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REPLY TO:

Center City

October 14, 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
COMPLAINANTS' ANSWER TO SUNOCO'S MOTION IN LIMINE

Dear Secretary Chiavetta:

Attached for electronic filing with the Commission is Complainants' Answer to Sunoco's Motion in Limine 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

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

COMPLAINANTS' RESPONSE TO SUNOCO'S MOTION IN LIMINE

Sunoco has filed a motion in limine that asks the ALJ in the October hearings not to admit inadmissible evidence, not to allow non-experts to give expert testimony, to keep witnesses from "incorrectly alarming" the public, and to keep witnesses from wasting the court's time with unduly repetitive testimony. The only thing Sunoco has not asked for is for Judge Barnes to cancel the lay witness hearing altogether.

Sunoco correctly notes that Your Honor already has ruled that "[t]estimony should not be overly repetitive or cumulative." (Motion at 1). Why the judge needs to be reminded of her own ruling is not explained. How the judge could possibly rule on this in advance, without knowing what witnesses intend to say, is not explained either.

For the reasons set forth below, Sunoco's motion should be denied.

Introduction

1. Denied. The AlJ cannot realistically rule prior to the hearings on how long each witness shall testify. Complainants, *pro se* parties and Intervenors have agreed that Complainants and one of Intervenors' witnesses will limit their evidence to the first day. Pro se parties will give their evidence the morning of the second day. Intervenors will give their evidence during the balance of the second day.

It must be noted that Sunoco has given Your Honor no explanation as to how she could possibly at this stage decide how long each of Complainants' witnesses should testify. Should it be fifteen minutes for Eric Friedman and two hours for Michael Walsh? The ALJ could only do so by acting arbitrarily and capriciously, an obvious violation of due process.

2. Denied. As explained further below, lay witnesses are allowed to give opinions under Pennsylvania law, just not expert opinions. Duplicative or repetitive evidence may be controlled by the judge as is appropriate during the course of the hearing. What evidence is relevant is obviously a matter of disagreement between the parties but Sunoco, again, has given the judge no basis at this stage to make a ruling. Similarly, whether Complainants have standing to raise issues Sunoco does not wish them to raise will be for the judge to decide during the hearings.

3. Denied. Sunoco writes that "[i]t is black letter law that lay witness opinion testimony ***is not admissible*** and cannot support a finding of fact..." (Motion at 3). The Pennsylvania Supreme Court would be surprised to hear this claim. In *Gibson v. W.C.A.B.*, ___ Pa. ___, 861 A. 2d 938,944 (2004) the Supreme Court stated that, at common law, lay witnesses could give testimony regarding things they had seen, heard, felt, tasted, smelled or done.

The *Gibson* court, however, went on to state that Rule 701 Pa.R.E. covers the subject as follows:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness, helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge within the scope ofRule 702.

The Supreme Court then stated its views, which completely contradict Sunoco's position:

> **This Court, from very early in Commonwealth history, interpreted the rules of evidence to permit individuals not qualified as experts, but possessing experience or specialized knowledge, to testify about technical matters that might have been thought to be within the exclusive province of experts.***See, e.g., Irwin v. Bear,*4Yeates262(Pa.1805) (opinions of settlers with knowledge of early names of streams admissible in land case);*Forbes v. Caruthers,*3Yeates527(Pa.1803) (specialized knowledge personal to witness).*See alsoGraham v. Pennsylvania Co.,*139Pa.149, 21A.151 (1891) (holding that the witnesses must have specialized knowledge that will assist the jurors, and that the knowledge must be personal to them); *Commonwealth v. Eyler,* 217Pa.512, 66A.746 (1907) (intoxication); *945 *Davis v. Southern Surety Co.,* 302 Pa.21, 153A.119 (1930) (value of construction equipment), *overruled on other grounds, Commonwealth ex rel. Schnader v. Great American Indemnity Co.,* 312Pa.183, 167A.793 (1933); *Workmen's Compensation Appeal Bd. (Pryce) v. Bethlehem Mines Corp.,* 22 Pa.Cmwlth.437, 349A.2d529 (1975) (apparent physical condition). (Emphasis added).

Gibson at 944-945.

Numerous examples abound in Pennsylvania jurisprudence. For example, a witness testified that he could have avoided hitting a victim if he had been driving the truck. *Com. v. Buterbaugh,* ___ Pa. Super. ___, 91 A. 3d 1247, 1261 (2014). A police officer, if he has perceived a defendant's appearance and acts, is competent to testify to his opinion as to the

defendant's state of intoxication and to his ability to drive a vehicle safely. *Com. v. Neiswonger*, 338 Pa. Super. 625, 488 A. 2d 68, 70 (1985).

Sunoco evinces concern over the prospective testimony of Eric Friedman. Sunoco states that "[t]estimony regarding potential impacts and impact radius is technical and scientific evidence that Mr. Friedman as a lay witness cannot offer." (Motion at 4).

In fact, there is plenty of information available to the general public concerning potential impacts and impact radius the understanding of which does not depend on technical or scientific training. Sunoco itself has disseminated much of this information in its so-called "public awareness" materials, which are by regulation required to be directed at the public (see 49 CFR section 195.440) as well as in public filings. Some of it is available from the federal government. These materials are not intended to be a mysterious "black box" understandable only to experts. In fact, they are required by applicable regulation to be understandable and usable by the public. Mr. Friedman is competent to testify as whether they are or not. As the current president of his Homeowners' Association, he is well-qualified to do so.

Eric Friedman is not planning to testify to any matters "to a reasonable scientific certainty." That scientific certainty will come in the form of expert reports and testimony next year. Mr. Friedman will give testimony based only on his own education, training, current employment and personal experience.

Pennsylvania rules of evidence and decisional authority permit a knowledgeable lay witness to give evidence rationally based on specialized knowledge. It will be for the judge (not Sunoco) to determine whether or not Mr. Friedman's testimony is competent and admissible.

Friedman will be asked dozens and dozens of questions during the October 23 hearing. If any of those questions improperly elicits expert conclusions beyond the scope of Rule 701, the

ALJ is perfectly capable of making an appropriate ruling at the time. It is impossible, however, in advance of the hearing, to make a meaningful ruling on all of Friedman's testimony.

4. Denied. Once again, Sunoco has adduced no criteria whatsoever that would enable the ALJ to anticipate Mr. Friedman's opinions and rule on them prior to the hearing.

5. Denied. Complainants will be putting on nine witnesses. If each one were to testify that on July 1, 2019 (s)he saw a fire truck bump into a telephone pole at 10:35 in the morning, that would be duplicative. Would it be "needlessly" duplicative? If Respondent's contention was that the event never happened, Your Honor could disbelieve all of the Complainants' witnesses and believe Sunoco's only witness. If Sunoco were to stipulate that the event occurred, it would not take nine witnesses; it would not even take one. If Sunoco only were to stipulate that if all nine witnesses were to testify they would say that same thing, that would benefit Sunoco and prevent the trier-of-fact from reaching a determination as to the credibility of Complainants' witnesses. Because credibility is always an issue, the ALJ prior to the hearing is not in any position to make a ruling.

6. Denied. Sunoco's distaste for Ms. Britton is palpable but it is no basis to limit her evidence at this or any other stage of the proceedings. Multiple witnesses to bolster evidence are common. Once again, if Sunoco were to stipulate to the facts and conclusions that Britton wishes to proffer, no witnesses would be required at all.

7. Denied. Sunoco argues that witnesses Marshall and McDonald should not be permitted to give evidence as to the living circumstances of their loved ones in Hershey's Mill and in the Wellington facility in Chester County. The claim is that these witnesses have no standing and that they may not be "stand-ins" or representatives of their loved ones.

Sunoco is confused about the notion of standing. Marshall and McDonald are not suing for damages on behalf of injured persons. They are going to give evidence about the difficulty of evacuating persons who cannot escape on foot, evidence that pertains directly to Sunoco's public awareness plan. They have first-hand knowledge of the Wellington senior care facility and the physical limitations of its residents, and do not need to be Complainants or residents of the facility to competently testify as to what they know. In addition, Marshall herself lives in Hershey's Mill and has personal knowledge of the location of current and proposed Mariner East pipelines immediately adjacent to a school, a nursing facility and even the area's main firehouse.

8. Denied. The ancient Mariner East 1 and 12-inch workaround pipelines run across the state and have leaked repeatedly as a result of corrosion. It is beyond logic to suggest that if the line running in front of your neighbor's property is corroded and therefore dangerous that that fact may not be relevant to the condition of the pipeline in front of your own house. Further, case law on standing does not prevent you from giving evidence about your neighbor's pipe just because you happen to live 20 feet away. As to whether evidence of Sunoco's historic recklessness as a pipeline operator throughout the country is admissible, the ALJ does not at this time have a record upon which to make a ruling.

9. Denied. For the reasons stated above, Dunn, McDonald and Marshall should not be precluded from giving evidence.

II. Expedited Answer and Ruling

Complainants' instant Answer is being filed within the time already set by the ALJ. As regards Sunoco's request that equal time for direct and cross-examination is required in the interest of due process (Motion at 7), if the request were granted then additional days for the

hearing would be necessitated. Again, the request would require an arbitrary and capricious evidentiary ruling, one that would plainly violate Complainants' due process.

III. Argument (Part II)

Paragraphs 1 – 9 of Sunoco's motion are replete with argument. Complainants hereby incorporate by reference their prior arguments in response to Sunoco's as though set forth at length below.

A. Opinion Testimony

11. This paragraph is repetitive and Complainants, therefore, have no additional response.

12. This paragraph is repetitive and Complainants, therefore, have no additional response.

13. It is acknowledged that a lay witness may not rely upon a technical report as a basis for his or her lay opinion. Complainants, however, have found no cases that say a witness may not rely upon facts or documents that a judge determines are appropriate for judicial notice or documents admissible under PRE 803. The doctrine of judicial notice has been found to apply both in civil and administrative proceedings. Once again, no factual record exists at this time upon which the ALJ may rule upon Sunoco's request.

14. This paragraph is repetitive and Complainants, therefore, have no additional response.

15. Sunoco overstates the import of the finding in the *Dinniman* case that a lay witness could not testify as to technical geological matters. Matters of pipeline safety and emergency response do not all rely upon technical expertise. Once again, no factual record exists at this time upon which the ALJ may rule upon Sunoco's request. Moreover, an examination of the

testimony of one of Sunoco's "experts," John Zurcher, at the May 10, 2018 hearing in *Dinniman*, showed that parts of Zurcher's testimony were simply false. (Complainants' cannot find a kinder way to characterize Zurcher's testimony that he was unable to find in the PHMSA database any evidence of subsidence-caused pipeline accidents. Non-expert members of the public who were present at this hearing immediately identified several, including the January 2015 rupture of the brand new ATEX ethane pipeline in Follansbee, WV. Closer examination of PHMSA data shows more than a dozen such accidents, including the September 2018 Energy Transfer Company pipeline accident in Beaver County. *See*, e.g., www.apnews.com/2e0005ec7db342a290199a4d8464b5a0. Complainants are astonished that Zurcher, offered as an expert by Sunoco, claimed he could not find these accidents in the data). In fact, on the same day Zurcher proffered this false testimony, a Sunoco hazardous liquids pipeline accident was underway in a residential subdivision of Oklahoma City.

16. This paragraph is repetitive and Complainants, therefore, have no additional response.

17. A determination of whether Sunoco's operations are safe, adequate and reasonable, or reckless and encumbered with unacceptable risk, is governed by various considerations, but ultimately it is up to the Commission under Section 1501 to consider all the evidence, lay and expert, before rendering a decision. Complainants' concern for non-ambulatory residents of Chester and Delaware counties runs up against Sunoco's implausible and unworkable "public awareness program" and failure to acknowledge the risks of continued highly volatile liquids accidents on its pipelines. Complainants' witnesses do not need to be experts to testify about the difficulties of evacuating Wellington or Hershey's Mill. Sunoco's claim is therefore unfounded.

Once again, no factual record exists at this time upon which the ALJ may rule upon Sunoco's request.

18. This paragraph is repetitive and Complainants, therefore, have no additional response.

B. Duplicative Testimony

19. Responding to this duplicative averment is a waste of everyone's time and resources. This paragraph is repetitive and Complainants, therefore, have no additional response.

20. This paragraph is repetitive and Complainants, therefore, have no additional response.

21. The location and siting of current and proposed Mariner East pipelines relative to the Walsh home are different from their location and siting relative to the Hughes home. Complainants' concerns also vary from one family to the next (for example, because of differences in age and number of children, physical abilities of family members, and numerous other factors). The decision to exclude testimony cannot reasonably be made at this stage.

22. This paragraph is repetitive and Complainants, therefore, have no additional response.

23. This paragraph is repetitive and Complainants, therefore, have no additional response.

C. **Irrelevant Testimony**

24. This paragraph is repetitive and Complainants, therefore, have no additional response.

25. This paragraph is repetitive and Complainants, therefore, have no additional response.

26. This paragraph is repetitive and Complainants, therefore, have no additional response.

IV. Conclusion

For all of the reasons set forth above, Complainants request that Sunoco's Motion in Limine be denied.

Respectfully submitted,

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Dated: October 14, 2019

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the persons listed below as per the requirements of § 1.54 (relating to service by a party). The document also has been filed electronically on the Commission's electronic filing system.

See attached service list.

Michael S. Bomstein, Esq.

Dated: October 14, 2019

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