PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17120

Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Walnut Bank valve control station in Wallace Township, Chester County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	**Public Meeting October 2, 2014** **2411941-OSA** **P-2014-2411941**
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Blairsville pump station in Burrell Township, Indiana County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	**P-2014-2411942**
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Middletown Junction valve control station in Lower Swatara Township, Dauphin County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	**P-2014-2411943**
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Cramer pump station in East Wheatfield Township, Indiana County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	**P-2014-2411944**
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Old York Road valve control station in Fairview Township, York County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	**P-2014-2411945**
Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Conodoquist River West valve control station in North Middleton Township, Cumberland County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	**P-2014-2411946**

Petition of Sunoco Pipeline, L.P. **P-2014-2411948**
for a finding that a building to shelter the
Juniata River West valve control station
in Frankston Township, Blair
County, Pennsylvania is reasonably necessary
for the convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. **P-2014-2411950**
for a finding that a building to shelter the
Ebensburg pump station
in Cambria Township, Cambria County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. **P-2014-2411951**
for a finding that a building to shelter the
West Conemaugh River valve control station
in Derry Township, Westmoreland
County, Pennsylvania is reasonably necessary
for the convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. **P-2014-2411952**
for a finding that a building to shelter the
West Loyalhanna Dam valve control station
in Loyalhanna Township, Westmoreland
County, Pennsylvania is reasonably necessary
for the convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. **P-2014-2411953**
for a finding that a building to shelter the
Old Chestnut Lane valve control station
in Penn Township, Westmoreland
County, Pennsylvania is reasonably necessary
for the convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. **P-2014-2411954**
for a finding that a building to shelter the
Old Harmony Road valve control station
in Hempfield Township, Westmoreland
County, Pennsylvania is reasonably necessary
for the convenience or welfare of the public

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

Petition of Sunoco Pipeline, L.P. **P-2014-2411964**
for a finding that a building to shelter the
Mount Union pump station
in Shirley Township, Huntingdon County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. **P-2014-2411965**
for a finding that a building to shelter the
Twin Oaks pump station
in Upper Chichester Township, Delaware County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. **P-2014-2411966**
for a finding that a building to shelter the
Boot pump station
in West Goshen Township, Chester County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. **P-2014-2411967**
for a finding that a building to shelter the
Doylesburg pump station
in Toboyne Township, Perry County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. **P-2014-2411968**
for a finding that a building to shelter the
Eagle pump station
in Upper Uwchlan Township, Chester County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. **P-2014-2411971**
for a finding that a building to shelter the
Beckersville pump station
in Brecknock Township, Berks County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

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

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

P-2014-2411980

JOINT MOTION OF VICE CHAIRMAN JOHN F. COLEMAN, JR. AND COMMISSIONER PAMELA A. WITMER

I. INTRODUCTION

Before the Commission today is the Initial Decision (ID) disposing of various Preliminary Objections regarding Sunoco Pipeline L.P.'s (Sunoco or Company) numerous requests for a zoning exemption pursuant to Section 619 of the Municipalities Planning Code[1] (MPC) as well as the Exceptions and Replies to Exceptions to the ID filed by the parties to this case. After our thorough review of the various pleadings, the ID, the Exceptions and Replies to Exceptions and relevant Commission Orders, we conclude that the Commission has subject matter jurisdiction over Sunoco's zoning exemption request. Therefore, we move to dismiss all preliminary objections, reverse the ID, and remand Sunoco's amended petitions to the Office of Administrative Law Judge (OALJ) for further proceedings, consistent with this Joint Motion.[2]

A thorough review of the various pleadings, the ID, and the Exceptions and Replies to Exceptions also convinces us that there are numerous and serious misconceptions regarding (1) Sunoco's regulated history with the Commission and (2) the specific issues that need to be disposed of in this proceeding with regard to Sunoco's requested relief. In this proceeding, the Commission has been asked to decide a very narrow question: whether enclosures (walls and a roof) that are built around and over a valve control or pump station should be exempt from municipal zoning regulation. To answer this question, we must decide whether it is in the convenience or welfare of the public for Sunoco to enclose the planned facilities with walls and roofs, even if those enclosures may conflict with local zoning ordinances. Sunoco is not seeking (1) a certificate of public convenience; (2) authorization to build the Mariner East pipeline or any facilities attendant thereto

[1] 53 P.S. § 10619.

[2] It is well settled that the Commission is not required to consider, expressly or at length, each contention or argument raised by the parties. We note that any issue, Preliminary Objection, Exception or Reply to Exception that we do not specifically delineate has been duly considered and is proposed to be denied without further discussion. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

(such as valve control or pump stations); (3) approval of the siting or route of the pipeline; or (4) a finding that the proposed pipeline complies with relevant public safety or environmental requirements. Those issues are outside the scope of this proceeding.

In addition to resolving the Exceptions and all outstanding Preliminary Objections, today's action makes several legal determinations regarding (1) the status and scope of Sunoco's current certificated authority under the jurisdiction of this Commission; (2) the nature of intrastate propane and methane pipeline transportation service; and (3) the issues to be addressed when making a determination under Section 619 of the MPC. Lastly, today's action proposes to remand the matter to OALJ to allow the Administrative Law Judges (ALJs) to issue a decision in this matter to aid the Commission in disposing of Sunoco's various Petitions.

II. PRELIMINARY OBJECTIONS BASED ON LACK OF COMMISSION SUBJECT MATTER JURISDICTION

A. APPLICABLE LEGAL STANDARD

Procedurally, we note that this case is at the preliminary objections stage; hence, we are not ruling on the merits of Sunoco's underlying zoning exemption requests. The Commission's procedure regarding the disposition of preliminary objections is similar to the procedure utilized in Pennsylvania civil practice – dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt.[3] The moving party may not rely on its own factual assertions, but must accept for the purposes of disposition of the preliminary objection all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts.[4] The preliminary objection may be granted only if the moving party prevails as a matter of law.[5] Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections.[6]

Here, the Preliminary Objections asserting a lack of subject matter jurisdiction challenge Sunoco's ability to petition the Commission under Section 619 of the MPC allegedly because Sunoco is not a "public utility corporation" under the MPC. Pennsylvania courts hold that Section 619 must be interpreted by using the definition of "public utility corporation" in Section 1103 of the Business Corporation Law, 15 Pa.C.S. § 1103.[7] However, the definition of "public utility

[3] *Interstate Traveler Services, Inc. v. Pa. Dep't of Environmental Resources*, 406 A.2d 1020 (Pa. 1979).
[4] *County of Allegheny v. Cmwlth. of Pa.*, 490 A.2d 402 (Pa. 1985).
[5] *Rok v. Flaherty*, 527 A.2d 211 (Pa. Cmwlth 1987).
[6] *Dep't of Auditor General, et al. v. State Employees' Retirement System*, 836 A.2d 1053 (Pa. Cmwlth. 2003).
[7] *Pa. Public Utility Comm'n v. WVCH Communications, Inc.*, 351 A.2d 328 (Pa. Cmwlth. 1976).

corporation" under the MPC includes, but is not limited to, a "public utility" under the Public Utility Code. In other words, an entity can meet the definition of "public utility corporation" under the Business Corporation Law/MPC by being a "public utility" under the Public Utility Code.

In light of the preliminary objection standard, which requires us to view the facts as plead in the light most favorable to Sunoco, we have no trouble concluding that Sunoco's amended petitions adequately plead sufficient facts for the Commission to find that it is both a "public utility" under Section 102 and a "public utility corporation" under the Business Corporation Law and Section 619 of the MPC. As discussed in more detail below, Sunoco has been certificated as a public utility in Pennsylvania for many years, and the existence of the Commission orders granting the certificates of public convenience to Sunoco is "prima facie evidence" of the facts therein, including that Sunoco is a public utility under the Public Utility Code.

B. HISTORY OF SUNOCO'S CERTIFICATES OF PUBLIC CONVENIENCE

Sunoco is the product of various mergers and acquisitions of two pipeline companies that were originally certificated by the Commission's predecessor, the Pennsylvania Public Service Commission, in the early 1930's to transport petroleum and refined petroleum products.[8] These pipeline companies were Susquehanna Pipe Line Co. (Susquehanna)[9] and the Keystone Pipe Line Company (Keystone).[10] The pipeline path for Susquehanna traversed the length of Pennsylvania latitudinally between Philadelphia-area refinery plants and the Ohio border and longitudinally to the New York border. The Keystone certificate linked the refinery region in Southeastern Pennsylvania "at or near Point Breeze, Philadelphia" to the Ohio and New York borders. These original pipeline authorities were subsequently expanded over the decades that followed. Title to these pipelines and certificates have changed hands several times as applications for transfer were submitted to, and approved by, the relevant Commission.

Eventually, Keystone became owned by Atlantic Pipeline Corp. and Susquehanna by Sun Pipe Line Company. In 2002, this Commission approved the transfer of assets of both companies

[8] Pursuant to Section 5.408(a) of the Commission's Regulations, we take administrative notice of the history of certificates and Orders issued by the Commission and predecessor agencies. *See* 52 Pa. Code § 5.408(a). Under Section 103 of the Public Utility Code, any certificates granted under prior iterations of the Public Utility Code remain valid and have the full force and effect of law. *See* 66 Pa. C.S. § 103. West Goshen Township provided many of these documents for inclusion in our deliberations here as Appendix A to its Reply Exceptions. We agree with the Township that these are "public records."

[9] *Application of Susquehanna Pipe Line Co.*, Application Docket No. 21736-30, Folder No. 2, Report and Order dated March 25, 1930.

[10] *See Application of Keystone Pipe Line Company*, Application Docket No. 23566-1931, Folder No. 2, Report and Order dated May 11, 1931.

to Sunoco and granted Sunoco authority "to transport petroleum products in the former service territory of Sun Pipe Line Company and Atlantic Pipeline Corp[.]"[11] Simultaneously, abandonment of those services by Susquehanna and Keystone were approved by Commission-issued certificates.

Notably, both the original Susquehanna and Keystone certificates contained a restrictive amendment, stipulated to by the applicants and various protesting local gas distribution companies, that "no right[,] power or privilege" is granted "to use the pipe lines constructed hereunder...for the transportation, storage or distribution of natural, manufactured or mixed natural or artificial gas" absent first obtaining Pa Public Service Commission approval. However, the 2002 certificate of public convenience issued to Sunoco contained no restrictive amendments like those adopted in the 1930 and 1931 certificates.

In 2013, Sunoco advised the Commission that it intended to revise its operations in view of the rapid development and limited infrastructure available to move Marcellus Shale natural gas and natural gas liquids (NGLs) to market. To that end, Sunoco filed an application with the Commission at Docket No. A-2013-2371789 to abandon certain intrastate service along portions of its pipeline system and a petition at Docket No. P-2013-2371775 to temporarily suspend a portion of certain intrastate service along other segments. Sunoco averred that the abandonment and suspension were necessary to construct its proposed Mariner East pipeline, which would meet a public need for the transportation of natural gas byproducts. By Order entered on August 29, 2013, and subsequently clarified on October 17, 2013, the Commission approved both the application and the petition.

However, circumstances surrounding the Mariner East project changed, and Sunoco subsequently filed a petition with the Commission to rescind the Commission's prior abandonment decision and to resume transportation service for petroleum products/refined petroleum products on a segment of its pipeline where its tariff was previously abandoned. Sunoco explained that it had initially planned for the Mariner East pipeline to provide only interstate transportation of ethane and propane from west-to-east. However, Sunoco explained that, based on the high supply of propane and other petroleum products generated by the Marcellus Shale and the need for uninterrupted deliveries of propane in Pennsylvania, it was now proposing to offer intrastate propane service. Specifically, Sunoco stated that it would change the directional flow from West to East and would now be transporting propane and ethane once the pipelines were reconfigured in the Mariner East

[11] *Joint Application of Sunoco Pipeline L.P., Sun Pipe Line Company and of Atlantic Pipeline Corp.*, A-140001, A-140400F2000, A-140075F2000, Corrected Order entered January 14, 2002 at Ordering Paragraph 2 ("2002 Joint Petition").

project.[12] In our July 2014 Order approving Sunoco's request to resume service, we found that that "the Company has demonstrated that there are significant public benefits to be gained" from enhancing delivery options for Marcellus Shale producers.[13]

In our July 2014 Order, the Commission also amended and clarified the procedures that Sunoco must follow to resume pipeline operations where its tariffs had been suspended and reinstated.[14] We also noted Sunoco's stated intent to resume service by initially shipping propane from Delmont, Pennsylvania to its Twin Oaks Pennsylvania facility. In doing so, we recognized our prior rulings and those of federal agencies holding that propane is a "petroleum product" and held that "approval of the Petition is in the public interest, as Sunoco's proposed provision of intrastate propane service will result in numerous potential public benefits" including the need for adequate pipeline capacity to meet peak demand for propane and avoidance of "the added expense and risks associated with trucking propane from the Marcellus Shale region."[15] Unopposed tariffs were also filed and approved for the institution of the intrastate movement of propane at a rate of $2.91/bbl.[16]

Finally, in August of this year, Sunoco received our approval to extend its service territory to include Washington County.[17] In seeking this additional certification, Sunoco stated its intent to establish the Houston, Washington County location as part of the first phase of the Mariner East project as the new origination point for the NGLs of propane and ethane to be transported and the expansion of its pipeline system in a second phase of the Mariner East project. This second phase will be a new 16-inch or larger pipeline, paralleling the existing pipeline from Houston, PA to the Marcus Hook Industrial Complex and running along much of the same route, as well as the addition of 15 miles of pipeline from Houston, PA to a point near the Pennsylvania-Ohio boundary line.[18] When approving the Washington County certificate, the Commission stated:

> We believe granting Sunoco authority to commence intrastate transportation of propane in Washington County will enhance delivery options for the transport of natural gas and natural gas liquids in Pennsylvania. In the wake of the propane shortage experienced in 2014, Sunoco's proposed service will increase

[12] *Application of Sunoco Pipeline L.P.*, A-2013-2371789 and P-2013-2371775, Order entered August 29, 2013.
[13] *Petition of Sunoco Pipeline, L.P. for Amendment of the Order Entered on August 29, 2013*, P-2014-2422583, Opinion and Order entered July 24, 2014 at 7 ("*Sunoco 2014 Petition*").
[14] *Sunoco 2014 Petition* Order. Sunoco's Petition was unopposed.
[15] *Id.* at 9-10.
[16] Sunoco Pipeline L.P. Request for Approval of Tariff Pipeline-Pa P.U.C. No. 16 and Waiver of 52 Pa. Code §53.52(b)(2) and (c)(1) through (5), R-2014-2426158, Order entered August 21, 2014.
[17] *Application of Sunoco Pipeline L.P.*, A-2014-2425633, Order entered August 21, 2014 ("to offer, render, furnish or supply intrastate petroleum and refined petroleum products pipeline service to the public in Washington County, Pennsylvania.") ("*Washington County Certificate*"). The application was unopposed.
[18] *Washington County Certificate* Order at 2-3.

the supply of propane in markets with a demand for these resources, including in Pennsylvania, ensuring that Pennsylvania's citizens enjoy access to propane heating fuel. Additionally, the proposed service will offer a safer and more economic transportation alternative for shippers to existing rail and trucking services.[19]

C. SUNOCO IS A PUBLIC UTILITY AND CURRENTLY POSSESSES VALID CERTIFICATES OF PUBLIC CONVENIENCE

The ID issued on July 30, 2014 found that Sunoco's proposed propane and ethane service did not qualify as public utility service within the meaning of Section 102 of the Code.[20] The ALJs further concluded that Sunoco's proposed service would also not qualify as public utility service under *Drexelbrook*.[21] The ALJs found that the nature of Sunoco's proposed service was private because it was limited to a select few shippers and was not available to members of the public.

We disagree with these findings and propose reversing the ID. First, the fact that Sunoco currently holds various certificates of public convenience is prima facie evidence under Code Section 316 that it is a public utility. Thus, using a *Drexelbrook* or similar analysis was unnecessary. As explained above, the pipeline routes and services described in this proceeding have been certificated as public utilities by this Commission (and its predecessors) since the early 1930s. More recently, in July 2014, the Commission certificated Sunoco to resume transportation service for petroleum products/refined petroleum products in a segment of its pipeline where its tariff was previously abandoned. In August 2014, the Commission also certificated Sunoco to extend its service territory to transport petroleum products/refined petroleum products to include Washington County, Pennsylvania. The Public Utility Code plainly states that prior Commission "rulings are binding on all parties and prima facie evidence of the facts found."[22] Thus, Sunoco is certificated in Pennsylvania as a public utility to transport petroleum/refined petroleum products, including propane, from Delmont, Pennsylvania to Twin Oaks, Pennsylvania.

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[19] *Id.* at 4.

[20] ID at 21. Section 102 of the Code provides the following definition for "public utility," in relevant part:

> Any person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for:
>
> (i) Producing, generating, transmitting, distributing or furnishing natural or artificial gas, electricity, or steam for the production of light, heat, or power to or for the public for compensation.
>
> ***
>
> (v) Transporting or conveying natural or artificial gas, crude oil, gasoline, or petroleum products, materials for refrigeration, or oxygen or nitrogen, or other fluid substance, by pipeline or conduit, for the public for compensation.

66 Pa. C.S. §102(1)(i),(v).

[21] ID at 21. *Drexelbrook Associates v. Pa. PUC*, 212 A.2d 237 (Pa. 1965). In *Drexelbrook*, the Pennsylvania Supreme Court found that an apartment complex landlord who sold water, electric, and natural gas services to tenants was not a public utility because only a privileged group – tenants accepted for residency – could subscribe to the services.

[22] 66 Pa. C.S. § 316.

Even if we were to ignore the existence of Sunoco's certificates to serve the territories covered by the instant Petitions, the view that Sunoco's services are not certifiable because no retail end-users are specifically identified conflicts with applicable law, including Subsection (1)(v) of the definition of Public Utility found at Section102 of the Public Utility Code[23] and our more recent decision in the *Laser June 2011 Order*.[24] The Commission has held numerous times that public utility services may be economically feasible only to entities that have large volumes of business and has also held that a retail component is not a requirement for public utility service.[25] Thus, the provision of wholesale services can clearly fall within the definition of public utility services,[26] which is evident with the existence of numerous certificated utilities providing wholesale services, including seven certificated wholesale pipelines operating in Pennsylvania in addition to Sunoco and numerous certificated telephone utilities providing wholesale only services. Moreover, whether a service is considered to be offered for the public does not depend on the number of persons who actually use the service. Rather, the determination depends on the service offering and whether the service is available to all members of the public, or a class of the public, who may require the service.[27]

D. THE SCOPE OF SUNOCO'S EXISTING CERTIFICATE AUTHORITY INCLUDES BOTH PROPANE AND ETHANE

The product to be shipped by Sunoco – "petroleum products" – is a broad term that includes both propane and ethane. While gasoline and fuel oil were the original products that were shipped in the pipelines and which continued until 2013, there is no restriction in any approved certificate limiting Sunoco's services to these particular products. In *Granger Energy*, we gave the undefined term "petroleum products," as used in Section 102, a broad meaning as a "catch all phrase."[28] Similarly, we specifically held in the *Sunoco 2014 Petition* that propane is a petroleum product.[29]

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[23] Id. at § 102.

[24] *Application of Laser Northeast Gathering Company, LLC for Approval to Begin to Offer, Render, Furnish, or Supply Natural Gas Gathering and Transporting or Conveying Service by Pipeline to the Public in Certain Townships of Susquehanna County, Pennsylvania*, Docket No. A-2010-2153371, Order entered June 14, 2011. (*Laser June 2011 Order*).

[25] *See, for example, Rural Telephone Co. Coalition v. Pa. PUC*, 941 A.2d 751 (Pa. Cmwlth. 2008); *Waltman v. Pa. PUC*, 596 A.2d 1221, 1223-1224 (1991), *aff'd*, 621 A.2d 994 (Pa. 1993))

[26] *Application of Sprint Communications Company L.P. for Approval of the Right to Offer, Render, Furnish or Supply Telecommunications Services as a Competitive Local Exchange Carrier to the Public*, A-310183F0002AMA, *et al*, Order entered December 1, 2006.

[27] *See C.E. Dunmore Gas Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 473 (Pa. Cmwlth. 1980).

[28] *Petition of Granger Energy of Honey Brook, LLC*, Docket No. P-00032043, Order entered August 19, 2004 at 9. ("*Granger Energy*").

[29] *Sunoco 2014 Petition* at 9, n.5 ("This is consistent with the definition of "petroleum gas" in the federal gas pipeline transportation safety regulations at 49 C.F.R. Part 192. Part 192 has been adopted by the Commission and defines "petroleum gas" to include propane. 49 C.F.R. § 192.3. Our interpretation is also consistent with the definition of "petroleum" in the federal hazardous liquids pipeline safety regulations at 49 C.F.R. Part 195. Part 195 has also been

While ethane is not expressly identified in 49 CFR 192.3, it also fits within the definition of "petroleum gas." Under 49 CFR 195.2, NGLs are encompassed under the terms "petroleum" and "petroleum product."[30] The U.S. Energy Information Administration's definition of NGLs includes ethane and propane, which, in turn, is included in the definition of "petroleum and other liquids."[31] In light of the above, we presumptively conclude that Sunoco's existing certificate authority encompasses the movement of ethane and propane.

We also reject the argument that the Sunoco pipeline implicated in this proceeding is limited to East-to-West transportation. This argument appears to be based upon two details. First, because of how the facilities were described in the original applications and Orders approving those applications, and second, because this was the original directional flow when other petroleum products were transported from Philadelphia area refineries to product distributors located to the West and North. Importantly, there is no directional restriction contained in any of the controlling certificates or Commission Orders. Nor do we believe it to be good public policy to adopt or interpret any such directional restrictions. To do so would likely result in the construction of new and redundant pipeline facilities, while existing facilities of the exact same nature, capable of providing the exact same services, would sit useless. This restriction, if accepted, could force the unnecessary expenditure of billions of dollars, which costs would be absorbed by the energy-using public through increased commodity prices.[32]

Thus, a succinct summary of Sunoco's existing authority in the Commonwealth is that it possesses the authority to provide intrastate petroleum and refined petroleum products bidirectionally through pipeline service to the public between the Ohio and New York borders and Marcus Hook, Delaware County through generally identified points. Accordingly, this authority is not contingent upon a specific directional flow or a specific route within the certificated territory. Moreover, this authority is not limited to a specific pipe or set of pipes, but rather, includes both the upgrading of current facilities and the expansion of existing capacity as needed for the provision of the authorized service within the certificate territory.

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adopted by the Commission and defines "petroleum" to include natural gas liquids and liquefied petroleum gas, which can include propane. 49 C.F.R. § 195.2.")

[30] 49 CFR 195.2. ("*Petroleum* means crude oil, condensate, natural gasoline, natural gas liquids, and liquefied petroleum gas. *Petroleum product* means flammable, toxic, or corrosive products obtained from distilling and processing of crude oil, unfinished oils, natural gas liquids, blend stocks and other miscellaneous hydrocarbon compounds.")

[31] http://www.eia.gov/tools/glossary/index.cfm?id=A#ass_diss_nat_gas

[32] Moreover, as discussed previously, the Commission recently addressed this very issue with this very utility. *See also, generally Application of UGI Penn Natural Gas, Inc. for approval of the Transfer by Sale of a 9.0Mile Natural Gas Pipeline, Appurtenant Facilities and Right of Way located in Mehoopany, Pennsylvania,* Docket No. A-2010-2213893, Order entered July 25, 2011.

Therefore, in light of above analysis affirming Sunoco's authority to provide intrastate pipeline transportation service from Houston, PA to Marcus Hook, PA, there is a rebuttable presumption that Sunoco is a public utility in this Commonwealth.

E. THE SCOPE OF THE ISSUES TO BE ADDRESSED UNDER THE MPC SECTION 619 IS NARROW

The specific request before the Commission for consideration is whether Sunoco has met its burden of proof to show its entitlement to a zoning exemption pursuant to Section 619 of the MPC. Section 619 states that the MPC:

> [S]hall not apply to any existing or proposed building, or extension thereof, used or to be used by a public utility corporation, if, upon petition of the corporation, the Pennsylvania Public Utility Commission shall, after a public hearing, decide that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public.[33]

Thus, there are only two parts to a Section 619 inquiry: (a) whether Sunoco is a public utility corporation[34] and (b) whether the proposed buildings at issue are reasonably necessary for the convenience or welfare of the public.

Regarding the first prong, the ALJs' determination on remand should specifically address the following two issues: (1) whether the presumption has been rebutted that Sunoco is a "public utility" under the Public Utility Code and hence, a "public utility corporation" under the Business Corporation Law and (2) whether Sunoco's proposed service is included within their existing authority, i.e., whether Sunoco has provided credible evidence that they will be transporting propane and/or ethane as proposed through the territories for which they are certificated as a public utility.

Regarding the second prong of the Section 619 analysis, we reiterate the need to clear up a set of misconceptions prior to remand. Much has been made of the facilities' upgrades proposed by Sunoco at various locations along the proposed Mariner East project and whether a Commission-granted zoning exemption would be in the public interest. However, Pennsylvania courts have established as an enduring principle that there is no power possessed by municipalities to zone with respect to utility structures other than buildings.[35] As a result, there is no exemption needed for any

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[33] 53 P.S. § 10619.

[34] Section 1103 of the Business Corporation Law (BCL) defines "public utility corporation" as including "[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. § 1103.

[35] *See Duquesne Light Co. v. Upper St. Clair Twp., et al.*, 105 A.2d 287 (Pa. 1954) (*Duquesne*). We note that *Duquesne* was decided prior to both the current Public Utility Code and the MPC. Subsequent cases, however, have made it clear that the principles enumerated in *Duquesne* are still in force. *See generally South Coventry Twp. v. Philadelphia Elec.*

public utility facilities, as a blanket exemption exists.[36] Moreover, it is clear from the laws and jurisprudence of this Commonwealth that public utility buildings, when found by this Commission to be reasonably necessary for the convenience or welfare of the public, are exempt from local regulations. Thus, there are two main limiting principles governing municipal zoning related to public utilities: (1) municipal zoning authority regarding utilities is limited to buildings and (2) a public utility can obtain an exemption from municipal zoning regulation for buildings upon a finding by this Commission that the exemption meets the "reasonably necessary" test enumerated in Section 619 of the MPC.

Put another way, the inquiry regarding the second prong of the Section 619 analysis concerns only *proposed buildings* as described in each of Sunoco's Petitions and whether the "present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public."[37] Sunoco is not seeking this Commission's approval to be certificated as a public utility, approval of the Mariner East project, or approval to construct the valve control and pump stations that the Company seeks to shelter. Rather, Sunoco requests a determination as to whether the structures the company proposes to build *around* and *over* the valve control and pump stations constitute "buildings" within the meaning of the MPC, and, if so, whether such "buildings" are reasonably necessary for the convenience or welfare of the public and, therefore, exempt from local zoning ordinances.[38] Thus, the inquiry on remand should not address whether it is appropriate to place the valve and pump stations in certain areas, but rather, should address whether the buildings proposed to shelter those facilities are reasonably necessary for the convenience or welfare of the public.

III. OTHER PRELIMINARY OBJECTIONS

In the remaining Preliminary Objections, the parties argue, among other things, that Sunoco's request should be dismissed as legally insufficient because (1) Sunoco did not show that the Mariner East project was reasonably necessary for convenience and welfare of the public; (2)

Co., 504 A.2d 368 (Pa. Cmwlth. 1986) (*South Coventry*) and *Heitzel v. Zoning Hearing Bd. of Millcreek Twp., 533 A.2d 832, 833 (Pa. Cmwlth. 1987).*

[36] The term "facilities" is broadly defined by the Public Utility Code as

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

66 Pa. C.S. § 102.

[37] 53 P.S. § 10619.

[38] *Petition of UGI Penn Natural Gas Inc. for a Finding that Structures to Shelter Pipeline Facilities in the Borough of West Wyoming, Luzerne County, To the Extent Considered To be Buildings under Local Zoning Rules, Are Reasonably Necessary for The Convenience or Welfare of the Public*, Docket No. P-2013-2347105 (Opinion and Order entered December 19, 2013).

the Amended Petitions seek to circumvent the law; and (3) Article 1, Section 27 of the Pennsylvania Constitution prohibits granting them. Based upon the legal standard for deciding preliminary objections and a review of the relevant documents submitted by the parties in this case, we do not believe that this relief requested by the moving parties is clearly warranted and free from doubt or that the moving parties are entitled to judgment as a matter of law on their legal insufficiency claims. Therefore, we do not believe that a disposition of these issues is appropriate through preliminary objections. Accordingly, the ALJs should have denied these Preliminary Objections, and Sunoco's exceptions should be granted.

Moreover, the issues and concerns raised in the Preliminary Objections arguing legally insufficiency are beyond the proper scope of this proceeding. These Preliminary Objections seek to improperly expand the scope of this proceeding to the environmental impacts of the Mariner East project and whether the overall project is reasonably necessary for the convenience and welfare of the public, which are issues that are beyond a Section 619 exemption inquiry. In short, these issues are not germane to the Section 619 issues implicated in this proceeding: (1) whether the presumption has been rebutted that Sunoco is a "public utility" under the Public Utility Code and hence, a "public utility corporation" under the Business Corporation Law; (2) whether Sunoco's proposed service is included within their existing certificated authority; and (3) whether the structures Sunoco proposes to build are "buildings" within the meaning of the MPC, and, if so, whether such "buildings" are reasonably necessary for the convenience or welfare of the public. Accordingly, these Preliminary Objections should be denied.

In addition, one party argues that Sunoco's Petition for West Goshen Township is factually insufficient because, among other reasons, Sunoco does not sufficiently identify the buildings and ordinances at issue in the petition affecting West Goshen Township. This same party also argues that a certain facility was improperly excluded from the exemption request and that Sunoco does not have Commission authority to use a certain segment of its pipeline in West Goshen Township. Based on the applicable legal standard and a review of the relevant documents submitted in this case, we do not believe that the requested relief with these Objections is clearly warranted and free from doubt or that the moving party is entitled to judgment as a matter of law on these issues. Therefore, we see no reasonable basis upon which the Commission can grant these Preliminary Objections. Moreover, we believe that Sunoco has plead sufficient facts to withstand preliminary objections and that any such factual issues are more appropriately explored and clarified through discovery. Accordingly, the ALJs should have overruled these Preliminary Objections as well.

THEREFORE, WE MOVE THAT:

1. The Initial Decision of Administrative Law Judges David A. Salapa and Elizabeth H. Barnes is reversed, consistent with this Joint Motion;

2. The Exceptions and Replies to Exceptions are granted in part and denied in part, consistent with this Joint Motion;

3. The Preliminary Objections filed by the various parties are denied, consistent with this Joint Motion;

4. This matter is remanded to the Office of Administrative Law Judge for further proceedings, consistent with this Joint Motion; and

5. The Office of Special Assistants draft an appropriate Order consistent with this Joint Motion.

JOHN F. COLEMAN, JR.
VICE CHAIRMAN

PAMELA A. WITMER
COMMISSIONER

DATE: October 2, 2014