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August 4, 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:

In connection with the above-referenced matter, PECO Energy Company hereby files the enclosed Answer to Ted Uhlman's Application for Reconsideration of the Format for the Review and the Scope of Inquiry in the Remanded Docket.

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)
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 :

**PECO ENERGY COMPANY’S ANSWER TO TED UHLMAN’S APPLICATION FOR
RECONSIDERATION OF THE FORMAT FOR THE REVIEW AND THE SCOPE OF
INQUIRY IN THE REMANDED DOCKET**

Pursuant to Section 5.61 of the Pennsylvania Public Utility Commission’s (the “Commission”) Regulations, 52 Pa. Code § 5.61, PECO Energy Company (“PECO”) hereby submits the following Answer to Ted Uhlman’s Application for Reconsideration of the Format for the Review and the Scope of Inquiry in the Remanded Docket¹ (the “Uhlman Motion”) and avers as follows:

PRELIMINARY STATEMENT

The Commission should reject Mr. Uhlman’s proposal that the parties “mutually agree upon a single group of environmental experts to execute the environmental review.” This proposal violates PECO’s right to due process and infringes on the Commission’s role as ultimate factfinder. Further, Mr. Uhlman’s contention that the proceeding should include an analysis of alternative sites is wrong: an analysis of alternative sites is outside the proper scope of the Remand Proceeding, which is limited to a constitutionally sound environmental impact review as to the

¹ Although Uhlman’s submission purports to be an “Application,” it does not meet the requirements of 52 Pa. Code § 5.12. The submission is categorized as a “Motion” on the docket, and PECO’s response reflects this designation.

siting of the buildings at PECO's proposed Natural Gas Reliability Station in Marple Township. Accordingly, PECO requests that the Uhlman Motion be denied.

I. FACTUAL BACKGROUND

The Initial Proceeding

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 (the "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. The matter included four public input sessions, 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").²

3. On December 7, 2021, Judges DeVoe and Long issued an Initial Decision, finding that the situation of the 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

² As explained in the June 22, 2023 Interim Order, "The Initial Proceeding included extensive testimony on: (1) the need for the Station as part of a broader Natural Gas Reliability Project to provide additional reliable supply of natural gas to an area with recognized demand; (2) the purpose of the Station's two Buildings; (3) PECO's efforts to locate a suitable site for the Station and the site selection criteria used to support such effort; (4) the optimal location of 2090 Sproul Road due to engineering considerations and availability; (5) PECO's safety record and procedures, and the general safety of natural gas infrastructure in the United States; and (6) health and welfare aspects of the Station, such as PECO's planned environmental remediation of the selected site, that the Station would comply with Marple Township's noise ordinance, and that the Station's preheaters were exempt from Pennsylvania Department of Environmental Protection (DEP) permitting." *See* Interim Order at pp. 2-3.

likewise found that the situation of the buildings was reasonably necessary for the convenience or welfare of the public.

4. 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*, 294 A.3d 965 (Pa. Commw. Ct. 2023), reconsideration and reargument denied (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

5. On June 22, 2023, Judge DeVoe issued an Interim Order (the "Interim Order"), rescheduling the Prehearing Conference for June 28, 2023.

6. 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.

7. Additionally, the Interim Order sets forth the limited scope of the Remand Proceeding, explicitly stating: "This 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.

8. 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.

9. The Prehearing Order states: “The Intervenors [Uhlman and Baker] requested the appointment of an independent expert to conduct the environmental assessment of the building siting proposal. The request was denied.” *See* Prehearing Order at p. 4.

10. On July 19, 2023, Mr. Uhlman filed the instant Motion, seeking reconsideration of the format of the environmental impact review and the scope of the Remand Proceeding.

II. ARGUMENT

a. Appointment of a Single Group of Environmental Experts is Improper, Would Usurp the Commission’s Authority, and Deprive PECO of its Constitutional Right to Due Process

11. Mr. Uhlman’s proposal, unsupported by any authority, that a single group of environmental experts perform the environmental review should be rejected on the basis that such a review would usurp the Commission’s authority and violate PECO’s due process rights.

12. The Commonwealth Court’s mandate to perform a “constitutionally sound environmental impact review” rests on the Commission, not a third party. *See Twp. Of Marple*, 294 A.3d at 973-74 (*[T]he Commission* is obligated to consider the environmental impacts of placing a building at a proposed location . . .”) (emphasis added); *id.* at 974 (“The source of *the Commission's responsibility* to conduct this type of review in a Section 619 proceeding is not the MPC itself or another statute; rather, it is [the ERA].”) (emphasis added); *id.* (“[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.”) (emphasis added).

13. It is well settled that the Commission “is the ultimate factfinder[] and makes all decisions as to the weight and credibility of evidence.” *Borough of Duncannon v. Pa. Pub. Util. Comm'n*, 713 A.2d 737, 739 (Pa. Cmwlth. 1998).

14. Mr. Uhlman’s proposal that the parties agree on a single set of facts developed by a group “from industry, academia, government, whatever” would divest the Commission of its role as the ultimate factfinder and is without precedent. *See* Uhlman Motion at p. 4.

15. The proposal would also deprive PECO of the opportunity offer evidence in support of its position, contrary to the fundamental tenets of due process.

16. “The [Public Utility] Commission, as an administrative body, is bound by the due process provisions of constitutional law and by the principles of common fairness.” *Smith v. Pa. Pub. Util. Comm'n*, 162 A.2d 80, 83 (Pa. Super. 1960) (citations omitted). “Among the requirements of due process are notice and an opportunity to be heard on the issues, to be apprised of the evidence submitted, to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal.” *Id.*

17. Limiting the facts of the environmental impact review to those put forward by a third-party would deprive PECO of its right to due process to present all evidence that PECO believes is relevant to the issues before the Commission.

b. The Scope of the Remand Proceeding is Properly Limited to the Issues Contained in the Remand Order

18. 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:

“[I]t has long been the law in Pennsylvania that following remand, a lower court is permitted to proceed only in accordance with the remand order.” *Commonwealth v. Sepulveda*, 636 Pa. 466, 144 A.3d 1270, 1280 n.19 (2016). In *Levy v. Senate of Pennsylvania*, 94 A.3d 436 (Pa. Cmwlth.), *appeal denied*, 630 Pa. 738, 106 A.3d 727 (Pa. 2014), which the Supreme Court cited with approval in *Sepulveda*, this Court explained: “Where a case is remanded for a specific and limited purpose, ‘issues not encompassed within the remand order’ may not be decided on remand. A remand does not permit a litigant a ‘proverbial second bite at the apple.’” *Levy*, 94 A.3d at 442 (quoting *In re Indep. Sch. Dist. Consisting of the Borough of Wheatland*, 912 A.2d 903, 908 (Pa. Cmwlth. 2006)).”

Marshall v. Commonwealth, 197 A.3d 294, 306 (Pa. Commw. Ct. 2018), *aff’d*, 214 A.3d 1239 (Pa. 2019).

19. The Commonwealth Court’s Opinion and Order contained three instructions to the Commission for this Remand Proceeding: (1) pursuant to the Environmental Rights Amendment, amend its decision and “incorporate the results of a constitutionally sound environmental impact review as to siting the so-called ‘Fiber Building’ and ‘Station Building’ upon the property located at 2090 Sproul Road in the Township of Marple, Pennsylvania” (*Twp. Of Marple*, 294 A.3d at 975); (2) “identify any such outside agency determinations that pertain[] to explosion impact radius [PIR], noise, or heater emissions” (*see id.*); and (3) factor the results of the appropriately thorough environmental review of the Buildings siting proposal into the Commission’s ultimate determination regarding the reasonable necessity of the proposed siting. (*See id.*).

20. 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).

21. This Motion represents yet another attempt by Mr. Uhlman to raise the issue of an alternative site, which has already been rejected multiple times by both the Commission and the Commonwealth Court, and which should again be rejected here.

22. Mr. Uhlman provides *no* authority for his contention that the scope of the proceeding should go beyond the environmental impact review ordered by the Commonwealth Court and that “the engineering and environmental pros and cons of the proposed location [should] be balanced by the pros and cons of other locations.” *See* Uhlman Motion at p. 4.

23. Pennsylvania law is clear that a remand proceeding is limited in scope to the issues contained in the remand order—here, a “constitutionally sound environmental impact review as to siting the so-called ‘Fiber Building’ and ‘Station Building’ ***upon the property located at 2090 Sproul Road . . .***” (*Twp. Of Marple*, 294 A.3d at 975) (emphasis added).

24. There is nothing in the Commonwealth Court Opinion and Order to suggest that any locations other than the property located at 2090 Sproul Road should be considered in this Remand Proceeding—to the contrary, the Commonwealth Court confirmed that consideration of alternative sites is not necessary, since “Section 619 ... does not require a utility to prove that the site it has selected is absolutely necessary or that it is the best possible site.” *Twp. Of Marple*, 294 A.3d at 972 (quoting *O'Connor v. Pa. Pub. Util. Comm'n*, 582 A.2d 427, 433 (1990)).

25. As explained in its *Amended Remand Proceeding Prehearing Conference Memorandum*, filed with the Commission on June 27, 2023 and incorporated herein by reference,

PECO asserts that the standards developed in other Environmental Rights Amendment contexts by the Pennsylvania Supreme Court, the Commonwealth Court, and the Environmental Hearing Board support PECO's position that the scope of the Remand Proceeding should properly be limited to the consideration of:

1) Whether the Commission's action of finding that siting PECO's proposed Station Buildings is reasonably necessary for the convenience or welfare of the public pursuant to Section 619 of the MPC (the "Commission's Action") implicates the Environmental Rights Amendment (*see, e.g., Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 196 A.3d 677, 695 (Pa. Commw. Ct. 2018).

2) 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 (*see, e.g., id.; see also Ctr. For Coalfield Justice and Sierra Club v. DEP and Consol Pa. Coal Co., LLC, Permittee*, 2017 WL 3842580, at *32-35 (Pa. Env. Hrg. Bd., Aug. 15, 2017); and

3) 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." (See *Twp. of Marple*, 294 A.3d at 975.)

WHEREFORE, for all the reasons set forth above, PECO requests that the Uhlman Motion be denied.

Respectfully submitted,
BLANK ROME LLP

/s/ Christopher A. Lewis

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Counsel for PECO Energy Company

Date: August 4, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing Answer to Ted Uhlman's Application for Reconsideration of the Format for the Review and the Scope of Inquiry in the Remanded Docket 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:

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Dated: August 4, 2023