

limerick ecology action

BOX 761

POTTSTOWN, PA. 19464

(215) 326-9122

RELATED CORRESPONDENCE

DOCKETER
USNRC

'84 MAR 27 A11:02

March 21 1984
DOCKETING & SERVICE
BRANCH

Lawrence Brenner, Esq.
Chairman, Atomic Safety
and Licensing Board
U.S. NRC
Washington, D.C. 20555

Dr. Peter A. Morris
Atomic Safety and
Licensing Board
U.S. NRC
Washington, D.C. 20555

Dr. Richard F. Cole
Atomic Safety and
Licensing Board
U.S. NRC
Washington, D.C. 20555

In the Matter of
Philadelphia Electric Company
Limerick Generating Station
Units 1 & 2
Docket Nos. 50-352, 50-353

Gentlemen,

In order to keep the Board and parties to this proceeding informed about matters pertaining to the development of off-site emergency planning for the Limerick Generating Station, Limerick Ecology Action hereby transmits the following:

- 1) Complaint of Philadelphia Electric Company vs. South Coventry Township, Civil Action (Equity) filed on March 9, 1984 in the Chester County Court of Common Pleas (Attorney I.D. #09434)
- 2) Defendants' Memorandum of Law in Opposition to Petition for a Preliminary Injunction, No. 84-01645 (Response of South Coventry Township)
- 3) Order of the Court dissolving a preliminary injunction against South Coventry Township and scheduling a final hearing on March 23, 1984.

Sincerely,

Phyllis Zitzer
Phyllis Zitzer, President
Limerick Ecology Action

cc: Service List

8403280336 840321
PDR ADOCK 05000352
PDR

DS03

a member of the environmental coalition on nuclear power

IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA

CIVIL ACTION - EQUITY

DOCKETED
USNRC

'84 MAR 27 A11:02

PHILADELPHIA ELECTRIC COMPANY	:	NO.
	:	
VS.	:	ATTORNEY I.D. # 09434
	:	
SOUTH COVENTRY TOWNSHIP and	:	IN EQUITY and for
JAMES OTTINGER	:	DECLARATORY JUDGMENT

LEAVE OF SECRECY
DOCKETING & SERV
BRANCH

COMPLAINT

Philadelphia Electric Company, Plaintiff, by its attorneys, Kaufman & Hughes, files the following Complaint:

1. Plaintiff is Philadelphia Electric Company, (PECo), a public utility with its principal place of business at 2301 Market Street, Philadelphia, Pennsylvania.
2. Defendants are South Coventry Township and James Ottinger, its zoning and building code officer.
3. PECO's Limerick Generating Station Unit 1 is nearing completion in Limerick Township, Montgomery County, Pennsylvania, as authorized by a construction permit (CPPR-106) issued by the United States Nuclear Regulatory Commission (NRC) pursuant to the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 et seq.
4. PECO has applied to the NRC for an operating license pursuant to said Atomic Energy Act and NRC's regulations thereunder (10 CFR Part 50). Operating license proceedings are presently under way before a NRC Atomic Safety and Licensing Board. Under PECO's present schedule for completion of Unit 1, the unit will be ready for fuel loading in August, 1984.

5. The NRC's regulations require that the plans for coping with radiological emergencies include the establishment of a system to provide prompt notification to the population within an emergency planning zone (EPZ), which is an area within about a 10 mile radius from a reactor facility.

6. To comply with the requirements of the NRC, PECO has surveyed the emergency planning zone surrounding its Limerick facility for the purpose of determining the design, location and number of siren installations necessary to comply with the requirements of the NRC. The siren installation system will also be available for use as part of the prompt notification system required to be provided by political subdivisions of the Commonwealth for emergency notification of the population pursuant to the Emergency Management Services Code, 35 Pa.CSA 7101 et seq.

7. Within the township of South Coventry there are ^{three}~~four~~ planned siren installation locations. Each siren installation consists of a wooden pole approximately 50 feet to 60 feet above ground to which is attached a 3' by 4' control cabinet approximately 12 feet above ground; a 4' by 5' platform approximately 15 feet above ground on which is mounted an enclosed air compressor; an antenna approximately 45 feet above ground; and a rotating sound horn assembly at the top of the pole, which assembly is connected to the air compressor by a 3 inch diameter pipe. The power supply for the installation is provided by a direct wire connection from the control cabinet to the local electric distribution system. A photograph showing a typical

siren installation is attached hereto, made a part hereof and marked Exhibit "A".

8. The height of the individual siren installations and their location is based upon an evaluation of the local area population density and topography together with the physical and acoustical characteristics of the area, with the objective of locating the siren installations in such a manner as to assure that the sirens will be audible to all members of the public within the EPZ when the system is activated. The siren system is an integrated system in that the location of each siren installation is related to the location of the neighboring siren installations.

9. Under NRC criteria the maximum sound levels to be received by any member of the public from such siren installations may not exceed 123 decibels and PECO's siren installation system is designed to meet such criteria.

10. Private right-of-way Grants were acquired by PECO from two landowners and residents of South Coventry Township, Chester County, Pennsylvania, specifically Mr. and Mrs. Michael Carlini, R.D. #1, P.O. Box 265, Elverson, Pennsylvania and Charles J. Nesley, P.O. Box 7, R.D. #4, Pottstown, Pennsylvania. True and correct copies of those Grants are attached hereto, made a part hereof and marked respectively Exhibit "B" and "C"; and the installation of sirens has commenced on the Carlini and Nesley properties pursuant to the right-of-way grants.

11. Mr. and Mrs. Michael Carlini and Charles J. Nesley have been cited or threatened with citation by South Coventry Township and its zoning officer James Ottinger for alleged violations of the South Coventry Township Ordinances in failing to obtain a permit for the installation of the sirens by PECO on their property, in violating the Zoning Ordinance's height and setback requirements and in creating an easement without subdivision approval. True and correct copies of letters to Mr. and Mrs. Michael Carlini and Charles J. Nesley from the said Mr. Ottinger dated February 17, 1984 and February 29, 1984, are attached hereto, made a part hereof and marked respectively Exhibit "D" and "E".

12. Facilities of a public utility such as PECO, other than buildings, are exempt and immune from such regulation as is being asserted by South Coventry Township against PECO's facilities described herein.

13. South Coventry Township may not do indirectly what it is prohibited by law from doing directly, namely, regulating the herein described facilities of PECO.

14. A scheduled July 25, 1984 exercise will be utilized by the Pennsylvania Emergency Management Agency and the Federal Emergency Management Agency to evaluate for licensing purposes the effectiveness of required emergency planning relating to PECO's Limerick facility, including the prompt notification system of which the siren system is part. A delay in the schedule for construction, installation check out and testing of the siren system and its components will jeopardize the scheduled exercise or its

effectiveness for evaluation purposes. Because of the involvement of state, federal and local agencies and personnel, rescheduling the exercise could result in a substantial delay.

15. If South Coventry Township is permitted to issue and pursue its ordinance violation citations against persons who have permitted PECO to erect utility facilities on their property, and to threaten legal action against those persons who grant or are inclined to grant right-of-way to PECO for siren installations, PECO will suffer and sustain actual and substantial injury, permanent and irreparable in character, not capable of adequate compensation for damages or redress by an adequate, complete, practical and efficient remedy at law.

16. The granting of an injunction restraining the issuance and prosecution of Ordinance violation citations against persons who have granted or who will in the future grant to PECO the right to construct utility facilities, that is, the siren installations, on their property, would not be contrary to the public welfare and greater injury would be suffered by Plaintiff should an injunction not be issued than would be suffered by Defendants should an injunction issue.

17. Defendants' action in citing or threatening to cite persons who have granted to PECO the right to erect facilities on their private property effectively denies Plaintiff the right to construct its facilities as described herein and improperly regulates Plaintiff in violation of the exemption of such public utility facilities from such regulation by local

municipalities.

18. The action of Defendants in attempting to deny to PECO the right to construct public utility facilities on private property in conjunction with the installation of the prompt notification system, which is an ancillary purpose, reasonably necessary or appropriate for the use of Limerick Generating Station, is unreasonable, unduly restrictive and deprives PECO of due process of law.

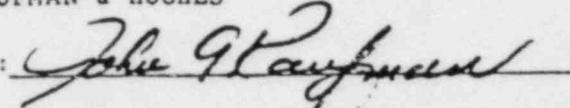
19. PECO's rights, status and other legal relations are affected by Defendants' stated position that the facilities of PECO and the persons who have agreed to the installation of those facilities, are subject to municipal ordinances, and a determination of the applicability of the municipal ordinances of South Coventry Township and like municipalities to Plaintiff and its grantors, will terminate the controversy and remove the uncertainty caused by Defendants' stated position, both as to the persons who have been cited or threatened with citation by Defendants and to such other residents and landowners in South Coventry Township as might otherwise be disposed to grant to PECO the right to construct its facilities on their property.

WHEREFORE, PECO requests that an injunction, preliminary in character and permanent thereafter, be issued restraining and enjoining Defendants South Coventry and James Ottinger, their agents, servants, workmen and employees from threatening to institute or from instituting or proceeding with criminal citations against PECO and/or any persons, including Mr. and Mrs. Michael Carlini and Charles J. Nesley, who have granted or will in the future grant to

PECo the right to construct facilities of PECO's prompt notification system on their property, and declare that the construction, erection, installation, maintenance and operation of the prompt notification system is exempt and immune from the municipal ordinances described herein and grant such other and further relief as is necessary and proper under the circumstances.

KAUFMAN & HUGHES

By:

A handwritten signature in dark ink, appearing to read "John G. Kaufman", written over a horizontal line.

John G. Kaufman, Esquire
Attorney for Plaintiff
Philadelphia Electric Company

V E R I F I C A T I O N

ROBERT H. LOGUE , Supervisor of Nuclear Service,
Electric Production Department of Philadelphia Electric Company
verifies that the statements made in the foregoing Complaint are true
and correct and makes these statements subject to the penalties of 18
Pa.C.S.A., Section 4904, relating to unsworn falsification to
authorities.

Robert H. Logue

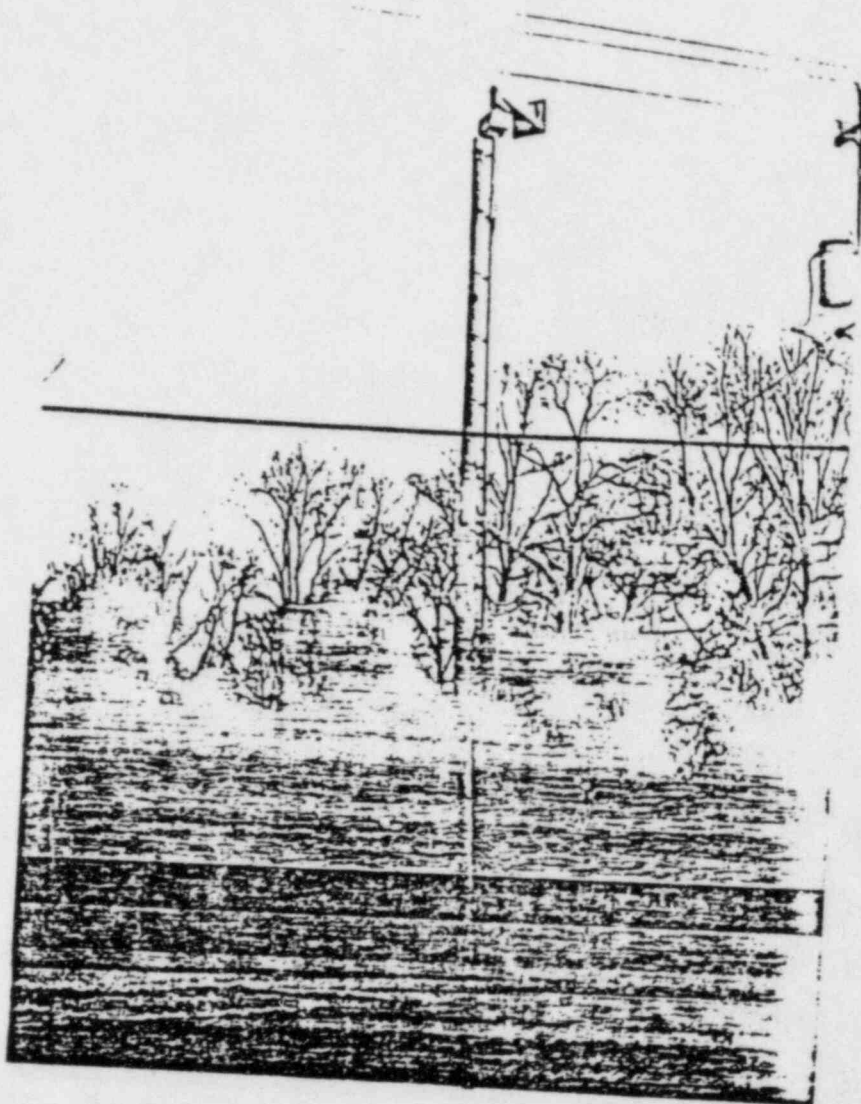


EXHIBIT "A"

For and in consideration of the sum of FIFTY DOLLARS (\$50.00), the receipt of which is hereby acknowledged, hereby grant (a) unto PHILADELPHIA ELECTRIC COMPANY (hereinafter called Company), its Successors and Assigns, the right to erect, construct, install, use, inspect, maintain, repair, renew, and remove facilities consisting of a pole with a platform, compressor, siren and appurtenances attached thereto, on the premises of the undersigned, situate approx. 40' S.W. of the center line of Eastmont Rd., approx. 77' S.W. of the center line of Laurel Lane, if extended, as necessary for the establishment of an emergency alert system.

TOGETHER with the right to attach to said pole such wires or cables as necessary to energize said alert system.

ALSO TOGETHER with the right of ingress and egress to and from said facilities and the right to trim and keep trimmed, in a workmanlike manner, all trees and branches of trees, to the extent deemed necessary by the Company to provide sufficient clearance for the protection of the aforesaid facilities.

Company shall have the right to assign this Agreement to any utility or governmental agency or regulatory body having jurisdiction for said emergency alert system.

Company shall lodge this agreement for record.

This Agreement shall be binding upon and inure to the benefit of said parties, their Heirs, Successors and Assigns.

EXECUTED this

day of

A.D. 1907,

Michael J. Carlini, Jr.

Caroline Carlini

OF

SS.

COUNTY OF

On this, the day of

1907

, before me,

the undersigned officer, personally

appeared

known to me (or satisfactorily proven) to be the person whose names subscribed to the within instrument, and acknowledged that

executed the same for the purposes therein

In Witness Whereof, I hereunto set my hand and official seal.

Notary Public

OF

SS.

COUNTY OF

On this, the

day of

, 1907

, A.D. before me,

, the undersigned officer personally appeared

, who acknowledged himself to be the

, a corporation, and that he

President of

an such

President, being authorized to do so executed the foregoing instrument for the purposes therein contained by signing the name of the corporation by himself as President.

In Witness Whereof, I hereunto set my hand and official seal.

Notary Public

EXHIBIT "D"

PE - 9519
445 155

The undersigned, owner (s) of premises situate on the South side of Ridge Rd.
(Rt. 23) South Coventry Twp., Chester Co., Pa.

for and in consideration of ONE HUNDRED DOLLARS (\$100.00), the receipt of which is hereby acknowledged, hereby grant (s) unto PHILADELPHIA ELECTRIC COMPANY (hereinafter called Company), its Successors and Assigns, the right to erect, construct, install, use, inspect, maintain, repair, renew, and remove facilities consisting of a pole with a platform, compressor, siren and appurtenances attached thereto, on the premises of the undersigned, situate on the S. Side of Ridge Rd. (Rt. 23), approx. 462' S.W. of the center line of New Philadelphia Rd. (T474)

as necessary for the establishment of an emergency alert system.

TOGETHER with the right to attach to said pole such wires or cables as necessary to energize said alert system.

ALSO TOGETHER with the right of ingress and egress to and from said facilities and the right to trim and keep trimmed, in a workmanlike manner, all trees and branches of trees, to the extent deemed necessary by the Company to provide sufficient clearance for the protection of the aforesaid facilities.

Company shall have the right to assign this Agreement to any utility or governmental agency or regulatory body having jurisdiction for said emergency alert system.

Company shall lodge this agreement for record.

This Agreement shall be binding upon and inure to the benefit of said parties, their Heirs, Successors and Assigns.

EXECUTED this

7th

day of December

A.D. 1983

W. J. Harned

Charles J. Mesley
Charles J. Mesley

OF

} SS.

COUNTY OF

On this, the day of

198

, before me,

the undersigned officer, personally

appeared

known to me (or satisfactorily proven) to be the person whose names subscribed to the within instrument, and acknowledged that executed the same for the purposes therein contained.

In Witness Whereof, I hereunto set my hand and official seal.

Notary Public

OF

} SS.

COUNTY OF

On this, the day of

, 198

, A.D. before me,

, the undersigned officer personally appeared

, who acknowledged himself to be the

, a corporation, and that he

President of

as such President, being authorized to do so executed the foregoing instrument for the purposes therein contained by signing the name of the corporation by himself as President.

In Witness Whereof, I hereunto set my hand and official seal.

South Coventry Township
Coventryville Road
20-2-37

February 17, 1984
Chestnuthill Road
Star Rt.
Pottstown, Pa. 19464

Michael J & Caroline Carlini
Box 265
R. D. # 1
Elverson, Pa. 19520

Dear Mr. & Mrs. Carlini:

This is to inform you that the structure, pole and equipment, placed on your property January 26, 1984 is in violation of the South Coventry Township Zoning Ordinance and the Subdivision and Land Development Ordinance of 1983.

The structure as placed is in violation of the following sections;

1. Zoning Ordinance Section 1702, Building Permits - construction without a permit.
2. Zoning Ordinance Section 1310, Height - the structure exceeds the height limitations within the Residential District of the township.
3. Zoning Ordinance Section 603, Subsection 3 - the structure is closer than that allowed from the street right of way line.
4. Subdivision and Land Development Ordinance Section 622, Easements - A plan for subdivision or easement was not submitted to the Planning Commission and reviewed or approved by the Board of Supervisors.

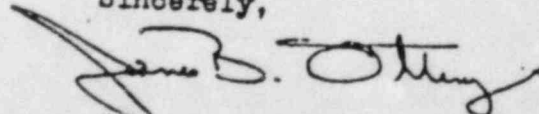
I request that you or another party immediately remove the structure to comply to the Township Ordinance's. Failure to remove the structure will place you in violation of the Ordinance's. A copy of the Zoning Ordinance, Section 1704, Penalties, is attached for your review.

Please advise me in writing by March 3, 1984 as to what your intentions are. This matter will be discussed at the next Board of Supervisors meeting scheduled for March 5, 1984. After that date a citation could be filed in District Court.

If you have any questions or desire to the matter please contact myself at 469-9331 between the hours of 6:00 PM to 10:00 PM Monday thru Friday or all day Saturday.

EXHIBIT "D"

Sincerely,



James B. Ottinger
Zoning Officer

South Coventry Township
Rt. 23
20-4-124

February 29, 1984
Star Rt.,
Chestnuthill Road
Pottstown, Pa. 19464

Mr. Charles J. Nesley
P. O. Box 7
RD # 4
Pottstown, Pa. 19464

REAL ESTATE DEPT.
MAR 08 1984
REFER TO

Dear Mr. Nesley:

This is to inform you that the structure, pole and equipment, as placed on your property is in violation of the South Coventry Township Zoning Ordinance and the Subdivision and Land Development Ordinance of 1983.

The structure as placed is in violation of the following sections;

1. Zoning Ordinance, Section 1702, Building Permits - construction without a permit.
2. Zoning Ordinance, Sections 804 & 1310, Height - the structure where placed exceeds the height limitations within the Commercial District of the Township.
3. Zoning Ordinance, Sections 803, Subsection 3 - the structure is closer than that allowed from the street right of way line.
4. Subdivision and Land Development Ordinance, Section 622, Easements - a plan for subdivision or easement was not submitted to the Planning Commission and reviewed or approved by the Board of Supervisors.

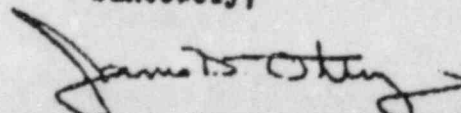
I request that you or another party immediately remove the structure to comply to the Township Ordinance's. Failure to remove the structure will place you in violation. A copy of the Zoning Ordinance, Section 1704, Penalties, is attached for your review.

Please advise me in writing by March 15, 1984 as to what your intentions are. This matter will be discussed at the next Board of Supervisors meeting scheduled for March 5, 1984. After March 15 a citation could be filed in District Court.

If you have any questions or desire to review the matter please contact myself at 469-9331 between the hours of 6:00PM to 10:00 PM Monday thru Friday or all day Saturday.

Sincerely,

EXHIBIT "E"


James B. Ottinger

RELATED CORRESPONDENCE

DOCKETED
USNRC

PHILADELPHIA ELECTRIC COMPANY : IN THE COURT OF COMMON PLEAS
: 84 MAR 27 11 02
: CHESTER COUNTY, PENNSYLVANIA
- VS - :
: NO. 84 01645
: OFFICE OF SECRETARY
: DOCKETING & SERVICE
: BRANCH
SOUTH COVENTRY TOWNSHIP and : IN EQUITY and for
JAMES OTTINGER : DECLARATORY JUDGMENT

O R D E R

AND NOW, TO WIT, March 16th, 1984, after hearing and argument, and upon consideration of the Memoranda of counsel, the preliminary injunction heretofore granted on March 9th, 1984, is hereby dissolved¹; and a final hearing shall be held on Friday, March 23rd, 1984, at 9:30 o'clock A.M., in Courtroom No. 4, Chester County Courthouse, West Chester, Pennsylvania.

BY THE COURT:

J.

MAR 16 12 09 PM '84

THE
CLERK
OF
COURT

¹In order to sustain a preliminary injunction, the plaintiff's right to relief must be clear, the need for relief must be immediate, and the injury must be irreparable if the injunction is not granted. Shenango Valley Osteopathic Hospital v. Department of Health, 499 Pa. 39, 50, 451 A. 2d 434, 439 (1982) (quoting from Bell v. Thornburgh, 491 Pa. 263, 267-68, 420 A. 2d 443, 445 (1980)). We are not convinced, on this limited record, that the Plaintiff at bar has established prima facie that its right to relief is clear. See, Fischer v. Department of Public Welfare, 497 Pa. 267, 271, 439 A. 2d 1172, 1174 (1982); New Castle Orthopedic Associates v. Burns, 481 Pa. 460, 392 A. 2d 1383 (1978). In view of our disposition, we need not address the question of whether the Plaintiff has met the remaining criteria.

DOCKETED
USMFC

IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA
CIVIL ACTION - EQUITY

'84 MAR 27 A11:03

PHILADELPHIA ELECTRIC COMPANY	:	NO. 84-01645
	:	
VS.	:	ATTORNEY I.D. #09434
	:	
SOUTH COVENTRY TOWNSHIP and	:	IN EQUITY and for
JAMES OTTINGER	:	DECLARATORY JUDGMENT

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO
PETITION FOR PRELIMINARY INJUNCTION

A. BRIEF STATEMENT OF FACT.

Philadelphia Electric Company ("PECo") has commenced construction of certain pole and siren structures on at least two privately owned properties within South Coventry Township. The owners of the respective properties, who have conveyed private "rights-of-way" to PECo for erection of the siren structures, have been cited by the South Coventry Township Zoning Officer for various violations of the Zoning Ordinance, as set forth on Exhibits "D" and "E" to PECo's Complaint in this action. PECo's action in equity seeks to enjoin the Township from enforcement of its zoning regulations with respect to the subject siren structures.

The following issues are raised by PECo's Complaint and prayer for injunctive relief:

(a) Are the siren structures proposed by PECo immune from municipal zoning and land use regulations?

(b) Has Federal law preempted stated municipal land use power with respect to the subject siren structures?

(c) Is PECO entitled to a Preliminary Injunction against the Township's enforcement of its ordinance?

B. THE PROPOSED SIREN STRUCTURES ARE SUBJECT TO LOCAL ZONING REGULATION

PECO has argued that it has an absolute right to construct and situate its 50 to 60 foot high siren installations in the manner and places it deems expedient, and that the exercise of that right is subject neither to the zoning restrictions of the effected municipality nor to prior review and approval by the Pennsylvania Public Utility Commission. Thus, PECO argues, it need neither comply with South Coventry Township's height, setback and building construction controls, or demonstrate to the Pennsylvania Public Utility Commission that the structures, propose to be erected in violation of those controls, are reasonably necessary for the convenience or welfare of the public. The authorities cited by PECO do not grant it any such unlimited exemption from regulation.

Section 619 of the Pennsylvania Municipalities Planning Code, ("MPC"), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. Section 10619, provides for an exemption of public utilities from zoning regulations, after a hearing and decision by the Pennsylvania Public Utility Commission on the necessity of

the particular construction proposed by the utility company.

Section 619 of the MPC states, in full:

Exemptions: This article [zoning] shall not apply to any existing to 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.

Thus, for entitlement to zoning exemption, Section 619 required that the utility company seeking exemption first petition the Public Utility Commission, and that upon such petition, the Public Utility Commission must determine, on the basis of a public hearing, that the proposed structures of the utility are reasonably necessary for public welfare or convenience. This latter factor, which must be decided by the Public Utility Commission to exist, will hereinafter be referred to as the requirement of "public necessity".

Despite the above provision, PECO has argued that the subject siren poles are immune from the local zoning regulation even though it has not petitioned the Public Utility Commission for a hearing upon the public necessity question. In so arguing, PECO has relied heavily upon the case of Duquesne Light Company vs. Upper St. Clair Township, 377 Pa. 323, 105 A.2d 287 (1954). Duquesne predated the enactment of the MPC, but construed a provision of the then existing First Class Township Code which paralleled the present Section 619 of the MPC. The

Duquesne Court found that, a public utility company was not subject to local zoning, even in the absence of a public necessity determination by the Public Utility Commission, where the object of the zoning regulations at issue was the siting and installation of electrical service transmission lines. The Duquesne case and those following it have established the principal that, once a public utility company is licensed to operate by virtue of the initial issuance of its certificate of public convenience, the normal management decisions of the utility relating to the siting and installation of the facility transmitting utility service are not subject to on-going Public Utility Commission review. Such utility transmission facilities are exempt from local zoning without the need for further Public Utility Commission proceedings. This principal of the Duquesne line of cases should not be so broadly read and applied as to stand for the proposition that structures owned and maintained by public utilities, but only incidentally related to the transmission or conveyance of a given utility service, are wholly exempt from all municipal and state regulations.

The Commonwealth Court, in a case which followed the enactment of the MPC, has held that, absent Public Utility Commission action upon a utility company request under Section 619, activities of the utility company are not exempt from zoning regulation. Denison vs. Petrenchak, 16 Pa. Comm. Ct. 383, 328 A.2d 219 (1974). In Denison, the Commonwealth Court held that

township zoning regulations would apply to a railroad company's placement of a fuel storage tank car on to an existing railroad track within the township where the railroad company, operating as a public utility, had not requested the requisite exempting action by the Public Utility Commission. The opinion of the Commonwealth Court in the Denison case is particularly significant because the Court observed that the tank car there involved was plainly not a "building", but rather was a structure other than a building under the township's zoning ordinance.

The Denison case thus supports the position of South Coventry Township in the instant case that the Duquesne line of reasoning has not been extended to exempt, from all regulatory review, the siting and construction of structures which are themselves not the vehicles for transmission or conveyance of the particular utility involved. The erection of structure other than transmission utility facility is not an activity which is necessarily contemplated or authorized by the initial issuance of a public convenience certificate.

In this latter respect, the erection of the proposed siren structures by PECO is not similar to its unregulated management prerogative concerning the laying out of electrical transmission lines,¹ as in Duquesne. Nor is it akin to construction by a

¹ Even with regard to transmission lines, the current regulations require that a public utility apply for and receive PUC approval of proposed construction and location of lines with high design voltage. 52 Pa. Code §57.72.

railroad of railroad tracks. PECO is not in the business of designing and building public alert systems. The principal that voluntary expansion or extension of public utility transmission facilities lies in the discretion of company management, recited in the cases quoted by PECO, therefore has no application to the proposed siren towers involved in the instant case.

To hold that the non-utility structures are immune from zoning without any public utility commission determination of necessity, would be to eliminate any possible forum for an assessment of that necessity and for the formulation of appropriate conditions which might reduce the conflict of the proposed construction with the land-use policies contained in local zoning regulations. An opportunity for the assessment of such a need, and for the formulation of such conditions, would be properly presented for PECO to seek a variance under the South Coventry Township Zoning Ordinance and Section 912 of the Pennsylvania Municipalities Planning Code, 53 P.S. 10912. Unless the zoning ordinance is enforced, however, these issues will never be addressed by anybody of review.

While Section 701 of the Public Utility Code, act of July 1, 1978, P.L. 598, as amended, 66 Pa. CSA Section 701, provides for the filing of Complaints with the public utility by any interested person, corporation or municipal corporation, such a Complaint may only concern the violation by a public utility of any regulation or order of the Commission, or of any law

which the Commission has jurisdiction to administer. If section 619 of the MPC is held not to require a determination of public necessity with regard to the proposed siren structures, then the questions relating to the design and construction of the proposed structures are not within the purview of the PUC. A railroad company, operating as a licensed public utility, has no tracks running through the Borough of West Chester, but has a yard located there. It desires to implement a public warning system which would be activated in the event of, for example, a train car derailment. As a part of its plan, it proposes to erect warning sirens in various locations, on private rights-of-way it has acquired by purchase, throughout the Borough of West Chester. The Public Utility Commission regulations require no such siren system and provide no specific process for controlling its implementation. Under the position argued by PECO, the railroad company could erect and operate its siren in an unrestricted manner, as it deems fit, in order to satisfy the federal safety demands. In so doing, the railroad company may violate the borough zoning regulation without any process for review, or forum for complaint, by the borough or its residents.

The scenerio of the above hypothetical case directly parallels the fact presently involved. It is a scenerio which lies beyond the scope and reasoning of the Duquesne line of cases. Without a determination by the Public Utility Commission

of the necessity of such an intrusion upon a municipality and its residents, the municipality itself must retain power under the MPC to regulate a land use so plainly impacting upon the community within its boarders. PECO's proposed poles and sirens, like the tank car in Denison vs. Petrenchak, supra, are not likely transmissions or conveyance buildings or structures. Like the tank car in Denison vs. Petrenchak, supra, the siren installation must be generally subject to local zoning regulation in the absence of a public hearing and determination of public necessity by the Public Utility Commission.

B. FEDERAL LAW HAS NOT PREEMPTED STATE AND MUNICIPAL LAND USE REGULATION WITH RESPECT TO THE SIREN STRUCTURES PROPOSED BY PECO.

This Honorable Court has raised the question of whether federal law has a preemptive effect on the ability of Pennsylvania agencies or municipalities to regulate the proposed construction from a land use perspective. The Atomic Energy Act of 1954, 42 U.S.C. Section 2011 et seq, may impose standard or requirements which necessitate the construction of facility which would not be deemed reasonably necessary by the Public Utility Commission under the Public Utility Code, or by municipalities under the MPC. Of course, where the necessity for certain activity is argued as being required under the Atomic Energy Act or the NRC Regulations, then the question of preemption is governed by whether the Atomic Energy Act itself dic-

tates preemption of state and municipal regulation, not whether the Public Utility Code of the MPC calls for such preemption.

The federal Nuclear Regulatory Commission, pursuant to authority of the Atomic Energy Act of 1954 (hereinafter the "Atomic Energy Act"), has promulgated certain regulatory standards concerning preparedness for emergencies occurring in the operation of a nuclear reactor facility, such as PECO's Limerick Plant. Those regulations, found at 10 CFR Section 50.47(b) and appendix E to part 50 of CFR, require, in general terms, that a preparation and implementation plans for prompt notification to the public within an area of about a ten mile radius of a nuclear facility. While the Nuclear Regulatory Commission has issued certain criteria for the guidance of a nuclear utility facility to comply with the public notification requirement of the emergency preparedness standards, it has not required that any particular type of communication system be implemented. In fact, up until two months ago, PECO had been planning for the implementation of an entirely different type of system involving telephone notification, rather than the recently proposed siren warning system.

In considering whether the Atomic Energy Act, or the Nuclear Regulatory Commission regulations promulgated thereunder, have effected a preemption of state and local land use regulation regarding the structures here involved, it must be borne in mind that the regulation of public utilities, and of

land use, are matters clearly within the traditional scope of the police power reserved for exercise by the respective states. Thus, "...we start with the assumption that the historic police powers of the states were not to be superceded by the Federal Act, unless that was the clear and manifest purpose of Congress." Rice vs. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 LEd. 1447 (1947).

The express provisions of the Atomic Energy Act itself speak to the limited preemptive effect of the act. Section 271 of the Act, 42 U.S.C. Section 2018 provides that:

Nothing in this chapter shall be construed to effect the authority or regulations of any federal, state or local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission: provided, that this Section shall not be deemed to confer upon any federal, state or local agency any authority to regulate, control, or restrict any activities of the Commission.

Section 274(k), 42 U.S.C. Section 2021(k), provides that:

Nothing in this Section shall be construed to effect the authority of any state or local agency to regulate activities for purposes other than protection against radiation hazards.

The United States Supreme Court, in Pacific Gas and Electric Company vs. State Energy Resources Conservation and Development Commission, ____ U.S. ____, 103 S. Ct. 1713, 1726 (1983), has held that the preemptive effect of the Atomic Energy Act is limited to the area of safety regulation with regard to radiological hazards, and that the states continued to "exercise

their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, rate making and the like."

With regard to the siren towers involved in the present case, the height, setback and building permit requirements of South Coventry's Ordinance are concerned with a matter altogether separate and distinct from the radiological safety issues addressed by the regulations of the Nuclear Regulatory Commission. Indeed, the zoning ordinance of South Coventry Township does not purport to in any way regulate the construction or operation of nuclear reactors. It is concerned, on the contrary, with the land use considerations of the siting, height, setback and structural soundness of all structures within the township. These land use concerns are not in any way addressed, must less displaced, by the federal scheme of safety regulation.

In this respect, a similar distinction has been made in the Pennsylvania cases finding a lack of preemption by the Solid Waste Management Act, 35 PS Section 6001 et seq, with regard to the land use regulatory power and municipalities with respect to landfills. For example, in Greene Township vs. Kuhl, 32 Pa. Commonwealth Ct. 592, 379 A.2d 1383 (1977), the Commonwealth Court noted that while a local municipality could not set geological or engineering standards stricter than those established by the Department of Environmental Resources for issuance of

permits for construction and operation of sanitary landfills, factors other than geological ones, such as those involving aesthetics, population density and accessibility, are the appropriate subject of local land use planning. Greene Township vs. Kohl, 32 Pa. Commonwealth Ct. 592, ____ 379 A.2d 1383, 1385 (1977).

It is true of course, that particular state regulations in a given field may be preempted, even if that field of regulation has not been entirely displaced, where requirements of the state regulations make impossible the compliance with federal regulations or the accomplishment of federal congressional purposes. Florida Lime and Avacado Growers, Inc. vs. Paul, 373 U.S. 132, 142, 83 S. Ct. 1210, 1217-18 10 L. Ed. 2nd 248 (1963); Heins vs. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L. Ed. 581 (1941). However, in the present case, there is absolutely no indication that it is impossible to devise and implement a public notification system, the placement and construction of which comply in all respects, or in at least some of the presently violated respects, of the South Coventry Township Zoning Ordinance. Indeed, the evidence would indicate that PECO has considered other, must less obtrusive means of complying with the general public notification requirements of the Nuclear Regulatory Commission and that it was only a very short time ago that such alternative communication systems were replaced with the present siren system plan.

In any event, even if the siren pole type of system were the only one available, there is nothing to indicate that compliance with, for example, the setback requirements of the South Coventry Township Zoning Ordinance is infeasible.

Again, the land use issues, and any possible difficulties with compliance, are considerations which may be properly addressed in variance proceedings before the South Coventry Township's Zoning Hearing Board. Absent such proceedings, the concerns of the township will never be directly addressed. The standards and criteria of the Nuclear Regulatory Commission are concerned only with the adequacy of emergency preparedness. The Nuclear Regulatory Commission is neither authorized nor competent to weigh land use planning factors in the balance, in assessing the adequacy of a particular facility emergency preparedness plan. This process can only be accomplished by a necessity hearing before the Public Utility Commission, or variance hearings before the effected municipality.

In sum, as is plainly evidenced by Section 274(k) of the Atomic Energy Act, the traditional police power of the state and their municipalities to regulate public utilities and land use planning may not be viewed as preempted by the Act or by the above-cited Nuclear Regulatory Commission rules. Thus, if the siren structures are not exempted by Section 619 of our own Municipalities Planning Code, the power of the municipality to enforce their zoning regulations is not otherwise preempted by

law. Therefore, the proposed structures must comply with the reasonable requirement of the South Coventry Township Zoning Ordinance and the municipal review process provided thereunder.

C. PECO IS NOT ENTITLED TO A PRELIMINARY INJUNCTION.

A Preliminary Injunction may only be granted where the rights of the Plaintiff are clear, the need for relief is immediate, and injunctive relief is necessary to avoid injury that is irreparable and cannot be compensated for by damages.

Hospital Association vs. Commonwealth Department of Public Welfare, 433 A.2d 450 (1981); Mazzie vs. Commonwealth of Pennsylvania, 432 A.2d 985, 987 (1981).

On the basis of the discussion in the preceeding sections of this Memorandum, the Plaintiff's right to relief based on a claimed "exemption" for zoning regulation is anything but clear. Thus, a fundamental prerequisite to preliminary injunctive relief cannot be established.

Moreover, the evidence will demonstrate that there is no urgency which would warrant the granting of preliminary relief prior to a final hearing and disposition of the controversy.

PECo's Complaint and Supporting Affidavit appear to make much of a scheduled July 25, 1984 exercise for evaluation of emergency preparedness planning relating to PECO's Limerick facility, including its, "prompt notification system". However, neither the Complaint of Affidavit purports to state in any

concrete terms what the effect of a postponement of such an exercise would be. The evidence will demonstrate that the alleged potential delay in the exercise would not in any realistic way jeopardize PECO's licensing process or its planned operations.

The Nuclear Regulatory Commission regulations, at 10 CFR Section 5047(d) make clear that, in the case of an operating license authorizing only fuel loading and/or low power operations up to 5% of rated power, no Nuclear Regulatory Commission or Federal Emergency Management Agency review, findings or determinations concerning the state of off-site emergency preparedness are required prior to the issuance of such a license. The evidence will show that PECO has no plans for operations beyond fuel loading or low power operations up to 5% of its rated power for the near future. The alleged necessity of scheduling exercises to enable findings by the responsible regulatory agencies during the upcoming summer does not relate to the prevention of any truly immediate or irreparable harm.

Furthermore, the evidence will show that any delay in construction of the proposed sirens in South Coventry Township will not, of itself, require any postponement of the scheduled exercise which would not, in any event, occur, for other reasons. In other words, the grant of the extraordinary remedy of Preliminary Injunctive Relief will not serve to prevent the delay which is alleged to constitute PECO's immediate and irre-

parable harm. PECO has not yet commenced construction of planned siren installation in at least one other township, that being Charlestown Township. The reason for this is that PECO has been unable to purchase private grants of right-of-way for construction of the pole sirens. PECO is, therefore, being compelled to resort to condemnation proceedings in order to acquire the necessary property for the installations in Charlestown Township. In order to exercise that right of condemnation, it is clear that PECO must apply to the Pennsylvania Public Utility Commission for a Certificate of Public Convenience to exercise the power of eminent domain to acquire the necessary rights-of-way. See *Lower Chichester Township vs. Pennsylvania Public Utility Commission*, 180 Pennsylvania Superior Court, 503 _____ A.2d _____ (1956); E.g. *Paxtowne vs. Pennsylvania Public Utility Commission*, 40 Pa. Commonwealth Ct. 646, _____ A.2d _____ (1979). Thus, it is plain that any temporary delay of construction in South Coventry Township occasioned by a denial of Preliminary Injunctive Relief can not be considered of any effect considered the substantial time which will be required for condemnation proceedings prior to any construction in Charlestown Township.

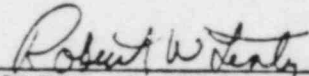
For the above and other reasons to be demonstrated upon hearing, PECO is unable to demonstrate the clear right to relief and the need to prevent immediate and irreparable harm

which are essential preconditions to the grant of a Preliminary Injunction.

D. CONCLUSION.

On the basis of all of the foregoing, Defendant South Coventry Township respectfully submits that Plaintiff Philadelphia Electric Company is not entitled to preliminary equitable relief and Defendant respectfully requests, therefore, that the prayer of the Petition for Preliminary Injunction be denied.

Respectfully Submitted,


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