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July 17, 2023

VIA EFILE

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

Re: 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
PUC DOCKET NO. P-2021-3024328

Dear Ms. Chiavetta:

Pursuant to the Honorable Administrative Law Judge Mary D. Long's July 5, 2023 Prehearing Order in the above-referenced matter, PECO Energy Company hereby files the enclosed Objections and Motion to Strike the Late-Filed Protest of Diana Giampino.

By copy of this letter and enclosure Protestant Diana Giampino is provided the Notice to Plead and notified that a response is required pursuant to 52 Pa. Code § 5.103(c).

If additional information is needed about this matter, please contact me via email or at my direct-dial number above. Thank you.

Very truly yours,

s/ Christopher A. Lewis

Christopher A. Lewis, Esq.

Enclosure

cc: The Honorable Mary D. Long (via email)
Protestant Diana Giampino (via First-Class Mail)
Full Service List (via email)

**BEFORE THE
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 : Docket No. P-2021-3024328
Marple Township, Delaware County Is :
Reasonably Necessary for the Convenience :
and Welfare of the Public :

NOTICE TO PLEAD

TO: Diana Giampino:

The attached Motion to Strike of PECO Energy Company (“PECO”) has been filed with the Pennsylvania Public Utility Commission in the above-captioned proceeding. If you wish to respond to the Motion, you must, pursuant to the provisions of 52 Pa. Code § 5.103, take action by filing a response with the Secretary of the Pennsylvania Public Utility Commission and serving a copy of that response upon all parties of record and the Administrative Law Judge within twenty (20) days from the date of service. You are warned that if you fail to do so, the case may proceed without you and an order may be entered against you by the Commission without further notice.

File with:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street – Filing Room
2nd Floor North
Harrisburg, PA 17105

With a copy to:

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Accepts eService

/s/ Christopher A. Lewis

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Counsel for PECO Energy Company

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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Marple Township, Delaware County Is :
Reasonably Necessary for the Convenience :
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**PECO ENERGY COMPANY’S OBJECTIONS AND MOTION TO STRIKE LATE-FILED
PROTEST OF DIANA GIAMPINO**

PECO Energy Company (“PECO”) hereby requests, pursuant to 52 Pa. Code § 1.38 and the July 5, 2023 Prehearing Order, that the Honorable Administrative Law Judge Mary D. Long strike from the record the Protest of Diana Giampino (the “Giampino Protest”) and in support thereof avers as follows:

PRELIMINARY STATEMENT

The Giampino Protest was filed over two years after the protest filing deadline and does not comply with the timing requirements set forth in 52 Pa. Code § 5.14(d) and 5.53. There is no good cause to accept the late-filed protest since there is no reasonable excuse for having missed the protest due date, the proceeding was contested at the time of the protest, receipt of the late-filed protest could delay the orderly progress of the case, and the protest could significantly broaden the issues. Accordingly, PECO requests that the Protest be stricken from the record.

I. FACTUAL BACKGROUND

The Protest Deadline

1. On February 26, 2021, PECO filed a petition (“Petition”) seeking a finding from the Commission, pursuant to Section 619 of the Municipalities Planning Code, 53 P.S. § 10619,

that the situation of two buildings associated with PECO's proposed Natural Gas Reliability Station (the "Station") at 2090 Sproul Road in Marple Township, Delaware County is reasonably necessary for the convenience or welfare of the public, and therefore exempt from local zoning, and that the security fence appurtenant to the Station is a public utility facility exempt from local land use controls.

2. On March 10, 2021, the Commission issued a Prehearing Conference Notice, whereby the Commission designated Administrative Law Judge Emily DeVoe as the Presiding Officer and set a deadline of April 12, 2021 for the filing of protests and answers to PECO's Petition in accordance with Title 52 of the Pennsylvania Code (the "Protest Deadline").

3. More than fifteen days before the Protest Deadline, on March 26, 2021, notice of PECO's Petition was published in both the Delaware County Daily Times and Sunday Times, with proof of publication filed in this proceeding on April 8, 2021. In addition, on March 27, 2021, notice of PECO's Petition was published in the Pennsylvania Bulletin. The notice in each publication stated that "[f]ormal protests and petitions to Intervene must be filed . . . on or before April 12, 2021."

4. On or before April 12, 2021, Marple Township, Delaware County, and two individuals, including Mr. Uhlman, filed Petitions to Intervene in this proceeding. Also on or before April 12, 2021, more than 60 individuals filed Protests in this proceeding.

5. On April 14, 2021 Judge DeVoe issued an Interim Order Providing Information to *Pro Se* Protestants and recognized 63 individual Protestants and two individuals as filing Petitions to Intervene.

6. On April 15, 2021, Intervenor Mr. Theodore Uhlman filed a petition seeking to extend the Protest and Petition to Intervene timeframe in this proceeding. On April 23, 2021, Judge

DeVoe issued a Prehearing Order, which, *inter alia*, denied: (1) Mr. Uhlman’s Motion to Extend the Protest Deadline, and (2) a Motion for Leave to File Late-Filed Protests filed by Sylvia and Joseph Baker.

The Initial Proceeding

7. Four public input hearing sessions were held on May 25 and May 26, 2021. During these public input hearing sessions, ninety-three individuals testified under oath and two offered comments. In addition to the public hearing sessions, the matter included the submission of direct, rebuttal, and surrebuttal testimony, four days of evidentiary hearings that occurred on July 15, 16, 20 and 22, 2021, and briefing from the parties (the “Initial Proceeding”).

8. On December 7, 2021, Judges DeVoe and Long issued an Initial Decision, finding that the situation of the two buildings associated with the Station was reasonably necessary for the convenience or welfare of the public pursuant to Section 619, and on March 10, 2022, the Commission on exceptions issued an Opinion and Order (the “Commission’s Opinion”) that likewise found that the situation of the buildings was reasonably necessary for the convenience or welfare of the public.

9. Following the Initial Proceeding, Marple Township filed a petition for review of the Commission’s Opinion with the Commonwealth Court, and on March 9, 2023, the Commonwealth Court issued an Opinion and Order vacating the Commission’s Opinion and remanding the matter to the Commission to “issue an Amended Decision” that “must incorporate the results of a constitutionally sound environmental impact review as to [the proposed siting of the buildings].” *Twp. of Marple v. Pennsylvania Pub. Util. Comm’n*, No. 319 C.D. 2022, 2023 WL 3069788 at *5 (Pa. Commw. Ct. Mar. 9, 2023), reconsideration and reargument denied (Apr. 25, 2023) (Publication Ordered Apr. 25, 2023). Citing the Environmental Rights Amendment

(“ERA”), article I, section 27 of the Pennsylvania Constitution, the Court held that “a Section 619 proceeding is constitutionally inadequate unless the Commission completes an appropriately thorough environmental review of a building siting proposal and, in addition, factors the results into its ultimate determination regarding the reasonable necessity of the proposed siting.” *Id.*

The Remand Proceeding

10. On June 5, 2023, Judge DeVoe issued a Prehearing Conference Order, which was served upon all active and inactive parties to the Initial Proceeding, scheduling a Prehearing Conference for the Remand Proceeding on June 21, 2023.

11. On June 20, 2023, Marilia Mancini-Strong and Jeffrey Strong filed Protests with the Commission. Ms. Mancini-Strong and Mr. Strong had both previously filed Protests with the Commission prior to the Protest Deadline and participated in the Initial Proceeding.¹

12. The parties convened for the Prehearing Conference as scheduled. However, due to technical difficulties, the conference was adjourned and on June 22, 2023, Judge DeVoe issued an Interim Order (the “Interim Order”), rescheduling the Prehearing Conference for June 28, 2023.

13. The Interim Order explains, “on remand, this proceeding must fulfill the directive of the Commonwealth Court . . . that the Commission amend its March 10, 2022 Opinion and Order following a constitutionally sound environmental impact review [as to the proposed siting of the buildings].” *See* Interim Order at pp. 4-5. Additionally, the Interim Order reflects the limited scope of the Remand Proceeding, explicitly stating that “[t]his Remand Proceeding is not an opportunity to relitigate the entire Initial Proceeding. Pennsylvania case law is clear that a remand proceeding is limited to the issues contained in the remand order.” *See* Interim Order at p. 5.

¹ PECO believes that the June 20, 2023 protests filed by Ms. Mancini-Strong and Mr. Strong constitute amendments of their earlier protests pursuant to 52 Pa. Code § 5.91(a) and, therefore, is not moving to strike these protests.

14. On June 27, 2023, nearly one week after the initially scheduled Prehearing Conference, and only one day before the rescheduled conference, the Giampino Protest was filed with the Commission.²

15. On June 28, 2023, the case was assigned to Judge Long, and the Prehearing Conference was held as scheduled. Subsequently, on July 5, 2023, Judge Long issued a Prehearing Order (“Prehearing Order”) memorializing the matters agreed upon at the prehearing conference.

16. The Prehearing Order instructs that PECO file the instant Motion indicating which protests filed since the remand of this case from the Commonwealth Court it does not object to, and which protest it moves to strike. *See* Prehearing Order at p. 2. In addition, the Prehearing Order sets forth Judge Long’s denial of the intervenors’ request that additional public input hearings be conducted, reasoning: “The issue on remand, an appropriately thorough environmental review of a building siting proposal, is technical and scientific and not conducive to lay testimony[,]” and noting that “[t]he public opposition to PECO’s project is well-documented in the evidentiary record.” Prehearing Order at pp. 2-3.

II. LEGAL STANDARD

17. Pursuant to 52 Pa. Code § 1.38, “[t]he Commission may reject a filing if it does not comply with any applicable statute, regulation or order of the Commission.”

18. A “person objecting to the approval of an application filed with the Commission may file a protest to the application,” which must comply with the applicable regulations. 52 Pa. Code § 5.51(a). “A protest to an application must: (1) set out clearly and concisely the facts from

² The Giampino Protest was drafted and filed by *pro se* intervenor Mr. Uhlman. Pursuant to 52 Pa. Code §§ 1.21 & 1.22, protestants may either represent themselves or be represented by an attorney licensed to practice law in the Commonwealth of Pennsylvania or admitted Pro Hac Vice. Accordingly, as stated in the Prehearing Conference Order dated June 5, 2023, “[u]nless you are an attorney, you may not represent someone else.” According to Ms. Giampino’s filing, Mr. Uhlman, who is not an attorney, “listened to her concerns, typed the preceding, and helped file her protest.” *See* Giampino Protest.

which the alleged interest or right of the protestant can be determined; (2) state the grounds of the protest; and (3) set forth the facts establishing the protestant's standing to protest. 52 Pa. Code § 5.52(a). Further, protests "shall be filed within the time specified in the published notice of the application." 52 Pa. Code § 5.53. And 52 Pa. Code § 5.14(d) specifically requires that a 15-day protest period be established for Section 619 proceedings.

19. The Commission should not accept late-filed protests as a matter of course, but "may accept late-filed protests at its discretion." *Application of Leatherstocking Gas Co., LLC, for Approval to Supply Nat. Gas Serv. to the Pub. in N. Susquehanna County, in the Townships of Bridgewater, Forest Lake, Great Bend, Harmony, New Milford, and Oakland and in the Boroughs of Great Bend, Hallstead, Lanesboro, Montrose, New Milford, Oakland and Susquehanna*, A-2011-2275595, 2012 WL 1794912, at *12 (Pa.P.U.C. Mar. 2, 2012).

20. However, "[w]ithout a showing of good cause, the failure to file a timely protest is a bar to participation in the proceeding." *Application of Lifestar Response of Nj-Lifestar Response Corp to Amend and Expand the Right to Provide Wheelchair and Med. Transportation Services Transport, As A Com. Carrier, by Motor Veh., to Persons, in Paratransit Operations*, A-2013-2352953, 2014 WL 1747698, at *7 (Pa.P.U.C. Apr. 3, 2014) (citing *Re. Milton Transportation, Inc.*, 56 Pa. PUC 623 (1982) (citing *Re: S.T.S. Motor Freight, Inc.*, 54 Pa. PUC 343, 344 (1980); *Application of Artesian Water Pennsylvania, Inc. for Approval to Begin to Offer, Render, Furnish or Supply Water Service to the Public in a portion of Franklin Township, Chester County*, Docket No. A-210111F0003 (Opinion and Order entered June 24, 2004); *Application of Willow Grove Yellow Cab Co., Inc., t/d/b/a Bux-Mont Yellow Cab & t/d/b/a Bux-Mont Transportation Services Co.*, Docket No. A-2009-2123552, 2011 Pa. PUC LEXIS 21 (Pa. PUC August 31, 2011)).

21. When determining whether good cause exists to permit late intervention, the Commission applies the factors set forth in *Joint Application of Pennsylvania-American Water Company and Thames Water Aqua Holdings GmbH*, Docket Nos. A-212285F0096, A-230073F0004, 2002 Pa. PUC LEXIS 15 (May 9, 2002) (*Pennsylvania American*). The four *Pennsylvania American* standards are:

1. Does the petitioner have a reasonable excuse for missing the protest due date?
2. Was the proceeding contested at the time of the filing of the protest?
3. Will the receipt of the late filed protest delay the orderly progress of the case?
4. Will the late filed protest significantly broaden the issues or shift the burden of proof?

Application of Artesian Water Pennsylvania, Inc. for Approval to Begin to Offer, Render, Furnish or Supply Water Service to the Public in a portion of Franklin Township, Chester County, Docket No. A-210111F0003 (Opinion and Order entered June 24, 2004) (citing *Pennsylvania American*).

III. ARGUMENT

a. **The Giampino Protest is Untimely, There is No Good Cause to Permit Late Intervention, and The Protest Should Be Stricken.**

22. The Giampino Protest is clearly untimely, as it was filed with the Commission on June 27, 2023—over *two years* after the April 12, 2021 Protest Deadline. Application of the *Pennsylvania American* factors demonstrates that there is no good cause to permit this late-filed protest.

23. With regard to the first standard, there is no reasonable excuse for Ms. Giampino missing the Protest Deadline. 63 individual Protestants have been recognized in this proceeding

demonstrating that adequate notice and opportunity to participate was provided. The Giampino Protest represents that Ms. Giampino “is a resident of Marple Township for about 24 years,” but it offers no explanation for the over two-year delay in filing a protest. *See* Giampino Protest. Accordingly, because there is no reasonable excuse for the substantial delay in filing the protest, this factor should weigh against Ms. Giampino.

24. The second factor also weighs against accepting the late-filed protest, since the proceeding was contested at the time the Giampino Protest was filed.

25. The third factor similarly weighs against acceptance of the Giampino Protest, since the addition of Ms. Giampino as a Protestant could delay the orderly progress of the case.

26. Importantly, the Remand Proceeding “is not an opportunity to relitigate the entire Initial Proceeding. Pennsylvania case law is clear that a remand proceeding is limited to the issues contained in the remand order.” *See* Interim Order at p. 5; *see also Del. Riverkeeper Network v. Middlesex Twp. Zoning Hearing Bd.*, 215 A.3d 96, 2019 WL 2605850, at *1 n.4 (Pa. Commw. Ct. June 26, 2019) (remand proceedings do not provide litigants “a second bite at the apple” on issues outside the limited purpose and scope of the remand proceeding) (citation omitted). Having failed to file a timely protest two years ago, Ms. Giampino now seeks an improper “second bite at the apple” on remand.

27. The Remand Proceeding is narrowly focused on the Commonwealth Court’s mandate for the Commission to amend its prior decision after a constitutionally sound environmental impact review. “The issue on remand, an appropriately thorough environmental review of a building siting proposal, is technical and scientific and not conducive to lay testimony.” Prehearing Order at p. 2. The Giampino Protest does not raise any new issues that have not already been expressed by the individuals who filed timely protests or during the public input hearings.

Put simply, “[t]he public opposition to PECO’s project is well-documented in the evidentiary record.” Prehearing Order at p. 3.

28. Acceptance of Ms. Giampino’s protest would likely lead to the filing of a substantial number of additional untimely protests, requiring the Commission and the parties to expend additional resources, and could significantly delay the orderly progress of the case. Therefore, the third factor should militate against accepting the Giampino Protest.

29. Finally, the fourth factor also weighs against a finding of good cause to accept the late protest, and any other late-filed protests. The Prehearing Order was clear as to the specific scope of this Remand Proceedings and the demonstrated opposition to this matter within the community. *See* Prehearing Order at pp. 2-3. Acceptance of the Giampino Protest, and any other late-filed protests, has the potential for late-filed protestants to raise any number of issues in their filings that are beyond the specific scope of this Remand Proceeding and these filings do not aid the Commission’s evaluation of the recognized technical and scientific issues in this proceeding.

WHEREFORE, for all the reasons set forth above, PECO submits that there exists no good cause to accept the untimely Giampino Protest and respectfully requests that Your Honor grant its Motion to Strike.

Respectfully submitted,
BLANK ROME LLP

/s/ Christopher A. Lewis

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Counsel for PECO Energy Company

Date: July 17, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing Objections and Motion to Strike Late-Filed Protest of Diana Giampino in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party) via mail or electronic mail on the following:

Diana Giampino
2209 Clover Drive
Broomall, PA 19008

FULL SERVICE LIST:

Honorable Mary D. Long
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/s/ Stephen C. Zumbrun

Counsel to PECO Energy Company

Dated: July 17, 2023