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August 14, 2013

VIA FEDEX OVERNIGHT MAIL
Irene M. Bizzoso, Prothonotary
Supreme Court of Pennsylvania
Middle District
601 Commonwealth Avenue, Suite 4500
P.O. Box 62575
Harrisburg, PA 17106

Re: Robinson Township et al. v. Commonwealth of Pennsylvania, et al., Docket No. 63 MAP 2012

Dear Ms. Bizzoso:

Please find the following enclosed relative to the above-captioned matter:

1. An unbound original and two (2) bound copies of Appellees' Answer to Appellants' Application to Resubmit Case; and

2. Additional coversheets for the above-mentioned pleading.

Kindly file the original pleading and return the time-stamped copies of the additional coversheets in the enclosed self-addressed, stamped return envelope. Your assistance with this matter is greatly appreciated.

If you have any questions, please do not hesitate to contact the undersigned accordingly.

Very truly yours,

John M. Smith

Enclosures

cc: Howard G. Hopkirk, Esq. (w/ encl) (via regular mail)
Matthew Hermann Haverstick, Esq. (w/ encl) (via regular mail)
James J. Rohn, Esq. (w/ encl) (via regular mail)
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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

DOCKET NO. 63 MAP 2012

ROBINSON TOWNSHIP, Washington County, Pennsylvania, BRIAN COPPOLA, Individually and in his Official Capacity as SUPERVISOR of ROBINSON TOWNSHIP, TOWNSHIP OF NOCKAMIXON, Bucks County, Pennsylvania, TOWNSHIP OF SOUTH FAYETTE, Allegheny County, Pennsylvania, PETERS TOWNSHIP, Washington County, Pennsylvania, DAVID M. BALL, Individually and in his Official Capacity as COUNCILMAN of PETERS TOWNSHIP, TOWNSHIP OF CECIL, Washington County, Pennsylvania, MOUNT PLEASANT TOWNSHIP, Washington County, Pennsylvania, BOROUGH OF YARDLEY, Bucks County, Pennsylvania, DELAWARE RIVERKEEPER NETWORK, MAYA VAN ROSSUM, the Delaware Riverkeeper, MEHERNOSH KHAN, M.D.,

Appellees,

v.

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA PUBLIC UTILITY COMMISSION, ROBERT F. POWELSON, in his Official Capacity as CHAIRMAN of the PUBLIC UTILITY COMMISSION, OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA, LINDA L. KELLY, in her Official Capacity as ATTORNEY GENERAL of the COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and E. CHRISTOPHER ABRUZZO, in his Official Capacity as SECRETARY of the DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Appellants.

Appeal of: the Pennsylvania Public Utility Commission, Robert F. Powelson, in his Official Capacity as Chairman of the Public Utility Commission, the Pennsylvania Department of Environmental Protection and E. Christopher Abruzzo, in his Official Capacity as Secretary of the Department of Environmental Protection

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ANSWER TO APPELLANTS' APPLICATION TO RESUBMIT CASE

APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT ENTERED
JULY 26, 2012 AT NO. 284 M.D. 2012

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ANSWER TO APPELLANTS' APPLICATION TO RESBUMIT CASE

AND NOW, Petitioners-Appellees, Robinson Township, Washington County, Pennsylvania, Brian Coppola, Peters Township, Washington County, Pennsylvania, David M. Ball, Township of Nockamixon, Bucks County, Township of Cecil, Washington County, Mount Pleasant Township, Washington County, Borough of Yardley, Bucks County, Township of South Fayette, Allegheny County, Delaware Riverkeeper Network, and Maya Van Rossum, the Delaware Riverkeeper, and Mehernosh Khan, M.D. (collectively referred to as "Petitioner-Appellees" hereinafter), by and through their attorneys, file the within **ANSWER TO APPELLANTS' APPLICATION TO RESUBMIT CASE**, and in support thereof set forth as follows:

INTRODUCTION

1. On February 14, 2012, Pennsylvania Governor Thomas W. Corbett signed HB 1950 into law as Act 13 of 2012, 58 Pa. C.S. § 2301 *et seq.* (hereinafter, "Act 13"). Act 13 amends the Pennsylvania Oil and Gas Act (hereinafter, "Oil and Gas Act"), 58 P.S. § 601.101 *et seq.*, to establish, in part, a uniform zoning scheme for oil and gas development that applies to every zoning district in every political subdivision in Pennsylvania and allows for oil and gas operations, including wastewater impoundments, in all zoning districts as a permitted use, including residential districts.

2. On March 29, 2012, Petitioners-Appellees filed a fourteen (14) count Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief ("Petition for Review") pursuant to the "Declaratory Judgments Act," 42 Pa. C.S. § 7531 *et seq.* requesting that the Commonwealth Court declare that provisions of Act 13 violate the United States Constitution and the Pennsylvania Constitution, and enjoin the implementation of the unconstitutional provisions of Act 13.

3. By Opinion and Order dated July 26, 2012, the *en banc* panel of the Commonwealth Court granted Petitioners-Appellees' Motion for Summary Relief as to Counts, I, II, and III declaring 58 P.S. §3304 unconstitutional, null and void. The Commonwealth Court specifically ordered that the Commonwealth is permanently enjoined from enforcing the provisions of 58 P.S. §3304 (Uniformity of Local Ordinances) and that the remaining provisions of Chapter 33 that enforce 58 P.S. §3304 were enjoined as well. The Commonwealth Court also declared 58 P.S. §3215(b)(4) null and void ruling that the General Assembly impermissibly delegated legislative authority to the Department of Environmental Protection to determine and grant setback waivers.

4. On July 27, 2012, Respondents-Appellants Pennsylvania Public Utility Commission and Robert F. Powelson, in his official capacity as Chairman of the Public Utility Commission (collectively the "Commission" or "PUC"), the

Pennsylvania Department of Environmental Protection and E. Christopher Abruzzo, in his official capacity as Secretary of the Department of Environmental Protection (collectively the "Department" or "DEP") filed a Notice of Appeal and Jurisdictional Statement of the Commonwealth Court's July 26, 2012, Order.

5. On July 30, 2012, the Commission and the Department filed an Application for Expedited Consideration in which Petitioners-Appellees joined, albeit based upon different reasoning than that set forth by the Commission and Department.

6. This Honorable Court granted the Application for Expedited Consideration on August 21, 2012, the briefing schedule was expedited and argument was held before the Court on October 17, 2012 before the six (6) justices who were active and participating in all decisions at that time.

For the reasons stated below, Petitioner-Appellees request that this Honorable Court deny Appellants' Application to Resubmit Case.

OBJECTIONS TO RESUBMISSION AND/OR REARGUMENT

7. Petitioner-Appellees object to the Commission and Department's attempt to resubmit and/or reargue the above-captioned matter on the following three (3) grounds, each of which will be addressed in turn:

A. The PUC-DEP's request for reargument is premature as any application for reargument must be filed following the entry of a judgment pursuant to Pa. R.A.P. 2542, and was filed in contravention of existing rules and internal operating procedures.

B. The PUC-DEP have failed to provide any sound basis for resubmission of the case and so proceeding with resubmission and/or reargument would result in a waste of judicial resources.

C. The PUC-DEP's request for resubmission and reargument would result in the appearance of impropriety such that public confidence in the independence of the judicial branch of government may be compromised.

A. The PUC-DEP's request for reargument is untimely as any application for reargument must be filed following the entry of a judgment pursuant to Pa. R.A.P. 2542 and was filed in contravention of existing rules and internal operating procedures.

8. The PUC-DEP have filed what is titled an "Application to Resubmit Case," and have done so without citing any legal authority in Pennsylvania case law, statute or rule that would provide for resubmission of a case to be heard and decided by an alternate panel of judges than those who were originally sitting on the bench.

9. Notably, the PUC-DEP's request that "at a minimum" the case be resubmitted on briefs to the Court. *See*, Appellants' Application for Resubmission, at ¶ 13. However, the PUC-DEP likewise request that, "if the Court deems it appropriate," reargument be presented on all issues in the pending appeals. *Id.*

10. The PUC-DEP plainly ignored the Pennsylvania Rules of Appellate Procedure and Internal Operating Procedures of the Court in submitting the Application.

11. The Rules of Appellate Procedure and the Court's Internal Operating Procedures both provide for redress in the event that the PUC-DEP are aggrieved by the Court's decision, but there is no legal authority for the PUC-DEP's presupposition that they can request reargument or reconsideration *before* the Court has rendered a decision.

12. As such, without any other basis to rely upon to provide such relief, the PUC-DEP's request can be analogized to an Application for Reargument, which is governed by Pennsylvania Rule of Appellate Procedure 2542. Importantly, Pa. R.A.P. 2542 states the following:[1]

> (1) General rule – Except as otherwise prescribed by this rule, an application for reargument shall be filed with the prothonotary within **14 days after entry of the judgment or other order involved**.

Pa. R.A.P. 2542. (emphasis added).[2]

13. To date, this Honorable Court has not issued judgment or an order with regard to the merits of the instant appeal. As a result, the PUC-DEP's request

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[1] Pa. R.A.P. 2543 further states that: "Reargument before an appellate court is not a matter of right, but of sound judicial discretion, and reargument will be allowed only where there are *compelling reasons* therefor." (Emphasis added). Petitioner-Appellees have likewise demonstrated that no compelling reasons exist to allow for reargument *or resubmission* of the case as explained *infra* in section B.

[2] Pa. R.A.P. 2547 also states that: "Second or subsequent applications for reargument, and applications for reargument which are out of time under these rules will not be received." Therefore, the Court should not accept the within Application as it is premature and has not been submitted pursuant to the proper timing set forth in the Rules.

for reargument is premature. Judgment or an order must first be entered by the Court as a prerequisite for any subsequent reargument request.

14. The proper procedure to seek reargument requires that the Court issue a decision before an application may be filed. The decision serves as the catalyst for the filing and is needed for the evaluation of whether reargument is warranted. *See*, Explanatory Note to Pa. R.A.P. 2543.[3]

15. It is improvident for the Court to expend time hearing premature appeals when there is already a process in place for such circumstances when reargument is sought following the issuance of an opinion.

16. Specifically, the Court's Internal Operating Procedures provide that the Prothonotary will assign applications for reconsideration to the Justice authoring the majority opinion or the opinion announcing the judgment of the Court, and if the appeal was resolved by an equally divided Court, the petition will be assigned to the author of the opinion in support of affirmance. 210 Pa. Code

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[3] The Note accompanying Pa. R.A.P. 2543 states in full:

> The following, while neither controlling nor fully measuring the discretion of the court, indicate the character of the reasons which will be considered:
>
> (1) Where the decision is by a panel of the court and it appears that the decision may be inconsistent with a decision of a different panel of the same court on the same subject.
>
> (2) Where the court has overlooked or misapprehended a fact of record material to the outcome of the case.
>
> (3) Where the court has overlooked or misapprehended (as by misquotation of text or misstatement of result) a controlling or directly relevant authority.
>
> (4) Where a controlling or directly relevant authority relied upon by the court has been expressly reversed, modified, overruled or otherwise materially affected during the pendency of the matter sub judice, and no notice thereof was given to the court pursuant to Rule 2501 (change in status of authorities).

§63.4(C)(1). Again, an opinion serves as a prerequisite for an application for reconsideration.

17. The Court cannot permit parties to ignore the statutory appeals process and Court rules to gain a perceived advantage.

18. The PUC-DEP's application for reargument and resubmission is premature because it is contrary to the Pennsylvania Rules of Appellate Procedure, and Supreme Court's Internal Operating Procedures. Additionally, because no Pennsylvania statute or case law exists recognizing that such relief is warranted or possible, it must be denied.

B. The PUC-DEP have failed to provide any sound basis for resubmission of the case such that proceeding with resubmission and/or reargument would result in a waste of judicial resources.

19. By filing the Application to Resubmit Case, the PUC-DEP seek to re-litigate the identical issues that the parties have already briefed and orally argued, and that this Honorable Court has been considering since the Fall of 2012.

20. In the interest of judicial economy, this Court must deny the PUC-DEP's Application to Resubmit Case.

21. In the interest of consistency and fairness, the Court must ensure that all cases argued before six (6) Justices are decided by the panel of six (6) Justices, and all cases pending before the Court when a new Justice is appointed are disposed of in the same manner.

22. The PUC-DEP's request that this Court arbitrarily select one (1) case to be resubmitted opens up a "Pandora's box" for all matters pending before the Court to be reargued despite no new facts or law being present before a decision is rendered.

23. Pennsylvania courts have long maintained that courts should ensure a degree of finality so that judicial economy and efficiency can be maintained. *Salerno v. Philadelphia Newspapers, Inc.*, 546 A.2d 1168, 1170 (Pa. Super. 1988) (*quoting, Commonwealth v. Eck*, 416 A.2d 520, 522 (Pa. Super. 1979)).

24. Furthermore, the Court should not sanction an approach to the resolution of cases that does not comport with basic fairness and that ultimately erodes the goals of finality and judicial economy. *Golden v. Dion*, 600 A.2d 568 (Pa. Super. 1991).

25. The PUC-DEP cite no new legal issue or material fact to justify resubmitting the case that would require, once again, a significant expenditure of taxpayer and judicial resources. No new legal matter has arisen to warrant resubmittal or require rebriefing or rearguing the case.

26. This Honorable Court has explained that, "Rule 2543 does not provide a basis for reargument where a party simply disagrees with the outcome, and it most certainly does not do so where the applicant wishes to make arguments not developed in the appeal process or based upon facts not at issue in the appeal or

made part of the record." *Sackett v. Nationwide Mut. Ins. Co.*, 934 A.2d 1155, 1157 (Pa. 2007). The substantive issues raised in the matter before the Court have already been argued, briefed, and are currently under consideration.

27. In *Turner v. Kohl*, the Superior Court held that to allow multiple petitions until such time as a judge can be found who will look favorably upon such a petition does not serve judicial economy or judicial efficiency, and it was an abuse of discretion for a trial judge to grant a second petition in the absence of changed circumstances. 617 A.2d 20 (Pa Super. 1992)(involving petition to change venue). The granting of the petition served only to delay proceedings and did not serve judicial economy or the efficiency of unified judicial system. *Id.*

28. There are currently four (4) appeals pending before this Court, which all stem from the decision of the Commonwealth Court in *Robinson Township, et al. v. Commonwealth of Pennsylvania, et al.*, 52 A.2d 463 (Pa. Cmwlth. 2012).

29. The PUC-DEP appealed to this Court from the Commonwealth Court's decision in 63 MAP 2012, and the Commonwealth of Pennsylvania and the Office of Attorney General appealed to this Court from the Commonwealth Court's decision in 64 MAP 2012. Petitioner-Appellees cross-appealed the Commission and the Department's appeal in 72 MAP 2012, and cross-appealed the Commonwealth of Pennsylvania and the Office of Attorney General's appeal in 73 MAP 2012.

30. The PUC-DEP now apply to resubmit only 63 MAP 2012 to the Court.

31. The PUC-DEP's Application fails to establish any "compelling reason" for the parties to resubmit only 63 MAP 2012 to the Court and fails to address the remaining three matters presently before the Court. *See*, Pa.R.A.P. 2543.

32. Resubmitting only 63 MAP 2012 to the Court for consideration would result in an unnecessary confusion of the remaining appeals and in piecemeal deliberations and decisions. The four appeals were argued together before the Court in the interest of efficiency and resubmitting one appeal individually would thwart this goal.

33. Furthermore, at the time Petitioners-Appellees filed this Answer, only the Commission and the Department have asked the Court for this relief and not the Commonwealth and Attorney General.

34. It is well-settled Pennsylvania law that "the Attorney General is the Commonwealth official statutorily charged with defending the constitutionality of all enactments passed by the General Assembly." *City of Philadelphia v. Com.*, 838 A.2d 566, 583 (Pa. 2003); *see also* 71 P.S. § 732-204(a)(3) ("It shall be the duty of the Attorney General to uphold and defend the constitutionality of all statutes . . . .").

35. The Commission and the Department were joined to the instant case as necessary parties because they had statutory obligations and were granted certain authorities under the Act.

36. Now, the Commission and the Department, executive agencies charged solely with implementation of the law, act as advocates for the zoning provisions of Act 13, independent of the Commonwealth.

37. Further, over a year ago, the PUC-DEP filed an Application for Expedited Consideration, which the Court granted on August 21, 2012. Then-Justice Joan Orie Melvin was suspended from all judicial powers and duties at the time of oral argument, *and when Appellants requested expedited consideration* of this matter.

38. In the Application for Expedited Consideration, the PUC-DEP argued that expedited consideration was needed for to establish certainty "one way or the other." *See*, PUC-DEP Application for Expedited Consideration, at ¶ 15.

39. Additionally, the PUC-DEP asserted that:

> [T]his matter shot forward at a breakneck pace in the Commonwealth Court – start to finish from March to July – on the spurs of that court's belief that quick resolution was necessary. This Court should, respectfully, adopt that same pace and shepherd this matter forward with equal haste, in recognition of the import this appeal has for the entirety of the Commonwealth.

Id. at ¶ 20.

40. As a result, the PUC-DEP requested expedited treatment of the case with knowledge and acceptance that a six-Justice Court, like all other cases before the Court at that time, would hear and render judgment on the case. *See In re Melvin*, 57 A.3d 226 (Pa. Ct. Jud. Discipline 2012); Appellants' Application at ¶8.

41. Without objection of the PUC-DEP or this Honorable Court, oral argument was held before six Justices on October 17, 2012.

42. Prior to the August 6, 2013 filing of the Application, the PUC-DEP did not indicate that they had any reservations or concerns regarding a six-Justice Court rendering a decision in this matter. In fact, the PUC-DEP requested expedited consideration by six (6) Justices – yet they now seek the very opposite.[4] The PUC-DEP's apparent change of heart and insistence on now resubmitting the case to the full Court and starting anew suggests potential improper motives and political agendas not appropriate for this Honorable Court.

43. The Court should decline to grant such an application that would serve to undermine the integrity, impartiality and objectivity of an independent judiciary.

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[4] A party to an action is estopped from assuming a position inconsistent with his or her assertion in a previous action, if his or her contention was successfully maintained. The test for judicial estoppel is: (1) did a party assume an inconsistent position, and (2) was his contention successfully maintained? *Trowbridge v. Scranton Artificial Limb Company,* 747 A.2d 862, 864 (Pa. 2000). The doctrine of judicial estoppel may be applied any time a litigant plays "fast and loose with the courts which has been emphasized as an evil the courts should not tolerate." *Scarano v. Central R. Co. of New Jersey,* 203 F.2d 510, 513 (3d Cir. 1953).

44. In addition, the PUC-DEP's current Application only serves to stall and delay a Court-expedited process and an awaited Court decision, leaving municipalities and citizens throughout the Commonwealth uncertain about the outcome and effects of these appeals.

45. The inherent uncertainty of the Court's pending determination makes it virtually impossible for municipalities and local officials to perform effective land-use planning and regulation.

46. Further, buyers, sellers and builders of homes are paralyzed waiting to see if their potential monetary investments will have the benefit of keeping industrial uses away from their residential properties by way of constitutional zoning districts.

47. A decision that upholds the Commonwealth Court's decision ensures that land-use planning and property investment can continue without the threat of disruption from industrial oil and gas operations. Further, such a decision maintains the same pre-Act 13 land use structure under which gas drilling and development activity has flourished (and continues to do so) in the Commonwealth.

48. All parties to the pending related appeals before the Court have fully litigated the multiple issues within the appeals. As such, all parties and the Court have expended countless hours and a tremendous amount of resources.

49. To start this process over would result in a duplication of time, taxpayer dollars and effort despite the fact that a decision has not been released and that *the law and the facts have not changed* since first submitted to this Honorable Court.

50. The parties fully argued the matter before the Court in a proceeding that lasted approximately two (2) hours.

51. Furthermore, the parties to this matter have heavily briefed the issues in the pending appeals and filed voluminous reproduced records.

A. The Commission and the Department have filed an Appellants' brief in 63 MAP 2012, a reply brief in 63 MAP 2012, and an Appellees' brief in 72 MAP 2012.

B. The Commonwealth of Pennsylvania and the Office of Attorney General have filed an Appellants' brief in 64 MAP 2012, a reply brief in 64 MAP 2012, and an Appellees' brief in 73 MAP 2012.

C. Petitioner-Appellees have filed an Appellees' brief in 63 MAP 2012 and 64 MAP 2012, an Appellants' brief in 72 MAP 2012 and 73 MAP 2012, and a reply brief in 72 MAP 2012 and 73 MAP 2012.

D. Additionally, eighteen (18) amicus briefs have been filed in this matter.

52. Further argument and briefing is not in the best interests of the Court or the parties and will not aid the Court in the decision-making process which is already well underway. The PUC-DEP's Application requests that this Court inappropriately use the limited judicial resources of the Court without justification by Pennsylvania rule, statute, case law or otherwise.

53. In addition, requiring all parties to resubmit a case that has already been fully litigated, briefed, and argued on all pending issues on a Court-ordered expedited basis is not an effective use of the Court's time or taxpayers' resources and would be an affront to the Commonwealth's long-standing policy of judicial economy.

54. The ultimate determination for this Honorable Court's appellate review in 63 MAP 2012 is whether the Commonwealth Court correctly determined that Sections 3304 and 3215(b)(4) of Act 13 are unconstitutional enactments. There is nothing more that resubmission of the case could contribute to the resolution of this constitutional question. Any after-the-fact arguments now resubmitted would be duplicative, distracting and unnecessary.

55. The PUC-DEP's Application asks for reargument before a decision has been rendered, effectively requesting a "second bite at the apple" with the benefit of hindsight, despite that the facts, law and record submitted to this Honorable Court remain unchanged.

56. This is not in keeping with judicial economy, the Appellate Rules or any existing Pennsylvania law, and therefore this Honorable Court must deny the Application.

C. The PUC-DEP's request for resubmission and reargument would result in the appearance of impropriety such that public confidence in the independence of the judicial branch of government may be compromised.

57. The PUC-DEP, through their Application, provide no new issues for this Court's review that were previously unconsidered. They instead request resubmission based solely upon the fact that they *believe* an additional justice should weigh in and *may* be favorable to their position.

58. The PUC-DEP's current Application is an effort to re-package their appeal in an attempt to possibly change a potentially perceived outcome.[5] Cases should not be decided based upon a change in the Court, but rather according to the dictates of the law.

59. Importantly, the newest addition to the Court was appointed by the Governor and confirmed by the Commonwealth Senate, both entities who have an interest in Act 13 remaining intact. Granting the PUC-DEP's current request could

[5] By contrast, the Commission and the Department have not sought resubmission of the pending cross-appeals filed by Petitioner-Appellees assumedly because if those appeals were currently 3-3, such a decision would inure to their benefit. This highlights their apparently questionable motives in seeking resubmission of 63 MAP 2012 only.

create the appearance that a named party used a judicial nomination to secure a desired vote on a pending case.

60. Re-submission of the same issues, rationales, and arguments is unjustified, particularly because the Court was (and still is) well-equipped, with no questions raised by the Parties or *sua sponte* by the Court as to hearing the case with six (6) Justices, to render a decision on those same issues with six (6) Justices presiding.

61. The interests of both the Commission and the Department are already adequately protected by the objectivity of the six (6) justice Court and the procedures put in place to allow for a decision to be rendered when only six (6) justices preside.

62. During the time when only six (6) justices presided within the past year, a number of other cases were argued and decisions have been rendered.

63. If resubmission is warranted based solely upon the notion that a seven (7) justice Court is necessary for a case to be decided, then that argument would remain true for each and every other case heard by the six (6) justice Court. The countless cases heard by the six (6) justice Court would be open for resubmission rendering the Court's work during the past year apparently meaningless. Permitting resubmission at this juncture would fundamentally undermine the system established for a six (6) justice Court to operate.

64. Moreover, if a conflict arises in a future six (6) justice Court, the relief requested by the PUC-DEP will set a precedent of "cherry-picking" certain cases for resubmission based upon the issues to be decided.

65. This sets unappealing precedent and needlessly creates the appearance of politicizing an otherwise independent judicial branch. The integrity of the Court would become at risk because of the appearance of political manipulation.

66. This Honorable Court has strongly cautioned against creating even an "appearance" of impropriety and has recognized this as an ongoing concern for jurists. *See, Commonwealth v. Dougherty*, 18 A.3d 1095 (Pa. 2011); *see also, In re Lokuta*, 11 A.3d 427 (Pa. 2011).

67. Because this case was briefed and argued approximately ten (10) months ago, the six (6) justices currently presiding are aware of the status of the case and the reasons, if any, for the timing and release of its decision. Pursuant to the Internal Operating Procedures of the Supreme Court, a vote is taken following oral argument and the opinion is assigned for authorship and then circulated. 210 Pa. Code §63.3(A)(3)[6]; 210 Pa. Code §63.4(A).[7] Pursuant to these rules, an

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[6] The Court meets in conference the day following oral argument to discuss the cases argued. The Chief Justice presides at the conference, lead the Court's discussion, and call for a tentative vote on the decision of each case. Argued cases are assigned at conference by the senior Justice in the majority position in such a manner as to avoid delay in deciding cases. 210 Pa. Code §63.3(A)(3).

opinion on this case presumably has been authored and circulated by the sitting Justices.

68. The parties, as well as the public, received a rare glimpse inside the internal deliberations of the Supreme Court at the time that Justice Eakin explained that when cases are initially tied 3-3, the Court will put those cases on the Justices' business agenda "...to see if one of them would be willing to change his or her vote or refine the issues in the case to get another member of the court to join the majority." *See*, The Legal Intelligencer, March 19, 2013, Eakin: Court Won't Fill Orie Melvin's Spot on Its Own." In March of 2013, Justice Eakin also explained that the Court had two (2) remaining decisions that were tied 3-3. *Id.*

69. As a result, Petitioner-Appellees are in the unenviable position of having to speculate as to the status of the case as well as the PUC-DEP's rationale for its desired relief of resubmission and reargument.

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[7] The assigned Justice of the majority position shall, absent extraordinary circumstances, circulate a proposed majority opinion to all members of the Court within ninety (90) days of the assignment in single-issue cases and within one hundred and twenty (120) days in multiple-issue cases. 210 Pa. Code §63.4(A)(1)(a). Concurrences and dissents shall be circulated to all members of the Court within forty (40) days of the date on which votes on the proposed majority opinions were due in single-issue cases and within sixty (60) days in multiple-issue cases. Matters may also be held for additional review by a Justice during these time periods. Circulating proposed opinions are voted upon each month according to the schedule provided by the Chief Justice for use in that calendar year. 210 Pa. Code §63.4(A)(1)-(2). Generally speaking, votes are due on the fifth business day following circulation of the vote list. Within two (2) business days following entry of the votes, the Chief Justice will circulate to all Justices a disposition, listing the votes for each case. 210 Pa. Code §63.4(A)(3).

70. The PUC-DEP appear to have filed their Application based upon pure speculation that the within case *may* currently be tied 3-3 on important issues – thereby resulting in an affirmance of the Commonwealth Court decision below that portions of Act 13 are unconstitutional. Assumedly, the PUC-DEP are now seeking an additional vote that they appear to believe *may* serve to alter this potential 3-3 outcome.

71. This request has placed the Court in an untenable position by suggesting to the public that the Court might merely "sit" on an expedited case, knowing the result of a voted on and circulated opinion, and may suggest that the Court held a 3-3 decision until a vote could be added to alter a known outcome by the Court.

72. Since the six (6) Justice Court began hearing cases in early 2012, the Court has already issued the following decisions in which the votes were split 3-3 and resulted in affirming the lower court's decision: *Allstate Life Insurance Co. v. Commonwealth of Pennsylvania*, 52 A.3d 1077 (August 2, 2012); *Commonwealth v. Gehris*, 54 A.3d 862 (September 27, 2012); *Commonwealth v. Champney*, 65 A.3d 386 (April 24, 2013); *Alkhafji v. TIAA-CREF*, No. 38 WAP 2011, No. 39 WAP 2011 (June 17, 2013).[8]

[8] Also noteworthy, the Supreme Court had five (5) additional 3-3 decisions between the time then-Justice Orie Melvin joined the Court in January 2010 and her suspension. In four (4) of the 3-3 cases – a February 21, 2012 ruling finding a search warrant invalid, a December 22, 2011

73. To the extent a 3-3 in vote exists in the matter *sub judice*, the new Justice's vote could potentially change the outcome of the case where an opinion is already authored yet not released.

74. Importantly, a "tie" in votes does not result in a "tie" or deadlocked decision, but rather affirms the lower court's decision and, as explained, the Court has already released decisions with this procedural posture.

75. To hold the knowledge of the current outcome of this vote, given that an opinion has been drafted and circulated as required at this time by Rule, and at the same time grant the PUC-DEP's Application would, at the very least, create the appearance of impropriety and damage public confidence in the integrity of the Court because such action could serve to alter a known outcome by the six (6) Justices.

76. The PUC-DEP's Application amounts to a backdoor attempt to side-step a potentially unfavorable decision (despite the fact that no decision has been issued) and otherwise achieve reconsideration without pursuing the proper avenues provided for in appellate review. In light of the foregoing, the Application should be denied.

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ruling allowing a mother's emotional distress lawsuit against Chester County Hospital and a radiologist, a September 27, 2011 ruling on an appeal in a liability case involving a fatal crash of a single-engine airplane, and an April 28, 2011 ruling on an appeal of a Geico motorcycle insurance case – then-Justice Orie Melvin recused herself. The fifth case, in which Nationwide Mutual Insurance was suing former agents, was argued before she was elected, but the decision was issued January 29, 2010. Before that case, the Supreme Court had four 3-3 decision in nine (9) years.

CONCLUSION

WHEREFORE, based upon the foregoing, Petitioner-Appellees respectfully request this Honorable Court to deny with prejudice Appellants' Application to Resubmit Case.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, John M. Smith, do hereby certify that a true and correct copy of the foregoing Answer to Appellants' Application to Resubmit Case was served via United States First-Class Mail on this 14th day of August 2013, to the following:

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