**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Meghan Flynn :

Rosemary Fuller :

Michael Walsh : P-2018-3006117

Nancy Harkins :

Gerald McMullen : C-2018-3006116

Caroline Hughes and :

Melissa Haines :

 :

 v. :

 :

Sunoco Pipeline, L.P. :

Melissa DiBernardino :

 :

 v. :  C-2018-3005025

 :

Sunoco Pipeline, L.P. :

Rebecca Britton :

 :

 v. : C-2019-3006898

 :

Sunoco Pipeline, L.P. :

Laura Obenski :

 :

 v. : C-2019-3006905

 :

Sunoco Pipeline, L.P. :

**PROCEDURAL ORDER**

Telephonic Prehearing Conferences were held in the above-captioned cases on April 24, 2019 and May 10, 201, respectively. Appearing at both conferences were: Michael Bomstein, Esquire on behalf of Meghan Flynn, Rosemary Fuller, Michael Walsh, Nancy Harkins, Gerald McMullen, Caroline Hughes, and Melissa Haines (collectively Flynn Complainants); Rich Raiders, Esquire, on behalf of Andover Homeowners’ Association; Thomas J. Sniscak, Esquire, Bryce Beard, Esquire, Whitney Snyder, Esquire, Neil Witkes, Diana Silva, Esquire for Sunoco Pipeline, L.P. (Sunoco or Respondent); Melissa DiBernardino, *pro se;* Rebecca Britton, *pro se;* Laura Obenski, *pro se*; Garrett Lent, Esquire, for Range Resources – Appalachia; Guy Donatelli, Esquire, Vincent Pompo, Esquire and Alex Baumler, Esquire for Pennsylvania State Senator Thomas Killion; Margaret Morris, Esquire for East Goshen Township and the County of Chester; Leah Rotenberg, Esquire for the Twin Valley School District; Mark Freed, Esquire for Uwchlan Township; Michael Pierce, Esquire for Edgmont Township; Kelly Sullivan, Esquire for Thornbury Township; James Dalton, Esquire and Daniel LePera, Esquire for West Chester Area School District; and James Flandreau, Esquire for Middletown Township. On May 10, 2019, I noted the additional appearances of Patricia Biswanger, Esquire for County of Delaware, Virginia Marcille Kerslake, pro se Intervenor, and Robert Fox, Esquire for Sunoco Pipeline, L.P.

The following matters were addressed, although not necessarily in this order: (1) consolidation of proceedings; (2) petitions to intervene; (3) site visits/evidentiary hearings; (4) Sunoco’s Motion to Amend Protective Order; (5) procedural schedule; (6) service requirements and parties list; (7) transcript turnaround; and (8) discovery modifications.

Procedural consolidation

The Commission’s regulations pertaining to consolidation appear at 52 Pa. Code § 5.81, and state in relevant part:

**§ 5.81. Consolidation**.

(a) The Commission or presiding officer, with or without motion, may order proceedings involving a common question of law or fact to be consolidated. The Commission or presiding officer may make orders concerning the conduct of the proceeding as may avoid unnecessary costs or delay.

Whether to consolidate particular cases is left to the sound discretion of the Commission or the presiding officer. In deciding whether to consolidate certain cases, the Commission or presiding officer must first determine that the proceedings involve a common question of law or fact. In such cases as *Application of Philadelphia Electric Co.,* 43 Pa. PUC 781 (1968), *Pa. Pub. Util. Comm’n v. Bell Telephone Co. of Pennsylvania,* 46 Pa. PUC 568 (1973) and *Pa. Pub. Util. Comm’n v. Butler Twp. Water Co.*, 52 Pa. PUC 442 (1978), as well as those cited above, the Commission has established that the Commission or presiding officer should evaluate considerations in addition to the presence of common questions of law or fact in ruling on a motion to consolidate. These other considerations include:

1. Will the presence of additional issues cloud a determination of the common issues?

2. Will consolidation result in reduced costs of litigation and decision-making for the parties and the Commission?

3. Do issues in one proceeding go to the heart of an issue in the other proceeding?

4. Will consolidation unduly protract the hearing, or produce a disorderly and unwieldy record?

5. Will different statutory and legal issues be involved?

6. Does the party with the burden of proof differ in the proceedings?

7. Will consolidation unduly delay the resolution of one the proceedings?

8. Will supporting data in both proceedings be repetitive?

No single consideration or group of considerations or the presence of a common question of law or fact is dispositive in determining whether to consolidate proceedings. Rather, the Commission or presiding officer must evaluate all of these considerations and balance those favoring versus those disfavoring consolidating the proceedings.

Ms. Obenski filed a motion to consolidate her complaint with the Flynn Complainants’ Complaint at C-2018-3006116 and P-2018-3006117. Sunoco filed a Motion to Consolidate and Response to Obenski’s Motion to Consolidate. Sunoco moves for the consolidation of the Flynn et al. complaint (Docket Nos. C-2018-3006116 and P-2018-3006117), with the DiBernardino complaint (Docket No. C-2018-3005025), the Britton complaint (Docket No. C-2019-3006898), and the Obenski complaint (Docket No. C-2019-3006905). At the prehearing conference on April 24, 2019, no one objected to Sunoco’s Motion to Consolidate and a procedural order was discussed. However, after the notice of hearing was issued, Complainant DiBernardino requested a further prehearing conference as she wished for a more expedited procedural schedule. The further prehearing conference was held on May 10, 2019. Complainants DiBernardino, Britton and Obenski expressed concerns that a July 2020 hearing date was too long to wait for a proper emergency plan. Tr. 691-693, 708-709, 714. Conversely, Sunoco argued to keep the agreed upon procedural schedule and to consolidate the cases as the cases involve technical issues, best addressed through written pre-served expert testimony, and the issues are substantially overlapping in nature involving the same Respondent and witnesses. The Complainants can call witnesses in October in Delaware or Chester Counties at an initial hearing, which would alleviate some of the burden in prosecuting their respective complaints. Tr. 698-702. Additionally, Ms. Obenski never formally withdrew her motion for consolidation. Ms. Britton has witnesses in common that intervened in the Flynn et al. complaint proceeding. Ms. DiBernardino has three witnesses in common, one of which is Ms. Hughes, a complainant in the Flynn et al. complaint proceeding. Tr. 705-706.

 After reviewing these considerations, the four cases shall be consolidated for purposes of discovery, evidentiary hearings, and decision writing. Consolidation is appropriate because the Flynn, DiBernardino, Britton, and Obenski complaints involve common questions of law and fact, and each of the eight factors established by the Commission in *City of Lancaster Sewer Fund* is met. All four complaints assert six central issues: (1) the safety and integrity of ME1, ME2, ME2X, and the 12-inch pipeline; (2) the safety of the locations of the pipelines and related equipment (i.e. valve stations); (3) the adequacy of SPLP’s public awareness program; (4) the adequacy of SPLP’s emergency response procedures and training; (5) SPLP’s integrity management protocols; and (6) the safety of the construction of ME2 and ME2X. All four complaints seek similar relief to address the complainants’ concerns with the Mariner East pipelines in Chester and Delaware Counties. These six issues are at the heart of all four cases and addressing them jointly will allow the Commission to determine the issues once, rather than in a serial and repetitive manner for each individual complaint. Separate adjudications in each of the four proceedings is inefficient both for the Commission and the parties, particularly since each party’s advocacy and witnesses will be largely duplicative in all four proceedings. Consolidation of these four proceedings is in the public interest, because it will conserve the Commission’s and the parties’ respective resources, eliminate the risk of any inconsistent rulings, and avoid unnecessary additional costs and delays if each matter proceeded individually. While each of the four complaints may raise certain additional individual issues, those issues are subordinate to the six common issues shared by all four complaints, such that any individual issues will not “cloud” the determination of the primary issues in all the cases. Ms. Obenski initially agreed that consolidation of these matters is appropriate, and filed a motion to consolidate her complaint with the Flynn matter on February 26, 2019, asserting that there are “interrelated issues in both proceedings.” See Motion to Consolidate, C-2019-3006905 (Feb. 26, 2019). She has not formally withdrawn her motion. The Flynn Complainants did not object to consolidation of the Obenski complaint. Moreover, in the context of granting certain petitions to intervene in the Flynn matter, the Commission has already recognized that judicial efficiency can be gained by joining matters that “raise issues essentially overlapping issues previously raised by [the Flynn] Complainants concerning safety and emergency preparedness in Chester and Delaware County areas.” See Second Interim Order, C-2018-3006116 at 17 (Mar. 12, 2019). Finally, consolidation will not prejudice any party, as prehearing schedules have not yet been established in any of the four cases, and a joint prehearing schedule will allow for an efficient, consistent, and streamlined adjudication of the overlapping issues presented in all four matters. Complainants will be permitted to participate at hearings via telephone and an initial hearing for layperson testimony will be scheduled to be held in October in Delaware or Chester Counties for the convenience of the pro se Complainants.

Petitions to intervene

The Commission's Rules of Practice and Procedure permit petitions to intervene. 52 Pa. Code §§ 5.71-5.76. The provision at 52 Pa. Code § 5.72 governs what entities are eligible to intervene in a proceeding and states as follows:

**§ 5.72. Eligibility to intervene.**

(a) Persons. A petition to intervene may be filed by a person claiming a right to intervene or an interest of such nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought. The right or interest may be one of the following:

(1) A right conferred by statute of the United States or of the Commonwealth.

(2) An interest which may be directly affected and which is not adequately represented by existing participants, and as to which the petitioner may be bound by the action of the Commission in the proceeding.

(3) Another interest of such nature that participation of the petitioner may be in the public interest.

(b) Commonwealth. The Commonwealth or an officer or agency thereof may intervene as of right in a proceeding subject to paragraphs (1)-(3).

 Allowance of intervention is a matter within the discretion of the Commission. *City of Pittsburgh v. Pennsylvania Pub. Util. Comm'n*, 33 A.2d 641 (Pa. Super. 1943); *N.A.A.C.P., Inc. v. Pennsylvania Pub. Util. Comm'n*, 290 A.2d 704 (Pa. Cmwlth. 1972).

 Senator Thomas Killion petitioned to intervene on March 20, 2019, in his capacity as a legislator for Senate District No. 9 and in his individual capacity as a resident of Middletown Township, Delaware County. Sunoco argues Senator Killion has no standing to represent his constituency and requests his standing be limited to his individual capacity. In the case of *Pennsylvania State Senator Andrew E. Dinniman v. Sunoco Pipeline, L.P.* at Docket No. C-2018-3001451 *et al.* the Commission held Senator Dinniman had individual standing, but agreed to certify this issue for interlocutory review at the Commonwealth Court. Pending a disposition by the Commonwealth Court, I am granting Senator Killion intervention to proceed in his individual capacity. I am reserving judgment on legislative standing pending disposition in the case of *Sunoco Pipeline, L.P. v. Pennsylvania Public Utility Commission* at 1169 C.D.

Thornbury Township, Chester County, Edgmont Township, and West Chester Area School District will all be granted Intervenor status as they have interests which may be directly affected and which are not adequately represented by existing participants, and as to which these petitioners may be bound by the action of the Commission in the proceeding.

Procedural Schedule

The following procedural schedule will be adopted.

|  |  |
| --- | --- |
| In-person lay, pro se litigant hearing(s) in Delaware/Chester Counties | TBD October 2019  |
| Complainants and Complainant-Aligned Intervenor Direct Written Testimony | January 15, 2020  |
| Respondent and Respondent-Aligned Intervenor Rebuttal Written Testimony | April 14, 2020 (90 days from Direct) |
| Complainants and Complainant-Aligned Intervenor Surrebuttal Written Testimony | May 14, 2020 (30 days from Rebuttal) |
| Respondent and Respondent-Aligned Intervenor Written Rejoinder Outlines | June 15, 2020 (30 days from Surrebuttal) |
| Hearings | July 15, 2020-July 29, 2020 (30 days from Rejoinder outlines) |
| Transcripts  | August 12, 2020 (15 days from end of hearing)  |
| Main Briefs | September 28, 2020 (45 days after receipt of transcript) |
| Reply Briefs | October 13, 2020 (15 days after Main Briefs) |
|  |  |

Coordination of witnesses

 Counsel for Sunoco Pipeline, L.P. is directed to coordinate an agreement as to the order of witnesses and hearing time needed for each witness and will present that agreement to me and the parties in writing no later than two business days before a hearing date.

Service of documents/parties’ list

 The parties are in agreement that they will accept electronic delivery of documents by 4:30 p.m. on the due date as satisfying the in-hand requirement, if followed by hard copy sent via first class mail or interoffice mail. I will also accept service of documents in this manner, but request that I be provided one (1) hard copy and an electronic version of all filed documents in an electronic copy in Word format or Excel as appropriate. In addition, I also request one (1) hard copy and an electronic version of all served testimony.

 For purposes of this proceeding, the parties of record are those entities which appeared at the Prehearing Conference. A service list is attached for the convenience of the parties. The parties can request that electronic service be provided to multiple persons, and these requests, as stated at the Prehearing Conference, will be honored.

E-mail distribution list

 The following is the e-mail distribution list and is subject to change.

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Transcript turnaround

 There will be a fifteen-day hearing transcript turnaround so that the briefs can be prepared in accordance with the procedural schedule.

Initial hearing(s) in Delaware/Chester Counties

 All parties agree to an initial hearing for layperson testimony from *pro se* complainants and lay-witnesses in Delaware and/or Chester Counties. Tr. 635-638. The hearing will be held in October at a time and place to be announced at a later date. A *pro se* complainant can either testify at this hearing or submit written testimony according to the procedural schedule. Possible venues include the Delaware County Courthouse and Chester County Courthouse during the day and a school auditorium in the West Chester Area School District in the evening. Tr. 667. The parties will coordinate with each other and the presiding officer to select a time and place for initial hearings in Delaware and/or Chester Counties.

Site view

The Flynn Complainants, Melissa DiBernardino, Downingtown School District, Rose Tree Media, Uwchlan Twp., Rebecca Britton, East Goshen Twp., Andover Homeowner’s Assn., Laura Obenski, Twin Valley School District, Middletown Twp., and Chester Area School District have requested site views in the Delaware/Chester Counties (primarily to see the Chester County Library, Sts. Peter and Paul School, Duffer’s Tavern, Glenwood Elementary School, Tunbridge Apt. Complex, and the Granite Farms Estates retirement community). Complainants contend the site visit would highlight an inadequate emergency plan that is not site specific. Tr. 643-645. A main complaint is that Sunoco’s emergency preparedness plans are inadequate and non-specific to the high consequence area surrounding the pipeline and its appurtenances. Complainants request mass warning systems and better emergency plans. Viewing these sites would enable the fact finder to better understand evidence regarding the complaints.

Sunoco generally opposes a site visit by the ALJ, but in the alternative advocates for a visit whereby where there is no taking of evidence in the form of testimony or exhibits involved. Tr. 647-654.

Although I am willing to conduct a site view, I have not been able to secure permission for one as this is not a high voltage transmission line siting case. Therefore, the requests for a site view will be denied.

Discovery modifications

Sunoco requested a modification to the discovery rules effective after the service of Complainants’ and any Aligned Intervenor’s Surrebuttal testimony. SPLP proposes to have objections to discovery requests due five (5) days after receipt of requests, that a Motion to Compel be due within five (5) days of service of any objections, and that an answer to a Motion to Compel be due within three (3) days of service of a Motion to Compel. SPLP requests that the presiding officer rule on the motion in an expedited fashion, ideally within three (3) days of receipt of the answer to the Motion to Compel. As Flynn Complainants objected wanting more than 5 days, the discovery rules will be modified to 7 days instead of the proposed 5, accordingly. Tr. 670-674.

Protective Order

 Sunoco Pipeline, L.P. filed a Motion for Amended Protective Order on April 17, 2019 and a Motion to Strike Untimely Intervenors’ Answer to Motion for Amended Protective Order filed on May 17, 2019, Complainants Meghan Flynn, Rosemary Fuller, Michael Walsh, Nancy Harkins, Gerald McMullen, Caroline Hughes, and Melissa Haines Response to Sunoco’s Motion for Amended Protective Order was filed on April 24, 2019. Intervenor Andover Homeowners’ Association’s Answer to Sunoco Pipeline L.P.’s Motion for Amended Protective Order was filed on May 8, 2019. Intervenors Chester County, Delaware County, East Goshen Township, Downingtown School District, and Rose Tree Media School District filed a joint Opposition on May 19, 2019. The main objections to the proposed Amended Protective Order are that it would be burdensome to Complainants and Intervenors to have their representatives travel to Bala Cynwyd, Pennsylvania to inspect documents marked “EXTREMELY SENSITIVE MATERIALS” when their experts are located in Pittsburgh and Ontario, Canada. Some Intervenors propose the use of cloud-based software applications providing restrictive private portals by which all three categories of documents can be accessed. Additionally, an objection was raised regarding the lack of provision for the resolution of disputes regarding the designation of materials as “EXTREMELY SENSITIVE MATERIALS” and whether Sunoco reasonably provides copies of these materials upon request.

Although the Commission’s regulations do not specifically provide for a third-tiered category of “EXTREMELY SENSITIVE MATERIALS,” I acknowledge the company’s efforts to keep Confidential Security Information secure and free from dissemination on the internet or to hackers and potential terrorists. However, the limitation of one location near Philadelphia seems unduly burdensome on the Representatives of Complainants and Intervenors, who have named experts located in Pittsburgh and Ontario, Canada. Accordingly, Sunoco’s motion will be granted in part and denied in part. Sunoco’s proposed Amended Protective Order, will be adopted as modified giving the parties’ Representatives the ability to inspect documents in two additional locations in Pennsylvania, Harrisburg or Pittsburgh, upon request. Additionally, a clause providing for a dispute resolution process will be added to an Amended Protective Order that will be issued separately. It appears Sunoco does not object to the parties being able to challenge the third designation. Tr. 674-675. I encourage Sunoco to share as many discovery responses as practicable through password-restricted access portals such as Case Anywhere, Q Discovery or DropBox to reduce the cost and burden of prosecution to *pro se* and governmental complainants and intervenors.

Electronic filing of admitted testimony

In the event there is no settlement, and an evidentiary hearing is held, admitted written testimony shall be electronically filed with the Commission within 30 days after the hearing date. If there is a settlement, and there is no cross-examination regarding pre-served and admitted testimony, then there is no need to file an electronic copy of the testimony.

Settlement

 The parties are reminded that if a settlement is reached, they should file a petition for settlement as well as individual party’s statements in support of the settlement petition. Additionally, it may be necessary to enter written testimony and other evidence into the record with a settlement petition, in order to provide the presiding officer with enough evidence to support findings that the proposed settlement is in the public interest and in accordance with the Public Utility Code. Evidence may be moved into the record with a written verification, or with the testimony of a live witness attesting to the truthfulness of the testimony offered. Any settlement petitions are to be filed in hard copy as well as in a CD in searchable PDF format. In addition, any settlement petitions are to be delivered to me in hard copy as well as electronically in Word format.

 THEREFORE,

 IT IS ORDERED:

1. That Docket Nos. C-2018-3006117, P-2018-3006117, C-2018-3005025, C-2018-3006905 and C-2019-3006898 are consolidated for purposes of discovery, hearings, briefs and decisions in these cases.
2. That the procedural schedule is as follows.

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| --- | --- |
| In-person lay, pro se litigant hearing(s) in Delaware/Chester Counties | TBD October, 2019 (same day following a TBD site visit by ALJ Barnes)   |
| Complainants and Complainant-Aligned Intervenor Direct Written Testimony | January 15, 2020  |
| Respondent and Respondent-Aligned Intervenor Rebuttal Written Testimony | April 14, 2020 (90 days from Direct) |
| Complainants and Complainant-Aligned Intervenor Surrebuttal Written Testimony | May 14, 2020 (30 days from Rebuttal) |
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| Main Briefs | September 28, 2020 (45 days after receipt of transcript) |
| Reply Briefs | October 13, 2020 (15 days after Main Briefs) |
|  |  |

3. That, except for good cause, any requests for a change in the scheduled hearing dates, briefing deadlines, or other deadlines must be submitted to me in writing no later than five (5) days prior to the scheduled date, if possible. 52 Pa. Code §1.15(b). Requests for changes must state the agreement or opposition of other parties, and must be sent to the presiding officer and all parties of record.

4. That the discovery rules are modified such that effective after the service of Complainants’ and any Aligned Intervenor’s Surrebuttal testimony, discovery requests shall be due seven (7) days after receipt of requests, that a Motion to Compel be due within seven (7) days of service of any objections, and that an answer to a Motion to Compel be due within three (3) days of service of a Motion to Compel.

5. That Thornbury Township is granted Intervenor status.

6. That the County of Chester is granted Intervenor status.

7. That Edgmont Township is granted Intervenor status.

8. That West Chester Area School District is granted Intervenor status.

9. That Senator Killion is granted Intervenor status in his individual capacity.

10. That in the event an evidentiary hearing is held, admitted written testimony shall be electronically filed with the Commission within 30 days after the hearing date(s).

11. That Sunoco Pipeline, L.P.’s Petition for an Amended Protective Order is granted in part and denied in part and an Amended Protective Order shall be issued under separate order.

12. That there will be a fifteen-day hearing transcript turnaround so that the briefs can be prepared in accordance with the procedural schedule.

13. That Complainants’ and Intervenors’ requests for a site view are denied.

Date: June 6, 2019 /s/

 Elizabeth H. Barnes

 Administrative Law Judge

**C-2018-3006116 et. al.- MEGHAN FLYNN et. al. v. SUNOCO PIPELINE LP**

*(Revised 6.6.19)*

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