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January 3, 2024

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. Section 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 (On Remand)

Dear Secretary Chiavetta:

Attached for filing is the Brief of Amicus Curiae Energy Association of Pennsylvania in the above-referenced proceeding. Copies are being provided as indicated on the Certificate of Service.

Respectfully submitted,

Devin Ryan

DR/kls
Attachment

cc: The Honorable Mary D. Long *(via email; w/attachment)*
Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the filing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

BRIEF OF AMICUS CURIAE ENERGY ASSOCIATION OF PENNSYLVANIA

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I. INTRODUCTION

This is a remand proceeding with a limited scope. PECO Energy Company ("PECO" or "Company") originally filed a Petition pursuant to Section 619 of the Municipalities Planning Code ("MPC"), requesting a Pennsylvania Public Utility Commission ("Commission") finding that the siting of two buildings—the "Fiber Building" and the "Station Building"—associated with the Company's proposed Natural Gas Reliability Station ("Station") in Marple Township is reasonably necessary for the convenience or welfare of the public and that the buildings are, therefore, exempt from local zoning requirements. Although the Commission approved the Petition, the Commonwealth Court of Pennsylvania remanded this case to the Commission to address three, and only three, specific issues related to the Petition:

1. Explosion impact radius;
2. Noise; and
3. Heater emissions.[1]

The Energy Association of Pennsylvania ("EAP"), whose members are electric and natural gas utilities in Pennsylvania, respectfully submits this Amicus Curiae Brief in light of and in response to the arguments raised in the Briefs of Marple Township ("Township"), Intervenors Julia M. Baker and Theodore R. Uhlman ("Intervenors"), and Amicus Curiae Citizens for Pennsylvania's Future ("PennFuture"), Clean Air Council, Delaware Riverkeeper Network, and Green Amendments for the Generations (collectively, "Environmental Amici"), which seek to unlawfully and unreasonably expand the scope of this remand proceeding beyond the strict confines established by the Commonwealth Court.

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[1] *Twp. of Marple v. Pa. PUC*, 294 A.3d 965, 974-75 (Pa. Cmwlth. 2023) ("*Marple*").

PECO filed the Petition pursuant to Section 619 so that it can complete construction of the Station and the associated buildings, which are needed to maintain the safe operating pressure of the Company's distribution system and resolve capacity constraints on that portion of the system. For gas utilities, maintaining safe operating pressure is critical to ensuring safe and reliable gas service to customers. Insufficient operating pressures can result in several safety problems, such as the pilot lights in customers' furnaces going out. Conversely, over-pressurization on low-pressure distribution systems can cause very dangerous circumstances, including explosions. Therefore, it is critical that gas utilities are allowed to undertake the projects necessary to continue providing safe, reliable, adequate, and reasonable service.

Public utilities have long relied on Section 619 of the MPC to ensure that their buildings, which are necessary to provide safe, reliable, adequate, and reasonable service to customers, can be sited and constructed without obstruction by local zoning authorities. For example, an electric utility may construct a building to support a substation that accommodates increased electrification from clean energy and electric vehicles ("EVs") and to improve system reliability due to extreme weather events. Moreover, as in this case, a gas utility may construct buildings to help support a project that will improve the reliability and safety of its distribution system.

Despite these important considerations of reliability and safety, the Township, Intervenors, and Environmental Amici argue that the Commission should deny the Section 619 Petition because, among other reasons, a constitutionally sound environmental impact review must be akin to an environmental assessment ("EA") or environmental impact statement ("EIS") under the National Environmental Policy Act ("NEPA"). Such a position is not supported by the Commonwealth Court's *Marple* decision, the Environmental Rights Amendment ("ERA"), the MPC, or the Public Utility Code. In fact, the Commonwealth Court ruled that the only thing

missing from a constitutionally sound environmental impact review here was an examination of the explosion impact radius, noise, and heater emissions issues.

Also, if the arguments of the Township, Intervenors, and Environmental Amici were accepted, electric and natural gas utilities' critical investments in these projects would be severely and adversely affected. The Township, Intervenors, and Environmental Amici contend that in Section 619 proceedings, the Commission must employ a rigorous review process to assess and analyze the potential environmental impacts, akin to an EA or EIS under NEPA, in order to comply with its obligations under the ERA.[2] At the very least, such an outcome would lead to more time-consuming and expensive projects. At worst, these projects could be unnecessarily delayed or halted altogether, jeopardizing the safety and reliability of the utilities' systems and, by extension, their service to customers.

Based on the foregoing, and as explained in greater detail in this Amicus Curiae Brief, EAP respectfully requests that Administrative Law Judge Mary D. Long ("ALJ") and the Commission reject the opponents' arguments and find, based on the extremely well-developed record on the three issues to be decided in this case, that PECO's Petition should be granted pursuant to Section 619 of the MPC.

II. IDENTIFICATION AND STATEMENT OF INTEREST OF AMICUS CURIAE[3]

EAP is a trade association whose members include the electric and natural gas public utilities operating in the Commonwealth of Pennsylvania.[4] Collectively, EAP's members deliver

[2] Pa. Const. art. I, § 27.

[3] No person or entity other than EAP, its members, or counsel has (i) paid in whole or in part for the preparation of this brief or (ii) authored in whole or in part this brief.

[4] EAP's members include: Citizens' Electric Company; Columbia Gas of Pennsylvania, Inc.; Duquesne Light Company; Leatherstocking Gas Company, LLC; Metropolitan Edison Company; National Fuel Gas Distribution Corporation; Pike County Light & Power Company; Pennsylvania Electric Company; Pennsylvania Power Company;

energy to more than 8.3 million residential, commercial, and industrial customers within the Commonwealth. EAP is an advocate for its members on policy issues before the General Assembly, the Commission, and various other state governmental agencies. In addition to its advocacy role, EAP helps its members better serve their customers by acting as a clearinghouse for information on best practices within the utility industry.

EAP and its members have a unique and substantial interest in the pending proceeding. As public utilities regulated by the Commission, EAP's members regularly file petitions pursuant to Section 619 of the MPC with the Commission so that they can construct buildings that are reasonably necessary for the convenience or welfare of the public. Those buildings often support critical infrastructure improvement projects, such as sheltering and protecting control equipment for new transmission-level substations. To the extent that the Commission establishes new requirements for what must be presented in Section 619 proceeding, or any other proceeding requiring Commission action, all public utilities in the Commonwealth could be affected, including electric and natural gas utilities.

III. <u>SUMMARY OF ARGUMENT</u>

The ALJ and Commission should approve PECO's Petition pursuant to Section 619 of the MPC and reject the unfounded arguments of the Township, Intervenors, and Environmental Amici.

This remand proceeding is simple and limited to three issues—explosion impact radius, noise, and heater emissions. The apparent lack of other agencies' determinations on those three issues is the only reason why the Commonwealth Court remanded the case to the Commission.

PECO Energy Company; Peoples Natural Gas Company LLC; Peoples Gas Company LLC; Philadelphia Gas Works; PPL Electric Utilities Corporation; UGI Utilities, Inc.; Valley Energy, Inc.; Wellsboro Electric Company; and West Penn Power Company.

Following the Court's direction, PECO developed thorough and reliable record evidence to support the Commission's ruling on those three issues, including through written testimony and four days of evidentiary hearings. The record demonstrates that the issues raised about explosion impact radius, noise, and heater emissions entirely lack merit. Thus, having rectified the purported flaw with the Commission's original Order approving PECO's Section 619 Petition, the Commission should approve PECO's Petition and find that the siting of the buildings is reasonably necessary for the convenience or welfare of the public.

In addition, the ALJ and Commission should reject the arguments of the Township, Intervenors, and Environmental Amici based on the ERA. These arguments essentially ignore and give little or no weight to the Commission's duty to ensure safe, adequate, and reliable gas service. PECO's buildings are being constructed as part of a reliability project to help maintain safe levels of pressure on its distribution system and resolve issues with capacity constraints. Those considerations should be of paramount importance to the Commission and the public. Nevertheless, the Township, Intervenors, and Environmental Amici focus almost exclusively on their erroneous claims that the ERA requires the Commission to employ a formal EA or EIS process.

Moreover, there is absolutely no legal basis for their position. Nothing in the Commonwealth Court's *Marple* decision, the ERA and cases decided thereunder, the MPC, or the Public Utility Code requires the Commission to adopt a formal EA or EIS process in its consideration of environmental issues. In fact, the only issue the Court found with the Commission's environmental review was that it could not point to other agencies' determinations on explosion impact radius, noise, and heater emissions. Now that a record has been developed on those three issues, the Commission's review will be complete and constitutionally sound.

Further, the adoption of a NEPA-like process in Section 619 proceedings or any other Commission proceeding would adversely affect public utilities and their customers. Public utilities maintain, repair, and upgrade critical infrastructure, the safety and maintenance of which is critically important. If public utilities were required to spend millions of dollars and several years to prepare and receive approval of an EIS before undertaking projects that maintain or improve safety of their utility services, both public utilities and their customers would be unduly harmed by the unnecessary delay, the resulting reliability and safety disruptions, and the increased costs that would be passed onto customers.

For these reasons, and as explained in PECO's Main and Reply Briefs, the Commission should approve PECO's Section 619 Petition and reject the arguments raised by the Township, Intervenors, and Environmental Amici.

IV. ARGUMENT

A. PECO'S SECTION 619 PETITION SHOULD BE APPROVED

1. The Scope of Section 619 Proceedings and the Applicable Standard of Review

Before addressing the legal and factual arguments raised on remand, it is critical to address the scope and purpose of this proceeding. As a preliminary matter, it must be emphasized that PECO does not require prior Commission approval to construct or site any portion of this project. Moreover, the entire project, except for the public utility buildings, is exempt from local zoning requirements. Although the buildings would normally be subject to local zoning requirements, the MPC provides an alternative, which PECO has selected, where the utility may petition the Commission to declare that the situation of the building is reasonably necessary for the convenience or welfare of the public. *See* 53 P.S. § 10619; *Marple*, 294 A.3d at 972-73. Two

conclusions follow from this black letter law: (1) if there were no building associated with this project, there would be no Commission or local zoning review of the project to consider environmental issues or any other issues; and (2) the issues presented in this case must, as a matter of law, relate solely to the need for the buildings and any environmental issues associated with the buildings.

The Township, Intervenors, and Environmental Amici incorrectly view the scope of a Section 619 case more broadly, somehow believing that due to the Section 619 Petition being filed, the Commission must now evaluate the environmental issues associated with the facilities (which are exempt from local zoning and outside the scope of this case) in addition to the buildings (which are the subject of the Section 619 Petition). (*See* Township MB at 33; Intervenors MB at 31-32; Environmental Amici MB at 20-21, 29-34.) That position conflicts with Commission precedent[5] and even the Commonwealth Court's decision in *Marple*, which specifically stated that the Commission must "complete[] an appropriately thorough environmental review of a <u>building</u> siting proposal" under Section 619 of the MPC. *Marple*, 294 A.3d at 974 (emphasis added). Thus, so long as the construction of the Station and Fiber Buildings is reasonably necessary for the convenience or welfare of the public,[6] and those buildings will not result in an "unreasonable degradation" of the environment,[7] then the Commission should approve PECO's Section 619 Petition.

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[5] *See Petition of UGI Penn Natural Gas Inc. for a Finding that Structures to Shelter Pipeline Facilities in the Borough of West Wyoming, Luzerne County, To the Extent Considered To be Buildings under Local Zoning Rules, Are Reasonably Necessary for The Convenience or Welfare of the Public*, Docket No. P-2013-2347105, at 12, 23 (Order entered Dec. 19, 2013) (adopting the initial decision, which found that "concerns about gas pressure, gas emissions, noise levels and other health and safety issues [were] valid concerns, but that approval of the construction of a gate station [*i.e.*, a public utility facility] is beyond the scope of this proceeding").

[6] *See* 53 P.S. § 10619.

[7] *Murrysville Watch Comm. v. Municipality of Murrysville Zoning Hearing Bd.*, 2022 Pa. Commw. Unpub. LEXIS 32, at *31 (Pa. Cmwlth. 2022) (quoting *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 954 (Pa. 2013)), *allowance of appeal denied*, 2022 Pa. LEXIS 1142 (Pa. 2022) (per curiam)

2. This Remand Proceeding Is Further Limited in Scope to Addressing Issues with Explosion Impact Radius, Noise, and Heater Emissions

The scope of this Section 619 proceeding is further limited on remand to evaluating three issues—the explosion impact radius, noise, and heater emissions related to the Station and Fiber Buildings. *See Marple*, 294 A.3d at 974-75. The apparent lack of other agencies' determinations on those issues is the only reason why the Commonwealth Court remanded the case. *See id*. After the Commission reviews and rules on those three issues, the Commission will have completed its duty to support its ruling with a "constitutionally sound environmental impact review." *Id.* at 975.

Nevertheless, the Township, Intervenors, and Environmental Amici want to push the scope of this proceeding beyond its narrow limits and take this opportunity to overhaul how the Commission must review Section 619 Petitions and, presumably, adjudicate any proposals by public utilities that raise environmental concerns. However, "it has long been the law in Pennsylvania that following remand, a lower court is permitted to proceed only in accordance with the remand order." *Commonwealth v. Sepulveda*, 144 A.3d 1270, 1280 n.19 (Pa. 2016). Therefore, "[w]here a case is remanded for a specific and limited purpose, 'issues not encompassed within the remand order' may not be decided on remand." *Levy v. Senate of Pa.*, 94 A.3d 436, 442 (Pa. Cmwlth. 2014) (quotation omitted). "A remand does not permit a litigant a 'proverbial second bite at the apple.'" *Id.* (quotation omitted). Accordingly, the ALJ and the Commission should not lose sight of the Commonwealth Court's explicit direction for the remand in this proceeding. The Court only intended this case to be a straightforward and efficient investigation of the explosion impact radius, noise, and heater emission issues related to the buildings.

3. PECO Established that There Are No Concerns Regarding Explosion Impact Radius, Noise, or Heater Emissions

In this remand proceeding, PECO followed the Commonwealth Court's direction and established that there are no concerns with explosion impact radius, noise, and heater emissions

related to the Station and Fiber Buildings. However, even if PECO's public utility facilities for the Station were evaluated as well, PECO addressed those concerns.[8] As PECO notes in its Main Brief, "Through four days of evidentiary hearings, as well as written testimony, the Commission amassed an extensive record on environmental and safety issues that go well beyond the siting of the Buildings at issue here." (PECO MB at 2.) "The evidentiary record further proves unequivocally that the opposition by the Intervenors rests not on any legitimate environmental or safety concerns related to the siting of the Buildings (or the Station) . . . ." (PECO MB at 2.)

First, explosion impact radius is a non-issue. PECO presented expert testimony explaining that "explosion impact radius" is not a term in the Pipeline and Hazardous Materials Safety Administration's ("PHMSA") regulations and that the "potential impact radius" ("PIR"), which is in PHMSA's regulations, only applies to transmission pipelines, not distribution pipelines. (PECO MB at 26.) Also, "PHMSA's regulations already require operators of distribution facilities to include all their assets in a Distribution Pipeline Integrity Management Program ('DIMP') *regardless* of the proximity of the asset to occupied buildings." (PECO MB at 26.) As such, "there is no such thing as either an 'explosion impact radius' or 'potential impact radius' for distribution facilities." (PECO MB at 26.)

Second, PECO established that there would be no concerns about noise from the buildings. PECO, through its engineering firm, contracted with an acoustic and sound control consultant to assist with designing the Station to comply with the Township's noise ordinance. (PECO MB at 27.) Based on that consultant's "ambient sound survey and noise impact assessment" and related recommendations for "various sound mitigation measures," PECO's consultant testified that the

[8] While EAP believes the *Marple* decision directed the Commission to address the three issues related to the buildings only, to the extent that the decision could be interpreted more broadly, PECO's Reply Brief addresses the additional environmental issues raised by the Township, Intervenors, and Environmental Amici.

Company's compliance with the noise ordinance is "technically feasible and readily achievable using feasible, readily available, and proven technology." (PECO MB at 27.)

Third, PECO presented extensive evidence addressing any concerns with heater emissions. (PECO MB at 28-30.) Critically, both of the air emission sources (*i.e.*, the indirect line heater and emergency generator) are located outside of the buildings and, therefore, are public utility facilities, not buildings.[9] (PECO MB at 28.) Moreover, both units do not require air permits from the Pennsylvania Department of Environmental Protection ("DEP") or the U.S. Environmental Protection Agency ("EPA") because they are subject to the blanket exemption set forth in 25 Pa. Code § 127.14. (PECO MB at 29.) Even if they were not exempt from those air permit requirements, PECO's expert explained that the emissions from those units would still be subject to DEP and EPA enforcement. (PECO MB at 29.) Additionally, PECO still "conducted air modeling in this Remand Proceeding pursuant to EPA-approved methods solely to respond to deeply flawed air modeling prepared by Dr. James McAuley for Marple Township related to the Line Heater and emergency generator." (PECO MB at 31.) Through that process, PECO found several errors with Dr. McAuley's study, such as: (1) assuming the wrong numbers of hours of operation for the emergency generator; (2) using the incorrect Station layout; and (3) utilizing different exhaust temperatures and exit velocities in modeling air emissions. (PECO MB at 31-32.) Dr. McAuley even admitted at the hearing that he failed to use the current site plan and that the exit velocities for the two sites should have been the same. (PECO MB at 32.) When correcting those errors, PECO established that "the facility would comply with [National Ambient Air Quality Standards] for all pollutants, which are thresholds established by EPA set forth in 40

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[9] *See Marple*, 294 A.3d at 972-73 (finding that the Commission "properly concluded" that the security fence "is a 'facility' and, thus, that it is exempt from regulation by the Township").

C.F.R. Part 50 that demonstrate that emissions from a proposed project are protective of public health and public welfare." (PECO MB at 32.)

Based on the foregoing, PECO adhered to the Commonwealth Court's direction and presented reliable, credible, and substantial evidence demonstrating that there are no issues regarding explosion impact radius, noise, or heater emissions raised by the buildings.

B. THE OPPONENTS' ARGUMENTS BASED ON THE ENVIRONMENTAL RIGHTS AMENDMENT SHOULD BE REJECTED

1. The Opponents Fail to Reconcile the Commission's Duty to Ensure Safe and Reliable Utility Service with the Commission's Obligations under the ERA

The Township, Intervenors, and Environmental Amici apparently discount the whole purpose for the facilities and buildings—to maintain and improve gas safety and reliability. As explained in PECO's Main Brief, the Station is "a regulating station" using "regulators (for safety) to reduce the pressure of the gas flowing into PECO's distribution mains to serve customers." (PECO MB at 4.) One of the Commission's most critical responsibilities is ensuring that public utilities are providing safe, adequate, reasonable, and reliable service. *See* 66 Pa. C.S. § 1501. "As the preemptive regulator in the field of public utilities," the Commission "ha[s] a duty to ensure public safety" in addition to protecting the resources enumerated under the ERA. *Centre Park Hist. Dist. v. UGI Utils., Inc. – Gas Div.*, Docket Nos. C-2015-2516051, *et al.*, at 46 (Order entered Oct. 24, 2019) ("*CPHD*").

However, that principle does not mean the Commission must place environmental concerns above all others when rendering its decision. As the Commonwealth Court held in *Delaware Riverkeeper*, the protection of "public natural resources" does not trump "all other legal concerns raised by every type of party under all circumstances." *Del. Riverkeeper Network v. Sunoco Pipeline L.P.*, 179 A.3d 670, 695-96 (Pa. Cmwlth. 2018) (en banc) ("*DRN*"), *allowance of appeal*

denied, 192 A.3d 1106 (Pa. 2018) (per curiam). Indeed, "[t]he Environmental Rights Amendment does not call for a stagnant landscape; nor . . . for the derailment of economic or social development; nor for a sacrifice of other fundamental values." *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 953 (Pa. 2013), *reargument and reconsideration denied*, 2014 Pa. LEXIS 513 (Pa. 2014). Rather, when government acts, the action must, <u>on balance</u>, reasonably account for the environmental features of the affected locale." *Id.* (emphasis added); *see CPHD* at 45-46 (citing and relying on the same). Therefore, the Commission should not place any environmental concerns raised by the Township, Intervenors, and Environmental Amici above all other legal concerns.

Here, PECO is constructing the Station to maintain proper pressurization and resolve capacity issues on its distribution system. As stated in PECO's Main Brief, "the Natural Gas Reliability Project" is being implemented "to address supply capacity constraints across its entire distribution system," and the Marple Township area was chosen for the Station "because that is the area within PECO's distribution system where the additional reliable supply is needed most." (PECO MB at 4-5.) EAP observes that maintaining proper pressure in natural gas distribution systems is critically important for the safe and reliable delivery of gas service to customers.[10] However, if the ALJ and Commission were to set a precedent here that gas safety and reliability concerns could be trumped by the opponents' environmental issues, it would be exceedingly difficult and more expensive for electric and gas utilities to address safety and reliability issues on their systems.

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[10] This is the reason why the Commission has regulations setting forth gas pressure requirements for low-pressure distribution systems, including maximum and minimum pressures as well as requirements for gas utilities' pressure gauges to monitor system pressure. *See* 52 Pa. Code § 59.29(a)-(b), (d).

2. There Is No Legal Basis for Requiring a Formal Environmental Assessment or Environmental Impact Statement in this Proceeding

The Township, Intervenors, and Environmental Amici also incorrectly assert that for the Commission to comply with its trustee obligations under the ERA, there must be a formal EA or EIS presented. (Township MB at 18, 22-23, 31-32, 50; Intervenors MB at 15, 44-46; Environmental Amici MB at 15-21.) According to the opponents of PECO's Petition, a NEPA-like EA or EIS is necessary because it will ensure a constitutionally sound environmental impact review. (Township MB at 18, 22-23, 31-32, 50; Intervenors MB at 15, 44-46; Environmental Amici MB at 15-21.) Such a position conflicts with the Commonwealth Court's direct guidance in remanding this case to the Commission and is not supported by the ERA, the MPC, or the Public Utility Code.

First, the Commonwealth Court already ruled that a constitutionally sound environmental impact review would be complete once the Commission evaluated and adjudicated the explosion impact radius, noise, and heater emissions issues. This was the only flaw that the Commonwealth Court found with the Commission's Order originally approving PECO's Section 619 Petition:

> 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. Here, however, the Commission sidestepped this obligation and, though it stated that it would defer to other agencies' determinations regarding environmental issues, *failed to identify any such outside agency determinations* that pertained to explosion impact radius, noise, or heater emissions. *See* Decision at 44-45. The Commission's "deference" in this context thus appears to have been nothing more than illusory and its environmental review substantively nonexistent. *See id.* at 37-45. This failure renders the Decision entirely deficient from a constitutional standpoint.

Marple, 294 A.3d at 974-75 (emphasis added) (italics in original). Therefore, all that the Commission must do in this remand proceeding is review and adjudicate the parties' claims

regarding those three issues. Once that is finished, the Commission will have completed its duty to support its ruling with a "constitutionally sound environmental impact review." *Id.* at 975.

In fact, the Commonwealth Court did not criticize the Commission for deferring to other agencies' determinations when those agencies have made rulings or taken specific actions on those issues. *See id.* at 974-75. The Court solely remanded this case to the Commission because the Commission failed to point to other agencies' determinations on explosion impact radius, noise, and heater emissions. *See id.* If the Commission had done so, there would have been no issue with the Commission's compliance with its duty under the ERA.

Second, nothing in the Commonwealth Court's *Marple* decision, the ERA, the MPC, or the Public Utility Code states that the Commission's ruling must be supported by a formal EA or EIS. The Commonwealth Court used the phrase "environmental impact review as to the proposed siting on the Property of the Fiber Building and the Station Building." *Marple*, 294 A.3d at 975. The Court, which is well-versed in environmental case law and applicable statutes,[11] could have said "environmental assessment" or "environmental impact statement." It did not. The parties should not interpret the Court's explicit direction (*i.e.*, develop a record and rule on the explosion impact radius, noise, and heater emission issues) to mean that the Commission must overhaul its practices and require that public utilities prepare and submit a formal EA or EIS before the Commission can make a ruling.

Indeed, the Commission has already issued several rulings where it complied with its duty under the ERA without an EA or EIS being submitted. For example, the Commission held in *CPHD* that "in the instances where UGI gave proper consideration to inside meter placement in

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[11] *See, e.g.*, *DRN*, 179 A.3d 670 (Pa. Cmwlth. 2018); *Pa. Env't. Def. Found. v. Commonwealth*, 285 A.3d 702 (Pa. Cmwlth. 2022); *Del-Aware Unlimited v. Commonwealth*, 508 A.2d 348, 359 n.36 (Pa. Cmwlth. 1986) (en banc), *allowance of appeal denied*, 523 A.2d 1132 (Pa. 1986).

conformance with Section 59.18," the Commission "cannot find that a violation of the ERA has occurred." *CPHD* at 46. No EA or EIS was presented in that case or when the Commission originally promulgated the amendments to Section 59.18 of its regulations. *See CPHD* at 45-46; 52 Pa. Code § 59.18. Likewise, in Philadelphia Gas Works' ("PGW") 2023 base rate case, the Commission recently held that it complied with its duty under the ERA when it analyzed and rejected a proposal for PGW to incorporate non-pipeline alternatives ("NPAs") into its planning processes. *See Pa. PUC v. Phila. Gas Works*, 2023 Pa. PUC LEXIS 298, at *125-27 (Order entered Nov. 9, 2023) ("*PGW 2023*"). Again, no EA or EIS was needed for the Commission to comply with its duty under the ERA.

Third, the Township, Intervenors, and Environmental Amici ironically point to various statutory schemes as examples of how the Commission should conduct its constitutionally sound environmental impact review in this proceeding, chief among them, NEPA. (*See* Township MB at 40; Intervenors MB at 23; Environmental Amici at 15.) However, NEPA only requires an EIS before a "major federal action." 42 U.S.C. § 4322(C)(i). The Intervenors even concede that NEPA "does not directly apply here because the Expansion Station is not a major federal action."[12] (Intervenors MB at 3.)

Yet, the opponents persist that a NEPA-esque process should be applied here for the Commission's decision to pass constitutional muster. (*See* Township MB at 40; Intervenors MB at 23; Environmental Amici at 15.) However, their position is not supported by the Commonwealth Court's *Marple* decision, the Public Utility Code, the MPC, or the ERA. Further,

[12] As explained previously, the air emission sources fall under a blanket exemption from air permitting requirements. It is difficult to see how a project whose emissions do not rise to the level of even requiring an air permit should qualify as a "major federal action" that warrants a full EIS.

even if a NEPA process were to be put in place for the Commission's rulings, then just as the U.S. Congress enacted NEPA, the General Assembly should enact a statute to that effect.

3. Public Utilities and their Customers Would Be Adversely Affected if an Environmental Assessment or Environmental Impact Statement Were Required in Every Section 619 Proceeding or Any Proceeding Requiring Commission Action

Section 619 of the MPC exists because the General Assembly recognized the importance of public utilities' buildings to support their facilities and operations. Where, as here, the buildings are reasonably necessary for the convenience and welfare of the public, the local zoning requirements should not prevent the buildings' construction. *See* 53 P.S. § 10619. Therefore, Section 619 of the MPC is intended to help facilitate the construction of important public utility buildings, such as the Station and Fiber Buildings at issue in this case. Section 619 should not be used to unnecessarily delay or completely block the construction of these buildings, to provide a backdoor for the review of public utility facilities that are exempt from local zoning requirements, nor to overhaul the Commission's regulatory review process.[13] In fact, if the Commission were to require a formal EA or EIS before ruling on a Section 619 Petition or taking any action that raises environmental concerns, public utilities and their customers would be adversely affected.

For instance, electric and gas utilities are spending significant time and money to repair and replace their aging infrastructure. Those repairs and replacements are being undertaken pursuant to the utilities' Commission-approved Long-Term Infrastructure and Improvement Plans ("LTIIPs"), which set forth the Distribution System Improvement Charge ("DSIC") eligible property that the utilities plan to repair or replace over the terms of the LTIIPs, such as how many miles of cast iron and bare steel gas distribution main a gas utility will replace in a given year. The

[13] As noted previously, the Commonwealth Court confirmed in *Marple* that public utility facilities are exempt from local zoning and do not require Commission approval under Section 619 of the MPC. *See Marple*, 294 A.3d at 972-73.

pace and cost of the repairs and replacements under the LTIIPs would be negatively affected if the utilities must account for more expensive and time-consuming Section 619 proceedings to construct buildings that are related to those critical infrastructure projects.

Furthermore, the Commission must regularly rule on formal complaints filed pursuant to Section 701 of the Public Utility Code, where the complainants raise environmental issues, such as the emission of radio frequency ("RF") fields and electromagnetic fields ("EMFs") by utility facilities as well as the application of herbicides for vegetation management purposes.[14] Indeed, while the Supreme Court of Pennsylvania's ruling in *Povacz v. Pa. PUC* was pending,[15] the Commission stayed 79 complaints about smart meters and the RF fields they produce, with the Commission already having ruled on many more of those complaints. The Commission's entire regulatory review process would grind to a halt if a formal EA or EIS were required to be prepared and presented in any Commission proceeding where a party raised environmental concerns. In such a situation, the Commission may not be able to act quickly on other important utility matters that directly affect customers and the safety of the utility services they receive.

Lastly, the sheer time and expense of a NEPA-like review process would adversely affect public utilities and their customers. In PECOs' Main Brief, the Company noted how "[a]ccording to Dr. Schmid, the cost of preparing an environmental impact statement for NEPA range in cost up to several millions of dollars." (PECO MB at 41.) Also, "[t]he analyses can . . . drag on for several years." (PECO MB at 41.) As PECO rightly points out, "[t]he cost would ultimately be borne by Ratepayers, and the delay would hinder utilities from upgrading critical infrastructure to

[14] *See, e.g.*, *Fretz v. Pa. PUC*, 666 A.2d 372, (Pa. Cmwlth. 1995) (affirming the Commission's order that rejected the protestant's EMF arguments); *West Penn Power Co. v. Pa. PUC*, 2019 Pa. Commw. Unpub. LEXIS 532 (Pa. Cmwlth. 2019) (reversing the Commission's decision to sustain a formal complaint about the utility's planned application of herbicides).

[15] 280 A.3d 975 (Pa. 2022).

support reliability." (PECO MB at 41.) It is not necessary for a public utility to spend millions of dollars and several years on preparing, submitting, and receiving approval of an EIS, when the environmental issues raised in Section 619 and other Commission proceedings have been properly adjudicated for years without them.

For these reasons, EAP respectfully submits that the Township's, Intervenors', and Environmental Amici's arguments based on the ERA should be rejected.

V. CONCLUSION

WHEREFORE, as explained above and in PECO Energy Company's Main and Reply Briefs, EAP respectfully submits that Administrative Law Judge Mary D. Long recommend and the Pennsylvania Public Utility Commission issue an Opinion and Order approving the Petition of PECO Energy Company.

Respectfully submitted,

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