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)

REPLY REMAND BRIEF OF INTERVENOR MARPLE TOWNSHIP

J. Adam Matlawski, Esq.
Attorney I.D. No.: 41678
Kaitlyn T. Searls, Esq.
Attorney I.D.: 311237
1223 N. Providence Road
Media, PA 19063
Counsel for Marple Township

January 3, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Constitutional Provisions

Other

I. SUMMARY OF REPLY

PECO's interpretation of the Commonwealth's Court Remand Order is terribly flawed. The Commonwealth Court overruled the entire decision of the Commission except as it applied to the Commission's determination that the *original* security fence proposed by PECO and part of its *original* Petition was a facility and exempt from local zoning. However, PECO has since changed its design and equipment, and therefore none of the original Commission findings are appliable. The Commission must render an entirely new decision that is in line with the Commonwealth Court's Order and Decision.

Despite this, PECO relied very little on the evidence, or lack thereof, presented at the Remand Proceedings and instead focused almost exclusively on findings of fact and conclusions reached previously by the Commission in the Original Decision. PECO claims that various facts have already been concluded and therefore automatically applicable to these Remand Proceedings. However, the prior decision of the Commission was vacated, and the Commission must now render a new decision that factors in a constitutionally sound environmental review.

It seems abundantly clear what the Commission must do in light of the Commonwealth Court's Order, however PECO's brief attempts to undercut and unreasonably narrow the review that the Commission must complete. The Commission must, in no uncertain terms, render a new decision that takes into account its constitutionally sound environmental assessment.

There are *no* prior agency determinations applicable to this matter and therefore nothing for the Commission to defer to when rendering its revised decision. Furthermore, PECO's securing of or not securing of permits is insufficient to take the place of an environmental review, especially considering the permits actually secured for the facility. The Commission therefore must complete a full environmental review <u>of the entire station</u> that is consistent with Article 1,

Section 27 of the Pennsylvania Constitution and render a decision accordingly. PECO's further reliance on outdated, overturned case law is flawed.

When the Commission fulfills its duty, it will be clear that PECO has not met its burden of reasonable necessity for the public convenience and welfare and therefore PECO's Petition must be denied.

II. ARGUMENT

a. THE COMMISSION MUST RENDER AN ENTIRELY NEW DECISION

Rather than present sufficient evidence and rely upon it in these Remand Proceedings, PECO chose to present limited evidence and rely almost exclusively on the findings of fact and conclusions of law of the Commission from the Original Proceedings. The findings and conclusions which have been *vacated*. See Township of Marple v. Pa. PUC, 294 A.3d 965 (Pa. Cmwlth. Ct. 2023).

i. Previous findings and conclusions by the Commission in the Original Proceedings are inapplicable to the Remand Proceedings and Commission's new decision

The Previous findings of fact and conclusions of law have been vacated by the Commonwealth Court and are therefore inapplicable. PECO is misguided in stating that the Commission has already found that the Station provides the twin public benefits of ensuring a reliable supply of natural gas for PECO's service territory and a reliable mechanism to deliver such gas to meet undisputed demand in Delaware County (PECO Main Br., p. 18).

The only issue theoretically off the table for these proceedings is the "security fence"[1] however, the original security fence is no longer part of the new Station's design. PECO has

[1] The Commonwealth Court found that the Commission properly concluded that the "security fence" described by PECO in the Original Proceedings and as requested in its original Petition was a "facility" and exempt from local zoning. Township of Marple, 294 A.3d at 972.

changed its design and its equipment since the Initial Proceedings and Initial Decision. PECO presented evidence that the new "Enhanced Design," in lieu of just a security fence, will include a perimeter wall constructed of brick and precast concrete, and an accompanying clock tower. (PECO St. No. 4-RD at 3:14-4:5.) PECO describes the new design as including a clocktower, perimeter wall of brick and precast concrete, and ambient lighting. (PECO St. No. 4-RD at 3:14-4:5; R. 1996-2001 and 2008; *see also* Marple Township Exhibit DO-Cross-1).

Furthermore, the "Enhanced Design" utilizes a 50-kw generator (PECO St. 6-RD, p. 9) which was not included in the original design or Initial Proceedings and therefore not previously considered by the Commission. The Commission must complete an evaluation of the entire Station's impact, including the increased impact caused by the changes to the Station's design.

Despite the Commonwealth Court's decision, PECO asserts that the "Commission has already found that the Station is needed to enhance the reliability of PECO's natural gas distribution system." (PECO Main Br., p. 7). Yet in its March 2023 Township of Marple decision, the Commonwealth Court vacated the Commission's opinion and order, which means that PECO cannot rely on the findings in the Initial Decision about the need for the Station. Moreover, the Township of Marple court specifically required the Commission to reconsider the reasonable necessity of the siting of the Station in light of the required environmental review. Township of Marple, 294 A.3d at 974-75. The Commission is thus not bound by any prior determination of need for either the Station or overall project itself.

Despite this, PECO's Brief, rather than explaining how and why the 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 relies on the findings made by the Commission in the Original Proceeding. (PECO Main Br., p. 4-5, 7, 8-9, 17-18, 34).

Those findings were made without consideration of any environmental, safety or health impact assessment, and without a final design of the Station.

Therefore, it is Marple Township's position that none of the previous findings by the Commission are automatically applicable in these Remand Proceedings. Accordingly, the Commission must render an entirely new decision regarding the PECO Petition that factors in the results of a constitutionally sound environmental review as instructed by the Commonwealth Court. Township of Marple, 294 A.3d at 975.

b. PECO'S REQUEST FOR THE COMMISSION TO REVIEW THESE PROCEEDINGS UNDER A LIMITED SCOPE IS CONTRARY TO THE COMMONWEALTH COURT'S ORDER AND SHOULD NOT BE FOLLOWED

PECO waived its opportunity to oppose the Commonwealth Court's decision. PECO could have filed an appeal from the decision of the Commonwealth Court but chose not to do so. Consequently, PECO is stuck with the decision and with the Commonwealth's direct and specific order for this Commission.

Seeking to limit the Commonwealth Court's Order now is inappropriate and guarantees that this matter will make its way back to Commission again. Indeed, the Commonwealth Court found error in the Commission's initial determination that environmental issues are not within the scope of this proceeding. Should the Commission now accept PECO's request for a limited scope on limited issues, the Commission would again be acting in direct contradiction to the Commonwealth Court's Order and the Pennsylvania Constitution.

PECO urges that the ERA analysis is only to apply to buildings and not facilities, such as heaters and generators. (PECO Main Br., pp. 38, 40). However, that is *not* what the Commonwealth Court said. Specifically, the Commonwealth Court demanded that the Commission make environmental findings as to "explosion impact radius" and "emissions",

neither of which could result from the brick and mortar of a building structure. It follows logic, and goes without saying, that the Commonwealth Court was interested in the environmental impact of these two main emissions points of the Station.

Next, PECO argues that the emissions from the utility infrastructure are not relevant. (PECO Main Br., p. 18, 38). Here again, this is not what the Commonwealth Court stated. The Commonwealth Court ordered the Commission to conduct an environmental review of the Station's emissions. Township of Marple, 294 A.3d at 975.

Finally, PECO argues that a NEPA-like environmental impact statement is not necessary for the Commission's ERA analysis under Section 619. (PECO Main Br., p. 18). Marple never argued for the completion of a full environmental impact statement. Marple and Intervenors highlighted that areas of review in environmental assessments performed under NEPA as a guide for the Commission's review These topics make logical sense and provide protection for the people of Marple and the Commonwealth of Pennsylvania and the Commission is able to use them as a guide for its review without the need for an environmental impact statement being completed.

Interestingly, however, PECO asked Dr. Schmid on cross-examination about the length of time for completion of an environmental impact statement and he testified that he has been involved in some that take a matter of a few months (R. 2214). PECO's selection of this site was in 2019, and PECO has been fighting with the Township for nearly five years. PECO could have completed multiple environmental impact statements in the time that has passed and, perhaps, completed its Station at another, more suitable location. PECO, as the project proponent, chose not to take this route and is left with the consequences of that decision.

c. COMMISSION MUST COMPLETE A CONSTITUTIONALLY SOUND ENVIRONMENTAL REVIEW IN LIGHT OF SECTION 619 OF THE MPC

Despite PECO's attempts to control and limit the Commission's review, there is no question that the Commission must conduct a constitutionally sound environmental review of PECO's proposed Station. Township of Marple, 294 A.3d at 975. A constitutionally sound environmental review is no longer a simple balancing test of benefits versus harms.

A mere recognition of the harms of a project and comparison to whether the benefits outweigh those harms was the prior Payne test which has since been overruled. Payne v. Kassab, 312 A.2d 86, 94 (Pa. Cmwlth. Ct. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976). Payne 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. Id. Because the Payne test deprived the constitution of any independent meaning, the Pennsylvania Supreme Court rejected that test in Pennsylvania Environmental Defense Foundation 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 Commission in its interpretation of Section 619. Township of Marple, 294 A.3d at 974-75.

Despite it no longer being the law, PECO's analysis still reflects the Payne test. PECOs overall argument is, in effect, that the Commission should approve the PECO Petition 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. Not

only is this approach inaccurate, but PECO's position also thumbs its nose at the Commonwealth Court and its clear orders to the Commission.

Also contrary to a suggestion in the PECO Main Brief, (PECO Main Br., p. 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. C.S. § 1501. PECO can still provide reliable service to its existing customers. Section 1501 should not be read to give PECO 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, § 27. To read section 1501 in this way would render that section unconstitutional.

i. PECO relies on cases that are no longer good law

Indeed, the two principal cases cited in PECO's Main Brief on this point, Funk v. Wolf, 144 A.3d 228 (Pa. Cmwlth 2016), aff'd, 158 A.3d 642 (Pa. 2017); and Cmty. Coll. of Delaware Cnty. v. Fox, 342 A.2d 468, 482 (Pa. Cmwlth. Ct. 1975)), were decided under the Payne 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.

Township of Marple is the law of this case. However, PECO flatly asserts, contrary to the Commonwealth Court's clear instruction, that "Pennsylvania jurisprudence" does not require a

Commonwealth agency to conduct a "pre-action environmental impact analysis." (PECO Main Br., p. 20). PECO 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. Cmwlth. 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 existing statewide regulation and permitting requirements from the Pennsylvania Departments of Environmental Protection and Transportation—in all zoning districts of the township. Id. 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.

The underlying facts and procedural posture of Frederick and this case are substantially different. Particularly, in Frederick, the Commonwealth Court was concerned with the administrative burden that would be borne by legislative bodies from requiring documentation of an environmental impact analysis. *Id*. at 700 n.44. However, unlike in the legislative context, the burden here is on PECO to show that its proposed Station will comply with Section 619 and the ERA. Any decision by the Commission that the 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 Station's reasonably foreseeable impacts as part of a pre-action "constitutionally sound environmental impact review," Twp. of Marple, 294 A.3d at 975.

PECO went so far to state in its brief that, under Frederick, "Pennsylvania jurisprudence makes clear that the ERA does not require that a 'pre-action environmental impact analysis' be conducted." (PECO Main Br., p 20). However, unlike the precedent in place at the time

Frederick was decided, here the Commonwealth Court specifically said that a pre-action environmental impact analysis for this Station *is* required.

d. THERE ARE NO PRIOR AGENCY DETERMINATIONS FOR THE COMMISSION TO DEFER TO IN ITS DECISION

The Commonwealth Court's directive was for the Commission to complete a constitutionally sound environmental review. In doing so, should the Commission defer to another agency's determination for a certain aspect of that review, then the Commission must identify that agency and the review relied upon. The Commission is not required to accept any permit as an agency determination and, if it does, is not bound to accept that as a "constitutionally sound environmental review". PECO's entire argument rests on the inaccurate belief that it has "obtained" agency "determinations" that the Commission must defer to and thus satisfy its obligation pursuant to the Commonwealth Court's decision. This belief could not be more flawed.

First, PECO has not obtained any agency determinations. According to Merian Webster, the legal definition of determination is as follows: **"**a decision of a court or administrative agency regarding an issue, case, or claim."[2] PECO has not obtained or presented any evidence of any *decision* by an agency. Indeed, what PECO claims to be agency determinations are not decisions at all. Relying on these "illusory" determinations would again render the Commission's decision constitutionally deficient.

Not only is the record devoid of any agency determinations applicable to PECO's project, merely obtaining the necessary permits for a project does not ensure a decision comports with the ERA, and enumerating permitting requirements does not take the place of an environmental assessment. Marple Township addresses the fallacy of this approach in its brief. Indeed, PECO

[2] (https://www.merriamwebster.com/dictionary/determination#legalDictionary).

takes the argument to the illogical conclusion that a showing that the project qualifies for a blanket permit exemption meets the prerequisites of a constitutionally adequate review. (PECO Main Br., p. 29).

i. The securing of or exemption for a permit does not take the place of a constitutionally sound environmental review

The fact that the project or aspect thereof qualifies for an exemption provides an even more important basis for a sound environmental review by the Commission. In this instance, no independent review has been conducted due to its qualification for an exemption or permit by rule. Furthermore, PECO's attempt to satisfy its burden by reiterating permit requirements directly contravenes both Pennsylvania Supreme Court precedent and the Commonwealth's analysis in Township of Marple.

Despite PECO's argument, compliance with statutes and regulations does not equate to compliance with the constitution. In the original proceeding, PECO submitted information about permits that the Commission mentioned in its Initial Order. In its Initial Order, the Commission discussed the lack of an applicable air permit as well as the Phase I and II site assessments that were performed. (Commission Opinion and Order at 35 n.14, 41 (Mar. 10, 2022)). Furthermore, the initial record included discussion of PECO's NPDES Permit it received from DEP (Exh. JM-2 at 9-10). However, the Commonwealth Court found this showing to be inadequate, holding that "the Commission is obligated to consider the 'environmental impacts'… *while also* deferring to environmental determinations made by other agencies . . ." Township of Marple, 294 A.3d at 973-74 (emphasis added).

Recognizing that a piece of equipment does not require an air permit is simply not enough. It may be a small piece of the review, but it is not conclusive. The cutoff numbers for pollutants requiring a permit does not take into account the proximity of residents, homes, and

businesses around the emission site. Surely, an emission point that is exempt from an air permit that sits in the middle of an open field with no homes in sight, is not the same as an emission point that is exempt from an air permit, with residents, homes, children and businesses within 100 feet from an environmental impact perspective. To believe otherwise is simply not logical or in the best interest of the people of Marple Township or the Commonwealth.

In fact, PECO quoted in its own brief from the court in Municipality of Murrysville that, "when government acts, the action must, on balance, reasonably account for the environmental features of the affected locale." Murrysville Watch Comm. v. Municipality of Murrysville Zoning Hearing Bd., 272 A.3d 998, at *11 (Pa. Cmwlth. Ct.), *appeal denied*, 283 A.3d 790 (Pa. 2022) (citing Robinson Township v. Commonwealth, 83 A. 3d 901, 953 (Pa. 2013)).

ii. PECO's alleged agency determinations and permits are insufficient for the Commission to rely upon

Historic properties, endangered or threatened species

First, PECO claims that it received agency determinations of no impact to historic properties, endangered or threatened species. (PECO Main Br., p. 21). PECO then explains its own 70-question Environmental Checklist completed by its own employees. (Id.). However, PECO's own witness, Jeffrey Harrington stated that the conclusion regarding no impact to historic properties and endangered species was based on the fact that there were no historic properties, endangered or threatened species on the project site (PECO St 6-RD, pp. 14, 16; R. 2139). His analysis had nothing to do with whether the emissions from the Station or the any other aspect of the Project could actually be harmful to these properties or species. (Id.)

NPDES permit

Next, PECO points out that it obtained an NPDES permit for stormwater management associated with the construction of the Station (PECO Main Br., p. 22). This permit has nothing

to do with the operation of the station and nothing to do with the topics of environmental review that the Commonwealth Court ordered to be considered in issuing a new opinion.

Emissions

PECO describes PADEP and EPA "determinations" for Station's air emission sources. However, here, there is no evidence of record that any review and decision was made by the PADEP or EPA for the Station's air emissions sources. PECO's citation to a blanket exemption stating that a particular heater or generator would not need a permit is not an agency decision. (PECO Main Br., p. 29).

With respect to emissions, Intervenors were the only ones to initially present any evidence on air quality. Despite PECO's attempts to confuse the issue in its brief, both air quality experts showed results that the Station's emissions unreasonably added to the ambient air quality. (Marple Twp. Statement 1-SR, p. 1; JH-4, p. 5). Indeed, some results were even higher than Marples. (Id.).

It is remarkable that, given the fact that PECO would have already built the Station if it had it its way, it still has no idea which generator it intends to use. PECO described its air emissions points and stated that "an emergency generator, which may either be 30-kW or 50-kW in size." (PECO St. No. 4, p.5:16-19; R. 2369) (PECO Main Br., p. 28). However, this "blanket exemption" does not account for the proximity of the Station to people, residences, schools and businesses.

PECO argues that the Commission is required to defer to the environmental determinations identified above (referring to air permitting exemptions) in evaluating its approval of the siting of the two Buildings under the ERA. Township of Marple, 294 A.3d at 973-74; *see also* Del-AWARE Unlimited, Inc., 513 A.2d at 596. This is an incorrect

characterization of the Commonwealth Court's decision. When the Commission defers to agency determinations, it must identify those agencies and determinations made. IT MUST ALSO complete a constitutionally thorough environmental review. Moreover, falling under the baseline to apply for a permit is not an "agency determination."

PECO claims that Dr. McAuley used the incorrect layout for the Station (PECO Main. Br., p. 32), however, so too did Hoover and Keith, Inc. in its noise study. (R. 1981). The difference here, is that Mr. Harringtons emissions numbers were higher than Dr. McAuley's showing an unreasonable increase in air pollutants. (Marple Twp. Statement 1-SR, p. 1; JH-4, p. 5). Thus, the emissions that PECO argues are "grossly overstated" and "unrealistically high" are, unfortunately for PECO, understated and very realistic.

PECO makes the baseless claim that there is no credible evidence in the record from which the Commission could conclude that air quality would be adversely affected by the Station and that the air modeling by Tetra Tech "shows no impact" is completely disingenuous. (PECO Main Br., p. 32). As clearly shown with a side-by-side comparison of the modelling results, Mr. Harrington's modeling undoubtedly revealed an adverse effect to the air quality. The statement "shows no impact" makes no logical sense. Mr. Harrington testified, in no uncertain terms, that **there would be an impact to air quality** from the Station's emissions. (R. 2412.). Mr. Harrington further testified that there will be an impact to human health from the Station's emissions. (Id.).

Safety/Potential impact radius

PECO then states that the Commission should be satisfied with respect to safety simply because no PHSMA determination is required (PECO Main Br., p. 26). PECO again is intentionally misinterpreting the Commonwealth Court decision. Just because PHSMA is not

required to render a decision/determination regarding a project does not mean that there are no environmental impacts from that project.[3] PECO's argument that since no permit is required under PHMSA to operate the facility, the environmental analysis as to the safety of the surrounding neighbors and property is complete is preposterous. The Commission must still review the environmental impacts of citing the Station at the proposed location.

Contrary to PECO's assertion, the testimony of Jeffrey Marx did not undercut the testimony of Mr. Capuzzi. The testimony of both Marple's experts was complimentary. While overall, Mr. Israni testified to catastrophic events being rare, he stated that most of those are from vehicular accidents (R. 2075). Most of PECO's other similar stations are not this close to the roadway and residents and therefore this Station will be much more susceptible to traffic incidents. (R.1358:23-1359:13). As previously stated, Mr. Israni testified to PIR in the Initial Proceedings and never once qualified his testimony as not applicable to the Station.

Noise

Finally, PECO claims that the Station will comply with Marple's noise ordinance (PECO Main Br., p. 27) however this is not definitive. PECO has produced no evidence that its current Enhanced Station model and new equipment would meet the local sound ordinance. The design and equipment utilized to perform the original sound study by Hoover and Keith, Inc. is not the same design and equipment. Even so, in order to meet the ordinance with the previous layout and equipment, noise dampening devices were necessary. (R. 1979). PECO never asked its expert to run another study after it changed its design layout and equipment. As such, the old sound study should have no bearing on this proceeding. (R. 1981).

[3] However, this argument by PECO strengthens Marple Township's position that an agency determination has to include a decision in order to be a determination in the first place.

Despite PECO's assertion, Marple is not required to produce its own noise expert. PECO bears this burden. And PECO submitted a 3-year old report based upon a design and equipment that is no longer relevant. PECO argues that Dr. McAuley used the wrong equipment design (same one utilized by Hoover and Keith, Inc.) and wrong generator size (30kw v 50kw) (same one utilized by Hoover and Keith, Inc.) to discount Dr. McAuley's findings for air quality, however PECO cannot have it both ways. The Commission cannot rely upon PECO's inaccurate noise study in its constitutionally sound environmental review.

Lastly, the "agency determinations" as argued by PECO that the Commission should rely on are NOT the same (or even similar) agency determinations contemplated under Del-AWARE Unlimited which took into account intense scrutiny of the issues and not just a fill-in-the-form application or a self-serving reading of the emissions standards to determine there would be no air permits required for specific equipment. Del-AWARE Unlimited, Inc. v. Pennsylvania Public Utility Commission, 513 A.2d 593 (Pa. Cmwlth. Ct. 1986).

a. PECO's submissions in the Remand Proceedings were inadequate to meet its burden

As previously outlined in Marple Township's Main Brief, PECO has failed to meet its burden of producing sufficient evidence of the environmental impacts of the Station and the Project to enable the Commission to conduct a "constitutionally sound environmental impact review." In the absence of such information, the Commission cannot determine whether the Station and the Project are necessary and in the public interest, as required under Section 619 of the MPC.

PECO has not shown in these Remand Proceedings that the Station is reasonably necessary for the convenience and welfare of the public in light of its detrimental environmental impacts and in light of the ERA. Instead, PECO restates and relies upon findings made by the

Commission in the Initial Decision, which was vacated by the Commonwealth Court. PECO incorrectly asserts that the "Commission has already found that the Station is needed to enhance the reliability of PECO's natural gas distribution system." (PECO Main Br., p. 7). However, in Township of Marple, the Commonwealth Court vacated the Commission's opinion and order, which means that PECO cannot rely on the findings in the Initial Decision about the need for the Station. Indeed, the Commonwealth Court required the Commission to factor the results of its "constitutionally sound environmental review" into "its ultimate determination regarding the reasonable necessity of the proposed siting," Township of Marple, supra. at 12. In fact, the Township of Marple court specifically required the Commission to reconsider the reasonable necessity of the siting of the Station in light of the required environmental review. Township of Marple, 294 A.3d at 974-75. The Commission is thus not bound by any prior determination of need for either the Station or the overall project.

In addition to its failure to present evidence of need, PECO failed to present reasonable alternatives to the Station, and its location, that may have lower impacts. 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 claims that it adequately evaluated the Don Guanella site and other locations for the Station, the record does not support this conclusion. Furthermore, PECO did not evaluate the alternative of not siting the station anywhere. As a result, PECO has not provided the Commission with a constitutionally sufficient environmental review and its Petition must be denied.

f. Marple Township adopts the arguments made in the Intervenors' Reply Brief

III. CONCLUSION

PECO has not met its burden in providing sufficient evidence that the proposed Gas Reliability Station sited at 2090 Sproul Road, Marple Township, is reasonably necessary for the convenience and welfare of the public in light of Article I, Section 27 of the Pennsylvania Constitution and in light of the requirements under Township of Marple. PECO's Petition must therefore be denied.

Respectfully Submitted,

MCNICHOL, BYRNE & MATLAWSKI, P.C.

/s/ J. Adam Matlawski, Esquire

J. Adam Matlawski, Esq.
Attorney I.D. No.: 41678
Kaitlyn T. Searls, Esq.
Attorney I.D.: 311237
1223 N. Providence Road
Media, PA 19063

Dated: January 3, 2024

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of PECO Energy Company for a Finding	:	P-2021-3024328
of Necessity Pursuant to 53 P.S. § 10619 that the	:	(On Remand)
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	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing, Remand Reply Brief of Marple Township in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant) in the manner listed below upon the parties listed below:

Honorable Mary D. Long
PO Box 3265
Harrisburg, PA 17105-3265
malong@pa.gov

Christopher A. Lewis, Esquire
Frank L. Tamulonis, Esquire
Stephen C. Zumbrun, Esquire
Joel Michel, Esquire
Blank Rome LLP
One Logan Square
Philadelphia, PA 19103-6998
lewis@blankrome.com
ftamulonis@blankrome.com
szumbrun@blankrome.com
jmichel@blankrome.com
Accepts eService
Representing PECO Energy Company

Jack R. Garfinkle, Esquire
PECO Energy Company
2301 Market Street
P.O. Box 8699
Philadelphia, PA 19101-8699
Jack.garfinkle@exeloncorp
Accepts eService

Robert W. Scott, Esquire
Carl Ewald, Esquire
205 North Monroe Street
Media, PA 19063
rscott@robertwscottpc.com
carlewald@gmail.com
Accepts eService

John C. Dernbach
Professor Emeritus
Widener University
Commonwealth Law School

3800 Vartan Way
Harrisburg, PA 17110
jcdernbach@widener.edu

Robert B. McKinstry, Jr.
548 School House Road
Kennett Square, PA 19348
robert.mckinstry@gmail.com

Devin McDougall
Clean Energy Program
Earthjustice
Philadelphia Office
1617 John F. Kennedy Blvd., Suite 2020
Philadelphia, PA 19103
dmcdougall@earthjustice.org

MCNICHOL, BYRNE & MATLAWSKI, P.C.

Dated: January 3, 2024

/s/ J. Adam Matlawski

By: J. Adam Matlawski, Esq.
Attorney I.D. No.: 41678
1223 N. Providence Road
Media, PA 19063