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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 PETITIONER TOWNSHIP OF MARPLE

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I. SUMMARY OF THE REPLY

The Commission erred a second time in this matter by failing to consider the entire gas reliability station when it issued its amended decision. The Commonwealth Court remanded this matter so that consideration could be given to environmental health issues such as emissions, health and safety concerns which must include an evaluation of the station as a whole. The Commission and PECO continue to maintain that consideration need only be given to the structure of the buildings themselves, and that the heater and generator are beyond the scope of the proceedings.

The Del-AWARE Unlimited case, citing throughout these proceedings, analyzes the siting of the entire pumphouse and not simply the buildings encasing them. Specifically, the Court considered the question of whether the *construction of facilities* related to the nuclear generating station was reasonably necessary for the convenience or welfare of the public.

Again, the Commission deferred to "illusory" agency determinations when issuing its amended decision. Not a single agency made a determination applicable to the environmental impact of the gas reliability station at issue in this matter.

The O'Connor and Del-AWARE Unlimited decisions tell us specifically what agency determinations must be given deference in Section 619 proceedings.

An agency determination, much like its name suggests, requires that findings and determinations be made by an agency authorized to do so.

There were no agency determinations for the Commission to defer to in this matter. The mere existence of a rule, policy or standard does not make it an agency determination like that referred to in the Del-AWARE Unlimited and O'Connor cases.

The Commission's decision failed to account for the local community and surroundings as mandated in the Supreme Court's decision in Robinson Township. Reliance upon statewide permit exemptions and emissions standards does not account for the local surroundings of the gas reliability station. These requirements would be the same regardless of where PECO sited the facility across Pennsylvania. A proper environmental review must account for the location of the Project itself.

Finally, while the Commission and PECO maintain that PECO need not choose the best possible site, they continue to argue that the environmental impact on the community was not less at the alternate site compared to the proposed location. This is simply untrue. A look at Mr. Harrington's expert report shows that five out of six of the modelled emissions were less at the alternate site.

II. REPLY ARGUMENT

a. The Commission was obligated to determine the reasonable necessity for the proposed site of the gas reliability station while factoring in a Constitutionally sound environmental impact review

The Commission failed to consider the entire gas reliability station in issuing its amended decision. The amended initial decision by the ALJ, the decision of the Commission and the briefs of PECO and the Commission all state that the environmental impact review mandated by the Commonwealth Court was to consider nothing more than the two buildings. While the Commonwealth Court remanded this matter so that consideration could be given to environmental health issues such as emissions, health and safety concerns, the Commission and PECO maintain that the only relevant evaluation is that of the buildings themselves which is opposition to the opinion in Del-AWARE Unlimited.

Specifically, in its September 26, 2024, Opinion and Order ("Sept. 2024 Opinion") the Commission noted PECO's argument that the heater and generator are located outside the building and therefore beyond the scope of the proceedings even though this Court specifically instructed otherwise. *Sept. 2024 Opinion*, p. 14. Believing this argument, the Commission opined that the emissions sources are the line heater and emergency generator and are not subject to siting regulation by the Commission and therefore not relevant in this proceeding. *Id.*, p. 18.

The commission further said that the ALJ only allowed evidence of emissions "out of an abundance of caution". *Sept. 2024 Decision*, p. 18. The Commission's position is frankly insulting, implying that the Commonwealth Court was not sure where the equipment was located in remanding this case for further proceedings. *Id.*, p. 41.

The Del-AWARE Unlimited case has been cited many times throughout these proceedings. It is this case that discusses the analysis of the entire pumphouse and not simply the buildings encasing them. The Commonwealth Court notes that it does not interpret Section 619 as requiring the Commission to reevaluate the entire project but that it does direct the Commission to "determine whether the *site* of the Bradshaw pumphouse is appropriate to further the public interest." Del-AWARE Unlimited, Inc. v. Pennsylvania Public Utility Com., 513 A.2d 593, 595 (Pa. Cmwlth. Ct. 1986).

The very first sentence in the Del-AWARE case is as follows:

> Once again, we must consider and dispose of a challenge to the construction of facilities to supply water for cooling a nuclear generating station in Limerick, Montgomery County…

Id., at 594. Put differently, the Court considered whether the construction of facilities to supply water for cooling a nuclear generating station was reasonably necessary for the convenience or welfare of the public.

The Commission's failure to analyze the siting of the gas reliability station while considering the environmental impact of the station renders its decision again unconstitutional.

b. The Commission relied upon nonexistent agency determinations

This notion of deference to agency determinations began with the ALJ's Initial Decision in this matter. In maintaining that the Commission need not consider environmental and safety factors, the ALJ found in the Initial Decision (I.D.), at conclusion of law number 5, the following:

> The Commission is not empowered under Section 619 of the MPC to evaluate the various aspects of the environmental impact of a project and, instead, is obliged to defer to the determinations of those agencies with jurisdiction over such impacts. *O'Connor v. Pa. Pub. Util. Comm'n*, 582 A.2d 427 (Pa. Cmwlth. 1990).

I.D. p. 29; RR 1977a.

In the Commission's March 10, 2022 Opinion and Order (the "March 2022 Opinion"), the Commission adopted this argument, stating:

> While the Commission is not empowered under Section 619 of the MPC to evaluate the various aspects of the environmental impact of a project, it defers to the determinations of those agencies with jurisdiction over such environmental impacts, including the Pennsylvania Department of Environmental Protection (DEP). *O'Connor*, 582 A.2d at 431.

March 2022 Opinion, p. 44; RR 2022a.

The O'Connor decision compares a decision by the Pennsylvania Historical Commission to the agency determination made by the Pennsylvania Department of Environmental Resources (DER) in the Del-AWARE Unlimited case. The Court in

O'Connor differentiated the determination of the Historical Commission with the agency determination of the DER in Del-AWARE Unlimited because the DER is statutorily authorized to make findings and determinations regarding environmental impact. O'Connor v. Pennsylvania Public Utility Com., 582 A.2d 427, 431 (Pa. Cmwlth. Ct. 1990).

A determination by an agency is decision reviewable by the Commonwealth Court. The Commonwealth Court will affirm an agency determination unless the determination is arbitrary and capricious, an abuse of discretion, or contrary to law. Bureau Veritas N. Am., Inc. v. DOT, 127 A.3d 871, 873 (Pa. Cmwlth. Ct. 2015).

The Department of Environmental Protection's standard exemptions for the line heater and emergency generator are not "agency determinations." Nearly all Pennsylvania agencies have their own rules, policies and standards. The existence of a rule, policy or standard does not make it an agency determination like that referred to in the Del-AWARE Unlimited and O'Connor cases.

It was noted in Del-AWARE Unlimited that many of the environmental impacts were reviewed by the Department of Environmental Resources (DER) and upheld by the Environmental Hearing Board (EHB). Del-AWARE Unlimited, supra. at 596.

Marple Township submits that the Commonwealth Court intended for the Commission to defer to agency determinations like that of the DER and EHB in Del-AWARE Unlimited – that being, findings and determinations regarding environmental impact when it issued its amended decision, something that the Commission failed to do and therefore failed to follow the directive given by the Commonwealth Court.

c. An environmental impact review must take into consideration all of the immediate surroundings and the location of the site for the station

Immediately surrounding the proposed location for the gas reliability station are neighborhoods, homes, a restaurant and outdoor seating. To quote Robinson Township again:

> 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).

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).

The major items relied upon by the Commission – permit requirements, permit exemptions, NAAQs, and certificates of conformity – are regulations that apply statewide. These requirements would be the same regardless of where PECO sited the facility across Pennsylvania. This is the very reason that the site of 2090 Sproul Road cannot be properly vetted from an environmental impact review standpoint without taking into account the immediate area and population surrounding the site. A proper environmental review must account for the location of the Project itself.

For instance, it is unacceptable for PECO's emissions expert to not have considered leaks in his analysis when its safety and risk expert identified leaks as the most likely concern with the station. RR 4035a. Mr. Harrington did not factor in leaks such as methane and other impurities simply because there are no national air quality standards for those pollutants. RR 3643a. Here is why the simple application of the NAAQs is not sufficient for the environmental impact review of a project like this which must account for the location itself. Likewise, the Commission's acceptance of this was error.

d. The evidence does prove that the emissions are less harmful to the community at the alternate site

The Commission's decision and respondents' briefs argue that Dr. McAuley's emissions findings for the alternate location cannot be credible because he used the wrong output amount and therefore the results are lower than they should be. However, Harrington's testing, who the Commission credited for using the correct output amount, shows 5 of the 6 modeled pollutants lower at the alternate site than at the proposed site (RR 3002a-3003a, tables 4-3 and 4-4).

While the Commission and PECO return to the argument that evidence of an alternate location is not enough *in and of itself* to discredit the selection of a site, they continue to argue that there is no evidence that emissions were less at the alternate location. *Sept. 2024 Opinion*, p. 42. This is simply untrue. The evidence of this comes from PECO's own emissions expert. The results clearly showed that there would be less environmental impact to the surrounding neighborhoods by placing the station at the alternate location rather than at 2090 Sproul Road. (RR 3002a-3003a, tables 4-3 and 4-4).

III. CONCLUSION

For all of the foregoing reasons, the Township of Marple respectfully request this Honorable Court reverse the Commission's ruling.

Respectfully submitted,

McNICHOL, BYRNE & MATLAWSKI, P.C.:

By: /s/ J. Adam Matlawski, Esquire
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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
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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
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Township of Marple,	:	**CASES CONSOLIDATED**
	:	
Petitioner	:	No. 1385 C.D. 2024
	:	
v	:	
	:	
Pennsylvania Public Utility Commission,	:	
	:	
Respondent	:	
	:	
Theodore Uhlman and Julie Baker	:	No. 1423 CD 2024
	:	
Petitioners	:	Petitions for Review of the Opinion and Order of the Pennsylvania Public Utility Commission entered September 26, 2024 in Docket No. P-2021-3024328
	:	
v	:	
	:	
Pennsylvania Public Utility Commission	:	
	:	
Respondent	:	

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PROOF OF SERVICE

I, J. Adam Matlawski, hereby certify that on May 19, 2025, I served the Reply Brief of Petitioner, Marple Township, within the above-captioned matter upon the following via E-Mail which satisfies the requirements of Pa. R.A.P. 121(b):

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