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August 21, 2020

BY ELECTRONIC FILING

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

Re: Meghan Flynn, et al., Docket Nos. C-2018-3006116 & P-2018-3006117 (consolidated)
Melissa DiBernardino, Docket No. C-2018-3005025 (consolidated)
Rebecca Britton, Docket No. C-2019-3006898 (consolidated)
Laura Obenski, Docket No. C-2019-3006905 (consolidated)
Andover Homeowner's Association, Inc.; Docket No. C-2018-3003605 (consolidated)
v. Sunoco Pipeline L.P.

SUNOCO PIPELINE L.P. MOTION FOR LEAVE TO REPLY TO ANSWERS TO MOTION FOR PARTIAL SUMMARY JUDGMENT ON CONSEQUENCE WITHOUT PROBABILITY AND REQUEST FOR EXPEDITED 5-DAY RESPONSE AND REPLY

Dear Secretary Chiavetta:

Enclosed for electronic filing with the Commission is Sunoco Pipeline L.P.'s Motion for Leave to Reply to Answers to Motion for Partial Summary Judgment on Consequence Without Probability and Request for Expedited 5-day Response. Included as Attachment A to this Motion is Sunoco Pipeline L.P.'s Reply to Complainants' Answer to Sunoco Pipeline L.P.'s Motion for Partial Summary Judgment on Consequence Without Probability. Because this document does not contain new averments of fact, it does not require a verification.

If you have any questions regarding this filing, please do not hesitate to contact me.

Very truly yours,

/s/ Whitney E. Snyder

Thomas J. Sniscak
Whitney E. Snyder
Counsel for Sunoco Pipeline L.P.

WES/das
Enclosure

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

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MEGHAN FLYNN et al.	:	Docket Nos. C-2018-3006116 (consolidated)
	:	P-2018-3006117
MELISSA DIBERNARDINO	:	Docket No. C-2018-3005025 (consolidated)
REBECCA BRITTON	:	Docket No. C-2019-3006898 (consolidated)
LAURA OBENSKI	:	Docket No. C-2019-3006905 (consolidated)
ANDOVER HOMEOWNER'S ASSOCIATION, INC.	:	Docket No. C-2018-3003605 (consolidated)
	:	
	:	
v.	:	
	:	
SUNOCO PIPELINE L.P.	:	

NOTICE TO PLEAD

Pursuant to 52 Pa. Code § 5.103, you are hereby notified that, if you do not file a written response to the enclosed Motion for Partial Summary Judgment within five (5) days from service of this notice, a decision may be rendered against you. Any Response to the Motion for Partial Summary Judgment must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for Sunoco Pipeline, L.P., and where applicable, the Administrative Law Judge presiding over the issue.

File with:

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

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MEGHAN FLYNN et al.	:	Docket Nos. C-2018-3006116 (consolidated)
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ANDOVER HOMEOWNER’S ASSOCIATION, INC.	:	Docket No. C-2018-3003605 (consolidated)
	:	
	:	
v.	:	
	:	
SUNOCO PIPELINE L.P.	:	

**SUNOCO PIPELINE L.P. MOTION FOR LEAVE TO REPLY TO ANSWERS TO
MOTION FOR PARTIAL SUMMARY JUDGMENT ON CONSEQUENCE WITHOUT
PROBABILITY AND REQUEST FOR EXPEDITED 5-DAY RESPONSE**

Pursuant to 52 Pa. Code § 5.103, Sunoco Pipeline L.P. (SPLP) moves for leave to submit a Reply to the Answers filed by the Flynn Complainants, Andover Homeowner’s Association Inc., Rebecca Britton, and Melissa DiBernardino to (Answers) SPLP’s July 28, 2020 Motion for Partial Summary Judgment on Consequence Without Probability (Motion). Section I contains SPLP’s Motion for Leave to Reply Section II contains SPLP’s Request for Expedited Response to this Motion. SPLP’s Reply is contained as Attachment A hereto.

I. MOTION FOR LEAVE TO REPLY

1. While a responsive pleading to an Answer is not a specifically allowable pleading pursuant to the Commission’s Regulations at 52 Pa. Code, SPLP is moving for leave to reply to the Answers for the following reasons:

A. The Answers cite and rely upon a Commission decision without mentioning that the decision it relies upon was overturned by the Commonwealth Court. SPLP believes it

has a duty to Your Honor and the Commission to identify and explain this material misstatement of the law.

- B. The Answers improperly introduce and rely upon documents¹ not previously identified as evidence in this proceeding in violation of 52 Pa. Code § 5.243(e), “which prohibits the introduction of evidence during rebuttal which should have been included in the party’s case-in-chief” and the Omnibus Order in this proceeding explaining and mandating adherence to this regulation. Omnibus Order, at ¶ 4 (Barnes, J.) (Feb. 11, 2020). SPLP believes it is crucial for Your Honor to be made aware of this as these documents cannot be relied upon in determining whether to grant summary judgment.
- C. The Answers improperly introduce and rely upon a new arguments not previously alleged in pleadings or identified in evidence in this proceeding. SPLP believes it is crucial for Your Honor to be made aware of this as these arguments cannot be relied upon in determining whether to grant summary judgment.

2. Moreover, fairness requires that SPLP be granted leave to reply because Your Honor has considered responsive documents to Answers in this proceeding in the past where leave was not sought to reply and over SPLP’s objections and Motion to Strike. Order Granting In Part And Denying In Part Complainants’ Motion To Compel Responses To Complainants’ Interrogatories And Document Request Set 1, at Ordering ¶ 1 (denying SPLP Motion to Strike two of the Flynn Complainants’ responsive filings to SPLP Answer Opposing Motion to Compel) (Barnes, J.) (Order entered Jun. 6, 2019); Order Granting In Part And Denying In Part

¹ In reality, the Complainants realize they did not make an evidentiary case that would survive a motion for summary judgment and now they attempt to add new documents, in derogation of the Omnibus Order at 52 Pa. Code § 5.243(e).

Complainants' Motion For Reconsideration Of Second Interim Order, at Ordering ¶ 5 (denying SPLP Motion to Strike Flynn Complainants' responsive filing to SPLP Answer Opposing Motion to for Reconsideration) (Barnes, J.) (Order entered Jun. 6, 2019).

WHEREFORE, SPLP respectfully requests Your Honor consider the Reply Attached hereto as Attachment A in ruling on SPLP's Motion.

II. REQUEST FOR EXPEDITED RESPONSE

3. SPLP believes its Motion for Partial Summary Judgment should be resolved prior to hearing and SPLP's Motion for Leave to Respond consists of only two paragraphs to which parties may respond. Accordingly, SPLP believes an expedited response to its two paragraph Motion is reasonable and efficient.

WHEREFORE, SPLP respectfully requests Your Honor order a five-day response time for Answers to its Motion for Leave to Reply.

Respectfully submitted,

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Attorneys for Respondent Sunoco Pipeline L.P.

Dated: August 21, 2020

ATTACHMENT A

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MEGHAN FLYNN et al.	:	Docket Nos. C-2018-3006116 (consolidated)
	:	P-2018-3006117
MELISSA DIBERNARDINO	:	Docket No. C-2018-3005025 (consolidated)
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ANDOVER HOMEOWNER’S ASSOCIATION, INC.	:	Docket No. C-2018-3003605 (consolidated)
	:	
	:	
v.	:	
	:	
SUNOCO PIPELINE L.P.	:	

**SUNOCO PIPELINE L.P.’S REPLY TO COMPLAINANTS’ NEW MATTERS IN THEIR
ANSWER TO MOTION FOR PARTIAL SUMMARY JUDGMENT ON
CONSEQUENCE WITHOUT PROBABILITY**

I. INTRODUCTION

1. Sunoco Pipeline, L.P. (“Sunoco”) filed a Motion for Partial Summary Judgment contending that Complainants failed to meet their burden of proving that the Mariner East pipelines¹ are unsafe, unreasonable or inadequate under Section 1501 of the Pennsylvania Public Utility Code, 66 P.S. § 1501 (“Section 1501”). The sole legal issue raised by Sunoco’s motion² is whether evidence of the consequences of a worst-case catastrophic release of highly volatile liquids (“HVLs”) in a high consequence area without any evidence of the probability or likelihood of such a catastrophic release occurring satisfies Complainants’ burden of proof under Section 1501.

¹ The Mariner East pipelines consist of Mariner East 1, Mariner East 2, Mariner East 2X and a portion of a 12-inch diameter pipeline that is currently being used as part of Mariner East 2 (collectively “ME2”).

² In their respective answers, Complainants assert that consequence analysis may be relevant to their claims that Sunoco’s public awareness program is deficient. That assertion, which Sunoco denies, is not relevant to Sunoco’s instant motion which relates only to Section 1501 of the Public Utility Code and has nothing to do with public awareness requirements that are set forth in an entirely different section of the regulations.

2. To obtain summary judgment on this issue, Sunoco must demonstrate two elements: (i) that there are no material disputed facts, and (ii) that Sunoco is entitled to relief as a matter of law. Sunoco has satisfied both elements. Despite being offered multiple opportunities to do so by ALJ Barnes and the Commission, Complainants uniformly concede that they knowingly offered *NO* evidence of the likelihood of a catastrophic release from ME2. The only fact relevant to Sunoco's Motion is thus undisputed.

3. The legal standard under Section 1501 is equally clear. Evidence of the consequence of a release from an HVL pipeline, no matter how large the impact, without evidence of the likelihood that such a consequence will occur is insufficient to prove a violation of Section 1501. ALJ Barnes held that in denying Complainants' petition for emergency relief. The Commission affirmed ALJ Barnes' holding. The decisions by the Commission and ALJ Barnes are consistent with the Commission's prior holdings in the "smart meter" cases which require proof of likelihood of harm occurring to establish a violation under Section 1501. *See Povacz v. PECO Energy Co.*, Docket No. C-2015-2475023, Opinion and Order (Order entered March 26, 2019), appeal docketed, No. 492CD 2019 (Commw. Ct. April 26, 2019); *Randall v. PECO*, Docket No. C-2016-2537666, Opinion and Order (Order entered May 9, 2019), §§ 6010 and 60503 and appeal docketed No. 607CD 2019 (Commw. Ct. May 22, 2009). And these decisions are consistent with the relevant regulations expressly authorizing the locating of HVL pipelines in high consequence areas such as Chester and Delaware Counties. *See* 52 Pa. Code 59.35(b) (incorporating 49 U.S.C.A. §§ 6010-60503 and 49 C.F.R. Part 195 regulations as safety standards for hazardous liquid public utilities); 49 U.S.C. § 60109; 49 C.F.R. §§ 195.1(a)(1), 195.450 and 195.452. For these reasons, Sunoco is entitled to summary judgment.

4. Complainants' answers attempt to divert from this undisputed factual record and the clear legal standard. Complainants' do so in a troubling and improper manner that compels Sunoco to reply. First, Complainants rely on a single cited case in their respective answers, *Mattu v. West Penn Power Co.*, C-2016-2547322 (Pa. Pub. Util. Comm'n 2018). Complainants allege that the Commission in *Mattu* did not require expert testimony, a quantitative risk analysis or evidence of probability to prove a violation of Section 1501. Complainants cite *Mattu* for the proposition that Mr. Mattu's personal concerns that a utility's application of a herbicide on his property could damage his drinking water well were sufficient to find that the utility's actions were unreasonable under Section 1501. See Andover's Answer at p. 9, ¶ 14; Flynn Complainant's Answer at pp. 9-10.

5. Complainants inexplicably fail to advise Your Honor and the Commission that the holding in *Mattu* was expressly *overruled* by the Commonwealth Court. On appeal, the Commonwealth Court in *West Penn Power Co. v. Pa. P.U.C.* Docket No. 1548 C.D. 2018, 2019 WL 4858352 (Pa. Commw. Ct., Oct. 2, 2019 (unreported panel decision C.J. Covey) held that Mr. Mattu could *not* satisfy his burden of proof under Section 1501, whether on grounds of safety or reasonableness,³ in the absence of expert testimony that the feared consequence was likely to occur. The Commonwealth Court held that Mr. Mattu's personal concerns, speculation or observations were insufficient and thus do not meet the risk requirement.

6. Second, Complainants' answers rely on new matters it raises for the first time in its answer to the motion in what is an obvious attempt to backfill its failure, despite repeated prefiled testimony opportunities and over two years to develop its case, to make a case as to

³ Complainants allege that if consequence alone may not demonstrate that ME2 is unsafe, it could still show that ME2 is unreasonable under Section 1501. Yet, the very case that Complainants rely upon, *Mattu*, states expressly that consequence alone is also not sufficient to find that a utility's conduct was unreasonable under Section 1501.

likelihood, probability and risk. In its Answer, for the first time, it seeks to supplement its testimony and evidence with four Hazard Assessments Sunoco submitted to the Commission. Sunoco designated the Hazard Assessments as Extremely Sensitive Materials. Despite the Flynn Complainants' counsel having reviewed these Hazard Assessments on three separate occasions,⁴ and an express procedure, set forth in the Amended Protective Order in this case for admitting Extremely Sensitive Materials into Complainants' direct or surrebuttal testimony, Complainants did not refer to, rely upon or introduce the Hazard Assessments as exhibits or evidence in their direct or surrebuttal testimony. Complainants reliance on the Hazard Assessments in their answers to Sunoco's Motion for Partial Summary Judgment violates 52 Pa. Code §5.243(e), which prohibits the introduction of evidence that should have been included in the party's case-in-chief, and also violates Your Honor's Omnibus Order mandating adherence to that regulation. Omnibus Order at ¶4, (Barnes, J.) (Feb. 11, 2020). Therefore, the Hazardous Assessments are not evidence in this case and cannot be considered for any purpose, including for purposes of Sunoco's Motion for Partial Summary Judgment.

7. Third, Complainants similarly improperly attempt to introduce affidavits submitted on behalf of both the Commission and Sunoco seeking to prohibit production of Extremely Sensitive Materials and Confidential Security Information pursuant to the Public Utility Confidential Security Information Disclosure Protection Act ("Disclosure Protection Act"), 35 P.S. § 2141.1 *et seq.* Again, Complainants failed to refer to, rely upon or introduce these affidavits as evidence in their direct and surrebuttal testimony and doing so now violates both the Commission's regulations and Your Honor's Omnibus Order. They are not evidence

⁴ Strikingly, Complainants lone expert on consequence, Jefferey Marx, never reviewed the Hazard Assessments.

and cannot be considered for any purpose in this case, including for purposes of Sunoco's Motion for Partial Summary Judgment.⁵

8. For these reasons, and as set forth more fully below, Sunoco is entitled to partial summary judgment. Complainants' answers misrepresent the case law, improperly rely upon evidence not in the record and otherwise do not provide any basis to deny Sunoco's motion.

II. ARGUMENT

A. The Legal Standard is Clear – Consequence Without Likelihood is Insufficient Under Section 1501 and HVL Pipelines Are Expressly Authorized in High Consequence Areas.

9. To address the three new and improper arguments Complainants raise in their answers, it is essential to understand the narrow issues raised by Sunoco's Motion for Partial Summary Judgment and how Complainants' improper answers seek to both misstate the law and go beyond the record evidence.

1. The legal standard under Section 1501

10. Complainants assert that neither Your Honor nor the Commission determined whether evidence of consequence without evidence of probability is sufficient to meet Complainants' burden under Section 1501. Complainants argue that Your Honor and the Commission found only that consequence without likelihood was insufficient to prove an immediate risk of harm rather than being insufficient for purposes of finding a violation of Section 1501. That is incorrect.

⁵ As set forth *infra* at pp. 13-14, the contents of the Hazard Assessments and issues relating to the Disclosure Protection Act are, in any event, a red herring and irrelevant to Sunoco's Motion. Just because Complainants allege that evidence of consequence alone may be relevant to one regulatory requirement, does not make evidence of consequence alone relevant or sufficient for other distinct regulatory requirements. The law is clear that consequence alone is insufficient for Section 1501, which is the only issue relevant to Sunoco's Motion for Partial Summary Judgment.

11. To prevail on their petition for emergency relief, Complainants had to prove four elements: (1) the right to relief is clear; (2) the need for relief is immediate; (3) the injury would be irreparable if relief is not granted; and (4) the relief requested is not injurious to the public interest. *See* 52 Pa. Code § 3.6(b). Your Honor expressly found that Complainants failed to meet their burden on all four elements, including whether their right to relief was clear, and not just on whether the need for relief was immediate. In fact, all of the quotations from Your Honor’s Opinion cited in Sunoco’s opening brief are from the section of the brief discussing whether the right to relief is clear. *See* Order Denying Petition for Emergency Interim Relief and Certifying Material Question (Dec. 11, 2018) at 11-13. (emphasis added).

12. The Commission’s Opinion affirming Your Honor was also not limited. The Commission held:

Without ruling upon whether the Complainant may be able to prove any of their allegations against Sunoco in the accompanying Complaint case, a review of the record shows that it does not set forth a clear and present danger to life and property under the facts presented by Petitioners in this matter.

Opinion and Order (Feb. 1, 2019) at 18.

13. The holdings by Your Honor and the Commission follow directly the Commission’s prior holdings in *Povacz* and *Randall*. In those cases, the Commission expressly rejected the proposition that the mere existence of an unquantified “potential for harm,” without evidence of the actual probability or likelihood of that harm occurring, was insufficient to meet a complainant’s burden of proof under Section 1501. The Commission described the “potential for harm” standard as an “overreach” that “rests upon a logical facility that equate any hazard with exposure to harm.” *Povacz* at 30. It is this caselaw that Complainants try to rebut by citing to a Commission opinion in *Mattu* that the Commonwealth Court overturned.

14. Significantly, both the Commission and Your Honor advised Complainants that even though Complainants had failed to meet their burden of proof by not producing evidence of the probability of a catastrophic release to support their petition for emergency relief, Complainants still had the opportunity to do so in this Complaint docket. The Commission's Opinion states:

Petitioners will now have a full and fair opportunity to present their concerns and evidence to support their allegations of violations in the accompanying Complaint Docket.

Opinion and Order (Feb. 1, 2019) at 19.

15. During the in-person hearing in the Complaint Docket, Your Honor offered the Complainants the opportunity to do precisely that. Your Honor inquired several times if Complainants were going to put on evidence of probability of a catastrophic release from ME2. If probability was not required under Section 1501, this colloquy would have been irrelevant. In fact, when Ms. Britton described risk as potential consequences, Your Honor responded by saying "And the probability of an incident." N.T. 1173:17-20. And, if there is any doubt as to what the ALJ's prior Opinion held, as affirmed by the Commission, after counsel for the Flynn Complainants stated that he understood that risk "has become part of the case," Your Honor responded by asking Complainants: "I always thought it was. Did you not read my decision?" N.T. 1174:8-10. Not surprisingly, Complainants' answers do not cite to or address Your Honor's statement directed to them on this central legal issue. Complainants simply ignore it. And to date, none of the Complainants have offered any such evidence on probability in the Complaint Docket. It is this void in their evidentiary record that Complainants try to fill, improperly and inadequately, with evidence that violates PUC regulations and Your Honor's Omnibus Order.

16. Having failed to properly and timely produce the required evidence to satisfy their burden of proof under Section 1501, Complainants next argue that an HVL pipeline should not be located in high consequence areas in Chester and Delaware Counties regardless of the probability of a catastrophic release. Again, the law says otherwise. Location of ME2 in a high consequence area is expressly authorized by 49 C.F.R. § 195.452. *See also* 49 U.S.C. § 60109. Any change to that authorization would have to be made through legislation or regulation

17. Significantly, Complainants' answers concede this point. The Flynn Complainants' answer states:

As Sunoco's counsel will know, the siting of pipelines is not within the power of PHMSA . . .

In addition, just because an HVL pipeline may operate in a high consequence area does not mean that it is a good idea in every high consequence area, or under all circumstances.

Flynn Complainants' Answer at 3.

18. The standard under Section 1501 is not whether the location of a pipeline is a "good idea." To create this new standard, whether or not it is a "good idea" to have HVL pipelines in a high consequence area, would require new legislation or new regulations. Without that, the Flynn Complainants' concede that the Commission simply does not have jurisdiction over the siting of pipelines.

19. Ms. Britton's answer concedes the same point. On page 4 of her answer, Ms. Britton states that the Governor through the legislature need to take this action:

PEMA is directed under Title 35 to recommend to the Governor legislation or other actions as deemed necessary in connection with the purpose of the project and its conduciveness and practicality for meeting state and federal safety standards.

Britton Answer at p. 4.

20. In sum, just as the legal standard under Section 1501 is clear, so is the authority to locate an HVL pipeline in a high consequence area. If Complainants want that express authority rescinded, the proper forum is the legislature or through rulemaking, not by an adjudication in this Complaint docket.

2. The facts are undisputed – Complainants offer no evidence on the probability or likelihood of a catastrophic release from ME2.

21. Despite being given multiple opportunities to do so, the Flynn Complainants' expert Mr. Marx offered no opinion or evidence of likelihood or probability. The Flynn Complainants' answer and the answers of Ms. Britton and Ms. DeBernardino say exactly the same.

22. The Flynn Complainants' answer states:

It is not disputed that Complainants have not offered and will not offer evidence of the probability that a pipeline release or failure might occur . . .

Admitted (once again) that no evidence has been or will be presented on the probability of a release or failure.

Flynn Complainants' Answer at pp. 10, 12 (emphasis added).

23. Ms. Britton's answer states, at page 5:

Probability is irrelevant to my filing.

24. Ms. Bernardino's answer states at page 2:

I am in no position to argue what the probability/likelihood of a failure happening.

Without the ability to determine the probability, there is no credible way to determine the risk.

25. Sunoco’s Motion for Partial Summary Judgment is limited to the issue whether consequence without probability is sufficient under Section 1501. There is no dispute as to the one fact relevant to Sunoco’s motion: Complainants offer no evidence of the probability or likelihood of a release from ME2.

B. Because the Facts are Undisputed and the Legal Standard is Clear, Complainants’ Answers Resort to Improperly Relying Upon a Case That was Reversed and Introducing Evidence Not in the Record that is Prohibited by Commission Rule and the Omnibus Order.

1. Complainants rely solely on the Commission’s opinion in *Mattu*, an opinion that the Commonwealth Court reversed.

26. Faced with Your Honor’s Opinion on consequence without probability, the Commission’s Opinion affirming Your Honor’s opinion and the Commission’s opinions in the “smart meter” cases rejecting a “potential for harm” standard under Section 1501, Complainants assert that the Commission’s opinion in *Mattu v. West Penn Power Co.*, C-2016-2547322 (Pa. Pub. Util. Comm’n 2018), holds that (i) qualitative risk is sufficient to satisfy Complainants’ burden of proof under Section 1501, See Andover’s Answer at p. 9, ¶14,⁶ or (ii) a significant consequence without evidence of probability can render a utility’s action under Section 1501 unsafe or unreasonable. Flynn Complainants’ Answer at pp. 9-10. Complainants fail to advise Your Honor and the Commission that the Commonwealth Court *overruled* the Commission’s opinion in *Mattu*.

⁶ It is hard to discern what evidence Andover’s Answer refers to as a qualitative risk assessment. The only evidence that Andover cites is Friedman Exhibit 24, a document from the PHMSA data base identifying the number of incidents on Sunoco pipelines nationally between 2006-2016. Andover asserts that this demonstrates Sunoco’s poor performance record, which is qualitative evidence of the probability of a catastrophic release from ME2. It is no such thing for the following reasons: (1) on its face, Friedman Exhibit 24 does not collate the size or type of incidents, does not identify an incident on ME2, nor does it collate whether the incidents occurred on natural gas lines, hazardous liquid lines, or HVL lines; (2) Mr. Friedman testified that he does not know any details about any of these incidents or even if they occurred on-site or off-site, N.T. p. 828:6-18; (3) ALJ Barnes sustained Sunoco’s objection to Mr. Friedman rendering any expert opinion on Friedman Exhibit 24, N.T. p. 795:22-24, p. 796:1-7; and (4) in the *Baker* case, ALJ Barnes disallowed reliance on PHMSA documents from a non-expert because they could not testify as to any events in that document, N.T. p. 164:23-25, p. 165:1-25 (relevant portion of the transcript attached as Exhibit 1). In short, Friedman Exhibit 24 is not evidence, qualitative or otherwise, of the probability or likelihood of a catastrophic release on ME2.

27. In *Mattu*, Mr. Mattu alleged that he feared contamination of his private water well from the utility's application of a herbicide on his property. Mr. Mattu offered no expert testimony, but rather relied upon his own perceptions, concerns and experiences. The Commission found that Mr. Mattu met his burden of proving that the application of herbicides by the utility was unreasonable.

28. The Commonwealth Court reversed. The Commonwealth Court held that Mr. Mattu, as Complainant, did not present any evidence that the application of herbicides posed an actual risk to his water supply sufficient to render the utility's actions unreasonable under Section 1501. *Mattu* at ¶10, citing *Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987). The Commonwealth Court held further that this was an area *requiring* scientific evidence and expert testimony and Mr. Mattu offered nothing more than personal opinions and perceptions. *Id.*⁷

29. Therefore, the only case that Complainants rely upon was expressly reversed. And the Commonwealth Court, in reversing, stated the law exactly as Your Honor and the Commission have stated in this case, and the Commission has held in the "smart meter" cases: consequence without actual evidence of likelihood of harm is insufficient to demonstrate that a utility acted unsafely or unreasonably under Section 1501. Complaints' failure to bring this Commonwealth Court opinion to the Commission's attention should not be tolerated.

⁷ Andover's argument that qualitative risk is sufficient also directly contradicts Mr. Marx's surrebuttal testimony in which he testifies that only a quantitative risk analysis would be sufficient to prove a sufficient risk to people along a pipeline route. Marx Surrebuttal, Exhibit 2 to Sunoco's Motion for Partial Summary Judgment at p. 6.

2. Complainants' attempt to introduce into evidence Sunoco's Hazard Assessments violates 52 Pa. Code § 5.243(c) and the Omnibus Order and as such cannot be considered for purposes of Sunoco's Motion for Partial Summary Judgment.

30. The Flynn Complainants assert that Sunoco has submitted four Hazard Assessments for ME-2 to the PUC pursuant to 195 C.F.R. § 195.452 and that the Hazard Assessments describe the consequences of an ME-2 release without any discussion of the likelihood of such a release. Flynn Complainants Answer at ¶ 8. The Flynn Complainants then extrapolate that if Sunoco can rely on consequence analysis for purpose of that section of the PUC regulations, Complainants can do the same to meet their burden of proof under Section 1501. Complainants argument should be dismissed for two primary reasons.

31. First, the Hazard Assessments are not properly in evidence and therefore cannot be considered for purpose of Sunoco's Motion for Partial Summary Judgment. Counsel for the Flynn Complainants reviewed the Hazard Assessments on three separate occasions, all before either their direct or surrebuttal testimony was due. But the Flynn Complainants expert on consequence, Mr. Marx, did not review the Hazard Assessments. The Flynn Complainants did not refer to the Hazard Assessments in their direct or surrebuttal testimony, nor did they include them as exhibits with their direct or surrebuttal testimony by identifying them as exhibits at that time for SPLP's submission pursuant to the Joint Stipulation of Record.

32. Now that Complainants direct and surrebuttal testimony deadlines have long passed, Complainants' attempted reliance on and introduction of the Hazard Assessments not previously identified for the record violates 52 Pa. Code § 5.243(e), "which prohibits the introduction of evidence during rebuttal which should have been included in the party's case-in-chief" and the Omnibus Order in this proceeding explaining and mandating adherence to this regulation. Omnibus Order, at ¶ 4 (Barnes, J.) (Feb. 11, 2020). The designation of these

documents as Extremely Sensitive Materials pursuant to the Amended Protective Order in this proceeding has no impact on Complainants' ability to have put these documents into evidence in accordance with the regulations and the Omnibus Order because Complainants had the ability to review and designate these documents prior to their direct and surrebuttal testimony. The Joint Stipulation of Record clearly allowed a procedure for Complainants to designate such materials for introduction into the record at the time of submission of their direct and surrebuttal cases. Order Admitting Stipulation Into the Record, (Barnes, J.) (Jan. 2, 2020); Joint Stipulation of Record, at ¶9 ("If Complainants want to include any ESM in Paragraph 2 as an exhibit to testimony, Complainants counsel will inform SPLP's counsel of each document to be included. SPLP will include the designated ESM as part of its exhibits when it submits its testimony.") (filed Dec. 30, 2019). Moreover, counsel for SPLP reminded Complainants' counsel of this agreed-upon procedure prior to submission of Complainants' written testimony. See email from Whitney Snyder, Esquire to Michael Bomstein, Esquire, dated January 13, 2020, attached hereto as Exhibit 2. Complainants chose not to designate any such materials pursuant to the Joint Stipulation and the time has passed for them to do so, including on any "friendly cross examination." Accordingly, the Hazard Assessments are not in evidence and cannot be considered for purposes of this motion.⁸

33. Second, because consequence alone may be sufficient to satisfy Sunoco's obligation under *one* PUC regulation does not mean that it can satisfy Complainants' burden of proof in a Complaint proceeding to prove a violation of Section 1501. The Flynn Complainants'

⁸ Sunoco objects to any other evidence Complainants attempt to introduce that was not introduced as part of its direct or surrebuttal testimony.

argument to that effect is illogical. Indeed, as a matter of law, consequence alone is *insufficient* to prove a violation of Section 1501.

3. The Flynn Complainants' attempt to introduce into evidence affidavits submitted by Sunoco and PUC staff opposing the release of confidential security information likewise violates 52 Pa. Code § 5.243(e) and the Omnibus Order and cannot be considered for purposes of Sunoco's Motion for Partial Summary Judgment.

34. In 2019, requests were made to the Commission under Pennsylvania's Open Records Law to release certain confidential security information relating to ME2. The Commission and Sunoco opposed release of that information under the Disclosure Protection Act, and each submitted affidavits in support of their positions. The affidavits were dated well before Complainants' written testimony was due. The Flynn Complainants did not refer to these affidavits in their direct or surrebuttal testimony and did not attach them as exhibits. The Flynn Complainants argue that in those affidavits, the Commission and Sunoco identified the consequences of release of the confidential information (sabotage on the pipeline and mass destruction), but failed to identify the probability that those consequences would occur. Flynn Complainants' Answer at pp. 18-19, ¶¶ 24-27. Relying on the same illogical argument they assert regarding the Hazard Assessments, the Flynn Complainants argue that because Sunoco relies on consequences alone in a submission under a completely different act, that means that consequence alone is sufficient in a Complaint proceeding to establish a violation of Section 1501. The Flynn Complainants' argument should be dismissed for three primary reasons.

35. First, as with the Hazard Assessments, the deadlines have passed, and the Flynn Complainants cannot rely on or introduce the affidavits. To do so violates 52 Pa. Code § 5.243(e) and the Omnibus Order.

36. Second, the General Assembly made a legislative determination in enacting the Disclosure Protection Act that the risk of disclosing confidential security information was

sufficiently probable that this information needs to be protected. Section 2141.5 of the Disclosure Protection Act states that the general rule is:

An agency shall not release, publish or otherwise disclose a public utility record or portion thereof which contains confidential security information.

35 P.S. § 2141.5. Indeed, to knowingly or recklessly do so results in potential imprisonment for up to a year and removal from office. 35 P.S. § 2141.6.

37. In stark contrast, Section 1501 contains no such legislative determination that the risk from an HVL pipeline is inherently unsafe or unreasonable. In fact, the Commission in *Povac* held the exact opposite, finding that a standard establishing a violation of Section 1501 based solely on consequence without likelihood rests upon a logical fallacy that equates any hazard with actual exposure to harm.

38. Finally, the Flynn Complainants mischaracterize the statements in the affidavits. The affidavits do not equivocate on the likelihood of significant consequences should the confidential security information be released. The affidavits are not, as the Flynn Complainants suggest, devoid of statements on probability. Over and over, the affidavits state that the release of the confidential security information “*would* create a significant risk to the security and integrity of ME2” or “*would* compromise security against sabotage or criminal or terrorist acts”. See Nardozi Affidavit at ¶7, Ray Affidavit at ¶6; Metro Affidavit at ¶¶7, 9, 10. So the very documents the Flynn Complainants improperly rely upon directly undermine the Flynn Complainants’ argument.

III. CONCLUSION

WHEREFORE, SPLP respectfully requests that Your Honor grants its Motion for Partial Summary Judgment and rule that Complainants have not met their burden to prove that ME2 violates Section 1501 of the Public Utility Code based solely on the potential consequences of a

release from or failure of the pipelines or location in a high consequence area, without any evidence of the likelihood or probability of the hypothetical catastrophic release occurring.

Respectfully submitted,

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Attorneys for Respondent Sunoco Pipeline L.P.

Dated: August 21, 2020

EXHIBIT 1

1 A. The pipeline is still exposed.

2 Q. Alrighty. And the pictures that I am putting into
3 my case here, most of them are yours, the X65 --

4 A. Yes, sir. I have over a thousand photos across the
5 time span that they started excavating on the property until
6 the time they covered everything up.

7 I was documenting everything for our landlord. Should
8 anything go wrong in the future, he would have photo
9 evidence.

10 Q. So most of the pictures of the X65 and X70 and
11 welded pipes and everything are your doing?

12 A. They were on that property, and every one of those
13 photos is date and time stamped as far as the date it was
14 created, and it's on the external hard drive for my
15 computer.

16 Q. And since that time, you've filed another
17 complaint?

18 A. With PHMSA? No. I have been waiting to see if
19 anything would happen. My next thing is to go through
20 Freedom of Information Act, find out from DEP whether or not
21 Sunoco actually went to them and asked for a special permit
22 to take care of this.

23 Q. So with the record that you had given me, I'd just
24 like to read this now. Notice of probable violation,
25 proposed compliance order --

1 MS. SNYDER: Objection, Your Honor.

2 MR. BAKER: I was just getting her to verify
3 that she had done that, to verify, that that was for
4 rebuttal, that she had put into this complaint.

5 JUDGE BARNES: What's the objection?

6 MS. SNYDER: The objection is that he's going
7 to ask her to talk about a document from PHMSA and she can't
8 offer opinions about that document. She can't rely on that
9 document. She's not an expert. The document can't come
10 into the record.

11 JUDGE BARNES: Sustained.

12 BY MR. BAKER:

13 Q. So anyways, if I can't cut to that phase, you had
14 given me records, though, you know, about violations,
15 international applications --

16 MS. SNYDER: Objection.

17 THE WITNESS: May I say something here, Your
18 Honor?

19 JUDGE BARNES: No.

20 THE WITNESS: Okay.

21 MS. SNYDER: It's the same objection, Your
22 Honor. She can't testify as to any of these events or these
23 records. She's not an expert. She can't rely on the
24 documents.

25 JUDGE BARNES: Okay. Sustained. You can ask

EXHIBIT 2

From: Whitney Snyder
Sent: Monday, January 13, 2020 4:59 PM
To: Michael S. Bomstein <mbomstein@gmail.com>
Cc: Thomas Sniscak (tjsniscak@hmslegal.com) <tjsniscak@hmslegal.com>; rfox@mankogold.com; Neil Witkes <NWitkes@mankogold.com>; Diana Silva <DSilva@mankogold.com>
Subject: Flynn Service of Expert Testimony Pursuant to Joint Stipulation of Record

Michael,

Thank you for speaking with me regarding implementation of the Joint Stipulation of Record concerning service of your clients' expert testimony. Here is a link for you to upload each set of testimony and exhibits, with one folder for each witness. [REDACTED]

[REDACTED] I have given Anil access to Dr. Zee's folder as well. Anil should use this link [REDACTED]

Pursuant to the Joint Stipulation (attached):

1. If you intend to use any Extremely Sensitive Materials (this does not apply to Highly Confidential Materials) as exhibits, you simply send us a list designating those materials as exhibits and SPLP will enter them into the record when it provides its testimony. Stipulation at Paragraph 6.
2. On the date your testimony and exhibits are due (Wednesday), you will upload all testimony and exhibits (in final form) to SPLP using the links above. Stipulation at paragraph 10. I understand Dr. Zee has a set of voluminous exhibits that you will provide us a link to access. When you and your teams are done uploading everything, I request that you send me a confirmation email. All testimony and exhibits should have your initial designations of whether they contain any Highly Confidential or Confidential Information.
3. SPLP will assess the testimony and exhibits to review confidentiality designations and modify such designations as necessary as well as add appropriate markings on the documents pursuant to the Amended Protective Order. Stipulation Paragraph 10.
4. Pursuant to Stipulation Paragraph 10, within four days (Monday):
 - a. SPLP will provide back to you (Michael) public versions of the testimony and exhibits for you to complete service on the other parties and the Administrative Law Judge.
 - b. SPLP will serve testimony and exhibits containing Highly Confidential or Confidential Materials.
 - c. SPLP will retain for in person review versions of testimony reflecting any Extremely Sensitive Materials.

Feel free to give me a call if there are any outstanding questions.

Best,

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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).

VIA ELECTRONIC MAIL ONLY

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Dated: August 21, 2020