

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

TOWNSHIP OF MARPLE,

Petitioner,

v.

PENNSYLVANIA PUBLIC
UTILITY COMMISSION,

Respondent

THEODORE UHLMAN AND JULIE
BAKER,

Petitioners,

v.

PENNSYLVANIA PUBLIC
UTILITY COMMISSION,

Respondent

CASES CONSOLIDATED

Docket No. 1385 CD 2024

Docket No. 1423 CD 2024

Petitions for Review of the Opinion and
Order of the Pennsylvania Public Utility
Commission entered September 26,
2024 in Docket No. P-2021-3024328

ORDER

AND NOW, on this _____ day of _____, 2025, upon
consideration of the Application for Leave to File Brief of *Amici Curiae* Delaware
Riverkeeper Network, Green Amendments for the Generations, Citizens for
Pennsylvania’s Future, and Clean Air Council in support of Appellant-Intervenors

Julia M. Baker And Theodore R. Uhlman, and any response thereto, it is hereby ORDERED that the Application is GRANTED. The Prothonotary shall file the proposed brief attached as Exhibit A to the *Amici's* Application.

BY THE COURT:

J.

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**APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE
DELAWARE RIVERKEEPER NETWORK, GREEN AMENDMENTS FOR
THE GENERATIONS, CITIZENS FOR PENNSYLVANIA'S FUTURE,
AND CLEAN AIR COUNCIL
IN SUPPORT OF APPELLANT-INTERVENORS
JULIA M. BAKER AND THEODORE R. UHLMAN**

Pursuant to Pennsylvania Rules of Appellate Procedure 123 and 531(b)(1)(iii), Delaware Riverkeeper Network, Green Amendments for the Generations, Citizens for Pennsylvania’s Future, and Clean Air Council, on behalf of themselves and their members (collectively, “*Amici*”), file the following Application for Leave to File *Amici Curiae* Brief in Support of Appellant-Intervenors Julia M. Baker And Theodore R. Uhlman, averring as follows:

A. Background on *Amici*

1. *Amici* are non-profit organizations that represent the constitutionally-protected environmental interests, health interests, and property interests of Pennsylvania members who are directly affected by the deleterious effects of air pollution and climate change.
2. Specifically, Delaware Riverkeeper Network is a nonprofit organization established in 1988 to protect, preserve and enhance the Delaware River, its tributaries, and habitats. Delaware Riverkeeper Network has over 27,000 members, who live, work, and recreate within the Delaware River Basin.
3. Green Amendments for The Generations is Delaware Riverkeeper Network’s sister organization. It is a nonprofit whose mission is to pursue and secure constitutional protection of environmental rights in states across the nation and ultimately at the federal level.

4. PennFuture is a Pennsylvania non-profit environmental organization, with over 1,100 members across the Commonwealth, whose mission includes protecting our air, water, and land, and empowering citizens to build sustainable communities for future generations.
5. Clean Air Council is Pennsylvania non-profit environmental organization, with over 8,000 members in Pennsylvania, dedicated to protecting everyone's right to a healthy environment.
6. *Amici* also advocate for the protection of the fundamental rights guaranteed by Article 1, Section 27 of the Pennsylvania Constitution. That provision, also known as the Environmental Rights Amendment ("ERA"), 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.

B. Procedural History

7. This case concerns the contested attempt by PECO Energy Company, Inc. ("PECO Gas") to build additional gas infrastructure in the Township of Marple (the "Station").

8. The Township denied zoning approval, and PECO Gas sought to use Section 619 of the Municipalities Planning Code, 53 P.S. § 10619, to exempt the Station from the Township’s zoning. On its initial review, this Public Utilities Commission (“Commission” or “PUC”) granted PECO Gas’s petition. In so doing, the Commission adopted PECO Gas’s position that environmental considerations are not part of a Section 619 proceeding. On appeal, the Commonwealth Court disagreed, finding that the exclusion of environmental considerations violated the Commission’s obligations under Article 1 Section 27 of the Pennsylvania Constitution.
9. As a result, it remanded the case for the Commission to conduct a “constitutionally sound environmental impact review” and incorporate such a review into its decision. *Twp. of Marple v. Pa. Pub. Util. Comm’n*, 294 A.3d 965, 975 (Pa. Cmwlth. 2023).
10. On remand, the Commission held additional proceedings, focused on taking testimony from the parties.
11. *Amici* participated in this phase of the proceedings by submitting a brief pursuant to Pa. Code § 5.502(e), which provides that anyone interested in the issues involved in a Commission proceeding may, without applying for leave to do so, file amicus curiae briefs in regard to those issues.

12. The Administrative Law Judge (“ALJ”) issued an opinion determining “the proposed situation of the buildings is reasonably necessary for the public convenience or welfare of the public.” Petition of PECO Energy, P-2021-3024328, Amended Initial Decision (Pa. P.U.C. Apr. 3 2024)
13. The Township and Intervenors filed exceptions to the ALJ’s decision with the Commission. The Commission, in its decision, largely adopted the ALJ’s opinion and found that the Station was “reasonably necessary for the convenience or welfare of the public within the meaning of Section 619.” Petition of PECO Energy, P-2021-3024328, Opinion and Order (“Remand Opinion”) (Pa. P.U.C. Sept. 26 2024). Commissioner Kimberly Barrow issued a separate accompanying statement. The Township and Intervenors appealed the Commission’s decision to this Court.
14. *Amici* now seek to submit an *amicus* brief for this Court’s consideration as it evaluates this appeal.

C. Grounds for Leave to File *Amicus* Brief

15. Pennsylvania Rule of Appellate Procedure 531 states that an *amicus curiae* may file a brief: (i) during merits briefing; (ii) in support of or against a petition for allowance of appeal, if the *amicus curiae* participated in the underlying proceeding as to which the petition for allowance of appeal seeks review; or (iii) by leave of court. Pa.R.A.P. 531(b)(1).

16. In accordance with Rule 531, *Amici* respectfully request leave to file an amicus brief in support of Intervenors' appeal. Pa.R.A.P. 531(b)(1)(iii). The brief proposed to be filed is attached as Exhibit A.
17. As representatives of beneficiaries of the ERA trust in this proceeding, *Amici* seek to provide the Court with additional information and analysis regarding the role of Article 1, Section 27 in this proceeding.
18. Pursuant to Pa. R.A.P. 531(b)(3), "[a]n amicus curiae brief under subparagraph (b)(1)(iii) is limited to the length specified by the court in approving the motion or, if no length is specified, to half the length that a party would be permitted under the rules of appellate procedure."
19. The proposed brief attached hereto as Exhibit A is under 7,000 words in length and includes a certification of that length in accordance with Pa. R.A.P. 2135(d).
20. Additionally, this application and proposed brief is timely under Pa. R.A.P. 531(b)(4), as it is filed on the same day as the filing of Intervenors, whose position *Amici* support.

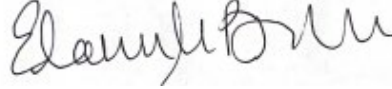
WHEREFORE, *Amici* respectfully request that this Court grant their Application for Leave to File *Amici Curiae* Brief in Support of Appellant-Intervenors, Julia M. Baker and Theodore R. Uhlman.

Respectfully submitted,



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Dated: February 26, 2025

Exhibit A

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**BRIEF OF AMICI CURIAE DELAWARE RIVERKEEPER NETWORK,
GREEN AMENDMENTS FOR THE GENERATIONS, CITIZENS FOR
PENNSYLVANIA'S FUTURE, AND CLEAN AIR COUNCIL
IN SUPPORT OF APPELLANT-INTERVENORS
JULIA M. BAKER AND THEODORE R. UHLMAN**

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE	2
INTRODUCTION	4
ARGUMENT	5
I. Article I, Section 27 Requires Commonwealth Agencies and Entities To Consider the Climate Change Impacts Of Their Actions Prior To Making A Decision.	5
A. The First Clause of Article I, Section 27 Requires Commonwealth Agencies and Entities to Evaluate the Climate Effects of Their Decisions Whether to Act or Refrain From Acting.	5
B. The Second and Third Clauses of Article I, Section 27 Require Commonwealth Agencies and Entities to Consider the Climate Impacts of Their Decisionmaking.....	11
C. Commonwealth Agencies and Entities Do Not Need Additional Legislative Authority to Consider the Climate Impacts of Their Actions.....	15
D. Deference to the Other Commonwealth Agencies is Not Appropriate Where Those Agencies Have Not Made an Applicable Determination.....	19
II. The Commission Unlawfully Avoided Its Constitutional Duty by Declining to Consider the Climate Effects Of Granting PECO’s Petition.	22
A. GHG Impacts Are Environmental Impacts and Must Be Considered in an Environmental Review.....	23
B. The Commission Failed To Conduct an Adequate Assessment Of the Reasonably Foreseeable GHG Impacts Of The Station.....	25
CONCLUSION	30

TABLE OF AUTHORITIES

Cases

<i>Air-Serv Group, LLC v. Commonwealth</i> , 18 A.3d 448, (Pa. Cmwlth. 2011)	12
<i>Frederick v. Allegheny Twp. Zoning Hrg. Bd.</i> , 196 A.3d 677 (Pa. Cmwlth 2018)	20
<i>Funk v. Wolf</i> , 144 A.3d 228 (Pa. Cmwlth. 2016)	17, 18
<i>Held v. State</i> , 560 P.3d 1235 (Mont. 2024)	7, 8, 23, 24
<i>Milkie v. Pa. Pub. Util. Comm’n</i> , 768 A.2d 1217 (Pa. Cmwlth. 2001)	29
<i>New Hanover Twp. v. Dept. of Env’t Prot.</i> , 2020 EHB 124	5
<i>Pa. Env’t Def. Found. v. Commonwealth (PEDF II)</i> , 161 A.3d 911 (Pa. 2017)	<i>passim</i>
<i>Pa. Env’tl. Def. Found. v. Commw.(PEDF V)</i> , 255 A.3d 289 (Pa. 2021)	15
<i>Payne v. Kassab (Payne I)</i> , 312 A.2d 86 (Pa. Cmwlth. 1973)	17
<i>Robinson Twp. v. Commonwealth</i> , 83 A.3d 901 (Pa. 2013)	<i>passim</i>
<i>S.F. v. Pa. Dep’t of Human Servs.</i> , 298 A.3d 495 (Pa. Cmwlth. 2023)	16
<i>Trust Under Will of Augustus T. Ashton</i> , 260 A.3d 81 (Pa. 2021)	14
<i>Twp. of Marple v. Pa. Pub. Util. Comm’n</i> , 294 A.3d 965 (Pa. Cmwlth. 2023)	<i>passim</i>
<i>W. Pa. Water Co. v. Pa. P.U.C.</i> , 311 A.2d 370, <i>vacated on other grounds</i> , 370 A.2d 337 (Pa. 1977)	16

Statutes

42 U.S.C. §§ 4321–4370m-11	28
53 P.S. § 10619	2, 20
Mont. Code Ann. § 75-1-102(1)	7
Mont. Code Ann. § 75-1-201(1)(iv) (2023)	7

Other Authorities

John C. Dernbach & Robert McKinstry, <i>Applying the Pennsylvania Environmental Rights Amendment Meaningfully to Climate Disruption</i> , 8 Mich. J. of Env’t. & Admin. L. 49, 69 (2018)	8
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John C. Dernbach, <i>Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part II—Environmental Rights and Public Trust</i> , 105 Dick. L. Rev. 97, 143–44 (1999)	10
PA. DEPT. OF ENV’T PROT., CLIMATE IMPACTS ASSESSMENT 2021	9, 10
Pa. State Historic Preservation Office, <i>Environmental Review</i> , (last visited Feb. 26, 2025) https://www.pa.gov/agencies/phmc/historic-preservation/environmental-review.html	28
Petition of PECO Energy, P-2021-3024328, Amended Initial Decision (Pa. P.U.C. Apr. 3 2024)	3, 21
Petition of PECO Energy, P-2021-3024328, Opinion and Order (“Remand Opinion”) (Pa. P.U.C. Sept. 26 2024).....	<i>passim</i>
Petition of PECO Energy, P-2021-3024328, Vice Chair Barrow Statement 1 (Pa. P.U.C. Sept. 26 2024)	30
Rules	
Pa. R.A.P. 531	1
Pa. R.A.P. 531(b)(2).....	2
Regulations	
25 Pa. Code §§ 105 <i>et seq.</i>	28
Constitutional Provisions	
Mont. Const. art. II, § 3	6, 10
Mont. Const. art. IX, § 1	7, 10
Pa. Const. art. I, § 27	<i>passim</i>

STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Delaware Riverkeeper Network, Green Amendments for the Generations, Citizens for Pennsylvania’s Future (“PennFuture”), and Clean Air Council (collectively, “Amici”) jointly file this brief pursuant to Pa. R.A.P. 531, which provides that anyone interested in questions in any matter pending in an appellate court may file an amicus curiae brief during merits briefing.

Delaware Riverkeeper Network is a nonprofit organization established in 1988 to protect, preserve and enhance the Delaware River, its tributaries, and habitats. Delaware Riverkeeper Network has over 27,000 members, who live, work, and recreate within the Delaware River Basin.

Green Amendments for The Generations is Delaware Riverkeeper Network’s sister organization. It is a nonprofit whose mission is to pursue and secure constitutional protection of environmental rights in states across the nation and ultimately at the federal level.

PennFuture is a Pennsylvania non-profit organization whose mission includes protecting our air, water, and land, and empowering citizens to build sustainable communities for future generations. Members of PennFuture regularly use and enjoy the natural, scenic, and esthetic attributes of Pennsylvania’s environment.

Clean Air Council is a member-supported, nonprofit environmental organization dedicated to protecting everyone's right to a healthy environment. The

Council works through public education, community advocacy, and government oversight to ensure enforcement of environmental laws. The Council has many members in Delaware County, including those who live near the proposed PECO Gas facility.

Amici have a long-standing interest in the health and wellbeing of Pennsylvania residents and are committed to preserving and protecting Pennsylvania's natural resources. Amici have a specific interest in ensuring that the Environmental Rights Amendment be interpreted in a manner that vindicates the constitutional environmental rights of Pennsylvania residents and preserves the constitutional trust protecting Pennsylvania's natural resources. In compliance with Pa. R.A.P. 531(b)(2), no other person or entity other than amici or their counsel paid for or authored this brief.

STATEMENT OF THE CASE

This case concerns the contested attempt by PECO Energy Company, Inc. ("PECO Gas") to build additional gas infrastructure in the Township of Marple (the "Station"). The Township denied zoning approval, and PECO Gas sought to use Section 619 of the Municipalities Planning Code, 53 P.S. § 10619, to exempt the Station from the Township's zoning. On its initial review, this Public Utilities Commission ("Commission" or "PUC") granted PECO Gas's petition. In so doing, the Commission adopted PECO Gas's position that environmental considerations

are not part of a Section 619 proceeding. On appeal, the Commonwealth Court disagreed, finding that the exclusion of environmental considerations violated the Commission's obligations under Article 1 Section 27 of the Pennsylvania Constitution. As a result, it remanded the case for the Commission to conduct a "constitutionally sound environmental impact review" and incorporate such a review into its decision. *Twp. of Marple v. Pa. Pub. Util. Comm'n*, 294 A.3d 965, 975 (Pa. Cmwlth. 2023).

On remand, the Commission held additional proceedings, focused on taking testimony from the parties. After the testimony concluded, the Administrative Law Judge ("ALJ") issued an opinion determining "the proposed situation of the buildings is reasonably necessary for the public convenience or welfare of the public." Petition of PECO Energy, P-2021-3024328, Amended Initial Decision (Pa. P.U.C. Apr. 3 2024).

The Township and Intervenors filed exceptions to the ALJ's decision with the Commission. The Commission, in its decision, largely adopted the ALJ's opinion and found that the Station was "reasonably necessary for the convenience or welfare of the public within the meaning of Section 619." Petition of PECO Energy, P-2021-3024328, Opinion and Order ("Remand Opinion") (Pa. P.U.C. Sept. 26 2024). Commissioner Kimberly Barrow issued a separate accompanying statement. The Township and Intervenors appealed the Commission's decision to this Court.

INTRODUCTION

This Court has already made clear: the Commission is required to conduct a constitutionally-sound environmental review prior to making its decisions. This is because the Commission is prohibited from violating the environmental rights held by the people, is a trustee of Pennsylvania's public natural resources, and is obligated by Article 1, Section 27 of the Pennsylvania Constitution to maintain and conserve those trust resources for the benefit of all people, including future generations.

To conduct the required review, the Commission must obtain and consider all information relevant to a proposed action's environmental impacts. This review must be holistic, must include reasonably foreseeable consequences of the action, and should consider, where applicable, the determinations of other Commonwealth agencies and entities.

Here, the Commission failed to conduct a constitutionally-sound review because it failed to adequately evaluate the impact of the project on the climate of Pennsylvania. The Commission did not require the project proponent, PECO Gas, to provide sufficient information about the greenhouse gas ("GHG") impacts of its project and it did not thoroughly review the reasonably foreseeable environmental impacts of the project. The Commission instead eschewed its responsibility to consider GHG impacts and offloaded its obligations to other agencies and to the

public trust beneficiaries. The Commission’s failure to consider the Station’s GHG impacts in the context of climate change was error.

ARGUMENT

I. Article I, Section 27 Requires Commonwealth Agencies and Entities To Consider the Climate Change Impacts Of Their Actions Prior To Making A Decision.

The structure of Article I, Section 27 is divided into three clauses. The first two clauses declare specific rights held by the people, while the second and third clause establish a constitutional public trust. All three clauses guide government action when it comes to environmental concerns, and require Commonwealth agencies such as the Commission to consider the effect of their decisionmaking on environmental rights and public natural resources.

A. The First Clause of Article I, Section 27 Requires Commonwealth Agencies and Entities to Evaluate the Climate Effects of Their Decisions Whether to Act or Refrain From Acting.

Compliance with the first clause of Article I, Section 27 demands informed decision-making, which includes a scientific understanding of the causes and effects of climate change. Without this understanding, the Commonwealth runs the risk of acting—or failing to act—in violation of the rights enumerated. *See, e.g.*, *New Hanover Twp. v. Dept. of Env’t Prot.*, 2020 EHB 124, 190 (“[An agency] cannot make an informed decision regarding the environmental effects of its action if it does not have an adequate understanding of what those effects are or will be.” (quoting *Friends of Lackawanna*, 2017 EHB 1123, 1161)).

This clause “requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features.” *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 952 (Pa. 2013) (plurality opinion). This requirement stems from the simple fact that a failure to do so risks infringement upon individual environmental rights. A “failure to obtain information . . . does not excuse the constitutional obligation because [it] exists *a priori* to any statute purporting to create a cause of action.” *Id.*

For these reasons, the *Marple* court held that “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.” *Marple*, 294 A.3d at 974. In other words, an environmental review is a constitutional requirement, independent of any statutory obligations. *See id.* at 973–74. Any such environmental review must include climate impacts.

Analysis of a comparable constitutional provision in another state, Montana, is helpful. In the State of Montana, the constitution includes an individual “right to a clean and healthful environment,” Mont. Const. art. II, § 3, and provides that:

- (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
- (2) The legislature shall provide for the administration and enforcement of this duty.
- (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide

adequate remedies to prevent unreasonable depletion and degradation of natural resources.

Mont. Const. art. IX, § 1. Like Pennsylvania, Montana courts have interpreted their Green Amendment to “provide environmental protections which are ‘both anticipatory and preventative’” to “ensure that Montanans’ inalienable right to a ‘clean and healthful environment’ is as evident in the air, water, and soil of Montana as it is in its law books.” *Held v. State*, 560 P.3d 1235, 1247 (Mont. 2024). To ensure compliance with its constitutional duties, the Montana legislature enacted the Montana Environmental Protection Act (“MEPA”), a procedural statute that requires environmental impact statements for “major actions of state government significantly affecting the quality of the human environment in Montana.” Mont. Code Ann. § 75-1-201(1)(iv) (2023); *see also* Mont. Code Ann. § 75-1-102(1).

Just last year, the Montana Supreme Court reviewed an amendment to MEPA that prohibited environmental review of “actual or potential impacts that are regional, national, or global in nature,” including climate change. *Held*, 560 P.3d at 1243. That court deemed the restriction unconstitutional, as it infringed on Montanans’ rights “to a clean and healthful environment and environmental life support system [which] includes a stable climate system.” *Id.* at 1249, 1260. The court reasoned that MEPA served “as a vehicle for pursuing its constitutional mandate to prevent environmental harms and its forward-looking mechanisms are encompassed by the Legislature’s constitutional obligations.” *Id.* at 1257. Because

the “Montana Constitution guarantees that certain environmental harms shall be prevented, and prevention depends on forethought,” MEPA’s information-forcing mechanism “enables ‘fully informed and considered decision making, thereby minimizing the risk of irreversible mistakes depriving Montanans of a clean and healthful environment.’” *Id.* (quoting *Park Cty. Env’t Council v. Mont. Dept. of Env’t Quality*, 477 P.3d 288, 306 (Mont. 2020)); *see also id.* at 1259 (“Obviously, a clean and healthful environment cannot occur unless the State and its agencies can make adequately informed decisions.”).

Although Pennsylvania does not currently have a procedural statute guiding its agencies and entities in their environmental reviews, a review are nonetheless constitutionally required in order to prevent infringement upon the rights enumerated in the first clause. *See Marple*, 294 A.3d at 973–74; *Robinson*, 83 A.3d at 952 (plurality opinion). The right that is perhaps most obviously impacted by GHG emissions and climate change is the right to “clean air.” Because “air and water quality have relative rather than absolute attributes,” one must look to the human health and ecological effects of an increased concentration of GHGs in the atmosphere to determine whether their emissions would cause a violation of environmental rights. *Robinson*, 83 A.3d at 953; *see also* John C. Dernbach & Robert McKinstry, *Applying the Pennsylvania Environmental Rights Amendment Meaningfully to Climate Disruption*, 8 Mich. J. of Env’t. & Admin. L. 49, 69 (2018)

“As is the case with most other conventional water and air pollutants, carbon dioxide is a naturally occurring substance necessary for life and the maintenance of the climate, and it is only when the concentration of the pollutant becomes too high that the natural processes are disrupted.”).

Clean air is not the only right affected by climate change. In 2021, the Pennsylvania Department of Environmental Protection (“PADEP”) published the latest Climate Impacts Assessment (“Assessment”), which acknowledged that the myriad harmful effects of climate change are caused by GHG emissions. *See* PA. DEPT. OF ENV’T PROT., CLIMATE IMPACTS ASSESSMENT 2021, 4 (“Across global climate models, a consensus exists that as global greenhouse gas emissions rise, average temperatures will increase.”).¹ The Assessment recognized that climate change was “already affecting Pennsylvania,” and that by mid-century, the average annual temperature will increase by 5.9°F, there will be “more frequent and intense extreme heat events,” rainfall will increase but will become more intense (causing flooding) and less frequent (resulting in droughts), and that tidally influenced flooding will increase in the Delaware Estuary. Assessment 2021 at ix. Flooding and drought both impact the right to “pure water,” because heavy precipitation carries

¹ Available at https://files.dep.state.pa.us/Energy/Office%20of%20Energy%20and%20Technology/OETDPortalFiles/Climate%20Change%20Advisory%20Committee/2021/2-23-21/2021_Impacts_Assessment_Final_2-09-21_clean.pdf

and transports contaminants and drought conditions damage pollutant-removing wetlands and increase the concentration of pollutants in surface waters. *See id.* at 32, 54, 62, 117.

In addition, the people’s right to the “preservation of the natural . . . values of the environment” is functionally similar to Montana’s right to a “clean and healthful environment” and protection of the “environmental life support system.” *Compare* Pa. Const. art. I, § 27 *with* Mont. Const. art. II, § 3 *and* Mont. Const. art. IX, § 1. “Natural values . . . include many services that are of benefit to humans” and “necessarily include the values of natural systems that are not affected by humans, including ecosystem integrity and biological diversity.” John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part II—Environmental Rights and Public Trust*, 105 Dick. L. Rev. 97, 143–44 (1999). Climate change will impact this right in dramatic ways: coastal ecosystems, for example, will be permanently changed because of changes in temperature and precipitation.

The Commonwealth has direct control over its own emissions, and indirectly controls the GHG emissions of others through regulation and various other decision-making authorities. The constitutional obligation to avoid infringement upon the first clause’s environmental rights “binds all government, state or local, concurrently” and functions as a “bulwark against actual or likely degradation of . . . our air and

water quality.” *Robinson*, 83 A.3d at 953. Based on the information known to the Commonwealth regarding the ongoing and future unconstitutional degradation of air and water quality as well as the natural values of the environment caused by GHG-induced climate change, the Commission is required to act to prevent such degradation and its contribution thereto. A thorough understanding of, and accounting for, GHG impacts associated with an action is therefore a constitutionally-required prerequisite to acting.

B. The Second and Third Clauses of Article I, Section 27 Require Commonwealth Agencies and Entities to Consider the Climate Impacts of Their Decisionmaking.

In addition to the constitutional mandate to avoid infringing on individual environmental rights of the people, Article I, Section 27 establishes a constitutional public trust. The second right identified in that provision is “the common ownership of the people, including future generations, of Pennsylvania’s public natural resources.” *Pa. Env’t Def. Found. v. Commonwealth (PEDF II)*, 161 A.3d 911, 931 (Pa. 2017) (citing *Robinson*, 83 A.3d at 954 (plurality opinion)). Public natural resources are not explicitly defined or listed, and in some cases may be identified by the relationship between the natural resource and the rights protected in the first clause. *See Robinson*, 83 A.3d at 955 (“[T]he term fairly implicates relatively broad aspects of the environment, and is amenable to change over time to conform, for

example, with the development of related legal and societal concerns.”) (plurality opinion).

When the *Robinson Township* plurality was written, the concept of public natural resources included “not only state-owned lands, waterways, and mineral reserves, but also *resources that implicate the public interest*, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property.” *Id.* at 955 (emphasis added); *see also Air-Serv Group, LLC v. Commonwealth*, 18 A.3d 448, 453–54 (Pa. Cmwlth. 2011) (explaining that the atmosphere is a part of the public natural resources—common property of all the people—and not subject to private ownership). The atmospheric resource thus belongs collectively to the people of the Commonwealth, including all those yet to be born.

The third clause establishes the constitutional trust that guides the Commonwealth’s duties. The trust names the public natural resources as the trust assets, the Commonwealth as trustee,² and the present and future generations as trust beneficiaries. *See* Pa. Const. art. I, § 27. The Commonwealth, as administrator, is tasked with the overriding duty to “conserve and maintain” the public natural resources “for the benefit of all the people,” *id.*, which means it must “prevent and

² All agencies and entities of the Commonwealth are trustees and are bound by the constitutional trust obligations. *See PEDF II*, 161 A.3d at 931 n.23.

remedy [their] degradation, diminution, or depletion.” *PEDF II*, 161 A.3d at 932 (citing *Robinson*, 83 A.3d at 956–57 (plurality opinion)). This is the trust purpose—meaning that the assets of the trust may not be used for any other purpose.

Because GHG emissions degrade the trust *res*—the atmosphere—the Commission must limit, reduce, or prevent GHG emissions resulting from its own actions or inactions, whether directly or through the acts of others, and remedy the effects of GHG pollution. GHG emissions, through their climate-changing effects, do not merely degrade the atmospheric resource but also have interrelated impacts on many other public natural resources. *See* Discussion of Assessment, Section I.A., *supra*.

Affirmative action is also required to carry out the trust purpose. Therefore, the Commission is required to reduce or prevent GHG emissions to protect these resources from degradation caused by climate change. *See Robinson*, 83 A.3d at 955–56 (the Commonwealth’s trustee duties are “both negative (*i.e.*, prohibitory) and affirmative (*i.e.*, implicating enactment of legislation and regulations)”) (plurality opinion). The Commission is also subject to several fiduciary duties by virtue of its trustee status, including the duties of prudence, loyalty, and impartiality. *Id.* The duty of prudence requires the Commission to “exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.” *PEDF II*, 161 A.3d at 932 (quoting *In re Mendenhall*, 398 A.2d 951, 953 (Pa. 1979)).

It is self-evident that climate change cannot be solved by a single agency or even a single government.³ The inability to solve the entirety of the problem is not a reason to shirk the constitutional obligation to consider and address the problem. By conforming its own actions and decisionmaking to align with this duty of prudence and caution, the Commission complies with its constitutional obligations in the face of the pervasive existential threat of climate change.

The duty of loyalty includes the duty not to use trust resources for the trustee’s own purposes—otherwise known as self-dealing. *See, e.g., Trust Under Will of Augustus T. Ashton*, 260 A.3d 81, 90 (Pa. 2021) (citing Restatement (Second) of Trusts § 170(1) & Comments). When dealing with trust resources, the Commission “may use the assets of the trust ‘only for purposes authorized by the trust or necessary for the preservation of the trust; other uses are beyond the scope of the discretion conferred, even where the trustee claims to be acting solely to advance other discrete interests of the beneficiaries.’” *PEDF II*, 161 A.3d at 933 (quoting *Robinson*, 83 A.3d at 978 (plurality opinion)). The Commission may not merely point to other public benefits as a justification for degradation of trust resources.

³ *See generally* Elinor Ostrom, *A Polycentric Approach for Coping with Climate Change* 35, World Bank Policy Research Working Paper No. 5095 (October 2009) (“An important lesson is that simply recommending a single governmental unit to solve global collective action problems—because of global impacts—needs to be seriously rethought and the important role of smaller-scale efforts recognized.”).

Finally, the duty of impartiality means that the Commission must act in the interests of all beneficiaries, including future generations. The “conservation and maintenance of the public natural resources is not temporally limited,” meaning that present and future generations are simultaneous beneficiaries and the Commonwealth “must consider an incredibly long timeline and cannot prioritize the needs of the living over those yet to be born.” *Pa. Env'tl. Def. Found. v. Commw.(PEDF V)*, 255 A.3d 289, 310 (Pa. 2021). In the context of climate change, this call for intergenerational equity is most clear. GHGs emitted today may not cause immediate harm, but when combined with past and future emissions, will cause environmental devastation decades in the future.

C. Commonwealth Agencies and Entities Do Not Need Additional Legislative Authority to Consider the Climate Impacts of Their Actions.

Contrary to its constitutional mandate, the Commission believes it needs special permission from the legislature to consider the effect of its actions on climate change: “the Commission, as a statutory agency, may exercise only the jurisdiction that the General Assembly has delegated, and the Commission cannot enact climate change policy or alter this legislative scheme without legislative authority from the General Assembly. Also, the ERA cannot expand the statutory powers of an administrative agency.” Remand Opinion at 62 (citations omitted) (citing *W. Pa. Water Co. v. Pa. Pub. Util. Comm’n*, 311 A.2d 370, 373 (Pa. Cmwlth. 1973), *Funk*

v. Wolf, 144 A.3d 228, 250 (Pa. Cmwlth. 2016), and *Commonwealth v. Monsanto Co.*, 269 A.3d 623, 644–45 (Pa. Cmwlth. 2021)).

This view of the Commission’s legal duties is based on outdated caselaw, is legally incorrect, and should be explicitly rejected by this Court. As this Court noted in *Western Pennsylvania Water Company v. Pennsylvania Public Utility Commission*, the Commission, as an agency of the Commonwealth, is “always . . . subject to: (1) the Constitution, (2) its limited power set forth in the enabling statute or other applicable legislation, and (3) review of its acts or adjudication by the appellate courts.” 311 A.2d at 373, *vacated on other grounds*, 370 A.2d 337 (Pa. 1977). It would therefore make little sense for an agency to use a narrow interpretation of its statutory mandate as an excuse for noncompliance with the Pennsylvania Constitution, as the Commission does here.

Instead, the Commission is prohibited from violating the fundamental rights preserved by Article I, Section 27, and is *without authority* to take action that would unconstitutionally infringe upon those rights. Refraining from action that would violate the constitution in no way expands the Commission’s statutory powers—it is empowered to act only within the bounds of the Pennsylvania Constitution. *See S.F. v. Pa. Dep’t of Human Servs.*, 298 A.3d 495, 532 (Pa. Cmwlth. 2023) (“[I]t is critically important that we ensure that our agencies act within the bounds of the Constitution.”). Consideration of climate change impacts in a constitutionally-sound

environmental review is not an arrogation of authority by the Commission, but an additional *requirement* imposed by the Constitution. *See Marple*, 294 A.3d at 974 (“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 . . .”).

For these same reasons, the oft-quoted *Funk* decision is also of no help to the Commission. *See Funk*, 144 A.3d at 235 (noting that the second provision of Article I, Section 27 “cannot operate on its own to ‘expand the powers of a statutory agency’” (quoting *Cnty. Coll. of Del. Cty. v. Fox*, 342 A.2d 468 (Pa. Cmwlth. 1975))). As an initial matter, *Funk* is no longer good case law for interpreting Article I, Section 27, as it is based on the since-rejected *Payne v. Kassab (Payne I)*, 312 A.2d 86 (Pa. Cmwlth. 1973) and its progeny, which provided a limited framework for interpretation of Article I, Section 27. *See 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.”).

Because the Pennsylvania Supreme Court had not yet issued its decision in *PEDF II* when *Funk* was decided, the *Funk* court rested on three faulty assumptions that have since been corrected. First, the *Funk* court thought Article I, Section 27 was a “thumb on the scale” in favor of the environment in a balancing exercise, rather than a constitutional mandate. 144 A.3d at 234 (quoting *Pa. Env’t Def. Found.*

v. Commonwealth (PEDF I), 108 A.3d 140, 170 (Pa. Cmwlth. 2015), *rev'd in part and vacated*, *PEDF II*, 161 A.3d at 939). Second, it erroneously assumed that agencies of the Commonwealth were not trustees in their own right. *See id.* at 235 (“[I]t is the Commonwealth, not individual agencies or departments, that is the trustee of public natural resources . . .”). Third, the *Funk* court held that the so-called “balancing” required by Article I, Section 27, was constrained by statute:

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.”

Id. at 235 (quoting *MCT Transp. Inc. v. Philadelphia Parking Auth.*, 60 A.3d 899, 904 (Pa. Cmwlth. 2013)).

The Supreme Court of Pennsylvania has clarified that Article I, Section 27 is a hard limit on the Commonwealth’s authority, not a statement of policy. *See PEDF II*, 161 A.3d at 931 (“[T]he rights contained in Article I are ‘excepted out of the general powers of government and shall forever remain inviolate.’” (quoting *Robinson*, 83 A.3d at 948)). It is also now well-understood 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.” *Id.* at 931 n.23. Finally, the Commission need not wait for legislative

direction before executing its duties as trustee—Article I, Section 27 is self-executing. “No implementing legislation is needed,” and the provision “create[s] a right in the people to seek to enforce the [trustee] obligations.” *Id.* at 937 (first quoting *Payne v. Kassab (Payne II)*, 361 A.2d 263, 272 (Pa. 1976), and then quoting *Robinson*, 83 A.3d at 974).

All three clauses of Article I, Section 27 *require* the Commission to use its statutory and regulatory authority to abate and remedy climate change. “Although a trustee is empowered to exercise discretion with respect to the proper treatment of the trust, that discretion is limited by the purpose of the trust and the trustee’s fiduciary duties, and does not equate to ‘mere subjective judgment.’” *PEDF II*, 161 A.3d at 933 (quoting *Robinson*, 83 A.3d at 978 (plurality opinion)). This means that where a trustee has authority granted to it by the General Assembly, that authority *must* be used in a manner consistent with Article I, Section 27.

Accordingly, the Commission’s reliance on *Funk* and other caselaw citing *Funk* for the proposition that it is not permitted to consider climate change without legislative direction is foundationally misplaced.

D. Deference to the Other Commonwealth Agencies is Not Appropriate Where Those Agencies Have Not Made an Applicable Determination.

In its Remand Opinion, the Commission agreed with the ALJ’s conclusion that, because Intervenors “failed to cite any DEP permit regulations or standards which would apply to the Reliability Station” and because “the Commission does

not have the authority to substitute its judgment for that of [PA]DEP or the General Assembly, devise its own climate action plan, or create its own analysis of greenhouse gas reduction strategies,” then it was absolved of the duty to think about climate change. *See* Remand Opinion at 61–62.

For the reasons stated above, the Commission need not, and in fact cannot, wait for the General Assembly to act before considering and addressing the climate impacts of its own actions. Similarly, it cannot defer to other agencies or entities of the Commonwealth where those agencies or entities are not charged with answering the same question as the Commission, or where they have not answered the question at all. Here, the Commission must determine whether the “situation of the building in question is reasonably necessary for the convenience or welfare of the public.” 53 P.S. § 10619.

This Court instructed the Commission to incorporate in its decision the environmental impacts of the siting, “while also deferring to environmental determinations made by other agencies with primary regulatory jurisdiction over such matters.” *Marple*, 294 A.3d at 973–74.⁴ However, as the Commission correctly

⁴ Although this Court has held that municipalities, for example, “lack the power to replicate the environmental oversight that the General Assembly has conferred upon DEP and other state agencies,” *Frederick v. Allegheny Twp. Zoning Hrg. Bd.*, 196 A.3d 677, 697 (Pa. Cmwlth 2018), there can be no “replication” where there has been no determination by DEP in the first instance.

points out, PADEP does not have a permitting program for GHG emissions or any type of climate-based regulatory framework that would apply to the Station.⁵ It is up to the Commission to understand the climate impacts of the Station and to determine whether granting PECO's requested exemption would be consistent with the Commission's constitutional obligations.

Although it might be a sensible policy for the General Assembly to enact a comprehensive climate law and to task PADEP with the responsibility to administer a GHG permitting program, the reality is that no such scheme exists. In the absence of ideal environmental policy, however, the Commission's responsibility under Article I, Section 27 comes into sharper focus. *See, e.g., Robinson*, 83 A.3d at 958 (“The call for complementary legislation . . . does not override the otherwise plain conferral of rights upon the people.”) (plurality opinion). As instructed by this Court, “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.” *Marple*, 294 A.3d at 974.

⁵ Although the ALJ found that the Station would be exempt from DEP's air permitting program, *See Amended Initial Decision* at 38–39, the fact that a permit is not required for the line heater or emergency generator is not a determination about the impact of the Station's GHG emissions on climate change, nor does it impart any wisdom about the continued expansion of natural gas infrastructure during a climate crisis.

The Commission retains an independent obligation to consider the environmental impacts of its own actions and whether PECO’s petition could be granted despite the adverse environmental impacts that would follow. One of the key features of Article I, Section 27 is its self-executing nature—where the General Assembly or other Commonwealth entity fails to act on an environmental problem, other Commonwealth entities are not excused from compliance with the Constitution. This Court faulted the Commission for previously “sidestepp[ing]” its obligation to consider environmental impacts by nominally deferring to PADEP but “fail[ing] to identify any . . . outside agency determinations” rendering its environmental review “illusory and . . . substantively nonexistent.” *Marple*, 294 A.3d at 974–75. This time around, with regard to the Station’s GHG impacts, the Commission has repeated its error.

II. The Commission Unlawfully Avoided Its Constitutional Duty by Declining to Consider the Climate Effects Of Granting PECO’s Petition.

As discussed above, the Commission was obligated to conduct an environmental review. The Commission erred in that review on remand because it did not utilize an appropriate review process and therefore did not adequately consider the GHG impacts of the proposed Station, including the reasonably foreseeable increase in gas consumption.

A. GHG Impacts Are Environmental Impacts and Must Be Considered in an Environmental Review.

When considering the environmental impacts of its own actions and whether PECO's petition could be granted despite the adverse environmental impacts that would follow, the Commission cannot treat greenhouse gas impacts differently than any other environmental impact. A stable climate system falls squarely within the scope of Article I, Section 27.

As discussed *supra*, in *Held v. State*, the Montana Supreme Court interpreted its own constitutional environmental rights amendment in the context of climate change. The court there rejected the State's argument that its constitutional framers, not having discussed climate change or global issues, could not have intended the right to address environmental degradation caused by climate change. *Held*, 560 P.3d at 1246. Citing instances of constitutional protections being applied to modern challenges, *id.* at 1248 (citing *State ex rel. Fenner v. Keating*, 163 P. 1156, 1158 (Mont. 1917) (holding new technologies like voting machines and electronic surveillance are still protected under the Montana Constitution); *State v. Williams*, 455 P.2d 634, 638 (Mont. 1969) (holding the right to free speech includes forms of expression like online speech, which did not exist in the 1889 Montana Constitution)), the court emphasized that a constitution is not a "straight-jacket, but a living thing" meant to evolve with society. *Id.* at 1247 (quoting *Goodell v. Judith Basin Cnty.*, 224 P. 1110, 1114 (Mont. 1924)). Therefore, the court held that "[n]ew

advancements, consistent with the object and true principles of the Constitution, are provided for within Montana’s living Constitution.” *Id.*

Just as constitutional rights in Pennsylvania have also been applied to new circumstances, environmental protections must adapt to modern threats like climate change. Here, as in Montana, the right to preservation of a clean and healthy environment “does not require the Framers to have contemplated every environmental harm that is protected [under the State’s Constitution]” *See id.* Indeed, the *Robinson* plurality noted that interpretation of Article I, Section 27 is “amenable to change over time to conform, for example, with the development of related legal and societal concerns.” *Robinson*, 83 A.3d at 955 (plurality opinion).

Similar to PADEP’s Climate Assessment, the state of Montana and its agencies in *Held* acknowledged the current and future environmental impacts of climate change on Montana. *Held*, 560 P.3d at 1246–49. As such, the court noted that climate change from GHG emissions is “drastically altering and degrading Montana’s climate, rivers, lakes, groundwater, atmospheric waters, forests, glaciers, fish, wildlife, air quality, and ecosystem[.]” *Id.* at 1248. Thus, the court concluded that “Montana’s right to a clean and healthful environment and environmental life support system includes a stable climate system.” *Id.* at 1249. This Court should take the opportunity to apply the same logic here.

B. The Commission Failed To Conduct an Adequate Assessment Of the Reasonably Foreseeable GHG Impacts Of The Station.

The Commission committed error here with regard to the GHG impacts of the project, and that error manifested in multiple ways. First, evaluating the public “need” for increased service must necessarily include evaluating the environmental impacts of fulfilling that need. Here, that means the additional GHG emissions associated with the increased service. As a consequence of that decision, the Commission then did not properly evaluate or even acknowledge the expansion that this project would facilitate. Next, the Commission erred because it ignored the reasonably foreseeable direct consequences of the project. Finally, the Commission erred in the process it employed because it failed to require PECO to provide an environmental review in the first instance, and instead flipped the burden of demonstrating environmental impacts away onto the Intervenors.

First, the Commission asserted that PECO Gas established a public “need” for increased service. The Commission erred in not considering the environmental impacts of fulfilling that need. In other words, if the purported need is for more gas, then the environmental impacts must include the consequences of the use of that gas. Here, the Commission credited that “PECO determined . . . that it needed to increase its natural gas supply capacity to diminish design day constraints and address customer usage growth in Delaware County, including Marple Township.” Remand Opinion at 4. In other words, it looked outside the Station for the need for the

service—the Station, naturally, would not need not exist without the larger pipeline infrastructure it is part of. However, the Commission then considered the environmental impact by evaluating only the narrowest, immediate impacts of the Station itself. This narrow scope is inappropriate in this kind of project, where the Station is inextricably part of a larger system.

Having inappropriately and inconsistently narrowed the scope of its consideration of environmental impacts, the Commission compounded its error by failing to consider the record testimony about the reasonably foreseeable GHG emissions that would result from the Station, and the climate impacts that would result. Indeed, the entirety of the Remand Opinion’s consideration of testimony regarding climate change was to dismiss it as “speculative.” Remand Opinion at 68. To be clear, *Amici* do not suggest that the Commission must consider every possible emission from the entire gas system across the region. However, the record shows that this project will be an expansion of the existing system, with an ascertainable maximum number of new customers. Those new customers will consume a reasonably ascertainable amount of gas, based on projections, existing use, and other information. Therefore, the Commission must consider those overall GHG emissions, and the impact they will have on Pennsylvania’s climate, as part of its constitutionally sound environmental assessment.

Finally, the Commission employed a process inconsistent with its obligation, under Article I, Section 27, and under this Court's direction in *Marple*, to conduct a constitutionally sound environmental review. Generally speaking, environmental review consists of a project proponent assembling materials—including data, modeling, and research—on the environmental impacts of a proposal, and then presenting those materials to the appropriate agency for a pre-decisional review. This reduces the likelihood of adverse environmental impacts that may violate the constitution. During the application or planning process, the identification of potential impacts gives the agency, the applicant, and interested citizens and municipalities the opportunity to determine ways to prevent or reduce them.

A pre-decision evaluation also creates a record that permits a reviewing court to assess whether the decision-making body even considered these impacts. This record, of course, makes it easier for a reviewing tribunal to decide whether the Commonwealth complied with its constitutional duties. A constitutionally sound environmental review is not merely an exercise in generating information. The information generated by the review forms the basis of the Commonwealth's determination whether the proposed action unreasonably impairs environmental rights or degrades, diminishes, or depletes the public natural resources. *See PEDF II*, 161 A.3d at 931–932. When an agency lacks enough information to make such a

determination, its decision to act in the face of this uncertainty is constitutionally suspect.

There are many models of pre-decisional environmental reviews. For example, environmental review of a PADEP Chapter 105 permit application is governed by regulations at 25 Pa. Code §§ 105 *et seq.*, and implementation guidance published by PADEP, which instruct the applicant what to include in its application and guide PADEP’s review of the application. Environmental review, however, is not limited to PADEP. The Pennsylvania State Historic Preservation Office also has environmental review obligations and reviews materials submitted by a project applicant in order to determine impacts on protected resources. *See, e.g.*, Pa. State Historic Preservation Office, *Environmental Review*, (last visited Feb. 26, 2025) <https://www.pa.gov/agencies/phmc/historic-preservation/environmental-review.html>. Of course, applicants for projects requiring review under the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321–4370m-11, which includes projects as varied as highway construction, community development block grants, and building gas pipelines, are required to follow the requirements of that statute and its implementing regulations to submit environmental information for evaluation by the reviewing agency.

The process here resembled none of those other environmental review models. Instead, the Commission decided to employ only an adjudicative, adversarial

process. Rather than seeking the submission of environmental review materials from PECO Gas, the ALJ merely took testimony. PECO Gas offered no evidence and no testimony regarding the climate impacts of the gas that would be distributed as a result of this project. *See, e.g.*, Remand Opinion at 16–20 (setting forth the remand testimony before the ALJ). PECO Gas acknowledged that it put forth no evidence related to greenhouse gas emissions and provided the PUC no basis with which to conduct a review of those emissions. Remand Opinion at 20. Indeed, while PECO Gas did submit information from its consultant, that information was limited to the Station itself and included no discussion of the impacts of the gas flowing through the station. *Id.* at 45 (discussing Tetra Tech report). The Commission faulted Intervenors because they “failed to isolate and identify climate change impacts of the Reliability Station.” *Id.* at 67. This information should have been provided by PECO Gas in the first instance; the burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm’n*, 768 A.2d 1217 (Pa. Cmwlth. 2001). Because no information regarding the climate impacts of the gas was provided as part of an environmental review, the burden of proof on such impacts was functionally shifted away from the applicant and instead onto the Township and the Intervenors.

Commissioner Barrow, in her separate statement, acknowledged flaws in the process here. Though Commissioner Barrow would still ratify the Commission’s

decision here, this Court can use her statement as a roadmap to direct the Commission to do what Commissioner Barrow has already indicated that they need to do:

In the future, it will be important that parties present this evidence from the outset and that the Commission carries out a thorough analysis of that evidence in rendering its decisions. All utilities should also engage with affected communities regarding the reasons that projects are needed so that delay in the provision of reliable and necessary utility services is minimized, to the extent possible. This proactive approach will allow the environmental concerns of the community to be fully heard and incorporated into planning and will fulfill the right, enshrined in the Pennsylvania Constitution, of Pennsylvania citizens to a healthy environment.

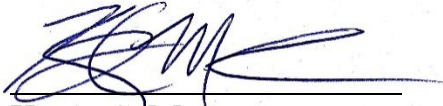
Petition of PECO Energy, P-2021-3024328, Vice Chair Barrow Statement 1 (Pa. P.U.C. Sept. 26 2024).

It is not an option for the future; it is what the Commission was required to do the first time. A trustee does not have the choice to undergo a constitutionally inadequate process *this time* and do a better job *in the future*. A trustee, like the Commission, is required to fulfill its trustee obligations *every time* it acts.

CONCLUSION

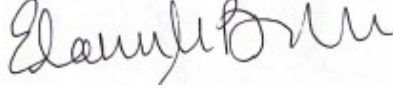
For the reasons set forth herein, amici curiae respectfully request that the Court find the Commission failed to conduct a constitutionally sound environmental review, and the Court should VACATE the Commission's Remand Decision and remand this matter back to the Commission to supplement its review to include consideration of foreseeable GHG emissions resulting from this project.

Respectfully submitted,



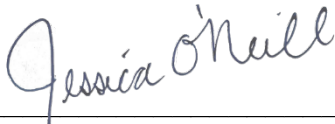
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Dated: February 26, 2025

CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITATIONS

In accordance with Pa. R.A.P. 2135(d), I, Kacy C. Manahan, hereby certify that this brief complies with length limitation in Pa. R.A.P. 531(b)(3) in that it contains fewer than 7,000 words, excluding the supplementary matter exempted by Pa. R.A.P. 2135(b), as determined by the word counting function in the word processing system used to prepare the brief, Microsoft Word.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Application for Leave to File *Amici Curiae* Brief in Support of Appellant-Intervenors, Julia M. Baker and Theodore R. Uhlman, was filed electronically using the PACFile system. Service will be made on the persons and in the manner set forth on the Proof of Service generated by the PACFile system, which service satisfies the requirements of Pa. R.A.P. 121.

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