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December 28, 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 are the Exceptions of PECO Energy Company to the Initial Decision. 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 :

EXCEPTIONS OF PECO ENERGY COMPANY TO THE INITIAL DECISION

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December 28, 2021

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I. INTRODUCTION

Pursuant to 52 Pa. Code § 5.533, PECO Energy Company (“PECO”) respectfully submits these Exceptions to the Initial Decision of Administrative Law Judges (“ALJs”) Emily I. DeVoe and Mary D. Long, dated December 7, 2021 (“Initial Decision”).

This matter arises from PECO’s Petition for a Pennsylvania Public Utility Commission (“Commission”) finding that (1) its proposed Natural Gas Reliability Station’s (“Station’s”) buildings in Marple Township, Delaware County are reasonably necessary for the convenience or welfare of the public, pursuant to Section 619 of the Municipalities Planning Code (“MPC”), 53 P.S. § 10619, and, therefore, are exempt from any zoning, subdivision, and land development restrictions of the Marple Township Municipal Code; and (2) the Station’s perimeter security fence (“Security Fence”) is a public utility “facility,” and, therefore, exempt from local municipal land use regulation.

Following four days of evidentiary hearings, the ALJs issued the Initial Decision granting PECO’s Petition. The ALJs first clarified the proper scope of the proceeding, stating that (1) the Commission’s narrow scope of inquiry under Section 619 of the MPC is limited to whether the proposed buildings are exempt from municipal zoning regulations (*see* Initial Decision, p. 20); and (2) that ancillary concerns related to noise, gas emissions, aesthetics, traffic, and other health and safety concerns are beyond the scope of the Commission’s review (*see id.*, p 22). Having established the proper scope of inquiry, the ALJs concluded:

... PECO has sustained its burden of demonstrating that the Station is reasonably necessary to meet the gas supply needs of its customers and that the buildings are required to protect the equipment from the weather, and to keep the equipment secure to ensure that reliable service is maintained and the facilities are maintained in a safe manner. Therefore, its request for the buildings associated with the site to be exempt from local zoning will be granted.

Id.

Subject only to the Exceptions seeking the clarifications enumerated below, PECO supports the findings and conclusions in the Initial Decision, which are thorough and squarely in line with well-established Commission and Pennsylvania precedent. PECO respectfully files these Exceptions for the limited purpose of clarifying the following points:

1. That the buildings associated with the Station are exempt from any subdivision and land development restrictions of the Marple Township Municipal Code including, but not limited to, any requirement to submit SALDO Plans, as defined below;
2. That the Security Fence appurtenant to the Station is a public utility “facility” exempt from local land use restrictions; and
3. To clarify Finding of Fact No. 53, stating that “the Gas Reliability Station is not compatible with residential and retail uses.”

II. BACKGROUND

PECO is a “public utility” and a “natural gas company” as defined, respectively, in Sections 102 and 2202 of the Pennsylvania Public Utility Code (the “Code”), 66 Pa. C.S. §§ 102, 2202. (*See* Initial Decision, Finding of Fact (“FOF”) No. 1). PECO provides natural gas distribution service to approximately 534,000 retail customers and transportation service to 1,800 large commercial and industrial customers in southeastern Pennsylvania. (FOF No. 2).

PECO is experiencing natural gas supply constraints that, over the next 10 years, will result in an increased deficit between its current capacity supply resources and its calculated design day demand requirements, which is the amount of natural gas needed to meet customer demand during a 24-hour period of zero-degree Fahrenheit average temperatures. (FOF Nos. 15-17). To address this deficit, PECO is implementing a long-term infrastructure project, known as the “Natural Gas Reliability Project”, to increase its capacity supply and diminish its design day constraints. (FOF No. 20). The Natural Gas Reliability Project will direct additional supply from PECO’s upgraded Liquefied Natural Gas Plant in West Conshohocken (“LNG Plant”) to Marple Township, Delaware

County, an area within PECO's distribution network that is currently experiencing demand constraints and where PECO projects usage growth over the next 10 years. (FOF Nos. 24-29).

To address this local demand and anticipated increase in usage in Marple Township and Delaware County, PECO will transport additional natural gas supply from the West Conshohocken LNG Plant along a new 11.5-mile steel 12-inch over-high-pressure gas main to Marple Township and inject the natural gas into PECO's existing 16-inch trunkline and downstream distribution network. (FOF No. 29). Before injecting the additional supply of natural gas, the pressure must be reduced to be compatible with PECO's local distribution system, which operates at a pressure of 99 pounds per square inch ("p.s.i."). (FOF No. 30). This further pressure reduction will be accomplished by PECO's proposed Natural Gas Reliability Station, the facility central to this proceeding.

The Natural Gas Reliability Station's design includes two buildings: a 2,073-square foot "Station Building" and a 160-square foot "Fiber Building." (FOF No. 6; Initial Decision, p. 20). Both buildings will house and protect the Natural Gas Reliability Station's equipment, and the Station Building will provide the added benefit of reducing sounds generated from the Station's equipment. (FOF Nos. 8-9; 11; Conclusion of Law ("COL") No. 7). The Natural Gas Reliability Station also will include a perimeter Security Fence composed of sound-absorbing material. (FOF No. 10).

Following an extensive site selection evaluation to locate the Natural Gas Reliability Station, PECO determined that 2090 Sproul Road was the only property that satisfied PECO's standard site selection criteria, including engineering considerations. (See PECO Statement No. 5, Direct Testimony of Jim Moylan, at 4:1-9:7; Tr. 1123:6-20, 1145:4-1150:11 & 1153:19-25). In February 2020, PECO representatives initially met with the owner of 2090 Sproul Road to discuss

acquiring the property. In June 2020, PECO and the owner reached an agreement for PECO to purchase the site. (PECO Statement No. 5, at 8:6-9; PECO Statement No. 7-SR, Surrebuttal Testimony of Michele Garrity, at 6:14-16). PECO had originally anticipated beginning construction for the Natural Gas Reliability Station by September 2021 to ensure the project was completed for the 2022-2023 heating season. (PECO Statement No. 1, Direct Testimony of Douglas Oliver, at 5:19-20).

As a preliminary step in developing the Natural Gas Reliability Station, PECO filed a zoning application with Marple Township seeking (1) a special exception for the Natural Gas Reliability Station at the site; and (2) a variance for the Security Fence measuring 8 feet in height around the Natural Gas Reliability Station. (FOF No. 55). On November 18, 2020, the Marple Township Zoning Hearing Board denied PECO's zoning application, which PECO appealed to the Court of Common Pleas of Delaware County to preserve its rights in that proceeding. That appeal is currently pending. (FOF No. 56). PECO subsequently filed this Petition with the Commission on February 26, 2021 to seek a finding of necessity pursuant to Section 619 of the MPC that the situation of PECO's proposed Station Building and Fiber Building at the Natural Gas Reliability Station is reasonably necessary for the convenience or welfare of the public and, separately, a finding that the Security Fence is a public utility "facility" exempt from local land use restrictions.

III. HISTORY OF THE PROCEEDING

On February 26, 2021, PECO filed its Petition for a finding of necessity by the Commission pursuant to 53 P.S. § 10619. The Commission assigned the proceeding to ALJ DeVoe and issued a Telephonic Prehearing Conference Notice scheduling a prehearing conference and advising any protests and answers to the Petition to be filed by April 12, 2021. Notice of the Petition, the Prehearing Conference, and the Protest deadline was published in the *Pennsylvania Bulletin* and

in both print and digital versions of the *Daily Times* and *Sunday Times*, which are local Delaware County publications.

Marple Township and the County of Delaware, Pennsylvania (“Delaware County”) filed separate Petitions to Intervene, which PECO did not oppose, and which ALJ DeVoe granted. Two individuals, Theodore Uhlman and Julia Baker, filed Petitions to Intervene in addition to Protests, and were later admitted as full parties to this proceeding following PECO’s indication of no objection to their participation. (Marple Township, Delaware County, Mr. Uhlman, and Ms. Baker are collectively referred to herein as the “Intervenors”). Additionally, Protests were filed by several *pro se* protestants.

ALJ DeVoe conducted telephonic public input hearings on May 25, 2021 and May 26, 2021. Ninety-three individuals testified under oath and two offered comments over the course of the four public input hearing sessions. Two witnesses, Gregory Fat and Marilia Mancini-Strong, offered exhibits during their testimony at the public input hearings.¹ The concerns raised by the hearing participants generally involved issues not germane to this proceeding, including (1) the need for the broader Natural Gas Reliability Project; (2) safety concerns, including the risk of fire, explosion, evacuation, vandalism, or terrorism; (3) a perceived lack of transparency by PECO in the development of the project; (4) alleged quality of life issues caused by the Station, such as noise, glare, or traffic; (5) alleged negative economic consequences of the Station on local businesses and residential property values; and (6) alleged health impacts on the community and general allegations about climate change.

¹ On June 30, 2021 and July 29, 2021, in response to PECO’s objections and motions to strike exhibits and testimony offered at the public input hearings, ALJ DeVoe issued Interim Orders that granted in part and denied in part PECO’s objections and motions to strike and struck certain portions of testimony of Mr. Fat, and exhibits of Mr. Fat and Ms. Mancini-Strong.

On May 14, 2021, PECO submitted its Direct Testimony and on July 6, 2021, Intervenors Marple Township, Delaware County, Mr. Uhlman, and Ms. Baker submitted written Rebuttal Testimony and Exhibits. On July 12, 2021, PECO filed a Motion in Limine, arguing, *inter alia*, that much of the Intervenors' Rebuttal Testimony was outside of the scope of a Section 619 proceeding, contained hearsay, or was purported expert testimony that did not meet Pennsylvania's *Frye* standard for admissibility of expert testimony codified by Pennsylvania Rule of Evidence 702. On July 13, 2021, PECO filed Surrebuttal Testimony to respond to testimony at the public input hearings and Intervenors' Rebuttal Testimony.

An evidentiary hearing was held on July 15, July 16, July 20, and July 22, 2021. At the hearing, ALJ DeVoe granted, in part, PECO's Motion in Limine filed on July 12, 2021, and struck certain Rebuttal Testimony and Exhibits offered by Marple Township, Mr. Uhlman, and Ms. Baker.

Following the evidentiary hearings, extensive briefing ensued. Main Briefs were filed by PECO, Delaware County, Marple Township, and Intervenors Uhlman and Baker on August 23, 2021. Reply Briefs were filed by PECO, Delaware County, Marple Township and Ms. Baker on August 31, 2021.² Mr. Uhlman and Ms. Baker filed a further amended brief on September 27, 2021.³ In response, PECO filed a supplemental reply brief on October 1, 2021.

On December 7, 2021, the ALJs issued an Initial Decision granting PECO's Petition concluding, among other things, that (1) public utility facilities are exempt from local regulation (Conclusion of Law ("COL") No. 3); (2) the Commission is not empowered under Section 619 of the MPC to evaluate the various aspects of the environmental impact of a project and, instead, is

² Mr. Uhlman did not file a Reply Brief.

³ The ALJ's permitted amended briefing due to delays in receiving the hard copies of the transcript and to ensure that Mr. Uhlman and Ms. Baker were afforded adequate time to review the transcripts. *See* Interim Order dated September 10, 2021.

obliged to defer to the determinations of those state and federal agencies with jurisdiction over such impacts⁴ (COL No. 5); (3) the location selected by PECO at 2090 Sproul Road for the Reliability Station is reasonably necessary (COL No. 6); and (4) the buildings are reasonably necessary to protect the equipment of the Natural Gas Reliability Station from weather and vandalism (COL No. 7). PECO supports the ALJs' well-reasoned decision which, as detailed in PECO's Main Brief, Reply Brief, and Supplemental Reply Brief, is consistent with applicable precedent from the Commission and Pennsylvania appellate courts. PECO files the following exceptions for the limited purpose of clarifying certain aspects of the Initial Decision.

IV. EXCEPTIONS

Exception No. 1. PECO seeks clarification that, in addition to being exempt from local zoning, the buildings associated with the Station are exempt from any subdivision and land development restrictions of the Marple Township Municipal Code, including, but not limited to, any requirement to submit SALDO Plans

In its Petition, PECO sought a finding that the situation of the two buildings for the 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....” *See* Petition of PECO Energy, p. 1 (emphasis added); *see also* PECO's Main Brief, App'x C (Proposed Ordering Paragraph). While the ALJs concluded that (1) public facilities are exempt from local regulation (COL No. 3, *citing Duquesne Light Co. v. Monroeville Borough*, 298 A.2d 252 (Pa. 1972)); and (2) PECO's request that the buildings associated with the site be exempt from local zoning is

⁴ Because public utility facilities are exempt from local regulation, the Commission's deference to other “agencies” regarding environmental, health, and safety issues is necessarily limited to *state* and *federal* agencies with jurisdiction over such matters, and cannot extend to *local* agencies. This is consistent with the Initial Decision, which specifically identifies the state Departments of Transportation and Environmental Protection as agencies responsible for such matters.

granted (*see* Initial Decision, p. 22), the Initial Decision is silent as to whether that exemption extends to the subdivision and land development restrictions in the Marple Township Subdivision and Land Development Ordinance (“SALDO”).

PECO seeks to clarify that the exemption from local regulation extends to Marple Township’s SALDO, which can be found at Chapter 265 of the Marple Township Municipal Code.⁵ Zoning requirements, similarly, are found at Chapter 300 of the Marple Township Municipal Code. Logically, PECO’s exemption “from local regulation” extends not only to the Township’s zoning requirements, but also to the Township’s subdivision and land development restrictions, which require PECO to, among other things, obtain a tax parcel identification number and submit a plan of subdivision and a plan of land development (collectively, “SALDO Plans”) for approval and execution by the Township’s Board of Commissioners and code officials.

Finding PECO to be exempt from Marple Township’s SALDO restrictions is squarely in line with Commission and court precedent. In *Newtown Township v. Philadelphia Electric Company*, 594 A.2d 834 (Pa. Cmwlth. 1989), the Commonwealth Court concluded that PECO was not subject to Newtown Township’s SALDO. There, PECO had applied to the Commission for a finding that a building associated with a substation was reasonably necessary for the public convenience under MPC Section 619. The Commission granted PECO’s request but, following the commencement of construction, Newtown Township issued a stop work order contending that PECO failed to obtain land development or subdivision approval from the Township. *Id.* at 835. The Township argued that, while the Commission’s order provided an exemption from the Township’s zoning ordinance, it did not apply to other local ordinances which require subdivision or land development approval. *Id.* The Township further argued that zoning ordinances and

⁵ *See* Township of Marple, Municipal Code, available at: <https://ecode360.com/MA0285>

subdivision ordinances are distinguishable because “a zoning ordinance controls the actual use of the land and a subdivision ordinance is concerned with health, safety and welfare of the public once the use of the land has been decided.” *Id.* at 837.

The Commonwealth Court rejected the Township’s arguments and, relying on a long and unbroken line of Pennsylvania case law finding public utilities to be exempt from local regulation,⁶ stated:

We conclude that it is clear that no “implied” power exists in the MPC which would allow the Township to regulate PECO through its subdivision and land development ordinance.

Id. at 837.

More recently, in an unpublished opinion, the Commonwealth Court affirmed a decision of the Court of Common Pleas of Delaware County dismissing plaintiffs’ complaint alleging that Sunoco, a regulated public utility, violated Middleton Township’s SALDO by constructing a pipeline less than 75 feet from residential dwelling units. *See Flynn v. Sunoco Pipeline L.P.*, 184 A.3d 645 (Pa. Cmwlth. 2018). The trial court determined that plaintiffs failed to establish that the SALDO was not preempted by state and federal law, and further noted that the PUC has exclusive jurisdiction over regulation of public utilities and that the public utility code preempts local attempts to regulate the location of public utility facilities. *Id.* at *9-10. The trial court rejected arguments that a township possesses a fundamental right to assure the safety of its citizens through enforcement of local ordinances such as the SALDO. *Id.* at *11. On appeal, the Commonwealth Court affirmed the trial court’s order dismissing plaintiffs’ suit. *Id.* at *15-16.

⁶ *See, e.g., York Water Co. v. York*, 95 A. 396 (Pa. 1915); *Duquesne Light Co. v. Upper St. Clair Twp.*, 105 A.2d 287 (Pa. 1954); *Chester County v. Philadelphia Elec. Co.*, 218 A.2d 331 (Pa. 1966); *Com. v. Delaware and Hudson Railway Co.*, 339 A.2d 115 (Pa. Cmwlth. 1975); *South Coventry Twp. v. Philadelphia Elec. Co.*, 504 A.2d 368 (Pa. Cmwlth. 1986).

Finally, in *Application of PPL Electric Utilities*,⁷ PPL sought an exemption from local zoning pursuant to MPC Section 619 for buildings to shelter control equipment at two substations associated with the Northeast-Pocono Reliability Project. The petition was opposed on the basis that the proposed siting of the substations violated Covington Township's zoning and subdivision ordinances as well as its comprehensive plan. The Township argued that, pursuant to its subdivision and land development ordinance, PPL should submit a plan for the construction of the buildings. PPL countered that the exemption under MPC Section 619 applies equally to zoning ordinances and SALDOs. ALJ Salapa agreed with PPL, concluding that:

It is long settled that public utility facilities, such as the right-of-way and tower structures, are exempt from local regulation. The Commission cannot grant PPL's petition and at the same time direct PPL to comply with Covington's zoning, subdivision, and land development ordinances. To do so would be to cede the Commission's exclusive utility regulatory functions to Covington. This in turn would undermine the Commission's statewide jurisdiction over public utilities. Once the Commission grants PPL's petition, the control equipment building at the North Pocono 230/69 kV Substation is exempt from Covington's regulation.

2013 Pa. PUC LEXIS 620, *358-59 (emphasis added) (citations omitted). Following exceptions, the Commission adopted ALJ Salapa's Recommended Decision. *See* 2014 Pa. PUC LEXIS 5 (Opinion and Order, Jan. 9, 2014).

Consistent with *Newtown Township, Flynn, Application of PPL Electric Utilities*, and the long line of Pennsylvania case law concluding that public utilities are exempt from local regulation, PECO respectfully seeks clarification that, by granting PECO's Petition and finding

⁷ *Application of PPL Electric Utilities Corporation*, 2013 Pa. PUC LEXIS 620 (Recommended Decision, Oct. 8, 2013); *adopted* 2014 Pa. PUC LEXIS 5 (Opinion and Order, Jan. 9, 2014).

public utilities to be exempt from local regulation, PECO is exempt from the requirements, regulations, and restrictions set forth in Marple Township’s SALDO including, but not limited to, any requirement to submit SALDO Plans.

Exception No. 2. PECO seeks clarification that the Security Fence appurtenant to the Station is a public utility “facility” exempt from local land use restrictions

The Natural Gas Reliability Station will include a perimeter Security Fence measuring eight feet in height composed of sound-absorbing material. (FOF No. 10). In addition to seeking an exemption under MPC Section 619 for the Station’s buildings, PECO’s Petition also requested a finding that the proposed Security Fence is a “facility” under 66 Pa. C.S. § 102 and is therefore exempt from the local requirements limiting its height to six feet. *See* Petition, Requested Relief; *see also* PECO’s Main Brief, App’x C (Proposed Ordering Paragraph).

It is well-settled that a local municipality only has the power to regulate *buildings* that are *not* found to be reasonably necessary for the public convenience or welfare. *See* Initial Decision, p. 19 (citing *Del-AWARE Unlimited, Inc. v. Pa. Pub. Utility Comm’n*, 513 A.2d 593, 596 (Pa. Cmwlth. 1986)); *see also* *Duquesne Light Co.*, 105 A.3d 287. In view of this long-standing precedent, the Commission has held that a zoning exemption is not needed for public utility *facilities* as a “blanket exemption” exists.⁸

⁸ *See* *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 Necessary for the Convenience or Welfare of the Pub.* *Petition of Sunoco Pipeline, L.P. for A Finding That A Bldg. to Shelter the Blairsville Pump Station in Burrell Twp., Indiana Cty., Pennsylvania Is Reasonably Necessary for the Convenience or Welfare of the Pub.*, No. P-2014-2411941, 2014 WL 5810345, at *25 (Opinion and Order, Oct. 2, 2014); *accord* *Petition of Pennsylvania-American Water Company for a Finding on an Expedited Basis that Two Buildings to Shelter Booster Pumps to be Constructed in Dunbar Township, Fayette County, Pennsylvania, are Reasonably Necessary for the Convenience or Welfare of the Public*, No. P-2014-2513587, 2016 WL 1689629, at *10 (Opinion and Order April 21, 2016).

Although the Initial Decision properly found that (1) the Security Fence is a “vital component of the” Station (FOF No. 10); (2) public utility facilities are exempt from local regulation (COL No. 3); and (3) no party has argued that the Security Fence is a “building” within the meaning of MPC Section 619 (*see* Initial Decision, p. 28), the Initial Decision did not explicitly find that the proposed Security Fence is a “facility” under 66 Pa. C.S. § 102 or is otherwise exempt from local regulation. PECO files this Exception seeking clarification that the Security Fence is not a “building” subject to local regulation, but rather is a public utility “facility” exempt from local zoning and land use requirements.

In the underlying proceeding, no party argued that the Security Fence is a “building” potentially subject to local regulation, and no party 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. 23. The Commission and the Pennsylvania Commonwealth Court have both indicated that the term “facilities” as used in the Public Utility Code is to be broadly construed. *See Application of Duquesne Light Co. for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code*, No. R-00974104, 1998 Pa. PUC LEXIS, *173 (Recommended Decision March 18, 1998) (*citing Country Place Waste Treatment Co., Inc. v. Pa. P.U.C.*, 654 A.2d 72, 76 (Pa. Cmwlth. 1995)).

PECO presented evidence that the Security Fence is a “fence” that is a part of PECO’s Natural Gas Reliability Station and thus a part of “all the plant and equipment of a public utility.” *See* 66 Pa. C.S. § 102. The Security Fence serves an important function and provides significant

benefits to the Station and to the community. First, it will surround the Station to prevent unauthorized access and protect against any potential tampering, vandalism, or other damage at the Natural Gas Reliability Station. (FOF No. 11). Second, the Security Fence will be made of Sound Fighter SonaGuard, which is a sound dampening material. (FOF No. 10). Third, the Security Fence will add an aesthetic element to the Station, thereby benefitting the community. (PECO Statement No. 4 at 8:1-3; PECO Statement No. 7-SR, at 9:23-10:5; Exhibit MG-3).

The Commonwealth Court's decision in *South Coventry Township*, is instructive. *See South Coventry Township v. Philadelphia Elec. Co.*, 504 A.2d 368 (Pa. Cmwlth. 1986). There, the Commonwealth Court upheld a trial court's preliminary injunction against South Coventry Township's citations against PECO related to the construction of siren towers that were required by federal and state agencies. *Id.* at 373. The court reasoned that the siren towers were a vital part of PECO's operations and thus constituted "facilities" within the definition of 66 Pa. C.S. § 102 that are exempt from local zoning. *Id.* at 372. Likewise, the Security Fence is a vital component of PECO's Natural Gas Reliability Station. (FOF No. 10).

Because the Security Fence is not a "building" but rather 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. For the above reasons, PECO respectfully requests clarification that the proposed Security Fence appurtenant to the Natural Gas Reliability Station is a "facility" under 66 Pa. C.S. § 102 and is therefore exempt from local regulation.

Exception No. 3. PECO seeks clarification with respect to Finding of Fact No. 53, stating that “the Gas Reliability Station is not compatible with residential and retail uses”

Citing Marple Township’s written testimony, the Initial Decision states that “The property at 2090 Sproul Road is the gateway to the business shopping district, is in close proximity to residential homes and a Gas Reliability Station is not compatible with residential and retail uses.” (FOF No. 53). Such finding, however, is inconsistent with other portions of the Initial Decision that clearly indicate that the proposed Station is compatible with the surrounding community and local zoning requirements. For example, the Initial Decision states:

The selected location, 2090 Sproul Road is located in an “N Neighborhood Center” zoning district and includes commercial uses **and specifically allows public utility use by special exception** and as such, Marple Township **specifically contemplated public utility use on this property**⁹ along Sproul Road in enacting the zoning classification. This location is adjacent to a main thoroughfare (Sproul Road) which *already* generates traffic and noise and which roadway feeds commercial establishments situated in the N Neighborhood Center district.

Initial Decision, FOF No. 54 (bold emphasis added). The Initial Decision further acknowledges that:

The ND District in Marple Township at least contemplates “public utility use.” PECO has made an effort to consider the aesthetics of the Station and attempted to propose materials and landscaping designs that will reduce the perceived inconsistent nature of the site with the surrounding buildings.

Id., p. 28.

⁹ By permitting the public utility use as a special exception use in this particular N Neighborhood Center District, the Board of Commissioners has already determined that the public utility facility is compatible with the uses in the N District and with the uses surrounding the district whatever the customary effects may be. *See Jojo Oil Co., Inc. v. Dingman Twp. Zoning Hearing Bd.*, 77 A.3d 679 (Pa. Cmwlth. 2013); *Appeal of O’Hara*, 131 A.2d 587 (Pa. 1957); *Zoning Hearing Bd. of Upper Darby Twp. v. Konyk*, 290 A.2d 715 (Pa. Cmwlth. 1972).

Furthermore, the record demonstrates that the Natural Gas Reliability Station is consistent with surrounding uses. PECO presented evidence that the Natural Gas Reliability Station is comparable, yet less extensive in size and scale, to PECO's 28 other gate stations, a majority of which are located in residential areas, and some of which are located within the same proximity to residences as the Natural Gas Reliability Station. (FOF No. 12). Testimony at the evidentiary hearing indicated that residences were built *after* some of PECO's other gate stations were constructed, thereby indicating that these facilities do not negatively affect surrounding residential communities. (Tr. 1359-60). Further, PECO witness Mike Israni explained that it is both common and necessary for natural gas distribution companies to locate district regulating stations in residential areas. (PECO Statement No. 6-SR, at 14:22-15:5). Finally, the Natural Gas Reliability Station's sound levels will comply with Marple Township's ordinance, and its CWT heater will operate primarily during the winter, which will result in minimal effect during operation, if any, on the residences or adjacent commercial property. (PECO Statement No. 4-SR, at 7:12-22 & 8:8-9:6).

In view of the above, PECO seeks clarification that the proposed Station is compatible with the surrounding community and local zoning and that Finding of Fact No. 53 was either in error or, alternatively, should not be interpreted as a conclusive finding on this issue, but rather should be interpreted and clarified as representing Marple Township's *allegation* with respect to its position on the Station's compatibility with the surrounding community, and one that the ALJs ultimately rejected.

V. CONCLUSION

For the forgoing reasons, PECO respectfully requests that the Commission adopt the Initial Decision subject to the limited clarifications identified above.

Respectfully submitted,
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Counsel for PECO Energy Company

Date: December 28, 2021

PROPOSED ORDERING PARAGRAPHS

PECO Energy Company proposes the following ordering paragraphs be adopted in this proceeding:

1. That the Exceptions filed on December 28, 2021 by PECO Energy Company to the Initial Decision of Administrative Law Judges Emily I. DeVoe and Mary D. Long, issued on December 7, 2021, are granted.
2. The Initial Decision of Administrative Law Judges Emily I. DeVoe and Mary D. Long, issued on December 7, 2021, is adopted, consistent with this Opinion and Order, and subject to the following clarifications.
 - a. The buildings associated with PECO's Natural Gas Reliability Station are exempt from any zoning and subdivision and land development restrictions of the Marple Township Municipal Code which require PECO to obtain zoning approval, a tax parcel identification number, and to submit a plan of subdivision and a plan of development for approval and execution by the Township's Board of Commissioners and code officials.
 - b. The Security Fence appurtenant to the Natural Gas Reliability Station is not a building, but rather is a public utility "facility" that is exempt from local land use restrictions.
 - c. Finding of Fact No. 53 shall be clarified and amended as follows: "Marple Township alleges that the property at 2090 Sproul Road is the gateway to the business shopping district, is in close proximity to residential homes and a Gas Reliability Station is not compatible with residential and retail uses. (Marple Township St. No. 1, p. 6)."

3. The proceedings at Docket No. P-2021-3024328 shall be marked closed.

CERTIFICATE OF SERVICE

I hereby certify that on this day I served a true copy of the foregoing Exceptions 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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Dated: December 28, 2021