PENNSYLVANIA

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held June 14, 2018

Commissioners Present:

 Gladys M. Brown, Chairman

 Andrew G. Place, Vice Chairman

 Norman J. Kennard, Joint Statement, dissenting

 David W. Sweet

 John F. Coleman, Jr., Joint Statement, dissenting

Amended Petition of State Senator P-2018-3001453

Andrew E. Dinniman for Interim

Emergency Relief

Pennsylvania State Senator Andrew E. Dinniman C-2018-3001451

 v.

Sunoco Pipeline, L.P.

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the *Interim Emergency Order and Certification of Material Question* (*Interim Emergency Order*) issued by Administrative Law Judge (ALJ) Elizabeth Barnes on May 24, 2018, in the above-captioned, consolidated proceedings.[[1]](#footnote-1) The proceedings are an *Amended Petition for Interim Emergency Relief* (*Petition)* and an *Amended Formal Complaint* (Complaint), wherein Senator Andrew E. Dinniman (Senator Dinniman, Complainant) is Petitioner and Complainant, and Sunoco Pipeline, L.P. (Sunoco) is Respondent.

The *Interim Emergency Order* granted the Petition of Senator Dinniman requesting interim emergency relief and is now before the Commission pursuant to the provisions of 52 Pa. Code § 3.10(b). The applicable provisions of our Regulations require the presiding ALJ to certify to the Commission the grant or denial of interim emergency relief as a material question in accordance with the procedures set forth at 52 Pa. Code § 5.305.

We state the material question before the Commission as follows:

Whether the evidentiary record supports the provisions of the *Interim Emergency Order* which (a) enjoins Sunoco from all current operation on Mariner East 1 [ME1]; and (b) enjoins construction, including drilling activities on the Mariner East 2 [ME2] and Mariner East 2X [ME2X] pipelines, all in West Whiteland Township, Pennsylvania, until the entry of a final Commission Order in the formal complaint proceeding at Docket No. C-2018-3001451?

Pursuant to 52 Pa. Code § 5.305(c), Briefs in support of and in opposition to the *Interim Emergency Order* have been received from the following Parties: (1) Senator Dinniman Brief; (2) Sunoco Pipeline, L.P. Brief; (3) Clean Air Council Brief (CAC); (4) *Amicus* Brief of Range Resources – Appalachia, LLC (Range); and (5) Virginia Marcille-Kerslake (Ms. Kerslake).

We note that the Commission also has received numerous letters from legislators, municipalities, and interested persons or groups and businesses who are not Parties of Record to the proceedings voicing support or opposition to the positions of the Parties. These submittals have been placed in a “Public Comment” folder that is available for inspection in the Secretary’s Bureau. These submittals are not considered part of the record in this proceeding.

Upon review of a certified question, the Commission is required to do one of the following:

 (1) Continue, revoke or grant a stay of proceedings;

 (2) Determine that the certification was improper and return the matter to the presiding officer for resolution; or

 (3) Answer the certified question.

*See* 52 Pa. Code § 5.305(e).

For the reasons stated herein, we shall answer the certified question, consistent with the discussion in this Opinion and Order and affirm, in part, and reverse in part, the *Interim Emergency Order*. Consistent with the directives in this Opinion and Order, we will return the matter to the Office of Administrative Law Judge (OALJ) for such further proceedings as are consistent with this Opinion and Order and the issuance of a Recommended Decision on an expedited basis.[[2]](#footnote-2) We shall reverse, in part, the determination of the standing of Senator Dinniman to reflect that his legislative standing is not properly recognized merely based on his membership in the General Assembly of Pennsylvania; but his standing as a property-owner and resident of West Whiteland Township, Chester County, is the basis of his standing to prosecute a Complaint before this Commission under the provisions of Section 701 of the Code, 66 Pa. C.S. § 701.

It is important to point out that the underlying Complaint may support a different conclusion following completion of the litigation before the ALJ. This Opinion and Order only addresses whether interim emergency relief in the form of an injunction shutting down the operation of ME1, ME2, and ME2X should be granted. The ongoing Complaint proceeding will provide further evidence and expert testimony which will aid our review of important public safety concerns in the context of a project of the magnitude and complexity of the Mariner East gas pipeline project.

**I. History of the Proceeding**

On April 25, 2018, Senator Dinniman filed the Complaint. On April 30, 2018, Senator Dinniman filed the Amended Formal Complaint and a Petition for Interim Emergency Relief against Sunoco.

The Complaint, after extensive and foundational averments and allegations contained in “Facts,” raises five counts before the Commission: Count I – ME1, ME2, and ME2X are Unreasonable, Unsafe, Inadequate, and Insufficient; Count II – Sunoco Has Failed to Take Reasonable Efforts to Warn and Protect the Public From Danger; Count III – Sunoco Has Failed to Select a Pipeline Right-of-Way So as to Avoid Areas Containing Private Dwellings and Places of Public Assembly; Count IV – ME1 is Located Within 50 Feet of Private Dwellings Despite Being Less Than 48 Inches Underground; and Count V – ME1, ME2 and ME2X Are Not Public Utility Facilities.

In Count I of the Complaint, Senator Dinniman alleges that the route of ME1, ME2, and ME2X is unreasonable, unsafe, inadequate, and insufficient. *See* ⁋ 61. The Complainant avers that the route of ME1, ME2, and ME2X through West Whiteland Township traverses the township through the “highly sensitive” and potentially unstable geologies of Conestoga Limestone and Ledger Dolomite, the instability of which is exacerbated by at least four fault lines running along the northern portion of the township, as well as the less soluble lithologies, such as the Octorara Phyllitie to the southeast. Complaint at⁋ 62. It is the position of the Complainant that the construction of ME2 and ME2X through West Whiteland Township has resulted and will continue to risk “Inadvertent Returns” (IRs), *infra*, and otherwise endanger private and public drinking water supplies. Complaint at⁋ 63.

In Count II of the Complaint, it is alleged, pursuant to the Commission’s Regulations at 52 Pa. Code § 59.33(a), and applicable Code of Federal Regulations provisions, 49 C.F.R. § 195.452(b)-(c), which are incorporated into the Commission’s regulations, that Sunoco is obligated to develop a written integrity management plan that “addresses the risks on each segment of pipeline.” Complaint at⁋ 70. Senator Dinniman asserts that despite requests from the public, Sunoco has refused to share its written integrity management program or risk analysis, or relevant portions thereof with the public. Complaint at⁋ 74. In such refusal, the Complainant alleges that Sunoco has failed to warn and protect the public from danger or reduce the hazards to the public by reasons of its equipment and facilities. Complaint at⁋ 76.

For relief, the Complainant requests that the Commission issue an Order prohibiting the construction and operation of ME2 and ME2X in West Whiteland Township, and the operation of ME1, until such time as Sunoco fully conducts and releases to the public a written integrity management program, risk analysis or other information required to warn and protect the public.

In Count III, the Complainant relies upon the Pipeline and Hazardous Safety Administration (PHMSA) regulation at 49 C.F.R. § 195.210(a), to argue that Sunoco has made no effort to avoid areas in and around West Whiteland Township containing private dwellings and places of public assembly concerning the route of ME2, and ME2X right-of-way.

For relief, the Complainant requests that the Commission issue an Order prohibiting the construction and operation of ME2 and ME2X in areas of the township containing private dwellings, industrial buildings, and places of public assembly. Similarly, the Complainant seeks an Order prohibiting the operation of ME1 in such areas until such time as Sunoco “fully” assesses and the Commission approves, the conditions, adequacy, efficiency, safety and reasonableness of ME1 – and the geology in which it sits.

In Count IV, the Complainant avers that the ME1 line violates the provisions of 49 C.F.R. § 195.248, which provides, *inter alia*, that “No pipeline may be located within 50 feet (15 meters) of any private dwelling, or any industrial building or place of public assembly . . .” Complaint at⁋⁋ 82-83. Senator Dinniman avers that the ME1 line is located within 50 feet of private dwellings in the Township.

The Complainant, essentially, requests the same relief as identified in Count III.

In Count V of the Complaint, Senator Dinniman argues that ME1, ME2, and ME2X are not “public utilities” within the definitions as contained in the Public Utility Code, 66 Pa. C.S. §§ 101, *et seq.* The Complainant acknowledges that the Commission’s jurisdiction applies to the intrastate movement of petroleum products. Complaint at⁋ 90, citing *In re Sunoco Pipeline, L.P.*, 143 A.3d 1000 (Pa. Cmwlth. Ct. 2016) (*Sunoco I*). However, the Complainant argues that, under information and belief, ME1, ME2 and ME2X do not move intrastate petroleum products or other fluid substances.

For relief, Senator Dinniman seeks a determination that Sunoco is not a public utility subject to the jurisdiction of the Commission and that ME1, ME2 and ME2X are not Commission-jurisdictional equipment or facilities, transferring the “matter” to an appropriate court or forum.

The entirety of relief sought in the Complaint and Petition was summarized by ALJ Barnes in the *Interim Emergency Order* at 1-2:

Specifically, Petitioner seeks an Interim Emergency Order: (1) enjoining Respondent from or continuing construction on Sunoco’s Mariner East 2 pipeline (ME2) and Mariner East 2X (ME2X) in West Whiteland Township; (2) enjoining Respondent from operating Mariner East 1; (3) directing Respondent to conduct extensive geophysical and geotechnical tests along the actual and proposed routes of ME1, ME2 and ME2X in West Whiteland Township; (4) directing Respondent to conduct a public risk assessment regarding persons, property and environment located within West Whiteland Township; (5) directing Respondent to disclose to Petitioner and his constituents the risks associated with Mariner East 1, 2 and 2X and activities associated with these pipelines; and (6) directing Sunoco to better inform emergency responders, hospitals, schools and township officials how to respond in the event of an emergency caused by a release or ignition of hazardous volatile gases transported in ME1, ME2 or ME2X. Exhibits P-1, 2 and 16.

On April 30, 2018, a Hearing Notice was issued scheduling a hearing on May 7, 2018. A Prehearing Order was issued on May 2, 2018. A Corrected Hearing Notice was issued on May 4, 2018, scheduling hearings on May 7 and 10, 2018. Hearings were held on those dates. Appearing for Senator Dinniman were Mark L. Freed, Esquire and Joanna Waldron, Esquire. Appearing for Sunoco were Thomas J. Sniscak, Esquire, Whitney E. Snyder, Esquire, Robert D. Fox, Esquire, Neil S. Witkes, Esquire and Diana A. Silva, Esquire. Also, appearing for Intervenor Clean Air Council was Kathryn Urbanowicz, Esquire. Appearing *pro se* was Intervenor Virginia Marcille-Kerslake, an individual residing at 103 Shoen Road, Exton, PA 19341. The two transcripts filed on May 10 and 14, respectively, total 706 pages. *Interim Emergency Order* at 2.

On May 24, 2018, the *Interim Emergency Order* of presiding ALJ Barnes was issued. The *Interim Emergency Order* granted the request for interim emergency relief. The pertinent Ordering Paragraphs provided the following:

1. That Docket Nos. P-2018-3001453 and C-2018-3001451 are consolidated.

\* \* \*

1. That the Amended Petition for Interim Emergency Relief filed on April 30, 2018 by Senator Dinniman is granted.
2. That Sunoco Pipeline L.P. is enjoined from beginning and shall cease and desist all current operation, construction, including drilling activities on the Mariner East 1, 2 and Mariner East 2X pipeline in West Whiteland Township, Pennsylvania until the entry of a final Commission Order ending the formal amended complaint proceeding at Docket No. C-2018-3001451.
3. That Sunoco Pipeline L.P. shall maintain sufficient minimum pressure in Mariner East 1 to avoid gasification of highly volatile liquids (HVLs); however, the HVLs shall not be flowing and need not be purged from ME1 unless the Commission directs same through a further order.
4. That Sunoco Pipeline L.P. may reinstate utility transportation of hazardous liquids utilizing Mariner East 1 pipeline upon further Commission order.
5. That Sunoco Pipeline L.P. shall fully assess the condition, adequacy, efficiency, safety and reasonableness of ME1, ME2 and ME2X including but not limited to the integrity of the ME1 pipe and its welds and shall report its findings to the Commission including a hazard and operability (HAZOP) report.
6. That Sunoco Pipeline L.P. shall report the pipe materials, pipe wall thickness, depth of cover over Mariner East 1, distance of Mariner East 1 from Mariner East 2 and 2x, distance of Mariner East 1 from residences, schools, hospitals, malls and other large gathering places.
7. That Sunoco Pipeline shall report whether the welded seams along Mariner East 1 consist of oxygen-acetylene welding or electrical resistance welded seams and whether there have been radiographic inspections of the welded seams.
8. That Sunoco Pipeline shall report the findings of any hydrostatic testing, any pig pipeline inspections, radiographic inspection of welds were done, and electrical resistance weld seams.
9. That Sunoco Pipeline shall report its emergency response plan, practices and procedures including how it intends to coordinate with fire, police, Pennsylvania Emergency Management Agency (PEMA), PHMSA, and State agencies in responding to a release or ignition of highly volatile liquids from its pipelines or appurtenances and whether its personnel will assist in evacuations.
10. That Sunoco shall submit a plan to train to identify, classify and assess leaks of high volatile liquid gases to appropriate operating personnel in emergency procedures and administer drug and alcohol tests to all employees and contractors involved in responding to an incident.
11. That Sunoco shall address whether it is willing to provide emergency responders with propane/butane/ethane mobile or fixed detector devices, Infrared Volatile Organic Compound (VOC) cameras, warning signs, tape and other equipment that might reasonably assist emergency responders and their own operating personnel in protecting the public safety.
12. That Sunoco Pipeline LP shall conduct geophysical and geotechnical studies regarding Mariner 2 and 2x in West Whiteland Township and shall submit the results to the Commission and parties in this case within thirty (30) days of the date of entry of this Order.
13. That Sunoco Pipeline LP shall file a report with the Commission within thirty days from the date of entry of this Order showing its internal procedures with respect to finding and reporting violations of the Code of Federal Regulations, Commission regulations or Department of Environmental Protection Orders and regulations.
14. Prior to any construction, open cut or drilling activity in West Whiteland Township, Sunoco Pipeline, L.P. is directed to notify the Commission’s Bureau of Investigation and Enforcement and accommodate staff presence during construction.
15. That Sunoco Pipeline L.P. shall create for the public an integrity management program, risk analysis and other information required to warn and protect the public from danger and to reduce the hazards to which the public may be subjected.
16. That the granting of relief by interim emergency order in the proceedings at Docket No. C-2018-3001451 is certified to the Commission as a material question requiring interlocutory review.
17. That a copy of this order shall be served upon the Pennsylvania Department of Environmental Protection.
18. That a copy of this order shall be served upon the Commission’s Bureau of Investigation and Enforcement and Bureau of Technical Utility Services.
19. That a copy of this order shall be served upon the Office of Consumer Advocate and Office of Small Business Advocate.

*Interim Emergency Order* at 22-25.

As noted, on May 31, 2018, Briefs in support of and in opposition to the *Interim Emergency Order* were received from the following Parties: (1) Complainant; (2) Sunoco; (3) CAC; (4) Range; and (5) Ms. Kerslake. For reference, the post-hearing briefs filed in this matter shall be referred to as “Main Briefs” or MB. Briefs filed in support of or in opposition to the *Interim Emergency Order* as provided by 52 Pa. Code § 5.305(c) are referred to as “Brief.”

**II. Background**

This proceeding is a continuation of issues of substantial public interest arising with regard to Sunoco’s Mariner East Pipeline. The Mariner East Pipeline (ME) has been the subject of a number of contentious legal proceedings that are in large part the result of an increased demand for the transportation of petroleum products and natural gas liquids (NGLs) such as propane, ethane, and butane, from the production regions of the Commonwealth of Pennsylvania (Commonwealth), primarily located in the Northwest and Central regions of the state, and from out-of-state areas such as West Virginia and Ohio, into the manufacture and distribution areas of the Southeastern portion of the Commonwealth, particularly to the destination of the Marcus Hook Industrial Complex (MHIC) and points in between. *See* *Sunoco I*.

Sunoco has variously described the Mariner East project as an approximately 300-mile pipeline that will use Sunoco’s existing pipeline infrastructure, supplemented by construction of an additional fifty-one-mile extension from Houston, Pennsylvania to Delmont, Pennsylvania, to ship NGLs from the “Marcellus Shale” in Pennsylvania to the MHIC on the Delaware River and Sunoco’s Twin Oaks facilities operated in conjunction with the MHIC. *See Petition of Sunoco . . .* , Docket No. P-2014-2411941, *et al* (Order entered October 29, 2014), at 11-12 (*Sunoco-Delaware Riverkeepers Order*), citing Sunoco Amended Petition at 2.[[3]](#footnote-3)

The Mariner East Project has two phases. ME1 was completed and utilized Sunoco’s existing pipeline infrastructure, bolstered by a 51-mile extension from Houston, in Washington County, to Delmont, in Westmoreland County, to ship 70,000 barrels per day of NGLs from the Marcellus Shale basin to the MHIC. *See Sunoco I*.

The second phase of the Mariner East Project, known as ME2, is in the process of being completed. Unlike ME1, which used both existing and new pipelines, ME2 requires construction of a new 351-mile pipeline largely tracking or co-located with the ME1 pipeline route. ME2 construction will variously be parallel to and mostly within the existing right-of-way of the ME1 pipeline. *Sunoco I* at 1008-09. *See also* Sunoco Answer to Complaint at ⁋ 24 “. . . ME1 is an 8” pipeline used to transport natural gas liquids and that SPLP [Sunoco] is currently constructing ME2 and ME2X, a 20”and 16” pipeline, which will be co-located in part with MEl, and that ME2 and ME2X will also transport natural gas liquids. . . .”

Sunoco is recognized and regulated as a public utility and a public utility corporation by the Commission. *See* *Sunoco I*. Sunoco maintains tariffs on file with the Commission pursuant to Section 1302 and 1303 of the Code, 66 Pa. C.S. §§ 1302; 1303. *See also, Sunoco Pipeline L.P. Supplement No. 2 Tariff Pipeline-Pa P.U.C. No. 16 and Letter Request for Waiver of 52 Pa. Code §53.52(b)(2) and (c)(1) through (5),* Docket No. R-2014-2452684 (Order entered January 15, 2015):

On November 6, 2014, Sunoco Pipeline L.P. (Sunoco or the company), Utility Code 140001, filed Supplement No. 2 Tariff Pipeline-Pa P.U.C. No. 16 (Supplement No. 2), to become effective January 5, 2015. On December 18, 2014, Sunoco filed Supplement No. 4 which voluntarily postpones the effective date to January 16, 2015.

Supplement No. 2 proposes to add the new origin point of Houston, Washington County, Pennsylvania for west to east intrastate movement of propane originating from the Marcellus Shale on the previously abandoned Mechanicsburg to Delmont segment and the newly constructed Houston to Delmont pipeline segment to markets in Southeastern Pennsylvania as part of Sunoco’s Mariner East Project.

Sunoco declares that given the increased interest expressed by shippers in securing intrastate pipeline transportation facilities sooner than originally anticipated, and in recognition of the public interest in ensuring adequate pipeline capacity to meet peak demand for propane during the winter season, Sunoco maintains it is able to answer shipper demand and support the public interest though the addition of the Houston, Pennsylvania origin point for the intrastate shipment of propane to Twin Oaks.

Sunoco indicates that they will be investing significant capital to reactivate the Delmont to Mechanicsburg segment and construct over 50 miles of new pipe and facilities from Houston to Delmont for the transportation of propane to Twin Oaks. Sunoco notes that in addition to the capital investment to complete the Mariner East project, substantial capital will continue to be invested and substantial expense incurred in connection with the remainder of the Pennsylvania intrastate petroleum and refined petroleum products pipeline to ensure their continued safe, reliable, and environmentally prudent operation.

\* \* \*

Sunoco declares that Supplement No. 2 Tariff No. 16 will generate $838,229 in revenue. Sunoco states that 5% of that revenue will be paid to the Commonwealth in gross receipts tax ($41,911).

Sunoco avers that they expect a positive effect on the service rendered, in that the tariff changes will enable it to continue the high level of reliable, environmentally responsible service it has traditionally provided to its customers.

Docket No. R-2014-2452684;Order at 1-3.

Sunoco is the product of various mergers and acquisitions of two pipeline companies that were originally certificated by the Commission’s predecessor, the Pennsylvania Public Service Commission, in the early 1930s to transport petroleum and refined petroleum products.[[4]](#footnote-4) *Sunoco-Delaware Riverkeepers Order* at 7. In this Order we additionally found as follows:

In 2013, Sunoco advised the Commission that it intended to revise its operations in view of the rapid development and limited infrastructure available to move Marcellus Shale natural gas and natural gas liquids (NGLs) to market. To that end, Sunoco filed an Application with the Commission at Docket No. A-2013-2371789 to abandon certain intrastate service along portions of its pipeline system and a Petition at Docket No. P-2013-2371775 to temporarily suspend a portion of certain intrastate service along other segments. Sunoco averred that the abandonment and suspension were necessary to construct its proposed Mariner East pipeline, which would meet a public need for the transportation of natural gas byproducts. By Order entered on August 29, 2013, and subsequently clarified on October 17, 2013, the Commission approved both the Application and the Petition. *See*, *Application of Sunoco Pipeline LP for a Certificate of Public Convenience to Abandon a Portion of its Petroleum Products Pipeline Transportation Service in Pennsylvania and a Petition for Approval of Temporary Suspension of a Portion of its Petroleum Product Pipeline Transportation Service in*

*Pennsylvania*, Docket Nos. A-2013-2371789 and P-2013-2371775 (Order entered on August 29, 2013) (*August 2013 Order*).

*Sunoco-Delaware Riverkeepers Order* at 9.

The Commission regulates the intrastate movement of natural gas and petroleum products or service by Sunoco through its pipelines, and not the actual physical pipelines conveying those liquids. *Id*.

In the present dispute, the ME2 and ME2X construction is represented to be 98% complete – of 340 miles. However, as noted by our *May 3 Order*,[[5]](#footnote-5) the area of West Whiteland Township in Chester County, has experienced events which have raised serious questions regarding the safety of both, ME1, and continued construction of ME2 and ME2X.

**A. ALJ Barnes’ *Interim Emergency Order* Focusing on Area of Lisa Drive**

On March 7, 2018, the Commission’s Bureau of Investigation and Enforcement (I&E) filed a Petition at Docket No. P-2018-3000281 for Issuance of an *Ex Parte Emergency Order*, pursuant to 52 Pa. Code Section 3.2, seeking suspension of transportation service on the ME 1 pipeline (*I&E Emergency Complaint*).

Soil subsidence events, sometimes referred to as “sinkholes” occurred in the area of Lisa Drive, West Whiteland Township, Chester County. These subsidence events appeared to be related to the adjacent construction of ME2 and ME2X pipelines within Sunoco’s right-of-way, partially exposing ME1 at one location. More specifically, Sunoco’s use of underground horizontal directional drilling (HDD) was associated with the subsidence events. HDD is any steerable trenchless drilling method, aided by drilling fluid, for installation of an underground pipe in an arc along a prescribed path by using a surface drilling rig. I&E’s Safety Division determined that there existed an immediate concern regarding the integrity of ME1 for the following reasons: (1) exposure of portions of ME1, combined with the fact that ME1 was an active pipeline transporting hazardous liquids; (2) ME1 was in close proximity to residential dwellings in the area; (3) the likelihood of additional soil subsidence events along the active ME1 pipeline as a result of continued construction was unknown. The *I&E Emergency Complaint*, in the interests of the safety of the public, sought the immediate suspension of transportation service on ME1.

Commission Chairman Gladys M. Brown granted the relief sought in the *I&E Emergency Complaint* and issued an *Ex Parte Emergency Order*, which was ratified by the full Commission on March 15, 2018.

The first subsidence feature was discovered in November 2017, occurring at the location of a pilot drill IR of the ME2X pipeline. An IR is an unauthorized discharge of drilling fluids into the ground or surface waters associated with HDD or other trenchless construction methodologies. Subsequently, the Pennsylvania Department of Environmental Protection (DEP) issued an Administrative Order (Exhibit P‑18) on January 3, 2018, which halted drilling of the ME2X pipeline. According to Sunoco’s Main Brief filed May 16, 2016, the borehole remained open and uncompleted for approximately 45 days before approval to re-start was received and the bore completed and the pipe installed. Sunoco MB at 30-31. On or about March 1, while Sunoco was undertaking the “pull-back” of the pipe, two additional subsidence features (one located 400 feet south of the IR location adjacent to the 491 Lisa Drive property and the other located approximately 20 feet north of the IR location, toward the Amtrak property), both developed within 48 hours following the pipe “pull-back.” *See* Brief of Senator Dinniman at 6-7.

Through its *May 3 Order,* the Commission, after a comprehensive investigation, testing, and measures as directed, unanimously approved the reinstatement of service on ME1. The reinstatement of transportation service on ME1 relied, in substantial part, on the concurrence of the Commission’s I&E Pipeline Safety Bureau’s satisfaction with the results of the analysis mandated in the *Ex Parte Emergency Order*. The concurrence was set forth in the *Statement of the Bureau of Investigation and Enforcement Concurring with the Request of Sunoco Pipeline L.P. A/K/A Energy Transfer Partners for Reinstatement of Transportation Service on its Mariner East 1 Pipeline* (*I&E Concurrence*).

Virtually concurrent with the *Ex Parte Emergency Order* proceedings, Senator Dinniman filed for intervention in the proceedings. Intervention requests in the *Ex Parte Emergency Order* proceedings were deemed moot. However, our *May 3 Order* expressly provided:

Accordingly, the would-be intervenors can address their concerns regarding SPLP to the Commission through the Commission’s formal complaint process and not through this emergency proceeding.

The Commission notes that on April 25, 2018, Senator Andrew E. Dinniman filed a Formal Complaint with the Commission at Docket No. C-2018-3001451 and an accompanying Petition for Interim Emergency Relief at Docket No. P-2018-3001453 regarding the continued construction of ME 2. Senator Dinniman also included in amended filings various challenges to the continued operation of any portion of ME 1 that range well beyond the scope of the Lisa Drive subsidence issues addressed in the [*Ex Parte] Emergency Order* addressed herein.

As a formal complainant in his own proceeding, Senator Dinniman has full party status and may proceed with litigation before the Commission including exercising the right of discovery, the presentation of testimony and evidence, and the cross-examination of opposing witnesses. Those opposed to the continued operation or construction of the ME pipelines may likewise present formal complaints to

the Commission such as that filed by Senator Dinniman or may seek to intervene in the formal complaint filed by Senator Dinniman.

*May 3 Order* at 12-13; notes omitted.

**III. Discussion**

We note that any issue we do not specifically address herein has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider expressly or at length each contention or argument raised by the Parties. [Consolidated Rail Corporation v. Pa. PUC*,* 625 A.2d 741 (Pa. Cmwlth. 1993)*;*](file:///C%3A%5CDocuments%20and%20Settings%5Ctfarrar%5CLocal%20Settings%5CTemporary%20Internet%20Files%5CContent.Outlook%5CLocal%20Settings%5CTemporary%20Internet%20Files%5CContent.Outlook%5CLocal%20Settings%5CTemporary%20Internet%20Files%5CContent.Outlook%5CLocal%20Settings%5Cresearch%5CbuttonTFLink) *also* see, generally, [University of Pennsylvania v. Pa. PUC*,* 485 A.2d 1217 (Pa. Cmwlth. 1984).](file:///C%3A%5CDocuments%20and%20Settings%5Ctfarrar%5CLocal%20Settings%5CTemporary%20Internet%20Files%5CContent.Outlook%5CLocal%20Settings%5CTemporary%20Internet%20Files%5CContent.Outlook%5CLocal%20Settings%5CTemporary%20Internet%20Files%5CContent.Outlook%5CLocal%20Settings%5Cresearch%5CbuttonTFLink)[[6]](#footnote-6)

We shall primarily address the Parties’ positions as they pertain to the four elements necessary for granting interim emergency relief. However, as a threshold consideration, Sunoco challenges the standing of Senator Dinniman to prosecute the issues raised in the Complaint.

**A. Legal Standards Governing Emergency Relief**

 The purpose of an interim emergency order is to grant or deny injunctive relief during the pendency of a proceeding. 52 Pa. Code § 3.1.

“Emergency” is defined in the Commission’s Regulations as “[a] situation which presents a clear and present danger to life or property or which is uncontested and requires action prior to the next scheduled public meeting.” 52 Pa. Code § 3.1. *See* *Petition of Direct Energy Services, LLC for Emergency Order Approving a Retail Aggregation Bidding Program for Customers of Pike County Light & Power Company,* Docket No. P‑00062205 (Order entered April 20, 2006) (large rate increases did not constitute a clear and present danger to life or property); *Petition of National Fuel Gas Distribution Corp. for Emergency Order Granting a Temporary Waiver of Certain Tariff Rules Related to Transportation Service,* Docket Nos. P-961022 and P-961021 (Order entered March 19, 1996) (threat of depletion of gas stores in unusually cold conditions constituted a clear and present danger to life or property).

The standards that govern the issuance of interim emergency orders are set forth at 52 Pa. Code § 3.6. Section 3.6 requires that a petition for interim emergency relief be supported by a verified statement of facts that establishes the existence of the need for emergency relief, including facts to support the following:

(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.

(4) The relief requested is not injurious to the public interest.

52 Pa. Code § 3.6(b). The Commission may grant interim emergency relief only when all of the foregoing elements exist. *Glade Park East Home Owners Association v. Pa. PUC*, 628 A.2d 468, 473 (Pa. Cmwlth. 1993).

 The party seeking relief bears the burden of proving that the facts and circumstances meet all four of the requirements of 52 Pa. Code § 3.6(b). 66 Pa. C.S. § 332(a). The burden of proof must be carried by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. den.*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the petitioner’s evidence must be more convincing, by even the smallest amount, than that presented by the other party. *Se‑Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

Additionally, any finding of fact necessary to support the Commission’s decision must be based upon substantial evidence. *Mill v. Pa. PUC*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa. PUC,* 623 A.2d 6 (Pa. Cmwlth. 1993). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Commonwealth, Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

**B. Senator Dinniman’s Standing to Obtain Emergency Relief**

We note that the ALJ found that Senator Dinniman had legislative standing to appear as a complainant and to seek the emergency relief requested. While we are not convinced that the reasoning in the ALJ’s*Interim Emergency Order* supports her finding, and we specifically do not decide the issue here, we do find that, after two days of hearings and the issuance of the *Interim Emergency Order,* as well as our finding below that he has personal standing, the issue has become moot.

We note that standing to participate in proceedings before an administrative agency is primarily within the discretion of the agency. *Pennsylvania Natural Gas Association v. T.W. Phillips Gas and Oil Co.,* 75 Pa. PUC 598 (1991). We further note that Commission discretion is especially implicated where important matters of public safety arise on an emergency basis. *See*. 52 Pa. Code Chapter 3 (pertaining to Commission power to grant emergency relief) and, 66 Pa. C.S. § 309 (pertaining to Commission power to do all things necessary and proper to implement the Public Utility Code). For the reasons stated more fully below, in our discretion, we find that the record is sufficient to support Senator Dinniman’s standing in his personal capacity as a property owner and resident of West Whiteland Township. Further, we find the facts are sufficient to warrant our consideration of the important public safety concerns presented by Senator Dinniman’s Complaint and request for emergency relief.

Under the Public Utility Code, standing to file a complaint and seek emergency relief arises under 66 Pa. C.S. § 701, providing in pertinent part:

The commission or any person, corporation, or municipal corporation having an interest in the subject matter, or any public utility concerned, may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation of any law which the commission has jurisdiction to administer or of any regulation or order of the commission.

66 Pa. C.S. § 701.

Standing is established by Senator Dinniman in his personal capacity where the Complainant’s interest in the proceeding is direct, immediate, and substantial. Interest in the subject matter of the proceeding is direct if such interest is adversely affected by the actions challenged in the protest, is immediate if there is a close causal nexus between the asserted injury and the actions challenged in the protest and is substantial if there is a discernible interest other than the general interest of all citizens in seeking compliance with the law. *Ken R. ex rel. C.R. v. Arthur Z.*, 546 Pa. 49, 53-54, 682 A.2d 1267, 1270 (1996); *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 195-197, 346 A.2d 269, 282-284 (1975).

In the present case, the allegations of the Complaint and request for emergency relief assert that the operation of ME1, and construction of ME2 and ME2X create a dangerous condition which would adversely impact the geographic area of West Whiteland Township. Consequently, the dangerous condition asserted is of direct concern to the citizens of that area. As a property owner and resident of West Whiteland Township, Senator Dinniman’s interest is personal and direct and discernable from the general interests of all citizens of the Commonwealth. *Id*.

We note, a party need not wait to experience harm before its position may be fully heard in a proceeding before the Commission. *See,* *Lehigh Valley Power Committee v. Pa. PUC*, 593 A.2d 1333, 1336-1337 (Pa. Cmwlth. 1991) (holding that Lehigh Valley Power Committee had a substantial interest due to a possible rate impact). Given the unique facts in the present case, which requests relief to preclude *possible* harm resulting from the operation of ME1 and construction of ME2 and ME2X to the basis, the ALJ’s analysis must consider the question of standing in view of the possible harm to the Complainant’s interest.

For these reasons, based upon our review if the record, and in view of Senator Dinniman’s assertion of important matters of public safety to the residents of West Whiteland Township, we exercise our discretion and find Senator Dinniman has personal standing in this proceeding as a property owner and resident of West Whiteland Township.

**C. Elements for Interim Emergency Relief**

 **1. Whether the Petitioner’s Right to Relief is Clear.**

As to the first element for interim emergency relief, presiding ALJ Barnes appropriately acknowledged the salient criteria. For Petitioner to meet the first criteria, he need not establish entitlement as an absolute right to relief on the underlying claim. In addition to satisfying the other three elements for interim emergency relief, the Petitioner must establish that the underlying claim raises substantial legal questions. *Interim Emergency Order* at 9, *cf.* *T.W. Phillips Gas and Oil Company v. The Peoples Natural Gas Company* (*T.W. Phillips*).[[7]](#footnote-7)

The Commission has determined that it is not necessary to determine the merits of a controversy in order to find that a petitioner’s right to relief is clear; rather, the basis for determining whether this standard has been met is whether a petitioner has raised “substantial legal questions.” *See* *Core Communications, Inc. v. Verizon Pennsylvania, Inc. and Verizon North LLC*, Docket No. P-2011-2253650 (Order entered September 23, 2011) (*Core*); *Level 3 Communications, LLC v. Marianna & Scenery Hill Telephone Company*, Docket No. C-20028114 (Order entered August 8, 2002) (*Level 3*); *T. W. Phillips Gas and Oil v. Peoples Natural Gas.*

**a. ALJ’s Recommendation**

ALJ Barnes found that the *status quo* in the instant case was that ME1 is currently operational. *Interim Emergency Order* at 9. However, drilling and construction is currently halted on the ME 2 and ME 2X~~x~~ lines in West Whiteland Township. Construction is, at present, halted for ME2 and ME2X because Sunoco is seeking permission to change its DEP Permits and, as of the date of the *Interim Emergency Order*, not yet received permission. *Id.,* citing Tr. at 472 – 477.

Concerning the first element for interim emergency relief, that the petitioner’s right to relief is clear, ALJ Barnes concluded that the Petitioner’s right to relief was clear in that “the claim raises substantial legal issues under the Commission’s jurisdiction and a conservative approach towards continued operations at Mariner East in West Whiteland Twp. is warranted.” *Interim Emergency Order* at 17. The ALJ found that the stated standard in the regulation, advocated by Sunoco, that there is a clear and present danger to life or property, should be read as it has been in civil courts to mean that substantial legal questions have been raised. [[8]](#footnote-8) The ALJ’s finding in this respect relied primarily on the questions of whether the continued operation of ME1 and the future construction of ME2 and ME 2X present a “clear and present danger to life and property.” *Id*.

ALJ Barnes reasoned that the continued operation of ME1 could create a clear and present danger to life or property. The ALJ bases her determination, in part, on her finding that Sunoco’s expert witness, David Demko, was not convincing and because she was not persuaded that the soil subsistence events, which occurred in the area of Lisa Drive did not compromise the integrity of ME1 “because only one side of a short section of pipeline was exposed and there was no soil underneath the pipeline supporting it.” *Interim Emergency Order* at 13. However, the ALJ found that the Petitioner’s witness, Dr. Sasowsky, “credibly testified that carbonate rock touching non-carbonate rock tends to be a focus area for dissolution and karst development.”[[9]](#footnote-9)  *Id*. *See also* *Interim Emergency* *Order* at 12-14, concerning what the ALJ characterizes as Dr. Sasowsky’s persuasive testimony that, “open trenching does not remove all concerns and there is a possibility of hitting soil filled voids where only pseudo-stable soil can collapse,” and that “the introduction of fluids underground in West Whiteland could result in sediment reaching water supplies, which is an unsafe condition.”

Specifically, ALJ Barnes noted that Sunoco has violated the provisions of Section 1501 and 1505 of the Code, 66 Pa. C.S. §§ 1501; 1505, based on several violations of regulations applicable to safety, as administered by DEP and Pipeline and Hazardous Materials Safety Administration (PHMSA). These violations involved allegations, certain of which have been admitted by Sunoco in administrative proceedings, that Sunoco failed to follow proper protocol and safety procedure designed to protect the public:

Within the past year, ME1 has experienced three leaks, all in high consequence areas.3 Although, there was no ignition, Sunoco failed to identify leaks on its pipeline and failed to report the leak or spill to proper authorities when they occurred. . . . One leak occurred in Morgantown, Berks County, PA on April 1, 2017, and was discovered and reported by a landowner. From the time the landowner informed the operator of a probable leak, it took approximately 90 minutes to shut the pipeline down. In that time nearly 1,000 liquid gallons of a natural gas liquids

mixture was released. Exhibit CAC-1. This is a dangerous quantity of hazardous gas. Since May 9, 2017, DEP has issued Sunoco over 50 Notices of Violation for IRs and other violations, including those occurring in West Whiteland Twp. Exhibits P-8, CAC-2 and CAC-3.

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3 High consequence area as defined in 49 CFR 195.450 means (1) a commercially navigable waterway, which means a waterway where a substantial likelihood of commercial navigation exists; (2) a high population area, which means an urbanized area, as defined and delineated by the Census Bureau, that contains 50,000 or more people and has a population density of at least 1,000 people per square mile; (3) an other populated area, which means a place, as defined and delineated by the Census Bureau, that contains a concentrated population, such as an incorporated or unincorporated city, town, village, or other designated residential or commercial area; or (4) an unusually sensitive area, as defined in 49 CFR 95.6. *See* Exhibit CAC-1.

*Interim Emergency Order* at 11.

ALJ Barnes also found the following, cited, violations to be probative of the right to relief:

On January 11, 2018, the Pipeline and Hazardous Materials Safety Administration (PHMSA) at CPF 1-2018-5002 issued Sunoco a Notice of Probable Violation and Proposed Compliance Order alleging violations of construction requirements on ME2 in Marwest Hopedale, Ohio. PHMSA alleged a probable violation of the Pipeline Safety Regulations, Title 49, CFR § 195.204 (relating to inspection in general). N.T. 579, 16-21; Exhibit P-12. PHMSA found Sunoco failed to adequately inspect pipe bending during the ME2 project to ensure it was in accordance with Section 195.212(b). *Id.* at 2.

In April 2017, as horizontal directional drilling (HDD) began in earnest across the Commonwealth, the Department of Environmental Protection began receiving reports of drilling fluid spills a/k/a inadvertent returns (IRs) containing bentonite and other chemicals in the aggregate amount of hundreds of thousands of gallons. CAC Brief 5. Notices of Violations DEP File No. NOV 38 17 102, Sunoco Mariner East II – Pipeline Construction Inadvertent Returns. Multiple IRs occurred in West Whiteland Twp. See Notice of Violation dated May 3, 2018, regarding Permit Nos. E23-524 and ESG 01 000 15 001. The DEP has assessed civil penalties on two occasions, in January and April 2018 totaling over $12,300,000. Once, the DEP did suspend construction on Mariner East 2 for more than a month. DEP Administrative Order in the Matter of Sunoco Pipeline, L.P. dated January 3, 2018. Exhibit P-8.

The Environmental Hearing Board has separately shut down horizontal directional drilling to build ME2 after granting a temporary supersedeas petition by CAC. July 25, 2017 Order, EHB Docket No. 2017-009-L. CAC argues Sunoco has breached an agreement to settle the supersedeas petition and CAC is seeking enforcement against Sunoco before the Environmental Hearing Board at Docket No. 2018-023-L.

*Interim Emergency Order* at 11-12.

 **b. Positions of the Parties**

 **(1) The Complainant**

Senator Dinniman asserts that he has shown, by a preponderance of the evidence, that his right to relief is clear concerning the establishment of an “emergency” according to the criteria of the Commission’s Regulations and supports affirmance of the *Interim Emergency Order*. In pertinent part, Senator Dinniman advises:

The facts of this case show that the construction and operation of ME1 and ME2/ME2X are anything but reasonable, safe, adequate or otherwise in compliance with the regulations. Since May 9, 2017, DEP has issued Sunoco over ***50 Notices of Violation*** for IRs and other violations in Pennsylvania, including in West Whiteland Township. The project has been shut down twice in the last five months, one time for problems that arose in West Whiteland Township and the other time for, among other things, Sunoco’s conduct of unpermitted activities. DEP’s January 3, 2018 order concluded that “Sunoco’s unlawful conduct . . . demonstrates ***a lack of ability or intention on the part of Sunoco to comply*** with the Clean Streams Law, the Dam Safety and Encroachment Act, and the permits issued thereunder.” (Ex. P-8) (emphasis added). Sunoco has received Notices form PHMSA for pipeline construction irregularities, severe coating damage and ruptures. Sunoco has repeatedly failed to properly report problems when they occur. Within the past year, ME1 has experienced three leaks, all in high consequence areas. Sunoco failed to identify leaks on its pipeline and failed to report the leak or spill to proper authorities when they occurred. In West Whiteland Township, Sunoco’s activities have resulted in household water supplies becoming cloudy, turbid, discolored, and diminished; families having to leave their homes; and water bubbling-up onto property. It has also resulted in inadvertent returns and multiple large sinkholes near a rail line, including one immediately over ME1.

Complainant Brief at 15 (*emphasis original*).

Thus, Senator Dinniman identified violations of applicable regulatory provisions administered by the DEP and PHMSA, by Sunoco, that are involved in the construction of ME2 and ME2X, which, according to his presentation, have impacted the safe operation of ME1 and the construction of ME2 and ME2X.

The Complainant also makes the argument that the *May 3 Order* adopting the stipulation reached between I&E and Sunoco, and which permitted a resumption of the operation of ME1 under enumerated conditions, does not foreclose his Complaint in this matter concerning ME1. The Complainant states, “The development of sinkholes at Lisa Drive [the specific area of the *May 3 Order*] leads to another significant point: To date, ***the only portion of ME2X to be installed in West Whiteland Township is at Lisa Drive.*** And, the results were catastrophic. Tr. at 448-49. This does not bode well for the installation of the remainder of the line.” Complainant Brief at 16 (*emphasis original*).

The Complainant maintains that the allegation of Sunoco, that the *Interim Emergency Order* directly conflicts with the *May 3 Order* approving the resumption oftransportation on ME1 is not accurate as the assessment of the Mariner East project around the Lisa Drive areas was limited in scope and the project area ran, approximately, 1,200 feet from south of the Amtrak/SEPTA rail line to the south of Lyntree Drive. *Id.* at 16, referencing Ex. SLP 19, Figure 1. The Complainant emphasizes that the *May 3 Order* concerned a specific portion of the ME 1 pipeline. *Id.* at 17. And, the order noted that the proceeding was not intended to address wide-ranging concerns about the construction and operation of the ME pipelines. *Id*.

 **(2) Sunoco**

Initially, Sunoco argues that the ALJ incorrectly shifted the burden of proof that the continued provision of public utility service is safe, including matters that have already been conclusively resolved, such as whether the integrity of ME1 has been compromised by the construction of ME2. Sunoco Brief at 6.

Specifically, with respect to the integrity of ME1 at the site of soil subsidence events in the Lisa Drive study area, Sunoco indicated that a major flaw in Senator Dinniman’s case was a lack of competent evidence. Sunoco contended that the ALJ disregarded the Commission’s *May 3 Order* and the comprehensive investigations, technical data and analyses on which it is based. Furthermore, it is Sunoco’s contention that Senator Dinniman offered no expert opinion that the sinkhole had any effect on ME1’s structural integrity, citing to the testimony of Senator Dinniman’s only expert, a geologist, who conceded that he had no opinion on the structural integrity of ME1 because he is not an engineer. Sunoco Brief at 7-8, citing Tr. at 283-284.

Additionally, Sunoco argues that even though pipelines can be safely installed in karst, Mr. Demko confirmed that Sunoco has conservatively eliminated HDDs as a construction method in all locations where the route of ME2 crosses karst in West Whiteland Township. Furthermore, Sunoco contends that this change in methodology is safe, citing to the ARM Report,[[10]](#footnote-10) which states that Sunoco has mitigated this concern by changing the next installation in this area from HDD installation to a trenching/direct burial installation. Sunoco Brief at 19-20.

 **(3) CAC**

The CAC averred that the ALJcorrectly found that there is evidence of structural danger in the ME1 pipeline, not counterbalanced by any evidence that these dangers have been remedied, and that such dangers demonstrate the existence of a clear and present danger. Brief of Intervenor Clean Air Council at 3 (CAC Brief). As part of its justification, the CAC addresses the events at Lisa Drive, comparing the formation of the sinkholes to an incident near Follansbee, West Virginia, where a similar pipeline failure caused an explosion due to subsidence (ground giving way) underneath it. CAC alleges that during the investigation of the local geology, PHMSA found that the subsidence was related to an old mine at the site that was presumably slowly collapsing and caused the ground above it to drop*. Id.* at 5. The CAC further avers that the sinkholes that occurred at Lisa Drive are not isolated incidents and may occur again at other locations due to Sunoco’s failure to utilize geophysical surveys. Furthermore, the CAC contends that changing construction methods, such as Sunoco proposes, does not make up for the lack of studies. *Id.* at 15.

**c. Disposition**

 Based on our review of the record, we find that the Senator Dinniman has established, by a preponderance of the evidence, substantial legal questions. [[11]](#footnote-11) The Senator has raised issues that implicate “facilities” and “service” as those terms are broadly defined in the Code, 66 Pa. C.S. §§ 1501 and 1505, and involve the reasonableness, adequacy, and sufficiency of Sunoco’s public utility service. Issues concerning the reasonableness, adequacy, and sufficiency of facilities and services of a public utility, be they contractual or otherwise, are squarely within the Commission’s jurisdiction. *See Disanto v. Dauphin Consolidated Water Supply Co*., 291 Pa. Super. 440, 436 A.2d 197 (1981). However, we shall reverse and modify the findings of the *Interim Emergency Order* as they pertain to the operation of ME1.

The underlying claim in this proceeding is whether the continued operation of ME1 will create a clear and present danger to life or property and whether the construction of ME2 and ME2X creates a clear and present danger to life or property.

With regard to the soil subsidence events that occurred in the area of Lisa Drive, we disagree with the ALJ’s position that the integrity of ME1 remains at issue. In this regard, Sunoco has performed all the necessary steps as directed in that matter to the satisfaction of our Gas Safety Division of I&E. We highlight the testimony of Sunoco expert witness in geology and hydrogeology, David J. Demko, P.G., who acknowledged the following concerning the three aforementioned subsidence areas at Lisa Drive:

Q. And did you also perform work outside of those three subsidence areas to determine whether there were any other areas that could result in subsidence?

A. Yes.

Q. Is one of the things you did walking to perform surface elevation measurements to see if there was any ground level subsidence?

A. Yes. That was actually instituted after the first subsidence.

Q. And did you see any movement of the ground surface?

A. No. All the survey data showed that there was no movement.

Q. And all was stable?

A. That’s correct.

Tr. at 681-682.

Senator Dinniman’s expert, Dr. Sasowsky, conceded that he had no opinion on the structural integrity of ME1 because he is not an engineer. However, in our view, the question presented by the *Petition* is whether Sunoco’s continued operation of ME1 gives rise to an “emergency” as defined in our regulations. We are not persuaded that it does. While the record contains accounts of Sunoco’s mishaps in other jurisdictions and other pipelines, there is no new, credible evidence to support a finding that the continued operation of ME1 poses a clear and present danger to life or property in West Whiteland Township. Moreover, considering that the purpose of emergency relief is to preserve the *status quo* pending the disposition of the underlying proceeding, we are not persuaded that Senator Dinniman has a clear legal right to the relief requested in the *Petition* regarding the continued operation of ME1*.*

However, the construction of ME2 and ME2X has posed more serious challenges to the citizens of West Whiteland Township – specifically the HDD and its effect on local residential and commercial wells. We note that Sunoco has ceased this type of activity in West Whiteland Township and has applied to the DEP for a change in its permits to allow it to proceed in a fashion other than that already approved by the DEP.[[12]](#footnote-12) Although Sunoco testified that it is not continuing with construction until the new DEP permits are issued in West Whiteland Township, it is prudent that the new permits be in place prior to restarting work on ME2 and ME2X. Accordingly, we conclude, subject to the further clarifications set forth in this Opinion and Order, that the Complainant has satisfied the first prong to obtain emergency relief as to further construction of ME2 and ME2X. Therefore, because of the record evidence regarding HDD and the impact to wells in West Whiteland Township, the Petitioner’s right to relief is clear concerning construction of ME2 and ME2X.

**2. Whether the need for relief is immediate.**

 **a. ALJ’s Recommendation**

 The second requirement for obtaining interim emergency relief is a demonstration by the petitioner that its need for relief is immediate. 52 Pa. Code § 3.6(b)(2). The ALJ determined that the need for injunctive relief was immediate.

I am persuaded by the credible testimony of Senator Dinniman, Intervenor Kerslake and Petitioner’s witness Sasowsky taken in conjunction with corroborative evidence of multiple leaks along ME1 within the past year, multiple IR, DEP regulation violations, and PHMSA notices of violations to find the need for relief is immediate.

*Interim Emergency Order* at 17.

A primary focus of the ALJ’s decision in finding that the immediacy requirement had been met, was an April 2016 incident of Sunoco’s violation of pertinent regulations and issuance of a civil penalty occurring in the state of Texas. Sunoco, in this incident, *inter alia*, used unqualified welders, failed to determine that a pipeline had ruptured for 11 days and misreported, thereby, underestimating, the number of barrels of hazardous liquids leaked. *Interim Emergency Order* at 17. Based on this evidence, ALJ Barnes, exercising caution, reached a conclusion that the “repurposing” of ME1 would be subject to unreasonable adverse safety risks if a stay were not issued at this time:

Sunoco witnesses Zurcher and Gordon testified that ME1 is within 50 feet of private dwellings and industrial buildings and not covered by 4 feet of cover. N.T. 584. Although Witness Zurcher testified 49 CFR 195.210 only applies to new construction and his view is that a repurposed pipeline such as ME1 need not conform to this standard as the pipeline pre-dates the 1970’s and the effective date of Chapter 195. N.T. 584-585 . . . . the undisputed evidence that ME1 is 87-year old 8-inch pipe transporting HVLs through an HCA and there is insufficient evidence to show whether the pipe has been properly tested for repurposing. There is no HAZOP report showing the integrity of the ME1 and its welds. No report was offered to show the pipe materials, pipe wall thickness, depth of cover over Mariner East 1, distance of Mariner East 1 from Mariner East 2 and 2x, distance of Mariner East 1 from residences, schools, hospitals, malls and other large gathering places. No comprehensive written plan as referenced by PHMSA’s Advisory Bulletin ADB-2014-04 has been submitted. Exhibits P-1 and P-2.

It is unknown whether the welded seams along Mariner East 1 consist of oxygen-acetylene welding or electrical resistance welded seams and whether there have been radiographic inspections of the welded seams. The technologies available in the 1930’s are not as good as they are today. For example, I do not believe electric resistance welding (ERW) was an available technology. Seamless pipe did not exist at that time. I have questions regarding the heat affected zones on the welds of ME1 and what the possible casualties’ scenarios might be given certain hypothetical situations.

*Interim Emergency Order* at 18.

Also, the ALJ found that the Petitioner established an immediate need for relief based on the potential threat to the water sources of West Whiteland Township:

Petitioner has shown Sunoco is putting West Whiteland Township’s water supplies at risk by failing to adequately identify, document and avoid drilling through well or aquifer locations underground. N.T. 3-5, 24-25, 71, 87. In the 350-mile pipeline route, Sunoco only identified 22 private wells in its water permit applications. N.T. 14-15. At least fourteen wells have been adversely affected in West Whiteland Twp. N.T. 86, 16-20. . . . I am persuaded by Petitioner’s witness Sasowsky to find that the introduction of fluids underground in West Whiteland could result in sediment reaching water supplies, which is an unsafe condition. N.T. 267, 280. Additionally, Dr. Sasowsky’s credible testimony that bentonite can reduce water flow to a well shows Sunoco is operating in an unsafe manner, not in a manner designed to protect the destruction of aquifers and private wells. N.T. 279. Sunoco should have used modern electrical resistivity, gravity and seismic methods and should have had a geophysical baseline test results prior to HDD drilling in West Whiteland Twp. Proper testing could have uncovered the underlying geology along the route and could have potentially avoided damaging private wells and creating

subsidence or “sink holes” in West Whiteland Twp. N.T. 683, Exhibit P-6. March 7, 2018 [Ex Parte] Emergency Order at P-2018-3000281. Exhibits SPLP 18, 19 and 20.

*Interim Emergency Order* at 13.

With respect to the issue of IRs, the ALJ found that there was sufficient evidence to determine that there is a clear and present danger and all construction, including drilling activities on the ME2 and ME2X pipelines in West Whiteland Township should cease and desist until the entry of a final Commission Order ending the formal amended complaint proceeding at Docket No. C-2018-3001451. *Interim Emergency Order* at 23.

The basis for ALJ Barnes’ finding on this issue of IRs is presented on pages 12-13 of the *Interim Emergency* *Order*. The ALJ deduced that the use of a construction technique that uses drilling mud creates a clear and present danger to life and property is formed by the following potential risks: (1) there is a possibility that IRs from HDD could occur in the future; (2) IRs could reduce water flow to a private well; (3) IRs could damage well equipment: and (4) extremely high concentrations of bentonite[[13]](#footnote-13) could cause some unidentified harm to aquatic life. *Interim Emergency Order* at 12-13.

 **b. Positions of the Parties**

 **(1) Complainant**

Senator Dinniman puts forth a number of concerns related to IRs, which attempt to justify the extraordinary relief of an emergency order, including: (1) unsubstantiated hearsay allegations submitted by Senator Dinniman that he was told by a constituent that the results of one water sample tested positive for bentonite (Tr. at 148-150); (2) past DEP Notices of Violations for IRs (Complainant Brief at 5); (3) Senator Dinniman’s contention that an IR occurred at Shoen Road (Tr. at 148-150); and (4) Dr. Sasowsky’s testimony that the use of bentonite could result in sediment in wells or reduce water flows to wells. *Interim Emergency Order* at 12-13.

 **(2) CAC**

The CAC echoed the concerns of Senator Dinniman, averring that since the commencement of construction of the ME2 and ME2X pipelines Sunoco has continually failed to comply with environmental laws and regulations, citing various DEP Notices of Violation. CAC Brief at 7-10. The CAC further contends that, as a result of Sunoco’s construction of the ME2 and ME2X pipelines, drinking water supplies have been destroyed and continue to be threatened by Sunoco’s failure to adequately identify and document private well locations. CAC Brief at 10-12.

 **(3) Sunoco**

On pages 14 through 16 of Sunoco’s Main Brief, it argued that there is no evidence that IRs of drilling mud create a clear and present danger to life or property. In support of its contention, Sunoco offered the following: (1) only two IRs occurred in West Whiteland Township, both in the same location at Lisa Drive; (2) no IR occurred at Shoen Road,[[14]](#footnote-14) (3) there is no evidence that an IR impacted any private or public water supply in West Whiteland Township; (4) Senator Dinniman’s witness, Dr. Sasowsky, conceded that he had no opinion as to whether any IRs will occur in West Whiteland Township through the future construction techniques that are proposed. Tr. at 289-290; and 5) Dr. Chrostowski’s expert opinion that contact with drilling mud from an IR would not cause any adverse health effects was credible and unrebutted. Sunoco Main Brief at 14-16.

 **c. Disposition**

Based on our review of the record, we shall affirm, in part, and reverse, in part, the ALJ’s determination that Complainant has established, by a ponderance of the evidence standard, that the need for relief is immediate regarding the continued operation of ME1 and the construction of ME2 and ME2X. We recognize that the construction, primarily of ME2 and ME2X, caused a number of DEP violations and subsequent imposition of civil penalties. However, the record supports a finding that these concerns are specific to new construction and have no direct bearing on the continued operation of ME1. Accordingly, we find that this prong of our regulations to obtain interim emergency relief is not met for ME1.

We find, however, that the record supports the conclusion of ALJ Barnes that the need for relief is immediate for ME2 and ME2X. It is undisputed that Sunoco intends to proceed with the work for constructing ME2 and ME2X, upon receipt of the appropriate authorizations from DEP owing to the Notice of Violations, and possible amendment and/or modification of its permits. Based in part on the testimony concerning the effect of further construction on the private water sources in the Township, we shall continue the stay that is in effect per the *Interim Emergency Order*. The stay of further construction on ME2 and ME2X shall coincide with the directives contained in this Opinion and Order and the express authorization from this Commission prior to resumption of construction on ME2 and ME2X.

Safe water implicates public safety. *See* *Popowski v. Pa. PUC*, 589 Pa. 605, 910 A.2d 38 (2006), citing [Pa. Const. Art. 1, § 27](https://advance.lexis.com/document/?pdmfid=1000516&crid=299ee145-0cf3-4d6a-bdd9-c320827a58b8&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A4MDG-KKY0-0039-44M0-00000-00&pddocid=urn%3AcontentItem%3A4MDG-KKY0-0039-44M0-00000-00&pdcontentcomponentid=9296&pdshepid=urn%3AcontentItem%3A7XWP-B7V1-2NSD-R34S-00000-00&pdteaserkey=sr5&pditab=allpods&ecomp=Lfmfk&earg=sr5&prid=269939b5-1090-42f2-96a2-905f55dc35d1) (“The people have a right to clean air, pure water . . . ”); [35 P.S. § 721.2(a)(1)](https://advance.lexis.com/document/?pdmfid=1000516&crid=299ee145-0cf3-4d6a-bdd9-c320827a58b8&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A4MDG-KKY0-0039-44M0-00000-00&pddocid=urn%3AcontentItem%3A4MDG-KKY0-0039-44M0-00000-00&pdcontentcomponentid=9296&pdshepid=urn%3AcontentItem%3A7XWP-B7V1-2NSD-R34S-00000-00&pdteaserkey=sr5&pditab=allpods&ecomp=Lfmfk&earg=sr5&prid=269939b5-1090-42f2-96a2-905f55dc35d1) (“An adequate supply of safe, pure, drinking water is essential to the public health, safety and welfare . . .”); *also* [*Hatfield Township v. Lansdale Mun. Auth*., 403 Pa. 113, 168 A.2d 333 (Pa. 1961)](https://advance.lexis.com/document/?pdmfid=1000516&crid=299ee145-0cf3-4d6a-bdd9-c320827a58b8&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A4MDG-KKY0-0039-44M0-00000-00&pddocid=urn%3AcontentItem%3A4MDG-KKY0-0039-44M0-00000-00&pdcontentcomponentid=9296&pdshepid=urn%3AcontentItem%3A7XWP-B7V1-2NSD-R34S-00000-00&pdteaserkey=sr5&pditab=allpods&ecomp=Lfmfk&earg=sr5&prid=269939b5-1090-42f2-96a2-905f55dc35d1) (recognizing direct connection between adequate supply of safe water and public health, safety and general welfare). We also are statutorily empowered to cooperate with the DEP to insure the purity of water supplied to the public.” *See* Section 318(b) of the Code:

**§ 318.  Commission to cooperate with other departments.**

\* \* \*

**(b)  Purity of water supply.--**The commission may certify to the Department of Environmental Resources any question of fact regarding the purity of water supplied to the public by any public utility over which it has jurisdiction, when any such question arises in any controversy or other proceeding before it, and upon the determination of such question by the department incorporate the department’s findings in its decision.

For these reasons, we conclude that the second prong to obtain emergency relief has been met for ME2 and ME2X in this case.

**3. Whether the injury would be irreparable if relief is not granted.**

The third requirement for obtaining interim emergency relief is a demonstration by a petitioner that the injury would be irreparable if relief is not granted. 52 Pa. Code § 3.6(b)(3).

 **a. ALJ’s Recommendation**

The ALJ concluded that the risk of physical injury or death in a densely populated area because of unsafe construction and operations constitutes irreparable harm. *Interim Emergency Order at* 20-21.

 **b. Positions of the Parties**

 **(1) The Complainant**

The Complainant, *inter alia*, relies upon *Application of Fink Gas Co., supra.*, to assert that, in determining whether an injury is “irreparable,” the Commission determines whether the harm can be reverse if the request for emergency relief is not granted.

 **(2) Sunoco**

Sunoco, in its Brief, vigorously argues that Senator Dinniman failed to establish that (1) the continued operation of ME1 will create a clear and present danger to life or property and (2) that the construction of ME2 creates a clear and present danger to life or property. It does not address the irreparable harm considerations of the Commission’s Regulations.

 **c. Disposition**

It is the contamination or disturbance of public wells that primarily drive the ALJ’s finding that the injury would be irreparable if interim emergency relief is not granted.[[15]](#footnote-15) This is caused by the construction of the new pipelines and not by the continued operation of ME1. Therefore, this prong is not met for ME 1.

While there is insufficient evidence to support a finding that ME1 is being operated unsafely in West Whiteland Township, we do find that there is sufficient evidence to support a finding that the construction on ME2 and ME2X should remain halted until Sunoco meets the requirements that will be imposed by this Opinion and Order. Accordingly, record evidence supports that this prong has not been met for ME 1 but has been met for ME 2 and ME 2X.

**4. Whether the relief requested is not injurious to the public interest**.

 **a. ALJ’s Recommendation**

 The fourth requirement for obtaining interim emergency relief is a demonstration by a petitioner that the relief requested would not be injurious to the public interest. 52 Pa. Code § 3.6(b)(4). The ALJ found that public interest considerations militated in favor of interim emergency relief.

 **b. Positions of the Parties**

 **(1) Complainant**

The position of the Complainant is that the public interest favors affirming the *Interim Emergency Order* until a final Commission Order is entered on the Complaint filed in this matter. Senator Dinniman explains that the 19th Senatorial District includes West Whiteland Township, which has suburban areas and urban centers. It has more places of public assembly than any other location in Chester County except West Chester. Complainant Brief at 2.

The pipelines at issue in this proceeding are alleged to come, or are proposed to come, into West Whiteland Township through the center of its commercial district, next to the largest mall in the County (Exton Mall), behind the County library, under Route 30 and Amtrak/SEPTA rail lines. This route is through highly concentrated residential areas that include apartment complexes. Senator Dinniman also advises that the pipelines are located near schools and senior care facilities, pass within 50 feet of residences, and within three feet of a school. Complainant Brief at 2.

The valley in which West Whiteland Township is located is a basic source of water for the population. There are more than 700 private water wells in West Whiteland Township, approximately 200 of which are residential water supplies. Brief at 2-3. There are also three (3) ground water withdrawals for public water supply wells along the route of the pipeline in West Whiteland Township. *Id*., citing Tr. at 71-72, 73.

There are numerous sinkholes and depressions in and around West Whiteland Township. Brief at 3, citing Tr. at 253. The greatest predominance of sinkholes and depressions are in the area around the Exton Mall and the County Library. *Id.*, citing Tr. at 75, 80.

When ME1 was built in the 1930s, West Whiteland Township was farmland and countryside. The Township has since grown to a population of over 18,000 people in 13 square miles and a density of more than 1,400 per square mile and is one of the key commercial centers of Chester County. Complainant Brief at 2.

 **(2) Sunoco**

 Sunoco explains its position that the termination of transportation service by the shutdown of ME1’s operation and the injunction against the construction of ME2 and ME2X is injurious to the public interest.  Sunoco is supported in this position by, *inter alia*, Range, Mr. Billman, Vice President of Business Development, and Mr. Gallagher, Business Manager of Steamfitters Local Union 420.  Sunoco Brief at 22-23.

 The testimony in support of the public interest, on behalf of Sunoco, emphasizes the importance of the delivery of NGLs to the economy – both for manufacture, heating/cooking, and jobs related to those sectors of the economy. Sunoco Brief at 23. Sunoco explains that the demand for NGLs will not “disappear” based on the cessation of operations of ME1, etc.  Rather, the demand NGLs will be met by alternatives to pipeline transportation of such commodity.  *Id*.  In this regard, Sunoco cites an incidental adverse impact on the public interest resulting from, *inter alia*, the increased use of trucking and railroads for the delivery of NGLs into the Southeastern Pennsylvania market. Brief at 23, citing testimony of Mr. Zurcher that rail and trucking transportation is 25 times and 73 times less safe than pipelines, respectively. *Id.*

 **(3) Range**

 Range, as noted, in its *Amicus* Brief, fully supports the position of Sunoco in arguing that the public interest is injured by the shutdown of ME1.

 **c. Disposition**

We wholeheartedly agree with the ALJ, that the risk of physical injury or death because of unsafe construction would be catastrophic. Unsafe construction could also be catastrophic by harming the water sources of the Township. However, there is also economic harm to the public in the continued shutdown of ME1, which plays an important role in local, state and the national economy. *See Sunoco I;* *also,* *In re Condemnation by Sunoco Pipeline L.P.*, 167 A.3d 307 (Pa. Cmwlth. 2017); *appeal denied* 179 A.3d 456 (Pa. 2018).

The primary concern of this Commission is the safety of the public as well as the safety of the utility workers. *See Pa. PUC v. York Water Co.*, Docket No. R‑00049165 (Order entered October 4, 2004). Regardless of the monetary costs involved in shutting down ME1, this Commission will not hesitate to direct a shut down when and if the conditions indicate that there is an imminent threat to public safety. *See, e.g., May 3 Order* when, in fact, the Commission authorized resumption of the operations of ME1 when the *Ex Parte Emergency Order* halted. operations in March 2018. Notwith-standing the foregoing, where there is no sign of imminent danger to the health, safety, or welfare of the public, evidence presented by Sunoco regarding the economic harm that is caused by the shutdown of ME1 is difficult to ignore.

Sunoco has placed in the record testimony of various segments of the public concerning the wide-ranging economic impact on the state, local, and regional economy, associated with the shutdown of ME1. *See Amicus Curiae* Brief of Range Resources, testimony of Alan Engbert, Tr. 604; testimony of Anthony Gallagher, Steamfitters Local 420; Braskem, Tr. 490; testimony of Richard Billman, Vice President of Business Development, Energy Transfer Partners and Sunoco Pipeline, LP, Tr. 621. This testimony, on review, measures the economic impact in the millions, in additional to the residual effect on the jobs and businesses of many Pennsylvanians. We reiterate that Sunoco has performed all of the necessary steps as directed in the *May 3 Order* to the satisfaction of the Commission’s I&E. Therefore, on review of the record, we find that under these circumstances, the relief requested is in fact, injurious to the public interest. Therefore, this factor of the Commission’s regulations has not been met for ME1.

 ME 2 and ME 2X present a different scenario as the construction is yet to be completed and the Commission can ensure that Sunoco meets requirements consistent with safe practices. Any economic injury to the utility or the public in continuing the injunction on the construction of ME2 and ME2X is, in our view, outweighed by the risk posed to the continued safe operation of ME1, the contamination of water wells and the direct impact on local residents and their properties in the township. Until the requirements set forth in this Opinion and Order are satisfied regarding construction of ME2 and ME2X, this fourth prong is met concerning further construction at this time.

**D. Sunoco’s Bond Request and Disposition**

 Sunoco requests that, if the Commission upholds the ALJ’s determination, then the Complainant should be required to post a bond, pursuant to Section 3.8 of our Regulations, 52 Pa. Code § 3.8. *See* Sunoco Brief at 24-25.

The request for a bond, denied by ALJ Barnes in the *Interim Emergency Order*, is two-fold: (1) it serves to compensate a wrongfully enjoined party; and (2) it serves to deter rash applications for interlocutory orders. Sunoco Brief at 24, citing *Synthes, Inc. v. Gregoris*, 228 F. Supp. 3d 421 (E.D. Pa. 2017), and citations (omitted). Sunoco takes the position that a bond is not awarding “damages,” which the Commission is statutorily prohibited from doing. *Id*., citing *Elkin v. Bell Telephone Company of Pennsylvania*, 420 A.2d 371 (Pa. 1980).

 **1. Disposition**

On consideration of the Sunoco request for a bond requirement, we shall decline to impose such an obligation. As a result of our reversal in part, and affirmance, in part, of the *Interim Emergency Order*, Sunoco will be permitted to resume operation of ME1. While Sunoco’s injunction regarding further construction on ME2 and ME2X will be continued, we note that the *status quo* reflects that construction is presently halted. Therefore, the limited continuation of the stay in this matter under the facts of this Complaint do not support imposition of a bond. *See*, *e*.*g*., *Pa. PUC v. Snyder Brothers, Inc*., Docket No. C-2014-2402746 (Order entered July 30, 2015); *Palmerton Telephone Company v. Global NAPs South, Inc.*, Docket No. C-2009-2093336 (Order entered August 3, 2010); *Buffalo-Lake Erie Wireless Systems Co., LLC Petition for Emergency Order*, Docket No. P-2009-2150008 (Order entered January 14, 2010). Accordingly, we shall deny Sunoco’s request.

**E. Preconditions to Resume Construction of ME2 and ME2X**

We affirm the ALJ’s grant of emergency relief to halt the construction for ME2 and ME2X, and further require certain measures to ensure the protection of public safety as a precondition for a Commission Order authorizing Sunoco to resume construction.

Pursuant to our statutory authority to regulate the Gas and Transportation utilities and to ensure the public safety as it may be impacted by the construction of ME2 and ME2X, it is critical that Sunoco established adequate evidence of practices for public safety protection in order for the Commission to determine whether construction can safely restart on the ME2 and ME2X pipelines in West Whiteland Township. Therefore, consistent with the *Interim Emergency Order,* we direct that Sunoco shall file the following information[[16]](#footnote-16) within twenty days of the entry date of this Opinion and Order:

1. Inspection and testing protocols, including but not limited to:

a. Preventative inspection and maintenance;

b. Leak detection and repairs; and

c. Frequency of inspections and testing.

2. Comprehensive emergency response plan, including but not limited to:

a. Communications and coordination necessary to report and respond to a release or ignition of highly volatile liquids from pipelines or appurtenances;

b. Public educational materials and notification protocols intended to instruct how affected parties along the right-of-way should respond and how Sunoco Pipeline will notify the public in the event of a pipeline-related incident; and

c. Specific procedures pertaining to coordination with state and local officials, local fire, police, the Pennsylvania Emergency Management Agency, the Pipeline Hazardous Materials Safety Administration, this Commission, and other utilities located in West Whiteland Township in responding to an incident.

3. Current safety training curriculum for employees and contractors, including but not limited to:

a. Proper pipeline construction, operation and maintenance; and

b. Identification of leaks and procedures for alerting emergency personnel.

In addition, we shall require that Sunoco provide a verification or affidavit that the Department of Environmental Protection has issued the appropriate permission for continued construction of ME2 and ME 2X in West Whiteland Township, when it is granted.

 Sunoco shall file the above-listed documents with the Commission and serve the documents on the Parties. The Parties shall have ten days to file a response as to whether the content of Sunoco’s filing satisfies the information above. The Parties shall file at this docket and provide a copy to the Commission's Office of Special Assistants (OSA). OSA is directed to review the Sunoco filings and any responses filed thereto by the Parties, and prepare a public meeting report on the adequacy of Sunoco’s filings, for submission at the next reasonably possible public meeting.

 We reaffirm that the requirements established for Sunoco in the prior docket, in our *May 3 Order*, remain in effect. We further expect that Sunoco will continue to cooperate and to work closely with the I&E, including giving advance notice and coordination of any construction, especially where construction involves drilling.

To the extent the ALJ’s Ordering Paragraphs 8-20 of the *Interim Emergency Order* impose additional requirements upon Sunoco relating to the operation of ME1 and construction of ME2 and ME 2X, the ALJ’s grant of relief is reversed. By this Opinion and Order, we do not decide the validity of the ALJ’s Ordering Paragraphs 8-20 which direct Sunoco to report certain facts, to develop and implement training, to educate first responders and to conduct additional testing. Those issues may be reviewed fully based upon evidence presented before the ALJ in the Complaint proceeding, including ~~the~~ Sunoco’s geophysical studies and analysis, including resistivity, seismic and gravity, in any areas in West Whiteland Township where Sunoco will use HDD.

**IV. Conclusion**

 Consistent with the foregoing discussion, we conclude that the ALJ correctly determined that Senator Dinniman met the requirements set forth in 52 Pa. Code § 3.6(b) and carried his burden of demonstrating his right to interim emergency relief with respect to ME2 and ME2X. We also deny Sunoco’s request that we direct the Complainant to post a bond under Section 3.8 of our Regulations, 52 Pa. Code § 3.8. Finally, as a precondition for authorizing Sunoco to resume construction of ME2 and ME2X, we shall require Sunoco to file pertinent information concerning evidence of its established practices, including but not limited to inspection and testing protocols, a comprehensive emergency response plan, and its current safety training curriculum for employees and contractors for our review; **THEREFORE,**

 **IT IS ORDERED:**

1. That the following material question arising from the May 24, 2018, *Interim Emergency Order* of Administrative Law Judge Elizabeth Barnes, in the above-captioned docket is, hereby, answered as follows:

Whether the evidentiary record supports the provisions of the *Interim Emergency Order* which (a) enjoins Sunoco from all current operation on Mariner East 1; and (b) enjoins construction, including drilling activities on the Mariner East 2 and Mariner East 2X pipelines, all in West Whiteland Township, Pennsylvania, until the entry of a final Commission Order in the formal complaint proceeding at Docket No C-2018-3001451?

ANSWER: Section (a) is answered in the negative; and Section (b) is answered in the affirmative.

 2. That the *Interim Emergency Order* is reversed, in part, and affirmed, in part, consistent with this Opinion and Order.

3. That Ordering Paragraph No. 5 of the *Interim Emergency Order* is reversed, and the injunction against operation of the ME1 pipeline is, hereby, dissolved, and resumption of operations of the ME1 pipeline is authorized, consistent with the processes and directives as contained in the Commission Order entered at *Petition of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission for the Issuance of an Ex Parte Emergency Order* at Docket No. P-2018-3000281 (Order entered May 3, 2018).

4. That the *Amended Petition for Interim Emergency Relief* filed by Senator Andrew E. Dinniman is granted, in part, and denied, in part, consistent with this Opinion and Order.

 5. That Sunoco Pipeline L.P.’s request that the Commission direct Senator Andrew E. Dinniman to post a bond under 52 Pa. Code § 3.8 is denied.

 6. That the injunction against construction of Mariner East 2 and Mariner East 2X shall remain in effect until further notice by the Commission, subject to compliance with the express conditions as further ordered below:

a. That, within twenty (20) days of the entry date of this Opinion and Order, in order to seek resumption of construction on Mariner East 2 and Mariner East 2X, Sunoco Pipeline L.P. shall file the following information with the Commission:

(1) Inspection and testing protocols, including but not limited to:

(a) Preventative inspection and maintenance;

(b) Leak detection and repairs; and

(c) Frequency of inspections and testing.

(2) Comprehensive emergency response plan, including but not limited to:

(a) Communications and coordination necessary to report and respond to a release or ignition of highly volatile liquids from pipelines or appurtenances;

(b) Public educational materials and notification protocols intended to instruct how affected parties along the right-of-way should respond and how Sunoco Pipeline will notify the public in the event of a pipeline-related incident; and

(c) Specific procedures pertaining to coordination with state and local officials, local fire, police, the Pennsylvania Emergency Management Agency, the Pipeline Hazardous Materials Safety Administration, this Commission, and other utilities located in West Whiteland Township in responding to an incident.

(3) Current safety training curriculum for employees and contractors, including but not limited to:

(a) Proper pipeline construction, operation and maintenance; and

(b) Identification of leaks and procedures for alerting emergency personnel.

 7. That the Sunoco Pipeline L.P. shall file a verification or affidavit that the Department of Environmental Protection has issued the appropriate permission for continued construction of Mariner East 2 and Mariner East 2X in West Whiteland Township when it is granted.

 8. That, within ten (10) days of the service of the reports and filings directed by Ordering Paragraph No. 6, any Party to the *Amended Petition for Interim Emergency Relief* at Docket, P-2018-3001453, may file and serve a response to the filings submitted as directed by Ordering Paragraph No. 6, as set forth in this Opinion and Order, which shall address whether the Sunoco Pipeline L.P. documents fully addresses this directive.

9. That all requested information directed by Ordering Paragraph Nos. 6, 7 and 8, shall be filed with the Commission at this docket, and a copy provided to the Commission’s Office of Special Assistants.

10. That upon receipt of any responses to Sunoco Pipeline L.P.’s filings, and any responses thereto, as directed in this Opinion and Order, the Office of Special Assistants shall prepare a report for the next reasonably possible public meeting.

 11. That the Complaint filed by Senator Andrew E. Dinniman against Sunoco Pipeline, L.P., at Docket No. C-2018-3001451 is returned to the Office of Administrative Law Judge for appropriate proceedings consistent with this Opinion and Order.

12. That a copy of this Opinion and Order shall be served upon the Office of Consumer Advocate, the Office of Small Business Advocate, Pennsylvania Department of Environmental Protection, and the Bureau of Investigation and Enforcement and the Bureau of Technical Utility Services.

 **BY THE COMMISSION,**



 Rosemary Chiavetta

 Secretary

(SEAL)

ORDER ADOPTED: June 14, 2018

ORDER ENTERED: June 15, 2018

1. See 52 Pa. Code § 3.1. Definitions : . . . Interim *emergency* order – An interlocutory order issued by a presiding officer which is immediately effective and grants or denies injunctive relief during the pendency of a proceeding. [↑](#footnote-ref-1)
2. Citing, *inter alia*, *Joint Application of Aqua Pennsylvania, Inc*., Docket Nos. A-2008-2074746 and A-2008-2074747 (Order entered December 29, 2008), Sunoco, supported in this position by *Amicus curiae*, Range, requests that we consider this matter and take action through notational voting according to 4 Pa. Code § 1.43(c). In *Joint Application of Aqua Pennsylvania, Inc*., as acknowledged by Sunoco, notational voting was appropriately taken in order to allow for the scheduled closing of a commercial transaction before December 30, 2008. In the present case, substantial issues involving the health, welfare, and safety of residents of West Whiteland Township are raised. Consequently, we do not find notational voting proper in this matter. [↑](#footnote-ref-2)
3. Sunoco filed 31 petitions requesting, *inter alia*, that the Commission find that the buildings to shelter 18 pump stations and 17 valve control stations along the Mariner East pipeline were reasonably necessary for the convenience or welfare of the public and therefore exempt from any local zoning ordinance. [↑](#footnote-ref-3)
4. Pursuant to Section 5.408(a) of the Commission’s Regulations, 52 Pa. Code § 5.408(a), we take administrative notice of the history of Certificates and Orders issued by the Commission and predecessor agencies. Under Section 103 of the Code, 66 Pa. C.S. § 103, any Certificates granted under prior iterations of the Code remain valid and have the full force and effect of law. [↑](#footnote-ref-4)
5. *See, Petition of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission for the Issuance of an Ex Parte Emergency Order;* Docket No. P-2018-3000281 (*Ex Parte Emergency Order* issued on March 7, 2018 and ratified on March 15, 2018). (*I&E Emergency Complaint Order).* By Order entered May 3, 2018 (*May 3 Order*), the Commission acted to reinstate transportation on Sunoco’s Mariner East 1 pipeline, with certain conditions applied for the transportation of hazardous liquids, and also required Sunoco to comply with certain directives and file all reports of its compliance with I&E for evaluation and monitoring. [↑](#footnote-ref-5)
6. We acknowledge the position of Ms. Kerslake and others who submitted Briefs in this matter. We have given consideration to the positions of the Parties; however, our disposition primarily focuses on the issues as presented in the pleadings of Sunoco and Senator Dinniman which encompass the concerns raised by all of the Parties. [↑](#footnote-ref-6)
7. In reviewing the issuance of an injunction, the Commonwealth Court held that the moving party was not required to demonstrate its absolute right to relief on the underlying claim where the other elements for injunctive relief were satisfied. The Court held that “. . . *if the other elements of a preliminary injunction are present*, and the underlying claim raises important legal questions, the plaintiff’s right to relief is clear.” *T.W. Phillips* at 781 (emphasis supplied). [↑](#footnote-ref-7)
8. Interim Emergency Order at 9, citing *T.W. Phillips Gas and Oil v. Peoples Natural Gas,* 492 A.2d 776 (Pa. Cmwlth. 1985). *But see, Petition of Direct Energy Services, LC for Emergency Oder Approving a Retail Aggregation Bidding Program for Customers of Pike County Light & Power Company,* Docket No. P-00062205 (Order entered April 20, 2006); *Petition of National Fuel Gas Distribution Corp. for Emergency Order Granting a Temporary Waiver of Certain Tariff Rules Related to Transportation Service,* Docket Nos. P-961022 and P-061021 (Order entered March 19, 1996)(both cases using the “clear and present danger to life or property” standard). [↑](#footnote-ref-8)
9. Karst is addressed in more detail later in this Opinion and Order. The Encyclopedia Britannica defines “karst” as “**Karst**, terrain usually characterized by barren, rocky ground, caves, sinkholes, underground rivers, and the absence of surface streams and lakes. It results from the excavating effects of underground water on massive soluble limestone. The term originally applied to the Karst (or Kras) physiographic region, a limestone area northeast of the Gulf of Trieste in Slovenia, but it has been extended to mean all areas with similar features. *See*, <https://www.britannica.com/science/karst-geology>. [↑](#footnote-ref-9)
10. I&E engaged an independent geological and geophysical consulting firm, ARM Group, Inc., which monitored Sunoco’s testing and reviewed the data generated.  The ARM report describes the background of the project, the tasks completed by Sunoco’s geological and geophysical consultants, the tasks completed by ARM and ARM’s opinion regarding the integrity of the ME1 pipeline. [↑](#footnote-ref-10)
11. In response to Sunoco’s averment that the ALJ’s decision does not mention any clear or present danger to life or property, we note that Commission determinations under Section 3.6 of our Regulations focus on the four elements required for interim emergency relief and do not always address or require the presence of a clear or present danger. *See Application of Fink Gas Company*, Docket No. A-2015-2466653 (Order entered August 20, 2015). Unlike Section 3.2 of our Regulations, Section 3.6 does not require a petitioner to establish the existence of an emergency. In any event under the factual circumstances in this case, we believe that there is sufficient evidence in the record to support a finding of a danger to life and/or property based on the dangers associated with HDD. [↑](#footnote-ref-11)
12. As of the date of this Opinion and Order, we are not aware that DEP has any new permits. [↑](#footnote-ref-12)
13. Drilling mud primarily consists of water and bentonite, which is non-toxic. Sunoco Main Brief at 2. [↑](#footnote-ref-13)
14. The Shoen Road HDD resulted in the loss of water and sedimentation to some private wells. Thirty-five wells were sampled, and none showed the presence of any contaminants. The water levels of all of the wells have since rebounded to their original water elevations. Furthermore, Sunoco has offered connections to public water to all residences on private water wells near Shoen Road at Sunoco’s expense, whether or not they experienced a loss of water or sedimentation. Sunoco will reconnect each homeowner to their private water supply after construction is completed, if they request it. Sunoco Brief at 15. [↑](#footnote-ref-14)
15. Environmental damage can be considered under the irreparable harm element of our Regulations. *Commonwealth v. Kennedy*, 87 A.2d 605 (Pa. 1913). When evaluating if an injury is irreparable, we examine “whether the harm can be reversed if the request for emergency relief is not granted.” *Core* at 15. [↑](#footnote-ref-15)
16. Confidential information required by this filing is subject to Commission rules for the treatment of confidential information and the protective order in effect in this docket. [↑](#footnote-ref-16)