BLANKROME
One Logan Square
130 North 18th Street | Philadelphia, PA 19103-6998

Phone: *(215) 569-5793*
Fax: *(215) 832-5793*
Email: *lewis@blankrome.com*

January 3, 2024

VIA ELECTRONIC FILING
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. § 10619 that the Situation of Two Buildings Associated with a Gas Reliability Station in Marple Township, Delaware County Is Reasonably Necessary for the Convenience and Welfare of the Public

Docket No. P-2021-3024328

Dear Secretary Chiavetta:

Enclosed for filing in the above-referenced proceeding please find PECO Energy Company's Remand Reply Brief.

Thank you for your continued attention to this matter.

Respectfully,

*/s/ **Christopher A. Lewis***

Christopher A. Lewis

Enclosures

cc: Honorable Mary D. Long (via email and Federal Express w/ encl.)
Certificate of Service List (via email w/ encl.)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REMAND REPLY BRIEF OF PECO ENERGY COMPANY

Christopher A. Lewis, Esq.
Frank L. Tamulonis, Esq.
Stephen C. Zumbrun, Esq.
BLANK ROME LLP
One Logan Square
130 North 18th Street
Philadelphia, PA 19103
Phone: 215.569.5793
Fax: 215.832.5793
Email: lewis@blankrome.com

Anthony E. Gay, Esq.
Jack R. Garfinkle, Esq.
PECO ENERGY COMPANY
2301 Market Street
Philadelphia, PA 19103
Phone: 215.841.4000
Email: anthony.gay@exeloncorp.com
jack.garfinkle@exeloncorp.com

Counsel for PECO Energy Company

January 3, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Administrative Decisions

Statutes

Other Authorities

PECO Energy Company ("PECO") submits this Reply Brief in response to the Main Briefs of Marple Township, Theodore Uhlman, and Julia Baker (collectively, "Intervenors"), and the Amicus Brief filed by various nonprofit organizations (the "Amici") in support of Intervenors Uhlman and Baker.[1]

I. INTRODUCTION

The Commonwealth Court remanded this Municipalities Planning Code Section 619[2] proceeding for one purpose: the Pennsylvania Public Utility Commission ("Commission") must complete and incorporate a "constitutionally sound environmental impact review" in its determination of the reasonable necessity of the siting of the "Fiber Building" and "Station Building" (collectively, the "Buildings") associated with PECO's proposed Natural Gas Reliability Station ("Station") at 2090 Sproul Road in Marple Township ("Property") (this "Remand Proceeding").[3]

PECO demonstrated that locating the Buildings at the Property will not result in any unreasonable environmental impacts. The Buildings will not emit any pollutants. The Property itself is a vacant lot that was a former gasoline station, which PECO is remediating. The Station will have a Cold Weather Technologies ("CWT") Indirect Line Heater ("Line Heater") and an emergency generator, which are located *entirely outside* of the Buildings and are public utility facilities beyond the scope of this proceeding, and any potential emissions even from those facilities will be *de minimis*. Under regulations promulgated by the Pennsylvania Department of

[1] The Amici are Citizens for Pennsylvania's Future, Clean Air Council, Delaware Riverkeeper Network, and Green Amendments for the Generations. PECO is not objecting to the Amici Brief as a prejudicial, late-filed protest so long as there is no change to the briefing schedule established for this matter.

[2] 53 P.S. § 10619 ("Section 619").

[3] *See Twp. of Marple v. Pennsylvania Pub. Util. Comm'n*, 294 A.3d 965, 971-73 (Pa. Cmwlth 2023), *reconsideration and reargument denied* (Apr. 25, 2023) ("*Marple*" or the "Remand Opinion").

Environmental Protection ("DEP"), no air permit is required for those facilities, PECO obtained all other permits required by Pennsylvania law, and PECO will continue to be subject to all applicable current and future federal and state environmental regulations.

Intervenors' and Amici's opposition in this proceeding is not because PECO is proposing to locate the Buildings at the Property. It is because PECO is proposing to build natural gas infrastructure, even where – as here – that infrastructure is necessary for system reliability.

Through the course of this proceeding, Intervenors' strategy has shifted considerably. They originally argued in the initial proceeding before remand (the "Initial Proceeding") a "Not In My Backyard" ("NIMBY") position, not opposing the Station but instead trying to require PECO to construct the Station at a nearby location within the Township. Now, based on a new global climate change position, they want to stop construction of any natural gas infrastructure and any possible increased customer usage of natural gas (ignoring this fundamentally is an infrastructure reliability project), and seek a sweeping review of the climate change impacts of *other* public utility facilities—facilities that are not Buildings, are not subject to local regulation, and thus are not part of this Section 619 proceeding. Moreover, they ask the Commission to conduct a federal National Environmental Policy Act ("NEPA")-style environmental review prior to making any decision.[4]

Such a framework is altogether unworkable and improper. Put simply, no Section 619 proceeding, let alone this particular Section 619 proceeding, is the appropriate venue to debate natural gas use in the Commonwealth or for the Commission to create a climate change action

[4] Indeed, even now all of the Township's environmental concerns apparently evaporate if PECO would only move the Station to the greenfield Don Guanella site. *See, e.g.,* Marple Remand Main Br. 18, 33, 46-47.

plan, a task that the General Assembly has reserved to itself with guidance from DEP and its Climate Change Action Committee.[5]

As the Commonwealth Court explained in *Marple*, Section 619 is a narrow carve-out to the Commission's broad powers to regulate public utilities in the Commonwealth, and gives municipalities the ability to regulate public utility *buildings* unless the Commission determines that "the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public."[6]

That is what this proceeding has always been about. In its March 10, 2022 Opinion and Order (the "Commission's Opinion"), the Commission found that the situation of the proposed Buildings at the Property was reasonably necessary for PECO to safeguard and enhance the reliability of its service.[7] On review, the Commonwealth Court affirmed much of the Commission's Opinion and confirmed the narrow focus of a Section 619 proceeding.[8] The Court found fault with the Commission's Opinion along only one axis—environmental impacts *of the Buildings*. Specifically, the Court held that the Commission is "*obligated* to consider 'the environmental impacts of placing [a building] at [a] proposed location,' while also deferring to environmental determinations made by other agencies with primary regulatory jurisdiction over such matters."[9] Thus, the Court remanded the case with instructions that the Commission must conduct "an appropriately thorough environmental review of a building siting proposal."[10]

---

[5] *See* Pennsylvania Climate Change Act of 2008 ("Act 70"), 71 P.S. § 1361.7(a)(5).

[6] *Marple*, 294 A.3d at 972 (citing 53 P.S. § 10619).

[7] *See* Commission's Opinion, Ordering Paragraph Nos. 4 and 5.

[8] *See Marple*, 294 A.3d at 972 ("This exception is one of narrow construction, for to the extent that Section 619 … gives any authority to local governments to regulate public utilities, that authority must be strictly limited to the express statutory language.") (citations and quotations omitted).

[9] *Id*. at 973-74 (emphasis and bracketed text in original).

[10] *Id*. at 974.

Accordingly, on remand, the issue before the Commission is not a reconsideration of whether PECO's Natural Gas Reliability Project to enhance reliability (the "Project") or the Station are necessary to provide reliable service. Nor is the issue whether the Environmental Rights Amendment ("ERA")[11] alters or displaces Section 619's statutory framework for balancing utility and municipal interests. The remand issue is limited to considering the environmental impact of siting the Buildings at 2090 Sproul Road.

PECO has a statutory obligation to provide reliable service in its certificated territory.[12] The Commission has a statutory duty to ensure that PECO performs its obligation.[13] PECO has established that all relevant environmental agency determinations have been obtained for the Station, and Intervenors have offered no competent evidence to show there will be any harmful environmental consequences from siting the Buildings at the Property. Therefore, the Commission should find that siting the Buildings at 2090 Sproul Road is reasonably necessary for the convenience or welfare of the public.

II. SUMMARY OF ARGUMENT

Intervenors and Amici improperly seek to supplant the narrow Section 619 standard and the limited remand scope with a sweeping environmental review aimed to limit or eliminate natural gas infrastructure development in Pennsylvania. As outlined below, the Commission should reject this effort because it would severely stymie public utility service, reliability and necessary improvements in public utility facilities in Pennsylvania, and because it contravenes well-established ERA caselaw in Pennsylvania warning against stagnating development and requiring deference to agencies with primary jurisdiction over environmental matters.

[11] Pa. Const, art. I, § 27.

[12] *See* 66 P.S. § 1501.

[13] *See* 66 P.S. § 501.

When viewed through the proper lens, PECO has clearly met its burden under Section 619 in accordance with the Remand Opinion. PECO has proven that there are no unreasonable environmental impacts (or any impacts, for that matter) associated with siting the Buildings at 2090 Sproul Road. PECO also has proven that, consistent with regulations of the DEP, the impact of other facilities located outside of the Buildings – facilities that are not even properly within the scope of this proceeding – is so negligible that PECO does not even need to seek a permit for potential air emissions from those facilities. Based on this evidentiary record and deferring to DEP's primary jurisdiction over the environmental impacts of projects like the Station, the Commission can and should find that siting the Buildings on the Property will not result in unreasonable degradation of the environment. The evidence far exceeds any standard required for the Commission to find in favor of PECO's Section 619 petition and remain compliant with the ERA.[14]

III. ARGUMENT

A. Intervenors and Amici Improperly Seek to Use the ERA to Ban Natural Gas Infrastructure through this Section 619 Proceeding.

Intervenors and Amici argue that PECO's Section 619 petition should be denied because the ERA requires the Commission to consider downstream and cumulative impacts of air emissions, including greenhouse gas emissions and speculative leaks from elsewhere on PECO's system unrelated to the Buildings. This argument fails because it is far beyond the limited remand issued by the Commonwealth Court, beyond the scope of a Section 619 proceeding, and the ERA does not provide the Commission with the ability to act beyond its enabling statutes.

[14] *Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 196 A.3d 677, 694–95 (Pa. Cmwlth 2018),), *appeal denied*, 208 A.3d 462 (Pa. 2019) ("*Frederick*") ("the 'Environmental Rights Amendment does not call for a stagnant landscape' or 'for the derailment of economic or social development' or 'for a sacrifice of other fundamental values' [but] when the government acts 'it must reasonably account for the environmental features of the affected locale....'") (quoting *Robinson Twp., Washington Cnty. v. Com.*, 83 A.3d 901, 951-53 (Pa. 2013) (plurality)).

1. Section 619 and the *Marple* Decision Limit this Remand Proceeding to an Evaluation of the Siting of the Buildings.

The alleged environmental impacts the Intervenors and Amici raise in their briefs all relate to public utility facilities that are outside of the Buildings, like the Station's Line Heater and its emergency generator, and, even further afield, from the use of natural gas in the homes of customers in Marple Township and Delaware County.[15] These considerations are far beyond the limited remand scope issued in *Marple* and beyond the scope of a Section 619 proceeding.

The Commonwealth Court's Remand Opinion for this proceeding was narrow–ordering only that the Commission "incorporate the results of a constitutionally sound environmental impact review as to **siting the so-called 'Fiber Building' and 'Station Building' upon the property located at 2090 Sproul Road** in the Township of Marple, Pennsylvania."[16] As noted by Administrative Law Judge ("ALJ") Mary D. Long, it is hornbook Pennsylvania law that, on remand, a lower court or other government unit must follow the instructions of an appellate court.[17] Thus, the Commonwealth Court's directive was specifically limited to evaluating the environmental impacts of siting PECO's proposed Fiber Building and Station Building at 2090 Sproul Road.

---

[15] Nevertheless, PECO has provided ample evidence that emissions from the Line Heater and emergency generator would be *de minimis*. *See* PECO Remand Main Br. at 31-35; PECO St. No. 6-RR, at 11:22-16:17.

[16] *Marple*, 294 A.3d at 975 (emphasis added).

[17] *See Interim Order Denying Application for Reconsideration Regarding the Format for Review and Scope of Proceedings*, No. P-2021-3024328 (Aug. 10, 2023) (denying request to expand proceedings beyond the explicit instructions of the Commonwealth Court and consider alternative sites); *see also Department of Envtl. Prot. v. B&R Resources*, 270 A.3d 580, 591 (Pa. Cmwlth. 2021), *reargument denied* (Jan. 27, 2022) (upon remand a governmental unit must proceed in accordance with judgment or order of appellate court; issues not encompassed within remand order may not be decided on remand); *Com. v. Sepulveda*, 144 A.3d 1270, 1280 n.19 (Pa. 2016) ("[I]t has long been the law in Pennsylvania that following remand, a lower court is permitted to proceed only in accordance with the remand order."); *Levy v. Senate of Pa.*, 94 A.3d 436, 442 (Pa. Cmwlth. 2014), *appeal denied*, 106 A.3d 717 (Pa. 2014) (where a case is remanded for a specific and limited purpose, issues not encompassed within the remand order may not be decided on remand, as a remand does not permit a litigant a proverbial second bite at the apple).

Moreover, by statute, the focus of a Section 619 proceeding is and always has been on the location of buildings. The Commission has preeminent authority to regulate utilities on a statewide basis. In Section 619, the General Assembly permitted municipalities to regulate *the location of a building* yet, even then, affirmed that the Commission can override a municipality's siting decision if the Commission finds that the proposed siting of a building is reasonably necessary for the convenience or welfare of the public. In a Section 619 proceeding, the question is whether the utility made a reasonable decision, not the best possible decision, about where to construct a building.[18] *Marple* left this framework undisturbed. In holding that the Station's security fence is beyond the scope of the Section 619 proceeding, *Marple* affirmed that "buildings" are the only legitimate object of a Section 619 proceeding.[19]

What *Marple* clarified is that under the ERA, the Commission must consider the environmental impacts of siting *a building* at a proposed location.[20] 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*."[21] Thus, this proceeding is *not* about the Station, the Project, any facilities, or natural gas use generally, and Intervenors' and Amici's attempts to broaden the focus of this proceeding are contrary to Section 619, *Marple*, and the limited scope of the remand. By lumping together the purported effects of the Station along with that of the Buildings and other facilities unrelated to the Buildings,

[18] *See generally*, *Marple*, 294 A.3d at 972 (citations and quotations omitted).

[19] *Id*. at 972-73.

[20] *Id*. at 974-75.

[21] *Id*. at 974 (emphasis added).

Intervenors and Amici essentially attempt to overturn the *Marple* Court's determination that public utility facilities are not subject to Section 619 or municipal zoning authority.[22]

2. The ERA Does Not Ban Natural Gas Infrastructure or Expand the Commission's Authority.

Intervenors and Amici argue that the ERA requires the Commission, in deciding whether to approve the siting of the two Buildings, to consider downstream and cumulative impacts of air emissions from the Station, PECO's other public utility infrastructure, and PECO's customers. To that end, Intervenors and Amici contend that the ERA requires the Commission to reevaluate air emission determinations already made by the DEP in its comprehensive regulations and argue that PECO must submit a NEPA-like environmental impact statement to fulfill the obligations of the ERA. Intervenors and Amici are wrong to contend that the ERA requires the Commission to turn this Section 619 proceeding into a referendum on natural gas use in Pennsylvania. As noted below, this approach has been rejected by Pennsylvania courts.

i. The ERA Does Not Expand the Statutory Authority of the Commission.

Intervenors and Amici do not point to *any* authority in Pennsylvania that would obligate the Commission to second-guess DEP regulations or perform the sweeping analysis they contemplate. *Marple* held, more limitedly, that the ERA obliges the agency to consider environmental impacts in performing the tasks the General Assembly assigns to the agency, but

[22] *Id.* at 972-73 ("Section 102 of the Code defines 'facilities,' in relevant part, as '[a]ll the plant and equipment of a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with, the business of any public utility.' 66 Pa. C.S. § 102. Reading Section 102 of the Code in conjunction with Section 619 of the MPC leads us to the conclusion that, in the context of public utilities, anything that does not qualify as a building under the latter should be considered a facility under the former. Thus, because the security fence does not fall within the common understanding of what constitutes a building, it is a facility that stands outside the Township's regulatory authority.").

the ERA does not mandate that the agency perform a completely different task.[23] At the same time, and in recognition of the Commission's unique expertise in utility operations and safety, and its relative lack of expertise in other areas, *Marple* confirmed that the Commission is obligated to defer to other agencies' determinations regarding environmental issues.[24]

This position is consistent with the Commonwealth Court's decision in *Funk v. Wolf*.[25] In *Funk*, the court stated that while the ERA "may impose an obligation upon the Commonwealth to consider the propriety of preserving land as open space, **it cannot legally operate to expand the powers of a statutory agency…** We held that the ERA could operate **only to limit such powers as had been expressly delegated by proper enabling legislation**."[26] The *Funk* court explained that the General Assembly is entrusted with balancing interests of the Commonwealth:

> Because it is the Commonwealth, not individual agencies or departments, that is the trustee of public natural resources under the ERA, and the Commonwealth is bound to perform a host of duties beyond implementation of the ERA, the ERA must be understood in the context of the structure of government and principles of separation of powers. In most instances, **the balance between environmental and other societal concerns is primarily struck by the General Assembly, as the elected representatives of the people, through legislative action.**[27]

[23] *Marple*, 294 A.3d at 973–74 ("To the contrary, in proceedings of this nature, the Commission is *obligated* to consider 'the environmental impacts of placing [a building] at [a] proposed location,' while also **deferring to environmental determinations made by other agencies with primary regulatory jurisdiction over such matters**.") (citation omitted) (emphasis in original and added).

[24] *Id*. at 974.

[25] *See Funk v. Wolf*, 144 A.3d 228 (Pa. Cmwlth. 2016), *aff'd*, 158 A.3d 642 (Pa. 2017) (citations omitted); *see also Frederick*, 196 A.3d at 695 ("Further, as a creature of statute, the Township can exercise only those powers that have been expressly conferred upon it by the General Assembly in the MPC and in the Second Class Township Code, by which the Township was created.")

[26] *Id*. at 249 (citations and quotations omitted) (emphasis in the original).

[27] *Id*. at 235 (emphasis added).

In *Funk*, the court found that the General Assembly had already developed a system for addressing greenhouse gas emissions and held that the ERA did not authorize the executive branch to disturb that legislative scheme:

> Petitioners point to no legislative enactments or regulatory provisions, and we have found none, that mandate Respondents to do any of the actions sought in the writ. Under the current scheme, deciding whether to conduct particular studies, promulgate regulations or issue executive orders detailing the process by which environmental decisions are made, and **to prepare and implement comprehensive regulations addressing climate change are either discretionary acts of government officials or is a task for the General Assembly**.[28]

Respecting the General Assembly's reasonable policy determinations and division of responsibilities among state agencies is fully consonant with the Commonwealth's trustee duty to "conserve and maintain" public natural resources. As explained in *Delaware Riverkeeper Network v. Penn. Dept. of Envt'l Prot.*, agencies make judgments within the framework the General Assembly constructs;[29] thus, the Commonwealth satisfies its trustee duty when one agency defers to environmental determinations of another agency with primary statutory jurisdiction. Accordingly, in a Section 619 proceeding, the Commission's obligation to consider environmental impacts includes deferring to determinations made by agencies with primary jurisdiction over environmental matters.[30]

---

[28] *Id*. at 250 (emphasis added).

[29] 247 A.3d 1188 (Pa. Cmwlth 2021) (unpublished) (citing *Funk*).

[30] *Marple*, 294 A.3d at 973–74 ("the Commission is *obligated* to consider 'the environmental impacts of placing [a building] at [a] proposed location,' while also deferring to environmental determinations made by other agencies with primary regulatory jurisdiction over such matters") (emphasis in original); *see also Del-Aware Unlimited, Inc. v. Pennsylvania Public Util. Comm'n*, 513 A.2d 593, 596 (Pa. Cmwlth. 1986), *appeal denied*, 527 A.2d 547 (Pa. 1987) (finding that the PUC was empowered to evaluate only the environmental impacts of placing a building at the proposed location and obliged to defer to DER's evaluation of the environmental impacts within DER's jurisdiction).

ii. The ERA Does Not Grant the Commission Authority to Reevaluate DEP's Environmental Determinations.

The General Assembly has designated the DEP as the Commonwealth agency responsible for promulgating environmental standards and enforcing compliance with them.[31] When enacting the Public Utility Code, the General Assembly expressly preserved the primary jurisdiction of the DEP (formerly the Department of Environmental Resources) with respect to environmental matters.[32] Intervenors' and Amici's primary challenge to the Station – not the Buildings which, notably, they do not reference – relates to the Station's air emissions from the Station's Line Heater and emergency generator. The General Assembly specifically authorized the DEP – not the Commission – to enforce Pennsylvania's Air Pollution Control Act.[33] The ERA does not grant the Commission the ability to change the focus of Section 619 and supplant the DEP in regulating air quality.[34]

By demanding that the Commission conduct a NEPA-style review, Intervenors and Amici ignore the well-established concept of agency deference and would dramatically expand the authority of the Commission, in essence turning it into a "super regulator"[35] charged with making complex and technical decisions surrounding, *inter alia*, air and water quality *in lieu* of decisions made by environmental agencies with jurisdiction over such matters. In sum, since they are not

[31] *See, e.g.*, 35 P.S. § 4004 (authorizing the DEP with the powers and duty to enforce Pennsylvania's Air Pollution Control Act); 35 P.S. § 691.5 (authorizing the DEP with the power and duty to enforce Pennsylvania's Clean Streams Law); and 35 P.S. § 6020.301 (authorizing the DEP with the power and duty to enforce Pennsylvania's Hazardous Sites Cleanup Program).

[32] The Public Utility Code does not remove any jurisdiction from the DEP or the Department of Health: "Powers of certain governmental agencies unaffected.--Nothing in this part shall be construed to deprive the Department of Health or the Department of Environmental Resources of any jurisdiction, powers or duties now vested in them." 66 Pa.C.S § 318(c).

[33] 35 P.S. § 4004.

[34] *See Funk,* 144 A.3d at 249.

[35] *See* Tr. 2356:19-2357:3.

pleased with the DEP's regulations (because they are not helpful to their position in this proceeding), they are asking the Commission to overrule those regulations, ignoring the very deference called for in *Marple*.

iii. The General Assembly Has Not Delegated to the Commission Authority to Regulate Greenhouse Gas Emissions.

Intervenors similarly ignore the legislation enacted to address climate change. The Pennsylvania Climate Change Act of 2008 ("Act 70") requires the DEP to develop a climate change action plan and to report on climate impacts.[36] Section 7(a) of Act 70 requires the climate change action plan, among other things, (i) to evaluate cost-effective strategies for reducing or offsetting GHG emissions from various sectors in this Commonwealth, (ii) to identify costs, benefits and co-benefits of GHG reduction strategies recommended by the plan, including the impact on the capability of meeting future energy demand within the Commonwealth, (iii) to identify areas of agreement and disagreement among committee members about the climate change action plan, and most importantly, and (iv) to recommend to the General Assembly legislative changes necessary to implement the plan.[37] Section 5(a) of Act 70 establishes an 18-person Climate Change Advisory Committee "established *within* the department [DEP]" and "[t]he purpose of the committee shall be to *advise the department* [DEP] regarding the implementation of the provisions of this act [Act 70]". (emphasis added). The Committee is broadly representative of the Commonwealth, with representatives from scientific, business and industry, transportation, environmental, social, outdoor and sporting, labor and other affected communities.[38] The Chair

[36] 71 P.S. §§ 1361.1–1361.8.

[37] *Id.* § 1361.7(a).

[38] *Id.* § 1361.5(b).

of the Pennsylvania Public Utility Commission is an *ex officio* member of the Climate Change Advisory Committee.[39]

The Commission has no authority under either Act 70 or the Public Utility Code: (1) to substitute its judgment for that of the DEP or General Assembly, (2) to devise its own climate change action plan that would not reflect the divergent views mandated by Act 70, or (3) to create its own separate cost-benefit analysis of GHG reduction strategies. On the contrary, as explained above, the Commission's chair is but one member of the Climate Change Advisory Committee and the General Assembly specifically established that the DEP has primary regulatory jurisdiction of Act 70.

Finally, even assuming the ERA requires the Commission to evaluate climate change impacts without DEP's guidance – which it does not – the Commission should find that climate change is not a significant concern in this case.[40] Intervenors' witness, Professor Najjar, conceded that any contribution to climate change from the Project was very small;[41] the climate change impacts of the Buildings are, necessarily, even smaller. Additionally, none of the Intervenors or Amici has made any effort to evaluate how PECO's customers and the homes and buildings in

[39] *Id.* § 1361.5(b)(3).

[40] *See Pa. PUC, et. al v. Philadelphia Gas Works*, Docket Nos. R-2023-3037933, 2023 WL 8714853, at *140 (Pa. P.U.C.) (Opinion and Order Nov. 9, 2023) ("2023 PGW Rate Case") ("We accept PGW's argument that it is unadvisable for the Commission to make new policy or establish new filing requirements via individual rate cases. We agree with PGW that it would be unfair to impose an undefined filing requirement upon it of the kind recommended by the ALJs in the absence of statutory, regulatory or other legal order or requirement that directs the creation and submission of information that is essentially a climate change plan.") Nor does the Commission act as a "super board of directors" of a utility and dictate management policies without a determination that a utility's service is inadequate or unreasonable. *See id.* at *139.

[41] Marple Township, Ted Uhlman & Julie Baker Remand St. No. 2 ("Najjar Statement"), at 18:6-9; Tr. 2258:20-21.

which they live and work would be impacted if customers were forced to use electricity rather than natural gas to meet the rising demand for energy.[42]

The purpose of this Remand Proceeding is to evaluate any environmental concerns from siting the Buildings at 2090 Sproul Road. As in the 2023 PGW Rate Case, proposals relating to climate change are more appropriately considered as part of a statewide, rulemaking procedure and stakeholder process, not as part of this narrow Section 619 case.[43]

iv. The ERA Does Not Call for an EIS/NEPA Style Review.

Intervenors and Amici erroneously contend that a "constitutionally sound environmental impact review" for a Section 619 proceeding can be accomplished only through a sweeping environmental impact statement and assessment, akin to that which NEPA prescribes for the federal government.[44] That contention rings hollow, for NEPA itself would not apply to a project as minor as the siting of the Buildings; rather, NEPA applies only to Major Federal Action Significantly Affecting the Quality of the Human Environment.[45] And Intervenors' argument regarding the lack of consideration of alternatives and the "no-action" alternative is factually erroneous, for the reasons discussed in Section III.B.4.ii below (*see* p. 31).

More importantly, this misguided position constitutes a breathtaking expansion of the ERA that is not supported by either a plain reading of the ERA or relevant jurisprudence. Certainly, the plain text of the ERA does not require a NEPA-style review of potential impacts that go well beyond the Buildings at issue here. Furthermore, the Commonwealth Court has already addressed

[42] *See, e.g.,* Tr. 2270:4-19 (Dr. Najjar conceded that he did not do a study on what is required to reliably serve customer demand growth); *see also* Tr. 2273:19-24 (Dr. Najjar conceded that he did not do a formal analysis or study of the impacts of his recommendations on existing or new customers).

[43] 2023 PGW Rate Case at *140.

[44] *See* Marple Remand Main Br. at 20, 40, 45, 50; Baker & Uhlman Remand Main Br. at 3-4, 23, 38-40, 44, 51-52; Penn. Future Am. Br. at 15-21.

[45] 42 U.S.C. § 4332.

this issue head-on, concluding that a pre-action environmental impact analysis is *not* required under the ERA before a Commonwealth agency may take action.[46]

Following Intervenors' and Amici's logic, the ERA would require the Commission to perform a NEPA-like environmental impact statement for every decision the Commission makes that could be argued to impact the environment in any way.[47] It is well-settled that a court must never interpret a statute or the constitution in such a way that yields an absurd result.[48] Intervenors' and Amici's position would result in an absurd and unreasonable standard–and a stark departure from the directive from the Supreme Court plurality in *Robinson Township* to "reasonably account" for environmental features of the "affected locale."[49] This would create a stifling standard that would bring Commission approvals and decision-making–including those necessary for critical infrastructure supporting reliability and for the transition to clean energy–to a standstill. The Commonwealth Court has expressly warned against such an outcome.[50]

---

[46] *See Murrysville Watch Comm. v. Municipality of Murrysville Zoning Hearing Bd*., 272 A.3d 998, at *13 (Pa. Cmwlth. Ct.), *appeal denied*, 283 A.3d 790 (Pa. 2022) ("[m]unicipality was not obligated to conduct a 'pre-action environmental impact analysis' and, in enacting an unconventional oil and gas well ordinance, a municipality need only demonstrate, through the ordinance's design or some other form of evidence, that it considered the citizens' rights under the ERA."); *see also Delaware Riverkeeper Network, Clean Air Council, David Denk, Jennifer Chomicki Anthony Lapina and Joann Groman v. Commonwealth of Pennsylvania, Department of Environmental Protection and R.e. Gas Development, LLC*, 2018 WL 2294492, at *28 (Pa. Env. Hrg. Bd., May 11, 2018) (evidence presented did not convince the Environmental Hearing Board that DEP "failed to consider the potential for environmental effects in advance of issuing [permits for gas wells]. The fact that the consideration did not involve a full-blown risk assessment and was not as extensive as [petitioner] believes was necessary does not . . . violate the requirements of [the ERA.]").

[47] Intervenors' and Amici's logic means the ERA would require the Commission to scrutinize any and all downstream impacts, cumulative impacts, and "no-action" alternatives for *all* Commission approvals that could be argued to impact the environment, not just those issued under Section 619 of the MPC. This would extend the NEPA analysis to Commission review of pipeline and railroad crossings under 66 Pa.C.S. § 2702(a) or approval of taxis and limousines under 66 Pa.C.S. § 2601 *et seq*. Applying Intervenors' and Amici's position, the Commission would need to analyze and evaluate all potential emissions–greenhouse gas or otherwise–of all freight carried on all railcars on the particular railroad and all product contained in the existing or proposed pipeline for a crossing approval. Similarly, the Commission would be required to quantify and consider all possible emissions from taxis or limousines.

[48] *See McLinko v. Commonwealth*, 279 A.3d 539, 575 (Pa. 2022); 1 Pa.C.S. §§ 1921, 1922.

[49] *Robinson Twp*., 83 A.3d 901 at 951-53.

[50] *See Frederick*, 196 A.3d at 694 (the ERA "…does not call for a stagnant landscape or for the derailment of economic or social development or for a sacrifice of other fundamental values.") (citations and quotations omitted).

To be clear, PECO is not advocating to revive the *Payne v. Kassab* ERA test, as Intervenors and Amici suggest. The *Payne* test was abrogated by the Pennsylvania Supreme Court in *Pennsylvania Env't Def. Found. v. Commonwealth*.[51] Rather, PECO urges the Commission to apply *Marple* and *Frederick* by identifying relevant agency determinations and deferring to those determinations in carrying out its responsibilities under the ERA. As required by Section 619 itself, this process must be conducted through a formal evidentiary hearing. The proposed onerous NEPA-like requirements advocated by Intervenors and Amici are not necessary because the established evidentiary process, where intervenors and the municipality involved have the right to appear, present witnesses, and cross-examine witnesses, provides a full opportunity for the adjudication of environmental issues relevant to the specific building siting proposal to be considered by the Commission.[52]

After PECO presented its *prima facie* case, Intervenors had every opportunity during this proceeding to offer evidence to demonstrate that the siting of the Buildings at 2090 Sproul Road creates an unreasonable impairment on the people's right to clean air, pure water, or the natural, scenic, historic, or esthetic values of the environment. If the record does not adequately reflect what Intervenors and Amici believe is important or necessary, it is not because the Commission must undertake a NEPA-style analysis but because the Intervenors failed to meet their burden to introduce evidence on those issues, despite ample opportunity to do so during this proceeding.[53]

---

[51] *Pennsylvania Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 930 (Pa. 2017).

[52] This process also addresses the core of Judge Ceisler's dissent in *Frederick*, where Judge Ceisler took issue with the subject municipal ordinance's lack of any public process in considering oil and gas permits. *Frederick*, 196 A.3d at 715 (J. Ceisler dissenting).

[53] *See Hurley v. Hurley*, 754 A.2d 1283, 1285-86 (Pa. Super. 2000); *Silver Valley Apartments/Mike Vianello v. PPL Electric Utilities Corporation*, No. C-2015-2510119, 2017 WL 466379, at *6 (Pa. P.U.C.) (Opinion and Order, Jan. 26, 2017) ("The "burden of proof" is composed of two distinct burdens - the burden of production and the burden of persuasion. . . [O]nce the party with the initial burden of production introduces sufficient evidence to make out a prima facie case, the burden of production shifts to the opposing party. If the opposing party introduces evidence sufficient to balance the evidence introduced by the party having the initial burden of production, the burden then shifts back to

B. PECO Has Met Its Burden Under Section 619 and the ERA.

In accordance with the Remand Opinion, PECO has identified the local, state, and federal agency determinations applicable to the construction and operation of the Station. PECO has further shown that there will be no unreasonable degradation to air quality, water quality, or any other environmental, esthetic, or historical concern. Finally, arguments related to the need for the Station and alternative site selection are improper because they are beyond the scope of this limited remand and have already been addressed by the Commission.

1. PECO Demonstrated No Unreasonable Environmental Degradation.

i. PECO Obtained All Necessary Agency Determinations and Approvals.

In order to construct and operate the Station, PECO received a National Pollutant Discharge Elimination System ("NPDES") permit for discharges of stormwater from the DEP. The NPDES permit was reviewed by the Delaware County Conservation District and approved by the DEP.[54] As part of the review process, PECO also received determinations from the Pennsylvania Game Commission, Pennsylvania Department of Conservation and Natural Resources, Pennsylvania Fish and Boat Commission, and U.S. Fish and Wildlife Service that there are no known impacts to threatened or endangered species or special concern species and resources related to the construction of the Buildings (or the Station).[55] Finally, the Pennsylvania Historical and Museum Commission – State Historic Preservation Office determined that the Buildings (and the Station) will cause no impacts to historical resources.[56] PECO is in compliance with the

---

the party who had the initial burden to introduce more evidence favorable to his/her position. The burden of production goes to the legal sufficiency of a party's case. Having passed the test of legal sufficiency, the party with the burden of proof must then bear the burden of persuasion to be entitled to a decision in that party's favor.") (citations omitted).

[54] PECO St. No. 2-RD, at 12:10-17, 13:14-18; PECO St. No. 6-RD, at 6:16-7:10.

[55] PECO St. No. 2-RD, at 8:1-9; PECO St. No. 6-RD, at 14:12-15; *see also* Exhibit KK-2.

[56] PECO St. No. 2-RD, at 8:12-13; PECO St. No. 6-RD, at 16:8-10; *see also* Exhibit. KK-2.

NPDES Permit and the requirements therein, including an Erosion and Sedimentation Control Plan and a Post Construction Stormwater Management plan.[57]

Accordingly, PECO obtained all necessary approvals from local, state, and federal agencies and Intervenors and Amici do not – and cannot – point to any other agency determinations that should have been acquired but were not.

ii. Intervenors and Amici Do Not Dispute a Lack of Impacts to Water Resources, Historical Resources, or Esthetics.

There is no material dispute that there will be no unreasonable impacts resulting from the construction or operation of the Buildings (or Station) for many of the values implicated under the ERA, namely the right to pure water, and preservation of natural, scenic, historic, and esthetic values of the environment. For example, there is no material dispute, and Intervenors and Amici do not even challenge, that: (i) PECO received a NPDES permit for discharges of stormwater;[58] (ii) there are no wetlands or surface waters at 2090 Sproul Road and none will be impacted by the construction or operation of the Buildings (or the Station);[59] (iii) PECO has and will address pre-existing historical contamination at 2090 Sproul Road in accordance with the environmental covenant at 2090 Sproul Road and applicable environmental regulations;[60] and (iv) the Enhanced Design of the Station, which includes the Buildings, will improve the esthetics of 2090 Sproul Road compared to its prior state as a vacant lot that was previously a gasoline station.[61]

Unable to identify any environmental impacts associated with the siting of the Buildings at the Property, Intervenors' and Amici's Main Briefs instead (1) challenge aspects related to the

[57] PECO St. No. 2-RD, at 13:14-18; PECO St. No. 6-RD, at 7:6-10.

[58] PECO St. No. 2-RD, at 12:10-17, 13:14-18; PECO St. No. 6-RD, at 6:16-7:10.

[59] PECO St. No. 2-RD, at 9:17-21, 12:4-7; PECO St. No. 6-RD, at 11:19-14:7.

[60] PECO St. No. 2-RD, at 14:20-18:5; PECO St. No. 4-RD, at 2:19-3:10, 4:12-17; PECO St. No. 6-RD, at 15:13-18.

[61] *See* PECO St. No. 4-RD, at 3:17-4:17; Tr. 1863:23-1864:2, 1866:22-1867:5; 1891:7-11.

Station's public utility *facilities*, namely, air emissions from the Station's air emission sources located *outside* the Buildings, (2) question PECO's noise expert, and (3) confuse the purpose and relevancy of the PHMSA's "potential impact radius." The facilities are beyond the scope of a 619 proceeding, which *Marple* made abundantly clear is limited to buildings.[62] However, even if the Commission were to consider the environmental impacts of these facilities, it should find that Intervenors' and Amici's arguments lack merit and should be rejected by the Commission.

iii. PECO Does Not Need an Air Permit for the Station's Emissions And Remains Subject to Other Air Quality Regulations.

The Station includes two air emission sources that run on natural gas, a Line Heater and an emergency generator, both of which are located *outside* of the Buildings at issue here, and therefore neither should be considered in this proceeding.[63]

PECO demonstrated, and Intervenors' and Amici's Briefs do not challenge, that: (i) the Line Heater and emergency generator are subject to blanket DEP air permitting exemptions;[64] (ii) the emergency generator has received a Certificate of Conformity from EPA indicating that its air emissions comply with federal regulations;[65] (iii) the Line Heater and emergency generator are subject to DEP regulation of EPA's National Ambient Air Quality Standards ("NAAQS"), New Source Performance Standards, and National Emissions Standards for Hazardous Air Pollutants;[66]

---

[62] *See Marple*, 294 A.3d at 972-73 ("Section 102 of the Code defines 'facilities,' in relevant part, as '[a]ll the plant and equipment of a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with, the business of any public utility.' 66 Pa. C.S. § 102. Reading Section 102 of the Code in conjunction with Section 619 of the MPC leads us to the conclusion that, in the context of public utilities, anything that does not qualify as a building under the latter should be considered a facility under the former. Thus, because the security fence does not fall within the common understanding of what constitutes a building, it is a facility that stands outside the Township's regulatory authority.").

[63] *See* PECO St. No. 4, at 5:16-19; PECO St. No. 4-SR, at 17:14-17; PECO St. No. 6-RD, at 8:5-8; Tr. 1997:1-1998:11, 2006:3-23, 2015:1-4, 2017:9-14; *see also* Marple Township Exhibit DO-Cross-1, Exhibit A.

[64] PECO St. No. 6-RD, at 9:12-14; 10:1-21.

[65] *Id.* at 11:5-11; Exhibits JH-2 & JH-3; Tr. 2380:10-14, 2462:20-2463:8.

[66] Tr. 2374:13-2377:15, 2381:9-13, 2390:24-2391:5.

(iv) the DEP has the authority to enforce these regulations;[67] and (v) the Line Heater and the emergency generator are below EPA's greenhouse gas emissions reporting requirements established under 40 C.F.R. Part 98, Subpart C.[68]

Thus, even if facilities beyond the Buildings are considered in this proceeding, there can be no material dispute that the facilities will not unreasonably impact air quality in light of conformity to these regulatory standards.

iv. PECO Demonstrated the Air Emissions Do Not Exceed Applicable Public Health Standards.

Yet, still not satisfied with the above determinations, Marple Township argues instead that the Commission should displace the determinations of DEP and subject the Station's emission sources to greater scrutiny because they are exempt from air permitting requirements.[69] The Township's position lacks legal and factual merit.

First, the Commission has no authority to re-evaluate the DEP's air emission determinations or DEP's regulations establishing permitting exemptions for sources of minor concern.[70] As explained above, the General Assembly specifically authorized DEP to enforce Pennsylvania's Air Pollution Control Act.[71] Pursuant to the Pennsylvania Public Utility Code, the Commission cannot supplant the DEP's jurisdiction on these matters.[72] In addition, the ERA does not grant the Commission the authority to act beyond the bounds of its enabling statute to regulate

[67] Tr. 2374:13-2377:15, 2460:19-24. *See also* Tr. 2530:17-2531:6 (Marple Township's witness Dr. McAuley agreeing with this assessment).

[68] PECO St. No. 6-RR, at 15:7-16:3.

[69] *See* Marple Remand Main Br. at 32-33.

[70] In its Brief, in Proposed Finding of Fact No. 65, Marple Township contends that PECO did not challenge any of the health concerns caused by emissions. This statement is misleading. PECO's position is that the DEP has already determined by regulation that the level of emissions from the sources at issue here does *not* pose health concerns.

[71] 35 P.S. § 4004.

[72] 66 Pa.C.S. § 318(c).

air quality and related public health issues (which is within the jurisdiction of DEP).[73] Because of this lack of authority, *Marple* directs that the Commission is obligated to defer to outside agency determinations.

Second, although not required under any law or regulation, PECO conducted air dispersion modeling for the Remand Proceeding to respond to faulty modeling conducted by Marple Township's witness, Dr. McAuley. The results of PECO's modeling demonstrate that the air emissions from the facility are below NAAQS, which are EPA standards designed to be protective of public health.[74] PECO modeled for the three air contaminants associated with natural gas combustion with established NAAQS (CO, NO2, and PM2.5)[75] and PECO's witness, Mr. Harrington of Tetra Tech, testified that the modeling "actually showed that predicted concentrations from the facility combined with background [concentrations not attributable to the Station] would be less than the NAAQS, which are developed to be protective of public health."[76] Dr. McAuley, admitted that NAAQS are established by EPA following a rigorous review process (which includes EPA committee reviews, literature reviews, and health studies) to be protective of the public health and the environment.[77]

Intervenors' environmental justice concerns related to air quality,[78] raised for the first time in this Remand Proceeding, are similarly misplaced. The NAAQS are designed to protect the

---

[73] *See Funk*, 144 A.3d at 249.

[74] PECO St. No. 6-RR, at 7:14-15; *see also* Tr. 2371:5-11, 2391:6-9, 2392:5-10, 2393:4-2394:2, 2394:14-21, 2396:11-15, 2397:11-22, 2422:7-10, 2429:3-16, 2461:17-21.

[75] Tr. 2461:22-2462:1. Marple Township questioned why Tetra Tech's modeling did not include volatile organic compounds ("VOCs") and lead. Mr. Harrington of Tetra Tech responded that VOCs were not modeled by Tetra Tech because there is no EPA established NAAQS for VOCs but Tetra Tech did calculate the emissions of VOCs to determine that the emissions would not exceed any permitting threshold. In addition, Mr. Harrington testified that lead is not a known constituent of natural gas heaters of this type. Tr. 2418:6-2419:2.

[76] Tr. 2461:18-21.

[77] Tr. 2508:20-2510:23.

[78] *See* Marple Remand Main Br. at 9, 40, 43; Uhlman and Baker Remand Main Br. at 43, 49.

general public health and welfare.[79] There is not one set of NAAQS for environmental justice communities and another for those not in environmental justice areas. Mr. Harrington's analysis has demonstrated that these standards will be met and the operation of the Station will be protective of the entire surrounding community,[80] regardless of any environmental justice designation. Accordingly, there will be no unreasonable or disproportionate impact to any surrounding environmental justice areas and Intervenors have produced no evidence demonstrating otherwise.

Dr. McAuley's assessment, in contrast to Tetra Tech's air dispersion modeling, was not compared to any standard, including NAAQS.[81] In addition, numerous errors were identified in his air dispersion modeling, including disregarding applicable EPA guidance and assuming that PECO would use the emergency generator in a noncompliant manner (modeling for 8,760 hours of usage compared with guidance to model for 500 hours of usage),[82] using the incorrect layout for the Station,[83] using incorrect stack dimensions,[84] using overly conservative nitrogen dioxide screening parameters in contravention to EPA's air modeling guidance,[85] and using different exhaust temperatures and exit velocities in modeling air emissions at 2090 Sproul Road and the Don Guanella site (a site for which Marple Township continues to advocate).[86] Incredibly, when

[79] PECO St. No. 6-RR, at 7:14-15; *see also* Tr. 2371:5-11, 2391:6-9, 2392:5-10, 2393:4-2394:2, 2394:14-21, 2396:11-15, 2397:11-22, 2422:7-10, 2429:3-16, 2461:17-21.

[80] *See, e.g.,* Tr. 2396:11-15, 2422:7-10.

[81] Tr. 2511:10-2512:16.

[82] *See* PECO St. No. 6-RR, at 3:19-4:28.

[83] *See id.* at 4:29-5:20.

[84] *See id.* at 6:1-18.

[85] *See id* at 6:21-7:12.

[86] *See id.* at 14:6-22.

confronted with these errors and inconsistencies, Dr. McAuley acknowledged that he did not address them and did not re-run his model due to a lack of time and demands from other clients.[87]

Notwithstanding compliance with the NAAQS, the blanket air permit exemptions, and the numerous errors in Dr. McAuley's air modeling, Marple Township cites to the testimony of its witness Dr. Ketyer, a pediatrician with no expertise in natural gas infrastructure or air emissions, to claim that the air emissions from the Station will cause medical conditions and health effects.[88] The Commission should afford his testimony no weight in this proceeding.[89] Dr. Ketyer is opposed to any new natural gas infrastructure, yet he has natural gas service to his own home.[90] Moreover, his testimony reflects that he is not an expert of customer demand for natural gas, despite claiming to be "kind of an expert" insofar as he is "a consumer of natural gas in [his] home."[91] Dr. Ketyer also conceded that he has no basis to dispute that customer demand for natural gas has been increasing in Delaware County (a county in which he does not reside).[92] He did not review any engineering drawings for the Station,[93] did not review any manufacturer specifications for the equipment at the Station,[94] is not an expert in air quality modeling,[95] has not calculated the

[87] Tr. 2494:14-24, 2495:6-11, 2496:7-13, 2498:19-25, 2500:2-3, 2500:9-2501:24.

[88] *See* Marple Remand Main Br. at 10-12, 37.

[89] PECO filed an Evidentiary Challenge to the testimony of Dr. Ketyer, and renewed its objection to his testimony at the evidentiary hearing because Dr. Ketyer provided the same testimony as in the Initial Proceeding, he was not an expert with regard to the areas that he opined on, and his testimony was not connected to any study in connection with PECO's Station (Tr. 2352:4-21), which evidentiary challenge was denied (Tr. 2367:1-6).

[90] Tr. 2321:1-7 ("Q: Did I understand you to say that you are opposed to any new natural gas infrastructure? A: Yes, that's what I said.").

[91] Tr. 2322:7-2324:11.

[92] *Id.*

[93] Tr. 2325:10-17.

[94] Tr. 2325:18-25.

[95] Tr. 2339:2-8.

concentration of expected emissions from the Station or conducted an air dispersion study,[96] has not determined the concentration of any pollutant from the Station,[97] and only minimally reviewed the modeling of Dr. McAuley and Mr. Harrington.[98]

Intervenors also claim that the Commission should consider speculative emissions from potential leaks from PECO's pipelines leading to the Station and at the Station itself.[99] In addition to the fact that these pipelines are well beyond the Buildings and therefore outside of the scope of this Section 619 proceeding, Intervenors presented no competent evidence that such leaks are likely to occur. Neither Marple Township witnesses Dr. Schmid nor Dr. Ketyer are qualified to speak to pipeline engineering or safety, and neither reviewed any engineering or other specific details of the Station.[100] By contrast, Mike Israni, a pipeline expert and former PHMSA official, and Mr. Harrington of Tetra Tech (an air emissions expert), both testified that there is a wide variety of equipment in distribution systems to minimize the amount of leaks on the system[101] and that PHMSA regulations require natural gas distribution system operators to include their assets in a Distribution Integrity Management Program ("DIMP"), "which will impose on the operator to have more frequent inspections and leak surveys and testing and maintenance requirements…."[102] Pursuant to these requirements, PECO does in fact maintain a DIMP and will continue to do so throughout the operation of the Station. Furthermore, the Commission has a continuing obligation

[96] Tr. 2339:9-18.

[97] Tr. 2340:15-2341:4.

[98] Tr. 2345:11-22.

[99] *See* Marple Remand Main Br. at 7-8, 40, 47; Uhlman and Baker Remand Main Br. at 1, 12, 14, 41-42, 46.

[100] Tr. 2205:8-2206:19, 2210:6-2210:20, 2325:1-2326:16, 2328:14-2330:7, 2333:25-2337:10, 2338:14-24.

[101] Tr. 2450:7-12.

[102] Tr. 2105:17-2106:1.

to ensure safety by requiring companies to comply with PHMSA's applicable safety regulations and subjecting them to inspection as necessary to ensure compliance.[103]

Accordingly, any concerns raised by the Intervenors regarding detrimental air emissions from PECO's facilities (notwithstanding that these are outside of the Buildings) are not supported by the record evidence.

2. PECO Will Comply with Marple Township's Noise Ordinance.

Marple Township's Brief[104] takes issue with the testimony of Reginald Keith, PECO's noise expert, noting that Mr. Keith has not seen the final designs for the Station.[105] Marple Township's position misses several key factual points related to noise concerns for the Station. Principally, the Commission has already identified that "[t]he Natural Gas Reliability Station will also include a perimeter security fence (Security Fence) composed of sound-absorbing material…"[106] and the Commission recognized that the Station Building will "include several sound-dampening features."[107] Also, during the Initial Proceeding, Marple Township's own witness, Nancy Wilson of Pennoni, specifically acknowledged that the Hoover & Keith Inc. noise study conducted for the Station indicated that the "sound level projections with all controls in place fell within the Marple Township noise code criteria…."[108]

---

[103] PECO Remand Main Br. at 26-27 (citing 52 Pa. Code §§ 59.33(b) & (d)).

[104] Marple Remand Main Br., at 7-8.

[105] PECO notes here that the Station's design changed because PECO agreed with the Township to build the "Enhanced Design" for the Station, which will provide more esthetically appealing design elements for the community's benefit. As part of this Enhanced Design, PECO changed the emergency generator from 30kW to 50kW to accommodate the added ambient lighting and the entrance gate associated with the Enhanced Design. PECO St. No. 4-RD, at 3:14-4:17; PECO St. No. 6-RD, at 9:16-22; Tr. 1996:9-2001:1; 2008:8-9; *see also* Marple Township Exhibit DO-Cross-1 at Ex. A-3).

[106] Initial Decision Finding of Fact ("FOF") Nos. 10 and 11, citing PECO St. No. 4, at 7:10-8:3 and 6:14-16, 24-25.

[107] FOF No. 8, citing PECO St. No. 4, at 6:14-16 and 10:3-11:4. Note further that the Commonwealth Court in *Marple* affirmed that the security fence is a public utility facility exempt from MPC Section 19 and municipal zoning authority. *Marple*, 294 A.3d at 972-73.

[108] Marple Township Statement No. 3, at 3:18-23.

During the Remand Proceeding, Mr. Keith affirmed on cross examination that, even considering the changes to the Station's design, which PECO made to address the Township's esthetic concerns, complying with Marple Township's Noise Ordinance was feasible using readily available and proven technology:

> A. I am saying that it is technically feasible for PECO to do this, and the mitigation that can be used, depending upon how they do the configuration, is feasible, readily available, and proven technology. They don't have to reinvent the wheel to do any of this stuff.
> …
> A. The station, it's technically feasible for them to do this. I think PECO recognizes they have to do this, and so I'm confident that PECO can.[109]

Intervenors did not provide any credible evidence to rebut the expert testimony of Mr. Keith that PECO will be able to comply with Marple Township's Ordinance.

3. There is No Safety-Related "Agency Determination" to Site the Station at 2090 Sproul Road.

Marple Township raises the issue of risk from the Station as a reason to not site the Station at 2090 Sproul Road,[110] claiming that the testimony of witnesses Mr. Jeffrey Marx and Mr. Jim Capuzzi support this position.[111] Absent from Marple Township's Brief is any discussion of the critical factual evidence provided by PECO's witnesses regarding the safety requirements imposed on the Station and the historic data for equivalent natural gas stations to demonstrate the inherent safety of these types of facilities, which testimony was corroborated by Marple Township's own safety expert.

---

[109] Tr. 1987:20-25 and 1988:9-11.

[110] *See* Marple Remand Main Br., at 12-14 and 48-49.

[111] Mr. Capuzzi lacks expertise to aid the Commission in evaluating risks posed by the Station in this proceeding because Mr. Capuzzi admitted that: (1) he is not an expert in quantitative risk analysis; (2) is not an expert in pipeline safety; (3) he did not review the PHMSA regulations; (4) is not an expert in the PHMSA regulations; (5) did not perform a quantitative risk analysis; (6) did not perform a study of the probability of a leak from the Station; and (7) did not perform a study of the probability of a fire occurring at the Station. Tr. 2294:24-2295:24; 2297:14-19; 2294:17-18; 2296:2-21; 2297:8-2298:7; 2300:2-7.

First, PECO's expert witness, Mr. Israni, testified as to the extensive PHMSA regulatory safety provisions that natural gas distribution pipeline operators must follow and the industry consensus standards that are incorporated into those regulations.[112] In addition, Mr. Israni evaluated decades worth of Incidents, defined by 49 C.F.R. § 191.3, from PHMSA's databases and only identified a minimal number of Incidents across the United States at equivalent natural gas regulating stations out of potentially thousands of such stations.[113] Finally, Mr. Marx, Marple Township's expert, also opined that his quantitative risk analysis determined that a risk from "significant holes" from the Station will be "rare" and that a "full pipe rupture" of the Station's pipeline equipment will be "extremely rare" and not expected to be a safety risk.[114]

Accordingly, as PECO explained in its Main Brief, Intervenors' safety concerns are not supported by the record evidence and should bear no weight on the Commission's decision as to the reasonable necessity to site the Station at 2090 Sproul Road.

4. Arguments Related to the Need for the Station and Alternative Site Selection Have Already Been Addressed by the Commission and Are Not Within the Scope of this Limited Remand.

i. The Commission Determined the Need for the Station.

The limited scope of this Remand Proceeding relates only to the impacts of siting the Buildings at 2090 Sproul Road. Nevertheless, Intervenors continue to oppose the Station on the grounds that the Station is not needed. In so doing, Intervenors advance a false narrative that the Station is an "Expansion" station and that climate change will reduce the need for natural gas demand.

[112] *See* 49 C.F.R. Part 192 and PECO St. No. 3-RD, at 11:15-12:7 (identifying extensive industry consensus standards incorporated into PHMSA regulations).

[113] PECO St. No. 6-SR, at 7:8-10:9; PECO St. No. 3-RD at 12:12-14:3.

[114] Tr. 2178:25-2179:18 and 2181:13-2182:6.

The Commission should reject this argument, not only because it is well beyond the limited scope of the remand, but also because the Commission has already found in the Initial Proceeding that the Station is needed to: (1) provide an additional source of supply to meet design day requirements[115] and (2) increase reliability by reducing PECO's reliance on market purchases and reduce price volatility.[116] Indeed, there was ample evidence provided to support these findings. For example, Carlos Thillet, PECO's Manager of Gas Supply and Transportation Department, explained the difference between PECO's firm demand and its firm assets, noting that every winter season PECO must address this gap through market purchases.[117] This process is evaluated annually by the Commission in PECO's Purchased Gas Cost proceedings.[118] Mr. Thillet testified that PECO's data demonstrated that there is a risk to not addressing the deficit.[119]

By misrepresenting the Station as an "Expansion" station, Intervenors and Amici miss the key point that PECO would build the Project even if there was no increase in customers in Delaware County. The Project is needed because PECO needs to address the design day requirement deficit in PECO's certificated territory, not because it needs to enlarge that territory (which it is not doing) or secure new customers. PECO is not seeking to enlarge its certificated service territory through the Project. To be sure, PECO *is* experiencing load growth in Delaware County, which is part of PECO's certificated territory.[120] But this growth, whether it is from new

[115] FOF No. 33, citing Tr. 1275:19-20; 1276:1-7.

[116] FOF No. 35, citing Tr. 1276:8-20.

[117] Tr. 1277:1-1279:12.

[118] *Id*.

[119] Tr. 1280:12-15.

[120] *See* FOF No. 38 and Tr. 2023:17-20.

customers or existing customers adding new appliances, merely exacerbates PECO's design day requirement deficit.[121]

Intervenors rely on the testimony of their Remand Proceeding witness, Professor Najjar, to challenge PECO's testimony on the need for the Station – arguing that climate change will reduce the number of heating degree days and thereby reduce natural gas demand.[122] But Professor Najjar's testimony on this subject should not be afforded any weight for several reasons. First, Professor Najjar conceded during cross-examination that he had no basis to challenge PECO's data on historical usage.[123] Second, Professor Najjar has never worked for a natural gas company,[124] has no experience in engineering natural gas distribution systems,[125] did not conduct a study of the sales of energy efficient appliances in Marple Township or Delaware County or their impacts on natural gas demand in this area,[126] and did not perform a study on what is required to reliably serve natural gas customers in Marple Township or Delaware County.[127] In the end, his opinion that there is actually decreasing natural gas usage in Marple Township and Delaware County, and ultimately a decreasing need for the Station, was not based on any type of analysis on the complex intricacies of natural gas supply and demand calculations across thousands of customers in Marple Township and Delaware County, but only on "common sense."[128] This lay

[121] *See* FOF No. 19.

[122] Najjar Statement, at 13:8-14:13.

[123] Tr. 2270:4-10.

[124] Tr. 2262:13-18.

[125] Tr. 2262:19-22.

[126] Tr. 2268:16-2270:1.

[127] Tr. 2270:11-19.

[128] Tr. 2269:1-3 ("No, I'm using my common sense knowledge. . . "); 2269:22-2270: 3 ("No. I'm using my common sense understanding . . . "); 2273:20-24 ("No, I'm using common sense.").

opinion, which is not based on Professor Najjar's oceanographic or climatological expertise, is not an acceptable foundation for expert testimony.[129]

Contrary to Professor Najjar's assertions, Oleg Shum, PECO's Manager of Gas Reliability Programs and Capacity Planning, testified that PECO calculates its design day requirements using planned coldest possible conditions that are independent of potential average temperature increases to ensure that PECO has adequate supply during potential peak demand.[130] Mr. Shum explained: "What we do is we monitor our historical usage. And for particularly Marple Township and the surrounding townships in Delaware County, we're seeing a substantial load growth…."[131] Mr. Shum emphasized that the Project was not based on assumptions, but rather the historical data. As Mr. Shum explained, even if average temperatures increase, PECO must be prepared to supply natural gas to customers in a safe, reliable, and affordable manner during periods of below average weather. For example, between December 23-25, 2022, extreme cold conditions occurred in PECO's service territory with minimum temperatures between 8 and 17 degrees Fahrenheit. PECO must be prepared to delivery supply to customers during such extreme conditions.[132]

Accordingly, the Commission should reject the Intervenors' argument that there is no need for the Station because it has already been addressed by the Commission, is beyond the scope of this proceeding, and is factually erroneous.

---

[129] Pa.R.E. 702; *Harley-Davidson Motor Co. v. Springettsbury Twp.*, 124 A.3d 270, 286 (Pa. 2015); *Collins v. Hand*, 246 A.2d 398, 404 (Pa. 1968); *Snizavich v. Rohm & Haas Co.*, 83 A.3d 191, 197 (Pa. Super. 2013), *appeal denied*, 96 A.3d 1029 (Pa. 2014); *Swift v. Dep't of Transp. of Com.*, 937 A.2d 1162, 1170 (Pa. Cmwlth. 2007), *appeal denied*, 950 A.2d 270 (Pa. 2008).

[130] PECO St. No. 7-RR, at 4:8-17.

[131] Tr. 2023:17-20.

[132] PECO St. No. 7-RR, at 4:8-14.

ii. The Commission Determined that PECO Evaluated Alternative Sites.

The Commission should also reject Intervenors' repeated contention that PECO did not consider "alternatives" to the Station or alternatives to siting the Station at 2090 Sproul Road. This contention was also addressed by the Commission in the Initial Proceeding and is, in any event, false. The Commission already found that "[d]uring its site selection process, PECO considered a total of fifteen (15) sites including 2090 Sproul Road."[133] The Property at 2090 Sproul Road was selected for a number of reasons, but the Commission found that "[b]ased upon the pressure of the lines and engineering issues, the only location this project as designed would work is at 2090 Sproul Road."[134] Consequently, the Commission has already made findings that reject Marple Township's oft-repeated but unsubstantiated argument that PECO's site selection process was merely a façade.[135]

Intervenors continue to argue that locating the Station at Don Guanella would be preferrable. But the Don Guanella site is a pristine woodland area with wetlands, meadows, and creeks; Delaware County has acquired the site through eminent domain to preserve it as parkland.[136] Developing this greenfield could lead to negative environmental impacts resulting from the need to cut trees, grade soil, and fill wetlands, none of which would be required at 2090 Sproul Road.[137] Furthermore, the Commission has already found that constructing the Station at the Don Guanella site would cause unreasonable engineering constraints.[138]

---

[133] FOF No. 49, citing PECO St. No. 5, at 4:19-5:26.

[134] FOF No. 52, citing Tr. 1222.

[135] Rather than repeat here all the evidence rebutting Marple Township's theory, PECO respectfully refers the Commission to the discussion of the relevant evidence at pp. 9-11 of PECO's Reply Brief in the Initial Proceeding.

[136] PECO St. No. 6-RR, at 16:19-24:13.

[137] PECO St. No. 2-RD at 18:8-18; PECO St. No. 6-RR, at 19:8-24:7.

[138] *See* FOF No. 50.

By contrast, the selected site for the Station, 2090 Sproul Road, is a vacant lot that was a former gasoline service station with residual contamination, and PECO has already improved the environmental condition of the Property by removing over 1,000 tons of the contaminated soil.[139] The Commission recognized that the site: (1) was contemplated for public utility use and (2) is along a busy, noisy roadway:

> The selected location, 2090 Sproul Road is located in an "N Neighborhood Center" zoning district that includes commercial uses and specifically allows public utility use by special exception and as such, Marple Township specifically contemplated public utility use on this property along Sproul Road in enacting the zoning classification. This location is adjacent to a main thoroughfare (Sproul Road) which *already* generates traffic and noise and which roadway feeds the commercial establishments situated in the N Neighborhood Center district.[140]

Intervenors' continued dangling of the Don Guanella site as a possible alternative site for locating the Station simply confirms that their opposition to the Station is based on NIMBY motivation, and not any legitimate environmental concern.

IV. CONCLUSION

The Commission should completely reject Intervenors' and Amici's attempts to circumvent the determinations of the state agencies that have jurisdiction over the relevant environmental matters, and to have the Commission not defer to them, as directed in *Marple*, but to overrule them. The Commission should also reject Intervenor's and Amici's attempts to turn this narrow remand proceeding into a full-blown, NEPA-style review of their allegations concerning climate change impacts of natural gas use, and to use this Section 619 Remand Proceeding as a vehicle to stymie natural gas use and infrastructure development supporting

[139] PECO St. No. 2-RD, at 9:19-21, 17:11-18:5; PECO St. No. 4-RD, at 3:5-10, 4:11-17.

[140] FOF No. 54 (citing PECO St. No. 5, at 9:2-4; Tr. 1154) (emphasis in the original).

reliability in the Commonwealth. This would upend the well-established regulatory regime for public utilities in Pennsylvania and stagnate further development, an outcome courts in Pennsylvania have long sought to avoid. Finally, the Commission should reject Intervenors' and Amici's attempt to ignore the plain language of Section 619 (relating only to the siting of the buildings), and ignore the scope of this Remand Proceeding (calling for a review of the impacts of locating the Buildings at 2090 Sproul Road).

The Commission has all the evidence necessary to find that PECO's proposed Buildings at 2090 Sproul Road are reasonably necessary for the convenience or welfare of the public pursuant to Section 619. The evidence is clear that: (1) PECO demonstrated a need for the Station and its Buildings at 2090 Sproul Road; and (2) there are no unreasonable environmental impacts by siting the Station's Buildings at 2090 Sproul Road. There is more than sufficient evidence for the Commission to identify all necessary agency determinations to site the Station's Buildings at 2090 Sproul Road and to defer to the expertise of those agencies, including the DEP. Notwithstanding the limited scope of this proceeding to PECO's proposed Buildings, PECO also demonstrated that there will be no unreasonable environmental degradation from the Station's air emission sources.

For all the foregoing reasons, PECO respectfully requests that the Pennsylvania Public Utility Commission find that, after conducting a constitutionally sound environmental impact review of the siting of the proposed Natural Gas Reliability Station's Station Building and Fiber Building, at 2090 Sproul Road, Marple Township, Delaware County, Pennsylvania, the siting of the Buildings is reasonably necessary for the convenience or welfare of the public pursuant to Section 619 of the MPC.

Respectfully submitted,

BLANK ROME LLP

/s/ Christopher A. Lewis

Christopher A. Lewis, Esq.
Frank L. Tamulonis, Esq.
Stephen C. Zumbrun, Esq.
BLANK ROME LLP
One Logan Square
130 North 18th Street
Philadelphia, PA 19103
Phone: 215.569.5793
Fax: 215.832.5793
Email: lewis@blankrome.com

Anthony E. Gay, Esq.
Jack R. Garfinkle, Esq.
PECO ENERGY COMPANY
2301 Market Street
Philadelphia, PA 19103
Phone: 215.841.4000
Email: anthony.gay@exeloncorp.com
jack.garfinkle@exeloncorp.com

Counsel for PECO Energy Company

CERTIFICATE OF SERVICE

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

Honorable Mary D. Long
PO Box 3265
Harrisburg, PA 17105-3265

J Adam Matlawski, Esquire
Kaitlyn T Searls, Esquire
McNichol, Byrne & Matlawski, P.C.
1223 N Providence Road
Media, PA 19063
ksearls@mbmlawoffice.com
amatlawski@mbmlawoffice.com
Accepts EService
Representing Marple Township

Robert W. Scott, Esquire
Carl Ewald, Esquire
ROBERT W SCOTT PC
205 North Monroe Street
Media, PA 19063
rscott@robertwscottpc.com
carlewald@gmail.com
Accepts EService
Representing Delaware County

John C. Dernbach, Esquire
Professor Emeritus
Widener University
Commonwealth Law School
3800 Vartan Way
Harrisburg, PA 17110
jcdernbach@widener.edu
Counsel for Theodore R. Uhlman and Julia M Baker

Robert B. McKinstry, Jr., Esquire
548 School House Rd.
Kennett Square Pa. 19348
robert.mckinstry@gmail.com
Counsel for Theodore R. Uhlman and Julia M Baker

Devin McDougall, Esquire
Senior Attorney
Clean Energy Program
Earthjustice
Philadelphia Office
1617 John F. Kennedy Blvd., Suite 2020
Philadelphia, PA 19103
dmcdougall@earthjustice.org
Counsel for Theodore R. Uhlman and Julia M Baker

Jessica R. O'Neill, Esquire
Emma H. Bast, Esquire
Citizens for Pennsylvania's Future
1429 Walnut Street, Suite 701
Philadelphia, PA 19102
oneill@pennfuture.org
bast@pennfuture.org
Counsel for Amicus Curiae *Citizens for Pennsylvania's Future*

Kacy C. Manahan, Esquire
Delaware Riverkeeper Network
Canal Street, Suite 3701
Bristol, PA 19007
kacy@delawareriverkeeper.org
Counsel for Amici Curiae *Delaware Riverkeeper Network and Green Amendments For the Generations*

Alex Bomstein, Esquire
Sage Lincoln, Esquire
Clean Air Council
135 South 19th Street, Suite 300
Philadelphia, PA 19103
215-567-4004
abomstein@cleanair.org
slincoln@cleanair.org
Counsel for Amicus Curiae *Clean Air Council*

/s/ Stephen C. Zumbrun
Counsel to PECO Energy Company

Dated: January 3, 2024