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March 11, 2019

VIA ELECTRONIC FILING

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

Re: Meghan Flynn, et al. v. Sunoco Pipeline L.P.; Docket Nos. C-2018-3006116
and P-2018-3006117; **SUNOCO PIPELINE L.P.'S OBJECTION TO
APPLICATION FOR ISSUANCE OF SUBPOENA**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is Sunoco Pipeline L.P.'s Objection to Application for Issuance of Subpoena in the above-referenced proceeding.

If you have any questions regarding this filing, please contact the undersigned.

Very truly yours,

Thomas J. Sniscak
Kevin J. McKeon
Whitney E. Snyder
Counsel for Sunoco Pipeline L.P.

WES/das
Enclosure

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MEGHAN FLYNN	:	
ROSEMARY FULLER	:	
MICHAEL WALSH	:	
NANCY HARKINS	:	
GERALD MCMULLEN	:	
CAROLINE HUGHES and	:	
MELISSA HAINES	:	
	:	
Complainants,	:	Docket No. C-2018-3006116
	:	Docket No. P-2018-3006117
v.	:	
	:	
SUNOCO PIPELINE L.P.,	:	
	:	
Respondent.	:	

**OBJECTIONS OF SUNOCO PIPELINE L.P.
TO APPLICATION FOR SUBPOENA**

Pursuant to 52 Pa. Code § 5.421(f), Sunoco Pipeline L.P. (SPLP) submits these Objections to the Application of Meghan Flynn, Rosemary Fuller, Michael Walsh, Nancy Harkins, Gerald McMullen, Caroline Hughes, and Melissa Haines (Complainants) for issuance of a subpoena to be served upon the custodian of the records of the PUC’s Bureau of Investigation and Enforcement (BIE) in the above captioned proceeding, and in support thereof, avers as follows:

I. Introduction

1. On February 27, 2019, Complainants filed an application for issuance of a subpoena to be served upon the custodian of records of the PUC’s Bureau of Investigation and Enforcement.
2. Attached as Exhibit A to the Application was a draft Subpoena Duces Tecum (Subpoena) which if issued would compel BIE to produce the following records related to the

“Mariner East I (“ME1”) pipeline leak of hazardous volatile liquids (“HVLs”) that occurred in the vicinity of Morgantown, Pennsylvania on or about April 1, 2017”:

- (a) Records and documents turned over to BIE by Sunoco (i) in the course of BIE’s investigation of the Morgantown Incident, and (ii) additional records and documents furnished to BIE by Sunoco since the conclusion of that investigation
- (b) Records and documents created by BIE itself in its investigation of the Morgantown Incident.

Application at P 5 and Exhibit A.

3. In the Application, Complainants “allege, in general, that (a) the existing 8 inch and 12 inch Mariner pipeline infrastructure are incapable of transporting HVLs safely across the Commonwealth, and (b) Sunoco is incapable of repairing, maintaining and monitoring the said 8 inch and 12 inch pipelines safely.” Application at P 4.

4. Upon information and belief, some or all of the records sought have been marked as containing confidential security information pursuant to the Public Utility Confidential Security Information Disclosure Protection Act (35 P.S. §§ 2141.1 to 2141.6) (CSI Act).

5. The records sought relate to a formal complaint filed by BIE against SPLP in a proceeding docketed at C-2018-3006534 (BIE Morgantown Complaint). BIE and SPLP have reached a joint settlement in principle regarding the BIE Morgantown Complaint that will promote public safety. SPLP and BIE filed a letter with the Commission notifying it and persons seeking to intervene in that docket that the settlement has been reached, that the parties will file a joint petition for settlement, that interested persons shall have an opportunity to comment with accompanying reply comments, and that the Commission will consider approval of the Settlement after comments and reply comments are received.

II. Objections to the Application

SPLP objects to the Application for Subpoena on the following grounds:

1. The Application fails to comply with 52 Pa. Code § 5.421(b)(1) in that it fails to adequately describe the materiality and scope of the documents sought.

- a. The Application fails to state how records provided by SPLP to BIE and/or created by BIE pursuant to its investigatory authority related to the Morgantown Incident are material to the issue in this proceeding: BIE's Morgantown Complaint and the issues subsumed therein are not relevant to this proceeding. Complainants have improperly attempted to incorporate that entire Complaint (which relates to events with no discernable effect on Complainants), into their Complaint. As explained in SPLP's Preliminary Objections, Complainants attempt to incorporate the BIE Morgantown Complaint and/or the issues therein should not be allowed in this proceeding. Complainants also lack standing to make allegations regarding the BIE complaint, which focuses on a pin-hole leak and alleged past non-conformity with integrity management and cathodic protection regulations. Complainants wholly fail to allege that the Morgantown incident or those past occurrences have in any way impacted them, let alone had the required direct, immediate, and substantial impact required for standing; those claims should be dismissed from this proceeding and therefore discovery seeking information regarding those claims is irrelevant.

Moreover, BIE's Morgantown Complaint has resulted in a settlement in principle with a Joint Petition for Settlement forthcoming that will allow for a public comment period for interested persons prior to the Commission deciding

whether to approve that settlement. The settlement will promote public safety. Allowing Complainants' to essentially open litigation of that settled Complaint is against Commission policy. Commission policy encourages settlement. Allowing a Complainant to essentially act as a third-party attorney general and litigate a complaint that the actual prosecutory entity brought against SPLP is improper and has a chilling effect on settlements. If SPLP is subject to litigation for the same claims it has settled with BIE here, that takes away SPLP's incentives to settle cases and agree to terms that promote public safety where it is subject to litigation of those same claims before the same regulatory body regardless of such settlement. Complainants were not discernably affected by the events of the Morgantown Complaint. To the extent Complainants assert any interest concerning the BIE Complaint, they can submit comments to the Commission concerning the Joint Petition for Settlement at that docket.

Also, the information sought is not relevant because it seeks information regarding the integrity of SPLP's pipelines, which Complainant's counsel bindingly admitted was not at issue in this proceeding. Complainants cannot litigate integrity of SPLP's pipelines in this proceeding. Complainants' counsel admitted that integrity issues are not a part of this proceeding after Your Honor consolidated the Complaint and Petition proceedings, those admissions are binding, and Complainants cannot now amend their Complaint and attempt to place integrity of SPLP's pipelines at issue in this case. At hearing, counsel for Complainants admitted, after the Petition and Complaint were consolidated, that integrity is not at issue in this proceeding. See, e.g., N.T. 32:810 ("If Your Honor please, we're

not talking about the integrity of the pipelines. That's not an issue in this proceeding.") That admission is binding on Complainants. *See, e.g., Sule v. W.C.A.B. (Kraft, Inc.)*, 121 Pa. Cmwlth. 242, 245, 550 A.2d 847, 849 (1988) ("It is well settled that an admission of an attorney during the course of a trial is binding upon his client."); *Marmo v. Com., Dep't of Transp.*, 121 Pa. Cmwlth. 191, 195–96, 550 A.2d 607, 609 (1988). Complainants cannot now raise integrity as an issue here.

Even if the Morgantown Incident is relevant to this proceeding (it is not), the Application seeks unspecified "additional records and documents furnished to BIE by Sunoco since the conclusion of that [Morgantown Incident] investigation." This request, which encompasses any record furnished by SPLP to BIE regardless of the subject or purpose of the record, is impermissibly vague and ambiguous as to the documents sought.

- b. Complainants unsupported conclusory declaration that "all discoverable records and documents in the BIE case are [...] discoverable in the present case" based on its improper attempt to incorporate BIE's formal complaint by reference is insufficient to establish the "general relevance, materiality and scope of the testimony or documentary evidence sought," as required by 52 Pa. Code § 5.421(b)(1). While discovery is broad in Pennsylvania, parties are not entitled to engage in "fishing expeditions." *Land v. State Farm Mut. Ins. Co.*, 600 A.2d 605, 608 (Pa. Super. 1991).
2. The Application fails to comply with 52 Pa. Code § 5.421(b)(2) by failing to identify facts to be proved by the documents in sufficient detail to indicate the necessity of the documents.

Complainants alleged purpose for seeking the records is an attempt to show “(a) the existing 8 inch and 12 inch Mariner pipeline infrastructure are incapable of transporting HVLs safely across the Commonwealth, and (b) Sunoco is incapable of repairing, maintaining and monitoring the said 8 inch and 12 inch pipelines safely.” In sum, the records sought by Complainants are for the purpose of attacking the integrity of SPLP’s pipelines generally. However, as Complainants’ admitted through counsel, the integrity of SPLP’s pipelines is not at issue in this proceeding. *Pittsburgh & L. E. R. Co. v. Pennsylvania Pub. Util. Comm’n*, 85 A.2d 646, 653 (Pa. Super. 1952) (“The Commission may refuse to require the production of records which are not necessary to a proper determination of the issue or issues involved.”). Thus, Complainants have failed to identify any facts to be proved by the records sought relevant to the issue in this proceeding.

3. The records sought by the Application constitute cumulative evidence as the information regarding BIE’s investigation of the Morgantown Incident has already been established in considerable detail by the complaint filed by BIE against SPLP in a proceeding docketed at C-2018-3006534, as well as SPLP’s answer to that complaint. *Merz White Way Tours v. Pennsylvania Pub. Util. Comm’n*, 201 A.2d 446, 451 (Pa. Super. 1964) (where the evidence sought by subpoena is merely cumulative, PUC’s discretion to deny Application for subpoena is particularly broad.)

4. The Application seeks the release of records related to BIE’s decision making and exercise of prosecutorial discretion, which are privileged. 52 Pa. Code. § 5.361(a)(3).

a. The Subpoena defines the scope of the records sought as any records related to the Morgantown Incident provided to and/or created by BIE, including “without limitation, correspondence, memoranda, notes, diaries, statistics, letters, telegrams, minutes, releases, agendas, opinions, reports, studies, test results...” Application,

Exhibit A. This unrestrained request implicates records subject to the deliberative process privilege that would expose confidential deliberations of law reflecting agency opinions, recommendations and advice related to BIE's prosecutorial and investigatory determinations, including initiation of the formal complaint filed by BIE against SPLP in a proceeding docketed at C-2018-300653. *Commonwealth v. Pennsylvania Pub. Util. Comm'n*, 331 A.2d 598 (Pa. Cmwlth. 1975) (finding PUC technical staff reports used to determine the appropriateness of utility tariff changes were not discoverable because they revealed the PUC's decision-making process).

- b. Disclosure of information and records voluntarily produced and/or provided to BIE through SPLP's cooperation in the PUC investigation process violates public policy as such disclosure could lead to regulated entities being less likely to cooperate and provide relevant information out of fear of retaliation or public embarrassment. "If individuals are less likely to cooperate in the inspections/investigations process, then the inspections/investigations will no longer be an effective means of monitoring the utilities compliance with statutory and regulatory requirements." *Pennsylvania Pub. Util. Comm'n v. Gilbert*, 40 A.3d 755, 761 (Pa. Cmwlth. 2012) (finding strong public policy considerations support PUC nondisclosure of materials related to underground natural gas pipeline investigation.).

5. The Application seeks to compel BIE to release "without limitation, ... opinions, reports, studies, [and] test results" related to its investigation of the Morgantown Incident. These records are, by definition, tantamount to an expert report of BIE and are therefore not discoverable. *See Columbia Gas Transmission Corp. v. Piper*, 615 A.2d 979 (Pa. Cmwlth. 1992) (party may not use expert report of another party); *see also, Spino v. John S. Tilley Ladder Co.*, 671 A.2d 726 (Pa.

Super. 1996) *aff'd* 696 A.2d 1169 (Pa. 1997) (party may not use subpoena to compel an expert opinion).

6. The Application seeks release of records containing confidential security information submitted to BIE pursuant to the CSI Act, each of which must be reviewed for redaction of confidential and privileged information, which is unduly burdensome in light of the its relevance, if any. 52 Pa. Code. § 5.361(a)(2). SPLP objects the production of any documents marked as CSI.

7. In the alternative, if the Application is granted, SPLP requests:

- i. limitation of the issued subpoena to exclude documents subject to any privilege, including the Attorney-Client privilege and work product doctrine, the deliberative process privilege and matters pertaining to prosecutorial discretion; and
- ii. adoption of an Amended Protective Order¹ to limit disclosure of confidential and privileged records sought.

¹ SPLP will be submitting a motion to amend the Protective Order in this proceeding on or about Wednesday, March 13, 2019.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, Sunoco Pipeline L.P. respectfully objects to the Application for Subpoena filed by Complainants and requests that it be denied, or, alternatively that any subpoena issued to BIE be limited to exclude documents subject to any privilege, including the Attorney-Client privilege and work product doctrine, the deliberative process privilege and matters pertaining to prosecutorial discretion.

Respectfully submitted,



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Dated: March 11, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the forgoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party). This document has been filed electronically on the Commission's electronic filing system and served on the following:

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