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May 31, 2018

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Filing Room
Harrisburg, PA 17120

Re: Pennsylvania State Senator Andrew E. Dinniman v. Sunoco Pipeline L.P.; Docket No. C-2018-3001451 & P-2018-3001453; **SUNOCO PIPELINE L.P.'S BRIEF IN OPPOSITION TO ORDER GRANTING INTERIM EMERGENCY RELIEF (PUBLIC VERSION)**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is Sunoco Pipeline L.P.'s (SPLP) Brief in Opposition to Order Granting Interim Emergency Relief (Public version) in the above-referenced proceeding. **SPLP requests that the Commission decide this certified material question on an expedited basis before its next scheduled public meeting by either calling a special public meeting or engaging in a notational decision pursuant to 4 Pa. Code S 1.43(c).**

If you have any questions regarding this filing, please contact the undersigned.

Very truly yours,

Thomas J. Sniscak

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WES/das
Enclosure
cc: Honorable Elizabeth Barnes (via email only)
Bert Marinko, Acting Director of OSA (rmarinko@pa.gov)
Per Certificate of Service

PUBLIC VERSION

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA STATE SENATOR ANDREW E. DINNIMAN,	:	
Petitioner,	:	Docket No. C-2018-3001451
v.	:	
SUNOCO PIPELINE L.P.,	:	
Respondent.	:	
PENNSYLVANIA STATE SENATOR ANDREW E. DINNIMAN,	:	
Petitioner,	:	Docket No. P-2018-3001453
v.	:	
SUNOCO PIPELINE L.P.,	:	
Respondent.	:	

RESPONDENT SUNOCO PIPELINE L.P.'S BRIEF
IN OPPOSITION TO ORDER GRANTING INTERIM EMERGENCY RELIEF

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Dated: May 31, 2018

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I. Introduction and Summary of Argument

Administrative Law Judge ("ALJ") Elizabeth Barnes granting interim emergency relief creates a dangerous precedent for the Commission that extends far beyond this case. It invites any person to file a petition for emergency relief based upon generalized safety concerns about any public utility in the Commonwealth - not just a natural gas liquids pipeline, but any type of pipeline, water or electric transmission utility. To be awarded emergency relief, the petitioner need not offer any credible evidence or properly-supported expert testimony that the continued operation of the public utility is unsafe, or that an emergency exists, but instead can rely on hearsay, expressions of concern, speculation, or past, unproven notices of violation issued to the public utility unrelated to safety. And the burden of proof will not be on the Petitioner to prove that the utility is ***actually unsafe***, but rather, the public utility will bear the burden to prove that its continued operation ***is safe***. Worse yet, the emergency relief will be granted on grounds the petitioner never raised, but the ALJ did *sua sponte*, for which ***no*** evidence was offered, but the ALJ supplied extrajudicially. As a result, the public utility will have no notice or opportunity to defend against those grounds and will be deprived of its due process rights. Unfortunately, this is not a hypothetical. This is precisely what occurred here, where SPLP has been deprived of its due process rights and of a fair impartial tribunal, violating the rule of law in *Lyness v. Com. State Bd. Of Medicine*, 529 Pa. 535, 542-43 (Pa. 1992) prohibiting an ALJ from acting as an advocate or prosecutor. It is a dangerous and unlawful precedent for the Commission to set, which will inevitably lead to a flood of emergency petitions where no actual safety emergency exists.

ALJ Barnes granted Petitioner Senator Dinniman's Amended Petition for Interim Emergency Relief, and issued an Order that suspended service on the entire Mariner East 1 pipeline ("ME1"), prohibited Sunoco Pipeline, L.P. ("SPLP") from constructing the Mariner East 2 and Mariner East 2X pipelines (collectively "ME2") in West Whiteland Township, and ordered SPLP to undertake nearly a dozen actions to assess the integrity of ME1 and the geological conditions in West Whiteland Township to construct ME2. The Order also required SPLP to distribute information identified as confidential

security information and *sua sponte* created new procedures and regulatory requirements, including welding practices and mandatory drug and alcohol testing of its and its contractors' employees.

As a threshold matter, Sen. Dinniman has no standing to bring this matter in his official capacity because he alleges no injury to his legislative function. Further, the ALJ's Order is not supported by the evidentiary record and much of it is based on extrajudicial material added after the hearing by ALJ Barnes which is not found in the petition or evidence offered, and for which SPLP had no prior notice or opportunity to be heard. Indeed, Sen. Dinniman's only expert witness conceded he could not offer any opinion that the operation of ME1 or construction of ME2 is unsafe. And, on the most fundamental level, no emergency exists and therefore there is no proof of the need for immediate relief: the Commission has unanimously found that there are no issues with the structural integrity of ME1 and SPLP has voluntarily halted construction of ME2 in West Whiteland Township until at least July 1, 2018. So, far from finding that Sen. Dinniman met his burden to prove that the operation of ME1 and construction of ME2 create clear and present dangers to life and property, the ALJ's Order amounts to judicial advocacy and regulatory rulemaking.

II. Legal Argument

In reviewing the ALJ's Order, "the PUC, not the ALJ, is the ultimate fact finder." *Greene Tp. Bd. Of Sup'rs v. PUC*, 642 A.2d 541, 543 (Pa. Commw. Ct. 1994). "The Commission is the ultimate finder of fact empowered to determine the credibility of witnesses and to resolve conflicts in evidence." *Hess v. PUC*, 107 A.2d 246, 259 (Pa. Commw. Ct. 2014).

A. Sen. Dinniman lacks standing to sue as a public official because the operation of ME1 and construction of ME2 do not impair the Senator's official power or authority to act as a legislator.

While the Commission must correct the errors of law, lack of evidentiary support and due process deprivations in the ALJ's Order so there is a decision by this Commission clearly stating how emergency relief is to be considered, what evidence is necessary, and how the standards are to be applied, the Commission must also decide if Senator Dinnaman has standing. Answers to both of these issues will serve to enlighten parties and ALJs in these matters and will conserve the time and resources of all

involved including the Commission. Moreover, it will ensure that important public utility service is not interrupted for insufficient or arbitrary reasons.

Sen. Dinniman concedes that he brings this action only in his official capacity. Pet'rs. Br. at 20. For Sen. Dinniman to have standing, he must prove that he has a "direct, immediate and substantial interest in the subject matter of the proceeding." Order at 3, citing *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282-84 (Pa. 1975); *see also*, *Mun. Auth. of Borough of West View v. PUC*, 41 A.3d 929, 933 (Pa. Commw. Ct. 2012) ("In order to have standing to pursue a formal complaint before the PUC under Section 701 of the Code, the Complainant must have a direct, immediate, and substantial interest in the subject matter of the controversy.'") (quoting *Waddington v. PUC*, 670 A.2d 199, 202 (Pa. Commw. Ct. 1995)).

To meet that standard, General Assembly members have standing in their official capacity to challenge governmental action ***only if*** it interferes with or impairs the legislator's official power or authority to act as a legislator:

> Standing exists only when a legislator's direct and substantial interest in his or her ability to ***participate in the voting process*** **is** negatively impacted, or when he or she has suffered a ***concrete impairment or deprivation of an official power or authority to act*** **as a legislator**. These are injuries personal to the legislator, as a legislator. By contrast, a legislator lacks standing where he or she has an indirect and less substantial interest in conduct outside the legislative forum which is unrelated to the voting or approval process, and ***akin to a general grievance about the correctness of governmental conduct, resulting in the standing requirement being unsatisfied.***

Markham v. Wolf, 136 A.3d 134, 145 (Pa. 2016) (internal citations omitted, emphasis added).

The ALJ's Order does not cite or refer to *Markham.* The ALJ acknowledges, however, that legislators are granted standing "in their official capacity to challenge agency actions that may implicate ***their legislative function***." Order at 4 (emphasis added). In finding that Sen. Dinniman meets that rigorous standard, the ALJ relies on six sources that are either completely inapplicable or in fact support the conclusion that Sen. Dinniman lacks standing here.

First, the ALJ's Order finds that Sen. Dinniman has standing pursuant to 52 Pa. Code § 1.21(c)(3). Section 1.21(c)(3) allows an officer of a government entity to represent that entity before the Commission, but only in a ***non-adversarial proceeding***. This is an ***adversarial*** proceeding, and therefore Section 1.21(c)(3) is inapplicable.

Second, the ALJ's Order finds that Sen. Dinniman has standing as a Petitioner pursuant to 52 Pa. Code § 5.72. Section 5.72 applies only to intervention. Sen. Dinniman is not an intervenor, he is the Complainant and Petitioner, and therefore this section is also inapplicable.

Third, the ALJ's Order finds that Sen. Dinniman has standing because he was found to have standing to intervene in *Application of Artesian Water Pennsylvania, Inc.*, Dkt. No. A-2014-2451241. *Artesian* is inapplicable because it relates to intervention under Section 5.72. But *Artesian* is entirely inapplicable for other reasons. *Artesian* was an ALJ decision that granted Sen. Dinniman protestant status to intervene in a proceeding initiated by another. That distinction is critical because, unlike a complainant or petitioner, a protestant need not establish the stringent direct, immediate, and substantial interest standard necessary to bring a complaint. Rather, a protestant is akin to a commenter who participates in an existing protest case to comment on whether that pending application is in the public interest. Allowing Sen. Dinniman to appear as a protestant has no precedential value for the more stringent standing requirements for a petitioner or complainant to initiate an action. Moreover, *Artesian* was never reviewed and upheld by the Commission, it predates *Markham* and therefore has no application after the Supreme Court decided *Markham*.

Fourth, the ALJ's Order cites to *Fumo v. City of Phila.*, 972 A.2d 487 (Pa. 2009), as support for a legislator's standing. *Fumo* stands for precisely the opposite. Consistent with the holding in *Markham*, *Fumo* holds that for a legislator to have standing in his or her official capacity, the injury alleged must be to "protect a legislator's right to vote on legislation" or to prevent "a diminution or deprivation of the legislator's . . . power or authority." *Id*. at 501. In sharp contrast, "legislative standing has not been recognized in actions seeking redress for general grievances about the correctness of governmental conduct." *Id.* Senator Fumo had standing in his official capacity because the harm alleged was the

usurpation of his authority as a member of the General Assembly, which body had the exclusive statutory authority to grant a license for the use of the submerged lands of the Commonwealth. *Id.* at 502. That alleged harm fell squarely within *Markham* because it directly affected Senator Fumo's legislative function. Significantly, the Court rejected Senator Fumo's claim of standing based on his disagreement with the merits of City of Philadelphia's decision to grant approval under a separate City ordinance because that claim did not interfere with Senator Fumo's own legislative function. *Id.*

Here, Sen. Dinniman did not identify any legislative function that has been impaired or interfered with by SPLP or any Commission action. Nor did the ALJ's Order, which cites only to Sen. Dinniman's involvement in "committees that address water issues" and "commenting on and approving expenditures related to water resources in Chester County." Order at 6. There is no allegation that these functions have been impaired. In fact, Sen. Dinniman testified that he is free and continues to introduce legislation directly on these issues. Tr. at 173:6-10. Instead, Sen. Dinniman's entire claim is based on a challenge made on behalf of his constituents to SPLP's, the Commission's and DEP's actions or inaction under existing law. *See, e.g.*, Tr. at 173:40-174:18. Under *Markham* and *Fumo*, that is expressly not enough to establish Sen. Dinniman's standing.

Fifth, the ALJ's Order cites to *Corman v. NCAA*, 74 A. 3d 1149 (Pa. Commw. Ct. 2013). In *Corman*, the legislature statutorily vested in certain legislators, including Senator Corman, the right to 30-days advance notice of expenditures from an endowment fund, and directed that no expenditure could be made until after that 30-day period. The Commonwealth Court held that Sen. Corman had standing to challenge disbursements related to this endowment precisely because he was given a statutory obligation to review these disbursements. In contrast, Sen. Dinniman has not been given any statutory obligation to protect the harms that he alleges, but rather has nothing more than generalized grievances he asserts on behalf of his constituents.

Sixth, the ALJ's Order refers to the Commission's May 3, 2018 Order ("May 3 Order") as support for Sen. Dinniman's standing. The Commission's May 3 Order merely states, however, that Sen. Dinniman had no standing to intervene in that proceeding, but he is free to file his own complaint where

he would be the party in interest. The May 3 Order takes no position on whether Sen. Dinniman will have standing in such a matter, nor could it because the Commission had no information regarding the basis on which Sen. Dinniman would assert that he has standing in this separate action.

For these reasons, Sen. Dinniman lacks standing and the ALJ's Order should be vacated and the matter dismissed.

B. To obtain emergency relief, a petitioner has the burden to prove each of four elements with substantial evidence.

To obtain interim emergency relief, the petitioner has the burden to prove "a ***clear and present danger*** to life or property" 52 Pa. Code § 3.1 (definition of "emergency") (emphasis added), 66 Pa. C.S. § 332(a) ("proponent of a rule or order has the burden of proof"), and establish all four of the following elements: (1) the petitioner's right to relief is clear; (2) the need for relief is immediate; (3) the injury would be irreparable if relief is not granted; and (4) the relief requested is not injurious to the public interest." 52 Pa. Code § 3.6(b). That burden must be "satisfied by establishing a preponderance of the evidence which is ***substantial*** and legally credible." *Lansberry, Inc. v. PUC*, 134 Pa. Commw. 218, 222-23 (Pa. Commw. Ct. 1990) (emphasis added).

While the ALJ's Order cites to the correct legal standards, in applying them, the ALJ does the opposite. Rather than requiring Sen. Dinniman to prove that the continued operation of ME1 and future construction of ME2 present a "clear and present danger to life and property," and that his right to relief is clear, the ALJ improperly shifted the burden to SPLP. Under the standard applied in the ALJ's Order, Sen. Dinniman was only required to raise what the ALJ considered to be "substantial legal questions" (Order at 9). Then, the burden shifted to SPLP to prove that the continued provision of public utility service is safe, including on matters that have already been conclusively resolved (e.g., ME1 and ME2 are public utilities and the integrity of ME1 has not been compromised by the construction of ME2), or on matters that were not raised, on which Sen. Dinniman offered no evidence and of which SPLP had no notice. As a consequence, SPLP has been deprived of a fair and impartial tribunal before which the case can be heard. *See, e.g., Lyness*, 529 Pa. at 542-43 (Pa. 1992).

C. Sen. Dinniman failed to prove that the continued operation of ME1 will create a clear and present danger to life or property.

1. Sen. Dinniman did not even seek relief on SPLP's status as a public utility, which the Commission and courts have repeatedly resolved in any event.

The ALJ's Order identified SPLP's questionable status as a public utility as one of two "substantial legal questions" affecting the safety of ME1 and ME2. Order at 10. Sen. Dinniman, however, offered no evidence to challenge SPLP's public utility status, and further, in his post-hearing brief conceded that he was "not seeking relief" on that basis. Petr's Br. at 36, n. 7. SPLP's status as a public utility should not be in dispute - the Commission and Commonwealth Court have repeatedly concluded that SPLP is a public utility and that ME1 and ME2 are public utility facilities, *e.g.*, SPLP Ex. 42, with one of the Commission's decisions reversing this very ALJ on this very issue over three years ago.

2. There is no evidence to contradict BIE's conclusion that the sinkhole on Lisa Drive did not compromise ME1's structural integrity.

By the May 3 Order, the Commission unanimously approved the reinstatement of service on ME1. In its May 3 Order, the Commission relied on the Bureau of Investigation and Enforcement ("BIE") conclusions "that the integrity of the ME1 pipeline remains intact" and "that the integrity of the ME1 pipeline has not been compromised." SPLP Ex. 20 at 9. The Commission's May 3 Order is "prima facie evidence of the facts found." 66 Pa. C.S. § 316.

The Commission's May 3 Order was based on detailed investigations and studies performed by SPLP, with which BIE and its independent geophysical consultant ARM Group, Inc. ("ARM") concurred. BIE and ARM spent over 260 hours meeting with SPLP and its consultants and reviewing the data generated from the numerous investigations and studies. SPLP Ex. 19.

The ALJ's Order disregards the Commission's unanimous May 3 Order and the comprehensive investigations, technical data and analyses on which it is based. Instead, ALJ Barnes concluded that "I am not persuaded" that ME1's structural integrity was not compromised until SPLP "makes its compliance findings" that the May 3 Order requires, (Order at 16-17), which extends for six months.

SPLP Ex. 20 at 14. ALJ Barnes effectively overruled the Commission's unanimous May 3 Order that restored ME1's public utility service with no expert testimony to support her ruling. The only "fact" on which ALJ Barnes relied in overruling the Commission's May 3 Order was a lay witness's inaccurate description of the sinkhole and the lay witness's unsubstantiated claims of depressions "that were of concern."[1] Order at 13.

Moreover, Sen. Dinniman offered no expert opinion that the sinkhole had any effect on ME1's structural integrity. Sen. Dinniman's only expert, a geologist, conceded that he had no opinion on the structural integrity of ME1 because he is not an engineer. Tr. at 283:22-284:1. Accordingly, there was no evidence to contradict the Commission's unanimous determination. The May 3 Order was based on extensive evidence and sound science that ME1's structural integrity was not impacted by the Lisa Dr. sinkholes and that ME1 is safe to be in service. SPLP Exs. 17-22.

3. Petitioner and Intervenors did not allege or submit evidence that ME1's age makes it unsafe to operate.

The ALJ's Order departs still further from the law and the evidentiary record when it questions whether ME1 "meets today's engineering standards." Order at 19. Sen. Dinniman's petition did not raise this issue, and Sen. Dinniman did not offer any evidence to attempt to prove it. Tellingly, the ALJ's Order contains no citations to evidence relating to "welded seams." There are no citations to the differences between "oxygen-acetylene" and "electrical resistance" welding, or even their existence. There are no citations to "heat affected zones" or even what they are, and no citation to "cold drawn" and "steel welded" pipes or the need for "weld tests" when ME1 was repurposed in 2014. And there are no citations to the various types of tests, inspections and reports that would describe the integrity of a

[1] ALJ Barnes also credits lay witness, Virginia Kerslake, over the testimony of SPLP's professional geologist, David Demko, P.G., that the sinkhole did not affect ME1's structural integrity, Tr. 681:9-686:24, because Ms. Kerslake has a background in earth science and soil chemistry and worked in a lab analyzing soil samples. Order at 14. Ms. Kerslake's experience has nothing to do with pipelines or engineering, and she was not offered or accepted as an expert to provide expert opinions on the structural integrity of ME1. Ms. Kerslake did not even purport to offer an opinion on ME1's structural integrity. Moreover, her description of the sinkhole and claims of depressions are not credible, particularly in the face of extensive structural, geotechnical, and geophysical work done in response to the sinkholes to establish ME1's structural integrity. In any event, Ms. Kerslake's description of the sinkhole was inaccurate, as reflected by the photograph contained in PUC files (attached as Exhibit "1"), and by Mr. Demko's eyewitness testimony.

pipeline, its welds or its materials, wall thickness, and depth of cover. Order at 18-19.

The lack of citations to the evidentiary record is unsurprising because these purported "findings" are not based on any evidence in the record. What is surprising, however, is that ALJ Barnes instead relies on some unknown, post-hearing, extrajudicial source beyond the record of these proceedings. Again, by doing so ALJ Barnes is acting as an advocate. The ALJ and the Commission cannot issue an interim emergency order on grounds that Sen. Dinniman did not raise in his petition and based on information that is not part of the evidentiary record. The issues in a hearing seeking interim emergency relief are limited to the allegations made in the petition seeking that relief. *Schwartz v. Del. & Hudson Ry. Co., Inc.*, Dkt. No. C-2011-2237486, 2013 WL 6503449, at *2 (Order entered Dec. 5, 2013); *Petition of Norfolk S. Ry. Co.*, Dkt. No. C-00019560, 2012 WL 1794909, at *6 (recommended decision entered Mar. 6, 2012) (Salapa, J.); *Americus Ctr., Inc. v. PPL Elec. Utilities Corp. City of Allentown*, Dkt. No. C-20077427, 2007 WL 1484284, at *4 (Order entered May 15, 2007).

Reliance on these purported "facts" that were not asserted in Sen. Dinniman's petition and on which no evidence was submitted at the evidentiary hearing also raises grave concerns over violations of SPLP's fundamental rights to due process and SPLP's rights to a fair, impartial tribunal. When an ALJ rules on issues outside of the petition or relies on extrajudicial evidence, a party's due process rights are violated because that party is deprived of notice of the issues to be litigated and an opportunity to present evidence to the contrary. *Pocono Water Co. v. PUC*, 630 A.2d 971, 973-74 (Pa. Commw. Ct. 1993) (finding that the Commission violated the utility's due process rights "because it assessed liability after determining an issue which [the utility] had not been afforded a reasonable opportunity to defend at the hearing."); *Duquesne Light Co. v. PUC*, 507 A.2d 433, 437 (Pa. Commw. Ct. 1986) (holding that the Commission violated the utility's due process rights because the utility was "not given adequate notice of the specific conduct being investigated, and hence its defense was gravely prejudiced.").

To direct the extreme remedy of emergency relief shutting down a public utility without prior notice of the issues in dispute is a violation of law, the Commission's rules, and fundamental notions of

fairness and due process.[2]

4. There is no evidence that seeps on Ms. Kerslake's property have compromised or will compromise ME1's structural integrity.

The ALJ's Order relies on the presence of two seeps on Ms. Kerslake's property (which the Order mischaracterizes as "springs") for the emergency shutdown of ME1, and states that the ALJ is "not persuaded" by SPLP's geologist that the seeps do not affect the structural integrity of ME1. Order at 14. The Order, however, does not cite to any evidence showing that Sen. Dinniman met his burden to prove by expert testimony that the seeps will impact ME1's structural integrity because no such evidence exists. Indeed, while Sen. Dinniman identified an engineer as an expert witness to testify at the hearing, the engineer never testified. The only expert in geology and hydrogeology that Sen. Dinniman did call, Ira Sasowsky, admitted that he had no opinion about ME1's structural integrity:

> Q. Do you have an opinion to a reasonable degree of scientific certainty about the integrity of ME1?
>
> A. I can't render an opinion on that because that seems like an engineering question to me. No, I don't have an opinion on that.

Tr. at 283:22-284:1.

Even though it is not SPLP's burden to disprove Sen. Dinniman's unproven allegations, SPLP did. The seeps appeared in a wooded area on Ms. Kerslake's property in July 2017, and the small amount of surface water from the seeps is contained within a small trench that channels the water across the ME1 right-of-way in a one-foot wide area. Since their development ten months ago, the seeps have not caused the development of any surface depressions, subsidences or sinkholes. SPLP's expert in geology and hydrogeology, David Demko, P.G., testified that he monitors this area frequently and that the seeps have not and will not cause any impact to the structural integrity of ME1. Tr. at 660:4-15; SPLP Ex. 47.

[2] If given notice that this was an issue, SPLP would have introduced evidence that portions of ME1 were newly constructed and others were replaced or reconditioned before it was repurposed and tested for transporting NGLs in 2014. SPLP would have offered evidence of the testing and inspections done both before it was put in service, and since it was put in service, including inspections performed by PHMSA and the Commission, including one recently concluded in May 2018. Neither PHMSA nor the Commission ordered ME1 to be shut down based on these inspections.

ALJ Barnes simply rejected Mr. Demko's unchallenged expert testimony, and only cited that "flowing water is one of the requirements for subsidence" to support her finding. Order at 14. But the ALJ's Order ignores the other two requirements for the creation of a subsidence – about which the experts agree – (1) an underground void for soil to fall into; and (2) soil cover that is able to move. Tr. 652:13-20 (Demko testimony); Tr. at 261:13-262:20 (Sasowsky testimony). There is no evidence of the presence of either of these other two conditions, and no expert opinion that the seeps will cause subsidence that will undermine ME1's structural integrity. Indeed, the lack of development of a surface depression, subsidence or sinkhole in the ten months since the seeps first appeared in July 2017 is powerful evidence that there is no clear and present danger of the development of a sinkhole. Sen. Dinniman offered no contrary evidence, and the ALJ's Order cites none.

The mere presence of surface water is at least two levels of proof away from a sinkhole that damages ME1's structural integrity. If the mere presence of surface water were the standard to establish a lack of structural integrity, then no pipeline could cross the Commonwealth, including in West Whiteland Township, as numerous pipelines do. SPLP Ex. 2.

5. Because ME2 is not undergoing construction, ME2 cannot compromise ME1's structural integrity.

The ALJ concluded that construction of ME2 creates an imminent risk to the structural integrity of ME1. But the Order acknowledges that there is no ongoing construction of ME2 in West Whiteland Township, and that construction will not recommence until July 1, 2018 at the earliest. Order at 9. Because there is no ongoing construction of ME2 in West Whiteland Township, then it cannot possibly create a "clear and present danger" of undermining the structural integrity of ME1. Based on these undisputed facts, and the Commission's unanimous May 3 Order finding that there are no issues with the structural integrity of ME1, there simply is no basis for the required finding that the "need for relief is immediate." Moreover, Mr. Demko's testimony was that the construction of ME2 remaining to be completed in West Whiteland Township would not damage the structural integrity of ME1, and that testimony was unrebutted. *See* Tr. at 661:19-23 and *infra* at Section D-4.

6. Leaks reported to PHMSA in 2016 and 2017 on ME1 and an unrelated SPLP pipeline in Texas, and prior unrelated enforcement actions relating to ME2 do not establish a clear and present danger from the continued operation of ME1.

The ALJ's Order cites prior issues and claims about ME1 and an unrelated SPLP pipeline in Texas as proof of a "clear and present danger" with the continued operation of ME1. Order at 11. Past conduct is generally insufficient to support an injunction, particularly when, as here, it is not accompanied by evidence of a clear and present danger, which requires proof of harm from future conduct. *Kuran v. Luzerne Cnty.*, 637 Pa. 33, 86 (Pa. 2016); *Den-Tal-Ez, Inc. v. Siemans Capital Corp.*, 389 Pa. Super. 219, 255 (Pa. Super. Ct. 1989). And incidents occurring months or years ago are not proof of an "imminent" threat or a "clear and present danger." *South Fayette Twp. v. Commw.*, 477 Pa. 574, 583 (Pa. 1978).

The ALJ's Order relies on three PHMSA reports of leaks on ME1 dated May 27, 2016, August 16, 2016, and April 1, 2017.[3] Order at 11. The two leaks in 2016 occurred on SPLP property and related to material used to seal the door where the in-line inspection tool is inserted into and removed from the pipeline as part of SPLP's ongoing integrity management program. The 2017 leak was a pinhole leak discovered by a landowner.[4] And certainly, a leak on an unrelated pipeline in Texas is no evidence of the integrity of ME1.

Prior leaks that did not cause injury or irreparable property damage cannot form the basis for interim emergency relief. If that were the standard, then PHMSA's database of leaks would identify many pipelines waiting to be shut down by an ALJ's interim emergency order.[5] And the lack of any

[3] The Order describes the three leaks as occurring "[w]ithin the past year," Order at 11. That is wrong. None occurred within a year of the hearing.

[4] The Order appears to attach negative significance to the fact that the landowner reported the pinhole leak. In fact, this proves the adequacy of SPLP's safety warnings to the public, since the landowner identified and reported the leak, which is what SPLP informs the public to do. SPLP Ex. 46. There is no evidence of improper leak detection procedures or an improper response to the pinhole leak, which was properly reported to PHMSA.

[5] PHMSA maintains a nationwide database of all pipeline accidents and incidents, which reflects that other pipelines operating in Pennsylvania had releases similar to those identified by ALJ Barnes in the Order. *See e.g.*, Operator Incident Detail, Buckeye Partners, L.P., *available at* https://primis.phmsa.dot.gov/comm/reports/operator/OperatorIM_opid_1845.html?nocache=5324#_Incidents_tab_3;

action by PHMSA or the Commission in the year since the report of the last of these three leaks demonstrates the lack of any "clear and present danger" for interim emergency relief.

The ALJ's Order then discusses various actions taken by DEP, the Environmental Hearing Board ("EHB"), and intervenor Clean Air Council ("CAC") with respect to inadvertent returns ("IRs") of drilling mud, and other alleged violations during construction of ME2. Evidence of alleged (but unproven) violations of environmental permits during construction of ME2 says nothing about the safety of ME1's operation. Similarly, PHMSA's documents relating to its findings of improper inspection of pipe bending during ME2's construction in Ohio does not show that the continued operation of ME1 presents a "clear and present danger" or an imminent safety threat.

7. There is no admissible evidence of inadequate warnings in the event of a pipeline failure to justify the emergency shutdown of ME1.

The ALJ's Order found a substantial issue in whether SPLP adequately warned the public and emergency responders about how to respond to an ME1 emergency based upon two pieces of evidence – one, hearsay letters that two school districts addressed to Governor Wolf claiming to be in need of additional information in the event of an ***ME2, not an ME1***, emergency, and two, Sen. Dinniman's self-serving characterization of SPLP's information as "boilerplate." Order at 15. Neither is evidence that SPLP has not properly warned the public about the risks associated with ME1 or what to do in the event of a pipeline leak.[6]

To the contrary, Chairman Brown's letter to Governor Wolf in which she described SPLP's public-awareness program, states that the Pipeline Safety Section's most recent inspection "did not disclose any deficiencies." SPLP Ex. 9. In fact, Chairman Brown's letter went on to describe SPLP's substantial outreach to the community, including mailings to property owners and public officials,

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Operator Incident Detail, Markwest Liberty Midstream & Resources, LLC, *available at* https://primis.phmsa.dot.gov/comm/reports/operator/OperatorIM_opid_32412.html?nocache=1817#_Incidents_tab_4; Operator Incident Detail, Williams Field Services, *available at* https://primis.phmsa.dot.gov/comm/reports/operator/OperatorIM_opid_30826.html?nocache=76#_Incidents_tab_5.

[6] Indeed, hearsay cannot support a factual finding, particularly when, as here, it is not corroborated. *Walker v. Unemployment Corp. Bd. of Review*, 367 A.2d 366, 370 (Pa. Commw. Ct. 1976); *Anderson v. Pa. Dept. of Pub. Welfare*, 468 A.2d 1167, 1169 at fn. 5 (Pa. Commw. Ct. 1983).

presentations and training to emergency responders, and coordination with emergency management agencies.

SPLP corroborated these findings with unrebutted evidence from a national expert in pipeline safety and integrity management, John Zurcher, who wrote the regulations and industry standards with which SPLP complies. Tr. at 519:5-11. Mr. Zurcher testified that safety information is readily available on SPLP's website, which sets forth in easily-understandable language what you need to know to recognize a leak, what to do in response to a leak, and what not to do. Tr. at 540:3-23; SPLP Ex. 46, *available at* http://www.sunocologistics.com/Public-Awareness-Safety/Public-Awareness/110. Any individual or entity, such as a school district, has all the necessary information to create an evacuation plan, much like it would create an evacuation plan to respond to a fire or other emergency. The fact that certain people who are not ambulatory, like small children, the infirm or elderly, may need physical assistance does not mean that school districts and others do not have adequate information in the event of an emergency. Those same issues exist for emergencies associated with any other evacuation as they do for catastrophic leaks from the other pipelines that cross West Whiteland Township.[7]

D. Sen. Dinniman failed to prove that the construction of ME2 creates a clear and present danger to life or property.

1. There is no evidence that inadvertent returns of drilling mud create a clear and present danger to life or property.

ALJ Barnes determined that because there is a possibility that IRs from Horizontal Directional Drilling ("HDD") could occur in the future, and IRs could reduce water flow to a private well or damage well equipment, then the use of a construction technique that uses drilling mud must create a clear and present danger to life and property. Order at 12-13. This is not logical. The only evidence presented of IRs was a list of past IRs that occurred during the construction of ME2,[8] and Sen. Dinniman's

[7] Curiously, Sen. Dinniman seems to have no complaints about how to respond to a leak from the Williams pipeline that crosses his property. Tr. 129:14-130. Williams' public website also states, as does SPLP's website, that in the event of a leak one should evacuate, prevent ignition sources, and contact 911 and the pipeline company. *See* http://co.williams.com/safety/emergency-information/recognizing-leaks/.

[8] Only two IRs occurred in West Whiteland Township, both in the same location at Lisa Dr.

unsupported belief that an IR occurred at Shoen Road. This is not sufficient or credible evidence to establish that: (1) an IR occurred at Shoen Road; (2) an IR will occur in the future in West Whiteland Township; or (3) even if an IR occurs, it will create a clear and present danger to life or property necessitating interim emergency relief.

In fact, no IR occurred at Shoen Road, and there is no evidence that an IR impacted any private or public water supply in West Whiteland Township.[9] Tr. at 656:17-18. Rather, a year ago, the HDD at Shoen Road encountered a shallow aquifer that resulted in the drawing down of certain landowners' wells. Tr. at 657:13-20. Mr. Demko's unrebutted expert testimony demonstrates that there has been no evidence of drilling mud or any other contamination in those wells, the water levels in the private wells have already rebounded to pre-construction levels and the wells will remain at those pre-construction levels after ME2's construction at Shoen Road is completed. Tr. at 658:10-15, 660:16-661:7. In addition, the residents near Shoen Road have been connected to public water at SPLP's expense (one homeowner refused); and if a homeowner requests it, SPLP will reconnect the homeowners to their private water supply after ME2's construction is completed. Tr. at 417:23-419:2, 656:9-657:12. The temporary impact to private wells, which was fully repaired months ago, is not evidence of a "clear and present danger" to life or property or evidence of an irreparable injury.

In the face of this unrebutted expert testimony, the ALJ credited testimony from Sen. Dinniman, who provided unsubstantiated hearsay allegations that he was told by a constituent that the results of one water sample tested positive for bentonite. Order at 12; Tr. at 89:12-22, 90:4-7, 148:10-12. Even though Sen. Dinniman and intervenors did not introduce those sampling results, ALJ Barnes found that "one sample tested positive for bentonite." Order at 12. Sen. Dinniman's statements involve multiple levels of hearsay, which cannot support any basis for relief. *See e.g.*, *Anderson v. Pa. Dept. of Pub. Welfare*, 79

[9] The ALJ's Order asserts that SPLP identified 22 private wells along the ME2 route, which is inaccurate. Order at 12. SPLP utilized the DCNR's PAGWIS database to identify publicly-available private wells, of which only 22 were reported. Subsequently, during the DEP permitting and land acquisition process, SPLP's land agents contacted each landowner within 150 feet of each HDD alignment and asked whether they had a private well and offered free well sampling before, during and after construction. This effort was later extended to all landowners within 450 feet of the HDD alignment. Tr. at 427:3-14.

Pa. Cmwlth. 182, 186 (Pa. Commw. Ct. 1983); *Gruelle c/o Toll Diversified Properties, Inc.*, Dkt. No. C-2015-2463573, 2015 WL 7873828, at *11 (Order entered Oct. 27, 2015) (Colwell, J.). Sen. Dinniman likewise presented no evidence that IRs will occur in West Whiteland Township in the future or that IRs equal a clear and present danger. And, Dr. Sasowsky conceded that he had no opinion "as to whether any inadvertent returns will occur in West Whiteland Township through the future construction techniques that are proposed." Tr. at 289:24-290:9.

There is also no evidence that the constituents of drilling mud pose any human health or toxicological risk. Sen. Dinniman admitted that bentonite is in cosmetics and baby products, and admitted that bentonite is used to dress wounds. Tr. at 146:16-147:4. SPLP's expert, Paul Chrostowski, Ph.D., provided unrebutted testimony that there are no human health or toxicological risks from the materials used in drilling muds during HDD. Tr. at 312:12-14. Dr. Chrostowski further testified that bentonite is a very common material that is approved by the Food and Drug Administration as a food additive and for cosmetics, personal care, and consumer products; bentonite is used in medical applications; and bentonite is approved by the National Sanitation Foundation for use in drinking water treatment, for casing in residential wells, and to treat water to remove other particulate matter and bacteria from water supplies. Tr. at 313:4-24, 315:13-16. Dr. Chrostowski's expert opinion that contact with drilling mud from an IR would not cause any adverse health effects was credible and unrebutted. Tr. at 314:23-315:1. The ALJ's observation that "extremely high concentrations" of bentonite "could" cause some undefined harm to aquatic life (Order at 12), is nothing more than the theoretical possibility of undefined harm to aquatic life in an unidentified location and is not evidence of a clear and present danger or imminent threat to safety.

Finally, the ALJ's Order relies on another theoretical risk, which is Dr. Sasowsky's statement that the use of bentonite "could result" in sediment in wells or reduce water flows to wells. Order at 12-13. Dr. Sasowsky's testimony is devoid of any opinion to a reasonable degree of scientific certainty that this has or will occur in West Whiteland Township, let alone that it presents a clear and present danger or that the theoretical risk to property is irreparable.

2. Prior shutdowns of ME2 construction are not evidence of a clear and present danger from the continued construction of ME2 in West Whiteland Township.

The ALJ's Order cites to a January 3, 2018 Administrative Order ("DEP Administrative Order") and the EHB's issuance of a temporary supersedeas in July 2017 in a pending case filed by CAC as evidence of ME2's unsafe construction. Order at 11-12. This is not evidence that the continued construction of ME2 in West Whiteland Township is unsafe.

First, the DEP Administrative Order had nothing to do with safety issues or property damage, but rather was related to certain construction techniques that DEP asserted were not within the scope of SPLP's permits. Ex. P-8. There is no evidence that any of the alleged unpermitted construction activity included in the DEP Administrative Order created a safety risk, an injury to a person, or an irreparable injury to property. Further, SPLP appealed that Order and entered into a settlement with DEP.

Second, the EHB's temporary supersedeas order in July 2017 was based on an entirely different legal standard that did not require the EHB to evaluate any evidence for CAC to demonstrate a likelihood of success on the merits and did not relate to any construction activities in West Whiteland Township. *See* 25 Pa. Code § 1021.64 (standards for temporary supersedeas before EHB). And CAC's claims related to that temporary supersedeas were settled before an evidentiary hearing.[10] A settlement is not evidence that any construction method was unsafe. Pa. R.E. 408 (evidence of compromise offers and negotiations inadmissible). Thus, the EHB grant of a temporary supersedeas in July 2017 has no bearing on whether the future construction of ME2 one year later presents a clear and present danger to life or property.

3. The seeps on Ms. Kerslake's property will be fully remediated when the construction of ME2 is completed.

The existence of the seeps on Ms. Kerslake's property is not evidence of an irreparable injury or a

[10] The ALJ's Order implies that SPLP breached this settlement agreement, which was an agreement between DEP, SPLP and CAC. Order at 12. In fact, the Department and SPLP vigorously contested that any breach occurred, and CAC ultimately dismissed its claim for breach of the settlement. *See* EHB Dkt. No. 2018-023-L, Apr. 6, 2018 Stipulated Order (docket marked closed and settled).

safety risk that supports a bar on future construction of ME2. The seeps on Ms. Kerslake's property will be fully remediated once the construction of ME2 at that location is completed. Sen. Dinniman and Ms. Kerslake offered no testimony that the existing seeps will worsen or persist after ME2 construction is completed. In sharp contrast, SPLP offered unrebutted testimony from Mr. Demko that after completion of ME2 construction the seeps will not persist. Tr. at 658:16-661:23; SPLP Ex. 47. Ms. Kerslake concedes that SPLP has already paid her for a plan to re-landscape the area where the seeps occurred and to pay for replacement landscaping. Therefore, there is no evidence that future ME2 construction will cause irreparable property damage to justify a ban on constructing a public utility. Tr. at 344:18-24.

4. There is no proof that the geology in West Whiteland Township is unsafe to construct ME2.

The ALJ's Order found that the underlying geology in West Whiteland Township was not properly evaluated prior to construction of ME2, that the lack of additional geological information creates a risk of damage to private wells and subsidence during the construction of ME2, and that additional geological testing should be conducted to avoid these risks. Order at 13, 14. This finding is not supported by the record.

SPLP presented abundant evidence to demonstrate that SPLP has properly assessed the geology in West Whiteland Township and that the construction of ME2 in that geology is safe. SPLP presented unrebutted expert testimony from Mr. Demko who is responsible for overseeing the geological aspects of ME2 construction in West Whiteland Township. Tr. at 643:1-16. Mr. Demko has personal knowledge of all HDD and other construction activities in West Whiteland Township, has reviewed the geology for each construction location and has performed geological testing to ensure that construction is being performed in competent geology. Tr. at 644:1-19. Mr. Demko testified that SPLP collected geological borings for each HDD, conducted additional geotechnical borings at each of the proposed HDD locations, completed additional geophysical investigation for any locations that crossed karst and performed a fracture trace analysis for all locations in West Whiteland Township and Chester County. Tr. at 654:21-655:12. Mr. Demko testified that, erring on the side of caution, SPLP performed all appropriate

geological and geophysical evaluations throughout West Whiteland Township, and that no additional geological or geophysical testing is needed. Tr. at 689:8-18. Mr. Demko testified to a reasonable degree of scientific certainty that for each construction location in West Whiteland Township: (1) construction of ME2 is safe in the underlying geology; (2) use of open cut, bore, or HDD at each location will not present risk of subsidence;[11] and (3) construction of ME2 does not create a safety risk to ME1. Tr. at 661:11-23, 665:18-666:7, 668:13-670:5, 671:4-10, 686:12-24, 672:9-20, 673:22-6. This testimony is unrebutted.

Mr. Demko also confirmed that multiple pipelines other than ME1 and ME2 have been constructed through karst in Chester County and West Whiteland Township without any safety concerns. Tr. at 645:25-647:10; SPLP Exs. 1 and 2. Sen. Dinniman agreed that Chester County has "the third highest number of pipelines of any county in the Commonwealth," but did not claim a safety concern for any other pipelines in West Whiteland Township or Chester County that cross karst. Tr. at 157:3-5. Both Sen. Dinniman and Dr. Sasowsky admitted that it was possible to construct a pipeline safely through karst with proper procedures and sufficient funding. Tr. at 162:11-14; Tr. at 287:18-21 (Sasowsky testifying that "you can safely construct in karst with proper procedures and enough money"). SPLP's project manager, Matthew Gordon, testified that there is sufficient funding to implement precisely those prevention and mitigation measures identified in the Karst Plan for future construction in West Whiteland Township. Tr. at 395:12-15.

Mr. Demko agreed and testified that in his professional opinion pipelines can be safely installed in karst using open cut, bores, and HDDs (Tr. at 647:11-20), and that SPLP has safely installed ME2 in karst at other locations along the pipeline route using HDD. Tr. at 687:23-5. Even though pipelines can be safely installed in karst, Mr. Demko confirmed that SPLP has taken the most conservative approach

[11] ALJ Barnes states that she is not persuaded by Mr. Demko's unrebutted opinion to a reasonable degree of scientific certainty that the subsidence at Lisa Drive was unrelated to karst geology, but rather was the result of pipe pull back after the bore hole was inactive for an extended period of time. Order at 13. The ALJ's Order cites to no contrary testimony. Indeed, Dr. Sasowsky testified that he had performed no evaluation and had no opinion of the cause of the sinkholes at Lisa Dr. Tr. at 281:6-22.

and eliminated HDDs as a construction method[12] in all locations where the route of ME2 crosses karst in West Whiteland Township. Tr. at 687:19-22; SPLP Exs. 5 and 6 (permit modifications to eliminate HDD in Karst); Tr. at 661:24-663:8, 666:8-668:16, 409:11-414:18. The ARM Report confirms that this change is safe: "It is ARM's opinion that SPLP has mitigated this concern by changing the next installation in this area from an HDD installation to a trenching/direct burial installation." SPLP Ex. 19 at 3.

In contrast, the only expert opinion that Dr. Sasowsky offered was a truism – that extra care should be taken when constructing in karst and that additional geological testing of investigations are in "everyone's best interest." Tr. at 296:7-10. But Dr. Sasowsky did not identify what additional testing was necessary[13] or that SPLP failed to perform an adequate geological analysis for the construction of ME2. Dr. Sasowsky admitted that: he did not review any of SPLP's geological or geophysical work for ME2 other than the work at Lisa Dr.; he did not review the ME2 permit applications or pending permit modifications or the geological work on which they were based; he did not even know what construction methods are being used in West Whiteland Township; he has never been to West Whiteland Township or examined its geology[14]; he has never overseen the use of HDD in karst; and he could offer no opinion whether it was safe to construct ME2 in West Whiteland Township. Tr. at 248:22, 281:3-5, 282:12-284:6, 285:21-2, 295:6-8.

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[12] There is no evidence to support the ALJ's finding that the use of a short FlexBor at the Swedesford Rd. construction area of ME2 in West Whiteland Township is unsafe because it will use fluids. Order at 9, 12. Sen. Dinniman's expert, Dr. Sasowsky, admitted that he could not render any opinions regarding the safety of construction methods used in West Whiteland Township, including specifically whether FlexBor was safe. Tr. at 248:22, 281:3-5, 288:1-7; 295:6-8. In fact, Dr. Sasowsky testified that he has no knowledge of what a FlexBor is or how it operates. Tr. at 266:11-14. The ALJ also ignored Mr. Demko's expert opinion that the proposed construction of ME2 at Swedesford Rd. would not present any risk of subsidence or create a safety risk for ME1. Tr. at 668:13-670:5; SPLP Ex. 6; Tr. at 413:15-414:12; 668:13-670:5.

[13] The only specific precaution that Dr. Sasowsky noted was increased stormwater controls in karst areas, Tr. at 268:9-17 – which SPLP has adopted as a best management practice and implements for the construction of ME2. Tr. at 395:1-11 (Gordon testimony, describing best management practices in Karst Plan); SPLP Ex. 7, Karst Plan at 6-7, 11-13 (describing best management practices for construction in karst, including stormwater management).

[14] Dr. Sasowsky acknowledged the importance of seeing the geology first hand, and plans to do so if the case goes forward. His explanation for not doing so – he did not have time in the 3 ½ weeks after being retained. Tr. 280:22-281:12; 294:25-295:8. In contrast, Mr. Demko has personally visited the construction sites in West Whiteland Township at least two dozen times. Tr. 656:5-10. Mr. Demko testified that it is "critical" to observe geological conditions first-hand to render an opinion regarding the geology of an area. Tr. at 655:13-656:4.

Based on this testimony, there is no evidence to support the ALJ's finding that the geology in West Whiteland Township makes further construction of ME2 unsafe.

E. Even if a clear and present danger has been established, the relief in the ALJ's Order is not appropriate for an interim emergency.

The ALJ's Order contradicts three fundamental doctrines regarding the permissible scope of an interim emergency order. First, the Commission's procedure requires that interim emergency relief must be a "quick but temporary response to an imminent threat to life and/or property." *Core Communications, Inc. v. Verizon, Inc.*, Dkt. No. P-2011-2253650, slip op. at 1 (Order entered Aug. 3, 2011) (Colwell, J.). The interim emergency relief cannot be open-ended with an indeterminate end point, with conditions that extend for at least six months.

Second, interim emergency relief cannot go beyond preserving the status quo. *See Anchel v. Shea*, A.2d 346, 355 (Pa. Super. Ct. 2000) (reversing preliminary injunction that was overbroad and that "imposed a status quo that never existed."); *see also, Three Cnty. Servs. v. Phila. Inquirer*, 486 A.2d 997, 999 (Pa. Super. Ct. 1985) ("The purpose of a preliminary injunction is to preserve the status quo as it exists or existed before the acts complained of, and the injunction should not go beyond preserving the status quo.").

Third, the interim emergency relief must be narrowly tailored to address only the alleged harm. *Santoro v. Morse*, 781 A.2d 1220, 1230 (Pa. Super. Ct. 2001) (affirming in part and vacating in part a portion of the preliminary injunction granted by the trial court because the preliminary injunction exceeded the requirement that it "must be crafted so as to be no broader than is necessary for the petitioner's protection") (internal citations omitted); *Big Bass Lake Cmty. Ass'n v. Warren*, 950 A.2d 1137, 1149 (Pa. Commw. Ct. 2008) (vacating the trial court's order granting injunctive relief because the relief granted by the trial court converted a hearing on a motion for preliminary injunction into a final hearing on the merits).

Assuming, *arguendo*, that emergency relief is warranted, only the relief in paragraphs 7, 8 or 9 of the ALJ's Order relates to maintaining the status quo. The remainder of the relief in the Order violates

the three fundamental doctrines discussed above because it goes well beyond maintaining the status quo and requires SPLP to perform affirmative, undefined actions with indeterminate end dates akin to a final ruling on the merits, including on issues that were not even raised and for which no evidence was offered.

By way of example, the ALJ's Order, *sua sponte*, requires:

- Mandatory drug testing for all emergency responders (an issue not raised by Petitioner). Order ¶ 15;
- Submission of a report on whether the existing welded seams along ME1, which has operated safely since 1930, consist of oxygen-acetylene or electrical resistance welded seams (again, an issue not raised by Petitioner), Order ¶ 12;
- Completion within thirty days of geophysical and geotechnical studies regarding ME2 in West Whiteland Township, Order ¶ 17, with no direction or specification of where in West Whiteland Township the studies are to be performed, nor what precise studies need to be performed (contrary to the uncontradicted expert testimony that such extensive testing has been done, and that no additional testing is warranted); and,
- Creation and dissemination to the public of an integrity management program and risk analysis, Order ¶ 20, which SPLP's project manager testified necessarily contains confidential security information and therefore, the ALJ cannot direct it to be disclosed publicly under the Public Utility Confidential Security Information Disclosure Protection Act, 35 P.S. § 2141 *et seq.*

As these examples demonstrate, the relief in the ALJ's Order goes well beyond what is appropriate, the relief is not temporary, not narrowly tailored to redress the harm alleged and goes far afield from maintaining the status quo. In some instances, requiring this relief would be illegal and could result in imprisonment and removal from office. *Id.* at § 2141.6.

F. The termination of public utility service by the shutdowns of ME1's operation and ME2's construction is injurious to the public interest.

To grant emergency interim relief, the ALJ must find that the emergency relief is not injurious to the public interest. But the entirety of the ALJ's Order on this required element (Order at 21-22) contains no mention of, let alone a finding, related to the injury to the public from the shutdown of ME1. Rather, the ALJ's Order exclusively addresses injury to the public from cessation of construction of ME2.

Petitioner likewise offered no testimony on the injury to the public from shutting down ME1. SPLP did, and that evidence is uncontradicted and unrebutted. **[BEGIN HIGHLY CONFIDENTIAL]**

[redacted]

[redacted]

[END HIGHLY CONFIDENTIAL] Mr. Anthony Gallagher, the Business Manager of Steamfitters Local Union 420 ("LU 420") that has approximately 4,700 members, testified that his union maintains ME1, and that its shutdown "will totally stymie not only . . . our local economy, but it would also put a damper on the building trades, not just LU420." Tr. at 487:8-488:5.

And finally, shutting down ME1 creates potential safety and access issues. The demand for NGLs will not disappear. So there will be increased use of trucking and railroads, which Mr. Engberg and Mr. Zurcher testified is less safe. Tr. at 609:2-12; 610:13-15 (Enberg testimony); Tr. at 528:25-529:531-5 (Zurcher testimony, rail 25 times less safe and trucking 73 times less safe than pipelines). Further, ethane cannot be transported by rail or truck, which limits access to that important product. Tr. at 609:2-16. Shutting down ME1 means landowners in Southwestern Pennsylvania will lose ten million dollars or more in ethane royalties. Tr. at 612:5-9. Accordingly, ME1 cannot be shut down because this required element for granting interim emergency relief has not been satisfied.

In addition, given the exigent injury to the public created by the ALJ's Order, SPLP requests that the Commission decide these certified material questions on an expedited basis by either calling a special public meeting or engaging in a notational decision pursuant to 4 Pa. Code § 1.43(c).[15]

[15] *Petition of Johnstown Regional Energy, LLC*, Dkt. No. P-2014-2457138, 2015 WL 7575459, at *4 (Order entered Nov. 19, 2015) ("Pennsylvania's Administrative Code grants authority for State agencies to take official action by notational voting under certain, limited circumstances. 4 Pa. Code § 1.41(b). Specifically, Section 1.43(c) provides that notational voting may be used upon a recommended written order prepared by the staff and circulated for approval to the members of the agency, but only to expedite decision making or to remove uncontested or noncontroversial matters from the agenda of public meetings in order to facilitate public deliberations of contested or significant items. 4 Pa. Code § 1.43(c)(1)-(2). Pursuant to the Commission's Procedures Manual Rule 105.D. (regarding notational voting), the Commission may utilize notational voting when necessitated by exigent

G. Any shutdown of public utility service should be conditioned on the posting of a suitable bond to cover the damages caused to utility customers, labor and SPLP.

52 Pa. Code § 3.8(b) expressly authorizes the Commission to require a petitioner to post a bond in the event injunctive relief is granted. The ALJ's Order states that the ALJ is not persuaded that Sen. Dinniman should have to post a bond, because "Sen. Dinniman is in a contractual relationship with Sunoco over which there is a monetary amount in dispute." Order at 20. There is no contract between Sen. Dinniman and SPLP. But, the presence or absence of a contractual relationship or monetary dispute is irrelevant to the determination whether a bond should be posted. Moreover, ALJ Barnes' assertion that there are no damages from the shut-down of ME2 ignores the evidence SPLP presented proving the separate damages from shutting down ME1.

The reasons for the bond requirement are two-fold. "For one, it serves to compensate a wrongfully enjoined party. It also serves to 'deter[ ] rash applications for interlocutory orders; the bond premium and the chance of liability on it cause plaintiff to think carefully beforehand.'" *Synthes, Inc. v. Gregoris*, 228 F.Supp.3d 421, 447 (E.D. Pa. 2017) (citing cases). Recognizing this, a petitioning party is required to have some risk if it seeks emergency relief, disrupts utility operations, causes losses, then loses on the merits. Thus, when emergency relief is granted and then overturned, the party against whom the emergency relief was improperly granted is entitled to damages. Without a bond, there is no guarantee that the petitioning party will later be able to pay those damages.

Significantly, establishing a bond is not awarding damages. There is a bifurcated process where the Commission determines the merits of emergency relief within its jurisdiction, but the court determines any award of damages. *See e.g., Elkin v. Bell Tel. Co. of Pa.*, 420 A.2d 371 (Pa. 1980). If the Commission has jurisdiction to enjoin a utility from conducting business or construction, it must have jurisdiction to require a bond for the utility to recover its costs at the civil damage award phase in the event the injunction is wrongly issued. **[BEGIN HIGHLY CONFIDENTIAL].** [redacted]

circumstances to expedite decision making. *See* PUC Procedures Manual Chapter 1, § 105(D)."); *see also PPL Electric Utility Corp.*, Dkt. No. M-2016-2554787 (Nov. 1, 2017).

[redacted]

[redacted] **[END HIGHLY CONFIDENTIAL].**

III. Conclusion

Sen. Dinniman does not have standing to bring this action. Further, the ALJ's Order is not supported by any evidence in the record, is replete with violations of clearly established principles of law and contains extrajudicial material that deprives SPLP of fundamental due process rights and the right to a fair, impartial tribunal. For these reasons, SPLP respectfully requests that the Commission address these errors, clarify the standards for granting emergency relief, vacate the ALJ's Order and dismiss the action. Moreover, given the exigent injury to the public created by the ALJ's Order, SPLP requests that the Commission decide these certified material questions on an expedited basis by either calling a special public meeting or engaging in a notational decision pursuant to 4 Pa. Code § 1.43(c).

Respectfully submitted,

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Dated: May 31, 2018

PUBLIC VERSION

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the forgoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party). This document has been filed electronically on the Commission's electronic filing system and served on the following who have accepted e-service:

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EXHIBIT 1