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February 7, 2020

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)
Andover Homeowner's Association, Inc.; Docket No. C-2018-3003605 (consolidated)
v.
Sunoco Pipeline L.P.

Sunoco Pipeline L.P.'s Reply to Flynn Complainants' Answer Seeking Affirmative Relief

Dear Secretary Chiavetta:

Attached for electronic filing with the Commission is Sunoco Pipeline L.P.'s Reply to Flynn Complainants' Answer Seeking Affirmative Relief in the above-referenced matter.

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

Very truly yours,



Thomas J. Sniscak
Whitney E. Snyder
Counsel for Sunoco Pipeline L.P.

WES/jld
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)
ANDOVER HOMEOWNER'S ASSOCIATION, INC.	:	Docket No.	C-2018-3003605 (consolidated)
	:		
	:		
v.	:		
	:		
SUNOCO PIPELINE L.P.	:		

**SUNOCO PIPELINE L.P.'S REPLY TO FLYNN COMPLAINANTS' ANSWER
SEEKING AFFIRMATIVE RELIEF**

Pursuant to 52 Pa. Code § 5.63, Sunoco Pipeline L.P. (SPLP) submits this Reply to Flynn Complainants' February 3, 2020 Answer to SPLP's January 29, 2020 Omnibus Motion for Adherence to Regulations and the Procedural Order and Request for Expedited Ten Day Answer Period. Despite Flynn Complainant's failure to include a notice to plead, because the Answer requests affirmative relief in the form of waiver of Commission regulations via a revised procedural order that would infringe on SPLP's due process rights, SPLP may submit this reply. 52 Pa. Code § 5.63. SPLP is limiting this Reply to the relief requested and the reasons Flynn Complainants raised in support and therefore is not responding on a paragraph by paragraph basis to the Answer. Flynn Complainants failed (again) to number the pages of their pleading. SPLP has attached a page-numbered copy of the pleading as Attachment A to this Reply.

1. Complainants are seeking a third bite at the evidentiary apple to present their direct case and ambush SPLP at hearing with new oral direct evidence that should have already

been presented in their direct case. This violates the Commission's regulations¹ and SPLP's due process rights² and cannot be allowed unless Complainants are required by a date certain to present such evidence and the procedural schedule is extended proportionally to allow SPLP the same amount of time for responsive testimony it is already entitled to under the June 6, 2019 Procedural Order and August 2, 2019 Prehearing Order (90 days) and the remainder of the procedural schedule modified accordingly. The Prehearing and Procedural Orders and the Commission's regulations already address issues concerning ongoing discovery and presentation of evidence.³ Complainants' also seek "guidance" from Your Honor. This is inappropriate, particularly given Complainants are represented by counsel and this is not the role of a presiding officer.⁴

2. Flynn Complainants ask Your Honor to "enter an amended Procedural Order that addresses Complainants' concerns," and to hold a telephone conference "for the purpose of discussing discovery and evidentiary issues not previously addressed in the current Procedural Order." Answer at pp. 1, 6.

3. Complainants do not identify what modifications to the procedural or prehearing orders they seek. As such the ill-defined request should be denied on that basis. Complainants seek the opportunity to present additional evidence but fail to state any credible cause for failing to present such evidence in their direct testimony despite having over a year to develop a direct case. In the event any relief is given, which it should not be, the procedural schedule must be

¹ 52 Pa. Code § 5.243(e).

² *Infra* ¶¶ 11-12.

³ *Infra* ¶ 15.

⁴ *Infra* ¶ 17.

modified to allow SPLP the same proportional additional time for its responsive testimony that it is already entitled to under the June 6, 2019 Procedural Order and August 2, 2019 Prehearing Order.

4. If Your Honor decides to hold a prehearing conference to address these issues, SPLP requests this conference be on the record. If SPLP's due process rights are infringed through modification of the Procedural or Prehearing Order or waiver of Commission regulations, it requires a record of the arguments and decision made at any such conference.

5. Complainants' "concerns" appear to be that they have failed to timely complete discovery for inclusion in their direct case and/or include sufficient information with their direct case, and now under the guise of seeking "procedural guidance" request Your Honor waive the requirement that a party may not present direct evidence in a rebuttal phase of the case (including at hearing):

Lay witnesses in October or November would have had no opportunity to produce documents or address matters based on answers to interrogatories not furnished until December, January and later. § 5.243(e) does not apply because there would have been no opportunity to present such discovery in October or November. Likewise, following the upcoming deposition of Matthew Gordon., Complainants may wish to call the witness as on-cross during the hearing. Mr. Gordon was not one of Complainants' lay witnesses and he certainly is not one of their experts.

Answer at ¶ 3.

6. Complainants' position is indefensible, and completely self-induced and they should not benefit from their own dalliance or errors. To the extent Complainants did not have discovery responses prior to the lay witness hearings in October or November or did not depose and have a transcript to attach to their written direct testimony, that is due to their own delay in pursuing discovery, particularly given that they proposed and agreed to the dates for the lay

witness hearings and the deadline for their written direct testimony.⁵ The Complaint was filed well over a year before Complainants' direct case was due and they could have instituted discovery from day one of the Complaint's filing under the Commission's regulations. The Commission's regulations expressly state: "A party shall initiate discovery **as early in the proceedings as reasonably possible**. In a proceeding, the right to discovery commences when a complaint, ... is filed." 52 Pa. Code § 5.331(b) (emphasis added). Complainants failed to serve their first set of discovery requests until on or about February 28, 2019 – over **four months** after the original Complaint was filed. Complainants failed to notice Mr. Gordon's deposition until **after** their written direct testimony was due.

7. Complainants attempt to place the blame on SPLP for their own delay in discovery also fails. Complainants assert: "Sunoco is implicitly asking the ALJ to ignore the long delays occasioned by its failure to produce discovery except upon repeated discovery enforcement orders." Answer at n.1. Complainants' are attempting to argue that because SPLP exercised its rights to object to discovery and not answer certain interrogatories until a ruling was made on those objections that this amounts to delay. That is false. Your Honor has already

⁵ Flynn Complainants April 19, 2019 Prehearing Memo at 3.

recognized that SPLP has this right.⁶ Moreover, Your Honor sustained or sustained in part many of SPLP's objections, including SPLP's objections to 271 interrogatories in Flynn Set I.⁷

8. Complainants' assertion that SPLP failed to produce discovery without being ordered to do so is patently and provably false. SPLP on March 21, 2019 timely served responses to the interrogatories including production of documents in Flynn Set I (served February 28, 2019) to which it did not object and filed its certificate of service at the docket the next day.⁸ So too with Flynn Set II requests (effectively served November 21, 2019). SPLP on December 11, 2019 timely served responses to the interrogatories to which it did not object in Set II and filed the certificate of service on that date.⁹ Moreover, Complainants, who are represented by counsel, had notice of the timing of discovery, which can take at least 50-60 days to resolve objections and give adequate time for a ruling and responses pursuant to such ruling per the timelines set forth in the Commission's discovery regulations. 52 Pa. Code § 5.342. SPLP cannot be blamed or prejudiced for Complainants' lack of diligence.

9. Moreover, Complainants' assertion that discovery responses were unavailable for witnesses at the lay hearings disregards the fact that the lay witness hearings were a unique

⁶ See, e.g., January 2, 2020 Order Denying Complainant DiBernardino's Motion to Preserve Potential Evidence at p.6 ("SPLP has been deprived of its rights to object to discovery and an order compelling discovery is premature until after discovery has been properly requested and served, the responding party either objects or fails to answer, and then a motion is filed."); October 21, 2019 Order on Motion for Sanctions at 2-3 ("Sunoco should be given an opportunity to object.").

⁷ See June 6, 2019 Order on Motion to Compel Flynn Set I at Ordering ¶¶ 5-6, 9-10-14, 16-22, 24, 27-30 (upholding either entirely or in part SPLP objections to 271 interrogatories and accompanying requests for production of documents).

⁸ Available at <http://www.puc.state.pa.us/pcdocs/1611527.pdf>

⁹ Available at <http://www.puc.state.pa.us/pcdocs/1647301.pdf>

option afforded to litigants for their convenience. August 2, 2019 Procedural Order at p. 9 (giving litigants option to utilize lay witness hearing or written testimony procedures, but not both). If Complainants knew there were discovery responses that they wanted lay witnesses to present, they could have had those lay witnesses present it through written direct testimony instead of having them testify at the lay witness hearing.

10. Complainants present the fallacy that because discovery is ongoing, that necessarily means they can present evidence that should have been included with their direct case at later phases in the hearing. Answer at p.1 (“Respondent’s new motion is predicated on the strange notion that “discovery is ongoing” but that Complainants’ opportunity to introduce new evidence has passed. . . .”). This is not a “strange notion.” This is how the Commission’s regulations are written. If Complainants argument were right, there effectively would be no deadline for direct testimony or evidence in support of their direct case and there would be no point to setting an orderly and sequential PUC-common schedule as Your Honor did here. That discovery is ongoing throughout a proceeding, *see generally* 52 Pa. Code § 5.331 (“Sequence and timing of discovery” placing no limitation on timing of lodging discovery) does not mean it gives a slow moving party a free pass to submit testimony whose due date has passed thereby rendering the schedule meaningless. Ongoing discovery has no effect on the Commission’s regulation that requires direct evidence to be presented in a parties’ direct case, not in later phases:

(e) A party **will not be permitted to introduce evidence during a rebuttal phase** which:

- (1) Is repetitive.
- (2) **Should have been included in the party’s case-in-chief.**
- (3) Substantially varies from the party’s case-in-chief.

52 Pa. Code § 5.243(e) (emphasis added). Thus, the ability to conduct discovery after a round of testimony has passed is clearly is for two reasons, to prepare for the next round of testimony (surrebuttal) in the Flynn Complainants case, or to prepare for cross-examination of a SPLP witness. In short Complainant's have conflated the concept of on-going discovery with the separate concept of due dates for a direct case and now propose to use on-going discovery as a ruse to produce at the hearing itself what should have been direct testimony when all rounds of testimony have come and gone by seeking to call Mr. Gordon as an adverse witness at the July evidentiary hearings.

11. Moreover, this requirement is not simply a procedural regulation that Your Honor can waive with no substantive effect on SPLP. SPLP has a right to due process and the Commission is bound by due process requirements. Allowing Complainants to present additional evidence without and legitimate or credible cause and where it is clear that their own dalliance caused the condition of which they complain should be rejected and not rewarded. But even if Complainants had cause, which they do not, there would have to be a substantial modification to the procedural schedule extending it to give SPLP the full time period for its first round of testimony in response. Otherwise, it not only violates SPLP's right to notice of the allegations against it and the ability to prepare and present a defense but also the spirit of Procedural Order which was set after multiple prehearing conferences and was developed from the schedule Complainants proposed as a starting point. Indeed:

Due process in matters before the Commission requires that a party be afforded reasonable notice of the nature of the allegations against it so that the party can prepare a suitable defense.

Pocono Water Co. v. Pa. Pub. Util. Comm'n, 630 A.2d 971, 973 (Pa. Cmwlth. 1993) (citing *Duquesne Light Co. v. Pa. Pub. Util. Comm'n*, 507 A.2d 433 (Pa. Cmwlth. 1986)).

12. 52 Pa. Code §5.243(e)'s requirement of presenting all direct evidence within a direct case is to protect these due process rights to avoid trial by ambush and prevent surprise. "The clear purpose of it [52 Pa. Code § 5.243(e)] is to avoid trial by ambush and the prevention of surprise can only be achieved if the parties are confined to the scope of their direct case." *Pennsylvania Public Utility Commission v. UGI Utilities, Inc.*, 1994 Pa. PUC LEXIS 138, *85; *Pennsylvania Pub. Util. Comm'n v Total Environmental Solutions, Inc.*, 103 Pa. P.U.C. 110 (July 30, 2008) (Parties here were "ambushed" by the new information contained in rebuttal testimony that "corrected" information provided in direct testimony and discovery responses.); *Pennsylvania Public Utility Commission v. Total Environmental Solutions, Inc. -- Treasure Lake Water Division, et al.*, Docket No. R-00072493, 2008 Pa. PUC LEXIS 42 at *114-116 (Pa PUC May 23, 2008) ("...it is not equitable to permit TESI to take a second bite at direct testimony, or to allow it to shore-up inadequate direct at the rebuttal phase of this case."), *aff'd*, Opinion and Order at 89 (July 30, 2008).

13. While Complainants use alleged lack of opportunity for lay witnesses to present as evidence discovery responses at the lay witness hearing as a reason 52 Pa. Code § 5.243(e) should not apply, Answer at ¶ 3, Complainants argue to the contrary that this is not what they are seeking. *Id.* at ¶ 23. As explained above, if discovery responses were not available at the time of the lay witness hearings, Complainants' delay in serving discovery created that circumstance and Complainants could have simply waited and presented such discovery responses through written direct testimony.

14. To the extent Complainants intend to present additional evidence in this proceeding to meet their burden of proving a *prima facie* case that has not already been submitted, the entire procedural schedule must be modified to allow SPLP the notice and opportunity to present a defense that due process requires. SPLP has significant rights at issue in this proceeding given that Complainants request its Mariner East pipelines be shut down. Failure to afford SPLP notice and sufficient time to respond to Complainants' allegations and evidence would violate SPLP's due process rights.

15. Complainants assertion that the procedural orders in this case do not address their "concerns" regarding "discovery issues or evidentiary issues arising from discovery," Answer at ¶ 1, is also false. The June 6, 2019 Procedural Order and the August 2, 2019 Prehearing Order both required that Complainants' present their direct case at either the lay witness hearings or through written direct testimony due January 15, 2020. *See, e.g.*, August 2, 2019 Prehearing Order at ¶¶ 4, 6-7. The Prehearing Order also expressly stated:

This hearing is a formal proceeding and will be conducted in accordance with the Commission's rules of practice and procedure. 52 Pa. Code Chapters 1, 3 and 5.

Id. at ¶ 13. Each order also allows Complainants the opportunity to present surrebuttal written testimony and exhibits to the extent a witness did not testify at the lay witness hearings. Obviously, this surrebuttal testimony may not include evidence Complainants were required to present on direct and must be responsive to SPLP's testimony. 52 Pa. Code § 5.243(e). Complainants are also entitled to cross-examination of SPLP's witnesses at hearing, but again Complainants' cross-examination must be within the scope of SPLP's written testimony. They cannot present new evidence for the first time at hearing in violation of SPLP's due process rights. 52 Pa. Code § 5.243(e); *supra* ¶¶ 11-12. Again, that discovery is ongoing throughout the

proceeding even after presentation of a direct case, as it is in every Commission proceeding, has no bearing on the rule that direct must be presented on direct. *Supra* ¶ 10.

16. Complainants also plant a red-herring and unripe argument regarding a lack of procedures for presenting evidence of a future potential event. Answer at ¶ 23. SPLP’s Motion does not address such a scenario because that is not what is at issue here. What is at issue here is evidence Complainants’ should have gathered through the discovery process prior to their direct case and submitted with their direct case. If a future event occurs and Complainants want to present evidence regarding such event, they can move to do so by an appropriate pleading, subject to SPLP’s right to be heard on such motion, and if warranted procedures may be put in place allowing for supplemental testimony and exhibits from all parties on the issue. Future events that may occur and how and when to submit evidence thereof is unripe and irrelevant.

17. Finally, Complainants, who are represented by counsel, state they are seeking “guidance” as to procedures. Answer at p. 1, ¶¶ 9, 27. This is inappropriate as it is in reality probing or inviting the tribunal to assist for affirmative relief counsel was seeking. Like in any legal proceeding, counsel has a duty to read and learn the forum’s rules of procedure – here the Public Utility Code and the Commission’s regulations. Moreover, giving such guidance to legal counsel is not the role of a presiding officer.¹⁰ SPLP objects to counsel seeking what amounts to legal “guidance” or affirmative relief regarding Orders entered or rulings in the matter from the presiding officer – such requests (particularly by email and not appropriate pleading) should not be entertained.

¹⁰ See 66 Pa. C.S. § 331 (describing authority of presiding officer, which does not include offering guidance to counsel); 52 Pa. Code §§ 5.483-5.485 (same).

WHEREFORE, SPLP respectfully requests its January 29, 2020 Omnibus Motion be granted and the relief requested in Flynn Complainants' February 3, 2020 Answer be denied. In the alternative, if Your Honor holds a prehearing conference regarding this matter, SPLP respectfully requests that such conference be on the record.

Respectfully submitted,

/s/ Whitney E Snyder

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Attorneys for Respondent Sunoco Pipeline L.P.

Dated: February 7, 2020

ATTACHMENT A

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**FLYNN COMPLAINANTS' RESPONSE TO SUNOCO'S
"OMNIBUS" MOTION AND REQUEST FOR TEN DAY ANSWER PERIOD**

On January 20, 2020, counsel for Flynn Complainants wrote ALJ Barnes seeking guidance as to the procedure to deal with discovery and trial matters not previously addressed in the ALJ's orders. The letter was sent simultaneously to all counsel and pro se parties of record. Judge Barnes responded by suggesting counsel seek to resolve the issues amicably and, if unable to do so, to consider filing a motion. Counsel for Sunoco stated that she would file a motion and Sunoco has now done so.

The parties have engaged in ongoing paper discovery, as recently as January 13, 2020, when Sunoco served answers to interrogatories that it had been compelled to serve pursuant to a motion to compel filed by Flynn Complainants. To date, the ALJ has not entered any order restricting ongoing discovery.

Respondent's new motion is predicated on the strange notion that "discovery is ongoing" (Motion at 5) but that Complainants' opportunity to introduce new evidence has passed, Complainants having "had abundant time to conduct discovery for presentation of their Direct

case.” (Motion at 9)¹ For the reasons set forth below, Flynn Complainants ask Your Honor to deny Sunoco’s Motion and instead enter an amended Procedural Order that addresses Complainants’ concerns.

I. **Introduction and Summary**

1. Denied as stated. The Pretrial Order did not expressly address discovery issues or evidentiary issues arising from discovery.

2. Admitted.

3. Denied. Lay witnesses in October or November would have had no opportunity to produce documents or address matters based on answers to interrogatories not furnished until December, January and later. § 5.243(e) does not apply because there would have been no opportunity to present such discovery in October or November. Likewise, following the upcoming deposition of Matthew Gordon, Complainants may wish to call the witness as on-cross during the hearing. Mr. Gordon was not one of Complainants’ lay witnesses and he certainly is not one of their experts. Respondent’s position fails to address these concerns.

4. Denied. Respondent fails to offer any authority to support its position. The obvious purpose of the email was to find out what procedural path the ALJ wished to be followed.

5. Denied. This claim is reminiscent of Sunoco’s earlier contention that, at the November 2018 hearings, Flynn Complainants waived certain rights. There was no factual nor legal basis for that assertion or this one either. The notion that Complainants accepted the schedule and, therefore, waived the right to discovery and to the evidentiary use of discovery is without basis in the law or in the applicable rules of procedure. Further, the suggestion that Complainants have been dilatory in pursuit of discovery is equally and obviously unfounded.

¹ Sunoco is implicitly asking the ALJ to ignore the long delays occasioned by its failure to produce discovery except upon repeated discovery enforcement orders.

6. Denied as stated. Flynn Complainants' concern is their ability to use the fruits of discovery and also to introduce documentary evidence that does not require authentication by the lay witnesses or the expert witnesses.

7. Admitted.

II. Request for Expedited Answer and Ruling

8. Admitted.

III. Argument

A. Flynn Complainants did not make a request for relief.

9. Denied as stated. First, the ALJ has discretion with respect to requests for relief. Second, the email was not a request for relief; it was a request for guidance as to the procedure to be followed.

10. Denied. See ¶ 9 above.

11. Denied. See ¶ 9 above.

12. Denied. There has been no inappropriate conduct.

B. Flynn Complainants have not asked for a waiver.

13. Denied. This averment is a repetition of previous averments which also were a repetition of previous averments. Those averments also were denied.

14. Denied. This averment is a repetition of previous averments which also were a repetition of previous averments. Those averments also were denied.

15. Denied. This averment is a repetition of previous averments which also were a repetition of previous averments. Those averments also were denied.

16. Denied as stated. Respondents' citations are correct. Factually, however, this averment is a repetition of previous averments which also were a repetition of previous averments. Those averments also were denied.

17. Denied. This averment is a repetition of previous averments which also were a repetition of previous averments. Those averments also were denied.

18. Denied as stated. As set forth in ¶ 3 above, lay witnesses in October or November would have had no opportunity to produce documents or answers based on responses to interrogatories not furnished until December, January and later. § 5.243(e) does not apply because there would have been no opportunity to present such discovery in October or November. Likewise, following the upcoming deposition of Matthew Gordon, Complainants may wish to call the witness as on-cross during the hearing. Mr. Gordon was not one of Complainants' lay witnesses and he certainly is not one of their experts. Respondent's position fails to address these concerns.

19. Denied. This averment is a repetition of previous averments which also were a repetition of previous averments. Those averments also were denied.

20. Denied. This averment is a repetition of previous averments which also were a repetition of previous averments. Those averments also were denied.

21. Denied. This averment is a repetition of previous averments which also were a repetition of previous averments. Those averments also were denied.

22. Denied. Your Honor has not ruled on any of the issues presently raised by Flynn Complainants. It is denied that the set of discovery requests was untimely or that Complainants were responsible for delays.

23. Denied. This averment is a repetition of previous averments which also were a repetition of previous averments. Those averments also were denied. The argument is a red herring of the first order. Caroline Hughes, e.g., is not seeking to introduce more evidence. All of the Complainants, however, through counsel, are engaged in additional discovery, the responses to which may be admissible. If another Sunoco pipeline leaks or ruptures in February, 2020, for instance, no good reason exists to preclude the offer of that information into evidence.

24. Denied. It is worth noting that no basis in the regulations or discovery rules is cited in support of this claim.

25. Denied. There are six months between now and the time of the next round of hearings. The assertion of prejudice is groundless.

26. Denied. This averment is a repetition of previous averments which also were a repetition of previous averments. Those averments also were denied.

27. Denied. No one has discussed seeking an extension of the direct testimony deadlines. No one has even sought relief, only guidance as to procedure.

28. Admitted.

29. Denied. See ¶ 27 above.

30. Denied. See ¶ 27 above.

C. Discovery Issues

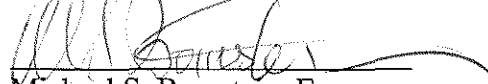
31. Denied. The effect of discovery on trial is important and has not previously been addressed. Second, the deposition of Sunoco manager Matthew Gordon does not require approval; a notice to attend is all that is required. Non-Sunoco persons are a separate matter.

32. Denied. For reasons already stated, the Procedural Order must be amended to address Flynn Complainants' concerns.

IV. Conclusion

WHEREFORE, Flynn Complainants pray that (a) a telephonic conference be arranged expeditiously for the purpose of discussing discovery and evidentiary issues not previously addressed in the current Procedural Order; and (b) an amended order be entered immediately thereafter.

Respectfully submitted,



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Attorney for Complainants

Dated: February 3, 2020

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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CERTIFICATE OF SERVICE

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