**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17120**

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|  | Public Meeting held September 17, 2020 |
| Commissioners Present:  Gladys Brown Dutrieuille, Chairman  David W. Sweet, Vice Chairman  John F. Coleman, Jr.  Ralph V. Yanora |  |
| Wilmer Baker | C-2018-3004294 |
| v. |  |
| Sunoco Pipeline, L.P. |  |

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Sunoco Pipeline, L.P., (Sunoco or the Company) filed on January 9, 2020, to the Initial Decision (I.D. or Initial Decision) of Administrative Law Judge (ALJ) Elizabeth H. Barnes, served on the Parties on December 20, 2019, in the above-captioned proceeding. On January 21, 2020, Wilmer Baker (Mr. Baker or Complainant) filed Replies to Exceptions. The Initial Decision granted in part and denied, in part, the Formal Complaint (Complaint) filed by Mr. Baker on August 10, 2018. For the reasons discussed below, we shall grant in part, and deny in part, the Company’s Exceptions, adopt the Initial Decision of ALJ Barnes, as modified, and grant the Complaint, in part, and deny it, in part, consistent with this Opinion and Order.

1. **Background**

This case involves a Complaint concerning Sunoco’s operation of Mariner East Pipeline (ME1) transporting highly volatile liquids (HVL) and constructing Mariner East 2 (ME2) and Mariner East 2X (ME2X) of its Mariner East pipeline project in Lower Frankford Township, Cumberland County. Complaint at 2-10. Mr. Baker, a *pro se* complainant, 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.

Mr. Baker further requested that Sunoco be required to furnish public awareness information as required by the 49 CFR 199, and an alarm system and odorant additive to alert all residents living within 1,000 feet of the potential blast zone and training for emergency personnel. Also, he requested that the old iron pipeline be replaced with American-made steel. I.D. at 1.

1. **History of the Proceeding**

On August 10, 2018,[[1]](#footnote-2) Mr. Baker filed the instant Complaint alleging that Sunoco failed on multiple counts to reasonably communicate with the Complainant regarding public awareness of safety matters related to the installation of Sunoco’s ME1 pipeline, transporting HVL. Specifically, the Complainant requested, *inter alia*, that Sunoco be directed to: (1) put in an alarm system for all residents living within the 1,000 foot blast zone; (2) hold public outreach meetings; (3) train emergency personnel; and (4) replace old iron pipeline with American-made steel. Complaint at 1-3; I.D. at 2.

On September 17, 2018, the Company filed an Answer to the Complaint and New Matter (Answer and New Matter), admitting to certain communication with Complainant, and denying the material allegations of the Complaint. Sunoco asserted by way of New Matter, that the Complainant’s property is approximately 1,300 feet from the Company’s ME1 pipeline. Answer and New Matter at 1-3; I.D. at 2.

Also, on September 17, 2018, Sunoco filed Preliminary Objections, claiming that the Complaint failed to state a claim upon which relief could be granted and should be dismissed. I.D. at 3-4.[[2]](#footnote-3) The Preliminary Objections were denied by Order entered on November 1, 2018. I.D. at 4.

On July 8 and 9, 2019, Comments in support of the Complaint were filed by Carrie Gross and Margaret Quinn. On or about July 9, 2018, Maxine Endy and Uwchlan Twp. Supervisor Kim Doan filed Comments. I.D. at 4.

On July 16, 2019, Virginia Marcille-Kerslake filed a Petition to Intervene.[[3]](#footnote-4)

On July 17 and 18, 2019, an evidentiary hearing was held as scheduled. The Complainant appeared *pro se* and testified on his behalf. The Company appeared represented by counsel.

The hearing transcripts were filed on July 22 and 23, 2019, respectively.

By Interim Order on July 25, 2019, the ALJ directed that the record would close upon filing of briefs.

On August 29, 2019, Susan Britton Seyler filed a Comment. On August 30, 2019, the Complainant and the Respondent filed their Main Briefs and Virginia Marcille-Kerslake filed an *Amicus Curiae* brief. On September 18, 2019, Sunoco filed a Motion to Strike portions of the Complainant’s Main Brief. Also on September 18, 2019, the Respondent and the Complainant filed their Reply Briefs. On September 24, 2019, Sunoco filed Attachment A to its Motion to Strike Portions of the Complainant’s Main Brief. On October 1, 2019, Sunoco filed a Motion to Strike Portions of Reply Brief. On October 7, 2019, the Complainant filed a Reply to Sunoco’s Motion to Strike Portions of Complainant’s Main Brief. On October 21, 2019, the Complainant filed a Reply to Sunoco’s Motion to Strike Portions of Complainant’s Reply Brief. I.D. at 4.

In the Initial Decision issued on December 20, 2019, the ALJ granted the Complaint in part, and denied it, in part. I.D. at 1, 20, 24.

As previously noted, Sunoco filed Exceptions on January 9, 2020, and the Complainant filed Replies to Exceptions on January 21, 2020.[[4]](#footnote-5)

1. **Discussion**

## Legal Standards

As the party seeking affirmative relief from the Commission, the complainant in a formal complaint proceeding has the burden of proof. 66 Pa. C.S. § 332(a). The evidence necessary to meet that burden must be substantial. 2 Pa. C.S. § 704. “Substantial evidence” is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Company of New York v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S.Ct. 206, 217 (1938). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the respondent utility is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). The offense must be a violation of the Public Utility Code (Code), a Commission Regulation or Order or a violation of a Commission-approved tariff. 66 Pa. C.S. § 701. Such a showing must be by a “preponderance of the evidence.” *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant’s evidence must be more convincing, by even the smallest amount, than that presented by the respondent. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

The burden of proof is comprised of two distinct burdens: (1) the burden of production; and (2) the burden of persuasion. *Hurley v. Hurley*, 2000 Pa. Super. 178, 754 A.2d 1283 (2000). The burden of production, also called the burden of going forward with the evidence, determines which party must come forward with evidence to support a particular claim or defense. *Scott and Linda Moore v. National Fuel Gas Distribution*, Docket No. C-2014-2458555 (Initial Decision issued May 11, 2015) (*Moore*). The burden of production goes to the legal sufficiency of a party’s claim or affirmative defense. *See Id*. It may shift between the parties during a hearing. A complainant may establish a *prima facie* case with circumstantial evidence. *See* *Milkie v. Pa. PUC*, 768 A.2d 1217, 1220 (Pa. Cmwlth. 2001) (*Milkie*). If a complainant introduces sufficient evidence to establish legal sufficiency of the claim, also called a *prima facie* case, the burden of production shifts to the utility to rebut the complainant’s evidence. *See Moore*.

If the utility introduces evidence sufficient to balance the evidence introduced by the complainant, that is, evidence of co-equal value or weight, the complainant’s burden of proof has not been satisfied and the burden of going forward with the evidence shifts back to the complainant, who must provide some additional evidence favorable to the complainant’s claim. *See Milkie*,768 A.2d at 1220*; see also,* [*Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff’d*, 501 Pa. 433, 461 A.2d 1234 (1983).](http://www.lexis.com/research/buttonTFLink?_m=0d7e78528297490763e78babd487bc42&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2006%20Pa.%20PUC%20LEXIS%20102%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=16&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b66%20Pa.%20Commw.%20282%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=9&_startdoc=1&wchp=dGLzVzz-zSkAz&_md5=44d0f4cf51bc1159652e85695542a09d)

Having produced sufficient evidence to establish legal sufficiency of a claim, the party with the burden of proof must also carry the burden of persuasion to be entitled to a favorable ruling. *See Moore*. While the burden of production may shift back and forth during a proceeding, the burden of persuasion never shifts; it always remains on a complainant as the party seeking affirmative relief from the Commission. *See* *Milkie*,768 A.2d at 1220; *see also, Riedel v. County of Allegheny*, 633 A.2d 1325, 1328, n. 11 (Pa. Cmwlth. 1993); *see also*, *Burleson*, 443 A.2d at 1375[.](http://www.lexis.com/research/buttonTFLink?_m=cd18bf6b106de1ce89522a0ab7ac078a&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1994%20Pa.%20PUC%20LEXIS%2095%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=9&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b501%20Pa.%20443%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlW-zSkAl&_md5=28aeeafc2a370113292dc79dfa134b36) It is entirely possible for a party to carry the burden of production but not be entitled to a favorable ruling because the party did not carry the burden of persuasion. *See Moore.* In determining whether a complainant has met the burden of persuasion, the fact-finder[[5]](#footnote-6) may engage in determinations of credibility, may accept or reject testimony of any witness in whole or in part, and may accept or reject inferences from the evidence. *See Moore*,citing *Suber v. Pa. Comm’n on Crime and Delinquency*, 885 A.2d 678 (Pa. Cmwlth. 2005), *appeal denied*, 586 Pa. 776, 895 A.2d 1264 (2006).

At the hearing, a complainant may prove his/her claim through the complainant’s own personal testimony and/or “the testimony of others as well as other evidence that goes to that issue.” *Romeo v. Pa. PUC*, 154 A.3d 422, 430 (Pa. Cmwlth. 2017) (*Romeo*).

Pursuant to Section 1501 of the Code, a public utility has a duty to maintain “adequate, efficient, safe, 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. *See,* 66 Pa. C.S. § 1501. Section 1501 of the Code, 66 Pa. C.S. § 1501, provides, in pertinent part, as follows:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public . . . Such service and facilities shall be in conformity with the regulations and orders of the commission.

The term “service” is defined broadly under Section 102 of the Code to include any and all acts done or rendered, or performed and any and all things furnished or supplied and any and all facilities, used, furnished or supplied by public utilities. *See*, [66 Pa. C.S. § 102](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000262&cite=PA66S102&originatingDoc=I256572f2c22311e9a76eb9e71287f4ea&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). The statutory definition of “service” is also to be broadly construed by the Commission and the courts. [*Country Place Waste Treatment Co., Inc. v. Pa. PUC*, 654 A.2d 72 (Pa. Cmwlth. 1995)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995028537&pubNum=0000162&originatingDoc=I68cba70861f811e7b73588f1a9cfce05&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

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. 49 CFR § 195.440 (relating to public awareness). A pipeline operator utility 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).

Finally, we note that any argument or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. [Consolidated Rail Corp. v. Pa. PUC, 625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) see also, generally, [University of Pennsylvania v. Pa. PUC, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

## ALJ’s Initial Decision

In the Initial Decision, ALJ Barnes made one hundred and twenty-one Findings of Fact (FOF) and reached twenty-five Conclusions of Law (COL). I.D. at 4‑19, 55-59. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

ALJ Barnes’ analysis addressed the Complainant’s allegations of Sunoco’s failures associated with the Company’s operation of ME1 and constructing ME2 and ME2X of its Mariner East pipeline project in Lower Frankford Township, Cumberland County, in violation of the Commission Regulations and the Code, 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. I.D. at 25.

The ALJ specifically addressed: (1) the applicability of the Pipeline Safety Act to ME1; (2) Public Awareness and Emergency Response Training, pursuant to the Code of Federal Regulations, Part 195.440. CFR § 195.440 (including print materials to the public, public awareness and education meetings, and emergency training); and (3) the Complaint’s requested relief to require Sunoco to institute an early warning alarm system and odorant to detect leaks. I.D. at 26-28; 28-30; 31-41; 42

The ALJ found that the pipeline operator has acted outside the guidelines of API Recommended Practice 1162 as incorporated in 49 CFR Part 195.440 pertaining to public awareness practices without good cause, thus violating the Public Utility Code at 66 Pa. C.S. § 1501, and Commission Regulation at 52 Pa. Code § 59.33. The ALJ concluded that because there have been no personal injuries or property damage as a result of the violation and the number of individuals affected is small, a civil penalty in the amount of $1,000 is appropriate given an additional directive designed to enhance and improve the pipeline operator’s public awareness and emergency training. I.D. at 54.

The ALJ found that, pursuant to API Recommended Practice 1162 as incorporated in 49 CFR Part 195.440, 66 Pa. C.S. § 1501, and 52 Pa. Code § 59.33, the pipeline operator is directed: (1) to contact the Lower Frankford Township Supervisors and Cumberland County Commissioners; (2) to schedule a public awareness/education meeting to be held in Cumberland County; and (3) absent exigent circumstances, to make an appearance at the scheduled meeting. The ALJ further concluded that “the pipeline operator is directed, in the public interest, to provide additional training to emergency officials/responders in Cumberland County as requested in a timely manner in addition to its CORE and MERO training.” I.D. at 54.

The ALJ also directed Sunoco to file, within 90 days of a final order, a plan to enhance its public awareness and emergency training plans and record keeping including but not limited to addressing: (1) the broadening of communication coverage areas beyond 1,000 feet; (2) shortening intervals for communications; (3) use of response cards and social media; (4) supplemental program enhancements to emergency training programs; (5) internal or external audits to evaluate the effectiveness of its programs; and (6) corrective action plans to address any insufficiencies or weaknesses revealed through its evaluations and audits. I.D. at 54-55.

The ALJ rejected the Complainant’s request for relief for an early warning alarm system for residents residing within 1,000 feet of the Mariner East pipeline facilities and a directive that an odorant be added to the highly volatile liquids of ethane, butane and propane being transported. The ALJ concluded that such matters should be vetted through a rulemaking proceeding at docket number L-2019-3010267 in order to not deprive the pipeline operator and other interest groups their due process rights. Further, the ALJ denied the request for an alarm and odorant as an accommodation under the Americans With Disabilities Act (ADA) for lack of jurisdiction to grant accommodations under the ADA in a proceeding before the PUC. Finally, the ALJ denied the Complainant’s request that Sunoco be directed to replace ME1, “an 80 year old pipe,” with American-made steel for lack of jurisdiction to direct the relief requested. I.D at 55.

## Exceptions, Replies, and Disposition

The Company’s Exceptions assert that the ALJ made four errors of fact and seven errors of law, and therefore the ALJ’s decision should be modified, and the Complaint dismissed with prejudice.

Specifically, Sunoco asserts that the ALJ erred as a matter of fact by finding: (1 ) that the Complainant’s property is within 1,000 feet of the Mariner East Pipeline; (2) that the Complainant had received Sunoco’s public awareness brochure; (3) that Lower Frankford Township had not received Sunoco’s public awareness brochure; and (4) that certain allegations were facts, where the allegations were irrelevant to the Complaint or were allegations the Complainant otherwise lacks standing to assert. Exc. Nos. 1, 3, 5 and 7.

With respect to alleged errors of law, the Company asserts that the ALJ erred by finding: (1) that Sunoco was required to mail Complainant a public awareness brochure every two years; (2) that it was relevant to consider either (i) mailing public awareness brochures addressed to “resident” at apartment buildings or (ii) Ms. Van Fleet's receipt of Sunoco’s public awareness brochures; (3) that Sunoco was or is required to hold or attend a public outreach meeting in Lower Frankford Township or Cumberland County; (4) that Sunoco is required to conduct additional emergency responder training.; (5) that injunctive relief is warranted where it is not narrowly tailored to the alleged and unfounded violations of law; (6) that hearsay documents were admissible into the record of this proceeding; and (7) that the Pipeline Safety Laws and Regulations are applicable to existing pipelines. Exc. Nos. 2, 4, 6, 7, 8, 10, and 11.

1. **Sunoco’s Exceptions Alleging Errors of Fact**
2. **Sunoco’s Exception Nos. 1, 3, 5 and 9**

In Sunoco’s Exception No. l, Sunoco asserts that Mr. Baker's primary “public awareness” claim, which the ALJ granted, that Sunoco failed in its obligation to provide Mr. Baker a public awareness brochure in 2018 because he resides within 1,000 feet of the pipeline has no basis in fact. Sunoco avers that because Mr. Baker himself did not testify that his property is within 1,000 feet, and because the Complainant did not affirmatively dispute Sunoco’s verified statement in its Answer and New Matter that Mr. Baker's property is in fact over 1,300 feet from the Mariner East pipelines, the ALJ was precluded from finding, as a matter of fact, that Mr. Baker resides within 1,000 feet of ME1. Exc. at 5-6.

Sunoco avers that the ALJ improperly advocated for the Complainant by “eliciting testimony from another witness for the Complainant” (the Complainant’s son who also resides within 1,000 feet of ME1), who testified that Mr. Baker’s property was less than 1,000 feet from the pipelines. Sunoco maintains that the ALJ’s reliance on that “guess” as fact disregarded both Sunoco’s verified pleading and the testimony of Sunoco’s Senior Vice President to conclude that Sunoco was in violation of the duty to provide public awareness information to Mr. Baker and impose a penalty of $1,000, was in error. Sunoco’ avers it was reversible error of fact for the ALJ to conclude Mr. Baker lives within the 1,000-foot mailing zone of required public awareness information dissemination in 2018. Exc. at 6-7.

In its Exception No. 3, Sunoco further asserts that the Initial Decision's finding that Mr. Baker received a public awareness brochure five years ago is unsupported by the record evidence. Sunoco acknowledged it has an obligation to provide such brochures every two years. In 2014 and 2016, its public awareness program voluntarily provided brochures to residents within 1,320 feet of the pipelines (even though the regulation only requires distribution to those residing within 660 feet). Sunoco conceded Mr. Baker’s home was within 1,320 feet and acknowledged that it had mailed the brochures to Mr. Baker in 2014 and 2016. Exc. at 13.

Sunoco asserts that no mailing was made to Mr. Baker in 2018 because in the interim Sunoco revised its distance requirement to 1,000 feet, which Sunoco asserts it was and is entitled to do. Sunoco asserts its Answer to the Complaint which contained the admission that Sunoco had mailed Mr. Baker a public awareness brochure “approximately five years ago” was insufficient for the ALJ to conclude, as a “matter of fact” that the last brochure Mr. Baker received was sent five years before the complaint was filed. Therefore, Sunoco argues that no substantial evidence of record supports the ALJ’s finding that “Wilmer Baker received a safety manual entitled, "Important Safety Message" from Respondent five years ago.” Exc. at 13, I.D. at p. 4, FOF 4.

In its Exception No. 5, Sunoco avers that there is not substantial evidence to support the ALJ’s factual finding that Lower Frankford Township did not receive Sunoco’s public awareness brochures. Exc. at 16. Sunoco asserts that the only evidence to support the factual finding was inadmissible hearsay and therefore, on this basis, Sunoco avers that the ALJ’s Initial Decision must be modified to correct FOF No 19. Exc. at 16-17.

Finally, in its Exception No. 9, Sunoco avers that the ALJ erred as a factual matter by reaching findings of fact which were either irrelevant to the Complaint or for which the Complainant lacks standing to pursue. Based on a lack of relevancy and lack of standing, Sunoco specifically excepts to FOF 15-20, 29-31, 42-44, 52, 62-66, 70-71, 73, 76-80, and asserts that ALJ’s decision should be modified to exclude those findings. Exc. at 35-36.

**b.** **Complainant’s Replies**[[6]](#footnote-7)

In the Complainant’s Replies to the Exceptions, the Complainant generally asserts that the ALJ’s findings of fact were supported by substantial evidence of record and references portions of the record and briefs relied upon by the ALJ in support of this position. R. Exc. at 1-5.

In summary, the Complainant asserts that Sunoco’s arguments should be rejected and the ALJ’s findings of fact should be adopted without modification. R. Exc. at 1-5.

1. **Disposition**

Upon review of Sunoco’s Exceptions alleging that the ALJ made several errors of fact, the Complainant’s Replies thereto, the ALJ’s Initial Decision, and the record in this proceeding, we conclude the ALJ made no error of fact which requires modification. In reviewing Sunoco’s allegations of errors of fact, we are mindful that the Code and Commission Regulations vest the Commission’s ALJs with authority to preside over the receipt and render determinations on the relevance of evidence at hearings.

We expressly consider the presiding ALJ’s broad authority to oversee and rule on the scope of and admissibility of evidence in a proceeding, as set forth in statute at Section 331(d)(3) of the Code, 66 Pa. C.S. § 331(d)(3) (pertaining to authority of the presiding officer), and Commission Regulations, including: at Sections 5.483 (pertaining to authority of presiding officer); 5.403 (pertaining to control of receipt of evidence); 5.103 (pertaining to authority to rule on motions); 5.222 (pertaining to prehearing conference in nonrate proceedings to oversee evidentiary matters for orderly conduct and disposition of the proceeding and furtherance of justice); and 5.223 (pertaining to authority of presiding officer at conferences). 52 Pa. Code §§ 5.483, 5.403, 5.103, 5.222, and 5.223. In view of this authority, ALJs retain broad discretion to determine the scope and admissibility of evidence as relevant to a given proceeding. The Commission will typically not disturb the ALJ’s evidentiary rulings or findings of fact unless it is determined to be an abuse of discretion or otherwise lacks substantial evidence.

In the present case, we find that the ALJ relied upon sufficient record evidence and retained discretion to conclude that the Complainant’s property was within 1,000 feet of ME1 and therefore, within the 1,000 foot zone to be provided public awareness information by Sunoco. We reject Sunoco’s assertion that the ALJ was precluded from questioning the Complainant’s son, who appeared as a witness for the Complainant, regarding the distance of the Complainant’s property from ME1. It is within the ALJ’s authority as the presiding officer to make *sua sponte* inquiries of witnesses on relevant matters. Further, the ALJ may rely upon the credible testimony of a witness to render a finding of fact, where, as here, the ALJ concludes the testimony is more credible than the contrary evidence presented.

We also find that it was within the ALJ’s purview to find as fact that the last brochure sent to the Complainant was five years ago, based on Sunoco’s Answer that contained an admission that the Company had mailed Mr. Baker a brochure “approximately 5 years ago” and that Mr. Baker testified that he had received the brochure five years ago.

With respect to Sunoco’s assertion, that the ALJ’s finding that Lower Frankford Township did not receive Sunoco’s public awareness brochures may not have been supported by substantial evidence, we conclude the error, if it occurred, was not material to the ALJ’s finding that Sunoco failed to meet its obligations to mail public awareness brochures to the Complainant. Therefore, we will not reexamine the finding for evidentiary purposes.

We note that the ALJ referenced the fact that Lower Frankford Township was not provided the brochures in the context of the question whether Sunoco’s participation at public outreach meetings was reasonable and adequate, however again, she did not rely upon the factual finding as material to the disposition of the question at issue. *See*, I.D. at 33, citing N.T 42. Because we do not find the alleged error of fact to be material to the disposition of any issue, we shall not disturb the evidentiary finding and find no basis for modification of the Initial Decision.

We also note that Sunoco’s assertion that the Lower Frankford Township’s letter requesting to be provided with a copy of the brochure fails to establish that it was never provided the brochure is a matter of interpretation. Exc. at 16-17. In this case, the ALJ concluded that Lower Frankford Township was not provided with a copy of the brochure, based upon the Complainant’s testimony that the Township sought a copy from him. In viewing the testimony of the Complainant, the ALJ also considered the testimony of Sunoco’s witnesses, which only provided aggregate data on mailing to local authorities, and provided no evidence or testimony to establish that Lower Frankford Township was specifically provided copies of the public awareness brochure.

Finally, with respect to Sunoco’s Exception No. 9, in which Sunoco avers that the ALJ erred as a factual matter by reaching findings of fact on issues the Complainant lacks standing to pursue or issues irrelevant to the Complaint. We disagree. The ALJ retains authority to determine the scope and relevancy of evidence in a proceeding, which the Commission will not set aside unless there is a finding of an abuse of discretion or that the finding lacks substantial evidence.

The findings referenced by Sunoco, (*i.e.,* FOF 15-20, 29-31, 42-44, 52, 62‑66, 70-71, 73, 76-80), are findings within the ALJ’s reasonable discretion to determine to be relevant to the present proceeding related to the Company’s actual practices regarding operation of the Mariner East Pipeline within the Commonwealth. While the facts found may not be material to any given disposition ultimately reached by the ALJ, the ALJ is free to admit to the record whatever relevant evidence is presented at hearing by the parties. We find nothing in Sunoco’s argument to persuade us that the ALJ’s findings were not relevant to the present proceeding concerning the Company’s practices regarding operation of the Mariner East Pipeline.

We expressly reject Sunoco’s reliance on the Court’s analysis in *Sunoco Pipeline, L.P. v. Dinniman*, 217 A.3d 1283, 1287 (Pa. Cmwlth. 2019) (holding lack of personal standing where “[t]he Complaint did not allege harm to Senator Dinniman’s property nor harm to his person, and the hearing before the ALJ did not yield evidence of either type of harm.”) (*Dinniman*),as a basis to conclude that the ALJ’s factual findings were in error*.* The holding in *Dinniman* did not review an ALJ’s evidentiary finding based on relevancy, but rather, narrowly focused on the Commission’s consideration of the Complainant’s standing to bring a complaint. *Dinniman* has no application where, as here, the Complainant has established standing to raise questions and offer all relevant evidence pertaining to the reasonableness of Sunoco’s practices regarding operation of the Mariner East Pipeline in Cumberland County including, public awareness in the form of both direct mailings to individuals and the public outreach meetings conducted, the adequacy of safety alarms, and materials used in construction of the pipeline which operates in close proximity to the Complainant’s residence, and through the County in which the Complainant resides.

Therefore, based on the forgoing discussion, we shall deny Sunoco’s Exception Nos. 1, 3 5, and 9.

1. **Sunoco’s Exceptions Alleging Errors of Law**
2. **Sunoco’s Exception Nos. 2, 4, 6, 7, 8, 10 and 11**

In Sunoco’s Exception No. 2, Sunoco avers that the ALJ erred as a matter of law by finding a violation of the Company’s duty to send public awareness brochures on the basis that Sunoco did not mail Mr. Baker a public awareness brochure every two years. Sunoco asserts that to make this finding, the ALJ incorrectly found that Mr. Baker resides within 1,000 feet of the pipelines, and unjustly took judicial notice of facts not in evidence, of prior testimony offered by Sunoco’s witness in a prior proceeding *(i.e., Dinniman*). Exc. at 7-8.

Sunoco argues that it was reversible legal error for the ALJ to *sua sponte* raise, misinterpret, and rely on extra-record evidence from a previous proceeding. Sunoco avers that the ALJ did not provide notice that excerpts of prior testimony in a separate proceeding would be considered and was thus deprived of the opportunity to be heard on the point. Exc. at 8-11. Sunoco asserts that the ALJ misinterpreted the prior testimony and precluded Sunoco from presenting alternative or additional facts, thus violating Sunoco’s right to due process. Exc. at 11-14.

In its Exception No. 4, Sunoco avers that there is not substantial evidence that the Complainant’s witness Van Fleet did not receive Sunoco’s public awareness brochures. Sunoco also avers that the ALJ erred as matter of law by imposing an incorrect standard for addressing public awareness mailings and by directing that Sunoco conduct a review of its mailing practices on the basis of the testimony of witness Van Fleet. Exc. at 14-17.

In its Exception No. 6, Sunoco avers that, contrary to the ALJ’s finding, Sunoco is under no legal requirement to attend a meeting open to the public and its actions have not violated law or regulation. Sunoco argues the ALJ findings misinterprets the applicable public awareness standards, imposing on Sunoco standards it believes the regulations should require, thereby creating a new standard in violation of Sunoco’s due process rights, the Commonwealth Documents Law, the Independent Regulatory Review Act, and Sunoco’s right to exercise managerial discretion. Exc. at 17-22.

Sunoco argues that the ALJ’s findings ignore that public awareness regulations and standards are performance based, not prescriptive, and that Sunoco’s public awareness program is achieving the required regulatory objectives without attending or holding the meetings. Exc. at 24-27.

Finally, Sunoco avers that the ALJ erred as a matter of law by misinterpreting the record evidence concerning cancellation of the meetings, which established that it was public officials rather than Sunoco, who were responsible for canceling the Sunoco’s scheduled meeting with the Cumberland County Commissioners. Exc. at 27-29.

In its Exception No. 7, Sunoco avers that the ALJ erred as a matter of a law by ordering relief where it did not find a violation regarding Sunoco’s emergency responder outreach and training. Moreover, Sunoco alleges the ALJ disregarded substantial evidence that Sunoco goes above and beyond regulatory requirements with its MERO training program held in Cumberland County from 2014-2017. The record shows Sunoco is willing to provide additional training, has offered to do so in Cumberland County, and Sunoco asserts it remains willing to do so. Exc. at 29-31.

In its Exception No. 8, Sunoco avers that the injunctive relief ordered is improper, even if the Commission were to adopt the ALJ’s finding of a violation of a duty based on Sunoco’s failure to mail Mr. Baker a public awareness brochure every two years. Exc. at 31. Sunoco argues this is especially true since the ALJ found in fact no harm to the Complainant occurred from this alleged violation. Exc. at 31-32.

Sunoco argues that where the violation is found to have been harmless and impacting very few in number, it is legal error for the ALJ to grant prospective and significant injunctive relief which goes to matters well beyond the alleged violation of failure to mail a brochure to a Complainant every two years. Exc. at 32-33.

Sunoco argues that the ALJ is not empowered to craft remedies or directives beyond the confines of the Complainant's case. In doing so, the Initial Decision ignores black letter legal principles that injunctive relief must be narrowly tailored to abate the alleged harm complained of, and that mandatory injunctions such as ordered here require a very strong showing in order to obtain relief. Sunoco avers that based on the Complaint and evidence presented, the only injunction appropriate to the alleged violation would be to require Sunoco to mail the Complainant a public awareness brochure, rather than a wholesale reworking of Sunoco’s public awareness program. Exc. at 33-34.

Sunoco further avers that the relief ignores Sunoco’s public awareness program, which shows Sunoco is already implementing much of the relief ordered. As a result, Sunoco avers the ALJ’s order amounts to an unlawfully promulgation of regulations. Sunoco argues the ALJ’s error is egregious, especially, where the ALJ concedes that the issue of proper standards for effective public outreach is pending before the Commission in ongoing rulemaking proceedings. Exc. at 34-35.

In its Exception No. 10, Sunoco avers the ALJ committed an error of law by admitting various hearsay documents. Specifically, Sunoco takes Exception to the admission of the Complainant’s Exhibits Nos. 7, 9 12, 13, 14 15, 18, 23, and Complainant Cross Exhibit 1, as a violation of the hearsay rule, because they were admitted over valid objection. Exc. at 36-37.

In its Exception No. 11, Sunoco avers that the ALJ committed reversible legal error by incorrectly interpreting the Pipeline Safety Laws and Regulations to *existing* pipelines, and therefore finding Sunoco in violation of the duty to mail public awareness information or attend a public meeting under the recommended practice of API 1162 as incorporated in 49 CFR § 195.440, as incorporated in 52 Pa. Code § 59.33 and 66 Pa. C.S. § 1501. Sunoco asserts that the ALJ misapplied the language of the 49 CFR § 195.440, which Sunoco asserts applies only to pipeline constructed after adoption of the regulations. Therefore, Sunoco avers that the ALJ’s application of the regulation to ME1, which was constructed prior to the adoption of the regulation at issue, amounts to retroactive application of the regulation, and should be reversed. Exc. at 37-38.

1. **Replies**

In the Complainant’s Replies to the Exceptions, the Complainant generally asserts that the ALJ’s legal conclusions were correct and supported by substantial evidence of record. In support, the Complainant references portions of the record and briefs relied upon by the ALJ in support of this position. R. Exc. at 1-5.

In summary, the Complainant asserts that Sunoco’s arguments should be rejected and the ALJ’s legal conclusions should be adopted without modification or that the Commission modify the Initial Decision if necessary. R. Exc. at 6.

1. **Disposition**

Upon review of Sunoco’s Exceptions alleging that the ALJ’s findings constituted reversible errors of law, the Complainant’s Replies thereto, the ALJ’s Initial Decision, and the record in this proceeding, as discussed more fully *infra*., we conclude the ALJ committed reversible error in granting injunctive relief to require Sunoco to revise its public outreach and emergency response training practices beyond the relief directly responsive to the allegations in the Complaint, and shall so modify the ALJ’s Initial Decision to strike the directives under Ordering Paragraph Nos. 9-12.[[7]](#footnote-8) In all other respects, we conclude the legal conclusions reached in the ALJ’s Initial Decision require no modification.

At the outset, we note that as an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it. *Schneider v. Pa. PUC*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984) (*Schneider*), citing *Fusaro v. Pa. PUC*, 382 A.2d 794 (Pa. Cmwlth. 1978). Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard. *Schneider*, 479 A.2d at 15 (Pa. Cmwlth. 1984), citing *Township of Middleton v. The Institute District of the County of Delaware*, 293 A.2d 885 (Pa. Cmwlth. 1972), *aff’d*, 450 Pa. 282, 299 A.2d 599 (Pa. Cmwlth. 1973). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Montefiore Hospital Ass’n of Western Pennsylvania v. Pa. PUC*, 421 A.2d 481, 484 (Pa. Cmwlth. 1980).

With respect to Sunoco’s Exception No. 2, averring legal error where the ALJ found a violation of the Company’s duty to send public awareness brochures, based upon the assertion that the ALJ incorrectly found that Mr. Baker resides within 1,000 feet of the pipelines, we shall deny the Exception. As discussed *supra*., the ALJ properly found that the Complainant resided withing 1,000 feet of ME1 and on that basis held Sunoco to its own public awareness standards, to send safety awareness brochures to residents within the 1,000 foot public awareness mailing zone.

With respect to Sunoco’s argument in Exception No. 2, that Sunoco’s due process rights were violated where the ALJ took judicial notice of prior witness testimony in the *Dinniman* case, we decline to review the finding for a due process violation, where the judicial notice was taken albeit, without affording Sunoco notice and opportunity to be heard on the point- where Sunoco introduced the facts in *Dinniman* to support its position in the present case. Further, we conclude that even if the Commission were to find there was legal error to take judicial notice of prior testimony in violation of Section 331 (g) (setting forth the requirement for notice and opportunity to be heard in taking judicial notice), we nevertheless conclude the error would be harmless where the ALJ did not rely on the information for which judicial notice was taken as material to rendering a determination on the matter at issue.

In this case, the ALJ’s conclusion that Sunoco was in violation of the duty to provide the Complainant with a public awareness brochure, was predicated upon the finding that the Complainant resided within the 1,000 foot public awareness zone, a fact which was irrelevant to the facts for which the ALJ took judicial notice (*i.e.,* that the Company’s prior witness testimony was that the public awareness zone was more expansive than 1,000 feet). Stated another way, the ALJ’s official notice of the fact that the Company’s prior testimony was that the public awareness zone was previously wider than 1,000 feet, is not material to the ALJ’s finding that the Complainant resides within the present public awareness zone of 1,000 feet. Therefore, we conclude that Sunoco’s Exception No. 2 fails to state a basis for modifying the ALJ’s Initial Decision.

Sunoco’s Exception Nos. 4, 6 and 8 challenge the ALJ’s grant of injunctive relief which Sunoco alleges goes far beyond the relief sought in the Complaint, and for which Sunoco alleges the Complainant lacks standing to pursue. Specifically, Sunoco challenges the ALJ’s findings and conclusions which underlie Ordering Paragraphs in the Initial Decision, as follows:

1. That Sunoco Pipeline, L.P. is directed to contact the Lower Frankford Township Supervisors and Cumberland County Commissioners within thirty (30) days of the date of entry of a final order for the purpose of scheduling a public awareness/education meeting(s) to be held in Cumberland County.

1. That absent exigent circumstances, Sunoco Pipeline, L.P. is directed to appear at the scheduled meeting referenced in Ordering Paragraph No. 7

1. That Sunoco Pipeline, L.P. is directed to meet with the Cumberland County Department of Public Safety and Cumberland County Board of Commissioners with thirty (30) days of the entry of the Final Order in this proceeding to discuss additional communications and training and that Sunoco is directed to provide such training as requested by those parties.
2. That within ninety (90) days of the Final Order in this proceeding, Sunoco Pipeline, L.P. shall submit to the Commission for review a written plan to enhance its public awareness and emergency training plans and record keeping including but not limited to addressing: 1) the broadening of communication coverage areas beyond 1,320 feet; 2) shortening intervals for communications; 3) use of response cards and social media; 4) supplemental program enhancements to emergency training programs; 5) internal or external audits to evaluate the effectiveness of its programs; and 6) corrective action plans to address any insufficiencies or weaknesses revealed through its evaluations and audits.

1. That included as part of its plan referenced in Ordering Paragraph No. 10, Sunoco Pipeline, L.P. shall at minimum complete or plan to complete in a timely manner an audit or review of its public awareness program and shall ultimately submit to the Commission within six (6) months from the date of entry of a final order a baseline evaluation of its public awareness program through either an internal self-assessment using an internal working group or through third-party auditors where the evaluation is undertaken by a third-party engaged at Sunoco Pipeline, L.P.’s cost.
2. That the plan referenced in Ordering Paragraph No. 10 shall also be served upon the Commission’s Bureau of Technical Utility Services, which shall review the plan and issue a staff determination Secretarial Letter within ninety (90) days of the filing of the plan indicating if the plan is in compliance with the directives in Ordering Paragraph Nos. 10 and 11.

I.D. at 60-61.

Upon review of the record, while we agree with the ALJ’s directive in Ordering Paragraph Nos. 7 and 8 above, we also agree with Sunoco that the ALJ’s grant of injunctive relief in Ordering Paragraph Nos. 9-12, directing Sunoco to: (1) meet with the Cumberland County Board of Public Safety and Board of Commissioners to provide training “as directed by those parties;” (2) within a prescribed period, submit a written plan to enhance its public awareness and emergency training plans and record keeping; and, (3) within a prescribed period, complete an audit of its public awareness program and submit a baseline evaluation of such program to be conducted by the a third-party engaged at Sunoco’s cost, were directives by the ALJ which exceeded the scope of relief sought by the Complaint and were not justified on the basis of the finding of a violation of the duty to meet public awareness and outreach obligations under 49 CFR § 199.440.

As noted by Sunoco, the ALJ’s broad directives are presently encompassed under proposed rulemaking by the Commission. As the ALJ acknowledged:

On June 13, 2019, the Commission initiated a regulatory rulemaking proceeding through the issuance of an Advance Notice of Proposed Rulemaking Order. *Advance Notice of Proposed Rulemaking Regarding Hazardous Liquid Public Utility Safety Standards at 52 Pa. code Chapter 59*,Docket No. L-2019-3010267 (Order entered June 13, 2019)*.* The Commission is currently reviewing comments submitted by stakeholders and interest groups regarding numerous issues, including those pertaining to operators’ interactions with local government officials regarding emergency response planning, requirements of periodic public awareness meetings with municipal officials and the public, and Pennsylvania specific enhancements to public awareness programs. *Id.* at 19.

I.D. at 41.

Therefore, we conclude that the relief in the present case as outlined above should be considered at the proposed Rulemaking Docket, subject to input by all concerned parties, and that the relief in the present case should be confined to the allegations in the Complaint and the findings relevant thereto.

In the present case, the ALJ found the Complainant has met his burden of proof to show that Sunoco violated its public awareness program by not sending him public awareness printed materials on a 2-year interval within the past 5 years even though the Complainant resides within 1,000 feet of the ME1 right of way. I.D. at 58, COL No. 17. The ALJ concluded that a penalty of $1,000 was reasonable and warranted. I.D. at 53-54. We agree.

The ALJ also found that Sunoco had abruptly cancelled a public outreach meeting, without good cause shown and with no notice, at which the Complainant was in attendance. The ALJ viewed the abrupt cancellation to be unreasonable in the circumstances, and explained:

Although Sunoco’s witnesses have testified that they have a public awareness program that engages the community, utilizing a variety of methods, including meetings, mailings, and specialized training (SPLP Exhibit No. 2 at N.T. 589-590), the evidence in this case is substantial to show there have been insufficient public outreach meetings in Cumberland County. N.T. 129, 126, 132, 136-148, Complainant Exhibit Nos. 10 and 11. Sunoco is avoiding media presence and potential litigation and has cancelled at least one public meeting at Lower Frankford Township and another meeting in the Borough of Carlisle was cancelled for unknown reasons. Sunoco’s excuses do not constitute good cause for cancellation, especially on short notice within 24 hours of a scheduled public meeting.

I.D. at 34.

Although, as Sunoco argues, the applicable federal regulations do not require Sunoco’s attendance at any public outreach meeting, Section 1501 of the Code *does* require that the Company act in a reasonable manner in the performance of its public outreach duties. In this case, the Company cancelled its attendance at a scheduled public outreach meeting at which the Complainant and county officials were in attendance, providing less than 24-hours notice of the cancellation. The Company did not offer a valid excuse for the short notice or reasons for cancelling, in addition to which the ALJ concluded there have been insufficient public outreach meetings in Cumberland County. On that basis, the ALJ concluded Sunoco’s failure to attend the scheduled public outreach meeting in Cumberland County was unreasonable. The ALJ then concluded it was reasonable to require Sunoco’s attendance at one public outreach meeting in Cumberland County and directed that, absent exigent circumstances, Sunoco schedule and attend, at a minimum, one such public outreach meeting. We agree.

However, given the present public health concerns due to the COVID-19 pandemic, we shall expressly provide that the public outreach/education meeting be conducted in accordance with applicable guidelines from the Commonwealth of Pennsylvania and the Center for Disease Control, allowing for virtual participation, provided the meeting remains open to public participation and viewing.

Based on the forgoing discussion, we shall grant Sunoco’s Exception Nos. 4, 6 and 8, in part, and deny them, in part. We shall direct that the relief directed by the Initial Decision’s Ordering Paragraph Nos. 7 and 8, be adopted, and that the relief directed by Ordering Paragraph Nos. 9-12 be denied as matter more appropriately addressed under the present rulemaking at *Notice of Proposed Rulemaking Regarding Hazardous Liquid Public Utility Safety Standards at 52 Pa. Code Chapter 59*,Docket No. L-2019-3010267 (Order entered June 13, 2019)

With respect to Sunoco’s Exception No. 10, averring that the ALJ committed an error of law by admitting various hearsay documents, including Complainant’s Exhibits Nos. 7, 9 12, 13, 14 15, 18, 23, and Complainant Cross Exhibit 1, we shall deny the Exception.

As discussed *supra*., under our discussion of the alleged errors of fact, the presiding ALJ retains broad authority to oversee and rule on the scope of and admissibility of evidence in a proceeding, as set forth in statute at Section 331(d)(3) of the Code, 66 Pa. C.S. § 331(d)(3) (pertaining to authority of the presiding officer), and Commission Regulations, including: at Sections 5.483 (pertaining to authority of presiding officer); 5.403 (pertaining to control of receipt of evidence); 5.103 (pertaining to authority to rule on motions). Where, as here, the alleged error in admission of hearsay is not asserted to be the basis for a material finding in the determination of any issue, the Commission will not engage in a review of the ALJ’s evidentiary rulings where the allegation amounts to harmless error. Therefore, we shall deny Sunoco’s Exception No. 10.

Finally, with respect to Sunoco’s Exception No. 11, asserting that the ALJ misapplied the language of the 49 CFR § 195.440 to ME1, since ME1 was constructed prior to the enactment of the regulation, we shall deny the Exceptions.

Sunoco asserts that 49 CFR § 195.440 applies only to pipeline constructed after adoption of the federal regulations, and therefore, the ALJ’s application of the regulation to ME1, which was constructed prior to the adoption of the regulation at issue, amounts to retroactive application of the regulation, and should be reversed. We disagree.

We agree with the ALJ’s analysis regarding the applicability of the public awareness provisions of 49 CFR § 195.440 to ME1, wherein the ALJ explained:

Portions of ME1 have been inspected, repaired, replaced, and expanded continuously since 1931 and the design, purpose and content of ME1 changed this past decade from transporting primarily petroleum products like diesel fuel and heating oil from the Marcus Hook Facility along the Delaware River to the western portions of the State, to transporting propane and ethane under higher pressures from the western portion of the state to the Marcus Hook Facility. Considering these factors, the Pipeline Safety Act requirements should apply to ME1 as well as ME2 and ME2X. Thus, I find that when the pipeline began transporting highly volatile liquids in 2014, Part 195 covered and applied to ME1. See 49 CFR § 195.1(a)(1). As ME1 was transporting HVLs during the period relevant to the instant Complaint proceeding and continues to transport HVLs, Part 195 may be generally applied to the facts in the instant case unless there is a specific and express grandfather clause to a specific section of Part 195.

I.D. at 24-25.

Upon review of the language of Part 195, we conclude that Sunoco’s proposed restrictive reading of the statutory language is incorrect. We further conclude that the ALJ’s analysis of the language was correctly applied in this case to conclude that Sunoco is obligated to meet the minimum standards required by Part 195. Accordingly, we shall deny Sunoco’s Exception No. 11, and adopt the ALJ’s conclusion that 49 CFR Part 195 is applicable to ME1 ME2 and ME2X, including the public awareness and outreach provisions.

**Conclusion**

Based upon our review of the record and the applicable law, we shall grant Sunoco’s Exceptions, in part, and deny them, in part, and adopt the Initial Decision, as modified by this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That the Exceptions filed by Sunoco Pipeline, L.P., on January 9, 2020, are granted, in part and denied, in part, consistent with this Opinion and Order.
2. That the Initial Decision of Administrative Law Judge Elizabeth H. Barnes, issued on December 20, 2019, at Docket No. C-2018-3004294, is adopted, as modified by this Opinion and Order.
3. That the Formal Complaint filed on August 10, 2018, by Wilmer Baker versus Sunoco Pipeline, L.P., at Docket No. C‑2018‑3004294, is granted, in part, and denied in part, consistent with this Opinion and Order.
4. That within thirty (30) days of the date of entry of a Final Order, Sunoco Pipeline, L.P. shall pay a civil penalty in the amount of $1,000 by certified check or money order made payable to “Commonwealth of Pennsylvania” and sent addressed as follows:

Secretary Rosemary Chiavetta

Pennsylvania Public Utility Commission

Commonwealth Keystone Building, Second Floor

400 North Street

Harrisburg, PA 17120

1. That Sunoco Pipeline, L.P. is directed to contact the Lower

Frankford Township Supervisors and Cumberland County Commissioners within thirty (30) days of the date of entry of a Final Order for the purpose of scheduling a public awareness/education meeting to be held in Cumberland County and conducted in accordance with applicable guidelines from the Commonwealth of Pennsylvania and the Center for Disease Control, allowing for virtual participation, provided the meeting remains open to public participation and viewing.

1. That absent exigent circumstances, Sunoco Pipeline, L.P. is directed

to participate at the scheduled meeting referenced in Ordering Paragraph No. 5.

1. That this proceeding at Docket No. C-2018-3004294 be marked closed.

**BY THE COMMISSION,**



Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: September 17, 2020

ORDER ENTERED: September 23, 2020

1. The Complaint was served upon the Respondent Company on August 27, 2018. I.D. at 2. [↑](#footnote-ref-2)
2. Sunoco did not raise as a preliminary objection lack of standing until the briefing stage in this proceeding. [↑](#footnote-ref-3)
3. Ms. Marcille-Kerslake’s Petition to Intervene was denied on procedural grounds after oral argument held at the evidentiary hearing. However, Ms. Marcille-Kerslake was given an opportunity to file an *Amicus Curiae* brief by the main brief deadline, which she did. I.D. at 4, N.T. 387-388. [↑](#footnote-ref-4)
4. We note that on March 11, 2020, Sunoco filed a Motion to Strike portions of the Complainant’s Replies which Sunoco asserted included arguments and facts not in evidence in the record below. On March 31, 2020, the Complainant filed an Answer to the Motion disputing Sunoco’s allegations. It is well-established that parties cannot introduce new evidence at the exceptions stage. *Application of Apollo Gas Co.*, 1994 Pa. P.U.C. Lexis, at \*8-14 (Order entered February 10, 1994) (*Apollo Gas*). If found to be information introduced for the first time in the Complainant’s Replies to Exceptions, such information is not in the record and is therefore, extra-record evidence which cannot be admitted into the record at this current procedural stage of the case. However, because we do not rely in the alleged extra-record evidence in our consideration and disposition of this matter, we conclude that Sunoco’s Motion to Strike is moot, and shall make no *Apollo Gas* determination on the admissibility of the alleged extra-record evidence. [↑](#footnote-ref-5)
5. In formal complaint proceedings, the Commission, not the ALJ, is the ultimate fact-finder; it weighs the evidence and resolves conflicts in testimony. When reviewing the initial decision of an ALJ, the Commission has all the powers that it would have had in making the initial decision except as to any limits that it may impose by notice or by rule. *Milkie*, 768 A.2d at 1220, n. 7 (citing, *inter alia*, 66 Pa. C.S. § 335(a)). [↑](#footnote-ref-6)
6. We acknowledge that the format of the Complainant’s Replies to the Exceptions does not strictly comply with the format prescribed under Section 5.535 of our Regulations, 52 Pa. Code § 5.535. Nevertheless, particularly because the Complainant is appearing *pro se*, we will accept the Replies to Exceptions as filed, pursuant to Section 1.2(a) and (d) of our Regulations, 52 Pa. Code § 1.2(a) and (d), in order to secure a just, speedy, and inexpensive determination. [↑](#footnote-ref-7)
7. We further direct that the mention of, now deleted, Ordering Paragraph No. 9 be deleted from Ordering Paragraph No. 13, for compliance purposes. [↑](#footnote-ref-8)