

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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Petition of PECO Energy Company for a Finding	:	
Of Necessity Pursuant to 53 P.S. §10619 that the	:	
Situation of Two Buildings Associated with a Gas	:	Docket No.: P-2021-3024328
Reliability Station in Marple Township, Delaware	:	(On remand)
County Is Reasonably Necessary for the	:	
Convenience and Welfare of the Public	:	

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**MAIN REMAND BRIEF OF INTERVENOR MARPLE TOWNSHIP**

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**TABLE OF CONTENTS**

	Page
I. INTRODUCTION.....	1
II. STATEMENT OF THE CASE.....	3
a. EVIDENCE SUBMITTED BY PECO.....	3
b. EVIDENCE SUBMITTED BY MARPLE TOWNSHIP.....	8
i. AIR QUALITY.....	8
ii. HEALTH IMPACTS FROM POLLUTANTS.....	10
iii. RISK.....	12
III. STATEMENT OF QUESTIONS INVOLVED.....	14
IV. LEGAL STANDARDS.....	15
V. SUMMARY OF ARGUMENT.....	16
VI. ARGUMENT.....	23
a. THE COMMISSION MUST INTERPRET SECTION 619 OF THE MPC IN A MANNER THAT IS CONSISTENT WITH ARTICLE 1, SECTION 27 OF THE PENNSYLVANIA CONSTITUTION.....	23
i. The Commission’s environmental assessment Pursuant to the ERA cannot be limited Solely to the structure of the Buildings.....	33
b. THE OPERATION OF THE STATION AT THE PROPERTY WILL RELEASE REGULATED POLLUTANTS IN QUANTIFIABLE AMOUNTS SUCH THAT THE AIR QUALITY WITHIN THE VICINITY OF THE STATION WILL BE NEGATIVELY IMPACTED IN VIOLATION OF THE ERA.....	34
c. THE COMMISSION SHOULD REJECT PECO’S PETITION BECAUSE PECO, AS THE PROJECT PROPONENT, HAS NOT PROVIDED THE INFORMATION NECESSARY FOR THE COMMISSION TO CONDUCT A CONSTITUTIONALLY SOUND ENVIRONMENTAL REVIEW .....	38
i. Failure to calculate impact on air quality.....	40

ii.	Failure to consider cumulative impacts.....	42
iii.	Insufficient information on local environment .....	42
iv.	Failure to consider alternatives.....	43
v.	No identification of adverse impacts that cannot be avoided.....	47
d.	PECO’S STATION IS NOT REASONABLY NECESSARY FOR THE CONVENIENCE AND WELFARE OF THE PUBLIC IN LIGHT OF THE ENVIRONMENTAL IMPACT ASSESSMENT PURSUANT TO THE PENNSYLVANIA CONSTITUTION.....	49
VII.	CONCLUSION.....	51
APPENDIX A – Proposed Findings of Fact, Conclusions of Law and Ordering Paragraphs		

**TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<u>Borough of E. McKeesport v. Special/Temporary Civil Service Commission,</u> 942 A.2d 274 (Pa. Cmwlth. Ct. 2008).....	15
<u>Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Comm'n,</u> 449 F.2d 1109(D.C. Cir. 1971).....	45
<u>City of New York v. U.S. Dep't of Transp.,</u> 715 F.2d 732 (2d Cir. 1983).....	45
<u>Clean Air Council v. Department of Environmental Protection,</u> 289 A.3d 928 (Pa. 2023).....	23
<u>Commonwealth v. McClelland,</u> 233 A.3d 717 (Pa. 2020).....	24
<u>Commonwealth v. Parker White Metal Co.,</u> 515 A.2d 1358 (Pa. 1986).....	24
<u>Commonwealth of Pennsylvania v. Williams,</u> 732 A.2d 1167 (Pa. 1999).....	15
<u>Del-AWARE Unlimited, Inc. v. Pennsylvania Public Utility Commission,</u> 513 A.2d 593 (Pa. Cmwlth. Ct. 1986).....	31, 32
<u>District of Columbia's Appeal,</u> 21 A.2d 883 (Pa. 1941).....	15
<u>Frederick v. Allegheny Twp. Zoning Hearing Bd.,</u> 196 A.3d 677 (Pa. Cmwlth. Ct. 2018).....	50
<u>Hanly v. Kleindienst,</u> 471 F.2d 823 (2d Cir. 1972).....	45
<u>Huntley &amp; Huntley, Inc. v. Borough Council of Borough of Oakmont,</u> 964 A.2d 855 (Pa. 2009).....	26
<u>McDonald v. Pennsylvania Railroad Co.,</u> 36 A.2d 492 (Pa. 1940).....	15
<u>Met-ed Indus. Uders Group v. Pennsylvania Public Utility Commission,</u> 960 A.2d 189 (Pa. Cmwlth. Ct. 2008) .....	15
<u>Monroe Cty. Conservation Council, Inc. v. Volpe,</u> 472 F.2d 693 (2d Cir. 1972).....	45
<u>Payne v. Kassab,</u> 312 A.2d 86 (Pa. Cmwlth. Ct. 1973) .....	24, 28, 30, 31
<u>Pennsylvania Environmental Defense Foundation v. Commonwealth,</u> 161 A.3d 911 (Pa. 2017) .....	17, 21, 23, 24, 25, 28, 29, 30, 44, 50

<u>Pa. Environmental Defense Foundation v. Commonwealth</u> , 255 A.3d 289 (Pa. 2021) .....	29
<u>Range Resources-Appalachia v. Salem Township</u> , 964 A.2d 869 (Pa. 2009).....	26
<u>Robinson Township v. Commonwealth</u> , 83 A.3d 901 (Pa. 2013).....	24, 25, 26, 27, 28, 29, 30, 39, 44, 49
<u>Strycker’s Bay Neighborhood Council, Inc. v. Karlen</u> , 444 U.S. 223 (1980).....	50
<u>Township of Marple v. Pa. PUC</u> , 294 A.3d 965 (Pa. Cmwlth. Ct. 2023).....	21, 30, 33, 39, 49
<u>W. Watersheds Project v. Abbey</u> , 719 F.3d 1035 (9th Cir. 2013).....	45

**Statutes**

1 Pa.C.S.A. § 1922(3).....	23
53 P.S. § 10619.....	1, 2, 14, 15, 16, 17, 20, 21, 23, 25, 27, 28, 30, 31, 38, 39, 43, 44, 47, 49, 51
42 U.S.C. § 4332(E).....	45
42 U.S.C. §§ 4321-4370h.....	21, 40, 50
66 Pa. C.S. § 102.....	1
66 Pa. C.S. 332(a).....	15, 20, 39, 45

**Regulations**

40 C.F.R. § 1508.9(b).....	45
52 Pa. Code § 5.41.....	1

**Constitutional Provisions**

Pa. Const. art. I, §27.....	2, 4, 14, 16, 17, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 40, 49, 50, 51
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**Other**

*The Potential Meanings of a Constitutional Public Trust*, 45 *Envtl. L.* 463, 499 (2015)  
1969 Pa. Legislative Journal-House at 485-86 (statement of Rep. Franklin Kury), in John C. Dernbach & Edmund J. Sonnenberg, *A Legislative History of Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania, Showing Source Documents*, Widener L.

School Legal Studies Res. Paper Series no. 14-18 at 7-8 (2014),  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2474660](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474660).....28

P.L 91-190, 83 Stat. 852 (Jan. 1, 1970).....45

## **I. INTRODUCTION AND HISTORY OF PROCEEDINGS**

On February 26, 2021, PECO Energy Company (“PECO”) filed a Petition before the Public Utility Commission (“PUC”). In its Petition, PECO requested that the Commission, pursuant to 52 Pa. Code § 5.41 and Section 619 of the Municipalities Planning Code (“MPC”), 53 P.S. § 10619, make a finding that: (1) the situation of two buildings at 2090 Sproul Road, Marple Township, Delaware County, Pennsylvania, 19008 (the “Property”) for a proposed Gas Reliability Station (the “Station”) is reasonably necessary for the convenience and welfare of the public and, therefore, exempt from the Marple Township Zoning Code pursuant to MPC § 619, and (2) a proposed security fence appurtenant to the Gas Reliability Station is a “facility” under 66 Pa. C.S. § 102 and is therefore exempt from local zoning requirements (the “Petition”).

The Station is part of a larger project by which PECO intends to install an 11.5-mile high-pressure gas main to deliver gas from its West Conshohocken facility to the Station in Marple Township. The Station by on-site process will reduce the pressure of the gas and then feed the gas into a distribution trunk line at the intersection of Lawrence Road and Sproul Road in Marple Township. (the “Project”).

It has been Marple Township’s position that PECO has not established by credible substantial evidence that it is reasonably necessary that the Gas Reliability Station be sited at the proposed location for the convenience and welfare of the public.

Prior to filing its Petition in this matter, PECO submitted a zoning application with the Marple Township Zoning Hearing Board seeking a special exception to operate a Gas Reliability Station (the “Station”) at the Property. After a hearing on the matter, the Zoning Hearing Board denied PECO’s application issuing Findings of Fact and Conclusions of Law. (R. 0379a-0394a).

PECO appealed the denial of its zoning application to the Delaware County Court of Common Pleas and the matter is currently pending.

On March 11, 2021, Marple Township filed a Petition to Intervene and on April 12, 2021, the County of Delaware, Pennsylvania filed a petition to Intervene. On or about April 12, 2021, sixty-three *pro se* protestants filed Protests to the Petition. Two residents, Mr. Ted Uhlman and Julie Baker, filed Petitions to Intervene in addition to Protests. Public Input Hearings were held on May 25 and 26, 2021, including approximately sixteen (16) hours of public comment, at which time ninety-three individuals testified, the overwhelming majority of which were Marple Township residents who voiced their opposition to and concerns with the siting of the Gas Reliability Station at the proposed location given the property's proximity to residences, a family restaurant, businesses and an elementary school. Written testimony, rebuttal and surrebuttal were exchanged by the parties and evidentiary hearings were held before Administrative Law Judge Emily DeVoe ("ALJ DeVoe") via telephonic proceedings on July 15, July 16, July 20, and July 22, 2021 (the "Initial Proceedings").

In the Initial Proceedings, PECO successfully opposed any consideration of the environmental impacts of the Station or the Project. The Commonwealth Court rejected the Commission's adoption of PECO's position as inconsistent with the requirements of Pennsylvania's Environmental Rights Amendment ("ERA"), Article I, Section 27. Pa. Const. art. I, §27. The Commonwealth Court stated:

In other words, a Section 619 proceeding is constitutionally inadequate unless the Commission completes an appropriately thorough environmental review of a building siting proposal and, in addition, factors the results into its ultimate determination regarding the reasonable necessity of the proposed siting.



Twp. Of Marple v. Pa. PUC, 294 A.3d 965, 974 (Pa. Cmwlth. Ct. 2023). The Court vacated the Commission’s decision and remanded the matter, requiring that the Commission incorporate a “constitutionally sound environmental impact review” into an amended decision. *Id.* at 975.

However, on remand, as fully set forth below, PECO failed to affirmatively present the Commission with sufficient evidence and information of the environmental impacts of its Station and Project. Instead, PECO again chose to rely on permitting requirements with the main focus being on permits and assessments done *prior* to even constructing the Station which pertained to stormwater control and not the environmental impacts of operating the Station. PECO downplayed any data regarding the detrimental environmental impacts of the Station and hid behind ambiguous terms and phrases such as no “unreasonable impacts,” no “air permitting required” and “no noncompliance beyond the fenceline.”

## **II. STATEMENT OF THE CASE**

### **a. Evidence submitted by PECO**

Remand evidentiary hearings were held on November 14, 15, 17 and 28, 2023 (collectively the “Remand Proceedings”). PECO presented the testimony of seven witnesses (including rebuttal testimony), five of which are employees of PECO.

PECO’s Station is comprised of four line heaters, a generator, a variety of other equipment including valves, piping, regulators, a battery backup system, and electronic/communications equipment. (PECO Statement 1-RD, p. 3). The Station consists of two buildings; the Station Building which includes most of the equipment for the Station and the Fiber Building which houses the telecommunications devices. (*Id.*). PECO insists that the directive from the Commonwealth Court is for the Commission to incorporate the results of a sound environmental impact review of the “Buildings” only. (*Id.* at 3-4). PECO submitted the

testimony of Doug Oliver who testified that in order for the Commission to find that the buildings are reasonably necessary for the convenience or welfare of the public the Commission need only consider the environmental impact of the buildings themselves (Id. at 4-5).

Two of PECO's employees, Keith Kowalski and Jim Moylan, provided testimony regarding what they described as environmental assessments completed by PECO. Kowalski described the NPDES permit needed for construction of the Station, not its operation. (PECO Statement 2-RD). PECO completed an Environmental Checklist Procedure (Id., at 4), which is done for all projects and did not consider the *site* of the Project. (Id. at 6). In fact, the Environmental Checklist procedure was completed prior to choosing 2090 Sproul Road. (Id.). Mr. Kowalski also discussed the Phase I and Phase II assessments completed by Stantec which were already a part of the record from the Initial Proceedings. (Id. at p 13). The purpose of the Stantec assessment was to identify and remediate soil and groundwater contamination that existed at the Property from its prior use as a gas station. (Id. at 16). The assessments had nothing to do with the environmental impact from the operation of the Station at the Property.

In the Initial Proceedings, PECO employee, Doug Oliver testified that the need for the Project was not because of any current gas supply shortage because PECO did not have a current supply shortage. (R. 913:13-20). PECO has sufficient supply currently in order to meet design day requirements. The reason for the desired additional supply to be added by the Project is to reduce PECO's reliability on market purchases, reduce the price volatility and to increase "reliability." (R. 1276:8-20). PECO currently has adequate supply to meet mandated requirements in a safe, cost-effective manner. (R. 1279:23-1280:11). However, PECO admits that the Project will not fully resolve the projected deficit in the long term. (R. 1282:1-2).

Pipeline consultant, Mike Israni, testified in both the Initial Proceedings, on rebuttal, and the Remand Proceedings. Originally, Mr. Israni provided information regarding the potential impact radius (“PIR”) in response to Delaware County witness, Timothy Boyce. (PECO Statement 1-SR, p. 23). Mr. Israni testified that based on PECO’s operational figures of pressure of the main connected to the Station of 525 PSI and the pressure arriving at the Station anticipated to be less than 200 PSI with a 12-inch diameter main, in the scenario of a serious incident at that natural Gas Reliability Station, the potential impact radius is 190 feet for 525 PSI and at 200 PSI, the potential impact radius is 117 feet. (Id. at 23-24; R. 1618:3 -1620:4). He defined PIR as the radius of a sector where if the pipeline fails, the persons or the buildings within that impact circle may be impacted. He testified that the failure of a pipeline where the gas was ignited resulting in flame or plume of that flame or fire would have impact on persons in that radius, with impacts such as such as 2<sup>nd</sup> degree burns from exposure to flame heat (20 secs), death within 30 seconds and building ignition within 30 minutes. (Id.). Interestingly, while Mr. Israni now states that the PIR is not relevant to this Station (PECO Statement 3-RD, p. 3), he never testified to this in the Initial Proceedings.

Although pressed by Marple in the Initial proceedings, PECO’s original testimony regarding emissions was virtually hidden from the record. The original testimony was that the vent stacks from the heaters would emit mainly water vapor and small amounts of carbon dioxide (CO<sub>2</sub>), but PECO witnesses could not say for sure that those are the only emissions. (R.1366). PECO would not answer the question regarding additional emissions from the heater stacks, other than saying that there is nothing that would require a permit to be issued. (R.1418-20). While refusing to disclose the types and amounts of emissions in the Initial Proceedings, PECO witness and employee, Tim Flanigan, did state that the emissions coming from the Station

when the heaters are running will be the equivalent of that of twenty-three (23) homes (R. 1366:16-1367:13).

On remand, pipeline permit consultant, Jeffrey Harrington, provided direct testimony that contained no modeling or testing of environmental impacts, and no assessment at all. To render his expert opinion on the environmental impacts from the operation of the Station, Harrington reviewed permit applications prepared by PECO, two issued permits and other Station documentation. (PECO Statement 3-RD, p. 5). It wasn't until after Marple presented the air modeling report of expert witness, Dr. Timothy McAuley, that PECO, the proponent of the Project, submitted the rebuttal testimony of Mr. Harrington which included his modeling.<sup>1</sup> Mr. Harrington's rebuttal testimony relied heavily on the argument that the line heaters and standby generator were subject to exemptions to air permit requirements. (PECO Statement 6-RR, p. 3). Mr. Harrington's report goes to great lengths to criticize the report of Dr. McAuley, but ultimately, of the three pollutants modelled by Mr. Harrington, all showed quantifiable amounts of emissions. (Id. at p 12). The pollutants modelled by Mr. Harrington were NO<sub>2</sub> (nitrogen dioxide), CO (carbon monoxide) and PM<sub>2.5</sub> (particulate matter). (Id.). Certainly, Mr. Harrington cannot state that the emissions from the Station will not cause any environmental impacts to the air, so instead he states that the Station will not cause any "unreasonable impacts to air quality." (Id. at 16).

Mr. Harrington's assessment was completed as though he was assisting a client with filling out a permit application. Mr. Harrington admits that there will be an impact to air quality (R. 2412. He also admits that there will be an impact to human health. (Id.). Mr. Harrington's

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<sup>1</sup> Additionally, it wasn't until Marple and Intervenors, Ted Uhlman and Julie Baker, submitted the testimony of Drs. Schmid, Najjar and Ketyer on the environmental impacts of GHG and climate change that PECO submitted rebuttal testimony that lightly addressed the issue.

conclusion that the construction of the Station would not cause unreasonable impacts to the environment is based solely on the Station not requiring a permit. (Id. at 2412-13). Harrington acknowledges that VOCs will be emitted from the Station but it was not included in his modeling (R. 2419). He did not factor in leaks such as methane and other impurities simply because there are no national air quality standards for those pollutants. (R. 2421). The air quality impacts will be there as long as the Station is operating. (R. 2436).

Harrington calls into question Dr. McAuley's findings regarding the increase in CO concentration for residents living around the Station but his critique does not disprove the added concentration of carbon monoxide, but simply that there will be "no noncompliance beyond the fence line." (R. 2395). Mr. Harrington further criticized Dr. McAuley's calculation of the NOX, but upon further questioning, he admits that Dr. McAuley's calculations are not wrong, but that they simply fall below the NAAQS. (R. 2426-27).

Mr. Harrington makes a claim that that Dr. McAuley inaccurately skewed the results at the Property relative to his comparison at the alternate (Don Guanella) location, making the emissions results at the alternate location seem lower. (R. 2401). Interestingly, Mr. Harrington's modelled results of the alternate location show all but one pollutant measuring a lower emission rate, like Dr. McAuley's modeling. (R. 2424). Indeed, 5 of the 6 modelled pollutants were lower at the alternate location. (R. 2424).

With respect to noise, the Station will not meet Marple Township's noise ordinance without noise attenuation measures, such as a building design with low noise ventilation systems, low noise gas heaters, noise barriers at the property boundaries, low noise valves and acoustical pipe coverings. (R. 1979). PECO sound expert, Mr. Reginald Keith, did not know of a final design for the Station so could not conclusively say that the Station will operate within the

Marple ordinance. (R. 1979-80). Furthermore, if changes to the Station occur, such utilization of a larger generator, increase in the footprint for additional gas capacity and climate control equipment on the fiber building, then the noise from the Property could also be increased. (R. 1980). Mr. Keith has not reviewed a final plan nor revised his assessment in consideration of the changes to the equipment which we now know were made. (R. 1981).

**b. Evidence submitted on behalf of Marple<sup>2</sup>**

**i. *Air Quality***

Dr. McAuley assessed whether the Station would create an elevated risk related to increased air emissions from the Station. (R. 2511). The Station will include several processes and equipment that have the potential to emit regulated pollutants in quantifiable amounts. (Marple Twp. Remand Stmt. No. 1, p. 4). These processes and equipment include the heater, standby generator, leaks from valves, flanges and connectors, roadways, and tailpipe emissions from automobiles. (Id. at 4-5). Dr. McAuley specifically evaluated the heater and generator because they are expected to be the largest sources of emissions at the facility. (Id. at 3).

Dr. McAuley calculated the potential to emit (PTE) of a source of emissions pursuant to the EPA's guidance. (Id. at 5). The Clean Air Act defines PTE as the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. (Id.) Based on the assessment, it was determined that air quality impacts from the proposed facility would be experienced by communities as far away as one mile from the Station. (Id.). Specifically, within a one-mile radius from the Station, the Station would cause or contribute to measurable impacts from emissions of nitrogen dioxide (NO<sub>2</sub>), carbon monoxide (CO), particulate matter (PM<sub>2.5</sub>),

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<sup>2</sup> Marple jointly presented the testimony of Drs. Schmid, Najjar and Ketyer with Intervenors, Ted Uhlman and Julie Baker. Marple hereby adopts the arguments made by intervenors, Ted Uhlman and Julie Baker in their brief.

benzene and formaldehyde, among others. (Id.) The most significant air quality impacts would occur within a half-mile of the facility. (Id.) Indeed, pollutants will not stop at the fence line of the Station. (R. 2477). Pollutants disperse, gases interact, and particulates migrate and grow. (R. 2477).

According to EPA's environmental justice screening and mapping tool (EJScreen), this area is home to nearly 3,000 residents at the Property. (Id. at 6). The proposed facility is also adjacent to a vibrant shopping center and near an elementary school and playing fields, all located within the area projected to experience the worst impacts from the Station's operations. (Id.). Operations would potentially impact those who work, attend and visit these uses as well. (Id.).

Of the modeled results, most of the pollutants do show emissions being generated. (Id. at 10). Three particular pollutants, Benzene, Carbon Monoxide and Formaldehyde have even been shown across various studies to be higher nearer gas plants and gas stations and that caution to elevated exposures near these locations should be considered for those residents located closest to the proposed PECO Station. (Id.). It is also recognized that Benzene and Formaldehyde are known human carcinogens and that any contributory levels of these should be avoided especially those residents closest to the Station. (Id.)

The levels of modeled estimated emissions of Nitrogen Dioxide (NO<sub>2</sub>) at the Property is of significant concern for the community as the levels of NO<sub>2</sub> that would be produced from the operations of the PECO Station are staggering. (Id.). In evaluating worst case 1-hr conditions at the Property, levels of 1-hour ambient concentrations for NO<sub>2</sub> exceed the National Ambient Air Quality Standards (NAAQS) by almost 6 times with a possible worst case modeled emissions concentration of 0.632 ppm for 1-hour. The NAAQS 1-hour is 0.1 ppm. (Id.)

Exposure to elevated levels of NO<sub>2</sub> above the NAAQS have shown acute and chronic health effects in children, adults and elderly and have been shown to be directly linked with issues of lung development such as breathing rates and lung volume, throat and lung upper respiratory irritation of airways and asthma exacerbation and development over time. (Id. at 11). Additional studies have shown evidence of increased inflammation of the airways, wheezing, and coughing leading to elevated emergency room visits and reduction of immunity leading to increased lung infections. (Id.). Therefore, the 1-hour concentrations found for NO<sub>2</sub> modeled “would unequivocally result” in adverse health effects across the community. (Id.).

*ii. Health impacts from pollutants*

Dr. Ketyer is a pediatrician who cared for patients before retiring from practice. (Marple Twp., Uhlman, Baker Remand Stmt. No. 3, p. 2). He has extensive experience in the practice of pediatric medicine as well as with environmental health advocacy with respect to health risks objectively associated with living near shale gas (unconventional) oil and gas (Id. at 4). He testified about the environmental health concerns with the proposed Station based upon his education, research and first-hand experience as a doctor. Dr. Ketyer explains that each component of the air pollution generated by burning natural gas has very significant health risks associated with it. (Id. at 4). Although sometimes small in number, there is no safe level of exposure to any component of pollution resulting from natural gas combustion. (Id.). It is known that even small amounts of exposure, even when brief, can produce significant health signs and symptoms that can affect quality of life for some and increase the risk of poor health outcomes for everyone. (Id.) Modern air pollution caused mostly from burning fossil fuels like natural gas can impair fertility, complicate pregnancies, and lead to poor birth outcomes. (Id.). ADHD,



learning disabilities, and even the development of autism has been associated with air pollution exposure during pregnancy. (Id. at 5).

Dr. Ketyer analyzed the emissions that Dr. McAuley and Jeffrey Harrington describe will be emitted from the facility.<sup>3</sup> Fine and ultrafine particulate matter (PM 2.5) has been linked with impaired fertility, miscarriage, and poor birth outcomes such as low birth weight, and prematurity — each of which carry lifelong health burdens for children, their families, and society. (Id. at 5). Breathing air contaminated with PM 2.5 exacerbates lung symptoms in children and adults with asthma and other chronic lung diseases. (Id.). PM 2.5 is a known carcinogen, causing lung cancer and bladder cancer, and is associated with other types of cancer in adults. (Id.). Breathing PM 2.5 causes headaches in some people and sinus problems in others. (Id.) There is no safe level of PM 2.5 exposure because even small exposures (**even those under standards**) can still result in noticeable health symptoms. (Id.).

Volatile organic compounds (VOCs) such as benzene will be produced from the burning of natural gas. (Id. at 6). Benzene is a known carcinogen, causing cancer in children and adults. (Id.). Fossil fuel combustion (which includes natural gas) results in emissions of other harmful VOCs potentially leading to serious health concerns, including toluene (permanent neurological damage), ethylbenzene and xylene (ENT and neurotoxicity), and formaldehyde (ENT and lung irritant, human carcinogen). (Id.).

Nitrogen oxide is produced abundantly wherever fossil fuels and natural gas are combusted. (Id.). Nitrogen oxide combines with VOCs in the presence of sunlight and heat to produce ground level ozone, also known as smog. Ozone adversely impacts every person's lung function. (Id.). It has been shown to stunt lung function growth in infants and young children.

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<sup>3</sup> See TM-2, Table 2 and JH-4, Table 4-3.

Whether one is young or old, rich or poor, active or sedentary, everyone's lung function is diminished on days when ozone levels are high. (Id.).

In addition to acute exposures to toxic air emissions, cumulative exposures can cause serious health problems, particularly in women who are pregnant, and in children who may not develop chronic heart and respiratory disorders or cancer until years and even decades have passed after exposure. (Id. at 10).

Notably, PECO did not challenge any of the health concerns caused by emissions. The only argument asserted by PECO was that the emissions would not rise to the level which required air permits.

***iii. Risk***

Jim Capuzzi, Fire Marshal for Marple Township for over a decade, testified on behalf of the Township in both the Initial Proceedings and Remand Proceedings. The Safety Data Sheet for Natural Gas provided by PECO confirms that Natural Gas is an extremely flammable gas, easily ignitable and will form explosive mixtures in air. (Marple Twp. Remand Statement No. 4, p. 3). This Data Sheet also gives guidance to emergency responders when an accidental release occurs. (Id.) This guidance tracks with the guidance presented in the US Department of Transportation 2020 Emergency Response Guide (ERG). (Id.). Both documents call for an immediate isolation of the leak area for at least 100 meters (330 feet) in all directions. This would mean that on the report of any leak at the 1 proposed facility at a minimum the following evacuations must take place:

1. All homes on Cedar Grove Road between Sproul Road and Boxwood Dr.
2. All homes and businesses on Sproul between Parkway W and north of Cedar Grove Rd. (Including Freddy's and Fritch's)

3. The first 3 homes on the east side of Boxwood Dr. from Cedar Grove Rd.
4. The total shut-down of Sproul Road (PA Route 320).

(Id at 4). If the leak is not immediately controlled this isolation area will need to be increased accordingly. (Id.).

Mr. Capuzzi reiterated his concern that the facility will be unmanned, and first responders will not have access. (Id. at 4). Should there be a leak emanating from a pipe flange ahead of the main valve of the incoming gas line inside the Station, it will be necessary to manually shut the valve in the street. (Id.). Considering the community would have to wait until the proper PECO employee arrived on scene, each second that the leak goes unmitigated increases the potential for an explosion with widespread destruction and possible loss of life. (Id.). In Mr. Capuzzi's experience, while PECO may have a representative on scene within one hour, it is not always a representative with the appropriate qualifications and so the wait time is longer. (Marple Twp Remand Statement No. 2-R, p. 7).

It is Mr. Capuzzi's opinion that the Station should not be located at the Property from a fire, life safety and public interest standpoint. (Id. at 6). The PIR is a useful calculation in this determination of whether this Station is appropriate for its location in relation to its close proximity to neighboring persons and property. (Id.).

Additionally, Jeff Marx provided expert testimony regarding the safety of the Station. He explained the hazards that could be present if an accidental release occurred. (Marple Twp. Remand Statement No. 2). Those hazards are exposure to a flash fire following ignition of a vapor cloud, exposure to thermal radiation due to a jet fire, or exposure to a blast wave following ignition of a flammable vapor cloud that is confined. (Id. p. 4).

The largest impacts would be from potential fire events. (Id. at 6). If an equipment failure of significant magnitude were to occur that releases natural gas, and that gas is ignited, there could be fire impacts in the immediate areas outside the Station boundaries. (Id.).

### **III. STATEMENT OF QUESTIONS INVOLVED**

- a.** Should the Commission interpret Section 619 of the Pennsylvania Municipalities Planning Code in a manner consistent with Article I, Section 27 of the Pennsylvania Constitution?

Suggested answer: Yes.

- b.** Will the Station release regulated pollutants in quantifiable amounts negatively impacting the air quality within the vicinity of the Station such that the Station is in violative of Article I, Section 27 of the Pennsylvania Constitution?

Suggested answer: Yes.

- c.** Has PECO failed to meet its burden of producing sufficient evidence of the environmental impacts of the Station and Project to enable the Commission to conduct a constitutionally sound environmental impact review?

Suggested answer: Yes.

- d.** Whether the site of PECO's Station at 2090 Sproul Road, Marple Township, is reasonably necessary for the convenience and welfare of the public in light of the environmental impact assessment pursuant to Article I, Section 27 of the Pennsylvania Constitution?

Suggested answer: No.

#### IV. LEGAL STANDARD

Section 332(a) of the Public Utility Code (“Code”), 66 Pa. C.S. 332(a), provides that a party seeking a rule or order from the Commission has the burden of proof in that proceeding. The preponderance of the evidence standard requires proof by a greater weight of the evidence. Commonwealth of Pennsylvania v. Williams, 732 A.2d 1167 (Pa. 1999). Additionally, any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence. Met-ed Indus. Users Group v. Pennsylvania Public Utility Commission, 960 A.2d 189, 193 n.2 (Pa. Cmwlth. Ct. 2008) (citing 2 Pa. C.S. §704). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Borough of E. McKeesport v. Special/Temporary Civil Service Commission, 942 A.2d 274, 281 (Pa. Cmwlth. Ct. 2008).

If the applicant sets forth a prima facie case, then the burden shifts to the opponent. McDonald v. Pennsylvania Railroad Co., 36 A.2d 492 (Pa. 1940). Establishing a prima facie case requires either evidence sufficient to make a finding of fact permissible or evidence to create a presumption against an opponent which, if not met, results in an obligatory decision for the opponent. Once a prima facie case on a point has been established, if contrary evidence is not presented, there is no requirement that the applicant produce additional evidence in order to sustain its burden of proof. District of Columbia’s Appeal, 21 A.2d 883 (Pa. 1941).

Section 619 of the Pennsylvania Municipalities Planning Code, provides:

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.

53 P.S. § 10619. Article I, Section 27 of the Pennsylvania Constitution provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. Art. 1, §27.

## V. SUMMARY OF THE ARGUMENT

The Commonwealth Court has instructed the Commission to render a decision which takes into account a sound environmental assessment of PECO's Petition in this Section 619 proceeding. Pennsylvania case law under Article I, Section 27 of the Pennsylvania constitution. Article I, Section 27 (also known as the Environmental Rights Amendment ("ERA")) recognizes two rights in the people. In its first sentence or clause, Section 27 recognizes a right in the people "to clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of the environment." The second and third sentences, the public trust clause, impose a public trust responsibility on the Commonwealth to "conserve and maintain" public natural resources for the benefit of present and future generations. The people, the beneficiaries of the public trust, have the right to have the government perform this duty.

The Commonwealth's trustee obligations "are not vested exclusively in any single branch of Pennsylvania's government"; rather, "all agencies and entities of the Commonwealth government, both statewide and local, have a fiduciary duty to act toward the corpus with prudence, loyalty and impartiality." *Id.* at 931 n.23. Indeed, PEDF II held that local and state government agencies have an obligation under the ERA to act as trustees for the environment and the natural resources of the state, and as such must prohibit their degradation and affirmatively act to protect them. *Id.* at 938. These duties, individually and collectively, require the Commission to consider the reasonably foreseeable environmental impacts of its decision under Section 619.

Additionally, Article I, Section 27 effectuates clear limits on agency authority. It does not effectuate an expansion of agency authority. The Commission is not allowed to decide this case in a manner that violates the rights of the people that are stated in Section 27.

The Commission was instructed to conduct a sound environmental assessment. The Commission was not instructed to review PECO's permits and permit applications. However, here it is PECO's position that because permits are not required for matters such as air quality and emissions that the Commission's job is complete. However, as was the case before this matter went to the Commonwealth Court, it remains insufficient to simply defer to outside agencies (who may or may not have issued a permit) when no determinations or thorough scrutiny was given. There is no place for the Commission to turn to on this matter other than the evidence presented in hearings.

Due consideration must be given to the pollutants that are guaranteed to be in the air when the Station is operating. Due consideration must be given to the medical testimony presented regarding the health effects of those pollutants. Due consideration must be given to the amount of time the Station will run and how long into the future it will run, continuously pumping those emissions into the air. Due consideration must be given to the fact that PECO currently has sufficient supply to meet its demand and that this Project is not urgent. Due consideration must be given to the fact that PECO designed this Project for this particular location and dismissed alternative options when they were presented to them years ago. One particular alternative, the Don Guanella location, would have less ambient air quality concentrations than the selected Property as modelled by both expert witnesses.

The Commission's environmental assessment must include the Station and Project as a whole. The Commission cannot limit its analysis to merely the two Building structures as PECO has argued. Doing so would run afoul of the Pennsylvania Constitution.

Despite any muddying of the water regarding emissions calculations, heater size and generator terminology, there is no argument that the emissions from the Station will contain the



pollutants as modeled by both experts. To that extent that the emissions are arguably under a particular guideline is irrelevant when compared to the *unrefuted* evidence of medical conditions and health effects caused by those pollutants.

Detrimental air quality impacts from the proposed facility would be experienced by communities as far away as one mile from the Station. Specifically, within a one-mile radius from the Station, the Station would cause or contribute to measurable impacts from emissions of nitrogen dioxide (NO<sub>2</sub>), carbon monoxide (CO), particulate matter (PM<sub>2.5</sub>), benzene and formaldehyde, among others. The most significant air quality impacts would occur within a half-mile of the facility. Indeed, pollutants will not stop at the fence line of the Station.

Exposure to elevated levels of NO<sub>2</sub> above the NAAQS have shown acute and chronic health effects in children, adults and elderly and have been shown to be directly linked with issues of lung development such as breathing rates and lung volume, throat and lung upper respiratory irritation of airways and asthma exacerbation and development over time. Additional studies have shown evidence of increased inflammation of the airways, wheezing, and coughing leading to elevated emergency room visits and reduction of immunity leading to increased lung infections. Therefore, the 1-hour concentrations found for NO<sub>2</sub> modeled “would unequivocally result” in adverse health effects across the community.

Despite critiques made by Mr. Harrington of Dr. McAuley’s air modelling, the results do not lie. Mr. Harrington’s 1-hour modelled concentrations for the Station at the Property were *higher* than Dr. McAuley’s. In any event, there is no dispute that the air will be subjected to higher amounts of pollutants with the operation of the Station than currently exists.

PECO has a duty, as the Project proponent, to present its Petition to the Commission in an appropriate manner. PECO has self-righteously dismissed any of the concerns to the public

raised by the Intervenors and has continuously maintained that it has no proactive duty to prove the safety of its own Project. PECO has failed to meet its burden of producing sufficient evidence of the environmental impacts of the Station and the Project to enable the Commission to conduct a “constitutionally sound environmental impact review.” In the absence of such information, the Commission cannot determine whether the Station and the Project are necessary and in the public interest, such that PECO’s application must be denied.

While the Commission has the obligation under this decision to perform that review, PECO has the burden of providing sufficient information to the Commission to conduct its own independent evaluation. As the petitioner for a Section 619 exemption, PECO is responsible for providing the Commission with adequate information in support of its application and has the burden of proving that the requested exemption should be granted. 66 Pa.C.S. § 332. This necessarily includes all information needed for the Commission to determine whether PECO’s proposal is reasonably necessary for public convenience and welfare. As the Commonwealth Court has instructed, an integral part of the reasonable necessity inquiry is an evaluation of the environmental impacts of the proposal.

On remand, rather than producing evidence that would enable the Commission to conduct a “constitutionally sound impact review,” PECO produced a woefully inadequate record lacking in virtually all the elements federal law requires for environmental review under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (“NEPA”). Notably, PECO failed to produce any evidence regarding indirect or downstream impacts, cumulative impacts, alternatives including the no action alternative, or adverse impacts that cannot be avoided, such as the safety risk to the surrounding community. Since PECO has the burden of proof of providing the Commission with the information necessary for the Commission to discharge its trusteeship

duties under Section 27, and PECO has failed to meet that burden, PECO's Petition must be rejected.

PECO has not shown that the Station is reasonably necessary for the convenience and welfare of the public in light of its detrimental environmental impacts and in light of the ERA. If PECO had properly factored the impacts of the proposed Station on the environment and community into its determination of need for the Project and if PECO had presented the Commission with the information necessary for a "constitutionally sound environmental review," the Commission would have determined PECO did not satisfy the requisites for its Section 619 Petition.

The Commonwealth Court required the Commission to factor the results of its "constitutionally sound environmental review" into "its ultimate determination regarding the reasonable necessity of the proposed siting," Township of Marple, supra. at 12. This determination must also be consistent with Article I, Section 27. Under Section 27, the necessary review here is not simply procedural; it is also substantive. Article I, Section 27 imposes limits on governmental authority, including the authority of the PUC. The Commonwealth may not unreasonably impair the resources and values identified in the first clause of Article I, Section 27. Concerning the second or public trust clause, "the Commonwealth has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties." PEDF II, 161 A.3d at 933. These limitations apply to the PUC.

Indeed, the purpose of this review must be to prevent the Commonwealth from violating the rights of Pennsylvania citizens, including future generations, in contravention of its duty as a

trustee. When the review is insufficient, or it shows that the gas Project will violate these rights, the PUC is legally obligated to disapprove the Station.

If PECO had presented the Commission with the information and data necessary for a sound environmental assessment, the Commission could readily determine that these adverse environmental impacts could be avoided with perhaps an alternative location. Because those impacts were masked from the start behind claims of permits and permitting applications, Marple and the pro se Intervenors were forced to collect essential environmental impact information on their own.

Accordingly, the Commission has been presented with information that includes: the increase of detrimental air pollution, adverse health effects from that air pollution, risk to the surrounding community related to an adverse event, and less of an air quality impact at an alternate location. This information, coupled with PECO's admission that it has no immediate need for the Station and that its current supply is adequate, should lead the Commission to deny PECO's Petition in light of its duty under Article 1, Section 27 of the Pennsylvania Constitution.

## VI. ARGUMENT

### a. THE COMMISSION MUST INTERPRET SECTION 619 OF THE MPC IN A MANNER THAT IS CONSISTENT WITH ARTICLE 1, SECTION 27 OF THE PENNSYLVANIA CONSTITUTION

The Commonwealth Court has instructed the Commission to render a decision which takes into account a sound environmental assessment of PECO's Petition in this Section 619 proceeding. Pennsylvania case law under Article I, Section 27 of the Pennsylvania constitution, and other provisions of the Declaration of Rights in the state constitution, make clear that statutes must be construed in a manner that is consistent with those constitutional provisions.

Article I, Section 27 (also known as the Environmental Rights Amendment ("ERA")) recognizes two rights in the people. In its first sentence or clause, Section 27 recognizes a right in the people "to clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of the environment." The second and third sentences, the public trust clause, impose a public trust responsibility on the Commonwealth to "conserve and maintain" public natural resources for the benefit of present and future generations. The people, the beneficiaries of the public trust, have the right to have the government perform this duty. "Trustee obligations are not vested exclusively in any single branch of Pennsylvania's government;" rather, "all agencies and entities of the Commonwealth government" have these obligations. Pennsylvania Environmental Defense Foundation v. Commonwealth, 161 A.3d 911, 931 n.23 (Pa. 2017) ("PEDF II"). As a result, the ERA's "mandate informs Pennsylvania's elaborate body of environmental protection statutes and regulations." Clean Air Council v. Department of Environmental Protection, 289 A.3d 928, 932 (Pa. 2023).

The General Assembly is bound by both clauses of Section 27. Because the General Assembly is presumed to act constitutionally, 1 Pa.C.S.A. § 1922(3), it is essential to interpret legislation in a manner that is consistent with the constitution. "[W]e are bound to interpret a

statute, where possible, in a way that comports with the constitution's terms.” Commonwealth v. McClelland, 233 A.3d 717, 735 (Pa. 2020). See Commonwealth v. Parker White Metal Co., 515 A.2d 1358, 1370-71 (Pa. 1986) (describing legislative responsibility for implementation of Article I, Section 27).

In Payne v. Kassab, 312 A.2d 86 (Pa. Cmwlth. Ct. 1973), the Commonwealth Court established a three-prong test to be used in determining whether an action or activity violated the ERA. The Payne test was first called into question with the Pennsylvania Supreme Court’s decision in Robinson Township v. Commonwealth, 83 A.3d 901 (Pa. 2013). In Robinson Township, a plurality of the Court found portions of a proposed amendment to the Pennsylvania Oil and Gas Act unconstitutional under the ERA but did not expressly overturn the Payne test.

In 2017, the Pennsylvania Supreme Court again considered the scope of the ERA in PEDF II. In PEDF II, the Court expressly overruled the Payne test and found that “[t]he proper standard of judicial review [for alleged violations of the ERA] lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.” PEDF II, 161 A.3d at 930. In so ruling, the Court held that the ERA grants citizens of the Commonwealth two separate rights: 1) the right to clean air and pure water and to the preservation of natural, scenic, historic and aesthetic values of the environment; and 2) the right of common ownership by the people, including future generations, of Pennsylvania’s public natural resources.

In PEDF II, the Court noted that the first right, which comes directly from the text of the ERA itself, “places a limitation on the state’s power to act contrary to [the] right, and while the subject of the right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional.” PEDF II, 161 A.3d at 931-32. The PEDF II Court expressly noted that the

Commonwealth’s trustee obligations “are not vested exclusively in any single branch of Pennsylvania’s government”; rather, “all agencies and entities of the Commonwealth government, both statewide and local, have a fiduciary duty to act toward the corpus with prudence, loyalty and impartiality.” *Id.* at 931 n.23. Indeed, PEDF II held that local and state government agencies have an obligation under the ERA to act as trustees for the environment and the natural resources of the state, and as such must prohibit their degradation and affirmatively act to protect them. *Id.* at 938.

In Robinson Township, the plurality stated:

In Pennsylvania, terrain and natural conditions frequently differ throughout a municipality, and from municipality to municipality. As a result, the impact on the quality, quantity, and well-being of our natural resources cannot reasonably be assessed on the basis of a statewide average. Protection of environmental values, in this respect, is a quintessential local issue that must be tailored to local conditions.

Robinson Township, *supra* at. 979. Furthermore, “the Commonwealth is now over three centuries old, and its citizens settled the territory and built homes and communities long before the exploitation of natural gas... became economically feasible.” As such, “oil and gas operations do not function autonomously of their immediate surroundings.” *Id.*

The Supreme Court’s decision in Robinson Township underscores the importance of interpreting Section 619 in a manner that conforms to the Constitution and takes into account the local community and surroundings. In Robinson Township, the Court held unconstitutional on their face statutory provisions that preempted local governments from using their traditional zoning authority to decide *where* shale gas facilities (including wells and compressor stations) could be located. *Id.* at 970 (quoting 58 Pa. C. S. § 3303).<sup>4</sup> In its place, the legislature

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<sup>4</sup> When this legislation was adopted, the Pennsylvania Supreme Court had already held that local governments were not preempted from using their traditional zoning authority to

substituted statewide rules for determining the location of these facilities and required local governments to approve facilities that met these rules. Id. at 970-72 (quoting and summarizing 58 Pa.C.S. § 3304). Among other things, the legislation required local governments “to authorize oil and gas operations, impoundment areas, and location assessment operations (including seismic testing and the use of explosives) as permitted uses in all zoning districts throughout a locality.” Id. at 971.

A plurality (three justices) based the decision on Article I, Section 27. The plurality reasoned that local governments are among the Commonwealth trustees under Article I, Section 27. The statutory provision that preempted local regulation of oil and gas operations, they said, violates Article I, section 27 because “the General Assembly has no authority to remove a political subdivision’s implicitly necessary authority to carry into effect its constitutional duties.” Robinson Township, 83 A.3d at 977 (Castille, C.J.). Then Chief Justice Castille, writing for the plurality in an opinion adopted by the whole Court in PDF II, explained:

The municipalities affected by Act 13 all existed before that Act was adopted; and most if not all had land use measures in place. Those ordinances necessarily addressed the environment, and created reasonable expectations in the resident citizenry. To put it succinctly, our citizens buying homes and raising families in areas zoned residential had a reasonable expectation concerning the environment in which they were living, often for years or even decades. Act 13 fundamentally disrupted those expectations, and ordered local government to take measures to effect the new uses, irrespective of local concerns.

Id.

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decide *where* oil and gas operations were conducted. *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 964 A.2d 855 (Pa. 2009). They were, however, preempted from imposing environmental regulations on *how* oil and gas operations are conducted. *Range Resources-Appalachia v. Salem Township*, 964 A.2d 869 (Pa. 2009). Thus, § 3303 preempted local governments from exercising their only remaining authority over oil and gas operations—determining *where* oil and gas operations could be conducted.



The legislation violated Section 27 because it failed to maintain local environmental protections:

The Commonwealth, by the General Assembly, declares in Section 3303 that environmental obligations related to the oil and gas industries are of statewide concern and, on that basis, the Commonwealth purports to preempt the regulatory field to the exclusion of all local environmental legislation that might be perceived as affecting oil and gas operations....The police power, broad as it may be, does not encompass such authority to so fundamentally disrupt these expectations respecting the environment.

Id. at 978.

The fourth justice (the late Justice Baer) based his decision on substantive due process, focusing on the same essential problem that the other three justices raised. In “a state as large and diverse as Pennsylvania,” he reasoned, “meaningful protection of the acknowledged substantive due process right of an adjoining landowner to quiet enjoyment of his real property can only be carried out at the local level.” Id. at 1001 (Baer, J., concurring). The challenged provisions, he said, “force municipalities to enact zoning ordinances [that] violate the substantive due process rights of their citizenries . . . .” Id.

Like the challenged legislation in Robinson Township, Section 619 preempts local authority to decide where specified facilities may be located and substitutes statewide rules for local rules. Unlike the provisions held unconstitutional in Robinson Township, though, Section 619 allows the PUC to make a decision that is tailored to the circumstances of a particular case. Thus, unlike the provisions in Robinson Township that were held facially unconstitutional, Section 619 does not appear unconstitutional on its face. However, under Robinson Township, Section 619 could be unconstitutional as applied. Both Article I, Section 27 and substantive due process prohibit the PUC from deciding this case in a manner that would violate these constitutional protections.

The text of Section 27 is now recognized, as it should have been all along, as constitutional law. That means that tribunals must interpret and apply Section 27 based primarily on its text. As the PEDF II court explained: “[W]hen reviewing challenges to the constitutionality of Commonwealth actions under Section 27, the proper standard of judicial review lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.” 161 A.3d at 930. The Court rejected the Payne test, explaining that it is “unrelated to the text of Section 27 and the trust principles animating it, [and] strips the constitutional provision of its meaning.” Id. (citing Robinson Twp., 83 A.3d at 967, and John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 *Envtl. L.* 463, 499 (2015)). The text of Article I, Section 27 has a meaning that is separate from, and independent of, statutes like Section 619. Because it is constitutional law, its scope cannot be reduced or defined by statutes like Section 619.

Our Supreme Court has held that the trust duties of prudence, loyalty, and impartiality must be used to interpret Section 27’s public trust clause. That clause requires the Commonwealth to “conserve and maintain” public natural resources for the benefit of present and future generations.

The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.

PEDF II, 161 A.3d at 932 (quoting Robinson Twp., 83 A.3d at 956–57). These duties, individually and collectively, require the Commission to consider the reasonably foreseeable environmental impacts of its decision under Section 619.

The duty of prudence, the Supreme Court said, involves “considering the purposes” of the trust and exercising “reasonable care, skill, and caution” in managing the trust corpus. PEDF

II, 161 A.3d at 938 (citing 20 Pa. Cons. Stat. § 7780). The purpose and duties of the public trust under Section 27 are the same—to conserve and maintain public natural resources for the benefit of present and future generations. The Commission, as trustee, cannot use “reasonable care, skill, care, and caution” if it makes this decision without understanding its reasonably foreseeable effects.

The duty of loyalty requires the trustee to manage the trust corpus “so as to accomplish the trust’s purposes for the benefit of the trust’s beneficiaries.” As the Supreme Court made clear in PEDF V, trustees such as the PUC have a duty to consider both present and future generations at the same time. Thus, the trustee cannot be “shortsighted” and must instead “*consider* an incredibly long timeline.” Pa. Environmental Defense Foundation v. Commonwealth, 255 A.3d 289, 310 (Pa. 2021) (“PEDF V”)(quoting Robinson Twp., 83 A.3d at 959) (emphasis supplied). The Commission cannot exercise its duty of loyalty toward present and future generations unless it considers the reasonably foreseeable environmental effects of its decision.

Finally, the duty of impartiality requires the Commonwealth to manage “the trust so as to give *all of the beneficiaries* due regard for their respective interests in light of the purposes of the trust.” PEDF II, 161 A.3d at 932 (emphasis supplied). In Robinson Township, the Supreme Court held a legislative provision unconstitutional because, under that provision, “some properties and communities will carry much heavier environmental and habitability burdens than others.” Robinson Twp., 83 A.3d at 980. This result, the Court decided, is inconsistent with the constitutionally stated obligation that the trustee act for the benefit of “*all the people.*” Id. (emphasis supplied). The Commission’s duty of impartiality in this case extends not only to ratepayers and utility customers; it also extends to the citizens of Marple Township and all people whose rights are recognized under Section 27, including future generations.

The Commonwealth Court’s decision in Township of Marple recognizes that PEDF II effectuates a changed legal landscape. Indeed, the Court’s ruling is founded on a recognition that PEDF II changes “the scope of the Commission’s environmental review duties in a Section 619 proceeding.” Township of Marple, 294 A.3d at 12 n. 13.

Additionally, Article I, Section 27 effectuates clear limits on agency authority. It does not effectuate an expansion of agency authority. The Commission is not allowed to decide this case in a manner that violates the rights of the people that are stated in Section 27. As the Pennsylvania Supreme Court has recognized, but the Payne test did not, the ERA is located in Article I, which contains Pennsylvania’s Declaration of Rights, the state’s analogue to the U.S. Bill of Rights. PEDF, 161 A.3d at 916, 918. “The Declaration of Rights is that general part of the Pennsylvania Constitution which limits the power of state government; additionally, ‘particular sections of the Declaration of Rights represent specific limits on governmental power.’” Robinson Township, 83 A.3d at 948 (plurality) (citations omitted). The placement of Section 27 in Article I, along with such rights as the right to property (Section 1), religious freedom (Section 3), freedom of speech (Section 7), and security from searches and seizures (Section 8), was no accident. As then Rep. Franklin Kury, the chief legislative sponsor of the amendment, explained when he introduced the resolution that would become Article I, Section 27:

Mister Speaker, I rise to introduce a natural resource conservation amendment to Pennsylvania’s Bill of Rights. I do so because I believe that the protection of the air we breathe, the water we drink, the esthetic qualities of our environment, has now become as vital to the good life – indeed to life itself -- as the protection of those fundamental political rights, freedom of speech, freedom of the press, freedom of religion, of peaceful assembly and privacy.

1969 Pa. Legislative Journal-House at 485-86 (statement of Rep. Franklin Kury), in John C. Dernbach & Edmund J. Sonnenberg, *A Legislative History of Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania, Showing Source Documents*, Widener L. School Legal Studies Res. Paper Series no. 14-18 at 7-8 (2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2474660](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474660).

The public has the right to have the Commonwealth perform the duties to protect these fundamental rights. These are actual rights under the Pennsylvania Constitution coequal to those of freedom of speech and religion. They cannot be denied, altered, or abridged by the state; and they are not mere considerations or statements of aspiration.

Notwithstanding the holding in Del-AWARE Unlimited about the limited scope of PUC review under Section 619, the Del-AWARE Unlimited Court's ultimate holding recognized that the constitutional scope of the project under Article I, Section 27 was broader than the environmental impacts of the location of the pumphouse. Del-AWARE Unlimited, Inc. v. Pennsylvania Public Utility Commission, 513 A.2d 593 (Pa. Cmwlth. Ct. 1986). The Court acknowledged that a broader range of environmental effects were considered by the Department of Environmental Resources (now the Department of Environmental Protection) when it issued permits needed for the overall project. Id. at 596. Indeed, when Del-AWARE appealed the issuance of these permits to the Environmental Board (EHB), the EHB "thoroughly scrutinized and upheld" the issuance of the permits. Id. Thus, in applying the first prong of the Payne test, the Commonwealth Court in Del-AWARE Unlimited held that "(1) the PUC was obliged to defer to DER's evaluation of environmental impacts within its jurisdiction." Id.

However, here it is PECO's position that permits are not required for matters such as air quality and emissions from the heaters and therefore the Commonwealth Court's directive for a

“sound environmental assessment” is complete. The difference here is that in Del-AWARE Unlimited, permits *were* issued after consideration of a broad range of environmental effects and, on appeal, “thoroughly scrutinized and upheld” by the EHB. We do not have these circumstances in the matter before the Commission and, as was the case before this matter went to the Commonwealth Court, it remains insufficient to simply defer to outside agencies when no determinations or thorough scrutiny was given.

In this matter, PECO presented two permits (PECO Statement 6-RD p. 6). The first was the National Pollutant Discharge Elimination System (NPDES) permit issued for the purposes of construction of the Station and for stormwater management. The second permit was the Pennsylvania Natural Diversity Index (PNDI) issued on behalf of four different agencies, essentially confirming that there will be no impact on rare or threatened species. (Id. at 6-7). None of the applications or permits obtained by PECO pertain to air emissions or air quality. No agency has thoroughly reviewed, or even reviewed the Station’s emissions or impact on air quality because no other permits were applied for by PECO. (Id. at 7). There is no place for the Commission to turn to on this matter other than the evidence presented in hearings.

Accordingly, the Commission’s decision could not be constitutional if its reliance was merely on the two permits obtained by PECO for the construction of the project, coupled with PECO’s claim that it need not obtain an air permit for emissions. Pursuant to the case law analyzed herein detailing the great responsibility the Commission now bears, the people of Marple Township and of Pennsylvania have the right for the Commission to do more.

Due consideration must be given to the pollutants that are guaranteed to be in the air when is the Station is operating. Due consideration must be given to the medical testimony presented regarding the health effects of those pollutants. Due consideration must be given to the

amount of time the Station will run and how long into the future it will run, continuously pumping those emissions into the air. Due consideration must be given to the fact that PECO currently has sufficient supply to meet its demand and that this Project is not urgent. Due consideration must be given to the fact that PECO designed this Project for this particular location and dismissed alternative options when they were presented years ago. One particular option, the Don Guanella location, would have less ambient air quality concentrations than the selected Property as modelled by both expert witnesses.

Despite any muddying of the waters regarding emissions calculations, heater size and generator terminology, there is no argument that the emissions from the Station will contain the pollutants as modeled by both experts. To that extent that the emissions are arguably under a particular guideline is irrelevant when compared to the *unrefuted* evidence of medical conditions and health effects caused by those pollutants.<sup>5</sup>

**i. The Commission’s environmental assessment pursuant to the ERA cannot be limited solely to the structure of the Buildings**

In determining that the Commission sidestepped its constitutional obligation when it deferred to other agencies’ determinations, the Commonwealth Court stated that the Commission “*failed to identify any such outside agency determinations that pertained to explosion impact radius, noise, or heater emissions.*” Township of Marple, 294 A.3d at 975. PECO chose not to appeal this decision further and therefore this is the law in the Commonwealth of Pennsylvania.

The Commission must review the Station and Project as a whole in light of the ERA and, in doing so, should deny PECO’s Petition.

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<sup>5</sup> Further discussion of the Station’s emissions is discussed below.

**b. THE OPERATION OF THE STATION AT THE PROPERTY WILL RELEASE REGULATED POLLUTANTS IN QUANTIFIABLE AMOUNTS SUCH THAT THE AIR QUALITY WITHIN THE VICINITY OF THE STATION WILL BE NEGATIVELY IMPACTED IN VIOLATION OF THE ERA**

Detrimental air quality impacts from the proposed facility would be experienced by communities as far away as one mile from the Station. (Marple Twp. Remand Statement No. 1, p. 5). Specifically, within a one-mile radius from the Station, the Station would cause or contribute to measurable impacts from emissions of nitrogen dioxide (NO<sub>2</sub>), carbon monoxide (CO), particulate matter (PM<sub>2.5</sub>), benzene and formaldehyde, among others. (Id.) The most significant air quality impacts would occur within a half-mile of the facility. (Id.) Indeed, pollutants will not stop at the fence line of the Station. (R. 2477).

The levels of modeled estimated emissions of Nitrogen Dioxide (NO<sub>2</sub>) at the Property is of significant concern for the community as the levels of NO<sub>2</sub> that would be produced from the operations of the PECO Station are staggering. (Id.). In evaluating worst case 1-hr conditions at the Property, levels of 1-hour ambient concentrations for NO<sub>2</sub> exceed the National Ambient Air Quality Standards (NAAQS) by almost 6 times with a possible worst case modeled emissions concentration of 0.632 ppm for 1-hour. The NAAQS 1-hour is 0.1 ppm. (Id.)

Exposure to elevated levels of NO<sub>2</sub> above the NAAQS have shown acute and chronic health effects in children, adults and elderly and have been shown to be directly linked with issues of lung development such as breathing rates and lung volume, throat and lung upper respiratory irritation of airways and asthma exacerbation and development over time. (Id. at 11). Additional studies have shown evidence of increased inflammation of the airways, wheezing, and coughing leading to elevated emergency room visits and reduction of immunity leading to increased lung infections. (Id.). Therefore, the 1-hour concentrations found for NO<sub>2</sub> modeled “would unequivocally result” in adverse health effects across the community. (Id.).



PECO witness, Mr. Harrington, spent a majority of his testimony criticizing Dr. McAuley's air modeling inputs and modeling techniques. This testimony, although helpful in creating confusion and muddying the waters, cannot hide the facts. Hidden within Mr. Harrington's report but not highlighted in his testimony is the fact that his modeling showed emissions numbers that were *higher* than those of Dr. McAuley's. (Marple Twp. Statement 1-SR, p. 1; JH-4, p. 5).

Dr. McAuley's analysis appears to have underestimated potential emissions from the generator compared to what Mr. Harrington claims to be more accurate. In Dr. McAuley's report, he estimated that potential emissions of nitrogen oxides (NOx) from the generator would be about 0.37 pounds per hour (lb/hr) and 0.09 tons per year (tpy). (Marple Twp. Statement 1, p 4) (*See* Table 1 showing "Typical" 6 Maximum Emissions of 184.4 pounds per year). Conversely, Mr. Harrington claims that the "correct" potential emissions from the generator could be as high as 0.97 lb/hr and 0.24 tpy. (*See* Exhibit JH-4, Section 3.1). This suggests that actual potential NOx emissions from the generator could be as much as *167 percent higher than Dr. McAuley's previous estimates*. (Marple Twp. Statement 1-SR at 3). Again, the reason for the discrepancy is not because of any mistakes made by Dr. McAuley, but because his modeling used a 30-kw generator which PECO originally stated it would be utilizing. (*Id.* at 3). However, after Dr. McAuley's modeling, PECO submitted the rebuttal testimony of Mr. Harrington which utilized the "clocktower" design and 50-kw heater. (*Id.*).

A comparison of the modelled 1-hour results of Dr. McAuley and Mr. Harrington are shown below. Dr. McAuley's chart is at the top and Mr. Harrington's is below:

**Table 2. Modeled Maximum 1-Hour Averaged Concentrations at the Preferred Location.**

Pollutant	Peak Conc.	Location of Peak Conc.			
	( $\mu\text{g}/\text{m}^3$ )	X (m)	Y (m)	(m)	(ft)
Benzene	0.02598	469209.69	4424290.45	31	103
Benzene (Worst Case)	1.94877	469209.69	4424290.45	31	103
Carbon Monoxide	184.0	469209.69	4424290.45	31	103
<b>Carbon Monoxide (Worst Case)</b>	<b>2,329.3</b>	469209.69	4424290.45	31	103
Formaldehyde	0.41624	469209.69	4424290.45	31	103
Formaldehyde (Worst Case)	25.43713	469209.69	4424290.45	31	103
Nitrogen Dioxide (NO <sub>2</sub> )	155.2	469259.69	4424290.45	35	115
<b>Nitrogen Dioxide (Worst Case)</b>	<b>1,210.0</b>	469209.69	4424290.45	31	103
Particulate Matter (PM <sub>2.5</sub> )	11.8	469259.69	4424290.45	35	115
<b>Particulate Matter (Worst Case)</b>	<b>28.9</b>	469209.69	4424290.45	31	103

**Table 4-3. AERMOD Predicted Modeling Results (Preferred Site)**

Pollutant / Averaging Period	Concentration Rank	Max. Project	Ambient	Total	
		Impact ( $\mu\text{g}/\text{m}^3$ )	Background ( $\mu\text{g}/\text{m}^3$ )	Concentration ( $\mu\text{g}/\text{m}^3$ )	NAAQS ( $\mu\text{g}/\text{m}^3$ )
CO 1-HR	H2H	6,409	2061	<b>8,470</b>	40,000
CO 8-HR	H2H	3,431	1718	5,149	10,000
NO <sub>2</sub> 1-HR	H8H (5-Year Avg.)	97.0	76.4	<b>173.4</b>	188
NO <sub>2</sub> ANNUAL	H1H	9.6	18.1	27.8	100

<b>PM2.5 24-HR</b>	H8H	5.5	23.6	<b>29.1</b>	35
PM2.5 ANNUAL	H1H (5 year Avg.)	1.1	10.1	11.2	12

**Note:** The emissions for the emergency engine have been scaled **for 500 hours per year operation (500/8760) for** the assessment of annual NO2 and PM2.5, as well as 1-hour NO2.

(See TM-2, Table 2 and JH-4, Table 4-3)(emphasis supplied). Not only are the results modelled by Mr. Harrington higher than those of Dr. McAuley, the notation under Mr. Harrington’s chart proves that he too used 8760 hours (24/7 run time) for the generator.

These modelled pollutants, coupled with the undisputed medical testimony of Dr. Ketyer, show that the Station will be detrimental to public welfare. Indeed, the established emissions have been linked with impaired fertility, miscarriage, and poor birth outcomes such as low birth weight, and prematurity — each of which carry lifelong health burdens for children, their families, and society. (Marple Twp., Uhlman, Baker Remand Statement No. 3, p. 5). Additional concerns include the exacerbation of lung symptoms in children and adults with asthma and other chronic lung diseases. (Id.). PM 2.5, a known carcinogen, is linked to lung cancer, bladder cancer, and is associated with other types of cancer in adults. (Id.).

Notably, PECO did not challenge any of the health concerns caused by emissions. The only arguments asserted by PECO pertained to Dr. McAuley’s air modelling (which PECO’s own witness showed higher concentrations in his modelling) and the fact that the emissions would not rise to any levels which required air permits.

**c. THE COMMISSION SHOULD REJECT THE PECO PETITION BECAUSE PECO, AS THE PROJECT PROPONENT, HAS NOT PROVIDED THE INFORMATION NECESSARY FOR THE COMMISSION TO CONDUCT A CONSTITUTIONALLY SOUND ENVIRONMENTAL REVIEW**

PECO has woefully failed to present its Petition to the Commission in an appropriate manner from the outset. PECO has self-righteously dismissed any of the concerns to the public raised by Intervenors and has continuously maintained that it has no proactive duty to prove the safety of its own Project. Indeed, PECO previously submitted that it has no “burden to disprove the adverse impacts conjured—but not demonstrated—by the Intervenors” (*See* PECO Reply Br. P. 9).

PECO has failed to meet its burden of producing sufficient evidence of the environmental impacts of the Station and the Project to enable the Commission to conduct a “constitutionally sound environmental impact review.” PECO failed to produce evidence of indirect impacts and also failed to produce evidence of alternatives and mitigating measures that would reduce the impacts, or other fundamental elements of environmental impact review required not only under federal law, but also under state laws that apply to land use and municipal projects. In the absence of such information, the Commission cannot determine whether the Station and the Project are necessary and in the public interest, such that PECO’s application must be denied.

The Commonwealth Court’s decision in Marple Township, *supra*, imposes two requirements on the PUC in this proceeding. The Commonwealth Court held that “a Section 619 proceeding is constitutionally inadequate unless the Commission completes an appropriately thorough environmental review of a building siting proposal *and, in addition*, factors the results into its ultimate determination regarding the reasonable necessity of the proposed siting.” *Id.* at 12 (emphasis supplied). The Court remanded the proceeding to this Commission “with instructions that it issue an Amended Decision regarding the PECO Petition, which must

incorporate the results of a constitutionally sound environmental impact review as to the proposed siting on the Property of the Fiber Building and the Station Building.” *Id.* at 13. It is the Commission’s responsibility alone to perform a “constitutionally sound environmental impact review” because no outside agency has performed any part of this review.<sup>6</sup>

While the Commission has the obligation under this decision to perform that review, PECO has the burden of providing sufficient information to the Commission to conduct its own independent evaluation. As the petitioner for a Section 619 exemption, PECO is responsible for providing the Commission with adequate information in support of its application and has the burden of proving that the requested exemption should be granted. 66 Pa.C.S. § 332. This necessarily includes all information needed for the Commission to determine whether PECO’s proposal is reasonably necessary for public convenience and welfare. As the Commonwealth Court has instructed, an integral part of the reasonable necessity inquiry is an evaluation of the environmental impacts of the proposal.

That is, the review must cover air, water, and the “natural, scenic, historic, and esthetic values of the environment.” It must also cover “public natural resources.” Public natural resources include “not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and groundwater, wild flora, and fauna (including fish) that are outside the scope of purely private property.” *Robinson Township*, 83 A.3d at 954 (plurality).

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<sup>6</sup> In *Township of Marple*, the Commonwealth Court held that the Commission could satisfy this obligation by deferring to “other agencies’ determinations regarding environmental issues,” but that the Commission did not point to any other agency determination regarding these issues. *Id.* at 12. Likewise, in the present proceeding, there are no other relevant outside agency determinations regarding environmental issues.

On remand, rather than producing evidence that would enable the Commission to conduct a “constitutionally sound impact review,” PECO produced a woefully inadequate record lacking in virtually all the elements federal law requires for environmental review under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (“NEPA”). Notably, PECO failed to produce any evidence regarding indirect or downstream impacts, cumulative impacts, alternatives including the no action alternative, or environmental justice impacts. Since PECO has the burden of proof of providing the Commission with the information necessary for the Commission to discharge its trusteeship duties under Section 27, and PECO has failed to meet that burden, PECO’s Petition must be rejected.

PECO’s submission is inadequate because it summarily concluded that, because there was no air permit required, the Station would generate no unreasonable environmental impacts. This approach fails to consider the tangible, quantifiable impacts the Station location has on air quality, fails to assess the cumulative impacts of the Station, fails to identify and assess those residents in the local environment, fails to adequately consider alternatives and fails to assess adverse impacts that cannot be avoided.

***i. Failure to calculate impact on air quality***

PECO has provided the Commission with no estimates of the air pollutants associated with the Station. The Station includes two large sources of air emissions: (1) the Cold Weather Technologies (CWT) Indirect Line Heater (“Line Heater”) with six boilers and (2) an emergency generator. (Exhibit TM-2 at 1). Additionally, leaks from the valves, flanges and connectors as well as tailpipe emissions associated with this project have the potential to emit regulated pollutants in quantifiable amounts. (McAuley Remand Direct at 4). In particular, the Line Heater and emergency generator will emit numerous air pollutants having a direct impact on health,

including nitrogen oxides, carbon monoxide, volatile organic compounds, PM2.5, and formaldehyde. (McAuley Remand Direct at 4-5). These air pollutants pose major health concerns. For example, formaldehyde is a known human carcinogen and any levels should be avoided. (McAuley Remand Direct at 10). Elevated levels of nitrogen oxide have severe respiratory health impacts and can also contribute to the formation of ground level ozone, which has additional associated health impacts. (McAuley Remand Direct at 11-12). Many other pollutants the Station will emit have other well-documented health impacts. Therefore, the Station will produce air pollutants that have known health impacts.

Instead of quantifying and analyzing these air pollution impacts of the Station, PECO concluded that there will be “no unreasonable environmental impacts to air quality from the construction or operation of the Station” merely because no individual air permit is required for these emissions sources. (PECO St 6-RD J Harrington at 11). However, needing a permit is not relevant in determining whether site-specific factors may lead to adverse air quality impacts. (McAuley Remand Rebuttal at 3). In this case, it is reasonably foreseeable that emissions from this plant may cause negative health impacts nearby and may have far worse cumulative effects. Despite this, PECO failed to perform any emissions modeling or consider any site-specific factors in comparing potential sites or reaching its conclusion. (McAuley Remand Rebuttal at 2).

The Station site selection has tremendous potential to influence the ambient air quality. An EPA-approved dispersion model shows that “measurable air quality impacts would occur up to 1 mile away from the facility,” but that “the worst impacts would be borne by residents living within one-half mile.” (Exhibit TM-2 at 9). Nearly 3,000 residents live within half a mile of the selected Station site. (Exhibit TM-2 at 9). 1-hour averaged nitrogen oxide concentrations from

the Station could reach 155 ug/m<sup>3</sup> under typical operating conditions. (Exhibit TM-2 at 12). In worst-case conditions, that figure could reach 1,200 ug/m<sup>3</sup>. (*Id.*). Therefore, PECO failed to provide the Commission with the site-specific information needed to assess the Station's impact.

***ii. Failure to consider Cumulative Impacts***

PECO also failed to consider the impact of cumulative emissions on ambient air quality around the Station. Air pollution emitted by the Station does not exist in isolation, but is added to the existing air pollution already experienced by the community. Outdoor air in Delaware County currently is classified as not attaining the National Ambient Air Quality Standards (NAAQS) for nitrogen dioxide (NO<sub>2</sub>), ozone (O<sub>3</sub>), and fine particulate matter (PM 2.5). (Exhibit JS-2 at 9). And the impact of the Station emissions on top of this background pollution could have serious health consequences. For example, the addition of emissions from the Station could cause 1-hour average NO<sub>2</sub> levels to exceed background concentrations by 200 percent. (McAuley Direct at 7). And in the worst-case emissions scenario, the additional emissions would cause the background 1-hour ambient concentrations of NO<sub>2</sub> to exceed the NAAQS by a factor of six. (McAuley Direct at 11). However, despite these risks and known background pollution in the area, PECO provided no analysis of the cumulative impact the Station would have on ambient air quality. Without such a record, the Commission is unable to understand the impact of the Station on ambient air quality, part of the trust corpus.

***iii. Insufficient information on local environment***

PECO did not prepare a thorough analysis of the local environment to be affected by the Station, providing no information on (1) the population density or socioeconomic characteristics of the project site and its surroundings; (2) distances to existing homes and businesses on



adjacent properties; (3) an Environmental Justice area immediately across Sproul Road from the property; or (4) the existing air quality at the site of its proposed new combustion source. It essentially has ignored the local surroundings of its proposed station and new pipeline. (Marple Twp., Uhlman, Baker Remand Rebuttal Statement No. 1-R, p. 7).

Homes are present on the adjacent lots to the east, north, and west of the facility site, and sidewalks run along two of its sides. There are half a dozen homes and one restaurant within 200 feet. The food and convenience store services along this stretch of Sproul Road draw much pedestrian and vehicle traffic from children and adults. None of the surrounding structures was constructed with fire- and explosion-proof protection measures on walls that face the transfer facility or the high-pressure gas pipeline that is to feed it. Despite the relatively low probability of a major explosion, the potential for lethal damage to resident and transient people unavoidably will be increased if the facility is constructed in this densely populated area. Heavy industrial facilities belong in districts zoned for industrial use (such districts exist in Marple Township). (Marple Twp., Uhlman, Baker Remand Rebuttal Statement No. 1-R, p. 7).

***iv. Failure to consider alternatives***

The Commission should also reject PECO's Petition because it failed to submit adequate information on alternatives to the Station. Without such information, the Commission does not have an adequate record to determine whether or not, factoring in the Station's environmental impacts as required by the Commission's ERA trusteeship duties, overriding the Township's zoning disapproval of the station is "reasonably necessary for the convenience or welfare of the public." 53 P.S. § 10619.

The Commission must consider alternatives to the proposed project to fulfill its trustee duties under the ERA. As discussed above, the Commission is an ERA trustee, and as such,

when making decisions that may impact the corpus of the trust, must fulfill duties of prudence, loyalty, and impartiality. *PEDF II*, 161 A.3d at 932. Informed decision-making is integral to the discharge of all of these duties, which is why the Commonwealth Court instructed the Commission to conduct a “constitutionally sound environmental review.” *Twp. of Marple*, 194 A.3d at 975. Here, PECO has requested that the Commission make a finding that the Station is reasonably necessary for public convenience and welfare under Section 619. [PECO Petition]. In order to reach an informed decision as to whether the Station is truly necessary for public convenience and welfare in light of environmental impacts, the Commission needs adequate information on alternatives to the project that may have lower environmental impacts, including the no-action alternative.

The Commission, as ERA trustee, is also obliged to take action to conserve the corpus of the trust. As the Pennsylvania Supreme Court has held, “[t]he explicit terms of the trust require the government to ‘conserve and maintain’ the corpus of the trust.” *PEDF II*, 161 A.3d at 932), quoting *Robinson Twp.*, 83 A.3d at 956–57. Accordingly, the Commission must, in evaluating how to respond to PECO’s Petition, be informed regarding alternatives and their impacts in order to discharge its duties to choose the lowest-impact alternative possible consistent with the Commission’s trustee duty to “conserve and maintain” trust resources.

As Dr. Schmid testified, consideration of project alternatives is an integral part of sound environmental review practices: “Documentation of project planning and the formal recording of reasons for rejecting alternatives deemed not viable are basic to the environmental review process.” (*Marple Twp.*, Uhlman, Baker Remand Rebuttal Statement No. 1-R, p. 3). Schmid noted that a major flaw with PECO’s Petition is its failure to include consideration of “the socially and environmentally appropriate, no-action alternative for the reliability station.” (*Id.*).

Federal environmental impact review law, which has been well-developed over the course of the decades since NEPA was enacted in 1970, P.L 91-190, 83 Stat. 852 (Jan. 1, 1970), provides a useful analogue to inform the scope of constitutionally sound environmental impact review under the ERA. Consideration of alternatives is core to environmental review under NEPA. When evaluating a proposed action under NEPA, federal agencies are required to consider a reasonable range of alternatives. 42 U.S.C. § 4332(E); 40 C.F.R. § 1508.9(b); City of New York v. U.S. Dep't of Transp., 715 F.2d 732, 742 (2d Cir. 1983); Hanly v. Kleindienst, 471 F.2d 823, 834–35 (2d Cir. 1972).

As a landmark early case on NEPA established, the purpose of the alternatives requirement is:

to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit analysis. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made.

Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

The alternatives analysis is the “linchpin” of a NEPA environmental review, because only by studying and presenting to the public a reasonable range of alternatives for a proposed action can an agency make an informed decision. Monroe Cty. Conservation Council, Inc. v. Volpe, 472 F.2d 693, 697 (2d Cir. 1972). As recognized in NEPA case law, “[t]he existence of a viable but unexamined alternative renders an [environmental impact review] inadequate.” W. Watersheds Project v. Abbey, 719 F.3d 1035, 1050 (9th Cir. 2013).

PECO claimed to have considered other properties in the Initial Proceedings however, it was clear that PECO narrowed in on 2090 Sproul Road at the Project’s infancy and directed all

focus to this location. Despite insisting that it considered the Don Guanella and cemetery locations, PECO found every reason to make that location an impossible alternative. (SR-3, p.6; R. 122:3-25). PECO never approached the owner to determine if they would voluntarily sell to PECO, like PECO did for the 2090 Sproul Road site. R 1140:3-16; R1142:7-12). PECO dismissed the Don Guanella property for zoning reasons even though the Township had informed PECO that it would work with PECO on zoning for an appropriate site. (Id.). PECO operates 28 gate stations with only 2 others as close to nearest residences as the proposed Station at 2090 Sproul Road. (R.1358:12-24, Exhibit TF-6). All of the other 28 gate stations are further in distance from residences and PECO does not maintain any gate stations which are closer to residences than the proposed Marple Station would be. (R. 1358:23-1359:13).

Mr. Moylan's direct testimony states that the station had to be located proximate to the gas main terminus, however he admitted that the Gas Reliability Station could be in a different location. (Moylan Statement p. 4). If it were to be located at a site outside of the half mile radius from the gas main terminus, PECO would have to install a pair of additional gas mains from the terminus to the site and then back from the site to the terminus. (Id.). PECO went forward with tearing up the roads and installing the 12' main running 11 ½ miles from the Conshohocken gas plant to the Marple Township site to connect with a future station even before it had approval from the Marple Township Zoning Hearing Board for the site. (R.924-25; R.975-76). Mr. Oliver further explained that this was because PECO was moving forward with parts of the project that needed to occur "regardless of where the final reliability station would be built." (R. 925). Thus, PECO admits that it would have been able to construct the Station at a different location.

Finally, PECO did not consider any alternative to building the Station altogether. PECO did not submit any analysis investigating whether or not projected gas demand increases (which

are not immediate) could be managed with lower environmental impacts. As discussed above, PECO bears the burden of proof of demonstrating that the Station is reasonably necessary for public convenience and welfare under Section 619, factoring in environmental considerations as required by the ERA. This requires investigation of reasonable alternatives to the Station that may have lower environmental impacts.

Dr. McAuley analyzed the air quality impacts of placing the Station at the Don Guanella site. The results clearly showed that there would be less environmental impact to the surrounding neighborhoods than placing the Station at the Property. While PECO witness, Mr. Harrington, disputed this in his written *rebuttal* testimony, his own chart from his report confirmed Dr. McAuley's analysis. Indeed, five out of the six pollutants modelled were lower at the alternate location. (R. 2424).

***V. No identification of adverse impacts that cannot be avoided***

PECO prepared no summary of adverse impacts which cannot be avoided. The operation of the Station itself will generate outdoor air pollution from two sources at a location where ambient outdoor standards at present are not being met. One is the onsite combustion of the natural gas (primarily methane) to heat liquified natural gas moved through the 12-inch pipeline. The other source is the valves which control the flow of products through the pipelines, and which typically leak methane. These discharges will increase emissions of carbon dioxide, methane, nitrogen dioxide, nitrous oxide and other air pollutants. Delaware County currently is classified as not attaining the National Ambient Air Quality Standards (NAAQS) for nitrogen dioxide (NO<sub>2</sub>), ozone (O<sub>3</sub>), and fine particulate matter (PM 2.5). (Marple Twp., Uhlman, Baker Remand Rebuttal Statement No. 1-R, p. 9). The operation of the Station will add to the total concentration of these air pollutants.

Finally, another adverse impact that cannot be avoided is the potential risk to life and property. As testified to by Mr. Capuzzi, the Safety Data Sheet for Natural Gas provided by PECO confirms that Natural Gas is an extremely flammable gas, easily ignitable and will form explosive mixtures in air. (Marple Twp. Remand Statement No. 4, p. 3). Despite this being a document that PECO shared, PECO refuses to acknowledge the dangerous risk of the Station. However, on the report of any leak at the proposed facility, at a minimum, the following evacuations must take place:

1. All homes on Cedar Grove Road between Sproul Road and Boxwood Dr.
2. All homes and businesses on Sproul between Parkway W and north of Cedar Grove Rd. (Including Freddy's and Fritch's)
3. The first 3 homes on the east side of Boxwood Dr. from Cedar Grove Rd.
4. The total shut-down of Sproul Road (PA Route 320).

(Id at 4). If the leak is not immediately controlled this isolation area will need to be increased accordingly. (Id.).

PECO witness, Mr. Israni, went to great lengths explaining why he believe that the potential impact radius (PIR) did not apply to this Station. However, even he cannot deny that he testified about the PIR in the Initial Proceedings and failed to mention then that the PIR was inapplicable. In any event, the PIR is a useful calculation in determining whether this Station is appropriate for its location in relation to its close proximity to neighboring persons and property. (Id.). Whether the PIR is applicable is irrelevant. What is relevant is understanding the number of residents in the Marple community that would be impacted by an adverse event at the Station.

All experts testifying on safety issues (Mr. Israni, Mr. Marx and Mr. Capuzzi) confirmed that there are persons who live, work or frequent the surrounding area of impact who could

suffer injury or death, as well as buildings and property located therein which would be damaged, in the event of gas leak, fire or explosion at the Station.

**d. PECO’S STATION IS NOT REASONABLY NECESSARY FOR THE CONVENIENCE AND WELFARE OF THE PUBLIC IN LIGHT OF AN ENVIRONMENTAL IMPACT ASSESSMENT PURSUANT TO THE PENNSYLVANIA CONSTITUTION**

If PECO had properly factored the impacts of the proposed Station on the environment and community into its determination of need for the Project and if PECO had presented the Commission with the information necessary for a “constitutionally sound environmental review,” the Commission would have determined PECO did not satisfy the requisites for its Section 619 Petition. The evidence that was adduced by the Township and Intervenors showed overwhelmingly that (1) the Project and Station were designed for the sole purpose of expanding PECO’s natural gas distribution network to new customers and new areas and that it was not necessary to meet the needs of PECO’s **existing** customers now, and (2) that the expansion of PECO network will result in emissions that will produce pollutants which effect air quality and the health of its residents including future generations who are the beneficiaries of the ERA trust. To approve PECO’s petition under those facts would violate the Commission’s duty as a trustee under Article I, § 27.

The Commonwealth Court also required the Commission to factor the results of its “constitutionally sound environmental review” into “its ultimate determination regarding the reasonable necessity of the proposed siting,” Township of Marple, supra. at 12, must also be consistent with Article I, Section 27. Under Section 27, the necessary review here is not simply procedural; it is also substantive. Article I, Section 27 imposes limits on governmental authority, including the authority of the PUC. The Commonwealth may not unreasonably impair the resources and values identified in the first clause of Article I, Section 27. Robinson Twp, 83

A.3d at 951-52; Frederick v. Allegheny Twp. Zoning Hearing Bd., 196 A.3d 677, 695 (Pa. Cmwlth. Ct. 2018). Concerning the second or public trust clause, “the Commonwealth has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties.” PEDF II, 161 A.3d at 933. These limitations apply to the PUC.

Under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h, which has been discussed extensively in this proceeding, a federal agency that prepares a legally adequate environmental assessment or environmental impact statement may lawfully proceed with an environmental damaging project. Strycker’s Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980). That is not how the Commission’s review can constitutionally function under Article I, Section 27. Rather, the purpose of this review must be to prevent the Commonwealth from violating the rights of Pennsylvania citizens, including future generations, in contravention of its duty as a trustee. When the review is insufficient, or it shows that the gas Project will violate these rights, the PUC is legally obligated to disapprove the Station.

If PECO had presented the Commission with the information and data necessary for a sound environmental assessment, the Commission could readily determine that these adverse environmental impacts could be avoided with perhaps an alternative location. Because those impacts were masked from the start behind claims of permits and permitting applications, Marple and the pro se Intervenors were forced to collect essential environmental impact information on their own.

Accordingly, the Commission has been presented with information that includes: the increase of detrimental air pollution, adverse health effects from that air pollution, risk to the surrounding community related to an adverse event, and less of an air quality impact at an



alternate location. This information, coupled with PECO’s admission that it has no immediate need for the Station and that its current supply is adequate, should lead the Commission to deny PECO’s Petition in light of its duty under Article 1, Section 27 of the Pennsylvania Constitution.

## VII. CONCLUSIONS

Under Section 619, the PUC must decide in this proceeding whether “the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public.” 53 P.S. § 10619. As discussed throughout, clearly this Project would harm the public welfare. Approving the gas expansion project would violate the PUC’s obligation to interpret Section 619 in a manner that is consistent with Article I, Section 27.

Although PECO has labelled the Project and the Station as designed to promote “reliability,” it is not necessary to meet the needs of PECO’s *existing* network and customers.

Thus, if the Commission considers the need for the Project and Station in light of the impacts of air quality, safety, health, alternatives and the impacts of the Project on climate as part of a “constitutionally sound” environmental impact analysis, the Commission must conclude that the Project and the Station are neither necessary nor in the public interest.

Respectfully Submitted,

MCNICHOL, BYRNE & MATLAWSKI, P.C.

/s/ J. Adam Matlawski, Esquire

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# **APPENDIX A**

**Proposed Findings of Fact**

**Proposed Conclusions of Law**

**Proposed Ordering Paragraphs**

## **PROPOSED FINDINGS OF FACT**

1. On February 26, 2021, PECO Energy Company (“PECO”) filed a Petition before the Public Utility Commission (“PUC”) requesting that the Commission, pursuant to 52 Pa. Code § 5.41 and Section 619 of the Municipalities Planning Code (“MPC”), 53 P.S. § 10619, make a finding that: (1) the situation of two buildings at 2090 Sproul Road, Marple Township, Delaware County, Pennsylvania, 19008 (the “Property”) for a proposed Gas Reliability Station (the “Station”) is reasonably necessary for the convenience and welfare of the public and, therefore, exempt from the Marple Township Zoning Code pursuant to MPC § 619, and (2) a proposed security fence appurtenant to the Gas Reliability Station is a “facility” under 66 Pa. C.S. § 102 and is therefore exempt from local zoning requirements (the “Petition”).

2. The Station is part of a larger project by which PECO intends to install an 11.5-mile high-pressure gas main to deliver gas from its West Conshohocken facility to the Station in Marple Township. The Station by on-site process will reduce the pressure of the gas and then feed the gas into a distribution trunk line at the intersection of Lawrence Road and Sproul Road in Marple Township. (the “Project”).

3. Prior to filing its Petition in this matter, PECO submitted a zoning application with the Marple Township Zoning Hearing Board seeking a special exception to operate a Gas Reliability Station (the “Station”) at the Property. After a hearing on the matter, the Zoning Hearing Board denied PECO’s application issuing Findings of Fact and Conclusions of Law. (R. 0379a-0394a).

4. PECO appealed the denial of its zoning application to the Delaware County Court of Common Pleas and the matter is currently pending.

5. On March 11, 2021, Marple Township filed a Petition to Intervene and on April 12, 2021, the County of Delaware, Pennsylvania filed a petition to Intervene.

6. On or about April 12, 2021, sixty-three *pro se* protestants filed Protests to the Petition.

Two residents, Mr. Ted Uhlman and Julie Baker, filed Petitions to Intervene in addition to Protests.

7. Public Input Hearings were held on May 25 and 26, 2021, including approximately sixteen (16) hours of public comment, at which time ninety-three individuals testified, the overwhelming majority of which were Marple Township residents who voiced their opposition to and concerns with the siting of the Gas Reliability Station at the proposed location given the property's proximity to residences, a family restaurant, businesses and an elementary school.

8. Written testimony, rebuttal and surrebuttal were exchanged by the parties and evidentiary hearings were held before Administrative Law Judge Emily DeVoe ("ALJ DeVoe") via telephonic proceedings on July 15, July 16, July 20, and July 22, 2021 (the "Initial Proceedings").

9. In the Initial Proceedings, PECO successfully opposed any consideration of the environmental impacts of the Station or the Project.

10. The Commonwealth Court rejected the Commission's adoption of PECO's position as inconsistent with the requirements of Pennsylvania's Environmental Rights Amendment ("ERA"), Article I, Section 27. Pa. Const. art. I, §27. The Commonwealth Court stated:

In other words, a Section 619 proceeding is constitutionally inadequate unless the Commission completes an appropriately thorough environmental review of a building siting proposal and, in addition, factors the results into its ultimate determination regarding the reasonable necessity of the proposed siting.

Twp. Of Marple v. Pa. PUC, 294 A.3d 965, 974 (Pa. Cmwlth. Ct. 2023).

11. The Commonwealth Court vacated the Commission's decision and remanded the matter, requiring that the Commission incorporate a "constitutionally sound environmental impact review" into an amended decision. Id. at 975.

12. Remand evidentiary hearings were held on November 14, 15, 17 and 28, 2023 (collectively the “Remand Proceedings”). PECO presented the testimony of seven witnesses (including rebuttal testimony), five of which are employees of PECO.

13. Marple Township and Intervenors, Ted Uhlman and Julie Baker, presented the testimony of Dr. Timothy McAuley, Dr. James Schmid, Dr. Ned Ketyer, Dr. Raymond Najjar, Mr. James Capuzzi and Mr. Jeffrey Marx.

14. PECO’s Station is comprised of four line heaters, a generator, a variety of other equipment including valves, piping, regulators, a battery backup system, and electronic/communications equipment. (PECO Statement 1-RD, p. 3).

15. The Station consists of two buildings; the Station Building which includes most of the equipment for the Station and the Fiber Building which houses the telecommunications devices. (Id.).

16. PECO obtained an NPDES permit, completed an Environmental Checklist and retained Stantec for a Phase I and Phase II assessments, all which were completed in anticipation of construction, not operation. (PECO Statement 2-RD at 4, 6 and 13).

17. PECO does not have a current gas supply shortage (R. 913:13-20) and has adequate supply to meet mandated requirements in a safe, cost-effective manner. (R. 1279:23-1280:11).

18. PECO has sufficient supply currently in order to meet design day requirements. The reason for the desired additional supply to be added by the Project is to reduce PECO's reliability on market purchases, reduce the price volatility and to increase “reliability.” (R. 1276:8-20).

19. This Project will not fully resolve the PECO’s projected deficit in the long term. (R. 1282:1-2).

20. Pipeline consultant, Mike Israni, testified in both the Initial Proceedings, on rebuttal, and

the Remand Proceedings.

21. In the Initial Proceedings, Mr. Israni provided extensive information regarding the potential impact radius (“PIR”) in response to Delaware County witness, Timothy Boyce. (PECO Statement 1-SR, p. 23).

22. Mr. Israni testified that based on PECO’s operational figures of pressure of the main connected to the Station of 525 PSI and the pressure arriving at the Station anticipated to be less than 200 PSI with a 12-inch diameter main, in the scenario of a serious incident at that natural Gas Reliability Station, the potential impact radius is 190 feet for 525 PSI and at 200 PSI, the potential impact radius is 117 feet. (Id. at 23-24; R. 1618:3 -1620:4).

23. Mr. Israni defined PIR as the radius of a sector where if the pipeline fails, the persons or the buildings within that impact circle may be impacted. (R. 1618-1619).

24. Mr. Israni testified that the failure of a pipeline where the gas was ignited resulting in flame or plume of that flame or fire would have impact on persons in that radius, with impacts such as such as 2<sup>nd</sup> degree burns from exposure to flame heat (20 secs), death within 30 seconds and building ignition within 30 minutes. (Id.).

25. Now, on remand, Mr. Israni states that the PIR is not relevant to this Station and should not be considered. (PECO Statement 3-RD, p. 3).

26. On remand, pipeline permit consultant, Jeffrey Harrington, provided direct testimony that contained no modeling, testing or assessment of environmental impacts.

27. To render his expert opinion on the environmental impacts from the operation of the Station, Harrington reviewed permit applications prepared by PECO, two issued permits and other Station documentation. (PECO Statement 3-RD, p. 5).

28. After Marple presented the air modeling report of expert witness, Dr. Timothy McAuley,

PECO submitted the remand rebuttal testimony of Mr. Harrington which included his modeling.

29. Mr. Harrington's rebuttal testimony relied heavily on the argument that the line heaters and standby generator were subject to exemptions to air permit requirements. (PECO Statement 6-RR, p. 3).

30. The pollutants modelled by Mr. Harrington, NO<sub>2</sub> (nitrogen dioxide), CO (carbon monoxide) and PM<sub>2.5</sub> (particulate matter), all showed quantifiable amounts of emissions. (Id. at p 12).

31. Mr. Harrington admits that there will be an impact to air quality and to human health. (R. 2414).

32. Mr. Harrington's conclusion that the construction of the Station would not cause unreasonable impacts to the environment is based solely on the Station not requiring a permit. (Id. at 2412-13).

33. As to the alternate location, the Don Guanella site, which was modelled by Mr. Harrington, 5 of the 6 modelled pollutants were lower than at the proposed Property. (R. 2424).

34. The Station will not meet Marple Township's noise ordinance without noise attenuation measures, such as a building design with low noise ventilation systems, low noise gas heaters, noise barriers at the property boundaries, low noise valves and acoustical pipe coverings. (R. 1979).

35. Because Marple sound expert, Mr. Reginald Keith, did not know of a final design for the Station he could not conclusively say that the Station will operate within the Marple ordinance. (R. 1979-80).

36. With the changes that have been made since the original sound study, such as the

utilization of a larger generator, increase in the footprint for additional gas capacity and climate control equipment on the fiber building, then the noise from the Property could also be increased. (R. 1980).

37. There has been no further noise assessment completed based in a final plan or changes to the equipment. (R. 1981).

38. Dr. McAuley testified on behalf of Marple Township and assessed whether the Station would create an elevated risk related to increased air emissions from the Station. (R. 2511).

39. The Station will include several processes and equipment that have the potential to emit regulated pollutants in quantifiable amounts. (Marple Twp. Remand Stmt. No. 1, p. 4).

40. These processes and equipment include the heater, standby generator, leaks from valves, flanges and connectors, roadways, and tailpipe emissions from automobiles. (Id. at 4-5).

41. Dr. McAuley calculated the potential to emit (PTE) of a source of emissions pursuant to the EPA's guidance. (Id. at 5). The Clean Air Act defines PTE as the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. (Id.)

42. Based on the assessment, it was determined that air quality impacts from the proposed facility would be experienced by communities as far away as one mile from the Station. (Id.).

43. Specifically, within a one-mile radius from the Station, the Station would cause or contribute to measurable impacts from emissions of nitrogen dioxide (NO<sub>2</sub>), carbon monoxide (CO), particulate matter (PM<sub>2.5</sub>), benzene and formaldehyde, among others. (Id.)

44. The most significant air quality impacts would occur within a half-mile of the facility. (Id.)

45. Indeed, pollutants will not stop at the fence line of the Station. (R. 2477). Pollutants, gases interact, and particulates migrate and grow. (Id.).



46. In evaluating worst case 1-hr conditions at the Property, levels of 1-hour ambient concentrations for NO<sub>2</sub> exceed the National Ambient Air Quality Standards (NAAQS) by almost 6 times with a possible worst case modeled emissions concentration of 0.632 ppm for 1-hour. The NAAQS 1-hour is 0.1 ppm. (Id.)

47. Exposure to elevated levels of NO<sub>2</sub> above the NAAQS have shown acute and chronic health effects in children, adults and elderly and have been shown to be directly linked with issues of lung development such as breathing rates and lung volume, throat and lung upper respiratory irritation of airways and asthma exacerbation and development over time. (Id. at 11).

48. Additional studies have shown evidence of increased inflammation of the airways, wheezing, and coughing leading to elevated emergency room visits and reduction of immunity leading to increased lung infections. (Id.).

49. Therefore, the 1-hour concentrations found for NO<sub>2</sub> modeled “would unequivocally result” in adverse health effects across the community. (Id.).

50. Dr. Ketyer testified on behalf of Marple Township, Ted Uhlman and Julie Baker. He is a pediatrician who cared for patients before retiring from practice. (Marple Twp., Uhlman, Baker Remand Stmt. No. 3, p. 2).

51. Dr. Ketyer analyzed the emissions that Dr. McAuley and Jeffrey Harrington describe will be emitted from the facility.<sup>1</sup>

52. Dr. Ketyer explains that each component of the air pollution generated by burning natural gas has very significant health risks associated with it. (Id. at 4).

53. Although sometimes small in number, there is no safe level of exposure to any

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<sup>1</sup> See TM-2, Table 2 and JH-4, Table 4-3.

component of pollution resulting from natural gas combustion. (Id.).

54. It is known that even small amounts of exposure, even when brief, can produce significant health signs and symptoms that can affect quality of life for some and increase the risk of poor health outcomes for everyone. (Id.)

55. Modern air pollution caused mostly from burning fossil fuels like natural gas can impair fertility, complicate pregnancies, and lead to poor birth outcomes. (Id.).

56. ADHD, learning disabilities, and even the development of autism has been associated with air pollution exposure during pregnancy. (Id. at 5).

57. Fine and ultrafine particulate matter (PM 2.5) has been linked with impaired fertility, miscarriage, and poor birth outcomes such as low birth weight, and prematurity — each of which carry lifelong health burdens for children, their families, and society. (Id. at 5).

58. Breathing air contaminated with PM 2.5 exacerbates lung symptoms in children and adults with asthma and other chronic lung diseases. (Id.).

59. PM 2.5 is a known carcinogen, causing lung cancer and bladder cancer, and is associated with other types of cancer in adults. (Id.).

60. Breathing PM 2.5 causes headaches in some people and sinus problems in others. (Id.)

61. There is no safe level of PM 2.5 exposure because even small exposures (**even those under standards**) can still result in noticeable health symptoms. (Id.).

62. Volatile organic compounds (VOCs) such as benzene will be produced from the burning of natural gas. (Id. at 6). Benzene is a known carcinogen, causing cancer in children and adults. (Id.).

63. Fossil fuel combustion (which includes natural gas) results in emissions of other harmful

VOCs potentially leading to serious health concerns, including toluene (permanent neurological damage), ethylbenzene and xylene (ENT and neurotoxicity), and formaldehyde (ENT and lung irritant, human carcinogen). (Id.).

64. In addition to acute exposures to toxic air emissions, cumulative exposures can cause serious health problems, particularly in women who are pregnant, and in children who may not develop chronic heart and respiratory disorders or cancer until years and even decades have passed after exposure. (Id. at 10).

65. PECO did not challenge any of the health concerns caused by emissions. The only argument asserted by PECO was that the emissions would not rise to the level which required air permits.

66. Jim Capuzzi, Fire Marshal for Marple Township for over a decade, testified on behalf of the Township in both the Initial Proceedings and Remand Proceedings.

67. The Safety Data Sheet for Natural Gas provided by PECO confirms that Natural Gas is an extremely flammable gas, easily ignitable and will form explosive mixtures in air. (Marple Twp. Remand Statement No. 4, p. 3).

68. This Data Sheet calls for an immediate isolation of the leak area for at least 100 meters (330 feet) in all directions. This would mean that on the report of any leak at the 1 proposed facility at a minimum the following evacuations must take place:

1. All homes on Cedar Grove Road between Sproul Road and Boxwood Dr.
2. All homes and businesses on Sproul between Parkway W and north of Cedar Grove Rd. (Including Freddy's and Fritch's)
3. The first 3 homes on the east side of Boxwood Dr. from Cedar Grove Rd.
4. The total shut-down of Sproul Road (PA Route 320).

(Id at 4).

69. If the leak is not immediately controlled this isolation area will need to be increased accordingly. (Id.).

70. Should there be a leak emanating from a pipe flange ahead of the main valve of the incoming gas line inside the Station, it will be necessary to manually shut the valve in the street. (Id.). Considering the community would have to wait until the proper PECO employee arrived on scene, each second that the leak goes unmitigated increases the potential for an explosion with widespread destruction and possible loss of life. (Id.).

71. The PIR is a useful calculation in this determination of whether this Station is appropriate for its location in relation to its close proximity to neighboring persons and property. (Id.).

72. Jeff Marx provided expert testimony regarding the safety of the Station. He explained the hazards that could be present if an accidental released occurred. (Marple Twp. Remand Statement No. 2).

73. Those hazards are exposure to a flash fire following ignition of a vapor cloud, exposure to thermal radiation due to a jet fire, or exposure to a blast wave following ignition of a flammable vapor cloud that is confined. (Id. p. 4).

74. The largest impacts would be from potential fire events. (Id. at 6). If an equipment failure of significant magnitude were to occur that releases natural gas, and that gas is ignited, there could be fire impacts in the immediate areas outside the Station boundaries. (Id.).

75. All experts testifying on safety issues (Mr. Israni, Mr. Marx and Mr. Capuzzi) confirmed that there are persons who live, work or frequent the surrounding area of impact who could suffer injury or death, as well as buildings and property located therein which would be damaged, in the event of gas leak, fire or explosion at the Station.

## PROPOSED CONCLUSIONS OF LAW

1. Section 332(a) of the Public Utility Code (“Code”), 66 Pa. C.S. 332(a), provides that a party seeking a rule or order from the Commission has the burden of proof in that proceeding.

2. The preponderance of the evidence standard requires proof by a greater weight of the evidence. Commonwealth of Pennsylvania v. Williams, 732 A.2d 1167 (Pa. 1999).

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

4. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Borough of E. McKeesport v. Special/Temporary Civil Service Commission, 942 A.2d 274, 281 (Pa. Cmwlth. Ct. 2008).

5. If the applicant sets forth a prima facie case, then the burden shifts to the opponent. McDonald v. Pennsylvania Railroad Co., 36 A.2d 492 (Pa. 1940).

6. Establishing a prima facie case requires either evidence sufficient to make a finding of fact permissible or evidence to create a presumption against an opponent which, if not met, results in an obligatory decision for the opponent.

7. Once a prima facie case on a point has been established, if contrary evidence is not presented, there is no requirement that the applicant produce additional evidence in order to sustain its burden of proof. District of Columbia’s Appeal, 21 A.2d 883 (Pa. 1941).

8. Section 619 of the Pennsylvania Municipalities Planning Code, provides:

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.

53 P.S. § 10619.

9. Article I, Section 27 of the Pennsylvania Constitution provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. Art. 1, §27.

10. The proper standard of judicial review [for alleged violations of the ERA] lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.” Pennsylvania Environmental Defense Foundation v. Commonwealth, 161 A.3d 911, 930 (Pa. 2017) (“PEDF II”).

11. In so ruling, the Court held that the ERA grants citizens of the Commonwealth two separate rights: 1) the right to clean air and pure water and to the preservation of natural, scenic, historic and aesthetic values of the environment; and 2) the right of common ownership by the people, including future generations, of Pennsylvania’s public natural resources.

12. In PEDF II, the Court noted that the first right, which comes directly from the text of the ERA itself, “places a limitation on the state’s power to act contrary to [the] right, and while the subject of the right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional.” PEDF II, 161 A.3d at 931-32.

13. The PEDF II Court expressly noted that the Commonwealth’s trustee obligations “are not

vested exclusively in any single branch of Pennsylvania’s government”; rather, “all agencies and entities of the Commonwealth government, both statewide and local, have a fiduciary duty to act toward the corpus with prudence, loyalty and impartiality.” *Id.* at 931 n.23.

14. Accordingly, the Commission has a fiduciary duty to the people of the Commonwealth of Pennsylvania to act with prudence, loyalty and impartiality.

15. In Pennsylvania, terrain and natural conditions frequently differ throughout a municipality, and from municipality to municipality. As a result, the impact on the quality, quantity, and well-being of our natural resources cannot reasonably be assessed on the basis of a statewide average. Protection of environmental values, in this respect, is a quintessential local issue that must be tailored to local conditions. Robinson Township v. Commonwealth, 83 A.3d 901, 979 (Pa. 2013).

16. Furthermore, “the Commonwealth is now over three centuries old, and its citizens settled the territory and built homes and communities long before the exploitation of natural gas... became economically feasible.” As such, “oil and gas operations do not function autonomously of their immediate surroundings.” *Id.*

17. The Supreme Court’s decision in Robinson Township underscores the importance of interpreting Section 619 in a manner that conforms to the Constitution and takes into account the local community and surroundings.

18. Unlike the provisions held unconstitutional in Robinson Township, Section 619 allows the PUC to make a decision that is tailored to the circumstances of a particular case.

19. The Commission’s duty of impartiality in this case extends not only to ratepayers and utility customers; it also extends to the citizens of Marple Township and all people whose rights are recognized under Section 27, including future generations.

20. The Commonwealth Court’s decision in Township of Marple recognizes that PEDF II effectuates a changed legal landscape. Indeed, the Court’s ruling is founded on a recognition that PEDF II changes “the scope of the Commission’s environmental review duties in a Section 619 proceeding.” Township of Marple, 294 A.3d at 12 n. 13.

21. In deciding to remand the prior decision in this matter, the Commonwealth Court stated that the Commission “*failed to identify any such outside agency determinations* that pertained to explosion impact radius, noise, or heater emissions.” Township of Marple, 294 A.3d at 975.

22. PECO chose not to appeal this decision further and therefore this is the law in the Commonwealth of Pennsylvania.

23. The Commission must review the Station and Project as a whole in light of the ERA and not limit its analysis to the two Buildings alone.

24. Notwithstanding the holding in Del-AWARE Unlimited about the limited scope of PUC review under Section 619, the Del-AWARE Unlimited Court’s ultimate holding recognized that the constitutional scope of the project under Article I, Section 27 was broader than the environmental impacts of the location of the pumphouse. Del-AWARE Unlimited, Inc. v. Pennsylvania Public Utility Commission, 513 A.2d 593 (Pa. Cmwlth. Ct. 1986).

25. The Del-AWARE Unlimited Court acknowledged that a broader range of environmental effects were considered by the Department of Environmental Resources (now the Department of Environmental Protection) when it issued permits needed for the overall project. Id. at 596.

26. This matter is distinguishable from Del-AWARE Unlimited in that the EHB “thoroughly scrutinized and upheld” the issuance of the applied-for permits. Id.

27. Here, there is no agency to point to that has thoroughly scrutinized PECO’s proposed



Station and thus no agency to defer to for a sound environmental review consistent with the ERA.

28. The Commission's decision could not be constitutional if its reliance was merely on the two permits obtained by PECO for the construction of the project, coupled with PECO's claim that it need not obtain an air permit for emissions.

29. Detrimental air quality impacts from the proposed facility would be experienced by communities as far away as one mile from the Station. (Marple Twp. Remand Statement No. 1, p. 5). The most significant air quality impacts would occur within a half-mile of the facility. (*Id.*)

30. The pollutants modelled, by both Dr. McAuley and Mr. Harrington, coupled with the undisputed medical testimony of Dr. Ketyer, show that the Station will be detrimental to public welfare.

31. PECO bore the burden of presenting the necessary evidence to the Commission for a sound environmental review.

32. PECO has failed to meet its burden of producing sufficient evidence of the environmental impacts of the Station and the Project to enable the Commission to conduct a "constitutionally sound environmental impact review."

33. The Commonwealth Court's decision in Marple Township, *supra*, imposes two requirements on the PUC in this proceeding.

34. The Commonwealth Court held that "a Section 619 proceeding is constitutionally inadequate unless the Commission completes an appropriately thorough environmental review of a building siting proposal *and, in addition*, factors the results into its ultimate determination regarding the reasonable necessity of the proposed siting." *Id.* at 12 (emphasis supplied).

35. The Court remanded the proceeding to this Commission "with instructions that it issue an

Amended Decision regarding the PECO Gas Petition, which must incorporate the results of a constitutionally sound environmental impact review as to the proposed siting on the Property of the Fiber Building and the Station Building.” *Id.* at 13. It is the

36. Commission’s responsibility alone to perform a “constitutionally sound environmental impact review” because no outside agency has performed any part of this review.<sup>2</sup>

37. While the Commission has the obligation under this decision to perform that review, PECO has the burden of providing sufficient information to the Commission to conduct its own independent evaluation.

38. As the petitioner for a Section 619 exemption, PECO is responsible for providing the Commission with adequate information in support of its application and has the burden of proving that the requested exemption should be granted. 66 Pa.C.S. § 332.

39. This necessarily includes all information needed for the Commission to determine whether PECO’s proposal is reasonably necessary for public convenience and welfare. As the Commonwealth Court has instructed, an integral part of the reasonable necessity inquiry is an evaluation of the environmental impacts of the proposal.

40. That is, the review must cover air, water, and the “natural, scenic, historic, and esthetic values of the environment.”

41. PECO’s proposed Station is not reasonably necessary for the convenience or welfare of

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<sup>2</sup> In *Township of Marple*, the Commonwealth Court held that the Commission could satisfy this obligation by deferring to “other agencies’ determinations regarding environmental issues,” but that the Commission did not point to any other agency determination regarding these issues. *Id.* at 12. Likewise, in the present proceeding, there are no other relevant outside agency determinations regarding environmental issues.

the public in light of a sound environmental assessment pursuant to the ERA.

42. If the Commission considers the need for the Project and Station in light of the impacts of air quality, safety, health, alternatives and the impacts of the Project on climate as part of a “constitutionally sound” environmental impact analysis, the Commission concludes that the Project and the Station are neither necessary nor in the public interest.

### **PROPOSED ORDERING PARAGRAPHS**

IT IS ORDERED THAT:

1. PECO’s Petition for a Finding of Necessity pursuant to 53 P.S. §10619 that the situation of two buildings association with a Gas Reliability Station in Marple Township, Delaware County is reasonably necessary for the convenience and welfare of the public is denied.
2. PECO must comply with the applicable sections of the Marple Township Zoning Code and Subdivision and Land Development for its proposed Gas Reliability Station.