**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Melissa DiBernardino :

:

v. :  C-2018-3005025

:

Sunoco Pipeline, L.P. :

**ORDER GRANTING IN PART AND DENYING IN PART PRELIMINARY OBJECTIONS TO AMENDED COMPLAINT**

On September 28, 2018, Melissa DiBernardino (Complainant) filed a complaint with the Commission against Sunoco Pipeline, L.P. (Sunoco or Respondent). The Complaint was served on October 1, 2018. Sunoco filed Preliminary Objections and an Answer and New Matter on October 22, 2018. Thereafter, on November 13, 2018, an Amended Complaint was filed and served upon Respondent. Sunoco filed Preliminary Objections and an Answer and New Matter to the Amended Complaint on December 3, 2018. On December 18, 2018, Complainant filed an Answer to Preliminary Objections. On December 19, Thomas Casey, a *pro se* individual, filed a Petition to Intervene. On December 21, 2018, this case was assigned to me.

In her Amended Complainant, Complainant avers she resides at 1602 Old Orchard Lane, West Chester, PA, and that her four children attend Saints Peter & Paul School, located approximately 100 feet from the Mariner East Pipeline Project. She avers that she and her family spend much of their time in the “probable impact radius of the Mariner East Project” through multiple townships and counties. Amended Complaint at 4. Complainant avers that due to unsafe operations, Sunoco should be directed to: 1) suspend operations of its Mariner East 1 (ME1) pipeline; 2) suspend construction of Mariner East 2 (ME2) and Mariner East 2X (ME2X); and 3) suspend plans to operate ME2 and ME2X using a 12-inch diameter (workaround) pipeline from Point Breeze to Montello line or any other existing line due to safety concerns regarding the integrity and compatibility of the repurposed 8-inch ME1 and 12-inch workaround pipelines.

Complainant alleges Sunoco is in violation of 66 C.S. 1501 and 52 Pa. Code § 59.33. Additionally, Complainant avers Sunoco has experienced over 125 inadvertent returns and has had upwards of 80 notices of violations for inadvertent returns while horizontal directional drilling (HDD), a non-standard method in high consequential areas within the meaning of 49 CFR Part 195. Complainant avers there have been changes in stormwater drainage, damaged aquifers and sinkholes exposing the operational ME1 as a result of HDD during the construction of ME2 and ME2X, most of which were not reported to regulating agencies by the operator but by residents. Amended Complaint at 6. Complainant avers cathodic protection is heavily relied upon to prevent corrosion when it comes to installation by HDD; however, this hope is unreasonable as it is not possible to perform cathodic testing on a pipe below a certain ground level. Complainant alleges Sunoco used an unreasonable and unsafe method of installation that will compromise the coating of the pipeline.

Complainant contends Chester County is having 56% more precipitation than average and its storm water drainage patterns have changed substantially by the removal of trees, other ground cover and the construction. She contends Sunoco should be required to show why a similar event to that of the Energy Transfer pipeline failure in Beaver County on September 10, 2018, will not happen in Chester County.

Additionally, Complainant avers Sunoco has inaccurate record-keeping and uncertainty concerning its ME2 pipeline location as evidenced by an incident in May 2018, when a subcontractor hired by Aqua (a water utility) struck the ME2 pipeline during excavation. She avers Sunoco’s reversal of flow and repurposing of ME1 and the 12-inch workaround pipeline, which has a history of leaks, was contrary to PHMSA guidelines.

Complainant contends Sunoco and its affiliate, Energy Transfer, have a history of violations of the federal code for using cathodic testing tools not in compliance with federal code and attempts to bury pipes with coating damage. Amended Complaint at 10.

Complainant avers the public in Chester County have received inadequate public awareness outreach and emergency response planning in violation of 49 CFR § 195.440. Complainant avers the Mariner East pipeline does not meet the standards under Title 35 of the Pennsylvania Code, regarding comprehensive disaster response and emergency preparedness planning. Amended Complaint at 13-15.

Sunoco filed an Answer and New Matter substantially denying the material averments in the Amended Complaint and averring that Complainant’s claims are barred by issue and claim preclusion and are an improper collateral attack on prior orders and determinations of the Commission and on permits issued to it by the Department of Environmental Protection. Sunoco also avers that Complainant lacks standing to bring claims regarding events beyond the geographic region for which she claims standing, the Saints Peter and Paul School, because those events have no adverse, discernable effect on Complainant. New Matter at 24.

Sunoco filed Preliminary Objections contending Complainant lacks standing to bring claims regarding events beyond the geographic region for which she claims standing, the Saints Peter and Paul School, because those events have no adverse, discernable effect on Complainant. Additionally, Sunoco preliminarily objects to “scandalous and impertinent” portions of the Complaint and moves to strike paragraphs 18-19, 21-26, 29-31, 33, 42, 50, 52 and 55.

In her Answer to Preliminary Objections, Complainant admits she is not claiming standing for Willington or other schools and the general public impacted by the Mariner East Project. Complainant responds that Complaint Paragraphs 18-19, 21-26, 29-31, 33, 42, 50, 52 and 55 should not be stricken because Sunoco’s performance record of construction, maintenance and operations of its pipeline affects the integrity and safety of the overall project and a currently pending formal complaint filed by the Bureau of Investigation and Enforcement (BI&E) strengthens her standing. Therefore, she has standing to complain about events occurring outside of Saints Peter and Paul School.

Additionally, Complainant denies the allegation there is scandalous and impertinent in her complaint. She avers there is nothing grossly disgraceful, immoral or indecent towards Respondent. Further, Complainant clarifies that the allegations in paragraph 42 of her Amended Complaint are not against Chester and Delaware Counties, rather they are against Sunoco as the Mariner East pipeline content does not allow her municipalities, counties and state to fulfill their requirements in Pennsylvania Title 35, Health and Safety. 52 Pa. Code §§ 7102, 7103(12), 7313(6) and 7503(2).

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).

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 Ms. DiBernardino and should dismiss the complaint only if it appears that she 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).

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. The standards also address emergency preparedness and public awareness plans. Specifically, 49 CFR 195.440 provides:

§ 195.440 Public awareness.

(a) Each pipeline operator must develop and implement a written continuing public education program that follows the guidance provided in the American Petroleum Institute's (API) Recommended Practice (RP) 1162 (incorporated by reference, see § 195.3).

(b) The operator's program must follow the general program recommendations of API RP 1162 and assess the unique attributes and characteristics of the operator's pipeline and facilities.

(c) The operator must follow the general program recommendations, including baseline and supplemental requirements of API RP 1162, unless the operator provides justification in its program or procedural manual as to why compliance with all or certain provisions of the recommended practice is not practicable and not necessary for safety.

(d) The operator's program must specifically include provisions to educate the public, appropriate government organizations, and persons engaged in excavation related activities on:

(1) Use of a one-call notification system prior to excavation and other damage prevention activities;

(2) Possible hazards associated with unintended releases from a hazardous liquid or carbon dioxide pipeline facility;

(3) Physical indications that such a release may have occurred;

(4) Steps that should be taken for public safety in the event of a hazardous liquid or carbon dioxide pipeline release; and

(5) Procedures to report such an event.

(e) The program must include activities to advise affected municipalities, school districts, businesses, and residents of pipeline facility locations.

(f) The program and the media used must be as comprehensive as necessary to reach all areas in which the operator transports hazardous liquid or carbon dioxide.

(g) The program must be conducted in English and in other languages commonly understood by a significant number and concentration of the non-English speaking population in the operator's area.

(h) Operators in existence on June 20, 2005, must have completed their written programs no later than June 20, 2006. Upon request, operators must submit their completed programs to PHMSA or, in the case of an intrastate pipeline facility operator, the appropriate State agency.

(i) The operator's program documentation and evaluation results must be available for periodic review by appropriate regulatory agencies.

49 CFR § 195.440

It is routine for the Commission to examine the complaints filed by *pro se* complainants to determine whether there is a matter over which it can exercise jurisdiction, even if the complaint is not fashioned in a technically correct way. If there exists a possibility that a relevant fact may be in dispute, preliminary objections and prehearing motions are denied giving the *pro se* complainant an opportunity to state a case over which the Commission can exercise its jurisdiction. The Commission has stated, however, that a customer should be heard on an allegation that equipment installed by a utility may be unsafe or its installation unreasonable. Recently, in *Paul v. PECO Energy Co.*, Docket No. C-2015-2475355 (Opinion and Order entered June 14, 2018) (*Paul*) the Commission reiterated that pursuant to Section 1501 of the Code, a public utility has a duty to maintain safe, adequate and reasonable service and facilities and to make repairs, changes, and improvements that are necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public, referencing 66 Pa.C.S. § 1501, cited above. Again, “service” is to be broadly construed. *Country Place Waste Treatment Co., Inc. v. Pa. Pub. Util. Comm'n*, 654 A.2d 72 (Pa.Cmwlth. 1995).

In *Paul v. PECO* and *Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018), the Commission noted that pursuant to Section 1501 of the Code, the Commission developed regulations governing electric safety standards. Under these regulations, an electric distribution company (EDC) must use reasonable efforts to properly warn and protect the public from danger. The EDC must also exercise reasonable care to reduce the hazards to which customers may be subjected to by reason of the EDC’s provision of electric utility service and its associated equipment and facilities. *See* 52 Pa. Code § 57.28(a)(1). Similarly, in the instant case, a pipeline operator utility must comply with Section 59.33, which provides that it should use every reasonable effort to properly warn and protect the public from danger and shall exercise reasonable care to reduce the hazards to which employees, customers and others may be subjected to by reason of its equipment and facilities. 52 Pa. Code § 59.33(a). Whether the actions of Sunoco are reasonable efforts to properly warn and protect the public from danger is an issue over which the Commission has jurisdiction.

Standing

Sunoco admits Saints Peter and Paul School is located approximately 100 feet from a portion of the Mariner East pipeline project. In its New Matter, Sunoco avers Complainant lacks standing to bring claims regarding events beyond the geographic region for which she claims standing, the Saints Peter and Paul School in East Goshen Township, because those events have no adverse, discernable effect on Complainant.

In her Answer to Preliminary Objections, Complainant admits she is not claiming standing for Willington or other schools and the general public impacted by the Mariner East Project. Complainant responds that Complaint Paragraphs 18-19, 21-26, 29-31, 33, 42, 50, 52 and 55 should not be stricken because Sunoco’s performance record of construction, maintenance and operations of its pipeline affects the integrity and safety of the overall project and a currently pending formal complaint filed by the Bureau of Investigation and Enforcement (BI&E) strengthens her standing. Therefore, she has standing to complain about events occurring outside of Saints Peter and Paul School.

Viewing the complaint in this case in the light most favorable to a Ms. DiBernardino, a *pro se* complainant, she has alleged that Sunoco has violated 52 Pa.Code § 59.33, promulgated pursuant to 66 Pa.C.S. § 1501, which 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 by operating ME 1 and constructing ME 2 and ME 2X of its Mariner East pipeline in a manner not consistent with the Code of Federal Regulations, Public Utility Code or Commission’s regulations.

The Commission recently held State Senator Andrew E. Dinniman, a resident of Chester County residing approximately 2 miles from the Mariner East pipeline(s), had personal standing to bring a similar complaint against Sunoco in the case of *Amended Petition of State Senator Andrew E. Dinniman for Interim Emergency Relief and Dinniman v. Sunoco Pipeline LP,* Docket Nos. P-2018-3001453 and C-2018-3001451, Opinion and Order entered July 25, 2018. Specifically, the Commission held:

In exercising our discretion to find Senator Dinniman has personal standing, our analysis considered the facts in the context of an asserted emergency involving allegations of danger to public safety caused by a major infrastructure project conducted by Sunoco within the Commonwealth. *June 15 Order* at 21. Our discretion to grant standing is at its apex where the matter before us concerns an alleged public safety emergency. Under the circumstances, we believe our finding that Senator Dinniman has standing was reasonable.

*Id.* at 14. (footnote omitted).

In the present case, the allegations of the Complaint assert that the operation of ME1 and construction of ME2 and ME2X create a dangerous condition which would adversely impact the geographic area of the Saints Peter and Paul School in East Goshen Township. Consequently, the dangerous condition asserted is of direct concern to the citizens of that area. As a mother of children attending the Saints Peter and Paul School in East Goshen Township, Complainant’s interest is personal and direct and discernable from the general interests of all citizens of the Commonwealth. *Id*. A party need not wait to experience harm before its position may be fully heard in a proceeding before the Commission. *See,* *Lehigh Valley Power Committee v. Pa. PUC*, 593 A.2d 1333, 1336-1337 (Pa. Cmwlth. 1991). Considering the question of standing in view of the possible harm to the Complainant’s interest, Complainant asserts important matters of public safety to herself and her children attending Saints Peter and Paul School in East Goshen Township.

The Commission possesses broad powers to take whatever action deemed necessary to fulfill its duty under the Public Utility Code. 52 Pa. Code Chapter 3 (pertaining to Commission power to grant emergency relief), and 66 Pa. C.S. § 309 (pertaining to Commission power to do all things necessary and proper to implement the Public Utility Code). See also, e.g., 66 Pa. C.S. § 331 (power of the Commission to investigate and hold hearings if deemed necessary), and 66 Pa. C.S. § 501 (pertaining to general regulatory and enforcement power of the Commission). Such authority encompasses exercising its discretion to grant personal standing if deemed necessary to protect the public safety. *See, City of Pittsburgh v. Pennsylvania Public Utility Commission,* (re: agency discretion to grant standing).

I find Ms. DiBernardino has personal standing as her four children attend the Saints Peter and Paul School to bring the instant complaint. The school is located approximately 100 feet from a Mariner East pipeline and she has a direct, immediate, and substantial interest in the subject matter of this controversy. *Mun. Auth. Of Borough of West View v. Pa. Pub. Util. Comm’n,* 41 A.3d 929, 933 (Pa. Cmwlth. 2012). She has a discernible interest other than the general interest of all citizens in seeking compliance with the law*. Ken R. ex rel. C.R. v. Arthur Z.,* 546 Pa. 49, 53-54, 682 A.2d 1267, 1270 (1996); *William Penn Parking Garage, Inc. v. City of Pittsburgh,* 464 Pa. 168, 195-197, 346 A.2d 269, 282-284 (1975). However, Complainant does not have standing to represent other individuals, schools or entities. This is not a class-action lawsuit.

Therefore, I find Complainant has personal standing to file the instant Complaint regarding safety of the pipeline in proximity to Saints Peter and Paul School in East Goshen Township. I am persuaded to limit the scope of relief claimed to whether Sunoco’s operations should be enjoined in East Goshen Township as although Complainant avers that she and her family spend much of their time in the “probable impact radius of the Mariner East Project” through multiple townships and counties, she is unspecific as to what counties and townships in addition to East Goshen Township. Amended Complaint at 4.

The Commission has regularly had to consider documentary, statistical and testimonial evidence throughout its history to evaluate whether actions of utilities, their employees and their contractors comply with the Public Utility Code and pertinent regulations promulgated thereunder. In the instant case, allegations relating to incidents pertaining to the Mariner East Project outside of the area in East Goshen Township where the Saints Peter and Paul School is located may be relevant to the issue of whether it is safe to operate ME1 and ME2 and ME2X in East Goshen Township in close proximity to Complainant’s children’s school.

At this preliminary stage in the litigation proceedings, I am unpersuaded to find averments in the Amended Complaint are “scandalous and impertinent” or to strike portions of the complaint that Sunoco argues are irrelevant because they allege past occurrences that have no relationship to whether it is safe to operate the pipelines in East Goshen Township.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objections filed by Sunoco Pipeline, L.P. at Docket No. C-2018-3005025 are granted in part and denied in part.
2. That Complainant has personal standing to file the instant Complaint regarding safety of the pipeline in proximity to Saints Peter and Paul School in East Goshen Township, Chester County, Pennsylvania.
3. That Complainant has no standing to assert claims to enjoin operations of Sunoco Pipeline, L.P. outside East Goshen Township, Chester County, Pennsylvania.
4. That Sunoco Pipeline, L.P.’s motion to strike portions of the Complaint at Docket No. C-2018-3005025 is denied.
5. That a telephonic prehearing conference shall be held at 2:00 p.m. on January 15, 2019 as scheduled.
6. That the Petition to Intervene filed by Thomas Casey, a *pro se* individual, shall be addressed at the prehearing conference.
7. That all petitions to intervene in this matter must be filed on or before January 11, 2019.

Date: December 21, 2018 /s/

Elizabeth H. Barnes

Administrative Law Judge

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