

No. _____

In The

SUPREME COURT OF THE UNITED STATES

IN RE: CONDEMNATION BY SUNOCO PIPELINE,
L.P. OF PERMANENT AND TEMPORARY RIGHTS
OF WAY FOR THE TRANSPORTATION OF
ETHANE, PROPANE, LIQUID PETROLEUM GAS,
AND OTHER PETROLEUM PRODUCTS IN THE
TOWNSHIP OF HEIDELSBERG, LEBANON
COUNTY, PENNSYLVANIA, OVER THE LANDS
OF HOMES FOR AMERICA, INC.,

Petitioners

vs.

SUNOCO PIPELINE, L.P.

Respondent,

On Petition for Writ of Certiorari from the Supreme
Court of Pennsylvania

**APPENDIX VOLUME I
PETITION FOR A WRIT OF CERTIORARI**

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**APPENDIX TO THE PETITION FOR A WRIT
OF CERTIORARI**

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179 A.3d 453 (Table)
Supreme Court of Pennsylvania.

IN RE: CONDEMNATION BY SUNOCO
PIPELINE L.P. of Permanent and Temporary
Rights of Way for the Transportation of Ethane,
Propane, Liquid Petroleum Gas and other
Petroleum Products in the Township of
Heidelberg, Lebanon County, Pennsylvania, over
the Lands of Homes for America, Inc.
Petition of: Homes for America, Inc.

No. 429 MAL 2017

|
January 22, 2018

Petition for Allowance of Appeal from the Order of the
Commonwealth Court

Opinion

ORDER

PER CURIAM

AND NOW, this 22nd day of January, 2018, the
Petition for Allowance of Appeal is **DENIED**.

All Citations

179 A.3d 453 (Table)

2017 WL 2291693

Only the Westlaw citation is currently available.
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RELEASED FOR PUBLICATION IN THE
PERMANENT LAW REPORTS. UNTIL
RELEASED, IT IS SUBJECT TO REVISION OR
WITHDRAWAL.

Commonwealth Court of Pennsylvania.
IN RE: CONDEMNATION BY SUNOCO
PIPELINE L.P. of Permanent and Temporary
Rights of Way for the Transportation of Ethane,
Propane, Liquid Petroleum Gas, and other
Petroleum Products in the Township of
Heidelberg, Lebanon County, Pennsylvania, over
the Lands of Homes for America, Inc.
Appeal of: Homes for America, Inc.

No. 565 C.D. 2016

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Submitted on Briefs: September 30, 2016

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Decided: May 24, 2017

BEFORE: HONORABLE RENÉE COHN
JUBELIRER, Judge, HONORABLE ANNE E.
COVEY, Judge, HONORABLE JOSEPH M.
COSGROVE, Judge

Opinion

MEMORANDUM OPINION

COVEY, JUDGE

*1 Homes for America, Inc. (Condemnee) appeals from the Lebanon County Common Pleas Court's (trial court) March 24, 2016 order overruling its Preliminary Objections to Sunoco Pipeline L.P.'s (Sunoco) Declaration of Taking (Declaration).¹ Condemnee contends that the trial court erred because Sunoco's Mariner East 2 Project is not an intrastate and interstate pipeline dually regulated by the Pennsylvania Public Utility Commission (PUC) and the Federal Energy Regulation Commission (FERC), Sunoco is not a public utility, Sunoco does not have eminent domain power, and Sunoco's Declaration is barred by the collateral estoppel doctrine.²

This Court *en banc* decided a majority of Condemnee's issues in *In re Condemnation by Sunoco Pipeline, L.P.*, 143 A.3d 1000 (Pa. Cmwlth. 2016), *petition for allowance of appeal denied*, (Pa. Nos. 571, 572, 573 MAL 2016, filed December 29, 2016) (*Sunoco I*). After careful review of the record in this case, and in accordance with *Sunoco I*, we affirm the trial court's order.

I. Background

On August 5, 2015, Sunoco filed the Declaration to condemn permanent and temporary easements across Condemnee's property located on South Canaan Grove Road, Newmanstown, Heidelberg Township, Lebanon County (Property) for the construction, operation and maintenance of Sunoco's Mariner East

2's pipelines. *See* Reproduced Record (R.R.) at 749a–767a, 880a–885a.

Condemnee filed Preliminary Objections to the Declaration in accordance with Section 306 of the Eminent Domain Code,³ 26 Pa.C.S. § 306, alleging: Sunoco does not have condemnation authority (Objection 1); Sunoco's corporate resolution does not authorize Sunoco to use eminent domain for the intrastate pipeline (Objection 2); Sunoco is collaterally estopped from asserting eminent domain power for Mariner East 2 after it was denied in *Loper v. Sunoco Pipeline, L.P.* (C.P. York No. 2013–SU–004518–05, filed February 24, 2014) (Objection 3); the Declaration falsely represents Mariner East 2 as an intrastate pipeline (Objection 4); Sunoco seeks approval for two pipelines despite that FERC only approved one (Objection 5); and, Pennsylvania law prohibits Sunoco's attempt to obtain eminent domain power under the Pennsylvania Business Corporation Law of 1988 (BCL)⁴ without a FERC Certificate of Public Convenience (CPC) (Objection 6).⁵ *See* R.R. at 920a–973a. Sunoco opposed Condemnee's Preliminary Objections. *See* R.R. at 974a–993a.

***2** The trial court conducted a hearing on November 30, 2015. *See* R.R. at 1269a–1453a. On March 24, 2016, the trial court ordered Condemnee's Preliminary Objections overruled, as follows:

1. The Mariner East 2 Pipeline will provide both interstate and intrastate service for ethane, propane, and other petroleum products in the Commonwealth.
2. Such pipeline service is dually-regulated, with [FERC] having the authority to regulate interstate

service and the [PUC] having the authority to regulate intrastate service.

3. Since [Sunoco] is regulated by the [PUC] for the Mariner East 2 Project, it meets the definition of a public utility providing public utility service under the Pennsylvania [BCL].

4. As a public utility providing public utility service under the [BCL], [Sunoco] has the power of eminent domain.

5. The doctrine of collateral estoppel does not apply to compel a different result.

6. The bonds posted by [Sunoco] in response to our Order of December 15, 2015 are adequate to cover the damages anticipated by Condemnee[].

7. In light of the above, the Preliminary Objections ... are [OVERRULED] in their entirety.

Condemnee Br. App. A, Trial Ct. Order. Also on March 24, 2016, the trial court filed an opinion in support of its order. *See* Condemnee Br. App. A, Trial Ct. Op. On April 8, 2016, Condemnee appealed to this Court.⁶

II. Analysis

A. Dual Regulation

Condemnee first argues that the trial court erred by finding that Mariner East 2 is both an intrastate and interstate pipeline subject to the PUC's regulation. Condemnee also contends that the trial court erred by finding that Mariner East 2 service is dually regulated by the PUC and FERC, because no law supports dual regulation, and Section 104 of the Public Utility Code (Code),⁷ 66 Pa.C.S. § 104, prohibits the PUC's regulation of interstate commerce. We disagree.

The record made before the trial court in this matter is nearly identical to the one made in *Sunoco I*. Both contain the same Sunoco witness testimony, Mariner East Project exhibits and PUC orders. Therefore, this Court's thorough and exhaustive analysis and summary of Sunoco's background in *Sunoco I* is relevant to the Declaration filed in this case.

1. Regulation of Sunoco as a Public Utility

Sunoco has operated as a Pennsylvania public utility since 2002, when it received the PUC's approval for the transfer, merger, possession, and use of all assets of the Sun Pipe Line Company (Sun) and of the Atlantic Pipeline Corporation (Atlantic), both of which were public utilities subject to the PUC's jurisdiction. *See* R.R. at 769a–772a. Accordingly, the PUC issued a CPC (2002 CPC) authorizing Sunoco “to transport petroleum products in the former service territory of Sun and Atlantic[,]” between Delmont, Westmoreland County, Pennsylvania and Twin Oaks, Delaware County, Pennsylvania, which includes Lebanon County. R.R. at 773a; *see also* R.R. at 773a–776a. In granting the 2002 CPC, the PUC declared that the transfer of assets to Sunoco “provides an affirmative public benefit” (R.R. at 774a) and that “the granting of [Sunoco's] application is necessary or proper for the service, accommodation, convenience and safety of the public.” R.R. at 769a.

2. The Mariner East Project

*3 Sunoco planned the Mariner East Project to transport natural gas liquids (NGLs),⁸ such as propane, ethane, and butane within the service territory authorized by the 2002 CPC. *See* R.R. at

755a; *see also In re Condemnation of Sunoco Pipeline, L.P.* (Pa. Cmwlth. No. 220 C.D. 2016, filed September 2, 2016);⁹ *Sunoco I*, 143 A.3d at 1007–11. The Mariner East Project consists of multiple phases, and the overall goal is to relieve the oversupply of NGLs in the Marcellus and Utica Shale basins and to remedy propane shortages in Pennsylvania and the Northeast. *See R.R.* at 755a.

Sunoco initially intended the Mariner East Project to prioritize interstate service. The first phase, known as Mariner East 1, was designed to transport NGLs from the Marcellus and Utica basins east to the Marcus Hook Industrial Complex (MHIC) located in both Delaware County and Claymont, Delaware. *See R.R.* at 755a. However, the record indicates that Sunoco also contemplated the *intrastate* transportation of propane for delivery to Pennsylvania customers. *See R.R.* at 755a. During the completion of Mariner East 1, Sunoco experienced a significant increase in demand for intrastate shipments of propane, driven by local consumer demand. *See R.R.* at 755a. The record further reflects that harsh winter conditions experienced during the 2013–14 winter season, combined with a pipeline infrastructure deficit, led to propane shortages and changing market conditions. *See R.R.* at 755a. Because of the circumstances, Sunoco accelerated its plans to provide intrastate shipments of propane, in addition to interstate shipments of propane and ethane, through the Mariner East Project. *See R.R.* at 755a.

This increased focus on intrastate shipments was the impetus for the second phase of Sunoco's Mariner East Project (Mariner East 2). *See R.R.* at 761a–762a.

Mariner East 2 will consist of pipelines with access points in Ohio, West Virginia, and Pennsylvania. *See* R.R. at 762a. Product will be placed into a pipeline (on-ramps), and there will be multiple exit points within Pennsylvania where product will be removed from the pipeline (off-ramps). *See* R.R. at 762a. Mariner East 2 generally will run parallel to the Mariner East 1 line. *See* R.R. at 763a. The Mariner East Project (through Mariner East 1 and Mariner East 2) will transport petroleum products in Sunoco's certificated areas as an integrated service.¹⁰

3. PUC Orders and Tariffs

*4 The record contains references to Sunoco initiating several PUC proceedings when its focus for the Mariner East Project moved from *interstate* to *intrastate* transportation of NGLs after the winter of 2013–14. *See* R.R. at 754a–767a. These proceedings, and the resulting PUC orders, include the following relevant actions:

- July 24, 2014 order—the PUC reaffirmed Sunoco's authority to transport petroleum products between Delmont, Westmoreland County, and Twin Oaks, Delaware County (*see* R.R. at 786a–796a);
- August 21, 2014 order—the PUC approved a tariff for Sunoco's west-to-east intrastate movement of propane from Mechanicsburg to Twin Oaks (*see* R.R. at 798a–802a);
- August 21, 2014 order—the PUC granted Sunoco a CPC authorizing it to provide intrastate transportation service of petroleum products in Washington County, which expanded the service territory in which Sunoco is authorized to provide

- its Mariner East service (*see* R.R. at 805a–809a);
- October 29, 2014 order—the PUC reaffirmed that “Sunoco has been certificated as a public utility in Pennsylvania ..., and the existence of [PUC o]rders granting the [CPCs] to Sunoco is *prima facie* evidence of the facts therein, including that Sunoco is a public utility under the Code.” (R.R. at 861a; *see also* R.R. at 822a–878a).
 - January 15, 2015 order—the PUC approved a tariff for Sunoco’s west-to-east intrastate movement of propane, reflecting a new origin point of Houston, Washington County (*see* R.R. at 811a–815a); and,
 - March 26, 2015 order—the PUC approved a supplemental tariff for intrastate shipments from Delmont, Westmoreland County to Twin Oaks, Delaware County (*see* R.R. at 817a–820a).

See Sunoco I; *see also In re Condemnation of Sunoco Pipeline, L.P.* (Pa. Cmwlth. No. 220 C.D. 2016, filed September 2, 2016).

The *Sunoco I* Court also “provide[d] some ... background information on the nature of the interrelationships between [sic] Sunoco, [the] PUC and [FERC,]” as follows:

Both FERC and [the] PUC regulate the shipments of natural gas and petroleum products or service through those pipelines, and not the actual physical pipelines conveying those liquids. **FERC’s jurisdiction is derived from the Interstate Commerce Act (ICA)^[11] and applies to interstate movements,**

while the Code and [the] PUC's jurisdiction apply to intrastate movements. This jurisdiction is not mutually exclusive....

Sunoco I, 143 A.3d at 1004 (original bold text emphasis, footnotes and original record citations omitted; bold text emphasis added).

[I]t is [the] PUC, and not FERC, that has authority to regulate intrastate shipments. Similarly, ... pipeline service operators in Pennsylvania, such as Sunoco, can be, and frequently are, simultaneously regulated by both FERC and [the] PUC through a regulatory rubric where FERC jurisdiction is limited only to interstate shipments, and [the] PUC's jurisdiction extends only to intrastate shipments. ...

....

The record substantiates that the pipeline system previously provided and currently provides interstate and intrastate service on the same pipelines. ... **[The] PUC has regulated Sunoco's intrastate pipeline transportation of petroleum products and refined petroleum products since 2002, and FERC has regulated Sunoco's interstate service of the same products on the same pipelines....**

Sunoco I, 143 A.3d at 1005–06 (emphasis added).

*5 Therefore, when the condemnees in *Sunoco I* made the identical dual regulation arguments,¹² this Court determined, based on the PUC orders related to the Mariner East Project, FERC's decision in *Amoco Pipeline, Co.*, 62 F.E.R.C. ¶ 61119, at 61803–61804, 1993 WL 25751, at *4 (Feb. 8, 1993) (finding that “the

commingling of oil streams is not a factor in fixing jurisdiction under the ICA”), and other related authority, “that **Sunoco’s CPCs apply to both Mariner East 1 service and to Mariner East 2 service**, as it is an authorized expansion of the same service.” *Sunoco I*, 143 A.3d at 1017 (original bold emphasis omitted; bold emphasis added). Thus, the *Sunoco I* Court held that the trial court

did not err when it concluded that ‘PUC regulated intrastate shipments of NGL [s,]’ including service provided by Mariner East 2, and that ‘[a]s a result, **[Sunoco] has the power of eminent domain to condemn property for the construction of [Mariner East 2].**’ (*Sunoco I* Trial Ct.] Op. at 4.)

Id. at 1017 (original bold emphasis omitted; bold emphasis added). The *Sunoco I* Court further held “that the record establishes that the expanded service to be provided by **the Mariner East 2 pipeline will involve both interstate service (subject to FERC regulation) and intrastate service (subject to [the] PUC[s] regulation)**” *Id.* at 1015 (original bold emphasis omitted; bold emphasis added).

Because this Court’s *Sunoco I* decision controls our analysis of this issue, we hold that the trial court here properly held that Mariner East 2 is both an intrastate and interstate pipeline dually regulated by the PUC and FERC.

B. Public Utility

Condemnee further argues that the trial court erred by finding that Sunoco is a public utility, since

Mariner East 2 “is in interstate commerce and not for the public.” Condemnee Br. at 8, 29. Because Condemnee failed to raise this issue in its Preliminary Objections, it is waived. *See In re Condemnation of Land for the S. E. Cent. Bus. Dist. Redevelopment Area # 1*, 946 A.2d 1143 (Pa. Cmwlth. 2008).

Notwithstanding, the *Sunoco I* condemnees likewise argued before the Cumberland County Common Pleas Court that Sunoco failed to demonstrate a public need for the Mariner East 2 pipeline. Therein, the condemnees contended that the PUC’s approval of a service is only a preliminary step, and it was the responsibility of the trial court in an eminent domain proceeding to review the public need and to make a determination of the scope and validity of the condemnation for the Mariner East 2 pipeline. *Id.* at 1017.

As to the PUC’s jurisdiction, this Court in *Sunoco I* stated:

[T]he Code charges [the] PUC with responsibility to determine which entities are public utilities and to regulate how public utilities provide public utility service. This has long been the statutory mandate. *See, e.g., Pottsville Union Traction Co. v. P[a.] Pub[.] Serv[.] Comm’n*, 67 Pa. Super. 301 (1917). It is beyond purview that the General Assembly intended [the] PUC to have statewide jurisdiction over public utilities and to foreclose local public utility regulation.

Duquesne Light Co. v. Monroeville Borough, 298 A.2d 252 (Pa. 1972).

Sunoco I, 143 A.3d at 1017. The *Sunoco I* Court further explained:

The Eminent Domain Code does not permit common pleas to review the public need for a proposed service by a public utility that has been authorized by PUC through the issuance of a CPC. In *Fairview Water Co. v. Public Utility Commission*], ... 502 A.2d 162 ([Pa.] 1985), our Supreme Court discussed the proper forum for a condemnee's challenge to the legality of a taking when a public utility attempts to condemn an easement and [the] PUC has determined that condemnee's property is necessary for the utility service. The case stemmed from a dispute between Fairview and a power company over the power company's continuing use of an easement previously agreed to by the parties. *Id.* at 163. The power company filed an application with [the] PUC requesting a finding and determination that its transmission line was necessary and proper for the service, accommodation, convenience, or safety of the public. A PUC Administrative Law Judge determined that the service was necessary and proper and also determined the scope and validity of the easement. This court affirmed. On appeal, Fairview argued that [the] PUC lacked jurisdiction to determine the scope and validity of the easement. *Id.* at 163-64. The Supreme Court agreed and stated: '[o]nce there has been a determination by the PUC that the proposed service is necessary and proper, the issues of scope and validity and damages must be determined by a Court of Common Pleas exercising equity jurisdiction.' *Id.* at 167. As *Sunoco* here holds

CPCs issued by [the] PUC and [the] PUC in its [o]rders issuing the CPCs found the authorized service to be necessary and proper, it is left to common pleas to evaluate scope and validity of the easement, but not the public need.

***6** As illustrated by *Fairview*, determinations of public need for a proposed utility service are made by [the] PUC, not the courts. Section 1103 of the Code requires an applicant for a CPC to establish that the proposed service is ‘necessary or proper for the service, accommodation, convenience, or safety of the public.’ 66 Pa.C.S. § 1103(a). Under this section, the applicant must ‘demonstrate a public need or demand for the proposed service’ *Chester Water Auth. v. Pub[.] Util[.] Comm’n*, 868 A.2d 384, 386 ([Pa.] 2005) (emphasis added).[]

Sunoco I, 143 A.3d at 1018–19 (footnote and emphasis omitted).

Accordingly, based upon this Court’s ruling on this precise issue in *Sunoco I*, we find no error in the trial court’s conclusion in this case that

even if this objection were not waived, ... the determination as to whether a particular service by a public utility will be in the public’s interest is a determination to be made by the ... PUC. In determining whether to grant CPCs, the PUC investigates and determines whether a company will be acting in the interest of the public. As to the public benefit of the Mariner East [P]roject, the PUC has ruled on multiple

occasions that the project is in the public interest. *See, e.g.* Condemnor's Ex[.] 4 at 10; Condemnor's Ex[.] 6[] at 4.

Trial Ct. Op. at 13. Accordingly, the trial court's reasoning is consistent with *Sunoco I*, and it properly concluded that Sunoco is a public utility.

C. Eminent Domain

Condemnee next argues that the trial court erred by finding that Sunoco has eminent domain powers for Mariner East 2 because its corporate resolution authorized an interstate pipeline, and Sunoco seeks to condemn for two pipelines when it only asserts the need for one.¹³ We disagree.

As previously described, in the public utility context, an entity must meet separate but related requirements set forth in both the BCL and the Code to be a public utility corporation clothed with the power of eminent domain. Section 1511(a)(2) of the BCL provides that 'public utility corporations' may exercise the power of eminent domain to condemn property for the transportation of, *inter alia*, natural gas and petroleum products. Section 1103 of the BCL defines public utility corporation as '[a]ny domestic or foreign corporation for profit that ... is subject to regulation as a public utility by the [PUC]' 15 Pa. C.S. § 1103. Section 1104 of the Code requires that a public utility must possess a CPC issued by [the] PUC pursuant to Section 1101 of the Code before exercising eminent domain. While courts of common pleas have jurisdiction to review whether an entity attempting to exercise eminent domain power meets the BCL criteria, that

jurisdiction does not include the authority to revisit PUC adjudications. **A CPC issued by[the] PUC is prima facie evidence that[the] PUC has determined that there is a public need for the proposed service and that the holder is clothed with the eminent domain power.**

Sunoco I, 143 A.3d at 1017–18 (emphasis added).

Specific to the PUC orders issued regarding the Mariner East Project, the *Sunoco I* Court noted that the PUC's July 24, 2014 order found that intrastate pipeline service proposed by Sunoco would result in "numerous potential public benefits" by allowing Sunoco "to immediately address the need for uninterrupted deliveries of propane in Pennsylvania and to ensure that there is adequate pipeline capacity to meet peak demand for propane during the winter heating season." *Id.* at 1019. The Court further noted that in its August 21, 2014 order authorizing the provision of intrastate petroleum and refined petroleum products pipeline transportation service in Washington County, the PUC stated that:

***7 [W]e believe that approval of this Application is necessary and proper for the service, accommodation, and convenience of the public. 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.

The Court held that "there is no basis for a common pleas court to review a PUC determination of public need," and that "to allow such review would permit collateral attacks on PUC decisions and be contrary to Section 763 of the Judicial Code, 42 Pa. C.S. § 763, which places review of PUC decisions within the jurisdiction of this Court." *Id.* Accordingly, this Court concluded in *Sunoco I* that Sunoco holds a CPC issued by the PUC for Mariner East 2, it "is clothed with the eminent domain power." *Id.* at 1018.

Relative to Sunoco's corporate resolution, the trial court ruled:

[Section 1511(g)(2) of the BCL,] 15 Pa.C.S. [§] 1511(g)(2)[,] provides, in relevant part, that a petition for approval and order filing bond 'shall be accompanied by the bond and a certified copy of the resolution of condemnation. The resolution shall describe the nature and extent of the taking.' *Id.* We find that the Resolution[] to Condemn submitted by

Sunoco satisfy the requirements of [Section] 1511 [of the BCL]. Contrary to Condemnee[’s] Preliminary Objection, the Resolution[] do[es] not specify that [it is] for an interstate pipeline, [r]ather, [it] state[s] that [it is] for the Mariner East 2 Project, which as noted above, we have found to be both an interstate and intrastate pipeline. The Resolution[] further specif[ies] that [it] cover[s] Lebanon County and specifically identif[ies] the subject [Property] and the extent of the easements sought on [the Property]. We therefore find that [the Resolution is] sufficiently specific to authorize the condemnation[]

Trial Ct. Op. at 8. Based upon our review of the record, we hold that the trial court properly determined that Sunoco’s corporate resolution authorized the Property’s condemnation. *See* R.R. at 887a–892a. Further, since “determinations of public need for a proposed utility service are made by [the] PUC, not the courts[,]” neither the trial court nor this Court may assess whether Sunoco, in fact, needs one or two pipelines for Mariner East 2.¹⁴ *Sunoco I*, 143 A.3d at 1019. Accordingly, the trial court’s reasoning, consistent with *Sunoco I*, properly concluded that Sunoco has eminent domain powers for Mariner East 2.

D. Collateral Estoppel

Lastly, Condemnee argues that the trial court erred by finding that the *Loper* decision denying Sunoco eminent domain power does not compel the same result in this case. We disagree.

The doctrine of collateral estoppel bars relitigation of an issue where a

question of law or fact essential to a judgment was actually litigated and determined by a court of competent jurisdiction. Collateral estoppel applies only when the issue decided in the prior case and the issue presented in the current case are identical; there was a final judgment on the merits; the issue was essential to the judgment; the party against whom estoppel is asserted had a full and fair chance to litigate the merits; and the party against whom estoppel is asserted was a party or in privity with a party in the prior case.

*8 *Foster v. Colonial Assur. Co.*, 668 A.2d 174, 180–81 (Pa. Cmwlth. 1995) (citation omitted), *aff'd*, 673 A.2d 922 (Pa. 1996).

The condemnees in *Sunoco I* similarly argued that Sunoco's declarations of taking were barred by collateral estoppel based on *Loper*. At issue in *Loper* was whether Sunoco satisfied the definition of "public utility corporation" in the BCL, as a result of the regulation of its interstate service by FERC. However, at the time *Loper* was decided, Sunoco had not yet sought or obtained PUC approval to provide intrastate service. Thus, the *Loper* court addressed only whether Sunoco was a public utility corporation because it was subject to regulation as a public utility by an officer or agency of the United States, *i.e.*, FERC, and did *not* decide whether Sunoco was a public utility corporation because it was subject to regulation as a public utility by the PUC.

However, the *Sunoco I* Court found that, subsequent to the *Loper* decision and after the polar vortex in 2013–14, Sunoco repurposed Mariner East 2 to be both an *interstate* pipeline, as well as an *intrastate* pipeline subject to PUC regulation. Sunoco filed its declarations of taking in Cumberland County as a public utility corporation subject to regulation as a public utility by the PUC. As the question before the trial court and on appeal to this Court was whether Sunoco was subject to regulation as a public utility by the PUC because the Mariner East 2 pipeline was also an intrastate service, we concluded that the issue decided in *Loper* was not the same as in *Sunoco I*, and hence that collateral estoppel did not bar Sunoco's declarations of taking.

Here, as it did in *Sunoco I*, Sunoco presented evidence that, after *Loper* was decided, an intrastate component was added to the Mariner East Project in the form of on-ramps and off-ramps within Pennsylvania, thus, providing for the PUC's regulation. In finding that the *Loper* decision does not bar the instant case, the trial court reasoned:

Relying upon *Loper* as the basis for the application of collateral estoppel in the instant case, Condemnee[] cannot meet [its] burden, as there have been subsequent, significant changes to the character of the Mariner East 2 Project in the two years since Judge Linebaugh's ruling. At the time *Loper* was decided, the Mariner East 2 [P]roject was intended to be only an interstate pipeline, one which crossed

Pennsylvania state lines but contained no stations for the on-loading and off-loading of transported materials within state lines. Thus, *Loper* only addressed whether Sunoco had condemnation authority under federal law for what was then a purely interstate pipeline. Since that time, in response to market conditions, Sunoco has designated, with [the] PUC[s] approval, Mariner East 2 as both an intrastate as well as an interstate pipeline. N.T. at 69–70, 79, 104–105, 143. Therefore, the facts of *Loper* are inapposite to those of the instant case[], and the decision cannot be the basis of Condemnee[s] assertion of collateral estoppel.

Trial Ct. Op. at 9–10 (emphasis added; footnote omitted).¹⁵ Based upon the PUC's approvals of Mariner East 2 as both an intrastate and interstate pipeline since *Loper* was decided, we agree that the issues in the two cases are not identical and, thus, consistent with *Sunoco I*, the trial court properly concluded that collateral estoppel does not compel a different result.

III. Conclusion

*9 Because we discern no error in the trial court's determinations pertaining to the dual regulation of Sunoco's Mariner East 2 project by the PUC and

FERC, Sunoco's status as a public utility, Sunoco's eminent domain powers and collateral estoppel, and these issues are directly controlled by this Court's *Sunoco I* decision with which the trial court's decision is in accord, we affirm the trial court's order overruling Condemnee's Preliminary Objections to Sunoco's Declaration.

ORDER

AND NOW, this 24th day of May, 2017, the Lebanon County Common Pleas Court's March 24, 2016 order is affirmed.

DISSENTING OPINION

COSGROVE, JUDGE

For the reasons set forth in my dissent in *In Re: Condemnation by Sunoco Pipeline, L.P. (Gerhart Appeal)*, (Pa. Cmwlth. No. 220 C.D. 2016, filed May 15, 2017), I dissent here as well.

All Citations

Not Reported in A.3d, 2017 WL 2291693

Footnotes

- 1 Appeals filed by Gerald V. and Katherine M. Thomas (collectively, Thomas) (Pa. Cmwlth. No. 563 C.D. 2016) and Heath K. and Brenda H. Nell (collectively, Nell) (Pa. Cmwlth. No. 564 C.D. 2016) were consolidated with Condemnee's appeal on April 26, 2016. However, because Thomas and Nell have since resolved their disputes with Sunoco, this Court discontinued their appeals by October 16, 2016 order. Only Condemnee's appeal remains active.
- 2 In its Statement of Questions Involved set forth in Condemnee's brief filed with this Court, Condemnee's first issue is whether the trial court erred in finding that Mariner East 2 is both an interstate and intrastate service. Condemnee's second issue is whether Mariner East 2 may be dually regulated by the PUC and FERC. Because both issues involve the same analysis, we combined those issues as Issue 1 herein.
- 3 26 Pa.C.S. §§ 101–1106.
- 4 15 Pa.C.S. §§ 1101–9507. Section 1511(a)(2) of the BCL, 15 Pa.C.S. § 1511(a)(2), provides that “public utility corporations” may exercise the power of eminent domain to condemn property for the transportation of, *inter alia*, natural gas and petroleum products. Section 1103 of the BCL, 15 Pa.C.S. § 1103, defines public utility corporation as “[a]ny domestic or foreign corporation for profit that ... is subject to regulation as a public utility by the [PUC] or an officer or agency of the United States” FERC is an agency of the United States that may regulate an entity as a public utility under this section.
- 5 Condemnee also objected to the sufficiency of Sunoco's bond; however, on December 9, 2015, Sunoco posted a bond agreeable to Condemnee. *See* R.R. at 1469a–1474a. Accordingly, Condemnee's seventh objection was rendered

moot. *See* Trial Court Op. at 12.

- 6 “In an eminent domain case disposed of on preliminary objections this Court is limited to determining if [the trial court’s] necessary findings of fact are supported by competent evidence and if an error of law or an abuse of discretion was committed.” *Sunoco I*, 143 A.3d at 1014 n.17.

- 7 66 Pa.C.S. §§ 101–3316.

- 8 According to the United States Energy Information Administration:

[NGLs] are hydrocarbons—in the same family of molecules as natural gas and crude oil, composed exclusively of carbon and hydrogen. Ethane, propane, butane, isobutane, and pentane are all NGLs ... NGLs are used as inputs for petrochemical plants, burned for space heat and cooking, and blended into vehicle fuel

The chemical composition of these hydrocarbons is similar, yet their applications vary widely. Ethane occupies the largest share of NGL field production. It is used almost exclusively to produce ethylene, which is then turned into plastics. Much of the propane, by contrast, is burned for heating, although a substantial amount is used as petrochemical feedstock

United States Energy Information Administration, *Today in Energy*, April 20, 2012, available at <http://www.eia.gov/todayinenergy/detail.cfm?id=5930> &=email (last visited May 20, 2016).

- 9 We acknowledge that this Court’s unreported memorandum opinions may be cited “for [their] persuasive value, but not as a binding precedent.” Section 414(a) of the Commonwealth Court’s Internal Operating Procedures, 210 Pa. Code § 69.414(a). We reference this Court’s *In re Condemnation of Sunoco Pipeline, L.P.* (Pa. Cmwlth. No. 220 C.D. 2016, filed September 2, 2016) decision herein for its persuasive value.

- 10 The PUC’s August 21, 2014 Order states:

Subject to continued shipper interest, Sunoco intends to undertake a second phase of the Mariner East [P]roject, which will expand the capacity of the project by constructing: (1) a 16[-]inch or larger pipeline, paralleling its existing pipeline from Houston, PA to the Marcus Hook Industrial Complex and along much of the same route, and (2) a new 15 miles of pipeline from Houston, PA to a point near the Pennsylvania–Ohio boundary line. This second phase, sometimes referred to as ‘Mariner East 2’, will increase the take-away capacity of natural gas liquids from the Marcellus Shale and will enable Sunoco to provide additional on-loading and off-loading points within Pennsylvania for both intrastate and interstate propane shipments.

R.R. at 806a–807a.

- 11 42 U.S.C. § 60502.
- 12 Condemnee’s counsel in the instant appeal, Michael F. Faherty, Esquire, also represented the condemnees in *Sunoco I*.
- 13 The *Sunoco I* condemnee made the same arguments to the trial court, but did not develop the corporate resolution argument on appeal to this Court. See *Sunoco I*, 143 A.3d at 1011; see also *id.* at 1014 n.16.
- 14 Since Condemnee expressly objected to Sunoco’s need for two pipelines in Objection 5 (see R.R. at 925a), there is no merit to Sunoco’s argument (see *Sunoco Br.* at 4) that the issue was waived.
- 15 The *Sunoco I* Court similarly held:
[The trial court] did not err in finding that collateral estoppel does not bar this action. The issue decided in *Loper* is not the same issue raised in this case, and so it does not meet the first condition. At issue in *Loper* was whether Sunoco satisfied the definition of public utility corporation as a result of the regulation of its interstate service by FERC and not as a result of PUC’s regulation of its

intrastate service. At the time *Loper* was decided, Sunoco had not yet sought or obtained[the] PUC[s] approval to provide intrastate service.... The *Loper* court addressed only whether Sunoco was a public utility corporation because it was subject to regulation as a public utility by an officer or agency of the United States, i.e., FERC, and did not decide whether Sunoco was a public utility corporation because it was subject to regulation as a public utility by [the] PUC, the issue raised here. Although [the c]ondemnees disagree that Sunoco can prevail on this issue that is a separate inquiry from whether the issue was previously decided. For these reasons, we agree that collateral estoppel is not a bar to this case.

Id. at 1015 (emphasis added).

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IN THE COURT OF COMMON PLEAS
OF LEBANON COUNTY, PENNSYLVANIA
CIVIL DIVISION

IN RE: CONDEMNATION BY :
SUNOCO PIPELINE L.P. OF :
PERMANENT AND : No. 2015-1338
TEMPORARY RIGHTS OF :
WAY FOR THE :
TRANSPORTATION OF :
ETHANE, PROPANE, LIQUID :
PETROLEUM GAS, AND :
OTHER PETROLEUM :
PRODUCTS IN THE :
TOWNSHIP OF :
HEIDELBERG, LEBANON :
COUNTY, PENNSYLVANIA, : EMINENT
OVER THE LANDS OF : DOMAIN
HOMES FOR AMERICA, INC. :

IN RE: CONDEMNATION BY :
SUNOCO PIPELINE L.P. OF :
PERMANENT AND : No. 2015-1200
TEMPORARY RIGHTS OF :
WAY FOR THE :
TRANSPORTATION OF :
ETHANE, PROPANE, LIQUID :
PETROLEUM GAS, AND :
OTHER PETROLEUM :
PRODUCTS IN THE :

TOWNSHIP OF :
 HEIDELBERG, LEBANON :
 COUNTY, PENNSYLVANIA, :
 OVER THE LANDS OF : EMINENT
 HEATH K. NELL AND : DOMAIN
 BRENDA H. NELL :

IN RE: CONDEMNATION BY :
 SUNOCO PIPELINE L.P. OF :
 PERMANENT AND : No. 2015-1197
 TEMPORARY RIGHTS OF :
 WAY FOR THE :
 TRANSPORTATION OF :
 ETHANE, PROPANE, LIQUID :
 PETROLEUM GAS, AND :
 OTHER PETROLEUM :
 PRODUCTS IN THE :
 TOWNSHIP OF :
 HEIDELBERG, LEBANON :
 COUNTY, PENNSYLVANIA, :
 OVER THE LANDS OF : EMINENT
 GERALD V. THOMAS AND : DOMAIN
 KATHERINE M. THOMAS :

ORDER OF COURT

AND NOW, this 11th day of April, 2016, after careful consideration of the Notice of Appeal to the Commonwealth Court filed by the Condemnees' from our Order and Opinion dated March 24, 2016, we fully

addressed our reasoning regarding the merits of Condemnees' Preliminary Objections in our Opinion of March 24, 2016. Therefore, we rest upon the reasoning set forth in the Opinion of March 24, 2016 (*In re: Condemnation by Sunoco Pipeline L.P. over the Lands of Homes for America, Inc.*; *In re: Condemnation by Sunoco Pipeline L.P. over the Lands of Nell*; *In re: Condemnation by Sunoco Pipeline L.P. over the Lands of Thomas* (Leb.C.C.C.P. Nos. CP-38-CV-1338-2016, CP-38-CV-1200-2016, CP-38-CV-1197-2016 (March 24, 2016)) with regard to the requirements of Pa.R.A.P. Rule 1925(a).

Accordingly, the Prothonotary of Lebanon County is directed to transmit the record of the above-stated case, together with this Order, to the Commonwealth Court of Pennsylvania pursuant to the requirements of Pa.R.A.P. 1931.

BY THE COURT:

_____, S.J.

ROBERT J. EBY

RJE/kw

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Prothonotary

IN THE COURT OF COMMON PLEAS
OF LEBANON COUNTY, PENNSYLVANIA
CIVIL DIVISION

IN RE: CONDEMNATION BY :
SUNOCO PIPELINE L.P. OF :
PERMANENT AND : No. 2015-1338
TEMPORARY RIGHTS OF :
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ETHANE, PROPANE, LIQUID :
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 OVER THE LANDS OF : EMINENT
 HEATH K. NELL AND : DOMAIN
 BRENDA H. NELL :

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 COUNTY, PENNSYLVANIA, :
 OVER THE LANDS OF : EMINENT
 GERALD V. THOMAS AND : DOMAIN
 KATHERINE M. THOMAS :

APPEARANCES:

MICHAEL FAHERTY, ESQ. FOR CONDEMNNEES
 TARA HORVATH, ESQ.

ALAN BOYNTON, ESQ. FOR CONDEMNOR

KANDICE KERWIN HULL, ESQ.

OPINION BY EBY, S.J., MARCH 24, 2016

Sunoco Pipeline L.P. (“Sunoco”) initiated the instant actions in July and August of 2015 by filing Declarations of Taking against three parcels of land in Heidelberg Township, Lebanon County to facilitate its Mariner East 2 pipeline project. Homes for America, Inc., Heath K. and Brenda H. Nell, and Gerald V. and Katherine M. Thomas (“Condemnees”) separately filed timely Preliminary Objections to those Declarations, challenging Sunoco’s authority to pursue eminent domain under 15 Pa.C.S.A. §1511. Following a Motion to Consolidate filed by Condemnees, the Court conducted a consolidated hearing on the Preliminary Objections on November 30, 2014. The parties subsequently provided the Court with Proposed Findings of Fact and Conclusions of Law, as well as supplemental legal authority supporting their respective positions. After a thorough review of the Preliminary Objections and the responses filed thereto, the testimony presented at the November 30 hearing, and the complete record of the case, we intend to deny the Preliminary Objections of Condemnees in their entirety.

Discussion

Sunoco filed the challenged Declarations of Taking under the authority of the Pennsylvania Business Corporation Law, (“BCL”), at 15 Pa.C.S.A. §1511 (a)(2). The pertinent section of the BCL provides:

(a) General Rule.—A public utility corporation shall, in addition to any other power of eminent domain conferred by any other statute, have the right to take, occupy and condemn property for one or more of the following principal purposes and ancillary purposes reasonably necessary or appropriate for the accomplishment of the principal purposes: (1) *** (2) The transportation of artificial or natural gas, electricity, petroleum or petroleum products or water or any combination of such substances for the public.

Id. The BCL defines a “public utility corporation” as “[a]ny domestic or foreign corporation for profit that: (1) 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.A. §1103. The term “public utility corporation” is not limited to corporations, but also includes partnerships and limited liability companies. 18 Pa.C.S. §8102(a)(2).

Condemnees have challenged the Declarations of Taking by means of Preliminary Objections, the exclusive method provided by statute for such a challenge. 26 Pa.C.S. §306(a)(3); *Robinson Township v. Commonwealth*, 52 A.3d 463, 487 (Pa. Commw. Ct. 2012) Preliminary objections in eminent domain proceedings have a different purpose from those filed in other civil actions. *In re Condemnation Proceeding by S. Whitehall Twp.*, 822 A.2d 142 (Pa.Cmwlth. 2003). They are intended to “resolve expeditiously the factual and legal challenges to a declaration of taking before the parties proceed to determine damages, and are limited to challenging “[t]he power or right of the

condemnor to appropriate the condemned property[,] . . . sufficiency of the security[,] . . . declaration of taking[,] . . . [or a]ny other procedure followed by the condemnor.” *Id.*; 26 Pa.C.S.A. §306.

Both the burden of production and the burden of proof lie with those raising the objections. *In re Condemnation Proceeding by S. Whitehall Twp.*, 822 A.2d at 145. The burden of production is a “heavy” one. *In re Condemnation No.2 by the Commonwealth*, 943 A.2d 997, 1002 (Pa.Cmwth. 2007). 822 A.2d at 145. Condemnees also bear the burden of proving the merits of their preliminary objections. See *Redevelopment Auth. v. Bratic*, 45 A.3d 1168, 1174 (Pa. Cmwth. 2012) This burden is also considered “heavy.” *In re Condemnation by Lower Paxton Twp. Of Sanitary Sewer Easement*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 170 at 21 (C.P. Dauphin 2010). Condemnees’ failure to carry either their burden of production or their burden of proof requires dismissal of their challenges. *In re Condemnation No.2 by the Commonwealth*, 943 A.2d at 1002.

With this legal framework in mind, we will consider each of Condemnees’ Preliminary Objections in turn.

1. Sunoco’s Power or Right as a public utility corporation to condemn the land

Condemnees first challenge Sunoco’s power or right to condemn, arguing that Sunoco is not a public utility corporation regulated by the Public Utility Commission (“PUC”), because Mariner East 2, the pipeline for which easement is sought, is an interstate pipeline. We disagree with Condemnees’ conclusions.

First, we are satisfied that Sunoco is a public utility corporation under the definition of the BCL. At the November 30 hearing, Sunoco offered numerous exhibits establishing its regulation by the PUC, including several Certificates of Public Convenience. Condemnor's Exhibits 2, 3, 4, 5, 6, 7, 8, and 9. We find the CPCs to be particularly significant, because the PUC grants CPCs only to public utilities offering public utility service. 66 Pa.C.S. §§ 102, 1101, 1102, 1103; *Bethlehem Steel Corp. v. Pennsylvania Public Util. Comm'n*, 680 A.2d at 1208, 1996 Pa. Commw. LEXIS 290, *16 (Pa. Commw. 1996); *Popowsky v. Pennsylvania Public Util. Comm'n*, 166 Pa. Cmth. 690, 700, 647 A.2d 302, 307, 1994 Pa. Commw. LEXIS 477, *15 (Pa. Commw. 1994). Indeed, the grant of a CPC by the PUC constitutes the PUC's declaration that the entity to which it is issued is a public utility regulated by the PUC and offers a public utility service. *Id.*

We also find persuasive the express language of the PUC Orders entered into evidence, some which state outright that the Commission considers Sunoco to be a public utility. For example, Condemnor's Exhibit 9, an Order and Opinion authored by the PUC in October of 2014, states: "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." N.T. November 30, 2015 at 155, Condemnor's Exhibit 9 at 33. That same Order and Opinion states: "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.” N.T. November 30, 2015 at 155, Condemnor’s Exhibit 9 at 36. Lebanon County falls within the service area defined by the CPCs granted by the PUC to Sunoco for Mariner East. N.T. November 30, 2015 at 156.

Condemnees argue that the PUC-granted CPCs and other regulation of the Mariner East project by Sunoco are not controlling, because Sunoco has “mischaracterize[d] Mariner East 2 from an interstate to an interstate pipeline.” Condemnees’ Preliminary Objections at 3. Condemnees argue further that, while Sunoco is a public utility corporation regulated by the PUC for purposes of Mariner East 1, a Pennsylvania pipeline, “Mariner East 2 is a pipeline which crosses state lines and is entirely, and only, within the jurisdiction of the Federal Energy Regulatory Commission.” Condemnees’ Preliminary Objections at 3.

Condemnees’ argument is not persuasive when we consider the express language of the PUC orders admitted at the hearing. Condemnor’s Exhibit 6, dated August 21, 2014, states that “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...Additionally, the proposed service will offer a safer and more economic (sic) transportation alternative for shippers to existing rail and trucking services.” N.T. November 30, 2015 at 150. In the same order, the PUC noted that “Sunoco intends to undertake a second phase of the Mariner East project....This second phase, sometimes referred to as ‘Mariner East 2’, will increase the take-away capacity of natural gas liquids from the Marcellus Shale and will enable Sunoco to provide additional on-

loading and off-loading points *within Pennsylvania for both intrastate and interstate propane shipments.*" (Emphasis added) N.T. November 30, 2015 at 151. In light of such express language, we are persuaded the PUC clearly anticipated that Mariner East 2 would provide both interstate and intrastate public utility service.

Likewise, we are not persuaded by Condemnees' argument that the Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction over Mariner East 2. While interstate transportation of petroleum products is regulated by FERC, intrastate transportation of such products is regulated by the PUC. Nothing prevents interstate and intrastate shipments in the same pipeline, and Condemnees have provided the court with no controlling authority¹

¹ Condemnees' reliance on *Williams Olefins Feedstock Pipeline, LLC* 145 FERC ¶ 61,303 is misplaced. That case did not address in any way whether a pipeline that provides both interstate and intrastate service is subject to exclusive regulation by FERC. Likewise, the case of *Clean Air Council, et al. v. Sunoco Pipeline, L.P.*, August Term 2015 No.03484 (C.P. Phila. Feb.5, 2016), submitted to this Court by correspondence dated February 24, 2016, has no relevance to the determination of whether Mariner East 2 is engaged in intrastate service or whether FERC has exclusive jurisdiction over pipelines that provide both interstate and intrastate service. Finally, 49 CFR Part 195, Appendix A, cited by Condemnees' as supporting their position that federal regulation preempts PUC regulation of Mariner East 2, provides no such support. The regulations cited by Condemnees are not FERC regulations concerning the transportation and utility aspects of liquids pipelines. Rather, enforced by the Pipeline and Hazardous Materials Safety Administration (not FERC), 49 CFR Part 195, Appendix A regulates pipeline safety. The regulations contained therein therefore do not support a claim of federal preemption over the utility service of a pipeline that provides both interstate and intrastate service. As noted above, such service is regulated by FERC for interstate service and a state's

suggesting that the FERC has exclusive jurisdiction over such dually-natured shipments. FERC opinions, in fact, suggest the opposite. *See, e.g., Amoco Pipeline Company* 62 FERC ¶ 61119, at 61803, 1993 WL 25751, at 4 (February 8, 1993) (recognizing dual jurisdiction and noting that interstate service on the Wyoming pipeline at issue was covered by a FERC tariff, while intrastate service was subject to regulation by the Wyoming Public Service Commission).

In light of the above, we do not believe the PUC is preempted by federal regulation from regulating the intrastate service of Mariner East 2. Therefore, based upon our finding that the PUC, through issuance of CPCs and other orders, has regulated the Mariner East service, including Mariner East 2, we believe Sunoco is a “public utility corporation” as that term is defined by the BCL. As such, it has the power or right to condemn property under Section 1511(a)(2) of the BCL.

2. Defects in the Corporate Resolution and Declaration of Taking

Condemnees next object that the Sunoco Resolution approving eminent domain for Mariner East 2 is defective because it does not specify approval of an intrastate pipeline. We disagree.

15 Pa.C.S. 1511(g)(2) provides, in relevant part, that a petition for approval and order filing bond “shall be accompanied by the bond and a certified copy of the resolution of condemnation. The resolution

utility commission—in this instance the PUC—for intrastate service.

shall describe the nature and extent of the taking.” *Id.* We find that the resolutions to Condemn submitted by Sunoco satisfy the requirements of §1511. Contrary to Condemnees’ Preliminary Objection, the Resolutions do not specify that they are for an interstate pipeline, Rather, they state that they are for the Mariner East 2 Project, which as noted above, we have found to be both an interstate and intrastate pipeline. The Resolutions further specify that they cover Lebanon County and specifically identify the subject properties and the extent of the easements sought on those properties. We therefore find that they are sufficiently specific to authorize the condemnations, and Condemnees’ preliminary objection on this basis is without merit.

3. Collateral Estoppel

Condemnees’ next objection is based upon the doctrine of collateral estoppel. They argue that “th[e] identical issue of whether Sunoco has the power of eminent domain to condemn for its Mariner East 2 pipeline was previously decided against Sunoco in *Loper v. Sunoco*”, No. 2013-SU-004518-05 (C.P. York Feb. 24, 2014) Condemnees’ preliminary Objections at 5. Condemnees’ argue that, in the *Loper* decision, Judge Stephen P. Linebaugh “reiterated Sunoco’s stated purpose for the Project was to transport natural gas liquids through an interstate pipeline. ...Sunoco may not avoid collateral estoppel by mischaracterizing the interstate pipeline as an intrastate pipeline.” *Id.*

The doctrine of collateral estoppel prevents the relitigation of identical issues by similar parties. *McGill v. Southwark Company*, 828 A.2d 430

(Cmwlth. 2003) It is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. *Piso v. Weirton Steel Co.*, 235 Pa. Super. 517, 530, 345 A.2d 728, 734 (1975) Collateral estoppel does not necessarily apply, however, when significant facts have changed in a case. As stated by the United States Supreme Court, “[A] subsequent modification of the significant facts or [a] change or development in the controlling legal principles may make [a] determination obsolete or erroneous...” *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 599, 68 S.Ct. 715, 720, 92 L.Ed. 898 (1948). Where facts have changed between two cases, a party is not precluded from introducing evidence as to such changes. *Piso*, 235 Pa. Super. At 530, 345 A.2d at 734.

Thus, one seeking to invoke the doctrine of collateral estoppel must establish five elements, with the first element being that the issue to be decided in the second case is identical to the issue to be decided in the first case. *Thompson v. Karastan Rug Mills*, 228 Pa. Super. 260, 323 A.2d 341 (1974). Relying upon *Loper* as the basis for the application of collateral estoppel in the instant case, Condemnees cannot meet this burden, as there have been subsequent, significant changes to the character of the Mariner East 2 Project in the two years since Judge Linebaugh’s ruling. At the time *Loper* was decided, the Mariner East 2 project was intended to be only an interstate pipeline, one which crossed Pennsylvania state lines but contained no stations for the on-loading and off-loading of transported materials within state lines. Thus, *Loper* only addressed whether Sunoco had condemnation authority under federal law for

what was then a purely interstate pipeline. Since that time, in response to market conditions, Sunoco has designated, with PUC approval, Mariner East 2 as both an intrastate as well as an interstate pipeline. N.T. at 69-70, 79, 104-105, 143. Therefore, the facts of *Loper* are inapposite to those of the instant cases, and the decision cannot be the basis of Condemnees' assertion of collateral estoppel.²

4. Exclusive interstate nature of Mariner East 2

Condemnees' fourth objection asserts that the Declarations of Taking are false, because they portray Mariner East 2 as an intrastate pipeline, when in fact it is a FERC-regulated interstate pipeline. As we explained above in addressing Condemnees' first preliminary objection, we are satisfied that Mariner East 2 is intended to and has been approved to provide both intrastate and interstate pipeline service.

² Indeed, since Sunoco's recharacterization of Mariner East 2 as both an interstate and intrastate pipeline, Orders entered by several Courts of Common Pleas within this Commonwealth have either expressly or implicitly upheld Sunoco's status as a PUC-regulated public utility with the power of eminent domain. See *In re Condemnation by Sunoco Pipeline L.P. over the lands of R. Scott Martin and Pamela S. Martin*, No. 2015-04052, *In re Condemnation by Sunoco Pipeline L.P. over the lands of Douglas M. Fitzgerald and Lyndsey M. Fitzgerald*, No. 2015-04053, and *In re Condemnation by Sunoco Pipeline L.P. over the lands of Harvey A. Nickey and Anna M. Nickey*, No. 2015-04055 (C.P. Cumberland, Sept. 29, 2015); *Sunoco Pipeline L.P. v. Cox*, No. 2015-411 (C.P. Huntington April 13, 2015); *Sunoco Pipeline L.P. v. Barroner*, No. 2015 GN 2704 (C.P. Blair Sept. 11, 2015); *Sunoco Pipeline v. Ross*, No. 2015 CV 02715 EQ (C.P. Dauphin Apr. 30, 2015); *Sunoco Pipeline L.P. v. Sarfert*, No. 2015 CV 02719 (C.P. Dauphin Apr. 30, 2015)

Therefore, we do not find that the Declaration of Taking is false.

5. FERC approval of only one pipeline

Condemnees next object that the Declarations of Taking seek approval for two pipelines, while FERC only approved one pipeline. Again, as stated above, we are persuaded that Sunoco's Mariner East 2 pipeline is an intrastate as well as an interstate pipeline, and it therefore is subject to regulation not just by FERC, but also by the PUC. We note that Condemnor's Exhibit 9, the Order and Opinion authored by the PUC in October of 2014, expressly states: "Sunoco has the authority to provide intrastate petroleum and refined petroleum products... [T]his 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." *Id.* at 39. Condemnees' objection, in the face of such language, is clearly meritless.

6. Sunoco's need for a FERC Certificate of Public Convenience and Necessity

Condemnees next object that Sunoco cannot exercise eminent domain power under Pennsylvania law without a CPC issued by FERC. In support of that position, they cite one case, *National Fuel Gas Corporation v. Kovalchick Corporation*, 2005 WL 3675407, 74 Pa. D. & C.4th 22 (Pa. Com.Pl. 2005), in which a public utility company had the power of

eminent domain because it had a Certificate of Public Convenience and Necessity granted by FERC.

The *National* case is a red herring. The pipelines involved in *National* were to be used for the interstate shipments of natural gas, which are governed by the Natural Gas Act (“NGA”), 15 U.S.C. §717(a)(5).³ The pipeline shipments in the instant case do not involve natural gas; they involve natural gas liquids, which are not covered within the ambit of the NGA and not subject to the exclusive jurisdiction of FERC when they are shipped intrastate. Because Sunoco’s intrastate service for natural gas liquids is subject to regulation by the PUC, Sunoco is a public utility corporation with the right of eminent domain under the BCL. A CPC from FERC is not required, and with regards to Sunoco’s proposed intrastate service, not within FERC’s jurisdiction to grant.

7. Challenge to the sufficiency of the bond

Condemnees’ final objection relates to the sufficiency of the bonds originally proposed by Sunoco. With the agreement of Sunoco, this Court entered an Order on December 15, 2015, directing Sunoco to post bond in the amounts proposed by Condemnees at the

³ FERC has regulatory authority over the construction of natural gas pipelines that it does not possess over pipelines that are designated for natural gas liquids. *Compare* 15 U.S.C. §717f with *Williams Pipe Co.*, Opinion No. 154, 21 FERC §P61,260, at 61,599 (1982)(“Post 1906-amendments to the Interstate commerce Act (ICA) gave [FERC’s predecessor] a veritable arsenal of regulatory controls over the construction of new facilities, the abandonment of service, the quality of service and the finances of the carriers. But these augmented powers were not granted with respect to oil pipelines.”)

November 30, 2015 hearing. On December 22, 2015, Sunoco filed the required bonds. Therefore, Condemnees' objection as to this issue is now moot.

8. The public purpose test

Though not raised in their Preliminary Objections, at both the November 30, 2015 hearing and in their subsequent filings, Condemnees have attempted to make a "public purpose or benefit" argument. They assert that, even if Sunoco has preliminary approval for an intrastate pipeline from the PUC, this Court must now review whether Mariner East 2 satisfies the "public purpose test", which requires Sunoco to prove that "said power is necessary or proper for the service, accommodation, convenience, or safety of the public." Condemnees' Findings of Fact and Conclusions of Law at 9. We disagree.

First, this challenge was not identified in Condemnees' Preliminary Objections. Therefore, it is waived. *See, e.g., In re S.E. Cent. Bus. Dist. Redevelopment #1*, 946 A.2d 1143 (Pa.Cmwth. 2008); *Benek v. Pennsylvania Game Comm'n*, 49 Pa. Cmwth. 63, 411 A.2d 267, 269 (1980)

Moreover, even if this objection were not waived, we do not believe that it is within the jurisdiction of this Court to conduct such an analysis in response to Preliminary Objections filed by Condemnees. We are persuaded that the determination as to whether a particular service by a public utility will be in the public's interest is a determination to be made by the body having jurisdiction over public utilities, in this instance the PUC. In determining whether to grant CPCs, the PUC investigates and determines whether

a company will be acting in the interest of the public. As to the public benefit of the Mariner East project, the PUC has ruled on multiple occasions that the project is in the public interest. *See, e.g.* Condemnor's Exhibit 4 at 10; Condemnor's Exhibit 6, at 4.

We are satisfied Condemnees' Preliminary Objections, are without merit and will enter an appropriate order.

IN THE COURT OF COMMON PLEAS
OF LEBANON COUNTY, PENNSYLVANIA
CIVIL DIVISION

IN RE: CONDEMNATION BY :
SUNOCO PIPELINE L.P. OF :
PERMANENT AND : No. 2015-1338
TEMPORARY RIGHTS OF :
WAY FOR THE :
TRANSPORTATION OF :
ETHANE, PROPANE, LIQUID :
PETROLEUM GAS, AND :
OTHER PETROLEUM :
PRODUCTS IN THE :
TOWNSHIP OF :
HEIDELBERG, LEBANON :
COUNTY, PENNSYLVANIA, : EMINENT
OVER THE LANDS OF : DOMAIN
HOMES FOR AMERICA, INC. :

IN RE: CONDEMNATION BY :
SUNOCO PIPELINE L.P. OF :
PERMANENT AND : No. 2015-1200
TEMPORARY RIGHTS OF :
WAY FOR THE :
TRANSPORTATION OF :
ETHANE, PROPANE, LIQUID :
PETROLEUM GAS, AND :
OTHER PETROLEUM :
PRODUCTS IN THE :

TOWNSHIP OF :
 HEIDELBERG, LEBANON :
 COUNTY, PENNSYLVANIA, :
 OVER THE LANDS OF : EMINENT
 HEATH K. NELL AND : DOMAIN
 BRENDA H. NELL :

IN RE: CONDEMNATION BY :
 SUNOCO PIPELINE L.P. OF :
 PERMANENT AND : No. 2015-1197
 TEMPORARY RIGHTS OF :
 WAY FOR THE :
 TRANSPORTATION OF :
 ETHANE, PROPANE, LIQUID :
 PETROLEUM GAS, AND :
 OTHER PETROLEUM :
 PRODUCTS IN THE :
 TOWNSHIP OF :
 HEIDELBERG, LEBANON :
 COUNTY, PENNSYLVANIA, :
 OVER THE LANDS OF : EMINENT
 GERALD V. THOMAS AND : DOMAIN
 KATHERINE M. THOMAS :

ORDER OF COURT

AND NOW, this 24th day of March, 2016, after careful consideration of the Preliminary Objections filed by Condemnees and the complete record of the case, we note and direct as follows:

1. The Mariner East 2 Pipeline will provide both interstate and intrastate service for ethane, propane, and other petroleum products in the Commonwealth.
2. Such pipeline service is dually-regulated, with the Federal Energy Regulatory Commission having the authority to regulate interstate service and the Pennsylvania Public Utility Commission having the authority to regulate intrastate service.
3. Since Sunoco Pipeline L.P. is regulated by the Public Utility Commission for the Mariner East 2 Project, it meets the definition of a public utility providing public utility service under the Pennsylvania Business Corporations Law.
4. As a public utility providing public utility service under the Business Corporations law, Sunoco Pipeline has the power of eminent domain.
5. The doctrine of collateral estoppel does not apply to compel a different result.
6. The bonds posted by Sunoco Pipeline L.P. in response to our Order of December 15, 2015 are adequate to cover the damages anticipated by Condemnees.
7. In light of the above, the Preliminary Objections of Condemnees are DENIED in their entirety.

BY THE COURT:

_____, S.J.

ROBERT J. EBY

RJE/kw

pc: Kandice Kerwin Hull, Esq., McNees Wallace &
Nurick LLC, 100 Pine Street, Box 1166,
Harrisburg, PA 17108
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Kathy G. Wingert, Esq.
Court Administration
Prothonotary

No. _____

In The

SUPREME COURT OF THE UNITED STATES

IN RE: CONDEMNATION BY SUNOCO PIPELINE,
L.P. OF PERMANENT AND TEMPORARY RIGHTS
OF WAY FOR THE TRANSPORTATION OF
ETHANE, PROPANE, LIQUID PETROLEUM GAS,
AND OTHER PETROLEUM PRODUCTS IN THE
TOWNSHIP OF HEIDELSBURG, LEBANON
COUNTY, PENNSYLVANIA, OVER THE LANDS
OF HOMES FOR AMERICA, INC.,
Petitioners

vs.

SUNOCO PIPELINE, L.P.
Respondent,

On Petition for Certiorari from the Supreme Court of
Pennsylvania

**APPENDIX VOLUME II
PETITION FOR A WRIT OF CERTIORARI**

Michael F. Faherty
Counsel of Record
Faherty Law Firm
75 Cedar Avenue
Hershey, PA 17033
(717) 256-3000

**APPENDIX TO THE PETITION FOR A WRIT
OF CERTIORARI**

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143 A.3d 1000

Commonwealth Court of Pennsylvania.

In re: Condemnation by SUNOCO PIPELINE, L.P.
of Permanent and Temporary Rights of Way for
the Transportation of Ethane, Propane, Liquid
Petroleum Gas, and other Petroleum Products in
the Township of North Middleton, Cumberland
County, Pennsylvania, over the Lands of R. Scott
Martin and Pamela S. Martin.

Appeal of: R. Scott Martin and Pamela S. Martin.

In re: Condemnation by Sunoco Pipeline, L.P. of
Permanent and Temporary Rights of Way for the
Transportation of Ethane, Propane, Liquid
Petroleum Gas, and other Petroleum Products in
the Township of North Middleton, Cumberland
County, Pennsylvania, over the Lands of Douglas
M. Fitzgerald and Lyndsey M. Fitzgerald.

Appeal of: Douglas M. Fitzgerald and Lyndsey M.
Fitzgerald.

In re: Condemnation by Sunoco Pipeline, L.P. of
Permanent and Temporary Rights of Way for the
Transportation of Ethane, Propane, Liquid
Petroleum Gas, and other Petroleum Products in
the Township of North Middleton, Cumberland
County, Pennsylvania, over the Lands of Harvey
A. Nickey and Anna M. Nickey.

Appeal of: Harvey A. Nickey and Anna M. Nickey.

Argued March 9, 2016.

|

Decided July 14, 2016.

Synopsis

Background: Pipeline service operator sought to condemn property, and condemnees filed objections. The Court of Common Pleas, Cumberland County, Nos. 2015–04052, 2015–04053 and 2015–04055, Guido, J., overruled the objections. Condemnees appealed.

Holdings: The Commonwealth Court, Nos. 1979 C.D. 2015, 1980 C.D. 2015, 1981 C.D. 2015, Renée Cohn Jubelirer, J., held that:

[1] collateral estoppel did not bar action;

[2] operator was public utility corporation empowered to exercise eminent domain;

[3] operator had power to condemn property for construction of pipeline; and

[4] there was no basis for the Court of Common Pleas to review the Public Utility Commission's (PUC) determination of public need.

Affirmed.

P. Kevin Brobson, J., filed dissenting opinion.

Patricia A. McCullough, J., filed dissenting opinion.

West Headnotes (16)

[1] Public Utilities~~Regulation~~

The Federal Energy Regulatory Commission (FERC) is an agency of the United States that may regulate an entity as a public utility under the Business Corporation Law of 1988 (BCL). 15 Pa.C.S.A. § 1103.

Cases that cite this headnote

[2] Eminent Domain~~Nature and source of power~~

Simply being subject to Public Utility Commission (PUC) regulation is insufficient for an entity to have the power of eminent domain. 66 Pa.C.S.A. § 1104.

Cases that cite this headnote

[3] Carriers~~Power to control and regulate~~
Gas~~Mains, pipes, and appliances~~

It is the Public Utility Commission (PUC), and not the Federal Energy Regulatory Commission

(FERC), that has authority to regulate intrastate shipments of natural gas and petroleum products.

1 Cases that cite this headnote

[4] **Eminent Domain** ~~Review~~ Matters concluded

Issue decided in previous case regarding pipeline service operator's plans to construct interstate natural gas pipeline was not same issue raised in operator's petition to condemn property after pipeline was repurposed to be interstate and intrastate pipeline, and therefore collateral estoppel did not bar action; prior case addressed only whether operator was public utility corporation because it was subject to regulation as public utility by Federal Energy Regulatory Commission (FERC), and did not decide whether operator was public utility corporation because it was subject to regulation as public utility by Public Utility Commission (PUC).

1 Cases that cite this headnote

[5] **Eminent Domain** ~~Review~~ Review

In an eminent domain case disposed of on

preliminary objections the Commonwealth Court is limited to determining if the court of common pleas' necessary findings of fact are supported by competent evidence and if an error of law or an abuse of discretion was committed.

2 Cases that cite this headnote

- [6] **Judgment**—Matters actually litigated and determined

Collateral estoppel bars any subsequent action where the sole issue requiring judgment was litigated previously.

1 Cases that cite this headnote

- [7] **Judgment**—Nature and requisites of former adjudication as ground of estoppel in general

For collateral estoppel to apply, the following conditions must be met: (1) the issue or issue of fact previously determined in a prior action are the same, with no requirement that the cause of action be the same, (2) the previous judgment is final on the merits, (3) the party against whom the doctrine is invoked is identical to the party in the prior action, and (4) the party against whom

estoppel is invoked had full and fair opportunity to litigate the issue in the prior action.

1 Cases that cite this headnote

[8] Eminent Domain—To Private Corporation

Service to be provided by natural gas pipeline involved both interstate service, subject to Federal Energy Regulatory Commission (FERC) regulation, and intrastate service, subject to Public Utility Commission (PUC) regulation, and therefore pipeline service operator was public utility corporation empowered to exercise eminent domain, despite contention that pipeline was solely in interstate commerce; pipeline was to consist of physical structure with access points in Ohio, West Virginia, and Pennsylvania, product was to be placed into pipeline and removed at multiple points within Pennsylvania, and pipeline operator had filed, and received PUC approval, of multiple tariffs applicable to operator's provision of intrastate service. 15 Pa.C.S.A. § 1511.

Cases that cite this headnote

[9] Eminent Domain—To Private Corporation

Public Utility Commission (PUC) regulated intrastate shipments of natural gas liquids, including service provided by pipeline that was authorized expansion of existing service, and therefore pipeline service operator had power of eminent domain to condemn property for construction of pipeline; operator's certificates of public convenience applied to both existing service and to planned expansion, and operator's approved tariffs proposed to add new origin point for west-to-east intrastate movements of propane, based on the certificates issued.

Cases that cite this headnote

[10] **Eminent Domain** Jurisdiction of courts in general

There was no basis for court of common pleas to review Public Utility Commission's (PUC) determination that public need was demonstrated by pipeline service operator in application to condemn property to construct natural gas pipeline; PUC followed its statutory mandate and evaluated issues within its purview, and allowing such review would have permitted collateral attacks on PUC decisions and would have been contrary to statute that placed review within authority of Commonwealth Court. 15 Pa.C.S.A. §§ 1103,

1511(a)(2); 42 Pa.C.S.A. § 763; 66 Pa.C.S.A. § 1103(a); 15 Pa.C.S.A. § 1104 (Repealed).

Cases that cite this headnote

[11] Public Utilities—Powers and Functions

The Public Utility Commission (PUC) is charged with responsibility to determine which entities are public utilities and to regulate how public utilities provide public utility service.

1 Cases that cite this headnote

[12] Eminent Domain—Jurisdiction

While courts of common pleas have jurisdiction to review whether an entity attempting to exercise eminent domain power meets the criteria of the Business Corporation Law of 1988 (BCL), that jurisdiction does not include the authority to revisit Public Utility Commission (PUC) adjudications. 15 Pa.C.S.A. §§ 1103, 1511(a)(2); 15 Pa.C.S.A. § 1104 (Repealed).

Cases that cite this headnote

[13] **Eminent Domain**—Evidence as to right to take

A certificate of public convenience issued by the Public Utility Commission (PUC) is prima facie evidence that PUC has determined that there is a public need for the proposed service and that the holder is clothed with the eminent domain power. 15 Pa.C.S.A. §§ 1103, 1511(a)(2); 15 Pa.C.S.A. § 1104 (Repealed).

7 Cases that cite this headnote

[14] **Eminent Domain**—Jurisdiction of courts in general

The Eminent Domain Code does not permit a court of common pleas to review the public need for a proposed service by a public utility that has been authorized by the Public Utility Commission (PUC) through the issuance of a certificate of public convenience. 15 Pa.C.S.A. §§ 1103, 1511(a)(2); 26 Pa.C.S.A. § 306(a); 15 Pa.C.S.A. § 1104 (Repealed).

6 Cases that cite this headnote

- [15] **Public Utilities**—Jurisdiction of courts in advance of or pending proceedings before commission

Determinations of public need for a proposed utility service are made by the Public Utility Commission (PUC), not the courts. 66 Pa.C.S.A. § 1103(a).

7 Cases that cite this headnote

- [16] **Public Utilities**—Service and facilities

Under the section of the Public Utility Code regarding applications for certificates of public convenience, the applicant must demonstrate a public need or demand for the proposed service. 66 Pa.C.S.A. § 1103(a).

1 Cases that cite this headnote

Attorneys and Law Firms

***1002** Michael F. Faherty, Hershey, for appellants.
 Christopher A. Lewis, Philadelphia, and Alan R.
 Boynton, Jr., Harrisburg, for appellee.

BEFORE: MARY HANNAH LEAVITT, President
 Judge, RENÉE COHN JUBELIRER, Judge, ROBERT
 SIMPSON, Judge, P. KEVIN BROBSON, Judge,
 PATRICIA A. McCULLOUGH, Judge, ANNE E.
 COVEY, Judge, and MICHAEL H. WOJCIK, Judge.

Opinion

OPINION BY Judge RENÉE COHN JUBELIRER.

R. Scott Martin and Pamela S. Martin, Douglas M.
 Fitzgerald and Lyndsey M. Fitzgerald, and Harvey A.
 Nickey and Anna M. Nickey (Condemnees) appeal
 from the September 29, 2015 Order of the Court of
 Common Pleas of Cumberland County (common pleas)
 that overruled Condemnees' Preliminary Objections
 to Declarations of Taking (Declarations) filed by
 Condemnor Sunoco Pipeline, L.P. (Sunoco) to
 facilitate construction of the phase of its Mariner East
 Project known as the Mariner East 2 pipeline.
 Condemnees assert that common pleas erred when it
 overruled their Preliminary Objections because:
 Sunoco's Declarations are barred under the doctrine
 of collateral estoppel by an earlier York County
 decision; the Mariner East 2 pipeline is not an
 intrastate ***1003** pipeline subject to Pennsylvania
 Public Utility Commission (PUC) regulation; the
 Mariner East 2 pipeline does not provide PUC
 regulated service; and, no public need exists for the
 Mariner East 2 pipeline. After careful review of the
 record, we find no error and therefore affirm.

I. PUC and FERC Jurisdiction, Sunoco and the Mariner East Project

Before we address the specific facts of these appeals and their merits, it will be helpful to provide some general background information on the nature of the interrelationships between Sunoco, PUC and Federal Energy Regulatory Commission (FERC), as well as the nature and history of the Mariner East Project.

A. Regulation of Public Utilities by PUC and by FERC

^[1] Section 1511(a)(2) of the Business Corporation Law of 1988¹ (BCL), 15 Pa.C.S. § 1511(a)(2),² provides that “public utility corporations” may exercise the power of eminent domain to condemn property for the transportation of, *inter alia*, natural gas and petroleum products. Section 1103 of the BCL, 15 Pa.C.S. § 1103, defines public utility corporation as “[a]ny domestic or foreign corporation for profit that ... is subject to regulation as a public utility by the [PUC] or an officer or agency of the United States....” FERC is an agency of the United States that may regulate an entity as a public utility under this section.

^[2] Jurisdiction over the certification and regulation of public utilities in the Commonwealth is vested in PUC through the Public Utility Code (Code).³ However, simply being subject to PUC regulation is insufficient for an entity to have the power of eminent domain. Section 1104 of the Code, 66 Pa.C.S. § 1104, requires that a public utility must possess a certificate of public convenience (CPC) issued by PUC pursuant to Section

1101 of the Code, 66 Pa.C.S. § 1101, before exercising the power of eminent domain.⁴

***1004** ^[3] Both FERC and PUC regulate the shipments of natural gas and petroleum products or service through those pipelines, and not the actual physical pipelines conveying those liquids. (R.R. at 1344a.) FERC's jurisdiction is derived from the Interstate Commerce Act (ICA) and applies to **interstate** movements,⁵ while the Code and PUC's jurisdiction apply to **intrastate** movements.⁶ This jurisdiction is not mutually exclusive. *See, e.g., Amoco Pipeline, Co.*, 62 F.E.R.C. ¶ 61119, at 61803–61804, 1993 WL 25751, at *4 (Feb. 8, 1993) (finding that “the commingling of oil streams is not a factor in fixing jurisdiction under the ICA”); (R.R. at 687a, 693a, 1379a–80a.) In *Amoco*, FERC held as follows:

Amoco argues that the commingling of the crude oil from Wyoming and other states makes all of the commingled crude oil subject to the interstate rate. This argument has no merit. As the cases demonstrate, the commingling of oil streams is not a factor in fixing jurisdiction under the ICA. Rather, we look to the “fixed and persistent intent of the shipper,” and to such factors as whether storage or processing interrupt the continuity of the transportation.

It is not disputed that both interstate and intrastate transportation occur over the pipeline segments in question, nor is there any dispute that crude oil shipped by Sinclair over these segments, no matter where produced, is destined for Sinclair's Wyoming refineries. Therefore, the

crude oil produced outside of Wyoming and transported over Amoco's Wyoming facilities to Sinclair's refineries in that state is moving in interstate commerce and is covered by the tariffs filed by Amoco with this Commission. Transportation over Amoco's facilities of that portion of the crude oil that is both produced and refined in Wyoming is subject to the regulation of the Wyoming *1005 [Public Service Commission]. Commingling does not alter the jurisdictional nature of the shipments, and as Sinclair has stated, the question of jurisdiction arises only in the context of the facts relevant to individual shipments.

Amoco argues that later decisions have effectively overruled this precedent. However, the cases cited by Amoco relate to the transportation of natural gas, which is governed by the Natural Gas Act (NGA), and which do not control our determination of the effect of commingling crude oil from various sources.

62 F.E.R.C. at ¶¶ 61803-61804, 1993 WL 25751 at *4. *See also National Steel Corp. v. Long*, 718 F.Supp. 622, 625 (W.D.Mich.1989) (holding in a prospective challenge to the exercise of regulatory jurisdiction by the Michigan Public Service Commission that the federal scheme under the ICA "is not so comprehensive as to address the local interests which are the focus of state regulation."); *Humble Oil & Refining Co. v. Tex. & Pac. Ry. Co.*, 155 Tex. 483, 289 S.W.2d 547 (1955) (where shipper produced oil in New Mexico and Texas and delivered it by pipeline to Texas tank farm where it was commingled and shipped by rail to various destinations, the shipper accepting at destination

the equivalent of oil delivered to farm, that portion of oil shipped which was equivalent in volume to that produced in New Mexico was subject to interstate rate, while that portion equivalent in volume to that produced in Texas was subject to intrastate rate.); *Removing Obstacles to Increased Elec. Generation & Natural Gas Supply in the W. United States*, 94 F.E.R.C. ¶¶ 61272, 61977 (Mar. 14, 2001) (FERC authority limited to regulating terms and rates of interstate shipments on a proposed line). Thus, it is apparent from these authorities that it is PUC, and not FERC, that has authority to regulate intrastate shipments. Similarly, the record shows that pipeline service operators in Pennsylvania, such as Sunoco, can be, and frequently are, simultaneously regulated by both FERC and PUC through a regulatory rubric where FERC jurisdiction is limited only to interstate shipments, and PUC's jurisdiction extends only to intrastate shipments. (R.R. at 1379a–80a.)

B. Regulation of Sunoco as a Public Utility

As to Sunoco generally, the record shows that it has been operating as a public utility corporation⁷ in Pennsylvania since 2002, at which time Sunoco received PUC approval for the transfer, merger, *1006 possession, and use of all assets of the Sun Pipe Line Company (“Sun”) and of the Atlantic Pipeline Corporation (“Atlantic”), both of which were subject to PUC jurisdiction. (R.R. at 28a–33a, 670a.) As such, Sunoco came into possession of a pipeline system operated previously by Sun and its predecessors and Atlantic and its predecessors. This “legacy” pipeline system operated under CPCs issued in 1930 and 1931

by PUC's statutory predecessor, the Pennsylvania Public Service Commission. (R.R. at 89a–90a.) The record substantiates that the pipeline system previously provided and currently provides interstate and intrastate service on the same pipelines. (R.R. at 90a–93a, 657a, 672a, 687a, 821a–22a, 1383a–87a.) PUC has regulated Sunoco's intrastate pipeline transportation of petroleum products and refined petroleum products since 2002, and FERC has regulated Sunoco's interstate service of the same products on the same pipelines. (R.R. at 90a–93a, 1383a–87a.)

As to regulation by PUC, that agency in an Order entered on October 29, 2014 concluded that: "Sunoco has been certificated as a public utility in Pennsylvania for many years, and [that] the existence of Commission Orders granting the [CPCs] to Sunoco is prima facie evidence ... that Sunoco is a public utility under the Code." (R.R. at 116a.) PUC further explained that Sunoco's existing authority under its prior CPCs gave it the right to reverse the flow within the existing pipeline and to add new pipelines if Sunoco concluded it was necessary to expand the previously certificated service, stating:

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.**

(R.R. at 122a (emphasis added).)

Additionally, by Order dated July 24, 2014, PUC clarified Sunoco's authority under its existing CPCs to transport petroleum products and refined petroleum products, including propane,⁸ between Delmont, ***1007** Westmoreland County and Twin Oaks, Delaware County. (R.R. at 41a–51a.) Therein, PUC stated that **Sunoco retained that authority under its 2002 CPCs**, its prior suspension and abandonment of gasoline and distillate service notwithstanding. (R.R. at 49a.) PUC further found that Sunoco's proposed intrastate propane service would result in "numerous potential public benefits" by allowing Sunoco "to immediately address the need for uninterrupted deliveries of propane in Pennsylvania and to ensure that there is adequate pipeline capacity to meet peak demand for propane during the winter heating season." (R.R. at 49a–50a.)

Further, by Order dated August 21, 2014, PUC **granted Sunoco's Application for a CPC** to expand its service territory into Washington County. (R.R. at 60a–64a.) In that Application, Sunoco stated

that it intended to expand the capacity of the Mariner East Project by implementing the Mariner East 2 pipeline, which would increase the take-away capacity of natural gas liquids (NGLs)⁹ from the Marcellus Shale and allow Sunoco to provide additional on-loading and off-loading points within Pennsylvania for interstate and intrastate propane shipments. (R.R. at 61a–62a.) PUC, by authorizing the provision of intrastate petroleum and refined petroleum products pipeline transportation service in Washington County in the August 21, 2014 Order expanded the service territory in which Sunoco is authorized to provide Mariner East service. (R.R. at 60a–64a.) PUC found that the expansion was in the public interest, stating:

Upon full consideration of all matters of record, we believe that approval of this Application is **necessary and proper for the service, accommodation, and convenience of the public.** 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 ***1008** proposed service will offer a **safer and more economic transportation alternative** for shippers to existing rail and trucking services....

(R.R. at 63a (emphasis added).)¹⁰

Therefore, pursuant to PUC's Orders, Sunoco has

CPCs that authorize it to transport, via its pipeline system, petroleum and refined petroleum products, including propane, from and to points within Pennsylvania. This authority was expanded to include Washington County in recognition of the public need and the importance of increasing the supply of propane to the citizens of Pennsylvania.

C. The Mariner East Project

In 2012, Sunoco announced its intent to develop an integrated pipeline system for transporting petroleum products and NGLs such as propane, ethane, and butane from the Marcellus and Utica Shales in Pennsylvania, West Virginia and Ohio to the Marcus Hook Industrial Complex ("MHIC") and points in between. (R.R. at 9a, 46a, 1377a.) Sunoco's various filings describe the overall goal of the Mariner East Project as an integrated pipeline system to move NGLs from the Marcellus and Utica Shales through and within the Commonwealth; and to provide take away capacity for the Marcellus and Utica Shale plays and the flexibility to reach various commercial markets, using pipeline and terminal infrastructure **within the Commonwealth**. (R.R. at 61a, 91a, 93a–94a, 656a, 662a.)

1. Mariner East 1

The Mariner East Project has **two phases**. The first, referred to as **Mariner East 1, has been completed** and utilized Sunoco's existing pipeline infrastructure, bolstered by a 51-mile extension from Houston, in

Washington County, to Delmont, in Westmoreland County, to ship 70,000 barrels per day of NGLs from the Marcellus Shale basin to the MHIC. (R.R. at 46a, 93a, 498a, 1377a.)

1. Mariner East 2

Sunoco has begun work on the **second phase** of the Mariner East Project, known as **Mariner East 2**. (R.R. at 16a.) Unlike Mariner East 1, which used both existing and new pipelines, **Mariner East 2 requires construction of a new 351-mile pipeline largely tracing the Mariner East 1 pipeline route, with origin points in West Virginia, Ohio, and Pennsylvania.** (R.R. at 658a, 1377a-78a.) Sunoco's plans for the Mariner East 2 phase include **constructing two adjacent pipelines** separated by approximately five feet over the portion of the Mariner East line which ***1009** runs from Delmont, Pennsylvania to the MHIC, and a single line over the portion of the Mariner East line which runs between Delmont and the West Virginia border. (R.R. at 17a.) With the exception of some valves, **Mariner East 2** will be below ground level, with most of it **paralleling and within the existing right of way of the Mariner East 1 pipeline.** Part of Mariner East 2 will be located in Cumberland County which is **within the geographic scope of the CPC issued to Sunoco by the PUC.** (R.R. at 12a, 18a.)

While Mariner East 1 was underway, Marcellus and Utica Shale producers and shippers advised Sunoco that there was a need for additional capacity to

transport more than the 70,000 barrels of NGLs per day being transported by Mariner East 1. (R.R. at 694a–95a, 1339a, 1378a.) Sunoco thus undertook to expand Mariner East Project capacity and developed the Mariner East 2 pipeline. (R.R. at 1339a–40a, 1384a.)

This expansion of the Mariner East 1 service will enlarge capacity to allow movement of an additional 275,000 barrels per day of NGLs, (R.R. at 498a), thereby allowing shippers from the Marcellus and Utica Shales to transport more barrels of NGLs through the Commonwealth to destinations within the Commonwealth, as well as to the MHIC for storage, processing, and distribution to local, domestic, and international markets. (R.R. at 604a, 1251a.) It is intended to increase the take-away capacity of NGLs from the Marcellus and Utica Shales and enable Sunoco to provide additional on-loading and off-loading points within Pennsylvania for both interstate and intrastate propane shipments and increase the amount of propane that would be available for delivery or use in Pennsylvania. (R.R. at 661a–64a, 1377a–78a.)

PUC recognized this second phase of the Mariner East Project in its August 21, 2014 Order granting Sunoco's CPC application for Washington County, stating:

Subject to continued shipper interest, Sunoco intends to undertake a second phase of the Mariner East project, which will expand the capacity of the project by constructing: (1) a 16 inch or larger

pipeline, paralleling its existing pipeline from Houston, PA to the Marcus Hook Industrial Complex and along much of the same route, and (2) a new 15 miles of pipeline from Houston, PA to a point near the Pennsylvania–Ohio boundary line. **This second phase, sometimes referred to as “Mariner East 2”, will increase the take away capacity of natural gas liquids from the Marcellus Shale and will enable Sunoco to provide additional on-loading and offloading points within Pennsylvania for both intrastate and interstate propane shipments.**

(R.R. at 61a–62a (emphasis added).)

Sunoco does not contest that the Mariner East Project initially was prioritized for interstate service.¹¹ However, before PUC and common pleas, Sunoco explained that during and after winter 2013–2014, as a result of the “polar vortex,” it had a significant increase in shipper demand for intrastate shipments of propane due to an increase in consumer demand within Pennsylvania as a result of shortages due to harsh winter conditions and insufficient pipeline infrastructure. (R.R. at 694a–95a, 1378a.) These changes in market conditions led Sunoco to accelerate its provision *1010 of intrastate service on the Mariner East Project. Sunoco thus sought and obtained PUC approval to provide intrastate service on the Mariner East 1 and 2 pipelines as described

above. As described in more detail below, PUC issued three final Orders in 2014 and two final Orders in 2015 confirming that Sunoco is a public utility corporation subject to PUC regulation as a public utility. PUC also recognized that the service provided by both phases of the Mariner East Project is a public utility service.

3. PUC Orders and Tariffs

Sunoco on May 21, 2014 filed an application pursuant to Section 703(g) of the Code, 66 Pa.C.S. § 703(g),¹² to clarify an August 29, 2013 PUC Order granting Sunoco authority to suspend and abandon its provision of east-to-west gasoline and distillate service (and the corresponding tariffs) in certain territories along its pipeline in order to facilitate the west-to-east Mariner East service of NGLs in those territories. (R.R. at 10a.) PUC on July 24, 2014, issued an Opinion and Order granting Sunoco's Application and reaffirmed Sunoco's authority under its existing CPCs to transport petroleum products and refined petroleum products, including propane, between Delmont, Westmoreland County, and Twin Oaks, Delaware County. (*Id.*) This approved route includes Cumberland County. (R.R. at 12a, 18a.)

PUC in its July 24, 2014 Order recognized that: circumstances changed regarding the Mariner East Project since August 2013 and that in response, Sunoco intended to provide intrastate transportation service of propane to respond to changing market conditions and increased shipper interest in

additional intrastate pipeline service facilities; the definition of “petroleum products” is interpreted broadly to encompass propane; and Sunoco’s proposed intrastate propane service will result in numerous public benefits by allowing it “to immediately address the need for uninterrupted deliveries of propane in Pennsylvania and to ensure that there is adequate pipeline capacity to meet peak demand for propane during the winter heating season.” (R.R. at 48a–50a.)

In addition to the May 21, 2014 application, Sunoco on June 12, 2014 filed Tariff Pipeline Pa. P.U.C. No. 16, with a proposed effective date of October 1, 2014. This tariff reflected PUC-regulated pipeline transportation rate for the west-to-east intrastate movement of propane from Mechanicsburg (Cumberland County) to Twin Oaks. (R.R. at 53a–54a.) PUC by final Order dated August 21, 2014, permitted the tariff to become effective on October 1, 2014. (R.R. at 53a–57a.)

PUC, by these actions and through Sunoco’s previously obtained CPCs, authorized Sunoco as a public utility to transport, as a public utility service, petroleum and refined petroleum products both east to west and west to east in the following Pennsylvania counties through which the Mariner East Project is located: Allegheny, Westmoreland, Indiana, Cambria, Blair, Huntingdon, Juniata, Perry, **Cumberland**, York, Dauphin, Lebanon, Lancaster, ***1011** Berks, Chester, and Delaware. (R.R. at 10a–12a, 48a–49a, 60a–64a.)

Sunoco’s service territory originally did not include Washington County because Sunoco did not maintain

facilities there and had not applied to PUC for a CPC for that county. However because the planned Mariner East service would originate in Washington County, Sunoco on June 6, 2014 applied to PUC to expand its service territory into that county. (R.R. at 12a–13a.) PUC by Order dated August 21, 2014 granted Sunoco's application and authorized the provision of intrastate petroleum and refined petroleum products pipeline transportation service in Washington County, thus expanding Sunoco's service territory for its intrastate Mariner East service. (R.R. at 60a–64a.)

II. Background of the Instant Appeals

The genesis of this matter was the filing by Sunoco on July 21, 2015 of the three Declarations in common pleas. As to Condemnees R. Scott Martin and Pamela S. Martin, Sunoco sought to condemn a permanent non-exclusive easement of 1.5 acres, a temporary workspace easement of 0.72 acres, and an additional workspace easement of 0.12 acres on the Martins' property on Longs Gap Road, North Middleton Township, Cumberland County. (R.R. at 7a–156a.) As to Condemnees Douglas M. Fitzgerald and Lyndsey M. Fitzgerald, Sunoco sought to condemn a permanent non-exclusive easement of 0.14 acres and a temporary workspace easement of 0.07 acres on the Fitzgeralds' property at 281 Pine Creek Drive, Carlisle, Cumberland County. (R.R. at 307a–454a.) As to Condemnees Harvey A. Nickey and Anna M. Nickey, Sunoco sought to condemn a permanent non-exclusive easement of 0.7 acres, and a temporary workspace easement of 0.31 acres on the Nickeys' property at 125 Blain McCrea Road, Lower Mifflin

Township, Cumberland County. (R.R. at 157a–306a.) Condemnees filed Preliminary Objections to the Declarations for their respective properties. (R.R. at 455a–507a, 561a–613a, 508a–560a.)

Condemnees are here, and were before common pleas, represented by the same counsel. Hence all three sets of Preliminary Objections raised the same objections to the Declarations subject to variances for the individual properties. All Condemnees objected: that Sunoco lacked the power or the right to condemn their land as Sunoco was not a public utility regulated by PUC for the Mariner East 2 pipeline; that Sunoco's corporate resolution authorized takings only for an **interstate** pipeline and not an **intrastate** pipeline; that the declarations were barred by collateral estoppel on the basis of the York County decision; that the Mariner East 2 pipeline was an interstate pipeline and not an intrastate pipeline; that the Declarations sought to condemn their properties for two pipelines while the agency Condemnees assert has sole jurisdiction, FERC, approved only one pipeline; that Sunoco lacked the FERC Certificate of Public Convenience and Necessity (Certificate) necessary to exercise eminent domain power for the pipeline; and that Sunoco's proposed bond amounts were insufficient. (*Id.*)

Sunoco filed responses to Condemnees' Preliminary Objections that were, like the objections, essentially uniform. With regard to the corresponding objections referenced in the preceding paragraph, Sunoco asserted: that PUC recognizes that, the fact that Sunoco has FERC authorization to make interstate movements on Mariner East notwithstanding, Sunoco

also has authority under state law to provide intrastate service as a public utility regulated by PUC; that the corporate resolution attached to the Declarations is not defective in any way; that the identical issue of *1012 whether Sunoco has the power of eminent domain to condemn for the Mariner East 2 pipeline was not decided previously in the York County decision; that the Mariner East 2 pipeline is regulated by both PUC and by FERC; that FERC's regulation of interstate shipments on Mariner East 2 pipeline is inapplicable to a determination of Sunoco's eminent domain authority as a Pennsylvania-regulated public utility; that a FERC Certificate is not the only method by which a public utility can obtain eminent domain power in Pennsylvania where state law provides eminent domain authority both to utilities regulated by PUC and to utilities regulated by an officer or agency of the United States, such as FERC; and that the bonds posted by Sunoco were adequate. (R.R. at 621a-33a, 951a-63a, 786a-98a.)

III. Common Pleas Decision

Common pleas consolidated the three Declarations and Preliminary Objections for hearing as they essentially were identical,¹³ and scheduled a hearing on the Preliminary Objections for September 22, 2015. Both Condemnees and Sunoco offered testimony and entered exhibits into the record. (R.R. at 1328a-1998a.) Common pleas on September 29, 2015, entered its Order overruling Condemnees' Preliminary Objections.¹⁴ Condemnees appealed to this Court and common pleas directed the filing of a Concise Statement of Errors Complained of on Appeal (Statement) pursuant to Rule 1925(b) of the

Pennsylvania Rules of Appellate Procedure, Pa.R.A.P.1925(b).¹⁵ Following receipt of Condemnees' Statements, common pleas on *1013 December 22, 2015 issued its Opinion in support of its September 29, 2015 Order. Common pleas first addressed Condemnees' contention that FERC possesses sole jurisdiction over the Mariner East 2 pipeline. After repeating the text of the first paragraph of the footnote from the September 29, 2015 Order, common pleas noted that "the Natural Gas Act (NGA)[] 15 U.S.C. § 717(a)(5) [] ... grants 'FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale,' " but observed further that "[h]owever, [Mariner East 2 pipeline] will transport natural gas liquids (NGLs), and thus, the physical pipeline is not regulated under the ambit of FERC through the NGA[]." (December 22, 2015 Op. at 3 (footnote omitted) (citation omitted).) Common pleas stated further that:

Condemnees[] also argue that because [Sunoco] did not receive a Certificate from FERC for ME2, they do not possess the power of eminent domain under federal law. Again, Condemnees are operating under the mistaken belief that FERC regulates the siting of NGL pipelines.[] FERC, pursuant to the NGA, regulates the siting of pipelines that carry interstate shipments of natural gas, doing so through the issuance of a CPC.[] Because FERC does not possess authority to regulate the siting of NGL pipelines, the responsibility falls to state agencies regardless of the physical jurisdiction of the NGL pipeline.[]

We were satisfied that the PUC regulates intrastate shipments of NGL. Therefore, [Sunoco]

is considered a “public utility corporation” under Pennsylvania’s Business Corporation Laws (BCL).^[1] Pursuant to 15 Pa.C.S. [] § 1511(a)(2), public utility corporations “have the right to take, occupy and condemn property for [the] principal purpose[] and ancillary purposes reasonably necessary or appropriate for the accomplishment of ... [t]he transportation of ... petroleum or petroleum products ... for the public.” As a result, [Sunoco] has the power of eminent domain to condemn property for the construction of [Mariner East 2 pipeline].

(December 22, 2015 Op. at 3–4 (footnotes omitted).)

Common pleas next addressed Condemnees’ collateral estoppel argument and relied on the text of the second paragraph of the footnote from the September 29, 2015 Order quoted above in holding that the reasoning in the York County decision relied upon by Condemnees, *Sunoco Pipeline, L.P. v. Loper*, 2013–SU–4518–05 (C.P.York, February 24, 2014) (*reaffirmed* March 25, 2014), did not apply in this instance because Sunoco reconfigured the Mariner East 2 pipeline “to be both an interstate pipeline as well as an intrastate pipeline subject to PUC regulation.” (December 22, 2015 Op. at 4–5.) With regard to Condemnees’ argument that Sunoco, to obtain the power of eminent domain under the BCL, must be granted a FERC Certificate as set forth in *Nat’l Fuel Gas Supply Corp. v. Kovalchick Corp.*, 74 Pa. D. & C.4th 22 (2005), common pleas concluded that *Kovalchick* also was inapposite to the facts of this case. Common pleas noted that the condemnor in *Kovalchick* was granted eminent domain power because it was subject to FERC regulation under the NGA. However, as common pleas earlier concluded

that the Mariner East 2 pipeline was not regulated by FERC under the NGA because it does not transport natural gas; common pleas held that Sunoco did not need a FERC Certificate to obtain the eminent domain power under the BCL. (December 22, 2015 Op. at 5–6.) Common pleas also rejected Condemnees’ argument that PUC’s orders issued to Sunoco regarding *1014 the Mariner East project did not include a reference to the Mariner East 2 pipeline, noting that PUC Order attached to each Declaration as Exhibit D provides:

Subject to continued shipper Interest, Sunoco intends to undertake a second phase of the Mariner East project ... This second phase, sometimes referred to as ‘Mariner East 2’, [sic] will increase the take-away capacity of natural gas from the Marcellus Shale and will enable Sunoco to provide additional on-loading and offloading points within Pennsylvania for both intrastate and interstate propane shipments.

(December 22, 2015 Op. at 6.)¹⁶

IV. Issues Before This Court

A. Collateral Estoppel

[4] [5] Condemnees appealed to this Court.¹⁷ Condemnees first argue that common pleas erred when it declined to find that Sunoco’s Petitions were barred by the doctrine of collateral estoppel based on *Loper*. As described above, common pleas concluded

that *Loper* is inapposite to this matter because it was decided when Sunoco's plans for the Mariner East 2 pipeline featured a purely **interstate** pipeline, crossing Pennsylvania state lines but containing no stations for the offloading of transported materials in Pennsylvania. Common pleas pointed out here that in *Loper*, Sunoco argued that **FERC** provided it with the power of eminent domain for a purely interstate pipeline, and that subsequently Sunoco repurposed Mariner East 2 to be **both an interstate pipeline** as well as an **intrastate pipeline** subject to PUC regulation.

Condemnees argue here that common pleas erred and that Mariner East 2 is in **interstate service only**. On that basis, PUC lacks jurisdiction and Sunoco thus is not a public utility corporation under the BCL. Moreover, Condemnees assert that Sunoco is regulated by FERC as a common carrier and not as a public utility with the power of eminent domain. Condemnees state that in *Loper*, Sunoco contended that it is a public utility under the BCL and therefore clothed with the eminent domain power and that Sunoco makes the same argument in this matter. For these reasons, Condemnees argue that the issue presented before common pleas is identical to that presented in *Loper* and that collateral estoppel applies to bar Sunoco's Declarations as to Condemnees.

[6] [7] Collateral estoppel bars any subsequent action where the sole issue requiring judgment was litigated previously. *Thompson v. Karastan Rug Mills*, 228 Pa.Super. 260, 323 A.2d 341, 343 (1974). For collateral estoppel to apply, the following conditions must be met: (1) the issue or issue of fact previously

determined in a prior action are the same (no requirement that the cause of action be the same); (2) the previous judgment is final on the merits; (3) the party against whom the doctrine is invoked is identical to the party in the prior action; and (4) the party against whom estoppel is invoked had full and fair opportunity to litigate the issue in the prior action. *Dep't of Transp. v. Martinelli*, *1015 128 Pa.Cmwlth. 448, 563 A.2d 973, 976 (1989).

Based on the record in this case, common pleas did not err in finding that collateral estoppel does not bar this action. The issue decided in *Loper* is not the same issue raised in this case, and so it does not meet the first condition. At issue in *Loper* was whether Sunoco satisfied the definition of public utility corporation as a result of the regulation of its interstate service by FERC and not as a result of PUC's regulation of its intrastate service. At the time *Loper* was decided, Sunoco had not yet sought or obtained PUC approval to provide intrastate service. (R.R. at 107a, 1378a.) The *Loper* court addressed only whether Sunoco was a public utility corporation because it was subject to regulation as a public utility by an officer or agency of the United States, i.e., FERC, and did not decide whether Sunoco was a public utility corporation because it was subject to regulation as a public utility by PUC, the issue raised here. Although Condemnees disagree that Sunoco can prevail on this issue that is a separate inquiry from whether the issue was previously decided. For these reasons, we agree that collateral estoppel is not a bar to this case.

B. Whether Mariner East is both an Interstate and Intrastate Pipeline

¹⁸¹ Condemnees next argue that common pleas erred when it concluded that the Mariner East 2 pipeline was both an **interstate** and an **intrastate** pipeline subject to PUC jurisdiction. This argument is grounded in the fact that Sunoco is a common carrier under the ICA and that it obtained FERC approval to transport NGLs from Ohio and West Virginia to the MHIC and beyond via the Mariner East 2 pipeline. Put another way, Condemnees assert that PUC has jurisdiction only over pipelines beginning and ending **entirely in Pennsylvania**, and that the Mariner East 2 pipeline is solely in interstate commerce because it crosses state lines. Condemnees maintain that Sunoco thus lacks eminent domain power because the Mariner East 2 pipeline can never be regulated by PUC as the Code prohibits PUC from regulating interstate commerce. Condemnees argue that common pleas used an incorrect conception of interstate commerce and cite numerous decisions for the proposition that a pipeline that crosses a state line is in interstate commerce and that products in that pipeline remain in interstate commerce during their entire journey. Condemnees thus disagree with common pleas' conclusion that, because the Mariner East 2 pipeline "will provide both loading and offloading of ethane, propane, liquid petroleum gas and other petroleum products within the Commonwealth ... [it] provides intrastate service, regulated by the [PUC]." (September 29, 2015 Order at 2 n. 1.)

Based on our review, we conclude that the record establishes that the expanded service to be provided

by the Mariner East 2 pipeline will involve **both interstate service** (subject to FERC regulation) and **intrastate service** (subject to PUC regulation) and that common pleas did not err when it overruled Condemnees' Preliminary Objection. FERC's decision in *Amoco* and the other authority previously discussed support this conclusion. Condemnees apparently do not accept that the service at issue can be both interstate and intrastate, and the cases they cite are not on point as they address general principles of interstate commerce and/or transport of natural gas.¹⁸ Moreover, PUC Orders *1016 related to the Mariner East Project and the testimony before common pleas establishes that the Mariner East 2 pipeline will provide both **interstate and intrastate service**. (R.R. at 49a, 53a-54a, 61a-62a, 66a, 68a, 72a-73a, 118a-19a, 657a, 659a, 1336a, 1339a, 1344a, 1378a.)

The record establishes that the Mariner East 2 pipeline will consist of a physical structure with access points in Ohio, West Virginia, and Pennsylvania. Product will be **placed into the pipeline and removed at multiple points within Pennsylvania**.¹⁹ (R.R. at 945a.) In addition, Sunoco has filed, and received PUC approval, of multiple tariffs applicable to Sunoco's provision of intrastate service through the Mariner East Project, including the use of Mariner East 2. (*See supra* note 10.) As we noted, under Section 1302 of the Code, authority to file a tariff is limited to a public utility regulated by PUC. We thus conclude that Sunoco is a public utility corporation empowered to exercise eminent domain under Section 1511 of the BCL, and that common pleas did not err when it overruled Condemnees' Preliminary Objection that the Mariner East 2

pipeline was an interstate pipeline and not an intrastate pipeline.

C. PUC Regulation of Mariner East 2 Service

^[9] Condemnees next argue that common pleas erred when it concluded that the Mariner East 2 pipeline provides service regulated by PUC. There are two related prongs to Condemnees' argument: that PUC Orders do not cover service on the Mariner East 2 pipeline; and, that PUC did not issue a CPC for Mariner East 2 because it provides interstate commerce. Common pleas found both of these arguments unpersuasive.

The record reflects that Sunoco, on June 9, 2014, applied to PUC to expand its service territory for the Mariner East Project, including Mariner East 2, into Washington County, the only service territory not previously certificated for Mariner East service by prior CPCs. (R.R. at 60a.) By Order dated August 21, 2014, PUC granted the application authorizing Sunoco's provision of intrastate petroleum and refined petroleum products pipeline transportation service in Washington County thus expanding Sunoco's service territory for its Mariner East service. (R.R. at 59a–64a.) PUC's Order accompanying the CPC described the authorized service, and specifically described Mariner East 2 service as an expansion of existing Mariner East 1 service. (R.R. at 61a.) The result of this Order is that **PUC authorized Mariner East 1 and Mariner East 2 intrastate service in 17 counties**, from Washington County in western Pennsylvania, through 15 other counties, including **Cumberland**

County, to Delaware County in eastern Pennsylvania. (R.R. at 1637a.)

Subsequently, in its October 29, 2014 Order, PUC stated that:

***1017 [T]his authority [under existing CPCs] 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 a certificated territory.

(R.R. at 122a (emphasis added).) From these PUC Orders we conclude that Sunoco's CPCs apply to **both** Mariner East 1 service **and to Mariner East 2 service**, as it is an authorized expansion of the same service. (R.R. at 657a–59a, 1344a, 1377a.) In addition, Sunoco's approved tariffs proposed to add the new origin point of Houston, Washington County for west-to-east intrastate movements of propane, based on the CPCs issued. (R.R. at 66a.) On these bases, we hold that common pleas did not err when it concluded that "PUC regulates intrastate shipments of NGL[s,]" including service provided by Mariner East 2, and that "[a]s a result, [Sunoco] has the power of eminent domain to condemn property for the construction of [Mariner East 2]." (December 22, 2015 Op. at 4.)

D. Demonstration of Public Need

Condemnees' final argument is that common pleas erred when it overruled the Preliminary Objections

and approved a pipeline where no public need was demonstrated. According to Condemnees, PUC approval of a service is only a preliminary step, and it was common pleas' responsibility to review the public need and to make a determination of the scope and validity of the condemnation for the Mariner East 2 pipeline.

PUC filed an amicus brief solely addressing this issue.²⁰ PUC expresses concern that Condemnees' argument, if credited, would permit eminent domain litigants to challenge the validity of PUC-issued CPCs before courts of common pleas, which would constitute impermissible collateral attacks on otherwise valid PUC orders and raises serious jurisdictional concerns. PUC argues, as does Sunoco, that the CPCs Sunoco obtained through its acquisition of Sun and Atlantic were for an integrated pipeline system and not a single pipeline, and that PUC's October 29, 2014 Order confirms that Sunoco's intrastate transportation of propane and other petroleum hydrocarbons is within its existing certificated authority for petroleum and petroleum products. PUC cites the same history we detailed above to establish that it, on numerous occasions, has asserted its regulatory authority over Sunoco and its public utility service on the Mariner East system.

1. PUC has statewide jurisdiction over public utilities

[10] [11] Initially, we observe that the Code charges PUC with responsibility to determine which entities are

public utilities and to regulate how public utilities provide public utility service. This has long been the statutory mandate. *See, e.g., Pottsville Union Traction Co. v. Pennsylvania Public Service Comm'n*, 67 Pa.Super. 301 (1917). It is beyond purview that the General Assembly intended PUC to have statewide jurisdiction over public utilities and to foreclose local public utility regulation. *Duquesne Light Co. v. Monroeville Borough*, 449 Pa. 573, 298 A.2d 252 (1972).

[12] [13] As previously described, in the public utility context, an entity must meet separate but related requirements set forth in both the BCL and the Code to be a public utility corporation clothed with the *1018 power of eminent domain. Section 1511(a)(2) of the BCL provides that “public utility corporations” may exercise the power of eminent domain to condemn property for the transportation of, *inter alia*, natural gas and petroleum products. Section 1103 of the BCL defines public utility corporation as “[a]ny domestic or foreign corporation for profit that ... is subject to regulation as a public utility by the [PUC]....” 15 Pa.C.S. § 1103. Section 1104 of the Code requires that a public utility must possess a CPC issued by PUC pursuant to Section 1101 of the Code before exercising eminent domain. While courts of common pleas have jurisdiction to review whether an entity attempting to exercise eminent domain power meets the BCL criteria, that jurisdiction does not include the authority to revisit PUC adjudications. A CPC issued by PUC is *prima facie* evidence that PUC has determined that there is a public need for the proposed service and that the holder is clothed with the eminent domain power. This Court has stated

"[t]he administrative system of this Commonwealth would be thrown into chaos if we were to hold that agency decisions, reviewable by law by the Commonwealth Court, are also susceptible to collateral attack in equity in the numerous common pleas courts." *Aitkenhead v. Borough of West View*, 65 Pa.Cmwlth. 213, 442 A.2d 364, 367 n. 5 (1982).

2. The Eminent Domain Code governs the scope and validity of a taking, and not public need

The Eminent Domain Code²¹ governs process and procedure in condemnation proceedings. Section 306 of the Eminent Domain Code provides in pertinent part that:

§ 306. Preliminary objections.

(a) *Filing and exclusive method of challenging certain matters.*—

(1) Within 30 days after being served with notice of condemnation, the condemnee may file preliminary objections to the declaration of taking.

(2) The court upon cause shown may extend the time for filing preliminary objections.

(3) Preliminary objections shall be limited to and shall be the exclusive method of challenging:

(i) The power or right of the condemnor to appropriate the condemned property unless it has been previously adjudicated.

(ii) The sufficiency of the security.

(iii) The declaration of taking.

(iv) Any other procedure followed by the condemnor.

26 Pa.C.S. § 306(a).

[14] The Eminent Domain Code does not permit common pleas to review the public need for a proposed service by a public utility that has been authorized by PUC through the issuance of a CPC. In *Fairview Water Co. v. Public Utility Comm'n*, 509 Pa. 384, 502 A.2d 162 (1985), our Supreme Court discussed the proper forum for a condemnee's challenge to the legality of a taking when a public utility attempts to condemn an easement and PUC has determined that condemnee's property is necessary for the utility service. The case stemmed from a dispute between Fairview and a power company over the power company's continuing use of an easement previously agreed to by the parties. *Id.* at 163. The power company filed an application with PUC requesting a finding and determination that its transmission line was necessary and proper for the service, accommodation, convenience, or safety of the public. A PUC Administrative *1019 Law Judge determined that the service was necessary and proper and also determined the scope and validity of the easement. This court affirmed. On appeal, Fairview argued that PUC lacked jurisdiction to determine the scope and validity of the easement. *Id.* at 163–64. The Supreme Court agreed and stated: “[o]nce there has been a determination by the PUC that the proposed service is necessary and proper, the issues of scope and validity and damages must be determined by a Court of Common Pleas exercising equity jurisdiction.” *Id.* at 167. As Sunoco here holds CPCs issued by PUC and PUC in its Orders issuing the CPCs found the authorized service to be necessary and proper, it is left

to common pleas to evaluate scope and validity of the easement, but not the public need.

[15] [16] As illustrated by *Fairview*, determinations of public need for a proposed utility service are made by PUC, not the courts. Section 1103 of the Code requires an applicant for a CPC to establish that the proposed service is “necessary or proper for the service, accommodation, convenience, or safety of the public.” 66 Pa.C.S. § 1103(a). Under this section, the applicant must “demonstrate a **public need or demand for the proposed service....**” *Chester Water Auth. v. Public Utility Comm’n*, 581 Pa. 640, 868 A.2d 384, 386 (2005) (emphasis added).²²

In this case, PUC in its July 24, 2014 Order held that Sunoco’s proposed intrastate propane service would result in “numerous potential public benefits” by allowing Sunoco “to immediately address the need for uninterrupted deliveries of propane in Pennsylvania and to ensure that there is adequate pipeline capacity to meet peak demand for propane during the winter heating season.” (R.R. at 49a–50a.) Further, in granting Sunoco’s CPC application to extend its service territory into Washington County, PUC stated:

[W]e believe that approval of this Application is **necessary and proper for the service, accommodation, and convenience of the public.** 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.

(R.R. at 63a (emphasis added).)

Here, both PUC and common pleas followed their statutory mandates and evaluated the issues within their respective purviews. There is no basis for a common pleas court to review a PUC determination of public need. In fact, to allow such review would permit collateral attacks on PUC decisions and be contrary to Section 763 of the Judicial Code, 42 Pa.C.S. § 763, which places review of PUC decisions within the jurisdiction of this Court.

***1020** For these reasons, we conclude that common pleas did not err when it overruled Condemnees' Preliminary Objections to Sunoco's Declarations of Taking. We further conclude that Sunoco is regulated as a public utility by PUC and is a public utility

corporation, and Mariner East intrastate service is a public utility service rendered by Sunoco within the meaning of the BCL, 15 Pa.C.S. §§ 1103, 1511. The September 29, 2015 Order of the Court of Common Pleas of Cumberland County is hereby affirmed.

ORDER

NOW, this 14th day of July, 2016, the September 29, 2015 Order of the Court of Common Pleas of Cumberland County is hereby **AFFIRMED**.

DISSENTING OPINION BY Judge BROBSON.

Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.

~James Madison¹

Private property rights have long been afforded especial protection in this Commonwealth. For that reason, the law of our Commonwealth requires that courts closely scrutinize the exercise of eminent domain. Eminent domain is a privilege conferred by the General Assembly, while property ownership is a right of our citizens protected by the United States Constitution and the Pennsylvania Constitution. As between the privilege and the right, the right is paramount. I cannot improve upon the words of our

Pennsylvania Supreme Court from 1866:

The right of the Commonwealth to take private property with out (sic) the owner's assent on compensation made, or authorize it to be taken, exists in her sovereign right of eminent domain, and can never be lawfully exercised but for a public purpose—supposed and intended to benefit the public, either mediately or immediately. The power arises out of that natural principle which teaches that private convenience must yield to the public wants. *This public interest must lie at the basis of the exercise, or it would be confiscation and usurpation to exercise it.* This being the reason for the exercise of such a power, it requires no argument to prove that after the right has been exercised the use of the property must be held in accordance with and for the purposes which justified its taking. Otherwise it would be a fraud on the owner, and an abuse of power.... The exercise of the right of eminent domain, whether directly by the state or its authorized grantee, is necessarily in derogation of private right, and *the rule in that case is, that the authority is to be strictly construed* [.] What is not granted is not to be exercised.

Lance's Appeal, 55 Pa. 16, 25–26 (1866) (citations omitted) (emphasis added); see *Winger v. Aires*, 371

Pa. 242, 89 A.2d 521, 523 (1952). With respect to the exercise of eminent domain, this Court's duty is clear: "[T]he court of original appellate jurisdiction has the responsibility, in the first instance, to review Appellants' preserved and colorable arguments, and any decision to affirm the taking of their property should be closely reasoned." *In re Opening a Private Road (O'Reilly)*, 607 Pa. 280, 5 A.3d 246, 258–59 (2010).

***1021** At issue in this case is the effort of a publicly-traded company—Appellee Sunoco Pipeline, L.P. (Sunoco)—to take the private property of citizens in Cumberland County, Pennsylvania (Property Owners), for the purpose of constructing a portion of an underground pipeline, which is a component of a project that Sunoco has dubbed Mariner East 2 (ME2).² This proposed pipeline will have the capacity to provide for both the interstate transportation of natural gas liquids (NGLs) from Ohio and West Virginia to Pennsylvania and the intrastate transportation of NGLs within Pennsylvania.³ The pipeline will terminate at Sunoco's Marcus Hook Industrial Complex, Delaware County, Pennsylvania (Marcus Hook IC). Although the majority's decision affirming the taking is well-reasoned, I believe that Property Owners have raised a substantial and critical mixed issue of fact and law that must be resolved before *any* court places its imprimatur on the proposed takings. I thus respectfully dissent.

Sunoco's legislative authority to take private property in the Commonwealth through eminent domain in order to construct an underground pipeline emanates from the Business Corporation Law of 1988 (BCL),

which provides:

(a) General rule.—A public utility corporation shall, in addition to any other power of eminent domain conferred by any other statute, have the right to take, occupy and condemn property for one or more of the following *principal purposes* and ancillary purposes reasonably necessary or appropriate for the accomplishment of the *principal purposes*:

....

(2) The transportation of artificial or natural gas, electricity, petroleum or petroleum products or water or any combination of such substances *for the public*.

15 Pa.C.S. § 1511(a)(2) (emphasis added). When interpreting a statute, this Court is guided by the Statutory Construction Act of 1972, 1 Pa.C.S. §§ 1501–1991, which provides that “[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.” 1 Pa.C.S. § 1921(a). “The clearest indication of legislative intent is generally the plain language of a statute.” *Walker v. Eleby*, 577 Pa. 104, 842 A.2d 389, 400 (2004). “When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa.C.S. § 1921(b). Only “[w]hen the words of the statute are not explicit” may this Court resort to statutory construction. 1 Pa.C.S. § 1921(c). “A statute is ambiguous or unclear if its language is subject to two or more reasonable interpretations.” *Bethenergy Mines, Inc. v. Dep’t of Env’tl. Prot.*, 676 A.2d 711, 715 (Pa.Cmwlth.), *appeal denied*, 546 Pa. 668, 685 A.2d 547 (1996). Moreover, “[e]very statute shall be construed, if possible, to give effect to all its

provisions.” 1 Pa.C.S. § 1921(a). It is presumed “[t]hat the General Assembly intends the entire statute to be effective and certain.” 1 Pa.C.S. § 1922(2). Thus, no provision of a statute shall be “reduced to mere surplusage.” *Walker*, 842 A.2d at 400. Finally, it is presumed “[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.” 1 Pa.C.S. § 1922(1).

***1022** Applying these principles of statutory construction to the eminent domain provision for public utility corporations in the BCL, the intent of the General Assembly is clear and unambiguous. A public utility corporation may use eminent domain to construct a facility, such as a pipeline, so long as the “principal purpose” of the facility is the transportation of the petroleum product, in this case NGLs, “for the public.” This “public use” condition in the BCL is coextensive with property rights conferred and protected by the United States and Pennsylvania Constitutions. Specifically, the Declaration of Rights in the Pennsylvania Constitution both authorizes and limits the use of eminent domain: “No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall private property be taken or applied to *public use*, without authority of law and without just compensation being first made or secured.” Pa. Const. art. I, § 10 (emphasis added). The proper and lawful exercise of eminent domain under the Declaration of Rights, then, is evidenced by (1) authority of law (*i.e.*, legislation, such as the BCL), (2) just compensation, and (3) the taking of property for “public use.” In addition, Article X, section 4 of the Pennsylvania Constitution addresses use of eminent domain by municipal and other corporations. Like Section 10 of

the Declaration of Rights, Article X, section 4 recognizes the power of eminent domain only with respect to the “taking [of] private property for *public use*.” Pa. Const. art. X, § 4 (emphasis added).

In the context of eminent domain, courts have used the phrases “public use” and “public purpose” interchangeably. In *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005), a sharply-divided United States Supreme Court, interpreting the Takings Clause of the Fifth Amendment to the United States Constitution,⁴ held that the taking of private property in furtherance of a community economic development plan by a private entity furthered a “public purpose” and thus was a valid “public use” for eminent domain purposes. Critics of the *Kelo* majority have contended that the majority applied an overly-broad interpretation of the phrase “public use,” opening the door for eminent domain takings that serve virtually any “public purpose.”⁵ This Court need not enter into this debate, however, because in cases involving the taking of private property by eminent domain (or like authority), the Pennsylvania Supreme Court has interpreted both “public use” and “public purpose” narrowly in favor of the private property interests of the landowner.

In *Middletown Township v. Lands of Stone*, 595 Pa. 607, 939 A.2d 331 (2007), a post-*Kelo* decision, the Pennsylvania Supreme Court held that Middletown Township could exercise its eminent domain power under Section 2201 of The Second Class Township Code⁶ to take private farm land for recreational purposes. The authorizing statute provides:

The board of supervisors may designate lands or buildings owned, leased or controlled by the township for use as ***1023** parks, playgrounds, playfields, gymnasiums, swimming pools, indoor recreation centers, public parks and other recreation areas and facilities *and acquire lands or buildings by lease, gift, devise, purchase or by the exercise of the right of eminent domain for recreational purposes* and construct and equip facilities for recreational purposes.

Section 2201 of The Second Class Township Code (emphasis added). The Supreme Court next considered whether Middletown Township acted within the scope of this statutory authority when it sought to take by eminent domain a 175-acre farm in Bucks County.

Although Section 2201 of The Second Class Township Code does not expressly use the phrase “public use,” the Supreme Court opined that in light of the Takings Clause of the Fifth Amendment to the United States Constitution, “the only means of validly overcoming the private right of property ownership ... is to take for ‘*public use*.’ In other words, without a *public purpose*, there is no authority to take property from private owners.” *Lands of Stone*, 939 A.2d at 337 (citation omitted) (quoting U.S. Const. amend. V) (emphasis added). As for the appropriate inquiry, the Supreme Court opined:

According to our Court, “a taking will be seen as having a public purpose only where the public is to be the primary and paramount beneficiary of its exercise.” In considering whether a primary public purpose was properly invoked, this Court has looked for the “real or fundamental purpose” behind

a taking. Stated otherwise, the **true** purpose must primarily benefit the public....

This means that the government is not free to give mere lip service to its authorized purpose or to act precipitously and offer retroactive justification.... Clearly, evidence of a well-developed plan of proper scope is significant proof that an authorized purpose truly motivates a taking.

....

... Because the law requires that the true purpose of the taking be recreational, it is not sufficient that some part of the record support that recreational purposes were put forth. But rather, in order to uphold the invocation of the power of eminent domain, this Court must find that the recreational purpose was real and fundamental, not post-hoc or pre-textual.

Id. at 337–38 (citation omitted) (quoting *In re Bruce Ave.*, 438 Pa. 498, 266 A.2d 96 (1970), and *Belovsky v. Redevelopment Auth.*, 357 Pa. 329, 54 A.2d 277 (1947)) (emphasis in original).

The Supreme Court then proceeded to examine the common pleas court's factual findings to determine whether the "true purpose" of the proposed taking in *Lands of Stone* was for the statutorily-authorized purpose—*i.e.*, recreational use. The Supreme Court concluded that the common pleas court's factual findings did not support the taking. The Supreme Court noted that the plan on which Middletown Township's taking was premised did not at all provide for use of the farm property for recreational purposes. *Id.* at 339. The Supreme Court also rejected as insignificant Middletown Township's consideration of

various recreational options for the property, each of which the Supreme Court found problematic from a “public use” and necessity perspective. *Id.* Finally, the Supreme Court rejected the common pleas court’s finding that Middletown Township “might” use portions of the property for passive recreation, noting the absence of any record evidence to support this finding. *Id.* The Supreme Court concluded:

***1024** It is clear that in order to invoke that power [of eminent domain], it was incumbent upon the Township to identify the fact that it could take for a recreational purpose and to take action to effectuate that purpose. Further, as stated previously, precedent demonstrates that condemnations have been consistently upheld when the taking is orchestrated according to a carefully developed plan which effectuates the stated purpose. Anything less would make an empty shell of our public use requirements. It cannot be sufficient to merely wave the proper statutory language like a scepter under the nose of a property owner and demand that he forfeit his land for the sake of the public. Rather, there must be some substantial and rational proof by way of an intelligent plan that demonstrates informed judgment to prove that an authorized public purpose is the true goal of the taking.

The record does not support any finding of a condemnation proceeding informed by intelligent judgment or a concrete plan to use the Stone farm for the authorized purpose of recreation....

Id. at 340 (citations omitted). Accordingly, the Supreme Court held that the common pleas court erred in overruling the preliminary objections to the taking. *Id.*

The Pennsylvania Supreme Court revisited the power of eminent domain a few years later, when it considered a constitutional challenge to the Private Road Act.⁷ The Private Road Act allows a landowner to petition the court of common pleas to appoint a board of viewers to consider the necessity of a private road to connect landlocked property with the nearest public thoroughfare. Like eminent domain, the landowner who is successful under the Private Road Act must compensate the person over whose property the private road is built. In *In re Opening a Private Road (O'Reilly)*, 607 Pa. 280, 5 A.3d 246 (2010), the challengers contended that the Private Road Act authorized the taking of private property for private purposes in violation of the United States and Pennsylvania Constitutions.

The Supreme Court, agreeing with the challengers, opined that the Private Road Act provides for a government taking of private property in the constitutional sense. *O'Reilly*, 5 A.3d at 257. The Supreme Court held that any effort by the General Assembly to vest within an individual or nongovernmental entity the right to take private property for its own use must constitute “a valid exercise of the power of eminent domain.” *Id.* In this Court’s majority opinion on review by the Supreme Court in *O'Reilly*, we articulated a public benefit behind the private road in question:

[E]ven if we were to use a traditional takings analysis to determine the constitutionality of the [Private] Road Act, a public purpose is served by allowing the laying out of roads over the land of another. Although

the private property owner who petitioned for the private road certainly gains from the opening of the road, the public gains because otherwise inaccessible swaths of land in Pennsylvania would remain fallow and unproductive, whether to farm, timber or log for residences, making that land virtually worthless and not contributing to commerce or the tax base of this Commonwealth. All of this, plus the fact that private roads are considered part of the road system of Pennsylvania, *equate with the conclusion that a public purpose is served by the Private Road Act provisions that allow for the taking of* *1025 *property of another for a private road to give access to landlocked property.*

In re Opening a Private Road (O'Reilly), 954 A.2d 57, 72 (Pa.Cmwltth.2008) (en banc) (emphasis added), *vacated and remanded*, 607 Pa. 280, 5 A.3d 246 (2010). The Supreme Court, however, found this articulation of a public purpose, or benefit, inadequate to support a taking. Instead, the test, as articulated in *Lands of Stone*, requires that “the public must be the primary and paramount beneficiary of the taking.” *O'Reilly*, 5 A.3d at 258 (citing *Lands of Stone*, 939 A.2d at 337). The Supreme Court, therefore, vacated this Court’s decision and remanded the case for further proceedings consistent with its decision—*i.e.*, to apply the proper test.

In their preliminary objections below and on appeal, Property Owners note that when Sunoco presented this very same pipeline facility—ME2—to the Court of Common Pleas of York County (York County court), Sunoco maintained that the sole purpose of the pipeline was for the interstate transportation of all types of NGLs (ethane, propane, liquid petroleum, gas, and others) for Sunoco's customers. In its February 25, 2014 Opinion Denying Motion for Immediate Right of Entry, the York County court,⁸ accepting Sunoco's represented purpose for constructing the pipeline, held that the facility was *not* an act in furtherance of Sunoco's PUC authority, but, rather, was an act in furtherance of interstate commerce, regulated by the Federal Energy Regulatory Commission (FERC) pursuant to the Interstate Commerce Act. (Reproduced Record (R.R.) 484a–89a.) Under such circumstances, according to the York County court, Sunoco's power of eminent domain as a public utility corporation under the BCL was not triggered.

Sunoco, through PUC-issued certificates of public convenience, is authorized to offer, furnish, or supply intrastate petroleum and refined petroleum products pipeline service.⁹ The particular NGL that is the subject of this PUC authority is propane, which many in the Commonwealth use as fuel for heating. (R.R. 60a–64a.)¹⁰ At the time the York County court issued its decision, however, Sunoco *did not* have PUC authority to offer that intrastate public utility service from Pennsylvania's western-most border to Pennsylvania's eastern-most border. In western Pennsylvania, that authority stopped at Westmoreland County. In addition, as revealed below,

Sunoco had suspended/abandoned intrastate service in some parts of the Commonwealth before pursuing the taking in York County.

Following the York County court's decision, Sunoco filed two applications with the PUC relating to ME2. The first, filed on May 21, 2014, sought "clarification" of a prior PUC Order (issued August 29, 2013), which granted Sunoco the authority to suspend and abandon public utility service in certain portions of its authorized territory. The PUC granted that application by order dated July 24, 2014. (R.R. 191a-201a.) *1026 In its disposition, the PUC noted a change of circumstances that prompted its reconsideration of the prior order authorizing suspension and abandonment of service:

We conclude that Sunoco has identified new considerations in its Petition, based on its averments that the circumstances surrounding the Mariner East Pipeline project have changed since the issuance of the *August 2013 Order*. When we approved Sunoco's Abandonment Application, the Company did not intend to provide intrastate service within Pennsylvania from the Mariner East Pipeline and planned to provide only intrastate transportation of ethane and propane from west-to-east to the [Marcus Hook IC]. *August 2013 Order at 3*. The Company's plans have since changed due to the increased demand for intrastate

transportation of propane, and Sunoco now intends to offer intrastate propane service in response to the increased shipper interest in securing intrastate pipeline facilities.

(R.R. 198a–99a.) In granting Sunoco’s application for clarification, the PUC confirmed that Sunoco retained its authority to provide intrastate public utility service through its certificates of public convenience in the previously abandoned service areas and clarified the procedures that Sunoco must follow to resume pipeline transportation services for petroleum products in those areas. (R.R. 200a–01a.)

On June 9, 2014, Sunoco applied to the PUC for authority to extend its authorized service to the public in Washington County, Pennsylvania—a border county with West Virginia. The PUC approved that request in August 2014. (*Id.*) With that decision, Sunoco, for the first time, had PUC authority to provide public utility service in the form of pipeline transportation of petroleum products in Pennsylvania as far east as Delaware County and as far west as Washington County.

As noted above, Sunoco relied solely on the *interstate* component, or purpose, of ME2 in the York County court proceeding (*Loper*). On or about July 21, 2015, Sunoco filed the three Declarations of Taking in the Court of Common Pleas of Cumberland County, Pennsylvania (trial court), that are at issue in this appeal. In the Declarations of Taking, in the proceedings below, and in this appeal, Sunoco

emphasizes its PUC authority and the *intrastate* service that ME2 will provide to those in Pennsylvania who benefit from that regulated service. As it did in its May 21, 2014 application to the PUC, Sunoco acknowledges in the Declarations of Taking that the renewed focus on *intrastate* supply of petroleum products occurred at or around the time of the York County court's decision in *Loper*:

During and following the 2013–2014 winter season, Sunoco Pipeline experiences a significant increase in shipper demand for *intrastate* shipments of propane due to an increase in local consumer demand for propane. These changes in market conditions were due to propane shortages caused by the harsh winter conditions and a deficit in pipeline infrastructure. The resulting price spikes and shortages prompted unprecedented emergency measures from both the state and federal governments. In reaction to the unfolding market conditions and shipper interest, Sunoco Pipeline accelerated its business plans to provide *intrastate* shipments of propane within the Commonwealth, in addition to interstate shipments of propane and ethane.

(R.R. 159a–60a (emphasis in original).) Absent from the Declarations of Taking, however, are any allegations that this new emphasis on the intrastate supply of propane *1027 to people within the Commonwealth is, as the Supreme Court phrased in

Lands of Stone, the “true” purpose behind the taking.¹¹

With this background, Property Owners are justifiably skeptical. At base, Property Owners contend that nothing of material moment has changed in terms of Sunoco’s purpose for constructing and its intended use of ME2. Counsel for Property Owners questioned Curtis M. Stambaugh, Esquire, Sunoco’s Assistant General Counsel, about this issue at the hearing on the preliminary objections below:

Q. And at that point [in a brief filed by Sunoco in the York County matter] doesn’t your Sunoco brief indicate that the Pennsylvania Public Utility Commission has no jurisdiction to regulate the pipeline because it is an interstate line not an intrastate line?

A. Yes, sir, I do. As you are aware from the four hearings we’ve already had where you’ve been counsel on the opposite side, we have repeatedly testified that in 2014 the initial plan was for interstate service only. After the polar vortex that changed to contemplate both inter and intrastate, that is actually the reason why we need to go get the Certificate of Public Convenience to include Washington County from the Public Utility Commission.

Q. After the polar vortex and after this [York County] decision, was Mariner East 2 still an interstate pipeline?

A. It is both, yes, sir, inter and intrastate.

Q. Continues to cross state lines? Continues to be a proposal to cross state lines?

A. Yes, sir.

(R.R. 1339a–40a.) According to Property Owners, ME2 is now what it always has been—a predominantly, if not exclusively, interstate endeavor, intended to benefit not the Pennsylvanians who require propane to heat their homes, but Sunoco’s customers, who will use the pipeline to transport NGLs from parts west of Pennsylvania and within western Pennsylvania to the Marcus Hook IC for eventual use by concerns outside of Pennsylvania. Accordingly, Property Owners contend that the result before the trial court on the Declarations of Taking should have matched the result in York County.

Although the legal issue is not as clearly articulated as I would hope (or even expect) it to be, the concern of Property Owners is plain. In their Statement of the Case, Property Owners complain that Sunoco “engaged in an array of activities attempting to obtain state eminent domain power to reduce the cost of purchasing property rights,” but that ME2 is still a matter of interstate commerce. The eminent domain power of the BCL is, therefore, not available, according to Property Owners. (Appellants’ Br. at 5.) At page 16 of their brief, Property Owners describe Sunoco’s addition of new on—and off-ramp locations along ME2 to serve intrastate service as “a faulty ploy to try to obtain eminent domain power.” (*Id.* at 16.) Although Property Owners mostly couch their arguments on appeal in terms of the pipeline being interstate *and not* intrastate (the trial court found that it is both), the position that the pipeline is *not intrastate enough* to trigger eminent domain authority under the BCL can also be gleaned from a fair and reasonable reading of the *1028 record below and Property Owners’ arguments on appeal.

Upon review of the trial court's September 29, 2015 Order, overruling Property Owners' preliminary objections to the Declarations of Taking, and the trial court's subsequent Opinion Pursuant to Pa. R.A.P.1925, I must conclude that the trial court's analysis of the takings at issue in this case and of Property Owners' contentions is incomplete. The trial court grounded its decision below on its factual findings that ME2, as reconfigured following the York County matter, will have the capacity to provide both interstate service regulated by FERC and intrastate service regulated by the PUC. Those findings alone, however, are inadequate to address the key legal question of whether Sunoco's "true purpose" behind the takings is to provide *intrastate* public utility service to Pennsylvanians of the type authorized and in the territories authorized by the PUC. If the courts are to allow these takings to proceed, it must be so, and not some post-hoc, retroactive, or pre-textual justification to secure land by eminent domain. Sunoco must convince the trial court, through "some substantial and rational proof," that providing PUC-authorized service "is the true goal" of taking Property Owners' land. *Lands of Stone*, 939 A.2d at 337–40. This Court cannot and should not authorize the taking of private land in this case until the trial court makes such findings and renders such a legal conclusion. At that point, we can properly exercise appellate review.

DISSENTING OPINION BY Judge McCULLOUGH.

I must respectfully dissent from the thoughtful Majority decision to permit Sunoco Pipeline, L.P.

(Sunoco), a publicly traded company, to confiscate the private property of R. Scott Martin and Pamela Martin, Douglas M. Fitzgerald and Lyndsey M. Fitzgerald, and Harvey A. Nickey and Anna M. Nickey (Condemnees). After reviewing the procedural history of this matter, I am concerned that Sunoco is trying to avoid what may be the collateral estoppel effect of a decision adverse to its interests rendered by the Court of Common Pleas of York County and to utilize the sovereign power of eminent domain to take Condemnee's property for its exclusively private benefit.

Specifically, in recent proceedings before the Court of Common Pleas of York County, Sunoco represented that the same pipeline facility that is at issue here, known as the Mariner East 2 pipeline or ME2, was for *interstate* transportation of all types of natural gas liquids (NGLs). Based on that representation, the common pleas court quite properly determined that ME2 was not in furtherance of Sunoco's Public Utility Commission (PUC) authority and, hence, Sunoco could not assert eminent domain powers under the guise of an intrastate public utility corporation and in accordance with section 1511(a) of the Business Corporation Law of 1988, 15 Pa.C.S. § 1511(a). See *Sunoco Pipeline, L.P. v. Loper* (York County C.P., No. 2013-SU-4518-05, filed February 24, 2014) (reaffirmed March 25, 2014).

Rather than appeal the decision in *Loper*, Sunoco, in May of 2014, less than two months after that decision, sought, and subsequently obtained, a "clarification" from the PUC to re-assert intrastate service after Sunoco had previously obtained PUC approval to

abandon such service less than a year before as set forth in a PUC Order dated August 29, 2013. Sunoco then followed up its claimed renewed intention to provide intrastate service within the Commonwealth from as far east as Delaware County to as far west as Washington County.

***1029** In other words, without abandoning its admitted interstate purpose for ME2, Sunoco has obtained approval for intrastate service for the first time across the entire breadth of Pennsylvania. Sunoco's dizzying array of procedural moves and reversal of course as to its business plans in Pennsylvania in the aftermath of the *Loper* decision were followed by the present declarations of taking seeking extensive portions of Condemnees' private properties in Cumberland County, not York County. Despite its prior representation that ME2 was an interstate pipeline, Sunoco now claims that it has an intrastate component as well, and, upon that basis alone, has sufficient justification for these takings.

The assertion that ME2 will have several new "on and off" ramp locations so as to ostensibly provide intrastate service, is, at the preliminary hearing stage, insufficient to counter the recent representation Sunoco made to the Court of Common Pleas of York County that ME2 was exclusively interstate. In order to uphold the invocation of the power of eminent domain, the justification must be genuine and real, not hypothesized, or invented *post hoc* in response to litigation. See *Middletown Township v. Lands of Stone*, 595 Pa. 607, 939 A.2d 331, 338 (2007); see also *United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996).

Additionally, I am troubled by Sunoco's failure to obtain any PUC recognition that ME2 is within the ambit of the "intrastate" service it now professes it plans to provide, as well as its failure to obtain any certificate of public convenience (CPC) to expressly authorize it to exercise the power of eminent domain. As can be gleaned from the Majority's opinion, Sunoco has cobbled together various CPCs since the 1930's, but never sought a CPC or any other PUC approval granting it the ability to exercise eminent domain within the Commonwealth. Most certainly, Sunoco never sought authority to exercise eminent domain as to ME2. Rather, Sunoco would have this Court confer such power upon it on the basis of vague, non-specific language in a PUC Order dated October 29, 2014, which was entered as part of Sunoco's post-*Loper* procedural posturing. I believe this violates the spirit if not the letter of Section 1104 of the Public Utility Code, 66 Pa.C.S. § 1104.

I would also note that the cases cited by the Majority to analogize this case to other instances of concurrent interstate and intrastate activity by business entities are clearly distinguishable in that none of the cases so cited involved the exercise of eminent domain powers to take private property. Private ownership of property is a fundamental right under the U.S. Constitution, and as noted by my colleague, Judge Brobson, in his dissent, a right that is zealously protected under the Pennsylvania Constitution as well. The Majority's decision, I fear, will gravely undermine that right.

Accordingly, I would reverse the trial court's decision and sustain Appellee's preliminary objection that Sunoco is collaterally estopped from re-litigating the interstate nature of ME2. I would also caution Sunoco not to bypass the PUC should it desire to pursue this matter further and obtain, in the first instance, the proper authority from the PUC to exercise eminent domain powers with respect to ME2 before it targets private property within the Commonwealth and seeks to deprive Commonwealth citizens of their fundamental right to own the same.

All Citations

143 A.3d 1000

Footnotes

¹ 15 Pa.C.S. §§ 1101–9507.

² Section 1511(a)(2) of the BCL provides:

§ 1511. Additional powers of certain public utility corporations.

(a) General rule.—

A public utility corporation shall, in addition to any other power of eminent domain conferred by any other statute, have the right to take, occupy and condemn property for one or more of the following principal purposes and ancillary purposes reasonably necessary or appropriate for the accomplishment of the principal purposes:

* * *

(2) The transportation of artificial or natural gas, electricity, petroleum or petroleum products or water or any combination of such substances for the public.

15 Pa.C.S. § 1511(a)(2).

³ 66 Pa.C.S. §§ 101–3316.

⁴ Section 1101 of the Code (related to the organization of public utilities and the beginning of service) provides:

Upon the application of any proposed public utility and the approval of such application by the commission evidenced by its certificate of public convenience first had and obtained, it shall be lawful for any such proposed public utility to begin to offer, render, furnish, or supply service within this Commonwealth. The commission's certificate of public convenience granted under the authority of this section shall include a description of the nature of the service and of the territory in which it may be offered, rendered, furnished or supplied.

66 Pa.C.S. § 1101. Similarly, Section 1102 of the Code (related to the enumeration of the acts requiring a certificate of public convenience), provides, in part, as follows:

(a) General rule.—Upon the application of any public utility and the approval of such application by the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, it shall be lawful:

(1) For any public utility to begin to offer, render, furnish or supply within this Commonwealth service of a different nature or to a different territory....

66 Pa.C.S. § 1102. Section 1104 of the Code states:

§ 1104. Certain appropriations by right of eminent domain prohibited.

Unless its power of eminent domain existed under prior law, no domestic public utility or foreign public utility authorized to do business in this Commonwealth shall exercise any power of eminent domain within this Commonwealth until it shall have received the certificate of public convenience required by section 1101 (relating to organization of public utilities and beginning of service).

66 Pa.C.S. § 1104.

⁵ See, e.g., 42 U.S.C. § 7155; 42 U.S.C. § 7172(b) (transferring authority conferred by ICA upon the Interstate Commerce Commission (ICC) to regulate pipeline transportation of oil to FERC); 49 U.S.C. § 60502 (regarding FERC jurisdiction over

rates for the transportation of oil by pipeline formerly vested in the ICC). According to its website, FERC is an independent agency that among other duties regulates the interstate transmission of electricity, natural gas and oil. The website further notes that many areas beyond FERC's jurisdiction are within the province of state public utility commissions. Federal Energy Regulatory Commission, What FERC Does, available at <http://ferc.gov/about/ferc-does.asp> (last visited May 20, 2016).

- ⁶ Pipeline transportation services are defined as public utility services under Section 102 of the Code, 66 Pa.C.S. § 102, which provides as follows:

§ 102. Definitions.

* * *

Public utility.

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

* * *

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

Id.

- ⁷ Sunoco points out that the term “public utility corporation” is not limited to corporations, but also includes partnerships and limited liability companies, citing Section 8102(a)(2) of the BCL, 15 Pa.C.S. § 8102(a)(2), which provides that:

§ 8102. Interchangeability of partnership, limited liability company and corporate forms of organization.

(a) General rule.—

Subject to any restrictions on a specific line of business made applicable by section 103 (relating to subordination of title to regulatory laws):

* * *

(2) A domestic or foreign partnership or limited liability company may exercise any right, power, franchise or

privilege that a domestic or foreign corporation engaged in the same line of business might exercise under the laws of this Commonwealth, including powers conferred by section 1511 (relating to additional powers of certain public utility corporations) or other provisions of law granting the right to a duly authorized corporation to take or occupy property and make compensation therefor.

Id.

⁸ PUC has interpreted the definition of “petroleum products” broadly to encompass what would otherwise be an exhaustive list of products. This list includes propane. See *Petition of Sunoco Pipeline, L.P. for Amendment of the Order Entered on August 29, 2013*, Entered July 24, 2014, Docket No. P-2014-2422583, at 9 n. 5, (R.R. at 41a-51a); and *Petition of Granger Energy of Honey Brook LLC*, Docket No. P-00032043, at 14 (Order entered August 19, 2004). In these Orders, PUC held that this interpretation 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 PUC and defines “petroleum gas” to include propane. 49 C.F.R. § 192.3. PUC posits that its interpretation also is consistent with the definition of “petroleum” in the federal hazardous liquids pipeline safety regulations at 49 C.F.R. Part 195. Part 195 also has been adopted by PUC (52 Pa.Code § 59.33(b)) and defines “petroleum” to include natural gas liquids and liquefied petroleum gas, which can include propane. 49 C.F.R. § 195.2. The following definitions can be found in the Parts 192 and 195 of the C.F.R.:

§ 192.3 Definitions.

As used in this part:

* * *

Petroleum gas means propane, propylene, butane, (normal butane or isobutanes), and butylene (including isomers), or mixtures composed predominantly of these gases, having a vapor pressure not exceeding 208 psi (1434 kPa) gage at 100° F (38° C).

49 C.F.R. § 192.3

§ 195.2 Definitions

As used in this part—

* * *

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.

49 C.F.R. § 195.2

⁹ According to the United States Energy Information Administration:

Natural gas liquids (NGLs) are hydrocarbons—in the same family of molecules as natural gas and crude oil, composed exclusively of carbon and hydrogen. Ethane, propane, butane, isobutane, and pentane are all NGLs ... NGLs are used as inputs for petrochemical plants, burned for space heat and cooking, and blended into vehicle fuel

The chemical composition of these hydrocarbons is similar, yet their applications vary widely. Ethane occupies the largest share of NGL field production. It is used almost exclusively to produce ethylene, which is then turned into plastics. Much of the propane, by contrast, is burned for heating, although a substantial amount is used as petrochemical feedstock....

United States Energy Information Administration, *Today in Energy*, April 20, 2012, available at <http://www.eia.gov/todayinenergy/detail.cfm?id=5930&src=email> (last visited May 20, 2016).

¹ Sunoco also points out that it has filed all necessary tariffs
⁰ required to implement the intrastate service proposed by the Mariner East Project. The authority to file a tariff is limited to a public utility regulated by PUC. Section 1302 of the Code states that “every public utility shall file with the [C]ommission ... tariffs showing all rates established by it and collected or enforced, or to be collected or enforced, within the jurisdiction of the [C]ommission.” 66 Pa.C.S. § 1302. The record contains the following with regard to Sunoco’s tariffs:

Sunoco filed Tariff Pipeline—Pa. P.U.C. No. 16 on June 12, 2014. By final Order dated August 21, 2014, in Docket No. R—

2014–2426158 PUC permitted the tariff to become effective on October 1, 2014. (R.R. at 53a–56a.) On November 6, 2014, Sunoco filed Supplement No. 2 Tariff Pipeline–Pa P.U.C. No. 16 (Supplement No. 2) to become effective January 5, 2015. (R.R. at 66a.) Supplement No. 2 proposed to add the new origin point of Houston, Washington County for west-to-east intrastate movements of propane, based on the CPCs issued. (*Id.*) On December 18, 2014, Sunoco filed Supplement No. 4 voluntarily postponing the effective date to January 16, 2015. PUC allowed Tariff Pipeline–Pa. P.U.C. No. 16 and Supplement No. 2 to become effective. (R.R. at 53a–57a, 66a–69a.)

¹ The York County decision upon which Condemnees rely for
¹ their collateral estoppel argument and which we address *infra* was issued during this timeframe and prior to Sunoco's decision to expand service on the Mariner East Project to include intrastate service.

¹ Section 703(g) of the Code provides:

² § 703. Fixing of hearings.

* * *

(g) Rescission and amendment of orders.—

The commission may, at any time, after notice and after opportunity to be heard as provided in this chapter, rescind or amend any order made by it. Any order rescinding or amending a prior order shall, when served upon the person, corporation, or municipal corporation affected, and after notice thereof is given to the other parties to the proceedings, have the same effect as is herein provided for original orders.

66 Pa.C.S. § 703(g).

¹ (December 22, 2015 Op. at 2 n. 1.)

³

¹ Common pleas added the following footnote to its September

⁴ 29, 2015 Order:

We feel that a brief explanation of our decision is appropriate in regards to [sic] Preliminary Objections 1, 3

and 7. As to the first Preliminary Objection, the Mariner East 2 (ME2) pipeline at issue will provide both loading and offloading of ethane, propane, liquid petroleum gas and other petroleum products within the Commonwealth. As such, ME2 provides intrastate service, regulated by the Pennsylvania Public Utility Commission (PUC). [Sunoco] is a “[p]ublic utility corporation” as defined at 15 Pa.C.S.[] § 1103. Pennsylvania public utility corporations possess the power of eminent domain. 15 Pa.C.S.[] § 1511. Since ME2 may be regulated by both the Federal Energy Regulatory Commission (FERC) and the PUC, federal preemption is not at issue.

As to the third Preliminary Objection, the Honorable Judge Linebaugh’s decision in *Sunoco Pipeline, L.P. v. Loper*, 2013–SU–4518–05 (C.P.York, February 24, 2014) (*reaffirmed* March 25, 2014) is inapposite to the case at bar. *Loper* was decided when Condemnor’s plans for ME2 consisted of the installation of a purely interstate pipeline, crossing Pennsylvania state lines but containing no stations for the off-loading of transported materials. In *Loper*, Condemnor had argued that FERC provided that with the power of eminent domain for a purely *interstate* pipeline. Since that decision Condemnor has reconfigured ME2 to be both an *interstate* pipeline as well as an *intrastate* pipeline subject to PUC regulation.

While we had questions as to the adequacy of the bond, the Condemnees failed to present any evidence as to the effect of the taking upon the value of their property. Therefore we have no alternative but to overrule their seventh Preliminary Objection.

(September 29, 2015 Order at 2 (emphasis in original).)

¹ Pa. R.A.P.1925(b) provides as follows:

⁵ **Rule 1925. Opinion in Support of Order**

* * *

(b) Direction to file statement of errors complained of on appeal; instructions to the appellant and the trial court.—If the judge entering the order giving rise to the notice of appeal (“judge”) desires clarification of the errors complained of on appeal, the judge may enter an order directing the appellant to file of record in the trial

court and serve on the judge a concise statement of the errors complained of on appeal ("Statement").

Id.

¹ Common pleas also rejected Condemnees' arguments that
⁶ Sunoco's corporate resolutions authorized takings for interstate pipelines only. (December 22, 2015 Op. at 5–6.) Condemnees do not pursue that argument here.

¹ In an eminent domain case disposed of on preliminary
⁷ objections this Court is limited to determining if common pleas' necessary findings of fact are supported by competent evidence and if an error of law or an abuse of discretion was committed. *Stark v. Equitable Gas Co., LLC*, 116 A.3d 760, 765 n. 8 (Pa.Cmwlth.2015).

¹ See, e.g., *Maryland v. Louisiana*, 451 U.S. 725, 101 S.Ct. 2114,
⁸ 68 L.Ed.2d 576 (1981) (for purposes of evaluating effect under the Commerce Clause of state tax, natural gas flowing from Gulf of Mexico in pipelines through Louisiana to up to 30 other states does not lose interstate character even if processing to remove NGLs takes place in Louisiana); *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 85 S.Ct. 486, 13 L.Ed.2d 357 (1965) (sale of gas which crosses a state line at any stage of its movement from wellhead to ultimate consumption is in interstate commerce within the meaning of the Natural Gas Act).

¹ Testimony shows that on-loading in Pennsylvania will occur in
⁹ Independence Township (Washington County), Houston (Washington County), Delmont (Westmoreland County), and Mechanicsburg (Cumberland County). (R.R. at 1340a.) Off-loading points in Pennsylvania are in Mechanicsburg, Schaefferstown (Lebanon County), Montello (Berks County), and Twin Oaks (Delaware County). (R.R. at 1341a.)

² PUC takes no position regarding the affirmance or reversal of
⁰ common pleas' decision or whether Sunoco appropriately exercised eminent domain authority against Condemnees' real property interests.

² 26 Pa.C.S. §§ 101–1106.

¹

² Condemnees cite several decisions for the proposition that
² “[t]he Court must ... review whether Mariner East 2 pipeline satisfies the public purpose test.” (Condemnees’ Br. at 26–27.) However, none of the cases cited support the proposition that common pleas may review a public utility’s CPC in an eminent domain context because those cases involve appellate review of PUC decisions related to public need for a particular service, not court decisions involving eminent domain.

¹ James Madison, *Property*, in *The Founders’ Constitution* I:598 (Philip Kurland and Ralph Lerner eds., Chicago: Univ. of Chicago Press 1987) (emphasis in original).

² Although Sunoco disputes that ME2 is an actual reference to the pipeline in question, unless the context indicates otherwise, I will use ME2 to refer to the proposed pipeline.

³ NGLs are byproducts of natural gas production compressed into liquid form. They include pentane, propane, butane, isobutene, and ethane.

⁴ The Takings Clause of the Fifth Amendment prohibits that taking of “private property ... for *public use*, without just compensation.” U.S. Const. amend. V (emphasis added).

⁵ See, e.g., Ilya Somin, *The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain* 73 (2015); Brent Nicholson and Sue Ann Mota, *From Public Use to Public Purpose: The Supreme Court Stretches the Takings Clause in Kelo v. City of New London*, 41:1 Gonz. L.Rev. 81 (2005).

⁶ Act of May 1, 1933, P.L. 103, *as amended*, 53 P.S. § 67201.

⁷ Act of June 13, 1836, P.L. 551, *as amended*, 36 P.S. §§ 2731–2891.

No. _____

In The

SUPREME COURT OF THE UNITED STATES

IN RE: CONDEMNATION BY SUNOCO PIPELINE,
L.P. OF PERMANENT AND TEMPORARY RIGHTS
OF WAY FOR THE TRANSPORTATION OF
ETHANE, PROPANE, LIQUID PETROLEUM GAS,
AND OTHER PETROLEUM PRODUCTS IN THE
TOWNSHIP OF HEIDELSBERG, LEBANON
COUNTY, PENNSYLVANIA, OVER THE LANDS
OF HOMES FOR AMERICA, INC.,

Petitioners

vs.

SUNOCO PIPELINE, L.P.

Respondent,

On Petition for Certiorari from the Supreme Court of
Pennsylvania

**APPENDIX VOLUME III
PETITION FOR A WRIT OF CERTIORARI**

Michael F. Faherty
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**APPENDIX TO THE PETITION FOR A WRIT
OF CERTIORARI**

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**IN THE COMMONWEALTH COURT OF
PENNSYLVANIA**

NO. 565 CD 2016

**HOMES FOR AMERICA, INC.,
Appellant
v.
SUNOCO PIPELINE, L.P.,
Appellee**

**Appeal from the Opinion and Order of the
Lebanon County
Court of Common Pleas, Robert J. Eby, S.J.,
Dated March 29, 2016**

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

This Court has jurisdiction to review final orders of the Courts of Common Pleas pursuant to 42 Pa. C.S.A. § 762(a)(6). The Court of Common Pleas for the Fifty Second Judicial District had jurisdiction under 42 Pa. C.S.A. § 931 to hear this matter. Appellant filed a notice of appeal on April 8, 2016. (R. at 1291a-1294a).

ORDER IN QUESTION
ORDER OF THE COURT

AND NOW, this 24th day of March, 2016, after careful consideration of the Preliminary Objections filed by Condemnees and the complete record of the case, we note and direct as follows:

1. The Mariner East 2 Pipeline will provide both interstate and intrastate service for ethane, propane, and other petroleum products in the Commonwealth.
2. Such pipeline service is dually-regulated, with the Federal Energy Regulatory Commission having the authority to regulate interstate service and the Pennsylvania Public Utility Commission having the authority to regulate intrastate service.
3. Since Sunoco Pipeline L.P. is regulated by the Public Utility Commission for the Mariner East 2 Project, it meets the definition of a public utility providing public utility service under the Pennsylvania Business Corporations Law.
4. As a public utility providing public utility service under the Business Corporations Law, Sunoco Pipeline has the power of eminent domain.
5. The doctrine of collateral estoppel does not apply to compel a different result.
6. The bonds posted by Sunoco Pipeline L.P. in response to our Order of December 15, 2015 are

adequate to cover the damages anticipated by
Condemnees.

7. In light of the above, the Preliminary
Objections of Condemnees are **DENIED** in their
entirety.

BY THE COURT,

_____, S.J.
ROBERT J. EBY

*The full Order and Opinion of the trial court is
attached as Appendix A.*

SCOPE AND STANDARD OF REVIEW

This Court's scope of review in eminent domain cases is abuse of discretion, error of law, or whether the findings and conclusions are supported by sufficient evidence. Octorara Area School Dist. Appeal, 556 A.2d 527 (Pa. Cmwlt. Ct. 1989). The trial court's findings of fact will not be disturbed if they are supported by substantial evidence. Erie Municipal Airport Auth. v. Agostini, 620 A.2d 55 (Pa. Cmwlt. Ct. 1993). In addition, when an appeal concerns a question of law, this Court's review is plenary. In Re Condemnation of Springboro Area Water Auth. of Property of Gillette, 898 A.2d 6, 8 n. 3 (Pa. Cmwlt. Ct. 2006).

QUESTIONS INVOLVED

1. Did the Court of Common Pleas err in finding the proposed Mariner East 2 pipeline will provide both intrastate and interstate service when Sunoco Pipeline, L.P. failed to provide any Public Utility Commission Orders which approved the Mariner East 2 pipeline or determined the proposed Mariner East 2 pipeline was for the public?

(Suggested Answer: Yes)

2. Did the Court of Common Pleas err in finding Mariner East 2 service as dually-regulated where no law supports dual regulation and the Pennsylvania Public Utility Code, 66 Pa. C.S.A. § 104, prohibits regulation of interstate commerce by the Pennsylvania Public Utility Commission?

(Suggested Answer: Yes)

3. Did the Court of Common Pleas err in finding Sunoco Pipeline, L.P. meets the definition of public utility under the Pennsylvania Business Corporation Law when the proposed Mariner East 2 is in interstate commerce and not for the public?

(Suggested Answer: Yes)

4. Did the Court of Common Pleas err in finding Sunoco Pipeline, L.P. has the power of eminent domain for its proposed Mariner East 2 pipeline when it is not for the public, the Resolution provided authorized an interstate pipeline, and the

evidence shows Sunoco's asserted need for only one (1) pipeline and not two (2) pipelines?

(Suggested Answer: Yes)

5. Did the Court of Common Pleas err in finding that collateral estoppel does not apply to compel a different result where Mariner East 2 remains in interstate commerce and eminent domain power for Mariner East 2 was denied in Sunoco Pipeline, L.P. v. Loper, 2013-SU-4518-05 (C.P. York County, February 24, 2014) *reaffirmed* March 25, 2014?

(Suggested Answer: Yes)

STATEMENT OF THE CASE

Sunoco Pipeline, L.P. (hereinafter “Sunoco”) is a for-profit company. (R. at 640a, 641a). Sunoco “is a master limited partnership formed to own, acquire and operate pipelines. To transport petroleum products and refined petroleum products . . . such as natural gas liquids [(hereinafter “NGLs”)] like propane, ethane, butane throughout [a] pipeline system to markets from origin to destinations.” (R. at 654a).

Around 2012, Sunoco developed a major pipeline project known as the Mariner East Project with the primary purpose “to alleviate the oversupply and lack of transportation infrastructure for those liquids to find more efficient methods of reaching markets for those liquids.” (R. at 623a, 655a, 186a-193a). Sunoco applied to the Federal Energy

Regulatory Commission (hereinafter “FERC”) for the Mariner East Project interstate service under the Interstate Commerce Act (hereinafter “ICA”) as a common carrier. (R. at 590a, 186a-193a). In that application, Sunoco stated there was no market in the Northeast, which included Pennsylvania, for the excess NGLs. (R. at 186a-193a). FERC approved the service for Sunoco’s Mariner East Project, without the power of eminent domain, on February 15, 2013. (R. at 590a, 591a, 186a-193a).

Sunoco seeks easements across property owned by Homes for America, Inc. (hereinafter “Homes, Inc.”) for two (2) new pipelines, 20 inches in diameter, known as Mariner East 2. (R. at 683a, 704a, 18a, 21a). Sunoco asserts it has eminent domain power to condemn the property because it is a public utility corporation under the Pennsylvania Business Corporation Law (hereinafter “BCL”). (R. at 688a,

692a). Homes, Inc. opposes this assertion and the attempted condemnation for the reasons fully set forth in its preliminary objections. (R. at 176a-184a). The Sunoco Resolution provided in the Declaration of Taking shows approval for an interstate pipeline, not eminent domain for an intrastate pipeline. (R. at 144a-148a). The Resolution specifically authorized a “350 mile new build pipeline from origins in Ohio, West Virginia and Pennsylvania to the Marcus Hook Industrial Complex.” (R. at 147a).

Mariner East 2 is Sunoco’s proposed pipeline which would originate in Scio, Ohio traverse through West Virginia and then Pennsylvania and end in Claymont, Delaware at Sunoco’s Marcus Hook Facility. (R. at 660a, 144a-148a). Sunoco’s admitted current plan shows the pipeline crossing state lines. (R. at 605a, 144a-188a). Sunoco admits the Pennsylvania Public Utility Commission (hereinafter

“PUC”) has no jurisdiction over interstate pipelines. (R. at 593a).

All of the PUC Certificates and Orders, proposed by Sunoco, to support its assertion that it is a public utility corporation describe PUC approval of intrastate service and do not show PUC approval or regulation of Mariner East 2. (R. at 24a-134a, 603a-604a, 629a). The August 21, 2014 Certificate approved only intrastate service of petroleum and refined petroleum products. (R. at 606a, 60a-65a). No PUC Order approves Sunoco’s Mariner East 2. (R. at 24a-134a, 629a).

In fact, Sunoco, with respect to the Mariner East 2, was found to not have the power of eminent domain in Loper v. Sunoco Pipeline, L.P., decision dated February 24, 2014. (R. at 206a-212a, 595a, 604a). That decision was reaffirmed on March 25, 2014. (R. at 213a-215a). The reaffirming decision

specifically provided that “FERC has chosen to regulate [Sunoco] as a common carrier pursuant to the ICA. It is therefore not a public utility for the purposes of the [BCL] and [Sunoco] is not entitled to eminent domain powers under the [BCL].” (R. at 214a-215a). Sunoco filed a Motion for Reconsideration but never appealed those decisions. (R. at 322a-336a).

It was after the Loper decision was handed down that Sunoco began asserting it switched its planning for Mariner East 2 to have on and off ramps in Pennsylvania. (R. at 629a). Sunoco alleges its shippers expressed the need, after the polar vortex, for intrastate service. (R. at 628a). However, the capacity on Sunoco’s already operating Mariner East 1 is in excess of the average demand of propane in Pennsylvania. (R. at 634a).

Transportation of propane, west to east, began on Sunoco’s Mariner East 1 in December 2014. (R. at

627a). Only propane has been transported on the Mariner East 1 since it began service. (R. at 627a). Mariner East 1 capacity, as of November 2015, was approximately 72,250 barrels per day. (R. at 633a). However, the Mariner East 1 is currently only transporting between 25,000 and 30,000 barrels per day of propane. (R. at 693a). As of 2012, Sunoco admits that Pennsylvania had average propane demands of 20,000 to 22,000 barrels per day. (R. at 633a).

Sunoco's proposed Mariner East 2 is a plan for two (2) additional pipelines with the much higher capacity of 275,000 barrels per day. (R. at 634a, 640a, 704a). An Economic Impact Report of the Mariner East Project, produced by Sunoco, indicates that the "Mariner East 2 *will deliver 275,000 barrels* of NGLs *to Marcus Hook* per day." (R. at 959a). (emphasis added). This capacity is nearly eight (8)

times what is currently being transported on Mariner East 1. (R. at 634a, 693a).

It is quite clear the purpose of the Mariner East 2 is not to serve the Pennsylvania public. Admittedly, Sunoco has no control over whether the NGLs on its Mariner East 2 go to locales in Pennsylvania. (R. at 657a, 662a). Sunoco contracts with shippers to ship on the Mariner East 2 but does not mandate any amount be off loaded in Pennsylvania for the Pennsylvania public. (R. at 697a, 700a-701a).

The definition of public utility under the BCL includes the requirement that service must be “for the public.” (R. at 692a). Here, Sunoco produced no testimony from shippers regarding the need in Pennsylvania for Mariner East 2. The evidence, in fact, shows Mariner East 2 would serve markets outside of Pennsylvania. (R. at 633a, 634a, 640a,

693a). Moreover, the PUC did not provide an analysis of the public need and/or inadequate service in relation to Mariner East 2. The trial court also did not perform this analysis.

The evidence shows that Mariner East 1 is not operating at full capacity. (R. at 634a). It also shows that Sunoco does not know whether Mariner East 1 is adequately serving the need of Pennsylvania. (R. at 693a). The evidence here clearly shows the significant capacity of the proposed Mariner East 2 is for the purpose of serving markets outside of Pennsylvania. (R. at 634a, 640a, 954a-980a, 959a). Testimony from a Sunoco witness explains that Sunoco currently only has the need for one pipeline and may have a future need for a second pipeline, yet it still seeks property rights from Homes, Inc. for two (2) pipelines. (R. at 640a, 704a) (emphasis added).

The root issue in this matter is the interstate nature of Mariner East 2. Mariner East 2 is in interstate commerce thus prohibited from regulation by the PUC. Interstate service is federally regulated. (R. at 606a, 685a). More specifically, the determinative federal regulations provide for the exclusive federal regulation of this pipeline. See 49 C.F.R. Part 195, Appendix A. The applicable federal statute and regulations define the pipeline proposal as only interstate and only within exclusive federal jurisdiction. Another court in this Commonwealth has recognized the interstate commerce of Mariner East 2. See Clean Air Counsel, et al. v. Sunoco Pipeline, L.P. (Feb. 5, 2016), p. 8.

This issue, along with several others raised herein, are pending in the Commonwealth Court on an expedited appeal of the Cumberland County case of Martin, et al. v. Sunoco Pipeline, L.P., (Docket Nos.

1979 CD 2015, 1980 CD 2015, 1981 CD 2015). Oral argument was held before this Court on March 9, 2016. A decision is expected on or about June 9, 2016.

SUMMARY OF ARGUMENT

The trial court erroneously overruled, in the entirety, all preliminary objections raised by Homes, Inc. in a March 29, 2016 Order and Opinion. (R. at 1306a-1320a). Thus, granting Sunoco the power of eminent domain to condemn property owned by Homes, Inc. for its Mariner East 2 pipeline. This proposed pipeline is an interstate pipeline which Sunoco argues is now intrastate because Sunoco changed the proposed plans adding on and off ramps in Pennsylvania to serve the Pennsylvania public. This argument is without merit. Sunoco provides no law in support of this argument. The trial court erroneously accepted this argument contrary to the law. First, the trial court made an erroneous finding that the proposed Mariner East 2 pipeline will provide both intrastate and interstate service when no

application was made to the PUC for Mariner East 2 and no PUC Certificates or Orders approve or pertain to Mariner East 2.

Second, federal regulation preempts PUC regulation of Sunoco's Mariner East 2 pipeline. The Mariner East 2 is a proposed interstate pipeline in interstate commerce. The primary purpose, admittedly by Sunoco, is to move NGLs away from the fracking locations to the Marcus Hook Facility. Well-established law provides that the proposal to add service locations within Pennsylvania does not change the exclusively interstate commerce nature of the pipeline, nor does it allow the PUC to regulate the interstate pipeline. The PUC can only regulate pipeline facilities within Pennsylvania. The PUC does not have authority over interstate service on an interstate pipeline.

Third, the trial court erred in finding Sunoco meets the definition of public utility under the BCL when the evidence clearly shows the Mariner East 2 is proposed to serve markets outside of Pennsylvania.

Fourth, eminent domain is one of the very few enumerated powers which must be strictly construed per 1 Pa. C.S.A. § 1928(b)(4). If eminent domain power is not explicitly granted, it may not be exercised. Middletown Township v. Lands of Stone, 939 A.2d 331, 337 (Pa. 2007). Here, Sunoco is not a public utility regulated by the PUC as Mariner East 2 is an interstate pipeline. Moreover, the proposed Mariner East 2 is to serve markets outside Pennsylvania. Sunoco currently seeks to condemn property for two (2) pipelines when Sunoco witness testimony provides Sunoco asserted need for only one (1) pipeline. Finally, the Sunoco Resolution in the Declaration of Taking shows approval for an

interstate pipeline, not eminent domain for an intrastate pipeline, therefore, any reliance on this Resolution as a basis for its authority to condemn is erroneous.

Fifth, the proposed on and off ramps in Pennsylvania do not change the interstate nature of Mariner East 2 as defined by well-established law. Accordingly, collateral estoppel does apply to this matter as the correct definition of interstate commerce was applied in Loper v. Sunoco Pipeline, L.P.

ARGUMENT**I. The trial court erred in approving eminent domain power by finding Mariner East 2 to be both an interstate and intrastate pipeline subject to Pennsylvania Public Utility Commission regulation when Sunoco failed to provide any PUC Certificates or Orders regulating Mariner East 2.**

Sunoco provided several PUC Certificates and Orders, however, all fail to show PUC regulation of Mariner East 2. Sunoco only obtains eminent domain power pursuant to the BCL if it is regulated, for the Mariner East 2, by the PUC. The closest Sunoco comes to a PUC Order regulating Mariner East 2 is found in the Order of August 21, 2014 which states:

Subject to continued shipper interest, Sunoco intends to undertake a second phase of the Mariner East project... This second phase, sometimes referred to as 'Mariner East 2', [sic] will increase the take-away capacity of natural gas from the Marcellus Shale and will enable Sunoco to provide additional on-loading and off-

loading points within Pennsylvania
for both intrastate and interstate
propane shipments.

(R. at 62a-63a).

Even this Order fails to show PUC regulation of Mariner East 2 in that the Order explicitly approved intrastate service, not the interstate service of Mariner East 2 now at issue. This is repeatedly explicit in the PUC Order as found in the caption “Intrastate” and the first sentence “intrastate.” The PUC Order specifically defines the “first phase” as entirely within Pennsylvania. The PUC Order also states “intrastate transportation of propane in Washington County.” Finally, it approved “intrastate service to the public in Washington County.”

The PUC Order contains dicta in that “Sunoco intends” to undertake a second phase. That second phase is referred to in that same paragraph as “Mariner East 2.” That statement of a Sunoco intent,

subject to a prerequisite of continued shipper interest, which was obviously unknown, was not applied for and not approved via this PUC Order. The PUC apparently looked favorably upon the Mariner East 2 project via inserting favorable dicta. However, the clear language states that the application and the PUC Order approves only intrastate service. The PUC Order does not approve the interstate commerce and foreign commerce of Mariner East 2.

The trial court's reliance on the PUC Order as a basis of Sunoco authority to condemn for this proposed Mariner East 2 was in error. The simple fact that the PUC noted an intention to undertake Mariner East 2 in no way equates to the application and analysis as required per Section 1102 of the Pennsylvania Public Utility Code.

All of the PUC Certificates and Orders, proposed by Sunoco, to support its assertion that it is

a public utility corporation describe PUC approval of intrastate service and do not show PUC approval or regulation of Mariner East 2. Sunoco did not apply to the PUC with regard to Mariner East 2. There was never a public necessity evaluation performed by the PUC or the trial court with regard to the Mariner East 2. The trial court erroneously concluded that the dicta contained in the August 21, 2014 PUC Order constituted PUC regulation of the Mariner East 2. However, the PUC never evaluated the Mariner East 2 as no application was ever made regarding the Mariner East 2.

II. The trial court erred in finding Mariner East 2 service as dually-regulated where no law supports dual regulation and the Pennsylvania Public Utility Code, 66 Pa. C.S.A. § 104, prohibits regulation of interstate commerce by the Pennsylvania Public Utility Commission.

Well-established law defines “interstate commerce” as a term of art flowing from the United States Commerce Clause. Commerce crossing a state line is in interstate commerce throughout the journey. Sunoco proposed and obtained federal approval of an interstate pipeline. The for-profit company obtained the proper FERC approval to build the pipeline, without eminent domain power, per the ICA.

Transportation crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey. As proposed by Sunoco, Mariner East 2 is a plan for transportation of product out of state, through Pennsylvania into Delaware. The transportation thus never will become intrastate and may not be regulated by the PUC. The PUC may only regulate intrastate service. Because the PUC may not regulate the service of the Mariner East 2 pipeline, Sunoco may not

obtain eminent domain power under the BCL via PUC regulation. Accordingly, the definition of “interstate commerce” defeats the opportunity to obtain eminent domain power via the PUC.

Federal regulations define exclusive federal jurisdiction of the (Part 195) Transportation of Hazardous Liquids by Pipeline. In doing so, the exclusive federal regulation precludes state (PUC) or local regulation. Part 195 includes natural gas liquids as petroleum per 49 C.F.R. Part 195.2. This is the controlling definition for “interstate pipeline facilities” 49 C.F.R. Part 195, Appendix A, paragraph 1, lines 8-9 states “[t]he HLPsA [Hazardous Liquids Pipeline Safety Act] leaves to exclusive federal regulation and enforcement the ‘interstate pipeline facilities,’ those used for pipeline transportation of hazardous liquids in interstate or foreign commerce.” This exclusive federal regulation of interstate pipeline facilities

controls the Mariner East 2 pipeline planned for Ohio to Delaware. The pipeline facility, Mariner East 2, for its entire length, is thus defined by the federal regulation of these hazardous liquid pipelines as interstate and exclusively regulated by the federal government. The “exclusive federal regulation” explicitly precludes PUC regulation and thereby precludes state eminent domain power. The Part 195 subsections go on to specify the regulation of such aspects as: design, **construction**, testing, and operation. (emphasis added).

Further sections of Appendix A to Part 195 consistently explain the exclusive federal regulation and jurisdiction. While paragraph 1 used the term “exclusive federal regulation,” paragraph 2 used the broader term of “exclusive federal jurisdiction.” By definition, exclusive federal jurisdiction precludes state jurisdiction. Paragraph 3 explains further that

the federal Department of Transportation (hereinafter "DOT") will not create "a separate federal scheme for determination of jurisdiction." Instead, it recognized "the jurisdiction of [FERC]." Paragraph 4 starts with "[i]n delineating which liquid pipeline facilities are interstate pipeline facilities within the means of HLPsA, DOT will generally rely on the FERC filings." Thus, the FERC Orders comport with the DOT regulations. Herein, FERC approved an interstate pipeline without eminent domain power via the ICA. Example 8 in Appendix A matches Mariner East 2 and defines it as "an interstate pipeline facility." We thus have the directly on point federal regulation of 49 C.F.R. Part 195, Appendix A, explicitly defining the Mariner East 2 pipeline at issue as subject to exclusive federal regulation and jurisdiction.

The controlling Hazard Liquids Pipeline regulations state that a pipeline is interstate or intrastate, but not both. The only regulations of hazardous liquid pipeline design, construction, and operation are the federal regulations at 49 C.F.R. Part 195. Applicability of the regulations is found at 49 C.F.R. 195.1. The specific liquids at issue in this case are found at 195.1, Chart of Products Transported (page 233). The determinative definitions are at 195.2 (page 175). We see from the definition that an intrastate pipeline is a pipeline “that is not an interstate pipeline.” The only plausible reading of the definitions of interstate pipeline and intrastate pipeline is that when a pipeline is interstate, it is not intrastate. Thus, Mariner East 2 is not an intrastate pipeline and may not be regulated by the PUC. A pipeline may be interstate or intrastate, but not both as asserted by Sunoco and the trial court.

The United States announced the preempting federal law in 1992 by enacting the Pipeline Safety Act, 49 U.S.C. §§ 60101 et seq. The definitions in the federal Act specify at 49 U.S.C. § 60101(a)(5-10) that a hazardous liquid pipeline facility in interstate commerce is not an “intrastate hazardous liquid pipeline facility.” 49 U.S.C. § 60101(a)(9), (10). Thus, the federal statute is explicit in stating that the federal government regulates such interstate facilities and defines them as outside state regulation of intrastate facilities. The statute thus defines the federal preclusion of state jurisdiction. The regulations are provided to regulate pipeline design, safety, and construction. Skinner v. Mid America Pipeline Co., 490 U.S. 212 (1989). The regulations define “pipeline” at 49 C.F.R. 195.2 and are given broad application. International Broth of Elect. Workers Local 1245 v. Skinner, 912 F.2d 1454 (9th

Cir. 1990). The Eighth Circuit has held that the Iowa State Utilities Board may not regulate interstate hazardous liquid pipelines because of expressed federal preemption. Kinley Corp. v. Iowa Utilities Bd., 999 F.2d 354, 357-59 (8th Cir. 1993). That case also determined that the safety and non-safety provisions may not be severed out of federal jurisdiction. Id. at 359. Any assertion that the federal regulations only concern safety, and not construction, should be rejected by established law.

Furthermore, the federal regulations have been adopted by the Pennsylvania PUC at 52 Pa. Code § 59.33(b). Accordingly, federal regulation and PUC regulation each explicitly adopt “exclusive federal jurisdiction” for these hazardous liquid pipelines. We thus see that the PUC does not attempt to regulate these pipelines.

Further support for this definition of the proposed services as interstate and never intrastate can be found in Elder v. Pennsylvania R. Co., 180 A. 183, 186 (Pa. Super. Ct. 1935):

As the federal law supersedes the state law, so do acts done thereunder, and where intra- and inter-state acts are mingled, or at times alternate, there is no separation. The interstate feature predominates and by it must the questioned act be judged. To separate duties by moments of time or particular incidents of its exertion would be to destroy its unity.

This case is particularly apt in that the interstate commerce law is applied in Pennsylvania to the comingling/dual jurisdiction argument of Sunoco. Dual jurisdiction is false and precluded.

A federal assertion of the exclusive federal jurisdiction over such hazardous liquids pipelines is found in the FERC decision of Williams Olefins

Feedstock Pipelines, LLC, 145 FERC ¶ 61,303, Docket No. OR13-29-000, December 31, 2013: “Generally the Commission’s ICA jurisdiction applies where oil or petroleum products that can be used for energy purposes are moved in interstate commerce.” Williams Olefins, 145 FERC ¶ 61,303 at page 5. Per pages 8-9, FERC will not disclaim jurisdiction over interstate ethane transportation based on an application’s assertion of the intended end-use of the ethane. The analysis and the products are identical to the Mariner East 2 proposal facility.

The trial court erroneously agreed with Sunoco and cited Amoco Pipeline Company, 62 FERC ¶ 61,119 (1993) as supporting dual jurisdiction. Amoco, however, did not decide jurisdiction. “Our acceptance of Sinclair’s notice of withdraw removes the jurisdictional issue from this case.” Amoco Pipeline, 62 FERC ¶ 61,119 at page 5. Also, that case is

obviously irrelevant in that it concerned tariff filings, or rates to be charged on existing lines, rather than a proposal for construction of new pipeline facilities. In truth, the federal government approves tariffs for pipelines entirely within Pennsylvania. Neither tariff structure has anything to do with the approval or design and construction of interstate pipelines. The PUC approved tariffs for use of intrastate pipelines. The federal government (FERC) approves tariffs for use of interstate pipelines.

Additional law also supports the explanation that “gas crossing a state line at any stage of its movement to ultimate consumer is in interstate commerce during the entire journey.” Maryland v. Louisiana, 451 U.S. 725, 755 (1981). When the pipeline is in interstate commerce it is not in intrastate commerce. California v. Lo-Vaca Gathering Co., 379 U.S. 366, 369 (1965). See Michigan-

Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 163 (1954); FPC v. East Ohio Gas Co., 388 U.S. 464, 472-73 (1950); Deep South Oil Co. v. FPC, 247 F.2d 882, 887-88 (CA5 1957). See generally Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498, 503-04 (1942) (fact of sale does not serve to change the “essential interstate nature of the business”); Southern Ry. Co. v. United States, 222 U.S. 20, 32 (1911); Houston, E & W. Texas Ry. Co. v. United States, 234 U.S. 342, 351-52 (1914). Interstate commerce explicitly encompasses this pipeline which would transport products, via the ICA authority, as described in FERC Orders.

The United States Commerce Clause and the extensive body of law determining interstate commerce is not limited to gas, the Natural Gas Act, or any particular product. It encompasses the full array of products transported in interstate commerce.

This includes interstate commerce using railroads, for example. Southern Ry. Co. v. United States, 222 U.S. 20, 32 (1911); Houston, E & W. Texas Ry. Co. v. United States, 234 U.S. 342, 351-52 (1914).

The controlling federal jurisdiction is also consistent with the PUC prohibition against the PUC regulation of interstate or foreign commerce. 66 Pa. C.S.A. § 104. Thus, with the Mariner East 2 pipeline proposal defined by regulation to be in interstate commerce, the PUC may not regulate Mariner East 2. Accordingly, Mariner East 2 is not eligible for PUC regulation to obtain eminent domain power via the BCL.

The PUC does not have authority to regulate the interstate commerce or foreign commerce of Mariner East 2. Nor does the PUC have the authority to reverse the firmly established definition of interstate commerce to state that this service, which

crosses state lines, could somehow become intrastate. Such regulatory overreaching is the exact harm prohibited by the long, broad body of law defining interstate commerce.

The PUC may only regulate intrastate commerce per 66 Pa. C.S.A. § 104 and that is exactly what it did in all the Orders in evidence. The PUC can and did regulate the intrastate service of phase one, Mariner East 1. The PUC could not, and did not, regulate the interstate service proposal of Mariner East 2. The PUC intentionally muddied the water with the chosen language, but it may not avoid the explicit federal and state regulations prohibiting PUC regulation of interstate or foreign commerce such as that of Mariner East 2. Neither the PUC nor any Pennsylvania Court may ignore the firmly established definition of “interstate commerce” which defines Mariner East 2 as interstate and not intrastate. A

reading of any of the other PUC Certificates and Orders consistently approve regulation only of the intrastate service. This is because the PUC authors are fully aware that the PUC is prohibited from regulating this interstate commerce. When the current Mariner East 2 proposal is considered, in light of the exclusive federal regulation and Elder, the proposed facility must be considered as interstate and never transformed into intrastate.

This exclusive federal regulation as performed by the FERC administration of ICA notably fails to provide eminent domain power. The federal government has provided for eminent domain power for natural gas via the Natural Gas Act. 15 U.S. Code § 717. This sharp distinction begs the question of why did the federal government provide eminent domain power for the interstate transportation of natural gas

and did not provide eminent domain power for other hazardous liquids.

This United States public policy determination is based initially on the significant differences in the products and the product usages. Natural gas serves as a fuel which has been, and is, a critical and large component of our national energy use and policy. The hazardous liquids such as the newly abundant NGLs of ethane, propane, and butane approved by the FERC Orders are primarily for manufacturing plastics. Propane may be used as fuel, but such use is minor compared to the prominent and planned use for these Mariner East 2 natural gas liquids. The use for the products in making plastics does not correspond to any particular government interest.

Another aspect of the products explain why they are not accorded the preference of eminent domain. That is the danger of these hazardous

liquids. Natural gas liquids are defined in the federal regulation as highly volatile and flammable. By contrast, the regulations define gasoline as flammable and fuel oil as non-flammable. 49 C.F.R. Part 195, Appendix C – Table 4 and the Product Transported Risk table, Appendix C, subsection III. The regulations thus explicate the science of the natural gas liquids as being especially dangerous. Essentially, the United States government recognized the explosive nature of these mainly manufacturing products and determined that the danger and uses of these products does not warrant the use of eminent domain. The public need has been determined by the policy determination of federal law to be inadequate to justify use of the awesome power of eminent domain.

This lack of eminent domain implores another question: how do these pipelines get built without

eminent domain? The answer is found in the generous FERC tariff rates. The current FERC tariff for transportation of natural gas liquids by Sunoco from Houston, Pennsylvania to Claymont, Delaware is just over three cents per gallon at \$03.1834. When that rate of \$3.1834 is multiplied by the capacity of Mariner East 2 at 275,000 barrels per day (42 U.S. gallons) the income amounts to \$875,435 per day. That recovery on investment is fully adequate to provide funds to induce private property owners to sell easement rights for hazardous liquid pipelines. A pipeline could be readily rerouted around any extreme holdout owner. In other words, the federal government has created, approved, and used for decades, via FERC and DOT, the exclusive and effective regulatory scheme which facilitates the safe construction of such hazardous liquid pipelines, while protecting fundamental Constitutional property

rights. A property owner may decide to sell easement rights, but they may not be taken from him/her. Also, Sunoco must abide by the absence of eminent domain as it applies to all such companies engaged in the interstate transportation of hazardous liquids. FERC approves start and end locations of these pipelines and leaves it to the common carriers to purchase the property rights to define the route. Purchase, not condemnation, is what has been and is authorized by the exclusive federal regulation.

III. The trial court erred in finding Sunoco Pipeline, L.P. meets the definition of public utility under the Pennsylvania Business Corporation Law when the proposed Mariner East 2 is in interstate commerce and not for the public.

The definition of a “public utility corporation” under the BCL is “[a]ny domestic or foreign corporation for profit that: (1) 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.A. § 1103 (emphasis added). The trial court here erroneously found Sunoco regulated by the PUC as a public utility for its proposed Mariner East 2 despite the lack of any PUC Certificate or Order approving Mariner East 2 as fully set forth in Section 1 above and despite any proof or evidence that this Mariner East 2 is for the Pennsylvania public.

The PUC definition of a public utility, in relevant part, is “[a]ny person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for: . . . [t]ransporting or conveying natural or artificial gas, crude oil, gasoline, or petroleum products, . . . or other fluid substance, by pipeline . . . **for the public** for compensation.” 66 Pa. C.S.A. § 102 (emphasis added).

The evidence shows transportation of propane, west to east, began on Sunoco's Mariner East 1 in December 2014 and only propane has been transported on Mariner East 1. Sunoco admits that Mariner East 1 is not operating at its full capacity of 72,250 barrels per day. The Mariner East 1 is currently only transporting between 25,000 and 30,000 barrels per day of propane. Sunoco admits that as of 2012, Pennsylvania had average propane demands of 20,000 to 22,000 barrels per day.

The evidence shows an additional Mariner East 2 pipeline is further removed from any need "for the public." Here, the failure of the trial court to provide the correct review of any public need suggests a remand before any condemnation would be approved. The trial court did not provide any review of the public need. Instead, the Order only progressed to view Sunoco as a public utility.

The required analysis would recognize that PUC approval of a service is only the general preliminary step. It was the responsibility of the trial judge to review the public need to make a determination of the scope and validity of a condemnation for this Mariner East 2 pipeline.

Even if this Honorable Court finds the Certificates to apply to the interstate Mariner East 2, “PUC approval is only a preliminary step and... the scope and validity of a particular condemnation remains for subsequent determination. Redding v. Atl. City Elec. Co., 269 A.2d 680, 683 (Pa. 1970) (citing Duquesne Light Company v. Upper St. Clair Township, 105 A.2d 287 (Pa. 1954); Kearns v. Pennsylvania Public Utility Commission, 191 A.2d 700 (Pa. Super. Ct. 1963); Reed v. Pennsylvania Public Utility Commission, 100 A.2d 399 (Pa. Super. Ct. 1953)). The Court must then review whether Mariner

East 2 pipeline satisfies the public purpose test. The test requires a showing of whether “said power is necessary or proper for the service, accommodation, convenience, or safety of the public.” Redding 269 A.2d at 684.

The test is whether the proposed two Mariner East 2 pipelines are reasonably necessary for the accommodation or convenience of the public. The burden in such situation is on the applicant. Philadelphia-Pittsburgh Carriers, Inc. v. Pennsylvania Public Utility Commission, 138 A.2d 693 (Pa. Super. Ct. 1958); Zurcher v. Pennsylvania Public Utility Commission, 98 A.2d 218 (Pa. Super. Ct. 1953). The inadequacy of existing service is a factor indicating public necessity for a proposed service. Pennsylvania R. Co. v. Pennsylvania Public Utility Commission, 184 A.2d 11 (Pa. Super. Ct. 1962).

The evidence here clearly shows the lack of need. The Mariner East 2 is a proposed plan for two (2) additional pipelines with significantly higher capacity than Mariner East 1. An Economic Impact Report of the Mariner East Project, produced by Sunoco, indicates that the “Mariner East 2 will deliver 275,000 barrels of NGLs *to Marcus Hook* per day.” This capacity is nearly eight (8) times what is currently being transported on Mariner East 1. Admittedly, Sunoco has no control over whether the NGLs on its Mariner East 2 go to locales in Pennsylvania. Sunoco does not mandate any amount of NGLs be off loaded in Pennsylvania for the Pennsylvania public. Moreover, Sunoco produced no testimony from shippers regarding the need in Pennsylvania for Mariner East 2. The evidence submitted here indisputably points to the ultimate purpose of serving outside markets via the Marcus Hook facility.

This evidence coupled with the fact that Mariner East 1 is still not operating at full capacity unquestionably shows Sunoco does not meet the explicit requirement under the BCL that the service provided by Mariner East 2 is for the public. Any conclusion to the contrary is flawed. Sunoco is not a public utility corporation with respect to this Mariner East 2 proposed pipeline as it does not mean the plain definition under the statute.

IV. The trial court erred in finding Sunoco Pipeline, L.P. has the power of eminent domain for its proposed Mariner East 2 pipeline when it is not for the public, the Resolution provided authorized an interstate pipeline, and the evidence shows Sunoco seeks to condemn for two (2) pipelines but asserted the need for only one (1) pipeline.

Eminent domain is one of the few enumerated powers in Pennsylvania that is to be strictly construed and what is not granted is not to be exercised. In Re: Condemnation of 110 Washington Street, 767 A.2d

1154 (Pa. Cmwlth. Ct. 2001), *appeal denied*, 788 A.2d 379. The United States Constitution provides that no property shall be taken for public use without due process and just compensation. U.S. Const. Amend. V; Pa. Const. art. I, § 10 (emphasis added). “The power of eminent domain, next to that of conscription of man power for war, is the most awesome grant of power under the law of the land.” Winger v. Aires, 89 A.2d 521, 522 (Pa. 1952). This Commonwealth recognized this awesome power and the Supreme Court of Pennsylvania has constrained eminent domain in favor of property owners. Reading Area Water Auth. v. Schuylkill River Greenway Ass’n, 100 A.3d 572 (Pa. 2014) (Explaining the prohibition by stating that if a proposed use serves both a public purpose and private enterprise, eminent domain is prohibited); In Re: Condemnation of 110 Washington Street, 767 A.2d 1154 (Pa. Cmwlth. Ct. 2001), *appeal denied*, 788 A.2d

379 (Eminent domain may not be exercised in Pennsylvania without the showing of a valid public purpose).

As explained in Section 3 above, the trial court's conclusion that Sunoco meets the definition of a public utility under the BCL for the Mariner East 2 is erroneous because it fails to show the Mariner East 2 service is for the public. The critical language of "for the public" reflects the long line of eminent domain cases defining what is a valid, public need. The public need is defined consistently in the relevant Pennsylvania law as service "for the public" in the Public Utility Code at 66 Pa. C.S.A. § 102 "Public Utility", in the BCL at 15 Pa. C.S.A. § 1511(a)(2) and in the Property Rights Protection Act via 26 Pa. C.S.A. § 204(b)(2)(i). Here, the evidence considered disproves the need for the Mariner East 2 pipeline. The absence of any need "for the public" defeats the condemnation.

The evidence here strongly proves the absence of a need “for the public.” Sunoco witness testimony explained all we need to know about the propane need in Pennsylvania. The demand for the entire state being approximately 22,000 barrels per day. The now operational Mariner East 1 has a capacity to deliver 72,250 barrels of propane per day. That new, recent capacity is beyond three times the Pennsylvania need. This fully disproves any further new need, beyond the Mariner East 1 capacity, for the 275,000 barrels per day capacity of the Mariner East 2 proposal. Furthermore, the evidence shows the purpose to be a take away project to move natural gas liquids away from, not to, Pennsylvania. Since Sunoco fails to meet the definition of a public utility under the BCL, it therefore fails to obtain the limited power of eminent domain under the statute.

Furthermore, Sunoco's Resolution provided in the Declaration of Taking authorizes an interstate pipeline, not an intrastate pipeline. The law provides that only that interstate acquisition which is authorized by the Resolution may be condemned. 26 Pa. C.S.A. § 302(b)(3); In Re: Certain Parcels of Real Estate, 216 A.2d 774 (Pa. 1966). Without a proper and valid Resolution, the power of eminent domain is not granted. Thus, the trial court erroneously concluded Sunoco has the statutory power of eminent domain where its Resolution does not authorize what it seeks to condemn.

The trial court also failed to recognize the excessive taking here. A public purpose is a current, not a future, need. The taking of private property for a future, speculative need is invalid as an excessive condemnation. Pidstawski v. South Whitehall Tp., 380 A.2d 1322 (Pa. Cmwlth. Ct. 1977). Sunoco

currently seeks to condemn the property for two (2) pipelines, up to 20 inches in diameter. However, testimony evidence from a Sunoco witness shows no actual need for the second pipeline. Sunoco plainly admitted that it currently only has the need for one pipeline and may have a future need for a second pipeline. The trial court here failed to recognize this infringement of rights.

Sunoco may not condemn “a greater amount of property than is reasonably required for the contemplated purpose.” Pennsylvania Dep’t of Transp. v. Montgomery Twp., 655 A.2d 1086, 1089 (Pa. Cmwlth. Ct. 1995) (citations omitted). Land acquired to meet future needs must be “necessary in good faith for future use within a reasonable time.” Id. Sunoco fails to show the need for even one pipeline on Mariner East 2 therefore the condemnation for two (2) pipelines is invalid.

For the reasons stated above, along with the important, well-established law regarding eminent domain which provides that what is not granted is not to be exercised, the trial court erroneously concluded that Sunoco has the power of eminent domain for the Mariner East 2.

V. The Court of Common Pleas erred in finding that collateral estoppel does not apply to compel a different result where Mariner East 2 remains in interstate commerce and eminent domain power for Mariner East 2 was denied in Sunoco Pipeline, L.P. v. Loper, 2013-SU-4518-05 (C.P. York County, February 24, 2014) reaffirmed March 25, 2014.

Sunoco efforts to obtain state eminent domain power were defeated in the Sunoco Pipeline, L.P. v. Loper, 2013-SU-4518-05 (C.P. York County, Feb. 24, 2014), reaffirmed March 25, 2014, decisions. Those decisions pertained to the now proposed Mariner East 2 pipeline. After those decisions, whereby Sunoco was denied eminent domain power for Mariner East 2,

Sunoco purported a new plan with on-loading and off-loading locations within Pennsylvania.

The PUC has been regulating Sunoco with regard to its Mariner East 1 pipeline. However, the PUC is prohibited from regulating the Mariner East 2. This Mariner East 1 is a pipeline originating in Pennsylvania and crossing Pennsylvania in an easterly direction. Now, the Mariner East 1 currently transports propane. The Sunoco proposal for Mariner East 2 is for a pipeline facility which would cross state lines. It also is proposed to transport ethane which is not currently transported by Mariner East 1 and is primarily used in the manufacturing of plastics. Sunoco admits no major market in the Northeast, including Pennsylvania, existed for the natural gas liquids at issue, therefore, the clear purpose of Mariner East 2 is to expand capacity to deliver NGLs

to the Marcus Hook Facility for shipment in markets abroad.

Sunoco fails to show any evidence of need for the proposed Mariner East 2. Sunoco has not applied to the PUC for any new proposed Mariner East 2 facility nor does any PUC Order it provides pertain to the Mariner East 2. In fact, all of the PUC Orders and Certificates in evidence pertain to within state service.

With or without the new loading locations, the proposed new pipeline facilities (and services) remain exclusively as interstate commerce. Long established case law and the current directly controlling federal regulations define the proposal as only interstate. No Pennsylvania regulations attempt to regulate these pipelines. The facilities and services never became, and never will become, intrastate. Pennsylvania has no jurisdiction. Accordingly, the PUC may not

regulate and Sunoco is preempted from state eminent domain power. The exclusive federal statute and regulation prohibits eminent domain power and thus ends the inquiry. The proposal for services to and from locations within Pennsylvania appears, at first glance, to be intrastate commerce, but the clear law defines such facilities as only interstate when they cross a state border.

Sunoco now attempts to obtain state eminent domain power under the ruse that this pipeline is no longer in interstate commerce because on and off ramps in Pennsylvania will exist. This attempt is only an attempt to reduce the cost of purchasing property rights. The BCL allows for the possibility of a private company obtaining the awesome power of eminent domain if it is regulated by the PUC. Here, the PUC may not regulate the proposed interstate pipeline, Mariner East 2. Here, the PUC and the trial court

created confusion. Nevertheless, the law defines Mariner East 2 as interstate commerce which is prohibited from PUC regulation and state eminent domain power.

In Sunoco Pipeline, L.P. v. Loper, Docket No. 2013-SU-4518-05 (C.P. York County, February 24, 2014) *reaffirmed* March 25, 2014, Sunoco tried to obtain the requested eminent domain power and failed. In Sunoco v. Loper, President Judge Linebaugh of the 19th Judicial District in York County rejected Sunoco's attempt to condemn for Mariner East 2. He did so following the Sunoco admission in briefing that the PUC could not regulate the Mariner East 2 pipeline because the pipeline would be in interstate commerce.

The doctrine of collateral estoppel bars parties from bringing issues into subsequent actions which have been previously litigated and final judgment on

the merits rendered which precisely applies here. Sunoco seeks to obtain eminent domain power for its Mariner East 2 interstate pipeline by claiming eminent domain authority via the Pennsylvania BCL. Specifically, Sunoco claims it is a public utility regulated by the Pennsylvania PUC. As previously litigated and determined in Loper, Sunoco is a common carrier regulated by the FERC under the ICA and is not a public utility corporation in regards to Mariner East 2. The previously decided and controlling case already determined that Sunoco does not have eminent domain power for Mariner East 2.

The issue presented here is identical to that presented in Loper v. Sunoco Pipeline, L.P. The Judge reviewed the assertion of a public utility corporation under Section 1103 of the BCL. After reviewing the identical issue regarding regulation of Sunoco with regard to the Mariner East 2 pipeline, the Judge

determined Sunoco is "regulated by FERC pursuant to the [ICA], and not the NGA, as a common carrier, and not as a public utility." In his Order, the Judge reiterated Sunoco's stated purpose for the project was to transport NGLs through an interstate pipeline. Eminent domain power for Mariner East 2 was denied in a thoughtful decision.

Sunoco filed a Motion for Reconsideration in that matter. The Motion demonstrated how the eminent domain issue was fully presented, litigated, and considered by the Judge before he explained the denial of eminent domain power for this Mariner East 2 pipeline in his March 25, 2014 Reaffirming Order. The Sunoco submission is enlightening in that it includes an analysis from "FERC expert" Attorney Cynthia A. Marlette. She explained that for regulation of common carriers, such as Sunoco, those entities are without the power of eminent domain.

Essentially, she explained the applicable FERC laws providing eminent domain power for transportation of natural gas by a natural gas company while not providing eminent domain power for pipeline companies providing interstate transportation of other substances such as the natural gas liquids at issue in this case.

The collateral estoppel doctrine bars against Sunoco's current action because the issue of eminent domain for Mariner East 2 was litigated and determined. This doctrine bars any subsequent action where the sole issue requiring judgment was previously litigated. Thompson v. Karastan Rug Mills, 323 A.2d 341, 343 (Pa. Super. Ct. 1974). "Where a question of fact essential to the judgment is actually litigated and determined by valid and final judgment, the determination is conclusive between the parties to such an action on . . . a different cause of action." Id.

at 344. The doctrine applies to suits in equity and actions at law. Id.

To apply, the following conditions must be met:

(1) the issue or issues of fact previously determined in a prior action are the same (no requirement that the cause of actions be the same); (2) the previous judgment is final on the merits; (3) the party against whom the doctrine is invoked is identical . . . to the party in the prior action; and (4) the party against whom estoppel is invoked had full and fair opportunity to litigate the issue in the prior action. Id.; Rue v. K-Mart Corp., 691 A.2d, 498, 500 (Pa. Super. Ct. 1997), *aff'd*, 713 A.2d 82 (Pa. 1998).

Sunoco had the full and fair opportunity to prove it was regulated, with regard to Mariner East 2, as a public utility by the Pennsylvania PUC. Sunoco never appealed and the Loper decisions are final on the merits. All of the conditions have been met.

There is no requirement that all the parties in the subsequent action be the same as all the parties in the prior action. Thompson, at 344. Moreover, an issue is considered litigated when "it is properly raised, submitted for determination, and then actually determined." Com. v. Holder, 805 A.2d 499, 502–03 (Pa. 2002) (citations omitted). A final judgment consists of any prior adjudications of an issue in another action with conclusive effect. Id. "Collateral estoppel may be used as either a sword or shield by a stranger to the subsequent action as long as the party against whom the defense is invoked is the same." Thompson, at 344 (citations omitted) (internal quotations omitted).

Sunoco asserts, and the trial court erroneously agreed, that changed events and orders of the PUC somehow make this action different than that in Loper v. Sunoco. However, nothing of relevancy has

changed. The PUC subsequent orders concerning the Mariner East 1 intrastate service within Pennsylvania are entirely distinct from the interstate Mariner East 2 pipeline reviewed by Judge Linebaugh and now at issue.

Sunoco attempts to avoid collateral estoppel by asserting that its construction planning has now changed to allow Mariner East 2 to allow for products to be entered into the pipeline in Pennsylvania and exit the pipeline in Pennsylvania. That argument is without merit as the evidence shows an absence of any need for Mariner East 2 and the purpose of Mariner East 2 is to serve markets outside Pennsylvania. The proposed pipeline remains an interstate pipeline from Ohio, through West Virginia, across Pennsylvania and into Delaware. It continues to be regulated by the United States agency, FERC. It continues to not be regulated under the Pennsylvania PUC because, as

admitted by Sunoco in the Loper Brief, the PUC has no jurisdiction to regulate Mariner East 2 interstate pipeline. The PUC has no jurisdiction to regulate Mariner East 2 because the pipeline continues along the entire journey to be a pipeline in interstate commerce. The Public Utility Code expressly prohibits such jurisdiction/regulation per 66 Pa. C.S.A. § 104.

Sunoco has produced an array of PUC orders dealing with the Mariner East 1 service within Pennsylvania. They are irrelevant. Sunoco has not been able to produce any PUC Orders or Certificates which would indicate regulation by the PUC of Mariner East 2. Again, the reason is obvious and statutory. The pipeline at issue crosses state lines. It is thus in interstate commerce regulation by FERC and excluded from PUC regulation. If Sunoco were to somehow obtain PUC orders showing PUC regulation

of Mariner East 2, it might then have facts different from Loper. Without such orders, the relevant facts and legal issue is identical and decided by Loper.

In the end, the matter now is identical to Loper and must be dismissed by collateral estoppel. This determination does not preclude Sunoco from somehow obtaining Pennsylvania PUC regulation. If Sunoco does so, the PUC Order or a Certificate would indicate PUC regulation of Mariner East 2. Such a Certificate for Mariner East 2 would demonstrate PUC regulation of the service in compliance with the PUC requirement of a "Certificate." The requirements of a Certificate allowing for eminent domain power is explicit in the Public Utility Code per 66 Pa. C.S.A. §§ 1101 to 1103. Sunoco, to date, has not submitted any Section 1101 application for a Certificate for the intrastate services of Mariner East 2. The mere possibility of future PUC regulation of Mariner East

2, apparently precluded as interstate commerce, is of no significance. Per Loper, Mariner East 2 was not regulated as a public utility by the PUC and Mariner East 2 remains in the same factual position as not regulated by the PUC.

Judge Linebaugh in Loper applied the correct definition of interstate commerce resulting in denial of eminent domain power. The Mariner East 2 pipeline is in interstate (and foreign) commerce meaning the PUC may not regulate Mariner East 2. The case law explicitly defines Mariner East 2 as interstate commerce rather than interstate and intrastate commerce. Sunoco may thus not obtain the PUC regulation which is needed to qualify for eminent domain power via the BCL.

Here we have federal approval of Mariner East 2 as an interstate pipeline from Ohio to Delaware without eminent domain power. As indicated in the

Sunoco application to FERC, the need for the pipeline is to transport excess NGLs for which no major market exists in Northeastern United States. The primary, if not the exclusive use, of Mariner East 2 would be for private enterprise to ship NGLs away from Pennsylvania, to relieve an oversupply in a takeaway project. Sunoco has been authorized by FERC to build the pipeline and is believed to have started construction. It simply has not been given eminent domain power by the applicable federal jurisdiction.

CONCLUSION

For the reasons explained above, the Appellant respectfully requests that the Order of the Lebanon County Court of Common Pleas overruling Preliminary Objections be reversed and reasonable costs and expenses awarded to the Appellant.

Respectfully submitted,

FAHERTY LAW FIRM

By: /s/ Michael F. Faherty

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Date: June 6, 2016 Attorney for Appellant

CERTIFICATE OF SERVICE

I, Sarah M. Dick, hereby certify that on this 6th day of June, 2016, I served a true and correct copy of the foregoing ***Brief of Appellant and Reproduced Record*** upon the persons and in the manner indicated below:

Via PACFile:

Commonwealth Court of Pennsylvania
Pennsylvania Judicial Center
601 Commonwealth Avenue
Suite 2100
P.O. Box 69185
Harrisburg, PA 17106

By U.S. First Class Mail

Kandice Kerwin Hull, Esquire
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Counsel for Appellee

/s/ Sarah M. Dick
Sarah M. Dick, Paralegal

No. _____

In The

SUPREME COURT OF THE UNITED STATES

IN RE: CONDEMNATION BY SUNOCO PIPELINE,
L.P. OF PERMANENT AND TEMPORARY RIGHTS
OF WAY FOR THE TRANSPORTATION OF
ETHANE, PROPANE, LIQUID PETROLEUM GAS,
AND OTHER PETROLEUM PRODUCTS IN THE
TOWNSHIP OF HEIDELSBURG, LEBANON
COUNTY, PENNSYLVANIA, OVER THE LANDS
OF HOMES FOR AMERICA, INC.,
Petitioners

vs.

SUNOCO PIPELINE, L.P.
Respondent,

On Petition for Certiorari from the Supreme Court of
Pennsylvania

**APPENDIX VOLUME IV
PETITION FOR A WRIT OF CERTIORARI**

Michael F. Faherty
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75 Cedar Avenue
Hershey, PA 17033
(717) 256-3000

**APPENDIX TO THE PETITION FOR A WRIT
OF CERTIORARI**

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Michael F. Faherty, Esquire

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75 Cedar Avenue

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Counsel for Condemnee

**IN THE COURT OF COMMON PLEAS OF
LEBANON COUNTY, PENNSYLVANIA
CIVIL DIVISION – IN REM**

IN RE: CONDEMNATION :
BY SUNOCO PIPELINE L.P. : NO.: 2015-OF 01338
PERMANENT AND :
TEMPORARY RIGHTS OF :
WAY FOR THE :
TRANSPORTATION OF :
ETHANE, PROPANE, LIQUID:
PETROLEUM GAS, AND :
OTHER PETROLEUM :
PRODUCTS IN THE : EMINENT
TOWNSHIP OF : DOMAIN – IN REM
HEIDELBERG, LEBANON :
COUNTY, PENNSYLVANIA, :
OVER THE LANDS OF :
HOMES FOR AMERICA, INC.:

PRELIMINARY OBJECTIONS
TO SUNOCO PIPELINE, L.P.'S DECLARATION
OF TAKING

AND NOW, Condemnee, Homes for America, Inc., by and through its Counsel, Michael F. Faherty, Esquire, and Faherty Law Firm, hereby files Preliminary Objections to Condemnor Sunoco Pipeline, L.P.'s Declaration of Taking and avers as follows:

The preliminary objections contained herein are filed on behalf of Condemnee Homes for America, Inc. pursuant to the Pennsylvania Eminent Domain Code. 26 Pa. C.S.A. § 306. Section 306 specifically limits the purpose of preliminary objections in condemnation actions to challenging the following: (1) power or right of the condemnor; (2) the sufficiency of the security; (3) the declaration of

taking; or (4) the procedure followed by the condemnor. 26 Pa. C.S.A. § 306(a)(3).

Eminent domain is a legislative power. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Separation of Powers: A Forgotten Protection in the Context of Eminent Domain and the Natural Gas Act, 16 Regent U.L. Rev. 371, 376 (2004). The controlling legislature, the U.S. Congress, has chosen to provide eminent domain power for transmission of natural gas. 15 U.S.C.A. § 717f(c). It chose not to provide eminent domain power for the natural gas liquids at issue. 49 U.S.C. § 1 *et seq.* (1988).

Here, the for profit Sunoco Pipeline, L.P. (hereinafter “Sunoco”) has attempted, and failed, to avoid the determinative federal preemption. 15 U.S.C.A. § 717f(c); Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement, 747

F. Supp. 401 (N.D. Ohio 1990). The assertion of state eminent domain power is entirely inapplicable to this interstate pipeline, Mariner East 2, at issue. Sunoco has repeatedly tried and failed to obtain the requested eminent domain power. In Loper v. Sunoco, Docket No. 2013-SU-4518-05, (2014), President Judge Linebaugh of the 19th Judicial District in York County flatly and forcefully rejected this exact attempt. Judge Katherine B. Emery of Washington County scoffed at the ploy in the approximately 20 cases consolidated in Washington County in Cox et al v. Sunoco. Sunoco chose to pay for the Washington County property rights or go around the property. That viable option remains open to Sunoco in this County. Judge Edward E. Guido of Cumberland County chose not to grant the requested eminent domain power in Fertig v. Sunoco, Docket No. 2015-02049 and Blume v. Sunoco, Docket No. 2015-02050.

Recently, Senior Judge William R. Nalitz sitting in Washington County has stayed eminent domain efforts while property owner objections in the form of Actions in Equity are considered. Cowden v. Sunoco, Docket No. 2015-3075 (Exhibit G).

Sunoco has now sunken to the effort of false representation of mischaracterizing Mariner East 2 from an interstate to an intrastate pipeline. Sunoco seeks eminent domain power to defeat constitutional law and simply reduce property costs. This Honorable Court should not be fooled.

1. The asserted taking of property is objected to on the basis of Sunoco not having the power or right to condemn the land. Sunoco is not a public utility corporation regulated by the Pennsylvania Public Utility Commission (hereinafter "PUC") for the only pipeline at issue, Mariner East 2.

Mariner East 1 is a Pennsylvania pipeline which has been regulated by the PUC. The Pennsylvania PUC only has jurisdiction over pipelines entirely within Pennsylvania. 66 Pa. C.S.A. § 104.

Mariner East 2 is a pipeline which crosses state lines and is entirely, and only, within the jurisdiction of the Federal Energy Regulatory Commission (hereinafter "FERC"). Sunoco is a common carrier regulated by FERC under the Interstate Commerce Act (hereinafter "ICA"). Sunoco applied for and obtained a FERC Order, attached as Exhibit A, which requested the authority to proceed in construction of a pipeline to transport natural gas liquids from Ohio and West Virginia across Pennsylvania and into Delaware. Sunoco's proposed pipelines rate design and tariff structure were approved by this FERC Order. However, this Order did not provide a Certificate of Public Convenience and Necessity which

is required under federal law to exercise eminent domain. Essentially, the Natural Gas Act provided eminent domain power for the transportation of natural gas and not natural gas liquids.

Sunoco, in its Petition to FERC, acknowledged its status as common carrier regulated by FERC under the ICA. See Exhibit A. Sunoco cited within its Petition the applicable ICA provisions including Section 1 which makes the ICA applicable to oil pipeline common carriers providing transportation in interstate commerce. Further support regarding jurisdiction is provided by Williams Olefins Feedstock Pipelines, LLC, 145 FERC ¶ 61,303 (2013) which explains that FERC, and only FERC, has jurisdiction over the interstate transportation of a natural gas liquid such as ethane. See Decision attached as Exhibit B.

2. The second preliminary objection challenges the taking on the basis that Sunoco's Resolution, attached to its Declaration of Taking as Exhibit I, approving "Mariner East 2 Project" for 350 miles from Ohio through West Virginia and Pennsylvania, does not authorize what is asserted in paragraph 39 of Sunoco's Declaration of Taking. The Resolution of the interstate Mariner East 2 pipeline does not authorize the attempt to use eminent domain for the intrastate pipeline asserted in the Declaration of Taking. Only that interstate acquisition which is authorized by the resolution may be condemned. 26 Pa. C.S.A. § 302(b)(3); In re Certain Parcels of Real Estate, 216 A.2d 774 (Pa. 1966).

3. The third preliminary objection challenges the taking on the basis of collateral estoppel. This identical issue of whether Sunoco has the power of eminent domain to condemn for its

Mariner East 2 pipeline was previously decided against Sunoco in Loper v. Sunoco. President Judge Stephen P. Linebaugh of the 19th Judicial District (York County) determined the Sunoco Mariner East 2 pipeline is "...regulated by FERC pursuant to the [ICA], and not the Natural Gas Act, as a common carrier, and not as a public utility." In his two Orders, the Judge reiterated Sunoco's stated purpose for the Project was to transport natural gas liquids through an interstate pipeline. See Orders attached as Exhibit C. Eminent Domain power for Mariner East 2 was denied in a well-reasoned, final decision. Sunoco may not avoid collateral estoppel by mischaracterizing the interstate pipeline as an intrastate pipeline. Exhibit C.

4. The fourth preliminary objection is a challenge to the Declaration of Taking in that it is based upon false allegations that the Mariner East 2

pipeline at issue is an intrastate pipeline. The allegations contained in paragraphs 38 and 39 portray the proposed pipelines as only being within Pennsylvania. In truth, the Mariner East 2 pipeline is the FERC regulated interstate pipeline. This was clear in Sunoco testimony and exhibits on April 29, 2015 in Dauphin County Court as shown in the attached cover page and Sunoco Exhibit 15. Exhibit D. The current Sunoco Pipeline Website information on the interstate Mariner East 2 is attached as Exhibit E. The PUC Orders in the Declaration of Taking and the current construction have been for the Mariner East 1 intrastate pipeline. The PUC orders only refer to service within Pennsylvania, consistent with PUC jurisdiction of a pipeline which does not cross state lines. The reference in the Declaration of Taking at paragraph 40 only references that “Sunoco intends to undertake a second phase.” The PUC orders

cited, consistent with limited PUC jurisdiction, contain no approval relevant to the interstate Mariner East 2 pipeline.

5. The fifth preliminary objection is that the Declaration of Taking seeks approval for two pipelines, while the regulating federal agency, FERC, only approved one pipeline. That approval was for a pipeline to transport propane and ethane as a common carrier, without eminent domain power. Exhibit A. The assertion of the two pipelines is found in the Declaration of Taking at paragraph 39. The approval for “a new pipeline easement” is found in the FERC Order, Exhibit A, at paragraph 12.

6. The sixth preliminary objection is that such an attempt to obtain eminent domain power via the Pennsylvania Business Corporation Law without a FERC Certificate of Public Convenience and

Necessity is explicitly prohibited by Pennsylvania law. National Fuel Gas Corporation v. Kovalchick Corporation, 2005 WL 3675407, 74 Pa. D. & C. 4th 22 (Pa. Com. Pl. 2005). See Exhibit F. The Court in Kovalchick approved eminent domain power while it stressed that the approval of that power was premised on the FERC Certificate of Public Convenience and Necessity. That is the federal document which could have provided the controlling federal eminent domain power. Such a certificate has not been obtained by Sunoco for Mariner East 2 and thus Sunoco may not be granted eminent domain power. If Sunoco seeks rights it may buy such rights or reroute the pipeline.

7. The seventh preliminary objection challenges the sufficiency of the bond amount. Sunoco's proposed bond amount of \$14,000 is inadequate for the severe harm caused to this property consisting of approximately 96 acres.

8. Fees and costs are demanded per 26 Pa. C.S.A. § 306(g).

9. The Honorable Court should also be aware of a set of very similar eminent domain actions for this same pipeline filed in Washington County (Docket Nos.: 2015-3075; 2015-3076; 2015-3077). Senior Judge William R. Nalitz has issued the attached Order staying those eminent domain actions, while allowing the property owners' actions in equity to move forward. See Exhibit G. The Action in Equity to challenge the Petition for Approval of a Bond per 15 Pa. C.S.A. § 1511 is the exact corollary of these Preliminary Objections to a Declaration of Taking per 26 Pa. C.S.A. § 306. A stay of this present petition is requested until such time as the discovery process is completed in Washington County, and the Washington County Court decides the eminent domain question for this pipeline.

WHEREFORE, Condemnee, Homes for America, Inc., respectfully requests that this Honorable Court now stay and then dismiss Sunoco's Declaration of Taking.

Respectfully submitted,
FAHERTY LAW FIRM

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Dated: September __, 2015

CERTIFICATE OF SERVICE

I, Sarah M. Dick, a paralegal with Faherty Law Firm, attorneys for Condemnee Homes for America, Inc., do hereby certify that on this __ day of September, 2015, I served a true and correct copy of the foregoing Preliminary Objections to Sunoco Pipeline, L.P.'s Declaration of Taking via U.S. First Class Mail, postage prepaid, upon the following:

Kandice Kerwin Hull, Esquire
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Sarah M. Dick, Paralegal