**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, :

Bureau of Investigation and Enforcement :

:

v. : C-2015-2468131

:

Continental Communities, LLC and :

Hickory Hills MHC, LLC :

**ORDER**

**DENYING PRELIMINARY OBJECTIONS**

On February 19, 2015, the Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement (I&E) filed with the Commission a formal complaint against Continental Communities, LLC and Hickory Hills MHC, LLC, Docket Number C-2015-2468131. In its Complaint, I&E averred that Continental and Hickory Hills violated various provisions of the Gas Hazardous Liquids Pipelines Act, 58 P.S. §§ 801.101, *et seq*. (Act 127), as well as the Code of Federal Regulations. In support of its Complaint, I&E provided significant detail regarding a propane gas explosion that occurred on February 14, 2014 at a residential community owned, operated and managed by Continental and Hickory Hills. More specifically, I&E averred in its Complaint that Continental and Hickory Hills are operators of the pipeline that exploded. I&E averred that the explosion completely destroyed one residence and damaged other residences which resulted in one fatality and minor injuries to another individual. I&E averred that Continental and Hickory Hills violated several state and federal regulations that govern pipeline operators and requested that Continental and Hickory Hills be assessed a civil penalty in the amount of $200,000 for each of the thirty-nine (39) violations up to the maximum civil penalty of $2,000,000 allowable by the Public Utility Code.

On April 10, 2015, Continental and Hickory Hills filed an Answer and New Matter. In their Answer, Continental and Hickory Hills admitted or denied the various averments made by I&E in its Complaint. In particular, Continental and Hickory Hills denied that they are pipeline operators as defined by state regulations. Continental also denied that it is subject to the Commission’s jurisdiction. Continental and Hickory Hills then denied the various averments regarding the explosion that is the subject of I&E’s Complaint, noting that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations. Continental and Hickory Hills also answered the individual violations of federal and state regulations that I&E averred in its Complaint. In its New Matter, which was accompanied by a Notice to Plead, Continental and Hickory Hills averred six affirmative defenses, including 1) that Continental has no obligation under Act 127, 2) Hickory Hills had no duty to register with the Commission, as I&E averred, 3) Hickory Hills was not responsible for the explosion that is the subject of the I&E Complaint, 4) settlement set off, 5) estoppel and 6) that there is no basis for civil penalty on facts unrelated to the alleged violations. Continental and Hickory Hills concluded its Answer and New Matter by requesting that the Commission dismiss the Complaint with prejudice.

Also on April 10, 2015, Continental and Hickory Hills filed Preliminary Objections in response to I&E’s Complaint. In its Preliminary Objections, which were also accompanied by a Notice to Plead, Continental and Hickory Hills seek dismissal of all or part of the Complaint because 1) it fails to state any cause of action against Continental because Continental has never owned or operated pipeline facilities in Pennsylvania and 2) it fails to state a cause of action against either Continental or Hickory Hills because there is no basis in law or in the factual allegations to create a nexus between the explosion and the alleged statutory violations.

On April 20, 2015, I&E filed an Answer to the New Matter raised by Continental and Hickory Hills. In its Answer, I&E responded to each of the affirmative defenses raised in the New Matter. In particular, I&E denied that Continental has never acted and operated in the past as owner of Hickory Hills. I&E also denied that Continental and Hickory Hills had no legal obligation to register with the Commission. I&E refuted the assertion by Hickory Hills that it was not responsible for the explosion that is the subject of I&E’s Complaint. I&E also denied the assertion that any statutorily imposed civil penalty is offset by any civil settlements or judgments or barred by the doctrine of estoppel. Finally, I&E also responded to the assertion from Continental and Hickory Hills that there is no basis for a civil penalty on facts unrelated to the alleged violations by arguing, among other things, that the explosion may have been avoided had the regulations been complied with. I&E concluded by requesting that the allegations raised in the New Matter be rejected and that Continental and Hickory Hills be found to be in violation of each and every count in the Complaint.

Also on April 20, 2015, I&E filed an Answer to the Preliminary Objections filed by Continental and Hickory Hills. In its Answer, I&E argued that, while Hickory Hills may be the deed holder of the real estate where the explosion occurred, Continental is the *de facto* owner and operator of Hickory Hills and the associated pipeline facility. I&E provided several attachments to its Answer in support of its position that the first Preliminary Objection should be rejected. I&E also argued that there is a causal nexus between the explosion and the failure of Continental and Hickory Hills to comply with various state and federal pipeline safety laws. I&E added that the explosion may have been avoided had Continental and Hickory Hills been in compliance with those laws. I&E concluded its Answer by requesting that the Commission dismiss the Preliminary Objections filed by Continental and Hickory Hills and sustain the Complaint.

On September 2, 2015, the Commission issued a Motion Judge Assignment Notice informing the parties that I was assigned as the Presiding Officer and responsible to resolve any issues which might arise during the preliminary phase of this proceeding. The Preliminary Objections filed by Continental and Hickory Hills are ready for disposition. For the reasons discussed below, the Preliminary Objections will be denied and the Complaint will proceed to a hearing.

Section 5.101 of the Commission’s Rules of Administrative Practice and Procedure provides for the filing of Preliminary Objections. 52 Pa.Code § 5.101. Commission Preliminary Objection practice is comparable to Pennsylvania civil practice respecting the filing of Preliminary Objections. Equitable Small Transportation Intervenors v. Equitable Gas Company*,* 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994) (Equitable). Section 5.101(a) provides:

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

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 a proceeding.

52 Pa.Code § 5.101(a)(1)-(7).

For purposes of disposing of Preliminary Objections, the Commission must accept as true all well pleaded, material facts of the nonmoving party, as well as every reasonable inference from those facts. County of Allegheny v. Commonwealth of Pennsylvania, 490 A.2d 402 (Pa. 1985); Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa., 551 A.2d 602 (Pa. Cmwlth. 1988). The Commission must view the complaint in this case in the light most favorable to I&E and should dismiss the complaint only if it appears that I&E would not be entitled to relief under any circumstances as a matter of law. Equitable, *supra*; *see also*, Interstate Traveler Services, Inc. v. Commonwealth, Department of Environmental Resources, 406 A.2d 1020 (Pa. 1979).

In this case, Continental and Hickory Hills argued in its first Preliminary Objection that the formal complaint fails to state a cause of action against Continental because Continental has no obligation on under Act 127. Continental argued that “Hickory Hills, not Continental Communities, is now and has since January 1999 been the sole fee simple owner of the real estate and fixtures that comprise the manufactured home community at 121 Hickory Hills Drive.” In support of its position, Continental attached to its Preliminary Objection a copy of the Hickory Hills deed to the property. Continental further argued that, as the sole owner and operator of the pipeline system in question with no obligation of any kind under Act 127, the Complaint fails to state a claim against Continental upon which relief can be granted.

In response, I&E denied that Continental is the sole owner and operator of Hickory Hills but noted that while “Hickory Hills may be the deed holder of the real estate at Hickory Hills Mobile Home Community, however, Continental Communities, LLC is the *de facto* owner and operator of Hickory Hills Mobile Home Community and the associated propane pipeline facility.” I&E included an attachment to its Answer wherein Continental represented itself to the Department of Labor and Industry as the sole owner of Hickory Hills. I&E further averred that Continental has obligations under Act 127 because it is jointly responsible for the actions of Hickory Hills and should be held jointly and severally liable for all consequences of such actions regardless of deed holder status. I&E also attached to its Answer a page from Continental’s website wherein Continental states it is the owner of Hickory Hills.

This Preliminary Objection will be rejected. When accepting as true all well pleaded material facts averred by I&E, as well as every reasonable inference from those facts, and viewing the Complaint in the light most favorable to I&E, as is required when disposing of the Preliminary Objections in this case, it does not appear that I&E would not be entitled to any relief under any circumstances as a matter of law. In particular, I&E averred in its Complaint, for example, that Continental “currently owns, operates and manages numerous manufactured housing communities, including respondent Hickory Hills.” Complaint at 2; *see also*, Id. at 11. I&E further averred in its Complaint that Continental is a pipeline operator “as that term is defined under the Gas and Hazardous Liquids Pipeline Act.” Id. at 3. I&E argued that, as a result, Continental has violated various statutes and regulations over which the Commission has jurisdiction. Id. at 12-16. When disposing of the first Preliminary Objection, these averments must be accepted as true and viewed in a light most favorable to I&E and are sufficient to deny Continental’s Preliminary Objection. These averments, when accepted as true, are sufficient upon which this Commission can grant relief. As a result, I&E’s averments warrant a hearing on the allegations raised by I&E. During that hearing, Continental will have its opportunity to prove I&E’s averments wrong. On a preliminary basis, however, I&E’s averments must be accepted as true and Continental’s first Preliminary Objection must be denied.

Continental and Hickory Hills’ second Preliminary Objection is that the Complaint fails to state a cause of action against either Continental or Hickory Hills to the extent it seeks the alleged maximum civil penalty based on the circumstances of the explosion that occurred at Hickory Hills on February 14, 2014. Continental and Hickory Hills argued that the facts alleged in the complaint “bear no relation to the violations alleged against [Continental and Hickory Hills].” Continental and Hickory Hills further argued that “nothing in Act 127 suggests that factors other than a pipeline operator’s failure to comply with the registration and reporting provisions in Act 127 may be considered as a basis for assessing a civil penalty.” Continental and Hickory Hills make similar arguments with regard to Section 3301 of the Public Utility Code and Section 69.1201 of the Commission’s regulations and conclude that “there is no basis in law or in the facts as pleaded in the Formal Complaint for the Commission to assess a civil penalty based on facts that have nothing to do with the violations alleged.”

In response, I&E argued in its Answer to the Preliminary Objection that there is a causal connection between the explosion and the failure to register with the Commission and bring the system into compliance with federal pipeline safety laws because, had Continental and Hickory Hills “registered with the Commission, allowed Commission gas safety personnel to inspect facilities, and brought its system into compliance with federal pipeline safety laws, this devastating incident might have been avoided.” I&E further argued, among other things, that Continental and Hickory Hills’ “actions in the weeks leading up to the explosion are of an egregious and serious nature, show a wanton disregard for the safety of the public at the Hickory Hills Mobile Home Community, as well as demonstrate a lack of qualification of pipeline personnel in responding to and repairing leaks.” I&E further argued that Continental and Hickory Hills misread relevant statutes and regulations and that the Formal Complaint alleges all necessary facts to support the violations of federal pipeline laws. I&E concluded that “the well pleaded facts in the Formal Complaint establish that Respondents allowed a severe pipeline leak to persist for several weeks, ultimately resulting in a fatal catastrophic explosion, which may have been avoided had Respondents complied with the provisions of Act 127 and the federal pipeline safety laws.”

The second Preliminary Objection will also be rejected. When accepting as true all well pleaded material facts averred by I&E, as well as every reasonable inference from those facts, and viewing the Complaint in the light most favorable to I&E, as is required when disposing of the Preliminary Objections in this case, it does not appear that I&E would not be entitled to any relief under any circumstances as a matter of law. Questions of material fact exist that warrant a hearing. In particular, I&E averred in its Complaint that Continental and Hickory Hills violated the Code of Federal Regulations in that they did not have a manual which included procedures for responding promptly to a report of gas odor inside or near a building. Complaint at 14, *citing*, 49 CFR § 192.605(b)(11). I&E further averred in its Complaint that Continental and Hickory Hills violated the Code of Federal Regulations in that they did not train appropriate operating personnel to assure they are knowledgeable of emergency proceedings and did not review employee activities to determine whether the procedures were effectively followed. Id. at 15, *citing*, 49 CFR § 192.615(b)(1), (2) and (3). I&E supported these averments in its Complaint with corresponding averments of fact.

As with the first Preliminary Objection, when disposing of the second Preliminary Objection, these averments must be accepted as true and viewed in a light most favorable to I&E and are sufficient to deny the Preliminary Objection. These averments, when accepted as true, are sufficient upon which this Commission can grant relief. As a result, I&E’s averments warrant a hearing on the allegations raised by I&E. During that hearing, Continental and Hickory Hills will have its opportunity to prove I&E’s averments wrong. On a preliminary basis, however, I&E’s averments must be accepted as true and the second Preliminary Objection must be denied.

As a result, both of the Preliminary Objections filed by Continental and Hickory Hills will be denied. When accepting as true the averments contained in the Complaint, and viewing those averments in a light most favorable to I&E, it is not clear that no relief is possible. These averments, when accepted as true, are sufficient upon which this Commission can grant relief. As a result, I&E’s averments warrant a hearing on the allegations raised by I&E. I&E is advised that a hearing on its Complaint will require it to carry its burden of proof by a preponderance of the evidence and that all decisions of the Commission must be supported by substantial evidence. This is a different standard of review than used when addressing Preliminary Objections. Nonetheless, the issues raised by I&E in its Formal Complaint should not be dismissed on a preliminary basis but will proceed to an Initial Hearing before an Administrative Law Judge.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objections filed by Continental Communities, LLC and Hickory Hills MHC, LLC at Docket Number C-2015-2468131 on April 30, 2015 are hereby denied.
2. That the Complaint filed by the Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement on February 19, 2015 will proceed to a hearing before an Administrative Law Judge.

Date: September 30, 2015 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Joel H. Cheskis

Administrative Law Judge

**C-2015-2468131 - PUC INVESTIGATION AND ENFORCEMENT v. CONTINENTAL COMMUNITIES LLC/HICKORY HILLS MHC LLC**

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