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August 19, 2014

VIA CERTIFIED U.S. MAIL

Rosemary Chiavetta, Secretary
PA Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Sunoco Pipeline, L.P.'s Exceptions to Initial Decision
Docket Nos. P-2014-2411941, 2411942, 2411943, 2411944, 2411945, 2411946,
2411948, 2411950, 2411951, 2411952, 2411953, 2411954, 2411956, 2411957,
2411958, 2411960, 2411961, 2411963, 2411964, 2411965, 2411966, 2411967,
2411968, 2411971, 2411972, 2411974, 2411975, 2411976, 2411977, 2411979,
2411980

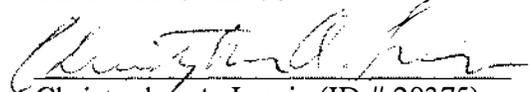
Dear Secretary Chiavetta,

Enclosed for filing pursuant to 52 Pa. Code §§ 1.4(a)(2), 1.11(a)(3) and 5.533(a) is an original of Sunoco Pipeline, L.P.'s Exceptions to the Initial Decision in the above-referenced matters, along with a Certificate of Service evidencing service of the Exceptions upon the parties of record in accordance with 52 Pa. Code § 1.54 (relating to service by a participant).

If you have any questions, please do not hesitate to contact me.

Sincerely yours,

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cc: Per Certificate of Service (w/encls.)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Amended Petition of Sunoco Pipeline L.P. for
a Finding That the Situation of Structures to
Shelter Pump Stations and Valve Control
Stations is Reasonably Necessary for the
Convenience and Welfare of the Public

:
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: 2411980
:
: (Not Consolidated)

**EXCEPTIONS OF
SUNOCO PIPELINE, L.P. TO INITIAL DECISION**

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Dated: August 19, 2014

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I. INTRODUCTION

Pursuant to 52 Pa. Code § 5.533, Sunoco Pipeline, L.P. (“SPLP”) respectfully submits these Exceptions to the Initial Decision of Administrative Law Judges David A. Salapa and Elizabeth H. Barnes dated July 23, 2014, and issued on July 30, 2014 (the “Initial Decision”). SPLP respectfully requests that the Pennsylvania Public Utility Commission (the “Commission” or “PUC”) reject the Initial Decision.

In the Initial Decision, the ALJs concluded that the Commission lacks jurisdiction over SPLP’s Amended Petitions which were filed with the Commission on May 8, 2014 (the “Amended Petitions”) because (i) SPLP’s proposed service does not constitute public utility service and (ii) SPLP is precluded from “public utility corporation” status, as that term is defined in the Business Corporation Law (the “BCL”), because SPLP is also regulated as a common carrier by the Federal Energy Regulatory Commission (“FERC”).¹

As explained more fully below, both of these conclusions are clearly erroneous. The intrastate service described in the Amended Petitions is “for the public” because it will be provided to all shippers who may demand it pursuant to tariffs duly filed with the Commission. Contrary to the opinion of the ALJs, under well-established state court precedent² and the Commission’s own recent precedent,³ a “public utility” need not provide service to end-user consumers in order to qualify as a public utility.

¹ See Initial Decision at pp. 19-21.

² See, e.g., *Drexelbrook Assocs. v. Pa. Pub. Util. Comm’n*, 212 A.2d 237 (Pa. 1965); *Rural Telephone Co. Coalition v. Pa. PUC*, 941 A.2d 751, 760 (Pa. Cmwlth. 2008).

³ See, e.g., *Application of Laser Northeast Gathering Company, LLC for Approval to Begin to Offer, Render, Furnish, or Supply Natural Gas Gathering and Transporting or Conveying Service by Pipeline to the Public in Certain Townships of Susquehanna County, Pennsylvania*, Opinion and Order, Docket No. A-2010-2153371 (May 19, 2011).

The Initial Decision also wrongly concludes that a pipeline service operator cannot be both a FERC-regulated common carrier and a “public utility corporation” under state law.⁴ In so holding, the Initial Decision relies exclusively on a 2013 FERC Order⁵ and a February 2014 York County Court of Common Pleas decision,⁶ both of which were decided when SPLP only planned to provide *interstate* transportation service. Now, as the Commission recently recognized,⁷ in response to emerging market and business circumstances, SPLP plans to provide *intrastate* service as well, and it is this *intrastate* service—and the numerous potential public benefits that it will provide—that undergird SPLP’s status as a public utility under state law.

For these reasons and as explained more fully below, SPLP respectfully requests that the Commission reject the Initial Decision. Moreover, since the record reveals that the remaining Preliminary Objections which were not addressed in the Initial Decision are equally devoid of legal basis or otherwise moot, SPLP respectfully requests that the Commission deny the remaining Preliminary Objections and remand this proceeding to the Office of Administrative Law Judge (OALJ) for adjudication of the merits of the Amended Petitions.

II. HISTORY OF THE PROCEEDING

Since 2002, SPLP has been a public utility corporation regulated by the Commission, offering petroleum products and refined petroleum products pipeline transportation service within Pennsylvania, subject to the Commission’s oversight and jurisdiction. In 2002, SPLP

⁴ See Initial Decision at p. 20.

⁵ See *Order Granting Petition for Declaratory Order*, Docket No. OR13-9-000 (Feb. 15, 2013).

⁶ See *Sunoco Pipeline, L.P. v. Loper, et al.*, (Docket No. 2013-SU-4518-05) (Feb. 25, 2014).

⁷ See *Petition of Sunoco Pipeline, L.P. for Amendment of Order Entered on August 29, 2013*, Opinion and Order at pp. 8-9, Docket No. P-2014-2422583 (July 24, 2014).

inherited an integrated pipeline service system⁸ when the Commission approved the transfer, merger, possession and use of all Pennsylvania PUC jurisdictional assets of the former Sun Pipe Line Company (“Sun”) and Atlantic Pipeline Corporation (“Atlantic”).⁹ The Commission’s Corrected Order accompanying the Certificate of Public Convenience approved “the right of Sunoco Pipeline, L.P. to transport petroleum products in the former service territory of Sun Pipe Line Company and Atlantic Pipeline Corp.”¹⁰

In 2012, SPLP announced the first phase of the Mariner East Project (sometimes referred to as “Mariner East 1”), a project designed to relieve oversupply of NGLs in the Marcellus and Utica Shale basins and to alleviate supply-side shortages of propane in Pennsylvania and the Northeast United States. The first phase of the Mariner East Project is a 300-mile pipeline service project that will make use of SPLP’s existing pipeline service infrastructure, supplemented by construction of an additional 51-mile extension from Houston, Pennsylvania to Delmont, Pennsylvania. Mariner East 1 was initially prioritized to provide interstate pipeline transportation service for propane and ethane from the Marcellus and Utica Basins, eastward to the Marcus Hook Industrial Complex, located primarily in Delaware County, Pennsylvania.¹¹

⁸ The integrated pipeline system includes, among other things, an 8-inch pipeline that extends from Point Breeze to Montello, a 12-inch pipeline that extends from Point Breeze to Montello, an 8-inch pipeline that extends from Twin Oaks to Exton, Fullerton, Macungie, and Montello, certain 6-, 8- and 14-inch pipelines in segments that extend from Montello to Williamsport, and an 8-inch pipeline that extends from Montello to Mechanicsburg, and then from Mechanicsburg to Delmont, Pennsylvania and then from Delmont to Pittsburgh, Pennsylvania.

⁹ See *Joint Application of Sunoco Pipeline L.P., Sun Pipeline Corp. for Approval of the Transfer of Assets and Merger of Sun Pipe Line Company and Atlantic Pipeline Corp. to Sunoco Pipeline L.P. for the Right of Sunoco Pipeline L.P. to Transport Petroleum Products in the Former Service Territory of Sun Pipe Line Company and Atlantic Pipeline Corp. and for the Abandonment of Services by Sun Pipe Line Company and Atlantic Pipeline Corp.*, Corrected Order, Docket No. A-140001, A-140400 F2000, A-140075 F2000 (Jan. 28, 2002).

¹⁰ *Id.*

¹¹ The Marcus Hook Industrial Complex (“MHIC”) is a 781-acre complex located primarily in Delaware County, Pennsylvania, with a small portion extending into the State of Delaware.

To implement Mariner East 1, SPLP conducted a widely publicized open season in which all potential shippers had an opportunity to participate. In connection with this open season, SPLP filed a Petition for a Declaratory Order before the Federal Energy Regulatory Commission (“FERC”) on December 7, 2012, seeking a declaratory order approving priority service, as well as a tariff and rate structure and service request allocation methodology for the Mariner East Project. Since 1996, FERC has issued declaratory orders permitting liquids pipelines to obtain pre-approval of various rates and terms of service through non-discriminatory open seasons in which all shippers have an opportunity to participate.¹² On February 15, 2013, FERC entered an Order granting SPLP’s Petition.¹³ In so doing, FERC approved SPLP’s proposal to reserve 90 percent of the pipeline’s service capacity for committed volumes, while ensuring that uncommitted volumes have access to 10 percent of the capacity. At the time of the filing of its Petition in December 2012, SPLP proposed that Mariner East 1 would initially provide interstate service only, stating that the project “will transport the NGLs to a Sunoco, Inc. terminal in eastern Pennsylvania and Delaware for storage, processing, and subsequent transportation to alternative markets by water or truck.”¹⁴

To further facilitate the pipeline service contemplated by Mariner East 1, SPLP filed on July 2, 2013, an application with the Commission to abandon its tariff for certain intrastate service along portions of its pipeline service system (“Abandonment Application”)¹⁵ and to

¹² See *Express Pipeline Partnership*, 75 FERC ¶ 61,245 (1996).

¹³ See *Order Granting Petition for Declaratory Order*, Docket No. OR13-9-000 (Feb. 15, 2013).

¹⁴ See *Petition for a Declaratory Order of Sunoco Pipeline L.P.*, Docket No. OR13-9-000 (Dec. 7, 2012).

¹⁵ See *Application of Sunoco Pipeline L.P. for: (I) Issuance of a Certificate of Public Convenience approving the Abandonment of a Portion of Its Petroleum Products Pipeline Transportation Service within Pennsylvania, from: (1) Point Breeze to Eldorado, Delmont, Blawnox, and Pittsburgh; (2) Montello to Eldorado, Delmont, and Blawnox; and (3) Twin Oaks to Icedale, Malvern, Eldorado, Delmont, and Pittsburgh; and (II) All Other Approvals or*

temporarily suspend certain intrastate service along other segments (“Suspension Petition”)¹⁶. The abandonment of its tariff and suspension of service on existing pipeline that previously provided east-to-west service of gasoline and distillates would permit SPLP to repurpose the pipeline to provide west-to-east service of propane and ethane.

On August 29, 2013, the Commission approved SPLP’s Abandonment Application and Suspension Petition.¹⁷ In so doing, the Commission recognized that providing “enhanced delivery options for the abundant supply of natural gas liquids and the moderation of the commodity costs due to the injection of a new supply of ethane and propane into existing natural gas liquids market” represents “significant public benefits”.¹⁸ Notably, however, the Commission’s Order did not (1) relinquish SPLP’s right to use the physical pipelines themselves, (2) alter SPLP’s status as a certificated public utility, or (3) constitute an abandonment by SPLP of its certificates of public convenience. To the contrary, SPLP continued and continues to transport petroleum products and refined petroleum products intrastate from Delmont to Pittsburgh and from Montello to the MHIC, as well as to other locations within SPLP’s integrated pipeline service system in Pennsylvania.¹⁹

Certificates Appropriate or Necessary Under the Public Utility Code to Grant the Relief Requested in the Application, as filed on July 2, 2013 (the “Abandonment Application”), Docket No. A-2013-2371789.

¹⁶ See *Petition of Sunoco Pipeline, L.P. for Approval of Temporary Suspension of Petroleum Products Transportation Service From: (1) Point Breeze to Mechanicsburg and (2) Twin Oaks to Exton, Fullerton, Macungie, Montello, Mechanicsburg, Tamaqua, Williamsport, and Kingston*, as filed on July 2, 2013 (the “Suspension Petition”), Docket No. P-2013-2371775.

¹⁷ See *Application of Sunoco Pipeline L.P. for a Certificate of Public Convenience to Abandon a Portion of its Petroleum Products Pipeline Transportation Service in Pennsylvania*, Order, Docket Nos. A-2013-2371789, P-2013-2371775 (Aug. 29, 2013, as amended Oct. 17, 2013).

¹⁸ *Id.* at p. 7.

¹⁹ The Initial Decision incorrectly finds that service has been suspended and “not yet resumed” from Mechanicsburg and points east. See *Initial Decision*, p. 15. To the contrary, SPLP continues to provide pipeline transportation service in that service territory on other pipelines. A map reflecting the abandoned and suspended routes, as approved by the Commission’s August 29, 2013 Order, as well as the routes that remained active, is attached to SPLP’s Answer to Preliminary Objections of the Concerned Citizens of West Goshen Township as Exhibit A.

On March 21, 2014, SPLP filed its original Petition with the Commission requesting a finding by the Commission that the structures to shelter 18 pump stations and 17 valve control stations for Mariner East 1 are reasonably necessary for the convenience or welfare of the public, and are therefore exempt from local zoning ordinances pursuant to Section 619 of the Municipalities Planning Code, 53 P.S. § 10619. The Petition reflected SPLP's then-current plan to provide interstate service only for the first phase of the Mariner East Project. However, at approximately the same time SPLP filed its original Petition, there was a significant change in market conditions due to severe shortages of propane and resulting price spikes experienced during and following the 2013-2014 winter season. As a result, SPLP experienced a significant increase in shipper demand for intrastate shipments of propane due to an increase in local consumer demand for propane. SPLP's business plan for the Mariner East Project always contemplated *intrastate* transportation of propane for delivery in Pennsylvania. In reaction to the unfolding market conditions, SPLP accelerated its business plans to provide intrastate shipments of propane, in addition to interstate shipments of propane and ethane. Due to this change in circumstances, SPLP filed Amended Petitions on May 8, 2014 relating to each of the 31 townships where SPLP is seeking an exemption pursuant to Section 619. The Amended Petitions reflected the change in market and business conditions.

In the Amended Petitions, SPLP indicated that additional filings would be forthcoming in order to institute pipeline transportation service for the Mariner East Project. Specifically, SPLP stated in paragraph 21 of the Amended Petition that "SPLP will be resuming service in the Suspension Segment and will file a tariff supplement to implement service between

Mechanicsburg and its Twin Oaks facility.”²⁰ SPLP further stated in paragraph 22 that it “will also be filing an application pursuant to Section 703(g) of the Public Utility Code, 66 Pa.C.S. § 703(g), [hereinafter “703(g) Petition”] to amend the CPC authorizing abandonment in the Abandonment Segment to reinstate intrastate service that will extend from Delmont to various points east.”²¹ SPLP also stated in paragraph 22 that “it will ... be filing an application for CPC to extend its intrastate petroleum transportation system to new service territory that includes Washington County, Pennsylvania for a segment of pipeline service to be constructed from Houston, Pennsylvania to Delmont, Pennsylvania.”²² SPLP filed the Application for CPC to (1) extend its service territory into Washington County and (2) to ensure that all pipeline transportation service of petroleum products and refined petroleum products in SPLP’s certificated service territories is authorized by the Commission, including all contemplated and future expansions of that same service, such as the service to be provided by Mariner East 2.

On May 21, 2014, SPLP filed the 703(g) Petition and, in accordance with 66 Pa. C.S. § 703(g) and 52 Pa. Code § 5.572, served each party to that proceeding.²³ Thereafter, on June 6, 2014, SPLP filed an Application for CPC.²⁴ In accordance with 52 Pa. Code § 5.14, the

²⁰ See *Amended Petition of Sunoco Pipeline L.P. for a Finding That the Situation of Structures to Shelter Pump Stations and Valve Control Stations is Reasonably Necessary for the Convenience and Welfare of the Public*, Docket Nos. P-2014-2411941 *et al.*, at ¶ 21 (May 8, 2014).

²¹ *Id.* at ¶ 22.

²² *Id.*

²³ See *Petition of Sunoco Pipeline L.P. for amendment of the Pennsylvania Public Utility Commission's Order entered on August 29, 2013, authorizing Sunoco Pipeline, L.P. to abandon a portion of its petroleum products transportation service*, Docket No. P-2014-2422583 (May 21, 2014).

²⁴ See *Application of Sunoco Pipeline L.P. for Issuance of a Certificate of Public Convenience and such other approvals, if any, as may be necessary under the Pennsylvania Public Utility Code, evidencing approval to extend its service territory for transportation of petroleum products and refined petroleum products by pipeline into Washington County*, Docket No. A-2014-2425633 (June 6, 2014).

Application for CPC was published in the Pennsylvania Bulletin on June 21, 2014, and in the Pittsburgh Post-Gazette on June 22, 2014.

On July 24, 2014, the Commission approved SPLP's 703(g) Petition, and authorized SPLP to resume pipeline transportation service on the pipeline from Mechanicsburg, Pennsylvania to Delmont, Pennsylvania, subject to the filing of appropriate tariff supplements with the Commission ("703(g) Opinion and Order"). In so doing, the Commission specifically noted that:

1. the factual circumstances surrounding the Mariner East Pipeline have changed since August 2013 in that SPLP now intends to provide *intrastate* transportation service of propane in response to developing market conditions and increased shipper interest in securing intrastate pipeline service facilities;²⁵
2. SPLP had retained its authority under its 2002 Certificate of Public Convenience to provide petroleum products and refined petroleum products transportation service between Twin Oaks and Delmont, Pennsylvania;²⁶
3. the definition of "petroleum products" is interpreted broadly to encompass propane;²⁷
4. the proposed provision of intrastate propane service will result in numerous public benefits by, *inter alia*, allowing SPLP "to immediately address the need for uninterrupted deliveries of propane in Pennsylvania and to ensure that there is adequate pipeline capacity to meet peak demand for propane during the winter season."²⁸

²⁵ See *Petition of Sunoco Pipeline, L.P. for Amendment of Order Entered on August 29, 2013*, Opinion and Order at pp. 8-9, Docket No. P-2014-2422583 (July 24, 2014).

²⁶ *Id.* at p. 9.

²⁷ *Id.* at p. 9, n.5.

²⁸ *Id.* at pp. 9-10.

Meanwhile, several groups filed Preliminary Objections to SPLP's Amended 619 Petitions. On May 28, 2014, the Clean Air Council ("CAC") filed Preliminary Objections. Specifically, CAC raised the following objections to SPLP's Amended Petitions: (1) The Commission lacks jurisdiction because SPLP does not meet the definition of "public utility" under the Public Utility Code or "public utility corporation" under the Business Corporation Law ("BCL"); (2) the Amended Petitions are legally insufficient because: (a) SPLP has not adequately shown that the Mariner East Project is reasonably necessary for the convenience and welfare of the public; (b) the Amended Petitions are an inappropriate circumvention of law; (c) Article 1, Section 27 of the Pennsylvania Constitution prohibits granting SPLP's Amended Petitions; and (d) SPLP's request that the dockets remain unconsolidated has no legal basis.

On June 5, 2014, the Delaware Riverkeeper Network ("DRN") filed Preliminary Objections. Specifically, DRN raised the following objections to SPLP's Amended Petitions: (1) SPLP's improper segmentation of its project does not qualify it for an exemption pursuant to the Municipal Planning Code ("MPC"); (2) SPLP is not a "public utility corporation" under the BCL; (3) SPLP is not a "public utility" under the Pennsylvania Public Utility Code; (4) Article 1, Section 27 prohibits a grant of the Amended Petitions; and (5) the Amended Petitions must be denied because the situation of structures is not reasonably necessary for the convenience or welfare of the public.

On June 9, 2014, the Concerned Citizens of West Goshen Township ("CCWGT") filed Preliminary Objections.²⁹ The Concerned Citizens of West Goshen specifically objected as

²⁹ The Concerned Citizens of West Goshen Township filed only in the P-2014-2411966 docket related to the situation of a building to shelter the Boot pump station in West Goshen, Chester County. All other parties filed their preliminary objections in each of the 31 dockets.

follows: (1) the Commission lacks jurisdiction because SPLP will not provide intrastate pipeline service; (2) the Commission lacks jurisdiction because SPLP has not received Commission authority to use a pipeline segment near Boot Road in West Goshen Township; (3) the Amended Petition is legally incomplete because it failed to consider all the buildings SPLP proposes to construct at the Boot Station site; and (4) the Amended Petition lacks sufficient specificity because it fails to address environmental impacts and any impacts related to West Goshen Township's zoning and comprehensive plans.

Finally, on June 9, 2014, the Mountain Watershed Association ("MWA") adopted the Preliminary Objections of the DRN.

SPLP answered the Preliminary Objections on June 9, June 18, and June 19, 2014, respectively.

By way of an Initial Decision dated July 23, 2014, but not issued until July 30, 2014, Administrative Law Judges Salapa and Barnes dismissed SPLP's Amended Petitions, finding that the Commission lacked jurisdiction because (1) SPLP is not a public utility corporation as defined under the BCL, 15 Pa.C.S. § 1103; and (2) SPLP's proposed service is not a "public utility service" as contemplated by the Public Utility Code, 66 Pa.C.S. § 102. On the former point, the Initial Decision reasoned that SPLP is regulated as a common carrier by FERC pursuant to the Interstate Commerce Act and therefore cannot be regulated as a public utility by the Commission, as required under the definition of "public utility corporation".³⁰ To the latter point, the Initial Decision reasoned that SPLP is not providing service "for the public" because it is not specifically serving "end-user customers" and the nature of the service, providing NGL

³⁰ See Initial Decision at pp. 19-21.

pipeline transportation service to shippers, is not open to all members of the public.³¹ Finally, the Initial Decision reasoned that the Amended Petitions are “at best premature” because they were filed prior to acquiring Commission approval of SPLP’s tariff filings regarding the intrastate transportation of NGLs in an easterly direction, and prior to Commission approval of the as-yet pending Application for Certificate of Public Convenience.³²

SPLP respectfully is taking exception to the Initial Decision because, as explained below, the Initial Decision (1) failed to follow well-established Pennsylvania jurisprudence, (2) failed to follow Commission precedent, and (3) is inconsistent with the Commission’s findings in the 703(g) Opinion and Order and its August 2013 Order granting the Abandonment Application and Suspension Petition.

III. BACKGROUND

The Mariner East Project is a critical new infrastructure project that has come to fruition as a result of the dramatically expanded natural gas production from the Marcellus Shale deposits in Pennsylvania. A byproduct of natural gas production from development in the Marcellus Shale is natural gas liquids, including propane and ethane. Yet, even as production has flourished, Pennsylvania has experienced severe consumer shortages of propane during periods of peak demand like the 2013-2014 winter season due in large part to a lack of adequate pipeline capacity. The unfortunate result was dramatic supply-side shortages of propane and severe propane price spikes, which this past winter resulted in unprecedented emergency measures from

³¹ See *id.* at p. 21.

³² See *id.* at p. 22.

both the state and federal governments.³³ As a result of the high production of propane and other NGLs, and given the need and consumer demand for uninterrupted deliveries of propane and heating fuels in the Commonwealth, the demand for intrastate transportation of propane is significant. To that end, shippers have expressed interest in intrastate pipeline service to transport propane within the Commonwealth. The Mariner East Project is intended to satisfy this shipper demand and concomitantly alleviate the supply-side shortages.

SPLP intends to implement the first phase of the Mariner East Project, or Mariner East 1, in four stages. First, to meet demand during the upcoming 2014-2015 winter season and in response to shipper interest, SPLP initially will be resuming service for the pipeline transportation of propane from Mechanicsburg to Twin Oaks. SPLP has filed a tariff to implement service between Mechanicsburg and its Twin Oaks facility.³⁴ This will allow SPLP to: (1) implement the earlier transportation service of propane by pipeline from Mechanicsburg prior to the full completion of the Mariner East pipeline, and (2) significantly increase the delivery service capacity due to the superior efficiency of pipeline service transportation as

³³ For example, the U.S. Department of Transportation issued emergency declarations concerning trucking regulations in 35 states, including Pennsylvania, and the District of Columbia, to help facilitate the delivery of propane to commercial and residential customers. Additionally, the Home Heating and Emergency Assistance Through Transportation Act was enacted on March 21, 2014, which extended the Department of Transportation emergency measures through May 31, 2014, in an effort to replenish depleted propane supplies. FERC was compelled to take the unprecedented action of invoking its emergency authority under the Interstate Commerce Act by issuing an order directing the TE Products Pipeline Company (TEPPCO) to provide pipeline priority treatment to propane shipments from Texas to the Midwest and Northeast. In Pennsylvania, Governor Corbett took emergency action and temporarily waived certain restrictions on commercial drivers to help ensure uninterrupted deliveries of propane gas and heating fuel in the Commonwealth. That action temporarily waived the normal federal hours of service requirements for drivers of trucks carrying propane and heating oil, and extended the timeframe for driving without a mandatory rest period from 11 hours to 14 hours. The goal of this program, as well as the Federal measures, was to allow for more distant deliveries of propane by allowing out-of-state trucks to purchase propane and ship to the Midwest and Northeast.

The above information was not provided in the Amended Petition or SPLP's Answers to any preliminary objections, and is provided here to clarify SPLP's assertion.

³⁴ See Tariff Pipeline – Pa. P.U.C. No. 16, Docket No. R- 2014-2426158.

compared to truck and rail transportation. Second, SPLP also intends to transport propane by pipeline from Delmont to Twin Oaks, having now attained the Commission's approval of the reinstatement of pipeline transportation service on the segment from Mechanicsburg to Delmont, where the Commission previously approved the abandonment of SPLP's tariff.³⁵

Third, subject to the Commission's grant of SPLP's Application for CPC, currently pending before the Bureau of Technical Utility Services, SPLP will be able to offer pipeline transportation service of propane (both interstate and intrastate) from Houston, Pennsylvania via an interconnection with the existing pipeline at Delmont, to the Marcus Hook Industrial Complex, including its Twin Oaks facility which is operated as a part of and in conjunction with the Marcus Hook Industrial Complex. Lastly, upon completion of the first phase of the Mariner East Project, SPLP will provide transportation service of mixed ethane and propane on an approximately 300-mile pipeline that will make use of SPLP's existing pipeline infrastructure, supplemented by construction of an additional 51-mile extension from Houston, Pennsylvania to the Marcus Hook Industrial Complex and the Twin Oaks facility and will increase the capacity of propane that is capable of being transported by pipeline, whether via interstate or intrastate movements, and available for delivery or use in Pennsylvania. This phase of the project is scheduled to be fully operational to transport propane and ethane by mid-2015.

Thereafter, SPLP intends to undertake a second phase of the Mariner East Project which will expand the service capacity of the project by constructing: (1) a 16-inch or larger pipeline, paralleling its existing pipeline from Houston, Pennsylvania to the Marcus Hook Industrial Complex and along much of the same route, and (2) a new 15 miles of pipeline from Houston,

³⁵ See *Petition of Sunoco Pipeline, L.P. for Amendment of Order Entered on August 29, 2013*, Opinion and Order, Docket No. P-2014-2422583 (July 24, 2014).

Pennsylvania to a point near the Pennsylvania-West Virginia boundary. This second phase of the project, sometimes referred to as “Mariner East 2”, will expand the Mariner East pipeline system and will increase the take-away capacity of natural gas liquids from the Marcellus Shale by converting the Mariner East 1 pipeline from a propane and ethane mix exclusively to ethane transportation service and permitting the newly constructed pipelines to be dedicated to propane and butane transportation service. As part of Mariner East 2, and at the request of shippers, SPLP will provide additional on-loading and off-loading points within Pennsylvania for both intrastate and interstate propane shipments, and will increase the amount of propane that will be available for delivery or use in Pennsylvania. SPLP plans to file a petition for declaratory order with FERC for Mariner East 2 on or before August 31, 2014 under which 90 percent of the pipeline service capacity will be allocated to committed shippers while 10 percent will be reserved for uncommitted shippers. Using the reserved capacity, SPLP will be able to expand the capacity for *intrastate* pipeline transportation of propane and butane to approximately 25,000 to 30,000 barrels per day—a capacity that exceeds the approximate 20,000 barrels per day average annual demand for propane in Pennsylvania.

When completed, the Mariner East Project will (i) provide desperately needed pipeline infrastructure to transport NGLs from the Marcellus Shale to markets in Pennsylvania and elsewhere; (ii) facilitate the repurposing of the Marcus Hook Industrial Complex as the NGL hub in the Northeast; (iii) promote sustained economic development and jobs-creation throughout multiple regions in Pennsylvania; and (iv) allow shippers to arrange reliable intrastate transportation service of propane during the winter season when demands for this service peak.

IV. LEGAL STANDARD

Section 5.101 of the Commission's Regulations, 52 Pa. Code § 5.101, sets forth the grounds for granting preliminary objections. Commission procedure regarding the disposition of preliminary objections is similar to the procedure utilized in Pennsylvania civil practice. A preliminary objection in civil practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. *See Interstate Traveller Services, Inc. v. Pa. Dep't of Env'tl. Res.*, 406 A.2d 1020 (Pa. 1979). The moving party may not rely on its own factual assertions, but must accept for the purposes of disposition of the preliminary objection all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts. *See County of Allegheny v. Commonwealth of Pa.*, 490 A.2d 402 (Pa. 1985); *see also Maria Povacz v. PECO Energy Co.*, 2013 WL 392699 (Pa. P.U.C. Jan. 24, 2013). The preliminary objection may be granted only if the moving party prevails as a matter of law. *Rok v. Flaherty*, 527 A.2d 211 (Pa. Cmwlt. 1987). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Dep't of Auditor General, et al. v. State Employees' Retirement System, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlt. 2003) (citing *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlt. 2002)).

V. EXCEPTIONS

Exception No. 1 The Initial Decision erred by concluding that SPLP's proposed service does not satisfy the definition of "public utility" under the Public Utility Code.

SPLP takes exception to the Conclusion of Law number 1,³⁶ finding that SPLP's proposed Mainer East pipeline service does not constitute "public utility service" as defined by

³⁶ Conclusion of Law number 1 appears on page 22 of the Initial Decision.

the Public Utility Code,³⁷ 66 Pa.C.S § 102.³⁸ The Initial Decision, relying on the Pennsylvania Supreme Court decision in *Drexelbrook Associates v. Pa. Pub. Util. Comm'n*, 212 A.2d 237 (Pa. 1965), concludes that it is unclear whether SPLP's Mariner East pipeline services are "for the public" because: (1) it is not clear that the service will be open to all members of the public who might require it; (2) it is unclear who would be the end-user customers of the proposed service; and (3) the nature of the proposed service is private since it is limited to a few shippers and not available to members of the public. Such a conclusion, however, distorts the Mariner East service described in the Amended Petitions, misconstrues fundamental principles of public utility law, misreads the Court's decision in *Drexelbrook Associates* and its progeny, and ignores recent Commission precedent directly on point with the facts and legal issues presented here.

1. State Court Precedent

According to *Drexelbrook*, the test for determining whether public utility services are being offered "for the public" is:

³⁷ The Pennsylvania Public Utility Code defines a "public utility" as, in relevant part:

(1) Any person or corporation now or hereafter owning or operating in this Commonwealth equipment or facilities for:

* * *

(v) Transporting or conveying natural or artificial gas, crude oil, gasoline, or petroleum products, materials for refrigeration, or oxygen or nitrogen, or other fluid substance, by pipeline or conduit, *for the public* for compensation.

66 Pa.C.S. § 102 (emphasis added).

³⁸ SPLP also takes exception to the related Conclusion of Law number 4, finding that SPLP's proposed buildings will not be used in public utility service as part of the Mariner East Project and Conclusion of Law Number 5, finding that the Commission lacks subject matter jurisdiction. As explained more thoroughly in this Section, SPLP is a "public utility" and a "public utility corporation" that is providing a "public utility service." Thus, the Commission has jurisdiction under Section 619 of the MPC to exempt the protective enclosures surrounding the pump stations and valve stations from the provisions of the MPC. Accordingly, the Commission has subject matter jurisdiction over SPLP's Amended Petitions.

Whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, *or to any limited portion of it*, as contradistinguished from holding himself out as serving or ready to serve only particular individuals.

Drexelbrook, 418 Pa. 430, at 435-36, 212 A. 2d 237, at 239 (1965) (emphasis added). Adopting language from the Superior Court's decision in *Borough of Ambridge v. Public Service Commission*, 165 A. 47, 49 (Pa. Super. 1933), *allocator denied*, 108 Pa. Super. xxiii (1933), the Court in *Drexelbrook* pointed out that the public or private character of the service does not depend on the number of persons using it, but rather on whether it is *available* for members of the public who may be privileged to demand service:

The public or private character of the enterprise does not depend...upon the number of persons by whom it is used, but upon whether or not it is open to the use and service of all members of the public who may require it.

Id.

Contrary to the view expressed in the Initial Decision, the users of a public utility service need not be end-user or retail consumers, *see, e.g., Rural Telephone Co. Coalition v. Pa. Pub. Util. Comm'n*, 941 A. 2d 751 (Pa. Cmwlth. 2008) (holding that offering telecommunications services to internet service providers and other similar entities constitutes public utility service), and the services being offered may be economically feasible only to entities that desire large volumes of business, *see Waltman v. Pennsylvania Public Utility Commission*, 143 Pa. Cmwlth. 44, 596 A. 2d 1221, 1223-24 (1991), *aff'd*, 533 Pa. 304, 621 A. 2d 994 (1993) (holding that telecommunications services provided to large commercial carriers purchasing in bulk were “for the public”). What matters is that the utility offer the services to *any* person or company that elects to subscribe to its services. *Id.*

In fidelity to this test, the Commonwealth Court has ruled that a pipeline can be certificated as a public utility, even where the product will be delivered to only a few end-users, provided the product passing through the line will belong to the shippers and those shippers can access the transportation service pursuant to filed tariffs and established rates.

They [appellants] first declare that IEC is not a public utility because it is a creation of one or a few privately owned public utilities designed to serve only them. It is to be noted in this regard that the oil passing through the line will belong to the shippers, not IEC, and that the application seeks and the Certificate confers the right to transport petroleum products limited in use to the supply of oil for electric generation. The record establishes that IEC will establish rates, file tariffs, that it will transport oil, for all shippers, and, if necessary, that it will prorate capacity among shippers. It is, under the law, a public utility although, of necessity, it will have few customers. The appellants simply disagree with the holding of *Independence Township School District Appeal*, 412 Pa. 302, 194 A. 2d 437 (1963) that a pipeline company serving three non-public utilities was nevertheless a public utility entitled to exemption from local taxes.³⁹

³⁹ In *Independence Township*, the Supreme Court of Pennsylvania explained that pipeline companies are public utilities because they are quasi-public entities carrying on essential activities that are in the public interest:

The Legislature, by granting the right of eminent domain to pipeline companies, has recognized that they carry on an essential activity affected with a substantial public interest. The transportation of gasoline, kerosene, diesel and fuel oils so directly affects the daily needs of the Commonwealth and its citizens that any extended stoppages would create serious hardships in practically every area of our existence.

Undoubtedly, these and other considerations of public policy and welfare compel the conclusion that operations of pipeline companies are impressed with a public trust.

194 A. 2d 437, 440 (1963).

Bucks County Bd. of Comm'rs v. Com., Public Utility Commission, 11 Pa. Cmwlth. 487, 313 A.2d 185 (1973).⁴⁰

The Mariner East Project, as described in the Amended Petitions, clearly passes the *Drexelbrook* test. During each phase of the Mariner East Project, the proposed intrastate service will be provided pursuant to tariffs or tariff supplements duly filed with the Commission. The first of these tariffs, for service from Mechanicsburg to Twin Oaks, was filed with the Commission on June 11, 2014. This means, both practically and as a matter of law, that the certificated service will be made available on a nondiscriminatory basis to *all* shippers who wish to demand it, subject only to available capacity. If the demand exceeds the capacity, then as with any utility, service will be prorated so that no shipper desiring service is excluded. Intrastate service will be provided according to uniform rates and conditions, as set forth in the tariffs. The statement in the Initial Decision that service will be limited to a “few shippers” and not made available to members of the public is flatly wrong. SPLP will have no ability to confine service to particular individuals.

Moreover, unlike the pipeline service cases cited above, where the end-users were the utilities who organized the formation of the pipeline service, the end-users for the Mariner East Project will be determined by the operation of the free market. SPLP will neither own the product being transported nor dictate the markets to which the product will move. The primary purpose of the Mariner East Project is to provide much needed take-away capacity for natural gas liquids derived from the Marcellus Shale, and provide shippers with a transportation method

⁴⁰ See also *UGI Utilities, Inc. v. Pennsylvania Public Utility Comm'n*, 684 A.2d 225 (1996) (holding that a certificate of public convenience was properly granted to the same company to initiate gas transportation service, based on the company's agreement that service would not be limited to existing customers).

in which to reach local, regional and international markets. The shippers and the free market will determine the end-users, not SPLP. Even so, given the shortages of propane that afflicted the Commonwealth during the winter of 2013-2014, SPLP reasonably anticipates that much of the propane it transports will in fact be used locally (and in the Northeast United States) for residential heating purposes, thereby serving a vital public interest.

To the extent that the Initial Decision can be read to suggest that the *intrastate* service to be provided by Mariner East is not “for the public” because it is being provided in tandem with *interstate* service where shippers have contracted for “firm commitment” service, SPLP submits that the Initial Decision is clearly erroneous.

Since 2002 and its inception, SPLP has *always* provided both intrastate and interstate transportation service on many of its pipelines in Pennsylvania. As discussed at greater length in Exception No. 2 below, as a matter of law, the *interstate* service is provided under FERC tariffs, while the *intrastate* service is regulated by the Commission. To the extent the Initial Decision suggests that a pipeline service cannot legally provide both, or be authorized to do so, that claim is belied by the Commission’s own actions. Such authorization was granted, and for good reason, in 2002 when the Commission approved “the right of Sunoco Pipeline, L.P. to transport petroleum products in the former service territory of Sun Pipe Line Company and Atlantic Pipeline Corp.”⁴¹

⁴¹See *Joint Application of Sunoco Pipeline L.P., Sun Pipeline Corp. for Approval of the Transfer of Assets and Merger of Sun Pipe Line Company and Atlantic Pipeline Corp. to Sunoco Pipeline L.P. for the Right of Sunoco Pipeline L.P. to Transport Petroleum Products in the Former Service Territory of Sun Pipe Line Company and Atlantic Pipeline Corp. and for the Abandonment of Services by Sun Pipe Line Company and Atlantic Pipeline Corp.*, Corrected Order, Docket No. A-140001, A-140400 F2000, A-140075 F2000 (Jan. 28, 2002).

The Public Utility Code contains no provision mandating that a pipeline service be devoted exclusively to *intrastate* service, and the Initial Decision cites no such requirement. That SPLP may use the same public utility facilities to provide *interstate* service in no way undermines the substantial benefits that accrue to the public from the provision of the *intrastate* service. To the contrary, utilizing the same pipeline to provide both kinds of service generates economies of scale and scope, benefiting *intrastate* and *interstate* shippers, their customers, and the public at large. Indeed, absent the firm commitments allowed by FERC for interstate movements, pipeline service companies would face insuperable difficulty in securing the financing needed to build this critical infrastructure.

Here, the proposed intrastate service—standing alone—will undoubtedly provide substantial public benefits. The initial intrastate shipments of propane—an estimated 5,000 barrels per day—equate to approximately 25 truckloads per day and represent approximately 25% of the annual average demand for propane in Pennsylvania. As the Commission acknowledged in its July 24, 2014 Order clarifying the procedures for SPLP to resume transportation service in the segments of the pipeline where the tariff was abandoned, these shipments will enable SPLP to immediately address the need for uninterrupted deliveries of propane in Pennsylvania and ensure that there is adequate pipeline capacity to meet peak demand for propane during the winter heating season. They will also assist shippers in avoiding the added expense and risks associated with trucking the propane from the Marcellus Shale region to Mechanicsburg.

Moreover, SPLP is committed to expanding Mariner East service. Already, SPLP has proposed multiple points of service origin, including Mechanicsburg, Delmont, Houston, and,

upon the completion of Mariner East 2, additional propane loading capacity in Washington County, near the West Virginia border. Upon completion of the second phase of Mariner East, SPLP will be able to convert existing pipeline to ethane-only transportation and use a newer, larger-diameter pipeline for increased propane shipments. SPLP anticipates that the *intrastate* capacity for Mariner East 2 will be approximately 25,000 to 30,000 barrels per day, which exceeds the average annual demand for propane in Pennsylvania and will be invaluable in addressing the peak winter demand. SPLP's commitment to expanding intrastate service demonstrates that Mariner East service is "for the public."

Finally, although the Commission's jurisdiction is limited to *intrastate* service, it should be noted that the *interstate* service was also open to the public and not confined to particular individuals. Due to the substantial capital investment necessary to complete the Mariner East Project, SPLP conducted a widely-publicized open season seeking term and volume commitments in return for priority service at a premium rate. Open Seasons are tools used to alleviate some of the regulatory uncertainty concerning rates and terms of service that might otherwise deter a pipeline company's investment in a pipeline project. The open season for Mariner East 1 began on August 9, 2012 and ended on September 25, 2012. The open season for Mariner East 2 began on December 4, 2013 and concluded on May 30, 2014. For each of the open seasons, notice was provided to interested parties, with additional notice by press release to more than 200 trade and general circulation print and online publications. Any member of the public who wished to participate could do so upon signing the required confidentiality agreement. Moreover, even for the *interstate* service, the open season required use of uniform transportation shipping agreements for similarly situated shippers, and SPLP had no ability to

vary the rates or terms of service. Finally, to ensure open access to the pipeline service, even for shippers who do not commit to priority service, the FERC rules require that 10% of the service capacity be reserved for uncommitted volumes. It is this substantial capacity that SPLP is using to provide the *intrastate* service under the Commission’s jurisdiction. The open season process, together with a declaratory order from FERC, enables common carrier pipelines to commit substantial resources to the construction of new pipelines while at the same time ensuring that such pipelines will be used for transportation and the investment recovered.

Given the state court precedent and the facts cited above, SPLP submits that the Initial Decision’s conclusion that Mariner East service is not “for the public” is clearly erroneous.

2. Commission Precedent - *Laser*

The Initial Decision also ignored Commission precedent that is squarely on point. In particular, the Initial Decision makes no mention of *Laser*, where the Commission addressed whether natural gas gathering pipeline service could constitute public utility service. In *Laser*, after analyzing applicable case law and the Commission’s *Policy Statement* at 52 Pa. Code § 69.1401, the Commission concluded that “offering service only to a customer group limited by its business characteristics, such as natural gas producers, can be service ‘for the public’ *as long as the service provider holds itself out as offering service to all members of that group.*”⁴² Importantly, there is no requirement in the Code or in PUC precedent or policy that the “customers” at issue be “end-user customers.” Rather, providing service *to shippers* constitutes providing service *to and for the public* in accordance with Section 102 of the Public Utility Code as well as *Drexelbrook Associates* and *Laser*.

⁴² *Laser*, at p. 25 (emphasis added).

In a subsequent Reconsideration Order, the Commission in *Laser* explained that the following facts established that Laser was providing service “for the public”:

1. Laser will be transporting or conveying natural or artificial gas by pipeline or conduit for compensation.
2. Laser explicitly stated that it would serve any and all potential customers needing to move gas through the pipeline system.
3. Laser stated that it intends to utilize negotiated contracts to secure customers; and that its contracts are not meant to be exclusionary, but rather to establish technical requirements, delivery points, and other terms and conditions of service.
4. Laser made a commitment to expand its capacity, as needed, to meet increased customer demand.⁴³

Similar to the facts in *Laser*, SPLP intends to serve all NGL shippers who request pipeline transportation service, subject only to the sufficient pipeline capacity. In the event that demand exceeds pipeline capacity, committed interstate shippers will be entitled to their full capacity under the agreements executed in the open season, while capacity for uncommitted shippers will be subject to allocation among all uncommitted shippers. Even then, SPLP has made a commitment to expand service, if feasible, to keep pace with the growing demand of shippers for take-away capacity from the Marcellus Shale in western Pennsylvania. SPLP has no legal right, whether interstate and regulated by FERC, or intrastate and regulated by the PUC, to deny service to shippers. As SPLP represented in its Answer to the Delaware Riverkeeper Preliminary Objections, the intrastate service that SPLP will offer is plainly service “to and for the public” because: (i) SPLP will be providing transportation service for propane by pipeline for compensation; (ii) SPLP explicitly has stated that it will serve any and all potential customers

⁴³ *Laser*, Opinion and Order at p. 19 (Aug. 25, 2011).

needing to move propane through the pipeline system subject to the available capacity and the tariffs on file with the Commission; (iii) SPLP has explicitly stated that it will be utilizing tariffs to establish technical requirements, delivery points, and other terms and conditions of service, and service, therefore, will not be governed by exclusionary contracts; and (iv) SPLP has made a commitment to endeavor to expand the capacity of the intrastate service by building Mariner East 2, if commercial conditions so permit.

In short, SPLP satisfies the definition of “public utility” under the Public Utility Code and as interpreted by the Pennsylvania Supreme Court, Commonwealth Court, and the Commission. By holding that SPLP is not providing service “for the public”, the Initial Decision fundamentally misinterpreted state court precedent, and completely ignored recent Commission precedent. As such, SPLP respectfully requests that this exception be granted.

Exception No. 2 The Initial Decision erred by concluding that SPLP does not meet the definition of a “public utility corporation” under the Business Corporation Law because it is regulated as a common carrier by FERC.

SPLP takes exception to the Conclusion of Law number 2,⁴⁴ finding that SPLP is not a “public utility corporation” as defined by the BCL⁴⁵, 15 Pa. C.S. § 1103.⁴⁶ In support of that

⁴⁴ See Initial Decision, at p. 22.

⁴⁵ The BCL defines a “public utility corporation” as:

Any domestic or foreign corporation for profit that (1) is subject to regulation *as a public utility by the Public Utility Commission* or an officer or agency of the United States; or (2) was subject to such regulation on December 31, 1980, or would have been so subject had it been then existing.

15 Pa.C.S. §1103 (emphasis added).

⁴⁶ SPLP also takes exception to the related Conclusion of Law number 4, finding that SPLP’s proposed buildings will not be used in public utility service as part of the Mariner East Project and Conclusion of Law Number 5, finding that the Commission lacks subject matter jurisdiction. As explained more thoroughly in this Section, SPLP is a “public utility” and a “public utility corporation” that is providing a “public utility service.” Thus, the Commission has jurisdiction under Section 619 of the MPC to exempt the protective enclosures surrounding the

conclusion, the Initial Decision relies on three presumptions: (1) the definition of “Public Utility Corporation” articulated in the BCL is inapplicable to corporations that are also subject to federal regulation as a common carrier; (2) an order from the Federal Regulatory Commission (“FERC”), dated February 15, 2013, at Docket No. OR13-9-000, conclusively demonstrates that SPLP is regulated as a common carrier by FERC, not a public utility regulated by the Commission; and (3) a decision from the York County Court of Common Pleas, *Sunoco Pipeline, L.P. v. Loper, et al.*, (Docket No. 2013-SU-4518-05)(Feb. 25, 2014), finding that SPLP did not meet the definition of a “public utility corporation” because it is regulated as a common carrier by FERC, is further evidence that SPLP is not a PUC-regulated public utility. For the reasons set forth below, the Initial Decision’s reliance on these factors is misplaced, and SPLP satisfies the definition of a “public utility corporation”, notwithstanding its regulation as a common carrier by FERC.

By holding that SPLP is not a public utility corporation due to its common carrier status under federal regulations, the Initial Decision incorrectly assumes that a state-regulated public utility and a federally regulated common carrier are mutually exclusive entities. They are not. There is no conflict between the Interstate Commerce Act and the Public Utility Code. The former applies to *interstate* movements, while the latter applies only to *intrastate* movements. More specifically, under Section 1(1) of the ICA, the FERC has no authority to regulate *intrastate* shipments. *See, e.g., Amoco Pipeline, Co.*, 62 F.E.R.C. 61119, at 61803, 1993 WL

pump stations and valve stations from the provisions of the MPC. Accordingly, the Commission has subject matter jurisdiction over SPLP’s Amended Petitions.

25751, at *4 (Feb. 8, 1993) (finding that “a commingling of oil streams is not a factor in fixing jurisdiction under the ICA.”).⁴⁷

For this reason, pipeline service operators can be, and frequently are, regulated by both FERC *and* the Commission under a regulatory framework wherein FERC jurisdiction extends only to *interstate* shipments, while the Commission’s jurisdiction extends only to *intrastate* shipments. However, in order to furnish *intrastate* service in Pennsylvania, a company *must* be certificated under Section 1102(a)(1) of the Public Utility Code, 66 Pa.C.S. § 1102(a)(1). Here, SPLP has been providing both intrastate and interstate service since 2002. The intrastate service was authorized pursuant to the issuance of the Commission’s 2002 Certificate of Public Convenience which granted “the right of Sunoco Pipeline, L.P. to transport petroleum products in the former service territory of Sun Pipe Line Company and Atlantic Pipeline Corp.”⁴⁸

If the reasoning of the Initial Decision is upheld, the illogical result is apparent: if a pipeline service operator is precluded from public utility status simply because it is also operated

⁴⁷ In *Amoco*, FERC further held as follows:

It is not disputed that both interstate and intrastate transportation occur over the pipeline segments in question, nor is there any dispute that crude oil shipped by Sinclair over these segments, no matter where produced, is destined for Sinclair’s Wyoming refineries. Therefore, the crude oil produced outside of Wyoming and transported over Amoco’s Wyoming facilities to Sinclair’s refineries in that state is moving in interstate commerce and is covered by the tariffs filed by Amoco with this Commission. Transportation over Amoco’s facilities of that portion of the crude oil that is both produced and refined in Wyoming is subject to the regulation of the Wyoming PSC. Commingling does not alter the jurisdictional nature of the shipments, and as Sinclair has stated, the question of jurisdiction arises only in the context of the facts relevant to individual shipments.

62 F.E.R.C. at 61803, 1993 WL 25751 at *4.

⁴⁸ See *Joint Application of Sunoco Pipeline L.P., Sun Pipeline Corp. for Approval of the Transfer of Assets and Merger of Sun Pipe Line Company and Atlantic Pipeline Corp. to Sunoco Pipeline L.P. for the Right of Sunoco Pipeline L.P. to Transport Petroleum Products in the Former Service Territory of Sun Pipe Line Company and Atlantic Pipeline Corp. and for the Abandonment of Services by Sun Pipe Line Company and Atlantic Pipeline Corp.*, Corrected Order, Docket No. A-140001, A-140400 F2000, A-140075 F2000 (Jan. 28, 2002).

as a common carrier under federal law, the operator could never provide both interstate *and* intrastate service. This result runs contrary to the applicable statutes and historical practice and also constitutes unsound public policy, since pipeline companies must rely on the long-term volume commitments of interstate shippers to support the enormous capital investment required for new pipeline capacity.

Thus, although SPLP is regulated by FERC as a common carrier, it is *also* regulated by the Commission as a public utility.⁴⁹ Indeed, the Commission has expressly recognized SPLP's status as a pipeline public utility.⁵⁰

The Initial Decision's reliance on FERC's February 15, 2013 Order to support the conclusion that SPLP is not a public utility corporation is also misplaced. In that decision, FERC, recognizing the need for additional pipeline capacity to transport excess NGLs produced in the Marcellus and Utica Shale regions, and further recognizing the need for SPLP to undertake a substantial investment to construct new pipeline facilities and modify existing pipeline service facilities to transport NGLs, approved SPLP's proposal to reserve 90 percent of the available

⁴⁹ The concept of a single entity owning or controlling both PUC-jurisdictional and non-jurisdictional facilities is not novel. For example, municipal corporations providing water and sewer service are subject to the Commission's jurisdiction for service provided *outside* their corporate boundaries, but are not subject to Commission jurisdiction for service provided *within* their corporate boundaries. See, e.g., *Petition of Skytop Lodge Corp. for a Declaratory Order*, Order, Docket No. P-2013-2354659 (July 24, 2014) (citing 66 Pa. C.S. §§ 102, 1102(a)(5), 1301, 1304, and 1501).

⁵⁰ The Commission has previously specifically recognized SPLP's public utility status. In *Laser*, two Commissioners affirmatively recognized that SPLP is regulated as a pipeline public utility in written opinions filed in concurrence with and in dissent to the Commission's majority decision regarding Laser Northeast Gathering Company's Application for a Certificate of Public Convenience at Docket Number A-2010-2153371. One Commissioner cited to the aforementioned 2002 Certificates of Public Convenience issued at Docket Number A-140001 as evidence of SPLP's public utility status, while the other Commissioner simply recognized SPLP as a PUC-regulated pipeline utility. See *Application of Laser Northeast Gathering Company, LLC for Approval to Begin to Offer, Render, Furnish, or Supply Natural Gas Gathering and Transporting or Conveying Service by Pipeline to the Public in Certain Townships of Susquehanna County, Pennsylvania*, Concurring Statement of Vice Chairman John F. Coleman, Jr., at p. 3, and Dissenting Statement of Commissioner James H. Cawley, at p. 19, Docket No. A-2010-2153371 (May 19, 2011).

capacity for those shippers that commit to 10- to 15-year contracts, while reserving 10 percent of the pipeline service capacity for uncommitted shippers that do not provide financial assurances. The financial assurances provided by the term and volume commitments are integral to the economic viability of the Mariner East Project. That decision did not prohibit, or otherwise affect, SPLP's ability to provide *intrastate* service pursuant to PUC regulation and certification. In fact, by ensuring that 10 percent of the pipeline remains for uncommitted shippers, FERC implicitly ensured that a percentage of the pipeline will remain available for intrastate shipments.

Moreover, the FERC decision can be factually distinguished from the case before the Commission because at the time SPLP petitioned FERC for a declaratory order, SPLP prioritized the Mariner East pipeline system to provide *interstate* transportation service of NGLs due to natural market conditions in existence at the time. Thus, at that time, *intrastate* transportation service for propane was not yet contemplated because the local market for propane had not yet developed. However, as 2013 and 2014 unfolded, the local market for propane increased significantly. Shipper demand for intrastate shipments of propane increased significantly as well following the conclusion of the Open Season for Mariner East 1. As a result of this change of circumstances, SPLP modified the scope of the first phase of the Mariner East Project to provide for the acceleration of *intrastate* pipeline transportation service. As clarified by the Commission in its recent Opinion and Order granting SPLP's 703(g) Petition, SPLP's PUC-issued Certificate of Public Convenience remained valid (and thus its right to provide NGL pipeline transportation service also remained valid) notwithstanding the abandonment of tariffs for service (related to the transportation of gasoline and distillate) along certain portions of the Mariner East pipeline in anticipation of repurposing the pipeline to provide west-to-east NGL transportation service. This

change in market and business circumstances, which became increasingly apparent in 2013 into 2014, occurred *after* the FERC proceeding, which concluded in February 2013. FERC has no legal authority to regulate *intrastate* shipment of NGLs, so there is no reason why SPLP would need to amend or modify the FERC Order to implement its modified plan to provide *intrastate* service in addition to *interstate* service.

In short, the Initial Decision's reliance on the FERC Order to support the conclusion that SPLP is not a public utility is misplaced because (1) the FERC Order is legally distinguishable in that the Order approved SPLP's proposal to reserve 90 percent of the pipeline capacity for committed shippers, with 10 percent to be available for uncommitted shippers and did not relate to or impact SPLP's ability to provide intrastate service or otherwise affect SPLP's public utility status; and (2) the FERC Order is factually distinguishable in that SPLP now will provide both FERC-regulated interstate service *and* PUC-regulated *intrastate* service, conditions which were not in existence at the time of the Order.

Finally, the Initial Decision's reliance on *Loper* is misplaced because that case is both legally and factually inapposite. As with the FERC Order, the *Loper* decision was rendered *before* SPLP modified its business plans to address the rising demand for intrastate shipments of propane. In *Loper*, SPLP argued that it met the definition of a "public utility corporation" in section 1103 of the BCL, 15 Pa.C.S. § 1103, *because* SPLP was a common carrier regulated by FERC and therefore was subject to regulation as a public utility by "*an officer or agency of the United States.*" The York County Court of Common Pleas rejected this contention. Because SPLP at that time had not yet proposed to provide intrastate service, the Court of Common Pleas did not, and could not, consider whether SPLP would qualify as a "public utility corporation"

under section 1103 because SPLP was subject to regulation as a public utility by “*the Public Utility Commission.*” Nor did the court in *Loper* have available the Commission’s recent Opinion and Order granting SPLP’s 703(g) Petition, where the Commission explicated both the market conditions relating to and the potential public benefits to be derived from *intrastate* transportation of propane. Finally, the decision in *Loper* neither explicitly nor implicitly holds that a FERC-regulated common carrier cannot also be a PUC-regulated public utility. For these reasons, the decision in *Loper* is simply inapposite to the facts now before the Commission.

In short, the regulation of SPLP’s interstate pipeline transportation service by FERC does not automatically preclude SPLP’s status as a public utility. Rather, consistent with historic practice and applicable law, SPLP’s provision of both intrastate and interstate service subject it to both FERC regulation as a common carrier *and* Commission regulation as a public utility. The Initial Decision’s reliance on the FERC Order dated February 15, 2013 and the *Loper* decision are misplaced because both are factually and legally distinguishable in light of SPLP’s recently changed circumstances to provide *intrastate* service in addition to *interstate* service. As the Commission has pointed out, SPLP is a pipeline public utility and has been regulated as such since 2002. The numerous Commission-issued Certificates of Public Convenience that SPLP currently holds, and the numerous tariffs and tariff supplements filed with the Commission are evidence of SPLP’s public utility status before the Commission.⁵¹ As such, SPLP respectfully requests that this exception be granted.

⁵¹ Although not before the ALJs at the time of their Initial Decision, SPLP submits the following additional evidence as indicia of SPLP’s public utility status: (1) SPLP is exempt from registration under Pennsylvania’s Gas and Hazardous Liquids Pipelines Act (Act 127) due to SPLP’s recognized status as a public utility; (2) SPLP pays an annual Pennsylvania Public Utility Reality Tax Assessment; and (3) SPLP pays an annual Pennsylvania Public Utility Gross Receipts Tax.

Exception No. 3 The Initial Decision erred by concluding that SPLP's Amended Petitions are premature.

Finally, the Initial Decision concludes on page 22 that the Amended Petitions are premature because (1) it has not yet sought and acquired Commission approval of tariff filings regarding the intrastate transportation of NGLs from west-to-east; and (2) several of the structures that are the subject of the Amended Petitions are in Washington County, where SPLP is currently seeking approval to begin furnishing intrastate transportation of propane, the approval of which is currently pending before the TUS.

SPLP's Amended Petitions are not premature and should not have been dismissed on this basis. First, a tariff can be filed only when the utility is prepared to offer service, because once a tariff is effective, the public is privileged to demand service on the terms and conditions set forth in the tariff. To suggest, as the Initial Decision does here, that the Commission must approve the tariff before it can make a determination under Section 619 of the MPC is to create a "Catch-22": the utility needs the buildings in order to be in a position to offer service, but the Commission would be refusing to grant the exemptions necessary for the erection of the buildings because service had not yet begun. This result is plainly absurd and unreasonable.

Moreover, while it is true that three (3) of the thirty-one (31) Amended Petitions involve municipalities in Washington County, which is the subject of a pending Application for a CPC to extend its service territory, there is no reason why the ALJs could not take action on the other 28 Amended Petitions or condition their approval of all the Amended Petitions upon SPLP's receipt of the CPC for Washington County.

There is nothing premature about SPLP's Amended Petitions. Rather, they are an integral part of SPLP's efforts to bring the substantial benefits of Mariner East service to the public in the Commonwealth.

Exception No. 4 The Initial Decision erred by not dismissing the remaining Preliminary Objections.

Because the Initial Decision dismissed the Amended Petitions due to a lack of subject matter jurisdiction, the ALJ's did not reach a conclusion on the remaining Preliminary Objections. Specifically, the Initial Decision did not address the following preliminary objections:

1. The Amended Petitions are legally insufficient because SPLP has not adequately shown that Mariner East Project is reasonably necessary for the convenience and welfare of the public; (CAC, DRN)
2. The Amended Petitions are legally insufficient because the Amended Petitions are an inappropriate circumvention of law; (CAC)
3. SPLP's improper segmentation of its project does not qualify it for an exemption pursuant to the MPC; (DRN)
4. The Commission lacks jurisdiction because SPLP will not provide intrastate pipeline service; (CCWGT)
5. The Commission lacks jurisdiction because SPLP does not have PUC approval or authority to use a pipeline segment near Boot Road in West Goshen Township; (CCWGT)
6. The Amended Petitions are legally insufficient because Article 1, Section 27 of the Pennsylvania Constitution prohibits granting SPLP's Amended Petition; (CAC, DRN)
7. The Amended Petition lacks sufficient specificity because it fails to address environmental impacts and any impacts related to West Goshen Township's zoning and comprehensive plans; (CCWTG)
8. The Amended Petition is legally insufficient because it fails to address the construction of a vapor combustion unit. (CCWGT)

SPLP will address each Preliminary Objection *ad seriatum*, and, for ease of reference, will refer to the objections as enumerated above. For the reasons explained more fully below, SPLP respectfully requests that the Commission deny each Preliminary Objection as a matter of law and rule that each Preliminary Objection is moot and/or devoid of legal merit.

Preliminary Objections 1 – 5

The Commission has already rejected the rationale behind Preliminary Objections 1 through 5 in its decision granting SPLP’s 703(g) Petition (*e.g.* the 703(g) Opinion and Order), and these Preliminary Objections are therefore moot.

Preliminary Objection 1

In this Preliminary Objection, the CAC and DRN assert that SPLP has not adequately shown that the Mariner East Project is reasonably necessary for the convenience and welfare of the public. This Preliminary Objection must be denied as a matter of law because the overall need or necessity for the Mariner East Project is related to the merits of the Mariner East Project, a legal issue which is not germane to a Section 619 proceeding. The Amended Petitions pertain to the siting of structures that might be considered public utility “buildings” under Section 619 of the MPC, 53 P.S. § 10619. In *Del-AWARE Unlimited, Inc. v. Pa. Pub. Util. Comm’n*, 513 A.2d 593, 596 (Pa. Commw. Ct. 1986), the Commonwealth Court ruled that Section 619 only empowers the Commission to decide if there is reasonable necessity for the *site* of buildings. In any event, this issue is now moot because the Commission found in its 703(g) Opinion and Order that the Mariner East Project’s proposed provision of intrastate propane service will result in numerous public benefits by, *inter alia*, allowing SPLP “to immediately address the need for uninterrupted deliveries of propane in Pennsylvania and to ensure that there is adequate pipeline

capacity to meet peak demand for propane during the winter season.”⁵² Accordingly, the CAC’s and DRN’s Preliminary Objections in this regard are moot and are otherwise devoid of legal merit and, accordingly, should be denied.

Preliminary Objections 2-4

Preliminary Objections 2 through 4 all assert, in various ways, that SPLP’s Amended Petitions are deficient because SPLP will not be offering intrastate pipeline transportation service. While SPLP has acknowledged that the Mariner East Project was originally prioritized for intrastate service, those business plans were modified in response to changing market conditions and, as explained in greater detail above, SPLP will now be providing both interstate *and* intrastate service. Moreover, the Commission recognized the legitimate basis for SPLP’s modified business plans, acknowledging in the 703(g) Opinion and Order that “the circumstances surrounding the Mariner East Project have changed since the issuance of the August 2013 Order.”⁵³ Accordingly, these Preliminary Objections are moot and are otherwise devoid of legal merit and must therefore be denied.

Preliminary Objection 5

CCWGT objects to the SPLP’s Amended Petition, arguing that a map provided by SPLP as Exhibit A to the Amended Petition shows that portion of the pipeline service in the vicinity of Boot Road, Chester County is part of an abandoned pipeline, and thus SPLP is not approved by the Commission to use that portion of the pipeline.

⁵² See *Petition of Sunoco Pipeline, L.P. for Amendment of Order Entered on August 29, 2013*, Opinion and Order at pp. 9-10, Docket No. P-2014-2422583 (July 24, 2014).

⁵³ *Id.* at p. 8.

CCWGT evidently has the mistaken impression that SPLP has abandoned physical pipelines and the use of the Boot Road site. While SPLP has suspended the *tariffs on service for gasoline and distillates* for pipeline movements that originate at Point Breeze and end at Mechanicsburg, and abandoned *tariffs on service for gasoline and distillates* for pipeline movements that originate in Twin Oaks and end at Icedale, Malvern, and points west of Mechanicsburg, SPLP continues to provide transportation service of petroleum products and refined petroleum products (gasoline and distillates) on pipeline movements through the Boot Road site (utilizing the Boot Road pump station in connection with this service) to Montello. SPLP will continue to provide these transportation services even after the completion of the Mariner East Project.

In the 703(g) Opinion and Order, the Commission reaffirmed that, notwithstanding the Commission's approval of the Abandonment Application and Suspension Petition, SPLP retained its authority under its 2002 Certificate of Public Convenience to provide petroleum products and refined petroleum products transportation service between Twin Oaks and Delmont, Pennsylvania. Accordingly, this Preliminary Objection is moot and is otherwise devoid of legal merit and, accordingly, must be denied.

Preliminary Objections 6 and 7

Preliminary Objections 6 and 7 respectively argue that SPLP's Amended Petitions should be denied (1) in light of the Supreme Court's plurality opinion in interpreting Article 1, Section 27 of the Pennsylvania Constitution, *Robinson Township, et al. v. Commonwealth of Pennsylvania, et al.*, 83 A.2d 901 (Pa. 2013), and (2) because the Amended Petitions otherwise failed to address environmental impacts and impacts related to local zoning.

The Supreme Court’s plurality decision in *Robinson Township* concerned Act 13 and did not involve Section 619 of the MPC. Moreover, unlike *Robinson Township* where Act 13 permitted incompatible uses as a matter of right, Section 619 of the MPC requires the Commission to make an *individualized* finding that the siting is for the convenience and welfare of the public before local zoning regulation is trumped. None of the concerns expressed in *Robinson Township* are implicated by this proceeding, and the Commission cannot unilaterally choose to disregard the statutory duties assigned to it by Section 619 of the MPC.

In response to CAC’s and CCWGT’s allegations that SPLP has failed to address environmental concerns,⁵⁴ SPLP responds by noting that, at this point in the proceeding, there is no evidence whatsoever that the siting of those structures may negatively impact the environmental integrity and esthetic value of the communities in which they are located.⁵⁵ To the extent that any party to this proceeding comes forward with evidence of such purported impacts from the *siting* of the structures, the Commission may consider such evidence in determining whether to make a finding that the *siting* of the structures is for the convenience or welfare of the public. SPLP expressly denies that this process implicates the concerns voiced in *Robinson Township*. To the contrary, under the Commission’s policy statement, 52 Pa. Code § 69.1101, in evaluating the siting of a public utility “building” under Section 619 of the MPC, the Commission will consider “...the impact of its decisions upon local comprehensive plans and zoning ordinances.” What’s more, the Commonwealth Court has explicitly held that the

⁵⁴ See *Preliminary Objections of Clean Air Council*, ¶ 48.

⁵⁵ By way of further response, SPLP submits that the Pennsylvania Department of Environmental Protection (“DEP”) has determined that the pump stations are air emissions sources of “minor significance” under 25 Pa. Code § 127.14, and thus any potential air emissions are so insubstantial as to not require a Plan Approval under the DEP’s air quality regulations. Consequently, the litany of pollutants and associated health problems alleged in paragraph 36 of the CAC’s Preliminary Objections is irrelevant.

Environmental Rights Amendment does not operate to expand the Commission's limited statutory authority of determining whether the proposed *site* of a building is reasonably necessary for the public convenience or welfare. *See Del-AWARE Unlimited*, 513 A.2d at 596 (citing *Borough of Moosic v. Pa. Pub. Util. Comm'n*, 429 A.2d 1237 (Pa. Cmwlth. 1981)). Accordingly, these Preliminary Objections are devoid of legal merit and must therefore be denied.

Preliminary Objection 8

CCWGT objects to the SPLP's Amended Petition, arguing that the vapor combustion unit at the Boot Road pump station was improperly excluded from SPLP's request for an exemption, reasoning that the vapor combustion unit is a "building" under the MPC.

SPLP has not included the vapor combustion unit in its Amended Petition because the unit is not a "building." Rather, it is a "public utility facility" that is not properly before the Commission in a Section 619 proceeding. *See Petition of UGI Penn Natural Gas Inc. for a Finding that Structures to Shelter Pipeline Facilities in the Borough of West Wyoming, Luzerne County, To the Extent Considered To be Buildings under Local Zoning Rules, Are Reasonably Necessary for The Convenience or Welfare of the Public*, 2013 WL 6835113 (Pa. P.U.C. 2013). The dictionary defines a "building" as a "structure or edifice inclosing a space within its walls." The vapor combustion unit is a piece of equipment. It is neither a "structure" nor an "edifice," nor does it have "walls." Unless a three-dimensional object is solid, it will always "enclose a space." This does not make the object a "building." Accordingly, there is no reason to request an exemption for the vapor combustion unit, and this Preliminary Objection must therefore be denied.

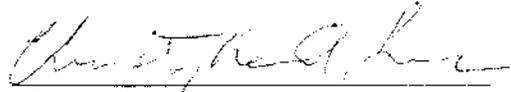
VI. CONCLUSION

In conclusion, the Initial Decision erred by concluding that SPLP is neither a “public utility corporation”, as defined by the BCL, nor a “public utility”, as defined by the Public Utility Code. Specifically, the Initial Decision erred in concluding that SPLP is not a “public utility corporation” because it is also regulated by FERC as a common carrier. As explained above, SPLP is regulated as both a common carrier by FERC and a public utility by the Commission, thus satisfying the definition of “public utility corporation.” A previous FERC Order and a York County Court of Common Pleas decision relied upon in the Initial Decision as evidence of SPLP’s common carrier status are distinguishable and inapplicable because, as recognized by the Commission, SPLP’s circumstances have changed in reaction to the unfolding market conditions such that SPLP will now be providing both interstate *and intrastate* service. Moreover, the Initial Decision erred in concluding that SPLP would not be providing a public utility service” As explained above, SPLP is providing service “for the public” because it is providing intrastate transportation service to all NGL shippers requesting such service, subject to available pipeline capacity. As such, the service satisfies the definition of “public utility” under the Code, as that definition is interpreted by recent Commission precedent and well-settled Supreme Court and Commonwealth Court caselaw. Furthermore, the Amended Petitions are not premature and, in any event, the filing of a Petition that is contingent on the outcome of a related proceeding is not grounds for dismissal. Finally, the remaining Preliminary Objections of the CAC, DRN, MWA, and CCWGT are without basis and should be denied as a matter of law.

For all the foregoing reasons, SPLP respectfully requests that the Commission reject the Initial Decision of the ALJs, deny the remaining Preliminary Objections as a matter of law, and

remand the Amended Petitions to the OALJ for adjudication of the Amended Petitions on the merits.

Respectfully submitted,



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**BEFORE THE
COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Sunoco Pipeline L.P. for a Finding That the Situation of Structures to Shelter Pump Stations and Valve Control Stations is Reasonably Necessary for the Convenience and Welfare of the Public

:
:
: Docket Nos. P-2014-2411941, 2411942,
: 2411943, 2411944, 2411945, 2411946,
: 2411948, 2411950, 2411951, 2411952,
: 2411953, 2411954, 2411956, 2411957,
: 2411958, 2411960, 2411961, 2411963,
: 2411964, 2411965, 2411966, 2411967,
: 2411968, 2411971, 2411972, 2411974,
: 2411975, 2411976, 2411977, 2411979,
: 2411980

(not consolidated)

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 2014, I caused a true copy of Sunoco Pipeline, L.P.'s Exceptions to the Initial Decision to be served upon the participants listed below in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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