**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held August 20, 2015

Commissioners Present:

Gladys M. Brown, Chairman

John F. Coleman, Jr., Vice Chairman

Pamela A. Witmer

James H. Cawley

Robert F. Powelson

Sharon Laffey C-2015-2462487

v.

Knox Energy Cooperative Association, Inc.

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Susan D. Colwell, issued on April 3, 2015, in the above-captioned Formal Complaint (Complaint) proceeding. Exceptions have not been filed. However, we exercised our right to review the Initial Decision pursuant to Section 332(h) of the Public Utility Code (Code), 66 Pa. C.S. § 332(h). For the reasons stated below, we shall modify the ALJ’s Initial Decision, remand the matter to the Commission’s Office of Administrative Law Judge (OALJ) for further proceedings, and refer this matter to the Commission’s Bureau of Investigation and Enforcement (I&E) and the Law Bureau.

**History of the Proceeding**

On December 12, 2014, Sharon Laffey (Complainant or Ms. Laffey) filed a Formal Complaint against Knox Energy Cooperative Association, Inc. (Knox or Respondent). Ms. Laffey alleged that a portion of the gas line to her residence was not buried and protruded from the ground, which, she believed, created a hazardous condition. The Complainant requested a Commission order directing the Respondent to bury the gas line. Ms. Laffey further stated that Knox promised to bury the gas line in the spring of 2014, but as of the date of the Complaint filing had not done so. Complaint at 2-4.

On February 5, 2015, the Respondent filed an Answer and New Matter in response to the Complaint. In its Answer, Knox admitted that a section of its gas line traverses the Complainant’s property and is above ground. However, the Respondent denied that this exposed section of line constitutes a hazard. Furthermore, Knox contended that its facilities are subject to annual Commission safety audits and that the most recent Commission audit of its facilities was performed on September 26, 2014. According to the Respondent, the Commission determined that Knox’s facilities were in compliance with all applicable state and federal pipeline safety regulations and that there were no enforcement actions or outstanding compliance issues with its system. Knox also averred that it has been in contact with Ms. Laffey in an attempt to resolve the Complaint which includes the development of plans to relocate her gas line. However, Knox explained that the planned relocation cannot be carried out until the spring of 2015 when the weather is more suitable for such work. Answer at 1-2.

In its New Matter, the Respondent averred that the Commission determined that Knox is a bona fide cooperative association as determined in a prior proceeding involving the transfer of a natural gas pipeline system to Knox.[[1]](#footnote-2) The Respondent also alleged that no changes have been made to its operating structure, and no orders, directives, or pronouncements from any state or federal agencies have altered its status as a bona fide cooperative association. The Respondent also contended, in part, that Ms. Laffey is a member of Knox and takes natural gas service from its Claysville, Pennsylvania System, which was the system at issue in the *Gasco Order*. New Matter at 2-3.

Also on February 5, 2015, the Respondent filed Preliminary Objections (POs). In its POs, Knox asserted that the Complaint should be dismissed due to lack of jurisdiction because the Respondent is a bona fide cooperative association as determined in the *Gasco Order*. The Respondent cited to 66 Pa. C.S. § 102 and argued that formal complaints against entities determined to be bona fide cooperative associations must be dismissed due to a lack of jurisdiction by the Commission.[[2]](#footnote-3) POs at 5-6.

The Complainant did not file responsive pleadings to the New Matter or POs.

In her Initial Decision, ALJ Colwell determined that the POs should be treated as a Motion for Judgment on the Pleadings pursuant to 52 Pa. Code § 5.102. The ALJ granted Knox’s Motion and dismissed the Complaint on the basis that the Respondent is a bona fide cooperative association and not regulated by the Commission. I.D. at 8-9.

No Exceptions to the Initial Decision have been filed.

**Discussion**

**Legal Standards**

The Commission’s Rules of Practice and Procedure regarding motions for summary judgment and judgment on the pleadings are as follows:

**§ 5.102. Motions for summary judgment and judgment on the pleadings.**

(a) *Generally.* After the pleadings are closed, but within a time so that the hearing is not delayed, a party may move for judgment on the pleadings or summary judgment. A motion must contain a notice which states that an answer or other responsive pleading shall be filed within 20 days of service of the motion.

(b) *Answers*. An answer to a motion for judgment on the pleadings or summary judgment, including an opposing affidavit or verification to a motion for summary judgment, may be filed within 20 days of the date of service of the motion. The answer to a motion for summary judgment may be supplemented by depositions, answers to interrogatories, or further affidavits and admissions.

\* \* \*

(d) *Decisions on motions.*

(1) *Standard for grant or denial on all counts.* The presiding officer will grant or deny a motion for judgment on the pleadings or a motion for summary judgment, as appropriate. The judgment sought will be rendered if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.

52 Pa. Code § 5.102.

Judgment on the pleadings is available when the pleadings show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Judgment on the pleadings should only be granted when the right to relief is clear and free from doubt. In determining the absence of a genuine issue of material fact, the Commission must take the view of the evidence most favorable to the non-moving party and resolve any doubts against the entry of the judgment. *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313, 1316 (Pa. Super. Ct. 1983).

ALJ Colwell made six Findings of Fact and reached eleven Conclusions of Law. I.D. at 3, 8-9. We shall adopt and incorporate herein by reference the ALJ’s Findings of Fact and Conclusions of Law, unless they are reversed or modified by this Opinion and Order, either expressly or by necessary implication.

As a preliminary matter, any issue that we do not specifically address has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corporation 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).

**ALJ’s Decision**

Preliminarily, the ALJ noted that POs may be filed in response to a pleading and that lack of Commission jurisdiction is a legitimate ground for a PO. I.D. at 4 (citing 52 Pa. Code § 5.101). However, the ALJ explained that lack of jurisdiction is not evident from the Complaint and that the Respondent raised the jurisdiction issue in its New Matter. Because a PO can only be based on facts set forth in the Complaint, the ALJ reasoned that any facts or issues raised in responsive pleadings such as New Matter cannot be considered in the disposition of the PO. Nonetheless, the ALJ explained that lack of jurisdiction is an affirmative defense and that Knox raised it in a timely manner. Accordingly, the ALJ determined that the Respondent’s POs would be treated as a Motion for Judgment on the Pleadings (MJOP) pursuant to 52 Pa. Code § 5.102. I.D. at 4.

In addressing the MJOP, the ALJ observed that there are no facts in dispute. The only averment is that Knox has not buried a partially-exposed gas line on Ms. Laffey’s property, which the Respondent admitted. I.D. at 5. Additionally, the ALJ noted that Knox, in its Answer and New Matter, averred that: it is working to relocate and rebury the gas line on the Complainant’s property; Ms. Laffey is a member of Knox; and the Respondent is a bona fide cooperative association outside of the Commission’s regulatory jurisdiction. By not responding to these averments, they are deemed admitted pursuant to 52 Pa. Code § 5.63(b). I.D. at 5.

ALJ Colwell explained the limits of the Commission’s authority to supervise and regulate bona fide cooperative associations pursuant to the exclusion contained in 66 Pa. C.S. § 102. The ALJ also cited to a prior Commission decision which ruled that formal complaints against entities determined to be bona fide cooperative associations must be dismissed due to lack of jurisdiction. I.D. at 6 (citing *John F. Mellon v. Morea Citizens Water Company*, Docket No. C-902997 (Order entered May 20, 1991)). Additionally, the ALJ referenced the Commission’s previous ruling in the *Gasco Order* in which Knox established a *prima facie* case to support its classification as a bona fide cooperative association. Consistent with the findings set forth in the *Gasco Order*, the Respondent averred in its New Matter factors which support the characteristics of a bona fide cooperative association. I.D. at 6-7.

Here, the ALJ determined that the sole count alleged in the Complaint is not within the jurisdiction of the Commission, granted the MJOP and dismissed the Complaint.

**Disposition**

Upon review, we agree that Knox is not a public utility as defined by Section 102 of the Code, 66 Pa. C.S. § 102. However, neither the Parties to this proceeding nor the ALJ addressed the Commission’s potential jurisdiction over this matter under the Gas and Hazardous Liquids Pipelines Act of 2011 (Act 127), 58 P.S.

§§ 801.101, *et seq.* Act 127 expanded the Commission’s authority to enforce the federal pipeline safety laws as they relate to non-public utility gas and hazardous liquids pipeline equipment and facilities within the state. The Commission is empowered to promulgate regulations, investigate pipeline operators’ facilities, practices and safety-related conditions, and where necessary, impose civil penalties or take other appropriate enforcement action for violations.

Under Section 501(a) of Act 127, 58 P.S. § 801.501(a), the Commission has the authority to supervise and regulate pipeline operators within Pennsylvania consistent with federal pipeline safety laws. Knox is a registered “pipeline operator” as defined by Section 102 of Act 127.[[3]](#footnote-4) We will take official notice of the Respondent’s gas distribution facilities through its Act 127 Registrations pursuant to 52 Pa. Code § 5.408.[[4]](#footnote-5)

Accordingly, the facility at the center of this dispute, a gas service line, is a “pipeline facility” subject to our jurisdiction under Act 127.[[5]](#footnote-6) Because there is no evidentiary record, it is not known whether there is a safety-related condition that should be investigated by I&E. It is appropriate for I&E to have the opportunity to examine the safety of the facilities at issue.

The scope of this review is a matter of first impression for the Commission. Act 127 does not expressly address whether private party complaints are permitted. In considering this question, it is proper to consider the federal regulatory scheme that the Commission is charged with enforcing. The relevant pipeline safety laws permit private causes of action. 49 U.S.C. § 60121.[[6]](#footnote-7) However, the right is not absolute, and these complaints may be preempted in certain circumstances. As we are charged with supervising pipeline operators in a manner consistent with federal pipeline safety laws, we find it appropriate to allow for private causes of action, consistent with 49 U.S.C.   
§ 60121.

For purposes of this proceeding, including the fact that the Complainant is *pro se* and that this is a matter of first impression, we find that the Complainant has satisfied the requirements for bringing a private cause of action under Act 127. Accordingly, we shall remand this matter to the OALJ for further proceedings as deemed necessary. Additionally, we direct the Law Bureau to review this matter and advise the Commission whether it is appropriate and necessary to revise the Commission’s internal procedures and/or promulgate regulations on the issue of private causes of action under Act 127.

In its Answer and New Matter, Knox stated that it is working with the Complainant to relocate and bury the service line. If this has occurred, and the Parties are satisfied with the resolution, they are encouraged to file a Certificate of Satisfaction consistent with 52 Pa. Code § 5.24. Furthermore, the proceeding on remand shall be stayed for sixty days from the date of entry of this Opinion and Order, in order for I&E to contact the Parties and to conduct an investigation into the Complainant’s allegations. At its discretion, I&E may intervene in this proceeding or, if it chooses, may take additional action it deems to be warranted.

**Conclusion**

Consistent with this Opinion and Order, we shall modify the ALJ’s Initial Decision, remand the proceeding to the OALJ, and refer the matter to I&E and Law Bureau. Additionally, we shall stay the remand proceeding for sixty days to permit I&E to contact the Parties, conduct an investigation into the Complainant’s allegations, and intervene, as it deems warranted; **THEREFORE,**

**IT IS ORDERED:**

1.That the Initial Decision of Administrative Law Judge Susan D. Colwell, issued on April 3, 2015, is modified, consistent with this Opinion and Order.

2. That the matter docketed at C-2015-2462487 is remanded to the Office of Administrative Law Judge for such further proceedings as may be warranted.

3. That the remand proceeding shall be stayed for sixty (60) days from the date of entry of this Opinion and Order to permit the Commission’s Bureau of Investigation and Enforcement to contact the Parties, conduct an investigation into the Complainant’s allegations, intervene or take additional action, it deems to be warranted.

4. That a copy of this Opinion and Order shall be served on the Bureau of Investigation and Enforcement and the Law Bureau.

**** **BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: August 20, 2015

ORDER ENTERED: September 3, 2015

1. *See, Application of Gasco Distribution Systems, Inc. for approval of the transfer of its Claysville Division’s assets to Utility Pipeline Ltd. and immediately thereafter to Knox Energy Cooperative Association, Inc. and for the abandonment of service by Gasco Distribution Systems, Inc.*, Docket No. A-120002F2001 (Order entered September 29, 2006) (*Gasco Order*). [↑](#footnote-ref-2)
2. A “public utility” does not include “any bona fide cooperative association which furnishes service only to its stockholders or members on a nonprofit basis.” *Id.* [↑](#footnote-ref-3)
3. A “pipeline operator” is

   A person that owns or operates equipment or facilities in this Commonwealth for the transportation of gas or hazardous liquids by pipeline or pipeline facility regulated under Federal Pipeline Safety laws. The term does not include a public utility or an ultimate consumer who owns a service line on his real property.

   58 P.S. § 801.102. Knox is registered as a pipeline operator at Docket No.   
   A-2012-2294046 and has filed Act 127 Pennsylvania Pipeline Operator Annual Registration Forms (Act 127 Registrations) in 2013, 2014 and 2015. [↑](#footnote-ref-4)
4. “Upon notification that facts are about to be or have been noticed, a party adversely affected shall have the opportunity upon timely request to show that the facts are not properly noticed or that alternative facts should be noticed.” 52 Pa. Code   
   § 5.408(c). Any request to show that this official notice is not proper or that alternate facts should be noticed shall be addressed during the remand proceeding. [↑](#footnote-ref-5)
5. A “pipeline facility” is a “new or existing pipeline, right-of-way and any equipment, facility or building used in the transportation of gas or hazardous liquids….” 58 P.S. § 801.102. [↑](#footnote-ref-6)
6. Pursuant to 49 U.S.C. § 60121(a), a “person may bring a civil action in an appropriate district court of the United States for injunction against another person … for a violation of this chapter or a regulation prescribed or order issued under this chapter.” Furthermore, 49 U.S.C. § 60121(d) permits additional remedies as follows: “[a] remedy under this section is in addition to any other remedies provided by law. This section does not restrict a right to relief that a person or a class of persons may have under another law or at common law.” [↑](#footnote-ref-7)