

**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

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**ADVANCE FORM BRIEF OF PETITIONER  
TOWNSHIP OF MARPLE**

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J. Adam Matlawski, Esquire  
Attorney I.D.: 41678  
Kaitlyn T. Searls, Esquire  
Attorney I.D.: 311237  
McNichol, Byrne & Matlawski, P.C.  
1223 N. Providence road  
Media, PA 19063  
(610) 565-4322

Dated: February 26, 2025

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## **I. STATEMENT OF JURISDICTION**

This Honorable Court has jurisdiction over this appeal pursuant to 42 Pa.C.S.A. § 763(a)(1). In relevant part, Section 763(a)(1) provides: “the Commonwealth Court shall have exclusive jurisdiction of appeals from final orders of government agencies,” including appeals from the Pennsylvania Public Utility Commission (*PUC*). *Id.* This Honorable Court has jurisdiction because the case concerns an appeal from a final order of the PUC.

## **II. ORDER IN QUESTION**

### **IT IS ORDERED:**

1. That the Exceptions filed by Marple Township, Delaware County, on April 23, 2024, are granted, in part, and denied, in part, consistent with this Opinion and Order.
2. That the Exceptions filed by Julia Baker and Theodore Uhlman on April 23, 2024, are denied, consistent with this Opinion and Order.
3. That the Amended Initial Decision of Administrative Law Judge Mary D. Long issued on April 3, 2024, is adopted, as modified, consistent with this Opinion and Order.
4. That the Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. § 10619 that the Situation of Two Buildings Associated with a Gas Reliability Station in Marple Township, Delaware County is Reasonably Necessary, at Docket No. P-2021-3024328, is hereby granted in that the proposed two “structures” constitute “buildings,” and their proposed situation in question is reasonably necessary for the convenience or welfare of the public within the meaning of Section 619 of the Municipalities Planning Code Act of July 31, 1968. P.L. 805, *as amended*, 53 P.S. § 10619. 70

5. That Finding of Fact No. 42 in the Amended Initial Decision of Administrative Law Judge Mary D. Long, issued on April 3, 2024, is modified to read as follows:

42. The vulnerability zone of 100 feet for “rare” events showed that any potential impact of a “rare” event would extend only a short distance beyond the site boundaries, if at all. (Tr. 2181). The vulnerability zone of an “extremely rare” event extends 220 feet from the potential source. An “extremely rare” event is not expected to occur at a controlled access facility such as the Reliability Station. Marple Township Remand St. No. 2 at 5, 8.

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

**BY THE COMMISSION,**

Rosemary Chiavetta  
Secretary

(Appendix A).

### **III. STANDARD AND SCOPE OF REVIEW**

This Court’s scope of review of a PUC order is limited to a determination of whether constitutional rights have been violated, an error of law has been committed, or the findings or order of the PUC are not supported by substantial evidence. Interstate Gas Mktg. v. Pennsylvania PUC, 679 A.2d 1349, 1353 (Pa. Cmwlth. Ct. 1996) *citing*, Middletown Township v. Pennsylvania Public Utility Commission, 482 A.2d 674 (Pa. Cmwlth. Ct. 1984).

The Commonwealth Court’s scope of review of a Commission order is to determine whether the Commission’s findings of fact are supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Popowsky v. Pa. Pub. Util. Comm’n, 910 A.2d 38 (Pa. 2006). The

standard of review to be applied when reviewing a Commission decision is that the Court should not substitute its judgment for that of the Commission when substantial evidence supports the Commission's decision on a matter within the Commission's expertise. City of Lancaster (Water) v. Pa. Pub. Util. Comm'n, 769 A.2d 567 (Pa. Cmwlth. 2001) *citing* Popowsky v. Pa. Pub. Util. Comm'n, 706 A.2d 1197, 1201 (Pa. 1997). Substantial evidence is such evidence that a reasonable mind might accept as adequate to support a conclusion.

Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Moorehead v. Civil Service Commission of Allegheny County, 769 A.2d 1233, 1238 (Pa. Cmwlth. Ct. 2001). The Court's standard of review in determining whether the Commission committed an error of law is de novo. Chester Water Authority v. Pa. PUC, 868 A.2d 384, 389 n. 9 (Pa. 2005); see also Mercury Trucking, Inc. v. Pa. P.U.C., 55 A.3d 1056, 1082 (Pa. 2012) (With respect to issues of law, which were in dispute in this case, the Commonwealth Court was to apply a de novo standard of review and, to the extent necessary, a plenary scope of review.) The Court will also review whether an error of law occurred when the facts of the case do not support the legal conclusions of the agency. Pa. Game Comm'n v. Civil Serv. Comm'n, 747 A.2d 887, 892-93 (Pa. 2000).



#### IV. QUESTIONS INVOLVED

- A. Whether the Commission erred as a matter of law and abused its discretion accepting agency determinations as sufficient for a Constitutionally sound environmental impact review pursuant to the Environmental Rights Amendment?

*Suggested Answer: Yes*

- B. Whether the Commission erred as a matter of law and abused its discretion by accepting blanket permit exemptions as sufficient for a Constitutionally sound environmental impact review pursuant to the Environmental Rights Amendment?

*Suggested Answer: Yes*

- C. Whether the Commission should have conducted a “little NEPA” style review consistent with other States as its Constitutionally sound environmental impact review and the failure to do so constituted an error of law?

*Suggested Answer: Yes.*

- D. Whether a Constitutionally sound environmental impact review requires more than a statement that no PHSMA determinations are applicable when assessing risk to human health and property and failure to do so constituted error of law and abuse of discretion?

*Suggested Answer: Yes*

- E. Whether a complete Constitutionally sound Environmental Impact Review is needed to determine the Necessity of the Project and failure to do so constituted error of law and abuse of discretion?

*Suggested Answer: Yes*

- F. Whether the Commission erred as a matter of law by analyzing this matter under the Payne test?

*Suggested Answer: Yes*

G. Whether the Commission abused its discretion by finding that PECO met its burden of proving reasonable necessity for the site of the Project?

*Suggested Answer: Yes*

## **V. STATEMENT OF THE CASE**

### **A. Procedural history**

On February 26, 2021, PECO Energy Company (“PECO”) filed a Petition before the Public Utility Commission (“Commission”). In its Petition, PECO requested that the Commission, pursuant to 52 Pa. Code § 5.41 and Section 619 of the Municipalities Planning Code (“MPC”), 53 P.S. § 10619, make a finding that: (1) the situation of two buildings at 2090 Sproul Road, Marple Township, Delaware County, Pennsylvania, 19008 (the “Property”) for a proposed Gas Reliability Station (the “Station”) is reasonably necessary for the convenience and welfare of the public and, therefore, exempt from the Marple Township Zoning Code pursuant to MPC § 619, and (2) a proposed security fence appurtenant to the Gas Reliability Station is a “facility” under 66 Pa. C.S. § 102 and is therefore exempt from local zoning requirements (the “Petition”).

The Station is part of a larger project by which PECO intends to install an 11.5-mile high-pressure gas main to deliver gas from its West Conshohocken facility to the Station in Marple Township. The Station by on-site process will reduce the pressure of the gas and then feed the gas into a distribution trunk line at the intersection of Lawrence Road and Sproul Road in Marple Township. (the “Project”).

Prior to filing its Petition in this matter, PECO submitted a zoning application with the Marple Township Zoning Hearing Board seeking a special exception to operate a Gas Reliability Station (the “Station”) at the Property. After a hearing on the matter, the Zoning Hearing Board denied PECO’s application issuing Findings of Fact and Conclusions of Law. *Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. §10619*, Evidentiary Hearing Transcript, Docket No. P-2021-3024328 (July 15, 2021) (“N.T. 7/15/21”), p. 929; RR \_\_\_\_\_. PECO appealed the denial of its zoning application to the Delaware County Court of Common Pleas and the matter is currently pending.

On March 11, 2021, Marple Township filed a Petition to Intervene and on April 12, 2021, the County of Delaware, Pennsylvania filed a petition to Intervene. On or about April 12, 2021, sixty-three *pro se* protestants filed Protests to the Petition. Two residents, Mr. Ted Uhlman and Julie Baker, filed Petitions to Intervene in addition to Protests. Public Input Hearings were held on May 25 and 26, 2021, including approximately sixteen (16) hours of public comment, at which time ninety-three individuals testified, the overwhelming majority of which were Marple Township residents who voiced their opposition to and concerns with the siting of the Gas Reliability Station at the proposed location given the property’s proximity to residences, a family restaurant, businesses and an elementary school. Written testimony, rebuttal and surrebuttal were exchanged by the parties and

evidentiary hearings were held before Administrative Law Judge Emily DeVoe (“ALJ DeVoe”) via telephonic proceedings on July 15, July 16, July 20, and July 22, 2021 (the “Initial Proceedings”).

In the Initial Proceedings, PECO successfully opposed any consideration of the environmental impacts of the Station or the Project. The Commonwealth Court rejected the Commission’s adoption of PECO’s position as inconsistent with the requirements of Pennsylvania’s Environmental Rights Amendment (“ERA”), Article I, Section 27. Pa. Const. art. I, §27. The Commonwealth Court stated:

In other words, a Section 619 proceeding is constitutionally inadequate unless the Commission completes an appropriately thorough environmental review of a building siting proposal and, in addition, factors the results into its ultimate determination regarding the reasonable necessity of the proposed siting.

Twp. Of Marple v. Pa. PUC, 294 A.3d 965, 974 (Pa. Cmwlth. Ct. 2023) (“Marple I”). This Honorable Court vacated the Commission’s decision and remanded the matter, requiring that the Commission incorporate a “constitutionally sound environmental impact review” into an amended decision. Id. at 975.

After a prehearing conference on June 28, 2023, the Intervenors and PECO served Remand Direct Testimony on September 22, 2023. On October 20, 2023, the parties served Remand Rebuttal Testimony. Remand evidentiary hearings were held on November 14, 15, 17 and 28, 2023 (collectively the “Remand Proceedings”).

## **B. Factual background**

PECO's Station is comprised of four line heaters, a generator, a variety of other equipment including valves, piping, regulators, a battery backup system, and electronic/ communications equipment. PECO Stmt 1-RD, at 3; RR \_\_\_\_\_. The Station consists of two buildings; the Station Building which includes most of the equipment for the Station and the Fiber Building which houses the telecommunications devices. Id.

Two of PECO's employees, Keith Kowalski and Jim Moylan, provided testimony regarding what they described as environmental assessments completed by PECO. Kowalski described the NPDES permit needed for construction of the Station, not its operation. PECO Stmt 2-RD, p 2; RR \_\_\_\_\_. PECO completed an Environmental Checklist Procedure, which is done for all projects and did not consider the *site* of the Project. Id. at 4, 6; RR \_\_\_\_\_. This Environmental Checklist procedure was completed prior to choosing 2090 Sproul Road. Id. PECO produced the Phase I and Phase II assessments completed by Stantec which were already a part of the record from the Initial Proceedings. Id. at 13; RR \_\_\_\_\_. These assessment are used to identify and remediate soil and groundwater contamination that existed at the Property previously. Id. at 16; RR \_\_\_\_\_.

In the Initial Proceedings, PECO employee, Doug Oliver testified that the need for the Project was not because of any current gas supply shortage because

PECO did not have a current supply shortage. N.T. 7/15/21, at 913:13-20; RR \_\_\_\_\_. PECO has sufficient supply currently to meet design day requirements. The reason for the desired additional supply to be added by the Project is to reduce PECO's reliability on market purchases, reduce the price volatility and to increase “reliability.” *Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. §10619*, Evidentiary Hearing Transcript, Docket No. P-2021-3024328 (July 16, 2021)(“N/T/ 7/16/21”) at 1276:8-20; RR \_\_\_\_\_. PECO currently has adequate supply to meet mandated requirements in a safe, cost-effective manner. N/T/ 7/16/21, at 1279:23-1280:11; RR \_\_\_\_\_.

Pipeline consultant Mike Israni, testified in both the Initial Proceedings, on rebuttal, and the Remand Proceedings. Originally, Mr. Israni provided information regarding the potential impact radius (“PIR”) in response to Delaware County witness, Timothy Boyce. PECO Stmt. 1-SR, p. 23; RR \_\_\_\_\_. Mr. Israni testified that based on PECO’s operational figures of pressure of the main connected to the Station of 525 PSI and the pressure arriving at the Station anticipated to be less than 200 PSI with a 12-inch diameter main, in the scenario of a serious incident at that natural Gas Reliability Station, the potential impact radius is 190 feet for 525 PSI and at 200 PSI, the potential impact radius is 117 feet. *Id.* at 23-24; *Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. §10619*, Evidentiary Hearing Transcript, Docket No. P-2021-3024328 (July 22, 2021)

(“N.T. 7/22/21”) pp. 1618:3 -1620:4; RR \_\_\_\_\_. He defined PIR as the radius of a sector where if the pipeline fails, the persons or the buildings within that impact circle may be impacted. He testified that the failure of a pipeline where the gas was ignited resulting in flame or plume of that flame or fire would have impact on persons in that radius, with impacts such as such as 2<sup>nd</sup> degree burns from exposure to flame heat (20 secs), death within 30 seconds and building ignition within 30 minutes. *Id.* Interestingly, while Mr. Israni now states that the PIR is not relevant to this Station, he never testified to this in the Initial Proceedings. PECO Statement 3-RD, p. 3; RR \_\_\_\_\_. Nor was any testimony offered controverting the fact that occupied residences and buildings are located within the zone of potential impact of personal injury and property damage in the event of fire or explosion at the Station.

Although pressed by Marple in the Initial proceedings, PECO answered very few questions regarding emissions. The original testimony was that the vent stacks from the heaters would emit mainly water vapor and small amounts of carbon dioxide (CO<sub>2</sub>), but PECO witnesses could not say for sure that those are the only emissions. *Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. §10619*, Evidentiary Hearing Transcript, Docket No. P-2021-3024328 (July 20, 2021) (“N.T. 7/20/2021”) p. 1366; RR \_\_\_\_\_. PECO’s response to questions about the emissions from the heater stacks was that they did not



require a permit. N.T. 7/20/2021,1418-20; RR \_\_\_\_\_. PECO witness and employee, Tim Flanigan, stated that the emissions coming from the Station when the heaters are running will be the equivalent of that of twenty-three (23) homes. N.T. 7/20/2021, pp. 1366:16-1367:13; RR \_\_\_\_\_.

On remand, pipeline permit consultant, Jeffrey Harrington, provided direct testimony but did not conduct any modeling or environmental impact assessment. To render his expert opinion on the environmental impacts from the operation of the Station, Harrington reviewed permit applications prepared by PECO and other Station documentation. *Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. §10619*, Evidentiary Hearing Transcript, Docket No. P-2021-3024328 (July 20, 2021); RR \_\_\_\_\_.

It wasn't until after Marple presented the air modeling report of expert witness, Dr. Timothy McAuley, that PECO submitted the rebuttal testimony of Mr. Harrington which included his modeling.<sup>1</sup> Mr. Harrington's rebuttal testimony relied heavily on the argument that the line heaters and standby generator were subject to exemptions to air permit requirements. PECO Statement 6-RR, p. 3; RR \_\_\_\_\_. Mr. Harrington criticizes the report of Dr. McAuley, but ultimately, of the

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<sup>1</sup> Additionally, it wasn't until Marple and Intervenors, Ted Uhlman and Julie Baker, submitted the testimony of Drs. Schmid, Najjar and Ketyer on the environmental impacts of GHG and climate change that PECO submitted rebuttal testimony that lightly addressed the issue. Ultimately, the Commissions review of GHG emissions was constitutionally insufficient.

three pollutants modelled by Mr. Harrington all showed quantifiable amounts of emissions. Id. at p 12; RR \_\_\_\_\_. The pollutants modelled by Mr. Harrington were NO2 (nitrogen dioxide), CO (carbon monoxide) and PM2.5 (particulate matter). Id. Certainly, Mr. Harrington cannot state that the emissions from the Station will not cause any environmental impacts to the air, so instead he states that the Station will not cause any “unreasonable impacts to air quality.” Id. at 16.

Mr. Harrington admitted that there will be an impact to air quality and to human health. *Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. §10619*, Evidentiary Hearing Transcript, Docket No. P-2021-3024328 (Nov. 28, 2024) (“N.T. 11/28/23”), p. 2412; RR \_\_\_\_\_. Mr. Harrington’s conclusion that the construction of the Station would not cause unreasonable impacts to the environment is based solely on the Station not requiring a permit. Id. at 2412-13; RR \_\_\_\_\_. Harrington acknowledges that VOCs will be emitted from the Station, but it was not included in his modeling Id. at 2419; RR \_\_\_\_\_. He did not factor in leaks such as methane and other impurities simply because there are no national air quality standards for those pollutants. Id. at 2421; RR \_\_\_\_\_. The air quality impacts will be there as long as the Station is operating. Id. at 2436; RR \_\_\_\_\_.

Harrington acknowledges that there will be an increase in CO concentration for residents living around the Station but states that there will be “no

noncompliance beyond the fence line.” N.T. 11/28/23, p. 2395; RR \_\_\_\_\_. Mr. Harrington agreed with the emissions of NOX done by Dr. McAuley but dismissed this because the numbers fall below the NAAQS. Id at. 2426-27; RR \_\_\_\_\_.

Mr. Harrington and Dr. McAuley both produced modeling that proved that the Don Guanella site, an alternate location, most pollutants have a lower emission rate than the Property. Id. at 2424; RR \_\_\_\_\_. Indeed, 5 of the 6 of Mr. Harrington’s modelled pollutants were lower at the alternate location. Id.

With respect to noise, the Station will not meet Marple Township’s noise ordinance without noise attenuation measures, such as a building design with low noise ventilation systems, low noise gas heaters, noise barriers at the property boundaries, low noise valves and acoustic pipe coverings. *Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. §10619*, Evidentiary Hearing Transcript, Docket No. P-2021-3024328 (Nov. 14, 2024) (“N.T. 11/14/23”), p. 1979; RR \_\_\_\_\_. PECO sound expert, Mr. Reginald Keith, did not know of a final design for the Station so could not conclusively say that the Station will operate within the Marple ordinance. Id. at 1979-80; RR \_\_\_\_\_. Furthermore, if changes to the Station occur, such utilization of a larger generator, increase in the footprint for additional gas capacity and climate control equipment on the fiber building, then the noise from the Property could also be increased. Id. at 1980; RR \_\_\_\_\_. Mr. Keith has not reviewed a final plan nor revised his

assessment in consideration of the changes to the equipment which we now know were made. Id. at 1981; RR \_\_\_\_.

**i. Air Quality and Emissions**

Dr. McAuley assessed whether the Station would create an elevated risk related to increased air emissions from the Station. N.T. 11/28/21, p. 2511; RR \_\_\_\_\_. The Station will include several processes and equipment that have the potential to emit regulated pollutants in quantifiable amounts. Marple Twp. Remand Stmt. 1, p. 4; RR \_\_\_\_\_. These processes and equipment include the heater, standby generator, leaks from valves, flanges and connectors, roadways, and tailpipe emissions from automobiles. Id. at 4-5; RR \_\_\_\_\_. Dr. McAuley specifically evaluated the heater and generator because they are expected to be the largest sources of emissions at the facility. Id. at 3; RR \_\_\_\_\_.

Dr. McAuley calculated the potential to emit (PTE) of a source of emissions pursuant to the EPA's guidance. Id. at 5; RR \_\_\_\_\_. The Clean Air Act defines PTE as the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Id. Based on the assessment, it was determined that air quality impacts from the proposed facility would be experienced by communities as far away as one mile from the Station. Id. Specifically, within a one-mile radius from the Station, the Station would cause or contribute to measurable impacts from emissions of nitrogen dioxide (NO<sub>2</sub>), carbon monoxide

(CO), particulate matter (PM2.5), benzene and formaldehyde, among others. Id. The most significant air quality impacts would occur within a half-mile of the facility. Id. Indeed, pollutants will not stop at the fence line of the Station. N.T. 11/28/21, p. 2477; RR \_\_\_\_\_. Pollutants disperse, gases interact, and particulates migrate and grow. Id.

According to EPA's environmental justice screening and mapping tool (EJScreen), this area is home to nearly 3,000 residents at the Property. (Marple Twp. Remand Stmt. 1, p. 6; RR \_\_\_\_\_. The proposed facility is also adjacent to a vibrant shopping center and near an elementary school and playing fields, all located within the area projected to experience the worst impacts from the Station's operations. Id. Operations would potentially impact those who work, attend and visit these uses as well. Id.

Of the modeled results, most of the pollutants do show emissions being generated. Id. at 10; RR \_\_\_\_\_. Three particular pollutants, Benzene, Carbon Monoxide and Formaldehyde have even been shown across various studies to be higher nearer gas plants and gas stations and that caution to elevated exposures near these locations should be considered for those residents located closest to the proposed PECO Station. Id. It is also recognized that Benzene and Formaldehyde are known human carcinogens and that any contributory levels of these should be avoided, especially those residents closest to the Station. Id.

The levels of modeled estimated emissions of Nitrogen Dioxide (NO<sub>2</sub>) at the Property is of significant concern for the community as the levels of NO<sub>2</sub> that would be produced from the operations of the PECO Station are staggering. Id. In evaluating worst case 1-hr conditions at the Property, levels of 1-hour ambient concentrations for NO<sub>2</sub> exceed the National Ambient Air Quality Standards (NAAQS) by almost 6 times with a possible worst case modeled emissions concentration of 0.632 ppm for 1-hour. The NAAQS 1-hour is 0.1 ppm. Id.

Exposure to elevated levels of NO<sub>2</sub> above the NAAQS have shown acute and chronic health effects in children, adults and elderly and have been shown to be directly linked with issues of lung development such as breathing rates and lung volume, throat and upper respiratory irritation of airways and asthma exacerbation and development over time. Id. at 11; RR \_\_\_\_\_. Additional studies have shown evidence of increased inflammation of the airways, wheezing, and coughing leading to elevated emergency room visits and reduction of immunity leading to increased lung infections. Id. Therefore, the 1-hour concentrations found for NO<sub>2</sub> modeled “would unequivocally result” in adverse health effects across the community. Id.

***ii. Health impacts from pollutants***

Dr. Ketyer is a pediatrician who cared for patients before retiring from practice. Marple Twp., Uhlman, Baker Remand Stmt. No. 3, p. 2; RR \_\_\_\_\_. He has

extensive experience in the practice of pediatric medicine as well as with environmental health advocacy with respect to health risks objectively associated with living near shale gas (unconventional) oil and gas. Id. at 4; RR \_\_\_\_\_. He testified about the environmental health concerns with the proposed Station based upon his education, research and first-hand experience as a doctor. Dr. Ketyer explains that each component of the air pollution generated by burning natural gas has very significant health risks associated with it. Id. Although sometimes small in number, there is no safe level of exposure to any component of pollution resulting from natural gas combustion. Id. It is known that even small amounts of exposure, even when brief, can produce significant health signs and symptoms that can affect quality of life for some and increase the risk of poor health outcomes for everyone. Id. Modern air pollution caused mostly from burning fossil fuels like natural gas can impair fertility, complicate pregnancies, and lead to poor birth outcomes. Id. ADHD, learning disabilities, and even the development of autism has been associated with air pollution exposure during pregnancy. Id. at 5; RR \_\_\_\_\_.

Dr. Ketyer analyzed the emissions that Dr. McAuley and Jeffrey Harrington describe will be emitted from the facility.<sup>2</sup> Fine and ultrafine particulate matter (PM 2.5) has been linked with impaired fertility, miscarriage, and poor birth

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<sup>2</sup> See TM-2, Table 2 and JH-4, Table 4-3.; RR \_\_\_\_\_.

outcomes such as low birth weight, and prematurity — each of which carry lifelong health burdens for children, their families, and society. Id. Breathing air contaminated with PM 2.5 exacerbates lung symptoms in children and adults with asthma and other chronic lung diseases. Id. PM 2.5 is a known carcinogen, causing lung cancer and bladder cancer, and is associated with other types of cancer in adults. Id. Breathing PM 2.5 causes headaches in some people and sinus problems in others. Id. There is no safe level of PM 2.5 exposure because even small exposures (even those under standards) can still result in noticeable health symptoms. Id.

Volatile organic compounds (VOCs) such as benzene will be produced from the burning of natural gas. Id. at 6; RR \_\_\_\_\_. Benzene is a known carcinogen, causing cancer in children and adults. Id. Fossil fuel combustion (which includes natural gas) results in emissions of other harmful VOCs potentially leading to serious health concerns, including toluene (permanent neurological damage), ethylbenzene and xylene (ENT and neurotoxicity), and formaldehyde (ENT and lung irritant, human carcinogen). Id.

Nitrogen oxide is produced abundantly wherever fossil fuels and natural gas are combusted. Id. Nitrogen oxide combines with VOCs in the presence of sunlight and heat to produce ground level ozone, also known as smog. Ozone adversely impacts every person's lung function. Id. It has been shown to stunt lung function



growth in infants and young children. Whether one is young or old, rich or poor, active or sedentary, everyone's lung function is diminished on days when ozone levels are high. Id.

In addition to acute exposures to toxic air emissions, cumulative exposures can cause serious health problems, particularly in women who are pregnant, and in children who may not develop chronic heart and respiratory disorders or cancer until years and even decades have passed after exposure. Id. at 10; RR \_\_\_\_.

Notably, PECO did not challenge any of the health concerns caused by emissions. The only argument asserted by PECO was that the emissions would not rise to the level which required air permits.

***iii. Risk***

Jim Capuzzi, Fire Marshal for Marple Township for over a decade and career risk management consultant, testified on behalf of the Township in both the Initial Proceedings and Remand Proceedings. The Safety Data Sheet for Natural Gas provided by PECO confirms that Natural Gas is an extremely flammable gas, easily ignitable and will form explosive mixtures in air. Marple Twp. Remand Statement 4, p. 3; RR \_\_\_\_\_. This Data Sheet also gives guidance to emergency responders when an accidental release occurs. Id. This guidance tracks with the guidance presented in the US Department of Transportation 2020 Emergency Response Guide (ERG). Id. Both documents call for an immediate isolation of the

leak area for at least 100 meters (330 feet) in all directions. This would mean that on the report of any leak at the 1 proposed facility at a minimum the following evacuations must take place:

1. All homes on Cedar Grove Road between Sproul Road and Boxwood Dr.
2. All homes and businesses on Sproul between Parkway W and north of Cedar Grove Rd. (Including Freddy's and Fritch's)
3. The first 3 homes on the east side of Boxwood Dr. from Cedar Grove Rd.
4. The total shut-down of Sproul Road (PA Route 320).

Id at 4; RR \_\_\_\_\_. If the leak is not immediately controlled this isolation area will need to be increased accordingly. Id.

Additionally, Jeff Marx provided expert testimony regarding the safety of the Station. He explained the hazards that could be present if an accidental released occurred. Marple Twp. Remand Statement 2, p. 4; RR \_\_\_\_\_. Those hazards are exposure to a flash fire following ignition of a vapor cloud, exposure to thermal radiation due to a jet fire, or exposure to a blast wave following ignition of a flammable vapor cloud that is confined. Id.

The largest impacts would be from potential fire events. Id. at 6; RR \_\_\_\_\_. If an equipment failure of significant magnitude were to occur that releases natural gas, and that gas is ignited, there could be fire impacts in the immediate areas outside the Station boundaries. Id.

## VI. SUMMARY OF ARGUMENT

This Honorable Court specifically stated that the Commission is *obligated* to consider “the environmental impacts of placing [a building] at [a] proposed location,” *while also deferring* to environmental determinations made by other agencies with primary regulatory jurisdiction over such matters. Listing agency determinations, although no determinations were made in this case, do not form the basis of a constitutionally sound environment review. The Commission was to do both – consider the environmental impacts *and* defer to environmental determinations made by other agencies if they so existed. In this matter, PECO did not obtain any agency determinations. PECO’s resubmission into the record of permits, a checklist and assessment completed by another company were not the agency determinations contemplated by this Court.

Permit exemptions are not agency determinations for the purposes of forming the basis of a constitutionally sound environmental impact review. The permit requirements for the Station’s equipment are the same requirements regardless of where the facility is located. Reviewing permit applications and standards for equipment does not consider the *site* of a station and the community surrounding it. A proper environmental review must account for the location of the Project itself.

PECO's own expert admits that there will be an impact to air quality and human health and that those impacts will be present as long as the Station is in existence. His ultimate conclusion that the construction of the Station would not cause unreasonable impacts to the environment is based solely on the Station not requiring a permit for the heater and generator.

There is no evidence of record that any review and decision was made by the PADEP or EPA for the Station's air emissions sources. Not only is the record devoid of any agency determinations applicable to PECO's Project, merely obtaining the necessary permits for a project does not ensure a decision comports with the ERA. This is precisely why the Commission must be held to their duty as trustee under the Environment Rights Amendment pursuant to Pennsylvania Supreme Court precedent and the Commonwealth's analysis in Marple I.

According to testimony, leaks are the most likely concern for the pipeline. However, the emissions from leaks was dismissed by the Commission because there is no national air quality standards for those pollutants, such as methane and other impurities.

On remand, the Commission had to conduct the environmental impact review on its own, having no agency determinations to defer to. In light of the foregoing, the Commission's decision on air quality – that blanket exemptions and

permits were sufficient to base its decisions – was an error of law and not supported by substantial evidence.

While Pennsylvania does not have a state environmental policy act, many other states do. Therefore the type of analysis necessary for an adequate environmental review is not novel. Five states – California, Georgia, Minnesota, New York, and Washington – require environmental impact reviews for *local government actions*, although each state has its own requirements. These “little NEPAs” vary widely in their requirements, impact, and effectiveness in encouraging state decision makers to take into account impacts on the natural environment. The Commission could have, and should have, looked to outside agencies for guidance in conducting a constitutionally sound environmental impact review.

The Commission’s failed environmental impact review led to a decision without full consideration of the environmental consequences of the Project. The Commission’s failure to perform a constitutionally sound environmental review constituted error of law and its decision to ignore the environmental evidence presented by Marple and Intervenors was not supported by substantial evidence.

The Commission improperly dismissed the evidence presented regarding the risk of the Station and adopted PECO’s argument that that no agency determination is required from either the Commission or PHMSA to site a

distribution facility like the Station. For the reasons stated herein, this conclusion by the Commission was not supported by substantial evidence and constitutes clear error of law.

The necessity of the Station cannot be assessed with a constitutionally sound environmental impact review. The Marple I court specifically required the Commission to reconsider the reasonable necessity of the siting of the Station in light of the required environmental review. Marple I, 294 A.3d at 974-75.

PECO has failed in both the Initial Proceedings and Remand Proceedings to prove that its decision to site the Station at the Property was reasonable and to prove reasonable necessity for the Project. At a minimum, the analysis for the siting of a natural gas facility should have to include an analysis of alternative projects or locations that could feasibly attain the basic objectives of the project.

The Commission's review was an exercise of the application of the Payne test which no longer the law. A mere recognition of the harms of a project and comparison to whether the benefits outweigh those harms was the prior Payne test which has since been overruled. The Commission's decision essentially states that the Project complied with existing statutes and regulations, there is an effect to minimize environmental harms, and thus any environmental harms are acceptable because the benefits of the project are great enough. This analysis deprives the constitution of any independent meaning and constitutes error of law.

The Commission’s decision, therefore, was not supported by substantial evidence. The lack of a constitutionally sound environmental impact review rendered it legally impossible to decide that the Project was reasonably necessary for the convenience and welfare of the public in light of Article I, Section 27 of the Pennsylvania Constitution and in light of the requirements of Marple I.

## **VII. ARGUMENT**

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. 1, §27.

The Commonwealth Court instructed the Commission in Marple I to render an amended decision which takes into account a constitutionally sound environmental impact review of the siting of PECO’s natural gas reliability station. Article I, Section 27, also known as the Environmental Rights Amendment (“ERA”), recognizes two rights in the people. In its first sentence or clause, Section 27 recognizes a right in the people “to clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of the environment.” The second and third sentences, the public trust clause, impose a public trust responsibility on the Commonwealth to “conserve and maintain”

public natural resources for the benefit of present and future generations. The people, the beneficiaries of the public trust, have the right to have the government perform this duty. “Trustee obligations are not vested exclusively in any single branch of Pennsylvania’s government;” rather, “all agencies and entities of the Commonwealth government” have these obligations. Pennsylvania Environmental Defense Foundation v. Commonwealth, 161 A.3d 911, 931 n.23 (Pa. 2017) (“PEDF II”). As a result, the ERA’s “mandate informs Pennsylvania's elaborate body of environmental protection statutes and regulations.” Clean Air Council v. Department of Environmental Protection, 289 A.3d 928, 932 (Pa. 2023).

In PEDF II, the Court expressly overruled the Payne test and found that “[t]he proper standard of judicial review [for alleged violations of the ERA] lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.” PEDF II, 161 A.3d at 930. In so ruling, the Court held that the ERA grants citizens of the Commonwealth two separate rights: 1) the right to clean air and pure water and to the preservation of natural, scenic, historic and aesthetic values of the environment; and 2) the right of common ownership by the people, including future generations, of Pennsylvania’s public natural resources. Indeed, PEDF II held that local and state government agencies have an obligation under the ERA to act as trustees for



the environment and the natural resources of the state, and as such must prohibit their degradation and affirmatively act to protect them. Id. at 938.

In Robinson Township, the plurality stated:

In Pennsylvania, terrain and natural conditions frequently differ throughout a municipality, and from municipality to municipality. As a result, the impact on the quality, quantity, and well-being of our natural resources cannot reasonably be assessed on the basis of a statewide average. Protection of environmental values, in this respect, is a quintessential local issue that must be tailored to local conditions.

Robinson Township v. Commonwealth, 83 A.3d 901, 927 (Pa. 2013). Furthermore, “the Commonwealth is now over three centuries old, and its citizens settled the territory and built homes and communities long before the exploitation of natural gas... became economically feasible.” As such, “oil and gas operations do not function autonomously of their immediate surroundings.” Id.

The Supreme Court’s decision in Robinson Township underscores the importance of interpreting Section 619 in a manner that conforms to the Constitution and takes into account the local community and surroundings. In Robinson Township, 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 compressor stations) could be located. Id. at 970 (quoting 58 Pa. C. S. § 3303).<sup>3</sup>

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<sup>3</sup> 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

Then Chief Justice Castille, writing for the plurality in an opinion 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 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.

Robinson Township, 83 A.3d at 977 Id.

Justice Baer based his concurring opinion on substantive due process, focusing on the same essential problem that the other justices raised. 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).

Here, Section 619 was unconstitutional as applied by the Commission. Both Article I, Section 27 and substantive due process prohibit the

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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 Resources-Appalachia v. Salem Township, 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.

Commission from deciding a case in a manner that would violate the constitutional protections explained in PEDF II and Robinson Township. The Commission's failure to conduct a constitutionally sound environmental impact review violated the rights of the citizens of Marple and Pennsylvania.

**A. Agency determinations, alone, are not sufficient for a Constitutionally sound Environmental Impact Review**

This Honorable Court specifically stated that the Commission is *obligated* to consider “the environmental impacts of placing [a building] at [a] proposed location,” *while also deferring* to environmental determinations made by other agencies with primary regulatory jurisdiction over such matters. *See Del-AWARE Unlimited, Inc. v. Pa. Pub. Util. Comm'n*, 513 A.2d 593, 596 (Pa. Cmwlth. 1986). The Commonwealth Court's instruction in the Marple I decision created a new directive as it relates to Section 619 proceedings. This instruction therefore had meaning and was not an invitation for PECO to resubmit its case and for the Commission to rubber stamp its application.

PECO argued, and the Commission accepted that the Commonwealth Court was only interested in the Commission documenting the agency determinations that applied. However, the Commission was to do both – consider the environmental impacts *and* defer to environmental determinations made by other agencies if they so existed.

With respect to this Petition PECO has not obtained any agency determinations. According to Merian Webster, the legal definition of determination is as follows: “a decision of a court or administrative agency regarding an issue, case, or claim.”<sup>4</sup> PECO has not obtained or presented any evidence of any *decision* by an agency on an issue, case or claim.

Lastly, the “agency determinations” that the Commission relied upon are NOT the same (or even similar) agency determinations contemplated under Del-AWARE Unlimited which took into account intense scrutiny of the issues and not just a fill-in-the-form application or a self-serving reading of the emissions permit standards to determine there would be no air permits required for specific equipment. Del-AWARE Unlimited, 513 A.2d 593.

Instead, PECO presented two of its employees, Keith Kowalski and Jim Moylan, who testified regarding what they described as environmental assessments completed by PECO, not by an agency. Kowalski described the NPDES permit needed for construction of the Station. PECO Statement 2-RD, p. 2; RR \_\_\_\_\_. He also testified that PECO completed their standard Environmental Checklist Procedure Id., at 4; RR \_\_\_\_\_. This checklist is done for all projects and did not consider the *site* of the Project. Id. at 6; RR \_\_\_\_\_. In fact, the Environmental Checklist procedure was completed prior to choosing 2090 Sproul Road. Id.

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<sup>4</sup> <https://www.merriamwebster.com/dictionary/determination#legalDictionary>.

Mr. Kowalski also discussed the Phase I and Phase II assessments completed by Stantec which were already a part of the record from the Initial Proceedings. Id. at p 13, RR \_\_\_\_\_. The purpose of the Stantec assessment was to identify and remediate soil and groundwater contamination that existed at the Property from its prior use as a gas station. Id. at 16; RR \_\_\_\_\_. The assessments had nothing to do with the environmental impact from the siting, construction or operation of the Station at the Property and were not completed by agencies.

Indeed, what PECO claims to be agency determinations are not decisions at all. Relying on these “illusory” determinations would again render the Commission’s Opinion constitutionally deficient. Pennsylvania agencies and courts should be reluctant to treat new decisions —especially those related to Constitutional rights—as failing to result in any meaningful change. What point does the Marple I decision serve if the standard is simply to require the same permits (or exemptions) that always come with the Project? The permits (or exemptions) that the Commission accepted as agency determinations equivalent to an environmental impact review were already the status quo for the project and were already deemed insufficient. There was no new review or analysis completed by the Commission.

**B. Permit exemptions are not agency determinations for the purposes of a Constitutionally sound Environmental Impact Review**

According to the Commission, PECO’s testimony that neither the line heater nor the emergency generator required a DEP air permit satisfied an agency determination as to air emissions. *Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. §10619*, Amended Initial Decision, Docket No. P-2021-3024328 (Apr. 3, 2024) (“A.I.D.”) p. 18; RR \_\_\_\_.

Furthermore, the Commission upheld the ALJ conclusion that the blanket exemptions and Certificates of Conformity constitute the relevant agency determinations for purposes of an environmental review of air quality impacts. *Id.* at 19; RR \_\_\_\_.

However, there was never an agency determination made as to air quality impacts because permit exemptions are insufficient for a constitutionally sound environmental impact review.

The permit requirements for the Station’s equipment are the same requirements regardless of where the facility is located. Reviewing permit applications and standards for equipment does not consider the *site* of a station and the community surrounding it. A proper environmental review must account for the location of the Project itself. A facility that may not need a permit but is located out in the middle of a field is different from an environmental and human health standpoint than a facility with residents living and working nearby.

In the remand proceedings, PECO's pipeline permit consultant, Jeffrey Harrington, rendered an opinion as to air quality impacts from the Station that was not based on any air modeling, testing or assessments. To render his expert opinion on the environmental impacts from the operation of the Station, Harrington reviewed permit applications prepared by PECO and other Station documentation. PECO Statement 3-RD, p. 5; RR \_\_\_\_\_. It wasn't until after Marple presented the air modeling report of expert witness, Dr. Timothy McAuley, that PECO submitted the rebuttal testimony of Mr. Harrington which included his modeling.

Mr. Harrington's rebuttal testimony relied heavily on the argument that the line heaters and standby generator were subject to exemptions to air permit requirements. PECO Statement 6-RR, p. 3; RR \_\_\_\_\_. The three pollutants modelled by Mr. Harrington, NO<sub>2</sub> (nitrogen dioxide), CO (carbon monoxide) and PM<sub>2.5</sub> (particulate matter), all showed quantifiable amounts of emissions. *Id.* at p 12; RR \_\_\_\_\_. Additionally, Mr. Harrington acknowledged that VOCs, as well as methane and other impurities due to leaks, will be emitted from the Station but these were not included in his modeling N.T. 11/28/23, p. 2419-21; RR \_\_\_\_\_.

Mr. Harrington admitted that there will be an impact to air quality and human health and that those impacts will be present as long as the Station is in existence. *Id.* at 2412, 2436; RR \_\_\_\_\_. His ultimate conclusion that the construction of the Station would not cause unreasonable impacts to the environment is based solely

on the Station not requiring a permit for the heater and generator. Id. at 2412-13; RR \_\_\_\_\_. He specifically stated, “[m]y basis is just on the fact that the project is exempt from Pennsylvania DEP permitting requirements...” and “so, therefore there would not be unreasonable environmental impact...” Id.

However, there is no evidence of record that any review and decision was made by the PADEP or EPA for the Station’s air emissions sources. Not only is the record devoid of any agency determinations applicable to PECO’s Project, merely obtaining the necessary permits for a project does not ensure a decision comports with the ERA. This is precisely why the Commission must be held to their duty as trustee under the Environment Rights Amendment pursuant to Pennsylvania Supreme Court precedent and the Commonwealth’s analysis in Marple I.

Contrary to PECO’s position and the Commission’s decision, the fact that the Project or any aspect thereof qualifies for a permit exemption provides an even more important basis for a sound environmental review by the Commission. In this instance, no independent review has been conducted.

As additional evidence of this, PECO’s pipeline expert identified leaks as the most likely concern for the pipeline. A.I.D. p 17; RR \_\_\_\_\_. However, Mr. Harrington failed to consider leaks in his determination of air quality impacts. He reasoned that he did not factor in leaks because there are no national air quality standards for those pollutants, such as methane and other impurities. N.T.



11/28/23, p. 2412; RR \_\_\_\_\_. This, again, is why reliance upon permit requirements, rather than an actual analysis of emissions is insufficient for an environmental impact review.

Finally, the Commission’s original decision already accounted for the permits that are now taking the place of an environmental impact review. In its Initial Order, the Commission discussed the lack of an applicable air permit as well as the Phase I and II site assessments and the NPDES permit. *Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. §10619*, Opinion and Order, Docket No. P-2021-3024328 (Mar. 10, 2022), pp. 35 n.14, 41; Exh. JM-2 at 9-10; RR \_\_\_\_\_. Again, these permits and assessments have little, if nothing, with the impact of the operation of Station on the environment.

On remand, the Commission had to conduct the environmental impact review on its own, having no agency determinations to defer to. In light of the foregoing, the Commission’s decision on air quality – that blanket exemptions and permits were sufficient to base its decisions – was an error of law and not supported by substantial evidence.

**C. The Commission should have conducted a “little NEPA” style review consistent with other States**

Pennsylvania does not have a state environmental policy act but many other states do, therefore the type of analysis necessary for an adequate environmental review is not novel. The model for these state environmental policy acts is

the National Environmental Policy Act (NEPA), a federal law requiring all federal agencies to submit environmental impact statements for all the major actions that could significantly affect the environment. Congress passed NEPA in 1969 during the growing push for environmental legislation such as the Clean Air Act and the Clean Water Act.

After NEPA was passed in 1969, many states followed suit in enacting similar procedural requirements for their own state agencies' actions and their impact on the environment. Like NEPA, these state laws are procedural laws, which means that they require state government agencies to follow specific procedures before they take action on a major project. Each state law varies with regard to what kinds of environmental review are required, which types of project must be reviewed, the specific requirements of an environmental assessment, and so on. Two states—California and Massachusetts—require a review of all state actions that could *potentially contribute to global warming and climate change*. Five states—California, Georgia, Minnesota, New York, and Washington—require environmental impact reviews for *local government actions*, although each state has its own requirements. Three states—California, New York and Minnesota—require environmental impact reviews for some private actions, such as agricultural projects in the case of Minnesota and state-permitted and state-funded projects in New York. These “little NEPAs” vary widely in their requirements, impact, and

effectiveness in encouraging state decision makers to take into account impacts on the natural environment. Marchman, Patrick, “*Little NEPAs*”: *State Equivalents to the National Environmental Policy Act in Indiana, Minnesota and Wisconsin*, Duke University (Oct. 8, 2012), <https://hdl.handle.net/10161/5891>.

In Washington, the State Environmental Policy Act (SEPA) requires that agencies complete an EIS prior to undertaking “major actions significantly affecting the quality of the environment.” RCW 43.21C.030(2)(c). The EIS is to be completed by the “responsible official” and must include:

- (i) the environmental impact of the proposed action;
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;
- (iii) alternatives to the proposed action;
- (iv) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Columbia Riverkeeper v. Port of Vancouver USA, 392 P.3d 1025, 1030 (Wash. 2017).

In Montana, MEPA requires state agencies to conduct an environmental review of any contemplated agency action that may have an impact on the human environment. Bitterrooters for Planning, Inc. v. Mont. Dep't of Env'tl. Quality, 401 P.3d 712, 718-719 (Mont. 2017). MEPA requires an agency to produce a formal

environmental impact statement (EIS) if an agency action will significantly affect the quality of the human environment. Id.

Under the Wisconsin Environmental Policy Act (WEPA), a state agency contemplating a "major action[] significantly affecting the quality of the human environment" must prepare and publish an Environmental Impact Statement (EIS): a detailed report evaluating potential environmental effects. Friends of the Black River Forest v. Wis. Dep't of Natural Res., 404 Wis. 2d 590, 592, 964 (Wisc. App. 2021). The EIS is meant to inform decision-makers and the public, so that actions are approved or denied only on full consideration of their environmental consequences. Id.

In Massachusetts, MEPA "sets forth a broad policy of environmental protection in the Commonwealth by directing [all State agencies] to 'review, evaluate, and determine the impact on the natural environment of all works, projects or activities conducted by them and . . . use all practicable means and measures to minimize damage to the environment.'" Ten Persons of the Commonwealth v. Fellsway Dev. LLC, 951 N.E.2d 648, 651 (Mass. 2011).

An environmental impact review in Massachusetts must:

contain statements describing the nature and extent of the proposed project and its environmental impact; all measures being utilized to minimize environmental damage; any adverse short-term and long-term environmental consequences which cannot be avoided should the project be undertaken; and reasonable alternatives to the proposed project and their environmental consequences. Id.

In California the courts state that "[t]he purpose of an environmental impact report is to identify the significant effects of a project on the environment, *to identify alternatives to the project*, and to indicate the manner in which those significant effects can be mitigated or avoided." (*Italics added*). Section 21061 states that "The purpose of an environmental impact report is . . . to list ways in which the significant effects of such a project might be minimized; *and to indicate alternatives* to such a project." (*Italics added*.) Laurel Heights Improvement Assn. v. Regents of University of California, 764 P.2d 278, 289, (Cal 1988). Perhaps most important, the Legislature has expressly declared that ". . . it is the policy of this state to: . . . [require] governmental agencies at all levels . . . *to consider alternatives* to proposed actions affecting the environment." The Guidelines require that an EIR "[describe] a reasonable range of alternatives to the project, or to the location of the project, which could feasibly attain the basic objectives of the project and evaluate the comparative merits of the alternatives." (Guidelines, § 15126, subd. (d).) These alternatives must be discussed, "even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly." Id.

The environmental impact review conducted by the Commission and forming the procedure for these types of hearings in the Commonwealth paled in comparison to any of the states listed above. For example, the Commission failed

to include a reasonable range of alternatives to the Project or alternatives to the location of the Project. PECO and the Commission shut down Marple's efforts to point out at least one viable alternative for the project.

The Commission's environmental impact review lacks an analysis of how an alternative project or alternative location could feasibly attain the basic objectives of the project. Rather than evaluate the merits of the alternate location suggested, the Commission stated that PECO was not obligated to pick the best site.

Furthermore, the Commission's review failed to contemplate how the Project impacts the human environment and failed to indicate the manner in which significant environmental effects of the Project can be minimized or avoided. The Commission gave no meaningful consideration to the medical evidence submitted by Marple and Intervenors. The Commission's lack of consideration constituted error in light of the fact that PECO offered no rebuttal to the evidence.

Dr. Ketyer testified about the environmental health risks with the proposed Station based upon his education, research and first-hand experience as a doctor. He testified that air pollution caused from burning fossil fuels like natural gas can impair fertility, complicate pregnancies, and lead to poor birth outcomes. Marple Twp., Uhlman, Baker Remand Stmt. No. 3, p. 4; RR \_\_\_\_\_. Indeed, ADHD, learning disabilities, and even the development of autism has been associated with air pollution exposure during pregnancy. Id. at 5; RR \_\_\_\_\_.

After analyzing the emissions that would come from the Station as described by Dr. McAuley and Jeffrey Harrington, Dr. Ketyer explained that this fine and ultrafine particulate matter has been linked with impaired fertility, miscarriage, and poor birth outcomes such as low birth weight, and prematurity — each of which carry lifelong health burdens for children, their families, and society. Id.

Dr. Ketyer explained that the emissions from the Station contain known carcinogens such as benzene, causing cancer in children and adults. Id. at 6; RR \_\_\_\_\_. Natural gas emissions also include other harmful VOCs potentially leading to serious health concerns, including toluene (permanent neurological damage), ethylbenzene and xylene (ENT and neurotoxicity), and formaldehyde (ENT and lung irritant, human carcinogen). Id. All such medical testimony is clearly relevant to the environmental and health impact of siting the facility immediately adjacent to and in close proximity to occupied residences and commercial properties.

This should all be considered in light of the fact that PECO has stated they do not have a current shortage and that this is for a need that is about ten years out. N.T. 7/15/21, p 913:13-20, 938; RR \_\_\_\_\_. There has been and continues to be ample time to fully evaluate this Project without forcing it upon the Township and stripping them of their zoning powers.

The Commission's failed environmental impact review led to a decision without full consideration of the environmental consequences of the Project. The

Commission's failure to perform a constitutionally sound environmental review constituted error of law and its decision to ignore the environmental and health evidence presented by Marple and Intervenors was not supported by substantial evidence.

**D. An assessment of risk should not be dismissed because there are no PHSMA determinations that are applicable**

The Commonwealth Court made it clear that it cared about the explosion risk of the facility given its proximity to homes and business that is not typical of a standard PECO gate station, yet the Commission skirted this obligation when it adopted PECO's argument that the potential impact radius ("PIR") does not apply to pipelines. The Commission's analysis is focused on the term PIR and not the actual potential harm to life and property which was initially mentioned by PECO's expert himself. The Commission ignored the uncontroverted fact that the PIR calculation presented without question showed that commercial and residential properties are located in the area of impact should a fire or explosion event occur at the facility.

Indeed, PECO pipeline consultant, Mike Israni, testified in both the Initial Proceedings and the Remand Proceedings. Originally, Mr. Israni provided information regarding the potential impact radius ("PIR") in response to Delaware County witness, Timothy Boyce. PECO Statement 1-SR, p. 23; RR \_\_\_\_\_. Mr. Israni testified that based on PECO's operational figures of pressure of the main



connected to the Station of 525 PSI and the pressure arriving at the Station anticipated to be less than 200 PSI with a 12-inch diameter main, in the scenario of a serious incident at that natural Gas Reliability Station, the potential impact radius is 190 feet for 525 PSI and at 200 PSI, the potential impact radius is 117 feet. Id. at 23-24; N.T. 7/22/21, pp. 1618:3 -1620:4; RR \_\_\_\_\_. He defined PIR as the radius of a sector where if the pipeline fails, the persons or the buildings within that impact circle may be impacted. He testified that the failure of a pipeline where the gas was ignited resulting in flame or plume of that flame or fire would have impact on persons in that radius, with impacts such as such as 2<sup>nd</sup> degree burns from exposure to flame heat (20 secs), death within 30 seconds and building ignition within 30 minutes. Id. Initially, Mr. Israni never stated that the term PIR was not relevant to this Station.

Jim Capuzzi, Fire Marshal for Marple Township for over a decade, and career risk management consultant, testified on behalf of the Township in both the Initial Proceedings and Remand Proceedings. The Safety Data Sheet for Natural Gas provided by PECO confirms that Natural Gas is an extremely flammable gas, easily ignitable and will form explosive mixtures in air. Marple Twp. Remand Statement 4, p. 3; RR \_\_\_\_\_. This Data Sheet also gives guidance to emergency responders when an accidental release occurs. Id. This guidance tracks with the guidance presented in the US Department of Transportation 2020 Emergency

Response Guide (ERG) which is produced by PHSMA. Id. Both documents call for an immediate isolation of the leak area for at least 100 meters (330 feet) in all directions. This would mean that on the report of any leak (the most likely incident per Mr. Israni) at the proposed facility at a minimum the following evacuations must take place:

1. All homes on Cedar Grove Road between Sproul Road and Boxwood Dr.
2. All homes and businesses on Sproul between Parkway W and north of Cedar Grove Rd. (Including Freddy's and Fritch's)
3. The first 3 homes on the east side of Boxwood Dr. from Cedar Grove Rd.
4. The total shut-down of Sproul Road (PA Route 320).

Id at 4. If the leak is not immediately controlled this isolation area will need to be increased accordingly. Id.

The danger of property damage and potential injury to persons in the area surrounding the Station is directly relevant to the siting of the proposed Station which is directly adjacent to commercial and residential properties. PECO has no gate station or like facility as close or closer than this station to residences, and, in fact, most are substantially further from residences and well outside the area of impact. Exhibit TF-6; RR \_\_\_\_.

PECO misinterprets this Honorable Court by stating that no agency determination is required from either the Commission or PHMSA to site a

distribution facility like the Station. The Commission, however, was not tasked with providing a recitation of agency determinations for the Project. Rather, the Commission was to conduct a constitutionally sound environmental impact review. Despite this Court's decision, and despite the fact that what the Commission relies upon are not agency determinations by definition, the Commission adopted PECO's argument that no PHMSA siting restrictions, agency determinations, or approvals for siting the Station were necessary and this acknowledgement constitutes an environmental impact review. A.I.D. p 6; RR \_\_\_\_.

For the reasons stated herein, this conclusion by the Commission was not supported by substantial evidence and constitutes clear error of law.

**E. Necessity of the Project cannot be assessed without a Constitutionally sound Environmental Impact Review**

In order to satisfy its burden in a Section 619 proceeding, “[t]he [public utility] must show that it has made a reasonable decision, not the best possible decision. Evidence of an alternative may be the basis for questioning the reasonableness of the [utility’s] decision but [the] mere existence of an alternative site does not invalidate [its] judgment.” Marple I, 294 A.3d at 972, *quoting Re Phila. Suburban Water Co.*, 54 Pa. PUC 127, 132 (1980). Moreover, the Marple I court specifically required the Commission to reconsider the reasonable necessity of the siting of the Station in light of the required environmental review. Marple I, 294 A.3d at 974-75.

PECO has failed in both the Initial Proceedings and Remand Proceedings to prove that its decision to site the Station at the Property was reasonable and to prove reasonable necessity for the Project. PECO employee, Doug Oliver testified that the need for the Project was not because of any current gas supply shortage because PECO did not have a current supply shortage. N.T. 7/15/21, p 913:13-20; RR \_\_\_\_\_. PECO has sufficient supply currently in order to meet design day requirements. PECO currently has adequate supply to meet mandated requirements in a safe, cost-effective manner. Id. at 1279:23-1280:11; RR \_\_\_\_\_.

Not only has PECO admitted that its need is not urgent, but considering the lack of constitutionally sound environmental impact review, including the items of a “Little NEPA,” it is impossible for PECO to show reasonable necessity. At a minimum, the analysis for the siting of a natural gas facility should have to include an analysis of alternative projects or locations that could feasibly attain the basic objectives of the project.

**F. The Commission’s review was nothing more than an application of the Payne test and constituted an error of law**

A mere recognition of the harms of a project and comparison to whether the benefits outweigh those harms was the prior Payne test which has since been overruled. Payne v. Kassab, 312 A.2d 86, 94 (Pa. Cmwlth. Ct. 1973). Payne required compliance with existing statutes and regulations, required that the record show a reasonable effort to minimize environmental harms, and told reviewing

courts that environmental harms were acceptable if the benefits of the project were great enough. Id. Because the Payne test deprived the constitution of any independent meaning, the Pennsylvania Supreme Court rejected that test in PEDF II. In its place, the Court held that judicial review is to be based on “the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.” Id. This Commonwealth Court’s Marple I decision makes clear that this new understanding of the ERA must guide the Commission in its interpretation of Section 619. Marple I, 294 A.3d at 974-75.

Despite it no longer being the law, the Commission’s analysis still reflects the Payne test. The Commission basically stated that the Project adheres to existing statutes and regulations, minimizes environmental harm, and on balance the benefits are greater than the environmental harm. This application of the wrong standard by the Commission amounted to an error of law.

**G. The Commission’s decision granting PECO’s Petition was not supported by substantial evidence**

Based upon all of the foregoing and the Commission’s failure to conduct a constitutionally sound environmental impact review which neglected nearly every important element outlined herein, the decision granting PECO’s Petition was an error of law and not supported by substantial evidence.

The lack of a constitutionally sound environmental impact review rendered it legally impossible to decide that the Project was reasonably necessary for the

convenience and welfare of the public in light of Article I, Section 27 of the Pennsylvania Constitution and in light of the requirements of Marple I.

The Commission's failure to adequately review the environment impacts of the Project violated the constitutional protections explained in PEDF II and Robinson Township. The Commission's failure to conduct a constitutionally sound environmental impact review therefore violated the rights of the citizens of Marple and Pennsylvania.

### **VIII. CONCLUSION**

For all of the foregoing reasons, the Township of Marple respectfully request this Honorable Court reverse the Commission's ruling finding that PECO established reasonable necessity for the site of 2090 Sproul Road for its Station. It is respectfully requested that this Honorable Court additionally find that the Commission's review was not sufficient for a constitutionally sound environmental impact review, thereby reversing this decision.

Respectfully submitted,

**McNICHOL, BYRNE & MATLAWSKI, P.C.**

By: /s/ J. Adam Matlawski, Esquire  
J. Adam Matlawski, Esquire  
Attorney I.D. 41678  
Kaitlyn T. Searls, Esquire  
Attorney I.D. 311237  
*Attorneys for Appellant, Township of Marple*

## CERTIFICATION OF COMPLIANCE

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

By: /s/ J. Adam Matlawski, Esquire  
J. Adam Matlawski, Esquire  
Attorney for Township of Marple

CERTIFICATION OF COMPLIANCE

Pursuant to Rule 2135, I certify the following:

This brief complies with the word count limitation set forth therein.

By: /s/ J. Adam Matlawski, Esquire  
J. Adam Matlawski, Esquire  
Attorney for Appellant



# APPENDIX “A”

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17120**

Public Meeting held September 26, 2024

Commissioners Present:

Stephen M. DeFrank, Chairman  
Kimberly Barrow, Vice Chair, Statement  
Ralph V. Yanora  
Kathryn L. Zerfuss  
John F. Coleman, Jr.

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

P-2021-3024328

**OPINION AND ORDER**

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**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed on April 23, 2024, by Marple Township, Delaware County (Marple Township or the Township), and Julia M. Baker (Ms. Baker) and Theodore R. Uhlman (Mr. Uhlman) (collectively, the Intervenors) to the Amended Initial Decision (A.I.D.) of Administrative Law Judge (ALJ) Mary D. Long issued on April 3, 2024, in the above-captioned proceeding. PECO Energy Company (PECO or the Company) filed its Replies to Exceptions on May 3, 2024. For the reasons stated below, we shall: (1) grant, in part, and deny, in part, Marple Township’s Exceptions; (2) deny Ms. Baker’s and Mr. Uhlman’s Exceptions; and (3) modify the Amended Initial Decision, consistent with this Opinion and Order.

**I. History of the Proceedings**

On February 26, 2021, PECO filed a Petition for a Finding of Necessity Pursuant to 53 P.S. § 10619 (Section 619) that the Situation of Two Buildings Associated with a Reliability Station in Marple Township, Delaware County Is Reasonably Necessary for the Convenience and Welfare of the Public (Petition). Following hearings and initial adjudication, the Commission approved the Petition. Specifically, the Commission concluded that the situation of PECO’s proposed Buildings was reasonably necessary for the convenience or welfare of the public and found that PECO’s proposed Reliability Station security fence is a public utility facility, and therefore exempt from local land use controls.<sup>1</sup> A.I.D. at 1-2.

Thereafter, Marple Township filed a petition for review in the Commonwealth Court. On March 9, 2023, the Commonwealth Court issued a decision

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

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

Evidentiary hearings were conducted by telephone and began on November 14, 2023. Additional days of hearing were held on November 15, 2023, November 17, 2023, and November 28, 2023. Written testimony and exhibits and hearing exhibits were admitted into the record. A.I.D. at 3.

The Parties filed initial briefs on December 15, 2023. Reply briefs were filed by all Parties on January 3, 2024. Briefs *amici curiae* were filed by Citizens for Pennsylvania’s Future, the Clean Air Council, the Delaware Riverkeeper, Green Amendments for the Generations, and the Energy Association of Pennsylvania. On January 5, 2024, the ALJ issued an interim order closing the record. A.I.D. at 3.

On April 3, 2024, the Commission served ALJ Long’s Amended Initial Decision in this matter. As noted above, Exceptions were filed on April 23, 2024, by Marple Township, and Ms. Baker and Mr. Uhlman. PECO filed its Replies to Exceptions on May 3, 2024.

## **II. Background**

PECO is a certificated natural gas utility providing natural gas service in Southeastern Pennsylvania to approximately 534,000 retail customers and transportation

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<sup>2</sup> *Twp. of Marple v. Pa. PUC*, 294 A.3d 965 (Pa. Cmwlth. 2023) (*Marple II*).

service to 1,800 large commercial and industrial customers. PECO and its natural gas customers rely on the interstate natural gas pipeline system to deliver natural gas into PECO's distribution system because PECO's service territory is not in a natural gas producing region. PECO St. 1-RD at 2.

PECO determined, as part of its obligation as a public utility to provide reliable service, 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. PECO initiated the "Natural Gas Reliability Project" (Reliability Project) to address that need. PECO St. 1-RD at 2.

The proposed Gas Reliability Station (Reliability Station or Station), the subject of this proceeding, is part of the Reliability Project, a long-term infrastructure project PECO is implementing to increase its capacity supply to diminish its design day constraints.<sup>3</sup> *Marple I* at 5 (citing PECO St. 2 at 3-7). The Station will serve to reduce the pressure of the natural gas delivered from Montgomery County to feed into a trunk line at the intersection of Lawrence Avenue and Sproul Road in the Township for delivery to customers in Delaware County. PECO St. 1-RD at 2-3.

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<sup>3</sup> According to PECO, the Company is experiencing natural gas supply constraints that, over the next ten years, will result in an increased deficit between its current supply capacity resources and its calculated design day demand requirements. PECO St. 2 at 7-22; PECO Exhs. CPT-1 at 25-31, CPT-2 at 18-25, and CPT-3 at 19-29. A "design day" is a 24-hour period of demand which is used as a basis for planning gas capacity requirements. "Design day requirements" refer to the amount of gas needed to meet customer needs during design day conditions. PECO St. 2 at 3-7. "Design day conditions" are defined as an average temperature of zero-degrees Fahrenheit for the 24-hour "gas day" period. A "gas day" runs from 10 a.m. until 10 a.m. the following day. PECO St. 2 at 3. *Marple I* at 5, n.3.



The location selected for the Station is zoned as “Neighborhood Center District” (ND). Marple Township Zoning Ordinance, Section 300-39; Exh. C to Petition. According to the Marple Township Ordinance, the intent of the district is as follows:

The intent of the N Neighborhood Center District is to provide appropriate locations and development standards for low-intensity commercial uses where more intensive commercial use would have adverse effects on adjacent and neighboring residential areas. The regulations that apply within the district provide for retail and office uses of limited scale that primarily serve nearby residents, affording opportunities for pedestrian access to local services. Buildings in this district should be compatible in size and scale with those in adjacent residential areas.

Marple Township Zoning Ordinance, Section 300-39; Exh. C to Petition. The Marple Township Zoning Ordinance, ND district, permits “public utility use” by special exception. *Marple I* at 6 (citing Marple Township Zoning Ordinance, Section 300-37, 300 Attachment 5).

The Station includes a variety of utility facilities: valves, piping, a line heater<sup>4</sup> (to heat water to control the temperature of the natural gas flowing out of the Station), regulators, a battery backup system, sensitive electronic and communications equipment, such as leak detectors, meters, and remote-control devices for the equipment. To protect some of the equipment from adverse weather to prevent corrosion and similar issues, the Station has two buildings: (1) a main building (Station Building) and (2) an additional smaller building (Fiber Building) to enclose sensitive telecommunication

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<sup>4</sup> The line heater will provide a heat input of 4.6 million British thermal units per hour to control the temperature of the natural gas flowing out of the Station. The line heater will include six burners fueled with natural gas which are used to heat water which is then used to control the natural gas temperature. PECO St. No. 6-RD at 8; Tr. at 2120. We note that the line heater is sometimes termed “line heaters” in this proceeding, but there is only one proposed line heater with six burners.

equipment that remotely connects the Station to PECO's control room, where PECO monitors the Station's operations. The Station Building measures 2,073 square feet and the Fiber Building measures 160 square feet. Both buildings (along with other utility facilities at the Station) will be enclosed within a perimeter wall. The line heater and emergency generator are located outside the buildings but within the perimeter wall. PECO St. 1-RD at 3.

PECO sought to locate the Station in Marple Township at a site that was in an area that permitted utility infrastructure by exemption, but the Township denied PECO's request for an exemption. PECO then petitioned the Commission for a finding pursuant to Section 619 that the Station is necessary for the convenience or welfare of the public, as well as a determination that the security fence for the facility (the precursor to the currently planned perimeter wall) was not subject to the Section 619 requirements (i.e. the fence was not a "building"). The Commission issued an Opinion and Order granting PECO's request in *Marple I* and the Township appealed the Commission's Opinion and Order to the Commonwealth Court. PECO St. 1-RD at 4.

In *Marple I*, the Commission determined that the issues raised by the Township and the Intervenor including noise, risk of explosion and air pollution, were beyond the scope of the Petition. A.I.D. at 19. The Commonwealth Court disagreed with the Commission's finding that it could not consider these issues; therefore, the Commonwealth Court held that it is the Commission's obligation to consider these factors pursuant to the Environmental Rights Amendment (ERA).<sup>5</sup> A.I.D. at 20. The Court instructed the Commission to issue an Amended Decision which incorporates the results of a "constitutionally sound environmental impact review as to the proposed siting

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<sup>5</sup> Environmental Rights Amendment, or Article I, Section 27 of the Pennsylvania Constitution, as discussed in Section III.A, *infra*.

on the Property of the Fiber Building and the Station Building.” A.I.D. at 21 (citing *Marple II* at 974).

On August 18, 2022, Marple Township and PECO entered into a joint stipulation that was filed with the Delaware County Court of Common Pleas which provides for an enhanced design replacing the perimeter fencing for the proposed Reliability Station. The enhanced design includes landscaping, a setback for pedestrian access to the sidewalk, a clock tower, a perimeter wall constructed out of brick and precast concrete, and perimeter lighting. The new design necessitates the use of a 50-kw emergency generator rather than the originally planned 30-kw generator. PECO St. 4-RD at 3-4; Tr. at 1999.

### **III. Discussion**

#### **A. Legal Standards**

##### **1. Burden of Proof**

As the proponent of a rule or order, PECO bears the burden of proof to establish that it is entitled to the relief it is seeking in this proceeding pursuant to Section 332(a) of the Pennsylvania Public Utility Code (Code), 66 Pa.C.S. § 332(a). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 602 A.2d 863 (Pa. 1992). That is, PECO’s evidence must be more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950).

Additionally, this Commission’s decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of

the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980).

Upon the presentation by a utility of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the utility shifts to the other parties to the proceeding. If the evidence presented by those parties is of co-equal value or “weight,” the burden of proof has not been satisfied. The utility now has to provide some additional evidence to rebut that of the opposing parties. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff’d*, 461 A.2d 1234 (Pa. 1983).

While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

## **2. Regulation of Natural Gas Infrastructure**

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

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

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

66 Pa.C.S. § 1501.

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

(b) Installation and improvement of facilities.—

\* \* \*

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

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

66 Pa.C.S. § 2205(b).

Local municipalities also lack jurisdiction to regulate the location of natural gas facilities by zoning. *See Marple II* (citing *Del. Riverkeeper Network v. Sunoco Pipeline L.P.*, 179 A.3d 670, 690-95 (Pa. Cmwlth. 2018); *Duquesne Light Co. v.*

*Upper St. Clair Twp.*, 105 A.2d 287, 293 (Pa. 1954); *Chester Cnty. v. Phila. Elec. Co.*, 218 A.2d 331, 333 (Pa. 1966)).

### **3. Exemption from Local Zoning Ordinances**

A narrow exception exists in the Pennsylvania Municipalities Planning Code (MPC), 53 P.S. § 10101, *et seq.*, which allows for local regulation of public utility buildings by zoning regulation. Specifically, Section 619 of the MPC provides, in relevant part, as follows:

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

53 P.S. § 10619.

In order for the MPC exemption to apply, the utility must qualify as a “public utility corporation.”<sup>6</sup> Section 1103 of the Business Corporation Law defines “public utility corporation” as including “[a]ny domestic or foreign corporation for profit that: ... is subject to regulation as a public utility by the Pennsylvania Public Utility Commission or an officer or agency of the United States.” 15 Pa.C.S. § 1103. In other words, an entity meets the definition of “public utility corporation” for MPC exemption purposes by being a “public utility” under the Code. Thus, a municipality may exercise its zoning powers over a public utility building unless the Commission determines that

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<sup>6</sup> Pennsylvania courts have held that Section 619 must be interpreted by using the definition of “public utility corporation” in Section 1103 of the Business Corporation Law, 15 Pa.C.S. § 1103. *Pa. PUC v. WVCH Communications, Inc.*, 351 A.2d 328 (Pa. Cmwlth. 1976).

the “site is reasonably necessary for the public convenience or welfare.” *Del-AWARE Unlimited, Inc. v. Pa. PUC*, 513 A.2d 593, 595-96 (Pa. Cmwlth. 1986) (*Del-AWARE*). If the Commission finds that the location or site, not the building itself, is reasonably necessary for the convenience or welfare of the public, the building is exempt from local zoning ordinances under the MPC. *Id.*

Moreover, the Commission has adopted a policy statement at 52 Pa. Code § 69.1101 to further the Commonwealth’s goal of making agency actions consistent with sound land use planning by considering the impact of its decision upon local comprehensive plans and zoning ordinances. That policy statement provides the following:

[T]he Commission will consider the impact of its decisions upon local comprehensive plans and zoning ordinances. This will include reviewing applications for:

- (1) Certificates of public convenience.
- (2) Siting electric transmission lines.
- (3) Siting a public utility “building” under section 619 of the Municipalities Planning Code (53 P.S. § 10619).
- (4) Other Commission decisions.

52 Pa. Code § 69.1101.

Whether the proposed buildings are reasonably necessary for the convenience or welfare of the public does not require the utility to prove that the site it has selected is absolutely necessary or that it is the best possible site. Rather, the Commission’s finding that the site chosen is reasonably necessary will not be disturbed if supported by “substantial evidence,” which is that quantum of evidence that a reasonable mind might accept as sufficient to support that conclusion. *O’Connor v. Pa. PUC*, 582 A.2d 427, 433 (Pa. Cmwlth. 1990) (*O’Connor*).

#### 4. Environmental Rights Amendment

Article I, Section 27 of the Pennsylvania Constitution, also known as the ERA, provides that:

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

Pa. Const. Art. I, Sec. 27.

In 2017, the Pennsylvania Supreme Court overruled the three-prong test previously established by the Commonwealth Court in *Payne v. Kassab*<sup>7</sup> to determine whether a government action or activity violated the ERA. See *Pa. Env't Def. Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (*PEDF*). Rather, in *PEDF*, the Pennsylvania Supreme Court found that “[t]he proper standard of judicial review [for alleged violations of the ERA] lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.” *Id.* at 930. In so ruling, the Court held that the ERA grants citizens of the Commonwealth two separate rights: 1) the right to clean air and pure water and to the preservation of natural, scenic, historic, and aesthetic values of the environment; and 2) the right of common ownership by the people, including future generations, of Pennsylvania’s public natural resources.

In *PEDF*, the Pennsylvania Supreme Court noted that the first right, which comes directly from the text of the ERA itself, “places a limitation on the state’s power to act contrary to [the] right, and while the subject of the right may be amenable to

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<sup>7</sup> *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973).



regulation, any laws that unreasonably impair the right are unconstitutional.” *PEDF* at 931-32. The Pennsylvania Supreme Court expressly noted that the Commonwealth’s trustee obligations “are not vested exclusively in any single branch of Pennsylvania’s government;” rather, “all agencies and entities of the Commonwealth government, both statewide and local, have a fiduciary duty to act toward the corpus with prudence, loyalty and impartiality.” *Id.* at 931, n.23.

The Commonwealth Court clarified it is the Commonwealth, not individual agencies or departments, that is the trustee of natural resources under the ERA. Therefore, while even agencies not tasked directly with protecting the environment must consider the protection of natural resources, they must do so within the policy choices articulated in legislation and within the confines of the authority delegated by the General Assembly. *Funk v. Wolf*, 144 A.3d 228, 234-35, 250 (Pa. Cmwlth. 2016), *affirmed*, 158 A.3d 642 (Pa. 2017).

## **B. Positions of the Parties**

PECO stated that it is implementing the Natural Gas Reliability Project in the Township to address supply capacity constraints across its entire distribution system. PECO Remand M.B. at 4 (citing Initial Decision, Finding of Fact (FOF) No. 20). PECO provided that it is proposing to install a pressure reducing station at the Marple Township, Delaware County location because that is the area within PECO’s distribution system where the additional reliable supply is needed most. PECO Remand M.B. at 4-5 (citing Initial Decision, Finding of Fact Nos. 22-29, 31-32, 35 and 37-43).

PECO averred that it has demonstrated that locating the Fiber Building and the Station Building (collectively, the Buildings) at the property will not result in any unreasonable environmental impacts. PECO explained that the Buildings will not emit any pollutants. The proposed site is a vacant lot that was a former gasoline station, which

PECO is remediating. The site will have a line heater and emergency generator which are located outside of the buildings and are public utilities beyond the scope of this proceeding. The emissions from the line heater and emergency generator will be *de minimus*. No air permits are required by the Pennsylvania Department of Environmental Protection (DEP) for the line heater or emergency generator. PECO averred that it has obtained all other permits required by Pennsylvania law and PECO will be subject to all applicable current and future federal and state environmental regulations. PECO Remand R.B. at 1-2.

PECO maintained that the arguments of Marple Township and the Intervenor are not based on any legitimate environmental or safety concerns related to the siting of the Buildings or the Station, but rather on a “not in my backyard” (NIMBY) backlash at the siting of a conventional public utility infrastructure which is similar to more than two dozen other stations installed and operating throughout PECO’s service territory. PECO Remand M.B. at 2, 5. PECO averred that Marple Township, and the Intervenor, claim that the Station will contribute to climate change and should not be sited anywhere. PECO M.B. at 5 (citing Marple Township, Ted Uhlman & Julie[sic]<sup>8</sup> Baker Remand St. 2 at 19).

The Township argued that PECO has not established that it is reasonably necessary that the Reliability Station be sited at the proposed location for the convenience and welfare of the public. Marple Township Remand M.B. at 1.

The Township contended that PECO has focused on findings of fact and conclusions reached previously by the Commission in the original Initial Decision. While PECO claimed that various facts have already been concluded and therefore apply

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<sup>8</sup> We note that the title of this document should state “Julia” Baker, and not “Julie” Baker.

in this remand proceeding, the Township noted that the prior decision of the Commission was vacated, and the Commission must now render a new decision that factors in a constitutionally sound environmental review. Marple Township Remand R.B. at 1.

Ms. Baker and Mr. Uhlman argued that the proposed Reliability Station is not necessary, and it will increase greenhouse gas emissions at a time when emissions need to be dramatically reduced to mitigate impacts on ERA trust resources. Baker and Uhlman Remand M.B. at 2. The Intervenors claimed that PECO's evidence lacked three elements found in a National Environmental Policy Act of 1969 (NEPA) review: (1) documentation and analysis of the reasonably foreseeable climate change impacts from the proposed Station; (2) cumulative impacts on air quality; and (3) analysis of a range of alternatives, including not going ahead with the Station. *Id.* at 3-4.

### **C. ALJ's Amended Initial Decision**

The ALJ made 103 Findings of Fact and reached 6 Conclusions of Law. A.I.D. at 3-16, 44-45. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

In the Amended Initial Decision, the ALJ granted PECO's Petition, finding that PECO met its burden of proving that the two buildings associated with the Reliability Station should be exempt from Marple Township zoning because the proposed situation of the buildings is reasonably necessary for the public convenience or welfare of the public. The ALJ concluded that the proposed Reliability Station and related buildings will enhance reliability and availability of supply services to PECO's customers. The ALJ reasoned that the ERA does not require a petitioner to prove that a project will not cause any impact on the environment. A.I.D. at 44.

The ALJ noted that, although the Commonwealth Court vacated the Commission's Opinion and Order in *Marple II*, the Commonwealth Court did not direct the Commission to consider the application anew. The ALJ provided that the Commission is instructed to render an "Amended Decision" after "incorporat[ing] the results of a constitutionally sound environmental impact review as to the proposed siting on the Property of the Fiber Building and the Station Building." A.I.D. at 23 (citing *Marple II* at 974).

The ALJ noted Marple Township's argument that the Commonwealth Court vacated the Commission's decision, and except for the Commission's finding that the security fence is a utility facility, all other findings of fact and conclusions of law are inapplicable. Contrary to Marple Township's argument, the ALJ stated that the findings of fact and factual conclusions of the Commission, as set forth in *Marple I*, are incorporated in the Amended Initial Decision. The ALJ considered additional evidence presented by the Parties regarding environmental issues and concluded that PECO sustained its burden of proving that the Reliability Station and the situation of the Station Building and Fiber Building are reasonably necessary for the convenience of the public and, therefore, the buildings are exempt from the Marple Township zoning ordinance. A.I.D. at 23.

Regarding the risk of explosion at the property, the ALJ considered the testimony of PECO's witness, Mr. Mike Israni, and Marple Township's witnesses, Mr. Jeffrey Marx and Mr. James Capuzzi. Mr. Israni, a former official at the Pipeline and Hazardous Materials Safety Administration (PHMSA),<sup>9</sup> testified that it is not unusual for a gate station or district regulating station, like the proposed Reliability Station, to be located in a residential or commercial area, such as the site selected by PECO in Marple

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<sup>9</sup> PHMSA is an agency within the U.S. Department of Transportation. A.I.D. at 31, n.44.

Township. Mr. Israni explained that the Reliability Station is a distribution facility subject to standards more stringent than for a transmission facility. Mr. Israni further explained that explosions and reportable incidents<sup>10</sup> are rare at these facilities and in his view, the Station is safe as designed and does not pose an unreasonable risk of harm to people or property. A.I.D. at 32.

Mr. Marx, Marple Township's expert, testified that the likelihood that an incident would occur which would cause an impact beyond the Station site would be "rare." Additionally, Mr. Capuzzi, Marple Township's witness, is very concerned about the safety of the Station and calculated a potential impact radius (PIR).<sup>11</sup> Mr. Israni explained that Mr. Capuzzi misused the PIR calculation. In this regard, Mr. Israni asserted that the PIR is to be used for transmission lines, and not at a distribution facility like the Reliability Station. In addition, distribution pipelines do not typically rupture or explode on their own, but are more likely to leak. Mr. Israni noted that the Station is equipped with sensors and in the event of a leak, PECO can cut the supply to the Station remotely. The ALJ placed more weight on the testimony of Mr. Israni. Taking Mr. Israni and Mr. Marx's testimony together, the ALJ concluded that the gas facilities proposed for the Station do not pose an unusual risk to the surrounding people or property. A.I.D. at 34-35.

Regarding potential noise impacts from the Station, PECO's witness, Mr. Reginald Keith, testified that compliance with Marple Township's noise ordinance is technically feasible and readily achievable. A.I.D. at 36 (citing Tr. at 1987). The

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<sup>10</sup> A Reportable Incident is serious and involves death or serious injury. A.I.D. at 32, n.48 (citing Tr. at 2073).

<sup>11</sup> PIR is defined as the radius of a circle in which the potential failure of a pipeline could have a significant impact on people or property. A.I.D. at 33 (citing PECO St. 6-SR at 23 (citing 49 CFR § 192.903)). The PIR is based on the maximum allowable pressure of the pipeline and the diameter of the pipeline. The calculation assumes the full rupture of a transmission line. A.I.D. (citing Tr. at 2059).

Intervenors produced two witnesses, Dr. James Schmid and Dr. Edward Ketyer, but neither witness: (1) was an acoustical expert; (2) calculated sound decibel levels for the Station; or (3) reviewed the sound study conducted by Hoover and Keith, Inc. (H&K). A.I.D. at 36-37 (citing Tr. at 2211, 2331). The ALJ reasoned that the testimony of Dr. Schmid and Dr. Ketyer was not sufficient to prove that noise generated by the equipment at the Station will cause an unreasonable impact. For example, the ALJ pointed to Dr. Ketyer's testimony that he was speaking generically about the impact of excessive sound and noise pollution on children's health. The ALJ further noted that Dr. Ketyer did not account for the sound dampening measures recommended in the H&K study. A.I.D. at 37 (citing Tr. at 2331-32). The ALJ provided that PECO's evidence showed that the noise can and will be mitigated by sound dampening technology and PECO will comply with the Township's Noise Ordinance. A.I.D. at 37.

The ALJ explained that the only emission sources at the Station will be located outside the Station Building and Fiber Building. Both the line heater and emergency generator are utility facilities and are, therefore, not subject to siting regulation by the Commission and are not subject to any zoning regulation by Marple Township. The ALJ noted that PECO does not need Commission authority to construct or site these facilities at the Station. A.I.D. at 37.

The ALJ clarified that, in an abundance of caution, she permitted the Parties to produce evidence on the subject of air emissions. The ALJ found that PECO produced substantial evidence to allow her to conclude that for the purposes of Section 619 review, the Station will not pose an unreasonable impact on air quality. According to the ALJ, PECO produced evidence that neither the line heater nor the emergency generator is large enough to require a DEP air permit and both are exempt from DEP air permitting requirements. A.I.D. at 37.

The ALJ noted that PECO's expert, Mr. Jeffrey Harrington, explained that even though they are exempt from permitting, the Station's air emission sources are subject to federal Environmental Protection Agency (EPA) regulations and DEP enforcement. Mr. Harrington provided that the emergency generator is subject to several federally enforceable requirements including: (1) New Source Performance Standard (NSPS) 40 CFR Part 60 Subpart JJJJ; (2) National Emission Standards for Hazardous Air Pollutants (NESHAPs) 40 CFR Part 63 Subpart ZZZZ for stationary reciprocating internal combustion engines; and (3) National Ambient Air Quality Standards (NAAQs)<sup>12</sup> set forth in 40 CFR Part 50. A.I.D. at 38.

With regard to air permits, the ALJ noted that PECO presented evidence that no air permits were required from DEP or EPA to construct or operate the Station's line heater or emergency generator because each is subject to the exemptions pursuant to 25 Pa. Code § 127.14. A.I.D. at 38 (citing PECO St. No 6-RD at 8-11; PECO St. No. 6-RR at 3; Exh. JH-6). Additionally, the ALJ noted that the 50-kw generator will comply with the emissions standards set forth in 40 CFR 60.4233(e) and both the 30-kw and 50-kw emergency generator sizes have received Certificates of Conformity from EPA, meaning that they comply with EPA emissions standards. A.I.D. at 39 (citing PECO St. 6-RD at 11; Exh JH-2 and JH-3). The ALJ concluded that the blanket exemptions and Certificates of Conformity constitute the relevant agency determinations for purposes of the Station emission units' air quality impacts. The ALJ noted it was the conclusion of PECO's witness, Mr. Harrington, that there will be no unreasonable impact on air quality. The ALJ was persuaded by Mr. Harrington's air quality modeling that the air pollution sources at the Station will not cause an unreasonable impact on air quality.

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<sup>12</sup> The NAAQs include both "primary" ambient air quality standards, which are the level of air quality that the EPA has determined it necessary, with an adequate margin of safety, to protect the public health, and "secondary" which are levels of air quality necessary to protect the public welfare from any known or anticipated effects of a pollutant. A.I.D. at 38.

The ALJ concluded that these utility facilities are small emitters and are unlikely to cause emissions in excess of the NAAQs. A.I.D. at 39-41.

The Intervenors contended that the Commission should not grant PECO an exemption from Marple Township's zoning ordinance because PECO failed to demonstrate that the Station will not exacerbate the effects of climate change. Thus, the Intervenors reasoned that the Commission cannot execute its duties to protect environmental resources as required by the ERA. A.I.D. at 41. The ALJ noted that it does not appear that this was raised as a ground for appeal before the Commonwealth Court, nor did the Court discuss climate change in its decision. *Id.*, n.75.

The ALJ observed that PECO countered that the Commission is not only not required to consider climate change, but that it is not authorized to do so. According to PECO, the responsibility for developing a plan to regulate greenhouse gas emissions in the Commonwealth has been delegated to DEP. A.I.D. at 41.

The ALJ set forth that the Commission may only exercise the jurisdiction that the General Assembly has delegated. A.I.D. at 41 (citing *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1977); *Allegheny County Port Authority v. Pa. PUC*, 237 A.2d 602 (Pa. 1967); *Dep't of Env't Res. v. Butler Cnty. Mushroom Farm*, 454 A.2d 1, 4 (Pa. 1982); *Pequea Twp. v. Dep't of Env't Prot.*, 716 A.2d 678, 686 (Pa. Cmwlth. 1998)). Additionally, while the Commission is obligated to consider "the environmental impacts of placing [a building] at [a] proposed location," it may only do so within the confines of its authority. A.I.D. at 41-42 (citing *Marple II* at 973-974, *Funk v. Wolf*, 144 A.3d 228, 235 (Pa. Cmwlth. 2016), *aff'd*, 158 A.3d 642 (Pa. 2017) at 234 (*Funk*)).

The ALJ opined that "[c]limate change is a complex problem which requires a balancing of many societal, economic and environmental concerns, and that the responsibility for striking this balance lies with the General Assembly, not with any



single agency.” A.I.D. at 42 (citing *Funk* at 250). The ALJ explained that the General Assembly has delegated the responsibility for developing air quality standards to DEP, and that the General Assembly has tasked DEP with the responsibility for developing a climate change action plan and to report on climate impacts. Specifically, the ALJ noted, the Pennsylvania Climate Change Act of 2008 (Act 70) requires the DEP to develop a climate change action plan and to report on climate impacts. A.I.D. at 42 (citing 71 P.S. §§ 1361.1-1361.8). The ALJ continued that Section 5(a) of Act 70 establishes an 18-person Climate Change Advisory Committee “established within the department [DEP]” and “[t]he purpose of the committee shall be to advise the department [DEP] regarding the implementation of the provisions of this act [Act 70].” A.I.D. at 43. The ALJ observed that the Chair of the Commission is an *ex officio* member of the Climate Change Advisory Committee, but the Commission is not tasked with any specific duties. *Id.* (citing 71 P.S. §§ 1361.5(b)).

Finally, the ALJ found that the Intervenors did not cite any DEP permit requirement or standard which applies to the Station. The ALJ stated:

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

A.I.D. at 43.

The ALJ concluded that “Ms. Baker and Mr. Uhlman failed to demonstrate that the Commission is required by Article I, Section 27 to consider climate change when

approving an exemption from a municipal zoning ordinance regulating the use of the buildings on the site.” A.I.D. at 44.

#### **D. Exceptions, Replies, and Dispositions**

Before addressing the Exceptions, we note that any issue or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

##### **1. Marple Township’s Exceptions, Replies, and Dispositions**

###### **a. Marple Township Exception No. 1, PECO’s Reply, and Disposition**

###### **(1) Marple Township Exception No. 1 and PECO’s Reply**

In its Exception No. 1, Marple Township objects to the description of PECO’s other gate stations in FOF No. 11.<sup>13</sup> The Township argues that while the ALJ’s finding states that “some” of PECO’s gate stations are located within the same proximity to residences as the gas reliability station, the number is actually two. The Township provides that none of the other types of stations are as close, or closer, than this station to residences, and most are substantially further from residences. Marple Township Remand Exc. at 3 (citing Exh. TF-6).

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<sup>13</sup> A.I.D. at 4-5

In its Replies, PECO contends that “some” can be used to describe the fact that two of PECO’s gate stations are located within the same proximity to residences as the proposed Reliability Station. PECO offers that most of PECO’s other gate stations are in residential areas and those gate stations are more extensive in size and scale than the Reliability Station. PECO Remand R. Exc. at 5.

**(2) Disposition**

We begin our disposition regarding Maple Township’s Exc. No. 1 noting that Finding of Fact No. 11 states:

The Natural Gas Reliability Station is comparable, yet less extensive in size and scale, to PECO’s 28 other gate stations, a majority of which are located in residential areas, and some of which are located within the same proximity to residences as the Natural Gas Reliability Station. (PECO St. No. 4 at 8; Exhibit TF-6).

A.I.D. at 4-5.

We disagree with Marple Township’s argument that the ALJ erred by using the word “some” in FOF No. 11. Of the 28 similar gate stations, 20 are located in residential areas. Two are located within 100 feet to the closest residence,<sup>14</sup> one is 115 feet from the closest residence, and another is 140 feet from the closest residence. There are at least four stations within 150 feet of the closest residence. The use of the word “some” by the ALJ is not an error. Accordingly, Marple Township Exception No. 1 is denied.

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<sup>14</sup> The distance is measured from the closest residential building to the regulator building at the Gate Station. Exh. TF-6.

**b. Marple Township Exception Nos. 2-7, PECO's Replies, and Disposition**

In its Exception Nos. 2-7, the Township objects to FOF Nos. 15, 65, 66, 67, and 70<sup>15</sup> addressing the potential for noise pollution from the Reliability Station. The Township also contends that the noise study completed by H&K is no longer applicable due to the proposed changes in the enhanced design. Specifically, the Township raises the following exceptions:

**(1) Marple Township Exception Nos. 2-5 and PECO's Replies**

In its Exception No. 2, Marple Township argues that FOF No. 15 references sound-dampening features as referenced in PECO St. 4, a written testimony from the initial proceeding. The Township contends that this information is no longer applicable due to the enhanced design and PECO's sound expert has not reviewed the new design. Marple Township Remand Exc. at 3 (citing Tr. at 1981). Similarly in its Exception No. 3, the Township contends that FOF No. 65 also refers to PECO St. 4 and is not applicable to the enhanced design. Marple Township Remand Exc. at 4.

In its Exception No. 4, the Township provides that FOF Nos. 66 and 67 relate to the old design and is no longer relevant. The Township avers that the H&K sound survey did not include the emergency generator or line heater. Marple Township Remand Exc. at 4 (citing PECO Exh. TF-7, Tr. at 1089, 1096-97). In its Exception No. 5, the Township objects to FOF No. 70, which states that PECO can comply with the Township's noise ordinance using readily available and proven technology. The Township reiterates that the new design has not been evaluated for compliance with the noise ordinance. Marple Township Remand Exc. at 5 (citing Tr. at 1979-1981).

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<sup>15</sup> A.I.D. at 5, 12.

In its Replies to Marple Township’s Exception Nos. 2-5, PECO contends that there are no errors with FOF Nos. 15, 65, 66-67 or 70. PECO provides that its witness, Mr. Oleg Shum, testified that the only changes for the enhanced design are the size of the generator, a gate at the Reliability Station, additional esthetic lighting, and the perimeter esthetic wall and clocktower. These changes were made after discussion with the Township to enhance the esthetics of the Station. PECO Remand R. Exc. at 6 (citing Tr. at 1866-67; 1996-2000; 2008). PECO avers that none of the design changes affect the sound-mitigating measures H&K recommended to be used at the Reliability Station. PECO notes that its witness, Mr. Keith, testified that he has been advised that PECO is planning to meet the noise ordinance through the H&K recommendations, including the use of the sound-mitigating SonaGuard perimeter wall. PECO Remand R. Exc. at 6-7 (citing PECO St. 5-RD at 3-5). PECO maintains that Mr. Keith opined that PECO will be able to meet the noise ordinance, and the Township and Intervenors offered no evidence to rebut this testimony. PECO Remand R. Exc.. at 7 (citing Tr. at 1987, 1988).

**(2) Marple Township Exception Nos. 6-7 and PECO’s Replies**

In its Exception No. 6, Marple Township contends that the record lacks evidence that the Station will not provide an unreasonable level of noise that cannot be mitigated. The Township reiterates its argument that the most updated design was not analyzed by PECO’s sound expert. The Township objects to the ALJ’s determination that the Township’s witness, Dr. Timothy McAuley used the “incorrect design” in his analysis of air quality impacts<sup>16</sup> but did not make the same finding here with H&K’s use of the original design. Marple Township Remand Exc. at 5.

Similarly, in its Exception No. 7, the Township objects to the ALJ’s characterization of the Township’s witness, Dr. Ketyer’s, testimony regarding the

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<sup>16</sup> See FOF No. 98, A.I.D. at 16.

potential impact of sound and noise on children's health. According to the Township, the ALJ found that Dr. Ketyer had not considered the sound dampening measures recommended in the H&K study. The Township reasons that the H&K study does not include the enhanced design and there was no testimony at the hearings about which sound dampening devices would be used. The Township contends that it is unfair and improper to exclude Dr. Ketyer's testimony. Marple Township Remand Exc. at 6.

In its Replies to Marple Township Remand Exception Nos. 6 and 7, PECO avers that there are no errors by the ALJ with the credibility determinations of the witnesses related to noise. Regarding the testimony of PECO's witness, Mr. Keith, PECO notes that he testified that the Company will be able to meet the noise ordinance with proven technology that is readily available. PECO Remand R. Exc. at 7 (citing Tr. at 1987). In contrast, PECO notes that the Township's witness, Dr. Ketyer, is not an acoustical expert and was only speaking in general terms about the impact of excessive sound and noise pollution on children's health. *Id.* at 7 (citing A.I.D. at 36-37). PECO maintains that the ALJ appropriately determined that the testimony did not prove that sound generated by the Reliability Station would cause an unreasonable impact. *Id.* PECO continues that the Commission should not disturb the ALJ's credibility determination. PECO Remand R. Exc. at 8 (additional citations omitted).

### **(3) Disposition**

In our disposition regarding Marple Township Exception Nos. 2-7, we note that PECO's witness, Mr. Keith, was made aware of the changes to the proposed station included with the enhanced design. Mr. Keith's testimony stated:

Based on my experience, the Station's compliance with Marple Township's noise ordinance is technically feasible and readily achievable. To the extent any design changes alter HK's prior analysis, common noise dampening features

and techniques are available to PECO to ensure that the Station will operate in a manner consistent with Marple Township's noise ordinance.

PECO St. 5-RD at 4.

Mr. Keith concluded: Based on the above and based on my experience, the Station will be able to operate in accordance with Marple Township's noise ordinance with the use of appropriate sound dampening measures.

PECO St. 5-RD at 5.

We note that Mr. Keith, an acoustics expert, has testified that the Station will be able to operate in compliance with the noise ordinance. He was aware of the proposed enhanced design when he made this conclusion. The proposed changes to the design did not persuade Mr. Keith to change his opinion that the Station will meet the noise ordinance. Mr. Keith provided that it is technically feasible for PECO to meet the requirements of the noise ordinance with readily available technology, as follows:

I am saying that it is technically feasible for PECO to do this, and the mitigation that can be used, depending upon how they do the configuration, is feasible, readily available, and proven technology. They don't have to reinvent the wheel to do any of this stuff.

Tr. at 1987.

We disagree with the Township's argument that the record does not show PECO can comply with the Township's noise ordinance. Mr. Keith has testified that there is technology readily available for PECO to use. Mr. Keith was made aware of the proposed enhanced design and did not change his assessment that PECO could comply with the noise ordinance. The Township has provided no evidence that the enhanced

design in the Joint Stipulation,<sup>17</sup> will cause the Reliability Station to violate the noise ordinance.

Regarding the testimony of the Township's witness, Dr. Ketyer, we note that he is not an acoustics expert and testified in general terms regarding the effect of noise pollution on children's health. Tr. at 2331-32. He did not perform an acoustic study on the proposed Reliability Station and did not take into consideration the H&K study or the planned use of noise-dampening equipment at the Station. Tr. at 2331. He did not testify that the Reliability Station could or could not meet the noise ordinance. Marple Township, Ted Uhlman & Julie[sic]<sup>18</sup> Baker Remand St. No. 3. We see no error in the ALJ's weighing of the testimony of Mr. Keith or Dr. Ketyer. Accordingly, the Township's Exception Nos. 2-7 are denied.

**c. Marple Township Exception No. 8, PECO's Reply, and Disposition**

**(1) Marple Township Exception No. 8 and PECO's Reply**

In its Exception No. 8, the Township contends that FOF Nos. 18 and 19<sup>19</sup> should clearly state that the Enhanced Clocktower Design is only a drawing and does not specify any measurements or equipment changes. The Township argues that PECO has not provided the Parties with the new plans for the Station. The Township argues that the equipment did change. Marple Township Remand Exc. at 6 (citing Exh. DO-Cross-1; Tr. at 1999).

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<sup>17</sup> Marple Township Cross Examination Exhibit DO-Cross 1-Stipulation.

<sup>18</sup> As previously noted, the title of this document should state "Julia" Baker not "Julie" Baker.

<sup>19</sup> A.I.D. at 5.



In its Reply, PECO avers that the Enhanced Clocktower Design is a rendering<sup>20</sup> drawn to scale to depict the design of the station. PECO Remand R. Exc. at 8 (citing Tr. at 1996). Additionally, PECO states that it provided the Parties and their experts with an internet weblink to view the final engineering design for the Reliability Station and also offered the parties the opportunity to view the final designs in person at one of PECO's facilities. PECO Remand R. Exc. at 8. (citing Tr. at 1990-91).

## (2) Disposition

We disagree with the Township's assertion that PECO did not provide final design information for the Reliability Station. We note that Marple Township's witness, Mr. Marx, provided a PECO Marple Reliability Station Hazard Analysis Study dated September 11, 2023. This study was based on the enhanced design, as it mentions the wall that was proposed as part of the enhanced design. Marple Township Remand Exh. JM-2 at 4. The study notes the following regarding the design information used to prepare the study:

Data regarding the Marple Reliability Station and its operating conditions was provided for this study in order to quantify the potential hazards. Data was provided by McNichol, Byrne, & Matlawski, PC, **as well as by PECO through a secure data portal**. Information concerning the piping configurations, pipe sizes, gas conditions (pressure, temperature, flow rate), and station layout were obtained for this analysis.

Marple Township Remand Exh. JM-2 at 1 (emphasis added).

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<sup>20</sup> Renderings of the proposed Enhanced Design can be found as an Attachment to Marple Township Cross Examination Exhibit DO-Cross 1-Stipulation at Exhibit A.

The hazard study could not have been adequately prepared by Marple Township's witness, Mr. Marx, without the design information provided by PECO. Accordingly, the Township's Exception No. 8 is denied.

**d. Marple Township Exception Nos. 9-13, PECO's Replies, and Disposition**

**(1) Marple Township Exception No. 9, PECO's Reply, and Disposition**

**i. Marple Township Exception No. 9 and PECO's Reply**

In its Exception No. 9, Marple Township argues that FOF No. 25<sup>21</sup> of the Amended Initial Decision, which states that “[g]as distribution facilities frequently need to be located near residences and businesses,” is a mischaracterization of the testimony of PECO's witness, Mr. Israni. The Township argues that Mr. Israni refused to state that it is better to have a station in an area with less people if it were the only consideration. Marple Township Remand Exc. at 6.

PECO replies that the Township is asking the Commission to disregard the extensive evidence that engineering constraints dictate where these facilities are placed, operators must follow extensive safety regulations wherever these facilities are placed, and that these are safe facilities. PECO Remand R. Exc. at 9 (citing Tr. at 1579, 1582, FOF Nos. 33, 39, 43 and 46).

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<sup>21</sup> A.I.D. at 6.

**ii. Disposition**

We note that Mr. Israni testified that the decision to site a facility like the Reliability Station is based on engineering and other considerations. More specifically, Mr. Israni stated “[y]ou cannot have the pipeline regulation stations way out of residential areas if the gas usage is in their residential area. You decide on the location of these regulation stations based on where the demand is, where the supply is and where the connection points are.” Tr. at 1577. Mr. Israni also stated, as follows:

[t]hese stations are typically found in the residential and commercial areas because engineering people, when they do analysis where gas is needed in the future forecast, they base it on where is [the] optimal location to locate these stations, where there’s – which is economically and technically feasible.

Tr. at 2109. Additionally, Mr. Israni testified that the Station is subject to the more stringent requirements of the Distribution Integrity Management Program (DIMP), which will require the operator to have more frequent inspections and leak surveys and testing and maintenance requirements to ensure that harmful incidents don’t occur. Tr. at 2105-06. There is no error in FOF No. 25. Accordingly, the Township’s Exception No. 9 is denied.

**(2) Marple Township Exception No. 10, PECO’s Reply and Disposition**

**i. Marple Township Exception No. 10 and PECO’s Reply**

In its Exception No. 10, Marple Township objects to FOF Nos. 27-33, and the ALJ’s discussion of the PIR. The Township maintains that its witness, Mr. Marx, testified regarding the potential hazards of the station if an accidental release occurs. The

Township argues that “[o]ther than conducting an academic exercise on the applicability of ‘PIR’, PECO’s witnesses did not refute the area around the station could be impacted if there were a gas leak, fire or explosion and it is error to not include this evidence in the amended decision.” Marple Township Remand Exc. at 8.

In its Reply to Marple Township Remand Exception No. 10, PECO provides that it is disingenuous for the Township to now argue that the PIR should not be considered in this proceeding. PECO argues that the Township’s witness, Mr. Capuzzi, repeatedly stated his concerns about the PIR and that PECO’s Petition should be denied because of the PIR. PECO Remand R. Exc. at 9-10 (citing Marple Township Remand St. No 2-R at 23, and 5-6; Tr. 2300-01).

PECO provides that the ALJ evaluated the PIR and found that this calculation is applicable only to transmission pipelines. PECO states that the Reliability Station is a distribution facility which is permitted to operate only at 20% of the maximum pressure of the lines’ capacity to ensure higher safety margins. PECO Remand R. Exc. at 10 (citing FOF Nos. 29, 32-33, 35, 62; A.I.D. at 34). PECO further avers that distribution facilities are required to be included in an operator’s “Distribution Integrity Management Program” which prioritizes and mitigates risks. PECO Remand R. Exc. at 10 (citing FOF Nos. 32-34.)

## **ii. Disposition**

We disagree with the Township’s characterization of the ALJ’s discussion of PIR as an “academic exercise.” Although he was unclear on exactly how PHMSA used the PIR, the Township’s witness, Mr. Capuzzi, was concerned that the Reliability Station had a PIR of concern and argued that the Petition should be denied because of the Station’s potential for incidents in a PIR. Tr. at 2300. The ALJ was correct in her decision to describe the PIR fully and to explain that the PIR applies only to transmission

facilities and not to a distribution facility that operates at lower pressures. The ALJ's effort to clarify the PIR was not "patronizing," as the Township contends. *See* Marple Township Remand Exc. at 7. It was part of the safety evidence related to the PIR presented by the Township and successfully rebutted by PECO. We find no error in FOF Nos. 27-33. Nor do we find error in the ALJ's discussion of the PIR. Accordingly, Marple Township Remand Exception No. 10 is denied.

**(3) Marple Township Exception No. 11, PECO's Reply and Disposition**

**i. Marple Township Exception No. 11 and PECO's Reply**

In its Exception No. 11, Marple Township objects to the ALJ's description of vulnerability zones in FOF No. 42. FOF No. 42 states:

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

A.I.D. at 9.

The Township contends that FOF No. 42 is inaccurate and does not reflect the evidence provided. According to the Township, there are half a dozen homes and one restaurant within 200 feet, which is within the "vulnerability zone." Marple Township Remand Exc. at 8 (citing Marple Township, Uhlman, Baker Remand Rebuttal St. No. 1-R at 4).<sup>22</sup>

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<sup>22</sup> This may have been an incorrect cite and should possibly refer to page 7, not page 4. Marple Township, Uhlman, Baker Remand Rebuttal St. No. 1-R at 7:22 states: "There are half a dozen homes and one restaurant within 200 feet."

In its Reply to Marple Township Exception No. 11, PECO provides that the Township's expert, Mr. Marx, testified that the likelihood of an event that would create a 100-foot zone potential impact distance at the Reliability Station is "rare" and PECO's expert testified that PHMSA's incident database has not identified a similar such incident at an equivalent regulating station across the United States. PECO Remand R. Exc. at 11 (citing FOF Nos. 38 and 39). Additionally, the likelihood of an event that would create a 220-foot zone was described as "extremely rare" by the Township's witness, Mr. Marx, and there were likewise no such events identified in PHMSA's database, which dates back several decades. *Id.* (citing FOFs. No. 40 and 43).

## **ii. Disposition**

In our disposition, we note that FOF Nos. 41 and 42 are better understood when read together. Additionally, FOF No. 43 relates to the 220-foot potential impact distance calculated to result from a full rupture event characterized as "extremely rare."

FOF No. 41: The potential impact distance identified in Marple Township's quantitative risk analysis was only 100 feet for the "rare" event and 220 feet for the "extremely rare" event of a full pipe rupture. (Tr. 2181).

FOF No. 42: These vulnerability zones of 100 feet and 220 feet showed that any potential impact would extend only a short distance beyond the site boundaries, if at all. (Tr. 2181).

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

A.I.D. at 8-9.

The Township's expert, Mr. Marx, testified that in the "rare" case of a maximum credible event, the potential impact distance extends 100 feet from the release source which does not cross or reach the other side of the two roads that bound the property. Tr. at 2181. In the event of a "rare" incident, Mr. Marx identified the potential impact distance as 100 feet from the source which extended only a short distance beyond the site boundary as shown in Marple Township Remand Exh. JM-2 at 6.

Regarding the "extremely rare" scenario of a full pipe rupture, Mr. Marx identified a potential impact distance of 220 feet from the release source. Mr. Marx testified that "[h]istorical data would show that such events are not expected to occur, especially within a controlled access facility such as this, but are within the realm of possibility." Tr. at 2181; Marple Township Remand Exh. JM-2 at 5.

Mr. Marx also prepared a PECO Marple Reliability Station Hazard Analysis<sup>23</sup> which identified potential vulnerability zones. The analysis also included the following relevant statement:

A significant amount of the equipment at the site is contained within the station building. This building would act like the outer walls, constraining both vapor clouds and fires to the immediate area within and perhaps above the building.

Marple Township Remand Exh. JM-2 at 4.

According to Mr. Marx, for the extremely rare scenario, the potential impact distance could extend 220 feet from the source or beyond the site boundary as shown in Marple Township Remand Exh. JM-2, Figure 2 at 8. We note that Mr. Marx's analysis indicated that horizontal releases tend to produce the largest hazard zones. Mr. Marx noted that the "natural gas equipment will be surrounded by an 8-foot wall.

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<sup>23</sup> Marple Township Remand Exh. JM-2.

Accidental releases in the horizontal direction will impact the wall.” Marple Township Remand Exh. JM-2 at 4. For the worst-case scenario, Mr. Marx modeled the fire resulting from a full rupture at a 45-degree orientation such that it would extend above and, in many cases, beyond the facility walls. Marple Township Remand Exh. JM-2 at 4.

According to PECO’s witness, Mr. Israni, the scenario of a “rare” event identified by Mr. Marx as two-inch diameter holes in the Station’s equipment would be “very hypothetical.” Mr. Israni provided that “there is no ‘vapor cloud’ to be formed from a release at the Station, as the natural gas is already in gaseous form at ambient temperatures, much lighter than air, and will quickly rise and dissipate in the air.” Mr. Israni noted that this type of incident is unlikely in a facility with new equipment that is monitored continuously and routinely inspected. Mr. Israni indicated that his review of the PHMSA database did not find a similar incident at district regulating stations like the proposed Station. PECO Remand St. 3-RR at 5.

Regarding the potential for an extremely rare event of a “full rupture”, Mr. Israni noted that the PHMSA database did not identify a single event equivalent to Mr. Marx’s analysis. Mr. Israni stated that a full rupture is a rare event that can occur during excavation around pipelines, which is highly unlikely at the Station, as it is fully enclosed within a security fence (or proposed wall of the enhanced design). Mr. Israni disagreed with Mr. Marx’s calculation of a 220-foot potential impact distance for a full rupture event at the inlet of the Station. Mr. Israni noted that to calculate a PIR resulting in such a distance, an inlet pressure for the Station would have to be 705 psi, which is too high. Mr. Israni provided that “the 220 feet impact radius calculated by Mr. Marx is inconceivable because the 705-psi pressure for this calculation will not be present at the Station.” PECO Remand St. 3-RR at 6-7 (citing PECO St. 3-RD).



Therefore, we will modify FOF No. 42 to clarify that “rare” events with a potential impact distance of 100 feet or less would extend only a short distance beyond the site boundary, as set forth below:

FOF No. 42: The vulnerability zone of 100 feet for “rare” events showed that any potential impact of a “rare” event would extend only a short distance beyond the site boundaries, if at all. (Tr. 2181). The vulnerability zone of an “extremely rare” event is not expected to occur at a controlled access facility such as the Reliability Station. Marple Township Remand Exh. JM-2 at 5, 8.

We have edited the reference to a 220-foot potential impact distance for an “extremely rare” event and note that Mr. Marx stated that such an event is not expected to occur at a controlled access facility such as the Reliability Station, but it is within the realm of possibility. Marple Township Remand Exh. JM-2 at 5, 8. We are including the information regarding the “extremely rare” event out of an abundance of caution as we note: (1) Mr. Israni’s testimony that the calculation may be incorrect; (2) the PHMSA database has not identified a similar incident at a district regulating station similar to the Reliability Station; and (3) the “extremely rare” event was modeled by Mr. Marx to extend above and beyond the facility wall as a worst-case scenario. Accordingly, Marple Township Exception No. 11 is granted, in part, and denied, in part.

**(4) Marple Township Exception Nos. 12-13, PECO’s Replies and Disposition**

**i. Marple Township Exception Nos. 12-13 and PECO’s Replies**

In its Exception No. 12, Marple Township disagrees with FOF No. 61, averring that in an extreme event there is potential for injury to persons or property

beyond the property line of the proposed Reliability Station. Marple Township Remand Exc. at 9 (citing Tr. at 2183-84).

FOF No. 61 provides as follows: “Even if an explosion occurred inside one of the buildings, the blast wave would not extend beyond the boundary of the Station. (Tr. 2183).” A.I.D. at 11.

In its Exception No. 13, the Township contends that the Findings of Fact should include a statement that “the gas at the station would be heated at the facility then travel above ground before being placed into the distribution mains.” *Id.* (citing Tr. at 2302, 2307).

In its Replies to Marple Township Exception No. 12, PECO provides that there is no error in FOF No. 61 as it reflects the exact testimony of the Township’s witness, Mr. Marx. PECO Remand R. Exc. at 12 (citing Tr. at 2183). Regarding the heating of natural gas at the station, PECO submits that the Amended Initial Decision correctly dispatched this issue because Mr. Capuzzi did not provide any evidence beyond his opinion that heating of natural gas at the facility could elevate the potential danger of an accident at the facility. PECO Remand R. Exc. at 12 (citing A.I.D. at 34-35).

## **ii. Disposition**

Upon review, we find no error in FOF No. 61. Mr. Marx testified that the blast wave in an extremely rare event would not extend beyond the site boundaries. Tr. at 2183-2184. Mr. Marx also stated that “[t]he final hazard of concern in this study is vapor cloud explosion overpressure. In the event of a release of flammable gas that collects in a confined or congested space, and is ignited, there is a possibility that a damaging blast wave will be generated in the explosion...While 1.0 psi will certainly break most windows and can result in minor structural damage to a building, it is

generally not capable of causing serious injuries to people outdoors.” Marple Township Remand Exh. JM-2 at 3.

We disagree with the Township’s argument that the Findings of Fact should include a statement that the gas from the Station would be heated at the facility. The Township stated that it was a concern raised by Marple Township’s expert James Capuzzi and a distinct feature of this Station that is unlike any other PECO Gate Station. While Mr. Capuzzi expressed his concern about the heating of natural gas at the Station, PECO witness Oleg Shum testified that line heaters have been used on PECO’s system for decades and have a strong reliability record. Mr. Shum explained that line heaters are not one-of-a-kind equipment and are used at PECO regulator stations to preheat the gas before it is stepped down. Tr. at 2002-2003. The ALJ noted that Mr. Capuzzi did not provide any evidence other than his opinion that the line heater was of extra concern. Accordingly, we shall deny the Township’s Exception Nos. 12 and 13.

**e. Marple Township Exception Nos. 14-17, PECO’s Replies, and Disposition**

**(1) Marple Township Exception Nos. 14-17 and PECO’s Replies**

In its Exception Nos. 14-17, Marple Township objects to FOF Nos. 93-100<sup>24</sup> regarding the testimony of its witness, Dr. McAuley. The Township provides that Dr. McAuley calculated air emissions for the emergency generator assuming the generator would operate 24/7/365 or 8,760 hours/year. The Township contends that Dr. McAuley did not make an error in this assumption, because PECO’s witness, Mr. Harrington, also used 8,760 hours of operation in his calculations for the emergency generator. Marple Township Remand Exc. at 9 (citing PECO Remand Exh.

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<sup>24</sup> A.I.D. at 15-16.

JH-4, Table 4-3). In its Exception No. 15, the Township insists that the results of Mr. Harrington are greater than those of Dr. McAuley because Dr. McAuley used the original proposed 30-kw generator rather than the 50-kw generator required in the enhanced design. *Id.* at 10.

In its Exception No. 16, the Township argues that Mr. Harrington did not consider all potential pollutants from the Station including volatile organic compounds (VOCs), methane leaks and “other impurities.” Marple Township Remand Exc. at 11 (citing Tr. at 2419). In its Exception No. 17, the Township contends that there would be less air quality impact at the alternate location. Marple Township Remand Exc. (citing Tr. at 2424).

In its Replies, PECO provides that the ALJ found that Dr. McAuley’s calculations failed to acknowledge: (1) PECO’s actual plans to run the emergency generator only sporadically; (2) federal law restricting operation of emergency generators to no more than 100 hours per year; and (3) EPA guidance specifying 500 hours as a conservative benchmark for generator air emissions modeling. PECO Remand R. Exc. at 12 (citing A.I.D. at 15, FOF No. 96). According to PECO, Dr. McAuley’s air emissions modeling did not use the statistical form of the NAAQs promulgated by EPA<sup>25</sup> and used the incorrect facility layout and stack dimensions, different exhaust temperatures and velocities when comparing different locations, and used an overly conservative screening parameter in contravention of EPA’s guidance.<sup>26</sup> PECO stresses that the ALJ found Mr. Harrington’s air modeling and analysis more persuasive than Dr. McAuley’s. *Id.* at 13 (citing A.I.D. at 40-41).

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<sup>25</sup> PECO Remand R. Exc. at 12 (citing A.I.D. at 15, FOF No. 94).

<sup>26</sup> PECO Remand R. Exc. at 13 (citing A.I.D. at 16, FOF No. 98-99).

Next, PECO notes that the ALJ permitted the Parties to provide evidence regarding the line heater and emergency generator even though it was not clear from the *Marple II* decision whether the Commonwealth Court was aware that neither emission source would be located in the buildings. PECO Remand R. Exc. at 13 (citing A.I.D. at 37). PECO avers that the evidence demonstrated: (1) that neither emission source required permits from DEP; (2) the emissions sources are subject to EPA regulations and DEP enforcement; and (3) that the emission sources will not cause an unreasonable impact on air quality. *Id.* at 13-14 (citing A.I.D. at 37-41).

## (2) Disposition

We find no errors in FOF Nos. 93-100. The record evidence demonstrates that the Township's witness, Dr. McAuley, used incorrect assumptions for the operation of the emergency generator and other parameters in his calculations. The ALJ was correct in weighing the evidence provided by Mr. Harrington and Dr. McAuley. The ALJ noted that the *Marple II* decision was unclear as to whether the Commonwealth Court was aware that the line heater and the emergency generator will be located outside of the station buildings. Furthermore, the line heater and emergency generator are facilities and are not subject to any zoning regulation by the Township. The ALJ allowed the Parties to provide evidence regarding the line heater and generator, weighed the evidence appropriately, and concluded that the proposed Reliability Station will not cause unreasonable air pollution at the proposed site. A.I.D. at 37-41.

Moreover, we conclude that Mr. Harrington used a more accurate analysis based on the correct site layout and other parameters. Mr. Harrington's analysis showed that the NAAQs will not be violated by the facility. Mr. Harrington testified that "neither the siting of the Fiber Building or Station Building at the Property, nor the construction and operation of the Station as a whole, will cause any unreasonable impacts to air quality." PECO Remand St. 6-RR at 16.

We disagree with the Township's assertion that Mr. Harrington did not address other potential pollutants. Marple Township Remand Exc. at 11. Mr. Harrington calculated the estimated emission of greenhouse gases, including carbon dioxide, methane and nitrous oxide. PECO Remand St. No. 6-RR at 15-16. Additionally, Mr. Harrington testified that DEP, like many other states, does not require modeling of hazardous air pollutants but considers the National Emissions Standards for Hazardous Air Pollutants as protective of human health. Mr. Harrington used New Jersey's screening modeling for hazardous air pollutants for the site and determined that the results for hazardous air pollutants for the surrounding residential areas and commercial enterprises were compliant with New Jersey's screening values. Tr. at 2398-99.

We also disagree with the Township's argument that air quality impacts at the alternate site would be less than that at the selected site. Marple Township Remand Exc. at 11. Mr. Harrington provided that Dr. McAuley's results regarding the alternate site are suspect, since dispersion around both sites is expected to be similar because the site configurations and topographic variations are substantially the same. Mr. Harrington noted that: (1) Dr. McAuley used different emergency generator exhaust parameters for the two sites, when they should be identical regardless of location; and (2) Dr. McAuley used pollution receptors (locations where modelling predicts concentrations) without accounting for the project fence line, which could produce substantially different model results. PECO Remand St. No. 6-RR at 14. Accordingly, Marple Township Exception Nos. 14-17 are denied.

**f. Marple Township Exc. No. 18, PECO's Reply, and Disposition**

**(1) Marple Township Exc. No. 18 and PECO's Reply**

In its Exception No. 18, Marple Township contends that the ALJ erred in not adopting a review, as required by NEPA. The Township argues that although the

ALJ does not have to follow every aspect of NEPA, it “has been used for years in completing environmental reviews of similar projects.” Marple Township Remand Exc. at 12.

In its Replies to Marple Township Remand Exception No. 18, PECO provides that NEPA applies only to federal projects, and more specifically to Major Federal Actions Significantly Affecting the Quality of the Human Environment. PECO contends that a NEPA-style review is inappropriate for a minor non-federal project involving only the siting of buildings. According to PECO, neither the plain text of the ERA, nor any court precedent interpreting the ERA, supports the use of a NEPA-like environmental review as a condition for Commission approval. PECO notes that the ALJ provided the Township and the Intervenors with the opportunity to present evidence on environmental, health, and safety concerns, both related to the buildings and for the utility facilities located outside of the buildings. PECO Remand R. Exc. at 14 (citing PECO Remand M.B at 40-41, PECO Remand R.B. at 11, 14-16).

## **(2) Disposition**

Upon review, we shall deny Marple Township’s Exception No. 18. A NEPA-style review is not necessary or appropriate here. NEPA is required for major federal projects – not a small utility project. This proceeding involves the siting of two buildings at a site that was formerly a gasoline service station already in remediation. The utility facilities at the site – a line heater and an emergency generator – are exempt from Township zoning and are small enough to be exempt from air quality permitting by DEP. Air quality modeling has shown that the proposed Reliability Station will not have an unreasonable impact on air quality. The facility’s greenhouse gas emissions would be minor compared to the statewide totals. PECO Remand St. 6-RR at 16. A costly NEPA-style environmental review for a site that is already developed and in the process

of remediation without potential impact to air quality, water quality, historical resources, or sensitive habitats (in contrast to the alternate site) would be excessive. *Id.* at 16-25.

We note that PECO has already completed Phase I and Phase II environmental site assessments for the proposed site for the Station. Prior to purchase by PECO, the site was a vacant and overgrown lot. In its previous use, the site was a gasoline service station from approximately 1968 until 2015. The Phase I and II site assessments identified residual contamination of the site and confirmed that the site was subject to a tank removal and soil remediation and mitigation pursuant to the Pennsylvania Land Recycling and Remediation Act, 35 P.S. §§ 6026.101-.908. The site is subject to an environmental covenant<sup>27</sup> dated 2013 and approved by DEP restricting future use of the site to non-residential uses only. PECO Remand St. 4-RD at 2. In 2022, PECO removed more than 1,000 tons of contaminated soil from the site. *Id.* at 3.

As part of its environmental review process, PECO obtained a National Pollutant Discharge Elimination System (NPDES) permit for the site for discharges of stormwater associated with construction activities at the site. PECO Remand St. 2-RD at 4, 6. The NPDES permitting process required review and approval from various local, state, and federal agencies, including the Delaware County Conservation District, Pennsylvania Historical and Museum Commission, the Pennsylvania Game Commission, the Pennsylvania Department of Conservation and Natural Resources, the Pennsylvania Fish and Boat Commission, and the U.S. Fish and Wildlife Service. *Id.* at 6-13.

Additionally, PECO hired Mr. Harrington's firm, Tetra Tech, to perform a comprehensive environmental review. Mr. Harrington provided that the Commonwealth Court required a "constitutionally sound" environmental impact review which is a reference to the ERA which protects the peoples' "right to clean air, pure water, and the

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<sup>27</sup> See PECO Exhibit JM-1.



preservation of the natural, scenic, historic, and esthetic values of the environment.” Mr. Harrington avers that he addresses these issues and similar concerns raised by the Parties. He provides the following regarding his assessment:

Notably, this assessment analyzes the impacts (or lack thereof) of the Station as a whole in addition to the impacts (or lack thereof) of the proposed siting of the Fiber Building and the Station Building. In this sense, my scope of review is broader than what was required by the Commonwealth Court. This comprehensive review performed by me and my Tetra Tech colleagues included a review of environmental permit applications; environmental permits and approvals; correspondence with local, state, and federal agencies; environmental due diligence reports; and design and engineering documents for the Station (collectively, “Project Documents”) to assess the potential impacts of the Station on air quality, water quality, wetlands, stormwater, endangered and threatened species, and historical structures.

PECO Remand St. 6-RD at 5.

Along with his testimony<sup>28</sup> regarding these issues, Mr. Harrington sponsored PECO Remand Exh. JH-4 titled “PECO Natural Gas Reliability Station, Marple Township, PA Air Quality Dispersion Modeling Impact Analysis.” This report also addressed the background ambient air quality and the potential greenhouse gas emissions at the proposed site.

Based on the environmental assessments done on the proposed site of the Station, the NPDES permitting process approval, PECO’s efforts to address the residual contamination at the site, the return to functional use of a brownfield (remediated industrial site) rather than using open space, and Tetra Tech’s environmental review, we

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<sup>28</sup> PECO Remand St. 6-RD and St. 6-RR.

do not see the need for a NEPA-style study for this project site. Accordingly, we shall deny Marple Township Exception No. 18.

**g. Marple Township Exception Nos. 19-20, PECO's Replies, and Disposition**

**(1) Marple Township Exception Nos. 19-20, PECO's Replies**

In its Exception Nos. 19 and 20, Marple Township contends that the ALJ erred by not completing a constitutionally sound environmental review. The Township contends that the ALJ erred by concluding that since DEP permits were not required for the line heater and generator, this constitutes an agency determination by DEP. Marple Township Exc. at 12-14.

In its Replies to Marple Township Remand Exception Nos. 19 and 20, PECO disagrees with the Township's claim that the Amended Initial Decision failed to engage in a constitutionally-sound environmental review because it inappropriately "punted" to the "illusory" agency determinations of the DEP and EPA. PECO contends that this argument attempts to circumvent the Commonwealth Court's instruction that "the Commission is obligated to consider 'the environmental impacts...while also deferring to environmental determinations made by other agencies with primary regulatory jurisdiction over such matters.'" PECO Remand R. Exc. at 14-15 (citing *Marple II* at 973-974). PECO notes that the Township does not dispute that DEP's regulations exempt the line heater and emergency generator from the requirement to obtain an air permit. PECO avers that these blanket exemptions are "agency determinations" of the DEP that are applicable to emission sources at the facility and deserve the Commission's deference. PECO Remand R. Exc. at 15.

PECO continues that the A.I.D. did not rely only on blanket exemptions. The ALJ allowed the Township to offer evidence concerning the Station’s air emissions. PECO maintains that the ALJ analyzed the modeling performed by Dr. McAuley and Mr. Harrington and concluded that there was no demonstration of an unreasonable impact on air quality. PECO Remand R. Exc. at 15 (citing A.I.D. at 37-41).

## (2) Disposition

We disagree with the Township that DEP’s exemption of the line heater and emergency generator are not determinations by the appropriate agency. The line heater and emergency generator are exempt from plan approval permitting based on specifications set in the DEP policy document titled “Air Quality Permit Exemptions.”<sup>29</sup> The document “provides criteria for sources and physical changes to sources *determined* to be eligible for permitting exemptions as sources of minor significance.” PECO Remand Exh. JH-6 (emphasis added). The policy document states that DEP “may *determine* sources or classes of sources to be exempt from the plan approval and permitting requirements of 25 Pa. Code Chapter 127 (relating to construction, modification, reactivation and operation of sources)” (emphasis added). PECO Remand Exh. JH-6 at 1. DEP has *determined* that minor sources such as the line heater and emergency generator are exempt from plan approval permitting.

The emergency generator is subject to the federal emissions standards of 40 CFR 60.4233(e), which references emissions standards listed in Table 1 of 40 CFR Part 60, Subpart JJJJ for NO<sub>x</sub>, hydrocarbons (HC), and carbon monoxide (CO) for emergency engines manufactured after January 1, 2009. PECO Remand Exh. JH-4 at 4.

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<sup>29</sup> PADEP Document No. 275-2101-003, July 1, 2021; PECO Remand Exh. JH-6.

DEP and EPA have determined that minor sources such as the line heater and emergency generator can be successfully regulated using the DEP policy document and federal emissions standards respectively. Air quality modeling is not required by DEP or EPA for these sources but was completed to “provide additional assurance that air quality impacts from the Project will be less than the National Ambient Air Quality Standards (NAAQs) designed to protect public health and public welfare.” PECO Remand Exh. JH-4 at 3.

Further, we disagree with the Township’s argument that the ALJ has not provided a constitutionally sound environmental review. As discussed, *infra*, the ALJ has provided a careful review of the safety, potential noise, and air quality impacts of the proposed Station. A.I.D. at 31-44. The ALJ reviewed extensive evidence and testimony through four days of evidentiary hearings regarding each of the concerns of the Parties, including safety, noise, and potential air quality and greenhouse gas emissions.

The Commonwealth Court instructions in *Marple II* stated that the Commission in *Marple I* “failed to identify any such outside agency determinations that pertained to explosion impact radius, noise, or heater emissions.” *Marple II* at 975. We will address each below.

**i. Explosion Impact Radius**

PECO’s witness, Mr. Israni, testified that a “potential impact radius”, the term used by PHSMA, is applicable to transmission facilities and is not applicable to a distribution facility such as the proposed Station. The ALJ reviewed testimony by Mr. Israni and the Township’s witnesses, Mr. Marx and Mr. Capuzzi. The ALJ noted that the Station will be subject to more stringent standards as a distribution facility including DIMP to continuously evaluate and mitigate risks. The ALJ found that the gas

facilities proposed for the Station do not pose an unusual risk to the surrounding people or property. A.I.D. at 35.

**ii. Noise**

The ALJ heard testimony from Mr. Keith regarding the potential for noise from the Station. Mr. Keith explained that he was aware of the potential changes to the design of the Station and that PECO could comply with the Township's noise ordinance with readily available technology. The ALJ was not persuaded by the more general testimony of the Township's witnesses, Drs. Schmid and Ketyer. A.I.D. at 37.

**iii. Heater Emissions**

The ALJ heard testimony from Mr. Harrington and Dr. McAuley regarding potential air pollution from the line heater and emergency generator. The ALJ noted that PECO does not need Commission authority to construct or site either the line heater or the emergency generator. The ALJ heard testimony that both the line heater and emergency generator are exempt from permitting by DEP and the EPA, but both will have to meet DEP regulatory requirements after installation. The ALJ heard testimony that the line heater and emergency generator will not exceed the NAAQs which are emission limits set to protect human health.

The ALJ has evaluated the testimony and evidence presented and has determined after consideration of the identified environmental impacts related to the proposed Station that the Station and related buildings will enhance reliability and availability of supply services to PECO's customers. A.I.D. at 44. The ALJ reasoned that the ERA does not require a petitioner to prove that a project will have no impact on the environment. *Id.* Accordingly, we shall deny Marple Township Exception Nos. 19 and 20.

**2. Ms. Baker’s and Mr. Uhlman’s Exceptions, PECO’s Replies, and Dispositions**

**a. Ms. Baker’s and Mr. Uhlman’s Exception Nos. 1 and 2, PECO’s Replies, and Disposition**

**(1) Ms. Baker’s and Mr. Uhlman’s Exception No. 1 and PECO’s Reply**

In their Exception No. 1, the Intervenors argue that the ALJ erred in concluding that the Reliability Station was reasonably necessary because the ALJ failed to clearly and unequivocally recognize that the Commission is subject to the ERA in interpreting and applying Section 619. The Intervenors contend that the Commonwealth Court held that Section 619 requires the Commission to complete a “constitutionally sound environmental impact review” of the Reliability Project. The Intervenors argue that the ALJ improperly attributed air emissions and climate change as only within the jurisdiction of the General Assembly and DEP to consider; however, the Intervenors contend that these environmental effects must be evaluated and considered by the Commission in its Section 619 determination in order to comply with the ERA. Baker and Uhlman Remand Exc. at 2.

The Intervenors argue that the ERA requires that all Commonwealth entities are equally obligated to protect the rights enumerated therein, within the scope of their authority, but the Commission is still required to consider air pollution associated with the Reliability Project when making a Section 619 determination. The Intervenors state that the ALJ’s concern that the Commission’s exercise of its ERA obligations would mean that it would “substitute its judgement for that of DEP” is misplaced. The Intervenors contend that DEP and the Commission would be evaluating different considerations and rendering different decisions. Baker and Uhlman Remand Exc. at 6 (citing A.I.D. at 43).

The Intervenors also maintain that the ALJ erred in her conclusions about the issue of climate change. The Intervenors argue that it is appropriate for the Commission to consider other Commonwealth laws, regulations, or plans regarding climate change, and that such laws and sources of information do not provide an excuse for the Commission to ignore its constitutional or statutory duties under Section 619. Moreover, the Intervenors contend that any deferral of Section 619 decision-making to DEP or any other Commonwealth entity is illusory and improper, and the air pollution control requirements of the EPA and DEP are not a substitute for the Commission's own evaluation of what these requirements mean for the overall environmental impact of the Reliability Project. Finally, the Intervenors submit that 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 the ERA. Baker and Uhlman Remand Exc. at 6-8.

In its Reply to the Intervenors' Exception No. 1, PECO contends that the Intervenors' argument is misleading and incorrect because the Commonwealth Court did not remand this matter for an environmental review of the entire Reliability Project, nor did the Commonwealth Court imply that the Commission should review the actions of non-utility end-users. To the contrary, PECO maintains that, in *Marple II*, the Commonwealth Court ordered the Commission to: “issue an Amended Decision...which must incorporate the results of a constitutionally sound environmental impact review **as to siting the so-called ‘Fiber Building’ and ‘Station Building’ upon the property located at 2090 Sproul Road in the Township of Marple, Pennsylvania.**” PECO Remand R. Exc. at 16 (citing *Marple II* at 975) (emphasis in original). PECO submits that the Commission was not directed to go beyond this limited judicial mandate. PECO argues that the “Intervenor’s repeated attempts to transform this Section 619 building siting proceeding into an attack on PECO’s reliable supply of natural gas to customers is far outside the Commonwealth Court’s mandate and outside the bounds of a Section 619 proceeding.” *Id.* (citing *Del-AWARE* at 593, 595).

PECO contends that the ALJ evaluated issues of air emissions and climate change by accepting and considering evidence proffered by the parties, including expert opinions, and making well-reasoned determinations regarding such evidence. Additionally, PECO avers that the Amended Initial Decision included extensive environmental findings regarding the Reliability Station, including findings about air emissions, water resources, endangered species and historic structures to conclude that there would be no unreasonable impact posed by the Reliability Station. PECO Remand R. Exc. at 17 (citing A.I.D. at 12-16, FOF Nos. 71-103). PECO further explains that, as directed by the Commonwealth Court, the Amended Initial Decision identified and deferred to DEP determinations for air permitting for the Reliability Station's equipment and broader climate change policy because DEP is charged by the General Assembly with that authority. *Id.* (citing A.I.D. at 37-44). PECO also argues that the ALJ correctly cited to established case law that the Commission, as a statutory agency, may exercise only the jurisdiction that the General Assembly has delegated. PECO Remand R. Exc. at 17. (citing A.I.D. at 41 (additional citations omitted)).

Moreover, PECO contends that the Commission's enabling statute, the Code, requires that the Commission provide for just, reasonable, and reliable public utility service, which is the Commission's authorization and guiding principle. PECO Remand R. Exc. at 18 (citing *Rulemaking Regarding Hazardous Liquid Pub. Util. Safety Standards at 52 Pa. Code Chapter 59*, Docket No. L-2019-3010267, 2024 WL 838537, at \*13 (February 22, 2024)). PECO states that the Commission has already found that the Reliability Station is needed to: (1) address design day requirements deficits; (2) reduce price volatility and increase reliability; and (3) address expected customer growth in the existing certificated areas of Marple Township and Delaware County. PECO Remand R. Exc. at 18 (citing December 7, 2020, Initial Decision, adopted on Exceptions by the Commission on March 10, 2022 (I.D.), FOF Nos. 18-20, 24, 29; 35). PECO argues that the Amended Initial Decision fulfilled the Commission's duty under the ERA by finding that the Reliability Station would create no unreasonable environmental impacts and



would ensure reliable natural gas distribution service in an existing certificated territory. PECO Remand R. Exc. at 18.

PECO notes that the Amended Initial Decision properly applied the law in support of the proposition that the General Assembly is the correct body to enact climate change policy, not the Commission outside of legislative authority. PECO Remand R. Exc. at 18 (citing A.I.D. at 41-42; *Funk*). The Amended Initial Decision, PECO explains, made greenhouse gas emissions determinations for the Reliability Station and deferred to agencies on both the environmental limits for such emissions and broader climate change policy in the Commonwealth as directed by the General Assembly in Act 70. PECO contends that the Commission, a statutory agency, has no ability to alter this legislative scheme established by the General Assembly. In addition, PECO avers that the Commonwealth Court has subsequently reaffirmed that the ERA cannot expand the statutory powers of an administrative agency. PECO Remand R. Exc. at 18-19 (citing *Commonwealth v. Monsanto Co.*, 269 A.3d 623, 644-45 (Pa. Cmwlth. 2021); *Delaware River Keeper Network v. Pennsylvania Dep't of Env't Prot.*, 247 A.3d 1188, 2021 WL 96887, at \*8 (Pa. Cmwlth. 2021) (unpublished)).

**(2) Ms. Baker's and Mr. Uhlman's Exception No. 2 and PECO's Reply**

In their Exception No. 2, the Intervenors argue that the ALJ erred by limiting the scope of the review under Section 619 to the location of the buildings. The Intervenors contend that the ALJ erred by not reviewing the entire Reliability Project that includes the Reliability Station, and by declining to evaluate most of the environmental impacts identified by the Intervenors. Baker and Uhlman Remand Exc. at 8-9.

By only reviewing the location of the buildings and not conducting an environmental impact review of the entire Reliability Project, the Intervenors contend

that they have no forum to challenge the environmental impacts of the Reliability Station without the Commission's review of the larger project, including greenhouse gas emissions. Baker and Uhlman Remand Exc. at 9. The Intervenors argue that such a result makes Section 619 unconstitutional, as applied, because it fails to protect the rights under the ERA. Therefore, the Intervenors submit that the Commission's review cannot be limited to the environmental effects of the specific location of the Reliability Station; rather, the Intervenors state that the Commission's review must include foreseeable environmental effects that would flow directly from approval of the entire project. The Intervenors argue that the Reliability Project presents a substantial risk of exacerbating ongoing damage from climate change to the people's rights to clean air and to have public natural resources conserved and maintained. *Id.* at 9, 13-14, 19.

In its Reply, PECO argues that a larger review of the Reliability Project, as the Intervenors propose, is contrary to the command given to the Commission by the Commonwealth Court in *Marple II* to specifically consider the environmental impact of placing a building at a proposed location. In other words, PECO avers that the Commonwealth Court specifically held that this Section 619 remand proceeding is limited to evaluating only PECO's building siting proposal. PECO Remand R. Exc. at 20 (citing *Marple II* at 973-75).

PECO further argues that downstream emissions of customers are not emissions of the Reliability Station itself, and that any reliance on such downstream impacts to establish an ERA concern has previously been rejected by the Commonwealth Court. PECO Remand R. Exc. at 21 (citing *Cnty. Coll. of Delaware Cnty. v. Fox*, 342 A.2d 468, 482 (Pa. Cmwlth. 1975)). PECO also avers that the Intervenors have not identified any language in Section 619, the Code, or any other Pennsylvania statute or regulation, that authorizes the Commission to evaluate climate change impacts from sources other than the Reliability Station. PECO Remand R. Exc. at 21.

Contrary to the Intervenor's allegations that they will have no other forum to challenge any environmental impacts from downstream emissions if they are not considered in this proceeding, PECO contends that the Intervenor has the ability to petition PHMSA, EPA, DEP, or the Commission for regulatory changes regarding end-use customers, and the General Assembly or Congress for legislative changes. According to PECO, the Intervenor cannot use this limited Section 619 proceeding to force the Commission to deny customers reliable public utility service without any legislative authority to do so. PECO Remand R. Exc. at 21. Moreover, PECO states that, *assuming arguendo*, if the Commission were obligated to consider any reasonably foreseeable downstream emissions impacts, the Intervenor failed to provide any evidence, other than speculation, as to what those impacts are, nor did they attempt to quantify the amount of natural gas usage or calculate any resulting increase emissions in GHGs. *Id.* at 22.

Finally, PECO reiterates the argument of the Energy Association of Pennsylvania in its Brief of *Amicus Curiae* that adoption of the Intervenor's position here would adversely impact all public utilities and their customers. PECO states that based on the Intervenor's position, every time any upgrades are made to any utility infrastructure, an industry-wide environmental impact review would be necessary, which could conflict with the findings of other agencies conducting their own environmental reviews because multiple agency approvals are sometimes required. PECO contends that such a result would be absurd and would stifle necessary upgrades to utility infrastructure and lead to dramatically higher costs. PECO Remand R. Exc. at 22 (citing Brief of *Amicus Curiae* of Energy Association of Pennsylvania (January 3, 2024) at 6, 16-18).

### **(3) Disposition**

Upon review of the record, we will deny Ms. Baker's and Mr. Uhlman's Exception Nos. 1 and 2. We find that the ALJ, in the Amended Initial Decision, has:

(1) acknowledged that the ERA applies to this Section 619 proceeding; (2) properly incorporated the results of an environmental impact review regarding the proposed siting of the two buildings on the property, which is the subject of this proceeding, rather than the entire Reliability Project; (3) considered environmental, safety, and additional evidence; and (4) satisfied the Commission’s ERA obligations in Section 619, the Commonwealth Court’s directive on remand, and the Code.

The ERA protects the rights of Pennsylvanians to clean air, pure water, and the preservation of the environment, while also requiring the Commonwealth to conserve and maintain the public’s natural resources for the benefit of all Pennsylvanians.

Specifically, the 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 of the people.

Pa. Const., Art. 1, § 27.

The Commission “and its adjudicatory decisions and regulations are subject to the ERA...because agencies of the Commonwealth are bound by the ERA.” *Marple II* at 974 (citing *PEDF*). Accordingly, the Commission must consider the ERA when analyzing a Section 619 proceeding, such as the instant case before us. The Commonwealth Court explained that “in proceedings of this nature, the Commission is obligated to consider ‘the environmental impacts of placing [a building] at [a] proposed location,’ while also deferring to environmental determinations made by other agencies with primary regulatory jurisdiction over such matters. *Id.* (citing *Del-AWARE* at 596). We conclude that, as discussed further below, the ALJ properly acknowledged the

application of the ERA to this Section 619 proceeding, and conducted and incorporated the results of a thorough environmental review into the determination regarding the reasonable necessity of PECO's building siting proposal.

Initially, we disagree with the Intervenors that the ALJ was tasked with assessing the Reliability Project. A Section 619 proceeding is not an evaluation of the entire project or its natural gas use or gas safety in general. This proceeding concerns the zoning exemption of two buildings at the Reliability Station, located at 2090 Sproul Road, in Marple Township, Delaware County, rather than the entire Reliability Project. The Commonwealth Court's order in *Marple II* set the parameters for this remanded proceeding and stated clearly, as the ALJ acknowledged, that the Amended Initial Decision regarding the PECO Petition must incorporate the results of an evaluation of the environmental impacts regarding the proposed siting and placement of the two buildings on the property, not the potential emissions from downstream customers. A.I.D. at 21 (citing *Marple II* at 974); *see also* A.I.D. at 45, Conclusion of Law No. 5.

The Commonwealth Court in *Marple II* identified three parts of the proposed Reliability Station at issue – the security fence, *the Fiber Building*, and *the Station Building*. The Commonwealth Court summarily concluded that, with respect to the security fence, the Commission properly concluded that it is a “facility” and, therefore, is exempt from regulation by the Township. *Marple II* at 972 (citing 66 Pa.C.S. § 102; 53 P.S. § 10619) (emphasis added). Regarding *the two buildings*, the Commonwealth Court found that the Commission erred when it deemed environmental concerns, such as potential explosions, noise, and emission from the Reliability Station's *buildings*, to be outside of the purview of Section 619 proceedings. Rather the Commonwealth Court stated that the Commission is obligated, under the ERA, to consider “the environmental impacts of placing [*a building*] at [*a*] proposed location,” while deferring to environmental determinations made by other agencies with primary jurisdiction over such matters. *Id.* at 973-74 (emphasis added). The Commonwealth

Court further noted 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.” *Id.* at 974 (emphasis added). Therefore, the Commonwealth Court remanded this matter to the Commission with specific instructions that the Commission “issue an Amended Decision regarding the PECO Petition, which must incorporate the results of a constitutionally sound environmental impact review as to the proposed siting on the Property *of the Fiber Building and the Station Building.*” *Id.* at 975 (emphasis added).

In addition, the scope of the Commission’s reconsideration of a matter may not be expanded beyond the explicit instructions of the Commonwealth Court. The Commonwealth Court has held that on remand, an agency is not permitted to expand the scope of its instructions:

Pursuant to Pennsylvania Rule of Appellate Procedure 2591(a), upon remand by an appellate court, a governmental unit “shall proceed in accordance with the judgment or other order of the appellate court ....” Pa.R.A.P. 2591(a). “[I]t has long been the law in Pennsylvania that following remand, [an administrative agency] is permitted to proceed only in accordance with the remand order.’ *Commonwealth v. Sepulveda*, 636 Pa. 466, 144 A.3d 1270, 1280 n.19 (2016). ’Where a case is remanded for a specific and limited purpose, issues not encompassed within the remand order may not be decided on remand.’ *Levy v. Senate of Pa.*, 94 A.3d 436, 442 (Pa. Cmwlth. 2014) (internal quotation and citation omitted).

*Dep’t of Env’t Prot. v. B&R Res., LLC*, 270 A.3d 580, 591 (Pa. Cmwlth. 2021).

Based on the above, we agree that the Intervenors have attempted to improperly expand this Section 619 building siting proceeding into an evaluation of

PECO's entire Reliability Project. However, this proceeding concerns the zoning exemption of two buildings at the Reliability Station, not the entire Reliability Project, and the Commonwealth Court, in remanding this matter to the Commission in *Marple II*, was clear that the amended decision herein must incorporate the results of a constitutionally sound environmental impact review as to the proposed siting on the property of the Fiber Building and the Station Building at 2090 Sproul Road. *See Marple II* at 974. For the most part, the environmental impacts identified by the Intervenors result from gas operations that are located outside of the buildings, and not subject to Commission approval pursuant to 66 Pa.C.S. § 2205. Therefore, we find that the ALJ correctly limited the scope of this proceeding to the zoning exemption at the Reliability Station, rather than the entire Reliability Project.

Next, in concluding that the buildings associated with the Reliability Station should be exempt from local zoning by Marple Township because the proposed siting of the buildings is reasonably necessary for the public convenience or welfare of the public, we find that the ALJ's Amended Initial Decision sufficiently considered environmental, safety, and additional evidence and addressed the identified environmental impacts of the Reliability Station, consistent with the Commonwealth Court's directive in *Marple II*. Out of an abundance of caution, and to ensure that all the issues identified by the Commonwealth Court were addressed, the ALJ considered record evidence regarding the line heater and emergency generator, as well as general safety concerns regarding explosion risk that includes piping located outside the Station Building and the Fiber Building. Specifically, the Amended Initial Decision sufficiently addressed the alleged environmental impacts of the Reliability Station, including safety, noise, and air quality.

With respect to safety, a significant amount of evidence was introduced by the Parties regarding the risk of explosion at the property. After considering the evidence, the ALJ found PECO's evidence on this issue more credible and convincing

than the evidence provided by the Township and the Intervenors. The ALJ concluded that, based on the evidence on the record, the gas facilities proposed for the Reliability Station do not pose an unusual risk to the surrounding people and property, and the risk of serious damage to property or injury to people is remote and unlikely to occur. A.I.D. at 31, 35.

Turning to whether the Reliability Station will produce noise at levels that will not comply with the Township's noise ordinance, the ALJ again found PECO's evidence that the Reliability Station will not produce an unreasonable level of noise to be credible and convincing. The ALJ found that the testimony provided by witnesses for the Township is not sufficient to prove that noise generated by the equipment at the Reliability Station will cause an unreasonable impact. Rather, the ALJ concluded that the evidence proffered by PECO shows that any noise can and will be mitigated by sound dampening technology which will allow PECO to comply with the Township's noise ordinance. A.I.D. at 3-37.

Regarding air emissions, the ALJ found that the only emission sources at the Reliability Station will be located outside of the Station Building and the Fiber Building, and that the pieces of equipment considered air pollution sources housed outside of either of the proposed buildings for this site subject to this Section 619 proceeding are utility facilities which are not subject to Commission or local zoning regulation. The ALJ explained that PECO does not need Commission authority to construct or site the facilities that may be alleged to be air pollution sources at the Reliability Station because they will not be housed in either of the buildings proposed for this site and subject to this Section 619 proceeding. The ALJ further explained that the Commission does not have the authority to regulate air pollution sources, as that authority rests with DEP. A.I.D. at 37.



However, the ALJ, out of an abundance of caution, permitted the Parties to produce evidence on the subject of air emissions, and the ALJ found that PECO produced substantial evidence to conclude that, for the purposes of this Section 619 review, the Reliability Station will not pose an unreasonable impact on air quality. The ALJ's conclusion rested on the fact that neither the line heater nor the emergency generator are large enough to require a DEP air pollution permit and are, therefore, exempt from DEP air pollution permitting requirements. In addition, the evidence produced also indicated that no air permits are required by the EPA to construct or operate the line heater or emergency generator. A.I.D. at 37-38. The ALJ concluded that it is appropriate for the Commission to rely on the air pollution control requirements of EPA and DEP, and that this is consistent with the Commonwealth Court's direction that the Commission "is obligated to consider 'the environmental impacts of placing [a building] at [a] proposed location,' while also deferring to environmental determinations made by other agencies with primary regulatory jurisdiction over such matters." *Id.* at 40 (citing *Marple II* at 974). Accordingly, the ALJ found that the limited source of air pollution emitters at the Reliability Station will not cause an unreasonable impact on air quality because these utility facilities are small emitters and are unlikely to cause emissions of air pollution in excess of the NAAQs as defined by EPA. A.I.D. at 41.

With respect to the issue of climate change, the ALJ concluded that the Intervenor failed to demonstrate here that the ERA requires the Commission to consider climate change when approving an exemption from a municipal zoning ordinance regulating the use of buildings on the site. A.I.D. at 44. The ALJ explained that the Commission's jurisdiction is limited to that which has been delegated by the General Assembly, and any consideration of environmental impacts of placing a building at a proposed location under a Section 619 review must occur within the confines of the Commission's authority. Rather, the responsibility for balancing various concerns regarding climate change lies with the General Assembly, and the General Assembly has delegated the responsibility to develop air quality standards and a climate change action

plan to DEP. *Id.* at 41-42 (citations omitted). The ALJ further found that the Intervenors failed to cite any DEP permit regulations or standards which would apply to the Reliability Station, and the Commission does not have the authority to substitute its judgment for that of DEP or the General Assembly, devise its own climate action plan, or create its own analysis of greenhouse gas reduction strategies. *Id.* at 43.

Based upon the ALJ's identification of the alleged environmental impacts and careful consideration of the environmental, safety, and additional evidence, as discussed, *supra*, we agree that the ALJ's Amended Initial Decision adequately addressed the environmental impacts of the Reliability Station, consistent with the Commonwealth Court's directive in *Marple II*, and properly concluded that the proposed Reliability Station and related buildings will enhance reliability and availability of supply service to PECO's customers, and that the buildings should be exempt from the Township's zoning ordinance because the situation of the buildings is reasonably necessary for the public convenience or welfare. *See A.I.D.* at 44. The ALJ accepted and considered evidence, including expert testimony, and made determinations regarding the evidence and environmental findings regarding the Reliability Station, including air emissions, water resources, endangered species, and historical structures, to conclude that there would be no unreasonable impact posed by the Reliability Station. *See A.I.D.* at 12-16, FOF Nos. 71-103. Therefore, we find that the ALJ thoroughly and cautiously examined the record evidence and properly concluded that the proposed buildings do not pose an unusual safety risk, will not produce unreasonable noise levels, do not include any air pollution sources with emissions in excess of EPA and DEP standards, and will not violate any climate change standards under the Commission's jurisdiction.

Moreover, with respect to the specific issue regarding climate change, we agree that the Commission, as a statutory agency, may exercise only the jurisdiction that the General Assembly has delegated, *Western Pennsylvania Water Company v. Pa. PUC*, 311 A.2d 370, 373 (Pa. Cmwlth. 1973), and the Commission cannot enact climate change

policy or alter this legislative scheme without legislative authority from the General Assembly. *Funk* at 250. Also, the ERA cannot expand the statutory powers of an administrative agency. *See Commonwealth v. Monsanto Co.*, 269 A.3d 623, 644-45 (Pa. Cmwlth. 2021); *Delaware River Keeper Network v. Pennsylvania Dep't of Env't Prot.*, 247 A.3d 1188, 2021 WL 96887, at \*8 (Pa. Cmwlth. 2021) (unpublished). For these reasons, we agree with the ALJ that, under the circumstances in this case, the Intervenor did not cite any DEP requirements or standards that apply to the Reliability Station. Therefore, because the Commission may only consider the environmental impacts of a building at a proposed location within the confines of its authority, the Intervenor failed here to demonstrate the Commission's obligation under the ERA to consider climate change when reviewing the exemption from the Township's zoning ordinance regulating the use of the buildings on the site in this matter.

Accordingly, we find that the ALJ has adequately applied and satisfied the ERA requirements to this Section 619 proceeding by completing a constitutionally sound environmental impact review, including air quality impacts and climate change, consistent with the Commonwealth Court's directives in *Marple II*. The ALJ fulfilled the Commission's duty under the ERA and properly determined that the Reliability Station would not create unreasonable environmental impacts, and appropriately deferred to DEP determinations for air permitting for the Reliability Station's equipment and broader climate change policy. Therefore, we shall deny the Intervenor's Exception Nos. 1 and 2.

**b. Ms. Baker's and Mr. Uhlman's Exception Nos. 3, 4 and 5, PECO's Replies, and Disposition**

**(1) Ms. Baker's and Mr. Uhlman's Exception No. 3 and PECO's Reply**

In their Exception No. 3, the Intervenor contend that the ALJ failed to consider climate impacts and make findings of fact relating to the climate-related

environmental impacts of the Reliability Project. The Intervenors aver that the ALJ made only two findings related to the greenhouse gas emissions of the Reliability Project, but neither involved climate impacts. The Intervenors submit that the two limited Findings of Fact fail to constitute a constitutionally sound environmental impact review. This, the Intervenors argue, renders the Amended Initial Decision's conclusion, that the Reliability Project was reasonably necessary, entirely deficient from a constitutional and statutory perspective. Baker and Uhlman Remand Exc. at 19-20, 22-23.

In reply, PECO argues that the ALJ did make specific findings regarding greenhouse gas emissions from the Reliability Station. PECO contends that the Intervenors mischaracterize their witness' testimony and the evidence presented. PECO states that the Intervenors' witness, Dr. Raymond Najjar, testified that all fossil fuel combustion contributes to climate change and described the impacts of climate change; however, Dr. Najjar did not isolate and identify climate change impacts from the Reliability Project standing alone. PECO Remand R. Exc. at 23.

**(2) Ms. Baker's and Mr. Uhlman's Exception No. 4 and PECO's Reply**

In their Exception No. 4, the Intervenors contend that the ALJ erred by finding that PECO had met its burden in showing that the project was reasonably necessary because the evidence showed that the project is an expansion project that would increase greenhouse gas emissions contrary to the public interest. The Intervenors argue that the Amended Initial Decision failed to consider evidence and arguments by the Intervenors showing that the Reliability Project was not necessary for reliability but rather is for expanding natural gas service to a new area and customers, thereby increasing greenhouse gas emissions. The Intervenors aver that the project is intended to expand the use of natural gas in the surrounding area. The Intervenors state that the ALJ improperly ignored evidence that showed that climate change had reduced demand which

will continue in the future, and that the reduced demand will cause an increase in electrification in the future. Accordingly, the Intervenor's submit that the proper consideration of climate change will show that demand from PECO's existing customers will decrease. The Intervenor's argue that the ALJ ignored extensive record and important legal arguments causing the Amended Initial Decision to err in concluding that the project was reasonably necessary. Baker and Uhlman Exc. at 23.

PECO, in its Reply, states that the Intervenor's ignore the testimony of PECO's witness, Mr. Carlos Thillet, that the Reliability Station is needed to protect the reliability of gas supply even without an increased demand in the area. PECO argues that the ALJ appropriately rejected the Intervenor's argument based on the record evidence and made a credibility determination that the Intervenor's witness, Dr. Najjar, speculated that climate change will impact the need for natural gas service which was not based on any analysis or demand calculations. PECO Remand R. Exc. at 23-24.

**(3) Ms. Baker's and Mr. Uhlman's Exception No. 5 and PECO's Reply**

In their Exception No. 5, the Intervenor's argue that the Reliability Station would serve to expand the use of gas in residential and commercial buildings and is, therefore, contrary to the Pennsylvania Climate Action Plan (Climate Action Plan).<sup>30</sup> The Intervenor's aver that the Amended Initial Decision did not address what the Climate Action Plan recommends; that is, the incentivization of building electrification and the reduction of methane emissions across oil and natural gas systems. The Intervenor's contend that by authorizing PECO to implement the proposed project, which is unneeded to meet existing demand from customers, and recover its costs from customers, the Commission would be incentivizing the expansion of fossil fuel use instead of

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<sup>30</sup> The Climate Action Plan was developed pursuant to Act 70, 71 Pa.C.S. §§ 1361.1-1361.8.

electrification. The Intervenors argue that the Amended Initial Decision's conclusions regarding the Climate Action Plan and the Commission's responsibility is based on a fundamental misunderstanding of Act 70 and how planning works. The Intervenors aver that the aspects of the Climate Action Plan at issue here are outside of DEP's statutory authority and must be implemented by the Commission, and that the Commission does not need additional legislative authority to deny PECO's application pursuant to Section 619. Baker and Uhlman Remand Exc. at 30-33.

In reply, PECO contends that there is nothing in the Climate Action Plan that mandates or suggest that the Commission should abandon its statutory duty to ensure the reliability of existing natural gas distribution service. In addition, PECO points out that the Climate Action Plan: (1) identified fuel switching as the first reason for reduced emissions in the residential and commercial sectors since 2005; (2) determined that building electrification would have a negative economic impact; and (3) called for new gas service to enable fuel switching in the industrial sector. PECO submits that the Climate Action Plan has no controlling aspect on this proceeding, and that there are conflicting aspects of it to the Intervenors' positions. PECO Remand R. Exc. at 24-25 (citing Pa. Dep't of Env't Prot., Climate Change Action Plan (2021) at 13, 50, 71 (link omitted)).

#### **(4) Disposition**

The Intervenors' Exception Nos. 3, 4, and 5 all specifically address the ALJ's consideration of climate impacts in the Amended Initial Decision. In these Exceptions, the Intervenors contend that, in finding that the Reliability Station was reasonably necessary for the public convenience, the Amended Initial Decision failed to: (1) include Findings of Fact to support a constitutionally sound environmental review; (2) recognize that the evidence showed that the Reliability Project would increase

greenhouse gas emissions contrary to the public interest; and (3) consider the provisions of the Climate Action Plan which supported denial of PECO's Application. We disagree.

First, we note that the Amended Initial Decision, as discussed in our disposition of the Intervenors' Exception Nos. 1 and 2, *supra*, conducted a constitutionally sound environmental impact review that included air quality impacts and climate change, and fulfilled the Commonwealth Court's mandate in *Marple II*. Specifically, with respect to greenhouse gas emissions from the Reliability Station, the Amended Initial Decision included the following Findings of Fact:

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

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

A.I.D. at 16.

Furthermore, we agree with PECO that the witness testimony relied upon here by the Intervenors generally described the impacts on climate change from fossil fuel combustion; however, it failed to isolate and identify climate change impacts of the Reliability Station. *See* Tr. at 2265:20-2273:24. For these reasons, we shall deny the Intervenors' Exception No. 3.

Next, we find that the Intervenors' testimony and arguments that the Reliability Project would increase greenhouse gas emissions was appropriately rejected

by the ALJ because it was speculative and simply based upon “common sense” of the Intervenors’ witness, Dr. Najjar. *See* Tr. at 2269:1-3, 2269:22-2270:3, 2273:2-24. We agree with the credibility determinations made by the ALJ here in rejecting the arguments of the Intervenors’ witness. Similar credibility determinations have been upheld by the Commonwealth Court where speculative theories advanced by parties under the ERA were rejected. *See Carnahan v. Slippery Rock Twp. Zoning Hearing Bd.*, 305 A.3d 211, 226-27 (Pa. Cmwlth. 2023). Accordingly, we shall reject the Intervenors’ Exception No. 4.

Finally, we find that the Climate Action Plan was given appropriate weight when considered by the ALJ in this matter. The Intervenors contend that the approval of the Reliability Station here would expand the use of gas in residential and commercial buildings, and is, therefore, contrary to the Climate Action Plan and should be denied. However, we agree with PECO that there is nothing in the Climate Action Plan, which is not binding on this proceeding, that suggests that the Commission should abandon its statutory duty to ensure the reliability of natural gas distribution service under Sections 1501 and 2205 of the Code when making a determination in a Section 619 proceeding. 66 Pa.C.S. §§ 1501, 2205(b). Furthermore, the Climate Action Plan also appears to include certain aspects that are contrary to the Intervenors’ position against abandoning natural gas usage. Specifically, the Climate Action Plan credits fuel switching to lower emitting fuels for heating as one reason that emissions from residential and commercial sectors have decreased twenty (20) percent since 2005, and it also touts new gas services as a way to enable fuel-switching in the industrial sector. *See* Pa. Dep’t of Env’t Prot., Climate Change Action Plan (2021) at 13, 71 (link omitted). Inasmuch as the Climate Action Plan includes certain conflicting areas with respect to the Intervenors’ arguments offered here and is not controlling on this proceeding, we agree with the ALJ’s consideration and conclusions with respect to the Climate Action Plan in the Amended Initial Decision. Therefore, we will deny the Intervenors’ Exception No. 5.



#### IV. Conclusion

Based on our review of the record and the applicable law, we shall:

(1) grant, in part, and deny, in part, Marple Township's Exceptions; (2) deny Ms. Baker's and Mr. Uhlman's Exceptions; and (3) adopt the Amended Initial Decision of Administrative Law Judge Mary D. Long, as modified, consistent with this Opinion and Order; **THEREFORE,**

#### **IT IS ORDERED:**

1. That the Exceptions filed by Marple Township, Delaware County, on April 23, 2024, are granted, in part, and denied, in part, consistent with this Opinion and Order.

2. That the Exceptions filed by Julia Baker and Theodore Uhlman on April 23, 2024, are denied, consistent with this Opinion and Order.

3. That the Amended Initial Decision of Administrative Law Judge Mary D. Long issued on April 3, 2024, is adopted, as modified, consistent with this Opinion and Order.

4. That the Petition of PECO Energy Company for a Finding of Necessity Pursuant to 53 P.S. § 10619 that the Situation of Two Buildings Associated with a Gas Reliability Station in Marple Township, Delaware County is Reasonably Necessary, at Docket No. P-2021-3024328, is hereby granted in that the proposed two "structures" constitute "buildings," and their proposed situation in question is reasonably necessary for the convenience or welfare of the public within the meaning of Section 619 of the Municipalities Planning Code Act of July 31, 1968. P.L. 805, *as amended*, 53 P.S. § 10619.

5. That Finding of Fact No. 42 in the Amended Initial Decision of Administrative Law Judge Mary D. Long, issued on April 3, 2024, is modified to read as follows:

42. The vulnerability zone of 100 feet for “rare” events showed that any potential impact of a “rare” event would extend only a short distance beyond the site boundaries, if at all. (Tr. 2181). The vulnerability zone of an “extremely rare” event extends 220 feet from the potential source. An “extremely rare” event is not expected to occur at a controlled access facility such as the Reliability Station. Marple Township Remand St. No. 2 at 5, 8.

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

**BY THE COMMISSION,**



Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED: September 26, 2024

ORDER ENTERED: September 26, 2024