



Thomas J. Sniscak
(717) 703-0800
tjsniscak@hmslegal.com

Whitney E. Snyder
(717) 703-0807
wesnyder@hmslegal.com

Kevin J. McKeon
(717) 703-0801
kjmckeon@hmslegal.com

Bryce R. Beard
(717) 703-0808
brbeard@hmslegal.com

ATTORNEYS AT LAW

100 North Tenth Street, Harrisburg, PA 17101 Phone: 717.236.1300 Fax: 717.236.4841 www.hmslegal.com

April 1, 2021

Via Electronic Filing

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

RE: **Glen Riddle Station, L.P. v. Sunoco Pipeline L.P.; Docket No. C-2020-3023129; SUNOCO PIPELINE L.P.'S REPLY LIMITED TO GLEN RIDDLE STATION'S LEGAL ARGUMENTS IN ITS ANSWER THAT ADDRESSES A RECENT FEDERAL DECISION ISSUED AFTER THE MOTION TO ENFORCE JANUARY 28, 2021 ORDER ON PRELIMINARY OBJECTIONS WAS FILED**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is Sunoco Pipeline L.P.'S Reply (SPLP) Limited To Glen Riddle Station's Legal Arguments In Its Answer That Addresses A Recent Federal Decision Issued After The Motion To Enforce January 28, 2021 Order On Preliminary Objections Was Filed, in the above-referenced proceeding. Copies have been served in accordance with the attached Certificate of Service.

SPLP respectfully seeks leave to file this limited reply to respond to legal arguments in Glen Riddle Station's (GRS) Answer that address the decision of the federal district court in GRS's related federal action that was issued on March 25, 2021, after SPLP filed its Motion to Enforce.

This notice is served electronically pursuant to the COVID-19 Suspension Emergency Order dated March 20, 2020 and ratified March 26, 2020.

If you have any questions, please feel free to contact the undersigned counsel.

Respectfully submitted,

/s/ Thomas J. Sniscak

Thomas J. Sniscak
Whitney E. Snyder
Kevin J. McKeon
Bryce R. Beard
Counsel for Sunoco Pipeline L.P.

BRB/das

Enclosures

cc: Honorable Joel Cheskis (via email jcheskis@pa.gov)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

GLEN RIDDLE STATION, L.P.	:	Docket No.	C-2020-3023129
	:		
v.	:		
	:		
SUNOCO PIPELINE L.P.	:		

**SUNOCO PIPELINE L.P.’S REPLY LIMITED TO GLEN RIDDLE STATION’S
LEGAL ARGUMENTS IN ITS ANSWER THAT ADDRESSES A RECENT FEDERAL
DECISION ISSUED AFTER THE MOTION TO ENFORCE JANUARY 28, 2021
ORDER ON PRELIMINARY OBJECTIONS WAS FILED**

Sunoco Pipeline L.P. (SPLP) files this limited reply to legal argument presented by Glen Riddle Station L.P.’s (GRS), relating to a recent federal decision that was issued after SPLP’s “Motion to (1) Enforce the January 28, 2021 Order Granting in Part and Denying in Part Preliminary Objections,¹ (2) to Strike Testimony and (3) for Expedited 7 Day Response” (Motion to Enforce), was filed, in GRS’ March 31, 2021 Answer (GRS Answer) to SPLP’s Motion to Enforce, and in support states as follows:

1. GRS argues that SPLP is “bound by” a “finding” made by Judge Diamond in his March 25, 2021 Memorandum (a ruling that resoundingly dismissed GRS’s federal district court complaint²) that “the PUC has the jurisdiction to hear matters pertaining to the safety of public utility service, even when those matters involve the violation of municipal laws.” GRS Answer at 2-3. The district court never stated and did not “find” that “the PUC has the jurisdiction to hear

¹ *Glen Riddle Station L.P. v. Sunoco Pipeline L.P.*, Docket No. C-2020-3023129, Order Granting in Part and Denying in Part Preliminary Objections (Order entered January 28, 2021) (January 28 Order).

² *Glen Riddle Station, L.P. v. Middletown Twp.*, Civ. No. 21-286, Memorandum Opinion (E.D. Pa. Mar. 25, 2021) (the “GRS Federal Court Case”), attached to GRS’s Answer as Exhibit A.

matters pertaining to the safety of public utility service, even when those matters involve the violation of municipal laws,” However, even if it had, neither Your Honor nor SPLP would be bound by such a finding. The district court merely agreed with Your Honor’s January 28 Order’s holding that “the Commission has jurisdiction to hear claims that a utility is providing unsafe service.” Memorandum at 15; January 28 Order at 7. But, the words “even when those matters involve the violation of municipal laws,” which GRS would like to add, neither appear in or are implied by Judge Diamond’s ruling, and SPLP never argued as much in the federal district court. Instead, the district court noted Your Honor’s further conclusion that the Commission “lacks jurisdiction to make” an initial finding that SPLP “violated municipal law” and may only entertain such a claim if “a court that has jurisdiction to hear such claims” has already so ruled. Memorandum at 14; January 28 Order at 7. Accordingly, other than providing another forum’s considered view that GRS’s claim that SPLP’s sound walls present a fire hazard is meritless, Judge Diamond’s dismissal of GRS’s Federal Court Case has no application here.

Judge Diamond’s Dismissal of GRS’s Federal Court Case

2. As background, GRS’s Federal Court Case asserted as GRS’s federal claim that Middletown Township’s approval of SPLP’s sound wall plan without affording GRS an opportunity to be heard abridged GRS’s due process rights in violation of Section 1983, and then requested the court to exercise supplemental jurisdiction by issuing a state law mandamus to “cure” that alleged violation of federal law by directing the Township to interpret the International Fire Code (IFC) as adopted by the Township in the way GRS prefers, so as to reverse the Township’s approval of the sound wall plan and find the sound wall plan to be in violation of the Township ordinance adopting the IFC.

3. Observing that GRS’s Federal Court Case is “but one of countless complaints

[GRS] has made in connection with Mariner East 2's construction," Memorandum at 2, the district court dismissed GRS's complaint for five separate reasons. First, the court found it **lacked subject matter jurisdiction** because GRS's Section 1983 "procedural due process claim is 'wholly insubstantial.'" *Id.* at 7. Second, the court refused to exercise supplemental jurisdiction over the state law mandamus claim because although the court has latitude to decide ancillary questions of state law, it is not required "to tolerate a litigant's effort to impose upon it what is in effect **only a state law case.**" *Id.* at 8. Third, the court concluded that GRS failed to demonstrate any present harm as the result of the sound wall plan or any "quantifiable risk of damage in the future," noting that the Township and SPLP as *amicus* alleged "without contradiction" that the Fire Department conducted three "trial" emergency visits to the GRS property without any access problem, and that "emergency services have responded to two separate, actual emergencies without problems." *Id.* at 9-10. Thus, the court concluded, "GRS's claims of injury are speculative and hypothetical" such that GRS presented no case or controversy and thus **lacked standing.** *Id.* at 10. Fourth, the court concluded it **lacked authority to grant state mandamus** relief because a federal court applies state substantive law but federal procedural law, that GRS's "[r]emarkabl[e]" claim that mandamus is a matter of state substantive law is "simply incorrect," *id.* at 11, and that notwithstanding GRS's citation of federal cases that happened to include the word "mandamus," none supported GRS's claim that a federal court may exercise supplemental jurisdiction to issue a state law mandamus to prescribe how a state or local agency must interpret its own regulations. *Id.* at 11, 13. Fifth, and finally, the court went on to observe that even if it "had subject matter jurisdiction," even if "GRS had standing," and even if the court "had the authority to grant the relief requested," the court would **abstain under the**

Burford abstention doctrine.³ *Id.* at 13.

4. It is the district court's *Burford* abstention discussion (that it did not need to reach, having already concluded that it lacked jurisdiction, that GRS lacked standing because its claims of injury are "speculative and hypothetical," and that the court lacked authority to grant the requested relief) that produced the alleged "finding" that GRS claims SPLP is "bound by." The court explained that *Burford* typically applies "when there is adequate state review in the form of an administrative or otherwise specialized process" and requires abstention where exercising federal jurisdiction "would interfere with a state's efforts to regulate an area of law in which state interests predominate" and in which "adequate and timely state review of the regulatory scheme is available." *Id.* at 14 (citations omitted).

5. The court noted the existence of GRS's complaint in this proceeding before Your Honor, observing that although "an ALJ has ruled that the Commission is without jurisdiction to consider violations of municipal ordinances, *that hardly ends the matter, especially as GRS may seek interlocutory review or appeal the ALJ's eventual final decision.*" *Id.* (emphasis added). The district court went on to point out that "[r]egardless of how the administrative proceeding is resolved," the Commission "certainly has jurisdiction to determine whether Sunoco's work site is *unsafe*," *id.* at 14-15 (emphasis in original), that the availability of appellate review of the Commission's order exclusively in the Commonwealth Court demonstrates the unified nature of the state regulatory process involving the matter, and that a federal district court's intervention in a how a township "must interpret and apply its own fire code" would frustrate "the Commonwealth's efforts to establish a consistent policy respecting fire and gas regulation." *Id.* at 16-17. Accordingly, Judge Diamond concluded, "[i]n these circumstances, even if the defects I

³ *Burford v. Sun Oil Company*, 319 U.S. 315 (1943).

have discussed were not present, I would abstain from hearing this matter.”

Judge Diamond Made No Finding That Is Binding In This Case

6. The essence of GRS’s answer to SPLP’s Motion to Enforce is that although the January 28 Order excludes from this proceeding claims that SPLP’s pipeline construction violates municipal laws and other matters over which the Commission lacks jurisdiction (absent a finding on that issue by a forum that does have jurisdiction), GRS may nonetheless present testimony that municipal laws “provide a standard of care and that a deviation from them is evidence of unsafe operation.” GRS Answer at 2. GRS attempts to leverage the *Burford* discussion in Judge Diamond’s Memorandum as a “finding” that supports this argument that SPLP is somehow bound by. None of these arguments withstands scrutiny.

7. First, if the Commission were to use a municipal ordinance such as Middletown’s ordinance adopting the IFC as the standard by which to determine whether SPLP’s sound walls create a fire hazard, and in doing so determined that SPLP failed to adhere to the standard of care set forth in the IFC, the Commission unavoidably would be making a determination over which it has no expertise or jurisdiction: that SPLP is violating the ordinance – notwithstanding the fact that the Township already has determined that SPLP complies with the ordinance, a decision GRS never challenged in the proper forum. Accordingly, the premise underlying GRS’s answer is wrong, resting as it does on a distinction without a difference. Any doubt about this is dispelled by considering how SPLP must rebut GRS’s evidence on this issue – by retaining an expert who will opine as to whether SPLP’s sound walls comply with the ordinance, leaving it to Your Honor and the Commission to decide in the first instance whether SPLP’s sound walls comply with the ordinance, in order to decide whether SPLP is conducting its pipeline construction safely.

8. Second, GRS's claim that Judge Diamond made a "finding" that "the PUC has the jurisdiction to hear matters pertaining to the safety of public utility service, *even when those matters involve the violation of municipal laws*," GRS Answer at 2-3 (emphasis added), simply has no basis in the text of the Memorandum. Judge Diamond interpreted Pennsylvania law to conclude that "the Commission certainly has jurisdiction to determine whether Sunoco's work site is *unsafe*." Memorandum at 14-15. The critical coda "even when those matters involve the violation of municipal laws" is GRS's wishful addition. The problem for GRS is that Judge Diamond neither stated nor implied that GRS may litigate safety by presenting testimony that SPLP's sound walls violate the IFC and Middletown Township's ordinance adopting the IFC.

9. Of course, even if Judge Diamond had made the "finding" GRS claims, it would not bind Your Honor or the Commission. *Povacz v. Pennsylvania Pub. Util. Comm'n*, 241 A.3d 481, 488 (Pa. Cmwlth. 2020) ("This Court ... is not bound by a federal district court's interpretation of a Pennsylvania statute."), *citing In re Stevenson*, 40 A.3d 1212 (Pa. 2012); *Duquesne Light Co. v. Pennsylvania Am. Water Co.*, 850 A.2d 701, 705 (Pa. Super. 2004), *citing Winslow-Quattlebaum v. Maryland Cas. Co.*, 723 A.2d 681, 684 (Pa. Super. 1998) (a federal court's interpretation of state law does not bind state courts; instead, state courts are the principal interpreters of state law) (citation omitted), *reversed on other grounds*, 752 A.2d 878 (Pa. 2000).

10. Nor is there any basis to argue that SPLP, which participated in GRS's Federal Court Case as an *amicus* and not a party, is "bound" by the "finding" GRS claims Judge Diamond made. Even if Judge Diamond had concluded that GRS had the right to present evidence to the Commission demonstrating the SPLP's sound walls violate the Township's ordinance, SPLP would not be estopped or otherwise prevented from arguing to the contrary in this proceeding, for multiple reasons. A federal district court's interpretation of Pennsylvania law

is not binding, as set forth above. Moreover, given his holdings that the district court lacks jurisdiction, GRS lacks standing, and the court lacks the authority to grant the relief requested, Judge Diamond's discourse on *Burford* abstention is not essential to his decision dismissing GRS's complaint, and thus is dicta – “an opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision. Dicta has no precedential value.” *Castellani v. Scranton Times, L.P.*, 124 A.3d 1229, 1243 n.11 (Pa. 2015), *quoting Valley Twp. v. City of Coatesville*, 894 A.2d 885, 889 (Pa. Cmwlth. 2006). Finally, although SPLP addressed the issue in briefing to Judge Diamond, SPLP took the same position there that it is taking here. As SPLP argued in its reply brief on the *Burford* issue, and as Your Honor held in the January 28 Order, the PUC has jurisdiction over safety, but not alleged violations of municipal law, so that if GRS seeks to have the Commission rule on whether failure to adhere to municipal law adversely affects the safety of a public utility's operations, it must first secure a ruling from a forum that has the jurisdiction to make such a determination:

In other words, the PUC Order did not eliminate state court jurisdiction over the safety-related issues that GRS asks this Court to determine under Pennsylvania law, nor did it relinquish the PUC's own jurisdiction over safety-related issues. Instead, the PUC Order indicated that before the PUC may rule on whether an alleged violation of a municipal code, state mandate, or regulation also violates the Public Utility Code, GRS must exhaust its other state remedies concerning those alleged violations. ***Alleged violations of municipal law may be challenged by a lawsuit brought in the Court of Common Pleas***; alleged violations of face covering mandates can be reported to the Department of Health online or can be reported to law enforcement if necessary at the Governor's website;¹ and alleged violations of environmental regulations may be reported to the Department of Environmental Protection (“DEP”), and decisions of the DEP may be appealed to the Environmental Hearing Board. ***Accordingly, just because the PUC directed GRS to exhaust its other state law remedies before relying on such alleged violations in the PUC*** does not mean that

GRS can run in essentially the opposite direction—to federal court—and have this Court rule on matters that are appropriately before, for instance, the Pennsylvania Department of Health. Instead of doing so, GRS asks this federal court to insert itself into a state dispute, displacing well-established state administrative and judicial tribunals with the necessary subject matter expertise and familiarity with relevant state and local regulations to efficiently and effectively resolve this dispute. In other words, GRS has done nothing to rebut the compelling reasons for the Court to abstain from exercising jurisdiction over this case under *Burford* or *Colorado River*.

See, GRS's Federal Court Case ECF 19-4, pages 14-16 of 19, Appendix B to GRS's Answer (emphasis added).

WHEREFORE, for all of the reasons set forth in SPLP's Motion to Enforce and in this reply to GRS's answer, SPLP respectfully requests that Your Honor:

- (1) Grant this Motion to Enforce the January 28, 2021 Order where your Honor correctly ruled in granting in part SPLP's preliminary objections declining GSR's invitations to have the PUC determine municipal law ordinance issues and other regulatory matters within the jurisdiction of other agencies or the court of common pleas; and
- (2) Strike the testimony and exhibits identified in Attachment A and B to SPLP's Motion to Enforce to avoid the time, resources, and expenses of the Commission and the parties and rule that SPLP need not prepare a suitable defense to address matters never pled or that are outside the Commission's jurisdiction to make initial findings of violations; or
- (3) In the alternative, extend the procedural schedule as proposed, consistent with due process, to allow SPLP adequate time to retain subject matter experts and prepare a suitable defense to these new issues or allegations outside the Commission's jurisdiction; or

(4) If Your Honor reverses the January 28, 2021 Order, which SPLP respectfully requests you should not, certify to the Commission as a material question pursuant to 52 Pa. Code § 5.305 whether such issues should and can be considered in a Commission proceeding given its limited jurisdictional scope, and stay the schedule and proceeding pending guidance from the Commission.

Respectfully submitted,

/s/ Thomas J. Sniscak

Thomas J. Sniscak, Esq. (PA ID No. 33891)
Whitney E. Snyder, Esq. (PA ID No. 316625)
Kevin J. McKeon, Esq. (PA ID No. 30428)
Bryce R. Beard, Esq. (PA ID No. 325837)
Hawke, McKeon & Sniscak LLP
100 North Tenth Street
Harrisburg, PA 17101
Tel: (717) 236-1300
tjsniscak@hmslegal.com
wesnyder@hmslegal.com
kjmckeon@hmslegal.com
brbeard@hmslegal.com

Date: April 1, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the forgoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

VIA ELECTRONIC MAIL ONLY

Samuel W. Cortes, Esquire
Ashley L. Beach, Esquire
Fox Rothschild LLP
747 Constitution Drive, Suite 100
Exton, PA 19341
(610) 458-7500
scortes@foxrothschild.com
abeach@foxrothschild.com

/s/ Thomas J. Sniscak _____

Thomas J. Sniscak, Esq.
Whitney E. Snyder, Esq.
Kevin J. McKeon, Esq.
Bryce R. Beard, Esq.

Dated: April 1, 2021