

**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	:	

REPLY BRIEF OF INTERVENOR DELAWARE COUNTY

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I. CONCISE COUNTER STATEMENT OF THE CASE

PECO has grown too confident that this Commission will grant its applications and complacent in its own narrative that what is good for PECO is also good for the public welfare. But, PECO is not some omnibenevolent body. PECO is a profit-making corporation that answers primarily to its shareholders.

The role of the Public Utility Commission is to “balance the needs of consumers and utilities; ensure safe and reliable utility service at reasonable rates; protect the public interest; educate consumers to make independent and informed utility choices; further economic development; and foster new technologies and competitive markets in an environmentally sound manner.” PUC Mission Statement. <https://www.puc.pa.gov/about-the-puc/>

The Petition 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 the site of its buildings is reasonably necessary for the public convenience or welfare.

PECO has filed written direct testimony. PECO has presented witnesses at evidentiary hearings. PECO has now filed its Main Brief. But, while PECO has made various arguments as to why its proposed “Natural Gas Reliability Project” will have benefits, it has not presented evidence to support the required finding, that the proposed location of such buildings are reasonably necessary for the convenience or welfare of the public.

II. SUMMARY OF ARGUMENT

This Reply Brief responds to the variety of arguments that are raised in the Main Brief of PECO. Each time PECO states its argument in support of its Petition, that argument sounds a little different. First, the project “will provide many benefits and that the location selected for its siting is reasonable.” (Main Brief at 3). Alternately, 2090 Sproul Road is the “only site that satisfied PECO’s standard site selection criteria and engineering needs.” (PECO Main Brief at 2, 5, 22). Or, “there is substantial evidence to find that the Natural Gas Reliability Station’s buildings serve a clear purpose and will benefit PECO and the public.” (PECO Main Brief at 28).

However, PECO failed to present evidence to meet its burden to prove that the “proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public.” Because PECO failed to meet the only standard that matters, the one which is set forth in Section 10619 of the Municipalities Planning Code, its Petition must be denied.

The Public Utility Commission is bound by the Statutory Construction Act to reject all of these alternate standards used by PECO. To follow the standards used by PECO would have this Commission interpret the language of the Municipalities Planning Code such that Section 10619 is meaningless. Such interpretations are expressly in violation of the Act and must be rejected.

III. ARGUMENT

Pennsylvania municipalities are granted an express power to zone with respect to public utility company buildings unless the Public Utility Commission renders a decision that the present or proposed location of such buildings are reasonably necessary for the convenience or welfare of the public. Newtown Tp. v. Philadelphia Elec. Co., 594 A.2d 834, 140 Pa.Cmwlth. 635 (Pa. Commw. Ct. 1991); 53 P.S. § 10619.

Absent a Petition to the PUC, the status quo of zoning empowers the municipality. Public utilities can only receive an exemption from that zoning if the utility proves by a preponderance of the evidence that it meets the standards of 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*).

PECO seeks to avoid this standard. Instead, it asks the PUC to grant its petition because PECO avers the project has benefits. PECO's main brief demonstrates that, not only did PECO fail to meet its burden of proof, it failed to conduct any analysis regarding the standards of § 10619.

PECO failed to prove that its project meets the standards of the MPC. Now it is asking this Commission to improperly relax the standard for zoning exemptions and effectively render MPC Section 10619 meaningless. The Rules of Statutory Construction require that the Commission find PECO is required to base its site selection on necessity for the public convenience and welfare. Otherwise, it must adhere to the local zoning regulations. .

A. PECO FAILED TO PROVE THAT THE PROPOSED STRUCTURE MEETS THE STANDARD OF MPC SECTION 10619.

In PECO's Main Brief, PECO attempts to argue why its Petition meets the standard for exemption under the Municipalities Planning Code. But PECO's own arguments demonstrate PECO's failure to meet this standard.

This Commission cannot grant the requested exemption unless the preponderance of the evidence proves that the "proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public." Yet, on page 9, PECO summarizes its argument as follows:

In short, the evidence of record clearly establishes that the Natural Gas Reliability Station will provide many benefits and that the location selected for its siting is reasonable. Further, absent the location issue, there is no dispute that the buildings associated with the Station are reasonably necessary for the public convenience and welfare. (PECO Main Brief at 3).

Project benefits and reasonableness of location is not the standard set forth in Section 10619. PECO raises multiple other various arguments that all conclude they should be granted an exemption. But, none relate to the standard of Section 10619.

On page 25, PECO argues "there is substantial evidence to support PECO's decision to implement the Natural Gas Reliability Project in order to increase its supply reliability and reduce its design day requirements deficit by upgrading the LNG Plant." (PECO Main Brief at 28). However, whether the Natural Gas Reliability Station will provide benefits is irrelevant. In fact, PECO's own Brief admits as much. When attempting to narrowly define the issues of this case, PECO cites Del-Aware Unlimited, Inc. v. Pennsylvania Public Utility Com'n, 513 A.2d 593, 99 Pa.Cmwlth. 634 (Pa. Commw. Ct. 1986) to argue that the necessity of the "Natural Gas Reliability Project" is not at issue in this case. Rather, the only issue is the appropriateness of 2090 Sproul Road. PECO argues:

Furthermore, 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 in original). (PECO Main Brief at 14).

Thus, it is clear that the only issue before the Commission is “to determine whether the *site* of the [proposed facility] is appropriate to further the public interest.” The “location, not the building itself, is the focus of concern.” *Del-Aware*, 513 A.2d at n4. Yet, PECO’s only arguments relating to necessity are that there are benefits purported to flow from the “Natural Gas Reliability Project”.

PECO attempts to shoehorn the location by arguing that 2090 Sproul Road is the “only site that satisfied PECO’s standard site selection criteria and engineering needs.” (PECO Main Brief at 2, 5, 22). While PECO repeatedly relies on this argument, it is a hollow argument because PECO’s standard site selection criteria have nothing to do with whether the site is reasonably necessary for the public convenience or welfare. PECO’s “standard site selection criteria” of “availability, zoning, size and location” do not include the most important criteria, whether it is necessary for the public convenience and whether it is necessary for the public welfare. N.T. July 16, 2021, at 1145:13-18; N.T. July 15, 2021, at 911:8-16; N.T. July 15, 2021, at 969:12-17.

In fact, PECO has become so complacent in its site selection process that it never conducts evaluations of impact on the public convenience and impact on the public welfare. N.T. July 15, 2021, at 954:18–24. These four criteria used by PECO for site selection are the criteria that it uses for every project. N.T. July 15, 2021, at 954:18–24. According to Moylan, for at least the past five and one-half years, PECO has never considered the impact on the public convenience and impact on the public welfare in the site selection process. N.T. July 16, 2021, at

1150: 12-17. PECO's witnesses agree that, once the site is selected by PECO using these four criteria, PECO never changes a site based on concerns raised by the local municipality. N.T. July 16, 2021, at 1144-1145; 24-3; N.T. July 15, 2021, at 987:1-11.

Because PECO never does any evaluation of impact on the public convenience and impact on the public welfare, PECO cannot meet its burden. PECO relies heavily on Petition of UGI Penn Nat. Gas Inc. for A Finding That Structures to Shelter Pipeline Facilities in the Borough of W. Wyoming, Luzerne Cty., to the Extent Considered to Be Buildings Under Loc. Zoning Rules, Are Reasonably Necessary for the Convenience or Welfare of the Pub., No. P-2013-2347105, 2013 WL 6835113, at *7 (Pa. PUC Dec. 19, 2013). (Cited in PECO Main Brief at 15, 23, 25, 27, 38, 42 51, 52). However, it is clear from W. Wyoming, that the parties therein did consider the public welfare.

PNG has proposed to construct the West Wyoming Gate Station on an approximately 3.2 acre property in a forested area of West Wyoming Borough. PNG St. No. 1 at 5. According to PNG, the location of the Gate Station was chosen because it is at the intersection of the Transco and Auburn II Lines, is approximately 1,500 feet from the nearest dwelling, and is in close proximity to an electric utility corridor. PNG St. No. 1-R at 13-14. The West Wyoming Gate Station and the existing Transco pipeline will provide PNG with access to lower-cost locally-produced natural gas without the expense and environmental impacts associated with the construction of a new pipeline.

PNG selected the site because it was large and forested, remote from the nearest dwelling, proximate to the area of need, and would reduce environmental impacts. The ALJ and PUC were convinced by these factors and found the location in a "rural area" to be persuasive. UGI Penn, at 12.

Likewise, PECO relies heavily on Del-Aware Unlimited, Inc. v. Pennsylvania Public Utility Com'n, 513 A.2d 593, 99 Pa.Cmwlt. 634 (Pa. Commw. Ct. 1986). (Cited in PECO Main Brief at 14, 23, 51, 52). But, therein the Commonwealth Court held:

We now hold that (1) the PUC was obliged to defer to DER's evaluation of environmental impacts within its jurisdiction, (2) there was a reasonable effort to reduce the environmental incursion caused by the pumphouse site to a minimum and (3) any alleged harm from the pumphouse site is clearly outweighed by its benefits. Del-Aware Unlimited, Inc. v. Pennsylvania Public Utility Com'n, 513 A.2d 593, 99 Pa.Cmwlth. 634 (Pa. Commw. Ct. 1986)

Thus, in Del-Aware, the DER evaluated the environmental impacts of the project, the utility made a reasonable effort to reduce the environmental impact, and the Commonwealth Court weighed the costs vs. the benefits of the project. This is what PECO should have done.

On page 28, PECO raises another argument and concludes “Accordingly, there is substantial evidence to find that the Natural Gas Reliability Station’s buildings serve a clear purpose and will benefit PECO and the public.” (PECO Main Brief at 28). But, “clear purpose” and “will benefit”, is not the standard.

Repeatedly, PECO raises arguments that are silent to the standard. The situation of the buildings must be reasonably necessary for the public convenience or welfare.

While PECO has argued urgency all along, the project will only take one year to complete once an appropriate location is selected. (PECO Main Brief at 5, citing PECO Statement No. 1, Direct Testimony of Douglas Oliver, at 5:19-20). PECO’s own projections don’t show any projected shortfall until 2027. N.T. July 16, 2021 1224:10-19. Accordingly, there is plenty of time to get the analysis right. PECO should not be permitted to skip the most important criteria in evaluating the site for the proposed facility. PECO’s Petition should be denied because not only did PECO fail to produce evidence in support of the MPC standard, but it also never even conducted the analysis.

B. THE COMMISSION CANNOT INTERPRET THE STANDARD TO IGNORE THE UTILITY'S BURDEN TO PROVE THE LOCATION IS REASONABLY NECESSARY FOR THE CONVENIENCE OR WELFARE OF THE PUBLIC.

PECO's requested relief would essentially require this Commission to interpret Section 10619 to read "This article shall not apply to any existing or proposed building, or extension thereof, used or to be used by a public utility corporation." and ignore the remainder of that Section. Pennsylvania has clear Rules of Statutory Construction which prohibit this.

Section 1921(a) requires that a statute be interpreted such that all provisions be given meaning. It provides

1 Pa.C.S. § 1921. Legislative intent controls.

(a) Object and scope of construction of statutes.--The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. **Every statute shall be construed, if possible, to give effect to all its provisions.** (*emphasis added*).

Similarly, Section 1922(2) forbids an interpretation that only reads one part of the Statute to be effective. It requires an interpretation that presumes as follows:

1 Pa.C.S. §1922 Presumptions in ascertaining legislative intent.

In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used:

(1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.

(2) That the General Assembly intends the entire statute to be effective and certain.

(3) That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.

(4) That when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language.

(5) That the General Assembly intends to favor the public interest as against any private interest. 1 Pa.C.S. § 1922

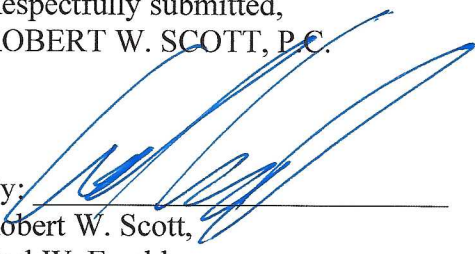
Yet, PECO's Petition and argument ignore the second part of MPC Section 10619. The Commission can only grant the relief requested in PECO's Petition if, based on the evidence presented, the PUC decides "that the present or proposed situation of the building in question is

reasonably necessary for the convenience or welfare of the public.” The Commission cannot ignore PECO’s failure to conduct this analysis. Accordingly the Petition should be denied.

IV. CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons and those in the Post-Hearing Brief of Intervenor County of Delaware, the County 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 30, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this day I served a true copy of the foregoing Reply 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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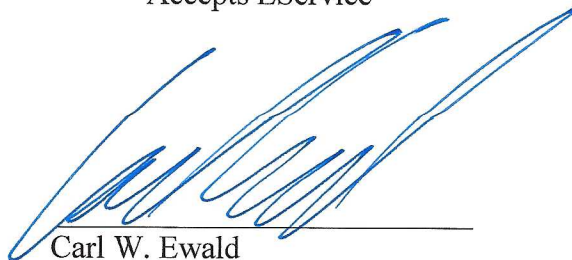
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