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June 21, 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 MOTION IN LIMINE TO (1) STRIKE PORTIONS OF GLEN RIDDLE STATION L.P.’S SURREBUTTAL THAT VIOLATES THE COMMISSION’S REGULATIONS AND SPLP’S DUE PROCESS; (2) MODIFY THE PROCEDURAL SCHEDULE TO ALLOW SPLP TO PRESENT ORAL REJOINDER TO RESPOND TO NEW TESTIMONY BEYOND THE SCOPE OF SPLP’S REBUTTAL TESTIMONY AND EXHIBITS; (3) REQUEST FOR ADDITIONAL HEARING TIME AND DATES, AND (4) REQUEST FOR EXPEDITED 4-DAY RESPONSE PERIOD**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is Sunoco Pipeline L.P.’S Motion In Limine To (1) Strike Portions Of Glen Riddle Station L.P.’s Surrebuttal That Violates The Commission’s Regulations And SPLP’s Due Process; (2) Modify The Procedural Schedule To Allow SPLP To Present Oral Rejoinder To Respond To New Testimony Beyond The Scope Of SPLP’s Rebuttal Testimony And Exhibits; (3) Request For Additional Hearing Time And Dates, and (4) Request For Expedited 4-Day Response Period in the above-referenced proceeding. Copies have been served in accordance with the attached Certificate of Service.

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

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For *Hawke McKeon and Sniscak LLP*

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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.	:		

NOTICE TO PLEAD

Pursuant to 52 Pa. Code § 5.103(c), you are hereby notified that, if you do not file a written response to the enclosed Motion in Limine within four (4) days from service of this notice,¹ a decision may be rendered against you. Any Response to the Motion 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

¹ This motion requests that the ALJ order an expedited response time of 4-days due to the expedited procedural schedule in this matter. Should the ALJ grant this request, the 20-day response time under 52 Pa. Code § 5.103(c) will be modified as ordered.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**SUNOCO PIPELINE L.P.’S MOTION IN LIMINE TO
(1) STRIKE PORTIONS OF GLEN RIDDLE STATION L.P.’S SURREBUTTAL THAT
VIOLATES THE COMMISSION’S REGULATIONS AND SPLP’S DUE PROCESS; (2)
MODIFY THE PROCEDURAL SCHEDULE TO ALLOW SPLP TO PRESENT ORAL
REJOINDER TO RESPOND TO NEW TESTIMONY BEYOND THE SCOPE OF
SPLP’S REBUTTAL TESTIMONY AND EXHIBITS; (3) REQUEST FOR
ADDITIONAL HEARING TIME AND DATES, AND (4) REQUEST FOR EXPEDITED
4-DAY RESPONSE PERIOD**

Due to the voluminous surrebuttal of Glen Riddle Station L.P. (“GRS”) which includes ten (10) surrebuttal testimony statements consisting of over 130 pages in total and seventy (70) new exhibits totaling 2.4 gigabits of documents,² and in accordance with 52 Pa. Code §§ 5.103(c), 5.223(a), and 5.243(e), Sunoco Pipeline L.P. (“SPLP”), by its undersigned counsel, requests Your Honor enforce the February 26, 2021, April 8, 2021, and May 24, 2021 Orders³ and 52 Pa. Code §5.243(e)’s prohibition that GRS is not permitted to introduce evidence during a rebuttal phase which should have been included in its case-in-chief and strike portions of GRS’s surrebuttal

² In its direct case, GRS filed 37 total pages of testimony and 47 exhibits submitted by 4 witnesses and offered 1 purported expert witness. GRS’s purported expert witness in direct, Jason Culp P.E., summarily addressed subjects and technical issues in 14 pages of direct testimony limited to description of the property (GRS St. No. 3 at 3), noise issue generally (Id. at 4-6), building structural concerns (Id at 6-8), parking lot issue (Id. at 8-10), alleged hazardous leak (Id. at 10), stormwater concerns (Id. at 11-12), and fire hazard concerns (Id. at 13-14). In surrebuttal, GRS filed over 130 pages of testimony by 10 witnesses including offering 6 new purported expert witness on the subjects of construction noise impacts including medical opinions on standards, a water main break, contamination concerns, groundwater and hydrology, fire access, traffic impacts, vibrations and more plus 70 additional exhibits and videos.

³ *Glen Riddle Station, L.P. v. Sunoco Pipeline, L.P.*, Docket No. C-2020-3023129, Scheduling Order (Feb. 26, 2021) (“Scheduling Order”); *Glen Riddle Station, L.P. v. Sunoco Pipeline L.P.*, Docket No. C-2020-3023129, Order Denying Motion in Limine Filed by Sunoco Pipeline L.P. (Order entered April 8, 2021) (“April 8 Order”); *Glen Riddle Station L.P. v. Sunoco Pipeline L.P.*, Docket No. C-2020-3023129, Order Granting Further Continuance at 5 (Order entered May 24, 2021) (“May 24 Order”); Collectively “Orders”.

testimony that violate Commission's regulations, the above-referenced Orders, and SPLP's due process rights. Allowing GRS to present supplemental direct testimony that could have and should have been included in GRS's direct testimony from newly retained experts amounts to trial by ambush which violates SPLP's due process rights because SPLP has no meaningful opportunity to respond to the new aspects improperly presented in surrebuttal testimony.⁴ In the alternative to granting this motion to strike testimony, SPLP requests a meaningful opportunity to respond to GRS's supplemental direct testimony which violates 52 Pa. Code § 5.243(e).

Additionally, SPLP requests that Your Honor allow SPLP to present oral rejoinder on new testimony GRS presented regarding events that transpired after GRS's direct testimony and raised for the first time in surrebuttal. SPLP also requests that Your Honor amend the start time of the July 12 and 13 hearings to begin at 9 AM and proposes an additional day of hearings to accommodate GRS's additional witnesses and issues injected in its surrebuttal testimony. SPLP also requests an expedited, four-day response period for this motion pursuant to 52 Pa. Code 5.103(c) to allow this motion and the procedural issues herein to be resolved prior to the currently scheduled July 12 and 13 evidentiary hearings.

Finally, if Your Honor reverses the Scheduling Order, April 8 Order, and May 24 Order and does not strike GRS's supplemental direct testimony or extend SPLP any meaningful opportunity to respond, SPLP respectfully requests Your Honor certify to the Commission as a material question pursuant to 52 Pa. Code § 5.305 whether GRS's testimony which violates the Commission's regulations and SPLP's due process rights should be permitted in the rebuttal stage

⁴ *Pennsylvania Public Utility Commission v. UGI Utilities, Inc.*, 1994 Pa. PUC LEXIS 138, *85; *Pennsylvania Pub. Util. Comm'n v Total Environmental Solutions, Inc.*, 103 Pa. P.U.C. 110 (July 30, 2008); *Pennsylvania Public Utility Commission v. Total Environmental Solutions, Inc. -- Treasure Lake Water Division, et al.*, Docket No. R-00072493, 2008 Pa. PUC LEXIS 42 at *114-116 (Pa PUC May 23, 2008) ("...it is not equitable to permit TESI to take a second bite at direct testimony, or to allow it to shore-up inadequate direct at the rebuttal phase of this case."), *aff'd*, Opinion and Order at 89 (July 30, 2008) ("*TESP*"); *City of Lancaster (Sewer Fund) v. Pennsylvania Pub. Util. Comm'n*, 793 A.2d 978 (Pa. Cmwlth. 2002)

when SPLP lacks the opportunity to respond, and stay the schedule and proceeding pending guidance from the Commission.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

On March 15, 2021, GRS served its direct testimony which included the testimony of four witnesses including Stephen Iacobucci, Raymond Iacobucci, Jason Culp P.E., and Johanna Rincon. GRS's direct included a total of 37 pages of testimony and 47 exhibits.

On March 22, 2021, SPLP filed a Motion in Limine to preclude GRS from violating the February 26, 2021 Scheduling Order⁵ and the Commission's regulations when GRS signaled its intention to supplement its direct testimony in surrebuttal. On April 8, 2021, Your Honor entered an order denying SPLP's Motion in Limine at that time because it was not ripe for disposition because GRS's surrebuttal was not yet served. SPLP was required to wait and assess whether GRS's surrebuttal as filed violated 52 Pa. Code § 5.243(e), at which point the issue could be raised and addressed. Your Honor held:

Sunoco's motion will be denied because it is not ripe – meaning, it is not ready for adjudication because it rests upon contingent future events that may not occur as anticipated or may not occur at all. **Regardless of what format Sunoco provided its discovery responses to Glen Riddle, and the volume of those responses, Glen Riddle is prohibited from introducing evidence during a rebuttal phase that should have been included in the party's case-in-chief.** To the extent that Glen Riddle had difficulties with the form and/or volume of Sunoco's discovery responses, it could have raised those issues separately, either formally or informally. Nonetheless, it is not uncommon in proceedings before the Commission for parties to reserve their right to supplement their testimony if the need arises. Doing so aids in the parties accurately and completely setting forth their litigation positions and developing a clear record which ultimately allows for these proceedings to be run more smoothly and effectively and a better end result to be achieved. **Of course, all parties' due process rights must be protected throughout the course of this**

⁵ *Glen Riddle Station, L.P. v. Sunoco Pipeline, L.P.*, Docket No. C-2020-3023129, Scheduling Order (Feb. 26, 2021) ("Scheduling Order").

proceeding and to the extent that a party supplements previously served written testimony, the opposing party must be given a reasonable opportunity to respond to such testimony. All parties' due process rights will be protected in this proceeding.

In this case, however, Sunoco's motion is premature. **It is necessary to see what Glen Riddle provides in its surrebuttal testimony to determine whether Section 5.243 is violated.** If Sunoco believes that Glen Riddle's surrebuttal testimony violates Section 5.243, it is free to raise its motion again and it will be addressed at that time. It is possible that any violations could be remedied by a modification of the procedural schedule but that will not be known until such violations occur, if they occur. There is no need to modify the existing procedural schedule now.

Glen Riddle Station, L.P. v. Sunoco Pipeline L.P., Docket No. C-2020-3023129, Order Denying Motion in Limine Filed by Sunoco Pipeline L.P. at 4-5 (Order entered April 8, 2021). (“April 8 Order”).

On May 12, 2021, SPLP served its rebuttal testimony per Your Honor's April 16, 2021, scheduling order. Subsequently on May 17, 2021, GRS filed a Motion for a Continuance to allow it “to review and respond to the proposed rebuttal testimony” and signaled GRS would retain multiple new expert witnesses to present testimony. *See* Glen Riddle Motion For Continuance at 1 (dated May 17, 2021). On May 17, 2021, SPLP filed an Answer to GRS's Motion for Continuance stressing the grave due process implications - as per 52 Pa. Code § 5.243's express prohibition -- of GRS's request to add a significant number of new experts in surrebuttal. *See* SPLP's Answer to Motion for Continuance at 7-10 (dated May 17, 2021).

By Order entered May 24, 2021, Your Honor granted the procedural continuance agreed to among the parties and set a hearing schedule. In doing so, Your Honor again warned GRS that the continuance was not an opportunity to expand its direct, and that GRS was not being given “a second bite of the apple” regarding its direct testimony:

Furthermore, Glen Riddle is reminded, as it was during the conference call held on May 19, 2021, that its surrebuttal must be responsive to Sunoco's rebuttal testimony. The additional time provided for Glen Riddle to provide surrebuttal testimony does not also give Glen Riddle an opportunity to expand the scope of its arguments beyond its direct testimony. Glen Riddle is not being given "a second bite of the apple" through this further continuance.

Glen Riddle Station L.P. v. Sunoco Pipeline L.P., Docket No. C-2020-3023129, Order Granting Further Continuance at 5 (Order entered May 24, 2021) ("May 24 Order").

On June 14, 2021, GRS served its surrebuttal testimony. It includes 10 written testimonies totaling over 130 pages and attaches over seventy (70) pre-marked exhibits and videos. In surrebuttal, GRS seeks to call 7 new witnesses, 6 of whom are newly retained witnesses they offer as experts, including a consultant, engineers, a geologist, and a medical doctor. As described below, GRS did not merely violate the rules to take "a second bite of the [direct testimony] apple" and shore up its direct, but rather *served supplemental direct testimony and expert opinions* on matters that should have been included in GRS's case-in-chief on March 15, 2021.

Significant portions of GRS's surrebuttal violates Your Honor's Orders and the Commission's regulations which expressly bar parties from introducing evidence during a rebuttal phase that should have been included in the party's case-in-chief and seeks nothing more than to ambush SPLP with new information when it has no meaningful opportunity to respond within the existing procedural schedule in complete violation of SPLP's due process rights. This testimony must be stricken.

In the alternative to striking GRS's supplemental direct testimony, which SPLP believes is the appropriate remedy for such misconduct, SPLP requests a meaningful opportunity to respond to the supplemental direct testimony through oral rejoinder testimony. Additionally, portions of GRS's surrebuttal presents new testimony on events that transpired since GRS's direct testimony was filed on March 15, 2021. SPLP must be afforded the opportunity to respond to the new event

testimony in compliance with due process and requests Your Honor formally allow SPLP to present oral rejoinder testimony at the hearing which Your Honor previously offered if necessary upon good cause shown.

Through this Motion, SPLP also requests that the hearings, currently scheduled for July 12 and 13, be extended to start at 9 AM on those respective days, and that Your Honor schedule additional hearing days to accommodate the significant expansion of witnesses and cross examination as a result of GRS's surrebuttal testimony. Finally, SPLP requests an expedited, 4-day response period to this motion so that the matters raised here are resolved sufficiently in advance of the scheduled hearings to allow SPLP to prepare adequately.

II. LEGAL STANDARDS

SPLP requests that Your Honor (a) strike portions of GRS's surrebuttal testimony which should have been presented in GRS's case-in-chief; (b) in the alternative modify the procedural schedule to allow SPLP to present oral rejoinder testimony addressing GRS's improper supplemental direct testimony which should have been presented in its case-in-chief in compliance with SPLP's due process; and (c) allow SPLP the opportunity to respond through oral rejoinder to GRS's surrebuttal which presents testimony on new events that transpired since GRS's direct testimony was filed on March 15, 2021. The Commission's regulations allow for each of these forms of relief.

First, the Commission's regulations and Your Honor's Orders described above bar the introduction of evidence in rebuttal that should have been included in the party's direct case:

(e) A party will not be permitted to introduce evidence during a rebuttal phase which:

- (1) Is repetitive.
- (2) **Should have been included in the party's case-in-chief.**
- (3) Substantially varies from the party's case-in-chief.

52 Pa. Code § 5.243(e) (emphasis added).

The purpose of the rule is to protect due process rights to avoid trial by ambush and prevent surprise. “The clear purpose of it [52 Pa. Code § 5.243(e)] is to avoid trial by ambush and the prevention of surprise can only be achieved if the parties are confined to the scope of their direct case.” *Pennsylvania Public Utility Commission v. UGI Utilities, Inc.*, 1994 Pa. PUC LEXIS 138, *85; *Pennsylvania Pub. Util. Comm'n v Total Environmental Solutions, Inc.*, 103 Pa. P.U.C. 110 (July 30, 2008) (parties here were “ambushed” by the new information contained in rebuttal testimony that “corrected” information provided in direct testimony and discovery responses.); *Pennsylvania Public Utility Commission v. Total Environmental Solutions, Inc. -- Treasure Lake Water Division, et al.*, Docket No. R-00072493, 2008 Pa. PUC LEXIS 42 at *114-116 (Pa PUC May 23, 2008) (“...it is not equitable to permit TESI to take a second bite at direct testimony, or to allow it to shore-up inadequate direct at the rebuttal phase of this case.”), *aff'd*, Opinion and Order at 89 (July 30, 2008) (“*TESP*”); *City of Lancaster (Sewer Fund) v. Pennsylvania Pub. Util. Comm'n*, 793 A.2d 978 (Pa. Cmwlth. 2002) (Commonwealth Court affirmed the PUC’s ruling that the City improperly proffered direct evidence during a rebuttal phase of the proceeding, citing 52 Pa. Code § 5.243(e)) (“*City of Lancaster*”).

Second, if Your Honor does not strike GRS’s supplemental direct testimony pursuant to 52 Pa. Code § 5.243(e), SPLP requests that, pursuant to 52 Pa. Code § 5.223(a), SPLP be permitted to respond to the supplemental direct testimony through oral rejoinder at the hearing in compliance with SPLP’s due process rights. See 52 Pa. Code § 5.223(a), as referenced in the Scheduling Order at Paragraph 8 (“any provision of this order may be modified upon motion and good cause shown by any party in interest in accordance with 52 Pa. Code §5.223(a)”).

Finally, SPLP asks Your Honor to allow it to provide responsive oral rejoinder testimony to the issues and matters raised in GRS's surrebuttal testimony that transpired since its direct testimony on March 17, 2021. SPLP requests that, pursuant to 52 Pa. Code § 5.223(a), that SPLP be permitted to respond to this new testimony on recent events through oral rejoinder at the hearing in compliance with SPLP's due process rights. *See* 52 Pa. Code § 5.223(a), as referenced in the Scheduling Order at Paragraph 8 ("any provision of this order may be modified upon motion and good cause shown by any party in interest in accordance with 52 Pa. Code §5.223(a).").

III. ARGUMENT

A. PORTIONS OF GRS SURREBUTTAL TESTIMONY MUST BE STRICKEN AS GRS IS BARRED FROM INTRODUCING EVIDENCE DURING A REBUTTAL PHASE WHICH SHOULD HAVE BEEN IN ITS CASE-IN-CHIEF.

It is without doubt that a party before the Pennsylvania Public Utility Commission is not permitted to introduce evidence during a rebuttal phase which should have been included in the party's case-in-chief. *See* 52 Pa. Code § 5.243(e); *TESI; City of Lancaster*. This rule cannot simply be waived or ignored – it is a rule that protects the due process rights of litigants before the Commission by expressly barring trial by ambush tactics by keeping the parties confined to the scope of their direct testimony. As the Commonwealth Court affirmed in the *City of Lancaster*, parties cannot proffer direct evidence to support their case-in-chief in a rebuttal phase as provided in 52 Pa. Code § 5.243(e). Further, as the Commission has explained, "the clear purpose of it [52 Pa. Code § 5.243(e)] is to avoid trial by ambush and the prevention of surprise can only be achieved if the parties are confined to the scope of their direct case." *Pennsylvania Public Utility Commission v. UGI Utilities, Inc.*, 1994 Pa. PUC LEXIS 138, *85 ("*UGI Utilities, Inc*").

As described below, portions of GRS's surrebuttal testimony demonstrably violate 52 Pa. Code § 5.243(e) and must be stricken. GRS had a burden to present its direct testimony on March 15,

2021 in its case in chief. That GRS now obviously believes that its direct case was deficient is not a reason to allow GRS to violate the Commission's regulations and SPLP's fundamental due process rights and add new witnesses and experts to offer opinions that could and should have been offered in GRS's direct testimony.

Importantly, SPLP is only moving to strike portions of GRS's surrebuttal testimony that are *not responsive* to SPLP's rebuttal and that constitutes new direct, case-in-chief opinions of GRS's newly retained experts that was required under the Commission's regulations to be presented in GRS's direct testimony. GRS's attempt to disguise its ambush by nominally basing its surrebuttal on references to SPLP's rebuttal is unavailing. Such references cannot change the fact that the testimony could and should have been part of GRS's case in chief. The multiple newly retained "experts" simply take "a second bite" at the same apple in order to shore up GRS's deficient direct testimony. This is not allowed under well settled law. *See* 52 Pa Code § 5.243(e); *TESI*; *City of Lancaster*; *UGI Utilities, Inc.*

SPLP carefully reviewed and analyzed GRS's surrebuttal to limit its request to strike only those portions that clearly and provably violate the Commission's regulations and SPLP's right to due process. As shown in the table below, the following portions of testimonies of Joseph Wittman, P.E., James Davidson, Jay Etzel, and Jeffrey Davis MD amount to direct, case-in-chief opinions and testimony that cannot be allowed in the rebuttal stage of this proceeding.

GRS Surrebuttal Statement	Page and line number of surrebuttal testimony which should have been included in GRS's direct case-in-chief
Statement No. 4 – Joseph Wittman, P.E.	<p>Consists of new “expert” opinions on the basis of GRS’s noise related complaints which should have been provided in GRS’s case-in-chief. Direct opinions include:</p> <ol style="list-style-type: none"> 1. Page 5:10-6:20 – discussing GRS’s own sound measurements presented in GRS’s direct Exhibits GRS-5, GRS-33. 2. Page 6:21-9:11 – providing opinions on Middletown Township’s noise ordinance and interpretation; work schedules; characteristics of GRS’s property to increase noise exposure related to sound walls; discussing videos in GRS direct exhibit GRS-5. 3. Page 9:12 – 10:5 – shoring up GRS direct that GRS-5 equipment is accurate; opinions on GRS-5 impact on residents. 4. Page 10:6-11:19 - Attacking SPLP’s Noise Impact Assessment and Sound Mitigation Plan at the property; discussing sampling that occurred in March 2021. 5. Page 11:20 – 12:13 – opinions on what SPLP should have done to mitigate noise. 6. Page 12:14-13:13 – opinions on what SPLP should have done at the outset of the project at Glen Riddle; that SPLP should have consulted GRS; that such consultations would have improved safety. 7. Page 15:1-16:8 – opinions on the August 20, 2020, March 10, 2021 Behrens and Associates report. 8. Page 16:10-18:16 – overall conclusions on application of the CDC noise guidelines as appropriate standard for GRS jobsite.
Statement No. 6 – James Davidson	<p>Consists of new “expert” opinions on the basis of the impacts of the sound walls at the site for fire protection and emergency issues which should have been provided in GRS’s case-in-chief. Direct opinions include:</p> <ol style="list-style-type: none"> 1. Page 5:15-6:2 – presenting testimony regarding ground level fire operations at property, placement of optimal nozzle streams, manpower needs for fire response. 2. Page 6:10-7:15 – Opinions on what SPLP “should have provided” under IFC regarding a never before discussed “gravel” logging style road addition for traffic looping, SPLP’s failure to provide looping is unsafe, and access roads violations per IFC could lead to increase risk. 3. Page 8:2-15 – sound walls - what SPLP should have done regarding access road and temporary looping road; that SPLP did not comply with standards of the IFC; that SPLP created “unnecessary and avoidable risk of serious harm.” 4. Page 8:22-9:21 – Emergency vehicle ingress and egress, SPLP created avoidable challenges at site. 5. Page 10:2-21 – ultimate conclusions regarding SPLP’s construction which should have been included in direct.
Statement No. 7 – Jay Etzel, P.E.	<p>Consists of new “expert” opinions on traffic safety issues which should have been provided in GRS’s case-in-chief. Direct opinions include:</p> <ol style="list-style-type: none"> 1. Page 3:10-18: outlining testimony and opinions that SPLP did not address traffic circulation, construction vehicles on site, parking impacts, bus stop

GRS Surrebuttal Statement	Page and line number of surrebuttal testimony which should have been included in GRS's direct case-in-chief
	<p>impacts, pedestrian and fire safety.</p> <ol style="list-style-type: none"> 2. Page 3: 19-20: site visit first occurred on June 1, 2021 3. Page 4:11-20 - general description of property should have been in case-in-chief 4. Page 5:11-19 – opinions on unsafe traffic conditions at site. 5. Page 5:20-6:9 – opinions on ingress and egress related to construction zone. 6. Page 6:18-7:4 – referencing direct exhibit GRS-28, new opinions on confusion for construction vehicles and markings. 7. Page 7:6-8:17 – Opinions regarding SPLP's alleged communication failures regarding construction at site for residents. 8. Page 9:6-10:20 – Opinions regarding the bus stop impacts, SPLP interactions with RTMSD, that SPLP did not plan for interruption to busses properly, that the bus stop is inherently unsafe due to location on a curve, and what actions SPLP should have taken. 9. Page 11:10-14 – Opinions on Middletown Township's fire vehicle tests at site not adequate. 10. Page 11:23-12:11 – Opinions on stacking of trucks at site and vehicles idling generally unsafe. 11. Page 12:13-14:23 – Ultimate conclusions that should have been presented in GRS case-in-chief
Statement No. 10 – Jeffrey Davis, MD	<p>Consists of new “expert” opinions focusing on the impact that certain decibels of sound can have on human hearing which should have been provided in GRS's case-in-chief. Direct opinions include:</p> <ol style="list-style-type: none"> 1. Page 3:10-4:8 – new medical opinions on the applicable of CDC or NIOSH standards.

The above identified portions of testimony are provably direct, case-in-chief opinion testimony on the many issues raised in GRS's Complaint that GRS was required to present in direct testimony on March 15, 2021 but failed to do so. Prior Commission decisions, the Commission's regulations, and Your Honor's Orders placed GRS on notice that such conduct and inclusion of direct testimony in rebuttal would not be tolerated. Therefore, consistent Your Honor's warnings and orders, SPLP respectfully requests that Your Honor rule to exclude from entry into the record GRS's surrebuttal testimony identified above because it violates 52 Pa. Code § 5.243(e).

B. IN THE ALTERNATIVE TO STRIKING GRS'S TESTIMONY THAT VIOLATES 52 PA. CODE § 5.243(e) DESCRIBED IN SECTION III(A), REQUEST FOR MEANINGFUL OPPORTUNITY TO RESPOND.

SPLP firmly believes that the testimony offered by GRS in its surrebuttal testimony that should have been presented in its case in chief must be stricken pursuant to the Commission's regulations and fundamental due process. *Supra* Section III(A). Should Your Honor permit GRS's supplemental direct testimony to remain unstricken, SPLP requests that, consistent with due process, SPLP be afforded the opportunity to present oral rejoinder testimony on all aspects of GRS's testimony which it was required to raise in its case-in-chief. SPLP requests, pursuant to 52 Pa. Code § 5.223(a), that SPLP be permitted to respond to the supplemental direct testimony through oral rejoinder at the hearing in compliance with SPLP's due process rights. *See* 52 Pa. Code § 5.223(a), as referenced in the Scheduling Order at Paragraph 8 ("any provision of this order may be modified upon motion and good cause shown by any party in interest in accordance with 52 Pa. Code §5.223(a)").

C. REQUEST TO PRESENT ORAL REJOINDER TESTIMONY TO ADDRESS PORTIONS OF GRS SURREBUTTAL TESTIMONY ON NEW EVENTS SINCE THE FILING OF GRS'S DIRECT AS REQUIRED BY DUE PROCESS.

GRS presented surrebuttal testimony on events that transpired since GRS filed its direct testimony (hereinafter "new events"). Unlike GRS's supplemental direct testimony which violates 52 Pa. Code § 5.243(e) as presented in Section III(A) above, the new event testimony could not have been presented in GRS's direct testimony due March 15, 2021. However, this testimony was still presented for the first time in surrebuttal testimony, and SPLP has no further opportunity under the current procedural schedule to respond to the new event testimony. Therefore, in order to protect SPLP's due process rights, SPLP must be given a meaningful opportunity to respond to the new event testimony presented by GRS in surrebuttal. SPLP has shown good cause as the

allegations and testimony on the new events was never before presented in this proceeding. *See* 52 Pa. Code § 5.223(a), as referenced in the Scheduling Order at Paragraph 8 (“any provision of this order may be modified upon motion and good cause shown by any party in interest in accordance with 52 Pa. Code §5.223(a)”).

The new event testimony revolves around four topics:

1. Allegations regarding the use of an approved solidifying agent, Calciment, at the property;
2. Allegations of building structural concerns and sound wall integrity concerns after March 2021;
3. Allegations regarding groundwater and hydrology after March 2021; and
4. Allegations regarding the May 26, 2021, Aqua water outage and water line replacement and allegations of contamination from the event.

Under the current procedural schedule, SPLP is afforded no further opportunity to respond to the new event testimony. In order to protect SPLP’s due process rights to be appraised of the claims raised and prepare a suitable defense, SPLP requests that Your Honor enter a formal order granting SPLP the right to present oral rejoinder testimony responsive to Glen Riddle’s surrebuttal testimony at the evidentiary hearings. SPLP is in the process of retaining additional experts to address the newly injected topics not previously in the scope of this proceeding. Previously during off-the-record procedural conferences, Your Honor offered that SPLP may request oral rejoinder should the need arise. SPLP has shown good cause for Your Honor to allow SPLP to present oral rejoinder testimony responsive to GRS’s surrebuttal in order to protect SPLP’s due process rights.

D. REQUEST FOR ADDITIONAL HEARING DATES AND PROPOSED MODIFICATION FOR 9 AM START OF HEARINGS

As described above, the scope of this proceeding has significantly expanded with GRS’s addition of seven (7) new witnesses during the surrebuttal stage of this proceeding. In total, GRS has identified eleven (11) witnesses, and SPLP has presented eight (8) witnesses and expects

additional witnesses to testify orally regarding the new issues injected by GRS in surrebuttal. In total, 20 or more witnesses will be offered by the parties at the July 12 and 13 hearings.⁶ Currently, the hearings are scheduled to begin at 10 AM.

Given the number of witnesses involved, SPLP requests that Your Honor amend the currently scheduled hearings to begin at 9 AM rather than 10 AM. This will allow the parties additional time for hearings on the currently scheduled dates. SPLP also requests that Your Honor and the Parties work to schedule additional hearing days. Initially, SPLP proposes Wednesday July 14, 2021, if Your Honor's and GRS's schedules permit.

Both parties have due process rights in this proceeding which include an opportunity to confront and cross-examine adverse witnesses. *Henderson v. Unemployment Compensation Board of Review*, 77 A.3d 699, 715 (Pa. Cmwlth. 2013); *McFadden v. Unemployment Comp. Bd. of Review*, 806 A.2d 955, 958 (Pa. Cmwlth. 2002). Under the current procedural schedule, SPLP believes that there will be insufficient time to adequately present SPLP's oral rejoinder testimony, cross examine GRS's 11 witnesses, and cross examine SPLP's witnesses. Therefore, SPLP requests that Your Honor amend the current hearing start time to 9 AM and schedule additional hearing days.

E. REQUEST FOR EXPEDITED FOUR DAY ANSWER PERIOD

Pursuant to 52 Pa. Code § 5.103(c), SPLP respectfully requests that Your Honor shorten the response period for this motion from 20 days to 4 days, so that the issue of supplemental direct testimony and the procedural matters can be resolved sufficiently in advance of the hearings scheduled to begin July 7 and continue July 12 & 13. Unless the answering period is shortened,

⁶ SPLP notes that the special sitting for one of SPLP's witnesses on July 7 was agreed only for that one witness to testify.

GRS's answer would not be due until July 12, 2021. This motion contains significant procedural issues and requests for additional hearing time which also needs to be addressed as soon as possible for both the parties and Your Honor's availability for additional hearings.

F. REQUEST FOR INTERLOCUTORY REVIEW AND CERTIFICATION OF MATERIAL QUESTION SHOULD YOUR HONOR NOT STRIKE GRS'S SUPPLEMENTAL DIRECT TESTIMONY AND NOT EXTEND SPLP A MEANINGFUL OPPORTUNITY TO RESPOND TO THE TESTIMONY WHICH VIOLATES 52 PA. CODE § 5.243(e).

If Your Honor reverses the Scheduling Order, April 8 Order, and May 24 Order and does not strike GRS's supplemental direct testimony and also not extend SPLP any meaningful opportunity to respond, SPLP respectfully requests Your Honor certify to the Commission as a material question pursuant to 52 Pa. Code § 5.305 whether GRS's testimony which violates the Commission's regulations and SPLP's due process rights should be permitted in the rebuttal stage when SPLP lacks the opportunity to respond, and stay the schedule and proceeding pending guidance from the Commission.

IV. CONCLUSION

For the foregoing reasons, SPLP respectfully requests that Your Honor:

- (1) Strike the portions of GRS's surrebuttal identified above that violate Your Honor's Orders, 52 Pa. Code § 5.243(e), and SPLP's due process rights;
- (2) In the alternative to striking GRS's surrebuttal testimony which violates 52 Pa. Code § 5.243(e), provide SPLP a meaningful opportunity to respond through oral rejoinder testimony;
- (3) Modify the procedural schedule to allow SPLP to present oral rejoinder testimony on the new events presented in GRS's surrebuttal testimony;
- (4) Modify the hearing schedule to start at 9 AM on July 12 and 13, and schedule additional hearing dates to accommodate the additional witnesses; and
- (5) Shorten the response period for this Motion from 20 days to 4 days.

Respectfully submitted,

/s/ Thomas J. Sniscak

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Date: June 21, 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).

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Dated: June 21, 2021