

**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 : 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 IN OPPOSITION TO MARPLE
TOWNSHIP’S EVIDENTIARY CHALLENGE TO THE WRITTEN DIRECT
TESTIMONY OF PECO WITNESS DOUG OLIVER**

Pursuant to Administrative Law Judge Mary D. Long’s November 9, 2023 Interim Order on Prehearing Evidentiary Motions, PECO Energy Company (“PECO” or the “Company”) hereby responds in opposition to Marple Township’s Evidentiary Challenge to strike the Direct Remand Testimony of Doug Oliver (“PECO’s Opposition Response”). In support of its Opposition Response, PECO states as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

1. On February 26, 2021, PECO filed a petition (the “Petition”) seeking a finding from the Commission, pursuant to Section 619 of the Municipalities Planning Code, 53 P.S. § 10619, that the situation of the two buildings associated with PECO’s proposed Natural Gas Reliability Station (“Station”) at 2090 Sproul Road in Marple Township, Delaware County was reasonably necessary for the convenience or welfare of the public and was therefore exempt from local zoning, and that the security fence appurtenant to the Station was a public utility facility exempt from local land use controls.

2. During the Initial Proceeding, on May14, 2021, PECO presented the testimony of Doug Oliver as a lay witness to testify as to: (1) PECO’s public utility status and gas operations;

(2) the overview of PECO's petition; and (3) PECO's outreach to the community regarding the location and aesthetics of the Station. *See* PECO Statement No. 1

3. 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.

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*, 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).

5. Citing the Environmental Rights Amendment ("ERA"), article I, section 27 of the Pennsylvania Constitution, the Commonwealth 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.*

6. On June 22, 2023, Judge DeVoe issued an Interim Order ("Interim Order") stating that 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. On September 22, 2023, as part of the Remand Proceeding, PECO served the direct testimony of Doug Oliver to describe the findings and relief requested by PECO in response to the Commonwealth Court’s Opinion and Order concerning the Station. *See* PECO Statement No. 1-RD.

8. On October 30, 2023, as part of the Remand Proceeding, PECO served rebuttal testimony from Doug Oliver to rebut the testimony of Marple Township, Ted Uhlman, and Julie Baker remand witness Dr. Raymond G. Najjar, Jr. *See* PECO Statement No. 1-RR.

9. On November 8, 2023, Marple Township filed an Evidentiary Challenge to Doug Oliver’s Remand Direct Testimony (Oliver Remand Direct Testimony), seeking to strike either in whole or in part Oliver’s Remand Direct Testimony presented by PECO on September 22, 2023. In support of its Evidentiary Challenge, Marple Township erroneously argues that Oliver’s Remand Direct Testimony is improper lay witness testimony and inadmissible hearsay. *See* Marple Evidentiary Challenge at p. 1.

10. As set forth below, Oliver’s Remand Direct Testimony is appropriate, limited lay witness testimony, properly submitted by PECO to formally “set the stage” as a foundational witness for PECO’s case-in-chief in this Remand Proceeding, which contains neither hearsay nor improper legal argument.

II. ARGUMENT

a. Legal Standard

11. The purpose of Commission evidentiary hearings is to present expert and non-expert (i.e., factual) testimony from witnesses that comply with the rules of evidence for formal proceedings set forth in the Commission’s regulations at 52 Pa. Code § 5.401, *et seq.*

12. All **relevant and material** evidence is admissible in Commission Proceedings. 52 Pa. Code § 5.401(a) (emphasis added).

13. Pursuant to Pa. R. E. 701, a lay witness may testify in the form of an opinion that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

14. “A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony.” Pa.R.E. 602.

15. Hearsay, considered inadmissible evidence, is recognized as an out of court statement **offered for the truth of the matter asserted**. Pa.R.E. 801(c) (emphasis added). Statements that are not offered for the truth of the matter asserted, such of their effect on the listener, are not considered hearsay. *Architectural Testing, Inc. v. Unemployment Comp. Bd. of Rev.*, 940 A.2d 1277, 1282 (Pa. Commw. Ct. 2008) (citing *In re Shahan*, 429 Pa. Super. 91, 101, 631 A.2d 1298, 1304 (1993)).

b. Mr. Oliver’s Direct Remand Testimony is Appropriate and Should be Considered by the Commission in this Proceeding

16. Marple Township first argues that portions of Mr. Oliver’s testimony where he references being “advised by counsel” of judicial findings relevant to this proceeding are “classic hearsay.” *See* Evidentiary Challenge at pp. 2-3.

17. However, these portions of testimony refer to specific Commonwealth Court decisions. Mr. Oliver, as PECO’s lead witness, is not testifying as to the truth of the matter asserted (the legal conclusions of the Court), but rather, is providing an overview and roadmap of PECO’s case as presented in its testimony.

18. Furthermore, Mr. Oliver is PECO's Senior Vice President of Governmental, Regulatory, and Environmental Affairs. As an officer and representative of PECO with personal knowledge of the proceedings, he is permitted to testify as to the previous findings in this matter, PECO's position regarding previously rendered legal opinions that are a part of this record, and relief requested by PECO in this remand proceeding. *See Evidentiary Challenge pp. 4-5.* This is proper lay witness testimony presented in the form of an opinion that is: 1) rationally based on Mr. Oliver's and PECO's perceptions; 2) is helpful to understanding his overall testimony and PECO's position in this matter; and 3) is not based on any scientific, technical, or other specialized knowledge. *See Pa. R. E. 701.*

19. Furthermore, as PECO's lead witness, Mr. Oliver is permitted to refer to PECO testimony that is in the record, in particular Jeffrey Harrington's Statement (PECO Statement No. 6-RD). *See Evidentiary Challenge pp. 5-6.*

20. Marple Township's argument that portions of Oliver's testimony which reference Harrington's Statement are "improper legal argument" is unavailing; Oliver is permitted to summarize PECO testimony that will be admitted into the record and, as a PECO representative, he may set forth PECO's position in this Remand Proceeding. Marple Township is permitted to conduct cross examination of Harrington (and Oliver) at hearing and suffers no prejudice by Oliver's reference to Harrington's Statement. *See 52 Pa. Code § 5.412(d).*

21. Finally, Oliver's testimony related to the potential impact of this proceeding on PECO's infrastructure plans to provide safe and reliable service to its customers is proper lay witness opinion testimony. *See PECO Statement No. 1-RD at p. 9.* As PECO's Senior Vice President of Governmental, Regulatory, and Environmental Affairs, he has direct personal knowledge of the testimony presented.

III. CONCLUSION

WHEREFORE, for all the reasons set forth above, PECO submits that Marple Township's Evidentiary Challenge to the Written Direct Testimony of PECO Witness Doug Oliver should be denied in its entirety.

Respectfully Submitted,

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Dated: November 13, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this day, I served a true copy of the foregoing Response in Opposition to Marple Township's Evidentiary Challenge to strike the Direct Remand Testimony of Doug Oliver 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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