**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17120**

Public Meeting held August 6, 2020

Commissioners Present:

Gladys Brown Dutrieuille, Chairman

David W. Sweet, Vice Chairman

John F. Coleman, Jr.

Ralph V. Yanora

Pennsylvania Public Utility Commission C-2018-3006534

Bureau of Investigation and Enforcement

v.

Sunoco Pipeline, L.P.

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Comments filed on June 1, 2020, by Sunoco Pipeline, L.P. (Sunoco or SPLP), in response to the Commission’s Second Tentative Opinion and Order issued on May 21, 2020 (*Second* *Tentative Order*) at this docket, regarding the proposed settlement of alleged pipeline safety violations stemming from a leak of highly volatile liquids (HVLs) of ethane and propane from Sunoco’s Mariner East 1 (ME1) pipeline. Our *Second Tentative Order* approved the Joint Petition for Approval of Settlement (Settlement, Joint Petition or Settlement Agreement) filed on April 3, 2019,[[1]](#footnote-1),[[2]](#footnote-2) by the Commission’s Bureau of Investigation and Enforcement (I&E) and Sunoco (collectively, the Parties or Joint Petitioners), with certain clarifications and modifications deemed reasonable and necessary in the public interest.

1. **History of the Proceeding**

The present proceeding arises from the Formal Complaint (Complaint) filed by I&E on December 13, 2018, against Sunoco alleging violations of federal and state gas pipeline safety regulations stemming from a leak of HVLs (ethane and propane), from Sunoco’s ME1 pipeline in Morgantown, Pennsylvania on April 1, 2017.

A detailed history of this Complaint proceeding is set forth in the Commission’s *Second Tentative Order*, and is adopted and incorporated herein, by reference. *See* *Second Tentative* *Order* at 2-6.

As noted, *supra*, the Complaint proceeding was resolved by Settlement Agreement as modified by the Addendum. The record closed on November 12, 2019, and the Commission issued the Initial Decision of ALJ Barnes on December 20, 2019, which adopted the Settlement without modification. No Exceptions were filed in response.

The Commission exercised its right to review the Initial Decision pursuant to Section 332(h) of the Public Utility Code (Code), 66 Pa. C.S. § 332(h). On March 10, 2020, the Commission issued the *March 2020 Tentative Order* which adopted the ALJ’s Initial Decision, with modifications deemed reasonable and necessary in the public interest. The Parties were granted ten days to file comments in response to the *March 2020 Tentative Order*.

On March 20, 2020, both I&E and Sunoco filed Comments in response to the *March 2020 Tentative Order*.

On May 21, 2020, the Commission issued the *Second Tentative Order* in which it which adopted the terms of the *March 2020 Tentative Order*, with certain clarifications and modifications deemed reasonable and necessary in the public interest. The order established a 10-day comment period in which any interested party could submit comments in response to the order.

On June 1, 2020, Sunoco filed comments in opposition to the *Second Tentative Order*’s clarifications and modifications of the Settlement terms.

By a Revised Letter filed June 2, 2020, I&E notified the Commission it was not filing Comments.

1. **Discussion**
2. **Legal Standards**

*Pursuant to the Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011) (delegating authority to initiate proceedings that are prosecutory in nature to I&E) and 66 Pa. C.S. § 308.2(a)(11), I&E is the entity authorized to prosecute complaints against public utilities. Pursuant to Section 59.33(b) of the Commission’s Regulations, 52 Pa. Code § 59.33(b), I&E’s Safety Division has the authority to enforce Federal pipeline safety laws and regulations set forth in 49 U.S.C.A. §§ 60101-60503 and as implemented at 49 CFR Parts 191-193, 195 and 199.

Sunoco is a public utility pipeline operator certificated at Docket No.

A-140111 to operate the ME1 pipeline, which currently transports hazardous volatile liquids on intrastate facilities. A public utility transporting hazardous liquids may be subject to the civil penalties provided under Federal pipeline safety laws at 49 U.S.C.A. §§ 60122(a)(1) and 60118(a), as adjusted annually for inflation.

In this case, the Parties submitted a Settlement of all issues. The Commission’s policy promotes settlements. 52 Pa. Code § 5.231. Settlements lessen the time and expense the parties must expend litigating a case and at the same time conserve administrative resources. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code § 69.401. The focus of inquiry for determining whether a proposed settlement should be recommended for approval is not a “burden of proof” standard, as is utilized for contested matters. *Pa. PUC v. City of Lancaster – Bureau of Water*, Docket No. R‑2010-2179103 (Opinion and Order entered July 14, 2011) *(Lancaster).* Instead, the benchmark for determining the acceptability of a settlement or partial settlement is whether the proposed terms and conditions are in the public interest. *Id.,* *citing* *Warner v. GTE North, Inc.*, Docket No. C-00902815 (Opinion and Order entered April 1, 1996) *(Warner); Pa. PUC v. C. S. Water and Sewer Associates*, 74 Pa. P.U.C. 767 (1991).

The Commission has traditionally defined the public interest as including ratepayers, shareholders, and the regulated community. *Pa. PUC v. Bell Atlantic-Pennsylvania, Inc.*,Docket No. R-00953409 (Order entered September 29, 1995). What is in the public interest is decided by examining the effect of the proposed Settlement on these “stakeholder” entities. *Id*. The public interest is best served, however, by ensuring that the underlying transaction complies with applicable law. *See Dauphin County Indus. Dev. Auth. v. Pa. PUC*, 123 A.3d 1124 (Pa. Cmwlth. 2015) (Commonwealth Court Order reversing Commission approval of a joint settlement due to the Court’s plenary review and disapproval of the Commission’s interpretation of Section 2807(f)(5) of the Act, 66 Pa. C.S. § 2807(f)(5)).

The Commission has authority over safety issues concerning all of Pennsylvania’s intrastate facilities, including hazardous liquids and underground natural gas storage facilities. Specifically, the Commission’s Regulations at 52 Pa. Code § 59.33, promulgated pursuant to 66 Pa. C.S. § 1501, require that hazardous liquid utilities shall have minimum safety standards consistent with the pipeline safety laws at 49 U.S.C. §§ 60101-60503 and the regulations at 49 CFR Parts 191-193, 195, and 199.

Furthermore, the Commission’s Regulations adopt federal safety standards for hazardous liquid facilities. These standards include what materials must be used for new hazardous liquid pipelines, how those pipelines should be constructed, as well as corrosion control, maintenance and testing of existing hazardous liquid pipelines. The standards also address emergency preparedness and public awareness plans at 49 CFR § 195.440 (relating to public awareness). A pipeline operator utility should use every reasonable effort to properly warn and protect the public from danger and shall exercise reasonable care to reduce the hazards to which employees, customers and others may be subjected to by reason of its equipment and facilities. 52 Pa. Code § 59.33(a).

1. **Second Tentative Opinion and Order**

The *Second Tentative Order* included certain clarifications and modifications to matters raised by the Parties which were deemed necessary for the approval of the Settlement in the public interest, based upon the Parties’ comments to the Commission’s *March 2020* *Tentative Order.* The *March 2020 Tentative Order* originally modified the terms of the Settlement solely to provide that the Independent Expert would issue the confidential Report of the ME1 Remaining Life Study (ME1 Safety Study) in *final form*, as opposed to sharing working drafts in the course of conducting the Study.

In response to that modification*,* both I&E’s and Sunoco’s Comments requested that the Commission issue an express procedural ruling that the filing of comments operates to stay the twenty-day period during which the Joint Petitioners may withdraw from the Settlement, *per* the terms of the Settlement Agreement. The Parties’ requested procedural ruling was adopted in the *Second Tentative Order*. *Second Tentative Order* at 22.

In addition, in response to comments of both I&E and Sunoco pertaining to the Independent Expert’s permission to communicate with the Parties as necessary for the performance of the ME1 Safety Study, a matter not addressed by the Settlement’s terms, our *Second Tentative Order* clarified our understanding that the Joint Petitioners’ communication with the Independent Expert is necessary, not only for Sunoco and I&E to provide information, but also to verify the accuracy of any facts and applicable industry standards, or other information, deemed material to the Independent Expert’s findings. We further clarified that such communication should be conducted jointly with the Parties, to ensure that both Parties were fully informed for purposes of verifying the accuracy of information deemed necessary to the Independent Expert’s performance of the ME1 Safety Study. We expressly noted that,

…all communication between the Independent Expert, I&E and Sunoco should be conducted jointly, in the interest of preserving the transparency and objectivity of the Independent Expert’s final form Study and public Summary.

*Second Tentative Order* at 23.

By our *Second Tentative Order*, we declined to adopt Sunoco’s proposed procedures regarding the Independent Expert’s issuance of the confidential ME1 Safety Study and public Summary, another matter not expressly covered by the terms of the Settlement. *Second Tentative Order* at 23-24. Sunoco requested that the Commission modify the Settlement terms to direct that the Independent Expert would issue the confidential Report and the public Summary of the ME1 Safety Study directly to Sunoco, individually, to allow Sunoco the opportunity to remove confidential security information (CSI), which Sunoco argued was required by Public Utility Confidential Security Information Disclosure Protection Act, 35 P.S. §§ 2141.12141.6 (CSI Act). *Id*.

We declined to modify the Settlement terms as requested by Sunoco. Rather, we directed that the Independent Expert shall issue both the confidential final form Study and the public Summary simultaneously to both I&E and Sunoco. Upon issuance of the final form Study, we directed that the Parties be granted ten days to raise any claim for confidentiality or otherwise seek a protective order before the Commission, prior to the public Summary’s publication on the Commission’s website at [www.puc.pa.gov](http://www.puc.pa.gov).[[3]](#footnote-3) *Second Tentative Order* at 29.

As such, our *Second Tentative Order* modified Paragraph 17(B) of the Settlement, in pertinent part, as follows:

The expert shall deliver only the final form Study and public Summary (excluding proprietary or confidential security information (CSI)), not interim drafts, to SPLP and I&E on or before the end of the six-month contract term. [A] The expert’s Summary of the [expert’s] findings shall be made public (excluding proprietary or confidential security information (CSI)), unless, within ten (10) days of the expert’s issuance of the Summary, an objection to disclosure or petition for protective order is filed with the Commission. If an objection to disclosure or petition for protective order is filed, replies thereto may be filed within seven (7) days. The filing of an objection or petition shall operate to stay public disclosure of the expert’s Summary.

*Id*.

Finally, by our *Second Tentative Order*, we reaffirmed that the Independent Expert should release the confidential ME1 Safety Study simultaneously to I&E and Sunoco. With respect to the public Summary, although not expressly stated by the Settlement terms, we confirmed that the Independent Expert, as the party responsible for preparing the final form ME1 Safety Study, is in the best position to draft a comprehensive public Summary of the Study for purposes of public disclosure. *Second Tentative Order* at 29-30.

1. **Sunoco’s Comments[[4]](#footnote-4)**

By its Comments, Sunoco raises a number of objections to the Commission’s modifications in our *Second Tentative Order* of the terms of the Settlement directing that the Independent Expert communicate jointly with the Parties as necessary to perform the ME1 Safety Study, and to submit the confidential final form Report and public Summary of the Study simultaneously to the Parties. Sunoco requests that the Commission modify the terms of the Settlement to authorize the Independent Expert’s *ex parte* communication with Sunoco, and to require that the Independent Expert issue the confidential Report and public Summary of the ME1 Safety Study directly to Sunoco in the first instance, to allow Sunoco to mark the documents for CSI or other confidential information. Sunoco further asserts that Sunoco, rather than the Independent Expert, should submit the confidential ME1 Safety Study to I&E. Sunoco asserts that the CSI Act creates a statutory right for Sunoco to submit the Independent Expert’s confidential ME1 Safety Study to the Commission because the document will contain Sunoco’s CSI. Sunoco Comments at 4-5.

As a general matter, Sunoco avers that the *Second Tentative Order*’s modification of the terms of the Settlement *sua sponte* imposed terms in the absence of a legal standard and were unfounded and unnecessary. Sunoco maintains that the Commission’s conclusion that the modifications were reasonable and necessary in the public interest to ensure the independence and objectivity of the Independent Expert was without support in the record evidence. Therefore, Sunoco asserts the Commission’s unilateral modification of the Settlement terms was without legal or evidentiary basis. Sunoco Comments at 1-4.

Sunoco comments that pursuant to the Commonwealth Court’s decision in *Sunoco Pipeline L.P. v. State Senator Andrew Dinniman and PUC*, 217 A.3d 1283, 1289 (Pa. Cmwlth. 2019) (*Sunoco v. Dinniman*), the Commission should not *sua sponte* inject issues against the wishes of the parties, particularly where there is no record evidence presented by the parties in support of the issue. Sunoco Comments at 3.

Regarding communication by the Independent Expert, Sunoco avers that there is no legal standard which supports the Commission’s *sua sponte* exercise of its authority to require that the Independent Expert communicate jointly with the Parties. Sunoco further avers that there is no record evidence to suggest the measure is necessary or which justifies the implication that Sunoco might exert undue influence upon results of the ME1 Safety Study. *Id*.

Sunoco asserts that if the Independent Expert is required to communicate jointly with Sunoco and I&E, the participation by the prosecutory arm of the Commission may have a “chilling” effect on the open exchange of information necessary to perform the study. Sunoco further asserts that the requirement to communicate jointly will unnecessarily extend the length of time required to perform the Study. Sunoco Comments at 11, fn. 9.

Finally, Sunoco avers that the Commission’s limitation of the Independent Expert’s ability to communicate individually with Sunoco, *i.e.,* prohibiting *ex parte* communication in the performance of the ME1 Safety Study, is contrary to the Commission’s standard practice regarding audits conducted by either Commission Staff or designated independent auditors. Sunoco Comments at 2, 8-11.

Sunoco requests that the Commission modify the *Second Tentative Order* to grant the Independent Expert discretion to determine whether to communicate with the Parties individually, *i.e.*, *ex parte*, or collectively, regarding the material facts, applicable industry standards, and other information necessary to assess the safety and longevity of ME1. Sunoco Comments at 13.

Regarding the Independent Expert’s issuance of the confidential Report and public Summary of the ME1 Safety Study, Sunoco comments that there is no applicable legal standard or evidentiary basis to support the Commission’s conclusion and *sua sponte* modification of the terms of the Settlement. Sunoco Comments at 4-8.

Sunoco further avers that the Commission *sua sponte* imposes procedures for the Independent Expert’s submission of the confidential Report and public Summary which violate the CSI Act. Sunoco asserts that the Commission’s action operates to effectively require that Sunoco waive its statutory rights under the CSI Act.  *Id.* Sunoco asserts that the Commission’s action operates to effectively require that Sunoco waive its statutory rights under the CSI Act. Sunoco advises that it is strongly considering withdrawing from the Joint Settlement over this issue. *Id.*

In order to resolve its concerns, Sunoco proposes that the Commission modify the *Second Tentative Order* to direct that the Independent Expert submit the final form ME1 Safety Study in a locked Portable Document Format (PDF) directly to Sunoco in the first instance, solely for the purpose of Sunoco’s review to mark CSI. Sunoco would then provide the Independent Expert the portions Sunoco designates as CSI, so that the Independent Expert may mark the CSI provisions. The Independent Expert would then provide a marked and locked copy of the PDF directly to Sunoco. Sunoco asserts that this procedure is required to enable Sunoco’s compliance with the CSI Act’s requirement that the utility transmit the information to the agency. Sunoco would then be responsible for providing the Study to I&E. Sunoco further agrees to include an affidavit attesting to the fact that Sunoco did not alter the Safety Study. Sunoco Comments at 7-8.

With respect to the public Summary, Sunoco proposes that the Commission modify the Settlement terms under the *Second Tentative Order* to direct that the Independent Expert provide the public Summary directly to Sunoco in the first instance, in a locked form PDF. Sunoco will then review the Summary solely for the purposes of marking CSI. If Sunoco finds no CSI or other proprietary materials, the Independent Expert may give the summary directly to I&E. Sunoco proposes that if Sunoco finds CSI or other proprietary materials, it will communicate jointly with I&E and the Independent Expert to excise any such information. Once any CSI/proprietary information is excised, under Sunoco’s proposal, the Independent Expert would provide the public summary to I&E.  Sunoco Comments at 8.

Sunoco reiterates the substance of its Comments filed in Reply to our *March 2020* *Tentative Order*, that, if the Commission's *March 2020 Tentative Order* is read to establish a procedure whereby the Independent Expert issues the confidential Report and public Summary of the ME1 Safety Study simultaneously to I&E and Sunoco, the procedures would contravene the statutory and regulatory requirements for handling confidential security information (CSI) under the Public Utility Confidential Security Information Disclosure Protection Act (CSI Act), 35 P.S. §§ 2141.1 to 2141.6, and Commission Regulations as they relate to the submission of CSI. Sunoco Comments at 5-7.

**III. Disposition**

The issues raised by Sunoco’s Comments to our *Second Tentative Order* pertain to the agreement between the Parties. Those issues under the terms of the Settlement are: (1) the performance of an ME1 Safety Study and the issuance of a confidential Report and public Summary of that Study; and (2) assessing the expected safety and longevity of Sunoco’s ME1 pipeline, which the Parties agreed should be carried out by an independent pipeline expert, *i.e.*, the Independent Expert, *per* the Settlement terms. Sunoco’s Comments specifically address two matters: (1) the process by which the Independent Expert is to communicate with the Parties; and, (2) the process by which the Independent Expert is to issue the confidential Report and public Summary of the ME1 Safety Study to the Parties. The two processes raised by Sunoco’s Comments, *i.e*, the Independent Expert’s communication during the performance of the Study and issuance of the confidential Report and public Summary of the Study, are processes which were not specified under the original terms of the Settlement, which were specified by our modification of those terms under the *Second Tentative Order*,as reasonable and necessary in the public interest for approval of the Settlement.

Because we conclude that our *Second Tentative Order*’s modifications to the terms of the Settlement directing that the Independent Expert communicate jointly with the Parties during the performance of the ME1 Safety Study to be reasonable and necessary in order to approve the Settlement as in the public interest, as discussed more fully*, infra*, we shall decline to adopt Sunoco’s Comments regarding the Independent Expert’s communication. However, while we do not adopt Sunoco’s interpretation and suggested application of the CSI Act , we conclude that Sunoco’s proposed procedure whereby the Independent Expert provides the confidential Safety Study and public Summary directly to Sunoco in the first instance, in a locked form PDF format, in order that Sunoco may review the Safety Study and Summary solely for the purposes of marking CSI and provide the marked version to the Independent Expert, to be a reasonable and necessary means to ensure both the independence and transparency of the Independent Expert’s Safety Study and Summary, and Sunoco’s ability to preserve CSI protections. Therefore, we shall adopt the procedure proposed by Sunoco’s Comments and approve the Settlement as modified by our *Second Tentative Order*, and this Opinion and Order, as in the public interest.

Sunoco’s Comments to our *Second Tentative Order* reiterate the Comments filed by Sunoco in opposition to the *March 2020 Tentative Order*. Sunoco comments that our *Second Tentative* *Order* should be modified to direct that the Independent Expert be permitted to conduct *ex parte* communication with Sunoco during the performance of the ME1 Safety Study, and to direct that the Independent Expert issue the confidential Report and public Summary of the ME1 Safety Study directly to Sunoco in the first instance, to provide Sunoco the opportunity to review the Report and public Summary to identify and classify CSI and any other confidential information.

In addressing Sunoco’s Comments, we are mindful that the proposed Settlement before us for review and approval in the public interest involves allegations of safety violations by Sunoco in connection with a leak of highly volatile liquids (propane and methane) from Sunoco’s ME1 pipeline. The public concern regarding the safety of ME1 is well documented in the record of this proceeding. As Sunoco itself points out, it was out of concern for the safety of the citizens of the Commonwealth that Governor Tom Wolf publicly called upon this Commission to conduct a study to assess the safety and longevity of Sunoco’s ME1 pipeline. *See* Sunoco Comments at 3, and, Sunoco Comments to the *March 2020 Tentative Order*. As such, Governor Wolf expressed his desire that the people of Pennsylvania be assured that Sunoco’s ME1 Pipeline project would be scrutinized to assess its safe future operation.

We are also cognizant of the fact that the Parties to this proceeding have engaged in lengthy negotiations to resolve the serious safety issues which are encompassed by the Settlement terms. Both I&E and Sunoco have expressed their support for the positive outcomes achieved for the citizens of the Commonwealth by this Settlement, which the Parties assert “[c]ontains significant public benefits above and beyond regulatory requirements and what could have been achieved through litigation.” Sunoco Comments at 4.

Upon our review of the terms of the Settlement, we recognize the significance of the terms providing for an Independent Expert to scrutinize the ME1 pipeline to assess its safety and longevity for the intended purpose of transporting dangerous highly volatile liquids (propane and methane) within the Commonwealth. We also recognize that the voluntary Settlement of the important safety matters concerned here is preferable to protracted litigation, given the immediate benefits promised under the terms of the Settlement. However, the approval of this Settlement brings with-it long-term consequences for the Commonwealth, including to the safety of our citizens. While the Settlement indisputably benefits the public interest, the terms of the Settlement also provide that Sunoco admits to no violation of state and federal safety standards and that any and all future claims associated with the alleged violations are forever barred.

Therefore, as the agency responsible for reviewing and approving a Settlement as in the public interest, it is within our authority and therefore, is our duty, where possible, to require reasonable and necessary procedures to assure the transparency and objectivity of the process by which the Independent Expert gathers information for and issues the Report and public Summary of the ME1 Safety Study assessing the safety and longevity of ME1.

Turning to our review of Sunoco’s comments, we expressly reject Sunoco’s general assertion that the *Second Tentative Order*’s modification of the terms of the Settlement *sua sponte* imposed terms in the absence of a legal standard and were unfounded and unnecessary.[[5]](#footnote-5) Sunoco asserts that the Commission is precluded from directing that the Independent Expert communicate jointly with the Parties and submit the final Report and Summary to the Parties simultaneously, citing the Commonwealth Court’s decision in *Sunoco v. Dinniman*.

Sunoco avers that, pursuant to *Sunoco v. Dinniman*, the Commission should not *sua sponte* inject issues against the wishes of the parties, particularly where there is no record evidence presented by the parties in support of the issue. Sunoco Comments at 3. Sunoco appears to argue that the court’s holding in *Sunoco v. Dinniman* places constraints upon the Commission’s statutory authority to review and approve the terms of settlement in the public interest under *Lancaster* and *Warner*, *supra.*, and, *See* 52 Pa. Code § 69.1201(Policy Statement setting forth ten factors applicable to the Commission’s determination whether a proposed settlement for a violation is reasonable and approval of the settlement agreement is in the public interest).

The Commission’s power to review and approve settlements if deemed to be in the public interest, under the Code, is rooted in the legislature’s intent that the Commission be charged with protecting the public’s interest in matters involving settlement of claims brought against public utilities. *See generally, Lancaster* and *Warner*. Weighing the public interest in a given settlement often involves balancing several competing public interests, whether it be fairness in rates, reliability of service, or the importance of ensuring the viability and continued operation of the public utilities providing the essential services to the citizens and businesses of the Commonwealth. Further, the Commission has enumerated the factors which may weigh on the determination whether a settlement is in the public interest which include, *inter alia*, the seriousness of the alleged violation and its consequences. That said, the safety of the citizens of this Commonwealth has forever been, and will always be, the paramount public interest this Commission is charged to protect.

In a case which centers on the safety of the operation of a pipeline transporting dangerous and highly volatile liquids (propane and methane), the public interest in the transparency and objectivity of the assessment of that pipeline’s safety and longevity is inherent. Therefore, in the present case, the Commission’s determination to require reasonable and necessary measures to assure the transparency and objectivity of the Independent Expert’s assessment of Sunoco’s ME1 pipeline, is derived directly from the record in this proceeding, and goes to the heart of the Commission’s consideration of the public interest at issue, the safety of Commonwealth’s citizens.

Further, we find Sunoco’s argument regarding the application of *Sunoco v. Dinniman* in the present circumstances to be meritless. In *Sunoco v. Dinniman*, the Commonwealth Court reviewed the Commission’s decision to grant personal standing to Andrew E. Dinniman, a Pennsylvania State Senator, who had filed a complaint against Sunoco asserting legislative standing in his capacity as a Senator. Although Senator Dinniman had not asserted personal standing, the Commission concluded that the circumstances warranted granting Senator Dinniman standing to bring the complaint in his personal, rather than his legislative capacity. The Commonwealth Court concluded it was an error for the Commission to raise the issue of personal standing *sua sponte* and against the wishes of the party seeking legislative standing, particularly where the record evidence was not offered to establish personal standing. *Sunoco v. Dinniman* at 1289.

As a legal matter, the holding in *Sunoco v. Dinniman* is irrelevant to the present matter, in which the Commission is reviewing whether a proposed settlement for approval is in the public interest, pursuant to *Lancaster* and *Warner*. The Commission’s authority to review settlements for approval that are in the public interest, includes the authority to *sua sponte* modify the terms of the settlement where the Commission deems it reasonable and necessary in the public interest. *See, e.g., Pa. PUC v. West Penn Power*, Docket No. C-2012-2307244 (Order entered January 9, 2014).

Similarly, as a factual matter, *Sunoco v. Dinniman* is inapposite to a case where, as here, the facts do not involve the Commission imposing an order on the parties. The Commission’s authority to *sua sponte* modify the terms of the settlement is subject to the consent of the parties to be bound by the terms of the settlement, as modified. *See, e.g., Id.* Sunoco remains free to withdraw from the Settlement if the terms, as modified, are unacceptable. However, if Sunoco elects to withdraw from the Settlement, it will be by its own volition. This Commission retains broad authority to require measures to ensure the transparency and objectivity of an independent expert where it is found to be reasonable and necessary in the circumstances.

With respect to our conclusion in the *Second Tentative Order*, that it is reasonable and is necessary in the public interest that the Independent Expert communicate jointly with the Parties regarding the information required to perform the ME1 Safety Study, Sunoco asserts there is no applicable legal standard or evidentiary basis to support the Commission’s conclusion. As discussed, *supra*., we disagree.

The Commission’s authority to approve or disapprove a settlement in the public interest includes asserting the public interest in safety, particularly where the settlement involves allegations of serious violations of state and federal pipeline safety standards. Further, Sunoco appears to argue that there must be record evidence that Sunoco would exert undue influence upon the Independent Expert before the Commission may determine that it is reasonable and necessary to require procedures which ensure the transparency and objectivity of the Independent Expert. This is not the case.

For example, Sunoco argues that under the Commission’s routine practice of appointing an independent financial auditor, there is historically no restrictions placed upon the independent auditor. Sunoco Comments at 2, 4. Sunoco argues that in such cases, and as here, the expert is, by *definition* “independent.” Sunoco infers that if the Commission does not impose any special measures regarding a financial auditor’s communication with the subject of such an audit, the Commission has no reason to do so in Sunoco’s case. *Id.*

However, a routine financial audit of a single utility cannot be compared to an assessment of the safety and longevity of an unprecedented pipeline project spanning the Commonwealth and transporting highly volatile liquids. Even if we were to accept Sunoco’s argument that the Commission should view the performance of the ME1 Safety Study as analogous to a financial audit, the Commission’s power to appoint an independent auditor expressly establishes the Commission’s discretion to establish the parameters under which the auditor will perform its duties. *See* 66 Pa. C. S. § 516 (providing that the contract between the utility and the independent auditor shall provide that the auditor work under the direction of the Commission). Therefore, the Commission’s prerogative to direct reasonable and necessary measures to ensure the transparency and objectivity of the ME1 Safety Study is expressly contemplated under the Code.

Accordingly, we reject Sunoco’s Comment suggesting that the Independent Expert be authorized to engage in *ex parte* communication with either Sunoco or I&E. A review of the Settlement terms reflects that the Parties specified the information necessary for the Study. *See* Settlement at 11. Clearly, the Parties intended that the ME1 Safety Study be based on objective criteria, including the relevant facts and the applicable industry standards. *See* *Second Tentative Order* at 10-12 (terms of the Settlement setting forth the content of the ME1 Safety Study). Given that the Study is to be based on objective criteria specified by the Parties, the exchange of the information in a joint manner assures that the Parties may evaluate whether the Independent Expert is assessing the proper criteria, and will have equal opportunity to clarify the accuracy of facts and applicable standards for the benefit of the Independent Expert. The joint exchange of information will assure agreement between the Parties on the appropriate facts and applicable standards, or, if there is any disagreement, help clarify the areas of disagreement for the benefit of the Independent Expert’s consideration.

Turning now to Sunoco’s Comments regarding the Independent Expert’s issuance of the confidential Report and public Summary of the ME1 Safety Study, we shall adopt Sunoco’s proposal because we conclude the proposed process is a reasonable means to satisfy our need to ensure the transparency and objectivity of the Independent Expert’s confidential Safety Study and public Summary while also addressing Sunoco’s concern that CSI protections be preserved

We note that Sunoco raises essentially the same arguments regarding the application of the CSI Act which we thoroughly reviewed and rejected in our *Second Tentative Order*, which we need not repeat here. *See Second Tentative Order* at 23-29. Our analysis of those arguments is adopted and incorporated herein, by reference.

While we do not adopt Sunoco’s interpretation of the CSI Act’s requirements, we acknowledge the Company’s concerns regarding the safeguarding and objectivity of the Independent Expert’s confidential Safety Study and public Summary. Sunoco now proposes a procedure, as noted *supra*. whereby:

[T]he Commission shall modify the *Second Tentative Order* to direct that the Independent Expert submit the final form ME1 Safety Study in a locked Portable Document Format (PDF) directly to Sunoco in the first instance, solely for the purpose of Sunoco’s review to mark CSI. Sunoco would then provide the Independent Expert the portions Sunoco designates as CSI, so that the Independent Expert may mark the CSI provisions. The Independent Expert would then provide a marked and locked copy of the PDF directly to Sunoco. … Sunoco would then be responsible for providing the Study to I&E. Sunoco further agrees to include an affidavit attesting to the fact that Sunoco did not alter the study.

With respect to the public Summary, Sunoco proposes that the Commission modify the Settlement terms under the *Second Tentative Order* to direct that the Independent Expert provide the public Summary directly to Sunoco in the first instance, in a locked form PDF. Sunoco will then review the Summary solely for the purposes of marking CSI. If Sunoco finds no CSI or other proprietary materials, the Independent Expert may give the summary directly to I&E. Sunoco proposes that if Sunoco finds CSI or other proprietary materials, it will communicate jointly with I&E and the Independent Expert to excise any such information. Once any CSI/proprietary information is excised, under Sunoco’s proposal, the Independent Expert would provide the public summary to I&E. Sunoco Comments at 7-8.

Upon review of Sunoco’s proposed procedure, we conclude that it adequately addresses our concern to ensure the transparency and objectivity of the Independent Expert’s Safety Study and public Summary. In the interest of preserving the benefits of this Settlement[[6]](#footnote-6) and avoiding undue delay in the implementation of its provisions; we shall exercise our discretion to adopt the modifications and procedures, with one additional condition. In addition to the procedures outlined above, we shall direct that the Independent Expert include a signed verification, consistent with 52 Pa. Code §1.36, with both the confidential Safety Study and the Public Summary it delivers to I&E, confirming that its findings have not been modified by Sunoco.

Our action with respect to both the Independent Expert’s communication with the Parties and the procedures for submission of the confidential Safety Study and public Summary, is taken, not to imply that Sunoco *would* exert any undue influence, but rather, to avoid even the appearance that Sunoco (or I&E) *might* do so. The objectivity of the facts and impartiality of the Independent Expert is crucial where the results of the Study will have significant implications for Sunoco’s future operation of ME1, and where the results are a matter of concern to both state and federal regulators and the public’s confidence in the findings. Prohibiting the Independent Expert from *ex parte* communication with Sunoco (or I&E) ensures that the Independent Expert’s performance of the ME1 Safety Study will be free from even the appearance of influence by either of the Parties.

In this case, the prohibition on *ex parte* communication by the Independent Expert preserves the integrity of the final Report in the same manner that a prohibition on *ex parte* communication is a foundation to the integrity of a judicial decree. In addition, adoption of the Sunoco’s proposed procedures and the requirement that the Independent Expert attest that the Safety Study and Summary were completed without outside influence, ensures that the final Report is reflective of the Independent Expert’s objective conclusions.

Accordingly, we shall adopt Sunoco’s Comment’s proposal for a procedure whereby the Independent Expert shall be directed to issue the confidential Report and public Summary of the ME1 Safety Study consistent with this Opinion and Order. We conclude that the procedures adopted by our *Second Tentative Order,* as modified by this Opinion and Order provide additional safeguards to ensure the transparency and objectivity if the Independent Expert’s findings.

1. **Conclusion**

Based on the foregoing, we shall adopt Sunoco’s Comments as they pertain to the procedures by which the Independent Expert shall issue its confidential Safety Study and public Summary, and shall reject Sunoco’s Comments as they pertain to the Independent Expert’s Communication with the Parties, and shall approve the Settlement, as clarified and modified by our *Second Tentative Order*, and this Opinion and Order, as in the public interest.

As the filing of Comments by Sunoco operated as a stay of the twenty (20) day period in which to withdraw from the Settlement, the Joint Petitioners may withdraw from the Settlement within twenty (20) days from the date of issuance of this order; **THEREFORE,**

**IT IS ORDERED:**

1. That the Commission’s Second Tentative Opinion and Order entered on May 21, 2020, at this Docket, is modified to direct that the Independent Expert shall submit the final form ME1 Safety Study in a locked Portable Document Format (PDF) directly to Sunoco Pipeline, L.P. in the first instance, solely for the purpose of Sunoco’s review to mark Confidential Security Information (CSI), as defined by the Public Utility Confidential Security Information Disclosure Protection Act, 35 P.S. §§ 2141.1-2141.6 (CSI Act). Sunoco Pipeline, L.P. shall then provide the Independent Expert the portions Sunoco Pipeline, L.P. designates as CSI, so that the Independent Expert may mark the CSI provisions in the final form document. The Independent Expert would then provide a marked and locked copy of the PDF directly to Sunoco Pipeline, L.P. … Sunoco Pipeline, L.P. shall then provide the Study to the Commission’s Bureau of Investigation and Enforcement, together with an affidavit attesting to the fact that Sunoco Pipeline, L.P. did not alter the study.
2. That the Commission’s Second Tentative Opinion and Order entered on May 21, 2020, at this Docket, is modified to direct that the Independent Expert shall submit the public Summary directly to Sunoco Pipeline, L.P. in the first instance, in a locked form PDF. Sunoco Pipeline, L.P. shall then review the Summary solely for the purposes of marking CSI. If Sunoco Pipeline, L.P. finds no CSI or other proprietary materials, the Independent Expert may deliver the Summary directly to the Commission’s Bureau of Investigation and Enforcement. If Sunoco Pipeline, L.P. finds CSI or other proprietary materials, it will communicate jointly with the Commission’s Bureau of Investigation and Enforcement and the Independent Expert to excise any such information. Once any CSI/proprietary information is excised, the Independent Expert shall provide the public Summary to the Commission’s Bureau of Investigation and Enforcement.
3. That the Commission’s Second Tentative Opinion and Order entered on May 21, 2020, at this Docket, is modified to direct that the Independent Expert shall

include a signed verification, consistent with 52 Pa. Code §1.36, with both the final form confidential Safety Study and the Public Summary, confirming that its findings have not been modified by Sunoco Pipeline, L.P.

1. That the Commission’s Second Tentative Opinion and Order entered on May 21, 2020, adopts the Initial Decision of Administrative Law Judge Elizabeth H. Barnes, issued on December 20, 2019, at this docket, adopting the Joint Petition for Approval of Settlement filed on April 3, 2019, at this docket, by the Commission’s Bureau of Investigation and Enforcement and Sunoco Pipeline, L.P., as amended on June 28, 2019, by the Addendum to the April 3, 2019 Joint Petition for Approval of Settlement, as clarified and modified by the Tentative Opinion and Order of the Commission entered on March 10, 2020, at Docket Number C-2018-3006534., as clarified and modified by this Opinion and Order.
2. That, *per* the terms of the Joint Petition for Approval of Settlement filed on April 3, 2019, at this docket, by the Commission’s Bureau of Investigation and Enforcement and Sunoco Pipeline, L.P. (Joint Petitioners), as amended on June 28, 2019, by the Addendum to the April 3, 2019 Joint Petition for Approval of Settlement (Joint Petition for Settlement), the Joint Petitioners shall, within twenty (20) days of the entry of this Opinion and Order, file with the Secretary of the Commission, and serve on all Parties to this proceeding, a written statement indicating either an acceptance of the modifications to the Joint Petition for Settlement or an election to withdraw from the Joint Petition for Settlement. Further:
3. If either Joint Petitioner fails to file such a statement within twenty (20) days of the entry of this Opinion and Order, or if either Joint Petitioner timely files an election to withdraw from the Joint Petition for Settlement, the Joint Petition for Settlement shall be disapproved without further action by this Commission, and this matter shall be referred to the Bureau of Investigation and Enforcement for prosecution of the Formal Complaint filed in this proceeding.
4. If both Joint Petitioners file a statement, within twenty (20) days of the entry of this Opinion and Order, indicating acceptance of the modifications to the Joint Petition for Settlement, this Opinion and Order shall become final without further Commission action.
5. That a copy of this Opinion and Order be served upon all the parties of record in the instant proceeding.

**BY THE COMMISSION,**



Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: August 6, 2020

ORDER ENTERED: August 19, 2020

1. Our *Second Tentative Order* adopted the Commission’s Tentative Opinion and Order issued on March 10, 2020, at this docket *(March 2020 Tentative Order*), with certain clarifications and modifications deemed necessary in the public interest. Our *March 2020 Tentative Order* adopted the Initial Decision of Administrative Law Judge (ALJ) Elizabeth H. Barnes issued on December 20, 2019, which adopted the Settlement of the Parties as in the public interest, as clarified and modified by the *March 2020 Tentative Order*. [↑](#footnote-ref-1)
2. The Joint Petition as amended on June 28, 2019, by the Addendum to the April 3, 2019 Joint Petition for Approval of Settlement (Addendum). [↑](#footnote-ref-2)
3. We also noted that this procedural step would provide Sunoco with the opportunity to assert that information contained not only in the public Summary, but also in the final form Study, should be treated as CSI or otherwise designated as confidential proprietary information. *Second Tentative Order* at fn. 5. [↑](#footnote-ref-3)
4. As noted, *supra.*, I&E did not file comments. *See*, I&E Letter – Not Filing Comments, at Docket No. C-2018-3006534 (Rev.) filed June 2, 2020. [↑](#footnote-ref-4)
5. We note that Sunoco implies that it was improper for the Commission to act *sua sponte* to review the terms of the Settlement in this proceeding*.* However, pursuant to the Commission’s statutory authority to review any initial decision, theCommission exercised its right to review the Initial Decision in this proceeding pursuant to Section 332(h) of the Code, 66 Pa. C.S. § 332(h). In addition, the Commission is the ultimate fact finder, and is vested with the statutory authority to review and approve all settlements if deemed to be in the public interest. *See*, *Lancaster* and *Warner*, *supra*. Finally, we note that, contrary to Sunoco’s assertions, our consideration of the process by which the Independent Expert communicates with the Parties during the Performance of the Study and issues the confidential Report and public Summary of the Study was not *sua sponte*, as both matters were raised by the Parties’ Comments to our *March 2020 Tentative Order.*  *See* Comments of I&E to the *March 2020 Tentative Order*, and Comments of Sunoco to the *March 2020 Tentative Order*. [↑](#footnote-ref-5)
6. In this case, the Parties submitted a Settlement of all issues. The Commission’s policy promotes settlements. 52 Pa. Code § 5.231. Settlements lessen the time and expense the parties must expend litigating a case and at the same time conserve administrative resources. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code § 69.401. [↑](#footnote-ref-6)