

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of Sunoco Pipeline L.P. for a	:	
Finding That the Situation of Structures to	:	Docket Nos. P-2014-2411941,
Shelter Pump Stations and Valve Control	:	2411942, 2411943, 2411944,
Stations is Reasonably Necessary for the	:	2411945, 2411946, 2411948,
Convenience and Welfare of the Public	:	2411950, 2411951, 2411952,
		2411953, 2411954, 2411956,
		2411957, 2411958, 2411960,
		2411961, 2411963, 2411964,
		2411965, 2411966, 2411967,
		2411968, 2411971, 2411972,
		2411974, 2411975, 2411976,
		2411977, 2411979, 2411980.

**Comment of Delaware Riverkeeper Network
Pursuant to Sunoco Pipeline L. P.’s Mariner East Petition**

The Delaware Riverkeeper Network and the Delaware Riverkeeper (“DRN”), submit the following comment with regard to Sunoco Pipeline L.P.’s (“Sunoco”) Petitions for a Finding That the Situation of Structures to Shelter Pump Station and Valve Control Stations is Reasonably Necessary for the Convenience and Welfare of the Public (“Petition”). DRN requests that the Pennsylvania Public Utility Commission (“Commission”) deny Sunoco’s Petitions.

Sunoco does not meet the legal standard for classification as a public utility corporation and, therefore is not exempt from 619 of the Pennsylvania Municipalities Planning Code (53 P.S. § 10619). Furthermore, a grant of Sunoco’s Petitions is prohibited by Article I Section 27 of the Pennsylvania Constitution. Lastly, even if Sunoco qualifies as a public utility corporation, and its Petitions were not constitutionally barred, Sunoco’s Petitions must still be denied because the situation of structures is not reasonably necessary for the convenience or welfare of the public.

Sunoco has proposed developing a pipeline project called Mariner East (“Project”), which involves a combination of the construction of new pipeline facilities and the use of existing pipeline facilities that will transport ethane, propane, liquid petroleum gas, and other petroleum products. The origination point of the Project will be in Houston, Pennsylvania and the delivery point will be located in Claymont, Delaware, within the Marcus Hook Refinery Complex. The purpose of the Project is to increase transportation infrastructure for the movement of Marcellus Shale resources, specifically natural gas liquids (“NGLs”). Sunoco has stated that the pipeline that “will transport the NGLs to a Sunoco, Inc. terminal in eastern Pennsylvania and Delaware for storage, processing, and subsequent transportation to alternative markets by water or truck.” *See* Order Granting Petition for Declaratory Relief, 142 FERC ¶ 61,115 (Feb. 15, 2013) (Docket No. OR13-9-000). Sunoco has stated that there are “no major markets in the Northeast United States.” *Id.* The project is anticipated to have an initial capacity to transport approximately 72,250 barrels per day of [NGLs] and can be “scaled to support higher volumes as needed.”¹

Sunoco's Petitions describe that the Mariner East Project will require the construction of 17 valve stations in 15 different municipalities, and the construction of 18 pumping stations in 18 different municipalities. The purpose of Sunoco’s Petitions is to request an exemption from section 619 of the Pennsylvania Municipalities Planning Code (53 P.S. § 10619) for the construction of these facilities, and therefore prevent local municipalities from applying their zoning ordinances to the proposed construction activities.

I. Sunoco Is Not A “Public Utility Corporation” Under The Business Corporation Law

¹ *See* <http://www.sunocologistics.com/Customers/Business-Lines/Natural-Gas-Liquids-NGLs/NGL-Projects/208/>.

The Commission's jurisdiction to review Sunoco's Petition arises out of the Municipal Planning Code ("MPC"), where the Commission may consider whether an exemption from zoning, subdivision, and land development ordinances is appropriate for any "public utility corporation." 53 P.S. § 10619. The term "public utility corporation" is not defined pursuant to the MPC; however, it is defined in Section 1103 of the Business Corporation Law ("BCL"), which states:

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

15 Pa. C.S. § 1103. General rules of statutory construction require that the Commission interpret the term "public utility corporation" in the MPC consistently with the way in which it the term is defined in the BCL. 1 Pa. C.S. § 1932.

Sunoco contends that it is a public utility because it is regulated by a federal agency, the Federal Energy Regulatory Commission ("FERC"), as a public utility. Sunoco Petition, at 5-8. DRN agrees that Sunoco is regulated by the FERC; however, it is admitted by Sunoco that it is regulated by FERC as a *common carrier*, pursuant to the Interstate Commerce Act ("ICA"). *Id.* This is a critical distinction that proves to be a dispositive factor in consideration of Sunoco's Petitions. The ICA regulates common carriers, not public utilities. 49 U.S.C. § 1(b). Indeed, the ICA explicitly and irrefutably articulates that liquids pipeline companies, such as Sunoco, are regulated as common carriers. For example, the ICA states that it applies to "common carriers engaged in . . . [t]he transportation of oil . . . by pipeline." 49 USC § 1 (1988); 15 USC § 717. As a result of FERC's regulation of Sunoco as a common carrier, Sunoco cannot meet the standard articulated in 15 Pa. C.S. § 1103. When the law is clear and explicit, the legislative

language controls and the matter does not progress to the subjective consideration of legislative intent. 1 Pa. C.S.A. § 1921.

Sunoco itself has recognized and admitted this reality. On December 7, 2012 Sunoco submitted a Petition for Declaratory Order to FERC pursuant to the ICA where it specifically characterized itself as a common carrier. *See* Petition for Declaratory Order of Sunoco Pipeline L.P., Accession No. 20121207-5161 (Dec. 7, 2012) (Docket No. OR13-9-000). In support of its December 7, 2012 FERC Petition, Sunoco cited three specific provisions of the ICA that identify Sunoco as being regulated as a common carrier:

ICA Section 1(1) states that the Act applies “to common carriers engaged in ...[t]he transportation of oil...by pipe line...from one State...to any other State.” 49 U.S.C. app. § 1(1)(b) (1988). Section 1(3) of the Act defines the term “common carrier” to include “all pipeline companies...and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire.”

ICA Section 1(4), which embodies the common carrier obligation of the Act, provides that: “It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable requests thereof...”

ICA Section 3(1) prohibits undue preference for or prejudice against particular shippers or classes of shippers. It provides: “It shall be unlawful for any common carrier...to make, give, or cause any undue or unreasonable preference or advantage to any particular person...or any particular description of traffic, in any respect whatsoever; or to subject any particular person...or any particular description of traffic to any undue burden or unreasonable prejudice or disadvantage in any respect whatsoever....”

Id. at 8-9. Moreover, in the instant matter, Sunoco directly admits in its Petitions that it “is a federally regulated *common carrier* under the ICA.” Sunoco Petition, at 6 (emphasis added). The law provides that only those entities subject to regulation specifically as a public utility can seek exemption from 616 of the MPC; here, FERC has clearly chosen to regulate Sunoco as a common carrier. As a result, Sunoco simply does not meet the express definition of a public utility pursuant to the BCL and MPC.

Furthermore, the Court of Common Pleas in York County already thoroughly examined and rejected precisely the same argument that Sunoco advances here before the Commission. *See Sunoco v. Loper, et al.*, York County Court of Common Pleas (Docket No. 2013-SU-4518-05) (February 26, 2014), *reconsideration denied* (March 25, 2014).² In *Loper*, Sunoco argued it was a public utility corporation under the BCL because it was regulated as a public utility by FERC, and as a result Sunoco had eminent domain rights pursuant to the BCL. *Id.* at 3-5. The Court disagreed, and found that because Sunoco was regulated as a common carrier by FERC, that it was not a public utility corporation and was not entitled eminent domain powers. *Id.* at 4.

In its Petitions, Sunoco cites *Public Utility Commission v. WVCH Communication*, for the proposition that an entity can be a "public utility corporation," under the MPC, even if it is a federally regulated common carrier. Sunoco Petition, at 5-6 (*citing WVCH*, 351 A.2d 328, 330 (Pa. Commw. Ct. 1976)). However, in *WVCH* the court *expressly found that the petitioner was not a public utility corporation*, and therefore the PUC lacked jurisdiction. *WVCH*, 351 A.2d at 330-331.

Furthermore, Sunoco also proposed precisely this argument in *Loper*, which the court soundly discarded. Order Reaffirming Previous Opinion and Order Denying Motion for Immediate Right of Entry (Docket No. 2013-SU-4518-05) (March 25, 2014). Sunoco can simply point to no case law where a pipeline company regulated by FERC as a common carrier was transformed into a public utility corporation pursuant to the MPC. As such, for this reason alone the Commission is compelled to deny Sunoco's Petitions.

² The February 26, 2014 opinion and the March 25, 2014 opinion are attached as Exhibit A.

It is clear that Sunoco is merely attempting to take another bite of the apple hoping for a different result. However, neither the record before the Commission nor the state of the law warrants such a result.

II. Article 1 Section 27 Of The Pennsylvania Constitution Prohibits A Grant Of Sunoco's Petition

Even if the Commission finds that Sunoco is a public utility corporation, which it is not, a grant of Sunoco's Petition exempting it from local zoning ordinances contradicts the Pennsylvania Supreme Court's ruling in *Robinson Townshi, et al v. Commonwealth of Pennsylvania, et al.*, and, more specifically, violates Article I Section 27 of the Pennsylvania Constitution. *Robinson*, 83 A.3d 901 (Pa. Dec. 19, 2013). A legal challenge pursuant to Section 27 may proceed upon alternate theories that either the government has infringed upon citizens' rights or the government has failed in its trustee obligations, or upon both theories, given that the two paradigms, while serving different purposes in the amendatory scheme, are also related and overlap to a significant degree. A grant of Sunoco's Petitions likely implicates both legal theories.

Article I of the Pennsylvania Constitution is the Commonwealth's Declaration of Rights, which delineates the terms of the social contract between government and the people that are of such "general, great and essential" quality as to be ensconced as "inviolable." Pa. Const. Art. I, Preamble & § 25. The Declaration of Rights ultimately limits the power of state government; additionally, "particular sections of the Declaration of Rights represent specific limits on governmental power." *Id.* at 1335 (citing *O'Neill v. White*, 22 A.2d 25 (Pa. 1941)). The first section of Article I affirms that all Pennsylvania citizens "have certain inherent and inalienable rights." Pa. Const. Art. I, § 1. Among those inherent rights are those articulated in Section 27, the Environmental Rights Amendment:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. art. I, § 27 (the "Environmental Rights Amendment"). The right to "clean air" and "pure water" provides clear conditions by which the government must abide. Furthermore, by calling for the "preservation" of a broad array of environmental values, the Constitution protects the people from governmental action that unreasonably causes actual or likely deterioration of these features.

The Pennsylvania Supreme Court expressly recognized that the public has a discrete and cognizable constitutional interest in the design, preservation, and application of local zoning ordinances. *Robinson*, 83 A.3d at 920-921 ("a political subdivision has a substantial, direct, and immediate interest in protecting the environment and the quality of life within its borders"). The Court in *Robinson*, found this interest in local control particularly important in the context of regulating construction activity related to oil and gas operations. *Id.* at 974-986. The Court held that a regulatory regime – or action of government – which permits incompatible "uses as a matter of right in every type of pre-existing zoning district is incapable of conserving or maintaining the constitutionally protected aspects of the public environment and of a certain quality of life." *Id.* at 979. The incompatible uses cited by the Court included infrastructure expansion construction activity, such as the construction proposed here by Sunoco. Specifically, the Court clarified that Act 13 was overturned because it compelled "the exposure of otherwise protected areas to environmental and habitability costs associated" with industrial development, which included among other things the "building of facilities incongruous with the surrounding landscape." *Id.*

The local zoning ordinances that Sunoco is attempting to free itself of necessarily address human health, the environment, and the aesthetic values of the community, and therefore, create reasonable expectations in the resident citizenry in the protection and preservation of these values. In other words, the citizens in each of the petitioned townships have reasonable expectations in the existing regulatory structures and zoning districts in which they made significant financial and quality of life decisions.

Sunoco's Petition fundamentally disrupts these expectations and requests that local governments cede their regulatory and zoning powers irrespective of local concerns. Ultimately, Sunoco's requests remove local government's necessary and reasonable authority to carry out its trustee obligations pursuant to Article I Section 27 by prohibiting the enactment of ordinances tailored to local conditions. To the extent that a grant of Sunoco's Petitions directs municipalities to disregard their constitutional mandate under Article I, Section 27, such an action by the Commission is unconstitutional.

III. Sunoco's Petitions Must Be Denied Because The Situation Of Structures Is Not Reasonably Necessary For The Convenience Or Welfare Of The Public

In order for the Commission to conclude that Sunoco is exempt from the local zoning ordinances the Commission must determine that the situation of the buildings for the Project are "reasonably necessary for the convenience or welfare of the public." 53 P.S. § 10619. However, a finding that the situation of the buildings is "reasonably necessary for the convenience or welfare of the public" is directly contradictory to the Supreme Court's holding in *Robinson*.

Any exposition of the subject of the need for a building or structure at a particular location necessarily results in the review of the need of the underlying need for the project itself. In other words, the review of the project and the site are inextricably intertwined, as it would be a

logical delusion for the Commission to find that although a project was not necessary for the convenience or welfare of the public, that the location of its structures was necessary.

In support of its Petition, Sunoco argues that three primary factors, each implicating the overall need for the Project, demonstrate that the construction of the pump and valve control stations is necessary for the convenience or welfare of the public.

[1] the locations of both pump and valve control stations are reasonably necessary to ensure efficient and safe operation of the new pipeline facilities. [2] the pump stations ensure that the ethane and propane are flowing properly, which contribute to the overall safety and efficiency of the project. The valve control stations ensure that the pipeline facilities operate safely and prevent harm to the public and environment. Both types of stations are enclosed with metal housing to protect the equipment from the elements and to facilitate maintenance. [3] as a whole, the Mariner East project results in increased infrastructure to enable the continued development of Marcellus Shale resources, by providing for an efficient outlet for natural gas liquids that are extracted during the process of extracting natural gas from Marcellus Shale wells

Sunoco Petition, at 14. In other words, one of the primary justifications for project is that it will facilitate and expedite the further development of the Marcellus Shale. Additionally, in the Commission's August 29, 2013 Order granting a certificate of public convenience to Abandon a Portion of Its Petroleum Products Pipeline Transportation Service in Pennsylvania, the Commission justified the Order by citing the public convenience of the project as a whole. *See* Pennsylvania Public Utility Commission Order, (Docket Nos. A-2013-2371789 and P-2013-2371775) (August 29, 2013), at 7. Specifically, the Commission found that "enhanced delivery options for the abundant supply of natural gas liquids and the moderation of commodity costs due to the injection of a new supply of ethane and propane into existing natural gas liquids markets" provided adequate justification. *Id.*

However, the interests that justify the exercise of zoning powers and the interests in the development of the oil and gas industry are simply not the same. This is undisputable as the

interest in oil and gas development is centered on efficient production and exploitation of resources, while the interest in zoning focuses on the orderly development and regulation of land use, consistent with local demographic and environmental concerns. As such, the Commission must balance these two interests against one another. Despite considering the benefits of oil and gas extraction there seems to be no evidence on the record demonstrating that the Commission has ever considered the harms resulting from these same activities. In December of 2013, three months after the Commission's August 29, 2013 Order, the Pennsylvania Supreme Court's issued its opinion in *Robinson* that unequivocally outlined these harms.

There the Court made it abundantly clear that the exploitation of natural gas resources absent local regulation was not a net benefit to the public, and that the environmental harms perpetrated by extraction activities outweighed the economic benefits. Chief Justice Castille prefaced the *Robinson* opinion by explaining that:

Pennsylvania has a notable history of what appears retrospectively to have been a shortsighted exploitation of its bounteous environment, affecting its minerals, its water, its air, its flora and fauna, and its people. The lessons learned from that history led directly to the Environmental Rights Amendment, a measure which received overwhelming support from legislators and the voters alike. When coal was "King," there was no Environmental Rights Amendment to constrain exploitation of the resource, to protect the people and the environment, or to impose the sort of specific duty as trustee upon the Commonwealth as is found in the Amendment. Pennsylvania's very real and mixed past is visible today to anyone travelling across Pennsylvania's spectacular, rolling, varied terrain. The forests may not be primordial, but they have returned and are beautiful nonetheless; the mountains and valleys remain; the riverways remain, too, not as pure as when William Penn first laid eyes upon his colonial charter, but cleaner and better than they were in a relatively recent past, when the citizenry was less attuned to the environmental effects of the exploitation of subsurface natural resources. But, the landscape bears visible scars, too, as reminders of the past efforts of man to exploit Pennsylvania's natural assets. Pennsylvania's past is the necessary prologue here: the reserved rights, and the concomitant duties and constraints, embraced by the Environmental Rights Amendment, are a product of our unique history.

Robinson, 83 A.3d at 976. More specifically, with regard to oil and gas operations themselves, the Court found that the “development of the natural gas industry in the Commonwealth unquestionably has and will have a *lasting, and undeniably detrimental, impact on the quality of these core aspects of Pennsylvania’s environment.*” *Id.* at 975 (emphasis added). Furthermore the Court stated, “[b]y any responsible account, the exploitation of the Marcellus Shale Formation will *produce a detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction.*” *Id.* at 976 (emphasis added).

The Court would go further, stating that while economic considerations – such as those proposed by Sunoco – are important, they do not, and cannot, outweigh the detrimental impact of oil and gas development that are not required to adhere to local zoning regulation. *Id.* at 954 (“economic development cannot take place at the expense of an unreasonable degradation of the environment”). These statements powerfully indicate that when the benefits here are weighed against harms, the proposed Petitions cannot be “reasonably necessary for the convenience or welfare of the public.” Furthermore, Sunoco fails to adequately address where the markets for the petroleum liquids are located. To the extent a portion of the liquids will be sold to foreign markets, Sunoco has failed to provide any justification for how such an exportation of resources benefits the public.

Despite the Commission’s previous willingness to cite the Project as a whole to justify the public necessity of the project, if the Commission decides here to limit its review to determine only whether the *sites* of the valve control and pump stations was appropriate and in the public interest, the Commission must still deny Sunoco’s Petition. Sunoco argues that to “ensure that otherwise applicable local ordinances will not bar [Sunoco]’s efforts to provide

service for the welfare and convenience of the public, [Sunoco] is filing the instant Petition and contends that the proposed situation of the pump and valve control stations is reasonably necessary for the convenience or welfare of the public.” Sunoco’s Petition, at 12. Sunoco plainly admits that its concern here is merely that local zoning process will incur extra costs or delays in the start of construction.

As discussed above the public has a well-defined and concrete interest in the application and enforcement of its local zoning codes. By stripping this interest from local government, the Commission risks undermining the fundamental reasonable expectations on which those interests are based. The Commission simply cannot approve such an indiscriminate and blunt approach for zoning what can only be described as sites for industrial construction activity.

IV. Conclusion

What Sunoco requests here of the Commission is for local government to essentially be complicit in accommodating industrial activity irrespective of the character of the locale. For the reasons stated forthwith the Delaware Riverkeeper Network and the Delaware Riverkeeper respectfully request that the Commission deny each of the Petitions submitted by Sunoco for a finding that the situation of structures to Shelter Pump Stations and Valve Control Stations is Reasonably Necessary for the Convenience and Welfare of the Public.

Dated: 4-18-14

Respectfully Submitted by:

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CERTIFICATE OF SERVICE

I, Aaron Stemplewicz, do hereby certify that a true and accurate copy of the foregoing PETITION TO INTERVENE was served upon the following on April 18, 2014, pursuant to the requirements of 52 Pa. Code § 1.54(b)(3) (relating to service by a participant):

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