

IN THE SUPREME COURT OF PENNSYLVANIA

City of Lancaster, Borough of	:	
Carlisle, and Borough of Columbia,	:	
Petitioners	:	
	:	
v.	:	Docket No. 107 MAP 2022
	:	
Pennsylvania Public Utility	:	
Commission,	:	
Respondent	:	

REPLY BRIEF OF RESPONDENT
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Appeal from Order entered October 11, 2022 in the Commonwealth Court at 251 M.D. 2019, invalidating the Pennsylvania Public Utility Commission’s amendment to 52 Pa. Code § 59.18 at Docket No. L-2009-2107155

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SUMMARY OF REPLY ARGUMENT

The Municipalities argument that Section 59.18, as amended, constitutes an improper "sub-delegation" of legislative authority to NGDCs, is without merit. Both the Municipalities and the Commonwealth Court ignore the fact that under Section 2205 of the Code, the General Assembly has explicitly stated that disputes concerning the installation of NDGC facilities shall be subject to the jurisdiction of the Commission and may be initiated by the filing of a complaint under Section 701 of the Code. 66 Pa.C.S. § 2205(b)(3). Thus, the Commission explicitly retains the authority to review an NGDC's decisions regarding the installation of its facilities, which includes decisions regarding the placement of gas meters in historic districts.

The Municipalities also assert that the Commission does not possess an applicable legal standard of review against which to weigh an NGDC's exercise of discretion. However, Section 2205(b)(2) directs that when the Commission considers such a complaint, it must review the NGDC's gas meter placement decision pursuant to Section 1501 of the Code. 66 Pa.C.S. § 2205(b)(2). The standard of review in Section 1501 provides that all public utility actions must be reasonable, and a test for reasonableness has been accepted as a proper standard of review throughout centuries of case law by appellate courts. Thus, since Section 59.18, as amended, was promulgated pursuant to Section 2205 of the Code, it is

illogical for the Municipalities to argue and for the Commonwealth Court to conclude that the Commission has vested absolute, unfettered, and unreviewable discretion with NGDCs regarding their decisions about gas meter relocations in historic districts.

Additionally, it must also be acknowledged that case law in Pennsylvania recognizes that public utilities are expected to make managerial decisions on a daily basis. The Municipalities ignore the fact that the Commission is precluded from managing a public utility's day-to-day operations. The managerial-decision doctrine cited in the Commission's Principal Brief recognizes that public utilities act and make decisions, in the first instance, without regulations covering every such act or decision.

The Municipalities also assert that Section 59.18, as amended, does not contain any language limiting the discretion of NGDCs in the placement of exterior gas meters in historic districts. This assertion, however, is patently false. While the general rule is that gas meters are to be placed on the exterior of a building, Section 59.18(d) sets forth clear directives and factors for consideration of an inside gas meter in historic districts. Additionally, the Municipalities do not read the exceptions within Section 59.18 correctly as the exceptions enumerate the NGDC facilities that accompany gas meters that are located inside, and which are

to be made part of the NGDC's decision in the first instance, of whether a gas meter can stay inside an historic structure.

Finally, the Municipalities' insistence that this case is a facial challenge to Section 59.18 of the Commission's regulations cannot be adjudicated. The Commonwealth Court itself held that the harm to historic aesthetic in this matter is "speculative and imaginative." Thus, the Municipalities stand before this Court without a case or controversy as their facial challenge to Section 59.18 fails to present substantial evidence of harm to historic aesthetic in their respective Historic Districts.

REPLY ARGUMENT

I. Chapter 22 Of The Public Utility Code Explicitly Enables The Commission To Review An NGDC's Decisions Regarding Gas Meter Placements In Historic Districts And Sets Forth The Legal Standard By Which The Commission Should Review Such Decisions

The Municipalities' Brief is replete with erroneous assertions about how the Commission's regulatory scheme regarding the placement of gas meters in historic districts constitutes an improper delegation of authority to NGDCs. Municipalities Brief at 20, 23-25, 28-29, 31-34, 38-39. However, NGDCs do not have unfettered discretion nor the last word on the gas meter placements. Section 59.18 was promulgated as a result of Section 2205(b) of the Code, which explicitly states that the Commission has the authority to review an NGDC's decisions regarding the installation of its facilities, which includes decisions regarding the placement of gas meters in historic districts. Thus, contrary to the Municipalities' assertions and the Commonwealth Court's ruling, the decisions of an NGDC as to where it places gas meters in historic districts is not left entirely to the discretion of the utility.

A. The General Assembly Directs The Commission To Apply Section 701 of the Code to Disputes Regarding The Installation Of NGDC Facilities

Just as they have done before the Commonwealth Court, the Municipalities urge this Court to blatantly ignore the regulatory scheme set forth in Section 2205 of the Code. 66 Pa.C.S. § 2205. Here, the Municipalities assert that Section 2205 "has absolutely nothing to do with, and places no limitations on, an NGDC's

discretion in the location of an exterior gas meter in a historic district.”

Municipalities’ Brief at 26 n.8. However, the plain reading of Section 2205 wholly refutes this assertion. The General Assembly has explicitly given the Commission jurisdiction over disputes concerning NGDC facilities, such as gas meters, in Section 2205.¹

As noted in the Commission’s Principal Brief, the Commission has field preemption over public utilities. Commission’s Principal Brief at 34-36. This Court has recognized the Commission’s field preemption in regulating public utilities and opined:

No principle has become more firmly established in Pennsylvania law than that the courts will not originally adjudicate matters within the jurisdiction of the PUC. Initial jurisdiction in matters concerning the relationship between public utilities and the public is in the PUC—not in the courts.

PPL Elec. Utilities Corp. v. City of Lancaster, 214 A.3d 639, 649 (Pa. 2019)

(quoting *Borough of Lansdale v. Philadelphia Electric Co.*, 170 A.2d 565, 566-67

(Pa. 1961). It is beyond dispute that the Commission has exclusive jurisdiction

¹ Facilities are defined in the Public Utility Code as:

All the plant and equipment of a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with, the business of any public utility.

66 Pa.C.S. § 102 (Facilities).

over public utility matters and, therefore, is the proper forum to adjudicate any and all disputes concerning the actions and decisions of a public utility.

Understanding that the Commission is fully capable, and in the best position, to adjudicate disputes concerning an NGDC's facilities, the General Assembly expressly preserved the Commission's authority to resolve disputes regarding the installation and improvement of an NGDC's facilities when it enacted Chapter 22 of the Code. Specifically, Section 2205 of the Code provides in relevant part:

(b) Installation and improvement of **facilities**--

* * *

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

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

66 Pa.C.S. § 2205 (emphasis added).

Section 2205(b)(3) of the Code expressly references that the Commission's complaint procedure is available to customers disputing an NGDC's decision or action regarding utility facilities. As set forth in our Principal Brief and as was discussed *supra*, Section 59.18 contains standards with respect to the placement of

meters on historic properties. Specifically, if a customer has an issue with an NGDC's decision regarding the placement of gas meters and believes it is contrary to the standards with respect to the placement of meters on historic properties, they can file a complaint pursuant to Section 701 of the Code. As such, the Commission remains fully equipped to develop a factual record when considering complaints regarding gas meter placements in historic districts and will render a decision consistent with its prior case law. *See* 66 Pa.C.S. § 703(c) and (e). More importantly, the Commission's decision regarding the placement of the gas meters in historic districts can be further reviewed on appeal before the Commonwealth Court. *See* 42 Pa.C.S. § 763.

It is beyond dispute that Section 59.18 was promulgated pursuant to Section 2205 of the Code. Consequently, Section 59.18, as amended, cannot be read to be totally distinct and separate from its statutory foundation. As such, it is apparent that the Commission's formal complaint procedure is applicable to and available with respect to any disputes concerning the placement of gas meters in historic districts.

Given this formal legal review process set forth in Section 2205 of the Code, it is erroneous for the Municipalities to attempt to characterize the NGDCs as having free, unconstrained authority to order meter relocations in historic districts. The plain language of Section 2205 of the Code proves that the Commission has

not delegated gas meter siting authority in historic districts to NGDCs and that it expressly retains the ability to safeguard consumers from arbitrary and ad hoc decision making by NGDCs regarding gas meter placements generally, and in historic districts specifically. Thus, it is unfathomable that the Commonwealth Court has agreed with the Municipalities erroneous contention that the Commission has vested absolute discretion in NGDCs with respect to the location of exterior gas meters in historic districts with its promulgation of Section 59.18, as amended.

B. The Safe And Reasonable Standard In Section 1501 Of The Code Has Been Accepted As A Sufficient Standard Of Review By Appellate Courts

The Commission asserts that Section 1501 of the Code clearly provides a defined standard of review that the Commission must apply when adjudicating a complaint concerning an NGDC's gas meter placement decision.

The General Assembly expressly stated that with respect to installation and improvement of NGDC facilities, maintenance and upgrades must be viewed through the lens of Section 1501 of the Code. *See* 66 Pa.C.S. § 2205(b)(2). As such, the Municipalities' assertion that there are only "some complaints that, arguably, can be adequately addressed through reliance on Section 1501" wholly ignores the General Assembly's directive in Section 2205 of the Code that the complaint procedure in Section 701 is to serve as the means to address NGDC

facility disputes and that the standard in Section 1501 is the standard for reviewing those disputes. *See* Municipalities' Brief at 28.

Relying on the Commonwealth Court's wholesale adoption of their erroneous contention, the Municipalities argue before this Court that the review standard set forth in Section 1501 of the Code is a wholly insufficient means for the Commission to review an NGDC's decision about the placement of gas meters in historic districts. As a result, they request this Court to affirm the Commonwealth Court's erroneous conclusion that the Commission has improperly delegated its authority to NGDCs in Section 59.18 of its regulations. However, this contention, and the Commonwealth Court's ruling, is false and unsupported by Pennsylvania jurisprudence.

As the Commission has asserted in its Principal Brief,² Section 1501 of the Code provides the Commission with a defined standard of review in which to review a utility's decisions regarding the placement of its facilities, including decisions regarding the placement and location of gas meters generally. The standard by which the Commission must view every public utility decision and action is whether it is "adequate, efficient, safe, and reasonable." 66 Pa.C.S. § 1501. The Commission relies upon this standard in developing its own body of

² Commission's Principal Brief at 24-28.

case law when adjudicating disputes involving a public utility’s service or facilities.

This Court has long recognized that a review for reasonableness is a proper standard by which to consider issues. In *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975) this Court reviewed whether a statute directing the judiciary to consider whether a tax was “excessive and unreasonable” constituted an unconstitutional delegation of legislative power to the judiciary.

This Court soundly rejected this contention explaining:

Many standards in the law are no more definite than a requirement of ‘reasonableness.’ The most notable example is the law of negligence, where the principal determinant of liability is whether the actor has acted as ‘a reasonable man’ would act in like circumstances. Indeed, the concept of ‘reasonableness’ pervades the common law. See, e.g., *Reid v. Brodsky*, 397 Pa. 463, 469—70, 156 A.2d 334, 338 (1959). That standard has for centuries been found adequate to guide the conduct of private actors and to provide a standard for judging that conduct.

Id. at 292 (citing Restatement (Second) of Torts s 283 (1965); W. Prosser, *Law of Torts* ss 31—32 (1971)). Indeed, this Court went on to list several cases where standards no more precise than “reasonable” and “safe” were recognized as constitutional delegations of the General Assembly’s legislative authority to Commonwealth agencies. See *Id.* at 292-93 (citing *Commonwealth v. Cherney*, 312 A.2d 38 (Pa. 1973) (Secretary of Highways authorized to establish speed

limits different from those provided by statute ‘where traffic or other conditions of the highways make it safe to operate motor vehicles’ at a speed other than that specified in the statute); *DePaul v. Kauffman*, 272 A.2d 500 (Pa. 1971) (rent withholding permitted whenever municipal department certifies that dwelling is ‘unfit for human habitation’); *Chartiers Valley Joint Schs. v. Allegheny County Bd. of Sch. Dirs.*, 211 A.2d 487 (Pa. 1965) (school reorganization permitted only if Council of Basic Education ‘deems wise in the best interests of the educational system of the Commonwealth’).

The standard the General Assembly set forth in Section 1501 of the Code goes well beyond simply being a reasonableness standard and cannot be held to be so indefinite as to arise to an unconstitutional delegation of the Commission’s authority to NGDCs with respect to gas-meter placement under Section 59.18. This Court has consistently recognized Section 1501 as providing the standard of review that the Commission must apply to public utility matters. *See Rohrbaugh v. Pa. Pub. Util. Comm’n*, 727 A.2d 1080 (Pa. 1999) (Whether a public utility violates its duty to provide reasonable and adequate service where extensive damage is caused to a rental property after the utility disconnects electric service); *Feingold v. Bell of Pa.*, 383 A.2d 791, 794 (Pa. 1977) (“The Public Utility Law³

³ The Public Utility Law, 66 P.S. §§ 1101, *et seq.*, was superseded by the Public Utility Code in 1978. 66 Pa.C.S. §§ 101–3316.

placed a broad range of subject matters under the control of the Public Utility Commission [], making that agency responsible for ensuring the adequacy, efficiency, safety, and reasonableness of public utility services.”). The holdings of these cases effectively demonstrate the absurdity of the Municipalities’ assertion that there is no adequate standard of review for NGDC decisions regarding the placement of gas meters.

It is beyond incredulity that the Municipalities continue to rely on the faulty premise that there is no applicable standard of review in existence for NGDC decisions to place its gas meters in a historic district. The Commission notes that both the Municipalities and the Commonwealth Court seem to acknowledge and recognize that Section 1501 is an applicable and legal standard of review with respect to an Electric Distribution Company’s (EDC) decision regarding smart-meter placement. *See Povacz v. Pa. Pub. Util. Comm’n*, 241 A.3d 481 (Pa. Cmwlth. 2020) *rev’d and aff’d* 280 A.3d 975 (Pa. 2022) (*Povacz*); *see also* Municipalities’ Brief at 28. By recognizing that Section 1501 provides a defined standard of review for smart-meter placement as held in *Povacz*, the Municipalities’ argument falls flat. They cannot rightfully acknowledge that Section 1501 of the Code provides a sufficient and defined standard of review for smart-meter placement decisions of EDCs but in the same breath attempt to

dismiss the same exact statutory provision as not being an adequate standard to review gas-meter placement decisions of NGDCs.

The Municipalities have failed to put forth a cogent argument demonstrating how Section 1501 provides no defined standard of review for NGDC gas-meter placement decisions. The Municipalities simply argue that since outdoor meter placement was made the rule, with exceptions for indoor meter placement in historic districts, that the Commission is somehow precluded and incapable of reviewing the NGDC's meter placement decision under Section 1501 of the Code. The Municipalities Brief at 23. Their assertion is faulty as it is countered by the fact that the General Assembly specifically enacted Section 1501 of the Code, which mandates the Commission to review a public utility's decisions regarding its service and facilities in order to determine if it meets the legal standard of being reasonable *in addition* to adequate, efficient, and safe. Therefore, the Municipalities' urging of this Court to disregard Section 1501 of the Code, as providing no standard of review as to amount to delegating authority to NGDCs for gas-meter placements in historic districts, is unsupported by case law and must be rejected.

C. *Centre Park* Demonstrates The Commission's Ultimate Authority Over NGDCs With Respect To The Placement Of Gas Meters

The Municipalities' emphasis on the particular issues addressed in *Ctr. Park Historic Dist., Inc. v. UGI Utilities, Inc.*, C-2015-2516051 and C-2016-2530475,

2019 WL 5592911 (Oct. 24, 2019) (*Centre Park*) misses the point. Municipalities' Brief at 31-33. *Centre Park* demonstrates that the Commission is empowered to review *any* NGDC decision or action that allegedly violates the Public Utility Code or the Commission's regulations. This is precisely what happened in *Centre Park*. Through the Commission's statutory review process, it determined that NGDCs were not following the regulation and it reviewed the NGDCs' decision and action pursuant to the Public Utility Code and regulations. *Id.* at *21 and *see* 66 Pa.C.S. §§ 1501, 2205 and 52 Pa. Code § 59.18. If the Municipalities' assertions had a scintilla of truth, the NGDC in *Centre Park* could not have been directed to consider indoor gas-meter placement in historic districts, and the Commission would have been powerless to direct them to consider indoor gas-meter placement in historic districts. *Id.* at *45-48.

The Municipalities place emphasis on the fact that the Commission did not define what type of "consideration" an NGDC must engage in. Municipalities' Brief at 33. While consideration of historic status was the issue in *Centre Park*, this demonstrates that the Commission is statutorily tasked with addressing *any* NGDC decision and/or action with respect to facilities, whether in historic districts or not. As discussed, *supra*, the NGDC's consideration must be *reasonable* pursuant to Section 1501 of the Code.

The Commonwealth Court's and Municipalities' refusal to acknowledge the Commission's statutorily prescribed review process ignores the fact that the Commission will develop a body of case law as NGDC complainants have NGDC gas-meter placement decisions reviewed. The Commission and NGDCs will ultimately be guided by the Commission's prior decisions and provide further guidance to all interested parties as to what gas-meter placements are reasonable. *See PECO Energy Co. v. Pa. Pub. Util. Comm'n*, 791 A.2d 1155, 1166 (Pa. 2002) (citations omitted) ("While the Commission is not bound by the rule of stare decisis, an administrative agency must render consistent opinions and should either follow, distinguish or overrule its own precedent."). Just as liability under a theory of negligence requires a review of what is reasonable, the Commission has its own body of case law to guide its review of NGDC gas meter location decisions which in turn guide NGDC's decisions in the first instance. Furthermore, appellate court review of Commission decisions, after development of a complete record of the facts and law, will provide guidance to the Commission, utilities and communities served by utilities. This statutory review process thus prevents arbitrary, ad hoc decisions being made by NGDCs which further demonstrates that the Commission has not delegated review of gas meter siting decisions to NGDCs.

II. Section 59.18, As Amended, Does Not Delegate The Commission's Authority To Review Gas-Meter Placement To NGDCs

What cannot be ignored in this matter is that the Commission amended Section 59.18 to make outdoor gas-meter placement the rule, with exceptions, because it reduces the risk of gas explosions. *See* R.06a-07a. While the General Assembly has not tasked the Commission with maintaining historical facades, the Commission was nonetheless cognizant of the interests Historic Districts have in their facades and made a limited exception to this rule if certain requirements within Section 59.18(d) are met, when safe and reasonable. *See* 52 Pa. Code § 59.18 (d)(2)-(4). The Municipalities try to argue that there is no defined procedure or standard of review within Section 59.18 which they conclude acts as delegating review of this decision to the NGDCs. However, this argument is flawed and ignores the fact that gas meters may be placed inside the building in historic districts as long as the inside placement remains safe and reasonable as required by relevant case law.

A. Public Utilities May Exercise Managerial Functions In The First Instance

It cannot be disputed that public utilities must make managerial decisions on a daily basis that are not all subject to an enumerated procedure of the type the Municipalities are contending must be implemented in Section 59.18. It is recognized that it is not the Commission's province to interfere with management

of a public utility unless an abuse of discretion or arbitrary action by the utility is shown. *Lower Chichester Twp. v. Pa. Pub. Util. Comm'n*, 119 A.2d 674 (Pa. Super. 1956). This Court recognizes that:

Routine day-to-day management decisions, which bear lesser risk to the utility as an ongoing concern, and which do not portend such ultimate danger of burdening the public with large rate increases to rescue the utility from extinction, or of impeding the utility's ability to raise capital through securities offerings, have traditionally been beyond the ambit of the PUC's control.

Pa. Pub. Util. Comm'n v. Philadelphia Elec. Co., 460 A.2d 734, 738 (Pa. 1983).

In this matter, the General Assembly directs the Commission in Sections 501, 1501 and 2205 of the Public Utility Code to ensure that NGDCs furnish and maintain adequate, efficient, safe and reasonable natural gas service. 66 Pa.C.S. §§ 501, 1501 and 2205. The Commission promulgated the amendment to Section 59.18 with safety as the paramount factor while also providing consideration for the interests of Historic Districts. R.05a-06a. Section 59.18 directs NGDCs to decide, in the first instance, where to locate gas meters within certain enumerated parameters.

The Municipalities argue that any and every directive the Commission gives a public utility must account for the entire decision-making process and that nothing can be left to the NGDC's managerial discretion in the first instance. This argument is untenable. While the Municipalities erroneously allege there is no

applicable review procedure tailored specifically to Section 59.18, it is beyond contention that Section 701 of the Public Utility Code, 66 Pa.C.S. § 701, clearly provides the procedural framework to challenge an NGDC's gas-meter placement decision before the Commission. 66 Pa.C.S. § 2205(b)(3). Further, Section 2205(b)(2) of the Code reiterates the General Assembly's intent that all disputes regarding an NGDC's facilities must be reviewed pursuant to the standard set forth in Section 1501 of the Code. 66 Pa.C.S. § 2205(b)(2). Accordingly, there is no support for the Municipalities' legal theory that there is no specific standard of review embedded within Section 59.18 of the Commission's regulations, which was promulgated pursuant to Section 501 and 1501 of the Code. Section 59.18 cannot be read in vacuum as if the decisions of an NGDC regarding its gas meter placements in historic districts are totally distinct and somehow separate and apart from the specific regulatory review process set forth in Section 2205 of the Code. As such, the managerial decisions of an NGDC concerning its placement of gas meters in historic districts is subject to review by the Commission. Thus, Section 59.18 does not amount to an unconstitutional delegation of authority to NGDCs by the Commission.

B. Municipalities' Analysis Of *Pickford* Is Flawed

The Municipalities place undue weight on the fact that the Pennsylvania Department of Environmental Protection (DEP) approved chloramine as a

disinfectant safe for use by a public utility in *Pickford v. Pa. Pub. Util. Comm'n*, 4 A.3d 707 (Pa. Cmwlth. 2010). Municipalities' Brief at 16-20. This fact simply establishes that the challenge to the utility's use of chloramine instead of chlorine before the Commission was, in fact, a managerial decision that had to be shown to be arbitrary and capricious; both chlorine and chloramine were already deemed safe by DEP, thus it was a managerial decision of the utility in picking one over the other. *Id.* at 714. What *Pickford* shows is that it was the utility's managerial decision after the DEP approved chloramine as safe, and it was the complainant's burden to show that using chloramine instead of chlorine was arbitrary and capricious.

The Commission's regulations do not provide any guidance in what type of disinfectant a water utility must use, but this does not mean that the Commission has delegated its authority to review a water utility's decisions. *Pickford* demonstrates that not every decision and action taken by a public utility can be accounted for and enumerated in the Commission's regulations. As recognized by this Court, utilities make daily day-to-day decisions that do not require pre-approval by the Commission. *Philadelphia Elec. Co.*, 460 A.2d 734 and *Pa. Pub. Util. Comm'n v. Philadelphia Elec. Co.*, 561 A.2d 1224 (Pa. 1989). Nevertheless, these managerial decisions are always subject to Commission oversight whenever challenged pursuant to Section 701 of the Public Utility Code. 66 Pa.C.S. § 701.

Accordingly, the Municipalities' emphasis on DEP providing the avenue for a challenge to the health effects of chloramine is a red herring, as *Pickford* was cited to demonstrate that the managerial-decision doctrine is recognized in matters beyond utility rate making, but still subject to Commission oversight.

C. The PUC Is Capable Of Reviewing The Safety And Reasonableness Of Gas-Meter Placement

A distinction lost in the Municipalities' analysis of *Pickford*, 4 A.3d 707, is that the Commission is fully empowered and capable of addressing any complaint a customer submits to the Commission against an NGDC. Municipalities incorrectly assert that "[t]here is no similarly limiting process applicable to placement of exterior gas meters on historic properties." Municipalities' Brief at 19. This is patently false. As previously argued, the limiting process is on full display in *Povacz*, which the dissent in the case *sub judice* recognized as providing the complaint procedure for the placement of utility facilities. R.1085a-86. The dissent expressly noted:

Just like the consumers in *Povacz* who contested the placement of wireless smart meters on their residences, the Municipalities and individual consumers are entitled to contest the NGDCs' decision on the placement of natural gas meters in historic districts before the Commission and request an accommodation pursuant to Sections 701 and 1501 of the Code.

R.1086a (emphasis in original) (citing 66 Pa.C.S. §§ 701 and 1501).

While there is no smart meter specific procedure for smart-meter placement, the Commonwealth Court and this Court recognized that the Commission's complaint procedure in Section 701 provides complainants with due process to address their safety concerns over the placement of smart meters. *See Povacz*, 280 A.3d at 999-1000. This applies directly to gas-meter placement pursuant to Section 59.18. As previously stated, *supra*, the Commission made outdoor gas-meter placement the rule for safety purposes, with exceptions. The exceptions enumerated in Section 59.18 provide NGDCs with guidance in making their decisions regarding an inside gas-meter placement, in the first instance.

If an NGDC customer believes that the NGDC's decision, deviates from the parameters set forth in Section 59.18, or for any reason, the customer may file a complaint with the Commission seeking review of the NGDC's gas meter placement decision pursuant to Sections 701, 1501 and 2205 of the Public Utility Code. 66 Pa.C.S. §§ 701, 1501, 2205. Ultimately, if the Commission finds, based on the facts presented, that the NGDC's gas-meter placement decision, in the first instance, is not reasonable, the Commission has the authority to direct the NGDC to place the meter at another location, whether inside or outside.⁴ Accordingly, the

⁴ It goes without saying that the customer and the NGDC would have the right to appeal the Commission's decision to the Commonwealth Court. *See* 42 Pa.C.S. § 763. This further demonstrates that an NGDC's meter placement decision, in the first instance, is subject to a full legal review guarding against any "arbitrary, *ad hoc* decision making." R.1067a.

Municipalities' argument that *Povacz*'s holding only applies to EDC decisions on smart-meter placement is unavailing and must be rejected.

III. The Municipalities Fail To Recognize The Parameters Set Forth In Section 59.18 For The Indoor Meter Exception

The Municipalities erroneously assert that Section 59.18 does not contain any factors limiting an NGDC's discretion in the placement of exterior gas meters in historic districts, which they conclude amounts to the Commission delegating its review of this decision entirely to the NGDCs. However, this argument is flawed and ignores the fact that gas meters may be placed inside the building in Historic Districts as long as the inside placement remains safe and reasonable as required by relevant case law.

Nonetheless, the Municipalities continue to falsely argue that Section 59.18 does not contain any factors for considering an indoor meter location; however, Section 59.18 itself does provide objective safety parameters for the indoor placement of gas meters. As previously noted, locating gas meters outside is the rule as it reduces the risk of gas leaks inside a dwelling that could result in an explosion. R.06a-07a. Inside meter placement must be considered, however, when it is possible to ensure that it can be done safely. Specifically, if gas service is being provided in an historic district, then the NGDC must consider indoor gas-meter placement when the gas meter:

1. has a shut-off valve located outside;

2. has an outdoor regulator if the service pressure is over 10 psig; and
3. is located in a ventilated place not less than three feet from a source of ignition or source of heat which may damage the gas meter.

52 Pa. Code § 59.18(d)(2)-(4).

Additionally, the Municipalities' argument against the limiting factors in Section 59.18 is flawed because they incorrectly disassociate NGDC facilities that are attendant to gas meters. Municipalities' Brief at 22. Shut-off valves⁵ and gas regulators⁶ are gas facilities that accompany inside gas-meter placement with the exception of a regulator if service pressure is below 10 psig. If the conditions in subsection (d)(2)-(4) are not met, then safety dictates that the gas meter must be located outside. However, if these requirements are met but the NGDC still seeks to move the gas meter outdoors with respect to an historic structure, as mentioned *supra*, the NGDC customer may file a formal complaint against the NGDC and challenge the NGDC's placement decision. Thereafter, based on the standards of review set forth in Section 1501 of the Code, the Commission would then determine whether the NGDC's decision to move the gas meter outdoors is reasonable, and not arbitrary or capricious. Thus, even if the gas meter must be located outside, the NGDC customer could still challenge where the NGDC placed

⁵ <https://plumbingsource.net/gas-shutoff-valve-installation/> (Accessed May 11, 2023).

⁶ <https://norgascontrols.com/blog/regulators/how-does-a-gas-regulator-work/> (Accessed May 11, 2023).

the meter outside and seek reasonable accommodations to address historic aesthetic if it can be done safely and reasonably. *See* 66 Pa.C.S. § 1501 and *Povacz*.

IV. Municipalities' Facial Challenge To Section 59.18 Does Not Present An Actual Case Or Controversy

The Municipalities insist that its challenge to Section 59.18 is only a facial challenge and that there is only a legal question before this Court. Municipalities' Brief at 37. However, the Municipalities have not alleged any harm whatsoever resulting from Section 59.18, which thwarts this facial challenge.

It must first be noted that the Municipalities are precluded from alleging harm to historic aesthetic before this Court. In addressing the Commission's Preliminary Objections, the Commonwealth Court held that it could not be determined whether historic aesthetic would inevitably be damaged and dismissed the Municipalities' claim that Section 59.18 violated the ERA. R.455a-56a. The Municipalities did not appeal this decision. Accordingly, the Municipalities cannot now allege damage to historic aesthetic. *See* Pa.R.A.P. 302 and *Jones v. Ott*, 191 A.3d 782 (Pa. 2018).

With no inevitable harm resulting from Section 59.18, the Municipalities' underlying declaratory judgment action before the Commonwealth Court now runs afoul of the Declaratory Judgments Act. 42 Pa.C.S. §§ 7531–7541. This Court recognizes that to maintain an action pursuant to the Declaratory Judgments Act:

The presence of antagonistic claims indicating imminent and inevitable litigation coupled with a clear manifestation that the declaration sought will be of practical help in ending the controversy are essential to the granting of relief by way of declaratory judgment.

Gulnac by Gulnac v. S. Butler Cnty. Sch. Dist., 587 A.2d 699, 701 (Pa. 1991).

Where there is a dispute as to relevant facts this Court has held that declaratory judgment proceedings should not be entertained. *C. H. Pitt Corp. v. Ins. Co. of N. Am.*, 257 A.2d 857 (Pa. 1969).

With the Commonwealth Court dismissing Count I of their Petition for Declaratory Judgment, the Municipalities stand before this Court without an actual case or controversy since they have effectively conceded that their declaratory judgment action alleges no inevitable harm to historic aesthetic arising from Section 59.18. In Count II of their Petition, the Municipalities simply alleged:

Municipalities assert that the delegation by the PUC to utility companies of the authority to make determinations regarding meter placement in historic districts is an invalid and unconstitutional subdelegation of its statutorily imposed obligation to make and enforce regulations not contrary to law, especially where the General Assembly has provided citizens with the right to enjoy the historic and esthetic value of such districts.

R.249a-50a. However, the Commonwealth Court expressly defined this harm to historic aesthetic as “imaginative speculation.” R.455a.

Without alleging any other inevitable harm resulting from Section 59.18, the Municipalities cannot establish inevitable litigation, and a direct substantial and

present interest in light of the Commonwealth Court holding that the gas-meter placement in this matter does not inevitably establish historic-aesthetic damage without a defined set of facts.⁷ R.455a-56a. The Municipalities therefore stand before this Court arbitrarily contesting the general application of Section 59.18.⁸ As such, the Commonwealth Court should be reversed, and this case dismissed.

⁷ The Commonwealth Court noted in dismissing the ERA challenge that its decision does not preclude the Municipalities from presenting an as-applied challenge to Section 59.18, alluding to the need for a definitive set of facts to determine the constitutionality under the ERA. R.456a n.14.

⁸ This lack of inevitable harm further demonstrates the Commonwealth Court's error in granting the Municipalities' Application for Summary Relief when it previously acknowledged a lack of harm being shown from Section 59.18 to the Municipalities, but proceeded to adjudicate the Petition for Declaratory Judgment on the merits.

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondent Pennsylvania Public Utility Commission respectfully requests that this Honorable Court reverse the Commonwealth Court's Majority Opinion and Order entered on October 11, 2022 and validate the Commission's regulation at 52 Pa. Code § 59.18 as amended on May 22, 2014.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
WITH WORD COUNT LIMITATION REQUIREMENT**

This reply brief complies with the word count limitation requirement of Pennsylvania Rule of Appellate Procedure (Pa.R.A.P.) 2135(d) because it contains 5,838 words, excluding the parts of the brief exempted by Pa.R.A.P. 2135(b) as shown by the word processing system used to prepare the brief.

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I hereby certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that requires filing confidential information and documents differently than non-confidential information and documents.

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