

Marple Township v. PUC

Commonwealth Court, en banc

March 9, 2023 (Reargument denied 4/25/23)

Opinion by Judge Ceisler

2023 WL 3069788

Case:

- PECO is proposing to build a gas reliability station in Marple Township, Delaware County, that
 - includes 2 buildings and a perimeter fence.
 - will connect to and regulate the pressure of a liquified natural gas pipeline facility in West Conshohocken (Mont. Co).

- Marple Twp. appealed to the Commonwealth Court, the **PUC 3/10/22** Opinion and Order **granting** PECO's "**619 Petition;**"
 - 619 is a provision in the Municipalities Planning Code
 - for **zoning exemptions** for utilities
 - if the PUC **finds the project is "reasonably necessary for the convenience or welfare of the public."**

Procedural History:

- BEFORE PECO filed 619 Petition, they submitted an application with the Twp. ZHB requesting a “special exception” to the zoning requirements.
- 11/18/20 Marple ZHB DENIED PECO zoning application, finding PECO failed to establish they qualified for special exception.
- On 2/26/21, AFTER Marple ZHB DENIAL, PECO filed 619 Petition with the PUC;
 - Marple Twp. and a number of pro se appellants intervened.
- On 12/8/21, 2 PUC ALJs granted the PECO Petition.
 - Agreed the PECO Station buildings were reasonably necessary for the public convenience or welfare of the public
 - Found PUC role in 619 petition review to be narrow, such that Twp. and citizen concerns about noise, gas emissions, aesthetics, traffic and other health and safety concerns to be “beyond the Commission’s review.”
- PECO, the Twp and pro se appellants filed exceptions to the ALJs’ ruling.
- On 3/10/22, the Public Utility Commission granted PECO’s, upholding the ALJs’ grant of the 619 Petition.

Issues on Appeal to the Commonwealth Court

- **Did the Commission err by declining to consider the Station's potential negative environmental impact** upon the public health, safety, and welfare, as well as its effect upon the Township's development goals, as expressed through the Township's Zoning Ordinance and comprehensive plan?

- **Did the Commission abuse its discretion by determining that PECO had established that it was reasonably necessary for the convenience and welfare of the public to site the Station on the Property?**
 - Where the evidence presented by PECO only established that its selection of the Property as the buildings' site only benefitted PECO itself, not the general public.
 - Where PECO's putative site search, during which it purported to consider 15 other locations for these buildings, was essentially a sham, as PECO had already chosen the Property before conducting the search and, in doing so, ignored other viable locations and its own search criteria.

Commonwealth Court Holding

- Public Utility Commission March 10, 2022 Opinion and Order VACATED;
- Case “REMANDED to the Commission, with instructions that it issue an Amended Decision regarding Intervenor PECO Energy Company's “Petition ... For a Finding Pursuant to 53 P.S. § 10619,” **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.”

Commonwealth Court Analysis

- PUC authorized to regulate utilities on a statewide basis by General Assembly
 - Municipalities are preempted from regulating public utilities' operations.

- HOWEVER, **Section 619** of the MPC establishes such a carve-out
 - gives municipalities the ability to regulate via local ordinance the location of a building that a public utility wishes to build or use,
 - **unless** the "Commission decide[s] 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

- Commonwealth Court AGREED w/ Twp. that the **PUC ERRED "when it flatly deemed environmental concerns to be outside the purview of Section 619 proceedings."**

- TO THE CONTRARY, 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.

- THE SOURCE OF THE COMMISSION'S RESPONSIBILITY TO CONDUCT THIS TYPE OF REVIEW IN A SECTION 619 PROCEEDING IS NOT THE MPC ITSELF OR ANOTHER STATUTE; RATHER, IT IS ARTICLE I, SECTION 27 OF THE PENNSYLVANIA CONSTITUTION, WHICH IS BETTER KNOWN AS THE ENVIRONMENTAL RIGHTS AMENDMENT (ERA).

- The PUC – as an agency of the Commonwealth – is subject to Article I, Section 27, and must meet its constitutional obligations thereunder.

- 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.**
 - Here, however, the Commission sidestepped this obligation and, though it stated that it would defer to other agencies' determinations regarding environmental issues, failed to identify any such outside agency determinations that pertained to **explosion impact radius, noise, or heater emissions.**

- The Commission's “deference” in this context thus appears to have been nothing more than illusory and its environmental review substantively nonexistent.

Significance of this decision in the broader context of evolving ERA precedent

- Confirms PUC obligations under Article I, Section 27 – PUC, like DEP, DCNR – all Commonwealth government agencies – must comply with Article I, Section 27 and is a trustee under the Constitution.
- Although the Commonwealth Court did not state this explicitly, the decision confirms that the amendment is “self-executing.”
- Commonwealth Court also did not state this explicitly, but this decision reinforces the interpretation of the Constitution as requiring co-trustee coordination and collaboration. (Which is related to the EHB cases that have held that cross program internal coordination is required by the ERA, such as in the New Hanover v. Gibraltar Rock and Hudson cases).
- This case is an example of successful municipal use of Article I, Section 27
 - municipalities have had less success invoking Article I, Section 27 directly in their decision making to support denials, or
 - in the enactment of stringent ordinances.