

**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	:	

POST HEARING BRIEF OF INTERVENOR DELAWARE COUNTY

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I. INTRODUCTION

Delaware County (the “County”) intervened in this proceeding because the proposed site of this PECO natural gas facility will have an immediate and substantial impact on the welfare of County residents. The proposed Marple Township location is in close proximity to an elementary school, restaurants, and in immediate proximity to numerous residences. It is also located on a busy roadway.

The County has a strong interest in protecting the health, safety, and welfare of the residents. It also has an interest in ensuring reliable and safe provision of heat and energy to its residents. Ultimately, the decision to locate natural gas facilities anywhere requires a weighing of the risks associated with natural gas transmission against the benefits that it provides for heat and energy. The County is very concerned because no such evaluation has been done.

While the Municipalities Planning Code envisions that utilities should have the power to received exemptions from zoning regulations where the location of a facility is reasonably necessary for the convenience or welfare of the public, to invoke that provision axiomatically requires an evaluation of the impact on the convenience and welfare of the public.

Delaware County requests that the PUC deny PECO’s Petition to override and ignore the zoning of Marple Township. Any finding of necessity is premature. Additionally, PECO has failed to even evaluate the impact on public welfare. Therefore, it has failed to meet its burden and its request lies outside of that which was contemplated or authorized by the Municipalities Planning Code. PECO should not continue with this project until such evaluation is complete and a location which balances the public benefits and the public welfare is determined. As always, the County stands ready and willing to work with PECO to secure an appropriate site which balances the need for natural gas distribution with the welfare of the public.

II. CONCISE STATEMENT OF THE CASE

A. Statement of the Proceedings

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.

PECO’s written direct testimony was submitted on May 17, 2021. Public input hearings were held on May 25 and 26, 2021. The rebuttal testimony of the intervenors was submitted on July 6, 2021 and surrebuttal testimony was served on July 13, 2021.

Four days of hearings were held on July 15, July 16, July 20, and July 22, 2021. Participating in the hearings as active parties were PECO, Delaware County, Marple Township, Ted Uhlman, and Julia Baker.

B. Statement of the Action

PECO is widely known in Southeastern Pennsylvania as the predominant provider of electricity and a provider of natural gas throughout the Philadelphia suburbs. PECO approached Marple Township in the late Fall of 2019 to advise the Township that it had decided to construct a new regulator station in Marple Township to augment the supply of natural gas in the region. PECO identified 2090 Sproul Rd. as the intended location for this facility.

A number of meetings and public discussions were held at which the Township, County and State Officials, and the residents of Marple Township expressed concern with the dense residential uses surrounding the proposed facility. In a world where “not in my backyard” reactions are common, Marple Township was quite different. The Township did not demand that the facility be relocated to another municipality. The County did not demand that the facility be built in another county.

The Township suggested to the PECO representatives that alternate locations should be considered and, in fact, provided suggested locations within Marple Township which would be safer and more suitable for this use. The County made clear that it supported PECO’s expansion, and that it was willing to help find a more suitable location in Marple Township.

Nevertheless, PECO determined to go ahead with its original location in contravention to the public concerns and filed an application with the Zoning Hearing Board to obtain approval for the 2090 Sproul Rd. location. Ultimately, PECO was unsuccessful in the zoning proceeding and its application was denied. PECO has appealed and that appeal will determine whether the proposed site meets zoning requirements. N.T. July 16, 2021, 1929:1-4.

At this point, PECO changed tactics and applied for an exemption from zoning with the Public Utilities Commission. That application brings the issue before the PUC now.

The application before the PUC is premised on Section 10619 of the Municipalities Planning Code which provides that the PUC may grant an exemption from local zoning where the applicant proves that its facility is reasonably necessary for the public convenience or welfare.

III. CONCISE STATEMENT OF THE QUESTIONS PRESENTED

1. Whether a utility structure is reasonably necessary such that it can be determined to be exempt from local zoning when the utility itself does not project that the structure will be necessary for six to ten more years?

Suggested answer: No

Urgency is a critical component of necessity. The testimony of PECO's own witnesses was clear that, without this facility, gas supply can continue unimpeded for at least six more years. That allows plenty of time for PECO to work with the Township to locate an appropriate site and complete construction long before the projected growth in demand creates any urgency. (If that projected growth materializes).

2. Whether the PUC is required to deny a petition for exemption under Section 10619 of the Municipalities Planning Code where the petitioner has failed to conduct any investigation into whether the proposed location is necessary for the public convenience or welfare?

Suggested answer: Yes

Section 10619 does not exempt utilities from zoning per se. The exemption is only effective upon proof, by a preponderance of evidence, that the proposed buildings are reasonably necessary for the public convenience and welfare. Where, as here, the utility fails to conduct any study as to the impact of the proposed buildings on the convenience and welfare of the public, it is impossible for the utility to meet its burden. Accordingly, the Petition must be denied.

IV. SUMMARY OF ARGUMENT

The Petition should be denied because PECO has failed to prove that it meets the mandatory standards for relief. Initially, there is no urgency to the project. According to PECO's own projections, there is no need for this infrastructure until at least 2027. That is ample time for PECO to work with the Township to determine a suitable location that balances the public welfare. Urgency is a critical component of necessity. Ten-year projections are helpful. But, they are not necessarily accurate. Two years ago, none of us had ever conducted remote hearings or meetings via videoconference. Now, Zoom is as integrated into our nomenclature as Google. While the County agrees that it is prudent for PECO to be proactive in upgrading its infrastructure and the County supports those efforts, it is premature for PECO to receive exemption from zoning based on a finding of necessity.

Additionally, PECO has never made any evaluation of whether this location is necessary "for the public convenience or welfare." Instead, PECO considered only four factors.

1. Proximity to the intersection of Sproul Road and Lawrence Road.
2. Size of lot.
3. Availability (whether the site was listed for sale).
4. Zoning.

Section 10619 does not exempt utilities from zoning per se. The exemption is only effective upon proof, by a preponderance of evidence, that the proposed buildings are "reasonably necessary for the public convenience or welfare". None of these four criteria have anything to do with the public convenience or welfare. These criteria are merely designed to acquire the minimum site with the minimum effort. PECO neglected the most important analysis in proving a potential site qualifies for an exemption under MPC § 10619. Because PECO failed to conduct any study as to the impact of the proposed buildings on the convenience and welfare of the public, it is impossible for PECO to meet its burden and its Petition must be denied.

V. ARGUMENT

Delaware County joins in and supports the brief and arguments of Marple Township. Instead of duplicating the effort of Marple Township, the County wishes to highlight two discrete arguments which clearly show that this petition is at best premature, and that PECO has failed to meet its burden to prove that this proposed facility is necessary for the public convenience or welfare.

The Pennsylvania Municipalities Planning Code (“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. However, it also provides utilities the opportunity to receive an exemption from that zoning by Petition to the PUC. 53 P.S. § 10619

§ 10619 Exemptions

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.** It shall be the responsibility of the Pennsylvania Public Utility Commission to ensure that both the corporation and the municipality in which the building or proposed building is located have notice of the hearing and are granted an opportunity to appear, present witnesses, cross-examine witnesses presented by other parties and otherwise exercise the rights of a party to the proceedings. (*emphasis added*).

This is not an automatic exemption. PECO is not exempt simply by nature of its status as a public utility alone. Instead, it is a case by case analysis in which PECO must prove by a preponderance of the evidence that its proposed buildings are “reasonably necessary for the convenience or welfare of the public.”

To grant a Petition under Section 10619, the Commission must rule that the proposed situation of the building in question is “reasonably necessary for the convenience or welfare of the public.” Section 10619 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. O'Connor v. Pa. P.U.C., 136 Pa. Commw. 119, 582 A.2d 427 (1990). But the PUC is not a rubber stamp. The Petitioner has the burden of proof of persuading the Commission through a preponderance of the evidence that the relief sought is proper and justified. Samuel J. Lansberry, Inc. v. Pa. P.U.C., 134 Pa. Cmwlth. 218, 578 A.2d 600 (1990). The location of the building cannot be not capriciously or wantonly determined. Duquesne Light Co. v. Upper St. Clair Tp., 377 Pa. 323, at note 1, 105 A.2d 287 (1954). Any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence. Met-ed Indus. Uders Group v. Pennsylvania Public Utility Commission, 960 A.2d 189, 193 n.2 (Pa. Commw. Ct. 2008) (citing 2 Pa. C.S. 704).

Herein, the Petitioner has failed to meet its burden in two critical ways. First, its determination of necessity is premature, seeking to address a need which is seven to ten years in the future. Second, it failed to conduct any evaluation of the impact of the location on the public convenience and welfare.

A. PETITIONER FAILED TO PROVE THAT THE PROPOSED STRUCTURE IS NECESSARY.

It is clear that PECO's petition is premature. PECO failed to meet its burden because the only evidence of necessity is a hypothetical projection of a need that is six to ten years away. Ryan Lewis is the Manager of Gas Engineering and Performance Asset Management for PECO. N.T. July 16, 2021, 1194:14-15. According to Lewis' testimony, PECO's own projections don't show any projected shortfall until 2027. N.T. July 16, 2021 1224:10-19.

Douglas Oliver is PECO's Vice President of Governmental and External Affairs. N.T. July 15, 2021 901:17-18. Oliver testified that the urgency of the project is to satisfy a need that is ten years in the future. N.T. July 15, 2021 938:10-11.

PECO notified the Township of this site in November of 2019. N.T. July 16, 2021, 950-1:19-9 and had already selected this site by May of 2019. Exhibit TF-2 Confidential. This was a full eight or more years before PECO's most conservative estimate projects any shortfall. Despite this, from December 9, 2019 through June 2020, PECO made no additional inquiry into potential sites that the Township would support. N.T. July 16, 2021, 921-2:22-6. We are still six years before PECO's most conservative estimation of shortfall.

Words and phrases in a statute are ordinarily defined according to their common usage. See Statutory Construction Act of 1972, 1 Pa. C.S. § 1903(a); Common usage can be determined by reference to a dictionary. Smith v. Ivy Lee Real Estate, LLC, 165 A.3d 93, (2017). The dictionary definition of "necessary" is:

1: absolutely needed : REQUIRED
Food is necessary for life.
2a: of an inevitable nature : INESCAPABLE
Death is a necessary feature of the human condition.
b(1): logically unavoidable
a necessary conclusion
(2): that cannot be denied without contradiction
c: determined or produced by the previous condition of things
the necessary outcome of the affair
d: COMPULSORY
Taking the oath of obedience is necessary.
<https://www.merriam-webster.com/dictionary/necessary>

But, while PECO has admitted that it even its own projections do not anticipate any shortfall in service for at least six years, PECO has relentlessly pushed the PUC to expedite consideration of its Petition under the premise that PECO intends to and desires to begin construction by mid-August 2021. PECO's internal timeline has nothing to do with necessity.

Six years is a long time. Many things can change in six years. Technologies can improve and demand for commodities can shift. It is entirely prudent that PECO would want a timeline which beats their projection by one year, two years, or even three years. But it is also entirely

possible that market forces could shift, and this demand could never materialize. So, it is entirely inappropriate to avoid all zoning and ignore all consideration of the public welfare.

With such a long lead time, there is no reason or excuse for this. There is no necessity. The County agrees that PECO should be proactive. The County supports PECO's effort to ensure that needed capital improvements are made such that a facility is complete and operational well in advance of any projected shortfall. However, when PECO's own projects show the runway is at least six years long, this cannot justify overriding zoning, while ignoring the impact on public welfare, and railroading approval through a PUC exemption.

PECO has made argument that its projections show a need at some future date to improve its system by providing a facility to increase the pressure and volume of natural gas being delivered within the vicinity of Marple Township. Where the alleged necessity is at least six years, and maybe a decade, away, it is premature for PECO to receive exemption from zoning based on a finding of necessity. The standard is reasonable necessity, not corporate prudence. PECO should work with the Township and the zoning to find a location that balances the need for capital improvements with the need to protect the public welfare.

B. PETITIONER FAILED TO PROVE THAT THE PROPOSED STRUCTURE IS NECESSARY FOR THE PUBLIC CONVENIENCE AND WELFARE

The Commission can only grant the relief requested in PECO's Petition if, based on the evidence presented, the PUC decides "that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public." However, PECO failed to do any analysis of whether this location is "reasonably necessary for the public convenience and welfare." As a result, it failed to present any evidence relating to how this proposed project impacts the public convenience and welfare.

PECO will likely cite O'Connor v. Pa. P.U.C., 136 Pa. Commw. 119, 582 A.2d 427 (1990) for the proposition 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. However, PECO's success in O'Connor highlights exactly how PECO failed in this case.

In O'Connor, an issue arose with a potential site for an electric substation because of the proximity of the site to potential historic resources. In response, PECO performed test archaeological digs at the site and consulted with the Pennsylvania Historical Commission. Based on those test digs, PECO presented evidence to the PUC that the proposed site would not harm the public welfare by endangering historical resources. Based on that evidence, the Historical Commission and the PUC agreed with PECO's determination that no significant archaeological resources were present. O'Connor v. Pennsylvania Public Utility Com'n, 136 Pa.Cmwlth. 119, 582 A.2d 427, (1990).

Unlike O'Connor, PECO failed to address the potential harms to the public. Instead, PECO relied on four criteria that have nothing to do with the public convenience or welfare to make its site selection. Douglas Oliver, PECO's Vice President of Governmental and External Affairs, testified that there are four criteria that PECO considered in the selection of this site. N.T. July 15, 2021, at 911:8-16.

1. Proximity to the terminus at Lawrence Road and Sproul Road
2. Availability – Actually listed for sale
3. Size of the Parcel
4. Zoning

In evaluating potential sites, PECO only uses these four criteria. each one is considered a deal breaker if not met. N.T. July 15, 2021, at 991:10-14. Oliver testified “I can say that when held to the standard of availability, zoning, and size, with availability being a particular importance, we

were very much limited in terms of what opportunities were there." N.T. July 15, 2021, at 912: 5–9. But these are PECO’s own criteria. There is not statutory basis for them.

There also is little relation to this project for the criteria. Oliver testified that the four criteria used by PECO for site selection are the same criteria that it uses for every project PECO constructs. N.T. July 15, 2021, at 954:18–24. Jim Moylan is a Real Estate Specialist for PECO. N.T. July 16, 2021, at 1119:25. He also testified that the site location criteria of “availability, zoning, size and location” were always the same. N.T. July 16, 2021, at 1145:13-18.

Michelle Garrity is the External Affairs Manager for PECO in Delaware County. N.T. July 15, 2021, at 965:10-11. Garrity confirmed the four criteria to choose a site. 969:12-17 She testified that PECO dismissed any property that wasn’t listed for sale. N.T. July 15, 2021, at 969:12-17.

The arbitrary and capricious nature of PECO’s analysis is laid bare by the two “mandatory” criteria of “zoning” and “availability and by how quickly PECO discarded these criteria when the 2090 Sproul Road property did not fit them. Zoning and availability were used to exclude almost every alternative site proposed and allegedly considered.

The mandatory criteria of “zoning” was used to rule out many potential properties. MT-Cross 2. PECO claims that, if a property is not zoned for utility use, it will not pursue that property.

Real Estate Specialist Moylan testified as follows:

1. Q. So second, the target property must be
 - 2 subject to zoning regulations to permit utility use.
 - 3 Is that correct?
 - 4 A. That's correct. That's what it says in
 - 5 my testimony. That's correct.
- N.T. July 16, 2021, at 1127:1-5.

However, this Petition would not be before the PUC today if that were true. The Zoning Hearing Board of Marple Township denied PECO’s zoning application for the site at 2090 Sproul

Road. N.T. July 16, 2021, at 1128-1129:22-1. In reaction, PECO is now asking this Commission to exempt PECO from zoning.

Requiring a lot to be subject to zoning regulations to permit utility use was for ease of acquisition and the convenience of PECO staff, it bears no relation to necessity. Otherwise, PECO would have abandoned this project when the zoning application was denied. PECO felt free to disregard its own “zoning” criteria when it suited its objective. Moreover, with the support of the Township, zoning can be changed, and the Township expressly offered to work with PECO to assist with zoning if a more appropriate site lacked zoning. N.T. July 15, 2021, at 980; 19-25. If adhering with zoning was a true objective of PECO, it would have cooperated and coordinated with the Township.

Similarly, the 2090 Sproul Road site that is applied for in this application was not for sale when PECO reached out to that owner. It was available for lease only. N.T. July 15, 2021, at 940; 23-24. Yet, PECO convinced the owner to sell instead of lease. So, when Oliver testified that due to the criteria with “availability being a particular importance, we were very much limited in terms of what opportunities were there”, that was not true. N.T. July 15, 2021, at 912: 5–9. PECO was free to disregard “availability” when it suited its objective.

Moreover, as a public utility, there is no obstacle at all to “availability”. Oliver admitted that PECO has the power of eminent domain. So, the availability condition, while it was a dealbreaker for PECO in its analysis, in fact has no relevance. PECO could select any site without regard to availability. N.T. July 15, 2021, at 941:4–8. PECO simply prefers not to use eminent domain. Michelle Garrity also testified that PECO has the power of eminent domain but prefers not to use it. N.T. July 15, 2021, at 970: 6–9. PECO will not use eminent domain nor make an

inquiry to the owner as to whether they are willing to sell if it is not actively for sale. N.T. July 15, 2021, at 985:15-16.

Requiring a lot to be actively for sale does not relate to the public convenience or welfare. It is merely for ease of acquisition, i.e. the convenience of PECO staff. Based on how quickly PECO discarded its criteria for “zoning”, one can assume that, had the owner of 2090 Sproul Road refused to sell, PECO may have quickly gotten over its aversion to eminent domain.

In the end, PECO’s meetings with the public and reliance on stated criteria were only for show, a hollow-hearted and cynical exercise where the end game was already pre-determined. In fact, the records shows that PECO had already identified the site and drafted site plans on May 15, 2019, (Exhibit TF-2 Confidential) at least seven months before informing the Township or County. PECO could not produce any examples of changes made after investigation/public input besides aesthetic changes.

Jim Moylan has worked for PECO for approximately five and one-half years. N.T. July 16, 2021, at 1143-1144; 23-1. In that time, Moylan has worked on close to 50 land acquisition projects for PECO facilities. N.T. July 16, 2021, at 1144; 11. In that time PECO has never changed a site after conferring with a local government. N.T. July 16, 2021, at 1144-1145; 24-3. Garrity admitted that the only changes that PECO makes regarding concerns raised by the community or municipalities are aesthetic changes, not site changes. N.T. July 15, 2021, at 987:1–11.

Key to this is that none of the four criteria employed by PECO relate to whether the location is reasonably necessary for the public convenience or welfare. PECO has never considered public welfare in their evaluation. On cross examination, Moylan admitted he never considers the public welfare.

- 12 Q. So you've got your four criteria that you
- 13 use for every - every acquisition that you do, but

14 not one of those criteria is evaluating the public
15 welfare impact of the site, is it?
16 A. That's not in my job description. That's
17 handled by External Affairs.
N.T. July 16, 2021, at 1150: 12-17

Yet, over and over again, the Government and External Affairs team of Oliver and Garrity claimed they had to defer to Jim Moylan. N.T. July 15, 2021, at 919:1-5; 919:15-23; 940: 8-14; 954:16-21; 969-970:23-2; 970-971:25-1; 981:18-24; 982:7-10. Moylan handles site selection. N.T. July 15, 2021, at 917:15-18. Oliver testified the “with respect to what sites were explored and when they were explored” Moylan “is the proper person to discuss that with”. The only thing that government affairs might do is negotiate an aesthetic tweak to the appearance of the proposed building. N.T. July 15, 2021, at 987:1–11.

After hundreds of pages of written testimony, surrebuttal testimony, and four days of hearings, it is clear that PECO made zero effort to evaluate the impact on the public convenience and welfare. It seems to presume that what is good for PECO and its shareholders is also good for the public at large. The four criteria PECO employs in site selection relate to ease of acquisition and reduction of cost, not the public convenience and welfare. Rigid proximity requirements ensure the least expensive location for the facility but do not weigh the impact on public convenience or welfare. Minimum lot size to fit the equipment is unrelated to the public convenience or welfare. Sites that have approved zoning for utilities and are actively listed for sale make it easier for PECO to obtain approval and acquire properties. But those criteria are unrelated to the public convenience and welfare. PECO completely ignored all consideration of anything related to the public welfare. Instead of conducting any study, PECO sought to discredit and undermine every witness that raised concerns for public welfare. In contravention of what is

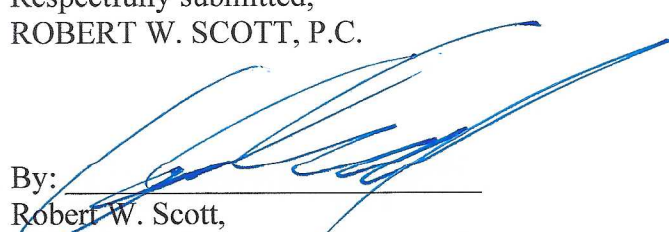
contemplated by the MPC, PECO did not perform any studies or evaluations to address the impact on public welfare.

As a result of PECO's capricious disregard of the public welfare, there is no choice but to deny its Petition. For these reasons, Delaware County respectfully request that the Commission deny the Petition and require that PECO work with the County and the Township to ensure that PECO weighs the benefits of the distribution of natural gas against the risks associated therewith and finds a location that meets both the needs of PECO and the residents. It is in all parties' best interest to provide for the safest distribution of that service possible.

VI. CONCLUSION AND REQUESTED RELIEF

For the Foregoing reasons, Intervenor County of Delaware, respectfully requests that the Petition of PECO to determine that it is exempt from zoning be denied.

Respectfully submitted,
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Dated: August 23, 2021

Appendix A – Proposed Findings of Fact And Conclusions Of Law

Proposed Findings of Fact

1. Ryan Lewis is the Manager of Gas Engineering and Performance Asset Management for PECO. N.T. July 16, 2021, 1194:14-15.

2. According to Lewis' testimony, PECO's own projections don't show any projected shortfall until 2027. N.T. July 16, 2021, 1224:10-19.

3. Douglas Oliver is PECO's Vice President of Governmental and External Affairs. N.T. July 15, 2021, 901:17-18.

4. Oliver testified that the urgency of the project is to satisfy a need that is ten years in the future. N.T. July 15, 2021, 938:10-11.

5. PECO notified the Township of this site in November of 2019. N.T. July 16, 2021, 950-1:19-9 and had already selected this site by May of 2019. Exhibit TF-2 Confidential.

6. PECO made no additional inquiry into potential sites that the Township would support. N.T. July 16, 2021, 921-2:22-6.

7. While the proposed facility may become necessary in the future, such a finding is premature due to the long lead time before PECO's own projections show necessity and the potential for shifts in market demands.

8. There are four criteria that PECO considered in the selection of this site. N.T. July 15, 2021, at 911:8-16.

1. Proximity to the terminus at Lawrence Road and Sproul Road
2. Availability – Actually listed for sale
3. Size of the Parcel
4. Zoning

9. In evaluating potential sites, PECO only uses these four criteria. each one is considered a deal breaker if not met. N.T. July 15, 2021, at 991:10-14.

10. The proposed 2090 Sproul Road site fails to meet two of the criteria that PECO's witnesses testified under oath were mandatory and the basis for excluding all other potential sites.

11. Public convenience is not one of the four criteria PECO uses to evaluate potential locations for its facilities.

12. The public welfare is not one of the four considerations that PECO uses in selecting a location.

13. Oliver testified "I can say that when held to the standard of availability, zoning, and size, with availability being a particular importance, we were very much limited in terms of what opportunities were there." N.T. July 15, 2021, at 912: 5-9.

14. The four criteria used by PECO for site selection are the same criteria that it uses for every project PECO constructs. N.T. July 15, 2021, at 954:18-24.

15. Jim Moylan also testified that the site location criteria of "availability, zoning, size and location" were always the same. N.T. July 16, 2021, at 1145:13-18.

16. Garrity confirmed the four criteria to choose a site. 969:12-17

17. PECO failed to present any testimony about how this site was reasonably necessary for the public convenience or welfare.

18. The mandatory criteria of "zoning" was used to rule out many potential properties.
MT-Cross 2

19. PECO claims that, if a property is not zoned for utility use, it will not pursue that property. N.T. July 16, 2021, at 1127:1-5.

20. However, the Zoning Hearing Board of Marple Township denied PECO's zoning application for the site at 2090 Sproul Road. N.T. July 16, 2021, at 1128-1129:22-1.

21. PECO felt free to disregard its own "zoning" criteria when it suited its objective. (See PECO PUC Petition herein seeking to disregard zoning.)

22. With the support of the Township, zoning can be changed and the Township expressly offered to work with PECO to assist with zoning if a more appropriate site lacked zoning. N.T. July 15, 2021, at 980; 19-25.

23. The 2090 Sproul Road site that is applied for in this application was not for sale when PECO reached out to that owner. It was available for lease only. N.T. July 15, 2021, at 940; 23-24.

24. As a public utility, all properties are "available" via eminent domain. N.T. July 15, 2021, at 941:4-8.

25. PECO has the power of eminent domain but prefers not to use it. N.T. July 15, 2021, at 970: 6-9.

26. Requiring a lot to be actively for sale does not relate to the public convenience or welfare.

27. PECO had already identified the site and drafted site plans on May 15, 2019, (Exhibit TF-2 Confidential)

28. Jim Moylan has worked for PECO for approximately five and one-half years. N.T. July 16, 2021, at 1143-1144; 23-1.

29. In that time, Moylan has worked on close to 50 land acquisition projects for PECO facilities. N.T. July 16, 2021, at 1144; 11.

30. In that time PECO has never changed a site after conferring with a local government. N.T. July 16, 2021, at 1144-1145; 24-3.

31. Michele Garrity admitted that the only changes that PECO makes regarding concerns raised by the community or municipalities are aesthetic changes, not site changes. N.T. July 15, 2021, at 987:1–11.

32. Jim Moylan admitted he never considers the public welfare and stated “That's not in my job description.” N.T. July 16, 2021, at 1150: 12-17

33. The Government and External Affairs team of Oliver and Garrity claimed they had to defer to Jim Moylan. N.T. July 15, 2021, at 919:1-5; 919:15-23; 940: 8-14; 954:16-21; 969-970:23-2; 970-971:25-1; 981:18-24; 982:7-10.

34. Moylan handles site selection. N.T. July 15, 2021, at 917:15-18.

35. The only thing that government affairs might do is negotiate an aesthetic tweak to the appearance of the proposed building. N.T. July 15, 2021, at 987:1–11.

36. PECO made zero effort to evaluate the impact on the public convenience and welfare

37. The four criteria PECO employs in site selection relate to ease of acquisition and reduction of cost, not the public convenience and welfare.

38. PECO has never made any evaluation of whether this location is necessary “for the public convenience or welfare.”

Proposed Conclusions of Law

1. The Petitioner has the burden of proof of persuading the Commission though a preponderance of the evidence that the relief sought is proper and justified. Samuel J. Lansberry, Inc. v. Pa. P.U.C., 134 Pa. Cmwlth. 218, 578 A.2d 600 (1990).

2. The location of the building cannot be not capriciously or wantonly determined. Duquesne Light Co. v. Upper St. Clair Tp., 377 Pa. 323, at note 1, 105 A.2d 287 (1954).

3. Any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence. Met-ed Indus. Uders Group v. Pennsylvania Public Utility Commission, 960 A.2d 189, 193 n.2 (Pa. Commw. Ct. 2008) (citing 2 Pa. C.S. 704).

4. Marple Township has the power to “enact, amend and repeal zoning ordinances to implement comprehensive plans”. 53 P.S. § 10601.

5. This includes the power to designate zoning for public utilities.

6. However, public utilities can Petition to the PUC to request an exemption from that zoning. 53 P.S. § 10619.

7. A utility can only receive an exemption if the utility proves 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.

8. The criteria employed by PECO for site selection failed to consider the convenience or welfare of the public.

9. PECO failed to present evidence or testimony relating to how this proposed site and the proposed situation of the building is reasonably necessary for the convenience or welfare of the public.

10. PECO has not proven by substantial evidence that the situation of the buildings for a Gas Reliability Station is reasonably necessary for the convenience or welfare of the public.

11. The Commission does not find PECO credible in its analysis of the properties and attempt to prove reasonable necessity.

12. PECO is not exempt from the Marple Township Zoning Code.

Proposed Ordering Paragraphs

It is ordered that:

1. PECO's Petition for a Finding of Necessity pursuant to 53 P.S. 10619 that the situation of two buildings association with a Gas Reliability Station in Marple Township, Delaware County is reasonably necessary for the convenience and welfare of the public is denied.

2. PECO's request that the proposed security fence be deemed a facility and exempt from local zoning regulations is denied.

CERTIFICATE OF SERVICE

I hereby certify that on this day I served a true copy of the foregoing Brief of Intervenor Delaware County was served upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party) via electronic mail.

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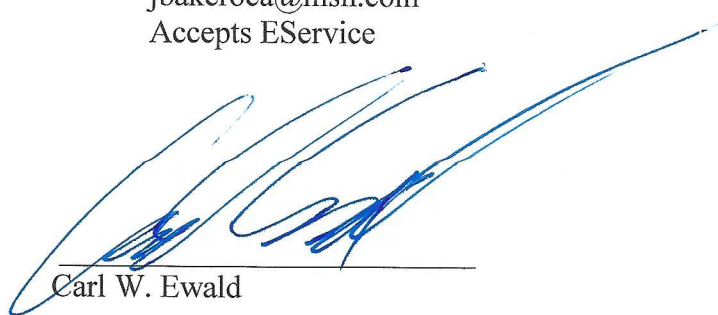
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Dated: August 23, 2021