

**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 : Docket No. P-2021-3024328
Associated with a Gas Reliability Station in :
Marple Township, Delaware County Is :
Reasonably Necessary for the Convenience :
and Welfare of the Public :
:

**PECO ENERGY COMPANY’S RESPONSE TO MARPLE TOWNSHIP’S
MOTION IN LIMINE**

Pursuant to the Pennsylvania Public Utility Commission’s (“Commission”) regulations at 52 Pa. Code § 5.103, PECO Energy Company (“PECO” or the “Company”) submits this Response to Marple Township’s (“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 Procedural 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 (“Motion”).¹

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Township contends that PECO should not be entitled to respond to the Remand Direct Testimony of its proffered expert, Dr. Timothy McCauley, on the issue of air dispersion modeling. Specifically, having elected to introduce air dispersion modeling as part of its case-in-chief on

¹ Notwithstanding the title of the Motion requesting a 4-day response period, Marple Township requested that, pursuant to 52 Pa. Code § 5.103(c), the 20-day response period be shortened to 5 days. Although this request was not yet decided by Administrative Law Judge (“ALJ”) Long, PECO nevertheless is submitting this response within five days of service of Motion, which was served on November 2, 2023.

remand, the Township now contends that any response from PECO must be limited to a critique of that modeling and not a correction of the numerous errors identified in the critique.

As an initial matter, PECO emphasizes that the public utility facilities that were modeled (line heaters and an emergency generator) are neither inside of nor part of the buildings that are at issue in this proceeding. Accordingly, the air model results should have no bearing on this proceeding.

Setting that aside, Marple Township's position violates PECO's due process right to respond to and correct Dr. McAuley's testimony, and further would leave the Commission with an incomplete and inaccurate evidentiary record on the issue of air quality. For the reasons set forth below, the Township's Motion should be denied, and the Township's request for a further delay of the hearing and briefing schedules should be rejected.

II. LEGAL ARGUMENT

A. PECO'S REBUTTAL TESTIMONY WAS PROPER AND NECESSARY TO CORRECT THE EVIDENTIARY RECORD

Marple Township contends that PECO should have included air dispersion modeling analysis in its case-in-chief and that any response to Dr. McAuley's testimony that includes additional modeling violates 52 Pa. Code § 5.243(e). The Township's argument fails for multiple reasons.

First, it is simply wrong to state that PECO had any affirmative obligation to conduct air modeling in its case-in-chief. In this Remand Proceeding, the Commission was directed to issue an Amended Decision incorporating "the results of a constitutionally sound environmental impact review as to the proposed siting on the Property of the Fiber Building and the Station Building"

consistent with the Environmental Rights Amendment (“ERA”).² To that end, PECO submitted the Remand Direct Testimony of Jeffery Harrington, a senior engineer with Tetra Tech, Inc. Consistent with the Commonwealth Court’s instruction, Mr. Harrington conducted a detailed environmental review that analyzed the potential impacts from the Natural Gas Reliability Station (“Station”) and the Station’s buildings to air quality, water quality, wetlands, stormwater, habitat, and historical structures, concluding that neither the Station nor its buildings will have any unreasonable impact on these resources.

With respect to air quality, Mr. Harrington concluded that there would be no unreasonable impacts based primarily on (1) PECO’s compliance with air permitting regulations, which provide blanket exemptions for the public utility facilities at the Station and (2) certificates of compliance demonstrating that the proposed generator will conform to federal emissions standards. Notably, the Commonwealth Court never mandated – or even suggested – that air modeling is necessary to show there will be no unreasonable impacts to air quality. Moreover, given the blanket permit exemptions, air modeling is not required under any environmental law or regulation. Further, Marple Township points to no case or regulation requiring or even suggesting that air modeling is required to satisfy an environmental review pursuant to the ERA.

In its Remand Direct Testimony, the Township elected to present its own evidence on air quality by introducing the testimony of Dr. McAuley, who undertook air dispersion modeling using the American Meteorological Society/EPA Regulatory Model (AERMOD). Dr. McAuley’s modeling attempts to demonstrate a risk of adverse air quality and non-compliance with certain air regulations by quantifying potential emissions from the proposed public utility facility.

² *Twp. of Marple v. Pa. Pub. Util. Comm’n*, 294 A.3d 965, 975 (Pa. Commw. 2023).

PECO's environmental expert, Jeffrey Harrington of Tetra Tech, reviewed Dr. McAuley's modeling and quickly realized that it used incorrect inputs and faulty assumptions. As an example, Dr. McAuley's modeling assumed that the emergency generator would operate continuously, non-stop, throughout the entire year, despite EPA guidance that states 500 hours is the appropriate default assumption for operation under worst-case conditions.

As a result of these errors, the emissions projected by Dr. McAuley are grossly overstated and unrealistically high. PECO had every right to respond and correct the record, and it did so through rebuttal testimony from Mr. Harrington. *See, e.g., Pa. Pub. Util. Comm'n v. Western Util., Inc.*, 1998 Pa. PUC LEXIS 145, *20-23 (Pa. P.U.C. 1998) (rejecting argument that rebuttal testimony violated 52 Pa. Code § 5.243(e) where rebuttal testimony was necessary to respond to arguments made in direct testimony) (citing *Standard Pennsylvania Practice 2d*, § 48.25) (regarding a party's right to submit rebuttal evidence to respond to an adverse party's initial presentation of evidence)). Most notably, in the rebuttal, PECO did not introduce any *new* model. Instead, PECO used the *same* AERMOD model used by Dr. McAuley but employed the correct parameters and assumptions. Indeed, the Township does not dispute that PECO is permitted to respond to Dr. McAuley's modeling; however, the Township suggests that PECO's response should have been limited to a critique of Dr. McAuley's modeling, and that any attempt to conduct further air modeling was improper. In fact, PECO did critique Dr. McAuley's modeling, noting that multiple faulty inputs and assumptions that were used and which produced significantly overstated modeled results. Yet, to limit a response to a mere critique and to prohibit PECO from any further response that corrects Dr. McAuley's modeling would deprive PECO of its due process to correct such errors and establish a record of compliance with air regulations. It would further leave a gaping void in the evidentiary record on the key issue of air quality.

Mr. Harrington's testimony regarding his air dispersion modeling should not be stricken simply because the Township elected to conduct its own faulty air dispersion modeling which is not required under law and the Township's apparent desire to have the last say on this issue. To the contrary, PECO was obligated to respond, correct the record, and adduce evidence to assist the Commission with its environmental review consistent with the ERA. Striking such testimony will leave the Commission with an evidentiary record which is crucially incomplete and erroneous and would jeopardize the Commission's ability to conduct an adequate and constitutionally sound environmental review.

B. PECO HAS SOUGHT TO ADDRESS MARPLE TOWNSHIP'S DUE PROCEEDS CONCERNS

In its Motion, the Township has alternatively requested an opportunity to conduct additional discovery and to respond to Mr. Harrington's Remand Rebuttal Testimony, contending its inability to do so is a denial of due process. This argument is plainly incorrect: where, as here, the procedural schedule establishes rounds of written testimony, it is unavoidable that a party will not be able to serve a further round of written testimony in response to the other party's last submission. Here, the parties mutually agreed to a procedural schedule that allows each party to submit one round of direct testimony and one round of rebuttal testimony. The Township's desire to have the last say and to further respond to PECO's Remand Rebuttal Testimony, while not uncommon, was not the arrangement agreed to by the parties and accordingly does not constitute a violation of the Township's due process rights.

Nevertheless, PECO sought to address the Township's due process concerns by consenting to rejoinder testimony on the air modeling issues and offering to schedule a technical conference between the experts so that any questions the Township might have could be answered in advance of the hearing. Moreover, on November 3, 2023, PECO promptly provided the Township with

the AERMOD data files underpinning Mr. Harrington's analysis. PECO further proposed that the parties exchange rejoinder outlines by Friday, November 5 and provide rejoinder testimony during the hearings scheduled for November 14 through 17. Accordingly, the Township already has all necessary information and data to substantively respond to Mr. Harrington's Remand Rebuttal Testimony and, under PECO's proposal, would have ample opportunity to do. On November 6, 2023, PECO held a meet-and-confer with the Township and other parties during which time the Township rejected this proposal.

C. FURTHER DELAY OF THE HEARING AND BRIEFING SCHEDULE IS NOT WARRANTED

PECO remains willing to work with the Township to find a mutually agreeable resolution that addresses the due process concerns of all parties. However, PECO adamantly opposes any further extension of the hearing and briefing schedules. All parties had previously agreed to the procedural schedule set during the Pre-Hearing Conference on June 28, 2023. Further, PECO already consented to the Township's request for a 1-week extension of the Direct Testimony deadline to provide the Township extra time to serve its Direct Testimony. Any further delays are unnecessary and could further interrupt an important public utility infrastructure project that has already been significantly delayed as a result of this protracted litigation.

III. CONCLUSION

WHEREFORE, for all the reasons set forth above, PECO requests that the Township's Motion be denied in its entirety.

Respectfully Submitted,

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Dated: November 7, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this day, I served a true copy of the foregoing Response to Marple Township’s Motion in Limine upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party) via electronic mail.

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Dated: November 7, 2023