January 3, 2024

Via Electronic Filing

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

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

Dear Secretary Chiavetta,

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

Sincerely,

*_/s/ Devin McDougall_*
PA Attorney ID No. 329855
Senior Attorney
Earthjustice
1617 John F. Kennedy Blvd., Suite 2020
Philadelphia, PA 19103
dmcdougall@earthjustice.org
(917) 628-7411

cc:
Certificate of Service
Secretary Chiavetta (via electronic filing)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of this electronically-filed document upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Alyssa Plotnick 2203 Graymoor Dr Broomall, PA 19008 dollgirl.plotnick27@gmail.com	Amanda Atkinson 709 Cedar Grove Rd Broomall, PA 19008 amanda.atkinson@gmail.com
Amy Blake 22 Stanfield Ave, Broomall, PA 19008 aeb817@gmail.com	Andrew I Redding Marple Newtown Soccer Association 104 Allison Circle Broomall, PA 19008 andrewiredding@gmail.com
Anna Masciantonio 2739 Brierwood Rd Broomall, PA 19008-1720 anna2739@verizon.net	Anna Willig 640 Cedar Grove Road Broomall, PA 19008 anna413@comcast.net
Anthony Gay, Associate General Counsel Exelon Corporation 2301 Market Street Legal Department S23-1 Philadelphia, PA 19103 anthony.gay@exeloncorp.com	Anthony Marziano Jr 237 Talbot Drive Broomall, PA 19008 managerptp@aol.com
Ash Kailath 2516 Parke Lane Broomall, PA 19008 ashokkailath@yahoo.com	Bob Dorazio 2148 Mary Lane Broomall, PA 19008 bobdorazio44@gmail.com
Bridgett Wendel 117 Academy Lane Broomall, PA 19008 bridgettwendel@gmail.com	Carl Ewald, Esquire Robert W. Scott PC 205 North Monroe Street Media, PA 19063 carlewald@gmail.com

Carolina Favazza 2006 Kerwood Dr Broomall, PA 19008 Carolina.favazza@villanova.edu	Charles Thomas Avedisian 2150 Sproul Road Broomall, PA 19008 cta2@cornell.edu
Christopher A Lewis, Esquire Blank Rome LLP One Logan Square 130 North 18th Street Philadelphia, PA 19103 lewis@blankrome.com	Christos Felfelis Kyra Designs 2211 Glenspring Lane Broomall, PA 19008 christosfelfelis@gmail.com
David Heagerty 2102 Boxwood Drive Broomall, PA 19008 daveheagerty@hotmail.com	Eileen Goldhorn 196 Cranbourne Drive Broomall, PA 19008 mrsgoldee@comcast.net
Felicia Carnaroli 252 Warren Blvd. Broomall, PA 19008 famoroso13@rocketmail.com	Frank Tamulonis, Esquire Blank Rome LLP One Logan Square 130 North 18th Street Philadelphia, PA 19103 ftamulonis@blankrome.com
Gregory Fat 2201 St Paul Drive Broomall, PA 19008 gregfat@gmail.com	Henry J. Gillin 2149 Mary Lane Broomall, PA 19008 hjg844@gmail.com
Holly Cross 322 Candlewood Rd Broomall, PA 19008 crossh12@gmail.com	J. Adam Matlawski, Esquire McNichol, Byrne & Matlawski, P.C. 1223 N. Providence Road 3rd Floor Media, PA 19063 amatlawski@mbmlawoffice.com
Jack Garfinkle, Esquire Exelon Business Services Company 2301 Market Street Legal Dept S23-1 Philadelphia, PA 19103 jack.garfinkle@exeloncorp.com	Jeffrey Strong 8 Grove Lane Broomall, PA 19008 jeffstrong5150@gmail.com

Jessica Pagliara 18 Stanfield Ave Broomall, PA 19008 javino0524@gmail.com	Jill Adaman 2160 Mary Lane Broomall, PA 19008 jea905@comcast.net
John Callaghan 17 Tower Rd Broomall, PA 19008 jdcalla1956@gmail.com	John R Cross 322 Candlewood Rd Broomall, PA 19008 jcross0209@gmail.com
Joseph Colagreco 2202 Rutgers Drive Broomall, PA 19008 colagreco@comcast.net	Julia M. Baker Objects Conservation Associates 2150 Sproul Rd. Broomall, PA 19008 jbakeroca@gmail.com
Kaitlyn Searls, Attorney McNichol, Byrne & Matlawski P.C. 1223 N. Providence Road Media, PA 19063 ksearls@mbmlawoffice.com	Karen E. Spector 403 Briar Drive Broomall, PA 19008 kspector@yahoo.com
Kevin Pickering 915 Cedar Grove Road Broomall, PA 19008 mr.kevinpickering@gmail.com	Kosmas Yiantsos Yiantos Residence 2228 Windsor Circle Broomall, PA 19008 kyiantsos@hotmail.com
Kyriaki Karamitopoulos Felfelis 2211 Glenspring Lane Broomall, PA 19008 kyradesigns@att.net	Linda A Collins 523 Warren Blvd Broomall, PA 19008 lindacollins225@gmail.com
Lucinda Scace 728 Cedar Grove Rd. Broomall, PA 19008 cynsca@comcast.net	Luisa Robbins 411 Langford Road Broomall, PA 19008 luisa0411@hotmail.com
Lynne Garrity Redding 104 Allison Cir Broomall, PA 19008 lynne.metzler@gmail.com	Maria Henderson Maria D Henderson, CPA 1 Madonna Lane Broomall, PA 19008 mdhcpa@verizon.net

Maria Rich 2691 Old Cedar Grove Rd., Broomall, PA 19008 mariarich@verizon.net	Marilia Mancini-Strong 8 Grove Lane, Broomall, PA 19008 mariliamstrong@hotmail.com
Marion H Darby 907 Cedar Grove Road Broomall, PA 19008 mdarby232@gmail.com	Marissa McGeehan 2102 Boxwood Drive Broomall, PA 19008 marissa.mcgeehan@gmail.com
Mary Karamitopoulos 802 Saint Francis Drive Broomall, PA 19008 kyriamaryk@gmail.com	Matthew Barrabee 2959 Dogwood Lane Broomall, PA 19008 mbarrabee@gmail.com
Megann Gibson, Esquire Blank Rome LLP One Logan Square Philadelphia, PA 19103 megann.gibson@blankrome.com	Michael Pagliara 18 Stanfield Ave Broomall, PA 19008 mikepags11@yahoo.com
Natalie Zemaitis 2651 Old Cedar Grove Rd Broomall, PA 19008 nattyz@hotmail.com	Nicole Howarth 2508 Selwyn Drive Broomall, PA 19008 nicolehowarth2@gmail.com
Nilgun Okur, Administrator Nilgun 2163 Mary Lane Broomall, PA 19008 nilgun.okur@gmail.com	Norma Blum 2164 Sproul Rd Broomall, PA 19008 myspang7@comcast.net
Petra Svenson 4 Hunters Run Broomall, PA 19008 petrasvenson@msn.com	Richard Giovanetti GSA 1 Arbordale Lane Broomall, PA 19008 richard.giovanetti@g-sa.com
Robert Jordan 2623 Springfield Road Broomall, PA 19008 rcjordanjr@gmail.com	Robert W. Scott, Attorney Robert W. Scott, P.C. 205 North Monroe Street Media, PA 19063 rscott@robertwscottpc.com

Ronald G Fender 2506 Parke Lane Broomall, PA 19008 captainron73@yahoo.com	Sabina Amoroso 2150 Kingswood Road Broomall, PA 19008 famoroso13@rocketmail.com
Salvatore P. Favazza, Jr. 2006 Kerwood Drive Broomalll, PA 19008 cnsspf@yahoo.com	Sarah Kuchan 114 Martins Run Media, PA 19063 sarahkuchan@gmail.com
Stephen Coleman, Customer Service Rep 100 N Sproul Rd Broomall, PA 19008 scc5153@psu.edu	Stephen DiMarco, President Freddys Frozen Custard & Steakburgers 2084 Sproul Road Broomall, PA 19008 sdimarco@pennoaksgolfclub.com
Stephen Zumbrun, Attorney Blank Rome One Logan Square 130 N. 18th Street Philadelphia, PA 19103 szumbrun@blankrome.com	Steven Welsh 2162 Mary Lane Broomall, PA 19008 sd_welsh@msn.com
Teresa DiCampli 121 1st Ave Broomall, PA 19008 tmdicampli@gmail.com	Theodore R. Uhlman 2152 Sproul Rd Broomall, PA 19008 uhlmantr@yahoo.com
Tracey Welsh 2162 Mary Lane Broomall, PA 19008 twelsh22@hotmail.com	William A Wegener 22 Stanfield Lane Broomall, PA 19008 wwegener@gmail.com
William Lenahan 1 Stanfield Ave. Broomall, PA 19008 wdlenahan@gmail.com	

Dated: January 3, 2024

/s/ Devin McDougall
Devin McDougall
PA Attorney ID No. 329855
Senior Attorney

Earthjustice
1617 John F. Kennedy Blvd., Suite 2020
Philadelphia, PA 19103
dmcdougall@earthjustice.org
(917) 628-7411

BEFORE THE COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. § 10619 that the 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)

REPLY BRIEF ON BEHALF OF INTERVENORS JULIA M. BAKER AND THEODORE R. UHLMAN

John C. Dernbach
(Pa. I.D. No. 33897)
Professor Emeritus
Widener University
Commonwealth Law School
3800 Vartan Way
Harrisburg, PA 17110
(717) 541-1933
jcdernbach@widener.edu

Robert B. McKinstry, Jr.
(Pa. I.D. No. 30015)
548 School House Rd.
Kennett Square Pa. 19348
(484) 467-3207
robert.mckinstry@gmail.com

Devin McDougall
(Pa. I.D. No. 329855)
Senior Attorney
Clean Energy Program
Earthjustice
Philadelphia Office
1617 John F. Kennedy Blvd., Suite 2020
Philadelphia, PA 19103
(917) 628-7411
dmcdougall@earthjustice.org

Attorneys for Intervenors Julia M. Baker and Theodore R. Uhlman

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT.. 4

A. PECO Gas Does Not Contest That the Commission Must Interpret Section 619 in a Manner That Is Consistent With the Pennsylvania Constitution 4

1. Article I, Section 27 Constrains Rather Than Expands the Commission's Authority Under Section 619. 4

2. A Constitutionally Sound Environmental Impact Review Includes Enough Information for the Commission to Comply With Its Constitutional Responsibilities 8

B. The Commission Should Reject the PECO Gas Petition Because PECO Gas Has Not Provided the Information Necessary for the Commission to Conduct a "Constitutionally Sound Environmental Impact Review" 13

1. To Conduct a "Constitutionally Sound Environmental Impact Review," the Commission Must Consider the Reasonably Foreseeable Climate Change and Cumulative Environmental Effects of the Gas Expansion Proposal Made Possible by the Station, Not Just the Environmental Effects of Its Location 13

2. To Conduct a "Constitutionally Sound Environmental Impact Review," the Commission Must Analyze and Evaluate Alternatives to the PECO Proposal................... 14

3. PECO Gas Has Not Met Its Burden of Submitting a Constitutionally Sound Environmental Review Because Substantial Emissions Will Likely Occur Even After All Necessary Permits Are Obtained 16

C. The Commission Should Reject the PECO Gas Petition Because Record Evidence Shows That the Expansion Station Is Not Reasonably Necessary for the Convenience or Welfare of the Public.. 20

1. The Expansion Station Is Not Reasonably Necessary 21

2. The Expansion Station Is Not in the Public Interest and Will Therefore Not Advance the Convenience or Welfare of the Public.. 23

III. CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

Cases

Cmty. Coll. of Delaware Cnty. v. Fox,
342 A.2d 468 (Pa. Commw. Ct. 1975) 6

Commonwealth v. Herman,
161 A.3d 194 (Pa. 2017) 7

Frederick v. Allegheny Township Zoning Hearing Board,
196 A.3d 677 (Pa. Commw. Ct. 2018), appeal denied, 208 A.3d 462
(Pa. 2019) 10, 11, 12, 13

Funk v. Wolf,
144 A.3d 228 (Pa. Commw. Ct. 2016), *aff'd*, 158 A.3d 642 (Pa. 2017) 6, 7

Held v. Montana,
No. CDV-2020-307 (1st Dist. Ct. Mont., Aug. 14, 2023) 8

In re Application of Maui Elec. Co.,
408 P.3d. 1 (Haw. 2017) 7

Matter of Maui Electric Co., Ltd.,
506 P.3d 192 (Haw. 2022) 7, 8

Murrysville Watch Comm. v. Municipality of Murrysville Zoning Hearing Bd.,
272 A.3d 998 (Pa. Cmwlth. Ct. 2022), *appeal denied*, 283 A.3d 790 (Pa. 2022) 5, 11, 12

Pa. Env't Def. Found. v. Commonwealth,
161 A.3d 911 (Pa. 2017) .... *passim*

Pa. Env't Def. Found. v. Commonwealth, 285 A.3d 702 (Pa. Commw. Ct. 2022),
aff'd 2023 WL 8101630 11

Payne v. Kassab,
312 A.2d 86 (Pa. Cmmw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976) 1, 4, 6, 17

Robinson Twp. v. Commonwealth,
83 A.3d 901 (Pa. 2013) 3, 4, 7, 18

Township of Marple v. Pa. Pub. Util. Comm'n,
294 A.3d 965 (Pa. Cmmw. Ct. 2023) .... *passim*

Statutes

1 Pa. Cons. Stat. § 1922(3) 7

53 Pa. Cons. Stat. § 10302 12

53 Pa. Cons. Stat. § 10303(a)(3) 12

53 Pa. Cons. Stat. § 10301(a)(2) 12

53 Pa. Cons. Stat. § 10301(a)(6) 12

53 Pa. Cons. Stat. § 10301(a)(7) 12

53 Pa. Cons. Stat. § 1060 12

53 Pa. Cons. Stat. § 10603 12

53 Pa. Cons. Stat. § 10604(1) 12

53 Pa. Cons. Stat. § 10609 12

53 Pa. Cons. Stat. § 10610 12

53 Pa. Cons. Stat. § 10619 (1988) .... *passim*

66 Pa. Cons. Stat. § 1501 3

66 Pa. Cons. Stat. § 332(a) 18

Constitutional Provisions

Pa. Const. art. I, § 27 (1971) .... *passim*

Mont. Const. art. IX § 1 8

Regulations

<u>Federal</u>

42 U.S.C. § 4332(2)(C) 9

40 C.F.R. § 1502.14(c) 16

40 C.F.R. § 60.5360 19

40 C.F.R. § 60.5365b 19

40 C.F.R. § 60.5386c 19

40 C.F.R. § 60.5430c 19

<u>States</u>

4 Minn. Stat. § 116D.04, subdiv. 6 (2019) 16

Haw. Rev. Stat. § 11-200.1-18(d)(7) (2023) 16

329 Ind. Admin. Code § 5-3-2(b)(1)(B) (2021) 16

Md. Code Regs. § 11.01.08.08 (2021) 16

301 Mass. Code Regs. § 11.05(5)(a) (2021) 16

Mont. Admin. R. § 17.4.609(3)(f) (2021) 16

1 N.C. Admin. Code § 25.0502(2) (2021) 16

Wis. Admin. Code SPS § 301.21(2)(b)(2) (2021) 16

Wash. Rev. Code § 43.21C.030(c)(3) 16

N.Y. Comp. Codes R. & Regs. tit. 6 § 617.9(b)(5)(v) 16

Cal. Code Regs. tit. 14 § 15126.6 16

Other Authorities

Inflation Reduction Act (“IRA”), Public Law 117-169, 136 Stat. 2003 (August 16, 2022) 24

I. INTRODUCTION

For more than four decades, courts and Commonwealth entities interpreted Article I, Section 27 of the Pennsylvania Constitution (also known as the Environmental Rights Amendment ("ERA")) through the lens of the three-prong balancing test in *Payne v. Kassab*, which required compliance with existing statutes and regulations, required that the record show a reasonable effort to minimize environmental harms, and told reviewing courts that environmental harms were acceptable if the benefits of the project were great enough. *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Cmmw. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976). Because the *Payne* test deprived the constitution of any independent meaning, the Pennsylvania Supreme Court rejected that test in *Pa. Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 930 (Pa. 2017) ("*PEDF II*"). In its place, the Court held that judicial review is to be based on "the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment." *Id*. The Commonwealth Court's *Township of Marple* decision makes clear that this new understanding of the ERA must guide the Pennsylvania Public Utility Commission (the "Commission") in its interpretation of Section 619. *Township of Marple v. Pa. Pub. Util. Comm'n,* 294 A.3d 965, 974-75 (Pa. Cmmw. Ct. 2023) ("*Twp. of Marple*" or "*Marple Township"*).

Yet PECO Gas's brief is written as if the *Payne v. Kassab* test were still the law of the ERA. Its central message is, in effect, that the Commission should approve the PECO Gas proposal because it complies with the *Payne* test: it adheres to existing statutes and regulations, minimizes environmental harm, and on balance the benefits are greater than the environmental harms. Put differently, PECO Gas is arguing that the Supreme Court's decision in *PEDF II* and the Commonwealth Court's decision in *Township of Marple*—and most importantly the ERA itself—mean little or nothing. This argument cannot be right.

A central issue presented in this proceeding is the construction of the phrase "constitutionally sound environmental impact review." *Twp. of Marple,* 294 A.3d at 975. Contrary to PECO's Main Brief, Intervenors do not contend that a full blown "environmental impact statement" is required. Remand Main Brief of PECO Energy Company, at 40-42 (Dec. 15, 2023) ("PBr."). Rather, a constitutionally sound review is contextual. It must provide enough information for the Commonwealth to properly exercise its constitutional decision-making responsibility in a particular case, no more and no less. Here, PECO Gas's analysis lacks certain elements of a sound environmental assessment required by the Pennsylvania Constitution and *Township of Marple*. Intervenors' Main Brief focuses on a narrow range of readily foreseeable environmental impacts that PECO Gas did not analyze (climate change and cumulative impacts), and identifies a narrow range of issues that need to be addressed in greater detail (especially alternatives). Unless and until PECO Gas addresses these issues, the Commission cannot decide the proposed Expansion Station "is reasonably necessary for the convenience or welfare of the public." 53 Pa. Cons. Stat. § 10619 (1988).

Intervenors' narrow legal points are directed primarily at foreseeable greenhouse emissions from operation of the proposed Expansion Station, which would enable expansion of PECO Gas's natural gas distribution system, increase the burning of natural gas, and increase greenhouse gas emissions well beyond the time by which those emissions must be eliminated. PECO asks the Commission to ignore these foreseeable climate impacts, even though the record shows that (1) they are unanalyzed and likely to be substantial, (2) these emissions impact ERA trust resources and harm trust beneficiaries, and (3) every additional ton of greenhouse gas emissions can cause harm, and (4) greenhouse gas emissions must be reduced to protect the environmental rights of the public, including future generations, under the ERA. Notably,

Intervenors do not ask the Commission "to ban natural gas infrastructure on the basis of climate change," but only to appropriately discharge its trustee obligations under the ERA. PBr. at 33.[1]

Also contrary to a suggestion in PECO's Main Brief (PBr. at 33-34), honoring the ERA's text and the Commission's public trust duties as a trustee does not violate the obligation of utilities to provide reliable service under Section 1501 of the Public Utility Code, 66 Pa. Cons. Stat. § 1501. PECO can still provide reliable service to its existing customers. Section 1501 should not be read to give PECO Gas the right to expand its service where it failed to analyze environmental impacts adequately, there are very reasonable and readily available alternatives, and the result of such expansion would cause irreversible damage to the public natural resources that are the subject of the trust created by Article I, Section 27. To read Section 1501 in this way would render that section unconstitutional.

The ERA was written to reconcile environmental protection with economic development—in other words, to foster sustainable development. As Chief Justice Castille explained in *Robinson Township*: "[A]s with the rights affirmed by the first clause of Section 27, the duties to conserve and maintain are tempered by legitimate development tending to improve upon the lot of Pennsylvania's citizenry, with the evident goal of promoting sustainable development." *Robinson Twp. v. Commonwealth,* 83 A.3d 901, 958 (Pa. 2013).[2] He wrote: "The

[1] PECO also speculates that the reasonable ERA analysis Intervenors advocate will burden its electric distribution infrastructure as well (PBr. at 39), but provides only conclusory statements in support. More broadly, as discussed herein in Parts II.A and II.B, Intervenors advocate ERA environmental review that is proportional to the impacts at stake, and electric distribution infrastructure is likely to have fewer downstream greenhouse gas and local air pollution impacts than gas distribution infrastructure.

[2] *See also id.* at 954 (explaining that, under Article I, Section 27, "the state's plenary police power, which serves to promote…welfare, convenience, and prosperity, must be exercised in a manner that promotes sustainable property use and economic development.") (citing John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I—An Interpretive Framework for Article I, Section 27*, 103 Dickinson L. Rev. 693, 718–20 (1999); 1970 Pa. Legislative Journal–House at 2270 ("the measure of our progress is not just what we have but how we live, that it is not man who must adapt himself to technology but technology which must be adapted to man.")).

drafters and the citizens of the Commonwealth who ratified the Environmental Rights Amendment, aware [of the Commonwealth's history of unsustainable development], articulated the people's rights and the government's duties to the people in broad and flexible terms that would permit not only reactive but also anticipatory protection of the environment for the benefit of current and future generations." *Robinson Twp*., 83 A.3d at 963. Thus, under *PEDF II* and *Township of Marple*, the environmental rights recognized in Section 27 deserve genuine constitutional protection. *Payne v. Kassab* balancing—tacitly advocated throughout the PECO Gas brief—will no longer do.

II. ARGUMENT

A. PECO Gas Does Not Contest That the Commission Must Interpret Section 619 in a Manner That Is Consistent With the Pennsylvania Constitution

Statutes such as Section 619 must be construed in a manner that is consistent with the Pennsylvania Constitution, including Article I, Section 27. Main Brief on Behalf of Intervenors Julia M. Baker and Theodore R. Uhlman, at 18-22 (Dec. 15, 2023) ("IBr."). This is particularly true here, where PECO Gas would have the statute applied to preempt local zoning. If a statutory exemption from local zoning cannot be reconciled with either Section 27 or substantive due process, it is unconstitutional. *See Robinson Twp. v. Commonwealth,* 83 A.3d 901 (Pa. 2013). PECO Gas does not contest this conclusion in its Main Brief. However, in relying on cases that are no longer good law or are inapplicable, PECO Gas seeks to evade its legal implications.

1. Article I, Section 27 Constrains Rather Than Expands the Commission's Authority Under Section 619.

Article I, Section 27 has two separate clauses, which each impose limits on the Commission's exercise of its authority under Section 619. IBr. at 29-31. The ERA's first

sentence recognizes the public's "right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment." Pa. Const. art. I, § 27 (1971). PECO Gas agrees that this sentence "places a limitation on the state's power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional." *PEDF II*, 161 A.3d at 931 (cited by PECO Gas as "limit[ing] the Commonwealth's power" in PBr. at 19).

Article I, Section 27's second and third sentences, its public trust clause, make the Commonwealth, including the Commission, trustees of the state's "public natural resources." Pa. Const. art. I, § 27. As trustee, the Commission is obliged to conserve and maintain these resources for the benefit of present and future generations. *Id*. Under the public trust clause, the Commission "has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties." *PEDF II*, 161 A.3d at 933. PECO Gas cites *Murrysville Watch Comm. v. Municipality of Murrysville Zoning Hearing Bd.*, 272 A.3d 998, at *11 (Pa. Cmwlth. Ct. 2022), *appeal denied*, 283 A.3d 790 (Pa. 2022), in support of this very point. PBr. at 19.

Instead of acknowledging the legal consequences of the ERA's limitation on the Commission's authority under Section 619, PECO's Main Brief argues that Intervenors are seeking to use the ERA to expand the Commission's statutory authority. They follow this with the illogical conclusion that the ERA does not enable the Commission to consider climate change impacts. PBr. at 17-18, 33. PECO Gas has it wrong on both counts.

Section 27 *limits* the Commission's authority under Section 619. IBr. at 28-33. The two principal opposing cases cited in the PECO Main Brief (PBr. at 33), *Funk v. Wolf,* 144 A.3d 228, 249 (Pa. Commw. Ct. 2016), aff'd, 158 A.3d 642 (Pa. 2017); and *Cmty. Coll. of Delaware Cnty.*

v. Fox, 342 A.2d 468, 482 (Pa. Commw. Ct. 1975)), were decided under the *Payne v. Kassab* test, which is no longer good law. *PEDF II*, 161 A.3d at 930. There is no consideration of constitutional environmental rights in the *Payne* test, even though, by definition, these constitutional rights limit the government's authority. These prior cases, in other words, are incompatible with the ERA after *PEDF II*. In *Township of Marple*, the Commonwealth Court recognized the same point—that *PEDF II* changes the Section 619 landscape. 294 A.3d at 973-74. Public rights, including the rights recognized in Article I, Section 27, limit agency authority.

Under *Township of Marple*, the requirement to conduct a "constitutionally sound environmental impact review" similarly limits agency authority. Accordingly, the Commonwealth Court instructed the Commission that it could not approve the PECO Gas Expansion Station unless it conducted such a review incorporated the results of the review into its ultimate determination in this proceeding. *Twp. of Marple,* 294 A.3d at 975.

On the second point—climate change—climate change adversely affects the air, water, public natural resources, and environmental values protected by Article I, Section 27. (IBr. at 36). (For a more detailed explanation, see Robert B. McKinstry, Jr. & John C. Dernbach, *Applying the Pennsylvania Environmental Rights Amendment Meaningfully to Climate Disruption*, 8 Mich. J. Envtl. & Admin. L. 50, 63-78 (2018), which is cited at IBr. 36-37). Because Article I, Section 27 applies to climate change, it imposes limits on the Commission's authority to contribute to climate change in ways that impair the public's constitutional rights.[3] Section 619 cannot constitutionally be read otherwise.

---

[3] PECO Gas cites the Commonwealth Court decision in *Funk* to support arguments fundamentally at odds with the Supreme Court's decisions in *Robinson Township* and the *PEDF* line of cases. PBr. at 33-34. *Funk* dealt with the very narrow question of whether the common law writ of *mandamus* could be used to compel action untethered to any statutory authority under Article I, § 27. It is irrelevant to the well settled principles at issue here that (1) statutes should be construed consistent with Article I, § 27 and (2) Commonwealth officers and agencies may not act

As Intervenors argued in the Main Brief (IBr. at 18-22), a basic rule of statutory construction requires laws be construed so as not to render them unconstitutional. 1 Pa. Cons. Stat. § 1922(3) ("In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used . . . That the General Assembly does not intend to violate the Constitution . . . of this Commonwealth."). As the Pennsylvania Supreme Court has instructed, "[u]nder the canon of constitutional avoidance, if a statute is susceptible of two reasonable constructions, one of which would raise constitutional difficulties and the other of which would not, we adopt the latter construction." *Commonwealth v. Herman*, 161 A.3d 194, 212 (Pa. 2017) (internal citation omitted).

Moreover, two states with environmental rights provisions similar to Article I, Section 27 have interpreted their provisions expressly to apply to climate change. The right to a "clean and healthful environment" under the Hawaiian constitutional environmental rights amendment includes a right to be protected against human-caused climate change. *In re Application of Maui Elec. Co*., 408 P.3d. 1, 5 & Holding #4 (Haw. 2017), (holding that Haw. Const. art. XI § 9, which guarantees each person "the right to a clean and healthful environment," includes the right to be protected "from the effect of greenhouse gas emissions"). *See also Matter of Maui Electric Co., Ltd.,* 506 P.3d 192, 202 n.15 (Haw. 2022) ("Article XI, section 9's 'clean and healthful environment' right . . . subsumes a right to a life-sustaining climate system.").

In *Held v. Montana,* No. CDV-2020-307 (1st Dist. Ct. Mont., Aug. 14, 2023), https://westernlaw.org/wp-content/uploads/2023/08/2023.08.14-Held-v.-Montana-victory-order.pdf, a Montana district court drew the same conclusion about Montana's constitutional

contrary to their trust responsibilities. *Funk* also did not address the question of whether the writ of *certiorari* could be applied to reverse decisions refusing to take statutorily authorized actions, as the petitioners in *Funk* might have done had they appealed the Environmental Quality Board's previous denial of their statutorily authorized rulemaking petition.

right to a "clean and healthful" environment in a way that directly undermines PECO Gas' argument. Montana has a longstanding state statute that requires environmental reviews prior to major state environmental decisions. The legislature subsequently created an exemption to the required review for greenhouse gas impacts of these projects, and the plaintiffs challenged that exemption as a violation of their constitutional right to a "clean and healthful environment." Mont. Const. art. IX § 1.[4] After trial, the district court agreed with the plaintiffs, and decided that this exemption was unconstitutional. PECO Gas's claim that the required environmental review under Section 619 does not include climate impacts (PBr. at 33) is similar to the legislative attempt in *Held* to exempt greenhouse gases from environmental review. Like the court in *Held*, the Commission should reject that claim.

2. A Constitutionally Sound Environmental Impact Review Includes Enough Information for the Commission to Comply With Its Constitutional Responsibilities

An additional constraint placed on the Commission, as trustee under Article I, Section 27, lies is its fiduciary responsibilities of prudence, loyalty, and impartiality. The Commission must "exercise [] reasonable care, skill, and caution" by analyzing the impacts of its actions on trust resources. *PEDF II*, 161 A.3d at 938 (citing 20 Pa. Cons. Stat. § 7780); IBr. at 26-30. These duties also limit the Commission in its decision-making under Section 619. IBr. at 18-22. While the PECO Main Brief is silent on the Commission's fiduciary duties as trustee, there can be no doubt that the Commission is a trustee, and that it is bound by these duties in exercising its authority under Section 619. In addition, the Commission has a responsibility to exercise its Section 619 authority in a way that does not unreasonably impair the public's right under the

[4] The Montana Constitution does not include a public trust provision.

ERA's first clause "to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." Pa. Const. art. I, § 27; *see* IBr. at 18-22.

A constitutionally sound environmental impact review enables the Commission to know the potential impacts of a decision on public natural resources as well as air, water, and the environmental values protected by Article I, Section 27. As a result, it enhances the likelihood that the Commission will comply with the substantive requirements of both clauses of the ERA. This review also creates a record, so that a reviewing court can determine whether or not the Commission complied with its statutory duties under Section 619 as well as the ERA. Brief of Amici Curiae Citizens for Pennsylvania's Future *et al*. in Support of Intervenors, at 9-10 (Dec. 15, 2023).

The length and depth of the environmental review will depend on the potential scope and severity of potential environmental harms as well as other factors. Essentially, a constitutionally sound environmental review must be sufficient for and proportional to the circumstances of the decision. The PECO Main Brief invokes the bogeyman of a full-blown environmental impact statement under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4332(2)(C). That mischaracterizes Intervenors' arguments. While NEPA does not apply here, NEPA and its state counterparts provide a source of learning and ideas about what constitutes a sufficient environmental review. As the Commission considers this question, this experience is worth examining. As Dr. Schmid testified, the depth and intensity of the needed environmental review is proportionate to the potential environmental impact of a proposal. *Marple Township*, Ted Uhlman & Julie Baker Remand Statement No. 1-R ("Schmid Rebuttal") at 3:24-25. Dr. Schmid further explained that full environmental impact statements are not required for all projects under NEPA, and less formal environmental assessments may be prepared where

appropriate under NEPA regulations (though as Schmid noted, depth of review must remain proportional to the potential for impacts). Schmid Rebuttal Exh. A at 8-9. Contrary to the PECO Main Brief (PBr. at 41-42), a constitutionally sound environmental review should not simply duplicate other existing procedures and requirements.

Township of Marple is the law of this case. However, PECO flatly asserts—contrary to the Commonwealth Court's clear instruction in this case—that "Pennsylvania jurisprudence" does not require a Commonwealth agency to conduct a "pre-action environmental impact analysis." PBr. at 20 (citations omitted). PECO Gas relies on language excised from the inapplicable decision of the Commonwealth Court in *Frederick v. Allegheny Township Zoning Hearing Board*, 196 A.3d 677 (Pa. Commw. Ct. 2018), *appeal denied*, 208 A.3d 462 (Pa. 2019) that is presented alone and devoid of the context of that particular case. *Frederick* involved the enactment of a zoning ordinance that allowed oil and gas development—an activity subject to extensive statewide regulation and permitting requirements from the Pennsylvania Departments of Environmental Protection and Transportation—in all zoning districts of the township. 196 A.3d at 680. The Commonwealth Court concluded that the Township was not required to engage in environmental, health, and safety studies prior to enacting that ordinance. *See id*. at 700-702.

Here, by contrast, the Commission is an administrative agency exercising its adjudicatory authority to determine whether the Expansion Station—a piece of natural gas infrastructure not subject to a comprehensive and focused state regulatory regime—should be exempted from all land use regulation. The procedural posture and facts of *Frederick* and this case are substantially and meaningfully dissimilar. Particularly, in *Frederick*, the Commonwealth Court was concerned with the administrative burden that would be borne by legislative bodies by requiring

documentation of an environmental impact analysis. *Id*. at 700 n.44; *see also Pa. Env't Def. Found. v. Commonwealth*, 285 A.3d 702, 716 (Pa. Commw. Ct. 2022), *aff'd* 2023 WL 8101630 (holding that "the General Assembly is not required to document 'some sort of pre-action environmental impact analysis' as a pre-condition to enactment of a statute" because it is "presumed that the General Assembly enacts legislation that conforms to any and all applicable constitutional mandates") (quoting *Frederick*, 196 A.3d at 700). In fact, the ordinances challenged in *Frederick* and subsequent cases relying on *Frederick* all contain detailed permit application requirements intended to ensure that any unconventional gas drilling approved under the ordinances is protective of the environment as well as public health and safety. *Murrysville Watch Comm.*, 272 A.3d at *10.

Unlike in the legislative context, the burden here is on PECO to show that its proposed Expansion Station will comply with Section 619 and the ERA. Any conclusion by the Commission that the Expansion Station is reasonably necessary for the convenience or welfare of the public will be reviewed by the Commonwealth Court on the basis of the record created in this proceeding. Accordingly, the record must reflect the Commission's review of the Expansion Station's reasonably foreseeable impacts as part of a "constitutionally sound environmental impact review," *Twp. of Marple,* 294 A.3d at 975.

Furthermore, *Frederick* and the zoning cases relying upon *Frederick* that PECO Gas cites, are inapplicable here because extensive environmental review requirements are already required before the adoption of zoning ordinances. The local legislative body must consider impacts on Article I, Section 27 resources and undergo multiple levels of review both in the adoption of a zoning ordinance itself and the precedent comprehensive plan. *See* 53 Pa. Cons. Stat. §§ 10302, 10303(a)(3) (requirements and process for adoption of comprehensive plan); §

10301(a) (2),(6),(7); (requirements for consideration of environmental trust resources in comprehensive plans); § 10601 (requirement that a zoning ordinances must "implement" the comprehensive plan); §§ 10603, 10604(1) (zoning ordinances must consider and preserve "the natural, scenic and historic values in the environment and preservation of forests, wetlands, aquifers and floodplains."); §§ 10609, 10610 (zoning ordinances must be prepared by the planning commission and are subject to review and comment by the county planning commission and any proposed ordinance is subject to requirements for public notice and a public hearing).

In upholding ordinances authorizing unconventional gas development ordinances under *Frederick* and similar subsequent cases, the Commonwealth Court held that the municipalities adopting these ordinances had complied with the relevant provisions of the Municipalities Planning Code requiring protection of the environment as well as public health and safety. *Murrysville Watch Comm.,* 272 A.3d at *14-15. The Commission has not incorporated equivalent considerations in its proceeding generally or its proceedings in this case, and the Commonwealth Court was undoubtedly aware of these differences in rendering its decision in *Township of Marple*.[5] The extensive consideration of impacts of municipal land use and zoning decisions under the MPC make it all the more important that the Commission not override local zoning decisions lightly, as PECO Gas would have in the current case.

Therefore, to satisfy its ERA trustee duties of prudence, loyalty, and impartiality, the Commission must consider how its actions will impact Pennsylvania's natural resources as well

[5] PECO Gas's suggestion that the public hearing requirement of Section 619 is an adequate process for considering environmental concerns, (PBr. at 41-42), directly contradicts the Commonwealth's *Township of Marple* decision that found the Commission's analysis deficient irrespective of the numerous environmental issues raised in the public hearings. This contention further ignores that PECO bears the burden of proof. 53 Pa. Stat. § 10619. Moreover, Section 619 contains nothing like the express incorporation of environmental considerations in a comprehensive plan and zoning ordinance adoption and does not include the multiple levels of review by local and county planning commissions and multiple public hearings, making it distinct from *Frederick*.

as air, water, and the environmental values the ERA protects. *See PEDF II,* 161 A.3d; IBr. at 18-22. And pursuant to the clear instructions of the Commonwealth Court in *Township of Marple*, this requires a "constitutionally sound environmental impact review." *Twp. of Marple,* 294 A.3d at 975.

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

1. To Conduct a "Constitutionally Sound Environmental Impact Review," the Commission Must Consider the Reasonably Foreseeable Climate Change and Cumulative Environmental Effects of the Gas Expansion Proposal Made Possible by the Station, Not Just the Environmental Effects of Its Location

Intervenors argued in the Main Brief that the Commission, as a trustee under Article I, Section 27, must analyze in advance the reasonably foreseeable environmental impacts of its proposed decision — particularly its climate change and cumulative impacts. This obligation grows directly out of the Commission's trustee responsibilities and *Township of Marple*. IBr. at 22-49. The PECO Main Brief does not directly address the issue of reasonable foreseeability. Instead, it stresses what PECO believes to be the narrow scope of the Commission's responsibility under *Township of Marple*, particularly by deciding what physical parts of the PECO proposal are subject to Section 619 and which are not.

PECO would have the Commission ignore its trusteeship responsibility by not considering the reasonably foreseeable climate change and cumulative impacts of its decision. PECO acknowledges that there will be increased greenhouse gas emissions and characterizes these emissions as relatively small. PBr. at 34. But any conclusion about the overall magnitude of these emissions is impossible without an analysis of their likely full extent. PECO's Main Brief does not directly address cumulative air quality impacts; without any such analysis, it is

impossible to dismiss them as minor or insubstantial. In fact, given the scope of the Expansion Station, common sense tells us that these emissions would certainly be orders of magnitude greater than PECO's calculation of the emissions from the pieces of equipment located at its Expansion Station.

2. To Conduct a "Constitutionally Sound Environmental Impact Review," the Commission Must Analyze and Evaluate Alternatives to the PECO Proposal

As explained in Intervenors' Main Brief, PECO Gas did not produce evidence regarding the environmental impacts of a reasonable range of alternatives to the Expansion Station, including the alternative of not going ahead with it. The Commission needs to examine alternatives because it must use the results of its environmental review to determine whether "the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public," 53 Pa. Cons. Stat. § 10619. That decision can only be made by comparing alternatives. While PECO Gas did not directly contest this point in its Main Brief, it argues that the only choices that require environmental review are whether to put the station at one proposed location or another location. PBr. at 38. It did not evaluate the alternative of not siting the station anywhere. As a result, PECO Gas has not provided the Commission with the materials needed for a constitutionally sound environmental review.

PECO points out in its Main Brief, that the "Initial Proceeding included extensive testimony on: (1) the need for the Station as part of a broader Natural Gas Reliability Project to provide an additional reliable supply of natural gas to an area with recognized demand and to reduce price volatility and over dependence on delivered supply and spot market purchases." PBr. at 8. Indeed, the PECO Main Brief devotes an entire page to findings the Commission made in the Initial Proceeding about the need for the overall project, including, but not limited to, the Expansion Station. PBr. at 8-9. In this remand proceeding, however, PECO Gas argues

that the foreseeable environmental impacts of approval of the Expansion Station (beyond simply any environmental differences between different potential locations) cannot be considered—even though it uses the alleged need for the overall project to justify its position that its Section 619 Petition be approved.

But that claim presupposes, wrongly, that the Commission has already made a final decision about the need for an Expansion Station. PECO asserts that the "Commission has already found that the Station is needed to enhance the reliability of PECO's natural gas distribution system." PBr. at 7. Yet, in its March 2023 *Township of Marple* decision, the Commonwealth Court vacated the Commission's opinion and order—which means that PECO Gas cannot rely on the findings in the Initial Decision about the need for the Expansion Station. Moreover, the *Township of Marple* Court specifically required the Commission to reconsider the reasonable necessity of siting the Expansion Station in light of the required environmental review. 294 A.3d at 974-75. The Commission is thus not bound by any prior determination of need for either the Expansion Station or the overall project it had previously enabled.

Because there is no prior legally binding Commission decision on the need for the Expansion Station, the Commission cannot assume, as PECO's Main Brief assumes, that the only siting decision is whether to build the Station in one location or another. Another siting option is available—one that is fully within the Commission's authority under Section 619: the Station should not be located at the proposed site or anywhere else. Indeed, given the fact that consideration of alternatives, including the no-action alternative is essential for the Commission to determine the need for the Expansion Station and is a central requirement for environmental assessment as exemplified by NEPA case law and regulations (40 C.F.R. § 1502.14(c)) and the

requirements for state environmental assessments,[6] the Commonwealth Court's decision requiring a constitutionally sound environmental impact review must be read to include consideration of a reasonable range of alternatives, including the no-action alternative.

3. PECO Gas Has Not Met Its Burden of Submitting a Constitutionally Sound Environmental Review Because Substantial Emissions Will Likely Occur Even After All Necessary Permits Are Obtained

No permit whatsoever is required for the majority of emissions that will foreseeably result if the Commission overrides Marple Township's zoning ordinance. Because PECO Gas would have the Commission ignore these impacts, the Commission does not have an estimate for those emissions, as required to allow the Commission to satisfy its constitutional obligations.

As the prior analysis indicates, a constitutionally sound environmental analysis is broad enough to ensure protection of the rights recognized in the ERA. Merely obtaining the necessary permits does not ensure a decision comports with the ERA, and, enumerating permitting

---

[6] *See* Intervenors' Main Brief, at 51-52; *See also* 4 Minn. Stat. § 116D.04, subdiv. 6 (2019) ("No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct."); Haw. Rev. Stat. § 11-200.1-18(d)(7) (2023) ("Identification and analysis of impacts and alternatives considered[.]"); 329 Ind. Admin. Code § 5-3-2(b)(1)(B) (2021) ("An environmental assessment includes the following: (1) Brief discussions of . . . alternatives to the considered action . . . ."); Md. Code Regs. § 11.01.08.08 (2021) ("6. List of alternatives considered."); 301 Mass. Code Regs. § 11.05(5)(a) (2021) ("The ENF shall include a concise but accurate description of the Project and its alternatives . . . ."); Mont. Admin. R. § 17.4.609(3)(f) (2021) ("[A]n EA must include . . . a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider and a discussion of how the alternative would be implemented . . . ."); 1 N.C. Admin. Code § 25.0502(2) (2021) ("[R]easonable alternatives to the recommended course of action . . . ."); Wis. Admin. Code SPS § 301.21(2)(b)(2) (2021) ("A description of reasonable alternative actions to the proposed action, including the alternative of taking no action.");Wash. Rev. Code § 43.21C.030(c)(3); N.Y. Comp. Codes R. & Regs. tit. 6 § 617.9(b)(5)(v); *A Guide to the Montana Environmental Policy Act*, at 19 (Revised by Hope Stockwell, 2019), https://leg.mt.gov/content/Committees/Interim/2019-2020/EQC/2019-mepa-handbook.pdf; Cal. Code Regs. tit. 14 § 15126.6.

requirements does not take the place of an environmental assessment. IBr. at 15.[7] Furthermore, PECO Gas' attempt to satisfy its burden by reiterating permit requirements directly contravenes both Pennsylvania Supreme Court precedent and the Commonwealth Court's analysis in *Township of Marple*.

By claiming that they have met their *prima facie* burden by obtaining necessary permits, PECO Gas seeks to relitigate an issue the Pennsylvania Supreme Court has already decided. PBr. at 30. In *PEDF II*, the Pennsylvania Supreme Court rejected the *Payne* test—a three-part balancing test used by courts to assess compliance with the ERA—because it "strips the [ERA] of its meaning." *PEDF II*, 161 A.3d at 930. This legally untenable *Payne* test essentially limited environmental review under Section 27 to the meaningless task of determining whether an action had the required permits. But compliance with statutes and regulations does not equate to compliance with the constitution. By arguing that meeting a narrow set of regulatory permit determinations satisfies its *prima facie* case and the Commission's ERA obligations, PECO Gas seeks to rewrite the well-established constitutional law of *PEDF II* and read the ERA out of existence.

Furthermore, the Commission's constitutional trustee duties under the ERA are separate and distinct from the regulatory requirements that other agencies place on PECO Gas and the Expansion Station. *See PEDF II*, 161 A.3d at 930 (finding the *Payne* test, which relied on statutory regulatory compliance, to be unrelated to the ERA's "trust principles"). As an ERA trustee, the Commission cannot fulfill its fiduciary duties of prudence, loyalty, and impartiality

[7] Indeed, PECO Gas takes the argument to the illogical conclusion that a showing that the project qualifies for a blanket permit exemption meet the prerequisites of a constitutionally adequate review. Although PECO Gas does not say so explicitly, its argument amounts to the contention that the Commission should defer to DEP's judgment, when DEP has provided no independent review of the project at issue due to PECO Gas' qualification for an exemption or permit by rule.

simply by looking at a permit checklist. This is particularly true when a trustee's decision may cause negative environmental impacts not addressed by permit requirements, as is the case here. In fact, PECO Gas relies on permits by rule and permit exemptions (PBr. at 21-30), which is precisely the one-size-fits-all approach that the Supreme Court rejected for local zoning decisions in *Robinson Township*.

PECO Gas' argument that it met its *prima facie* burden by outlining other agency determinations and permits also directly flouts the Commonwealth Court's prior decision in this case. In the original proceeding, PECO submitted information about permits that the Commission mentioned in its initial order.[8] However, the Commonwealth Court found this showing [in the initial order] to be inadequate, holding that "the Commission is obligated to consider the 'environmental impacts'. . . *while also* deferring to environmental determinations made by other agencies . . ." *Twp. of Marple*, 294 A.3d at 973-74 (emphasis added). Therefore, a constitutionally sound review requires an independent consideration of environmental impacts *in addition to* a consideration of other agency determinations, such as permits. As the applicant, PECO Gas has the burden of proof to provide the Commission with adequate information to consider environmental impacts. 66 Pa. Cons. Stat. § 332(a). While some of this information may be pulled from permitting materials and other agency determinations, if reasonably foreseeable environmental impacts are not adequately addressed in such materials then PECO Gas must independently analyze these impacts and provide that analysis to the Commission.

Intervenors produced unrebutted testimony establishing that the Expansion Station would allow increased emissions of methane, a potent greenhouse gas, from leaks in PECO Gas'

[8] In its initial order, the Commission discussed the lack of an applicable air permit as well as the Phase I and II site assessment PECO had performed. Commission Opinion and Order at 35 n.14 (Mar. 10, 2022). Furthermore, the initial record included discussion of PECO's NPDES Permit it received from DEP (Exh. JM-2 at 9-10).

distribution system and use of natural gas in homes. (Marple Township, Ted Uhlman & Julie Baker Remand Statement No. 2 at 17-18 ("Najjar Direct")). EPA has recently adopted regulations requiring control of methane leaks from natural gas production and transmission operations. *Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review*, 40 C.F.R. § 60.5360 Subparts OOOOb (new source performance standards) OOOOc (emissions guidelines for existing sources), https://www.epa.gov/system/files/documents/2023-12/eo12866_oil-and-gas-nsps-eg-climate-review-2060-av16-final-rule-20231130.pdf. These regulations, however, do not apply beyond the point of the delivery of the natural gas to the gateway of the distribution system. *See* 40 C.F.R. § 60.5365b (applicability of the new source rule), § 60.5430b (rule applies to "natural gas production, processing, transmission, and storage, which include the well and extend to, but do not include, the local distribution company custody transfer station," defined as "a metering station where the [local distribution system] receives a natural gas supply from an upstream supplier"); § 60.5386c (emissions guidelines applicability); § 60.5430c (regulated source category does not include local distribution company). This regulation has nothing to do with emissions from distribution systems, which are the relevant emissions here. In fact, EPA's calculation of greenhouse gas emissions from natural gas systems, which Mr. Harrington failed to consider in his calculation of the Expansion Station's emissions, do include emissions from downstream sources and these emissions are very substantial. (Tr. 2447:19 – 2448:6 (referencing EPA's calculation of methane emissions from natural gas distribution found in *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2021*, at 3-95 to 3-96 (2023)).

Likewise, carbon dioxide emissions from burning natural gas in all homes, most commercial establishments, and many industrial establishments are completely unregulated and, like other pollutants, do not require a permit. However, these emissions can have a tremendous environmental impact. IBr. at 9-12.

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

As discussed in Intervenors' opening brief, PECO Gas has the burden of producing evidence and proving that the "proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public." 53 Pa. Cons. Stat. § 10619. Thus, Section 619 requires the proposal be shown to be (1) reasonably necessary (2) for the convenience or welfare of the public. PECO Gas has not made the required showing on three specific issues: the effect of warming winters on demand, the potential for reasonable alternatives, and climate change and cumulative air impacts from the project. Moreover, even if PECO Gas met its initial burden to go forward, Intervenors have shown that the Expansion Station is not necessary and will not advance the convenience or the welfare of the public. IBr. at 53-55.

In PECO Gas' Brief, rather than explaining how and why the Expansion Station is "reasonably necessary" and will serve the public convenience and welfare in light of the overwhelming evidence to the contrary produced on remand, PECO Gas relies solely on the moot findings made by the Commission in the Initial Proceeding. (PBr. at 4-5, 7-9, 17-18, 34). PECO may not do so, given the Commonwealth Court's decision concluding that the Commission is required to consider the impacts of the Expansion Station on environmental trust resources under Article I, Section 27 as part of its ultimate determination of reasonable necessity in this proceeding. The Commission's pre-remand findings were made without consideration of the

impact of climate change on demand, alternatives, or the project's climate change and cumulative air quality impacts. Evidence produced by Intervenors showed there will be no necessity for an expansion and that expansion of natural gas distribution infrastructure, under the facts presented for this particular project, will disserve the public interest. PECO Gas incorrectly states that the testimony regarding the adverse effects of an expansion of distribution systems to commercial and residential customers would "render Section 619 illusory for natural gas distribution companies and prevent them from fulfilling their obligation under Section 1501 of the Code, 66 Pa. C.S. § 1501, to provide reliable service." PBr. at 17. PECO Gas does not identify any instance where expansion of service to any category of customer, much less residential and commercial customers, would be necessary and serve the public interest, as is its burden.

In the only section of its brief that addresses climate change, PECO Gas fails to engage with the testimony of Dr. Raymond Najjar and Dr. James Schmid on climate change, its impact on demand, and the adverse impact of the project on both climate and cumulative air burdens. PBr. 32-35. PECO Gas further contends that the Intervenors are seeking to "place local interests above the public interest," (PBr. at 7), when, in fact, following sound environmental review principles and incorporating consideration of climate change is plainly in the public interest. What follows reiterates the evidence presented and shows how it relates to a sound environmental assessment.

1. The Expansion Station Is Not Reasonably Necessary

The Commission has found that there is no need for the Expansion Station to serve the needs of existing customers, (Initial Decision, Findings of Fact at ¶34), and no evidence introduced on remand contravenes this finding. As discussed in the Intervenors' Main Brief, the unrebutted evidence presented on remand demonstrates that total and peak demand for natural gas from commercial and residential customers during the winter will be reduced due to the

impacts of climate change, more efficient gas appliances and the current market trend to replace natural gas appliances with non-emitting electric appliances. IBr. at 6-9. By way of example, to rebut PECO Gas's testimony, Dr. Najjar testified:

> In 2022, 4.2 million heat pumps were sold in comparison to 3.9 million gas furnaces. This shift occurred before the massive incentives associated with the Inflation Reduction Act. So we can accept - we can expect these trends of both declining use of gas appliances and increasing use of electric appliances to continue and even accelerate well into the future.

(Tr. 2258: 2-10).

The unrebutted evidence produced on remand shows that the Expansion Station would allow expansion of natural gas services to new customers whose demand would exceed the reduction in existing demand resulting from the effects of climate change, efficiency, and market trends. IBr. 6-9. PECO Gas' response relies on the Commission's findings made without consideration of the testimony regarding reduction in demand and states that "Professor Najjar also overlooked that, even absent any increase in customer usage, PECO would still need to construct the Station to increase its capacity supply to diminish its design day constraints." PBr. at 34 (*citing* Initial Decision, FOF No. 20, *citing* PECO St. No. 2, at 3-7). PECO Gas also points to testimony regarding the need to address supply fluctuations. PBr. at 34. Both arguments completely ignore Dr. Najjar's testimony that PECO's demand analysis was flawed because increased winter temperatures, a switch to energy efficient gas appliances, and a switch to energy efficient gas appliances will decrease both peak and overall demand.[9] This applies across the system, and is not limited to Marple Township, Delaware County, or the service area for the Expansion Station. Even if PECO Gas had met its burden of proving the issue of necessity, Dr. Najjar's testimony rebutted PECO Gas, requiring further testimony by PECO Gas to explain why

[9] PECO refers to testimony of its witnesses advancing the claim that energy efficient gas appliances would increase overall and peak demand (PBr. at 33, n.11)., a notion completely rebutted by Dr. Najjar. (Tr. 2255:22 – 2257:7).

the Expansion Station is necessary with existing customer demand going down and further decreasing in the future. There is no such evidence.

2. The Expansion Station Is Not in the Public Interest and Will Therefore Not Advance the Convenience or Welfare of the Public

As shown in Intervenors' Brief, the evidence shows that PECO's proposed Expansion Station is not only unnecessary; it will also result in uncontrolled increases in greenhouse gas emissions. These will result from increased, unregulated and uncontrolled combustion as well as unregulated and uncontrolled emissions of methane, a potent greenhouse gas. All of these increased emissions, rather than advancing the convenience or welfare of the public, will disserve the public interest. IBr. at 11-12.

Dr. Raymond Najjar explained:

> Because electricity can be decarbonized, achieving the reductions necessary to avoid the worst impacts of climate disruption will require (1) discontinuing fossil fuel use in situations where carbon dioxide emissions cannot be captured by pollution control and (2) using electricity to provide the power for those situations. For the latter, this means that appliances that use natural gas and oil in buildings for heating, cooling, cooking, and hot water be replaced with electric appliances, such as energy-efficient heat pumps, induction cook tops, and other electrical appliances whose use has been encouraged by Congress in the Inflation Reduction Act. Decarbonizing also makes sense in a warming climate because of the current and projected increases in summer cooling demand and decreases in winter heating demand. Because cooling is generally provided by electricity and heating by fossil fuels, we should expect increased demand for energy that can be decarbonized (like electricity) and a decreasing demand for energy that cannot (like natural gas).
>
> The need to reduce emissions by 50% by 2030 and to achieve emissions neutrality by 2050 makes it imperative that we not build new infrastructure to expand use of fossil fuels in situations where greenhouse gas emissions cannot be captured and sequestered.

Najjar Direct at 16: 8-22.[10] After demonstrating that winter demand would go down due to increased winter temperatures, he also testified:

---

[10] The Inflation Reduction Act referenced in the testimony, as a matter of law, provides incentives in the form of tax credits or direct payments equaling 30% of the cost of energy efficient heat pumps and increasing up to 50% of the

> In contrast, the same analysis by ICF concluded that cooling degree days (CDDs), defined in the same way as HDDs but considering temperatures above 65 °F, are projected to dramatically increase in the future. Thus, installing energy efficient heat pumps to meet both heating and cooling requirements can save consumers money, while reducing greenhouse gas emissions.

(*Id.* at 15: 1-5). On cross examination of Dr. Najjar, PECO Gas elicited testimony that use of electric appliances in lieu of gas appliances would be cheaper and become increasingly cheaper for customers due to trends in electricity generation and the Inflation Reduction Act. (Tr. 2272:4-22) Dr. Najjar elaborated on the importance of preventing every additional ton of greenhouse gas emissions:

> Mr. Harrington misses the point that every metric ton of greenhouse gas emissions has a human and environmental cost. And as I said in my direct testimony, it has been estimated that every 500 metric tons emitted now anywhere results in a human death between now and 2100.

(N.T. 2259:3-8). PECO Gas has presented no testimony rebutting the foregoing evidence.

A decision reached under the United Nations Framework Convention on Climate Change ("UNFCCC"), Sept. 8, 1992, 1771 U.N.T.S. 107, S. Treaty Doc. No. 102-38, , *after* Dr. Najjar's testimony, further supports his conclusion that the unnecessary expansion of natural gas distribution infrastructure is against the public interest. The objective of the Convention, to which the U.S. is a party, is to prevent dangerous anthropogenic (human-caused) interference with the climate system. *Id.* art. 2. The recently concluded Conference of the Parties reached a decision "*calls on* Parties" to contribute to global efforts by "[t]ransitioning away from fossil fuels in energy systems, . . .accelerating action in this critical decade, so as to achieve net zero by

---

cost in environmental justice communities. Inflation Reduction Act ("IRA"), Public Law 117-169, 136 Stat. 2003 (August 16, 2022), §§ 13801 (adding §§ 6417 and 6418 of the Internal Revenue Code (Code) (providing for direct payments or sales of credits for nonprofits), 13102 (investment tax credits for solar, geothermal, etc.), 13301 (tax credit for residential energy efficiency), 13302 (tax credit for residential purchase of solar electric property, solar water heating property, fuel cells, geothermal heat pump property, small wind energy property, and qualified biomass fuel property), 13303 (energy efficient commercial building tax deduction); *see also* Congressional Research Service, *Tax Provisions in the Inflation Reduction Act of 2022 (H.R. 5376)*)

2050 in keeping with the science." UNFCCC, *Conference of the Parties serving as the meeting of the Parties to the Paris Agreement: Outcome of the first global stocktake* ¶28(d) (revised advance version, Dec. 13, 2023), https://unfccc.int/sites/default/files/resource/cma2023_L17_adv.pdf.[11] Because the U.S. is a party to this Convention, and because of the importance of treaties under the U.S. Constitution,[12] this decision should inform the Commission in deciding what serves the public interest under Section 619.

PECO Gas has also produced no evidence whatsoever that would suggest that its unnecessary Expansion Station would serve the public interest in any other way, as is needed to meet its burden of going forward and burden of proof under Section 619. Given that failure, its application should be denied.

---

[11] Similarly, the Massachusetts Department of Public Utilities recently issued an order barring gas utilities from charging ratepayers for new gas distribution infrastructure if non-gas alternatives exist. Order, MA DPU Docket No. 20-80-B at 122 (Dec. 6, 2023), https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/18297602.

[12] U.S. Const. art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding.")

III. CONCLUSION

PECO Gas has not produced an environmental record that satisfies the requirements of *Marple Township* and the Expansion Station is unnecessary and will not serve the public interest. Accordingly, PECO Gas's application must therefore be denied.

Dated: January 3, 2024

Respectfully submitted,

/s/ John C. Dernbach

John C. Dernbach
(Pa. I.D. No. 33897)
Professor Emeritus
Widener University
Commonwealth Law School
3800 Vartan Way
Harrisburg, PA 17110
(717) 541-1933
jcdernbach@widener.edu

/s/ Robert B. McKinstry, Jr.

Robert B. McKinstry, Jr.
(Pa. I.D. No. 30015)
548 School House Rd.
Kennett Square Pa. 19348
(484) 467-3207
robert.mckinstry@gmail.com

/s/ Devin McDougall

Devin McDougall
(Pa. I.D. No. 329855)
Senior Attorney
Clean Energy Program
Earthjustice
Philadelphia Office
1617 John F. Kennedy Blvd., Suite 2020
Philadelphia, PA 19103
(917) 628-7411
dmcdougall@earthjustice.org

Counsel for Intervenors