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February 21, 2018

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA. Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

**Re: West Goshen Township v. Sunoco Pipeline, L.P.
Docket No. C-2017-2589346**

Dear Ms. Chiavetta:

Enclosed is West Goshen Township's Answer to Sunoco Pipeline L.P.'s Motion to Compel Responses and Dismiss Objections of West Goshen Township to Sunoco Pipeline L.P.'s Second Set of Discovery Requests, copies of which were served upon the individuals listed below and in the enclosed Certificate of Service in accordance with 52 Pa. Code § 1.54.

Thank you for your attention to this matter.

Please feel free to contact me with any questions.

Sincerely,

Richard C. Sokorai

RCS:jmg
Enclosure

cc: Hon. Elizabeth H. Barnes (via email & U.S. Mail)
Thomas J. Sniscak, Esquire (via email & U.S. Mail)
Kevin J. McKeon, Esquire (via email & U.S. Mail)
Whitney E. Snyder, Esquire (via email & U.S. Mail)
David J. Brooman, Esquire (via email)
Mark R. Fischer, Jr., Esquire (via email)

Following the Township's service of its experts' written direct testimony, on February 2, 2018 SPLP served 29 Interrogatories and Requests for Production of Documents (with 44 "sub-questions" and hidden requests for admissions mixed in to them.)

Commission rules regarding expert discovery are clear. The permissible scope of expert discovery is set forth in 52 Pa.Code §5.324, which provides that a party may through interrogatories require the identity of each person the other party expects to call as an expert witness at hearing and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The responding party may provide written direct testimony of the expert as a response. See 52 Pa.Code §5.324(a)(1)(ii).

In accordance with 52 Pa.Code § 5.324, the Township has already provided written direct testimony for each expert witness that sets forth the substance of the facts and opinions about which each expert will testify and the grounds for each opinion. The Township produced exhibits that include each expert witness' curriculum vitae and a detailed list of the SPLP documents or publications relied upon in preparing each witness' testimony. SPLP's requests, which include but are not limited to requests for admissions (weaved into the requests but not identified in the title or cover letter), requests for production of document and interrogatories related to documents considered or reviewed but not relied upon by the experts, transcripts of testimony or statements ever submitted in any court or regulatory proceeding, work papers, and publications authored, all far exceed the scope of expert discovery set forth in 52 Pa.Code §5.324.

In support of its contention that such discovery is appropriate, SPLP essentially relies on several Commission cases that it maintains hold that expert discovery is far broader than that which is set forth in the rules and points to a number of requests made in other cases. However,

a review of the cases reveals that they do not stand for the propositions for which they are cited (they pertain more to the scope of cross-examination, rather than discovery). Further, the anecdotal, out of context, expert discovery requests from other cases do nothing to shed light on the issues in this case. Far more enlightening is the way Pennsylvania courts have defined the scope of expert discovery, based on essentially the same rules used the Commission.

1. The cases cited by SPLP are inapposite.

SPLP cites *Pa.P.U.C. v. Pa. Gas and Water Co.*, 68 Pa. PUC 191 (Sept. 29, 1988) for the proposition that permissible expert discovery is far broader than that which is set forth in the Commission's rules. However, a review of that case reveals the issue did not involve the scope of expert interrogatories and requests for production of documents at all, but rather, dealt with the testimony of witnesses who based their testimony on customer complaints. On cross-examination, the witnesses refused to answer. The PUC explained that on cross-examination, an expert witness may not pick and choose which questions he will answer. While there is a reference to the ability to discover facts upon which experts rely, SPLP is in possession of all such facts. What SPLP seeks is far beyond the facts and opinions of the expert, and goes on to facts not relied upon, as well as facts, testimony and opinions from other cases, and documents that were considered but not relied upon, which reveals strategy and other impermissible subjects for discovery. Even the case cited in the *Pa. Gas and Water Co.* opinion, *Shanberg v. Commonwealth of PA Secretary of Education*, 426 A.2d 232 (Pa. Commw. Ct. 1981) deals solely with the scope of cross-examination and not discovery rules. The *Pa. Gas and Water Co.* case is simply inapposite to the present issue.

Similarly, SPLP cites *Pa.P.U.C. v. Breezewood Telephone Co.*, 74 Pa.P.U.C. 431 (Feb. 14, 1991) as supporting its argument for broadening the scope of expert discovery under the

Commission's rules. However, again, that case merely discussed the discovery of facts and opinions held by the expert relative to that case. *See id.* The case did not address supplemental discovery pertaining to expert witnesses' backgrounds, or facts not relied upon, or testimony and opinions from other cases, as SPLP is seeking in this case. *Id.* Further, the *Breezewood* opinion did restrict the scope of the requested discovery in that case, finding that one of the discovery requests sought the disclosure of conclusions and opinions that are not discoverable. *Id.* SPLP's discovery is attempting to do precisely what the *Breezewood* opinion found unacceptable. Further, contrary to SPLP arguments, rejecting SPLP's improper discovery requests does not limit its ability to question the credibility and reasoning of the Township's experts on cross-examination at the hearing in this matter. For these reasons, the *Breezewood* opinion does not support SPLP's pursuit of supplemental expert discovery in this case.

2. The sample discovery requests referenced by SPLP are anecdotal and out of context.

In its effort to exceed the scope of permissible expert discovery, SPLP attaches discovery requests from other cases in an apparent argument of "see, other people do it too." However, such an argument cannot stand.

First, there is no context provided for each example: no indication as to the subject matter of the case or the expert's testimony; what information was provided by the expert; or how the answering party responded to discovery, whether by objection or answer. Such anecdotal evidence is simply not helpful to the analysis of SPLP's motion. Such an argument is akin to saying "don't give me a speeding ticket because other people speed too." Even if these other litigants did not object to the discovery, it does not mean such discovery is permitted by the Commission's rules. Often times litigants will make the determination that complying with an

improper request is less expensive than litigating the issue. However, unfortunately, the way SPLP has chosen to act in this case has forced everything to be litigated.

3. The Pennsylvania Supreme Court has addressed the scope of expert discovery under the corollary rule in the Pennsylvania Rules of Civil Procedure and found such discovery restricted.

The corollary to 52 Pa.Code § 5.324 is found in Pennsylvania Rule of Civil Procedure 4003.5, which includes similar provisions limiting the scope of expert discovery, subject to the Court’s ability to order further expert discovery upon “cause shown.” *See* Pa.R.C.P. 4003.5(a)(2). In examining the scope of expert discovery under this rule, the Pennsylvania Supreme Court has recognized that the rule should be read to restrict the scope of all expert discovery, with inquiries into collateral information required to be made through the rule’s “cause shown” criterion. *Cooper v. Schoffstall*, 588 Pa. 505, 521, 905 A.2d 482, 492 (2006). The *Cooper* Court further recognize that the trial court should be involved in determining the appropriate scope of such expert discovery based on the circumstances of the case, in order to “center the discovery on the main issues and to reduce the intrusiveness and burden of collateral forays, while permitting such additional inquiries as the interests of justice may require in special circumstances.” *Id.* at 521, 905 A.2d at 492–93.

In this case, SPLP made no application to the presiding officer under 52 Pa.Code § 5.324(a)(3) as to the need for supplemental discovery from the Township’s experts. Further, as indicated in the Township’s objections, the information SPLP is seeking in the discovery requests can be explored through cross-examination of the Township’s experts at the scheduled hearings. *See Cooper*, 588 Pa. at 525, 905 A.2d at 495 (commenting that courts have favored questioning of the witness over production of discovery for exploring bias and credibility).

To the extent that SPLP argues that permitting the requested discovery will preserve time at the hearings and advance judicial economy, such an argument is hardly persuasive, in that

SPLP will presumably still want to cross-examination the witness on any relevant information produced.

WHEREFORE, Complainant West Goshen Township respectfully requests an order denying SPLP's motion to compel the expert discovery and sustaining the Township's objections thereto.

HIGH SWARTZ LLP

By:  _____

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West Goshen Township

Date: 02/21/2018

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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WEST GOSHEN TOWNSHIP, :
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 : Docket No. C-2017-2589346
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 v. :
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 SUNOCO PIPELINE, L.P., :

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2018 a true and correct copy of West Goshen Township’s Answer to Sunoco Pipeline L.P.’s Motion to Compel Responses and Dismiss Objections of West Goshen Township to Sunoco Pipeline L.P.’s Second Set of Discovery Requests, was served upon the parties listed below by email and U.S. Mail, first-class, postage prepaid, in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a party).

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