

**BEFORE  
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 from
Situation of Two Buildings Associated with a Gas	:	the Commonwealth Court)
Reliability Station in Marple Township, Delaware	:	
County Is Reasonably Necessary for the	:	
Convenience and Welfare of the Public	:	

**AMENDED  
INITIAL DECISION**

Before  
Mary D. Long  
Administrative Law Judge

**INTRODUCTION**

This is an amended decision on remand from the Pennsylvania Commonwealth Court. Following consideration of evidence regarding safety, noise, and air emissions, this decision approves of the 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. This decision finds that PECO has met its burden of proving that the buildings should be exempt from Marple Township zoning because the proposed situation of the buildings is reasonably necessary for the public convenience or welfare of the public.

**HISTORY OF THE PROCEEDINGS**

On February 26, 2021, PECO Energy Company (PECO) filed a Petition 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 (Petition). Following hearings and initial adjudication, the Commission approved the Petition. Specifically, the Commission concluded that the situation of PECO’s proposed Buildings was reasonably necessary for the convenience or welfare of the public and found that PECO’s proposed Station security fence is a public utility facility, and therefore exempt from local land use controls.<sup>1</sup>

Thereafter, Marple Township filed a petition for review in the Commonwealth Court. On March 9, 2023, the Commonwealth Court issued a decision vacating the Commission’s Opinion and remanding the matter to the Commission. The Court instructed the Commission to issue an amended decision that “must incorporate the results of a constitutionally sound environmental impact review as to siting the so-called ‘Fiber Building’ and ‘Station Building’ upon the property located at 2090 Sproul Road in the Township of Marple, Pennsylvania.”<sup>2</sup>

By hearing notice dated June 21, 2023, the Office of Administrative Law Judge scheduled a prehearing conference by telephone on June 28, 2023.<sup>3</sup> The prehearing conference convened as scheduled. Counsel for PECO, Christopher Lewis, Frank Tamulonis and Stephen Zumbun, and Marple Township, Adam Matlawski and Kaitlyn Searls, appeared. Self-represented intervenors Julia Baker and Ted Uhlman also appeared. The Parties agreed to a schedule for discovery and the exchange of written testimony.<sup>4</sup> The Parties also agreed that technical evidentiary hearings would take place beginning on November 14, 2023. I also ruled that the Protective Order issued on June 9, 2021, remained in effect for the proceedings on remand. Following the prehearing conference, I issued a prehearing order on July 5, 2023, which memorialized the matters discussed at the prehearing conference, including a litigation schedule.

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<sup>1</sup> *Petition of PECO Energy Co.*, Docket No. P-2021-3024328 (Opinion and Order entered Mar. 10, 2022) (*Marple I*).

<sup>2</sup> *Twp. of Marple v. Pa. Pub. Util. Comm’n*, 294 A.3d 965 (Pa. Cmwlth. 2023) (*Marple II*).

<sup>3</sup> Administrative Law Judge Emily I. DeVoe became unavailable, and the case was assigned to me by Judge Change Notice dated June 28, 2023.

<sup>4</sup> I issued an order on September 19, 2023, which made a slight modification to the litigation schedule.

The Parties exchanged written Direct and Rebuttal Testimony. A further prehearing conference was convened on November 9, 2023. All of the Parties appeared and participated. The purpose of the conference was to consider evidentiary motions made by the Parties in advance of the hearings which would begin on November 14, 2023. Among other things, the Parties agreed to add an additional day of hearing on November 28, 2023. I issued an order memorializing my rulings on the motions on November 9, 2023.

Evidentiary hearings were conducted by telephone and began on November 14, 2023. Additional days of hearing were held on November 15, 2023, November 17, 2023, and November 28, 2023. Written testimony and exhibits and hearing exhibits were admitted into the record.

On December 6, 2023, I issued a Briefing Order which directed that the Parties file initial briefs on December 15, 2023, and reply briefs on January 3, 2024. The Parties filed initial briefs on December 15, 2023. Reply briefs were filed by all Parties on January 3, 2024.<sup>5</sup> Briefs amici curiae were filed by Citizens for Pennsylvania's Future, Clean Air Council, Delaware Riverkeeper, Green Amendments for the Generations, and the Energy Association of Pennsylvania. On January 5, 2024, I issued an interim order closing the record.

#### FINDINGS OF FACT

1. Findings of Fact 1-56 from Initial Decision and adopted by Opinion and Order entered March 10, 2022, are incorporated in their entirety as though individually set forth herein. (*See Marple I* at 8, 27-28, 34)

2. PECO Energy Company (PECO) is a certificated public utility regulated by the Public Utility Commission.

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<sup>5</sup> On December 14, 2023, John Dernbach; Robert B. McKinstry, Jr and Devin McDougall of Earthjustice entered appearances on behalf of Mr. Uhlman and Ms. Baker and filed initial and responsive briefs on their behalf.

3. PECO provides natural gas service to approximately 534,000 retail customers and transportation service to 1,800 large commercial and industrial customers. (PECO St. No. 1 at 2).

4. PECO's gas service territory comprises an area of 1,900 square-miles adjacent to Philadelphia that includes all, or portions of Bucks, Delaware, Montgomery, and Lancaster Counties. (PECO St. No. 1 at 3).

5. PECO and its natural gas customers rely on the interstate natural gas pipeline system to deliver natural gas into PECO's distribution system because PECO's service territory is not a natural gas producing region. (PECO St. No. 2 at 4).

6. The site for the Gas Reliability Station, 2090 Sproul Road, was the site of a retail gasoline station from 1968 until 2015. (PECO St. No. 4-RD at 2).

7. The term "gas reliability station" is not a term of art in the natural gas industry. (Tr. 2063).

8. PECO's Gas Reliability Station shares some characteristics with a "gate station" and also characteristics of a "district regulating station." (PECO St. No. 3-RR; Tr. 2064).

9. The primary difference between the proposed Station and PECO's other gate stations, is that the proposed Station is not a "custody transfer point." That is, PECO will own the gas that comes into the Station. (Tr. 1355).

10. The gas arriving at the Station will have been odorized before entry, unlike a typical gate station. (PECO St. No. 4 at 8-9; Tr. 2064).

11. The Natural Gas Reliability Station is comparable, yet less extensive in size and scale, to PECO's 28 other gate stations, a majority of which are located in residential

areas, and some of which are located within the same proximity to residences as the Natural Gas Reliability Station. (PECO St. No. 4 at 8; Exhibit TF-6).

12. The Natural Gas Reliability Station’s design includes two buildings, a “Station Building” and a “Fiber Building.” (PECO St. No. 4 at 6-7).

13. The Station Building will be enclosed and provide weather protection for the pipes, valves, regulators, and electronic equipment necessary for the operation of the Natural Gas Reliability Station and provide climate control for the proper functioning of this equipment. (PECO St. No. 4, at 6).

14. The Station Building will be locked to protect the equipment from unauthorized access. (PECO St. No. 4 at 6).

15. Additionally, the Station Building will include several sound-dampening features to minimize the effect of the Station on the community. (PECO St. No. 4 at 10-11).

16. The Fiber Building will protect sensitive telecommunication equipment necessary to connect the Station to PECO’s control room and provide an enhanced aesthetic appeal. (PECO St. No. 4 at 6-7).

17. On August 18, 2022, Marple Township and PECO negotiated and entered into a joint stipulation, which was filed with the Delaware County Court of Common Pleas (the Joint Stipulation). (*See* Marple Township Ex. DO-Cross-1).

18. The Joint Stipulation provides for an enhanced clock tower design and perimeter wall for the Station (Enhanced Design). (*See* Marple Township Ex. DO-Cross-1).

19. The Enhanced Design incorporates numerous decorative elements, landscaping, a setback permitting pedestrian use of the sidewalk, and aesthetic lighting on its

exterior, specifically along the perimeter of the fence line, as well as on the clock tower. (Marple Township Ex. DO-Cross-1; Tr. 1999-2000).

20. The Enhanced Design renderings in the Joint Stipulation are the final renderings for the Station. (Tr. 1996).

21. The Enhanced Design resulted in a change in the emergency generator planned for the Station to ensure emergency power for additional electrical equipment for the Station, including additional controls for the Station's gate, perimeter lighting for the Station, and the Enhanced Design's clock tower. (Tr. 1999).

22. The Natural Gas Reliability Station and the 11.5-mile gas main connecting to the Station are natural gas "distribution facilities," as defined by federal Pipeline Hazardous Materials and Safety Administration (PHMSA) regulations. (PECO St. No. 3-RD at 5).

23. The Natural Gas Reliability Station is classified in the natural gas distribution industry as a "district regulating station." (PECO St. No. 6-SR at 14-15; PECO St. No. 3-RD at 2).

24. The PHMSA regulations do not prohibit the siting of natural gas distribution facilities near homes or people. (Tr. 1650-51).

25. Gas distribution facilities frequently need to be located near residences and businesses. (Tr. 1577).

26. There are no PHMSA determinations or approvals required to site the Station or the Station's Buildings at 2090 Sproul Road. (PECO St. No. St. No. 3-RD at 9-10).

27. A potential impact radius (PIR) calculation is based, in part, on the maximum allowable operating pressure in the pipeline segment and the diameter of the pipeline in inches. (PECO St. No. 6-SR at 23).

28. The calculation assumes a full rupture of a transmission line. (Tr. 2059).

29. The PIR calculation is only applicable to natural gas “transmission pipelines,” which have separate regulatory requirements than “distribution pipelines.” (PECO St. No. 3-RD at 7-8).

30. The PIR is a calculation based on a transmission pipeline’s maximum allowable operating pressure and diameter, which calculation is used to determine if a rural or suburban segment of transmission pipeline is located in an area with higher density, known as a “high consequence area.” (PECO St. No. 3-RD at 6-7).

31. Transmission pipeline operators are required to follow additional “Transmission Integrity Management Program” requirements in “high consequence areas.” (PECO St. No. 3-RD at 6-7).

32. Because the Station and its connecting facilities are distribution facilities, the PIR is not applicable to the Station, and is not related to any siting requirement for the Station or the Station’s Buildings. (PECO St. No. 3-RD at 7-8).

33. There is no PIR calculation for distribution facilities under PHMSA regulations because operators of distribution facilities are required in accordance with 49 C.F.R. Part 192 Subpart P, Gas Distribution Pipeline Integrity Management (IM), to include all of their distribution facility assets in a written Distribution Integrity Management Program (DIMP) regardless of the proximity of a distribution asset to occupied buildings. (PECO St. No. 3-RD at 7-8)

34. DIMP establishes a written program that a distribution facility operator must follow to continuously evaluate, prioritize and mitigate risks, such as corrosion, excavation damage, other outside force damage, or equipment failure to an operator’s distribution system. (PECO St. No. 3-RD at 11 (citing 49 C.F.R. Part 192 Subpart P)).

35. As a distribution facility, PECO is required to operate the Station with a much larger safety margin than would apply to a transmission facility in a similar location. (PECO St. No. 3-RR at 3).

36. Marple Township witness Jeffrey Marx prepared a quantitative risk analysis, analyzing the safety risk of PECO's proposed Natural Gas Reliability Station at 2090 Sproul Road. (Tr. 2178-79).

37. A risk analysis identifies not only potential hazards and their consequences, but also the probability of an adverse event. (Tr. 2172)

38. The quantitative risk analysis conducted by Marple Township determined that there is a low risk for a safety event involving 2-inch holes in the Station's facilities, described by the analysis as the "maximum credible event," which was determined to be a "rare" event. (Tr. 2178-79).

39. PHMSA's database of incidents as defined by 49 C.F.R. § 191.3, which includes data dating several decades, did not identify an equivalent "significant holes" event, as described in Marple Township's quantitative risk analysis, to have previously occurred at any equivalent district regulating station across the United States. (PECO St. No. 3-RR at 5).

40. The Marple Township quantitative risk analysis also determined that there was not expected to be a safety risk from a full rupture event at the Station, which was described as "extremely rare." (Tr. 2181-82).

41. The potential impact distance identified in Marple Township's quantitative risk analysis was only 100 feet for the "rare" event and 220 feet for the "extremely rare" event of a full pipe rupture. (Tr. 2181).



42. These vulnerability zones of 100 feet and 220 feet showed that any potential impact would extend only a short distance beyond the site boundaries, if at all. (Tr. 2181).

43. PHMSA's database of incidents as defined by 49 C.F.R. § 191.3, which includes data dating several decades, did not identify an equivalent full rupture event, as described in Marple Township's quantitative risk analysis, to have previously occurred at an equivalent district regulating station across the United States. (PECO St. No. 3-RR at 5-6).

44. PECO has committed to comply with all federal and state safety requirements in the construction and operation of the Gas Reliability Station. (PECO St. No. 4-SR at 11).

45. PHMSA's enforcement dataset did not identify any enforcement violations against PECO since 2002 and PECO's operational record meets or exceeds federal and state standards. (PECO St. No. 6-SR at 16; 3-RD at 14-15).

46. The PHMSA databases indicate that no incidents, as defined by 49 C.F.R. § 191.3, have occurred at PECO's regulating stations dating back to 1986, the earliest records available. (PECO St. No. 6-SR at 7-9).

47. PECO remotely monitors its gate stations using fiber optic cables and also through the cellular network to ensure communication with the equipment within its facilities. PECO will be able to remotely shut down the Station if a problem is ever identified. (PECO St. No. 4 at 11).

48. If necessary, PECO also has the ability to shut off gas from the West Conshohocken LNG<sup>6</sup> Plant that would travel to the Natural Gas Reliability Station. (PECO St. No. 4 at 11).

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<sup>6</sup> Liquefied natural gas.

49. PECO will also have shut-off valves at multiple points along the 11.5-mile gas main and at the LNG Plant. (PECO St. Nos. 4 at 11; 4-SR at 13).

50. PECO's internal procedures for responding to irregularities in operations at the Station include instructions for responding to gas odors calls and gas emergency response protocols. (PECO St. No. 4 at 11).

51. The procedures require PECO to respond to any incident within an hour. PECO operates its control room 24 hours per day, 7 days a week. (PECO St. No. 4 at 11).

52. The Company routinely communicates with local fire and emergency management officials and works with them on a regular basis. (PECO St. No. 4 at 12).

53. PECO also conducts an annual training program, free of charge, for local emergency management officials located across PECO's service territory. (PECO St. No. 4 at 12).

54. The program trains emergency officials on the appropriate steps that should be taken to respond to any incidents involving PECO's facilities or equipment, such as the procedures for how to ensure an area is safe around PECO's facilities and how to notify PECO of the incident. (PECO St. No. 4 at 12).

55. PECO's protocols mandate that the Company have a staff member onsite within one-hour for gas odor calls, per industry and regulatory standards. PECO achieves this result 99.9% of the time. (PECO St. No. 4-SR at 14).

56. PECO has met with Marple Township and Delaware County emergency officials to discuss the Natural Gas Reliability Station and PECO's safety protocols. (PECO St. No. 4 at 12).

57. Once the Natural Gas Reliability Station is completed, PECO will invite local emergency management officials to tour the Station to allow them to familiarize themselves with the assets and to further discuss PECO's safety protocols for the facility. (PECO St. No. 4 at 12).

58. According to Mr. Marx's evaluation, fire is the most significant potential impact in the immediate area outside the facility boundaries. (Marple Township Remand St. No. 2 at 6).

59. The impact of a "maximum credible event," would be rare and would only extend 100 feet beyond the release source. (Tr. 2181).

60. A full pipe rupture would be extremely rare and would only extend 220 feet from the release source. (Tr. 2182).

61. Even if an explosion occurred inside one of the buildings, the blast wave would not extend beyond the boundary of the Station. (Tr. 2183).

62. Distribution pipelines generally operate at much lower pressures and are only permitted to operate at 20% of the maximum pressure of the pipeline's capacity. (Tr. 2067).

63. As a result of these lower pressures in relation to the thickness of the pipe, distribution pipes don't rupture or explode on their own. (Tr. 2067).

64. The original design for the Station included a perimeter security fence (Security Fence) composed of sound-absorbing material. (PECO St. No. 4 at 7-8).

65. PECO's engineering firm, EN Engineering, contracted with acoustic and sound control consultant Hoover & Keith Inc. to assist PECO in designing the Station to comply with Marple Township's Noise Ordinance. (PECO St. No. 4 at 10; Exhibit TF-7).

66. Hoover & Keith Inc. conducted an ambient sound survey and noise impact assessment specific to 2090 Sproul Road to determine the potential impact of sounds generated by the Station's equipment, and the company then recommended various sound mitigation measures. (PECO St. No. 4 at 10; PECO St. No. 4-SR at 8-9).

67. These measures include the use of acoustic-dampening insulation and doors for the main Station Building, a forced air ventilation system to minimize open areas where sounds can escape, sound absorbing or dampening HVAC equipment, and other sound-dampening materials on the Station's regulators and valves. (PECO St. No. 4 at 10-11).

68. The original design for the Station included a perimeter security fence (Security Fence) composed of sound-absorbing material. The Security Fence is a vital component of the Natural Gas Reliability Station that will be constructed and maintained by PECO. (PECO St. No. 4 at 7-8).

69. The Enhanced Design replaces the original security fence with a security fence that will include a perimeter wall constructed of brick and precast concrete, and an accompanying clock tower. (PECO St. No. 4-RD at 3-4; Marple Township Exhibit DO-Cross-1).

70. Compliance with Marple Township's Noise Ordinance is technically feasible and readily achievable using feasible, readily available, and proven technology. (PECO St. No. 5 at 4; *see also* Tr. 1987).

71. PECO's witness, Jeffrey Harrington concluded that there will be no unreasonable impact on air quality. (PECO St. No. 6-RD at 11).

72. The only emission generating equipment at the Station will be (1) the Cold Weather Technologies (CWT) Indirect Line Heater (Line Heater) and (2) an emergency generator. (PECO St. No. 4 at 5; PECO St. No. 6-RD at 8).

73. The Line Heater and emergency generator run on natural gas. (PECO St. No. 4 at 5).

74. The Line Heater and the emergency generator are situated outside, and not within, the Station Building or the Fiber Building, the buildings that are at issue in this proceeding. (PECO St. No. 4-SR at 17; PECO St. No. 6-RD at 8; Tr. 1997-98, 2006, 2015, 2017; *see also* Marple Township Exhibit DO-Cross-1, Exhibit A).

75. The Line Heater and emergency generator will only operate sporadically, with the emergency generator only being used in emergencies, or during its weekly maintenance testing. (PECO St. No. 4-SR at 17).

76. The Line Heater uses a 50/50 water/antifreeze bath to heat natural gas piping that passes through the Line Heater to ensure that the natural gas delivered to customers is at a specific temperature. (PECO St. No. 4-SR at 6-7; Tr. 2003, 2017-18, 2033).

77. PECO may build either a 30 kilowatt (kW) or 50-kW emergency generator. (PECO St. No. 6-RD at 9).

78. A 50-kW emergency generator will be required if PECO implements the Enhanced Design agreed upon by PECO and Marple Township in the August 18, 2022, stipulation. (PECO St. No. 6-RD at 9; Tr. 1999).

79. The Pennsylvania Department of Environmental Protection (DEP) and the U.S. Environmental Protection Agency (EPA) have regulatory jurisdiction over air emissions from the Station's proposed emergency generator and Line Heater. (PECO St. No. 6-RR at 3; Tr. 2371, 2373-77, 2379-80).

80. The Line Heater will provide a heat input of 4.6 million British thermal units per hour (MMBtu/hr) and will include six burners fueled with natural gas. (PECO St. No. 6-RD at 8; Tr. 2120).

81. PADEP regulations at 25 Pa. Code § 127.14(a)(3) establish a blanket exemption from the air permitting requirement for combustion units with a rated capacity of less than 10/MMBtu/hr of heat input fueled by natural gas supplied by a public utility. (PECO St. Nos. 6-RD at 8-11, 6-RR at 3; Exhibit JH-6).

82. The Line Heater qualifies for this blanket exemption. (PECO St. No. 6-RD at 9).

83. The rated capacity of the 30-kW generator as stated by the vendor is 46.6 brake horsepower (bhp). (PECO St. No. 6-RD at 10).

84. PADEP regulations at 25 Pa. Code § 127.14(a)(8) establish a blanket exemption from the air permitting requirement for internal combustion engines rated at less than 100 bhp. (PECO St. Nos. 6-RD at 8-11 and 6-RR at 3; Exhibit JH-6).

85. The 30-kW generator qualifies for this blanket exemption. (PECO St. No. 6-RD at 10).

86. The 50-kW generator would have estimated nitrogen oxide NO<sub>x</sub> emissions of 0.97 lb/hr, 23.3 lb/hr, and 0.24 tpy. (PECO St. No. 6-RD at 10).

87. Both the 30-kW and 50-kW generators qualify for an exemption from DEP air permitting requirements. (PECO St. Nos. 6-RD at 8-11; 6-RR at 3; Exhibit JH-6).

88. PECO has Certificates of Conformity from the EPA for both the 30-kW and 50-kW emergency generators, which indicate that the engines have been found to conform with applicable federal emissions standards. (PECO St. No. 6-RD at 11; Exhibits JH-2 & JH-3).

89. The exemptions from the DEP's permitting requirements apply on a specific emissions unit basis. (Tr. 2373).

90. Even if the facility emissions from the Line Heater and emergency generator were combined, their potential emissions would be considerably lower than the threshold that triggers the DEP permitting requirement. (Tr. 2374).

91. Tetra Tech's air dispersion modeling performed for the Remand Proceeding identified that the ambient air impacts directly attributable to the Station are much less than the EPA's National Ambient Air Quality Standards (NAAQS). (PECO St. No. 6-RR at 9, 12-13).

92. Even in the absence of an air permit requirement, the emergency generator will be subject to several enforceable requirements, including federal New Source Performance Standards codified in 40 CFR Part 60, subpart JJJJ and federal National Emissions Standards for Hazardous Air Pollutants for stationary reciprocating internal combustion engines codified at 40 CFR Part 63, subpart ZZZZ. (Tr. 2374-75).

93. DEP has the authority to enforce these regulations and to investigate facilities that potentially violate the NAAQS, new source performance standards, and National Emissions Standards for Hazardous Air Pollutants (NESHAPs). (Tr. 2374-77).

94. Marple Township's air dispersion modeling did not use the statistical form of the NAAQS standard promulgated by the EPA. (Tr. 2392).

95. Dr. McAuley assumed for the purposes of his model that the emergency generator would operate on a 24/7/365 continuous basis, for 8,760 hours per year. (PECO St. No. 6-RR, at 3-4).

96. Dr. McAuley's assumption ignores (i) PECO's actual plans (which are to operate the generator only in emergencies and for routine testing for an hour per week (ii) federal law that restricts such operation to no more than 100 hours per year, and (iii) guidance from the EPA specifying 500 hours as a conservative benchmark for the modeling. (Tr. 2384).

97. Dr. McAuley modeled air emissions from the generator assuming non-compliance, which as Mr. Harrington testified, is not a standard principle of air modeling. (Tr. 2382).

98. Dr. McAuley used the incorrect layout for the Station, incorrect stack dimensions; overly conservative nitrogen dioxide screening parameters in contravention to EPA's air modeling guidance and used different exhaust temperatures and exit velocities in modeling air emissions at 2090 Sproul Road (PECO's preferred site) and the Don Guanella site (Marple Township's preferred site). (PECO St. No. 6-RR at 5-10).

99. Dr. McCauley acknowledged that he did not use the current site plan, and further acknowledged that the exit velocities for the two sites should have been the same. (Tr. 2499-2501; 2524, 2536).

100. As a result of these errors in the underlying assumptions, Dr. McCauley's air modeling resulted in overstated and unrealistically high emissions projections. (PECO St. No. 6-RR at 10).

101. Tetra Tech evaluated the Station's greenhouse gas emissions using 500 hours of emergency generator operation during a given year and operation of all six of the Line Heater's burners operating 24/7/365, which evaluation resulted in a conservatively high emission potential because the equipment is not expected to operate at those durations. (PECO St. No. 6-RR at 15-16).

102. Tetra Tech's evaluation concluded that the Station's greenhouse gas emissions would be approximately one-tenth of EPA's greenhouse gas reporting threshold pursuant to 40 CFR Part 98, Subpart C. (PECO St. No. 6-RR at 15-16).

103. The Station will not cause an unreasonable impact on streams or wetlands, stormwater, endangered species, or historical structures. (PECO St. No. 6-RD at 13-16).



## DISCUSSION

### **Description of the Gas Reliability Station, the Initial Proceeding and Commonwealth Court Remand**

The site for the Gas Reliability Station, 2090 Sproul Road, was the site of a retail gasoline station from 1968 until 2015. The site is located in an “N Neighborhood Center” zoning district that includes commercial uses and specifically allows public utility use by special exception. Marple Township specifically contemplated public utility use on this property along Sproul Road in enacting the zoning classification. This location is adjacent to a main thoroughfare (Sproul Road) which already generates traffic and noise and which roadway feeds the commercial establishments situated in the N Neighborhood Center district. Before filing the Petition with the Commission, PECO sought a special exception to authorize the use of the property for the Gas Reliability Station. PECO’s application was denied on November 18, 2020. According to the Zoning Hearing Board, the proposed Station was not consistent with the intent of the Neighborhood Center District.<sup>7</sup>

The Gas Reliability Station is comparable, yet less extensive in size and scale, to PECO’s 28 other gate stations, a majority of which are located in residential areas, and some of which are located within the same proximity to residences as the Gas Reliability Station. The Gas Reliability Station includes two buildings, a 2,073-square foot Station Building and a 160-square foot Fiber Building. The Station Building will be enclosed and provide weather protection for the pipes, valves, regulators, and electronic equipment necessary for the operation of the Gas Reliability Station and provide climate control for the proper functioning of this equipment. The Station Building will be locked to protect the equipment from unauthorized access. Additionally, the Station Building will include several sound-dampening features to minimize the effect of the Station on the community. The Fiber Building will protect sensitive telecommunication equipment necessary to connect the Station to PECO’s control room and provide an enhanced aesthetic appeal.

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<sup>7</sup> PECO Ex. LG-2.

The original proposal by PECO, which was reviewed by the Commission in the Initial Proceeding, included the construction of a perimeter security fence composed of sound-absorbing material. The Commission determined that the fence was a utility facility as that term is defined by Section 102 of the Public Utility Code and was therefore beyond the authority of Marple Township to impose any zoning restrictions. The Commonwealth Court affirmed this determination.<sup>8</sup>

However, on August 18, 2022, Marple Township and PECO negotiated and entered into a joint stipulation, which was filed with the Delaware County Court of Common Pleas, which provides for an enhanced design for the perimeter fencing which includes a clocktower. This enhanced design necessitated a change in the emergency generator planned for the Station to ensure emergency power for additional electrical equipment for the Station, including additional controls for the Station's gate, perimeter lighting for the Station, and the Enhanced Design's clock tower.

On February 26, 2021, PECO filed this Petition which seeks a determination by the Commission that the situation of two buildings (Buildings) for a proposed gas reliability station (Gas Reliability Station) is reasonably necessary for the convenience and welfare of the public and, therefore, exempt from any zoning, subdivision, and land development restriction of the Marple Township Subdivision and Land Development Ordinance and the Marple Township Zoning Code.

Following four public input hearings and four days of evidentiary hearings, Judge Emily I. DeVoe and I concluded that PECO had met its burden of demonstrating that the buildings should be exempt from the Marple Township zoning ordinance because the proposed situation of the buildings is reasonably necessary for the public convenience or welfare of the public. We based this conclusion on the credible testimony offered by PECO's witnesses that the Gas Reliability Station was an important component in PECO's future growth and reliability

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<sup>8</sup> *Marple II* at 972.

planning. After reviewing the existing caselaw and 53 P.S. § 10619 (Section 619), we determined that the issues raised by the Intervenors, namely, noise, risk of explosion and air pollution, were beyond the scope of the petition.

Marple Township and the Intervenors filed exceptions. Following consideration of the exceptions and the underlying decision, the Commission generally agreed with our conclusion regarding the Station Building and the Fiber Building. The Commission adopted our conclusion that the Gas Reliability Station was part of a project to provide for future customer growth in Marple Township and the surrounding communities:

The Gas Reliability Station is part of the “Natural Gas Reliability Project,” a long-term infrastructure project PECO is implementing in order to increase its capacity supply to diminish its design day constraints.<sup>4</sup> PECO St. 2 at 3-7. According to PECO, in addition to increasing design day requirements, the Gas Reliability Station is also needed to address customer and usage growth in Delaware County, particularly in Marple Township. PECO St. 3 at 3-12. In addition to the growing need for natural gas in Marple Township, PECO chose to site its Gas Reliability Station in Marple Township because of its location within PECO’s existing natural gas distribution system in Delaware County. PECO St. 3 at 5-18.<sup>[9]</sup>

The Commission concluded that PECO had met its burden of demonstrating that the Sproul Road location was reasonably necessary from the standpoint of planning for gas reliability:

Among other things, PECO’s analysis using hydraulic modeling showed that Delaware County has the greatest future projected need for peak day demand due to the County’s usage growth and that Lawrence and Sproul Roads was an ideal location to direct the increased supply of natural gas. PECO St. 3 at 4, 5-6. PECO’s testimony and accompanying exhibits demonstrated that locating the Gas Reliability Station in Marple Township will enable PECO to meet current and projected demand for natural gas in that area, and this evidence was not sufficiently rebutted

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<sup>9</sup> *Marple I*, at 4-5.

by the other Parties. In evaluating whether the proposed buildings are reasonably necessary for the convenience or welfare of the public, the utility is not required to prove that the site it has selected is absolutely necessary or that it is the best possible site. Rather, the Commission's finding that the site chosen is reasonably necessary will not be disturbed if it is supported by "substantial evidence."<sup>[10]</sup>

The Commission went on to state:

In reviewing these Exceptions and the applicable law, we do not find any error in the ALJs' conclusion that issues related to noise, gas emissions, aesthetics, traffic, and other health and safety concerns are beyond the Commission's review in a Section 619 proceeding. The scope of the Commission's review and determination in a Section 619 proceeding is very narrow and, in this case, involves only a determination of whether the proposed site of the buildings associated with the Gas Reliability Station is reasonably necessary for the public convenience or welfare of the public. If the Commission finds that the location is reasonably necessary for the convenience or welfare of the public, the buildings are exempt from local zoning ordinances under the MPC. Ancillary issues unrelated to the siting of the buildings, such as the issues related to the siting or route of the public utility's facilities, public safety, or environmental requirements, are outside the scope of a Section 619 proceeding.<sup>[11]</sup>

Marple Township and the Intervenors appealed to the Commonwealth Court. Although the Commonwealth Court agreed that the review of the petition under Section 619 was narrow, the court disagreed that the Commission could not consider noise, gas emissions, aesthetics, traffic and other health and safety concerns. Indeed, the Court held that it is the Commission's obligation to give consideration to these factors pursuant to Article I, Section 27 of the Pennsylvania Constitution:

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<sup>10</sup> *Marple I*, at 49 (footnotes omitted); *see also Marple I*, at 32.

<sup>11</sup> *Marple I*, at 44 (citations omitted).

[I]n proceedings of this nature, the Commission is obligated to consider “the environmental impacts of placing [a building] at [a] proposed location,” while also deferring to environmental determinations made by other agencies with primary regulatory jurisdiction over such matters. The source of the Commission's responsibility to conduct this type of review in a Section 619 proceeding is not the MPC itself or another statute; rather, it is article I, section 27 of the Pennsylvania Constitution, which is better known as the Environmental Rights Amendment (ERA). In other words, a Section 619 proceeding is constitutionally inadequate unless the Commission completes an appropriately thorough environmental review of a building siting proposal and, in addition, factors the results into its ultimate determination regarding the reasonable necessity of the proposed siting. Here, however, the Commission sidestepped this obligation and, though it stated that it would defer to other agencies’ determinations regarding environmental issues, failed to identify any such outside agency determinations that pertained to explosion impact radius, noise, or heater emissions. The Commission's “deference” in this context thus appears to have been nothing more than illusory and its environmental review substantively nonexistent. This failure renders the Decision entirely deficient from a constitutional standpoint.<sup>[12]</sup>

Therefore, the Court instructed the Commission to issue an Amended Decision which incorporates the results of a “constitutionally sound environmental impact review as to the proposed siting on the Property of the Fiber Building and the Station Building.”<sup>13</sup>

### **Burden of Proof**

Section 332(a) of the Public Utility Code (Code), provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding.<sup>14</sup> It is axiomatic that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and

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<sup>12</sup> *Marple II*, at 974 (footnotes and citations omitted)

<sup>13</sup> *Id.*

<sup>14</sup> 66 Pa.C.S. § 332(a).

legally credible.”<sup>15</sup> The preponderance of evidence standard requires proof by a greater weight of the evidence.<sup>16</sup> This standard is satisfied by presenting evidence more convincing, by even the smallest amount, than that presented by another party.<sup>17</sup>

Additionally, any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence.<sup>18</sup> Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.<sup>19</sup> Although substantial evidence must be “more than a scintilla and must do more than create a suspicion of the existence of the fact to be established,”<sup>20</sup> the “presence of conflicting evidence in the record does not mean that substantial evidence is lacking.”<sup>21</sup>

If the applicant sets forth a *prima facie* case, then the burden shifts to the opponent. Establishing a *prima facie* case requires either evidence sufficient to make a finding of fact permissible or evidence to create a presumption against an opponent which, if not met, results in an obligatory decision for the proponent. Once a *prima facie* case on a point has been established, if contrary evidence is not presented, there is no requirement that the applicant produce additional evidence in order to sustain its burden of proof.<sup>22</sup>

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<sup>15</sup> *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

<sup>16</sup> *Commonwealth v. Williams*, 732 A.2d 1167 (Pa. 1999).

<sup>17</sup> *Brown v. Commonwealth*, 940 A.2d 610 (Pa. Cmwlth. 2008).

<sup>18</sup> *Met-Ed Indus. Users Grp. v. Pa. Pub. Util. Comm’n*, 960 A.2d 189 (Pa. Cmwlth. 2008) (citing 2 Pa.C.S. § 704).

<sup>19</sup> *Borough of E. McKeesport v. Special/Temp. Civil Serv. Comm’n*, 942 A.2d 274 (Pa. Cmwlth. 2008).

<sup>20</sup> *Kyu Son Yi v. State Bd. of Veterinarian Med.*, 960 A.2d 864, 874 (Pa. Cmwlth. 2008) (citation omitted).

<sup>21</sup> *Allied Mech. & Elec., Inc. v. Pa. Prevailing Wage Appeals Bd.*, 923 A.2d 1220, 1228 (Pa. Cmwlth. 2007) (citation omitted).

<sup>22</sup> *District of Columbia’s Appeal*, 21 A.2d 883 (Pa. 1941). See, e.g., *Application of Pa. Power & Light Co.*, Docket No. A-110500F0196 (Order entered Dec. 15, 1994) (holding that the company met its burden to prove that there was an immediate need for the reinforcement of the power supply where the need for the project was uncontested and no party presented any evidence challenging the need for the project).

As explained above, this matter is before the Commission on remand by the Commonwealth Court. Marple Township argues that the Commonwealth Court vacated the Commission's decision. According to Marple Township, except for the Commission's finding that the security fence is a utility facility, all other findings of fact and conclusions of law are inapplicable.

Although the Commonwealth Court vacated the Commission's Opinion and Order, the Court did not direct the Commission to consider the application anew. Indeed, the Commission is instructed to render an "Amended Decision" after "incorporate[ing] the results of a constitutionally sound environmental impact review as to the proposed siting on the Property of the Fiber Building and the Station Building."<sup>23</sup> Unless stated otherwise, the findings of fact and factual conclusions of the Commission as set forth in *Marple I* are incorporated. However, I have considered additional evidence presented by the Parties regarding environmental issues. I conclude after considering this additional evidence that PECO sustained its burden of proving that the Gas Reliability Station and the situation of the Station Building and the Fiber building are reasonably necessary for the convenience of the public and therefore the buildings are exempt from the Marple Township zoning ordinance.

### **Regulation of Natural Gas Infrastructure**

The Public Utility Code mandates that all public utilities maintain sufficient infrastructure to meet the utility needs of the public:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the

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<sup>23</sup> *Marple II*, p. 974.

regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. Any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the commission as to service and extensions, with the same force and in like manner as if such service were rendered by a public utility. The commission shall have sole and exclusive jurisdiction to promulgate rules and regulations for the allocation of natural or artificial gas supply by a public utility.<sup>[24]</sup>

The General Assembly determined that natural gas utilities are not required to seek Commission approval to site gas facilities:

(b) Installation and improvement of facilities.--

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(2) Nothing in this chapter shall prevent the natural gas distribution company from maintaining and upgrading its system to meet retail gas customer requirements consistent with the requirement of section 1501 (relating to character of service and facilities) or compliance with other statutory and regulatory requirements.

(3) Disputes concerning facilities shall be subject to the jurisdiction of the commission and may be initiated by the filing of a complaint under section 701 (relating to complaints) by the commission or any interested party.<sup>[25]</sup>

Local municipalities also lack jurisdiction to regulate the location of natural gas facilities by zoning. The Commonwealth Court in *Marple II* stated:

It is well settled that, by enacting the Code, the General Assembly intended to vest the Commission with preeminent authority to regulate utilities on a statewide basis. *See Del. Riverkeeper Network v. Sunoco Pipeline L.P.*, 179 A.3d 670, 690-95 (Pa. Cmwlth. 2018). This reflects the reality that

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<sup>24</sup> 66 Pa.C.S. § 1501.

<sup>25</sup> 66 Pa. C.S. § 2205(b).



[L]ocal authorities not only are ill-equipped to comprehend the needs of the public beyond their jurisdiction, but, and equally important, those authorities, if they had the power to regulate, necessarily would exercise that power with an eye toward the local situation and not with the best interests of the public at large as the point of reference.

*Duquesne Light Co. v. Upper St. Clair Twp.*, 377 Pa. 323, 105 A.2d 287, 293 (1954). Indeed, as our Supreme Court has remarked,

[t]he necessity for conformity in the regulation and control of public utilities is as apparent as the electric lines which one views traversing the Commonwealth. If each [municipality was] to pronounce its own regulation and control over electric wires, pipe lines and oil lines, the conveyors of power and fuel could become so twisted and knotted as to affect adversely the welfare of the entire state. It is for that reason that the [General Assembly] has vested in the ... Commission exclusive authority over the complex and technical service and engineering questions arising in the location, construction and maintenance of all public utilities facilities.

*Chester Cnty. v. Phila. Elec. Co.*, 420 Pa. 422, 218 A.2d 331, 333 (1966); see 66 Pa. C.S. § 1501 (giving the Commission the power to regulate public utilities' facilities and services throughout Pennsylvania). Accordingly, absent an express statutory directive to the contrary, municipalities are preempted from regulating public utilities' operations. See *Sunoco*, 179 A.3d at 692, 694-95.<sup>[26]</sup>

A narrow exception exists in the Municipalities Planning Code which allows for local regulation of public utility buildings by zoning regulation. However, if the Commission finds that the situation of the buildings on the site is reasonably necessary, the Commission can determine that local municipalities may not regulate such buildings by zoning:

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

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<sup>26</sup>

*Marple II*, at 971–72.

or welfare of the public. It shall be the responsibility of the Pennsylvania Public Utility Commission to ensure that both the corporation and the municipality in which the building or proposed building is located have notice of the hearing and are granted an opportunity to appear, present witnesses, cross-examine witnesses presented by other parties and otherwise exercise the rights of a party to the proceedings.<sup>27</sup>

The Commission is the agency tasked with executing these legislative directives. No party has argued that this statutory authority is unconstitutional or facially violates Article I, Section 27 of the Pennsylvania Constitution.

### **Environmental Rights Amendment**

Article I, Section 27 of the Pennsylvania Constitution, also known as the Environmental Rights Amendment (ERA), provides that:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.<sup>[28]</sup>

In *Payne v. Kassab*,<sup>29</sup> the Commonwealth Court established a three-prong test to be used in determining whether a government action or activity violated the ERA. The *Payne* test was first called into question with the Pennsylvania Supreme Court's decision in *Robinson Township v. Commonwealth*.<sup>30</sup> In *Robinson Township*, a plurality of the Court found portions of

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<sup>27</sup> 53 P.S. § 10619 (Section 619).

<sup>28</sup> Pa. Const. Art. I, Sec. 27.

<sup>29</sup> *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. Ct. 1973).

<sup>30</sup> *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (*Robinson Township*).

a proposed amendment to the Pennsylvania Oil and Gas Act unconstitutional under the ERA but did not expressly overturn the Payne test.

In 2017, the Pennsylvania Supreme Court again considered the scope of the ERA in *Pennsylvania Environmental Defense Foundation v. Commonwealth*.<sup>31</sup> In *PEDF*, the Court expressly overruled the Payne test and found that “[t]he proper standard of judicial review [for alleged violations of the ERA] lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.”<sup>32</sup> In so ruling, the Court held that the ERA grants citizens of the Commonwealth two separate rights: 1) the right to clean air and pure water and to the preservation of natural, scenic, historic and aesthetic values of the environment; and 2) the right of common ownership by the people, including future generations, of Pennsylvania’s public natural resources.

In *PEDF*, the Court noted that the first right, which comes directly from the text of the ERA itself, “places a limitation on the state’s power to act contrary to [the] right, and while the subject of the right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional.”<sup>33</sup> The Court expressly noted that the Commonwealth’s trustee obligations “are not vested exclusively in any single branch of Pennsylvania’s government”; rather, “all agencies and entities of the Commonwealth government, both statewide and local, have a fiduciary duty to act toward the corpus with prudence, loyalty and impartiality.”<sup>34</sup>

In abrogating the three-prong test of *Payne v. Kassab*, and substituting an analytical framework based on trust and fiduciary principles, agencies such as the Commission have little useful guidance. The notion of the government as a trustee of the peoples’ natural resources works well when applied to the legislative functions of government, such as the

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<sup>31</sup> *Pa. Env’t Def. Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (*PEDF*).

<sup>32</sup> *Id.* at 930.

<sup>33</sup> *Id.* at 931-32.

<sup>34</sup> *Id.* at 931, n. 23.

promulgation of statutes<sup>35</sup> and zoning ordinances.<sup>36</sup> This framework is less helpful to guide the Commission’s judicial function of applying a specific set of facts in order to make a determination whether a statutory standard has been met.<sup>37</sup> This is particularly true where the Commission, tasked with the regulation of public utilities, yet must consider factors outside of its expertise and assigned jurisdiction.

In *Funk v. Wolf*, the Commonwealth Court clarified that it is the Commonwealth, which is the trustee of natural resources, not individual state agencies. Therefore, while even agencies not tasked directly with protecting the environment must consider the protection of natural resources, they must do so within the policy choices articulated in legislation.<sup>38</sup>

Applying the ERA is particularly challenging in the context of Section 619 of the MPC. Section 619 of the MPC, authorizes the Commission to waive local zoning regarding whether the “situation of the building in question is reasonably necessary for the convenience or welfare of the public.” The plain language of the statute is unclear as to whether the “situation of the buildings” refers to the arrangement of the buildings on the property, or the location of the property itself. The seminal case interpreting Section 619 is the Commonwealth Court’s decision in *Del-AWARE v. Pa. Public Utility Commission*.<sup>39</sup> There, the Court reviewed the Commission’s application of Section 619 to a pumphouse which the utility proposed to construct in connection with facilities to supply water for cooling the Limerick nuclear generating station. The project, not unlike the Gas Reliability Station, was controversial.<sup>40</sup> Del-AWARE argued that

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<sup>35</sup> E.g., *Robinson; PEDF*.

<sup>36</sup> *Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 196 A.3d 677 (Pa. Cmwlth. 2018).

<sup>37</sup> See *EHB Ctr. For Coalfield Just. v. Pa., Dep’t of Env’t Prot.*, 2017 WL 3842580, at \*31–33 (Pa. Env. Hrg. Bd. 2017).

<sup>38</sup> *Funk v. Wolf*, 144 A.3d 228, 235 (Pa. Cmwlth. 2016), *affirmed*, 158 A.3d 642 (Pa. 2017).

<sup>39</sup> *Del-AWARE Unlimited Inc. v. Pa. Pub. Util. Comm’n*, 513 A.2d 593 (Pa. Cmwlth. 1986) (*Del-AWARE*).

<sup>40</sup> “As before, we are obliged an intend to confine our consideration to the merits of the precise legal issues presented, despite the widespread public discussion and disagreement inspired by the construction of [water diversion project].” *Id.* at 594.

the Commission’s conclusion that the situation of the pumphouse was reasonably necessary as set forth in Section 619 was in error because PECO had other alternatives available to provide cooling water to the nuclear plant. The Court rejected this argument, in part, because it did “not interpret this provision as requiring the PUC to reevaluate the entire project. It merely directs the PUC to determine whether the site of the Bradshaw pumphouse is appropriate to further the public interest.”<sup>41</sup>

The Court rejected the Commission’s view that it must consider the necessity for the building itself:

We disagree with the PUC’s reasoning. Section 619 only empowers the PUC, upon petition, to decide if there is reasonable necessity for the site. Moreover, the purpose of the inquiry is only to determine whether an exception to the local zoning provisions applicable to the site is justified. Therefore, the location, not the building itself, is the focus of concern. This position would not result in contradictory findings by the PUC regarding the building and site because the PUC is simply not empowered to evaluate the building.<sup>[42]</sup>

Yet, as noted above, the Commission does not approve the site for natural gas facilities. The Commission does not evaluate the entire project, but must consider more than the buildings themselves. The Commission nevertheless analyzes the location of the property where the utility project will be built, rather than the location of the buildings on the property.

For example, in reviewing the Initial Decision, the Commission in *Marple I*, emphasized that although the attributes of the buildings were relevant to the extent they are related to whether the site was reasonably necessary, the “legal focus should be on whether the *site of the buildings* associated with the Gas Reliability Station is reasonably necessary for the public convenience or welfare . . . .”<sup>43</sup> Read in context of the entire decision, the focus of the

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<sup>41</sup> *Id.* at 595.

<sup>42</sup> *Id.* at fn. 4.

<sup>43</sup> *Marple I*, at 33-34 (emphasis added).

Commission's Section 619 analysis was the site of the Gas Reliability Station itself, rather than the manner in which the Station Building and the Fiber Building were located on the property.

Marple Township's zoning ordinance does not address the "situation" of the buildings on the Gas Reliability Station property. That is, no Party identified any zoning restrictions on the setbacks of the buildings from the border of the property, or the size of the buildings or the building materials from which the buildings will be constructed. Instead, the zoning restriction addresses the public utility use of the property.

A Section 619 proceeding is not an evaluation of the project which includes the Gas Reliability Station. Nor does it encompass natural gas use or gas safety generally. For the most part, the environmental impacts identified by the Intervenors result from gas operations that are located outside of the buildings, and not subject to Commission approval pursuant to Section 2205 of the Public Utility Code. In an abundance for caution and to ensure that all the issues identified by the Commonwealth Court are addressed, the record includes evidence regarding the line heater and emergency generator, as well as general safety concerns regarding explosion risk that includes consideration of piping located outside the Station Building and the Fiber Building.

### **Constitutionally Sufficient Environmental Review: Substantive Considerations Identified by the Commonwealth Court**

As part of its planning process, PECO determined that additional infrastructure was necessary in Marple Township in order to meet additional need for gas service in the area. But for the buildings proposed for the site, PECO would not require authorization from the Commission to construct the Gas Reliability Station. Further, Marple Township would have no authority to prevent PECO from constructing the Gas Reliability Station at Sproul Road. Marple Township argues that the Sproul Road location is inappropriate because the operation of the Gas Reliability Station poses a safety risk, will be too noisy and will degrade the air quality of the surrounding community.

## 1. Safety

In the Initial Proceeding, the Parties introduced a significant amount of evidence regarding the risk of explosion at the property. The Commission considered the evidence but concluded that it was not relevant to the application of Section 619 to the buildings on the site. In the Remand Proceeding, the Parties expanded on the evidence that was presented in the Initial Proceeding regarding alleged safety issues posed by the location of the Gas Reliability Station. PECO and Marple Township each presented additional expert testimony regarding safety and concerns related to the operation of the Station and the potential negative impacts to the surrounding community in the event of a leak or explosion.

After considering the evidence, I find PECO's evidence regarding the facilities at the Station more credible and convincing than the evidence provided by Marple Township and the Intervenors. Any natural gas infrastructure poses the risk of damage to people and property, including the natural gas facilities which are already in place in the form of distribution mains, service lines and gas appliances. PECO is not required to prove that the Station poses zero risk to the community. The expert testimony supports the conclusion that the risk of serious damage to property or injury to people is remote and unlikely to occur.

PHMSA,<sup>44</sup> among other things, regulates gas pipeline safety. Pennsylvania specifically incorporated all PHMSA pipeline safety regulations in 49 CFR Subtitle B Ch. I Subch. D, Pipeline Safety, including regulations for natural gas distribution facilities under Part 192.<sup>45</sup> PHMSA regulations do not restrict where natural gas distribution facilities can be located because the distribution assets must be located in proximity to serve their customers and because siting restrictions are unnecessary due to the extensive safety regulations that natural gas

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<sup>44</sup> Pipeline and Hazardous Materials Safety Administration. PHMSA is an agency within the U.S. Department of Transportation.

<sup>45</sup> See 58 P.S. § 801.302(a) ("The safety standards and regulations for pipeline operators shall be those issued under the Federal pipeline safety laws as implemented in 49 CFR Subtitle B Ch. I Subch. D (relating to pipeline safety).").

distribution operators must follow.<sup>46</sup> The PHMSA regulations require natural gas pipeline operators to comply with extensive safety requirements which are inherent in the operation of natural gas distribution systems.<sup>47</sup>

PECO offered the expert testimony of Mike Israni. Mr. Israni is a former official of PHMSA, the federal agency tasked with setting safety regulations related to gas facilities. Mr. Israni explained that “gas reliability station” is not a term of art in the natural gas industry. PECO’s Gas Reliability Station shares some characteristics with a “gate station” and also characteristics of a “district regulating station.” The primary difference between the proposed Station and PECO’s other gate stations, is that the proposed Station is not a “custody transfer point.” That is, PECO will own the gas that comes into the Station. Further, the gas arriving at the Station will have been odorized before entry, unlike a typical gate station.

According to Mr. Israni, it is not unusual for a gate station or a district regulating station to be located in a residential or commercial area such as the site selected by PECO in Marple Township. As a distribution facility, PECO is required to operate the Gas Reliability Station with a much larger safety margin than the safety margins that would apply to a transmission facility in a similar location. PECO is required to follow a Distribution Integrity Management Plan (DIMP). A DIMP establishes a written program that a distribution facility operator must follow to continuously evaluate, prioritize and mitigate risks, such as corrosion, excavation damage, other outside force damage, or equipment failure to an operator’s distribution system. He explained that explosions and “reportable incidents”<sup>48</sup> are rare at these facilities. In his view, the Station is safe as designed and does not pose an unreasonable risk of harm to people or property.

Jeffrey Marx, Marple Township’s expert, estimated that the likelihood that an incident would occur which would cause an impact beyond the Station site would be “rare.”

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<sup>46</sup> See PECO Statement 3-RD at 8, 10.

<sup>47</sup> 49 C.F.R. Part 192

<sup>48</sup> A reportable incident is serious and involves death or serious injury. See Tr. 2073.



According to his evaluation, fire is the most significant potential impact in the immediate area outside the facility boundaries. The impact of a “maximum credible event” would be “rare” and would only extend 100 feet beyond the release source. A full pipe rupture would be “extremely rare” and would only extend 220 feet from the release source.

Mr. Marx noted that methane gas is not a very “energetic” material and outdoor explosions do not tend to cause extensive damage. Even if an explosion occurred inside one of the buildings, the blast wave would not extend beyond the boundary of the Station. While it would be possible for people to be injured in the event of a “worst case” scenario, the likelihood of such an event is extremely rare.

Mr. Israni agreed with Mr. Marx, that a “full rupture event” at the inlet to the Station would be extremely rare. A review of the PHMSA dataset for district regulating stations did not identify a single full rupture event.

Marple Township’s witness James Capuzzi is very concerned about the safety of the Station. He relied on his calculation of the “potential impact radius” (PIR)<sup>49</sup> and his anecdotal experience regarding PECO’s response time to an emergency call.

PIR is defined as the radius of a circle within which the potential failure of a pipeline could have a significant impact on people or property.<sup>50</sup> A PIR calculation is based, in part, on the maximum allowable operating pressure in the pipeline segment and the diameter of the pipeline in inches.<sup>51</sup> The calculation assumes a full rupture of a transmission line.<sup>52</sup>

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<sup>49</sup> The Commonwealth Court referred to “explosion impact radius.” *Marple II*, p. 975. The PHMSA regulations do not use the term “explosion impact radius.” PECO St. 3-RD at 3:16-18. At the hearing, counsel for Marple Township explained that the parties likely used the incorrect term in their brief to the court. *See* Tr. 2066.

<sup>50</sup> PECO St. 6-SR at 23 (citing 49 C.F.R. § 192.903).

<sup>51</sup> *Id.*

<sup>52</sup> Tr. 2059.

Mr. Capuzzi calculated a PIR and concluded that an accident at the Station would require an evacuation radius of 330 feet, which would include residences and Freddy's Restaurant.<sup>53</sup>

Mr. Israni explained that Mr. Capuzzi misused the PIR calculation. According to PHMSA, a PIR calculation is used to determine the safety protocols which should be in place for transmission lines. The calculation is based on a catastrophic rupture of a transmission line operating at a maximum allowable operating pressure. It is used by PHMSA to determine what level of safety management and control is required for transmission lines. He went on to explain that since the Station is already located in a high consequence area the most rigorous safety management is required.

Further, the Station is a distribution facility. Distribution pipelines generally operate at much lower pressures and are only permitted to operate at 20% of the maximum pressure of the pipeline's capacity. As a result of these lower pressures in relation to the diameter of the distribution pipes, Mr. Israni explained that distribution pipelines do not typically rupture or explode on their own. Distribution pipes are more likely to leak. He noted that the Station will be equipped with sensors and in the event of a leak, PECO can cut the gas supply to the Station remotely.

Mr. Capuzzi overstates the risk posed by the Station by relying solely on the PIR for his opinion. He conceded that the primary variable in calculating the PIR is operating pressure. Mr. Israni explained that the distribution facilities in the Station are required by PHMSA to operate at much lower pressures than those used by Mr. Capuzzi in his PIR calculation. Mr. Capuzzi further conceded that the National Gas Code does not prohibit the installation of distribution lines within a PIR, and that there are existing gas mains already located within the rights-of-way of the major roads adjacent to the Station. Indeed, the evacuation radii for the existing mains on Sproul Road would be the same as the evacuation radius he calculated for the Station. Although he expressed concern that the gas would be heated at the facility and that the gas would be coming above ground before being placed into the

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<sup>53</sup> Marple Township Remand St. 4 at 3-4.

distribution mains, he did not provide any evidence other than his opinion that these factors may elevate the danger of an accident at the facility.

I place more weight on the expert testimony of Mr. Israni. Taking Mr. Israni's testimony and Mr. Marx's testimony together, I conclude that the gas facilities proposed for the Station do not pose an unusual risk to the surrounding people or property. Mr. Capuzzi is not an engineer and does not have any specialized experience with gas safety except in his role as Marple Township Fire Marshall and as a firefighter in Broomall. His reliance on his PIR calculation is misplaced because the pipeline at the station will be operating at much lower pressure levels than the pressures that he used in his calculation. Further, he conceded that there are existing gas mains under nearby public roadways, Sproul and Cedar Grove Roads. A rupture of these existing pipelines would require a similar evacuation radius as the 330 feet that he calculated for the Gas Reliability Station.<sup>54</sup> Therefore, the evacuation radius in the unlikely event of a pipeline rupture at the Gas Reliability Station is not different from the evacuation radius that would result from a similarly unlikely pipeline rupture from existing natural gas facilities. In short, Mr. Capuzzi's testimony does not overcome PECO's evidence that the Station is designed and will operate safely and is very unlikely to cause harm to people or property due to gas leaks or explosion that are significantly different from the risks posed by existing facilities.

Mr. Capuzzi also described an incident where a PECO electric division employee responded to an incident and would not turn off the PECO gas facility.<sup>55</sup> Therefore, in Mr. Capuzzi's view, as a firefighter and risk consultant, the Sproul Road site is not appropriate for the Station. This single incident is not sufficient evidence to conclude that PECO will not respond appropriately in the event of a public safety emergency at the Gas Reliability Station.

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<sup>54</sup> Tr. 2304.

<sup>55</sup> Marple Township Remand St. 2-R at 4; Tr. 2292-93.

## 2. Noise

Marple Township argues that the Station will produce noise at levels that will not comply with the Township's noise ordinance. PECO has committed to complying with Marple Township's noise ordinance.<sup>56</sup> PECO's evidence that the Station will not produce an unreasonable level of noise that cannot be mitigated with feasible, readily available, and proven technology is credible and convincing.

PECO's engineering firm, EN Engineering, contracted with acoustic and sound control consultant Hoover & Keith Inc. to assist PECO in designing the Station to comply with Marple Township's Noise Ordinance. Hoover & Keith Inc. conducted an ambient sound survey and noise impact assessment specific to 2090 Sproul Road to determine the potential impact of sounds generated by the Station's equipment, and the company then recommended various sound mitigation measures. These measures include the use of acoustic-dampening insulation and doors for the main Station Building, a forced air ventilation system to minimize open areas where sounds can escape, sound absorbing or dampening HVAC equipment, and other sound-dampening materials on the Station's regulators and valves.

PECO witness Reginald Keith, principal consultant and President of Hoover & Keith, testified in the Remand Proceeding that compliance with Marple Township's Noise Ordinance is technically feasible and readily achievable using feasible, readily available, and proven technology. As Mr. Keith explained, "[t]hey don't have to reinvent the wheel to do any of this stuff."<sup>57</sup>

In the Remand Proceeding, the Intervenors produced two witnesses who claimed there would be noise impacts from the Station—Dr. James Schmid and Dr. Edward Ketyer. However, neither is an acoustical expert,<sup>58</sup> neither had calculated sound decibel levels for the

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<sup>56</sup> PECO Reply Brief at p. 25.

<sup>57</sup> Tr. 1987.

<sup>58</sup> Tr. 2211 (Schmid); Tr. 2330-31 (Ketyer).

Station, and neither had reviewed the Hoover & Keith sound study.<sup>59</sup> Dr. Ketyer conceded he was speaking generically about the impact of excessive sound and noise pollution on children's health. He further admitted that he had not taken into account the sound dampening measures recommended in the Hoover & Keith study.<sup>60</sup>

Drs. Schmid and Ketyer's testimony regarding noise at the facility is not sufficient to prove that noise generated by the equipment at the Station will cause an unreasonable impact. PECO's credible evidence shows that the noise can and will be mitigated by sound dampening technology and that PECO can and will comply with Marple Township's Noise Ordinance.

### 3. Air Emissions

The only emission sources at the Station will be located outside the Station Building and the Fiber Building. Both of these pieces of equipment are utility facilities and are therefore not subject to siting regulation by the Commission and are not subject to any zoning regulation by Marple Township. It is not clear from the decision in *Marple II* that the court was aware that neither of the air pollution sources would be housed in either of the buildings proposed for the site. Further, as explained above, PECO does not need Commission authority to construct or site these facilities at the Gas Reliability Station. The Commission also does not have the authority to regulate air pollution sources. That authority rests with DEP.

However, in an abundance of caution, I permitted the parties to produce evidence on the subject of air emissions and find that PECO produced substantial evidence to conclude that for the purposes of Section 619 review, the Gas Reliability Station will not pose an unreasonable impact on air quality. This conclusion largely rests upon PECO's evidence that neither the line heater nor the emergency generator are large enough to require a DEP air pollution permit and that they are exempted from DEP air pollution permitting requirements. I wish to emphasize that this conclusion is limited to the narrow review authorized by Section 619

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<sup>59</sup> Tr. 2211 (Schmid); Tr. 2331 (Ketyer).

<sup>60</sup> Tr. 2331.

of the Municipalities Planning Code and does not exempt PECO from any requirements or enforcement action that DEP may undertake. The Commission does not have authority over any matters within the jurisdiction of a sister state agency.<sup>61</sup>

Even in the absence of an air permit requirement, PECO's expert witness Jeffrey Harrington explained that the Station's air emission sources will still be subject to EPA regulations and DEP enforcement. Mr. Harrington explained that the emergency generator will be subject to several enforceable requirements, including federal New Source Performance Standards (NSPS) codified in 40 CFR Part 60, subpart JJJJ and federal National Emissions Standards for Hazardous Air Pollutants (NESHAPs) for stationary reciprocating internal combustion engines codified at 40 CFR Part 63, subpart ZZZZ. These regulations contain both emissions-related and operational limitations.

In addition, Mr. Harrington explained that National Ambient Air Quality Standards (NAAQS) are defined by EPA as the thresholds that demonstrate that emissions from a proposed project are protective of public health and public welfare. EPA's NAAQS regulations are set forth at 40 CFR Part 50. NAAQS include both "primary" ambient air quality standards, which are the level of air quality that the EPA has determined is necessary, with an adequate margin of safety, to protect the public health, and "secondary" which are levels of air quality necessary to protect the public welfare from any known or anticipated effects of a pollutant. Mr. Harrington explained that DEP has the authority to enforce these regulations and to investigate facilities that potentially violate the NAAQS, NSPS, and NESHAP.

PECO presented evidence that no air permits are required from the DEP or EPA to construct or operate the Station's line heater or emergency generator because each is subject to blanket exemptions pursuant to 25 Pa. Code § 127.14.<sup>62</sup> Additionally, the 50-kW emergency generator will comply with the emissions standards set forth in 40 C.F.R. 60.4233(e) and both the 30-kW and 50-kW emergency generator sizes have received Certificates of Conformity from

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<sup>61</sup> See *Funk*.

<sup>62</sup> PECO St. No. 6-RD, at 8-11; PECO St. No. 6-RR, at 3; Exhibit JH-6.

EPA, meaning that they comply with EPA emissions standards.<sup>63</sup> The blanket exemptions and Certificates of Conformity constitute the relevant agency determinations for purposes of the Station emission units' air quality impacts. PECO's witness, Jeffrey Harrington concluded that there will be no unreasonable impact on air quality.

Marple Township and the Intervenors presented the analysis of Dr. McAuley. According to Dr. McAuley, the Station would create an elevated risk related to increased air emissions from the Station. Dr. McAuley calculated the potential to emit (PTE) of a source of emissions pursuant to the EPA's guidance. According to Dr. McAuley, within a one-mile radius from the Station, the Station would cause or contribute to measurable impacts from emissions of nitrogen dioxide (NO<sub>2</sub>), carbon monoxide (CO), particulate matter (PM<sub>2.5</sub>), benzene and formaldehyde, among others.<sup>64</sup> The most significant air quality impacts would occur within a half-mile of the facility.

In response to Dr. McAuley's analysis, PECO also presented evidence in the form of air modeling pursuant to EPA-approved methods. According to Mr. Harrington, Dr. McAuley's air modeling was deeply flawed.<sup>65</sup> Mr. Harrington explained that Dr. McAuley assumed for the purposes of his model that the emergency generator would operate on a 24/7/365 continuous basis, for a total of 8,760 hours per year.<sup>66</sup> This assumption ignores (i) PECO's actual plans (which are to operate the generator only in emergencies and for routine testing for an hour per week), (ii) federal law that restricts such operation to no more than 100 hours per year, and (iii) guidance from the EPA specifying 500 hours as a conservative benchmark for the modeling.<sup>67</sup> In other words, Dr. McAuley modeled air emissions from the generator assuming that PECO would not comply with regulations, which is not a standard principal of air modeling.

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<sup>63</sup> PECO St. No. 6-RD, at 11; *see also* Exhibits JH-2 and JH-3.

<sup>64</sup> Marple Township Remand Statement No. 1 at 5.

<sup>65</sup> PECO St. No. 6-RR, at 3; Tr. 2378.

<sup>66</sup> PECO St. No. 6-RR at 3-4.

<sup>67</sup> *Id.*; Tr. 2384.

Marple Township also argues that any level of air emissions is harmful to human health, therefore the Commission should not approve the zoning exemption for PECO. Marple Township relies on the testimony of Dr. Ketyer. According to Dr. Ketyer, there is no safe level of exposure to any component of air pollution resulting from natural gas combustion.<sup>68</sup>

Article I, Section 27 does not require that a project, such as the Station, create *zero* negative impacts on air quality.<sup>69</sup> The state and federal government have set levels of air pollution in the form of NAAQS that are deemed to be sufficient to protect human health.<sup>70</sup> Similarly, DEP develops state standards which conform to the mandates set by the federal government. As DEP has been tasked with the authority to regulate air pollution, the Commission is bound to defer to that agency's expertise. In DEP's expertise, it is not necessary to require permits for small emission sources such as the line heater and emergency generator.<sup>71</sup> Emission sources are still required to comply with emission thresholds for certain pollutants, even in the absence of a permit. While some might disagree with those standards,<sup>72</sup> it is appropriate for the Commission to rely on air pollution control requirements of EPA and DEP.<sup>73</sup> This is consistent with the observation of the Commonwealth Court that the Commission "is obligated to consider 'the environmental impacts of placing [a building] at [a] proposed location,' while also deferring to environmental determinations made by other agencies with primary regulatory jurisdiction over such matters."<sup>74</sup>

I find Mr. Harrington's air modeling and analysis more persuasive than Dr. McAuley's. I agree with the reasons articulated by Mr. Harrington that Dr. McAuley overstated

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<sup>68</sup> Marple, Uhlman, Baker Remand St. 3 at 4.

<sup>69</sup> *Robinson Township; PEDF*.

<sup>70</sup> Mr. Harrington explained that federal NAAQS are by definition deemed to be protective of human health. Tr. 2391.

<sup>71</sup> *See Ex. JH-6*.

<sup>72</sup> *See Marple Township, Uhlman, Baker Remand St. 3 at 5*.

<sup>73</sup> *Funk; Del-AWARE*.

<sup>74</sup> *Marple II*, at 974.



his estimates of emissions from the line heater and the generator. The air pollution sources at the Station will not cause an unreasonable impact on air quality. These utility facilities are small emitters and are unlikely to cause emissions of air pollution in excess of NAAQS.

#### 4. Climate Change

Ms. Baker and Mr. Uhlman argue that the Commission should not grant PECO an exemption from Marple Township’s zoning ordinance because PECO failed to demonstrate that the Gas Reliability Station will not exacerbate the effects of climate change.<sup>75</sup> Therefore, according to Ms. Baker and Mr. Uhlman, the Commission cannot execute its duties to protect environmental resources as required by Article I, Section 27.

PECO counters that the Commission is not only not required to consider climate change, but that it is not authorized to do so. The responsibility for developing a plan to regulate greenhouse gas emissions in the Commonwealth has been delegated to DEP.

The Commission may only exercise the jurisdiction that the General Assembly has delegated.<sup>76</sup> While the Commission is obligated to consider “the environmental impacts of placing [a building] at [a] proposed location,”<sup>77</sup> it may only do so within the confines of its authority:

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

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<sup>75</sup> It does not appear that this was raised as a ground for appeal before the Commonwealth Court, nor did the court discuss climate change in its decision.

<sup>76</sup> *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1977); *Allegheny County Port Authority v. Pa. Publ. Util. Comm’n.*, 237 A.2d 602 (Pa. 1967). See also *Dep’t of Env’t Res. v. Butler Cnty. Mushroom Farm*, 454 A.2d 1, 4 (Pa. 1982); *Pequea Twp. v. Dep’t of Env’t Prot.*, 716 A.2d 678, 686 (Pa. Cmwlth. 1998).

<sup>77</sup> *Marple II*, at 973-74.

representatives of the people, through legislative action. While executive branch agencies and departments are, from time to time, put in the position of striking the balance themselves, they do so only after the General Assembly makes “basic policy choices” and imposes upon the agencies or departments “the duty to carry out the declared legislative policy in accordance with the general provisions of the statute.” The second provision of the ERA impels executive branch agencies and departments to act in support of conserving and maintaining public natural resources, but it cannot operate on its own to “expand the powers of a statutory agency...” Thus, courts assessing the duties imposed upon executive branch departments and agencies by the ERA must remain cognizant of the balance the General Assembly has already struck between environmental and societal concerns in an agency or department's enabling act.<sup>[78]</sup>

Climate change is a complex problem which requires a balancing of many societal, economic and environmental concerns. The responsibility for striking this balance lies with the General Assembly, not with any single administrative agency.<sup>79</sup>

The General Assembly has done this by delegating the responsibility for developing air quality standards to DEP. Further, the General Assembly has tasked DEP with the responsibility for developing a climate change action plan and to report on climate impact. Specifically, The Pennsylvania Climate Change Act of 2008 (Act 70) requires the DEP to develop a climate change action plan and to report on climate impacts.<sup>80</sup> Section 7(a) of Act 70 requires the climate change action plan, among other things, (i) to evaluate cost-effective strategies for reducing or offsetting greenhouse gas emissions from various sectors in this Commonwealth, (ii) to identify costs, benefits and co-benefits of greenhouse gas reduction strategies recommended by the plan, including the impact on the capability of meeting future energy demand within the Commonwealth, (iii) to identify areas of agreement and disagreement among committee members about the climate change action plan, and most importantly, (iv) to

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<sup>78</sup> *Funk*, at 234 (citations omitted)

<sup>79</sup> *See Funk* at 250.

<sup>80</sup> 71 P.S. §§ 1361.1–1361.8.

recommend to the General Assembly legislative changes necessary to implement the plan.<sup>81</sup> Section 5(a) of Act 70 establishes an 18-person Climate Change Advisory Committee “established *within* the department [DEP]” and “[t]he purpose of the committee shall be to *advise the department* [DEP] regarding the implementation of the provisions of this act [Act 70]”. (emphasis added). The Committee is broadly representative of the Commonwealth, with representatives from scientific, business and industry, transportation, environmental, social, outdoor, and sporting, labor and other affected communities.<sup>82</sup> The Chair of the Pennsylvania Public Utility Commission is an *ex officio* member of the Climate Change Advisory Committee, but the Commission is not tasked with any specific duties.<sup>83</sup>

Ms. Baker and Mr. Uhlman have not cited any DEP permit requirement or standard which applies to the Gas Reliability Station. The Commission has no authority under either Act 70 or the Public Utility Code: (1) to substitute its judgment for that of the DEP or General Assembly, (2) to devise its own climate change action plan that would not reflect the divergent views mandated by Act 70, or (3) to create its own separate cost-benefit analysis of greenhouse gas reduction strategies. On the contrary, as explained above, the Commission’s chair is but one member of the Climate Change Advisory Committee and the General Assembly specifically established that the DEP has primary regulatory jurisdiction of Act 70.

Further, Ms. Baker and Mr. Uhlman’s argument that PECO did not demonstrate that PECO’s forecasted demand analysis was reasonable also fails. In *Marple I*, the Commission concluded that PECO had adequately demonstrated that the location selected for the Gas Reliability Station and the associated buildings was reasonable. This conclusion was supported by credible and competent evidence from PECO’s experts.<sup>84</sup> The Commission noted that although it considered PECO’s evidence regarding the need for the project as a whole, Section 619 only requires a determination that the situation of the buildings is necessary.

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<sup>81</sup> 71 P.S. § 1361.7(a).

<sup>82</sup> 71 P.S. § 1361.5(b) (emphasis added).

<sup>83</sup> 71 P.S. § 1361.5(b)(3).

<sup>84</sup> *Marple I*, at. 32-33. *See also Marple I*, at 49, 72, 78.

Ms. Baker and Mr. Uhlman’s only evidence was the speculative testimony of Dr. Najjar, that generally, with warming temperatures, natural gas usage will decrease. Dr. Najjar also speculated that PECO customers will convert from using gas appliances to using electric appliances, thereby further decreasing demand.<sup>85</sup> Neither of these opinions was supported by any sort of data typically used by experts, but instead were simply Dr. Najjar’s “common sense” opinion. Nor did Ms. Baker or Mr. Uhlman support their argument by pointing to any legislation or other specific factors that might incentivize PECO customers to switch from gas appliances to electric appliances, or any other data which would contradict PECO’s demand analysis.

To conclude, Ms. Baker and Mr. Uhlman failed to demonstrate that the Commission is required by Article I, Section 27 to consider climate change when approving an exemption from a municipal zoning ordinance regulating the use of the buildings on the site.

## **Conclusion**

After considering the identified environmental impacts related to the Gas Reliability Station, I conclude that the proposed Gas Reliability Station and related buildings will enhance reliability and availability of supply services to PECO’s customers. Article I, Section 27 of the Pennsylvania Constitution does not require a petitioner to prove that a project will not cause any impact on the environment. Accordingly, PECO has met the burden of proving that the buildings should be exempt from Marple Township zoning because the situation of the buildings is reasonably necessary for the public convenience or welfare.

## CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject-matter of the dispute. 53 P.S. § 10619.

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<sup>85</sup> Marple, Uhlman, Baker Remand Statement No. 2 at 17; Tr. 2255-57.

2. As the party seeking approval from the Commission, PECO bears the burden of proof. 66 Pa.C.S. § 332(a).

3. Public utility facilities are exempt from local regulation. *Duquesne Light Co. v. Monroeville Borough*, 298 A.2d 252 (Pa. 1972).

4. Under Section 619 of the Pennsylvania Municipalities Planning Code, a municipality may exercise its zoning powers over a public utility building unless the Commission determines that the site is reasonably necessary for the public convenience or welfare. 53 P.S. § 10619.

5. The Commission must incorporate the results of a constitutionally sound environmental impact review when determining that a site is reasonably necessary for the public convenience or welfare. *Twp. of Marple v. Pa. Pub. Util. Comm'n*, 294 A.3d 965 (Pa. Cmwlth. 2023).

6. The location selected by PECO at 2090 Sproul Road for the Reliability Station is reasonably necessary. 53 P.S. § 10619.

### ORDER

THEREFORE,

IT IS ORDERED:

1. That the 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, at Docket No. P-2021-3024328, is hereby granted in that the proposed two “structures” constitute “buildings” and their proposed situation in question is reasonably necessary for the convenience or welfare of the

public within the meaning of Section 619 of the Municipalities Planning Code (MPC) Act of July 31, 1968. P.L. 805 as amended, 53 P.S. § 10619.

2. That this proceeding at Docket P-2021-3024328 be marked closed.

Date: April 3, 2024

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/s/  
Mary D. Long  
Administrative Law Judge