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July 15, 2022

Rosemary Chiavetta, Secretary Pennsylvania  
Public Utility Commission Commonwealth  
Keystone Building  
400 North Street, Second Floor Harrisburg,  
PA 17120

**RE: Denise Eubanks v. PECO Energy Company**  
**Docket Number: C-2021-3025997**

Dear Ms. Chiavetta:

Enclosed for filing with the Commission is the *Reply Exceptions of Respondent, PECO Energy Company*.

I have enclosed a Certificate of Service showing that a copy of the above document was served on the interested parties. Thank you for your time and attention on this matter.

Very truly yours,

A handwritten signature in blue ink that reads "M.H. Davis". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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Melissa H. Davis, Esquire

Cc: Honorable Darlene Heep, ALJ  
Certificate of Service

**BEFORE THE PENNSYLVANIA  
PUBLIC UTILITY COMMISSION**

**Denise Eubanks**

**Complainant,**

**v.**

**PECO Energy Company,**

**Respondent.**

**Docket No. C-2021-3025997**

**REPLY EXCEPTIONS OF RESPONENT, PECO ENERGY COMPANY**

PECO Energy Company (“PECO”) hereby replies to the Exceptions filed by Denise Eubanks (“Eubanks” or “Complainant”) in the above-referenced matter on July 5, 2022.

**I. STATEMENT OF THE CASE**

Complainant filed a formal Complaint against PECO with the Public Utility Commission (“PUC”) on or about May 19, 2021. In this complaint, Eubanks alleged that PECO improperly calculated her Customer Assistance Program Fixed Credit Option (“CAP FCO”) credits pursuant to PECO’s Universal Service and Energy Conservation Plan (“USECP”) and provided unreasonable service.

On June 23, 2021, Respondent PECO filed its first Answer to Eubanks’ complaint, denying all material allegations and later, on September 2, 2021, Respondent filed its Third Amended Answer to Complainant’s Complaint, again denying all material allegations.

An Initial Hearing was held on November 12, 2021 before Darlene D. Heep, Administrative Law Judge. Based upon the hearing transcript, exhibits presented by the Complainant and the Respondent and applicable law, ALJ Heep issued an Initial Decision on July

15, 2022 (“Decision”) denying and dismissing the Complainant’s complaint. ALJ Heep ruled that the Complainant had not met the burden proving that PECO’s calculations under the terms of the USECP were unreasonable service under 66 Pa.C.S. §1501 and 66 Pa.C.S. §332(a). Op. at 19. On July 5, 2022, Complainant timely filed her Exceptions of the Complaint with the PUC.

## **II. LEGAL ARGUMENT**

As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Code, 66 Pa. C.S. §332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the respondent utility, PECO, is responsible or accountable for the problem described in the Complaint through a violation of the Code or a regulation or order of the Commission. *Patterson v. The Bell Tel. Co. of Pa.*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Commw. 1990), *alloc. denied*, 602 A.2d 863 (Pa. 1992). That is, the Complainant’s evidence must be more convincing, by even the smallest amount, than that presented by the respondent. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950).

Additionally, this Commission’s decision must be supported by evidence on the record that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980).

Upon the presentation by a complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence, sometimes called the burden of persuasion, to rebut the evidence of the complainant, shifts to the respondent. If the evidence presented by the respondent is of co-equal value or “weight,” the burden of proof has not been satisfied. The complainant now has to provide some additional evidence to rebut that of the

respondent. *Burleson v Pa. PUC*, 443 A.2d 1371(Pa. Commw. 1982), *aff'd*, 433 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. PUC*, 768 A.2d 1217 (Pa. Commw. 2001).

### III. DISCUSSION

The Commission should sustain the initial decision of ALJ Heep. In her Exceptions, Complainant excepts to the decision issued by ALJ Heep, because she simply disagrees with the ALJ's decision and believes she submitted adequate proof to the ALJ to support her position. Moreover, Complainant is simply seeking to re-litigate the issues she raised in her Complaint, her briefing, and at the lengthy hearing in November, 2021. As such, Complainant's Exceptions should be denied.

#### 1. Exception 1: ALJ Heep Correctly Decided that PECO's 2016-2018 USECP Does Not Require Use of Updated Energy Burdens in Calculating Complainant's CAP Credits.

ALJ Heep correctly found that PECO did not commit a violation by using the current 16% energy burden (EB) rather than the 10% in the Commission's updated CAP Policy Statement. Both parties agree that 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." On November 5, 2019, the PUC updated its CAP Policy Statement and lowered the energy burdens to between 6% and 10% of income. However, these energy burdens have not been officially approved by the Commission. As the parties stipulated, and as PECO has previously briefed, PECO calculates a CAP customer's FCO credit to bring a customer's bill down to that specific percentage of income. USECP at 29-35. On November 5, 2019, as the Company was performing its analysis of potential CAP changes, the Commission

issued the Revised CAP Policy Statement, which, among other things, included updated EB percentages. Complainant argues that based upon the November 5, 2019 action, PECO should have changed the EBs in the CAP FCO to match the EBs in the Revised CAP Policy Statement. This position is contrary to the Commission's orders and the plain language of the EB Footnote.

First, and as PECO has argued before, the Revised CAP Policy Statement did not become effective by its terms until publication in the Pennsylvania Bulletin on March 21, 2020<sup>1</sup>. Second, in the Final Policy Order, the Commission directed PECO, among others, to file addendums to their existing or proposed USECPs indicating how they intended to implement the policy changes specified in the Revised CAP Policy Statement. This filing requirement was further clarified in a later order in the same docket, where the Commission explained that the addendum should specify “[w]hat changes to its current or pending USECP, if any, the utility proposes to implement.” Again, the CAP Policy Statement which lowers energy burdens cannot be implemented until the Commission approves it. In the interest of fixing the acknowledged shortcomings of the FCO and reflecting the Revised CAP Policy Statement, PECO filed the Amended USECP to improve bill affordability for all CAP customers, including Ms. Eubanks. PECO is compliant with the only Commission approved USECP and is therefore not in violation of Commission policies. While Complainant argues that “whether or not PECO violated the terms of its current 2016-2018 USECP cannot depend on whether the Commission has approved new proposals from PECO regarding its CAP design, as the ALJ suggests,” that is precisely what the USECP and Commission requires. *See* Complainant's Exceptions at 5.

Accordingly, Complainant is still incorrectly asserting that PECO is in violation of the

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<sup>1</sup> Final Policy Order, Docket No. M-2019-3012599, p. 105, Ordering Paragraph no. 4 (stating that the Revised CAP Policy Statement would become effective upon its publication in the Pennsylvania Bulletin); see also 50 Pa. Bull. at 1691-95 (Mar. 21, 2020).

USECP by not changing the EB it used to calculate Ms. Eubanks' credit, contrary to the express language of the USECP which incorporates the PUC's revised, lower energy burdens. As ALJ Heep pointed out, it is reasonable for PECO to consider and use the 16% energy burden in its calculations for the PECO low income program as the Commission has not yet issued an Order regarding the proposed program. ALJ Decision at 15. As PECO has argued in this matter, Complainant's arguments are premature and untimely. PECO is compliant with the only Commission approved USECP and is therefore not in violation of Commission policies. There was no Commission approval of this Revised CAP Policy Statement or the 2019-2024 USECP at the time of the Initial Decision. The proposed 2019-2024 USECP was still in the hands of the Commission awaiting approval. As such, the Initial Decision of Administrative Law Judge Darlene Heep should be upheld and the Complainant's Complaint should be dismissed with prejudice.

2. **Exception 2: The ALJ is Correct In Its Finding that PECO's Failure, If Any, To Use A Full 12 Months of Usage History Was Negligible And, Therefore, Did Not Rise to the Level of a Violation Was Proper And Must be Upheld**

ALJ Heep's Decision that PECO's use of 11 months and 6 days of usage, instead of the required 12 months, was negligible and did not rise to the level of a violation was proper and should be upheld. As PECO has thoroughly briefed and argued throughout this matter, under the CAP-FCO program, a customer may receive a monthly credit to their bill based upon their income and their historical usage. At the time of CAP enrollment in 2019, PECO Energy did not have 12 previous months of data for this specific Complainant and premise combination. Mr. Kehl explained at the hearing in this matter that under the 2015 Settlement and subsequent 2016-2018 USECP, the next default usage is to use the premise usage from a previous customer. Therefore, the default usage used to create the initial FCO calculation was the average CAP Residential

Heating usage from the previous customer, Parkside LLC, which was available. Complainant now contends that using 11 months and 6 days – as opposed to 12 months – of data “is a significant component of PECO’s larger failure to reasonably calculate CAP credits” without explaining the precise effect of PECO’s not considering less than 25 *days* of usage. Complainant fails to provide any explanation of her claim that the effect of not considering the last full month’s worth of usage data in its calculation was more than a negligible fact, relying simply on conclusory statements. Furthermore, it appears that Complainant is merely using this opportunity to re-litigate the issue of whether PECO properly relied on the usage from the previous customer at that premises, as is permissible by the terms of the 2015 Settlement or 2016-2018 USECP and was found to be appropriate by ALJ Heep in her decision. Accordingly, ALJ Heep’s determination that the use of 11 months and 6 days of usage was negligible that did not arise to the level of a violation must be upheld.

**3. Exception 3: The ALJ Acknowledged the Specific Requirement that PECO Update CAP Credits Based on Changes in Base Rates**

Despite Complainant’s contentions otherwise, ALJ Heep did not conflate PECO’s 2016-2018 USECP requirement that the CAP credits be updated every three months with the requirement that the Annual CAP credits increase to correspond with PECO electric or gas base rate increases. As PECO argued in its initial briefing, the allegation that PECO should have updated its Annual Credit calculation because there was a base rate increase during the period of usage used to calculate Complainant’s initial CAP credit is without merit. In its initial briefing, the Complainant correctly cites the testimony of Mark Kehl in which he testified that 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 described by Mark Kehl's testimony, PECO was in full compliance with its USECP, which requires:

Every three months, PECO will recalculate Step I using the customer's most recent three months' data on usage/charges. PECO will then use the results of the Step 1 recalculation as inputs to complete Steps 2 through 5 to determine a Quarterly Recalculation of the Annual Credit. The adjusted Annual Credit will be applied to bills on a going-forward basis. This quarterly recalculation will be coordinated with the results of PECO's quarterly Generation Services Adjustment filing and approval so that, in each such quarterly PECO Universal Service and Energy Conservation Plan (2016-2018) Page 33 of 54 adjustment, PECO's just-approved PTC will replace the oldest three months of PTC data in the underlying calculation.

*See*, USECP at 33.

PECO's USECP further provides that "if PECO is granted a gas base rate increase, the maximum allowable credits will be increased by a percentage equal to the system-wide residential distribution rate increase, applied to the portion of the Maximum Credit that is attributable to distribution rates." *See*, USECP at FN 8. However, PECO's USECP does not require a recalculation of a prior tenant's twelve-month lookback period in order to compile its pro forma profile. The evidence is clear that PECO has abided by the terms of the 2015 Settlement and the 2016-2018 USECP. Furthermore, ALJ Heep separately considered the requirement relating to base rate increases. *See* Decision at 17. Accordingly, in her opinion, ALJ Heep clearly understood the distinction between the two requirements, and as such, her decision should be upheld.

**4. The ALJ Did Not Err In Holding That PECO Has Acted Reasonably And in Accordance With Its 2016-2018 USECP and the CAP Policy Statement**

Here, Complainant is merely trying to re-litigate all the claims and arguments she has made in this matter, arguing that PECO's "egregious failure to administer its CAP pursuant to the clear terms of its 2016-2018 USECP constitutes unreasonable service" and that the ALJ's failure to reach this conclusion stems from her failure to properly enforce PECO's 2016-2018

USECP. Complainant's Exceptions at 9. As it has argued throughout this matter<sup>2</sup>, and as its track record shows, PECO has a strong history of providing robust and varied assistance programs, such as LIHEAP, for its low-income customers, including Complainant. The Company has worked consistently, transparently and in good faith to improve affordability under CAP and comply with Commission orders. In fact, PECO has already sought Commission approval to do the very thing that Complainant is seeking in this case – implement the revised EBs as part of the CAP FCO. Complainant has chosen to simply ignore that filing and disingenuously state that PECO has failed to take any action to comply with the currently approved USECP. Accordingly, PECO has not provided unreasonable service and has not violated 66 Pa. C.S. §1501, and ALJ's Decision should be upheld in its entirety.

#### **IV. CONCLUSION**

Based on the credible evidence of record, ALJ Heep correctly determined that Complainant had not met her burden of proof that PECO improperly calculated her Customer Assistance Program bill and that PECO provided unreasonable service. ALJ Heep correctly concluded, that the Complainant has not met her burden of proof in this matter pursuant to 66 Pa. C.S. §332(a). Accordingly, ALJ Heep's decision to dismiss the Complainant's case against PECO Energy should be upheld.

For the reasons set forth above, PECO respectfully requests that the Commission deny the Exceptions and issue an Order upholding the Initial Decision in its entirety, finding:

1. The Exceptions filed by Denise Eubanks on July 5, 2022 at Docket No. C-2021-3025997, are denied consistent with the Initial Decision.

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<sup>2</sup> PECO incorporates by reference all its arguments as set forth in all its briefing and in testimony at the hearing of this matter as to why PECO has provided Complainant reasonable service that complies with 66 Pa. C.S. §1501.

2. That the Initial Decision of Administrative Law Judge Darlene Heep is adopted within the Opinion and Order of the Secretary.

3. That the Formal Complaint filed by Denise Eubanks on or about May 19, 2021 at Docket No. C-2021-3025997 is dismissed with prejudice.

Date: July 15, 2022

Respectfully submitted,

/s/ Melissa H. Davis

Melissa H. Davis

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**VERIFICATION**

I, Melissa H. Davis, hereby declare that I am counsel for PECO Energy Company; that as such I am authorized to make this verification on its behalf; that the facts set forth in the foregoing Pleading are true and correct to best of my knowledge, information and belief, and that I make this verification subject to the penalties of 18 Pa. C.S. §4904 pertaining to false statements to authorities.

Date: July 15, 2022

/s/ Melissa H. Davis  
Melissa H. Davis

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**CERTIFICATE OF SERVICE**

I, Melissa H. Davis, hereby certify that I have this day served a copy of the foregoing Reply Exceptions of Respondent PECO Energy Company upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code § 1.54.

**Via Email**

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*Counsel for Complainant*

Dated at Philadelphia, Pennsylvania, July 15, 2022.

/s/ Melissa H. Davis  
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