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July 12, 2021

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Glen Riddle Station, L.P. v. Sunoco Pipeline L.P.; Docket No. C-2020-3023129

Dear Secretary Chiavetta:

Enclosed for electronic filing with the Pennsylvania Public Utility Commission is Complainant's Motion In Limine To Strike Respondent's Rejoinder Testimony Or, In The Alternative, To Allow Complainant A Meaningful Opportunity To Respond, in the above-referenced matter. If you have any questions with regard to this filing, please do not hesitate to contact me. Thank you.

Respectfully,

A handwritten signature in black ink, appearing to read 'Samuel W. Cortes', written over a light blue horizontal line.

Samuel W. Cortes

SWC:jcc
Enclosure

cc: Per Certificate of Service

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**COMMONWEALTH OF PENNSYLVANIA
BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

GLEN RIDDLE STATION, L.P.,	:	DOCKET NO. C-2020-3023129
Complainant,	:	
	:	
v.	:	
	:	
SUNOCO PIPELINE L.P.,	:	
Respondent.	:	

NOTICE TO PLEAD

TO: Sunoco Pipeline L.P.

Pursuant to 52 Pa. Code § 1.15(b) and 52 Pa. Code § 5.202(c), you are hereby notified that Glen Riddle Stations, L.P., has filed a Motion *in Limine* at the above-referenced docket to which you may file an answer. Your failure to answer will allow the ALJ to rule on the Motion without a response from you, thereby requiring no other proof. All pleadings such as an Answer to this Motion must be filed with the Secretary of the Pennsylvania Public Utility Commission, Rosemary Chiavetta.

FOX ROTHSCHILD LLP

July 12, 2021

By:



Samuel W. Cortes, Esquire
Attorney ID No. 91494
Attorneys for GRS

**COMMONWEALTH OF PENNSYLVANIA
BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

GLEN RIDDLE STATION, L.P.,	:	DOCKET NO. C-2020-3023129
Complainant,	:	
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v.	:	
	:	
SUNOCO PIPELINE L.P.,	:	
Respondent.	:	

COMPLAINANT’S MOTION *IN LIMINE* TO STRIKE RESPONDENT’S REJOINDER TESTIMONY OR, IN THE ALTERNATIVE, TO ALLOW COMPLAINANT A MEANINGFUL OPPORTUNITY TO RESPOND

Complainant, Glen Riddle Station, L.P. (“GRS”), files this Motion *in Limine* To Strike Respondent’s Rejoinder Testimony Or, In The Alternative, To Allow Complainant A Meaningful Opportunity To Respond (the “Motion”). As set forth below, at the close of business on the last business day before the hearing, Respondent Sunoco Pipeline L.P. (“Sunoco”) produced 18 pages of rejoinder testimony and identified two witnesses (including a new purported expert witness) that it intends to call, without prior notice and for the first time, at Monday’s hearing. After providing its surrebuttal testimony on June 14, 2021 (approximately one month ago), GRS is left with one weekend – zero business days – to review and respond to the extensive and demonstrably false allegations set forth in Sunoco’s new written testimony. GRS has no opportunity to prepare a response or even retain an expert to prepare a response to the as-of-yet undisclosed opinions of Sunoco’s newest expert – a purported toxicologist. Sunoco’s rejoinder testimony violates the Commission’s regulations, the ALJ’s Scheduling Orders, and denies GRS its due process rights. Accordingly, GRS respectfully requests that the ALJ strike Sunoco’s purported new testimony or, in the alternative, allow GRS two weeks to respond.

I. Procedural History

On February 26, 2021, the ALJ issued the first stipulated Scheduling Order, which provided for the presentation of evidence through the submission of written direct testimony by GRS, followed by written rebuttal testimony of Sunoco, and closing with written surrebuttal testimony by GRS. [See February 26, 2021 Scheduling Order]. Although the Scheduling Order was subsequently extended, the agreed upon presentation of evidence never changed. [See April 16, 2021 Scheduling Order; May 24, 2021 Scheduling Order]. It has always been understood, agreed, and ordered that GRS – the party with the burden of proof – would close the written presentation of evidence with surrebuttal testimony and that the hearing in this manner would be reserved for cross-examination, if any. [See Scheduling Orders].

GRS complied with the ALJ's Scheduling Orders in all respects. On March 15, 2021, GRS produced direct testimony of three witnesses. On May 12, 2021, Sunoco produced rebuttal testimony of eight witnesses (including three experts). On June 14, 2021, GRS produced its surrebuttal testimony.

On June 21, 2021, Sunoco filed a Motion *in Limine* seeking to strike certain portions of GRS's surrebuttal testimony or, in the alternative, to offer oral rejoinder. [See Sunoco's Motion *in Limine*]. GRS opposed the Motion, arguing that its surrebuttal testimony directly responded to testimony offered by Sunoco's witnesses in rebuttal. [See GRS's Response to Sunoco's Motion *in Limine*, pp. 3-10].

On July 2, 2021, the parties and the ALJ held a conference call, during which the ALJ indicated that he intended to deny Sunoco's Motion as GRS's surrebuttal testimony complied with 52 Pa. Code § 5.243(e). In response to Sunoco's objections, the ALJ scheduled oral argument on

the Motion *in Limine* for July 7, 2021, indicating that he would review GRS’s surrebuttal testimony “line by line” to determine whether it responded to Sunoco’s rebuttal testimony.

On July 7, 2021, the parties argued the Motion *in Limine* before the ALJ. During oral argument, the ALJ reiterated his initial intention to deny Sunoco’s Motion. Over GRS’s objections, the ALJ granted Sunoco its requested relief by allowing Sunoco the opportunity to provide “efficient and brief” oral rejoinder. The ALJ directed Sunoco to produce a description of its proposed rejoinder testimony as soon as possible. Sunoco asserted that “due to schedules” it would not be able to share the document until Friday – only one business day before the start of the hearing.

At approximately 10:00 a.m. on July 7, 2021, Sunoco produced a limited proposed rejoinder testimony proffer, identifying five (5) witnesses, including (1) Jayme Fye, (2) David Amerikaner, (3) Joseph McGinn, (4) Scott Horn of Horn Plumbing and Heating, Inc. (a new witness), and (5) Brian Magee, Ph.D (a new proposed toxicologist expert). [See Sunoco’s Rejoinder Testimony Proffer]. Sunoco estimated its total rejoinder time to be approximately 2 hours – i.e., more than one quarter of the hearing time allotted to each party for this case.

Shortly after Sunoco produced its rejoinder testimony proffer, the ALJ responded by email writing, “[u]nfortunately, this does not fit into my definition of ‘efficient and brief’ that we discussed on Wednesday. So this will have to be significantly pared down to something that is more reasonable.” [See Email from ALJ]. Later that afternoon, the parties and the ALJ held a conference call, during which GRS argued that Sunoco’s proffered rejoinder testimony prejudiced GRS as the rejoinder was proffered on the eve of trial and without any time for GRS to respond or to retain an expert qualified to respond.

At the conclusion of the conference call, the ALJ directed Sunoco to submit the rejoinder testimony of Messrs. Fye, Amerikaner, and McGinn in writing by 5:00 p.m. on July 9, 2021 – the last business day before the hearing. The ALJ allowed Sunoco to present oral rejoinder testimony of Sunoco’s two new witnesses, Dr. McGee (Sunoco’s proposed toxicology expert) and Mr. Horn (Sunoco’s plumbing contractor).

On July 9, 2021 at 4:56 p.m., Sunoco produced a proffer of the expert qualifications of its new toxicologist, Dr. Magee. No testimony or opinion evidence was produced by Sunoco providing GRS with any notice of the testimony or opinions that Dr. Magee will offer when called to testify at Monday’s hearing. Sunoco also produced written rejoinder testimonies of Mr. Fye (7 pages), Mr. Amerikaner (9 pages), and Mr. McGinn (2 pages). Upon initial review, each of the written rejoinder testimonies are replete with demonstrably false accusations and repetitive testimony, as addressed briefly below.

A. Mr. Fye’s Rejoinder Testimony

Mr. Fye testifies that, with respect to the water line break at the GRS property, GRS refused to let Sunoco test the water at the property. [See Fye Rejoinder, p. 3 ln. 11-16, p. 5 ln. 22-23]. At first glance, it is evident that these claims are directly contradicted by Sunoco’s counsel, Mr. Amerikaner, in his rejoinder testimony. [See Amerikaner Rejoinder, p. 9 ln. 12-14 (“Given that the testing recommended by Aqua was already in progress, Sunoco Pipeline decided not to collect its own samples (if Glen Riddle had granted permission) and to let Aqua test the water.”)].

Mr. Fye submits the same testimony that he offered, almost verbatim, during his rebuttal testimony with respect to comments he made about pedestrian safety concerns. [Compare Fye Rebuttal, p. 8 ln. 9 – ln. 20 (“I certainly used the phrase common sense in response to a question regarding how SPLP plans to avoid collisions between trucks and pedestrians....I also explained,

however, that we would have flaggers on site...I also said that two important factors ensuring safe driving were 1) safe driving is a condition of employment with Michels, and 2) the criminal justice system...”) with Fye Rejoinder, p. 6 ln. 13 – p. 7 ln. 3 (“My response initially was to say common sense as all people from the time they can drive know to be on the look out for pedestrians...I said we would have certified flaggers on site at all times and that two other substantial factors involved the criminal justice system and job employment...”)].

B. Mr. Amerikaner’s Rejoinder Testimony

Mr. Amerikaner’s rejoinder testimony is false. For example, in his rejoinder, Mr. Amerikaner testifies that GRS never gave Sunoco permission to collect water samples. [See Amerikaner Rejoinder, p. 9 ln. 8-11 (“On the morning of May 27, I attempted to contact Glen Riddle counsel several times to get permission for Sunoco Pipeline personnel to enter the buildings and collect water samples. That permission was never given.”)]. To the contrary, at 12:04 p.m. on May 27, GRS’s counsel emailed Mr. Amerikaner, writing “[p]lease give me the phone number and name of the individual that GRS needs to coordinate with for [Sunoco’s water safety consultant] and we will facilitate the testing immediately.” [See Emails dated May 27, 2021 between counsel (GRS-139)]. Mr. Amerikaner responded, stating “[w]e understand from your email that Aqua is on-site collecting water samples for testing purposes, or has already done so. We have also spoken with Aqua and received the same information. That being the case, those efforts do not need to be duplicated.” [Id.].

C. Mr. McGinn’s Rejoinder Testimony

As with Mr. Fye and Mr. Amerikaner, Mr. McGinn’s rejoinder testimony is completely duplicative of testimony that Sunoco offered during rebuttal and false. For example, in his rejoinder, McGinn seemingly claims that GRS is only interested in a “large sum of money,” which

is demonstrably false as evidenced by the testimony of GRS's witnesses regarding GRS's concerns over the safety and welfare of its residents. [See McGinn Rejoinder, p. 2 ln. 1-4]. Mr. McGinn also claims Sunoco has evidenced a continued "willingness to mediate," which is patently false as Sunoco refused GRS's offer to continue mediation. Finally, Mr. McGinn claims that "more than 100 residents of GRS have received rent relief." [Id., p. 2 ln. 16-18]. Yet, on June 22, 2021 Sunoco responded to GRS's Interrogatories requesting identification of all of Sunoco's communications with the residents and did not identify a single communication regarding rent relief. [See Sunoco's Answers to GRS's Interrogatory No. 2].

It is clear that Sunoco submitted the rejoinder testimony of these witnesses, not for any legitimate purpose, but only to get the last (false) word in these proceedings without allowing any opportunity for GRS to respond meaningfully.

II. Argument

Sunoco's last minute submission of two hours of rejoinder testimony – including the yet unknown testimony of a new expert witness – deprives GRS of any meaningful opportunity to respond or even obtain an expert to prepare a response. Pennsylvania Courts and the Commission itself have found that these exact circumstances result in due process violations, as discussed below. Accordingly, the Commission should strike Sunoco's rejoinder testimony because it violates the Commission's regulations, the applicable Scheduling Orders, and GRS's due process rights.

"In a proceeding, the party having the burden of proof, shall open and close unless otherwise directed by the presiding officer" who may vary the presentation of evidence "when the evidence is peculiarly within the knowledge or control of another party." See 52 Pa. Code § 242 (a), (c); see also David Nippes v. PECO Energy Co., No. C-2013-2363324, 2013 WL 4717017, at

*1 (Pa. P.U.C. Aug. 15, 2013) (holding, “[C]ommission regulations require that the presentation of evidence following convention, with each having the right to present evidence, cross-examination, etc.”) (citing 52 Pa. Code § 242).

The Commission’s regulations vest the presiding officer with the authority to “exclude irrelevant, immaterial or unduly repetitive evidence, to prevent excessive examination of witnesses, to schedule and impose reasonable limitations on discovery and to otherwise regulate the course of the proceeding.” 52 Pa. Code § 5.483. The presiding officer is further vested with the authority at a pre-hearing conference to direct the advance distribution of written prepared testimony in advance of the hearing. 52 Pa. Code § 5.223(a). “The rulings of the presiding officer made at the conference will control the subsequent course of the hearing, unless modified for good cause shown.” *Id.* The presiding officer must actively employ its powers “to direct and focus the proceedings consistent with due process.” 52 Pa. Code § 5.403(b).

To comport with due process, the Commission’s regulations and comparable rules employed in the civil and administrative context provide for the pre-trial disclosure of expert testimony. *See* 52 Pa. Code § 5.412(a) (“Use of written testimony in Commission proceedings is encouraged, especially in connection with the testimony of expert witnesses.”); Mary Paul v. PECO Energy Co., No. C-2015-2475355, 2019 WL 1315249, at *15 (Pa. P.U.C. Mar. 14, 2019) (striking untimely submitted expert testimony, holding that “the admission of testimony requested by the Complainant during the hearing, but after the deadline for the identification of expert witnesses had passed, would have violated PECO’s due process rights, just as if the request were made after the hearing”); (see also Mr. Loren Kiskadden v. Commonwealth of Pennsylvania, Department of Environmental Protection and Range Resources - Appalachia, LLC, Permittee, No. 2011-149-R, 2014 WL 4659475, at *1 (Env. Hearing Board Sept. 12, 2014)

(striking late filed expert reports, holding that “allowing the new experts to testify at the trial would cause severe prejudice to the [a]ppellant”); Kiskadden v. Jistarri v. Nappi, 549 A.2d 210 (Pa. Super. Ct. 1998) (holding that the purpose of the rules of civil procedure regarding the pre-trial disclosure of expert witness opinions is “to prevent the unfairness that would occur if one party were unable to counter the expertise of a surprise witness produced at the last minute by the opposing party”) (citing Clark v. Hoerner, 525 A.2d 377 (Pa. Super. Ct. 1987) (applying Pa. R.C.P. 4003.5 and holding, “The purpose of the discovery rules is to prevent surprise and unfairness and to allow a trial on the merits. When expert testimony is involved, it is even more crucial that surprise be prevented, since the attorneys will not have the requisite knowledge of the subject on which to effectively rebut unexpected testimony. By allowing for early identity of expert witnesses and their conclusions, the opposing side can prepare to respond appropriately instead of trying to match years of experience on the spot. Thus, the rule serves as more than a procedural technicality; it provides a shield to prevent the unfair advantage of having a surprise witness testify.”)).

Here, as reflected in the multiple Scheduling Orders issued in this case, the ALJ ordered that GRS as the party with the burden of proof would close. See 52 Pa. Code § 242(a); [see also Scheduling Orders]. GRS complied with the Commission’s Scheduling Orders and prepared for these proceedings under the Scheduling Order’s express directives that GRS would close the written presentation of evidence with surrebuttal testimony. The ALJ has not found “good cause” to deviate from the existing Scheduling Order and none exists. There is simply no finding in the record to support granting the relief Sunoco seeks under these circumstances.

Moreover, the timing of Sunoco’s production of the rejoinder testimony – on the eve of the hearing – violates GRS’s due process rights. Sunoco had ample time to produce its rejoinder

testimony well before the close of business on the last business day before the hearing. Instead, in an unabashed display of gamesmanship, it waited one month - until the eve of the hearing - to produce 18 pages of rejoinder testimony, 9 pages of which are detailed factual allegations from its own lawyer who has been involved in this case since its outset and who was, obviously, available to produce this testimony weeks ago. In turn, GRS is left only with one weekend to review and respond to the rejoinder testimony that Sunoco produced. Most egregiously, with respect to the rejoinder testimony that Sunoco has not produced (i.e., Mr. Horn and Dr. Magee), GRS obviously cannot prepare a response, let alone retain a responsive expert over the weekend, when Sunoco has not even offered a summary of Dr. Magee's action opinions. This is a denial of due process. See Mary Paul, 2019 WL 1315249, at *15; Kiskadden, 2014 WL 4659475, at *1.

The weekend before the hearing does not provide GRS with a meaningful opportunity to respond to the false and misleading allegations set forth in Sunoco's rejoinder testimony. Accordingly, GRS respectfully requests that the ALJ either strike Sunoco's rejoinder testimony or allow GRS additional and meaningful time to respond.

III. CONCLUSION

For the foregoing reasons, GRS respectfully requests that the ALJ grant this Motion on an expedited basis and strike Sunoco's rejoinder testimony or, in the alternative, provide GRS with a meaningful opportunity in the form of at least two weeks of additional time to respond to Sunoco's rejoinder testimony.

Respectfully submitted,

FOX ROTHSCHILD LLP

July 12, 2021

By:



Samuel W. Cortes, Esquire
Attorney ID No. 91494
Attorneys for Complainant

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Complainant,	:	
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Respondent.	:	

CERTIFICATE OF SERVICE

I hereby certify that, on July 12, 2021, I served a true and correct copy of Complainant’s Motion *In Limine* To Strike Respondent’s Rejoinder Testimony Or In The Alternative To Allow Complainant A Meaningful Opportunity To Respond upon the persons listed below and by the methods set forth below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party):

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