**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MEGHAN FLYNN et al. : C-2018-3006116 (consolidated)

: P-2018-3006117

MELISSA DIBERNARDINO : C-2018-3005025 (consolidated)

REBECCA BRITTON : C-2019-3006898 (consolidated)

LAURA OBENSKI : C-2019-3006905 (consolidated)

:

v. :

:

SUNOCO PIPELINE L.P. :

ANDOVER HOMEOWNERS’ :

ASSOCIATION, INC. : C-2018-3003605

:

v. :

:

SUNOCO PIPELINE L.P. :

**ORDER GRANTING IN PART AND DENYING IN PART**

**SUNOCO PIPELINE, L.P.’S MOTION IN LIMINE**

Sunoco Pipeline, L.P.’s October 9, 2019 Motion in Limine

On October 9, 2019, Sunoco Pipeline, L.P. (Sunoco or Respondent) filed a Motion in Limine Regarding Lay Witness Hearing Evidence and Request for Expedited Seven Day Answer Period and Expedited Ruling. The Flynn Complainants, Complainant Rebecca Britton and Complainant Laura Obenski filed Answers to Sunoco’s Motion in Limine by the shortened response deadline of October 17, 2019.

First, Sunoco seeks a ruling that opinion evidence of lay persons be inadmissible. It argues lay witness testimony on technical issues such as health, safety and the probability of structural failure require expert evidence to be persuasive enough to support the proposing party’s burden of proof. Sunoco cites as authority for its position *Application of PPL Elec.*

*Utilities Corp.*, A-2009-2082652, 2010 WL 637063, at \*11 (Jan. 14, 2010) (emphasis added); *Pickford v. Pub. Util. Comm'n*, 4 A.3d 707, 715 (Pa. Cmwlth. 2010). Sunoco argues duplicative and repetitive evidence should be excluded and irrelevant evidence should also be excluded.

Specifically, Sunoco seeks the preclusion of the following testimony:

* + Flynn Complainants identified as witnesses testifying to “adequacy” of public awareness/emergency response, “concerns over possible adverse pipeline events,” and/or the “integrity maintenance process.” Whether something is “adequate” or a “concern” is opinion testimony that a lay witness cannot offer. So too regarding pipeline integrity.
  + Gerald McMullen testifying to “fragile” nature of topography. Whether topography is “fragile” is clearly technical and scientific evidence to which lay witnesses cannot testify.
  + Eric Friedman testifying to “impacts of highly volatile liquid transportation, including pipeline and valve site issues, within the context of the Association, its Members, its neighbors and other stakeholders in the immediate vicinity of Association property and within the potential “blast zone” of any such incident.” Testimony regarding potential impacts and impact radius is technical and scientific evidence that Mr. Friedman as a lay witness cannot offer.

Although the Pennsylvania Rules of Evidence are not strictly adhered to at the Commission, the Pennsylvania Supreme Court has stated that any relaxation of the rules of evidence in administrative settings cannot allow lay witnesses to testify to technical matters “without personal knowledge or specialized training.”[[1]](#footnote-1)Lay witness testimony only carries evidentiary weight where the witness has actually perceived the situation, and the opinion is not based on scientific, technical or specialized knowledge.[[2]](#footnote-2)

As the Commission previously held in *Frompovich v. PECO Energy Company,* Docket No. C-2015-247602, (Opinion and Order entered May 3, 2018)(*Frompovich)*, a lay person can testify as to their opinion pursuant to Pa. R.E. 701, which provides:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Pa. R.E. 701.

The Commission held in *Frompovich*:

First, a lay witness’s testimony is limited to opinion not based on scientific, technical or other specialized knowledge within the scope of Rule 702. A lay witness is limited to giving opinion that is rationally based on the witness’s own perceptions and helpful to clearly understanding the witness’s testimony or to determining a fact in issue.

\* \* \*

Secondly, underlying documents relied upon by a lay witness in providing lay opinion testimony cannot be admitted into evidence pursuant to Pa. R.E., Rule 705, as the basis of such opinion, unless such documents are otherwise reliable as competent evidence . . .

*Id.*

The Flynn Complainants respond that Mr. Friedman, the Flynn Complainants, and Mr. McMullen wish to give lay person opinion that is rationally based on their own perceptions and helpful to clearly understand the witnesses’ testimonies or to determine a fact in issue; thus, their testimony regarding their opinion is permissible. Underlying documents relied upon by a lay witness in providing lay opinion testimony cannot be admitted into evidence pursuant to Pa. R.E., Rule 705, as the basis of such opinion, unless such documents are otherwise reliable as competent evidence. *Id.*  At the hearing the lay witnesses may testify; however, no scientific reports to support their testimony as lay persons will be admitted.

Duplicative/Repetitive Testimony

Sunoco seeks to preclude duplicative/repetitive testimony. I agree in general that there is no need for duplicative testimony. Witnesses are encouraged to state that they agree with prior testimony given by prior witnesses at the hearing in the interest of judicial efficiency. However, in this case as it is pled that Sunoco’s public awareness program is inadequate or is not being complied with in Chester and Delaware Counties, overlapping testimony from more than one stakeholder witness as to where they live in reference to a communications coverage buffer and whether they have received information pamphlets and/or other information is not necessarily redundant. Such testimony seems relevant to show whether the pipeline operator is tailoring its communications coverage to fit the potential impact consequences of its particular pipelines in Chester/Delaware Counties.

Whether there should be a wider communications coverage area than the current coverage area for the dissemination of safety pamphlets and other information pertaining to emergency evacuations to the public is an issue raised by the Complainants in this proceeding, at least with regard to the high consequence areas in Chester and Delaware Counties. Sunoco’s Public Awareness Plan states that it fully supports the goals and objections set forth in the first edition of the American Petroleum Institute’s (API) Recommended Practice 1162. API RP 1162 recommends the pipeline operator expand its communications area surrounding pipelines with a higher potential impact on the surrounding community. API RP 1162 has been incorporated by reference in 49 CFR 195.440 and 66 Pa. C.S. § 1501.

It has been averred that Sunoco is placing more than one HVL pipeline in close proximity to another in Delaware and Chester Counties. Whether Sunoco’s communications coverage in Delaware and Chester Counties is adequate is an issue. Although this is not a civil action or class action proceeding involving claims for damages, the witnesses identified are stakeholders who reside near the utility’s facilities, *i.e.* Mariner East pipelines and other appurtenances in Chester/Delaware Counties, and their testimonies may be relevant as to the effectiveness and appropriateness of Sunoco’s public awareness plan and implementation. Ms. Britton’s witness, Wanda J. Dunn, may testify at the hearing as to her public awareness. Flynn Complainants’ witnesses Tom McDonald, Christi Marshall can testify. Evidentiary rulings will be made if there are objections at the hearing.

In *State Senator Andrew Dinniman v. Sunoco Pipeline L.P.*, Docket Nos. P-2018-3001453 *et al.* (Opinion and Order entered June 15, 2018), the Commission did not expressly rule that adverse pipeline events occurring out of state are completely irrelevant to whether a preliminary injunction should be granted. Rather, the Commission acknowledged the record contained “accounts of Sunoco’s mishaps in other jurisdictions and other pipelines.” The Commission did not strike that evidence from the evidentiary record as inadmissible, but focused upon whether there was “new, credible evidence to support a finding that the continued operation of ME1 poses a clear and present danger to life or property in West Whiteland Township.” *Id.* at 34.In other words, the Commission did not find the record of mishaps constituted substantial evidence to warrant a shutdown of ME1.

The Commission further considered evidence regarding Sunoco’s application to the Department of Environmental Protection (DEP) for a change in permits in West Whiteland Township and the fact that construction of ME2 and ME2X caused a number of DEP violations and subsequent impositions of civil penalties. *Id.* at 35.In its decision to enjoin Sunoco from further construction of ME2 and ME2X in West Whiteland Township, the Commission considered regulatory approval of other administrative bodies concerning the Mariner East Pipeline project. *Id.* at 34-35, 42.The Commission considered economic consequences to a shut-down of ME1, not only locally, but statewide and nationwide. *Id.* at 45, *citing* *See Sunoco I;* *also,* *In re Condemnation by Sunoco Pipeline L.P.*, 167 A.3d 307 (Pa. Cmwlth. 2017); *appeal denied* 179 A.3d 456 (Pa. 2018).

The Commission has discretion to give what weight it deems appropriate to evidence in the instant proceeding. The threshold for admissibility of evidence is low in an administrative proceeding as the Commission is governed by the Commonwealth’s Administrative Agency Law, 2 Pa. C.S.§ 101, *et seq.* Section 505 of the Administrative Agency Law, 2 Pa. C.S. § 505, specifies that a Commonwealth agency is not bound by technical rules of evidence at an agency hearing. Specifically, 2 Pa. C.S. § 505, provides: “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.” Thus, if the evidence is relevant to the issues before the agency and of reasonable probative value, the agency may receive it. 2 Pa. C.S. § 505. Evidence is relevant if it tends to establish facts in issue. *LeRoi v. Pa. State Civil Service Commission,* 382 A.2d 1260 (Pa. Cmwlth. 1978).

The Pennsylvania Supreme Court has stated, however, that in order for evidence relied upon in an administrative proceeding to be considered “substantial evidence,” the “. . . information admitted into evidence must have sufficient indicia of reliability . . . ” *Gibson v. W.C.A.B,* 861 A.2d 938, 944, 580 Pa. 470, 480 (Pa. 2004). “If the evidence is both competent and sufficient, then the finding is supported by substantial evidence.” *Id*.

Accordingly, while the strict rules of evidence have been relaxed in agency hearings under the Commonwealth’s Administrative Agency Law, see 2 Pa. C.S. § 505, there has not been an abandonment of all rules. *Dawes v. Pennsylvania Gas and Electric,* F-2013-2361655 (Initial Decision Issued January 14, 2014) (related to authentication per Pa.R.E. 901 of a third-party recording of a customer call and application of Best Evidence Rule, Pa.R.E. 1001 and 1002). For evidence relied upon in an administrative proceeding to be considered competent, the evidence must be authenticated and follow the applicable hearsay rules.

Pursuant to Rule 901 of the Pennsylvania Rules of Evidence, parties to a hearing are required to satisfy the requirement of authenticating or identifying an item of evidence. To do so, “the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Pa.R.E. 901. The rationale for requiring authentication is that it provides a measure of protection against fraud or mistaken attribution of a writing to a person who fortuitously has the same name as the author. *Commonwealth v. Brooks*, 508 A. 2d 316 (Pa. Super. 1986); *Commonwealth v. Harrison*, 434 A.2d 808 (Pa. Super. 1981). Improper authentication can lead to reversal on appeal. *Kopytin v. Aschinger*, 947 A.2d 739 (Pa. Super. 2008). As it is the duty of the ALJ to ensure that the evidentiary record is solid and reliable, permitting improper authentication is a breach of that duty. *See Moore*.

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).

For these reasons, Sunoco’s request that all hearsay testimony, layperson opinions, or evidence regarding any pipeline incident occurring before a separate state agency or outside the state be precluded at the hearing is overruled.

ORDER

THEREFORE,

IT IS ORDERED:

1. That Sunoco Pipeline, L.P.’s Motion in Limine filed on October 9, 2019 is granted in part and denied in part consistent with the body of this Order.
2. That Wanda J. Dunn, Christi Marshall, Tom McDonald, Eric Friedman and the Flynn Complainants are permitted to testify at the October 23 and 24, 2019 hearing as lay witnesses; however, no scientific reports to support their testimony as lay persons will be admitted.
3. That in all other respects, the Motion in Limine filed on October 9, 2019 is denied.

Date: October 21, 2019 /s/

Elizabeth H. Barnes

Administrative Law Judge

**C-2018-3006116 et. al.- MEGHAN FLYNN et. al. v. SUNOCO PIPELINE LP**

*(Revised 10/21/19)*

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1. *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004) (holding Rules of Evidence 602, 701 and 702 generally applicable in agency proceedings). [↑](#footnote-ref-1)
2. Pa.R.E. 701. [↑](#footnote-ref-2)