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REPLY TO:
Center City

March 21, 2019

Via Electronic Filing

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

Re: Meghan Flynn, et al. v. Sunoco Pipeline L.P.
Docket Nos. C-2018-3006116 and P-2018-3006117

MOTION FOR RECONSIDERATION OF SECOND INTERIM ORDER

Dear Secretary Chiavetta:

Attached for electronic filing with the Commission is Complainants' Motion for Reconsideration of Second Interim Order in the above-referenced proceeding.

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

Very truly yours,


MICHAEL S. BOMSTEIN, ESQ.

MSB:mik

cc: Judge Barnes (Via email and First Class Mail)
Per Certificate of Service

- b. That Complainants have personal standing to file the instant Complaint regarding safety of the pipeline in proximity to the County of Delaware and the County of Chester, Pennsylvania.
- c. That Complainants have no standing to assert claims to enjoin operations of Sunoco Pipeline, L.P. outside Delaware County or Chester County, Pennsylvania.
- d. That the following sentence in Paragraph 74 of the Amended Complaint at Docket No. C-2018-3006116 is hereby stricken: “Complainants hereby incorporate the averments of the BIE Complaint by reference thereto, as though set forth more fully at length hereinbelow.”
- e. That Complainants’ Application for Issuance of Subpoena filed on February 28, 2019 is denied.

2. Complainants believe that their complaint can be amended to address (d) and (e) above.

They also believe that a new subpoena can be drafted to accommodate all of the ALJ’s concerns, with one exception as discussed below.

3. In view of the foregoing Complainants now ask Judge Barnes to reconsider her rulings on the above points, as argued more in detail below.

Preliminary Objections

4. “On December 21, 2018, Complainants filed an Amended Complaint raising issues regarding the integrity management plan of Respondent, particularly as it relates to the 12-inch workarround pipeline and compliance with federal standards. Complainants also amended their relief requested to include, among other things, an order directing that an independent contractor conduct a remaining life study of Mariner East 1 (ME1) and the 12-inch sections of the

workaround pipeline to determine the forecasted retirement age of ME1.” (Second Interim Order at 2).

5. On January 10, 2019, Respondent filed Preliminary Objections to the Amended Complaint. One of Respondent’s objections was an assertion that a Formal Complaint may not incorporate another Complaint by reference and ask for the same relief. (Second Interim Order at 7). The ALJ sustained this objection, reasoning that (a) paragraph 74 was too vague; (b) the I&E Complaint had not even been assigned to an ALJ; and (c) the parties in the BIE case had advised they already had a settlement in principle. (Second Interim Order at 8). Complainants now ask the ALJ to reconsider this ruling.

6. Since the date of the Second Interim Order, Complainants have prepared a Second Amended Formal Complaint which addresses the concerns raised in the Order. In place of paragraph 74 they have set out in a new section of the pleading those averments from the BI&E Complaint that have a direct bearing on them as residents of Chester and Delaware Counties.

7. Paragraphs 70-93 of the attached Second Amended Formal Complaint (Ex. “A” hereto) consists of twenty-four straightforward averments of Sunoco’s knowing and willful violation of statutes, regulations, and good engineering practices as they directly and adversely affect Complainants as residents of Chester and Delaware Counties.

8. By way of example only, paragraph 87 of the amended pleading alleges that “Sunoco’s records concerning close interval potential surveys (“CIPS”) of ME1, which were performed in 2009, 2013 and 2017, demonstrate that only “on” potentials were measured.²

Complainants believe and aver that Sunoco knew or should have known that CIPS based only on “on” potentials are incomplete; that the data acquired would necessarily be tainted;

² An “on” potential is a measurement taken at a position on the ground surface of a pipeline where the rectifier or current source remains “on” as opposed to being interrupted.

and that residents of Delaware and Chester Counties could be or already have been adversely affected.

9. Complainants believe and aver the information set forth in paragraph 87 is accurate. It is true whether or not BIE withdraws its complaint. It will also remain relevant to Complainants and their safety regardless of whether BIE withdraws its complaint, and regardless of whether BIE has struck a deal with Sunoco that may ultimately just result in Sunoco paying another fine and the extent of its unlawful activity being concealed.

10. Complainants believe that they will be able to prove that Sunoco did not conduct CIPS testing in accordance with generally accepted engineering practices and that it knew that it was flouting the proper standards in order to skew the results and make it appear that it was maintaining pipeline integrity. As a result, it willfully ignored evidence of corrosion and put Complainants and other residents of Chester County and Delaware County at risk of injury.

11. Sunoco's failure to maintain a negative cathodic potential greater than -850 m V (§ 82), failure to address microbiologic induce corrosions (§ 83), ignoring unfavorable side drain measurements that showed current was dangerously flowing away from the pipeline (§ 84), failing to maintain proper records (§ 89), delaying an In-Line Inspection (§ 90), paying no heed to obvious metal loss (§ 91), failure to document how it would comply with the requirements of 49 C.F.R. § 195.573 (§ 92), and failure to comply with § 195.571 (§ 93) also are matters that affect or may affect Complainants adversely. These allegations are true whether or not BIE withdraws its complaint. They will also remain relevant to Complainants and their safety regardless of whether BIE withdraws its complaint, and regardless of whether BIE has struck a deal with Sunoco that may ultimately just result in Sunoco paying another fine and the extent of its unlawful activity being concealed.

12. Paragraph 71 of the Second Amended Complaint alleges that “While the data from the Morgantown accident reviewed by I&E was largely specific to the site of the leak, Sunoco’s procedures and overall application of corrosion control and its cathodic protection practices, as implicated in the Morgantown incident, are relevant to all of ME1. Thus, Complainants believe and aver that the corrosion control program and Sunoco’s engineering and cathodic protection practices already have adversely affected or will adversely affect the residents of Chester and Delaware Counties.

13. In light of the ALJ’s ruling, the Second Amended Complaint seeks relief *only* in Chester and Delaware Counties. Paragraph 72 states that “Complainants do not seek relief with respect to the location of the Morgantown incident. Rather, they seek only such relief as may be needed to protect their interests in Chester and Delaware Counties, which relief may require repairs of the subject pipelines or even the complete cessation of pipeline operations in Chester and Delaware Counties.”

14. The ALJ in this context has written, “I am not prepared to strike references to the outstanding I&E complaint as I am not prepared to rule that alleged past occurrences of leaks on the ME1 line or 12-inch workarround pipeline have no relationship or relevance to whether it is safe to operate these pipelines in Delaware and Chester Counties.” (Second Interim Order at 11 – 12).

15. In light of the foregoing, Complainants respectfully request that the ALJ enter an order modifying Interim Order No. 2 and granting leave to file their proposed Second Amended Formal Complaint.

The BIE Subpoena

16. The ALJ has denied Complainants' subpoena request on a number of distinct grounds. Preliminarily, Complainants agree that some of the documents held by BIE may be protected by the deliberative process privilege. Certain documents reflecting upon agency opinions, recommendations and advice related to I&E's determinations are protected.

17. From this it does *not* follow that all data, findings and reports related to the Morgantown incident are protected by the deliberative process privilege.

18. As a general principle, "Pennsylvania law does not favor evidentiary privileges." *Joe v. Prison Health Servs., Inc.*, 782 A.2d 24, 31 (Pa. Commw. Ct. 2001) (citing *Commonwealth v. Stewart*, 547 Pa. 277, 690 A.2d 195 (1997)).

19. The deliberative process privilege in particular has been narrowly construed in Pennsylvania. *Id.* (holding that records used to evaluate the performance of a contractor were not part of a deliberative process).

20. Moreover, the deliberative process privilege covers only information comprising "confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice." *Com. v. Vartan*, 557 Pa. 390, 399, 733 A.2d 1258, 1263 (1999).

21. Objective findings, e.g., that current readings are below a particular level, photographs of corroded pipeline, and documents recording data are not deliberations of law or policymaking and are not opinions, recommendations, or advice.

22. The ALJ notes that "[r]egarding substantive objections, the information sought is relevant because it seeks information regarding the integrity of Sunoco's pipelines." (Second Interim Opinion at 20). At the same time, the ALJ writes that the application is insufficiently

specific, “failing to identify facts to be proved by the documents in sufficient detail to indicate the necessity of the documents.” (Second Interim Order at 21).

23. The ALJ also writes that Complainants’ request “which encompasses any record furnished by Sunoco to BIE regardless of the subject or purpose of the record, is overly broad and unduly burdensome to I&E. Documentation could be sought directly from Sunoco.” (Second Interim Order at 21).

24. Finally, the ALJ has denied the Application “pertaining to documentation marked as CSI, because each must be reviewed for redaction of confidential and privileged information, which is unduly burdensome. 52 Pa. Code. § 5.361(a)(2). Complainants may seek CSI information through discovery requests directed to Sunoco pursuant to a protective order in this case.” (Second Interim Order at 21).

25. Complainants believe that through counsel they already have entered into a confidentiality agreement with Sunoco and that at the time of the November hearing the parties signed a confidentiality stipulation that was approved by Judge Barnes.

26. What documents are properly deemed “confidential” or “Confidential Security Information,” however, is a horse of a different color. On or about March 17, 2019, counsel for Complainants received the attached Affidavit of Sunil R. Patel, an engineer in the Safety Division of the BIE. (Ex. “B.”). Mr. Patel swears under oath that, “All of the technical records provided to me by Sunoco Pipeline, L.P. (sic) (“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.” (Affidavit, ¶ 3).

27. According to I&E's objection to the subpoena Sunoco provided thousands of pages of documents during the Morgantown incident investigation. All of the *technical* records were marked either confidential or CSI. (I&E Objection at 8). (Italics in original).

28. Whether I&E is distinguishing between technical and non-technical records is unclear. Complainants submit that the fact that *not even one page* of the technical documents was deemed not confidential or not CSI is extraordinary and immediately suspect.

29. Complainants respectfully submit that, after almost four years of dealing with Sunoco's public lies, after dealing with Sunoco's broken promises, and after learning that not one page of the technical documents submitted to I&E was unmarked by a confidentiality stamp, it is not realistic to count on Sunoco to furnish all documents that the company supplied to I&E.

30. The attached proposed subpoena ties the documents requested to specific allegations in the Second Amended Complaint. The subpoena also expressly states that it does not seek documents containing or reflecting upon the administrative decision-making process.

31. Complainants submit that it will not be unduly burdensome to comply with this newly clarified request.

32. As regards the claim of confidentiality and CSI, it is Sunoco's burden as a threshold matter to demonstrate that its claims are warranted.

33. In *Hagy v. Premier Mfg. Corp.*, 404 Pa. 330, 172 A.2d 283, 284 (1961), our Supreme Court held that "discovery which would reveal confidential information or trade secrets to a competitor, as in this case, should not be allowed." The court's decision is reversible only upon a showing of abuse of discretion. *Branham v. Rohm and Haas Co.*, 119 A.3d 1094 (2011).

34. In *Air Products and Chemicals, Inc. v. Johnson*, 296 Pa. Super. 405, 442 A. 2d 1114, 1120-21 (1982), Superior Court relied upon the Restatement of Torts, § 757, Comment B, to define a trade secret. That Comment reads as follows:

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competition who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.... A trade secret is a process or device for continuous use in the operation of the business.

See, also, *Omicron Systems, Inc. v. Weiner*, 860 A. 2d 554 (2004).

35. In the case of *Dibble v. Penn State Geisinger Clinic, Inc.*, 806 A. 2d 866, 871 (2002), the Superior Court noted factors that a court may consider in deciding if information qualifies as a trade secret:

(1) the extent to which the information is known outside the owner's business; (2) the extent to which it is known by employees and others involved in the owner's business; (3) the extent of measures taken by the owner to guard the secrecy of the information; (4) the value of the information to the owner and to his competitors; (5) the amount of effort or money expended by the owner in developing the information; and (6) the ease or difficulty with which the information could be acquired or duplicated by others. (Citations omitted).

36. Complainants have found little discussion in the Pennsylvania courts as to what factors should be considered in determining what confidentiality is and how to determine good cause relative to a confidentiality claim. In *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995), however, the Third Circuit Court of Appeals spoke of a balancing test to balance the need for information against the injury that might result from uncontrolled disclosure. Seven factors were identified as relevant:

(1) whether disclosure will violate any privacy interests;

- (2) whether the information is being sought for a legitimate purpose or for an improper purpose;
- (3) whether disclosure of the information will cause a party embarrassment;
- (4) whether confidentiality is being sought over information important to public health and safety;
- (5) whether the sharing of information among litigants will promote fairness and efficiency;
- (6) whether a party benefiting from the order of confidentiality is a public entity or official; and
- (7) whether the case involves issues important to the public.

37. In the instant proceeding, if the parties are unable to agree on confidentiality issues, Complainants submit that either an in camera review by the ALJ or a closed fact-finding hearing could resolve the parties' competing claims

New High Pressure Pipes

38. Since filing the Amended Complaint, and after the issuance of the Second Interim Order, Complainants learned for the first time that Sunoco may be operating or planning to operate segments of the workaround pipeline at a higher pressure than has been tested and approved.

39. The workaround pipeline as it currently exists is pieced together from components of three other pipelines, including segments of what Sunoco at one point planned as the 16-inch Mariner East 2X pipeline.

40. The maximum operating pressure for the 16-inch pipeline segments, as documented in various filings Sunoco has submitted to government agencies, has been 1480 psig.

41. Per 49 CFR § 195.304, hydrostatic testing of the pipeline segments is based on the maximum operating pressure.

42. In drawings just submitted to the Department of Environmental Protection in reevaluation of horizontal directional drilling plans, Sunoco has changed the maximum operating pressure of 16-inch pipeline segments to 2100 psig, a more than 40% increase in pressure that has not been permitted nor, upon information and belief, tested.

43. Complainants believe and therefore aver that because the workaround pipeline includes segments of 16-inch pipe, including in Chester and Delaware Counties, there may be segments of the workaround pipeline that are being operated or will be operated at a higher pressure than they have tested for or previously reported.

44. Complainants believe and therefore aver that operating the workaround pipeline or segments thereof at a pressure that is higher than has been reported to the public and government agencies or a pressure that is not supported by required testing puts Complainants' lives and property at risk.

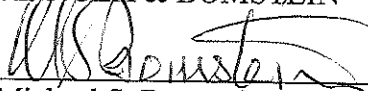
45. Complainants believe that this new information regarding increases in operating pressures is an additional ground for relief and they have added these averments to their proposed Second Amended Formal Complaint.

Relief

In light of the foregoing, Complainants urge the ALJ to modify her Second Interim Order and allow them the opportunity to file their Second Amended Complaint and serve their Amended Subpoena as set out in the exhibits attached hereto.

Respectfully submitted,

PINNOLA & BOMSTEIN

A handwritten signature in black ink, appearing to read "M. Bomstein", written over a horizontal line.

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Dated: March 22, 2019

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