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August 30, 2021

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: 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

Docket No. P-2021-3024328

Dear Secretary Chiavetta:

Enclosed for filing in the above-referenced proceeding is the Reply Brief of PECO Energy Company. Copies will be provided as indicated on the Certificate of Service.

Thank you for your continued attention to this matter.

Respectfully,
/s/ Christopher A. Lewis
Christopher A. Lewis

Enclosures

cc: Certificate of Service List (w/ encl.)

**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 Reliability Station in : Docket No. P-2021-3024328
Marple Township, Delaware County Is :
Reasonably Necessary for the Convenience :
and Welfare of the Public :

REPLY BRIEF OF PECO ENERGY COMPANY

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August 30, 2021

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I. INTRODUCTION

Intervenors' opposition to PECO's Petition can be boiled down to the following sentence: "Marple Township does not oppose the 'Gas Reliability Station' project in general; however, Marple does oppose the siting of the Gas Reliability Station at PECO's chosen location." *Main Brief of Intervenor Marple Township* ("Marple Br."), at p. 20.¹ Should Intervenors prevail in this matter, decades of Pennsylvania case law warning against this manner of local control over public utilities would be up-ended. Nearly seventy years ago, the Pennsylvania Supreme Court aptly noted that:

Local authorities not only are ill-equipped to comprehend the needs of the public beyond their jurisdiction, but, and equally important, those authorities, if they had the power to regulate, necessarily would exercise that power with an eye toward the local situation and not with the best interest of the public at large as the point of reference.

Duquesne Light Co. v. Upper St. Clair, 105 A.2d 287, 293 (Pa. 1954).

Nevertheless, Intervenors here seek to take control over PECO's site selection process and compel the relocation of the proposed Natural Gas Reliability Station ("Station") to a supposed location that, in their view, would be more suitable. Intervenors, however, have failed to: (1) present any meaningful and properly corroborated evidence that the selected location at 2090 Sproul Road is arbitrary or capricious or is not otherwise in the public interest; (2) identify any viable alternative site; or (3) identify any site selection criteria or process that would identify a viable site. In short, Intervenors are suggesting that PECO engage in an open-ended process to identify a site acceptable to them and not one that meets the best interests of the public at large.

¹ PECO notes that *pro se* Intervenor Julia Baker has filed what purports to be her Main Brief containing various notes and an outline of a partially completed brief citing to 52 Pa. Code § 57.76(a)(4), which relates to the Commission's review of the siting and construction of electric transmission lines, and which is not applicable to this proceeding. Ms. Baker has filed a motion to file an amended brief, which PECO opposes, and which remains pending.

Locating public utility facilities in this manner is precisely what Pennsylvania courts have determined to be not only problematic, but altogether unworkable.² For the reasons that follow, each of the Intervenor’s arguments should be rejected.

II. SUMMARY OF ARGUMENT³

The limited issues in this proceeding are: (1) whether the situation of buildings which serve to protect equipment, dampen sound, and enhance aesthetics is reasonably necessary for the convenience or welfare of the public, and (2) whether the Security Fence falls within the broad definition of “facilities” at 66 Pa. C.S. § 102.⁴ Here, PECO has met and exceeded its burden of producing evidence regarding the necessity and benefits of siting the Station’s buildings at 2090 Sproul Road and, though not at issue in this proceeding, the Station itself. In response, Intervenor’s have raised a series of arguments that, in the context of a Municipal Planning Code (“MPC”) Section 619 proceeding, are red herrings because they are beyond the proper scope of this proceeding. Intervenor’s do not challenge the location or public benefits of the proposed buildings at the Natural Gas Reliability Station, and instead challenge the location of the entire Station. Additionally, they raise a myriad of concerns that are not supported by competent evidence of record and which are simply incorrect. PECO will address each of Intervenor’s arguments in turn.

² See *PPL Elec. Utils. Corp. v. City of Lancaster*, 214 A.3d 639, 650 (Pa. 2019) (citations omitted) (“If each county were to pronounce its own regulation and control over electric wires, pipe lines and oil lines, the conveyors of power and fuel could become so twisted and knotted as to affect adversely the welfare of the entire state. It is for that reason that the Legislature has vested in the [PUC] exclusive authority over the complex and technical service and engineering questions arising in the location, construction and maintenance of all public utilities facilities.”) (citations omitted).

³ Pursuant to 52 Pa. Code § 5.501 and ALJ DeVoe’s Interim Order dated July 21, 2021, the Reply Brief must also contain a concise statement of the case. For brevity and convenience, PECO relies on and incorporates its Statement of the Case in its Main Brief. See Main Brief of PECO Energy Company (“PECO Br.”), Section III.

⁴ Apart from a finding that the situation of the Station’s buildings is reasonably necessary for the convenience or welfare of the public under MPC Section 619, the Commission also has the authority to issue declaratory relief to terminate a controversy or remove uncertainty, which in this case involves whether the Security Fence is a public utility facility. 66 Pa. C.S. § 333(f).

III. ARGUMENT

A. **Intervenors improperly seek to expand the scope of this Municipal Planning Code Section 619 proceeding.**

The Commonwealth Court has clearly recognized that the scope of a proceeding under MPC Section 619 is narrow. *See Del. Riverkeeper Network v. Sunoco Pipeline L.P.*, 179 A.3d 670, 679 (Pa. Cmwlth. 2018) (“[P]ennsylvania courts consistently construe Section 619 narrowly and hold a township has no power to regulate a public utility by zoning ordinance with regard to uses and structures that are not buildings.”). Specifically, the proper scope of inquiry under MPC Section 619 is “whether the ‘structures’ as proposed are ‘buildings’ and if so, whether the proposed situation of the buildings in question is reasonably necessary for the convenience or welfare of the public.”⁵ As Your Honor has repeatedly advised, the only issue germane to this proceeding is whether the siting of the Natural Gas Reliability Station’s *buildings* is reasonably necessary for the convenience or welfare of the public and this is *not* a proceeding to approve PECO’s Natural Gas Reliability Project or the siting of the Natural Gas Reliability Station’s *facilities*. *See, e.g.*, July 29, 2021 Interim Order at p. 3; June 30, 2021 Interim Order at p. 3; and May 18, 2021 Interim Order at p. 5; *see also Del-AWARE Unlimited, Inc. v. Pa. Pub. Util. Comm’n*, 513 A.2d 593, 596, n.4 (Pa. Cmwlth. 1986).

Nevertheless, Intervenors have consistently tried to expand the scope of this proceeding by arguing that the proposed location of the Natural Gas Reliability Station (as opposed to *the buildings* at issue here) is not necessary for the convenience or welfare of the public because: (1)

⁵ *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 (Initial Decision, August 16, 2013) at 23; *adopted by the Commission on exceptions*, 2013 WL 6835113, at *13 (Pa.P.U.C.) (Opinion and Order, Dec. 19, 2013) (“*Petition of UGI*”); *see also Petition of Sunoco Pipeline, L.P. for A Finding That A Bldg. to Shelter the Walnut Bank Valve Control Station in Wallace Twp., Chester Cty., Pennsylvania is Reasonably for the Convenience or Welfare of the Pub.*, No. P-2014-2411941, 2014 WL 5810345, at *26 (Pa. P.U.C.) (Opinion and Order, Oct. 2, 2014) (“*Petition of SPLP 2014*”).

PECO allegedly failed to consider alternative sites; and (2) PECO allegedly did not consider ancillary issues such as fire safety, air emissions, land use planning, and noise. *See* Marple Br. at p. 16.⁶ Intervenors seek not only to relocate or eliminate the buildings at issue, but they also seek to challenge the location of the entire Natural Gas Reliability Station and its appurtenant facilities. Such relief is simply not appropriate under applicable law.

PECO has nonetheless established the reasonable necessity and benefits of *both* the Station *and* its buildings at 2090 Sproul Road. *See* PECO Br., Section VII, A.⁷ Accordingly, PECO submits that Your Honor should adopt PECO’s findings of fact and conclusions of law indicating for the Commission that it has unequivocally met its burden of proof in this case.⁸

⁶ Notably, none of the Intervenors challenge the need for the Natural Gas Reliability Station generally. For example, Marple Township’s position is that while the proposed site for the Station is not reasonably necessary, the Township **“does not argue PECO’s projections for the need for the proposed Gas Reliability Station.”** *See* Marple Br., at p. 2 (emphasis added). Similarly, while Delaware County is concerned that PECO did not evaluate public welfare (which is demonstrably false), the County nevertheless states that it **“stands ready and willing to work with PECO to secure an appropriate site which balances the need for the natural gas distribution** with the welfare of the public.” Delaware Co. Br., at p. 3 (emphasis added). Mr. Uhlman likewise mounts no substantive argument against the need for the Station other than to vaguely assert that PECO’s calculations of increased normalized usage may be overestimated (without providing any calculations of his own). *See* Ted Uhlman’s Brief in Opposition (“Uhlman Br.”), at p.7.

⁷ For example, PECO submitted direct evidence that the Natural Gas Reliability Project is necessary to: (1) reduce price volatility and over-dependence on delivered supply and spot market purchases, and (2) reduce its design day requirements deficit. Further, the location of the Natural Gas Reliability Station at 2090 Sproul Road is necessary because: (a) that area is furthest away hydraulically from any other supply source, (b) the intersection of Sproul and Lawrence Road is the area of lowest pressure and highest demand, and (c) normalized usage in Marple Township is expected to grow 1 percent annually (and 2 percent in Delaware County). Finally, the buildings appurtenant to the Station are necessary to: (i) protect and preserve the proper functioning of sensitive equipment, (ii) prevent unauthorized access, (iii) dampen ambient sound, and (iv) enhance aesthetic appeal. *See* PECO Br., Section VII.A.(a)-(c).

⁸ Notably, such findings would be consistent with Commissioner Ralph Yanora’s recent statement, dated June 17, 2021, in connection with PECO’s natural gas rate case, concluding that “PECO has met its burden of proof and has provided substantial evidence regarding the necessity of the Natural Gas Reliability Project...”. *Motion of Commissioner Ralph V. Yanora*, Docket No. R-2020-3018929 (June 17, 2021).

B. Intervenors have not produced any evidence that the selection of 2090 Sproul Road was arbitrary and capricious.

Selecting the proper location for public utility facilities falls squarely to the discretion of the public utility, and the utility's siting decisions will only be disturbed if the public utility acted arbitrarily and capriciously. *See Petition of UGI* (Initial Decision), at p. 24 (citing *Lower Chichester Township v. Pennsylvania Public Utility Commission*, 119 A.2d 674 (Pa. Super. 1956); *Abbingdon Electric Co. v. Pennsylvania Public Utility Commission*, 198 A. 901 (Pa. Super. 1938)).

Here, Intervenor

s argue that PECO failed to find an appropriate location for the Natural Gas Reliability Station. Intervenors contend that the selected site is not in the public interest because of their opposition and some vocal local residents.⁹ But local opposition is not valid evidence that the situation of the buildings associated with the Station is not in the public interest because, as the applicable case law has recognized, local municipalities are often preoccupied with local concerns and not with the best interest of the public at large. *See Duquesne Light, supra*; *see also Popowski v. Pa. Pub. Util. Comm'n*, 937 A.2d 1030, 1061 (Pa. 2007). Further, much of the local opposition in this case can be attributed to the continuing misinformation being disseminated about the project.

Next, Intervenor

s turn to general concerns regarding safety, air emissions, and noise to suggest that locating the Station at 2090 Sproul Road is not in the public interest. As noted below, these issues are not only outside the scope of this proceeding, but also have been disproven with appropriate expert testimony.

⁹ *See Uhlman Br.*, at p. 6 (“But the most glaring problem with the suggestion [that PECO is representing the public interest] is that the residents of Marple Township have shown time and time again that they are opposed to this location.”); *see also Marple Br.*, at p. 23 (the chosen site is not reasonably necessary for the convenience or welfare of the public because “This site has been consistently opposed by the local community, including government officials and residents alike”).

In contrast, the record contains an abundance of evidence demonstrating that PECO's selection of 2090 Sproul Road was not arbitrary and capricious; rather, 2090 Sproul Road was the best and only site among those identified because it "threaded the needle" of satisfying the necessary engineering, availability, sizing, and zoning considerations. *See* PECO Br., Section VII.A.(a)-(e). PECO has thus met and, in fact, exceeded the standard of showing that the selection of the site located at 2090 Sproul Road was "reasonably necessary." *See O'Connor*, 583 A.2d at 433 (the company must only show that it has made a reasonable decision, not the best possible decision); *Petition of UGI* (Initial Decision), at p. 24.

C. Delaware County's argument that the Natural Gas Reliability Station is not necessary because there is no "urgent" need is an improper application of the standard and is, in any event, incorrect.

Delaware County contends that PECO has no urgency to construct the Natural Gas Reliability Project, and baldly states that "[u]rgency is a critical component of necessity." *See* Delaware Co. Br., at p. 7. Notably, Delaware County fails to cite to any legal authority to support its contention that urgency is a "critical component" to determining necessity, and indeed, there is none. The County's argument also appears to be at odds with the County's tacit acknowledgement of need, as noted in footnote 6, *supra*. *See* Delaware Co. Br., at p. 3.

Aside from improperly reading into the standard an element that does not exist, this argument is also factually inaccurate. First, Delaware County completely ignores the reality that PECO's natural gas distribution system has become constrained, as noted by PECO witness Carlos Thillet, and that the Natural Gas Reliability Project is designed to reduce price volatility associated with PECO's over-dependence on delivered supply and spot market purchases, as well as reduce a design day deficit by upgrading the peaking capacity of its West Conshohocken LNG Plant. (PECO Statement No. 2, at 7:3-12). As noted in PECO's Main Brief, these issues have been

brought to light in PECO's Purchased Gas Cost ("PGC") proceedings. The risk associated with "kicking the can down the road" as Delaware County proposes, therefore, is two-fold: (1) PECO will be not be able to ensure that it can meet its gas customers' needs during periods of peak demand, and (2) PECO, and its customers, will be exposed to the risk of increasingly volatile pricing for firm supply.

Additionally, the urgency for the Natural Gas Reliability Project is further supported by the testimony of PECO Witness Ryan Lewis. Contrary to Delaware County's belief, the natural gas constraints that PECO projects are not "a need that is ten years in the future". *See* Delaware Co. Br., at p. 9. As Mr. Lewis stated, PECO projects that "the natural gas system in Delaware County will become constrained *at some point within* the next 10 years." (PECO Statement No. 3, at 8:19-20) (emphasis added). In fact, PECO projects that the constraints may be experienced much sooner than that and that supply constraints could be experienced in as little as six years. (Tr. 1224:18).

In the face of such projections, PECO must continue to fulfill its statutory obligations to act prudently and provide safe, reliable, and adequate service, which necessarily requires that PECO act with foresight and preparation. *See* 66 Pa. C.S. § 1501. This is why, since 2018, the Joint Settlements in PECO's PGC Proceedings have explicitly required PECO to address the supply constraint issue. Prudence requires that PECO prepare adequately, allowing for sufficient time for necessary planning, applying for and receiving permits and other appropriate legal approvals, construction lead time, and potential construction delays.

In sum, Delaware County's argument highlights why the General Assembly chose not to allow local municipalities to control the construction or siting of public utility facilities. Local

municipalities often do what is *expedient to local concerns and local pressures*, and not what is *prudent for the public interest*. See *Duquesne Light Co., supra*.

D. Intervenor’s contention that PECO failed to evaluate public welfare is belied by the record and represents a fundamental misunderstanding of the statutory scheme governing public utility law.

Delaware County erroneously contends that PECO failed to evaluate the impact on public welfare and “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.” See *Delaware Co. Br.*, at p. 3. This argument fails for a number of reasons.

As a threshold matter, it is factually inaccurate. PECO completed multiple studies regarding the location and potential impacts of the proposed Natural Gas Reliability Station. First, PECO conducted an analysis using hydraulic modeling to determine current and projected natural gas need and the optimal location to direct the additional capacity from the Natural Gas Reliability Project to a location where the increased supply could be accepted. (PECO Statement No. 3, at 4:3-7). Second, PECO performed a linear trend analysis for both customer count and usage growth based on the 10-year (2011-2020) historical customer counts for Delaware County and Marple Township. According to PECO’s analysis, the customer count for Delaware County is expected to grow by 3-4 percent over the next 10 years and normalized usage will grow 2 percent annually. (PECO Statement No. 3, at 4:14-17). Third, PECO retained Hoover & Keith Inc. to conduct an ambient sound survey and noise impact assessment specific to 2090 Sproul Road to determine the potential impact of sounds generated by the Station’s equipment and developed sound mitigation measures for the Natural Gas Reliability Station. (PECO Statement No. 4, at 10:7-15; PECO Statement No. 4-SR, at 8:8-9:6). The Station is designed to comply with the Marple Township noise ordinance and will not appreciably add sounds to the community. (PECO Statement No. 4,

at 10:18-11:4; PECO Statement No. 4-SR, at 8:8-9:6.).¹⁰

Moreover, the County's argument constitutes a fundamental misunderstanding of public utility law in Pennsylvania. In this proceeding, PECO has met its burden of demonstrating that the situation of the Station's buildings (and indeed the Station itself) is reasonably necessary for the public convenience and welfare. *See* PECO Br., Section VII.A.(a)-(e). In a Section 619 proceeding, the burden then shifts to the Intervenors to produce evidence to counter PECO's *prima facie* case.¹¹ Here, Intervenors have not met their burden of production or persuasion because they have not produced any competent evidence of record demonstrating that the Natural Gas Reliability Station will adversely impact public welfare.

Intervenors confuse the parties' respective burdens and seek to place burdens on PECO that it does not have in this proceeding. Even if PECO had the burden to disprove the adverse impacts conjured—but not demonstrated—by the Intervenors, PECO met this burden by providing substantial evidence that the community will not be adversely impacted by noise, air emissions, or traffic from the Station. *See* PECO Br., Section VII.B. PECO further established, and supported through expert testimony, that PECO will safely operate the Natural Gas Reliability Station. *See* PECO Br., Section VII.B.5.

¹⁰ In fact, as noted in the testimony of PECO witness Timothy Flanagan, the sound produced by the traffic on Sproul Road is louder than any sounds that will be generated by the proposed Station. *See* PECO St. 4-SR at 18:13-15.

¹¹ *See Applications of Transource Pennsylvania, LLC for Approval of the Siting & Constr. of the 230 Kv Transmission Line Associated with the Indep. Energy Connection - E. & W. Projects in Portions of York & Franklin Cty.s., Pennsylvania Petitions of Transource Pennsylvania, LLC for A Finding That A Bldg. to Shelter Control Equip. at the Rice Substation in Franklin Cty., Pennsylvania & the Furnace Run Substation in York Cty., Pennsylvania*, No. A-2017-2640195, 2021 WL 2143699, at *12 (Pa. P.U.C.) (Opinion and Order, May 24, 2021).

E. Intervenor’s contention that PECO’s public outreach and site selection was a façade is not germane to the scope of this proceeding, and is, in any event, incorrect.

Intervenors advance a cynical but unsupported opinion of PECO’s site selection analysis and public outreach efforts, believing that PECO selected the site at 2090 Sproul Road and, only after having done so, “backtracked” to establish necessity and reached out to public officials simply to go “through the motions”. *See* Marple Br., at pp. 1, 21. Delaware County likewise believes that PECO’s public outreach was a “hollow-hearted and cynical exercise.” *See* Delaware Co. Br., at p. 15.

As an initial matter, the extent and scope of PECO’s public outreach efforts are simply not germane to the issue of whether the situation of the buildings at issue here is reasonably necessary for the convenience or welfare of the public. *See Del-AWARE Unlimited*, 513 A.2d at 596; *see also* *Petition of UGI, supra*. Setting that aside, the Township’s and County’s positions are simply incorrect, and are disproven by substantial record evidence.

Marple Township’s argument is that because PECO prepared a drawing of the Gas Reliability Station at 2090 Sproul Road in May 2019, PECO’s decision to site the Station at 2090 Sproul Road must have been final as of May 2019, and PECO never intended to seriously consider any alternative sites. *See* Marple Br., at pp. 20-22. Notably, Marple Township’s brief does not cite to any evidence on the record to support this interpretation (*see id.*), likely because a straightforward review of the evidence shows a much simpler, and much less cynical, story.

The site selection process began in the Spring of 2019 when PECO’s Gas Department requested that Jim Moylan identify potential locations for the proposed Station. (PECO Statement No. 5, at 2:18-19). PECO subsequently met with Township officials in November 2019 and solicited site recommendations from them in December 2019. (PECO Statement No. 7-SR, at

4:10-5:11). What ensued thereafter was a series of meetings with elected officials and staff members to further discuss the project in January, July, and November of 2020, and in January 2021. (PECO Statement No. 1, at 7:4-8:20; Tr. 902:12-16). Multiple recommendations for alternative locations for the siting of the Natural Gas Reliability Station were received, thoroughly analyzed, and determined to be infeasible for one or more reasons. (PECO Statement No. 5-SR, at 2:16-7:22; PECO Statement No. 3-SR, at 11:1-12:21; Exhibit RL-6; *see also* PECO Br., Section VII.A.d.ii.).

In short, contrary to the Intervenor's argument, the evidence of record shows that PECO identified an impending need to enhance the reliability of its natural gas service, identified an appropriate region in which to locate the facilities to address that need, reached out to local and state elected officials, as well as the public, to solicit suggested sites, and investigated each site that was suggested. There is simply no evidence that suggests that this process was tainted in any way or that the final result was preordained. To the contrary, the process was described as "fluid." (Tr. 1125.)

Finally, but notably, PECO did not even meet with the property owner of 2090 Sproul Road until February 2020, and a purchase agreement was not executed until June 2020. (PECO Statement No. 5, at 8:6; PECO Statement No. 7-SR, at 6:14-16). This timeline refutes Marple Township's and Delaware County's theory that PECO's site selection process and public outreach was a *fait accompli* as of Spring 2019.

F. PECO's standard site selection criteria are not arbitrary and capricious.

Delaware County and Marple Township attack both the use and application of PECO's standard site selection criteria, describing them as "arbitrary and capricious." *See* Delaware Co. Br., at p. 13. The Intervenor's arguments lack any merit. To the contrary, PECO has demonstrated

that its use and application of its standard site selection criteria were reasonable, customary, and prudent. (*See* PECO Statement No. 5 at pp. 2:20-8:9; Tr.1123-1154).

In challenging PECO's site selection criteria, Intervenors failed to satisfy their burden of offering testimony or other evidence demonstrating that PECO's approach was arbitrary or capricious and further failed to provide any alternative criterion or processes. Rather, Intervenors simply contend that PECO should have contacted owners of properties that were not publicly advertised as being available, and, if all else fails, should exercise eminent domain. *See* Delaware Co. Br., at p. 14; Marple Br., at p. 23.

There is, however, no evidence of record that these practices are (or should be) standard for a public utility's site selection or acquisition, that they should have been used here, or that they would have led to a different result. Indeed, PECO has made clear that it only uses eminent domain as an option of last resort (PECO Statement No. 5, at 8:11-13), and here it was unnecessary to engage in such tactics because PECO identified a willing seller at a location that satisfied each of PECO's site selection criteria and engineering considerations. Had PECO in fact approached owners whose properties were *not* available for purchase, it no doubt would have been subject to the criticism that it was threatening eminent domain, as the Intervenors baselessly—and ironically—claimed here with respect to PECO's agreement to purchase 2090 Sproul Road. The Intervenors cannot have it both ways by falsely criticizing PECO for threatening eminent domain at 2090 Sproul Road, but suggesting PECO should exercise eminent domain for other properties that meet their liking.

Delaware County also challenges PECO's first site selection criteria—that any site considered must be available for purchase—by arguing that 2090 Sproul Road was only available for lease, not purchase. *See* Delaware Co. Br., at p. 14. This is a distinction without a difference

and again, is intended only to argue that PECO should have located the facilities anywhere but at 2090 Sproul Road.

When PECO was exploring possible sites, its real estate personnel noted two large, red signs on the 2090 Sproul Road property stating, “Pad Site Available” and “Ground Lease Available.” (See PECO Statement No. 5-SR, JM-2, attached hereto as **Appendix A**). When PECO employee Jim Moylan approached the property owner in February 2020 to inquire about availability, the property owner offered to sell the site, contingent on an agreed-upon price. (PECO Statement No. 5-SR, at 8:8-10). In brief, the site was vacant, clearly and publicly advertised as being “available” in some fashion—certainly enough to invite an inquiry—and upon inquiring, PECO was able to negotiate an agreement to purchase the property. Any claim that this was somehow arbitrary, capricious, or otherwise unreasonable has absolutely no evidentiary support.

Marple Township and Delaware County also challenge PECO’s second criteria—that the site be must be subject to zoning regulations that permit public utility uses—by arguing that: (1) the “station is proposed to be built in an area where a utility should not be” (see Marple Br. p. 24); (2) requiring zoning that permits public utility uses was for PECO’s own convenience (see Delaware Co. Br., at p. 14); and (3) the Township would have been willing to “work with PECO on zoning” to find an appropriate site and “zoning can be changed” (see *id.* at p. 23; see also Delaware Co. Br., at p. 14).

As to the first argument, Intervenors are flatly wrong. 2090 Sproul Road is zoned for public utility use by special exception, and, as such, Marple Township specifically contemplated public utility use on this property along Sproul Road in enacting the zoning classification. (PECO Statement No. 5, at 9:2-4; Tr. 1154).

The second argument makes no sense as it is difficult to discern how PECO's efforts to comply with the Township's zoning regulations is for PECO's own convenience.

Intervenors' third argument contradicts their first, and appears to suggest that the local zoning rules are not to be taken seriously, and that the location of the facility can be "spot" zoned. However, spot zoning is disfavored and is also antithetical to the general prohibition against local regulation and control over public utility facility siting. *See, e.g., Chester Cty. v. Philadelphia Elec. Co.*, 218 A.2d 331, 333 (Pa. 1966); *see also In re Realen Valley Forge Greenes Assocs.*, 838 A.2d 718, 729 (Pa. 2003) ("Spot zoning is the antithesis of lawful zoning in this sense. In spot zoning, the legislative focus narrows to a single property and the costs and benefits to be balanced are those of particular property owners."). Instead of trying to circumvent the Marple Township's established zoning and exercising eminent domain, PECO identified a willing seller at a location that complied with appropriate zoning.

Intervenors also attempt to discredit PECO's site selection criteria by arguing that that they bear "little relation to this project for the criteria." *See Delaware Co. Br.*, at p. 13. Once again, this is wrong. The remaining two criteria – that the site be at least 0.5 acres and be located within 0.5 miles of the proposed terminus at Sproul and Lawrence Road – are specifically tailored to the project and are not arbitrary, generic, or otherwise unreasonable, as the County seems to suggest.

Finally, Marple Township seeks to further discredit PECO's site selection criteria by highlighting Michele Garrity's and Jim Moylan's inability to recall on cross-examination if PECO has ever changed the location of a proposed site in response to public concerns. *See Marple Br.*, at p. 6. This argument, too, lacks merit because it has no bearing whatsoever on whether the situation of the buildings associated with the Natural Gas Reliability Station is reasonably necessary. Nevertheless, to ensure the evidentiary record is accurately reflected, PECO points out

that its site selection analysis, while robust, is also reasonably flexible, and that PECO may be willing to relocate a proposed site **if** such relocation can be reasonably accomplished and the alternative site satisfies all of PECO's site selection criteria. By way of example, *see Application of PECO Energy Company for a finding of necessity for the situation of one building on a site in Montgomery Township, Montgomery County, Pennsylvania, containing four acres, located on 110 Demorah Drive near Corporate Drive, adjacent to Applicant's transmission line right-of-way, A-110550F0161* (Initial Decision, May 27, 2005) ("A total of three sites were considered by PECO, and it decided on the Demorah Drive site after taking into consideration the concerns expressed by members of the affected community during the course of an extension public outreach effort...."); *Lower Chichester Township v. PECO*, C-2014-2433513 (Initial Decision, May 18, 2015) (granting township's request to withdraw complaint, noting that PECO modified the route of the proposed transmission line to address public interest concerns). Thus, Intervenors' allegations that PECO's site selection process is rigid and pre-determined is not only belied by the evidentiary record, but also by PECO's past practices and course of conduct. To be clear, after outreach to local officials and residents (some who propose another site just a few hundred feet away), applying its site selection criteria, and looking again at proposed alternative sites, PECO has determined a relocation of the buildings and Station cannot be reasonably accomplished. For all of the foregoing reasons, arguments that PECO's site selection criteria are arbitrary and capricious should be rejected.

G. Intervenors continue to argue issues that are not germane to this proceeding.

Unable to mount any substantive argument that the situation of the Natural Gas Reliability Station's buildings is not reasonably necessary for the convenience or welfare of the public,¹²

¹² No party has substantively disputed that the buildings accompanying the Natural Gas Reliability Station will offer multiple public benefits related to noise, security, protection, and aesthetics.

Intervenors instead turn to a host of non-germane issues to argue that the Station itself should not be located at 2090 Sproul Road. For example, both Marple Township and Mr. Uhlman argue that the location of the Natural Gas Reliability Station is unreasonably located based on concerns over safety and noise. Marple Township further argues that the location of Station is unreasonable based on air emissions and compatibility with the surrounding neighborhood. However, the Commission has already concluded that:

concerns about gas pressure, **gas emissions, noise levels and other health and safety issues** are valid concerns; however, approval of the construction of a gate station is beyond the scope of this proceeding.

Petition of UGI, (Initial Decision) at p. 22 (emphasis added); *Petition of UGI*, (Commission Opinion and Order) at p. 22 (“[w]e further conclude that many of the issues and concerns raised by the Intervenors are beyond this Commission’s jurisdiction in this matter and were properly limited by the ALJ via her granting PNG’s Motion in Limine.”)

PECO thoroughly addressed each of these issues with substantial record evidence as set forth in its Main Brief. *See* PECO Br., Section VII.B.1-8. Nevertheless, PECO reiterates here that, in addition to being non-germane, Intervenors have also failed to meet their burden of proof with respect to each issue because they either failed to produce any expert that in any way substantiates these claims, or, where expert testimony was proffered, it was so devoid of factual analysis, study, or qualification that the Commission should afford it no weight. *See Harley-Davidson Motor Co. v. Springettsbury Twp.*, 124 A.3d 270, 286 (Pa. 2015) (“an expert cannot base his [or her] opinion upon facts which are not warranted by the record. No matter how skilled or experienced the witness may be, he will not be permitted to guess or to state a judgment based on mere conjecture”) (*quoting Collins v. Hand*, 246 A.2d 398, 404 (Pa. 1968)); *Snizavich v. Rohm & Haas Co.*, 83 A.3d 191, 197 (Pa. Super. 2013) (“the proffered expert testimony must point to, rely

on or cite some scientific authority—whether facts, empirical studies, or the expert's own research—that the expert has applied to the facts at hand and which supports the expert's ultimate conclusion”); *Swift v. Dep't of Transp. of Com.*, 937 A.2d 1162, 1170 (Pa. Cmwlth. 2007) (The putative expert must show that he has a “reasonable pretension to specialized knowledge on the subject under investigation”); Pa.R.E. 702.

H. Intervenor's seek an open-ended site selection process predicated on local consensus.

Despite Intervenor's insistence that PECO failed to identify an acceptable location for the Natural Gas Reliability Station, none of the Intervenor's suggested a feasible alternative for the location of Natural Gas Reliability Station or its proposed buildings because, upon review and careful consideration, each suggested location failed to meet one or more of PECO's site selection criteria. See PECO Br., Section VII.A.d.ii. Even if the Intervenor's had identified a viable alternative, it is well-settled that the mere existence of an alternative site does not invalidate PECO's judgment. See *Petition of UGI* (Initial Decision), at pp. 24-25 (citations omitted).

By asking the Commission to deny PECO's Petition, and by failing to identify an acceptable alternative, Intervenor's are demanding that PECO engage in an open-ended process to identify a site that is politically or personally acceptable to them. However, as noted above, the law in Pennsylvania neither contemplates nor requires a never-ending site selection process that satisfies every local or individual concern. See, e.g., *Duquesne Light, supra*; *PPL, supra*.

I. No Party Disputes that the Security Fence is a public utility “facility”.

Finally, no party has substantively disputed that the Security Fence is a public utility facility under the broad definition of “facilities”:

All the plant and equipment of a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any

manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with, the business of any public utility.

66 Pa. C.S. § 102. Marple Township, the only party to address this issue in any way, merely asserts that PECO's arguments regarding the Security Fence are "moot" because the Natural Gas Reliability Station is not reasonably necessary for the convenience or welfare of the public. *See Marple Br.*, at p. 26.¹³ Marple Township is wrong because PECO has met its burden of establishing the reasonable necessity and benefits of siting *both* the Station and its buildings at 2090 Sproul Road. In any event, because the Security Fence is an instrumentality used in connection with (and indeed a critical component of) the Natural Gas Reliability Station, it falls well within the broad definition of "facilities" at 66 Pa. C.S. § 102.

IV. CONCLUSION

PECO has met its burden of showing that the situation of the Natural Gas Reliability Station's buildings is reasonably necessary, and Intervenors have failed to produce any competent countervailing evidence. Intervenors can do little to hide the reality that this is a classic "not in my back yard" case. Each Intervenor, and some members of the public, have indicated they do not dispute the need for the project and would support PECO – if only the Natural Gas Reliability Station were located elsewhere.

Intervenors themselves, however, cannot seem to agree on a better site. Ted Uhlman and Julia Baker are still advocating in favor of the site adjacent to a Wawa at 2024 Sproul Road. *See Uhlman Br.*, at p. 4; Tr. 1462:11-25 and 1629:24-1630:20. Marple Township originally supported

¹³ Marple Township's statement that "the Natural Gas Reliability Station is not reasonably necessary" is inconsistent with its overall position that it does not oppose the project and does not argue against the need for the project. *See Marple Br.* at pp. 2, 20. Rather, Marple Township's position, more accurately stated, alleges that the *proposed location* at 2090 Sproul Road is not reasonably necessary, a position which fails for the multiple reasons stated herein. *See id.* at 2, 16, and 20.

that site for the Station, but no longer does. *See* Marple Br., at pp. 21-22. All Intervenors suggest relocating to the Don Guanella site, but press reports (which are publicly available)¹⁴ show that local residents and coalitions, similar to the Marple Safety Coalition who opposes this Station, vigorously opposed the last attempt to develop that site.

Such divergent and whimsical preferences are the very reason local authorities (and individuals) cannot dictate where public utility facilities are built, or whether buildings associated with such facilities are in the public interest. Indeed, if the siting of utility infrastructure could be changed based on claims that it should be moved to the next block or next township, buildings and facilities necessary for the provision of safe, reliable, and adequate utility distribution service would never be able to be constructed.

Accordingly, for the reasons stated herein, PECO respectfully requests that Your Honor grant PECO's Petition and find that: (1) the siting of the proposed Natural Gas Reliability Station's buildings, specifically the Station Building and the Fiber Building, at 2090 Sproul Road, Marple Township, Delaware County, Pennsylvania is reasonably necessary for the convenience or welfare of the public; and (2) the Natural Gas Reliability Station's Security Fence is a public utility facility, and therefore exempt from local municipal land use regulation.

¹⁴ https://www.delcotimes.com/news/protesters-challenge-don-guanella-development-neighbors-begin-to-rally-against-massive-plan/article_19e3bf60-1d34-5138-8297-d8120a1ddd22.html

Respectfully submitted,
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Date: August 30, 2021

APPENDIX A

(PECO Statement No. 5-SR, JM-2)



CERTIFICATE OF SERVICE

I hereby certify that on this day I served a true copy of the foregoing Reply Brief of PECO Energy Company 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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