**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Wilmer Baker :

:

v. :  C-2018-3004294

:

Sunoco Pipeline, L.P. :

**ORDER DENYING PRELIMINARY OBJECTIONS**

On August 10, 2018, Wilmer Jay Baker (Complainant) filed a complaint with the Commission against Sunoco Pipeline, L.P. (Sunoco or Respondent). Complainant avers he attempted to speak to a Sunoco representative about his complaint at a township meeting on July 10, 2018, but Sunoco cancelled attending the meeting one hour before it began. Complainant avers he resides within 1,000 feet of the Mariner East pipeline (ME1) and received a safety manual from Sunoco five years ago about this old iron pipeline. Since that time, he avers Sunoco put two bigger pipes in the ground and back-flowed the over 80-year-old pipe from 800 psi to 1400 psi. Complainant requests relief in the form of an alarm system for all residents that live within the 1,000 foot blast zone that will notify residents of a gas leak. He further requests a Commission directive that: 1) Sunoco train emergency personnel; and 2) Sunoco replace the original old iron pipeline with American made steel. The Complaint was served upon Sunoco on August 27, 2018.

On September 17, 2018, Sunoco filed an Answer and New Matter. Also on September 17, 2018, Sunoco filed Preliminary Objections contending the doctrine of collateral estoppel bars these claims and that they are not legally sufficient.

On October 9, 2018, Complainant’s Answer to Preliminary Objections was filed. Complainant avers Sunoco violated 52 Pa. Code § 59.33 of the Commission’s regulations by not training Lower Frankford Township first responders at a meeting as had been scheduled for July

10, 2018 and by not mailing out safety manuals in accordance with federal and state regulations pursuant to 49 USCA 60101-60503, 49 CFR parts 191-193, 195, 199.

On October 11, 2018, a Motion Judge Assignment Notice was issued by the Office of Administrative Law Judge assigning me as Presiding Officer in the instant matter. The Preliminary Objections are ripe for a decision.

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

1. Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
2. Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
3. Insufficient specificity of a pleading.
4. Legal insufficiency of a pleading.
5. Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
6. Pendency of a prior proceeding or agreement for alternative dispute resolution.

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

52 Pa. Code §5.101(a).

Whether the Complaint is Legally Sufficient - 52 Pa. Code §5.101(a)(4)

Sunoco contends the Complaint is legally insufficient as Complainant fails to cite and allege violations of any statute, regulation or Commission Order. Sunoco admits to mailing the safety document to which Complainant refers, but contends it is not a violation of law to have mailed the document. Sunoco further responds that “old iron pipe” is an erroneous characterization when Mariner East 1 (ME1) is constructed of steel and was originally constructed with domestically manufactured steel pipe. As part of continuous maintenance throughout its life, significant mileage of the pipeline has been replaced with API 5L grade X42 and X52 pipe, much of which was manufactured domestically. Sunoco contends the Complaint should be dismissed because it is not legally insufficient, pursuant to 52 Pa. Code § 5.101(a)(4).

Sunoco specifically argues the regulations and safety standards found in 49 CR Part 195 and the Commission’s regulation at 52 Pa. Code § 59.33(b), are not violated because the ME1 pipeline was built before 1968, the year a Pipeline Safety Act became law, codifying at Title 49, Chapter 601 of the U.S. Code.” Thus, the design, installation or construction standards were not retroactive and do not apply to the ME1. 49 U.S.C. § 60104(b).

Sunoco contends that by constructing ME2 and ME2X it did not violate the law. Sunoco cites as authority the Commission’s interim Opinion and Order entered October 29, 2014*, In re: Petitions of Sunoco Pipeline, L.P.,* Docket Nos. P-2014-2411941, et al., 2014 WL 5810345 at \*19. Sunoco also contends there is no requirement that Sunoco provide alarm systems for certain residents. Sunoco contends its emergency response procedures and public outreach plans are consistent with regulations and industry practices and the Commission has reviewed them and found them to be adequate as of August 14, 2018. *See Dinniman v. Sunoco Pipeline LP,* Docket Nos. P-2018-3001451 *et al.* Sunoco’s further contends there is no legal requirement it replace its ME1 pipeline with American-made steel. Thus, this relief is legally insufficient.

Additionally, Sunoco contends the complaint should be barred by issue and claim preclusion pursuant to 66 Pa. C.S. § 316 as it is a collateral attack on Commission Orders that twice found ME1 to be safe to operate. See generally, *Petition of Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission for the Issuance of an Ex Parte Emergency Order,* Docket No. P-2018-3000281, (Order entered May 3, 2018); and *Dinniman v. Sunoco Pipeline, L.P.*, Docket Nos. P-2018-3001453, et al. (Order entered June 15, 2018)(*Dinniman*).

Regarding claims of training of emergency personnel and public outreach, Sunoco responds that its outreach and training are consistent with regulations and industry practices and that the Commission has already reviewed and found them to be adequate in its August 14, 2018 Order in *Dinniman, Id.* Thus, this claim should be barred by the doctrine of collateral estoppel as it is legally insufficient.

Conversely, Complainant avers Sunoco violated 52 Pa. Code § 59.33 of the Commission’s regulations by: 1) not implementing an alarm system; 2) cancelling a training meeting in Lower Frankford Township for first responders and the public as had been scheduled for July 10, 2018; and 3) by not mailing out safety manuals in accordance with federal and state regulations pursuant to 49 USCA 60101-60503, 49 CFR parts 191-193, 195, 199. In his Answer to Preliminary Objections, Complainant contends Sunoco’s public outreach programs are not reaching the public in Cumberland County, Pennsylvania. Complainant further contends what information Sunoco may have given does not pertain specifically to Cumberland County, a county different than Chester County, Pennsylvania, where Senator Dinniman in a separate complaint proceeding resides. Complainant contends Sunoco’s trained emergency personnel are almost non-existent in Cumberland County, where they are stretched too far for adequate protection, putting him in danger in violation of Section 59.33. Sunoco’s CORE training sessions in 2017 were not held in Cumberland County.

Complainant also argues there are import laws that say a certain amount of American made steel must be used in domestic projects, Article 7 page 3. Complainant contends the one of the two orders restarting the ME1, came after an Interim Emergency Order shutting down ME1 and ME2 construction until June 14, 2018. Complainant attached to his response what is purported to be a letter from Mike Chestnut, Fire Police Lieutenant stating as of September 21, 2018 that he was not trained. A letter from Matthew Gordon, Project Manager for Sunoco, addressed to Cumberland County Board of Commissioners stating he invited attendance at the Paradigm Core-Ex Emergency Response Training to be held at the Harrisburg Best Western on September 12, 2018.

Disposition

Collateral estoppel bars a subsequent lawsuit where (1) an issue decided in a prior action is identical to one presented in a later action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to the prior action or is in privity with a party to the prior action, and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action. *Rue v. K-Mart Corp.*, 552 Pa. 13, 713 A.2d 82 (1998); *Stilp v. Com. of PA, et al.*, 910 A.2d 775, 784 (Pa. Com. Ct. 2006).

Commission preliminary objection practice is analogous to Pennsylvania civil practice regarding preliminary objections. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa PUC LEXIS 69, Docket No. C‑00935435 (July 18, 1994). Preliminary objections in civil practice requesting dismissal of a pleading will be granted only where the right to relief is clearly warranted and free from doubt. *Interstate Traveller Services, Inc. v. Pa. Dept. of Environment Resources*, 406 A.2d 1020 (Pa. 1979); *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 595 A.2d 172 (Pa. Super. 1991). The Commission follows this standard. *Montague v. Philadelphia Gas Company*, 66 Pa. PUC 24 (1988).

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

The Commission regulation at 52 Pa. Code §5.21(a) states that a person may file a formal complaint claiming violation of a statute that the Commission has jurisdiction to administer. The regulation at 52 Pa. Code §5.21(d) authorizes the Commission to dismiss a complaint if a hearing is not necessary and authorizes preliminary objections to be filed in response to a complaint.

The regulation at 52 Pa. Code §5.101(a)(4) permits the filing of a preliminary objection to dismiss a pleading for legal insufficiency. The provision at 52 Pa. Code §5.101(a)(4) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa. C.S. §703(a); *Lehigh Valley Power Committee v. Pa. Pub. Util. Comm’n*, 563 A.2d 557 (Pa. Cmwlth. 1989); *Lehigh Valley Power Committee v. Pa. Pub. Util. Comm’n*, 563 A.2d 548 (Pa. Cmwlth. 1989); *S.M.E. Bessemer Cement, Inc. v. Pa. Pub. Util. Comm’n*, 540 A.2d 1006 (Pa. Cmwlth. 1988); *White Oak Borough Authority v. Pa. Pub. Util. Comm’n*, 103 A.2d 502 (Pa. Super. 1954).

In order to be legally sufficient, a complaint must set forth “an act or thing done or omitted to be done or about to be done or omitted to be done by the respondent in violation, or claimed violation, of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission.” 52 Pa. Code §5.22(a)(4). Here, the complaint alleges facts that could be construed as a violation by Sunoco of a statute, regulation or order which the Commission has jurisdiction to administer by failing to provide adequate, reasonable service and facilities.

The statute at 66 Pa.C.S. §1501 governs any allegations of unreasonable or inadequate service. Pursuant to 66 Pa.C.S. §1501, the Commission has original jurisdiction over the reasonableness and adequacy of public utility service. *Elkin v. Bell Telephone Co.,* 372 A.2d 1203 (Pa. Super. 1977) *aff’d* 420 A.2d 371 (Pa. 1977); *Behrend v. Bell Telephone Co.*, 243 A.2d 346 (Pa. 1968). As a general proposition, neither the Public Utility Code nor the Commission’s regulations require public utilities to provide constantly flawless service. The Public Utility Code at 66 Pa.C.S. §1501 does not require perfect service or the best possible service but does require public utilities to provide reasonable and adequate service. *Analytical Laboratory Services, Inc. v. Metropolitan Edison Co.*, Docket No. C-2006608 (Order entered December 21, 2007); *Emerald Art Glass v. Duquesne Light Co.,* Docket No. C-00015494 (Order entered June 14, 2002); *Re: Metropolitan Edison Co.*, 80 PAPUC 662 (1993).

The Commission regulations at 52 Pa.Code § 59.33, promulgated pursuant to 66 Pa.C.S. § 1501, require that hazardous liquid utilities shall have minimum safety standards consistent with the pipeline safety laws at 49 U.S.C. §§ 60101-60503 and the regulations at 49 CFR Parts 191-193, 195 and 199. The Commission regulations adopt federal safety standards for hazardous liquid facilities. These standards include what materials must be used for new hazardous liquid pipelines, how those pipelines should be constructed, as well as corrosion control, maintenance and testing of existing hazardous liquid pipelines. The standards also address emergency preparedness and public awareness plans. Specifically, 49 CFR 195.440 provides:

§ 195.440 Public awareness.

(a) Each pipeline operator must develop and implement a written continuing public education program that follows the guidance provided in the American Petroleum Institute's (API) Recommended Practice (RP) 1162 (incorporated by reference, see § 195.3).

(b) The operator's program must follow the general program recommendations of API RP 1162 and assess the unique attributes and characteristics of the operator's pipeline and facilities.

(c) The operator must follow the general program recommendations, including baseline and supplemental requirements of API RP 1162, unless the operator provides justification in its program or procedural manual as to why compliance with all or certain provisions of the recommended practice is not practicable and not necessary for safety.

(d) The operator's program must specifically include provisions to educate the public, appropriate government organizations, and persons engaged in excavation related activities on:

(1) Use of a one-call notification system prior to excavation and other damage prevention activities;

(2) Possible hazards associated with unintended releases from a hazardous liquid or carbon dioxide pipeline facility;

(3) Physical indications that such a release may have occurred;

(4) Steps that should be taken for public safety in the event of a hazardous liquid or carbon dioxide pipeline release; and

(5) Procedures to report such an event.

(e) The program must include activities to advise affected municipalities, school districts, businesses, and residents of pipeline facility locations.

(f) The program and the media used must be as comprehensive as necessary to reach all areas in which the operator transports hazardous liquid or carbon dioxide.

(g) The program must be conducted in English and in other languages commonly understood by a significant number and concentration of the non-English speaking population in the operator's area.

(h) Operators in existence on June 20, 2005, must have completed their written programs no later than June 20, 2006. Upon request, operators must submit their completed programs to PHMSA or, in the case of an intrastate pipeline facility operator, the appropriate State agency.

(i) The operator's program documentation and evaluation results must be available for periodic review by appropriate regulatory agencies.

49 CFR § 195.440

Viewing the complaint in this case in the light most favorable to Mr. Baker, a *pro se* complainant, he has alleged that Sunoco has violated 52 Pa.Code § 59.33, promulgated pursuant to 66 Pa.C.S. § 1501, which require that hazardous liquid utilities shall have minimum safety standards consistent with the pipeline safety laws at 49 U.S.C. §§ 60101-60503 and the regulations at 49 CFR Parts 191-193, 195 and 199 by operating ME 1 and constructing ME 2 and ME 2X of its Mariner East pipeline project in Lower Frankford Township, Cumberland County in a manner not consistent with the Code of Federal Regulations, Public Utility Code or Commission’s regulations. Mr. Baker complains he only received one pamphlet from Sunoco five years ago educating him about the pipeline and that this is insufficient. Mr. Baker requests an alarm system for all residents living within the 1,000 foot blast zone and training for emergency personnel. Also, he requests the old iron pipeline be replaced with American-made steel.

Accepting as true all of the facts alleged in Mr. Baker’s complaint, Sunoco’s right to relief is not clearly warranted or free from doubt. A hearing is necessary to determine what steps Sunoco has taken in implementing its standard operating procedures regarding the public awareness plan and emergency training pertaining to Lower Frankford Township, Cumberland County and whether those actions comply with Sunoco’s Standard Operating Procedures, applicable statutes, regulations and orders. Whether Sunoco is in compliance with its Public Awareness Plan and Emergency Response Plan as filed in the *Senator Dinniman v. Sunoco Pipeline LP* case at Docket No. C-2018-3001451 is an issue over which the Commission has jurisdiction. Complainant alleges he is a member of the affected public who only received an educational pamphlet five years ago. He further alleges Sunoco cancelled a meeting with emergency personnel and local officials in Lower Frankford Township, Cumberland County upon short notice. Sunoco’s Public Awareness Plan as filed in the *Dinniman* case provides that it is committed to communicating with targeted stakeholders based upon a frequency table including the affected public, emergency officials, public officials, and excavators/contractors. There is an allegation that Sunoco is not following its own standard operating procedures regarding the frequency and content of communication with these entities. This is legally sufficient. Additionally, Complainant is not a party to the pending *Dinniman* case, which primarily focuses on issues regarding a lack of public education and other pipeline-related issues in Chester County, and the relief he requests has not already been decided by the Commission. Therefore, the doctrine of collateral estoppel clearly does not bar the Commission from hearing the instant complaint.

Whether an accommodation of alarm system is appropriate and whether ME1 is compliant with the law are also issues appropriate for a hearing. It is routine for the Commission to examine the complaints filed by *pro se* complainants to determine whether there is a matter over which it can exercise jurisdiction, even if the complaint is not fashioned in a technically correct way. If there exists a possibility that a relevant fact may be in dispute, preliminary objections and prehearing motions are denied giving the *pro se* complainant an opportunity to state a case over which the Commission can exercise its jurisdiction. The Commission has stated, however, that a customer should be heard on an allegation that equipment installed by a utility may be unsafe or its installation unreasonable. Recently, in *Paul v. PECO Energy Co.*, Docket No. C-2015-2475355 (Opinion and Order entered June 14, 2018) (*Paul*) the Commission reiterated that pursuant to Section 1501 of the Code, a public utility has a duty to maintain safe, adequate and reasonable service and facilities and to make repairs, changes, and improvements that are necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public, referencing 66 Pa.C.S. § 1501, cited above. Again, “service” is to be broadly construed. *Country Place Waste Treatment Co., Inc. v. Pa. Pub. Util. Comm'n*, 654 A.2d 72 (Pa.Cmwlth. 1995).

In *Paul v. PECO* and *Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018), the Commission noted that pursuant to Section 1501 of the Code, the Commission developed regulations governing electric safety standards. Under these regulations, an EDC must use reasonable efforts to properly warn and protect the public from danger. The EDC must also exercise reasonable care to reduce the hazards to which customers may be subjected to by reason of the EDC’s provision of electric utility service and its associated equipment and facilities. *See* 52 Pa. Code § 57.28(a)(1). Similarly, in the instant case, a pipeline operator utility must comply with Section 59.33, which provides that it should use every reasonable effort to properly warn and protect the public from danger and shall exercise reasonable care to reduce the hazards to which employees, customers and others may be subjected to by reason of its equipment and facilities. 52 Pa. Code § 59.33(a). Whether the actions of Sunoco are reasonable efforts to properly warn and protect the public from danger is an issue over which the Commission has jurisdiction. It is alleged Sunoco is not properly warning and protecting the public from danger. This is legally sufficient. Accordingly, for these above-reasons the Preliminary Objections will be denied and a prehearing conference will be scheduled.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objections filed by Sunoco Pipeline, L.P. at Docket No. C-2018-3004294 are denied.

2. That a prehearing conference shall be scheduled, and notice shall be provided to the parties of record.

Date: October 31, 2018 /s/

Elizabeth H. Barnes

Administrative Law Judge

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