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June 25, 2018

VIA ELECTRONIC FILING

Rosemary Chiavetta
Secretary
Pennsylvania Public Utility Commission
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 (Formal Complaint)
Docket No. P-2018-3001453 (Petition for Interim Emergency Relief)**

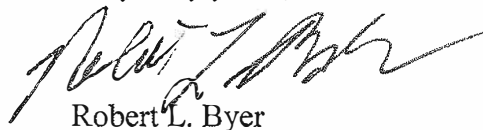
**SUNOCO PIPELINE, L.P.'S MOTION FOR CERTIFICATION OF THE
COMMISSION'S JUNE 15, 2018 ORDER FOR INTERLOCUTORY
APPEAL**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is Sunoco Pipeline, L.P.'s Motion for Certification of the Commission's June 15, 2018 Order for Interlocutory Appeal in the above-referenced matters. Copies have been served in accordance with the attached Certificate of Service.

If you have any questions regarding this filing, please contact me at your convenience.

Very truly yours,



Robert L. Byer

RLB
Enclosure
DUANE MORRIS LLP

Rosemary Chiavetta
June 25, 2018
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Duane Morris

cc: Honorable Elizabeth H. Barnes
Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**RESPONDENT SUNOCO PIPELINE L.P.’S MOTION FOR
CERTIFICATION OF THE COMMISSION’S JUNE 15, 2018 ORDER FOR
INTERLOCUTORY APPEAL**

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June 25, 2018

NOTICE TO RESPOND

Pursuant to 52 Pa. Code § 5.103(b), a response to this motion must be filed within 20 days of service.

Sunoco Pipeline L.P. (“SPLP”) moves for certification of the Commission’s June 15, 2018 Order for interlocutory appeal under 52 Pa. Code § 5.633 and Pa.R.A.P. 1311.

I. INTRODUCTION

1. Senator Dinniman, in his capacity as a member of the General Assembly, initiated this action against SPLP on April 25, 2018, seeking to enjoin the operation of the Mariner East 1 pipeline and the construction of the Mariner East 2 and 2X pipelines (“ME2 and 2X”). Senator Dinniman also sought interim emergency relief against SPLP.

2. Administrative Law Judge (“ALJ”) Elizabeth Barnes found that Senator Dinniman had made the required showing for interim emergency relief.

3. The Commission affirmed in part and reversed in part ALJ Barnes’ *Interim Emergency Order* in an Opinion and Order issued on June 15, 2018 (“Opinion and Order”).

4. SPLP now seeks amendment of that order to allow an interlocutory appeal to the Commonwealth Court.

5. On June 22, 2018, SPLP filed the documentation required under the Commission’s Order in order to have the injunction against the construction of ME2 and 2X lifted. Because § 5.633 imposes a ten-day limitation on the time to seek certification from the Commission, SPLP files this motion as a precautionary

measure in order to preserve its ability to appeal, if necessary. If the Commission lifts the injunction, allowing construction to resume, SPLP will evaluate whether any issues raised in this motion have become moot.

II. ARGUMENT

6. The Opinion and Order involves the following controlling questions of law as to which there is a substantial difference of opinion and which will materially advance the ultimate termination of the matter:

- a. Whether Senator Dinniman lacks standing to sue because the construction of ME2 and 2X does not impair the Senator's official power or authority to act as a legislator and because Senator Dinniman is not bringing suit as a private individual;
- b. Whether Senator Dinniman has failed to show that construction of ME2 and 2X creates a clear and present danger to life and property, such that the need for relief is immediate; and
- c. Whether the Commission should require Senator Dinniman to post a bond to protect SPLP's interest in the expeditious construction of ME2 and 2X in the event that the injunction was improperly granted.

A. Legal Standard

7. Section 702(b) of the Judicial Code provides:

When a court or other governmental unit, in making an interlocutory order in a matter in which its final order

would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

42 Pa.C.S. § 702(b).

8. Section 5.633 of the Commission’s Rules permits parties “to request that the Commission find, and include the findings in the order by amendment, that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal to the Commonwealth Court from the order may materially advance the ultimate termination of the matter.” 52 Pa. Code § 5.633.

B. Senator Dinniman Lacks Standing to Pursue the Underlying Complaint and the Petition for Emergency Relief.

1. The Lack of Senator Dinniman’s Standing Is Subject to Substantial Difference of Opinion.

9. SPLP challenged Senator Dinniman’s standing to pursue this action both in the proceedings before ALJ Barnes and in seeking the Commission’s review.

10. The Commission declined to decide whether Senator Dinniman has legislative standing to pursue this action because, “after two days of hearings and

the issuance of the *Interim Emergency Order*, as well our finding below that he has personal standing, the issue is moot.” Opinion and Order at 21.

11. The Commission instead relied on the fact that Senator Dinniman lives in West Whiteland Township, concluding that he has standing “as a resident and property owner.” *Id.*

12. There is a substantial difference of opinion whether the Commission’s conclusions regarding Senator Dinniman’s standing are correct.

13. First, the Commission should not have relied on Senator Dinniman’s status as a resident and property owner in West Whiteland Township, because Senator Dinniman stated that he was bringing this action solely in his official capacity as a state senator, thus disclaiming any grounds for standing other than legislative standing as a senator.

14. Second, any determination that Senator Dinniman has standing to pursue this action in his capacity as a state senator is questionable under recent Pennsylvania Supreme Court precedent, because he has not shown how actions by SPLP or the Commission impair his official power or authority to act as a legislator. *See Markham v. Wolf*, 136 A.3d 134, 145 (Pa. 2016).

15. Third, the Commission’s conclusion that the standing issue is moot because of the two days of hearings held before ALJ Barnes in advance of her Interim Emergency Order is questionable. Questions of mootness with respect to

standing “involve litigants who clearly had standing to sue at the outset of the litigation” but whose “necessary stake in the outcome” is deprived by “events occurring after the lawsuit has gotten under way[, such as] changes in the facts or in the law.” *In re Gross*, 382 A.2d 116, 119 (Pa. 1978). In addition, courts routinely address standing issues alongside the merits of the case. *See Tishok v. Dep’t of Educ.*, 133 A.3d 118, 119 & n.1 (Pa. Cmwlth. 2016).

16. In addition, SPLP challenged Senator Dinniman’s standing in its response to the Petition for Interim Emergency Relief, questioned Senator Dinniman at the hearing about the basis for his standing, and argued in its post-hearing brief and brief in opposition to ALJ Barnes’ Order granting interim emergency relief that Senator Dinniman lacked standing. As the Petitioner, Senator Dinniman had the obligation to establish standing to pursue his petition for interim emergency relief. The question of standing did not become moot, particularly when SPLP expressly challenged Senator Dinniman’s standing at every opportunity.

17. Finally, it is questionable whether the record establishes that Senator Dinniman’s status as a resident and property owner in West Whiteland Township is sufficient to show a “direct, immediate, and substantial interest in the subject matter of the proceeding,” such that he has standing as a private citizen to bring this action. *Municipal Auth. of Borough of W. View v. Pa. Public Utility*

Commission, 41 A.3d 929, 933 (Pa. Cmwlth. 2012). Senator Dinniman testified that he lives on a hill two miles from the pipelines, and did not identify any impacts from the operation of ME1 and disclaimed any impacts from the construction of ME2 and 2X.

18. The disagreement between the Commissioners also demonstrates that there is a substantial difference of opinion on the issue of Senator Dinniman's standing to pursue this action.

2. Review of the Threshold Inquiry into Senator Dinniman's Lack of Standing May Materially Advance the Ultimate Termination of This Matter.

19. In addition to presenting an issue subject to substantial disagreement, Senator Dinniman's lack of standing is a controlling issue of law that, if determined in SPLP's favor, will terminate this matter.

20. Standing is a "threshold and dispositive issue," and if it is lacking, the action must be dismissed. *Tishok*, 133 A.3d at 122, 125.

21. Here, if SPLP prevails in the Commonwealth Court on its standing argument, the action will be dismissed, bringing this litigation to an end.

22. Thus, immediate review of the Commission's decision as it relates to standing may materially advance the ultimate termination of this matter.

C. Senator Dinniman Has Failed to Show that SPLP’s Construction of ME2 and 2X Presents a Clear and Present Danger, such that Immediate Relief Is Necessary.

1. The Commission’s Determination that Senator Dinniman Established a Clear Right to Immediate Relief Is the Subject of Substantial Disagreement.

23. As with the standing issue, there is substantial disagreement regarding whether Senator Dinniman has made the requisite showing for emergency relief.

24. There is a substantial question whether a petitioner seeking emergency relief must show “clear and present danger to life or property,” or whether establishing the four factors in 52 Pa. Code § 3.6(b) is sufficient.

25. There are also substantial questions regarding whether Senator Dinniman has proven each of the factors in 52 Pa. Code § 3.6(b) by a preponderance of the evidence, including:

- a. whether asserting “substantial legal issues” can substitute for showing that the right to relief is clear, *see* Opinion and Order at 32; and
- b. whether an injunction can be entered based only on past occurrences and speculation, without expert testimony that the future conduct enjoined actually creates a clear and *present* danger.

26. The Joint Statement issued by Commissioners Coleman and Kennard demonstrates that this issue is the subject of substantial disagreement, meaning interlocutory review by the Commonwealth Court is appropriate.

2. An Immediate Appeal on the Issue of Whether Senator Dinniman Established a *Prima Facie* Case for Emergency Relief May Materially Advance the Ultimate Termination of this Matter.

27. Interlocutory review of the Commission's decision will materially advance this litigation and may bring about the ultimate termination of this matter.

28. First, Senator Dinniman's allegations and ALJ Barnes' findings at this stage of the proceedings are likely the same facts that will be relied upon later, meaning appellate review will clarify whether Senator Dinniman can make a *prima facie* showing of his entitlement to relief throughout the entirety of this action.

29. In addition, interlocutory review is appropriate given the need for the Commonwealth Court to clarify what constitutes a "clear and present danger" justifying emergency relief, as this issue is likely to arise in litigation against SPLP in the future, including in other unrelated matters.

30. Finally, the Commission should certify this action for interlocutory review by the Commonwealth Court because substantial issues of due process and fairness are implicated by ALJ Barnes' reliance on uncorroborated hearsay, extra-record facts, and unsupported allegations.

D. The Commission Should Have Required Posting of a Bond When Affirming the Order Granting Interim Emergency Relief.

1. There Is Substantial Disagreement Regarding Whether the Commission Should Have Required the Posting of a Bond in Affirming of the Order Granting Interim Emergency Relief.

31. Section 3.8(b) of Title 52 of the Pennsylvania Code states that an “order following a hearing on a petition for interim emergency relief may require a bond to be filed.” 52 Pa. Code § 3.8(b).

32. In determining that a bond was not required in this case, the Commission relied on the fact that it was reversing the injunction against the Mariner East 1 pipeline, ignoring the substantial evidence introduced in front of ALJ Barnes of daily damages experienced by SPLP during each day¹ of any shutdown, and regarding the damage SPLP will suffer each day if construction on ME2 and 2X is enjoined. Moreover, it ignores including in the bond amounts to cover SPLP’s daily damages² during the 24 days that the petitioner caused ME 1 to be enjoined improperly.

¹ Daily damages were shown separately for the Mariner East 1 pipeline and ME2.

² In addition to SPLP’s daily damages, the record also shows testimony from Steamfitters Local Union 420 and from Range Resources as to damages they incurred due to Petitioner Dinniman wrongly obtaining an injunction of the Mariner East 1 pipeline’s operation or will incur if the construction of ME2 and 2X is enjoined in West Whiteland Township.

33. There is a substantial question whether it was appropriate for the Commission to ignore this evidence in determining that a bond is not required.

34. In addition, there is a substantial question whether the decision not to require a bond conflicts with the longstanding Pennsylvania principle that a preliminary injunction is not valid without a bond. *See Rosenzweig v. Factor*, 327 A.2d 36, 38 (Pa. 1974); *see also* Pa.R.C.P. 1531(b).

2. Interlocutory Review of the Commission's Authority Not to Require Senator Dinniman to Post a Bond May Hasten Resolution of This Action.

35. Allowing interlocutory review of the Commission's decision not to require a bond after affirming the injunction on construction of ME2 and 2X may materially advance the resolution of this action.

36. A bond will protect SPLP's interest in the ME2 and 2X pipelines, allowing SPLP to focus on developing the record in front of ALJ Barnes showing that continued construction of ME2 and 2X is appropriate and safe, without the threat of losing millions of dollars a day.

37. Review of the decision not to require a bond may also help the parties evaluate the potential damages that may be involved and whether a settlement can be reached.

III. CONCLUSION

38. SPLP requests that the Commission (1) find that the June 15, 2018 Order involves the above controlling questions of law, the resolution of which may ultimately advance the termination of this action, and (2) amend the June 15, 2018 Order to include these findings. Granting this motion will enable SPLP to raise these questions in a petition for permission to appeal in the Commonwealth Court.

Respectfully submitted,

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June 25, 2018

CERTIFICATE OF SERVICE

I certify that, on June 25, 2018, I served a true copy of the foregoing document upon the entities, 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.

VIA FIRST CLASS MAIL

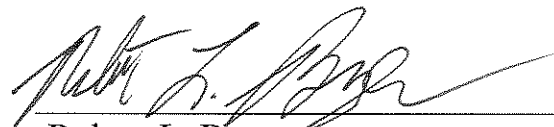
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