

Legal Department  
2301 Market Street / S23-1  
P.O. Box 8699  
Philadelphia, PA 19101-8699

Direct Dial: 215.841.6863

April 8, 2015

Rosemary Chiavetta, Secretary  
Pa. Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, Second Floor - West  
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's Preliminary Objections to the First Amended Complaint* in the aforementioned matter.

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

cc: Certificate of Service

WS/ab

**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>	:	
	:	

---

**NOTICE TO PLEAD**

Pursuant to 52 Pa. Code § 5.101(b), you are hereby notified that, if you do not file a written response denying or correcting the enclosed Preliminary Objections of PECO Energy Company to the First Amended Complaint 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:

Mary D. Long  
Administrative Law Judge  
Pennsylvania Public Utility Commission  
Piatt Place  
301 5<sup>th</sup> Avenue, Suite 220  
Pittsburgh, PA 15222

Ward L. Smith, Esq.  
PECO Energy Company  
2301 Market Street, S-23  
Philadelphia, PA 19103

Dated at Philadelphia, PA, April 8, 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>	:	

---

**PECO ENERGY COMPANY’S PRELIMINARY OBJECTIONS TO FIRST AMENDED COMPLAINT**

PECO Energy Company (“PECO”), pursuant to 52 Pa. Code § 5.101(a) (3), (4), and (7), respectfully petitions this Honorable Commission to dismiss the instant Complaint for legal insufficiency, insufficient specificity of a pleading, and inadequate standing.

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 1989. The First Amended Complaint alleges that PECO’s recent construction of a communications’ tower violates the Commission’s 1989 Order in that proceeding because, according to the First Amended Complaint, PECO has not complied with an agreement between PECO and East Goshen Township that was approved by the Commission in that proceeding. PECO poses three preliminary objections: First, that Mr. Davidson does not have standing to attempt to enforce an agreement between PECO and the Township. Second, 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 1989 Order. PECO’s third preliminary objection builds on the first two preliminary objections by requesting additional specificity of pleading – if PECO is correct on its first argument that Mr. Davidson has no

standing, or in its second preliminary objection that it has not violated the Commission's 1989 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 as Exhibit 1 to PECO's Answer and New Matter, which is also being filed today.

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

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 to Answer and New Matter.

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 to Answer and New Matter.

4. On January 15, 2015, PECO filed its Preliminary Objections to Formal Complaint. As those Preliminary Objections were later deemed moot, a copy is not attached.

5. On January 29, 2015, Mr. Davidson filed his response to PECO's Preliminary Objections. Mr. Davidson's response included twelve paragraphs, numbered as paragraphs 29-40, that were

labelled as “New Matter” and which contained new factual allegations not contained in his initial complaint. A copy of Mr. Davidson’s response is attached as Exhibit 2 to PECO’s Answer and New Matter.

6. On February 18, 2015, PECO filed a Motion to Have Complainant’s “Reply to Respondents Preliminary Objections” Designated as a First Amended Complaint.

7. On March 19, 2015, Administrative Law Judge Mary D. Long issued an Interim Order Dismissing Preliminary Objections as Moot. In that Interim Order, the ALJ granted PECO’s Motion to treat the response to its preliminary objections as an amended complaint, and dismissed PECO’s preliminary objections as moot. The Interim Order gave PECO 20 days to file an answer to amended complaint.

8. PECO separately filed an Answer and New Matter today.

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

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

11. Pursuant to 52 Pa. Code § 5.101(a)(7), a preliminary objection may be filed for lack of standing.

12. 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).

13. 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).

14. 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”).

15. 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).

16. 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.

17. 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.

18. 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).

19. 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. Lack of Standing – Mr. Davidson Does Not Have Standing to Enforce An Agreement Between PECO and East Goshen Township**

20. The First Amended Complaint is based upon the claim that PECO has violated an agreement between it and East Goshen Township. This claim can be found in the December 31, 2014 complaint, paragraph 4 (“PECO has failed to follow the approval by East Goshen Township . . . inasmuch as PECO has recently constructed a 100-foot tower which was not included in the plan they originally submitted to East Goshen Township”) and paragraph 5 (“The Complainant seeks that PECO relocate the recently constructed 100 foot tower for failure to follow PECO’s Approval by East Goshen Township.”) This claim can also be found in Mr. Davidson’s January 29, 2015 Response, paragraph 30 (“failure to file PECO’s approval by East Goshen Township”) and paragraph 33 (quoting the Commission as stating that “Applicant shall landscape the site in accordance with [the] landscape plan as submitted by the Township of East Goshen”). *See also* references to meeting the requirements of the East Goshen agreement in paragraphs 34, 35, 37, 39, and 40.<sup>1</sup>

---

<sup>1</sup> PECO has read the references in the First Amended Complaint as referring to the 1989 settlement agreement between PECO and East Goshen Township. If the references refer to some other alleged requirement for PECO to, e.g., obtain local permits, then those arguments are outside of the jurisdiction of the Commission. The context of the First Amended Complaint makes it clear that Mr. Davidson is discussing the 1989 settlement agreement, but if he later changes his theory of the case, PECO reserves the right to object on jurisdictional grounds to any such request.

21. Mr. Davidson is not an official or representative of East Goshen Township, and has made no claim to hold such a role. The Amended Complaint is signed in his capacity as a private citizen and area landowner.

22. PECO recognizes that, as a PECO customer, Mr. Davidson may generally file a complaint against it. But his status as a customer does not imbue in him the power to act on behalf of the Township, and the First Amended Complaint -- to the extent that it is deemed to be an attempt to enforce an agreement between PECO and the Township -- should therefore be dismissed.

### **III. 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**

23. 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.

24. 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.

25. 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.

26. 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>2</sup>

27. 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 1989 Approval to Construct the Rocky Hill Substation**

28. 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,

---

<sup>2</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 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.

attached to Complaint as Exhibit B, pp. 1-2. See also Complainant's January 29, 2015 Response, paragraph 31, in which Mr. Davidson specifically alleges that in the 1989 proceeding PECO "only sought a finding by the Public Utility Commission for necessity for building a control building."

29. 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. Cmwlt. 1986), or reservoirs. *See Delaware Unlimited, Inc. v. PaPUC*, 513 A. 2d 593 (Pa. Cmwlt. 1986), *appeal den.* 527 A. 2d 547 (1986). PECO respectfully suggests that Section 619 also does not apply to communications' towers.

30. In 1989, the Commission approved the construction of the substation control building<sup>3</sup> subject only to two conditions that are not at issue here: (a) PECO was required to create a berm and to plant certain vegetation pursuant to an agreed-upon landscaping plan, and (b) PECO was required to meet local noise ordinances.<sup>4</sup>

31. The Commission's 1989 Order approving construction of the Rocky Hill Substation was limited to consideration of the substation. The underlying statute that motivated

---

<sup>3</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 1989 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.

<sup>4</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 1.

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.

32. Nearly 25 years later, PECO found it necessary to install an additional, non-building, public utility facility.<sup>5</sup> PECO had statutory authority for that construction. As there is nothing in the Commission's 1989 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 1989 Order.

**IV. Insufficient Specificity -- Other Than the Claimed Violation of the Commission's 1989 Order, the Complaint Does Not Specify Any Statute, Regulation, Order, or Tariff That PECO is Claimed to Have Violated**

33. The Complaint raises only one claimed violation of a statute, regulation, order, or tariff – the claimed violation of the agreement with East Goshen Township, as approved in the Commission's 1989 approval of the Rocky Hill Substation. This claim can be found in the December 31, 2014 complaint, paragraph 4 (“PECO has failed to follow the approval by East Goshen Township . . . inasmuch as PECO has recently constructed a 100-foot tower which was not included in the plan they originally submitted to East Goshen Township”) and paragraph 5 (“The Complainant seeks that PECO relocate the recently constructed 100 foot tower for failure to follow PECO's Approval by East Goshen Township.”) This claim can also be found in Mr. Davidson's January 29, 2015 Response, paragraph 30 (“failure to file PECO's approval by East Goshen Township”) and paragraph 33 (quoting the Commission as stating that

---

<sup>5</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.

“Applicant shall landscape the site in accordance with [the] landscape plan as submitted by the Township of East Goshen”). *See also* references to meeting the requirements of the East Goshen agreement in paragraphs 34, 35, 37, 39, and 40

34. In its first Preliminary Objection, PECO demonstrated that Mr. Davidson does not have standing to attempt to enforce the agreement with the Township.

35. In its second Preliminary Objection, PECO demonstrated that it has not violated the Commission’s 1989 approval.

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

37. 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 1989 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 (1) lack of standing to enforce an agreement between PECO and East Goshen Township; (2) legal insufficiency and, (3) unless Mr. Davidson files a Second Amended Complaint specifying a claimed violation of some

statute, regulation, order or tariff other than the Commission's 1989 Order, dismissing all issues which were raised in the Complaint.

Respectfully submitted,

A handwritten signature in cursive script that reads "Ward L. Smith". The signature is written in black ink and is positioned above a horizontal line.

---

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: April 8, 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

VIA email

Mary D. Long  
Administrative Law Judge  
Pennsylvania Public Utility Commission  
Piatt Place  
301 5<sup>th</sup> Avenue, Suite 220  
Pittsburgh, PA 15222

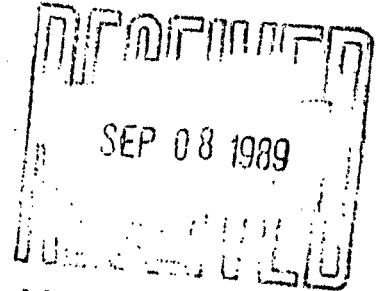
Dated at Philadelphia, April 8, 2015.



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

**Exhibit 1 – Complete Copy of Commission’s September 6, 1989  
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.

---

<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.

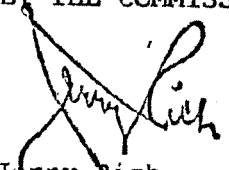
Payne v. Kassab, 312 A.2d 86 (Cmwlth. Ct. 1973) requires compliance with all applicable statutes and regulations relevant to the protection of the commonwealth's public natural resources. In this regard, the Protestants again raise the arguments that the Pennsylvania Historical and Museum Commission

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