IN THE COMMONWEALTH COURT OF PENNSYLVANIA

TOWNSHIP OF MARPLE, Petitioner, v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, Respondent	**CASES CONSOLIDATED** Docket No. 1385 CD 2024
THEODORE UHLMAN AND JULIE BAKER, Petitioners, v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, Respondent	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

REPLY BRIEF OF PETITIONERS

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SUMMARY OF ARGUMENT

Marple Citizens have asked this Court to correct the Pennsylvania Public Utility Commission ("Commission") on the nature of its constitutional duties under the Pennsylvania Environmental Rights Amendment ("ERA"), Pa. Const. art. I, § 27, and to order it to supplement its environmental impact review for PECO's Section 619 Petition ("Petition") and incorporate this information into a new Opinion and Order concerning PECO's Petition. Such supplementation must include analysis of (1) reasonably foreseeable greenhouse gas ("GHG") impacts of approving PECO's Petition and (2) reasonable alternatives that could reduce GHG impacts.

Respondents argue that Marple Citizens should not be granted relief because the Commission did voluntarily consider certain onsite GHG impacts. This argument is unavailing because the Commission continues to insist it is not constitutionally required to evaluate GHG impacts and because the Commission's voluntary consideration omitted all reasonably foreseeable offsite GHG impacts.

Respondents also argue that the Commission only needs to evaluate the environmental impacts of the buildings proposed in PECO's Petition and may exclude the impacts of the operation of the gas distribution equipment associated with the buildings. This argument is without merit, because it contradicts this

Court's remand order requiring consideration of equipment-related impacts and ERA precedent concerning fiduciary duties and the need to consider reasonably foreseeable impacts. It also ignores the Commission's own positions in this proceeding relying on putatively beneficial equipment-related impacts (increased gas throughput to Delaware County) in finding approval of PECO's Petition to be in the public interest.

Finally, Respondents argue that the Commission does not need to consider reasonable alternatives to approving PECO's Petition, because doing so would cause the denial of safe and reliable service to ratepayers in violation of law. This argument cannot withstand scrutiny. Marple Citizens seek an evidence-based evaluation of the availability of reasonable alternatives, which would not require any unlawful denial of utility service. The Commission's ERA fiduciary duties require consideration of whether a reasonable lower-impact alternative is available.

ARGUMENT

I. MARPLE CITIZENS' REQUESTED REMEDIES ARE NARROWLY TAILORED AND REPRESENT MODEST STEPS TOWARDS SUSTAINABLE DEVELOPMENT

Marple Citizens' request to this Court is simple and amounts only to requiring the Commission to fully comply with this Court's decision in *Twp. of Marple v. Pennsylvania Pub. Util. Comm'n*, 294 A.3d 965 (Pa. Cmwlth. 2023)

("*Marple Twp*."). *Marple Twp.* directed the Commission to incorporate Article I, Section 27 into its statutory duties under Section 619.

However, the Commission, on remand, refused to analyze reasonably foreseeable GHG impacts of PECO's Section 619 petition. Nor did it evaluate a reasonable range of alternatives that could reduce reasonably foreseeable GHG impacts—information needed to make the public convenience and necessity determination under Section 619. Nor did the Commission fully acknowledge its public trust responsibilities under the ERA. In fact, as discussed in Marple Citizens' Brief, the Commission repeatedly took legal positions that denied and violated its constitutional trustee responsibilities. Marple Citizens' request for relief is based on these basic legal issues, Marple Citizens' Brief at 67-68 ("Br."), which stem directly from this Court's decision in *Marple Twp*. Contrary to Respondents' suggestion, *e.g.*, Commission Br. at 17-20, these legal issues are neither technically complex nor require deference to the Commission.

The briefs from the Commission, PECO, and amicus Energy Association of Pennsylvania ("EAP") (collectively "Respondents") would have this Court believe that Marple Citizens ask for more than stated in their request for relief. Marple Citizens do not ask this Court to make policy decisions about climate change that properly belong to the General Assembly. Commission Br. at 57-58; PECO Br. at

49-50. Rather, they ask this Court to order the Commission to apply its existing statutory authority under Section 619 consistently with the ERA to comply with *Marple Twp.*

Contrary to Respondents' contentions, Marple Citizens' request is consistent with the Commission's statutory mandate to provide reliable utility service, PECO Br. at 36-37, 46, 58, and is not an argument that Article I, Section 27 trumps "gas safety and reliability concerns." EAP Br. at 19. Analyzing GHG emissions and evaluating alternatives to determine which will reduce emissions and not impair reliability is not inconsistent with reliability, and nothing in the record indicates it is.

Marple Citizens are not using this proceeding to "attack the use of natural gas throughout the Commonwealth." PECO Br. at 3. The requested Court order here is narrow—an analysis of foreseeable GHG emissions arising from this *project*, which will unquestionably increase emissions, and reasonable alternatives to this *project* that could reduce those impacts. This has nothing to do with other projects presenting different facts.

Marple Citizens' requested relief is based on then-Chief Justice Castille's plurality opinion in *Robinson Township v. Commonwealth*, 83 A.3d 901, 958 (Pa. 2013) that the Article I, Section 27 duties to "conserve and maintain are tempered

by legitimate development tending to improve upon the lot of Pennsylvania's citizenry, with the evident goal of promoting sustainable development." *See also id*. at 958, 963, 978, 980-81 (explaining sustainable development as accomplishing economic development and environmental protection at the same time). It is true that Article I, Section 27 does not require "a freeze of the existing public natural resource stock." *Id.* at 958; PECO Br. at 7-8; *see also* Commission Br. at 21-22. But its text requires the Commonwealth, including the Commission, to protect environmental rights in the process of development.

Contrary to Respondents' exaggerated claims, Commission Br. at 46; EAP Br. at 10-11, the requested assessment and determination here are nothing like the extensive environmental impact statement required under federal law for major infrastructure projects. The requested GHG evaluation is limited to reasonably foreseeable GHG impacts *of this proposal*. The requested analysis of reasonable alternatives *to this proposal* with lower emissions is needed for the Commission to make its public convenience and necessity determination under Section 619.

II. THE ERA APPLIES TO GHG IMPACTS, AND THE COMMISSION, AS TRUSTEE, MUST CONSIDER SUCH IMPACTS.

A. Marple Citizens' Unrebutted Arguments Establish that Both Clauses of the ERA Are Implicated by GHG Emissions Affecting Climate.

Respondents did not rebut Marple Citizens' argument that Article I, Section 27 applies to GHG impacts. Br. at 19-26. They did not rebut Marple Citizens' argument that climate change driven by GHG impacts impairs the people's rights under the fundamental rights clause of the ERA, consistent with the holdings of the Hawai'i and Montana Supreme Courts under similar environmental rights amendments. *Id*. at 22 n.4, 24-25. In a footnote, PECO makes a conclusory assertion that the Hawai'i and Montana provisions "differ" from the ERA, but the only example PECO provides is a line from the Montana provision that requires consideration of "future generations." PECO Br. at 56, n.177. The ERA also requires consideration of "generations yet to come." Pa. Const. art. I, § 27.

Nor did Respondents rebut Marple Citizens' argument that the ERA's trusteeship clause applies to GHG impacts. Br. at 21-24. The Pennsylvania Supreme Court determined that a similar argument was substantial in reversing this Court in *Shirley v. Pa. Legis. Reference Bureau*, 318 A.3d 832 (Pa. 2024). Accordingly, this Court should apply the standard in *Shirley* to this case, holding that both clauses of Article I, Section 27 apply to GHG impacts.

B. Respondents Have Provided No Meaningful Argument that the Commission Is Not an ERA Trustee.

Marple Citizens argued that the Commission is an ERA trustee and must act in accordance with a trustee's fiduciary duties. Br. at 26-38. Respondents insist that individual agencies are not trustees, relying on overruled reasoning in *dicta* in *Funk v. Wolf*, 144 A.3d 228, 235 (Pa. Cmwlth. 2016), *aff'd without opinion* 158 A.3d 642 (2017) ("*Funk*"). Commission Br. at 22, 48-49; PECO Br. at 48-50. As Marple Citizens have previously explained, this is contradicted by subsequent precedent of the Pennsylvania Supreme Court and this Court. Br. at 27-32.

Moreover, not only is *Funk* no longer good law on the point regarding individual agencies not being trustees, it is also distinguishable. *Funk* involved the question of whether the requested relief could be obtained through a writ of mandamus or declaratory judgment. There was no holding on the rights and duties under the ERA. The *Funk* plaintiffs sought to compel the Commonwealth to conduct studies and enact regulations to address climate change unrelated to any specific statutory authorization. *Funk*, 144 A.3d at 237-39. With respect to mandamus, the Court held that it could not compel discretionary actions and concluded, "Petitioners point to no legislative enactments or regulatory provisions, and we have found none, that *mandate* Respondents to do any of the actions sought in the writ." *Id.* at 250 (emphasis added). The Court refused to grant declaratory

relief because, in the absence of a mandatory legal duty to do any of the requested actions, "doing so would require us to enter an advisory opinion." *Id.* at 251. In the present case, again, Section 619 provides the statutory authority and the ERA both limits that authority and guides how that statute should be construed.

III. THE COMMISSION'S APPROVAL OF THE PETITION VIOLATES THE ERA AND SECTION 619 BECAUSE THE COMMISSION FAILED TO CONSIDER REASONABLY FORESEEABLE GHG IMPACTS.

A. Because ERA Trustees Are Constitutionally Bound to Abide By Trust Law Principles, the ERA Requires the Scope of the Commission's Environmental Impact Review to be Defined By Reasonable Foreseeability.

Marple Citizens argued that the correct legal standard to apply to assessing the required scope of the Commission's environmental impact review in a Section 619 proceeding is reasonable foreseeability. Br. at 51. This is because (1) the Commission is an ERA trustee;[1] (2) the standard of care applicable to ERA trustees' decisions is defined by trust law principles;[2] and (3) well-established trust law principles require that trustees must act reasonably in "light of all of the facts and circumstances then existing or reasonably foreseeable[.]"[3] Br. at 51-52.

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[1] For further discussion, *see* Br. at 27-32.
[2] For further discussion, *see* Br. at 32-37.
[3] Quoting *In re Lerch's Est.*, 159 A.2d 506, 512 (Pa. 1960).

Respondents do not meaningfully rebut these arguments. Although Respondents disagree with Marple Citizens regarding what environmental impacts are properly considered to be reasonably foreseeable, they do not contest Marple Citizens' position that reasonable foreseeability is the standard to use in defining the scope of environmental impact review required by the ERA. On the contrary, Respondents themselves indicate that reasonableness is appropriate as a legal standard to guide the ERA's application to environmental impact review. Commission Br. at 22 (noting that when an agency acts, the ERA requires it to "reasonably account for the environmental features of the affected locale"); PECO Br. at 55 (using "the ERA's reasonableness standard" as a basis for argument).

Accordingly, this Court should confirm with a clear holding that because ERA trustees are bound by trust law principles, the required scope of a "constitutionally sound environmental impact review" under the ERA is reasonable foreseeability. *Marple Twp*., 294 A.3d at 975.

B. The ERA Requires that the Commission's Section 619 Environmental Impact Review Must Include GHG Impacts.

Marple Citizens argued that the ERA requires the Commission's environmental impact review for a Section 619 Petition to include an evaluation of the GHG impacts of approving the Petition. Br. at 51-57. This is because the ERA applies to climate change, and as the Commonwealth has recognized in its own

official findings, climate change is driven by GHG emissions and poses a severe threat to the Commonwealth's environment. Br. at 19-26.

Respondents argue that the ERA does not require the Commission to include GHG impacts in its environmental impact review for PECO's Petition. Notably, the Commission's order under review here states that it does not have an "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." Opinion and Order, Docket No. P-2021-3024328, at 63 (Sept. 26, 2024) ("Sept. 2024 Opinion and Order"). The Commission's Brief repeats this conclusory assertion, stating that Marple Citizens' argument that the Commission must consider GHG impacts as part of environmental review for a Section 619 petition is "without merit." Commission Br. at 50.

While the Commission makes its bottom-line legal conclusion clear, it provides no reasoning to defend this conclusion. Instead, the Commission simply devotes several pages of its brief to describing how it voluntarily considered certain evidence relating to GHG impacts. Commission Br. at 50-56. This material is not responsive to the question on appeal regarding whether the ERA *requires* the Commission to consider GHG impacts in its environmental impact review for a Section 619 petition.

PECO's Brief similarly provides no actual defense of the Commission's legal assertion that the ERA does not require it to consider GHG impacts in a Section 619 proceeding. Instead, PECO argues that the Commission did not say what it said below. PECO argues that what the Commission *really* meant was only that in the subset of Section 619 proceedings where the proposed buildings are not themselves sources of GHG emissions, the Commission need not study GHG impacts. PECO Br. at 47. Then PECO, like the Commission, immediately pivots to filling pages with description of how the Commission voluntarily considered GHG impacts, which is not responsive to the question of whether the ERA requires the Commission to do so.

While creative, PECO's attempt at *post hoc* rationalization is defied by the plain text of the Commission's insistence that it has no constitutional obligation to consider GHG in Section 619 proceedings, period. But even more fatally for PECO's attempt to rewrite the Commission's legal position below, the Commission, as noted above, has itself reaffirmed the categorical position it took below that the ERA does not require it to consider GHG impacts in a Section 619 proceeding. Commission Br. at 50. Since it is the Commission, and not PECO, that issued the Sept. 2024 Opinion and Order, it is the Commission's legal positions that are the subject of this appeal.

This Court should provide a clear holding rejecting the Commission's legal position that the ERA does not require it to consider GHG impacts in a Section 619 review. Although the Commission voluntarily elected to consider certain evidence related to *some* GHG impacts of granting PECO's petition without altering its legal stance that the ERA does not require it, this does not shield the Commission's legal position and voluntary actions from judicial review. A purely voluntary paradigm compromises what constitutional rights mean, and the rights and duties under the ERA are fundamental. Such fundamental constitutional rights and duties cannot be left to the whims of administrative agencies.

C. The ERA Requires that the Scope of the Commission's Review of the GHG Impacts of Granting PECO's Petition Include Any Reasonably Foreseeable GHG Impacts, Whether Occurring On the Site of Proposed Buildings or Offsite.

Marple Citizens argued that the standard for the scope of the Commission's environmental impact review is reasonable foreseeability, and that the Commission's environmental impact review must include GHG impacts. It follows that the correct legal rule is that the Commission's environmental impact review must include any GHG impacts of approving PECO's Petition that are reasonably foreseeable, either within or outside of the Station's property lines. Br. at 54-58.

The Respondents' counterarguments can be grouped into two categories. First, Respondents argue that in an environmental impact review for a Section 619

petition, the Commission is required to consider only the GHG impacts of constructing the proposed buildings, and is not required to consider *any* reasonably foreseeable GHG impacts arising from the operation of gas distribution equipment associated with the buildings. Commission Br. at 54.

Second, Respondents argue that the Commission, as a matter of law, is not required by the ERA to review reasonably foreseeable *offsite* GHG impacts from the operation of equipment associated with the buildings for its intended purpose of increasing gas throughput in the immediate vicinity. Commission Br. at 54-55; PECO Br. at 54. According to Respondents, a Section 619 constitutional environmental review is strictly about the proposed buildings and any potential offsite impacts from gas distribution equipment associated with the buildings are out of scope. Respondents argue further that requiring consideration of reasonably foreseeable offsite GHG impacts from the operation of the buildings' equipment would be unsupported by precedent and would be unworkable because any such analysis would be infeasible. Commission Br. at 52; PECO Br. at 54. These arguments are wrong.

1. Reasonably Foreseeable Onsite GHG Impacts

Respondents' arguments are inconsistent with the law. As an ERA trustee, subject to fiduciary duties under trust law, the Commission is constitutionally

required to consider any reasonably foreseeable impacts of its actions on the environmental trust. Br. at 52. In a Section 619 proceeding, the Commission is petitioned by a utility to override a municipality's zoning disapproval to enable the construction of a building desired by the utility for use in providing utility service. If an environmental impact of granting such a petition is reasonably foreseeable, under constitutional trust law principles, the Commission as trustee must consider it, whether such an impact arises from the erection of the buildings themselves or from gas distribution equipment associated with the buildings.

This Court has also specifically ruled that a constitutionally sound environmental impact review for a Section 619 petition must include environmental impacts arising from equipment operation associated with the buildings at issue, not simply from the placement of the buildings themselves. As this Court expressly instructed, a constitutionally sound environmental impact review for PECO's Petition must include analysis of explosion risk, noise, and air emissions, all of which result from the operation of equipment associated with the buildings rather than from the buildings themselves. *Marple Twp*., 294 A.3d at 973.

More specifically, as Marple Citizens argued, the ERA requires consideration of GHG impacts, and there is no principled way to exclude GHG impacts (a type of air emission) from this Court's ruling that the Commission's

constitutionally sound environmental impact review must include air emissions. Br. at 40-41.

2. Reasonably Foreseeable Offsite GHG Impacts

Respondents also rely on their proposed 'equipment exclusion rule' to argue that, as a matter of law, the Commission is not required by the ERA to consider the reasonably foreseeable offsite GHG impacts of granting a Section 619 petition that would result from the operation of equipment enabled by the buildings at issue. For the reasons explained above, this argument is unavailing for GHG impacts of any kind, whether onsite or offsite.

Respondents' entire case is based on the proposition that offsite reliability impacts of gas distribution equipment enabled by buildings proposed by a utility in a Section 619 proceeding must be considered by the Commission when determining whether the utility's Section 619 petition is in the public interest. In this case, as Marple Citizens noted in their Brief, the Commission devoted substantial attention in its order below to its findings that granting PECO's Petition to construct its proposed buildings would enable the operation of gas distribution equipment that would increase gas throughput in the area around the Station, which the Commission concluded would be beneficial. Br. at 55.

There is no lawful basis for the Commission to maintain that while offsite economic benefits (alleged reliability benefits) from the operation of gas distribution equipment associated with a building proposed in a Section 619 petition are properly considered, offsite GHG impacts that also result from the operation of that same equipment are out of scope because a Section 619 proceeding is confined to evaluating impacts of the buildings, not their equipment. The Commission, as an ERA trustee, must be faithful to the principles of sustainable development articulated by the Pennsylvania Supreme Court to guide the application of the ERA, considering both the economic and environmental impacts of an agency action. It cannot lawfully 'stack the deck' in favor of economic factors by excluding environmental considerations. *Robinson Twp.*, 83 A.3d 901, 958, 963, 978, 980-81 (Pa. 2013).

Requiring that the Commission consider offsite GHG impacts alongside offsite reliability benefits it is already considering is not only consistent with ERA principles of sustainable development; it is fully consistent with ERA case law. The Commission cites this Court's 1975 decision in *Cmty. Coll. of Delaware Cnty. v. Fox* ("*Fox*") for the proposition that an ERA trustee does not need to consider "downstream" future impacts of its action. Commission Br. at 52, *citing* 342 A.2d 468, 482 (Pa. Cmwlth. 1975). The Commission concedes, in a footnote, that this

case relied on the overruled *Payne v. Kassab* test, but claims that a plurality of the Pennsylvania Supreme Court in the *Robinson* decision "favorably viewed this decision's result." Commission Br. at 52; *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973). As evidence for this claim, the Commission quotes from footnote 53 of the *Robinson* decision, in which the plurality states that "the Commonwealth Court's conclusions [in *Fox*] that the Amendment limits rather than expands executive agency authority, and that executive agency authority to act is limited by its enabling legislation, are certainly reasonable." *Robinson Twp.*, 83 A.3d at 967, n. 53.[4]

These "conclusions" of the *Fox* court are both basic principles of administrative law, and the *Robinson* plurality's agreement with those conclusions is not particularly notable. It is certainly not the equivalent of endorsing the "result" of the *Fox* decision, as the Commission claims. Commission Br. at 52 n.142. In fact, the *Robinson* plurality specifically rejects the *Fox* decision's refusal to engage with long-term environmental impacts. As the *Robinson* plurality states, "[t]he Environmental Rights Amendment offers protection equally against actions

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[4] *See* Marple Citizens' Br. at 22. *See also* John C. Dernbach & Robert B. McKinstry, Jr., *Agency Statutory Authority and the Pennsylvania Environmental Rights Amendment*, 37 Georgetown Envtl. L.R. 1 (2025).

with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term." *Robinson Twp.*, 83 A.3d at 959. In a footnote to this statement, the *Robinson* plurality specifically criticizes the *Fox* decision as an example of the kind of "inevitable bias toward present consumption of public resources by the current generation, reinforced by a political process characterized by limited terms of office" that an ERA trustee "should be aware of and attempt to compensate for." *Id.* at n.46.

Importantly, the *Fox* case was decided before the Pennsylvania Supreme Court revitalized the ERA by discarding the *Payne v. Kassab* test and taking the ERA seriously as constitutional law. As part of this, the Pennsylvania Supreme Court, first in a plurality opinion in *Robinson* and subsequently in a full majority in *PEDF II*, confirmed that ERA trustees must abide by trust law principles, including a duty of prudence that requires evaluating environmental impacts of agency actions on future generations. *Robinson Twp.,* 83 A.3d at 967; *Pa. Env't Def. Found. v. Commonwealth,* 161 A.3d 911, 936 (Pa. 2017) ("*PEDF II*") (requiring agency action "in strict accordance and fidelity to Pennsylvania trust principles"). As noted above, the *Robinson* plurality used the *Fox* case as an example of 'what

not to do' in this regard. Such willful blindness to the future violates an ERA trustee's fiduciary duties, including duties to future generations.

Finally, PECO contends that it would be "inherently unworkable" for the Commission to be required by the ERA to consider the reasonably foreseeable offsite GHG impacts of granting a Section 619 Petition because any such impacts would be impossible to calculate. PECO Br. at 54. This contention misses the mark. PECO's claim that such analysis is impossible is an assertion of fact, rather than law. *Id*.

The correct legal rule here is reasonable foreseeability. Whether or not offsite GHG impacts of a particular project can be meaningfully projected is an issue of fact. It is not something PECO can simply announce in an appellate brief as the truth for all circumstances.

PECO's assertions are also belied by record evidence reflecting that the Commonwealth has demonstrated its capabilities for projecting GHG emissions from the use of gas by residents. In the 2021 Pennsylvania Climate Action Plan ("CAP"), the Commonwealth develops GHG projections for the use of gas in buildings in Pennsylvania. (R. 1706a.) While additional steps would be required to develop projections specific to Delaware County, this contradicts PECO's

contention that projecting GHG emissions from gas use is, as a matter of law, "inherently unworkable." PECO Br. at 54.

Additionally, as the D.C. Circuit has recognized, the Federal Energy Regulatory Commission ("FERC") has demonstrated that it is possible to develop GHG impact projections from the delivery of gas to customers of a local gas distribution utility in a particular area. In *Food & Water Watch v. FERC,* 104 F.4th 336, 341-2 (D.C. Cir. 2024) ("*FWW v. FERC*"), the project at issue was an interstate gas transmission pipeline designed to deliver gas to local gas distribution utility ConEd to be distributed to end-users in Westchester County, New York. In this case, FERC did determine that GHG impacts were reasonably foreseeable and did quantify the "downstream" GHG impacts of gas delivered to end-users. *Id*. at 346. This Court should therefore reject PECO's conclusory argument that it is, as a matter of law, impossible to do so.

D. Onsite and Offsite GHG Impacts of the Commission Approving PECO's Petition are Reasonably Foreseeable.

Marple Citizens argued that it is reasonably foreseeable that approval of PECO's Petition will lead to increased GHG impacts because the express purpose of the Station is to inject increased gas supply into the gas distribution grid in Marple Township for combustion by PECO customers in Delaware County. Br. at 54. PECO's own testimony and filings explain this purpose clearly. PECO Br. at

16-17; (Lewis Direct, R. 372a). Marple Citizens also submitted expert testimony concluding that this will generate GHG impacts because a portion of the gas will leak along the way, leading to GHG emissions, and gas that does not leak will be combusted on arrival by end-users to generate energy, leading to GHG emissions. (Najjar Direct, R. 2133-34a; Schmid Rebuttal, R. 2922-24a). Since the purpose of the Station is to increase gas supply, and either of these two outcomes for such increased gas throughput, leakage or combustion, result in GHG impacts, it is reasonable to foresee that approval of PECO's Petition will result in increased GHG impacts in Delaware County.

Respondents argue that offsite GHG impacts of the Station are not reasonably foreseeable because any increased combustion or leakage of the gas conveyed by the Station is "remote" (Commission Br. at 54) and "speculative" (PECO Br. at 45). Respondents also claim that Dr. Najjar's testimony that gas conveyed by the Station would either leak or be combusted, thus generating GHG emissions, should be discounted because the ALJ determined it lacked credibility. Commission Br. at 54; PECO Br. at 53. PECO cites National Environmental Policy Act ("NEPA") case law in support of this position to the effect that "GHG emissions from a broad array of end-users over a wide geographic area are *not* 'reasonably foreseeable' because both the end-users and the specific uses of the

natural gas were not identified with particularity." PECO Br. at 56. These contentions are incorrect.

First, the prospect that increased gas supply injected into the gas distribution grid in Marple Township for use by customers in Delaware County will generate GHG impacts through leakage or combustion is neither "remote" nor "speculative." Commission Br. at 54; PECO Br. at 45. The record is clear that the Station's purpose is to increase gas supply. PECO's witness explained the location of the Station was selected because "Lawrence and Sproul Roads in Marple Township was an ideal location to direct the increased supply of natural gas." (Lewis Direct, R. 372a). PECO's Petition asserted "[t]he construction of the Gas Reliability Station will support the public interest by providing an adequate, safe and reliable supply of natural gas to Delaware County to meet growing demand. In the absence of these necessary upgrades, the natural gas system in Delaware County will become constrained no later than some point within the next 10 years. The resulting capacity limits will interfere with the reliability of natural gas service to existing customers and will prohibit new customers from connecting to the system." (R. 20a). PECO thus admitted that the Station's purpose is to increase gas throughput, and in the absence of the Station, *new* customers will not be able to

connect to the gas distribution grid, leading to less gas consumption and use than if they were able to connect.

Second, the record is clear that when gas is injected into a local distribution grid, that gas generates GHG impacts through leaking in transit or through combustion by an end-user. (Schmid Direct, R. 2083a; Najjar Direct, R. 2133a). Gas that is combusted results in carbon dioxide emissions, the most common GHG, and gas that leaks in transit results in methane emissions, a more potent GHG. Dr. Schmid and Dr. Najjar are independent sources of authority on this point. *Id*.

While Respondents seek to distort the record regarding Dr. Najjar's testimony, as discussed below, Respondents do not contest Dr. Schmid's testimony that the increased gas throughput conveyed by the Station will cause GHG impacts in the form of carbon dioxide and methane emissions. (Schmid Direct, R. 2081a-83a). The existence of such impacts is reasonably foreseeable. That is all Marple Citizens need to demonstrate, and Dr. Schmid's unrebutted and unquestioned testimony alone is sufficient for that purpose.

Still, notwithstanding the Respondents' distortions, Dr. Najjar provides a second source of authority for the same point. The Commission contends that Dr. Najjar's testimony that it is reasonably foreseeable that the Station would increase

GHG impacts should be disregarded because the ALJ "rejected" Dr. Najjar's testimony on this point as "speculative" and based only on "common sense" rather than expertise. Commission Br. at 54. In support, the Commission cites three pages of the evidentiary hearing transcript. Commission Br. at 54 (citing R. 3461-62a, 3465a).

The Commission is wrong. The cited transcript pages contain cross-examination of Dr. Najjar regarding a different portion of testimony, addressing the potential role of heat pumps in avoiding gas use. (R. 3461-62a, 3465a). The cited transcript pages do not reflect any 'rejection' of Dr. Najjar's testimony on heat pumps by the ALJ, but presumably the Commission is referring to the Amended Initial Decision ("AID"), in which the ALJ determined that Dr. Najjar's testimony on heat pumps was "speculative" because he stated that his conclusion that Delaware County residents would respond to new federal incentives for electrification was based on "common sense." (R. 4062a).

Notably, the ALJ did not reject or otherwise criticize Dr. Najjar's testimony that when gas is pumped into the gas distribution system, it leaks or is combusted, resulting in increased GHG emissions. Dr. Najjar's testimony on this point was not rebutted by any testimony from PECO or otherwise contradicted by any record evidence.

PECO makes a similar claim to the Commission, arguing that Dr. Najjar's testimony that the Station could be reasonably expected to increase GHG impacts was rejected by the Commission due to the ALJ's determination that it was "speculative" and based on "common sense." PECO Br. at 53; citing Sept. 2024 Opinion and Order, at 67-68.

Yet PECO's argument must fail because the Commission's Sept. 2024 Opinion and Order makes the same error as the Commission's Brief in this appeal. In its Sept. 2024 Opinion and Order, the Commission cites precisely the same set of transcript pages (R. 3461-62a, 3465a) and claims that these transcript pages demonstrate that Dr. Najjar's testimony on GHG impacts from gas leakage and combustion is "speculative" and based only on "common sense." Sept. 2024 Opinion and Order, at 67-68. As noted above, these transcript pages concern only Dr. Najjar's testimony on the role of heat pumps in avoiding gas use, not his testimony that gas leakage and combustion result in GHG impacts.

The Commission's Sept. 2024 Opinion and Order states that it "agree[s]" with the finding of the ALJ that Dr. Najjar's testimony on gas leakage and combustion lacks "credibility," but the ALJ made no such determination in the AID. Sept. 2024 Opinion and Order, at 68. Moreover, as noted above, no party

rebutted Dr. Najjar's testimony that increased gas supply injected into a gas distribution system will be combusted or leak, generating GHG impacts either way.

In sum, Respondents have strained to make simple facts seem complex and confusing. PECO's own filings establish that the purpose of the Station is to inject increased gas supply into the gas distribution grid in Marple Township for use by end-users in Delaware County. The only additional evidentiary step the Marple Citizens need to establish is the fate of that increased gas throughput. It is not a large or complicated factual leap to fill in the blank with testimony explaining that when gas is pumped into a local gas distribution system it causes GHG impacts when it is either combusted by end-users or leaks in transit. No party actually rebutted Dr. Schmid's or Dr. Najjar's testimony to this fact. Dr. Schmid's testimony alone is sufficient for this purpose, and Dr. Najjar, when the clutter attacking his credibility on other points is cleared away, adds another source of authority.

Thus, this Court should recognize that Marple Citizens have met their burden of showing that it is reasonably foreseeable that granting PECO's Petition will result in offsite GHG impacts, triggering the Commission's obligation, as an ERA trustee, to include analysis of those GHG impacts in a constitutionally sound environmental impact review.

PECO, however, mounts a final line of defense, citing two NEPA cases for the point that when gas is conveyed "over a wide geographic area" to a "broad array of end-users," any resulting GHG impacts are not reasonably foreseeable, arguing this means that any offsite GHG impacts in this case are not reasonably foreseeable. PECO Br. at 56. These cases do not support PECO's desired conclusion. In fact, the first, *FWW v. FERC*, discussed *supra*, suggests the opposite conclusion. That case concerned an interstate gas transmission pipeline delivering gas to local gas distribution utility ConEd for distribution to customers in Westchester County, New York. 104 F.4th at 341-2. As noted above, FERC concluded that GHG impacts from customer use of the gas were reasonably foreseeable, and it did quantify such "downstream" GHG impacts. 104 F.4th at 346.

In the second case, *Delaware Riverkeeper v. FERC* ("*DRN v. FERC*"), the project at issue was an interstate gas transmission pipeline without specified end-users, constructed to serve interstate market opportunities as they emerged. 45 F.4th 104, 107 (D.C. Cir. 2022). In this case, FERC did not develop a quantification of GHG impacts, and its decision not to do so was upheld. The court concluded that GHG impacts were not reasonably foreseeable because the destination and end users of the gas were unknown. *Id*. at 109-11.

Contrary to PECO's contention, these two cases, taken together, support Marple Citizens' position. Here, PECO's gas infrastructure project has specified end users: PECO customers in Delaware County. This is similar to *FWW v. FERC*, in which the gas pipeline was constructed to transmit gas to ConEd customers in Westchester County. In that case, FERC concluded that GHG impacts from combustion by ConEd customers were reasonably foreseeable, and did complete a quantification of such projected GHG impacts. *FWW v. FERC*, 104 F.4th at 346.

The case for the reasonable foreseeability of GHG impacts from customer combustion in Delaware County is even stronger, since the gas is not being carried hundreds of miles on the interstate gas transmission system from its source to the county where it is to be used. The Station is itself located in the very same county where the gas will be used, and the gas will likely be combusted by end-users in close proximity to the Station. This case is thus distinguishable from *DRN v. FERC*, in which no information was available about where or when the gas would be combusted. 45 F.4th at 109-11.

E. Respondents Have Not Rebutted Marple Citizens' Argument that the Commission, as an ERA Trustee, Bears the Duty to Conduct a Constitutionally Sound Environmental Impact Review, Not Marple Citizens.

Marple Citizens argued that, based on trust law principles and this Court's remand order, the Commission, not Marple Citizens, bears the duty to conduct a

constitutionally sound environmental impact review. Br. at 60-61. Respondents argue that any inadequacy or limitation of the Commission's environmental impact review relating to GHG impacts is the fault of Marple Citizens for not doing what the Commission is constitutionally required to do. PECO Br. at 53; Commission Br. at 55-56.

However, Respondents do not meaningfully respond to Marple Citizens' arguments in their Brief. Notably, Respondents' position is also directly contradicted by this Court's remand order that "a Section 619 proceeding is constitutionally inadequate *unless the Commission completes* an appropriately thorough environmental review[.]" *Marple Twp*., 294 A.3d at 974 (emphasis supplied).

IV. THE COMMISSION'S APPROVAL OF THE PETITION VIOLATES THE ERA AND SECTION 619 BECAUSE THE COMMISSION FAILED TO CONSIDER ALTERNATIVES THAT COULD REDUCE REASONABLY FORESEEABLE GHG IMPACTS.

Marple Citizens argued that, to be consistent with Section 619 and the ERA, the Commission's environmental impact review must include consideration of alternatives to PECO's proposal that could reduce reasonably foreseeable GHG impacts. Br. at 61-67. This is because Section 619 requires a determination of whether approval of the Petition is reasonably necessary for the public interest, which includes the environment, and a determination of necessity cannot be made

without an analysis of reasonable alternatives. Br. at 61-63. It is also because of the Commission's constitutional duties arising under the trusteeship and fundamental rights clauses of the ERA. Br. at 63-64. This conclusion is independent of, but consistent with, NEPA jurisprudence, which has long held that evaluation of alternatives is essential to meaningful environmental impact review. Br. at 64-65.

The Commission's Brief contains no argument opposing Marple Citizens' arguments concerning the requirement that the Commission study alternatives. Only PECO's Brief makes opposing arguments. First, PECO argues that if the Commission were to adopt Marple Citizens' proposal to consider whether any lower-impact alternatives are feasible, this would automatically cause the Commission to deny safe and reliable utility service to customers, contrary to the Public Utility Code. Second, PECO contends that if the Commission were to consider lower-impact alternatives, this would result in the Commission making climate change policy that would exceed the Commission's powers under Section 619. Third, PECO closes with a "grab-bag" paragraph, conclusorily asserting that consideration of lower-impact alternatives would force the Commission to invent a new climate change action plan inconsistent with the CAP and to rely on "speculative" testimony from Dr. Najjar. PECO Br. at 58-60.

PECO's contentions lack merit. First, the Commission can consider lower-impact alternatives without automatically denying customers safe and reliable utility service. As Marple Citizens have previously explained, the Commission must conduct a fact-based inquiry into whether there are reasonable alternatives to PECO's proposal that meet public needs but have lower GHG impacts. Br. at 65-67. Such consideration does not in any way require that customers be denied safe and reliable utility service.

Second, it is incorrect to argue that evaluating the availability of lower-impact alternatives equates to promulgating a climate change policy. The Commission has a constitutional duty to ensure that when it acts, it avoids unnecessary harm to the environment. This is not the same as setting plenary statewide policy on climate. It is also important to remember that when the General Assembly unanimously adopted, and the Pennsylvania voters overwhelmingly ratified, the ERA, this constitutionalized a public policy requiring that all ERA trustees act prudently to avoid contributing to environmental harms wherever possible. The Commission is not free to invent its own policy of refusing to examine whether there are means of lowering the environmental harms of its actions in defiance of this binding constitutional policy.

Third, PECO is wrong to argue that if the Commission were to examine reasonable lower-impact alternatives to PECO's proposal, this would amount to creating a climate action plan conflicting with the Commonwealth's CAP. The Commission's evaluation of reasonable means to reduce the GHG impacts of a particular action is not the same as developing statewide climate policy for all sectors and all GHG emissions. Moreover, as Marple Citizens argue, the CAP and applicable executive orders instruct and encourage Commonwealth agencies to identify means of reducing GHG impacts where feasible. Br. at 11-12, 25. The Commission's consideration of reasonable alternatives with lower GHG impacts is fully consistent with those authorities.

Fourth, PECO is also wrong to argue that any evaluation of lower-impact alternatives means automatically relying on a portion of Dr. Najjar's testimony that the Commission deemed speculative. As explained above, the Commission, as ERA trustee, has a constitutional duty to complete a sound environmental impact review, including investigation of whether lower-impact alternatives are feasible. It is the Commission's responsibility to provide a reasoned, fact-based explanation why such alternatives are or are not reasonably available. The Commission cannot offload this duty onto trust beneficiaries, point to alleged deficiencies or gaps in

testimony presented by trust beneficiaries, and then refuse to further evaluate whether lower-impact alternatives are possible.

V. Conclusion.

For the reasons explained above and in Marple Citizens' Main Brief, this Court should grant the relief requested by Marple Citizens.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Pennsylvania Rule of Appellate Procedure 2135 because this brief contains 6,805 words, excluding the Supplementary Matter exempted by Pa.R.A.P. 2135(b).

I further certify that this filing complies with the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania as set forth in Pa.R.A.P. 127.

Dated: May 19, 2025

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