**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, :

Bureau of Investigation and Enforcement :

:

v. : C-2018-3006534

:

Sunoco Pipeline, L.P. :

**INTERIM ORDER**

**GRANTING IN PART AND DENYING IN PART**

**MOTIONS TO STRIKE**

PROCEDURAL HISTORY

On December 13, 2018, the Commission’s Bureau of Investigation and Enforcement (I&E) filed a formal complaint against Sunoco Pipeline, L.P. (Sunoco or SPLP) a/k/a Energy Transfer Partners (ETP) alleging violations of federal and state gas pipeline safety regulations by Sunoco stemming from an alleged incident involving a leak of highly volatile liquids (HVLs) of ethane and propane from the Mariner East 1 (ME1) pipeline in Morgantown, Pennsylvania on April 1, 2017. On April 3, 2019, I&E and Sunoco (collectively, Joint Petitioners) filed a Joint Petition for Approval of Settlement (Joint Petition). The Joint Petition consists of the proposed Settlement Agreement (Petition at 1-10) and attached: Appendix “A” (Statement of I&E at 1-19); Appendix “B” (Statement of Sunoco, 1-13); and, Appendix “C” (Formal Complaint at 1‑19). An Addendum to the Settlement was filed by Joint Petitioners on June 28, 2019. The Addendum modifies the Settlement Agreement Condition of Settlement at Paragraph 21.

Much of the history of this above-captioned proceeding is detailed in the Commission’s Opinion and Order entered June 10, 2019, which referred Docket No. C-2018-3006534 to the Office of Administrative Law Judge (OALJ) for such further proceedings and hearings, as deemed necessary, consistent with its Opinion and Order.

On July 15, 2019, an Order Granting Petitions to Intervene was issued. Seven Petitioners were granted Intervenor status, including: 1) Thomas Casey; 2) West Goshen Township (WGT); 3) Josh Maxwell; 4) West Whiteland Township; 5) Edgmont Township; 6) Megan Flynn, Rosemary Fuller, Michael Walsh, Nancy Harkins, Gerald McMullen, Caroline Hughes, and Melissa Haines (collectively Flynn Intervenors)[[1]](#footnote-1); and 7) Upper Uwchlan Township, respectively.

Intervenors were given leave to file Comments with the Secretary’s Bureau regarding the Joint Petition for Approval of Settlement by August 16, 2019. All parties were permitted to file Reply Comments in response to the Intervenors’ Comments by September 16, 2019.

On August 13, 2019, Flynn Intervenors filed an Objection to the Joint Petition for Settlement. On August 15, 2019, West Whiteland Township filed Comments. On August 16, 2019, West Goshen Township filed an Objection. I&E and Sunoco filed Reply Comments on September 16, 2019. On September 16, 2019, I&E filed a Motion to Strike Portions of the Flynn Intervenors’ Comment and a Motion to Strike Exhibits “A” and “B” of West Goshen Township’s Public Comments in Opposition to the Joint Petition for Approval. Also on September 16, 2019, Sunoco filed a Motion to Strike West Goshen Township’s Public Comments and a Motion to Strike the Flynn Intervenors’ Comments. On September 23, 2019, Flynn Intervenors filed an Answer to I&E’s Motion to Strike and an Answer to Sunoco’s Motion to Strike. On October 4, 2019, West Goshen Township filed an Answer to I&E’s Motion to Strike and an Answer to Sunoco’s Motion to Strike. The Motions to Strike are ripe for a decision.

DISCUSSION

Bureau of Investigation and Enforcement’s Position

I&E moved to strike Exhibits A and B attached to West Goshen Township’s Comment as these Exhibits are the extra-record expert opinion report of Robert B. Kuprewicz, President of Accufacts Inc., which was appended as Exhibit A and the Consent Order and Agreement between the Pennsylvania Department of Environmental Protection (DEP) and SPLP dated February 8, 2018 and associated documents marked Exhibit B. I&E argues the consideration of extra-record evidence would violate I&E’s due process as it is being deprived of any ability to question Mr. Kuprewicz of Accufacts or otherwise challenge statements of hearsay made in his report, the DEP Consent Order and Agreement and numerous associated documents. I&E contends that no evidentiary hearing should be held as the complaint has been fully resolved; however, I&E requested the opportunity to submit a written response to both Exhibits A and B should they not be stricken.

I&E also moved to strike comments of M. Zee, PhD of Matergenics Materials and Energy Solutions dated June 10, 2018 and incorporated by reference into the Flynn *et al.* Intervenors’ Comment. I&E moved to also strike extra-record evidentiary statements and references to extra-record documents and materials throughout the Comment. I&E’s reply to the Flynn Comment did not address the substance of Dr. Zee’s comments or the extra-record statements and materials that were identified in I&E’s Motion to Strike. I&E requested the opportunity to submit a written response to Exhibit A of the Flynn Comment, which is the “Preliminary Comments on Proposed BI&E/Sunoco Morgantown Settlement” authored by Dr. Zee, as well as the numerous extra-record statements and references made in the Flynn Comment should they not be stricken.

Sunoco Pipeline, L.P.’s Position

Sunoco moved to strike the following portions of WGT’s Comments:

1. Exhibit A to the Comments (an expert report with accompanying CV and PowerPoint attachments) along with all statements within the Comments relying on these materials because this is an attempt to introduce evidence in violation of the July 15 Order.
2. Exhibit B to the Comments (a Department of Environmental Protection (DEP) Consent Order and Agreement with accompanying exhibits and appendices) along with all statements in the Comments relying on these irrelevant materials because this is an attempt to introduce evidence and substantially broaden issues in this proceeding in violation of the July 15 Order.
3. Statement regarding the 12-inch pipeline. Sunoco argues that the only pipeline at issue in this proceeding is the Mariner East 1 pipeline. The July 15 Order precluded Intervenors from substantially broadening the issues, so inclusion of statements regarding the 12-inch pipeline are irrelevant to approval of the Settlement. Thus page 2, second paragraph “Moreover, it is clear that the settlement does not include the equally ancient 12" "Point Breeze to Montello" work around pipeline now being used by SPLP to transport HVLs” should be stricken.
4. Scandalous and Impertinent Matter.Sunoco contends that portions of the Comments constitute mudslinging, incendiary, unsupported, and/or incorrect accusations against SPLP. Specifically, statements alleging breach of the WGT settlement agreement should be stricken as impertinent and scandalous because they are untrue, misleading, and irrelevant to consideration of the Settlement at issue here. These statements misrepresent the Commission’s prior findings and collaterally attack a Commission Order.

SPLP moved to strike the following portions of Flynn *et al.*’s Comments:

|  | **Description of Materials** | **Cites to Locations in Comments** |
| --- | --- | --- |
|  | Expert Report with CV and affidavit and statements within Comments referencing or relying thereon | Exhibit A to Comments and:   * Comments at page 7, entire first paragraph; * Comments at page 39, fourth and fifth paragraph; and * Comment at page 41, third paragraph, second sentence. |
|  | Environmental Hearing Board (EHB) Stipulated Order and EHB Adjudication | Exhibit B (which appears to also include the document referenced as Exhibit C within the Comments) to Comments and Comments at page 23 fifth paragraph through entirety of page 25. |
|  | PHMSA Notices of Proposed Safety Order regarding Missouri pipeline | Comments at page 29, second and third paragraphs (referencing Exhibit D). |
|  | Statements regarding 12-inch pipeline | * Comments at page 3, first paragraph “Moreover” through end of first paragraph; * Comments at page 15, second sentence of third paragraph through page 16 end of first paragraph; * Comment at page 17, third paragraph, last sentence, “Moreover, the condition of the 12-inch . . .”; * Comments at page 39, last paragraph, second sentence through page 40, entire first paragraph; and * Comments at page 40, first paragraph, reference to 12-inch pipeline and page 41, first three paragraph references to 12-inch pipeline. |
|  | “Factual Background” and characterizations of Complaint and Answer, which speak for themselves | * Comments at page 4 Section III. through all of page 6; * Comments at page 7 Section c. through page 8 end of paragraph (k); * Comments at page 14, last paragraph “More important for present purposes is Sunoco’s evasive answer . . .” through page 15, first sentence of third paragraph; and * Comments at page 35, third paragraph, phrase referring to I&E’s analysis in Complaint “of Sunoco defective safety and integrity practices”. |
|  | Statements regarding replaced section of pipe | Comments at page 16, second paragraph, through page 17 first sentence of third paragraph “An additional reason . . .”. |
|  | Statements regarding effects of pin-hole leak on SPLP’s customers | Comments at page 21, entirety of third and fourth paragraphs. |
|  | Marx testimony on “risk assessment” that was withdrawn from evidence in *Flynn Complaint* emergency petition proceeding | * Comments at page 42, entire first paragraph; and * Comments at page 44, second paragraph, first sentence. |
|  | Scandalous, impertinent, and/or otherwise irrelevant allegations attempting to substantially broaden scope of proceeding and/or introduce evidence | 1. Comments at page 8 last paragraph “Given Sunoco’s repeated violation of agency orders as well as recent settlement agreements,”; 2. Comments at page 10 entire second paragraph (allegations regarding DEP); 3. Comments at page 13, entire paragraph 2; 4. Comments at page 17, entire last paragraph; through page 18 entire first paragraph; 5. Comments at page 18, third paragraph (allegations of lack of public transparency); 6. Comments at page 19, second paragraph, third sentence, (“Intervenors further submit that I&E’s statement in Appendix A of the Joint Petition for Approval Petition[sic] contains important factual misstatements.”) through page 20, second paragraph, first three sentences; page 20, third paragraph, second sentence: “Regarding this factor, I&E’s claim is a red herring.”; page 20, fourth paragraph, “I&E’s own Complaint makes clear that it has *no idea*” (emphasis in original) through page 21, entire second paragraph; page 21, last paragraph, second sentence (“I&E inexplicably suggests that Sunoco is a good citizen. . . .”); 7. Comments at page 22 through page 33, third paragraph; 8. Comments at page 33, last paragraph (“The settlement, by Sunoco’s own analysis, was achieved in bad faith. . . .”) through entirety of page 34; 9. Comments at page 41, fourth paragraph through fifth paragraph first sentence; and 10. Comments at page 42, second paragraph (including picture) through page 45 picture. |
|  | Allegations and legal arguments seeking relief as to the *Flynn Complaint* proceeding | Comments at page 45, Section VIII. through entirety of page 48. |

SPLP argues these materials should be stricken because they: (1) violate the July 15 Order ruling that Intervenor comments cannot introduce new evidence or substantially broaden issues in this proceeding; and/or (2) contain scandalous and/or impertinent allegations.

Specifically, SPLP argues that an expert report, Curriculum Vitae, and affidavit accompanying such report is clearly the type of materials that would be considered “evidence.” The July 15 Order precluded Intervenors from submitting evidence, so these materials should be stricken, and appropriate sanctions imposed. These materials also attempt to substantially broaden issues in violation of the July 15 Order and should be stricken for this reason as well.

Sunoco argues that Exhibit B is an EHB Stipulated Order and an EHB Adjudication and references and relies on these materials within the Comments at page 23, fifth paragraph through the entirety of page 25 (The reference to Exhibit C on page 25 is a reference to the Adjudication contained in Exhibit C). This is an attempt to introduce evidence and substantially broaden issues in this proceeding in violation of the July 15 Order. The EHB materials are an attempt to introduce documentary evidence. Also, these materials are irrelevant and thus an attempt to broaden issues beyond the approval of the Settlement.

West Goshen Township’s Position

WGT argues the Motions to Strike are an attempt to cut out the substance of WGT’s Comments and otherwise censor WGT’s opposition to the settlement terms so that SPLP and I&E do not have to answer for the serious inadequacies in the proposed settlement. WGT argues it is not violating due process rights by introducing evidence or broadening issues. WGT merely offers commentary with scientific and legal support to highlight inadequacies of the settlement reached before any evidentiary record was developed. WGT is a governmental body, which could not offer meaningful comments without the guidance of a qualified consultant. A censorship of WGT’s comments undermines the Commission’s inquiry into whether the proposed settlement serves the public interest.

Flynn *et al.* Intervenors’ Position

Flynn *et al.* Intervenors agree with Sunoco that Objections A-J are generally accurate in characterizing many of intervenors’ factual assertions as being outside the parties’ filings. Intervenors do not quarrel with the claim.

However, Flynn *et al.* Intervenors object to striking Exhibit A, the preliminary comments of Dr. Zee incorporated by reference. Dr. Zee stated the issues he had with the settlement if it were rejected and outlined the interest of the Flynn Complainants if the settlement were accepted. Specifically, Dr. Zee stated concerns with the replacement of an 8 foot segment with 83 feet of new pipe without further explanation and there is lack of information pertaining to test results on the removed pipe. Clarification is needed as to whether just 8 feet of pipe was removed, or whether an additional 75 feet of pipe was also removed and what the test results were for the additionally removed pipe. Dr. Zee advocates for baseline information and additional testing protocols including: 1) Close Interval Survey (CIS) in selected areas based upon the previous Inline Inspection (ILI) data; 2) potential reads at test stations; 3) rectifier inspection; 4) soil resistivity and Barne’s Layer Testing and Analysis; and 5) soil sampling and field testing for corrosivity be added to the Settlement. Exhibit A at 13.

Dr. Zee discusses different forms of corrosion and states that reports discussing the condition of the coating should be produced. Dr. Zee recommends cathodic protection (CP) shielding by protective coatings and hypothesizes: “The leak at Morgantown could have been caused by (MIC) as is typical under disbonded CP shielding pipeline coatings. CP cannot effectively protect the pipeline when CP shielding coatings disbond.” Exhibit A at 12. Flynn *et al.* Intervenors argue that although they have no knowledge in engineering, Dr. Zee does and they have adopted his report as their comments. Intervenors have no objection to I&E’s request for a right to file a written response to Dr. Zee’s report or the other Exhibits and comments to which I&E and Sunoco have moved to strike.

Flynn *et al.* Intervenors claim there is no authority cited to support Sunoco’s assertion that only its compliance history in the State of Pennsylvania can be considered by the Commission in determining the appropriate civil penalty. Intervenors contend the age of the 12-inch pipeline is similar to the ME1 and if raising issues pertaining to the 12-inch pipeline impermissibly broadens the Comment inquiry, it is within the presiding officer’s discretion to so rule.

Disposition

As previously stated in the Order Granting Petitions to Intervene:

In the instant case, the Commission referred not only the petitions to intervene and response to OALJ, but also the Joint Petition for Settlement. There is no directive that the record be certified to the Commission prior to the issuance of an initial or recommended decision addressing the settlement. Therefore, I am persuaded to permit Intervenors not agreeing to the settlement to state the reasons why, to delineate the issues they would raise if the settlement were rejected and to outline how their interest would be affected if the settlement were accepted. An initial or recommended decision will consider comments/reply comments and will be issued for exceptions, giving those parties not accepting the settlement an opportunity to indicate to the Commission why they have not accepted the settlement and/or why the Commission should accept or approve the settlement.

\* \* \* \*

In granting intervention, the Intervenors will be required to take the case as it currently stands seven months after the filing of the Complaint commencing this proceeding and following the submission of a settlement petition. The orderly progress of the case will be maintained, the issues will not be significantly broadened, and the burden of proof will not be shifted. Intervenors will be precluded from introducing evidence into the record.

July 15 Order at 16-17.

I&E averments at Paragraphs 26 and 28 of its Complaint averred Sunoco’s corrosion controls were reviewed by I&E staff and revised. Paragraph 31 averred that microbiological induced corrosion (MIC) may have contributed to the corrosion that was observed. It is not clear to me from the formal complaint averments whether the MIC was external, internal, or both. Flynn *et al.* Intervenors offer suggestions as outlined in Dr. Zee’s comments as outlined above. WGT offers comments recommending additional remedies to address external MIC. I&E shall be given an opportunity to address Mr. Kuprewicz’s recommendation that the Settlement should incorporate for ME1 a requirement that a pipeline map be developed showing the approximate areas of bare, or ineffective coating as well as coating type including “unknown” and be identified by milepost for additional assessments through direct field digs. The map will help the pipeline operator and regulators determine “hot zones” along the ME1 where additional corrosion assessment is warranted to assure cathodic protection is operating effectively or coating replacement is warranted to get external corrosion under control.

Additionally, Mr. Kuprewicz recommends additional parameters to assist I&E with gauging Sunoco’s performance or the effectiveness of external corrosion procedures. He suggested requiring the reporting of certain corrosion wall loss triggers to I&E similar to that proposed by PHMSA concerning external corrosion program effectiveness. These comments are relevant to the averment in the complaint that MIC may have been a contributive factor to corrosion and offers recommendations to address “hot spots” along the pipeline that may reduce MIC corrosion. I think it is in the public interest rather than striking these comments, to allow I&E and Sunoco an opportunity to address these comments and recommendations in further reply comments. The parties may consider adopting some of the additional protocols and amending their Settlement Petition for the Commission’s consideration.

Under the relaxed evidentiary standards applicable to administrative proceedings, see 2 Pa. C.S. § 505, it is well-settled that simple hearsay evidence, which otherwise would be inadmissible at a trial, generally may be received into evidence and considered during an administrative proceeding. *D'Alessandro v. Pennsylvania State Police*, 937 A.2d 404, 411, 594 Pa. 500, 512 (2007) (*D’Alessandro)*. See also, Section 505 of the Administrative Agency Law: “Commonwealth agencies shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received. Reasonable examination and cross-examination shall be permitted.” 2 Pa. C.S. § 505. Therefore, hearsay evidence may generally be received and considered during an administrative proceeding. *See A.Y. v. Pa. Dep't of Pub. Welfare, Allegheny County Children & Youth Serv.,* 537 Pa. 116, 641 A.2d 1148, 1150 (1994).

I find it is permissible for Intervenors to incorporate and attach to their comments the comments of consultant engineers. Although the comments of Dr. Zee and Mr. Kuprewicz may be considered hearsay evidence, to cure any due process issue, I&E and SPLP will be given thirty days to respond with further reply comments addressing any of the recommendations in Dr. Zee’s and Mr. Kuprewicz’s comments. The public consent orders involving Sunoco Pipeline, L.P. as a party are public documents which the Commission may determine what weight to give. Similarly the PHMSA Safety Reports will not be stricken. The Commission will determine what weight they are to be accorded.

I agree with Sunoco that the Commission already held that Sunoco did not breach its Agreement with WGT in an unrelated matter. WGT’s statements are irrelevant to the issue before the Commission in the present case and these comments shall be stricken. *See* 66 Pa. C.S. § 316 (“Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be *prima facie* evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.”); *West Goshen Township v. Sunoco Pipeline L.P.*, Docket No. C-2017-2589346 (Order entered Oct 1, 2018) at 15 (ALJ finding that SPLP did not breach duty of good faith and fair dealing), 16 (ALJ finding that SPLP satisfied notice provisions of agreement), 18.

I disagree with Sunoco that the EHB materials and Exhibit E PHMSA Notices of Proposed Safety Order regarding a Missouri pipeline (the Panhandle Eastern Pipeline) should be stricken from Comments as the Commission may determine what weight to give them. The Commission may or may not consider these documents in determining the compliance history of the pipeline operator in its determination of an appropriate civil penalty.

Throughout its Comments, Flynn makes allegations regarding the 12-inch pipeline (Comments at page 3, first paragraph “Moreover” through end of first paragraph; page 15, second sentence of third paragraph through page 16 end of first paragraph; page 17, third paragraph, last sentence, “Moreover, the condition of the 12-inch . . .”; page 39, last paragraph, second sentence through page 40, entire first paragraph; and page 40, first paragraph, reference to 12-inch pipeline and page 41, first three paragraph references to 12-inch pipeline.). The only pipeline at issue in this proceeding is the Mariner East 1 pipeline. The July 15 Order precluded Intervenors from substantially broadening issues, statements regarding the 12-inch pipeline are irrelevant to approval of the Settlement, so these materials should be stricken.

ORDER

THEREFORE,

IT IS ORDERED:

* 1. That the Motion of the Bureau of Investigation and Enforcement to Strike Exhibit A and B of West Goshen Township’s Public Comments is denied.
  2. That the Motion of Sunoco Pipeline, L.P. to Strike Portions of West Goshen Township’s Comments is granted in part and denied in part.
  3. That West Goshen Township’s comments referencing the 12-inch pipeline and claiming Sunoco breached its agreement with West Goshen Township are stricken as the claims unduly broaden the scope of the proceeding.
  4. That the Bureau of Investigation and Enforcement and Sunoco Pipeline, L.P. are granted leave to file additional comments to West Goshen Township’s Exhibits A and B attached to its Public Comments in Opposition to the Joint Petition for Approval of Settlement filed on April 15, 2019 within thirty (30) days of the date of issuance of this Interim Order.
  5. That the Motion of the Bureau of Investigation and Enforcement to Strike Portions of Flynn *et al.’s* Comments is granted in part and denied in part.
  6. That the Motion of Sunoco Pipeline, L.P. to Strike Portions of Flynn *et al.’s* comments is granted in part and denied in part.
  7. That statements regarding the 12-inch pipeline in Flynn *et al.* Intervenors’ Comments are stricken on pages 3, 15, 16, 17, 39, 40, and 41 of their Comments as they unduly broaden the scope of the proceedings.
  8. That the Bureau of Investigation and Enforcement and Sunoco Pipeline, L.P. are granted leave to file additional comments to Flynn et al.’s Exhibit A, B, C, and D attached to its Public Comments in Opposition to the Joint Petition for Approval of Settlement filed on April 15, 2019 within thirty (30) days of the date of issuance of this Interim Order.

Date: October 11, 2019 /s/

Elizabeth H. Barnes

Administrative Law Judge

**C-2018-3006534-PENNSYLVANIA PUBLIC UTILITY COMMISSION BUREAU OF INVESTIGATION AND ENFORCEMENT v. SUNOCO PIPELINE, LP a/k/a ENERGY TRANSFER PARTNERS**

THOMAS J SNISCAK ESQUIRE

KEVIN J. MCKEON ESQUIRE

WHITNEY E. SNYDER ESQUIRE

HAWKE MCKEON AND SNISCAK LLP

100 N TENTH STREET

HARRISBURG PA 17101

**717.236.1300**

***Accepts E-Service***

*Representing Sunoco Pipeline, L.P.*

CURTIS STAMBAUGH ASSISTANT GENERAL COUNSELSUNOCO PIPELINE LP212 N Third Street Suite 201HARRISBURG PA 17101**717-236-1731*Accepts E-Service***

*Representing Sunoco Pipeline L.P.*

VINCENT MATTHEW POMPO ESQUIRE

LAMB MCERLANE PC24 EAST MARKET ST BOX 565WEST CHESTER PA 19382-0565**610.430.8000*Accepts E-Service***

*Solicitor for West Whiteland Township*

MICHAEL L. SWINDLER ESQUIRE

STEHPANIE M. WIMER ESQUIRE

400 NORTH STREET

PO BOX 3265

HARRISBURG PA 17120

**717.783.6369**

**717.772.8839**

***Accepts E-Service***

THOMAS CASEY

1113 WINDOSR DRIVE

WEST CHESTER PA 19380

**484.678.4901**

***Accepts E-Service***

JOSH MAXWELL

4 WEST LANCASTER AVENUE

DOWNINGTON PA 19335

MICHAEL P. PIERCE ESQUIRE

PIERCE & HUGHES PC

17 VETERANS SQUARE

PO BOX 604

MEDIA PA 19335

**610.566.0911**

***Accepts E-Service***

*Representing Edgmont Township*

MICHAEL BOMSTEIN ESQUIRE

PINNOLA & BOMSTEIN

100 SOUTH BROAD STREET

SUITE 2126

PHILADELPHIA PA 19110

**215.592.8383**

***Accepts E-Service***

*Representing Flynn Complainants*

DAVID BROOMAN ESQUIRE

RICHARD C SOKORAI ESQUIRE

MARK R FISCHER JR ESQUIRE

40 E AIRY STREET

NORRISTOWN PA 19404

**610.275.0700**

***Accepts E-Service***

*Representing Upper Uwchlan Township*

*& West Goshen Township*

1. Megan Flynn, Rosemary Fuller, Michael Walsh, Nancy Harkins, Gerald McMullen, Caroline Hughes, and Melissa Haines are Complainants in a separate proceeding involving Sunoco (*See*, *Flynn v. Sunoco Pipeline*, L.P., Docket No. C-2018-3006116). They are not Complainants, but are Intervenors in the instant case. [↑](#footnote-ref-1)