

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held December 2, 2021

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
John F. Coleman, Jr., Vice Chairman
Ralph V. Yanora

Wilmer Baker and Rolfe Blume

C-2020-3022169

v.

Sunoco Pipeline, L.P.

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Wilmer Baker and Rolfe Blume (Complainants) filed on December 28, 2020, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Elizabeth H. Barnes issued December 9, 2020. Replies to Exceptions were filed by Sunoco Pipeline, L.P. (Sunoco or the Company), on January 8, 2021.

Upon review of the Exceptions and Replies thereto, and the record in this proceeding, and consistent with the discussion, *infra.*, we shall deny the Exceptions, adopt the ALJ's Initial Decision, which grants Sunoco's Preliminary Objections, and denies and dismisses the Complaint with prejudice.

I. Background

This matter involves the Formal Complaint (Complaint) filed jointly by the Complainants, averring that one of them filed a pending complaint at Docket No. C-2018-3004294, and alleging horizontal directional drilling (HDD) fluid spills containing bentonite, water, and other chemicals (inadvertent returns or IRs) by the Company since the beginning of 2020. Complaint at 2-4.

II. History of the Proceeding

On September 3, 2020, the Complainants jointly filed a Complaint with the Commission against Sunoco.¹ Paragraph No. 4 of the Complaint states that the Complainants are having a reliability, safety, or quality problem with their utility gas service, and that, "I filed (C-2018-3004294) still pending a final decision by the Commission. Since the beginning of this year, there has been a number of inadvertent returns."

At paragraph No. 5 of the Complaint (requested relief), Complainants request the following relief:

- 1) restore Mr. Blume's farmland to its rightful condition;
- 2) drill Rolfe Blume's well for safe drinking water;

¹ Sunoco was served with the Complaint on September 29, 2020.

- 3) an alarm system for those that live in blast zone; and
- 4) stop inadvertent returns at Graham Creek (Rolfe Blume) Locust Creek (W-J35) beside my land (Wilmer Baker)

Also, at paragraph No. 5 of the Complaint, Complainant Baker implies that he was not notified of inadvertent returns.

Sunoco filed an Answer with New Matter and Preliminary Objections on October 19, 2020. The Answer admits that Complainant Baker filed a nearly identical Complaint at Docket No. C-2018-3004294, however, denies that the matter is still pending as a final order was entered September 23, 2020, prior to the service of the present Complaint upon Sunoco. Sunoco further denied that it is a gas utility and denied any generally stated averment of IRs as “too non-specific as to time and location.” Additionally, Sunoco averred IRs are regulated by the Pennsylvania Department of Environmental Protection (DEP) and subject to the DEP-issued permits for Sunoco.

Sunoco’s New Matter asserted that the Complaint should be dismissed for failure to state a claim on which relief can be granted. Sunoco asserted that neither of the two allegations of the Complaint consist of a violation of any law or regulation within the Commission’s jurisdiction. Finally, Sunoco averred that, while the Complaint was filed prior to the Commission’s issuance of a final order; the Complaint was not served upon Sunoco until after the final order was entered and issued. *See Baker v. Sunoco Pipeline LP*, Docket No. C-2018-3004294 (Order entered September 23, 2020) (*Baker Order*).

Regarding the relief requested, in its New Matter, Sunoco averred the Commission cannot order the requested relief in paragraph No. 5 of the Complaint. The request that Sunoco restore Mr. Blume’s farmland to its rightful condition is an issue that was already raised in Complainant Baker’s prior litigation and is the subject of litigation

pending before the Cumberland County Court of Common Pleas at Docket No. 2019-10499, involving the interpretation and application of easement rights, which is beyond the scope of the Commission's jurisdiction.

Sunoco further averred that the request that Sunoco "drill Rolfe Blume's well for safe drinking water" is more appropriately before the Cumberland County Court of Common Pleas – Civil Division in a separate complaint that Mr. Blume filed there, at Case No. 2019-05603. Sunoco avers that civil action, while not formally stayed, is awaiting resolution of the just compensation issues in the suit discussed above. Additionally, Sunoco avers this issue was already raised in Complainant Baker's prior litigation.

Sunoco also averred that the issue regarding the installation of an alarm system was previously ruled on in Complainant Baker's first Complaint at Docket No. C-2018-3004294 and that requested relief was denied, providing:

Complainant's requested relief for an early warning alarm system for residents residing within 1,000 feet of the Mariner East pipeline facilities and a directive that an odorant be added to the highly volatile liquids of ethane, butane and propane being transported is denied as these requests should be vetted through a rulemaking proceeding at docket number L-2019-3010267 in order to not deprive the pipeline operator and other interest groups a right to due process.

Baker Order at 55. Sunoco averred that, as the requested relief has been explicitly ruled upon and denied in the Commission's *Baker Order*, the allegation of the Complaint fails to state a claim for which relief can be granted.

Sunoco also averred that any inadvertent returns at Graham Creek (Rolfe Blume) Locust Creek (W-J35) (Wilmer Baker) were reported to and resolved with DEP and construction is complete in this area. Thus, the requested relief that Sunoco stop IRs at those locations is moot.

Sunoco's Preliminary Objections contended that the Complaint fails to allege that the Respondent has violated any provision of the Public Utility Code (Code) or Commission Regulations. Therefore, Sunoco argued that the Commission lacks jurisdiction to award the relief sought by the Complainants.

Sunoco's Preliminary Objections further stated that the Commission lacks jurisdiction over claims involving the validity of easements, property rights controversies and matters under the jurisdiction of other agencies and courts of law. Sunoco argued that the Complaint should also be dismissed under the doctrine of *res judicata*, *lis pendens* and pursuant to 66 Pa. C.S. § 316, as a legally insufficient collateral attack on the Commission's *Baker Order* denying some of the same relief requested after an evidentiary hearing and where the same claims for injunctive relief regarding the restoration of property, the interpretation of easements and the digging of a new well on Complainant Blume's property are currently pending before the Court of Common Pleas of Cumberland County.

On November 12, 2020, the Complainants filed untimely responses to Sunoco's New Matter and Preliminary Objections.

The ALJ's Initial Decision, issued on December 9, 2020, treated Sunoco's Preliminary Objection as a motion for judgement on the pleadings, granted the motion and dismissed the Complaint with prejudice.

As previously noted, the Complainants filed Exceptions on December 28, 2020.² and Sunoco filed Replies to the Exceptions on January 8, 2021.

III. DISCUSSION

A. Legal Standards

We note that any issue or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *also see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

1. Burden of Proof

A complainant, as the party seeking affirmative relief from the Commission, has the burden of proof. 66 Pa. C.S. § 332(a). The burden of proof in actions before the Commission is the “preponderance of the evidence” standard. *Suber v. Pennsylvania Com’n on Crime and Delinquency*, 885 A. 2d 678, 682 (Pa. Cmwlth. 2005) (*Suber*); *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990),

² We note that the Complainants, acting *pro se*, filed Exceptions which do not strictly conform with Commission rules governing filing exceptions before the Commission. *See, generally*, 52 Pa. Code §5.533 (procedures to except to initial decision). However, we shall exercise our discretion, under 52 Pa. Code § 1.2, to liberally construe our Regulations to secure a just and speedy determination, where, as here, doing so does not impact the substantive rights of the parties.

alloc. denied, 529 Pa. 654, 602 A.2d 863 (1992) (*Lansberry*); *see also North American Coal Corp. v. Air Pollution Commission*, 279 A.2d 356 (Pa. Cmwlth. 1971).

2. Preliminary Objections

Preliminary objections may be filed consistent with Commission Regulations at 52 Pa. Code § 5.101, which provides:

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.
- (7) Standing of a party to participate in the proceeding.

52 Pa. Code § 5.101(a).

Commission preliminary motion practice is comparable to Pennsylvania civil practice respecting the filing of preliminary objections. *Equitable Small Transp. Intervenor v. Equitable Gas Co.*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994). Any doubt as to the sufficiency of a preliminary objection must be

resolved in favor of the non-moving party by refusing to sustain the objections. *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002). *Dept. of Auditor General v. State Emps. Retirement System*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003).

The Commission must view the Complaint in the light most favorable to the Complainants and should dismiss the Complaint only if it appears that the Complainants would not be entitled to relief under any circumstances as a matter of law. *Equitable Small Transp. Intervenors v. Equitable Gas Co.*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (1994).

Preliminary objections in civil practice requesting dismissal of a pleading will be granted only where the right to relief is clearly warranted and free from doubt. *Interstate Traveller Servs., Inc. v. Pa. Dep't of Env't Resources*, 406 A.2d 1020 (Pa. 1979); *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 595 A.2d 172 (Pa. Super. 1991). The Commission follows this standard. *Montague v. Philadelphia Elec. Co.*, 66 Pa. P.U.C. 24 (1988).

B. ALJ's Initial Decision

The ALJ reached seven Findings of Fact and drew thirteen Conclusions of Law. I.D. at 5-6, 17-18. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

The ALJ analyzed the Complainants' allegation that a previous Complaint at Docket No. C-2018-3004294 is "still pending a final decision by the Commission" and further concluded the averment fails to allege acts or omissions by Sunoco in violation of

law, regulation, or Commission order. The ALJ also noted that, while a final decision was pending in the prior proceeding at the time the Complainants filed the instant Complaint, the Commission entered its final order in the prior proceeding at Docket No. C-2018-3004294, issuing the *Baker Order* on September 23, 2020, granting in part and denying in part the Exceptions of Sunoco and modifying the Initial Decision to grant the Complainant Baker’s relief in part, and deny it in part. *See, Baker Order*.

The ALJ held that the present Complaint constitutes a collateral attack on the Commission’s *Baker Order*. Therefore, the ALJ dismissed the Complaint on the grounds of *res judicata* and 66 Pa. C.S. § 316 (pertaining to effect of Commission actions), because the issues raised by the present Complaint were previously raised and litigated in the prior Complaint proceeding. I.D. at 12-16, C.O.L. 7-9, 13.

With respect to the Complainants’ requested relief that Sunoco “stop inadvertent return’s [sic]...”, the ALJ concluded the averment fails to allege acts or omissions by Sunoco in violation of law, regulation, or Commission order, and are further, outside the Commission’s jurisdiction. The ALJ noted that the averment neither states any specific facts regarding the occurrence of IRs nor alleges any specific violation of law, regulation or Commission order, including Sections 1501 and 1505 of the Code. I.D. at 11-13.

The ALJ further concluded that the Commission lacks jurisdiction over property right controversies, the scope and validity of easements, and environmental permitting issues within the jurisdiction of the DEP. I.D. at 10-12, C.O.L. 4-5.

Specifically, with respect to the claims regarding Sunoco’s easement on the Complainant Blume’s land and the repair thereof, the alleged condition of Complainant Blume’s well, and the allegation regarding inadvertent returns in creeks near the

Complainants' lands, the ALJ concluded that the matters arising related to the scope or validity of the easement in question are not within the Commission's jurisdiction, pursuant to *Fairview Water Co. v. Pa. PUC*, 502 A.2d 162, 167 (Pa. 1985) (providing that the PUC does not have jurisdiction to determine the scope and validity of an easement). I.D. at 11.

With respect to the requested relief that Sunoco drill Complainant Blume a well on his Property, the ALJ concluded the requested injunctive relief was a matter properly brought before the Court of Common Pleas, citing *Lasko v. Windstream Pa., LLC*, Docket No. C-2010-2217869 (Final Order entered April 1, 2011); *Perrige v. Metro. Edison Co.*, Docket No. C-00004110 (Order entered July 3, 2003); *Fiorillo v. PECO Energy Co.*, Docket No. C-00971088 (Order entered September 15, 1999). Based on established precedent, the ALJ concluded the Commission is not the proper forum for resolving property rights disputes. Rather, such issues should be presented to a court of general jurisdiction. I.D. at 11-12.

Finally, with respect to the averments of IRs, the ALJ noted that such matters pertain to the environmental permitting process subject to the jurisdiction of the DEP rather than the Commission. Therefore, the ALJ concluded the Commission lacks jurisdiction over such matters and dismissed this portion of the Complaint pursuant to 52 Pa. Code § 5.101(a)(1), for failure to state a claim for relief subject the Commission's jurisdiction. I.D. at 13.

The ALJ treated Sunoco's preliminary Objections as a motion for judgement on the pleadings and granted Sunoco's preliminary objections asserting lack of Commission jurisdiction pursuant to 52 Pa. Code § 5.101(a)(1) and legal insufficiency of the complaint pursuant to 52 Pa. Code. § 5.101(a)(4) and requesting dismissal of the

Complaint pursuant to 52 Pa. Code § 5.101(a)(6) due to the pendency of other matters on the subject matter of the Complaint in other forums. I.D. at 19.

C. Exceptions, Replies and Disposition

The Complainants' Exceptions are set forth on two handwritten pages and 38 pages of attachments.³ In summary, the Complainants raise two Exceptions asserting that the Commission should accept jurisdiction of the Complaint where: (1) the present case is materially distinguishable from the proceeding culminating in the Commission's *Baker Order* at Docket No. C-2018-3004294; and (2) there are DEP permitting issues regarding IRs. Exc. at 1-2.

Upon review of the Exceptions, the Replies thereto and the record in this proceeding, we shall deny the Exceptions, consistent with the discussion below.

Regarding Exception No. 1, the Complainants' Exceptions aver that the present case "is different case with different issues" from the proceeding which culminated in the Commission's *Baker Order*. Exc. at 1. The Complainants assert that the Commission should exercise jurisdiction as dismissal is not in the public interest.

In its Replies, Sunoco avers that Complainants fail to state any basis to conclude that the present Complaint raises any issue over which the Commission has jurisdiction that is not barred by *res judicata* or is not a collateral attack on the Commission's *Baker Order* in the prior complaint proceeding. Sunoco asserts that the ALJ properly concluded that there are no new issues here over which the Commission has jurisdiction. R. Exc. at 2-3. Sunoco reiterates the arguments raised in its Preliminary

³ The attachments to the Exceptions are in PDF format, and not consecutively numbered.

Objections that the prior Complaint proceeding involved identical issues raised by the Complainants, specifically: Sunoco's public awareness program; restoration and remuneration regarding one of the Complainants' properties pursuant to an easement; and a request for an alarm system. R. Exc. at 2, citing Sunoco Preliminary Objections at 10-12, 20-22.

Sunoco further notes that the Complainants' Exceptions include attachments which are documents that were admitted as evidence in the prior Complaint proceeding. R. Exc. at 2-3, citing Exc. at attachment pages 22-26. In addition, Sunoco notes that the Complainants raise dissatisfaction with the public input meeting Sunoco held regarding Lower Frankford Township and Cumberland County because, consistent with the Commission's *Baker Order*, Sunoco held the meeting virtually amidst the ongoing pandemic and consistent with Centers for Disease Control and Department of Health guidelines. *Id.*

Upon review of the Complainants' Exception No. 1 and the Replies thereto, we shall deny the Exception. We agree with Sunoco's argument in its Replies, that the ALJ properly concluded that the present Complaint is a prohibited collateral attack on the Commission's prior *Baker Order*, which addressed the identical issues raised in the present proceeding, which included: Sunoco's public awareness program; restoration and remuneration regarding one of Complainants' properties pursuant to an easement; and a request for an alarm system. Further the Complainants' assertions regarding the public input hearings were expressly addressed by the Commission's *Baker Order*, stating:

[t]hat Sunoco Pipeline, L.P. is directed to contact the Lower Frankford Township Supervisors and Cumberland County Commissioners within thirty (30) days of the date of entry of a Final Order for the purpose of scheduling a public awareness/education meeting to be held in Cumberland County and conducted in accordance with

applicable guidelines from the Commonwealth of Pennsylvania and the Center for Disease Control, allowing for virtual participation, provided the meeting remains open to public participation and viewing.

Baker Order at Ordering Paragraph No. 5.

Any issue the Complainants may have had with the Commission's final decision in the *Baker Order*, including the Commission's direction to allow a virtual meeting, was effectively waived by Complainant Baker's failure to file an appeal from the *Baker Order*. Therefore, the present Complaint and Exceptions raising, *inter alia*, the issue of a public awareness/education meeting by Sunoco is an impermissible collateral attack on the Commission's *Baker Order*. *See*, 66 Pa. C.S. § 316. Accordingly, we conclude the ALJ's Initial Decision properly dismissed that portion of the Complaint, and we shall deny Complainants' Exception No. 1.

Regarding Exception 2, the Complainants' Exceptions generally aver issues concerning Sunoco's compliance with DEP permitting. The Complainants assert that the DEP failed to properly address IR issues. Exc. at 2 (attaching portions of DEP-related documentation regarding IR issues and Sunoco's compliance with DEP-issued permits). *See*, Exc. attachments at 14-21.

In its Replies, Sunoco avers that the Complainants' own Exceptions and attachments thereto demonstrate that the issue of IRs and compliance with DEP-issued permits are matters before the DEP and, therefore, subject to the DEP's jurisdiction rather than the Commission's. R. Exc. at 3-4. Sunoco argues that the ALJ properly reasoned these issues are outside the scope of the Commission's jurisdiction, where the DEP rather than the Commission retains jurisdiction to permit or regulate the environmental permitting process, which may address IRs, for Sunoco's pipeline construction.

Upon review of the Complainants' Exception No. 2 and the Replies thereto, we shall deny the Exception. We agree with Sunoco's argument in its Replies, that the ALJ properly concluded that the Commission lacks jurisdiction over matters generally related to the DEP-issued permits governing construction of the pipeline. Specifically, the issue of IRs and whether Sunoco properly complied with the permits which are sought, obtained, modified, and enforced by DEP, demonstrates that such issues do not fall within the Commission's jurisdiction.

As the ALJ correctly noted:

Regarding the requested relief that [Sunoco] stop inadvertent returns, such claims are outside the jurisdiction of the Commission. The Commission does not permit or regulate the environmental permitting process for [Sunoco's] construction. Those permits are sought, obtained, modified, and enforced by [DEP]. Therefore, the Commission lacks jurisdiction over such matters, and this portion of the Complaint shall be dismissed pursuant to 52 Pa. Code § 5.101(a)(1).

I.D. at 12.

The Complainants' Exceptions, which rely upon supporting documentation related to DEP-issued permits, reinforce the ALJ's conclusion that IRs and any alleged violations associated with the DEP construction permits are issues subject to DEP's jurisdiction, rather than the Commission's. As the ALJ noted, in the absence of any allegation of a violation of the Code, Commission Order or Regulations, if the Complainants wish to challenge issues related to IRs and DEP-issued permit violations, the matter is properly brought to DEP, not before the Commission. *Id.* We agree with the ALJ's general conclusion that the Commission lacks jurisdiction over property right

controversies, the scope and validity of easements, and environmental permitting issues within the jurisdiction of the DEP. *Id.*

Accordingly, we conclude the ALJ's Initial Decision properly dismissed the Complaint, and we shall deny the Complainants' Exception No. 2.

IV. CONCLUSION

Based on the foregoing discussion, we shall deny the Exceptions, consistent with the discussion in this Opinion and Order, and adopt the ALJ's Initial Decision;

THEREFORE:

IT IS ORDERED:

1. That the Initial Decision of Administrative Law Judge Elizabeth H. Barnes issued on December 9, 2020, at Docket No. C-2020-3022169 is adopted by this Opinion and Order without modification.
2. That the preliminary objections, treated also as a motion for judgment on the pleadings, filed by Sunoco Pipeline, L.P. at Docket No. C-2020-3022169 are sustained/granted.
3. That the Complaint of Wilmer Baker and Rolfe Blume at Docket No. C-2020-3022169 against Sunoco Pipeline, L.P. is dismissed with prejudice.

4. That the record at Docket No. C-2020-3022169 be marked closed.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is fluid and cursive, with the first name "Rosemary" written in a larger, more prominent script than the last name "Chiavetta".

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: December 2, 2021

ORDER ENTERED: December 2, 2021