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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 ANSWER TO
MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING INTEGRITY
MANAGEMENT, CORROSION CONTROL AND CATHODIC PROTECTION
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 Answer to Motion for Partial Summary Judgment regarding Integrity Management, Corrosion Control and Cathodic Protection and Request for Expedited 5-day Response. Included as Attachment A to this Motion is Sunoco Pipeline L.P.'s Reply to Flynn Complainants' Answer to Sunoco Pipeline L.P.'s Motion for Partial Summary Judgment regarding Integrity Management, Corrosion Control and Cathodic Protection. 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
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| v. | : | |
| | : | |
| SUNOCO PIPELINE L.P. | : | |

**SUNOCO PIPELINE L.P. MOTION FOR LEAVE TO REPLY TO ANSWER TO
MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING INTEGRITY
MANAGEMENT, CORROSION CONTROL AND CATHODIC PROTECTION 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 Answer filed by Flynn Complainants to (Answer) SPLP’s July 28, 2020 Motion for Partial Summary Judgment Regarding Integrity Management, Corrosion Control and Cathodic Protection (Motion). Section I contains SPLP’s Motion for Leave to Reply and 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 Answer because it cites and relies upon a Commission decision without mentioning that the decision it relies upon was overturned by the Commonwealth Court and materially misstates the law applicable to obtaining relief in a Complaint proceeding. SPLP believes it has a duty to Your

Honor and the Commission to identify and explain this misstatement of the law. Flynn Complainants also improperly attempt to raise “undisputed facts,” many of which are either not facts or not material facts sufficient to overcome summary judgment. SPLP should be entitled to reply.

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 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 believe 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,

/s/ Thomas J. Sniscak

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Attorneys for Respondent Sunoco Pipeline L.P.

Dated: August 21, 2020

ATTACHMENT A

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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| MEGHAN FLYNN et al. | : | Docket Nos. C-2018-3006116 (consolidated) |
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| | : | |
| v. | : | |
| | : | |
| SUNOCO PIPELINE L.P. | : | |

**SUNOCO PIPELINE L.P. REPLY TO FLYNN COMPLAINANTS’ ANSWER TO
SUNOCO PIPELINE L.P.’S MOTION FOR PARTIAL SUMMARY JUDGMENT
REGARDING INTEGRITY MANAGEMENT, CORROSION CONTROL AND
CATHODIC PROTECTION**

Pursuant to Sunoco Pipeline L.P.’s (SPLP) Motion for Leave to Reply, SPLP submits this Reply to Flynn Complainants’ Answer To Sunoco Pipeline L.P.’s Motion For Partial Summary Judgment Regarding Integrity Management, Corrosion Control And Cathodic Protection.

A. Flynn Complainants Misstate the Law and Rely Upon an Overturned Commission Case

1. In apparent admission that Flynn Complainants have not shown a violation of law which is required to obtain any relief in a Complaint proceeding, Flynn Complainants misstate the law and rely upon a Commission case that does not stand for the proposition for which they assert and which the Commonwealth Court overturned. The law is clear that to obtain any relief, including a study, Complainants must show a violation of law or regulation.

2. As SPLP explained at length in its Motion, to obtain any relief in a Complaint proceeding at the Commission, Complainant has the burden of proof and must show a violation of law or regulation over which the Commission has jurisdiction to obtain any relief:

“For the Commission to sustain a complaint brought under this section [66 Pa. C.S. § 1501], the utility must be in violation of its duty under this section. Without such a violation by the utility, the Commission does not have the authority, when acting on a customer’s complaint, to require any action by the utility.” *Seese v. PPL Elec. Util’s Corp.*, Docket No. C-2015-2500818, Initial Decision at *5 (ALJ Barnes ID entered Mar. 17, 2016) (Final via Act 294) (citing *West Penn Power Co. v. Pa. Pub. Util. Comm’n*, 478 A.2d 947, 949 (Pa. Cmwlth. 1984)); *see also Rahn, Twp. of Spring et al. v. Pennsylvania-American Water Co.*, Docket Nos. C-20054919 et al, 2007 WL 2198196 at *6 (Order entered Jul. 27, 2007) (denying request for geophysical testing where no credible evidence that some act or omission by utility in violation of the Code or Commission regulations would be remedied by geophysical testing).

Motion at ¶ 16.

3. In their Answer, Complainants assert the following:

For Sunoco’s motion to be granted, it would have to show that Flynn Complainants have not adduced sufficient evidence to warrant a ruling that good reason exists to appoint an independent consultant.

Answer at p. 2.

1. Count IV of the Complaint concerns pipeline integrity and it asks the Commission to appoint an independent consultant to investigate the condition of the 8-inch and 12-inch pipelines.

2. The relief requested is unusual, if not novel, and Sunoco questions the authority of the Commission to grant such relief.

3. Because the relief requires is unusual, an important question that needs to be addressed is what quantum of evidence would be sufficient to warrant such relief.

Answer at p. 19, ¶¶ 1-3.

7. In *Mattu v. West Penn Power Co.*, C-2016-2547322 (2018), complainant had vegetation on his property that West Penn periodically removed by mechanical means. West Penn proposed to change that arrangement by using herbicides instead. Mattu claimed that this could permanently damage two private wells that were the only source of water on his property. The Commission found that West Penn's actions were consistent with its management plan and did not violate the Code, a regulation or a Commission order, but that it would be *inequitable* to allow the company to proceed with its plan on Mr. Mattu's property.

Answer at p. 20, ¶ 7.

4. Thus, Complainants are essentially alleging that the Commission can order relief here without finding a violation of law because the relief they are requesting is “novel.” This is false. The relief requested here is not novel, is already covered by existing law, and *Mattu* is not good law.

5. The proposition Complainants cite from *Mattu*, (that relief can be granted without a showing of a violation of law or regulation) was reconsidered by the Commission where it explained that it was in fact finding a violation of law:

In our *July 2017 Order* we were clear in our conclusion that, under the specific facts of the instant dispute, West Penn's application of herbicides as part of its vegetation management, would be unreasonable and, therefore, violate Section 1501 of the Code.

Mattu v. West Penn Power Company, Order on Reconsideration at p. 19 (Order entered Oct. 25, 2018). The Commission's finding of violation was then overturned by the Commonwealth Court because there was not substantial evidence supporting a showing of violation of Section 1501. *West Penn Power Company v. PUC*, 1548 C.D. 2018, 2019 WL 4858352 (Pa. Cmwlt. Oct. 2, 2019) (unreported).

6. Complainants are essentially seeking an investigation as relief – this is not novel and the standard for obtaining such relief has already been decided. First, pursuant to *Seese and West Penn supra*: “Without such a violation by the utility, the Commission does not have the authority, when acting on a customer’s complaint, to require **any action** by the utility.” *Id.* (emphasis added). Moreover, *Rahn, Twp. of Spring et al. v. Pennsylvania-American Water Co.*, is directly on point, holding that the Commission cannot order a utility to undertake an investigative study where no violation of law or regulation was shown would be remedied by the study:

Next, we wish to address the Complainants’ request for a GPR study of the properties in the Stonegate community. If we were to order PAWC to conduct testing of the property in the Stonegate community, we would have to base that order on credible evidence that some act or omission by PAWC in violation of the Code or our Regulations would be remedied by the testing. *See, West Penn Power Co. v. Pa. PUC*, 478 A.2d 947 (Pa. Cmwlth. 1984) (holding that for the PUC to sustain a customer’s Section 1501 complaint against a utility, the utility must have violated its duty under the Code and that absent such a violation, the PUC has no authority to require the utility to recompense the customer). The Complainants have not proven on this record that PAWC violated its duty under the Code, and that the violation led to the sinkholes. The experts on both sides of this proceeding agree that geophysical testing of the Sinking Spring area will reveal sinkholes, an inherent characteristic of the limestone formation geography throughout the Sinking Spring area. However, the Complainants have not presented any evidence supporting the theory that the cause of the sinkholes would be attributable to any one contributor, much less to PAWC. “Any such testing would reveal extensive limestone geology formations riddled with sinkholes, some of which have existed for thousands of years, and some of which were caused simply by the nature of urbanization. Simply because of the nature of this geological formation, it would be impossible to identify what, if any, sinkhole conditions are attributable to the water main break and what conditions are simply pre-existing, or what are attributable to other man-made sources.” (PAWC R.B. at 20; PAWC Exh. 2 at 12, 13; Tr. at 467).

The OCA estimates that the cost of testing the nineteen affected properties would be approximately \$29,000. (OCA M.B. at 5, 54; OCA

Exc. at 2, n. 2). We are not persuaded that assigning this cost to PAWC (a cost that would likely be recoverable from the ratepayers) when there is not a way to verify that PAWC in some way caused the formation of the sinkholes that will undoubtedly be found throughout these properties. Therefore, we will not direct PAWC to carry out the GPR testing that the Complainants seek.

Rahn, Twp. of Spring et al. v. Pennsylvania-American Water Co., Docket Nos. C-20054919 et al, 2007 WL 2198196 at *6 (Order entered Jul. 27, 2007).

7. Complainants do not cite a single PHMSA regulation SPLP is alleged to have violated that has not already been resolved or is not subject to the doctrine of *lis pendens*. The PHMSA regulations are important because these are the standards that apply to whether a pipeline operator is acting within the law (ie. providing safe and reasonable service and facilities). 52 Pa. Code § 59.22(b). First, Complainants rely on BI&E's *allegations*¹ concerning the Morgantown incident, but as Your Honor has already ruled, relief for those allegations cannot be obtained here pursuant to the doctrine of *lis pendens* and that Complainants lack standing.² That Complainants chose to put on evidence in their direct testimony of these events in violation of Your Honors Orders and that SPLP thus had to respond is irrelevant. Contrary to Complainants assertions, Dr. Zee raised the Morgantown issue, not SPLP. *See, e.g.*, Dr. Zee Direct at 17:12-13, 12:18-13:18, 21:14-34, 41:19-24. Second, Complainants rely on a PHMSA Notice of Probable Violation, but

¹ There is an obvious legal difference between making an allegation, a finding being made, or an admission. The Morgantown Settlement specifically is without admission and may not be used in that or any other proceeding. *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Sunoco Pipeline L.P.*, Docket No. C-2018-3006534, Joint Petition for Settlement at Paragraphs 15, 22 (filed Apr. 3, 2019).

² Order Granting In Part And Denying In Part Complainants' Motion For Reconsideration Of Second Interim Order, at pp. 5-7 (denying reconsideration of Complainants' request to include Morgantown Complaint allegations in their Complaint and denying Complainants' request for subpoena to BI&E for documents related to Morgantown Complaint) (Barnes, J.) (Order entered Jun. 6, 2019); Order Granting Preliminary Objections To Second Amended Complaint, at 6-7 (striking portions of Second Amended Complaint identical to Morgantown Complaint and stating **Flynn Complainants "ignored [the prior two] orders and filed the Second Amended Complaint that contains allegations nearly identical to those of the Morgantown Complaint"**) (Barnes, J.) (Order entered Jul. 31, 2019) (emphasis added).

as SPLP explained in its Motion, these allegations have already been resolved with PHMSA and PHMSA has found SPLP to be in compliance. Motion at p. 45, ¶ 29, TTT.

8. Complainants are thus left solely relying on 52 Pa. Code § 59.33(a), which states “Each public utility shall at all times 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.” Even if this standard can be interpreted to mean something other than following the applicable PHMSA regulations, Complainants would have to show through competent and substantial evidence that SPLP was in violation of this provision. As explained at length in SPLP’s Motion, the only evidence Complainants presented on this issue is the testimony of Dr. Zee which is too equivocal, inconclusive and openly admits it needs more information to opine, to be considered substantial evidence.

B. Complainants’ “Undisputed Facts”

9. In Section III of the Answer, pp. 8-19, ¶¶ 1-51, Flynn Complainants set forth allegedly undisputed facts to overcome SPLP’s Motion. SPLP responds that to the extent any of these are “facts” they are either not material or already taken as true for purposes of SPLP’s Motion.³

10. Paragraphs 1-2 on page 9 are conclusions of law, not undisputed material facts.

11. Paragraphs 5-6 on pages 9-12 merely reflect allegations of the Complaint, which SPLP did not admit. Allegations in a Complaint are not sufficient to overcome summary judgement. The nonmoving party may not simply rest upon the mere allegations or denials of its pleading but must set forth facts showing that there is a genuine issue for trial. *Crh Catering Co.*,

³ To the extent SPLP’s Motion is not granted, it reserves its right to dispute any of these alleged “facts.”

Inc., No. C-2014-2415277, 2015 WL 849251, at *6 (Pa. P.U.C. 2015), citing *Fiffick v. GAF Corp.*, 603 A.2d 208 (Pa. Super. 1991) (discussing the Pennsylvania Rules of Civil Procedure). Assertions, personal opinions, or perceptions do not constitute evidence. *Mable Lekawa*, No. F-2017-2629733, 2018 WL 5994785, at *11 (Pa. P.U.C. Nov. 6, 2018), citing *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

12. Paragraphs 7-51 on pages 12-19, to the extent they accurately reflect Dr. Zee's testimony are taken as true for purposes of SPLP's Motion only. To the extent these paragraphs allege Dr. Zee's testimony is definitive or conclusive enough to meet the substantial evidence burden, that is a conclusion of law, not a material fact. As argued in SPLP's Motion, Dr. Zee's testimony is not conclusive or definitive enough. In fact he repeatedly admits he needs more information or study to reach a conclusion. These defects cause Complainants to fail to meet the substantial evidence burden to show a violation of law or regulation for which relief here can be granted.

Respectfully submitted,

/s/ Thomas J. Sniscak

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Attorneys for Respondent Sunoco Pipeline L.P.

Dated: August 21, 2020

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).

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Dated: August 21, 2020