

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

RULE TO SHOW CAUSE

AND NOW, this day of , 2015, upon consideration of plaintiffs deMarteleire and Bomstein's Motion for Preliminary Injunction and after hearing thereon, it is hereby ORDERED that:

- (1) A Rule is granted upon defendant to show cause, if any there be, why the relief requested by plaintiffs should not be granted;
- (2) Respondent shall file an answer to the Motion within twenty (20) days of service upon the respondent;
- (3) A hearing or argument shall be scheduled at the discretion of the Assigned Judge; and
- (4) Notice of the entry of this Order shall be provided to all parties by the movant.

BY THE COURT:

J.

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

PRELIMINARY INJUNCTION

AND NOW, this day of , 2015, upon consideration of plaintiffs deMarteleire and Bomstein’s Motion for Preliminary Injunction and after hearing thereon, it is hereby ORDERED that same shall be and hereby is GRANTED. The Court finds that the Mariner East 2 pipeline is regulated by the Federal Energy Regulatory Commission as an interstate pipeline upon application of defendant. Accordingly, pursuant to the Public Utility Code, 66 Pa.C.S. §104, for purposes of the Mariner East 2 pipeline, defendant is engaged in commerce between the states and the Public Utility Code is inapplicable. Since eminent domain rights for defendant are all derived from the Public Utility Code, defendant does not have the right to exercise eminent domain to build the Mariner East 2 pipeline. Defendant, therefore, is preliminarily enjoined from claiming the right of eminent domain for the premises owned by plaintiffs deMarteleire and Bomstein.

This decree shall remain in effect until such time as it may be rescinded or vacated by the Court. Pursuant to Rule 1531 Pa.R.C.P., plaintiffs shall post a bond in the amount of \$ as a condition of enforcement of this decree.

BY THE COURT:

_____ J.

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and Bomstein

CLEAN AIR COUNCIL, et al.,
Plaintiffs : COURT OF COMMON PLEAS
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**MOTION OF PLAINTIFFS deMARTELEIRE
AND BOMSTEIN FOR PRELIMINARY INJUNCTION**

TO THE HONORABLE JUDGES OF THE SAID COURT:

Plaintiffs Margaret M. deMarteleire and Michael S. Bomstein, by their attorney, Michael S. Bomstein, hereby move the Court to grant them a Preliminary Injunction against defendant, Sunoco Pipeline L.P. (“SPLP”), and in support hereof aver as follows:

Introduction

1. Plaintiffs hereby incorporate by reference all of the allegations in their Complaint as though set forth more fully at length below. A true and correct copy of the Complaint is attached hereto, made part hereof, and marked as “Complaint Exhibit.”

2. Plaintiffs deMarteleire and Bomstein are the owners of real property at 225 South Pennell Road, Media, Delaware County, Pennsylvania 19063, having bought it in 2013.

3. In 2014, defendant SPLP's received tariff approval from the Federal Energy Regulatory Commission ("FERC") for its new, Mariner 2 pipeline to transport natural gas liquids ("NGL's") from the shale fields of Ohio and West Virginia, across Pennsylvania and to a terminal situated both in Pennsylvania and in Delaware for the purpose of shipping to markets outside the Commonwealth.

4. This motion is brought by plaintiffs deMarteleire and Bomstein to enjoin SPLP from exercising eminent domain rights at their property for construction of the Mariner 2 pipeline.

5. In seeking federal tariff approval, SPLP represented that it was *a common carrier* under the Interstate Commerce Act ("ICA") and that the project was designed to relieve an oversupply of NGL's in the Commonwealth.

6. After obtaining federal tariff approval, SPLP was unable to obtain the permission of property owners throughout the state to run pipelines through their yards, so it began to file declarations of taking to take properties under Pennsylvania's eminent domain laws. More than two dozen eminent domain proceedings have already begun.

With Respect to Mariner 2, SPLP is a Federally Regulated Common Carrier, Not a Public Utility.

7. Because SPLP is a federally regulated common carrier that submitted to FERC jurisdiction with respect to the Mariner 2 project, it is engaged in commerce among the several states within the meaning of 66 Pa.C.S. §104. That provision states explicitly that in such a case the Public Utility Code is inapplicable.¹ For purposes of Mariner 2, therefore, it is not a "public utility" or "public utility corporation."

¹ 66 Pa.C.S. §104 states that the code "shall not apply, or be construed to apply, to commerce...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."

8. Because it recognized that it is a federally regulated common carrier, SPLP has never applied to the Pennsylvania Public Utility Commission (“PUC”) for a certificate of public convenience for Mariner 2.

9. If SPLP had applied to PUC for approval to build Mariner 2 and notified plaintiffs, plaintiffs would have intervened in any such application proceedings before the PUC to oppose such application.

10. The eminent domain rights available to public utilities derive solely from legislation. As set forth more in detail in the Memorandum of Law attached hereto, defendant’s claimed right under the Eminent Domain Code hinges on SPLP being a public utility as defined in the Public Utility Code, which right does not exist when defendant is certified federally as a common carrier instead. Defendant’s claimed right under the Business Corporation Law, likewise, hinges on SPLP being a public utility as defined in the Public Utility Code, which right does not exist when defendant is certified federally as a common carrier instead. Thus, in the absence of statutory authority under the Public Utility Code, SPLP lacks any authority to exercise the right of eminent domain for Mariner 2’s construction.

**SPLP is Not Entitled to Eminent Domain Rights Because
It Has Neither Applied for Nor Obtained an Appropriate
Certificate of Public Convenience from the Public Utility Commission.**

11. In the alternative, even if it were determined that the project is engaged in intrastate commerce, SPLP is not entitled to eminent domain rights because it has neither applied for nor obtained an appropriate certificate of public convenience from the Public Utility Commission.

12. SPLP contends that it has a right to eminent domain everywhere in Delaware County stemming from an ancient approval of an earlier pipeline. In various filings with the PUC, SPLP has taken the position that, because it has been certificated as a public utility for one route

through a county, it automatically is certificated to construct additional pipelines anywhere in that county without new PUC approval. As alleged in plaintiffs' Complaint, the consequence of this argument for all the counties in which defendant operates is that SPLP claims the right of eminent domain for all land within approximately forty (40%) of the Commonwealth.

13. Plaintiffs believe this claim is in direct conflict with Pennsylvania law and violates property rights protected under the federal and state constitutions, including the 5th Amendment to the U.S. Constitution, Article I, §27 of the Pennsylvania Constitution (the Environmental Rights Amendment ("ERA")), and Article X, §4 of the Pennsylvania Constitution.

14. At no time prior to their purchase did deMarteleire and Bomstein ever have actual or constructive notice that, by virtue of an ancient certificate of public convenience not recorded in the Delaware County property records, their property was at risk to be taken for construction of a NGL pipeline.

15. Plaintiffs deMarteleire and Bomstein do not wish to give or sell an easement to SPLP for Mariner 2. Plaintiffs believe and aver that NGL's are hazardous materials and that an additional easement for a new hazardous materials pipeline will lower their property value, harm the environment and permanently impair their property.

16. Plaintiffs believe and aver that a valid certificate of public convenience approving a pipeline route conveys the right to eminent domain for the approved route, within certain limits. But they also believe that a certificate of public convenience that would putatively allow eminent domain *anywhere* in Delaware County is a conveyance subject to Pennsylvania recording laws. SPLP never recorded any of the ancient certificate(s) and plaintiffs, therefore, had neither actual nor constructive notice of same prior to settlement on their home.

**Eminent Domain is Improper Because Mariner 2
Does Not Have a Public Purpose and Is Not “For the Public”.**

17. SPLP in its 2014 FERC Petition claims that Mariner 2 would transport propane and butane in interstate commerce. The market for butane is not Pennsylvania-wide. On the contrary, butane is used in cigarette lighters and the sole sizeable customer for butane in Pennsylvania is the Zippo Manufacturing Company in Bradford, on the New York State border in Northwestern Pennsylvania, the opposite corner of the state from the terminal where Mariner 2 would deliver butane. Additionally, SPLP has never been certificated to distribute petroleum products in McKean County, Zippo’s home.

18. As regards propane, the 2014 FERC Petition claims that there is a glut of supply in the Commonwealth. It wrote that this might cause “an oversupply that could lead to curtailment of natural gas production.” For that reason, propane needs to be shipped outside the state.

19. Any new business in Pennsylvania has the potential to create employment and add to the tax base. A new McDonald’s restaurant in the right location, for example, has the potential to be an economic stimulus, but no one would seriously argue that its construction constitutes a public purpose. If McDonald’s happened to be a previously certified public utility, that would not make its purpose any more public.

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

21. The delivery of butane to a single customer (were that customer even along the route served by the pipeline) and the delivery of propane outside the Commonwealth are not public purposes. The public is not the primary or paramount beneficiary.

22. Eminent domain exercised for non-public purposes, such as these, is an unconstitutional taking of private property and, as such, violates both the Fifth Amendment to the United States Constitution and Article X, §4 of the Pennsylvania Constitution.

23. The Public Utility Code also incorporates the requirement that companies transport liquids “for the public” for the companies to be considered public utilities. 26 Pa.C.S. § 102. For these same reasons, SPLP’s proposed transmission pipeline does not meet the requirement that the transmission be “for the public,” and so SPLP is not a public utility with respect to Mariner 2, and consequently cannot exercise eminent domain power.

24. In addition, the ERA requires government actors to take environmental considerations into account before making decisions that could harm Pennsylvania residents’ environmental rights. 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.

25. Lacking a public purpose, lacking public utility status as respects Mariner 2, and not having weighed the environmental considerations per the ERA into its plans, it cannot be said that defendant’s exercise of eminent domain is proper or lawful.

A Preliminary Injunction is Appropriate.

26. Defendant has notified the general public that it intends to build Mariner 2, a new pipeline project, and that citizens who do not make a deal with them will suffer eminent domain takings.

27. Defendant, through its agent, has sent plaintiffs deMarteleire and Bomstein a copy of the map depicting a route for Mariner 2 through their backyard.

28. Defendant, through its agents or employees, has placed a stake in deMarteleire and Bomstein's backyard to begin the process of eminent domain against them.

29. Under the Eminent Domain Code, the very act of filing a declaration of eminent domain transfers title to a condemnor. 26 Pa.C.S. §302(a)(2).

30. Based on information obtained relative to defendant's efforts to exercise the right of eminent domain throughout Pennsylvania, plaintiffs believe and aver that the taking of their property by defendant is imminent.

31. Individual plaintiffs, and Clean Air Council's members, should not have to await loss of their property to a defendant that has no eminent domain rights under Pennsylvania law or any other law before seeking judicial relief.

32. SPLP is still at liberty to enter into negotiations with landowners to purchase easements along the proposed Mariner 2 route, just as any other private enterprises would be.

33. The status quo ante will be maintained should an injunction be granted prior to a declaration of taking.

34. Plaintiffs believe and aver that, with respect to Mariner 2, their claim that SPLP does not have eminent domain rights is more likely than not to prevail on the merits following trial.

35. Greater injury will be caused by refusing an injunction than by granting it. The Mariner 2 project is in such a preliminary stage that the inability to take plaintiffs' property for a period of time will have no effect on the pipeline's construction in the event that plaintiffs lose the underlying case.

36. The relief sought by plaintiffs is reasonably suited to the offending activities of SPLP.

37. The public's interest will not be adversely affected by the granting of a preliminary injunction. On the contrary, the violation of private property rights by a private company in furtherance of its private profits is contrary to the public interest. There is no cognizable harm to SPLP, or other parties, in being prevented from taking private property to which SPLP has no legal right.

38. Money damages cannot compensate plaintiffs for the loss of enjoyment of their private property and the natural environment on that property.

39. Plaintiffs are entitled to a preliminary injunction barring SPLP from asserting eminent domain to take private property for use for the Mariner East pipeline projects.

WHEREFORE, plaintiffs deMarteire and Bomstein pray this Honorable Court grant a preliminary injunction in their favor and against SPLP, barring defendant from exercising eminent domain rights with respect to Mariner 2.

/s/Michael S. Bomstein
Michael S. Bomstein, Esq.

Attorney for deMarteire
and Bomstein

Dated: August 26, 2015

VERIFICATION

I, Margaret M. deMarteleire, hereby verify that I am plaintiff in the within action; that I have read the within Motion for Preliminary Injunction, and that the facts set forth therein are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. Section 4904, relating to unsworn falsification to authorities.


Margaret M. deMarteleire

Dated: August 26, 2015

VERIFICATION

I, Michael S. Bomstein, hereby verify that I am plaintiff in the within action; that I have read the within Motion for Preliminary Injunction, and that the facts set forth therein are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. Section 4904, relating to unsworn falsification to authorities.


Michael S. Bomstein

Dated: August 26, 2015

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CLEAN AIR COUNCIL, et al.,	:	COURT OF COMMON PLEAS
Plaintiffs	:	PHILADELPHIA COUNTY
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**MEMORANDUM OF LAW IN SUPPORT OF deMARTELEIRE
AND BOMSTEIN'S MOTION FOR PRELIMINARY INJUNCTION**

I. Matter Before the Court

This action is brought by Clean Air Council and Delaware County residents Margaret M. deMarteire and Michael S. Bomstein, to obtain declaratory and injunctive relief to stop Sunoco Pipeline L.P. from exercising eminent rights for construction of its proposed Mariner 2 pipeline.

Sunoco Pipeline L.P. ("SPLP") is an interstate carrier of crude oil, gasoline, and natural gas liquids such as propane, butane and ethane. In 2014, defendant SPLP received approval from the Federal Energy Regulatory Commission ("FERC") for its new, Mariner 2 pipeline to transport natural gas liquids ("NGL's") from the shale fields of Ohio and West Virginia, across Pennsylvania and to a terminal situated both in Pennsylvania and in Delaware for the purpose of shipping to markets outside the Commonwealth.

In seeking federal approval, SPLP represented that the project was designed to relieve an oversupply of NGL's in the Commonwealth. After obtaining federal approval, 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.

In this action, plaintiffs allege that because Mariner 2 is in interstate commerce, the state's Public Utility Code does not apply¹ and that 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 domain rights because it has neither applied for nor obtained an appropriate certificate of public convenience from the Public Utility Commission.

Finally, in the event it is held that existing certificates of public convenience 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 5th Amendment to the U.S. Constitution (property rights), Article I, §27 (environmental rights) and Article X, §4 (property rights) of the Pennsylvania Constitution. In that light, it is clear that Sunoco has no right to use eminent domain to take individuals' private property for the Mariner 2 project.

¹ See, 66 Pa.C.S. §104.

II. Statement of Questions Involved

A. Whether the Pennsylvania Public Utility Code applies to Mariner 2 since the project is in interstate commerce and, under 66 Pa.C.S. §104, the code “shall not apply, or be construed to apply, to commerce...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.”

Suggested Answer: No, Mariner 2 is governed by the Interstate Commerce Act.

B. Whether Sunoco Pipeline, L.P. has any authority to exercise the right of eminent domain for Mariner 2 when the Public Utility Code plainly does not apply.

Suggested Answer: No, since the right of eminent domain is statutory and the statutes conferring that right only apply to utilities governed by the Public Utility Code.

C. In the alternative, even if Mariner 2 were deemed to be governed by the Public Utility Code, whether Sunoco Pipeline L.P. would have the right of eminent domain for the project.

Suggested Answer: No, because the company has neither applied for nor obtained an appropriate certificate of public convenience from the Pennsylvania Public Utility Commission.

D. Whether SPLP has the right of eminent domain since the project does not have a public purpose.

Suggested Answer: No, since eminent domain may not take place where the public good is not primary and paramount.

E. Whether, under the circumstances, plaintiffs are entitled to a preliminary injunction.

Suggested Answer: Yes.

III. Factual Background

Plaintiffs deMarteleire and Bomstein hereby incorporate by reference all of the averments of their Complaint as though set forth more fully at length below.

Plaintiffs deMarteleire and Bomstein purchased their property in September 2013. In anticipation of their purchase they obtained a title search from Commonwealth Land Title Company, which search identified pipeline easements on their property in favor of Sun Oil Company, Atlantic Pipe Line Company and Keystone Pipe Line Company.

Said title search did not identify any other rights of way or easements affecting their property. Said title search did not identify any claim or potential claim to their title by SPLP by virtue of PUC-granted territorial rights in Delaware County.

At no time prior to their purchase did deMarteleire and Bomstein ever have actual or constructive notice that SPLP, by virtue of a certificate of public convenience not recorded in the Delaware County property records, could condemn their property for construction of a NGL pipeline. At no time prior to their purchase did deMarteleire and Bomstein ever have actual or constructive notice that SPLP was planning to construct a new pipeline in their backyard.

Plaintiffs deMarteleire and Bomstein do not wish to give or sell an easement to SPLP for Mariner 2. Plaintiffs believe and aver that NGL's are hazardous materials and that an additional easement for a new hazardous materials pipeline will lower their property value, put their home and its environment at risk of harm, and permanently impair their property.

Defendant has now notified the general public that it intends to build Mariner 2, a new pipeline project, and that citizens who do not make a deal with it will suffer eminent domain takings. Defendant, through its agent, has sent plaintiffs deMarteleire and Bomstein a copy of a map depicting a route for Mariner 2 through their backyard. Defendant, through its agents or employees, has without permission placed a stake in deMarteleire and Bomstein's backyard to begin the process of eminent domain against them.

If SPLP had applied to PUC for approval to build Mariner 2 and notified plaintiffs, plaintiffs would have intervened in any such application proceedings before the PUC to oppose such application.

IV. Argument

A. The Pennsylvania Public Utility Code does not apply to Mariner 2 since the project is in interstate commerce and, under 66 Pa.C.S. §104, the code “shall not apply, or be construed to apply, to commerce...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.”

1. Mariner 2 is an interstate pipeline project.

On August 29, 2014, SPLP filed its second FERC petition, this time seeking approval *as a common carrier* for setting tariffs for Mariner 2 (“Mariner 2 FERC Petition”), which, once again, was repeatedly characterized as an interstate pipeline. FERC granted approval of tariffs to SPLP *as a common carrier* for Mariner 2 by Order dated December 1, 2014.

Defendant’s petition stated, *inter alia*, “[a] byproduct of the increase in natural gas production from development of the Marcellus and Utica Shale is an abundance of propane and butane. The ever increasing supply is quickly outpacing demand in the Northeast, potentially causing an oversupply that could lead to curtailment of natural gas production.”

The petition also said that Mariner 2 would allow “propane and butane to move from Scio, Ohio, Hopedale, Ohio, Follansbee Jct., West Virginia and Houston, Pennsylvania to the SPMT Terminal” in Pennsylvania and Delaware, where “the Product will be stored, processed, and transported to alternative markets by water, rail or truck.” (Mariner 2 FERC Petition, p. 8).

In short, defendant’s argument was that there was too much propane and butane to sell in the Commonwealth, so that it had become necessary for SPLP *as a common carrier* to transport

these NGL's to destinations outside the Commonwealth. Hence, federal approval had become necessary.²

2. Under 66 Pa.C.S. §§102 & 104, the Pennsylvania Public Utility Code does not apply to the Mariner 2 project.

66 Pa.C.S. §104 provides in pertinent part that the Public Utility Code “shall not apply, or be construed to apply, to commerce...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.”

Mariner 2 as proposed is an NGL pipeline that would run from Ohio, pass through West Virginia, cross Pennsylvania and enter Delaware. As such, it obviously constitutes commerce among the several states and the Public Utility Code does not apply.

Additionally, the definition of “public utility” under the Public Utility Code only encompasses companies that distribute their product “for the public.” Because Mariner 2 is not transporting butane and propane “for the public,” as explained more under §IV.D., *infra*, it is not a public utility and may not avail itself of eminent domain rights under the Public Utility and Eminent Domain Codes.

B. SPLP does not have eminent domain rights with respect to project Mariner 2.

The power of eminent domain is exercised only pursuant to legislative enactment. Snitzer, *Pennsylvania Eminent Domain* (2014 Ed.), §1.1.3. Whether SPLP has the right of eminent domain as a public utility for purposes of Mariner 2, therefore, depends entirely on the state's legislative scheme and applicable constitutional constraints.

² In its earlier, December 7, 2012 petition for federal tariff approval of the Mariner 1 interstate project, SPLP was even more explicit, when it asserted that the Interstate Commerce Act (“ICA”) was implicated as the ICA “applies to common carriers engaged in the transportation of oil... by pipe line from one state... to any other state.” (Mariner 1 FERC Petition, p. 8).

In Pennsylvania, the legislature enacted the Eminent Domain Code, 26 Pa.C.S. §101, *et seq.* to govern the process. As defined in the Eminent Domain Code, the power of eminent domain is exercised through the process of condemnation. Under the Eminent Domain Code a public utility, *as defined in the Public Utility Code* at 66 Pa.C.S.A. §102, may be a condemnor and exercise the right of eminent domain. 26 Pa.C.S. §§103, 203 and 204(b)(2).

As shown above, the Public Utility Code is inapplicable to the interstate Mariner 2 project. Hence, SPLP is not acting as a public utility in building this pipeline and SPLP may not exercise the right of eminent domain under the Eminent Domain Code.

The Business Corporation Law at 66 Pa.C.S.A. §1511(a) confers the power of eminent domain on public utility corporations that transport petroleum products. Under §1511(g), however, it is the Eminent Domain Code that is applicable to such proceedings. As shown above, the Eminent Domain Code does not permit condemnation by a “public utility corporation” that is not a public utility within the meaning of the Public Utility Code.

Further, the term “public utility corporation” in the Business Corporation Law is defined as “[a]ny domestic or foreign corporation for profit that: (1) is *subject to regulation as a public utility* by the Pennsylvania Public Utility Commission or an officer or agency of the United States; or (2) was subject to such regulation on December 31, 1980, or would have been so subject if it had been then existing,” (emphasis supplied).

As explained above, however, SPLP is recognized federally *as a common carrier* with respect to the Mariner East pipelines, not *as a public utility*. Hence, for purposes of Mariner 2, SPLP is not a public utility within the meaning of the Business Corporation Law.

Under the Public Utility Code itself, a public utility may exercise the right of eminent domain. 66 Pa.C.S. §1104. But, since the Public Utility Code is inapplicable, §1104 is likewise inapplicable.

In sum and in short, defendant's claim that it has eminent domain rights for Mariner 2 under the Public Utility Code, the Business Corporation Law, and the Eminent Domain Code is simply wrong.

C. Even if Mariner 2 were deemed to be governed by the Public Utility Code, SPLP would not have the right of eminent domain for the project.

SPLP claims that, once approval is granted for a pipeline route through any Pennsylvania county, the PUC has approved the use of eminent domain *anyplace in the county, at any time, and of any nature*, without the need for further PUC approval. Hence, PUC approval in 1930 and 1931 for service across the state, including Delaware County, means that SPLP has a right to eminent domain everywhere in Delaware County in perpetuity, even though such a property claim has never been recorded in the Delaware County property records.

Plaintiffs dispute this contention as being overbroad and in violation of their property rights under Pennsylvania law and under the constitutions of both the Commonwealth and the United States. It is plaintiffs' claim that defendant has neither applied for nor obtained an appropriate certificate of public convenience for Mariner 2 from the PUC.

All of the certificates of public convenience issued prior to 2002 related to in-state pipelines. SPLP's inventory of pipelines was described in detail in those certificates. At the time of SPLP's December, 2012 FERC application, SPLP was not operating pipelines from Ohio and West Virginia that delivered NGL's to the Commonwealth or Delaware.

Plaintiffs recognize that a valid certificate of public convenience conveys the right to eminent domain within certain limitations. While no Pennsylvania decisional authority on this

issue has been found, plaintiffs believe and aver that a certificate of public convenience that putatively conveys a right to take land anywhere within a county must necessarily be a conveyance subject to Pennsylvania recording laws.

At the time of plaintiffs' purchase of their home in 2013, SPLP had never recorded the ancient certificates that it claims stake out their sweeping property rights. Plaintiffs, therefore, had neither actual nor constructive notice of same prior to settlement on their home. They had no notice that their property would be at risk to be taken for construction of an NGL pipeline.

The Pennsylvania Supreme Court in Middletown Twp. v. Lands of Stone, 595 Pa. 607, 617, 939 A.2d 331, 337 (2007) has held that "the exercise of the right of eminent domain is necessarily in derogation of a 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." (internal quotation marks omitted). "It is well settled that private property may be taken for public purposes only in such an amount and to such an extent as these purposes reasonably require." Twp. of Cornplanter v. McGregor, 745 A.2d 725, 727 (Pa. Commw. Ct. 2000).

Notwithstanding SPLP's claims or even decisions of the PUC, no certificate of public convenience allowing a route through a Pennsylvania county can reasonably be construed as conferring a right to take private property anywhere in a county at any time. Such a construction would turn the law of eminent domain, constrained as it is by due process and public purpose requirements, on its head. Thus, a claim that a certificate granted in 1930 or 1931 to transport oil west from a Delaware County refinery to the Ohio border grants rights of eminent domain everywhere in Delaware County is entirely unsustainable.

SPLP's position is also contrary to its own practices. In 2002, defendant acquired the assets of other pipeline operators, including the lines comprising present-day Mariner 1, running

from Philadelphia County and Delaware County to Allegheny County and the Ohio border. Approval of service was given to predecessor Sinclair to run a line through Washington County. Approval was also granted to Sun Pipeline to run a pipeline to the Ohio boundary.

When it came time in 1967 to create a new pipeline in Allegheny and Beaver counties to meet increased demand almost *on the exact same right of way* as previously used,³ Sun Pipeline through local attorneys Pepper, Hamilton and Scheetz, filed a PUC application seeking approval. In that petition, Sun averred that “Approval of the application is necessary or proper for the following reason: The facilities of the Company’s main line from the Pennsylvania-Ohio state line to the Allegheny Pump Station are insufficient to meet all the present and anticipated future demands made thereon, and a supplementary line, as proposed in this application, is necessary to supply the service demanded of the facilities of the applicant.” (Application of June 18, 1967 at pp. 4-5).

In the case of Washington County, Sinclair was already operating a pipeline there prior to its acquisition by ARCO, predecessor of instant defendant. Nonetheless, in 2014 SPLP applied to PUC for approval to construct fifteen miles of new pipeline as part of its project to connect Delmont and Houston (the Washington County Petition).

Mariner 2, as represented to FERC and as described in SPLP’s public statements, is an entirely new pipeline that, if constructed, would be more than three hundred miles long. It is much greater in size and scope than the two projects for which approval was sought in 1967 and in 2014. Moreover, it would transport NGL’s rather than the petroleum derivatives SPLP had up until recently carried, and take them from west to east rather than east to west.

In light of the foregoing, it is clear that even if the Mariner 2 project is governed by the Public Utility Code—which is not conceded—SPLP would be required to make a new

³ Sun noted that a five-mile segment was not on the same right-of-way.

application to PUC for approval of a new certificate of public convenience. Without such a certificate, SPLP has no arguable claim to the right of eminent domain.

D. Eminent domain is improper because Mariner 2 does not have a public purpose.

SPLP in its Mariner 2 FERC Petition claims that Mariner 2 would transport propane and butane in interstate commerce. The market for butane is not Pennsylvania-wide. On the contrary, butane is used in cigarette lighters and the sole sizeable customer for butane in Pennsylvania is the Zippo Manufacturing Company in Bradford, on the New York State border in Northwestern Pennsylvania, the opposite corner of the state from the terminal where Mariner 2 would deliver butane. Additionally, SPLP has never been certificated to distribute petroleum products in McKean County, Zippo's home.

As regards propane, the Mariner 2 FERC Petition claims that there is a glut of supply in the Commonwealth. It wrote that this might cause "an oversupply that could lead to curtailment of natural gas production." For that reason, propane needs to be shipped outside the state.

Any new business in Pennsylvania has the potential to create employment and add to the tax base. A new McDonald's restaurant in the right location, for example, has the potential to be an economic stimulus, but no one would seriously argue that its construction constitutes a public purpose. If McDonald's happened to be a previously certified public utility, that would not make its purpose any more public.

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

The delivery of butane to a single customer (were that customer even along the route served by the pipeline) and the delivery of propane outside the Commonwealth are not public purposes. The public is not the primary or paramount beneficiary.

Eminent domain exercised for non-public purposes, such as these, is an unconstitutional taking of private property and, as such, violates both the Fifth Amendment to the United States Constitution and Article X, §4, of the Pennsylvania Constitution.

In addition, the state’s Environmental Rights Amendment (“ERA”), Article I, §27 of the Pennsylvania Constitution, requires government actors to take environmental considerations into account before making decisions that could harm Pennsylvania residents’ environmental rights. Plaintiffs believe and aver that environmental considerations were never properly considered by the PUC or Sunoco in any such proceedings, if they were considered at all.

Lacking a public purpose, and not having weighed the environmental considerations per the ERA into its plans, it cannot be said that defendant’s exercise of eminent domain is proper or lawful.

E. A preliminary injunction is appropriate under the circumstances of this case.

Under the Eminent Domain Code, the very act of filing a declaration of eminent domain transfers title to a condemnor. 26 Pa.C.S. §302(a)(2). If SPLP had applied to PUC for approval to build Mariner 2 and notified plaintiffs, plaintiffs would have intervened in any such application proceedings before the PUC to oppose such application. They never had that opportunity.

The required elements for granting a preliminary injunction have been set forth in Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc., 573 Pa. 637, 828 A.2d 995, 1001 (2003):

A court may grant a preliminary injunction only where the moving party establishes the following familiar elements: (1) the relief is necessary to prevent immediate and irreparable harm which cannot be compensated by damages; (2) greater injury will occur from refusing the injunction than from granting it; (3) the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct; (4) the party seeking an injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits. Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity. Sixth and finally, the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest.

Plaintiffs deMarteleire and Bomstein, and Clean Air Council's members, should not have to await loss of their property to a defendant that has no eminent domain rights under Pennsylvania law or any other law. Based on information obtained relative to defendant's efforts to exercise the right of eminent domain throughout Pennsylvania, plaintiffs believe and aver that the taking of their property by defendant is imminent.

SPLP is still at liberty to enter into negotiations with landowners to purchase easements along the proposed Mariner 2 route, just as any other private enterprises would be. But with only a private purpose in mind, defendant has no right to expect that it can grab plaintiffs' property if plaintiffs do not agree to enter into a sale agreement.

Plaintiffs believe and aver that, with respect to Mariner 2, their claim that SPLP does not have eminent domain rights is more likely than not to prevail on the merits following trial. Further, the status quo ante will be maintained should an injunction be granted prior to a declaration of taking.

The harm caused by the granting of an injunction will be less than the harm caused by not granting it. The Mariner 2 project is in such a preliminary stage that the inability to take plaintiffs' property for a period of time will have no effect on the pipeline's construction in the event that plaintiffs lose the underlying case. 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.”).

Granting a preliminary injunction is reasonably suited to abate, temporarily, the offending conduct. The duration of the injunction should be until such time as this Court has ruled on plaintiffs' underlying allegations and decided whether or not declaratory and/or permanent injunctive relief is appropriate.

The public's interest will not be adversely affected by the granting of a preliminary injunction. On the contrary, the violation of private property rights by a private company in furtherance of its private profits is contrary to the public interest.

There is no cognizable harm to SPLP, or other parties, in being prevented from taking private property to which SPLP has no legal right. On the other hand, money damages cannot compensate plaintiffs for the loss of enjoyment of their private property and the natural environment on that property.

V. Conclusion

For all of the above reasons, plaintiffs are entitled to a preliminary injunction barring SPLP from asserting eminent domain to take private property for use for the Mariner 2 project.

Plaintiffs, therefore, pray this Honorable Court grant a preliminary injunction in their favor and against SPLP, barring defendant from exercising eminent domain rights with respect to Mariner 2.

Respectfully submitted,

/s/Michael S. Bomstein
Michael S. Bomstein, Esq.

Attorney for deMarteleire
and Bomstein

Dated: August 26, 2015

CERTIFICATE OF SERVICE

I, Michael S. Bomstein, do hereby certify I that this date I will be serving a true and correct copy of Plaintiffs' Motion for Preliminary Injunction upon defendant Sunoco Pipeline L.P. by hand delivery as set forth below:

Sunoco Pipeline L.P.
1818 Market Street, Suite 1500
Philadelphia, PA 19103

/s/ Michael S. Bomstein
Michael S. Bomstein

Dated: August 27, 2015