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 UPPER FRANKFORD, CUMBERLAND COUNTY, PENNSYLVANIA, OVER THE LANDS OF ROLFE W. BLUME AND DORIS J. BLUME,

Petitioners

vs.

SUNOCO PIPELINE, L.P.

Respondent,

On Petition for 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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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IN RE: CONDEMNATION BY SUNOCO PIPELINE, L.P. OF PERMANENT AND TEMPORARY RIGHTS OF WAY FOR TRANSPORTATION OF ETHANE, PROPANE, LIQUID PETROLEUM GAS, AND OTHER PETROLEUM PRODUCTS IN THE TOWNSHIP OF UPPER FRANKFORD, CUMBERLAND COUNTY, PENNSYLVANIA, OVER THE LANDS OF ROLFE W. BLUME AND DORIS J. BLUME	:	No. 434 MAL 2017
PETITION OF: ROLFE W. BLUME AND DORIS J. BLUME	:	Petition for Allowance of Appeal from the Order of the Commonwealth Court

ORDER

PER CURIAM

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

2017 WL 2303666

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN 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 Upper Frankford, Cumberland County, Pennsylvania, Over the Lands of Rolfe W. Blume and Doris J. Blume

Appeal of: Rolfe W. Blume and Doris J. Blume

No. 1306 C.D. 2016

|

Argued: March 6, 2017

|

FILED: May 26, 2017

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge HONORABLE JULIA K. HEARTHWAY, Judge HONORABLE DAN PELLEGRINI, Senior Judge

Opinion

MEMORANDUM OPINION

COHN JUBELIRER, JUDGE

*1 Rolfe W. and Doris J. Blume (Condemnees) appeal from the Order of the Court of Common Pleas of Cumberland County (trial court) that overruled their preliminary objections to Sunoco Pipeline L.P.'s (Condemnor) Declaration of Taking. The trial court found the majority of Condemnees' preliminary objections were controlled by this Court's prior *en banc* decision in In Re: Condemnation by Sunoco Pipeline, L.P., 143 A.3d 1000 (Pa. Cmwlth.), petition for allowance of appeal denied, (Pa. Nos. 571, 572, 573 MAL 2016, filed December 29, 2016) (Sunoco I). The few issues that were not explicitly covered by Sunoco I were nonetheless meritless, according to the trial court. After careful review of the record, and consistent with our decision in Sunoco I, we discern no error and therefore affirm.

I. Factual & Procedural Background

This case is the latest in a line of cases challenging the ability of Condemnor to exercise eminent domain to condemn private property in order to construct its pipeline. On September 30, 2015, Condemnor filed a Declaration of Taking under Section 302 of the Eminent Domain Code, 26 Pa. C.S. § 302, seeking to condemn portions of Condemnees' property located at 45 Wildwood Road, Newville, Upper Frankford Township, Cumberland County. (Declaration of Taking, ¶¶ 50–51.) Condemnor sought a permanent

easement over 1.92 acres and a temporary workspace easement over 0.97 acres. (Id. ¶ 52.)

Condemnor maintains the condemnation is necessary to construct the second phase of its Mariner East project. The project began in 2012 and was designed to relieve an oversupply of natural gas liquids (NGLs) in the Marcellus and Utica Shale basins and to alleviate supply-side shortages of propane in Pennsylvania and the Northeast. (Id. ¶ 8.) Phase I, commonly referred to as Mariner East 1, initially prioritized the interstate pipeline transportation of propane and ethane from the Marcellus and Utica basins eastward to the Marcus Hook Industrial Complex (MHIC) in Delaware County, Pennsylvania and Claymont, Delaware. (Id. ¶ 9.) Condemnor's business plan always contemplated intrastate shipment, but at a later time. (Id.)

Following a harsh winter in 2013–14, Condemnor experienced an increase in shipper demand for intrastate shipments, causing it to accelerate its business plan to include intrastate shipments earlier than originally planned. (Id. ¶ 10.) Phase II, or Mariner East 2, calls for placement of two pipelines adjacent to one another over a portion of the existing Mariner East 1 line, which runs from Delmont, Pennsylvania, to MHIC, and placement of a single line over a portion of the existing Mariner East 1 line between Delmont, Pennsylvania and the West Virginia border. (Id. ¶ 39.) Mariner East 2 will be primarily underground, except for valves, and will be mostly parallel to and within the existing Mariner East 1 right of way. (Id. ¶ 42.)

To accommodate this increased need, on May 21, 2014, Condemnor filed an application with the Pennsylvania Public Utility Commission (PUC) seeking to clarify an August 29, 2013 Order, that granted it the authority to suspend and abandon east-to-west gasoline and distillate service in certain areas. (Id. ¶ 12.) On July 24, 2014, the PUC issued an Opinion and Order, which reaffirmed Condemnor's authority under an existing Certificate of Public Convenience (CPC) to transport petroleum products and refined petroleum products between Delmont, Westmoreland County, and Twin Oaks, Delaware County. (Id. ¶ 13; PUC Op. and Order, R.R. 43a–53a.) Condemnor was first issued a CPC in 2002 after the PUC approved the transfer of assets and merger of Sun Pipe Line Company and Atlantic Pipeline Corporation with Condemnor. (Declaration of Taking, ¶ 6; CPC dated Feb. 26, 2002, R.R. 26a.) After the PUC issued its July 24, 2014 Order, Condemnor filed the necessary tariff that established PUC-regulated transportation rates for west-to-east intrastate movement of propane from Mechanicsburg, Cumberland County, to Twin Oaks. (Declaration of Taking, ¶ 16.) The tariff was approved by the PUC, effective October 1, 2014. (Id. ¶ 17; PUC Op. and Order, R.R. 55a–59a.)

***2** Under the CPCs issued by the PUC, Condemnor is authorized to transport petroleum and refined petroleum products bi-directionally in, *inter alia*, Allegheny, Westmoreland, Indiana, Cambria, Blair, Huntingdon, Juniata, Perry, Cumberland, York, Dauphin, Lebanon, Lancaster, Berks, Chester, and

Delaware Counties. (Declaration of Taking, ¶ 21.) Because Condemnor's original service territory did not include Washington County, which is where the Mariner East service would originate, Condemnor filed an application to expand its service territory into Washington County on June 6, 2014, which was approved by the PUC by Order dated August 21, 2014. (Id. ¶¶ 22–23; CPC dated Aug. 21, 2014, R.R. 61a; PUC Op. and Order, R.R. 62a–66a.) Supplemental tariffs were thereafter filed and approved, adding new origin points in Houston, Washington County, and Delmont, Westmoreland County. (Declaration of Taking, ¶¶ 30–33; PUC Ops. and Orders, 68a–72a, 74a–77a.)

Following the filing of the Declaration of Taking, Condemnees filed preliminary objections challenging the condemnation on a number of grounds, which mirror the issues raised in this appeal. (R.R. 175a–82a.) Hearings were held on February 8, 2016 and February 29, 2016. On July 19, 2016, the trial court issued an order overruling the preliminary objections.[1] Condemnees filed a timely notice of appeal on July 29, 2016.[2]

II. Analysis

Condemnees assert a number of grounds to support reversal of the trial court. Although they enumerate nine issues on appeal,[3] several are intertwined and can be consolidated into the following: (1) whether the proposed pipeline is solely interstate, subject only to the jurisdiction of the Federal Energy Regulatory

Commission (FERC); (2) assuming it is not, whether Condemnor has the power of eminent domain as a "public utility corporation"; (3) whether there is a public need for the project; and (4) whether Condemnor procedurally complied with all the legal requirements to condemn the property, *i.e.* passage of appropriate corporate resolutions and posting of adequate bond.

***3** Condemnor argues that the trial court properly relied upon this Court's holding in Sunoco I to deny the preliminary objections. In particular, Condemnor notes this Court has already found the PUC and FERC share regulatory responsibilities for the pipeline and that it is a public utility corporation under Section 1511 of the Business Corporation Law of 1988 (BCL), 15 Pa. C.S. § 1511(a)(2). Further, Condemnor argues that the Court previously found the PUC's issuance of a CPC conclusive that the project was for the benefit of the public and satisfied a public need. Finally, it asserts there is substantial evidence to support the trial court's findings that the corporate resolutions authorizing the taking were proper and bond posted was sufficient.

A. Nature of Pipeline

Condemnees first assert that the proposed pipeline is interstate and therefore subject to exclusive regulation by FERC. This Court addressed this exact issue in Sunoco I, wherein we held that the expanded Mariner East 2 pipeline would involve both interstate service subject to FERC regulation and

intrastate service subject to PUC regulation.[4] 143 A.3d at 1015. As in Sunoco I, the evidence of record in this case supports this conclusion. Harry Alexander, vice president of business development for Condemnor, testified to this effect. (R.R. at 668a, 673a–74a.) In addition, Condemnees' own expert, Dr. Dennis Witmer, acknowledged that companies can operate as both.[5] (R.R. at 553a.) The fact that the PUC issued Orders related to the project serves as further evidence that the pipeline also provides intrastate service because it would be outside the PUC's jurisdiction to regulate interstate service. The trial court, thus, did not err in concluding the proposed pipeline was not within the exclusive jurisdiction of FERC.

B. Status of Condemnor

Next, Condemnees assert that Condemnor is not a public utility corporation and therefore lacks the power of eminent domain. Their argument to this effect is three-fold. First, they claim Condemnor is collaterally estopped from claiming public utility status based upon the Court of Common Pleas of York County's decision in Sunoco Pipeline, L.P. v. Loper, 2013–SU–4518–05 (C.P. York, Feb. 24, 2014), reaffirmed March 25, 2014, (Loper). Second, they assert none of the orders or CPCs issued by the PUC pertain to the Mariner East 2 project. Third, they claim Condemnor is a private enterprise, and, therefore, the Property Rights Protection Act (PRPA), 26 Pa. C.S. §§ 201–204, prohibits the condemnation. Once again, Sunoco I controls disposition of these arguments.

As for Condemnees' collateral estoppel argument, this Court has already expressly held that Loper is distinguishable and, therefore, not dispositive. As we explained in Sunoco I, "[a]t issue in Loper was whether [Condemnor] 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." 143 A.3d at 1015. Because Loper did not address whether Condemnor was a public utility corporation based upon its regulation by the PUC,[6] the first element of collateral estoppel is not satisfied.[7]

***4** This Court has already addressed Condemnees' argument that the PUC orders and/or CPCs do not cover the Mariner East 2 project. In Sunoco I, we detailed how the various PUC Orders and CPCs, which are common here, apply to the project. 143 A.3d at 1016–17. Because we have already concluded in Sunoco I that the CPCs and orders apply to both Mariner East 1 and Mariner East 2, we cannot conclude the trial court erred in so holding.

Finally, although not specifically addressed in Sunoco I, Condemnees' argument that the PRPA prohibits the condemnation because Condemnor is operating as a private enterprise is also foreclosed by our prior *en banc* decision. Condemnees rely on Section 204(a) of the PRPA, which prohibits "the exercise by any condemnor of the power of eminent domain to take private property in order to use it for private enterprise." 26 Pa. C.S. § 204(a). However,

Condemnees ignore that the **PRPA expressly excepts public utilities**.[8] 26 Pa. C.S. § 204(b)(2)(i). In Sunoco I, we found that Condemnor is a public utility under both the Public Utility Code (Code)[9] and BCL. Under Section 1104 of the Code, 66 Pa. C.S. § 1104, in order to have the authority to exercise the power of eminent domain, a public utility must possess a CPC issued by the PUC pursuant to Section 1101 of the Code, 66 Pa. C.S. § 1101. A CPC authorizes a public utility to begin to offer, render, furnish, or supply service and describes the nature of such service and the territory in which it may be offered. Sections 1101 and 1102(a)(1) of the Code, 66 Pa. C.S. §§ 1101, 1102(a)(1). As discussed above, Condemnor has CPCs issued by the PUC. In addition, under Section 1511(a)(2) of the BCL, a "public utility corporation" is vested with the power of eminent domain to condemn property for the transportation of, *inter alia*, petroleum or petroleum products. 15 Pa. C.S. § 1511(a)(2). "Public utility corporation" is defined to include "[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," such as FERC. Section 1103 of the BCL, 15 Pa. C.S. § 1103; Sunoco I, 143 A.3d at 1003. As stated above, Condemnor is subject to regulation by both the PUC and FERC. Therefore, because Condemnor is a public utility, which is specifically excepted from the PRPA, we conclude that the PRPA does not bar the condemnation and affirm the trial court on this issue.[10]

C. Public Need

***5** Condemnees also forcefully argue that the existing Mariner East 1 pipeline has more than sufficient capacity to meet the public's demand and that absent a showing that a second pipeline is needed, Condemnor is not entitled to exercise its eminent domain power. As with the other arguments raised by Condemnees, this argument was also addressed in Sunoco I, which controls disposition here.

In Sunoco I, we explained that the Eminent Domain Code does not permit a court to review the public need for a proposed service. 143 A.3d at 1018. Citing Fairview Water Company v. Public Utility Commission, 502 A.2d 162 (Pa. 1985), we held that "determinations of public need for a proposed utility service are made by PUC, not the courts." Id. at 1019.

In this case, as in Sunoco I, the PUC has found a public need for the proposed pipeline. This is evidenced by its issuance of CPCs and accompanying Orders. For instance, in its July 24, 2014 Order, the PUC found that Condemnor's petition was in the "public interest" and that Condemnor's proposed intrastate propane service "will result in numerous potential public benefits." (R.R. at 51a.) Specifically, the PUC found expansion would allow Condemnor 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 52a.) In addition, it found the project will "further assist shippers in avoiding the added expense and risks associated with trucking the propane from the Marcellus Shale region to Mechanicsburg." (Id.) Similarly, in its August 21, 2014 Order that granted Condemnor a CPC to expand its service territory to Washington County, the PUC stated:

> 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 [Condemnor] 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, [Condemnor'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. For these reasons, we conclude that approval of the Application is in the public interest

....

(R.R. at 65a.) In order to receive a CPC, an applicant must " 'demonstrate a *public need or demand for the proposed service*.' " Sunoco I, 143 A.3d at 1019 (quoting Chester Water Auth. v. Public Utility Comm'n, 868 A.2d 384, 386 (Pa. 2005)) (emphasis in original). Section 1103(a) of the Code requires as much. 66 Pa. C.S. § 1103(a) (requiring an applicant for a CPC to establish the proposed service is "necessary or proper for the service, accommodation, convenience, or safety of the public").

Here, the CPCs and Orders clearly establish that the PUC believes a public need for the proposed project exists, and the courts are not permitted to second guess the PUC's findings. To do so would "constitute impermissible collateral attacks on otherwise valid PUC orders." Sunoco I, 143 A.3d at 1017. Again, it bears emphasis:

> ***6** 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."

Id. at 1018 (quoting Aitkenhead v. Borough of West View, 442 A.2d 364, 367 n.5 (Pa. Cmwlth. 1982)). The various CPCs and Orders related to the Mariner East Project issued by the PUC are conclusive evidence of public need. Therefore, the trial court did not err in overruling Condemnees' preliminary objections.

Condemnees further argue that the Pennsylvania Supreme Court's recent decision in Robinson Township v. Commonwealth, 147 A.3d 536 (Pa. 2016), commands that the public be the "primary and paramount beneficiary" before eminent domain power may be exercised. In Robinson Township, the Supreme Court analyzed the constitutionality of a private natural gas company to exercise eminent domain pursuant to Act 13 of February 14, 2012, P.L. 87, 58 Pa. C.S. §§ 2301–3504 (Act 13). The Court's analysis did not impact the express authority of a public utility, such as Condemnor, to condemn property. Instead, the Supreme Court specifically noted that "public utilities have long been permitted the right to exercise powers of eminent domain conferred on them by the Commonwealth in furtherance of the overall public good." Robinson Twp., 147 A.3d at 587. As stated above, the PUC has already determined the proposed project is for the public good, and we cannot disturb this finding.

D. Procedural/Technical Requirements

The final issue raised by Condemnees relates to whether the bond posted was adequate and the corporate resolution that was adopted authorized the

taking. We find no error in the trial court's reasoning.

The adequacy or sufficiency of a bond amount in an eminent domain case is a matter within the trial court's discretion, which will not be disturbed unless there is a manifest abuse of discretion. In re Phila. Parking Auth., 189 A.2d 746, 752 (Pa. 1963); York City Redev. Auth. of City of York v. Ohio Blenders, Inc., 956 A.2d 1052, 1061 (Pa. Cmwlth. 2008); In re City of Scranton, 572 A.2d 250, 256 (Pa. Cmwlth. 1990). Here, the trial court held an evidentiary hearing to allow testimony from both parties as to the sufficiency of the bond amount. In its Rule 1925(a) Opinion, the trial court explained that it credited Condemnor's real estate appraisal and testimony of Paul D. Griffith over the testimony of Condemnee Mr. Blume. (Trial Ct. Op. at 13.) Specifically, the trial court found Mr. Blume's estimate of $600,000 in damages was "not reasonable, especially in light of the fact that there is an existing pipeline owned and maintained by Condemnor in place on the property already, and running roughly parallel and adjacent to the proposed new pipelines." (Id.) The trial court was within its discretion to conclude that the $13,000 bond posted was sufficient.

Similarly, the trial court did not err in concluding the corporate resolutions authorized the condemnation. The Eminent Domain Code requires that a declaration of taking must contain "specific reference to the action, whether by ordinance, resolution or otherwise, by which the declaration of taking was

authorized, including the date when the action was taken and the place where the record may be examined." 26 Pa. C.S. § 302(b)(3). Here, Condemnor introduced a corporate resolution of Sunoco Logistics Partners Operations GP LLC, which is the general partner of Condemnor, authorizing it to do and perform all acts necessary and appropriate to effectuate the implementation of the Mariner East 2 project, including acquiring rights of way and easements whether through purchase or condemnation. (R.R. at 144a–45a.) In a July 24, 2014 resolution, the Board of Directors for Sunoco Partners, LLC, which is general partner of Sunoco Logistics Partners, LP, authorized:

> ***7** the undertaking by the Partnership or one of its operating subsidiaries of any action or proceeding necessary or required in connection with the execution or implement of the Mariner East 2 Project, including the institution of condemnation proceedings or other action in connection with the use of eminent domain authority under applicable state law.

(R.R. 147a–48a.)

Condemnees' property was specifically identified as a property for which condemnation proceedings were to be pursued. (R.R. 150a–51a.) As such, the corporate resolutions complied with the statutory requirements, and the trial court did not err in so holding.

III. Conclusion

As the trial court aptly recognized, several of Condemnees' arguments are identical or virtually identical to those previously asserted by others opposing condemnation of their properties in Sunoco I. Because the trial court correctly applied the principles in Sunoco I, we discern no error. Furthermore, to the extent Condemnees challenge the adequacy of the bond and corporate resolutions, which are factual determinations specific to this case, we conclude the trial court's findings are supported by substantial evidence. Therefore, we affirm.

ORDER

NOW, May 26, 2017, the order of the Court of Common Pleas of Cumberland County is **AFFIRMED.**

Judge Wojcik did not participate in the decision in this case.

All Citations

Not Reported in A.3d, 2017 WL 2303666

Footnotes

[1] The trial court issued its Rule 1925(a) opinion on September

1, 2016, wherein it elaborated on the bases for its denial of the preliminary objections.

[2] On appeal of orders overruling preliminary objections in an eminent domain case, this Court's scope of review is limited to determining whether the trial court abused its discretion or committed an error of law. In re Condemnation of Certain Properties and Property Interests forUse as Public Golf Course, 822 A.2d 846, 849 n.6 (Pa. Cmwlth. 2003) (citations omitted). Because the trial court serves as fact finder, its findings will not be disturbed if supported by substantial evidence. In re Dep't of Transp., of the Right of Way for State Route 0202, Section 701, 871 A.2d 896, 900 n.2 (Pa. Cmwlth. 2005) (citation omitted).

[3] Condemnees raise the following issues on appeal:

> (1) Did the [trial court] err in overruling [Condemnees'] preliminary objections, in their entirety, when [Sunoco I] did not involve or address all preliminary objections raised in this matter?
>
> (2) Did the [trial court] err in overruling [Condemnees'] preliminary objection regarding the [Condemnor's] resolution where it did not authorize the proposed condemnation and the law requires a valid resolution pursuant to 26 Pa. C.S.[ ] 302?
>
> (3) Did the [trial court] err in overruling [Condemnees'] preliminary objection challenging the attempted condemnation for two (2) pipelines when [Condemnor] admits only one (1) pipeline is needed?
>
> (4) Did the [trial court] err in overruling [Condemnees'] preliminary objection challenging the attempted condemnation because it is for private enterprise and thus prohibited by the Property Rights Protection Act, 26 Pa. C.S. [ ] §§ 201–204?
>
> (5) Did the [trial court] err in overruling [Condemnees'] preliminary objection relating to the bond amount when the evidence shows [Condemnor's] proposed bond amount was inadequate?

> (6) Did the [trial court] err in overruling [Condemnees'] preliminary objection challenging [Condemnor's] authority to condemn because Mariner East 2 is an interstate pipeline in interstate commerce subject to exclusive federal regulation thereby preempting any state/local regulation?
>
> (7) Did the [trial court] err in overruling [Condemnees'] preliminary objection challenging [Condemnor's] authority to condemn because, for Mariner East 2, it is not a public utility corporation, under the Pennsylvania Business Corporation Law (BCL) and it is not regulated by the Pennsylvania Public Utility Commission (PUC) as evident by the [Condemnor's] failure to provide any PUC orders or certificates pertaining to Mariner East 2?
>
> (8) Did the [trial court] err in overruling [Condemnees'] preliminary objection regarding collateral estoppel when Sunoco Pipeline, L.P. v. Loper, 2013–SU–4518–05 (C.P. York [ ], Feb. 24, 2014), reaffirmed March 25, 2014, evaluated [Condemnor's] status as a public utility corporation under the BCL and ultimately denied eminent domain power for Mariner East 2?
>
> (9) Did the [trial court] err in overruling [Condemnees'] preliminary objections in their entirety which thereby granted [Condemnor] the statutory power of eminent domain for Mariner East 2?

(Condemnees' Br. at 9–11.)

[4] In Sunoco I, we explained that FERC's and PUC's jurisdiction is not mutually exclusive of one another; rather, a public utility can be and frequently is simultaneously regulated by both. 143 A.3d at 1004–05.

[5] Dr. Witmer's testimony was in a separate but related Washington County case, but was admitted into the record of this matter by Order of Court dated February 24, 2016. (R.R. 656a–57a.)

[6] Condemnor had not yet sought approval from the PUC to

provide intrastate service at the time Loper was decided. Sunoco I, 143 A.3d at 1015.

[7] To establish collateral estoppel, the following conditions must be met: (1) the issue or issue of fact previously determined in a prior action is 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 a full and fair opportunity to litigate the issue in the prior action. Id. (citing Dep't of Transp. v. Martinelli, 563 A.2d 973, 976 (Pa. Cmwlth. 1989)).

[8] The PRPA provides, in pertinent part:

> (a) **Prohibition.**—Except as set forth in subsection (b), the exercise by any condemnor of the power of eminent domain to take private property in order to use it for private enterprise is prohibited.
>
> (b) **Exception.**—Subsection (a) does not apply if any of the following apply: ...
>
> (2) The property is taken by, to the extent the party has the power of eminent domain, transferred or leased to any of the following:
>
> (i) a public utility or railroad as defined in [the Public Utility Code (Code),] 66 Pa. C.S. § 102 (relating to definitions).

26 Pa. C.S. § 204. Section 102 of the Code, in turn, defines a "public utility" as "[a]ny person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for ... transporting or conveying ... petroleum products ..., by pipeline or conduit, for the public for compensation." 66 Pa. C.S. § 102.

[9] 66 Pa. C.S. §§ 101–3316.

[10] Recently, our Supreme Court in Robinson Township v. Commonwealth, 147 A.3d 536 (Pa. 2016), found Section

3241 of Act 13, 58 Pa. C.S. § 3241, unconstitutional on its face as it grants a corporation the power of eminent domain to take private property for a private purpose, in violation of the Fifth Amendment of the United States Constitution and Article I, Sections 1 and 10 of the Pennsylvania Constitution. After comparing Section 3241 of Act 13 to Section 102 of the Code, the Court stated that Section 3241 "does not restrict the type of corporation eligible to take the subterranean lands of another property owner to only corporations that meet these specific legislatively imposed conditions for them to qualify for classification as public utilities." Id. at 587. Here, Condemnor is a certificated public utility under the jurisdiction of the PUC exercising the powers of eminent domain pursuant to the Code and the BCL.

IN RE: CONDEMNATION BY SUNOCO PIPELINE, L.P. OF PERMANENT AND TEMPORARY RIGHTS OF WAY FOR TRANSPORTATION OF ETHANE, PROPANE, LIQUID PETROLEUM GAS, AND OTHER PETROLEUM PRODUCTS IN THE TOWNSHIP OF UPPER FRANKFORD, CUMBERLAND COUNTY, PENNSYLVANIA, OVER THE LANDS OF JOHN PERRY AND AUDREY B. PERRY	:	NO. 2015-4382 CIVIL TERM EMINENT DOMAIN – IN REM
IN RE: CONDEMNATION BY SUNOCO PIPELINE, L.P. OF PERMANENT AND TEMPORARY RIGHTS OF WAY FOR TRANSPORTATION OF ETHANE, PROPANE, LIQUID PETROLEUM GAS, AND OTHER PETROLEUM PRODUCTS IN THE	:	NO. 2015-4228 CIVIL TERM EMINENT DOMAIN – IN REM

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IN RE: CONDEMNATION BY SUNOCO PIPELINE, L.P. OF PERMANENT AND TEMPORARY RIGHTS OF WAY FOR TRANSPORTATION OF ETHANE, PROPANE, LIQUID PETROLEUM GAS, AND OTHER PETROLEUM PRODUCTS IN THE TOWNSHIP OF UPPER FRANKFORD, CUMBERLAND COUNTY, PENNSYLVANIA, OVER THE LANDS OF ROLFE W. BLUME AND DORIS J. BLUME	:	NO. 2015-5516 CIVIL TERM EMINENT DOMAIN – IN REM

IN RE: PRELIMINARY OBJECTIONS
ORDER OF COURT

AND NOW, this 18th day of July, 2016, upon consideration of Declaration of Taking and the Condemnees's Preliminary Objections, the Briefs submitted by the parties and after hearing;

IT IS HEREBY ORDERED AND DIRECTED that the Condemnees' Preliminary Objections are overruled in their entirety. See 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, PA ~ Appeal of: R.S. Martin, et. al. – 1979-1981 C.D. 2015. (2016 Pa. Commonwealth LEXIS 326)

By the Court,

_____

M. L. Ebert, Jr. J.

Alan R. Boynton, Esquire
Kandice Kerwin Hull, Esquire
For Sunoco Pipeline, LP

Michael F. Faherty, Esquire
For Condemnees

tls

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 UPPER FRANKFORD, CUMBERLAND COUNTY, PENNSYLVANIA, OVER THE LANDS OF ROLFE W. BLUME AND DORIS J. BLUME,

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APPENDIX VOLUME II
PETITION FOR A WRIT OF CERTIORARI

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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**⇐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

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 1988[1] (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 corporation[7] 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).[] 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

[8] 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 Code[21] 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 Madison[1]

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 Envtl. 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 Code[6] 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.Cmwlth.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 Pennsylvanian'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).

[10] Sunoco also points out that it has filed all necessary tariffs 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.

[8] *Sunoco Pipeline, L.P. v. Loper* (C.P. York, 2013–SU–4518–05, filed February 25, 2014) (*reaffirmed* March 25, 2014).

[9] The definition of "public utility" in the Public Utility Code includes a person or corporation that owns or operates facilities in the Commonwealth for: "transporting or conveying ... petroleum products ... for the public for compensation." 66 Pa.C.S. § 102. Although the Public Utility Code does not define "petroleum product," the PUC, in its *amicus curiae* brief, notes that PUC considers propane a "petroleum product." (PUC Br. at 6–7.)

[10] In an October 29, 2014 decision, the PUC concluded that Sunoco's authority also extended to pipeline service for the intrastate transportation of ethane. (R.R. 120a–22a.)

[11] Sunoco argues that the ME2 project always contemplated an intrastate component. For purposes of this dissent, I accept that claim. The question that remains is whether that intrastate component is the "true" purpose behind the construction of the pipeline.

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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 UPPER FRANKFORD, CUMBERLAND COUNTY, PENNSYLVANIA, OVER THE LANDS OF ROLFE W. BLUME AND DORIS J. BLUME,

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

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APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: CONDEMNATION BY SUNOCO PIPELINE (ROLFE W. and DORIS J. BLUME)

No. 1306 CD 2016

On appeal from the July 19, 2016 Order of the Honorable M.L. Ebert, Jr., J. Court of Common Pleas,
Cumberland County, Pennsylvania, Docket No. 2015-05516

APPELLANT BRIEF

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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 twelfth Judicial District had jurisdiction under 42 Pa. C.S.A. § 931 to hear this matter. Appellants filed a notice of appeal on July 29, 2016. (R. at 836a-841a).

ORDER IN QUESTION

ORDER OF COURT

AND NOW, this 18th day of July, 2016, upon consideration of Condemnor's Declaration of Taking and the Condemnees' Preliminary Objections, the Briefs submitted by the parties and after hearing;

IT IS HEREBY ORDERED AND DIRECTED that the Condemnees' Preliminary Objections are overruled in their entirety. See 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, PA ~ Appeal of: R.S. Martin, et al. – 1979-1981 C.D. 2015. (2016 Pa. Commonwealth LEXIS 326).

BY

THE COURT,

M.L.

Ebert, Jr., J.

The Order of the Honorable M.L. Ebert, Jr. is attached as Appendix A. The date of entry of this Order was July 18, 2016.

SCOPE AND STANDARD

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. Cmwlth. 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. Cmwlth. 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 Authority of Property of Gillette, 898 A.2d 6, 8 n. 3 (Pa. Cmwlth. Ct. 2006).

QUESTIONS PRESENTED FOR REVIEW

This appeal raised nine issues. They are intertwined with the fundamental issue of eminent domain; what is a valid "public purpose" to justify use of the awesome power of eminent domain? The Pennsylvania definition of such a "public purpose" has been explicitly defined by the Pennsylvania Supreme Court. In order to satisfy this "public purpose" requirement, "the public must be the primary and paramount beneficiary of the taking." Robinson Township v. Commonwealth of Pennsylvania [J-34A-B-2016], No. 104 MAP 2014, page 84, PA, Decided September 28, 2016. This "public purpose" central issue of this case controls the particular appeal issues identified below.

1. Did the Court of Common Pleas err in overruling Owners' preliminary

objections, in their entirety, when In re: Condemnation by Sunoco Pipeline, L.P.: Appeal of R.S. Martin, et al., 1979, 1980, and 1981 CD 2015 (Pa. Cmwlth. Ct. July 15, 2016) did not involve or address all preliminary objections raised in this matter?

(Suggested Answer: Yes)

2. Did the Court of Common Pleas err in overruling Owners' preliminary objection regarding the Sunoco resolution where it did not authorize the proposed condemnation and the law requires a valid resolution pursuant to 26 Pa. C.S.A. § 302?

(Suggested Answer: Yes)

3. Did the Court of Common Pleas err in overruling Owners' preliminary objection challenging the attempted condemnation for two (2) pipelines when Sunoco admits only one (1) pipeline is needed?

(Suggested Answer: Yes)

4. Did the Court of Common Pleas err in overruling Owners' preliminary objection challenging the attempted condemnation because it is for private enterprise and thus prohibited by the Property Rights Protection Act, 26 Pa. C.S.A. §§ 201-204?

(Suggested Answer: Yes)

5. Did the Court of Common Pleas err in overruling Owners' preliminary objection relating to the bond amount when the evidence shows Sunoco's proposed bond amount was inadequate?

(Suggested Answer: Yes)

6. Did the Court of Common Pleas err in overruling Owners' preliminary objection challenging Sunoco's authority to condemn because Mariner East 2 is an interstate pipeline in interstate commerce subject to exclusive federal regulation thereby preempting any state/local regulation?

(Suggested Answer: Yes)

7. Did the Court of Common Pleas err in overruling Owners' preliminary objection challenging Sunoco's authority to condemn because, for Mariner East 2, it is not a public utility corporation, under the Pennsylvania Business Corporation Law ("BCL") and it is not regulated by the Pennsylvania Public Utility Commission ("PUC") as evident by the Sunoco failure to provide any PUC orders or certificates pertaining to Mariner East 2?

(Suggested Answer: Yes)

8. Did the Court of Common Pleas err in overruling Owners' preliminary objection regarding collateral estoppel when Sunoco Pipeline, L.P. v. Loper, 2013-SU-4518-05 (C.P. York County, February 24, 2014) *reaffirmed* March 25, 2014 evaluated Sunoco's status as a public utility corporation under the BCL and ultimately denied eminent domain power for Mariner East 2?

(Suggested Answer: Yes)

9. Did the Court of Common Pleas err in overruling Owners' preliminary objections in their entirety which thereby granted Sunoco the statutory power of eminent domain for Mariner East 2?

(Suggested Answer: Yes)

STATEMENT OF THE CASE

The federal government regulates hazardous liquid pipelines. In doing so, the Federal Energy Regulatory Commission (hereinafter "FERC") approved an interstate pipeline for transportation from Ohio through Pennsylvania and into Delaware, without eminent domain power. Projected Sunoco Pipeline tariff income, per day, is $875,435, or close to one million dollars per day. Sunoco Pipeline has asserted a public need and benefit via new on-loading and offloading stations within Pennsylvania. However, Sunoco Pipeline already satisfied any Pennsylvania need for the natural gas liquids by recently creating the Mariner East 1 pipeline. Zero public need and zero public benefit is found in creation of on-loading and offloading stations which would provide additional, unneeded capacity. The public is not the primary and paramount beneficiary of the

proposed Mariner East 2 pipeline. Constitutional property rights must be protected over higher profits of a pipeline company.

SUMMARY OF ARGUMENT

The Pennsylvania Supreme Court has long been recognized as a strong protector of private property rights. That fundamental protection of Constitutional private property rights was expressed after the 2005 United States Supreme Court decision in Kelo v. City of New London, 545 U.S. 469 (2005) in at least two cases, In re: Opening Private Road for Benefit of O'Reilly, 5 A.3d 246 (Pa. 2010) and Reading Area Water Authority v. Schuylkill Greenway Association, 100 A.3d 572, 578 (Pa. 2014). The thus established power of eminent domain in Pennsylvania only satisfies the public purpose test when "the public must be the primary and paramount beneficiary of the taking." O'Reilly, 5 A.3d at 258. This Commonwealth Court did not review, or follow, that law in deciding Martin, et al. v. Sunoco, No. 1979 C.D. 2015 on July 14, 2016 in favor of Sunoco Pipeline's eminent domain

power. Martin, et al. is now awaiting a Pennsylvania Supreme Court decision on a Petition for Allowance of Appeal filed on August 12, 2016.

Thereafter, on September 28, 2016 the Pennsylvania Supreme Court reaffirmed the applicable public use test that "the public must be the primary and paramount beneficiary of the taking" in Robinson Township. Application of the Robinson Township "public purpose" test decided after Martin, et al. requires the determination of the "primary and paramount beneficiary." The evidence in this case now before the Court demands a determination that the use of eminent domain is not allowed because the public is not the primary and paramount beneficiary.

ARGUMENT

A. Decision at Issue

The Common Pleas decision in this matter approved eminent domain power via reliance on the

recent Commonwealth Court decision in Martin, et al. – 1979-1981 C.A. 2015 (216 Pa. Commonwealth LEXIS 326). Afterwards, the parties settled the matters involving the properties of Perry and Walters. This matter continues concerning the property of Rolfe and Doris Blume.

B. Blume Objections and Evidence

While the decision below relied on Martin, et al., the preliminary objections and the evidence differ from that case. As stated in the Rule 1925(A) Opinion (RR. At 849a), the Blume case raised two preliminary objections, 7 and 8, which were not raised in Martin, et al. The seventh preliminary objection challenged the attempted condemnation as being for private enterprise and thus prohibited by the Property Rights Protection Act. 26 Pa. C.S.A. §§ 201-204. This preliminary objection was filed on October 20, 2015 (RR. at 180a). This preliminary objection, not raised

in Martin, et al., requires full consideration by this Honorable Court of the Property Rights Protection Act with its embodiment of the "public purpose" test.

The decision below raised an eighth preliminary objection not raised in Martin, et al. This objection challenged the jurisdiction and regulation by the Pennsylvania Public Utility Commission (hereinafter "PUC"). As will be more fully reviewed, the PUC regulates public utilities when they are providing service "for the public." When an entity with public utility status operates a project which is for profit, it is not operating with the public as the primary and paramount beneficiary of the taking. A corporate entity may act as a public utility corporation with projects for the public. They may also, as the evidence revealed here, operate a project with a speculative and de minimis public purpose. Thus, this new preliminary objection also requires consideration

of the "public purpose" test of Pennsylvania law as in Robinson Township.

Also, the Blume evidence here, while having overlap with Martin, et al. differs. Each owner is fully entitled to the due process protection against taking of property as stated in the Fifth Amendment of the United States Constitution and Article 1, Section 1 and 10 of the Pennsylvania Constitution.

C. Chronology

Consideration of this appeal is appeal is aided by the clarification of the chronology of decisions and events concerning the "public purpose" requirement. Initially and importantly, the Pennsylvania Constitution protected private property rights before our United States Constitution.

Pennsylvania Constitution – ratified 1776

United States Constitution – ratified 1788

Kelo v. City of New London – 2005

Property Rights Protection Act – 2006

In re: Opening Private Road for Benedict O'Reilly – 2010

Reading Area Water Authority v. Schuylkill Greenway Assoc. – 2014

Martin, et al. (Commonwealth Court Decision) – July 14, 2016

In re: Condemnation by Sunoco (Blume) – July 18, 2016

Martin, et al. (Petition for Allowance of Appeal) – August 12, 2016

Robinson Township v. Commonwealth of Pennsylvania – September 28, 2016

The chronology provides the historical perspective whereby our Pennsylvania property rights are Constitutionally guaranteed. The United States

Supreme Court in Kelo compromised those rights by broadly defining public purpose. Pennsylvania then strongly and insightfully responded by protecting Pennsylvania private property rights in the Property Rights Protection Act. The legislative wisely included language which did not provide a blanket exception for public utility corporations. Instead, and critically for the appeal at issue, the legislature provided an exception when such a public utility corporation was acting "for the public." 26 Pa. C.S.A. § 204(b)(2)(i) and 66 Pa. C.S.A. § 102. A thoughtful analysis of the Property Rights Protection Act may be reviewed at Property Rights Protection Act: An Overview of Pennsylvania's Response to Kelo v. City of New London. Anthony B. Seitz, 18 Widener L.J. 205 (2008).

After the Property Rights Protection Act, the Pennsylvania Supreme Court twice emphasized that a taking with only a modest or ancillary public

purpose does not justify eminent domain. O'Reilly, 5 A.3d 246; Reading Area, 100 A.3d 572. Then this Honorable Court decided Martin, et al. in a decision with strong, sound dissenting opinions. The majority decision found Sunoco Pipeline to be a public utility. The majority decision failed to evaluate the "public purpose" requirement as previously laid out in O'Reilly and Reading Area. The potential review by the Pennsylvania Supreme Court would be expected to review the "primary and paramount beneficiary."

Following the Commonwealth Court decision in Martin, et al. the Pennsylvania Supreme Court took the opportunity in Robinson Township to again emphasis that in Pennsylvania the "public purpose" requirement for eminent domain demands the evaluation of the "primary and paramount beneficiary." This Honorable Court is thus now required to evaluate the "primary and paramount

beneficiary." A Certificate of Public Convenience for one service or project does not provide any exception for a different project, from the "public purpose" requirement. We must recognize that the Property Rights Protection Act exemption for public utility corporation does not give a free pass to avoid the foundational "public purpose" requirement. The "public purpose" scrutiny of the Blume condemnation could only rationally conclude that the primary and paramount beneficiary is a pipeline company, Sunoco Pipeline, and not the public.

The scrutiny of the "public purpose" requirement must be done in recognition that any grant of the power of eminent domain mist be strictly construed. 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. Commw. 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 Authority, 100 A.3d 572 (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 (Eminent domain may not be exercised in Pennsylvania without the

showing of a valid public purpose). See Robinson Township.

D. The Attempted Condemnation Is For Private Enterprise And Is Thus Prohibited By the Property Rights Protection Act.

An attempted condemnation for private enterprise is prohibited by Pennsylvania's Property Rights Protection Act. 26 Pa. C.S.A. §§ 201-204. Eleven years ago the United States Supreme Court issued the landmark Kelo case in which it allowed the use of eminent domain for private enterprise. Kelo, 545 U.S. 469. The case contains extensive review of the requirement of a valid public need as the base requirement for approval of eminent domain power. Suzette Kelo's home was taken for an insurance company campus which would serve the public via tax revenue.

The nation was outraged. Approximately 45 states passed anti-Kelo laws to specifically and fully prevent the use of eminent domain for private enterprise. Pennsylvania did this ten years ago in the Property Rights Protection Act. 26 Pa. C.S.A. § 201-204. The taking of "... private property in order to use it for private enterprise is prohibited." 26 Pa. C.S.A. § 204(a). The fullness of this prohibition was explicated by the Pennsylvania Supreme Court decision in Reading Area Water Authority, 100 A.3d 572. The Court held that a condemnation which is used for private enterprise and provided a public benefit is a prohibited use of eminent domain. The Court explained:

> Against this backdrop, the legislative body elected to phrase the central prohibition broadly in terms of whether the subject property is being condemned "to use it for

> private enterprise," – the latter of which, in any event, would have had little effect on the *status quo* since any condemnation accomplished solely for private purposes would likely have failed the constitutional public-use standard.

Id. at 583. The case concluded with footnote 15 which stated:

> The presence of a public benefit, even a significant one, cannot save what is otherwise an improper condemnation.

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 Natural Gas Liquids (Hereinafter "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 and is now prohibited from using eminent domain by the Pennsylvania anti-Kelo statute. Thus, the thoughtful and careful regulation of such an interstate pipeline for private enterprise requires the purchase of easements from Pennsylvania property owners.

Sunoco asserts that it escapes the private enterprise prohibition as a public utility as defined by 66 Pa. C.S.A. § 102. The argument fails for two reasons. The first is the "public utility" definition of section 102(l)(i) which limits the definition to corporations transporting natural or artificial gas "to

or for the public for compensation." Thus, this 2006 law did not allow any exception for the private enterprise use vs. the public use. Sunoco may, and does, act as a public utility for some projects and for private enterprise for others. Here, the use is for a prohibited new use for natural gas liquids for private enterprise.

The second reason Sunoco is not exempt from the private enterprise prohibition is the very narrow exception as defined in section 204(b)(2). The statute states the exception to the prohibition as applying "... to the extent the party has the power of eminent domain, transferred or leased to any of the following: (;) A public utility or railroad as defined in 66 Pa. C.S.A. § 102 (relating to definitions)." Here, Sunoco not asserting it has the power of eminent domain via having it "transferred or leased" to it. The narrow exception simply does not apply. Sunoco asserts it has

eminent domain via an overly broad reading of Certificates from 2002, before the natural gas liquids at issue were produced and before the Pennsylvania anti-Kelo law. Sunoco status as a public utility corporation, per inapplicable intrastate services, does not create public utility status for a proposed interstate pipeline facility.

The Supreme Court of Pennsylvania in Reading Area properly chose to place private property rights above the use of eminent domain for private enterprise. The court's aversion to eminent domain abuse such as this was so strong that the Court went out of its way to explain how complete is the prohibition. Per Reading Area, a project which is both for the public and for private enterprise may not use eminent domain power. The Sunoco attempt to distinguish via the nature of different government

entities does not alter the principle of prohibited private enterprise.

Sunoco attempts to avoid the Property Rights Protection Act via an exclusion for public utilities. However, that argument fails when we recognize that the exception only applies when the utility is providing service "for the public." When the proposed service to Delaware and Europe is recognized to be for private enterprise rather than "for the public" the exception does not apply. The critical language of "for the public" reflects the long line of eminent domain cases defining what is a valid public purpose.

The public purpose 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 meaningful need "for the public" defeats the condemnations.

Also, the required analysis recognizes that PUC approval of a service is only the general preliminary step. It is 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 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, 377 Pa. 323, 339, 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. This test is whether the proposed Mariner East 2 is 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, as asserted by Sunoco, 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). If the

proposed service is identical to the existing service, as asserted by Sunoco, the burden of demonstrating the need "for the public" for the proposed service requires condemnor proof of the need and proof of the inadequacy of the existing service per 66 Pa. C.S.A. § 1103; Mobilfone of Northeastern Pennsylvania, Inc. v. Pennsylvania Public Utility Commission, 458 A.2d 1030 (Pa. Cmwlth. Ct. 1983).

The evidence consistently proved the absence of a need "for the public." The analysis begins with the Sunoco assertion that it has been approved by the PUC for transportation of petroleum and refined petroleum products. Sunoco then asserts a need for propane, one of the natural gas liquids approved by FERC. However, the evidence strongly proved the absence of a need "for the public."

Sunoco's own witness, Harry Alexander, explained all we need to know about propane need in Pennsylvania. He testified to the need for the entire state of up to 22,000 barrels per day. The now operational Mariner East 1, per Mr. Alexander, has a capacity to deliver 72,250 barrels of propane per day. That new, recent capacity is beyond three times the Pennsylvania need of 72,250 barrels per day. Mariner East 1 fully satisfied any need for the natural gas liquids in Pennsylvania. 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 proves the purpose to move natural gas liquids away from, not to, Pennsylvania.

Additionally, the credible testimony of Dr. Dennis Witmer fully proved the prior service was adequate and there is no need for the public

concerning any of the natural gas liquids proposed for Mariner East 2. He reviewed the Sunoco records as showing the plan for delivery to Delaware for sale at the highest price. He explained how the Mariner East 2 proposal was for private profit, rather than "for the public" of Pennsylvania. The testimony of the energy expert is much more on target to the public need for petroleum products than self-serving testimony of Sunoco concerning some generalized public benefits of the project, rather than any need of petroleum products "for the public." Sunoco Pipeline satisfied any public need or public purpose with Mariner East 1, thereby eliminating any public need for Mariner East 2.

E. The Controlling Federal Regulation, 49 C.F.R. Part 195 – Appendix A, Announced Exclusive federal Jurisdiction.

The directly on point cited 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" thus 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.

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 Interstate Commerce act. 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 United States announced the preempting federal regulations in 1992 by enacting the Pipeline Safety Act, 49 U.S.C. §§ 60101 et seq. 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).

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. This Honorable Court could rely thus on federal and/or state regulation to confirm exclusive federal jurisdiction.

Further support for this definition of the proposed services as interstate and never intrastate was identified in oral argument of Martin, et al. before the Commonwealth Court by the questions of Judge Kevin P. Brobson, who asked how this new pipeline facility could be intrastate after the Elder v.

Pennsylvania R. Co., 180 A. 183 (Pa. Super. Ct. 1935) statement:

> 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...

Sunoco could not then refute the jurisdiction as only federal, and with the long established law, is now still unable to refute it. Judge Brobson's citation to Elder 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 recent FERC decision in 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." 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.

Sunoco attempts to distinguish Williams Olefins and the exclusive federal jurisdiction of the federal and state regulations by citation to Amoco Pipeline Company, 62 FERC ¶ 61,119 (1993). The effort obviously fails. First, while this older case includes some discussion of jurisdiction, the case did not decide jurisdiction. "Our acceptance of Sinclair's

notice of withdraw removes the jurisdictional issue from this case." Page 5. Also, that case is obviously irrelevant in that it concerned tariff filings, or rates to be changed 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 design, interstate pipelines and the PUC approves tariffs for construction and testing of a new facility as regulated exclusively by 49 C.F.R. Part 195. Amoco, the best case Sunoco could identify, is completely unpersuasive.

A wealth of additional law is consistent in the explanation that gas crossing a state line at any stage of its movement the 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, 472-473 (1950); Deep South Oil Co. v. FPC, 247 F.2d 882, 887-888 (CA5 1957). See generally Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498, 503-504 (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, 34 (1914). Interstate commerce explicitly encompasses this pipeline which would transport products, via the ICA authority, as described in the 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., 222 U.S. at 32; Houston, E & W. Texas Ry. Co., 234 U.S. at 34.

This "Delineation Between Federal and State Jurisdiction" is found in the title of Appendix A to Part 195. It is entirely consistent with the federal FERC exclusive regulation as explained in the 2013 and 2014 FERC Orders approving Mariner East 2.

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 Mariner East 2 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.

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 feedstock for manufacturing plastics. Propane may be used as fuel, but such use is minor compared to the prominent and planned used for these Mariner East 2 natural gas liquids. The use for the products in making plastics does not correspond to any particular government interest. Lower shipping costs for the main plastics component serves a private enterprise purpose for European plastics, not any Pennsylvania public utility need. The plan of propane service of Mariner East 1, supposedly to satisfy a public need, has now shifted to ethane to Europe.

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. 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 begs another question as posed by a Common Pleas Judge in a related case. 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

Pipeline, L.P. 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. (Transcript 2/8/16 Page 64, Line 3-6). 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.

We should stop to consider the primary and paramount beneficiary in light of the projected tariff income to Sunoco Pipeline of $875,435 per day. That projected income corresponds to $319,533,775 per year. That income year after year defines the primary and paramount beneficiary. By contrast, the public obtains no benefit because the Pennsylvania need for natural gas liquids was satisfied by Mariner East 1.

F. The Proposal Of On-loading And Offloading Within Pennsylvania Does Nothing To Alter The Proposed Pipeline Facility From Being Only Interstate Commerce, Thus Resulting In The Applicability Of Collateral Estoppel.

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. Accordingly, the collateral estoppel of Sunoco v. Loper applies.

The only final decisions concerning th e pipeline at issue are the decisions of Sunoco Pipeline, L.P. v. Loper (Condemnee Exhibits 4 and 7). Sunoco tried to obtain the requested eminent domain power and failed. In Sunoco v. Loper, 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 in his February 24, 2014 Order and his March 25, 2014 Reaffirming Order. He did so following the Sunoco admission in briefing that the PUC could not regulate the Mariner East 2 pipeline (Condemnee Exhibit 3, Page 6, Footnote 4). because the pipeline would be in interstate commerce. Sunoco will assert that the Loper case dealt with a different issue concerning survey rights. That argument is without merit because Loper decided the eminent domain issue which serves as the basis of both survey rights and property acquisition.

Sunoco then attempted to avoid the collateral estoppel of Loper by describing on-loading and offloading Mariner East 2 locations within Pennsylvania. The trial court in the case of Martin et al. v. Sunoco under review was convinced that these new locations resulted in Mariner East 2 being in interstate commerce and intrastate commerce. That was the critical and controlling error of that case. Mariner East 2 is in interstate commerce only and the PUC is prohibited from regulating interstate commerce.

For efficiency and preservation of judicial resources, 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. Here, Sunoco once again 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. To the contrary, for Mariner East 2, Sunoco is not a public utility corporation under the BCL, nor is it a public utility regulated by the FERC. As previously litigated and determined by a Common Pleas Court in York County, 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 in Sunoco's current cases is identical to that presented to President Judge Stephen P. Linebaugh in Loper v. Sunoco Pipeline, L.P. (Condemnee Exhibit 4). The Judge, at page three, 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, President Judge Linebaugh of the 19th judicial district (York County) determined Sunoco is "regulated by FERC pursuant to the [ICA], and not the NGA, as a common carrier, and not as a public utility." See Page four. 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 President Judge Linebaugh before he explained the denial of eminent domain power for this Mariner East 2 pipeline in his March 25, 2014 Reaffirming Order. (Condemnee Exhibit 7). The

Sunoco submission is also enlightening in that it includes an analysis from "FERC expert" Attorney Cynthia A. Marlette. Her explanation is 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. Collateral estoppel may have been "involved in an unlimited range of situations." Thompson v. Karastan Rug Mills, 323 A.2d 341, 343

(Pa. Super Ct. 1974). This doctrine bars any subsequent action where the sole issue requiring judgment was previously litigated. Id. "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).

Notably, 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. The Sunoco assertions that President Judge Linebaugh did not consider the correct BCL test is in direct conflict with his language.

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, 323 A.2d at 344 (citations omitted) (internal quotations omitted).

Sunoco brought these subsequent actions seeking eminent domain power for its Mariner East 2 pipeline, claiming eminent domain authority via the BCL. The same issue and argument was previously heard and decided. Collateral estoppel bars Sunoco's current action seeking eminent domain power for its Mariner East 2. This Court should dismiss Sunoco's Declaration of Taking as it is barred by the doctrine of collateral estoppel.

Sunoco asserts 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 next attempts to avoid collateral estoppel by arguing that President Judge Linebaugh only considered whether Sunoco was regulated as a public utility by the United States and that he did not consider whether Sunoco was regulated as a public utility by the Pennsylvania PUC. The definition at issue is that in the Public Utility Code definitions of 15 Pa C.S.A. § 1103(a) which defines a public utility corporation as "any domestic or foreign corporation for profit that: (1) is subject to regulation as a public utility by the Pennsylvania PUC or any officer or agency of the United States."

Both Orders of President Judge Linebaugh were explicit in that he stated he considered Sunoco's arguments for public utility status under § 1103(a). Nowhere, does he state that he only considered the application via the part of § 1103(a) which refers to the United States. Specifically, his February 24, 2014 Order, from the middle of Page 3 to the top of Page 4, is the specification of his consideration of § 1103(1) with the exact wording considered as: "(1) subject to regulation as a public utility by the Pennsylvania Public Utility Commission or an officer or agency of the United States." Similarly, the Reaffirming Order of March 25, 2014 stated the President Judge Linebaugh consideration of the exact same § 1103(a) test by which Sunoco could have qualified as a public utility via regulation by the Pennsylvania PUC. President Judge Linebaugh considered the possibility and rejected it, leading him to conclude his

Reaffirming Order with the statement: "It therefore is not a public utility for purposes of the [BCL]."

The Orders admittedly did not contain further analysis of the possibility of "subject to regulation as a public utility by the Pennsylvania [PUC]." This is because Sunoco had admitted that it was not subject to such regulation. Per the Sunoco Brief in Loper at Page six, footnote four, "[t]he PUC cannot regulate this Pipeline; it is beyond its authority to do so." Further analysis or discussion by President Judge Linebaugh was obviously unnecessary. What President Judge Linebaugh did was accept the Sunoco admission that it was not regulated by the Pennsylvania PUC. He went on to explain why Sunoco was not regulated as a public utility by the United States. He thus reached his conclusion that Sunoco did not satisfy the § 1103(a) test of public

utility regulation by the Pennsylvania PUC or the United States.

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 possibility is irrelevant and unpersuasive. 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.

The proposal to create on and off locations in Pennsylvania is believed to be a faulty ploy to try to obtain eminent domain power. It fails because such within Pennsylvania service fails to create Pennsylvania regulation, while the regulation remains with the FERC. 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 a Certificate of Public Convenience and Necessity (hereinafter "Certificate") 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 § 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.

G. The PUC Certificate For Washington County And The PUC Orders Indicate That The Mariner East 2 Proposal Is Not Regulated By The PUC.

Sunoco only obtains eminent domain power via the BCL, if it regulated, for this proposed facility, by the PUC. An array of PUC Certificates and Orders are found in evidence. Sunoco is unable to point to any of them as providing regulation of Mariner East 2. An insightful view of such evidence is that the more documents it takes to show the legislative grant of eminent domain power, the less likely the grant of the power exists.

The closest Sunoco comes to a PUC Order regulating Mariner East 2 is found in the Order of August 21, 2014, which states at Page 3:

> 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.

Any reliance on that, or for that matter any of the PUC Orders, is factually and legally in error. Initially, the PUC Order is explicit in that it only concerns an application for Washington County. The application and approval for Washington County service has no control, authority or jurisdiction for the three (3) consolidated Cumberland County cases under review.

The next reason that the Order fails to show PUC regulation of Mariner East 2 is 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". Page two, paragraphs two and three specifically define the "first phase" as entirely within Pennsylvania. Page three at the third full paragraph references "this first phase." The middle of Page four recounts "...intrastate transportation of propane in Washington County..." The PUC Order states at paragraph two it approved "...intrastate service to the public in Washington County".

The PUC Order does contain dicta as cited by the trial Judge 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. That interest has apparently vanished, given the current shipping of ethane to Europe via Mariner East 1. The PUC apparently smiled 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. Again, 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 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 so because the PUC authors are fully aware that the PUC is prohibited from regulating this interstate commerce.

H. The Attempted Condemnation For Two Pipelines Is Prohibited As An Excessive Taking Beyond Any Current Public Need.

A preliminary objection challenged the attempt to condemn property rights for not one, but two, pipelines. That assertion of two pipelines is found in item #7 of the Declaration of Taking. A foundation principle of eminent domain is the eminent domain may only be used for a valid, public purpose. 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. Commw. Ct. 1977).

Here, the Declaration(s) of Taking included the opportunity to build two (2) pipelines (Item 7 of the

Declaration of Taking). A foundational premise of eminent domain is that it is only granted for 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 may be considered as disproving the need for either Mariner East 2 pipeline.

Looking beyond the first Mariner East pipeline to a possible Mariner East 2 pipeline, the evidence shows that any public need was satisfied by Mariner East 1. Mariner East 2 pipeline is further removed from any need "for the public". Looking further to the issue of a second Mariner East 2 pipeline, that need is simply absent. Per the Sunoco witness, Harry Joseph Alexander, Sunoco is only proposing a single Mariner

East 2 pipeline because it only has a need for one pipeline. If eminent domain power is approved, it may only be approved for the public need of a single Mariner East 2 pipeline. The absence of any public need defeats the property right of an easement for a second pipeline.

CONCLUSION

For the Above reasons, the Appellants request that the Order of the Cumberland County Court of Common Pleas overruling Preliminary Objections be reversed and reasonable costs and expenses awarded to the Appellants per 26 Pa. C.S.A. § 306(g).

Respectfully submitted,

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Date: November 14, 2016

PROOF OF SERVICE

I, Sarah M. Dick, paralegal for Michael F. Faherty, hereby certify that on this 14th day of November, 2016, I served a true and correct copy of the foregoing ***Appellants' Brief*** on the following individuals pursuant to Pa. R.A.P. 121 via U.S. First Class Mail:

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_____
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 UPPER FRANKFORD, CUMBERLAND COUNTY, PENNSYLVANIA, OVER THE LANDS OF ROLFE W. BLUME AND DORIS J. BLUME,

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

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APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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

IN RE: CONDEMNATION BY SUNOCO PIPELINE, L.P. OF PERMANENT AND TEMPORARY RIGHTS OF WAY FOR TRANSPORTATION OF ETHANE, PROPANE, LIQUID PETROLEUM GAS, AND OTHER	:	N0.: 2015-05516
	:	EMINENT DOMAIN – IN REM

PETROLEUM PRODUCTS IN THE TOWNSHIP OF UPPER FRANKFORD, CUMBERLAND COUNTY, PENNSYLVANIA, OVER THE LANDS OF ROLFE W. BLUME AND DORIS J. BLUME :

CONCISE STATEMENT OF ERRORS COMPLAINED OF ON APPEAL

AND NOW, come Condemnees/Owners, Rolfe W. and Doris J. Blume, through their counsel Michael F. Faherty, Esquire, and Faherty Law Firm, and pursuant to Cumberland County Local Rule 1925, file this Concise Statement of Errors Complained of on Appeal and aver as follows:

Statement of Errors

This Honorable Court overruled Owners' Preliminary Objections, in their entirety, on July 18, 2016. This Order was entered on July 19, 2016. The

only rationale provided was a citation to the recent decision of In re: Condemnation by Sunoco Pipeline, L.P.: Appeal of R.S. Martin, et al., 1979, 1980, and 1981 CD 2015 (Pa. Cmwlth. Ct. July 14, 2016). Pursuant to this Court's Local Rule 1925, Owners are required to file a statement within ten days of taking an appeal. Thus, Owners file this Statement without adequate information from the Court as to its reasoning for overruling the Owners' Preliminary Objections in their entirety.

Owners recognize that the recent decision by the Commonwealth Court in In re: Condemnation by Sunoco Pipeline, L.P.: Appeal of R.S. Martin, et al., 1979, 1980, and 1981 CD 2015 addressed several, but not all, of the issues raised in Owners' Preliminary Objections, however, this decision will be appealed and in anticipation of possible reversal of that

decision, Owners preserve the following issues for appeal:

1. Did the Court of Common Pleas err in overruling Owners' preliminary objections, in their entirety, when In re: Condemnation by Sunoco Pipeline, L.P.: Appeal of R.S. Martin, et al., 1979, 1980, and 1981 CD 2015 (Pa. Cmwlth. Ct. July 15, 2016) did not involve or address all preliminary objections raised in this matter?

2. Did the Court of Common Pleas err in overruling Owners' preliminary objection regarding the Sunoco resolution where it did not authorize the proposed condemnation and the law requires a valid resolution pursuant to 26 Pa. C.S.A. § 302?

3. Did the Court of Common Pleas err in overruling Owners' preliminary objection challenging the attempted condemnation for two (2) pipelines when Sunoco admits only (1) pipeline is needed?

4. Did the Court of Common Pleas err in overruling Owners' preliminary objection challenging the attempted condemnation because it is for private enterprise and thus prohibited by the Property Rights Protection Act, 26 Pa. C.S.A. §§ 201-204?

5. Did the Court of Common Pleas err in overruling Owners' preliminary objection relating to the bond amount when the evidence shows Sunoco's proposed bond amount was inadequate?

6. Did the Court of Common Pleas err in overruling Owners' preliminary objection challenging Sunoco's authority to condemn because Mariner East 2 is an interstate pipeline in interstate commerce subject to exclusive federal regulation thereby preempting any state/local regulation?

7. Did the Court of Common Pleas err in overruling Owners' preliminary objection challenging Sunoco's authority to condemn because, for Mariner

East 2, it is not a public utility corporation, under the Pennsylvania Business Corporation Law ("BCL") and it is not regulated by the Pennsylvania Public Utility Commission ("PUC") as evident by the Sunoco failure to provide any PUC orders or certificates pertaining to Mariner East 2?

8. Did the Court of Common Pleas err in overruling Owners' preliminary objection regarding collateral estoppel when Sunoco Pipeline, L.P. v. Loper, 2013-SU-4518-05 (C.P. York County, February 24, 2014) *reaffirmed* March 25, 2014 evaluated Sunoco's status as a public utility corporation under the BCL and ultimately denied eminent domain power for Mariner East 2?

9. Did the Court of Common Pleas err in overruling Owners' preliminary objections in their entirety which thereby granted Sunoco the statutory power of eminent domain for Mariner East 2?

STATEMENT OF TRANSCRIPTS FOR APPEAL

1. Hearings in this matter were held on February 8, 2016 and February 29, 2016.

Respectfully submitted,

FAHERTY LAW FIRM

By: _____

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Attorney for Condemnees

Date: August ___, 2016

CERTIFICATE OF SERVICE

I, Sarah M. Dick, an employee of Faherty Law Firm, hereby certify that on this ___ day of August, 2016, I served a true and correct copy of the foregoing **Concise Statement of Errors Complained of on Appeal, Statement of Transcripts for Appeal, and Proof of Service** via U.S. First Class mail, postage prepaid, addressed as follows:

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Sarah M. Dick, Paralegal

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

IN RE: CONDEMNATION BY SUNOCO PIPELINE, L.P. OF PERMANENT AND TEMPORARY RIGHTS OF WAY FOR TRANSPORTATION OF ETHANE, PROPANE, LIQUID PETROLEUM GAS, AND OTHER PETROLEUM PRODUCTS IN THE TOWNSHIP OF UPPER FRANKFORD, CUMBERLAND COUNTY, PENNSYLVANIA, OVER THE LANDS OF ROLFE W. BLUME AND DORIS J. BLUME	:	DOCKET NO.: 2015-05516 CT EMINENT DOMAIN – IN REM

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

AND NOW, Condemnees, Rolfe W. Blume and Doris J. Blume, by and through their Counsel, Michael F. Faherty, Esquire, and Faherty Law Firm, hereby file Preliminary Objections to Condemnor Sunoco Pipeline, L.P.'s Declaration of Taking and aver as follows:

The preliminary objections contained herein are filed on behalf of Condemnees Rolfe W. Blume and Doris J. Blume 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 to obtain the requested eminent

domain power and failed in several courts.[1] 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. Senior Judge William R. Nalitz sitting in Washington County stayed eminent domain efforts while property owner objections in the

[1] Recently, Judge Edward E. Guido of Cumberland County chose to grant the requested eminent domain power in Martin v. Sunoco Pipeline, L.P., Docket No.: 2015-4052, Fitzgerald v. Sunoco Pipeline, L.P., Docket No.: 2015-4053, and Nickey v. Sunoco Pipeline, L.P., Docket No.: 2015-4055. In all three matters, the decision was appealed on or about October 8, 2015.

form of Actions in Equity are considered. Cowden v. Sunoco, Docket No. 2015-3075 (Exhibit G).

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 are misleading in that they imply 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 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 attempted condemnation because it is for private enterprise and is thus prohibited by the Property Rights Protection Act. 26 Pa. C.S.A. §§ 201-204.

8. The eighth preliminary objection is that Sunoco asserts jurisdiction of and regulation by the Pennsylvania PUC, however, the PUC has not adjudicated regulation of the Mariner East 2 pipeline at issue. Such an adjudication is for the PUC determination, not this Court. Courts will not adjudicate matters within the jurisdiction of the PUC. County of Erie v. Verizon North, Inc., 879 A.2d 357, 363 (Pa. Commw. Ct. 2005); Landsdale Borough v.

Phila. Elec. Co., 170 A.2d 565, 566-67 (Pa. 1961). Denial of the asserted condemnation would leave open the opportunity for Sunoco to use the primary jurisdiction of the PUC to have the PUC determine if it will regulate Mariner East 2.

9. The ninth preliminary objection challenges the sufficiency of the bond amount. Sunoco's proposed bond amount of $13,000 is inadequate for the severe harm caused to this approximately 63 acre property.

10. Fees and costs are demanded per 26 Pa. C.S.A. § 306(g) and 15 Pa. C.S.A. § 1511.

11. 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, Condemnees, Rolfe W. Blume and Doris J. Blume, respectfully request that this Honorable Court now stay and then dismiss Sunoco's Declaration of Taking.

Respectfully submitted,

FAHERTY LAW FIRM

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Dated: October __, 2015

CERTIFICATE OF SERVICE

I, Sarah M. Dick, a paralegal with Faherty Law Firm, attorneys for Condemnees Rolfe W. Blume and Doris J. Blume, do hereby certify that on this __ day of October, 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
McNees, Wallace & Nurick, LLC
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Sarah M. Dick, Paralegal