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C. FORTE

CLEAN AIR COUNCIL, *et al.* Plaintiffs, v. SUNOCO PIPELINE L.P., Defendant.	COURT OF COMMON PLEAS PHILADELPHIA COUNTY CIVIL ACTION—EQUITY AUGUST TERM, 2015 NO. 03484 CONTROL NO. 15091569

O R D E R

AND NOW, this day of November, 2015, upon consideration of Defendant's (a) Preliminary Objections, Memorandum of Law in support thereof, and Supplemental Omnibus Brief; (b) Plaintiffs' Response to Preliminary Objections and Response to Defendant's Memorandum of Law and Supplemental Omnibus Brief; and after argument thereon, the Court now makes the following Order:

(1) Defendant's Preliminary Objections, supplemental objections, request to dismiss Plaintiffs' motion for preliminary injunction and motion for change in venue are all DENIED. Defendant shall file its Answer to the Complaint within twenty (20) days of the date of this Order;

(2) An evidentiary hearing on Plaintiff's Motion for a Preliminary Injunction shall be held on December 3, 2015, in Courtroom 232, City Hall, Philadelphia, PA at 10 a.m.;

(3) This Order shall not be construed to inhibit discovery.

(4) Plaintiffs' First Interrogatories to Defendant, previously served, shall be answered fully and completely and served on counsel for Plaintiffs no later than December 30, 2015;

(5) Plaintiffs' First Document Requests, previously served, shall be answered fully and completely and served, with the documents therein identified, on counsel for Plaintiffs no later than December 30, 2015;

(6) No case management conference shall take place in this action until further order of Court;

(7) Pending the preliminary injunction hearing, Defendant shall not conduct any further surveying activity or commence condemnation proceedings against premises 225 South Pennell Road, Media, PA 19063; and

(8) In the event any of the parties shall be aggrieved by this Order, the Court upon written request shall hold a hearing to entertain a request that the matter be certified to Superior Court for an interlocutory appeal.

BY THE COURT:

____
Carpenter, J.

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CLEAN AIR COUNCIL, *et al.* Plaintiffs, v. SUNOCO PIPELINE L.P., Defendant.	COURT OF COMMON PLEAS PHILADELPHIA COUNTY CIVIL ACTION—EQUITY AUGUST TERM, 2015 NO. 03484 CONTROL NO. 15091569

PLAINTIFFS' RESPONSE TO DEFENDANT'S MEMORANDUM OF LAW AND SUPPLEMENTAL OMNIBUS BRIEF ON JURISDICTION AND VENUE

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I. MATTER BEFORE THE COURT

Before this Honorable Court are Defendant's Preliminary Objections and Supplemental Omnibus Brief on Jurisdiction and Venue, and Plaintiffs deMarteleire and Bomstein's Motion for Preliminary Injunction. Due to the complexity of this case, Plaintiffs below offer a brief overview of the case.

Sunoco Pipeline L.P. ("SPLP") is an interstate carrier of crude oil, gasoline, and natural gas liquids ("NGL's") such as propane, butane, and ethane. In 2012, SPLP received approval from the Federal Energy Regulatory Commission ("FERC") for a new pipeline project, referred to as the Mariner East 1 pipeline ("Mariner East 1"), which would transport NGL's from the shale fields of Ohio, West Virginia, and Western Pennsylvania, through a pipeline starting in Ohio and crossing the two other states, to a terminal situated both in Pennsylvania and Delaware, for the purpose of shipping to markets outside the Commonwealth. In 2014, its new Mariner East pipeline project ("Mariner East 2") also received federal approval to do the same.

In seeking federal approval, SPLP represented that the projects were designed to relieve an oversupply of NGL's in the Commonwealth. After obtaining federal approval for Mariner East 2, SPLP was unable to obtain the permission of property owners throughout the state to run pipelines through their yards, so it began to take properties under Pennsylvania's eminent domain laws. Dozens of eminent domain proceedings have already begun.

Plaintiffs allege that because Mariner East 1 and Mariner East 2 are in interstate commerce, the state Public Utility Code does not apply and SPLP lacks any authority to exercise the right of eminent domain for the project's construction. In the alternative, even if it were determined that the project is engaged in intrastate commerce, SPLP is not entitled to eminent

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domain rights because it has neither applied for nor obtained an appropriate certificate of public convenience—the needed authorizing document—from the Public Utility Commission. The Interstate Commerce Act, which governs NGL pipelines, confers no eminent domain rights.

In the event it is held that existing certificates of public convenience do cover transportation of petroleum products in given Pennsylvania counties, those certificates must nonetheless be construed narrowly in the light of (a) the applications submitted at the time; (b) the purpose for which the pipelines were arguably approved; and (c) the constitutional rights of property owners in the affected counties under state and federal constitutions, including the Takings Clauses of the U.S. and Pennsylvania constitutions and the Environmental Rights Amendment of the Pennsylvania Constitution. In that light, it is clear that SPLP still has no right to use eminent domain to take individuals' private property for the Mariner East project.[1]

Over the last two years, SPLP has filed actions *in equity* against property owners in at least York, Dauphin, Washington, and Huntingdon Counties. In each case SPLP either sought an order to gain access to do a survey under the Eminent Domain Code ("EDC") or an order under the Business Corporation Law seeking permission to take property and post a bond. SPLP is clearly aware, then, *contrary its representations to this Court*, that the EDC is not the exclusive jurisdictional framework for disposition of eminent domain-related claims. This conclusion is

[1] SPLP asserts that "Plaintiffs raised for the first time at the September 16 Scheduling Hearing two new contentions: First, Plaintiffs contend that they will suffer a harm at the moment a declaration of taking is filed because a taking is effectuated, and the property is transferred, at the time of the filing. Second, Plaintiffs challenged SPLP's right of access to conduct … surveys prior to the exercise of eminent domain." (Supplemental Omnibus Brief at 8). Actually, the first contention was squarely set forth in Plaintiffs deMarteleire and Bomstein's Motion for Preliminary Injunction at ¶¶28-31, and the second is referenced in that ¶28 and is a necessary consequence of Plaintiffs' challenge to SPLP's claimed right to eminent domain, as the right of access is only allowed to legitimate condemnors. Plaintiffs address SPLP's arguments on title transfer at §IV.C.2., *infra*, and its arguments on the right of access at §IV.B.2.d., *infra*.

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buttressed by a binding 2013 Pennsylvania Supreme Court holding in *Robinson Township v. Commonwealth*. SPLP instead seeks to mislead the Court by citing an inapplicable line of cases having no connection with the unique and separate procedures for taking utility rights of way.

SPLP also has represented in court and in its pleadings that the Mariner East pipelines are both in interstate *and* intrastate commerce at the same time. In other filings, however, it has stated plainly that the Mariner East pipelines were *only* interstate. Thus, after previously submitting to federal jurisdiction in December 2012, Defendant, in its July 2, 2013 Pennsylvania Public Utility Commission ("PUC") Application to Abandon, *twice* stated that the Mariner East 1 pipeline would not be making *any* intermediate deliveries in Pennsylvania.

With respect to both of the Mariner East projects, SPLP submitted federal regulatory applications stating that it had already lined up shippers to transport NGL's from Ohio, across West Virginia and Pennsylvania, to the state of Delaware. The company expressly acknowledged that in doing so it had functioned as a common carrier in interstate commerce. In this case, however, SPLP *now* says that it "does not determine the markets to which product will be transported … It is the shippers who determine whether movements of product will be interstate or intrastate." (Answer to Preliminary Injunction Motion, ¶3).

Defendant repeatedly emphasizes its claims that (a) the PUC already has approved the Mariner East 2 pipeline, and therefore Defendant has carte blanche eminent domain rights in over forty (40%) of the Commonwealth, and (b) it may lawfully operate a pipeline both as an

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interstate common carrier and as an intrastate public utility at the same time. As shown below, neither of these claims is correct.[2]

Further, the steps that a utility company must take in order to obtain PUC approval of a pipeline route are numerous and significant. Those steps are outlined below. The Court will see that Defendant has taken *none* of those steps.

As shown below, Defendant's claims repeatedly mis-cite law, misrepresent facts, fail to point the Court to binding precedent and applicable statutes, and require this Court to accept absurd conclusions about SPLP's claimed powers. For these and other reasons, this Honorable Court should overrule Defendant's Preliminary Objections, grant Plaintiffs' Motion for Preliminary Injunction, and reject Defendant's request for transfer of venue.

II. QUESTIONS PRESENTED

1. Whether Plaintiffs' Complaint may be dismissed based on purported facts that appear nowhere in the Complaint.

Suggested Answer: No, Defendant's creation of new facts in its objections is improper and should be disregarded.

[2] SPLP points to and attaches a decision by the Cumberland County Court of Common Pleas overruling the condemnees' preliminary objections to SPLP's declaration of taking in those cases. Not much can be discerned from the decision, the entire opinion which is written into a footnote in the order, but that that court: (1) heard and rejected a federal preemption argument, and (2) believed that SPLP will be delivering product intrastate along Mariner East 2 which, per the court, would grant it eminent domain rights. Plaintiffs here have not argued federal preemption. Also, it is not clear from the decision that the court took any evidence on intrastate shipments, or anything else for that matter.

Plaintiffs disagree with this ruling, in a consolidated case to which Plaintiffs were not parties, and do not believe it contains any persuasive reasoning that should sway this Court. It certainly did not, as SPLP claims, reject "the very arguments advanced by Plaintiffs here." (Supplemental Omnibus Brief at 4).

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2. **Whether the suit must be dismissed on the ground that all of Plaintiffs' claims must be decided in Eminent Domain Code proceedings.**

   Suggested Answer: No, since the EDC's provisions do not apply here, where such declarations of taking have not been filed.

3. **Whether the suit must be dismissed on the ground that the PUC has primary and exclusive jurisdiction over Plaintiffs' claims.**

   Suggested Answer: No, since the PUC does not have such jurisdiction.

4. **Whether the Complaint must be dismissed for failure to join indispensable parties.**

   Suggested Answer: No, as there is no basis for Defendant's position.

5. **Whether Plaintiffs' claim that the Mariner East 1 and 2 pipelines' interstate character makes the Public Utility Code inapplicable should be dismissed.**

   Suggested Answer: No, Plaintiffs' claim should not be dismissed.

6. **Whether the Court should dismiss Plaintiffs' claim that existing certificates of public convenience issued by the PUC prior to 2002 do not render it unnecessary for Defendant to seek approval for the Mariner East 1 and 2 pipelines.**

   Suggested Answer: No, because those certificates do not cover the proposed new pipelines.

7. **Whether Plaintiffs' Complaint should be dismissed on the ground that the PUC already has expressly ruled that Mariner East 1 and 2 may go into operation.**

   Suggested Answer: No, since the PUC has made no such ruling.

8. **Whether the claims of deMarteleire and Bomstein as alleged in the Complaint would, if proved, be grounds for a preliminary injunction.**

   Suggested Answer: Yes.

9. **Whether before any exercise of eminent domain by Defendant for the benefit of the two pipeline projects the Defendant must demonstrate its compliance with the Environmental Rights Amendment in**

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accordance with the holdings in the case of *Pennsylvania Environmental Defense v. Com.*, __Pa. Cmwlth. __, 108 A.3d 140 (2015).

Suggested Answer: Yes, Environmental Rights Amendment compliance under the Pennsylvania Constitution is required.

10. Whether Plaintiffs lack standing to sue Defendant.

Suggested Answer: No, as there is no basis for Defendant's position.

III. FACTUAL BACKGROUND

A. FACTS AS ALLEGED BY PLAINTIFFS IN THEIR COMPLAINT

SPLP in 2002 acquired by merger the pipeline system previously owned and/or operated by Atlantic Pipeline, Keystone Pipeline, and other companies and, at that time, was certificated by PUC to operate those pipelines under the same terms and conditions set forth in previous certificates of public convenience ("CPC's") granted to those predecessor entities. All of the CPC's prior to 2002 related to in-state pipelines. SPLP's inventory of pipelines was described in detail in CPC's issued prior to 2002. (Complaint, ¶¶138-139).

In December 2012, SPLP applied to FERC for approval of a route to carry NGL's from Ohio, through West Virginia, across Pennsylvania and to Delaware. The application represented that SPLP was applying in its capacity as an interstate common carrier. The project was referred to as Mariner East and was later identified as Mariner East 1. The 2012 FERC application made clear that most of the pipeline would consist of existing pipes and that it was designed to relieve an oversupply of NGL's for which there was no market in the Northeast. To secure funds needed to complete the project, SPLP conducted an open season, seeking and then obtaining commitments from NGL shippers that they would use its pipeline system to ship certain volumes of liquids for certain terms. (Complaint, ¶¶1-17).

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On February 15, 2013, FERC granted the petition and noted that SPLP was expected to "construct the Project to transport the excess NGL's from the Marcellus Shale region in southwestern Pennsylvania *and Ohio's Utica Shale regions* to an existing pipeline that will then transport the NGL's to a Sunoco, Inc. terminal in Eastern Pennsylvania and Delaware for storage, processing, and subsequent transportation to alternative markets by water or truck." (Complaint, ¶22) (emphasis added).

In July 2013, SPLP applied to the PUC for permission to abandon and suspend the use of certain existing pipelines within the Commonwealth. In those PUC filings, Defendant referred to the Mariner East 1 project as an interstate project and twice stated that there would be no intermediate deliveries within Pennsylvania. SPLP also averred that, consistent with its interstate character, the PUC would have no regulatory authority over the project. (Complaint, ¶¶28-35). In PUC filings in March 2014, SPLP referred to the Mariner East 1 project as interstate and did not identify any points in the Commonwealth for delivery of NGL's. (Complaint, ¶38).

In August 2014, SPLP applied to FERC for approval of a new pipeline route to carry NGL's from Ohio, through West Virginia, across Pennsylvania and to Delaware. The application represented that SPLP was applying in its capacity as an interstate common carrier. The application depicted a route consisting of all new pipes running from Ohio, through West Virginia, across Pennsylvania and to Delaware. In seeking federal approval, SPLP represented that the projects were designed to relieve an oversupply of NGL's in the Commonwealth. SPLP has never filed an application with PUC for approval of the Mariner East 2 pipeline. (Complaint, ¶¶54, 55, and 66).

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Up until the commencement of the Mariner East Project, SPLP and its predecessors in interest sought authorization from the PUC before building new transmission pipelines. This is in fact a requirement. Only in the last few years has SPLP begun claiming a right to build a new transmission pipeline without seeking new PUC authorization. (Complaint, ¶61). SPLP has neither sought nor obtained approval from the PUC for a CPC for the Mariner East 2 pipeline. (Complaint, ¶¶59 and 60).

Even if SPLP had sought approval, such approval as a public utility could not be legally given. SPLP's NGL's are intended for delivery to alternative markets outside the Commonwealth. (Complaint, ¶¶8, 11, 15, 16, 22, 24, 26, 28, 30, 31, 32, 33, 35, 36, 38, 39, 45, 46, 47, 52, 53, 55, 72, 73, 74, 83, 84, 101, 103, 106, 107, and 156). The NGL ethane is a plastics feedstock used only by industry, and not a fuel used by the public. Its transmission is intended for sale outside Pennsylvania. (Complaint, ¶¶47, 71 and 168). Likewise, SPLP's shipment of propane and butane are interstate as they are intended primarily for export. (Complaint, ¶169).

The Mariner East project threatens Pennsylvania's environment. The Pennsylvania Department of Environmental Protection ("DEP") already has fined SPLP $95,366 for release of toxic chemicals into public waterways and improper remediation of water pollution. For its part, SPLP has admitted in a DEP consent order that on six occasions between June 2014 and November 2014, it had discharged toxic chemicals into Commonwealth waterways. Defendant further admitted that in at least an additional five instances, its pipeline construction activity disturbed the land it was working on, causing illegal erosion and runoff into Pennsylvania streams. DEP also is currently investigating additional SPLP Mariner East 2-related violations

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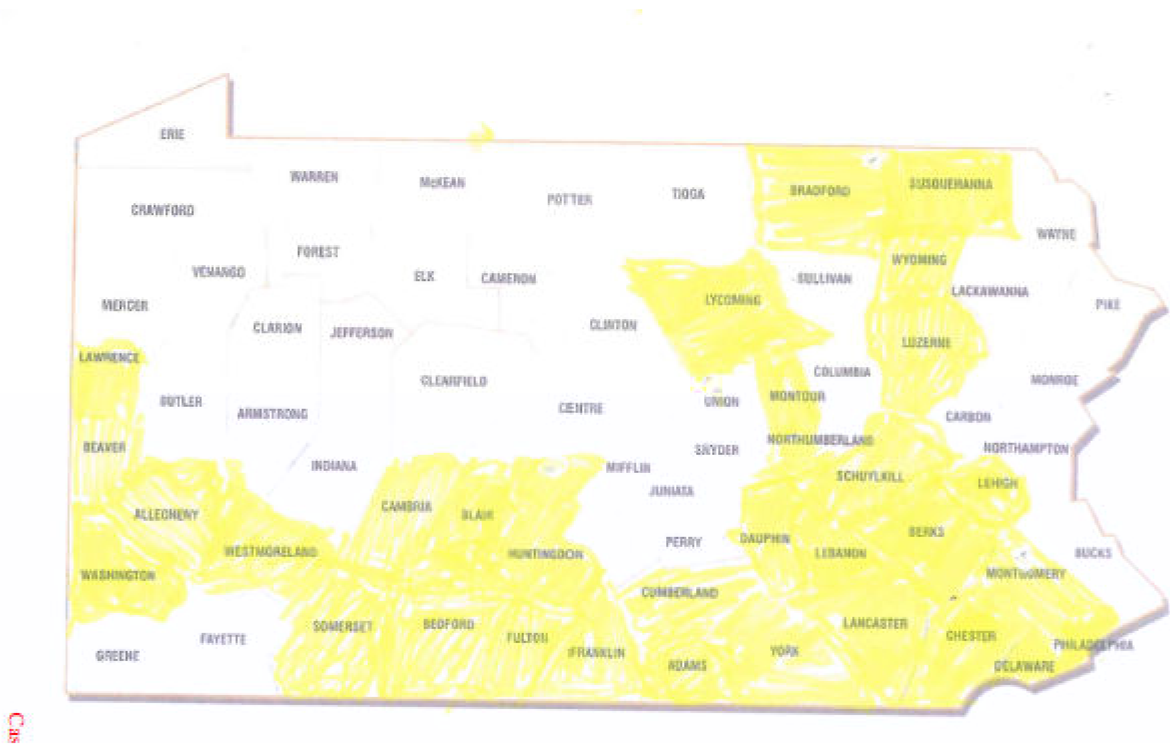
of Commonwealth environmental laws, which investigations could result in further fines. (Complaint, ¶¶177-179).

SPLP has contended that once it is certificated to operate a route through a Pennsylvania county, it thereafter has the right of eminent domain to operate additional routes everywhere in that county without the need to seek additional PUC approval. Based on prior PUC certificates, fully forty (40%) percent of Pennsylvania would be subject to Defendant's eminent domain claims, as shown on a colorized map attached to the Complaint as Exhibit "L." (Complaint, ¶¶159-161) and depicted below:



B. ASSERTIONS OF SPLP'S THAT MAY NOT BE CONSIDERED

Approximately seven (7) pages of SPLP's Memorandum of Law in Support of Preliminary Objections ("PO Memorandum") are devoted exclusively to Defendant's version of

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facts, in blatant violation of the rules governing Preliminary Objections. (PO Memorandum at 4-12). The gravamen of its factual representations is that the plans for Mariner East 1 and Mariner East 2 now have changed;[3] they now plan to make deliveries of the hazardous liquids within the Commonwealth and they already have begun deliveries in the Mariner East 1 system.

SPLP offers five separate factual assertions in support of the claim that it is serving the public interest. (PO Memorandum at 7). Defendant also explains why it withdrew thirty-one (31) PUC petitions to become exempt from local zoning requirements. (PO Memorandum at 9, n.4).

Plaintiffs submit that this Court, in disposing of Defendant's Preliminary Objections, should entirely disregard all of the said factual representations.

IV. ARGUMENT

A. APPLICABLE STANDARDS

Apart from the substantive inconsistency of SPLP across-the-board, in the case at bar Defendant has mis-cited and "cherry-picked" applicable legal principles to suit its needs. With respect to the legal standard for evaluating preliminary objections, for example, in its PO Memorandum, Defendant writes that,

> Preliminary objections should be sustained and a claim dismissed when such claim fails as a matter of law to state a cognizable cause of action. *Insurance Adjustment Bureau, Inc. v. Allstate Ins. Co.,*

[3] To be precise, SPLP makes contradictory statements on whether the claimed intrastate aspect of the Mariner East project is new or not. On the one hand, SPLP stated as recently as 2014 that "The origination point of Mariner East will be in Houston, Pennsylvania; the delivery point will be located in Claymont, Delaware, within the Marcus Hook Refinery complex." (Complaint, Ex. D, at 3). On the other hand, SPLP now states that "In 2012, SPLP announced the 'Mariner East' project with the stated intent of transporting petroleum products … from the Marcellus Shale in Pennsylvania to the Marcus Hook Industrial Complex ('MHIC'), *and various points in between*." (PO Memorandum at 5). These statements cannot be reconciled. This is merely one example of why on Preliminary Objections, before engaging in fact-finding, this Court should reject SPLP's improper new version of the facts.

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> 905 A.2d 462, 468 (Pa. 2006). When considering the facts averred in the complaint, a court "is not bound by legal conclusions, unwarranted inferences from facts, argumentative allegations, or expressions of opinion." *Armstrong County Memorial Hosp. v. Dep't of Public Welfare*, 67 A.3d 160, 170 (Pa. Commw. Ct. 2013).

(PO Memorandum at 12-13).

Unfortunately, Defendant left out the most important part: "In determining the merits of a demurrer, all well-pleaded, material facts set forth in the complaint and all inferences fairly deducible from those facts are considered admitted and are accepted by the trial court as true; conclusions of law are neither deemed admitted nor deemed true." *Insurance Adjustment Bureau, Inc.*, *supra*., 905 A.2d at 468.

By mis-citing the review standard, Defendant is then in a position to use preliminary objections to tell its side of the story. With all due respect, not only is that not the function of preliminary objections, it also is manifestly improper.

As noted already above, "In determining the merits of a demurrer, all well-pleaded, material facts set forth in the complaint and all inferences fairly deducible from those facts are considered admitted and are accepted by the trial court as true; conclusions of law are neither deemed admitted nor deemed true." *Insurance Adjustment Bureau, Inc. v. Allstate Ins. Co.*, 588 Pa. 470, 905 A.2d 462, 468 (2006).

SPLP, without saying as much, also has asked this Court to take judicial notice of certain PUC filings that were not attached as exhibits to Plaintiffs' Complaint. Ordinarily, when considering preliminary objections in the nature of a demurrer, a court must severely restrict the principle of judicial notice, as the purpose of a demurrer is to challenge the legal basis for the

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complaint, not its factual truthfulness. *Styers v. Bedford Grange Mutual Insurance Co.*, ___ Pa. Super. ___, 900 A.2d 895 (2006); *see also*, *The 220 Partnership v. Philadelphia Electric Co.*, 437 Pa. Super. 650, ___ A.2d ____ (1994).

Some of the PUC filings in question in fact were referred to in the Complaint and, therefore, may be considered within the four corners of the Complaint. Examples are PUC orders and CPC's. Other such filings were not referred to in the Complaint and were not attached. These include tariff documents. For purposes of the instant Preliminary Objections, of the additional PUC documents relied upon by Defendant, only the PUC non-tariff orders and CPC's are properly before this Court.

The fact that PUC applications, orders, and CPC's are referenced, however, does not mean that the Complaint is averring that the *contents* of those documents are truthful. For example, SPLP in many of its filings routinely describes the Mariner East project and places a gloss on it that Plaintiffs believes is inaccurate. Thus, when Plaintiffs allege that Defendant filed an application, Plaintiffs are not by any means asserting that what SPLP says in that application is truthful. On the contrary, at several places in the Complaint Plaintiffs explicitly allege that what Defendant states in a filing is plainly false.

Again, Plaintiffs believe it is important to note that in Preliminary Objections Defendant is not at liberty to insert its version of facts. A relatively harmless example comes from SPLP's PO Memorandum, where SPLP states that Defendant's "headquarters were recently relocated to Newtown Square, Delaware County." (PO Memorandum at 4).

Less benign examples, however, appear throughout SPLP's Memorandum. Plaintiffs' Complaint, for example, alleges that SPLP's NGL's are intended primarily and perhaps

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exclusively for delivery to alternative markets outside the Commonwealth. (Complaint, ¶¶8, 11, 15, 16, 22, 24, 26, 28, 30, 31, 32, 33, 35, 36, 38, 39, 45, 46, 47, 52, 53, 55, 72, 73, 74, 83, 84, 101, 103, 106, 107, and 156). This is a clear factual claim that SPLP might wish to dispute in its Answer, but that SPLP has no right to dispute in Preliminary Objections.

SPLP, however, does dispute these factual assertions in its PO Memorandum, where it writes that the Mariner East project had "the stated intent of transporting petroleum products, such as propane, ethane and butane, from the Marcellus Shale in Pennsylvania to the Marcus Hook Industrial Complex *and various points in between*." (PO Memorandum at 5-6, emphasis added).

In their argument below, Plaintiffs identify example after example of SPLP improperly presenting its side of the story. These averments manifestly have no proper place in Preliminary Objections and none of these may properly be considered in ruling on the company's Preliminary Objections.

B. THIS COURT HAS JURISDICTION TO DECIDE PLAINTIFFS' CLAIMS.

Plaintiffs set forth in their Complaint claims for declaratory and injunctive relief, including claims based on due process violations. These claims largely hinge on the invalidity of SPLP's claim that it is entitled to take private property without consent of the owners to build an interstate hazardous liquids pipeline using the awesome sovereign power of eminent domain. Plaintiffs seek such relief both with respect to deMarteleire and Bomstein's property in Delaware

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County and also with respect to the property of members of Clean Air Council, scattered throughout Pennsylvania along the routes of the Mariner East pipelines.[4]

SPLP has already begun eminent domain proceedings in other courts for at least some property of Clean Air Council members. Plaintiffs do not seek to divest those courts of jurisdiction through this action. However, this Honorable Court unquestionably has jurisdiction to hear and decide the claims presented in this case.

1. **This Court must follow the binding Supreme Court ruling in *Robinson Township v. Commonwealth*, under which this Court has jurisdiction over Plaintiffs' claims seeking declaratory relief.**

Most of the counts in the Complaint seek relief under the Declaratory Judgments Act. A binding and precedential section of the recent Pennsylvania Supreme Court decision in *Robinson Township v. Commonwealth* controls this case, and provides that this Court has jurisdiction over those claims. Moreover, as will be explained in the next section, even setting *Robinson Township* aside, SPLP's argument that the EDC controls this case is based on a fundamental error of law.

In *Robinson Township v. Commonwealth*, ___ Pa. Cmwlth. ___, 52 A.3d 463 (2012), the petitioners challenged various aspects of Pennsylvania's Act 13 of 2012, including that portion that granted certain natural gas companies the right to use eminent domain to take property to store natural gas. On preliminary objections, the Commonwealth argued before the

[4] Defendant throughout its Supplemental Omnibus Brief speaks as if the only property at issue in this case is the individual Plaintiffs' property in Delaware County. (*See,* e.g., Supplemental Omnibus Brief at 15 n.4 (speaking of "the subject property"), 26 (referring to "a taking which … likely will never occur"), 37 ("Should … injury be incurred, that injury would occur in Delaware County …"), 38 ("the land at issue here is located in Delaware County"). This rhetoric is obviously designed to support Defendant's request to move the case to Delaware County. Such misleading rhetoric should be rejected.

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Commonwealth Court some of the very same arguments that SPLP asserts here. With only one paragraph of analysis, accepting the Commonwealth's arguments, the Commonwealth Court dismissed that eminent domain claim. We reproduce that paragraph verbatim here:

> In its preliminary objections, among other things, the Commonwealth contends that Petitioners fail to state a claim upon which relief may be granted under Count V because they have failed to allege and there are no facts offered to demonstrate that any of their property has been or is in imminent danger of being taken, with or without just compensation. Even if they had an interest that was going to be taken, we could not hear this challenge in our original jurisdiction because the exclusive method to challenge the condemnor power to take property is the filing of preliminary objections to a declaration of taking. *See* 26 Pa. C.S. § 306. Accordingly, the Commonwealth's preliminary objection to Count V is sustained and Count V is dismissed.

Robinson Twp. v. Com., ___ Pa. Cmwlth. ___, 52 A.3d 463, 487-88 (2012).

The Supreme Court reversed the Commonwealth Court, reinstating petitioners' eminent domain claim. The Supreme Court explains the Commonwealth Court's error as follows:

> The provision upon which the Commonwealth Court relied to sustain the preliminary objections, Section 306(a)(1) of the Eminent Domain Code, is not applicable here: the citizens have not been served with notice of condemnation and, as a result, the provision's procedure is not applicable on its terms. 26 Pa. C.S. § 306(a)(1) ("Within 30 days after being served with notice of condemnation, the condemnee may file preliminary objections to the declaration of taking."). Indeed, this is not a condemnation matter and, as a result, is not subject to the exclusive procedure of the Eminent Domain Code. *See* 26 Pa. C.S. § 102(a). Rather, the citizens filed their claim pursuant to the Declaratory Judgment Act. The purpose of the Declaratory Judgment Act "is 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." 42 Pa. C.S. § 7541(a). According to the Declaratory Judgment Act, "[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

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> statutory remedy is available has unreasonably limited the availability of declaratory relief and such principle is hereby abolished." 42 Pa. C.S. § 7541(b). Declaratory relief, according to the Act, is "additional and cumulative" to other available remedies. *Id.* The citizens' constitutional challenge here seeks relief from uncertainty and insecurity with respect to rights under Section 3241.

Robinson Twp. v. Com., 623 Pa. 564, 709-10, 83 A.3d 901, 990 (2013).

SPLP argued before this Court on September 16, 2015 that this was a non-binding plurality decision. SPLP is mistaken. While portions of the *Robinson Township* decision indeed only commanded a plurality of the Supreme Court, four justices joined the Judgment of the Court in this section. *Robinson Twp.*, 623 Pa. at 584, 83 A.3d at 913.

Perhaps realizing its error, SPLP glaringly fails in its nearly 80 cumulative pages of briefing to inform the Court of this binding precedent. SPLP devotes roughly one page of argument in its Supplemental Omnibus Brief to jurisdiction over Plaintiffs' declaratory judgment claims. In that page it cites a single inapposite authority, the Commonwealth Court decision in *Blackwood, Inc. v. Township of Reilly*, ___ Pa. Cmwlth. ___, 923 A.2d 1256 (2007). SPLP would have this Court understand that *Blackwood* set forth the only "limited exceptions" to the "rule" that "the Eminent Domain Code is the sole and exclusive remedy for challenging" a party's claimed right to exercise eminent domain. (*See* Supplemental Omnibus Brief at 30, 31-32).

Blackwood does not stand for such a proposition. *Blackwood* merely quoted *Blackwell v. State Ethics Comm'n*, 125 Pa. Cmwlth. 42, 556 A.2d 988, 991 (1989), which quote SPLP artfully cuts off just before the language that undercuts its argument. That quote in full is as follows:

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> [w]hen a statute provides for an exclusive remedy which calls for specialized fact finding and/or application of an agency's administrative expertise, declaratory relief is not properly granted. When, however, challenges—particularly constitutional challenges—are set forth questioning the *validity of a statute itself* or questioning the *scope* of a governmental body's action pursuant to statutory authority, then the Declaratory Judgments Act is properly invoked, because "the existence of an alternative remedy shall not be a ground for refusal to proceed...."

Blackwood, 923 A.2d at 1259 (emphasis in original).

Of course, Plaintiffs here set forth constitutional challenges to SPLP's claimed right to use the sovereign eminent domain power pursuant to the Public Utility Code or the Business Corporation Law. *Blackwood*, quoting *Blackwell*, supports this Court's jurisdiction over Plaintiffs' declaratory judgment claims.

Moreover, even the portion of the quote that SPLP excerpted fails to support its argument. The declaratory relief that Plaintiffs seek does not call for "specialized fact finding and/or application of an agency's administrative expertise," as did the question in *Blackwood* of ascertaining damages under the EDC. Rather, Plaintiffs seek a declaration on the legal question of whether the use of eminent domain itself is at all proper in the circumstances presented in their Complaint. Further, as explained in more depth in the following section, there is no "exclusive remedy" at play here.

Returning to *Robinson Township*, the parallels between that case and this are striking. There, as here, petitioners challenged whether the purported condemnors qualified as public utilities with respect to the right to use eminent domain for the purposes in question, implicating the PUC. There, as here, the respondent argued that preliminary objections in an EDC proceeding were the exclusive method to challenge purported condemnors' power or right to

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exercise eminent domain. There, as here, the respondent argued that there had not yet been a taking. There, the Commonwealth Court accepted those arguments, and was reversed by a majority of the Supreme Court.

At the scheduling conference before this Court, SPLP hinted at an argument attempting to distinguish *Robinson Township* on the ground that that decision addressed a facial challenge to a statute, whereas there are particular parcels of land at stake here. Presumably, then, SPLP would argue that Plaintiffs can just wait for eminent domain proceedings for each parcel and assert their challenges there. By the very language of *Robinson Township* itself, however, such a distinction is without a meaningful difference.

"Declaratory relief, according to the Act, is 'additional and cumulative' to other available remedies. [42 Pa. C.S. § 7541(b)]. The citizens' constitutional challenge here seeks relief from uncertainty and insecurity with respect to rights under Section 3241 [of Act 13]." *Robinson Township*, 623 Pa. at 710, 83 A.3d at 990. The Supreme Court explained that it was the petitioners' choice to bring that action under the Declaratory Judgments Act. "A party challenging the availability of pre-enforcement review may, of course, assert concerns that issues or facts are not adequately developed, and question whether its adversary will suffer any hardships if review is delayed. But, that is not how this litigation developed." *Id.* (citation omitted).

Under a plain reading of the language of the Declaratory Judgments Act, the Supreme Court could not have ruled otherwise. The Act expressly states that

> [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

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> has unreasonably limited the availability of declaratory relief and such principle is hereby abolished. The availability of declaratory relief shall not be limited by the provisions of 1 Pa. C.S. § 1504 (relating to statutory remedy preferred over common law) and *the remedy provided by this subchapter shall be additional and cumulative to all other available remedies* except as provided in subsection (c).

42 Pa. C.S. § 7541(b) (emphasis added). Subsection (c) lists a few inapplicable exceptions to this rule.[5]

Moreover, as explained below, SPLP has the option to bypass the EDC's procedures. There is no judicial economy in waiting for many cases hearing these arguments in equity when this dispute is already before this Court.

In sum, *Robinson Township* controls this case, and holds that the self-described exclusivity of the EDC does not rob courts of jurisdiction to sit in equity and decide, pursuant to the Declaratory Judgments Act, the right or power of purported condemnors to exercise the power of eminent domain.

2. <u>The Eminent Domain Code does not preclude jurisdiction of this Court over Plaintiffs' due process and injunction claims because eminent domain proceedings have not even begun.</u>

As established above, this Court has jurisdiction over Plaintiffs' requests for declaratory relief under *Robinson Township*. This Court also has jurisdiction over the remaining counts in Plaintiffs' Complaint. SPLP misleads this Court by citing a line of cases in a materially different

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[5] SPLP might argue that the PUC's alleged exclusive jurisdiction over this case would qualify as an exception under §7541(c)(2), "Proceedings within the exclusive jurisdiction of a tribunal other than a court." As alleged in the Complaint, Plaintiffs dispute that the PUC has *any* jurisdiction over the Mariner East pipelines, let alone exclusive jurisdiction. But even if this Court were to find that the PUC had jurisdiction over the issues in the Complaint, the exception under Section 7541(c)(2) does not apply here. Where plaintiffs challenge the jurisdiction of an agency over particular subjects, that question is *itself* amenable to declaratory judgment. *Delaware River Port Authority v. State Ethics Comm'n*, 126 Pa. Cmwlth. 147, 149, 558 A.2d 932, 933 (1989).

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context holding that equity cannot enjoin a condemnation, and that challenges to the right or power to use eminent domain must be addressed per the EDC. In fact, those cases do not apply to purported utility right of way condemnations absent a declaration of taking under the EDC.

A little history of Pennsylvania condemnation procedure is needed at this point to understand SPLP's misdirection and what the law actually holds. With this background, it will become clear that equity has always had jurisdiction over challenges to utility rights of way where the EDC has not been used.

a. The Eminent Domain Code has never applied to utility right of way takings unless and until a utility invokes it by a declaration of taking filed under its procedures, if ever.

The Eminent Domain Code was originally enacted in 1964, launching the modern era of eminent domain law in Pennsylvania. Under earlier law, no common statutory scheme existed to pre-empt courts from sitting in equity to enjoin takings, or adjudicate the right to condemn. For example, in *Winger v. Aires*, the Pennsylvania Supreme Court enjoined a school district's taking of excessive amounts of land to build a new school. 371 Pa. 242, 89 A.2d 521 (1952). There was no question that the Supreme Court in *Winger* had jurisdiction.

The EDC as enacted in 1964 contained a savings clause at §901. That section provided, in pertinent part:

> This act shall not ... repeal, modify or supplant any law insofar as it confers the authority or prescribes the procedure for condemnation of rights-of-way or easements for occupation by water, electric, gas, oil and/or petroleum products, telephone or telegraph lines used directly or indirectly in furnishing service to the public. If the condemnation for occupation by water, electric, gas, oil and/or petroleum products, telephone or telegraph lines consists of the taking of a fee, all the provisions of this act shall be applicable.

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In other words, condemnations for utility rights-of-way fell outside the scope of the EDC. "The Eminent Domain Code sets forth generally the applicable procedures to guarantee due process in the taking of a person's property. … However, the Eminent Domain Code specifically holds it is not applicable to a condemnation of a right of way by a utility. 26 P.S. § 1-901." *Fairview Water Co. v. Pennsylvania Pub. Util. Comm'n*, 509 Pa. 384, 392, 502 A.2d 162, 166 (1985). The Pennsylvania Supreme Court continued, "[t]herefore, the Eminent Domain Code explicitly excludes the type of case now before us, such that a condemnee cannot avail itself of the procedures set forth in the Eminent Domain Code when questioning the scope and validity of an easement." *Id.*

With the EDC inapplicable, appealing to equity remained the proper method of challenging the right to use eminent domain for a purported utility condemnation, or seeking to enjoin its use. *Id.*, 509 Pa. at 393, 502 A.2d at 167 ("Once 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."); *see also Redding v. Atlantic City Elec. Co.*, 440 Pa. 533, 269 A.2d 680 (1970) (holding that equity has jurisdiction over utility right of way condemnations and distinguishing line of cases including *Faranda* and *Valley Forge Golf Club*, cited by SPLP here, as this is not "a condemnation subject to all the provisions of the Eminent Domain Code").[6]

[6] The only decision of which Plaintiffs are aware that held otherwise is the Pennsylvania Supreme Court's first attempt at addressing this issue in *McConnell Appeal*, 428 Pa. 270, 236 A.2d 796 (1968), which is no longer good law, though SPLP cites it anyway. (Supplemental Omnibus Brief at 13 and 29). *McConnell Appeal* was a 4-3 decision where the dissent, written by Mr. Justice (later Chief Justice) Roberts, stated "I cannot agree with the majority's conclusion that the procedure for contesting the validity of this taking is governed by the Eminent Domain Code of 1964." Justice Roberts quoted §901, and then added that "[t]his section is a clear and unmistakable legislative command that, when certain public utilities condemn less than a fee, the procedure to be followed is not

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In 1988, the General Assembly passed the General Association Act, Act 177, which amended eminent domain law among other things. Act 177 supplemented the Business Corporation Law ("BCL") to provide an alternative provision for utilities to exercise eminent domain: §1511 of the BCL. Because of this new section, Act 177 also partially repealed §901 of the EDC as superseded. *See* Act 177, §302(a), repealers.

This new law, §1511 of the BCL, provides that public utility condemnors can choose whether to conduct a taking by using the procedures of the EDC, or by bypassing certain of those procedures (notably including the preliminary objection procedures) and using a separate set of "quick take" procedures. Under §1511(g), a condemning utility "may elect to proceed as follows *in lieu of the procedures specified in sections 402, 403, 405 and 406 of the Eminent Domain Code*,"[7] (emphasis added). Those §1511(g)(2) procedures include challenging the validity of the condemnation through an action in equity. The official 1990 Committee Comment to the statute notes,

> Subsection (g) preserves the existing procedures traditionally used in condemnations of easements and rights of way, to which the procedures of the Eminent Domain Code did not apply. In such proceedings, preliminary objections are not available to challenge the validity or scope of the condemnation. Possession is obtained, after notice, upon approval by the appropriate court of the condemnor's bond, with surety, and the only issue before the court at that hearing is the form and adequacy of the bond. By the same token, **there is no intent to change existing law under which the**

changed by the Eminent Domain Code of 1964, but rather is the same as that which obtained prior to passage of the code. … I think it clear that the proper route for objection to the validity of the taking should be classified as part of the condemnation procedure not the determination of damages and thus the procedure antedating the code should apply." The Supreme Court only three years later implicitly overruled *McConnell Appeal* on this point in *Redding*. *See also Appeal of Swidzinski*, 134 Pa. Cmwlth. 330, 335, 579 A.2d 1352, 1354 (1990) (discussing *McConnell Appeal* and *Redding*).

[7] Under the current EDC, the corresponding section numbers would be 302, 303, 305 and 306.

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> **condemnee's constitutional rights are protected by virtue of his ability to file and [sic] action in equity to challenge the validity or scope of the condemnation.**

15 Pa. C.S.A. § 1511 (West) (emphasis added). That is, the change in law preserved the Pennsylvania Supreme Court holdings of *Redding* and *Fairview Water* providing a forum in equity for challenges such as this. The Commonwealth Court agreed with this official comment: "There is nothing magic about preliminary objections. Although preliminary objections are the exclusive method for challenging a condemnation under the Eminent Domain Code, an action in equity is the appropriate method for challenging a § 1511(g)(2) taking." *In re Carnegie Natural Gas Co.*, 157 Pa. Cmwlth. 217, 220, 629 A.2d 256, 258 (1993).

The EDC underwent one more overhaul in 2006, in the wake of the controversy over the U.S. Supreme Court eminent domain decision *Kelo v. City of New London*, 545 U.S. 469 (2005). This overhaul eliminated the remainder of the EDC savings clause, but retained the statutory scheme for utility takings in the BCL, including equity's jurisdiction in determining the scope or validity of a utility right of way condemnation.[8] *SEPTA v. Pub. Util. Comm'n*, ___ Pa. Cmwlth.

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[8] Plaintiffs note that the official comment to §102 of the EDC reads, in pertinent part, as follows:

> It is intended that the code shall be the exclusive procedure for all condemnations. The Pennsylvania Rules of Civil Procedure supplement the code only if the code is silent. The public utility exception contained in former section 901 which provided that the code did not apply to "condemnation[s] of rights-of-way or easements for occupation by water, electric, gas, oil and/ or petroleum products, telephone or telegraph lines used directly or indirectly in furnishing service to the public[.]" has not been codified. Consequently, the code applies to all public utility condemnations.

26 Pa. C.S.A. § 102 (West). Westlaw lists the comment as being from 1985, but the EDC was only codified in 2006, so it must be from 2006 or thereabouts. This comment might be persuasive were it not for the General Assembly's choice in 2006 to leave intact the alternative BCL procedures which expressly take utilities outside of the EDC, and subsequent binding precedent confirming that the 2006 EDC amendments did not change the law with respect to utility right-of-way condemnations. *See SEPTA*, *supra*, in text accompanying this note; *Condemnation by Valley Rural Elec. Co-op., Inc. v. Shanholtzer*, ___ Pa. Cmwlth. ___, 982 A.2d 566, 572 (2009) ("With regard to the

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___, 991 A.2d 1021, 1023-24 (2010) (analyzing §1511(g) and following *Fairview* in holding that a common pleas court sitting in equity, not the PUC, was the proper forum for SEPTA's challenge to an electrical utility right-of-way taking).

In brief, over the course of the decades since the EDC took effect, the statutes and the courts have spoken clearly that, absent a filing of a declaration of taking under the EDC, equity is the proper forum for challenging a purported right to take a utility right-of-way.

b. Because the Complaint challenges SPLP's claimed right of eminent domain and seeks to prevent utility right-of-way takings that have not yet occurred, this Court has jurisdiction in equity.

It bears repeating that Plaintiffs are not seeking to extinguish the jurisdiction of courts already hearing existing cases SPLP filed under the EDC. The instant Complaint seeks a judgment enjoining future conduct and setting forth the parties' rights. Consequently, Plaintiffs are in a position where declarations of taking have not yet been filed. In such a situation, as noted above, decades of authority hold that the proper way to challenge a purported right to take a utility right-of-way is by going before a court of common pleas sitting in equity. This is what Plaintiffs have done.

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manner of exercising the power of eminent domain, §1511(g) provides that a public utility corporation *may* exercise the power of eminent domain by proceeding, as Valley Rural has, in accordance with the Eminent Domain Code (Code), 26 Pa. C.S. §§ 101—1106.") (emphasis added); *In re Laser Gathering Co.*, PUC Docket No. A-2010-2153371, Dissenting Statement of Commissioner James H. Cawley, dated May 19, 2011, at page 5 (in mooted proceeding, explaining the §1511(g)(2) procedures and stating "The landowner's constitutional rights are thought to be protected by virtue of his or her ability to file an action in equity in the Court of Common Pleas to challenge the validity or scope of the condemnation. If the public utility instead elects to condemn an easement or right of way under the Eminent Domain Code, preliminary objections are the exclusive method for the landowner to challenge the condemnation."). Indeed, as elaborated below, SPLP has availed itself of these alternative procedures, belying its exclusivity argument.

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As explained above, in the *Robinson Township* case, the Pennsylvania Supreme Court held that when petitioners sought to challenge alleged condemnors' right to take property, nothing stopped them from bringing their claims to the court sitting in equity. The Supreme Court brushed aside the purported exclusivity of the EDC because "the citizens have not been served with notice of condemnation and, as a result, the [preliminary objections] provision's procedure is not applicable on its terms. … Indeed, this is not a condemnation matter and, as a result, is not subject to the exclusive procedure of the Eminent Domain Code." 623 Pa. at 709, 83 A.3d at 990. Plaintiffs here are in the same position as those in *Robinson Township* with respect to their claim for injunctive relief, seeking to bar SPLP from exercising its wrongfully claimed eminent domain rights.

c. SPLP's cited authority on the alleged exclusivity of the Eminent Domain Code preliminary objection procedures is inapplicable, and SPLP had to have known this since it has many times initiated litigation using other procedures.

Which of the binding legal authorities just cited did Defendant direct this Court's attention to? SPLP does not cite *Robinson Township*, *Redding*, *Winger*, *Fairview Water*, and *Carnegie Natural Gas*. SPLP fails to mention the old EDC savings clause at 26 P.S. § 1-901, which was in effect when Pennsylvania courts handed down *Vartan* and *Sholder*, as well as the other cases SPLP relies on for its EDC exclusivity argument.

Yet SPLP cannot be said to have not known of the alternative procedures for utility right-of-way condemnations, as it has repeatedly availed itself of them, and even admits as much in its briefing: "While Section 1511 of the BCL provides public utility corporations with alternative procedures for condemnation and taking of property, SPLP has found that the Eminent Domain

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Code procedures lead to quicker resolution of issues. SPLP has not used the Section 1511 BCL procedures since July, and has no intention to use them in Delaware and Chester Counties." (PO Memorandum at 15, n.6).[9] SPLP does not even attempt to harmonize that fact with its contrary claims about the allegedly exclusivity of the EDC and its preliminary objection procedure. SPLP, therefore, is estopped from now contending that procedures under the EDC are the sole means of adjudicating the right and power to condemn property.

SPLP has even violated its own claims of the exclusivity of the preliminary objection procedure in cases it has brought under the EDC itself. In the *McQuain* case in Dauphin County, for example, SPLP filed suit in equity against landowners seeking a preliminary injunction ordering the landowners to allow SPLP or its agents on their property to conduct surveys for the Mariner East 2 pipeline. *SPLP v. McQuain,* C.P. Dauphin County, No. 2015-CV-2716-EQ, Plaintiff's Motion for Preliminary Injunction and Immediate Right of Entry to Survey and Test, attached hereto without its exhibits as Ex. A.

Under §309 of the EDC, SPLP needed to qualify as a condemnor to have the right to enter land for survey purposes, so it argued that it possessed the right of eminent domain, using many of the arguments it uses here. (*See id.*). The necessary implication of SPLP's choice to file its *McQuain* complaint in a court sitting in equity is that it believed the court would have jurisdiction to hear and decide the arguments, which the landowners asserted, that SPLP does *not* qualify as a condemnor because it lacks the power or right to condemn property. SPLP is

[9] Defendant's statement of intent with regard to the future legal proceedings it may or may not use is, of course, yet another "fact" that cannot be considered on Preliminary Objections. Regardless, such stated intent does not change the statutory framework by which SPLP would have either of two options for takings available were it actually a public utility with respect to the Mariner East pipelines.

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estopped from now contending that the EDC deprives courts of jurisdiction to hear such arguments sitting in equity.

To set the record straight, *none* of the cases that Defendant cites for the proposition that Plaintiffs' challenges must be brought in preliminary objections to EDC proceedings are utility right-of-way cases,[10] with the sole exception of *McConnell Appeal* which, as discussed above, is no longer good law. Further, in each of these cases that Defendant cites, the court was operating in a legal universe where it was understood that proclamations about the EDC's exclusivity referred to situations where the EDC applied at all.[11] The conclusion that the EDC was exclusive was necessarily based on the language of the EDC, which does not apply here.

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[10] *In the Matter of: Opening a Private Road for the Benefit of Timothy P. O'Reilly*, 607 Pa. 280, 5 A.3d 246 (2010) (challenge to taking under the Private Road Act to provide landlocked landowner with access to public road); *Simco Stores v. Redevelopment Authority of City of Philadelphia*, 455 Pa. 438, 317 A.2d 610 (1974) (appeal of Redevelopment Authority condemnation of properties as blighted); *Municipal Auth. of Zelienople Borough Appeal*, 431 Pa. 306, 245 A.2d 451 (1968) (challenge to condemnation of parcel for use as an airport); *Valley Forge Golf Club v. Upper Merion Twp.*, 442 Pa. 227, 221 A.2d 292 (1966) (private golf club seeking to prevent condemnation of entire course by township); *Faranda Appeal*, 420 Pa. 295, 216 A.2d 769 (1966) (appeal from a declaration of taking of certain properties in fee simple by Redevelopment Authority of the City of Lancaster); *Mazur v. Trinity Area Sch. Dist.*, ___ Pa. Cmwlth. ___, 926 A.2d 1260 (2007) (challenge to resolution by local taxing authority to condemn property for a proposed commercial development in area deemed blighted); *White v. Pennsylvania Dept. of Trans.*, ___ Pa. Cmwlth. ___, 738 A.2d 27 (1999) (challenge to highway interchange condemnation); *In the Matter of the Condemnation of the Surface of that Certain Tract of Land Located in the Borough of Centralia, Columbia County, Pennsylvania*, ___ Pa. Cmwlth. ___, 658 A.2d 481 (1995) (challenge to municipal condemnation of the surfaces of properties endangered by mine fires); *Vartan v. Reed*, 100 Pa. Cmwlth. 163, 514 A.2d 646 (1986) (redevelopment authority sought fee simple interest in private property); *Sholder v. Commonwealth Dept. of Trans.*, 57 Pa. Cmwlth. 497, 426 A.2d 1228 (1981) (challenge to Department of Transportation plan to widen highway); *Lashe v. Northern York County Sch. Dist.*, 52 Pa. Cmwlth. 541, 417 A.2d 260 (1980) (challenge to occupation tax resolution adopted by school district); *Gerner v. Borough of Bruin*, 37 Pa. Cmwlth. 271, 390 A.2d 319 (1978) (challenge to *de facto* municipal condemnation as a result of flooding); *Lerro v. Com., Dept. of Transp.*, 32 Pa. Cmwlth. 372, 379 A.2d 652 (1977) (challenge to *de facto* highway condemnation); *Ramad Realty Corp. v. Springettsbury Twp. Sewer Authority*, 10 Pa. Cmwlth. 1, 309 A.2d 80 (1973) (challenge to *de facto* taking by municipal sewer authority); *Montgomery County v. A.J.S. Enterprises, Inc.*, 18 Pa. D. & C.3d 507, 1981 WL 862 (Montgomery Com. Pl., Feb. 5, 1981) (sanitary landfill condemnation challenge); *In re Condemnation of Right-of-Way*, 75 Pa. D. & C.2d 215, 1975 WL 17004 (Chester Com. Pl., Jan, 13 1975) (challenge to highway expansion condemnation); *Commonwealth v. Kahn*, 46 Pa. D. & C.2d 529, 1969 WL 7648 (Cumberland Com. Pl. 1969) (challenge to condemnation of land by Commonwealth for Pennsylvania game lands).

[11] As an aside, even within the context of non-utility condemnations, the cases are divided on the validity of the holding of *Vartan v. Reed* that "equity does not have jurisdiction to enjoin a condemnation." 100 Pa. Cmwlth.

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It could be argued that the logic of *Vartan* and *Ramad Realty* should apply even outside the EDC context to bar actions to enjoin condemnation. Those cases provided that where a challenge existed to a condemnation but a declaration of taking had not yet been filed, a court could sit in equity only to force such a filing, to allow preliminary objections to be lodged. *Vartan v. Reed*, 100 Pa. Cmwlth. 163, 167-68, 514 A.2d 646, 648 (1986) (citing *Ramad Realty Corp. v. Springettsbury Twp. Sewer Authority*, 10 Pa. Cmwlth. 1, 309 A.2d 80 (1973)). Yet this logic also derives from the exclusivity of the EDC, which is not operative here.

In *Ramad*, the Commonwealth Court posited a situation where "there is no declaration of taking to challenge under § 406 [modern EDC § 306] whereby his rights may be protected. In that situation, equity may be invoked in order to force the authority to proceed with proper condemnation proceedings. This is the only method by which the landowner may protect his rights." 10 Pa. Cmwlth. 1, 6, 309 A.2d 80, 83. Where the EDC is not exclusive because of the existence of alternative eminent domain procedures, the landowners' rights may also be protected as they were traditionally, as exemplified by the Supreme Court in *Winger*, by filing a suit in equity to enjoin the condemnation.

Defendant SPLP is simply wrong in arguing that the EDC bars this Court's jurisdiction to hear and decide this case.

163, 167, 514 A.2d 646, 648 (1986). *See Cass Plumbing & Heating Co. v. PPG Indus., Inc.*, 52 Pa. Cmwlth. 600, 607, 416 A.2d 1142, 1146 (1980) ("Before the advent of the Eminent Domain Code, equity was the appropriate vehicle for relief against allegedly improper threatened prospective takings …. Equity remains as the remedy for threatened prospective takings after the enactment of the Code. … [A] different rule would leave landowners threatened by improper condemnations and desiring to keep their properties, without any remedy at all while the putative condemnor contemplates an assertedly improper action at its leisure.") (citations omitted).

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d. Even if the Eminent Domain Code applied here, it would not provide a complete remedy in this case, and therefore could not block this Court's jurisdiction.

The EDC, as explained above, does not apply here. Even if it did, however, there are yet further reasons for why this Court would have jurisdiction in equity over this case.

It is a commonplace that where the legislature has provided a complete remedy or procedure, that remedy or procedure is exclusive and alone must be pursued. *Schwab v. Burgess and Town Council of Borough of Pottstown*, 407 Pa. 531, 180 A.2d 921 (1962) (relying upon *Jacobs v. Fetzer*, 381 Pa. 262, 112 A.2d 356 (1955)). But, where a statute does not afford a plaintiff a remedy, equity may take jurisdiction. *Byers v. Hempfield Tp.*, 226 Pa. 27, 875 A. 415 (1910).

The EDC explicitly states at 26 Pa. C.S. §102(a) that it "provides the complete and exclusive procedure and law to govern all condemnations of property for public purposes and the assessment of damages." Plaintiffs have already shown above that this is incorrect and that Defendant is aware it is incorrect.

Plaintiffs challenge Defendant's putative right to invade property to conduct surveys under color of §309 of the EDC.[12] §309 makes no express provision for a court either to enforce the right of a putative condemnor to survey a land owner's property or to enjoin a putative condemnor from surveying a land owner's property. §306, on the other hand, makes provision for challenges to actual takings following filing of declarations of record. Prior to a taking, however, it is obviously inapplicable. Absent a statutory remedy, then, §309 is unenforceable

[12] SPLP falsely claims that "Plaintiff deMarteliere [sic] initially granted SPLP verbal permission to access the property" to survey. (Supplemental Omnibus Brief at 9). This simply never happened. Moreover, it is a new allegation of fact that cannot be considered on Preliminary Objections.

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without resort to equity.[13] As noted above, SPLP has acknowledged equity's jurisdiction in this context by availing itself of it, and is estopped from arguing otherwise here. (*See* Ex. A).

SPLP points to the provision of §309 that provides for actual damages sustained, and notes that the Commonwealth Court has found such provision a reasonable remedy in *White v. PennDOT*, ___ Pa. Cmwlth. ___, 738 A.2d 27 (2007). If Plaintiffs' sought relief from damages sustained, as the plaintiffs did in *White*, that holding would be applicable. Plaintiffs here seek relief from uncompensable loss of enjoyment of private property and the natural environment. (Complaint, ¶247). The Commonwealth Court in *White* also addressed the Whites' trespass argument, overruling the condemnor's related preliminary objection against it. *Id.* at 30. Though the Commonwealth Court ruled that the condemnor had a right to enter onto the Whites' property to survey, that court never squarely addressed this argument. Moreover, unlike here, the Whites did not challenge PennDOT's status as a condemnor that ultimately had a legitimate right to take land to build the highway interchange.

3. This Court has jurisdiction to adjudicate Plaintiffs' claims as the PUC does not have jurisdiction, let alone primary or exclusive jurisdiction.

In addition to claiming that this case must be adjudicated *in rem* in a common pleas court under the exclusive procedures of the EDC, SPLP claims that this case must be adjudicated

[13] Plaintiffs also state claims that are collateral to the right or power of SPLP to exercise eminent domain, and hence not challengeable under §306, were the EDC even applicable. In non-public utility cases, there are conflicting authorities as to what matters are deemed collateral to challenges under Section 306. Defendant has again cherry picked the decisions it likes and ignored such cases finding claims such as Plaintiffs' environmental and due process claims collateral, e.g., *White v. PennDOT*, ___ Pa. Cmwlth. ___, 738 A.2d 27 (2007) (failure of state to obtain prior clearance from agriculture board charged with protecting farmlands); *Appeal of Gaster*, 5124 Pa. Cmwlth. 314, 56 A.2d 473 (1989) (environmental challenge); *In re Legislative Route 58018*, 31 Pa. Cmwlth. 775, 375 A.2d 1364 (1977) (environmental challenge); and *Condemnation for Route 201*, 22 Pa. Cmwlth. 440, 349 A.2d 819 (1975) (due process/environmental challenge). *See also* §IV.C.5.

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before the Public Utility Commission. Though it is hard to reconcile the claimed dual exclusivity, Plaintiffs will address this argument as if it were in the alternative.

SPLP's claim that the PUC has "primary and exclusive" jurisdiction over this case fails for at least two reasons. First, the PUC does not have *any* jurisdiction over this case because §104 of the Public Utility Code takes the interstate Mariner East pipelines outside of the PUC's jurisdiction. Second, longstanding binding precedent makes clear that a common pleas court sitting in equity is the appropriate forum for hearing cases challenging the scope or validity of a claimed public utility's right to exercise eminent domain.

For these reasons, the PUC is not a proper forum for this case, and this Court should retain its jurisdiction over Plaintiffs' claims.

a. §104 of the Public Utility Code divests the PUC of jurisdiction.

According to its filings with FERC, Mariner East 1 and Mariner East 2 were designed to relieve the glut of NGL's in the Commonwealth and find alternative markets since there has been no major market in the Northeast. The two projects have been designed for no intermediate deliveries and were approved by FERC with respect to their tariffs because SPLP represented that, with respect to Mariner East 1 and 2, it was a common carrier functioning in interstate commerce.

Plaintiffs' Complaint clearly alleges that the Mariner East pipelines were designed to ship NGL's from sources west of Pennsylvania, across Pennsylvania and to a locale outside of Pennsylvania with no intermediate deliveries. In this connection, in *Blackmore v. Public Service Commission*, 120 Pa. Super. 437, 183 A. 115, 118 (1936), the Superior Court held that shipments

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of goods from one state, through Pennsylvania, and on to another state were in interstate commerce.

With respect to such interstate shipments, the Public Utility Code at 66 Pa. C.S. § 104 states as follows:

> **The 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.

(Emphasis supplied).

Such shipments obviously constitute interstate commerce. Indeed, Defendant has conceded as much, both in its PUC filings where it has asserted that interstate shipments do not fall under PUC regulation, and in recent court filings. In *Sunoco Pipeline LP v. Loper,* C.P. York County, No. 2013-SU-004515-05, *e.g.*, SPLP's Verified Motion for Immediate Right of Entry Pursuant to 26 Pa.C.S. §309, SPLP alleged as follows:

> 3. As part of its objective to provide ethane, propane, liquid petroleum gas, and other petroleum products transportation services to its customer, Sunoco has proposed to construct an interstate pipeline…
>
> 4. Service on the Pipeline will be regulated by the Federal Energy Regulatory Commission ("FERC") under the Interstate Commerce Act ("ICA"), 49 U.S.C. § 1 (1988)…

Although in Defendant's Preliminary Objections SPLP fails even to attempt to explain how §104 of the Code can mean anything other than what it says, Defendant itself has previously acknowledged that the PUC has no jurisdiction to regulate Mariner East 2. Thus, in the *Loper* case, *supra*, Defendant asserted in its brief that, "the Pennsylvania Public Utility Commission ('PUC') has no jurisdiction to regulate this Pipeline [Mariner East 2] because it is an interstate

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line, not an intrastate one … . **In short, any argument by Defendant that these FERC approved pipelines are subject to PUC review cannot be taken seriously; the PUC *cannot* regulate this Pipeline; it is beyond its authority to do so.**"[14] (Emphasis added, italics in original).

If this were not such a serious matter, it would almost be entertaining that Defendant believes it can get away with saying one thing in one forum and the opposite in another forum, depending on only what it wants at the time.

The PUC clearly has no jurisdiction to adjudicate a matter where the company sought and obtained FERC tariff approval as an interstate common carrier; where the company only months later acknowledged in a separate PUC petition that the project involved no deliveries of NGL's in Pennsylvania; and where in subsequent court filings it acknowledged the same.

b. The PUC also has no jurisdiction because there is no factual basis in the Complaint to support Defendant's claim that it makes or intends to make any deliveries in the Commonwealth.

As noted above, SPLP's NGL's are intended for delivery to alternative markets outside the Commonwealth. (Complaint, ¶¶8, 11, 15, 16, 22, 24, 26, 28, 30, 31, 32, 33, 35, 36, 38, 39, 45, 46, 47, 52, 53, 55, 72, 73, 74, 83, 84, 101, 103, 106, 107, and 156). The NGL ethane is a plastics feedstock used nearly exclusively by industry, and is not a fuel used by the public. Its transmission is intended for sale outside Pennsylvania. (Complaint, ¶¶47, 71 and 68). Likewise, SPLP's shipments of propane and butane are interstate as they are intended primarily for export. (Complaint, ¶169).

[14] SPLP's Brief in Support of the Verified Motion for Immediate Entry Pursuant to 26 Pa. C.S. § 309, at page 6, n.4, *Sunoco Pipeline L.P. v. Loper*, No. 2013-SU-004518-05, York County Court of Common Pleas.

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The following *factual* averments more than amply illustrate Plaintiffs' contention: Complaint, ¶¶ 36, 44, 45, 46, 47, 52, 53, 74, 83, 101, 103, 106, 107 and 156. SPLP, therefore, may not be heard at this stage of litigation to aver that it is currently making or intends in the future to make any more than *de minimis* deliveries, if those, within the Commonwealth.

c. FERC and the PUC do not have simultaneous jurisdiction over the Mariner East projects.

Even if the Complaint did afford a factual basis to find that some more than *de minimis* NGL deliveries are taking place or will take place in the Commonwealth—which is not conceded—Defendant notably has not cited any statutory basis for its erroneous assertion that a pipeline like this can be regulated simultaneously by both FERC and the PUC. Significantly, SPLP deliberately ignores the plain language of Public Utility Code §104 and offers no analysis of it whatsoever, despite the fact that this section provides that where a pipeline is in interstate commerce the Public Utility Code is inapplicable.

Defendant has not identified a single example of a pipeline operator holding certificates of public convenience from FERC and the PUC for the same route. The one authority relating to this issue[15] that Defendant points to time and again concerns a Wyoming pipeline—where, obviously, 66 Pa. C.S. § 104 does not apply—and that case does not resolve the question at hand. Thus, in *Amoco Pipeline Co.*, 62 FERC ¶ 61,119, 1993 WL 25751 (Feb. 8, 1993), FERC looked at whether *it* had authority over the pipeline in question, not whether the Wyoming Public Service Commission did; the latter was undisputed and outside the scope of the case.

[15] SPLP makes the separate argument in its Answer to the Motion for Preliminary Injunction, at ¶5, that FERC does not address intrastate oil shipments. For that proposition, it cites several additional authorities. Plaintiffs do not take issue with that proposition, but FERC's lack of jurisdiction does not then confer on the PUC the authority to grant eminent domain for intrastate shipments on pipelines of overwhelming interstate character.

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Moreover, SPLP's claim that since 2002, SPLP has been regulated by both FERC for interstate service and the PUC for intrastate service cannot seriously be read as alleging historical dual jurisdiction over the same pipeline, as SPLP has previously represented (as explained above) that its Mariner East "FERC approved pipelines" are beyond PUC's regulatory authority.[16]

d. The cases make clear that this, not the PUC, is the appropriate forum to hear cases challenging a company's claimed eminent domain rights as a public utility.

Even if §104 did not prevent the PUC from exercising jurisdiction over the questions at issue in this case, nonetheless it is clear that this Court is the better forum for this case.

The Commonwealth Court in *Appeal of Swidzinski*, 134 Pa. Cmwlth. 330, 579 A.2d 1352 (1990), surveyed the cases on precisely the question of when equity or the PUC is the better forum to decide the validity and scope of the right to condemn. Curiously, this case does not appear in Defendant's briefs. The Commonwealth Court explained that various statutes, including the BCL and the EDC, play a role in deciding what determinations need to be made where.

The *Appeal of Swidzinski* court quoted, for example, from the Pennsylvania Supreme Court in *Redding*, *supra*:

---

[16] A company may qualify as a public utility for one purpose and not a public utility for another purpose. Insofar as a CPC has been issued for intrastate delivery of petroleum products, SPLP is a public utility for certain purposes within the scope of the CPC. Thus, the CPC's issued to SPLP's predecessors prior to 2002 were for intrastate delivery of petroleum products other than NGL's. In all those instances the predecessors were public utilities for purposes of the pipelines they built and operated, but not for other purposes. For instance, if Sunoco's gasoline retailing business were to be reshuffled to operate under the SPLP banner, SPLP could not seriously contend that it could take private property through eminent domain for gas stations because it is a public utility. The facts at hand here are only a slightly less obvious version of this hypothetical situation.

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> We need not review the cases in which the PUC has decided questions on the scope and validity of a taking or delineate its exact power in this regard. What is important in this context is that even assuming the PUC has the power to decide such questions, *the legislature has not made this the exclusive, mandatory procedure for their determination. At most, this statutory remedy is permissive or alternative.* Therefore, appellants' claim that the existence of this power in the PUC means equity has no jurisdiction does not raise a jurisdictional question....

Id. at 134 Pa. Cmwlth. at 338, 579 A.2d at 1356 (quoting *Redding,* 440 Pa. at 540, 269 A.2d at 684) (emphasis added by *Appeal of Swidzinski* court).

Here, as in *Redding*, the PUC was raised as a possible forum because the purported grant of eminent domain stemmed from an empowering statute under which "the PUC is given the responsibility of determining whether the proposed service is necessary or proper for the public convenience... ." The question before the Supreme Court in *Redding* was "whether this section provides a mandatory, exclusive statutory method for testing the validity and scope of the taking for if it does equity is without jurisdiction and appellants have raised a jurisdictional question…" *Redding,* 440 Pa. at 538, 269 A.2d at 683. As quoted above, the Supreme Court found that, at most, the PUC was a *permissive* forum for making this determination.

The Commonwealth Court in *Appeal of Swidzinski* continued its analysis of the legal precedent:

> We next must consider two cases in our Court which have dealt with this question. In *Philadelphia Electric Co. v. Carr,* 4 Pa. Commonwealth Ct. 571, 580, 287 A.2d 917, 921 (1972), we adopted as our own the language of the trial court which stated, "It is clear ... that equity has at the very least, alternative jurisdiction to determine the scope and validity of a taking and, accordingly, *if the Public Utility Commission* does not provide a forum for these determinations, equity will provide a forum." (Emphasis added.) In Wilson v. Western Pennsylvania Water Company, 60 Pa.

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> Commonwealth Ct. 312, 430 A.2d 1247 (1981), the landowners/condemnees filed an action in equity to challenge the water company's taking of an easement. The trial court dismissed the complaint in equity and the landowners appealed to this Court. We noted that the legislation giving water companies the power to condemn less than a fee did not require any hearings before the PUC. We also stated the obvious that some forum must exist to challenge a taking. As the PUC was not available as a forum, we held that it was error to dismiss the suit in equity.

134 Pa. Cmwlth. at 338, 579 A.2d at 1356. In each such case the Commonwealth Court found that equity was a viable forum for determination of these questions. The Pennsylvania Supreme Court in *Redding* suggested it is the *preferred* forum.

Notably, in *Appeal of Swidzinski* itself, the Commonwealth Court found that, "Just as in [*Wilson*], it is clear that the PUC has no jurisdiction over this matter because the legislation giving WTG the power to condemn does not provide for PUC jurisdiction over *inter* state telecommunications lines." 134 Pa. Cmwlth. at 339, 579 A.2d at 1356.

Ultimately, the *Appeal of Swidzinski* Court ruled, "we hold that the better method in our view for challenging the validity of a taking when PUC involvement is not required by statute is by filing an action in equity." 134 Pa. Cmwlth. at 340, 579 A.2d at 1357; *see also SEPTA*, ___ Pa. Cmwlth. ___, 991 A.2d at 1023-24 (2010) (analyzing §1511(g) and following *Fairview* in holding that a common pleas court sitting in equity, not the PUC, was the proper forum for SEPTA's challenge to an electrical utility right of way taking). This is what Plaintiffs have done. SPLP has not pointed to a statute that requires the PUC to make this determination, because there is no such statute.

Appeal of Swidzinski and the cases it cites are the relevant, on-point law for our purposes here. SPLP builds its argument on the PUC's jurisdiction out of more general propositions of

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law outside of the eminent domain context that, (a) do not all say what SPLP says they say, and (b), do not lead to the conclusion that the PUC has "primary and exclusive" jurisdiction.

SPLP bases much of its argument for the PUC's "primary" jurisdiction on the Washington County Court of Common Pleas decision in *Pettko v. Pennsylvania-American Water Co*., 15 Pa. D. & C. 5th 565 (Wash. Com. Pl., Aug. 27, 2010). SPLP, however, fails to let the Court know that, on appeal, the Commonwealth Court reversed the Common Pleas Court in *Pettko*. The Commonwealth Court held that the PUC *did not* have exclusive jurisdiction over all asserted claims. Instead, that court ruled that, because the plaintiff sought relief that could not be granted by the PUC, the PUC did not have *any* jurisdiction over plaintiff's Unfair Trade Practices Consumer Protection Law claim. *Pettko v. Pennsylvania-American Water Co* ., ___ Pa. Cmwlth ___, 39 A.3d 473, 485 (2012).

Even more telling is SPLP's decision not to let this Court know that in *Pettko* the trial court's decision was based in part on its finding that "The PUC is responsible for regulating utility rates and evaluating proposed tariffs; therefore, 'it has particular expertise over such matters.'" *Pettko*, 15 Pa. D. & C. 5th 565, 568 (Wash. Com. Pl., Aug. 27, 2010) (citations omitted). This is the idea behind the primary jurisdiction doctrine. The case at bar obviously has nothing to do with utility rates or proposed tariffs, and does not require the PUC's particular expertise. Rather, this case primarily concerns SPLP's claimed power to exercise eminent domain. Jurisdiction for that question is a matter of settled law, as described above.

SPLP also argues that, having established primary jurisdiction, the PUC also has exclusive jurisdiction because it has the power to grant the relief Plaintiffs request. Whether the PUC, if it did have jurisdiction, would have the authority to grant all the declaratory relief

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Plaintiffs request is not made clear by SPLP's allegations in its briefing. *See Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 7-8, 383 A.2d 791, 794 (1977) ("The enforcement and remedial powers of the PUC, although formidable, are not those of a court. … Since the PUC is a creature of statute, it has only those powers which are expressly conferred upon it by the Legislature and those powers which arise by necessary implication."). The language of §502 of the Public Utility Code and its title ("Enforcement Proceedings by Commission") appear to provide that the PUC's injunctive power is limited to enforcing the Public Utility Code. Plaintiffs allege that SPLP is acting *outside* the Public Utility Code, not contrary to it. Plaintiffs do not believe that the PUC would have any injunctive authority in the present context.

Regardless, Defendant's PUC exclusivity argument is off-point, ignores controlling precedent, and fails to persuade. This Court should not dismiss the case on that account.

4. <u>Other landowners are not indispensable parties to this case, and so Plaintiffs have not failed to join all indispensable parties.</u>

In a tacked-on jurisdictional argument, SPLP bizarrely contends that a state-wide injunction preventing SPLP from exercising its claimed power of eminent domain constitutes action that would "adversely impact the rights of other landowners who are not a party to this action and who may have an interest in having portions of their property condemned." (Supplemental Omnibus Brief at 30-32). Failure to join these landowners, according to Defendant, deprives the court of subject matter jurisdiction because (1) "eminent domain cases are *in rem* proceedings against a particular property," and (2) "the owner of real estate is an indispensable party to proceedings seeking transfer of title to the property." In support of its contentions, Defendant quotes *Nicoletti v. Allegheny Cnty. Airport Auth.*, ___ Pa. Commw. ___,

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841 A.2d 156, 163 (2004)). SPLP misunderstands the case at bar and the indispensable party requirement.

A party is indispensable to an action "when his or her rights are so connected to the claims of the litigants that no decree can be made without impairing those rights." *City of Philadelphia v. Manu*, 76 A.3d 601, 607 (quoting *Fulton v. Bedford County Tax Claim Bureau*, ___ Pa. Cmwlth. ___, 942 A.2d 240, 242 n.3 (2008)). Certainly a property right is a cognizable interest for purposes of the indispensable party requirement. *See*, *generally*, *id.* But, it cannot be emphasized enough, the case at bar is not a condemnation case, and so is not *in rem*. Plaintiffs here seek *in personam* relief against SPLP, not relief against one or more properties. Plaintiffs do not seek to transfer title to any property; rather, they seek to prevent SPLP from wrongfully transferring title.

Moreover, it is ludicrous to contend that this lawsuit could impair landowners' rights. A state-wide injunction against SPLP with respect to the Mariner East pipelines would deprive SPLP of its illusory power to condemn; that would greatly strengthen the property rights of the property owners, who will no longer be subject to wrongful condemnation proceedings by SPLP. "Indeed, as the Pennsylvania Supreme Court stated long ago: '… 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' ... ." *In re Condemnation of 110 Washington St., Borough of Conshohocken, Pennsylvania, by Redevelopment Auth. of Cnty. of Montgomery, for Urban Renewal Purposes*, 767 A.2d 1154, 1158-59 (Pa. Cmwlth. 2001) (quoting *Lance's Appeal,* 55 Pa. 16, 25-26 (1867)) (emphasis added).

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Assuming this Court decides to grant Plaintiffs all the relief they request, any hypothetical property owners desiring to have their land condemned—a proposition that strains credulity—would still retain the ability to enter into agreements of sale or lease to accommodate the Mariner East pipelines on their property, if they so choose.

There is simply no way to construe Plaintiffs' complaint as requiring the joinder of other landowners.

Each of Plaintiffs' claims is properly before this Court. For this and other reasons, this Court should maintain jurisdiction over this case, and overrule SPLP's First, Third, and Fourth Preliminary Objections.

C. PLAINTIFFS HAVE STATED CLAIMS UPON WHICH RELIEF MAY BE GRANTED.

Besides its arguments claiming lack of jurisdiction in this Court over the Complaint, SPLP also seeks to dismiss the Complaint for failure to state claims upon which relief may be granted. As they have with the jurisdictional arguments raised in the Preliminary Objections, Plaintiffs have provided a point-by-point rebuttal in their accompanying response to Defendant's Preliminary Objections.

This section of Plaintiffs' Memorandum rebuts the major points underlying the Sixth through Thirteenth Preliminary Objections, and the Supplemental Omnibus Brief arguments going to Plaintiffs' request for preliminary injunction, by explaining that: (1) SPLP lacks certificates of public convenience authorizing the Mariner East pipelines; (2) the 2014 and 2015 orders of the PUC on which SPLP relies so heavily do not relieve it from the requirement to obtain a CPC before building and operating the pipelines; (3) this Court should grant Plaintiffs'

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injunctive relief requests; (4) SPLP is bound by the same restrictions as the sovereign is in its attempt to exercise the sovereign power of eminent domain; (5) SPLP has violated the Environmental Rights Amendment; and (6) SPLP has violated Plaintiffs' due process rights.

1. Defendant's failure to apply for a certificate of public convenience is a bar to the Mariner East pipelines' operation.

§1101 of the Public Utility Code requires a utility company to make an application in order for proposed service to gain initial recognition as a public utility. That recognition is evidenced by a certificate of public convenience. §1102(a) of the Public Utility Code expressly states that additional certificates of public convenience are only granted "upon the application of" a public utility. The procedure to obtain a CPC is codified in §1103.

In addition, the PUC has enacted regulations at 52 Pa. Code §§5.11-5.14 governing applications. In particular, §5.12 sets out in great detail what information is required to be contained in such an application, including that the applicant "[s]tate clearly and concisely the authorization or permission sought." Thus, nothing in the Code or regulations suggests that a CPC may be granted without an application first being submitted, evaluated and approved.

Plaintiffs' Complaint specifically alleges that *SPLP has never applied for nor obtained PUC approval for Mariner East.* Defendant is not now at liberty in Preliminary Objections to state or suggest, contrary to the facts alleged in the Complaint, that it has submitted such an application or that the PUC has approved such an application.[17]

[17] Interestingly, SPLP has never furnished such an application, despite the lack of hesitation on its part to identify other extraneous documents it believes the Court should review on its Preliminary Objections.

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a. Existing CPC's do not cover the Mariner East pipelines' operations.

Defendant points to dicta in the October 29, 2014 PUC Opinion supposedly suggesting that CPC's that existed as of 2002 were sufficient for SPLP to put the two Mariner East pipelines into operation. In footnote 3 of its PO Memorandum, Defendant makes the following claims:

> [3] Because SPLP has been previously certificated by the PUC to provide petroleum and petroleum products pipeline transportation service, any expansion of that service in the same service territory, including Mariner East 2 service, does not require a separate certification of public convenience from the PUC. *See* PUC October 29, 2014 Final Order at 39 (SPLP's "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.*") (emphasis added).
>
> 7

In this connection, Plaintiffs note that Defendant's argument relies heavily on the pre-2002 certificates that supposedly cover the Mariner East expansions. It is "passing strange" then (*Othello Act 1*, *scene 3*, *158–163*) that Defendant has not even seen fit either to quote directly from those certificates or at least attach copies of those certificates to their Preliminary Objections. Hence **there is no factual basis before this Court upon which to draw any inferences as to what those certificates covered or did not cover**. Absent a factual predicate, Defendant's claim as to prior coverage must fail.

With respect to the October 29, 2014 PUC opinion, as before, Defendant has left out pertinent language from the very same paragraph that changes the context significantly. Thus, where SPLP's quotation speaks of "authorized service within the certificated territory," Defendant has left out the earlier sentence where the Commission refers to approval of **intrastate** pipeline service "**through generally identified points**." Service is authorized on a

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route between points that have been identified by the utility applicant. The entire paragraph is as follows:

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

Plaintiffs also note the following significant points in the opinion: (a) The authority is not limited to a specific route; (b) there is room for expansion and upgrading of the authorized service; and (c) the authorized service is intrastate "service to the public" between places within the Commonwealth.

It is not possible to understand completely what the PUC meant by its statements in the above paragraph. If nothing else, however, it is clear the Commission is referring to *intrastate*

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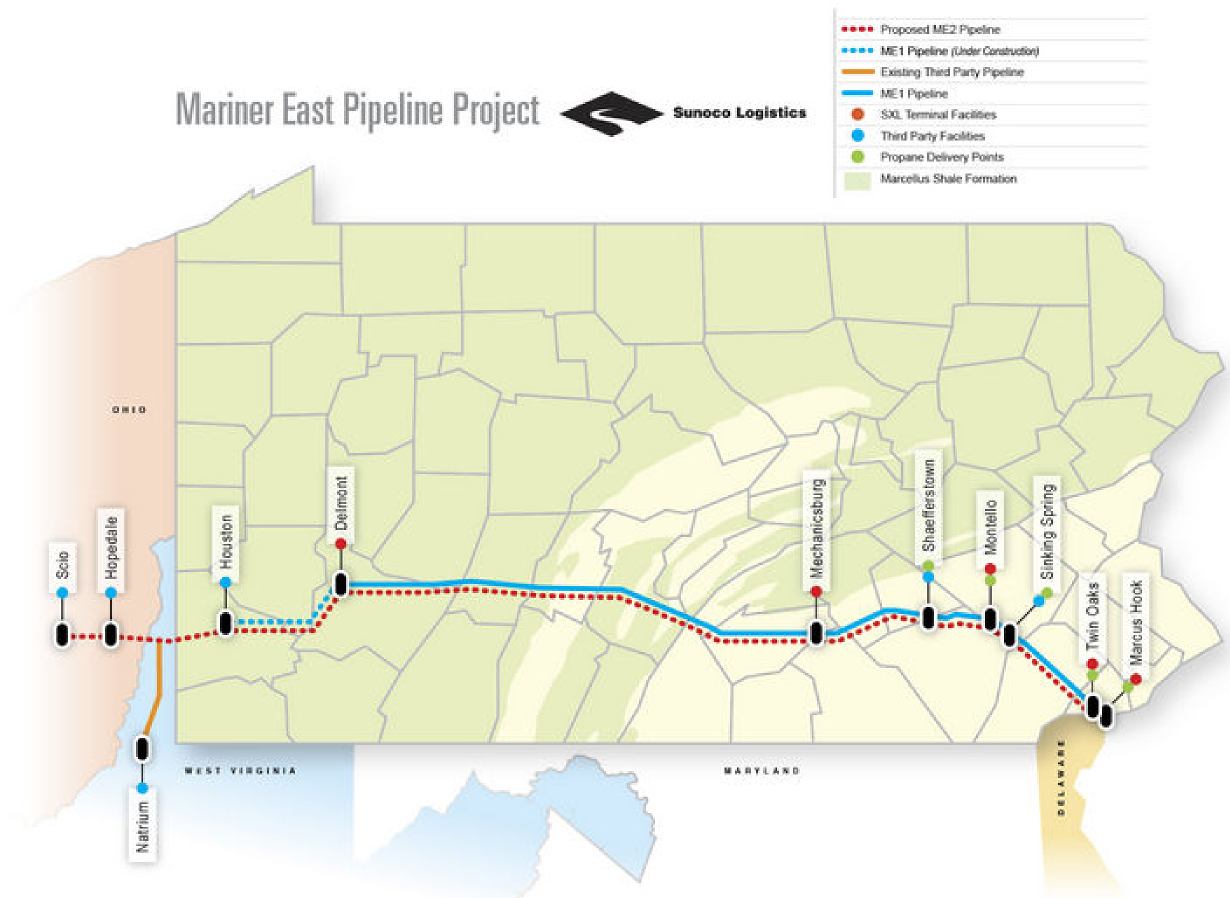
service "to the public" *through generally identified points* and that upgrading may take place in order to continue to provide the *authorized* service.[18]

PUC applications for new routes contain maps. *See*, e.g., Complaint, ¶49, Ex. G, showing a map for Washington County service, and Complaint, ¶51, showing a map for Mariner East lines published by Sunoco Logistics on the Internet. Below is that Mariner East map identifying the generally identified points through which the Mariner East route is supposed to travel:



[18] These general propositions make sense in the context of traditional utilities such as electricity or water distribution companies—as the population grows or spreads out in an area, the utility may grow or spread its distribution network to serve that population.

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Defendant's maps, therefore, show overall routes through generally identified points but the specific route that a pipeline takes obviously will depend on local circumstances and other factors. Certain upgrading and expansion are permitted for the *authorized* service without need for a new certificate but it is implicit that expansion of a pipeline system beyond authorized service through generally identified points does in fact require a new certificate.

Plaintiffs note one other significant point: the PUC states that prior authorization to operate between generally identified points creates a rebuttable presumption that SPLP is a public utility. This last statement entails the obvious proposition that SPLP's status as a public utility may be challenged in an appropriate case. It is *not* the case that once a public utility, always a public utility, for all purposes, despite Defendant's pronouncements to that effect at public meetings. (*See*, e.g., Complaint, ¶110).

While there may be some room for interpretation of this one paragraph of the PUC's October 29, 2014 opinion, it is still sufficiently clear that Defendant's construction of the decision is more than a stretch; it simply confounds logic.

The notion that Mariner East 2 is simply an expansion or upgrading of the intrastate Philadelphia-to-Pittsburgh pipeline system is disingenuous at best. To begin with, SPLP describes Mariner East 2 in various documents as a new, separate, entirely *interstate* pipeline. As alleged in the Complaint, the Mariner East 2 project is designed to deliver NGL's from out of state to destinations out of state. It is planned to be more than 300 miles long. The portion from Houston (Washington County) to Delmont (Allegheny County) is intended to be 51 miles of new

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pipes not even remotely running between generally identified points along the Philadelphia toward Ohio route.

Most pernicious in Defendant's claim is the statement excerpted above that the PUC held that "any expansion of that service in the same service territory"—read "same county"—"does not require a separate certification of public convenience." In fact, **whatever PUC said in its October 29, 2014 opinion, it never stated or implied that an entire county becomes fair game for a private, for-profit, hazardous liquids shipper once a particular route has previously been certificated.** Defendant's statement to the contrary is simply and demonstrably false.

Consider what accepting the force of SPLP's argument would mean. In Defendant's world, a CPC granted in the 1930s upon application of an oil company to build a cross-state petroleum pipeline allows a successor company in the 2010s the right to build any pipeline it wants carrying what are arguably "petroleum products" through any corner of any county in which it is certificated. It does not need to seek any governmental authority to review its exercise of this claimed right.

Normally, limits on the exercise of this right would at least be constrained by a condemnee's ability to raise issues as to the scope and validity of the taking in court at the time of the condemnation. But SPLP's argument goes further. According to SPLP, issues of scope and validity are not for *any* court to decide because "those issues have already been adjudicated and decided [by the PUC] squarely in SPLP's favor." (Supplemental Omnibus Brief at 3).

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For the PUC's dicta speaking of a "rebuttable presumption" of public utility status to have any meaning (to the extent it does), the PUC must be contemplating later judicial oversight of the exercise of eminent domain. SPLP wants to escape oversight altogether.

Without oversight, SPLP runs smack into the proscriptions of the takings clauses of the Pennsylvania and federal constitutions, and problems with substantive due process. In Count III, ¶208 of the Complaint, Plaintiffs allege that "[t]he right to eminent domain now claimed by SPLP for the Mariner East pipeline projects would violate plaintiffs' property rights as guaranteed by the Fifth Amendment to the United States Constitution as incorporated via the Fourteenth Amendment, as it constitutes a private taking for private use rather than for any public purpose."

"The power of eminent domain, next to that of conscription of manpower for war, is the most awesome grant of power under the law of the land." *Winger v. Aires*, 371 Pa. 242, 89 A. 2d 521, 522 (1952). Moreover, the exercise of eminent domain in Pennsylvania is subject to restrictions based on the takings clauses of the U.S. and Pennsylvania constitutions, which require a public purpose for any taking. *See, Kelo v. City of New London*, 545 U.S. 469 (2005); U.S. Const. amend. V; Penna. Const. Art. X, §4.

Exercises of eminent domain are only permissible in Pennsylvania where the public is the *primary and paramount* beneficiary. The Pennsylvania Supreme Court has held, "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." *Middletown Twp.*

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v. Lands of Stone, 595 Pa. 607, 617, 939 A.2d 331, 337 (2007) (internal citations and quotation marks omitted).

At its core, Defendant's position, that a private utility company has a right to use vast and unspecified tracts of land for an indefinite period of time into the future for the purpose of transporting hazardous chemicals to sites outside the Commonwealth, is illogical, contrary to law, contrary to PUC rulings and in gross violation of our citizens' constitutional rights. It is nothing more than a huge land grab and a massive case of corporate overreach, and it is no wonder that SPLP wishes to evade judicial scrutiny.

SPLP's position is really twofold, the first plausible but wrong and the second astonishingly implausible. The first is that the Mariner East projects are for the benefit of the public and that Defendant already has been approved for them. Defendant's pipeline projects have not been approved already; this is addressed elsewhere in Plaintiffs' Memorandum. Nor, as alleged in the Complaint, would this service be "for the public," a requirement under 26 Pa. C.S. §102. (*See* Complaint, ¶¶81-84; Motion for Preliminary Injunction, ¶23).[19]

[19] Defendant quotes extensively from the PUC's October 29, 2014 Opinion and Order for its argument that the "for the public" requirement has been met. (Answer to Motion for Preliminary Injunction, ¶23). The gravamen of the PUC's opinion as stated is that a retail component is not a requirement for public utility service. The PUC cites, e.g., *Rural Telephone Co. Coalition v. Pa. PUC*, ___ Pa. Cmwlth. ___, 941 A.2d 751 (2008), for this proposition. In *Rural Telephone*, the Commonwealth Court did affirm that service "for the public" does not have to be actually used by the entire public but simply has to be *available* to the entire public. *See also*, *Waltman v. Pa. PUC*, ___ Pa. Cmwlth. ___, 596 A.2d 1221, 1223-24 (1991), *aff'd* 533 Pa. 304, 621 A.2d 994 (1993).

Presumably, the point of Defendant's argument, therefore, is that in the present case, even if Plaintiffs are correct in asserting that the NGL buyers are overseas industry, the "public" could purchase NGL's from SPLP as well. Hence, since it is available to everyone, the shipping of NGL's is "for the public."

This argument fails for a number of distinct reasons. First, the argument—once again—depends heavily on this Court accepting SPLP's version of facts, contrary to the facts stated in the Complaint. As alleged in the Complaint, this is not a case at all akin to delivery of energy or telecommunications services to intermediate providers who, in turn furnish service to everyone in the state. As the Complaint states plainly, it is a case where the Pennsylvania public is not even in the loop. Second, it relies on a non-final, mooted opinion issued on the most

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The second and more interesting of SPLP's proposition is the claim that SPLP *currently* meets the Fifth Amendment's requirement that its unspecified, anywhere-in-a-county eminent domain prospects are for public use; that is, a use for which the public is the primary and paramount beneficiary.

An illustration makes this easier to understand. Thus, the area of Chester County, Pennsylvania is approximately 760 square miles.[20] A Sunoco Logistics online interactive map discloses that the total length in miles of SPLP's rights of way in Chester County comes to 102.89 miles.

Although the Complaint does not set forth the average width of pipeline easement, if for the sake of argument it were even 200 feet wide—a width no one would claim—then the space used up by SPLP pipeline easements would be approximately 3.9 square miles. That means that current pipeline easements in Chester County amount to less than 1/2 of 1 percent of Chester County. Put another way, 99.5% of the County is not covered by SPLP easements.

The same analysis can easily be done for all the other counties in which SPLP has run pipelines. The Court can readily see that, with certificated rights for a limited purpose to only a

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favorable standard of review for SPLP. *See*, *infra*, at §IV.C.1.b.(1). Third, and crucially, is that fact that this suit is at core about challenging eminent domain rights. Even if SPLP met the PUC's standard for service "for the public," eminent domain could not be exercised without a showing that the public is the primary and paramount beneficiary of the project. While a proper use might incidentally benefit the company, in the case at bar Plaintiffs allege that SPLP's primary and paramount purpose is not to benefit the public and the Complaint makes very specific factual allegations to warrant that conclusion.

[20] Wikipedia, "Chester County, Pennsylvania," available at https://en.wikipedia.org/wiki/Chester_County,_Pennsylvania, accessed on October 18, 2015.

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small percentage of Pennsylvania land—less than 1%—SPLP makes claim to more than forty (40%) percent of the Commonwealth's 46,055 square-mile land mass.[21]

That is no different from the proposition that an unknown variable—"X"—has the ability to meet the public's needs. One cannot possibly know if that is true, however, unless and until a project is fleshed out and the public use is adequately described. That is, without a specific written application to the PUC for a specified route—complete with a description of the pipeline's purpose and an eventual environmental assessment—SPLP may not claim that it is entitled to eminent domain rights to the remaining 99.5% of the counties in which it was previously certificated. Such a sweeping "carte blanche" assertion of rights clearly is constitutionally infirm under both the state and federal constitutions. Hence, whether SPLP asserts this position or the PUC asserts the position, landowners' rights under both constitutions bar any such sweeping claims.

Whatever the PUC found in its various inapplicable orders, SPLP cannot point to any language where the PUC found that any specific route met the requirements of takings law, or that the Mariner East pipelines are for the "primary and paramount" benefit of the public.

Therefore, SPLP's argument that pre-existing CPC's are all SPLP needs to justify its exercise of eminent domain for the Mariner East projects is unsustainable.

b. The various PUC orders that SPLP references do not support Defendant's contentions.

SPLP points to five PUC orders as supporting its argument that PUC has already determined it may exercise eminent domain to build its Mariner East pipelines.[22] Setting aside

[21] Wikipedia, "Pennsylvania," available at https://en.wikipedia.org/wiki/Pennsylvania, accessed on October 12, 2015.

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the issue that none of these orders was issued in response to an SLPL application to the PUC to build and operate either Mariner East 2 or the full length of Mariner East 1, these orders do not provide SPLP the support it needs to sustain its argument.

While Plaintiffs can in many places speak to the Mariner East pipelines collectively, when it comes to the PUC orders, the Mariner East 1 pipeline, which has a new segment but is mostly pre-existing, must be distinguished from the pipelines that would be completely new.

Contrary to the undistinguished "Mariner East pipeline service" SPLP speaks of in discussing the orders (*see* Supplemental Omnibus Brief at 21), each of the five orders SPLP relies on relates to the Mariner East 1 pipeline; none of them authorizes anything whatsoever with respect to the Mariner East 2 pipeline. (*See* Plaintiffs' Response to Preliminary Objections, ¶22).

As noted already above, the October 29, 2014 Opinion and Order did not authorize anything or establish any precedent. However, the remaining four referenced orders—the Washington County CPC Order, the two tariff orders, and the July 2014 order granting what Plaintiffs in their Complaint called the Petition for Restoration—all authorized various activities along the Mariner East 1 pipeline.[23] The totality of what the PUC did was to authorize intrastate

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[22] In SPLP's Memorandum of Law in opposition to the Motion for Preliminary Injunction, at page 6, SPLP also refers this Court to various opinions in the PUC *In re Laser Northeast Gathering Co.* docket for the proposition that "[t]he Commission has previously specifically recognized SPLP's public utility status." *See* Docket No. A-2010-215337. These opinions preceded the Mariner East project, and hence obviously did not speak to the status of proposed service over those pipelines as public utility service or not. Moreover, this is another example of SPLP referring this Court to non-final mooted opinions. In the *Laser* case, several appeals of the PUC's interlocutory decision were filed with the Commonwealth Court, and the parties settled the matter before those appeals could be heard. *See* PUC's December 5, 2011 Order on that docket.

[23] SPLP tries to catch Plaintiffs in a "gotcha" with respect to the Washington County certificate, writing that "Plaintiffs incorrectly state that, with respect to service in Washington County, the only CPCs obtained were

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service at various tariff rates, and allow intrastate service to extend into Washington County along a designated route.

The authorization of certain types of service confirms a fact the parties do not dispute—that the PUC has regulated SPLP's service over the old Philadelphia-to-Pittsburgh pipeline system. (*Cf.* Complaint, ¶¶6-7) (noting existing system). The authorizations also confirm that intrastate service is proper over what SPLP is now calling the Mariner East 1 pipeline.

But a tariff order does not authorize *construction* of or use of eminent domain for a transmission pipeline along a particular route, and the Petition for Restoration order did not do so either. The Washington County CPC Order did authorize the expansion of Mariner East 1 in Washington County, but it was granted based on the false representations of SPLP that it would provide intrastate service to the public in Washington County.

In essence, SPLP cannot use PUC orders concerning imaginary or *de minimis* intrastate service on one pipeline to justify its use of eminent domain for two interstate pipelines. Each such order is addressed below to explain for this Court what the PUC did and did not decide.

2013 and 2014 *FERC* CPCs. *See* [Complaint,] ¶ 195. … Here again, SPLP feels compelled to set the record straight." (Supplemental Omnibus Brief at 21) (emphasis in original).

SPLP apparently failed to read the very first word in the cited paragraph. The Complaint at Paragraph 195 reads, in whole: "**Except** with respect to service in Washington County, the only certificate of public convenience obtained by SPLP relative to Mariner 1 was the 2013 FERC certificate permitting SPLP as an interstate common carrier. The only certificate of public convenience obtained by SPLP relative to Mariner 2 was the 2014 FERC certificate permitting SPLP as an interstate common carrier," (emphasis added).

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(1) October 29, 2014 PUC Opinion and Order

Defendant claims that the PUC's October 29, 2014 Opinion and Order[24] make a separate application for the Mariner East pipelines unnecessary. In fact, the Order was not final and by its own terms did not decide SPLP's right to create and operate any Mariner East pipeline.

The PUC made very clear that,

> In this proceeding, the Commission has been asked to decide a very narrow question: whether enclosures (walls and a roof) that are built around and over a valve control or pump station should be exempt from municipal zoning regulation. … SPLP is not seeking (1) a Certificate of Public Convenience; (2) authorization to build the Mariner East pipeline or any facilities attendant thereto (such as valve control or pump stations); (3) approval of the siting or route of the pipeline; or (4) a finding that the proposed pipeline complies with relevant public safety or environmental requirements. Those issues are outside the scope of this proceeding.

Clearly, in light of its explicit holdings, any PUC commentary on these issues is dicta. Moreover, the PUC viewed the facts before it "in the light most favorable to Sunoco, as the non-moving party." (SPLP Ex. C at 32). Further, the proceeding out of which this order issued was mooted when SPLP withdrew its petitions. The PUC's phrasing here, notably, would suggest that as of October 29, 2014, the PUC believed that SPLP had not proved or sought to prove that it was entitled to any of the authority that it now claims it received at that time.[25]

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[24] SPLP falsely characterizes this Order as "Final," (PO Memorandum at 12), despite the fact that it was an order on appeal of a grant of preliminary objections to SPLP's petitions, and directed a remand to the administrative law judges for further proceedings. Those proceedings ended when SPLP withdrew all 31 petitions, rendering the commission's decision moot.

[25] SPLP cites dicta in the Opinion that suggests the opposite of the PUC's explicit holdings. Defendant offers no authority, however, for the proposition that explicit holdings may be overridden by dicta. Whether *existing* CPC's covered the Mariner East pipelines is addressed above.

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(2) August 21, 2014 PUC CPC Order

This Order grants a certificate "to offer, render, furnish, or supply intrastate petroleum and refined petroleum products pipeline service to the public in Washington County, Pennsylvania." (SPLP Ex. E at 5). The Order does not authorize any route outside of Washington County, and it only applies to "*intrastate ... service to the public in Washington County*" (emphasis added).

Despite the express limitation that the approval was for intrastate service to the public within Washington County, Plaintiffs believe and allege in their Complaint (*see*, e.g., ¶47) that NGL's are not being shipped intrastate through Mariner East 1. In no way can this Order be construed as authorizing the cross-state routes of Mariner East 1 or 2.

As noted above, if the primary and paramount purpose of the pipeline in Washington County is interstate service not to the public—as alleged in the Complaint—then under 66 Pa. C.S. §104 the PUC is without jurisdiction to issue the CPC and SPLP cannot use eminent domain to take the land for the pipelines. Any takings under these circumstances would further be forbidden under both the state and federal constitutions.

Because governmental proclamations must be read, if possible, to be authorized and constitutional, the recent Washington County CPC must be read as only authorizing intrastate service to the public within Washington County. Since the Mariner East 1 pipeline is an interstate pipeline intended to be transporting ethane for sale primarily overseas, (*see* Complaint, ¶¶68-71, 154-161), and the Mariner East 2 pipeline was not authorized by this Order and CPC,[26]

[26] SPLP misleadingly states in its Memorandum of Law in opposition to the Motion for Preliminary Injunction, at page 11, that, in its application for this CPC, "SPLP indicated that it intended to expand the capacity

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this Order and the CPC decidedly do not support the construction or use of eminent domain for either.[27]

(3) August 21, 2014 PUC Tariff Order

The August 21, 2014 PUC Order concerning tariffs explicitly concerns shipments along the existing Philadelphia-to-Pittsburgh pipeline system at a time before the Mariner East 1 project is even completed. (SPLP Ex. F at 2) (concerning shipment of propane "prior to the full completion of the Mariner East pipeline"). The Order does not authorize anything except a waiver of certain procedures and approval of the proposed shipping charges.

(4) July 24, 2014 PUC Order

The July 2014 Petition for Restoration Order reflected SPLP's claimed change of design for the Mariner East 1 pipeline, and claimed new intention to transport NGL's not just interstate to the Marcus Hook facility, but intrastate to the Twin Oaks facility (about two miles up the road and connected by pipeline from Marcus Hook).[28] The PUC found that the restoration of service along a discontinued section of the pre-existing Philadelphia-to-Pittsburgh pipeline, done as part of the Mariner East 1 project, would be in the public interest. This Order did not state that SPLP has eminent domain power with respect to any pipeline, or authorize new construction, or count as a CPC. Nothing more can be read into this order, which specifically states that "any issue or

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of the Mariner East project by implementing Mariner East 2." While SPLP did state in its application that it would expand the capacity, it never mentioned that it intended to build entirely new pipelines, including along entirely new routes. Regardless, the PUC did not authorize any such pipelines.

[27] In case it bears repeating, the mere fact that the PUC issued orders about SPLP's activities does not mean that SPLP may use eminent domain for whatever purposes and in whatever manner it wants. *See supra* at §IV.C.1.

[28] There remains a factual question, unanswerable on Preliminary Objections, about whether, if any shipments are being made to Twin Oaks, that product is not being continued on to Marcus Hook for further shipment interstate.

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argument that we do not specifically address herein has been duly considered and will be denied without further discussion." (*Id.* at 4).

(5) January 15, 2015 PUC Tariff Order

Like the other tariff order, this Order only authorizes a waiver of certain procedures and approval of the proposed shipping charges. No authorization needed for the use of eminent domain is supplied here. Unlike the other tariff order, this Order authorizes tariffs for hypothetical future shipments along a portion of pipeline which "Sunoco indicates that they … will … construct … from Houston to Delmont," (SPLP Ex. G at 2). Again, it is not clear from this filing whether any intrastate shipments actually will or did occur. Moreover, the PUC made clear that "approval of this filing does not constitute a determination that this filing is lawful, just, or reasonable, but only that further investigation or suspension does not appear to be warranted at this time." *Id.* at 4.

2. This Court may grant Plaintiffs' requested injunctive relief.

Count VIII of Plaintiffs' Complaint is entitled "Injunctive Relief." Plaintiffs in this count seek both preliminary and final injunctive relief. Plaintiffs deMarteleire and Bomstein also filed a separate Motion for Preliminary Injunction.

Defendant SPLP in its Eighth Preliminary Objection asserts that the Complaint is deficient in two respects as regards injunctive relief: (a) a Court may not order preliminary or injunctive relief in the context of a condemnation proceeding, and (b) Plaintiffs have not alleged facts that would satisfy the six essential prerequisites to obtain a preliminary injunction.

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SPLP also filed an Answer to the Motion for Preliminary Injunction. The arguments made there are essentially the same as the arguments in Defendant's Eighth Preliminary Objection. Below, Plaintiffs address both arguments.

First, and most obviously, the instant litigation is not a condemnation proceeding. There has been no declaration of taking filed against deMarteleire and Bomstein or against Clean Air Council. SPLP is certainly aware of this circumstance. Apart from its own knowledge, neither the Complaint nor the Motion alleges that condemnation has begun. In fact, the predicate of the Motion is that a condemnation proceeding is imminent but it has not yet commenced. In short, the assertion that a standard enunciated in condemnation proceedings applies to the case at bar is entirely frivolous.

Second, the Complaint makes two distinctive injunction claims: one for a preliminary injunction and the other for a permanent injunction. Thus, even if preliminary relief were not appropriate it might well be the case that permanent injunctive relief would be. In SPLP's objection and Answer, however, Defendant appears to conflate the two and does not address the two separate standards.

Defendant's summary of the prerequisites to preliminary injunctive relief is accurate. Plaintiffs' Complaint and Motion aver that each of those six elements has been made out on the facts of the case as alleged.

For purposes of Preliminary Objections, all of Plaintiffs' factual allegations are deemed true. For purposes of Plaintiffs' Motion, however, Defendant is entitled to set forth its version of the facts in its Answer and SPLP has done so. Which version of facts is correct, however, is not a matter that can be determined at this stage; only an evidentiary hearing may resolve that. The

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matter before this Court, then, is whether or not, on the facts alleged in the Complaint and Motion, a basis for preliminary relief has been made out.

That said, Defendant's first contention is that immediate and irreparable harm are not threatened against deMarteleire and Bomstein because (a) SPLP has not started condemnation, and (b) individual Plaintiffs could use the EDC procedures to protect their interests. The latter claim already has been addressed above; suffice it to say, the EDC would not necessarily apply and anyway the EDC does not permit consideration of many of Plaintiffs' objections to condemnation.[29]

The former claim also ignores the very premise of Plaintiffs' request for injunctive relief. Once SPLP files a declaration it has title to deMarteleire and Bomstein's property, even though under 66 Pa. C.S. §104 it has no right to eminent domain for Mariner East 2 and even though it has not met its obligations under the Environmental Rights Amendment. Moreover, the

[29] Two other facets of SPLP's argument, though hinging on the inapplicable EDC, are nonetheless worth rebutting. First, SPLP says that

> under the Eminent Domain Code, a condemnor's title is defeasible until any preliminary objections are decided. *Vecchione v. Cheltenham*, 320 A.2d 853, 855 (Pa. Commw. Ct. 1974) ("The fact that the hearing occurred after the passage of title is rendered irrelevant because, by the terms of Section 406€ condemnor's title is defeasible until the preliminary objections are decided.)

(Supplemental Omnibus Brief at 8). The *Vecchione* court was not considering whether irreparable harm would occur, but rather whether the transfer of title through the procedures of the EDC deprived the condemnee of due process. The Commonwealth Court there found that eminent domain was a "valid governmental interest [that] would justify postponement of the due process right for a hearing until after the taking of the property." *Id.* This is obviously not the same analysis as irreparable harm.

Second, SPLP argues that its posting of a bond will prevent any irreparable harm to Plaintiffs. This argument fails. Irreparable harm is by definition harm that cannot be compensated by money. Also, SPLP's posting of a bond would not even necessarily compensate for damages. As the Order attached as Exhibit A to SPLP's Supplemental Omnibus Brief noted, even the court otherwise ruling in SPLP's favor "had questions as to the adequacy of the bond" in that case.

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Complaint and Motion allege the various steps SPLP has taken under color of 66 Pa. C.S. §309, surveying the property and trespassing on it, all in anticipation of condemnation. There is only one reason that Defendant has been trespassing on Plaintiffs' property: to complete its survey and prepare for condemnation.

As regards Plaintiffs' averment that greater harm will result from denying an injunction than granting it, SPLP makes the sweeping assertion—citing no facts whatsoever—that it and the public will suffer significant harm if a preliminary injunction is granted. Whatever metric has been utilized in support of Defendant's broad statement, however, is nowhere shared in Defendant's objections, memorandum or answer to the motion.

DeMarteleire and Bomstein have asserted that the transfer of title to SPLP—a private, for-profit enterprise engaged in shipping hazardous liquids under high pressures for delivery outside the Commonwealth—is irrevocable. As owners of real estate, they allege that there will be a permanent diminution in value of their property, both value in terms of their enjoyment and value in terms of marketability.

In the event a preliminary injunction is granted, there presumably will be a final hearing date at which time the Court will rule whether or not a final injunction should be imposed. Assuming that discovery takes place in the interim, the time interval between the two hearings might amount to six to nine months.

SPLP cannot credibly argue that that period will cause it any harm at all. First, as a FERC-certified interstate carrier of hazardous liquids engaged in delivery to destinations outside the Commonwealth, it does not even have the right of eminent domain. Second, even if for some reason Defendant prevails on its claim that it is subject to PUC regulation, Defendant still must

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file an application with the PUC for approval of the Mariner East 2 project, complete a proper environmental assessment in conformity with the Environmental Rights Amendment, and otherwise obtain properties along the proposed route through easement agreements or eminent domain. The notion that SPLP can demonstrate it will suffer harm from its short-term inability to acquire one property along the route is simply unfounded and unprovable. *See McCurdy v. Mountain Valley Pipeline, LLC*, C.A. No. 1:15–03833, 2015 WL 4497407 (S.D.W.V. July 23, 2015) ("[C]ommon sense … allows the court to recognize that a project of this magnitude cannot adhere to a rigid schedule and does not hinge on plaintiffs' property alone. It would be improper for this court to attribute any schedule delays, incurred for any reason, solely to defendant's inability to survey plaintiffs' property.").[30]

The third recited element requires evidence that there has been wrongful conduct and that a preliminary injunction would restore the *status quo ante.* Defendant contends that there has been no wrongful conduct. Plaintiffs' Complaint and Motion recite facts supporting a finding that there have been repeated trespasses by this private enterprise that lacks the power of eminent domain. If Plaintiffs' allegations are believed—as they must be for purposes of Preliminary Objections—then deMarteleire and Bomstein already have been the victims of wrongful conduct.

A preliminary injunction in Plaintiffs' favor may be as simple as a "stay away" order. That would restore Plaintiffs to the position that they were in prior to SPLP's trespasses.

[30] Plaintiffs cited to *McCurdy* in their Complaint at ¶241, but SPLP has made no attempt to distinguish it.

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Plaintiffs submit that the present activities and anticipated future activities of SPLP are actionable, that their right to relief is clear and that they are likely to prevail on the merits. For the reasons set forth above, Plaintiffs believe that this element has been made out.

The injunctive relief being sought by Plaintiffs in a preliminary decree is simply a stay-away order. Plaintiffs suggest that such an order is reasonably suited to abate the offending activity.

Plaintiffs submit that the public interest will not be adversely affected by granting preliminary relief to deMarteleire and Bomstein pending a final hearing. The relief requested will not apply to adjacent or other property owners. Nothing in the injunction will prevent SPLP from entering easement agreements with the many other property owners along the proposed pipeline. Indeed, the granting of the motion will afford the parties an opportunity for the Court to resolve important legal issues and clarify the rights of property owners with respect to the proposed Mariner East 2 pipeline.

Finally, at the close of evidence in this case, the Court will be asked by Plaintiffs Clean Air Council and deMarteleire and Bomstein to declare their rights and enter a final injunction against SPLP with respect to SPLP's statewide eminent domain rights. The proposed scope of such a decree will extend far beyond deMarteleire and Bomstein's claims.

In *Buffalo Twp. v. Jones*, 571 Pa. 637, 813 A.2d 659, 663 (2002), our Supreme Court wrote that:

> Initially, we note that in order to establish a claim for a permanent injunction, the party must establish his or her clear right to relief. *See Boyle v. Pennsylvania Interscholastic Athletic Ass'n., Inc.,* 676 A.2d 695, 699 (Pa.Commw.1996). However, unlike a claim for a preliminary injunction, the party need not establish either

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> irreparable harm or immediate relief and a court "may issue a final injunction if such relief is necessary to prevent a legal wrong for which there is no adequate redress at law." *Soja v. Factoryville Sportsmen's Club,* 361 Pa.Super. 473, 522 A.2d 1129, 1131 (1987).

Hence, a clear right to relief in circumstances when there is no adequate remedy at law is sufficient for the granting of a permanent injunction. Plaintiffs submit that, in the event this Court grants declaratory relief, finding that SPLP does not have eminent domain rights, or that SPLP may not proceed with Mariner East 2 without a proper CPC, or that SPLP may not proceed unless and until SPLP conducts a proper environmental assessment, then at that time the entry of a permanent injunction will be appropriate. Until such time as this Court hears all the evidence, however, it is not in a position to determine Plaintiffs' right to a permanent injunction.

In light of the foregoing, Plaintiffs' Count VIII and deMarteleire and Bomstein's Motion should not be dismissed.

3. In acting under color of sovereign authority in attempting to exercise the sovereign power of eminent domain, SPLP is bound by constitutional restrictions on the Commonwealth's power.

SPLP wants immunity from constitutional provisions. (*See* Eighth through Twelfth Preliminary Objections). Because it clothes itself in the power of the sovereign in claiming a right to exercise eminent domain, it may not avoid the sovereign's responsibilities.

The power of eminent domain is "an attribute of sovereignty, inherent in the State, **to be exercised subject to applicable provisions of the Constitution** and in accord with statutes regulating procedure." *Peters v. Reading,* 321 Pa. 220, 221, 184 A. 23, 24 (1936). While the power of eminent domain is "generally exercised by the State" it is also sometimes exercised "by agencies to which the State delegates the power, such as municipal corporations and others

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sometimes designated quasi-public corporations." *Id.* Where a private entity is exercising a power of the sovereign, constitutional restrictions apply. The United States Supreme Court has given the exercise of eminent domain as an example of where the Fourteenth Amendment would adhere to private parties, precisely because it is a power "traditionally associated with sovereignty." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352-53, 95 S. Ct. 449, 454, 42 L. Ed. 2d 477 (1974) (discussing state action under the Due Process clause); *see also Williams v. City of St. Louis*, 783 F.2d 114, 117 (8th Cir. 1986) (considering exercise of eminent domain to be action under color of state law).

Corporations exercising the power of eminent domain must consider in particular the constitutional protections afforded to private property by due process, restrictions on takings, and the Environmental Rights Amendment. The use of the power of eminent domain is subject to the "Constitutional mandates of the Fifth and Fourteenth Amendments." *Balent v. City of Wilkes-Barre*, 542 Pa. 555, 565, 669 A.2d 309, 314 (1995). The Environmental Rights Amendment also requires restraint in the use of eminent domain, whether directly by the state or by a purported utility company. *Robinson Twp. v. Commonwealth,* 623 Pa. 564, 83 A.3d 901, 953–54 n.42 (2013).

The *Feudale* case SPLP cites, holding private parties not subject to the ERA, is wholly inapplicable. In *Feudale*, the plaintiff challenged "Aqua's waterline replacement project, for which Aqua sought and received the appropriate permit from the DEP." *Feudale v. Aqua Pennsylvania, Inc.*, No. 335 M.D. 2014, ___ A.3d ___, 2015 WL 4461069, at *2 (Pa. Cmwlth. July 22, 2015). There was no allegation in that case that, as here, the private actor was acting under color of state law.

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The law applies constitutional restrictions to private actors such as SPLP when they act under color of state law. It could not be otherwise. To dispense with the guarantees of the federal and state constitutions so easily by delegation to private parties would be to render them meaningless.

4. Plaintiffs' claims under the Environmental Rights Amendment should not be dismissed.

a. The Environmental Rights Amendment imposes several obligations on SPLP in connection with the Mariner East pipeline projects.

Article 1, §27 of the Pennsylvania Constitution provides:

> **§ 27. Natural resources and the public estate** 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.

The constitutional mandates of the ERA, while quite clear, have been held by our appellate courts to be limited by other constraints, including the right of the public to development of public and private resources in accordance with various legislative mandates.

Payne v. Kassab, 11 Pa. Cmwlth. 14, 312 A.2d 86, (1973), *affirmed* 14 Pa. Cmwlth. 491, 323 A.2d 407, 408 (1974), was the first significant decision under the ERA. It balanced the constitutional and legislative concerns of the substantive guarantee of the ERA in a three-pronged test:

> [I]n exercising judicial review of the propriety of development of property subject to Article I, Section 27, of the Constitution of Pennsylvania, P.S., a court must balance conflicting environmental and social concerns and determine (1) whether the proposed

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> development complies with applicable environmental statutes and regulations, (2) whether a reasonable effort is being made to minimize environmental incursion, and (3) whether the environmental harm which will result so clearly outweighs the benefits to be derived that to permit such development would constitute an abuse of discretion.

In *Pennsylvania Environmental Defense Foundation v. Com. ("PEDF")*, ___ Pa. Cmwlth. ___, 108 A.3d 140 (2015), the Commonwealth Court assessed the state of the law with respect to the *Payne* balancing test and the holdings of a plurality in the seminal case of *Robinson Twp. v. Commonwealth,* 623 Pa. 564, 83 A.3d 901, 950–51 (2013). The Commonwealth Court held as follows:

> Part III of the Pennsylvania Supreme Court's lead opinion in *Robinson Township.* … represents a plurality view of the Supreme Court. The legal reasoning and conclusions contained therein are thus not binding precedent on this Court. Nonetheless, in reviewing the accompanying minority opinions, **it does not appear that any of the concurring and dissenting justices disputed the plurality's construction of the Environmental Rights Amendment, including the rights declared therein and attendant duties imposed thereby on the Commonwealth**. … For our purposes, we find the plurality's construction of Article I, Section 27 persuasive only to the extent it is consistent with binding precedent from this Court and the Supreme Court on the same subject.

108 A.3d 140, 156 n.37 (2015) (citation omitted) (emphasis added).

In light of the *PEDF* ruling, *Robinson Township*'s ERA analysis is considered the law in this jurisdiction except only that the *Payne* three-pronged test for the substantive guarantee of the ERA remains in effect. Because of its importance to the case at bar, Plaintiffs below excerpt for the Court portions of *PEDF* that specify the portions of *Robinson Township* upon which the Commonwealth Court has placed its imprimatur.

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> [T]he first clause of the Environmental Rights Amendment "requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features." …
>
> To balance the "inviolate" rights conferred on the people under the Environmental Rights Amendment with that legitimate state interest, the Supreme Court held that "economic development cannot take place at the expense of an unreasonable degradation of the environment" and that the police power to promote the economic welfare of the citizens "must be exercised in a manner that promotes sustainable property use and economic development."
>
> The second and third clauses of the Environmental Rights Amendment create a public trust in favor of the people… . The Supreme Court described the Commonwealth's trustee obligations as two-fold: "[T]he Commonwealth has an obligation to refrain from performing its trustee duties respecting the environment unreasonably, including via legislative enactments or executive action. As trustee, the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, *e.g.,* because of the state's failure to restrain the actions of private parties…"
>
> The second obligation peculiar to the trustee is ... to act affirmatively to protect the environment, via legislative action. ... [T]he trustee has an obligation to deal impartially with all beneficiaries and ... the trustee has an obligation to balance the interests of present and future beneficiaries. …

PEDF, 108 A.3d at 156-157 (internal citations omitted).

The *Robinson Township* decision in Footnote 41 stated the following concerning implementation of the ERA (emphasis added):

> Pa. Legislative Journal–House at 2272 (proposed amendment is more than statement of policy; **it is intended to create legally enforceable right to protect and enhance environmental quality**); Franklin L. Kury, *Clean Politics, Clean Streams: A*

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> *Legislative Autobiography and Reflections,* app. C (2011) (appendix includes copy of questions and answers document distributed to public prior to referendum on Environmental Rights Amendment).

At Footnote 42, the Supreme Court quoted from the said questions and answers:

> Q. Won't the right of eminent domain still exist?
>
> A. Yes, however, it will have to be exercised in conformity with this amendment. **A highway department or utility company could not take land without fully considering the public's right to a decent environment.** [The amendment] should force a much more judicious use of eminent domain.

83 A.3d at 953-954 (emphasis added).

It is clear, then, that a utility company may not take land without first fully considering the public's right to a decent environment. *PEDF* forbids a taking potentially impacting "the natural, scenic, historic and esthetic values of the environment" without full consideration of the public's rights under the ERA.

The instant case is unusual in that SPLP is not a state-operated agency or a municipally operated agency or redevelopment authority. Nonetheless, in claiming the right to exercise the power of eminent domain, which is a power belonging to the sovereign, as explained in the preceding section of this brief, SPLP must be deemed to have the same responsibilities as state and municipal agencies. Defendant may not escape its responsibilities under the ERA when proposing to build a new, three-hundred-mile-long, hazardous liquids pipelines through the backyards of unwilling citizens of this Commonwealth.

Where and how the ERA must be considered in the eminent domain process is not obvious. That it must be considered at some stage in the process is indeed obvious. As alleged

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in the Complaint, it has never taken place in connection with the Mariner East 1 or Mariner East 2 projects.

That said, Plaintiffs submit that the holdings of *PEDF* and the *Payne* standards for the substantive guarantee of the ERA may readily be adapted to the present matter. Plaintiffs' analysis is set forth below.

b. The Complaint sets forth allegations which, taken to be true in considering these Preliminary Objections, establish violations of the ERA.

As explained in *PEDF* above, "the first clause of the Environmental Rights Amendment requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features." *PEDF*, 108 A.3d at 156 (internal quotation marks omitted). This duty cannot be discharged merely by complying with applicable environmental statutes and regulations, or the entire ERA would amount to surplusage. In Paragraphs 172-173 of the Complaint, Plaintiffs allege that, "There is no evidence in the record before PUC that PUC or SPLP took environmental considerations into account in any of the proceedings upon which SPLP bases its claims of right to the power of eminent domain. Plaintiffs believe and aver that environmental considerations were never properly considered by the PUC or SPLP in any such proceedings, if they were considered at all."

Thus, SPLP has violated the ERA by failing to conduct the needed pre-decisional environmental analysis.

Moreover, applying the *Payne* test, it is clear that SPLP has also violated the substantive guarantee of the ERA:

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(1) First Prong

The proposed Mariner East pipeline projects do not comply with applicable statutes and regulations. The Complaint specifically alleges violations and potential violations at Paragraphs 176-180. For purposes of the present Preliminary Objections, these factual allegations must be deemed true. Accordingly, the proposed projects do not comply with all applicable environmental statutes and regulations.

(2) Second Prong

Payne requires an examination of whether a reasonable effort is being made to minimize environmental incursion. Plaintiffs contend that this question cannot be addressed unless one first determines whether or not there is environmental incursion and, if yes, the extent which there is environmental incursion. Only then can a plan be formulated to minimize the deleterious environmental effects.

As alleged in Plaintiffs' Complaint and explained above, there has been utterly no evaluation of environmental incursion by SPLP except, at best, for the minimum required by statute.

For purposes of the present Preliminary Objections, these factual allegations must be deemed true. Accordingly, SPLP has not made a reasonable effort to minimize environmental incursions.

(3) The Third Prong

The third prong of the *Payne* test is whether the environmental harm which will result so clearly outweighs the benefits to be derived that to permit such development would constitute an abuse of discretion. This specific balancing constitutes the essence of the *Payne* standard.

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Defendant, however, cannot meet this requirement because there has never been an evaluation of the environmental harm posed by the Mariner East 1 and 2 projects.

PEDF requires a utility company to fully consider the public's right to a decent environment before exercising the eminent domain power. Defendant has not considered the public's right to a decent environment. Defendant cannot meet even one of the *Payne* requirements. For purposes of SPLP's Preliminary Objections, then, the contention that Plaintiffs have not set forth a cognizable environmental rights claim must be dismissed.

5. **The exercise of eminent domain power by SPLP for Mariner East 1 and 2 violates and would violate due process rights under the state and federal constitutions.**

Both the individual Plaintiffs and Clean Air Council, on behalf of its members, will suffer a violation of their procedural due process rights under the 14th Amendment to the United States Constitution as well as Article I, § 1 of the Pennsylvania Constitution if they do not have an opportunity to be heard before this Court on the claims set forth in the Complaint.

First, as established above, SPLP has at its option two routes for conducting takings: through the EDC or through the procedures of §1511(g)(2), which avoid §306 entirely. *See* §IV.B.2., *supra*. But if SPLP chooses to condemn the individual Plaintiffs' property using the EDC, it is not true that Plaintiffs will have an opportunity to raise all of their arguments set forth in the Complaint in preliminary objections in that proceeding.

Although Defendant argues that Plaintiffs must assert their claims under §306(a) of the EDC, Pennsylvania courts have consistently held that "the scope of preliminary objections under Section [306(a)] is to be limited." *Simco Stores v. Redevelopment Authority of City of Philadelphia*, 455 Pa. 438, 317 A.2d 610, 613 (1974). *See also In the Matter of Condemnation*

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of Property Situated in Perry Township, ___ Pa. Cmwlth. ___, 938 A.2d 517, 520 (2007) ("This Court also notes that preliminary objections to a condemnor's power and right to condemn are limited to 'challenging the condemning authority's grant of power from the legislature through appropriate enabling statutes.'").

Where a plaintiff is not actually challenging the legislature's grant to a condemnor of the power to condemn, but rather is alleging that the condemnor has failed to follow all necessary authorizing procedures in order for it to exercise that power, that is not a challenge directly related to the taking, but rather to a collateral procedure. Courts have held that such collateral challenges are not properly raised under §306(a), but rather are properly raised in equity. *See Simco Stores*, 317 A.2d at 613-14 (holding that appellants could not raise in preliminary objections to a condemnation proceeding grievances that the condemnor had failed to comply with various procedures necessary to give it the authority to condemn); *In the Matter of Condemnation of Property Situate in Perry Township*, 938 A.2d at 520 (holding that section 306 "does not include challenges to [the condemnor's] authorizing procedure"); *In re Legislative Route 58018*, 31 Pa. Cmwlth. 775, 375 A.2d 1364, 1367-68 (1977) (holding that claims that condemnor failed to comply with procedural requirements "are properly raised before this court only in our original jurisdiction in equity" and that such claims should have been dismissed for lack of jurisdiction when raised in preliminary objections in a condemnation proceeding); *Condemnation of Legislative Route 201*, 22 Pa. Cmwlth. 440, 349 A.2d 819, 821-22 (1975) (holding that, where condemnee claimed that a condemnor had failed to follow procedural requirements before initiating condemnation, "preliminary objections to the declaration of taking

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is not the proper vehicle to challenge such procedures" because such matters are collateral to the condemnation proceeding).

In this case, Plaintiffs' Environmental Rights Amendment and due process claims are similarly collateral to the actual condemnation proceeding and Plaintiffs therefore would not, contrary to what Defendant suggests, have an opportunity to raise them in preliminary objections in eventual condemnation proceedings. *See* §IV.B.2.d. at n.13 (listing cases holding that such claims are collateral).

With respect to these claims, Plaintiffs are not arguing that the Public Utility Code would not grant a legitimate public utility that was properly certificated by the PUC the power of eminent domain with respect to a given project. Plaintiffs are instead arguing that Defendant has not followed the necessary authorizing procedures of obtaining valid CPC's from the PUC and engaging in the consideration of the environmental impacts of the Mariner East pipeline projects required by Article I, Section 27 of the Pennsylvania Constitution. These claims are collateral to any actual eventual condemnation proceedings under the EDC.

Plaintiffs' ERA claim in particular clearly cannot be raised in preliminary objections later because courts have explicitly held that claims pursuant to Article I, Section 27 are collateral and may not be raised in preliminary objections in a condemnation proceeding. *In re Legislative Route 58018*, 31 Pa. Cmwth. 275, 282 (1977) (holding that a claim under Article I, Section 27 in particular was properly raised in equity and should have been dismissed for lack of jurisdiction when raised in preliminary objections in a condemnation proceeding); *see also* §IV.B.2.d. at n.13. Plaintiffs would therefore indeed suffer a deprivation of due process and an opportunity to be heard on these claims if this Court does not hear them.

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Moreover, the cases Defendant cites to support its argument that Plaintiffs can obtain sufficient due process through preliminary objections in an EDC proceeding are inapposite. Defendant cites *In the Matter of: Opening a Private Road for the Benefit of Timothy P. O'Reilly*, 607 Pa. 280, 5 A.3d 246 (2010) for the proposition that "a wide variety of constitutional challenges can and have been heard on preliminary objections under the Eminent Domain Code by Pennsylvania courts." (Supplemental Omnibus Brief at 25). However, that case involved an action commenced under the Pennsylvania Private Roads Act, not a condemnation under the EDC, so the Supreme Court did not even address the Eminent Domain Code, let alone a challenge on preliminary objections under §306.

Defendant also cites *Matter of the Condemnation of the Surface of that Certain Tract of Land Located in the Borough of Centralia, Columbia County, Pennsylvania*, ___ Pa. Cmwlth. ___, 658 A.2d 481 (1995) for the same proposition. This case too is inappropriately cited. Defendant represents to the Court that this was a case "denying preliminary objections to a declaration of taking that asserted, *inter alia*, that the declaration violated the due process protections of the United States Constitution … ." (Supplemental Omnibus Brief at 26). In fact, this was a Commonwealth Court *appeal* from a denial, not a trial-level opinion sustaining or denying any preliminary objections. Moreover, even to the extent that this appellate decision can be characterized as having considered any due process issues at all, which is questionable, the appellate court agreed with the trial court's holding that the condemnee was not entitled to raise the types of factual issues it was asserting in preliminary objections and affirmed the trial court's dismissal of the condemnee's claims without an evidentiary hearing. *Id.* at 484. Thus, if

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anything, *Borough of Centralia* lends support to Plaintiffs' contention that they would not be able to obtain a hearing on their claims through the process provided by the EDC.

In sum, Plaintiffs would not be able to raise their due process and ERA claims in preliminary objections under the EDC and thus would be deprived of due process if this Court does not take jurisdiction over this case.

Plaintiffs also have claims that they have *already* been deprived of their property rights without due process of law as a result of Defendant's actions. Defendant's employees or agents have already entered onto the deMarteleire-Bomstein property without notice or permission and have pounded a survey stake into their backyard. (Complaint, ¶108). This trespass has violated Plaintiffs' property rights. Because Defendant has not sought any certification for the Mariner East 2 project from any agency or regulatory body, Plaintiffs have thus far been deprived of any opportunity to be heard with respect to these issues in violation of their federal and state due process rights, as asserted in Counts V and VI of the Complaint.

Defendant argues that it has made various filings with the PUC which allowed Plaintiffs opportunities to be heard, (*see* Supplemental Omnibus Reply Brief at 24, n.8), however as previously discussed none of those filings related to the Mariner East 2 and at no time has Defendant affirmatively sought PUC approval for the Mariner East 2 project. *See* §IV.C.1.; (*see also* Plaintiffs' Response to Preliminary Objections, ¶22). Moreover, to the extent Defendant seeks to challenge Plaintiffs' well-pled factual assertions relating to its due process claims, preliminary objections for failure to state a claim are simply not the appropriate vehicle—a hearing on the merits is required.

Plaintiffs have sufficiently pled their due process claims, which should not be dismissed.

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D. PLAINTIFFS HAVE STANDING.

Each of the Plaintiffs in this case—Clean Air Council and the individual Plaintiffs deMarteleire and Bomstein—have standing to bring the claims in the Complaint.

1. <u>The individual Plaintiffs have standing.</u>

The individual Plaintiffs deMarteleire and Bomstein have standing to bring their claims as stated in the Complaint.

The rule for standing commonly applied in Pennsylvania, and recently reiterated by the Pennsylvania Supreme Court, is that in order to have standing a party must show that it has a "substantial, direct and immediate interest in the claim sought to be litigated." *Pennsylvania Med. Soc'y v. Dep't of Pub. Welfare*, 614 Pa. 574, 39 A.3d. 267, 278 (2012). *See also William Penn Parking Garage v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269, 280-282 (1975). Plaintiffs deMarteleire and Bomstein meet this requirement.

DeMarteleire and Bomstein's property is directly in the pathway of the proposed Mariner East 2 project, and the Plaintiffs believe that the Mariner East 1 project is currently making use of a pre-existing pipeline through their property in violation of existing easement rights. (Complaint, ¶¶108, 112). Defendant, through its agent, has sent deMarteleire and Bomstein a map depicting their property as "lot 42" on the pipeline route, and in early 2015, without providing any notice or obtaining consent, SPLP agents or employees pounded a survey stake into their backyard. (Complaint, ¶108). SPLP has also publically announced its intention to use eminent domain to build the Mariner East 2 pipeline and indeed has already commenced numerous other proceedings with respect to the project. Commencement of eminent domain proceedings on Plaintiffs' property would immediately deprive them of their property rights and

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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 pipeline.[31]

DeMarteleire and Bomstein are therefore experiencing a substantial, immediate and direct threat of injury to their property rights as well as to their ability to enjoy the natural environment of their backyard and their neighborhood. The threat of injury to the individual Plaintiffs as a result of being subject to a condemnation proceeding by the Defendant is not in any way conjectural or hypothetical, but is concrete, particularized and imminent.

Contrary to what Defendant would seem to have the Court believe, it is simply not the case that a party must wait until after an injury has occurred in order to have standing. It is well established that the injury may be actual *or imminent* in order for standing to exist. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). The fact that SPLP has not yet exercised eminent domain over the individual Plaintiffs' property is therefore not a bar to their standing because—given that SPLP has made abundantly clear its intentions to exercise eminent domain over Plaintiffs' property and has commenced eminent domain procedures on other properties with respect to this project—Plaintiffs are suffering under an imminent threat of being subject to and injured by such a proceeding.

[31] SPLP claims in the second paragraph of its Supplemental Omnibus Brief that "under current engineering plans," no declaration of taking "will be filed as to Plaintiff Bomstein and deMarteliere's [sic] property." Later SPLP qualifies this opening statement: "pursuant to current engineering plans," the taking "**likely** will never occur." (Supplemental Omnibus Brief at 26) (emphasis added). This is SPLP's approach to legal challenges for the Mariner East project in a nutshell: every time a challenge arises, SPLP simply claims it has now changed its plans in a way that will avoid the challenge. It will now have intrastate shipments, it will no longer use the BCL condemnation process, it will go around Plaintiffs' property. SPLP hopes each time that no one will ask for evidence. SPLP cannot divest Plaintiffs of standing by mere say-so—on Preliminary Objections—particularly when SPLP could just as easily claim to have changed its mind again.

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To the extent Defendant attempts to rely on *Sierra Club, Pennsylvania Chapter v. Hartman*, 130 Pa.Cmwlth. 100, 567 A.2d 339 (1989) for the proposition that deMarteleire and Bomstein's claims are "too remote" from the requested relief to confer standing (PO Memorandum at 23), that reliance is misplaced. In *Sierra Club*, the environmental petitioners, including the individual plaintiff, were seeking to compel the promulgation of certain environmental regulations in order to bring Pennsylvania into compliance with the Clean Air Act. *Id.* at 341. The Commonwealth Court held that the individual plaintiff had failed to plead facts sufficient to establish a close-enough causal connection between the proposed regulations and her respiratory ailments. *Id.* at 341-42. This factual scenario is completely different from the one in this case, where there can be no question whatsoever about the causal connection between the imminent threat of SPLP's improper exercise of eminent domain with respect to the Bomstein-deMarteleire property and the injury such exercise would cause to the Plaintiffs. While in *Sierra Club* the individual plaintiff may not have sufficiently pled the ways in which she had an interest in proposed regulations beyond the common interest held by all citizens, here it is not a proposed regulation that is at issue but rather an imminently threatened action of the Defendant directed specifically towards the individual Plaintiffs and their property. There can be no question but that the individual Plaintiffs have a substantial, immediate and direct interest in the claims they seek to litigate here.

Therefore, deMarteleire and Bomstein have standing to bring their claims as set forth in the Complaint.

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2. **<u>Clean Air Council has standing.</u>**

Clean Air Council also has standing to bring its claims set forth in the Complaint, both associational standing through its members, and through procedural injury.

a. Clean Air Council has associational standing through its members.

First, Clean Air Council has associational standing to bring its claims. An association has standing as a representative of its members, even where the association itself is not injured, "if the association alleges that at least one if its members is suffering immediate or threatened injury as a result of the action alleged." *Robinson Twp.*, 83 A.3d at 922. *See also Pennsylvania Med. Soc'y*, 39 A.3d at 278.

The most widely-applied test for associational standing was set forth in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). There, the Supreme Court held that an organization has associational standing where "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 343. The Council meets all the requirements of the *Hunt* test for associational standing.

(1) <u>Multiple Clean Air Council members would otherwise have standing to sue on their own.</u>

First, the Complaint establishes that multiple Clean Air Council members are suffering threatened injury as a result of Defendant's actions and would have standing to sue in their own right as a result of those threatened injuries. Plaintiffs deMarteleire and Bomstein are members of Clean Air Council. As described in detail above, deMarteleire and Bomstein are suffering

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under a substantial, immediate and direct threat of injury as a result of Defendant's actions and they have standing to sue in their own right.

Eric Friedman, a member of Clean Air Council whose declaration Plaintiffs attached to the Complaint, also has standing to sue in his own right. Mr. Friedman is the current president of the Andover Homeowner's Association, the homeowner's association for the Andover subdivision located in Thornbury Township, Delaware County, Pennsylvania. The Andover HOA enjoys a common area of vegetated land where members of the HOA recreate and which serves as a buffer between the Andover subdivision and the noise, lights and pollution from nearby State Route 352. Defendant has publically announced its intention to build its Mariner East 2 pipeline through that Andover common space. Thus, Mr. Friedman, as a resident of the Andover subdivision, and a representative of the Andover HOA, is facing an imminent threat of being deprived of property rights as well as the ability to recreate in and otherwise enjoy the Andover common space as a result of an eminent domain action brought by Defendant. Therefore he too is suffering under a substantial, immediate and direct threat of injury as a result of Defendant's actions and he would have standing to sue on his own.

Thomas Casey, another Clean Air Council member whose declaration Plaintiffs attached to the Complaint, lives in West Goshen Township, Chester County, Pennsylvania, across the street from Defendant's intended route for the Mariner East 2 pipeline. He would therefore be directly harmed by the air pollution and the noise that would inevitably result from the construction and maintenance of the pipeline within feet of his property. He would also be harmed by the permanent alteration of the aesthetics of his neighborhood that would result from the clearing of a right of way for the pipeline, impeding his ability to enjoy his property.

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Contrary to Defendant's assertions, Mr. Casey's very close proximity to the proposed pipeline route *is* sufficient to give him standing to sue in his own right. No matter what Defendant may assert, close proximity to an environmental harm *can* provide a basis for standing, even if that harm is not directly on the plaintiff's property. *See, e.g.*, *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) (holding that citizens living and working in close proximity to the operation of nuclear power plant had standing to bring suit on the grounds that the plants would produce pollution that could potentially affect the citizens and would interfere with their recreation on nearby lakes).

Moreover, the case Defendant relies on for its erroneous assertion that close proximity to conduct affecting the environment is not sufficient to confer standing is no longer good law. (PO Memorandum at 23). Defendant cites *McConville v. City of Philadelphia*, June Term 2010, No. 01468, 2012 WL 5476673 (Phila. Com. Pl., April 24, 2012), in which Judge Smith for this Court held that the fact that one of the plaintiffs in that case, McConville, was able to see a billboard from her property was not sufficient to confer standing on her. Defendant neglects to inform this Court, however, that that holding was explicitly reversed by the Commonwealth Court in *McConville v. City of Philadelphia*, ___ Pa. Cmwth. ___, 80 A.3d 836, 843 (2013) ("We, therefore, will reverse the portion of the trial court's order dismissing the Complaint as to McConville for lack of standing."). Defendant's reliance on *McConville* to support its erroneous assertion that living across the street from the Mariner East 2 project is not close enough to confer standing is completely disingenuous and simply does not reflect the state of the law.

The very close proximity of Mr. Casey's home to the proposed pipeline route is causing him to be imminently threatened with exposure to pollution and deprivation of his enjoyment of

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his own property and his neighborhood. This imminently threatened injury is a kind of injury that courts have recognized as conferring standing, and it does indeed give Mr. Casey standing to sue in his own right.

Clean Air Council has established that multiple of its members have standing to bring this suit in their own right, and the first prong of the *Hunt* test is satisfied.

(2) <u>The interests Clean Air Council seeks to protect are germane to its purpose.</u>

The interests of its members that Clean Air Council seeks to protect by bringing this suit are germane to its purpose. Clean Air Council is a non-profit organization whose purpose for many decades has been to protect everyone's right to breathe clean air. (Complaint, ¶1). One of the numerous harms that would result from the construction of the Mariner East 2 pipeline is the emission of truly significant amounts of air pollution. Many aspects of the construction and operation of the entire Mariner East 2 pipeline would produce air pollution, both in the short term and over the lifespan of the project.

The Complaint specifically alleges that SPLP pumping stations for the Mariner East project produce noxious air pollution. (Complaint, ¶¶8, 132-134). The Complaint also alleges that the Mariner East project heightens the risk of spills or explosions along the Mariner East 1 route (Complaint, ¶113), which would also impair air quality and endanger Clean Air Council's members. Various other environmental problems with the Mariner East project potentially threatening Clean Air Council members are set forth in the Complaint as well. (Complaint, ¶¶167-172). And this Court can take judicial notice that clearing a 300-mile-long swath of

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Pennsylvania land for pipelines carrying byproducts of fracking overseas is germane to the purpose of a Pennsylvania non-profit environmental organization.

Thus, Clean Air Council satisfies the second prong of the *Hunt* test.

(3) <u>The claims asserted and the relief requested do not require the participation of individual members.</u>

Neither the claims Clean Air Council is asserting nor the relief it is requesting require the participation of its individual members in the lawsuit. The Third Circuit Court of Appeals has repeatedly held that associational standing is appropriate as long as the resolution sought by the association benefits its members and the claims can be proven by evidence from individual members without a fact-intensive individual inquiry. *See, e.g.*, *Pa. Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 286-87 (3d Cir. 2002) (holding that where an association's claims on behalf of its members involved systemic policy violations, it was possible to establish the claims using sample member testimony, participation of all individual members was not required, and associational standing was appropriate); *Hosp. Council of W. Pa. v. City of Pittsburgh*, 949 F.2d 83 (3d Cir. 1991) (Alito, J.) (also holding that where association claims can be established by sample evidence from members, participation of individual members was not required and associational standing was appropriate).

Moreover. the relief sought by Clean Air Council in this case is injunctive and declaratory, and does not require determination of individual rights in the way that a claim for damages for individual members would. The U.S. Supreme Court has repeatedly held that requests for declaratory and injunctive relief by an association do not require the participation of individual members. *See Pennell v. City of San Jose*, 485 U.S. 1, 7 n.3 (1988); *UAW v. Brock*,

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477 U.S. 274, 287-88 (1986). Therefore, the participation of individual Clean Air Council members as plaintiffs—while it is permissible, as in the case of deMarteleire and Bomstein—is not required, and the third prong of the *Hunt* test is satisfied.

For all these reasons, Clean Air Council meets the requirements for associational standing on behalf of its members.

b. Clean Air Council has standing through procedural injury.

In addition to having associational standing, Clean Air Council also has standing to bring its claims because it has suffered a procedural injury.

The U.S. Supreme Court has discussed this type of procedural standing recently in its landmark decision *Massachusetts v. E.P.A.*, 549 U.S. 497, 517-18, 127 S. Ct. 1438, 1453, 167 L. Ed. 2d 248 (2007):

> [A] litigant to whom Congress has accorded a procedural right to protect his concrete interests … can assert that right without meeting all the normal standards for redressability and immediacy. When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.

(Internal citations and quotation marks omitted).

Clean Air Council has had significant involvement with SPLP's Mariner East projects for quite some time. Clean Air Council intervened in and fully litigated the PUC proceeding in which Defendant initially sought to obtain an exemption from local zoning codes for its Mariner East 1 project under the Municipalities Planning Code, until Defendant withdrew its petitions in that case. Now SPLP seeks to exercise eminent domain to build out its Mariner East project,

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against the interests of Clean Air Council and its members in a clean and healthy environment, based on the dicta in a PUC decision SPLP itself mooted.

As established above, the Public Utility Code requires putative public utilities to apply for CPC's for the right to build projects such as the Mariner East pipelines. *See* §IV.C.1., *supra*. Interested parties such as Plaintiffs have a right to intervene in such proceedings. By failing to apply for the needed CPC's, SPLP has deprived Clean Air Council of an opportunity to protect its interests and those of its members before the PUC.

Clean Air Council therefore has a more particular and substantial interest in challenging Defendant's attempts to build these Mariner East pipelines than that of the general citizen seeking obedience to the law, and has standing by fact of this procedural injury. *See Cella v. Togum Constructeur Ensembleier en Industrie Alimentaire*, 173 F.3d 909, 911-12 (3d Cir. 1999) (holding that a defendant had standing to appeal due to the procedural injury of the trial court having "deprived him of a legitimate expectation of being able to litigate the Cellas' claims in the federal court," the forum which the defendant had chosen).

This proposition is supported by cases such as *McConville*, 80 A.3d 836. In that case, a litigant, McConville, had sought and obtained a notice of violation for a billboard from the City of Philadelphia and had fully participated in hearings related to the appeal of that notice. *Id.* at 842-43. The Commonwealth Court held that, when the owner of the billboard abruptly withdrew that appeal, it left McConville with "a more particular and substantial interest … than that of the common citizen seeking obedience to the law" in being involved when the owner of the billboard sought to avoid the violation through alternate means, and that she had standing to bring her claims. *Id.*

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The situation here is much the same. Defendant abruptly withdrew its earlier PUC petitions before any final resolution could be reached and now is seeking to build its Mariner East projects through alternate means, avoiding the PUC altogether. Clean Air Council's already significant participation and interest in this matter means that its interests are directly and immediately affected by Defendant's attempts to build these projects through eminent domain, and Clean Air Council therefore has standing in its own right to bring its claims.

E. VENUE SHOULD NOT BE TRANSFERRED.

Rule 1006(b) of the Pennsylvania Rules of Civil Procedure provides that venue rules for actions against corporations is governed by Rule 2179. That rule states:

> (a) Except as otherwise provided by an Act of Assembly, by Rule 1006(a.1) or by subdivision (b) of this rule, a personal action against a corporation or similar entity may be brought in and only in
> (1) the county where its registered office or principal place of business is located;
> (2) a county where it regularly conducts business;
> (3) the county where the cause of action arose;
> (4) a county where a transaction or occurrence took place out of which the cause of action arose, or
> (5) a county where the property or a part of the property which is the subject matter of the action is located provided that equitable relief is sought with respect to the property.

Plaintiffs in their Complaint allege that Defendant "is a limited partnership organized and existing under the law of the State of Texas and registered to do business in the Commonwealth. SPLP has its principal offices at 1818 Market Street, Suite 1500, Philadelphia, PA 19103." Rule 2179(a)(1) permits service where a corporation is alleged to have its principal place of business. In addition, it is obvious that at the time SPLP conducted business at that location, so (a)(2) also applies.

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Plaintiffs chose to file suit in the county where Defendant is alleged to have its principal place of business, 1818 Market Street in Philadelphia. The Court's docket entries reflect that service of the Complaint was made upon SPLP at that address on one Troy Allen, Executive Assistant, at 1:45 p.m. on August 27, 2015, the same day that suit was filed. Whether or not Defendant relocated its offices after that date is, of course, immaterial.

As explained above, this is not a case under the EDC, so the EDC's venue rules do not apply. Given that, Plaintiffs' choice of venue is allowed by Rules 1006 and 2179.

SPLP asks this Court to transfer the case to Delaware County pursuant to Pa. R. Civ. P. 1006(d)(1), based on *forum non conveniens*. However, where venue is not improper, the law requires deference to Plaintiffs' choice.

Under Pennsylvania law, a court should only transfer venue on this basis when the defendant can prove to the court that the plaintiff's chosen venue is oppressive or vexatious. *Cheeseman v. Lethal Exterminator, Inc.*, 549 Pa. 200, 213, 701 A.2d 156, 162 (1997). The Pennsylvania Supreme Court has "emphatically stated that the plaintiff's choice of forum … is entitled to weighty consideration." *Bratic v. Rubendall*, 626 Pa. 550, 99 A.3d 1, 6 (2014) (citing *Okkerse v. Howe*, 521 Pa. 509, 556 A.2d 827, 832 (1989)). "Thus, the party seeking a change of venue bears a heavy burden in justifying the request, and it has been consistently held that this burden includes the demonstration *on the record* of the claimed hardships." *Id.* at 7 (quoting *Okkerse*) (emphasis in original).

Defendant has not met and cannot meet this burden. Boiled down to their essence, SPLP's arguments center on two contentions, helpfully underlined in its Supplemental Omnibus Brief: (1) "This case has no connection to Philadelphia County," and (2) "The witnesses live in

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Delaware County and the property at issue is located in Delaware County." Neither of these is factually correct and neither meets the hardship criteria imposed by our courts.

First, this case has plentiful connection to Philadelphia. Plaintiff Clean Air Council is based in Philadelphia. At the time suit commenced, Defendant SPLP was headquartered in Philadelphia and its parent company, Sunoco Logistics, upon information and belief, is still headquartered in Philadelphia. Defendant regularly conducts business in Philadelphia. SPLP possesses one or more certificates of public convenience for Philadelphia from the PUC like those for other counties.

Should the case move forward, Plaintiffs have already confirmed that all of their witnesses are available to testify in Philadelphia Common Pleas Court. As regards Defendant's witnesses, it would appear from other court proceedings that some of them travel wherever the company sends them to give testimony in support of the Mariner East projects.[32] With the burden of demonstrating hardship, SPLP presents zero evidence to this Court as to the location of their witnesses or the difficulty of producing them for hearings in Philadelphia. Inasmuch as it is Defendant's burden on a Rule 1006(d) motion to create a factual record in support of its contentions, the absence of evidence or even a reference to evidence is striking.

Insofar as travel from Delaware County to Philadelphia might be an issue, to travel from there to Center City is only a journey of forty-five minutes. To justify a transfer of venue, the defendant must demonstrate that the chosen venue presents more than a "mere inconvenience." *Bratic*, 99 A.3d at 9. SPLP cannot even establish inconvenience.

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[32] For example, Harry Alexander, a/k/a Hank Alexander, has signed verifications for various applications and given testimony in Huntingdon County even though, Plaintiffs believe, his offices are in Philadelphia or Delaware County.

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The Pennsylvania Supreme Court has held that "claims by the defendant … that no significant aspect of the case involves the chosen forum, and that litigating in another forum would be more convenient … do not amount to a showing that the chosen forum is oppressive or vexatious." *Cheeseman*, 549 Pa. 200, 214. There is no way to construe SPLP's allegations regarding the connection to Philadelphia as establishing that Philadelphia is an oppressive or vexatious venue prejudicing SPLP. Indeed, the only thing special about Delaware County is that the residence of two of the Plaintiffs is located there, and SPLP coincidentally moved its headquarters there shortly after the filing of this suit.

Second, to say "the property at issue is located in Delaware County" is false, as there are *many* properties at issue. SPLP conveniently ignores Plaintiff Clean Air Council, whose members have property along the length of the pipeline, far beyond Delaware County. In that light, one county close to the pipeline is no better or worse than another. Nor can SPLP raise the locations of the individual Plaintiffs or Clean Air Council members as evidence tending to oppress or vex *Defendant*.

Defendant SPLP has thrown every argument it can at this Court to see what will stick to stop this case from going forward before this Court. The law accords Plaintiffs respect for their chosen forum, which is this Court. Plaintiffs respectfully request that this Court retain jurisdiction over, and not transfer, this case.

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V. RELIEF

Plaintiffs hereby request that this Honorable Court deny Defendant's Preliminary Objections, dismiss Defendant's additional jurisdictional arguments, deny Defendant's request for change in venue, and set down Plaintiffs' Motion for Preliminary Injunction for a hearing.

LAW OFFICES OF PINNOLA & BOMSTEIN

/s/ Michael S. Bomstein
Michael S. Bomstein

Attorney for Margaret M. deMarteleire
and Michael S. Bomstein

CLEAN AIR COUNCIL

/s/ Joseph Otis Minott
Joseph Otis Minott
Alexander G. Bomstein
Augusta Wilson

Attorneys for Clean Air Council

Dated: October 23, 2015

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CERTIFICATE OF SERVICE

I, Alexander G. Bomstein, do hereby certify that on this day, October 23, 2015, I served true and correct copies of Plaintiffs' Response to Defendant's Memorandum of Law and Supplemental Omnibus Brief on Jurisdiction and Venue, and Plaintiffs' Responses to Defendant's Preliminary Objections, through the Court's electronic filing system, on:

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Melanie S. Carter, Esq.
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*/s/ Alexander G. Bomstein*________
Alexander G. Bomstein

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Exhibit A

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Attorneys for Plaintiff Sunoco Pipeline L.P.

SUNOCO PIPELINE L.P., Plaintiff v. CECIL L. MCQUAIN and LIANA T. MCQUAIN, Defendants	: IN THE COURT OF COMMON PLEAS : DAUPHIN COUNTY, PENNSYLVANIA : : NO. 2015 CV 2716 EQ : : : :

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND IMMEDIATE RIGHT OF ENTRY TO SURVEY AND TEST

Pursuant to Pennsylvania Rule of Civil Procedure 1531, Plaintiff Sunoco Pipeline L.P. ("Sunoco Pipeline"), by and through its undersigned counsel, hereby moves for issuance of a preliminary injunction barring Defendants from interfering with Sunoco Pipeline's brief and limited entry onto Defendants' property for the purposes of surveying the property and

[illegible] Said Motion is brought pursuant to 26

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2. Sunoco Pipeline has its principal office at 1818 Market Street, Suite 1500, Philadelphia, Pennsylvania 19103.

3. As more fully set forth in Sunoco Pipeline's brief in support of this Motion, which is being filed contemporaneously herewith, Sunoco Pipeline is a public utility corporation for purposes of exercising eminent domain under Pennsylvania's Eminent Domain Code and Business Corporation Law ("BCL").

4. In 2012, Sunoco Pipeline announced plans to transport via pipeline petroleum products such as propane, ethane, and butane within the territories set forth in a 2002 Certificate

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Pennsylvania, creating more than 30,100 jobs during the construction period, with job earnings of $1.9 billion. (*See* http://marcelluscoalition.org/2015/02/new-study-highlights-shales-significant-impact-for-pa-s-economy/).

9. With the exception of some of the valves, the Mariner East 2 Pipeline will be routed below ground level, with most of it paralleling and within the right of way of the Mariner East 1 pipeline.

10. Part of the Mariner East 2 Pipeline will be located in Dauphin County, Pennsylvania, which is within the geographic scope of the Certificates of Public Convenience issued by the PUC to Sunoco Pipeline.

11. In establishing the Mariner East 2 Pipeline route, Sunoco Pipeline is required to conduct certain environmental, cultural resource, and other surveys and tests to comply with Pennsylvania law and determine, among other things, whether the proposed routing impacts endangered species or encroaches on protected wetlands, archaeologically significant sites, and other protected areas.

B. DEFENDANTS HAVE, IN VIOLATION OF STATUTORY AND CONTRACTUAL LAW, IMPROPERLY REFUSED TO ALLOW SUNOCO PIPELINE LIMITED ACCESS TO THEIR PROPERTY TO SURVEY AND TEST

12. Defendants Cecil L. McQuain and Liana T. McQuain (together, "Defendants") are married adult individuals with a last known address of 308 Laurel Drive, Hershey, Dauphin County, Pennsylvania 17033.

13. Defendants own a parcel of property in Conewago Township, Dauphin County, Pennsylvania, tax identification # 22-010-031-000-0000 (the "Property").

14. The potential route of the Mariner East 2 Pipeline extends through the Property.

1. <u>Pre-Existing Easement Rights on the Property</u>

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15. On April 29, 1936, Martin B. Nye and Agnes M. Nye (the "Nyes"), Defendants' predecessors in interest in the Property, executed an easement agreement (the "Right of Way

[illegible]

successors and assigns, the right to lay additional lines upon payment of compensation to the landowner:

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18. Pennsylvania law recognizes the necessity for these surveys and tests and permits potential condemnors to make pre-condemnation surveys and tests. Specifically, Section 309 of Pennsylvania's Eminent Domain Code (26 Pa.C.S. § 309), provides that "prior to the filing of the declaration of taking, the condemnor or its employees or agents, shall have the right to enter upon any land or improvement in order to make studies, surveys, tests, soundings and appraisals."

19. Section 309 of the Eminent Domain Code requires that, prior to a survey and testing, "the owner of the land or the party in whose name the property is assessed shall be notified ten days prior to entry on the property," and that "any actual damages sustained by the owner of a property interest in the property entered upon by the condemnor shall be paid by the condemnor." *See* 26 Pa.C.S. § 309.

20. By law, Sunoco Pipeline is required to conduct certain surveying and other environmental tests in order to determine the exact route of the Pipeline and to determine the precise location of other pipelines, if any, existing on the Property.

21. On February 10, 2015, Sunoco Pipeline notified Defendants and their attorney, Michael Faherty, Esquire, that Sunoco Pipeline would be accessing the Property to conduct the required surveys and tests for the Mariner East 2 Pipeline. A true and correct copy of the February 10, 2015 letter is attached hereto as Exhibit I. Ten days' notice under Section 309 was therefore provided.

22. On or about February 23, 2015, Attorney Faherty advised counsel for Sunoco Pipeline that Defendants denied Sunoco Pipeline access to the Property to conduct the necessary

[illegible] tests to determine the route of the Mariner East 2 Pipeline

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23. Of the 236 tracts in Dauphin County upon which the Mariner East 2 Pipeline may be routed, Defendants are one of only a handful of landowners to deny survey access.

C. THE NEED FOR PRELIMINARY INJUNCTIVE RELIEF

24. Because Sunoco Pipeline and its representatives were unable to obtain access to the Property with consent, and because certain surveys and tests are necessary to determine the path of the Mariner East 2 Pipeline, Sunoco Pipeline is proceeding with this Motion.

25. This Motion does not seek establishment of any additional easement or ownership rights in the Property, nor would the requested access result in any permanent impact on the Property. Rather, Sunoco Pipeline seeks only to access the Property to conduct surveys and tests, for a limited time, to determine if the Property qualifies to be within the potential route and to fix locations necessary for engineering for the Mariner East 2 Pipeline.

26. Defendants are protected from any monetary loss that may occur as a result of Sunoco Pipeline entering the Property under Section 309 of the Pennsylvania Eminent Domain Code, which requires Sunoco Pipeline to pay actual damages sustained by Defendants. Defendants are likewise protected by the bond that will be posted upon entry of an order for injunctive relief.

27. Sunoco Pipeline has a clear right to relief on the merits of its claim. Section 309 authorizes potential condemnors to access property for the purpose of conducting surveys and

tests. As noted above, and in the contemporaneously filed brief, Sunoco Pipeline is subject to regulation as a public utility corporation by the PUC. Sunoco Pipeline is therefore entitled to utilize the provisions of the Pennsylvania Eminent Domain Code and Section 1511 of the

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28. Moreover, Pennsylvania law permits Sunoco Pipeline to access the Property to exercise its additional line rights as set forth in the Right of Way Agreement. That Agreement unequivocally permits Sunoco Pipeline to lay an additional line, provided that it provides [illegible] to Defendants. It necessarily follows that, in order to install the additional

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of an express statutory provision *per se constitutes irreparable harm."* *Council 13*, 595 A.2d at 674.

31. Sunoco Pipeline also has no remedy at law, or alternative remedy, which would make it whole. The Mariner East 2 Pipeline cannot move forward unless surveying is conducted. No award of damages from Defendants in the future could adequately compensate Sunoco Pipeline for the harm which would arise from its inability to proceed because of Defendants' refusal to comply with state law and their contractual obligations. Additionally, Sunoco Pipeline must physically access the Property in order to conduct the necessary surveys and tests to determine the route of the Mariner East 2 Pipeline. As such, monetary damages are not an adequate remedy in this matter.

32. The likelihood of harm to Sunoco Pipeline is also imminent. The development process for the Mariner East 2 Pipeline is well underway, with surveys having been completed, or scheduled, on the vast majority of properties along the anticipated route, with the next phase of the project awaiting final identification of the route.

33. Defendants' refusal to grant reasonable access presently is substantially likely to significantly delay a major project, which will cause Sunoco Pipeline immediate and irreparable harm in goodwill and in its relationships with its customers and consumers and will, as discussed below, delay significant benefits to Pennsylvania residents.

34. Sunoco Pipeline's request is even more pressing considering the Commonwealth's requirement that Sunoco Pipeline survey for bog turtles. The Property is in an area where Sunoco Pipeline is required by the Pennsylvania Fish & Boat Commission to survey for bog turtles. Survey season for the turtle begins on May 15, 2015 and ends on June 15, 2015, and may require multiple surveys. If Sunoco Pipeline cannot conduct the surveys within the

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aforementioned timeline, Sunoco Pipeline will need to wait for the next survey season in May, 2016, thereby causing significant delay in the project.

35. Greater injury will be inflicted upon Sunoco Pipeline by the denial of temporary injunctive relief than would be inflicted upon Defendants by the granting of such relief since the surveying process is brief and minimally invasive, and Sunoco Pipeline will be legally responsible for any harm to the Property which might arise from the process. By contrast, if Sunoco Pipeline is prevented or delayed from building the Mariner East 2 Pipeline, it will incur unquantifiable monetary damage.

36. The public interest strongly favors the granting of the requested relief. First, the courts have a strong interest in enforcing agreements, such as the Right of Way Agreement in this case. *Vector Security, Inc. v. Stewart*, 88 F.Supp. 2d 395, 401 (E. D. Pa. 2000) ("it is generally in the public interest to uphold an agreement freely entered into by the parties."); *First Health Grp. Corp. v. Nat'l Prescription Adm'rs, Inc.*, 155 F. Supp. 2d 194, 230 (M.D. Pa. 2001) ("The public interest favors the enforcement of contracts."). Additionally, although Sunoco Pipeline is a for-profit entity, the services provided by it benefit the public. As noted in the PUC's Order of July 24, 2014, the proposed pipeline "will result in numerous public benefits," including the ability to "ensure that there is adequate pipeline capacity to meet peak demand for propane during the winter heating season." Exhibit B, at 9, 10. The PUC's August 21, 2014 Order determined that the proposed pipeline:

> 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.

Exhibit D, at 4.

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37. If not enjoined, Defendants' actions, which are in breach of contract and are contrary to the statutory law of the Commonwealth, will threaten to thwart the public interest in prompt development of the Mariner East 2 Pipeline.

38. Sunoco Pipeline is entitled to the requested relief as a matter of law. The relief sought by it is also reasonable and limited, and will return the parties to their respective positions immediately before Defendants' improper actions, *i.e.* prior to Defendants unreasonably and without legal justification barring Sunoco Pipeline from its own right of way for reasonable survey purposes. As such, the granting of injunctive relief is consistent with law and will maintain the *status quo ante*.

39. The requested relief is limited and narrowly focused on enforcing Sunoco Pipeline's specific contractual rights as well as those rights afforded to it under Section 309 of

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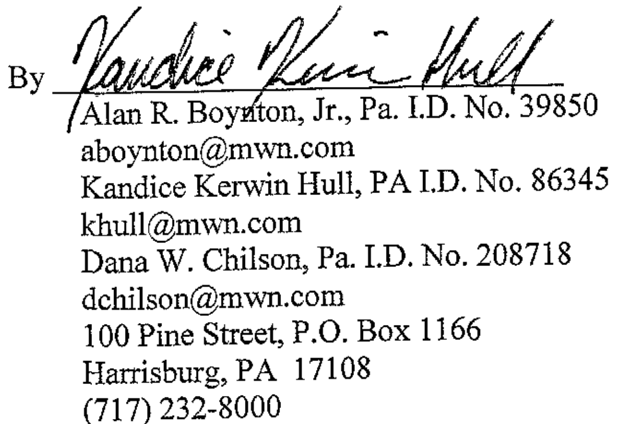
WHEREFORE, Plaintiff Sunoco Pipeline L.P. respectfully requests that this Court grant its Motion for Preliminary Injunction and Immediate Right of Entry to Survey and Test and enter an Order, in the form attached, permitting Sunoco Pipeline's employees, agents, and representatives to enter on the Property to perform the required studies, surveys, tests, soundings, and appraisals as authorized by the Right of Way Agreement and Section 309 of the Pennsylvania Eminent Domain Code.

McNEES WALLACE & NURICK LLC

By 

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Dated: April 10, 2015

Counsel for Plaintiff Sunoco Pipeline L.P.

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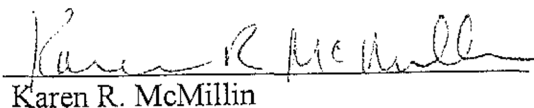
VERIFICATION

Subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities, I hereby certify that I am the Director of Right of Way for Sunoco Pipeline L.P., and that I am authorized to sign this verification on its behalf. I further verify that the facts set forth in the foregoing document are true and correct to the best of my knowledge, information, and belief.

SUNOCO PIPELINE L.P.
By: Sunoco Logistics Partners Operations
GP LLC, its general partner



Karen R. McMillin

Dated: April 10, 2015

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