

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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**REMAND MAIN BRIEF OF PECO ENERGY COMPANY**

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December 15, 2023

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## I. INTRODUCTION

PECO Energy Company (“PECO”) respectfully submits this Remand Main Brief in support of its Petition for a Pennsylvania Public Utility Commission (the “Commission”) finding that the situation of two buildings—a telecommunications “Fiber Building” and a “Station Building” covering natural gas utility infrastructure (collectively the “Buildings”)—associated with PECO’s proposed Natural Gas Reliability Station (the “Station”) at 2090 Sproul Road in Marple Township, Delaware County (the “Property”) is reasonably necessary for the convenience or welfare of the public, and therefore exempt from local zoning (the “Petition”) under Section 619 of the Municipalities Planning Code (“MPC”), 53 P.S. § 10619.

In its March 9, 2023 Opinion and Order remanding this matter to the Commission (the “Remand Opinion and Order”), the Commonwealth Court affirmed the broad powers of the Commission to regulate public utilities in the Commonwealth but acknowledged the narrow “carve-out” authorized by Section 619 of the MPC by which local authorities may regulate the location of a public utility building. *Twp. of Marple v. Pennsylvania Pub. Util. Comm’n*, 294 A.3d 965, 971-73 (Pa. Cmwlth. Ct. 2023), *reconsideration and reargument denied* (Apr. 25, 2023). This “carve-out” is available unless the ““Commission decide[s] that the present or proposed situation of the building in question is reasonably necessary for the convenience of welfare of the public.”” *Id.* at 972.

In the Remand Opinion and Order, the Court framed a public utility’s burden in a Section 619 proceeding as follows: “[t]he [public utility] must show that it has made a reasonable decision, not the best possible decision” with respect to the location of a building. *Id.* However, the Court noted that the Commission is nevertheless “obligated to consider ‘the environmental impacts of placing [a building] at [a] proposed location’” pursuant to Pennsylvania’s Environmental Rights Amendment (“ERA”). *Id.* at 973-74. The Court found that the Commission “sidestepped” this

obligation by failing to identify outside agency determinations pertaining to environmental and safety issues and instructed the Commission to issue an Amended Decision on the Petition which must incorporate the results of a “constitutionally sound environmental impact review” as to siting the Fiber Building and Station Building on the Property at 2090 Sproul Road (the “Remand Proceeding”).

Through four days of evidentiary hearings, as well as written testimony, the Commission amassed an extensive record on environmental and safety issues that go well beyond the siting of the Buildings at issue here. PECO submits that it has met its burden of demonstrating that PECO obtained all necessary agency determinations for the Station and provided extensive evidence to demonstrate compliance with a constitutionally sound environmental impact review.

The evidentiary record further proves unequivocally that the opposition by the Intervenors rests not on any legitimate environmental or safety concerns related to the siting of the Buildings (or the Station), but rather on a “not in my backyard” (“NIMBY”) backlash to the siting of this conventional public utility infrastructure which is similar to more than two dozen other stations installed and operating throughout PECO’s service territory.

While the record unequivocally confirms that: (1) PECO has obtained all necessary agency determinations for the Station; and (2) the siting of the Buildings at 2090 Sproul Road is in the public interest even when environmental factors are explicitly considered, PECO believes it is both appropriate and important for the Commission to clarify the legal standards that will apply in future Section 619 proceedings. Local municipalities and neighboring residents should not be allowed to obstruct and delay the installation of critical utility infrastructure by using the narrow carve out to a local regulation of public utility buildings under Section 619 to launch sweeping

environmental challenges to public utility facilities that are wholly unrelated to the siting of buildings themselves and completely outside the well-established, limited scope of the statute.

Consistent with the facts and argument set forth below, PECO respectfully requests that the Commission issue an Amended Decision finding that the situation of the Buildings remains reasonably necessary for the convenience or welfare of the public. The Commission should further underscore that Section 619 is a narrow carve-out to the Commission's preemptive regulation of public utility infrastructure, and reject the Intervenors' efforts to turn a Section 619 proceeding into a back-door opportunity to demand that public utilities disprove every environmental or safety theory imagined by project opponents that have no basis in law or fact.

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

In its Remand Opinion and Order, the Commonwealth Court emphasized the longstanding case law that municipalities do not have the power to zone with respect to utility facilities other than buildings. *See Twp. of Marple*, 294 A.3d at 971-73; *see also Delaware Riverkeeper Network v. Sunoco Pipeline L.P.*, 179 A.3d 670, 679 (Pa. Cmwlth. 2018) (citations omitted), *appeal denied*, 192 A.3d 1106 (Pa. 2018). This enduring principle reflects the reality that:

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

*Twp. of Marple*, 294 A.3d at 971, *quoting Duquesne Light Co. v. Upper St. Clair Twp.*, 105 A.2d 287, 293 (Pa. 1954). Indeed, as the Commonwealth Court noted, the Supreme Court has remarked:

[t]he necessity for conformity in the regulation and control of public utilities is as apparent as the electric lines which one views traversing the Commonwealth. If each [municipality was] to pronounce its own regulation and control over electric wires, pipe



lines and oil lines, the conveyors of power and fuel could become so twisted and knotted as to affect adversely the welfare of the entire state. It is for that reason that the [General Assembly] has vested in the . . . Commission exclusive authority over the complex and technical service and engineering questions arising in the location, construction and maintenance of all public utilities facilities.

*Twp. of Marple*, 294 A.3d at 971-72, quoting *Chester Cnty. v. Phila. Elec. Co.*, 218 A.2d 331, 333 (Pa. 1966); see 66 Pa. C.S. § 1501 (giving the Commission the power to regulate public utility facilities and services throughout Pennsylvania). Section 619 of the MPC, which gives municipalities the ability to regulate via ordinance the location of a building that a public utility wishes to build or use, is a narrow carve-out to this rule. *Twp. of Marple*, 294 A.3d at 971-72.

Contrary to the distorted exaggerations advanced by the Intervenors, the proposed Station is not an “industrial” facility. There will be no manufacturing, refining, processing, or other chemical operations at the Station. Rather, it is simply a regulating station that uses redundant regulators (for safety) to reduce the pressure of the gas flowing into PECO’s distribution mains to serve customers. The Station is similar to PECO’s 28 other gate stations located throughout its Southeastern Pennsylvania service territory and thousands of regulating stations nationwide operated safely by natural gas distribution companies. The only differences between this Station and PECO’s other gate stations are that: (1) PECO will already own the natural gas arriving at this Station (whereas at the other gate stations PECO acquires ownership at those stations); (2) no natural gas odorization will occur at this Station; and (3) this Station has a smaller footprint and operates at lower pressures than PECO’s other gate stations. (*See* Initial Decision, Finding of Fact Nos. 12 and 32; *see also* PECO Statement (“St.”) No. 4 at 9:4-9.)

The Commission has already found that PECO is implementing this Natural Gas Reliability Project to address supply capacity constraints across its entire distribution system. (Initial Decision, Finding of Fact No. 20.) PECO is proposing to install the pressure reducing station in

Marple Township, Delaware County, because that is the area within PECO's distribution system where the additional reliable supply is needed most. (Initial Decision, Finding of Fact Nos. 22-29, 31-32, 35 and 37-43.)

In this proceeding, Intervenor Marple Township, Theodore (Ted) Uhlman, and Julia Baker have sought to dramatically expand the Section 619 carve-out far beyond its narrow scope to try to block the siting of this conventional natural gas distribution facility. The inconsistency and contradictions in the Intervenor's positions illustrate why local authorities and individuals cannot be allowed to dictate where public utility facilities can be built.

For example, in the initial proceeding, Intervenor indicated they did not dispute the need for the project and would support PECO – if only the Station were located elsewhere. At that time, however, Intervenor themselves could not agree on a better site. Ted Uhlman and Julia Baker advocated in favor of the site adjacent to a Wawa at 2024 Sproul Road. (*See* Uhlman Initial Proceeding Br., at p. 4; Tr. 1462:11-25 and 1629:24-1630:20.) Marple Township originally supported that site for the Station, but no longer does. (*See* Marple Township Initial Proceeding Br., at pp. 21-22.)

Indeed, even in this remand proceeding, Intervenor have suggested that PECO should relocate the Station to the Don Guanella site they extolled in the initial proceeding. But relying on the testimony of Professor Raymond Najjar, an oceanographer and climatologist, Intervenor now claim that downstream greenhouse gas (“GHG”) emissions from new customers served by the Station will contribute to climate change, and therefore the Station should not be sited *anywhere*. (*See* Marple Township, Ted Uhlman & Julie Baker Remand St. No. 2 (“Najjar Statement”) at 19:15-18.)

Moreover, although Intervenors continue to dangle the theoretical possibility of siting the Station at the Don Guanella site,<sup>1</sup> they ignore the environmental issues that would arise if that site were chosen. The Don Guanella site consists of woodlands, wetlands, meadows, and creeks and is subject to a Master Plan being developed by the County to create a County Park. (PECO St. No. 6-RR, at 17:6-24:13.) Construction of the Station at this alternative, greenfield location, would arguably cause greater environmental impacts than locating the Station at PECO's preferred location, a vacant, formerly contaminated site (which PECO remediated) that was previously used as a gasoline filling station. (*Id.*) Thus, this case offers a prime example of why our Supreme Court wisely concluded more than 50 years ago that local authorities are ill-equipped to regulate public utilities providing service regionally due to the likelihood of a misguided emphasis on purely local interests.

In the Remand Opinion and Order, the Commonwealth Court noted that "Section 619 . . . does not require a utility to prove that the site it has selected is absolutely necessary or that it is the best possible site." *Twp. of Marple*, 294 A.3d at 972, quoting *O'Connor v. Pa. Pub. Util. Comm'n*, 582 A.2d 427, 433 (Pa. Cmwlth. 1990). To the contrary, in order to satisfy its burden in a Section 619 proceeding, "[t]he [public utility] must show that it has made a reasonable decision, not the best possible decision. Evidence of an alternative may be the basis for questioning the reasonableness of the [utility's] decision but [the] mere existence of an alternative site does not invalidate [its] judgment." *Id.* (quoting *Re Phila. Suburban Water Co.*, 54 Pa. PUC 127, 132 (1980)).

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<sup>1</sup> See Marple Township Remand St. No. 1, Remand Direct Testimony of Timothy, R. McAuley, PhD, at 7, discussing air emission modeling conducted by Dr. McAuley comparing air emission modeling between the "Preferred Location", 2090 Sproul Road, and the "Alternate Location", the intersection of Sproul Road and Reed Road, i.e., the Don Guanella site.

The Commission has already found that the Station is needed to enhance the reliability of PECO's natural gas distribution system. *See* pp. 8-9, *infra*. The Commission should not allow Section 619 to be used as a vehicle to place local interests above the public interest, particularly where, as here, there is no credible evidence of any unreasonable environmental harm from the siting of the Buildings or the Station itself and any contribution to climate change is concededly small.

### **III. HISTORY OF THE PROCEEDING**

#### **A. INITIAL PROCEEDING**

Initiated in 2021, this matter is now on remand from the Commonwealth Court's March 9, 2023 Remand Opinion and Order. On February 26, 2021, PECO filed a petition ("Petition") with the Pennsylvania Public Utility Commission (the "Commission") for a finding pursuant to Section 619 of the MPC, 53 P.S. § 10619, that the situation of the two Buildings associated with PECO's proposed Station at 2090 Sproul Road in Marple Township, Delaware County is reasonably necessary for the convenience or welfare of the public, and therefore exempt from local zoning. Additionally, PECO sought a finding that the Station's proposed security fence is a public utility facility, and therefore exempt from local land use controls.

Marple Township, Delaware County, and *pro se* intervenors Ted Uhlman and Julia Baker ("Intervenors," and collectively with PECO, "the Parties") participated as full participants. Four public input hearing sessions took place regarding PECO's Petition, two on May 25, 2021 and two on May 26, 2021. The Parties submitted direct, rebuttal, and surrebuttal testimony. On July 15, 16, 20 and 22, 2021, evidentiary hearings took place before Administrative Law Judge ("ALJ") Emily DeVoe, and post-hearing briefing was subsequently submitted by the Parties (collectively, the "Initial Proceeding").

The Initial Proceeding included extensive testimony on: (1) the need for the Station as part of a broader Natural Gas Reliability Project to provide an additional reliable supply of natural gas to an area with recognized demand and to reduce price volatility and over dependence on delivered supply and spot market purchases; (2) the purpose of the Station's two Buildings; (3) PECO's considerable efforts to locate a suitable site for the Station and the site selection criteria used to support such effort; (4) why the selection of the site at 2090 Sproul Road was the optimal location due to engineering considerations and availability; (5) PECO's safety record and procedures, and the general safety of natural gas infrastructure in the United States; and (6) health and welfare aspects of the Station, including (i) PECO's planned environmental remediation of the selected site to address pre-existing contamination, (ii) compliance with Marple Township's noise ordinance, and (iii) the Station's preheater's blanket exemption from Pennsylvania Department of Environmental Protection ("PADEP") air permitting.

On December 7, 2021, ALJ DeVoe and ALJ Mary Long issued an Initial Decision finding that the situation of PECO's proposed Fiber Building and Station Building was reasonably necessary for the convenience or welfare of the public pursuant to Section 619. Relying on prior Commonwealth Court and Commission precedent, the Initial Decision determined that the scope of a Section 619 proceeding was limited, and environmental impacts of the Station were outside the scope of a Section 619 proceeding. (*See* Initial Decision Conclusion of Law No. 5). Notably the Initial Decision included Findings of Fact ("FOF") that PECO was implementing the Station to enhance the reliability of its system in two ways: (1) to increase the capacity supply across PECO's entire distribution system to address the deficit between the capacity resources and PECO's calculated design day requirements; and (2) to address customer and usage growth in Delaware County:

- PECO is experiencing natural gas supply constraints that, over the next 10 years, will result in an increased deficit between its current supply capacity resources and its calculated design day demand requirements. (FOF No. 15, citing PECO St. No. 2, at 7:14-22; Exhibits CPT-1, at 25-31, CPT-2, at 18-25, & CPT-3, at 19-29).
- To address this deficit, PECO is implementing a long-term infrastructure project, known as the “Natural Gas Reliability Project,” to increase its capacity supply to diminish its design day constraints. (FOF No. 20, citing PECO St. No. 2, at 3-7).
- The reason for the desired additional supply to be added by the project in question is to reduce PECO's reliance on market purchases and reduce the price volatility and to increase reliability. (FOF No. 35, citing Tr.1276:8-20).
- PECO’s plan to address this deficit consist of two components. First, PECO intends to ensure that sufficient capacity exists to satisfy design day deliverability requirements. The Company’s capacity is diversified into three categories: (1) pipeline firm transportation capacity; (2) pipeline storage capacity; and (3) peaking capacity, which consists of PECO’s Liquefied Natural Gas facility (LNG), propane-air facility, and contracted peaking services with reliable third-party suppliers. (FOF No. 22, citing PECO St. No. 2, at 5:12-16).
- In PECO’s second component of its plan to address the above deficit, PECO intends to ensure that a firm source of supply exists through contractual arrangements with its suppliers to utilize the capacity resources described above and managing its storage inventory to prepare for winter seasons. (FOF No. 23, citing PECO St. No. 2, at 6).
- PECO conducted an analysis using hydraulic modeling to determine current and projected natural gas need and the optimal location to direct the additional capacity from the Natural Gas Reliability Project to where the increased supply would be able to be accepted into the system. (FOF No. 37, citing PECO St. No. 3, at 4:3-7).
- PECO’s analysis showed that Delaware County has the greatest future projected need for peak day demand due to the County’s usage growth. (FOF No. 38, citing PECO St. No. 3, at 5-6).
- PECO’s hydraulic modelling analysis also showed that the intersection of Lawrence and Sproul Roads in Marple Township is a “null point” along PECO’s existing 16-inch distribution trunkline because this area is experiencing the lowest gas pressures in the system. (FOF No. 39, citing PECO St. No. 3, at 5-6).
- In addition to increasing design day requirements, the Natural Gas Reliability Station is also needed to address customer and usage growth in Delaware County. (FOF No. 24, citing PECO St. No. 3, at 4:3-12; see also FOF Nos. 25-28 discussing PECO’s linear trend analysis of customer count and usage growth).

On March 10, 2022, the Commission on exceptions issued an Opinion and Order (the “Commission’s Opinion”) that adopted the FOF in the Initial Decision and **likewise found that the situation of PECO’s proposed Buildings was reasonably necessary for the convenience or welfare of the public.** (See Commission’s Opinion, Conclusions of Law Nos. 4 and 5.) The Commission also relied on prior Commonwealth Court and Commission precedent to determine that the scope of a Section 619 proceeding was narrow and ancillary issues such as the route of public utility facilities to a site, public safety, or environmental concerns were outside the scope of a Section 619 proceeding. (See Commission’s Opinion at 44.)

## **B. COMMONWEALTH COURT APPEAL AND OPINION**

Following the Initial Proceeding, Marple Township filed a petition for review of the Commission’s Opinion with the Commonwealth Court (“Marple Township’s Appeal”). PECO subsequently purchased the site on April 13, 2022 and the deed for the Property was recorded on May 16, 2022. On August 18, 2022, in an effort to resolve certain aspects of the Station during Marple Township’s Appeal, Marple Township and PECO negotiated and entered into a joint stipulation, which was filed with the Delaware County Court of Common Pleas. The joint stipulation provided, *inter alia*, that: (1) PECO’s proposed Station would include an enhanced clock tower design for the Station’s security fence; (2) PECO would comply with the Township’s stormwater management code to develop the clock tower design; (3) PECO would be permitted to construct a lateral from the gas main to the Property along Sproul Road, but PECO would not construct the Station’s Buildings during the pendency of the appeal; and (4) in lieu of permit fees to Marple Township for the Station, PECO would make a donation to the Marple Township Park and Recreational Fund in the amount of \$49,409.84. See Marple Township Exhibit DO-Cross-1.

After briefing and oral argument before the Commonwealth Court, on March 9, 2023, the Commonwealth Court issued its Remand Opinion and Order vacating the Commission’s Opinion

and remanding the matter to the Commission to “issue an Amended Decision” that “must incorporate the results of a constitutionally sound environmental impact review as to siting the so-called ‘Fiber Building’ and ‘Station Building’ upon the Property located at 2090 Sproul Road in the Township of Marple, Pennsylvania.” *Twp. of Marple* 294 A.3d at 975.

The Commonwealth Court found the Commission erred when “. . . it flatly deemed environmental concerns to be outside the purview of Section 619 proceedings.” *Id.* at 973. The Court wrote: “[t]o the contrary, in proceedings of this nature, the Commission is *obligated* to consider ‘the environmental impacts of placing [a building] at [a] proposed location,’ while also deferring to environmental determinations made by other agencies with primary regulatory jurisdiction over such matters.” *Id.* at 973-74. Observing that the source of this responsibility is Article I, Section 27 of the Pennsylvania Constitution—the ERA, the Court concluded that “. . . a [S]ection 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 974.

The Commonwealth Court ruled the Commission had “sidestepped” this obligation because though the Commission had stated it would defer to other agencies’ determinations regarding environmental issues, but it “. . . *failed to identify any such outside agency determinations* that pertained to explosion impact radius, noise, or heater emissions.” *Id.* at 974-75 (emphasis in original). The Court declared the Commission’s deference to be “illusory” due to the failure to identify the outside agency determinations requiring deference and thus found the Commission’s Decision to be constitutionally deficient. *Id.* at 975.



### C. REMAND PROCEEDING

On May 30, 2023, the Commission initiated this Remand Proceeding with a Hearing Notice and a June 5, 2023 Prehearing Conference Order. On June 20, 2023, two individuals who filed protests during the Initial Proceeding filed protests in this Remand Proceeding, and on July 27, 2023, two individuals who had *not* filed protests during the initial proceeding filed protests in this Remand Proceeding. PECO moved to strike the latter group of late-filed protests, which motions were granted by Interim Orders dated August 10, 2023 and September 5, 2023.

On June 28, 2023, a Prehearing Conference was held before ALJ Long. The Parties to the Prehearing Conference were PECO, Intervenors Marple Township, and *pro se* individuals Ted Uhlman and Julia Baker.<sup>2</sup> The parties discussed the litigation schedule and the scope of inquiry for this Remand Proceeding. Intervenor Ted Uhlman requested that the proceeding be conducted by one set of “independent experts.” ALJ Long denied this request during the Prehearing Conference. On July 5, 2023, ALJ Long issued a Prehearing Order establishing the discovery and litigation schedule.

On July 10, 2023, Intervenor Ted Uhlman filed an Application for Reconsideration for the Scope of Inquiry in the Remanded Docket No. P-2021-3024328. PECO answered Mr. Uhlman’s July 10, 2023 Application, and ALJ Long issued an August 10, 2023 Interim Order denying Mr. Uhlman’s Application.

On September 22, 2023, PECO and Intervenors Marple Township, Ms. Baker, and Mr. Uhlman served Remand Direct Testimony on ALJ Long and the active parties. On October 30, 2023, PECO and Intervenors Marple Township, Ms. Baker, and Mr. Uhlman served Remand Rebuttal Testimony on ALJ Long and the active parties. On November 2, 2023, Marple Township filed a Motion in Limine, arguing, *inter alia*, that PECO’s Remand Rebuttal Testimony of witness Jeff

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<sup>2</sup> Delaware County participated as an active party during the Initial Proceeding but did not participate as an active party during the Remand Proceeding.

Harrington should have been filed as direct testimony, to which PECO filed a Response on November 7, 2023. PECO and Marple Township resolved Marple Township's Motion in Limine by agreeing to allow Marple Township to submit surrebuttal testimony on November 24, 2023, and to allow an additional day of hearing limited to the issue of air quality on November 28, 2023.

On November 8, 2023, PECO filed an Evidentiary Challenge to several of the Intervenors' witnesses and exhibits and Marple Township also filed an Evidentiary Challenge to PECO witness Douglas Oliver's testimony. On November 13, 2023, PECO filed an Answer to Marple Township's Evidentiary Challenge.

Evidentiary hearings were held before ALJ Long on November 14, 15, 17, and 28, 2023. At the evidentiary hearings, ALJ Long denied Marple Township's Evidentiary Challenge and granted in part and denied in part PECO's Evidentiary Challenge. During the hearings, the Parties offered rejoinder testimony, conducted cross-examination and submitted the following testimonies and exhibits subject to any corrections identified on the record, which were admitted into evidence by ALJ Long:

- PECO Statement No. 1-RD Remand Direct Testimony of Douglas Oliver
- PECO Statement No. 1-RR Remand Rebuttal Testimony of Douglas Oliver
- PECO Statement No. 2-RD Remand Direct Testimony of Keith Kowalski
  - i. Exhibit KK-1-CONFIDENTIAL
  - ii. Exhibit KK-2
  - iii. Exhibit KK-3
  - iv. Exhibit KK-4
- PECO Statement No. 3-RD Remand Direct Testimony of Mike Israni
  - i. Exhibit MI-3
- PECO Statement No. 3-RR Remand Rebuttal Testimony of Mike Israni
  - i. Exhibit MI-4
- PECO Statement No. 4-RD Remand Direct Testimony of Jim Moylan
  - i. Exhibit JM-6-CONFIDENTIAL

- ii. Exhibit JM-7
- PECO Statement No. 5-RD Remand Direct Testimony of Reginald Keith
  - i. Exhibit RK-1
- PECO Statement No. 6-RD Remand Direct Testimony of Jeffrey Harrington
  - i. Exhibit JH-1
  - ii. Exhibit JH-2
  - iii. Exhibit JH-3
- PECO Statement No. 6-RR Remand Rebuttal Testimony of Jeffrey Harrington
  - i. Exhibit JH-4
  - ii. Exhibit JH-6<sup>3</sup>
- PECO Statement No. 7-RR Remand Rebuttal Testimony of Oleg Shum
- Marple Township Statement No. 1 Remand Direct Testimony of Timothy McAuley
  - i. Exhibit TM-1
  - ii. Exhibit TM-2
- Marple Township Remand Statement No. 1-R Remand Rebuttal of Timothy McAuley
- Marple Township Remand Statement No. 1-RS Remand Surrebuttal Testimony of Timothy McAuley
- Marple Township Statement No. 2 Remand Direct Testimony of Jeffrey Marx
  - i. Exhibit JM-1
  - ii. Exhibit JM-2
- Marple Township Statement No. 4 Remand Direct Testimony of James Capuzzi
- Marple Township Statement No. 2-R Remand Rebuttal Testimony of James Capuzzi
- Marple Township, Ted Uhlman & Julie Baker Remand Statement No. 2 Remand Direct Testimony of Raymond Najjar
  - i. Exhibit RN-1
- Marple Township, Ted Uhlman & Julie Baker Remand Statement No. 3 Remand Direct Testimony of Edward Ketyer
  - i. Exhibit EK-1

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<sup>3</sup> Exhibit JH-5 was not admitted into the record.

- Marple Township, Ted Uhlman & Julie Baker Remand Statement No. 1 Remand Direct Testimony of James Schmid
  - i. Exhibit JS-1
- Marple Township, Ted Uhlman & Julie Baker Remand Rebuttal Statement No. 1-R Remand Rebuttal Testimony of James Schmid
- Marple Township, Ted Uhlman & Julie Baker Supplemental Remand Rebuttal Statement No. 1-SRR Supplemental Remand Rebuttal Testimony of James Schmid
- Marple Township Exhibit DO-Cross-1
- Uhlman Cross Exhibit Kowalski 1, Schematic and Letter

PECO hereby submits this Remand Main Brief in support of its Petition with respect to the Remand Proceeding.

#### **IV. LEGAL STANDARDS**

##### **A. BURDEN OF PROOF AND WEIGHT OF EVIDENCE**

The party seeking a rule or order from the Commission has the burden of proof in that proceeding. 66 Pa.C.S. § 332(a). The degree of proof required before an administrative tribunal is a preponderance of the evidence. *See Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990), *appeal denied*, 602 A.2d 863 (Pa. 1992); *Se-Ling Hosiery v. Margulies*, 70 A.2d 854, 855-56 (Pa. 1950). The “burden of proof” is composed of two distinct burdens: the burden of production and the burden of persuasion. *See Hurley v. Hurley*, 754 A.2d 1283, 1285 (Pa. Super. 2000); *Silver Valley Apartments/Mike Vianello v. PPL Electric Utilities Corporation*, No. C-2015-2510119, 2017 WL 466379, at \*6 (Pa. P.U.C.) (Opinion and Order, Jan. 26, 2017) (“*Silver Valley*”). Once the party with the initial burden of production introduces sufficient evidence to make a *prima facie* case, that burden shifts to the opposing party. *Id.* A *prima facie* case is established if there is enough shown to make a finding of the existence of a fact permissible, or it may mean that such finding is obligatory in the absence of other evidence.

*In re Fink's Est.*, 21 A.2d 883, 888 (Pa. 1941). The burden of production may shift between the parties during the course of a trial. *Silver Valley*, at \*6. Having passed the test of legal sufficiency, the party with the burden of proof must then bear the burden of persuasion to be entitled to a verdict in his favor. *Id.* at \*7.

Pennsylvania Rules of Evidence 701 and 702 require expert testimony on technical issues to be persuasive enough to support the proposing party's burden of proof or persuasion. Rule 701 provides that lay testimony is limited to opinions or inferences which are rationally based on the "the perception of the witness, helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Pa.R.E. 701. For expert testimony, the Commission should afford no weight to testimony that is devoid of factual analysis, study, or qualification. *See Harley-Davidson Motor Co. v. Springettsbury Twp.*, 124 A.3d 270, 286 (Pa. 2015); *Collins v. Hand*, 246 A.2d 398, 404 (Pa. 1968); *Snizavich v. Rohm & Haas Co.*, 83 A.3d 191, 197 (Pa. Super. 2013), *appeal denied*, 96 A.3d 1029 (Pa. 2014); *Swift v. Dep't of Transp. of Com.*, 937 A.2d 1162, 1170 (Pa. Cmwlth. 2007), *appeal denied*, 950 A.2d 270 (Pa. 2008); Pa.R.E. 702.

## **V. SUMMARY OF ARGUMENT**

There is extensive evidence for the Commission to find that siting the Station at 2090 Sproul Road will not cause unreasonable environmental degradation and, ultimately, that siting the Station's Buildings at 2090 Sproul Road is reasonably necessary for the convenience or welfare of the public pursuant to Section 619 of the MPC. The Commission can make these findings and satisfy the directives from Commonwealth Court's Remand Opinion and Order by recognizing the agency determinations that PECO has obtained or exist to site the Station, including: (1) a National Pollutant Discharge Elimination System ("NPDES") permit for stormwater discharges, (2) determinations from state and federal agencies that there will be no impact to historic properties

or endangered or threatened species, (3) PADEP and U.S. Environmental Protection Agency (“EPA”) determinations for the Station’s air emission sources, (4) that there are no U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration (“PHMSA”) agency determinations or approvals required to site the Station at 2090 Sproul Road, and (5) that the Station will comply with Marple Township’s Noise Ordinance.

The Commission is obligated to defer to these agency determinations. *Twp. of Marple*, 294 A.3d at 973-74; *see also Del-AWARE Unlimited, Inc. v. Pennsylvania Pub. Util. Comm’n.*, 513 A.2d 593, 596 (Pa. Cmwlth. 1986), *appeal denied*, 527 A.2d 547 (Pa. 1987). Accordingly, PECO established a *prima facie* case that there is no unreasonable environmental degradation or unreasonable impairment of the public’s rights, and the burden shifts to the Intervenors to rebut PECO’s evidence. *Silver Valley, supra*, at \*6.

Unlike PECO, the Intervenors did not satisfy their burden. Intervenors offered no evidence that the NPDES permit and the related local, state, and federal agency determinations were inadequate. With respect to air emissions, the Intervenors introduced a flawed air dispersion model that used several incorrect inputs, was calculated in contravention of EPA’s guidance, and did not compare the results to the correct standard. For noise, Marple Township did not produce any credible witnesses during the Remand Proceeding to rebut PECO’s expert testimony.

Intervenors also raised the issue of climate change in this proceeding and argued that natural gas distribution infrastructure cannot be sited *anywhere*. This proposition goes well beyond possible zoning of buildings and would render Section 619 illusory for natural gas distribution companies and prevent them from fulfilling their obligation under Section 1501 of the Code, 66 Pa.C.S. § 1501, to provide reliable service. The General Assembly has not vested the Commission with the statutory authority to ban natural gas distribution utility infrastructure based

on climate change, and the ERA does not expand the Commission’s statutory grant of authority. *See Funk v. Wolf*, 144 A.3d 228 (Pa. Cmwlth 2016), *aff’d*, 158 A.3d 642 (Pa. 2017). Where, as here, the Commission has already found that the Station provides the twin public benefits of ensuring a reliable supply of natural gas for PECO’s service territory and a reliable mechanism to deliver such gas to meet undisputed growing demand in Delaware County, the Commission should find that any concerns arising from the very small contribution of greenhouse gas emissions that arise from public utility *facilities*, located *outside* of the buildings, are more than outweighed by the public benefit of enhanced natural gas reliability from the Station.

With regard to safety considerations, Intervenors did not identify a PHMSA agency determination that is required to site the Station at 2090 Sproul Road or a PHMSA determination or regulation that would prevent siting the Station at 2090 Sproul Road. Intervenors’ own witness, Mr. Jeffrey Marx, a risk analysis expert, corroborated the testimony of PECO’s expert Mr. Israni and determined that a safety event from the Station would be “rare” or “extremely rare.”

Notwithstanding the above findings, in order to respond to the Commonwealth Court’s directives, PECO urges the Commission to underscore for future Section 619 proceedings that: (1) the ERA analysis under Section 619 applies only to buildings, not public utility facilities; (2) emissions from utility infrastructure is not a relevant issue for the siting of buildings under Section 619; and (3) a NEPA-like environmental impact statement is not a necessary precondition for the Commission’s ERA analysis under Section 619.

Accordingly, PECO requests that the Commission amend its March 10, 2022 Opinion and Order by adding the Findings of Fact as outlined in the attached Proposed Findings of Fact and make a determination that the siting of PECO’s proposed Station Building and Fiber Building at

2090 Sproul Road is reasonably necessary for the convenience or welfare of the public pursuant to MPC Section 619.

## VI. ARGUMENT

### A. **A CONSTITUTIONALLY SOUND ENVIRONMENTAL IMPACT REVIEW REQUIRES THE COMMISSION TO DETERMINE WHETHER THERE WILL BE UNREASONABLE DEGRADATION OF THE ENVIRONMENT**

The ERA provides, in Art. I, § 27 of the Pennsylvania Constitution:

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.

The Pennsylvania Supreme Court has determined that the ERA creates the right of the people to “clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment,” and limits the Commonwealth’s power (including local governments and government agencies) from unreasonably impairing this right. *Pennsylvania Env’t Def. Found. (PEDF) v. Commonwealth*, 161 A.3d 911, 931 (Pa. 2017).

“At its core, the ERA ‘protects the people from governmental action that unreasonably causes actual or likely deterioration’ of public natural resources.” *Murrysville Watch Comm. v. Municipality of Murrysville Zoning Hearing Bd.*, 272 A.3d 998, at \*11 (Pa. Cmwlth. Ct.), *appeal denied*, 283 A.3d 790 (Pa. 2022) (citing *Robinson Township v. Commonwealth*, 83 A. 3d 901, 953 (Pa. 2013)). “Stated in somewhat different terms, ‘to achieve recognition of the[ ] rights enumerated in the first clause of [the ERA] as ‘inviolable’ necessarily implies that economic development cannot take place at the expense of an unreasonable degradation of [public natural resources]. Instead, ‘when government acts, the action must, on balance, reasonably account for the environmental features of the affected locale.’” *Id.* (internal citations omitted).



In *Twp. of Marple*, the Commonwealth Court determined that in “proceedings of this nature” (*i.e.*, a Section 619 proceeding where municipal zoning may be preempted), the ERA is implicated and the Commission’s Section 619 analysis must “incorporate the results of a constitutionally sound environmental impact review” as to the proposed siting of a utility building. 294 A.3d at 973-74. In light of the Commonwealth Court’s guidance in *Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 196 A.3d 677, 694 (Pa. Commw. Ct. 2018), *appeal denied*, 208 A.3d 462 (Pa. 2019), that review should demonstrate that the Commission’s action – *i.e.*, preempting municipal zoning and concluding that the siting of a building is necessary for the convenience and welfare of the public – “reasonably account[s] for the environmental features of the affected locale.” *Id.* (quotations omitted); *see also Murrysville Watch Comm., supra.*<sup>4</sup>

Notably, the ERA “...does not call for a stagnant landscape or for the derailment of economic or social development or for a sacrifice of other fundamental values.” *Frederick* 196 A.3d at 694 (quotations and citations omitted). In addition, the requirements of the ERA do not empower a municipality (or other state agency) to act beyond the bounds of its enabling legislation or “to replicate the environmental oversight that the General Assembly has conferred upon the DEP and other state agencies.” *See id.* at 697. Finally, Pennsylvania jurisprudence makes clear that the ERA does not require that a “pre-action environmental impact analysis” be conducted. *See Murrysville*, 272 A.3d at \*12-14 (citing *Frederick*, 196 A.3d 677 and *Protect PT v. Penn Twp. Zoning Hearing Bd.*, 220 A.3d 1174 (Pa. Cmwlth. Ct. 2019)).

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<sup>4</sup> The Environmental Hearing Board, which reviews appeals of permit issuances or denials from the PADEP, also adopted this approach. In *Ctr. For Coalfield Justice and Sierra Club v. DEP and Consol Pa. Coal Co., LLC, Permittee*, 2017 WL 3842580, at \*32 (Pa. Env. Hrg. Bd., Aug. 15, 2017), the Environmental Hearing Board analyzed the Pennsylvania Supreme Court’s decision in *PEDF*, 161 A.3d 911, and *Robinson Twp.*, 83 A.3d 901, plurality opinion, and determined that the proper review for a PADEP permit decision in the context of the Environmental Rights Amendment is to determine: (1) whether the PADEP considered the environmental effects of its action, and (2) whether, by a preponderance of the evidence, the action is likely to cause the unreasonable degradation or deterioration of the rights enumerated by the Environmental Rights Amendment.

**B. PECO HAS OBTAINED ALL NECESSARY AGENCY DETERMINATIONS**

In its Remand Opinion and Order, the Commonwealth Court ruled that the Commission had “sidestepped” its obligation to perform a “constitutionally sound environmental impact review” when it claimed to defer to—but failed to identify—the environmental determinations made by other agencies with primary jurisdiction over such matters. In this Remand Proceeding, PECO has supplemented the evidentiary record with a comprehensive account of these agency determinations.

**1. Agency Determinations Relating to Water, Stormwater, Wetlands, Endangered Species and Historic Properties**

For all of its construction and infrastructure projects, PECO follows a standard review process to identify activities that require environmental support, approvals, or permitting. (PECO St. No. 2-RD, at 4:11-5:7.) The procedure requires a Project Environmental Checklist to be completed by PECO’s Environmental Services (“ES”) or an environmental consultant. (*Id.*) The Environmental Checklist requires consideration of more than 70 questions that address broad topics including construction activities, demolition and remediation activities, facilities activities, industrial hygiene and safety, and vegetation management. (*Id.*)

In April 2019, PECO, through its environmental consultant Stantec Consulting, completed the Environmental Checklist pertaining to the Natural Gas Reliability Station project. (*Id.* at 5:9-21.) The Environmental Checklist revealed that the following assessments would need to be undertaken for any property purchased for the Station: (1) a Phase I Environmental Site Assessment, (2) soil and groundwater sampling, if necessary, (3) a Cultural Resources Survey, (4) a Pennsylvania Natural Diversity Index (“PNDI”) survey, and (5) a wetlands assessment. (*Id.*) In addition, the Environmental Checklist identified the need for a NPDES permit for discharges of

stormwater associated with construction activities, and an associated Erosion and Sedimentation Control Plan. (*Id.*)

On June 8, 2021, PECO obtained the NPDES permit for discharges of stormwater associated with construction activities of the Station. (*Id.* at 12:10-17.) The NPDES permit application process involved a comprehensive review of construction plans and required approvals from a variety of local, state, and federal agencies. (*Id.* at 7:7-9 and 12:20-13:2.) The process included: (1) a PNDI search to determine the possibility of impacts to endangered and threatened species, (2) consultation from the Pennsylvania Historical and Museum Commission – State Historic Preservation Office (“SHPO”), (3) submission of an Erosion and Sedimentation Control Plan (“ESCP”), and (4) submission of a Post-Construction Stormwater Management (“PCSM”) Plan, and related information. (*Id.* at 7:6-16.) PECO’s NPDES application was reviewed by both the PADEP and the Delaware County Conservation District (“DCCD”) for completeness and compliance. (*Id.* at 12:8-13.) Since receiving its NPDES permit, PECO has been and continues to be in compliance with the permit. (*Id.* at 13:14-18; PECO St. No. 6-RD, at 7:6-10.)

As part of the PNDI process, several state and federal agencies determined that there would be no known impacts to threatened or endangered species or special concern species or resources, including: the Pennsylvania Game Commission; the Pennsylvania Department of Conservation and Natural Resources; the Pennsylvania Fish and Boat Commission; and the U.S. Fish & Wildlife Service. (PECO St. No. 2-RD, at 8:1-9; PECO St. No. 6-RD, at 14:12-15.) Also, the SHPO concluded that the project would have “no effect on historic properties.” (PECO St. No. 2-RD, at 8:12-13; PECO St. No. 6-RD, at 16:8-10; *see also* Exhibit. KK-2.)

PECO also prepared an ESCP that identified various measures to minimize or mitigate erosion and sedimentation. (PECO St. No. 2-RD, 9:12-16 and 10:1-19; Exhibit KK-2.) These

included measures to minimize earth disturbance, protect existing drainage features and vegetation, minimize soil compaction, and increase runoff protection. *Id.* In accordance with the PADEP’s Erosion and Sedimentation Pollution Control Program Manual, the ESCP also identified Best Management Practices (“BMPs”) and other controls to ensure that sediment-laden runoff would not be discharged into surface waters. (PECO St. No. 2-RD, at 10:21-11:2.) These BMPs include pumped water filter bans, tire cleaning, inlet protection, compost filter socks, street sweeping, concrete washout facilities, and a rock construction entrance with wash rack. (*Id.* at 11:2-12:3). The BMPs ensure that construction of the Station will not adversely impact surface waters. (*Id.* at 12:4-7; PECO St. No. 6-RD, at 14:3-7.) In fact, stormwater conditions at the Property will be *improved* due to the net reduction in stormwater following construction. (PECO St. 2-RD, at 8:16-19; PECO St. 6-RD, at 14:3-7; Exhibit KK-3 (PCSM Plan)).

In addition, PECO has taken steps to ensure there will be no adverse groundwater impacts and to improve the condition of the Property by removing pre-existing contaminated soil. PECO conducted a Phase I Environmental Site Assessment of the Property in August 2020. (PECO St. 2-RD, at 14:1-3 and 16:1-3; PECO St. 4-RD, at 2:13-17.) The Phase I Environmental Site Assessment revealed that the Property was previously used by an unrelated third-party as a retail gasoline service station since the 1960s. (PECO St. 2-RD, at 14:21-15:1.) During its prior use as a gasoline station, public records revealed evidence of a release at the Property during the removal of two gasoline underground storage impacts, and 720 tons of impacted soil were removed. (*Id.* at 14:21-15:3.) Groundwater investigations conducted between 2001 and 2012 showed that groundwater at the Property was impacted by the releases. (*Id.* at 15:3-5.) In 2012, the PADEP approved a Remedial Action Completion Report, which indicated that the Property satisfied the Site-Specific standard under the Pennsylvania Land Recycling and Remediation Act. (*Id.* at 15:7-

10.) Subsequently, the PADEP approved an environmental covenant for the Property, which confirmed the continued presence of benzene and methyl tertiary-butyl ether (“MTBE”) in excess of relevant the PADEP standards and which prevented the use of the groundwater at the Property and limited use of the Property to non-residential uses only. (*Id.* at 15:10-13.) The environmental covenant eliminates any potential exposure pathway that could impact human health. (*Id.* at 15:14-18.)

PECO also conducted a Phase II Environmental Site Assessment to investigate the nature and extent of residual contamination due to the Property’s prior use as a gasoline service station. (*Id.* at 16:9-11.) The purpose of the Phase II assessment was to allow PECO to take appropriate measures during construction of the Station to ensure the health and safety of workers and the community. (*Id.* at 16:11-15.) The Phase II assessment revealed soil and groundwater contamination in the form of petroleum hydrocarbons and fuel additives as a result of the Property’s historic use as a gas station. (*Id.* at 16:17-19.) In May-June 2022, PECO engaged in remedial excavation in order to remove over 1,000 tons of contaminated soil, which was subsequently appropriately disposed of. (*Id.* at 17:11-17 and 17:20-22.) PECO also removed a large volume of piping and conduits that existed at the Property. (*Id.* at 17:16-17.) These efforts improved the condition of the Property, removed and capped soil contamination resulting from the Property’s prior use, and will ensure that the public is not and will not be exposed to residual contamination remaining at the Property. (*Id.* at 17:18-18:5.)

PECO’s Station will also improve the esthetics of the Property. PECO has agreed with the Township to a new “Enhanced Design.” (Tr. 1996:20-22; *see also* Marple Township Exhibit DO-Cross-1 at Ex. A-3.) The new “Enhanced Design,” in lieu of just a security fence, will include a perimeter wall constructed of brick and precast concrete, and an accompanying clock tower.

(PECO St. No. 4-RD at 3:14-4:5.) The Enhanced Design incorporates numerous decorative elements, landscaping, a setback permitting pedestrian use of the sidewalk, and esthetic lighting on its exterior, specifically along the perimeter of the fence line, as well as on the clock tower. (*Id.* and Tr. 1999:22-25; 2000:1-2.) By converting an abandoned and blighted brownfield property to an esthetically enhanced and productive use, PECO’s redevelopment will benefit the community. (PECO St. No. 4-RD at 4:8-17.)

In sum, not only has PECO obtained all necessary agency determinations relating to water, stormwater, wetlands, endangered species, and historic properties, but PECO has improved the environmental condition of the Property by removing contaminated soil and further reducing stormwater runoff, and will enhance the esthetics by converting a vacant and blighted property into a property with a clock tower, landscaping, pedestrian access, and ambient lighting.

## **2. Agency Determinations Relating to “Explosion Impact Radius,” Noise and Heater Emissions**

The Commonwealth Court’s March 9, 2023 Remand Opinion and Order specifically identified that the Commission’s March 10, 2022 Opinion “failed to identify any such outside agency determinations that pertained to explosion impact radius, noise, or heater emissions.” *Twp. of Marple*, 294 A.3d at 975. PECO addressed each of these issues in the Remand Proceeding.

### **a. “Explosion Impact Radius”**

PECO presented expert testimony from Mike Israni, a former official with U.S. DOT PHMSA, who was responsible for developing and administering the PHMSA regulations. Mr. Israni testified that there is no term “explosion impact radius” in PHMSA’s regulations. (PECO St. 3-RD at 3:16-18.) PHMSA regulations do include the term “potential impact radius” (“PIR”) at 49 C.F.R. § 192.903, but the PIR calculation is only applicable to natural gas “**transmission pipelines.**” (PECO St. 3-RD at 7:13-8:2.) The PIR calculation is used by PHMSA to determine

if a rural or suburban segment of transmission pipeline is located in an area with higher density, known as a “high consequence area.” (PECO St. 3-RD at 6:1-7:10.) Transmission pipeline operators are required to follow additional “Transmission Integrity Management Program” requirements in “high consequence areas.” (PECO St. 3-RD at 6:1-7:10.) It is inappropriate to apply the PIR to a distribution facility like the proposed Station because “distribution pipelines, in their entirety, are considered to be already in the high consequence areas” and their requirements are already more stringent than transmission pipelines. (Tr. 2066:20-2067:2.) In addition, PHMSA’s regulations already require operators of distribution facilities to include all their assets in a Distribution Pipeline Integrity Management Program (“DIMP”) *regardless* of the proximity of the asset to occupied buildings. (*See* PECO St. 3-RD at 7:19-8:2; 49 C.F.R. Part 192 Subpart P.) For these reasons, there is no such thing as either an “explosion impact radius” or “potential impact radius” for distribution facilities.

More importantly, as a matter of law, no agency determination is required from either the Commission or PHMSA to site a distribution facility like the Station. (PECO St. No. 3-RD at 2:5-8; 9:18-19; 10:3-8.) Under Section 2205(b)(2) of the Public Utility Code, 66 Pa.C.S. § 2205(b)(2), natural gas distribution companies are permitted to maintain and upgrade their facilities without obtaining Commission approval. The Commission ensures safety by requiring the companies to comply with PHMSA’s applicable safety regulations,<sup>5</sup> 52 Pa. Code § 59.33(b), and subjecting

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<sup>5</sup> The comprehensive safety regulations are contained in 49 C.F.R. Part 192. These regulations provide requirements for the materials used in natural gas facilities (Subpart B); pipe and pipeline component design requirements (Subparts C and D); construction requirements, including welding and joining requirements (Subparts D through G); requirements for customer meters, service regulators, and service lines (Subpart H), corrosion control requirements (Subpart I); operation and maintenance requirements (Subparts L and M); personnel qualifications and recordkeeping requirements (Subpart N); and DIMP requirements, which establish a written program that an operator must follow to continuously evaluate, prioritize and mitigate risks, such as corrosion, excavation damage, other outside force damage, or equipment failure to an operator’s distribution system (Subpart P). (PECO St. 3-RD at 10:16-11:5.)

them to inspection as necessary to ensure compliance, 52 Pa. Code § 59.33(d). PHMSA's regulations do not restrict where natural gas distribution facilities can be located because the assets must always be located in proximity to customers and buildings in order to provide the service. (PECO St. 3-RD, at 8:5-14 and 10:10-11:5.)

There are no PHMSA siting restrictions, agency determinations, or approvals to site district regulating stations, such as PECO's proposed Station, anywhere, including in urban areas. (Tr. 1650:8-16.; PECO St. 3-RD at 9:18-19; 10:3-8).

#### **b. Noise**

PECO's engineering firm, EN Engineering, contracted with acoustic and sound control consultant Hoover & Keith Inc. to assist PECO in designing the Station to comply with Marple Township's Noise Ordinance. (PECO St. No. 4 at 10:3-7; Exhibit TF-7, at i.) Hoover & Keith Inc. conducted an ambient sound survey and noise impact assessment specific to 2090 Sproul Road to determine the potential impact of sounds generated by the Station's equipment, and the company then recommended various sound mitigation measures. (PECO St. No. 4 at 10:7-15; PECO St. No. 4-SR at 8:8-9:6.) These measures include the use of acoustic-dampening insulation and doors for the main Station Building, a forced air ventilation system to minimize open areas where sounds can escape, sound absorbing or dampening HVAC equipment, and other sound-dampening materials on the Station's regulators and valves. (PECO St. No. 4 at 10:18-11:2.)

PECO witness Reginald Keith, principal consultant and President of Hoover & Keith, testified in the Remand Proceeding that compliance with Marple Township's Noise Ordinance is technically feasible and readily achievable using feasible, readily available, and proven technology. (PECO St. No. 5 at 4:3-12; *see also* Tr. 1987:20-25.) As Mr. Keith explained, "[t]hey don't have to reinvent the wheel to do any of this stuff." (Tr. 1987:24-25.)



In the Remand Proceeding, the Intervenors produced two witnesses who claimed there would be noise impacts from the Station—Dr. James Schmid and Dr. Edward Ketyer. However, neither is an acoustical expert (Tr. 2211:8-17; 2330:17-2331:3), neither had calculated sound decibel levels for the Station (*id.*), and most remarkably, neither had reviewed the Hoover & Keith sound study. (*Id.*) On cross-examination, Dr. Ketyer readily conceded he was speaking generically about the impact of excessive sound and noise pollution on children’s health (Tr. 2331:24-2332:2), and he further admitted that he had not taken into account the sound dampening measures recommended in the Hoover & Keith study.<sup>6</sup> (Tr. 2331:12-18.)

Having produced no competent evidence to substantiate their claims regarding noise, Intervenors appear to rely on the implausible and unsupported contention that, having listened to local concerns about possible noise from the Station, having engaged an acoustical engineering firm to recommend sound dampening measures to respond to these concerns, and having identified readily available sound mitigation measures to fulfill the recommendations, PECO would nonetheless ignore all it had done. Intervenors presented no evidence whatsoever that such a scenario is credible or likely.

### **c. Heater Emissions**

The Station includes two air emission sources that run on natural gas: a Cold Weather Technologies (“CWT”) Indirect Line Heater (“Line Heater”) and an emergency generator, which may either be 30-kW or 50-kW in size. (PECO St. No. 4, at 5:16-19; Tr. 2369:15-20.) At the outset, it is important to note that both of these units are located *outside* of the Buildings that are at issue in this proceeding, and are therefore public utility “facilities”. (*See* Tr. 1997:1-1998:11,

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<sup>6</sup> Dr. Ketyer also expressed an opinion about light pollution despite never having reviewed a lighting plan for the Station, not knowing how many lights would be used at the Station, not knowing the orientation of those lights and where they would point, and not being aware of the lighting that would be associated with the enhanced clock tower design for the perimeter of the Station. (Tr. 2333:4-2333:1).

2006:3-23 and 2015:1-4; 2017:9-14; PECO St. No. 4-SR, at 17:14-17; PECO St. No. 6-RD at 8:5-8; *see also* Marple Township DO-Cross-1, Exhibit A.) No air permits are required from the PADEP or EPA to construct or operate the Station’s Line Heater or emergency generator because each is subject to blanket exemptions pursuant to 25 Pa. Code § 127.14.<sup>7</sup> (PECO St. No. 6-RD, at 8:18-11:16; PECO St. No. 6-RR, at 3:1-12; Exhibit JH-6.) Additionally, the 50-kW emergency generator will comply with the emissions standards set forth in 40 C.F.R. 60.4233(e)<sup>8</sup> and both the 30-kW and 50-kW emergency generator sizes have received Certificates of Conformity from EPA, meaning that they comply with EPA emissions standards. (PECO St. No. 6-RD, at 11:1-11; *see also* Exhibits JH-2 and JH-3.) The blanket exemptions and Certificates of Conformity constitute the relevant agency determinations for purposes of the Station emission units’ air quality impacts.<sup>9</sup>

Even in the absence of an air permit requirement, PECO’s expert witness Jeffrey Harrington explained that the Station’s air emission sources will still be subject to EPA regulations and PADEP enforcement. Mr. Harrington explained that the emergency generator will be subject

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<sup>7</sup> The Line Heater will provide a heat input of 4.6 million British thermal units per hour (“MMBtu/hr”) and will include six burners fueled with natural gas. This unit qualifies for an exemption from the permit requirement under 25 Pa. Code § 127.14(a)(3). The emergency generator will either be a 30-kilowatt (kW) or 50-kW emergency generator, the latter being associated with the Enhanced Design referenced in the stipulation with Marple Township. The rated capacity of the 30-kW generator as stated by the vendor is 46.6 brake horsepower (bhp). The rated capacity of the 50-kW generator as stated by the vendor is 104.7 bhp. Regardless of whether a 30-kW or 50-kW emergency generator is used, the generator will qualify for an exemption from the requirement for an air permit. The 30-kW generator qualifies for an exemption under 25 Pa. Code § 127.14(a)(8). The 50-kW generator qualifies for an exemption under 25 Pa. Code § 127.14(a)(8). (PECO St. No. 6-RD at 8:18-10:21; Exhibit JH-6 (PADEP Document No. 275-2101-003).) The exemptions from the DEP’s permitting requirements apply on a specific emissions unit basis. (Tr. 2373:15-23.) Moreover, as noted by Mr. Harrington, even if the facility emissions from the Line Heater and generator were combined, their potential emissions would be considerably lower than the threshold that triggers the DEP permitting requirement. (Tr. 2373:24-2374:7.)

<sup>8</sup> If the 30-kW emergency generator were to be installed, it would be subject to and comply with the emissions standards referenced in 40 CFR 60.4233(d). (PECO St. No. 6-RD, at p. 11, n.2.)

<sup>9</sup> PECO’s air emissions expert, Mr. Harrington, explained that the exemptions from the PADEP’s permitting requirements apply on a specific emissions unit basis. (Tr. 2373:15-23.) Moreover, as noted by Mr. Harrington, even if the facility emissions from the Line Heater and emergency generator were combined, their potential emissions would be considerably lower than the threshold that triggers the PADEP permitting requirement. (Tr. 2374.)

to several enforceable requirements, including federal New Source Performance Standards (“NSPS”) codified in 40 CFR Part 60, subpart JJJJ and federal National Emissions Standards for Hazardous Air Pollutants (“NESHAPs”) for stationary reciprocating internal combustion engines codified at 40 CFR Part 63, subpart ZZZZ. These regulations contain both emissions-related and operational limitations. (Tr. 2374:19-2375:12.) In addition, Mr. Harrington explained that National Ambient Air Quality Standards (“NAAQS”) are defined by EPA as the thresholds that demonstrate that emissions from a proposed project are protective of public health and public welfare. EPA’s NAAQS regulations are set forth at 40 CFR Part 50. NAAQS include both “primary” ambient air quality standards, which are the level of air quality that the EPA has determined is necessary, with an adequate margin of safety, to protect the public health, and “secondary” which are levels of air quality necessary to protect the public welfare from any known or anticipated effects of a pollutant. (PECO St. No. 6-RR, at 7:14-20.) Mr. Harrington explained that PADEP has the authority to enforce these regulations and to investigate facilities that potentially violate the NAAQS, NSPS, and NESHAP. (Tr. 2374:19-2375:12 and 2376:15-2377:15.)

**C. INTERVENORS HAVE NOT PROVEN UNREASONABLE DEGRADATION OF THE ENVIRONMENT**

The Commission is required to defer to the environmental determinations identified above in evaluating its approval of the siting of the two Buildings under the ERA. *Twp. of Marple*, 294 A.3d at 973-74; *see also Del-AWARE Unlimited, Inc.*, 513 A.2d at 596. Consequently, under the burden of proof standards discussed above, PECO has satisfied its initial burden of producing sufficient evidence to make a *prima facie* case that there is no unreasonable degradation of the environment. The burden then shifts to the Intervenors to introduce evidence to prove such

unreasonable degradation. *See* pp. 15-16, *supra*. Intervenors have completely failed to meet this burden.

### **1. Air Emissions**

The Station is not subject to air permitting requirements, nor is it required to conduct air dispersion modeling. (PECO St. No. 6-RR, at 3:1-12 and 7:14-8:4; Tr. 2377:23-2378:6). Nevertheless, PECO conducted air modeling in this Remand Proceeding pursuant to EPA-approved methods solely to respond to deeply flawed air modeling prepared by Dr. James McAuley for Marple Township related to the Line Heater and emergency generator (PECO St. No. 6-RR, at 3:9-12; Tr. 2378:9-14) – each of which are *public utility facilities which are neither inside of nor part of the Buildings that are at issue in this proceeding*. (*See* Tr. 1997:17-1998:5; 2006:3-10; 2015:1-4; 2017:9-14; PECO St. No. 4-SR, at 17:14-17; *see also* Marple Township DO-Cross-1, Exhibit A.) Dr. McAuley’s analysis purported to raise potential issues regarding emissions of nitrogen oxides (NO<sub>x</sub>). (PECO St. No. 6-RR, at 3:1-12 and 7:14-8:4; *see also* Marple Township Exhibit TM-2.)

PECO’s air modeling exposed numerous flaws in Dr. McAuley’s study. For example, Dr. McAuley assumed for the purposes of his model that the emergency generator would operate on a 24/7/365 continuous basis, for a total of 8,760 hours per year. (PECO St. No. 6-RR at 3:21-4:28.) This assumption ignores (i) PECO’s actual plans (which are to operate the generator only in emergencies and for routine testing for an hour per week (ii) federal law that restricts such operation to no more than 100 hours per year, and (iii) guidance from the EPA specifying 500 hours as a conservative benchmark for the modeling. (*Id.*; Tr. 2384:10-15.) In other words, Dr. McAuley modeled air emissions from the generator assuming non-compliance, which is not a standard principal of air modeling. (Tr. 2382:16-25.)

Tetra Tech also identified that Dr. McAuley used the incorrect layout for the Station (PECO St. No. 6-RR, at 5:1-20),<sup>10</sup> incorrect stack dimensions (*see id.* at 6:1-18); overly conservative nitrogen dioxide screening parameters in contravention to EPA’s air modeling guidance (*see id.* at 6:21-7:12), and used different exhaust temperatures and exit velocities in modeling air emissions at 2090 Sproul Road and the Don Guanella site (Marple Township’s preferred site) (*see id.* at 14:6-22.) Indeed, during the hearing, Dr. McAuley acknowledged that he did not use the current site plan, and further acknowledged that the exit velocities for the two sites should have been the same. (Tr. 2499:13-2501:24, 2524:18-19, 2536:16-24.) As a result of these errors and inaccurate assumptions, emissions projected by Dr. McAuley were grossly overstated and unrealistically high. (PECO St. No. 6-RR, at 10:14-18.) By contrast to Dr. McAuley’s flawed study, PECO’s air modeling using the correct inputs and parameters demonstrated that the facility would comply with NAAQS for all pollutants, which are thresholds established by EPA set forth in 40 C.F.R. Part 50 that demonstrate that emissions from a proposed project are protective of public health and public welfare. (PECO St. No. 6-RR, at 7:14-8:4, 9:15-17, and 12:8-13.)

Because Dr. McAuley’s air modeling was thoroughly flawed, there is no credible evidence in the record from which the Commission could conclude that air quality would be adversely affected by the Station. Indeed, the correct air modeling by Tetra Tech shows no such impact.

## **2. Climate Change**

Intervenors offered the testimony of Professor Raymond Najjar, an oceanographer and climatologist, who opined that the Commission should limit *any and all* infrastructure that will

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<sup>10</sup> The layout of the site was modified based on the stipulation between Marple Township and PECO for the Station to have the “Enhanced Design”, including a clocktower, perimeter wall of brick and precast concrete, and ambient lighting. (PECO St. No. 4-RD at 3:14-4:5; Tr. 1996:9-2001:1 and 2008:8-9; *see also* Marple Township Exhibit DO-Cross-1.) The final layout was made available to the Intervenors during the Remand Proceeding. (Tr. 1990:15-1993:13.)

increase the use of fossil fuels to mitigate the effects of climate change. (Najjar Statement at 19:15-18 and Tr. 2265:15-2266:16.)<sup>11</sup>

Broad policy concerns regarding global climate change are well outside the narrow issue in this proceeding—namely, whether the siting of the Buildings at the Station is reasonable. Further, the downstream greenhouse gas emissions cited by Professor Najjar are emitted by PECO’s customers, and not the Station or its Buildings (*id.* at 17:11-15) and they will occur *regardless* of where the Buildings or the Station are sited. (Tr. 2265:15-19.) Indeed, Professor Najjar conceded that his opinion is independent of the siting of the Buildings or the facility itself. (Tr. 2267:9-17.)

Notably, the General Assembly has not vested the Commission with the statutory authority under the MPC, the Code, or anywhere else to ban natural gas infrastructure on the basis of climate change, and the ERA cannot be construed to expand the Commission’s statutory authority. *Funk v. Wolf*, 144 A.3d 228, 249 (Pa. Cmwlth. Ct. 2016), *aff’d*, 158 A.3d 642 (Pa. 2017) (While “the ERA ‘may impose an obligation upon the Commonwealth to consider the propriety of preserving land as open space, **it cannot legally operate to expand the powers of a statutory agency....**’”) (emphasis in original) (quoting *Cnty. Coll. of Delaware Cnty. v. Fox*, 342 A.2d 468, 482 (Pa. Cmwlth. Ct. 1975)). Section 1501 of the Code, 66 P.S. § 1501, requires PECO to provide reliable

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<sup>11</sup> Proceeding from the premise that climate change will cause a reduction in peak winter demand from existing customers, Professor Najjar claimed that “the real intent of [PECO’s] project is to increase distribution and use of natural gas for residential and commercial buildings, increase greenhouse gas emissions and lock those increases in for decades to come.” (Najjar Statement at 17:11-15.) Professor Najjar’s analysis ignores that existing customer usage can increase based on a number of factors, including existing customers increasing their load or updating equipment which can impact load projections. (PECO St. No. 7-RR, at 4:8-5:3.) For example, an existing customer can increase their usage by adding another natural gas appliance. (*Id.*) As another example, new energy efficient heaters use higher percentages of natural gas at the front end of the cycle, as opposed to older models that use more natural gas over an extended period of time. (*Id.*) During periods of high demand, an increase in these types of energy efficient heaters across the customer base will peak demand at different rates than in prior years when these models were not as available. (*Id.*) PECO has a statutory obligation under Section 1501 of the Code, 66 P.S. § 1501, to provide reliable service to these customers.

service to its customers, and the Commission has the statutory responsibility to enforce this duty under Section 501 of the Code, 66 P.S. § 501.

The ERA does not call for a stagnant landscape or for the derailment of economic or social development or for a sacrifice of other fundamental values. *See Frederick*, 196 A.3d at 694. Professor Najjar’s testimony concedes that the emissions from the Project will be small in comparison to overall world emissions, but argues, as a policy matter, that this does not matter “because in order for the necessary reductions in world emission to take place, reductions must come from all parties that currently contribute to emissions.” (Najjar Statement at 18:6-9.) This position completely disregards PECO’s *statutory obligation* under Section 1501 of the Code, 66 P.S. § 1501, to provide reliable natural gas distribution service and to upgrade its infrastructure as necessary or proper to fulfill this obligation. Professor Najjar has no basis to dispute PECO’s evidence that customer demand and usage are increasing in Delaware County. (Tr. 2270:4-10.) Professor Najjar also overlooked that, even absent any increase in customer usage, PECO would still need to construct the Station to increase its capacity supply to diminish its design day constraints. (Initial Decision, FOF No. 20, citing PECO St. No. 2, at 3-7). The additional supply is needed for PECO’s entire system—not just Delaware County—to reduce PECO’s reliance on market purchases and price volatility for PECO’s customers. (Initial Decision, FOF No. 35, citing Tr. 1276:8-20).

As explained above, the small amount<sup>12</sup> of emissions from the Station are associated with utility infrastructure essential to providing reliable services to customers and are not sourced from

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<sup>12</sup> The EPA’s 40 C.F.R. Part 98, Subpart C requires facilities with greenhouse gas emission of 25,000 metric tons or more to annually report emissions and does not require greenhouse gas reporting for emergency generators due to the low emissions levels. (PECO St. No. 6-RR at 15:7-16:3.) Using conservative assumptions (*i.e.*, that the heater’s six burners would operate 24 hours per day/365 days per year and the emergency generator engine would operate 500 hours per year), estimated greenhouse gas emissions from the Station would be approximately one-tenth of EPA’s reporting requirement. (*Id.*) The Station’s greenhouse gas emissions would represent just 0.0008% of the

the Station's Buildings. The Commission should find that the ERA does not require the Commission to refuse to site the Buildings. Instead, the Commission can fairly consider the climate change implications from this project and still reach the conclusion that the siting of the Buildings is still reasonably necessary for the convenience or welfare of the public.

### 3. Safety

Intervenors offered in the Remand Proceeding the testimony of two witnesses on the issue of safety: Jeffrey Marx, an expert in quantitative risk analysis; and Jim Capuzzi, the Township's Fire Marshal.

Mr. Marx's quantitative risk analysis corroborated the testimony of PECO's expert, Mike Israni, and thoroughly undercut that of Mr. Capuzzi. Mr. Marx explained that hazard identification and risk analysis represent diametrically opposite ends of a spectrum. Hazard identification is simply identifying things that can have an adverse effect and can be something as simple as a can of gasoline. (Tr. 2171:16-25.) Risk analysis, by contrast, takes into account both consequences and the probability of an adverse event. (Tr. 2172:4-11.)

In conducting his analysis, Mr. Marx selected a natural gas release hole size of two inches in diameter for a "maximum credible event" scenario and concluded that such events would be rare events whose resultant risk can be considered low. (Tr. 2178:25-2179:1-9.) Mr. Marx also considered the possibility of a full pipe rupture. He concluded that such events are extremely rare and are not expected to occur within a controlled access facility such as the Station. (Tr. 2181:13-25.) The potential impact distance was only 100 feet for the "rare" event and 220 feet for the "extremely rare" event of a full pipe rupture. These vulnerability zones showed that any potential impact would extend only a short distance beyond the site boundaries, if at all. (*Id.*) Indeed, Mr.

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State of Pennsylvania's greenhouse gas emissions, resulting in a negligible contribution as compared to statewide totals. (*Id.*)



Marx testified that if an explosion were to occur, the blast wave would not extend beyond the site boundaries. (Tr. 2182:20-2183:12.)

Consistent with Mr. Marx's description of the adverse events as being "rare" and "extremely rare," Mr. Israni testified that his review of the PHMSA database dating back several decades revealed no such incidents despite thousands of equivalent stations operating across the United States. (PECO St. No. 3-RR at 5:8-6:8.) Mr. Israni also pointed out that it would be unlikely for any significant holes to develop in newly constructed equipment that is continuously monitored by PECO and that a full rupture event was unlikely considering that full ruptures occur during excavation of pipelines and the Station will be enclosed by a perimeter wall, thus preventing this hypothetical scenario. (*Id.*).

Mr. Capuzzi, unlike Mr. Marx, is not an expert in quantitative risk analysis, and unlike Mr. Israni, he is neither an expert in pipeline safety nor the PHMSA regulations. (Tr. 2294:24-2295:24; 2297:14-19.) Nevertheless, Mr. Capuzzi felt he could opine that the PIR would be a useful calculation in determining whether the Station is appropriately located in relation to neighboring population and property. (Marple Township Remand St. No. 2-R at 2:2-5; Tr. 2298:21-2299:8). Mr. Capuzzi's opinion is not credible for multiple reasons. First, Mr. Capuzzi believed that the reason the PIR was not applied to the Station was because PHMSA has no authority over distribution systems. (Marple Township Remand St. No. 2-R at 2:12-14.). This belief is simply wrong. As explained earlier, by Mike Israni, PHMSA does have authority over distribution facilities, but does not use the PIR for siting of either transmission or distribution facilities. (Tr. 2056:16-2059:12). Mr. Capuzzi is claiming that the PIR should be used for a purpose for which it was not intended.<sup>13</sup> Second, as Mr. Israni explained, the PIR assumes a full rupture event. (Tr.

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<sup>13</sup> Like Dr. Schmid, Mr. Capuzzi also relies on recommended minimum evacuation distances as a ground for not siting the Station at 2090 Sproul Road. However, the recommended evacuation distances are for evacuation, not

2059:15-22.) Mr. Capuzzi ignores Mr. Marx’s testimony that this is extremely rare, and his belief that aboveground facilities pose greater risk ignores the fact that full rupture events are associated with damage to underground facilities caused by excavation. (Tr. 2181:13-2182:6; PECO Statement No. 3-RR at 5:8-6:8.) Similarly, while Mr. Capuzzi notes that operating pressure, a primary variable in the PIR calculation, would theoretically apply to distribution pipelines as well as to transmission pipelines, he ignores the fact that PHMSA’s regulations mandate that distribution pipelines operate at 20% of specified minimum yield strength (“SMYS”) while transmission pipelines can operate at up to 50% of SMYS. (Tr: 2067:4-12.) Accordingly, for any given amount of operating pressure, a distribution pipeline is required to be much stronger than a transmission pipeline, providing a greater margin of safety. (*Id.*)

In sum, Mr. Capuzzi’s testimony is at odds with the PHMSA regulations and the safeguards that underlie them. Having admitted on cross-examination that: (1) he did not review the PHMSA regulations; (2) is not an expert in the PHMSA regulations; (3) did not perform a quantitative risk analysis (4) did not perform a study of the probability of a leak from the Station; and (4) did not perform a study of the probability of a fire occurring at the Station (Tr. 2294:17-18; 2296:2-21; 2297:8-2298:7; 2300:2-7), Mr. Capuzzi does not meet the legal standard to be qualified as an expert on safety risks from the Station, and his testimony should be rejected as mere conjecture. *See Harley-Davidson Motor Co. v. Springettsbury Twp.*, 633 Pa. 139, 165, 124 A.3d 270, 286 (2015) (“[a]n expert cannot base his [or her] opinion upon facts which are not warranted by the record. No matter how skilled or experienced the witness may be, he will not be permitted to guess or to state a judgment based on mere conjecture.”) (internal quotations and citations omitted).

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siting, assume a full rupture event that Marple Township’s own witness Mr. Marx categorized as “extremely rare” and are not intended to replace a site specific risk analysis of the type performed by Mr. Marx. (Tr. 2209:9-25; 2210:1-19; and 2181:13-2182:6.)

**D. THE COMMISSION SHOULD UNDERSCORE THE LIMITED SCOPE OF SECTION 619 TO GUIDE FUTURE PROCEEDINGS**

PECO submits that the agency determinations and preponderance of the evidence show that neither the siting of the Buildings nor the Station itself will cause unreasonable degradation of the environment. To prevent Section 619 from being used improperly in future proceedings to delay and obstruct critical infrastructure projects, PECO requests the Commission underscore that: (1) the ERA analysis under Section 619 applies only to buildings, not public utility facilities; (2) emissions from utility infrastructure is not a relevant issue for the siting of buildings under Section 619; and (3) a NEPA-like environmental impact statement is not a necessary precondition for the Commission's ERA analysis under Section 619.

**1. The ERA Analysis in a Section 619 Proceeding Applies Only to Buildings, Not Public Utility Facilities**

PECO urges the Commission to recognize a threshold limitation on the scope of the required ERA analysis under Section 619: the environmental issues being considered by the Commission must relate to *placing a building at a proposed location*. Under Section 2205(b)(2) of the Code, public utilities are permitted to install and upgrade their facilities without obtaining Commission approval. 66 P.S. § 2205(b)(2). When they do so, under longstanding judicial precedent, local municipalities are preempted from interfering with the siting of the public utility facility. *See Duquesne Light Co. v. Upper St. Clair Twp.*, 377 Pa. 323, 326, 105 A.2d 287, 293 (1954); *Chester Cnty. v. Philadelphia Elec. Co.*, 420 Pa. 422, 424, 218 A.2d 331, 333 (1966).

The Commonwealth Court's Opinion recognized that Section 619 is an exception to this principle that must be narrowly construed. *See Twp. of Marple*, 294 A.3d at 972-73. Section 619 gives municipalities the ability to regulate via local ordinance the location of a *building* that a public utility wishes to build or use, unless the Commission decides that the situation of the building is reasonably necessary for the convenience or welfare of the public. *Id.* Section 619

does *not* give local municipalities the authority to regulate public utility facilities that are *not* buildings:

With regard to the fence, the Commission properly concluded that it is a “facility” and, thus, that it is exempt from regulation by the Township. Section 102 of the Code defines “facilities,” in relevant part, as “[a]ll the plant and equipment of a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with, the business of any public utility.” 66 Pa. C.S. § 102. Reading Section 102 of the Code in conjunction with Section 619 of the MPC leads us to the conclusion that, in the context of public utilities, anything that does not qualify as a building under the latter should be considered a facility under the former. Thus, because the security fence does not fall within the common understanding of what constitutes a building, it is a facility that stands outside the Township’s regulatory authority.

*Id.* at 972-73.

Allowing local municipalities to challenge public utility *facilities* under the ERA simply because of the presence of a building would invite grave policy consequences. As Douglas Oliver, PECO’s Senior Vice President for Governmental, Regulatory and External Affairs, testified, PECO will be investing approximately \$6 billion across its electric and natural gas systems to inspect equipment and complete targeted system enhancements and corrective maintenance, invest in new equipment, and perform vegetation management to ensure that its gas and electric customers have reliable utility service. (PECO St. No. 1-RD at 9:9-13.) If Section 619 is erroneously construed to permit municipalities to challenge utility facilities that do not involve buildings, this critical investment could be unavoidably delayed or even prevented due to increased costs and unnecessary litigation, potentially resulting in the inability to provide safe and reliable service as PECO is legally required to do. (PECO St. No. 1-RD at 9:13-18.)

Recognizing that Section 619 applies only to buildings, not facilities, disposes of two of the Intervenor's main legal arguments in the Remand Proceeding:

First, the Commission should clarify the record via an explicit factual finding that the contested air emissions arise from the Line Heaters and emergency generator which are *outside* the buildings at issue in this Remand Proceeding and are public utility "facilities". For future proceedings, air emissions associated with public utility facilities located outside of buildings should be considered beyond the scope of a Section 619 proceeding.

Second, as explained earlier, the Commission should underscore that climate change is not a relevant consideration in an ERA analysis under Section 619. Such challenges do not relate to the reasonableness of the *location* of a building, but rather are challenges to the *existence* of public utility facilities. A Section 619 Petition before the PUC is not the proper venue to challenge the existence of public utility facilities across Pennsylvania.

## **2. An ERA Analysis under Section 619 Does Not Require an Environmental Impact Statement**

The Intervenor's have suggested via testimony from Dr. James Schmid that it would be prudent for the Commission to require an environmental impact statement or environmental assessment, similar to those required for federal projects by the National Environmental Policy Act, as a precondition to its ERA analysis under Section 619.<sup>14</sup>

Nothing in the ERA supports this proposition. Indeed, Pennsylvania courts and agencies have repudiated similar arguments. *See Murrysville Watch Comm., supra.* at \*13 ("[m]unicipality was not obligated to conduct a 'pre-action environmental impact analysis' and, in enacting an

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<sup>14</sup> On cross-examination, Dr. Schmid testified that NEPA applies "everyone and every project," (Tr. 2216:23-25), but only if a federal permit or federal financing is required does NEPA require the preparation of an environmental impact statement (Tr. 2216:24-2217:20.) In other words, Congress has determined that an environmental impact statement should not be federally required for non-federal projects.

unconventional oil and gas well ordinance, a municipality need only demonstrate, through the ordinance's design or some other form of evidence, that it considered the citizens' rights under the ERA.”); *Delaware Riverkeeper Network, Clean Air Council, David Denk, Jennifer Chomicki Anthony Lapina and Joann Groman v. Commonwealth of Pennsylvania, Department of Environmental Protection and R.e. Gas Development, LLC*, 2018 WL 2294492, at \*28 (Pa. Env. Hrg. Bd., May 11, 2018) (evidence presented did not convince environmental hearing board that PADEP “failed to consider the potential for environmental effects in advance of issuing [permits for gas wells]. The fact that the consideration did not involve a full blown risk assessment and was not as extensive as [petitioner] believes was necessary does not . . . violate the requirements of [the Pennsylvania ERA.]”). Indeed, the Commonwealth Court’s Remand Opinion and Order remanding this matter to the Commission to issue an Amended Decision incorporating the results of a constitutionally sound environmental impact review is **devoid** of any reference to, or requirement for, the preparation of an environmental impact statement.

Sound policy considerations militate against imposing a NEPA-like environmental impact statement requirement standard on public utilities. According to Dr. Schmid, the cost of preparing an environmental impact statement for NEPA range in cost up to several millions of dollars. (Tr. 2213:23-25.) The analyses can also drag on for several years. (Tr. 2214:14-2215:1.) The cost would ultimately be borne by ratepayers, and the delay would hinder utilities from upgrading critical infrastructure to support reliability.

Moreover, the purported benefits that Dr. Schmid seeks to obtain from the preparation of an environmental impact statement are already embodied in Section 619 and the Commission’s current regulations. Section 619 specifically requires a public hearing, and the municipality involved has the right to appear, present witnesses, and cross-examine witnesses. In addition,

public input concerning potential environmental issues is obtained through public input hearings. Indeed, Dr. Schmid himself appeared at the public input hearing in this proceeding and gave essentially the same testimony as his direct testimony in the Remand Proceeding. (Tr. 558:21-568:3.) Accordingly, additional onerous requirements are not necessary under Section 619 because there is a full opportunity for environmental issues relevant to the particular building siting proposal to be considered in the existing process.

## **VII. CONCLUSION**

For all the foregoing reasons, PECO respectfully requests that the Pennsylvania Public Utility Commission find that the siting of the proposed Natural Gas Reliability Station's Station Building and Fiber Building, at 2090 Sproul Road, Marple Township, Delaware County, Pennsylvania is reasonably necessary for the convenience or welfare of the public following a constitutionally sound environmental impact review.

Respectfully submitted,

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## **APPENDIX A**

### **PROPOSED FINDINGS OF FACT TO ADD TO THE INITIAL DECISION**

PECO Energy Company (“PECO” or “the Company”) incorporates herein by reference all findings of fact made in the Initial Proceeding. PECO proposes that the additional findings of fact be made in this Remand Proceeding:

1. On August 18, 2022, Marple Township and PECO negotiated and entered into a joint stipulation, which was filed with the Delaware County Court of Common Pleas (the “Joint Stipulation”). (*See* Marple Township Exhibit DO-Cross-1.)

2. The Joint Stipulation provides for an enhanced clock tower design and perimeter wall for the Station (“Enhanced Design”). (*See* Marple Township Exhibit DO-Cross-1.)

3. The Enhanced Design renderings in the Joint Stipulation are the final renderings for the Station. (Tr. 1996:20-22.)

4. The Enhanced Design resulted in a change in the emergency generator planned for the Station to ensure emergency power for additional electrical equipment for the Station, including additional controls for the Station’s gate, perimeter lighting for the Station, and the Enhanced Design’s clock tower. (Tr. 1999:1-13.)

#### **Air Emission Determinations for the Natural Gas Reliability Station**

5. The only emission generating equipment at the Station will be (1) the Cold Weather Technologies (CWT) Indirect Line Heater (“Line Heater”) and (2) an emergency generator. (PECO Statement No. 4, at 5:16-18; PECO Statement No. 6-RD, at 8:5-8.)

6. The Line Heater and emergency generator run on natural gas. (PECO Statement No. 4, at 5:16-19.)

7. The Line Heater and the emergency generator are situated outside, and not within, the Station Building or the Fiber Building, the buildings that are at issue in this proceeding. (PECO Statement No. 4-SR, at 17:14-17; PECO Statement No. 6-RD at 8:5-8; Tr. 1997:1-1998:11, 2006:3-23, 2015:1-4, and 2017:9-14; *see also* Marple Township Exhibit DO-Cross-1, Exhibit A.)

8. The Line Heater and emergency generator will only operate sporadically, with the emergency generator only being used in emergencies, or during its weekly maintenance testing. (PECO Statement No. 4-SR, at 17:10-14).

9. The Line Heater uses a 50/50 water/antifreeze bath to heat natural gas piping that passes through the Line Heater to ensure that the natural gas delivered to customers is at a specific temperature. (PECO Statement No. 4-SR, at 6:20-7:10; Tr. 2003:7-17, 2017:22-2018:8 and 2033:13-17.)

10. PECO may build either a 30 kilowatt (kW) or 50-kW emergency generator. (PECO Statement No. 6-RD, at 9:16-17). A 50-kW emergency generator will be required if PECO implements the Enhanced Design agreed upon by PECO and Marple Township in the August 18, 2022 stipulation. (PECO Statement No. 6-RD, at 9:16-22; Tr. 1999:1-13.)

11. The Pennsylvania Department of Environmental Protection (“PADEP”) and the U.S. Environmental Protection Agency (“EPA”) have regulatory jurisdiction over air emissions from the Station’s proposed emergency generator and Line Heater. (PECO Statement No. 6-RR at 3:1-12; Tr. 2371:5-11, 2373:15-2377:15, 2379:10-2380:19).).

12. The Line Heater will provide a heat input of 4.6 million British thermal units per hour (“MMBtu/hr”) and will include six burners fueled with natural gas. (PECO Statement No. 6-RD, at 8:10-16; Tr. 2120:7-8.) PADEP regulations at 25 Pa. Code § 127.14(a)(3) establish a blanket exemption from the air permitting requirement for combustion units with a rated capacity of less than 10/MMBtu/hr of heat input fueled by natural gas supplied by a public utility. (PECO Statement Nos. 6-RD at 8:18-11:16 and 6-RR at 3:1-12; Exhibit JH-6.) The Line Heater qualifies for this blanket exemption. (PECO Statement No. 6-RD, at 9:12-14.)

13. The rated capacity of the 30-kW generator as stated by the vendor is 46.6 brake horsepower (bhp). (PECO Statement No. 6-RD, at 10:17-21). PADEP regulations at 25 Pa. Code § 127.14(a)(8) establish a blanket exemption from the air permitting requirement for internal combustion engines rated at less than 100 bhp. (PECO Statement Nos. 6-RD, at 8:18-11:16 and 6-RR at 3:1-12; Exhibit JH-6.) The 30-kW generator qualifies for this blanket exemption. (PECO Statement No. 6-RD, at 10:17-20.)

14. The 50-kW generator would have estimated nitrogen oxide NOx emissions of 0.97

lb/hr, 23.3 lb/hr, and 0.24 tpy. (PECO Statement Nos. 6-RD, at 10:1-15.) PADEP regulations at 25 Pa. Code § 127.14(a)(8) establish a blanket exemption from the air permitting requirement for internal combustion engines, regardless of size, with combined actual NO<sub>x</sub> emissions less than 100 pounds per hour (lb/hr), 1000 pounds per day (lb/day), 2.75 tons per ozone season, and 6.6 tons per year (tpy) on a 12-month rolling basis. (PECO Statement Nos. 6-RD, at 8:18-11:16 and 6-RR, at 3:1-12; Exhibit JH-6.) Both the 30-kW and 50-kW generators qualify for this blanket exemption. (PECO Statement No. 6-RD, at 10:1-21.)

15. The PADEP blanket exemptions from air permitting for the Line Heater and emergency generator are agency determinations from the PADEP.

16. The emergency generator will comply with the emissions standards set forth in 40 CFR 60.4233(e). PECO has Certificates of Conformity from the EPA for both the 30-kW and 50-kW emergency generators, which indicate that the engines have been found to conform with applicable federal emissions standards. (PECO Statement No. 6-RD, at 11:1-11; Exhibits JH-2 & JH-3.)

17. The exemptions from the PADEP's permitting requirements apply on a specific emissions unit basis. (Tr. 2373:15-23.) Even if the facility emissions from the Line Heater and emergency generator were combined, their potential emissions would be considerably lower than the threshold that triggers the PADEP permitting requirement. (Tr. 2374.)

18. PECO did not conduct air dispersion modeling to construct or operate the Station prior to this Remand Proceeding because the Line Heater and the emergency generator are each subject to PADEP blanket exemptions from air permitting. (PECO Statement No. 6-RR, at 3:1-12 and 7:14-8:4; Tr. 2377:23-2378:6.)

19. PECO's expert witness, Jeffrey Harrington of Tetra Tech, conducted air dispersion modeling to respond to the air modeling from Marple Township's witness, Timothy McAuley. (PECO Statement No. 6-RR, at 3:9-12; Tr. 2378:9-14.)

20. Tetra Tech's air dispersion modeling performed for the Remand Proceeding identified that the ambient air impacts directly attributable to the Station are much less than the EPA's National Ambient Air Quality Standards ("NAAQS"). (PECO Statement No. 6-RR, at 9:15-17 and 12:8-13.)

21. Mr. Harrington of Tetra Tech explained that NAAQS are defined by EPA as the thresholds that demonstrate that emissions from a proposed project are protective of public health and public welfare. EPA's NAAQS regulations are set forth at 40 CFR Part 50. NAAQS include both "primary" ambient air quality standards, which are the level of air quality that the EPA has determined is necessary, with an adequate margin of safety, to protect the public health, and "secondary" which are levels of air quality necessary to protect the public welfare from any known or anticipated effects of a pollutant. (PECO Statement No. 6-RR, at 7:14-20.)

22. Even in the absence of an air permit requirement, the emergency generator will be subject to several enforceable requirements, including federal New Source Performance Standards codified in 40 CFR Part 60, subpart JJJJ and federal National Emissions Standards for Hazardous Air Pollutants for stationary reciprocating internal combustion engines codified at 40 CFR Part 63, subpart ZZZZ. These regulations contain both emissions-related and operational limitations. (Tr. 2374:19-2375:12.)

23. PADEP has the authority to enforce these regulations and to investigate facilities that potentially violate the NAAQS, new source performance standards, and NESHAP. (Tr. 2374:19-2375:12 and 2376:15-2377:15.)

24. Marple Township's air dispersion modeling did not use the statistical form of the NAAQS standard promulgated by the EPA. (Tr. 2392:13-14.)

25. Additionally, Mr. Harrington testified that there were numerous flaws in Marple Township's air dispersion modeling. For example, Dr. McCauley assumed for the purposes of his model that the emergency generator would operate on a 24/7/365 continuous basis, for 8,760 hours per year. (PECO Statement No. 6-RR, at 3:21-4:28.) Mr. Harrington explained that this assumption ignores (i) PECO's actual plans (which are to operate the generator only in emergencies and for routine testing for an hour per week (ii) federal law that restricts such operation to no more than 100 hours per year, and (iii) guidance from the Environmental Protection Agency ("EPA") specifying 500 hours as a conservative benchmark for the modeling. (*Id.*; Tr. 2384:10-15.) In other words, Dr. McCauley modeled air emissions from the generator assuming non-compliance, which as Mr. Harrington testified, is not a standard principal of air modeling. (Tr. 2382:16-25.)

26. Mr. Harrington also testified that Dr. McAuley used the incorrect layout for the Station (*see* PECO Statement No. 6-RR, at 5:1-20), incorrect stack dimensions (*see id.* at 6:1-18); overly conservative nitrogen dioxide screening parameters in contravention to EPA’s air modeling guidance (*see id.* at 6:21-7:12), and used different exhaust temperatures and exit velocities in modeling air emissions at 2090 Sproul Road (PECO’s preferred site) and the Don Guanella site (Marple Township’s preferred site) (*see id.* at 14:6-22). During the hearing, Dr. McCauley acknowledged that he did not use the current site plan, and further acknowledged that the exit velocities for the two sites should have been the same (Tr. 2499:13-2501:24, 2524:18-19, 2536:16-24.)

27. Mr. Harrington testified that as a result of these errors in the underlying assumptions, Dr. McCauley’s air modeling resulted in overstated and unrealistically high emissions projects. (PECO Statement No. 6-RR, at 10:14-18.)

28. Tetra Tech evaluated the Station’s greenhouse gas emissions using 500 hours of emergency generator operation during a given year and operation of all six of the Line Heater’s burners operating 24/7/365, which evaluation resulted in a conservatively high emission potential because the equipment is not expected to operate at those durations. Tetra Tech’s evaluation concluded that the Station’s greenhouse gas emissions would be approximately one-tenth of EPA’s greenhouse gas reporting threshold pursuant to 40 CFR Part 98, Subpart C. (PECO Statement No. 6-RR, at 15:7-16:3.)

29. Marple Township did not calculate the greenhouse gas emissions from the Station’s air emission sources.

### **Water Quality Determinations for the Natural Gas Reliability Station**

25. On June 8, 2021, PECO received a National Pollutant Discharge Elimination System (“NPDES”) permit from PADEP for discharges of stormwater associated with construction activities at the Station. (PECO Statement No. 2-RD, at 12:10-17.)

26. The NPDES permitting process involved consultations with the Pennsylvania Historical and Museum Commission – State Historic Preservation Office (“SHPO”), Pennsylvania Game Commission, Pennsylvania Department of Conservation and Natural Resources,

Pennsylvania Fish and Boat Commission, and U.S. Fish and Wildlife Service. Additionally, PECO's application was subject to a completeness and technical review by the Delaware County Conservation District ("DCCD"). (PECO Statement No. 2-RD, at 7:6-8:9 and 12:10.)

27. PECO testified that it has been and continues to be in compliance with the NPDES permit. (PECO Statement No. 2-RD, at 13:14-18; PECO Statement No. 6-RD, at 7:6-10.)

28. PECO testified that stormwater conditions are expected to improve following construction of the Station. There will be a net decrease in rate and volume of stormwater runoff from the Property after the Station is completed, due to a decrease in the area of impervious surface from 0.57 acres to 0.38 acres (36% reduction in impervious cover). (PECO Statement No. 2-RD, at 8:16-19; PECO Statement 6-RD, at 14:3-7; Exhibit KK-3 (PCSM Plan).)

29. PECO designed and will install two underground detention systems in order to satisfy the requirements of Marple Township Ordinance, Section 257-16(A), and PECO is otherwise constructing the Station to be consistent with Marple Township's stormwater ordinance. (PECO Statement No. 2-RD, at 9:1-7.)

30. PECO prepared an Erosion and Sedimentation Control Plan in conjunction with the NPDES permit pursuant to 25 Pa. Code Chapter 102 that identified various measures to minimize or mitigate erosion and sedimentation. These included measures to minimize earth disturbance, protect existing drainage features and vegetation, minimize soil compaction, and increase runoff protection. (PECO Statement No. 2-RD, 9:12-16 and 10:1-19; Exhibit KK-2.)

31. In accordance with DEP's Erosion and Sedimentation Pollution Control Program Manual, PECO developed Best Management Practices ("BMPs") for the construction activities at 2090 Sproul Road designed to ensure that sediment-laden runoff would not be discharged into surface waters. These BMPs include pumped water filter bans, tire cleaning, inlet protection, compost filter socks, street sweeping, concrete washout facilities, and a rock construction entrance with wash rack. (PECO Statement No. 2-RD, at 10:20-12:3.) PECO testified that the BMPs ensure that construction of the Station will not adversely impact surface waters. (*Id.* at 12:4-7.)

32. There are no wetlands or other surface waters at the 2090 Sproul Road, as the

Property was developed as a retail gasoline service center since the 1960s and was covered in asphalt, concrete, and stone prior to PECO's purchase of the Property. (PECO Statement No. 2-RD, at 9:17-21.)

33. The Property is located outside of any special flood hazard area or flood zone. (PECO Statement 6-RD, at 13:20-23.)

34. PECO conducted a Phase I environmental site assessment of the Property in August 2020. (PECO Statement 2-RD, at 14:1-3 and 16:1-3; PECO Statement 4-RD, at 2:13-17.)

35. During its prior use as a gasoline station, public records revealed evidence of a release at the Property during the removal of two gasoline underground storage impacts, and 720 tons of impacted soil was removed. (PECO Statement 2-RD, at 14:21-15:3.)

36. Groundwater investigations conducted between 2001 and 2012 showed that groundwater at the Property was impacted by the releases. (PECO Statement 2-RD, 15:3-5.)

37. In 2012, the PADEP approved a Remedial Action Completion Report, which indicated that the Property satisfied the Site-Specific standard under the Pennsylvania Land Recycling and Remediation Act. (PECO Statement 2-RD, 15:7-10.)

38. Subsequently, the PADEP approved an environmental covenant for the Property, which confirmed continued presence of benzene and methyl tertiary-butyl ether ("MTBE") in excess of relevant the PADEP standards and which prevented the use of the groundwater at the Property and limited use of the Property to non-residential uses only. (PECO Statement 2-RD, at 15:10-13.) PECO testified that the environmental covenant eliminates any potential exposure pathway that could impact human health. (*Id.* at 15:14-18.)

39. PECO conducted a Phase II environmental assessment to investigate the nature and extent of residual contamination due to the Property's prior use as a gasoline service station. (PECO Statement 2-RD, at 16:9-15.)

40. The Phase II assessment revealed soil and groundwater contamination in the form

of petroleum hydrocarbons and fuel additives as a result the Property's historic use as a gas station. (PECO Statement 2-RD, at 16:17-19.)

41. In May-June 2022, PECO's contractors engaged in remedial excavation in order to remove over 1,000 tons of contaminated soil, which was subsequently appropriately disposed of. PECO's contractor also removed a large volume of piping and conduits that remained beneath the concrete at the Property. (PECO Statement 2-RD, at 17:11-17.) PECO testified that these efforts improved the condition of the Property, removed and capped soil contamination resulting from the Property's prior use, and will ensure that the public is not and will not be exposed to residual contamination remaining at the Property. (*Id.* at 17:18-18:5.)

#### **Natural, Scenic, Historic and Esthetic Determinations for the Station**

42. During consultations with the SHPO as part of the NPDES permit process, the SHPO concluded that the Project would have "no effect on historic properties." (PECO Statement No. 2-RD, at 8:12-13; PECO Statement No. 6-RD, at 16:8-10; *see also* Exhibit. KK-2.)

43. PECO has also received determinations from the Pennsylvania Game Commission, Pennsylvania Department of Conservation and Natural Resources, Pennsylvania Fish and Boat Commission, and U.S. Fish and Wildlife Service that the project will have no known impacts to threatened or endangered species or special concern species and resources. (PECO Statement No. 2-RD, at 8:1-9; PECO Statement No. 6-RD, at 14:12-15.)

44. 2090 Sproul Road is not in a residential zoning district under Section 300-19 of the Marple Township Zoning Ordinance, where public utility use is prohibited. (*See* Exhibit JM-5).

45. A majority of PECO's gate stations are located in residential areas. Some of PECO's existing gate stations have residences within 100 feet of the gate station, a distance similar to that of the Natural Gas Reliability Station. (PECO Statement No. 3, at 6:11-16; PECO Statement No. 4, at 8:17-21).

46. Many of PECO's other regulating stations are located in residential areas, including instances where residential development occurred after the stations were in operation. (Tr. 1359-60).

47. PECO agreed with Marple Township to construct the Station with the Enhanced



Design to enhance the aesthetic appeal of the Property as well as the surrounding community through landscaping, facility design, and enhanced pedestrian access. (PECO Statement No. 4-RD, at 3:20-4:17; *see also* Exhibit JM-7.)

48. The Station will be unstaffed; therefore, it will not create additional traffic in the area. (PECO Statement No. 4, at 9:16-18.)

49. Marple Township and the Intervenors have proposed that the Station be constructed at an alternative location located on the former Don Guanella School property.

50. The former Don Guanella School property consists of woodlands, wetlands, meadows, and creeks and is subject to a Master Plan being developed by Delaware County to create a County Park. (PECO Statement No. 6-RR, at 17:6-18:6.)

51. A portion of the Don Guanella property contains cultural and historic remains of the Rhoads Tannery and Whetstone Factory Site, which would be adversely impacted by development in the area. (PECO Statement No. 6-RR. at 23:12-24:7.)

52. Natural gas will be odorized at PECO's West Conshohocken LNG Plant, so no odorization will be performed at the Natural Gas Reliability Station when it is fully operational. (PECO Statement No. 4 at 9:4-9.)

53. The Station will have aesthetic lighting on its exterior, specifically along the perimeter of the fence line, as well as on the clock tower. (Tr. 1999:22-25; 2000:1-2.)

54. The Station will require additional minimal lighting that will be positioned on the Building and directed downward toward the equipment. (Tr. 2000:3-7; 18-25.)

55. The new "Enhanced Design," in lieu of a security fence, will include a perimeter wall constructed of brick and precast concrete, and an accompanying clock tower. (PECO Statement No. 4-RD, at 3:14-4:5.) The Enhanced Design incorporates numerous decorative elements, landscaping, and a setback permitting pedestrian use of the sidewalk. (*Id.* at 4:8-17.)

56. PECO's noise study conducted by Hoover & Keith Inc. indicated that the Station's contribution to background sound levels with PECO's sound mitigating designs will only add 1 to 3 dB to background sound levels, which is representative of only a minimum impact on human perception. (PECO Statement No. 4, at 3:21-22; Exhibit TF-7).

57. PECO proposed to implement sound mitigating designs for the Station, which include the use of acoustic-dampening insulation and doors for the main Station Building, a forced air ventilation system to minimize open areas where sounds can escape, sound absorbing or dampening HVAC equipment, and other sound-dampening materials on the Station’s regulators and valves. (PECO Statement No. 4, at 10:18-11:2).

58. The Station’s Security Fence will be composed of Sound Fighter SonaGuard materials, specifically designed to absorb sounds and prevent them from extending beyond the Station’s footprint. (PECO Statement No. 5-RD, at 4:15-19).

59. PECO’s expert noise witness, Reginald Keith, testified that it is technically feasible for PECO to implement the sound mitigation measures using feasible, readily available, and proven technology and it would be feasible and readily achievable to meet Marple Township’s Noise Ordinance standards. (Tr. 1979:24-25; 1980:1-2; 1987:20-25).

60. In the Remand Proceeding, the Intervenors produced two witnesses who claimed there would be noise impacts from the Station—Dr. James Schmid and Dr. Edward Ketyer. However, neither is an acoustical expert (Tr. 2211:8-17; 2330:17-2331:3), neither had calculated sound decibel levels for the Station (*Id.*), and neither had reviewed the Hoover & Keith sound study. (*Id.*) Dr. Ketyer conceded he was speaking generically about the impact of excessive sound and noise pollution on children’s health (Tr. 2331:24-2332:2), and he further acknowledged that he had not taken into account the sound dampening measures recommended in the Hoover & Keith study. (Tr. 2331:12-18.)

### **Safety Determinations for the Natural Gas Reliability Station**

61. The Natural Gas Reliability Station and the 11.5-mile gas main connecting to the Station are natural gas “distribution facilities,” as defined by federal Pipeline Hazardous Materials and Safety Administration (“PHMSA”) regulations. (PECO Statement 3-RD at 5:20-22.)

62. The Natural Gas Reliability Station is classified in the natural gas distribution industry as a “district regulating station.” (PECO Statement No. 3-RD at 2:3-5.)

63. The PHMSA regulations do not prohibit the siting of natural gas distribution facilities near homes or people. (Tr. 1650:8-1651:20.)

64. These facilities frequently need to be located near residences and businesses. (Tr. 1577:5-10.)

65. The PHMSA regulations do not restrict where natural gas distribution facilities can be located because the distribution assets must be located in proximity to serve their customers and because siting restrictions are unnecessary due to the extensive safety regulations that natural gas distribution operators must follow. (PECO Statement 3-RD at 8:5-14; 10:10-11:5.)

66. There are no PHMSA determinations or approvals required to site the Station or the Station's Buildings at 2090 Sproul Road. (PECO St. 3-RD at 9:18-19; 10:3-8.)

67. Pennsylvania specifically incorporated all PHMSA pipeline safety regulations in 49 CFR Subtitle B Ch. I Subch. D, Pipeline Safety, including regulations for natural gas distribution facilities under Part 192. *See* 58 Pa. Stat. Ann. § 801.302 (a) (“The safety standards and regulations for pipeline operators shall be those issued under the Federal pipeline safety laws as implemented in 49 CFR Subtitle B Ch. I Subch. D (relating to pipeline safety).”).

68. The PHMSA regulations require natural gas pipeline operators to comply with extensive safety requirements which are inherent in the operation of natural gas distribution systems, including PHMSA regulations at 49 C.F.R. Part 192. These regulations provide requirements for the materials used in natural gas facilities (Subpart B); pipe and pipeline component design requirements (Subparts C and D); construction requirements, including welding and joining requirements (Subparts D through G); requirements for customer meters, service regulators, and service lines (Subpart H), corrosion control requirements (Subpart I); operation and maintenance requirements (Subparts L and M); personnel qualifications and recordkeeping requirements (Subpart N); and a distribution integrity management program (DIMP) requirements, which establishes a written program that an operator must follow to continuously evaluate, prioritize and mitigate risks, such as corrosion, excavation damage, other outside force damage, or equipment failure to an operator's distribution system (Subpart P). (PECO Statement 3-RD at 10:16-11:5.)

69. The PHMSA regulations do not use the term “explosion impact radius.” (PECO St. 3-RD at 3:16-18.)

70. The PHMSA regulations include the term “potential impact radius” (“PIR”) at 49

C.F.R. § 192.903.

71. The PIR calculation is only applicable to natural gas “transmission pipelines”, which have separate regulatory requirements than “distribution pipelines.” (PECO St. 3-RD at 7:13-8:2.)

72. The PIR is a calculation based on a transmission pipeline’s maximum allowable operating pressure and diameter, which calculation is used to determine if a rural or suburban segment of transmission pipeline is located in an area with higher density, known as a “high consequence area.” (PECO St. 3-RD at 6:1-7:10.)

73. Transmission pipeline operators are required to follow additional “Transmission Integrity Management Program” requirements in “high consequence areas.” (PECO Statement 3-RD at 6:1-7:10.)

74. Because the Station and its connecting facilities are distribution facilities, the PIR is not applicable to the Station, and is not related to any siting requirement for the Station or the Station’s Buildings. (PECO Statement 3-RD at 7:13-8:14.)

75. There is no PIR calculation for distribution facilities under PHMSA regulations because operators of distribution facilities are required in accordance with 49 C.F.R. Part 192 Subpart P, Gas Distribution Pipeline Integrity Management (IM), to include all of their distribution facility assets in a written Distribution Integrity Management Program (“DIMP”) regardless of the proximity of a distribution asset to occupied buildings. (PECO Statement 3-RD at 7:19-8:2.)

76. DIMP establishes a written program that a distribution facility operator must follow to continuously evaluate, prioritize and mitigate risks, such as corrosion, excavation damage, other outside force damage, or equipment failure to an operator’s distribution system. (PECO Statement 3-RD at 11:2-5, citing 49 C.F.R. Part 192 Subpart P.)

77. Intervenors offered the testimony of two witnesses on the issue of safety: Jeffrey Marx, an expert in quantitative risk analysis; and Jim Capuzzi, the Township’s Fire Marshal. During the hearing, Mr. Capuzzi acknowledged that he did not review the PHMSA regulations, is not an expert in the PHMSA regulations, did not perform a quantitative risk analysis, did not perform a study of the probability of a leak from the Station, and did not perform a study of the

probability of a fire occurring at the Station (Tr. 2294:17-18, 2996:2-21, 2297:8-2298:7 and 2300:2-7.)

78. Marple Township witness Jeffrey Marx prepared a quantitative risk analysis, analyzing the safety risk of PECO's proposed Natural Gas Reliability Station at 2090 Sproul Road. (Tr. 2178:25-2179:18). A risk analysis identifies not only potential hazards and their consequences, but also the probability of an adverse event. (Tr. 2172:4-11.)

79. The quantitative risk analysis conducted by Marple Township determined that there is a low risk for a safety event involving 2-inch holes in the Station's facilities, described by the analysis as the "maximum credible event," which was determined to be a "rare" event. (Tr. 2178:25-2179:18.)

80. PHMSA's database of incidents as defined by 49 C.F.R. § 191.3, which includes data dating several decades, did not identify an equivalent "significant holes" event, as described in Marple Township's quantitative risk analysis, to have previously occurred at any equivalent district regulating station across the United States. (PECO Statement No. 3-RR at 5:8-20.)

81. The Marple Township quantitative risk analysis also determined that there was not expected to be a safety risk from a full rupture event at the Station, which was described as "extremely rare." (Tr. 2181:13-2182:6.)

82. The potential impact distance identified in Marple Township's quantitative risk analysis was only 100 feet for the "rare" event and 220 feet for the "extremely rare" event of a full pipe rupture. These vulnerability zones showed that any potential impact would extend only a short distance beyond the site boundaries, if at all. (Tr. 2181:13-25.)

83. PHMSA's database of incidents as defined by 49 C.F.R. § 191.3, which includes data dating several decades, did not identify an equivalent full rupture event, as described in Marple Township's quantitative risk analysis, to have previously occurred at an equivalent district regulating station across the United States. (PECO Statement No. 3-RR at 5:8-6:8.)

84. PECO has committed to comply with all federal and state safety requirements in the construction and operation of the Natural Gas Reliability Station. (PECO Statement No. 4-SR, at 11:13-20.)

85. PHMSA's enforcement dataset did not identify any enforcement violations against PECO since 2002 and PECO's operational record meets or exceeds federal and state standards. (PECO Statement Nos. 6-SR at 16:1; 3-RD at 14:7-15:3.)

86. The PHMSA databases indicate that no incidents, as defined by 49 C.F.R. § 191.3, have occurred at PECO's regulating stations dating back to 1986, the earliest records available. (PECO Statement No. 6-SR at 7:8-9:4.)

87. PECO remotely monitors its gate stations using fiber optic cables and also through the cellular network to ensure communication with the equipment within its facilities. PECO will be able to remotely shut down the Station if a problem is ever identified. If necessary, PECO also has the ability to shut off gas from the West Conshohocken LNG Plant that would travel to the Natural Gas Reliability Station. (PECO Statement No. 4 at 11:8-17.)

88. PECO will also have shut-off valves at multiple points along the 11.5-mile gas main and at the LNG Plant (PECO Statement Nos. 4 at 11:8-17; 4-SR at 13:5-16.)

89. PECO's internal procedures for responding to irregularities in operations at the Station include instructions for responding to gas odors calls and gas emergency response protocols. The procedures require PECO to respond to any incident within an hour. PECO operates its control room 24 hours per day, 7 days a week. (PECO Statement No. 4 at 11:20-25.)

90. The Company routinely communicates with local fire and emergency management officials and works with them on a regular basis. PECO also conducts an annual training program, free of charge, for local emergency management officials located across PECO's service territory. The program trains emergency officials on the appropriate steps that should be taken to respond to any incidents involving PECO's facilities or equipment, such as the procedures for how to ensure an area is safe around PECO's facilities and how to notify PECO of the incident. (PECO Statement No. 4 at 12:3-10.)

91. PECO's protocols mandate that the Company have a staff member onsite within one-hour for gas odor calls, per industry and regulatory standards. PECO achieves this result 99.9% of the time. (PECO Statement No. 4-SR at 14:8-13.)

92. PECO has met with Marple Township and Delaware County emergency officials

to discuss the Natural Gas Reliability Station and PECO's safety protocols. (PECO Statement No. 4 at 12:13-17.)

93. Once the Natural Gas Reliability Station is completed, PECO will invite local emergency management officials to tour the Station to allow them to familiarize themselves with the assets and to further discuss PECO's safety protocols for the facility. (PECO Statement No. 4 at 12:20-23.)

**APPENDIX B**  
**PROPOSED CONCLUSIONS OF LAW**

PECO Energy Company (“PECO”) proposes that the following conclusions of law in this Remand Proceeding:

1. The Commission has jurisdiction over the parties and the subject-matter of the dispute. 53 P.S. § 10619.

2. As the party seeking approval from the Commission, PECO bears the burden of proof. 66 Pa.C.S. § 332(a).

3. Public utility facilities are exempt from local regulation. *Duquesne Light Co. v. Monroeville Borough*, 298 A.2d 252, 257 (Pa. 1972); *Twp. of Marple v. Pennsylvania Pub. Util. Comm'n*, 294 A.3d 965, 972-73 (Pa. Cmwlth. Ct. 2023), *reconsideration and reargument denied* (Apr. 25, 2023).

4. “Section 619 of the Municipalities Planning Code . . . gives municipalities the ability to regulate via local ordinance the location of a building that a public utility wishes to build or use, unless the ‘Commission decide[s] that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public.’” *Twp. of Marple v. Pennsylvania Pub. Util. Comm'n*, 294 A.3d 965, 972 (Pa. Cmwlth. Ct. 2023), *reconsideration and reargument denied* (Apr. 25, 2023), *quoting* 53 P.S. § 10619.

5. “[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. Pennsylvania Pub. Util. Comm'n*, 294 A.3d 965, 974 (Pa. Cmwlth. Ct. 2023), *reconsideration and reargument denied* (Apr. 25, 2023).

6. The Commission is obligated to defer to agency determinations made by other agencies with primary regulatory jurisdiction over such matters. *Twp. of Marple v. Pennsylvania Pub. Util. Comm'n*, 294 A.3d 965, 973-74 (Pa. Cmwlth. Ct. 2023), *reconsideration and reargument denied* (Apr. 25, 2023); *see also Del-AWARE Unlimited, Inc. v. Pennsylvania Pub. Util. Comm'n*, 513 A.2d 593, 596 (Pa. Cmwlth. 1986), *appeal denied*, 527 A.2d 547 (Pa. 1987).



7. PECO has the statutory duty under the Public Utility Code to provide reliable natural gas distribution service to its customers, 66 P.S. § 1501, and the Commission has the statutory responsibility under the Code to enforce this duty, 66 P.S. § 501.

8. The Environmental Rights Amendment cannot be construed to expand the Commission's statutory authority. *See Funk v. Wolf*, 144 A.3d 228, 235, 249 (Pa. Cmwlth 2016), *aff'd*, 158 A.3d 652 (Pa. 2017).

9. The Commission has no statutory authority to ban natural gas infrastructure on the basis of climate change. *See Funk v. Wolf*, 144 A.3d 228, 249–251 (Pa. Cmwlth 2016), *aff'd*, 158 A.3d 652 (Pa. 2017).

10. The scope of a Municipalities Planning Code Section 619 proceeding before the Commission is limited to evaluating the siting of the public utility's proposed building(s) at a location. *Twp. of Marple v. Pennsylvania Pub. Util. Comm'n*, 294 A.3d 965, 974 (Pa. Cmwlth. Ct. 2023), *reconsideration and reargument denied* (Apr. 25, 2023) (“a Section 619 proceeding is constitutionally inadequate unless the Commission completes an appropriately thorough environmental review of a building siting proposal”); *Petition of Sunoco Pipeline, L.P. for A Finding That A Bldg. to Shelter the Walnut Bank Valve Control Station in Wallace Twp., Chester Cty., Pennsylvania Is Reasonably Necessary for the Convenience or Welfare of the Pub.* *Petition of Sunoco Pipeline, L.P. for A Finding That A Bldg. to Shelter the Blairsville Pump Station in Burrell Twp., Indiana Cty., Pennsylvania Is Reasonably Necessary for the Convenience or Welfare of the Pub.*, No. P-2014-2411941, 2014 WL 5810345, at \*26 (Pa. P.U.C.) (Opinion and Order, Oct. 2, 2014) (“the inquiry on remand should not address whether it is appropriate to place the valve and pump stations in certain areas, but, rather, should address whether the buildings proposed to shelter those facilities are reasonably necessary for the convenience or welfare of the public.”).

11. Anything that does not qualify as what constitutes the common understanding of a building under the Municipalities Planning Code, 53 P.S. § 10619, should be considered a public utility facility under Section 102 of the Public Utility Code, 66 Pa.C.S. § 102. *Twp. of Marple v. Pennsylvania Pub. Util. Comm'n*, 294 A.3d 965, 972–73 (Pa. Cmwlth. Ct. 2023), *reconsideration and reargument denied* (Apr. 25, 2023).

12. The proposed perimeter wall and clock tower that will be built as part of the Station's Enhanced Design are facilities pursuant to 66 Pa.C.S. § 102 because they are not buildings, and are therefore exempt from local zoning requirements and outside the scope of a Section 619 proceeding.

13. The Cold Weather Technologies ("CWT") Indirect Line Heater ("Line Heater") and emergency generator that are proposed at PECO's Natural Gas Reliability Station are public utility facilities pursuant to Pa.C.S. § 102, and are therefore exempt from local zoning requirements and outside the scope of a Section 619 proceeding.

14. Mr. Capuzzi is not qualified as an expert on safety risks from the Station and, accordingly, his testimony will be afforded no weight. *See Harley-Davidson Motor Co., v. Springettsbury Twp.*, 124 A.3d 270, 286 (Pa. 2015); Pa.R.E. 702.

15. Dr. Ketyer is not qualified as an expert on noise impacts and, accordingly, his testimony will be afforded no weight. *See Harley-Davidson Motor Co., v. Springettsbury Twp.*, 124 A.3d 270, 286 (Pa. 2015); Pa.R.E. 702.

16. PECO has obtained all necessary agency determinations to site PECO's proposed Natural Gas Reliability Station at 2090 Sproul Road, Marple Township, Delaware County.

17. The Commission is obligated to defer to the agency determinations that PECO obtained or that exist for the components of PECO's proposed Natural Gas Reliability Station. *Twp. of Marple v. Pennsylvania Pub. Util. Comm'n*, 294 A.3d 965, 973-74 (Pa. Cmwlth. Ct. 2023), *reconsideration and reargument denied* (Apr. 25, 2023); *see also Del-AWARE Unlimited, Inc. v. Pennsylvania Pub. Util. Comm'n*, 513 A.2d 593, 596 (Pa. Cmwlth. 1986), *appeal denied*, 527 A.2d 547 (Pa. 1987).

18. There will be no unreasonable environmental degradation by siting PECO's proposed Natural Gas Reliability Station or the Station's Buildings at 2090 Sproul Road, Marple Township, Delaware County.

19. There will be no unreasonable impairment to the public's right to clean air from the Station's Buildings because there are no air emission sources from those buildings. Similarly, the Buildings are not a source of greenhouse gas emissions contributing to climate change.

20. There will be no unreasonable impairment to the public’s right to clean air from the Line Heater and emergency generator because: (i) PECO demonstrated that the Line Heater and emergency generator are subject to blanket PADEP air permitting exemptions; (ii) the emergency generator has received a Certificate of Conformity from EPA indicating that its air emissions comply with federal regulations; (iii) the Line Heater and emergency generator are subject to PADEP enforcement and regulation and must comply with EPA’s National Ambient Air Quality Standards, New Source Pollution Standards, and National Emissions Standards for Hazardous Air Pollutants; and (iv) the Line Heater and the emergency generator are below EPA’s greenhouse gas emissions reporting requirements established under 40 C.F.R. Part 98, Subpart C. *See* 25 Pa. Code § 127.14(a)(8); 40 CFR 60.4233(e); 40 CFR Part 50; 40 CFR Part 60, subpart JJJJ; 40 CFR Part 63, subpart ZZZZ.

21. There will be no unreasonable impairment to the public’s right to clean water from the Station’s Buildings and the Station because: (i) PECO received a National Pollutant Discharge Elimination System (“NPDES”) permit for discharges of stormwater; (ii) there are no wetlands or surface waters on 2090 Sproul Road; and (iii) PECO has and will address historical contamination at 2090 Sproul Road in accordance with the environmental covenant at 2090 Sproul Road.

22. There will be no unreasonable impairment to the public’s right to the natural, scenic, historic and esthetic aspects of the environment because: (i) the Pennsylvania Historical and Museum Commission – State Historic Preservation Office determined that there are no historic aspects of 2090 Sproul Road; (ii) the Pennsylvania Game Commission, Pennsylvania Department of Conservation and Natural Resources, Pennsylvania Fish and Boat Commission, and U.S. Fish and Wildlife Service determined that there are no known impacts to threatened or endangered species or special concern species and resources; (iii) there are no natural or scenic aspects to 2090 Sproul Road currently because it is a vacant lot; (iv) the Enhanced Design of the Station will improve the esthetics of 2090 Sproul Road compared to a vacant lot; and (v) PECO has demonstrated that the Station will be able to comply with Marple Township’s Noise Ordinance.

23. The Pipeline and Hazardous Materials Safety Administration’s (“PHMSA’s”) regulations govern natural gas distribution facilities in Pennsylvania. 58 P.S. § 801.302(a).

24. Under Section 2205(b)(2) of the Public Utility Code, 66 Pa.C.S. § 2205(b)(2), natural gas distribution companies are permitted to maintain and upgrade their facilities without

obtaining Commission approval. The Commission ensures safety by requiring the companies to comply with PHMSA’s applicable safety regulations, 52 Pa. Code § 59.33(b), and subjecting them to inspection as necessary to ensure compliance, 52 Pa. Code § 59.33(d).

25. The Station and the gas main connecting to the Station are natural gas distribution facilities. 49 C.F.R. § 192.3.

26. There is no “explosion impact radius” in PHMSA’s regulations.

27. The PHMSA regulations include a “potential impact radius” (“PIR”) that is specific to natural gas transmission pipelines. 49 C.F.R. § 192.903

28. As distribution facilities, the PIR is inapplicable to the Station and the gas main connecting to the Station. 49 C.F.R. § 192.903

29. There is no PHMSA agency determination that PECO must obtain to site the Station at 2090 Sproul Road.

30. Federal regulations do not prohibit the siting of natural gas distribution facilities near homes or people.

31. Even considering contributions to climate change from the Station itself and downstream greenhouse gas emissions, the siting of PECO’s proposed Station Building and Fiber Building at 2090 Sproul Road, Marple Township, is reasonably necessary for the convenience and welfare of the public because it will enhance the reliability of the natural gas supply to diminish PECO’s design day requirements and meet growing demand for natural gas in Delaware County.

**APPENDIX C**  
**PROPOSED ORDERING PARAGRAPHS**

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

1. That the Petition of PECO Energy Company (“PECO”) for a Finding of Necessity Pursuant to 53 P.S. § 10619 that the Situation of Two Buildings Associated with a Gas Reliability Station in Marple Township, Delaware County is Reasonably Necessary for the Convenience and Welfare of the Public, at Docket No. P-2013-2347105, is hereby granted in that the situation of the two buildings associated with the proposed natural gas reliability station (the “Natural Gas Reliability Station”) is reasonably necessary for the convenience and welfare of the public within the meaning of Section 619 of the Municipalities Planning Code (“MPC”) Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. § 10619 and, therefore, exempt from any zoning, subdivision, and land development restriction of the Marple Township Zoning Code pursuant to MPC § 619; and
2. The proposed perimeter wall and clock tower appurtenant to the Natural Gas Reliability Station is a “facility” under 66 Pa. C.S. § 102 and is therefore exempt from local zoning requirements.

## CERTIFICATE OF SERVICE

I hereby certify that on this day I served a true copy of the foregoing Remand Main Brief of PECO Energy Company upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party) via electronic mail.

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Dated: December 15, 2023