

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PECO Energy Company for a Finding :  
Of Necessity Pursuant to 53 P.S. §10619 that the :  
Situation of Two Buildings Associated with a Gas : Docket No.: P-2021-3024328  
Reliability Station in Marple Township, Delaware :  
County Is Reasonably Necessary for the :  
Convenience and Welfare of the Public :

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**MARPLE’S TOWNSHIP’S RESPONSE IN OPPOSITION TO THE MOTION IN LIMINE  
OF PECO ENERGY COMPANY TO LIMIT THE SCOPE OF THE EVIDENTIARY  
HEARINGS AND TO EXCLUDE CERTAIN PORTIONS OF THE INTERVENORS’  
TESTIMONY AND EXHIBITS**

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Marple Township (“Marple”) hereby files this response in opposition to the motion in limine of PECO Energy Company (“PECO”) to limit the scope of the evidentiary hearings and to exclude certain portions of the intervenors’ testimony and exhibits (the “Motion”), and sets forth as follows:

**I. FACTUAL BACKGROUND**

This matter concerns PECO’s 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 (the “Petition”). In the Petition, PECO requests that the 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 at 2090 Sproul Road, Marple Township, Delaware County, Pennsylvania, 19008 (the “Property”) for a proposed gas reliability station is reasonably necessary for the convenience and welfare of the public and, therefore, exempt from 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.

PECO has filed a motion in limine to limit the scope of the evidentiary hearings and to strike the rebuttal evidence of the Intervenors, including Marple Township, for various reasons, but mostly based on a relevance standard.

## II. LEGAL ARGUMENT

### a. Scope of proceedings

Article VI of the MPC provides that “[T]he governing body of each municipality . . . , may enact, amend and repeal zoning ordinances to implement comprehensive plans . . .” 53 P.S. § 10601. Section 619 of the MPC further provides:

**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 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.

53 P.S. § 10619 (emphasis added). Thus, as a preliminary matter, Marple objects to PECO’s characterization of the issue in paragraph 11 of its Motion which states the following:

The first issue is whether the situation of two buildings for a proposed Natural Gas Reliability Station is reasonably necessary for the convenience and welfare of the public and, therefore exempt from any zoning, subdivision, and land development restrictions of the Marple Township Subdivision and Land Development Ordinance and the Marple Township Zoning Code.

Section 619 clearly states that “[t]his article shall not apply...” “This article” meaning Article VI. Zoning. Although inconsequential to the analysis of this Motion, it is important to be clear on the relief requested.

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. 53 P.S. § 10619 (emphasis added). In deciding this type of case, consideration must be given to the following:

- A. Whether the Public Utility Commission has jurisdiction over the parties and subject matter pursuant to the Municipalities Code, 53 P.S. § 10619;
- B. Whether the **proposed site** is reasonably necessary for the convenience or welfare of the public;
- C. Environmental impact.

*See Application of Pennsylvania American Water Company for a finding of reasonable necessity, under Section 619 of the Pennsylvania Municipalities Planning Code, 53 P.S. § 10619, for the subdivision of lands, and for the proposed situation and construction of the buildings comprising an expansion of the wastewater treatment plant on a site in South Coatesville Borough, Chester County, Pennsylvania (hereinafter "PAWC"), 2006 Pa. PUC LEXIS 91, \*8 (Pa. P.U.C. October 25, 2006) (emphasis added). Therefore, the standard to be applied in granting an exemption under 52 P.S. § 10619 is reasonable necessity for the site, i.e., whether the site is reasonably necessary for the public convenience or welfare. PAWC, at. \*11.*

In addition to Section 619, the Commission has 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. *See* 31 Pa. Bull. 951 (February 17, 2001). 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).

Judge DeVoe accurately described the scope of this proceeding in her June 1, 2021,

Interim Order by stating that:

Therefore, the issue in this case is whether the siting of the Gas Reliability Station at 2090 Sproul Road is reasonably necessary for the convenience or welfare of the public. In other words, whether it is reasonably necessary for the convenience or welfare of the public that the Gas Reliability Station be sited at 2090 Sproul Road. It is the *siting of the buildings* that is at issue in this matter. In deciding this issue, the Commission will consider the impact of its decision upon local comprehensive plans and zoning ordinances.

**b. PECO's Motion to Strike**

While the title of PECO's Motion suggests that it is only requesting to strike portions of the Intervenor's testimony and exhibits, the fact is that PECO is asking for the ALJ to make a ruling that none of the Intervenor's evidence be permitted. Marple has submitted the rebuttal testimony of Lawrence Gentile, Jim Capuzzi, Nancy Wilson, Matt Wannamaker, Joe Mastronardo and Stephen DiMarco.<sup>1</sup> PECO has asked this ALJ to strike all the testimony offered by Marple.

**1. Lawrence Gentile**

PECO states at paragraph 51.:

Mr. Gentile is Marple Township's Manager and testifies that the site is a gateway to the community and not for industrial use, and that PECO did not ask about additional sites after initial meetings. These issues are not relevant to the proceeding. Furthermore, Mr. Gentile's testimony contains impermissible hearsay from Joe Romano.

It is incomprehensible for PECO to make the argument that Mr. Gentile's testimony is not relevant. The precise issue before the ALJ is the *siting* of the Gas Reliability Station, and clearly the makeup of the surrounding area around the site are relevant, not to mention ALJ DeVoe already stated this in her Interim Order mentioned above.

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<sup>1</sup> Marple Township is no longer presenting Alan Llyod as a witness.

Furthermore, PECO has submitted the testimony of Douglas I. Oliver, wherein one specific topic of his testimony is community outreach. This is a topic that PECO has made an issue from the start of these proceedings yet has pushed back on every attempt of Marple and the other Intervenors presenting evidence to the contrary. Therefore, not only is Marple permitted to submit evidence to rebut PECO's own evidence, but to attack the credibility of PECO's witnesses on this issue as well.

Although PECO does not specifically state which part of Mr. Gentile's testimony is "inadmissible hearsay," Marple believes PECO is referring to page 3 where it says, "Joe Romano informed them [PECO] that the site was not for sale and that the owners of the site would not sell the site (having refused to sell it to previous interested parties, including recently, a bank who wished to build a new facility at the site)."

PECO correctly states that hearsay is an out of court statement offered for the truth of the matter asserted. Pa.R.E. 801. However, this statement is not being offered for the truth of the matter asserted and is therefore not hearsay. This statement is not being offered to prove that the property was not listed for sale and that the owners would not sell the site. It is being offered to show that as early as December of 2019, PECO had its eyes set on this one particular location regardless of the circumstances of the particular site, and regardless of the matrix it is presenting to prove why absolutely no other location was feasible. Furthermore, this exchange rebuts PECO's witnesses who will testify about meaningfully exploring other locations or the criteria used and timing in doing so.

## **2. Jim Capuzzi**

PECO's argument for striking the rebuttal of Mr. Capuzzi is no argument at all, and more or less a summary of his testimony. Mr. Capuzzi clearly has the education, skill, knowledge, and

background to qualify as an expert in, among other things, fire protection, fire protection engineering and property risk control. The fact that PECO has failed to produce sufficient documents or details regarding the gas reliability station, piping, instrumentation, and protection systems does not render Mr. Capuzzi's opinion improper. Given his knowledge and experience, it is important for the ALJ to hear this opinion as well as the other opinions rendered in his report.

### **3. Nancy Wilson**

PECO's argument regarding Ms. Wilson misstates the proper issue and scope of the proceedings again. The question is whether it is reasonably necessary for the convenience or welfare of the public that the Gas Reliability Station be sited at 2090 Sproul Road. Therefore, evidence of sound is important given the residential and retail areas in close proximity the Property. Furthermore, the testimony is not speculative and, if this were the case, then all of PECO's witnesses' testimony is speculative because the facility is not yet built and, by its own admission, other facilities operated by PECO are different in size, design and operation.

### **4. Matt Wannamker**

Contrary to PECO's argument, Mr. Wannamaker's testimony is relevant because the Commission will consider the impact of its decision upon local comprehensive plans and zoning ordinances.

### **5. Joseph Mastronardo**

Contrary to PECO's argument, Mr. Mastronardo's testimony is relevant because the Commission will consider the impact of its decision upon local comprehensive plans and zoning ordinances. Additionally, Mr. Mastronardo is highly knowledgeable and experienced in municipal zoning issues and its relation to public health and welfare and has served for many

years as a municipal engineer. Mr. Mastronardo has reviewed local zoning, subdivision and land development applications for compliance with local codes. He has been qualified and permitted to testify as an expert in civil engineering and zoning/land development matters before numerous municipalities, zoning boards and the Commonwealth of Pennsylvania. It is not necessary to be an “expert in public health or safety” as argued by PECO to render this opinion.

#### **6. Stephen DiMarco**

Again, PECO’s objection is not logical. Mr. DiMarco may be the most affected individual to testify in the proceeding as he owns the restaurant immediately adjacent to the Property and mentioned by countless others in the public input hearings. Mr. DiMarco is not being offered as an expert and his testimony is wholly relevant in this matter, particularly as it relates to the effect on the community and his business.

### **III. CONCLUSION**

The saying goes, “what’s good for the goose is good for the gander.” Here, however, PECO wishes to raise any argument it wants, but objects to the rebuttal of those arguments as not being relevant. Marple Township, as well as the other Intervenors<sup>2</sup> in this matter, presented rebuttal based upon the Petition, evidence, averments, arguments and testimony made by PECO over the course of these proceedings. PECO directly put these issues on the table, presenting testimony on same, but cries foul at any challenges to those issues. All of PECO’s contentions can easily and rightfully be addressed via cross-examination and argument at the close of the evidentiary hearings. PECO makes no logical, factual or lawful challenge to the testimony

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<sup>2</sup> For example, Carlos Thillet’s testimony is labelled “need for the Gas Reliability Station,” yet PECO objects to Mr. Uhlman and Ms. Baker presenting evidence contrary to that need.

proffered by Marple Township and it is respectfully requested that PECO's Motion be denied as to Marple and in its entirety.

Respectfully Submitted,

MCNICHOL, BYRNE & MATLAWSKI, P.C.

/s/ J. Adam Matlawski, Esquire

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Dated: July 14, 2021



**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true and correct copy of the foregoing, Response of Marple Township in Opposition to the Motion in Limine of PECO’s Energy Company to Limit the Scope of the Evidentiary Hearings and to Exclude Certain Portions of the Intervenors’ Testimony and Exhibits, in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant) in the manner listed below upon the parties listed below:

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Respectfully Submitted,

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Dated: July 14, 2021

          /s/ J. Adam Matlawski            
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