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June 1, 2020

**VIA ELECTRONIC FILING**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, Filing Room  
Harrisburg, PA 17120

Re: Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement  
v. Sunoco Pipeline L.P. Docket Number C-2018-3006534; **SUNOCO PIPELINE  
L.P.'S COMMENTS TO MAY 21, 2020 SECOND TENTATIVE OPINION  
AND ORDER**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is Sunoco Pipeline  
L.P.'s Comments to the Commission's May 21, 2020 Second Tentative Opinion and Order.

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

Very truly yours,

*/s/ Thomas J. Sniscak*

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Whitney E. Snyder  
*Counsel for Sunoco Pipeline L.P.*

WES/  
Enclosure

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Hon. Elizabeth H. Barnes, (pdf only via email to [ebarnes@pa.gov](mailto: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) to the extent possible. Due to COVID-19-related government restrictions, undersigned counsel is unable to serve physical copies via first class mail but has served all parties to this proceeding via email as indicated below. This document has been filed electronically on the Commission's electronic filing system.

### VIA ELECTRONIC MAIL ONLY

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/s/ Thomas J. Sniscak  
Thomas J. Sniscak, Esq.  
Whitney E. Snyder, Esq.

Dated: June 1, 2020

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PENNSYLVANIA PUBLIC UTILITY	:	
COMMISSION, BUREAU OF	:	
INVESTIGATION AND	:	
ENFORCEMENT	:	
	:	
Complainant,	:	
	:	Docket No. C-2018-3006534
v.	:	
	:	
SUNOCO PIPELINE L.P.,	:	
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	:	
Respondent.	:	
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**SUNOCO PIPELINE L.P. COMMENTS TO MAY 21, 2020 SECOND TENTATIVE  
OPINION AND ORDER**

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Sunoco Pipeline L.P. (SPLP) respectfully submits these Comments to the May 21, 2020 Second Tentative Opinion and Order (May 21 Order) modifying the Joint Petition for Approval of Settlement as amended on June 28, 2019 by the Addendum to the Joint Petition for Approval of Settlement<sup>1</sup> (Settlement) between SPLP and the Commission’s Bureau of Investigation and Enforcement (BI&E) (SPLP and BI&E collectively, the Joint Petitioners) and as amended on March 10, 2020 by the Commission (March 10 Order) to request modification of certain directives contained in the May 21 Order related to preparation and submission of the Remaining Life Study (RLS) and the public summary of the RLS.

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<sup>1</sup> On June 28, 2019, SPLP and BI&E filed an Addendum to the Settlement. The Addendum modifies the Settlement Agreement Condition of Settlement at Paragraph 21 in exchange for SPLP not exercising its withdrawal from the Settlement at that time due to the Commission’s not considering the Settlement directly and instead referring the matter to an Administrative Law Judge for determinations of what, if any, further process is due or appropriate.

## I. COMMENTS

1. In both the March 10 and May 21 Orders, the Commission modified the Settlement by adding directives that parties did not agree to for communicating with the Independent Expert and other procedures after the Administrative Law Judge's Initial Decision approved the Settlement without modification. Notably, no party filed exceptions advocating the modifications to the settlement in the March 10 Order. Then, in the May 21 Order, the Commission without any evidentiary basis, and contrary to the way the Commission has always handled audits by its staff or independent auditor experts, imposed limitations on the RLS Independent Expert's ability to communicate with SPLP. In both Orders, the Commission also *sua sponte* imposed procedures for submission of the RLS and public summary of the RLS which fail to strictly comply with the Public Utility Confidential Security Information Disclosure Protection Act, 35 P.S. §§ 2141.1-2141.6 (CSI Act). The Commission unilaterally modified the Settlement and imposed conditions reasoning they were appropriate so as not to "unnecessarily call into question the independence and objectivity of the Independent Expert's Remaining Life Study and public Summary,"<sup>2</sup> despite the fact that by the terms of the Settlement the expert must and will be independent.<sup>3</sup> There is no legal standard to "unnecessarily call into question the independence and objectivity" as a basis to *sua sponte* impose conditions upon a settlement. Similarly, there is no record evidence to support this supposition or prejudging implication that SPLP would try to influence the conclusions of the Independent Expert who is, like any outside Auditor the Commission retains for Management or

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<sup>2</sup> May 21 Order at 24.

<sup>3</sup> *E.g.* May 21 Order at Ordering Paragraph 4 ("That the Remaining Life Study shall be conducted by a qualified Independent Expert that has conducted independent studies for, but not limited to, governmental entities, such as the Pipeline and Hazardous Materials Safety Administration (PHMSA) or State Commissions, and the Pipeline Research Counsel International (PRCI), American Petroleum Institute ("API"), or the Interstate Natural Gas Association of America (INGAA).").

Financial Audits, *independent* by definition. Likewise, the Commission’s modification and assumption that a non-lawyer independent pipeline expert is necessarily an expert in Pennsylvania’s legally nuanced CSI Act<sup>4</sup> is unfounded and wholly speculative and is inconsistent with a strict interpretation of the CSI Act.

2. The Commonwealth Court has recently held the Commission should not raise and inject such issues *sua sponte* and reach conclusions against the wishes of the parties, particularly where there is no record evidence supporting the Commission’s decision. *Sunoco Pipeline L.P. v. State Senator Andrew Dinniman and PUC*, 217 A.3d 1283, 1289 (Pa. Cmwlth. 2019) (“The PUC erred in raising the issue of personal standing *sua sponte* and injecting this theory of standing into the case against Senator Dinniman’s wishes.”). The March 10 and May 21 Orders violate that holding, discourage settlement, and create a remedy for a problem not driven by facts but rather by subjective and incorrect optic “concerns.”

3. The Settlement, which Judge Barnes approved as clearly in the public interest, was a comprehensive and public interest accord after extensive negotiations and discussions between BI&E and SPLP and it has now morphed into something that, respectfully, is presently unacceptable to SPLP for reasons explained below. The rejection of the Settlement that Judge Barnes approved without modification and consequent delay of a major feature—a Remaining Life Study—that the Governor specifically requested in February 2019 (over 15 months ago) is contrary to the Governor’s request.

4. The May 21 Order’s restrictions upon whom and how the Independent Expert can communicate with, and its repeated *sua sponte* modification of the Settlement prejudging SPLP would somehow influence an independent expert and establishing non-fact based procedures that

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<sup>4</sup> May 21 Order at 24-25.

no party agreed to in the Settlement, has unnecessarily complicated and delayed approval and implementation of the Settlement that, as BI&E itself correctly and commendably recognized in its Statement in Support, contains significant public benefits and goes above and beyond regulatory requirements and what could have been achieved through litigation.<sup>5</sup> These actions are contrary to the Commission's regulation encouraging settlements. 52 Pa. Code § 5.231(a) ("It is the policy of the Commission to encourage settlements.") and in effect discourages settlement. Given these circumstances, SPLP is strongly considering exercising its right to withdraw from the Settlement and litigate this case. However, SPLP files these comments in hopes that these issues can be finally and reasonably resolved as suggested below.

5. **Submission of RLS and Public Summary.** Requiring the Independent Expert to submit the RLS and public summary of the RLS directly to BI&E is contrary to a strict interpretation of the CSI Act. While SPLP appreciates and supports the Commission's stated interpretation and implementation of the CSI Act and Right-to-Know Law (RTKL) and believes that the Commission would not intentionally allow release of CSI in the RLS, the Commission is not the final arbiter of whether a document allegedly not submitted in strict compliance with the CSI Act and Commission's procedures loses CSI Act protections. As of the submission of these comments, that is very much an open legal issue before Commonwealth Court. As the Commission is aware, in various RTKL appeals the Office of Open Records (OOR) has found cause to usurp the Commission's exclusive authority to decide whether records should be protected under the CSI Act where a record was allegedly not submitted in strict compliance with a strict

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<sup>5</sup> BI&E Statement in Support at 5 ("I&E submits that the Settlement constitutes a reasonable compromise of the issues presented and achieves a preferable outcome compared to one that would have been reached through litigation in that SPLP has agreed to perform actions above and beyond those required by any applicable law or regulation."), 9-18.

interpretation the CSI Act and the Commission's implementing regulations.<sup>6</sup> For example, in *PUC v. Friedman*, 1560 CD 2019 and *Energy Transfer v. Friedman*, 1576 CD 2019 (consolidated), OOR held that neither the Commission nor SPLP were entitled to protection under the CSI Act for SPLP's CSI submissions to BI&E where no public version of the documents was submitted to BI&E; OOR determination, now on appeal to the Commonwealth Court, was that SPLP waived protection because it allegedly did not strictly comply with the Commission's regulations. *Friedman v. Pennsylvania Public Utility Commission*, Docket No. AP 2019-1325, Final Determination (OOR Oct. 10, 2019) at 21. While these cases are on appeal (by both the Commission and SPLP), SPLP cannot take the risk of losing CSI protections if OOR's interpretation of the CSI Act, the Commission's implementing regulations, and the RTKL are upheld due to the March 10 and May 21 Orders which essentially delegate power to the Independent Expert to decide what in its report regarding information provided by SPLP is CSI or not and to usurp SPLP's statutory obligation and right under the CSI to invoke CSI protection for information it provides.

6. Given the severe penalties under the CSI Act for release of CSI, it seems ill-advised for the Commission itself to take and/or recommend SPLP to take this risk. It seems similarly ill-advised to put the Independent Expert or BI&E in that position as part of the Commission. The CSI Act makes it a crime for an agency employee to release a record containing CSI. 35 P.S. § 2141.5(a) (“[a]n agency shall not release, publish, or otherwise disclose a public utility record or portion thereof which contains confidential security information...”); 35 P.S. § 2141.6 (subjecting

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<sup>6</sup> See *PUC v. Friedman*, 980 CD 2019 and *Energy Transfer v. Friedman*, 982 CD 2019 (consolidated); *PUC v. Friedman*, 1560 CD 2019 and *Energy Transfer v. Friedman*, 1576 CD 2019 (consolidated); *PUC v. Moss*, 1722 CD 2019 and *Energy Transfer v. Moss*, 1700 CD 2019 (consolidated); *PUC v. Blanchard*, 19 CD 2020 and *Energy Transfer v. Blanchard*, 26 CD 2020 (consolidated).

a public official who “knowingly or recklessly... discloses...confidential security information” to discharge and criminal penalties).

7. Moreover, while the Commission will always strive to assure that CSI in its possession is not released, it cannot presumptively take the initial statutory right to and responsibility for designation, submission, and protection of the information—that is the responsibility and concern of the utility. Nor can the Commission waive or modify the CSI Act, regardless of whether it can waive or interpret its own regulations and procedures. Under the CSI Act, SPLP is responsible for the determination, identification, and submission of CSI information to the Commission:

**GENERAL RULE.— The public utility is responsible** for determining whether a record or portion thereof contains confidential security information. **When a public utility identifies a record as containing confidential security information, it must** clearly state in its transmittal letter, upon submission to an agency, that the record contains confidential security information and explain why the information should be treated as such.

35 Pa.C.S. § 2141.3(a) (emphasis added); *see Id.* § 2141.3(c) (“Challenges to a **public utility’s designation** or request to examine records containing confidential security information by a member of the public shall be made in writing to the agency in which the record or portions thereof were originally submitted. . .”) (emphasis added). In line with the public utility’s responsibility under Section 2141.3(a), the CSI Act expressly limits the Commission’s CSI “filing protocols and procedures” to the public utility:

**SUBMISSION OF CONFIDENTIAL SECURITY INFORMATION.—** An agency shall develop filing protocols and procedures **for public utilities to follow when submitting records**, including protocols and procedures for submitting records containing confidential security information. Such protocols and procedures shall instruct **public utilities who submit records to an agency** to separate their information into at least two categories: (1) PUBLIC.— Records or portions thereof subject to the provisions of the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know Law. (2)

CONFIDENTIAL.— Records or portions thereof requested to be treated as containing confidential security information and not subject to the Right-to-Know Law.

35 Pa. C.S. § 2141.3 (b) (emphasis added). While the Commission may waive its regulations, the Commission cannot, as it does in the March 10 and May 21 Orders, waive SPLP's statutory duty and right to identify SPLP's CSI prior to submission pursuant to a strict interpretation of the CSI Act.

8. Moreover, SPLP's interest in seeing that an Independent Expert does not unintentionally disclose its CSI also calls for SPLP directly and primarily to review the draft document to be made public. Once it is made public, it cannot be called back. The whole purpose of the CSI Act is to protect in the greatest way CSI of the utility and as the utility SPLP respectfully submits it is best situated to determine if the document to be released is CSI because it has the best understanding of how the information relates to integrity and safety of its facilities—a point the General Assembly recognized in the CSI Act. *See* 35 Pa.C.S. § 2141.3. If the Independent Expert or BI&E would disagree, the CSI Act and the Commissions regulations have a legal process and remedy for any challenge of SPLP's CSI determination. SPLP cannot and will not waive its rights to claim information it provides to the Commission or under any Order by the Commission is CSI and treated as such.

9. The Tentative Orders compounded the problems presented by these issues with respect to the public summary of the RLS when it ordered that SPLP will not be allowed to review the RLS public summary for CSI prior to its submission to BI&E. Such a document could be considered a public record under the RTKL if it contains CSI and is not properly marked by the submitting utility. In sum, this is no criticism of the Independent Expert or BI&E or for that matter existing Commission practices and procedures; rather, it is a reservation of SPLP's rights and

obligations regarding CSI and the Commission cannot interpose a substitute procedure that in effect removes SPLP's CSI Act rights and responsibilities to claim any information it provides to the Commission or pursuant to any order is CSI without violating the CSI Act and causing RTKL issues.

10. **Requested Procedures for the RLS.** SPLP requests the Commission order the following procedure for submission of the RLS to BI&E, and submits that the procedure will resolve the Commission's "concerns" regarding transparency and objectivity:

- The Independent Expert provides a locked-form PDF to SPLP to review solely for the purposes of marking CSI.
- SPLP would then provide to the Independent Expert the portions SPLP designates as CSI so the expert can incorporate such designations and branding of those provisions within the study.
- The Independent Expert would then provide a marked and locked copy of the designated and branded PDF to SPLP.
- SPLP would then be responsible for providing the RLS to BI&E, as required by the CSI Act, with an affidavit attesting that SPLP did not alter substance of the study but rather designated and branded for CSI.

11. **Requested Procedures for RLS Public Summary.** SPLP requests the Commission order the following procedure for submission of the public summary of the RLS to BI&E, and submits that the procedure will resolve the Commission's concerns regarding transparency and objectivity:

- The Independent Expert provides a locked form PDF to SPLP to review *solely for the purposes of designating and branding CSI.*

- If SPLP finds no CSI or other proprietary materials, the expert can give the summary directly to BI&E.
- If SPLP finds CSI or other proprietary materials, it will communicate jointly with BI&E and the Independent Expert to excise or redact any such information.
- Once any CSI/proprietary information is excised or redacted, the Independent Expert would provide the public summary to BI&E.

12. **Communications with Independent Expert.** The Commission ordered that communications between SPLP and the Independent Expert must include BI&E. This is not based on record evidence, is unnecessary, and is at cross-purposes with the Independent Expert obtaining the information it needs from each party and may create significant timing issues given the six-month timeframe<sup>7</sup> to complete the study. It also prejudices and prejudicially suggests SPLP would attempt to somehow influence an Independent Expert, an expert who by the terms of the Settlement is to have done work for public agencies and whose reputation is based upon being independent—calling it like she or he sees it. The Commission ordered this procedure “in the interest of preserving the transparency and objectivity of the Independent Expert’s final form Study and public Summary.” May 21 Order at 23. Again, the terms of the Settlement dictate the expert must and will be independent.<sup>8</sup> There is no record evidence to support the Commission’s *sua sponte*

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<sup>7</sup> The parties negotiated and agreed to a six-month time frame based on reasonable assumptions about sufficient, efficient, unrestricted and open communication flow with the independent expert. The May 21 Order’s modifications identified in these Comments works at cross-purposes with this and thus calls into question the ability to meet the six-month deadline.

<sup>8</sup> *E.g.* May 21 Order at Ordering Paragraph 4 (“That the Remaining Life Study shall be conducted by a qualified Independent Expert that has conducted independent studies for, but not limited to, governmental entities, such as the Pipeline and Hazardous Materials Safety Administration (PHMSA) or State Commissions, and the Pipeline Research Counsel International (PRCI), American Petroleum Institute (“API”), or the Interstate Natural Gas Association of America (INGAA).”).

supposition and speculative concern regarding objectiveness and transparency or the implication that SPLP would try to influence the conclusions of the Independent Expert. SPLP is unaware of the Commission ordering such procedures for BI&E's participation for any other proceeding such as a financial or managerial audit where the Commission engaged an outside independent consulting auditor firm. Moreover, in such audits which essentially are independent expert studies or reports, the auditors (including the Commission's auditors) routinely provide a draft of the report or study to the utility so as to avoid any inadvertent inaccuracy that can essentially invalidate the study's conclusions. There is no reason in law or fact to treat SPLP differently, to question anyone's objectivity as an independent expert, or to prejudge anyone with no evidence based upon conjecture.

13. On a practical level, the Tentative Order's restrictions undermine the "independence" of the Independent Expert and perhaps the conclusions. The Independent Expert should be just that, independent – and that includes the ability to talk to and request information directly from and unilaterally with SPLP, and for that matter, to talk unilaterally with BI&E, or if the Independent Expert believes appropriate, to communicate with both. There should be no hard and inflexible edict by the Commission to which the parties did not feel was necessary nor agree to restrict or mandate this process. Moreover, this procedure is wholly unnecessary. If the Settlement is approved without the modifications that are the subject of these comments by final order and SPLP does not exercise its rights to withdraw from the Settlement, SPLP must comply with it. Per the terms of the Settlement, the expert must and will be *independent*. She or he also must have a background that involves providing studies for regulators. It is BI&E's role to first select the expert from a list of three submitted by SPLP and then to investigate and enforce if they have reason to believe non-compliance has occurred; not for the Commission by the May 21 Order to prejudge compliance or conjure influence. As a utility SPLP would be required to cooperate

reasonably with any such investigation. The May 21 Order's procedure also works at cross-purposes with open communications and transparency with the Independent Expert. There may be conversations the Independent Expert wants to have solely with BI&E or solely with SPLP where if both parties were involved, one party may not be willing to be as frank with the expert because the other party will be listening.<sup>9</sup> This is a matter that is or should be left to the Independent Expert's informed judgment and professional discretion.

14. This procedure also creates a negative timing issue. The RLS must be completed within six months. Requiring that both parties participate in any communications with the Independent Expert means additional schedules must coalesce for the opportunity to have a communication. The Independent Expert cannot simply pick up the phone and call one of the parties.

15. **Requested Modification to May 21 Order.** SPLP requests the Commission modify the May 21 Order to allow for the Independent Expert to communicate as they see fit using practices customary in conducting such studies by such experts including with SPLP and BI&E individually or collectively as the expert sees fit.

## **II. CONCLUSION AND REQUESTED MODIFICATIONS OF MAY 21 ORDER**

16. The May 21 Order's restrictions upon with whom and how the Independent Expert can communicate and the repeated *sua sponte* modification of the Settlement prejudging SPLP would somehow influence an independent expert and establishing non-fact based procedures that no party requested in the Settlement has complicated and delayed approval and implementation of

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<sup>9</sup> It also would be unusual in the context of an Independent Expert's task to be forced to include BI&E, who essentially is a prosecutor, to be involved in conversations or requests for information in developing the study. It could have a chilling effect and result in multiple counsel on all sides being involved. The Commission should keep this process akin to the many audit procedures it uses.

the Settlement that, as BI&E itself correctly and commendably recognized in its Statement in Support, contains significant public benefits and goes “above and beyond regulatory requirements.”<sup>10</sup> These actions are contrary to the Commission’s regulation encouraging settlements. 52 Pa. Code § 5.231(a) (“It is the policy of the Commission to encourage settlements.”). SPLP is strongly considering exercising its rights to withdraw from the Settlement and litigate this case. SPLP is filing these comments in hopes that these issues can be finally and reasonably resolved.

**WHEREFORE**, SPLP respectfully requests the Commission issue an order:

1. Modifying procedures for submission of the RLS as follows:
  - The Independent Expert provides a locked form PDF to SPLP to review solely for the purposes of marking CSI.
  - SPLP would then provide to the Independent Expert the portions SPLP designates as CSI so the expert can mark those provisions within the study.
  - The Independent Expert would then provide a marked and locked copy of the PDF to SPLP.
  - SPLP would then be responsible for providing the RLS to BI&E, as required by the CSI Act, with an affidavit attesting that SPLP did not alter the study.
2. Modifying procedures for submission of the RLS public summary as follows:
  - The Independent Expert provides a locked form PDF to SPLP to review solely for the purposes of marking CSI.

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<sup>10</sup> BI&E Statement in Support at 5 (“I&E submits that the Settlement constitutes a reasonable compromise of the issues presented and achieves a preferable outcome compared to one that would have been reached through litigation in that SPLP has agreed to perform actions above and beyond those required by any applicable law or regulation.”), 9-18.

- If SPLP finds no CSI or other proprietary materials, the expert can give the summary directly to BI&E.
- If SPLP finds CSI or other proprietary materials, it will communicate jointly with BI&E and the Independent Expert to excise any such information. Once any CSI/proprietary info is excised, the Independent Expert would provide the public summary to BI&E.

3. Modifying procedures for communications with the Independent Expert to communicate using practices customary in conducting such studies by such experts including with SPLP and BI&E individually or collectively as the expert sees fit using standard communication practices used in conducting such studies.

Respectfully submitted,

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Dated: June 1, 2020