

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of Sunoco Pipeline L.P. for a	:	
Finding That the Situation of Structures to	:	Docket Nos. P-2014-2411941,
Shelter Pump Stations and Valve Control	:	2411942, 2411943, 2411944,
Stations is Reasonably Necessary for the	:	2411945, 2411946, 2411948,
Convenience and Welfare of the Public	:	2411950, 2411951, 2411952,
		2411953, 2411954, 2411956,
		2411957, 2411958, 2411960,
		2411961, 2411963, 2411964,
		2411965, 2411966, 2411967,
		2411968, 2411971, 2411972,
		2411974, 2411975, 2411976,
		2411977, 2411979, 2411980.

Notice to Plead

To: Sunoco Pipeline L.P., through its attorneys:

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Pursuant to 52 Pa. Code§ 5.101(b), you are hereby notified that, if you do not file a written response denying or correcting the enclosed Preliminary Objections of the Delaware Riverkeeper Network and the Delaware Riverkeeper (“DRN”) within ten (10) days from service of this Notice, the facts set forth by DRN in its Preliminary Objections may be deemed to be true, thereby requiring no further proof. All pleadings, such as an Answer to Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served on counsel for DRN, and where applicable, the Administrative Law Judge presiding over the case.

Dated: April 21, 2014

/s/ Aaron Stemplewicz

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		2411974, 2411975, 2411976,
		2411977, 2411979, 2411980.

**Preliminary Objections of Delaware Riverkeeper Network
Pursuant to Sunoco Pipeline L. P.’s Mariner East Petition**

Pursuant to 52 Pa. Code § 5.101 the Delaware Riverkeeper Network and the Delaware Riverkeeper, Maya van Rossum (“DRN”), submit the following Preliminary Objections with regard to Sunoco Pipeline L.P.’s (“Sunoco”) Petitions for a Finding That the Situation of Structures to Shelter Pump Station and Valve Control Stations is Reasonably Necessary for the Convenience and Welfare of the Public (“Petition”). The Preliminary Objections stated here are consistent with DRN’s comment letter submitted on April 18, 2014. DRN requests that the Pennsylvania Public Utility Commission (“Commission”) deny Sunoco’s Petitions.

1) Sunoco does not meet the legal standard for classification as a public utility corporation and, therefore is not exempt from 619 of the Pennsylvania Municipalities Planning Code (53 P.S. § 10619). Furthermore, a grant of Sunoco’s Petitions is prohibited by Article I Section 27 of the Pennsylvania Constitution. Lastly, even if Sunoco qualifies as a public utility corporation, and its Petitions were not constitutionally barred, Sunoco’s Petitions must still be

denied because the situation of structures is not reasonably necessary for the convenience or welfare of the public.

2) Sunoco has proposed developing a pipeline project called Mariner East (“Project”), which involves a combination of the construction of new pipeline facilities and the use of existing pipeline facilities that will transport ethane, propane, liquid petroleum gas, and other petroleum products. The origination point of the Project will be in Houston, Pennsylvania and the delivery point will be located in Claymont, Delaware, within the Marcus Hook Refinery Complex. The purpose of the Project is to increase transportation infrastructure for the movement of Marcellus Shale resources, specifically natural gas liquids (“NGLs”). Sunoco has stated that the pipeline that “will transport the NGLs to a Sunoco, Inc. terminal in eastern Pennsylvania and Delaware for storage, processing, and subsequent transportation to alternative markets by water or truck.” *See* Order Granting Petition for Declaratory Relief, 142 FERC ¶ 61,115 (Feb. 15, 2013) (Docket No. OR13-9-000). Sunoco has stated that there are “no major markets in the Northeast United States.” *Id.* The project is anticipated to have an initial capacity to transport approximately 72,250 barrels per day of [NGLs] and can be “scaled to support higher volumes as needed.”¹

3) Sunoco's Petitions describe that the Mariner East Project will require the construction of 17 valve stations in 15 different municipalities, and the construction of 18 pumping stations in 18 different municipalities. The purpose of Sunoco’s Petitions is to request an exemption from section 619 of the Pennsylvania Municipalities Planning Code (53 P.S. § 10619) for the construction of these facilities, and therefore prevent local municipalities from applying their zoning ordinances to the proposed construction activities.

¹ *See* <http://www.sunocologistics.com/Customers/Business-Lines/Natural-Gas-Liquids-NGLs/NGL-Projects/208/>.

Sunoco Is Not A “Public Utility Corporation” Under The Business Corporation Law

4) The Commission's jurisdiction to review Sunoco's Petition arises out of the Municipal Planning Code (“MPC”), where the Commission may consider whether an exemption from zoning, subdivision, and land development ordinances is appropriate for any “public utility corporation.” 53 P.S. § 10619. The term “public utility corporation” is not defined pursuant to the MPC; however, it is defined in Section 1103 of the Business Corporation Law (“BCL”), which states:

Any domestic or foreign corporation for profit that (1) is subject to regulation as a public utility by the Pennsylvania 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 if it had been then existing.

15 Pa. C.S. § 1103. General rules of statutory construction require that the Commission interpret the term “public utility corporation” in the MPC consistently with the way in which it the term is defined in the BCL. 1 Pa. C.S. § 1932.

5) Sunoco contends that it is a public utility because it is regulated by a federal agency, the Federal Energy Regulatory Commission (“FERC”), as a public utility. Sunoco Petition, at 5-8. DRN agrees that Sunoco is regulated by the FERC; however, it is admitted by Sunoco that it is regulated by FERC as a *common carrier*, pursuant to the Interstate Commerce Act (“ICA”). *Id.* This is a critical distinction that proves to be a dispositive factor in consideration of Sunoco's Petitions. The ICA regulates common carriers, not public utilities. 49 U.S.C. § 1(b). Indeed, the ICA explicitly and irrefutably articulates that liquids pipeline companies, such as Sunoco, are regulated as common carriers. For example, the ICA states that it applies to “common carriers engaged in . . . [t]he transportation of oil . . . by pipeline.” 49 USC § 1 (1988); 15 USC § 717. As a result of FERC's regulation of Sunoco as a common carrier, Sunoco cannot meet the standard articulated in 15 Pa. C.S. § 1103. When the law is clear and explicit, the legislative

language controls and the matter does not progress to the subjective consideration of legislative intent. 1 Pa. C.S.A. § 1921.

6) Sunoco itself has recognized and admitted this reality. On December 7, 2012 Sunoco submitted a Petition for Declaratory Order to FERC pursuant to the ICA where it specifically characterized itself as a common carrier. *See* Petition for Declaratory Order of Sunoco Pipeline L.P., Accession No. 20121207-5161 (Dec. 7, 2012) (Docket No. OR13-9-000). In support of its December 7, 2012 FERC Petition, Sunoco cited three specific provisions of the ICA that identify Sunoco as being regulated as a common carrier:

ICA Section 1(1) states that the Act applies “to common carriers engaged in ...[t]he transportation of oil...by pipe line...from one State...to any other State.” 49 U.S.C. app. § 1(1)(b) (1988). Section 1(3) of the Act defines the term “common carrier” to include “all pipeline companies...and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire.”

ICA Section 1(4), which embodies the common carrier obligation of the Act, provides that: “It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable requests thereof...”

ICA Section 3(1) prohibits undue preference for or prejudice against particular shippers or classes of shippers. It provides: “It shall be unlawful for any common carrier...to make, give, or cause any undue or unreasonable preference or advantage to any particular person...or any particular description of traffic, in any respect whatsoever; or to subject any particular person...or any particular description of traffic to any undue burden or unreasonable prejudice or disadvantage in any respect whatsoever....”

Id. at 8-9. Moreover, in the instant matter, Sunoco directly admits in its Petitions that it “is a federally regulated *common carrier* under the ICA.” Sunoco Petition, at 6 (emphasis added). The law provides that only those entities subject to regulation specifically as a public utility can seek exemption from 616 of the MPC; here, FERC has clearly chosen to regulate Sunoco as a common carrier. As a result, Sunoco simply does not meet the express definition of a public utility pursuant to the BCL and MPC.

7) Furthermore, the Court of Common Pleas in York County already thoroughly examined and rejected precisely the same argument that Sunoco advances here before the Commission. *See Sunoco v. Loper, et al.*, York County Court of Common Pleas (Docket No. 2013-SU-4518-05) (February 26, 2014), *reconsideration denied* (March 25, 2014).² In *Loper*, Sunoco argued it was a public utility corporation under the BCL because it was regulated as a public utility by FERC, and as a result Sunoco had eminent domain rights pursuant to the BCL. *Id.* at 3-5. The Court disagreed, and found that because Sunoco was regulated as a common carrier by FERC, that it was not a public utility corporation and was not entitled eminent domain powers. *Id.* at 4.

8) In its Petitions, Sunoco cites *Public Utility Commission v. WVCH Communication*, for the proposition that an entity can be a "public utility corporation," under the MPC, even if it is a federally regulated common carrier. Sunoco Petition, at 5-6 (*citing WVCH*, 351 A.2d 328, 330 (Pa. Commw. Ct. 1976)). However, in *WVCH* the court *expressly found that the petitioner was not a public utility corporation*, and therefore the PUC lacked jurisdiction. *WVCH*, 351 A.2d at 330-331.

9) Furthermore, Sunoco also proposed precisely this argument in *Loper*, which the court soundly discarded. Order Reaffirming Previous Opinion and Order Denying Motion for Immediate Right of Entry (Docket No. 2013-SU-4518-05) (March 25, 2014). Sunoco can simply point to no case law where a pipeline company regulated by FERC as a common carrier was transformed into a public utility corporation pursuant to the MPC. As such, for this reason alone the Commission is compelled to deny Sunoco's Petitions.

² The February 26, 2014 opinion, the March 25, 2014 opinion, and the associated briefing are attached as Exhibit A.

10) It is clear that Sunoco is merely attempting to take another bite of the apple hoping for a different result. However, neither the record before the Commission nor the state of the law warrants such a result.

Article 1 Section 27 Of The Pennsylvania Constitution Prohibits A Grant Of Sunoco's Petition

11) Even if the Commission finds that Sunoco is a public utility corporation, which it is not, a grant of Sunoco's Petition exempting it from local zoning ordinances contradicts the Pennsylvania Supreme Court's ruling in *Robinson Township, Delaware Riverkeeper Network, et al v. Commonwealth of Pennsylvania, et al.*, and, more specifically, violates Article I Section 27 of the Pennsylvania Constitution. *Robinson*, 83 A.3d 901 (Pa. Dec. 19, 2013). A legal challenge pursuant to Section 27 may proceed upon alternate theories that either the government has infringed upon citizens' rights or the government has failed in its trustee obligations, or upon both theories, given that the two paradigms, while serving different purposes in the amendatory scheme, are also related and overlap to a significant degree. A grant of Sunoco's Petitions likely implicates both legal theories.

12) Article I of the Pennsylvania Constitution is the Commonwealth's Declaration of Rights, which delineates the terms of the social contract between government and the people that are of such "general, great and essential" quality as to be ensconced as "inviolable." Pa. Const. Art. I, Preamble & § 25. The Declaration of Rights ultimately limits the power of state government; additionally, "particular sections of the Declaration of Rights represent specific limits on governmental power." *Id.* at 1335 (citing *O'Neill v. White*, 22 A.2d 25 (Pa. 1941)). The first section of Article I affirms that all Pennsylvania citizens "have certain inherent and inalienable rights." Pa. Const. Art. I, § 1. Among those inherent rights are those articulated in Section 27, the Environmental Rights Amendment:

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

Pa. Const. art. I, § 27 (the "Environmental Rights Amendment"). The right to "clean air" and "pure water" provides clear conditions by which the government must abide. Furthermore, by calling for the "preservation" of a broad array of environmental values, the Constitution protects the people from governmental action that unreasonably causes actual or likely deterioration of these features.

13) The Pennsylvania Supreme Court expressly recognized that the public has a discrete and cognizable constitutional interest in the design, preservation, and application of local zoning ordinances. *Robinson*, 83 A.3d at 920-921 ("a political subdivision has a substantial, direct, and immediate interest in protecting the environment and the quality of life within its borders"). The Court in *Robinson*, found this interest in local control particularly important in the context of regulating construction activity related to oil and gas operations. *Id.* at 974-986. The Court held that a regulatory regime – or action of government – which permits incompatible "uses as a matter of right in every type of pre-existing zoning district is incapable of conserving or maintaining the constitutionally protected aspects of the public environment and of a certain quality of life." *Id.* at 979. The incompatible uses cited by the Court included infrastructure expansion construction activity, such as the construction proposed here by Sunoco. Specifically, the Court clarified that Act 13 was overturned because it compelled "the exposure of otherwise protected areas to environmental and habitability costs associated" with industrial development, which included among other things the "building of facilities incongruous with the surrounding landscape." *Id.*

14) The local zoning ordinances that Sunoco is attempting to free itself of necessarily address human health, the environment, and the aesthetic values of the community, and therefore, create reasonable expectations in the resident citizenry in the protection and preservation of these values. In other words, the citizens in each of the petitioned townships have reasonable expectations in the existing regulatory structures and zoning districts in which they made significant financial and quality of life decisions.

15) Sunoco's Petition fundamentally disrupts these expectations and requests that local governments cede their regulatory and zoning powers irrespective of local concerns. Ultimately, Sunoco's requests remove local government's necessary and reasonable authority to carry out its trustee obligations pursuant to Article I Section 27 by prohibiting the enactment of ordinances tailored to local conditions. To the extent that a grant of Sunoco's Petitions directs municipalities to disregard their constitutional mandate under Article I, Section 27, such an action by the Commission is unconstitutional.

Sunoco's Petitions Must Be Denied Because The Situation Of Structures Is Not Reasonably Necessary For The Convenience Or Welfare Of The Public

16) In order for the Commission to conclude that Sunoco is exempt from the local zoning ordinances the Commission must determine that the situation of the buildings for the Project are "reasonably necessary for the convenience or welfare of the public." 53 P.S. § 10619. However, a finding that the situation of the buildings is "reasonably necessary for the convenience or welfare of the public" is directly contradictory to the Supreme Court's holding in *Robinson*.

17) Any exposition of the subject of the need for a building or structure at a particular location necessarily results in the review of the need of the underlying need for the project itself. In other words, the review of the project and the site are inextricably intertwined, as it would be a

logical delusion for the Commission to find that although a project was not necessary for the convenience or welfare of the public, that the location of its structures was necessary.

18) In support of its Petition, Sunoco argues that three primary factors, each implicating the overall need for the Project, demonstrate that the construction of the pump and valve control stations is necessary for the convenience or welfare of the public.

[1] the locations of both pump and valve control stations are reasonably necessary to ensure efficient and safe operation of the new pipeline facilities. [2] the pump stations ensure that the ethane and propane are flowing properly, which contribute to the overall safety and efficiency of the project. The valve control stations ensure that the pipeline facilities operate safely and prevent harm to the public and environment. Both types of stations are enclosed with metal housing to protect the equipment from the elements and to facilitate maintenance. [3] as a whole, the Mariner East project results in increased infrastructure to enable the continued development of Marcellus Shale resources, by providing for an efficient outlet for natural gas liquids that are extracted during the process of extracting natural gas from Marcellus Shale wells

Sunoco Petition, at 14. Additionally, in the Commission's August 29, 2013 Order granting a certificate of public convenience to Abandon a Portion of Its Petroleum Products Pipeline Transportation Service in Pennsylvania, the Commission itself justified the Order by citing the public convenience of the project as a whole. *See* Pennsylvania Public Utility Commission Order, (Docket Nos. A-2013-2371789 and P-2013-2371775) (August 29, 2013), at 7. Specifically, the Commission found that "enhanced delivery options for the abundant supply of natural gas liquids and the moderation of commodity costs due to the injection of a new supply of ethane and propane into existing natural gas liquids markets" provided adequate justification. *Id.*

19) However, the interests that justify the exercise of zoning powers and the interests in the development of the oil and gas industry are simply not the same. This is undisputable as the interest in oil and gas development is concentrated on efficient exploitation of fossil fuel resources, while the interest in zoning focuses on the orderly development and regulation of land

use that is consistent with local concerns and environmental preservation. As such, the Commission must balance these two interests against one another. Despite considering the benefits of oil and gas extraction there seems to be no evidence on the record demonstrating that the Commission has ever considered the harms resulting from these same activities. In December of 2013, three months after the Commission's August 29, 2013 Order, the Pennsylvania Supreme Court's issued its opinion in *Robinson* that unequivocally outlined these harms.

20) There the Court made it abundantly clear that the exploitation of natural gas resources absent local regulation must be adequately balanced with the significant harms resulting from such extraction activities. Chief Justice Castille prefaced the *Robinson* opinion by explaining that:

Pennsylvania has a notable history of what appears retrospectively to have been a shortsighted exploitation of its bounteous environment, affecting its minerals, its water, its air, its flora and fauna, and its people. The lessons learned from that history led directly to the Environmental Rights Amendment, a measure which received overwhelming support from legislators and the voters alike. When coal was "King," there was no Environmental Rights Amendment to constrain exploitation of the resource, to protect the people and the environment, or to impose the sort of specific duty as trustee upon the Commonwealth as is found in the Amendment. Pennsylvania's very real and mixed past is visible today to anyone travelling across Pennsylvania's spectacular, rolling, varied terrain. The forests may not be primordial, but they have returned and are beautiful nonetheless; the mountains and valleys remain; the riverways remain, too, not as pure as when William Penn first laid eyes upon his colonial charter, but cleaner and better than they were in a relatively recent past, when the citizenry was less attuned to the environmental effects of the exploitation of subsurface natural resources. But, the landscape bears visible scars, too, as reminders of the past efforts of man to exploit Pennsylvania's natural assets. Pennsylvania's past is the necessary prologue here: the reserved rights, and the concomitant duties and constraints, embraced by the Environmental Rights Amendment, are a product of our unique history.

Robinson, 83 A.3d at 976. More specifically, with regard to oil and gas operations themselves, the Court found that the "development of the natural gas industry in the Commonwealth unquestionably has and will have a *lasting, and undeniably detrimental, impact on the quality of*

these core aspects of Pennsylvania's environment." *Id.* at 975 (emphasis added). Furthermore the Court stated, "[b]y any responsible account, the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction." *Id.* at 976.

21) The Court would go further, stating that while economic considerations – such as those proposed by Sunoco – are important, they must be balanced against the responsibilities of local governance to act as a fiduciary and consider the impacts to on future generations. *Id.* at 954 ("economic development cannot take place at the expense of an unreasonable degradation of the environment"). These considerations powerfully indicate that when the benefits here are weighed against harms, the proposed Petitions cannot be "reasonably necessary for the convenience or welfare of the public."

22) Furthermore, Sunoco fails to adequately address where the markets for the petroleum liquids are located. To the extent a portion of the liquids will be sold to foreign markets, Sunoco has failed to provide any justification for how such an exportation of resources benefits the public.

23) Despite the Commission's previous willingness to cite the Project as a whole to justify the public necessity of the project, even if the Commission decides here to limit its review to determine only whether the *sites* of the valve control and pump stations were appropriate and in the public interest, the Commission must still deny Sunoco's Petition. Sunoco argues that to "ensure that otherwise applicable local ordinances will not bar [Sunoco]'s efforts to provide service for the welfare and convenience of the public, [Sunoco] is filing the instant Petition and contends that the proposed situation of the pump and valve control stations is reasonably

necessary for the convenience or welfare of the public.” Sunoco’s Petition, at 12. Sunoco plainly admits that its concern here is merely that local zoning process will incur extra costs or delays in the start of construction. As discussed above the public has a well-defined and concrete interest in the application and enforcement of its local zoning codes. By stripping this interest from local government, the Commission risks undermining the fundamental reasonable expectations on which those interests are based. The Commission simply cannot approve such an indiscriminate and blunt approach for zoning what can only be described as sites for industrial construction activity.

Conclusion

24) What Sunoco requests here of the Commission is for local government to essentially be complicit in accommodating industrial activity irrespective of the character of the locale. For the reasons stated forthwith the Delaware Riverkeeper Network and the Delaware Riverkeeper respectfully request that the Commission deny each of the Petitions submitted by Sunoco for a finding that the situation of structures to Shelter Pump Stations and Valve Control Stations is Reasonably Necessary for the Convenience and Welfare of the Public.

Dated: 4-21-14

Respectfully Submitted by:

/s/ Aaron Stemplewicz

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VERIFICATION

I, Maya K. van Rossum, hereby state that the facts above set forth in the Preliminary Objections are true and correct (or are true and correct to the best of my knowledge, information, and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. 4904 (relating to unsworn falsification to authorities).

Dated April 21, 2014

/s/ Maya K. van Rossum

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CERTIFICATE OF SERVICE

I, Aaron Stemplewicz, do hereby certify that a true and accurate copy of the foregoing PRELIMINARY OBJECTIONS were served upon the following on April 21, 2014, pursuant to the requirements of 52 Pa. Code § 1.54(b)(3) (relating to service by a participant):

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Middletown, PA 17057

Patti Smith, Chainnan
Spring Township Board of Supervisors

2850 Windmill Rd.
Sinking Spring, P A 19608

James R. Oswald, Chairman
Spring Township Planning Commission
2850 Windmill Rd.
Sinking Spring, PA 19608

Rob Jones, Chainnan
Wallace Township Board of Supervisors
1250 Creek Road
P.O. Box 670
Glen Moore, PA 19343

John Frommeyer, Chairman
Wallace Township Planning Commission
1250 Creek Road
P.O. Box 670
Glen Moore, PA 19343

Dated: 4-21-14

Respectfully Submitted by:

/s/ Aaron Stemplewicz

Aaron Stemplewicz, Esq.,
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Delaware Riverkeeper Network
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Bristol, PA 19007
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Exhibit A

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

SUNOCO PIPELINE L.P.,
Plaintiff

No. 2013-SU-4518-05

vs.

CIVIL ACTION - LAW

WILLIAM C. LOPER and JODI LOPER
f/k/a JODI WOLFE,
Defendants

APPEARANCES:

CURTIS N. STAMBUAGH, Esquire
KANDICE KERWIN HULL, Esquire
DANA W. CHILSON, Esquire
For the Plaintiff

MICHAEL F. FAHERTY, Esquire
For the Defendants

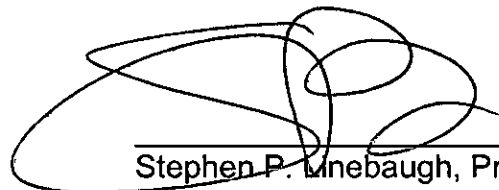
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ORDER DENYING MOTION FOR IMMEDIATE RIGHT OF ENTRY

AND NOW, this 24th day of February 2014, in accordance
with the attached Opinion, the Motion for Immediate Right of Entry filed by
Plaintiff on January 29, 2014 is **DENIED**.

Copies of this Order and Opinion shall be forwarded to counsel of record.

BY THE COURT,



Stephen P. Mnebaugh, President Judge

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

SUNOCO PIPELINE L.P.,
Plaintiff

No. 2013-SU-4518-05

vs.

CIVIL ACTION - LAW

WILLIAM C. LOPER and JODI LOPER
f/k/a JODI WOLFE,
Defendants

APPEARANCES:

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KANDICE KERWIN HULL, Esquire
DANA W. CHILSON, Esquire
For the Plaintiff

MICHAEL F. FAHERTY, Esquire
For the Defendants

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OPINION DENYING MOTION FOR IMMEDIATE RIGHT OF ENTRY

Upon consideration of Plaintiff's Verified Motion for Immediate Right of Entry Pursuant to 26 Pa. CSA §309 filed January 29, 2014, Defendants' Response filed February 4, 2014, Plaintiff's Brief in Support filed February 12, 2014, and Defendants' Brief in Opposition filed February 20, 2014, the Court has concluded that Plaintiff is not a public utility corporation and is therefore not a condemnor pursuant to the Pennsylvania Business Corporation Law. Plaintiff is

therefore not entitled to enter the property of Defendants and Plaintiff's Motion for Immediate Right of Entry will be DENIED.

Facts and Procedural History

Plaintiff Sunoco Pipeline L.P. filed a Motion for Immediate Right of Entry Pursuant to 26 Pa. CSA §309 on January 29, 2014. Plaintiff has proposed to construct an interstate pipeline, known as the Mariner East II Pipeline, that will travel through York County and that will transport ethane, propane, liquid petroleum gas, and other petroleum products. Plaintiff alleges that, pursuant to Pennsylvania's Business Corporation Law, that it enjoys the right of eminent domain for the purposes of constructing the pipeline. The potential route of the pipeline will extend through the property of Defendants William C. Loper and Jodi Loper located in Fairview Township, York County, Pennsylvania, with tax identification # 27-000-RG-0046.00-0000. Defendants filed a Response to Plaintiff's Motion on February 4, 2014. The Motion and Response were heard at the February 6, 2014 session of Current Business, at which time the Court took the matter under advisement and provided both Parties an opportunity to supply the Court with Briefs. The time period for the filing of Briefs has now passed and the Court is prepared, having closely reviewed the Briefs submitted, to rule on Plaintiff's Motion.

Discussion

At issue in this case is whether Plaintiff is a "condemnor" entitled to enter the Defendants' property located in Fairview Township. 26 Pa. CSA §309(a) provides that "[p]rior to the filing of the declaration of taking, the condemnor or its employees or agents shall have the right to enter upon any land or improvement in order to make studies, surveys, tests, soundings and appraisals." In this case, no declaration of taking has yet been filed and, should Plaintiff be determined to be a condemnor, it would have the right to enter the property in question. In order to be a condemnor pursuant to the eminent domain statute, Plaintiff must enjoy the right of eminent domain. Plaintiff argues that it is a condemnor pursuant to the eminent domain statute because it qualifies as a public utility corporation that enjoys eminent domain powers as provided in the Pennsylvania Business Corporation Law.

Section 1511(a) of the Pennsylvania Business Corporation Law provides that a public utility corporation shall "have the right to take, occupy and condemn property" for certain purposes including "[t]he production, generation, manufacture, transmission, storage, distribution or furnishing of natural or artificial gas, electricity, steam, air conditioning or refrigerating service or any combination thereof to or for the public." 15 Pa. CSA §1511(a)(2). Section 1103 of the BCL defines a "public utility corporation" as "[a]ny domestic or foreign corporation for profit that: (1) is subject to regulation as a public utility by the

Pennsylvania Public Utility Commission or an officer or agency of the United States." 15 Pa. CSA §1103(a). In this case, Sunoco Pipeline is regulated by FERC, an agency of the United States, pursuant to the Interstate Commerce Act, which applies "to common carriers engaged in...[t]he transportation of oil...by pipeline." 49 USC §1 (1988); 15 USC §717. Plaintiff admits several times in its Brief that they are regulated by FERC as a *common carrier*. In addition, Plaintiff is seeking to transport ethane, propane, liquid petroleum gas, and other petroleum products to its customers through the interstate pipeline, and Plaintiff argues that the Pipeline will provide a service to the public; specifically, that Plaintiff will be required to provide a service to the public because its regulation by FERC requires it to provide equal and non-discriminatory opportunities for all prospective shippers.

Defendant argues that Plaintiff is not in fact a "public utility corporation" under the Business Corporation Law. Defendant first argues that Plaintiff is *not* a public utility regulated by FERC and is therefore *not* a public utility corporation under the Pennsylvania Business Corporation Law. The Court agrees. As Plaintiff repeatedly argues, it is regulated by FERC pursuant to the Interstate Commerce Act, and not the Natural Gas Act, as a common carrier, and not as a public utility. It therefore does not fall within the definition of a public utility corporation entitled to condemn property. Courts in this Commonwealth have permitted public utility corporations to condemn property for the purposes of

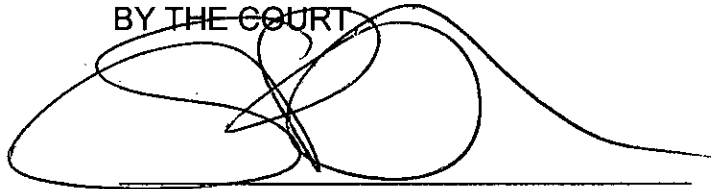
building natural gas pipelines; for example, in the persuasive case of *National Fuel Gas Supply Corporation v. Kovalchick Corporation*, 2005 WL 3675408, 74 Pa. D. & C.4th 22 (Pa.Com.Pl.2005), President Judge Foradora of the Jefferson County Court of Common Pleas considered whether National Fuel, an entity regulated under the Natural Gas Act by FERC as a public utility, could condemn property pursuant to the Business Corporation Law. In that case, that National Fuel was regulated by FERC under the Natural Gas Act as a *public utility* was necessary for the conclusion that National Fuel had condemnation powers. In the current case, Plaintiff is regulated under the Interstate Commerce Act, and not the Natural Gas Act, and it regulated as a common carrier, and not as a public utility. It is therefore not entitled to condemn property pursuant to the Pennsylvania Business Corporation Law.

Since the Court has concluded that Plaintiff does not have eminent domain powers under the Business Corporation Law, the only identified legislation under which Plaintiff claims to have eminent domain powers, it is unnecessary for the Court to consider Defendant's other arguments at this time. Plaintiff does not have the right of eminent domain under the Business Corporation Law, it is not a condemnor, and it is therefore not entitled to enter onto Defendants' property.

Conclusion

In conclusion, the Court will **DENY** the Motion for Immediate Right of Entry filed on January 29, 2014. An Order consistent with this Opinion will be entered.

BY THE COURT

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Stephen P. Linebaugh, President Judge
19th Judicial District of Pennsylvania

Dated: _____

2/24/14

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

SUNOCO PIPELINE L.P.,
Plaintiff

No. 2013-SU-4518-05

vs.

CIVIL ACTION - LAW

WILLIAM C. LOPER and JODI LOPER
f/k/a JODI WOLFE,
Defendants

APPEARANCES:

CURTIS N. STAMBUAGH, Esquire
KANDICE KERWIN HULL, Esquire
DANA W. CHILSON, Esquire
For the Plaintiff

MICHAEL F. FAHERTY, Esquire
For the Defendants

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**ORDER REAFFIRMING PREVIOUS OPINION AND ORDER DENYING
MOTION FOR IMMEDIATE RIGHT OF ENTRY**

AND NOW, this 25th day of March 2014, Plaintiff's Verified
Motion for Immediate Right of Entry Pursuant to 26 Pa. CSA §309 filed January
29, 2014 is **DENIED**.

The Court previously denied Plaintiff's Motion by Opinion and Order filed
February 25, 2014. Plaintiff filed a Motion for Reconsideration on March 11,
2014. The Court granted the Motion for Reconsideration. On March 18, 2014,
Defendant filed their Answer to the Motion for Reconsideration. The Court has

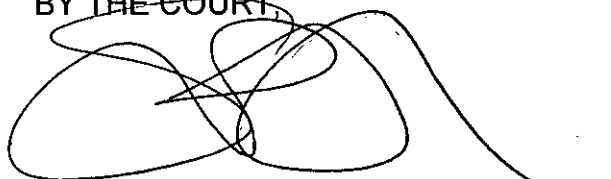
reconsidered its previous decision and closely reviewed Plaintiff's Motion, the affidavit submitted as an exhibit to the Motion, the applicable United States Code sections, and Defendants' Answer to the Motion and the Court has determined that its previous decision was not in error and hereby adopts the reasoning from its earlier opinion.

In addition, the Court reiterates that the clear language of the Pennsylvania Business Corporation Law awards eminent domain powers only to a "public utility corporation," with "public utility corporation" being defined as "[a]ny domestic or foreign corporation for profit that: (1) is subject to regulation as a public utility by the Pennsylvania Public Utility Commission or an officer or agency of the United States." 15 Pa. CSA §1511(a); 15 Pa. CSA §1103(a). Plaintiff is regulated by the Federal Energy Regulatory Commission as a common carrier pursuant to the Interstate Commerce Act ("ICA"). Plaintiff has argued that while it is defined as a "common carrier" under the ICA, that it is regulated like it is a public utility by FERC and should therefore be considered a public utility for the purposes of the Pennsylvania Business Corporation Law. The Court does not agree. The Business Corporation Law is clear that the power of eminent domain is awarded only to public utilities; and while public utilities may also be common carriers, the Law provides only that those entities subject to regulation as a public utility can seek the power of eminent domain. FERC has chosen to regulate Plaintiff as a common carrier pursuant to the ICA. It is

therefore not a public utility for the purposes of the Business Corporation Law
and Plaintiff is not entitled to eminent domain powers under the Business
Corporation Law.

Copies of this Order shall be forwarded to counsel of record.

BY THE COURT,

A handwritten signature in black ink, consisting of several overlapping loops and a long tail that extends to the right, crossing the horizontal line of the name below.

Stephen P. Linebaugh, Judge

SUNOCO PIPELINE L.P.,
Movant
v.
WILLIAM C. LOPER AND JODI LOPER
f/k/a JODI WOLFE,
Respondents

: IN THE COURT OF COMMON PLEAS
: YORK COUNTY, PENNSYLVANIA
:
: NO. 2013-SU-004518-05
:
:
:

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**BRIEF IN SUPPORT OF SUNOCO PIPELINE L.P.'S VERIFIED MOTION
FOR IMMEDIATE RIGHT OF ENTRY PURSUANT TO 26 Pa.C.S. § 309**

Submitted by Sunoco Pipeline L.P.

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SUNOCO PIPELINE L.P., : IN THE COURT OF COMMON PLEAS
Movant : YORK COUNTY, PENNSYLVANIA
 :
v. : NO. 2013-SU-004518-05
 :
WILLIAM C. LOPER AND JODI LOPER :
f/k/a JODI WOLFE, :
Respondents :

**SUNOCO PIPELINE L.P.'S BRIEF IN SUPPORT OF THE VERIFIED
MOTION FOR IMMEDIATE ENTRY PURSUANT TO 26 Pa.C.S. § 309**

Movant Sunoco Pipeline L.P. ("Sunoco Pipeline"), by and through its undersigned counsel, hereby submits this Brief in Support of its Verified Motion for Immediate Entry Pursuant to 26 Pa.C.S. § 309 (the "Motion").

I. SUMMARY OF RELEVANT FACTS AND PROCEDURAL HISTORY

Sunoco Pipeline is a public utility corporation that operates both interstate and intrastate pipelines across the United States. As part of its objective to provide transportation of ethane, propane, liquid petroleum gas, and other petroleum products to its customers, Sunoco Pipeline is constructing an interstate pipeline, known as the Mariner East II Pipeline, that will be routed below ground level and that will travel, as part of its route, through York County, Pennsylvania (the "Pipeline"). The Pipeline crosses state lines, originating in Ohio and terminating in

Delaware. The pipeline will not have any delivery or "off ramp" points in Pennsylvania. As a purely interstate pipeline, service on the Pipeline is regulated by the federal government, specifically the Federal Energy Regulatory Commission ("FERC") under the Interstate Commerce Act ("ICA"), 49 U.S.C. § 1 (1988).

Respondents William C. Loper and Jodi Loper f/k/a Jodi Wolfe (together, "Respondents") own a parcel of property in Fairview Township, York County, Pennsylvania, tax identification # 27-000-RG-0046.00-00000 (the "Property"). In order to determine the route of the Pipeline, Sunoco Pipeline needs to conduct certain tests and surveys over the Property, as permitted by Section 309 the Pennsylvania Eminent Domain Code. Sunoco Pipeline is not currently seeking to condemn any portion of the Property and merely seeks to access the Property to conduct the surveys and tests necessary to determine the Pipeline's route.

On December 16, 2013, Sunoco Pipeline instituted this action by filing a Writ of Summons, which was served upon Respondents on January 2, 2014. On January 29, 2014, Sunoco Pipeline filed the Motion. Respondents filed a response to the Motion on February 3, 2014. The Motion was presented in the York County Court of Common Pleas Motions Court to the Honorable Stephen P. Linebaugh on February 6, 2014. Upon hearing oral argument from both parties, the Court requested briefing on the Motion and the Response. This Brief is hereby submitted in response to the Court's request.

II. QUESTIONS PRESENTED

- A. **Whether Sunoco Pipeline Has Eminent Domain Authority Under The Business Corporation Law For The Pipeline?**

Suggested Answer: Yes.

- B. **Does The Use Of Eminent Domain Serve A Public Purpose Where The Intent Of The Pipeline To Which The Condemnations Relate Is To Provide A Service To The Public And The Federal Government Regulates That Service To Ensure That It Is Fair To The Public?**

Suggested Answer: Yes.

- C. **Whether Federal Law Preemption Principles Are Inapplicable Because The Pipeline Is Not Regulated Pursuant To The Natural Gas Act?**

Suggested Answer: Yes.

- D. **Whether The Limitations Of Pennsylvania Property Rights Protection Act Are Inapplicable To Sunoco Pipeline's Eminent Domain Authority?**

Suggested Answer: Yes

- E. **Whether Section 309 Of The Pennsylvania Eminent Domain Code Permits Access To The Property For The Purpose Of Conducting Surveys And Testing Relating To The Pipeline?**

Suggested Answer: Yes

III. ARGUMENT

- A. **Sunoco Pipeline Has Eminent Domain Authority Under The Business Corporation Law For The Pipeline.**

1. **Sunoco Pipeline is a public utility corporation as defined in the BCL because it is a public utility regulated as such by a federal government agency.**

Section 202 of the Pennsylvania Eminent Domain Code includes within the definition of condemners both public utilities pursuant to Section 102 of the Pennsylvania Public Utility Code and private entities. 26 Pa.C.S. § 102. The authority granted to private entities is provided by Section 1511 of the Pennsylvania Business Corporation Law ("BCL"), 15 Pa.C.S. § 1101 *et seq.*, which grants eminent domain power to public utility corporations.

Section 1511 of the BCL grants eminent domain power to public utility corporations. 15 Pa C.S. § 1511(a). The term "public utility corporation" is defined to include both public utilities regulated by the Pennsylvania Public Utility Commission ("PUC") and other entities, such as those organizations which are regulated as public utilities by the federal government. 15 Pa.C.S. § 1103. Specifically, the BCL defines a public utility corporation as "[a]ny domestic or foreign corporation for profit that ... is subject to regulation as a public utility by the Pennsylvania Public Utility Commission or an officer or agency of the United States." *Id.* (emphasis added).

Consistent with the terms of Section 1103 of the BCL, Sunoco Pipeline qualifies as a public utility corporation because it is regulated by an agency of the United States, namely FERC.¹ FERC regulates the Pipeline at issue here pursuant to the ICA. The ICA states that it "shall apply to common carriers engaged in ... [t]he transportation of oil ... by pipeline." 49 U.S.C. § 1 (1988); 15 U.S.C. § 717.² FERC has held that pipelines transporting ethane, propane,

¹ Sunoco Pipeline's status as a limited partnership does not change its status as a public utility corporation under the BCL. 15 Pa.C.S. § 8102 (extending the provisions of the BCL explicitly to limited partnerships and limited liability companies).

² Oil pipelines became subject to certain provisions of the ICA through the enactment of the Hepburn Act in 1906. Act of June 29, 1906, ch. 3591 § 1, 34 Stat. 584, 49 U.S.C. App. § 41

and other natural gas liquids ("NGLs") are subject to regulation under the ICA. *Williams Olefins Feedstock Pipelines, L.L.C.*, FERC Docket No. OR13-29-0000 (confirming FERC's regulation of ethane and propane pipelines under the ICA and specifically referencing Sunoco Pipeline)³.

There is no dispute that Sunoco Pipeline, and the Pipeline, are regulated pursuant to the ICA.

All that is necessary for Sunoco Pipeline to qualify as a public utility corporation is regulation by an agency of the United States. It meets that qualification. Once Sunoco Pipeline qualifies as a public utility corporation under the statute, it has the power of eminent domain. 15 Pa.C.S. § 1511(a). The BCL states that "[a] public utility corporation shall, *in addition to any other power of eminent domain conferred by any other statute, have the right to take, occupy and condemn property ...*" *Id.*(emphasis added). Significantly, the statute says that the right to condemn property given by that statute is in addition to any powers of condemnation granted elsewhere. Thus, the grant of eminent domain authority in Section 1511 is a grant of power separate and distinct from any other statutory authorization. A condemnor may rely upon the

(1988). Originally, oil pipelines were under the jurisdiction of the Interstate Commerce Commission ("ICC"); however, in 1977 jurisdiction over oil pipelines was transferred to FERC, along with jurisdiction over interstate transportation of natural gas under the Natural Gas Act ("NGA"). 49 U.S.C. Apps. §§ 1 et seq. (1988). In 1978, the ICA was revised and recodified (Revised Act) and a portion applicable to railroads was repealed. However, the portion of the ICA applicable to oil pipelines, as it existed on October 1, 1977, was not repealed and this is the law that FERC must apply in its regulation of oil pipelines. This law cannot be found by referring to Title 49 in the U.S. Code as it is published today. The last publication of the October 1, 1977, version of the ICA was in the 1988 publication of the U.S. Code. A pdf version of Title 49 from the 1988 U.S. Code can be found on FERC's website available at <http://www.ferc.gov/legal/fed-sta.asp?new=sc4>.

³ A copy of all unpublished decisions and FERC decisions are produced in the Appendix that is being filed simultaneously with this Brief.

grant of power in Section 1511 without reference to any other source of eminent domain authority. *Id.* Sunoco Pipeline, having met the definition of a public utility corporation, possesses the power of eminent domain pursuant to Section 1511 without reference to any other statute or regulation.

2. **Sunoco Pipeline does not need approval from FERC prior to exercising its right of eminent domain.**

Respondents argue that, despite the clear grant of authority in the BCL, Sunoco Pipeline does not have the power of eminent domain because FERC does not regulate Sunoco Pipeline's use of eminent domain for the Pipeline. No such regulation of the use of eminent domain, however, is required by the BCL.⁴ Indeed, the BCL does not require that a federal government agency regulate the use of eminent domain in order for an entity to qualify as a public utility, only a requirement that the agency regulate *the corporation* itself.

Both the Commonwealth Court and a Court of Common Pleas have held that an entity like Sunoco Pipeline may initiate condemnation proceedings in Pennsylvania pursuant to its status as a government-regulated interstate public utility. The central tenet underlying this conclusion is that an entity qualifies as a public utility corporation, as defined in the BCL, regardless of whether or not the federal regulation authority extends to specific review of eminent domain authority and siting and construction matters for the utility facilities. *See* 15

⁴ Although not expressly argued by Respondents in their Response to the Motion or at oral argument, the Pennsylvania Public Utility Commission ("PUC") has no jurisdiction to regulate the Pipeline because it is an interstate line, not an intrastate one. Thus, any argument by Respondents that Sunoco Pipeline must obtain review of the Pipeline by the PUC must be dismissed. The PUC *cannot* regulate this Pipeline; it is beyond its authority to do so.

Pa.C.S. § 1103; *see also National Fuel Gas Supply Corp. v. Kovalchick Corp*, 2005 WL 3675408 (C.P. Jefferson 2005).

In *National Fuel Gas*, the court found that a public utility regulated by FERC for interstate transmission of natural gas could exercise eminent domain to construct natural gas gathering pipelines pursuant to its status as a federally-regulated "public utility corporation." *Id.* Most importantly, the court held that Section 1511 of the BCL empowered the public utility to invoke eminent domain despite the fact that FERC regulated only its transmission lines and did not exert jurisdiction over the subject gathering lines. *Id.* As stated by the court: **"The FERC need not regulate every aspect of National's facilities before it can qualify to condemn property under 15 Pa.C.S. § 1511. The statute imposes no such restriction, but only requires regulation of the corporation."** *Id.* (emphasis added) (relying on the plain meaning of 15 Pa.C.S. § 1511).

Similarly, in *Appeal of Swidzinski*, 579 A.2d 1352 (Pa. Commw. 1990), the Commonwealth Court found that WTG was a common carrier of interstate telecommunications, under the regulatory auspices of the Federal Communications Commission and having the power of eminent domain pursuant to the former Section 322 (currently Section 1511) of the BCL. *See* 15 Pa.C.S. § 1511 (formerly 15 P.S. § 1322). The court concluded that the telecommunications lines which were to occupy the condemned property were purely for interstate purposes and, based on the interstate nature of the lines, concluded that the Legislature has not made preapproval of the PUC necessary before WTG exercised its power of eminent domain under the BCL.

Both cases, therefore, have interpreted the BCL to require only regulation of the entity, not the use of eminent domain, in order for the entity to possess the power of eminent domain pursuant to Section 1511. In this case, that means that, although the ICA does not specifically convey federal eminent domain rights and FERC does not review the use of eminent domain under that statute, FERC's regulation of Sunoco Pipeline pursuant to the ICA is sufficient to convey *state* eminent domain rights under Pennsylvania law.

Respondents contention that further FERC oversight is required is contrary to both the statute and precedent and is also contrary to the regulatory scheme created by FERC. Specifically, Respondents argue that Sunoco Pipeline must obtain a certificate of public convenience, or CPC, from FERC. As explained above, FERC regulates interstate transportation of oil, including ethane, propane, liquid petroleum gases, and other petroleum products, under authority of the ICA. 49 U.S.C. § 1. However, under the ICA, FERC's oversight relates to rate regulation and not regulation of the location of facilities. *Id.*⁵ In other words, FERC does not

⁵ To exercise its authority under the ICA to regulate various aspects of petroleum products pipeline transportation, FERC has developed extensive regulations applicable to Sunoco Pipeline and other interstate petroleum products pipeline companies. Under current FERC regulations, oil and petroleum products pipeline rates must be cost-based and just and reasonable. *BP West Coast Prods., LLC v. FERC*, 374 F.3d 1263, 1282–83 (D.C. Cir. 2004). Initial rates must be set by cost of service or agreement with non-affiliated customers. 18 C.F.R. § 342.2(a)-(b) (2006). Once initial rates are approved, rate changes can be implemented by filing supplemental cost of service data, requesting permission to charge market-based rates following FERC determination that a carrier lacks market power, reaching a settlement with current shippers, or increasing tariff rates in accordance with FERC's annual adjusted index rates. 18 C.F.R. § 342.3-4. Regardless of how rates are set, FERC reserves authority to challenge new and existing rates to ensure that all rates collected by oil and petroleum products pipeline companies are just and reasonable. 49 U.S.C. § 13(1), 15(1), (7). Thus, although FERC does not review siting of pipelines, its regulation of pipelines under the ICA is significant.

review or approve the location of pipelines or the use of eminent domain pursuant to the ICA. FERC has no regulatory process for obtaining a CPC pursuant to the ICA. The ICA is not structured to include a CPC process, and FERC has neither an obligation nor the authority to grant or require a CPC for ICA-jurisdictional service. Respondents, therefore, are contending that Sunoco Pipeline must submit itself to a regulatory scheme that *does not exist* prior to invoking its eminent domain authority. Obviously, Sunoco Pipeline cannot do this and, more importantly, is not required to do so by any state or federal law.

There is no requirement in the BCL that a utility obtain a CPC prior to the exercise of its eminent domain authority. Although the condemnor in *National Fuel Gas* (discussed above) the possessed a CPC from FERC, the court did not rely on the authority from the CPC in finding that condemnor's status as a FERC-regulated public utility conferred eminent domain power under Section 1511 of the BCL. *See National Fuel Gas*, at *28. To the contrary, the court approved National's eminent domain authority despite the fact that *the proposed natural gas gathering facilities for which National sought to exercise eminent domain were outside the scope of the CPC issued by FERC for construction of natural gas transmission pipelines. Id.* The court explained that "the rates, terms, and conditions of service—are governed by FERC regulations," because the pipelines affected interstate transportation of natural gas. *Id.* Accordingly, the court determined that National was authorized to initiate eminent domain proceedings because FERC had jurisdiction over rates and service applicable to the natural gathering lines. *Id.*

National Fuel Gas, therefore, confirms that CPCs are not a prerequisite to the exercise of eminent domain authority under the BCL. Hence, Respondents' assertion that Sunoco Pipeline must proceed to request eminent domain by an application for Certificate of Public Convenience and Necessity from FERC is misguided and inaccurate. Sunoco Pipeline is in full compliance with the dictates of Section 1511 of the BCL and is not required to obtain a CPC from a government agency to proceed under that statute. Because the government agency need only regulate the corporation, and not the particular utility facilities in order for an entity to qualify as a public utility corporation under the BCL, Sunoco Pipeline meets the definition of a public utility corporation and has the power of eminent domain under that statute. 15 Pa.C.S. § 1103.

3. **The Pipeline will transport products for which the BCL authorizes the use of eminent domain.**

The BCL authorizes a public utility to condemn easements for the purpose of, among other things, pipelines for the transportation of petroleum products. 15 Pa.C.S. § 1511(a)(2). The products to be transported initially on the Pipeline, namely, ethane and propane, satisfy the meaning of the term "petroleum products" as set forth in Section 1511(a)(2). The term "petroleum or petroleum products" is not defined in the BCL itself. Where a statute lacks explicit definition, the Pennsylvania Rules of Statutory Construction establish that legislative intent controls. 1 Pa.C.S. § 1921. Legislative intent may be determined by considering "the occasion and necessity for the statute." 1 Pa.C.S. § 1921(c). In this case, the purpose of Section 1511 is to grant the power of eminent domain to public utility corporations. 15 Pa.C.S. § 1511. As discussed above, Sunoco Pipeline is a public utility corporation with respect to this pipeline

by virtue of its regulation by FERC. Accordingly, it is appropriate to adopt the FERC definition of "petroleum products" for purposes of eminent domain rights under Section 1511.

Under its ICA authority to regulate oil pipelines, FERC exercises jurisdiction over transportation of NGLs and petroleum and petroleum products, regulating each substance without distinction. FERC has, for years, defined NGLs to include ethane and propane and has regulated both products under the ICA, rather than under the Natural Gas Act ("NGA"). *Gulf Central Pipeline Company*, 50 FERC ¶ 61,381 at 62,166 (1990). For purposes of regulating interstate pipeline transportation, FERC has consistently construed the term "petroleum products" to include NGLs. *Michigan-Ohio Pipeline Corp.*, 11 FERC ¶ 62,232 at 63,434 (1980); *Gulf Central*, 50 FERC at ¶ 62,163. Therefore, consistent with the stated purpose of Section 1511, ethane and propane are "petroleum products." *See* 15 Pa.C.S. § 1511(a)(2).

The regulatory jurisdiction over oil pipelines conveyed to FERC under the ICA encompasses a broad range of products, including ethane, propane, liquid petroleum gases, and other petroleum products. Courts have ruled that the legislative history granting authority under the ICA to FERC demonstrates that Congress intended a broader meaning of oil than the ordinary usage of the word. *See, e.g., Mid-Am. Pipeline Co., LLC*, 136 FERC ¶ 61087 at P 4 (Aug. 5, 2011); *CF Indus. Inc. v. FERC*, 925 F.2d 476, 478 (D.C. Cir. 1991); *Mobil Oil Corp. v. F.P.C.*, 483 F.2d 1238, 1249 (D.C. Cir. 1973). Specifically, FERC has determined that its regulatory authority under the ICA extends to "*petroleum products* that are handled in liquid form by pipelines that are, as a matter of common usage, considered 'oil' pipelines, *i.e.* pipelines that handle a range of liquid products that are derived from oil, condensate, *and natural gas*, and

are used for heating or transportation purposes." *See Gulf Central Pipeline Company*, 50 FERC ¶ 61381, at 62163-64 (March 20, 1990) (emphasis added); *see also Enter. Te Products Pipeline Co. LLC*, 139 FERC ¶ 61036 (Apr. 13, 2012) (common carrier petroleum products pipeline receives FERC authority to transport various NGLs, including propane and butane, and refined petroleum products). Whether derived from oil or natural gas, products such as ethane, propane, liquid petroleum gases, other petroleum products are regulated under FERC's ICA authority and not the NGA. *Id.* Because ethane and propane are NGLs, the Pipeline will be considered an oil pipeline subject to the ICA. *See Locust Ridge Gas Co.*, 15 FERC ¶ 63,035, n.4 (May 18, 1981). Since the Pipeline will transport petroleum products, it will be transporting a substance for which the BCL allows a public utility corporation to condemn land to transport. 15 Pa.C.S. § 1511(a).

Based upon prior experience with Respondents' counsel, it is anticipated that Respondents will argue that ethane and propane⁶ are not petroleum products and allege that the Section 1511 of the BCL did not anticipate transportation of the natural byproducts of ethane and propane for profit. First, Respondents ignore the fact that liquid natural gas byproducts, as distinguished from natural gas, are "as a matter of common usage" petroleum products. *See Gulf Central Pipeline Company*, 50 FERC ¶ 61381, at 62163-64 (March 20, 1990). Consistent with common usage of the term "petroleum products," FERC does not consider ethane and propane to be products that are regulated under the NGA as natural gas, but rather regulates these liquid gas byproducts as petroleum products. *See Mid-Am. Pipeline Co., LLC*, 136 FERC ¶ 61087 at P 4

⁶ Propane is more commonly referred to as "LPG" or "Liquified Petroleum Gas." (Emphasis added).

(Aug. 5, 2011) (FERC citing ICA authority for approval of Petition for Declaratory Order requesting authority to transport natural gas liquids, including propane, butane, isobutane, naphtha, natural gasoline, and ethane). Second, Respondents emphasis on the for-profit nature of Sunoco Pipeline is a *non-sequitur* because Section 1511 of the BCL only grants eminent domain authority to for-profit corporations. *See* 15 Pa.C.S. § 1103 (defining "Public Utility Corporation" to include only for-profit entities). Accordingly, Sunoco Pipeline's exercise of eminent domain power is entirely consistent with Section 1511 of the BCL.

4. **Respondents' reliance on provisions of the Natural Gas Act is misplaced.**

Respondents rely extensively on provisions of the Natural Gas Act ("NGA") in contravention of clear pronouncements by the Federal Energy Regulatory Commission ("FERC") that it regulates the subject pipelines only under authority of the Interstate Commerce Act ("ICA"). Respondents' references to NGA authority are entirely inapplicable to this proceeding and should be rejected by the Court.

Respondents erroneously portray the subject pipeline as an NGA-jurisdictional facility. Respondents aver that FERC's authority over the proposed pipeline flows from the Natural Gas Act. Respondents further cite to the NGA to support their proposition that Sunoco Pipeline must obtain a Certificate of Public Convenience from FERC to transport natural gas or obtain eminent domain authority. Respondents allege that *all* pipelines regulated by FERC are required to obtain Certificates of Public Convenience. All of these references are wholly inapplicable to the

present circumstances because Sunoco Pipeline has not and could not submit the proposed pipeline to FERC's NGA authority.

The NGA is completely inapplicable to the Mariner East II Pipeline. The Mariner East II Pipeline will transport ethane and propane. As clarified by FERC in various orders, FERC regulates pipelines that transport ethane and propane as oil and petroleum products pipelines under authority given by the ICA, which is an act entirely separate and distinct from the NGA.⁷

Respondents cannot produce a single decision showing FERC regulating petroleum products, including ethane and propane, under the NGA. Respondents, however, would have this Court apply the NGA to the Pipeline based on their unsubstantiated belief that natural gas liquids are analogous to natural gas. This is directly contrary to federal authority establishing that natural gas liquids are not analogous to natural gas, but, instead, are considered petroleum products and are regulated as such under the ICA. Accordingly, Sunoco Pipeline requests that this Court disregard Respondents' reliance on the NGA, including all allegations that Sunoco Pipeline has failed to comply with the federal authority therein.⁸

⁷ FERC regulates transportation of *liquid* products, such as ethane and propane, under the ICA and transportation of gaseous products under the NGA. The distinction relates to the state of matter of the products. Ethane and propane are *liquid* petroleum products and, therefore, regulated under the ICA.

⁸ Respondents' argument is illogical. Respondents suggest that Sunoco Pipeline should return to FERC and inform the agency that its decision on its own governing regulatory scheme was in error. This is neither a vehicle to do this nor an even a logical way to present such a claim to FERC. That agency has determined that the ICA applies. Both Sunoco Pipeline and Respondents must abide by that decision.

B. The Use Of Eminent Domain Serves A Public Purpose Where The Intent Of The Pipeline To Which The Condemnations Relate Is To Provide A Service To The Public And The Federal Government Regulates That Service To Ensure That It Is Fair To The Public.

The pipeline will provide the requisite "service to the public" as required for the exercise of eminent domain under Section 1511(g)(2) of the BCL. As discussed above, FERC will regulate the pipeline under the ICA. In this role, FERC is charged with ensuring that all common carriers subject to the ICA provide an "equal, non-discriminatory opportunity" for all prospective shippers (*i.e.*, the public) to receive service when capacity is available. *Express Pipeline P'ship*, 76 FERC ¶ 61,245, *order on reh'g*, 77 FERC ¶ 61,188 (1996). Thus, a private entity subject to the ICA is required to provide "service to the public."

In accordance with its obligation to provide non-discriminatory access to its available capacity, Sunoco Pipeline is conducting a widely publicized "open season" seeking term and priority commitments from prospective shippers in return for priority service at a premium rate. Notice of the open season was provided to interested parties, with additional notice provided by press release. Pursuant to its obligations under the ICA, and as demonstrated by the notice provided in the open season, Sunoco Pipeline will provide all interested shippers with an "equal, non-discriminatory opportunity" to obtain future available capacity on the Pipeline.

Additionally, the fact that Sunoco Pipeline is a for-profit entity does not change the conclusion that service on the Pipeline benefits the public. The definition of a public utility in the BCL states that it is "[a]ny domestic or foreign corporation *for profit* that ... is subject to regulation as a public utility by the Pennsylvania Public Utility Commission or an officer or

agency of the United States." 15 Pa.C.S. § 1101 (emphasis added). Thus, the statute recognizes that utilities are for-profit corporations. This does not change the public nature of the services that are provided.

C. Federal Law Does Not Preempt Section 1511 Of The Pennsylvania Business Corporation Law.

Respondents allege that Section 1511 of the Pennsylvania Business Corporation Law ("BCL"), 15 Pa.C.S. § 1511, is preempted by federal law. This claim flows entirely from Respondents' contention that the NGA is applicable to the Mariner East II Pipeline and, for the reasons discussed above, must be discarded as inapplicable to this proceeding. Respondents appear not to understand that FERC operates under several, distinct statutory grants of authority, including separate and distinct NGA and ICA statutory directives.

Regardless of whether the NGA preempts certain state laws, it is clear that FERC's regulation of the pipeline under the ICA does not preempt Pennsylvania authority to convey state eminent domain power through Section 1511 of the BCL. State law is preempted either by Congressional intent to occupy a field or direct conflict with a Federal law. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987). While the ICA authorizes FERC to regulate the rates, terms, and conditions of service on Sunoco Pipeline's proposed pipeline, FERC has clarified that its ICA authority does not extend to regulation of siting or construction of pipelines. *See Removing Obstacles to Increased Elec. Generation & Natural Gas Supply in the W. United States*, 94 FERC ¶ 61272, 61977 (Mar. 14, 2001); *see also Longhorn Partners Pipeline, L.P.*, 85 FERC ¶ 61206, 61862 (Nov. 10, 1998). Thus, there is no intent for the ICA to

completely occupy the field of petroleum pipeline regulation. Moreover, nothing in the ICA contradicts Pennsylvania eminent domain law. Accordingly, with respect to pipelines subject to federal regulation under FERC's ICA authority, Section 1511 of the BCL neither infringes on a field of regulation occupied by Federal law nor conflicts with any Federal law.

D. The Pennsylvania Property Rights Protection Act Does Not Affect Sunoco Pipeline's Eminent Domain Authority.

Respondents allege that Sunoco Pipeline's proposed condemnation is prohibited by the Pennsylvania Property Rights Protection Act ("PRPA"), which was passed by the General Assembly in 2006. The PRPA was Pennsylvania's response to a United States Supreme Court decision finding that general economic development, even in the absence of blighted conditions, can satisfy the requisite "public use" standard for exercise of eminent domain power under the United States Constitution. *Kelo v. City of New London, Conn.*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005). In response to concerns that the Court's decision would lead to widespread condemnations of property for vague economic development purposes, the General Assembly amended the Eminent Domain Code to restrict the use of eminent domain authority for private enterprise, other than as identified in Section 204 of the PRPA. 26 Pa.C.S. § 204.

Contrary to Respondents' contention that the PRPA prohibits Sunoco Pipeline's exercise of eminent domain authority, the exemptions therein define "public utility" in a manner consistent with the Section 1511 of the BCL. *Id.* Accordingly, Sunoco Pipeline is a public

utility within the meaning of the PRPA and permitted to exercise eminent domain authority for the purpose of transporting petroleum products, including ethane and propane.⁹

The PRPA prohibits use of eminent domain for private enterprise, but exempts both public utilities and common carriers from this general rule. 26 Pa.C.S. § 204. The PRPA does not independently grant eminent domain power, but appropriately defines Condemnors as entities authorized to condemn by other laws. 26 Pa.C.S. § 202. However, the exercise of such power is limited under the PRPA to entities meeting specific exemptions set forth in Section 204 of the statute. 26 Pa.C.S. § 204. Of the enumerated exemptions, both the public utility and common carrier exemptions are relevant to Defendant.

The PRPA indicates that public utilities, as defined in Section 102 of the Public Utility Code, are exempt from the Act. Section 102 of the Public Utility Code defines the term "public utility" as "Any person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for ... (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." Sunoco

⁹ The Pennsylvania Supreme Court, has found the provision of non-discriminatory service to be the primary distinction between public utilities and non-public utilities. *See Com. v. Lafferty*, 426 Pa. 541, 550, 233 A.2d 256, 260 (1967) (addressing whether non-PUC regulated contract carriers may qualify for use tax exemptions available for public utility service). Thus, status as a public utility is not related to the for-profit corporation status of the entity, but rather relates to an entities obligation to provide its services to the public at an approved rate.

Pipeline meets this definition because it owns and operates equipment in Pennsylvania for transporting petroleum products.¹⁰

The PRPA also indicates that it is inapplicable to common carriers. 26 Pa.C.S. § 204. Sunoco Pipeline submits that it is a common carrier under the PRPA and is exempt from the act on that basis. The term common carrier is directly defined in the PRPA to include "[a]ny and all persons or corporations holding out, offering or undertaking, directly or indirectly, service for compensation to the public for the transportation of passengers or property, or both, or any class of passengers or property, by, through, over, above or under land, water or air...). 26 Pa.C.S. § 202. Under the ICA, Sunoco Pipeline engages in common carrier transportation of commodity properties via pipeline under land. Sunoco Pipeline, therefore, is a common carrier as defined in PRPA.

Section 102 of the Eminent Domain Code clarifies that the provisions of the statute, which include the PRPA, should not be construed to "to *enlarge or diminish* the power of condemnation given by law to any condemnor." *See* 26 Pa.C.S. § 102(2). Accordingly, the PRPA does not affect the grant of eminent domain authority set forth in the BCL, but requires only that a condemnor demonstrate that the use fits the enumerated private condemnation uses exempted under in Section 204 of the PRPA. By including public utility and common carrier condemnations in Section 204, the PRPA confirms that public utility and common carrier

¹⁰ An entity may meet the definition of "public utility" under Section 102 of the Public Utility Code even if it is not subject to regulation by the PUC. *See Concentric Network Corp. v. Com.*, 897 A.2d 6, 12 (Pa. Commw. 2006), *aff'd*, 592 Pa. 26, 922 A.2d 883 (2007). Thus, Sunoco Pipeline meets the definition of a public utility under the PRPA regardless of the fact that the Mariner East II Pipeline is not regulated by the PUC because it is an interstate line.

eminent domain actions are exempted as permissible private exercises of eminent domain power, consistent with the authority to condemn granted to public utility corporations under Section 1511 of the BCL.

For the reasons enumerated above, Respondents' claim that the Sunoco Pipeline's exercise of eminent domain is barred by the PRPA must be rejected.

E. Section 309 Of The Pennsylvania Eminent Domain Code Permits Access To The Property For The Purpose Of Conducting Surveys And Testing Relating To The Pipeline.

As set forth at length above, Sunoco Pipeline acquired the power of eminent domain through Section 1511 of the BCL. As such, Sunoco Pipeline is entitled to access the Property for the purpose of conducting surveys and tests to determine the route of the Pipeline.¹¹

Section 309 of the Code provides that, prior to the commencement of condemnation proceedings, "...the condemnor or its employees or agents shall have the right to enter upon any land or improvement in order to make studies, surveys, tests, soundings and appraisals." *See* 26 Pa.C.S. § 309. Sunoco Pipeline is thus entitled to access the Property for the purpose of conducting surveys, tests, soundings, and appraisals relating to the route of the Pipeline. Indeed, even if Sunoco Pipeline has not yet proven that it is imbued with the power of eminent domain, which is denied, it would still have the right to access the Property to conduct the necessary

¹¹ Section 1511 makes clear that the procedures set forth therein are a substitute procedure for 26 Pa.C.S. § 302, i.e. a declaration of taking. *See* 15 Pa. C.S. § 1511(g)(1), (2)(iv). Although Sunoco Pipeline's condemnation authority is obtained via Section 1511 of the BCL, the Pennsylvania Eminent Domain Code (the "Code") is applicable to the procedural matters not addressed in the BCL. *Id.*

surveys and tests. *White v. Pennsylvania Department of Transportation*, 738 A.2d 27, 31 (Pa. Commw. 1999)(holding that PennDOT could access the petitioners property pursuant to 26 Pa.C.S. § 409 [the identical predecessor to Section 309] even though it was unclear as to whether PennDOT would ultimately have the power to condemn the property).

Sunoco Pipeline has given Respondents sufficient notice under Section 309 and will be required to reimburse Respondents for any damage that occurs relating to the surveying and/or testing. 26 Pa.C.S. § 309(b), (c). As noted previously, Section 309 specifically states that the right to enter the property under this section does not constitute a condemnation. 26 Pa.C.S. § 309(d). There is thus no reason for Respondents to deny Sunoco Pipeline access to the Property at this time.

IV. CONCLUSION

For the reasons set forth above, Sunoco Pipeline requests that the Court grant its Verified Motion for Immediate Entry Pursuant to 26 Pa.C.S. § 309.

Respectfully submitted,

By 

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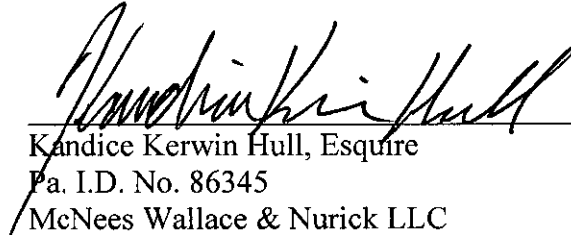
Dated: February 12, 2014

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a true and correct copy of the foregoing Brief in Support of Sunoco Pipeline L.P.'s Verified Motion for Immediate Entry Pursuant to 26 Pa.C.S. § 309, and the accompanying Appendix, were served upon the following via hand delivery:

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February 12, 2014

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**RE: Sunoco Pipeline L.P. v. William C. Loper and Jodi Loper
No. 2013-SU-004518-05**

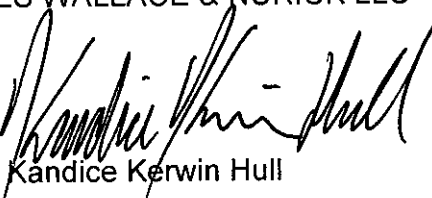
Dear Ms. Lee:

Enclosed for filing are the original and two (2) copies of Sunoco Pipeline L.P.'s Brief in Support of the Verified Motion for Immediate Right of Entry Pursuant to 26 Pa.C.S. § 309 and the Appendix of Unreported Decisions in support thereof.

Very truly yours,

McNEES WALLACE & NURICK LLC

By


Kandice Kerwin Hull

KKH/jb
Enclosure

c: (via hand delivery)
The Honorable Stephen P. Linebaugh
Michael F. Faherty, Esq.

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IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

SUNOCO PIPELINE, L.P.,
Movant

v.

WILLIAM C. LOPER AND JODI LOPER
f/k/a JODI WOLFE,
Respondents

: IN THE COURT OF COMMON PLEAS
: YORK COUNTY, PENNSYLVANIA

: No.: 2013-SU-004518-05

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RESPONDENTS' BRIEF

Submitted by Respondents

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**IN THE COURT OF COMMON PLEAS
OF WASHINGTON COUNTY, PENNSYLVANIA
CIVIL DIVISION**

WILLIAM C. LOPER and
JODI LOPER f/k/a JODI WOLFE,
Respondent

v.

SUNOCO PIPELINE, L.P.,
Movant

Docket No.: 2013-SU-00458-0

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RESPONDENTS' BRIEF

OVERVIEW

Eminent domain is a legislative power, not a judicial power. Here, legislature, neither federal nor state, has provided the awesome power of eminent domain for the innovative Sunoco Pipeline, L.P. (hereinafter "Sunoco Pipeline") plan to transport the natural gas products of propane and/or ethane via an interstate pipeline. Sunoco Pipeline acknowledged regulation by the Federal Energy Regulatory Commission (hereinafter "FERC") for the proposal of this interstate pipeline, but then seeks to avoid FERC regulation for safety and eminent domain purposes. Instead, Sunoco Pipeline seeks state eminent domain power. However, state statutes providing eminent domain law must be "strictly construed" per 1 Pa. C.S.A. §1928(b)(4) and such eminent domain power simply does not exist in Pennsylvania law.

An example of such federal legislation providing eminent domain authority is the power for transportation of natural gas via the Natural Gas Act. 15 USCS §717f(c). That law is administered by FERC which specifies that eminent domain power may be obtained. The procedure would be for a natural gas company to apply to FERC for a FERC regulatory review

via a Petition to Obtain a Certificate of Public Convenience and Necessity. FERC would then review such an application to see if the natural gas company met the requirements for a Certificate for Public Convenience and Necessity as specified at 18 C.F.R. Part 157. Here, Sunoco Pipeline is not asserted to be a natural gas company and thus could not obtain eminent domain power through 15 USCS §717f(c).

The Pennsylvania legislature has similarly provided for eminent domain authority in various statutes such as 71 P.S. §513(e)(1) which authorized the Pennsylvania Department of Transportation to make use of eminent domain power. Another example is found in the Second Class Township Code at 53 P.S. §6501. First Class Townships are provided eminent domain authority via 53 P.S. §56901. The Pennsylvania legislature has also provided for the possibility of an entity to be a Pennsylvania public utility and thereby obtain the authority of eminent domain. 15 Pa. C.S.A. §1511(a)(2). Notably, per Subsection (e) of the same law, such eminent domain authority is only obtained by following the provisions of the Pennsylvania Utility Code, 66 Pa. C.S.A. §1104, which requires the issuance of Certificate of Public Convenience and Necessity before eminent domain could thus be authorized for use by a public utility. Here, Sunoco Pipeline is not a public utility corporation. Instead, it is a common carrier regulated by the Interstate Commerce Act as acknowledged in the Sunoco Pipeline brief at page 4.

In Pennsylvania, the state power of eminent domain over property rises only when legislative action sets forth the occasions, modes and agencies for its exercise. The legislature may delegate the right to exercise eminent domain power, but the body to which the power is entrusted has no authority beyond that which is specifically, legislatively granted. Any grant of the power of eminent domain must be "strictly construed". 1 Pa. C.S.A. §1928(b)(4); Marple Township v. Marple Newtown School District, 856 A.2d 225 (Pa. Cmwlth. 2004). The authority

to condemn property via eminent domain must be strictly construed. Township of O'Hara v. Condemnation of an Easement (Appeals of Kent and May), 204 WL 2470428 (Pa. Cmwlth. Ct.); Winger v. Aires, 371 Pa. 242 (Pa. 1952); Middletown Township v. The Lands of Stone, 939 A.2d 331 (Pa. 2007); Com., Dept of Transp. v. Cantono W. & Sons, Inc., 593 A.2d 26 (Pa. Cmwlth. Ct. 1991); In re 203.76 Acres of Land in Franklin Tp., Beaver County, 245 A.2d 451 (Pa. 1968); In re School Dist. of Pittsburgh, Allegheny County, 244 A.2d 42 (Pa. 1968); Pagni v. Com., 116 A.2d 294 (Pa. Super 1955). Black letter law explicitly indicates by statute and caselaw that if eminent domain power has not been explicitly granted, it may not be used.

A solid foundation for this ambiguous law is that the power of eminent domain is in derogation of the right of private property. The private property protections flow from common law, the Fifth Amendment of the United States Constitution and the Pennsylvania Constitution. Those constitutional protections may not be put aside without the explicit legislative grant of eminent domain power. Here, such power is attempted to be judicially created via the Sunoco Pipeline efforts. Yet, Sunoco Pipeline has not identified any legislative grant of eminent domain power to allow for the very high pressure transportation of these explosive materials across Pennsylvania.

Here, Sunoco Pipeline has asserted its authority is via the Interstate Commerce Act as regulated by FERC. However, Sunoco Pipeline cannot point to any part of any law that provides for a common carrier such as this pipeline company to acquire the awesome power of eminent domain. Sunoco Pipeline admits that it is regulated by the Federal Energy Regulatory Commission via the Interstate Commerce Act and Sunoco Pipeline fails to cite any eminent domain power through that Act/regulation. Notably, Sunoco Pipeline has not asserted that it acquires eminent domain power through the Interstate Commerce Act. This is so because

nowhere does the Interstate Commerce Act provide for eminent domain power. It provides for common carriers such as this pipeline company, or other companies such as a trucking company, to operate in interstate commerce, but it does not provide eminent domain power.

The closest Sunoco Pipeline has come to identifying any legislative authority for eminent domain is the reference to the Pennsylvania Business Corporations Law. The Sunoco Pipeline argument is that it is a public utility because it is regulated by the federal agency, FERC, as a public utility. The property owners agree that Sunoco Pipeline is regulated by FERC, but it is admitted by Sunoco Pipeline that it is regulated by FERC as a common carrier, not a public utility. This critical fact of common carrier regulation is described and admitted in the Sunoco Pipeline brief at page 4. Contradictorily, Sunoco Pipeline then argues for eminent domain power as potentially being obtained by a "public utility corporation" as defined at 15 Pa. C.S.A. §1103. The section provides that a corporation could be a public utility corporation if it "...is subject to regulation as a public utility by the Pennsylvania Public Utility Corporations or an officer or agency of the United States..." (emphasis added). Here, Sunoco Pipeline is regulated by FERC, a United States agency, as a common carrier, not as a public utility. Accordingly, Sunoco Pipeline does not meet the definition of a public utility and may not qualify for eminent domain power as provided for public utilities in Pennsylvania. 15 Pa. C.S.A. §1103.

Even if Sunoco Pipeline became a public utility, it may only obtain the power of eminent domain for the enumerated specific purposes and substances provided in the Business Corporations Law at 15 Pa. C.S.A. §1511(a)(2). Notably, transportation of natural gas products propane and/or ethane are not listed items for the potential to obtain eminent domain. Even more damning to the Sunoco Pipeline effort to identify legislative authority of eminent domain power is the explication in the Pennsylvania Public Utility Code that eminent domain power

may only be exercised after a public utility: "...shall have received the certificate of public convenience as required by section 1101". The law is thus crystal clear that even if this pipeline company were to be considered a public utility, it does not have the authority for the transportation of the propane and ethane, nor does it have the absolutely required Certificate of Public Convenience and Necessity. It is only the Certificate of Public Convenience and Necessity which may be held out as the valid authority to exercise eminent domain power. Fairview Water Co. v. Pennsylvania Public Utility Com'n, 502 A.2d 162 (Pa. Super 1985). It is only the PUC which would have the authority to proceed to approve a request for eminent domain power via the Pennsylvania Business Corporations Law. Phillips v. Pennsylvania Public Utility Commission, 124 A.2d 625 (Pa. Super 1956).

Sequentially and specifically, ten (10) individual **Standards of Law** now define Sunoco Pipeline as not a condemnor with survey rights as reviewed below:

1. JURISDICTION IS WITH FERC RATHER THAN THE PENNSYLVANIA COURT OF COMMON PLEAS.

Sunoco Pipeline has acknowledged that it is regulated by FERC (Sunoco Pipeline Brief, p. 4). Sunoco Pipeline acknowledges it is proceeding with an interstate pipeline. (*Id.* p. 1). FERC has authority to regulate construction, extension, operation and acquisition of natural gas facilities under 15 USCS §717f(c)(1)(A). Specifically, applicants to FERC for eminent domain power in §717f proceedings must certify to FERC that it will design, install, inspect, test, construct, operate, replace and maintain gas pipeline facilities under those standards and plans for inspection and maintenance under the Pipeline Safety Act, 49 USCS §60101 et seq. Colo. Interstate Gas Co. v. Wright (210 DC KAN), 707 F.Supp. 2d 1169. Also, explicit law has established that the Natural Gas Act, as enforced by FERC, has preempted state law. One federal court has indicated this with the language: "...Congress, in the Natural Gas Act, has

enacted a regulatory scheme that preempts the State Law which is an obstacle to the fulfillment of the NGA purposes.” Guardian Pipeline, LLC v. 729.42 Acres of Land, 210 F.Supp.2d 971, 975 (N.D. Ill. 2002). FERC is the federal agency that authorizes and regulates the potential use of eminent domain for interstate pipelines. State eminent domain power for an interstate pipeline is preempted. The exclusive jurisdiction is identified at 15 USCS §717b(2) and discussed in Federal Commerce Comm’n., 339 US 905.

Herein, FERC has not provided a Certificate for Public Convenience and Necessity. Perhaps Sunoco Pipeline has not pursued that application, perhaps because of an expectation of denial. Sunoco is proceeding via a proposed Mariner East Pipeline per the October 30, 2013 letter of Attorney Dana W. Chilson (Motion Exhibit B). That pipeline for propane and ethane is regulated by FERC per the attached FERC Order (Exhibit A). In any event, FERC has jurisdiction and it is FERC which exists as the exclusive method to attempt to obtain a FERC order allowing for the use of eminent domain power. The exclusive method to challenge the absence of a FERC order of a Certificate of Public Convenience and Necessity is by a direct appeal to FERC per 15 USCS §717(r). Here FERC obviously has not provided the power of eminent domain. Any challenge to the FERC failure to grant eminent domain power must be directed to FERC. The present challenge in the state court is without merit because such a state court lacks jurisdiction to entertain a challenge to the matter under FERC jurisdiction. Williams Natural Gas Co. v. City of Oklahoma City, 890 F.2d 255 (10th Cir. 1989). The Tenth Circuit held that the judicial review provision of the Natural Gas Act to review challenges to the FERC Order “are exclusive”. *Id.* at 261. The Court held that: “...a challenger may not collaterally attack the validity of a prior FERC Order in supplemental proceedings.” *Id.* at 262. Prohibition on collateral attack such as this effort in state court is a provision that applies in both the federal

and state courts. This is true even when the issue being challenged is the agency's jurisdiction. *Id.* at 263. The Court specifically held that: "The eminent domain authority granted by the district Courts under...the NGA, 15 U.S.C. §717f(h), does not provide challenges with an additional forum to attack the substance and validity of FERC regulation. The district Court's function is not appellate, but rather to provide for enforcement." *Id.* at 264.

Thus, the attempt to obtain eminent domain power with survey rights for an interstate pipeline could have been raised in the FERC proceedings and cannot be raised initially in the present state proceeding. Essentially, without a Certificate of Public Convenience and Necessity, Sunoco Pipeline is requesting eminent domain authority from a court without jurisdiction. A Pennsylvania Federal Court case, litigated by this counsel, explains the grand significance of the Certificate of Public Convenience and Necessity in FERC regulation. Steckman Ridge v. Gipson, 2008 U.S. Dist. Lexis 71302, W.D. PA.

Additional, well-established law explains how the Sunoco Pipeline reliance upon state law of the Pennsylvania Business Corporations Law is preempted. Such state law creation of eminent domain power for the proposed interstate pipeline would be an usurpation of the Federal substantive law in violation of the supremacy clause of the United States Constitution. Kern River Gas Transmission Company v. Clark County, 757 F.Supp. 1110, 1118 (D. Nev. 1990); U.S.G. Pipeline Co. v. 1.74 Acres in Marion County, 1 F.Supp. 2d at 825-26. The NGA "occupies the field" with respect to the regulation of natural gas rights and facilities. Tennessee Gas Pipeline Co. v. Massachusetts Day Transp. Auth., 2 F.Supp. 106 (D. Mass. 1995); Schneidewind v. ANR Pipeline Co., 485 U.S. at 293. An interstate pipeline is a "facility" regulated by FERC with the only authorized eminent domain power found singularly in the Certificate of Public Convenience and Necessity provisions of the Natural Gas Act. In Columbia Gas Transmission

Corp. v. An Exclusive Natural Gas Storage Easement, 747 F.Supp. 401 (N.D. Ohio 1990) property owners brought a counter-claim for trespass and the Court concluded that the law concerning the taking of property by the United States Government or a private corporation is controlled and limited by the Federal substantive law. Furthermore, a FERC Order attached to the Sunoco Pipeline brief as Exhibit C discusses the transportation of ethane and propane as subject to FERC jurisdiction (Section 3, last paragraph).

Simply put, Sunoco Pipeline is proposing survey rights for an interstate pipeline. Such pipelines are regulated by FERC with consideration of the Pipeline Safety Act. Thus, this court does not have jurisdiction and the case must be dismissed because of the lack of jurisdiction.

Sunoco Pipeline has acknowledged that FERC does have jurisdiction over this pipeline. That jurisdiction is consistent with the recent FERC review of a very similar pipeline proposal in Texas which found that FERC does retain jurisdiction. Per the attached FERC Order of December 31, 2013 (Exhibit B), FERC reviewed the proposal for a pipeline of a similar substance of an ethane product. Per the attached Order, FERC retained jurisdiction. Sunoco Pipeline being under FERC jurisdiction could potentially obtain eminent domain power through FERC regulation (18 C.F.R. part 157), but has not done so.

Next, Sunoco Pipeline points to National Fuels Gas Pipeline Corporation v. Kovalchick Corporation, 74 Pa. D. & C. 4th 22, as asserting state law allowing for the exercise of eminent domain per the Pennsylvania Business Corporations Law. However, that law provides no support whatsoever for the Sunoco Pipeline argument. Initially, Kovalchick reviewed a corporation operating as a natural gas company. A natural gas company, but not a common carrier, may obtain eminent domain power through the Natural Gas Act. 15 USCS 717f(c). Sunoco Pipeline, as a pipeline company, has acknowledged that it is not operating as a natural

gas company. Here, the Kovalchick argument also fails because it concerned gathering lines within Pennsylvania rather than the herein proposed new interstate pipeline for high pressure transportation of explosive natural gas products. The Kovalchick argument additionally fails because federal law supersedes state law. The court found that the lack of a Pennsylvania PUC certificate made no difference. It was the FERC Certificate which controlled. The pipelines were regulated by FERC and their purpose was ultimately to facilitate interstate transmission of natural gas. The FERC Certificate of Public Convenience and Necessity, which was obtained in Kovalchick, authorized that natural gas company use of eminent domain power. By the same reasoning, the Sunoco Pipeline efforts under the Pennsylvania Business Corporations Law could only potentially proceed via the superseding federal law which requires a FERC Certificate of Public Convenience and Necessity. The absence of such a certificate defeats the Sunoco Pipeline efforts to use eminent domain power and its corresponding survey right. The Kovalchick Certificate of Public Convenience and Necessity is specifically referenced at 74 Pa. D&C 4th, p. 26. Page 29 discusses the lack of a state certificate and the superseding federal law. Footnote 4 references the interstate transmission of natural gas for all of the FERC regulated pipelines in that case.

Essentially, Kovalchick, while it authorized eminent domain power through the Business Corporations Law, it did so only based on the regulation of natural gas and natural gas company possession of a FERC Certificate of Public Convenience and Necessity. The case essentially recognized the requirement in the Pennsylvania Business Corporations Law of a Certificate of Public Convenience and Necessity and found that the FERC Certificate of Public Convenience and Necessity was adequate for the in state gathering lines used in interstate commerce. In simple terms, the state court approved the eminent domain power because the applicable

federal jurisdiction of FERC had previously granted eminent domain power via the FERC Certificate of Convenience and Necessity.

2. SUNOCO PIPELINE HAS NOT PROPERLY INITIATED A LAWSUIT UNDER STATE LAW.

Pennsylvania Rules of Civil Procedure 1107 allows for the initiation of a legal action in Pennsylvania via a writ or a complaint. Herein, Sunoco Pipeline originally filed a writ and a motion, however, the January 23, 2014 Order of Judge Andrea Marcea Strong proceeded to “dismiss the petition without prejudice.” Accordingly, the effort of the writ followed by a motion ended. Thereafter, on January 29, 2014 Sunoco Pipeline proceeded, without a writ, to file a Verified Motion for Immediate Right of Entry pursuant to 26 Pa. C.S.A. §309. Thus, a mere motion without a writ, complaint or petition, is pending before the court. The motion is thus not an authorized vehicle to initiate the court’s consideration. Accordingly, the motion should be dismissed for failure to follow Pennsylvania Rule of Civil Procedure 1107.

3. SUNOCO PIPELINE DOES NOT OBTAIN §309 SURVEY RIGHTS BECAUSE IT IS NOT A CONDEMNOR.

The Pennsylvania Eminent Domain Code at 26 Pa. C.S.A. §309(a) provides for survey rights for a “condemnor”. The Code at 26 Pa. C.S.A. §103 defines a condemnor as: “the acquiring agency, including the Commonwealth, that takes, injures or destroys property by authority of law for a public purpose.” Admittedly, a private corporation could potentially become a condemnor as acknowledged in the 1964 comment on the term “Condemnor”.

The analysis thus is whether or not Sunoco Pipeline takes, injures or destroys property by authority of law for a public purpose. The Pennsylvania law concerning public utility corporations does allow for a public utility corporation to obtain the power of eminent domain via the issuance of a Certificate of Public Convenience and Necessity as explicitly required at 66

Pa. C.S.A. §1104. Similarly, a public utility corporation could obtain the power of eminent domain for an interstate pipeline through FERC regulation. 15 USCS §717(f)(c); 18 C.F.R. Part 157; Colo. Interstate Co. v. Wright(210, DC Kan), 707 F.Supp.2d 1169. Here, the absence of a state Certificate of Public Convenience and Necessity and the absence of a federal Certificate of Public Convenience and Necessity indicates that Sunoco Pipeline is not now a condemnor. Accordingly, it does not take, injure or destroy by eminent domain authority and thus does not have the survey rights of condemnors as provided by the Pennsylvania Eminent Domain Code at §309.

Potentially, Sunoco Pipeline could proceed to the state and request certification as a public utility and then request a Certificate of Public Convenience and Necessity. Such an effort would be the preliminary step for eminent domain with the scope and validity of a particular condemnation left for a subsequent determination. Currents v. Pennsylvania Public Utility Commission, 191 A.2d 700 (1963); Duquesne Light Co. v. Upper St. Clair Tp., 105 A.2d 287 (Pa. 1954). Alternatively, the federal jurisdiction as discussed in Kovalchick indicates that a natural gas company could potentially proceed to become a condemnor by obtaining a Certificate of Public Convenience and Necessity. Thus, one or more avenues could be available to Sunoco Pipeline to become a condemnor, but it has apparently not attempted those avenues to date. The right of eminent domain will not be presumed to exist, especially in a private corporation. Legislative authority of eminent domain power must be shown. There is no implication of such eminent domain authority for a pipeline company such as Sunoco Pipeline. In re Crescent Pipe Line Co.'s Petition, 56 Pa. Super 201 (1914). In contrast, an established condemnor such as PennDOT in White v. Department of Transportation, 738 A.2d 27 (Pa. Cmwlth. Ct. 1999) may obtain survey rights because it is clearly identified by legislation as a condemnor.

The effort of Sunoco Pipeline to acquire eminent domain via the Pennsylvania Business Corporations Law would only properly proceed via the filing of a Verified Petition for Approval of a Bond. 15 Pa. C.S. A. §1511(g)(2)(i). Per the 1990 comments to that section, the property owner would then have the constitutional rights protected by virtue of the property owner's ability to file an Action in Equity to challenge the validity or scope of the condemnation. The outcome of such an action could result in a final Order determining the pipeline company's status as a condemnor. Prior to that, Sunoco Pipeline is not a "condemnor". See Condemnation of Lands of Swidzinski, 579 A.2d 1352, 1357 (Pa. Commonwealth Ct. 1990). The last paragraph of this case needs to be particularly reviewed to reveal that the case upholds the property owner's right to challenge condemnation, rather than revealing court approval of condemnation as asserted in the Sunoco Pipeline brief at page 7. Only at the end of such a process would Sunoco Pipeline potentially have escaped federal jurisdiction and found itself defined as a condemnor by Pennsylvania law. If Sunoco Pipeline progressed through those required steps then, and only then, could it become a condemnor with survey rights under Pennsylvania Law.

4. SUNOCO PIPELINE DOES NOT OBTAIN SURVEY RIGHTS BECAUSE IT IS NOT A CONDEMNOR UNDER STATE LAW REQUIRING A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

As reviewed above, Sunoco Pipeline has the potential, if it were to somehow avoid federal jurisdiction, to proceed under state law via a Petition for Approval of Bond. That would include the allegation of Sunoco Pipeline's qualification of a public utility as being regulated as a public utility by a federal agency. Sunoco Pipeline's own argument would appear to end the effort at that point in that Sunoco Pipeline acknowledges its regulation by FERC with its regulation of eminent domain power via the federal Certificate of Public Convenience and Necessity. Essentially, Sunoco Pipeline seeks to be a public utility per the Pennsylvania law by being

federally regulated allegedly as a public utility, but then seeks to not be federally regulated for the purposes of eminent domain. Even with that tortured argument, Sunoco Pipeline only gets to the explicit state law requirement of a Certificate of Public Convenience and Necessity. Pennsylvania eminent domain law is reasonably cautious of providing eminent domain power to a non-government entity of a public utility corporation. Pennsylvania does not provide eminent domain power to common carriers. Pennsylvania only provides eminent domain power to public utilities via the specific and indisputable requirement of the issuance of a Certificate of Public Convenience and Necessity before a public utility could potentially exercise the power of eminent domain. 66 Pa. C.S.A. §1104; Hillman Coal & Coke Co. v. Pennsylvania Public Utility Commission, 433 A.2d 631 (Pa. Cmwlth. 1981). The Certificate of Public Convenience and Necessity would be required to specify the “nature of the services and of the territory” supplied. 66 Pa. C.S.A. §1101. Sunoco Pipeline, lacking a state Certificate of Public Convenience and Necessity and lacking a federal Certificate of Public Convenience and Necessity, may not be considered a condemnor for purposes of Pennsylvania state law. The requested survey rights under the Pennsylvania Eminent Domain Code at §309 are only provided to condemnors, and thus, Sunoco Pipeline has not qualified for the exercise of survey rights.

One of the privileges of property ownership in these United States is the right to deny access or use of the property by others. Sunoco Pipeline has demonstrated no valid legal authority to compromise that property right in this action.

5. SUNOCO PIPELINE DOES NOT OBTAIN SURVEY RIGHTS UNDER §309 BECAUSE IT IS NOT A CONDEMNOR PER FEDERAL LAW.

Sunoco Pipeline is regulated by FERC as shown by the attached FERC Order in regards to the Mariner East Pipeline. FERC regulates interstate pipelines per 15 USCS §717f(c). See Colorado Interstate Gas Company, and Kovalchick. Sunoco Pipeline has apparently failed to

submit itself to the process of applying for eminent domain power through federal law and the FERC regulations at 18 C.F.R. Part 157. FERC has not divested itself of jurisdiction and Sunoco Pipeline has not obtained the required Certificate of Public Convenience and Necessity to obtain eminent domain power. Accordingly, by federal law, Sunoco Pipeline herein is not a condemnor and will not be allowed federal survey rights accorded to a condemnor. The comprehensive regulatory scheme as applied by FERC indicates that the State of Pennsylvania has no power to regulate or authorize eminent domain in the field of interstate pipelines regulated by FERC. Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement, 747 F.Supp. 401 (N.D. Ohio 1990). That preclusion of state law reaffirms the requirements of federal law, including the federal Certificate of Public Convenience and Necessity.

6. SUNOCO PIPELINE DOES NOT QUALIFY FOR PUBLIC UTILITY POWER OF EMINENT DOMAIN BECAUSE IT IS NOT A PUBLIC UTILITY PER THE PENNSYLVANIA BUSINESS CORPORATIONS LAW. 15 Pa. C.S.A. §1103.

The closest Sunoco Pipeline has come to identifying any legislative authority for eminent domain is the reference to the Pennsylvania Business Corporations Law. The Sunoco Pipeline argument is that it is a public utility because it is regulated by the federal agency, FERC, as a public utility. The property owners agree that Sunoco Pipeline is regulated by FERC, but it is regulated by FERC as a common carrier, not a public utility. The Interstate Commerce Act regulates common carriers, not public utilities. 49 U.S.C. §1(b). This critical fact of common carrier regulation is described and admitted in the Sunoco Pipeline brief at page 4. Contradictorily, Sunoco Pipeline then argues for eminent domain power as potentially being obtained by a "public utility corporation" as defined at 15 Pa. C.S.A. §1103. The section provides that a corporation could be a public utility corporation if it "...is subject to regulation as a public utility by the Pennsylvania Public Utility Corporations or an officer or agency of the United

States..." (emphasis added). Here, Sunoco Pipeline is regulated by FERC, a United States agency, as a common carrier, not as a public utility. Accordingly, Sunoco Pipeline obviously does not meet the definition of a public utility and may not qualify for eminent domain power as provided for public utilities in Pennsylvania. 15 Pa. C.S.A. §1103. The argument is fatuous.

7. PENNSYLVANIA BUSINESS CORPORATIONS LAW DOES NOT PROVIDE FOR EMINENT DOMAIN AUTHORITY FOR TRANSMISSION OF THE NATURAL GAS BYPRODUCTS ETHANE AND PROPANE.

As stated previously, the Pennsylvania Business Corporations Law is preempted by the Federal law. Even if the Pennsylvania Business Corporations Law is applied, it does not provide the asserted eminent domain authority. Sunoco Pipeline at Item 4 of the Verified Petition asserts eminent domain authority via 15 Pa. C.S.A. §1101 et seq. The specific provision at issue is 15 Pa. C.S.A. §1511(a)(2) which provides for the power of eminent domain for the: "...transportation of artificial and natural gas, electricity, petroleum or petroleum products, or water or any combination of any such substances for the public." That list includes natural gas but noticeably does not include a listing of natural gas products, natural gas byproducts, propane or ethane. The proposed propane and ethane, as products of the natural gas production, are simply not included in the list of substances for which eminent domain is potentially authorized for pipelines within Pennsylvania. Any Sunoco Pipeline effort to stretch the definition to include the ethane and/or propane is compromised by the usage of the terms "petroleum or petroleum products" in the law. If the law intended to include natural gas products or byproducts, it certainly could have done so. In that it did not grant the eminent domain power for natural gas products, propane or ethane, that power is not granted and is not to be exercised. This is clearly so because the power of eminent domain is necessarily in derogation of a private right, and the rule in such cases is that the authority is to be strictly

construed. 1 Pa. C.S.A. §1928(b)(4); Winger v. Aries, 371 Pa. 242 (Pa. 1952); Middletown Township v. The Lands of Stone, 939 A.2d 331 (Pa. 2007). The Pennsylvania strict construction law controls over FERC analysis of substances as asserted in the Sunoco Pipeline brief at pages 11-13.

It is unknown what the Pennsylvania legislature considered as applicable substances when it passed the law, but we do know that it did not list any eminent domain authority for natural gas products, natural gas byproducts, propane or ethane. As such, such eminent domain authority was not granted and may not be exercised. The legal maxim “*expressio unius est exclusio alterius*” directs that the mention in a specific manner as such implies the exclusion of others not mentioned. Hoffman v. Borough of Millvale, 591 A.2d 1137, 1139 (Pa. Cmwlth. 1991). Similarly, the mention of a specific matter in a statute implies the exclusion of others not mentioned. Here, 15 Pa. C.S.A. §1511(a)(2) specified “...natural gas, electric, petroleum or petroleum products...”. Notably, the law did not say natural gas, natural gas products. Natural gas products were not listed in a specific matter and were simply not authorized by the statute. The listing of petroleum or petroleum products demonstrates that the legislature intended natural gas but not natural gas products. The facts here closely match Olson v. Whitpain Township, 595 A.2d 706 (1991) rev’g In re Condemnation of Olson Property, 6 D. & C. 4th 668 (1990) (Montgomery County) which in the end found that the Second Class Township Code did not authorize condemnation for recreational use.

Legislative action after Olson reflected that it is entirely up the Pennsylvania legislature to create eminent domain power, if that power was not specifically granted. Soon after Olson, the legislature amended the Second Class Township Code to allow for eminent domain power for recreational use. Similarly, here the Pennsylvania legislature did not specifically authorize a

common carrier to use eminent domain power for transportation of the natural gas products, but could do so in the future. The legislature has not created this eminent domain power but could create the eminent domain power in the future. The request for such power would properly be presented to the Pennsylvania legislature, not a Pennsylvania court.

8. THE ASSERTED AUTHORITY OF THE PENNSYLVANIA BUSINESS CORPORATIONS LAW FAILS THE EMINENT DOMAIN REQUIREMENT OF A PUBLIC PURPOSE.

The foundation of eminent domain requires that the authority is only granted for public purposes. That is embodied in 15 Pa. C.S.A. §1511(g)(2) in its description of the services: "...in furnishing service to the public...". By contrast Sunoco Pipeline, asserted to be a limited partnership, seeks to provide substances to its customers. That purpose of a private company providing a service to its customers does not meet the public good requirement as contained in the Pennsylvania Business Corporations Law and required as a foundational basis for any eminent domain authority. The Sunoco Pipeline equal opportunity to shipping may specify opportunities for such companies, but does absolutely nothing to define such activity as service to the public. Shippers are simply not "the public".

9. EMINENT DOMAIN FOR PRIVATE ENTERPRISE IS PROHIBITED.

Even if State law were somehow deemed to apply, the Pennsylvania anti-Kelo statute at 26 Pa. C.S.A. §204 specifically prohibits the use of eminent domain for private enterprise. An exception therein for public utilities as defined by 66 Pa. C.S. §102 does not apply because Sunoco Pipeline is not a public utility as thus defined. Specifically, Sunoco Pipeline is not regulated by FERC as a public utility. By the Sunoco Pipeline allegations in its motion, it is a common carrier, not a public utility. Also, 66 Pa. C.S. §102 defines public utility as providing for transportation of enumerated substances not including natural gas products, natural gas

products, ethane or propane for the public for compensation. Herein the provision for ethane and propane would not be for the public. The Sunoco Pipeline purpose is to provide substances to its customers. Its customers do not correspond to open availability for the public. Sunoco Pipeline's private enterprise effort to obtain eminent domain is simply prohibited under Pennsylvania law. The public utility exception does not apply because Sunoco Pipeline is not a public utility. Also, the common carrier exception of 26 Pa. C.S.A. §204(b)(2)(i) only applies when a: "...party has the power of eminent domain..." and that party conveys the power to a common carrier. Here, no entity has the eminent domain power to convey to the common carrier Sunoco Pipeline.

10. SUNOCO PIPELINE'S ELECTION TO PROCEED UNDER THE PENNSYLVANIA BUSINESS CORPORATIONS LAW ELIMINATED ITS OPPORTUNITY TO OBTAIN SURVEY RIGHTS UNDER THE PENNSYLVANIA EMINENT DOMAIN CODE.

Sunoco Pipeline has asserted that it has the power of eminent domain via the Pennsylvania Business Corporations Law. 15 Pa. C.S.A. §1511. While that law allows for the procedure to attempt condemnation to proceed with a Verified Petition for Approval of Bond, 15 Pa. C.S.A. §1511(g)(2)(i), the choice to proceed to attempt to obtain eminent domain power through that Business Corporations Law directs that such an effort is controlled by specific provisions of the Pennsylvania Corporations Law, as opposed to specific sections of the Pennsylvania Eminent Domain Code. Specifically, 15 Pa. C.S.A. §1511(g)(2)(iv) states that: "The papers filed by the corporation with the court under this paragraph shall constitute the declaration of taking for the purposes of sections 404, 408 and 409 and Articles V through VIII of the Eminent Domain Code." As explained in that footnote, section 409 is now 26 Pa. C.S.A. §309 per the 2006 revisions of the Pennsylvania Eminent Domain Code. Accordingly, §409, now §309, survey rights do not apply when an entity attempts to proceed to obtain eminent

domain power via the public utility provisions of the Pennsylvania Business Corporations Law. Section 309 is simply and explicitly inapplicable. By comparison, §309 would apply if Sunoco Pipeline was proceeding via the Eminent Domain Code rather than the Business Corporations Law. This limit on survey rights is entirely reasonable when we recognize that the public utility process would be to have a public utility attempt to obtain the power of eminent domain through a Certificate of Public Convenience and Necessity and only then proceed with the later question of the validity of a specifically located effort to obtain property via eminent domain. Philadelphia Electric Co. v. Carr, 287 A.2d 917 (Pa. 1972). The procedure of applying for a federal (18 C.S.A. Part 157) or state Certificate of Public Convenience and Necessity could involve survey rights, but survey rights are not obtained via the inapplicable §309.


CONCLUSION

In summary, a private pipeline company is creative in its effort to increase profits via use of an interstate pipeline to transport dangerous natural gas products. Such a private company's efforts could lead it to successfully negotiate property rights from property owners. However, nothing in the innovative effort indicates any law which has provided eminent domain authority. A federal regulatory scheme controls interstate pipelines and Sunoco Pipeline must avail itself of that jurisdiction. Absent that, neither the federal government nor the State of Pennsylvania has provided any eminent domain authority, certainly not the required explicit eminent domain authority, for this purpose. Sunoco Pipeline has indicated it is regulated under the Interstate Commerce Act. Nothing in that Act, the Business Corporations Law or other relevant law has provided the legal authority for eminent domain rights and survey rights. This Court may not, and will not, create an eminent domain right or survey right. Accordingly, the motion for survey rights must be denied.

Respectfully submitted,

LAVERY FAHERTY PATTERSON

DATE: 2/19/14

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SUNOCO PIPELINE L.P.,	:	IN THE COURT OF COMMON PLEAS
Movant	:	YORK COUNTY, PENNSYLVANIA
	:	
v.	:	NO. 2013-SU-004518-05
	:	
WILLIAM C. LOPER AND JODI LOPER	:	
f/k/a JODI WOLFE,	:	
Respondents	:	

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SUNOCO PIPELINE L.P.'S MOTION FOR RECONSIDERATION

Sunoco Pipeline L.P. ("Sunoco Pipeline"), by and through its undersigned counsel, hereby submits this Motion for Reconsideration of the February 25, 2014 Order of Court denying Sunoco Pipeline's Verified Motion for Immediate Right of Entry Pursuant to 26 Pa.C.S. § 309.

In support thereof, Sunoco Pipeline avers as follows:

I. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND

1. On January 29, 2014, Sunoco Pipeline filed a Verified Motion for Immediate Right of Entry Pursuant to 26 Pa.C.S. § 309 (the "Motion") to obtain an Order allowing entry onto the property of Respondents William C. Loper and Jodi Loper f/k/a Jodi Wolfe (the "Property") for the purpose of conducting the necessary surveys and tests to determine the route of a potential interstate pipeline (the "Pipeline").

2. On February 25, 2014, the Court issued an Order denying the Motion (the "Order") on the basis that Sunoco Pipeline did not have eminent domain authority for the Pipeline because it was regulated by FERC as a "common carrier," rather than as a public utility and, therefore, did not qualify as a "public utility corporation" and possess the condemnation power granted to public utility corporations under the BCL.

3. Sunoco Pipeline respectfully requests that the Court reconsider the Order for the following reasons:

- A. The Order concludes that Sunoco Pipeline cannot be regulated as a public utility corporation because it is called a common carrier by FERC. There is no legal basis on which to conclude that "common carrier" and "public utility corporation" are mutually exclusive terms;
- B. To the contrary, the plain text of the Pennsylvania Business Corporations Law (the "BCL"), as well as the committee comments to the statute, express a clear and unambiguous legislative intent to permit common carriers to exercise eminent domain authority, as public utility corporations, under the BCL;
- C. As Sunoco Pipeline would demonstrate at a hearing, the indicia of regulation as a public utility corporation (as tested by Pennsylvania law) are clearly present in FERC's regulation of Sunoco Pipeline;
- D. When reading the expressed language of Sections 1103 (definitions) and 1511 (eminent domain) of the BCL together, it is clear that the Legislature intended to provide the power of eminent domain to pipelines moving petroleum products, both for intrastate (PUC-regulated) and interstate (FERC-regulated) shipments.

For these reasons, and the additional reasons set forth below, Sunoco Pipeline respectfully requests that the Court reconsider its Order.

II. ANALYSIS

4. Modification of a court order is within the sound discretion of the trial court, so long as the motion for reconsideration is filed within 30 days from the date of the entry of the order at issue. *See* 42 Pa.C.S. § 5505.

A. The Terms Common Carrier And Public Utility Are Not Mutually Exclusive.

5. The Order concluded that Sunoco Pipeline does not fall within the definition of a public utility corporation under the BCL because it is regulated as a common carrier under FERC and, thus, cannot be considered a public utility. Order, p. 4.

6. Pennsylvania law is clear, however, that the terms common carrier and public utility are not mutually exclusive. For example, the Pennsylvania Public Utility Code, which governs intrastate public utility service, defines a "public utility" to include motor vehicle "common carriers." 66 Pa.C.S. § 102.

7. Similarly, the absence of a direct reference to oil and petroleum products pipeline common carriers does not remove such common carriers from the purview of public utility regulation. For example, the NGA does not use the term "public utility" and, instead, refers to the regulated service providers as "natural-gas companies." 15 U.S. Code § 717(a). The NGA, however, as recognized by the Court in the Order, does regulate entities "as public utilities," despite the fact that the term public utility is not used by the NGA.

8. Further, the Commonwealth Court of Pennsylvania has found common carrier status to be a favorable factor in determining whether an entity is a public utility corporation for purposes of applying certain tax exemptions under the Municipalities Planning Code, 53 P.S. §

10619. *Public Utility Commission v. WVCH Commc'n, Inc.*, 351 A.2d 328, 330 (Pa. Commw. Ct. 1976)(noting that, while WVCH was required to obtain a Federal Communications Commission ("FCC") license, it was not one of the common carriers regulated by the FCC and, thus, could not be a public utility corporation).

9. If given the opportunity to present evidence on the issue, Sunoco Pipeline will present the testimony of Cynthia A. Marlette, former General Counsel of FERC. A true and correct copy of the Affidavit of Cynthia A. Marlette ("Marlette Affidavit") is attached hereto as Exhibit A. Specifically, Ms. Marlette's testimony will provide the Court with an extensive comparison of FERC's regulation of oil pipelines under the ICA, natural-gas companies under the NGA, and electric "public utilities" under the Federal Power Act ("FPA"). Her testimony will explain how FERC regulates oil pipelines with respect to rates, terms, and conditions of service, with respect to tariffs, and with respect to obligations to provide non-discriminatory access. Marlette Affidavit, pp. 3-4. Her testimony will show that FERC regulates the different types of entities under its jurisdiction under different statutory authority, but "commonly with respect to these core statutory provisions and requirements requiring services provided to the public." *Id.*, p. 6.

10. As a common carrier regulated by FERC under the ICA, Sunoco Pipeline is a public utility corporation with eminent domain authority under the BCL. As such, Sunoco Pipeline respectfully requests that the Court reconsider its Order.

B. Sunoco Pipeline Qualifies As A Public Utility Corporation Under Pennsylvania Law.

1. The Pennsylvania General Assembly included common carriers within the scope of public utility corporations under the BCL.

11. The Order determined that Sunoco Pipeline is not a public utility corporation under the BCL because it is regulated by FERC as a common carrier. Order, p. 5. This determination is in error because Section 1511, and the Section 1103 definition of "public utility corporation", explicitly and implicitly include common carriers within the scope of public utility corporations.

12. Section 1511 lists various activities for which condemnation authority may be exercised, including the "transportation of persons or property or both as a common carrier" by rail, ferry or trolley. 15 Pa. C.S. §1511(a)(1). This provision alone demonstrates that common carriers are included among the entities that may qualify as public utility corporations and that are granted condemnation authority under the BCL.

13. The Committee Comments accompanying the statute clarify an intent to broadly include common carriers as public utility corporations. 15 Pa. C.S. § 1511, Committee Comments 1990; *see also* 15 Pa. C.S. § 1103, Committee Comments 2013. Although eminent domain statutes must be strictly construed, the Commonwealth Court has long held that "such strict construction does not require construing a statute as narrow as possible, or construing it so literally that its obvious intent is frustrated." *In re Columbia Cnty. ex rel. Condemnation of Prop. of G.M. Hock Penn, LLC*, 1681 C.D. 2011, 2012 WL 8685534 (Pa. Commw. Ct. 2012). As evidenced by the language of the Committee Comments to Sections 1103 and 1511 of the

BCL, the General Assembly intended the definition of "public utility corporation" to be inclusive, not exclusive.

14. For example, the definition of "public utility corporation" in Section 1103 of the BCL allows entities to qualify as public utility corporations based on historic regulation as of December 31, 1980 *or* present regulation. Committee Comments to Sections 1511 and 1103 of the BCL illustrate the broad scope of this authority, noting that "if the Federal Communications Commission deregulates interexchange service, facilities for such service would still be entitled to the benefits of this section." *Id.* In other words, entities that were, or would have been, subject to regulation as a public utility on December 31, 1980 may still qualify as a public utility corporation even if they are no longer subject to such regulation as a result of deregulation in their industry.

15. Additionally, the reference to interexchange service providers as entities deemed eligible for Section 1511 condemnation authority further evidences the General Assembly's inclusive intent because the FCC regulates interexchange service providers as common carriers. *Id.* Analogously to the ICA's definition of oil pipelines as common carriers, interexchange telecommunications providers are regulated by the FCC as common carriers under the Communications Act of 1934 (as amended by the Telecommunications Act of 1996). 47 U.S.C.A. § 153 (defining common carrier "as any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a

person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier").

16. By confirming that FCC regulated common carriers fall within the definition of public utility corporation under Section 1103 of the BCL, the 1990 Committee Comments verify that the explicit reference to rail, ferry, or trolley common carriers in Section 1511 of the BCL does not exclude other common carriers. *Id.*

17. As the 1990 Committee Comments clarify that eminent domain authority under the BCL is available to interexchange telecommunications providers regulated by the FCC as common carriers, the Order's conclusion that regulation as a common carrier precludes regulation as a public utility is in error.

2. Sunoco Pipeline has all of the indicia of regulation as a public utility under Pennsylvania law.

18. First and foremost, Sunoco Pipeline unequivocally is a public utility corporation regulated by the PUC. Sunoco Pipeline is the current holder of multiple PUC Certificates of Public Convenience authorizing shipments by pipeline in Pennsylvania. It therefore qualifies as a Public Utility Corporation as that term is defined in Section 1103 of the BCL, for sub-part (1) "subject to regulation as a public utility by the Pennsylvania Public Utility Commission" independent of also being subject to such regulation by "an officer or agency of the United States." 15 Pa.C.S § 1103.

19. Second, under Section 1103 of the BCL, an entity also qualifies as a public utility corporation if it is subject to regulation as a public utility by the federal government. 15 Pa.C.S.

§ 1103. Both the Pennsylvania Supreme Court and the Commonwealth Court have addressed the demarcation between public utility service and private utility service. A review of the applicable law confirms that FERC's regulation of Sunoco Pipeline as a common carrier constitutes regulation as a public utility under the BCL.

20. The Pennsylvania Supreme Court has found the provision of non-discriminatory service to be the primary distinction between public utilities and non-public utilities. *See Com. v. Lafferty*, 426 Pa. 541, 550, 233 A.2d 256, 260 (1967) (addressing whether non-PUC regulated contract carriers may qualify for use tax exemptions available for public utility service). Thus, status as a public utility relates to an entity's obligation to provide its services to the public at regulated rates. *See id.* Sunoco Pipeline, as a common carrier regulated by FERC under the ICA, is required to provide non-discriminatory service at approved rates, which is consistent with the Pennsylvania Supreme Court's definition of a public utility. *See id.; see also* Marlette Affidavit, p. 2.

21. Building upon *Lafferty*, the Commonwealth Court developed a four-factor test for "public utility corporation" status under the Pennsylvania Municipalities Planning Code. *WVCH Commc'n, Inc.*, 351 A.2d at 330. According to the court, an entity is a public utility corporation if it must:

- A. Serve all members of the public upon reasonable request;
- B. Charge just and reasonable rates subject to review by a regulatory body;
- C. File tariffs specifying all of its charges; and
- D. Modify or discontinue its service only with the approval of the regulatory agency.

Id. The court did not reach the question of whether a public utility corporation must meet all of the above factors, as the subject entity in that case met none of the four factors. *Id.*

22. As described in the attached Affidavit from Ms. Marlette, FERC's regulation of Sunoco Pipeline meets each of the four factors identified in *WVCH*. Marlette Affidavit, pp. 2-3. Under its ICA authority, FERC requires Sunoco Pipeline to: (1) furnish non-discriminatory service upon reasonable request; (2) charge just and reasonable rates; (3) publish tariffs showing all rates charged; and (4) modify its service only upon 30 days' notice to FERC and subject to FERC's authority to suspend and investigate any proposed changes. Marlette Affidavit, pp. 2-3.

23. As evidenced by *Lafferty* and *WVCH*, the Court's finding that Sunoco Pipeline is not a public utility corporation because it is regulated as a common carrier was in error. FERC's regulation of Sunoco Pipeline as a common carrier under the ICA constitutes public utility regulation under Pennsylvania law.

C. **A Certificate Of Public Convenience Is Not Required To Meet The Definition Of Public Utility Corporation Under Section 1511 Of The BCL.**

24. To the extent that the Court's finding that Sunoco Pipeline is not regulated as a public utility rests on the absence of a FERC Certificate of Public Convenience ("CPC") approving the Pipeline, such an assertion is inconsistent with Pennsylvania law.

25. As described in Ms. Marlette's Affidavit, FERC issues CPCs for natural-gas companies under its NGA authority, but does not issue CPCs for oil and petroleum products pipelines under its ICA authority. Marlette Affidavit, p. 5. Nor does FERC issue a CPC for

electric transmission facilities. The absence of a CPC in no way precludes Sunoco Pipeline from meeting the BCL definition of a public utility corporation.

26. In *National Fuel Gas Supply Corporation v. Kovalchick Corporation*, 2005 WL 3675408 (C.P. Jefferson 2005), the Jefferson County Court of Common Pleas observed that National Fuel possessed a CPC from FERC approving construction of a natural gas transmission line. *Id. at* *27. However, the question before the court was whether National Fuel could exercise eminent domain power under Section 1511 of the BCL to condemn property for two natural gas gathering lines, which were not authorized by the CPC issued by FERC, not subject to siting and construction review under the NGA, and regulated by FERC only as to rate and quality of service issues. *Id.*

27. The *National Fuel* court acknowledged that National Fuel possessed a FERC CPC for the transmission line, but separately concluded that National Fuel qualified as a public utility corporation authorized to condemn property *for the gathering lines* (referenced as G-102 and G-110). *Id. at* *27. The court observed that National could not exercise eminent domain pursuant to any PUC or FERC certificate for the gathering lines (i.e., G-102 and G-110). *Id.* (Emphasis added). Notwithstanding, the court concluded that National could exercise eminent domain under the broad grant of authority bestowed by the BCL. The court reasoned that FERC's regulation of the rates and services of the gathering lines, even without a FERC CPC for gathering lines, still met the standard for "regulation as a public utility" under the BCL. *Id. at* *27; *see also* 15 Pa.C.S. §§ 1103, 1511.

28. The plain language in the BCL further evidences that Sunoco Pipeline's being subject to regulation as a public utility does not require issuance of a CPC. Indeed, had the Legislature intended that a public utility corporation be required to obtain certain PUC approvals relating to oil and petroleum products pipelines, it would have done so, as it expressly did with other particular purposes. For example, the BCL specifically requires a public utility corporation to obtain approval from the PUC when exercising Section 1511 authority to construct "aerial electric" facilities. 15 Pa.C.S. § 1511(c). In essence, a public utility corporation must obtain approval from the PUC prior to *exercising* eminent domain power for certain enumerated purposes. *Id.* For other purposes, such as construction of oil and petroleum products pipeline, the corporation can proceed under Section 1511 without a CPC from FERC and without approval from the PUC. *See id.*

29. Similarly, the FCC does not require common carriers providing domestic interexchange telecommunications to obtain a CPC before commencing service or constructing facilities. 47 C.F.R. § 63.01 (requiring only licensing of non-common carrier radio frequencies and compliance with environmental rules for construction of facilities). As discussed above, the 1990 Committee Comments to the BCL directly reference FCC-regulated interexchange telecommunications providers as public utility corporations, confirming that status as a public utility corporation or "regulation as a public utility" are not limited to entities possessing CPCs from regulators.

30. The same holds true for Sunoco Pipeline. FERC regulates oil and petroleum products pipelines under the ICA, but does not issue CPCs. Marlette Affidavit, p. 5. Like

electric and interexchange telecommunications companies under the FPA and Communications Act, Sunoco Pipeline is still regulated by FERC in other aspects, including its requirement to furnish non-discriminatory service at just and reasonable rates to the public. Marlette Affidavit, pp. 2-3, 5. The absence of a CPC does not affect Sunoco Pipeline's authority to condemn because Section 1511 of the BCL establishes a CPC requirement only to condemn property for construction of aerial electric, telephone, or telegraph facilities. 15 Pa.C.S. § 1511(c).

D. Sunoco Pipeline's interstate pipeline services regulated by the ICA complement Sunoco Pipeline's existing intrastate services regulated by the Pennsylvania PUC.

31. In addition to Sunoco Pipeline's federally regulated petroleum products pipelines, Sunoco Pipeline operates a robust network of intrastate pipelines for which it possesses CPCs issued by the Pennsylvania PUC. *See* Exhibit B. Sunoco Pipeline recently requested authority from the PUC to abandon a segment of intrastate pipeline for service to points west of Montello, and temporarily suspend service on other segments of intrastate pipeline, including from Point Breeze to Mechanicsburg and from Twin Oaks to Mechanicsburg, in order to allow construction of the proposed interstate Pipeline. The PUC granted Sunoco Pipeline's request to abandon a part of its intrastate service, and suspend certain service segments, finding that Sunoco Pipeline demonstrated public benefits for transportation of natural gas liquids and petroleum products. PUC Order at Docket Nos. A-2013-2371789, P-2013-2371775 (August 29, 2013, *as amended* November 14, 2013). Notwithstanding these partial abandonments, Sunoco Pipeline continues to hold CPCs for certain intrastate services through York County, along the same route where the Pipeline may be located.

III. OTHER COURTS HAVE ACKNOWLEDGED THAT SUNOCO PIPELINE HAS EMINENT DOMAIN POWER UNDER THE BCL AND HAS AUTHORITY TO CONDUCT SURVEYS AND TESTS UNDER SECTION 309 OF THE EMINENT DOMAIN CODE

32. Courts in other Pennsylvania counties have acknowledged Sunoco Pipeline's eminent domain authority in the following proceedings:

- A. *In re Cline*, Docket No. GD 13-016606 (Ct. Common Pleas of Allegheny County, December 19, 2013) (granting Sunoco Pipeline's condemnation for the Mariner East pipeline);
- B. *In re Klobucar*, Docket No. 4657 of 2013 (Ct. Common Pleas of Westmoreland County, November 19, 2013) (granting Sunoco Pipeline's condemnation for the Mariner East pipeline);
- C. *Sunoco Pipeline L.P. v. Quest Realty Partnership*, Docket No. 679 of 2013 (Ct. Common Pleas of Westmoreland County, February 22, 2013) (granting Sunoco Pipeline's petition for entry to conduct surveys over land);
- D. *In re Quest Realty Partnership*, Docket No. 3587 of 2013 (Ct. Common Pleas of Westmoreland County, August 2, 2013) (granting Sunoco Pipeline's condemnation for Mariner East pipeline);
- E. *In re Yanko*, Docket No. 5955 of 2013 (Ct. Common Pleas of Westmoreland County, November 22, 2013) (granting Sunoco Pipeline's condemnation for Mariner East pipeline);
- F. *Sunoco Pipeline L.P. v. Michael J. Zima and Laurie J. Zima*, Docket No. 3652 of 2013 (Ct. Common Pleas of Westmoreland County, July 15, 2013) (granting Sunoco Pipeline's petition for entry to conduct surveys over land);
- G. *In re Zima*, Docket No. 4626 of 2013 (Ct. Common Pleas of Westmoreland County, November 19, 2013) (granting Sunoco Pipeline's condemnation for Mariner East pipeline);
- H. *Sunoco Pipeline L.P. v. Holdings, Inc.*, Docket No. 2013-3513 (Ct. Common Pleas of Westmoreland County, June 19, 2013) (granting Sunoco Pipeline's petition for entry to conduct surveys over land).

- I. *Sunoco Pipeline L.P. v. David Squarer and Arella Squarer*, Docket No. 413 of 2014 (Ct. Common Pleas of Westmoreland County, February 28, 2014) (granting Sunoco Pipeline's petition for entry to conduct surveys regarding this Pipeline).

33. No court of common pleas has found that Sunoco Pipeline is not a public utility corporation or lacks the power of eminent domain. Sunoco Pipeline respectfully submits that the Order was a deviation from the rulings of this Court's brethren, and respectfully requests that the Court reconsider its Order.

IV. SUNOCO PIPELINE IS ENTITLED TO A HEARING ON THE ISSUES SET FORTH IN THIS MOTION AND ITS VERIFIED MOTION FOR IMMEDIATE ENTRY PURSUANT TO 26 PA.C.S. § 309

34. As the Court is aware, the issues raised in Sunoco Pipeline's Verified Motion for Immediate Entry Pursuant to 26 Pa.C.S. § 309 and this Motion for Reconsideration constitute issues of first impression for this Court.

35. The issues raised are very important to both Sunoco Pipeline and Respondents. As such, Sunoco Pipeline submits that both parties would benefit from the opportunity to create a complete record.

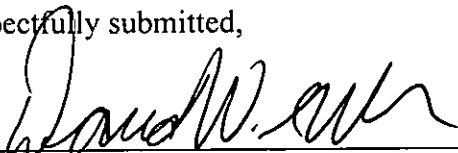
36. Sunoco Pipeline respectfully requests a hearing on the issues set forth in its Verified Motion for Immediate Entry Pursuant to 26 Pa.C.S. § 309 and this Motion for Reconsideration.

37. Pursuant to York County Local Rule 208.2(d), on or about March 10, 2014, counsel for Sunoco Pipeline discussed with Respondents' counsel the filing of this Motion. Respondents' counsel does not concur in the filing of this Motion.

WHEREFORE, Sunoco Pipeline requests that the Court schedule a hearing on the issues as set forth in this Motion for Reconsideration.

Respectfully submitted,

By


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SUNOCO PIPELINE, L.P.,	:	IN THE COURT OF COMMON PLEAS
Movant	:	YORK COUNTY, PENNSYLVANIA
	:	
	:	No.: 2013-SU-004518-05
	:	THE HONORABLE STEPHEN P. LINEBAUGH
v.	:	
	:	
WILLIAM C. LOPER AND JODI LOPER	:	
f/k/a JODI WOLFE,	:	VERIFIED MOTION FOR
Respondents	:	IMMEDIATE RIGHT OF ENTRY

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ANSWER TO MOTION FOR RECONSIDERATION
SUBMITTED BY WILLIAM C. LOPER AND JODI LOPER
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SUNOCO PIPELINE, L.P., Movant	:	IN THE COURT OF COMMON PLEAS
	:	YORK COUNTY, PENNSYLVANIA
	:	
	:	No.: 2013-SU-004518-05
	:	THE HONORABLE STEPHEN P. LINEBAUGH
v.	:	
	:	
WILLIAM C. LOPER AND JODI LOPER f/k/a JODI WOLFE, Respondents	:	VERIFIED MOTION FOR IMMEDIATE RIGHT OF ENTRY

ANSWER TO MOTION FOR RECONSIDERATION
SUBMITTED BY WILLIAM C. LOPER AND JODI LOPER
f/k/a JODI WOLFE

William C. Loper and Jodi Loper f/k/a Jodi Wolfe (“Lopers”) by and through their undersigned counsel, hereby submit this Answer to Motion for Reconsideration following the February 25, 2014, Order of Court denying Sunoco Pipeline’s Verified Motion for Immediate Right of Entry pursuant to 26 Pa. C.S.A. §309. The Lopers respond as follows:

This Answer will proceed with an overall response before proceeding with specific answers to the allegations. The analysis as contained in the February 24, 2014, Opinion of President Judge Stephen P. Linebaugh is spot on in its analysis of Sunoco Pipeline being regulated by the Interstate Commerce Act as a common carrier. The Opinion succinctly reviewed the Sunoco Pipeline repeated representations in its pleadings, oral argument and brief, that it is regulated by the Federal Energy Regulatory Commission ("FERC") via the Interstate Commerce Act with Sunoco Pipeline regulated as a common carrier. While that Opinion relied mainly upon the repeated Sunoco Pipeline admissions, that reliance is entirely consistent with the specific statute describing the Interstate Commerce Act regulation of the common carrier with no reference whatsoever in that Act to any resolution of Sunoco Pipeline as a public utility corporation.

Essentially Sunoco Pipeline initially lost because it was a common carrier. Sunoco Pipeline now attempts to evade that determination by asserting that it is regulated like a public utility corporation. Even if that is so, that does nothing to compromise the specific statutory regulation of Sunoco Pipeline as a common carrier under the Interstate Commerce Act.

The Interstate Commerce Act as attached to the Sunoco Pipeline Motion for Reconsideration is as explicit as it could be in its statement that pipeline companies, such as Sunoco Pipeline, are regulated as a common carrier. Specifically the Interstate Commerce Act starts with the first sentence beginning with: "The provisions of this chapter shall apply to common carriers engaged in - . . ." 49 CFR §1(1). The next page includes the 49 CFR §1(3), Definition (a) as ". . . the term 'common carrier' as used in this chapter shall include all pipe-line

companies . . .” Accordingly, the applicable law is explicit. Sunoco Pipeline is a pipeline company regulated as a common carrier. This is in direct conflict with the Sunoco Pipeline assertion of regulation by FERC as a public utility corporation as that term is defined in the Pennsylvania Business Corporation Law at 15 Pa. C.S.A. §1103.

The Sunoco submission of a statement by a private attorney “expert” that the FERC regulation, as admitted to be defined as a “common carrier,” is like public utility corporation regulation does nothing to alter the controlling statutory law. No witness opinion can alter the explicit statute that defines that pipeline companies are regulated as common carriers.

When such law is clear and explicit, the legislative language controls and the matter does not progress to any consideration of legislative intent. 1 Pa. C.S.A. §1921. Where a statute is effective and its words are clear, courts are precluded from holding otherwise. Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Scioli-Turco Post 593, VFW, 668 A.2d 1207, Pa. Commwlth. Ct. 1995, appeal denied, 679 A.2d 231 (Pa. 1995).

If the matter were to progress to legislative intent, legislative intent is fully consistent with the statutes in that they consistently convey the intent not to convey eminent domain power for the common carrier service proposed herein.

Next, Sunoco misleadingly suggests that the denial of survey rights was a deviation from court rulings at Sunoco cited in cases. The eighth case could not be found and may have been cited in error. All of the other cases were uncontested. In truth, no court has approved any contest of this asserted eminent domain power and no court could because of the absence of the legislative grant of the strictly construed eminent domain power. Also, the additional three cases

cited in the Sunoco Motion for Reconsideration all cut in favor or support of the well grounded prior Opinion and Order of The Honorable Stephen P. Linebaugh.

SPECIFIC ANSWERS

I. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND

1. The Verified Motion for Right of Entry per 26 Pa. C.S. §309 is admitted. The correction citation would be to 26 Pa. C.S.A. §309.

2. It is admitted that the February 24, 2014, Order determined that Sunoco Pipeline was regulated by FERC as a common carrier, not as a public utility corporation.

3. The asserted reasons for reconsideration are acknowledged as assertions. They are denied and strict proof is demanded.

II. ANALYSIS

4. Admitted.

A. The Terms Common Carrier and Public Utility are Not Mutually Exclusive

5. Denied. The applicable and correct determination was: "As Plaintiff repeatedly argued, it is regulated by FERC pursuant the Interstate Commerce Act and not the Natural Gas Act, as a common carrier, and not as a public utility. It therefore does not fall within the definition of a public utility corporation entitled to condemn property."

6. Denied. Strict proof is demanded. The law does not define "public utility" to include motor vehicle common carriers. More specifically the term "public utility" include corporations operating in this Commonwealth, equipment or facilities for 66 Pa. C.S.A.

§102(1)(iii) "Transporting passengers or property as a common carrier." The provision specifically refers to operations in this Commonwealth rather than between states as with this Sunoco pipeline.

7. Denied. Strict proof is demanded. The Interstate Commerce Act, 49 C.F.R §1(1) and (3) define such pipeline companies as common carriers and specifically fails to define them as public utility corporations. Also, the Natural Gas Act provided eminent domain power to natural gas companies, not to public utilities. 15 U.S.C. §717(a).

8. Denied. Strict proof is demanded. Under the cited Municipalities Planning Code and the cited case of Public Utility Commission found that WVCH Communications was not a public utility corporation and that therefore the PUC lacked jurisdiction. As herein, the PUC lacks jurisdiction. PUC jurisdiction over this interstate pipeline is specifically prohibited by the Public Utility Code at 66 Pa. C.S.A. §104. Even if Sunoco Pipeline is viewed as a public utility corporation, it may not obtain any eminent domain power under the Business Corporation Law because it does not possess a certificate of public convenience as required by 66 Pa. C.S.A. §1104.

9. Denied. Strict proof is demanded. The statements of a purported expert amount to the statement that Sunoco Pipeline is regulated by the Interstate Commerce Act as a common carrier and that resolution is similar to regulation of the Public Utility Corporation. Any such similarities do nothing to change the explicit statute of regulation of the Interstate Commerce Act of pipeline companies as a common carrier. Furthermore, the Natural Gas Act regulation of natural gas companies with eminent domain power does nothing to provide eminent domain

power to a common carrier. Nor does the Natural Gas Act provide eminent domain power to the public utility corporations. If attorney Cynthia A. Marlette testified fully consistent with her statement, the statement would do nothing to change the explicit statutory regulation of Sunoco Pipeline as a pipeline company regulated as a common carrier under the Interstate Commerce Act.

10. Denied. Strict proof is demanded. The statement is a legal conclusion in conflict with the explicit statute.

B. **Sunoco Pipeline Qualifies as a Public Utility Corporation Under Pennsylvania Law**

11. Denied. Strict proof is demanded. The Order is entirely correct and in accordance with the representations of Sunoco and the controlling Interstate Commerce Act. The assertion that §1103 definition of “public utility corporation” explicitly includes common carriers is denied. It does include the statement that if the corporation is a public utility corporation (15 Pa. C.S.A. §1511(a)), that public utility corporation may condemn for certain purposes related to common carrier services, such common carrier services are limited to specific means, which do not include any pipelines 15 Pa. C.S.A. §1511(a)(1). The provisions of 15 Pa. C.S.A. §1511 do nothing to transform a common carrier into a public utility corporation. Also 15 Pa. C.S.A. §1103 “Public utility corporation” does nothing whatsoever to include common carriers, nor even reference common carriers, within the scope of the definition.

12. Denied. Strict proof is demanded. In truth 15 Pa. C.S.A. §1511 (a)(1) states that when a company is a public utility corporation it could use eminent domain for the purposes of

those of a common carrier for certain specified "means." None of those means refer to pipeline. Thus, the cited law provides no authority whatsoever for a public utility categorization or a common carrier use via means of a pipeline.

13. Denied. Strict proof is demanded. As reviewed in the answer to number 11, if the established public utility corporation attempts to use eminent domain for common carrier purposes, it could only do so via the enumerated means which specifically exclude pipelines. The statute is clear and committee comments are unnecessary for any interpretation of this subsection. Also, committee comments convey no reference whatsoever of any intent to broadly include common carriers as public utility corporations. Also, the case cited by Sunoco Pipeline, In re Columbia Cnty, is an unpublished case with the specific note is that the opinion shall not be cited. If the case is given any consideration, the Commonwealth Court would recognize that it exemplifies that eminent domain is authorized only when it is very specifically authorized, as done in that case with §1999(c) County Code, with the full consideration of the requirement of a strict construction of any grant of eminent domain power.

14. Denied. Strict proof is demanded. The 1990 comment recognizing the potential of deregulation of interexchange service is irrelevant and does nothing to support any scope of authority of eminent domain.

15. Denied. Strict proof is demanded. Any reference to the interexchange services is regulated by the Federal Communication Commission or the Telecommunications Act of 1996 is entirely irrelevant to the Interstate Commerce Act regulation of pipelines as common carriers.

16. Denied. Strict proof is demanded. 15 Pa. C.S.A. §1103 1990 Committee Comments begin with a reference to the definition of “credit unions” and have nothing at all to do with the relevant definitions.

17. Specifically denied. Strict proof is demanded.

18. Denied. Strict proof is demanded. Sunoco Pipeline may hold a Pennsylvania Public Utility Corporation Certificate of Public Convenience authorizing shipments by pipeline in Pennsylvania, as asserted “in Pennsylvania.” Such certifications are distinct and entirely different from the regulation of interstate pipelines by FERC. Such interstate pipeline regulation is specifically prohibited from Pennsylvania PUC regulations at 66 Pa. C.S.A. §1104. This proposed pipeline purpose may not be regulated by the Pennsylvania Public Utility Commission. Also, it is only federally regulated as a pipe-line regulated as a common carrier under the Interstate Commerce Act.

19. Specifically denied. Strict proof is demanded. As previously reviewed, this pipeline activity is regulated by FERC via the Interstate Commerce Act which regulates pipelines as a common carrier under the Interstate Commerce Act. The cited Pennsylvania law authority is simply nonexistent. No Pennsylvania law exists to reject Interstate Commerce Act regulations of pipelines as common carriers and only as common carriers.

20. Denied. Strict proof is demanded. The Sunoco Pipeline cited case of Lafferty, posed the sole question of whether a contract carrier, which is not a public utility, but which renders service identical to that rendered by a common carrier, it entitled to the exclusion from

taxation afforded to those engaged in a “public utility service.” The answer was no. The entire inapplicable analysis was that of the Selective Sales and Use Tax Act, 223 A.2d at 257.

21. Denied. Strict proof is demanded. The Sunoco cited case WVCH, did not establish any four part test. It merely found that a communications company was not a public utility corporation and therefore the PUC lacked jurisdiction. The same applies here. Sunoco Pipeline is not a public utility corporation, therefore the PUC lacks jurisdiction. Furthermore, the jurisdiction over such a proposed interstate commerce pipeline is prohibited via 66 Pa. C.S.A. §1104.

22. Denied. Strict proof is demanded. The affidavit of Ms. Marlette must be rejected as being in conflict with the explicit crystal clear language of the Interstate Commerce Act defining the pipe-line companies as a common carrier. See also the answer to Number 21.

23. Specifically denied. Strict proof is demanded. See the answers to Numbers 21 and 22.

C. A Certificate of Public Convenience is Not Required to Meet the Definition of Public Utility Corporation Under Section 1511 of the BCL.

24. Specifically denied. Strict proof is demanded. The Court’s prior ruling did not rely upon the absence of a FERC Certificate of Public Convenience and Necessity. Nevertheless, the absence of a Certificate of Public Convenience precludes the asserted eminent domain rights. 66 Pa. C.S.A. §1104.

25. Specifically denied. Strict proof is demanded. It is acknowledged that FERC may issue to a natural gas company, a Certificate of Public Convenience and Necessity for

transportation of natural gas in interstate commerce. Also, the absence of a Certificate of Public Convenience expressly precludes Sunoco Pipeline from obtaining eminent domain power via the Business Corporations Law.

26. Specifically denied. Strict proof is demanded. Natural Fuel Gas granted eminent domain under Business Corporation Law only because it considered a natural gas company, with a FERC issued Certificate of Public Convenience, to transport natural gas in interstate commerce. By contrast Sunoco seeks to have a common carrier transport other substances without a Certificate of Public Convenience and Necessity, across state lines. If anything, Natural Fuel Gas clarifies the very unique situation of Pennsylvania Business Corporations Law providing eminent domain power only when a natural gas company with a Certificate of Public Convenience and Necessity is making use of pipelines in interstate commerce.

27. Specifically denied. Strict proof is demanded. See the answer to Number 26.

28. Specifically denied. Strict proof is demanded. Sunoco Pipeline is regulated as a common carrier by FERC, an agency of the United States. As such, it does not meet the requirement of 15 Pa. C.S.A. §1103 of regulation as a public utility, by an agency of the United States. Also, the reference to 15 Pa. C.S.A. §1511(c) specifying some requirements for electric, intrastate aerial telephone or intrastate aerial telegraph facilities, does nothing to authorize a pipeline company to obtain eminent domain power.

29. Specifically denied. Strict proof is demanded. Also, a Federal Communication Commission regulation of interexchange communications bears no relevance to the pipe-line companies specifically defined as common carriers per the Interstate Commerce Act.

30. It is acknowledged that FERC regulates oil and petroleum pipelines under the Interstate Commerce Act. If it does not issue a Certificate of Public Convenience, as asserted by Sunoco, Sunoco may not obtain eminent domain power under the Pennsylvania Business Corporations Law and because the Certificate of Public Convenience and Necessity is required by 66 Pa C.S.A. §1104. The absence of a Certificate of Public Convenience and Necessity further defines Sunoco Pipeline as not having the power of eminent domain.

D. Sunoco Pipeline's Interstate Pipeline Services Regulated by the ICA Complement Sunoco Pipeline's Existing Intrastate Services Regulated by the Pennsylvania PUC.

31. Denied. Strict proof is demanded. A Sunoco Pipeline operation of pipelines within the state are entirely irrelevant to this proposal of an interstate pipeline as admittedly regulated by the Interstate Commerce Act. The Interstate Commerce Act defines the pipeline regulation as regulation of a common carrier. The Interstate Commerce Act and related law contains nothing which would define such a pipeline company as being a public utility corporation. No legal authority allows Sunoco Pipeline to overcome the initial hurdle of the Pennsylvania Business Corporations Law definition of a public utility corporation to be regulated "as a public utility." 15 Pa. C.S.A. §1103 "Public utility corporation".

III. OTHER COURTS HAVE ACKNOWLEDGED THAT SUNOCO PIPELINE HAS EMINENT DOMAIN POWER UNDER THE BCL AND HAS AUTHORITY TO CONDUCT SURVEYS AND TESTS UNDER SECTION 309 OF THE EMINENT DOMAIN CODE

32. Specifically denied. Strict proof is demanded. The allegations of Number 31 and 32 assert the prior Order was a deviation from the rulings of other courts. Closer analysis reveals that those cases provide no authority whatsoever for the asserted eminent domain power. The case listed at case H could not be found. That may have been identified in error. In all of the other cases, the asserted eminent domain power was entirely uncontested. A few cases involve the entry of appearance of an attorney, but none of them involved any sort of answer or contrary evidence on the eminent domain issue. In truth Sunoco Pipeline can cite to no authority providing any analysis of the issues properly and previously reviewed by Judge Lindbaugh's Opinion and Order. The docket entries are attached as Appendix "A."

33. See answer Number 32.

IV. SUNOCO PIPELINE IS ENTITLED TO A HEARING ON THE ISSUES SET FORTH IN THIS MOTION AND ITS VERIFIED MOTION FOR IMMEDIATE ENTRY PURSUANT TO 26 PA. C.S. (SIC) §309

34. Admitted.

35. The asserted importance is admitted. It is denied that other parties would benefit from the opportunity to create an evidentiary record. No testimony or facts could negate the significance of the Interstate Commerce Act definition of the pipeline company as a common carrier, rather than a public utility corporation.

36. The request for a hearing is acknowledged. An evidentiary hearing would be entirely irrelevant to the explicitly controlling law which precludes eminent domain power and precludes the survey rights.

37. Admitted.

WHEREFORE, the Respondent property owners, the Lopers, respectfully request an Order denying the Motion for Reconsideration with reaffirmation of the conclusion following the alternative argument of Sunoco Pipeline.

Respectfully submitted,

LAVERY FAHERTY PATTERSON

DATE: March 18, 2014

By: _____



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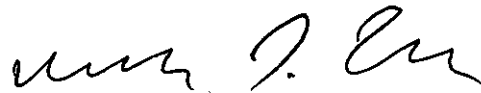
CERTIFICATE OF SERVICE

I, Michael F. Faherty, Esquire, with the law firm of Lavery Faherty Patterson, do hereby certify that on this 18th day of March, 2014, I served a true and correct copy of the foregoing Answer to Motion for Reconsideration, **by hand delivery**, to the following:

Judge Stephen P. Linebaugh
York County Courthouse
York County Judicial Center
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York, PA 17401
Via Hand Delivery

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