

IN THE SUPREME COURT OF PENNSYLVANIA

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|---|---|--------------------------------|
| City of Lancaster, Borough of | : | |
| Carlisle, and Borough of Columbia, | : | |
| Appellees | : | |
| | : | |
| v. | : | Docket No. 107 MAP 2022 |
| | : | |
| Pennsylvania Public Utility | : | |
| Commission, | : | |
| Appellant | : | |

BRIEF OF APPELLANT
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.

Joseph P. Cardinale, Jr.
Assistant Counsel

Kriss E. Brown
Deputy Chief Counsel

Renardo L. Hicks
Chief Counsel

Counsel for Pennsylvania
Public Utility Commission

P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-5000

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STATEMENT OF JURISDICTION

In this matter, the Commission is appealing from the Commonwealth Court's Order entered on October 11, 2022. *See City of Lancaster, et al. v. Pa. Pub. Util. Comm'n*, 284 A.3d 522 (Pa. Cmwlth. 2022). The basis for the Supreme Court's jurisdiction in this matter arises under Section 723(a) of the Judicial Code, 42 Pa.C.S. § 723(a). In this matter, the Petitioners, City of Lancaster, Borough of Carlisle, and Borough of Columbia (collectively Municipalities), filed a Petition for Review in the Commonwealth Court's original jurisdiction, 42 Pa.C.S. § 761, seeking declaratory judgment that the Commission's regulation at 52 Pa. Code § 59.18, as amended on May 22, 2014, was unconstitutional and unenforceable.

ORDER IN QUESTION

And now, this 11th day of October, 2022, the City of Lancaster's, the Borough of Carlisle's, and the Borough of Columbia's Application for Summary Relief is granted. This Court declares that Section 59.18 of the Pennsylvania Public Utility Commission's Regulations, 52 Pa. Code § 59.18, as amended by the Final Rulemaking Order adopted on May 22, 2014,¹ constitutes an unconstitutional delegation of legislative authority, and is unenforceable.

City of Lancaster, et al. v. Pa. Pub. Util. Comm'n, 284 A.3d 522, 537 (Pa. Cmwlth. 2022).

¹ The Final Rulemaking Order was adopted at public meeting on May 22, 2014 and was entered on May 23, 2014.

STATEMENT OF SCOPE AND STANDARD OF REVIEW

The scope of review refers to “the confines within which an appellate court must conduct its examination. That is, the matters (or “what”) the appellate court is permitted to examine.” *Morrison v. Commonwealth of Pa., Dep’t of Pub. Welfare*, 646 A.2d 565 (Pa. 1994); quoting *Coker v. S.M. Flickinger Co., Inc.*, 625 A.2d 1181, 1186 (Pa. 1983). The scope of review in this matter is directed towards whether the lower court abused its discretion or committed an error of law. *Rehab. and Community Providers Assoc. v. Dept. of Human Serv.*, 283 A.3d 260 (Pa. 2022). This Court’s review of questions of law is *de novo* and plenary. *Sphere Drake Ins. Co. v. Philadelphia Gas Works*, 782 A.2d 510 (Pa. 2001). Further, where there is a question as to whether issues of genuine fact exist presents a legal question which is reviewed by this Court *de novo*. *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899 (Pa. 2007).

At issue in this matter is a Petition for Review seeking declaratory judgment pursuant to the Declaratory Judgments Act.² The Commonwealth Court granted Summary Relief to the Municipalities which was an error of law and an abuse of discretion. An application for summary relief filed pursuant to Rule 1532 is “properly evaluated according to the standards for summary judgment.” *Myers v.*

² 42 Pa.C.S. §§ 7531-7541.

Commonwealth, 128 A.3d 846, 849 (Pa. Cmwlth. 2015). An application for summary relief pursuant to Pa. R.A.P. 1532(b), may only be granted when: (1) there are no genuine issues of material fact; and (2) the right to relief is clear as a matter of law. *Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911, (Pa. 2017) (citing *Jubelirer v. Rendell*, 953 A.2d 514 (Pa. 2008)). When the Court reviews an application for summary relief it must view evidence of record in light most favorable to the non-moving party. *Cent. Dauphin Sch. Dist. v. Commonwealth, Dep't of Educ.*, 598 A.2d 1364 (Pa. Cmwlth. 1991). In considering an application for summary relief, the Court must make its determination on undisputed facts. *Indep. Oil & Gas Ass'n of Pa. v. Pa. Pub. Util. Comm'n*, 804 A.2d 693 (Pa. Cmwlth. 2002). Where material facts are in dispute therein, summary relief should not be granted in motions for declaratory judgment. *Hydropress Envtl. Servs. Inc. v. Twp. of Upper Mount Bethel, Cnty. of Northampton*, 836 A.2d 912 (Pa. 2003).

STATEMENT OF THE QUESTIONS INVOLVED

1. Did the Commonwealth Court err in granting summary relief when it failed to recognize the Commission's statutorily prescribed procedure to review the placement of utility facilities in the Public Utility Code at Sections 701, 1501 and 2205, 66 Pa.C.S. §§ 701, 1501 and 2205?

Suggested Answer: Yes.

2. Did the Commonwealth Court err in granting summary relief in accepting the Municipalities' assertion that Section 59.18, as amended on May 22, 2014, 52 Pa. Code § 59.18, would cause damage to historic facades in historic districts but failed to conduct an analysis of the safety issues regarding meter placement versus historic aesthetic?

Suggested Answer: Yes.

3. Did the Commonwealth Court err in granting summary relief when the Municipalities failed to demonstrate the existence of an actual controversy when there is a material question as to whether Section 59.18, as amended on May 22, 2014, 52 Pa. Code § 59.18, actually operates to cause harm to historic aesthetic, value, or other attribute of properties in the Municipalities' historic districts?

Suggested Answer: Yes.

STATEMENT OF THE CASE

The focus of this matter is on the Commission's 2014 amendment to its regulation at Section 59.18, 52 Pa. Code § 59.18, as amended. The history of the amendment to Section 59.18 is based in gas safety with consideration for historic aesthetics. On May 23, 2014, the Pennsylvania Public Utility Commission (Commission or PUC) entered a final rulemaking order amending 52 Pa. Code § 59.18 (Location of meters) after the Commission's Bureau of Transportation, Gas Safety Division,³ conducted an investigation into the issue of gas-meter placement and relocation in the context of service disputes between natural gas distribution companies (NGDC) and their customers. *Rulemaking Re Amendment to 52 Pa. Code § 59.18 Meter Location*, Docket No. L-2009-2107155 (Order entered May 23, 2014) (*Final Rulemaking*). R.01a-065a.

Prior to Section 59.18 being amended, the regulation simply directed that NGDCs could locate natural gas meters inside a building “preferably in a dry, well-ventilated place not subject to excessive heat, and as near as possible to the point of entrance of the pipe supplying service to the building.” R.03a. The Commission's Gas Safety Division concluded that the existing Section 59.18 was vague, inadequate, and out-of-date with respect to the Federal standards.

³ The Commission's Gas Safety Division was transferred to the Bureau of Investigation and Enforcement in 2011. *See Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011).

R.08a-09a. In amending Section 59.18, the Commission adopted the Federal standards from the Pipeline and Hazardous Materials Safety Administration's (PHMSA) regulations.⁴ *See* 49 C.F.R. § 192.353 (Customer meters and regulators: Location), and 49 C.F.R. § 192.357 (Customer meters and regulators: Installation).

The Commission solicited data from ten gas utilities regarding the number of inside and outside meter sets, inside regulators, inside-meter set leak calls, reportable incidents associated with inside-meter sets, inside leak surveys, and local ordinances requiring certain meter locations. The Commission also requested information on the utilities' tariff language and meter-relocation charges. All the responding gas utilities' tariffs had rules governing the location of meter sets with each tariff stating that the utility will make the ultimate siting determination. Most of the tariffs provided allowances for inside meters and regulator sets based upon historic-area prohibitions and areas that have high amounts of vandalism. R.05a.

During the final rulemaking, the Commission received comments on the visual impacts to historic resources when equipment is installed outside on a primary facade. Specifically, the City of Allentown, the mayor of the City of Allentown, the Pennsylvania Historical and Museum Commission, and Society

⁴ PHMSA regulations are the "minimum safety requirements for pipeline facilities and the transportation of [natural] gas..." 49 C.F.R. § 192.1. States with PHMSA certification, such as Pennsylvania, may adopt additional or more stringent safety standards for intrastate pipeline facilities when such standards are compatible with the minimum standards established by PHMSA. 49 U.S.C. § 60104(c).

Hill all commented on their concerns over the placement of natural gas meters outside of historic structures. *Final Rulemaking*, R.025a. The Municipalities did not participate in the Rulemaking regarding the amendments to Section 59.18.

In 2016, a natural gas explosion at an apartment building in Silver Spring, Maryland, caused, in part, by a natural gas meter located inside the building prompted the National Transportation Safety Board (NTSB) to investigate natural gas meter locations. The NTSB submitted a report and safety recommendations to PHMSA on its findings. The NTSB recommended to PHMSA that it require that all new gas regulators be installed outside occupied structures and that all existing interior gas regulators be relocated outside of occupied structures. *See Building Explosion and Fire, Silver Spring, Maryland, August 10, 2016*, NTSB/PAR-19/01 and NTSB letter to PHMSA Administrator dated June 10, 2019 (*NTSB Accident Report*). R.066a-153a.

The Municipalities filed their Petition for Review in the Commonwealth Court's original jurisdiction on April 29, 2019, seeking declaratory judgment on the validity of Section 59.18.⁵ R.232a-393a. Thereafter, the Commission filed Preliminary Objections to the Municipalities' Complaint on June 26, 2019,⁶ and the Municipalities filed their respective answer on August 9, 2019. R.394a-413a

⁵ The Commission was officially served with the Petition on May 21, 2019.

⁶ The Commission filed Amended Preliminary Objections on July 1, 2019.

and R.414a-433a, respectively. On February 21, 2020, the Commonwealth Court entered its Opinion and Order sustaining the Commission's Preliminary Objections with respect to Count I of the Petition for Review and overruling the Preliminary Objections with respect to Count II. R.434a-467a. The Commission filed an Application for Reconsideration on March 6, 2020, which the Commonwealth Court denied on April 7, 2020. R.468a-605a and R.730a, respectively.

The Municipalities subsequently filed an Application for Summary Relief and supporting brief on September 6, 2020. R.731a-1036a. The Commission submitted its Answer to the Application for Summary Relief on September 21, 2020. R.1037a-1050a. On December 7, 2020, the Commonwealth Court heard oral argument on the Municipalities' Application for Summary Relief. Thereafter, on October 11, 2022, the Commonwealth Court entered its majority and dissenting opinions, wherein the Commonwealth Court's majority invalidated the Commission's May 22, 2014 amendment to Section 59.18. R.1051a-1075a and R.1076a-1096a, respectively.⁷

On November 7, 2022, the Commission filed a Notice of Appeal and a Jurisdictional Statement with this Court. The Municipalities filed a No Answer Letter to the Commission's Notice of Appeal and Jurisdictional Statement on

⁷ The Commonwealth Court's Majority and Dissenting Opinion are attached as Appendix A and B, respectively.

November 21, 2022. Subsequently, on February 21, 2023, this Court entered an order noting Probable Jurisdiction.

SUMMARY OF THE ARGUMENT

The safety of natural gas consumers in the Commonwealth is at issue in this matter. In 2014, the Commission amended its natural gas meter placement regulation at Section 59.18 directing how NGDCs make natural gas meter placement decisions in historic districts. Contrary to the Commonwealth Court's holding, Section 59.18 as amended did not delegate to NGDCs the Commission's authority to review NGDC natural gas meter placement in historic districts. The Commission's enabling statute, the Public Utility Code, clearly provides any aggrieved customer the right to contest an NGDC's natural gas meter placement decision. The Commonwealth Court's majority decision errs in reading Section 59.18, as amended, exclusive from the Public Utility Code. Such a reading fails to recognize the duties the General Assembly assigned to the Commission in regulating public utilities and operates to throw into question all of the Commission's regulations that regulate public utility services and facilities.

In finding that Section 59.18, as amended, delegated the Commission's authority, the Commonwealth Court majority leaves intact Municipal Historic District Ordinances that do not consider natural gas safety. Such a holding is at odds with the field preemption this Court has recognized the Commission having with respect to regulating public utility service and facilities. By invalidating Section 59.18, as amended, the Commonwealth Court has wholly discounted any

safety consideration for the placement of natural gas meters in historic districts and elevates historic aesthetics to the only factor for consideration in the placement of natural gas meters in Historic Districts.

Finally, the Commonwealth Court also failed to consider that there are glaring material facts still at issue in this case. Notwithstanding the Commonwealth Court's erroneous conclusion with respect to delegation, it erred in considering the merits of the Municipalities' Petition for Review when the Municipalities failed to prove the historic aesthetic, value or other attribute of properties in the historic districts are in any way harmed by Section 59.18, as amended. All of the Municipalities' Historic District Ordinances permit the attachment of modern appliances to the facades of buildings in Historic Districts. Accordingly, there is a serious material question as to whether Section 59.18, as amended, that requires NGDCs to consider placing natural gas meters outside a historical building actually harms historic aesthetic, value or other attribute of the properties in historic districts.

ARGUMENT

I. The Commission Has Authority To Review Public Utility Placement Of Meters In Historic Districts

The Commonwealth Court's majority in *City of Lancaster, et al.* 284 A.3d 522, makes three fundamental errors in reaching the conclusion that the Commission delegated unreviewable siting authority to public utilities in the 2014 amendment to Section 59.18 of the regulations, 52 Pa. Code § 59.18. First, the Commonwealth Court majority did not consider the managerial-decision doctrine, wherein Courts in Pennsylvania recognize that public utilities have authority to make managerial decisions subject to Commission oversight. Second, the Commonwealth Court majority erred in its reading of Section 59.18, as amended, where the regulation clearly contains factors that an NGDC must consider for indoor natural gas meter placement in historic districts. Lastly, the Commonwealth Court majority wholly failed to recognize the Commission's statutorily prescribed review process over utility decisions.

A. Meter Placement Decisions Made By NGDCs Are Managerial Decisions Reviewable By The Commission

Before Section 59.18 was amended in 2014, NGDCs had wider discretion in deciding where to place natural gas meters regardless of a property's historic district status. This type of managerial decision was formally recognized by this Court in *Pa. Pub. Util. Comm'n v. Philadelphia Elec. Co.*, 561 A.2d 1224 (Pa.

1989). In that case, the Commission reviewed an electric utility's rate increase to offset energy replacement costs incurred from closing two nuclear power plants. The Commission denied the rate increase because it concluded that part of the energy replacement costs were caused by mismanagement, and that since one of the outages was caused by a manufacturing defect, the electric utility was in the best position to pursue damages against the manufacturer. *Id.* at 1225. The Commonwealth Court reversed the Commission, holding that the Commission should have considered whether the rate was just and reasonable. This Court granted review, and in analyzing this issue, this Court opined:

Although the Commission is a watchdog for the public and against unreasonable rates, the Commission must not interfere with *managerial decisions* of a utility absent an abuse of discretion.

Id. at 1226 (emphasis added). This Court went on to recognize how the Commonwealth Court characterized the interplay between the Commission and utility:

It is also fundamental that the Commission has an ongoing duty to protect the public from unreasonable rates while insuring that utility companies are permitted to charge rates sufficient to cover their costs and provide a reasonable rate of return. Recognizing the Commission's duty to the public and a utility's right of self-management, our courts adopted the further proposition that *it is not within the province of the Commission to interfere with the management of a utility unless an abuse of discretion or arbitrary action by the utility has been shown*. An obvious corollary of the

above proposition is that if there has been an abuse of managerial discretion, and the public interest has been adversely affected thereby, *then the Commission is empowered to intervene.*

Id. at 1226-27 (emphasis added) (quoting *Metropolitan Edison Co. v. Pa. Pub. Util. Comm'n*, 437 A.2d 76, 80 (Pa. Cmwlth. 1981) (internal citations omitted)).

This managerial-decision doctrine is not confined to ratemaking. In *Pickford v. Pa. Pub. Util. Comm'n*, 4 A.3d 707 (Pa. Cmwlth. 2010) the Commonwealth Court recognized that a water utility's choice of chemicals to disinfect water falls within the managerial-decision doctrine. In *Pickford*, water customers challenged a water utility's use of chloramine as a decontaminate as posing non-health related risks to the public. However, the Commonwealth Court noted that chloramine was declared safe by the Pennsylvania Department of Environmental Protection (DEP) and the United States Environmental Protection Agency (EPA). *Id.* at 714. Since the DEP and EPA determined that chloramine was safe for use, the Commonwealth Court held that the water utility's decision to use chloramine as a disinfectant was a managerial decision. As such, the Commonwealth Court noted that to meet their burden, "Petitioners were required to demonstrate that [the utility]'s decision to use a DEP-approved treatment chemical was an abuse of discretion or an arbitrary decision which adversely affected the public." *Id.* at 715. The Commonwealth Court held that the customers did not meet their burden of demonstrating that the utility's service, specifically its

choice of treatment to use chloramines, was not reasonable, safe or prudent under Section 1501 of the Public Utility Code, 66 Pa.C.S. § 1501. *Id.*

In the case *sub judice*, NGDCs make managerial decisions daily deciding where to place natural gas meters. While there is no regulation establishing a distinct procedure for the placement of such meters, as there were no regulations for the use of particular disinfectants in *Pickford*, this *managerial decision* is subject to Commission review when challenged.

Unlike in *Pickford*, where there was no regulation providing water utilities guidance in their decision for which disinfectant to use, Section 59.18, 52 Pa. Code § 59.18, as amended (hereafter Section 59.18), provides guidance to NGDCs on natural gas meter placement. The 2014 Amendment to Section 59.18, added explicit directives that NGDCs must consider in making their meter placement decisions in historic districts. However, just like the customers in *Pickford* who contested the water utility's decision to use chloramine, if a utility customer disagrees with the NGDC's meter placement decision in a historic district, that customer may seek review of the NGDC's decision through the Commission's formal complaint procedure set forth in the Public Utility Code at Sections 701, 1501 and 2205, like any other utility's managerial decision. 66 Pa.C.S. §§ 701, 1501 and 2205.

The Commonwealth Court majority wholly disregarded the Commission’s statutorily prescribed review procedure to arrive at the conclusion that Section 59.18 delegated the Commission’s authority over the placement of natural gas meters in historic districts to NGDCs. As case law demonstrates, managerial decisions made by public utilities are subject to Commission review, and the Commonwealth Court majority erred in finding Section 59.18 delegated “unfettered” and “unguided” authority to NGDCs regarding natural gas meter placement in historic districts. *City of Lancaster, et al.*, 284 A.3d at 534 n.15.

B. Section 59.18 Contains Factors An NGDC Must Consider For Inside Meter Placement

When the Commission amended Section 59.18, its primary concern was safety. *Final Rulemaking*, R.05-06 and R.08-09. The Commission noted in the *Final Rulemaking* that:

The gas distribution utilities reported more than 4,000 leaks occurring on inside meter sets over a five year period. The number of reportable incidents^[8] (65) over the past forty years, however, is more alarming. While it appears from the data that the inside meter and regulators were not always the primary factor for accidents, locating meters and regulators inside certainly contributed to these incidents through a release of natural gas.

State and federal gas safety regulations require gas utilities to perform leak surveys over service lines periodically; however, several of the utilities reported

⁸ A reportable incident exists where there was a release of gas and (1) greater than \$50,000 in damages; (2) death or injury; or (3) a significant event in the determination of the distribution utility.

that they could not comply with the leak survey requirements when the meter and regulator are inside a building which prevents access. This is troubling because the state and federal regulations require leak surveys up to the meter. By not having access to the meter sets, the NGDCs cannot comply with the state and federal regulations and cannot detect inside leaks.

The state has experienced several gas explosions related to steel service lines being struck and pulled up from their stable position and subsequently pulling the service line from the inside meter set. Plastic service lines with inside meter sets do not pull away since the excavation equipment usually severs the line immediately after being struck. The combination of steel service line and inside meter set is a high risk factor for natural gas incidents.

Final Rulemaking, R.05a-06a.

As such, the Commission drafted Section 59.18 to make outdoor meter placement the rule and created limited exceptions for indoor meter placement. This intent is made clear in the text of the regulation itself. The regulation provides in relevant part:

(d) Inside meter locations.

(1) Inside meter locations shall be considered only when:

(i) The service line pressure is less than 10 psig.

(ii) A meter is located in a building that meets one of the following criteria:

(A) A building is listed in the National Register of Historic Places or the customer or building owner notifies the utility that the building is eligible to be

listed in the National Register of Historic Places and the eligibility can be readily confirmed by the utility.

(B) A building is located within a historic district that is listed in the National Register of Historic Places or the customer or building owner notifies the utility that the historic district is eligible to be listed in the National Register of Historic Places and the eligibility can be readily confirmed by the utility.

(C) A building has been designated as historic under the act of June 13, 1961 (P. L. 282, No. 167) (53 P. S. §§ 8001-8006), known as the Pennsylvania Historic District Act, the Pennsylvania Municipalities Planning Code (53 P. S. §§ 10101-11202) or a municipal home rule charter.

(D) A building is located within a locally designated historic district or is eligible for the listing, or a building is individually designated under a local ordinance as a historic landmark or is eligible for the listing.

(iii) Protection from ambient temperatures is necessary to avoid meter freeze-ups.

(iv) A utility determines that a meter is subject to a high risk of vandalism based on the utility's prior experience.

(v) A utility determines that an outside meter location is neither feasible nor practical.

(2) Except for low pressure systems with service line pressure less than 10 psig, regulators must be located outside when a meter is located inside.

(3) Installed inside meters must be attached to an operable outside shut off valve.

(4) Meters installed within a building must be located in a ventilated place not less than 3 feet (914 millimeters)

from a source of ignition or source of heat which may damage the meter.

52 Pa. Code § 59.18.

Subsection (d)(1) of Section 59.18 establishes the circumstances where an NGDC *must consider* the indoor placement of a natural gas meter. However, the entirety of Section 59.18 must be read to appreciate the factors that the NGDC must consider for indoor placement of a meter. In particular, Subsection 59.18(d)(2) directs that NGDCs must be able to locate gas regulators outside for service-line pressures greater than 10 psig. If an NGDC is unable to meet this requirement it cannot locate a natural gas meter indoors for a historic building, with safety dictating outdoor meter placement. R.046.

Next, Subsection 59.18(d)(3) adds another safety requirement for indoor meter placement by directing that NGDCs must be able to install an operable outside shut off valve to a meter located indoors. Again, the regulation, focused on safety, gives the NGDC the initial discretion to consider an indoor natural gas meter location.

Finally, Subsection 59.18(d)(4) directs that for natural gas meters to be located indoors they must be able to be in a ventilated place within no less than three feet from a source of ignition or source of heat that could damage the meter. All of these factors the NGDC must consider were adopted by the Commission from the U.S. Department of Transportation regulations and are enforced pursuant

to an agreement with PHMSA.⁹ *Final Rulemaking*, R.04a. *See also NTSB Accident Report*, R.104a-105a.

It is notable that Section 59.18, prior to the 2014 amendment, contained only the following factors for an NGDC to consider:

preferably in a dry, well-ventilated place not subject to excessive heat, and as near as possible to the point of entrance of the pipe supplying service to the building.

52 Pa. Code 59.18 (2013). Not only were there missing safety factors for NGDCs to consider, the way Section 59.18 was previously drafted did not direct NGDCs to consider indoor meter locations for historic buildings. It was left only to the sound managerial decision of the NGDC to consider indoor meter placement. Each NGDC operating in the Commonwealth had its own Commission approved tariff that dictated when it would consider indoor gas meter placement, leaving a patchwork of standards across the Commonwealth for historic districts.

Ironically, Section 59.18, prior to the 2014 Amendment, gives more managerial discretion to an NGDC for meter placement as there is nothing in the prior version compelling an NGDC to consider inside gas meter placement in a

⁹ *See Ratification and Adoption of Amendments to Part 192 of Title 49 of the Code of Federal Regulations*, Docket No. M-01347, Order entered March 16, 2000, 2000 Pa. PUC LEXIS 4; 52 Pa. Code § 59.33 Safety.

historic district.¹⁰ As the 2014 Amendment to Section 59.18 set forth clear directives and factors for consideration of an inside natural gas meter in historic districts, the Commission has not delegated the authority for natural gas meter placement in historic districts especially when read in *pari materia* with the Public Utility Code, discussed *infra*.

C. The Commonwealth Court Failed To Recognize The Commission’s Statutorily Prescribed Authority To Review Complaints Against Public Utilities

As Section 59.18 provides factors an NGDC must consider when placing a meter indoors in historic districts, it becomes apparent that any aggrieved party has the right to contest, before the Commission through a formal complaint, an NGDC’s decision to place the meter outside. *See* 66 Pa.C.S. §§ 701, 2205(b)(3). The Commonwealth Court wholly ignored the safety factors an NGDC must consider in Section 59.18(d)(2)-(4) when it analyzed the Commission’s formal complaint process provided for in the Public Utility Code. Section 701 provides:

¹⁰ The Commonwealth Court addressed the Municipalities’ request for deference to the Historic District Ordinances. In its memorandum opinion adjudicating the Commission’s Preliminary Objections the Commonwealth Court noted:

However, even if the Court were to conclude that 52 Pa. Code § 59.18 was unlawful or invalid, as a practical matter, it is likely that the Historic District Ordinances would still be preempted and thus inoperable. This is because, in enacting the Public Utility Code, the General Assembly intended to occupy the entire regulatory field, and the net result is that “we must reject all local regulation fairly encompassed by that field.”

R.443a (footnote omitted) (*quoting PPL Electric Utilities Corp. v. City of Lancaster*, 214 A.3d 639, 655 (Pa. 2019)).

The commission, or any person, corporation, or municipal corporation having an interest in the subject matter, or any public utility concerned, may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.

66 Pa.C.S. § 701. Additionally, the Commission has set forth the procedure for submitting formal complaints in its regulations that provide, in relevant part, that:

(a) A person complaining of an act done or omitted to be done by a person subject to the jurisdiction of the Commission, in violation, or claimed violation of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission, may file a formal complaint with the Commission.

* * *

(d) The filing of a formal complaint [sic] entitles the complainant to a formal hearing before the Commission except that the Commission may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. Motions may be filed in accordance with §§ 5.101 and 5.102 (referring to preliminary objections; and motions for summary judgment and judgment on the pleadings).

52 Pa. Code § 5.21.

Through this formal complaint procedure, an aggrieved customer can challenge an NGDC's managerial decision to locate a natural gas meter outside under Section 59.18, as well as challenge the reasonableness of the NGDC's decision under Sections 1501 and 2205 of the Public Utility Code. 66 Pa.C.S.

§§ 1501, 2205. As such, the Commonwealth Court’s finding that Section 59.18 delegated the Commission’s authority to review natural gas meter placement in historic districts to NGDCs is wrong, as the Commonwealth Court Dissenting Opinion points out. *See* Dissenting Slip Op. at R.1086a-1087a.

1. The NGDC Decision For Natural Gas Meter Location Must Be Safe And Reasonable

Notwithstanding the provisions within Section 59.18, any aggrieved property owner can contest an NGDC’s natural gas meter location decision under Section 1501 of the Public Utility Code. Section 1501 of the Public Utility Code provides in relevant part:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. * * * Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service.

66 Pa.C.S. § 1501 (Character of service and facilities).

Accordingly, if an NGDC decided to locate a meter outside of one of the Municipalities’ historic buildings, the aggrieved party would have a right to file a formal complaint with the Commission to have that NGDC’s decision reviewed by

the Commission. In fact, the Commonwealth Court and this Court recognized this very procedure and the Commission's authority to direct meter placement.

In *Povacz, et al. v. Pa. Pub. Util. Comm'n*, 241 A.3d 481 (Pa. Cmwlth. 2020) rev'd and aff'd by 280 A.3d 975 (Pa. 2022), the Commonwealth Court expressly recognized that the Commission had the authority to direct an electric distribution company (EDC) to relocate wireless electric smart meters away from complainants' homes. At issue in *Povacz* was whether Act 129 permitted accommodations for electric customers with health concerns over wireless electric smart meters. *See* 66 Pa.C.S. § 2807. While Act 129 provided no distinct procedure for customers to seek accommodations from wireless smart meters, the Commonwealth Court held that the Commission had authority to accommodate a consumer's request to avoid RF emission from smart meters. *Id.* at 494-95.

The Commonwealth Court, in the case *sub judice*, addressed *Povacz* in a footnote in its majority decision, opining:

In *Povacz*, there was no unlawful delegation challenge. Unfettered and unguided utility discretion was not at issue therein. The consumers did not challenge a PUC regulation but, rather, the interpretation of an Act of the General Assembly. This Court determined that *the relevant statutory provision could be interpreted to address the consumers' concerns and remanded the case to the PUC to determine appropriate accommodations based on the facts before it.*

City of Lancaster v. Pa. Pub. Util. Comm'n, 284 A.3d 522, 534 n.15 (Pa. Cmwlth. 2022) (emphasis added).

The Commonwealth Court expressly recognized the Commission's statutorily prescribed authority to direct an EDC's electric meter placement. This finding implicitly recognizes the Commission's ultimate authority to review an NGDC's placement of a gas meter found in Sections 701, 1501 and 2205 of the Public Utility Code. However, the Commonwealth Court made a dubious distinction between the Commission exercising its authority over the interpretation of a statute, Section 2807, and its authority to adjudicate regulations, Section 59.18. This distinction has no effect on the Commission's ultimate authority in an NGDC's gas meter placement decision in historic districts.

On appeal, this Court recognized in *Povacz*, 280 A.3d 975 that while smart meter complainants cannot prevent installation of a smart meter under Act 129, a smart meter litigant has the ability to seek accommodation pursuant to Section 1501 of the Public Utility Code. 66 Pa.C.S. § 1501. This Court opined:

As in this case, a customer can file a claim under Section 1501 that smart meter technology service is unsafe and/or unreasonable. If the customer establishes by a preponderance of the evidence based on the totality of the circumstances that smart meter service violates Section 1501, they are entitled to an accommodation to the extent allowed by Act 129 and a utility's tariff.

Povacz, 280 A.3d at 1014. In fact, this Court even alluded to meter aesthetics when discussing the disjunctive operation of “safe” and “reasonable” service in Section 1501, opining:

[I]t is easy to imagine situations where safe service could be unreasonable. For example, requiring a smart meter could be safe but unreasonable service if the smart meter were so large that it filled a consumer’s entire basement *or was to be installed on the front door of a house, detracting from the property’s curb appeal.*

Id. at 1012 (emphasis added).

While this observation was *dicta* in *Povacz*, this logic directly applies to the application of Section 1501 and the installation of gas meters in historic districts. This court recognized that Section 1501 requires public utilities to consider safety and reasonableness of its facilities. In turn, the Commission reviews a public utility’s service and facilities under Section 1501, to determine whether the public utility’s service and facilities are safe and reasonable, upon complaint by a utility customer.

The *Povacz* holding directly applies to natural gas utility customers in historic districts. Instead of the Commission interpreting a statute dictating the installation of a meter, there is a regulation, Section 59.18, with safety parameters defined within the regulation itself, that the Commission can review if an aggrieved customer disagrees with the NGDC’s determination to move a gas meter outside. An aggrieved historic district gas utility customer is able to contest an

NGDC's gas meter placement decision within Section 59.18, contesting the safety and reasonableness of the decision pursuant to Section 1501 of the Public Utility Code. 66 Pa.C.S. § 1501.

It is apparent that the Commonwealth Court's majority opinion misstates the law and how it operates in regard to the Commission's review of gas utility meter placement decisions. NGDCs do not have the last word on the gas meter placement in historic districts. To the contrary, Section 59.18 provides safety parameters that the NGDC must consider for indoor meters in historic districts and the NGDC's meter placement decision is subject to challenge before the Commission where the Commission retains ultimate authority to determine if the utility's meter location decision is safe and reasonable. On review before the Commission, the NGDC's decision is subject to the parameters set forth in Section 59.18, as well as the Commission's standard of review set forth in Section 1501 of the Public Utility Code. Accordingly, the Commonwealth Court's majority decision finding that Section 59.18 unlawfully delegated the Commission's authority to NGDCs is wrong and must be reversed.

2. The Commonwealth Court Majority Misinterprets The Public Utility Code And How It Applies To Section 59.18

The Commonwealth Court incorrectly relied on holdings in *Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.)*, 161 A.3d 827 (Pa. 2017), *Pa. Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383 (Pa.

2005), and *42 Prop. Ass'n of Alpha Chi Rho, Inc. v. State Coll. Borough Zoning Hearing Bd.*, 223 A.3d 300 (Pa. Cmwlth. 2019). In *Protz*, the Worker's Compensation Act allowed employers to demand claimants to undergo an impairment-rating evaluation due to the claimant's compensable injury. In making this determination, the Worker's Compensation Act required physicians to apply a methodology from the most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. *Id.* at 830. At issue in *Protz* was the incorporation of guidelines from a private entity in the Workers' Compensation Act of which this Court held was an unconstitutional delegation of power. *Id.* at 838.

In the instant case, the Commonwealth Court majority incorrectly concludes that the Commission delegated its natural gas meter siting authority to NGDCs since the decision is first left to the NGDC *with requirements from the Commission* found within Section 59.18. The incorporation of a private entity's guidelines for review of a complaint, like in *Protz*, is not at issue in the case *sub judice*. The Code and the Commission's regulation at Section 59.18 are the only authorities the Commission considers in reviewing an NGDC's natural gas meter placement in a historic district.

Unlike the express reference to a private entity's guidelines for reviewing a claimant's case in *Protz*, a claimant before the Commission contesting the gas

meter placement is not beholden to any private entity's guidelines. A claimant contesting an NGDC's natural gas meter placement in a historic district before the Commission is subject to review under Section 1501 and 2205 of the Code, 66 Pa.C.S. §§ 1501, 2205, just like the consumers contesting the placement of electric wireless smart meters in *Povacz*, 280 A.3d 975. As such, the Commonwealth Court's rationale relying on an analogy to *Protz* is wrong and resulted in erroneously finding that Section 59.18 delegated final gas meter location determinations in historic districts to NGDCs.

The majority compounded its error of analogizing to *Protz* when it determined that Section 1501 does not provide any standard of review when reviewing public utility decisions and actions. The majority in *City of Lancaster, et al.*, again, makes the mistake of reading authority in a vacuum. In forming its erroneous conclusion that Section 59.18 delegated authority to NGDCs, the Commonwealth Court interpreted Section 1501 of the Public Utility Code as simply "describ[ing] a public utility's duty to the public," and that it "does not prescribe the manner in which an NGDC must exercise the unfettered, PUC-granted discretion regarding whether to order an existing interior gas meter in a historic district be moved to an exterior location[.]" *Id.* at 535. This erroneous interpretation wholly excludes the Commission's general powers the General

Assembly bestowed on the Commission. Section 501 of the Public Utility Code provides in relevant part:

(a) Enforcement of provisions of part.--In addition to any powers expressly enumerated in this part, the commission shall have full power and authority, *and it shall be its duty to enforce*, execute and carry out, by its regulations, orders, or otherwise, all and singular, *the provisions of this part*, and the full intent thereof; and shall have the power to rescind or modify any such regulations or orders. The express enumeration of the powers of the commission in this part shall not exclude any power which the commission would otherwise have under any of the provisions of this part.

* * *

(c) Compliance.--Every public utility, its officers, agents, and employees, and every other person or corporation subject to the provisions of this part, affected by or subject to any regulations or orders of the commission or of any court, made, issued, or entered under the provisions of this part, shall observe, obey, and comply with such regulations or orders, and the terms and conditions thereof.

66 Pa.C.S. § 501 (General powers) (emphasis added).

The Commonwealth Court majority failed to recognize that the Commission has the duty to enforce the Public Utility Code and in turn enforce the letter of Section 1501 and 2205. It is this duty that requires the Commission to review all public utilities' services and facilities through the lens of Section 1501 and NGDCs through the specific lens of Section 2205(b)(3), 66 Pa.C.S. § 2205(b)(3), as prescribed by the General Assembly. As such, the majority's conclusion that

Section 1501 merely describes a public utility's duty to the public, fails to recognize that the Commission is the statutorily empowered entity tasked with enforcing the Public Utility Code and ensuring that public utilities are actually providing "adequate, efficient, safe, and reasonable service and facilities." 66 Pa.C.S. § 1501.

3. The Commission Has Reviewed NGDC Natural Gas Meter Decisions In Other Historic Districts

The statutory framework and case law cited to herein is fully demonstrated by the Commission's review of NGDC gas meter placement decisions in other historic districts. In 2015 and 2016, the Commission received two formal complaints from two historic districts contesting UGI Utilities, Inc.'s decision to locate natural gas meters outside of historic buildings in their respective historic districts. 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 Historic District, Inc. and the City of Reading submitted formal complaints against UGI Utilities, Inc.'s (UGI) decision to relocate gas meters outside of historic buildings in their respective historic districts without giving any consideration for the factors enumerated in Section 59.18. The Commission's Office of Administrative Law Judge conducted formal hearings to determine UGI's practices in placing gas meters in the historic districts at issue. The Commission ordered UGI to submit letters to the addresses of each customer in historic districts whose meters were

relocated between September 13, 2014, and July 30, 2016. *Id.* at *48-49. This demonstrates that the formal complaint procedure prescribed in Section 701 of the Public Utility Code precludes ultimate natural gas meter siting authority in historic districts.

In *Centre Park Historic Dist., Inc. v. UGI Utilities, Inc. and City of Reading v. UGI Utilities, Inc.*, UGI was subject to the Commission's final order just as it would be subject to any other final order from the Commission arising from a formal complaint. *See* 66 Pa.C.S. § 501. This same process stands ready for any historic building property owner aggrieved by an NGDC's gas meter placement decision. As it is evident that Section 59.18 did not delegate the Commission's authority over the placement of natural gas meters in historic districts, the Commission respectfully requests that this Court reverse the Commonwealth Court's majority decision and order and validate Section 59.18.

II. The Commonwealth Court Failed To Conduct An Analysis Of The Safety Issues Regarding Meter Placement Versus Historic Aesthetic

The consequence of the Commonwealth Court's majority decision is the complete discounting of gas safety and the Commission's statutory obligation to ensure public safety. By erroneously finding that the Commission delegated its utility facility siting authority to NGDCs, the Commonwealth Court has wholly removed gas safety from the gas meter siting equation in Historic Districts and is

instead permitting the Municipalities' local Historic District Ordinances to dictate where an NGDC can locate gas meters in Historic Districts.

A. Municipalities Are Preempted From Legislating In The Field Of Public Utilities

The Commonwealth Court's majority decision essentially recognizes Section 59.18 as subordinate to the Municipalities' Historic District ordinances. This position is wholly untenable. This Court has reaffirmed the Commission's authority to preempt local ordinances with respect to public utility facilities. In *PPL Elec. Utilities Corp. v. City of Lancaster*, 214 A.3d 639 (Pa. 2019) this Court held:

[W]e reaffirm that the General Assembly long has intended, and continues to intend, that its comprehensive statutory framework for utility regulation, as complemented by the PUC's voluminous complementary regulations, reflect its general intention wholly to occupy the field of utility regulation at the state level.

Id. at 652. This Court went further, opining:

Upon finding that the legislature intended to occupy the regulatory field, we must reject *all* local regulation fairly encompassed by that field.

* * *

As evinced by the Code and regulations thereunder, matters pertaining to the location of utility facilities lie within the ambit of the PUC's regulatory authority. Hence, *relocation and removal of utility facilities also lie within the preempted field.*

Id. at 655 (emphasis added).

Consistent with this Court’s ruling, the Commonwealth Court has addressed the issue of gas meter location, and it held that Section 59.18 preempts the enforcement of local ordinances directing the location of gas meters in historic districts. In *UGI Utilities, Inc. v. City of Reading*, 179 A.3d 624 (Pa. Cmwlth. 2017), the Commonwealth Court entered declaratory judgment against the City of Reading’s local ordinance directing the location of gas meters in historic districts. The Commonwealth Court opined that state law preempts local ordinances in three situations:

- 1) where there is a preemption clause expressly restricting local regulation; 2) where the state law is intended to occupy the entire field and permit no local regulation; and 3) where the ordinance conflicts with state law either because compliance with both is impossible or because the ordinance stands as an obstacle to the execution of the full purposes of the state law.

Id. at 629 (citing *Hoffman Mining Co., Inc. v. Zoning Hearing Bd. of Adams Township, et al.*, 32 A.3d 587 (Pa. 2011)).

The City of Allentown’s ordinance directing the location of gas meters in historic districts was preempted by Section 59.18, because the local ordinance stood as an obstacle to the execution of the *full purpose* of Section 59.18. *Id.* at 630. As such, the Commonwealth Court determined that the local ordinance:

specifically regulates the very same subject regulated by the PUC, the location of gas meters, and provides for local enforcement of its restrictions by orders that gas meters be removed or altered and by imposition of

penalties. Such regulation of the location of utility facilities is preempted by the PUC's exclusive authority regardless of whether it conflicts with any specific PUC regulations or orders.

Id. Finally, the Commonwealth Court held:

[t]he City does not claim that PUC Regulation 59.18 violates Article 1, Section 27 or is unconstitutional in any respect. Nor is there are [sic] any basis on which a court could conclude that the PUC's safety regulation of gas meters violates Article 1, Section 27 of the Pennsylvania Constitution, as *it in fact takes into account the interest in protection of historic resources by providing for consideration of indoor meter placement in historic districts.* 52 Pa. Code § 59.18(d)(ii).

Id. at 631-32 (emphasis added).

It is evident that the Commonwealth Court's majority decision is at odds with this Court's recognition of the Commission's field preemption and the Commonwealth Court's own prior decisions regarding placement of gas meters in historic districts. Given that the Commission is recognized as having field preemption over public utility facilities, the Commonwealth Court's majority decision in the case *sub judice* must be reversed and Section 59.18 must be held to be valid over the Municipalities' respective individual Historic District ordinances.

B. The Municipalities' Historic District Ordinances Only Address Aesthetics And Are Devoid Of Any Safety Considerations

The consequence of ignoring the Commission's field preemption in this instance ignores one of the fundamental reasons why the Commission is

recognized as having field preemption amongst public utility regulation. The Commonwealth Court's invalidation of Section 59.18 effectively places historic district ordinances above the Commission's regulations. Of note, these ordinances do not address any safety measures with respect to gas meters nor the safety of any other public utility facility. By invalidating Section 59.18, the Commonwealth Court has removed safety regulations expressly promulgated by the state agency statutorily entrusted with ensuring safe and reliable public utility service as well as specifically ensuring that NGDCs maintain the integrity of their respective distribution systems to provide safe and reliable service to *all* gas customers. *See* 66 Pa.C.S. § 1501 and 2205.

The Municipalities' Historic District ordinances were promulgated pursuant to the Pennsylvania Historic District Act, 53 P.S. §§ 8001-8006. The Historic District Act sets forth the following purpose:

For the purpose of protecting those historical areas within our great Commonwealth, which have a distinctive character recalling the rich architectural and historical heritage of Pennsylvania, and of making them a source of inspiration to our people by awakening interest in our historic past, and to promote the general welfare, education and culture of the communities in which these distinctive historical areas are located, all counties, cities except cities of the first or second class, boroughs, incorporated towns and townships, are hereby authorized to create and define, by ordinance, a historic district or districts within the geographic limits of such political subdivisions. No such ordinance shall take effect until the Pennsylvania Historical and Museum Commission

has been notified, in writing, of the ordinance and has certified, by resolution, to the historical significance of the district or districts within the limits defined in the ordinance, which resolution shall be transmitted to the executive authority of the political subdivision.

53 P.S. § 8002 (Creating and defining districts).

The Historic District Act has no other purpose than to preserve the historic areas in the Commonwealth. There is no consideration given to the implementation of safe, reliable, and reasonable public service and facilities let alone any specific provisions for NGDCs' duty for maintaining a safe and reliable distribution system for all gas customers. It logically follows that the Municipalities' Historic District ordinances promulgated pursuant to the Pennsylvania Historic District Act are thereto silent as to how public utility service and facilities are to be implemented safely and reasonably. *See* R.154a-190a, R.191a-200a, R.201a-231a. With the invalidation of the 2014 amendment to Section 59.18, the Commonwealth Court has completely removed safety as a consideration for gas service to gas utility customers living in historic districts and has elevated historic aesthetics to the sole consideration for gas service in historic districts. This completely contradicts the General Assembly's intent to entrust the Commission with regulating public utilities and frustrates the Commission's ability to ensure that NGDCs provide safe, reliable, and reasonable service in Historic Districts as it does everywhere else in the Commonwealth. Accordingly, the

Commonwealth Court's majority decision must be reversed and Section 59.18, as amended, held valid.

III. Section 59.18 Does Not Actually Operate To Cause Harm To Historic Aesthetics, Value, Or Other Attribute Of Properties In Historic Districts

While the Commonwealth Court dismissed the Municipalities' Environmental Rights Amendment (ERA) claim,¹¹ the ultimate harm being implicitly alleged here is that outside placement of gas meters in historic districts harms historic aesthetics. Otherwise, the reason for the Municipalities' underlying action would be arbitrary as the placement of gas meters outside of buildings is focused on safety and there would be no other reason to contest meter placement except for alleging harm to historic aesthetics in this matter.

However, there are substantial questions of material fact still at issue in this matter that preclude summary relief on this issue. Summary relief may be granted only where the right thereto is clear. Pa. R.A.P. 1532(b). A court may grant summary relief only when: (1) there are no genuine issues of material fact; and (2) the right to relief is clear as a matter of law. *Pa. Env'tl. Def. Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017). Further, when a court decides an application for summary relief, it must view the evidence in the light most

¹¹ See R.495a-511a.

favorable to the non-moving party. *Cent. Dauphin Sch. Dist. v. Commonwealth, Dep't of Educ.*, 598 A.2d 1364 (Pa. Cmwlth. 1991).

The most glaring material fact that is still at issue in this matter is whether the exterior placement of gas meters actually harms the historic aesthetics, value or other attribute of affected properties. Aside from generally alleging that exterior placement of natural gas meters is occurring within the Municipalities' historic districts, the Municipalities have not identified any properties actually affected by Section 59.18 in a manner that actually harms the historic aesthetics, value or other attributes of the affected property or that any such diminution supersedes the Code's requirement that NGDCs furnish and maintain adequate, efficient, safe and reasonable service and facilities that are necessary and proper for the accommodation, convenience and safety of the NGDC's patrons, employees, and the public. *See* 66 Pa.C.S. §§ 1501 and 2205.

It is apparent from the Municipalities' respective local ordinances that modern conveniences such as heating and air conditioning units, solar panels, windmills and satellite dishes are all acceptable modern appliances that may be attached to the facades of buildings located within the Municipalities' respective historic districts. *See* R.186a (Lancaster Code at § 155:27(C)), Borough of Carlisle

Code § 255-200(c),¹² and R.212a (Columbia Borough Ordinance No. 902-2018 Section 130-15.2(1)(e)). As a result, there is a material fact at issue as to whether the exterior placement of gas meters in the Municipalities' historic districts would actually harm the historic aesthetics, value or other attributes of any property when it is apparent that the Municipalities permit other modern appliances to be attached to building facades in historic districts. Aside from the Municipalities conclusively asserting that exterior gas meters will damage historic aesthetics, the Municipalities have failed to put forth any evidence as to whether exterior gas meters in fact damage historic aesthetics in the Municipalities' historic districts. Accordingly, based on this glaring lack of evidence, when looked at in the light most favorable to the Commission, the Commonwealth Court should have denied summary relief.

Despite the Municipalities' contention that this is simply a facial challenge to Section 59.18, this does not absolve the requirement that Section 59.18 actually operates to cause harm to the historic aesthetics, value, or other attributes of properties in their respective historic districts. To sustain an action under the Declaratory Judgments Act there must be a direct, substantial and present interest,

¹² While not part of The Borough of Carlisle's Historic District Ordinances, the Borough of Carlisle's ordinances outside of the Historic District Ordinances dictate that modern conveniences such as satellite dishes, heating cooling systems, windmills, and solar panels are permitted in all districts.

and the claimant must “demonstrate the existence of an actual controversy related to the invasion or threatened invasion of one’s legal rights.” *GTECH Corp. v. Commonwealth Dep’t of Revenue*, 965 A.2d 1276, 1285 (Pa. Cmwlth. 2009).

It is not known what measures the Municipalities have taken to protect the historic aesthetics, value or other attributes in their historic districts. Nor are there uncontested facts showing that the historic aesthetics, value or other attributes of properties in the historic districts are in any way harmed by Section 59.18 in a way that should supersede the Code’s requirement that NGDCs furnish and maintain adequate, efficient, safe and reasonable service and facilities that are necessary and proper for the accommodation, convenience and safety of the NGDC’s patrons, employees, and the public. Accordingly, this Court must reverse the Commonwealth Court’s decision granting the Municipalities’ Application for Summary Relief. At the very least, this case should be remanded to the Commonwealth Court for a fact determination as to whether the Municipalities’ have experienced harm from the promulgation of the amendment to Section 59.18.

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,

/s/ Joseph P. Cardinale, Jr.

Joseph P. Cardinale, Jr.

Assistant Counsel

Attorney ID No. 308140

Kriss E. Brown

Deputy Chief Counsel

Attorney ID No. 89036

Renardo L. Hicks

Chief Counsel

Attorney ID No. 40404

Counsel for Pennsylvania

Public Utility Commission

P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-5000

Dated: April 3, 2023

Appendix A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | | |
|------------------------------------|---|--------------------------|
| City of Lancaster, Borough of | : | |
| Carlisle, and Borough of Columbia, | : | |
| Petitioners | : | |
| | : | |
| v. | : | |
| | : | |
| Pennsylvania Public Utility | : | |
| Commission, | : | No. 251 M.D. 2019 |
| Respondent | : | Argued: December 9, 2020 |

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge¹
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge²
HONORABLE MICHAEL H. WOJCIK, Judge³
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge

OPINION BY
JUDGE COVEY

FILED: October 11, 2022

Before this Court is the City of Lancaster’s, the Borough of Carlisle’s, and the Borough of Columbia’s (collectively, Municipalities) Application for Summary Relief (Application) regarding Count II of their Petition for Review (Petition) filed in this Court’s original jurisdiction. After review, this Court grants the Application.

¹ This case was argued before an *en banc* panel of the Court before January 3, 2022, when President Judge Emerita Leavitt became a senior judge on the Court, and before January 7, 2022, when Judge Cohn Jubelirer became President Judge.

² This matter was assigned to the Opinion writer on June 10, 2022.

³ This case was argued before an *en banc* panel of the Court that included Judge Crompton. Judge Crompton’s service with this Court ended on January 2, 2022, before the Court reached a decision in this matter. Accordingly, Judge Wojcik was substituted for Judge Crompton as a panel member and considered the matter as submitted on the briefs.

Background

On April 29, 2019, the Municipalities filed the Petition challenging the validity of Section 59.18 of the Pennsylvania Public Utility Commission's (PUC) Regulations (Section 59.18), 52 Pa. Code § 59.18, which, as amended by a Final Rulemaking Order adopted on May 22, 2014 (Final Rulemaking Order), *see* Petition, Ex. G, mandates outdoor gas meter locations but permits a natural gas distribution company's (NGDC) consideration of indoor gas meter locations when a gas meter is, *inter alia*, in a building within a locally designated historic district. *See* 52 Pa. Code § 59.18(a)(1). In Count I of the Petition, the Municipalities challenged Section 59.18 on the basis that, as amended, it violated article I, section 27 of the Pennsylvania Constitution.⁴ In Count II of the Petition, the Municipalities challenged Section 59.18 as an improper delegation of the PUC's authority to private parties - NGDCs.

On June 26, 2019, the PUC filed preliminary objections to both Counts of the Petition (Preliminary Objections). The Court heard oral argument on December 12, 2019. On February 21, 2020, this Court sustained the PUC's Preliminary Objection to Count I of the Petition, but overruled the PUC's Preliminary Objection to Count II. *See City of Lancaster v. Pa. Pub. Util. Comm'n* (Pa. Cmwlth. No. 251 M.D. 2019, filed Feb. 21, 2020) (February 2020 Opinion).

In its February 2020 Opinion, this Court stated relative to Count II, in relevant part:

⁴ Article I, section 27 of the Pennsylvania Constitution states:

The people have a right to clean air, [and] pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art. I, § 27.

[A]s **correctly noted** by the Municipalities in their brief [in opposition to the Preliminary Objections], [Section] 59.18(d) “**contains no procedures whatsoever with respect to the placement of meters on historic properties. To the contrary, the decision of where to place a meter on a historic property is left entirely to the discretion of the utility.**” (Municipalities’ Br. [in Opp’n to Prelim. Objs.] at 24.) Although . . . it is possible that the owners of the historic buildings may discuss the location of the meter with the NGDC as part of the notice process, [Section] 59.18(d) does not appear to have a formal, adjudicative process. Most notably, contrary to that argued by the PUC, there is no formal application procedure embedded within [Section] 59.18. Further, in light of the plain language of [Section] 59.18(d), an NGDC is not required to set forth the basis or reasons for its determination as to whether a meter should be located inside or outside a structure.

February 2020 Op. at 24-25 (emphasis added).

On March 27, 2020, the PUC filed its answer to the Petition. On September 6, 2020, the Municipalities filed the Application seeking summary relief as to remaining Count II.

Discussion

Initially,

Pennsylvania Rule of Appellate Procedure 1532(b) allows the Court to enter judgment at any time after the filing of a petition for review where the applicant’s right to relief is clear. P[a].R.A.P. 1532(b). Summary relief is reserved for disputes that are legal rather than factual, *Rivera v. P[a.] State Police*, 255 A.3d 677, 681 (Pa. Cmwlth. 2021), and we resolve “all doubts as to the existence of disputed material fact against the moving party.” *Id.* (quoting *Marcellus Shale Coal[.] v. Dep[’]t of Env[’]t Prot[.]*, 216 A.3d 448, 458 (Pa. Cmwlth. 2019)). **An application for summary relief is appropriate where a party lodges a facial challenge to the constitutionality of a statute.**

McLinko v. Dep't of State, 270 A.3d 1243, 1250 (Pa. Cmwlth.), *aff'd in part, rev'd in part on other grounds*, 279 A.3d 539 (Pa. 2022) (footnote omitted; emphasis added). “An application for summary relief may be granted if a party’s right to judgment is clear and no material issues of fact are in dispute.” *Jubelirer v. Rendell*, 953 A.2d 514, 521 (Pa. 2008) (quoting *Calloway v. Pa. Bd. of Prob. & Parole*, 857 A.2d 218, 220 n.3 (Pa. Cmwlth. 2004)).

The Municipalities first contend that since no material facts are in dispute, this Court may grant summary relief in a facial challenge to Section 59.18. Specifically, the Municipalities assert that “this Court need only consider the wording of Section 59.18,” Municipalities Br. at 12, to determine “whether the PUC did so in a way that constitutes an improper delegation to NGDCs[, which] is the only question that remains before this Court.” Municipalities Reply Br. at 4. Because the Municipalities challenge whether Section 59.18 itself is an improper delegation of authority, which raises a legal rather than factual question, the Municipalities’ Application is appropriate.

The Municipalities next argue that they are entitled to judgment as a matter of law because Section 59.18 improperly delegates authority to NGDCs in contravention of article II, section 1 of the Pennsylvania Constitution, which provides: “The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.” PA. CONST. art. II, § 1. Specifically, the Municipalities contend that Section 59.18 lacks adequate standards and/or procedures to guide NGDCs in determining where to place a meter at a property located in a historic district,⁵ and to prevent arbitrary NGDC decisions mandating meter relocations.

⁵ The Municipalities assert, and it is undisputed, that they have each established historic districts pursuant to what is commonly known as the Pennsylvania Historic District Act, Act of June 13, 1961, P.L. 282, No. 167, *as amended*, 53 P.S. §§ 8001-8006, and that the Municipalities,

Section 59.18 provides:

(a) *General requirements for meter and regulator location.*

(1) **Unless otherwise allowed or required in this section, meters and regulators must be located outside** and aboveground.

(2) Except in the case of an emergency, a utility shall provide written notice to a utility customer by first class mail or by personal delivery at least 30 days prior to relocating and subsequently installing a meter or regulator outside the customer's building. . . .

(3) The written notice must inform the customer and building owner of the equipment that the utility proposes to relocate, the planned new location and how to contact the utility to provide supplemental information that the utility may not have, such as the building's historic status. The written notice must include contact information for the [PUC's] Bureau of Consumer Services.

. . . .

(5) When selecting a meter or service regulator location, a utility shall consider potential damage by outside forces.

(6) The meter location must accommodate access for meter reading, inspection, repairs, testing, changing and operation of the gas shut-off valve.

(7) When feasible and practical to do so, the meter location must accommodate the installation of the service line in a straight line perpendicular to the main.

(8) Meters and service regulators may not be installed in the following locations:

including their historic districts, are served by an NGDC operating pursuant to the PUC's rules and regulations.

(i) Beneath or in front of windows or other building openings that may directly obstruct emergency fire exits.

(ii) Under interior stairways.

(iii) Under exterior stairways, unless an alternate means of egress exists and the meter and service regulator are installed in a well-vented location under stairs constructed of noncombustible material.

(iv) A crawl space.

(v) Near building air intakes under local or [s]tate building codes.

(vi) In contact with soil or other potentially corrosive materials.

(9) Unless caused by a customer's or building owner's violation of applicable gas safety or tariff rules, a utility shall pay the costs of relocating a meter or regulator when the relocation is performed to meet utility or [PUC] safety requirements.

(10) Unless caused by a customer's or building owner's violation of applicable gas safety or tariff rules, a utility shall pay the cost of extending customer-owned facilities to the new meter or regulator location when the relocation is performed to meet utility or [PUC] safety requirements.

(11) A customer or building owner requesting that a meter or regulator be moved shall pay the costs associated with relocation when the meter and regulator are currently situated in a suitable location under [s]tate and [f]ederal regulations.

(12) Utilities shall address meter, regulator and service line location regulations in their tariffs.

.....

(d) *Inside meter locations.*

(1) Inside meter locations shall be considered only when:

(i) The service line pressure is less than 10 [pounds per square inch gauge ([psig])].

(ii) **A meter is located in a building that meets one of the following criteria:**

(A) A building is listed in the National Register of Historic Places or the customer or building owner notifies the utility that the building is eligible to be listed in the National Register of Historic Places and the eligibility can be readily confirmed by the utility.

(B) A building is located within a historic district that is listed in the National Register of Historic Places or the customer or building owner notifies the utility that the historic district is eligible to be listed in the National Register of Historic Places and the eligibility can be readily confirmed by the utility.

(C) A building has been designated as historic under the [Act of June 13, 1961 (P.L. 282, No. 167[, *as amended*,]) (53 P.S. §§ 8001-[8006), known as the Pennsylvania Historic District Act, the Pennsylvania Municipalities Planning Code ([Act of July 31, 1968, P.L. 805, *as amended*,] 53 P.S. §§ 10101-[11202), or a municipal home rule charter.

(D) A building is located within a locally designated historic district or is eligible for the listing, or a building is individually designated under a local ordinance as a historic landmark or is eligible for the listing.

(iii) Protection from ambient temperatures is necessary to avoid meter freeze-ups.

(iv) A utility determines that a meter is subject to a high risk of vandalism based on the utility's prior experience.

(v) A utility determines that an outside meter location is neither feasible nor practical.

(2) Except for low pressure systems with service line pressure less than 10 psig, regulators must be located outside when a meter is located inside.

(3) Installed inside meters must be attached to an operable outside shut off valve.

(4) Meters installed within a building must be located in a ventilated place not less than 3 feet (914 millimeters) from a source of ignition or source of heat which may damage the meter.

52 Pa. Code § 59.18 (a)(1)-(3), (5)-(12), (d) (bold emphasis added).

This Court observed in its February 2020 Opinion:

[T]he Final Rulemaking Order states that “**the utility will continue to retain discretion in applying this [R]egulation,**” [Petition, Ex. G, Final Rulemaking Order] at 1, admits that “**the [R]egulation does contain provisions that delegate discretion to the utility** in making a determination with respect to locating an outside meter,” *id.* at 26, and confirms that “due to [a utility’s] public safety obligations,” “**it is necessary that . . . the utility be allowed to make the final decision.**” *Id.*

February 2020 Op. at 26 (bold and underline emphasis added).

In *Protz v. Workers’ Compensation Appeal Board (Derry Area School District)*, 161 A.3d 827 (Pa. 2017), the Pennsylvania Supreme Court emphasized:

[W]hen the General Assembly empowers some other branch or body to act, our jurisprudence requires “that the basic policy choices involved in ‘legislative power’ actually be made by the [l]egislature as constitutionally mandated.” *Tosto v. Pa. Nursing Home Loan Agency*, . . . 331 A.2d 198, 202 ([Pa.] 1975). This constraint serves two purposes. First, it ensures that duly authorized and politically responsible officials make all of the necessary policy decisions, as is their mandate per the electorate. And second, it seeks to protect against the arbitrary exercise of unnecessary and uncontrolled discretionary power.

.....

Although [the Pennsylvania] Constitution generally forbids the delegation of “legislative power,” it nonetheless permits the General Assembly, in some instances, to assign the authority and discretion to execute or administer a law. *Blackwell*[v. *State Ethics Comm’n*], 567 A.2d [630,] 637 [(Pa. 1989)]. When the General Assembly does so, the Constitution imposes two fundamental limitations. **First, as mentioned, the General Assembly must make “the basic policy choices,” and second, the legislation must include “adequate standards which will guide and restrain the exercise of the delegated administrative functions.”** *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, . . . 877 A.2d 383, 418 [(Pa.) 2005]; *State Bd. of Chiropractic Exam’rs* [v. *Life Fellowship of Pa.*], 272 A.2d [478,] 481 [(Pa. 1971)] (quoting *Chartiers Valley Joint Sch. v. C[n]ty. Bd. of Sch. Dirs. of Allegheny C[n]ty.*, . . . 211 A.2d 487, 492-93 (Pa. 1965)).

Id. at 833-34 (citations omitted; emphasis added).⁶ “In determining whether adequate standards have been established, we look to the entire [statute]; ‘we are not

⁶ In *Pennsylvania AFL-CIO v. Commonwealth*, 219 A.3d 306 (Pa. Cmwlth. 2019), this Court summarized:

In *Protz* [], our Supreme Court applied these standards to conclude that Section 306(a.2) [of the Workers’ Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, added by the Act of June 24, 1996, P.L. 350, *formerly* 77 P.S. § 511.2, repealed by the Act of October 24, 2018, P.L. 714, No. 111,] was an impermissible delegation of the General Assembly’s legislative authority to the [American Medical Association (]AMA[)] because that provision did not include **any** standards or basic policy choices to restrain the AMA’s **future enactment** of the [American Medical Association *Guides to the Evaluation of Permanent Impairment* (]Guides[)], which would **then become the law** by which [impairment rating evaluations] would be performed. *Id.* at 835-36. This left the AMA with the ability to “**revise** the *Guides* once every ten years or once every ten weeks,” which “gave the AMA *de facto*, **unfettered control** over a formula that ultimately will determine whether a claimant’s partial[]disability benefits will cease after 500 weeks.” *Id.* at 835-36 (emphasis added). Because Section 306(a.2) [of the Act] failed to meet even the basic requirements for a permissible delegation, [our] Supreme Court did not address the question of

limited to the mere letter of the law, but must look to the underlying purpose of the statute and its reasonable effect.’” *Gambling Expansion Fund*, 877 A.2d at 418 (quoting *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 293 (Pa. 1975)).

The instant matter involves a Commonwealth agency’s delegation of its legislatively granted authority by way of a regulation.⁷ Nonetheless, this Court addressed an analogous circumstance in *City of Williamsport Bureau of Codes v. DeRaffe*, 170 A.3d 1270 (Pa. Cmwlth. 2017). The *City of Williamsport* Court explained:

[I]n the instant matter, Williamsport would have us interpret Section 11018.13 of the Third Class City Code⁸ [(11 Pa.C.S. § 11018.13) (Section 11018.13)] in a manner that would effectively grant the International Code Council unfettered authority to create a new controlling Maintenance Code for the residents of Williamsport. We

whether the General Assembly’s delegation to a “private entity” could ever validly occur. Although it cited precedent raising concerns about such delegations, including the lack of political accountability of a private entity, it also cited other precedent that did not rule out the constitutional propriety of those delegations.

Id. at 314; *see also Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1228 (Pa. Cmwlth. 2018) (wherein “[t]he General Assembly delegated authority to [a third-party trade association] without providing any of the safeguards required to conform that delegation of authority to constitutional strictures[]”).

⁷ In fact, long before *Protz*, this Court addressed a PUC regulation governing the use of natural gas outdoor lighting that lacked necessary standards - specifically, the applicable regulations did not define “residential customer” but deferred to the utility’s own classification (“residential” versus “commercial”). This Court concluded:

Basing such a decision solely on a utility’s billing classification cannot, in our view, be proper. In effect, the [PUC] would be delegating its authority to answer certain legal questions to a public utility, thereby allowing the company sought to be regulated to assume the role of regulator. While a utility’s billing classification may have some relevance in the matter, it is by no means conclusive.

Woodland Rd. Ass’n v. Pa. Pub. Util. Comm’n, 487 A.2d 1030, 1032 (Pa. Cmwlth. 1985).

⁸ 11 Pa.C.S. §§ 10101-14702.

decline to do so. We acknowledge that the issue of delegation is made slightly more complicated here because the General Assembly has already delegated authority to local governments like Williamsport to enact property maintenance codes. See [Section 141A04(a) of the Uniform Construction Code,] 11 Pa.C.S. § 141A04(a) (“[n]otwithstanding the primacy of the Uniform Construction Code, a city may enact a property maintenance ordinance, including a standard or nationally recognized property maintenance code or a change or variation”). **Williamsport’s reading of Section 11018.13, however, results in the delegation of legislative authority, originating in the General Assembly, passing through local governments, and ending in the hands of the International Code Council.** The General Assembly cannot grant local governments more authority than the General Assembly possesses. **Such a scheme is analogous to the legislative delegation that the Supreme Court addressed in *Protz* and, therefore, cannot pass constitutional muster.**

Id. at 1274-75 (emphasis added); see also *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205 (Pa. Cmwlth. 2018).

Similarly, in *425 Property Association of Alpha Chi Rho, Inc. v. State College Borough Zoning Hearing Board*, 223 A.3d 300 (Pa. Cmwlth. 2019), this Court stated:

As our Supreme Court has held, *a permissible delegation of legislative authority must include concrete measures to channel the delegatee’s discretion and safeguards to protect against arbitrary, ad hoc decision making, such as a requirement that the delegate[e] hold hearings, allow for public notice and comment, or explain the grounds for its decision in a reasoned opinion subject to judicial review.* [*Protz*, 161 A.3d] at 835. This Court has held that the non-delegation principle applies equally to a municipality’s ability to delegate administrative functions to a third party. See *City of Williamsport*

. . . .

Here, like *Protz*, the [z]oning [o]rdinance unconstitutionally delegates authority to Penn State [University (Penn State)] to decide whether a property may be used as a “Fraternity House” under the [z]oning [o]rdinance. The [z]oning [o]rdinance provides that a “Fraternity House” is a student living arrangement where residents are members of a Penn State “recognized fraternity or sorority” and that “recognition shall be determined by [Penn State] **through its procedures as may be established from time to time.**” [State College Borough] Zoning Ordinance, § 201 . . . (emphasis added). Similar to *Protz*, the [z]oning [o]rdinance provides none of the necessary safeguards to “guide and restrain the exercise” of the administrative functions delegated to Penn State. *Protz*, 161 A.3d at 834. Specifically, *the [z]oning [o]rdinance neither outlines the policy preferences favored by [State College] Borough with respect to fraternity recognition, nor provides standards to guide Penn State in determining its recognition of fraternities as it relates to the [z]oning [o]rdinance. Under the [z]oning [o]rdinance, Penn State has sole and unbridled discretion regarding the recognition of fraternities and may revoke recognition at will. There are also no procedural mechanisms in the [z]oning [o]rdinance to protect against Penn State exercising “administrative arbitrariness and caprice.” Id. at 836.*

425 Prop. Ass’n, 223 A.3d at 313 n.9 (italic emphasis added).

This Court’s reasoning expressed in *425 Property Association* was consistent with our Supreme Court’s somewhat analogous decision in . . . *Gambling Expansion Fund* In *Gambling Expansion Fund*, a statutory provision gave the Pennsylvania Gaming Control Board [Gaming Board] authority to ignore local zoning ordinances in deciding where to locate slot machine casinos. The [*Gambling Expansion Fund*] Court concluded the provision constituted an unconstitutional delegation of legislative authority because it failed to impose “definite standards, policies and limitations to guide [the Gaming Board’s] decision[]making with regard to zoning issues.” *Id.* at 418. The *Gambling Expansion Fund* Court contrasted the permissible delegation of authority at issue in *William Penn Parking Garage*, . . . which assigned to courts the determination of whether a

tax was unreasonable. That delegation of authority was appropriately limited, in that courts must explain their decisions in reasoned opinions that are subject to precedents and to appellate review; such safeguards protect from arbitrary, *ad hoc* decisions and uncontrolled discretion. *Gambling Expansion Fund*, 877 A.2d at 418 (citing *William Penn Parking Garage*, 346 A.2d at 291-92).

Southpointe Golf Club, Inc. v. Bd. of Supervisors of Cecil Twp., 250 A.3d 495, 505 (Pa. Cmwlth. 2021).

In response to the Municipalities' assertion that Section 59.18 improperly vests absolute discretion in NGDCs with respect to gas meter locations in properties in historic districts and that Section 59.18 contains no standards or procedures to curtail or affect review of that discretion, the PUC claims:

Section 59.18 . . . **does not vest absolute discretion in NGDCs with respect to the location of natural gas meters.** Section 59.18 clearly states that an NGDC must consider the location of a natural gas meter inside a building in a historic district. If the NGDC **determines that it cannot accommodate** a natural gas meter inside the building, the aggrieved party can ultimately have the [PUC] review this determination pursuant to Section 701 of the Pennsylvania Public Utility Code [(Code)], 66 Pa.C.S. § 701, and Section 5.21 of the [PUC]'s Regulations, 52 Pa. Code § 5.21.

PUC Br. at 17-18 (emphasis added).

The PUC further rejoins:

Section 59.18 simply directs NGDCs to consider the interior placement of natural gas meters in historic districts **and if the NGDC personnel decides it cannot safely keep a natural gas meter inside an affected building[.]** that decision is ultimately reviewable by the [PUC], based on record evidence provided by the parties to a complaint.

PUC Br. at 22 (emphasis added).

The PUC interprets Section 59.18 as imposing an affirmative duty on an NGDC to attempt to accommodate an indoor meter. However, Section 59.18(d)(1) provides: “Inside meter locations shall be considered only when[,]” *inter alia*, the meter is in a building in a historic district. 52 Pa. Code § 59.18(d)(1). Section 59.18 does not guide the NGDC, and certainly does not create a presumption that a meter must remain inside a building unless the NGDC “cannot accommodate” it. PUC Br. at 18.

Similarly, the PUC interprets Section 59.18 as imposing a fictional burden on the NGDCs, which in no manner is supported by the Regulation, to consider the interior placement of natural gas meters in historic districts.⁹ However, Section 59.18 imposes **no** burden on the NGDC, **no** presumption of an indoor meter location, and **no** requirement that an NGDC attempt to maintain an indoor meter location unless it “cannot safely” do so.¹⁰ PUC Br. at 22.

⁹ Like the PUC, the Dissent interprets Section 59.18 to require that an NGDC attempt to maintain an indoor meter location in a historic building. *See City of Lancaster v. Pa. Pub. Util. Comm’n*, ___ A.3d ___ (Pa. Cmwlth. No. 251 M.D. 2019, filed Oct. 11, 2022) (McCullough, J., dissenting), slip op. at 10 (“[i]f the NGDC **determines that it cannot accommodate a natural gas meter inside the building**, an aggrieved party can ultimately have the [PUC] review this determination pursuant to [S]ection 701 of the Code and [S]ection 5.21(a) of the [PUC’s] [R]egulations”) (emphasis added); *see also id.*, ___ A.3d at ___, dissenting slip op. at 11 (“**if the NGDC personnel decides it cannot safely keep a natural gas meter inside** an affected building, that decision is ultimately reviewable by the [PUC] based on record evidence provided by the parties to a complaint”) (emphasis added); *see also id.*, ___ A.3d at ___, dissenting slip op. at 17 (“[Section] 59.18 requires the NGDCs to give individualized consideration to each property, based on customer feedback (regarding preservation of historical aesthetics) and safety - *i.e.*, **place [the meter] indoors if it can be done safely, feasibly[,] and practically . . .**”) (emphasis added).

¹⁰ Section 59.18 merely provides a customer or building owner the **opportunity** to provide information to the NGDC when notified that the NGDC intends to relocate a meter. It does not require the NGDC to actually consider such information. In fact, the assumption that an NGDC’s decisions will be given “individualized consideration . . . based on customer feedback . . . and safety” *invites* an arbitrary and capricious exercise of the NGDC’s delegated power. *City of Lancaster*, ___ A.3d at ___, dissenting slip op. at 17. Even if, as the Dissent contends, such decisions must be made on individual considerations based on specific building characteristics, such does not eliminate the necessity for standards under which the NGDCs should exercise

Rather, a decision regarding whether a meter in a building located in a historic district is to be moved to an outdoor location is at the NGDC's complete discretion, with absolutely no guidance in Section 59.18 and no "safeguards to protect against arbitrary, *ad hoc* decision making[.]"¹¹ *425 Prop. Ass'n*, 223 A.3d at

discretion "to protect against arbitrary, *ad hoc* decision making[.]" *425 Prop. Ass'n*, 223 A.3d at 313 n.9.

¹¹ The Dissent states:

While it does not have specific guidelines pertaining only to historic buildings, [Section] 59.18 provides exactly when and how meters can safely be placed inside - for historic and non-historic buildings. For example, pursuant to [Section] 59.18 -

- A[n] NGDC cannot install a meter inside if it cannot be attached to an operable outside shut off valve. 52 Pa. Code § 59.18(d)(3).
- A[n] NGDC cannot place or leave a gas meter inside if the service line pressure is greater than 10 psig. 52 Pa. Code § 59.18(d)(1)(i).
- NGDCs must make sure that the gas meter is in a well-vented area, not under a stairwell, or in a crawl space, and the placement must "accommodate access for meter reading, inspection, repairs, testing, changing and operation of the gas shut-off valve." 52 Pa. Code § 59.18(a)(6), (8).
- Meters installed within a building must be located in a ventilated place not less than 3 feet (914 millimeters) from a source of ignition or source of heat which may damage the meter. 52 Pa. Code § 59.18(d)(4).

These are specific guidelines that restrict the NGDCs' decision making process when "considering" whether to place a gas meter inside a property in every area, including a historic district.

City of Lancaster, ___ A.3d at ___, dissenting slip op. at 12-13 (italics and underline emphasis added; bold emphasis omitted).

The Dissent has erroneously combined Section 59.18(a) and (d), and mischaracterized the Regulation's clear language. First, Section 59.18(a) states the general rule that all meters are to be located outside, unless this section allows otherwise. *See* 52 Pa. Code § 59.18(a)(1). It also provides that meters must be accessible and lists six locations where meters may not be installed. *See* 52 Pa. Code § 59.18(a)(6) and (8). Section 59.18(a) contains no language as to whether an

313 n.9. Like the statutory section at issue in *Gambling Expansion Fund*, Section 59.18 “does not provide [NGDCs] with definite standards, policies[,] and limitations to guide its decision[]making with regard to [meter locations at buildings in historic districts].”¹² *Gambling Expansion Fund*, 877 A.2d at 418.

existing meter in a historic building must be relocated. Second, Section 59.18(d) is entitled “Inside meter locations” and provides that “[i]nside meter locations shall be considered only when” and lists five **independent** criteria that may **permit** a meter to be located inside a building. 52 Pa. Code § 59.18(d). Each one of the criteria is, in and of itself, a sufficient justification for an NGDC to consider an inside meter location.

The Dissent confuses the relevant regulatory language in Section 59.18(a) governing **installation** of meters as guiding an NGDC’s decision over whether an **existing meter** in a historic building must **be relocated**. Section 59.18(a) mandates that, absent an exception (as set forth in Section 59.18(d)), a meter must be located outside. Section 59.18(a) addresses outdoor meter **installation**, not considerations governing whether an existing meter, subject to an exception to the outdoor requirement, must be relocated.

Further, the Dissent misinterprets Section 59.18(d)(1)(i) as supporting its declaration that Section 59.18 provides “exactly when and how meters can safely be placed inside – for historic and non-historic buildings.” *City of Lancaster*, ___ A.3d at ___, dissenting slip op. at 12 (emphasis omitted). Section 59.18(d)(1)(i) is one independent criterion **permitting** consideration of an indoor meter location – nonetheless, the Dissent misconstrues Section 59.18(d)(1)(i) as its converse – **prohibiting** “[a]n NGDC [from] plac[ing] or leav[ing] a gas meter inside if the service line pressure is *greater than 10 psig*.” *City of Lancaster*, ___ A.3d at ___, dissenting slip op. at 13 (italic emphasis added; bold emphasis omitted). Section 59.18(d)(1)(i) does not provide “exactly when and how meters can safely be placed inside” a historic building since a meter location in a historic building is simply one of the **other** four, independent bases under Section 59.18(d)(1) for permitting a meter to remain indoors. *City of Lancaster*, ___ A.3d at ___, dissenting slip op. at 12 (emphasis omitted).

The Dissent suggests that “specific guidelines that restrict the NGDCs’ decision making process when ‘considering’ whether **to place a gas meter** inside a building[,]” *City of Lancaster*, ___ A.3d at ___, dissenting slip op. at 13 (emphasis added), are “very clear and specific[,]” and govern an NGDC’s decision on whether to **relocate** a historic building’s **existing meter**. *Id.* at 14. However, the Dissent also contends that “even if [the purported guidelines] were not [clear and specific], Pennsylvania’s non[-]delegation doctrine ‘does not require that all of the details needed to administer a law be precisely or separately enumerated in the statute.’” *Id.* (quoting *Pa. Builders Ass’n v. Dep’t of Lab. & Indus.*, 4 A.3d 215, 225 (Pa. Cmwlth. 2010)). Contrary to the Dissent’s characterization, the instant matter does not involve *unclear or nonspecific* guidelines. Simply put, there are **no** standards guiding an NGDC’s decision **regarding whether to relocate a historic building’s indoor meter to an outdoor location**, where Section 59.18 provides historic buildings a specific exception to the general requirement that meters must be located outside.

¹² The Dissent argues it is impossible to establish standards to guide NGDCs’ decisions on historic building meter relocation. It further claims, without citation to the Municipalities’ Briefs,

Absent an **actual** burden and/or any “safeguards to protect against arbitrary, *ad hoc* decision making,” NGDCs have free, unconstrained authority to order meter relocations in historic districts. *425 Prop. Ass’n*, 223 A.3d at 313 n.9. The delegation of such authority absent basic policy choices and adequate standards cannot be sustained. *See also Pennsylvania AFL-CIO v. Commonwealth*, 219 A.3d 306, 314 (Pa. Cmwlth. 2019) (“[A] law must include ‘procedural mechanisms that serve to limit or prevent the arbitrary and capricious exercise of the delegated power.’”) (quoting *Protz*, 161 A.3d at 834).

This Court finds unconvincing the PUC’s assertions that the Municipalities’ concerns regarding an NGDC’s absolute discretion are adequately addressed by Section 59.18, by the right to PUC review permitted by Section 701 of

that the Municipalities complain that NGDCs’ considerations do not include a historic building’s aesthetics, *see City of Lancaster*, ___A.3d at ___, dissenting slip op. at 16, noting:

It . . . becomes a question of how the [PUC] could ever enact regulations that would cover every aesthetic concern in and of itself. Due to NGDCs’ public safety obligations and the fact that it is impossible for the [PUC] to envision every individual circumstance, . . . it is necessary that the utilities be allowed to make the final decision as to whether a meter should be located inside or outside a structure in a historic district on a case-by-case basis to ensure the safety of the public and its personnel.

City of Lancaster, ___A.3d at ___, dissenting slip op. at 16-17. This Court cannot identify any statement in the Municipalities’ Brief or Reply Brief specifically raising an NGDC’s failure to consider aesthetics. Whether an NGDC should make the final decision on meter location is a separate question from whether the PUC was required to have included standards and guidelines in Section 59.18 to prevent the NGDCs’ “arbitrary, *ad hoc* decision making[.]” *425 Prop. Ass’n*, 223 A.3d at 313 n.9.

the Code,¹³ and by Section 5.21(a) of the PUC's Regulations,¹⁴ as informed by Section 1501 of the Code, 66 Pa.C.S. § 1501.

In its February 2020 Opinion, this Court observed:

Although . . . it is possible that the owners of the historic buildings may discuss the location of the meter with the NGDC as part of the notice process, [Section]59.18(d) does not appear to have a formal, adjudicative process. Most notably, contrary to that argued by the PUC, there is no formal application procedure embedded within [Section]59.18. Further, in light of the plain language of [Section]59.18(d), an NGDC is not required to set forth the basis or reasons for its determination as to whether a meter should be located inside or outside a structure.

February 2020 Op. at 25.

The PUC reasons that Sections 701 and 1501 of the Code, and Section 5.21 of the PUC's Regulations, provide an adequate review process. Notably, Section 701 of the Code permits any person, corporation, or municipal corporation

¹³ 66 Pa.C.S. § 701. Section 701 of the Code provides, in relevant part:

The [PUC], or any person, corporation, or municipal corporation having an interest in the subject matter, . . . may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the [PUC] has jurisdiction to administer, or of any regulation or order of the [PUC]. Any public utility, or other person, or corporation likewise may complain of any regulation or order of the [PUC], which the complainant is or has been required by the [PUC] to observe or carry into effect.

Id.

¹⁴ 52 Pa. Code § 5.21(a). Section 5.21(a) of the PUC's Regulations states:

A person complaining of an act done or omitted to be done by a person subject to the jurisdiction of the [PUC], in violation, or claimed violation of a statute which the [PUC] has jurisdiction to administer, or of a regulation or order of the [PUC], may file a formal complaint with the [PUC].

Id.

to challenge a public utility's actions. Similarly, Section 5.21(a) of the PUC's Regulations permits a complainant to file a formal complaint with the PUC objecting to violations of law by a person under the PUC's jurisdiction.¹⁵

To find purported standards under Section 59.18 for PUC consideration in such hearings, the PUC relies on Section 1501 of the Code, which sets forth the conditions under which a utility provides its service. Specifically, Section 1501 of the Code provides:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities **as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public.** Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities **shall be in conformity with the regulations and orders of the**

¹⁵ The PUC cites *Povacz v. Pennsylvania Public Utility Commission*, 241 A.3d 481 (Pa. Cmwlth. 2020) (*en banc*), *aff'd in part, rev'd in part*, ___ A.3d ___ (Pa. Nos. 34-45 MAP 2021, filed Aug. 16, 2022), to support its assertion that the PUC “has . . . authority . . . over the NGDCs that are placing natural gas meters in historic districts.” PUC Br. at 19. *Povacz* involved a challenge by utility customers to the PUC's denials of the customers' requests to be exempted from smart meter installation in or on their homes, based on their health concerns related to radiofrequency emissions exposure. The relevant statute mandated that an electric distribution company “shall furnish smart meter technology . . . in accordance with a depreciation schedule not to exceed 15 years.” Section 2807(f)(2)(iii) of the Code, 66 Pa.C.S. § 2807(f)(2)(iii). However, that Section of the Code did not provide a review process for challenging the utility's smart meter placement. Nonetheless, this Court found a right to challenge under Sections 701, 1501, and 2205 of the Code, 66 Pa.C.S. §§ 701, 1501, 2205. The PUC claims that like the consumers in *Povacz*, “the Municipalities are entitled to contest the NGDC's decision on the placement of natural gas meters in historic districts before the [PUC] and request[] an accommodation pursuant to Sections 701, 1501[,] and 2205 of the Code.” PUC Br. at 19.

In *Povacz*, there was no unlawful delegation challenge. Unfettered and unguided utility discretion was not at issue therein. The consumers did not challenge a PUC regulation but, rather, the interpretation of an Act of the General Assembly. This Court determined that the relevant statutory provision could be interpreted to address the consumers' concerns and remanded the case to the PUC to determine appropriate accommodations based on the facts before it.

[PUC]. Subject to the provisions of this part and the [R]egulations or orders of the [PUC], every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. Any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the [PUC] as to service and extensions, with the same force and in like manner as if such service were rendered by a public utility. The [PUC] shall have sole and exclusive jurisdiction to promulgate rules and regulations for the allocation of natural or artificial gas supply by a public utility.

66 Pa.C.S. § 1501 (emphasis added). According to the PUC, Section 1501 of the Code “provides the governing standard for all [PUC] determinations concerning the conditions under which a utility provides its service.” PUC Br. at 23.

The PUC explains:

Once before the [PUC] for review, the [PUC] reviews the NGDC’s meter location decision pursuant to [S]ection 1501 of the Code . . . to determine whether the NGDC’s natural gas meter location decision furnishes and maintains adequate, efficient, safe, and reasonable service and facilities that are necessary and proper for the accommodation, convenience, and safety of the NGDC’s patrons, employees, and the public.

PUC Br. at 18. However, Section 1501 of the Code’s general statement simply describes a public utility’s duty to the public. It does not prescribe the manner in which an NGDC must exercise the unfettered, PUC-granted discretion regarding whether to order an existing interior gas meter in a historic district be moved to an exterior location, nor does it provide “concrete measures to channel the delegatee’s discretion and safeguards to protect against arbitrary, *ad hoc* decision making[.]”¹⁶ *425 Prop. Ass’n*, 223 A.3d at 313 n.9.

¹⁶ The PUC implies that NGDC safety obligations under Section 1501 of the Code are adequate standards under which NGDCs may render a decision regarding meter locations for buildings in historic districts. This Court does not agree. In *Commonwealth v. Cherney*, 312 A.2d

Notwithstanding a right to appeal under Sections 701 and 2205¹⁷ of the Code, and Section 5.21(a) of the PUC’s Regulations, absent any standards in Section

38 (Pa. 1973), the Pennsylvania Supreme Court reviewed a trial court’s ruling holding that a statutory provision, stating in relevant part, “[t]he Secretary of Highways [(Secretary)] may, after due investigation, establish any speed limit on [s]tate highways where traffic conditions or other conditions of the highway make it safe to operate motor vehicles at the speeds other than as provided by this act[.]” was an unconstitutional delegation of legislative authority. *Id.* at 40. The Pennsylvania Supreme Court disagreed. Notably, **the *Cherney* Court based its decision, in part, on the fact that the legislature had provided sufficient guidelines which the Secretary could consult, i.e., that “[t]he legislature specifically established speed limits for types of highways in given areas.”** *Cherney*, 312 A.2d at 41 n.8 (emphasis added).

The *Cherney* Court explained:

It is clear the legislature was attempting to establish a law which would provide speed limits to promote safety on the highways. There can be no other meaning intended but that the [S]ecretary must determine, on the basis of the particular characteristics of a highway and his expert knowledge in the field of transportation, whether raising a speed limit on certain highways will promote safety and advance the steady flow of traffic. Moreover, **in applying this guideline, the [S]ecretary need only look to [the relevant statutory provisions establishing speed limits for types of highways in given areas] to seek legislative guidance on what the legislature believes to be safe speeds in certain rural and urban areas, and [another subpart to that same statutory provision] provides many factors which the legislature deems of importance.** In light of the clear legislative purpose of safety, **and the factors enumerated in the other sections of the [c]ode**, there is no question in our view, that the first paragraph is a valid grant of authority.

Id. at 41 (emphasis added; footnotes omitted). Here, in contrast, there are no other “factors enumerated in other sections of the [Code],” *id.*, or other similar provisions providing standards relevant to gas meter placement at buildings in historic districts, i.e., “concrete measures to channel the delegatee’s discretion and safeguards to protect against arbitrary, *ad hoc* decision making[.]” *425 Prop. Ass’n*, 223 A.3d at 313 n.9.

¹⁷ Section 2205 of the Code specifies, in relevant part:

(a) Integrity of distribution system.

(1) Each [NGDC] shall maintain the integrity of its distribution system . . . in a manner sufficient to provide safe and reliable service to all retail gas customers connected to

59.18 for the NGDCs to follow, this Court cannot discern how the PUC is able to review an NGDC’s decision regarding whether an interior gas meter in a historic building must be relocated to the exterior simply based on a public utility’s general duties to the public under Section 1501 of the Code. Section 59.18 does not prescribe the manner in which an NGDC must exercise PUC-granted discretion regarding whether to order an existing interior gas meter in a historic district be relocated to an exterior location, and cannot serve as the PUC’s standard to prevent “arbitrary, *ad hoc* decision making.”¹⁸ *425 Prop. Ass’n*, 223 A.3d at 313 n.9.

its system consistent with this title and the [PUC’s] orders or [R]egulations.

....

(b) Installation and improvement of facilities.

....

(3) Disputes concerning facilities shall be subject to the jurisdiction of the [PUC] and may be initiated by the filing of a complaint under [S]ection 701 [of the Code] (relating to complaints) by the [PUC] or any interested party.

66 Pa.C.S. § 2205 (a)(1), (b)(3).

¹⁸ The Municipalities aptly note in their Reply Brief:

[The PUC] states that “the standard of review the [PUC] would apply would be made pursuant to Section 1501 of the Code . . . and the NGDC would have to provide substantial competent evidence demonstrating its rationale for why it placed the meter where it did.” [PUC Brief in Opp’n to Prelim. Objs. at 21.] However, there are no standards, period, under [Section] 59.18, Section 1501 of the . . . Code, or elsewhere in the PUC’s [R]egulations, that provide any guidelines for determining where to place meters on historic properties.

The PUC treats [Section] 59.18 as if it contains standards and procedures to be applied. It does not. The PUC argues that other sections of the . . . Code or PUC [R]egulations fill the gaps left by [Section] 59.18. They do not.

Id. at 11-12 (footnotes omitted).

To the extent NGDC public safety obligations provide some minimum limitations on an NGDC’s exercise of discretion under Section 59.18, there is simply no guidance therein with

Further, given “**the utilit[ies]’ . . . continue[d] . . . retain[ed] discretion in applying [Section 59.18],**” Petition, Ex. G, Title 52 Executive Summary, at 1 (emphasis added), and the PUC’s declaration in the Final Rulemaking Order that “**it is necessary that . . . the utility be allowed to make the final decision[,]**” Petition, Ex. G, Final Rulemaking Order, at 26 (emphasis added),¹⁹ it is unclear what standards the PUC would apply in deciding an appeal, other than deferring to the NGDC. Petition, Ex. G. Under such circumstances, an appeal to the PUC under Section 701 of the Code and Section 5.21 of the PUC’s Regulations for an impartial review of an NGDC’s decision would be meaningless.

Conclusion

Accordingly, because the Municipalities’ “right to judgment is clear and no material issues of fact are in dispute[.]” *Jubelirer*, 953 A.2d at 521 (quoting

respect to meter relocation decisions where an existing interior meter location in a historic building **is** safe and reasonable, but an NGDC intends to relocate the meter to an interior location to purportedly make it **safer** or, perhaps, for an arbitrary reason, or for no reason whatsoever.

¹⁹ Despite the PUC’s declarations in the Final Rulemaking Order that “the **utility** will continue to **retain discretion** in applying this regulation,” Petition Ex. G, Final Rulemaking Order, at 1, and “it is necessary that, due to its public safety obligations, **the utility be allowed to make the final decision**[.]” Petition, Ex. G, Final Rulemaking Order, at 26 (emphasis added), the PUC claims in its brief to this Court that “[t]he Code and . . . Section 59.18 have **not** delegated authority to NGDCs for the **final** say on the placement of natural gas meters in historic districts.” PUC Br. at 20 (emphasis added).

Similarly, despite urging that it is necessary that an NGDC make the final decision on meter placement, *see* ___ A.3d at ___, dissenting slip op. at 9, 17, 20, the Dissent inconsistently claims “[Section] 59.18 **does not** delegate authority to NGDCs for the final say on the placement of natural gas meters in historic districts. Rather, that final say is vested in the [PUC].” ___ A.3d at ___, dissenting slip op. at 11 (emphasis added).

Calloway, 857 A.2d at 220 n.3), the Municipalities' Application is granted.²⁰


ANNE E. COVEY, Judge

²⁰ The Municipalities also urge this Court to find Section 58.21 *per se* unconstitutional since it delegates authority to private entities. In light of this Court's holding, we need not decide whether the PUC's delegation to NGDCs is *per se* unconstitutional as a delegation to private entities.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | | |
|------------------------------------|---|-------------------|
| City of Lancaster, Borough of | : | |
| Carlisle, and Borough of Columbia, | : | |
| Petitioners | : | |
| | : | |
| v. | : | |
| | : | |
| Pennsylvania Public Utility | : | |
| Commission, | : | No. 251 M.D. 2019 |
| Respondent | : | |

ORDER

AND NOW, this 11th day of October, 2022, the City of Lancaster's, the Borough of Carlisle's, and the Borough of Columbia's Application for Summary Relief is GRANTED. This Court declares that Section 59.18 of the Pennsylvania Public Utility Commission's Regulations, 52 Pa. Code § 59.18, as amended by the Final Rulemaking Order adopted on May 22, 2014, constitutes an unconstitutional delegation of legislative authority, and is unenforceable.



ANNE E. COVEY, Judge

Appendix B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Lancaster, Borough of :
Carlisle, and Borough of Columbia, :
Petitioners :
: No. 251 M.D. 2019
v. :
: Argued: December 9, 2020
Pennsylvania Public Utility :
Commission, :
Respondent :

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge

DISSENTING OPINION
BY JUDGE McCULLOUGH

FILED: October 11, 2022

Prompted by safety concerns with gas leaks and explosions, among other things, with indoor meters, the Pennsylvania Utility Commission (Commission) amended the regulations at issue here.¹ Contrary to the thoughtful Majority, and notwithstanding that there are no specifically tailored standards for placement of meters in historic districts, *see City of Lancaster v. Pennsylvania. Public Utility Commission* (Pa. Cmwlth., No. 251 M.D. 2019, filed February 21, 2020) at 24-25, I disagree with the Majority that the Commission’s regulation, 52

¹ See Building Explosion and Fire, Silver Spring, Maryland, August 10, 2016, NTSB/PAR-19/01 and NTSB letter to PHMSA Administrator dated June 10, 2019, attached as Appendix A to the Commission’s brief.

Pa. Code § 59.18 (Location of Meters) (hereinafter Regulation 59.18) lacks adequate standards and/or procedures to guide natural gas distribution companies (NGDCs) in determining where to place a meter located in a historic district. The Commission's regulatory amendments necessarily emphasize safety concerns foremost, not aesthetics. However, the Commission does not preclude consideration of the placement of meters indoors due to aesthetics. In fact, it specifically provides for consideration by the NGDCs of the placement of meters inside buildings in historic districts. As safety concerns override aesthetics, the NGDCs are given the discretion as to the placement of these meters, while ultimate discretion resides with the Commission.

For the reasons that follow, I believe (1) the Commission has provided NGDCs with clear guidelines and sufficiently defined boundaries to enable the NGDCs to make an informed decision as to whether a gas meter can safely be placed indoors; and (2) the Commission actually retains **the final and absolute discretion** over a NGDC's decision in the placement of natural gas meters. Therefore, I am unable to agree that Regulation 59.18 constitutes an unlawful delegation of the Commission's administrative rulemaking authority.

Factual and Procedural Background²

Prior to its amendment, Regulation 59.18 permitted meters to be located inside a building “preferably in a dry, well-ventilated place not subject to excessive heat, and as near as possible to the point of entrance of the pipe supplying service to the building.” (Final Rulemaking Order, attached to Municipalities’ Petition for Review (PFR) as Exhibit “G,” at 3.) **The Commission’s Gas Safety Division concluded that the Commission’s existing regulation was vague, inadequate, and out-of-date with respect to federal standards.** In amending Regulation 59.18, the Commission adopted the federal standards from the Pipeline and Hazardous Materials Safety Administration’s (PHMSA) regulations.³ *See* 49 C.F.R. § 192.353 (Customer meters and regulators: Location); 49 C.F.R. § 192.357 (Customer meters and regulators: Installation).

In its Final Rulemaking Order, the Commission amended Regulation 59.18 governing gas meter location, 52 Pa. Code § 59.18. **The meter location requirements of Regulation 59.18 are safety regulations imposed to reduce the**

² The City of Lancaster, Borough of Carlisle, and Borough of Columbia (collectively, Municipalities) have each established historic districts pursuant to the Historic District Act, Act of June 13, 1961, P.L. 282, *as amended*, 53 P.S. §§ 8001-06. The Municipalities have, by ordinances, established rules and regulations applicable in their historic districts. The Municipalities, including properties located in their historic districts, are served by NGDCs, operating pursuant to the rules and regulations of the Commission.

On May 22, 2014, the Commission adopted a Final Rulemaking Order, amending Regulation 59.18 after the Commission’s Bureau of Transportation, Gas Safety Division, investigated the issue of gas meter placement and relocation in the context of service disputes between NGDCs and their customers.

³ PHMSA regulations are the “minimum safety requirements for pipeline facilities and the transportation of [natural] gas” 49 C.F.R. § 192.1. States with PHMSA certifications, such as Pennsylvania, may adopt additional or more stringent safety standards for intrastate pipeline facilities when such standards are compatible with the minimum standards established by PHMSA. 49 U.S.C. § 60104(c).

dangers from gas leaks. Final Rulemaking Order, 44 Pa.B. 5835, 5835-36, 5838 (2014) (concluding that “[s]pecifying mandatory requirements for meter, regulator and service line locations is necessary to protect the safety of the public” and that “[w]hile it appears from the data that the inside meter and regulators were not always the primary factor for accidents, **locating meters and regulators inside certainly contributed to these incidents through a release of natural gas**”).

Regulation 59.18(a) generally requires that gas meters be located “outside and aboveground.” The PUC has set forth rules and guidelines for NGDCs to follow when installing gas meters inside and outside:

§ 59.18. Meter, regulator and service line location.

(a) General requirements for meter and regulator location.

(1) **Unless otherwise allowed or required in this section, meters and regulators must be located outside and aboveground.**

* * * *

(6) **The meter location must accommodate access for meter reading, inspection, repairs, testing, changing and operation of the gas shut-off valve.**

(7) When **feasible and practical to do so**, the meter location must accommodate the installation of the service line in a straight line perpendicular to the main.

(8) **Meters and service regulators may not be installed in the following locations:**

(i) Beneath or in front of windows or other building openings that may directly obstruct emergency fire exits.

(ii) **Under interior stairways.**

(iii) Under exterior stairways, unless an alternate means of egress exists and the meter and service regulator are installed in a well-vented location under stairs constructed of noncombustible material.

(iv) **A crawl space.**

52 Pa. Code § 59.18(a)(1), (6)-(8) (emphasis added). Regulation 59.18(d) also provides guidelines for **when and how gas meters can safely be placed inside:**

(1) Inside meter locations **shall be considered** only when:

(i) **The service line pressure is less than 10 psig.**

* * * *

(ii)(D) A meter is located in a building . . . within a locally designated historic district or is eligible for the listing, or a building is individually designated under a local ordinance as a historic landmark or is eligible for the listing.

(iii) Protection from ambient temperatures is **necessary** to avoid meter freeze-ups.

(iv) **A utility determines that a meter is subject to a high risk of vandalism based on the utility's prior experience.**

(v) **A utility determines that an outside meter location is neither feasible nor practical.**

(2) Except for low pressure systems with service line pressure less than 10 psig, regulators must be located outside when a meter is located inside.

(3) Installed inside meters must be attached to an operable outside shut off valve.

(4) Meters installed within a building must be located in a ventilated place not less than 3 feet (914 millimeters) from a source of ignition or source of heat which may damage the meter.

52 Pa. Code § 59.18(d)(1)-(4) (emphasis added).

The Commission, in promulgating this regulation, made clear that utilities must consider installation of gas meters indoors in historic districts but the decision whether to install a meter indoors involves an exercise of discretion by the utility, noting **“it is necessary that, due to its public safety obligations, the utility be allowed to make the final decision.”** Final Rulemaking Order, 44 Pa. B. at 5848.

Relying on *Protz v. Workers’ Compensation Appeal Board (Derry Area School District)*, 161 A.3d 827 (Pa. 2017), the Majority Opinion concludes that the Commission has violated the nondelegation rule by giving NGDCs unfettered discretion to apply their own standards when making that determination for historic properties under Regulation 59.18. I must respectfully disagree.

Nondelegation Rule

Under article II, section 1 of the Pennsylvania Constitution, “[t]he legislative power of the Commonwealth shall be vested in a General Assembly.” Pa. Const. art. II, §1. Therefore, “when the General Assembly empowers some other branch or body to act, our jurisprudence requires that the basic policy choices involved in ‘legislative power’ actually be made by the [l]egislature as constitutionally mandated.” *Protz*, 161 A.3d at 833. This is to ensure that “duly authorized and politically responsible officials make all of the necessary policy

decisions, as is their mandate per the electorate,” and also “to protect against the arbitrary exercise of unnecessary and uncontrolled discretionary power.” *Id.* Although generally forbidding the delegation of legislative power, in some instances the Pennsylvania Constitution permits the General Assembly to assign its authority and discretion to execute and administer a law, with the following limitations. First, the General Assembly must make the basic policy choices, and second, the legislation must include adequate standards to guide and restrain the exercise of the delegated administrative functions. *Id.* This means that “the law must contain some intelligible principle to which the person or body authorized to act is directed to conform.” *Id.* A permissible delegation of legislative authority must include concrete measures to channel the delegatee’s discretion and safeguards to protect against arbitrary, *ad hoc* decision making – such as a requirement that the delegatee hold hearings, allow for public notice and comment, or explain the grounds for its decision in a reasoned opinion subject to judicial review. *Id.* at 835.

In *Protz*, the Supreme Court addressed the constitutionality of a provision in the Workers’ Compensation Act, Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§ 1-1041.4, 2501-2710, that required physicians performing impairment rating evaluations of workers’ compensation claimants to apply the methodology provided in the “most recent edition” of the American Medical Association (AMA) Guides to the Permanent Evaluation of Permanent Impairment. *Protz*, 161 A.3d at 830-31. The Supreme Court concluded that the General Assembly’s delegation of authority to the AMA, a private entity, failed to provide any of the necessary safeguards. *Id.* at 835. In particular, the Court concluded that “the General Assembly did not favor any particular policies relative to the Guides’ methodology for grading impairments, nor did it prescribe any standards to create

such a methodology.” *Id.* Without any parameters, the AMA would be free to adopt any formula for impairment ratings and could change the formula at will, potentially with such frequency that no one could keep up with the changes, or alternatively, with such infrequency as to fall behind recent medical advances. *Id.* The Court also found that the General Assembly did not include any of the procedural mechanisms that are considered necessary to protect against “administrative arbitrariness and caprice,” such as requiring the AMA to “hold hearings, accept public comments, or explain the grounds for its methodology in a reasoned opinion, which then could be subject to judicial review.” *Id.* at 836. Thus, the Court concluded that the General Assembly unconstitutionally delegated lawmaking authority to the AMA. *Id.* at 838.

Unlike the Majority Opinion, I do not believe Regulation 59.18 constitutes an unconstitutional delegation of unbridled authority to NGDCs, as in *Protz*.

All NGDCs are required to furnish and maintain adequate, efficient, safe, and reasonable service and facilities that are necessary and proper for the accommodation, convenience, and safety of the NGDCs’ patrons, employees, and the public. *See* Section 1501 of the Public Utility Code (Code), 66 Pa.C.S. § 1501. Regulation 59.18 requires NGDCs to consider inside placement of gas meters in historic districts. Requiring NGDCs to consider, in the first instance, whether it is safe, convenient, adequate, efficient, and reasonable to locate a meter inside in a historic district, is not an unlawful delegation of the Commission’s authority.

The Commission cannot possibly decide where to place gas meters on a property-to-property basis. That decision naturally depends on the unique physical attributes of each property and the physical nature of the surroundings, which the NGDCs’ personnel is in the best position to evaluate, just as it does for meters in

non-historic districts. It is the NGDCs' personnel who install, maintain, service, monitor, and read the gas meters. In view of their expert knowledge of gas distribution systems and their exclusive control over the gas meters, delegating to the NGDCs the authority to apply prudent techniques and practices at each historic property to determine if indoor meter placement is feasible or practical in view of safety concerns is not an unlawful delegation of the Commission's administrative rulemaking power. As this Court has already observed, due to its public safety obligations, it is necessary that the NGDC be allowed to make the final decision as to meter placement. *See UGI Utilities, Inc. v. City of Reading*, 179 A.3d 624, 630 (Pa. Cmwlth. 2017).

Moreover, contrary to the conclusion of the Majority Opinion, **Regulation 59.18 does not vest absolute discretion in NGDCs** with respect to the placement of natural gas meters. Regulation 59.18 clearly states that an NGDC must consider the location of a natural gas meter inside a building in a historic district. However, the Commission still retains absolute discretion over the NGDCs' decision in the placement of natural gas meters. Section 701 of the Code, 66 Pa.C.S. § 701, provides:

The commission, or **any person**, corporation, or municipal corporation having an interest in the subject matter, or any public utility concerned, **may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.** Any public utility, or other person, or corporation likewise may complain of any regulation or order of the commission, which the complainant is or has been required by the commission to observe or carry into effect. The Commonwealth through

the Attorney General may be a complainant before the commission in any matter solely as an advocate for the Commonwealth as a consumer of public utility services. The commission may prescribe the form of complaints filed under this section.

66 Pa.C.S. § 701 (emphasis added).

Section 5.21(a) of the Commission's regulations likewise provides:

A person complaining of an act done or omitted to be done by a person subject to the jurisdiction of the Commission, in violation, or claimed violation of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission, may file a **formal complaint with the Commission.**

52 Pa. Code § 5.21(a) (emphasis added).

If the NGDC determines that it cannot accommodate a natural gas meter inside the building, an aggrieved party can ultimately have the Commission review this determination pursuant to section 701 of the Code and section 5.21(a) of the Commission's regulations, 52 Pa. Code § 5.21(a). Once before the Commission for review, the Commission reviews the NGDC's meter location decision pursuant to section 1501 of the Code, 66 Pa.C.S. § 1501, to determine whether the NGDC's natural gas meter location decision furnishes and maintains adequate, efficient, safe, and reasonable service and facilities that are necessary and proper for the accommodation, convenience, and safety of the NGDC's patrons, employees, and the public.

This complaint procedure on the placement of utility facilities was recently affirmed by this Court. In *Povacz v. Pennsylvania Public Utility Commission*, 241 A.3d (Pa. Cmwlth. 2020) (*en banc*) (affirmed in part, and reversed,

in part, on other grounds), __ A.3d __ (Pa. Nos., 34-35 MAP 2021, filed August 16, 2021), consumers contested the placement of electric wireless smart meters. This Court recognized that the Commission is fully capable of accommodating consumers who do not want to accept electric wireless smart meters at their homes. This Court analyzed Act 129, 66 Pa.C.S. § 2807(f), and determined that despite its language directing the furnishing of smart meters on all residential service locations, the Commission has the authority to direct utilities to make accommodations for the substitution or relocation of wireless smart meters at residences. Although there was no language in Act 129 providing a set procedure for customers to follow to challenge placement of a wireless smart meter on their property, this Court unequivocally recognized that the Commission is authorized to direct utilities in the placement of utility facilities, specifically smart meters. Here, the Commission has the same authority, recognized in *Povacz*, over the NGDCs that are placing natural gas meters in historic districts. **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.** 66 Pa.C.S. §§ 701, 1501.

Thus, I submit that Regulation 59.18 does not delegate authority to NGDCs for the final say on the placement of natural gas meters in historic districts. Rather, that final say is vested in the Commission. Regulation 59.18 simply directs NGDCs to consider the interior placement of natural gas meters in historic districts, and if the NGDC personnel decides it cannot safely keep a natural gas meter inside an affected building, that decision is ultimately reviewable by the Commission based

on record evidence provided by the parties to a complaint. Because there is an administrative procedure under the Code and the Commission's regulations for reviewing the placement of natural gas meters by NGDCs, I would conclude that the Municipalities' argument that NGDCs have been vested with the ultimate authority over the placement of natural gas meters in historic districts is without merit.

Regulation 59.18 Does Not Lack Adequate Standards

I further disagree with the Majority Opinion's conclusion that Regulation 59.18 is unconstitutional for lack of adequate standards to guide and restrain the NGDCs' exercise of the delegated administrative functions.

Regulation 59.18 contains sufficiently detailed rules to guide and restrain its execution by NGDCs in making the determination of whether to locate a gas meter inside as opposed to outside and vice versa.

Substantive rulemaking is a widely used administrative practice, and its use should be upheld whenever the statutory delegation can reasonably be construed to authorize it. *Tri-County Industries, Inc. v. Commonwealth of Pennsylvania*, 818 A.2d 574 (Pa. Cmwlth. 2003), *as amended*, (Feb. 12, 2003), *aff'd*, 884 A.2d 867 (Pa. 2005). Here, there is no question that in enacting section 1501 of the Code, the legislature made the basic policy choice that all NGDCs are required to furnish and maintain "adequate, efficient, safe, and reasonable service and facilities" that are necessary and proper for the accommodation, convenience, and safety of the NGDC's patrons, employees, and the public. In turn, the Commission promulgated detailed regulations consistent with that basic policy choice of upholding safety.

Most significantly, Regulation 59.18 is **not without standards and guidelines**. While it does not have specific guidelines pertaining only to historic

buildings, Regulation 59.18 provides exactly **when and how** meters can safely be placed inside – for historic and non-historic buildings. For example, pursuant to Regulation 59.18 –

- **A NGDC cannot install a meter inside if it cannot be attached to an operable outside shut off valve. 52 Pa. Code §59.18(d)(3).**
- **A NGDC cannot place or leave a gas meter inside if the service line pressure is greater than 10 psig. 52 Pa. Code §59.18(d)(1)(i).**
- **NGDCs must make sure that the gas meter is in a well-vented area, not under a stairwell, or in a crawl space, and the placement must “accommodate access for meter reading, inspection, repairs, testing, changing and operation of the gas shut-off valve.” 52 Pa. Code §59.18(a)(6), (8).**
- **Meters installed within a building must be located in a ventilated place not less than 3 feet (914 millimeters) from a source of ignition or source of heat which may damage the meter. 52 Pa. Code §59.18(d)(4).**

These are specific guidelines that restrict the NGDCs’ decision making process when “considering” whether to place a gas meter inside a building in every area, including a historic district. As noted, those rules and guidelines govern NGDCs in carrying out their public utility functions under section 1501 of the Code, which requires all NGDCs to, among other things, furnish and maintain services and

facilities that are necessary and proper for the accommodation, convenience, and safety of the NGDCs' patrons, employees, and the public.⁴

⁴ In footnote 11 of its Opinion, the Majority charges the Dissent with “combining” and “mischaracterizing” Regulation sections 59.18 (a) (general requirements for meter and regulator location) and 59.18(d) (inside meter locations). We have done no such thing. As explained, the Regulation sufficiently defines the restrictions under which inside meters shall be considered. If these circumstances do not exist, then the general rule of paragraph (1) of subsection (a) applies and the meter and regulator shall be located outside and above ground.

The Majority Opinion also proposes to create a distinction between the installation and relocation of a meter in a historic district - when there is none, arguing that there are no specific standards for the latter. The Regulation must be read in its entirety and when that is done properly, it is clear that it does provide sufficient guidance and direction for the location of meters – which necessarily includes both the installation and relocation of gas meters.

While complaining that there are no standards to guide NGDCs in determining whether to relocate meters outside in a historic building, the Majority has not identified **one** proposed additional standard that could be used in guiding historic building relocation determinations that are not already in place. The only considerations that could possibly govern the relocation of meters outside would necessarily focus on the potential physical harm to the building or aesthetics. However, the foremost consideration by the NGDCs is whether the meter can safely remain inside - regardless of the fact that the building may be harmed if it is relocated outside, or the potential for physical harm to the building. Safety simply cannot take a back seat to aesthetics or the desire to maintain the historic nature of a building. A gas meter cannot be **installed or remain inside** if it is unsafe to do so – even when the meter clashes aesthetically with historical nature of the building. Regulation sections 59.18(a) and (d) set forth precisely the minimum safety standards that NGDCs must consider when making the determination of whether leaving a meter inside is safe. The Majority itself cites the criteria to be used to evaluate the location of meters in historic districts as safety-driven, which is exactly the point of the Dissenting Opinion. Ironically, these are the very standards by which the NGDCs must determine, for **any** building, whether to place or relocate a meter inside. It ignores the fact it was safety concerns due to explosions and gas leaks that prompted the change in law to placement of meters outdoors in the first place. We have, in this Dissenting Opinion, clearly extrapolated from the Regulation the standards to guide the NGDC exactly when and how meters can safely be placed inside. Those guidelines and standards undoubtedly focus on safety first.

The Majority Opinion further charges the Dissent with “misinterpreting” Regulation 59.18(d)(1)(i) “as its converse.” Again, that section provides: “Inside meter locations shall be considered **only when** (i) The service line pressure is less than 10 psig.” Clearly, if the NGDC must consider an inside meter **only when** service line pressure **is less than** 10 psig, then the **inverse** necessarily is also true, namely, an inside meter cannot be placed inside if the service line is **greater than** 10 psig.

These standards are very clear and specific; but even if they were not, Pennsylvania’s nondelegation doctrine “does not require that all of the details needed to administer a law be precisely or separately enumerated in the statute.” *Pennsylvania Builders Association v. Department of Labor & Industry*, 4 A.3d 215, 225 (Pa. Cmwlth. 2010); *Matter of Revocation of Restaurant Liquor License No. R-12122*, 467 A.2d 85, 87 (Pa. Cmwlth. 1983). To constitute an adequate standard under the delegation doctrine, the standard itself need “not be definite or precise.” *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 293 (Pa. 1975). Standards that control a non-legislative party’s exercise of rulemaking authority must be viewed in light of the task necessary to accomplish the General Assembly’s purpose. *Gilligan v. Pennsylvania Horse Racing Commission*, 422 A.2d 487 (Pa. 1980). In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), the U.S. Supreme Court noted that the degree of vagueness that is constitutionally tolerable depends in part on the nature of the enactment. In *Kissane v. Town Council of Town of McCandless* (Pa. Cmwlth., No. 314 C.D. 2015, Feb. 18, 2016) 2016 WL 640650, slip op. at *10,⁵ local residents argued section 1313.06(e) of the McCandless Town Zoning Code, which provided that the Town Council “may require to approve alternative design standards for off-street parking in response to unusual conditions,” was an unconstitutional delegation of legislative authority. We found that section 1313.06(e) reflected a legislatively determined policy choice to permit a reduction in parking based upon an objective showing of actual parking needs. We found the “expected parking” language in section 1313.06(e) to be an adequate standard upholding a basic policy choice by the Town

⁵ See 210 Pa. Code § 69.414(a) (an unpublished memorandum opinion, although not binding precedent, may be cited for its persuasive value in accordance with section 414(a) of this Court’s Internal Operating Procedures).

to permit a reduction required parking spaces based upon documented analysis of anticipated parking needs. As such, it did not constitute an unlawful delegation of legislative power.

Again, here, the Commission's primary consideration in placement of meters is the safety of the NGDC's patrons, employees and the public. In placing meters, a NGDC must furnish and maintain services and facilities that are necessary and proper for the accommodation and convenience of customers, but this must always be subject to the overarching public safety concern. These rules and guidelines governing the placement of meters apply equally to historic and non-historic buildings alike.

The impetus of Municipalities' complaint seems to be based solely upon the concern that a gas meter placed outside could be incompatible with the surrounding historic district or affect the property aesthetically. It makes no sense to place aesthetics over safety. A building that is historically accurate but unsafe seems to be theoretically counterintuitive. In any event, it cannot be said that NGDCs do not consider aesthetics, even though it is not a specific guideline listed under subsection (d)(1)(ii) regarding historic districts. *See Centre Park Historic District, Inc. v. UGI Utilities, Inc. City of Reading v. UGI Utilities, Inc.* (Public Utility Commission, C-2015-2516051, C-2016-2530475, filed October 24, 2019), 2019 WL 5592911 (holding that UGI's revised Gas Operation Manual, which contained standards including that UGI should attempt to locate meters in unobtrusive locations to avoid placing meters in front of distinguishing exterior features of historic properties, did not violate Regulation 59.18). If the customer is not satisfied with the response, he still has a right to appeal to the Commission to argue why his particular aesthetic request is feasible while still meeting the

overarching concern for the safety of the NGDCs' patrons, employees, and the public.

Moreover, the obvious difficulty, if not impossibility, is the implementation of regulations that will apply evenly to every request made by every building owner in an historic district. Aesthetics will vary from building to building and from historic district to historic district. It thus becomes a question of how the Commission could ever enact regulations that would cover every aesthetic concern in and of itself. Due to NGDCs' public safety obligations and the fact that it is impossible for the Commission to envision every individual circumstance, I submit that it is necessary that the utilities be allowed to make the final decision as to whether a meter should be located inside or outside a structure in a historic district on a case-by-case basis to ensure the safety of the public and its personnel. **In fact, in *UGI Utilities, Inc. v. City of Reading*, 179 A.3d at 629-30, a panel of this Court has already observed that, due to its public safety obligations, it is necessary that the NGDCs be allowed to make the final decision as to meter placement.**

In my view, when the Regulation is viewed as a whole, it is clear that the Commission intended NGDCs to evaluate, on a case-by-case basis, whether a meter associated with a building in a historic district should be left inside, taking into consideration the guidelines and rules that have been enunciated. The Commission cannot possibly be constitutionally required to appraise beforehand the myriad situations in which it wishes a particular meter placement policy to be applied and to formulate specific rules for each situation. NGDCs are public utilities with special expertise when it comes to locating gas meters on a property-to-property basis. Regulation 59.18 requires the NGDCs to give individualized consideration to each property, based on customer feedback (regarding preservation of historical

aesthetics) and safety – *i.e.*, place indoors if it can be done safely, feasibly and practically – given that it is the NGDCs that must access, repair, read, monitor, and maintain the meter. Regulation 59.18 contains adequate standards to guide and restrain NGDCs’ exercise of the delegated function. Necessity fixes a point beyond which it is unreasonable and impracticable to compel the Commission to prescribe even more detailed rules.

The Majority Opinion does not explain, nor can I fathom, how the Commission could establish **additional** standards to any degree as being concrete - as each individual gas meter placement would have different physical and aesthetic considerations. The Majority Opinion would require standards for something that is not measurable or definable. **Again, the discretion granted in all cases, in historic and non-historic districts, is guided first and foremost by “public safety” pursuant to section 1501 of the Code. Further, Regulation 59.18 contains specific and detailed rules and guidelines that inform the NGDCs when NOT to put a meter inside and the parameters that must be followed when placing a meter inside—for example, if the inside meter cannot be attached to an operable outside shut off valve or if the service line pressure is greater than 10 psig. 52 Pa. Code § 59.18(d)(3). Further, the gas meter must be in a well-vented area, it cannot be under a stairwell, or in a crawl space, and it must “accommodate access for meter reading, inspection, repairs, testing, changing and operation of the gas shut-off valve.” 52 Pa. Code § 59.18(a)(6), (8). Meters installed within a building in a historic district must be located in a ventilated place not less than 3 feet (914 millimeters) from a source of ignition or source of heat which may damage the meter. 52 Pa. Code § 59.18(d)(4).**

Requiring NGDCs to consider placing gas meters indoors if they can safely do so (by adhering to these specific rules and guidelines in Regulation 58.18) and when feasible or practicable – in a manner so that the NGDCs can reasonably and safely perform their public utility services to the public - does not constitute an unconstitutional delegation of the Commission’s administrative rulemaking.

Lastly, to the extent that the Majority Opinion suggests that our prior opinion stating there are no specific additional guidelines pertaining only to historic districts in Regulation 59.18 binds our decision here, I disagree. First, a trial court exercises different types of review for preliminary objections and motions for summary judgment. “When reviewing preliminary objections the trial court looks to the pleadings, but, in considering a motion for summary judgment the trial court weighs the pleadings, depositions, answers to interrogatories, admissions and affidavits.” *Herczeg v. Hampton Township Municipal Authority*, 766 A.2d 866, 870 (Pa. Super. 2001). Furthermore, a trial court may always revisit its own prior pre-trial rulings in a case without running afoul of the law of the case doctrine. *Commonwealth v. Starr*, 664 A.2d 1326, 1331 (Pa. 1995). In our February 21, 2020 decision overruling the Commission’s preliminary objection to Count II (alleging improper sub-delegation), we analyzed Regulation 59.18 in terms of whether the Municipalities had exhausted their administrative remedies before seeking relief in this Court. In ruling on that issue, we were required to accept as true the well-pled facts of the Municipalities’ PFR that the Commission vested absolute, unfettered, and unreviewable discretion in an NGDC when deciding whether to perform a meter relocation. (PFR, ¶¶ 23, 55.)

Furthermore, in our prior ruling, we never addressed the question posed here, which is whether detailed procedures specific to historic properties are needed

in order for the Commission's delegation of authority to be unlawful. As explained herein, although Regulation 59.18 itself contains no specific separate procedures with respect to the placement of meters on historic properties, other provisions of the Regulation do contain sufficient measures to guide the NGDCs in their decisions which apply to placement of all meters and specifically those that are considered for placement indoors pursuant to subsection (d). Moreover, discretion must be vested in the NGDCs and ultimately the Commission as safety must override aesthetics.

For example, as explained above, the NGDCs must follow specific requirements pursuant to Regulation 59.18. The NGDCs must be able to attach the inside meter to an operable outside shut off valve. The NGDCs cannot place a meter inside if the service line pressure is greater than 10 psig. The gas meter has to be in a well-vented area, it cannot be under a stairwell, or in a crawl space, and it must "accommodate access for meter reading, inspection, repairs, testing, changing and operation of the gas shut-off valve." Meters installed within a building must be located in a ventilated place not less than 3 feet (914 millimeters) from a source of ignition or source of heat which may damage the meter. Further, section 1501 of the Code requires all NGDCs to, among other things, furnish and maintain services and facilities that are necessary and proper for the accommodation, convenience, and safety of the NGDCs' patrons, employees, and the public.

Due to NGDCs' public safety obligations and the fact that it is impossible for the Commission to envision every individual circumstance regarding every building situated in the Commonwealth of Pennsylvania, it is necessary that the utilities be allowed to make the final decision as to whether a meter should be located inside or outside a historic structure on a case-by-case basis to ensure the safety of the public and their personnel, guided by the specific guidelines for

placement of all meters and those being considered for indoor placement. The Municipalities have raised no other basis on which the placement of these meters can be determined. The decision is then subject to appeal to the Commission for further review. For these reasons, I believe our two rulings are entirely consistent and not contradictory as argued by the Majority Opinion.

Based on the forgoing, I would deny the Municipalities' application for summary relief and dismiss their PFR.

s/ Patricia A. McCullough
PATRICIA A. McCULLOUGH, Judge

President Judge Cohn Jubelirer joins in this dissenting opinion.

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

This brief complies with the word count limitation requirement of Pennsylvania Rule of Appellate Procedure (Pa.R.A.P.) 2135(d) because it contains 9,171 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.

/s/ Joseph P. Cardinale, Jr.

Joseph P. Cardinale, Jr.

Assistant Counsel

Attorney ID No. 308140

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