

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held October 2, 2014

Commissioners Present:

Robert F. Powelson, Chairman
John F. Coleman, Jr., Vice Chairman
James H. Cawley, Dissenting Statement
Pamela A. Witmer
Gladys M. Brown, Statement

Petition of Sunoco Pipeline, L.P. P-2014-2411941
for a finding that a building to shelter the
Walnut Bank valve control station
in Wallace Township, Chester County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. P-2014-2411942
for a finding that a building to shelter the
Blairsville pump station
in Burrell Township, Indiana County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. P-2014-2411943
for a finding that a building to shelter the
Middletown Junction valve control station
in Lower Swatara Township, Dauphin County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. P-2014-2411944
for a finding that a building to shelter the
Cramer pump station
in East Wheatfield Township, Indiana County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. P-2014-2411945
for a finding that a building to shelter the
Old York Road valve control station
in Fairview Township, York County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. P-2014-2411946
for a finding that a building to shelter the
Conodoquist River West valve control station
in North Middleton Township, Cumberland
County, Pennsylvania is reasonably necessary
for the convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. P-2014-2411948
for a finding that a building to shelter the
Juniata River West valve control station
in Frankston Township, Blair
County, Pennsylvania is reasonably necessary
for the convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. P-2014-2411950
for a finding that a building to shelter the
Ebensburg pump station
in Cambria Township, Cambria County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. P-2014-2411951
for a finding that a building to shelter the
West Conemaugh River valve control station
in Derry Township, Westmoreland
County, Pennsylvania is reasonably necessary
for the convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. P-2014-2411952
for a finding that a building to shelter the
West Loyalhanna Dam valve control station
in Loyalhanna Township, Westmoreland
County, Pennsylvania is reasonably necessary
for the convenience or welfare of the public

Petition of Sunoco Pipeline, L.P.
for a finding that a building to shelter the
Old Chestnut Lane valve control station
in Penn Township, Westmoreland
County, Pennsylvania is reasonably necessary
for the convenience or welfare of the public

P-2014-2411953

Petition of Sunoco Pipeline, L.P.
for a finding that a building to shelter the
Old Harmony Road valve control station
in Hempfield Township, Westmoreland
County, Pennsylvania is reasonably necessary
for the convenience or welfare of the public

P-2014-2411954

Petition of Sunoco Pipeline, L.P.
for a finding that a building to shelter the
Youghiogheny River South valve control station
in Rostraver Township, Westmoreland
County, Pennsylvania is reasonably necessary
for the convenience or welfare of the public

P-2014-2411956

Petition of Sunoco Pipeline, L.P.
for a finding that a building to shelter the
Hollidaysburg pump station
in Allegheny Township, Blair County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

P-2014-2411957

Petition of Sunoco Pipeline, L.P.
for a finding that a building to shelter the
Monongahela River West valve control station
in Union Township, Washington
County, Pennsylvania is reasonably necessary
for the convenience or welfare of the public

P-2014-2411958

Petition of Sunoco Pipeline, L.P.
for a finding that a building to shelter the
Ross Road valve control station
in North Strabane Township, Washington
County, Pennsylvania is reasonably necessary
for the convenience or welfare of the public

P-2014-2411960

Petition of Sunoco Pipeline, L.P. P-2014-2411961
for a finding that a building to shelter the
Marklesburg pump station and
Raystown Lake West valve control station
in Penn Township, Huntingdon County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. P-2014-2411963
for a finding that a building to shelter the
Houston-Mark West, Houston-Williams
and West Pike Street valve control stations
in Chartiers Township, Washington
County, Pennsylvania is reasonably necessary
for the convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. P-2014-2411964
for a finding that a building to shelter the
Mount Union pump station
in Shirley Township, Huntingdon County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. P-2014-2411965
for a finding that a building to shelter the
Twin Oaks pump station
in Upper Chichester Township, Delaware County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. P-2014-2411966
for a finding that a building to shelter the
Boot pump station
in West Goshen Township, Chester County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. P-2014-2411967
for a finding that a building to shelter the
Doylesburg pump station
in Toboyne Township, Perry County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. P-2014-2411968
for a finding that a building to shelter the
Eagle pump station
in Upper Uwchlan Township, Chester County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. P-2014-2411971
for a finding that a building to shelter the
Beckersville pump station
in Brecknock Township, Berks County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. P-2014-2411972
for a finding that a building to shelter the
Montello pump station and valve control station
in Spring Township, Berks County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. P-2014-2411974
for a finding that a building to shelter the
Mechanicsburg pump station
in Hampden Township, Cumberland County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. P-2014-2411975
for a finding that a building to shelter the
Blainsport pump station
in West Cocalico Township, Lancaster County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P. P-2014-2411976
for a finding that a building to shelter the
Middletown pump station
in Londonderry Township, Dauphin
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

Petition of Sunoco Pipeline, L.P.
for a finding that a building to shelter the
Cornwall pump station
in West Cornwall Township, Lebanon County,
Pennsylvania is reasonably necessary for the
convenience or welfare of the public

P-2014-2411977

Petition of Sunoco Pipeline, L.P.
for a finding that a building to shelter the
Plainfield pump station
in Lower Frankford Township, Cumberland
County, Pennsylvania is reasonably necessary
for the convenience or welfare of the public

P-2014-2411979

Petition of Sunoco Pipeline, L.P.
for a finding that a building to shelter the
Delmont pump station
in Salem Township, Westmoreland
County, Pennsylvania is reasonably necessary
for the convenience or welfare of the public

P-2014-2411980

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Sunoco Pipeline, L.P. (Sunoco) on August 19, 2014, to the Initial Decision Sustaining Preliminary Objections and Dismissing Petitions (Initial Decision or I.D.) of Administrative Law Judges (ALJs) David A. Salapa and Elizabeth H. Barnes, issued on July 30, 2014. On August 29, 2014, the Concerned Citizens of West Goshen Township (CCWGT), the Delaware Riverkeeper Network (DRN), the Mountain Watershed Association (MWA), the Clean Air Council (CAC), and West Goshen Township (WGT) filed Replies to Exceptions. For the reasons set forth herein, we shall grant Sunoco's Exceptions; reverse the Initial Decision; and remand this case to the Office of Administrative Law Judge (OALJ) for further proceedings, consistent with this Opinion and Order.

Procedural History

On March 21, 2014, Sunoco filed a Petition for a Finding that the Situation of Structures to Shelter Pump Stations and Valve Control Stations is Reasonably Necessary for the Convenience or Welfare of the Public, pursuant to 52 Pa. Code § 5.41 and Section 619 of the Municipalities Planning Code (MPC), 53 P.S. § 10619. The Petition contained thirty-one separate locations in its caption, and the Commission's Secretary treated the Petition as thirty-one separate petitions and assigned thirty-one docket numbers to the Petition.

Notice of Sunoco's thirty-one petitions was published in the *Pennsylvania Bulletin* on April 5, 2014, at 44 *Pa. B.* 2145, and provided that the deadline for filing formal

protests, comments, or petitions to intervene was April 21, 2014. Numerous parties filed comments, protests, and petitions to intervene.

On April 18, 2014, CCWGT filed Preliminary Objections. On April 21, 2014, DRN also filed Preliminary Objections. On April 28, 2014, Sunoco filed an Answer to the Preliminary Objections of CCWGT. On April 30, 2014, Sunoco filed an Answer to the Preliminary Objections of DRN.

On May 8, 2014, Sunoco filed thirty-one separate amended petitions (Amended Petitions) pursuant to 52 Pa. Code § 5.41 and Section 619 of the MPC, 53 P.S. § 10619, requesting that the Commission find that structures to shelter eighteen pump stations and seventeen valve control stations along Sunoco's proposed Mariner East pipeline are reasonably necessary for the convenience or welfare of the public and, therefore, exempt from any local zoning ordinance.¹

Notice of Sunoco's Amended Petitions was published in the *Pennsylvania Bulletin* on May 24, 2014, at 44 *Pa. B.* 3204-3215, and provided that the deadline for filing formal protests, comments, or petitions to intervene was June 9, 2014. Various parties filed comments, protests, and a petition to intervene.

On May 28, 2014, CAC filed Preliminary Objections to all thirty-one of Sunoco's Amended Petitions. CAC averred that the Commission lacked jurisdiction over Sunoco's Amended Petitions because Sunoco is not a public utility as defined by the Public Utility Code (Code), 66 Pa. C.S. § 101, *et seq.*, and is not a public utility corporation under the MPC. Alternatively, CAC averred that Sunoco's Amended Petitions were legally insufficient because they did not allege facts sufficient to show that

¹ Unless otherwise indicated, all citations related to statements in the Amended Petitions will be to the Amended Petition at Docket No. P-2014-2411941 for ease of reference.

the Mariner East pipeline is necessary for the convenience or welfare of the public. CAC also stated that Sunoco's Amended Petitions failed to address the environmental impact of the proposed valve stations and pump stations which, according to CAC, will emit various air pollutants and affect air quality.

On June 6, 2014, DRN filed Preliminary Objections to all thirty-one of Sunoco's Amended Petitions. DRN also averred that the Commission lacked jurisdiction over Sunoco's Amended Petitions because Sunoco is not a public utility as defined by the Code and is not a public utility corporation under the MPC. DRN contended that Sunoco's Amended Petitions were legally insufficient because they did not allege facts sufficient to show that the Mariner East pipeline is necessary for the convenience or welfare of the public.

On June 9, 2014, CCWGT filed Preliminary Objections to Sunoco's Amended Petition at Docket No. P-2014-2411966, relating to a building to shelter the Boot pump station in West Goshen Township, Chester County, Pennsylvania. CCWGT also argued that the Commission lacked jurisdiction over Sunoco's Amended Petitions because Sunoco is not a public utility as defined by the Code and is not a public utility corporation under the MPC. In addition, CCWGT averred that Sunoco lacked Commission authority to use the pipeline segment in West Goshen Township. CCWGT stated that the portion of Sunoco's pipeline on which service was suspended between Mechanicsburg and Twin Oaks is not located near West Goshen Township. CCWGT concluded that the Commission lacked jurisdiction over the Boot Road site in West Goshen Township because the pipeline at that location did not appear to CCWGT to be part of the proposed pipeline route between Mechanicsburg and Twin Oaks.

CCWGT additionally contended that Sunoco's Amended Petition at Docket No. P-2014-2411966 was legally insufficient because it failed to include all buildings that

Sunoco plans to construct at the location designated as Boot station. CCWGT asserted that Sunoco intended to construct a vapor combustion unit in addition to a control building, but Sunoco's Petition did not provide information on the vapor combustion unit other than to allege that there was no building involved. CCWGT stated that the vapor combustion unit would include a large chimney and housing for the combustion equipment and that the chimney and structure are buildings. CCWGT further contended that Sunoco's Petition at Docket No. P-2014-2411966 lacked sufficient specificity, because it failed to include a complete description of the Boot pump station property on which Sunoco plans to construct the shelter building, failed to provide information on the environmental impact of the proposed shelter building, and failed to discuss the impact of the proposed shelter building on the West Goshen Township zoning and comprehensive plans.

On June 9, 2014, MWA filed Preliminary Objections to all thirty-one of Sunoco's Amended Petitions. MWA's Preliminary Objections stated that MWA adopted DRN's Preliminary Objections and requested that the Commission deny Sunoco's Petitions.

On June 9, 2014, Sunoco filed an Answer to the Preliminary Objections of CAC. Sunoco stated that it is a public utility as defined by the Code, because it has been certificated and regulated by the Commission as a public utility since 2002. Sunoco averred that, since it is subject to regulation as a public utility by the Commission, it is also a public utility corporation under the MPC. Sunoco contended that, because the Commission has determined that it is a public utility, CAC may not challenge that determination in this proceeding. Therefore, Sunoco asserted that the Commission has jurisdiction over its Amended Petitions. Sunoco also averred that its Amended Petitions were legally sufficient because the Petitions only need to address whether the siting of the

buildings are reasonably necessary, not whether the Mariner East pipeline is necessary for the convenience and welfare of the public.

On June 18, 2014, Sunoco filed an Answer to the Preliminary Objections of DRN. Similar to its response to CAC's Preliminary Objections, Sunoco stated that it is a public utility as defined by the Code, because it has been certificated and regulated by the Commission as a public utility since 2002. Sunoco averred that, because it is subject to regulation as a public utility by the Commission, it is also a public utility corporation under the MPC. Sunoco also pointed out that the issue of the need for the Mariner East pipeline is not at issue in these proceedings.

On June 19, 2014, Sunoco filed an Answer to the Preliminary Objections of MWA. Sunoco's Answer referenced its Answer to DRN's Preliminary Objections and requested that the Commission deny MWA's Preliminary Objections.

Also on June 19, 2014, Sunoco filed an Answer to the Preliminary Objections of CCWGT. Sunoco again averred that it is a public utility as defined by the Code, because it has been certificated and regulated by the Commission as a public utility since 2002. Sunoco stated that, since it is subject to regulation as a public utility by the Commission, it is also a public utility corporation under the MPC. Additionally, Sunoco denied that the vapor combustion unit is a building and contended that the vapor combustion unit is a piece of equipment and, therefore, is a public utility facility not properly before the Commission in this proceeding.

Further, Sunoco denied that its Amended Petition lacked sufficient specificity on the basis that previous Commission Orders have held that 53 P.S. § 10619 does not require the specificity that CCWGT contends it does. Sunoco also denied that there was any environmental impact involved in the construction of the proposed shelter

building and that it was required by the Commission to evaluate the environmental impact of the construction of the proposed shelter building.

The ALJs' Initial Decision was dated July 23, 2014, but was not issued by the Commission until July 30, 2014. ALJs Salapa and Barnes sustained the Preliminary Objections filed by CAC, DRN, CCWGT, and the MWA and dismissed Sunoco's thirty-one Amended Petitions. I.D. at 23.

Sunoco filed Exceptions to the Initial Decision on August 19, 2014.

On August 29, 2014, CCWGT, DRN, MWA,² CAC, and WGT filed Replies to Exceptions.

Background

Sunoco's Certificates of Public Convenience

Sunoco is the product of various mergers and acquisitions of two pipeline companies that were originally certificated by the Commission's predecessor, the Pennsylvania Public Service Commission, in the early 1930s to transport petroleum and refined petroleum products.³ These pipeline companies were Susquehanna Pipe Line Co. (Susquehanna) and the Keystone Pipe Line Company (Keystone). *See, Application of*

² MWA adopts verbatim DRN's Replies to Exceptions.

³ Pursuant to Section 5.408(a) of the Commission's Regulations, 52 Pa. Code § 5.408(a), we take administrative notice of the history of Certificates and Orders issued by the Commission and predecessor agencies. Under Section 103 of the Code, 66 Pa. C.S. § 103, any Certificates granted under prior iterations of the Code remain valid and have the full force and effect of law. WGT provided many of these documents for inclusion in our deliberations here as Appendix A to its Replies to Exceptions. We agree with WGT that these are "public records."

Susquehanna Pipe Line Co., Docket No. 21736-30, Folder No. 2 (Report and Order dated March 25, 1930); *Application of Keystone Pipe Line Company*, Docket No. 23566-1931, Folder No. 2 (Report and Order dated May 11, 1931). The pipeline path for Susquehanna traversed the length of Pennsylvania latitudinally between Philadelphia-area refinery plants and the Ohio border and longitudinally to the New York border. The Keystone Certificate linked the refinery region in Southeastern Pennsylvania “at or near Point Breeze, Philadelphia” to the Ohio and New York borders. These original pipeline authorities were subsequently expanded over the decades that followed. Title to these pipelines and Certificates have changed hands several times as applications for transfer were submitted to, and approved by, the relevant Commission.

Eventually, Keystone became owned by Atlantic Pipeline Corp. and Susquehanna by Sun Pipe Line Company. In 2002, this Commission approved the transfer of assets of both companies to Sunoco and granted Sunoco authority “to transport petroleum products in the former service territory of Sun Pipe Line Company and Atlantic Pipeline Corp[.]” *Joint Application of Sunoco Pipeline L.P., Sun Pipe Line Company and of Atlantic Pipeline Corp.*, Docket Nos. A-140001, A-140400 F2000, and A-140075 F2000 (Corrected Order entered January 14, 2002). Simultaneously, abandonment of those services by Susquehanna and Keystone were approved by Commission-issued Certificates. Notably, both the original Susquehanna and Keystone Certificates contained a restrictive amendment, stipulated to by the applicants and various protesting local gas distribution companies, that “no right, power or privilege” is granted “to use the pipe lines constructed hereunder...for the transportation, storage or distribution of natural, manufactured or mixed natural or artificial gas” absent first obtaining Pennsylvania Public Service Commission approval. However, the 2002 Certificate issued to Sunoco contained no restrictive amendments like those adopted in the 1930 and 1931 Certificates.

In 2013, Sunoco advised the Commission that it intended to revise its operations in view of the rapid development and limited infrastructure available to move Marcellus Shale natural gas and natural gas liquids (NGLs) to market. To that end, Sunoco filed an Application with the Commission at Docket No. A-2013-2371789 to abandon certain intrastate service along portions of its pipeline system and a Petition at Docket No. P-2013-2371775 to temporarily suspend a portion of certain intrastate service along other segments. Sunoco averred that the abandonment and suspension were necessary to construct its proposed Mariner East pipeline, which would meet a public need for the transportation of natural gas byproducts. By Order entered on August 29, 2013, and subsequently clarified on October 17, 2013, the Commission approved both the Application and the Petition. *See, Application of Sunoco Pipeline LP for a Certificate of Public Convenience to Abandon a Portion of its Petroleum Products Pipeline Transportation Service in Pennsylvania and a Petition for Approval of Temporary Suspension of a Portion of its Petroleum Product Pipeline Transportation Service in Pennsylvania*, Docket Nos. A-2013-2371789 and P-2013-2371775 (Order entered on August 29, 2013) (*August 2013 Order*).

Circumstances surrounding the Mariner East project changed, and Sunoco subsequently filed a petition with the Commission to amend the Commission's prior abandonment decision and to resume transportation service for petroleum products and refined petroleum products on a segment of its pipeline where its tariff was previously abandoned.⁴ Sunoco explained that it had initially planned for the Mariner East pipeline to provide only interstate transportation of ethane and propane from west-to-east. However, Sunoco explained that, based on the high supply of propane and other petroleum products generated by the Marcellus Shale and the need for uninterrupted deliveries of propane in Pennsylvania, it now proposed to offer intrastate propane service. Specifically, Sunoco stated that it would change the directional flow from west-to-east

⁴ Sunoco's Petition was unopposed.

and would be transporting propane and ethane once the pipelines were reconfigured in the Mariner East project. In our Order approving Sunoco's request to resume service, we found that that "the Company has demonstrated that there are significant public benefits to be gained" from enhancing delivery options for Marcellus Shale producers. *Petition of Sunoco Pipeline, L.P. for Amendment of the Order Entered on August 29, 2013*, Docket No. P-2014-2422583 (Order entered July 24, 2014) at 7 (*Amendment Order*).

In our *Amendment Order*, we also clarified the procedures that Sunoco must follow to resume pipeline operations where its tariffs had been abandoned. We noted Sunoco's stated intent to resume service by initially shipping propane from Delmont, Pennsylvania to its Twin Oaks Pennsylvania facility. In doing so, we recognized our prior rulings and those of federal agencies holding that propane is a "petroleum product" and that "approval of the Petition is in the public interest, as Sunoco's proposed provision of intrastate propane service will result in numerous potential public benefits," including the need for adequate pipeline capacity to meet peak demand for propane and the avoidance of "the added expense and risks associated with trucking propane from the Marcellus Shale region." *Id.* at 9-10. Unopposed tariffs were subsequently filed and approved for the institution of the intrastate movement of propane at a rate of \$2.91/bbl. *Sunoco Pipeline, L.P. Request for Approval of Tariff Pipeline - Pa. P.U.C. No. 16 and Waiver of 52 Pa. Code § 53.52(b)(2) and (c)(1) through (5)*, Docket No. R-2014-2426158 (Order entered August 21, 2014) (*Tariff No. 16 Order*).

Finally, in August of this year, Sunoco received our approval to extend its service territory to include Washington County. *Application of Sunoco Pipeline, L.P. for Approval of the Right to Offer, Render, Furnish or Supply Intrastate Petroleum and Refined Petroleum Products Pipeline Service to the Public in Washington County, Pennsylvania*, Docket No. A-2014-2425633 (Order entered August 21, 2014)

(*Washington County Application Order*).⁵ In seeking this additional certification, Sunoco stated its intent to establish the Houston, Washington County location as part of the first phase of the Mariner East project as the new origination point for the NGLs of propane and ethane to be transported and the expansion of its pipeline system in a second phase of the Mariner East project. This second phase will be a new sixteen-inch or larger pipeline, paralleling the existing pipeline from Houston, Pennsylvania to the Marcus Hook Industrial Complex (MHIC) and running along much of the same route, as well as the addition of fifteen miles of pipeline from Houston, Pennsylvania to a point near the Pennsylvania-Ohio boundary line. *Id.* at 2-3. In approving the Washington County Certificate, we stated:

We believe granting Sunoco authority to commence intrastate transportation of propane in Washington County will enhance delivery options for the transport of natural gas and natural gas liquids in Pennsylvania. In the wake of the propane shortage experienced in 2014, Sunoco's proposed service will increase the supply of propane in markets with a demand for these resources, including in Pennsylvania, ensuring that Pennsylvania's citizens enjoy access to propane heating fuel. Additionally, the proposed service will offer a safer and more economic transportation alternative for shippers to existing rail and trucking services.

Id. at 4.

Sunoco's Amended Petitions

Sunoco indicated that its Amended Petitions relate to the Mariner East project. Sunoco described the project as an approximately 300-mile pipeline that will use Sunoco's existing pipeline infrastructure, supplemented by construction of an additional fifty-one mile extension from Houston, Pennsylvania to Delmont, Pennsylvania, to ship valuable natural energy resources from the Marcellus Shale in Pennsylvania to the MHIC

⁵ The application was unopposed.

on the Delaware River and Sunoco's Twin Oaks facilities operated in conjunction with the MHIC. Amended Petition at 2. Sunoco indicated that, as part of the Mariner East pipeline project and the repurposing of its existing pipeline assets, it will construct eighteen new pump stations and seventeen new valve control stations along the pipeline. Sunoco stated that these pump stations and valve control stations will be located in thirty-one municipalities in Pennsylvania. Amended Petition at 12. Sunoco explained that the pump stations will be used to inject energy into the flow of ethane and propane moving through the pipeline, and the valve control stations will provide a safety enhancement for the pipeline facilities by monitoring the temperature and pressure of the ethane and propane and automatically cutting off flows on the lines if there is a pressure loss. *Id.* at 13.

Sunoco averred that each pump station has two structures that could be characterized by municipalities as "buildings." Sunoco indicated that each station has a structure that surrounds the pump and functions to reduce noise, protect the pump equipment from weather impacts, and enable convenient maintenance of the pump equipment. Sunoco also indicated that each pump station has a power distribution center, which is a modular building that houses the electrical, control, and communication equipment for the pump. Similarly, Sunoco noted that each of the valve control stations has a single structure that protects the stations from weather impacts and allows for convenient maintenance of the site. Sunoco explained that this structure is smaller than the power distribution centers for pump stations and houses the electrical, control, and communication equipment for the valve control site. *Id.* at 14.

Sunoco stated that the pump and valve control stations are reasonably necessary for the convenience or welfare of the public. First, Sunoco averred that the locations of the pump and valve control stations are reasonably necessary to ensure efficient and safe operation of the new pipeline facilities. *Id.* at 14-15. Second, Sunoco

averred that the pump stations ensure that the propane is flowing properly, and, thus, contribute to the safety and efficiency of the project. Likewise, Sunoco submitted that the valve control stations ensure that the pipeline facilities operate safely and prevent harm to the public and the environment. Third, Sunoco emphasized that the Mariner East project, as a whole, will result in increased infrastructure for the continued development of Marcellus Shale resources by providing an efficient outlet for NGLs that are extracted from Marcellus Shale wells. *Id.* at 15.

Discussion

Based on a thorough review of the various pleadings, the Initial Decision, and the Exceptions and Replies to Exceptions, we have determined that there are serious misconceptions regarding (1) Sunoco's regulated history with the Commission and (2) the specific issues that need to be disposed of in this proceeding. In this proceeding, the Commission has been asked to decide a very narrow question: whether enclosures (walls and a roof) that are built around and over a valve control or pump station should be exempt from municipal zoning regulation. To answer this question, we must decide whether it is in the convenience or welfare of the public for Sunoco to enclose the planned facilities with walls and roofs, even if those enclosures may conflict with local zoning ordinances. Sunoco is not seeking (1) a Certificate of Public Convenience; (2) authorization to build the Mariner East pipeline or any facilities attendant thereto (such as valve control or pump stations); (3) approval of the siting or route of the pipeline; or (4) a finding that the proposed pipeline complies with relevant public safety or environmental requirements. Those issues are outside the scope of this proceeding.

For these reasons, in addition to resolving the Exceptions and all outstanding Preliminary Objections, we will make several legal determinations in this Opinion and Order regarding the following: (1) the status and scope of Sunoco's current

certificated authority under the jurisdiction of this Commission; (2) the nature of intrastate propane and methane pipeline transportation service; and (3) the issues to be addressed when making a determination under Section 619 of the MPC. We will also remand this matter to the OALJ for a determination on Sunoco's Amended Petitions.

Legal Standards

General

The ALJs made fifteen Findings of Fact and reached five Conclusions of Law. I.D. at 9-11, 22-23. We shall adopt and incorporate herein by reference the ALJs' Findings of Fact and Conclusions of Law, unless they are reversed or modified by this Opinion and Order, either expressly or by necessary implication.

We note that any issue, Preliminary Objection, or Exception that we do not specifically delineate has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

Preliminary Objections

The ALJs dismissed Sunoco's Amended Petitions based on their ruling on Preliminary Objections. Because this case is at the preliminary objections stage, we are not ruling on the merits of Sunoco's underlying zoning exemption requests at this time. Section 5.101 of the Commission's Regulations, 52 Pa. Code § 5.101, sets forth the

grounds for filing preliminary objections. In pertinent part, that section provides as follows:

§ 5.101. Preliminary objections.

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.
- (7) Standing of a party to participate in the proceeding.

52 Pa. Code § 5.101(a).

Commission 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. *Interstate Traveller Services, Inc. v. Pa. Dep't of Environmental Resources*, 486 Pa. 536, 406 A.2d 1020 (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. *County of Allegheny v. Commonwealth of Pa.*, 507 Pa. 360, 490 A.2d 402 (1985). 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. Cmwlth. 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. Cmwlth. 2003) (citing *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002)).

Exemptions from Local Zoning Ordinances Under the MPC

The MPC provides, in relevant part, as follows:

This article shall not apply to any existing or proposed building, or extension thereof, used or to be used by a public utility corporation, if, upon petition of the corporation, the Pennsylvania Public Utility Commission shall, after a public hearing, decide that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public.

53 P.S. § 10619.

In order for the MPC exemption to apply, Sunoco must qualify as a “public utility corporation.”⁶ Section 1103 of the Business Corporation Law (BCL) defines “public utility corporation” as including “[a]ny domestic or foreign corporation for profit that: ... is subject to regulation as a public utility by the Pennsylvania Public Utility Commission or an officer or agency of the United States.” 15 Pa. C.S. § 1103. In other words, an entity meets the definition of “public utility corporation” for MPC exemption purposes by being a “public utility” under the Public Utility Code.

⁶ Pennsylvania courts have held that Section 619 of the MPC must be interpreted by using the definition of “public utility corporation” in Section 1103 of the Business Corporation Law, 15 Pa. C.S. § 1103. *Pa. PUC v. WVCH Communications, Inc.*, 351 A.2d 328 (Pa. Cmwlth. 1976).

Thus, a municipality may exercise its zoning powers over a public utility building unless the Commission determines that the “site is reasonably necessary for the public convenience or welfare.” *Del-AWARE Unlimited, Inc. v. Pa. PUC*, 513 A.2d 593, 596 (Pa. Cmwlth. 1986). If the Commission finds that the location is reasonably necessary for the convenience or welfare of the public, the building is exempt from local zoning ordinances under the MPC. *Id.*

Whether the proposed buildings are reasonably necessary for the convenience or welfare of the public does not require the utility to prove that the site it has selected is absolutely necessary or that it is the best possible site. Rather, the Commission’s finding that the site chosen is reasonably necessary will not be disturbed if supported by “substantial evidence,” which is that quantum of evidence that a reasonable mind might accept as sufficient to support that conclusion. *O’Connor v. Pa. PUC*, 582 A.2d 427, 433 (Pa. Cmwlth. 1990).

The Preliminary Objections based on Lack of Commission Jurisdiction

ALJs’ Recommendation

According to the ALJs, the Preliminary Objections contended that the Commission lacks jurisdiction over the Amended Petitions because Sunoco is not a public utility as defined by the Code and is not a public utility corporation as that term is used in the MPC. I.D. at 16. The ALJs noted that Section 102 of the Code provides the following definition for “public utility,” in relevant part:

- (1) Any person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for:
 - (i) Producing, generating, transmitting, distributing or furnishing natural or artificial gas, electricity, or steam for

the production of light, heat, or power to or for the public for compensation.

* * *

(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(1)(i) and (v). The ALJs held that Sunoco's proposed service did not qualify as public utility service within the meaning of Section 102 of the Code. I.D. at 21. The ALJs reasoned that Sunoco's Amended Petitions did not state that Sunoco will transport natural gas or that it is a producer of natural gas distributing directly to the public for compensation. Additionally, the ALJs reasoned that Sunoco's Amended Petitions did not state that the transportation of NGLs would be for the public in Pennsylvania, as the Amended Petitions stated that, after the NGLs are delivered from Mechanicsburg to Twin Oaks, the product could be sent to third-party storage facilities or distribution terminals. *Id.*

The ALJs concluded that Sunoco's proposed service would also not qualify as public utility service under *Drexelbrook Associates v. Pa. PUC*, 418 Pa. 430, 212 A.2d 237 (1965) (*Drexelbrook*).⁷ I.D. at 21. The ALJs could not discern from the Amended Petitions what members of the public would use Sunoco's proposed service, and the ALJs found that the nature of Sunoco's proposed service was private because it was limited to a select few shippers and was not available to members of the public. The ALJs noted that the Amended Petitions indicated that the Twin Oaks facilities and the MHIC facility

⁷ In *Drexelbrook*, the Pennsylvania Supreme Court found that an apartment complex landlord who sold water, electric, and natural gas services to tenants was not a public utility because only a privileged group – tenants accepted for residency – could subscribe to the services.

are connected by pipeline, and the Twin Oaks terminal is operated in conjunction with the MHIC. The ALJs believed that it appeared from the Amended Petitions that the propane could be stored at the Twin Oaks terminal for later processing and export through the Marcus Hook facility or to third-party distributors. *Id.*

The ALJs also found that Sunoco did not satisfy the definition of a public utility corporation in the BCL. The ALJs determined that Sunoco's proposed transport of ethane and propane through Pennsylvania at the Federal Energy Regulatory Commission (FERC) approved rates was interstate common carrier service regulated by FERC through the Interstate Commerce Clause. *I.D.* at 19. In reaching this conclusion, the ALJs took judicial notice of a declaratory judgment issued on February 15, 2013, at Docket No. OR13-9-000, in which FERC declared that Sunoco demonstrated a need for additional pipeline capacity to transport NGLs produced in association with natural gas in the Marcellus and Utica Shale production regions. The ALJs stated that FERC approved Sunoco's plan to reserve ninety percent of the available capacity for select shippers committing to ship or pay contracts at premium rates for initial ten to fifteen year terms and to provide ten percent capacity for uncommitted shippers that do not provide financial assurance. The ALJs also stated that FERC found that the proposed terms of service and rate structure were reasonable. *I.D.* at 19.

The ALJs relied on Sunoco's statement in its Original Petition that it is regulated by FERC under the Interstate Commerce Act (ICA) as a common carrier. *I.D.* at 20 (citing Original Petition at 5-8). The ALJs indicated that the ICA regulates common carriers of interstate commerce, not public utilities, and, accordingly, found that Sunoco did not meet the definition of a public utility corporation as set forth in the BCL at 15 Pa. C.S. § 1103. *I.D.* at 20. The ALJs also relied on a recent Court of Common Pleas of York County decision holding that Sunoco is not a public utility corporation within the meaning of the BCL because it is regulated as a common carrier by FERC.

I.D. at 20 (citing *Sunoco Pipeline, L.P. v. Loper*, York County Court of Common Pleas, Docket No. 2013-SU-4518-05, slip. op. at 2 (February 25, 2014)).

Furthermore, the ALJs found that the Amended Petitions were premature. The ALJs stated that Sunoco filed the Amended Petitions before it sought and acquired Commission approval for the tariff filings regarding the transportation of NGLs, including propane and ethane in Pennsylvania from west to east. The ALJs also stated that Sunoco's Washington County Application was still pending before the Commission. *Id.* at 22.

For these reasons, the ALJs held that Sunoco's proposed Mariner East pipeline service did not constitute public utility service and, accordingly, that the proposed buildings described in the Amended Petitions were not public utility buildings. The ALJs found that, as a result, the Commission lacked jurisdiction to find that the proposed buildings were necessary for public utility service and exempt from local zoning ordinances. *Id.* at 21.

Exceptions and Replies

Sunoco

Sunoco avers that the Initial Decision erred by concluding, in Conclusion of Law No. 1, that Sunoco's proposed service did not meet the definition of public utility service under the Code. Exc. at 15. Sunoco also excepts to the related Conclusion of Law No. 4, finding that Sunoco's proposed buildings would not be used in public utility service as part of the Mariner East project. Sunoco argues that the conclusions reached in the Initial Decision distort the proposed service described in the Amended Petitions; misconstrue fundamental principles of public utility law; misinterpret the decisions in

Drexelbrook, supra, and its progeny; and ignore recent Commission precedent. Exc. at 16.

Sunoco states that, contrary to the determination in the Initial Decision, the users of public utility service are not required to be end-user or retail consumers, and the services offered may be economically feasible only to entities that have large volumes of business. *Id.* at 17 (citing *Rural Telephone Co. Coalition v. Pa. PUC*, 941 A.2d 751 (Pa. Cmwlth. 2008); *Waltman v. Pa. PUC*, 596 A.2d 1221, 1223-1224 (1991), *aff'd*, 533 Pa. 304, 621 A.2d 994 (1993)). Sunoco also states that the Commonwealth Court has ruled that a pipeline can be certificated as a public utility, even when the product will be delivered to only a few end-users, so long as the product passing through the line will belong to the shippers and the shippers can access the transportation service pursuant to filed tariffs and established rates. Exc. at 18 (citing *Independence Twp. Sch. Dist. Appeal*, 412 Pa. 302, 308, 194 A.2d 437, 440 (1963)).

Sunoco avers that the Mariner East project, as described in its Amended Petitions, meets the *Drexelbrook* standards. Sunoco explains that, during each phase of the project, the proposed intrastate service will be provided pursuant to tariffs or tariff supplements filed with the Commission. Sunoco indicates that this means that the service will be available on a nondiscriminatory basis to all shippers that demand the service, subject only to available capacity. Sunoco states that, if the demand exceeds the capacity, then service will be prorated so that no shipper desiring service is excluded. Sunoco also states that, because the service will be provided according to the uniform rates and conditions in its tariff, it will not have the ability to limit service to particular individuals. Sunoco distinguishes its proposed service from other pipeline service on the basis that the end-users for the Mariner East project will be determined by the operation of the free market, and Sunoco will not own the product being transported or dictate the markets to which the product will move. Exc. at 19. Regardless, Sunoco anticipates that,

due to the shortages of propane during the winter of 2013-2014, much of the propane it transports will be used in Pennsylvania for residential heating, thereby serving the public interest. *Id.* at 20.

Sunoco objects to the ALJs' suggestion that the intrastate service to be provided by the Mariner East pipeline is not "for the public" because it is being provided along with interstate service where shippers have contracted for "firm commitment" service. Sunoco indicates that it has been providing both intrastate and interstate transportation service on many of its pipelines in Pennsylvania since it was certificated in 2002. Sunoco states that the Code does not mandate that pipeline service be devoted exclusively to intrastate service. Sunoco believes that using the same pipeline to provide both intrastate and interstate service generates economies of scale and scope, resulting in benefits to intrastate and interstate shippers, their customers, and the public. *Id.* at 21.

Additionally, Sunoco contends that the Initial Decision ignored the Commission's decision in *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*, Docket No. A-2010-2153371 (Order entered June 14, 2011) (*Laser June 2011 Order*). Sunoco avers that, pursuant to the *Laser June 2011 Order*, providing service to shippers constitutes providing service to and for the public in accordance with Section 102 of the Code. *Exc.* at 23. Sunoco also cites to the Commission's Reconsideration Order in the *Laser* proceeding to demonstrate that, similarly to *Laser*, Sunoco will be providing service "for the public." *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*, Docket No. A-2010-2153371 (Order entered August 25, 2011) (*Laser Reconsideration*

Order). Sunoco states that it intends to serve all NGL shippers who request pipeline transportation service, subject only to sufficient pipeline capacity. Sunoco explains that, if demand exceeds pipeline capacity, committed interstate shippers will be entitled to their full capacity under their agreements, and capacity for uncommitted shippers will be subject to allocation among all uncommitted shippers. Sunoco indicates that it has made a commitment to expand service, if feasible, to maintain pace with the growing demand of shippers for take-away capacity from the Marcellus Shale in western Pennsylvania. Sunoco notes that, in its Answer to the DRN Preliminary Objections, it stated that the intrastate service it would offer was service “to and for the public” for the following reasons:

- (i) [Sunoco] will be transporting or conveying the propane by pipeline for compensation;
- (ii) [Sunoco] explicitly has stated that it will serve any and all potential customers needing to move propane through the pipeline system subject to the available capacity and the tariffs on file with the Commission;
- (iii) [Sunoco] has explicitly stated that it will be utilizing tariffs to establish technical requirements, delivery points, and other terms and conditions of service; and
- (iv) [Sunoco] has made a commitment to endeavor to expand the capacity of the intrastate service by building Mariner East 2, if commercial conditions so permit.

Exc. at 25 (quoting Answer to Preliminary Objections of DRN at 6).

Furthermore, Sunoco disagrees with the ALJs’ statement that its Amended Petitions were filed prematurely. Sunoco avers that a tariff can be filed only when a utility is prepared to offer service, because once the tariff becomes effective, the public may demand service based on the terms and conditions in the tariff. Sunoco believes that to conclude that the Commission must approve the tariff before it can make a determination under Section 619 of the MPC creates a “Catch-22”: the utility needs the buildings to be ready to offer service, yet the Commission would be refusing to grant the

exemptions requested to erect the buildings because service had not yet begun. Exc. at 32.

Finally, Sunoco objects to Conclusion of Law No. 2, which found that Sunoco was not a “public utility corporation” under the BCL. Exc. at 25. First, Sunoco states that the ALJs incorrectly concluded that Sunoco was not a public utility corporation due to its common carrier status under federal law. Sunoco avers that a state-regulated public utility and a federal-regulated common carrier are not mutually exclusive. Sunoco also avers that there is no conflict between the ICA and the Code, as the ICA applies to interstate movements, while the Code applies to intrastate movements. *Id.* at 26. Specifically, Sunoco states that the ICA provides that FERC has no authority to regulate intrastate shipments. *Id.* (citing *Amoco Pipeline Co.*, 1993 WL 25751 at *4). According to Sunoco, for this reason, pipeline service operators can be, and frequently are, regulated by both FERC and the Commission. Nevertheless, Sunoco notes that, to provide service in Pennsylvania, a company must first receive a Certificate under Section 1102(a)(1) of the Code, 66 Pa. C.S. § 1102(a)(1). Exc. at 27. Sunoco believes that, if the reasoning in the Initial Decision is adopted, the illogical result will be apparent: if a pipeline operator is denied a Certificate because it is also operating as a common carrier under federal law, then the operator would not be able to provide both intrastate and interstate service. *Id.* at 27-28. Sunoco indicates that it is regulated by FERC as a common carrier and by the Commission as a public utility. *Id.* at 28.

Sunoco contends that the Initial Decision’s reliance on FERC’s February 15, 2013 Order to support the finding that Sunoco is not a public utility corporation was misplaced. According to Sunoco, FERC ensured that a percentage of Sunoco’s pipeline would remain available for intrastate shipments by providing that ten percent of the pipeline remained for uncommitted shippers. Additionally, Sunoco states that the FERC decision is factually different from its Amended Petitions that are before the

Commission, because when Sunoco petitioned FERC for a declaratory order, Sunoco was planning to use the Mariner East pipeline to provide interstate transportation service of NGLs and was not planning to provide intrastate transportation service for propane at that time. Sunoco indicates that, due to the increased shipper demand for intrastate shipments of propane in 2013 to 2014, it modified the scope of the first phase of the Mariner East project to provide for the acceleration of intrastate pipeline transportation service. *Id.* at 29. Sunoco notes that these changes occurred after the FERC proceeding concluded in February 2013. Sunoco avers that the FERC Order did not relate to or impact Sunoco’s ability to provide intrastate service or otherwise affect its status as a public utility. *Id.* at 30.

Sunoco asserts that the Initial Decision’s reliance on *Loper, supra*, is also misplaced, as that case is legally and factually distinguishable. Sunoco states that, like the FERC Order, the *Loper* decision was issued before Sunoco modified its business plans to address the rising demand for intrastate shipments of propane. Sunoco explains that, in *Loper*, the court rejected Sunoco’s argument that it met the definition of a public utility corporation under the BCL because it 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.” Sunoco avers that the court could not consider whether it qualified as a public utility corporation due to regulation by the Commission at that time because Sunoco had not yet proposed to provide intrastate service. *Id.*

CAC

In its Replies to Exceptions, CAC avers that the ALJs correctly found that Sunoco’s proposed Mariner East pipeline service does not meet the definition of public utility service under Section 102 of the Code. CAC R. Exc. at 4. CAC contends that Sunoco’s assertion that it plans to use a small amount of propane, specifically 5,000

barrels out of the pipeline's daily capacity of over 70,000 barrels for potential distribution to Pennsylvania consumers, when its pipeline is primarily designed to provide interstate service for eventual shipping to foreign markets, is insufficient to permit Sunoco to transform its project into public utility service for Pennsylvanians. *Id.* at 5. CAC states that Sunoco's Amended Petitions do not contain any statements that affirmatively indicate any change in the primary purpose of the proposed project, nor do they contain any statements indicating that propane delivered to the Twin Oaks facility would definitely be delivered to Pennsylvania customers. *Id.* at 5-6.

CAC believes that Sunoco's Petitions were "artfully phrased," because they stated that 5,000 barrels of propane would initially be delivered to the Twin Oaks facility, from which point it is possible that propane could then be delivered through third party distributors intrastate to Pennsylvania residents. *Id.* at 6 (citing Amended Petitions at 2). CAC also believes that, based on Sunoco's statements, it is equally possible that 5,000 barrels might be temporarily stored at Twin Oaks and later shipped to other states or to international markets. CAC asserts that Sunoco's language in its Exceptions is also broad and vague, as it attempts to argue that Sunoco's proposed project will be for the public because it will be delivering propane intrastate. CAC R. Exc. at 6. For example, CAC submits that Sunoco states that the function of the Mariner East project is to transport NGLs "from the Marcellus Shale to markets in Pennsylvania *and elsewhere*," and the Exceptions describe the primary purpose of the project as "to provide much needed take-away capacity for natural gas liquids derived from the Marcellus Shale, and provide shippers with a transportation method in which to reach local, *regional and international markets*." *Id.* at 6-7 (quoting Exc. at 14 and 19-20 (emphasis supplied by CAC)). CAC states that Sunoco has conceded that the intrastate capacity of its proposed project would be limited to no more than ten percent of the pipeline capacity, with ninety percent committed to firm interstate shippers, and that Sunoco has also indicated that it will only use the proposed pipeline for propane transportation for a limited period of time until it

builds the Mariner East 2 pipeline. CAC R. Exc. at 7-8. For these reasons, CAC contends that the proposed project currently under review by the Commission would at best only deliver a small amount of propane intrastate for a short and defined period. *Id.* at 8.

Additionally, CAC avers that Sunoco's proposed Mariner East project does not meet the *Drexelbrook* test. CAC R. Exc. at 8. CAC states that the fact that intrastate capacity on the proposed project would be limited to no more than ten percent indicates that Sunoco would not be committing to provide intrastate service to any and all members of the public who may require it. *Id.* at 8-9. CAC also states that Sunoco's proposed project would, at most, serve a limited number of highly specialized intrastate shippers using a fraction of the interstate pipeline capacity. *Id.* at 9. For similar reasons, CAC asserts that Sunoco's Mariner East project does not meet the standards set forth in the Policy Statement at 52 Pa. Code § 69.1401, which provides guidance for determining public utility status. CAC R. Exc. at 9. CAC indicates that the proposed project fails to satisfy the third criterion in that policy statement, because the Mariner East project would serve a defined, privileged, and limited group and would not be available to any member of the Pennsylvania public who was privileged to demand service. According to CAC, Sunoco's project also fails to satisfy the second criterion, because the Mariner East project was originally designed to serve only large shippers serving foreign markets and had to be significantly revised through the Amended Petitions to include the diversion of propane to a new facility to even feasibly serve the Pennsylvania public. *Id.* at 10, 11. CAC contrasts the facts in this case from those in the *Laser* proceeding on the basis that Laser could serve any and all interested customers without any significant construction or revision to the proposed design of its project. *Id.* at 11 (citing *Laser June 2011 Order* at 16). CAC also finds Laser distinguishable on the basis that Laser was prepared to furnish service to "any and all potential customers needing to move gas through the pipeline system ... [including] large capital, largely capitalized producers, small capitalized

producers, individual landowners owning wells ... [and] landowner groups.” CAC R. Exc. at 11 (quoting *Laser June 2011 Order* at 25).

CAC states that the ALJs correctly found that Sunoco was not a public utility corporation as defined in the BCL. CAC R. Exc. at 12. According to CAC, Sunoco appears to misconstrue the ALJs’ decision by arguing that the Initial Decision incorrectly held that Sunoco could not be regulated both at the federal level by FERC as an interstate carrier and at the state level by the Commission as an intrastate carrier. CAC indicates that the ALJs held that, in the context in which Sunoco is regulated at the federal level by an agency of the United States, it is regulated as a common carrier and not as a public utility. *Id.* (citing I.D. at 20). CAC avers that Sunoco does not meet the definition of a public utility corporation in the BCL because it is regulated by FERC, an agency of the United States, as a common carrier and not as a public utility. CAC R. Exc. at 13. CAC submits that the holding in *Loper* was that Sunoco did not meet the second part of the BCL’s definition of public utility corporation because Sunoco was regulated by an agency of the United States under the ICA as a common carrier and not as a public utility. *Id.* at 14 (citing *Loper* at 5).

DRN

In its Replies to Exceptions, DRN avers that the ALJs correctly concluded that Sunoco’s Mariner East project does not qualify as public utility service under Section 102 of the Code. DRN agrees with the ALJs that Sunoco failed to show that the transportation of NGLs would be for the public in Pennsylvania, because Sunoco did not specify who would be the end-user customer. DRN states that Sunoco admits that it has no control over who the end-user will be since it cannot dictate the markets to which the product will move. DRN R. Exc. at 2. DRN also states that Sunoco admits in its Exceptions that the Twin Oaks facility is part of the MHIC and, DRN contends, this

provides further evidence that the final end-user will be nearly impossible to define and that the propane could easily be stored at the Twin Oaks terminal for later processing and exportation from the MHIC. *Id.* at 2-3.

DRN asserts that Sunoco's proposed Mariner East project does not qualify as public utility service under the standards in *Drexelbrook* and its progeny. DRN R. Exc. at 3. DRN avers that *Drexelbrook* rejected the very argument that Sunoco is offering in this case: that it is a public utility because its services will be provided "according to uniform rates and conditions, as set forth in tariffs," and it will not have the "ability to confine service to particular individuals." DRN R. Exc. at 3 (quoting Exc. at 19). DRN states that Sunoco has admitted to entering into four Transportation Services Agreements with three shippers for the project and, accordingly, has retained the discretion to select its customers based on those customers meeting key terms and conditions in its contracts. Additionally, DRN believes that Sunoco's business model fits precisely into the exception to public utility service set forth in the third criterion of the policy statement at 52 Pa. Code § 69.1401, because Sunoco's intended method of operation allows it to select privileged customers. DRN R. Exc. at 4.

Further, DRN avers that, even if Sunoco could specify the public character of its small throughput of NGLs for the partitioned portion of the project, the private character of the project as a whole shows that Sunoco cannot be considered a public utility. *Id.* at 4-5. DRN submits that the primary purpose of the Mariner East project is to provide transportation service to the MHIC, as demonstrated by the high percentage of the project's capacity that is wholly dedicated to serving the MHIC. DRN also contends that the *Laser* proceeding does not support Sunoco's position that it is providing public utility service, because Laser withdrew its Application in that proceeding and is currently operating as a private pipeline. *Id.* at 5.

Finally, DRN argues that the ALJs correctly decided that Sunoco fails to satisfy the definition of a public utility corporation under the BCL because Sunoco is regulated as a common carrier by FERC. DRN avers that Sunoco has not cited to any precedent supporting the position that a pipeline company regulated by FERC as a common carrier for the interstate transportation of NGLs was also classified as a public utility corporation pursuant to the MPC and, in fact, such precedent does not exist. DRN R. Exc. at 6. DRN also avers that the ALJs correctly relied on *Loper*, in which the court determined that, since Sunoco was regulated as a common carrier by FERC, it was not entitled to eminent domain powers. DRN asserts that 15 Pa. C.S. § 1103 addresses public utility corporations as entire entities and, therefore, Sunoco's contention that both FERC and the Commission have jurisdiction over the Mariner East project is meritless. *Id.* at 7 (citing *National Fuel Gas Supply Corp. v. Kovalchick Corp.*, 74 Pa. D. & C.4th 22, 28 (2005)).

CCWGT

Similarly to CAC and DRN, CCWGT states that the ALJs correctly found that Sunoco has not alleged facts sufficient to demonstrate that it will be providing service within Pennsylvania as a public utility. CCWGT R. Exc. at 6. CCWGT avers that Sunoco has not met the standards in *Laser* for qualification as a public utility, because it has not made a commitment to serve any and all intrastate customers and to expand capacity, as necessary, to meet increased customer demand. *Id.* at 8. CCWGT notes that, instead, Sunoco has said that intrastate capacity is limited to no more than ten percent of the capacity of the pipeline and admits that, if the demand exceeds pipeline capacity, committed interstate shippers will be entitled to their full capacity under their agreements, while capacity for uncommitted shippers will be subject to allocation among all uncommitted shippers. *Id.* at 8-9. CCWGT interprets this to mean that Sunoco will not serve all intrastate customers and expand capacity to meet intrastate demand and, if

interstate uncommitted demand exceeds the ten percent of capacity which is not covered by firm interstate contracts, then both interstate and intrastate shippers will be curtailed. *Id.* at 9.

CCWGT emphasizes that it does not believe Sunoco has alleged sufficient facts to show that it will even provide intrastate service. CCWGT agrees with the ALJs that Sunoco stated only that it will ship propane to its affiliate's Twin Oaks facility and that the Twin Oaks terminal is operated in conjunction with the MHIC. Thus, CCWGT concurs with the ALJs that, based on the averments in the Amended Petitions, propane could be stored in the Twin Oaks terminal for later processing and export through the Marcus Hook facility. *Id.* (citing I.D. at 21).

CCWGT also agrees that the ALJs correctly held that Sunoco did not qualify as a public utility for intrastate service, and its interstate service as a common carrier did not qualify Sunoco as a public utility corporation under the MPC and the BCL. CCWGT specifically avers that the federal component of Sunoco's service, by itself, is insufficient to give the Commission jurisdiction over a Section 619 petition, because FERC regulation of petroleum pipelines is regulation as a common carrier, not as a public utility. CCWGT R. Exc. at 11.

WGT

In its Replies to Exceptions, WGT states various reasons why it believes Sunoco's proposed Mariner East project does not meet the definition of a public utility under the Code and Pennsylvania law. WGT avers that, until Sunoco applies for a Certificate for the project and indicates a legal basis for its plan to provide intrastate public utility service, its Amended Petition is not supported or timely. WGT R. Exc. at 6-7. First, WGT contends that Sunoco has not shown that the proposed project will serve

the public in Pennsylvania, as the capacity that will be available for intrastate shippers is an open question, which WGT submits cannot properly be addressed in a Section 619 petition. *Id.* at 7-8.

Second, WGT contends that Sunoco's Certificate authorizing different services is irrelevant to the service Sunoco intends to provide through the Mariner East pipeline. WGT states that Sunoco is required to amend its Certificate or to obtain a new Certificate, pursuant to Section 1102(a)(1) of the Code, 66 Pa. C.S. § 1102(a)(1), because, according to WGT, Sunoco will be providing service of a different nature. *Id.* at 8. WGT cites to two Pennsylvania cases in support of its argument that Sunoco must go through an additional application proceeding in order to add services or territory not originally included in its Certificate.⁸ WGT avers that Sunoco's current Certificate does not pertain to west to east transportation of propane or ethane or to the pressure and other conditions that will apply to the Mariner East project and, as such, Sunoco does not have authorization for the proposed service. *Id.* at 8, 9, 10-15. WGT also avers that safety concerns of the Township, its residents, and other Parties to the proceeding have not been addressed in any prior proceedings before the Commission. *Id.* at 8-9.

WGT argues that Sunoco cannot use the *Amendment Order* to expand its authority under its Certificate, because Sunoco cannot claim any rights greater than those it possessed prior to filing for abandonment. *Id.* at 17. WGT contends that the *Amendment Order* does not address the problem that, according to WGT, Sunoco plans to offer a different service than the one that it previously abandoned. WGT also contends that a due process problem may be created with any effort to expand authority in the context of a Petition for Amendment in the absence of notice and a hearing. *Id.* at 18 (citing *Armstrong Telecommunications, Inc. v. Pa. PUC*, 835 A.2d 409 (Pa. Cmwlth.

⁸ WGT R. Exc. at 16 (citing *Ferry v. Pa. PUC*, 192 Pa. Super. 331, 162 A.2d 266 (Pa. Super. Ct. 1960); *Rosemont Taxi Cab Co., Inc. v. Philadelphia Parking Authority*, 68 A.3d 29 (Pa. Cmwlth. 2013)).

2003); *Popowsky v. Pa. PUC*, 805 A.2d 637 (Pa. Cmwlth. 2002)). WGT similarly argues that Sunoco’s recently filed tariff supplement, Tariff Pipeline – Pa. P.U.C. No. 16, does not help Sunoco’s arguments, because the tariff is not effective yet and does not contain all of the supporting data required by Section 53.52 of the Commission’s Regulations, 52 Pa. Code § 53.52. WGT R. Exc. at 19.

Third, WGT avers that Section 619 of the MPC authorizes the Commission to over-ride local zoning ordinances only when it is necessary to achieve a broader public interest through the provision of public utility service. *Id.* (citing *Robinson Township v. Commonwealth of Pennsylvania*, 83 A.3d 901, 931, 954 (Pa. 2013)). WGT states that exempting a significant project from municipal zoning laws is a rare occurrence under the state Constitution and laws. WGT asserts that “[t]he assumption of M.P.C. § 619 is that a true public utility – an enterprise that meets the needs of a broad public – is of singular importance and requires a uniform system of land use regulation.” WGT R. Exc. at 21. WGT also asserts that the proposed Mariner East project does not qualify for this standard. *Id.*

Disposition

Initially, we note the procedural posture of this case: four Parties filed various Preliminary Objections to Sunoco’s Amended Petitions, contending, *inter alia*, that the Commission lacks jurisdiction over the Petitions. As stated above, preliminary objections should only be granted where relief is clearly warranted and free from doubt. Therefore, in this case, the Preliminary Objections before us should only be granted if it is clear that we do not have jurisdiction over the Amended Petitions. Viewing the Amended Petitions in the light most favorable to Sunoco, as the non-moving party, we conclude that the Preliminary Objections before us should be denied, because Sunoco’s Amended Petitions adequately pled sufficient facts for us to find that Sunoco is both a

“public utility” under Section 102 of the Code, 66 Pa. C.S. § 102, and a “public utility corporation” under the BCL and Section 619 of the MPC. As discussed in detail herein, Sunoco has been certificated as a public utility in Pennsylvania for many years, and the existence of Commission Orders granting the Certificates to Sunoco is *prima facie* evidence of the facts therein, including that Sunoco is a public utility under the Code.

The instant Petitions were filed pursuant to Section 619 of the MPC, 53 P.S. § 619, which provides as follows:

This article shall not apply to any existing or proposed building, or extension thereof, used or to be used by a public utility corporation, if, upon petition of the corporation, the Pennsylvania Public Utility Commission shall, after a public hearing, decide that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public.

The ALJs concluded that the Commission lacks jurisdiction because it is clear that: (1) Sunoco does not meet the definition of a public utility corporation articulated in the BCL, I.D. at 20, and (2) Sunoco’s proposed Mariner East pipeline service does not constitute public utility service as defined in the Code or under the standards set forth in *Drexelbrook, supra*, I.D. at 21. We disagree with these findings.

With regard to the ALJs’ first finding, we disagree that it is clear that Sunoco is not a “public utility corporation.” Section 1103 of the BCL defines a “public utility corporation” as including corporations that are “subject to regulation as a public utility by the Pennsylvania Public Utility Commission or an officer or agency of the United States.” 15 Pa. C.S. § 1103. In this proceeding, Sunoco has not contended that it is a public utility corporation based on its federal status as a common carrier. *See*, Answer to Preliminary Objections of CCWGT at 9 (“[Sunoco] admits that its Amended Petition does not assert a claim that it is a ‘public utility corporation’ under the MPC by virtue of its status as a federally regulated pipeline. [Sunoco] is a public utility by virtue

of its existing Certificates of Public Convenience ...”). Even viewing the Amended Petitions in the light most favorable to Sunoco, Sunoco is not making an argument that it qualifies as a public utility corporation based on regulation as a public utility by an officer or agency of the United States.

Nevertheless, in this case, Sunoco has pled sufficient facts for us to conclude that it is a corporation that is subject to regulation as a public utility by this Commission. Sunoco asserted in its Amended Petitions that it is a “public utility corporation” because it holds Certificates issued by the Commission which authorize shipments of petroleum and petroleum products by pipeline in Pennsylvania. Amended Petition at 4. Moreover, the ALJs stated “Sunoco’s amended petitions are at best premature,” I.D. at 22, because several of Sunoco’s filings related to the Mariner East project were still pending before the Commission when the ALJs wrote their Initial Decision. Since that time, we have issued Orders in several of those proceedings.⁹ First, in the *Amendment Order*, we granted Sunoco’s petition for an amendment of the *August 2013 Order*, which allowed Sunoco to resume transportation service for petroleum products and refined petroleum products in the segment of the pipeline where its tariff was abandoned, subject to the filing of appropriate tariff supplements. In reaching our determination, we found as follows:

While Sunoco received authorization in the *August 2013 Order* to cease the transportation of gasoline and distillates as to the shippers and routes on the schedules identified in the *August 2013 Order*, it retained its authority under its Certificate to provide petroleum products and refined petroleum products transportation service on its pipelines between Twin Oaks and Delmont, Pennsylvania. As such, Sunoco is certificated to provide intrastate propane service on the abandoned segment of the pipeline.

⁹ Given these recent procedural developments, we do not find it necessary to address the timing of Sunoco’s filing of the Amended Petitions.

Amendment Order at 9.

Shortly thereafter, we permitted Sunoco's Tariff Pipeline – Pa. P.U.C. No. 16 to become effective on October 1, 2014. *Tariff No. 16 Order* at 4. This tariff added a new origin point in Mechanicsburg and a new destination point in Twin Oaks for the west to east intrastate movement of propane on Sunoco's system, originating from the Marcellus Shale production areas to markets in Southeastern Pennsylvania. *Id.* at 1-2. Additionally, we approved the application of Sunoco to offer, render, furnish, or supply intrastate petroleum and refined petroleum products pipeline service to the public in Washington County, Pennsylvania, and the Commission's Secretary issued to Sunoco a Certificate authorizing Sunoco to provide such service. *Washington County Application Order* at 4. In view of these developments, as well as the averments of Sunoco's Amended Petition, we disagree with the ALJs' conclusion that it is clear Sunoco is not a "public utility corporation."

We also disagree with the ALJs' second finding, that it is clear and free from doubt that Sunoco's proposed Mariner East pipeline project does not constitute public utility service as defined in the Code and as interpreted in *Drexelbrook*. First, the fact that Sunoco currently holds various Certificates is *prima facie* evidence under Section 316 of the Code, 66 Pa. C.S. § 316,¹⁰ that it is a public utility. Thus, using a *Drexelbrook* or similar analysis is unnecessary. As explained above, the pipeline routes and services described in this proceeding have been certificated as public utilities by this Commission (and its predecessors) since the early 1930s. More recently, in July 2014, the Commission certificated Sunoco to resume transportation service for petroleum products and refined petroleum products in a segment of its pipeline where its tariff was

¹⁰ Section 316 provides that "[w]henver the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review." 66 Pa. C.S. § 316.

previously abandoned. In August 2014, the Commission also certificated Sunoco to extend its service territory to transport petroleum products and refined petroleum products to include Washington County, Pennsylvania. Therefore, Sunoco is certificated in Pennsylvania as a public utility to transport petroleum and refined petroleum products, including propane, from Delmont, Pennsylvania to Twin Oaks, Pennsylvania.

Even if we were to ignore the existence of Sunoco's Certificates to serve the territories covered by the instant Amended Petitions, the view that Sunoco's services do not constitute public utility services because no retail end-users are specifically identified conflicts with applicable law, including the definition of "public utility" set forth in Section 102(1)(v) of the Code and our more recent decision in the *Laser June 2011 Order*, in which we found that Laser's provision of service as a midstream gathering pipeline operator that transported natural gas from producer wells to an interstate pipeline constituted service "for the public." The Commission has held numerous times that public utility services may be economically feasible only to entities that have large volumes of business and has also held that a retail component is not a requirement for public utility service. *See, e.g., Rural Telephone Co. Coalition v. Pa. PUC*, 941 A.2d 751 (Pa. Cmwlth. 2008); *Waltman v. Pa. PUC*, 596 A.2d 1221, 1223-1224 (Pa. Cmwlth. 1991), *aff'd*, 533 Pa. 304, 621 A.2d 994 (Pa. 1993); *Application of Sprint Communications Company L.P. for Approval of the Right to Offer, Render, Furnish or Supply Telecommunications Services as a Competitive Local Exchange Carrier to the Public*, Docket No. A-310183F0002AMA, *et al.* (Order entered December 1, 2006). Thus, the provision of wholesale services can clearly fall within the definition of public utility services, which is evident with the existence of numerous certificated utilities providing wholesale services, including seven certificated wholesale pipelines operating in Pennsylvania in addition to Sunoco, and numerous certificated telephone utilities providing wholesale only services. Moreover, whether a service is considered to

be offered for the public does not depend on the number of persons who actually use the service. Rather, the determination depends on the service offering and whether the service is available to all members of the public, or a class of the public, who may require the service. *See, C.E. Dunmire Gas Co. v. Pa. PUC*, 413 A.2d 473, 474 (Pa. Cmwlth. 1980).

For these reasons, we believe the ALJs erred in granting the Preliminary Objections based on lack of jurisdiction. Accordingly, we shall grant Sunoco's Exception on this issue; reverse the ALJs' decision granting these Preliminary Objections; deny the pertinent Preliminary Objections of CCWGT, DRN, MWA, and CAC; and remand this case to the OALJ for further proceedings, consistent with this Opinion and Order.

The Scope of Sunoco's Existing Certificate Authority

The product to be shipped by Sunoco – “petroleum products” – is a broad term that includes both propane and ethane. While gasoline and fuel oil were the original products that were shipped in the pipelines until 2013, there is no restriction in any approved Certificate limiting Sunoco's services to these particular products. In *Petition of Granger Energy of Honey Brook, LLC*, Docket No. P-00032043 (Order entered August 19, 2004) at 9, we gave the undefined term “petroleum products,” as used in Section 102 of the Code, a broad meaning as a “catch all phrase” to include what would otherwise be an exhaustive list of products. Similarly, we specifically held in the *Amendment Order*

that propane is a petroleum product.¹¹ While ethane is not expressly identified in 49 C.F.R. § 192.3, it also fits within the definition of “petroleum gas.” Under 49 C.F.R. § 195.2, NGLs are encompassed under the terms “petroleum” and “petroleum product.”¹² The U.S. Energy Information Administration’s definition of NGLs includes ethane and propane, which, in turn, is included in the definition of “petroleum and other liquids.”¹³ In light of the above, we presumptively conclude that Sunoco’s existing Certificate encompasses the movement of ethane and propane.

We also reject the argument, as raised by WGT in its Replies to Exceptions, that the Sunoco pipeline implicated in this proceeding is limited to east-to-west transportation. This argument appears to be based upon two details: (1) the description of the facilities in the original applications and Orders approving those applications, and (2) the original directional flow when other petroleum products were transported from Philadelphia area refineries to product distributors located to the West and North.

¹¹ See, *Amendment Order* at 9 n.5, stating the following:

This is consistent with the definition of “petroleum gas” in the federal gas pipeline transportation safety regulations at 49 C.F.R. Part 192. Part 192 has been adopted by the Commission and defines “petroleum gas” to include propane. 49 C.F.R. § 192.3. Our interpretation is also consistent with the definition of “petroleum” in the federal hazardous liquids pipeline safety regulations at 49 C.F.R. Part 195. Part 195 has also been adopted by the Commission and defines “petroleum” to include natural gas liquids and liquefied petroleum gas, which can include propane. 49 C.F.R. § 195.2.

¹² See, 49 C.F.R. § 195.2 (“Petroleum means crude oil, condensate, natural gasoline, natural gas liquids, and liquefied petroleum gas. Petroleum product means flammable, toxic, or corrosive products obtained from distilling and processing of crude oil, unfinished oils, natural gas liquids, blend stocks and other miscellaneous hydrocarbon compounds.”)

¹³ http://www.eia.gov/tools/glossary/index.cfm?id=A#ass_diss_nat_gas

Importantly, there is no directional restriction contained in any of the controlling Certificates or Commission Orders, nor do we believe it to be good public policy to adopt or interpret any such directional restrictions. To do so would likely result in the construction of new and redundant pipeline facilities, while existing facilities of the exact same nature, capable of providing the exact same services, would sit useless. This restriction, if accepted, could force the unnecessary expenditure of billions of dollars, which costs would be absorbed by the energy-using public through increased commodity prices. Moreover, as discussed previously, the Commission recently addressed this very issue with this very utility in the *Amendment Order*. See also, generally, *Application of UGI Penn Natural Gas, Inc. for approval of the Transfer by Sale of a 9.0 Mile Natural Gas Pipeline, Appurtenant Facilities and Right of Way located in Mehoopany, Pennsylvania*, Docket No. A-2010-2213893 (Order entered July 25, 2011).

Thus, Sunoco has the authority to provide intrastate petroleum and refined petroleum products bi-directionally through pipeline service to the public between the Ohio and New York borders and Marcus Hook, Delaware County through generally identified points. This authority is not contingent upon a specific directional flow or a specific route within the certificated territory. Additionally, this authority is not limited to a specific pipe or set of pipes, but rather, includes both the upgrading of current facilities and the expansion of existing capacity as needed for the provision of the authorized service within the certificated territory. In light of the above analysis affirming Sunoco's authority to provide intrastate pipeline transportation service from Houston, Pennsylvania to Marcus Hook, Pennsylvania, there is a rebuttable presumption that Sunoco is a public utility in this Commonwealth.

The Scope of the Issues to be Addressed in this Section 619 Proceeding

The specific request before us for consideration is whether Sunoco has met its burden of proof to show its entitlement to zoning exemptions pursuant to Section 619 of the MPC, 53 P.S. § 10619. There are only two parts to a Section 619 inquiry: (1) whether Sunoco is a public utility corporation, and (2) whether the proposed buildings at issue are reasonably necessary for the convenience or welfare of the public.

Regarding the first prong, the ALJs' determination on remand should specifically address the following two issues: (1) whether the presumption has been rebutted that Sunoco is a "public utility" under the Code and, hence, a "public utility corporation" under the BCL, and (2) whether Sunoco's proposed service is included within its existing authority, *i.e.*, whether Sunoco has provided credible evidence that it will be transporting propane and/or ethane, as proposed, through the territories for which it is certificated as a public utility.

Regarding the second prong of the Section 619 analysis, Pennsylvania courts have established as an enduring principle that municipalities do not have the power to zone with respect to utility structures other than buildings. *See, Duquesne Light Co. v. Upper St. Clair Twp., et al.*, 377 Pa. 323, 105 A.2d 287 (1954) (*Duquesne*).¹⁴ As a result, an exemption is not needed for any public utility facilities, as a blanket exemption

¹⁴ We note that *Duquesne* was decided prior to both the current Public Utility Code and the MPC. Subsequent cases, however, have made it clear that the principles enumerated in *Duquesne* are still in force. *See generally, Heitzel v. Zoning Hearing Bd. of Millcreek Twp.*, 533 A.2d 832, 833 (Pa. Cmwlth. 1987); *South Coventry Twp. v. Philadelphia Elec. Co.*, 504 A.2d 368, 371 (Pa. Cmwlth. 1986).

exists.¹⁵ Moreover, it is clear under Pennsylvania law that public utility buildings, when found by this Commission to be reasonably necessary for the convenience or welfare of the public, are exempt from local zoning regulations. Thus, there are two main limiting principles governing municipal zoning related to public utilities: (1) municipal zoning authority regarding utilities is limited to buildings, and (2) a public utility can obtain an exemption from municipal zoning regulation for buildings upon a finding by this Commission that the exemption meets the “reasonably necessary” test enumerated in Section 619 of the MPC.

Put another way, the inquiry regarding the second prong of the Section 619 analysis concerns only *proposed buildings* as described in each of Sunoco’s Amended Petitions and whether the “present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public.” 53 P.S. § 10619. Sunoco is not seeking this Commission’s approval to be certificated as a public utility, approval of the Mariner East project, or approval to construct the valve control and pump stations that the Company seeks to shelter. Rather, Sunoco requests a determination as to whether the structures the company proposes to build *around* and *over* the valve control and pump stations constitute “buildings” within the meaning of the MPC, and, if so, whether such “buildings” are reasonably necessary for the convenience or welfare of the public and, therefore, exempt from local zoning ordinances. *Petition of UGI Penn Natural Gas Inc. for a Finding that Structures to Shelter Pipeline Facilities in the*

¹⁵ The term “facilities” is broadly defined by the Code as the following:

All the plant and equipment of a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with, the business of any public utility.

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, Docket No. P-2013-2347105 (Order entered December 19, 2013).

Accordingly, the inquiry on remand should not address whether it is appropriate to place the valve and pump stations in certain areas, but, rather, should address whether the buildings proposed to shelter those facilities are reasonably necessary for the convenience or welfare of the public.

The Remaining Preliminary Objections

ALJs' Recommendation

The ALJs concluded that, since they determined that the Commission lacks jurisdiction over the Amended Petitions, it was unnecessary to address the remaining Preliminary Objections. *Id.*

Exceptions and Replies

Sunoco

Sunoco states that the ALJs erred by not dismissing the remaining Preliminary Objections. Sunoco first addresses the remaining Preliminary Objections of CAC and DRN, which averred that Sunoco did not adequately show that the Mariner East project was reasonably necessary for the convenience and welfare of the public. Exc. at 34; DRN's Preliminary Objections at 18-23; CAC's Preliminary Objections at 8-11. Sunoco contends that these Preliminary Objections should be denied because the overall need for the Mariner East project is related to the merits of the Mariner East project, a legal issue that is not relevant to a Section 619 proceeding. Sunoco avers that the Commonwealth Court has ruled that Section 619 only empowers the Commission to

determine if there is a reasonable necessity for the site of the buildings. Exc. at 34 (citing *Del-AWARE Unlimited*, 513 A.2d at 596). Sunoco also avers that this issue is moot because the Commission found in the *Amendment Order* that the Mariner East project's provision of intrastate propane service would result in numerous public benefits. Exc. at 34 (citing *Amendment Order* at 9-10).

Second, Sunoco addresses three Preliminary Objections filed by CAC, DRN, and CCWGT. Exc. at 35. CAC's Preliminary Objection contended that Sunoco's Amended Petitions were legally insufficient because the Petitions were an inappropriate circumvention of law. CAC's Preliminary Objections at 11-12. DRN's Preliminary Objection alleged that Sunoco's improper segmentation of the Mariner East Project did not qualify it for an exemption under the MPC. DRN's Preliminary Objections at 7-11. CCWGT's Preliminary Objection averred that the Commission lacked jurisdiction because Sunoco would not be providing intrastate pipeline service. CCWGT's Preliminary Objections at 4-5. Sunoco states that all of these Preliminary Objections assert, in various ways, that the Amended Petitions are deficient because Sunoco will not be offering intrastate pipeline transportation service. Sunoco notes that, due to the modifications in its business plan in response to changing market conditions, it will be providing intrastate and interstate service and, therefore, these Preliminary Objections are moot and otherwise without legal merit. Exc. at 35.

Third, Sunoco addresses CCWGT's Preliminary Objection that the Commission lacks jurisdiction over the Amended Petition for West Goshen Township because it appears that Sunoco does not have Commission authority to use a pipeline segment near Boot Road in West Goshen Township. Exc. at 35; CCWGT's Preliminary Objections at 5-7. Sunoco responds to CCWGT's averment that a map Sunoco provided as Exhibit A to the Amended Petition showed that a portion of the pipeline service in Boot Road, Chester County was part of an abandoned pipeline. Sunoco explains that,

while it had suspended the tariffs for gasoline and distillates service originating in Twin Oaks and ending in Icedale, Malvern, and points West of Mechanicsburg, Sunoco continued to provide transportation service of petroleum and refined petroleum products (gasoline and distillates) on pipeline movements through the Boot Road site, using the Boot Road pump station, to Montello. Sunoco indicates that it will continue to provide these transportation services pursuant to the Certificate it received from the Commission in 2002. Exc. at 36.

Fourth, Sunoco contests the Preliminary Objections of CAC and DRN, which asserted that the Amended Petitions were legally insufficient because Article 1, Section 27 of the Pennsylvania Constitution prohibits granting the Amended Petitions; and the Preliminary Objection of CCWTG, which asserted that the Amended Petition lacked sufficient specificity because it failed to address the environmental impacts as well as the impacts on West Goshen Township's zoning and comprehensive plans. Exc. at 36; CAC's Preliminary Objections at 12-13; DRN's Preliminary Objections at 16-18; CCWTG's Preliminary Objections at 9-11. Sunoco indicates that the Preliminary Objections respectively argued that its Amended Petitions should be denied (1) based on the Supreme Court's decision interpreting Article 1, Section 27 of the Pennsylvania Constitution in *Robinson Township, supra*, and (2) because the Amended Petitions failed to address environmental and local zoning impacts. Exc. at 36. Sunoco states that *Robinson Township* involved Act 13 of 2012 and did not involve Section 619 of the MPC. Sunoco also states that Section 619 of the MPC requires the Commission to make a specific finding that the siting is necessary for the convenience and welfare of the public before exemptions from local zoning are permitted, whereas Act 13 permitted incompatible uses. Exc. at 37.

In response to the arguments that Sunoco failed to address environmental concerns, Sunoco states that, at this point in the proceeding, there is no evidence to

indicate that the siting of the proposed structures will negatively impact the environment within the communities where the structures are located. Sunoco avers that, if any party presents such evidence during the proceeding, the Commission may consider that evidence in deciding whether the siting of the structures is for the convenience or welfare of the public. Exc. at 37. Sunoco notes that, pursuant to Section 619 of the MPC and the Policy Statement at 52 Pa. Code § 69.1101, the Commission will consider “the impact of its decisions upon local comprehensive plans and zoning ordinances.” Exc. at 37. Sunoco also notes that the Environmental Rights Amendment does not expand the Commission’s limited statutory authority to determine whether the proposed site of a building is reasonably necessary for the public convenience or welfare. *Id.* at 38 (citing *Del-AWARE Unlimited*, 513 A.2d at 596).

Fifth, Sunoco objects to CCWGT’s Preliminary Objection which argued that the vapor combustion unit at the Boot Road pump station was improperly excluded from Sunoco’s request for an exemption. Exc. at 38; CCWGT’s Preliminary Objections at 7-9. Sunoco states that it did not include the vapor combustion unit in its Amended Petition at Docket No. P-2014-2411966 because the unit is not a building, rather, it is a public utility facility that is not before the Commission in a Section 619 proceeding. Exc. at 38 (citing *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*, Docket No. P-2013-2347105 (Order entered December 19, 2013)).

CAC

In reply, CAC argues that, if the Commission finds that it has jurisdiction, CAC’s remaining Preliminary Objections are meritorious and should be sustained by the

Commission.¹⁶ CAC R. Exc. at 14. CAC specifically states that the Commission should sustain its Preliminary Objection contending that Sunoco failed to demonstrate that the proposed project was reasonably necessary for the convenience or welfare of the public. *Id.* at 14. CAC maintains that Sunoco has misinterpreted the holding in *Del-AWARE Unlimited, supra*. According to CAC, the Commonwealth Court's decision in that case to limit its review to the siting of the buildings involved hinged on the fact that the predecessor to the Pennsylvania Department of Environmental Protection had already conducted a thorough review of the environmental impacts of the proposed project, and that review was upheld by the Environmental Hearing Board. *Id.* at 15 (citing *Del-AWARE Unlimited*, 513 A.2d at 596). CAC indicates that, in the instant case, no environmental reviews or assessments have been conducted. CAC is concerned that, if the Commission were to approve the requested exemption without considering the environmental impacts of the Mariner East project, then the project would be constructed without any comprehensive environmental review. CAC R. Exc. at 15.

DRN

In its Replies to Exceptions, DRN asserts that its remaining Preliminary Objections demonstrate that Sunoco's Amended Petitions should be dismissed. First, DRN argues that the structures are not reasonably necessary for the convenience or welfare of the public. DRN states that, if the Commission limits its evaluation to whether the sites of the valve control and pump stations are in the public interest, the Commission should dismiss the Amended Petitions. DRN R. Exc. at 9. DRN indicates that Sunoco's averment that the siting of the pump stations is necessary is based entirely on a graph demonstrating that the pump stations are located based on where the amount of fluid energy drops below sub-optimal levels. *Id.* at 9 (citing Exhibit E to the Amended

¹⁶ We note, however, that in CAC's prayer for relief, CAC argues that the Commission should remand the matter to the OALJ for rulings on the remaining Preliminary Objections. CAC R. Exc. at 16-17.

Petition). DRN also indicates that Sunoco admitted that the location of the pump stations was based on the entire capacity of the Mariner East project. DRN asserts that, if Sunoco was basing the siting of the pump stations on the production profile of its segmented intrastate transportation throughput, the physical location and number of pump stations would be radically different from what is depicted in Exhibit E. DRN R. Exc. at 9. Additionally, DRN avers that a finding that the siting of the buildings in this case is reasonably necessary for the convenience or welfare of the public, “which would result in the displacement of all local development guidelines and permit oil and gas infrastructure development and operation in every type of zoning district,” is contrary to the holding in *Robinson Township, supra*, and Article I, Section 27 of the Pennsylvania Constitution. DRN R. Exc. at 11.

CCWGT

In its Replies to Exceptions, CCWGT first notes that Sunoco fails to include two of CCWGT’s Preliminary Objections in its listing of Preliminary Objections. CCWGT R. Exc. at 12. CCWGT avers that it objected to the insufficient specificity of the Amended Petition based on Sunoco’s failure to identify (1) the specific property for which Sunoco sought a zoning exemption; and (2) the specific zoning or land use ordinances from which Sunoco sought an exemption. *Id.* at 12, 13. As such, CCWGT states that Sunoco’s Exception is incomplete and inaccurate, and the Commission should not rule on the remaining Preliminary Objections at this time. *Id.* at 13.

Second, CCWGT avers that, if the Commission determines it has jurisdiction, this matter should be remanded to the OALJ for rulings on the remaining Preliminary Objections and all further proceedings. *Id.* at 14. CCWGT asserts that the Commission’s Regulations require preliminary objections to be decided by a presiding officer. *Id.* at 13 (citing 52 Pa. Code § 5.101(g)). CCWGT states that the Commission’s

practice when it reverses an Initial Decision which found a lack of jurisdiction is to remand the matter to the OALJ to address all remaining matters in the case, including preliminary objections. CCWGT R. Exc. at 13 (citing *Robinson v. Shrewsbury Borough Municipal Authority*, Docket No. C-2011-2238127 (Order entered October 14, 2011)). CCWGT argues that Sunoco has not provided any precedent or alleged any compelling reasons for its request to circumvent the usual administrative process.

Disposition

Based upon the legal standard for deciding preliminary objections and a review of the relevant documents submitted by the Parties in this case, we conclude that the relief requested by the moving parties is not clearly warranted and free from doubt and that, accordingly, the preliminary objections pertaining to the legal insufficiency claims should be denied. We also find that the issues and concerns raised in the Preliminary Objections arguing legal insufficiency are beyond the proper scope of this proceeding. These Preliminary Objections seek to improperly expand the scope of this proceeding to issues concerning the environmental impacts of the Mariner East project and whether the overall project is reasonably necessary for the convenience and welfare of the public, which are issues that are beyond a Section 619 exemption inquiry. Accordingly, we will deny the Preliminary Objections pertaining to legal insufficiency.

In addition to these Preliminary Objections, CCWGT argues that Sunoco's Amended Petition for West Goshen Township is factually insufficient because, among other reasons, Sunoco does not sufficiently identify the buildings and ordinances at issue in the Petition affecting West Goshen Township. CCWGT also argues that a certain vapor combustion unit was improperly excluded from the exemption request and that Sunoco does not have Commission authority to use a certain segment of its pipeline in West Goshen Township. Based on the applicable legal standard and a review of the

relevant documents submitted in this case, we conclude that the relief requested by CCWGT is not clearly warranted and free from doubt and that, accordingly, CCWGT's Preliminary Objections should be denied. Moreover, we find that Sunoco has pled sufficient facts to withstand Preliminary Objections and that any such factual issues are more appropriately explored and clarified through discovery.

For these reasons, we conclude that the ALJs should have denied the remaining Preliminary Objections. We shall grant Sunoco's Exception on this issue and deny the remaining Preliminary Objections of CCWGT, DRN, MWA, and CAC, consistent with this Opinion and Order.

Conclusion

Based upon our review of the pleadings, the Parties' positions, and the applicable law, we shall grant Sunoco's Exceptions; reverse the Initial Decision Sustaining Preliminary Objections and Dismissing Petitions; deny the Preliminary Objections filed by CCWGT, DRN, MWA, and CAC; and remand this case to the OALJ for further proceedings, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed by Sunoco Pipeline, L.P. on August 19, 2014, are granted.
2. That the Initial Decision Sustaining Preliminary Objections and Dismissing Petitions, issued by Administrative Law Judges David A. Salapa and Elizabeth H. Barnes on July 30, 2014, is reversed.

3. That the Preliminary Objections filed by the Concerned Citizens of West Goshen Township, the Delaware Riverkeeper Network, the Mountain Watershed Association, and the Clean Air Council are denied.

4. That this case is remanded to the Office of Administrative Law Judge for further proceedings, consistent with this Opinion and Order.

 IN,

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: October 2, 2014

ORDER ENTERED: October 29, 2014