EARTHJUSTICE
BECAUSE THE EARTH NEEDS A GOOD LAWYER

April 23, 2024

Via Electronic Filing

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

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

Dear Secretary Chiavetta,

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

Sincerely,

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

CERTIFICATE OF SERVICE

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

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BEFORE THE COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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

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I. INTRODUCTION

Article I, Section 27 of the Pennsylvania Constitution provides:

> 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.

Pa. Const. art. I, § 27 (1971). Article I is Pennsylvania's Declaration of Rights, this state's analogue to the U.S. Bill of Rights. These are rights that the public has against the government. The state, for example, is not allowed to deprive people of their rights to free speech or freedom of assembly; similarly, the state is not allowed to interfere with the people's right to "clean air, pure water" and preservation of certain values of the environment, or the people's right to have the Commonwealth conserve and maintain public natural resources for the benefit of present and future generations. The "Pennsylvania Constitution now places citizens' environmental rights on par with their political rights." *Pa. Env't Def. Found. v. Commonwealth,* 161 A.3d 911, 917 (Pa. 2017) ("*PEDF II*").

To comply with Section 27, the Commission is required to consider the reasonably foreseeable impacts of its action under Section 619, both upon the rights enumerated in the first clause of Section 27, and upon the public natural resources held in trust by the Commonwealth.

The Amended Initial Decision's (the "AID's") failure to recognize the Commission's role in carrying out these constitutional responsibilities—and its many consequences for the cases that the Commission ordinarily uses when it applies Article I, Section 27—is the basis for these exceptions. We respectfully request the Commission to issue a decision that corrects these errors and to deny PECO Gas's application.

II. EXCEPTIONS

Exception 1: The AID's conclusion that the Project was reasonably necessary was error because it failed to clearly and unequivocally recognize that the Commission is subject to Article I, Section 27 of the Pennsylvania constitution in interpreting and applying Section 619.

This proceeding, of course, is on remand from the Commonwealth Court's decision concerning the applicability of Article I, Section 27 to the Commission. *Township of Marple v. Pa. Pub. Util. Comm'n,* 294 A.3d 965 (Pa. Cmmw. Ct. 2023) ("*Twp. of Marple*"). The Court held that Section 619 requires the Commission to complete a "constitutionally sound environmental impact review" of the PECO Gas Expansion Project ("Project") proposal and factor that review into its ultimate determination regarding the reasonable necessity of the proposed siting of the proposal. *Id.* at 974-75. That decision necessarily means that the Commission is bound by Article I, Section 27 to protect public rights to a quality environment.

While the AID recognizes this changed legal landscape as a general matter, it does not specifically acknowledge that it must apply Section 619 in this case in a manner that protects these rights. The AID improperly siloed air emissions and climate change as only within the jurisdiction of the General Assembly and the Pennsylvania Department of Environmental Protection ("DEP") to consider. Instead, these environmental effects must be evaluated and considered by the Commission in its Section 619 determination in order to comply with Article I, Section 27 and its mandate from the Commonwealth Court. Existing laws, regulations, and adjudications by other Commonwealth agencies provide a wealth of information and context for the Commission's consideration, but they do not absolve the Commission of its duties under Article I, Section 27.

For four decades prior to *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013) ("*Robinson Twp.*") and *PEDF II,* 161 A.3d 911, a three-prong balancing test—not the

Constitution itself—was used to determine compliance with Article I, Section 27. The Commission's and the Commonwealth Court's Section 619 jurisprudence during this period applied this balancing test. This invalidated test, articulated by the Commonwealth Court in *Payne v. Kassab*, needs to be quoted and briefly explained here because its lives again in the AID. The AID does not apply the text of Article I, Section 27, and repeatedly treats statutes and regulations as the only relevant law. This is essentially the approach taken by the *Payne* test, which functioned as a substitute for the text of Article I, Section 27. It provides as follows:

> The court's role must be to test the decision under review by a threefold standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?
>
> *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), aff'd, 361 A.2d 263 (Pa. 1976).[1]

In *PEDF II*, the Supreme Court invalidated the *Payne* test, explaining that it is "unrelated to the text of Section 27 and the trust principles animating it, [and] strips the constitutional provision of its meaning." 161 A.3d at 930 (citing *Robinson Twp.*, 83 A.3d at 967, and John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 Envtl. L. 463, 499 (2015). The test conflates the constitution with statutes and regulations, and does not even recognize that Article I, Section 27 sets out constitutional environmental rights. Because Article I, Section 27 is constitutional law, its scope cannot be reduced or defined by statutes like Section 619.

[1] The Pennsylvania Supreme Court did not affirm on the basis of that test, however; it merely noted that the Commonwealth Court had used it. 361 A.2d at 272 n.23.

After *PEDF II*, that balancing test is no longer valid. Instead, judicial review is to be based on "the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment." *PEDF II*, 161 A.3d at 930. Article I, Section 27, in other words, is a source of law that is separate and apart from the statutes and regulations that the Commission ordinarily applies.

While the AID's errors in this regard occur throughout the opinion, the most basic example is its heavy reliance on dicta[2] in *Funk v. Wolf*, 144 A.3d 228 (Pa. Commw. Ct. 2016) ("*Funk*"), a Commonwealth Court case decided and published in 2016. This case was decided one year before the Pennsylvania Supreme Court's decision in *PEDF II*.

The Commonwealth Court *Funk v. Wolf* rested its entire analysis of Article I, Section 27 on the *Payne* framework, which was first questioned by the Supreme Court in *Robinson Township* in 2013, and then explicitly rejected by the *PEDF II* court. *See Funk*, 144 A.3d at 234 n.2 ("Because the . . . lead opinion in *Robinson Township* did not garner a majority of the Supreme Court, the plurality's rejection of the analytical framework discussed in *Payne* and its progeny is not binding precedent."); *PEDF II*, 161 A.3d at 930 ("The *Payne I* test, which is unrelated to the text of Section 27 and the trust principles animating it, strips the constitutional provision of its meaning . . . Accordingly, we reject the test developed by the Commonwealth Court as the appropriate standard for deciding Article I, Section 27 challenges."). Thus, statements in *Funk* based on the *Payne* framework are no longer good law. *See, e.g.*, *Daimler*

[2] The Court held in Funk that mandamus and declaratory relief were not available remedies to reduce greenhouse gas emissions in the absence of a specific existing statute or regulation indicating the exact relief that would be ordered. 144 A.3d at 250-51. For a detailed discussion of *Funk*, see John C. Dernbach & Robert B. McKinstry, Jr., *Agency Statutory Authority and the Pennsylvania Environmental Rights Amendment*, 60-64, Geo. Env't L. Rev. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4784534.

AG v. Bauman, 571 U.S. 117, 138 n.18 (2014) (rejecting the precedential value of caselaw relying on a now-overruled legal framework).

Such statements include, among others, that "it is the Commonwealth, not individual agencies or departments, that is the trustee of public natural resources under the ERA." *Funk*, 144 A.3d at 235. In *PEDF II*, the Supreme Court corrected this misconception by stating that "[t]rustee obligations are not vested exclusively in any single branch of Pennsylvania's government, and instead *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." 161 A.3d at 931 n.23 (emphasis added). Similarly, the idea that the General Assembly somehow has a special and distinct role in compliance with Article I, Section 27—and the implication that the General Assembly has the power to remove Section 27 duties from the scope of an agency's authority—is based on an outdated and erroneous interpretation of the constitution. Instead, Article I, Section 27 is a self-executing provision that applies directly to the Commission without the need for any implementing legislation or guidance. *See PEDF II*, 161 A.3d at 937.

Article I, Section 27 imbues all Commonwealth entities equally with the obligation to protect the rights enumerated therein, within the scope of their authority. Even though the Commission does not regulate air pollution sources in the same manner that DEP does, it is still required to consider air pollution associated with the Project when determining if it is "reasonably necessary for the convenience or welfare of the public." 53 Pa. Stat. § 10619. While DEP review and approval is relevant information for the Commission to consider in its determination, a Section 619 determination is answering a *different question* than the questions DEP must answer when deciding that an entity is entitled to an air permit. *See Peifer v. Colerain*

Twp. Zoning Hrg. Bd., 302 A.3d 811, 819 (Pa. Commw. Ct. 2023) ("[E]ven though [all Commonwealth] entities must abide by the ERA, their respective decisions as to how to do so may take different forms and not manifest in the same way."). In other words, it is possible that an applicant may meet the requirements for an air permit, yet the emissions authorized by such permit could prevent a public utility from obtaining a favorable Section 619 decision. *See, e.g. Liberty Twp. v. Commonwealth*, EHB Docket No. 2021-007-L, 2024 WL 202006 at *63 (Jan. 8, 2024) ("[C]ompliance with statutes and regulations is not necessarily coextensive with the fulfillment of the duties laid out in Article I, Section 27."). Moreover, the AID's concern that the Commission's exercise of its ERA obligation would mean that it would "substitute its judgment for that of DEP" is misplaced because the DEP and the Commission are evaluating different considerations and rendering different decisions. AID at 43.

When it comes to climate change, Article 1, Section 27 prohibits the Commission from "passing the buck" based on the inaction of other state agencies. Once again citing the now-defunct *Funk*, AID justifies its failure to engage on the issue of climate change by referring to discrete acts of the General Assembly. AID at 42–43. Again, while it would be appropriate for the Commission to consider other Commonwealth laws, regulations, and any plans regarding climate change, those laws and sources of information do not provide an excuse for the Commission to ignore either its constitutional duty or its statutory duty under Section 619.

A determination by the Commission that a project's climate impacts are contrary to the public interest and do not meet the standard set out in Section 619 in no way overrides the authority of any other Commonwealth entity for two reasons. First, contrary to the ALJ's concern, the Commission does not need to "devise its own climate change action plan" or "create its own separate cost-benefit analysis of greenhouse gas reduction strategies" in order to

accomplish its determination under Section 619. AID at 43. Second, the Commission, and only the Commission, has been tasked with the authority to make that specific determination. And, as the Commonwealth Court directed in its remand of this matter, the Commission needs to make that determination in light of its own trustee obligations. As a result, any attempt at deferral of that Section 619 decision-making to DEP or any other Commonwealth entity is at best illusory and improper. The AID says, for example, that "it is appropriate for the Commission to rely on air pollution control requirements of EPA and DEP." AID at 40. Those requirements, however, are not a substitute for the Commission's own evaluation of what these requirements mean for the overall environmental impact of the project.

Apart from *Funk*, the AID contains other language indicating casting doubt on whether the Commission is bound by Article I, Section 27 in this proceeding. The AID, for example, suggests that the changed legal landscape brought about by *Robinson Twp.* and *PEDF II* does not apply in an adjudicatory setting like this one:

> 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 promulgation of statutes and zoning ordinances. 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. 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.

AID at 27-28 (citations omitted). The AID repeatedly indicates that its primarily responsibility is to ensure compliance with the Commission's statutes and regulations, and it subsequently reduces constitutional compliance to compliance with statutes and regulations. *See, e.g.*, AID at 26, 28, 37, 38, 41-43. This, of course, is exactly what the now-defunct *Payne* test did. On the issue of climate change, the AID says that the General Assembly is responsible:

> 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.

AID at 42. It then states that the General Assembly has tasked the Department of Environmental Protection with the job of preparing a climate change action plan, but that "the Commission is not tasked with any specific duties" under this plan. *Id*. at 43. "[T]he 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 [Climate Change Act of 2008, 71 P.S. §§ 1361.1–1361.8.]". AID at 43. According to the AID, then, the Commission has no responsibility for considering or mitigating the climate change impacts of its decisions, even when the exercise of its statutory authority causes or contributes to climate change, and even though these impacts are covered by Article I, Section 27. Moreover, as discussed below in Exception 5, *infra*, the plan itself repeatedly refers to the Commission as an implementation partner with DEP and other agencies in addressing climate change. *See* Pa. Dep't of Env't Prot., *Climate Change Action Plan*, at 75, 78, 143, 151, 160 (2021).[3]

The Commission's decision in this case should clearly and unequivocally recognize that the Commission is bound to interpret and apply Section 619 in compliance with Article I, Section 27, as the Commonwealth Court directed it to do in its remand.

Exception 2: The AID's conclusion that the Project was reasonably necessary was error because it was based on the misconception that the proper scope of review under Section 619 is not the Project but rather the location of the buildings.

The AID ruled that the proper scope of review under Section 619, including environmental impact review, is limited to the location of the buildings, and limited the location

[3] *Available at* https://greenport.pa.gov/elibrary//GetDocument?docId=3925177&DocName=2021%20PENNSYLVANIA%20CLIMATE%20 ACTION%20PLAN.PDF%20%20%3cspan%20style%3D%22color:green%3b%22%3e%3c/span%3e%20%3cspan%20style%3D%22color:blue%3b%22%3e%28NEW%29%3c/span%3e%209/21/2023.

decision to a choice between two sites. The AID concluded that "[t]he location selected by PECO at 2090 Sproul Road for the Reliability Station is reasonably necessary." Conclusion of Law ¶ 6, AID at 45. In reaching this conclusion, the AID analyzed only "the location of the property where the project will be built[.]" AID at 29. The AID did not evaluate "the Project that includes the Gas Reliability Station." AID at 30. The AID declined to evaluate most of the "environmental impacts identified by the Intervenors," including climate change, because they "result from gas operations that are located outside of the buildings." AID at 30. As detailed above, the AID reached this decision using case law based on the now-defunct *Payne* test.

The consequences of the AID's holding are that Intervenors have no forum to challenge the environmental impacts, including those related to greenhouse gas emissions. If so, Section 619 is unconstitutional as applied because it fails to protect their rights under Article I, Section 27. Essentially, the AID's interpretation of Section 619 reduces the constitutionally required environmental impact analysis to the location of the buildings and forecloses constitutional analysis of the environmental impact of the overall project of which they are a part. Fortunately, there are more constitutionally appropriate ways of reading Section 619.

Legislation must be read in a manner that is consistent with the state constitution; that is particularly the case with legislation like Section 619 that creates exemptions to local zoning. The General Assembly is presumed to act constitutionally, 1 Pa. Cons. Stat. § 1922(3) (1972). It is therefore essential to interpret legislation in a manner that is consistent with Article I, Section 27. '"[W]e are bound to interpret a statute, where possible, in a way that comports with the constitution's terms.'" *Commonwealth v. McClelland*, 233 A.3d 717, 735 (Pa. 2020) (quoting *Commonwealth v. Veon*, 150 A.3d 435, 443 (Pa. 2016)). *See also Commonwealth v. Parker*

White Metal Co., 515 A.2d 1358, 1370-71 (Pa. 1986) (describing legislative responsibility for implementation of Article I, Section 27).[4]

The Supreme Court's decision in *Hartford Accident & Indem. Co. v. Ins. Comm'n,* 482 A.2d 542 (Pa. 1984), illustrates this principle for a different right in Pennsylvania's Declaration of Rights. There, the Court decided that gender-based auto insurance rates were "unfairly discriminatory" under a state insurance statute. The decision was based largely on the Equal Rights Amendment to the state constitution, providing: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." Pa. Const. art. I, § 28. Because of this amendment, the court held, "the statute must be interpreted to include sex discrimination as one type of unfair discrimination." *Hartford Accident & Indem. Co.*, 542 A.2d at 585. The constitution did not merely allow the Insurance Commissioner to interpret the statute in that manner, the court reasoned; the constitution required that interpretation.

The Supreme Court's decision in *Robinson Twp.* underscores the importance of interpreting Section 619 in a manner that conforms to the Constitution. In that case, the Court held unconstitutional on their face statutory provisions that preempted local governments from using their traditional zoning authority to decide *where* shale gas facilities (including wells and

[4] *See also Adams Sanitation Co., Inc. v. Dep't of Envtl. Prot.*, 715 A.2d 390, 394 (Pa. 1998) (rejecting interpretation of the Clean Streams Law that was not based on plain language of statute and that is inconsistent with "the legislative mandate contained in Article I, Section 27); *Nat'l Wood Preservers, Inc. v. Dep't of Env't Res.*, 414 A.2d 37, 41 (Pa. 1980) (claim that Section 316 applies only to pollution caused by mining is inconsistent with statutory language and would "frustrate the Legislature's fulfillment of its obligation" under Article I, Section 27); *Dresser Indus. v. Dep't of Env't Res.*, 604 A.2d 1177, 1181 (Pa. Commw. Ct. 1992) (rejecting claim that Section 316 does not apply to the Commonwealth as landowner because upholding claim would "frustrate the Legislature's fulfillment of its obligation under Article I, section 27").

compressor stations) could be located.[5] *Robinson Twp.*, 83 A.3d 901 (quoting 58 Pa. C.S. § 3303 (2012). In doing so, the legislature declared that environmental matters relating to shale gas were a matter of "statewide concern." *Id.* at 970 (quoting 58 Pa. C.S. § 3303). In place of local zoning, the legislature substituted statewide rules for determining the location of these facilities and required local governments to approve facilities that met these rules. *Id.* at 970-72 (quoting and summarizing 58 Pa. C.S. § 3304). Among other things, the legislation required local governments "to authorize oil and gas operations, impoundment areas, and location assessment operations (including seismic testing and the use of explosives) as permitted uses in all zoning districts throughout a locality." *Id.* at 971.

A plurality (three justices) decided this legislation violated Article I, Section 27. The plurality reasoned that local governments are among the Commonwealth trustees under Article I, Section 27. The statutory provision that preempted local regulation of where oil and gas operations could occur, they said, violates Article I, Section 27 because "the General Assembly has no authority to remove a political subdivision's implicitly necessary authority to carry into effect its constitutional duties." *Id.* at 977. Then-Chief Justice Castille, writing for the plurality in an opinion later adopted by the whole Court in *PEDF II*, explained:

> The municipalities affected by Act 13 all existed before that Act was adopted; and most if not all had land use measures in place. Those ordinances necessarily addressed the environment, and created reasonable expectations in the resident citizenry. To put it succinctly, our citizens buying homes and raising families in areas zoned residential had a reasonable expectation concerning the environment

[5] When this legislation was adopted, the Pennsylvania Supreme Court had already held that local governments were not preempted from using their traditional zoning authority to decide *where* oil and gas operations were conducted. *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 964 A.2d 855 (Pa. 2009). They were, however, preempted from imposing environmental regulations on *how* oil and gas operations are conducted. *Range Res.-Appalachia v. Salem Twp.*, 964 A.2d 869 (Pa. 2009). Thus, § 3303 preempted local governments from exercising their only remaining authority over oil and gas operations—determining *where* oil and gas operations could be conducted.

> in which they were living, often for years or even decades. Act 13 fundamentally disrupted those expectations, and ordered local government to take measures to effect the new uses, irrespective of local concerns.

Id.

The legislation violated Article I, Section 27 because it failed to maintain local environmental protections:

> The Commonwealth, by the General Assembly, declares in Section 3303 that environmental obligations related to the oil and gas industries are of statewide concern and, on that basis, the Commonwealth purports to preempt the regulatory field to the exclusion of all local environmental legislation that might be perceived as affecting oil and gas operations….The police power, broad as it may be, does not encompass such authority to so fundamentally disrupt these expectations respecting the environment.

Id.

The fourth justice (the late Justice Baer) based his decision on substantive due process, focusing on the same essential problem that the other three justices raised. His analysis means that statutes, and by statutory interpretation, need to be consistent with substantive due process. In "a state as large and diverse as Pennsylvania," he reasoned, "meaningful protection of the acknowledged substantive due process right of an adjoining landowner to quiet enjoyment of his real property can only be carried out at the local level." *Id*. at 1001 (Baer, J., concurring). The challenged provisions, he said, "force municipalities to enact zoning ordinances [that] violate the substantive due process rights of their citizenries . . . ." *Id.* at 1008.

Like the challenged legislation in *Robinson Twp.*, Section 619 preempts local authority to decide where specified facilities may be located and substitutes statewide rules for local rules. Unlike the provisions held unconstitutional in *Robinson Township*, though, Section 619 allows the Commission to make a decision that is tailored to the circumstances of a particular case. In contrast to the provisions in *Robinson Township* that were held facially unconstitutional, Section

619 does not appear to be unconstitutional on its face. However, under *Robinson Township*, Section 619 could be unconstitutional as applied. Both Article I, Section 27 and substantive due process prohibit the Commission from deciding this case in a manner that would violate these constitutional protections.

Under Section 619, the Commission may preempt local zoning if it decides "that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public." 53 Pa. Cons. Stat. § 10619. The Commission's review cannot constitutionally be limited to the environmental effects of the specific location of the Station. Rather, it must include the reasonably foreseeable environmental effects of the Project. In all other settings of which we are aware, a review of the environmental impact of a proposal must consider all of the reasonably foreseeable environmental effects that flow directly from approval of the proposal.[6] The Project will make it possible for expansion of PECO Gas's

[6] *See e.g., Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) (holding the environmental impact assessment for the restart of undamaged Three Mile Island nuclear reactor must consider environmental effects of the decision to restart reactor, including risk of an accident, but may exclude non-environmental effects—in this case the psychological effects of risk of accident). As the Court explained, there must be "a reasonably close relationship" between the government's decision to approve a proposal "and the environmental effect at issue." 460 U.S. at 774.

Indeed, guidelines adopted under both the National Environmental Policy Act ("NEPA") and state laws governing environmental impact review specifically require review of greenhouse gases ("GHG") emissions induced by a project. *NEPA Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 Fed. Reg. 1196 (Jan. 9, 2023) ("NEPA Guidance") (federal); Cal. Env't Quality Act Guidelines, Cal. Code Regs. tit. 14, § 15064.4 ("CEQA Guidelines"); N.Y. Env't Conservation Law § 6 CRR-NY 617.9(b)(5)(iii) (2022); N.Y State Dep't of Env't Conservation ("NY DEC"), Assessing Energy Use and Greenhouse Gas Emissions in Environmental Impact Statements (July 15, 2009); NY DEC, Commissioner's Policy: Climate Change and DEC Action (2010); 301 Mass. Code Regs. §§ 11.02, 11.03m 11.07m, 11.12 (2023); Massachusetts Environmental Policy Act Greenhouse Gas Emissions Policy and Protocol ("MEPA") (2010).

distribution network in Delaware and Montgomery Counties; indeed, that is its intended purpose. *See* Exception 4, *infra.*

It is illogical and inappropriate to consider only some of the environmental effects of the Station and the expanded use of gas it makes possible. Moreover, if the Commonwealth does not consider the reasonably foreseeable environmental effects of the Expansion Station, they will not be considered at all. There is no other available state-level legal process to consider these effects holistically. Nothing in law or in the record indicates any role for DEP or any statewide agency to consider overall environmental effects—other than the Commission.[7] If the Commission deprives Marple Township of its ability to review and control the Expansion Station under Section 619, the Township will be unable to consider these effects. *Duquesne Light Co. v. Borough of Monroeville*, 298 A.2d 252, 256 (Pa. 1972) ("This Court has consistently held…that the Public Utility Commission has exclusive regulatory jurisdiction over the implementation of public utility facilities."). Thus, the only way to conduct a "constitutionally sound environmental impact review" under Section 619 is for the Commission to consider the reasonably foreseeable environmental effects of the Expansion Station.

A narrow reading of Section 619—one that focuses only on the environmental effects of the location of the Station—would run afoul of the Supreme Court's decision in *Robinson Twp.* In the context of Section 619, the Pennsylvania Commonwealth Court has explained the effect of that decision on preemption as follows:

> Article 1, Section 27 can bar preemption of local regulation where the state statute or regulation on which preemption is based so completely removes environmental protections that it violates the state's duties under that constitutional provision. *See*

[7] As noted above, DEP must issue a NPDES permit for storm water for construction of the Expansion Station. (PECO Statement No. 2 ("Kowalski Direct")). But the review required for that permit hardly constitutes a full review of the environmental impacts of construction and operation of the Expansion Station.

> *Robinson Township v. Commonwealth*, 623 Pa. 564, 83 A.3d 901, 969-85 (2013) (plurality opinion) (striking down "unprecedented" state law that barred all local zoning and environmental protection regulation on the grounds that the state law violated Article 1, Section 27). The reason that preemption fails in such a case is that the preempting state law itself is unconstitutional.

UGI Utils., Inc. v. City of Reading, 179 A.3d 624, 631 (Pa. Commw. Ct. 2017). A reading of Section 619 that excludes consideration of the reasonably foreseeable environmental effects of the Expansion Station would "so completely remove[d] environmental protections that it violates the state's duties" under Article I, Section 27 and substantive due process.

The Commonwealth Court's decision in *Del-Aware Unlimited, Inc. v. Pa. Pub. Util. Comm'n.*, 513 A.2d 593 (Pa. Commw. Ct. 1986) ("*Del-Aware*") does not change this conclusion.[8] In that case, the Court held that the Commission's decision under Section 619 must be limited to the environmental effects of the location of a pumphouse needed for the Limerick nuclear electric generating station. While the Court took Article I, Section 27 into account, it did so under a very different legal understanding of Article I, Section 27 than the one we have today. As the *Del-Aware* Court explained, judicial review of decisions under Article I, Section 27 at the time was controlled by the Commonwealth Court's "three-prong test" in *Payne v. Kassab*. *Del-Aware*, 513 A.2d at 596. This test led the *Del-Aware* Court to: 1) see Section 27 in terms of an agency's statutory authority; 2) limit the application of Section 27 whenever it appeared to expand agency authority; and 3) to limit environmental review under Article I, Section 27 to the essentially meaningless task of determining whether the proposed facility had the required environmental permits. As the Supreme Court held in overruling the *Payne* test in *PEDF II*, however, these conclusions are wrong as a matter of constitutional law. The Commonwealth

[8] The Commission's March 10, 2022 decision also cites *O'Connor v. Pa. Pub. Util. Comm'n*, 582 A.2d 427 (Pa. Commw. Ct. 1990), but the relevant part of that case relies so heavily on *Del-Aware* that we are simply analyzing *Del-Aware* here.

Court's decision in *Township of Marple* recognizes that *PEDF II* effectuates a changed legal landscape. Indeed, the Court's ruling is founded on a recognition that *PEDF II* changes "the scope of the Commission's environmental review duties in a Section 619 proceeding." *Twp. of Marple,* 294 A.3d at 12 n.13. Thus, the *Del-Aware* decision can no longer be read to require or support a narrow reading of Section 619.

The Commission must interpret and apply Section 27 based primarily on its text. As the *PEDF II* court explained: "[W]hen reviewing challenges to the constitutionality of Commonwealth actions under Section 27, the proper standard of judicial review 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." *PEDF II,* 161 A.3d at 930.

Because the text of Article I, Section 27's first clause protects the rights to "clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment," the Commission cannot act contrary to those rights and must understand the impact of any proposed action upon those rights prior to acting. *Id*. at 931; *Robinson Twp.*, 83 A.3d at 952. The information generated during the Commission's constitutionally-sound environmental review supports its determination of whether its decision pursuant to Section 619 complies with the constitution.

Under the second or public trust clause, our Supreme Court has also held that trustee such as the Commission have a duty, not only to conserve and maintain public natural resources, but also to exercise the duties of prudence, loyalty, and impartiality to protect these resources. That clause requires the Commonwealth to "conserve and maintain" public natural resources for the benefit of present and future generations.

> The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.

PEDF II, 161 A.3d at 932 (quoting *Robinson Twp.*, 83 A.3d at 956-57). These duties, individually and collectively, require the Commission to consider the reasonably foreseeable environmental impacts of its decision under Section 619. *In re Duncan Trust*, 391 A.2d 1051, 1057 (Pa. 1978) (using reasonable foreseeability of events in administration of the trust to determine a trustee's responsibility under terms of the trust).

The duty of prudence, the Supreme Court said, involves "considering the purposes" of the trust and exercising "reasonable care, skill, and caution" in managing the trust corpus. *PEDF II*, 161 A.3d at 938 (citing 20 Pa. Cons. Stat. § 7780).[9] The purpose and duties of the public trust under Section 27 are the same—to conserve and maintain public natural resources for the benefit of present and future generations. The Commission, as trustee, cannot use "reasonable care, skill, and caution" if it makes this decision without understanding its reasonably foreseeable effects.

The duty of loyalty requires the trustee to manage the trust corpus "so as to accomplish the trust's purposes for the benefit of the trust's beneficiaries." As the Supreme Court made clear in 2021, trustees, such as the Commission, have a duty to consider both present and future generations at the same time. Thus, the trustee cannot be "shortsighted" and must instead

[9] George T. Bogert, Trusts § 93 (Hornbooks, 6th ed. 1987). *See also In re Estate of McAleer,* 248 A.3d 416, 445 (Pa. 2021) (Donohue, J., concurring) ("In navigating the potentially complex legal landscape of trust administration, a trustee should seek competent [professional advice] not only for guidance on what will best serve the trust's purpose, but also to determine the potential risks that a trustee is subject to when making these difficult decisions in the course of trust administration."); *PEDF II*, 161 A.3d at 932 n.24 ("[T]he duty to administer with prudence involves 'considering the purposes, provisions, distributional requirements and other circumstances of the trust and . . . exercising reasonable care, skill and caution.'").

"*consider* an incredibly long timeline." *Pa. Env't Def. Found. v. Commonwealth*, 255 A.3d 289, 310 (Pa. 2021) ("*PEDF V*") (quoting *Robinson Twp.*, 83 A.3d at 959) (emphasis added). The Commission cannot exercise its duty of loyalty toward present and future generations unless it considers the reasonably foreseeable environmental effects of its decision. This is particularly true of the climate change impacts of its decision.

Finally, the duty of impartiality requires the Commonwealth to manage "the trust so as to give *all of the beneficiaries* due regard for their respective interests in light of the purposes of the trust." *PEDF II*, 161 A.3d at 932 (emphasis added). Under the text of the Article 1, Section 27, these beneficiaries include future generations who will bear the full effect of the additional climate disruption caused by the expansion of natural gas use and infrastructure caused by the Expansion Station. In *Robinson Township*, the Supreme Court held a legislative provision unconstitutional because, under that provision, "some properties and communities will carry much heavier environmental and habitability burdens than others." *Robinson Twp.*, 83 A.3d at 980. This result, the Court decided, is inconsistent with the express constitutional obligation that the trustee act for the benefit of "*all the people.*" *Id.* (emphasis supplied). The Commission's duty of impartiality in this case extends not only to ratepayers and utility customers; it also extends to the citizens of Marple Township and all people whose rights are recognized under Article I, Section 27, including future generations.

The Commission's duty to conserve and maintain public natural resources, as well as these reinforcing fiduciary duties, mean that the Commission has a responsibility to analyze the environmental impacts of the entire project, particularly its climate change impacts. A proper fiduciary would not restrict itself to only a small part of the overall impact of its decision on the trust corpus.

The record reflects a substantial risk of serious environmental harms if the Project is approved, because the Station will enable a regional Project that will result in a substantial increase in GHG emissions. *See* Exception 4, *infra*. In the course of this proceeding, the Intervenors presented evidence that climate change represents an existential threat to the natural resources and people of the Commonwealth. Intervenors Main Brief, at Part IV.B. The Intervenors also presented evidence that the Station is part of a larger Project that will result in increased GHG emissions that will exacerbate climate change. Intervenors Main Brief, at Part IV.C. In light of this evidence, it is an error of law for the AID to fail to consider the ways in which the Station and Project will contribute to climate change as part of determining whether or not the Station is "reasonably necessary." 53 Pa. Stat. § 10619.

The PECO proposal presents a substantial risk of exacerbating ongoing damage from climate change to the people's right to clean air and their right to have public natural resources conserved and maintained. The Commission must at a minimum incorporate careful consideration of that risk of damage in determining whether or not to issue an approval. By failing to do so, the AID erred.

Exception 3: The AID's conclusion that the Project was reasonably necessary was error because it failed to include findings of fact that constitute a constitutionally sound environmental review.

The AID's conclusion that the Project was reasonably necessary is erroneous because the AID fails to make sufficient findings of fact on the climate impacts of the Project. In *Township of Marple*, the Commonwealth Court vacated the Commission's first opinion because the Commission failed to consider the environmental impacts of this Project and directed the Commission to "incorporate the results of a constitutionally sound environmental impact review" in deciding whether the Expansion Project is reasonably necessary. *Twp. of Marple*, 294 A.3d at

975; *see also* Conclusion of Law ¶ 5, AID at 45. Climate impacts are one such environmental impact that must be considered by the Commission. However, despite extensive evidence presented on remand, the AID makes just two findings related to the greenhouse gas emissions of the Expansion Project—neither of which involves climate impacts. AID at 16. Therefore, the findings of fact fail to demonstrate a constitutionally sound environmental review sufficient to make a finding of reasonable necessity.

In an adjudication, the Commission must usually set forth all relevant findings of fact necessary to reach its conclusion. "When the fact finder in an administrative proceeding is required to set forth his findings in an adjudication, that adjudication must include *all findings necessary* to resolve the issues raised by the evidence and which are relevant to a decision." *City of Phila. v. Pa. P.U.C*, 458 A.2d 1026, 1030 (Pa. Commw. Ct. 1983) (internal citations omitted) (emphasis added).

Findings of fact must be set forth in this Section 619 proceeding. In Commission investigations and hearings, "[a]ll decisions, including initial . . . shall include a statement of: (1) findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record . . . ." 66 Pa. Cons. Stat. § 335(c). Additionally, unless specifically exempted, agency adjudications must comply with Pennsylvania's administrative procedure laws, which require, among other things, that all agency adjudications "shall contain findings." 2 Pa. Cons. Stat. § 507. Therefore, the Commission must publish written findings in this proceeding. And because findings must be set forth, the Commission must therefore include "all findings necessary" to resolve relevant issues such as climate impacts. *City of Phila*., 458 A.2d at 1030.

Commission decisions must also identify any relevant factors considered and make sufficiently specific findings of fact. Commission decisions must indicate the "relevant factors which it took into consideration in reaching its decision and the weight it afforded the evidence," to allow appeals courts to adequately review lower court decisions. *Greene Twp. Bd. of Sup'rs v. Pa. P.U.C.*, 642 A.2d 541, 544 (Pa. Commw. Ct. 1994) (vacating a Commission adjudication and remanding for "additional findings of fact and a discussion of the factors which the [Commission] took into consideration"). *Id.* A failure to provide adequate fact findings specifying these factors will lead to remand on appeal. Furthermore, any finding of fact must be sufficiently specific to enable appellate review. *See Noerr Motor Freight., Inc. v. Pa. P.U.C.*, 118 A.2d 248, 252 (Pa. Super. Ct. 1955) ("as a general rule, there should be sufficient specific and definite findings in the order of the commission to enable us to review the case and pass upon the legal questions involved"); *Warminster Twp. Mun. Auth. v. Pa. P.U.C.*, 138 A.2d 240, 245 (Pa. Super. Ct. 1958) (requiring specificity in the findings of fact so that the court could properly review the decision at issue).

Specific and definite findings of fact are particularly necessary to perform a constitutionally sound environmental review. Many environmental impacts are quantifiable or have quantifiable aspects. This enables the Commission to clearly and specifically make findings of fact on environmental impacts. Even when impacts themselves are not directly quantifiable, there is often scientific and quantitative data available relating to the underlying environmental impact. When performing a constitutionally sound environmental review, these quantitative and specific findings of fact are necessary to comply with constitutional obligations and to provide a sufficient basis for appellate review.

In *Township of Marple,* the Court found that the failure of the Commission to consider environmental impacts was constitutionally inadequate and remanded the decision to "incorporate the results of a constitutionally sound environmental impact review." *Twp. of Marple,* 294 A.3d at 975. Therefore, in the decision on remand, the Commission must make *all findings necessary* to prove a constitutionally sound environmental review was performed. As explained above, these findings of fact must be "sufficiently specific," and the ALJ's decision must indicate all "relevant factors" considered and their "weight."

When viewed under these standards, the AID fails to make adequate findings of fact related to climate impacts. Intervenors presented extensive evidence related to the climate impacts of the Expansion Project. *See* Exhibit RN-1, Exhibit RN-2, Marple Township, Ted Uhlman & Julie Baker Remand Statement No. 2 at 1-20 ("Najjar Direct"); Tr. 2253-60. Despite this, the AID includes only two findings of fact even remotely related to climate impacts. AID at 16. Finding of Fact 101 states that Tetra Tech evaluated the Station's greenhouse gas emissions. *Id.* Finding of Fact 102 states that Tetra Tech concluded that the Station's greenhouse gas emissions would not meet EPA's greenhouse gas reporting threshold. *Id.* Neither of these findings of fact relate to the environmental *impacts* of these emissions, despite the record showing that even relatively small emissions can have significant impacts. Najjar Direct at 18-19. These facts do not address most reasonably foreseeable emissions associated with the Expansion Project called out in the record and briefing, such as upstream and downstream emissions. Intervenor Brief at 38-43, Tr. 2447-48. There are no findings of fact relating to foreseeable methane leaks associated with the Project, despite record evidence indicating that these leaks could have significant environmental impacts. Najjar Direct at 17-18. And the findings of fact do not address the deficiency of environmental analysis in PECO's filings that

make it difficult or impossible for the Commission to perform a constitutionally sound environmental review, despite PECO having the burden of proof. Intervenor Brief at 38-43; Tr. 2447-48.

Ultimately, the two limited findings of fact completely fail to constitute a "constitutionally sound environmental impact review." *Twp. of Marple,* 294 A.3d at 975. They fail to identify any reasonably foreseeable environmental impacts associated with the greenhouse gas emissions of the Project. They fail to in any way quantify these environmental impacts. They fail to explain how these impacts are regulated by another agency. Furthermore, while the AID references a greenhouse gas reporting threshold, this does not constitute "deferring to environmental determination made by other agencies with primary regulatory jurisdiction over such matters" where there is no analysis of why that reporting threshold matters or the implications of any deferral for the environmental review. *Id.* at 974.

The Commonwealth Court clearly stated that the Commission is "*obligated* to consider the environmental impacts of placing [a building] at [a] proposed location." *Id.* (internal citations omitted). The failure to consider climate impacts and make findings of fact relating to the climate-related environmental impacts of this Project render the AID's conclusion that the Project was reasonably necessary entirely deficient from a constitutional and statutory perspective.

Exception 4: The AID's conclusion that the Project was reasonably necessary as a reliability project is error because the evidence showed that it is, in fact, an Expansion Project that would increase greenhouse gas emissions contrary to the public interest.

The AID erred by finding that PECO Gas had met its burden in showing that the project was reasonably necessary. The AID failed to consider evidence and arguments by the Intervenors showing that the Project was not necessary for reliability but rather is for expanding natural gas service to new areas and customers, thereby increasing greenhouse gas emissions.

Had the AID properly considered this evidence, it would have found that the Expansion Project is not reasonably necessary for the convenience and welfare of the public.

The record shows that the Expansion Station, whose approval was denied by Marple Township, is intended to expand the use of natural gas in the surrounding area as an integral part of a broader Expansion Project. Based on PECO Gas's evidence in the first proceeding, the Commission found that the Station is needed to address winter deficits, Initial Decision, Pa. P.U.C. Docket No. P-2021-3024328, Findings of Fact at ¶¶ 18-20 (Dec. 7, 2021), and "customer and usage growth in Delaware County." Initial Decision, Findings of Fact at ¶ 24, citing PECO Statement No. 3, at 4:3-12. The equipment located at the Station is intended to allow PECO Gas to increase natural gas pressure within its larger system by creating a "virtual gate station" in Marple Township fed by the new 11.5-mile steel 12-inch over-high-pressure gas main. The station will step down the pressure to allow the distribution system to meet additional demand in Delaware and Montgomery Counties. (Initial Decision, Findings of Fact at ¶¶ 29-31). In the initial proceedings, PECO Gas witnesses testified that there was no current gas supply shortage, Record ("R") 913:13-20, and that PECO Gas currently has adequate supply to meet mandated requirements in a safe, least cost manner. R. 1279:23-1280:11. Thus, the Commission found that PECO Gas has sufficient supply without the Station to meet its existing demand. Initial Decision, Findings of Fact at ¶34.

PECO Gas based its determination of a future "need" for the Station on "calculated design day demand requirements," Initial Decision, Findings of Fact at ¶ 15, and based growth in demand on a "linear trend analysis," which extrapolated past growth in customer count and usage over the next ten years. Initial Decision, Findings of Fact at ¶¶ 25-28. PECO Gas did not account for climate change in its modeling. Tr. 1212-13, 0589A-0590A. Peak demand for

natural gas occurs during winter months and climate change will reduce demand for natural gas during those months. Indeed, the rapid winter warming of southeastern Pennsylvania over the last 50 years has already reduced demand. The fact that demand has increased in the past is due to other factors, such as population growth. Marple Township, Ted Uhlman & Julie Baker Remand Statement No. 2 at 13 ("Najjar Direct"). Thus, a straight-line analysis based on past trends assumes continued increase in customers.

This straight-line analysis is overly simplistic and fails to consider a number of changes, all of which indicate that demand from existing customers has been going down and will be further reduced in the future. Specifically, as discussed in detail below, the evidence adduced on remand shows that (1) climate change has reduced peak and total demand due to warmer winters and this trend will increase in the future; and (2) this reduced demand will be accentuated by existing market forces that have been causing a trend towards electrification—a trend that will also increase in the future. The AID improperly ignored this evidence by summarily calling Dr. Najjar's testimony "speculative." AID at 44. This finding is inconsistent with the record.

If climate change is properly considered, as required in an analysis consistent with Article I, Section 27, it can readily be determined that peak winter demand and overall demand from PECO Gas's *existing* customers will be reduced due to multiple factors identified by Intervenors' witnesses. Najjar Direct at 17; Tr. 2265-67. Thus, there will be no increase in "usage" by existing customers and the real intent of the Expansion Station is to support "customer growth." The purpose of the Expansion Station is to support increased distribution and use of natural gas for *additional* customers in residential and commercial buildings in Delaware and Montgomery Counties, which, in turn, will increase GHG emissions and lock those increases in for decades to come. Najjar Direct at 17.

The record clearly shows that gas demand is highly impacted by winter temperature, which climate change will reduce. Najjar Direct at 13. Heating fuel demand increases as the number of heating degree days ("HDDs") increases. HDDs for a winter season are calculated by first determining the number of degrees that the average temperature for a winter day is below 65º F. For example, if the average temperature for a day is 55º F, then the HDD for that day is equal to 10º F. The HDD is zero for any day in which the daily average temperature is above 65º F. HDDs for a whole winter is simply the sum of HDDs for individual winter days. Najjar Direct at 13. The Delaware Valley Regional Planning Commission hired the consulting firm ICF to conduct a climate impacts analysis for several counties in southeastern Pennsylvania. Najjar Direct at 13-14, Figure 10. Compared to the baseline HDDs given by the 1961–1999 period, average HDDs for the 2020–2039 period are projected to decline by 10%, regardless of which scenario is used for future GHG emissions. HDDs are projected to continue to decline throughout the 21st century, with even greater declines for higher emissions scenarios, with as much as a 35% decrease by the end of the century. Najjar Direct at 14 (referencing Delaware Valley Regional Planning Commission, https://www.dvrpc.org/energyclimate/ccmit/); Tr. 2253-55.

Furthermore, the record demonstrates that reduced demand from warming winters will be accentuated by an increasing trend in switching from natural gas heat to the far more efficient electric heat pumps. Tr. 2257-58. Thus, there is an increasing trend of replacement of natural gas with electricity for space heating and cooling, hot water, and cooking. This conversion can readily provide superior service at a lower cost. By way of example, to rebut PECO Gas's testimony, Dr. Najjar testified:

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

Tr. 2258 at ¶¶ 2-10.

Dr. Najjar testified that this trend is likely to accelerate when one considers the tax credits and grants made available by the federal government for high efficiency heat pumps, ground source geothermal, and solar electric generating units to power them, as well as the extension of solar and high efficiency heat pump credits to non-profit organizations. Najjar Direct at 16; Tr. 2252-2260. Intervenors provided citations supporting this testimony in footnote 10 of their Reply Brief:

> The Inflation Reduction Act referenced in the testimony, as a matter of law, provides incentives in the form of tax credits or direct payments equaling 30% of the cost of energy efficient heat pumps and increasing up to 50% of the cost in environmental justice communities. Inflation Reduction Act ("IRA"), Public Law 117-169, 136 Stat. 2003 (August 16, 2022), §§ 13801 (adding §§ 6417 and 6418 of the Internal Revenue Code (Code) (providing for direct payments or sales of credits for nonprofits), 13102 (investment tax credits for solar, geothermal, etc.), 13301 (tax credit for residential energy efficiency), 13302 (tax credit for residential purchase of solar electric property, solar water heating property, fuel cells, geothermal heat pump property, small wind energy property, and qualified biomass fuel property), 13303 (energy efficient commercial building tax deduction); *see also* Congressional Research Service, *Tax Provisions in the Inflation Reduction Act of 2022 (H.R. 5376)*).

Dr. Najjar also testified that the acceleration of this trend will further reduce demand from existing customers. Reduced demand from warming winters will also be accentuated by a trend toward more efficient gas appliances. Although some new gas appliances use more gas when they first cycle on, they use less gas overall, so that replacement of existing gas appliances will further reduce demand from existing customers. Tr. 2255-2257. This trend is also unlikely to contribute to any increases in peak demand because it is unreasonable to believe that all gas appliances would cycle on at the same time. Tr. 2255-2257.

The AID stated, with no citations to the record or any explanation whatsoever, that the foregoing testimony was not supported by any sort of data typically used by experts, but was merely "common sense." AID at 44. That statement is incorrect. As is evident from the foregoing citations and review of the actual testimony, Dr. Najjar's direct testimony and his report are replete with numerous citations to journals and other evidence considered by experts in climate science. Najjar Direct at 7:21 – 9:9; 13:12 – 15:5; 15:20 – 17:13 and included a list of references Najjar Direct at 19:21–21:3. These sources included a report by the expert firm ICF for the Delaware Valley Regional Planning Commission, the Pennsylvania Climate Impacts Assessment Report, and the determination of Philadelphia Winter Warming by Climate Central, indicating the changes in heating degree days and project future heating degree days. In his oral testimony rebutting PECO Gas's witnesses, Dr. Najjar uses the term "common sense" to discuss the relationship between "heating degree days" and peak demand fuel use, Tr. 2254:1-22, supplementing that with his own analysis of his home fuel use. These are topics on which he was well qualified to opine, having trained as an engineer and conducted research and teaching in related fields. Tr. 2262:1-12. He also referred to analyses of winter records of peak low temperatures, as well as data showing declines of gas furnace sales and increases in heat pump sales. Tr. 2257:24 - 2258:9. The record lacks any suggestion that any of this evidence is not normally relied upon by experts in engineering and climate. Likewise, the AID did not address Dr. Schmid's supporting testimony.

In contrast, PECO Gas's demand witness, Oleg Shum testified that he had not considered the impacts of climate change on demand projections and was not an expert in climate change. Tr. 2021:24 - 2023:2.

None of the foregoing is addressed in the AID. The AID's conclusion that there was no "data typically used by experts" to support Dr. Najjar's testimony is therefore clearly erroneous and ignores important record evidence.

The AID also erroneously stated: "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." AID at 44. As noted in the foregoing quotation of footnote 10, Intervenors' Reply Brief included numerous citations to the provisions of the Inflation Reduction Act providing tax credits and direct payments for non-profit organizations for high efficiency electric heat pumps and other energy conservation and efficiency measures. These measures will reduce demand for natural gas services to residential and commercial customers and will encourage the switch from natural gas to electricity.

Thus, this is not a question of the AID weighing credibility or evidence, but of ignoring evidence and important legal arguments altogether. The Commission's findings of fact must be supported by substantial evidence. *Mill v. Commonwealth, Pa Pub. Util. Comm'n*, 447 A.2d 1100 (Pa. Commw. Ct. 1982); *Edan Transp. Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Commw. Ct. 1993); 2 Pa. Cons. Stat. §704. In this regard the Commission's decisions must include not only findings and conclusions, "the reasons or basis therefore, on all material issues of fact, law or discretion presented on the record." The AID's treatment of the record regarding the need clearly fails to meet these standards and is also factually erroneous based on the record.

Therefore, by failing to consider extensive record evidence related to the underlying need for the Expansion Project, the AID erred in concluding that the project was reasonably necessary.

Exception 5: The AID's conclusion that the Project was reasonably necessary was error because it failed to consider the provisions of the Pennsylvania Climate Action Plan which militate in favor of denying PECO Gas's Application.

Section 619, again, authorizes the Commission to preempt local zoning, but only if it decides "that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public." 53 Pa. Cons. Stat. § 10619. The AID gave considerable weight to the legislation authorizing the state's Climate Action Plan, but did not discuss the Plan itself, which emphasizes, among other things, the importance of electrifying residential and commercial buildings. The proposal at issue here would serve to expand the use of gas in residential and commercial buildings and is therefore contrary to the Plan. Because the AID did not factor that consideration into the conclusion that the proposal is "reasonably necessary for the convenience or welfare of the public," the Commission should deny PECO's request.

As explained above, the AID discusses Pennsylvania Climate Change Act of 2008, 71 Pa. Cons. Stat. §§ 1361.1-1361.8, and the Climate Action Plan developed pursuant to the act, to support its conclusion that the Commission has no Article I, Section 27 responsibility to implement measures to address climate change. While, as Intervenors explain above, a statute and a plan cannot absolve the Commission of its Constitutional responsibilities, the AID did not address what the Climate Action Plan actually recommends. Perhaps most prominently, the plan recommends that the Commonwealth "[i]ncentivize building electrification." Climate Action Plan, *supra*, at 50. "Electrification of buildings," the plan states, "will reduce the amount of gas and fuel oil consumed, and as a result this strategy will reduce emissions of CO_2 [carbon dioxide] and other GHG [greenhouse gases] associated with fossil fuel combustion such as CH_4 [methane] and N_2O [nitrous oxide]." *Id.* This strategy is projected to be capable of producing reductions of 12.3 million metric tons of carbon dioxide equivalent by 2050—which is more than all but three

of the other 16 strategies identified in the plan. *Id.* at 35. The Plan also calls for reduction of methane emissions across oil and gas natural gas systems. *Id.* at 79. By overriding local zoning and authorizing PECO Gas to implement this expansion project and allowing PECO Gas to recover its costs for this project based on fees to customers, the Commission would be incentivizing expansion of fossil fuel use in residential and commercial homes and businesses rather than electrification. Indeed, as discussed further above in Exception 3, the testimony on remand established that this Expansion Project was unneeded for meeting demand from existing customers, which will be reduced by increasing electrification, warmer winters due to climate change and increased appliance efficiency. Schmid Rebuttal at 10; Najjar Direct at 16-19; Tr. 2257-58, 2265-67. Because the Project is unneeded to meet demand from existing customers, its purpose is to expand natural gas service to new customers and new areas, thus encouraging greater fossil fuel use in residential and commercial buildings. This, of course, is the opposite of what the plan calls for.

The Project is also inconsistent with the Climate Plan's recommendation for reduction of methane emissions across oil and gas systems. Climate Action Plan, at 26, tbl.2, GHG Reduction Strategies, Recommendation D. Dr. Najjar's unrebutted testimony established that there is a substantial risk of leaks of methane, a powerful greenhouse bas, from natural gas distribution systems and that there are no incentives to monitor and regulate those leaks, which are unregulated.[10] Najjar Direct at 17-18. Because the Project will enable and, indeed

[10] EPA has recently adopted regulations requiring control of methane leaks from natural gas production and transmission operations. *Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review*, 40 C.F.R. § 60.5360, Subparts OOOOb (new source performance standards) and OOOOc (emissions guidelines for existing sources), https://www.epa.gov/system/files/documents/2023-12/eo12866_oil-and-gas-nsps-eg-climate-revi

encourage, expansion of PECO Gas/ natural gas systems to new areas and new customers without measures for detecting and controlling leaks, it will lead to greater methane emissions, which is, again, inconsistent with the Climate Plan. *Id.*

None of the foregoing facts were considered in the AID. They all undermine the AID's conclusion that the PECO proposal is "reasonably necessary for the convenience or welfare of the public." 53 Pa. Cons. Stat. § 10619.

The AID's conclusions with regard to the Climate Plan and the Commission's lack of responsibility appear to be based upon a fundamental misunderstanding of both the Climate Change Act and how planning actually works. Here, the General Assembly assigned the planning function to DEP, as the agency with the greatest responsibility. Because, however, DEP lacks expertise and authority within certain areas, the General Assembly called for the creation of an advisory committee that included, among others, representatives of the Commission, the Department of Conservation and Natural Resources ("DCNR") and the Department of Community and Economic Development ("DCED"). 71 Pa. Cons. Stat. § 1361.5(b). DEP is responsible for implementing some aspects of the plan, but others, such as those at issue in this proceeding, lie outside of the DEP's statutory authority and must be implemented by the PUC, or, in other cases, by DCNR or DCED. Although the Climate

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ew-2060-av16-final-rule-20231130.pdf. These regulations, however, do not apply beyond the point of the delivery of the natural gas to the gateway of the distribution system. *See* 40 C.F.R. § 60.5365b (applicability of the new source rule), § 60.5430b (rule applies to "natural gas production, processing, transmission, and storage, which include the well and extend to, but do not include, the local distribution company custody transfer station," defined as "a metering station where the [local distribution system] receives a natural gas supply from an upstream supplier"); 60.5386c (emissions guidelines applicability); 60.5430c (regulated source category does not include local distribution company).

Planning Act calls for recommendations to the General Assembly, those are limited to the "legislative changes necessary to implement the climate change action plan." *Id.* § 1361.7(a)(5).

The Commission, however, does not need additional legislative authority to deny this application pursuant to section 619. Indeed, such an action is consistent with the Commission's other powers. For example, the Commission clearly has the authority to implement the recommendations for electrification, increased efficiency, and methane controls under its "general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth." 66 Pa. Cons. Stat. §501(b). In fact, the Commission is required to consider "the efficiency, effectiveness and adequacy of service of each utility when determining just and reasonable rates under this title." 66 Pa. Cons. Stat. §523(a).

The AID failed to consider the inconsistency between the Climate Action Plan and the PECO proposal. Its failure provides another reason for the Commission to conclude that PECO has failed to demonstrate that the Project is reasonably necessary, and to deny PECO's request.

III. CONCLUSION

In conclusion, the Commission should find that the AID's finding of reasonable necessity was error as a matter of law and as well as in its evaluation of the record on remand. Therefore, Intervenors respectfully request that the Commission not adopt the AID and instead issue an order denying PECO Gas's proposal for the reasons enumerated herein.

Respectfully submitted,

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