



December 15, 2023

Via Electronic Filing

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

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

Dear Secretary Chiavetta,

Enclosed for electronic filing please find the Main Brief of Intervenors Julia M. Baker and Theodore R. Uhlman in the above-referenced matter. If you have any questions regarding this filing, please do not hesitate to contact me.

Sincerely,

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Certificate of Service

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**BEFORE THE COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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I. INTRODUCTION AND STATEMENT OF THE CASE

In this proceeding, the natural gas division of PECO Energy Company, Inc. (“PECO Gas”) has invoked Section 619 of the Pennsylvania Municipalities Planning Code (“Section 619”), 53 Pa. Cons. Stat. § 10619 (1988), to circumvent the Township of Marple’s (“Township”) zoning disapproval of a so-called “reliability station” (hereinafter labeled more accurately as “Expansion Station” or simply “Station”) at 2090 Sproul Road in the Township. The express purpose of the Expansion Station is to expand gas throughput through the distribution system, with a concomitant long-term increase in greenhouse gas (“GHG”) emissions from the combustion of natural gas in those homes and businesses as well as leaks from its pressurized and expanded natural gas pipeline distribution system. Julia M. Baker and Theodore R. Uhlman (“Intervenors”), individuals who live in close proximity to the proposed Station, were admitted as parties to the proceeding pro se and the undersigned have since entered an appearance and offer this brief on their behalf. In the initial proceedings, PECO Gas successfully opposed any consideration of the environmental impacts of the Expansion Station. The Commonwealth Court rejected the Pennsylvania Public Utility Commission’s (“Commission”) adoption of PECO Gas’s position as inconsistent with the requirements of Pennsylvania’s Environmental Rights Amendment (“Article I, Section 27” or “ERA”), Pa. Const. art. I, § 27 (1971), holding:

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

Township of Marple v. Pa. Pub. Util. Comm’n, 294 A.3d 965, 974-75 (Pa. Cmmw. Ct. 2023), (“*Twp. of Marple*”). The Court remanded the matter, requiring that the Commission incorporate a “constitutionally sound environmental impact review” in its decision. *Id.* at 975.

As the *Twp. of Marple* court recognized, the meaning of a constitutionally sound review has changed significantly in the past decade. For four decades prior to *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (“*Robinson Twp.*”) and *Pa. Env’tl. Def. Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (“*PEDF II*”), a three-prong balancing test—not the constitution itself—was used to determine compliance with Article I, Section 27. The Commission’s and the Commonwealth Court’s Section 619 jurisprudence during this period applied this balancing test. After *Robinson Twp.*, and particularly *PEDF II*, however, that balancing test is no longer valid. Instead, judicial review is to be based on “the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.” *PEDF II*, 161 A.3d at 930. The present case appears to be the first case since *PEDF II* to present the Commission with the question of how Section 619 should now be interpreted and applied.

In this brief, we focus primarily on the climate change impacts of the PECO Gas proposal for an Expansion Station. We do so because we see climate change as an existential threat, because PECO Gas did not adequately analyze the climate change effects of the proposal, because the Expansion Station is not necessary, and because it will increase GHG emissions at a time when emissions need to be dramatically reduced to mitigate impacts on ERA trust resources.

II. SUMMARY OF ARGUMENT

After *PEDF II*, the Commission has two roles in a Section 619 proceeding. It is the guarantor of the public’s Article I, Section 27 right to “clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.” It is also a trustee, along with other Commonwealth entities, for the “public natural resources” of the

Commonwealth. As a trustee, the Commission is required to “conserve and maintain” those resources for the benefit of present and future generations.” These are not new Commission powers; they are limits on the Commission’s power under Section 619.

Article I, Section 27 and Section 619 impose procedural and substantive requirements. On remand, PECO Gas has failed to meet its burden under both. Consequently, the Commission should deny its request.

Procedurally, PECO failed to submit a constitutionally sound environmental impact review for the Expansion Station. Rather than produce evidence that would enable the Commission to conduct such a review, PECO Gas refrained from furnishing the information necessary for the Commission to discharge its fiduciary duties of prudence, loyalty, and impartiality as a trustee under the ERA. *PEDF II*, 161 A.3d at 932). The Commission cannot discharge any of these fiduciary duties if PECO Gas does not provide sufficient information about the environmental impacts of the Expansion Station proposal.

The National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. § 4322(C)(i) requires an environmental impact statement prior to every major federal action that may significantly affect the quality of the human environment. While NEPA does not directly apply here because the Expansion Station is not a major federal action, NEPA provides a half-century of litigation-tested experience in determining the adequacy of environmental impact reviews like that required here. PECO Gas’s submission lacked three key elements of that review. First, it did not document or analyze the reasonably foreseeable climate change impacts of Expansion Station approval. Second, it did not document or analyze the reasonably foreseeable cumulative impacts of Expansion Station approval on air quality. Third, PECO Gas did not produce

evidence regarding the environmental impacts of a reasonable range of alternatives to the Expansion Station, including the alternative of not going ahead with it.

PECO appears to believe that the Commission's review is limited to the environmental impact of the location of the Expansion Station. That view is incorrect. Because the Commission is both a guarantor of public environmental rights and a constitutional trustee for public natural resources, a constitutionally sound environmental impact review must include all reasonably foreseeable effects of its decision. It cannot limit its review to only some of the impacts of its decision. In prior cases under the three-prong test, particularly *Del-Aware Unlimited, Inc. v. Pa. Pub. Util. Comm'n.*, 513 A.2d 593 (Pa. Cmmw. Ct. 1986), the Commission was able to avoid analyzing other reasonably foreseeable environmental impacts because another state agency analyzed those impacts. Here, however, there is no other agency to do the job. And, after *PEDF II*, the Commission cannot lawfully authorize an action that would violate constitutional rights. On the three elements described above, PECO Gas has not provided the Commission with enough information to conduct a constitutionally sufficient environmental review. For these procedural failures, the Commission should reject the PECO petition.

Substantively, both Section 619 and Article I, Section 27 impose limits on the Commission's ability to approve this request. Section 619 requires a showing from the applicant that the proposed project is "reasonably necessary for the public convenience and welfare." 53 Pa. Cons. Stat. § 10619.

As the Commonwealth Court has instructed, Section 619 must be interpreted and applied consistent with Section 27, which requires consideration of constitutional environmental rights. Article I, Section 27 imposes limits on the Commission's authority under Section 619. The Commission may not unreasonably impair the resources and values identified in the first clause

of Article I, Section 27. *Robinson Twp*, 83 A.3d at 951; *Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 196 A.3d 677, 694 (Pa. Cmmw. Ct. 2018). In addition, under the public trust clause, the Commission “has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties.”¹ *PEDF II*, 161 A.3d at 933. As such, the Commission must apply Section 619 consistent with these limits.

When examined under this framework, PECO Gas has failed to demonstrate that the Station is reasonably necessary. To start, PECO Gas’s request is premised on demand projections that ignore uncontradicted evidence in the record that shows that climate change will reduce demand for gas because winters are warmer than they were historically, and will continue to get warmer still. These demand reductions will be compounded by market shifts towards electrification and energy efficiency. In addition, PECO Gas failed to analyze potentially less-damaging alternatives that could defer or avoid the need to construct the Expansion Station.

PECO Gas has also failed to demonstrate that the Station advances public convenience and welfare. It is apparent that the Expansion Station will lead to increased GHG emissions at a time when growing atmospheric concentrations of these gases are causing increasingly severe threats to the public’s constitutional rights and the environment itself. As the record indicates, every additional ton of GHGs in the atmosphere has a significant additional cost. This is particularly true where, as here, the Commission’s decision involves construction of infrastructure that would cause increased uncontrolled GHG emissions for decades to come.

III. PROCEDURAL HISTORY

¹ The Court identified a second trustee duty: “the Commonwealth must act affirmatively via legislative action to protect the environment.” *PEDF II*, 161 A.3d at 933.

Intervenors adopt the Procedural History set forth in the Township’s Main Brief.

IV. STATEMENT OF FACTS

This Statement of Facts highlights four key factual conclusions that emerge from the record on remand. It is not coextensive with the Proposed Findings of Fact.

A. PECO Did Not Analyze the Effect of Warming Winters from Climate Change on Demand for the Expansion Station.

The Expansion Station, whose approval was denied by Marple Township, is intended to expand the use of natural gas in the surrounding area. Based on PECO Gas’s evidence in the first proceeding, the Commission found that the Station is needed to address winter deficits (Initial Decision, PA PUC Docket No. P-2021-3024328, Findings of Fact at ¶¶18-20 (Dec. 7, 2021)) and “customer and usage growth in Delaware County.” (Initial Decision, Findings of Fact at ¶24, citing PECO St. No. 3, at 4:3-12). The equipment located at the Station is intended to allow PECO Gas to increase natural gas pressure within its larger system by creating a "virtual gate station" in Marple Township fed by the new 11.5-mile steel 12-inch over-high-pressure gas main. The station will step down the pressure to allow the distribution system to meet additional demand in Delaware and Montgomery Counties. (Initial Decision, Findings of Fact at ¶¶29-31). In the initial proceedings, PECO Gas witnesses testified that there was no current gas supply shortage (Record (“R”) 913, 13-20) and that PECO Gas currently has adequate supply to meet mandated requirements in a safe, least cost manner. (R. 1279:23-1280:11). Thus, the Commission found that PECO Gas has sufficient supply without the Station to meet its existing demand. (Initial Decision, Findings of Fact at ¶34).

PECO Gas based its determination of a future “need” for the Station on “calculated design day demand requirements” (Initial Decision, Findings of Fact at ¶15), and based growth

in demand on a “linear trend analysis,” which extrapolated past growth in customer count and usage over the next ten years. (Initial Decision, Findings of Fact at ¶¶25-28). PECO Gas did not account for climate change in its modeling. (Tr. 1212-1213, 0589A-0590A). Peak demand for natural gas occurs during winter months and climate change will reduce demand for natural gas during those months. Indeed, the rapid winter warming of southeastern Pennsylvania over the last 50 years has already reduced demand. The fact that demand has increased in the past is due to other factors, such as population growth. (Marple Township, Ted Uhlman & Julie Baker Remand Statement No. 2 at 13 (“Najjar Direct”). Thus, a straight-line analysis based on past trends assumes continued increase in customers.

This straight-line analysis is overly simplistic and fails to consider a number of changes, all of which indicate that demand from existing customers has been going down and will be further reduced in the future. Specifically, as discussed in detail below, the evidence adduced on remand shows that (1) climate change has reduced peak and total demand due to warmer winters and this trend will increase in the future; and (2) this reduced demand will be accentuated by existing market forces that have been causing a trend towards electrification—a trend that will also increase in the future.

If climate change is properly considered, as required in an analysis consistent with Article I, § 27, it can readily be determined that peak winter demand and overall demand from PECO Gas’s *existing* customers will be reduced due to multiple factors identified by Intervenors’ witnesses. (Najjar Direct at 17; Tr. 2265-67). Thus, there will be no increase in “usage” by existing customers and the real intent of the Expansion Station is to support “customer growth.” The purpose of the Expansion Station is to support increased distribution and use of natural gas for *additional* customers in residential and commercial buildings in Delaware and Montgomery

Counties, which, in turn, will increase GHG emissions and lock those increases in for decades to come. (Najjar Direct at 17).

Gas demand is highly impacted by winter temperature, which climate change will reduce. (Najjar Direct at 13). Heating fuel demand increases as the number of heating degree days (“HDDs”) increases. HDDs for a winter season are calculated by first determining the number of degrees that the average temperature for a winter day is below 65 °F. For example, if the average temperature for a day is 55 °F, then the HDD for that day is equal to 10. The HDD is zero for any day in which the daily average temperature is above 65 °F. HDDs for a whole winter is simply the sum of HDDs for individual winter days. (Najjar Direct at 13). The Delaware Valley Regional Planning Commission hired the consulting firm ICF to conduct a climate impacts analysis for several counties in southeastern Pennsylvania. (Najjar Direct, at 13-14, Figure 10). Compared to the baseline HDDs given by the 1961–1999 period, average HDDs for the 2020–2039 period are projected to decline by 10%, regardless of which scenario is used for future GHG emissions. HDDs are projected to continue to decline throughout the 21st century, with even greater declines for higher emissions scenarios, with as much as a 35% decrease by the end of the century. (Najjar Direct at 14 (referencing Delaware Valley Regional Planning Commission, <https://www.dvrpc.org/energyclimate/ccmit/>); Tr. 2253-55).

Reduced demand from warming winters will be accentuated by an increasing trend in switching from natural gas heat to the far more efficient electric heat pumps. (Tr. 2257-58). Thus, there is an increasing trend of replacement of natural gas with electricity for space heating and cooling, hot water, and cooking. This conversion can readily provide superior service at a lower cost. This trend is likely to accelerate when one considers the tax credits and grants made available by the federal government for high efficiency heat pumps, ground source geothermal,

and solar electric generating units to power them, as well as the extension of solar and high efficiency heat pump credits to non-profit organizations. (Najjar Direct at 16; Tr. 2252-2260).

The acceleration of this trend will further reduce demand from existing customers. Reduced demand from warming winters will also be accentuated by a trend toward more efficient gas appliances. Although some new gas appliances use more gas when they first cycle on, they use less gas overall, so that replacement of existing gas appliances will further reduce demand from existing customers. (Tr. 2255-2257). This trend is also unlikely to contribute to any increases in peak demand, because it is unreasonable to believe that all gas appliances would cycle on at the same time (Tr. 2255-2257).

B. Climate Change Caused by Emissions of Greenhouse Gases Poses an Existential Threat to Pennsylvania's Public Natural Resources.

The climate has warmed and will continue to warm from human emissions of GHGs, including carbon dioxide, methane, and nitrous oxide. (Najjar Direct at 4-6). The effects of climate change on human society and on the ecology of the planet are overwhelmingly negative and, in some aspects, extremely severe. This warming is already damaging Pennsylvania's public natural resources, including forests and plant life, birds and other wildlife, trout and other fish, and insect life. (Najjar Direct at 6-10). Impacts will worsen greatly if GHG emissions are not reduced. The region will see increased intense precipitation and flooding; heat waves; drought during summer months; sea level rise, which will cause flooding in Philadelphia; and the salt line moving up the Delaware River, threatening Philadelphia's water intakes and supply. (Najjar Direct at 10-12). These effects are expected to increase and, without reductions in emissions of carbon dioxide and other GHGs, could reach disastrous levels. (Najjar Direct at 15). Mitigating the effects of climate change is necessary to protect the public interest and the

health and welfare of Pennsylvanians and their water, air, and environment and other resources protected under Article I, § 27 of the Pennsylvania Constitution. (Najjar Direct at 19).

Under the business-as-usual scenario, annual average temperatures in Pennsylvania by 2050 are projected to be about 6 °F above the baseline average for the 1971-2000 period, according to a 2021 report issued by the Pennsylvania Department of Environmental Protection under the authority of the Pennsylvania Climate Change Act (Act 70 of 2008). (*Marple Township*, Ted Uhlman & Julie Baker Remand Statement No. 1-R (“Schmid Rebuttal”) at 10 (citing Pennsylvania Department of Environmental Protection, *Climate Impacts Assessment 2021*)). According to this report, other adverse climate impacts that will result from global warming in the Commonwealth absent aggressive efforts to cut emissions include increased heat mortality, an increase in Lyme disease, and rises in violent crime. These harms also include reduced dissolved oxygen in the waters of our freshwater streams as well as in the Delaware River estuary as consequences of global warming to which the Expansion Station will contribute. The report describes the resulting impacts as catastrophic on Pennsylvania forests, wildlife, and ecosystems. During 2023, our region experienced unhealthy concentrations of smoke from distant wildfires induced by global warming, exacerbating the consequences of local emissions. (Schmid Rebuttal at 10).

Every ton of carbon dioxide emitted leads to damage, including loss of human life. By one estimate, every 500 metric tons of carbon dioxide emitted now leads to one human death by 2100. For reference, Pennsylvania’s carbon dioxide-equivalent emissions in 2019 (the most recent estimate available) amounted to 266 million metric tons, which is the equivalent of about

50,000 deaths worldwide by 2100. (Najjar Direct at 18 (citing R. Daniel Bressler, *The Mortality Cost of Carbon*, 12(1) *Nature Communications*: 4467 (July 29, 2021)).²

According to the Second State of the Carbon Cycle Report (“SOCCR2”), human-driven carbon dioxide emissions are expected to continue to drive changes in climate in the coming decades and centuries. Emissions from fossil fuel combustion in the North American energy sector are the largest source of carbon dioxide, and all GHGs, from this continent to the atmosphere. Reducing GHG emissions will limit global surface temperature change and, in turn, limit these many harms. While no one individual state or country policy will singlehandedly solve the climate crisis, every policy or action reduces the harm from climate change. (Najjar Direct at 18-19 (discussing U.S. Global Change Research Program, *Second State of the Carbon Cycle Report (SOCCR2): A Sustained Assessment Report*. U.S. Global Change Research Program (N. Cavallaro et al. eds., 2018)).

Moreover, the nations that are party to the United Nations Framework Convention on Climate Change, including the United States, as well as the scientific community, agree that warming must be limited to 1.5 to 2 °C above historic levels to avoid dangerous anthropogenic interference with the climate system. (Najjar Direct at 15). To achieve that, emissions need to be reduced by 50% by 2030 and to emissions neutrality by 2050. (Najjar Direct at 16).

C. The Expansion Station Will Increase Emissions and Cause Dangerous Anthropogenic Interference With the Climate System.

² At the federal level, the Biden Administration recently issued an Executive Order instructing agencies to calculate the full social costs of greenhouse gases. Executive Order 13990 (Jan. 20, 2021), 86 Fed. Reg. 7037. (“It is essential that agencies capture the full costs of greenhouse gas emissions as accurately as possible, including by taking global damages into account. Doing so facilitates sound decision-making, recognizes the breadth of climate impacts, and supports the international leadership of the United States on climate issues. . . An accurate social cost is essential for agencies to accurately determine the social benefits of reducing greenhouse gas emissions when conducting cost-benefit analyses of regulatory and other actions.”).

The express purpose of this Station is to increase gas throughput through the distribution system to serve PECO's projected increases in demand. If throughput increases, this will increase emissions from fossil fuel combustion, and to the extent new gas infrastructure is built out to serve that projected increase demand, these emissions will be locked in for decades to come. Such impacts are inconsistent with the need to reduce those emissions to avoid damage to trust resources and move towards emissions neutrality by 2050. (Najjar Direct at 17).

The expanded infrastructure can also be expected to result in new leaks of methane, a GHG that is far more potent than carbon dioxide. Dr. Najjar reviewed the literature on methane leaks in U.S. natural gas distribution systems and found that those leaks release the GHG equivalent of 2% of on-road emissions in the U.S. From a monetary perspective, it would make sense to repair such leaks because the climate damages of the released methane are about five times the repair costs. However, from the perspective of distribution companies, it is not worth it to repair the leaks because the climate damages fall on the public and the cost of the lost methane to the utilities is relatively small and simply passed on to customers. Najjar Direct at 17-18 (citing Ryan P. Scott, Tyler A. Scott & Robert A. Greer, *Who Owns the Pipes? Utility Ownership, Infrastructure Conditions, and Methane Emissions in United States Natural Gas Distribution*, 39(2) Review of Policy Research (2022)).

D. PECO Gas's Environmental Submission Did Not Analyze the Reasonably Foreseeable Climate Change and Cumulative Impacts of the Expansion Station or Analyze Alternatives to the Expansion Station.

On remand, PECO Gas produced six pieces of direct testimony that constitute its entire environmental review of the Station. Statement 1 was made by PECO employee Douglas I. Oliver, Statement 2 was from PECO employee Keith Kowalski, Statement 3 was from pipeline

consultant Mike Israni, Statement 4 was from PECO employee Jim Moylan, Statement 5 was from consultant Reginald Keith, and Statement 6 was from consultant Jeffrey Harrington.

The heart of PECO's environmental review was produced by Keith Kowalski (Statement 2) and Reginald Keith (Statement 6). In Statement 2, Keith Kowalski summarized the environmental reviews PECO has performed for the Expansion Station. (PECO Statement No. 2-RD ("Kowalski Direct")). Most of Kowalski's testimony centered on the required NPDES permit for discharges of stormwater associated with construction activities. Kowalski described the NPDES stormwater permit application process, components of PECO Gas's NPDES permit application, and actions that PECO Gas will take pursuant to its NPDES permit. (*Id.* at 8-13). Kowalski also discussed the Phase I and II environmental assessments that were performed to assess the pre-existing condition of the site and identify pre-existing environmental issues on the site. (*Id.* at 13-18). The Phase I and II environmental reviews and NPDES permit materials were attached to Statement 2 as exhibits.

In Statement 6, consultant Jeffrey Harrington reviewed existing project documents and permit requirements and made conclusions about environmental impacts based on these materials. (PECO Statement 6, at 5 ("Harrington Direct")). In assessing air quality impacts, Harrington summarized emissions sources, noted that no air permit was needed, and remarked the sources complied with Environmental Protection Agency ("EPA") standards. (*Id.* at 8-11). Harrington also testified that there would be no water quality impacts because there are no streams or wetlands on the property, (*Id.* at 11-13), no unreasonable stormwater quality impacts because of the NPDES permit, (*Id.* at 13-14), and no threat to endangered or threatened species. (*Id.* at 14).

The rest of PECO Gas’s testimony focused on other aspects of the Expansion Station. In Statement 1, Douglas Oliver provided a high-level overview of the Expansion Station and broader reliability effort, summarized the testimony of other witnesses, and requested that the Commission find that the Expansion Station is reasonably necessary for the convenience and welfare of the public. (PECO Statement No. 1 (“Oliver Direct”). In Statement 3, Mike Israni discussed the applicability of Pipeline and Hazardous Materials Safety Administration regulations to the Expansion Station, the overall history of safety incidents at district regulating stations across the U.S., and PECO Gas’s general safety record. (PECO Statement No. 3 (“Israni Direct”). For his testimony in Statement 4, Jim Moylan described the aesthetic design of the Expansion Station, as well as historic soil contamination and remediation at 2090 Sproul Road. (PECO Statement No. 4 (“Moylan Direct”). Reginald Keith’s testimony in Statement 5 focused on the noise impact of the Expansion Station and design elements of the station intended to mitigate noise. (PECO Statement No. 5 (“Keith Direct”).

The sole testimony adduced by PECO Gas relating to climate impacts was Mr. Harrington’s calculation of GHG emissions from the Station. In calculating GHG emissions from the Station, Mr. Harrington limited his consideration to the direct emissions from the equipment located at the Station and did not include any emissions from additional customers who will be able to connect as a result of the Station. (Tr. 2444-2445). He did not include any emissions resulting from a 20% increase in residential customers that PECO expects. (Tr. 2447). He also did not include any methane leaks from the distribution system or the 20% increase in homes that PECO Gas projects will serve as a result of the Station. (Tr. 2447). He did not consider these downstream emissions despite being “vaguely aware” of the fact that EPA counts emissions from customer's natural gas use and methane leaks in its calculation of GHG

emissions from the natural gas distributions sector (Tr. 2447- 2448). He did not consult any guidance issued by EPA, American Society for Testing and Materials, Council on Environmental Quality (“CEQ”), or any other organization regarding how to calculate GHG emissions for the purpose of an environmental assessment. (Tr. 2448-2449).

Mere compliance with a specific permit requirement does not take the place of an environmental assessment. (Schmid Rebuttal at 4). Dr. James Schmid, a Ph.D. ecologist who has performed environmental assessments for Pennsylvania state programs, federal programs and the programs of many other states, reviewed PECO Gas’ submissions and opined that the submission lacked many, if not most, of the elements that are needed to determine the environmental impact of a proposed project. (Schmid Rebuttal at 2, 6-11). Three deficiencies are particularly relevant here. First, PECO Gas did not analyze or determine the GHG emissions that would be the reasonably foreseeable result of Commission approval of the Expansion Station and would have long term irreversible adverse impacts on the environment. (Schmid Rebuttal at 5-7, 8-9). The Station will result in construction of infrastructure expanding the natural gas distribution risk becoming stranded assets that will last after their emissions must cease. (Schmid Rebuttal at 10; Najjar Direct at 17-19). Second, PECO Gas did not analyze the reasonably foreseeable cumulative air quality impacts of Commission approval of the Expansion Station. (Schmid Rebuttal at 6-7, 9). Third, PECO Gas did not analyze a reasonable range of alternatives to the Expansion Station, including alternatives that would not require any Station at all, such as energy efficiency and electrification measures. (Schmid Rebuttal at 8, 11; Najjar Direct at 16). As a result, it is not possible on this record for the Commission to understand the overall environmental effect of the Expansion Station. (Schmid Rebuttal at 6).

V. LEGAL STANDARDS

A. Burden of Proof

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

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

B. Section 619 of Municipalities Planning Code

Section 619 of the Pennsylvania Municipalities Planning Code provides:

This article shall not apply to any existing or proposed building, or extension thereof, used or to be used by a public utility corporation, if, upon petition of the corporation, the Pennsylvania Public Utility Commission shall, after a public hearing, decide that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public. It shall be the responsibility of the Pennsylvania Public Utility Commission to ensure that both

the corporation and the municipality in which the building or proposed building is located have notice of the hearing and are granted an opportunity to appear, present witnesses, cross-examine witnesses presented by other parties and otherwise exercise the rights of a party to the proceedings.

53 Pa. Cons. Stat. § 10619. Therefore, a municipality may apply local zoning rules to public utility buildings unless the Commission determines that the site is reasonably necessary for the public convenience or welfare. This exception is “one of narrow construction.” *Twp. of Marple v. Pa. Pub. Util. Comm’n*, 294 A.3d at 972. In deciding this type of case, consideration must be given to the following:

- A. Whether the Public Utility Commission has jurisdiction. . . ;
- B. Whether the proposed site is reasonably necessary for the convenience or welfare of the public;
- C. Environmental impact.

Application of Pennsylvania American Water Company for a Finding of Reasonable Necessity under Section 619 of the Pennsylvania Municipalities Planning Code, (Pa. PUC LEXIS 91, *8)(Pa. P.U.C. October 25, 2006).

C. Article I, Section 27 of the Pennsylvania Constitution

Article I, Section 27 of the Pennsylvania Constitution provides:

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

Pa. Const. art. I, § 27. “[W]hen reviewing challenges to the constitutionality of Commonwealth actions under Section 27, the proper standard of judicial review lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.” *PEDF II*, 161 A.3d at 930.

The first clause of Section 27 grants the people environmental rights and “places a limitation on the state’s power to act contrary to this right,” meaning “any laws that unreasonably impair the right are unconstitutional.” *Id.* at 931. The second and third clauses create an environmental trust and vests ERA trustee obligations in “all agencies and entities of the Commonwealth government.” *Id.* at 931 n.23. ERA trustees are fiduciaries, and must act “with prudence, loyalty, and impartiality” as defined by Pennsylvania trust law. *Id.* at 932 (citing *Robinson Twp.*, 83 A.3d at 956-67).

VI. ARGUMENT

A. The Commission Must Interpret Section 619 in a Manner that Is Consistent with Article I, Section 27 of the Pennsylvania Constitution and Substantive Due Process.

Both Pennsylvania statutory law and Pennsylvania case law under Article I, Section 27 of the Pennsylvania constitution, and other provisions of Article I (Declaration of Rights) in the state constitution, make clear that statutes must be construed in a manner that is consistent with those provisions. In *Robinson Twp.*, the Supreme Court held that another statutory zoning exemption was unconstitutional on its face. *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013). We are not arguing here that Section 619 is unconstitutional on its face. Rather, we argue that it must be applied in a constitutional manner.

Article I, Section 27 (also known as the Environmental Rights Amendment, “ERA”) recognizes two rights in the people. In its first sentence or clause, Section 27 recognizes a right in the people “to clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of the environment.” In its second and third sentences, the public trust clause, it imposes a public trust responsibility on the Commonwealth to “conserve and maintain” public natural resources for the benefit of present and future generations. The people, beneficiaries of

the public trust, have the right to have the government perform this duty. “Trustee obligations are not vested exclusively in any single branch of Pennsylvania’s government;” rather, “all agencies and entities of the Commonwealth government” have these obligations. *Pa. Env’tl. Def. Found. v. Commonwealth*, 161 A.3d 911, 931 n. 23 (Pa. 2017) (“*PEDF II*”). As a result, the ERA’s “mandate informs Pennsylvania’s elaborate body of environmental protection statutes and regulations.” *Clean Air Council v. Dep’t of Env’tl. Prot.*, 289 A.3d 928, 932 (Pa. 2023).

The General Assembly is bound by both clauses of Section 27. Because the General Assembly is presumed to act constitutionally, 1 Pa. Cons. Stat. § 1922(3) (1972), it is essential to interpret legislation in a manner that is consistent with the constitution. “[W]e are bound to interpret a statute, where possible, in a way that comports with the constitution’s terms.” *Commonwealth v. McClelland*, 233 A.3d 717, 735 (Pa. 2020) (quoting *Commonwealth v. Veon*, 150 A.3d 435, 443 (Pa. 2016)). *See also Commonwealth v. Parker White Metal Co.*, 515 A.2d 1358, 1370-71 (Pa. 1986) (describing legislative responsibility for implementation of Article I, Section 27).³

Hartford Accident & Indem. Co. v. Ins. Comm’n, 482 A.2d 542 (Pa. 1984), illustrates this principle for a different right in Pennsylvania’s Declaration of Rights. There, the Supreme Court decided that gender-based auto insurance rates were “unfairly discriminatory” under a state insurance statute. The decision was based largely on the Equal Rights Amendment to the state constitution, providing: “Equality of rights under the law shall not be denied or abridged in the

³ *See also Adams Sanitation Co., Inc. v. Dep’t of Env’tl. Prot.*, 715 A.2d 390, 394 (Pa. 1998) (rejecting interpretation of the Clean Streams Law that was not based on plain language of statute and that is inconsistent with “the legislative mandate contained in Article I, Section 27”); *Nat’l Wood Preservers, Inc. v. Dep’t of Env’tl. Res.*, 414 A.2d 37, 41 (Pa. 1980) (claim that Section 316 applies only to pollution caused by mining is inconsistent with statutory language and would “frustrate the Legislature’s fulfillment of its obligation” under Article I, Section 27); *Dresser Indus. v. Dep’t of Env’tl. Res.*, 604 A.2d 1177, 1180 (Pa. Commw. Ct. 1992) (rejecting claim that Section 316 does not apply to the Commonwealth as landowner because upholding claim would “frustrate the Legislature’s fulfillment of its obligation under Article I, section 27”).

Commonwealth of Pennsylvania because of the sex of the individual.” Pa. Const. art. I, § 28.

Because of this amendment, the court held, “the statute must be interpreted to include sex discrimination as one type of unfair discrimination.” *Hartford Accident & Indem. Co.*, 542 A.2d at 585. The constitution did not merely allow the Insurance Commissioner to interpret the statute in that manner, the court reasoned; the constitution required that interpretation.

The Supreme Court’s decision in *Robinson Twp.* underscores the importance of interpreting Section 619 in a manner that conforms to the Constitution. In that case, the Court held unconstitutional on their face statutory provisions that preempted local governments from using their traditional zoning authority to decide *where* shale gas facilities (including wells and compressor stations) could be located.⁴ In doing so, the legislature declared that environmental matters relating to shale gas were a matter of “statewide concern.”⁵ In place of local zoning, the legislature substituted statewide rules for determining the location of these facilities and required local governments to approve facilities that met these rules.⁶ Among other things, the legislation required local governments “to authorize oil and gas operations, impoundment areas, and location assessment operations (including seismic testing and the use of explosives) as permitted uses in all zoning districts throughout a locality.” *Robinson Twp.* at 971.

A plurality (three justices) based the decision on Article I, Section 27. The plurality reasoned that local governments are among the Commonwealth trustees under Article I, Section 27. The statutory provision that preempted local regulation of where oil and gas operations

⁴ *Robinson Twp.*, 83 A.3d 901 (Pa. 2013) (quoting 58 Pa. C.S. § 3303 (2012)). When this legislation was adopted, the Pennsylvania Supreme Court had already held that local governments were not preempted from using their traditional zoning authority to decide *where* oil and gas operations were conducted. *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 964 A.2d 855 (Pa. 2009). They were, however, preempted from imposing environmental regulations on *how* oil and gas operations are conducted. *Range Resources-Appalachia v. Salem Township*, 964 A.2d 869 (Pa. 2009). Thus, § 3303 preempted local governments from exercising their only remaining authority over oil and gas operations—determining *where* oil and gas operations could be conducted.

⁵ *Robinson Twp.*, 83 A.3d at 970 (quoting 58 Pa. C.S. § 3303).

⁶ *Id.* at 970-72 (quoting and summarizing 58 Pa. C.S. § 3304).

could occur, they said, violates Article I, Section 27 because “the General Assembly has no authority to remove a political subdivision’s implicitly necessary authority to carry into effect its constitutional duties.”⁷ Then-Chief Justice Castille, writing for the plurality in an opinion later adopted by the whole Court in *PEDF II*, explained:

The municipalities affected by Act 13 all existed before that Act was adopted; and most if not all had land use measures in place. Those ordinances necessarily addressed the environment, and created reasonable expectations in the resident citizenry. To put it succinctly, our citizens buying homes and raising families in areas zoned residential had a reasonable expectation concerning the environment in which they were living, often for years or even decades. Act 13 fundamentally disrupted those expectations, and ordered local government to take measures to effect the new uses, irrespective of local concerns.⁸

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

The Commonwealth, by the General Assembly, declares in Section 3303 that environmental obligations related to the oil and gas industries are of statewide concern and, on that basis, the Commonwealth purports to preempt the regulatory field to the exclusion of all local environmental legislation that might be perceived as affecting oil and gas operations....The police power, broad as it may be, does not encompass such authority to so fundamentally disrupt these expectations respecting the environment.⁹

The fourth justice (the late Justice Baer) based his decision on substantive due process, focusing on the same essential problem that the other three justices raised. His analysis means that statutes, and by statutory interpretation, need to be consistent with substantive due process. In “a state as large and diverse as Pennsylvania,” he reasoned, “meaningful protection of the acknowledged substantive due process right of an adjoining landowner to quiet enjoyment of his real property can only be carried out at the local level.”¹⁰ The challenged provisions, he said,

⁷ *Robinson Twp.*, 83 A.3d at 977 (Castille, C.J.).

⁸ *Id.*

⁹ *Id.* at 978.

¹⁰ *Id.* at 1001 (Baer, J., concurring).

“force municipalities to enact zoning ordinances [that] violate the substantive due process rights of their citizenries”¹¹

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

B. To Conduct a “Constitutionally Sound Environmental Impact Review,” the Commission Must Consider the Reasonably Foreseeable Environmental Effects of the Gas Expansion Proposal Made Possible by the Station, Not Just the Environmental Effects of its Location.

The Commission’s review cannot constitutionally be limited to the environmental effects of the specific location of the Station. Rather, it must include the reasonably foreseeable environmental effects of the Expansion Station. The Station will make it possible for expansion of PECO Gas’s distribution network in Delaware and Montgomery Counties; indeed, that is its intended purpose.

In all other settings of which we are aware, a review of the environmental impact of a proposal must consider all of the reasonably foreseeable environmental effects that flow directly from approval of the proposal. *See e.g., Metropolitan Edison Co. v. People Against Nuclear*

¹¹ *Id.* at 1008.

Energy, 460 U.S. 766 (1983) (holding the environmental impact assessment for the restart of undamaged Three Mile Island nuclear reactor must consider environmental effects of the decision to restart reactor, including risk of an accident, but may exclude non-environmental effects—in this case the psychological effects of risk of accident). As the Court explained, there must be “a reasonably close relationship” between the government’s decision to approve a proposal “and the environmental effect at issue.” 460 U.S. at 774.

Indeed, guidelines adopted under both NEPA and state laws governing environmental impact review specifically require review of GHG emissions induced by a project. *NEPA Guidance on Consideration of Greenhouse Gas Emissions and Climate Change* (“NEPA Guidance”), 88 Fed. Reg. §1196 (Jan. 9, 2023) (federal); California Environmental Quality Act Guidelines (“CEQA Guidelines”), Cal. Code Regs. tit. 14, § 15064.4; N.Y. Env’tl. Conserv. Law § 6 CRR-NY 617.9(b)(5)(iii) (2022); New York State Department of Environmental Conservation (“NY DEC”), *Assessing Energy Use and Greenhouse Gas Emissions in Environmental Impact Statements* (2009); NY DEC, *Commissioner’s Policy on Climate Change and DEC Action* (2010); 301 Mass. Code Regs. §§ 11.02, 11.03m 11.07m 11.12 (2023); Massachusetts Environmental Policy Act Greenhouse Gas Emissions Policy and Protocol (“MEPA”) (2010).

It is illogical and inappropriate to consider only some of the environmental effects of the Station and the expanded use of gas it makes possible. Moreover, if the Commonwealth does not consider the reasonably foreseeable environmental effects of the Expansion Station, they will not be considered at all. There is no other available state-level legal process to consider these effects holistically. Nothing in law or in the record indicates any role for the Department of Environmental Protection or any statewide agency to consider overall environmental effects—

other than the Commission.¹² If the Commission deprives Marple Township of its ability to review and control the Expansion Station under Section 619, the Township will be unable to consider these effects. *Duquesne Light Co. v. Monroeville Borough*, 298 A.2d 252, 256 (Pa. 1972) (“This Court has consistently held...that the Public Utility Commission has exclusive regulatory jurisdiction over the implementation of public utility facilities.”). Thus, the only way to conduct a “constitutionally sound environmental impact review” under Section 619 is for the Commission to consider the reasonably foreseeable environmental effects of the Expansion Station.

A narrow reading of Section 619—one that focuses only on the environmental effects of the location of the Station—would run afoul of the Supreme Court’s decision in *Robinson Twp.* In the context of Section 619, the Pennsylvania Commonwealth Court has explained the effect of that decision on preemption as follows:

Article 1, Section 27 can bar preemption of local regulation where the state statute or regulation on which preemption is based so completely removes environmental protections that it violates the state's duties under that constitutional provision. *See Robinson Township v. Commonwealth*, 623 Pa. 564, 83 A.3d 901, 969-85 (2013) (plurality opinion) (striking down “unprecedented” state law that barred all local zoning and environmental protection regulation on the grounds that the state law violated Article 1, Section 27). The reason that preemption fails in such a case is that the preempting state law itself is unconstitutional.

UGI Utils., Inc. v. City of Reading, 179 A.3d 624, 631 (Pa. Cmmw. Ct. 2017). A reading of Section 619 that excludes consideration of the reasonably foreseeable environmental effects of the Expansion Station would “so completely remove[d] environmental protections that it violates the state’s duties” under Article I, Section 27 and substantive due process.

¹² As noted above, the Department of Environmental Protection must issue a NPDES permit for storm water for construction of the Expansion Station. (PECO Statement No. 2 (“Kowalski Direct”)). But the review required for that permit hardly constitutes a full review of the environmental impacts of construction and operation of the Expansion Station.

The Commonwealth Court’s decision in *Del-Aware Unlimited, Inc. v. Pa. Pub. Util. Comm’n.*, 513 A.2d 593 (Pa. Cmmw. Ct. 1986) (“*Del-Aware*”) does not change this conclusion.¹³ In that case, the Court held that the Commission’s decision under Section 619 must be limited to the environmental effects of the location of a pumphouse needed for the Limerick nuclear electric generating station. While the Court took Article I, Section 27 into account, it did so under a very different legal understanding of Article I, Section 27 than the one we have today. As the *Del-Aware* Court explained, judicial review of decisions under Article I, Section 27 at the time was controlled by the Commonwealth Court’s “three-prong test” in *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmmw. Ct. 1973), *aff’d*, 361 A.2d 263 (Pa. 1976). *Del-Aware*, 513 A.2d at 596. That test functioned as a substitute for the actual text of Section 27:

The court's role must be to test the decision under review by a threefold standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

312 A.2d at 94. (“*Payne* test”).

This test led later courts, including the *Del-Aware* Court, to 1) see Section 27 in terms of an agency’s statutory authority, 2) to limit the application of Section 27 whenever it appeared to expand agency authority, and, 3) in many cases, to limit environmental review under Article I, § 27 to the essentially meaningless task of determining whether the Station has the environmental permits required (as PECO Gas would have the Commission do here). As the Supreme Court held in overruling the *Payne* test in *PEDF II*, however, these conclusions are wrong as a matter

¹³ The Commission’s March 10, 2022 decision also cites *O’Connor v. Pa. Pub. Util. Comm’n.*, 582 A.2d 427 (Pa. Cmmw. Ct. 1990), but the relevant part of that case relies so heavily on *Del-Aware* that we are simply analyzing *Del-Aware* here.

of constitutional law. Thus, the *Del-Aware* decision can no longer be read to require or support a narrow reading of Section 619.

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

Our Supreme Court has held that the trust’s duties of prudence, loyalty, and impartiality must be used to interpret Section 27’s public trust clause. That clause requires the Commonwealth to “conserve and maintain” public natural resources for the benefit of present and future generations. “The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.” *PEDF II*, 161 A.3d at 932 (quoting *Robinson Twp.*, 83 A.3d at 956-57). These duties, individually and collectively, require the Commission to consider the reasonably foreseeable environmental impacts of its decision under

Section 619. *In re Duncan Trust*, 391 A.2d 1051, 1057 (Pa. 1978) (using reasonable foreseeability of events in administration of the trust to determine a trustee’s responsibility under terms of the trust).

The duty of prudence, the Supreme Court said, involves “considering the purposes” of the trust and exercising “reasonable care, skill, and caution” in managing the trust corpus. *PEDF II*, 161 A.3d at 938 (citing 20 Pa. Cons. Stat. § 7780).¹⁴ The purpose and duties of the public trust under Section 27 are the same—to conserve and maintain public natural resources for the benefit of present and future generations. The Commission, as trustee, cannot use “reasonable care, skill, and caution” if it makes this decision without understanding its reasonably foreseeable effects.

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

¹⁴ George T. Bogert, *Trusts* § 93 (Hornbooks, 6th ed. 1987). See also *In re Estate of McAleer*, 248 A.3d 416, 445 (Pa. 2021) (Donohue, J., concurring) (“In navigating the potentially complex legal landscape of trust administration, a trustee should seek competent [professional advice] not only for guidance on what will best serve the trust’s purpose, but also to determine the potential risks that a trustee is subject to when making these difficult decisions in the course of trust administration.”); *PEDF II*, 161 A.3d at 932 n.24 (“[T]he duty to administer with prudence involves ‘considering the purposes, provisions, distributional requirements and other circumstances of the trust and . . . exercising reasonable care, skill and caution.’”).

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

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

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

As the Pennsylvania Supreme Court has recognized, but the *Payne* test did not, the ERA is located in Article I, which contains Pennsylvania’s Declaration of Rights, the state’s analog to the U.S. Bill of Rights. *PEDF II*, 161 A.3d at 916, 918. “The Declaration of Rights is that

general part of the Pennsylvania Constitution which limits the power of state government; additionally, ‘particular sections of the Declaration of Rights represent specific limits on governmental power.’” *Robinson Twp.* at 948. The placement of Section 27 in Article I, along with such rights as the right to property (Section 1), religious freedom (Section 3), freedom of speech (Section 7), and security from searches and seizures (Section 8), was no accident. As, then Rep. Franklin Kury, the chief legislative sponsor of the amendment, explained when he introduced the resolution that would become Article I, Section 27:

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

John C. Dernbach & Edmund J. Sonnenberg, *A Legislative History of Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania, Showing Source Documents*, Widener L. Sch. Legal Stud. Res. Paper Series No. 14-18 at 6-7 (July 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474660.¹⁵

The text of the amendment further underscores the recognition of environmental rights in the public. Each of the three sentences in the ERA refers to “the people.” The Pennsylvania Supreme Court in *PEDF II* explained that the amendment recognizes two sets of rights in the people. 161 A.3d at 931. Each of these sets of rights imposes a limit on the power of the Commonwealth. The first sentence or clause provides: “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the

¹⁵ The legislative history, in fact, is replete with references to the importance of Section 27’s placement in Article I. *See e.g.*, *A Legislative History* at 14-15, 66-68. Under the Pennsylvania Constitution, a constitutional amendment must be passed by both houses of the legislature in one session, passed by both houses in the next legislative session, and then approved in a public referendum. PA. CONST. art. XI, § 1. The ERA was adopted by a vote of nearly four to one in 1971. *PEDF II*, 161 A.3d at 918.

environment.” Pa. Const. art. 1, § 27. This sentence, the Court said, “places a limitation on the state’s power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional.” *PEDF II*, 161 A.3d at 931.

The second and third sentences, the Court said, create a constitutional public trust. *Id.* at 931-32. These sentences in the ERA’s public trust clause, provide: “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.” Art. I, § 27. Under this clause, the Court noted, the Commonwealth is the trustee. *PEDF II*, 161 A.3d at 932. The corpus, or body of the trust, is public natural resources, which the Court held includes state parks and forests, as well as the oil and gas they contain. *Id.* at 916. The people, including present and future generations, are “the named beneficiaries” of this trust. *Id.* at 931-32. The Court also explained that “all agencies and entities of the Commonwealth government, both statewide and local,” have a constitutional trust responsibility. *Id.* at 932 n.23. Under this trust, the Pennsylvania Supreme Court said, the Commonwealth has two duties: “First, the Commonwealth has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties.... Second, the Commonwealth must act affirmatively via legislative action to protect the environment.” *Id.* at 933. These trust duties, of course, limit the Commonwealth’s power to act contrary to these duties.

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

considerations or statements of aspiration. As Article I, Section 25 (Reservation of Powers in People) states:

To guard against the transgressions of the high powers which we have delegated, we declare that everything *in this article* is excepted out of the general powers of government and shall forever remain inviolate.

Pa. Const. art. I, § 25 (emphasis supplied). Because Article I, Section 27 is (of course) in Article I, the state has no power to violate the rights it recognizes.

All of this means that Article I, Section 27 constrains the Commission's ability to limit its review to the environmental effects of the location of the buildings. To protect the constitutional rights of the people, the Commission must consider all of the environmental effects of the Expansion Station and factor them into its decision. The Commission lacks the legal authority to do otherwise.

The *Del-Aware* decision can no longer be read to oppose this conclusion. The *Del-Aware* Court rejected the petitioner's claim that it should consider a broader range of environmental effects, not just the environmental effects of the location of the pumphouse, because "Section 27 cannot legally operate to expand the powers of a statutory agency." *Del-Aware*, 513 A.2d at 596 (citation omitted). The Court continued: "In this case, the PUC is empowered *only* to decide whether the proposed site of the Bradshaw pumphouse is reasonably necessary for the public convenience or welfare. Therefore, we hold that it may evaluate only the environmental impacts of placing the pumphouse at the proposed location." *Id.* (emphasis in original).

After *PEDF II*, this is exactly the wrong framework. Article I, Section 27 imposes a constitutional constraint on the Commission's statutory authority. Under Section 619, the Commission cannot limit its review to the environmental impacts of the Station's location. Its

review must also include the broader environmental impacts that are reasonably foreseeable from the Station's construction and operation.

Notwithstanding its holding about the limited scope of Commission review under Section 619, the *Del-Aware* Court's ultimate holding recognized that the constitutional scope of the project, under Article I, Section 27, was broader than the environmental impacts of the location of the pumphouse. The Court acknowledged that a broader range of environmental effects were considered by the Department of Environmental Resources (now, the Department of Environmental Protection) when it issued permits needed for the overall project. 513 A.2d at 596. Indeed, when *Del-Aware* appealed the issuance of these permits to the Environmental Hearing Board ("EHB"), the EHB "thoroughly scrutinized and upheld" the issuance of the permits. *Id.* Thus, in applying the first prong of the *Payne* test, the Commonwealth Court in *Del-Aware* held that "(1) the PUC was obliged to defer to DER's evaluation of environmental impacts within its jurisdiction." *Id.*¹⁶ In so doing, it recognized that Article I, Section 27 extends to these other environmental impacts, not just those related to the location of the pumphouse.

The facts of the present case are like those of *Del-Aware* because there are environmental effects other than those related to the location of the Station. Unlike *Del-Aware*, however, there are no relevant permit applications required on account of those overall effects. There is no other agency to review them or defer to. There is, thus, no means of administrative or judicial review to thoroughly scrutinize an agency decision concerning these other environmental impacts.

¹⁶ On the other two *Payne* factors, the Court held: "(2) there was a reasonable effort to reduce the environmental incursion caused by the pumphouse site to a minimum and (3) any alleged harm from the pumphouse site is clearly outweighed by its benefits." *Del-Aware*, 593 A.2d at 596.

Under these circumstances, it is not constitutionally sufficient to conclude that these other reasonably foreseeable environmental impacts will simply have to go unaddressed or leave the public's constitutional rights unprotected. Because the Commission has the authority to override Marple Township's decision to deny approval of the Station, a decision to grant PECO Gas's petition means that these other environmental impacts will occur. It cannot avoid the constitutional prohibition against causing or allowing these impacts. The Commission cannot approve the location of the Station under Section 619 unless it has also examined the environmental impacts of the expansion of natural gas service and use that the Station makes possible and has also concluded that the overall Expansion Station is reasonably necessary for the convenience or welfare of the public.

C. The Commission Should Reject the PECO Gas Petition Because PECO Gas Has Not Provided the Information Necessary for the Commission to Conduct a “Constitutionally Sound Environmental Impact Review.”

The Commonwealth Court's decision in *Twp. of Marple v. Pa. Pub. Util. Comm'n*, 294 A.3d 965, 974-75 (Pa. Cmmw. Ct. 2023), (*“Twp. of Marple”*) imposes two requirements on the Commission in this proceeding. The Commonwealth Court held that “a Section 619 proceeding is constitutionally inadequate unless the Commission completes an appropriately thorough environmental review of a building siting proposal *and, in addition*, factors the results into its ultimate determination regarding the reasonable necessity of the proposed siting.” *Id.* at 12 (emphasis supplied).²³ The Court remanded the proceeding to this Commission “with instructions that it issue an Amended Decision regarding the PECO Gas Petition, which must incorporate the results of a constitutionally sound environmental impact review as to the proposed siting on the Property of the Fiber Building and the Station Building.” *Id.* at 13. It is

the Commission’s responsibility alone, to perform a “constitutionally sound environmental impact review” because no outside agency has performed any part of this review.¹⁷

While the Commission has the obligation under this decision to perform that review, PECO Gas has the burden of providing sufficient information to the Commission to conduct its own independent evaluation. As the applicant for a Section 619 exemption, PECO Gas is responsible for providing the Commission with adequate information in support of its application and has the burden of proving that the requested exemption should be granted. 66 Pa. Cons. Stat. § 332 (2023). This necessarily includes all information needed for the Commission to determine whether PECO Gas’s proposal is reasonably necessary for public convenience and welfare. As the Commonwealth Court has instructed, an integral part of the reasonable necessity inquiry is an evaluation of the environmental impacts of the proposal.

As applied here, PECO Gas’s burden of proof requires that it provide the Commission, as guarantor of the rights in the first sentence of the ERA and as trustee in the second and third sentences, with a coherent description and analysis of the impacts of the Expansion Station on affected rights. That is, the review must cover air, water, and the “natural, scenic, historic, and esthetic values of the environment.” It must also cover “public natural resources.” Public natural resources include “not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and groundwater, wild flora, and fauna (including fish) that are outside the scope of purely private property.” *Robinson Twp v. Commonwealth*, 83 A.3d at 955 (Pa. 2013). Because these resources depend upon a relatively stable climate (Najjar Direct at 5-7), a stable climate must be considered a public natural resource.

¹⁷ Except for the NPDES permit referenced in note 19.

As explained in Section B, the Pennsylvania Supreme Court has held that the trust duties of prudence, loyalty, and impartiality must be used to interpret Section 27’s public trust clause. *PEDF II*, 161 A.3d at 932 (quoting *Robinson Twp.*, 83 A.3d at 956-57). These duties suggest that there is no one-size-fits-all approach to a “constitutionally sound environmental impact review.” *Marple Township v. Pennsylvania Public Utility Commission*, 294 A.3d 965, 974-75 (Pa. Cmwlth. 2023). The depth of the review will depend on what resources are potentially affected, the scope and severity of possible impacts, and other factors.

As is evident from the Statement of Facts, PECO has failed to meet its burden of producing sufficient evidence of the environmental impacts of the Expansion Station to enable the Commission to conduct a “constitutionally sound environmental impact review.” Whatever else such a review must require, PECO Gas failed to produce sufficient evidence to enable the Commission to make a decision on three elements. The first two are reasonably foreseeable impacts of the proposal: 1) climate change impacts, and 2) cumulative effects, particularly air pollution. In addition, PECO failed to produce sufficient evidence on alternatives, particularly the alternative of no action. In the absence of information on these three elements, the Commission cannot perform a constitutionally sufficient environmental review of the proposed Expansion Station. As a result, PECO Gas’ application must be denied.

1. The Record Lacks Sufficient Evidence for the Commission to Make a Constitutionally Sound Determination of the Climate Change Impacts of the PECO Gas Proposal.

The Commission should reject PECO Gas’s Petition because it failed to submit any significant information—let alone a constitutionally adequate record—on the climate impacts of the Station. Without such a record, the Commission is unable to perform a constitutionally

sound environmental impact review and satisfy its obligations as a trustee under Article I, Section 27.

The ERA creates a broad set of enforceable constitutional rights and duties intended to address historic, ongoing, and future environmental harms. *See Robinson Twp.*, 83 A.3d at 960-63. In particular, the emission of GHGs directly implicates the ERA’s “right to clean air.” Pa. Const. art. I, § 27. Pennsylvania and federal law recognize that GHGs are air contaminants and air pollution. In this proceeding, the testimony of Dr. Raymond Najjar establishes that GHG pollution is inimical to public health and safety, is injurious to human, plant, and animal life and property. (Najjar Direct 5–13). GHGs are thus “air contaminants” as defined in the Air Pollution Control Act, 35 Pa. Stat. § 4003. Therefore, emissions of GHGs implicate the first clause of the ERA by interfering with the constitutional right to clean air. Because the public’s right to clean air constrains state government, the Commission cannot make a decision that would unreasonably impair this right. To ensure that it complies with the ERA, the Commission must understand the effects of its decision beforehand.

As explained in the Statement of Facts, climate change caused by emissions of GHGs also poses an existential threat to Pennsylvania’s public natural resources, which are protected by the public trust clause of the ERA. Because the Commission is an agency of the Commonwealth, it is a trustee under that clause. *PEDF II*, 161 A.3d at 931 n.23 (explaining that “all agencies and entities of the Commonwealth government” are trustees). Continued GHG emissions will dramatically harm the Commonwealth’s public natural resources and worsen air and water quality across the state. Expanded GHGs resulting from the construction and operation of the Expansion Station will increase these adverse impacts, directly implicating the Commission’s duty as a trustee under the ERA. *See generally* Robert B. McKinstry, Jr. & John

C. Dernbach, *Applying the Pennsylvania Environmental Rights Amendment Meaningfully to Climate Disruption*, 8 Mich. J. Env'tl. & Admin. L. 50 (2018).

As an ERA trustee, the Commission must consider in advance how its decisions will impact the corpus of the trust—including the climate impacts. Under Article 1, Section 27, the Commission is subject to fiduciary duties of prudence, loyalty, and impartiality. *PEDF II*, 161 A.3d at 932. This requires “the exercise of reasonable care, skill, and caution.” *PEDF II*, 161 A.3d at 933I (quoting 20 Pa.C.S. § 7780). It also requires careful and informed consideration of the risks of potential courses of action. *In re Estate of McAleer*, 248 A.3d 416, 445 (Pa. 2021) (Donohue, J., concurring) (“In navigating the potentially complex legal landscape of trust administration, a trustee should seek competent [professional advice] not only for guidance on what will best serve the trust’s purpose, but also to determine the potential risks that a trustee is subject to when making these difficult decisions in the course of trust administration.”). Therefore, when considering a fossil-fuel related project such as the Station that has direct and indirect GHG emissions, there must be some investigation into the climate impacts on Pennsylvania’s public natural resources. This responsibility is not static but evolves as our knowledge of the science and impacts of climate change improve.²⁷ Therefore, the scope of a constitutionally sound environmental impact review requires at least some consideration of current climate science for projects that may have climatic impacts.

The duty of loyalty, as previously explained, requires the Commission to give due regard not only to the present generation but also to future generations. *PEDF IV*, 255 A.3d at 310 (quoting *Robinson Twp.*, 83 A.3d at 959). Here, the GHG emissions of the Expansion Station would have long-lasting impacts. The Expansion Station is likely to be in operation for decades, generating new emissions throughout its entire lifespan. This is also true of the new burning

equipment installed in additional homes and businesses that are the customer targets of the Expansion Station. Additionally, most of the emissions produced by this Station will remain in the atmosphere for hundreds or thousands of years. Failing to investigate the long-term impacts of the Expansion Station violates the duty of loyalty to future beneficiaries, who will not have a seat at the table for the Commission’s consideration of this Station.

Therefore, as an ERA trustee, the Commission must at minimum consider how the Station’s emissions will impact the Commonwealth’s air and public natural resources. And it is PECO Gas’s obligation to provide the Commission with sufficient information to review this.

a. PECO Is Required to Provide Sufficient Evidence of the Reasonably Foreseeable Impacts of its Proposal on Climate Change.

The inclusion of reasonably foreseeable climate impacts in environmental reviews is a common-sense and widely adopted practice in light of the severe environmental harms caused by additional GHG emissions. Federal and state environmental review requirements emphasize the importance of considering reasonably foreseeable climate impacts in sound environmental reviews. These well-established practices can provide guiding and limiting principles when considering what a constitutionally sound environmental impact review must contain under the ERA.

Recognizing the catastrophic environmental harms caused by climate change, the federal government requires climate impact analysis in environmental reviews. For example, the federal government has clarified that NEPA reviews should “quantify proposed actions’ GHG emissions, place GHG emissions in appropriate context and disclose relevant GHG emissions and relevant climate impacts.” *NEPA Guidance on Consideration of Greenhouse Gas Emissions and Climate Change* (“NEPA Guidance”), 88 Fed. Reg. 1,197 (Jan. 9, 2023). The fact that a

project would represent only a small percentage of regional emissions does not allow an agency to “omit the analysis of environmental effects entirely when there are methods for analyzing those impacts.” *Dine Citizens Against Ruining Our Env’t v. Haaland*, 59 F.4th 1016 (10th Cir. Feb. 1, 2023).¹⁸

An adequate environmental review should include an analysis of impacts—including climate impacts—that are reasonably foreseeable. This is consistent with the federal approach under NEPA Guidance, which requires the consideration of both direct and indirect effects of the projects. 40 C.F.R. §§ 1508.8, 1508.9. In implementing NEPA Guidance and considering effects, an “agency need not foresee the unforeseeable, but ... [r]easonable forecasting and speculation is ... implicit in NEPA.” *Scientists’ Inst. For Pub. Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). Reasonably foreseeable impacts can be indirect. When an agency can “reasonably foresee” that “greenhouse-gas emissions are an indirect effect of authorizing [a pipeline] project,” the NEPA review is “needed to include a discussion of the ‘significance’ of this indirect effect....” *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017). Furthermore, there must be a causal relationship between the proposed action and an indirect effect. *See e.g., City of Dallas v. Hall*, 562 F.3d 712 (5th Cir. 2009) (effects of wildlife refuge highly speculative and not proximate cause of future water shortages).

¹⁸ Many states have statutes that require environmental review that includes an assessment of greenhouse gas emissions and climate impacts. California requires climate change impacts to be analyzed under its Environmental Quality Act. Cal. Code Regs. tit.14 §§ 21083.05 and 15000–15387 (“CEQA Guidelines”). This is also the case with New York and Massachusetts. NY DEC, *Assessing Energy Use and Greenhouse Gas Emissions in Environmental Impact Statements* (2009) (New York); NY DEC, *Commissioner’s Policy on Climate Change and DEC Action* (2010) (New York); 301 CMR §§ 11.02, 11.03m 11.07m 11.12 (Massachusetts); *MEPA Greenhouse Gas Emissions Policy and Protocol* (2010) (Massachusetts). Furthermore, other states with environmental constitutional provisions have required the consideration of climate impacts. *See e.g., In re Hawai’i Elec. Light Co., Inc.*, 152 Haw. 352, 359, 526 P.3d 329, 336 (2023). Pennsylvania has no such statute.

Reasonably foreseeable environmental impacts can include impacts that happen downstream from the project. Addressing these downstream impacts is common practice in environmental reviews. For example, federal CEQ regulations implementing NEPA require reviews to consider growth-inducing impacts. 40 C.F.R. § 1508.8(b); *see also City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975) (case preceded 1978 CEQ regulations) (holding that an agency must discuss growth and development induced by the project in its environmental review). Downstream climate impacts also need to be addressed when they are reasonably foreseeable: in *Sierra Club v. FERC*, the D.C. Circuit Court of Appeals held that a NEPA environmental impact assessment was inadequate because it “should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so.” 867 F.3d 1374 (D.C. Cir. 2017); *see WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019) (requiring an agency to consider as indirect effects the impact of downstream GHG emissions from fossil fuels enabled by the project); *see also San Juan Citizens All. v. U.S. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227 (D.N.M. 2018) (same).

Using these existing environmental review frameworks to understand current standards for environmental reviews, it is clear that an adequate review must include both indirect and downstream climate impacts that are reasonably foreseeable and caused by the Expansion Station. Therefore, the Commission should consider the direct, downstream, and upstream climate impacts of the Station to satisfy its obligations as a trustee under Article I, § 27.

b. PECO Gas’s Analysis of the Foreseeable Climate Impacts of the Expansion Station Was Insufficient and its Petition Should Be Denied.

While the exact requirements of a constitutionally sound environmental impact review under the ERA will vary based on the scope and nature of a project, PECO Gas’s failure to consider *any* reasonably foreseeable climate impacts is insufficient. PECO Gas provided little or no analysis of many direct impacts of the Expansion Station, including methane leaks. PECO Gas provided no analysis on the even more significant upstream and downstream impacts of the Expansion Station. PECO Gas’s failure to provide the Commission with sufficient information to perform an adequate environmental review leaves the Commission no choice but to deny its Petition. This is especially true because climate change caused by GHG emissions poses an existential threat to the resources protected under the ERA. (Najjar Direct 18-19; Marple Township, Ted Uhlman & Julie Baker Remand Statement No. 1, at 10 (“Schmid Direct”). The threat of climate change, in fact, dwarfs the threats that motivated the adoption of the ERA. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 960-2 (Pa. 2013) (“*Robinson Township*”); *PEDF II*, 161 A.3d at 916-18).¹⁹

The Expansion Station will result in several sources of direct GHG emissions that PECO Gas failed to consider. PECO Gas’s only evidence regarding climate change or GHG emissions was testimony by Jeffrey Harrington, whose initial remand testimony included no analysis of GHG emissions. (*See* Harrington Direct). Harrington’s rebuttal testimony was limited to his calculation of the direct GHG emissions from the equipment in the Station, developed with no consideration of relevant guidance on calculation of induced GHG emissions (Harrington Rebuttal, at 14-16; Tr. 2444-2445). Such guidance requires the inclusion of methane leaks and

¹⁹ Preventing the worst ravages of climate change requires that we achieve emissions neutrality by 2050 (Najjar Statement at 17); *see Federal Sustainability Plan*, <https://www.sustainability.gov/federalsustainabilityplan/>. Thus, the federal Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 2003 (2022), encourages use of electricity and renewable energy sources rather than equipment that emits greenhouse gases (“GHGs”) without emissions controls.

carbon dioxide emissions from unregulated combustion of natural gas made possible by the Expansion Station, which was not done. *Id.*

Likewise, PECO Gas completely failed to consider the direct climate impacts of methane leaks from valves, flanges, connectors, and pipes that are associated with the Station. Methane is a GHG that is far more potent than carbon dioxide, and therefore poses a significant climate risk. (Najjar Direct at 17). However, for distribution companies, it is often not worth it to repair leaks because the lost gas is relatively small and can be passed on to consumers. (*Id.* at 18). This can lead to significant methane leaks in natural gas distribution systems. An analysis of the potential for these leaks and their climate impacts is necessary to understand the impact that this fossil fuel Station will have on Pennsylvania’s natural resources and air.

PECO’s filings are also constitutionally deficient because they failed to analyze downstream or upstream GHG emissions associated with the Station. While there is no one-size-fits-all approach to a constitutionally sound environmental impact review, well-known environmental impacts of a project that have a clear causal relationship must be identified and considered to comply with the Commission’s trustee duties. This approach is consistent with requirements under federal and state environmental reviews.

The GHG emissions caused from the downstream gas usage caused by the approval of the Station are significant, foreseeable, and directly caused by the Station. The Expansion Station is designed to “increase its natural gas supply capacity.” (Oliver Direct at 2). The Expansion Station seeks to address “customer and usage growth in Delaware County” by connecting a liquified natural gas facility in West Conshohocken with its distribution network. (Initial Decision, Findings of Fact ¶¶24-29). Therefore, the ultimate purpose of the Station is to enable the downstream burning of gas. This downstream combustion creates emissions.

Despite the Station having reasonably foreseeable downstream emissions, PECO Gas performed no analysis of these emissions or associated environmental impacts. PECO Gas knew how much additional gas flow will be enabled by the construction of this Station and could have easily calculated downstream emissions resulting from the combustion of this new gas. However, PECO Gas entirely failed to provide information on the environmental impacts of these additional emissions that will be locked in for decades to come. PECO Gas's failure to provide analysis of the downstream environmental impacts prevents the Commission from being able to satisfy its obligations as a trustee under Article I, Section 27.

2. The Record Lacks Sufficient Evidence for the Commission to Make a Constitutionally Sound Determination of the Cumulative Impacts of the PECO Gas Proposal.

The Commission should reject PECO Gas's Petition because it failed to submit information relating to the cumulative impacts of the Station. Without a record analyzing this issue, the Commission is unable to satisfy its obligations as a trustee under Article I, Section 27 and is at risk of violating the public's environmental rights.

a. PECO Is Required to Provide Sufficient Evidence of the Reasonably Foreseeable Cumulative Impacts of its Proposal.

PECO's duty to provide information about cumulative impacts derives from Article I, Section 27. While clean air is impacted by the emissions from individual facilities, air quality is based on cumulative pollution from all sources. Some areas have higher levels of air pollution, and thus unhealthier air, than others, particularly environmental justice areas. Therefore, in the clean air context, a critical ERA inquiry is how a decision impacts cumulative air pollution. Under the ERA, the Commission must consider not just the reasonably foreseeable additional air

pollution caused by the Expansion Station; it must also consider the cumulative effect of this decision on overall air quality.

The ERA's emphasis on clean air demonstrates the importance of this duty to the drafters. The first words of the ERA are "[t]he people have a right to clean air. . ." Pa. Const. Art. I, § 27. The ERA's second and third sentences create a constitutional public trust consisting of "Pennsylvania's natural resources," *id.*, which includes "ambient air." *Robinson Twp.*, 83 A.3d at 955.

Analyzing cumulative impacts has long been recognized as a necessary part of informed environmental decision-making and is common practice in other environmental review frameworks. For example, NEPA requires an Environmental Impact Statement ("EIS") to consider the cumulative impacts of the proposed action. 40 C.F.R. § 1508.7. "Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-Federal) or person undertakes such other actions." *Id.* The cumulative impacts analysis must do more than merely catalogue relevant projects in the area but not consider the collective impacts of these projects. Under NEPA, environmental assessments have proven to be inadequate when they failed to consider the cumulative impacts of past actions. *See e.g., Kentucky Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402 (6th Cir. 2013) (finding environmental analysis to be insufficient because no attempt was made to consider past actions); *League of Wilderness Defs. v. United States Forest Serv.*, 549 F.3d 1211, 1218 (9th Cir. 2008) (noting that "NEPA requires adequate cataloguing of *relevant* past projects in the area").

Similarly, environmental reviews under state statutes require a cumulative impacts assessment. The California Environmental Quality Act requires environmental reviews to

analyze impacts to ambient air pollution concentrations and the cumulative impacts of such pollution concentrations. *See City of Long Beach v. City of Los Angeles*, 19 Cal.App.5th 465 (Cal. Ct. App. 2018) (finding an analysis of air quality impacts to be inadequate). Other states have also required cumulative impacts assessments in environmental reviews. *See e.g., Pope Cty. Mothers v. Minnesota Pollution Control Agency*, 594 N.W.2d 233 (Minn. Ct. App. 1999) (requiring consideration of cumulative effects); D.C. Code Ann. §§ 8-109.1 to 8-109.11.

Consideration of cumulative impacts is particularly important in the context of environmental justice areas. The ERA trustee fiduciary duties of loyalty and impartiality require trustees to consider the impact their decisions will have on beneficiaries. The duty of loyalty requires the trustee to manage the trust corpus “so as to give all the beneficiaries due regard for their respective interests in light of the purposes of the trust.” *PEDF II*, 161 A.3d at 932. The Commission cannot therefore ignore all beneficiaries’ interest in clean air. The duty of impartiality “implicates questions of access to and distribution of public natural resources,” such as clean air. *Robinson Twp.*, 83 A.3d at 959. This duty “means that the trustee must treat all equitably in light of the purposes of the trust.” *Id.* Decisions under which “some properties and communities will carry much heavier environmental and habitability burdens than others” are inconsistent with the obligation that the trustee act for the benefit of “all the people.” *Id.* at 1007.

Because the duty of impartiality prohibits the Commission from making decisions that impose greater environmental burdens on some communities than others, the Commission must consider whether its decisions will contribute to some beneficiaries experiencing worse ambient air quality than others. However, it is impossible to know whether or not decisions create disproportionate burdens without first understanding the pollution burdens a community already

experiences. Therefore, the duty of impartiality requires a trustee to consider who is burdened by a decision, what environmental burdens that community already experiences, and how the impacts of the project add to existing impacts.²⁰

b. PECO Gas’s Analysis of the Foreseeable Cumulative Impacts of the Expansion Station Was Insufficient and its Petition Should Be Denied.

PECO Gas’s analysis was inadequate because it does not assess the cumulative impact of the Station on air quality and fails to assess whether selecting this location for the Expansion Station results in overburdening this community. PECO Gas summarily concluded that, because there was no air permit required, the Station would generate no unreasonable environmental impacts. This approach fails to consider the tangible, quantifiable impacts the Station location has on air quality and fails to assess the cumulative impacts of the Station.

i. Failure to calculate impact on air quality

PECO Gas has provided the Commission with no estimates of the air pollutants associated with the Station. The Station includes two large sources of air emissions: (1) the Cold Weather Technologies (“CWT”) Indirect Line Heater (“Line Heater”) with six boilers and (2) an emergency generator. *Marple Township*, Timothy R. McAuley Remand Statement No. 1 (“McAuley Direct”), Ex. TM-2 at 1). Additionally, leaks from the valves, flanges and

²⁰ The Commonwealth has also recognized that, despite the fact all “people have a right to clean air,” some communities experience a disproportionate share of cumulative impacts. For example, Governor Wolf’s Executive Order 2021-07 declared that “historically and currently, low-income communities and communities of color bear a disproportionate share of adverse climate and environmental health impacts with accompanying adverse health impacts.” Pa. Exec. Order 2021-07, Environmental Justice (Oct. 28, 2021). Furthermore, in its Environmental Justice Policy, the DEP defines environmental justice as “the just treatment . . . of all people. . . so that people: are fully protected from. . . the cumulative impacts of environmental and other burdens.” Pa. Dep’t of Env’t Protection, Environmental Justice Policy at 3 (Sept. 16, 2023). Thus, the Commonwealth has recognized that the overall share of environmental burdens and their cumulative impacts are important in assessing access to clean air and that there are deep inequities in how these cumulative impacts are distributed. These cumulative impacts and distributional inequities are inherent in the right to clean air and maintenance of public environmental resources, and must be considered by ERA trustees to satisfy their constitutional obligations.

connectors as well as tailpipe emissions associated with the Expansion Station have the potential to emit regulated pollutants in quantifiable amounts. (McAuley Direct at 4). In particular, the Line Heater and emergency generator will emit numerous air pollutants having a direct impact on health, including nitrogen oxides, carbon monoxide, volatile organic compounds, PM2.5, and formaldehyde. (McAuley Direct at 4-5). These air pollutants pose major health concerns. For example, formaldehyde is a known human carcinogen, and any levels should be avoided. (McAuley Direct at 10). Elevated levels of nitrogen dioxide have severe respiratory health impacts and can also contribute to the formation of ground level ozone, which has additional associated health impacts. (McAuley Direct at 11-12). Many other pollutants the Station will emit have other well-documented health impacts. Therefore, the Station will produce air pollutants that have known health impacts.

Instead of quantifying and analyzing these air pollution impacts of the Station, PECO Gas concluded that there will be “no unreasonable environmental impacts to air quality from the construction or operation of the Station” merely because no individual air permit is required for these emissions sources. (PECO Statement No. 6 at 11 (Harrington Direct)). However, needing a permit is not relevant in determining whether site-specific factors may lead to adverse air quality impacts. (*Marple Township*, Timothy R. McAuley Remand Rebuttal Statement No. 1-R-1 (“McAuley Rebuttal”) at 3). In this case, it is reasonably foreseeable that emissions from this plant may cause negative health impacts nearby and may have worse cumulative effects. Despite this, PECO Gas failed to perform any emissions modeling or consider any site-specific factors in comparing potential sites or reaching its conclusion. (McAuley Rebuttal at 2).

The Station site selection has significant potential to influence the ambient air quality. An EPA-approved dispersion model shows that “measurable air quality impacts would occur up

to 1 mile away from the facility,” but that “the worst impacts would be borne by residents living within one-half mile.” (McAuley Direct, Ex. TM-2 at 9). Nearly 3,000 residents live within half a mile of the selected Station site. (*Id.* at 9). 1-hour averaged nitrogen oxide concentrations from the Station could reach 155 ug/m³ under typical operating conditions. (*Id.* at 12). In worst-case conditions, that figure could reach 1,200 ug/m³. (*Id.*). Therefore, PECO Gas failed to provide the Commission with the site-specific information needed to assess the Station’s air impacts.

ii. Failure to Analyze Cumulative Impacts

PECO Gas also failed to consider the impact of cumulative emissions on ambient air quality around the Station. Air pollution emitted by the Station does not exist in isolation but is additive to the existing air pollution already experienced by the community. Outdoor air in Delaware County currently is classified as not attaining the National Ambient Air Quality Standards (“NAAQS”) for nitrogen dioxide (NO₂), ozone (O₃), and fine particulate matter (PM 2.5). (Schmid Direct, Ex. JS-2 at 9). And the impact of the Station emissions on top of this background pollution could have serious health consequences. For example, the addition of emissions from the Station could cause 1-hour average NO₂ levels to exceed background concentrations by 200 percent. (McAuley Direct at 7-8). And in the worst-case emissions scenario, the additional emissions would cause the background 1-hour ambient concentrations of NO₂ to exceed the NAAQS by a factor of six. (*Id.* at 11). However, despite these risks and known background pollution in the area, PECO Gas provided no analysis of the cumulative impact the Station would have on ambient air quality. Without such a record, the Commission is unable to understand the impact of the Station on ambient air quality, part of the trust corpus.

PECO Gas also did not prepare a thorough analysis of the trust beneficiaries to be affected by the location of the Station. PECO Gas provided the commission with no information on (1) the population density or socioeconomic characteristics of the Expansion Station site and its surroundings; (2) distances to existing homes and businesses on adjacent properties; (3) the environmental burden that the surrounding community already experiences. It essentially has ignored the local surroundings of its proposed station and new pipeline. (Schmid Rebuttal at 7). This failure is particularly notable in light of the fact that some of the land adjacent to the proposed Station site has been designated by the Pennsylvania Department of Environmental Protection as an Environmental Justice Area. (Schmid Direct, Ex. JS-2 at 9). Without information on who will be impacted by the Station and what those impacts will be, the Commission cannot satisfy its trustee obligations to “give all the beneficiaries due regard for their respective interests”, *PEDF II*, 161 A.3d at 933, and to prevent some communities from “carry[ing] much heavier environmental and habitability burdens than others.” *Robinson Twp.*, 83 A.3d at 1007.

3. The Record Lacks Sufficient Evidence for the Commission to Make a Constitutionally Sound Determination of Alternatives to the PECO Gas Proposal.

The Commission should also reject PECO Gas’s Petition because it failed to submit adequate information on alternatives to the Station. Without such information, the Commission does not have an adequate record to determine whether or not, factoring in the Station’s environmental impacts as required by the Commission’s ERA trusteeship duties, overriding the Township’s zoning disapproval of the station is “reasonably necessary for the convenience or welfare of the public.” Pennsylvania Municipalities Planning Code, 53 Pa. Cons. Stat. § 10619 (1988).

a. PECO Is Required to Provide Sufficient Evidence and Analysis of Alternatives to its Proposal.

As discussed above, when the Commission is making decisions that impact the corpus of the trust, it must act with prudence, loyalty, and impartiality. *Pa. Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 932 (2017) (“*PEDF II*”). Informed decision-making is integral to the discharge of all of these duties, which is why the Commonwealth Court instructed the Commission to conduct a “constitutionally sound environmental impact review.” *Twp. of Marple v. Pa. Pub. Util. C.*, 294 A.3d 965, 975 (Pa. Cmmw. Ct. 2023). Here, PECO Gas has requested that the Commission make a finding that the Station is reasonably necessary for public convenience and welfare under Section 619. In order to reach an informed decision as to whether the Station is truly necessary for public convenience and welfare in light of environmental impacts, the Commission needs adequate information on alternatives to the Expansion Station that may have lower environmental impacts, including the no-action alternative.

The Commission, as ERA trustee, is also obliged to take action to conserve the corpus of the trust. As the Pennsylvania Supreme Court has held, “[t]he explicit terms of the trust require the government to ‘conserve and maintain’ the corpus of the trust,” not only for those who are presently alive but future generations. *PEDF II*, 161 A.3d 932 (2017) (quoting *Robinson Twp.*, 83 A.3d at 956-57). Accordingly, the Commission must, in evaluating how to respond to PECO Gas’s Petition, be informed regarding alternatives and their impacts in order to discharge its duties to choose the lowest-impact alternative possible consistent with the Commission’s trustee duty to “conserve and maintain” trust resources.

As Schmid testified, consideration of project alternatives is an integral part of sound environmental review practices: “Documentation of project planning and the formal recording of

reasons for rejecting alternatives deemed not viable are basic to the environmental review process.” (Schmid Rebuttal at 3). Schmid noted that a major flaw with PECO Gas’s Petition is its failure to include consideration of “the socially and environmentally appropriate, no-action alternative for the reliability station.” (*Id.* at 3).

Federal environmental impact review law, which has been well-developed over the course of half a century,²⁹ provides a useful analogue to inform the scope of constitutionally sound environmental impact review under the ERA. Consideration of alternatives is core to environmental review under NEPA. When evaluating a proposed action under NEPA, federal agencies are required to consider a reasonable range of alternatives. 42 U.S.C. § 4332(E); 40 C.F.R. § 1508.9(b); *City of New York v. U.S. Dep’t of Transp.*, 715 F.2d 732, 742 (2d Cir. 1983); *Hanly v. Kleindienst*, 471 F.2d 823, 834-35 (2d Cir. 1972). This must include the “no action alternative.” 40 C.F.R. § 1502.14(c). Moreover, “[l]ike NEPA, the state environmental policy acts require impact statements to include a discussion of alternatives.” § 12:22. Alternatives, NEPA Law and Litig. § 12:22 (2023-2024).²¹ Also like NEPA, “the cases interpreting the state environmental policy acts also apply a ‘rule of reason’ when deciding which alternatives must be discussed.” *Id.*

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

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

²¹ “The same general principles that apply in NEPA reviews typically apply to state-level frameworks as well.” Jessica Wentz, Environmental Impact Assessment, in *Global Climate Change and U.S. Law*, Chapter 6 at 192 (Michael B. Gerrard et al. eds., ABA 3rd ed. 2023).

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

The alternatives analysis is the “linchpin” of a NEPA environmental review, because only by studying and presenting to the public a reasonable range of alternatives for a proposed action can an agency make an informed decision. *Monroe Cty. Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 697 (2d Cir. 1972). As recognized in NEPA case law, “[t]he existence of a viable but unexamined alternative renders an [environmental impact review] inadequate.” *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013) (quoting *Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 868 (9th Cir. 2004)).

b. PECO Gas’s Evidence and Analysis of Alternatives Was Insufficient and Its Petition Should Be Denied.

PECO Gas’s petition must be rejected because it did not include in its environmental review any meaningful analysis of potential alternatives to the proposed Expansion Station, including analysis of the potential for alternatives with lower environmental impacts. Most importantly, it did not consider include discussion of a no-action alternative for the Expansion Station, or any analysis of alternative means of managing demand to defer or avoid entirely the need for a project like the Expansion Station. As Dr. Najjar noted, PECO Gas presented the Expansion Station as necessary due to projections of increased future demand for gas. (Najjar Direct at 17). Yet PECO Gas did not submit any analysis investigating whether or not projected gas demand increases could be managed with lower environmental impacts by alternative means, such as demand-side management measures, including energy efficiency measures and electrification. (Schmid Rebuttal at 8).

As discussed above, PECO Gas bears the burden of proof of demonstrating that the Station is reasonably necessary for public convenience and welfare under Section 619, factoring in environmental considerations as required by the ERA. This requires, as part of a “constitutionally sound environmental impact review,” investigation of reasonable alternatives to the Station that may have lower environmental impacts. *Twp. of Marple* at 975. PECO Gas, however, has failed to submit any meaningful analysis of potential alternatives to constructing the Station as part of its environmental review. Without this information, the Commission cannot conduct the “constitutionally sound environmental impact review” that is required under the ERA. *Id.* Accordingly, PECO Gas’s Petition must be rejected.

D. The Commission Should Reject the PECO Gas Petition Because Record Evidence Shows that the Expansion Station is Not Reasonably Necessary for the Convenience or Welfare of the Public.

As explained above, PECO Gas’s Section 619 Petition should be rejected on procedural grounds, due to PECO Gas’s failure to submit necessary record evidence to enable the Commission to conduct a “constitutionally sound environmental impact review” under the ERA. Memorandum Opinion, *Twp. of Marple v. Pa. Pub. Util. Comm’n*, Case No. 319 C.D. 2022 at 12 (Pa. Cmmw. Ct. Mar. 9, 2023). Additionally, however, PECO Gas’s Petition should also be rejected on substantive grounds because PECO Gas has failed to carry its burden of proof of showing that it is entitled to the relief it seeks, namely, overriding the Township’s zoning determination under Section 619.

Under Section 619, PECO Gas is obliged to demonstrate to the Commission that the “proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public.” Pennsylvania Municipalities Planning Code, 53 Pa. Cons. Stat. § 10619.

The Commonwealth Court ordered that the results of the ERA environmental review be factored into that demonstration. Memorandum Opinion, *Twp. of Marple*, Case No. 319 C.D. 2022 at 12.

Section 619 requires the proposal to be shown to be 1) reasonably necessary 2) for the convenience or welfare of the public. The limited evidence available in the record shows that PECO Gas has not carried its burden of proof of demonstrating that the project is either reasonably necessary or advances the convenience and welfare of the public. This is particularly true because, as previously explained, Section 619 must be interpreted and applied to be consistent with the Commission's constitutional responsibilities under the ERA.

Record evidence shows that PECO Gas has not carried its burden of showing that the Station is reasonably necessary in light of constitutional environmental requirements. First, as demonstrated in Section A of the Statement of Facts (Part III.A), PECO Gas failed to analyze the effect of warming winters on reducing demand in the future. When climate change is considered, the average and peak demand from existing customers will be reduced, due to the fact that winters are warming and will get warmer still. (Najjar Direct at 13-15; 17; Tr. 2253-55). This will be compounded by the increasing trend in switching from gas heat to the far more efficient electric heat pumps, which do not emit GHGs, will continue to reduce demand. (Tr. 2257-58). Demand reductions will be further accentuated by new gas appliances that will reduce both average and peak demands for gas from existing customers. (Tr. 2255-57). In light of these deficiencies in its demand analysis, PECO Gas cannot be said to have satisfied its burden of proving the need for the Station.

Additionally, as previously explained, PECO Gas failed to examine the potential for reasonable alternatives to defer or avoid the need to construct the Station, rendering its environmental review defective. *See supra* at Part V.C.3. As a result, PECO Gas has not carried

its burden of substantively demonstrating that the Station is reasonably necessary under Section 619.

Record evidence shows that PECO has also not carried its burden of showing that the Station advances public convenience and welfare in light of constitutional environmental requirements. Testimony presented on remand shows that authorizing the Expansion Station is decidedly against the public interest. Climate change caused by GHG emissions poses an existential threat to the resources protected under the ERA, as set out in detail in Section B of the Statement of Facts (Part III.B). It is also notable that the ERA makes “future generations” beneficiaries of the trust. Pa. Const. art. I, § 27. Although we are already experiencing the adverse impacts of climate change, climate change will continue to worsen in the future and impose growing burdens on future generations. (Najjar Direct at 6-7). Given these serious environmental impacts, the Commission’s affirmative duty under the ERA to preserve trust resources, and PECO’s Gas’s inadequate showing of need, it would not advance public welfare and convenience to proceed with the project.

Therefore, PECO has not carried its burden of showing, as required under Section 619, that the Expansion Station is reasonably necessary for public convenience and welfare. As a result, the Commission must deny PECO’s Petition.

E. PECO Gas’s Petition Must Also be Rejected for the Reasons Set Out in Marple Township’s Brief.

Intervenors Julia M. Baker and Theodore R. Uhlman also incorporate by reference the arguments made in Marple Township’s Main Brief.

VII. CONCLUSION

As discussed above, PECO Gas has failed to submit sufficient information to the Commission to allow it to perform a constitutionally sound environmental impact assessment and PECO Gas has not met either its burden of going forward or its burden of proof. PECO Gas's application should be denied on that ground. PECO Gas's application should also be denied because the evidence shows that the Expansion Station is not reasonably necessary and would not advance public convenience and welfare. There is no current need for the Expansion Station to meet the needs of any current customers. PECO Gas failed to consider the impacts of a warming climate and trends for replacing gas appliance with less polluting and more cost-effective electric appliances in its determination of need and those trends both show that demand from existing customers will be reduced in the future. The Station will result in extension of the system to new customers and will result in increased GHG emissions for a period long after Pennsylvania and the world need to achieve net-neutrality to prevent the worst ravages of climate change. This is decidedly contrary to the public interest.

Respectfully submitted,

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APPENDIX A. PROPOSED FINDINGS OF FACT

PECO Did Not Analyze the Effect of Warming Winters from Climate Change on Demand for the Expansion Station.

1. The Expansion Station, whose approval was denied by Marple Township, is intended to expand the use of natural gas in Delaware, Montgomery and probably Chester Counties. Based on PECO Gas's evidence in the first proceeding, the Commission found that the Station is needed to address winter deficits (Initial Decision, PA PUC Docket No. P-2021-3024328, Findings of Fact at ¶¶18-20 (Dec. 7, 2021)) and "customer and usage growth in Delaware County." (Initial Decision, Findings of Fact at ¶24, citing PECO St. No. 3, at 4:3-12).
2. The equipment located at the Station is intended to allow PECO Gas to increase natural gas pressure within its larger system by creating a "virtual gate station" in Marple Township fed by the new 11.5-mile steel 12-inch over-high-pressure gas main. The station will step down the pressure to allow the distribution system to meet additional demand in Delaware and Montgomery Counties. (Initial Decision, Findings of Fact at ¶¶29-31).
3. In the initial proceedings PECO Gas witnesses testified that there was no current gas supply shortage (Record ("R") 913, 13-20) and that PECO Gas currently has adequate supply to meet mandated requirements in a safe, least cost manner. (R. 1279:23-1280:11).
4. Thus, the Commission found that PECO Gas has sufficient supply without the Station to meet its existing demand. (Initial Decision, Findings of Fact at ¶34).
5. PECO Gas based its determination of a future "need" for the Station on "calculated design day demand requirements" (Initial Decision, Findings of Fact at ¶15), and based growth in demand on a "linear trend analysis," which extrapolated past growth in customer count and usage over the next ten years. (Initial Decision, Findings of Fact at ¶¶25-28).

6. PECO Gas did not account for climate change in its modeling. (Tr. 1212-1213, 0589A-0590A).
7. Peak demand for natural gas occurs during winter months and climate change will reduce demand for natural gas during those months. Indeed, the rapid winter warming of southeastern Pennsylvania over the last 50 years has already reduced demand. The fact that demand has increased in the past is due to other factors, such as population growth and PECO Gas extending service to other customers. (Marple Township, Ted Uhlman & Julie Baker Remand Statement No. 2 at 13 (“Najjar Direct”). Thus, a straight-line analysis based on past trends assumes continued increase in customers.
8. This straight-line analysis is overly simplistic and fails to consider a number of changes, all of which indicate that demand from existing customers has been going down and will be reduced in the future. Specifically, the evidence adduced on remand shows that (1) climate change has reduced peak and total demand due to warmer winters and this trend will increase in the future; and (2) this reduced demand will be accentuated by existing market forces that have been causing a trend towards electrification—a trend that will increase in the future. (Najjar Direct at 13-14; Tr. 2255-2257).
9. If climate change is properly considered, it can readily be determined that peak winter demand and overall demand from PECO Gas’ *existing* customers will be reduced due to multiple factors identified by Intervenors’ witnesses. (Najjar Direct at 17; Tr. 2265-2267). Thus, there will be no increase in “usage” by existing customers and the real intent of the Expansion Station is to support “customer growth.” The purpose of the Expansion Station is to support increased distribution and use of natural gas for *additional* customers in residential and commercial buildings in Delaware and Montgomery Counties, which, in turn, will

increase greenhouse gas emissions and lock those increases in for decades to come. (Najjar Direct at 17).

10. Climate change will reduce the need for gas in the winter. Heating fuel demand increases as the number of heating degree days (“HDDs”) increases. HDDs for a winter season are calculated by first determining the number of degrees that the average temperature for a winter day is below 65 °F. For example, if the average temperature for a day is 55 °F, then the HDD for that day is equal to 10. The HDD is zero for any day in which the daily average temperature is above 65 °F. HDDs for a whole winter is simply the sum of HDDs for individual winter days. (Najjar Direct at 13). The Delaware Valley Regional Planning Commission hired the consulting firm ICF to conduct a climate impacts analysis for several counties in southeastern Pennsylvania. (Najjar Direct, at 13-14, Figure 10). Compared to the baseline HDDs given by the 1961–1999 period, average HDDs for the 2020–2039 period are projected to decline by 10%, regardless of which scenario is used for future greenhouse gas emissions. HDDs are projected to continue to decline throughout the 21st century, with greater declines for higher emissions scenarios, and as much as a 35% decrease by the end of the century. (Najjar Direct at 14 (referencing Delaware Valley Regional Planning Commission, <https://www.dvrpc.org/energyclimate/ccmit/>); Tr. 2253-2255).

11. Reduced demand from warming winters will be accentuated by an increasing trend in switching from natural gas heat to the far more efficient electric heat pumps. (Tr. 2257-2258).

12. Thus, there is an increasing trend of replacement of natural gas with electricity for space heating and cooling, hot water, and cooking. This conversion can readily provide superior service at a lower cost. This trend is likely to accelerate when one considers the tax credits

and grants made available by the federal government for high efficiency heat pumps, ground source geothermal, and solar electric generating units to power them, as well as the extension of solar and high efficiency heat pump credits to non-profit organizations. (Najjar Direct at 16; Tr. 2252-2260). The acceleration of this trend will further reduce demand from existing customers.

13. Reduced demand from warming winters will also be accentuated by a trend toward more efficient gas appliances. Although some new gas appliances use more gas when they first cycle on, they use less gas overall, so that replacement of existing gas appliances will further reduce demand from existing customers. (Tr. 2255-2257). It is unreasonable to believe that all gas appliances would cycle on at the same time (Tr. 2255-2257).

Climate Change Caused by Emissions of Greenhouse Gases Poses an Existential Threat to Pennsylvania's Public Natural Resources.

14. The climate has warmed and will continue to warm from human emissions of greenhouse gases, including carbon dioxide, methane, and nitrous oxide. (Najjar Direct at 4-6).
15. The effects of climate change on human society and on the ecology of the planet are overwhelmingly negative and, in some aspects, extremely severe. This warming is already damaging Pennsylvania's public natural resources, including forests and plant life, birds and other wildlife, trout and other fish, and insect life. (Najjar Direct at 6-10).
16. Impacts will worsen greatly if greenhouse gas emissions are not reduced. The region will see increased intense precipitation and flooding; heat waves; drought during summer months; sea level rise, which will cause flooding in Philadelphia; and the salt line moving up the Delaware River, threatening Philadelphia's water intakes and supply. (Najjar Direct at 10-12). These effects are expected to increase and, without reductions in emissions of carbon dioxide and other greenhouse gases, could reach disastrous levels. (Najjar Direct at 15).

17. Mitigating the effects of climate change is necessary to protect the public interest and the health and welfare of Pennsylvanians and their water, air, and environment and other resources protected under Article I, § 27 of the Pennsylvania Constitution. (Najjar Direct at 19).
18. Under the business-as-usual scenario, annual average temperatures in Pennsylvania by 2050 are projected to be about 6 °F above the baseline average for the 1971-2000 period, according to a 2021 report issued by the Pennsylvania Department of Environmental Protection under the authority of the Pennsylvania Climate Change Act (Act 70 of 2008). (*Marple Township*, Ted Uhlman & Julie Baker Remand Rebuttal Statement No. 1-R (“Schmid Rebuttal”) at 10 (citing Pennsylvania Department of Environmental Protection, *Climate Impacts Assessment 2021*)). According to this report, other adverse climate impacts that will result from global warming in the Commonwealth absent aggressive efforts to cut emissions include increased heat mortality, an increase in Lyme disease, and rises in violent crime. These harms also include reduced dissolved oxygen in the waters of our freshwater streams as well as in the Delaware River estuary as consequences of global warming to which the Expansion Station will contribute. The report describes the resulting impacts as catastrophic on Pennsylvania forests, wildlife, and ecosystems. During 2023, our region experienced unhealthy concentrations of smoke from distant wildfires induced by global warming, exacerbating the consequences of local emissions. Schmid Rebuttal at 10.
19. Every ton of carbon dioxide emitted leads to damage, including loss of human life. By one estimate, every 500 metric tons of carbon dioxide emitted now leads to one human death by 2100. For reference, Pennsylvania’s CO₂-equivalent emissions in 2019 (the most recent estimate available) amounted to 266 million metric tons, which is the equivalent of about

50,000 deaths worldwide by 2100. (Najjar Direct at 18 (citing R. Daniel Bressler, *The Mortality Cost of Carbon*, 12(1) *Nature Communications*: 4467 (July 29, 2021)).

20. According to the Second State of the Carbon Cycle Report (“SOCCR2”) human-driven CO₂ emissions are expected to continue to drive changes in climate in the coming decades and centuries. Emissions from fossil fuel combustion in the North American energy sector are the largest source of carbon dioxide, and all GHGs, from this continent to the atmosphere. Reducing GHG emissions will limit global surface temperature change and, in turn, limit these many harms. While no one individual state or country policy will singlehandedly solve the climate crisis, every policy or action reduces the harm from climate change. (Najjar Direct at 18-19 (discussing U.S. Global Change Research Program, *Second State of the Carbon Cycle Report (SOCCR2): A Sustained Assessment Report. U.S. Global Change Research Program* (N. Cavallaro et al. eds., 2018)).

21. Moreover, the nations that are party to the United Nations Framework Convention on Climate Change, including the United States, as well as the scientific community, agree that warming must be limited to 1.5 to 2 °C above historic levels to avoid dangerous anthropogenic interference with the climate system. (Najjar Direct at 15). To achieve that, emissions need to be reduced by 50% by 2030 and to emissions neutrality by 2050. (Najjar Direct at 16).

The Expansion Station Will Increase Emissions and Cause Dangerous Anthropogenic Interference With the Climate System.

22. The express purpose of this Station is to increase gas throughput through the distribution system to serve PECO's projected increases in demand. If throughput increases, this will increase emissions from fossil fuel combustion, and to the extent new gas infrastructure is built out to serve that projected increase demand, these

emissions will be locked in for decades to come. Such impacts are inconsistent with the need to reduce those emissions to avoid damage to trust resources and move towards emissions neutrality by 2050. (Najjar Direct at 17).

23. The expanded infrastructure can also be expected to result in new leaks of methane, a greenhouse gas that is far more potent than carbon dioxide. Dr. Najjar reviewed the literature on methane leaks in U.S. natural gas distribution systems and found that those leaks release the greenhouse gas equivalent of 2% of on-road emissions in the U.S. From a monetary perspective, it would make sense to repair such leaks because the climate damages of the released methane are about five times the repair costs. However, from the perspective of distribution companies, it is not worth it to repair the leaks because the climate damages fall on the public and the cost of the lost methane to the utilities is relatively small and simply passed on to customers. Najjar Direct at 17-18 (citing Ryan P. Scott, Tyler A. Scott & Robert A. Greer, *Who Owns the Pipes? Utility Ownership, Infrastructure Conditions, and Methane Emissions in United States Natural Gas Distribution*, 39(2) Review of Policy Research (2022)).

PECO Gas’ Environmental Submission Did Not Analyze the Reasonably Foreseeable Climate Change and Cumulative Impacts of the Expansion Station or Analyze Alternatives to the Expansion Station.

24. On remand, PECO Gas produced six pieces of direct testimony that constitute its entire environmental review of the Station. Statement 1 was made by PECO employee Douglas I. Oliver, Statement 2 was from PECO employee Keith Kowalski, Statement 3 was from pipeline consultant Mike Israni, Statement 4 was from PECO employee Jim Moylan, Statement 5 was from consultant Reginald Keith, and Statement 6 was from consultant Jeffrey Harrington.

25. The heart of PECO’s environmental review was produced by Keith Kowalski (Statement 2) and Reginald Keith (Statement 6). In Statement 2, Keith Kowalski summarized the environmental reviews PECO has performed for the Expansion Station. (PECO Statement No. 2-RD (“Kowalski Direct”). Most of Kowalski’s testimony centered on the required NPDES permit for discharges of stormwater associated with construction activities. Kowalski described the NPDES stormwater permit application process, components of PECO Gas’s NPDES permit application, and actions that PECO Gas will take pursuant to its NPDES permit. (*Id.* at 8-13). Kowalski also discussed the Phase I and II environmental assessments that were performed to assess the pre-existing condition of the site and identify pre-existing environmental issues on the site. (*Id.* at 13-18). The Phase I and II environmental reviews and NPDES permit materials were attached to Statement 2 as exhibits.
26. In Statement 6, consultant Jeffrey Harrington reviewed existing project documents and permit requirements and made conclusions about environmental impacts based on these materials. (PECO St 6-RD J Harrington Remand Direct Testimony at 5). In assessing air quality impacts, Harrington summarized emissions sources, noted that no air permit was needed, and remarked the sources complied with EPA standards. (*Id.* at 8-11).
27. The rest of PECO Gas’s testimony focused on other aspects of the Expansion Station. In Statement 1, Douglas Oliver provided a high-level overview of the Expansion Station and broader reliability effort, summarized the testimony of other witnesses, and requested that the Commission find that the Expansion Station is reasonably necessary for the convenience and welfare of the public. (PECO Statement No. 1 (“Oliver Direct “)).

28. In Statement 3, Mike Israni discussed the applicability of PHMSA regulations to the Expansion Station, the overall history of safety incidents at district regulating stations across the U.S., and PECO Gas's general safety record. (PECO Statement No. 3 ("Israni Direct")).
29. For his testimony in Statement 4, Jim Moylan described the aesthetic design of the Expansion Station, as well as historic soil contamination and remediation at 2090 Sproul Road. (PECO Statement No. 4 ("Moylan Direct")).
30. Reginald Keith's testimony in Statement 5 focused on the noise impact of the Expansion Station and design elements of the station intended to mitigate noise. (PECO Statement No. 5 ("Keith Direct")).
31. The sole testimony adduced by PECO Gas relating to climate impacts was Mr. Harrington's calculation of GHG emissions from the Station. In calculating these emissions, Mr. Harrington limited his consideration to the direct emissions from the equipment located at the Station and did not include any emissions from additional customers who will be able to connect as a result of the Station. (Tr. 2444-2445).
32. In calculating GHG emissions from the Station, Mr. Harrington did not include any emissions resulting from a 20% increase in residential customers that PECO expects. (N.T. 1. 9 -18). He also did not include any methane leaks from the distribution system or the 20% increase in homes that PECO Gas projects will be served as a result of the Station. (Tr. 2447).
33. In calculating GHG emissions from the Station, Mr. Harrington did not consider downstream emissions despite being "vaguely aware" of the fact that EPA did include these emissions in its calculation of total U.S. emissions from natural gas distribution. (Tr. 2447- 2448).

34. In calculating GHG emissions from the Station, Mr. Harrington did not consult any guidance issued by EPA, ASTM, CEQ or any other organization regarding how to calculate GHG emissions for the purpose of an environmental assessment. (Tr. 2448-2449).
35. Harrington also testified that there would be no water quality impacts because there are no streams or wetlands on the property, (Harrington Direct at 11-13), no unreasonable stormwater quality impacts because of the NPDES permit, (Harrington Direct at 13-14), and no threat to endangered or threatened species. (Harrington Direct at 14).
36. Mere compliance with a specific permit requirement does not take the place of an environmental assessment. (Schmid Rebuttal at 4).
37. Dr. James Schmid, a Ph.D. ecologist who has performed environmental assessments for Pennsylvania state programs, federal programs and the programs of many other states, reviewed PECO Gas' submissions and opined that the submission lacked many, if not most, of the elements that are needed to determine the environmental impact of a proposed project. (Schmid Rebuttal at 2, 6-11). Three deficiencies identified by Dr. Schmid are particularly relevant here.
38. First, PECO Gas did not analyze or determine the greenhouse gas emissions that would be the reasonably foreseeable result of Commission approval of the Expansion Station and would have long term irreversible adverse impacts on the environment. (Schmid Rebuttal at 5-7, 8-9). The Station will result in construction of infrastructure expanding the natural gas distribution system to new homes and businesses and for using gas in homes and business that will last long before their emissions must cease. (Schmid Rebuttal at 10; Najjar Direct at 17-19).

39. Second, PECO Gas did not analyze the reasonably foreseeable cumulative air quality impacts of Commission approval of the Expansion Station. (Schmid Rebuttal at 6-7, 9).
40. Third, PECO Gas did not analyze alternatives to the Expansion Station, including alternatives that would not require any Station at all, such as electrification and measures to conserve gas or methods to mitigate the adverse effects of GHG emissions. (Schmid Rebuttal at 8, 11; Najjar Direct at 16).
41. As a result of the deficiencies identified by Dr. Schmid and Dr. Najjar, it is not possible on this record for the Commission to understand the overall environmental effect of the Expansion Station. (Schmid Rebuttal at 6)

APPENDIX B. PROPOSED CONCLUSIONS OF LAW

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. Under Section 619 of the Pennsylvania Municipalities Planning Code, a municipality may exercise its zoning powers over a public utility building unless the Commission determines that the site is reasonably necessary for the public convenience or welfare. 53 P.S. § 10619.
4. The Commission must interpret Section 619 in a manner that is consistent with Article I, Section 27 of the Pennsylvania Constitution. *Commonwealth v. McClelland*, 233 A.3d 717, 735 (Pa. 2020); *Commonwealth v. Parker White Metal Co.*, 515 A.2d 1358, 1370-71 (Pa. 1986); *Marple Township v. Pennsylvania Public Utility Commission*, 294 A.3d 965, 974-75 (Pa. Cmwlth. 2023).
5. The Commission must interpret Section 619 in a manner that is consistent with substantive due process. *Robinson Twp.*, 83 A.3d at 1001 (Baer, J., concurring).
6. The Commission’s determination of the reasonable necessity of the Station for public convenience and welfare must incorporate a “constitutionally sound environmental review.” *Marple Township v. Pennsylvania Public Utility Commission*, 294 A.3d 965, 974-75 (Pa. Cmwlth. 2023).
7. The Commission is required by the first clause of Article I, Section 27 to protect the public’s “right to clean, pure water, and the preservation of the natural, scenic, historic, and esthetic values of the environment.” Pa. Const. art. I, § 27

8. The emission of greenhouse gases implicates the first clause of Article I, Section 27 by interfering with the constitutional “right to clean air.” Pa. Const. art. I, § 27; 35 Pa. Stat. § 4003 (definition of air contaminant).
9. The Public Utility Commission is a trustee of public natural resources under the public trust clause of Article I, Section 27 of the Pennsylvania Constitution. *PEDF II*, 161 A.3d at 931 n.23; *Marple Township v. Pennsylvania Public Utility Commission*, 294 A.3d 965, 974-75 (Pa. Cmwlth. 2023).
10. As a trustee under Article I, Section 27, the Commission is required to “conserve and maintain” public natural resources for the benefit of present and future generations. Pa. Const. art. I, § 27.
11. As a trustee under Article I, Section 27, the Commission is subject to fiduciary duties of prudence, loyalty, and impartiality. *PEDF II*, 161 A.3d at 932.
12. To conduct a “constitutionally sound environmental review,” the Commission must consider the reasonably foreseeable environmental effects of the gas expansion proposal made possible by the station, not just the environmental effects of its location. *PEDF II*, 161 A.3d at 932; *Robinson Twp.*, 83 A.3d at 956–57; *In re Duncan Trust*, 391 A.2d 1051, 1057 (Pa. 1978); *Marple Township v. Pennsylvania Public Utility Commission*, 294 A.3d 965, 974-75 (Pa. Cmwlth. 2023).
13. The Commonwealth Court’s decision in *Del-Aware Unlimited, Inc. v. Pa. Pub. Util. Comm’n.*, 513 A.2d 593 (Pa. Cmmw. Ct. 1986), can no longer be read to limit the Commission’s authority in a Section 619 proceeding to determining the environmental effects of the location of the gas expansion proposal. *PEDF II*, 161 A.3d at 932; *Robinson Twp.*, 83 A.3d at 956–57; *In re Duncan Trust*, 391 A.2d 1051, 1057 (Pa. 1978); *Marple*

Township v. Pennsylvania Public Utility Commission, 294 A.3d 965, 974-75 (Pa. Cmwlth. 2023).

14. A “constitutionally sound environmental review” must include consideration of the impacts of a project on climate change. Pa. Const. art. 1, § 27; *Marple Township v. Pennsylvania Public Utility Commission*, 294 A.3d 965, 974-75 (Pa. Cmwlth. 2023).
15. A “constitutionally sound environmental review” must include consideration of the cumulative impacts of a project, particularly on environmental justice communities. Pa. Const. art. 1, § 27; *Marple Township v. Pennsylvania Public Utility Commission*, 294 A.3d 965, 974-75 (Pa. Cmwlth. 2023).
16. A “constitutionally sound environmental review” must include review of a reasonable range of project alternatives. Pa. Const. art. 1, § 27; *Marple Township v. Pennsylvania Public Utility Commission*, 294 A.3d 965, 974-75 (Pa. Cmwlth. 2023).
17. PECO Gas failed to carry its burden of submitting information on climate change, cumulative impacts, and alternatives necessary for the Commission to complete a “constitutionally sound environmental review” of the Station. Pa. Const. art. 1, § 27; *Marple Township v. Pennsylvania Public Utility Commission*, 294 A.3d 965, 974-75 (Pa. Cmwlth. 2023).
18. PECO Gas failed to carry its burden of showing that the Station is “reasonably necessary.” 53 P.S. § 10619.
19. The Expansion Station will enable expansion of PECO Gas’s natural gas distribution system. Since PECO Gas has not conducted a constitutionally sufficient environmental review, PECO Gas has not demonstrated a need for it, and because of its impacts on ERA trust resources, PECO Gas failed to carry its burden of showing that the Station would advance “public convenience and welfare.” 53 P.S. § 10619.

APPENDIX C. PROPOSED ORDERING PARAGRAPHS

Due to PECO Gas' failure to adduce sufficient evidence to allow the Commission to conduct a "constitutionally sound" assessment of environmental impacts as ordered by the Commonwealth Court and because the proposed Station is not reasonably necessary for public convenience and welfare, it is hereby ORDERED, that

(1) The application of PECO Energy pursuant to Section 619 of the Municipalities Code is HEREBY DENIED.