



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

IN REPLY PLEASE
REFER TO OUR FILE

March 11, 2019

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

Re: Meghan Flynn, *et al.* v. Sunoco Pipeline, L.P.
Docket Nos. C-2018-3006116 and P-2018-3006117
**I&E Objection to Complainants' Application for Issuance of a
Subpoena**

Dear Secretary Chiavetta:

Enclosed for paper filing is an Objection on behalf of the Bureau of Investigation and Enforcement ("I&E") to an Application for Issuance of Subpoena ("Application") filed by Complainants in the above-referenced proceeding. Appended to I&E's Objection is I&E Exhibit 1, which is an affidavit from Sunil R. Patel, Fixed Utility Valuation Engineer ("FUVE") III of I&E's Safety Division, that attests the type of documents and records requested. Due to the time constraints associated with the response time, which were exacerbated by Complainants' failure to serve I&E with the Application when it was filed, I&E is unable to procure the affiant's signature before the presence of a Notary Public by today's filing deadline. I&E intends to supplement its filing with an executed and notarized affidavit as soon as practicable.

Copies of the Objection are being served on the parties of record in accordance with the attached Certificate of Service. Should you have any questions, please contact me.

Sincerely,

Scott J. Thomas
Assistant Counsel
Law Bureau
Attorney ID No. 201013

Enclosure

cc: Honorable Elizabeth H. Barnes
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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MEGHAN FLYNN, <i>et al.</i> ,	:	
Complainants	:	
	:	
v.	:	Docket Nos. C-2018-3006116 &
	:	P-2018-3006117
SUNOCO PIPELINE, L.P.,	:	
Respondent	:	

**OBJECTION OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT
TO COMPLAINANTS' APPLICATION FOR ISSUANCE OF A SUBPOENA**

On February 28, 2019, Complainants filed an Application for Issuance of a Subpoena (“Application”) with the Pennsylvania Public Utility Commission (“Commission”) in the above-captioned proceeding. The Application seeks approval for the issuance of a subpoena for documents and records in connection with the Commission’s Bureau of Investigation and Enforcement’s (“I&E”) investigation of an April 1, 2017 ethane and propane leak that occurred in Morgantown, Berks County, PA on Mariner East 1 (“ME1” or “pipeline”), a pipeline owned and operated by Sunoco Pipeline, L.P. (“Sunoco”). The entirety of Complainants’ request seeks records and documents that are privileged material and otherwise not subject to discovery. Moreover, neither I&E nor the Law Bureau¹ were served with the Application² and the notice regarding the right to respond or object to the Application was addressed to Sunoco.

I&E respectfully requests that the presiding Administrative Law Judge (“ALJ”) deny Complainants’ Application because it is fatally deficient as to service. Alternatively, to the

¹ Section 5.421(c)(4) of the Commission’s regulations requires service of a subpoena directed to a Commission employee upon the Law Bureau. 52 Pa. Code § 5.421(c)(4). Complainants’ Application is directed to the custodian of I&E’s records – an employee of the Commission.

² Service of the Application was not made on I&E even though I&E is presently a party to this proceeding.

extent that the Application is deemed to be procedurally proper pursuant to the Commission's regulations governing the subpoena process, I&E hereby files an Objection to the Application pursuant to 52 Pa. Code § 5.421(f).

I. BACKGROUND

On November 19, 2018, Complainants filed a Formal Complaint with the Commission against Sunoco at Docket No. C-2018-3006116. That same day, Complainants concurrently filed a Petition for Interim Emergency Relief at Docket No. P-2018-3006117. Both dockets have since been consolidated. *See Interim Order of ALJ Elizabeth H. Barnes ("ALJ Barnes")* dated December 3, 2018.

A. Complainants' Petition for Interim Emergency Relief

Complainants' Petition for Interim Emergency Relief asserted that Sunoco's pipelines in Chester and Delaware Counties, PA, are inherently dangerous due to their location in a high consequence area. Complainants' contended that ME1 and a "work around" pipeline that connects to Sunoco's Mariner East 2 ("ME2") pipeline in West Whiteland Township, Chester County, PA, are operated without an adequate public awareness program, emergency notification system or credible emergency management plan. Complainants also averred that ME1 and the "work around" pipeline fail to comply with federal pipeline safety regulations in that they are located within fifty (50) feet of occupied buildings without at least thirty-six (36) inches of ground cover.

On November 27, 2018, Sunoco filed an Answer to Complainants' Petition for Interim Emergency Relief. Hearings were held on Complainants' request for interim emergency relief on November 29 and 30, 2018, and the parties filed briefs in support of their positions on December 7, 2018. Following the evidentiary hearings, ALJ Barnes

entered an order on December 11, 2018, denying the request for interim emergency relief and certifying the denial as a material question for review by the Commission. On December 18, 2018, I&E filed a Notice of Intervention to intervene at both docket numbers, C-2018-3006116 and P-2018-3006117, for the limited purpose of filing a brief that clarified what I&E deemed to be a mischaracterization made by Sunoco regarding the status of Sunoco's Mariner East pipelines. I&E and other parties filed briefs addressing the material question on December 18, 2018. On December 28, 2018, I&E filed a Petition to Withdraw its Intervention. Since there has been no ruling issued on I&E's Petition, I&E technically remains a party-of-record to this proceeding. By Order entered on February 1, 2019, the Commission affirmed ALJ Barnes' denial of interim emergency relief and the matter was returned to the Commission's Office of Administrative Law Judge ("OALJ") for disposition of the Complaint proceeding.

B. Complainants' Complaint

In the Complaint accompanying the Petition for Interim Emergency Relief, Complainants aver that Sunoco violated federal pipeline safety regulations, the Public Utility Code, and Commission regulations by failing to create a legally compliant public awareness program concerning ME1 and the "work around" pipeline and to place sections of the pipeline at least thirty-six (36) inches below ground surface when the pipeline is located within fifty (50) feet of occupied buildings. As a result of those violations, the Complainants allege that public safety is compromised and request that the Commission enter an Order directing Sunoco to permanently cease operation of ME1 and the "work around" pipeline.

On December 11, 2018, Sunoco filed Preliminary Objections to the Complaint.

On December 20, 2018, Complainants filed an Amended Complaint that, *inter alia*, attempts to incorporate by reference an entire separate Complaint filed by I&E on December 13, 2018, against Sunoco. I&E's Complaint alleges violations of the United States Code, federal pipeline safety regulations and Commission regulations for allegations pertaining to an investigation that I&E conducted of an April 1, 2017 ethane and propane leak that occurred on ME1 in Morgantown, Berks County, PA, which led I&E to examine Sunoco's corrosion control program and cathodic protection practices (hereinafter referred to as the "Morgantown Incident"). See Complainants' Amended Complaint at ¶¶ 74-81; I&E's Complaint at Docket No. C-2018-3006534. Complainants, who are all residents of either Chester or Delaware Counties, did not petition to intervene in the I&E Complaint proceeding. Rather, Complainants attempt to take all of I&E's allegations, which were raised first by I&E in a separate but ongoing matter and litigate them here.

On January 10, 2019, Sunoco filed an Answer that contained New Matter. On that same day, Sunoco filed Preliminary Objections in response to the Amended Complaint contending, *inter alia*, that the portions of the Amended Complaint that incorporate I&E's Complaint should be stricken. On January 18, 2019, Complainants' filed an Answer and Reply to New Matter as well as an Answer to Sunoco's Preliminary Objections. A ruling on the Preliminary Objections remains pending.

On February 28, 2018, Complainants filed the instant Application seeking disclosure of the following two types of records from I&E:

- (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.

Complainants' Application at ¶ 5.

Complainants failed to serve the Commission's Law Bureau and I&E, even though I&E records and documents are the subject of the subpoena and I&E remains a party of record in the instant proceeding since its December 28, 2018, Petition to Withdraw its Intervention has not been ruled upon.³

For the reasons described below, I&E respectfully requests that Your Honor deny Complainants' Application as it is procedurally deficient, or, in the alternative, because it seeks disclosure of privileged and otherwise non-discoverable materials.

II. OBJECTIONS

A. COMPLAINANTS' APPLICATION SHOULD BE DENIED BECAUSE IT IS PROCEDURALLY DEFICIENT

Commission regulations at 52 Pa. Code Section 5.421 identify the form and service requirements for a written application for issuance of a subpoena. 52 Pa. Code §§ 5.421(b)-(c). Complainants, who are represented by counsel, disregarded the Commission's procedural regulations. As a result, their Application should be denied.

A party to a formal complaint, other than the Commission, must apply to the presiding administrative law judge for permission to issue a subpoena. 52 Pa. Code § 5.421(a)(2). Application can be made orally on the record before the presiding officer or in writing. *Id.* A 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,

³ The Law Bureau and I&E were only made aware of this filing by email sent from ALJ Barnes one (1) day after Complainants' Application was filed.

it must contain a notice indicating that any response or objection shall be filed within ten (10) days of service of the application and a certificate of service. 52 Pa. Code §§ 5.421(b)(3)-(4).

In addition, a written application for a subpoena must be served “*by the petitioner*” upon, among other parties, the Commission’s Law Bureau when the subpoena is directed to a Commission employee and the person “for whom the subpoena is sought when the person is not a party to the case.” 52 Pa. Code §§ 5.421(c)(4)-(5).

Here, in violation of 52 Pa. Code § 5.421(c)(4)-(5), Complainants failed to serve both the Commission’s Law Bureau, even though the proposed subpoena is directed to “the custodian of records” in I&E, which is a Commission employee, *and* I&E, the bureau subject to the proposed subpoena. *See* Application at 1. The Application was only emailed to the Law Bureau and I&E after the fact by ALJ Barnes; however, 52 Pa. Code § 5.421(c) requires service “by the petitioner.” Further, Complainants’ notice to object, which must be included with the Application pursuant to 52 Pa. Code § 5.421(b)(3), was addressed to Sunoco, not I&E.

Complainants are and have been represented by counsel and are thus held to a higher standard than *pro se* litigants. *See Final Rulemaking for the Revision of Chapters 1, 3 and 5 of Title 52 of the Pennsylvania Code Pertaining to Practice and Procedure Before the Commission*, Docket No. L-00020156 (January 4, 2006) (providing that Commission practice and procedure affords a liberal construction of the rules for *pro se* litigants). Through their disregard of the Commission’s subpoena procedures, the Complainants have failed to provide the Law Bureau and I&E with timely and appropriate notice of their Application. Indeed, the Commission has previously denied an application for a subpoena

when even a *pro se* applicant failed to serve the essential parties or individuals. *Seese v. PPL Electric Utilities Corporation*, Docket No. C-2015-2500818 (Initial Decision issued March 17, 2016; Final Order entered April 29, 2016). Accordingly, Complainants' Application, should be denied.

B. IN THE ALTERNATIVE, SHOULD COMPLAINANTS' APPLICATION BE ENTERTAINED, IT SHOULD BE DENIED BECAUSE IT SEEKS DISCLOSURE OF PRIVILEGED OR OTHERWISE PROTECTED MATERIALS

Complainants' Application for Issuance of a Subpoena seeks disclosure of the following records from I&E:

- (a) Records and documents provided by Sunoco to I&E (i) during the course of I&E's investigation of the Morgantown Incident and (ii) since the conclusion of that investigation.
- (b) Records and documents created by I&E in its investigation of the Morgantown Incident.

Complainants' Application at ¶ 5. As demonstrated herein, both document types seek privileged and/or otherwise non-discoverable materials.

In proceedings before the Commission, a participant may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party or participant. 52 Pa. Code § 5.321(c). Section 5.321(c) of the Commission's regulations further provides that "[i]t is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*

Further, Section 5.361 of the Commission's regulations specifically limits the scope of discovery in proceedings before the Commission. In particular, Section 5.361 provides the following:

- (a) Discovery or deposition is not permitted which:
 - (1) Is sought in bad faith.
 - (2) Would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or participant.
 - (3) Relates to a matter which is privileged.
 - (4) Would require the making of an unreasonable investigation by the deponent, a participant or witness.

52 Pa. Code § 5.361(a)(emphasis added).

The records sought by Complainants are protected by statutory and other generally recognized privileges against disclosure. To support I&E's assertion that the documents and records in I&E's possession consist of privileged information, attached is I&E Exhibit 1, which contains an affidavit from Sunil R. Patel, who is an engineer in I&E's Safety Division and investigated the Morgantown Incident. As such, Complainants' Application should be denied in its entirety.

1. The records provided by Sunoco to I&E are exempt from disclosure because they contain Confidential Security Information.

Sunoco provided *thousands* of pages of documents to I&E related to the Morgantown Incident during and after the investigation. All of the technical records provided by Sunoco, which were necessary for I&E to examine Sunoco's corrosion control and cathodic protection practices and procedures, were marked by Sunoco as proprietary and confidential information, and confidential security information ("CSI"). Such information is exempt

from disclosure by statute and public employees who knowingly release such records are subject to criminal prosecution for improper disclosure. As such, Complainants' Application must be denied.

The Public Utility Confidential Security Information Disclosure Protection Act ("CSI Disclosure Act"), 35 P.S. §§ 2141.1 to 2141.6, prohibits disclosure of material that could compromise security or endanger life, safety, or public utility facilities. The public utility is responsible for determining whether a record contains CSI. 35 P.S. § 2141.3(a). A government agency must adopt protocols to protect such information from disclosure, 35 P.S. § 2141.3(d), and "shall not release, publish or otherwise disclose a public utility record or portion thereof which contains confidential security information," 35 P.S. § 2141.5(a). Any public official or employee who knowingly or recklessly releases such information commits a misdemeanor of the second-degree carrying penalties including imprisonment for up to one year; a fine of up to \$5,000; and loss of office or employment. 35 P.S. § 2141.6.

Here, Sunoco has determined that the technical documents it turned over to I&E, both during and after I&E's investigation of the Morgantown Incident, contain CSI. Under the CSI Disclosure Act, once a record is marked as containing CSI, there is a specific process to challenge such designation. *See* 35 P.S. § 2141.3(c)(1)-(6) (providing that a member of the public may challenge the CSI designation followed by agency review of the designation. Significantly, if an agency determines that the material does not consist of CSI, it must continue to honor the CSI designation during any appeal of an agency's decision). However, it is clear that unless and until the information marked as CSI is determined not to contain CSI, I&E must honor Sunoco's designation or I&E employees may risk incarceration, substantial fines and loss of employment.

Requests for Sunoco documents should be addressed to Sunoco, not I&E. If Complainants wish to pursue disclosure of the documents provided to I&E by Sunoco, Complainants may do so directly through discovery requests to Sunoco. Moreover, any further question regarding disclosure of the documents provided by Sunoco to I&E should be resolved between the Complainants and Sunoco through the procedure established in the CSI Disclosure Act. However, under these circumstances, Complainants cannot and should not be permitted to obtain such documents from I&E.

2. The records requested—both those *provided* by Sunoco to I&E and those *created* by I&E—are exempt from disclosure under the attorney work product privilege.

The records that are the subject of Complainants' Application were collected or prepared by I&E as part of I&E's investigation into the Morgantown Incident. All of those documents are exempt from disclosure under the attorney work product privilege. As such, Complainants' Application should be denied.

The attorney work product privilege exempts from disclosure the materials, notes, reports, opinions, and mental impressions of an attorney, *and* persons working under his supervision, when secured in anticipation of litigation. *Bagwell v. Pa. Dep't of Educ.*, 103 A.3d 409, 415-16 (Pa. Cmwlth. 2014) (holding that the work product protection applied to material created by a law firm engaged to investigate allegations of sexual abuse at a state university that subsequently became the subject of lawsuits).

The Director/Chief Prosecutor of I&E, Richard Kanaskie, is an attorney. I&E, after investigating the Morgantown Incident, filed a Complaint with the Commission. The Complaint initiated I&E's enforcement action against Sunoco for alleged violations of the United States Code, the Code of Federal Regulations, and the Pennsylvania Code.

The Sunoco records and documents sought by Complainants represent the records, test results, reports, and other materials *collected* by I&E personnel working under the supervision, direction and control of the Director/Chief Prosecutor of I&E. Similarly, the I&E records and documents sought by Complainants represent the records, materials, memos, reports, opinions and mental impressions *prepared* by I&E personnel working under the supervision, direction, and control of the Director/Chief Prosecutor.

Since the Director/Chief Prosecutor of I&E is an attorney, and since the documents sought were either collected or prepared by I&E staff working under his supervision in anticipation of litigation—that is, an enforcement action—regarding the Morgantown Incident, those records are exempt from discovery pursuant to the attorney work product privilege. As such, Complainants' Application should be denied.

3. The records created by I&E are exempt from disclosure under attorney-client privilege.

The records created by I&E as part of its investigation into the Morgantown Incident are also exempt from disclosure under attorney-client privilege. Therefore, Complainants' Application should be denied.

Commonwealth Court has previously held that communications between employees of a state agency and the agency's legal counsel may be protected by the attorney-client privilege and not subject to disclosure. In *Heavens v. Pa. Dep't of Env'tl. Prot.*, 65 A.3d 1069 (Pa. Cmwlth. 2013), the Pennsylvania Department of Environmental Protection ("DEP") partially denied a Right to Know Law ("RTKL") request for copies of files relating to DEP's investigation of a fire at a gas well. DEP's denial was based, in part, on its assertion that the material requested was protected from disclosure under the attorney-client privilege. The

Office of Open Records (“OOR”) concluded that DEP had met its burden in demonstrating that the requested records were protected from disclosure. In affirming the OOR, Commonwealth Court found that DEP demonstrated that the records “contain communications made to and by DEP counsel for the purpose of providing professional legal advice concerning legal issues arising out of DEP’s investigation . . . of the well site fire.” *Heavens*, 65 A.3d at 1076.

In the Morgantown Incident investigation, I&E inspectors and engineers prepared documents that were provided to I&E prosecutors for the purposes of providing professional legal advice concerning Sunoco’s compliance with federal and state laws and regulations and to evaluate the need for prosecution. Those records served as the basis for I&E prosecutors to file a Complaint against Sunoco.

I&E strongly asserts that the documents prepared by I&E inspectors and engineers during their investigation of the Morgantown Incident must be preserved as confidential pursuant to the attorney-client privilege and therefore must not be disclosed. Like DEP’s files relating to its investigation of a gas well fire in *Heavens*, I&E’s files relating to the Morgantown Incident contain communications made to I&E prosecutors for providing legal advice in relation to the investigation and for determining whether to take enforcement action against Sunoco. As such, they should be exempt from disclosure by attorney-client privilege.

If I&E is required to disclose the written communications that its inspectors and engineers made to its prosecutors in anticipation of the instant enforcement action, then it would only be fair to require Complainants to disclose any and all written communications with their legal counsel. Such a result would be absurd.

Just as was the case in *Heavens*, the I&E-created documents were provided to I&E prosecutors for professional legal advice to evaluate Sunoco's compliance with federal and state statutes and regulations and to determine whether a formal enforcement action was warranted. Such communication must be preserved as confidential and not disclosed. Therefore, Complainants' Application should be denied.

4. The records furnished by Sunoco to I&E since the conclusion of the investigation of the Morgantown Incident are exempt from disclosure as they consist of privileged settlement negotiations.

Complainants' seek from I&E records provided to I&E by Sunoco following the conclusion of I&E's investigation of the Morgantown incident.⁴ Portions of these records and documents consist of CSI, as addressed above, while the remaining portions of these records pertain to privileged settlement negotiations.

I&E and Sunoco announced by letter filed on March 1, 2019, at Docket No. C-2018-3006534, that the parties reached a settlement-in-principle related to the Morgantown Incident. It is well-established that offers of settlement are privileged and not discoverable.

Section 5.231(d) of the Commission's regulations provides that "[o]ffers of settlement, of adjustment, or of procedure to be followed, and proposed stipulations not agreed to by every party, including proposals intended to resolve discovery disputes, will not be admissible in evidence against a counsel or party claiming the privilege." 52 Pa. Code § 5.231(d).

The rule of evidence which excludes unaccepted settlement offers is well established and is based upon two considerations: (1) the recognition that the relevance of unaccepted

⁴ It is curious that Complainants' do not seek such records and documents from Sunoco, the named Respondent in the instant matter, since the materials Complainants' seek originated with Sunoco.

proposals of settlement is limited at best; and (2) public policy favors excluding such evidence in order to foster settlements. *Pa. Public Util. Comm'n. v. Pa. Electric Company*, Docket Nos. R-80051197 and C-80072106 (Order entered December 4, 1980), citing *Redevelopment Authority of the City of Philadelphia v. Penelec*, 409 A.2d 122 (Pa. Cmwlth. Ct. 1979). In holding that settlement negotiations are privileged, the Commission has stated that:

we need not delve into case law in order to determine the existence or non-existence of a privilege in administrative proceedings, for we find one clearly recognized in 1 Pa. Code § 35.115. That provision, placed as it is within prehearing conference procedures, indicates that the privilege reasonably extends to any unaccepted proposals of settlement or to any discussions regarding settlement, as well as a wide variety of other matters which would expedite the proceeding. Consequently, the scope of the privileged subject matter is to be interpreted broadly. Accordingly, we find that settlement negotiations are privileged, confidential and inadmissible into evidence

Pa. Public Util. Comm'n. v. Pa. Electric Company, Docket Nos. R-80051197 and C-80072106 (Order entered December 4, 1980); *see also Elliot v. Pa. Electric Company*, Docket No. F-2017-2597039 (Order entered October 4, 2018). Thus, the records and documents furnished to I&E by Sunoco since the conclusion of I&E's Investigation of the Morgantown Incident consists of either CSI or settlement negotiations both of which are not discoverable.

5. The records requested by Complainants are duplicative of and subsumed by I&E's Complaint proceeding, which raised allegations related to the Morgantown Incident first.

In their December 20, 2018 Amended Complaint, Complainants' improperly attempt to incorporate by reference I&E's entire Complaint against Sunoco, which was filed on December 13, 2018 at Docket No. C-2018-3006534. *See* Complainants' Amended

Complaint at ¶¶ 74-81. Moreover, the requested relief in Complainants' Amended Complaint is nearly identical to the requested relief sought in I&E's Complaint in that both request Sunoco to perform a remaining life study of ME1. *See* I&E's Complaint at ¶ 47(a) and Complainants' Amended Complaint at p. 28.

In response to the Amended Complaint, Sunoco filed Preliminary Objections in this matter on January 10, 2019, contending, *inter alia*, that the portions of the Amended Complaint that incorporate I&E's Complaint should be stricken. Complainants filed an Answer to the Preliminary Objections on January 18, 2019, and a ruling remains pending.

Complainants now reason that since their Amended Complaint incorporates by reference I&E's Complaint, all discoverable records in I&E's case are discoverable in the present case. Such reasoning is flawed as the portions of the Amended Complaint that incorporate I&E's Complaint are duplicative of and subsumed by I&E's proceeding, which was initiated first, and any related discovery amounts to a needless duplication of effort when the parties have sought the same requested relief.

In order to plead successfully the defense of *lis pendens*, *i.e.*, the pendency of a prior action, it must be shown that the prior case is the same, the parties are the same, and the relief requested is the same. *Crutchfield v. Eaton Corp.*, 806 A.2d 1259, 1262 (Pa. Super. Ct. 2002); *Penox Technologies, Inc. v. Foster Medical Corp.*, 546 A.2d 114, 115 (Pa. Super. Ct. 1988). The purpose of the *lis pendens* defense is to protect a defendant from harassment by having to defend several suits on the same cause of action at the same time. *Id.* The doctrine of *lis pendens* requires that the prior action be pending. *Norristown Auto Co. v. Hand*, 562 A.2d 902, 904 (Pa. Super. Ct. 1989). Under Pennsylvania law, the question of a pending

prior action “is purely a question of law determinable from an inspection of the pleadings.” *Davis Cookie Co. v. Wasley*, 566 A.2d 870, 874 (Pa. Super. Ct. 1989).

Once the defense is raised, a court may dismiss or stay the subsequent proceedings. *Penox*, 546 A.2d at 115. The three-pronged identity test – *i.e.*, same case, same parties, same relief – must be applied strictly when a party is seeking dismissal under the doctrine of the prior pending action. *Id.* **However**, if the identity test is *not* strictly met but the action involves a set of circumstances where the litigation of two suits would create a duplication of effort on the part of the parties, waste judicial resources and “create the unseemly spectacle of a race to judgment,” the trial court may stay the later-filed action. *Crutchfield*, 806 A.2d at 1262.

Paragraphs 74 through 81 of the Complainants’ Amended Complaint seek to incorporate I&E’s *entire* case docketed at C-2018-3006534, which was filed first. Moreover, the relief sought in the Amended Complaint that a remaining life study of ME1 be performed in order to determine the forecasted retirement age of the pipeline is the same relief sought by I&E in its Complaint. *See* I&E’s Complaint at ¶ 47(a). While the named Complainants are not a party to the I&E Complaint proceeding, this particular set of circumstances involves a duplication of effort to seemingly achieve the same goal – obtaining a remaining life study of ME1.

Moreover, I&E and Sunoco announced by letter filed on March 1, 2019, that they reached a settlement-in-principle to resolve I&E’s Complaint docketed at C-2018-3006534. “It is the policy of the Commission to encourage settlements.” 52 Pa. Code § 5.231(a). Fully litigating a matter in adversarial hearings before OALJ, Commission review of the litigated proceeding and potential appeals is expensive and time consuming. To avoid these

costs, and to ensure that appropriate and mutually acceptable remedial action is promptly taken, it is prudent to encourage I&E and a utility subject to enforcement action to settle their dispute.

The continuation of Complainants' Amended Complaint—to the extent that it alleges the same violations as I&E's Complaint—may ultimately discourage settlement of I&E's enforcement action if Sunoco is forced to litigate the same issues here.

Thus, Paragraphs 74 through 81 of the Complainants' Amended Complaint should be dismissed or stayed pending a resolution of the I&E Complaint proceeding and Complainants' request for all records and documents in I&E's possession related to the Morgantown incident should be denied pursuant to the doctrine of *lis pendens*.

6. The records requested—both those *provided* by Sunoco to I&E and those *created* by I&E—should be exempt from disclosure for important public policy reasons.

The records that are the subject of Complainants' Application were collected or prepared by I&E as part of its investigation into the Morgantown Incident, which ultimately resulted in an enforcement action initiated by I&E. All of those documents should be exempt from disclosure for important public policy reasons as disclosure would have a chilling effect on a utility's incentive to fully cooperate with I&E during an investigation. As such, Complainants' Application should be denied.

Sound public policy dictates that a utility subject to an investigation be encouraged to fully cooperate with I&E. I&E's overriding goal is to protect public safety. In order to achieve that goal, I&E relies on each utility to be fully transparent so that it can determine the root cause of an issue and thereby develop appropriate corrective measures.

A utility's full cooperation with an investigation—especially including the production of documents—is absolutely necessary for I&E to successfully complete its investigation and any resulting enforcement action. If all the documents a utility provides to I&E are subject to discovery in other proceedings, utilities will know that whatever documents they provide can be used against them in another case. This would result in a chilling effect on all utilities' willingness to provide documents to I&E, which in turn would make it incredibly difficult or even impossible for I&E to perform its duties and public safety would be jeopardized. Based on these important public policy implications, Complainants' Application should be denied.

7. *Complainants' Overbroad Request for All Documents Turned Over To I&E by Sunoco And Records Created By I&E Related to The Morgantown Incident Would Cause an Unreasonable Burden and Expense To I&E.*

Section 5.361 of the Commission's regulations prohibits discovery that "would require the making of an unreasonable investigation by the deponent, a participant or witness." 52 Pa. Code § 5.361(a)(4). Complainants' essentially request every document in I&E's possession concerning the Morgantown Incident. All such documents, as illustrated above, are privileged information in that they consist of either CSI, work product, attorney-client communications or pertain to settlement negotiations. Moreover, the requested information is voluminous in that it consists of thousands of pages and would unnecessarily require I&E to commit significant resources to compile every single document, which is a fruitless exercise when all the requested material is privileged. Complainants' request for unspecified documents amounts to nothing more than a fishing expedition for privileged information at the sole cost and expense of I&E. For this reason, and all of the

aforementioned reasons, Complainants' Application for Issuance of a Subpoena should be denied.

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 denying Complainant's Application for Issuance of a Subpoena because it is procedurally improper as it was directed to the incorrect party and not properly served. Alternatively, the Application for Issuance of Subpoena should be denied as it seeks records that are privileged, is duplicative to another proceeding that raised the pertinent claims first, is contrary to public policy and is an overbroad request that would create an unreasonable burden and expense to the Bureau of Investigation and Enforcement.

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Respectfully submitted,



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Law Bureau
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Date: March 11, 2019

⁵ Attorney Thomas, Assistant Counsel, Law Bureau, was temporarily assigned to I&E. Pursuant to 52 Pa. Code § 5.421(c)(4), Attorney Thomas assisted I&E solely for the purpose of objecting to the instant Application for Issuance of Subpoena. Accordingly, Attorney Thomas does not intend to file a Notice of Appearance or otherwise represent I&E in this proceeding.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MEGHAN FLYNN, <i>et al.</i> ,	:	
Complainants	:	
	:	
v.	:	
	:	Docket No. C-2017-2599145
SUNOCO PIPELINE, L.P.,	:	
Respondent	:	
	:	

AFFIDAVIT OF SUNIL R. PATEL

Sunil R. Patel, Affiant, hereby states as follows:

1. My name is Sunil R. Patel and I am a Fixed Utility Valuation Engineer (“FUVE”) III in the Safety Division of the Pennsylvania Public Utility Commission’s Bureau of Investigation and Enforcement.
2. I investigated the Morgantown Leak incident and assisted, and continue to assist, I&E prosecutors regarding the I&E Complaint proceeding concerning the Morgantown Incident, which is docketed at C-2018-3006534.
3. All of the technical records provided to me by Sunoco Pipeline, L.P. (“Sunoco”) during the course of I&E’s investigation of the Morgantown Incident and since the conclusion of the same investigation were marked by Sunoco as being proprietary and confidential information as well as confidential security information.
4. I created documents containing notes and analyses of my opinions and conclusions of the investigation of the Morgantown Incident that were furnished to I&E prosecutors and were used to initiate I&E’s formal enforcement proceeding against Sunoco at Docket No. C-2018-3006534.
5. I reviewed and edited documents containing settlement offers and settlement counter-offers regarding I&E’s Complaint proceeding against Sunoco concerning the Morgantown Incident, which is docketed at C-2018-3006534.

Dated: _____

Sunil R. Patel

SWORN TO and SUBSCRIBED BEFORE
ME THIS ___ DAY OF _____

NOTARY PUBLIC

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MEGHAN FLYNN, *et al.*,
Complainants

v.

SUNOCO PIPELINE, L.P.,
Respondent

:
:
:
: Docket Nos. C-2018-3006116 &
: P-2018-3006117
:
:
:

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:

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Dated: March 11, 2019

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