

**BEFORE THE**  
**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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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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**REPLY BRIEF OF INTERVENOR MARPLE TOWNSHP**

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August 30, 2021

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## **I. SUMMARY OF REPLY**

In its main brief, PECO glosses over its own contradictories, argues against logic, belittles the concerns of the Intervenors, and attempts to limit the scope of the siting standard that is blatantly contrary to law. PECO reveals itself as an entity determined to push its agenda forward without regard for its obligations and with no concern for or cooperation with the very public that it serves.

PECO can repeat over and over again and take up as many pages of a brief as it wishes with statements about how engaged it was in public outreach, how much it wishes to work with the Township, and how thoroughly it analyzed other locations for the Gas Reliability Station, however, not even a lengthy, repetitive, argument can change the reality of what took place between the Spring of 2019 through the present.

PECO's criticism of the Township's position as a "not in my backyard" argument is neither accurate nor fair. In fact, the truth would be that the Township's argument is more along the lines of: "here is our entire backyard; let us work together in finding the most suitable location for your project." Instead, PECO appears to view the Township, the County, and the public they serve as little more than annoyances to be dealt with and dismissed.

Finally, PECO continues to misstate the scope of these proceedings even when the law it cites contradicts that argument. Despite its own determinations, PECO's search process and ultimate decision to site a Gas Reliability Station at 2090 Sproul Road, Marple Township was not reasonable, and in fact, arbitrary.

## II. ARGUMENT

### A. PECO CONTINUES TO MISSTATE THE PROPER SCOPE FOR THIS PROCEEDING

PECO continues to contradict itself and even quotes the Del-AWARE Unlimited case which states that the Commonwealth Court has explained, “[w]e do not interpret [Section 619 of the MPC] as requiring the [Commission] to reevaluate the entire project. [Section 619 of the MPC] merely directs [the Commission] to determine whether the *site* of the **[proposed facility]** is appropriate to further the public interest.” *Del-AWARE Unlimited, Inc.*, 513 A.2d at 595 (emphasis added). It does not say that the PUC is to determine the appropriate site of a building encasing a public utility facility, rather it directs the PUC to evaluate the appropriateness of the proposed facility – that being the Gas Reliability Station itself, and whether or not it furthers the public interest.

Contrary to PECO’s assertion, ALJ DeVoe’s Order states as follows: the Commission must “determine whether the site of the [proposed facility] is appropriate to further the public interest.” (June 1, 2021 Interim Order) citing (*Del-AWARE Unlimited, Inc.*, 513 A.2d 593. (emphasis in original)). That same Order states that “[t]he Petition at issue in the instant matter pertains only to the Gas Reliability Station.” Finally, and most importantly a detail that PECO failed to highlight is that ALJ DeVoe’s order states the following:

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**. (June 1, 2021 Interim Order) (emphasis added).

Furthermore, PECO continues to defy its own logic with references such as the following: Importantly, though, 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; rather it need

only show that the building is reasonably necessary. O'Connor v. Pa. Pub. Util. Comm'n., 582 A.2d 427, 433 (Pa. Cmwlth. 1990). (PECO Main Brief, p. 14). It is only logical that the courts are discussing the entire utility stations. If we were only discussing the siting of an outer building structure, where else could it possibly be located if not around the utility equipment itself? The only sensible conclusion is that the courts are evaluating the entire public utility facility.

**B. PECO'S NEW CRITERIA FOR SITE SELECTION**

Presumably, now seeing its own failed logic, PECO has developed new criteria for site selection to include in its main brief. PECO has modified the wording of its originally stated criteria after evidentiary hearings where it was made clear that PECO's pre-determined situs of the Gas Reliability Station did not quite fit. PECO now states that their criteria is the following: (1) Availability; (2) appropriate zoning; (3) adequate size; and (4) a location that satisfies engineering constraints. (PECO Main Brief, p. 16).

PECO's original wording of its criteria was: (1) that the property is available for purchase, (2) that the property is zoned for utility use, (3) that the property is at least a half an acre and (4) that the property is located within a half mile from the proposed main terminus at the intersection of Sproul and Lawrence Roads. (R. 1123 – 30). Here PECO does nothing, but further prove the Township's point that PECO chose a location, grasped at all available arguments along the way and forced this particular site from the infancy of the project planning. The selected location, 2090 Sproul Road, does not meet PECO's criteria any more than some of the other properties "explored" by PECO. Indeed, 2090 Sproul Road was not available for purchase, it required a special exception be granted in order to meet zoning and this application was denied by the zoning hearing board, and it fits the size requirement by a mere fraction.

### **C. PECO'S SITE SELECTION WAS NOT REASONABLE**

PECO self-characterizes its site selection process as reasonable and thorough, however the evidence shows that it was anything but thorough and reasonable. Even after knowingly modifying its alleged criteria, rather than admit that this site was chosen because PECO wanted to choose it, PECO continues its baseless argument that it “considered *all* of the sites recommended...” (PECO Main Brief, p. 17). To the contrary, PECO’s own evidence proves, without a shadow of doubt, that PECO chose 2090 Sproul Road in the Spring of 2019 and never once put any efforts into another location. Indeed, if PECO was in possession of any evidence showing that it honestly considered another site for this project, that evidence would have been submitted. Instead, what we are left with is blanket assertions.

Before ALJ DeVoe and the Commission are plans developed in the Spring of 2019 showing a drawing of the Gas Reliability Station on 2090 Sproul Road and modified several times thereafter. Not once did PECO request for its engineer to create a plan showing the Gas Reliability Station at any of the other locations it claims to have considered. Not once did PECO reach out to any other property owners to inquire about purchasing their properties or to acquire by eminent domain. Not once did PECO halt its construction of the piping towards the selected location even though it had not received the approvals to move forward, knowing it would force this location at whatever cost. If nothing else, PECO should have no credibility before ALJ DeVoe or the Commission in this matter.

Marple is unfortunately not surprised of the disingenuous nature in which PECO described Mr. Gentile’s testimony. PECO is aware, and the record is perfectly clear, that Mr. Gentile suggested the location of 2024 Sproul Road prior to learning anything at all about the project. Yet, PECO presents in its argument that Mr. Gentile’s is a “shifting and conflicting

opinion.” Nonetheless, PECO’s argument about listening to local opinions is irrelevant. PECO’s solicitation of feedback from the Township is nothing more than smoke and mirrors, and a checkmark on PECO’s list to later present an argument before this ALJ and the Commission.

PECO’s contention that Marple Township is attempting to engage in “spot zoning” is also inaccurate. Zoning changes occur all the time. Initially, the County of Chester v. Philadelphia Elec. Co. case cited by PECO has nothing to do with spot zoning. Indeed, it was a case involving a township that enacted an ordinance placing numerous requirements on utility companies. See County of Chester v. Philadelphia Elec. Co., 218 A.2d 331 (Pa. 1966). The In re Realen Valley Forge Greenes Assoc. case states that “[b]etween 1955 and 1990 the vast majority of the properties within the AG District were rezoned to permit intense commercial development,” highlighting that certain areas had been changed in the past. Id., at. 722. Furthermore, the court notes that to analyze spot zoning challenges, the question is whether the lands at issue are a single, integrated unit and whether any difference in their zoning from that of adjoining properties can be justified with reference to the characteristics of the tract and its environs. Id., at. 730. Thus, without knowing which property PECO is referring to, and the zoning of the neighboring properties, this is an analysis that is beyond this case and not relevant to the current proceedings.

Finally, PECO attempts to highlight the danger of allowing local municipalities to control the siting of public utility facilities, but we submit that there is equal, if not more, concern with a public utility attempting to exercise complete control and dictating how a case is to be ruled upon.



**D. PECO'S DECISION WAS ARBITRARY GIVING GROUNDS TO DENY ITS PETITION**

PECO points out in its Main Brief that unless PECO acted in an arbitrary or capricious manner, its decision should remain undisturbed. See, e.g., Lower Chichester Twp. v. Pa. Pub. Util. Comm'n, 119 A.2d 674 (Pa. Super. 1956); Abington Electric Co. v. Pa. Pub. Util. Comm'n, 198 A. 901 (Pa. Super. 1938). Merriam-Webster defines “arbitrary” as existing or coming about seemingly at random or by chance or as a capricious and unreasonable act of will; based on or determined by individual preference or convenience rather than by necessity or the intrinsic nature of something.

While PECO argues that it thoroughly analyzed 14 alternative sites, the evidence does not support such contention. Other than producing a list of addresses, with a few notations under each stating why they could not pursue those properties (many with the same issues as the selected location, or things that did not need to be issues such as zoning and structures thereon), PECO has produced no evidence of and made no credible argument why it has no evidence to support this contention. As highlighted above, PECO cannot produce a single other drawing showing the potential Gas Reliability Station at any other location. PECO cannot produce a single letter addressed to any other property owner in the Township regarding their interest in selling their land to PECO, or its desire to acquire through eminent domain. There is not a single PECO employee or representative who had a conversation with any property owner other than Mr. Facciola, wherein somehow the parties discussed eminent domain, but we are to be convinced that PECO did not threaten eminent domain and only uses this as its last resort. Regarding the conversation with Mr. Facciola, Mr. Moylan testified that “[i]n this instance, the landowner acknowledged during negotiations that PECO is legally entitled to condemn the property, but PECO never discussed or threatened using eminent domain to acquire the Property with the landowner. (PECO Statement

No. 5, p. 8). If this were to be believed by any rational person, it begs the question, why then, could PECO not get other property owners to “acknowledge” their condemnation powers without exactly threatening or using eminent domain?

It is similarly curious that PECO states that the property must be zoned for public utility use when PECO clearly does not care whether the property is zoned for public utility use or not which is the sheer reason we are involved in this current proceeding. Finally, the fact that PECO even includes that a parcel containing an office structure needing to be demolished as a reason to not pursue a property is insulting considering (1) the costly environmental remediation efforts PECO will need to perform at the selected location and (2) the time and litigation fees already spent and continuing to being spent on these proceedings.

PECO’s selection of 2090 Sproul Road was determined by its own preference and convenience, not by necessity, and not for the convenience or welfare of the public. The fact that PECO’s own drawings show that 2090 Sproul Road was selected from the project’s infancy, coupled with zero evidence that the company made any sort of meaningful deliberation regarding an alternative location, and finally in conjunction with 2090 Sproul Road not even meeting its own “criteria,” should give ALJ DeVoe and the Commission extreme pause in finding that PECO’s decision to site its project at 2090 Sproul Road was anything other than arbitrary.

### **III. CONCLUSION**

In light of the foregoing Reply Brief and Marple Township’s Main Brief filed with the Commission of August 23, 2021, in this matter, Marple Township respectfully requests that the Commission enter an order encompassing the Proposed Ordering Paragraphs attached to the Township’s Brief as Appendix “A” and order such other relief as is just and proper.

Respectfully Submitted,

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Dated: August 30, 2021

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true and correct copy of the foregoing, Reply Brief of Intervenor Marple Township 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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