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REPLY TO:
Center City

August 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' MOTION FOR A FINDING OF SPOILIATION
AND FOR SANCTIONS AGAINST RESPONDENT SUNOCO**

Dear Secretary Chiavetta:

Attached for electronic filing with the Commission is Flynn Complainants' Motion for a Finding of Spoliation and for Sanctions Against Respondent Sunoco.

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**

Michael Flynn, Rosemary Fuller,	:	
Michael Walsh, Nancy Harkins,	:	
Gerald McMullen, Caroline Hughes,	:	Docket No. P-2018-3006117
and Melissa Haines,	:	Docket No. C-2018-3006116
<i>Complainants,</i>	:	Docket No. C-2018-3005025
v.	:	Docket No. C-2019-3006898
	:	Docket No. C-2019-3006905
Sunoco Pipeline, L.P.,	:	Docket No. C-2018-3003605
<i>Respondents.</i>	:	

**FLYNN COMPLAINANTS’
MOTION FOR A FINDING OF SPOILIATION
AND FOR SANCTIONS AGAINST RESPONDENT SUNOCO**

The Flynn Complainants hereby move for a finding of spoliation and for sanctions against respondent Sunoco in the form of an adverse inference as a consequence of Sunoco’s intentional actions and its bad faith conduct. In support hereof Complainants aver as follows:

A. RELEVANT FACTUAL BACKGROUND

1. Your Honor is familiar with the procedural history of this case as well as the history in *BI&E v. Sunoco*, docketed here at C-2018-3006534. (“BI&E Complaint”).

2. On April 1, 2017, a leak of hazardous, highly volatile liquids (“HVLs”), specifically ethane and propane, occurred on the pipeline known as ME1 in Morgantown (the “Morgantown Incident”). See Docket No. C-2018-3006534 (BI&E Complaint against Sunoco).

3. The Morgantown Incident was the subject of an investigation by BI&E and it led BI&E to examine Sunoco’s corrosion control program and cathodic protection practices. See Docket No. C-2018-3006534 (BI&E Complaint).

4. In the present action, Complainants' Second Amended Complaint alleged that BI&E had found numerous violations at the site of the Morgantown Incident, including failure to *implement* integrity management procedures and failure to *document* Sunoco's implementation of integrity management procedures. (Second Am. Compl. at ¶¶ 63 – 93).

5. On March 12, 2019, the averments in the Second Amended Complaint related to the Morgantown Incident were stricken by order of Judge Barnes. (Second Interim Order, Mar. 12, 2019).

6. On June 15, 2020, however, Sunoco reintroduced the facts of the Morgantown Incident through the testimony of rebuttal witnesses John G. Field, III,¹ and Kevin Garrity².

7. At the time Sunoco served Flynn Complainants with Field's and Garrity's Rebuttal Testimony, Sunoco also served new exhibits JF-3 and JF-5.³ Obviously, Complainants' expert, Mehrooz Zamanzadeh, Ph.D. ("Dr. Zee") did not have these available to him when he submitted his testimony five months earlier.

8. Sunoco's Exhibit JF-5 was the report on the metallurgical analysis for the Morgantown Incident. Sunoco had retained DNV GL USA, Inc. ("DNV") to perform a metallurgical analysis (the "DNV Analysis") on a section of pipe (the "Segment") from the 11190 MTLT-TWI4 8-inch nominal diameter propane pipeline that leaked in service on April 1, 2017 at Station 2449+ 12.

¹ John G. Field, III is a corrosion engineer for Sunoco Pipeline, LP and Energy Transfer.

² Kevin Garrity, FNACE, is Executive Vice President of Mears Group, Inc., a corrosion engineering, technical services, and construction services company that provides corrosion engineering and related services regarding the pipeline oil and gas industry.

³ Exhibits JF-3 and JF-5 are both marked HIGHLY CONFIDENTIAL pursuant to the protective order in force in this action and as such will not be appended to this motion. Either or both will be produced, under seal, if the Commission desires.

9. Sunoco had cut the Segment out of the pipe that had leaked and sent the 8-foot Segment to DNV for analysis.

10. Sunoco's Exhibit JF-5, the DNV Analysis, includes photos of the eight-foot Segment as well as an explanation of how the leak site was contaminated by Sunoco field techs.

11. Sunoco's Exhibits JF-3 and JF-5 were referred to in both Field's and Garrity's testimony. Mr. Garrity explicitly stated that he reviewed and relied upon Sunoco's Exhibit JF-5, the DNV Analysis. (Garrity Rebuttal at 4). Several pages of Garrity's testimony relate to the Morgantown Incident and Conclusion No. 4 addresses the Morgantown Incident as well. (Garrity Rebuttal at 19).

12. The DNV Report notes that the leak portion of the 8 foot pipe segment had been *contaminated by Sunoco* before it arrived at the DNV laboratory for examination. "Again, people are familiar from television with the work that crime scene technicians do at the scene of crimes. Contamination of a crime scene often makes it impossible to obtain a definitive forensic result. In data processing they have a saying, 'Garbage in, garbage out.' So, too, DNV was doomed from the start."⁴ (Zee Surrebuttal at 6-7).

13. Sunoco repaired the pipeline by installing a new, eighty-three foot long pipe segment into the pipeline. (BI&E Complaint at ¶ 27).

⁴ Sunoco's Exhibit JF-5, the DNV Analysis, makes specific findings as to how exactly Sunoco contaminated the leak site but those findings were redacted by Sunoco's attorneys from the public version of Dr. Zee's surrebuttal testimony as Sunoco obviously did not want the public to know. While there was nothing in particular confidential as the means by which the leak site was contaminated, Flynn Complainants did not think it worth their while to file yet another motion to declassify DNV's specific findings.

14. How Sunoco managed to install eighty-three feet of new pipe into an eight foot opening presently remains a mystery. Sunoco's Exhibit JF-5, the DNV Analysis, fails to mention this. Messrs. Field and Garrity say nothing about this. Sunoco has yet to explain it.

15. Obviously, roughly eighty-three feet of the ME1 pipe – not eight feet -- was removed by Sunoco after the Morgantown Incident. Where did the other seventy-five feet go? What was its condition? Why is Sunoco going out of its way *not* to address the absence and the condition of the missing pipe? No records of the missing seventy-five feet and its condition were supplied to Flynn Complainants.

B. ARGUMENT

1. **Applicable Standards**

16. Spoliation of evidence is the non-preservation or significant alteration of evidence for pending or future litigation when a party has a duty to preserve it. *Gardner v. State Civ. Serv. Comm'n.*, 2016 Pa. Commw. Unpub. LEXIS * 703 (Oct. 6, 2016) (*citing Pyeritz v. Commonwealth.*, 613 Pa. 80, 88-89, 32 A. 3d 687, 692 (2011)).⁵

17. Parties that destroy evidence are subject to sanctions. Indeed, the Pennsylvania Supreme Court has allowed trial courts to exercise their discretion to impose a range of sanctions against the spoliator. *Pyeritz*, 613 Pa. at 88-89, 32 A.3d at 692 (2011); *see also Schroeder v. Commw.*, 551 Pa. 243, 710 A.2d 23, 27 (1998) (*citing Schmid v. Milwaukee Elec. Tool Corp.*, 13 F. 3d 76 (3d Cir. 1994)).

18. Pursuant to the doctrine of spoliation of evidence, the Commission has the right to impose such sanctions in this case against Sunoco as it reasonably deems appropriate under the circumstances set forth above. *Schroeder*, 551 Pa. 243, 710 A.2d at 27.

⁵ Parties may cite an unreported panel decision of the Commonwealth Court issued after January 15, 2008 for its persuasive value, but not as binding precedent.

19. The Pennsylvania Supreme Court has provided the following factors to aid the court in deciding the proper penalty for spoliation: (a) the degree of fault of the party who altered or destroyed the evidence; (b) the degree of prejudice suffered by the opposing party, and (c) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct. *Schroeder*, 551 Pa. at 250-51, 710 A.2d at 27 (“Fashioning a sanction for the spoliation of evidence based upon fault, prejudice, and other available sanctions will discourage intentional destruction.”).

20. The degree of fault comprises two components: (1) the extent of the party's duty to preserve the evidence; and (2) the presence or absence of bad faith. *Gardner*, 2016 Pa. Commw. Unpub. LEXIS * 703 (citing *King v. Pittsburgh Water & Sewer Auth.*, 139 A.2d 336, 347-48 (Pa. Commw. 2016)); see also *Fleeger v. United States Auto. Ass'n*, 2014 Pa. Dist. & Cnty. Dec. LEXIS 3565, 43 Pa. D. & C.5th 408, 419-20 (citing *Mount Olivet Tabernacle Church v. Edwin L. Wiegand Div.*, 2001 Pa. Super. 232, 781 A.2d 1263, 1269 (Pa. Super. 2001)).

21. A duty to preserve arises when a party has notice that the evidence is relevant to litigation or should know that the evidence may be relevant to future litigation. *Gardner*, 2016 Pa. Commw. Unpub. LEXIS * 703 (citing *King*, 139 A.2d at 348). Factors that the Courts may also consider are the degree of prejudice suffered by the opposing party and the availability of a lesser sanction while protecting the opposing party's right. *Gardner*, 2016 Pa. Commw. Unpub. LEXIS * 703 n.8 (citing *King*, 139 A.2d at 345).

22. Remedies or sanctions range from striking a party's pleadings or defenses, ruling that given facts are established, or giving an adverse-inference instruction to a jury. *Gardner*, 2016 Pa. Commw. Unpub. LEXIS * 703 (citing *Duquesne Light Co. v. Woodland Hills Sch. Dist.*, 700 A.2d 1038 (Pa. Commw. 1997)).

23. The spoliation inference has both prophylactic and punitive effects. *Fleeger*, 2014 Pa. Dist. & Cnty. Dec. LEXIS 3565, 43 Pa. D. & C. 5th at 419-20 (citing *Mount Olivet*, 2001 Pa. Super. 232, 781 A.2d at 1269). Under this rule the court may impose various sanctions, which include “dismissal, striking out pleadings or portions thereof, prohibiting the introduction of evidence, and permitting the inference at trial that the destroyed evidence would have been harmful to plaintiff.” *Fleeger*, 2014 Pa. Dist. & Cnty. Dec. LEXIS 3565, 43 Pa. D. & C. 5th at 419-20 (quoting *Troup v. Tri-County Confinement Sys.*, 708 A.2d 825, 828 (Pa. Super. 1998)). The doctrine of spoliation provides that a party may not benefit from its own destruction or withholding of evidence. *King*, 139 A.2d at 345.

24. Courts permit an inference that the destroyed evidence would have been unfavorable to the position of the offending party. *Gardner*, 2016 Pa. Commw. Unpub. LEXIS *703 (citing *Pyeritz*, 613 Pa. at 88-89 n.5, 32 A.3d at 692 n.5); *Rodriguez v. Kravco Simon Co.*, 2015 Pa. Super. 41, 111 A.3d 1191, 1196 (2015) (citing *Mount Olivet*, 2001 Pa. Super. 232, 781 A.2d at 1269).

25. The evidentiary rationale for the spoliation inference is nothing more than the common sense observation that a party who has notice that the evidence is relevant to the litigation and who proceeds to destroy the evidence is more likely to have been threatened by that evidence than is a party in the same position who does not destroy the document. *Rodriguez*, 2015 Pa. Super. 41, 111 A.3d at 1196 (citing *Mount Olivet*, 2001 Pa. Super. 232, 781 A.2d at 1269).

2. **Sunoco is subject to sanctions as a consequence of its bad faith spoliation of evidence.**

26. Sunoco had a duty to *not* contaminate the leak site and to *not* conceal or destroy the missing seventy-five foot Segment.

27. Although, in a vacuum, it is conceivable that field technicians were searching for a leak and had no idea that the leak site was evidence requiring preservation, one does not accidentally make seventy-five feet of probably corroded pipe disappear.

28. The concealment or destruction of the Segment -- seventy-five feet of ME1 pipe -- was obviously a deliberate act, designed to thwart further inquiry.

29. Sunoco engaged DNV to examine eight feet of pipe. It made a conscious decision not to have DNV examine the other seventy-five feet.

30. Flynn Complainants clearly are adversely affected in this proceeding by their inability to examine or review the examination of the seventy-five feet of concealed or destroyed pipe.

31. Applying the Supreme Court's standard for determining penalties for spoliation, Your Honor must consider: (a) the degree of fault of the party who altered or destroyed the evidence; (b) the degree of prejudice suffered by the opposing party, and (c) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct.

32. Sunoco was entirely and solely at fault for concealing and/or destroying the missing seventy-five foot Segment.

33. Information concerning the seventy-five foot Segment could have significantly bolstered Complainants' claims of pipeline corrosion. It is not possible, however, for Complainants to determine the degree of prejudice suffered in the absence of this information.

3. Sanctions

34. It is clear that there must be a finding of spoliation under the

circumstances. Complaints submit that it would appropriate and reasonable to impose the sanction of an adverse inference that the missing seventy-five foot Segment contained significant amounts of internal, external, or other corrosion; other defects that make an accidental release of hazardous, highly volatile liquids likely or inevitable; evidence of past releases; and/or all of these things.

C. CONCLUSION

In light of the foregoing, the Flynn Complainants respectfully request that this Honorable Judge make a finding of spoliation and impose the sanction of an adverse inference that the missing seventy-five foot Segment contained significant amounts of internal, external, or other corrosion; other defects that make an accidental release of hazardous, highly volatile liquids likely or inevitable; evidence of past releases; and/or all of these things.

Respectfully submitted,

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Dated: August 13, 2020

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the within 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: August 13, 2020

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