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REPLY TO:

Center City

July 13, 2020

Electronic Filing

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

Re: Flynn, et al. v. Sunoco Pipeline L.P.,
Docket Nos. C-2018-3006116, P-2018-3006117
DiBernardino, Docket No. C-2018-3005025 (consolidated)
Britton, Docket No. C-2019-3006898 (consolidated)
Obenski, Docket No.C-2019-3006905 (consolidated)
Andover, Docket No. C-2018-3003605

FLYNN COMPLAINANTS' ANSWER TO SUNOCO'S MOTION TO DETERMINE OBJECTIONS AND ANSWERS TO REQUEST FOR ADMISSIONS AND INTERROGATORIES

Dear Secretary Chiavetta:

Attached for electronic filing with the Commission is Flynn Complainants' Answer to Sunoco's Motion to Determine Objections and Answers to Request for Admissions and Interrogatories.

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

Very truly yours,

MICHAEL S. BOMSTEIN, ESQ.

MSB:mik

cc: Per Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

MEGHAN FLYNN	:	
ROSEMARY FULLER	:	
MICHAEL WALSH	:	
NANCY HARKINS	:	
GERALD MCMULLEN	:	DOCKET NO. C-2018-3006116
CAROLINE HUGHES and	:	DOCKET NO. P-2018-3006117
MELISSA HAINES	:	DOCKET NO. C-2018-3005025
Complainants	:	DOCKET NO. C-2019-3006898
v.	:	DOCKET NO. C-2019-3006905
	:	DOCKET NO. C-2018-3003605
	:	
SUNOCO PIPELINE L.P.,	:	
Respondent	:	

FLYNN COMPLAINANTS' RESPONSE TO
SUNOCO'S MOTION TO COMPEL DISCOVERY

I. BACKGROUND

This proceeding against Sunoco has challenged the company's ability to build and operate HVL pipelines that have the capability of wreaking havoc and causing the catastrophic loss of life and property throughout Pennsylvania. Sunoco's historic record in operating pipelines is one of the worst in its industry.

Sunoco's callous disregard for the environment and regular flouting of state and federal regulations, as shown by the incidents involving Raystown Lake, the Revolution Pipeline, and the leak in Morgantown, all support Complainants' allegations that the Company is not fit to build or operate the Mariner East pipelines or any other petroleum product pipelines.

The Flynn Complainants' most recent Amended Complaint alleges in great detail how Sunoco is in violation of its obligation to provide a public awareness program compliant with federal regulations. The Amended Complaint alleges that the siting of the Mariner East pipelines is dangerously close to homes, businesses, and other facilities in high-consequence areas of

Chester and Delaware Counties. The Amended Complaint also alleges that the condition of the existing circa 1930s 8-inch and 12-inch pipelines is questionable and must be investigated.

Whatever the precise scope of the parties' respective claims and defenses, nothing in the Amended Complaint or the evidentiary hearings or the direct testimony of Complainants' three expert witnesses involves or touches upon the question of whether or not the law firm Manko Gold endangers children.

II. THE CURRENT DISPUTE

The circumstances leading to the instant motion are not substantially in dispute. Attorney Fox was offended by an anonymous internet user's logon information, not directed at him, that spelled out "Fuck You" and "Manko Gold Endangers Children."

Mr. Fox was not satisfied when no one took responsibility for the offensive communication and so his firm sought discovery. Discovery was not directed to all parties but rather to Thomas Casey, the Flynn Complainants and Eric Friedman (nominally Andover). In common, all of the targets are persons who are strong, publicly visible opponents of this pipeline project.

Moreover, as alleged by Sunoco's very experienced attorneys, the documents stored in Manko Gold's ShareFile systems are public. Flynn complainants are aware of no reason that this particular ShareFile link could not have been accessed by persons who have no involvement whatsoever in the present case.

Sunoco's efforts are about nothing more than seeking to settle a personal matter. Flynn Complainants assert that Mr. Fox cannot properly use discovery tools in the instant matter to settle a personal score. Accordingly, they filed timely objections to Sunoco's RFAs.

III. SUMMARY OF ARGUMENT

Sunoco raises three distinct grounds in favor of overruling the objections. First, the information sought is discoverable under ordinary discovery rules. Second, the logon information constitutes violations of PUC protocol. Third, the logons were defamatory and not protected by the Constitution's protection of free speech.

For the reasons set forth below, Sunoco's motion should denied.

IV. ARGUMENT

Discovery Argument

Sunoco's requests seek information that is non-discoverable because the requests relate to matters entirely outside the scope of permissible discovery under the applicable rules of civil procedure. Discovery is in every instance constrained by relevancy.

52 Pa. Code § 5.321(c) provides in pertinent part that "[s]ubject to this subchapter, a party may obtain discovery regarding **any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party…"** (Emphasis supplied). Thus, under § 5.321(c), the party seeking discovery must limit its inquiry to claims or defenses of the parties in the proceeding.

It goes without saying that a matter is relevant if it makes a fact in dispute more likely or less likely. It also is perfectly obvious that there are no claims or defenses in this proceeding that will be made more likely or less likely by the response to these requests for admission.

Whether or not the Flynn complainants received the Manko Gold ShareFile link for Sunoco's rebuttal testimony and exhibit does not make it more or less likely that the company complied with its obligation to create a legally compliant public awareness plan. The receipt of

the ShareFile link has nothing to do with Sunoco's construction and operation of the Mariner East pipelines obscenely close to homes, businesses and senior facilities in high consequence areas. The receipt of the ShareFile link does not make it more likely or less likely that persons next to a ruptured HVL pipeline are going to die and that Sunoco was fully aware of this fact but concealed it from the public.

Sunoco's motion glosses entirely over the requirement that a party must limit its inquiry to claims or defenses in the case. Whatever the precise parameters of the claims and defenses at issue in this proceeding, they do not include Mr. Fox's concerns over an insult, not obviously directed at him, that he nonetheless took personally.[1]

Sunoco cites a case that supposedly makes Mr. Fox's concerns a matter appropriate for discovery: *Commonwealth v. Nolen*, 634 A. 2d 192 (Pa. 1993). The case, however, relates to the proper scope of cross-examination of a witness giving testimony in court.

In *Commonwealth v. Nolen* the Court wrote, "The first issue raised by appellant concerns the trial court's refusal to permit cross-examination of Joey Boyer regarding bias. It is well settled that it is within the discretion of the trial court to determine the scope and limits of cross-examination and that this Court cannot reverse those findings absent a clear abuse of discretion or an error of law. *Commonwealth v. Birch*, 532 Pa. 563, 616 A.2d 977 (1992)."

In other words, during the time a witness is on the stand, the witness may be cross-examined as to bias. The parties against whom Sunoco seeks discovery, however, have already been on the stand and are not going back.

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[1] It should also be clear that Sunoco would not be excused from compliance with the discovery rules if it were to argue that this particular request is merely "foundational." The area of inquiry relates to irrelevant matters; "foundational" questions such as this have only one purpose: to obtain information outside the proper scope of discovery.

In this case, all of the Flynn Complainants as well as Andover principal Eric Friedman and Thomas Casey have testified; they have been examined and cross-examined. Questions seeking to elicit bias against Sunoco were quite properly allowed during their testimony. Of course, no questions relative to bias against Sunoco's counsel were raised at that time.

It is Sunoco's present position that evidence which may impeach a witness is deemed relevant even if there are no witnesses left to impeach. None of the individuals served with the RFAs is going to be a witness again. They all were subject to direct, cross, re-direct and re-cross examination in late 2019. They will not be on the stand again in this proceeding. There is no one to impeach. Remarkably, despite writing that "[t]he caselaw could not be clearer," not a single one of the cases Sunoco cites in making this argument concerns the scope of discovery. (Motion at 6). *Commonwealth v. Nolen* and these other cases, therefore, clearly are inapposite and Sunoco counsel can be presumed to have known that when the present motion was filed.

PUC Protocol Argument

Sunoco cites 52 Pa. Code §§ 1.26-1.27 for the proposition that "if a party engaged in this contemptuous and improper conduct, they face potential consequences in this proceeding further showing this information is relevant." That's not what Sections 1.26-1.27 say at all, however.

Sections 1.26 – 1.27 relate solely to conduct that takes place during the course of a hearing: "(a) Contemptuous conduct at a hearing before the Commission or a presiding officer shall be grounds for exclusion from the hearing and for summary suspension without a hearing for the duration of the hearing."

The conduct in question at this time did not take place at a hearing. Sunoco counsel can be presumed to have known that when the present motion was filed.

Sunoco also cites 66 Pa. C.S. § 332(f) which provides in pertinent part:

> **If the actions of a party** or counsel in a proceeding **shall be determined** by the commission, after due notice and opportunity for hearing, **to be obstructive** to the orderly conduct of the proceeding and inimical to the public interest**, the commission may reject or dismiss any rule or order in any manner proposed by the offending party** or counsel, and, with respect to counsel, may bar further participation by him in any proceedings before the commission.

(Emphasis added).

Interpreting this section as broadly as possible, any one of the individuals served with the RFAs is a party in this proceeding. If what a party did *during a hearing* was both (a) obstructive to the orderly conduct of the proceeding AND (b) inimical to the public interest, the commission would have the authority to impose sanctions.

Sunoco has not cited any cases interpreting this provision, nor has it demonstrated that what it alleges a party did was both (a) obstructive to the orderly conduct of the proceeding AND (b) inimical to the public interest—or either, for that matter. In such a case where both elements were proven, the commission would have the authority to impose sanctions.

Flynn counsel has found no cases interpreting this portion of Section 332(f). The portion of the provision that has been interpreted concerns failure to appear at a hearing, leading to dismissal of a complaint. *See, Mobley v. PECO Energy Co.,* 2018 WL 4851224 (Pa.P.U.C.). This case supports the view that Section 332 relates solely to what happens during the course of hearings.

That being the case, the most obvious reading of the obstruction portion of the statute is that it simply addresses "in-court" contempt. The words that Mr. Fox felt slighted by, however, were not issued during an actual hearing; did not obstruct the orderly conduct of such a hypothetical hearing; and were not demonstrably inimical to the public interest. Ergo, PUC

protocol has not been breached and protection of PUC protocol does not require answers to Sunoco's RFAs.

Free Speech/Defamation

52 Pa. Code § 1.36 provides *inter alia* that motions "containing an averment of fact not appearing of record in the action or containing a denial of fact must be personally verified by a party thereto or by an authorized officer or other authorized employee of the party if a corporation or association."

Sunoco's motion contains averments of fact that do not appear of record. A review of Sunoco's motion finds that a verification is nowhere to be found.

Flynn Complainants bring this to the ALJ's attention, but not to nitpick the way Sunoco has in so many procedural motions to date. If Mr. Fox says that he has been the unfortunate target of obscene words, counsel for the Safety 7 accept that statement. Mr. Fox, however, will not accept the statement of Flynn counsel that he has polled his clients and they all deny sending the email. (Motion at 10).

The problem here lies in the fact that Sunoco's motion insists that Flynn Complainants must answer the RFAs and serve the company with verified answers, subject to penalties for perjury. (Motion at 4).[2] The word of Complainants' attorney, however, is not sufficient for Mr. Fox.

"Fuck You" and "Mankogold Endangerschildren" are the putatively offensive terms at issue in Sunoco's motion. Email addresses are identified as "fred@fucksunoco.com" and "kaboom@milewideblastradius.com."

[2] If Sunoco does not lose this motion for apparent hypocrisy, the ALJ should consider dismissing it for lack of a sense of irony.

The only obscene epithet even arguably directed at anyone is "Fuck You." The email addresses and the name "Mankogold Endangerschildren" are not profane epithets directed at an individual person.

The Safety 7's Complaint actually does allege that Sunoco's pipelines endanger children. The suggestion that Sunoco's law firm does the same is the expression of an opinion which without a doubt is protected by the U.S. Constitution.

Complainants agree that the *Mastrangelo* decision does hold that free speech doctrine is not offended by a statute that bans language that is "lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." In *Mastrangelo*, a business owner repeatedly swore at a meter maid who had ticketed his car. A ruling against the business owner was upheld.

In the matter now before the ALJ, however, a single instance of profanity in computer logon information—that would not have necessarily been viewed by anyone at all—happened to have been seen by an experienced attorney outside the presence of an ALJ or commissioner. Moreover, this did not occur during the course of a hearing. There was no possible breach of the peace or injury to Mr. Fox.

Sunoco's motion cites no cases in which offensive behavior that takes place outside of a hearing is somehow culpable and subject to PUC sanctions. As for defamation, if Mr. Fox feels he has been defamed he can hire an IT specialist in order to locate and sue the person who sent the email.

It should be noted that "MankogoldEndangers Children" is different from "Fuck You." In the minds of some persons, lawyers are responsible for their clients' misconduct. While experienced members of the bar usually do not agree with that notion of responsibility, members

of the public sometimes do. A statement that Mr. Fox's firm is endangering children is the expression of an opinion. It is not an obscenity and it most certainly is protected speech.

Defamatory speech cannot be prohibited but it may be punished. In Pennsylvania, a communication is libelous if it is a maliciously written or printed publication which tends to blacken a person's reputation or to expose him to public hatred, contempt, or ridicule, or to injure him in his business or profession: Volomino v. Messenger Pub. Co., 410 Pa. 611, 189 A.2d 873 (1963).

Even one instance of stating "Fuck You" might not be protected speech. At the same time, if Mr. Fox believes he can show that this single piece of logon information, which no one knew about until he brought it to light, blackened his reputation, exposed him to hatred, contempt or ridicule or injured him in his business or profession, he will have to pay someone by the hour to bring that suit; he would be well advised, however, not to bet his future on ever obtaining a judgment in Pennsylvania.

V. CONCLUSION

For all of the reasons set forth above, Sunoco's motion must be denied.

Respectfully submitted,

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Dated: July 13, 2020

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of Flynn Complainants' foregoing Motion upon the persons listed below as per the requirements of § 1.54 (relating to service by a party).

See attached service list.

/s/ Michael S. Bomstein
Michael S. Bomstein, Esq.

Dated: July 13, 2020

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