not a full 12 months – in fact, PECO's witness acknowledged that the September 2018 usage reflected a six-day billing period.<sup>92</sup> As such, Complainant has met her burden of proof to show that PECO violated the terms of its USECP in calculating her initial CAP credit.

3. *PECO's USECP requires updating CAP credits upon a change in rates.*

The terms of PECO's USECP incorporate by reference the terms of the Commission-approved CAP FCO Settlement establishing the terms and conditions of PECO's CAP.<sup>93</sup> As described on page 6 of the Settlement Term Sheet, "if PECO is granted an electric base rate increase, the portion of each Rate RH customer's Annual Credit that is attributable to distribution rates will be increased by a percentage equal to the system-wide distribution rate increase."<sup>94</sup> The purpose of this provision is to adjust CAP customers' annual credits, calculated in part based on past billings, to fully represent the actual impact, going forward, of increased rates and charges. Indeed, for CAP to provide affordable bills, the credit must increase in corresponding amount as the billing rates to which it is applied.

Because there was a base rate increase during the period of usage used to calculate Complainant's initial CAP credit, PECO should have updated its Annual Credit calculation based on that rate increase. However, as noted by PECO witness Mark Kehl, PECO did not adjust the Annual Credit calculated based on the usage at the residence.<sup>95</sup> According to Mr. Kehl,

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<sup>92</sup> Hearing Tr. at 53:12-18.

<sup>93</sup> See PECO Energy Company Universal Service and Energy Conservation Plan for 2013-2015, Docket No. M-2012-2290911 (order entered July 8, 2015), <https://www.puc.pa.gov/pcdocs/1370232.doc>; USECP at 5 ("The details of the specific calculation were determined by Commission Order, and are set forth in Attachment B . . ."). The CAP FCO Settlement Term Sheet is included in Hearing Exhibit 1, Appendix Q. Appendix Q includes both the Joint Petition for Settlement and attached Exhibit, Exhibit A, which is the CAP FCO Settlement Term Sheet. See Hearing Exh. 1, Appendix Q.

<sup>94</sup> Hearing Exh. 1, Appendix Q. See also Hearing Tr. at 38:24-39:6.

<sup>95</sup> Hearing Tr. at 39:18-40:2.

the only update that happens is during the quarterly adjustment of CAP credits when three months of new usage information is substituted for three months of old usage information. As a result, PECO has failed to implement a required provision of its USECP that would, in combination with legally-compliant and reasonable operation of its CAP (as discussed more fully in Section VI.B., below), have directly benefitted Complainant by reducing her CAP bills.

PECO's statements constitute admissions that PECO has not, in fact, implemented the CAP credit adjustment required to take into account base rate increases in the operation of its USECP. As such, the Commission should find that Complainant has met her burden to show PECO's violation of its USECP.

**B. PECO provided Complainant with unreasonable service in violation of 66 Pa. C.S. § 1501.**

Section 1501 of the Public Utility Code requires public utilities like PECO to “furnish and maintain adequate, efficient, safe, and reasonable service and facilities,” and further requires that:

Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service.<sup>96</sup>

The Commission has held that the statutory definition of “service” is to be broadly construed, and includes a utility accurately billing its customers.<sup>97</sup> Additionally, public utility tariffs have

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<sup>96</sup> 66 Pa. C.S. § 1501.

<sup>97</sup> *Michael Guagenti v. PECO Energy Company*, Pa. PUC Docket No. F-2018-3001891, Opinion and Order at 5 (Dec. 19, 2019) (citing *Country Place Waste Treatment Co., Inc. v. Pa. PUC*, 654 A.2d 72 (Pa. Cmwlth. 1995)), available at <https://www.puc.pa.gov/pcdocs/1648249.docx>; *Jay Larry Moyer v. PPL Electric Utilities Corporation*, Pa. PUC Docket No. C-2017-2629683, Opinion and Order at 48 (Oct. 28, 2021), available at <https://www.puc.pa.gov/pcdocs/1723657.doc>. See also 66 Pa. C.S. § 102 (“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, in the performance of their duties under this part to their patrons, employees, other public utilities, and the public.”).

the force and effect of law and are binding on the public utility and its customers.<sup>98</sup> While utilities do not need to provide “perfect” service, they must be held to a standard of reasonableness in their course of business and interactions with customers.<sup>99</sup>

In this case, Complainant has shown by a preponderance of the evidence that PECO’s actions were unreasonable, in violation of 66 Pa. C.S. § 1501. First, PECO’s violation of the terms of its USECP, which was approved by Commission order and is incorporated into PECO’s Tariff, constitutes unreasonable service in and of itself.<sup>100</sup> In addition, PECO’s calculation of Complainant’s CAP credit was unreasonable because it failed to take into account changes in rates, and because PECO utilized proxy usage it should have known to be unrepresentative of what a tenant’s actual usage would be. Furthermore, even if PECO’s calculation of Complainant’s CAP credit was not directly in violation of its USECP (Complainant avers it was), PECO still provided unreasonable service because it failed to remedy its CAP in operation, and continued to charge Complainant far in excess of her appropriate energy burden. For all of these reasons, the Commission should find that PECO provided unreasonable service to Complainant, in violation of 66 Pa. C.S. § 1501.

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<sup>98</sup> *Guagenti v. PECO*, Pa PUC Docket No. F-2018-3001891, Opinion and Order at 6 (Dec. 19, 2019) (citing *Pennsylvania Electric Co. v. Pa. PUC*, 663 A.2d 281 (Pa. Cmwlth. 1995)).

<sup>99</sup> See *In Re Metro. Edison Co.*, 80 Pa. P.U.C. 662, 672 (Nov. 10, 1993), rev’d on other grounds, *Popowsky v. Pa. Pub. Util. Comm’n*, 653 A.2d 1385 (Pa.Cmwlth. 1995) (“The Code only requires a public utility to furnish *reasonable* service. . . . It does not mandate perfect service nor must a public utility provide the best possible service.”); see also *Lori Brickner and Peter Brickner v. PPL Electric Utilities Corp.*, Pa. PUC Docket C-2009-2105583, Opinion and Order at 7 (order adopted April 22, 2010), available at <https://www.puc.pa.gov/pcdocs/1079281.docx> (holding that the failure of PPL to provide accurate information via its customer service representatives was inadequate service within the meaning of 66 Pa. C.S. § 1501).

<sup>100</sup> *DeSantis v. Pennsylvania Power Company*, Pa. PUC Docket No. C-2019-3013652, Initial Decision at 10 (Apr. 27, 2020), <https://www.puc.pa.gov/pcdocs/1661583.pdf> (“[F]ailure to apply all the criteria from the most current universal service plan is a violation of Section 1501 of the Public Utility Code.”).

1. *PECO's violation of the terms of its Universal Service and Energy Conservation Plan constitutes unreasonable service.*

Failure to follow the terms and conditions of a current universal services plan constitutes unreasonable service in violation of Section 1501.<sup>101</sup> In addition, PUC regulation requires PECO to bill residential customers “in accordance with approved rate schedules.”<sup>102</sup> PECO’s Tariffs set forth that CAP rates will be set in accordance with its USECP.<sup>103</sup> As a result, PECO’s failure to abide by the terms of its USECP as described in Section VI.A above means that PECO failed to provide legally permissible rates to Complainant, in violation of law.

In addition, as described above, PECO’s training materials for call center representatives show that PECO also represents to its customers that it is running its CAP in accordance with PUC guidelines.<sup>104</sup> Those training materials include CAP scripts, and represent what a customer who calls in with questions about their CAP credit would be told.<sup>105</sup> The Commission has found that when utility customer service representatives fail to provide accurate information about a specific rate schedule, the utility provides unreasonable service within the meaning of section 1501.<sup>106</sup> In this case, PECO’s customer service representatives have been trained to inform CAP customers, falsely, that PECO utilizes the Commission’s approved energy burdens, when PECO has in fact continued to use energy burdens that were superseded in 2019.

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<sup>101</sup> See *DeSantis v. Pennsylvania Power Company*, Pa. PUC Docket No. C-2019-3013652, Initial Decision at 10.

<sup>102</sup> 52 Pa. Code § 56.11(a).

<sup>103</sup> See Customer Assistance Program (CAP) Rider to PECO Energy Company Electric Service Tariff, Supplement No. 1 to Electric Pa. P.U.C. No. 7 (January 1, 2022) at 79, <https://www.peco.com/SiteCollectionImages/Elec%20Compliance%20tariff%20clean%20updated%20with%20replacment%20page%20for%20rule%2013.1.pdf> (“Customers must apply for the rates contained in this rider.... Based on the applicable level of income, number of household members, and their historical usage CAP customers will receive a Fixed Credit Option (“FCO”) based upon that individual household’s need. The details of the FCO calculation can be found in the PECO Universal Service and Energy Conservation Plan at Docket No. M-2015-2507139.”).

<sup>104</sup> Hearing Exh. 1, Appendix H. See also Hearing Tr. at 44:10 – 45:9.

<sup>105</sup> Hearing Tr. at 45:17-20.

<sup>106</sup> *Brickner v. PPL Electric Utilities*, Pa. PUC Docket C-2009-2105583, Opinion and Order at 7 (finding that PPL inadequately trained customer service representatives to inform customers accurately).

As a CAP customer, Complainant was entitled to the benefit of the CAP rates that PECO is required to charge pursuant to its Tariff – which incorporates the terms of its USECP. But, as discussed above, PECO has failed to calculate CAP credits pursuant to the specific requirements of its USECP by failing to use twelve full months of usage in calculating Complainant’s initial CAP credit, failing to adjust its calculations to reflect increased base rates, and failing to update its CAP credit calculations to conform to PUC policy regarding affordability. As a result, PECO did not charge Complainant the appropriate rates. Unrebutted record evidence shows that PECO failed to adhere to the requirements of its USECP and its Tariff. Accordingly, Complainant has met her burden to show that PECO provided unreasonable service in violation of Section 1501 of the Public Utility Code.

2. *PECO’s calculation of Complainant’s CAP credit was unreasonable because it utilized proxy usage it should have known was unrepresentative of usage at the premise.*

As discussed above, PECO’s calculation of Complainant’s CAP credit was based on primarily on proxy usage, using bills issued for service prior to Complainant’s residence at the premise. In addition to being contrary to the clear language of the USECP itself, PECO should have known that the proxy usage was unrepresentative of actual usage at the premises.

Hearing Exhibit 2 shows several years of usage from a previous occupant at the property.<sup>107</sup> In the winter months, that occupant consistently had usage ranging in the thousands of kilowatt hours, as high as 4250 kWh per month. Even in the summer months, when usage was relatively low, it never went below 270 kWh per month. By contrast, the premise usage utilized by PECO in calculating Complainant’s CAP credit included two months of usage less than 100kWh, May 2019 and June 2019.<sup>108</sup> This is in addition to the six days of usage reflected in the

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<sup>107</sup> Hearing Exh. 2.

<sup>108</sup> *Id.*

September 2019 bill used by PECO, which is also less than 100 kWh. As acknowledged by PECO witness Mark Kehl, the usage in Hearing Exhibit 2 shows significantly higher and more variable usage than what PECO used to calculate Complainant's credit.<sup>109</sup> In addition, PECO was not aware of, and made no effort to determine, whether the premise was occupied, consistently or at all, during the period prior to Complainant moving in.<sup>110</sup> Indeed, PECO testified that the account had been "switched over" to the landlord after a prior tenant moved out.<sup>111</sup> Even a cursory overview of the usage pattern at this premise while the account was listed in the name of the landlord reveals that using those monthly bills as a proxy for monthly usage is demonstrably unreasonable.

PECO's USECP does not require that PECO use the immediately preceding 12 months of usage at the premise. It only requires that PECO create a pro forma profile using "usage at that residence by prior customers" if available.<sup>112</sup> If that usage is unavailable, PECO can use either usage at similar residences in the same area, or system-wide or CAP average usage.<sup>113</sup> PECO witness Mark Kehl admitted that the CAP Credit calculation doesn't look at whether a premise was occupied – only whether there is any usage. Mr. Kehl was unable to identify whether there was any minimum amount of usage necessary to use premise usage instead of system-wide or average usage.<sup>114</sup> Unrebutted record evidence shows that PECO failed to use representative usage in calculating Complainant's CAP credit. As such, PECO's calculation of Complainant's CAP credit was unreasonable – as it should have known that the premise usage it used was unrepresentative of historical usage at the property.<sup>115</sup> Accordingly, Complainant has met her

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<sup>109</sup> Hearing Tr. at 56:16-21.

<sup>110</sup> Hearing Tr. at 57:23 - 59:22.

<sup>111</sup> Hearing Tr. at 58:13-15.

<sup>112</sup> Hearing Tr. at 38:1-9.

<sup>113</sup> *Id.*

<sup>114</sup> Hearing Tr. at 59:4-22.

<sup>115</sup> *See, e.g. Brickner v. PPL Electric Utilities*, Pa. PUC Docket C-2009-2105583, Opinion and Order at 7.

burden to show that PECO provided unreasonable service in violation of Section 1501 of the Public Utility Code.

3. *PECO's calculation of Complainant's CAP credit was unreasonable because it failed to take into account changes in rates.*

PECO's calculation of Complainant's CAP credit failed to take into account any changes in rates or anomalies in rate data for the lookback period, resulting in unreasonable service. Complainant submitted evidence showing the rates used to calculate her initial CAP credit based on a pro forma usage profile.<sup>116</sup> As shown in Hearing Exhibit 1, Appendix K, PECO used the rates in effect for the month of usage in calculating "last years charges based on usage."<sup>117</sup> Because those charges totaled to an amount (\$1,234.51) lower than what Complainant could afford based on the energy burden in effect (\$1,453.44), Complainant received no credit.<sup>118</sup> However, PECO's calculation of "last years charges based on usage" was unreasonable because PECO used outdated rates for several of the relevant months, and even used rates in one month (January 2019) that were substantially lower due to an isolated, one-month rate adjustment. As a result, PECO's calculation failed to constitute a reasonable proxy for the future rates Complainant would be charged.

PECO increased its base rates in January 2019, in the middle of the lookback period.<sup>119</sup> Yet, in converting the usage numbers for September, October, November and December 2018 to a dollar amount, PECO still used the old customer charge and distribution charges that it knew had increased as of January 2019 and were no longer in effect at the time the CAP credit was

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<sup>116</sup> Hearing Exh. 1, Appendix K.

<sup>117</sup> Hearing Exh. 1, Appendix A.

<sup>118</sup> Hearing Exh. 1, Appendix A.

<sup>119</sup> Hearing Tr. at 86:1-17.

calculated.<sup>120</sup> Pursuant to the terms of its USECP, PECO should have updated the calculation of Complainant's Annual Credit based on that rate increase. Yet, as noted by PECO witness Mark Kehl, PECO made no adjustments to its calculations.<sup>121</sup> According to Mr. Kehl, PECO does not comply with this provision at all, relying solely on its quarterly adjustments and ignoring the immediate impact a rate increase has on its CAP credit calculations.<sup>122</sup> PECO has failed to fulfill both the letter and intent of this provision, which requires CAP credit calculations to adjust automatically when distribution rates are increased in order to fairly reflect the anticipated charges to which the CAP credit will apply.

In addition, the per kWh rate for January 2019 was much lower than any other month used in the lookback period.<sup>123</sup> Richard Schlessinger, PECO's manager of retail rates, testified at the hearing and explained that January 2019 was in fact a "very unique month" that was unlikely to repeat.<sup>124</sup> In that month, PECO took the corporate tax cut it received following passage of the federal Tax Cut and Jobs Act and passed the savings back to customers.<sup>125</sup> This one-time adjustment substantially understated the foreseeable monthly costs that Complainant would be charged for a winter heating month.

PECO was aware that several of the rates used to calculate the CAP credit were lower than the rates that Complainant would be charged. Yet, PECO failed to adjust the inputs for its calculation of Complainant's CAP credit. Complainant presented un rebutted evidence that these actions by PECO artificially deflated the calculation of what Complainant's bills were expected to be in the following year. For these reasons, PECO's calculation of Complainant's CAP credit

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<sup>120</sup> Hearing Tr. at 86:1-17.

<sup>121</sup> Hearing Tr. at 39:18 -40:2.

<sup>122</sup> Hearing Tr. at 39:18-40:20.

<sup>123</sup> Hearing Exh. 1, Appendix K; Hearing Tr. at 86:17-87:17.

<sup>124</sup> Hearing Tr. at 87:5; Hearing Tr. at 101:4-24 (acknowledging that the adjustment in January 2019 was a one time adjustment that would not repeat).

<sup>125</sup> Hearing Tr. at 87:4-17.

in 2019 was unreasonable, and Complainant has met her burden of proof to show that PECO provided unreasonable service in violation of Section 1501.

4. *PECO's failure to provide a retroactive credit was unreasonable based on the language of its USECP.*

The evidence in this case shows that PECO charged Complainant far in excess of the allowable energy burden set forth in its USECP. As discussed above, PUC regulations require that PECO bill Complainant in accordance with approved rate schedules, which incorporate the terms of PECO's USECP.<sup>126</sup> In her first year enrolled in CAP, Complainant received CAP credits totaling just \$321.12, and was charged \$2,361.79 over the course of 12 months.<sup>127</sup> Sixteen percent of Complainant's monthly income of \$757 would have been \$1,453.44 for the year, or \$121.22 per month.<sup>128</sup> By contrast, Complainant's charges from August 2019 through July 2020 were just under 26% of her yearly income. PECO's USECP sets forth two reasons why CAP customers would receive bills above the Commission's energy burden guidelines: if a CAP customer received the maximum CAP credit, or if a CAP customer had income low enough such that the minimum monthly bill (\$30 for electric heating customers) was more than the relevant percentage of income.<sup>129</sup> As acknowledged by PECO's witness, neither of these scenarios applied to Complainant's first year in CAP.<sup>130</sup> During her first year enrolled in CAP, Complainant did not receive the maximum CAP credit,<sup>131</sup> nor was the minimum bill of \$30 more

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<sup>126</sup> 52 Pa. Code § 56.11(a).

<sup>127</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶35.

<sup>128</sup> *Id.*

<sup>129</sup> See USECP at 31 n.7 (“The maximum Annual Credit was calculated to provide bills within Commission energy burden guidelines to approximately . . . 96% of Rate RH customers. In addition, application of the Commission-required minimum monthly bills . . . results in bills above Commission energy burden guidelines for approximately 6% of PECO's CAP customers overall. The combination of those two effects will result in 12% of PECO's Rate R, and 10% for PECO's Rate RH, with bills exceeding Commission energy burden guidelines, assuming a normal weather year.”).

<sup>130</sup> See Hearing Tr. at 45:22 – 47:9.

<sup>131</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 36.

than 16% of her income.<sup>132</sup> As such, the USECP provides that Complainant should have received a CAP credit over the course of twelve months that would have brought her bill down to the appropriate energy burden set forth in the Commission's guidelines. Complainant, through counsel, attempted to resolve this issue directly with PECO, but was unsuccessful.<sup>133</sup>

In addition, even if PECO's initial calculation of Complainant's CAP credit is found to be reasonable, once the PUC adopted lower energy burdens, PECO was required to use them. PECO should provide a retroactive credit to reflect the difference between the 10% energy burden required by PECO's USECP and the Commission's energy burden guidelines and the 16% energy burden PECO has maintained. PECO's continued use of the superseded 16% energy burden has resulted in Complainant being overcharged from November 2019 until present. PECO represents to its customers that CAP credits are calculated in accord with PUC affordability guidelines, as required by its USECP. PECO should be required not only to do what its USECP says, but also what it tells its most vulnerable customers. The Commission should order PECO to provide retroactive credits to Complainant's account to compensate for its unreasonable service.

### **C. Complainant is entitled to relief.**

Complainant is entitled to a credit on her bill based on the difference between the credit provided to Complainant while enrolled in CAP and the credit required under PECO's USECP.<sup>134</sup> As discussed at length in this brief, PECO's violations of its USECP and unreasonable service led to Complainant receiving bills she could not afford and accumulating a

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<sup>132</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 32 (Noting that sixteen percent of Complainant's income of \$757 per month is \$121.12 per month).

<sup>133</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 24.

<sup>134</sup> PECO is able to do a retroactive calculation for a single customer through a manual process. Hearing Tr. at 49:16-50:2.

back balance on her bills.<sup>135</sup> Complainant's sole income is Supplemental Security Income. PECO's records show Complainant had an income of \$757 per month in 2019, and an income of \$793 per month in 2020.<sup>136</sup> For multiple months in 2019 and early 2020, Complainant's bills were more than \$300 per month.<sup>137</sup> Three hundred dollars is close to 40% of Complainant's income. That is far above the allowable energy burdens required by PECO's USECP and Commission policy.

As clearly laid out in PECO's USECP, "[i]f 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>138</sup> PECO has not disputed that this language is in its USECP – nor has it disputed that the PUC updated the referenced CAP Policy Statement in November 2019, lowering the energy burdens.<sup>139</sup> Nonetheless, PECO has failed to implement these energy burdens, in violation of the express terms of its USECP.

In addition, PECO made several errors in calculating Complainant's CAP credit, in violation of both the plain language of PECO's USECP and the intent of the CAP program. These multiple violations led to Complainant accumulating a balance that was clearly unaffordable. For these reasons, Complainant is entitled to a bill credit of \$908.35, representing the difference between the amount she was charged between August 2019 and July 2020 (\$2,361.79)<sup>140</sup> and the amount PECO calculated as affordable to her in August 2019 (\$1,453.44).<sup>141</sup> Complainant is further entitled to a bill credit equal to the additional CAP credit

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<sup>135</sup> Hearing Tr. at 15:11-18.

<sup>136</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶¶ 32-33.

<sup>137</sup> In November 2019, Complainant's CAP bill was \$301.49. In December 2019, it was \$390.37. In January 2020, her bill was \$470.42, and in February 2020, her bill was \$365.11. Hearing Exh. 1, Joint Stipulation of Facts at ¶ 35.

<sup>138</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 19 (citing USECP at 30 n.3).

<sup>139</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 17. As noted in that stipulated fact, the PUC updated the Policy Statement in November 2019.

<sup>140</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 35.

<sup>141</sup> Hearing Exh. 1, Joint Stipulation of Facts at ¶ 32.

she would have received had PECO implemented and maintained the 10% energy burden approved by the Commission in November 2019, as required by PECO's USECP.

## **VII. CONCLUSION**

For the reasons set forth above, Complainant requests the Commission:

- 1) Find that PECO violated the terms of its Universal Service and Energy Conservation Plan.
- 2) Find that PECO provided Complainant with unreasonable service, in violation of 66 Pa. C.S. § 1501.
- 3) Order PECO to provide Complainant with a bill credit of \$908.35, the difference between what Complainant was actually charged in her first year of enrollment in CAP, and what PECO calculated as an affordable bill when she enrolled in CAP.
- 4) Order PECO to provide Complainant with an additional bill credit equal to the additional CAP credit she would have received had PECO implemented a 10% energy burden in November 2019.
- 5) Grant any other relief as is appropriate, just, and in the public interest.

Respectfully Submitted,



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## Appendix A: Proposed Findings of Fact

1. In August 2019, Complainant established service with PECO at 871 N. 31<sup>st</sup> Street, Apartment 1, Philadelphia, PA 19104 (Property or Residence). Hearing Tr. at 14:13-14; Hearing Exh. 1, Joint Stipulation of Facts at ¶¶ 22-23; 30.
2. Complainant uses electricity for cooling, heating, cooking, lighting and medical devices. Hearing Tr. at 14:17-19; Hearing Exh. 1, Joint Stipulation of Facts at ¶¶ 26, 28.
3. When Complainant established service in August 2019, she transferred her enrollment in PECO's Customer Assistance Program (CAP) to the new address. Hearing Tr. at 14:23-24; 16:18-24.
4. Complainant's understanding of PECO's CAP program was that it was supposed to help low income households with a discount based on income and usage. Hearing Tr. at 15:1-7.
5. In her first year at 871 N. 31<sup>st</sup> Street, Complainant paid what she could but struggled to keep up. Hearing Tr. at 15:8-21.
6. Prior to moving to the Property, Complainant had been enrolled in CAP at her previous address, where her electric bills were no more than \$100 per month. Hearing Tr. at 16:18-24.
7. According to PECO's call records, when Complainant called PECO in October 2019 to inquire about her CAP credits, she was told that CAP credits are based on usage, energy burden and income. Hearing Exh. 1, Appendix G.
8. PECO's training for its call center representatives states that if a customer calls in with questions about their CAP credit, they are told that "the company calculates the customer's energy burden based upon the customer's federal poverty percentage. The

energy burden is a percentage of your annual income, and the amount that you are reasonably able to afford to pay for utility service per the PUC’s affordability guidelines.” Hearing Tr. at 44:13 – 45:9;

9. The document identified as “CAP Scripts – CAP Credit Calculation” (Hearing Exh. 1, Appendix H) reflects what a PECO Customer Service Representative would have been trained with in October 2019. Hearing Exh. 1, Joint Stipulation of Facts at ¶ 27.
10. PECO’s Universal Service and Energy Conservation Plan (USECP) contains the rules for how PECO’s Customer Assistance Program (CAP) operates. Hearing Exh. 1, Joint Stipulation of Facts at ¶ 9.
11. PECO’s 2016-2018 USECP remains in effect. Hearing Exh. 1, Joint Stipulation of Facts at ¶ 10.
12. The first step in calculating a customer’s CAP credit is to establish their Federal Poverty Level (FPL) by looking at the household income and household size. Hearing Tr. at 19:18 – 20:1.
13. Based on the CAP customer’s Federal Poverty Level and whether they are a residential customer, residential heating customer, or gas customer, PECO determines which energy burden percentage to use. Hearing Tr. at 20:2-13.
14. PECO’s USECP states that “[i]f 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.” Hearing Exh. 1, Joint Stipulation of Facts at ¶ 18
15. By Order entered November 5, 2019, the PUC updated its CAP Policy Statement and lowered the energy burdens to between 6% and 10% of income. Hearing Exh. 1, Joint Stipulation of Facts at ¶ 14.

16. The updated CAP Policy Statement sets an allowable energy burden for an electric heating customer with income between 51% and 100% of FPL at 10% of income. Hearing Tr. at 23:14-24:11; 52 Pa. Code § 69.265(2)(i).
17. After the Commission's update to its CAP Policy Statement, PECO did not change the energy burden it used to calculate Ms. Eubanks' credit. Hearing Tr. at 24:12-14.
18. The language of PECO's USECP does not require PECO to make an additional filing prior to implementation of the lower energy burdens. Hearing Tr. at 77:13-16.
19. When Complainant enrolled in CAP in August 2019, Complainant's only income was Supplemental Security Income (SSI) totaling \$757 per month, and PECO used this income, which placed Complainant between 51% and 100% of FPL. Hearing Exh. 1, Joint Stipulation of Facts at ¶¶ 29, 31-32.
20. In August 2019, the maximum allowable energy burden in the PUC's CAP Policy Statement was 16% of household income for this federal poverty level range, and so PECO's USECP utilized 16% of Complainant's income to determine her CAP credit. Hearing Exh. 1, Joint Stipulation of Facts at ¶¶ 29, 32.
21. Sixteen percent of income for Complainant, having an income of \$757 per month, is \$121.12 per month or \$1,453.44 per year. Hearing Exh. 1, Joint Stipulation of Facts at ¶ 32.
22. Once PECO establishes the amount that a customer can afford to pay, PECO compares that amount to the previous 12 months of usage (also referred to as the "lookback" period). Hearing Tr. at 20:21-23.
23. Ideally, PECO looks at the last 12 months of usage by the CAP customer at their residence and calculates a projected bill amount based on that usage. Hearing Tr. at

20:21- 21:8.

24. If that projected bill amount is higher than the amount PECO calculated that the customer could afford to pay, the customer receives a credit for the following year. Hearing Tr. at 20:21- 21:8
25. If actual usage for the customer at the property is unavailable, PECO can create a pro forma profile using a prior customer's usage at the property, or using system-wide or average usage. Hearing Tr. at 21:19-22:12.
26. Absent usage by the Complainant at the residence, PECO opted to use the usage registered at the property from September 2018 through July 2019 as a proxy, and used a combination of Complainant's usage and the prior usage for August 2019. Hearing Exh. 1, Appendix A.
27. From August 2018 through July 2019, the PECO bill had been "switched over" to the property landlord, Parkside LLC, because the prior tenant had moved out. Hearing Tr. at 58:8-18.
28. There was no usage at the property for August 2018, and the usage for September 2018 was only 46 kWh, reflecting a six-day billing period. Hearing Tr. at 52:17-53:18; 58:8-18.
29. Usage for May 2019 was 72 kWh and usage for June 2019 was 46 kWh. Hearing Exh. 1, Appendix C.
30. Usage for May 2018 was 989 kWh and usage for June 2018 was 331 kWh. Hearing Exh. 2.
31. PECO used 11 months of usage and a six-day billing period from September 2018 in the calculation of Complainant's CAP credit. Hearing Tr. at 52:3-53:18.

32. The account history of a prior tenant at the property shows that usage had been higher at the residence in previous years. Hearing Exh. 2.
33. PECO's system did not consider whether the property was occupied, continuously or at all, during the time period used as a proxy for the purpose of CAP credit calculation. Hearing Tr. 58:5 – 59:3.
34. Using proxy usage, PECO projected that Complainant's bills for the following year would be \$1,234.51. Hearing Exh.1, Appendix A.
35. To project Complainant's bills for the following year, PECO used the rates that were in effect for each month in the lookback period, without regard to the fact that base rates had increased in January 2019. Hearing Tr. at 93:2-4; Hearing Exh. 1, Appendix A; Hearing Exh. 1, Appendix K.
36. One of the lookback months, January 2019, was a unique month, with a significantly lower per kWh charge that reflected a one-time downward adjustment due to a federal tax cut – an adjustment that was not going to repeat the following year. Hearing Tr. at 87:4-17; 101:7-24.
37. PECO did not make any adjustment to its calculations due to rate changes or abnormalities. Hearing Tr. at 100:4-10; 104:16-105:21.
38. \$1,234.51 is less than the \$1,453.44 that PECO calculated was "affordable" to Complainant. Hearing Exh. 1, Appendix A.
39. Complainant did not receive any CAP credit upon initial enrollment in August 2019. Hearing Exh. 1, Appendix A.
40. In calculating Complainant's credit in August 2019, PECO projected her future bills using "last years charges based on usage". Hearing Exh. 1, Joint Stipulation of Facts,

Appendix A.

41. PECO increased base rates starting in January 2019. Hearing Tr. at 93:2-4.
42. The rates used to calculate the “last years charges based on usage” were the rates in effect for the historical month of usage. Hearing Exh. 1, Joint Stipulation of Facts, Appendix K.
43. For September 2018, October 2018, November 2018 and December 2018, PECO used rates in effect prior to the rate increase that went into effect on January 1, 2019, including a lower customer charge and lower distribution rate than were being charged in August 2019. Hearing Tr. at 94:14-17; 95:21-96:3.
44. The tariff rates in effect for January 2019 included a per kWh charge of 7.845 cents, which reflected a one-time downward adjustment due to a federal tax cut, an adjustment that was not going to repeat the following year. Hearing Tr. at 87:4-17; 101:7-24.
45. If PECO is granted an electric base rate increase, the portion of each rate RH customers’ annual CAP credit that is attributable to distribution rates is supposed to be increased by a percentage equal to the system wide RH distribution rate increase. Hearing Tr. at 38:24 – 39:6; Hearing Tr. at 98:10-18.
46. PECO made no adjustments to Complainant’s CAP credit to account for the base rate increase. Hearing Tr. at 39:18 -40:2.
47. PECO does not adjust any customer’s Annual Credits following a base rate increase and instead relies solely on its quarterly adjustments, ignoring the immediate impact a rate increase has on its CAP credit calculations. Hearing Tr. at 39:18-40:20.
48. Complainant did not receive the maximum annual credit. Hearing Tr. at 46:18-21.
49. Complainant’s percentage of income energy burden is higher than the minimum bill of \$30. Hearing Tr. at 47:3-5.

50. CAP credits adjust every 3 months, substituting in 3 months of actual usage for the proxy usage used in PECO's initial calculations. Hearing Tr. at 50:20-51:2.
51. It took Complainant a full year for her own usage, rather than a proxy, to be reflected in her CAP credit calculation. Hearing Tr. at 50:20-51:2.
52. By July 2020, because of the rolling 3 month adjustments, PECO had provided Complainant with CAP credits totaling \$321.12. Hearing Exh. 1, Joint Stipulation of Facts at ¶ 35.
53. In that same time frame, PECO had billed Complainant for \$2,361.79. Hearing Exh. 1, Joint Stipulation of Facts at ¶ 35.
54. For multiple months in 2019 and early 2020, Complainant's bills were more than \$300 per month. In November 2019, Complainant's CAP bill was \$301.49. In December 2019, it was \$390.37. In January 2020, her bill was \$470.42, and in February 2020, her bill was \$365.11. Hearing Exh. 1, Joint Stipulation of Facts at ¶ 35.
55. In August 2020, PECO calculated Complainant's CAP credit for the following year based on Complainant's actual usage at the property. Hearing Exh. 1, Appendix B; Hearing Exh. 1, Joint Stipulation of Facts at ¶ 35.
56. In August 2020, PECO calculated a CAP credit of \$1,239.17 for the following year. Hearing Exh. 1, Appendix B.
57. In all, in her second year of enrollment in CAP, PECO billed Complainant \$1,394.86 and she received CAP credits totaling \$1,285.85. Hearing Exh. 1, Joint Stipulation of Facts at ¶ 35.
58. The difference between what Complainant was charged from August 2019 through July 2020 (\$2,361.79) and the amount PECO calculated as affordable to her in August 2019,

based on 16% of her income (\$1,453.44) is \$908.35. Hearing Exh. 1, Joint Stipulation of Facts at ¶¶ 32, 35.

59. Complainant, through counsel, requested an adjustment to her bill to resolve her concern, but was unsuccessful. Hearing Exh. 1, Joint Stipulation of Facts at ¶ 24.
60. PECO is able to do a retroactive calculation for a single customer through a manual process. Hearing Tr. at 49:16-50:2.

## Appendix B: Proposed Conclusions of Law

1. Reasonable service pursuant to 66 Pa. C.S. § 1501 includes accurately billing customers. 66 Pa. C.S. § 1501; Jay Larry Moyer v. PPL Electric Utilities Corporation, Pa. PUC Docket No. C-2017-2629683, Opinion and Order at 48 (Oct. 28, 2021),
2. Public utility tariffs have the force and effect of law and are binding on the public utility and its customers. Guagenti v. PECO, Pa PUC Docket\_No. F-2018-3001891, Opinion and Order at 6 (Dec. 19, 2019).
3. PECO is required to bill residential customers in accordance with approved rate schedules. 52 Pa. Code § 56.11(a).
4. PECO's USECP contains the rules for how PECO's CAP operates, including the mechanisms by which PECO calculates and updates a customer's CAP credit. PECO Energy Company Universal Service and Energy Conservation Plan 2016 to 2018, Docket No. M-2015-2507139 (submitted February 17, 2017).
5. PECO's Tariff incorporates the terms of PECO's current USECP.
6. PECO's USECP provides that the allowable energy burden that is used to calculate a customer's CAP credit is based on the maximum energy burden in the Public Utility Commission's CAP Policy Statement. USECP at 30 n.3.
7. In 2019, the Commission updated its CAP Policy Statement, reducing the allowable energy burden for an electric heating customer with income between 51% and 100% of FPL at from 16% to 10% of income. 52 Pa. Code § 69.265(2)(i).
8. PECO's USECP requires PECO to: (a) calculate CAP credits using the energy burdens set forth in the Commission's revised CAP Policy Statement; (b) utilize a full 12 months

prior billings in calculating CAP credits; and (c) adjust CAP credits to take into account increases in base rates.

9. Complainant met her burden of proof to show that PECO violated the terms of its USECP by failing to update Complainant's CAP credit following the Commission's change to its CAP Policy Statement. USECP at 30 n.3.
10. Complainant met her burden of proof to show that PECO failed to use twelve months of premise usage, as required by PECO's USECP, when calculating Complainant's initial CAP credit. USECP at 29-30.
11. Complaint met her burden of proof to show that PECO failed to properly adjust her annual credit based on a change in base rates, as required by PECO's USECP and the CAP FCO Settlement. USECP at 5 (incorporating the CAP FCO Settlement Term Sheet).
12. Complainant met her burden of proof to show that PECO violated the terms of its USECP. Failure to follow the terms of a Universal Service and Energy Conservation Plan constitutes unreasonable service. 66 Pa. C.S. § 1501; *DeSantis v. Pennsylvania Power Company*, Pa. PUC Docket No. C-2019-3013652, Initial Decision at 10 (Apr.27, 2020).
13. PECO's calculation of Complainant's CAP credit was unreasonable because it utilized proxy usage it should have known was unrepresentative of usage at the premise. 66 Pa. C.S. § 1501; *Brickner v. PPL Electric Utilities*, Pa. PUC Docket C-2009-2105583, Opinion and Order (Order adopted April 22, 2010).
14. PECO's calculation of Complainant's CAP credit was unreasonable because it failed to take into account changes in rates in the lookback period and used rates that were unrepresentative of future rates Complainant would be charged. 66 Pa. C.S. § 1501;

Brickner v. PPL Electric Utilities, Pa. PUC Docket C-2009-2105583, Opinion and Order  
(Order adopted April 22, 2010).

15. PECO's failure to remedy its incorrect billing by providing a retroactive credit was unreasonable. 66 Pa.C.S. § 1501; USECP at 31 n. 7.

### Appendix C: Proposed Ordering Paragraphs

1. The formal complaint of Denise Eubanks at Docket No. C-2021-3025997 is sustained.
2. Within ten (10) days of entry of the final order of the Commission, PECO shall provide Complainant with a bill credit of \$908.35, the difference between what Complainant was actually charged in her first year of enrollment in CAP, and what PECO calculated as an affordable bill when she enrolled in CAP.
3. Within thirty (30) days of entry of the final order of the Commission, PECO shall provide Complainant with an additional bill credit equal to the additional CAP credit she would have received had PECO implemented a 10% energy burden in November 2019.
4. PECO shall file confirmation that it has provided this retroactive relief within forty five (45) days of this Order on this docket.
5. PECO shall continue to calculate Complainant's CAP credit based on the applicable energy burden standards set forth in the Commission's CAP Policy Statement for as long as Complainant remains enrolled in CAP and PECO operates its CAP pursuant to the terms of the CAP FCO Settlement.