STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ENBRIDGE PIPELINES (ILLINOIS) L.L.C. APPLICATION PURSUANT TO SECTIONS 8-503, 8-509 AND 15-401 OF THE PUBLIC UTILITIES ACT/THE COMMON CARRIER BY PIPELINE LAW TO CONSTRUCT AND OPERATE A PETROLEUM PIPELINE AND WHEN NECESSARY TO TAKE PRIVATE PROPERTY AS PROVIDED BY THE LAW OF EMINENT DOMAIN	))))))))))	Dkt. No. 07-0446 (Reopen)

REPLY OF TURNER INTERVENERS
TO THE RESPONSE OF ENBRIDGE PIPELINES (ILLINOIS) L.L.C.
TO TURNER INTERVENORS' MOTION REGARDING THE SCHEDULE

The Turner Interveners respectfully file this Rely, by their attorney, Mercer Turner. The Response arguments of Enbridge in chronological order and the Reply to those arguments are as follows:

Enbridge Response Argument 1. Nothing has changed since the ALJ set that schedule. Thus, there is no reason to depart from it.

Turner Interveners' Reply: While Enbridge might argue that the Turner Interveners' can be accused of having good insight, the deadline to propose a schedule for the Reopened 07-0446 was July 25, 2014. The SEC disclosure by Enbridge occurred on August 1, 2014 and by Marathon on August 4, 2014. Saying nothing has change may technically be correct. But clearly there was a significant and relevant release of material new information on August 1 and thereafter, which prior to August 1, 2014, Enbridge was concealing.

Enbridge Response Argument 2. Such an open-ended discovery process would prejudice IEPC, which must construct the pipeline in a timely fashion to meet the needs of its shippers.

Turner Interveners' Reply: The making of the construction schedule was a unilateral act of Enbridge, creating no substantive legal rights compelling a truncated schedule. While the eleventh-hour filing of the Motion to Reopen seemed to reveal a galactic oversight, since the construction schedule had been announced months prior to May 19, 2014, it now appears to be part of a scheme to induce a false sense of urgency and a quick ICC decision without careful review.

Enbridge Response Argument 3. The Turner Intervenors incorrectly assume that the present reopened proceeding will revisit the issue of whether IEPC is qualified for a Certificate of Good Standing. In fact, the Commission has expressly confined this reopened proceeding to the "limited purpose" described in Enbridge's Motion to Reopen and Amend, which is the construction of a 24-inch diameter pipeline instead of a 36-inch diameter pipeline.

Turner Interveners' Reply: Surely Enbridge might expect that the ICC would do more than perform simple subtraction, and conclude that the difference between 36 and 24 is 12. While a metaphysical analysis of the finite number 12 might intellectually stimulate a Post-Doctoral Mathematics student, if the ICC does not look into the effect of the proposed downsizing, then something is terribly wrong. No case of this magnitude should be considered on the basis of a verified motion which proposes an entirely new plan and up-dated responses of two 6-year-old ICC Data Requests. The ICC staff does not have the right to be this reckless. Perhaps the communications between the ICC staff and Enbridge contemporaneous with the filing of the Motion to Reopen should be

explored. If the ICC staff was been simply duped into poor decision-making by the false sense of urgency, then that can be corrected within the parameters of this case. However, if the ICC staff is intentionally laying down, what becomes a serious issue goes well-beyond ICC jurisdiction.

Enbridge Response Argument 4. Neither IEPC's relationship with Marathon, nor any other information described in the Schedule Motion, has any bearing whatsoever on the change in pipeline diameter.

Turner Interveners' Reply: This argument is dead wrong. The Turner Interveners' pre-August 1 insight into Enbridge shenanigans is directly related to the 24" diameter. A 24" pipeline is conspicuously out-of-place. Why would a Canadian company construct a new regional USA trunk-line with only a 24" diameter, when its real interest is the rapid movement of Canadian product to the Gulf Coast? The Enbridge line supplying the Enbridge Pontiac terminal is 42", the largest diameter pipeline Enbridge has in the USA. The new Flanagan South Pipeline is 36". The new line 78 is 36". Enbridge has so much product to move, it announced and obtained approval, prior July 25, 2014, to use rail to transport crude to Pontiac, Illinois. Furthermore, Enbridge has had a long history of complaining about the inadequacies of using small diameter lines to move dilbit. A former Enbridge president said it was like sucking a thick milkshake through a straw. It is not difficult to see that a 24" SAX line would have a limited purpose, without knowing that it was twinned-up with the Sandpiper. The three Midcontinent Marathon refineries have not yet been tooled with a coker. South of Pontiac, there would be the slimmest of demand from any refinery without a coker for light product from Patoka, other than the

Marathon refineries. Enbridge does not supply gas stations or airports. Its customers are refineries. The ICC needs to look at where the refineries are located.

Enbridge Response Argument 5. Moreover, the overarching purpose behind the Turner Intervenors' request for a longer schedule appears to be support for a theory that IEPC should lose its Certificate of Good Standing because Marathon's commitment for a portion of the pipeline's capacity deprives the SAX pipeline of its status as a common carrier.

Turner Interveners' Reply: Enbridge has never had a Certificate of Good Standing for a 24" line from Pontiac to Patoka. That is why the Motion to Reopen was filed.

Enbridge Response Argument 6. Not only is that outside the scope of this "limited purpose" proceeding, but that theory is incorrect *as a matter of law*. Indeed, the very FERC Order they cite demonstrates that SAX will be a common carrier with valid FERC tariffs with the Marathon commitment.

Turner Interveners' Reply: FERC approval is not a prerequisite for ICC approval. Neither does federal preemption trump ICC authority.

Enbridge Response Argument 7. Lastly, the Turner Intervenors' assertions that Enbridge now seeks approval for a "new pipeline," and that the Commission's grant of a Certificate to IEPC rested on a record that is "inaccurate" and thus brings the proceedings "back to square one" (Schedule Motion at 1-2), are not grounded in reality.

Turner Interveners' Reply: Almost the entire Motion to Reopen admits that the evidence presented by Enbridge in 2007 and 2008 was incorrect. Patoka did not become a hotspot for dilbit. Enbridge needs to read its own motion and then thank the Turner and Pliura Interveners for delaying its plans in 2007 for the SAX line. It would have been a costly mistake. Enbridge is welcome.

Enbridge Response Argument 8. As … long as IEPC "holds itself out" as willing to serve all shippers subject to available capacity, IEPC is a common carrier.

Turner Interveners' Reply: There are many pertinent facts of the Marathon/Enbridge arrangement with respect to the twin projects, Sandpiper SAX, which are still concealed by Enbridge. It is therefore a bit premature to determine what the proper legal analysis should be. However, simply saying that SAX is a common carrier is insufficient. Merely checking a box to identify oneself as a common carrier has been held in Texas, for example, as inadequate proof of common carrier status. *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 55 Tex. Sup. Ct. J. 380, 363 S.W.3d 192 (Tex., 2012). It is incontrovertible that Marathon is both a shipper and an owner. At least 35% of the SAX is, therefore, entirely private. Nothing suggests that Marathon is devoting its 35% as a common carrier to carry dilbit to the newly announced massive refinery of ExxonMobil near Houston, for example. It is also incontrovertible that Marathon is the anchor shipper for the Sandpiper SAX twins and that the Sandpiper is devoted almost exclusively to Marathon. Concealed is the size of the written shipping commitment of Marathon. Should the Marathon written commitment for SAX be greater than say 50% of the capacity of the SAX, then the SAX is not a common carrier. Also consider a recent preliminary decision made in the State of Pennsylvania which is attached hereto, where arguments were made based on FERC jurisdiction. Illinois law requires an analysis of what is planned, rather than simply taking an applicant at it word. *Browne v. SCR MEDICAL TRANSP. SERVICES*, 826 N.E.2d 1030, 356 Ill. App.3d 642 (1st Dist. 2005) describes it this way:

> In Illinois, a common carrier is "one who undertakes for the public to transport from place to place such persons or the goods of such persons as choose

> to employ him for hire." *Illinois Highway Transportation Company v. Hantel*, 323 Ill.App. 364, 375, 55 N.E.2d 710 (1944). The test to distinguish a common carrier from a private carrier is whether the carrier serves all of the public alike. *Hantel*, 323 Ill.App. at 375, 55 N.E.2d 710. A common carrier is "one who undertakes for hire to carry all persons indifferently who may apply for passage, so long as there is room and there is no legal excuse for refusal." *Hantel*, 323 Ill.App. at 376, 55 N.E.2d 710. A private carrier on the other hand "undertakes by special agreement, in a particular instance only, to transport persons or property from one place to another either gratuitously or for hire." *Jane Doe v. Rockdale School District, No. 84*, 287 Ill.App.3d 791, 794, 223 Ill.Dec. 320, 679 N.E.2d 771 (1997). Further, a private carrier "makes no profession to carry all who apply for carriage" and "is not bound to serve every person who may apply." *Rockdale School District*, 287 Ill.App.3d at 794, 223 Ill.Dec. 320, 679 N.E.2d 771.

Until there has been further investigation into the facts which are being intentionally concealed by Enbridge, the ICC is unable to determine what Enbridge and Marathon have conspired to do.

Wherefore, the Turner Interveners respectfully pray that the hearing date be vacated in the interest of full disclosure and justice.

Respectfully submitted,

TURNER INTERVENERS

By: /s/ Mercer Turner
Mercer Turner, their counsel

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Walnut Bank valve control station in Wallace Township, Chester County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	:	P-2014-2411941
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Blairsville pump station in Burrell Township, Indiana County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	:	P-2014-2411942
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Middletown Junction valve control station in Lower Swatara Township, Dauphin County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	:	P-2014-2411943
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Cramer pump station in East Wheatfield Township, Indiana County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	:	P-2014-2411944
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Old York Road valve control station in Fairview Township, York County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	:	P-2014-2411945
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Conodoquist River West valve control station in North Middleton Township, Cumberland County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	:	P-2014-2411946

Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Juniata River West valve control station in Frankston Township, Blair County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : :	P-2014-2411948
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Ebensburg pump station in Cambria Township, Cambria County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : :	P-2014-2411950
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the West Conemaugh River valve control station in Derry Township, Westmoreland County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : :	P-2014-2411951
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the West Loyalhanna Dam valve control station in Loyalhanna Township, Westmoreland County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : :	P-2014-2411952
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Old Chestnut Lane valve control station in Penn Township, Westmoreland County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : :	P-2014-2411953
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Old Harmony Road valve control station in Hempfield Township, Westmoreland County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : :	P-2014-2411954

Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Youghiogheny River South valve control station in Rostraver Township, Westmoreland County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : :	P-2014-2411956
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Hollidaysburg pump station in Allegheny Township, Blair County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : :	P-2014-2411957
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Monongahela River West valve control station in Union Township, Washington County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : :	P-2014-2411958
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Ross Road valve control station in North Strabane Township, Washington County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : :	P-2014-2411960
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Marklesburg pump station and Raystown Lake West valve control station in Penn Township, Huntingdon County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : : :	P-2014-2411961
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Houston-Mark West, Houston-Williams and West Pike Street valve control stations in Chartiers Township, Washington County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : : :	P-2014-2411963

Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Mount Union pump station in Shirley Township, Huntingdon County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : : :	P-2014-2411964
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Twin Oaks pump station in Upper Chichester Township, Delaware County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : : :	P-2014-2411965
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Boot pump station in West Goshen Township, Chester County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : : :	P-2014-2411966
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Doylesburg pump station in Toboyne Township, Perry County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : : :	P-2014-2411967
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Eagle pump station in Upper Uwchlan Township, Chester County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : : :	P-2014-2411968
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Beckersville pump station in Brecknock Township, Berks County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : : :	P-2014-2411971

Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Montello pump station and valve control station in Spring Township, Berks County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : :	P-2014-2411972
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Mechanicsburg pump station in Hampden Township, Cumberland County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : :	P-2014-2411974
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Blainsport pump station in West Cocalico Township, Lancaster County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : :	P-2014-2411975
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Middletown pump station in Londonderry Township, Dauphin Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : :	P-2014-2411976
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Cornwall pump station in West Cornwall Township, Lebanon County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : :	P-2014-2411977
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Plainfield pump station in Lower Frankford Township, Cumberland County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	: : : : : :	P-2014-2411979

Petition of Sunoco Pipeline, L.P.	:	
for a finding that a building to shelter the	:	
Delmont pump station	:	P-2014-2411980
in Salem Township, Westmoreland	:	
County, Pennsylvania is reasonably necessary	:	
for the convenience or welfare of the public	:	

INITIAL DECISION SUSTAINING PRELIMINARY OBJECTIONS AND DISMISSING PETITIONS

Before
David A. Salapa
Elizabeth H. Barnes
Administrative Law Judges

INTRODUCTION

A pipeline operator filed petitions requesting that the Commission find that the buildings to shelter 18 pump stations and 17 valve control stations along its proposed pipeline are reasonably necessary for the convenience or welfare of the public and therefore exempt from local zoning ordinances as public utility buildings. This decision dismisses the petitions because the pipeline operator's proposed service is not public utility service and the Commission therefore lacks jurisdiction over the petitions.

HISTORY OF PROCEEDINGS

On March 21, 2014, Sunoco Pipeline, L.P. (Sunoco), filed a petition, with the Pennsylvania Public Utility Commission (Commission), pursuant to 52 Pa.Code § 5.41 and 53 P.S. § 10619. The petition contained 31 separate locations in its caption. The Commission's Secretary treated the petition as 31 separate petitions and assigned 31 docket numbers to the same petition.

These 31 petitions requested that the Commission find that the buildings to shelter 18 pump stations and 17 valve control stations along Sunoco's proposed Mariner East pipeline are reasonably necessary for the convenience or welfare of the public and therefore exempt from any local zoning ordinance. The petitions indicated that the Mariner East pipeline involved the construction of new pipeline facilities and use of existing pipeline facilities to transport ethane and propane. The Mariner East pipeline would originate in Houston, Pennsylvania and terminate in Claymont, Delaware.

The petitions alleged that the purpose of the Mariner East pipeline was to provide additional transportation infrastructure to transport Marcellus Shale resources. According to the petitions, there is a need for additional infrastructure to transport natural gas and associated natural gas liquids (NGLs).

As part of the construction of the Mariner East pipeline, Sunoco will have to construct pump stations to facilitate the transportation of ethane and propane. In addition, Sunoco must construct valve control stations to ensure that the ethane and propane are transported safely. These pump stations and valve control stations will be enclosed in metal buildings. The buildings will protect the electrical, control and communication devices for the pump and valve equipment from the weather. The buildings will dampen the noise from the operation of the pump and valve control equipment that reaches the area surrounding each station.

Notice of Sunoco's 31 petitions was published in the April 5, 2014 Pennsylvania Bulletin at 44 Pa.B. 2145, specifying a deadline of April 21, 2014, for filing formal protests, comments or petitions to intervene in the proceeding.

Numerous parties filed comments, protests and petitions to intervene in response to Sunoco's 31 petitions. In addition, on April 18, 2014, the Concerned Citizens of West Goshen Township (CCWGT) filed preliminary objections asserting, inter alia that Sunoco's petitions lacked specificity, pursuant to 52 Pa.Code § 5.101(a)(3).

On April 21, 2014, the Delaware Riverkeeper Network (DRN) also filed preliminary objections asserting, inter alia that the Commission lacked jurisdiction over Sunoco's petitions, pursuant to 52 Pa.Code § 5.101(a)(1).

On April 28, 2014, Sunoco filed an answer to the preliminary objections of CCWGT. The answer alleged that, pursuant to 52 Pa.Code § 5.91(b) a party may file an amended pleading as of course within 20 days after service of preliminary objections alleging that the pleading lacked specificity. The answer stated that Sunoco would be filing an amended petition within the 20 days, as permitted by 52 Pa.Code § 5.91(b). The answer requested that the CCWGT's preliminary objections be denied upon the filing of Sunoco's amended petition.

On April 29, 2014, Sunoco filed an answer to the preliminary objections of DRN. The answer reiterates the allegations set forth in Sunoco's answer to CCWGT's preliminary objections. The answer requested that DRN's preliminary objections be denied upon the filing of Sunoco's amended petition.

By notice dated May 5, 2014, the Commission notified the parties that it had assigned Sunoco's 31 petitions to us as motion judges.

On May 8, 2014, Sunoco filed 31 separate amended petitions requesting that the Commission find that the buildings to shelter 18 pump stations and 17 valve control stations along Sunoco's proposed Mariner East pipeline were reasonably necessary for the convenience or welfare of the public and therefore exempt from any local zoning ordinance. The amended petitions alleged that the Mariner East pipeline would originate in Houston, Pennsylvania and deliver propane to the Marcus Hook Industrial Complex (MHIC) and Sunoco's Twin Oaks facilities, located in Delaware County, Pennsylvania.

The amended petitions allege that Sunoco currently holds a certificate of public convenience to provide petroleum products transportation services for the segment of the Mariner East pipeline located west of Mechanicsburg, Cumberland County. A portion of the service on this segment has been discontinued and abandoned pursuant to Commission orders

entered August 29, 2013 and October 17, 2013 at A-2013-2371789. According to the amended petitions, Sunoco will be seeking to resume intrastate transportation service along this segment so that it can ship propane by pipeline to the Twin Oaks facilities to allow further distribution to third party storage facilities or distribution terminals.

In addition, the certificate of public convenience to provide petroleum products transportation services for the segment of the Mariner East pipeline located east of Mechanicsburg, Cumberland County has been suspended, pursuant to Commission orders entered August 29, 2013 and October 17, 2013 at P-2013-2371775. The amended petitions assert that Sunoco will resume service to meet demand for the 2014-2015 winter season and will file a tariff supplement to implement service between Mechanicsburg and its Twin Oaks facilities. This will allow Sunoco to transport approximately 5,000 barrels per day of propane by pipeline from Mechanicsburg to Twin Oaks.

Sunoco claims it needs to construct pump stations to facilitate the transportation of ethane and propane. In addition, Sunoco must construct valve control stations to ensure that the ethane and propane are transported safely. These pump stations and valve control stations will be enclosed in metal buildings. The buildings will protect the electrical, control and communication devices for the pump and valve equipment from the weather. The buildings will lessen the amount of noise from the operation of the pump and valve control equipment that reaches the area surrounding each station.

Notice of Sunoco's 31 amended petitions was published in the May 24, 2014 Pennsylvania Bulletin at 44 Pa.B. 3204-3215, specifying a deadline of June 9, 2014 for filing formal protests, comments or petitions to intervene in the proceeding.

On May 21, 2014, pursuant to 52 Pa.Code § 5.572(a) and (d), Sunoco filed a petition at P-2014-2422583 for amendment of the Commission's order entered on August 29, 2013 at Docket Nos. A-2013-2371789 and P-2013-2371775, which had authorized Sunoco to abandon a portion of its petroleum products transportation service. The petition requests that the Commission amend its August 29, 2013 order at A-2013-2371789 and P-2013-

2371775 to allow Sunoco to re-commence intrastate service of petroleum products in the segment of the pipeline where the tariff was abandoned, subject to the filing of a new tariff. This petition states that it relates to the Mariner East pipeline project and avers the company holds a certificate of public convenience to provide petroleum products and refined petroleum products pipeline transportation service in all counties in which the Mariner East project is located, with the exception of Washington County, where Houston, Pennsylvania is located. The petition at P-2014-2422583 is pending before the Commission.

On May 28, 2014, the Clean Air Council (CAC) filed preliminary objections to all 31 of Sunoco's amended petitions. The preliminary objections argue that, pursuant to 52 Pa.Code § 1.101(a)(1), the Commission lacks jurisdiction over Sunoco's amended petitions because Sunoco is not a public utility as defined by the Public Utility Code and is not a public utility corporation as that term is used in the Municipalities Planning Code (MPC).

Alternatively, CAC's preliminary objections contend that, pursuant to 52 Pa.Code § 1.101(a)(4), Sunoco's amended petitions are legally insufficient because they do not allege facts sufficient to show that the Mariner East pipeline is necessary for the convenience and welfare of the public. CAC further argues that Sunoco's amended petitions fail to address the environmental impact of the proposed valve stations and pump stations which, according to CAC, will emit various air pollutants affecting air quality.

On June 5, 2014, DRN filed preliminary objections to all 31 of Sunoco's amended petitions. DRN's preliminary objections also argue that, pursuant to 52 Pa.Code § 1.101(a)(1), the Commission lacks jurisdiction over Sunoco's amended petitions because Sunoco is not a public utility as defined by the Public Utility Code and is not a public utility corporation as that term is used in the MPC. DRN's preliminary objections also contend that, pursuant to 52 Pa.Code § 1.101(a)(4), Sunoco's amended petitions are legally insufficient because they do not allege facts sufficient to show that the Mariner East pipeline is necessary for the convenience and welfare of the public.

On June 6, 2014, at Docket No. A-2014-2425633, Sunoco filed an application for a certificate of public convenience, pursuant to 66 Pa.C.S. §§ 1102(a)(1) and 1103 and 52 Pa.Code §§ 5.11–5.14, to extend its service territory for transportation of petroleum products and refined petroleum products by pipeline into Washington County. Formal protests were due July 7, 2014. This application is currently pending before the Commission and has not been consolidated with the amended petitions that are the subject of this proceeding.

On June 9, 2014, CCWGT filed preliminary objections to Sunoco's amended petition at P-2014-2411966. CCWGT's preliminary objections also argue that, pursuant to 52 Pa.Code § 1.101(a)(1), the Commission lacks jurisdiction over Sunoco's amended petitions because Sunoco is not a public utility as defined by the Public Utility Code and is not a public utility corporation as that term is used in the MPC. In addition CCWGT argues that Sunoco lacks Commission authority to use the pipeline segment in West Goshen Township. According to CCWGT, the portion of Sunoco's pipeline on which service has been suspended between Mechanicsburg and Twin Oaks is not located near West Goshen Township. CCWGT concludes that the Commission lacks jurisdiction over the Boot Road site in West Goshen Township since the pipeline at that location does not appear to be part of the proposed pipeline route between Mechanicsburg and Twin Oaks.

CCWGT's preliminary objections also contend that, pursuant to 52 Pa.Code § 1.101(a)(4), Sunoco's amended petition at P-2014-2411966 is legally insufficient because it fails to include all buildings that Sunoco plans to construct at the location designated Boot station. CCWGT asserts that Sunoco intends to construct a vapor combustion unit in addition to a control building. CCWGT contends that Sunoco's petition at P-2014-2411966 fails to provide any information on the vapor combustion unit other than to allege that there is no building involved.

CCWGT alleges that the vapor combustion unit will include a large chimney and housing for the combustion equipment. CCWGT argues that the chimney and structure are buildings. CCWGT concludes that Sunoco's petition does not describe all of the buildings to be constructed in West Goshen Township and is therefore legally insufficient.

CCWGT further alleges that Sunoco's petition at P-2014-2411966 lacks sufficient specificity, pursuant to 52 Pa.Code § 5.101(a)(3), because it fails to include a complete description of the Boot pump station property on which Sunoco plans to construct the shelter building, fails to provide information on the environmental impact of the proposed shelter building and fails to discuss the impact of the proposed shelter building on the West Goshen Township zoning and comprehensive plans.

According to CCWGT, Sunoco owns two separate parcels on Boot Road in West Goshen Township. Both parcels are zoned residential. One parcel is vacant. The second parcel has buildings on it that house Sunoco's equipment. However, Sunoco's amended petition at P-2014-2411966 does not indicate which parcel it will use for the proposed shelter building.

CCWGT contends that the Commission requires an evaluation of the environmental impact of the construction of the proposed shelter building. According to CCWGT, Sunoco's amended petition at P-2014-2411966 does not contain any information on environmental impact.

CCWGT also alleges that the Commission's policy statement at 52 Pa.Code § 69.1101 requires the Commission to consider the effect of a petition like Sunoco's on comprehensive plans and zoning ordinances. According to CCWGT, Sunoco's amended petition at P-2014-2411966 does not contain any information on the effect of its amended petition on West Goshen Township's comprehensive plan and zoning ordinance.

On June 9, 2014, the Mountain Watershed Association (MWA) filed preliminary objections to all 31 of Sunoco's amended petitions. MWA's preliminary objections state that MWA adopts DRN's preliminary objections and request that the Commission deny Sunoco's petitions.

On June 9, 2014 Sunoco filed an answer to CAC's preliminary objections. Sunoco alleges that it is a public utility as defined by the Public Utility Code because it has been

certificated and regulated by the Commission as a public utility since 2002. Since it is subject to regulation as a public utility by the Commission, it is also a public utility corporation as that term is used in the MPC. Since the Commission has determined that Sunoco is a public utility, CAC may not challenge that determination in this proceeding, according to Sunoco. The Commission therefore has jurisdiction over Sunoco's amended petitions.

Sunoco also argues that its amended petitions are legally sufficient because its amended petitions only need to address whether the siting of the buildings are reasonably necessary, not whether the Mariner East pipeline is necessary for the convenience and welfare of the public. The issue of the need for the Mariner East pipeline is not at issue in these proceedings. Sunoco requests that the Commission dismiss CAC's preliminary objections.

On June 18, 2014, Sunoco filed an answer to DRN's preliminary objections. Sunoco makes allegations similar to those in its answer to CAC's preliminary objections. Sunoco alleges that it is a public utility as defined by the Public Utility Code because it has been certificated and regulated by the Commission as a public utility since 2002. Since it is subject to regulation as a public utility by the Commission, it is also a public utility corporation as that term is used in the MPC. Sunoco also points out that the issue of the need for the Mariner East pipeline is not at issue in these proceedings. Sunoco requests that the Commission dismiss CAC's preliminary objections.

On June 19, 2014, Sunoco filed an answer to MWA's preliminary objections. Sunoco's answer to MWA's preliminary objections references its answer to DRN's preliminary objections and requests that the Commission deny MWA's preliminary objections.

Also on June 19, 2014, Sunoco filed an answer to CCWGT's preliminary objections. Sunoco alleges that it is a public utility as defined by the Public Utility Code because it has been certificated and regulated by the Commission as a public utility since 2002. Since it is subject to regulation as a public utility by the Commission, it is also a public utility corporation as that term is used in the MPC. Since the Commission has determined that Sunoco

is a public utility, CCWGT may not challenge that determination in this proceeding, according to Sunoco. The Commission therefore has jurisdiction over Sunoco's amended petitions.

Sunoco denies that the vapor combustion unit is a building. Rather, Sunoco contends that the vapor combustion unit is a piece of equipment. Since it is a piece of equipment, it is a public utility facility not properly before the Commission in this proceeding.

Sunoco denies that its amended petition lacks sufficient specificity, pursuant to 52 Pa.Code § 5.101(a)(3). Sunoco contends that previous Commission orders have held that 53 P.S. § 10619 does not require the specificity that CCWGT contends that it does.

Sunoco denies that there is any environmental impact involved in the construction of the proposed shelter building. Sunoco also denies that it is required by the Commission to evaluate the environmental impact of the construction of the proposed shelter building. Sunoco requests that the Commission dismiss CCWGT's preliminary objections.

On July 11, 2014, Sunoco filed Tariff Pipeline – Pa. PUC No. 16 at R-2014-2426158 which proposes to add a new origin point of Mechanicsburg and a new destination point of Twin Oaks for the west to east movement of propane on the company's system. This tariff provision is a "reinstatement of service" according to Sunoco's filing. The tariff provision has not been approved yet by the Commission. The tariff filing has not been consolidated with Sunoco's amended petitions that are the subject of this proceeding.

The preliminary objections are ready for decision. For the reasons set forth below, we will grant the preliminary objections and dismiss the amended petitions.

FINDINGS OF FACT

1. On March 21, 2014, Sunoco filed 31 petitions, with the Commission, pursuant to 52 Pa.Code § 5.41 and 53 P.S. § 10619.

2. Notice of Sunoco's 31 petitions was published in the April 5, 2014 Pennsylvania Bulletin at 44 Pa.B. 2145, specifying a deadline of April 21, 2014, for filing formal protests, comments or petitions to intervene in the proceeding.

3. On May 8, 2014, Sunoco filed 31 amended petitions.

4. Notice of Sunoco's 31 amended petitions was published in the May 24, 2014 Pennsylvania Bulletin at 44 Pa.B. 3204-3215, specifying a deadline of June 9, 2014 for filing formal protests, comments or petitions to intervene in the proceeding.

5. On May 21, 2014, Sunoco filed a petition for amendment of the Commission's order entered on August 29, 2013 at Docket Nos. A-2013-2371789 and P-2013-2371775, which had authorized Sunoco to abandon a portion of its petroleum products transportation service.

6. On May 28, 2014, CAC filed preliminary objections to all 31 of Sunoco's amended petitions.

7. On June 5, 2014, DRN filed preliminary objections to all 31 of Sunoco's amended petitions.

8. On June 6, 2014, at Docket No. A-2014-2425633, Sunoco filed an application for a certificate of public convenience, pursuant to 66 Pa.C.S. §§ 1102(a)(1) and 1103 and 52 Pa.Code §§5.11–5.14, to extend its service territory for transportation of petroleum products and refined petroleum products by pipeline into Washington County.

9. On June 9, 2014, CCWGT filed preliminary objections to Sunoco's petition at P-2014-2411966.

10. On June 9, 2014, the MWA filed preliminary objections to all 31 of Sunoco's amended petitions.

11. On June 9, 2014 Sunoco filed an answer to CAC's preliminary objections.

12. On June 18, 2014, Sunoco filed an answer to DRN's preliminary objections.

13. On June 19, 2014 Sunoco filed an answer to MWA's preliminary objections.

14. On June 19, 2014, Sunoco filed an answer to CCWGT's preliminary objections.

15. On July 11, 2014, Sunoco filed Tariff Pipeline – Pa.PUC No. 16 which proposes to add a new origin point of Mechanicsburg and a new destination point of Twin Oaks for the west to east movement of propane on the company's system.

DISCUSSION

The Commission's Rules of Practice and Procedure permit parties to file preliminary objections. The grounds for preliminary objections are limited to those set forth in 52 Pa.Code § 5.101(a) as follows:

> (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
>
> (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
>
> (3) Insufficient specificity of a pleading.
>
> (4) Legal insufficiency of a pleading.
>
> (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.

(6) Pendency of a prior proceeding or agreement for alternative dispute resolution.

(7) Standing of a party to participate in the proceeding.

Here, the preliminary objections assert lack of Commission jurisdiction, pursuant to 52 Pa.Code § 5.101(a)(1), legal insufficiency, pursuant to 52 Pa.Code § 5.101(a)(4) and lack of sufficient specificity, pursuant to 52 Pa.Code § 5.101(a)(3). Before addressing these assertions, we will first discuss the standards for Commission approval of the siting of Sunoco's proposed buildings.

The Pennsylvania Supreme Court has long held that municipalities have no power to zone with respect to utility facilities. Duquesne Light Co. v. Upper St. Clair Twp., 105 A.2d 287 (Pa. 1954); Duquesne Light Co. v. Monroeville Borough, 298 A.2d 252, 256 (Pa. 1972) (the PUC has exclusive regulatory jurisdiction over the implementation of public utility facilities). See, also, County of Chester v. Philadelphia Electric Co., 218 A.2d 331, 333 (Pa. 1966) (regulation by a multitude of jurisdictions would result in "twisted and knotted" public utilities with consequent harm to the general welfare of the public); Commonwealth v. Delaware & Hudson Railway Co., 339 A.2d 155, 157 (Pa. Cmwlth. 1975) ("public utilities are to be regulated exclusively by an agency of the Commonwealth with state-wide jurisdiction rather than a myriad of local governments with different regulations").

The statute at 53 P.S. § 10619, Section 619 of the MPC, provides a limited exception to this general rule. Section 619 of the MPC states as follows:

> 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. It shall be the responsibility of the Pennsylvania Public Utility Commission to ensure that both the corporation and the municipality in which the building or proposed building is located have notice of the hearing and are granted an opportunity to appear, present witnesses, cross-examine witnesses presented by

> other parties and otherwise exercise the rights of a party to the proceedings.

Therefore, a municipality may zone a public utility building unless the Commission determines that the building is reasonably necessary for the convenience or welfare of the public. If the Commission finds that the building is reasonably necessary, the building is exempt from a local zoning ordinance under the MPC. Del-AWARE Unlimited, Inc. v. Pa. Pub. Util. Comm'n, 513 A.2d 593 (Pa. Cmwlth. 1986). Section 619 of the MPC does not require a utility to prove that the site it has selected is absolutely necessary or that it is the best possible site, it need only show that the building is reasonably necessary. O'Connor v. Pa. Pub. Util. Comm'n, 582 A.2d 427 (Pa. Cmwlth. 1990).

The Commission adopted a policy statement, set forth at 52 Pa.Code § 69.1101, to further the Commonwealth's goal of making agency actions consistent with sound land use planning by considering the impact of its decision upon local comprehensive plans and zoning ordinances. The policy statement at 52 Pa.Code § 69.1101 states as follows:

> To further the State's goal of making State agency actions consistent with sound land-use planning and under the act of June 22, 2000 (P.L. 483, No. 67) and the act of June 23, 2000 (P.L. 495, No. 68), the Commission will consider the impact of its decisions upon local comprehensive plans and zoning ordinances. This will include reviewing applications for:
>
> (1) Certificates of public convenience
>
> (2) Siting electric transmission lines
>
> (3) Siting a public utility "building" under section 619 of the MPC (53 P.S. § 10619)
>
> (4) Other Commission decisions

Having discussed the standards for Commission approval of the siting of Sunoco's proposed buildings, we will now address the preliminary objections set forth above,

starting with the contention that the Commission lacks subject matter jurisdiction over the amended petitions.

Commission preliminary objection practice is analogous to Pennsylvania civil practice regarding preliminary objections. Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (Order entered July 18, 1994). A preliminary objection asserting lack of Commission jurisdiction, pursuant to the Commission's Rules of Practice and Procedure, is therefore analogous to preliminary objections allowed by Rule 1028 of the Pennsylvania Rules of Civil Procedure.

Preliminary objections in civil practice requesting dismissal of a pleading will be granted only where the right to relief is clearly warranted and free from doubt. Interstate Traveller Services, Inc. v. Pa. Dept. of Environment Resources, 406 A.2d 1020 (Pa. 1979); Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc., 595 A.2d 172 (Pa. Super. 1991). The Commission follows this standard. Montague v. Philadelphia Electric Company, 66 Pa. PUC 24 (1988).

The Commission may not rely upon the factual assertions of the moving party but must accept as true, for purposes of disposing of the motion, all well pleaded, material facts of the nonmoving party, as well as every reasonable inference from those facts. County of Allegheny v. Commonwealth of Pennsylvania, 490 A. 2d 402 (Pa. 1985); Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa., 551 A.2d 602 (Pa. Cmwlth. 1988). The Commission must view the amended petitions in the light most favorable to Sunoco and should dismiss the amended petitions only if it appears that Sunoco would not be entitled to relief under any circumstances as a matter of law. Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

The regulation at 52 Pa.Code § 5.101(a)(1) permits the filing of a preliminary objection to dismiss a pleading for lack of Commission jurisdiction. The provision at 52 Pa.Code § 5.101(a)(1) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary.

Lehigh Valley Power Committee v. Pa. Pub. Util. Comm'n, 563 A.2d 557 (Pa. Cmwlth. 1989); S.M.E. Bessemer Cement, Inc. v. Pa. Pub. Util. Comm'n, 540 A.2d 1006 (Pa. Cmwlth. 1988); White Oak Borough Authority v. Pa. Pub. Util. Comm'n, 103 A.2d 502 (Pa. Super. 1954).

The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code. Tod and Lisa Shedlosky v. Pennsylvania Electric Co., Docket No. C-20066937 (Order entered May 28, 2008); Feingold v. Bell Tel. Co. of Pa., 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. City of Pittsburgh v. Pa. Pub. Util. Comm'n, 43 A.2d 348 (Pa. Super. 1945). Jurisdiction may not be conferred by the parties where none exists. Roberts v. Martorano, 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. Hughes v. Pennsylvania State Police, 619 A.2d 390 (Pa. Cmwlth. 1992) alloc. denied 637 A.2d 293 (Pa. 1993).

Viewing Sunoco's amended petitions in this case in the light most favorable to Sunoco, for purposes of ruling on the preliminary objections, Sunoco currently holds a certificate of public convenience to provide petroleum products transportation services for the segment of the Mariner East pipeline located west of Mechanicsburg, but a portion of the service on this segment has been discontinued and abandoned pursuant to Commission orders at A-2013-2371789.

Although Sunoco has a certificate of public convenience to provide petroleum products transportation services for the segment of the Mariner East pipeline located east of Mechanicsburg, that transport service has been suspended pursuant to Commission orders at P-2013-2371775. Sunoco has not yet resumed service on this segment, although it now asserts in the amended petitions a desire to meet demand for propane shipments for the winter of 2014-2015 and has subsequently filed a tariff supplement to implement service between Mechanicsburg and its Twin Oaks facilities. This tariff supplement is currently under consideration before the Commission in a separate docket.

The preliminary objections contend that the Commission lacks jurisdiction over the amended petitions because Sunoco is not a public utility as defined by the Public Utility Code and is not a public utility corporation as that term is used in the MPC. The preliminary objections acknowledge that Sunoco previously held a certificate of public convenience to transport gasoline and gasoline distillate from the eastern portion of Pennsylvania for distribution to the western portion of the state but argue that it does not necessarily follow that it would be acting as a public utility in its proposed Mariner East pipeline project.

The preliminary objections contend that the proposed Mariner East project will involve transport of different commodities including propane and ethane as opposed to petroleum distillates like gasoline, diesel fuel and heating oil in the reverse west to east direction to different shippers and end users. The preliminary objections assert that the proposed Mariner East project will not necessarily benefit the public as the previous service did.

In ruling on Sunoco's amended petitions, the Commission must determine whether Sunoco's proposed service is public utility service within the meaning of the Public Utility Code. The leading case in this area is Drexelbrook Associates v. Pa. Pub. Util. Comm'n, 212 A.2d 237 (Pa. 1965) (Drexelbrook), in which Drexelbrook Associates sought to purchase the equipment from the electric and water companies already in place to serve a real estate development consisting of 1223 residential units, 9 retail stores, a club with a dining room, swimming pool, skating rink and tennis courts. The companies provided electric and water service directly to the tenants prior to the purchase. Afterwards, the companies would provide service to Drexelbrook, which would then bill the tenants, using the individual meters already in place to determine usage. The Commission denied the application for transfer of equipment holding that Drexelbrook would become a public utility and would need to apply for a certificate of public convenience.

The Supreme Court of Pennsylvania reversed the Commission, holding that the service that Drexelbrook intended to provide would not be "to or for the public" within the meaning of the statute. The court held that the public or private character of the enterprise does not depend upon the number of persons by whom it is used, but upon whether or not it is open to

the use and service of all members of the public who may require it. Drexelbrook at 435, citing Borough of Ambridge v. Pa. Pub. Serv. Comm'n, 165 A. 47, 49 (Pa. Super. 1933). Where the service was to an apartment house, the court held the service to be private in nature as it was limited to the tenants and incidental to the business of maintaining the apartment house. Drexelbrook at 435, citing Aronimink Transp. Co. v. Pa. Pub. Serv. Comm'n, 170 A. 375 (Pa. Super. 1934). In addition, "a public use . . . is not confined to privileged individuals, but is open to the indefinite public" and "it is this indefinite or unrestricted quality that gives it its public character." Drexelbrook at 436, citing Camp Wohelo, Inc. v. Novitiate of St. Isaac Jogues, 36 Pa. PUC 377 (1958). The Supreme Court of Pennsylvania later held in Bethlehem Steel Corporation v. Pa. Pub. Util. Comm'n, 713 A.2d 1110 (Pa. 1998) that a single customer is not "the public," unless the reason for the single customer was the entity's inability to secure other customers despite actively seeking additional customers to no avail. Pilot Travel Centers LLC v. Pa. Pub. Util. Comm'n, 933 A.2d 123 (Pa. Cmwlth. 2007).

The Commission has issued a policy statement to provide guidance for the determination of public utility status. These guidelines are consistent with the case law cited above. The policy statement provides a method for evaluating whether a proposed service is a public utility service. The policy statement states in part:

> **§ 69.1401. Guidelines for determining public utility status – statement of policy.**
>
> * * *
>
> (c) *Fact based determination.* The Commission will consider the status of a utility project or service based on the specific facts of the project or service and will take into consideration the following criteria in formulating its decision:
>
> (1) The service being provided by the utility project is merely incidental to nonutility business with the customers which creates a nexus between the provider and customer.
>
> (2) The facility is designed and constructed only to serve a specific group of individuals or entities, and others cannot feasibly be serviced without a significant revision to the project.

> (3) The service is provided to a single customer or to a defined, privileged and limited group when the provider reserves its right to select its customers by contractual arrangement so that no one among the public, outside of the selected group, is privileged to demand service, and resale of the service is prohibited, except to the extent that a building or facility owner/operator that manages the internal distribution system servicing the building or facility supplies electric and related electric power services to occupants of the building or facility. See 66 Pa.C.S. 102 and 2803 (relating to definitions).
>
> * * *

In this case, the Commission must accept as true for purposes of disposing of the preliminary objections all well pleaded, material facts in Sunoco's 31 amended petitions, as well as every reasonable inference from those facts. The Commission must view Sunoco's 31 amended petitions in the light most favorable to Sunoco and should dismiss the amended petitions only if it appears that Sunoco would not be entitled to relief under any circumstances as a matter of law.

The amended petitions allege that Sunoco has Commission authority to provide service as a public utility using the same facilities that it intends to use to provide service through its proposed Mariner East project. While the Commission orders entered August 29, 2013 and October 17, 2013 at A-2013-2371789 and P-2013-2371775 authorized Sunoco to suspend or abandon its service, the Commission orders also contemplated that Sunoco in the future would use those same facilities to provide service through its proposed Mariner East project. The Commission orders at A-2013-2371789 and P-2013-2371775 do not specifically state whether the service proposed by the Mariner East project would be public utility service.

Sunoco's amended petitions state that Sunoco had initially prioritized the Mariner East pipeline system to provide interstate transportation of ethane and propane from west to east across Pennsylvania. However, given the increased interest expressed by shippers in securing intrastate pipeline transportation facilities sooner than originally anticipated, and in recognition of the public interest in ensuring adequate pipeline capacity to meet peak demand for propane during the winter season, Sunoco has acted to offer intrastate service as well along the existing pipelines, and will be able to offer more intrastate service pipeline capacity and more

destinations within the Commonwealth upon full completion of the Mariner East pipeline system. Amended petitions at 9.

In its amended petitions, Sunoco describes the way in which the now fragmented portion of the project will involve transportation of 5,000 barrels of propane per day from the Mechanicsburg terminal to Twin Oaks, which is located in close proximity to the Marcus Hook facility. Amended petitions at 9-10. However, there is no mention in the amended petitions of a change in the primary purpose of the Mariner East Project to provide transportation of approximately 72,000 barrels per day of NGLs from Houston, PA, located near the border of Ohio to Sunoco's MHIC facility, located in Pennsylvania and Delaware along the Delaware River.

We take judicial notice of a recent declaratory judgment issued on February 15, 2013 at Docket No. OR13-9-000, wherein the Federal Energy Regulatory Commission (FERC) declared Sunoco had demonstrated a need for additional pipeline capacity to transport excess NGLs produced in association with natural gas in the Marcellus and Utica Shale production regions. FERC approved Sunoco's plan to reserve 90 percent of the available capacity for those select few shippers committing to ship or pay contracts at premium rates for initial 10 – 15 year terms. Sunoco also will provide 10% capacity for uncommitted shippers that do not provide the financial assurances. The proposed terms of service and rate structure was found to be reasonable by FERC.

The FERC order supports the conclusion that Sunoco's proposed transport of ethane and propane through the state of Pennsylvania at FERC approved rates is interstate common carrier service regulated by FERC through the Interstate Commerce Clause, rather than intrastate public utility service regulated by the Commission through the provisions of the Public Utility Code. The Public Utility Code does not apply to interstate commerce. 66 Pa.C.S. § 104.

Only recently, after Sunoco filed the initial and amended petitions in this proceeding, did it file a tariff at R-2014-2426158 with the Commission seeking authority to

provide the intrastate transportation of propane from Mechanicsburg to Twin Oaks. This tariff is currently under review by the Commission.

In its original petitions Sunoco admitted it is regulated by FERC pursuant to the Interstate Commerce Act (ICA) as a common carrier and not as a public utility. Original petition at 5-8. The ICA regulates common carriers of interstate commerce, not public utilities. 49 U.S. C. § 1(b). Sunoco does not meet the definition of a public utility corporation articulated in the Business Corporation Law (BCL) at 15 Pa.C.S. § 1103, which provides in pertinent part:

> Any domestic or foreign corporation for profit that (1) is subject to regulation as a public utility by the Public Utility Commission or an officer or agency of the United States; or (2) was subject to such regulation on December 31, 1980, or would have been so subject had it been then existing.

Our conclusion that Sunoco is not providing public utility service through its proposed Mariner East project is consistent with a recent court decision. The Court of Common Pleas of York County recently determined that Sunoco is not a public utility corporation within the meaning of the BCL. See Sunoco Pipeline, L.P. v. Loper et al., York County Court of Common Pleas, (Docket No. 2013-SU-4518-05)(February 25, 2014), slip. Op. at 2; Reaffirmed on Reconsideration *(*March 25, 2014). In Loper, the trial court rejected Sunoco's argument that it met the definition of a "public utility corporation" within the meaning of the BCL. The court found that because Sunoco was regulated as a common carrier by FERC, it therefore was not entitled to eminent domain powers. Id. at 4.

In addition, it is not clear that Sunoco's proposed Mariner East pipeline service constitutes public utility service as defined in the Public Utility Code. The Public Utility Code defines a public utility in relevant part as follows:

(1) Any person or corporation now or hereafter owning or operating in this Commonwealth equipment or facilities for:

(i) Producing, generating, transmitting, distribution or furnishing natural or artificial gas, electricity or steam for the production of light, heat, or power to or for the public for compensation[or]

. . .

(v) Transporting or conveying natural or artificial gas, crude oil, gasoline, or petroleum products, materials for refrigeration, or oxygen or nitrogen, or other fluid substance, by pipeline or conduit, for the public for compensation.

66 Pa.C.S. § 102.

Sunoco's amended petitions do not state that Sunoco will be engaged in the transportation of natural gas or that it is a producer of natural gas distributing directly to the public for compensation. Therefore, pursuant to 66 Pa.C.S. §102(2), Sunoco's proposed service does not qualify as public utility service within the meaning of Section 102.

Further, under Subparagraph (v), Sunoco's amended petitions do not state that the transportation of NGLs would be for the public in Pennsylvania. The amended petitions state that once NGLs are delivered from Mechanicsburg to Twin Oaks, the product could be sent to third-party storage facilities or distribution terminals. The amended petitions do not specify what members of the public would be the end-user customers.

Pursuant to the Supreme Court of Pennsylvania's decision in Drexelbrook, in order to be public utility service, Sunoco's proposed Mariner East pipeline service must be open to the use and service of all members of the public who may require it. One cannot determine from Sunoco's amended petitions what members of the public would use Sunoco's proposed service. The nature of Sunoco's proposed service is private since it is limited to a selected few number of shippers and not available to members of the public.

According to the amended petitions, the Twin Oaks facilities and the MHIC facility are connected by pipeline and the Twin Oaks terminal is operated "in conjunction with the MHIC." Thus, it appears from the averments in the amended petition that the propane could be stored at the Twin Oaks terminal for later processing and export through the Marcus Hook facility, or to third-party distributors, not members of the public.

Sunoco's amended petitions are at best premature. Sunoco filed the amended petitions before it sought and acquired Commission approval of the tariff filings regarding the transportation of NGLs, including propane and ethane in an intrastate manner from west to east. In addition, the amended petitions state that the Mariner East project begins in Houston, Pennsylvania, located in Washington County. Three of the amended petitions at Dockets P-2014-2411958, P-2014-2411960; and P-2014-2411963, concern structures in Washington County. However, Sunoco's application to begin furnishing intrastate transport service of propane in Washington County, is currently pending before the Commission.

For all of the above reasons, we conclude that Sunoco's proposed Mariner East pipeline service does not constitute public utility service. Since Sunoco's proposed service is not public utility service, the proposed buildings that are the subject of the amended petitions are not public utility buildings. The Commission therefore lacks jurisdiction to make a finding that the proposed buildings that are the subject of the amended petitions are necessary for public utility service and exempt from local zoning ordinances.

In conclusion, viewing Sunoco's amended petitions in the light most favorable to Sunoco, we conclude that Sunoco would be unable to obtain relief as the Commission lacks jurisdiction. Since we have determined that the Commission lacks subject matter jurisdiction over the amended petitions, it is unnecessary for us to discuss the remaining preliminary objections. We will enter the following order.

CONCLUSIONS OF LAW

1. Sunoco's proposed Mariner East pipeline service does not constitute public utility service as defined by the Public Utility Code. 66 Pa.C.S. § 102.

2. Sunoco is not a public utility corporation as defined by the Business Corporation Law. 15 Pa.C.S. § 1103.

3. A municipality may zone a public utility building unless the Commission determines that the building is reasonably necessary for the convenience or welfare of the public. 53 P.S. § 10619.

4. Sunoco's proposed buildings will not be used in public utility service as part of the proposed Mariner East project.

5 The Commission lacks subject matter jurisdiction over Sunoco's amended petitions.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objections filed by the Clean Air Council, the Delaware Riverkeeper Network, the Concerned Citizens of West Goshen Township and the Mountain Watershed Association are sustained and the Amended Petitions at Docket Numbers P-2014-2411941; P-2014-2411942; P-2014-2411943; P-2014-2411944; P-2014-2411945; P-2014-2411946; P-2014-2411948; P-2014-2411950; P-2014-2411951; P-2014-2411952; P-2014-2411953; P-2014-2411954; P-2014-2411956; P-2014-2411957; P-2014-2411958; P-2014-2411960; P-2014-2411961; P-2014-2411963; P-2014-2411964; P-2014-2411965; P-2014-2411966; P-2014-2411967; P-2014-2411968; P-2014-2411971; P-2014-2411972; P-2014-2411974; P-2014-2411975; P-2014-2411976; P-2014-2411977; P-2014-2411979; P-2014-2411980 are hereby dismissed.

2. That Docket Numbers P-2014-2411941; P-2014-2411942; P-2014-2411943; P-2014-2411944; P-2014-2411945; P-2014-2411946; P-2014-2411948; P-2014-2411950; P-2014-2411951; P-2014-2411952; P-2014-2411953; P-2014-2411954; P-2014-

2411956; P-2014-2411957; P-2014-2411958; P-2014-2411960; P-2014-2411961; P-2014-2411963; P-2014-2411964; P-2014-2411965; P-2014-2411966; P-2014-2411967; P-2014-2411968; P-2014-2411971; P-2014-2411972; P-2014-2411974; P-2014-2411975; P-2014-2411976; P-2014-2411977; P-2014-2411979; P-2014-2411980 be closed.

Dated: July 23, 2014

/s/
David A. Salapa
Administrative Law Judge

/s/
Elizabeth H. Barnes
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Mercer Turner, an attorney, certify that I caused copies of the foregoing Reply to be served on each of the parties listed on the service list via electronic or regular mail, this 28th day of August, 2014.

/s/ Mercer Turner

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