Rosemary Chiavetta, Secretary
PA Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

RE: Reply to Sunoco Pipeline, L.P.'s Exceptions to Initial Decision: Docket Nos. P-2014-2411941, 2411942, 2411943, 2411944, 2411945, 2411946, 2411948, 2411950, 2411951, 2411952, 2411953, 2411954, 2411956, 2411957, 2411958, 2411960, 2411961, 2411963, 2411964, 2411965, 2411966, 2411967, 2411968, 2411971, 2411972, 2411974, 2411975, 2411976, 2411977, 2411979, 2411980.

Dear Secretary Chiavetta,

Enclosed please find for filing pursuant to 52 Pa. Code § 5.535(a) an original and a copy of the Delaware Riverkeeper Network's Reply to Sunoco Pipeline, L.P.'s Exceptions to Initial Decision in the above-referenced matters, along with a Certificate of Service to the parties of record.

Dated: August 29, 2014

/s/ Aaron Stemplewicz

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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.

DELAWARE RIVERKEEPER NETWORK'S REPLY TO EXCEPTIONS OF SUNOCO PIPELINE, L.P. TO INITIAL DECISION

Dated: August 29, 2014

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. REPLIES TO EXCEPTIONS.....2

Reply to Exception No. 1 - The Initial Decision correctly concluded that Sunoco's Mariner East 1 Project fails to satisfy the definition of "public utility" pursuant to the Public Utility Code 2

Reply to Exception No. 2 - The Initial Decision correctly concluded that Sunoco's Mariner East 1 Project fails to satisfy the definition of "public utility corporation" pursuant to the Business Corporation Law because it is regulated as a common carrier by the Federal Energy Regulatory Commission 6

Reply to Exception No. 4 – DRN's remaining Preliminary Objections also sufficiently demonstrate that Sunoco's Petitions must be dismissed or denied 8

III. CONCLUSION 11

I. INTRODUCTION

1. Pursuant to 52 Pa. Code § 5.535(a) the Delaware Riverkeeper Network and the Delaware Riverkeeper, Maya van Rossum ("DRN"), submit the following Reply to Exceptions of Sunoco Pipeline, L.P. to Initial Decision with regard to Sunoco Pipeline L.P.'s ("Sunoco") Amended 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"). Despite forty additional pages of briefing, Sunoco merely rehashes the same failed arguments that were squarely considered and rightly rejected by Administrative Law Judges David A. Salapa and Elizabeth H. Barnes in the Initial Decision. DRN requests that the Pennsylvania Public Utility Commission ("Commission") adopt the well-reasoned analysis of the Administrative Law Judges and deny and or dismiss Sunoco's Amended Petitions.

2. Sunoco's Amended Petitions and Exceptions represent nothing more than a brazen attempt to circumvent the Pennsylvania Public Utility Commission's regulatory regime to avoid potential delays and extra costs in constructing and operating its proposed Project. What Sunoco asks in return is for every single township the Project passes through to sacrifice their only mode of local control to fairly represent and protect the interests of its constituents.

3. Sunoco's Exceptions provide nothing new to demonstrate that it can meet the statutory or legal standards for a classification as a "public utility" service or a "public utility corporation" and, therefore, be exempt from 619 of the Pennsylvania Municipalities Planning Code (53 P.S. § 10619). Furthermore, Sunoco's Amended Petitions must also be dismissed or denied because the situation of structures is not reasonably necessary for the convenience or welfare of the public, and a grant of the Amended Petitions is constitutionally barred by Article I Section 27 of the Pennsylvania Constitution.

II. REPLIES TO EXCEPTIONS

Reply to Exception No. 1: The Initial Decision correctly concluded that Sunoco's Mariner East 1 Project fails to satisfy the definition of "public utility" pursuant to the Public Utility Code.

4. The Administrative Law Judges' ("ALJ") Conclusion of Law number 1 was correctly decided, which found that the proposed Mariner East 1 Project ("Project") did not constitute a "public utility" service as defined by the Public Utility Code. 66 Pa.C.S. § 102.

5. The ALJs rightly found that Sunoco failed to show that the transportation of Natural Gas Liquids ("NGLs") would be "for the public" in Pennsylvania by not specifying who would be the end-user customer. Initial Decision, at 21. Sunoco admits that it has no control over who the end-user will be, as it cannot dictate the markets to which the product will move. Sunoco's Exceptions, at 19. Instead, the final end-user will be wholly and entirely determined by "the operation of the free market." *Id*. at 19. As such, propane could as easily end up abroad as it would in the tanks of Pennsylvania consumers.

6. Additionally, Sunoco points to no authority – nor can it – where a service was considered a public utility despite not specifically identifing what members of the public would be the end-user customer. Rather, the best Sunoco can offer is haphazard speculation on what may, or may not, happen with the final distribution of the propane it wishes to transport. Sunoco's Exceptions at 19-20.

7. Moreover, Sunoco admits in its Exceptions that not only does the Twin Oaks facility "operate in conjunction" with the Marcus Hook Industrial Complex, the Twin Oaks facility is actually "part of" the Marcus Hook Industrial Complex. Sunoco's Exceptions, at 13. This provides further evidence that the final end-user will be nearly impossible to define, and that the

propane could easily be stored at the Twin Oaks terminal for later processing and exportation from Marcus Hook.

8. Sunoco is therefore reduced to asserting the unfounded argument that the Project meets the definition of a "public utility" based upon the service being provided to a narrow class of potential shippers. Sunoco takes great pains to contort *Drexelbrook Associates v. Pennsylvania Public Utility Commission*, in such a way so as to support this argument. Sunoco's Exceptions, at 16-17. However, Sunoco cannot escape the fact that nothing in *Drexelbrook*, or any of its progeny, supports the contention that a pipeline company who has a limited number of highly specialized clients and no defined end-use consumers, may transform itself into a public utility service by fragmenting an extremely small portion of its capacity from interstate to intrastate pipeline transportation. Sunoco's bald manipulation of its project parameters in order to shoe-horn Mariner East 1 to meet public utility status must be rejected by the Commission.

9. Sunoco contends that it is a public utility because its services will be provided "according to uniform rates and conditions, as set forth in tariffs," and Sunoco will have no "ability to confine service to particular individuals." Sunoco Exceptions, at 19. However, the Pennsylvania Supreme Court rejected the same exact argument in *Drexelbrook* that Sunoco now offers here. Indeed, Drexelbrook Associates contended that it was a public utility because it did not "propose to reserve the right to select its customers, but would obligate itself under separate and uniform contracts to furnish service to all [users], present and future, in its development." *Drexelbrook Associates v. Pa. Pub. Util. Comm'n*, 212 A.2d 237, 239 (Pa. 1965).

10. Ultimately, the Pennsylvania Supreme Court clarified that Drexelbrook Associates was not a public utility because "the only persons who would be entitled to and who would receive service are those who have entered into or will enter into a [contractual] relationship with

appellant." *Id.* at 240. Sunoco has admitted to entering into four Transportation Services Agreements with three shippers for the Project. As such, Sunoco has retained the discretion to select the customers it sees fit based on those customers meeting key terms and conditions in its contracts. Sunoco failed in their initial Petitions, the Amended Petitions, and again in the Exceptions to the Initial Decision to make any statement or point to any source of authority to suggest that if potential shippers fail to meet any of the terms and conditions they may still qualify for service.

11. Sunoco's business model is the prototypical example of the exception to public utility service articulated in the third criterion of the Commission's Policy Statement at 52 Pa. Code 69.1401(c)(3), which is patterned on the Pennsylvania Supreme Court's holding in *Drexelbrook*. Tellingly, Sunoco conspicuously failed to dispute, discuss, or even mention the Commission's policy statement, despite expending considerable effort disputing the ALJs' Conclusion of Law number 1.

12. The policy statement requires an examination as to whether the service will be provided "to a defined, privileged and limited group when the provider reserves its right to select its customer by contractual arrangement so that no one among the public outside of the selected group is privilege to demand service." *Id*. The primary criterion therefore is an indiscriminant holding out to the indefinite public to provide service to the extent of one's capacity to do so. The Commission can simply not accept promises of holding to the public when the proposed method does not bear out the assertion. Here, the intended method of operation allows Sunoco to select its privileged customers. That is not a public utility service.

13. Additionally, even if Sunoco were able to adequately specify the public character of its small throughput of NGLs for the partitioned portion of the Project, the overwhelming private

character of the Mariner East 1 as a whole demonstrates that Sunoco cannot be considered a public utility. The ALJs rightly identified that the primary purpose of the Project is to provide transportation service to the Marcus Hook Industrial Complex, as demonstrated by the fact that roughly 93% of the Project's capacity is solely dedicated to serving Marcus Hook. DRN's Preliminary Objections, at 17. Sunoco concedes that the Mariner East Project would not be viable but for the throughput to the Marcus Hook Industrial Complex. Therefore, the overwhelming nature of the service being provided by the Project is wholly and indisputably private, and by definition, not open to the use and service of all members of the public who may require it. Sunoco does not even attempt to contend that the portion of the project serving the Marcus Hook Industrial Complex lends itself to qualifying the Project as a public utility.

14. Curiously, Sunoco cites *Application of Laser Northeast Gathering Company, LLC* for the proposition that Sunoco's Project is a "public utility" service. Sunoco's Exceptions, at 23. However, Sunoco fails to mention that Laser withdrew its Application to the Commission and is currently operating as a *private pipeline* as opposed to a public utility pipeline. To the extent that *Application of Laser Northeast Gathering Company, LLC* provides any precedential value, it is that Sunoco's proposed Project *must* be found to be a private pipeline outside the jurisdiction of the Commission.[1] Any other finding would be squarely at odds with the way in which Laser and a significant number of other pipelines in Pennsylvania are currently being regulated by the Commission, and would require sweeping changes to the regulatory landscape.

15. Sunoco's Exceptions offer nothing new that can alter the Commission's analysis of the Amended Petitions. As such, the Commission should accept the ALJs' Conclusion of Law number 1 and dismiss or deny Sunoco's Petitions.

[1] *See*, http://www.puc.state.pa.us//pcdocs/1145772.pdf

Reply to Exception No. 2: The Initial Decision correctly concluded that Sunoco's Mariner East 1 Project fails to satisfy the definition of "public utility corporation" pursuant to the Business Corporation Law because it is regulated as a common carrier by the Federal Energy Regulatory Commission.

16. The Administrative Law Judges' Conclusion of Law number 2 was also correctly decided, which found that the proposed Mariner East 1 Project did not constitute a "public utility corporation" as defined by the Business Corporation Law ("BCL"). 15 Pa.C.S. § 1103.

17. Sunoco is regulated by the Federal Regulatory Energy Commission ("FERC") as a common carrier for the purposes of its Project, and therefore, Sunoco does not meet the standard of a public utility corporation pursuant to the MPC. Sunoco points to no judicial or administrative precedent supporting the proposition that a pipeline company regulated by FERC as a common carrier for the interstate transportation NGLs was also classified as public utility corporation pursuant to the MPC. Indeed, such a case does not exist.

18. The term "public utility corporation" 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. As stated in DRN's Preliminary Objections, Sunoco is regulated by FERC as a *common carrier* in the context of its Mariner East Project, pursuant to the Interstate Commerce Act ("ICA"). Simply put, the ICA regulates Sunoco as a common carrier, not a public utility, which even Sunoco directly admits. DRN's Preliminary Objections, at 12-13.

19. The ALJs rightly cite a recent Court of Common Pleas of York County case that Sunoco is not a public utility corporation within the meaning of the BCL. Initial Decision, at 20. There, the court rejected whole-sale Sunoco's argument that it met the definition of a "public utility corporation" within the meaning of the BCL. The court found that because Sunoco was regulated as a common carrier by FERC, it therefore was not entitled to eminent domain powers. *Id*.

20. Sunoco theorizes that its provision of both intrastate and interstate service subjects it to both FERC regulation as a common carrier and Commission regulation as a public utility. Sunoco's Exceptions, at 31. Sunoco contends that the *Loper* decision is inapposite because it occurred before Sunoco offered its intrastate service, and that regulation by FERC and the Commission is not mutually exclusive. Sunoco's Exceptions, at 26-27.

21. However, Sunoco egregiously fails to cite, mention, or even attempt to distinguish case law that directly repudiates its fragile legal theory. In *National Fuel Gas Supply Corporation v. Kovalchick Corporation*, the court held that 15 Pa. C.S. § 1103 "address[es] public utility corporations as *entire entities* and ask[s] whether the corporations are regulated by an agency of the United States." *Kovalchick*, 2005 WL 3675408, *fn. 4 (Pa. Com. Pl., Sept. 15, 2005) (emphasis added). Just as in *Kovalchick*, Sunoco is regulated here as an *entire entity* by FERC, and therefore Sunoco's contention that both FERC and the Public Utility Commission has jurisdiction over the Project is meritless.

22. Furthermore, Sunoco cannot point to a single example which provides the specific outcome it requests here. And for good reason, Sunoco's Amended Petitions are a barefaced attempt to fragment its Project in order to manipulate the way in which it is classified and regulated by the Commission. DRN's Preliminary Objections, at 8-11. It is plainly obvious that

when Sunoco's initial legal theory met resistance, and was ultimately rejected in a court of law, it changed not only the law firm that represented it, but also its legal theory. An approval of Sunoco's artificial segmentation of its Project will result in a cavalcade of applications to the Commission where pipeline companies attempt to evade local zoning laws by partitioning their projects to add small quantities of intrastate service, just as Sunoco has done in the instant matter. Despite submitting forty pages of additional argument to the Commission, Sunoco has offered no answer for this outcome.

23. Sunoco also complains that "if a pipeline service operator is precluded from public utility status simply because it is also operated as a common carrier under federal law, the operator could never provide both interstate and intrastate service." Sunoco's Exceptions, at 27-28. Here, Sunoco's hyperbolic rhetoric overstates its predicament, as a dismissal of Sunoco's petitions would in no way prevent Sunoco from providing both interstate and intrastate service; rather, such a ruling would only prevent Sunoco from *dodging local zoning rules* in the implementation of its proposed services.

Reply to Exception No. 4: DRN's remaining Preliminary Objections also sufficiently demonstrate that Sunoco's Petitions must be dismissed or denied.

24. Sunoco's Amended Petitions must also be dismissed or denied because the situation of structures is not reasonably necessary for the convenience or welfare of the public, and the a grant of the Amended Petitions is constitutionally barred by Article I Section 27 of the Pennsylvania Constitution.

25. The situation of the buildings for the Project are not "reasonably necessary for the convenience or welfare of the public." DRN Preliminary Objections, at 20-25. Sunoco suggests that the Commission is only empowered to decide if *the site* is reasonable necessity for the benefit of the public; yet, at the same time, Sunoco also contends that the Commission's 703(g)

Opinion and Order supports a finding that the project *as a whole* may result in some public benefits and that therefore the issue is moot. Sunoco's Exceptions, at 34-35. Sunoco's quizzically contradictory arguments aside, Sunoco's Amended Petitions fail whichever way they are reviewed.

26. To the extent the Commission decides to limit its evaluation only to whether the *sites* of the valve control and pump stations were appropriate and in the public interest, the Commission must deny or dismiss Sunoco's Amended Petitions. Sunoco states that Exhibit E to the Amended Petitions "contains a graph demonstrating that the location of the pump stations are based on where the amount of fluid energy is dropping below sub-optimal levels." Sunoco entirely relies on this graph to demonstrate that the siting of the pumping stations is *necessary*. Amended Petitions, at 13. Sunoco admits that "the optimal location of the pump stations w[ere] based on the *entire capacity* of the Mariner East Project." Sunoco's Answer to DRN's Preliminary Objections, at 17 (emphasis added). Sunoco has also made clear through its withdrawal of its initial Petitions that it is now applying for an exemption based solely upon the introduction of intrastate service.

27. However, if Sunoco were basing the *siting* of the pump stations on the production profile of its segmented intrastate transportation throughput, the physical location and number of pump stations would be radically different from what is proposed in Exhibit E. Simply stated, the siting for the pump stations is inappropriate as they are not reasonable or necessary for the production of intrastate service.

28. Furthermore, to the extent the Commission reviews the Project as a whole to determine whether it is "reasonably necessary for the convenience or welfare of the public," the Commission must also dismiss or deny the Amended Petitions. Sunoco contends that the

Commission's 703(g) Opinion and Order, which suggests that the Project may result in public benefits, renders DRN's Preliminary Objections moot. Sunoco's Exceptions, at 34-35.

29. However, in this context, the question to be reviewed by the Commission is not whether the project will confer some benefits to the general public; rather, the Commission must determine whether Sunoco's interests in avoiding potential delays and extra costs resulting from the adhering to the zoning process outweighs the public's interest in applying those procedures.

30. The public has a well-established concrete and particularized interest in local zoning as made clear in *Robinson Township, Delaware Riverkeeper Network, et al v. Commonwealth of Pennsylvania, et al*. DRN's Preliminary Objections, at 22-25. The proposed Project can be constructed and operated absent an exemption, therefore, to the extent the project is viewed as a whole it must be viewed in the framework of balancing the public's interests in retaining some modicum of control through local zoning, against Sunoco's interest in eluding some extra costs and delays. Such a balancing can only be found in favor of the public's interest in local control. DRN's Preliminary Objections, at 20-25.

31. Lastly, Sunoco contends that the Pennsylvania Supreme Court's decision in *Robinson Township, Delaware Riverkeeper*, does not constitutionally bar the Amended Petitions from being granted because the MPC requires the Commission to make an individualized finding that the siting is for the convenience and welfare of the public before local zoning regulation is trumped. Sunoco's Exceptions, at 36-37. However, the 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 901, 920-921 (Pa. Dec. 19, 2013) ("a political subdivision has a substantial, direct, and immediate interest in protecting the environment and the quality of life within its borders"). Specifically, 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 and operation, such as the construction proposed here by Sunoco.

32. A finding that *the siting of the buildings* (or the project as a whole) is reasonably necessary for the convenience and welfare of the public, which would result in the displacement of all local development guidelines and permit oil and gas infrastructure development and operation in every type of zoning district, runs afoul of both the holding in *Robinson Township, Delaware Riverkeeper*, and Article I Section 27 of the Pennsylvania Constitution. DRN's Preliminary Objections, at 17-20. As such, Sunoco's Amended Petitions are also constitutionally barred.

III. CONCLUSION

33. In conclusion, the ALJs' Initial Decision correctly dismissed Sunoco's Amended Petitions by concluding that Sunoco failed to meet the standard of both a "public utility" service, and a "public utility corporation." Furthermore, even if Sunoco could meet these standards, which they cannot, Sunoco's Amended Petitions still fail as they are not reasonably necessary for the welfare of the public and are also constitutionally barred.

34. For the reasons stated forthwith, the Delaware Riverkeeper Network and the Delaware Riverkeeper respectfully request that the Commission adopt the ALJs' well-reasoned conclusions of law and dismiss or deny each of Sunoco's Amended Petitions.

Dated: August 29, 2014

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 Reply to Sunoco's Exceptions 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: August 29, 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 REPLY TO SUNOCO'S EXCEPTIONS TO INITIAL DECISION were served upon the following on August 29, 2014, pursuant to the requirements of 52 Pa. Code § 1.54(b)(3) (relating to service by a participant):

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