*Via electronic service only due to Emergency Order at M-2020-3019262*

**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PECO Energy Company for a Finding : P-2021-3024328

Of Necessity Pursuant to 53 P.S. § 10619 that the :

Situation of Two Buildings Associated with a Gas :

Reliability Station in Marple Township, Delaware :

County Is Reasonably Necessary for the :

Convenience and Welfare of the Public :

**PREHEARING ORDER**

**NOTE: Please read this document in its entirety as it provides important information about this case.**

On February 26, 2021, PECO Energy Company (PECO) filed a Petition for a Finding of Necessity Pursuant to 53 P.S. § 10619 that the Situation of Two Buildings Associated with a Gas Reliability Station in Marple Township, Delaware County Is Reasonably Necessary for the Convenience and Welfare of the Public (Petition). In the Petition, PECO requests that the Pennsylvania Public Utility Commission (Commission), pursuant to 52 Pa.Code § 5.41 and Section 619 of the Municipalities Planning Code (MPC), 53 P.S. § 10619, make a finding that: (1) the situation of two buildings (Buildings) for a proposed gas reliability station (Gas Reliability Station) is reasonably necessary for the convenience and welfare of the public and, therefore, exempt from any zoning, subdivision, and land development restriction of the Marple Township Subdivision and Land Development Ordinance and the Marple Township Zoning Code pursuant to MPC § 619, and (2) a proposed security fence appurtenant to the Gas Reliability Station is a “facility” under 66 Pa.C.S. § 102 and is therefore exempt from local zoning requirements.

Pursuant to 52 Pa.Code § 5.14(d)(9), applications to secure exemption under section 619 of the Pennsylvania Municipalities Planning Code (53 P.S. § 10619) must be published in the *Pennsylvania Bulletin* and are subject to a 15-day protest period.

On March 10, 2021, the Commission issued a Telephonic Prehearing Conference Notice scheduling a prehearing conference for 10:00 a.m. on April 21, 2021.

On March 27, 2021, notice of the Petition and the prehearing conference was published in the *Pennsylvania Bulletin*. The published notice further advised that the protest deadline was April 12, 2021.[[1]](#footnote-1) PECO also published notice of the Petition and the protest deadline in the *Daily Times* *and* *Sunday Times* as well as the *Daily and Sunday Times Digital* on March 26, 2021.[[2]](#footnote-2)

On March 11, 2021, Marple Township, Delaware County (Marple Township) filed a Petition to Intervene in the proceeding. A ruling on this Petition to Intervene is still outstanding.

On March 18, 2021, PECO filed an Answer to Marple Township’s Petition to Intervene, advising it does not oppose it.

On April 1, 2021, the undersigned’s legal assistant received an email containing comments regarding the above-captioned matter. By Interim Order dated April 2, 2021, the comments were attached to the record.

On April 5, 2021, a Prehearing Conference Order was issued.

On April 12, 2021, Marple Township filed an Answer, New Matter, and Formal Protest to the Petition.

On April 12, 2021, the County of Delaware, Pennsylvania (Delaware County) filed a Petition to Intervene.

Sixty-three timely protests were filed by *pro se* protestants on or about April 12, 2021. Two individuals filed a Petition to Intervene in addition to their Protest, Theodore Uhlman (Mr. Uhlman) and Julie Baker. Two individuals filed untimely protests, Sylva Baker and Joseph Baker.

On April 13, 2021, Mr. Uhlman filed a Motion requesting the protest period be extended.

On April 14, 2021, an Interim Order was entered providing information to *pro se* protestants.

On April 15, 2021, an Interim Order was entered regarding Mr. Uhlman’s Motion to extend the protest period.

A prehearing conference was held on April 21, 2021 as scheduled. PECO, the Township, and the County were represented by counsel. Twenty-five *pro se* protestants were present, as were Mr. and Mrs. Baker. The parties discussed a variety of matters detailed below.

**Burden of Proof**

Although the burden of proof in this matter was not discussed in detail at the prehearing conference, the undersigned believes it is important to provide some basic information to the parties at this time.

Article VI of the Pennsylvania Municipalities Planning Code (“MPC”)[[3]](#footnote-3), provides that “[T]he governing body of each municipality . . . , may enact, amend and repeal zoning ordinances to implement comprehensive plans . . .”[[4]](#footnote-4) Article VI of the MPC does not apply to a proposed building to be used by a public utility corporation if, after notice to the municipality and corporation and public hearing, the Commission decides that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public.[[5]](#footnote-5) Section 619 of the MPC[[6]](#footnote-6) does not require a utility to prove that the site it has selected is absolutely necessary or that it is the best possible site.[[7]](#footnote-7)

On January 11, 2001, the Commission adopted a final policy statement order intending to further the State’s goal of making State agency actions consistent with sound land use planning by considering the impact of its decisions upon local comprehensive plans and zoning ordinances.[[8]](#footnote-8) The policy statement provides that the Commission will consider the impacts of its decisions upon local comprehensive plans and zoning ordinances when reviewing applications for the following:

1. Certificates of public convenience.
2. Siting electric transmission lines.
3. Siting a public utility “building” under section 619 of the Municipalities Planning Code (53 P.S. §10619).
4. Other Commission decisions.[[9]](#footnote-9)

As the Petitioner, PECO has the burden of proof[[10]](#footnote-10) of persuading the Commission though a preponderance of the evidence that the relief sought is proper and justified[[11]](#footnote-11).

**Litigation Schedule**

Counsel for PECO, the Township, and the County agreed upon the following litigation schedule, which was adopted by the undersigned at the prehearing conference:

|  |  |
| --- | --- |
| Date | Event |
| Monday, April 26, 2021 | Service of Initial Written Discovery |
| Wednesday, May 5, 2021 | Responses to Written Discovery |
| Friday, May 14, 2021 | Direct Testimony of PECO |
| Wednesday, May 19, 2021 | Service of Remaining Written Testimony |
| Friday, May 28, 2021 | Responses to Remaining Written Discovery |
| Monday, June 14, 2021 | Written Rebuttal Testimony |
| Monday, June 21, 2021 | Written Surrebuttal |
| Monday, June 28, 2021 and Tuesday June 29, 2021 | Evidentiary Hearings |
| Tuesday, July 13, 2021 | Main Briefs |
| Tuesday, July 27, 2021 | Reply Briefs |
| 14 calendar days from service of RD | Exceptions Due |

The parties are reminded of the Commission’s requirements for the preparation and filing of written testimony. 52 Pa.Code §§ 5.412 and 5.412a. Written testimony must be accompanied by all exhibits to which it relates. Technical terms and concepts are to be clearly defined and explained in the testimonies and briefs. **No written testimony will be admitted into evidence unless accompanied by a verification or affidavit of the witness**.

Active parties serving prepared testimony in proceedings pending before the Commission pursuant to 52 Pa.Code § 5.412(f) shall be required, within thirty (30) days after the final hearing in an adjudicatory proceeding, to e-file with the Secretary’s Bureau a copy of all testimony furnished to the court reporter during the proceeding consistent with 52 Pa.Code § 5.412a.

The above-stated dates are in-hand dates for service on the active parties and the undersigned. The undersigned agrees to accept email transmission of such material, so long as the subject email is received by 4:00 p.m. on the due date. The email address of the undersigned is [edevoe@pa.gov](mailto:edevoe@pa.gov).

Evidentiary hearings will begin promptly at **10:00 a.m. on June 28, 2021, and June 29, 2021**. The active parties must confer before commencement of the hearings to schedule their witnesses so as to avoid “holes” or “dead time” during the hearings.

**Parties**

The Petitions to Intervene filed by the Township and the County were granted by the ALJ at the prehearing conference.

As mentioned above, sixty-three *pro se* individuals filed timely protests, and twenty-three of them appeared at the prehearing conference on April 21, 2021. An additional two, Jill Adaman and Maria Henderson, contacted the undersigned prior to the conference advising they would be unable to participate in the prehearing conference due to other commitments.

Individuals who filed timely protests and did not appear at the prehearing conference: Consistent with the April 14, 2021 Interim Order, those parties who did not appear at the prehearing conference, with the exception of Ms. Adaman and Ms. Henderson, are now considered inactive parties and will be placed on the limited service list. These individuals will still receive notice of the public input hearings and will be able to testify at those public input hearings if they choose to do so.

Individuals who filed timely protests and did appear at the prehearing conference: As for the *pro se* protestants who did appear at the prehearing conference, as well as Ms. Adaman and Ms. Henderson, these individuals are to e-file a signed statement with the Commission’s Secretary’s Bureau by **4:00 pm on April 28, 2021** if they want to be considered active parties in this proceeding. Otherwise, they will be considered inactive parties and placed on the limited service list. If they choose not to become active parties, they will still receive notice of the public input hearings and will be able to testify at those public input hearings if they choose to do so.

A current Service List is appended to this Order.

**Motion to Extend the Protest Deadline**

After consideration of the written motion, PECO’s filing in response, and oral argument at the prehearing conference, the ALJ denied the motion to extend the protest deadline. **Individuals who did not timely file a protest will still be able to testify at a public input hearing if they choose to do so.**

**Motion for Leave to File Late-Filed Protests**

On April 19, 2021, Sylva Baker filed a protest with the Secretary’s Bureau. On April 20, 2021, the undersigned was served by Joseph Baker with a purported protest, but as of the time of the issuance of this Order, it does not appear in the Commission’s online docket system as filed with the Commission’s Secretary’s Bureau.[[12]](#footnote-12)

Both Mr. and Mrs. Baker were present at the prehearing conference. The undersigned advised she would treat their filings as Motions for Leave to File Late-filed Protests. After oral argument from Mr. and Mrs. Baker and counsel for PECO, the County, and the Township, the undersigned denied the Motion for Leave to File Late-Filed Protests. The undersigned advised Mr. and Mrs. Baker they would receive notice of the Public Input Hearings and would be able to testify if they chose to do so.

**Public Input Hearings**

At least two days of public input hearings will be held in this matter. They will be held remotely. The exact dates and times of the public input hearings will be set at a later time.

**Filing and Service**

**The only way to file anything in this case is to** **e-file with the Secretary’s Bureau**. Filings may not be made by emailing or faxing the Secretary’s Bureau. Filings may not be made through the undersigned or her office.

Once a filing has been made, the document must then be served upon the undersigned and every other person appearing on the most recent party’s list provided by the Commission.

The undersigned may be served by email. Furthermore, everyone at the prehearing conference agreed to be served by email. **Therefore, all service by the Commission, the active parties, and protestants shall be by email.**

Service by *pro se* protestants upon the undersigned: When a *pro se* protestant is serving something he or she has already filed, the *pro se* protestant must send one email serving the undersigned and all other parties simultaneously. If the undersigned receives an email from a *pro se* protestant, regardless of its contents or purpose, and all other parties are not also copied, the email will not be read by the undersigned and will be deleted.

**Site Visit**

Several *pro se* protestants requested a site visit. The request was discussed at the prehearing conference. Ultimately, the undersigned denied the request for a site visit at this time.

## Issues

Prehearing memoranda was filed by PECO, the Township, the County, and several *pro se* protestants. In their prehearing memoranda, they identified various issues they may wish to pursue. The reader is directed to these documents to review a recitation of these issues. Additional issues may arise as the discovery process unfolds.

**Discovery**

The parties shall engage in informal discovery whenever and wherever possible in an attempt to resolve any discovery disputes amicably. 52 Pa.Code § 5.322. If this process fails, the parties have recourse under the Commission’s procedures for formal discovery. 52 Pa.Code §§ 5.321, *et* *seq*. The parties must not send the Presiding ALJ discovery material or cover letters, unless attached to a motion to compel. **All motions to compel must contain a certification of the informal discovery undertaken and the parties’ efforts to resolve their discovery disputes informally.** If a motion to compel fails to contain such certification, the Presiding ALJ will contact the parties and direct them to pursue informal discovery.

**Protective Order**

PECO attached a proposed protective order to its prehearing memoranda. There was some discussion of the proposed order at the prehearing conference, but the undersigned took no action on the proposed order.

Therefore, the parties must comply with 52 Pa.Code § 5.362 (Protective orders), § 5.365 (Orders to limit availability of proprietary information), and § 102.4(h) (Challenge procedures to confidentiality designation) regarding the preparation and filing of a motion for a protective order.

If a party files a motion for a protective order, the motion must contain a notice to plead, and the party must submit a copy of the proposed protective order to the Presiding ALJ by email in a *Microsoft Office Word* format.

**Settlement**

The parties are reminded it is the Commission’s policy to encourage settlements. 52 Pa.Code § 5.231(a). The parties are strongly urged to seriously explore this possibility.

In the event that the active parties reach a partial or non-unanimous full settlement is achieved, the active parties should be prepared to proceed on the first scheduled day of hearing.

In the event that that the active parties reach a full unanimous settlement, the active parties should notify the presiding ALJ as soon as possible prior to the scheduled evidentiary hearings, but no later than **4:00 p.m. on Thursday, June 24, 2021**.

If the active parties reach a full unanimous settlement, they may choose to convene on June 28, 2021 and/or June 29, 2021 as scheduled and offer their written testimonies and exhibits on the record. Testimonies and exhibits may be admitted into the record upon oral motion as long as the other active parties waive cross-examination of the witness and an appropriate verification has been filed with the Commission’s Secretary’s Bureau.

If the active parties reach a full unanimous settlement, they may request that the ALJ cancel the evidentiary hearings. Such a request should be made as soon as possible prior to the scheduled hearings, but no later than **4:00 p.m. on Thursday, June 24, 2021**. The ALJ will not cancel the evidentiary hearings unless and until the active parties file a fully-executed joint stipulation for the admission of evidence with the Secretary’s Bureau. The stipulation must include: (1) a stipulation that all active parties waive cross-examination of all witnesses, (2) a list of all testimonies and exhibits to be admitted into the record, either embedded within the stipulation or attached to the stipulation, and (3) a stipulation that the testimonies and exhibits to be admitted into the record are admissible and should be admitted. If such a stipulation is filed, the ALJ may issue an Order adopting the stipulation, admitting the evidence into the record, cancelling the evidentiary hearings, and ordering the active parties to file their testimonies and exhibits, with appropriate verifications, with the Commission’s Secretary’s Bureau along with a copy of the Order.

**Stipulations**

If settlement is not feasible, the parties are encouraged to stipulate to any matters they reasonably can in order to expedite this proceeding, lessen the burden of time and expenses in litigation on all parties, and conserve precious administrative hearing resources. 52 Pa.Code §§ 5.232 and 5.234.

All stipulations entered into by the active parties must be reduced to writing, signed by the active parties to be bound thereby, and moved into the record either orally at an evidentiary hearing or through a motion filed with the Secretary’s Bureau.

**Cross-Examination**

Friendly cross-examination or cumulative cross-examination during the evidentiary hearings will not be permitted. 52 Pa.Code §§ 5.76 & 5.243.

**Briefs**

The parties must comply with 52 Pa.Code §§ 5.501, *et* *seq*., regarding the preparation and filing of briefs. Page limitations on briefs will be discussed on or before the last day of hearing. The parties shall submit an electronic copy of all briefs to the Presiding ALJ **in a *Microsoft Office Word*format.**

**Modification**

Any of the provisions of this Prehearing Order may be modified upon motion and good cause shown by any party in interest.

Date: April 23, 2021  /s/

Emily I. DeVoe

Administrative Law Judge

**P-2021-3024328 – PETITION OF PECO ENERGY COMPANY FOR A FINDING OF NECESSITY PURSUANT TO 53 P.S. § 10619 THAT THE SITUATION OF TWO BUILDINGS ASSOCIATED WITH A GAS RELIABILITY STATION IN MARPLE TOWNSHIP, DELAWARE COUNTY IS REASONABLY NECESSARY FOR THE CONVENIENCE AND WELFARE OF THE PUBLIC.**

*Revised 4/23/21*

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*Updated 4/23/21*

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1. Fifteen days from March 27, 2021, is April 11, 2021, a Sunday. Therefore, the protest deadline was set for the next business day, Monday, April 12, 2021. [↑](#footnote-ref-1)
2. PECO filed proof of publication on April 8, 2021. [↑](#footnote-ref-2)
3. 53 P.S. §10101 *et seq.* [↑](#footnote-ref-3)
4. 53 P.S. § 10601. [↑](#footnote-ref-4)
5. *See* 53 P.S. § 10619. [↑](#footnote-ref-5)
6. 53 P.S. § 10619. [↑](#footnote-ref-6)
7. *O’Connor v. Pa. P.U.C.,* 136 Pa. Commw. 119, 582 A.2d 427 (1990). [↑](#footnote-ref-7)
8. *See* 31 Pa. Bull. 951 (February 17, 2001). [↑](#footnote-ref-8)
9. 52 Pa.Code § 69.1101. [↑](#footnote-ref-9)
10. 66 Pa.C.S. §332(a). [↑](#footnote-ref-10)
11. *See Samuel J. Lansberry, Inc. v. Pa. P.U.C.,* 134 Pa. Cmwlth. 218, 578 A.2d 600 (1990); *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). [↑](#footnote-ref-11)
12. Mr. Baker advised at the prehearing conference that he had in fact filed a protest with the Commission’s Secretary’s Bureau and had received a confirmation number for the filing. [↑](#footnote-ref-12)