



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

IN REPLY PLEASE
REFER TO OUR FILE

March 7, 2019

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: Wilmer Jay Baker v. Sunoco Pipeline, L.P.
Docket No. C-2018-3004294
I&E Objection to Subpoena Form

Dear Secretary Chiavetta:

Enclosed for filing please find an Objection on behalf of the Bureau of Investigation and Enforcement to a Subpoena form submitted by Wilmer Jay Baker, *pro se* Complainant, in the above-referenced proceeding.

Copies are being served on the parties of record in accordance with the attached Certificate of Service.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Stephanie M. Wimer
Senior Prosecutor
Attorney ID No. 207522

SMW/jfm
Enclosure

cc: Honorable Elizabeth H. Barnes
As per Certificate of Service

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I. BACKGROUND

On August 10, 2018, Complainant filed a Formal Complaint with the Pennsylvania Public Utility Commission (“Commission”) against Sunoco Pipeline, L.P. (“Sunoco”) averring that he is having an unspecified safety problem with gas utility service. Complainant stated that he received a safety manual approximately five (5) years ago regarding “the old iron pipeline” and since that time, Sunoco installed two bigger pipelines and increased the pressure of the “old” pipeline. Complainant further indicated that he attempted to bring his complaint to a township meeting scheduled for July 10, 2018, but the meeting was cancelled approximately one (1) hour before it was scheduled to begin. For relief, Complainant requests that Sunoco install an alarm system for residents living within a 1,000 feet “blast zone,” that emergency personnel be trained and that “the old iron pipeline” be replaced with American-made steel.

On September 17, 2018, Sunoco filed an Answer and New Matter. Also on September 17, 2018, Sunoco filed Preliminary Objections contending the doctrine of collateral estoppel bars claims of the Mariner East 1 (“ME1”) pipeline being unsafe and challenging the legal sufficiency of the complaint.

On October 6, 2018, Complainant filed a Reply to New Matter, which alleged violations of 52 Pa. Code § 59.33 and several other federal pipeline safety regulations, and appended numerous documents from Lower Frankford Township, news articles, a Certificate of Completion regarding Pipeline Emergency Response and Awareness for Excavator Operations, and a note from a fire police lieutenant.

On October 9, 2018, Complainant filed an Answer to Preliminary Objections that denied the material averments of Sunoco's New Matter and appended various other documents including news articles and a letter from Sunoco to the Cumberland County Board of Commissioners.

On October 11, 2018, a Motion Judge Assignment Notice was issued by the Office of Administrative Law Judge ("OALJ") assigning Administrative Law Judge ("ALJ") Elizabeth H. Barnes as the presiding officer in this proceeding. By Order dated October 31, 2018, ALJ Barnes denied Sunoco's Preliminary Objections and directed that a prehearing conference be scheduled.

A prehearing conference was held on December 18, 2018, following which, on December 20, 2018, Complainant submitted a list of witnesses who will testify on his behalf as well as documentary evidence he intends to present. The list of witnesses includes residents of Carlisle and Newville, Cumberland County, PA, and the documentary evidence includes the same documents Complainant previously submitted, which consists of news articles, a note from a fire police lieutenant, documents from Lower Frankford Township and the aforementioned Certificate of Completion.

By Prehearing Order dated December 18, 2018, an Initial Hearing is scheduled in this matter for March 28, 2019.

On February 25, 2019, Complainant submitted a "Subpoena Form" to the parties in this proceeding seeking the presence and testimony of Paul J. Metro, Manager, Safety Division of I&E, at the in-person evidentiary hearing scheduled for March 28, 2019. The Subpoena Form was not filed with the Commission, does not appear on the docket of this proceeding and contains no Certificate of Service, among other deficiencies that are

described in more detail herein. Complainant requests that Mr. Metro testify about the safety of the Sunoco pipelines that “run thru Cumberland County and beyond” and certain portions of the “case file” designated by Complainant by letters and numbers that do not appear to correspond to the documents previously submitted by Complaint in his Reply to New Matter, Answer to Preliminary Objections or prehearing statement of December 20, 2018. For the reasons described below, I&E respectfully requests that Your Honor strike Complainant’s Subpoena Form as being procedurally improper and, alternatively, if not stricken, I&E requests that the attempt to subpoena Mr. Metro to testify on Complainant’s behalf at the Initial Hearing be denied.

II. OBJECTION

A. COMPLAINANT’S SUPBOENA FORM SHOULD BE STRICKEN AS IT FAILS TO CONTAIN AN APPLICATION

The Commission has previously recognized that a *pro se* litigant is not excused from complying with the Commission’s procedural rules. *See Lewis v. PECO Energy Company*, Docket No. C-2010-2189187 (Initial Decision issued June 2, 2011; Final Order entered July 15, 2011) (dismissing a *pro se* complainant’s Formal Complaint for failing to comply with a presiding officer’s Order). In *Lewis*, the Commission stated as follows:

“The right of self-representation is not a license . . . not to comply with relevant rules of procedure and substantive law.” *Faretta v. California*, 422 U.S. 806, 834 n.6, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975). Our Supreme Court in *Peters Creek Sanitary Authority v. Welch*, 545 Pa. 309, 681 A.2d 167, 170 (1996) no.5, again enunciated its position as to *pro se* litigants citing *Vann v. Unemployment Compensation Board of Review*, 508 Pa. 139, 494 A.2d 1081 (1985)(*pro se* litigant must to some extent assume the risk that his lack of legal training will prove his undoing); *Commonwealth v. Abu-Jamal*, 521 Pa. 188, 200, 555 A.2d 846, 852 (1989)(*pro se* litigant “is subject to the same rules of procedure as is a counseled defendant; he has no greater right

to be heard than he would if he were represented by an attorney” and finally, *Jones v. Rudenstein*, 501 Pa. Super. 400, 585 A.2d 520 appeal denied, 529 Pa. 634, 600 A.2d 954 (1991)(pro se litigant not absolved of complying with procedural rules). *Green v. Harmony House North 15th Street Housing Assoc., Inc.*, 684 A.2d 1112, 1114 (Pa.Comm.w., 1996).

Lewis (Initial Decision at 5). The Complainant initiated and was engaged in a formal contested proceeding before the Commission. The fact that Complainant is unrepresented does not excuse Complainant from failing to follow the Commission’s regulations governing the issuance of subpoenas.

In fact, the presiding officer’s December 18, 2018 Prehearing Order apprised Complainant of the Commission’s procedural requirements as they relate to subpoenas. The December 18, 2018 Prehearing Order states as follows:

If you intend to subpoena witnesses for the hearing, you should review the procedures established in 52 Pa. Code § 5.421. You must submit your written application to me sufficiently in advance of the hearing date so that the other parties will have the required ten (10) days’ notice to answer or object, and so you will have enough time to receive the subpoena and serve it.

December 18, 2018 Prehearing Order at 2. Despite being expressly notified of the Commission’s subpoena process, Complainant elected to disregard the Commission’s procedural regulations and Your Honor’s December 18, 2018 Prehearing Order.

Complainant’s Subpoena Form is fatally deficient in that it fails to contain an Application. Section 5.421(a) of the Commission’s regulations expressly states that:

(a) *Issuance.*

- (1) A subpoena may be issued by the Commission upon its own motion.
- (2) Other than under paragraph (1), ***a subpoena will issue only upon application in writing to the presiding officer***, except that during a hearing in a proceeding, the application may be made orally on the record before the presiding officer, who will determine the necessity of issuing the subpoena.

52 Pa. Code § 5.421(a) (emphasis added). Moreover, the written application “must specify as nearly as possible the general relevance, materiality and scope of the testimony . . . sought.” 52 Pa. Code § 5.421(b)(1). Furthermore, the written Application must contain a notice indicating that a response or objection shall be filed within ten (10) days of service of the Application and the Application must include a certificate of service. 52 Pa. Code § 5.421(b)(3)-(4).

The filing of an Application is a necessary and mandatory aspect of the Commission’s subpoena process as the Application is designed to put the parties on notice as to the relevance, materiality and scope of the testimony and provide the parties with an opportunity to object. The Commission has previously denied subpoenas that failed to contain an application that was: (1) served on the essential parties or individuals; and (2) specify the relevance or scope of testimony sought. *Seese v. PPL Electric Utilities Corporation*, Docket No. C-2015-2500818 (Initial Decision issued March 17, 2016; Final Order entered April 29, 2016). Complainant deprives interested parties of such opportunity here and, accordingly, his Subpoena Form should be stricken.

In Complainant’s proposed Subpoena Form, Complainant provides no explanation as to the relevance and materiality of Mr. Metro’s testimony as it would relate to the allegations advanced by Complainant in his Formal Complaint, which can be fairly characterized as a complaint against Sunoco for failing to provide sufficient information to Complainant regarding Sunoco’s pipelines that are located near his residence in Cumberland County. Indeed, Complainant seeks in his requested relief an alarm system for all residents who live 1,000 feet within an alleged blast zone, that Sunoco train emergency personnel and that

Sunoco replace ME1 with American-made steel. It is entirely unclear how Mr. Metro's testimony would be relevant or material to Complainant's allegations as Complainant provides no such demonstration. Furthermore, Complainant seeks to require Mr. Metro to testify "to the safety of the Sunoco pipelines that run thru Cumberland County and beyond," yet such testimony is beyond the scope of the allegations of Complainant's Complaint.

Moreover, Complainant's proposed Subpoena Form contains no Notice to Plead to apprise interested persons, including Mr. Metro, of the opportunity to object pursuant to 52 Pa. Code § 5.421(b)(3). Significantly, the proposed Subpoena Form lacks a Certificate of Service, which is mandatory pursuant to 52 Pa. Code § 5.421(b)(4). Service of an Application for Subpoena is required to be made on the party, person or individual to be subpoenaed. 52 Pa. Code § 5.421(c)(1). Neither Mr. Metro nor I&E were served with the Subpoena Form. Further, there is no indication that the Commission's Law Bureau was served with the Application for Subpoena even though the subpoena is directed to a Commission employee. *See* 52 Pa. Code § 5.421(c)(4).

Applications for Subpoena must be approved prior to the issuance of the Subpoena. Complainant improperly seeks to avoid this step by seemingly attempting to issue a Subpoena himself. Notably, Complainant's proposed Subpoena contains no signature of the presiding officer. Thus, for all the above-described reasons, Complainant's proposed Subpoena Form should be stricken in its entirety as it wholly disregards the Commission's regulations pertaining to the issuance of subpoenas.

B. IN THE ALTERNATIVE, SHOULD COMPLAINANT’S SUBPOENA FORM BE ENTERTAINED, IT SHOULD BE DENIED AS IT SEEKS TO MANDATE I&E PARTICIPATION BEYOND THE SCOPE OF I&E’S DELEGATED RESPONSIBILITIES AND CONTRARY TO I&E’S INDEPENDENT PROSECUTORIAL DISCRETION

The Commission created I&E in 2011 to perform the prosecutory functions of the Commission. *Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011) (hereinafter referred to as the August 11, 2011 Reorganization Order”). I&E is charged with, *inter alia*, representing the public interest “in ratemaking and service matters before the Office of Administrative Law Judge and enforcing compliance with the state and federal motor carrier safety and gas safety laws and regulations.” *Id.* at 5; *See also* 66 Pa.C.S. § 308.2(a)(11). I&E also handles rail safety enforcement proceedings that are referred by the Bureau of Technical Utility Services (“TUS”) and defense of Commission assessment cases. *Id.* Section 1003 of the Commission’s Procedures Manual limits the proceedings in which I&E may participate or initiate to the aforementioned proceedings delineated in the August 11, 2011 Reorganization Order. *See* Section 1003(A)(1) of the Commission’s Procedures Manual. I&E also retains independent prosecutorial discretion to initiate or participate in proceedings before the Commission and otherwise take actions that it deems warranted. *See* Sections 1301(B)(3), 1302(C)(3) and 1302(D)(1) of the Procedures Manual.

Complainant’s proposed Subpoena Form runs afoul of Section 308.2(a)(11) of the Public Utility Code, the August 11, 2011 Reorganization Order and the Commission’s internal procedures in that it seeks to coerce an employee of I&E into participating and providing opinionated expert testimony in a proceeding in which I&E has elected not to intervene. In essence, granting Complainant’s subpoena would remove any independent

prosecutorial discretion of I&E to “take appropriate enforcement actions” by mandating I&E to serve at the whim of Complainant. 66 Pa.C.S. § 308.2(a)(11). I&E simply was not created for such purposes.

Furthermore, granting Complainant’s subpoena of Mr. Metro would result in an unprecedented and unfavorable result that would allow any party to subpoena any Commission employee, whether the employee works in the I&E Safety Division, the Bureau of Audits, TUS, the Bureau of Consumer Services, etc., to appear and testify in any proceeding, and provide expert opinions on the applicable subject matter. Such a precedent would essentially allow any party appearing before the Commission to obtain a “free” expert employee-witness at the Commission’s time and expense. Complainant could have and should have presented his own expert witness to testify in support of his Formal Complaint.

Moreover, as illustrated above, it is entirely unclear how Mr. Metro’s testimony would support the allegations or requested relief set forth in the underlying Formal Complaint. Complainant has made no claims as to how Mr. Metro, an individual not a party to this proceeding, will shed light on Complainant’s inability to obtain satisfactory information from Sunoco concerning pipelines that are located near his residence in Cumberland County, or will aid him in obtaining his requested relief that: (1) an alarm system be installed for all residents who live 1,000 feet within an alleged blast zone; (2) Sunoco train emergency personnel; and (3) Sunoco replace ME1 with American-made steel. Courts will only enforce a subpoena if, *inter alia*, the information sought is reasonably relevant to the inquiry. *See U.S. v. Westinghouse Elec. Corp.*, 788 F.2d 164, 166 (3d Cir. 1986), citing *U.S. v. Powell*, 379 U.S. 48, 57-58 (U.S. 1964). Complainant’s Subpoena Form fails to meet this standard.

Additionally, the documents that were appended to Complainant's December 20, 2018 prehearing statement were not prepared by Mr. Metro or by persons under his supervision. As such, Mr. Metro lacks sufficient, first-hand knowledge to testify about those documents and his testimony would most certainly not survive a hearsay objection. Similarly, while I&E is unable to discern the identity of the documents listed in Complainant's Subpoena Form, it appears that Complainant seeks to require Mr. Metro to testify about documents not prepared by Mr. Metro or employees within the Safety Division, *i.e.* Kim Van Fleet's Complaint and Reply, Sunoco's Manual, and documents related to Substandard Steel Pipes. Such testimony would amount to nothing more than hearsay. Therefore, not only would granting Complainant's subpoena contravene the Public Utility Code, the August 11, 2011 Reorganization Order and Commission internal procedures, but it would also not aid Complainant in proving the elements of the allegations averred in his Formal Complaint. Complainant's subpoena is simply without merit.

WHEREFORE, for all the foregoing reasons, the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission respectfully requests that Your Honor issue an Order striking Complainant's Subpoena Form as being procedurally improper or, alternatively, issue an Order denying the request to subpoena Paul J. Metro to appear and testify at the in-person Initial Hearing scheduled for March 28, 2019.

Respectfully submitted,



Stephanie M. Wimer
Senior Prosecutor
PA Attorney ID No. 207522

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Date: March 7, 2019

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Wilmer Jay Baker,
Complainant

v.

Sunoco Pipeline, L.P.,
Respondent

Docket No. C-2018-3004294

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Service as indicated below:

Via First Class Mail:

Wilmer Jay Baker
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Carlisle, PA 17015

**Via First Class Mail and
Electronic Mail:**

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Dated: March 7, 2019



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