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July 23, 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 ANSWER TO THE MOTION OF GLEN
RIDDLE STATION L.P. TO STRIKE CERTAIN PORTIONS OF SUNOCO
PIPELINE L.P.’S TESTIMONY**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is Sunoco Pipeline L.P.’S Answer to The Motion of Glen Riddle Station L.P. to Strike Certain Portions of Sunoco Pipeline L.P.’S Testimony 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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BRB/das

Enclosures

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

**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 ANSWER
TO THE MOTION OF GLEN RIDDLE STATION L.P. TO STRIKE CERTAIN
PORTIONS OF SUNOCO PIPELINE L.P.’S TESTIMONY**

Sunoco Pipeline L.P. (SPLP), by and through undersigned counsel, hereby submits this Answer to Motion of Glen Riddle Station, L.P. (“GRS”) to strike certain portions of Sunoco Pipeline L.P.’s testimony filed on July 20, 2021, in this proceeding. (“Motion”). In support thereof SPLP avers as follows:

I. BACKGROUND

A. Corrected list of testimony cited.

1. Initially,¹ GRS’ motion is inaccurate or confusing as it states it is objecting to certain lines or portions of *rejoinder* testimony when in fact the citations and its objections in its motion were posed only to *rebuttal* testimony of Mr. Amerikaner.² For Your Honor’s convenience, the corrected list of the citations of the testimony cited in Motion Paragraph 2 and the concluding paragraph are:

¹ SPLP is not required to and will not provide a paragraph-by-paragraph response to the Motion. *Compare* 52 Pa. Code § 5.61(b)-(c) (allegations in complaint may be deemed admitted if not specifically denied) *with* 52 Pa. Code § 5.103 (regarding response to motions and containing no similar provision).

² SPLP notes that the Motion at paragraph 2 changes various non-substantive words without indicating a change. i.e. GRS’s cite to SPLP statement No. 2-R 7:15-18 – the first word in original is “this” not “the.”

Rebuttal Testimony of David Amerikaner, SPLP Statement No. 2-R

- p. 3:22-23;
- p. 4:1-2;
- p. 4:10-11;
- p. 5:18-21;
- p. 7:15-18;
- p. 17:7-13; and
- p. 19:9-12.

B. The Motion contains inaccurate and provably false statements not supported by the record testimony or evidence, and the evidence of record speaks for itself.

2. In paragraph 5 of the Motion, GRS provides a speaking-motion narrative regarding the alleged purpose of its demands for excessive monetary compensation from SPLP in an attempt to portray GRS's conduct in a more favorable light. However, the statement that GRS demanded excessive monetary compensation from SPLP "to relocate its residents" is demonstrably false as this spin narrative: 1) is entirely unsupported by the evidence of record in this proceeding as shown by the absence of testimonial or evidentiary citations in paragraph 5; 2) attempts to inject a new and entirely false narrative regarding GRS's monetary demands and abuse of the Commission's processes; and 3) provides inaccurate and prejudicial statements by GRS that SPLP did not act in good faith when dealing with GRS's excessive monetary demands.

3. The testimony of record speaks for itself, and Your Honor can review the testimony and email exchanges presented by both GRS and SPLP to understand the primary motive for GRS's threats and ultimate abuse of the Commission's formal complaint and petitions for interim emergency procedures. SPLP maintains that the evidence of record shows the Commission's procedures were weaponized to increase the pressure on SPLP to accede to GRS's excessive financial demands on matters outside of the Commission's jurisdiction -- unproven business losses and the value of the temporary easement taking -- rather than to pursue what SPLP has demonstrated on the record to be manufactured and meritless communication and safety concerns.

II. LEGAL ARGUMENT

- A. **The testimony in SPLP Statement No. 2-R that GRS moved to strike is not prohibited by 52 Pa. Code § 5.231 as the testimony itself does not constitute “offers of settlement” but rather provides context to communications between the parties or illustrates GRS’s underlying pretext and use of the Commission’s emergency order and complaint process to leverage damages or monies from SPLP. As explained below, that issue, which bears on credibility or lack thereof, is admissible.**

4. GRS incorrectly argues the Commission’s regulation at 52 Pa. Code § 5.231(d) creates an absolute bar to the admissibility of evidence of GRS’s underlying purposes for its formal complaint and threatened petitions for interim emergency relief as “offers of settlement,” simply because GRS wishes to label such communications as settlement discussions. However, the testimony GRS wishes to strike does not constitute “offers of settlement” on the communication and safety allegations of the instant complaint; the compensation GRS demanded is not relief GRS could get from the Commission and has nothing to do with GRS’ alleged communication and safety concerns regarding SPLP’s construction at the property. Therefore 52 Pa. Code § 5.231(d) does not bar the admission of the cited testimony. The evidence of GRS’s monetary demands is thus not protected by the settlement privilege; it is evidence that goes to GRS’s credibility, which is why GRS seeks to strike it.

5. 52 Pa. Code § 5.231(d) provides that “**offers of settlement**... will not be admissible in evidence...” See 52 Pa. Code § 5.231(d) (emphasis added). Pennsylvania courts have defined a similar term, an “offer of compromise” as “the settlement of differences by mutual concessions; an adjustment of conflicting claims.” *Hooker v. State Farm Fire and Cas. Co.*, 880 A.2d 70, 85 (Pa. Cmmw. 2005); *citing Rochester Mach. Corp. v. Mulach Steel Corp.*, 498 Pa. 545, 549, 449 A.2d 1366, 1368 (1982). Under this definition, the Pennsylvania Supreme Court has held that demand letters do not constitute an offer to compromise a disputed claim or suggest efforts to

negotiate a compromise. *Rochester Mach. Corp. v. Mulach Steel Corp.*, 498 Pa. 545, 549, 449 A.2d 1366, 1368 (1982) (finding a ***demand letter*** containing statements on items damaged and the estimated cost of repair is not an effort to negotiate a compromise.)

6. The testimony cited by GRS in Motion paragraph 2 does not constitute “offers of settlement” or “offers of compromise” as 1) the testimony references monetary demands by GRS ***prior to the filing of the instant complaint*** unrelated to resolution of the communication and safety allegations subject to this complaint, and 2) the testimony cited does not disclose the topics of communications to prove or disprove the validity of a disputed claim raised in the Complaint, but rather catalogues various communications between the parties which go to the credibility or weight of GRS’s communication and safety allegations and GRS’s underlying motive for the instant litigation. See SPLP St. No. 2-R at 3:22 – 4:2 (discussing sporadic communications in the months of April, May, and June 2020 prior to the filing of the Complaint which included a conference call on May 19, 2020 discussing compensation for the Temporary Easement *that does not* constitute evidence of an “offer of settlement”); 4:10-11 (discussing GRS’s lack of concern for safety issues prior to the Complaint during April, May, and June 2020 and that GRS’s focus was on compensation for the Temporary Easement *that does not* constitute evidence of an “offer of settlement”); 5:18-21 (discussing communications prior to the filing of the Complaint in September 2020, including that a letter requesting monetary compensation had been received on Sept. 25, 2020 *that does not* constitute evidence of an “offer of settlement”); 7:15-18 (discussing correspondence between counsel prior to the Complaint around October 16, 2020 after discussion of various site inspections, with a letter from GRS to SPLP informing SPLP of GRS’s alleged losses and demands *that does not* constitute evidence of an “offer of settlement”); 17:7-13 (***discussing GRS threatening to weaponize the PUC’s Emergency Petition for Interim Relief in***

order to leverage monetary payments from SPLP that does not constitute evidence of an “offer of settlement”); and 19:9-12 (discussing the driving factor of GRS’s purpose for filing the instant proceeding, laying out the range of demands levied against SPLP generally *that does not* constitute evidence of an “offer of settlement.”).

7. Further, the single case GRS cites to support its argument, *James Munro v. PECO Energy Co.*, is both distinguishable and not controlling. See *James Munro v. PECO Energy Co.*, Docket No. C-2010-2214718, Opinion and Order (Order entered June 21, 2021) (“*Munro*”). *Munro* involved a complaint regarding alleged incorrect charges for electric service by PECO and a dispute over past due amounts and/or payment arrangements. *Id.* In coming to her decision on the *pro se* complaint, ALJ Vero did not rely on the complainant’s statements as proof of the validity of his claim when he alleged that a company employee during settlement discussions informed complainant that certain debts had been written off as a settlement of the debt owed, which ultimately did not occur. *Id.*; see also *Munro* Exceptions filed February 9, 2012. In *Munro*’s exceptions, the Complainant requested the Commission rely on the admitted settlement discussions and details under his “missing information in decision” exception. *Id.* In dismissing the exception, the Commission ultimately ruled that the ALJ’s decision to not address this claim was appropriate, noting 52 Pa. Code § 5.231(d), as the statement’s contents that the debt was written off constitutes the contents of an offer of settlement. *Id.* at 14.

8. The factual background of *Munro* is far and distinct from the posture of the instant proceeding, and as discussed below, even if the testimony GRS seeks to strike was considered “offers of settlement,” “offers of compromise,” or even settlement communications, which it is not, the testimony is not offered to prove or disprove the validity of a claim in dispute as was in *Munro* but rather offered to show that GRS’s true purpose for filing the instant proceeding –to

pressure SPLP into upping its offer on non-PUC jurisdictional matters amounts to an abuse of the Commission's process.

9. As shown above, the testimony GRS seeks to strike in the Motion does not constitute "offers of settlement" as it does not contain attempts to compromise on the communication and safety allegation issues in the instant complaint – parties cannot compromise on legitimate communication and safety concerns with monetary demands rather than action. Therefore, the testimony is admissible evidence in this proceeding and not barred by 52 Pa. Code § 5.231(d).

10. Additionally, there are significant portions of GRS's testimony and exhibits of Stephen Iacobucci which discuss various communications on the monetary demand issue. *See e.g.* the surrebuttal testimony of Stephen Iacobucci at 29:18 – 31:10. That GRS now seeks to strike SPLP's testimony on these same topics, yet maintain its own in this record, violates the rule of completeness and advances GRS's desire to present only one side of the story. Your Honor should not allow such imbalance in the record.

B. Even if the testimony GRS moved to strike does constitute "offers of settlement," which it does not, such communications are admissible under the exceptions in Rule 408 of the Pennsylvania Rules of Evidence as evidence for another purpose.

11. While the strict rules of evidence have been relaxed in agency proceedings under the Commonwealth's Administrative Agency Law, "in the administrative forum there has not been an abandonment of all rules of evidence." *Norman v. PECO Energy Company*, Docket No. F-2018-2640713, Opinion and Order (Order entered June 18, 2020); *citing A.Y. v. Dep't of Pub. Welfare, Allegheny Cnty. & Youth Services*, 537 Pa. 116, 641 A.2d 1148, 1151 (1994); *see also* 2 Pa. C.S. § 505. The Commission's regulation at 52 Pa. Code § 5.231 clearly is based on longstanding Pennsylvania law and the Pennsylvania Rules of Evidence 408 and must be construed

and applied in that light and not in a vacuum. Indeed, the Commonwealth Court has ruled that Pa. R.E. 408 applies to administrative proceedings. *See Liberty Manor Personal Care Home v. Dept. of Pub. Welfare*, 979 C.D. 2014, 2015 WL 5432471 (Pa.Cmwlt. 2015); *citing Shapiro v. State Board of Accountancy*, 856 A.2d 864, 875 (Pa.Cmwlt.2004).

12. Therefore, as discussed below, while SPLP maintains that the testimony subject to this Motion does not constitute an offer of settlement (*supra* Section II(A)), in the alternative, Your Honor should rule consistent with the rules of evidence and the supporting caselaw on Pa. R.E. 408 that settlement communications are admissible evidence so long as the use of the settlement communications falls under the “another purpose” exception to the rule and is not offered to either prove or disprove the validity of a claim or amount in dispute. Here, the testimony is offered not to prove or dispute the validity of a claim or amount in dispute, but to show GRS’s ultimate motive for the underlying complaint and threats to pursue an emergency order.

13. Pa. R.E. 408 provides:

Rule 408. Compromise Offers and Negotiations.

(a) Prohibited Uses. Evidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

- (1) furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in compromising or attempting to compromise the claim; and
- (2) conduct or a statement made during compromise negotiations about the claim.

(b) Exceptions. The court *may admit this evidence for another purpose*, such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Pa. R.E. 408 (*italicized emphasis added*).

14. While Rule 408 prohibits the use of settlement offers and negotiations to prove or disprove the validity or amount of a disputed claim, it does not create an absolute bar on the use

of settlement communications or related documents. Rule 408 includes an express exception that allows settlement offers and negotiations to be admitted for “another purpose.” Pennsylvania state and federal courts have consistently held that Rule 408 and its federal counterpart are not an absolute bar on the use of compromise offers and negotiations as evidence, so long as the use of the settlement communications falls under the “another purpose” exception.³ *See, e.g., E-Z GO Div. of Textron, Inc. v. Lindsay Golf Group, Ltd*, 1814 WDA 2017, 2018 WL 4907687 (Pa. Super. Oct. 10, 2018) (*not reported*) (affirming trial court opinion that evidence regarding payment from settlement negotiations that while the information could not be used to prove or disprove the validity of the payment offer, the evidence was admissible to show *motive* as to why the party wanted to terminate or breach the agreement); *W.W. v. M.W.*, 584 MDA 2017, 2017 WL 3624091 (Pa. Super. Aug. 24, 2017) (*not reported*) (affirming trial court ruling that an email and communications regarding settlement were admissible for another purpose and not to prove or disprove the validity or amount of a disputed claim but to show what the witness’s attitude was); *see also McMullen v. Kutz*, 925 A.2d 832, 835 (Pa. Super. Ct. 2007) (Rule 408 was inapplicable “because the court was considering the lack of settlement efforts to assess the reasonableness of wife’s legal fees, not the validity of her underlying claim”), *aff’d*, 603 Pa. 602 (Pa. 2009); *Lohman v. Duryea Borough*, 574 F.3d 163, 167 (3d Cir. 2009) (Rule 408 “does not bar a court’s consideration of settlement negotiations in its analysis of what constitutes a reasonable fee award in a particular case”), *cert. denied*, 574 F.3d 163 (U.S. 2010); *Lydon Millwright Servs., Inc. v.*

³ Federal Rule of Evidence 408 is almost identical to Pennsylvania Rule 408, the only difference being that Federal Rule 408(a)(2) includes additional language permitting the use of settlement offers and negotiations in criminal cases and when the negotiation relates to a claim by a public officer in the exercise of his or her regulatory, investigative, or enforcement authority. In fact, the comments to Pennsylvania Rule 408 note that for the operative section of the Rule that lists the “other purposes” exception, that “Pa. R.E. 408(b) is identical to F.R.E. 408(b).” Pa. R.E. 408 cmt. Thus, cases applying Federal Rule 408 provide guidance to the Board or a Pennsylvania court where there is a lack of case law on a subject. *Beaumont v. ETL Servs., Inc.*, 761 A.2d 166, 173 n. 14 (Pa. Super. Ct. 2000) (court looked to decisions interpreting federal rule of evidence for guidance on the meaning of the analogous Pennsylvania rule).

Ernest Bock & Sons, Inc., No. 11-7009, 2013 WL 1890355, at *8 (E.D. Pa. May 7, 2013) (*not reported*) (evidence of settlement discussions used to negate defendant’s release defense was not barred by Rule 408 because it was not being used to support the underlying breach of contract claim); *Stainton v. Tarantino*, 637 F. Supp. 1051, 1082 (E.D. Pa. 1986) (Rule 408 does not bar testimony offered to elaborate upon and explain defendant’s notes of a telephone conversation with plaintiffs’ counsel during which the parties were discussing settlement); *B&B Inv. Club v. Kleinert’s, Inc.*, 472 F. Supp. 787, 791 (E.D. Pa. 1979) (an affidavit establishing that defendant was not successful in negotiating a settlement was not barred by Rule 408 because it was being used to establish that defendant was not entitled to recover for indemnification costs).

15. Courts have likewise held that settlement communications and documents can be used to support an abuse of process claim, since demonstrating a party’s knowledge or intent is one of the “other purposes” for which Rule 408 allows settlement discussions to be admitted. *See, e.g., BTG Int’l Inc. v. Bioactive Labs.*, No. 15-04885, 2016 WL 3519712 at * 8, 10 (E.D. Pa. June 28, 2016) (*not reported*) (denying motion to strike portions of complaint that disclose settlement discussions used “as evidence of an independent wrong,” which was the defendants’ filing of a patent claim to leverage a settlement payment in an entirely unrelated proceeding⁴; noting that the Rule 408 “other purposes” exception allows admission of settlement discussions to show a party’s knowledge or intent, holding that an absolute bar on the admission of settlement communications “would not only contravene Rule 408’s text, but also allow a party to easily insulate itself from an abuse of process claim by labeling as settlement discussions its purportedly improper and possibly illegal demands.”)

⁴ In the instant matter, there is a separate condemnation proceeding between Sunoco and GRS for the temporary easements.

16. While the Commission’s jurisdiction is limited to only the powers granted to it under the Public Utility Code,⁵ the basic principles of the common law cause of action for abuse of process support admission of the testimony for another purpose -- to show that the basis of GRS’s alleged communication and safety concerns is not and was not the ultimate purpose of this proceeding, and in particular, why the alleged settlement communications regarding GRS’s threats and weaponization of the Commission’s formal complaint and petition for interim emergency relief processes matter here. As the Superior Court has defined, “abuse of process is, in essence, ***the use of legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process.***” *P.J.A. v. H.C.N.*, 156 A.3d 284, 288 (Pa. Super. 2017) (emphasis added).

17. The evidence presented by SPLP and its witness David Amerikaner shows that GRS pursued this action with the proven and continued purpose to leverage significant sums of money from SPLP, a certificated public utility, rather than on the basis of any legitimate safety concerns as a result of SPLP’s construction at GRS’s property.

18. To the extent that the testimony GRS seeks to strike would be considered settlement communications, the rules clearly allow for such evidence to be admitted for another purpose, here to show that GRS’s communication and safety claims are not and were not GRS’s purpose in filing this proceeding.

19. Therefore, to the extent that Your Honor determines the testimony cited in paragraph 2 of the Motion would constitute “offers of settlement” or settlement communications, which it does not, Your Honor should find that the testimony offered falls under the exception to Pa. R.E. 408 as the evidence is offered for “another purpose” to show GRS’s weaponization of the Commission’s complaint procedures to leverage significant sums of money from SPLP rather than

⁵ *City of Pittsburgh v. Pa. Pub. Util. Comm'n*, 43 A.2d 348 (Pa. Super. 1945)

to pursue legitimate communication and safety concerns or matters within the Commission's jurisdiction.

WHEREFORE, SPLP respectfully requests the Motion be DENIED.

Respectfully submitted,

/s/ Thomas J. Sniscak

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Date: July 23, 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

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Dated: July 23, 2021