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August 31, 2018

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Filing Room
Harrisburg, PA 17120

Re: Mark Iacono v. Energy Transfer Company; Docket No. C-2018-3003645;
**ENERGY TRANSFER COMPANY'S PRELIMINARY OBJECTIONS
TO THE FORMAL COMPLAINT OF MARK IACONO**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is Energy Transfer Company's Preliminary Objections to the Formal Complaint of Mark Iacono in the above-referenced proceeding.

If you have any questions regarding this filing, please contact the undersigned.

Very truly yours,

Thomas J. Sniscak
Kevin J. McKeon
Whitney E. Snyder
Counsel for Energy Transfer Company

WES/das
Enclosure
cc: Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MARK IACONO,

Complainant,

v.

a
ENERGY TRANSFER COMPANY,

Respondent.

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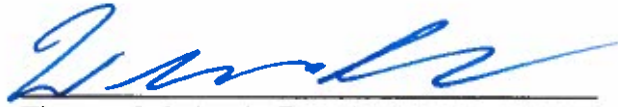
Docket No. C-2018-3003645

NOTICE TO PLEAD

You are hereby advised that, pursuant to 52 Pa. Code § 5.61, you may file a response within ten (10) days of the attached preliminary objections. Any response must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for Sunoco Pipeline, L.P., and where applicable, the Administrative Law Judge presiding over the issue.

File with:
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Second Floor
Harrisburg, PA 17120

Respectfully submitted,



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Energy Transfer Company*

Dated: August 31, 2018

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MARK IACONO,

Complainant,

v.

ENERGY TRANSFER COMPANY,

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Docket No. C-2018-3003645

**ENERGY TRANSFER COMPANY'S PRELIMINARY OBJECTIONS
TO FORMAL COMPLAINT OF MARK IACONO**

Pursuant to 52 Pa. Code § 5.101, Respondent Energy Transfer Company (ETC) submits these Preliminary Objections to Mark Iacono's July 27, 2018 Formal Complaint (Complaint) in the above captioned proceeding and requests the Complaint be dismissed. ETC notes that because it is preliminarily objecting to the Complaint including insufficient specificity, it is not required to file an Answer to the complaint until further order. 52 Pa. Code § 5.101(e)(1) ("If a preliminary objection regarding insufficient specificity in a pleading is filed, an answer is not required until further directed by the presiding officer or the Commission.")

I. INTRODUCTION

1. **Insufficient Specificity.** Pursuant to 52 Pa. Code § 5.101(e)(1), the Complaint, filed by counsel, should be dismissed in its entirety because it is insufficiently specific to give notice to ETC of the basis for Commission jurisdiction and fails to allege violation of any specific law, regulation, or Commission order. Respondent is not a public utility and the Complaint does not allege public utility status, so jurisdiction does not exist under any claim or contention subject

to the Pennsylvania Public Utility Code, 66 Pa.C.S. §§101 *et. seq.* governing regulation of public utilities. Stated differently, the Commission only has jurisdiction to entertain third-party complaints against public utilities. 66 Pa. C.S. §701. ETC thus cannot determine the basis under which Complainant is alleging jurisdiction and would have to guess as to what grounds on which ETC is alleged to be subject to Commission jurisdiction to defend itself.

2. The Complaint also fails to cite a single law, regulation, or Commission order. ETC has no notice of what alleged violations of law occurred under the facts alleged by the Complaint. These two defects coupled together further deprive ETC of notice of what laws are even alleged to be applicable to ETC. Complainant could be alleging violation of federal pipeline safety law, but as stated below that is inapplicable relative to third-party complaints for non-public utility pipelines. Consequently, the Complaint wholly fails to give ETC the required specificity under due process to defend itself and should be dismissed for insufficient specificity.

3. **Lack of Jurisdiction.** Pursuant to 52 Pa. Code § 5.101(a)(1), the Complaint should be dismissed in its entirety because the Commission lacks jurisdiction to entertain complaints by third parties against non-public utilities. The Commission as a regulatory body only has the powers that the General Assembly grants to it. *See, e.g., W. Pennsylvania Water Co. v. Pennsylvania Pub. Util. Comm'n*, 370 A.2d 337, 339 (Pa. 1977) (Administrative agencies are creatures of the legislature and have only those powers which have been conferred by statute.). The Commission only has jurisdiction to adjudicate complaints by third parties against *public utilities*. 66 Pa. C.S. § 701 (emphasis added). The Complaint does not aver that ETC is a public utility or provide facts that would show ETC is a public utility, and ETC is in fact not a public utility.

4. Instead, the Commission only has limited jurisdiction over ETC as a pipeline operator under Act 127 of 2011, 58 P.S. § 801.101 *et seq.* (Act 127). First, Act 127 is not part of

the Public Utility Code but rather is a separate statute and hence the Public Utility Code's complaint and hearing procedures are inapplicable and not available (or even mentioned) under Act 127, which instead incorporates Pipeline and Hazardous Materials Safety Administration (PHMSA) regulations and grants the Commission very specific enforcement and investigation power of those regulations. *Id.* at § 501. The Commission's enforcement of those provisions must be consistent with federal regulations. *Id.* Those federal regulations do not provide for third party complaints. *See generally* 49 CFR §§ Part 190 (Pipeline Safety Enforcement and Regulatory Procedures) (available at <https://www.law.cornell.edu/cfr/text/49/part-190>). Thus, it would be a violation of Act 127 for the Commission to entertain third party complaints against pipeline operators. Moreover, Act 127 by its plain terms does not grant the Commission the jurisdiction or adjudicatory power to entertain complaints pursuant to 66 Pa. C.S. § 701 against pipeline operators. Act 127 expressly states:

Section 504. Jurisdiction and authority of commission.

(a) Jurisdiction.--Nothing in this act shall give the commission jurisdiction over any pipeline operator for purposes of rates or ratemaking or any purpose other than those set forth in this act.

...

(c) Authority.--Nothing in this act grants the commission additional authority to determine or regulate a pipeline operator as a public utility as defined in 66 Pa.C.S. § 102 (relating to definitions) or as a natural gas supplier or natural gas supply services as defined in 66 Pa.C.S. § 2202 (relating to definitions).

5. Accordingly, the Commission lacks jurisdiction over the Complaint and it should be dismissed. *Notably, Complainant has filed a similar action in the Beaver County Court of Common Pleas.* The Complaint is essentially a landowner dispute over a right-of-way, not a

public utility matter over which this Commission has jurisdiction since no public utility is involved nor is it a justiciable complaint under Act 127.

6. **Legal Insufficiency.** In the alternative, if Your Honor finds the Commission does have jurisdiction somehow (it does not) over the Complaint, the Complaint should be dismissed because it is legally insufficient. As a pipeline operator, the Commission only has jurisdiction over ETC's compliance with Act 127 and federal pipeline safety laws and regulations. The Complaint, which counsel submitted on behalf of Complainant, fails to cite to any pipeline safety law or regulation that it claims ETC has violated. Instead, the Complaint makes general "public safety" allegations and cites to news articles about incomplete and misleading recommended decisions which were reversed or which have be modified in the utility involved in these separate and irrelevant proceedings. Complaint at Ex. 7. The Complaint does not aver ETC is a public utility or facts to show ETC is a public utility, and ETC is not a public utility over which the Commission has jurisdiction regarding general safety allegations under 66 Pa. C.S. § 1501. Because the Complaint fails to aver ETC has violated a federal pipeline law or regulation, it should be dismissed as legally insufficient.

II. ARGUMENT

A. **Legal Standard**

7. The Commission's regulations allow a respondent to file preliminary objections to a complaint. 52 Pa. Code § 5.101. Preliminary motion practice before the Commission is similar to that utilized in Pennsylvania civil practice. *Equitable Small Transportation Interveners v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, PUC Docket No. C-00935435 (July 18, 1994) (citing Pa. R.C.P 1017). A preliminary objection in civil practice seeking dismissal of a pleading

will be granted where relief is clearly warranted and free from doubt. *Interstate Traveller Services, Inc. v. Pa. Dept. of Environmental Resources*, 406 A.2d 1020 (Pa. 1979).

8. In determining whether to sustain preliminary objections, all well-pleaded material, factual averments and all inferences fairly deducible therefrom are presumed to be true. *Marks v. Nationwide Ins. Co.*, 762 A.2d 1098, 1099 (Pa. Super. Ct. 2000), *appeal denied*, 788 A.2d 381 (Pa. 2001). The pleaders' conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinion should not be considered to be admitted as true. *Id.* The preliminary objections should be sustained if, based on the facts averred by the plaintiff, the law says with certainty that no recovery is possible. *Soto v. Nabisco, Inc.*, 32 A.3d 787, 790 (Pa. Super. Ct. 2011), *appeal denied*, 50 A.3d 126 (Pa. 2012).

B. Preliminary Objection 1: The Complaint Is Insufficiently Specific

9. To be sufficiently specific, a Complaint must give fair notice of the alleged wrongdoing in violation of a law, regulation, or order over which the Commission has jurisdiction. *See LouiGens Piller, v. Philadelphia Gas Works*, Docket No. C-2013-2365623, 2013 WL 3971559, at *2 (Order entered Jul. 29, 2013) (Colwell, J.) (final by operation of law) ("The pleading must be sufficiently specific so that the defending party will know how to prepare his defense. *Department of Transportation v. Shipley Humble Oil Co.*, 29 Pa. Commw. 171, 370 A.2d 438 (Pa. Cmwlth. 1977). Pennsylvania is a fact pleading, rather than notice, state. Thus, the pleadings should conform to the elements necessary to state a cause of action. *Pappert v. Tapp Pharmaceuticals, et al.*, 868 A.2d 624; 2005 Pa. Commw. LEXIS 39.").

10. A Complaint is not sufficiently specific where a respondent has to guess at what action complained of is alleged to be illegal. "A respondent is not required to guess whether the

Complainant means to allege something, and it is also possible that a respondent will guess the wrong basis of the complaint.” *Id.*

11. Here, the Complaint is insufficiently specific because it fails to allege the basis for Commission jurisdiction, and fails to allege violation of any law, regulation or Commission order. In fact, the Complaint, submitted by counsel, does not cite a single law, regulation, or Commission order. The Complaint gives ETC no notice of what it has allegedly done wrong because none of the alleged facts are tied to any law.

12. As to jurisdiction, which is discussed at length in preliminary objection 2, Respondent is not a public utility and the Complaint does not allege public utility status, so jurisdiction does not exist under any claim or contention subject to the Pennsylvania Public Utility Code, 66 Pa.C.S. §§101 *et. seq.* governing regulation of public utilities. The Commission only has jurisdiction over complaints against public utilities. 66 Pa. C.S. § 701. While ETC is not a public utility, the Complaint is insufficiently specific for ETC to determine whether Complainant is averring jurisdiction based on alleged public utility status because there are no facts presented regarding ETC’s utility status. For ETC to properly defend against the Complaint, it cannot be forced to guess at the basis for which Complainant is asserting the Commission has jurisdiction or the basis on which Complainant may be alleging utility status.

13. The insufficient specificity regarding jurisdictional grounds coupled with the insufficient specificity regarding alleged violation of law, regulation, or Commission order is exponentially problematic in terms of notice to ETC. ETC does not believe the Commission has jurisdiction over this Complaint, but if Your Honor does find jurisdiction, then Complainant could be alleging violation of federal pipeline safety regulations. The Complaint fails to give notice of

even what set of laws ETC is alleged to have violated, let alone what specific law. The Complaint should be dismissed for insufficient specificity.

C. **Preliminary Objection 2: The Commission Lacks Jurisdiction Over the Complaint**

14. The Commission as a regulatory body only has the powers that the General Assembly grants to it. *See, e.g., W. Pennsylvania Water Co. v. Pennsylvania Pub. Util. Comm'n*, 370 A.2d 337, 339 (Pa. 1977) (Administrative agencies are creatures of the legislature and have only those powers which have been conferred by statute.). The Commission only has the power to entertain complaints by third parties against “public utilities.”

The commission, *or any person*, corporation, or municipal corporation having an interest in the subject matter, or any public utility concerned, may complain in writing, *setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission*. Any public utility, or other person, or corporation likewise may complain of any regulation or order of the commission, which the complainant is or has been required by the commission to observe or carry into effect. The Commonwealth through the Attorney General may be a complainant before the commission in any matter solely as an advocate for the Commonwealth as a consumer of public utility services. The commission may prescribe the form of complaints filed under this section.

66 Pa. C.S. § 701 (emphasis added).

15. Respondent is not a public utility and the Complaint does not allege public utility status, so jurisdiction does not exist under any claim or contention subject to the Pennsylvania Public Utility Code, 66 Pa.C.S. §§101 *et. seq.* governing regulation of public utilities. Instead, the Complaint avers ETC does “business as a natural gas pipeline company.” ETC does do business as a pipeline operator in Pennsylvania under Act 127. Act 127 is not part of the Public

Utility Code but rather is a separate statute and hence the Public Utility Code's complaint and hearing procedures are inapplicable and not available (or even mentioned) under Act 127. Act 127 of 2011 gave the Commission limited jurisdiction over pipeline operators. That jurisdiction includes the power to make pipeline operators register with the Commission and the power to enforce federal pipeline law and regulations, consistent with those laws and regulations. That jurisdiction does not include the power to entertain third party complaints; Act 127 was very specific regarding the Commission's authority over pipeline operators:

Section 501. General powers of commission.

(a) Commission authority.--The commission shall have general administrative authority to supervise and regulate pipeline operators within this Commonwealth consistent with Federal pipeline safety laws. The commission may adopt regulations, consistent with the Federal pipeline safety laws, as may be necessary or proper in the exercise of its powers and perform its duties under this act. The regulations shall not be inconsistent with or greater or more stringent than the minimum standards and regulations adopted under the Federal pipeline safety law. The commission shall have the following duties:

- (1) To investigate a service, act, practice, policy or omission by a pipeline operator to determine compliance with this act.
- (2) To investigate a pipeline transportation facility to determine if it is hazardous to life or property.
- (3) To investigate the existence or report of a safety-related condition that involves a pipeline transportation facility.
- (4) To enter into contracts or agreements with the United States Department of Transportation to inspect intrastate or interstate transmission facilities.
- (5) Accept grants-in-aid, cash and reimbursements made available to the Commonwealth by the Federal Government to implement Federal pipeline safety laws or other Federal law.
- (6) To advise, consult and cooperate with the Federal Government, other states and other agencies as may be necessary to carry out the purposes of this act.
- (7) To enforce the Federal pipeline safety laws and, after notice and opportunity for a hearing, impose civil penalties and fines and take other appropriate enforcement action.

(8) For purposes of petroleum gas, the commission's jurisdiction under this act shall be limited to those petroleum gas systems that are the following:

(i) Subject to the Federal pipeline safety laws.

(ii) Not a public utility.

(b) Compliance.--Each pipeline operator, its officers, agents and employees, and other persons subject to this act, or to an order of the commission, or a court under this act, shall observe, obey and comply with this act and the terms and conditions of the orders issued hereunder.

Section 504. Jurisdiction and authority of commission.

(a) Jurisdiction.--*Nothing in this act shall give the commission jurisdiction over any pipeline operator* for purposes of rates or ratemaking *or any purpose other than those set forth in this act.*

(b) Landfill gas distribution systems.--The jurisdiction of the commission over landfill gas distribution systems under this act shall be limited to systems subject to Federal pipeline safety laws. The commission shall not have jurisdiction over operations and systems within the property boundary of the landfill.

(c) Authority.--*Nothing in this act grants the commission additional authority to determine or regulate a pipeline operator as a public utility as defined in 66 Pa.C.S. § 102 (relating to definitions) or as a natural gas supplier or natural gas supply services as defined in 66 Pa.C.S. § 2202 (relating to definitions).*

Id. (emphasis added).

16. Act 127 thus grants the Commission specific duties to investigate pipeline operators and enforce federal pipeline laws and regulations. *Id.* at § 501. Nowhere in Act 127 did the General Assembly grant the Commission the power to entertain third party complaints against pipeline operators. In fact, Act 127 is clear that pipeline operators are not public utilities and cannot be regulated as public utilities. *Id.* at § 504. Act 127 also expressly excludes public utilities from the definition of pipeline operator. *Id.* at § 102 (“‘Pipeline operator.’ 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.”) (emphasis added).

17. The Pennsylvania Supreme Court addressed an analogous scenario regarding the regulation of electric generation suppliers (EGS). In *Delmarva Power & Light Co. v. Pa PUC*, 870 A.2d 901 (Pa. 2005), the Court held that the Public Utility Code defined an EGS as a public utility for certain limited circumstances, and the Commission could not regulate EGSs as utilities except within those limited circumstances. *Id.* at 909-10 (holding that since Public Utility Code only defined EGS as a public utility for purposes of Sections 2809 and 2810, EGS could not be considered a public utility for assessment purposes under Section 501). Here, pipeline operators are not considered public utilities for any purpose, and Act 127 expressly limited the Commission’s authority to enforcement and investigation and promulgation of regulations. 66 Pa.C.S. at §§ 501, 504. A pipeline operator is not subject to third party complaints pursuant to Section 701.

18. A pipeline operator is subject to complaints via an enforcement action by the Commission’s Bureau of Investigation and Enforcement because Act 127 expressly allowed for the Commission to exercise its enforcement authority. *Id.* at § 501 (“To enforce the Federal pipeline safety laws and, after notice and opportunity for a hearing, impose civil penalties and fines and take other appropriate enforcement action.”). However, when the Commission acts in solely its adjudicatory capacity by entertaining a third party complaint, that is not an enforcement action and is not an action allowed under Act 127 or the public utility code.

19. Moreover, allowing third party complaints is inconsistent with federal law and thus violates Act 127. Act 127 not only adopted PHMSA regulations and federal pipeline laws, but mandated that the Commission exercise its enforcement authority consistent with those laws. *Id.*

at § 501 (“Commission authority.--The commission shall have general administrative authority to supervise and regulate pipeline operators within this Commonwealth *consistent with Federal pipeline safety laws*. The commission *may adopt regulations, consistent with the Federal pipeline safety laws*, as may be necessary or proper in the exercise of its powers and perform its duties under this act. The *regulations shall not be inconsistent with or greater or more stringent than the minimum standards and regulations adopted under the Federal pipeline safety law.*”) (emphasis added). The Commission has not adopted any such regulations. The law and regulations that govern are thus the federal standards. Those federal standards do not allow for third party complaints against pipeline operators before the agency administering PHMSA regulations. *See generally* 49 CFR §§ Part 190 (Pipeline Safety Enforcement and Regulatory Procedures) (available at <https://www.law.cornell.edu/cfr/text/49/part-190>). The Complaint should be dismissed for lack of jurisdiction.

D. Preliminary Objection 3: The Complaint is Legally Insufficient

20. 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); *see, e.g., James Drake v. Pennsylvania Electric Co.*, Docket No. C-2014-2413771, Initial Decision Sustaining Preliminary Objection and Dismissing Complaint, 2014 WL 2003281, *4 (May 7, 2014).

21. Here, the Complaint, submitted by counsel, fails to cite and allege violation of any statute, regulation, or Commission order. Instead, the Complaint alleges “dangerous conditions” and “public safety” issues, *see, e.g.*, Complaint at 34, and cites to news articles about incomplete and misleading recommended decisions which were reversed or which have be modified in the

utility involved in these separate and irrelevant proceedings. Complaint at Ex. 7. Generalized safety allegations and complaints are legally insufficient to bring a case against ETC because ETC is not a public utility. While such allegations may be sufficient against a public utility pursuant to 66 Pa. C.S. § 1501, that section by its unambiguous terms applies only to public utilities. *Id.* (“Every **public utility** shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities. . .”) (emphasis added).

22. As discussed above, the Complaint does not aver ETC is a public utility, and ETC is not a public utility. Instead, ETC is a pipeline operator over which the Commission has limited jurisdiction under Act 127. Act 127 is clear that pipeline operators are not and cannot be regulated as public utilities. *See, e.g., Id.* at § 504. Accordingly, even if the Commission has jurisdiction over this Complaint (it does not), that jurisdiction only extends to enforcement of federal pipeline safety laws and regulations. Notably, the Commission cannot pass regulations “inconsistent with or greater or more stringent than the minimum standards and regulations adopted under the Federal pipeline safety law.” Act 127 at § 501(a). The Complaint wholly fails to even cite a law or regulation ETC is alleged to have violated. Therefore, the Complaint is legally insufficient because it does not 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.” *See, e.g., supra James Drake v. Pennsylvania Electric Co.*

III. CONCLUSION

WHEREFORE, Energy Transfer Company respectfully requests the Complaint be dismissed in its entirety.

Respectfully submitted,



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*Attorneys for Respondent
Energy Transfer Company*

Dated: August 31, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the forgoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party). This document has been filed electronically on the Commission's electronic filing system and served via overnight mail on the following:

VIA FIRST CLASS MAIL

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Dated: August 31, 2018