Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2 nd Floor
Harrisburg, PA 17120

Re: Docket No. P-2021-3024328
Date: June 27, 2023

Dear Secretary Chiavetta:

Enclosed please find attached

TED UHLMAN'S AMENDED PREHEARING CONFERENCE MEMORANDUM

and Certificate of Service for same. Copies of this document have been served in accordance with the attached Certificate of Service.

Thank you for your attention to this matter.

Respectfully Submitted,

Ted Uhlman
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June 27, 2023

BEFORE THE COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. § 10619 that the Situation of Two Buildings Associated with a Gas Reliability Station in Marple Township, Delaware County Is Reasonably Necessary for the Convenience and Welfare of the Public	:	Docket No. P-2021-3024328

TED UHLMAN'S PREHEARING CONFERENCE MEMORANDUM

Pursuant to 52 Pa. Code § 5.222 and in accordance with the Prehearing Conference Order dated June 5, 2023, TED UHLMAN respectfully submits the following Prehearing Conference Memorandum.

PRELIMINARY STATEMENT AND PROCEDURAL HISTORY

Before 2020 - PECO started working on their 11.5 mile pipeline from the Conshohocken Gate Station to Marple. Rt3 320 was closed periodically, but nobody paid that much attention, and PECO wasn't announcing their plans.

2020 - In the midst of The Covid-19 Pandemic, PECO announced their plans for a Gas Expansion Plant (aka"Reliability Station") at the Corner of Sproul and Cedar Grove Roads. PECO applied to the Marple Township Zoning Hearing Board for variances and exceptions, which were denied.

2021 - On February 26, PECO applied to the PA Public Utility Commission for permission to steam-roller over the decision of the Marple Township Zoning Hearing Board. During March and April; sixty-five residents filed to be pro se protestants and/or intervenors. On April 12, the Telephonic PreHearing Conference was held, with twenty-five residents in attendance. On May 25 and May 26, a total of four Telephonic Public Hearings were held, and about 100 residents called in, almost unanimously to voice their concerns about the location of the proposed facility. On December 7, the Initial Decision was published, and, although the PUC decided in PECO's favor, the Initial Decision included the following statement:

> *While we find that the **concerns** raised by the municipalities and the individual intervenors **are valid**, and **we are not unsympathetic** to those concerns, issues*

related to noise, gas emissions, aesthetics, traffic and other health and safety concerns are ***beyond the Commission's review****.*

2022 - Marple Township appealed the decision to the PA Commonwealth Court, and oral arguments were heard in Pittsburgh on October 12.

2023 - On March 19, a seven member panel of PA Commonwealth Court judges **unanimously** decided that the PUC had erred in its decision, and remanded the case back to the PUC, with the following instructions:

> *...that it issue an Amended Decision regarding Intervenor PECO Energy Company's "Petition... . . . For a Finding Pursuant to 53 P.S. § 10619,"* ***which must incorporate the results of a constitutionally sound environmental impact review****... "*

2023 – On June 21, at least 50 phone numbers called in to the scheduled Pre-Hearing Conference. That is a 100% increase above the 25 respondents who attended the Telphonic Pre-Hearing Conference of April 12, 2021, indicating continued high interest in this case.

ISSUES AND SUB-ISSUES

ENVIRONMENTAL REVIEW – There has never been an Environmental Review performed in association with a "619 Procedure", as such a review had been prohibited prior to the ruling by the recent Commonwealth Court on this issue. In this precedent making case, all aspects of the review have implications, not only for this case, but for future cases of a similar nature. What does a constitutionally sound environmental impact review look like, when applied to a "619 Procedure"?

In the previous round of this case, the vast majority of the expert witnesses for Exelon/PECO were, in fact, employees of Exelon/PECO. Similarly, the vast majority of the expert witnesses for the other side were employees of Marple Township or Delaware County. Each witness had obvious reasons to expand or contract their testimony as much as possible

Thus far, there has been little agreement between the parties on the facts of this case. Marple Township and the *pro se* intervenors insist that the homes, businesses, and nearby traffic within the Potential Impact Radius constitute a very serious problem. They insist that the noise studies

promulgated by PECO are inadequate. They insist that pollution from the exhaust gasses and methane releases are unacceptable. They insist that other locations[1] are both technologically feasible and much safer. They insist that PECO's claims of an alternative site search was a sham. They insist that PECO's claims of "community interaction" are ludicrous. They even question PECO's claim that Residential Natural Gas Usage in Marple Township and Delaware County will increase by 20% within ten years, which is the basis of PECO's argument that the facility is "reasonably necessary". PECO, on the other hand, challenges all of Marple's assertions.

Additionally, for a long time, in the previous iteration of this case, PECO repeatedly told us about the "Half Mile Radius from the Corner of Sproul and Lawrence Roads"; this assertion even appears in Findings of Fact #44, #45, #46, and #51 in the Initial Decision. However, when the Don Guanella site was seriously pushed forward as a viable alternative location, suddenly those facts needed to be amended. In the Initial Decision, without any further explanation of the "**engineering restraints**", Finding of Fact #50 refutes the half-mile radius in that it states:

> *"Despite the Don Guanella property being within the [one half] mile of the Sproul and Lawrence connection and meeting that site selection criteria, the Don Guanella site would not be acceptable to PECO as its location would cause unreasonable engineering constraints. (SR-3, p.6; Tr. 122:3-25)"*

Clearly, the two sides have repeatedly been dealing with two different sets of facts; occasionally, there are conflicting facts even within the Initial Decision's Findings of Fact.

And now, as the case returns from the Commonwealth Court to the Public Utility Commission, with orders to issue an Amended Decision which must incorporate the results of a constitutionally sound environmental impact review, it is important, not just for this case, but, for future , similar cases, that the same level of disagreement does not obfuscate the scientific facts of the environmental review. To continue on a road where the two sides employ their own environmental witnesses to promote their own interests is not in the best interests of the case, nor of the precedent that it sets. A constitutionally sound environmental impact review has never before been associated with a "619 Procedure", so this court may well determine the course of such reviews in the future. Therefore, it is imperative that all parties mutually agree upon a

[1]Such as the "Don Guanella" site at the Corner of Sproul and Reed Roads

single group of environmental experts to execute the environmental review. Such a group could be drawn from industry, academia, government, whatever.

The review should be based upon impartial facts of science, not the lawyerly arguments of the two sides, each having clear agendas in the case. After The Review has been completed, both sides will then have the opportunity to cross-examine the review and the reviewers, and continue on with their legal opinions and interpretations of ONE SET OF FACTS.

SCOPE – While it could be argued that the current proceeding should constitute nothing more than a constitutionally sound environmental impact review slapped on top of the existing record, the fact is that the Order of the Commonwealth Court, in ordering that the Amended Decision must incorporate the results of a constitutionally sound environmental impact review, has implied that the engineering and environmental pros and cons of the proposed location be balanced by the pros and cons of other locations. PECO's initial acceptance of a half-mile radius from the corner of Sproul and Lawrence Roads, followed by their later complaint of "technological restraints" associated with the Don Guanella site needs to be looked at more closely. Even PECO's claim to the half mile radius requirement has not been explained adequately, which could possibly make other sites[2] farther afield attractive alternatives. During the previous iteration of this case at the Public Utility Commission, when Marple Township and/or the *pro se* intervenors questioned such details, PECO objected that such inquiries were not relevant to "a 619 Proceeding". Now, they are relevant.

Two additional considerations are (a) the interpretation of the term "reasonable" and (b) the interpretation of the first sentence of the Order of the Commonwealth Court: "*AND NOW, this 9th day of March, 2023, it is hereby ORDERED that Respondent Pennsylvania Public Utility Commission's (Commission) March 10, 2022 opinion and order is VACATED*."

SCOPE – REASONABLE NECESSITY – In general usage, the term "Reasonably Necessary" implies what a reasonable person would agree is necessary. However, in this case, it seems that "Reasonably Necessary" implies "Not Absolutely Necessary, but Close Enough". In the previous hearing, in order to show that the location was "Reasonably Necessary", the only bar that PECO was aiming at was to prove that they really, really wanted this location; they didn't

[2] Such as, deep in the the forested area across Sproul Rd from Cardinal O'Hara High School, between the cemetary and I-476.

even have to prove that the location was Absolutely Necessary. Now that the Commonwealth Court has ordered that the Amended Decision incorporate the results of a constitutionally sound environmental impact review, the definition of "Reasonably Necessary" now requires that the Environmental Impacts be balanced by the Necessity. Therefore, all parties should, in fact, have "another bite at the apple", and issues such as the "half-mile radius" and the "unreasonable engineering constraints" which appeared in the Initial Decision require further investigation. The Don Guanella site is much more reasonable, because it is farther away from homes and businesses, where the PIR, noise, and emissions will not be a problem.

SCOPE – VACATED – While PECO makes a strong point that the Order of the Commonwealth Court **Remanded** the decision back to the Public Utility Commission, there is little mention of the fact that "*Respondent Pennsylvania Public Utility Commission's (Commission) March 10, 2022 opinion and order is* ***VACATED***." A vacated judgment may free the parties to civil litigation to re-litigate the issues subject to the vacated judgment. The United States Court of Appeals for the Seventh Circuit has noted that a vacated judgment "place[s] the parties in the position of no trial having taken place at all; thus a vacated judgment is of no further force or effect."[3] While the United States v. Williams 1990 case was based upon a clerical error, the Order of the Commonwealth Court clearly and unequivicabley means that the Opinion and Ordeer is **VACATED**, and therefore can only be interpreted as "a second bite at the apple"

FACTUALLY AND MATERIALLY DISTINGUISHABLE – In PECO's initial Pre-Hearing Memorandum, the case is made for a very limited scope, and for a scenario of "Dueling Experts", much like the first iteration of this case. At the bottom of Page 7, PECO states "*The Commission* ***has yet to develop a standard to evaluate MPC Section 619 in the context of the Environmental Rights Amendment*** *following the 2017 PEDF decision"*. PECO proposes that the standards developed in other Environmental Rights Amendment contexts by the

[3] *United States v. Williams*, 904 F.2d 7, 8 (7th Cir. **1990**) - The defendant argued that when a conviction is vacated, the effect is to nullify the judgment entirely and place the parties in the position of no trial having taken place at all, *United States v. Lawson,* 736 F.2d 835 (2d Cir.1984); thus a vacated judgment is of no further force or effect. *Simpson v. Motorists Mut. Ins. Co.*, 494 F.2d 850, 854 (7th Cir.), *cert. denied,* 419 U.S. 901, 95 S.Ct. 184, 42 L.Ed.2d 147 (1974). **The defendant is correct as to the law**, but that is not what happened in his case. What happened in this case was a clerical error, in that the court wrote that the CONVICTION was vacated, when, in fact, only the SENTENCE was vacated.

Pennsylvania Supreme Court, the Commonwealth Court, and the Environmental Hearing Board be used to formulate a standard for this Remand Proceeding." However, virtually all of the cases that PECO uses as precedent are Factually and Materially Distinguishable from the current proceeding. Act 13 of 2012 is **NOT** about Natural Gas Distribution Infrastructure in Densely Populated Suburban Neighborhoods; it is about Fracking and Natural Gas and Oil Development in the Agricultural and Wilderness Areas of Central and Western Pennsylvania. Pittsburgh sits on top of Marcellus Shale, but nobody is trying to Frack Highmark Stadium, Steelers Stadium, PPG Paints Arena, Acrisure Stadium and/or PNC Park. The location of a Natural Gas Expansion Plant at the Corner of Sproul and Cedar Grove Roads inMarple Township is so far beyond the pale that there is a requirement (at least in this unique situation) to develop a standard much higher than the one that PECO proposes.

The Major Functions Act 13 of 2012 are: to an impact fee on all unconventional wells drilled in the state, to create the Natural Gas Development Program to increase the use of natural gas for transportation, to strengthen existing environmental regulations and create new standards for unconventional well drilling, and to seek to improve consistency among local zoning regulations in the state.

In addition to Act 13 being related only tangentially to the current case, other cases that are cited are similarly unrelated to the current proceedings include:

- *Frederick v. Allegheny Twp. Zoning Hearing Bd., 196 A.3d 677, 695 (Pa. Commw. Ct. 2018)* is about a township writing a new ordinance related to fracking. There is no new ordinance here; the Marple Zoning Hearing Board made its decision based upon zoning regulations that had been in existence for years. Allegheny Township, in Westmoreland County, had an area of 32 sq. mi. and a population of 8,068 in 2018. On the other hand, Marple Township had an area of 10.5 sq. mi. and a population of 23,743 in 2015.
- Similarly, Robinson Twp. v. Pa. Pub. Util. Commission was concerned with the constitutionality of Act 13. It has NOTHING to do with the current situation.
- Ctr. For Coalfield Justice and Sierra Club v. DEP and Consol Pa. Coal Co., LLC, Permittee? What is the point here? Is PECO suggesting that the decisions of the Environmental Hearing Board related to expansion of coal mining activities should be

relevant to a case that puts Natural Gas Distribution Infrastructure (such as a Gas Expansion Plant) in the middle of a densely populated suburban neighborhood, immediately adjacent to homes and businesses?

As PECO cherry-picks quotes from these previous decisions, is is hard for me to see how quotes such as "*the Environmental Rights Amendment does not call for a stagnant landscape or for the **derailment of economic or social development** or for a sacrifice of **other fundamental values***." support PECO's argument for another round of "dueling experts" of a very limited scope. Nobody is calling for a stagnant landscape in this affair. There are MANY possible uses for the proposed location at the Corner of Sproul and Cedar Grove Roads that are better than a Gas Expansion Plant. And as far as the **derailment of economic, social, or other fundamental values** is concerned, it is PECO that is looking for such derailment, and it is the Environmental Rights Amendment where defense against that deraailment is sought.

And, if "*the Environmental Rights Amendment does not **impose** express duties on the government to enact **affirmative measures** to promote the rights articulated in the Environmental Rights Amendment*", then is must be said that it **does not prohibit** said affirmative measures either.

PUBLIC INPUT HEARINGS – The last time that Public Input Hearings were held, the voices of the residents were given no weight in the decision, which was based solely on the assumption that PECO had successfully argued that the location was "reasonably necessary", and other considerations were not relevant to a "619 procedure'.

INDEPENDENT THIRD PARTY – In PECO's Pre-Hearing Memorandum of June 20, 2023, PECO rejects Mr. Uhlman's proposal for an independent third party to perform the environmental review.

1. PECO claims that, "t*he mandate to perform a "constitutionally sound environmental impact review" rests on the Commission, not a third party*". However, the Order of the Commonwealth Court seeks a Finding, "...which must incorporate the results of a constitutionally sound environmental impact review." The order does not say who should

perform the review, and the history of this case, with multiple conflicting truths[4], requires that a higher level of discourse be entertained.

2. PECO claims that, "*limiting the facts of the environmental impact review to those put forward by a single entity deprives PECO of its right to due process to present all evidence that PECO believes is relevant to the issues before the Commission*" Au contraire, PECO will have ample opportunity to present all the evidence that it wants to, at any time that the ALJ sees fit. However, having an independent, mutually agreed upon third party of environmental experts sift through the conflicting claims, and searching for unbiased facts, can only benefit the decision in this case, benefiting both the public confidence in the decision of the court in this particular case, and the precedent that it sets for similar cases (at least when it comes to distribution infrastructure in a densly populated suburban neighborhood, if not for oil and gas fracking development infrastructure in the sparsely inhabited wilds of central Pennsylvania).

3. PECO claims that, "*the alleged adverse environmental impacts from the siting of the Station have already been identified (e.g., alleged noise, air emissions, and the PIR), and it should take no more than the timeline proposed above by PECO and Marple Township for the parties to evaluate whether these impacts rise to the level of unreasonable environmental degradation.*" Again, PECO assumes too much, in that, as has been outlined above, there is much to talk about <u>again</u>, as we revisit the VACATED decision. Additionally, PECO sees a limitation on the environmental review in that it would only cover three issues (the Blast Radius, the Noise from the Heaters, Regulators, Generators and other equipment, and the emissions from Blow Downs and from the Heaters). I see no such limitations expressed in the Order of the Commonwealth Court, and expect to see additional environmental aspects covered, including (but not limited to) aesthetics and low level vibration[5]

Additionally, PECO claims that, Mr. Uhlman's proposal creates unnecessary delay for a project that already has been unduly delayed." To the contrary, delays thus far have not been undue, and Mr. Uhlman's proposal is the best and shortest path to a decision that will not be again

[4] i.e PECO's rejection of the DonGuanella site for "unreasonable engineering constraints"

[5] I have personally witnessed tables and chandeliers shaking as a result of the operation of a gate station that interfaces with PECO's distribution system.

overturned by the Commonwealth Court because the environmental impact review will not have been constitutionally adequate.

WITNESSES – Witnesses have not yet been identified, but I reserve the right to call witnesses in the future.

SUMMARY – On Page 11 of PECO's Pre-Hearing Memorandum, PECO proposes three questions to be addressed by the court. The first, "*Whether the Commission's action... implicates the Environmental Rights Amendment*" has already been settled by the Commonwealth Court. If PECO wanted to argue that again, they should have gone to the Pennsylvania Supreme Court. The second, "*Whether the Commission's Action unreasonably impairs or otherwise causes the unreasonable degradation or deterioration of the public's right to: (i) clean air; (2) pure water; or (3) the preservation of the natural, scenic, historic and esthetic values of the environment*" is fair game, but not (for reasons explained above) with another round of "dueling experts". The third, "*Whether the siting of the Station's Buildings requires any "outside agency determinations" pertaining to: (i) explosion impact radius [PIR], (ii) noise, or (iii) heater emissions*" is a question that, due to the unique circumstances of this case, has the potential to set a new legal precedent, and will be decided by this court and/or by other courts on appeal.

The Initial Decision, included language about sympathy for the valid health and safety concerns of the Township and the Intervenors, but, unfortunately, the legislation controlling a "619 Procedure" did not allow the Public Utility Commission to review the environmental consequences of their decisions. With the recent ruling on this matter, the Commonwealth Court has changed that calculus. PECO could have appealed that decision to the Supreme Court, but chose not to. Instead, PECO intends to hobble the intent of the Commonwealth Court's Decision by arguing for another round of "dueling experts", and again arguing for a very limited scope of investigation. And of course, this has to be done very quickly, because PECO claims that there will be a problem in ten years.

Proposed Litigation Schedule for Remanded Proceeding – (see next page)

Date	Event
June 28, 2023 – 9:00 AM	Pre-hearing Conference Scheduled
September 21, 2023	All Parties must agree to a single Environmental Consultant who will perform the Constitutionally Sound Environmental Impact Review
September 21, 2024	Expected Completion of Constitutionally Sound Environmental Impact Review
November 21, 2024	Service of Supplemental Direct Testimony of all parties
October 8, 2024	Final Day for All Written Discovery to be Propounded
December 31, 2024	Service of Supplemental Rebuttal Testimony of all parties
Week of February 13, 2025	Evidentiary Hearings
March 14, 2025	Main Briefs Due
May 1, 2025	Reply Briefs

Respectfully Submitted on June 27, 2023

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P-2021-3024328 – PETITION OF PECO ENERGY COMPANY FOR A FINDING OF NECESSITY PURSUANT TO 53 P.S. § 10619 THAT THE SITUATION OF TWO BUILDINGS ASSOCIATED WITH A GAS RELIABILITY STATION IN MARPLE TOWNSHIP, DELAWARE COUNTY IS REASONABLY NECESSARY FOR THE CONVENIENCE AND WELFARE OF THE PUBLIC.

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