**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania State Senator Andrew E. Dinniman :

 : P-2018-3001453

 v. :

 : C-2018-3001451

Sunoco Pipeline, L.P. :

**ORDER DENYING PRELIMINARY OBJECTIONS**

On April 26, 2018, Pennsylvania State Senator Andrew E. Dinniman (Senator Dinniman or Complainant) filed a complaint and a petition for interim emergency relief with the Commission against Sunoco Pipeline, L.P. (Sunoco or Respondent). The Complaint was served upon Sunoco on April 26, 2018.[[1]](#footnote-1) On May 1, 2018, Complainant filed an Amended Complaint. The Amended Complaint alleges that Sunoco’s construction and operation of ME 1, ME 2 and ME 2X in West Whiteland Township, Chester County, Pennsylvania are unsafe, unreasonable, and in violation of 66 Pa. C.S. §1501. Senator Dinniman alleges Sunoco violated Section 59.33 of the Commission’s regulations, 52 Pa. Code § 59.33(a) because it has not used reasonable efforts to warn and protect the public from danger and has not exercised reasonable care to reduce the hazards to which employees, customers and others may be subjected to by reason of its equipment and facilities.

Senator Dinniman requests a public risk analysis pursuant to 49 CFR 195.452(i) and (j). He requests the Commission issue an Order prohibiting the construction of ME 2 and ME 2X in areas of West Whiteland Township and prohibiting the operation of ME 1 in West

Whiteland Township until Sunoco fully assesses and the Commission approves the adequacy, condition, efficiency, safety and reasonableness of ME 1 and the geology in which it sits. Alternatively, Senator Dinniman contends Sunoco is not a public utility. Therefore, the Commission should issue an order finding Sunoco is not a Commission public utility, that ME 1, ME 2 and ME 2X are not Commission public utility equipment or facilities. If Sunoco is not a public utility, this matter should be transferred to the appropriate court of competent jurisdiction. Amended Complaint at 1-19.

On May 4, 2018, petitions to intervene were filed by the Clean Air Council and Virginia Marcille Kerslake, respectively. On May 7 and 10, 2018, hearings were held on the Petition for Emergency Interim Relief. At the hearing, Clean Air Council and Ms. Kerslake were granted Intervenor status. On May 21, 2018 an Answer and New Matter to the Amended Complaint was filed. Also, on May 21, 2018, Preliminary Objections to the Amended Complaint were filed. On May 23, 2018, an Interim Emergency Order and Certification of Material Question was issued. On May 31, 2018, Senator Dinniman filed Preliminary Objections to Preliminary Objections.[[2]](#footnote-2) On June 8, 2018 Sunoco filed a Motion to Strike Preliminary Objections and Request for Expedited Treatment. On June 11, 2018, Senator Dinniman filed an Answer to New Matter. There have been a few more petitions to intervene and over 50 Comments filed to these consolidated Docket Nos. C-2018-3001451 and P-2018-3001453.[[3]](#footnote-3) Sunoco’s 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 Complainant has Standing - 52 Pa. Code § 5.101(a)(7)

Sunoco’s preliminary objections allege that the Amended Complaint should be dismissed pursuant to Section 5.101(a)(7) for lack of standing. On June 15, 2018, the Commission entered an Opinion and Order[[4]](#footnote-4) (*June 2018 Order*) affirming in part and reversing in part the Interim Emergency Order. Specifically, the Commission held Senator Dinniman has standing to proceed in this matter because of his membership in the General Assembly and also as a property-owner and resident of West Whiteland Twp., Chester County under 66 Pa. C.S. §701. *June 2018 Order* at 21-23. Thus, I find in favor of Complainant on this issue.

Whether Complainant failed to join necessary parties to the Amended Complaint - 52 Pa. Code §5.101(a)(5)

Sunoco also contends the Amended Complaint should be dismissed pursuant to 52 Pa. Code § 5.101(a)(5) because Complainant failed to join necessary parties that will be directly adversely affected if the relief is granted, including Sunoco’s current shipper, Range Resources, and businesses relying on deliveries or future deliveries such as the Marcus Hook Industrial Plant.

A necessary party is one whose rights are so connected to the claims of litigants that no relief can be granted without infringing upon those rights. *Pennsylvania Fish Commission v. Pleasant Twp.*, 388 A.2d 756, 759 (Pa.Cmwlth. 1978). Sunoco asserts the enjoining or delaying operations of Sunoco will infringe upon the rights of its shippers who pay tariffed rates to ship product as well as those persons or entities in contractual relationships with its shippers and the Marcus Hook Industrial Plant. Sunoco contends all of these entities and individuals should have been joined to the Complaint as necessary parties, but Sunoco offers no compelling authority or precedent for such a legal requirement. Range Resources – Appalachia, LLC has filed a Petition to Intervene. Anyone filing a timely petition to intervene in this matter will receive notice of a prehearing conference and may participate in the conference. The parties of record including Petitioning Intervenors: Range Resources – Appalachia, LLC, West Whiteland Township and Andover Homeowners’ Association, Inc. will be served a notice of prehearing conference. Accordingly, I find in favor of Complainant on this issue.

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

Sunoco contends Counts II – V should be dismissed because they are legally insufficient, pursuant to 52 Pa. Code § 5.101(a)(4). Sunoco specifically argues the “doctrine of laches” bars Count III because no law or regulation prohibits Sunoco from locating these pipelines within 50 feet of a dwelling and the Complainant knew or should have known ME 2 would be constructed in the existing right of way of the ME 1 pipeline since 2014, yet the Complaint was filed in 2018 after Sunoco had begun and completed 98% of the ME 2 pipeline. Any change to the route at this point is “extremely prejudicial” to Sunoco and the doctrine of laches bars any challenge to the route.

The doctrine of laches is an affirmative defense. 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).

The Commission held in its *June 2018 Order* in pertinent part:

Based on our review of the record, we find that Senator Dinniman has established, by a preponderance of the evidence, substantial legal questions. The Senator has raised issues that implicate “facilities” and “service” as those terms are broadly defined in the Code, 66 Pa. C.S. §§ 1501 and 1505, and involve the reasonableness, adequacy, and sufficiency of facilities and services of a public utility, be they contractual or otherwise, are squarely within the Commission’s jurisdiction.

*June 2018 Order* at 32.

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.

Viewing the complaint in this case in the light most favorable to Senator Dinniman, he has alleged that Sunoco has violated 66 Pa.C.S. § 1501 and regulations by operating ME 1 and constructing ME 2 and ME 2X of its Mariner East pipeline project in West Whiteland Township in a manner not consistent with the Public Utility Code or Commission’s regulations. Senator Dinniman requests a public risk analysis pursuant to 49 CFR 195.452(i) and (j). Accepting as true all of the facts alleged in Senator Dinniman’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 siting the Mariner East Project, in developing a risk analysis and emergency response plan and whether those actions comply with applicable statutes, regulations and orders. Denying Sunoco’s preliminary objections is appropriate under the circumstances.

ORDER

 THEREFORE,

 IT IS ORDERED:

1. That the preliminary objections filed by Sunoco Pipeline, L.P. at Docket No. C-2018-3001451 and P-2018-3001453 are denied.

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

Date: July 16, 2018 /s/

 Elizabeth H. Barnes

 Administrative Law Judge

**P-2018-3001453 – Pennsylvania State Senator Andrew E. Dinniman v Sunoco Pipeline, L.P. C-2018-3001451 – Pennsylvania State Senator Andrew E. Dinniman v Sunoco Pipeline, L.P. Revised 7/17/2018**

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1. It is noted that a copy of the original Complaint was served by Complainant upon Thomas J. Sniscak, Esquire and Curtis N. Stambaugh, Esquire on April 26, 2018. Mr. Sniscak entered an appearance on April 27, 2018. Electronic service of the Amended Complaint is deemed to have occurred on May 1, 2018. The record shows the Commission’s Secretary’s Bureau made multiple attempts to mail a hard copy of the Complaint and Amended Complaint with notices to plead to Sunoco. I remind Sunoco that it is the duty of the utility to keep the Commission apprised of its address for the service of formal complaints. *See* 52 Pa. Code 1.53. *See also*, 52 Pa. Code 1.55(a) and (b) (when an attorney enters an appearance, service must be directed to the attorney and service to the attorney is deemed service upon the party). [↑](#footnote-ref-1)
2. As Preliminary Objections to Preliminary Objections are not permitted pursuant to 52 Pa. Code Section 5.101(a), Sunoco need not respond to Complainant’s Preliminary Objections. Rather, they will be treated as Complainant’s Answer to Preliminary Objections. Complainant’s Answer to New Matter also addresses the substance of Sunoco’s Preliminary Objections. [↑](#footnote-ref-2)
3. On May 23, 2018, Andover Homeowners’ Association, Inc. filed a Petition to Intervene. On May 30, 2018, Range Resources – Appalachia, LLC filed a Petition to Intervene. On June 28, 2018, West Whiteland Twp., Chester County filed a Petition to Intervene. Many comments from legislators, municipalities, associations, companies and individuals were filed. The following filed comments between May 23 and June 14, 2018, seeking affirmation of an Interim Emergency Order: Rep. Leanne Krueger-Braneky, 161st Dist. Pipeline Safety Coalition; Citizens of Commonwealth of PA; Rep. Christopher Quinn, 168th Dist.; Rep. Duane Milne; Westtown Twp.; Edgemont Twp.; Sen. Rafferty 44th Dist.; Sen. Folmer, 48th Dist.; Jerry McMuller, Ph.D.; Chester County Commissioners; Rosemary Fuller; DelChesco United for Pipeline Safety; Eric Friedman; West Whiteland Twp.; Carrie Gross; Chester County Assn. of Twp. Officials; West Pikeland Twp.; Principal Margaret Egan, St. Peter and Paul School; Swathmore Borough; Board of Supervisors of East Goshen Twp.; Sen. Leach 17th Dist.; Rep. Schwank Reading; Rep. Comitta 156th Dist.; Uwchlan Twp.; Sen. Killion; Thornbury Twp.; Rep. Corbin, 155th Dist.; Christine Simms; Janice Mancuso; Sen. McGarrigle, 26th Dist. The following filed comments seeking reversal of the Interim Emergency Order: JKLM Energy, LLC; Sewickley Twp., Westmoreland County; INEOS – Global manufacturer of petrochemicals; Mechanical and Plumbing Contractors Assn. of Eastern PA; Rep. Taylor 177th Dist.; Sen. Bartolatta; Sen. Scarnati; Sen. Yaw; Commissioners of Westmoreland County; Steamfitters Local Union 420; PA Energy Infrastructure Alliance; Burrell Twp. Supervisors; International Brotherhood of Electrical Workers (IBEW) Local Union 654; Dominion Energy; Fire Chief Donald Thoma; PA Chamber of Business; Lower Allen Twp.; Derry Twp.; Loyalhanna Twp.; Rep. Oberlander; Burrell Twp. Supervisors; Hueber Launch Service; Jackson Twp. Fire Co. [↑](#footnote-ref-3)
4. It is noted Sunoco has made at least ten compliance filings at this consolidated docket per Ordering Paragraph Nos. 6-9 of the *June 2018 Order*. [↑](#footnote-ref-4)