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April 6, 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 ANSWER OPPOSING FLYNN
COMPLAINANTS' MOTION FOR LEAVE TO SUBMIT ADDITIONAL
EVIDENCE**

Dear Secretary Chiavetta:

Attached for electronic filing with the Commission is Sunoco Pipeline L.P.'s Answer Opposing Flynn Complainants' Motion for Leave to Submit Additional Evidence.

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

Very truly yours,

/s/ Whitney E. Snyder

Thomas J. Sniscak
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Counsel for Sunoco Pipeline L.P.

WES/das
Enclosure

cc: Honorable Elizabeth Barnes (by email only ebarnes@pa.gov)
Per Certificate of Service

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).

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/s/ Whitney E. Snyder
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Whitney E. Snyder, Esquire

Dated: April 6, 2020

**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. ANSWER OPPOSING FLYNN COMPLAINANTS'
MOTION FOR LEAVE TO SUBMIT ADDITIONAL EVIDENCE**

Pursuant to 52 Pa. Code § 5.103(c), Sunoco Pipeline L.P. (SPLP) submits this Answer Opposing Flynn Complainants' (Complainants) March 16, 2020 Motion for Leave to Submit Additional Evidence (Motion). SPLP will respond to the substantive arguments of the Motion but will not and is not required to¹ provide a paragraph by paragraph response to the Motion particularly as it contains unnecessarily lengthy, repetitive, and irrelevant allegations and arguments.

1. The Motion requests reconsideration of a ruling Your Honor has already declined to reconsider. *See* Attachment A (Excerpt of Deposition Transcript) at N.T. 120:3-8 (upholding SPLP's objection to introduction of documents at issue here), N.T. 121:24-25 (declining to reconsider ruling). Particularly, the Motion seeks leave without good cause to untimely submit for the record and add to Complainants' direct case (which was due January 15, 2020 over a year from filing the Complaint) DEP Consent Orders and attachments thereto that have been resolved by

¹ Compare 52 Pa. Code § 5.61(b) (requiring answers to complaints admit or deny specifically all material allegations), with 52 Pa. Code § 5.103(c) (containing no such requirement for answers to motions).

DEP, are administratively final, and cannot be relitigated concerning past environmental permitting and construction issues halfway across the state (not in Chester or Delaware County)² that Complainants' do not have standing to raise and are outside the scope of the direct testimony of the Flynn Complainants' witnesses.

2. On February 25, 2020, Complainants' counsel attempted to use these exact documents at the deposition of Matthew Gordon. *Compare* Attachment A at N.T. 112:11-20 (Complainants' counsel referring to documents to be introduced as DEP consent orders relative to Raystown and Revolution), *with* Motion at A. ¶ 5 (seeking to introduce DEP orders relative to Raystown and Revolution). Complainants raised essentially the same arguments at the deposition that they raise here. Your Honor considered these arguments and rejected them:

I'm inclined to agree with Mr. Fox on this issue, that going into the permitting that was already resolved in the DEP consent orders is outside the scope of the direct testimony of the Flynn complainants' witnesses.

Attachment A at N.T. 120:3-8.

3. Complainants' counsel then challenged this ruling and Your Honor declined to reconsider it. Attachment A at N.T. 121:24-25.

4. Complainants' Motion wholly fails to mention Your Honor's prior ruling and denial of reconsideration of the exact issues it now raises. Complainants present no new arguments meriting yet another reconsideration. Thus, Complainants' Motion improperly attempts a third bite at this apple and should be denied on these grounds alone.

5. The Motion should likewise be denied because Your Honor's ruling was correct in the first (and second) instance. Nothing in the Motion merits reconsideration. Your Honor ruled that the DEP documents could not be used at the deposition in part because these documents raise

² See Motion at A. ¶ 5.

issues beyond the scope of Complainants' direct testimony. Your Honor has already made clear in the Order Granting SPLP's Omnibus Motion that Complainants cannot expand the scope of their direct testimony. On February 11, 2020, Your Honor ordered:

That all parties shall comply with the provisions of 52 Pa. Code § 5.243(e) which prohibits the introduction of evidence during rebuttal which should have been included in the party's case-in-chief or which substantially varies from the party's case-in-chief, unless the party is introducing evidence in support of a proposed settlement.

Order Granting Sunoco Pipeline L.P.'s Omnibus Motion at Ordering ¶ 4. At the deposition, SPLP argued these documents were outside the scope of Complainants' direct case and thus cannot become part of the case pursuant to the Omnibus Order and Your Honor agreed:

They have not established in any of their direct testimony that any of this has any relationship to the only thing that's at issue before the PUC and the PUC regulations, which is safety. They cannot point to a single thing that they put in their direct testimony that relates to that issue. He may want to argue this, that there's some pattern of conduct; but there's no direct testimony.

...

Your Honor, your omnibus order addresses this exact point and what the limitations are. And he has just conceded that it was not part of their direct testimony. That really ends the issue pursuant to the omnibus order.

...

JUDGE BARNES: I'm inclined to agree with Mr. Fox on this issue, that going into the permitting that was already resolved in the DEP consent orders is outside the scope of the direct testimony of the Flynn complainants' witnesses.

Attachment A at N.T. 117:12-21, 119:18; see also *Id.* at N.T. 120-2-8.

6. Complainants attempt to circumvent the February 11, 2020 Order and 52 Pa. Code § 5.243(e) by arguing that the documents were not available at the time of the October and November 2020 lay witness hearings and thus could not have been included in the parties' case-

in-chief, and would not substantially vary from the Complainants' case-in-chief.³ Each of these assertions is false.

7. Regarding availability of documents and ability to present them as part of Complainants' direct case through lay witness testimony, this argument is extremely misleading. First, Complainants' counsel already admitted that a lay witness could not testify as to these issues: **"The direct witnesses did not give testimony about this because it would not be within their competence."** Attachment A at N.T. 118:5-9 (emphasis added). Second, Complainants give no reason for not including the DEP documents or any expert testimony regarding pipeline construction with their written direct testimony on January 15, 2020. Complainants were free to present witnesses at the lay witness hearings or to present by January 15, 2020 written direct testimony from witnesses (expert or lay) who did not testify at the lay witness hearings.⁴ **Not all of the named Complainants testified at the lay witness hearings and Complainants could have presented written direct testimony and exhibits through lay and expert witnesses on January 15, 2020.** Complainants have not explained, and cannot explain, why they did not introduce this evidence as part of their written direct testimony.

8. Second, these documents do substantially vary from the evidence submitted as part of Complainants' case-in-chief, and allowing admission of these documents significantly broadens the scope of issues Complainants presented on direct because Complainants presented no expert testimony that SPLP's construction practices in Chester and Delaware Counties are in violation of any law or regulation over which the Commission has jurisdiction. Simply put,

³ See, e.g., Motion at A. ¶¶ 3-4, D. ¶ 141.

⁴ August 2, 2019 Procedural Order at p. 9 (giving litigants option to utilize lay witness hearing or written testimony procedures, but not both).

Complainants had ample opportunity to raise and support construction issues as they relate to safety, but they neglected to do so.

9. Third, the documents are irrelevant as Your Honor already found. The Commission has jurisdiction over pipeline safety, and as SPLP argued at the deposition, these documents have no relation to safety and Complainants have shown none:

The third thing, and I think this is maybe the most important, is **they have no evidence whatsoever** and **have offered no evidence in their direct testimony**, expert or otherwise, **about how these prior violations which are related to construction permitting for things that have already been constructed are a safety issue now.**

Attachment A at 115:2-9 (emphasis added). While Complainants' Motion repeatedly avers that they presented such evidence, it cites to absolutely no record evidence. In fact, Complainants' have admitted that the DEP documents they now try to introduce substantially vary from their case-in-chief because Complainants admittedly failed to present any expert testimony on pipeline construction. Complainants' counsel stated on the record that the documents at issue would be a subject area of expert testimony. Attachment A at N.T. 118:5-9 ("The direct witnesses did not give testimony about this because it would not be within their competence."). Since Complainants' presented no expert testimony on pipeline construction, the documents necessarily substantially differ from their case-in-chief.

10. DEP permitting violations and construction issues halfway or more across the Commonwealth are not evidence of any issues Complainants, who are from southeastern Pennsylvania, have standing to raise, particularly because there is no expert or other testimonial evidence showing a link to what is at issue here – Chester and Delaware County. DEP permitting and construction issues regarding Raystown and the Revolution gathering line are irrelevant to the case Complainants in fact presented, regardless of what they may have alleged in their Complaints

but failed to prove. There is no nexus between how the prior incidents discussed in the DEP documents are related to the safety of the Mariner East Pipelines in Chester and Delaware Counties.

11. Complainants' attempt to manufacture a nexus via the unverified Motion fails. Complainants allege that because of alleged permitting and construction issues regarding Raystown and Revolution, that somehow equates to proof that SPLP "cannot be trusted to operate the Mariner East pipeline in high consequence areas." *See, e.g.*, Motion at B. ¶ 118. Complainants' theory that construction halfway across the Commonwealth has some bearing on operations of pipelines in Chester and Delaware County is not explained. Instead, Complainants (apparently recognizing that they have not put on substantial evidence of SPLP violating a law or regulation over which the Commission has jurisdiction regarding pipeline construction), attempt to make a case that SPLP is "wanton and reckless" by making unsworn allegations which in any event are irrelevant to Chester and Delaware County. Those allegations are not substantial evidence and cannot be used to show SPLP has violated a law or regulation over which the Commission has jurisdiction. Moreover, the past issues in the DEP documents have been resolved with DEP. This proceeding is not a relitigation of environmental issues resolved by those DEP Orders. If Complainants wanted to be heard on those issues, they had a full opportunity to challenge those consent orders and cannot now collaterally challenge that settled litigation. They did not raise a challenge in the proper forum, and those DEP orders are final and the environmental issues therein that they want to raise here are not within the Commission's jurisdiction.

12. The documents are irrelevant to Complainants' case-in-chief and if admitted will substantially vary from Complainants' case-in-chief and broaden the issues SPLP must address in its testimony. Complainants are attempting to add to their direct case after the deadline, which is

not allowed. Complainants have shown no good cause shown for the untimely submission of the DEP documents, and the Motion should be denied.

13. Alternatively, if Your Honor does allow Complainants to supplement their direct testimony to admit these documents, SPLP must be given additional time from the date of that ruling for submission of SPLP's testimony as it will have to engage additional witnesses and prepare testimony on the issues raised. SPLP believes 60 days from the date of that ruling will be sufficient and that the entire schedule will have to be extended and reset.

WHEREFORE, SPLP respectfully requests the Motion be denied.

Respectfully submitted,

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Attorneys for Respondent Sunoco Pipeline L.P.

Dated: April 6, 2020

Attachment A

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2 held off the record.)

3 - - -

4 MR. BOMSTEIN: Your Honor,
5 this is Mike Bomstein.

6 Can you hear me okay?

7 JUDGE BARNES: Yes.

8 MR. BOMSTEIN: Thank you for
9 taking our call. We've been getting along
10 just fine. We just have one very serious
11 disagreement and we're hoping you will assist
12 us.

13 JUDGE BARNES: Go ahead.

14 MR. BOMSTEIN: All right.
15 We've prepared, on behalf of the Flynn
16 complainants, a number of questions concerning
17 Sunoco's history of violating permits and
18 violating regulations in connection with
19 construction of Mariner East 2 and 2X.

20 And we believe that this is,
21 first, within the scope of the complaint
22 because we've alleged that Sunoco's practices
23 are reckless, that they're not safe, adequate
24 or reasonable; and that how they have
25 persistently violated DEP permits and violated

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2 regulations is something that's relevant to
3 that.

4 In addition, the scope of the
5 deposition notice identified two areas that we
6 believe cover this. The first is DEP orders
7 and enforcement and consent orders relative to
8 Mariner East pipelines from 2014 to present,
9 including but not limited to January 3, 2020
10 in reference to the Revolution pipeline.

11 We also identified substance
12 of matters at issue in DEP orders and
13 enforcement and consent orders relative to
14 Mariner East pipelines from 2014 to present,
15 including but not limited to January 3, 2020
16 in reference to the Revolution pipeline.

17 So the substance of the
18 matters at issue in these orders, including
19 consent orders, is violations. And basically
20 that's what the orders are about. For
21 example, the incident at Raystown --

22 JUDGE BARNES: Raystown.

23 MR. BOMSTEIN: Raystown, thank
24 you very much.

25 By way of example, the DEP

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2 made certain findings with respect to repeated
3 conversion to HDD drilling, as opposed to the
4 permitted kind of drilling, open trench, and
5 ultimately a consent order was entered.

6 We believe that each of those
7 instances demonstrates a willful disregard for
8 the law.

9 So, that's where we're coming
10 from, that's what we're interested in
11 inquiring about. Counsel has a different
12 notion both of what the scope of the
13 deposition is and whether or not these
14 questions are relevant.

15 I will leave it to Mr. Fox to
16 state their position.

17 MR. FOX: Good morning, Your
18 Honor.

19 JUDGE BARNES: Good morning.

20 MR. FOX: So I have a series
21 of objections to this. So first of all, this
22 is not a 30(b)(6) deposition, where a witness
23 is representing the company on all issues
24 relating to this matter or potentially
25 relating to this matter. As Your Honor said,

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2 it's supposed to be narrowly tailored. So
3 that's number one.

4 Number two, he is going into
5 alleged violation of DEP permits for things
6 that have happened historically. Those are
7 embodied in consent orders. Those are issues
8 that have been resolved with the Department of
9 Environmental Protection. This is not a
10 relitigation of DEP regulations. This is in
11 front of the PUC.

12 They had a full opportunity to
13 challenge any of those violations, to
14 challenge the consent orders which resolved
15 those violations. They did not. They are
16 administratively final. They are not within
17 the jurisdiction of the PUC.

18 In addition to that, the
19 issues that he is raising are not inside
20 Chester and Delaware County. He's asking
21 about the Revolution pipeline incident.

22 Again, not something that at
23 all relates to this particular matter, these
24 particular lines. It's not even the same
25 pipeline.

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2 The third thing, and I think
3 this is maybe the most important, is they have
4 no evidence whatsoever and have offered no
5 evidence in their direct testimony, expert or
6 otherwise, about how these prior violations
7 which are related to construction permitting
8 for things that have already been constructed
9 are a safety issue now.

10 To the extent that
11 Mr. Bomstein has asked about ongoing
12 construction issues, we have allowed any of
13 that questioning that he has asked. He's
14 asked about many incidents that are ongoing
15 that are still the subject of construction.
16 We have not objected.

17 But there is no direct
18 testimony that they've offered at all as to
19 how these prior incidents are safety related
20 for things that have already been constructed
21 and been resolved with the DEP. It's far
22 afield. This is supposed to be a narrowly
23 tailored deposition on specific topics, and we
24 are not relitigating issues with DEP and DEP
25 permits that have been resolved and

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2 administratively final.

3 MR. BOMSTEIN: Your Honor, may
4 I respond briefly?

5 JUDGE BARNES: Yes.

6 MR. BOMSTEIN: First of all,
7 the fact that Sunoco got caught in hundreds of
8 instances and managed to pay fines to DEP
9 doesn't at all eliminate the concern that we
10 have for their pattern historically of
11 recklessness.

12 They're not suddenly a safe
13 company if the people who are making these
14 decisions over and over and over got slapped
15 on the hand and then they're given permission
16 to proceed. For example, the recent
17 \$30 million fine is nothing to a company that
18 has billions and billions of dollars in
19 revenue.

20 So, it is very relevant. And
21 in fact, Your Honor ruled in a discovery
22 ruling concerning objections to questions
23 about the Revolution pipeline, that Sunoco was
24 to answer questions. And they did, after we
25 went back and forth several times. It's

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2 certainly relevant.

3 If they have a pattern going
4 back several years of unsafe practices in
5 hundreds of instances, the fact that those are
6 resolved at the DEP level doesn't mean there's
7 any less concern as to whether they should
8 continue to operate and whether they are a
9 safe, adequate and reasonable operator.

10 MR. FOX: All of those
11 discovery issues were prior to their direct
12 testimony submission. They have not
13 established in any of their direct testimony
14 that any of this has any relationship to the
15 only thing that's at issue before the PUC and
16 the PUC regulations, which is safety.

17 They cannot point to a single
18 thing that they put in their direct testimony
19 that relates to that issue. He may want to
20 argue this, that there's some pattern of
21 conduct; but there's no direct testimony.

22 This deposition is not for
23 purposes of direct testimony. That ship has
24 sailed and this is supposed to be for
25 cross-examination. They have not put that

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2 into evidence. They can't now start wanting
3 to put that into evidence, where they had the
4 opportunity and did not do so.

5 MR. BOMSTEIN: Your Honor, we
6 have not had our ship sail. The direct
7 witnesses did not give testimony about this
8 because it would not be within their
9 competence.

10 Mr. Gordon has been called as
11 a witness in accordance with the rules of
12 procedure. The scope is very clear. There's
13 no reason he, who is particularly in a
14 position to talk about permits and violation
15 of permits in many instances, should not be
16 allowed to testify.

17 MR. FOX: Honestly, Your
18 Honor, Mr. Bomstein just made my argument,
19 because he has admitted this this is not part
20 of their direct testimony. He could have
21 taken Mr. Gordon's deposition prior to the
22 deadline for direct testimony. He could have
23 submitted that on cross as part of his direct
24 testimony if he wanted to. They chose not to.

25 He's also admitted that it's

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2 not within their competence. He can't use a
3 deposition after the close of direct testimony
4 to establish direct testimony. That is a
5 violation of the PUC rules. He cannot do
6 that. It's outside the scope.

7 MR. BOMSTEIN: If Your Honor,
8 please, it is not outside the scope. It is
9 not outside the scope of what your procedural
10 order said. And we have no constraints on
11 general discovery rules up to this point.

12 They opposed his deposition.
13 Your Honor permitted it. There is nothing in
14 the rules or in your prior orders that limits
15 the scope, other than giving them fair notice
16 of the topics. And we gave them fair notice
17 of the topics.

18 MR. FOX: Your Honor, your
19 omnibus order addresses this exact point and
20 what the limitations are. And he has just
21 conceded that it was not part of their direct
22 testimony. That really ends the issue
23 pursuant to the omnibus order.

24 MR. BOMSTEIN: I believe, Your
25 Honor, the omnibus order does not direct

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2 itself to this at all.

3 JUDGE BARNES: I'm inclined to
4 agree with Mr. Fox on this issue, that going
5 into the permitting that was already resolved
6 in the DEP consent orders is outside the scope
7 of the direct testimony of the Flynn
8 complainants' witnesses.

9 MR. FOX: Thank you, Your
10 Honor.

11 MR. BOMSTEIN: Your Honor,
12 before you conclude, we are not contending
13 that it was improper for DEP to make its
14 rulings. We are not contending that there was
15 anything improper about the DEP decision. We
16 are not challenging it and it was not
17 challenged.

18 What we are saying is that a
19 matter that was not before the DEP, whether in
20 hundreds of instances they did these unsafe
21 things should not be part of our case, you've
22 ruled previously that matters involving
23 safety, including Revolution pipeline, are
24 relevant.

25 MR. FOX: Then you have to put

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2 on direct evidence of that, which you admit
3 that you have not. You could have taken his
4 deposition before the deadline for direct
5 testimony and put that on. You did not.

6 We're not relitigating DEP
7 consent orders or the underlying facts of DEP
8 consent orders. That's expanding the scope of
9 what you have identified as part of your
10 direct case. It's just simply too late to do
11 that.

12 MR. BOMSTEIN: Your Honor, we
13 disagree for obvious reasons. There are no
14 procedural orders, omnibus or otherwise, where
15 you stated that information obtained during
16 the course of routine discovery could not be
17 used -- obtained and used in the case.

18 You identified lay witnesses
19 who testified earlier, expert witnesses who
20 will testify later. We've already said this
21 in our motions. You did not, with all due
22 respect, preclude what we are doing today and
23 what we intend to do today.

24 JUDGE BARNES: All right. I'm
25 not convinced to reconsider my ruling.

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2 MR. BOMSTEIN: Very well.

3 MR. FOX: Thank you, Your
4 Honor.

5 MR. BOMSTEIN: We will proceed
6 with it. And thank you for your time.

7 JUDGE BARNES: All right,
8 thank you. Goodbye.

9 - - -

10 (Whereupon, a discussion was
11 held off the record.)

12 - - -

13 MR. FLANDREAU: Gentleman,
14 Exhibit 32, which is a letter from my client
15 posting for public information, Mr. Bomstein,
16 you correctly read into the record the date of
17 that letter; however, on its face, that's an
18 erroneous date and must be a typographical
19 error on the date.

20 The body of the letter makes
21 it clear that the events described were
22 January and February 2020 timeframe; whereas,
23 the dating of the letter itself is January 31,
24 2019. Clearly a mistake. I didn't want there
25 to be confusion in the record, so I'm offering