

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
 FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
 CIVIL TRIAL DIVISION

CLEAN AIR COUNCIL, ET AL.  
*Plaintiffs*

v.

SUNOCO PIPELINE, L.P.  
*Defendant*

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AUGUST TERM, 2015  
 NO. 03484

CONTROL NOS. 15091569  
 15083161

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ORDER

**AND NOW**, this 5<sup>th</sup> day of February, 2016, it is hereby **ORDERED** and **DECREED** that the Plaintiffs' Motion for Temporary Injunctive Relief is **DISMISSED WITHOUT PREJUDICE**, pursuant to the stipulation entered on the record by the parties on November 6, 2015. The stipulation was presented to this Court as follows:

The parties deMarteleire and Bomstein, plaintiffs, and Sunoco hereby stipulate that for the pendency of this litigation before the [Common] Pleas Court that either Sunoco nor its agents or employees shall enter upon the property of plaintiffs deMarteleire and Bomstein at 225 South Pennell Road, Media, Pennsylvania. In the event said plaintiffs believe that Sunoco has failed to comply with this agreement, it may bring the matter to the Court's attention for a hearing on its motion for preliminary injunction.<sup>1</sup>

It is **FURTHER ORDERED** and **DECREED** that Defendant Sunoco Pipeline, L.P.'s Preliminary Objection at Control No. 15091569 to Count IX of Plaintiffs' Complaint is **SUSTAINED** and Count IX of the Complaint is hereby **STRICKEN**. Defendant Sunoco Pipeline, L.P.'s Preliminary Objection at Control No. 15091569 to

<sup>1</sup> N.T. 11/6/2015 at 7:4-16.



venue is **MOOT**, pursuant to the withdrawal of such objection on the record on November 6, 2015.<sup>2</sup> All remaining Preliminary Objections at Control No. 15091569 are **OVERRULED**.

It is **FURTHER ORDERED** and **DECREED** that this matter is certified for interlocutory appeal to the Superior Court and the proceedings are **STAYED** pending appeal.

BY THE COURT:

A handwritten signature in black ink, consisting of a large, stylized initial 'J' followed by a surname that appears to be 'Carpenter'. The signature is written over a horizontal line.

Carpenter, J.

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<sup>2</sup> N.T. 11/6/2015 at 11:9-21.

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AUGUST TERM, 2015

NO. 03484

**OPINION**

CARPENTER, J.

FEBRUARY 5, 2016

This Court submits the following Opinion in support of the accompanying Order overruling, in part, and sustaining, in part, the Preliminary Objections of Defendant Sunoco Pipeline, L.P. to Plaintiffs' Complaint.

**PROCEDURAL HISTORY**

On August 27, 2015, Plaintiffs Margaret deMarteleire ("deMarteleire"), Michael Bomstein ("Bomstein"), and Clean Air Council ("the Council") filed a Petition for Preliminary Injunction and a nine count Complaint in the Court of Common Pleas of Philadelphia County seeking declaratory and permanent injunctive relief. In the Complaint, Plaintiffs set forth detailed factual averments that Defendant Sunoco Pipeline, L.P. ("Sunoco") is an *interstate* carrier of crude oil, gasoline and natural gas, and has proposed two pipeline projects for the shipment of natural gas liquids ("NGLs") for the purpose of engaging in

*interstate commerce* by shipping NGLs from Pennsylvania to markets outside of the Commonwealth. Count 1 of the Complaint seeks a declaration that Sunoco may not exercise the right of eminent domain against the Council's members because the pipeline is not operating as a public utility within the Commonwealth because it is engaged in interstate commerce and, thus, the statutory provisions permitting eminent domain do not apply. Count II seeks a declaration that the pipeline does not have a proper certificate of convenience and, thus, cannot lawfully exercise the power of eminent domain. Counts III & IV seek a declaration that the right of eminent domain that Sunoco has asserted violates the federal and Commonwealth Takings Clause because it involves a taking for private purposes rather than for public purposes. Counts V & VI assert violations of due process under the federal and Commonwealth Constitutions. Count VII seeks a declaratory judgment pursuant to the Commonwealth's Environmental Rights Amendment. Count VIII seeks an injunction barring Sunoco from exercising eminent domain rights. Finally, Count IX asserts a request for general equitable relief.

On September 14, 2015, Sunoco filed Preliminary Objections asserting that Plaintiffs lacked standing to bring suit and that this Court lacked jurisdiction for a myriad of reasons, but primarily arguing that the Eminent Domain Code barred the action and that this matter should be submitted to the Public Utility Commission, rather than to the Court of Common Pleas, for determination. On September 15, 2015, this Court set a briefing and argument schedule. On October 6, 2015, Sunoco filed an omnibus brief supporting its defenses to the injunction and in support of its objections with regard to standing, jurisdiction, and venue. The Council filed an omnibus response to Sunoco's contentions on October 23, 2015. Sunoco filed a reply to Plaintiffs' response on November 5, 2015.

On November 6, 2015, this Court held a full day hearing on the issues raised in the parties' briefs. Following this hearing, the Court allowed the parties to submit supplemental memoranda, both of which were filed on November 20, 2015. The Council filed a Reply on November 30, 2015. On December 11, 2015, this Court closed briefing and held this matter under advisement.

The issues raised are discussed below.

## **DISCUSSION**

### **I. STANDING**

The Supreme Court of Pennsylvania has long held that “where a person is not adversely affected in any way by the matter challenged, he is not aggrieved and thus has no standing to obtain a judicial resolution of that challenge.”<sup>1</sup> The Court has further clarified that, “in order to be aggrieved, a party must show that it has a substantial, direct and immediate interest in the claim sought to be litigated.”<sup>2</sup> In defining the terms “substantial”, “direct”, and “immediate”, the Court has stated that:

a “substantial” interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law; a “direct” interest requires a showing that the matter complained of caused harm to the party's interest; an “immediate” interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it, and is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or constitutional guarantee in question.<sup>3</sup>

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<sup>1</sup> *Pennsylvania Med. Soc. v. Dep't of Pub. Welfare of Com.*, 39 A.3d 267, 278 (Pa. 2012) (citing *Hosp. & Healthsystem Ass'n of Pennsylvania v. Department of Public Welfare*, 888 A.2d 601, 607 (Pa. 2005) (citing *William Penn Parking Garage, v. City of Pittsburgh*, 346 A.2d 269, 280 (Pa. 1975))).

<sup>2</sup> *Id.*; *William Penn*, 346 A.2d at 280–83.

<sup>3</sup> *Pennsylvania Med. Soc.*, 39 A.3d at 278 (citing *Hosp. & Healthsystem Ass'n*, 888 A.2d at 607 (citing *South Whitehall Township Police Service v. South Whitehall Township*, 555 A.2d 793, 795 (Pa. 1989))).

Additionally, an association has proper standing to bring a cause of action, even in the absence of injury to itself, if it “alleges that at least one of its members is suffering immediate or threatened injury as a result of the challenged action and the members of the association have an interest in the litigation that is substantial, direct, and immediate.”<sup>4</sup>

In the instant matter, individual Plaintiffs deMarteleire and Bomstein are citizens of the Commonwealth of Pennsylvania who own and reside at the property located at 225 South Pennell Road, Media, PA 19063 (“the property”). The property is directly in the pathway of Defendant Sunoco’s proposed Mariner East 2 pipeline, a project announced to be commenced via eminent domain proceedings. Plaintiffs deMarteleire and Bomstein aver that such project will immediately deprive them of their property rights and also subject them to the air pollution, noise, and permanent alteration of the aesthetics of their property that would be the result of the construction and maintenance of the Mariner East 2 pipeline. As such, this Court has determined that they have a substantial, direct and immediate interest in enjoining the Mariner East 2 pipeline project and, thus, have proper standing. Additionally, this Court has found that the Council has standing as an association because its members, deMarteleire and Bomstein, are suffering threatened injury as a result of the Mariner East 2 pipeline project and deMarteleire and Bomstein have an interest in enjoining the project that is substantial, direct, and immediate. This Court notes that although the information regarding the affected landowners may have changed since the commencement of the instant action, the Council in its Complaint at paragraphs 108-130, and at the hearing of this matter, represented that it has a body of members along the site of the pipeline, who could present their qualifications for standing

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<sup>4</sup> *Pennsylvania Med. Soc.*, 39 A.3d at 278 (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

to the Court, and Sunoco did not present any evidence to the contrary. Moreover, this Court also accepted the Council's argument concerning deMarteleire and Bomstein's, among others, standing based upon their proximity to the pipeline project and the related consequences.<sup>5</sup>

## II. PROPER JURISDICTION OF THIS COURT

Sunoco has challenged this Court's jurisdiction over the instant proceeding via its Preliminary Objections to the Complaint and, for the reasons that follow, this Court has found that such challenges lack merit. In making the determination that this Court retained proper jurisdiction over the request for declaratory and injunctive relief, this Court has found our Supreme Court's holding in *Robinson Township v. Commonwealth*<sup>6</sup> to be the most persuasive. In *Robinson Township*, the Court determined that the Commonwealth Court's reliance on the Eminent Domain Code in sustaining the Commonwealth's Preliminary Objections was misplaced, based upon the fact that the citizens seeking relief *had not been served with a notice of condemnation* (emphasis added). Having made such a distinction, the Court concluded that it was "not a condemnation matter and, as a result, [was] not subject to the exclusive procedure of the Eminent Domain Code."<sup>7</sup> Instead, the Court determined that the constitutional challenges [to 58 Pa.C.S.A. § 3241] filed by the citizens in *Robinson Township* were filed pursuant to the Declaratory Judgment Act<sup>8</sup>, as the citizens were seeking "relief from uncertainty and insecurity with respect to rights

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<sup>5</sup> See N.T. 11/6/2015 at 20-22.

<sup>6</sup> 83 A.3d 901, 990 (Pa. 2013).

<sup>7</sup> *Id.* at 990; see also 26 Pa.C.S. § 102(a) (providing that Eminent Domain title "provides a complete and exclusive procedure and law to govern all condemnations of property for public purposes and the assessment of damages).

<sup>8</sup> 42 Pa.C.S. § 7531 et seq.

under Section 3241.”<sup>9</sup> Under the Act, the “[t]he General Assembly finds and determines that the principle rendering declaratory relief unavailable in circumstances where an action at law or in equity or a special statutory remedy is available has unreasonably limited the availability of declaratory relief and such principle is hereby abolished.”<sup>10</sup> Declaratory relief, according to the Act, is “additional and cumulative” to other available remedies.<sup>11</sup>

The instant proceeding mirrors that of *Robinson Township* in that deMarteleire, Bomstein, and the Council (collectively “Plaintiffs”) have brought a claim challenging Sunoco’s exercise of eminent domain, but the Plaintiffs have not been served with a notice of condemnation and, as such, the proceeding is not exclusively governed by the Eminent Domain Code. Like the eminent domain challenges in *Robinson Township*, the instant matter involves (among other constitutional challenges) a constitutional challenge arising under the Environmental Rights Amendment at Article I, Section 27 of the Pennsylvania Constitution, wherein Plaintiffs are seeking “relief from uncertainty and insecurity with respect to rights” under that Amendment. Accordingly, their challenges shall also be assessed within the framework of the Declaratory Judgment Act, rather than the Eminent Domain Code, and such assessment rests within the proper jurisdiction of this Court.

Sunoco further challenges the jurisdiction of this Court based upon the longstanding precedent in this Commonwealth that the courts “will not originally adjudicate matters within the jurisdiction of the [Public Utility Commission].”<sup>12</sup> Our Supreme Court has held that “[i]nitial jurisdiction in matters concerning the relationship between public utilities and

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<sup>9</sup> *Robinson Twp., Washington Cty.*, 83 A.3d at 990; see also 42 Pa.C.S. § 7541(a) (setting forth purpose of Act as “to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered”).

<sup>10</sup> 42 Pa.C.S. § 7541(b).

<sup>11</sup> *Robinson Twp., Washington Cty.*, 83 A.3d at 990.

<sup>12</sup> *Einhorn v. Philadelphia Elec. Co.*, 190 A.2d 569, 571 (Pa. 1963) (citing *Lansdale Borough v. Philadelphia Elec. Co.*, 170 A.2d 565, 566–67 (Pa. 1961)).



the public is in the [Public Utility Commission]—not in the courts.”<sup>13</sup> The Court further opined that such jurisdiction has included matters “involving rates, service, rules of service, extension and expansion, hazard to public safety due to use of utility facilities, installation of utility facilities, [and] location of utility facilities [. . .].”<sup>14</sup> While this Court recognizes the jurisdiction of the Public Utility Commission over matters squarely within Public Utility Code, the instant proceeding is removed from such sphere based upon the *interstate commercial* nature of Sunoco’s pipeline project. Section 104 of the Public Utility Code specifically states that:

[t]he provisions of this part, except when specifically so provided, *shall not apply, or be construed to apply, to commerce with foreign nations, or among the several states*, except insofar as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress.<sup>15</sup> (emphasis added)

This Court has found that the facts pleaded in the Complaint<sup>16</sup> as well as Plaintiffs’ response to the Preliminary Objections<sup>17</sup> amply support a finding that Sunoco’s Mariner East 2 project is engaged in interstate commerce. Indeed, the information presented to this Court in Sunoco’s Petition for Declaratory Order before the Federal Energy Regulatory Commission (“FERC”), attached as Exhibit H to the Complaint, has Sunoco *itself* admitting that the project is interstate commerce, as follows:

Project Mariner East 2 is designed to provide a pipeline outlet for ethane, propane and butane from the rich natural gas fields of the Marcellus Shale and Utica Shale in *Pennsylvania, Ohio and West Virginia*. *Interstate movements through Project Mariner East 2 will traverse the pipeline to the inlet flange [. . .] in Claymont Delaware*. [. . .] As shown on the map [. . .] Project Mariner East 2 will increase the capacity and versatility of the original Project Mariner East by [. . .] developing a

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<sup>13</sup> *Lansdale Borough v. Philadelphia Elec. Co.*, 170 A.2d 565, 567 (Pa. 1961)).

<sup>14</sup> *Id.*

<sup>15</sup> 66 Pa.C.S. § 104.

<sup>16</sup> See Plaintiffs’ Complaint at paragraphs 5-9, 11-36, 49-55, 68, 72-75, 99-101, 104, 106-107, and Exhibit “H” to Complaint.

<sup>17</sup> See Plaintiffs’ Answer to Preliminary Objections at paragraphs 3(d) and 22 (a)- (e).

batched propane and butane pipeline *from Scio, Ohio and other downstream receipt points to [Claymont Delaware]*.

\* \* \*

Project Mariner East 2 will provide a continuous pipeline system allowing propane and butane *to move from Scio, Ohio, Hopedale, Ohio, Follansbee Jct., West Virginia and Houston, Pennsylvania to the SPMT Terminal [in Claymont Delaware]*<sup>18</sup> (emphasis added)

This FERC petition further requests that Project Mariner East 2 be deemed by FERC to be “acceptable under the Interstate Commerce Act...”<sup>19</sup>

While Sunoco has averred that the pipeline could be contemporaneously interstate and intrastate<sup>20</sup> and that Sunoco has, at all times, sought to comply with the certification and tariff requirements related to the different genres of commerce, this Court finds that, for purposes of determining the jurisdictional arguments at issue here, the Plaintiffs have sufficiently plead that Mariner East 2 project is interstate commerce. Thus, under the plain language of Section 104, the Public Utility Commission does not have exclusive jurisdiction over the issues presented here, particularly the requests for declaratory and injunctive relief under the Declaratory Judgment Act and Constitution of the Commonwealth of Pennsylvania.<sup>21</sup> Accordingly, this Court has determined that the instant proceeding falls outside of the ambit of the Public Utility Commission’s jurisdiction and remains properly before this Court.

Further, despite Sunoco’s averment that the pipeline has application *to intrastate commerce* for the public benefit within this Commonwealth, this Court cannot ignore that

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<sup>18</sup> See Exhibit H to Complaint at pages 1-2 and 8.

<sup>19</sup> *Id.* at 10.

<sup>20</sup> See N.T. 11/6/2015 at 120-126.

<sup>21</sup> In making this finding, this Court also acknowledges the additional concern of the implications arising from conflicting determinations by the respective regulating authorities and finds that such consideration refutes any argument in support of contemporaneous interstate and intrastate commerce.

the Plaintiffs' Complaint has pleaded facts that the proposed pipeline is inherently and primarily *interstate* and *commercial* in nature. The Plaintiffs have pleaded facts that the pipeline is designed to transport gases among several states to diverse markets *outside* of the Commonwealth under the Interstate Commerce Act and, thus, the cause of action is outside the purview of both the Eminent Domain Code and the Public Utility Commission. Further, at the hearing on this matter, this Court heard argument that Sunoco had been advertising to shippers the new nature of the service to be provided by the project with regard to products going to overseas markets, and thereby shifting the benefit away from the public.<sup>22</sup> This is highly contrary to the existing service wherein the pipeline transported petroleum products to places within the Commonwealth for receipt by the public here in Pennsylvania, thereby making the public the primary beneficiary of the product.<sup>23</sup> Accordingly, this Court has determined that the Plaintiffs have pleaded facts to support that this Court is not divested of jurisdiction to hear the claims for declaratory and injunctive relief.

### **III. CLAIMS ARISING UNDER THE U.S. CONSTITUTION AND THE PENNSYLVANIA CONSTITUTION**

The Environmental Rights Amendment at Article I, Section 27 of the Pennsylvania Constitution, as adopted on May 18, 1971, provides the following:

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

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<sup>22</sup> The facts raised with regard to whether the project is for the public benefit of the Commonwealth versus a private enterprise engaged in interstate commerce also support that jurisdiction is not precluded by the Eminent Domain Code.

<sup>23</sup> See N.T. 11/6/2015 at 155-157.

Commonwealth shall conserve and maintain them for the benefit of all the people.<sup>24</sup>

Our Commonwealth Court, in *Payne v. Kassab*<sup>25</sup>, upheld the principle that such provision “was intended to allow the normal development of property in the Commonwealth, while at the same time constitutionally affixing a public trust concept to the management of public natural resources of Pennsylvania.”<sup>26</sup> In holding as such, the Court recognized the obligation of *the judiciary* to weigh “conflicting environmental and social concerns in arriving at a course of action that will be expedient as well as reflective of the high priority which constitutionally has been placed on the conservation of our natural, scenic, esthetic and historical resources.”<sup>27</sup> The Court further established the following three-pronged approach for matters on review:

- (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
- (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
- (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?<sup>28</sup>

While the three prongs of *Payne* remain as the guiding authority for assessing challenged decisions and/or actions, the provision has not generated a significant body of environmental rights jurisprudence in this Commonwealth. As held by our Supreme Court in *Robinson Township*, however, such absence “does nothing to diminish the textual, organic rights” nor does it relieve the court of its “obligation to vindicate the rights of its

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<sup>24</sup> Pa. Const. art. I, § 27.

<sup>25</sup> 312 A.2d 86 (Pa. Commw. Ct. 1973).

<sup>26</sup> *Payne*, 312 A.2d at 94; see also *Concerned Residents of Yough v. Dep't of Env'tl. Res.*, 639 A.2d 1265, 1275 (Pa. Commw. Ct. 1994).

<sup>27</sup> *Payne*, 312 A.2d at 94.

<sup>28</sup> *Id.*

citizens where the circumstances require it and in accordance with the plain language of the Constitution.”<sup>29</sup>

Plaintiffs’ instant claims related to violations of Section 27, among other state and federal constitutional challenges, further support this Court’s retention of jurisdiction, as such challenges cannot be appropriately adjudicated in another forum, such as the Public Utility Commission. While Sunoco’s Preliminary Objections to the Complaint seek to have the matter dismissed without prejudice to give Plaintiffs the option to bring a new matter before the Public Utility Commission, this Court does not find that such objections warrant relief, as a statutory scheme cannot shield unconstitutional conduct from review by the courts.

Moreover, this Court rejects Sunoco’s arguments that this matter can be properly decided within the context of the Eminent Domain Code. Section 306 of the Eminent Domain Code delineates the specific categories of challenges that may be raised to a declaration of taking. In relevant portion, Section 306 provides:

- (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.<sup>30</sup>

Challenges in the form of constitutional violations, such as those now raised in Plaintiffs’ Complaint, are notably absent from this list and, as collateral issues under the Eminent Domain Code, would be statutorily precluded. As such, the instant constitutional challenges could not be raised via Preliminary Objections in an alternate type of

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<sup>29</sup> *Robinson Twp., Washington Cty. v. Com.*, 83 A.3d 901, 969 (Pa. 2013).

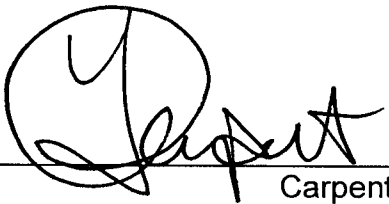
<sup>30</sup> 26 Pa.C.S. § 306(a)(3).

proceeding and this action now before the Court provides the sole forum for such challenges to be heard.

#### **IV. CERTIFICATE OF PUBLIC CONVENIENCE**

This Court is not making any finding as to the existence, validity, or properness of Sunoco's certificate of public convenience related to the Mariner East 2 pipeline. The argument and evidence presented to this Court were sufficient to allow this Court to find that the issue should continue through the course of the litigation; however, no further findings concerning the certificate would have altered this Court's determinations with regard to its proper jurisdiction.

BY THE COURT:



Carpenter, J.