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October 17, 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., Docket Nos. C-2018-3006116 & P-2018-3006117 (consolidated)
Melissa DiBernardino, Docket No. C-2018-3005025 (consolidated)
Rebecca Britton, Docket No. C-2019-3006898 (consolidated)
Laura Obenski, Docket No. C-2019-3006905 (consolidated)
v.
Sunoco Pipeline L.P.

**SUNOCO PIPELINE L.P.'S MOTION IN LIMINE REGARDING LAY
WITNESS HEARING EVIDENCE AND REQUEST FOR EXPEDITED
FOUR DAY ANSWER PERIOD AND EXPEDITED RULING**

Dear Secretary Chiavetta:

Attached for electronic filing with the Commission is Sunoco Pipeline L.P.'s Motion in Limine to preclude introduction of exhibits or portions of exhibits at the October 23 and 24, 2019 Lay Witness Hearings in this matter and **request for expedited four-day answer period and expedited ruling**. Because this document does not contain new averments of fact, it does not require a verification.

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

cc: Honorable Elizabeth Barnes (by email and first class mail)
Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | |
|----------------------|---|---|
| MEGHAN FLYNN et al. | : | Docket Nos. C-2018-3006116 (consolidated) |
| | : | P-2018-3006117 |
| MELISSA DIBERNARDINO | : | Docket No. C-2018-3005025 (consolidated) |
| REBECCA BRITTON | : | Docket No. C-2019-3006898 (consolidated) |
| LAURA OBENSKI | : | Docket No. C-2019-3006905 (consolidated) |
| | : | |
| v. | : | |
| | : | |
| SUNOCO PIPELINE L.P. | : | |

NOTICE TO PLEAD

TO: – Michael S. Bomstein, Esquire for Flynn Complainants
 – Rich Raiders, Esquire for Andover Homeowner’s Association, Inc.
 – Melissa DiBernardino
 – Rebecca Britton
 – Laura Obenski

PLEASE TAKE NOTICE that Sunoco Pipeline L.P. (“SPLP”) has filed a Motion *In Limine* regarding the introduction of exhibits or portions of exhibits at the October 23 and 24, 2019 Lay Witness Hearings (“Motion”). Pursuant to 52 Pa. Code § 5.103, **you are hereby notified that that an answer or other responsive pleading shall be filed within four (4) days of service of the Motion**¹. Your failure to file an answer or other responsive pleading will allow the presiding officer to rule on the Motion without a response from you. All pleadings must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served on the undersigned counsel.

¹ Pursuant to 52 Pa. Code § 5.103(c), this motion requests an expedited, 4-day response period. To the extent the presiding officer grants the expedited response period requested, answers shall be due within 4-days, allowing for resolution of this motion prior to the Lay Witness hearings in this proceeding.

Respectfully submitted,



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Attorneys for Respondent Sunoco Pipeline L.P.

Dated: October 17, 2019

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | | |
|----------------------|---|-------------|-------------------------------|
| MEGHAN FLYNN et al. | : | Docket Nos. | C-2018-3006116 (consolidated) |
| | : | | P-2018-3006117 |
| MELISSA DIBERNARDINO | : | Docket No. | C-2018-3005025 (consolidated) |
| REBECCA BRITTON | : | Docket No. | C-2019-3006898 (consolidated) |
| LAURA OBENSKI | : | Docket No. | C-2019-3006905 (consolidated) |
| | : | | |
| v. | : | | |
| | : | | |
| SUNOCO PIPELINE L.P. | : | | |

**SUNOCO PIPELINE L.P.’S MOTION IN LIMINE REGARDING LAY WITNESS
HEARING EVIDENCE AND REQUEST FOR EXPEDITED FOUR DAY ANSWER
PERIOD AND EXPEDITED RULING**

Pursuant to 52 Pa. Code §§ 5.103 and 5.483 Sunoco Pipeline L.P. moves for rulings to preclude introduction of exhibits or portions of exhibits at the October 23 and 24 Lay Witness Hearings in this matter. SPLP requests that Your Honor issue a ruling that answers to this motion be submitted four days from service and that Your Honor rule on this motion prior to the October 23, 2019 hearing day. Exhibits were not provided to SPLP until October 11 and October 16, and SPLP has filed this Motion as expeditiously as possible. Requiring expedited answers and ruling on this Motion prior to hearing will result, if granted, in conserving the time and expense of all parties at the hearing. *Infra* Section II.

Specifically, SPLP moves¹ to preclude introduction and admission of the following exhibits:

¹ SPLP reserves its rights to lodge objections to any piece of evidence for any reason at hearing, regardless of whether SPLP raised such objection in this Motion.

Flynn Complainants

Friedman Exhibits 1 (narration only), 4-7, 12, 14, 15, 16, 18-22, 24-26

McMullen Exhibits 7, 11-14, 27, 31, 35 (narration only)

Hughes Exhibits 5 (narration only), 6-7

Fuller Exhibits 2-4, 10, 17-18, 20

Marshall Exhibits (All)

McDonald Exhibit 1

Dussling Exhibits 3-8

Pro Se Complainant Rebecca Britton

Exhibits RB 2-RB-7, RB-8 (both Exhibits labeled RB-8), RB9-10, RB-23

Pro Se Complainant Melissa DiBernardino

Exhibits MD 7, 9a-9c, 11, 14b, 15c

I. ARGUMENT

A. Lay Witnesses Cannot Introduce, Authenticate, or Verify Expert Technical and Scientific Hearsay Exhibits Containing Statements, Opinions or Conclusions of Others and Doing So Violates the Fundamental Nature of the Lay Witness Hearings Under Your Honor Orders, Constitutes Hearsay, Violates Due Process, and Is Subterfuge for Introducing Expert Testimony.

1. This is a lay witness hearing. Unlike expert witnesses, lay witness cannot present technical opinion evidence (at all) let alone rely upon and sponsor reports, statements and conclusions of others to present such testimony. Moreover, under longstanding Pennsylvania law, for an expert to make or offer opinion testimony and technical analysis and exhibits, the expert

must be able to swear that her or his testimony is to a reasonable degree of scientific certainty in the discipline or field of the expert. None of these lay witnesses have the credentials, education, or background which would allow them to swear, under oath, to the scientific certainty of their proposed exhibits as they are not experts which, regardless, are not supposed to testify at these lay hearings. These lay witnesses should not be able to circumvent longstanding Pennsylvania law by offering the opinions of others on technical or scientific matters via introducing exhibits and work product of experts. As Your Honor ruled, expert written testimony shall be submitted by January 15, 2020.

2. The Commission has found that a lay witness is not qualified to testify or offer exhibits related to any issues outside of direct personal knowledge. *Lamagna v. Pa. Elec. Co.*, C-2017-2608014, 2018 WL 6124353, at *20 (Oct. 30, 2018) (lay witness was “not qualified to testify or offer exhibits related to health and safety issues outside of her direct personal knowledge.”). To the extent a lay witness offers references to reports or conclusions of others, these may not be considered as substantial evidence because a lay witness cannot rely on such information in reaching a conclusion – rather, that is the role of a qualified expert witness. *Compare* Pa. R.E. 701 *with* Pa. R.E. 703.

3. Moreover, these are not evidentiary rules that can be relaxed in an administrative setting and to do so is reversible error. The Pennsylvania Supreme Court has recognized that any relaxation of the rules of evidence in administrative settings cannot permit lay witnesses to testify to technical matters “without personal knowledge or specialized training.” *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004) (holding Rules of Evidence 602 (personal knowledge), 701 (opinion testimony by lay witnesses) and 702 (testimony by expert witnesses) generally applicable in agency proceedings); Nancy Manes, C-20015803, 2002 WL 34559041, at *1 (May 9, 2002) (the

Commission abides by the Pennsylvania Supreme Court's standard “that a person qualifies as an expert witness if, through education, occupation or practical experience, the witness has a reasonable pretension to specialized knowledge on the matter at issue.”).

4. The distinction that experts may rely upon documents that would otherwise be considered hearsay while lay witnesses may not, cannot be ignored because allowing such exhibits into the record infringes on SPLP’s due process right to cross-examination. Because the witnesses are lay witnesses, they cannot competently testify as to the hearsay conclusions and opinions contained in the exhibits at issue. Therefore, lay witnesses offering as their exhibits documents which contain technical and expert opinions and conclusions within these exhibits is a blatant end-run about existing law that only allows qualified experts to offer such opinion, statements or conclusions. Not only is there that legal defect, but it violates the letter of Your Honor’s Order providing for lay testimony and evidence only at the lay hearings (the Order provides for pre-filed expert testimony by experts for the Complainants and aligned intervenors shall be filed by January 15, 2020), violates due process, is hearsay, and would set a rule that there are no legal rules governing evidence becoming record evidence before Your Honor and this Commission.

5. For example, Friedman Exhibits 4-7 are all documents purporting to be risk assessments or other calculations concerning consequences of pipeline failures. This is clearly expert subject matter of a technical and scientific nature. Mr. Friedman cannot present technical or expert evidence on this issue as a lay witness directly and so too he should not be permitted to do that indirectly. Thus, he cannot introduce and rely upon these exhibits – they are hearsay and he is neither competent to be cross-examined on the opinions and conclusions that the documents contain, nor is he the declarant of the documents.

6. To the extent Complainants or Intervenors allege that any witness can testify to such expert technical matters, that testimony is not allowable at this lay witness hearing. If parties allege that a witness can give expert testimony, then they are required to do so through written direct testimony, including providing supporting data to show the witness has the expertise alleged. No party has provided a CV or other exhibits to support any alleged expertise of witnesses that will testify at the lay witness hearing. They cannot now claim that such witness has expertise enabling them to present expert testimony and to the extent they make such claim, that witness must provide written direct testimony as all other experts are required to do.

7. Accordingly, SPLP moves to strike the following exhibits, which consist of hearsay, expert technical and scientific reports, assessments, data, and/or other documents containing opinions and conclusions of non-testifying witnesses that lay witnesses intend to present:

- Friedman Exhibits 4-7, 12, 15-16, 18-22, 24-26
- McMullen Exhibits 31
- Hughes Exhibits 6-7
- Fuller Exhibits 10, 17-18
- Melissa DiBernardino Exhibit MD 15c

B. Video Narration Including Hearsay and Technical Opinions

8. Flynn Complainants' Exhibits Friedman 1, McMullen 35, and Hughes 5 are videos showing areas of Chester and Delaware County that have narration imposed over the video. The

narration should not be admitted into the record because it is hearsay,² contains technical expert conclusions,³ and is totally unnecessary where this hearing is being held specifically for the purpose of allowing Complainants' witnesses to testify in person in a location convenient to them.

9. For example, the narration in Exhibit McMullen 35 clearly is not Mr. McMullen speaking – it is hearsay by an unknown declarant. It contains technical expert-type opinions about alleged difficulties of evacuation, consequences, economic impacts. Similar issues infect the narration in each video, even where the witness may be the speaker in the video. It is totally unnecessary for this narration to enter the record – the witnesses will be in the hearing to testify and can present testimony about the images in the video on the record, subject to cross-examination and objection. The narration should be precluded from introduction and admission into the record.

C. Hearsay Exhibits That Should Not Be Introduced or Admitted

10. SPLP moves to preclude introduction and admission into the record of the following exhibits because they are hearsay or contain scientific or technical discussion, opinions or conclusions of others, and cannot be authenticated by the lay witnesses:

- Friedman Exhibit 14
- McMullen Exhibit 7, 11, 13, 14, 27
- Fuller Exhibits 2-4, 20
- Exhibits MD 7, 9a-9c, 11, 14b
- Exhibits RB 2-RB-7, RB-8 (both Exhibits labeled RB-8), RB-9-10, RB-23.

² *Infra* Section II.C.

³ *Supra* Section II.A.

11. Your Honor summarized rules concerning hearsay evidence in *Evangeline Hoffman-Lorah v. PPL Electric Utilities Corporation*, Docket No. C-2018-2644957, Initial Decision at 16-18 (Nov. 14, 2018) (ALJ Barnes):

Hearsay is an out-of-court statement made by a declarant that is offered by a party to prove the truth of the matter asserted in the statement. See Pa.R.E. 801. The general rule against hearsay is that hearsay is inadmissible at trial unless it falls into one of the recognized exceptions to the hearsay rule pursuant to the Pennsylvania Rules of Evidence, other rules prescribed by the Pennsylvania Supreme Court, or statute. See Pa.R.E. 801, 802, 803, 803.1, 804. The rationale for the rule against hearsay is that hearsay lacks the guarantees of trustworthiness to be considered by the trier of fact; however, exceptions have been fashioned to accommodate certain classes of hearsay that are substantially more trustworthy than hearsay in general, and thus merit exception to the rule against hearsay. See e.g. *Commonwealth v. Kriner*, 915 A.2d 653 (Pa. Super. 2007); *Commonwealth v. Cesar*, 911 A.2d 978 (Pa. Super. 2006); *Commonwealth v. Bruce*, 916 A.2d 657 (Pa. Super. 2007). Under the relaxed evidentiary standards applicable to administrative proceedings, see 2 Pa. C.S. § 505, it is well-settled that simple hearsay evidence, which otherwise would be inadmissible at a trial, generally may be received into evidence and considered during an administrative proceeding. *D'Alessandro v. Pennsylvania State Police*, 937 A.2d 404, 411, 594 Pa. 500, 512 (2007) (D'Alessandro). The Supreme Court of Pennsylvania stated: "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801(c). Hearsay evidence is normally inadmissible at trial unless an exception provided by the Pennsylvania Rules of Evidence, jurisprudence, or statute is applicable. Pa.R.E. 802. Complicating this general rule in the administrative law context, however, is Section 505 of the Administrative Agency Law: "Commonwealth agencies shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received. Reasonable examination and cross-examination shall be permitted." 2 Pa. C.S. § 505. Therefore, hearsay evidence may generally be received and considered during an administrative proceeding. See *A.Y. v. Pa. Dep't of Pub. Welfare, Allegheny County Children & Youth Serv.*, 537 Pa. 116, 641 A.2d 1148, 1150 (1994).

However, whether simple hearsay may support a finding of an agency depends on whether the evidence meets the criteria of the *Walker/Chapman* rule. The *Walker/Chapman* rule provides that simple hearsay evidence may support an agency's finding of fact so long as the hearsay is admitted into the record without objection and is corroborated by competent evidence in the record. See *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366, 370 (Pa. Cmwlt. 1976) (*Walker*) (citations omitted); see also *Chapman v. Unemployment*

Compensation Board of Review, 20 A.3d 603, 610, n.8 (Pa. Cmwlth. 2011) (*Chapman*).

Under Pennsylvania's *Walker/Chapman* Rule, it is well-established that "[h]earsay evidence, properly objected to, is not competent evidence to support a finding." Even if hearsay evidence is "admitted without objection," the ALJ must give the evidence "its natural probative effect and may only support a finding . . . if it is corroborated by any competent evidence in the record," as "a finding of fact based solely on hearsay will not stand." *Walker* at 370 (citations omitted).

To be "properly objected to" in an administrative proceeding, the hearsay evidence must not fall within one of the recognized exceptions to the rule against hearsay. Hearsay that falls within one of the recognized exceptions to the hearsay rule is competent evidence that may be relied upon by the agency. See *Chapman*, supra, n. 8 (finding that the Board properly relied upon a party's admission as competent evidence as a recognized exception to the hearsay rule); see also *Sanchez v. PPL Electric Utilities Corporation*, Docket No. C-2015- 2472600 (Order entered July 21, 2016) (*Sanchez*) (finding that testimony related to the issuance of a termination letter fell within the business records exception to the hearsay rule, and, therefore, was not simple hearsay, and was competent evidence to be relied upon in the proceeding to determine whether the complainant satisfied her burden of proof); see also Pa.R.E. 802, 803, 803.1 and 804.

Moreover, hearsay cannot corroborate hearsay. See *Sule v. Philadelphia Parking Authority*, 26 A.3d 1240, 1244 (Pa. Cmwlth. 2011), citing *J.K. v. Department of Public Welfare*, 721 A.2d 1127, 1133 (Pa. Cmwlth. 1998) (noting substantial evidence did not exist because there was no non-hearsay evidence to corroborate hearsay testimony).

12. Importantly, where hearsay is not corroborated by competent evidence, it cannot support a finding of fact. There is no reason to allow such evidence into the record and create confusion regarding the weight it could be given – it can be given no weight. Moreover, these documents contain multiple hearsay statements. So, even if one statement may be corroborated, if the hearsay document is admitted into the record there is now a document that could be relied upon for a fact in single sentence while the remainder of the document cannot be relied upon. Such confusion should not be introduced into the record. Moreover, admitting the hearsay if it can be corroborated is pointless. The corroborative evidence must be competent itself. That evidence

can be admitted and stand on its own to support a finding of fact, so adding in hearsay evidence on the same fact serves no purpose – it is duplicative and muddles the record with extraneous information.

13. For example, Exhibits RB-23 and MD-7 are the Commission’s Respondent Brief to the Commonwealth Court in the Dinniman proceeding. It is 40 pages long. Assuming there is some relevant factual assertion buried in this brief, SPLP is totally deprived of the right to cross examine the people making that assertion. None will be witnesses here. Moreover, it is impossible that the entirety of the brief contains relevant evidence that can be corroborated by competent evidence. So, even if there is a relevant factual assertion contained in the brief that could be corroborated, if the entire brief is admitted the record now contains a document containing a myriad of other assertions, arguments, and information that is hearsay that cannot be relied upon. It makes no sense to admit such hearsay evidence.

14. So too regarding news articles various Complainants attempt to have admitted (e.g. Exhibits Friedman 14, Fuller 20). The authors of these articles are not available for cross examination and the articles contain various assertions and conclusions of these reporters as well as people they quoted (hearsay within hearsay). Such materials should not be admitted. Accordingly, SPLP moves to preclude introduction and admission of all of the hearsay exhibits listed above.

D. Irrelevant Exhibits Related to Issues Complainants Do Not Have Standing To Pursue

15. SPLP moves to preclude from introduction/admission into the record the following exhibits because they relate to issues Complainants (none of whom reside in a nursing home or adult community or reside at Ms. Allison Higgins home) do not have standing to pursue.

- Marshall Exhibits (All)
- McDonald Exhibit 1
- Dussling Exhibits 3-8

16. As SPLP explained in its Motion in Limine concerning testimony for the Lay Witness Hearing, some witnesses who are not Complainants (Ms. Marshall and Mr. McDonald) intend to present testimony regarding topics that none of the Complainants have standing to pursue, including nursing homes and adult communities. Complainants do not have standing to pursue those issues and the exhibits associated with those issues should not be introduced or admitted into the record. Nor are they lawyers authorized to represent other individuals or businesses and under the Commissions regulations may not do so. 52 Pa. Code §§ 1.21-1.23. Your Honor has correctly held that Complainants, who also are not attorneys, do not have standing to represent others and that this is not a class-action lawsuit.⁴

17. The Flynn Complainants arguments that SPLP does not understand standing because this is not a suit for damages (as if principles of standing would somehow apply differently) and that a Complainant should be able to stand in for their “loved one” are meritless. *See* Flynn Complainants’ October 14, 2019 Answer to Motion in Limine. The Commonwealth Court could not have been more clear on this point - to pursue a Complaint at the PUC, including specific issues therein, the Complainant MUST have standing – a direct, immediate, and substantial interest. *Sunoco Pipeline L.P. v. Dinniman and Pub. Util. Comm’n*, __ A.3d __, 2019

⁴ *Flynn et al v. SPLP*, June 6, 2019 Order Granting In Part And Denying In Part Complainants’ Motion For Reconsideration Of Second Interim Order at 5-6 (discussing Flynn Complainants cannot bring claims on behalf of others and that “This is not a class action lawsuit.”).

WL 4248071, Docket No. 1169 C.D. 2018, Slip Op. at 7-10 (Pa. Cmwlth. Sept. 9, 2019). Complainants here simply do not have standing to raise issues related to emergency response or evacuation for facilities in which they do not reside because they have no such interest.

18. Complainants now also intend to present through Ms. Dussling exhibits demonstrating the horizontal distance between a Ms. Allison Higgin's home and the pipelines. Again, Complainants have no standing to pursue this issue. Ms. Higgins is not a party to this case. They cannot pursue locational issues on her behalf. Thus, Ms. Dussling's exhibits 3-8 should also be precluded from introduction and admission at the hearing.

II. REQUEST FOR EXPEDITED ANSWER AND RULING

19. SPLP believes that it is in all parties' and Your Honor's interests to resolve this Motion prior to the October 23 and 24 Lay Witness Hearings. SPLP believes that by precluding introduction of inadmissible, irrelevant, or otherwise improper exhibits prior to hearing, significant hearing time can be saved because there should be less objectionable evidence attempted to be introduced into the record, cutting down on both the time to introduce and present such evidence as well as objections and arguments thereon. Time is particularly important here, where Complainants and Intervenors have proposed to present approximately 36 witnesses in a two day hearing. Accordingly, to allow time for a ruling before hearing, SPLP requests an expedited time for response to this Motion of four days and a ruling on this motion prior to the commencement of the October 23 hearing day.

III. CONCLUSION

WHEREFORE, SPLP respectfully requests:

- Answers to this Motion shall be filed within four days of service.

- The following exhibits shall not be introduced and/or admitted at hearing:

Flynn Complainants

- Friedman Exhibits 1 (narration only), 4-7, 12, 14, 15, 16, 18-22, 24-26
- McMullen Exhibits 7, 11-14, 27, 31, 35 (narration only)
- Hughes Exhibits 5 (narration only), 6-7
- Fuller Exhibits 2-4, 10, 17-18, 20
- Marshall Exhibits (All)
- McDonald Exhibit 1
- Dussling Exhibits 3-8

Pro Se Complainant Rebecca Britton

- Exhibits RB 2-RB-7, RB-8 (both Exhibits labeled RB-8), RB-9-10, RB-23

Pro Se Complainant Melissa DiBernardino

- Exhibits MD 7, 9a-9c, 11, 14b, 15c

Respectfully submitted,



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Attorneys for Respondent Sunoco Pipeline L.P.

Dated: October 17, 2019

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the forgoing document upon the persons listed below in accordance with the requirements of § 1.54 (relating to service by a party).

VIA ELECTRONIC MAIL

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Thomas J. Sniscak, Esquire
Kevin J. McKeon, Esquire
Whitney E. Snyder, Esquire

Dated: October 17, 2019