

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PECO Energy Company for a Finding	:	P-2021-3024328
of Necessity Pursuant to 53 P.S. § 10619 that the	:	(On Remand)
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	:	

NOTICE TO PLEAD

Pursuant to 52 Pa. Code § 5.103(c), you are hereby notified that, if you do not file a written response to the enclosed Motion in Limine within four (5) days from service of this notice,¹ a decision may be rendered against you. Any Response to the Motion must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for Marple Township and active parties, and where applicable, the Administrative Law Judge presiding over the issue. File with: Rosemary Chiavetta, Secretary Pennsylvania Public Utility Commission Commonwealth Keystone Building 400 North Street, Second Floor Harrisburg, PA 17120.

¹ This motion requests that the ALJ order an expedited response time of 5-days due to the procedural schedule in this matter. Should the ALJ grant this request, the 20-day response time under 52 Pa. Code § 5.103(c) will be modified as ordered.

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**MARPLE TOWNSHIP’S MOTION IN LIMINE TO (1) STRIKE PORTIONS OF
PECO’S REBUTTAL THAT VIOLATES THE COMMISSION’S REGULATIONS AND
MARPLE’S OWN DUE PROCESS; (2) MODIFY THE PRECEDURAL SCHEDULE
TO ALLOW MARPLE TO CONDUCT ADDITIONAL DISCOVERY AND PRESENT
SURREBUTTAL; (3) REQUEST FOR CONTINUANCE OF HEARINGS, AND (4)
REQUEST FOR EXPEDITED 4-DAY RESPONSE PERIOD**

Marple Township, by its undersigned counsel, requests your Honor enforce 52 Pa. Code §5.243(e)’s prohibition that PECO is not permitted to introduce evidence during a rebuttal phase which should have been included in its case-in-chief and strike portions of PECO’s rebuttal testimony that violate Commission’s regulations and Marple’s due process. Allowing PECO to present rebuttal testimony that could have and should have been included in PECO’s direct testimony amounts to trial by ambush which violates Marple’s due process rights because Marple has no meaningful opportunity to respond to the new aspects improperly presented in rebuttal testimony.² In the alternative to granting this motion to strike testimony, Marple requests

² Pennsylvania Public Utility Commission v. UGI Utilities, Inc., 1994 Pa. PUC LEXIS 138, *85; Pennsylvania Pub. Util. Comm’n v Total Environmental Solutions, Inc., 103 Pa. P.U.C. 110 (July 30, 2008); Pennsylvania Public Utility Commission v. Total Environmental Solutions, Inc. -- Treasure Lake Water Division, et al., Docket No. R00072493, 2008 Pa. PUC LEXIS 42 at *114-116 (Pa PUC May 23, 2008) (“...it is not equitable to permit TESI to take a second bite at direct testimony, or to allow it to shore-up inadequate direct at the rebuttal phase of this case.”), aff’d, Opinion and Order at 89 (July 30, 2008) (“TESI”); City of Lancaster (Sewer Fund) v. Pennsylvania Pub. Util. Comm’n, 793 A.2d 978 (Pa. Cmwlth. 2002).

a meaningful opportunity to conduct discovery and to respond to PECO's rebuttal testimony that violates 52 Pa. Code §5.243(e).

Additionally, Marple requests that Your Honor modify the hearing schedule in this matter to allow for additional discovery and written surrebuttal testimony. Marple also requests an expedited five-day response period for this motion pursuant to 52. Pa. Code §5.103(c) to allow this motion and the procedural issue here to be resolved prior to the currently scheduled November 14-17, 2023 hearings.

Finally, if Your Honor does not strike PECO's "supplemental direct testimony" or extend Marple any meaningful opportunity to conduct discovery and respond, Marple respectfully requests Your Honor certify to the Commission as a material question pursuant to 52 Pa. Code §5.305 whether PECO's testimony which violates the Commission's regulations and Marple's due process rights should be permitted in the rebuttal stage when Marple lacks the opportunity to respond, and stay the schedule and proceeding pending guidance from the Commission.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This matter, initiated in 2021, is now on remand from the Commonwealth Court's March 9, 2023 Opinion and Order. Specifically, the Commonwealth Court Ordered that the matter be remanded to the PUC for an amended decision which must incorporate the results of a constitutionally sound environmental impact review. Based upon the ERA, the Commission is to complete an appropriately thorough environmental review of the building siting proposal and, in addition, factor the results into its ultimate determination regarding the reasonable necessity of the proposed siting.

Service of direct testimony of all parties was due on September 22, 2023. In accordance with the schedule and the purpose of the proceedings given the Commonwealth Court's

directive, Marple submitted the testimony of Timothy R. McAuley, MS, PhD who conducted an air modeling assessment and provided expert testimony regarding his findings. PECO did not present testimony of any expert who had conducted modeling or any assessments.

Thereafter, PECO served Marple Township with discovery requests including interrogatories and requests for production of documents directed towards Dr. McAuley, Marple's air quality expert, which Marple responded to and produced numerous documents therewith.

In accordance with the schedule, rebuttal testimony was due October 30, 2023. For the first time, in its rebuttal testimony, PECO provided testimony from Jeffrey Harrington with purported results of air dispersion modeling. Mr. Harrington not only presents new data and information but opines on the data used by Dr. McAuley as provided to him by Marple in PECO's discovery request. Jeffrey Harrington's "rebuttal" as it pertains to air modeling is nothing more than a second bite at the apple by PECO and a way to shore up its direct, on matters that should have been included in PECO's case-in-chief on September 22, 2023.

This action of PECO violates the Commission's regulations which expressly bar parties from introducing evidence during a rebuttal phase that should have been included in the party's case-in-chief and seeks nothing more than to ambush Marple with new information when it has no meaningful opportunity to respond within the existing procedural schedule in complete violation of Marple's due process rights. This testimony must be stricken.

In the alternative to striking portions of PECO's rebuttal, Marple requests a meaningful opportunity to respond to the new information provided by Jeffrey Harrington. For instance, Mr. Harrington states that Dr. McAuley utilized the wrong design proposal for the gas reliability station, however there is nothing in the underlying record in this matter that states that a final

design has been determined. Mr. Harrington described findings from his own air dispersion modeling without disclosing the input data he utilized. Mr. Harrington also misstates many of Dr. McAuley's findings.

Marple must be afforded the opportunity to conduct discovery and request the data utilized by Mr. Harrington in his modeling, just as PECO requested of Dr. McAuley. Furthermore, Marple must be given the opportunity to respond to this new testimony in compliance with due process and requests Your Honor formally allow Marple to present surrebuttal testimony on the limited issue described in this motion.

II. LEGAL ARGUMENT

A. PORTIONS OF PECO'S REBUTTAL TESTIMONY OF JEFFREY HARRINGTON MUST BE STRICKEN AS PECO IS BARRED FROM INTRODUCING EVIDENCE DURING REBUTTAL WHICH SHOULD HAVE BEEN IN ITS CASE-IN-CHIEF

The Commission's regulations bar the introduction of evidence in rebuttal that should have been included in the party's direct case:

- (e) A party **will not be permitted to introduce evidence during a rebuttal phase** which:
 - (1) is repetitive.
 - (2) **should have been included in the party's case-in-chief.**
 - (3) substantially varies from the party's case-in-chief.

52 Pa. Code §5.243(e)(emphasis added).

The purpose of the rule is to protect due process rights to avoid trial by ambush and prevent surprise. "The clear purpose of it [52 Pa. Code § 5.243(e)] is to avoid trial by ambush and the prevention of surprise can only be achieved if the parties are confined to the scope of their direct case." *Pennsylvania Public Utility Commission v. UGI Utilities, Inc.*, 1994 Pa. PUC LEXIS 138, *85; *Pennsylvania Pub. Util. Comm'n v Total Environmental Solutions, Inc.*, 103

Pa. P.U.C. 110 (July 30, 2008) (parties here were “ambushed” by the new information contained in rebuttal testimony that “corrected” information provided in direct testimony and discovery responses.); *Pennsylvania Public Utility Commission v. Total Environmental Solutions, Inc. -- Treasure Lake Water Division, et al.*, Docket No. R-00072493, 2008 Pa. PUC LEXIS 42 at *114-116 (Pa PUC May 23, 2008) (“...it is not equitable to permit TESI to take a second bite at direct testimony, or to allow it to shore-up inadequate direct at the rebuttal phase of this case.”), *aff’d*, Opinion and Order at 89 (July 30, 2008) (“TESI”); *City of Lancaster (Sewer Fund) v. Pennsylvania Pub. Util. Comm’n*, 793 A.2d 978 (Pa. Cmwlth. 2002) (Commonwealth Court affirmed the PUC’s ruling that the City improperly proffered direct evidence during a rebuttal phase of the proceeding, citing 52 Pa. Code § 5.243(e)) (“City of Lancaster”).

Here, PECO should have submitted an air modeling analysis in its case-in-chief as the proponent of the project, the party with the burden of proof, and in accordance with the remand Order of the Commonwealth Court. It defies logic that the proponent of a project would not submit its modeling for the other parties to then analyze. PECO was either not expecting Marple to conduct air modeling or specifically omitted air modeling hoping the Commission would not consider it. Either way, it is evidence that could have and should have been included in PECO’s case-in-chief and should not be permitted in rebuttal.

Specifically, the report of, results of and any mention in Jeffrey Harrington’s rebuttal testimony of Tetra Tech’s modeling analysis should be precluded. While PECO is permitted to respond to the air modeling assessment of Tim McAuley, it cannot submit new air modeling testing, data or results in its rebuttal.

B. IN THE ALTERNATIVE TO STRIKE PECO’S TESTIMONY, MARPLE REQUESTS AN OPPORTUNITY FOR DISCOVERY AND TO RESPOND WITH WRITTEN SURREBUTTAL TESTIMONY AND TO MODIFY THE HEARING SCHEDULE

Second, if Your Honor does not strike PECO's rebuttal testimony pursuant to 52 Pa. Code § 5.243(e), Marple requests that, pursuant to Your Honor's July 5, 2023 scheduling order, Marple be permitted to conduct additional discovery and respond to the rebuttal testimony of Jeffrey Harrington via surrebuttal testimony in compliance with Marple's due process rights. Pursuant to the Scheduling Order which states the following:

MODIFICATION

Any of the provisions of this Prehearing Order may be modified upon motion and good cause shown by any party in interest.

Because good cause has been shown, Marple asks Your Honor to allow it to conduct limited discovery and provide responsive surrebuttal testimony to the issues and matters raised in PECO's rebuttal testimony of Jeffrey Harrington. Marple also requests a modification of the hearing schedule to account for discovery and service of surrebuttal in compliance with Marple's due process rights.

C. REQUEST FOR EXPEDITED FIVE DAY ANSWER PERIOD

Pursuant to 52 Pa. Code § 5.103(c), Marple respectfully requests that Your Honor shorten the response period for this motion from 20 days to 5 days, so that the issue of supplemental discovery, written surrebuttal and modification of the hearing schedule can be resolved sufficiently in advance of the hearings scheduled to begin November 14-17, 2023. Unless the answering period is shortened, PECO's answer would not be due until November 23, 2023, which is after the scheduled hearings. This motion contains significant procedural issues and requests for additional hearing time which also needs to be addressed as soon as possible for both the parties and Your Honor's availability for new hearing dates.

D. REQUEST FOR INTERLOCUTORY REVIEW AND CERTIFICATION OF MATERIAL QUESTION SHOULD YOUR HONOR NOT STRIKE PORTIONS OF PECO'S REBUTTAL TESTIMONY OF JEFFREY HARRINGTON AND NOT EXTEND MARPLE A MEANINGFUL OPPORTUNITY FOR DISCOVERY AND TO RESPOND TO THE TESTIMONY WHICH VIOLATES 52 PA. CODE § 5.243(e).

If Your Honor does not strike portions of PECO's rebuttal testimony and also does not extend Marple any meaningful opportunity to respond, Marple respectfully requests Your Honor certify to the Commission as a material question pursuant to 52 Pa. Code § 5.305 whether PECO's testimony which violates the Commission's regulations and Marple's due process rights should be permitted in the rebuttal stage when Marple lacks the opportunity to respond, and stay the schedule and proceeding pending guidance from the Commission.

V. CONCLUSION

For the foregoing reasons, Marple respectfully requests that Your Honor:

- (1) Strike the portions of PECO's rebuttal testimony of Jeffrey Harrington, including the report of, results of and any mention of Tetra Tech's air modeling analysis, that violate 52 Pa. Code §5.243(e) and Marple's due process rights;
- (2) In the alternative to striking the rebuttal testimony which violates 52 Pa. Code §5.243(e), provide Marple a meaningful opportunity for discovery and to submit surrebuttal on the new information presented in PECO's rebuttal;
- (3) Modify the procedural schedule to account for the time for Marple to complete additional discovery and surrebuttal testimony, thus modifying the hearing dates;
- (4) Shorten the response period for this Motion from 20 days to 5 days.

Respectfully Submitted,
MCNICHOL, BYRNE & MATLAWSKI, P.C.

/s/ J. Adam Matlawski, Esquire

J. Adam Matlawski, Esq.
Attorney I.D. No.: 41678
Kaitlyn T. Searls, Esq.
Attorney I.D.: 311237
1223 N. Providence Road
Media, PA 19063

Dated: November 2, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing, Marple Township's Motion in Limine, in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant) in the manner listed below upon the parties listed below:

Honorable Mary D. Long
PO Box 3265
Harrisburg, PA 17105-3265
malong@pa.gov

Christopher A. Lewis, Esquire
Frank L. Tamulonis, Esquire
Stephen C. Zumbun, Esquire
Joel Michel, Esquire
Blank Rome LLP
One Logan Square
Philadelphia, PA 19103-6998
lewis@blankrome.com
ftamulonis@blankrome.com
szumbun@blankrome.com
jmichel@blankrome.com
Accepts eService
Representing PECO Energy Company

Theodore R. Uhlman
2152 Sproul Road
Broomall, PA 19008
uhlmantr@yahoo.com
Accepts eService

Julia M. Baker
Objects Conservation Associates
2150 Sproul Road
Broomall, PA 19008
jbakeroca@msn.com
Accepts eService

Jack R. Garfinkle, Esquire
PECO Energy Company
2301 Market Street
P.O. Box 8699
Philadelphia, PA 19101-8699
Jack.garfinkle@exeloncorp
Accepts eService

Robert W. Scott, Esquire
Carl Ewald, Esquire
205 North Monroe Street
Media, PA 19063
rscott@robertwscottpc.com
carlewald@gmail.com
Accepts eService

MCNICHOL, BYRNE & MATLAWSKI, P.C.

Dated: November 2, 2023

/s/ J. Adam Matlawski
By: J. Adam Matlawski, Esq.
Attorney I.D. No.: 41678
1223 N. Providence Road
Media, PA 19063