

Direct Dial: 215.841.6863

January 21, 2015

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, Second Floor  
Harrisburg, PA 17120

**RE: Edward Davidson v. PECO Energy Company**  
**PUC Docket No.: C-2014-2460364**

Dear Ms. Chiavetta:

Enclosed for filing with the Commission is *PECO Energy Company's Preliminary Objection to Formal Complaint* with regard to the matter referenced above.

I have enclosed a Certificate of Service showing that a copy of the above document was served on the interested parties. Thank you for your time and attention on this matter.

Very truly yours,



Ward L. Smith  
Counsel for PECO Energy Company

WS/lo  
Encl.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>EDWARD DAVIDSON</b>	:	
<b>Complainant</b>	:	
<b>v.</b>	:	<b>DOCKET NO. C-2014-2460364</b>
	:	
<b>PECO ENERGY COMPANY</b>	:	
<b>Respondent</b>	:	
	:	

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**NOTICE TO PLEAD**

Pursuant to 52 Pa. Code § 5.63, you are hereby notified that, if you do not file a written response denying or correcting the enclosed Preliminary Objections of PECO Energy Company within 10 days from service of this notice, a decision may be rendered against you. All pleadings, such as a Reply to Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for PECO Energy Company, Ward L. Smith, and where applicable, the Administrative Law Judge presiding over the issue.

File with:  
Rosemarie Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, Second Floor  
Harrisburg, PA 17120

With a copy to:  
Ward L. Smith, Esq.  
PECO Energy Company  
2301 Market Street, S-23  
Philadelphia, PA 19103

Dated at Philadelphia, PA, January 21, 2015.

  
\_\_\_\_\_  
Ward L. Smith  
Counsel for PECO Energy Company  
2301 Market Street S-23  
Philadelphia, PA 19101-8699  
215-841-6863  
ward.smith@exeloncorp.com

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>EDWARD DAVIDSON</b>	:	
<b>Complainant</b>	:	
<b>v.</b>	:	<b>DOCKET NO. C-2014-2460364</b>
	:	
<b>PECO ENERGY COMPANY</b>	:	
<b>Respondent</b>	:	

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**PRELIMINARY OBJECTIONS OF RESPONDENT,  
PECO ENERGY COMPANY**

PECO Energy Company ("PECO"), pursuant to 52 Pa. Code § 5.101(a)(3) and (4) respectfully petitions this Honorable Commission to dismiss the instant Complaint for legal insufficiency and for insufficient specificity of a pleading.

This case involves PECO's construction of a communications' tower within the footprint of an existing electric utility substation in PECO's service territory. The substation in question was the subject of litigation before the Commission in 1990. The Complaint alleges that PECO's recent construction of a communications' tower violates the Commission's 1990 Order in that proceeding. PECO poses two preliminary objections: First, that the Complaint is legally insufficient because PECO has statutory authority to construct the tower. This preliminary objection has two parts: (1) That PECO has statutory authority, pursuant to 66 Pa. C.S. §§ 1101 and 1501, to construct public utility facilities, and (2) that in exercising that right, it did not violate the Commission's 1990 Order. PECO's second preliminary objection builds on the first preliminary objection by requesting additional specificity of pleading – if PECO is correct on its first argument that it has not violated the Commission's 1990 Order, then this Complaint should not be allowed to proceed unless and until Complainant specifies some other statute, regulation, order or tariff that he claims PECO has violated.

**I. Background**

1. On December 31, 2014, PECO Energy was served with a formal complaint filed by Edward Davidson (hereafter "Complainant" or "Mr. Davidson"). A copy of the Complaint is attached hereto as Exhibit 1.

2. In his Complaint, the Complainant alleges the following:

4. PECO has failed to follow the approval by East Goshen Township, Chester County, Pennsylvania for a substation in the area known as Rocky Hill which was affirmed by the Public Utility Commission A-00220550F022 and later affirmed by the Pennsylvania Commonwealth Court in the matter of *James C. O'Connor, et. al. v. Pennsylvania Public Utility Commission*, 136 Pa. Comm. Ct. 119, 582 A. 2d 427 (1990) inasmuch as PECO has recently constructed a 100 foot tower which was not included in the plan they originally submitted to East Goshen Township.

See Exhibit 1.

3. In his request for relief, the Complainant states:

The Complainant seeks that PECO relocate the recently constructed 100 [foot] tower for failure to follow PECO's Approval by East Goshen Township, and in accordance with the Pennsylvania Public Utility Adjudication which was affirmed by the Pennsylvania Commonwealth Court.

See Exhibit 1.

4. Pursuant to 52 Pa. Code § 5.101(a)(3), a preliminary objection may be filed for insufficient specificity of a pleading.

5. Pursuant to 52 Pa. Code § 5.101(a)(4), a preliminary objection may be filed for legal insufficiency of a pleading.

6. Because these Preliminary Objections include an objection for insufficient specificity of a pleading, PECO is not simultaneously filing an Answer with the instant Preliminary Objections. See 52 Pa. Code §5.101(e).

7. Commission procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil procedure. *Equitable Small Transportation Intervenors. v. Equitable Gas Co.*, 1994 Pa.PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

8. In deciding preliminary objections, the Public Utility Commission must determine, based on the factual pleadings of the petitioner, if relief or recovery is possible. *Roc v. Flaherty*, 527 A.2d 211 (Pa. Cmwlth 1985).

9. A complaint must be able to recover under the law to survive a preliminary objection. *Milliner v. Enck*, 709 A.2d 417, 418 (Pa. Super. Ct. 1998) (“preliminary objection should be sustained only where it appears with certainty that, upon the facts averred, the law will not allow the plaintiff to recover”).

10. All of the non-moving party’s averments must be taken as true for the sake of deciding the preliminary objection. *County of Allegheny v. Commw. of Pa.*, 490 A.2d 402 (Pa. 1985).

11. The court does not, however, need to accept, “unwarranted inferences from facts, argumentative allegations, or expressions of opinions.” *Feingold v. McNulty*, 2009 Phila. Ct. Com. PI LEXIS 167, \*3.

12. Section 703 of the Public Utility Code, 66 Pa. C.S.A. § 703(b) provides that the Commission may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary to the public interest.

13. A hearing is required only when there is a disputed question of fact, and is not required to resolve questions of law. *Dee-Dee Cab, Inc. v. Pa.Pub. Util. Comm’n*, 817 A.2<sup>nd</sup> 593 (Pa.Commw. Ct. 2003), *petition for allowance of appeal denied*, 836 A.2d 123 (Pa. 2003).

14. Here, there are no genuine issues of fact and PECO Energy is entitled to judgment as a matter of law with respect to the allegations raised in the Complaint.

## II. Legal Insufficiency – PECO Has Statutory Authority to Construct the Utility Tower in Question

### A. PECO Was Granted the Authority and Obligation to Construct Reasonable and Necessary Utility Facilities When It Was Granted Its Certificate of Convenience to Provide Public Utility Service

15. PECO is a Pennsylvania public utility corporation, with certificates of public convenience to provide electric utility service in the City of Philadelphia and electric and natural gas utility service to the surrounding counties in Southeast Pennsylvania.

16. Upon being granted its certificate of service, it became “lawful [for PECO] to offer, render, furnish, or supply service” within its certificated service territory. 66 Pa. C.S. § 1101.

17. Moreover, as a public utility, PECO has the statutory authority and obligation to “make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public.” 66 Pa. C.S. §1501.

18. While all utility facilities are subject to oversight and review by the Commission, PECO is generally not required to obtain the approval of the Commission prior to constructing its public utility facilities. Where such prior approval is required, the law specifically sets forth that PECO must file an application and obtain such approval. PECO is aware of three primary situations in which it is required to obtain Commission approval prior to constructing its public utility facilities, none of which apply to the tower in question:

- a. Overhead transmission lines of 100 kV or more; *see* 52 Pa. Code §57.71 et seq.
- b. Facilities that are located in a “grade crossing;” *see* 66 Pa. C.S. §2702.
- c. A “public utility building,” for which PECO must obtain approval from either the

local municipal authority or the Commission. *See* 53 Pa. C.S. §10619.<sup>1</sup>

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<sup>1</sup> The Municipalities Planning Code Section 619 states that local zoning “shall not apply to any existing or proposed building, or extension thereof, used or to be used by a public utility corporation, if, upon

19. No requirement exists for PECO to obtain Commission approval prior to construction of a communication tower. PECO thus has authority, pursuant to 66 Pa. C.S. §§1101 and 1501, to construct this public utility facility.

**B. PECO's Construction of The Tower Did Not Violate the Commission's 1990 Approval to Construct the Rocky Hill Substation**

20. PECO's 1988 application to build the Rocky Hill substation in East Goshen Township was an application to build a substation control building pursuant to Section 619 of the Municipalities Planning Code (that is, 53 Pa. C.S. §10619). See Commission Opinion and Order, attached to Complaint as Exhibit B, pp. 1-2.

21. Section 619 of the Municipalities Planning Code applies only to public utility buildings. It does not apply to other public utility facilities, such as siren towers, see *South Coventry Township v. Philadelphia Electric Co.*, 504 A. 2d 368 (Pa. Cmwlth. 1986), or reservoirs. See *Delaware Unlimited, Inc. v. PaPUC*, 513 A. 2d 593 (Pa. Cmwlth. 1986), *appeal den.* 527 A. 2d 547 (1986). PECO respectfully suggests that Section 619 also does not apply to communications' towers.

22. In 1990, the Commission approved the construction of the substation control building<sup>2</sup> subject only to two conditions that are not at issue here: (a) PECO was required to create a

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petition of the corporation, the Pennsylvania Public Utility Commission shall, after a public hearing, decide that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public." This statute allows a utility to proceed with the construction of a utility "building" upon receipt of either local zoning approval or of PUC approval. In the case of the Rocky Hill Substation, PECO proceeded with construction of the building on the basis of PUC approval.

<sup>2</sup> The Complaint alleges twice that approval was also obtained from East Goshen Township. Although this issue does not need to be resolved in order to grant PECO's Preliminary Objection, PECO does wish to clarify the procedural posture of the 1990 proceeding. East Goshen Township was a complainant before the Commission. PECO worked with the Township and agreed to a landscaping plan, which the Commission approved and incorporated into the Commission's order. Thus, while the Township was certainly a stakeholder and participant in the Commission proceeding, no separate approval was necessary or obtained from the Township.

berm and to plant certain vegetation pursuant to an agreed-upon landscaping plan, and (b) PECO was required to meet local noise ordinances.<sup>3</sup>

23. The Commission's 1990 Order approving construction of the Rocky Hill Substation was limited to consideration of the substation. The underlying statute that motivated PECO's application applies only to buildings; the application only requested approval to construct a building; and the Commission's Order only addressed a building. The Order did not create any limitation on PECO's existing statutory right, pursuant to 66 Pa. C.S. § 1501, to construct other public utility facilities.

24. Nearly 25 years later, PECO found it necessary to install an additional, non-building, public utility facility.<sup>4</sup> PECO had statutory authority for that construction. As there is nothing in the Commission's 1990 approval to build the Rocky Hill Substation that limits PECO's existing authority to construct public utility facilities, the construction of the tower did not violate the 1990 Order.

### **III. Insufficient Specificity -- Other Than the Claimed Violation of the Commission's 1990 Order, the Complaint Does Not Specify Any Statute, Regulation, Order, or Tariff That PECO is Claimed to Have Violated**

25. The Complaint raises only one claimed violation of a statute, regulation, order, or tariff – the claimed violation of the Commission's 1990 approval of the Rocky Hill Substation.

26. In its first Preliminary Objection, PECO demonstrated that it has not violated the Commission's 1990 approval.

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<sup>3</sup> The copy of the Commission's approval that was attached to the Complaint was missing the final page, which contains the Commission's ordering paragraphs. A complete copy is attached to this Preliminary Objection as Exhibit 2.

<sup>4</sup> Although not necessary to resolve this Preliminary Objection, PECO notes that the tower in question is part of its smart meter/smart grid infrastructure.

27. If the Commission grants PECO's first Preliminary Objection, the Complaint will thus not contain any specific claim of a violation of a statute, regulation, order, or tariff.

28. PECO recognizes that the Commission gives additional latitude to individual complainants in the framing of their complaints. In this case, however, PECO respectfully suggests that if its first preliminary objection is granted, this case should only be allowed to proceed if Mr. Davidson specifies some statute, regulation, order or tariff that he claims PECO has violated -- *other than the Commission's 1990 approval*.

**REQUEST FOR RELIEF**

WHEREFORE, for the reasons set forth above, PECO Energy Company respectfully requests that your Honorable Commission summarily dismiss the Complainant's formal complaint for legal insufficiency and, unless Mr. Davidson files an Amended Complaint specifying a claimed violation of some statute, regulation, order or tariff other than the Commission's 1990 Order, dismissing all issues which were raised in the Complaint.

Respectfully submitted,



Ward L. Smith  
Counsel for PECO Energy Company  
2301 Market Street, S23-1  
P.O. Box 8699  
Philadelphia, PA 19101-8699  
(215) 841-6863  
ward.smith@exeloncorp.com

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>EDWARD DAVIDSON</b>	:	
<b>Complainant</b>	:	
<b>v.</b>	:	<b>DOCKET NO. C-2014-2460364</b>
	:	
<b>PECO ENERGY COMPANY</b>	:	
<b>Respondent</b>	:	

**VERIFICATION**

I, Ward Smith, hereby declare that I am counsel for PECO Energy Company; that as such I am authorized to make this verification on its behalf; that the facts set forth in the foregoing Pleading are true to the best of my knowledge, information and belief, and that I make this verification subject to the penalties of 18 Pa. C.S. § 4904 pertaining to false statements to authorities.

Date: January 21, 2015

  
\_\_\_\_\_  
Ward Smith

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>EDWARD DAVIDSON</b>	:	
<b>Complainant</b>	:	
<b>v.</b>	:	<b>DOCKET NO. C-2014-2460364</b>
	:	
<b>PECO ENERGY COMPANY</b>	:	
<b>Respondent</b>	:	

**CERTIFICATE OF SERVICE**

I, Ward Smith, hereby certify that I have this day served a copy of PECO Energy Company's Answer in the above matter upon all interested parties by mailing a copy, properly addressed and postage prepaid to:

Edward Davidson  
9 Oak Tree Lane  
Malvern, PA 19355

Dated at Philadelphia, Pennsylvania, January 21, 2015



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Ward L. Smith  
Counsel for PECO Energy Company  
2301 Market Street, S23-1  
P.O. Box 8699  
Philadelphia, PA 19101-8699  
(215) 841-6863  
ward.smith@exeloncorp.com



An Exelon Company

Direct Dial: 215 841-6863

January 21, 2015

Edward Davidson  
9 Oak Tree Lane  
Malvern, PA 19355

**RE: Edward Davidson v. PECO Energy Company**  
**PUC Docket No.: C-2014-2460364**

Dear Mr. Davidson:

Enclosed is a copy of PECO Energy Company's response to the formal complaint filed in the above-referenced docket. The law requires PECO Energy to file an answer to your Public Utility Commission complaint. Keep these papers for your records. This is not a decision on your complaint. PECO's response may include a New Matter, Motion or Preliminary Objection. Please note that if you do not respond to a New Matter, Motion, or Preliminary Objection an unfavorable decision may be rendered against you. Responses to New Matters and Motions must be filed within 20 days. Responses to Preliminary Objections must be filed within 10 days. If there is no New Matter, Motion or Preliminary Objection included, no response is required.

Soon, the Public Utility Commission will schedule either a settlement conference or a hearing on your complaint. The Commission will let you know by mail whether there will be a conference or a hearing and will include instructions on what to do next. If the matter is set for hearing, the notice will provide you with information about the date, time and place of the hearing. If we are unable to resolve your complaint and have to proceed with a hearing, a judge will be at the hearing and will decide your complaint. You must call the Public Utility Commission if you have any questions about the hearing or if you cannot attend the hearing.

Thank you for your time and attention on this matter.

Very truly yours,

A handwritten signature in cursive script that reads "Ward L. Smith". To the right of the signature, there are initials "L.S." written in a similar cursive style.

Ward L. Smith  
Counsel for PECO Energy Company

WS/lo  
Encl.

**Exhibit 1**

**Complaint As Filed**

Mr. Edward Davidson  
9 Oak Tree Lane  
Malvern, PA 19355

December 11, 2014

Via Certified Mail 7010 0290 0002 8649 2480

Secretary  
Pennsylvania Public Utility Commission  
400 North Street  
Harrisburg, PA 17120

**RE: Pennsylvania Public Utility Commission Formal Complaint – PECO  
Substation on 3.831 acres, East Goshen Township, Chester County,  
Pennsylvania known as Rocky Hill**

Dear Secretary:

Enclosed herewith please find my original formal Complaint in reference to the above-captioned matter.

If you have any questions, or need any additional information please do not hesitate to contact me.

Thank you,



Edward Davidson

**RECEIVED**

DEC 17 2014

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Formal Complaint

Filing this form begins a legal proceeding and you will be a party to the case. If you do not wish to be a party to the case, consider filing an informal complaint.

To complete this form, please type or print legibly in ink.

1. Customer (Complainant) Information

Provide your name, mailing address, county, telephone number(s), e-mail address and utility account number. It is your responsibility to update the Commission with any changes to your address and to where you want documents mailed to you.

Name Edward Davidson

Street/P.O. Box 9 Oak Tree Lane Apt #

City Malvern State PA Zip 19355

County Chester

Telephone Number(s) Where We Can Contact You During the Day:

(610) 296-0604 (home) ( ) (mobile)

E-mail Address (optional): ed@emaildavidson.com

Utility Account Number (from your bill) Strasburg Rd. - 38791-01707 Home/Oak Tree Lane - 13968-01100

If your complaint involves utility service provided to a different address or in a different name than your mailing address, please list this information below.

Name Edward Davidson

Street/P.O. Box 1603 E. Strasburg Road

City West Chester State PA Zip 19380

2. Name of Utility or Company (Respondent)

Provide the full name of the utility or company about which you are complaining. The name of your utility or company is on your bill.

PECO

RECEIVED

DEC 17 2014

PA PUBLIC UTILITY COMMISSION SECRETARY'S BUREAU

3. Type of Utility Service N/A

Check the box listing the type of utility service that is the subject of your complaint (check only one):

- ELECTRIC                       WASTEWATER/SEWER  
 GAS                                       TELEPHONE/TELECOMMUNICATIONS (local, long distance)  
 WATER                                       MOTOR CARRIER (e.g. taxi, moving company, limousine)  
 STEAM HEAT

4. Reason for Complaint

What kind of problem are you having with the utility or company? Check all boxes below that apply and state the reason for your complaint. Explain specifically what you believe the utility or company has done wrong. Provide relevant details including dates, times and places and any other information that may be important. If the complaint is about billing, tell us the amount you believe is not correct. Use additional paper if you need more space. **Your complaint may be dismissed without a hearing if you do not provide specific information.**

- The utility is threatening to shut off my service or has already shut off my service.
- I would like a payment agreement.
- Incorrect charges are on my bill. Provide dates that are important and an explanation about any amounts or charges that you believe are not correct. Attach a copy of the bill(s) in question if you have it/them.
- I am having a reliability, safety or quality problem with my utility service. Explain the problem, including dates, times or places and any other relevant details that may be important.
- Other (explain).  
PECO has failed to follow the approval by East Goshen Township, Chester County, Pennsylvania for a substation in the area known as Rocky Hill which was affirmed by the Public Utility Commission A-00220550F022 and later affirmed by the Pennsylvania

Commonwealth Court in the matter of James C. O'Connor, et. al. v. Pennsylvania Public Utility Commission, 136 Pa. Comm. Ct. 119, 582 A.2d 427 (1990) inasmuch as PECO has recently constructed a 100 foot tower which was not included in the plan they originally submitted to East Goshen Township (A copy of the picture of the pole is attached hereto and made a part hereof as Exhibit "A-1 through A-7").

**Note:** If your complaint is only about removing or modifying a municipal lien filed by the City of Philadelphia, the Public Utility Commission (PUC) cannot address it. Only local courts in Philadelphia County can address this type of complaint. The PUC can address a complaint about service or incorrect billing even if that amount is subject to a lien.

In addition, the PUC generally does not handle complaints about cell phone or Internet service, but may be able to resolve a dispute regarding voice communications over the Internet (including the inability to make voice 911/E911 emergency calls) or concerns about high-speed access to Internet service.

**5. Requested Relief**

**How do you want your complaint to be resolved?** Explain what you want the PUC to order the utility or company to do. Use additional paper if you need more space.

The Complainant seeks that PECO relocate the recently constructed 100 tower for failure to follow PECO's Approval by East Goshen Township, and in accordance with the Public Utility Commission Adjudication which was affirmed by the Pennsylvania Commonwealth Court. (A copy of the Pennsylvania Utility Commission Order dated August 31<sup>st</sup>, 1989 is attached hereto as Exhibit "B"; a copy of the Commonwealth Court decision is attached hereto as Exhibit "C").

**Note:** The PUC can decide that a customer was not billed correctly and can order billing refunds. The PUC can also fine a utility or company for not following rules and can order a utility or company to correct a problem with your service. Under state law, the PUC cannot decide whether a utility or company should pay customers for loss or damages. Damage claims may be sought in an appropriate civil court.

6. **Protection From Abuse (PFA)**

Has a court granted a "Protection From Abuse" order that is currently in effect for your personal safety or welfare? The PUC needs this information to properly process your complaint so that your identity is not made public.

**Note:** You must answer this question if your complaint is against a natural gas distribution utility, an electric distribution utility or a water distribution utility AND your complaint is about a problem involving billing, a request to receive service, a security deposit request, termination of service or a request for a payment agreement.

Has a court granted a "Protection From Abuse" order for your personal safety or welfare?

YES

NO

If your answer to the above question is "yes," attach a copy of the current Protection From Abuse order to this Formal Complaint form.

7. **Prior Utility Contact**

a. Is this an appeal from a decision of the PUC's Bureau of Consumer Services (BCS)?

YES

NO

**Note:** If you answered yes, move to Section 8. No further contact with the utility or company is required. If you answered no, answer the question in Section 7 b. and answer the question in Section 7 c. if relevant.

b. If this is not an appeal from a BCS decision, have you spoken to a utility or company representative about this complaint?

YES

NO

**Note:** You must contact the utility first if (1) you are a residential customer, (2) your complaint is against a natural gas distribution utility, an electric distribution utility or a water utility AND (3) your complaint is about a billing problem, a service problem, a termination of service problem, or a request for a payment agreement.

- 
- c. If you tried to speak to a utility company representative about your complaint but were not able to do so, please explain why.

**Note:** Even if you are not required to contact the utility or company, you should always try to speak to a utility or company representative about your problem before you file a **Formal Complaint with the PUC.**

**8. Legal Representation**

If you are filing a **Formal Complaint as an individual on your own behalf, you are not required to have a lawyer.** You may represent yourself at the hearing.

If you are already represented by a lawyer **in this matter**, provide your lawyer's name, address, telephone number, and e-mail address, if known. Please make sure your lawyer is aware of your complaint. If represented by a lawyer, both you and your lawyer must be present at your hearing.

Lawyer's Name \_\_\_\_\_

Street/P.O. Box \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Area Code/Phone Number \_\_\_\_\_

E-mail Address (if known) \_\_\_\_\_

**Note:** Corporations, associations, partnerships, limited liability companies and political subdivisions are **required** to have a lawyer represent them at a hearing **and** to file any motions, answers, briefs or other legal pleadings.

9. **Verification and Signature**

**You must sign your complaint.** Individuals filing a Formal Complaint **must** print or type their name on the line provided in the verification paragraph below and **must** sign and date this form in **ink.** **If you do not sign the Formal Complaint, the PUC will not accept it.**

**Verification:**

*I Edward Davidson, hereby state that the facts above set forth are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).*

Edward Davidson  
Signature of Complainant)

December 11<sup>th</sup>, 2014  
(Date)

\_\_\_\_\_  
Title of authorized employee or officer (only applicable to corporations, associations, partnerships, limited liability companies or political subdivisions)

Note: If the Complainant is a corporation, association, partnership, limited liability company or political subdivision, the verification **must** be signed by an authorized officer or authorized employee. If the Formal Complaint is **not signed** by one of these individuals, the PUC **will not accept it.**

10. **Two Ways to File Your Formal Complaint**

**Electronically.** You must create an account on the PUC's eFiling system, which may be accessed at <http://www.puc.pa.gov/efiling/default.aspx>.

Note: If you are appealing your Bureau of Consumer Services (BCS) decision, you must file your formal complaint by mail.

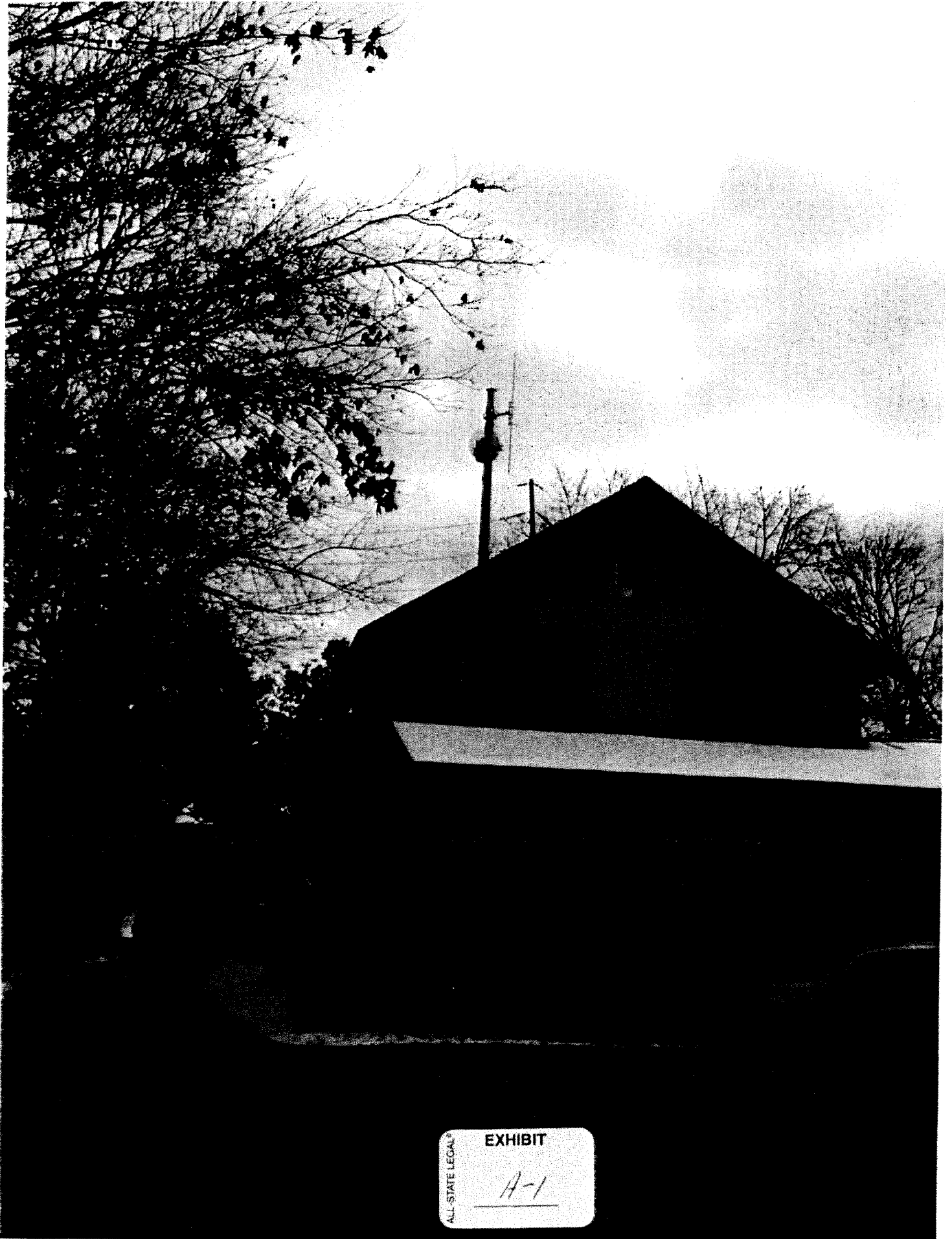
**Mail.** Mail the completed form with your original signature and any attachments, by certified mail, first class mail, or overnight delivery to this address:

Secretary  
Pennsylvania Public Utility Commission  
400 North Street  
Harrisburg, Pennsylvania 17120

Note: Formal Complaints sent by fax or e-mail will **not** be accepted.

If you have any questions about filling out this form, please contact the Secretary's Bureau at 717-772-7777.

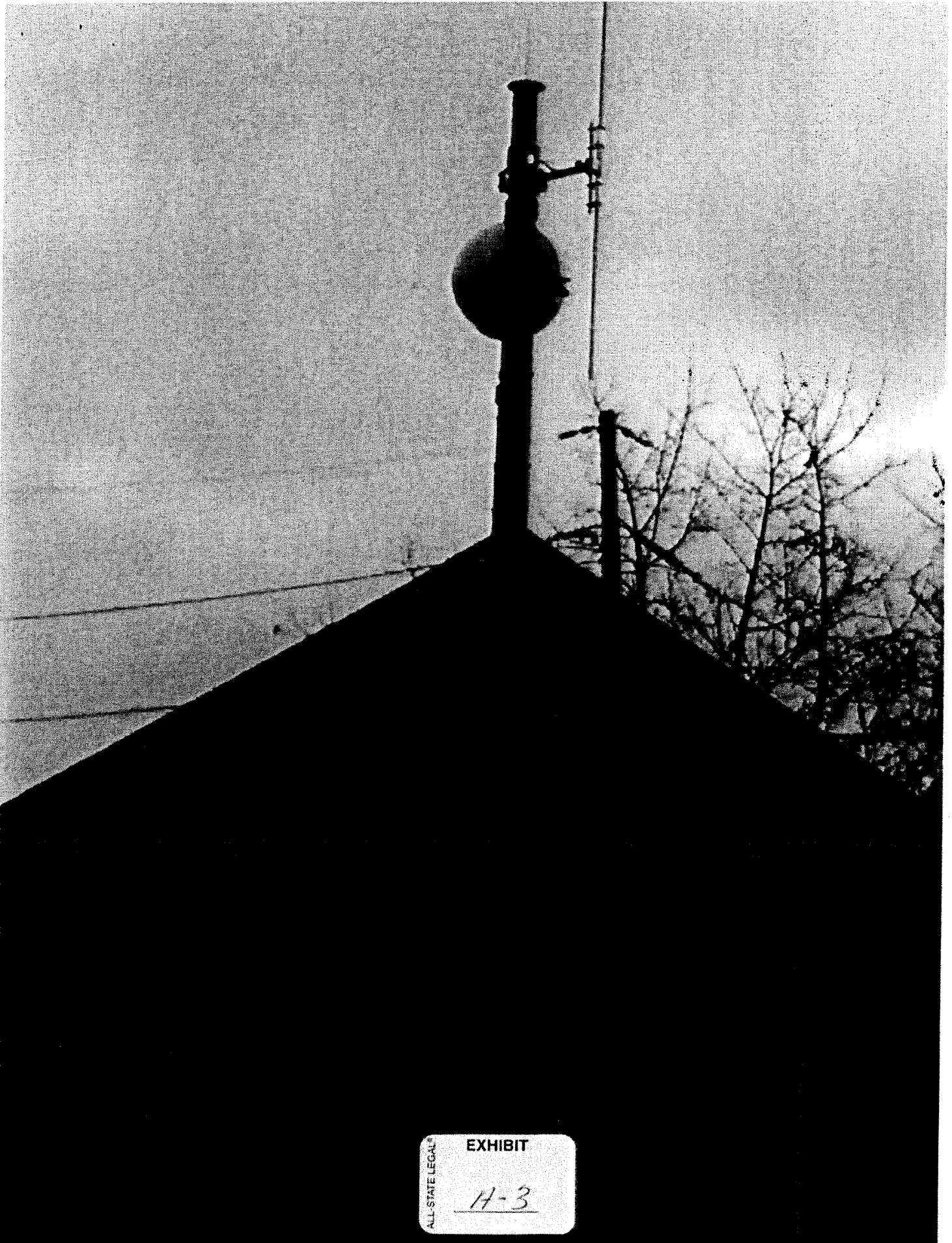
Keep a copy of your Formal Complaint for your records.



ALL-STATE LEGAL®  
EXHIBIT  
A-1



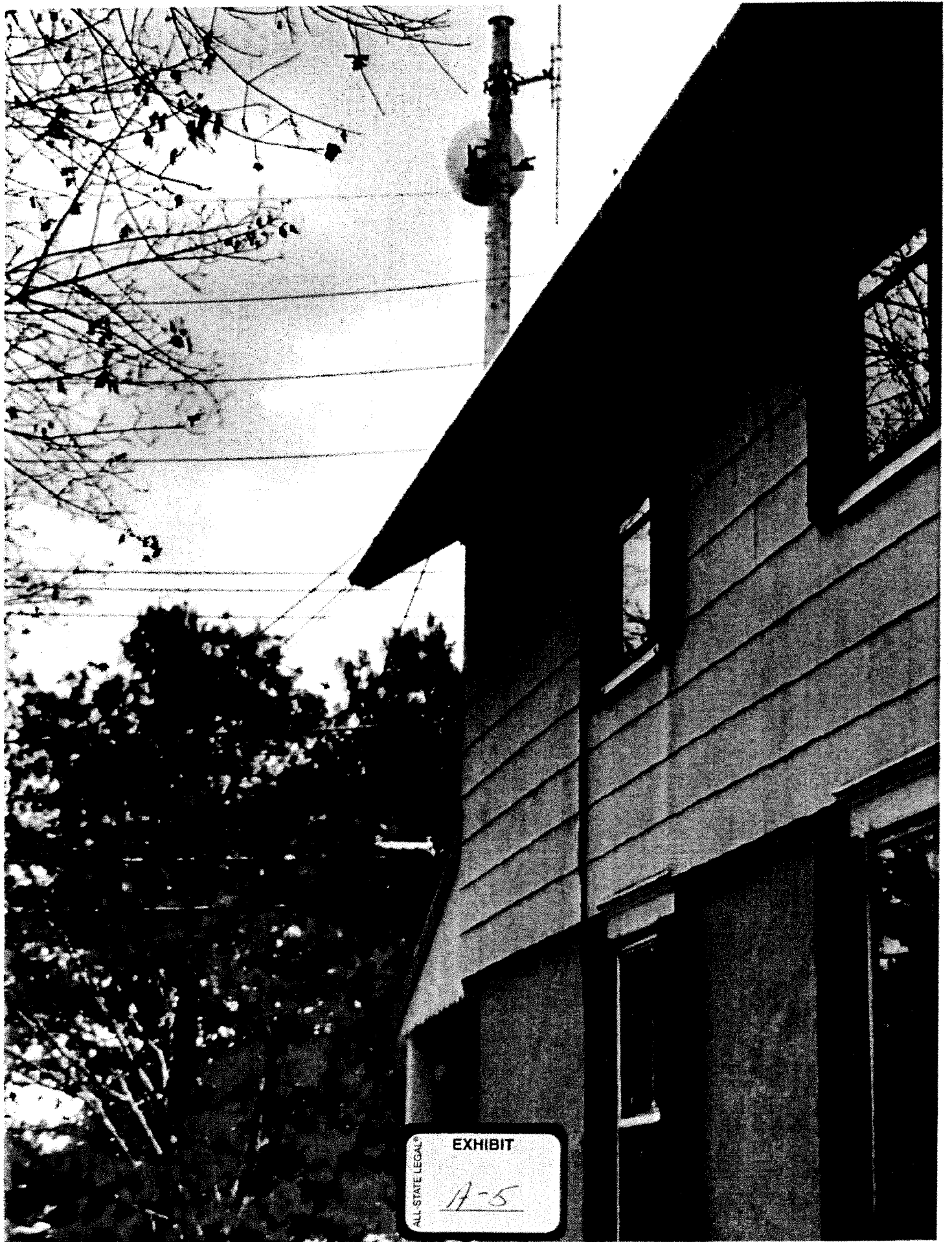
ALL-STATE LEGAL  
EXHIBIT  
H-2



ALL-STATE LEGAL®  
EXHIBIT  
11-3



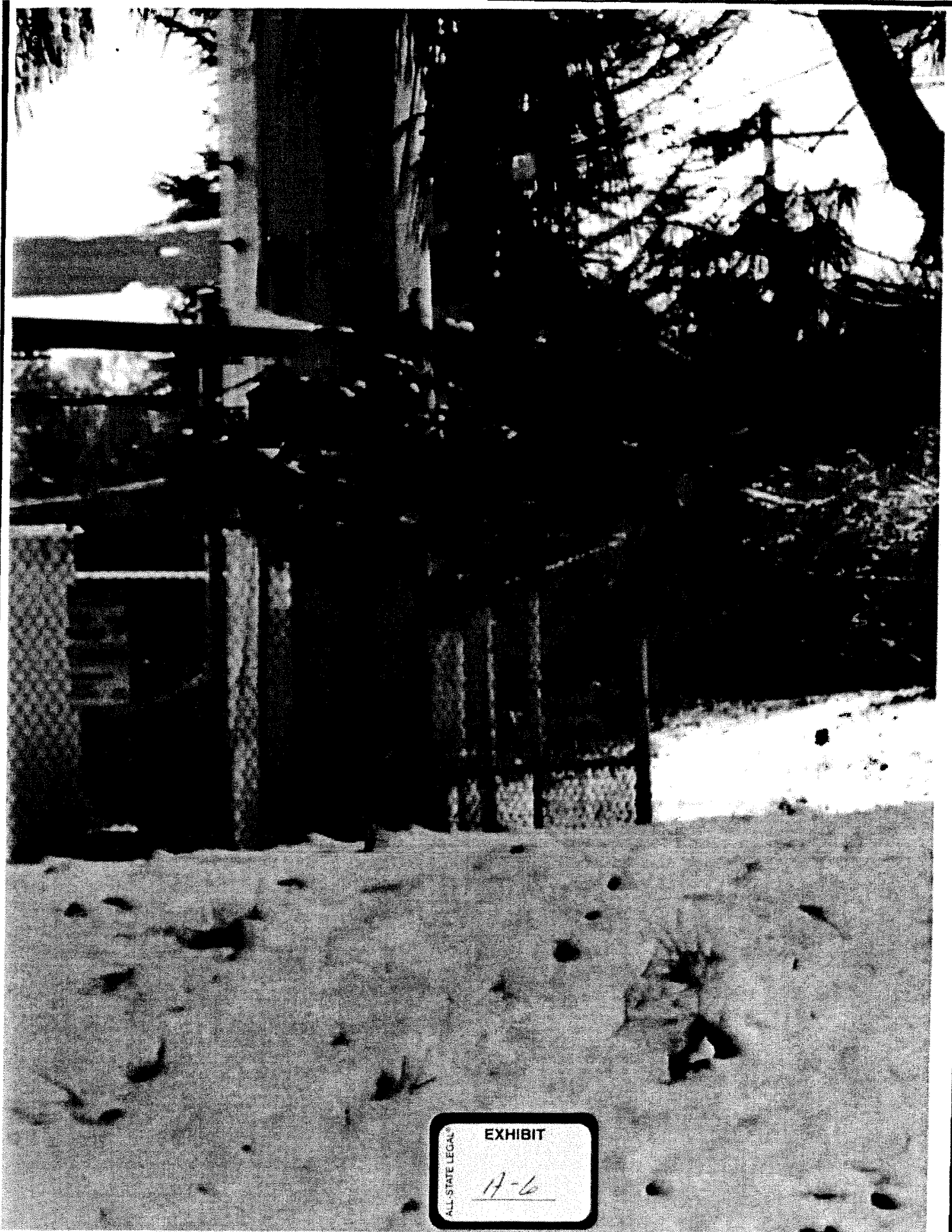
ALL-STATE LEGAL<sup>®</sup>  
**EXHIBIT**  
17-4



ALL STATE LEGAL

EXHIBIT

A-5



ALL STATE LEGAL<sup>®</sup>  
EXHIBIT  
H-6



ALL-STATE LEGAL

EXHIBIT

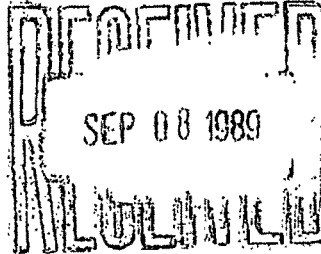
14-7



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P. O. BOX 3265, HARRISBURG, Pa. 17120

September 6, 1989

IN REPLY PLEASE  
REFER TO OUR FILE  
A-110550F022



TO ALL PARTIES

Application of the Philadelphia Electric Company ofr a finding of necessity for the situation of a control building on a site in East Goshen Township, Cheater County, containing 3.831 acres, located at the southeast corner of Strasburg Road and Chester Road.

To Whom It May Concern:

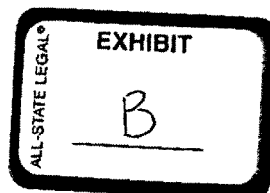
This is to advise you that an Opinion and Order has been adopted by the Commission in public meeting held August 31, 1989 in the above entitled proceeding.

A copy of this Opinion and Order has been enclosed for your records.

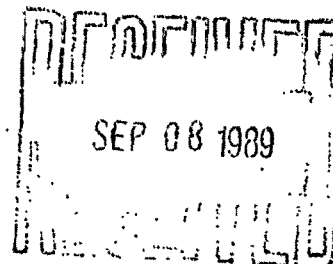
Very truly yours,

Jerry Rich, Secretary

fao  
Encls.  
Cert. Mail



PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17120



Public Meeting held August 31, 1989

Commissioners Present:

Bill Shane, Chairman  
William H. Smith, Vice-Chairman  
Joseph Rhodes, Jr.  
Frank Fischl

Application of the Philadelphia Electric Company for a finding of necessity for the situation of a control building on a site in East Goshen Township, Chester County, containing 3.831 acres, located at the southeast corner of Strasburg Road and Chester Road.

A-00110550F022

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before us for consideration are the Exceptions of Protestants, O'Connor, et al. ("Protestants" or "O'Connor") filed on June 12, 1989, to the Initial decision of Administrative Law Judge Wendell F. Holland ("ALJ") served on the parties May 23, 1989, wherein the ALJ recommended that the Application of Philadelphia Electric Co. ("PECO", "Applicant" or "Company") for a finding of necessity for building a control building in East Goshen Township, Chester County, be granted subject to certain conditions. On June 22, 1989 PECO filed Reply Exceptions.

**BRIEF HISTORY OF PROCEEDING**

On or about March 7, 1988, PECO filed the subject Application under the provisions of the Pennsylvania Municipalities Planning Code, Section 10619, 53 P.S. §10619, in

order to build a substation<sup>1/</sup> in a section of East Goshen Township, Chester County, known as Rocky Hill. James C. O'Connor and other residents living near the prospective site filed protests averring, inter alia, that the Application should be denied because the proposed substation will adversely affect the historic nature of the area. A Protest was also filed on behalf of East Goshen Township. On June 21, 1988, a prehearing conference and a public input session were held before the ALJ in West Chester. Evidentiary hearings were held on July 14, September 14, October 20 and 21, and December 23, 1988 in West Chester. .

At the hearing on September 14, 1988, Protestants requested that the Application proceedings be stayed pending a determination by Federal and/or State Historical Commissions to determine whether the proposed substation would have an adverse impact on the Rocky Hill area. The ALJ denied that motion by Order issued October 21, 1988 and the Commission affirmed the denial. On or about October 13, 1989, the Pennsylvania Historical and Museum Commission filed a Petition to Intervene. The ALJ denied the petition as being untimely; however, the Commission granted the Petition. As a result, an evidentiary hearing was held in West Chester at which the Historical Commission presented its case.

Initial Briefs were filed by all parties. Reply Briefs were filed by PECO and Protestant O'Connor. The record in this proceeding consists of 674 transcript pages and approximately 30 exhibits.

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<sup>1/</sup> PECO proposes to build a 69KV-34KV distribution substation. The high voltage electrical equipment will be located outdoors, and the control equipment will be housed within a control building.

The Protestants' Exceptions argued that the ALJ erred in concluding that PECO's construction of the control building on the proposed site is reasonably necessary for the convenience or welfare of the public. The Protestants argued that alternative sites were better suited to the control building. Specifically, the Protestants excepted to the ALJ's Findings of Fact numbers 3, 9, 12, 14, 16, 18, 19, 20, 22, 23, 24 and 25. In addition, the Protestants excepted to all three of the ALJ's Conclusions of Law. We shall discuss each in sequence.

FINDING OF FACT NO. 3:

3. The site upon which the proposed project is to be constructed contains about four or more acres for which PECO paid \$475,000 in 1987 to acquire.

The Protestant excepted and averred that: "The record is quite clear that the proposed location of the control building and substation is 3.831 acres...." The company did not respond to the Exception. We find this Exception is irrelevant to the matters in issue. It is, therefore, denied.

FINDING OF FACT NO. 9

9. Several sites in the area were evaluated based on various criteria - namely, the ease of ingress and egress to the property, property location, present zoning, physical characteristics of the property, aesthetics, costs and ability to acquire the property amicably.

The Protestants do not deny that several sites in the area were evaluated for suitability. The Company did not respond to the Exception. Protestants object to the fact that PECO did not evaluate their proposed site. We find this Exception irrelevant to this Finding of Fact and shall, therefore, deny it.

FINDING OF FACT NO. 11

11. The Rocky Hill site is uniquely suitable for the project because of the coming together of different lines from different sources and its location on a corner.

The Protestants argued that the Rocky Hill site was not uniquely suitable for the project. In this regard, the Protestants refer us to their Initial Brief to the ALJ. We find that the ALJ thoroughly examined the evidence and arguments of all the parties. The Protestants do not point to any authority, error of law or lack of evidence but merely contest the ALJ's findings. We shall decline to disturb the ALJ's ruling on such a flimsy basis. The Exception is, therefore, denied.

FINDING OF FACT NUMBER 12:

12. Approximately 13 alternative sites have been identified but are undesirable because of additional costs or being too far away from a system planning point of view.

The Protestants do not deny that thirteen alternative sites were evaluated but object that this finding does not refer to their preferred site. As above, the Protestants refer us to their Initial Brief to the ALJ. We find that the ALJ thoroughly examined the evidence and arguments of all the parties. The Protestants do not cite any authority, error of law or lack of evidence to support the finding but merely contest the ALJ's ruling. We shall not disturb the ALJ's decision on such a flimsy basis. The Exception is, therefore, denied.

FINDING OF FACT NUMBER 13:

13. The proposed situation of the control building and the substation would not produce any significant electric or magnetic fields which could be measured at the property line.

FINDING OF FACT NUMBER 14:

14. The maximum value of the electric field that would be emitted would be as insignificant as the electric field emitted by various household appliances such as an electric iron, a stereo, an electric blanket, a toaster and a television.

The Protestants' Exceptions state that Findings of Fact Numbers 13 and 14 are not supported in the record. In discussing the testimony of the manager of the Engineering Division of PECO's Engineering and Construction Department, the ALJ recounts at page 8 of the Initial Decision:

He emphasized that the proposed situation of the control building would not produce any electric or magnetic fields which could be measured at the property line. He admitted that the proposed substation will produce electromagnetic fields which can be measured at the property line. But, he explained that the maximum value of the electric field that will be emitted would be as insignificant as the electric field emitted by an electric iron, a stereo and an electric blanket. And the maximum value of the magnetic field would be comparable to a toaster, a television and an electric stove heating coil. He assured that even under the worst conditions, the electromagnetic fields would be comparatively harmless. (I.D., p. 8).

The Protestants Exceptions are denied.

FINDING OF FACT NO. 16:

16. PECO has won awards in the past for its ability to construct similar projects in conformity with the surroundings of the areas and will do so in this case.

FINDING OF FACT NUMBER 18:

18. Relatively recently PECO has constructed three substations that abut or are in close proximity to significant historic sites, including Valley Forge National Park.

The Protestants do not deny that PECO has constructed similar buildings in a pleasing architectural manner. They do not deny that PECO has shown the ability, expertise and desire to blend their buildings into the surrounding areas. They only contend that PECO's past performance is "totally irrelevant to the facts as presented in this case." (Protestants' Exceptions, p. 5). We disagree. PECO's clearly manifested intent to build the substation with little incursion to the environment supports granting the Application. The Exception is, therefore, denied.

FINDING OF FACT NUMBER 19:

19. There are several factors that reduce the integrity of the intersection as a historic district - namely, some buildings at the intersection have been sided with 20th century materials which cover or obliterate most of their 19th century architectural details; a non-contributing residence and barn located at the intersection; a modern subdivision of "ubiquitous" design; and the adaptive reuse of the dominant structure of the intersection.

FINDING OF FACT NUMBER 20:

20. The Rock Hill area is the subject of an application for listing in the National Register.

FINDING OF FACT NUMBER 22:

22. Any environmental harm to the alleged historic district does not outweigh the benefits to the public from the increased supply of electric energy in East Goshen Township. PECO's decision to use the Rocky Hill site for its proposed project was reasonable and not arbitrary or capricious or made in bad faith.

Essentially, the Protestants argue that the Commission is without jurisdiction because the Rocky Hill site is potentially of historical significance, citing Commonwealth v. National Gettysburg Battlefield Tours, Inc., 454 Pa. 193 (1973) and Del-Aware Unlimited, Inc. v. Pennsylvania Public Utility Commission, 513 A.2d 593 (Pa. Cmwlth. Ct. 1986).

The ALJ noted that the Company adequately distinguished the Del-Aware case, supra:

PECO responds that Del-Aware is inapplicable because the review of the National Register application in this case is far less "comprehensive" than DER's in Del-Aware. The letter involved an entire administrative hearing process (i.e., full hearing, cross-examination and briefs) before a review board that issued an appealable decision. In contrast, the Historical Commission reviewed Rock Hill's Application in just two days, which PECO considers at best hasty and at worst incomplete, since the Historical Commission has not yet visited the site or determined its boundaries.

(Initial Decision, p. 49).

As for the National Gettysburg case, supra, the ALJ thoroughly examined its application to the facts of this case and found it lacking:

We find the Historical Commission's argument to be legally and factually without force in this case. From a legal perspective, the Gettysburg Battlefield case clearly permits a utility to build near a

historic site: development is to be controlled not prohibited. Factually, the record shows that PECO has numerous units and substations throughout Valley Forge National Park and other designated historic sites throughout its service area. Both Gettysburg Battlefield and Valley Forge have unquestioned places in history and are even included in the National Register. Rock Hill's historic significance does not compare and is indeed greatly disputed. Thus taken in its best light, and even assuming that Rocky Hill is actually included in the National Register, we are not required to defer our determination on PECO's Application in this case.

(Id. p. 50).

The Protestants' Exceptions are denied.

FINDING OF FACT NO. 23:

23. PECO's decision to use the Rock Hill site for the proposed project was technically well considered and based on sound engineering judgment.

FINDING OF FACT NO. 24:

24. PECO has followed all the requirements of the applicable law and regulations.

FINDING OF FACT NO. 25:

25. PECO has made reasonable efforts to reduce environmental incursions to a minimum.

Essentially, the Protestants rehash prior arguments that the ALJ in not adopting the Protestants proposed alternative cite, somehow committed an error of law. The Protestants fail to cite any authority for this position. We find that the ALJ's Findings of Fact on this issue are supported by substantial record evidence. The Protestants Exceptions are, therefore, denied.

The ALJ made these Conclusions of Law. The Protestants excepted to all three of them. We shall discuss each in sequence.

CONCLUSION OF LAW NO. 1:

1. The Commission has jurisdiction over the parties and the subject matter of this Application.

The Protestants restate their prior arguments that the Commission does not have subject matter jurisdiction over this application. For the reasons discussed infra, we shall deny this Exception.

CONCLUSION OF LAW NO. 2:

2. Construction of the control building on the proposed site is reasonably necessary for the convenience or welfare of the public.

The Protestants reargue that the ALJ's recommendation of the proposed site is somehow erroneous "since alternate sites exist..." (Protestants Exceptions at p. 12). In addition, the Protestants again argue that the Commission is without jurisdiction in this case. For the reasons discussed previously, this Exception is denied.

CONCLUSION OF LAW NO. 3:

3. PECO has met the three-prong test of Payne v. Kassab, supra, and the intensified burden arising therefrom, and it has not violated Article I, Section 27 of the Pennsylvania Constitution.

Payne v. Kassab, 312 A.2d 86 (Cmwlth. Ct. 1973) requires compliance with all applicable statutes and regulations relevant to the protection of the commonwealth's public natural resources. In this regard, the Protestants again raise the arguments that the Pennsylvania Historical and Museum Commission

1ST CASE of Level 1 printed in FULL format.

James C. O'CONNOR, et al., Petitioners, v. PENNSYLVANIA PUBLIC UTILITY COMMISSION,  
Respondent

No. 1977 C.D. 1989

Commonwealth Court of Pennsylvania

136 Pa. Commw. 119; 582 A.2d 427; 1990 Pa. Commw. LEXIS 601

September 13, 1990, Argued

November 9, 1990, Decided

**PRIOR HISTORY: (\*\*\*)**

Appeal from No. A-00110550F022; Pennsylvania Public Utility Commission.

**CORE TERMS:** site, protestant, substation, historic, archaeological, environmental impact, preservation, substantial evidence, environmental, defer, fact finder, alternative site, landscaping, electrical, exemption, build, pump house, historic preservation, reasonably necessary, local zoning, incursion, protest, binding, advice, trees, input, scope of review, failure to call, coordinate, contracted

**COUNSEL:** James C. O'Connor, Farage & McBride, Philadelphia, for petitioners.

Patricia Krise Burket, Asst. Counsel, with her, Frank B. Wilmarth, Deputy Chief Counsel, and John F. Povilaitis, Chief Counsel, Harrisburg, for respondent.

Donald Blanken, Philadelphia, for intervenor, Philadelphia Elec. Co.

**JUDGES:** Smith and Kelley, JJ., and Barry, Senior Judge.

**OPINIONBY: BARRY**

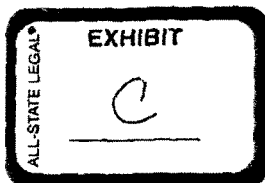
**OPINION: [\*122] [\*\*428] OPINION**

James C. O'Connor and other residents living near the proposed site of an electrical utility substation and control building (protestants) appeal from a decision of the Pennsylvania Public Utility Commission (PUC) that approved an application of the Philadelphia Electric Company (PECO) to [\*\*429] obtain exemption from local zoning laws for the proposed facility. n1

n1 The original protest filed with the PUC names as protestants Dr. and Mrs. Walter Malone and Mr. and Mrs. James C. O'Connor. (R.R. 7a.)

The questions presented are (1) whether the PUC was bound to defer to an opinion expressed [\*\*\*2] by the Pennsylvania Historical and Museum Commission (Historical Commission) that the area in question is of historical significance and that the proposed substation would adversely affect it, and (2) whether the findings and conclusions of the administrative law judge (ALJ) whose initial decision the PUC adopted relating to the reasonable necessity for the selected site and the adequacy of efforts to reduce the environmental incursion of the facility are supported by substantial evidence in the record.

PECO filed an application with the PUC to obtain an exemption from local zoning rules pursuant to Section 619 of the Pennsylvania Municipalities Planning Code (MPC) n2 in order to build a substation n3 on a 3.831-acre site PECO owns in a section of East Goshen Township (Township), Chester County, known as Rocky Hill. Nearby residents filed protests with the PUC, averring that the substation [\*123] would have an adverse visual impact on the area, which they said was of historical value. The Township also filed a protest. The ALJ conducted a public input hearing and five days of evidentiary hearings concerning the application. He denied the request of the Historical Commission [\*\*\*3] to intervene. The PUC reversed his order and allowed intervention, and the Historical Commission presented evidence. That evidence included the prepared testimony of Kurt W. Carr, Chief of the Division of Archaeology and Protection of the Historical Commission, and certain exhibits, including a letter from the Director of the Bureau for Historic Preservation of the Historical Commission



136 Pa. Commw. 119, \*123; 582 A.2d 427, \*\*429;  
1990 Pa. Commw. LEXIS 601, \*\*\*3

to the Secretary of the PUC, stating that the opinion of that office was that "the Rocky Hill Historic District is historically significant and eligible for listing in the National Register of Historic Places as an example of the establishment and modest growth of an important type of community in Chester County, the crossroads hamlet." (Historic Commission Exhibit A-5; R.R. 735a.) The Historical Commission's recommendations for the proposed substation, in order, were (1) build it elsewhere, (2) build it underground or (3) move it to the rear of the property.

n2 Act of July 31, 1968, P.L. 805, as amended, 53 P.S. § 10619. That section provides in part:

This article shall not apply to any existing or proposed building, or extension thereof, used or to be used by a public utility corporation, if, upon petition of the corporation, the Pennsylvania Public Utility Commission shall, after a public hearing, decide that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public.

[\*\*\*4]

n3 PECO proposes to build a 69KV-34KV distribution substation. The high voltage electrical equipment is to be located outdoors, and the control equipment is to be housed within a control building.

PECO presented the expert testimony of two qualified electrical engineers who testified about the need for a substation in the general area because of increased demand. They also testified that the site selected was ideal because the location afforded ease of ingress and egress for transmission lines, the size was sufficient, the cost to develop would be low because the topography was good, the site was acquired amicably for reasonable cost and had enough area for future expansion, and the corner location allowed direct access to streets for distribution lines to run north and south or east and west. Other PECO witnesses testified concerning the site selection from a real estate perspective, comparing the selected location to fifteen alternative sites that had been considered by PECO and rejected. PECO performed test archaeological digs at the site, at the request of the Historical Commission. The [\*\*\*5] Historical Commission [\*124] agreed with PECO's determination that no significant archaeological resources were present.

At the public input hearing one non-party witness presented a list of thirteen alternative sites. The Township also presented evidence concerning alternative sites, and a [\*\*\*430] witness for the protestants presented another alternative site (Coco site). PECO's witnesses testified

in rebuttal to the alternatives presented at the public input hearing and by the Township. PECO did not expressly offer rebuttal with regard to the Coco site. Its cross-examination established, however, that the witness who proposed it had never designed an electrical substation or selected a site for one and had no experience designing transmission lines. It was also established that he did not have an electrical engineering degree that he claimed to have.

The ALJ filed an initial decision approving the application subject to the conditions that PECO landscape the site in accordance with landscaping plans submitted by the Township and that noise levels at the property line not exceed levels set forth in the Township ordinance. The protestants filed exceptions to the ALJ's decision with [\*\*\*6] the PUC, and PECO filed reply exceptions. The PUC issued an opinion and order denying the exceptions of the protestants, adopting the decision of the ALJ and approving the application subject to conditions the ALJ imposed. The protestants petitioned this Court for review of the PUC's action; the Township and the Historical Commission did not appeal. n4

n4 Our scope of review of an order of the PUC is limited to a determination of whether the PUC violated constitutional rights or committed an error of law or whether its necessary findings were not supported by substantial evidence in the record. 2 Pa. C.S. § 704; *Bell Telephone Company of Pennsylvania v. Pennsylvania Public Utility Commission*, 83 Pa. Commonwealth Ct. 331, 478 A.2d 921 (1984).

The protestants first contend that the PUC must defer to the determinations of the Historical Commission that the Rocky Hill area is of historic significance, that the substation will have an adverse effect on the historical nature of the area, [\*\*\*7] and that the substation should be [\*125] located at an alternative site. Section 301(3) of the History Code (Code), 37 Pa. C.S. § 301(3), provides that the Historical Commission shall have the power and duty, among other things, to "[i]nitiate, encourage, support and coordinate and carry out historic preservation efforts in this Commonwealth." Section 508(4) of the Code, 37 Pa. C.S. § 508(4), provides that Commonwealth agencies shall "[i]nstitute procedures and policies to assure that their plans, programs, codes, regulations and activities contribute to the preservation and enhancement of all historic resources in this Commonwealth." The protestants contend that the above sections of the Code empower the Historical Commission to render decisions regarding the effect of a proposed project on the historic resources where a

136 Pa. Commw. 119, \*125; 582 A.2d 427, \*\*430;  
1990 Pa. Commw. LEXIS 601, \*\*\*7

Commonwealth assisted, permitted or contracted project is involved.

Arguing by analogy to this Court's holding in *Del-AWARE, Unlimited, Inc. v. Pennsylvania Public Utility Commission*, 99 Pa. Commonwealth Ct. 634, 513 A.2d 593 (1986), protestants contend that the PUC is bound to respect such determinations of the Historical Commission. [\*\*\*8] In that case the PUC approved the location of a pump house that was part of a project to divert water from the Delaware River to a creek, where it could flow to provide supplemental cooling for the Limerick nuclear generating station. The protestant citizens' group argued in part that the PUC did not adequately consider the environmental impact of the pump house under Pa. Const. art. I, § 27. n5 This Court held that Section 619 of the MPC empowered the PUC to determine only whether the site of the pump house was appropriate and in the public interest, not to reevaluate various aspects of the environmental impact of the facility that had been considered by the Pennsylvania Department of Environmental Resources (DER) when it granted construction [\*126] [\*\*\*431] permits for the project. We held that the PUC was obliged to defer to DER's determinations within its jurisdiction regarding environmental impact. The protestants here contend that the Historical Commission has made a similar determination within its jurisdiction, to which the PUC must defer.

n5 That section of the Pennsylvania Constitution provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

[\*\*\*9]

The protestants contend further that although the Pennsylvania Supreme Court held in *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 311 A.2d 588 (1973), that art. I, § 27 is not self-executing, but requires legislation to define the values sought to be protected and to establish procedures by which the use of private property can be regulated to protect those values, the History Code, enacted in 1988, n6 is the type of legislation contemplated in the Supreme Court's decision.

n6 Act of May 26, 1988, P.L. 414.

The PUC acknowledges that this Court's decision in *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 29-30, 312 A.2d 86, 94 (1973), aff'd, 468 Pa. 226, 361 A.2d 263 (1976), established a three-pronged test for review of governmental actions challenged under art. I, § 27: (1) was there compliance with all applicable statutes and regulations relating to protection of natural resources; (2) does the [\*\*\*10] record show a reasonable effort to reduce environmental incursion to a minimum; and (3) whether the environmental harm would so clearly outweigh the benefits to be derived that going ahead with the project would be an abuse of discretion. If the History Code required the PUC to defer to the Historical Commission, then the PUC's order in this case would not meet the first prong of the Payne test.

The PUC asserts, however, that nothing in the Code expressly authorizes the Historical Commission to conduct legal proceedings to determine the environmental impact of development upon a historical resource. The PUC notes that Section 502 of the Code provides in part that the Historical Commission shall have the power and duty to:

[\*127] (6) Provide information and advice on historic resources and appropriate preservation procedures to public officials, private individuals and organizations.

(7) Advise public officials regarding the planning and implementation of undertakings affecting historical resources.

....

(10) Coordinate and comment upon activities of public officials affecting historic resources and preservation activities.

By the PUC's interpretation, these provisions [\*\*\*11] establish only an advisory role for the Historical Commission, not the power to make determinations binding upon other agencies. The PUC asserts that the ALJ did consider the advice of the Historical Commission, and followed that advice to the extent of requiring PECO to incorporate the landscaping proposals offered by the Township into the final plan for the substation.

Intervenor PECO argues that the jurisdiction and authority of the Historical Commission is vastly different from that of the DER, which was at issue in *Del-AWARE*. DER is statutorily authorized to make findings and determinations regarding environmental impact and to issue permits regarding various matters, including permits for different aspects of the construction at issue in that case.

136 Pa. Commw. 119, \*127; 582 A.2d 427, \*\*431;  
1990 Pa. Commw. LEXIS 601, \*\*\*11

n7 but the Historical Commission is not so authorized. PECO also contends that the Historical Commission's actions in this case do not constitute a "determination", noting that the Historical Commission's witness conceded that no representative of that commission had visited and examined the area.

n7 See *Del-AWARE, Unlimited, Inc. v. Department of Environmental Resources*, 96 Pa. Commonwealth Ct. 361, 365 n. 5, 370 n. 14, 508 A.2d 348, 352 n. 5, 354 n. 14, petition for allowance of appeal denied, 514 Pa. 644, 523 A.2d 1132 (1986), (listing construction permits granted by DER and the statutory basis for such permits, in this Court's affirmance of orders of the Environmental Hearing Board upholding DER's actions regarding the same water-diversion project against challenges by citizens' groups).

\*\*\*12]

The only portion of the History Code authorizing the Historical Commission to issue permits is found in Section [\*128] 506(d) of [\*\*432] the Code, 37 Pa. C.S. § 506(d), relating to permits for archaeological field investigations on Commonwealth land. Section 507(a) of the Code, 37 Pa. C.S. § 507(a), requires Commonwealth agencies and political subdivisions to notify potential permittees, contractors or others whose activities may affect archaeological sites that the costs of surveys or field investigations should be included in their bids or permit applications. The Code requires agencies and subdivisions to notify the Historical Commission before undertaking any Commonwealth assisted, permitted or contracted projects that may affect archaeological sites or when they learn of any undertaking in connection with such a project that affects or may affect such a site. As noted above, PECO conducted archaeological testing to the satisfaction of the Historical Commission in this case. In addition, Section 512 of the Code, 37 Pa. C.S. § 512, relating to enforcement of historic preservation laws and policies, provides: "The Attorney General, the [Historical] commission, any political subdivision, [\*\*\*13] person or other legal entity may maintain an action in an administrative tribunal or court for the protection or preservation of any historic resource in this Commonwealth."

In our view, the provisions of the History Code noted above support the PUC's position that the role of the Historical Commission is advisory and that it lacks the authority to make determinations binding upon other agencies, such as the PUC. The Code does not empower or require the Historical Commission to grant permits

for construction affecting historical resources, and it does not establish procedures by which the Historical Commission can adjudicate disputes. Section 512, by authorizing the Historical Commission, among others, to proceed before administrative tribunals or courts to protect historic resources, implies that the Commission lacks the authority to adjudicate such matters itself. The PUC did not err by concluding that the Historical Commission's opinions in this matter should be considered, but that those opinions were [\*129] not binding upon the PUC in its determination of PECO's application for exemption from local zoning laws.

The protestants next note that the ALJ, in discussing the alternative [\*\*\*14] site advanced by the protestants, the Coco site, stated that there was a substantial question regarding PECO's ability to acquire it, that it appeared to be too small and that use of it would result in a cost penalty. The protestants assert that no testimony in the record supports these statements. The protestants also note that, although PECO requested permission to rebut their evidence concerning the Coco site, PECO did not present any rebuttal testimony. A fact finder may draw a negative inference from a party's failure to call an available witness with relevant, noncumulative testimony that ordinarily would be expected to favor the party. *Murphy v. Department of Public Welfare*, 85 Pa. Commonwealth Ct. 23, 31-32, 480 A.2d 382, 387 (1984). Protestants assert that application of that principle to PECO's failure to recall its engineering witnesses to rebut their evidence concerning the Coco site should require such a negative inference and the consequent adoption of their witness' testimony regarding the feasibility of the alternative.

The PUC responds that the statements of the ALJ (which were not findings of fact) were supported in the record, [\*\*\*15] noting that the protestants' Exhibit No. 8, a communication from the realtor involved to Mr. O'Conno~~r~~ indicated that the price was \$ 350,000 and that the net usable land of the lot was approximately 2.62 acres. PECO's evidence was that the ultimate configuration of the proposed substation would require three acres. The PUC asserts that the cost of purchasing the property speaks for itself. PECO refers to questions, noted above, concerning the qualifications of that witness that it raised on cross examination and later. It notes also that the Township solicitor later corrected a statement by the protestant's witness that the Coco site would not affect residential areas, noting that the map of the site showed that it was contiguous to a residential property.

[\*130] The PUC also contends that no legal authority required PECO to investigate the site suggested by the protestants. The requirement of Section 619 of the

136 Pa. Commw. 119, \*\*430; 582 A.2d 427, \*\*432;  
1990 Pa. Commw. LEXIS 601, \*\*\*15

MPC is [\*\*433] that the PUC determine that "the proposed situation of the building is reasonably necessary for the convenience or welfare of the public." Under the PUC's precedent on this subject, a utility seeking Section 619 zoning exemption must demonstrate "reasonable [\*\*\*16] necessity" for a particular location, not "absolute need":

The Company must show that it has made a reasonable decision, not the best possible decision. Evidence of an alternative may be the basis for questioning the reasonableness of the Company's decision but mere existence of an alternative site does not invalidate the company's judgment.

*Re Philadelphia Suburban Water Co., 54 Pa. PUC 127, 132 (1980).* The PUC and PECO both point to the extensive evidence presented by PECO's witnesses as to why the site chosen was desirable and reasonable. Concerning negative inferences, the PUC notes that the principle cited by protestants is that a fact finder may draw such an inference, not that he or she must.

The PUC is correct that Section 619 of the MPC does not require a utility to prove that the site it has selected is absolutely necessary or that it is the best possible site. If the PUC's finding that the site chosen is reasonably necessary is supported by substantial evidence, this Court will not disturb that finding. Substantial evidence is that quantum of evidence that a reasonable mind might accept as sufficient to support a conclusion. *Norfolk and Western Railway Co. v. Pennsylvania Public Utility Commission, 489 Pa. 109, 128, 413 A.2d 1037, 1047 (1980).* [\*\*\*17] PECO's extensive evidence concerning its reasons for selecting the site at issue here and its consideration of various possible alternatives, once credited by the fact finder, constituted substantial evidence. Further, as the PUC correctly notes, there is absolutely no requirement that a fact finder draw a negative inference from a failure to call or recall a witness. [\*131] *Murphy*, cited by the protestants for that proposition, also states: "We stress this rule only states that an in-

terence may be drawn from a party's failure to produce a particular witness. The rule does not call for the creation of a presumption which shifts a burden of proof." *85 Pa. Commonwealth Ct. at 31 n. 7, 480 A.2d at 387 n. 7.*

Finally, the protestants assert that the screening and landscaping for the substation pursuant to the proposal made by the Township and incorporated into the final plan by the PUC's order is inadequate. They list the height of the structures and of the trees and berm proposed to demonstrate that the trees will not completely screen the structures. The PUC denied protestants' exceptions to the ALJ's findings that PECO had in the past constructed [\*\*\*18] similar projects in conformity with the surroundings, and it would do so in this case. In its brief here, the PUC asserts that the protestants are asking this Court to engage in de novo fact-finding, beyond our scope of review. PECO asserts that the landscaping provisions incorporated in the plan are reasonable and adequate to reduce the environmental incursion, under the second prong of the Payne test. 3

The protestants' position in effect asserts that Payne requires that an intrusive facility be completely screened from view by trees or shrubbery. We do not interpret Payne to establish such a rigid principle, and we decline to disturb the PUC's conclusion, on the basis of the evidence in the record, that the efforts to reduce the environmental intrusion to a minimum in this case are adequate.

For the foregoing reasons, we affirm the order of the PUC.

#### ORDER

NOW, November 9, 1990, the order of the Pennsylvania Public Utility Commission at Docket No. A-00110550F022, entered September 6, 1989, is affirmed.

**CERTIFIED MAIL**



7010 0290 0002 8649 2480

com:  
Edward Davidson  
9 Oak Tree Lane  
Malvern, PA 19355



**RECEIVED**

DEC 17 2014

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

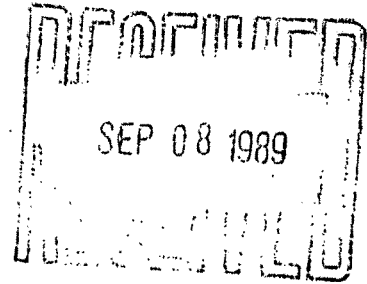
**TO:**

Secretary  
PA Public Utility Commission  
400 North Street  
Harrisburg, PA 17120

## **Exhibit 2**

**Full Copy of Commission's 1990 Order**

PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17120



Public Meeting held August 31, 1989

Commissioners Present:

Bill Shane, Chairman  
William H. Smith, Vice-Chairman  
Joseph Rhodes, Jr.  
Frank Fischl

Application of the Philadelphia Electric Company for a finding of necessity for the situation of a control building on a site in East Goshen Township, Chester County, containing 3.831 acres, located at the southeast corner of Strasburg Road and Chester Road.

A-00110550F022

OPINION AND ORDER

BY THE COMMISSION:

Before us for consideration are the Exceptions of Protestants, O'Connor, et al. ("Protestants" or "O'Connor") filed on June 12, 1989, to the Initial decision of Administrative Law Judge Wendell F. Holland ("ALJ") served on the parties May 23, 1989, wherein the ALJ recommended that the Application of Philadelphia Electric Co. ("PECO", "Applicant" or "Company") for a finding of necessity for building a control building in East Goshen Township, Chester County, be granted subject to certain conditions. On June 22, 1989 PECO filed Reply Exceptions.

BRIEF HISTORY OF PROCEEDING

On or about March 7, 1988, PECO filed the subject Application under the provisions of the Pennsylvania Municipalities Planning Code, Section 10619, 53 P.S. §10619, in

order to build a substation<sup>1/</sup> in a section of East Goshen Township, Chester County, known as Rocky Hill. James C. O'Connor and other residents living near the prospective site filed protests averring, inter alia, that the Application should be denied because the proposed substation will adversely affect the historic nature of the area. A Protest was also filed on behalf of East Goshen Township. On June 21, 1988, a prehearing conference and a public input session were held before the ALJ in West Chester. Evidentiary hearings were held on July 14, September 14, October 20 and 21, and December 23, 1988 in West Chester. -

At the hearing on September 14, 1988, Protestants requested that the Application proceedings be stayed pending a determination by Federal and/or State Historical Commissions to determine whether the proposed substation would have an adverse impact on the Rocky Hill area. The ALJ denied that motion by Order issued October 21, 1988 and the Commission affirmed the denial. On or about October 13, 1989, the Pennsylvania Historical and Museum Commission filed a Petition to Intervene. The ALJ denied the petition as being untimely; however, the Commission granted the Petition. As a result, an evidentiary hearing was held in West Chester at which the Historical Commission presented its case.

Initial Briefs were filed by all parties. Reply Briefs were filed by PECO and Protestant O'Connor. The record in this proceeding consists of 674 transcript pages and approximately 30 exhibits.

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<sup>1/</sup> PECO proposes to build a 69KV-34KV distribution substation. The high voltage electrical equipment will be located outdoors, and the control equipment will be housed within a control building.

The Protestants' Exceptions argued that the ALJ erred in concluding that PECO's construction of the control building on the proposed site is reasonably necessary for the convenience or welfare of the public. The Protestants argued that alternative sites were better suited to the control building. Specifically, the Protestants excepted to the ALJ's Findings of Fact numbers 3, 9, 12, 14, 16, 18, 19, 20, 22, 23, 24 and 25. In addition, the Protestants excepted to all three of the ALJ's Conclusions of Law. We shall discuss each in sequence.

FINDING OF FACT NO. 3:

3. The site upon which the proposed project is to be constructed contains about four or more acres for which PECO paid \$475,000 in 1987 to acquire.

The Protestant excepted and averred that: "The record is quite clear that the proposed location of the control building and substation is 3.831 acres...." The company did not respond to the Exception. We find this Exception is irrelevant to the matters in issue. It is, therefore, denied.

FINDING OF FACT NO. 9

9. Several sites in the area were evaluated based on various criteria - namely, the ease of ingress and egress to the property, property location, present zoning, physical characteristics of the property, aesthetics, costs and ability to acquire the property amicably.

The Protestants do not deny that several sites in the area were evaluated for suitability. The Company did not respond to the Exception. Protestants object to the fact that PECO did not evaluate their proposed site. We find this Exception irrelevant to this Finding of Fact and shall, therefore, deny it.

FINDING OF FACT NO. 11

11. The Rocky Hill site is uniquely suitable for the project because of the coming together of different lines from different sources and its location on a corner.

The Protestants argued that the Rocky Hill site was not uniquely suitable for the project. In this regard, the Protestants refer us to their Initial Brief to the ALJ. We find that the ALJ thoroughly examined the evidence and arguments of all the parties. The Protestants do not point to any authority, error of law or lack of evidence but merely contest the ALJ's findings. We shall decline to disturb the ALJ's ruling on such a flimsy basis. The Exception is, therefore, denied.

FINDING OF FACT NUMBER 12:

12. Approximately 13 alternative sites have been identified but are undesirable because of additional costs or being too far away from a system planning point of view.

The Protestants do not deny that thirteen alternative sites were evaluated but object that this finding does not refer to their preferred site. As above, the Protestants refer us to their Initial Brief to the ALJ. We find that the ALJ thoroughly examined the evidence and arguments of all the parties. The Protestants do not cite any authority, error of law or lack of evidence to support the finding but merely contest the ALJ's ruling. We shall not disturb the ALJ's decision on such a flimsy basis. The Exception is, therefore, denied.

FINDING OF FACT NUMBER 13:

13. The proposed situation of the control building and the substation would not produce any significant electric or magnetic fields which could be measured at the property line.

FINDING OF FACT NUMBER 14:

14. The maximum value of the electric field that would be emitted would be as insignificant as the electric field emitted by various household appliances such as an electric iron, a stereo, an electric blanket, a toaster and a television.

The Protestants' Exceptions state that Findings of Fact Numbers 13 and 14 are not supported in the record. In discussing the testimony of the manager of the Engineering Division of PECO's Engineering and Construction Department, the ALJ recounts at page 8 of the Initial Decision:

He emphasized that the proposed situation of the control building would not produce any electric or magnetic fields which could be measured at the property line. He admitted that the proposed substation will produce electromagnetic fields which can be measured at the property line. But, he explained that the maximum value of the electric field that will be emitted would be as insignificant as the electric field emitted by an electric iron, a stereo and an electric blanket. And the maximum value of the magnetic field would be comparable to a toaster, a television and an electric stove heating coil. He assured that even under the worst conditions, the electromagnetic fields would be comparatively harmless. (I.D., p. 8).

The Protestants Exceptions are denied.

FINDING OF FACT NO. 16:

16. PECO has won awards in the past for its ability to construct similar projects in conformity with the surroundings of the areas and will do so in this case.

FINDING OF FACT NUMBER 18:

18. Relatively recently PECO has constructed three substations that abut or are in close proximity to significant historic sites, including Valley Forge National Park.

The Protestants do not deny that PECO has constructed similar buildings in a pleasing architectural manner. They do not deny that PECO has shown the ability, expertise and desire to blend their buildings into the surrounding areas. They only contend that PECO's past performance is "totally irrelevant to the facts as presented in this case." (Protestants' Exceptions, p. 5). We disagree. PECO's clearly manifested intent to build the substation with little incursion to the environment supports granting the Application. The Exception is, therefore, denied.

FINDING OF FACT NUMBER 19:

19. There are several factors that reduce the integrity of the intersection as a historic district - namely, some buildings at the intersection have been sided with 20th century materials which cover or obliterate most of their 19th century architectural details; a non-contributing residence and barn located at the intersection; a modern subdivision of "ubiquitous" design; and the adaptive reuse of the dominant structure of the intersection.

FINDING OF FACT NUMBER 20:

20. The Rock Hill area is the subject of an application for listing in the National Register.

FINDING OF FACT NUMBER 22:

22. Any environmental harm to the alleged historic district does not outweigh the benefits to the public from the increased supply of electric energy in East Goshen Township. PECO's decision to use the Rocky Hill site for its proposed project was reasonable and not arbitrary or capricious or made in bad faith.

Essentially, the Protestants argue that the Commission is without jurisdiction because the Rocky Hill site is potentially of historical significance, citing Commonwealth v. National Gettysburg Battlefield Tours, Inc., 454 Pa. 193 (1973) and Del-Aware Unlimited, Inc. v. Pennsylvania Public Utility Commission, 513 A.2d 593 (Pa. Cmwlth. Ct. 1986).

The ALJ noted that the Company adequately distinguished the Del-Aware case, supra:

PECO responds that Del-Aware is inapplicable because the review of the National Register application in this case is far less "comprehensive" than DER's in Del-Aware. The letter involved an entire administrative hearing process (i.e., full hearing, cross-examination and briefs) before a review board that issued an appealable decision. In contrast, the Historical Commission reviewed Rock Hill's Application in just two days, which PECO considers at best hasty and at worst incomplete, since the Historical Commission has not yet visited the site or determined its boundaries.

(Initial Decision, p. 49).

As for the National Gettysburg case, supra, the ALJ thoroughly examined its application to the facts of this case and found it lacking:

We find the Historical Commission's argument to be legally and factually without force in this case. From a legal perspective, the Gettysburg Battlefield case clearly permits a utility to build near a

historic site: development is to be controlled not prohibited. Factually, the record shows that PECO has numerous units and substations throughout Valley Forge National Park and other designated historic sites throughout its service area. Both Gettysburg Battlefield and Valley Forge have unquestioned places in history and are even included in the National Register. Rock Hill's historic significance does not compare and is indeed greatly disputed. Thus taken in its best light, and even assuming that Rocky Hill is actually included in the National Register, we are not required to defer our determination on PECO's Application in this case.

(Id. p. 50).

The Protestants' Exceptions are denied.

FINDING OF FACT NO. 23:

23. PECO's decision to use the Rock Hill site for the proposed project was technically well considered and based on sound engineering judgment.

FINDING OF FACT NO. 24:

24. PECO has followed all the requirements of the applicable law and regulations.

FINDING OF FACT NO. 25:

25. PECO has made reasonable efforts to reduce environmental incursions to a minimum.

Essentially, the Protestants rehash prior arguments that the ALJ in not adopting the Protestants proposed alternative cite, somehow committed an error of law. The Protestants fail to cite any authority for this position. We find that the ALJ's Findings of Fact on this issue are supported by substantial record evidence. The Protestants Exceptions are, therefore, denied.

The ALJ made these Conclusions of Law. The Protestants excepted to all three of them. We shall discuss each in sequence.

CONCLUSION OF LAW NO. 1:

1. The Commission has jurisdiction over the parties and the subject matter of this Application.

The Protestants restate their prior arguments that the Commission does not have subject matter jurisdiction over this application. For the reasons discussed infra, we shall deny this Exception.

CONCLUSION OF LAW NO. 2:

2. Construction of the control building on the proposed site is reasonably necessary for the convenience or welfare of the public.

The Protestants reargue that the ALJ's recommendation of the proposed site is somehow erroneous "since alternate sites exist..." (Protestants Exceptions at p. 12). In addition, the Protestants again argue that the Commission is without jurisdiction in this case. For the reasons discussed previously, this Exception is denied.

CONCLUSION OF LAW NO. 3:

3. PECO has met the three-prong test of Payne v. Kassab, supra, and the intensified burden arising therefrom, and it has not violated Article I, Section 27 of the Pennsylvania Constitution.

Payne v. Kassab, 312 A.2d 86 (Cmwlth. Ct. 1973) requires compliance with all applicable statutes and regulations relevant to the protection of the commonwealth's public natural resources. In this regard, the Protestants again raise the arguments that the Pennsylvania Historical and Museum Commission

somehow has jurisdiction over this application and that somehow a reasonable effort to reduce environmental incursion to a minimum has not been demonstrated because the Protestants' proposed alternate site was not chosen. For the reasons discussed previously, this Exception is denied; THEREFORE,

IT IS ORDERED:


1. That the Exceptions to the Initial Decision of Administrative Law Judge Wendell F. Holland be, and hereby are, denied.

2. That the Initial Decision of Administrative Law Judge Wendell F. Holland be, and hereby is, adopted.

3. That the Application of Philadelphia Electric Company, docketed at A-110550, F.022, be and is hereby approved subject to the following conditions:

- a. Applicant shall landscape the site in accordance with the landscape plans submitted by the Township of East Goshen.
- b. The noise level at the property line shall not exceed those levels set forth in the Township Ordinance.

BY THE COMMISSION,

  
Jerry Rich  
Secretary

(SEAL)

ORDER ADOPTED: August 31, 1989

ORDER ENTERED: SEP 06 1989