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RELATED CORRESPONDENCE

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

APPLICANT'S NOTIFICATION TO THE LICENSING BOARD OF THE ADJUDICATION IN THE COURT OF COMMON PLEAS, CHESTER COUNTY, PENNSYLVANIA

By letter dated July 11, 1984, Mrs. Maureen Mulligan, Vice President, Limerick Ecology Action, transmitted to the Atomic Safety and Licensing Board "Defendants' Memorandum in Reply to PEMA's Amicus Curiae Brief Regarding Annex E," filed in the Court of Common Pleas, Chester County, Pennsylvania, in the matter of Philadelphia Electric Company, v. South Coventry Township, et al.

The stated purpose of the letter was to keep the Board and parties to the proceeding informed about matters related to the "installation of sirens and related zoning issues . . . ."

Transmitted herewith for the information of the Board is a copy of the Adjudication by the Honorable Leonard Sugerman, Judge of said Court of Common Pleas which held in pertinent part that:

D502

. . . South Coventry Township is hereby permanently enjoined and restrained from enforcing or endeavoring to enforce the terms or provisions of its Zoning Ordinance, or any other Township Ordinance against Philadelphia Electric Company and landowners upon whose premises the said Company has erected or will in the future erect poles, towers, sirens and appurtenances, with respect to the said Company's siren-alert system; . . . (Adjudication at 31).

Respectfully submitted,

CONNER & WETTERHAHN, P.C.

Troy B. Conner, Jr.

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July 19, 1984

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Notification to the Licensing Board of the Adjudication in the Court of Common Pleas, Chester County, Pennsylvania," dated July 19, 1984 in the captioned matter have been served upon the following by deposit in the United States mail this 19th day of July, 1984:

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PHILADELPHIA ELECTRIC COMPANY	:	IN THE COURT OF COMMON PLEAS
	:	
	:	CHESTER COUNTY, PENNSYLVANIA
- vs -	:	
	:	NO. 84 01645
	:	
SOUTH COVENTRY TOWNSHIP and JAMES OTTINGER	:	IN EQUITY and for DECLARATORY JUDGMENT

A D J U D I C A T I O N

BY SUGERMAN, J.

INTRODUCTION[1]

The Plaintiff, Philadelphia Electric Company ("PECO"), a public utility in the Commonwealth of Pennsylvania[2], is approaching the completion of construction of Unit 1 at its Limerick Generating Station, a nuclear generating plant located in Montgomery County, Pennsylvania. As will be seen, before a nuclear generating plant, or more precisely, a nuclear power reactor may be licensed by the Nuclear Regulatory Commission ("NRC"), a Federal agency, the NRC must find that "there is reasonable assurance that adequate protective measures can and will be taken in the

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[1]This subpart contains our findings of fact which are essentially undisputed.

[2]66 Pa. C.S.A. §102.

event of a radiological emergency". 10 C.F.R. §50.47(a)(1) (1983). The NRC makes such finding upon the basis of a review of state and local emergency plans by the Federal Emergency Management Agency. 10 C.F.R. §50.47(b), sets forth the standards such plans must meet and requires, inter alia, that

> "(5) Procedures have been established for notification, by the licensee, of State and local response organizations and for notification of emergency personnel by all organizations; the content of initial and follow-up messages to response organizations and the public has been established; and means to provide early notification and clear instruction to the populace within the plume exposure pathway Emergency Planning Zone have been established.
>
> (6) Provisions exist for prompt communications among principal response organizations to emergency personnel and to the public." Id. §§50.47(b)(5), -(6). (Emphasis added).

The "plume exposure pathway Emergency Planning Zone" ("EPZ"), as that term is used in 10 C.F.R. §50.47(b)(5) and applied to PECO's Unit 1 Generating Station includes the area within a ten-mile radius of the Unit at Limerick. A total of 42 municipalities are situated within the EPZ. As observed, before PECO's Unit 1 may thus be licensed by the NRC, PECO must demonstrate that there is, in place, a prompt notification system in the EPZ.

As a result, PECO has determined to construct such system, consisting of a network of 166 warning sirens and

appurtenances within the EPZ, known as a "siren-alert system". Each siren is or will be mounted upon a pole or tower, 50 to 60 feet in height. The poles and sirens have been or will be erected upon plots of land in the EPZ acquired by PECO from the owners thereof in fee or by easement. The specific location of each of the 166 sirens has been predetermined in accordance with a plan designed by PECO consultants to insure the saturation of the EPZ with warning signals in the event of a radiological emergency.

The legislature of the Commonwealth of Pennsylvania, in an effort to provide for emergency planning to safeguard the public, enacted the Emergency Management Services Code. 35 Pa. C.S.A. §§7101-7707. The Code created the Pennsylvania Emergency Management Agency ("PEMA"), and delegates to that body the duty of preparing and maintaining a Pennsylvania Emergency Management Plan. Id. §7313(1). The Code provides, inter alia, that the Plan may include provisions allocating and coordinating emergency management responsibilities among local municipalities and other units of government. Id. §§7313(1)(ii), -(v), -(vi). Under the Code, every political subdivision of the Commonwealth is directed to establish a local emergency management organization "in accordance with the plan and program" of PEMA, Id. §§7501(a), and

prepare a disaster emergency management plan "in consonance" with the Plan prepared by PEMA, Id. §7503(1).

PEMA, in an effort to assume the responsibilities imposed upon it by the Code, has adopted a Disaster Operations Plan. The latter Plan includes a plan specifically relating to nuclear emergencies, entitled "Annex E, Fixed Nuclear Facility Incidents" ("Annex E"). PECO's Limerick Generating Station is, of course, a fixed nuclear facility. Annex E assigns the responsibilities for nuclear emergency preparedness to various parties, including management personnel of fixed nuclear facilities, as PECO. See, Annex E, Appendix 4, pp. E-4-1, -2. One such responsibility imposed upon the management of fixed nuclear facilities is the following:

> "15. Provide and maintain a siren-alert system within the plume exposure pathway EPZ with activation controls located in each risk county EOC." Id. at p. E-4-2.

PECO contends that it is constructing the siren-alert system not only to comply with the licensing requirements of the NRC, as noted earlier, but to fulfill its obligation under the quoted provision of Annex E as well.

Two such sirens were erected in the Township by PECO in early January, 1984, on poles or towers 50 to 60 feet in heighth,

and a third will shortly be erected. Section 1303 of the Township Zoning Ordinance prohibits the erection of any structure at a height greater than 35 feet and the same Section prohibits the erection of any structure within any required front or side yard. Section 1702 of the Zoning Ordinance prohibits the erection of any structure without first obtaining a building permit therefor[3]. The erection of the poles or towers by PECO admittedly violates the heighth and yard limitations of Section 1303 of the Zoning Ordinance and PECO failed to obtain building permits before erecting the sirens. Between March 26, 1984 and March 30, 1984, the Township, through its Zoning Officer, the Defendant James Ottinger, caused twenty citations to be issued against PECO asserting four violations of the foregoing Sections of the Zoning Ordinance on each of the five days.

PECO thereupon commenced the instant litigation seeking injunctive relief in the form of an order restraining the Township and its Zoning Officer from citing PECO and the owners of land upon which the sirens are erected under the Zoning Ordinance. PECO alternatively seeks a declaratory judgment, declaring that

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[3]The poles or towers and sirens are clearly "structures". South Coventry Township Zoning Ordinance, Article II, Section 201(44).

the construction, erection, installation, maintenance and operation of the sirens are "exempt and immune" from the Township Zoning Ordinance. The Township filed an Answer to PECO's Complaint controverting PECO's principal allegations and the matter was thus at issue. Two hearings were held, the parties by able counsel have fully briefed and argued their respective positions and submitted proposed findings of fact and conclusions of law, the Commonwealth of Pennsylvania, PEMA has filed an amicus brief in support of PECO's position, and the matter is ripe for final disposition[4]. In view of our disposition, we consider only PECO's request for injunctive relief.

The principal issue requiring adjudication, of course, is whether PECO's siren-alert system is subject to regulation under the Township's Zoning Ordinance.

DISCUSSION

PECO contends that the siren-alert system is a public utility "facility" and that thereby, exclusive jurisdiction to

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[4]At the first hearing, West Vincent Township, Chester County, was permitted to intervene as a party Defendant. Thereafter, West Vincent Township withdrew from the action.

regulate the construction and maintenance of the system is vested exclusively in the Pennsylvania Public Utility Commission ("PUC"). The Township, on the other hand, contends that the system is exempt from local zoning regulation only in accordance with Section 619 of the Pennsylvania Municipalities Planning Code ("MPC")[5], which Section provides the following:

> "[§10619.] Exemptions
>
> This article shall not apply to any existing or proposed building, or extension thereof, used or to be used by a public utility corporation, if, upon petition of the corporation, the Pennsylvania Public Utility Commission shall, after a public hearing, decide that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public."

As PECO did not petition the PUC for an exemption for the siren-alert system under Section 619 of the MPC, the Township argues, and as the PUC has made no such determination, the system is subject to regulation by the Township Zoning Ordinance.

Before we consider PECO's contention that the siren-alert system is a "facility" of a public utility and thus immune from the impact of the Township Zoning Ordinance, we first

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[5]Act of July 31, 1961, P.L. 805, as amended, 53 P.S. §10619.

dispose of the Township's contention that Section 619 of the MPC is controlling.

(a)

We note that the Township in its Memorandum, does not refer to the poles and sirens as "buildings", as that word appears in Section 619, but rather, as "structures" other than "transmission utility" facilities. See, e.g., PECO's Memorandum of Law, at 5.

In Duquesne Light Co. v. Upper St. Clair Township, 377 Pa. 323, 105 A. 2d 287 (1954), a case predating the MPC, Duquesne, in order to meet increased demand for power, proposed the construction of a transmission line between a new generating station and a distributing substation. The transmission line, as proposed, traversed the Township. Duquesne acquired the necessary land in the Township and commenced erecting steel towers to support the new transmission line. The Township, contending that its zoning ordinance applied to such construction, directed Duquesne to stop work until building permits were obtained and assessed a daily fine against Duquesne. Duquesne sought and obtained an injunction against the Township in the lower court.

On appeal, the Township relied upon Section 3110 of the First Class Township Code, 53 P.S. §58108, asserting that the language thereof impliedly conferred upon townships the power to regulate public utility uses and structures. Section 3110 provides, in language virtually identical to that contained in Section 619 of the MPC:

> "This article [the article conferring zoning power upon first class townships] shall not apply to any existing or proposed building or extension thereof, used or to be used by public service corporations, if, upon petition of the corporation, the Public Utility Commission shall, after a public hearing, decide that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public."

The Township contended that as buildings alone may be exempted by Section 3110, the general zoning power permitted first class townships to regulate public utility uses and structures other than buildings.

The Supreme Court disagreed and quoted with approval from the adjudication of the lower court:

> "'Now, if a first class township by zoning ordinance can exclude a utility entirely from within its borders, or can dictate where structures of the utility shall be erected or how they may be used, it then most certainly is enabled to (1) regulate the utility, and (2) make it impossible for the utility to perform its statutory duty of rendering adequate and efficient service. Thus, if

the zoning article of the First Class Township Law were construed as Upper St. Clair would have it construed, that construction would modify the Code in these respects: (1) First class townships, together with the Commission, and not the Commission alone, would regulate public utility companies; and (2) public utility companies would render adequate and efficient service unless they were prevented from doing so by zoning ordinances of first class townships. Section 3110 merely grants an express power (not contained at all in the section granting general zoning power) to zone with respect to buildings of a public utility company, subject to a determination by the Commission that the present or proposed location of such buildings is not reasonably necessary for the convenience of [or] welfare of the public. This construction in no way modifies the Code, for it can be seen that the Commission--the regulatory body under the Code is entrusted with the vital determination of necessity. We therefore conclude that the policy of the Commonwealth in entrusting to the Commission the regulation and supervision of public utilities has excluded townships from the same field, and that no power in townships to enter that area can be read into the First Class Township Law by implication. Unless the legislature has given an express grant of power to townships, the Commonwealth's own expressed policy on the subject is undiminished and supreme.'" Id. at 334-35, 105 A. 2d at 292. (Emphasis in original).

In Commonwealth v. Delaware and Hudson Railway Company, 19 Pa. Cmwlth. Ct. 59, 339 A. 2d 155 (1975), the Lehigh Valley Railroad constructed a cross-over railroad track upon land owned by both Lehigh Valley and the defendant-appellant Delaware and Hudson. Dupont Borough cited both railroad companies as being in violation of the Borough Zoning Ordinance which required a building permit before the erection of a "structure or building".

The Borough, as the Township at bar, contended that if Delaware and Hudson desired to obtain exemption from the Zoning Ordinance, it should have proceeded under Section 619 of the MPC.

The Court relying in part upon Duquesne Light Co. v. Upper St. Clair Township, supra, held:

> "We hold that the word 'building' in Section 619 of the [MPC] does not include railroad tracks as it does not include transmission lines of power companies. . .

and

> . . .to the extent that Section 619 of the [MPC] gives any authority to local governments to regulate public utilities, that authority must be strictly limited to the express statutory language." Id. at 62, 339 A. 2d at 157. (Emphasis added).

The same result was reached in Lower Chichester v. Pennsylvania PUC, 180 Pa. Super. 503, 119 A. 2d 674 (1956), wherein the Court said succinctly:

> "Thus, while first-class townships have the power to zone with respect to the buildings of a public utility company, subject to a determination by the Commission that the present or proposed situation of such buildings may be reasonably necessary, they do not have power, either express or implied, to regulate utilities with respect to uses and structures other than buildings. . . ." Id. at 509, 119 A. 2d at 677. (Emphasis in original).

It is thus obvious that Section 619 of the MPC concerns only buildings of a public utility and not the facilities, uses or

structures of the utility. The word "building" as used in Section 619 of the MPC is not defined in the latter statute. In such circumstances the word is to be construed according to its common and approved language. 1 Pa. C.S.A. §1903(a). The word "building" is defined in Webster's Third New International Dictionary (17th ed. 1976) as:

> ". . .a constructed edifice designed to stand more or less permanently, covering a space of land, usually covered by a roof and more or less completely enclosed by walls, and serving as a dwelling, storehouse, factory . . ." Id. at 292.

Obviously, the structures instantly do not remotely fit within this definition, and it is thus clear at bar that the poles, sirens and appurtenances are not buildings.

Nonetheless, the Township relies heavily upon the opinion of a panel of the Commonwealth Court in Denison v. Petrenchak, 16 Pa. Cmwlth. Ct. 383, 328 A. 2d 219 (1974)[6], as a basis for its contention that public utility "structures" are subject to regulation under local zoning ordinances. Defendants' Memorandum of Law, at 4-5.

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[6]J.A. Denison was real estate manager for the Delaware and Hudson Railway; and Joseph Petrenchak was zoning officer of Plains Township.

In Denison, the Delaware and Hudson Railway, a public utility, owned a railroad yard in Plains Township. Without applying for a permit under the township zoning ordinance, Delaware and Hudson moved a tank car onto an existing track in the yard for use as a fuel storage facility. The township cited Delaware and Hudson for violating a provision of its zoning ordinance requiring a zoning permit "prior to the erection of any structure" and a provision requiring that application for zoning permits be made in writing to the zoning officer. Id. at 384, 328 A. 2d at 220.

The Commonwealth Court found that the township zoning ordinance itself provided an exemption from the permit requirement:

> "However, the appellant further contends that the placement of the tank car is exempted by specific provision of the Plains Township ordinance and with this argument we agree.
>
> Section 2.122 of the ordinance provides pertinently: 'Nothing in this Ordinance shall prohibit the erection, construction, alteration or maintenance of essential services, by public utilities. . .and no zoning certificate shall be required for any such structure; provided, however, that the provisions of this paragraph shall not apply to buildings, towers or storage yards of such public utilities. . .except when conforming to the procedure specified by the Pennsylvania Municipalities Planning Code, Act 247, Article VI, Section 619.' (Emphasis supplied.) The appellant clearly demonstrated at the hearing on its appeal from the summary conviction that some sort of facility for

fueling its diesel locomotives was essential to the performance of its services." Id. at 385, 328 A. 2d at 220. (Emphasis in original).

However, earlier in the opinion the Court noted:

> "The appellant advances a number of reasons why it was not required to apply for or receive a permit before locating its tank car on the tracks for the purpose described. Its assertion that the Pennsylvania Public Utility Commission has exclusive jurisdiction is ineffective because Section 619 of the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P. L. 805, as amended, 53 P.S. §10619, exempts activities of public utilities from zoning regulation only where the PUC has granted a certificate of public convenience, which it had not here because not requested to do so by the appellant." Id. at 384-85, 328 A. 2d at 220.

This language, the Township argues, supports its position that unless and until PECO applies for and obtains a determination by the PUC that the siren-alert system is necessary for the welfare of the public, the system is subject to local regulation.

It is obvious, however, that such language is at the very least, dictum and hence not controlling. The holding of Denison is clear: the township zoning ordinance provided an exemption to Delaware and Hudson from the permit requirement. Section 619 of the MPC was irrelevant to the Court's decision and the Court's brief comment concerning Section 619 is indeed dictum. As

the Superior Court said in Martin v. Sablotney, 296 Pa. Super. 145, 442 A. 2d 700 (1982):

> "'In every case, what is actually decided is the law applicable to the particular facts; all other legal conclusions therein are but obiter dicta'. In Re Schuetz's Estate, 315 Pa. 105, 109, 172 A. 865, 867 (1934). This succinct statement of the rule is a distillation of the following more expansive discussion. General expressions in an opinion may not properly be severed from, and must be considered in light of, the facts of the case. What is actually decided, and controlling, is the law applicable to the particular facts of that particular case. All other legal conclusions therein are but obiter dicta and, though they may be entitled to great consideration, they are not controlling. See, In Re Trust Estate of Pew, 411 Pa. 96, 104, 191 A. 2d 399, 404 (1963); Welsch v. Pittsburgh Terminal Coal Corporation, 303 Pa. 405, 154 A. 716, 717 (1931)." Id. at 162, 442 A. 2d at 708-09. (Emphasis in original).

And see, Mackey v. Adamski, 286 Pa. Super. 456, n. 13, 429 A. 2d 28, n. 13 (1981).

More to the point, however, as PECO notes in its Memorandum, any doubt generated by the Court's observation in Denison was surely resolved by the Court's subsequent decision in Commonwealth v. Delaware & Hudson Railway, supra, holding that the scope of Section 619 is controlled by the Supreme Court's ruling in Duquesne, supra.

We inevitably conclude that the Township's reliance upon Section 619 of the MPC is misplaced and its argument unpersuasive.

(b)

Although we have determined that the poles and sirens comprising the system are not "buildings" of a public utility, we must still address the question of whether such structures constitute a utility "facility". PECO argues, of course, that the system is indeed a facility of a public utility.

The Public Utility Code[7] defines the word "facilities" as

> "All the plant and equipment of a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with, the business of any public utility." 66 Pa. C.S.A. §102.

It is apparent to us that the siren-alert system, constructed by PECO, upon land acquired by PECO and to be maintained by PECO in

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[7]1978, July 1, P.L. 598, No. 116, §1, 66 Pa. C.S.A. §§102, et seq.

conjunction with the operation of its nuclear generating station is at the very least "tangible. . .personal property" of a public utility, or an instrumentality "in any manner owned, operated . . .used. . .or supplied for, by, or in connection with the business of" a public utility.

The Township, however, argues that as the Emergency Management Services Code "establishes a network of governmental bodies and officials" responsible for emergency management, and as the Code has directed PEMA to establish a consolidated statewide system of warning and provide a system of disaster communications, 35 Pa. C.S.A. §7313(2), the responsibility for constructing the warning system in the EPZ is upon the government and not upon PECO. Thus, the Township contends, the siren-alert system cannot be a facility of a public utility as PECO is not responsible for its construction. As a result, the argument continues, PECO has unlawfully usurped a governmental function. Defendant's Supplemental Memorandum of Law at 6-13.

The Township correctly notes that PEMA has been directed by the Code to establish "a consolidated statewide system of warning". PEMA has heeded that direction, in part, by promulgating Annex E and imposing upon PECO thereby the obligation to construct a warning system in the EPZ. PECO has unequivocally

accepted that obligation. We fail to understand how PECO can now be said to have no obligation to construct the system or to have usurped a governmental function when PECO is merely fulfilling an obligation imposed upon it by that same government.

When confronted with such simple logic, the Township responds with the argument that Annex E is in reality an administrative regulation and as it has not been published in the Pennsylvania Bulletin and codified as required by The Publication Act and the Commonwealth Documents Law, 45 Pa. C.S.A. §§501, 1102, et seq., or filed with the Legislative Reference Bureau, Annex E is invalid and of no effect. 45 Pa. C.S.A. §1208. PECO argues, to the contrary, that Annex E is not a regulation but is, rather a "Plan" and the Commonwealth, as amicus contends that it is a "statement of policy", non-general and non-permanent in nature, neither of which need be codified, published, or filed with the Legislative Reference Bureau.

The Commonwealth Documents Law, 45 Pa. C.S.A. §§1102-1208, and The Publication Act, 45 Pa. C.S.A. §§501-907, define a regulation as:

> ". . .any rule or regulation, or order in the nature of a rule or regulation, promulgated by an agency under statutory authority in the administration of any statute

administered by or relating to the agency, or prescribing the practice or procedure before such agency." Id. §§501, 1102(12).

As the legislature has obviously painted with a broad brush, we are not materially assisted in our effort to resolve the specific issue before us.

We turn, then, to the language of the Emergency Management Services Code under which Annex F was promulgated and it is seen at once that Annex E is neither a regulation nor a statement of policy. The legislature has repeatedly referred to the Disaster Operations Plan, of which Annex E is a part, as a "Plan". As PECO points out in its Reply Memorandum, the legislature was well aware of the distinction between the words "regulation" and "plan". For example, the Code directs PEMA to prepare, maintain and keep current an emergency management "plan". 35 Pa. C.S.A. §7313(1). Section 7503, relating to the powers and duties of political subdivisions, requires each to prepare, maintain and keep current a disaster emergency management "plan" in consonance with the "Plan" prepared by PEMA. Section 7313(1)(vi) recommends that PEMA coordinate the emergency management plan with the disaster "plans" of the Federal government and those of other states.

At the same time, under Section 7313(3) of the Code, PEMA is authorized to promulgate, adopt and enforce such rules, "regulations" and orders as PEMA deems necessary to carry out the provisions of the Code. Under 7313(11), PEMA is authorized to prepare for issuance by the Governor such orders, proclamations and "regulations" as necessary or appropriate in coping with disasters. Under Section 7301(b) of the Code, the Governor may issue, amend or rescind, inter alia, "regulations which shall have the force and effect of law"; under Section 7301(e), the Governor, as commander in chief of Pennsylvania's military forces shall delegate or assign command authority by executive orders or "regulations"; and under Section 7302(a)(3), the Governor may by "regulations" suspend or modify statutes or "regulations" when necessary to provide temporary housing. Obviously, then, the legislature clearly intended to distinguish the Disaster Operations Plan from a regulation, and there is indeed a substantive distinction between the two.

A regulation is defined as a rule of general application and future effect. 71 P.S. §1710.2 (repealed); Newport Homes v. Kassab, 17 Pa. Cmwlth. Ct. 317, 328, 332 A. 2d 568, 574 (1975). A "plan" on the other hand is "a method of achieving something", "a way of carrying out a design", "a method of doing something",

Webster's, supra at 1729 (emphasis added) or "a method of action, procedure or arrangement", Black's Law Dictionary at 1308 (4th ed. Rev. 1968) (emphasis added). It is apparent to us that the legislature, by delegating to PEMA the power and duty to prepare an emergency management "plan", 35 Pa. C.S.A. §7313(1) clearly envisioned and intended that PEMA formulate a "method" of accomplishing emergency and disaster management. Reference to the Disaster Operations Plan at bar, and its appurtenant Annex E, convinces us that it is indeed a plan as envisioned by the legislature and not a regulation. Thus, Annex E is valid notwithstanding PEMA's failure to comply with the Commonwealth Documents Law.

Finally, and quite apart from the question of the validity of Annex E, the Township, in a dual contention asserts that the siren-alert system cannot be a utility facility as (1) unlike transmission lines or railroad tracks, the system is not directly related to the generation or distribution of electricity, and (2) as the siren-alert system may be activated only by a governmental unit and not PECO[8], by definition the system cannot be a facility of a utility.

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[8]See, e.g., Annex E, pp. E-11, E-8-1.

As to the first of these contentions, it is undisputed as earlier observed, that PECO cannot obtain or retain a full power license for its Limerick Generating Station unless a warning system is in place and functional in the EPZ. We cannot envisage "tangible personal property" more directly related to the generation of electricity at Limerick, as obviously, without a warning system, there would be no such activity at Limerick. The system is as essential to PECO's principal activity as are transmission lines.

As to the second of the Township's assertions, although indeed PECO cannot activate the system, PECO is responsible under the provisions of Annex E for the construction and continuing maintenance of the system. We find the designation of the agency which may activate the system to be irrelevant to the question of whether the system is a facility of a public utility. Suffice it to note again that in our view, the siren-alert system clearly fits within the definition of a facility as set forth in 66 Pa. C.S.A. §102, regardless of who may be designated to activate it.

Again, in our view, the siren-alert system is a facility of a public utility, and exclusive jurisdiction to regulate the location and construction of the system has been vested by the

legislature in the PUC, 66 Pa. C.S.A. §1501, et seq., and the Township may not resort to its Zoning Ordinance to accomplish such regulation. This principle finds lucid and repeated expression in a myriad of decisions emanating from the appellate courts of the Commonwealth. Typical of such expression is this statement of the principle in Warrington Township v. Meade, 35 Pa. Cmwlth. Ct. 112, 385 A. 2d 604 (1978):

> "The General Assembly has vested in the Public Utility Commission of Pennsylvania exclusive authority over all questions concerning the location, construction and maintenance of all public utility facilities. Behrend v. Bell Telephone Company of Pennsylvania, 431 Pa. 63, 243 A. 2d 346 (1968); Chester County v. Philadelphia Electric Company, 420 Pa. 422, 218 A. 2d 331 (1966); Einhorn v. Philadelphia Electric Company, 410 Pa. 630, 190 A. 2d 569 (1963); Commonwealth v. Delaware & Hudson Railway Company, 19 Pa. Cmwlth. 59, 339 A. 2d 155 (1975). Since the Warrington Water Company is a public utility operating under a Certificate of Public Convenience issued by the Public Utility Commission, the township has no power to impose its regulations on the activities of that enterprise in the exercise of its Certificate." Id. at 114, 385 A. 2d at 605.

In Chester County v. Philadelphia Electric Co., supra, cited in Warrington, supra, the rationale underlying the exemption of utility facilities from local regulation was equally well stated:

> "One would search in vain through the County Code for any provision authorizing counties to control the

actions of public utilities as Chester County has attempted here. The State, speaking through the Public Utility Law, Act of May 28, 1937, P. L. 1053, §1 et seq., as amended (66 P.S. §1101 et seq.) has given the Public Utility Commission all-embracive regulatory jurisdiction over companies such as the defendant company in this case. In Lansdale Boro. v. Philadelphia Electric Company, 403 Pa. 647, this Court held: 'no principle has become more firmly established in Pennsylvania law than that the courts will not originally adjudicate matters within the jurisdiction of the PUC. Initial jurisdiction in matters concerning the relationship between public utilities and the public is in the PUC--not in the courts. It has been so held involving rates, service, rules of service, extension and expansion, hazard to public safety due to use of utility facilities, installation of utility facilities, location of utility facilities, obtaining, alerting, dissolving, abandoning, selling or transferring any right, power, privilege, service, franchise or property and rights to serve particular territory.' (Emphasis supplied.)

This reasoning is irrefutable. The necessity for conformity in the regulation and control of public utilities is as apparent as the electric lines which one views traversing the Commonwealth. If each county were to pronounce its own regulation and control over electric wires, pipelines and oil lines, the conveyors of power and fuel could become so twisted and knotted as to affect adversely the welfare of the entire state. It is for that reason that the Legislature has vested in the Public Utility Commission exclusive authority over the complex and technical service and engineering questions arising in the location, construction and maintenance of all public utilities facilities: Einhorn v. Philadelphia Electric Company, 410 Pa. 630; Duquesne Light Co. v. Upper St. Clair, 377 Pa. 323; Lower Chichester Twp. v. Pa. P. U. C., 180 Pa. Superior Ct. 503." Id. at 425-26, 218 A. 2d at 332-33.

Such reasoning applies to the case before us with equal force. It will be recalled that the siren-alert system has been

or will be constructed in 42 separate political subdivisions situated in the EPZ. One can only speculate as to the impact of 42 zoning ordinances upon the system[9].

The Township is not without a remedy, however, as it may utilize the complaint procedures set forth in the Public Utility Code. 66 Pa. C.S.A. §701, provides in pertinent part:

> "[§701.] Complaints
>
> 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."

As this language makes plain, a municipality may file a complaint with the PUC, as any private person or entity and utilize the procedures set forth in the Code. 35 Pa. C.S.A. §§701-903. And see, Duquesne Light Co. v. Monroeville Borough 49 Pa. 573, 298

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[9]The location of each of the 166 sirens in the system was predetermined on the basis of a computer model developed by PECO's consultant. The system has been designed to saturate the EPZ with sound at a level of not more than 123 decibels. Sound waves are affected, inter alia, by topography and ground cover, and these important factors have been considered in determining the location of each siren. (Notes of Testimony, 3/14/84, 31-32).

. 2d 252 (1972); Commonwealth v. Delaware & Hudson Railway Co., supra.

The Township, seizing upon the language, "violation . . .of any law which the commission has jurisdiction to administer" as set forth in 35 Pa. C.S.A. §701, contends that the PUC is powerless to entertain a complaint by the Township as no law which the PUC has jurisdiction to administer requires the construction of a siren-alert system. Whether such law exists, however, is irrelevant. We have determined that the siren-alert system is a facility of a public utility. The Public Utility Code has vested plenary and exclusive power to regulate the facilities of public utilities in the PUC. 66 Pa. C.S.A. §1501[10]. Clearly, complaints concerning such facilities may be entertained by the PUC in accordance with 66 Pa. C.S.A. §§701-903.

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[10]Section 1501, provides in pertinent 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 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 commission."

All that remains, then, is to determine the form of relief to which PECO is entitled. It will be recalled that the Township endeavored to enforce its Zoning Ordinance against PECO by causing twenty citations to be issued during a five-day period. Two such citations were issued as to each siren for each day. The citations were issued under the provisions of Section 1704 of the Zoning Ordinance. That provision subjects PECO to a fine of as much as $500 for each violation and further provides that each day a violation continues constitutes a separate offense. Presumably, when the third siren is erected, the Township will increase the number of daily citations by two. Thus, PECO will be subjected to potential cumulative fines of as much as $3,000 per day.

While it is true that PECO may appear at a hearing before a district justice to challenge the citations, and thereafter appeal an adverse decision, equity is not powerless to afford PECO a remedy. In Duquesne Light Co. v. Upper St. Clair, supra, factually identical in this aspect to the case at bar, the Court said:

> "As stated by the chancellor: 'There are thirty properties in Upper St. Clair which will be used in the construction and maintenance of the transmission line in that township. The ordinance imposes a fine of $100.00 per day for each day that work is performed in violation of the ordinance. Thus, it is entirely possible that since Upper St. Clair already has served two notices respecting the Free and Becker properties, it would take

the position that if Duquesne worked on all thirty of the properties in any one day, in violation of the ordinance, there would be thirty violations and hence a fine of $3,000.00 per day. That penalty would swell at the rate of $3,000.00 for each day that Duquesne continues with the construction and maintenance of the transmission line, while waiting for Upper St. Clair's administrative machinery to grind out an appealable order, or for a test case on the criminal side to run its course.'.

In Adams v. New Kensington, 357 Pa. 557, 55 A. 2d 392, Justice, now Chief Justice Horace Stern, at pps. 560, 561 said: 'It is elementary that an injunction will not be granted to restrain criminal prosecutions on the mere ground that the statute or ordinance on which the prosecution is based is, for any reason, unenforceable, since the party has an adequate remedy at law; he may establish at trial, by way of defense, the invalidity of the legislative enactment. But equity does have jurisdiction to enjoin such a prosecution where it is alleged not only that the statute or ordinance is unconstitutional and void but that its enforcement would cause the plaintiff irreparable loss to his property, either by effecting, if not a total suppression of his business, at least a grave interference therewith, or by subjecting him to the imposition of cumulative, exorbitant and oppressive penalties pending judicial determination of the validity of the legislation. . .'. And see Meadville Park Theatre Corporation v. Mook et al., 337 Pa. 21, 29, 10 A. 2d 437. We are of the opinion that under the circumstances here presented the chancellor correctly held that the pursuit of the administrative remedy would result in irreparable harm to the utility. We conclude that the equity court had jurisdiction and properly issued the preliminary injunction." Id. at 340-41, 105 A. 2d at 295.

In addition to the threat of exorbitant and oppressive penalties, we are satisfied that all the elements necessary for

the issuance of a permanent injunction have been established on this record. It is undisputed that PECO simply cannot obtain a full-power license to operate its Limerick Generating Station from the NRC unless and until an appropriate warning system is in place and operable in the EPZ. Thus, the injury threatened to PECO is clearly substantial and irreparable and as it cannot be compensated for in money damages, there is no adequate remedy at law. Peugeot Motors of American, Inc. v. Stout, 310 Pa. Super. 142, ___, 456 A. 2d 1002, 1008-09 (1983).

CONCLUSIONS OF LAW

1. This Court, sitting in equity, has jurisdiction over the parties to and subjects of the within litigation.

2. Annex E, issued by the Pennsylvania Emergency Management Agency as a part of its Disaster Operations Plan, requires that Philadelphia Electric Company construct and maintain a warning system within a ten-mile radius of that Company's Limerick Generating Station.

3. Annex E is not an administrative regulation or general and permanent statement of policy; Annex E is a plan and an integral part of the Disaster Operations Plan; and accordingly,

Annex E is valid notwithstanding the failure of the Pennsylvania Emergency Management Agency to comply with the Commonwealth Documents Law at the date Annex E was promulgated.

4. The siren-alert system presently under construction by Philadelphia Electric Company is a facility of a public utility within the context of The Public Utility Code, 66 Pa. C.S.A. §102.

5. As a facility of a public utility, the said siren-alert system is subject to regulation exclusively by the Pennsylvania Public Utility Commission and is exempt from the provisions of the Township Zoning Ordinance.

6. Unless the Township is restrained from endeavoring to enforce the provisions of its Zoning Ordinance against Philadelphia Electric Company and the landowners upon whose premises the sirens are erected, Philadelphia Electric Company will suffer irreparable harm and Philadelphia Electric Company has no adequate remedy at law.

7. A permanent injunction should accordingly issue.

DECREE NISI

AND NOW, TO WIT, July 12th, 1984, it is hereby ORDERED, ADJUDGED and DECREED that South Coventry Township is hereby permanently enjoined and restrained from enforcing or endeavoring to enforce the terms or provisions of its Zoning Ordinance, or any other Township Ordinance against Philadelphia Electric Company and landowners upon whose premises the said Company has erected or will in the future erect poles, towers, sirens and appurtenances, with respect to the said Company's siren-alert system; and the Prothonotary of Chester County shall enter this Decree Nisi and forthwith give written notice thereof, and of the Adjudication to the parties to the within action or to their counsel of record, and if no exceptions are filed thereto within ten (10) days after such notice, this Decree shall be entered as the Final Decree herein, as of course.

BY THE COURT:

J.