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September 24, 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 MAIN BRIEF**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is Sunoco Pipeline L.P.'s Main Brief in the above-referenced matter. Copies have been served in accordance with the attached Certificate of Service.

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.	:	
	:	Docket No. C-2020-3023129
v.	:	
	:	
SUNOCO PIPELINE L.P.	:	

SUNOCO PIPELINE L.P.'S MAIN BRIEF

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Dated: September 24, 2021

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I. INTRODUCTION AND STATEMENT OF THE CASE

This case is moot. There remains no actual case or controversy because the construction of Sunoco Pipeline L.P.'s ("SPLP") Mariner East 2/2X pipelines that Complainant Glen Riddle Station L.P. ("GRS") complained of is complete and the only relief requested in the Complaint – enjoining or restraining the now completed new pipeline construction – can no longer be granted. This fact, which Complainant admitted, warrants complete dismissal of the Complaint.

Even if mootness did not warrant complete dismissal, which it does, Complainant (the party with the burden of proof) has universally failed to meet its burden to show a violation of the Public Utility Code, Commission regulation, or Commission order. From the inception of this litigation, Complainant has directed this case down a long and unnecessary road, filling the record with extensive communications between the parties, various matters far outside the Commission's jurisdiction, and hollow allegations tangential to the now-completed construction. The record is clear that Complainant has failed to prove any harm or legitimate safety concern. Instead, Complainant asks the Commission to second guess SPLP's pipeline construction planning and execution based on lay opinions or the opinions of professionals acting outside of their fields of expertise, in a failed attempt to show that the pipeline construction was performed in an improper or unsafe manner. Notably, Complainant offered no witness with requisite pipeline construction expertise. That omission stands in great contrast to SPLP's presentation of both company and outside experts who are steeped in appropriate construction practices, and who evaluated the construction of the pipelines at Complainant's property and found it to be in conformance with standard industry practices.

Throughout this proceeding, GRS alleged that SPLP's communications with GRS concerning its construction activities were insufficient and unsatisfactory, and that the construction at the property created safety issues. The record demonstrates to the contrary. SPLP communicated

extensively and reasonably with GRS prior to and during construction, more so than what any other landowner required across the project which traverses 17 counties and more than 80 municipalities across the Commonwealth. SPLP provided the testimony of Joseph McGinn (Vice President of Public and Government Affairs for Energy Transfer), and outside counsel David Amerikaner, Esq., along with other witnesses, who proved through detailed testimony and exhibits that SPLP took all reasonable efforts to attempt to satisfy GRS's communication demands.

The record also demonstrates that GRS failed to meet its burden to prove that any of SPLP's construction activities were unsafe or unreasonable. SPLP presented the testimony of fact witnesses Joseph Becker (Senior Director, Engineering & Construction, Energy Transfer), Jayme Fye (Superintendent for Michels Pipeline, a division of Michels Corporation, SPLP's vastly experienced pipeline construction contractor), John Packer (Director of Operations for The Zorion Security Group, SPLP's worksite security personnel), and Scott Horn (of Horn Plumbing) regarding events related to the now complete pipeline construction. Additionally, SPLP presented the testimony of nationally renowned Emergency Planning and Response expert Gregory Noll (Principal of GGN Technical Resources, LLC), Chad Farabaugh (Senior Engineer and Project Manager with RETTEW Associates, Inc.), Seth Harrison (Principal of Harrison Acoustics), and Brian Magee, Ph.D (Senior Vice President/Principal Toxicologist at Arcadis) all of whom demonstrated that GRS's allegations of unsafe conditions at the worksite were either inaccurate or intentionally misleading, and that there were in fact no safety concerns at the site that SPLP did not properly address. These witnesses and experts squarely refuted every contention GRS raised, however meritless or far afield from the scope of the Commission's regulatory authority.

The utter lack of substance in GRS's many grievances suggests that something other than concern for the safety of its residents was the driving force behind its Complaint and proceeding

with this moot litigation. The record demonstrates that GRS has attempted to use this Complaint and the Commission's processes (including the interim emergency relief procedures that the Commission rightly views as reserved for actual emergencies), to leverage additional compensation from SPLP for the rights of way and easements GRS had already negotiated or that remain in litigation in other forums. These facts, when considering GRS's unfounded allegations and litigation posturing, bring into question the veracity of GRS's entire Complaint.

Because there is no merit to Complainant's alleged communication deficiencies or safety concerns regarding the construction of the Mariner East 2/2X pipelines on GRS's property, and because Complainant has provided no credible evidence to satisfy its burden of proof before the Commission on these issues, the Complaint should be dismissed or denied.

II. PROCEDURAL HISTORY

On December 2, 2020, Glen Riddle Station, L.P. ("GRS") filed a formal complaint ("Complaint") against Sunoco Pipeline, L.P. ("SPLP") alleging that SPLP's construction at the GRS property violated various provisions of the Public Utility Code, federal regulations at 49 C.F.R. Part 195, portions of the Commission's regulations, and SPLP public awareness Standard Operating Procedures. GRS requested as its sole relief that the Commission enter an order enjoining or restraining SPLP from engaging in further work at the property until its concerns were addressed.[1] The very heart of the Complaint is now moot.

[1] Prior to the filing of the Complaint, many important and contextual events occurred:

- *Approximately 1931* – SPLP's pipeline right-of-way bisecting the property was created prior to GRS owning the property.
- *1971* – The apartment buildings were constructed abutting against and straddling the pre-existing pipeline easement with apartment buildings mere feet from the right-of-way.
- *June 20, 2016* - GRS voluntarily granted SPLP expanded permanent easement rights through the property for agreed-to compensation. Exhibit GRS-3.

On December 23, 2020, SPLP filed an answer and new matter to the Complaint. The new matter was accompanied by a notice to plead. GRS never filed an answer to SPLP's new matter. This resulted in admission of various facts and allegations and is yet another reason the Complaint should be dismissed. Also on December 23, 2020, SPLP filed Preliminary Objections to the Complaint which GRS answered on January 4, 2021.

On February 11, 2021, GRS filed a petition for interim emergency relief because construction zone warning signs alerting the public of work activities inadvertently contained "safe distance" information that did not apply to the GRS work site and which stated a greater safe distance than could be set; SPLP immediately addressed the site specific safe distance issue. On February 16, 2021, GRS withdrew its petition for interim emergency relief after SPLP agreed to host a town hall for GRS's residents. On February 23, 2021, SPLP hosted the virtual Town hall to answer questions from residents regarding construction, including signage, at the site.

- *April – June 2020* - SPLP worked with GRS to pursue the voluntarily grant to SPLP of a temporary workspace easement and a temporary access road easement. Ultimately, SPLP was forced to acquire these temporary easements through the power of eminent domain.
- *September 22, 2020* - The Department of Environmental Protection (DEP) approved a permit modification (Major Permit Modification for HDD S3-0620) which approved SPLP's use of direct pipe, open trench, and conventional road bore construction at the property. SPLP's initial construction plan had been to construct the pipeline through the property using horizontal directional drilling, but that proved unfeasible. GRS did not comment or protest SPLP's Major Permit Modification for HDD S3-0620 proposal during the public comment period with DEP, or otherwise appeal the permit modification when it was issued.
- *September – November 2020* - SPLP communicated extensively with GRS regarding upcoming construction, culminating in site inspections and pre-construction meetings occurring in October and November 2020 prior to the filing of the Complaint.
- *Late November 2020* - SPLP began its pipeline construction activities at the property.
- *July 2021* – all construction and property restoration work was completed at the GRS site; SPLP vacated the GRS property.

On March 15, 2021, GRS served the written direct testimony of three lay witnesses and a civil engineer who was not an expert in the construction issues raised here. On April 14, 2021, GRS and SPLP agreed to a temporary stay in the proceeding in order to explore possible settlement through mediation. A modified schedule was entered on April 16, 2021. On May 12, 2021, after settlement discussions failed, SPLP served written rebuttal testimony pursuant to the modified schedule. On May 17, 2021, GRS filed a Motion for Continuance requesting additional time to prepare surrebuttal testimony. The continuance was granted on May 24, 2021. On June 9, 2021, GRS served its written surrebuttal testimony. The surrebuttal testimony included the testimony of ten witnesses, seven of which did not testify in GRS's direct round of testimony; the surrebuttal testimony greatly expanded the issues. Hearings were held on July 7, 12, and 13. Due to the expansion from GRS's direct case in its surrebuttal testimony, which expansion is barred under the Commission's rules at 52 Pa. Code § 5.243(e), SPLP requested and was allowed limited second round testimony to respond to GRS's new accusations and litany of newly raised events outside GRS's direct case. SPLP provided written second round testimony to GRS on July 9, 2021, and provided two oral second round testimonies at the beginning of the July 12, 2021 hearing. GRS, the party with the burden of proof, provided responsive oral testimony to SPLP's second round testimony on July 12, 2021. As of July 9, 2021, SPLP's construction at the property was completed, and the property has been restored.

III. BURDEN OF PROOF AND LEGAL STANDARDS

A. Burden Of Proof.

As the proponent of a rule or order, Complainant has the burden under Section 332(a) of the Public Utility Code (Code), 66 Pa. C.S. § 332(a), to prove the elements of its claims by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC,* 578 A.2d 600 (Pa. Cmwlth. 1990), *appeal denied*, 602 A.2d 863 (Pa. 1992). To establish a fact or claim by a preponderance

of the evidence means to offer the greater weight of the evidence, or evidence that outweighs, or is more convincing than, the probative value of the evidence presented by the other party. *Se-Ling Hosiery v. Margulies,* 70 A.2d 854 (Pa. 1950). To satisfy its burden of proof, Complainant must show that SPLP is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Telephone Co. of Pennsylvania,* 72 Pa. P.U.C. 196 (1990).

Complainant must prove that SPLP violated the Public Utility Code, a Commission regulation or order, or a Commission-approved tariff to obtain ***any*** relief.

> We hold that in order for the PUC to sustain a complaint brought under this section [66 Pa. C.S. § 1501], the utility must be in violation of its duty under this section. Without such a violation by the utility, the PUC does not have the authority, when acting on a customer's complaint, to require *any* action by the utility.

West Penn Power Co. v. Pa. PUC, 478 A.2d 947, 949 (Pa. Cmwlth. 1984) (emphasis added)("*West Penn*"); *see also Township of Spring v. Pennsylvania-American Water Co.,* Dkt. Nos. C-20054919 et al., 2007 WL 2198196, at *6 (Order entered July 27, 2007) ("If we were to order PAWC to conduct testing of the property in the Stonegate community, we would have to base that order on credible evidence that some act or omission by PAWC in violation of the Code or our Regulations would be remedied by the testing.") (citing *West Penn*). "The offense must be a violation of the Public Utility Code (Code), a Commission Regulation or Order or a violation of a Commission-approved tariff." *Baker v. SPLP*, Docket No. C-2018-3004294, Opinion and Order at 6 (Order entered Sept. 23, 2020) (citing 66 Pa. C.S. § 701) ("*Baker*").

Moreover, the Commission's adjudications must be supported by "substantial evidence" in the record. 2 Pa. C.S. § 704; *Lansberry*, 578 A.2d at 602. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Co. of New York v. National Labor Relations Board*, 305 U.S. 197, 229 (1938). More is

required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. Of Review*, 166 A.2d 96 (Pa. Super. 1961); *Murphy v. Comm. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984). A legal decision must be based on real and credible evidence that is found in the record of the proceeding affording the utility the opportunity to respond. *Pocono Water Co. v. Pa. PUC*, 630 A.2d 971, 973-74 (Pa. Cmwlth. 1993) (finding that the Commission violated the utility's due process rights "because it assessed liability after determining an issue which [the utility] had not been afforded a reasonable opportunity to defend at the hearing."); *Duquesne Light Co. v. Pa. PUC*, 507 A.2d 433, 437 (Pa. Cmwlth. 1986) (holding that the Commission violated the utility's due process rights because the utility was "not given adequate notice of the specific conduct being investigated, and hence its defense was gravely prejudiced.").

Upon presentation of evidence sufficient to initially establish a *prima facie* case, the burden to rebut the complainant's evidence shifts to the respondent; if the evidence that the respondent presented is of co-equal weight, then the complainants have not satisfied their burden of proof and must provide some additional evidence to rebut that of the respondent. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 461 A.2d 1234 (Pa. 1983).

While the burden of going forward with evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001). In sum, Complainant always has the burden of proof in this proceeding.

B. Legal Standard For Pipeline Safety.

The Commission regulations at 52 Pa. Code § 59.33, promulgated pursuant to 66 Pa. C.S. § 1501, require that hazardous liquid utilities shall have minimum safety standards consistent with the pipeline safety laws at 49 U.S.C. §§ 60101-60503 and the regulations at 49 C.F.R. Part 195. Thus, the Commission's regulations adopt federal safety standards for hazardous liquid utilities.

Whether a complainant or lay witness claims to feel safe or unsafe is not the evidentiary standard to be applied in adjudicating a complaint and cannot substitute for qualified expert testimony or science-based evidence about the safety of a utility facility or its compliance with the applicable regulatory standards. "Complainant's assertions, regardless of how honest or strong, cannot form the basis of a finding . . . since assertions, personal opinions or perceptions do not constitute factual evidence." *Herring v. Metropolitan Edison*, Docket No. F-2016-2540875, 2017 WL 3872590 at 3 (Order entered Aug. 31, 2017) (citing *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987)). Instead, to find that utility practices are unsafe requires proof that they violate applicable regulatory standards that address pipeline safety at 49 C.F.R. Part 195. *See, e.g.*, *Info Connections, Inc. v. Pa PUC*, 630 A.2d 498, 502 (Pa. Cmwlth. 1993) (where no regulation imposes duty to act, failure to take such action is not a violation) (citing *Commonwealth v. Stein*, 546 A.2d 36 (1988), *cert. denied*, 490 U.S. 1046, 109 S.Ct. 1953, 104 L.Ed.2d 422 (1989) (administrative rules and regulations must be written, must describe with particularity what is forbidden, and must create standards that eliminate vagueness and uncertainty)); *Smalls, Sr. v. UGI Penn Natural Gas, Inc.*, Docket No. C-2014-2421019, 2014 WL 6807073 (Initial Decision entered Oct. 24, 2014) (Ember S. Jandebeur, J.) (Final by Act 294, Dec. 30. 2014) (reasoning because there are safety regulations that apply to gas pipelines, but there was no federal or state regulation that prohibited the specific action of placing a gas line within close proximity to a home, there cannot be a violation since there was not a set standard finding a safety violation where Complainant failed to show violation of relevant portion of 49 C.F.R.); *Bennett v. UGI Central Penn Gas, Inc.*,

Docket No. F-2013-2396611, 2014 WL 1747713 (Initial Decision entered Apr. 10, 2014) (David A. Salapa, J.) (Final by Act 294, May 29, 2014) ("In the absence of any evidence that [UGI] failed to comply with these regulations [49 CFR 191-93, 195, 199], I cannot conclude that [UGI] acted unreasonably or violated any Commission regulation in failing to prevent the leaks that occurred at the Complainant's property.").

Moreover, the Commonwealth Documents Law (45 P.S. §§ 1102, *et seq*.) and the Independent Regulatory Review Act (71 P.S. §§ 745.1, *et seq*.) require that regulatory changes occur through notice and comment procedures with accompanying governmental review, not as the result of administrative adjudications. Thus, where, as here, current pipeline safety regulations neither prohibit an action SPLP took nor require an action SPLP did not take, no violation can be found. *Supra Info Connections.* Notably, even the Commission's current broad-ranging pipeline safety Notice of Proposed Rulemaking, would not make any of SPLP's actions or inactions at issue in this proceeding a regulatory violation. Thus, while the Commission had the opportunity to consider and propose regulations setting forth communication requirements for new pipeline construction, it did not. There is no regulatory or legal basis to create new standards in this adjudication.[2]

C. <u>Standards For Injunctive Relief.</u>

GRS sought only the permanent cessation of SPLP's construction of the Mariner East 2/2X pipelines within its property to address alleged safety and communication concerns. *See* Complaint at p. 28. The request was for injunctive relief that would have altered the status quo, i.e., enjoining and restraining SPLP's new pipeline construction at the property. Construction at the property was completed more than two months ago, and the workspaces on the property have been fully restored. The case and request for relief as presented in the Complaint is now moot,

[2] *Infra* Section V(C)(1) discussing the Commission's July 14, 2021 NOPR Order.

and there is no controversy. Even if construction were still active and ongoing at the property, which it is not, GRS would still not be entitled to the extraordinary relief requested.

To obtain permanent injunctive relief, a party must establish that his or her right to relief is clear and that the relief is necessary to prevent a legal wrong for which there is no adequate redress at law. *See Buffalo Twp. v. Jones*, 813 A.2d 659, 663 (Pa. 2002), *cert. denied*, 157 L. Ed. 2d 41, 2003 U.S. LEXIS 6042 (2003). Where a Complainant seeks temporary injunctive relief, however, they must also demonstrate that: (1) the need for relief is immediate; and (2) injury would be irreparable if relief is not granted. *See Buffalo Twp*. 813 A.2d at 663 (citing *Soja v. Factoryville Sportsmen's Club*, 522 A.2d 1129, 1131 (Pa. Super. 1987)). In addition, the Commission's regulations contemplate a party seeking an injunction must demonstrate that the requested relief is not injurious to the public interest. 52 Pa. Code § 3.6(b); *see also Peoples Natural Gas Co. v. Pa. PUC,* 555 A.2d 288, 291 (Pa. Cmwlth. 1989). If any one of these essential prerequisites is not proved by a complainant, the Commission will deny the relief requested. *See Crums Mill Assoc. v. Dauphin Consolidated Water Co*., 1993 Pa. PUC LEXIS 90 (Order dated April 16, 1993); *see also County of Allegheny v. Commonwealth*, 544 A.2d 1305, 1307 (Pa. 1988).

As both Administrative Law Judges and the Commission have recognized, injunctive relief is an extraordinary remedy that must be narrowly tailored to abate the harm complained of:

> Injunctive relief must be narrowly tailored to abate the harm complained of. *Pye v. Com. Ins. Dep't*, 372 A.2d 33, 35 (Pa. Cmwlth. 1977) ("An injunction is an extraordinary remedy to be granted only with extreme caution"); *Woodward Twp. v. Zerbe*, 6 A.3d 651, 658 (Pa. Cmwlth. 2010) ("Even where the essential prerequisites of an injunction are satisfied, the court must narrowly tailor its remedy to abate the injury"); *West Goshen Township v. Sunoco Pipeline L.P.*, Docket No. C-2017-2589346 at 17-18 (Order entered Mar. 15, 2018).

West Goshen Township v. Sunoco Pipeline L.P., Dkt. No C-2017-2589346, Recommended Decision at 42 (Barnes, J.) (adopted in full by Commission by Order dated Oct. 1, 2018). *See also*

Baker at 26 (holding directives to provide additional training, submit a plan to enhance public awareness and emergency training plans and record keeping, and complete an audit of the public awareness program by a third-party "were not justified on the basis of the finding of a violation of the duty to satisfy public awareness and outreach obligations under 49 C.F.R. § 195.440").

Moreover, an injunction that commands the performance of an affirmative act, a "mandatory injunction," is the rarest form of injunctive relief and is often described as an extreme remedy. *Woodward Twp. v. Zerbe,* 6 A.3d 651 (Pa. Cmwlth. 2010) (citing *Big Bass Lake Community Association v. Warren*, 950 A.2d 1137, 1144 (Pa. Cmwlth. 2008)). The case for a mandatory injunction must be made by a very strong showing, one stronger than that required for a restraining-type injunction. *Id.* at 1145; *see also Crums Mill Assoc. v. Dauphin Consolidated Water Supply Company*, Docket No. C-00934810, 1993 Pa. PUC LEXIS 89, at *10 (Interim Emergency Order Denying Relief dated Mar. 23, 1993) (citing *Allen v. Colautti*, 417 A.2d 1303 (Pa. Cmwlth. 1980)). Indeed, Pennsylvania courts have previously held that a party seeking a mandatory injunction "must demonstrate that they are clearly entitled to immediate relief and that they will suffer irreparable injury if relief is not granted." *Allen,* 417 A.2d at 401.

GRS failed to satisfy any of these requirements, and therefore is not entitled to injunctive relief in this action.

D. <u>Evidentiary Standards On Expert Opinion And Lay Witness Testimony.</u>

1. Standards for expert qualifications.

Pa. Rule of Evidence 702 sets forth the standard for the qualification of expert witnesses and provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

> (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;
> (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and
> (c) the expert's methodology is generally accepted in the relevant field.

Pa. R.E. 702; s*ee also Gibson v. WCAB*, 861 A.2d 938, 947 (Pa. 2004) (holding, in part, that notwithstanding the statutory maxim of 2 Pa. C.S. § 505, which mandates a relaxation of the strict rules of evidence in agency hearings and proceedings, the "evidentiary Rules 602, 701, and 702 are applicable to agency proceedings in general").

To the extent that a witness is found to possess specialized knowledge to qualify as an expert on certain subject matters, ***the witness's expert testimony is limited to those issues within his or her specific expertise***. *See Bergdoll v. York Water Co.*, No. 2169 C.D. 2006, 2008 WL 9403180 (April 1, 2008), at *8–9 (Pa. Cmwlth. 2008) (unreported) (prohibiting independent contractors from offering expert testimony on water source and cause of sewer blockage; while witnesses were qualified to offer certain testimony as to facts and the extent of damage at issue, the source of the water and cause of the sewer blockage at issue "was not within their expertise") (emphasis added) ("*Bergdoll*"); *see also Application of Shenango Valley Water Co.*, No. A-212750F0002, 1994 WL 932364, at *19 (Jan. 25, 1994) (President of water company was "not qualified to provide expert testimony regarding the ratemaking value of utility property" when, notwithstanding his skills and expertise as to the operation of a public utility, he was "not a registered professional engineer and has never been a witness concerning valuation of utility property in any proceeding before the Commission . . . lacks knowledge regarding standard ratemaking conventions concerning capital stock as an item of rate base, cash working capital and

the ratemaking requirements of Section 1311 of the Public Utility Code.") (internal record citations omitted).

2. Expert testimony must be competent.

An expert opinion exhibiting equivocation and speculation based on mere possibilities is not competent evidence. *Vertis Group, Inc. v. Duquesne Light Co.*, 2003 WL 1605744, Docket No. C-00003643 (Order entered Feb. 24, 2003), *aff'd,* 840 A.2d 390 (Pa. Cmwlth. 2003), *appeal denied,* 859 A.2d 770 (Pa. 2004). As the Commission explained in *Vertis Group.*:

> An expert need not testify with absolute certainty or rule out all possible causes of a condition. *Mitzfelt v. Kamrin*, 526 Pa. 54, 584 A.2d 888 (1990). Likewise, the testimony need not be expressed in precisely the language used to enunciate the legal standard. *In re Jones*, 432 Pa. 44, 246 A.2d 1149 (1984). ***Rather, expert testimony must be viewed in its entirety to assess whether it expresses the requisite degree of certainty***. *McCann v. Amy Joy Donut* Shops, 325 Pa. Superior Ct. 340, 472 A.2d 1149 (1984). ***Expert testimony based upon mere probability, however, e.g., "more probable than not", that the alleged cause "possibly" or "could have" led to the result, that it "could very properly account" for the result, or even that it "was very highly probable" that it caused the result, lacks the requisite degree of certainty to be accepted as competent evidence***. *Hoffman v. Brandywine Hospital*, 443 Pa. Superior Ct. 245, 661 A.2d 397 (1995).

Id. at Exception 20 (agreeing with the ALJ that expert opinions exhibiting equivocation and speculation based upon mere probabilities failed to rise to the level of scientific certainty required by law to accept expert opinion testimony) (all emphasis added). *See Halaski v. Hilton Hotel*, 409 A.2d 367, 369, n.2 (Pa. 1979); *Menarde v. Philadelphia Transp. Co.,* 103 A.2d 681, 684 (Pa. 1954) ("[T]he expert has to testify, not that the condition of claimant might have, or even probably did, come from the cause alleged, but that in his professional opinion the result in question came from the cause alleged. A less direct expression of opinion falls below the required standard of proof and does not constitute legally competent evidence.").

3. Lay witness testimony is limited to direct personal knowledge.

Lay opinions on matters requiring scientific, technical or specialized knowledge are not competent evidence to support a finding of fact. Pa. R.E. 701(c) ("If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is . . . not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."). Although the Commission does not strictly adhere to the Pennsylvania Rules of Evidence, ***the Pennsylvania Supreme Court has recognized that any relaxation of the rules of evidence in administrative settings cannot permit lay witnesses to testify to technical matters "without personal knowledge or specialized training."*** *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004) (holding Rules of Evidence 602 (personal knowledge), 701 (opinion testimony by lay witnesses) and 702 (testimony by expert witnesses) are generally applicable in agency proceedings); *Nancy Manes v. PECO Energy Company*, Docket No. C-20015803, 2002 WL 34559041, at *1 (May 9, 2002) (the Commission abides by the Pennsylvania Supreme Court's standard "that a person qualifies as an expert witness if, through education, occupation or practical experience, the witness has a reasonable pretension to specialized knowledge on the matter at issue"). Accordingly, the Commission has consistently held that a lay witness is not qualified to testify or offer exhibits related to any issues outside of his or her direct personal knowledge. *Lamagna v. Pa. Elec. Co.*, Docket No. C-2017-2608014, 2018 WL 6124353, at *20 (Oct. 30, 2018) (Final by Act 294, Dec. 21, 2018) (lay witness was "not qualified to testify or offer exhibits related to health and safety issues outside of her direct personal knowledge"). Moreover, to the extent that a lay witness offers references to reports or conclusions of others, they may not be considered as substantial evidence because a lay witness cannot rely on such information in reaching a conclusion. Rather, that is the role of a qualified expert witness. *Compare* Pa. R.E. 701 *with* Pa. R.E. 703.

While a factfinder may weigh the opinion testimony of a qualified expert, any such testimony of an unqualified lay witness must be excluded and should not be given any evidentiary weight. *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004); *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 528 (Pa. 1995). Accordingly, the Commission has consistently rejected lay witness testimony on technical issues such as health, safety, and the probability of structural failure as these necessarily "require expert evidence to be persuasive enough to support the proposing party's burden of proof." *Application of PPL Elec. Utilities Corp.*, A-2009-2082652, 2010 WL 637063, at *11 (Feb. 12, 2010) (emphasis added); *Pickford v. Pub. Util. Comm'n*, 4 A.3d 707, 715 (Pa. Cmwlth. 2010) (ALJ "properly disregarded" testimony from thirteen lay witnesses related to concerns and personal opinions about damage to pipes, lead leaching, toxicity to fish and home filtration expenses because "the nature of these opinions … was scientific and required an expert."); *Lamagna v. Pa. Elec. Co.*, Docket No. C-2017-2608014, 2018 WL 6124353, at *20 (Oct. 30, 2018) (Final by Act 294, Dec. 21, 2018) (finding that lay witness testimony and exhibits regarding technical health and safety issues "carry no evidentiary weight and … were properly objected to and excluded").

Moreover, even when a lay witness possesses some level of knowledge and education in a related subject, that is not enough to make him or her an expert on specialized and technical matters – such as pipeline construction, pipeline safety, emergency response, traffic planning and engineering, acoustical engineering, or toxicology – and such unqualified testimony is not credible evidence. *See Amended Petition of State Senator Andrew E. Dinniman for Interim Emergency Relief*, Docket. No. P-2018-3001453 *et al.,* Opinion and Order (Order entered Jun. 14, 2018) (acknowledging lack of expert testimony regarding technical geological concerns, thereby necessarily rejecting testimony of lay witness on geological issues without regard for lay witness's

purportedly related education and experience.); *see also*, Joint Statement of Commissioners Coleman and Kennard, *Amended Petition of State Senator Andrew E. Dinniman for Interim Emergency Relief*, Docket No. P-2018-3001453 *et al.* (Jun. 14, 2018) (acknowledging "no credible evidence of record to indicate that a clear and present danger exists with respect to the construction activities on ME2 and ME2X in West Whiteland Township" when hearing transcript was "devoid of any expert witness testimony that, to a reasonable degree of scientific certainty, there is a credible and immediate harm with the construction of these lines").

IV. SUMMARY OF ARGUMENT

It is universally accepted and established[3] that at any point in the litigation process, a case pending before a tribunal can lose an element of justiciability; at all times, courts and administrative agencies must only exercise judicial power over an actual case or controversy. One of the key maxims of justiciability, mootness, requires that at all times during the litigation process, the allegations of a case must remain alive and *the relief the claimant seeks must be judicially addressable*. Where intervening change in the factual basis for the complaint renders all aspects of the requested relief unaddressable, mootness dissolves the dispute, extinguishing the power of the court to grant any relief. That is now the posture of this case. Complainant sought only injunctive and restraining relief against construction that is now completed.

Here, GRS sought only to enjoin SPLP from continuing pipeline construction within SPLP's permanent and temporary easements across GRS property until SPLP submitted a "comprehensive plan and work schedule" to the Commission. Complaint at p. 28. GRS did not seek any other relief and did not address any concerns not exclusively tied to SPLP's now completed new pipeline construction at the property. At no point in this proceeding did GRS amend its Complaint to encompass any other requested relief. Critically, GRS admitted through its failure to file a reply to SPLP's New Matter many facts and refutations to every material allegation in the Complaint. The simple fact is that the only governing document and request for relief from GRS, the Complaint dated December 2, 2020, must be dismissed as moot because events have overtaken the only relief GRS requested; SPLP's construction activities at the GRS property were completed as of July 2021.

[3] *Infra* Section V(A).

Even if construction were still ongoing, however, GRS would not be entitled to the requested relief because GRS failed to meet its burden to prove that SPLP's construction or communications violated any law, regulation, or order under the Commission's jurisdiction. SPLP's rigorous responsive testimony showed that each and every contention GRS made was either unfounded or exaggerated, and that none rose to the level of a violation of any applicable standard. That GRS's lay witnesses or its alleged experts suggested alternatives for construction, or preferred different communication practices, does not make SPLP's appropriate exercise of managerial discretion in constructing the Mariner East 2/2X pipelines a violation of anything. In fact, the record shows that SPLP communicated extensively with GRS beginning in early 2020 and continuing through the completion of construction, that SPLP provided extensive safety information to GRS and its residents, and that SPLP communicated with local governments, DEP, and other applicable state and federal agencies regarding the construction. Taken together, this shows SPLP's communications were both reasonable and prudent.

The record also shows unequivocally that SPLP's execution of the construction was safe, steady-handed, and reasonable. SPLP's planning and care for its construction practices and those of its contractors led to the intended result – no safety incidents or harm occurred during construction of the Mariner East 2/2X pipelines at the GRS property. This outcome attests to the effectiveness of SPLP's communication and safety protocols. SPLP adhered throughout construction to these protocols, despite GRS's repeated attempts to confuse and misconstrue what actually was happening on the ground during construction – particularly as GRS continued to attempt to disrupt and interfere with the construction process, including making baseless requests to law enforcement agencies, regulatory authorities, the courts, and the Commission in an attempt to stop or delay the construction from occurring. Given the completion of construction at GRS,

GRS's failure to meet its burden to show actual violations of applicable standards, and the fact that no harm to GRS or its residents actually occurred or was in danger of occurring, the question arises: why did GRS initiate this case, and why is it continuing to pursue it? The answer is that GRS never had a reason to seek redress for legitimate safety concerns or communication failures from this Commission, because none existed. Rather, this complaint proceeding is simply a continuation of GRS's efforts to pressure SPLP into a monetary settlement that will benefit GRS's owners. Indeed, the record contains ample proof of GRS's extensive threats to weaponize the Commission's processes to that end. GRS's Complaint was never about legitimate concerns over the safety of SPLP construction at the property. The Commission should see GRS for what it is: a litigant abusing the Commission's processes and resources to extract monetary settlements from a public utility.

For all these reasons, GRS's complaint should be dismissed and denied.

V. ARGUMENT

A. The Complaint Is Moot.

In the Complaint, GRS raised two main categories of allegations based on SPLP's then-active construction at the property: 1) SPLP's communications regarding active construction (*see* Complaint at § C); and 2) SPLP's implementation of construction activities (*see* Complaint at § D). These allegations were tied exclusively to SPLP's ***active*** construction, which has long since been completed. *See* Davidson Cross Exhibit No. 1 (Aerial Photo of GRS Property on July 9, 2021 showing construction complete) (admitted N.T. 349:7-8); N.T. 640:7-11. Indeed, GRS's request for relief sought only to enjoin and restrain further work at the property:

> "WHEREFORE, Complainant, Glen Riddle Station, L.P., respectfully requests that the Commission enter an order ***enjoining and restraining Respondent from engaging in any further work at the Property*** until the submission to and approval by the Commission of a comprehensive plan and work schedule that addresses the safety issues identified herein."

Complaint at p. 28 (emphasis added).

GRS's Complaint is moot because SPLP's construction activities at the GRS property concluded as of the hearings on July 13, 2021. N.T. 640:7-11; Davidson Cross Exhibit No. 1. GRS has already expressly conceded that its Complaint would be rendered moot once construction was finished. GRS counsel stated as much at the initial prehearing conference on February 26, 2021; in the context of demanding an expedited schedule, GRS counsel warned that GRS's entire complaint would become moot upon the completion of SPLP's construction at the GRS property:

> So the schedule that was omitted from opposing counsel's statement there was *the schedule that he's called for to resolve these safety issues.* ***Calls for them to be resolved when they're all moot****.*

See N.T. 10:19-22 (discussing scheduling and GRS's counsel's request for expedited treatment of the proceeding on concerns of mootness) (emphasis added). As completion of construction at the property has long since occurred, GRS's requested relief is now moot by GRS's own admission.[4]

Pennsylvania courts agree, having long held that an actual case or controversy must exist ***at all stages*** of the judicial or administrative process:

> It is well-established that an actual case or controversy must exist at all stages of the judicial or administrative process. If not, the case is moot and will not be decided by this court. *Musheno v. Dep't of Pub. Welfare,* 829 A.2d 1228 (Pa.Cmwlth.2003).

Util. Workers Union of Am., Loc. 69, AFL-CIO v. Pub. Util. Commn., 859 A.2d 847, 849–50 (Pa. Cmwlth. 2004). Further, when only injunctive relief is sought, the fact that the event the complainant seeks to enjoin has already been completed creates an intervening change in the factual posture of the case rendering the matter moot. *See Allen v. Birmingham Twp.*, 244 A.2d 661 (Pa. 1968) (appeal from denial of injunction to prevent excavation of land held moot where excavation had already been completed); *Strassburger v. Philadelphia Record Co.*, 6 A.2d 922 (Pa. 1939) (appeal from denial of injunction to prevent annual shareholder meeting held moot where meeting had already been held according to by-laws); *In re Gross,* 382 A.2d 116, 121 (Pa. 1978) (appeal involving intervening change in factual posture as the patient was no long being administered medication by provider against his will).

[4] It is well established that acts or statements made by an attorney in the course of a trial are binding on the client. *See Com., Dept. of Transp., Bureau of Driver Licensing v. Yandrich*, 529 A.2d 1210, 1211–12 (Pa. Cmwlth. 1987) ("As the agent of his client, of course, acts or statements made by an attorney, in the course of employment and within the scope of the attorney's authority, are binding on the client.")(citing *Eldridge v. Melcher,* 313 A.2d 750 (Pa. Super. 1973)). Counsel for GRS, on the record at the February 26, 2021, prehearing conference, admitted a fact SPLP agrees with – the completion of construction and resolution of this matter after construction would make Your Honor decide "these safety issues…. when they're all moot." N.T. 10:19-22.

In this proceeding, it is without doubt that there is no longer an actual case or controversy and the only relief sought, enjoining or retraining SPLP's construction at GRS's property, can no longer be granted. Indeed, the Commission cannot grant any of the relief GRS requested due to the intervening change in the factual posture – the new pipeline construction at the property was completed without any safety related incidents and there is nothing to enjoin. GRS has not shown that either a harm occurred, or that there is an ongoing risk of harm to GRS's interests at the property due to the completed construction as discussed below in Section V(E).

As the record shows, with no actual case or controversy or ability to obtain the relief sought, GRS continuing this moot proceeding is for one purpose only – to further leverage GRS's monetary demands regarding unproven business losses and the value of the temporary easement taking – issues that are beyond the Commission's jurisdiction. As SPLP's witness David Amerikaner testified, GRS made it clear in negotiations with SPLP, before GRS filed the Complaint, that GRS would use the Commission's procedures to enmesh SPLP in this litigation unless SPLP acquiesced in GRS's monetary demands that were entirely unrelated to the Commission's jurisdiction:

> GRS clearly desired to obtain a significant payment for use of its property during construction and to compensate it for unproven alleged business losses. [redacted] GRS also attempted to weaponize its complaint before the PUC by conditioning forbearance in filing a petition for emergency interim relief on Sunoco Pipeline's willingness to engage in monetary settlement negotiations or to make monetary payments to GRS. GRS wanted compensation for use of its property and alleged harm to its financial interests; this had nothing to do with safety.

SPLP St. No. 2-R, Amerikaner Rebuttal at 19:8-16.[5] On many occasions, GRS explicitly linked the litigation of this now moot proceeding before the Commission and threats of filing an Emergency Petition with the Commission to pressure SPLP into its demands – a fact clearly shown in the testimony of Mr. Amerikaner and his accompanying exhibits. SPLP St. No. 2-R, Amerikaner Rebuttal at 17:4–19:5; Exhibits DA-30, 31, 32, 33, 34, 35, 36.[6] With all of GRS's requested relief now moot, the Commission should not condone litigants weaponizing the Commission's procedures with unwarranted allegations to threaten a public utility into monetary settlement.

Therefore, SPLP requests that Your Honor deny the Complaint as moot under well settled Pennsylvania precedent due to the character of the relief sought and the intervening change in the factual posture of this case, and rule consistent with GRS's own admission that resolution of this matter after construction would make Your Honor decide "these [alleged] safety issues…. when they're all moot." N.T. 10:19-22.

B. The Complaint Should Be Dismissed For Failure To Reply To New Matter And Lack Of Valid Verification.

1. Failure to reply to New Matter

GRS failed to file a reply to SPLP's New Matter, the allegations in New Matter are deemed admitted, and the Complaint should be dismissed. In response to the Complaint, SPLP timely filed an Answer and New Matter, which included a Notice to Plead. *See* SPLP Answer and New Matter, filed and served December 23, 2020. SPLP's New Matter properly incorporated by reference its

[5] Noting stricken portions pursuant to ALJ Cheskis' August 4, 2021 Order.

[6] Indeed, that GRS failed to present qualified expert testimony (*see Bergdoll supra*) to provide a substantial direct case (GRS's only alleged expert that presented direct testimony was Jason Culp, GRS St. No. 3, which consisted of 14 pages of written testimony from a civil engineer largely unqualified to opine as he did on a multiplicity of discrete disciplines (N.T. 452:6 – 453:9)), then chose to bolster and supplement its direct case in surrebuttal (*see* N.T. 453:12-18) by adding 7 new witnesses, 6 of whom were experts, shows that GRS sought the quickest and least expensive route to try to leverage money from SPLP rather than pursue legitimate communication and safety concerns.

denial and counterstatement of factual and legal allegations contained in its Answer. *Id.* at ¶ 135; *see* 52 Pa. Code § 1.33 (allowing for incorporation by reference). GRS failed to submit a Reply to New Matter. GRS's failure to reply to SPLP's New Matter results in admission of the allegations therein:

> Failure to file a timely reply to new matter may be deemed in default, and relevant facts stated in the new matter may be deemed to be admitted.

52 Pa. Code § 5.63(b). *See, e.g.*, *Stefanowicz v. Pennsylvania-American Water Co.*, Docket No. C-22078165, 2008 WL 8014613 at *4 (Pa. PUC May 22, 2008); *see also Ciabattoni v. Rounsville t/a Schuylkill Valley Airport Shuttle*, Docket No. C-2009-2097477, 2009 WL 2986733 at *4 (Pa. PUC Sept. 11, 2009); *Brenda Smith v. Blue Pilot Energy LLC and PPL Electric Utilities Corp.*, Docket F-2015-2472890, 2018 WL 4204537 (Initial Decision Jul. 9, 2018). Thus, GRS has admitted, *inter alia*, that:

- The Commission lacks jurisdiction over environmental law issues and permitting issues; the validity and scope of easements; compliance with municipal ordinances; and face covering mandates. SPLP New Matter at ¶¶ 137-148.
- Complainants failed to state a claim upon which relief can be granted with regard to public awareness and SPLP's public awareness plans and standard operating procedures. SPLP New Matter at ¶¶ 149-154.
- SPLP's public awareness plan and SOPs do not apply to new pipeline construction occurring at GRS. SPLP New Matter at ¶¶ 102, 149-154.
- Complainants failed to state a claim upon which relief can be granted with regard to the requested relief in the Complaint. SPLP New Matter at ¶¶ 155, 159-160.
- SPLP is entitled to managerial discretion regarding the means and methods of constructing its pipelines and its actions are not in violation of the Public Utility Code, Commission regulation or Commission order. SPLP New Matter at ¶¶ 155, 159-160.
- SPLP has undertaken reasonable efforts to communicate with Complainant and answer Complainant's questions and concerns even where not legally obligated to do so and despite Complainant's unreasonable requests and actions. Answer ¶¶ 119, 122.

- The vibrations from SPLP's construction are not strong enough to cause any major structural damage to the structures on the Property that would implicate the safety of the Property, structures thereon, or Residents therein. Answer ¶ 109.

In the Answer and New Matter, SPLP denied and provided a counterstatement of facts to every material allegation in the Complaint. GRS's failure to answer results in admission of SPLP's denials and counterstatements. Accordingly, the Complaint should be dismissed.

2. Invalid verification.

GRS failed to show that Stephen Iacobucci was authorized to sign the verification to the Complaint, so the Complaint should be dismissed. Pursuant to 52 Pa. Code § 1.36, formal complaints "must be personally verified by a party thereto or by an authorized officer or other authorized employee of the party if a corporation or association." *Id.* Here, the Complainant is Glen Riddle Station L.P., which is a limited partnership. Stephen Iacobucci testified he is not an employee of Glen Riddle Station L.P. GRS St. No. 1, Stephen Iacobucci Direct at 1:8-10. The company Stephen does own is not a general partner in Glen Riddle Station L.P.[7] N.T. 267:24-269:5. Instead, the sole general partner of Glen Riddle Station L.P. is RIC General Partner, LLC. Exhibit GRS-3 at 7. The person that can act on behalf of Glen Riddle Station L.P. through RIC General Partner LLC is its sole member, Raymond Iacobucci. *Id.* Thus, Stephen Iacobucci was not legally able to verify the Complaint; consequently, the Complaint has no valid verification, and must be dismissed.

[7] Even if Stephen Iacobucci or his company were a limited partner in Glen Riddle Station L.P., which GRS failed to prove, that does not mean he is necessarily authorized to sign on Glen Riddle Station L.P.'s behalf. 15 Pa. C.S. § 8632(a) ("A limited partner is not an agent of a limited partnership solely by reason of being a limited partner.").

C. GRS Failed To Prove That SPLP's Extensive Communications Regarding The Construction Of New Pipeline Facilities Violated The Public Utility Code, The Commission's Regulations, 49 C.F.R. § 195.440, Or API RP 1162; SPLP's Communications Went Above And Beyond A Reasonable Standard Of Care In Keeping GRS Informed.

From the outset of this proceeding, GRS has claimed that SPLP failed to communicate regarding construction activities at the property, and therefore believed that SPLP violated various "public awareness" regulatory provisions or SPLP's public awareness plan and program. *See* Complaint at ¶¶ 25-43. However, the law and evidence of record clearly demonstrate that SPLP was both in compliance with all regulations for new pipeline construction and, indeed, went above and beyond a reasonable standard of care in keeping GRS, a demanding and litigious property owner, informed at all stages of construction.

The record shows that SPLP was responsive to hundreds of emails, demands, threats, phone calls, in-person meetings, and other requests that went well beyond what is required for SPLP's new pipeline construction activities within its temporary and permanent easements at the GRS property. GRS's demands went well-beyond the demands of any other property owner across the entire pipeline project statewide, as SPLP witness Joseph McGinn explained. SPLP St. No. 7-RJ, McGinn Rejoinder at 1:14-22; *see also* SPLP St. No. 2-RJ, Amerikaner Rejoinder at 8:3-5. Importantly, the record shows that SPLP communicated significantly and reasonably to those most affected, GRS's residents, and provided them with extensive information and accommodations during construction.

Finally, while the applicable regulations do not impose specific duties on SPLP for communicating with GRS and local government emergency response officials, the record shows that SPLP communicated extensively with GRS and worked cooperatively with Middletown Township. Ultimately, with no governing statutes, regulations, or Standard Operating Procedures (SOP) defining new pipeline construction communication requirements, GRS would have this

Commission essentially create new rules and regulations for SPLP's pipeline construction and then apply them retroactively to the completed construction. Doing so would not only skip the requirements of the rulemaking process, but also illegally impose unknown substantive rules and regulations retroactively.[8]

1. SPLP's communication regarding its new pipeline construction complied with PHMSA's regulations, the Commission's regulations, and SPLP's SOPs and exceeded a reasonable standard of care.

GRS tries to twist the rules and regulations governing SPLP's new pipeline construction by misconstruing the term "public awareness" as a catch-all to require any communication about any pipeline construction topic that GRS could subjectively desire. *See* Complaint at ¶¶ 25-43; GRS St. No. 2, Stephen Iacobucci Direct at 5:18-20. But GRS's attempt to hijack the term "public awareness" has no basis in law, regulation, or SPLP SOPs.

First, the Complaint incorrectly alleged that SPLP was in violation of its Public Awareness Plan as governed by 49 C.F.R. § 195.440 related to SPLP's new pipeline construction at the GRS property. *See* Complaint at ¶¶ 28-29. However, the Public Awareness Plan required under Section 195.440 does not even apply to SPLP's ***new*** pipeline construction, the only construction at issue here.

Specifically, Part 195 is divided into various subparts, each dealing with different topics. Section 195.440, on which GRS relies, is located in Subpart F – "Operation and Maintenance,"

[8] *Supra Info Connections*; 1 Pa. C.S. § 1926 ("No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly."); *Jenkins v. Unemployment Compensation Bd. Of Review*, 56 A.2d 686 (Pa. Super. 1948) (applying 1 Pa. C.S. § 1926 to regulations of administrative agencies); *Moyer v. Berks County Bd. of Assessment Appeals*, 803 A.2d 833, 842 (Pa. Cmwlth. 2002) ("It is well established that a statute must be construed prospectively unless the legislature intends that it operate retrospectively and expresses this intent so clearly as to preclude any question."). *R & P Services, Inc. v. Commonwealth of Pennsylvania, Department of Revenue,* 541 A.2d 432 (Pa. Cmwlth. 1988).

not Subpart D – "Construction." Moreover, Part 195 adopts by reference American Petroleum Institute Recommended Practice 1162 ("API RP 1162"), which governs public awareness standards. 49 C.F.R. 195.440(a). API RP 1162 expressly states it does ***not*** apply to ***new*** pipeline construction:

> "**This guidance is not intended to focus on public awareness activities appropriate for new pipeline construction** or for communication that occur immediately after a pipeline-related emergency."

API RP 1162 at 1.2 (Scope) (emphasis added).

Consequently, GRS has no basis to argue that 49 C.F.R. § 195.440 or API RP 1162 apply to SPLP's new pipeline construction activities. Further, where 49 C.F.R. § 195.440 and API RP 1162 do apply – in public awareness related to operations and maintenance – the record is clear that SPLP has complied with these requirements by sending public awareness brochures every two years to the affected public that include a broad array of public awareness information in compliance with the requirements. SPLP St. No. 7-R, McGinn Rebuttal at 7:9-21; SPLP Exhibit JM-3. GRS presented no evidence to dispute or refute that SPLP's two-year public awareness mailings were sent to GRS and its residents in compliance with applicable regulations. Thus, under the plain language of these regulations, which do not apply to new pipeline construction, the "public awareness" requirements cannot be said to apply to SPLP's construction activities at the GRS property.

Second, the Commission's relevant gas service regulations at 52 Pa. Code Chapter 59 do not create "Public Awareness" obligations related to new pipeline construction either. In the Complaint, GRS alleged that the general gas safety regulation at 52 Pa. Code § 59.33(a) imputes a requirement on SPLP to communicate regarding new pipeline construction and that SPLP must meet GRS's unbounded demands and subjective preferences. *See* Complaint at ¶ 43. It does not.

To the extent 52 Pa. Code § 59.33(a) is an enforceable regulation, it states that utilities "shall at all times use every reasonable effort to properly warn and protect the public from danger, and shall exercise reasonable care to reduce the hazards to which …. others may be subjected to by reason of its equipment and facilities." *Id.* SPLP has, without doubt, met this regulation in its construction at GRS. As discussed below, SPLP's extensive communications with GRS and its residents, along with the significant worksite safety precautions SPLP instituted at the property, shows that SPLP used every reasonable effort to warn and protect the public regarding construction at the property. The record clearly shows that SPLP had nearly daily communications with GRS, had direct communications with residents when GRS management permitted it, and instituted extra worksite precautions including sound walls, flaggers, and other increased safety precautions. SPLP took every reasonable effort to deal with GRS's demands. Indeed, most of GRS's allegations and demands were nothing more than "gotcha" attempts to lay traps for SPLP in order to create as much litigation fodder as possible to leverage SPLP into a monetary settlement. SPLP St. No. 2-R, Amerikaner Rebuttal at 17:4 – 19:5; Exhibits DA-30-36; SPLP St. No. 2-RJ, Amerikaner Rejoinder at 4:9-15.

Third, the Commission initiated a rule making prior to the outset of the instant complaint when it issued an Advanced Notice of Proposed Rulemaking for amendments to 52 Pa. Code Chapter 59. *Advance Notice of Proposed Rulemaking Regarding Hazardous Liquid Public Utility Safety Standards at 52 Pa. Code Chapter 59*, Advanced Notice of Proposed Rulemaking Order, Docket No. L-2019-3010267 (Order entered Jun. 13, 2019). On July 15, 2021, the Commission moved forward with its proposed amendments to Chapter 59 and issued a Notice of Proposed Rulemaking, including an Annex with proposed draft regulations for comment. *Notice of Proposed Rulemaking Regarding Hazardous Liquid Public Utility Safety Standards at 52 Pa. Code Chapter*

59, Notice of Proposed Rulemaking Order, Docket No. L-2019-3010267 (Order entered July 15, 2021)("NOPR Order"). Notably absent from the NOPR Order is any proposed regulation regarding communication requirements pertaining to ***new*** pipeline construction. Portions of the NOPR Order, in particular the new proposed regulation § 59.140(e) – Operation and Maintenance, address supplemental Public Awareness communication requirements beyond API RP 1162 regarding the affected public, emergency responders, and public officials for *operating and maintaining* a pipeline. The Commission had the opportunity to consider and propose regulations setting forth communication requirements for new pipeline construction, but it did not. *See generally* NOPR Order. Therefore, neither the Commission's current regulations nor the proposed regulations in its NOPR Order impose heightened communication requirements during new pipeline construction. GRS's arguments that the Commission's regulations impose such specific communication requirements thus have no basis beyond GRS's subjective preferences and its quest to create violations where none occurred to leverage SPLP into meeting its economic demands.

GRS's final attempt to find footing for its imagined communications requirements rests on SPLP's SOPs on Public Awareness. However, the record is clear that SPLP's SOPs are: 1) based on and in compliance with 49 C.F.R. Part 195 and API RP 1162 and the Commission's regulations; and, 2) like those regulations, do not apply to SPLP's new pipeline construction. SPLP St. No. 7-R, McGinn Rebuttal at 6:1-8. They are standard *operating* procedures; not construction procedures.

GRS has not and cannot not meet its burden to prove that SPLP has violated any requirement, duty, or statutory mandate regarding communications during new pipeline construction. As discussed below, the record is clear that SPLP nonetheless communicated

extensively with GRS Counsel, GRS management, and GRS residents under the rules and restrictions GRS imposed, and local government emergency officials. SPLP's communications practices were above and beyond a reasonable standard of care. Given this, and given the failure of GRS to point to any applicable communication requirements that SPLP failed to adhere to in its new pipeline construction involving GRS, the Commission must find that SPLP's conduct was both reasonable and prudent under the circumstances.

2. The record is clear that SPLP communicated both extensively and reasonably with GRS prior to and during construction at the property.

While there are no applicable statutory, regulatory, or other requirements creating standards or guidelines for SPLP's communications with GRS during new pipeline construction, the record clearly shows that SPLP went to great lengths to communicate extensively and reasonably with GRS to keep it informed of the planned and active construction within SPLP's easement at the GRS property. The record shows that from early 2020 onward, SPLP personnel and outside counsel Mr. David Amerikaner communicated extensively with GRS on all aspects of SPLP's work at the property and engaged in extraordinary and meaningful communications, ranging from GRS's preconstruction and active construction concerns (no matter their merit or veracity), preconstruction site assessment and utility location, site preparations and installation of sound walls, monetary compensation in lieu of PUC litigation, resident awareness, and other matters. As shown below, SPLP's communications were at all times reasonable and sensible even when faced with wild and inaccurate accusations from GRS.

a. *Preconstruction communications with GRS (prior to December 2020)*

The evidence of record shows that prior to SPLP's active construction at the GRS property which began in December 2020, SPLP communicated significantly with GRS related to SPLP's upcoming work at the property within the existing right of way, including the permanent easement

negotiated in 2016 (Exhibit No. GRS-3), the Temporary Workspace Easements and temporary access road easement SPLP acquired through eminent domain in 2020, and preconstruction communications prior to SPLP beginning construction activities in late November 2020 including, but not limited to:

- Preliminarily, the pipeline line right-of-way SPLP holds existed since approximately 1931, predating GRS ownership of the property. In 1971, GRS management chose to construct its apartments right against the right-of-way and straddling the pipeline right-of-way through the property. *See* SPLP St. No. 7-R, McGinn Rebuttal at 4:6-14; SPLP Exhibit JM-9 at page 1-2.

- GRS through Raymond Iacobucci voluntarily gave SPLP a permanent easement on June 20, 2016, in exchange for compensation that was freely negotiated. SPLP St. No. 2-R, Amerikaner Rebuttal at 2:6-20.

- Beginning April 6, 2020, counsel for GRS and SPLP began discussions on acquisition of the temporary workspace easements and SPLP informed GRS of the details of construction known at that time. SPLP shared information GRS requested including DEP Permits (*See* SPLP Exhibit DA-1); when those negotiations failed SPLP was forced to file its declaration of taking in June 2020. SPLP St. No. 2-R at 2:21 – 4:6; *See* SPLP Exhibit DA-2, DA-3. Throughout this period, GRS's primary focus was on negotiating for and obtaining maximum compensation, and only inquired into SPLP's construction details in limited instances. SPLP St. No. 2-R, Amerikaner Rebuttal at 4:7-19.

- In July and August 2020, SPLP communicated with GRS counsel to share details on construction including anticipated timeline, methodology, planned noise mitigation measures including sound walls, work schedules, and other safety details known at that time. *Id*. at 4:20 – 5:13; SPLP Exhibits DA-4, DA-5.

- In September 2020, counsel for SPLP and GRS communicated on monetary settlement proposals to resolve the eminent domain action; although GRS requested some limitations on conditions on the workspace and construction, it did not make specific safety-related demands. SPLP St. No. 2-R, Amerikaner Rebuttal at 5:14-23; SPLP Exhibit DA-6. Beginning September 30, 2020, SPLP intensified communications with GRS counsel regarding the preparations for construction activities, initially requesting a structural inspection of the property by SPLP's contractor Vibra-Tech and providing other construction details known at that time. SPLP St. No. 2-R, Amerikaner Rebuttal at 5:22 – 6:13. Also in September 2020, SPLP mailed its public awareness brochures to the affected public, including GRS management and residents. SPLP St. No. 7-R, McGinn Rebuttal at 7:9-21; SPLP Exhibit JM-3.

- In October 2020, communication frequency greatly intensified to include follow-up on the Vibra-Tech inspection which partially occurred on October 19, 2020 (prior to GRS's Jason

Culp leaving the inspection early), and GRS questions from GRS's engineer Jason Culp. SPLP St. No. 2-R, Amerikaner Rebuttal at 6:14 – 7:2; SPLP Exhibit DA-8, DA-9; SPLP St. No. 2-RJ, Amerikaner Rejoinder at 4:18 – 5:18. SPLP responded to GRS regarding the questions from Jason Culp on October 16, 2020. SPLP St. No. 2-R, Amerikaner Rebuttal at 7:3-22; Exhibit DA-10. At that time, SPLP proposed that a pre-construction meeting be scheduled to discuss the details of construction. Subsequently, on October 22, 2020, GRS sent a demand letter for significant monetary compensation wholly unrelated and unlinked to any construction safety issues.

- By email dated October 27, 2020, SPLP requested a date for the Vibra-Tech inspection to be completed. SPLP St. No. 2-R, Amerikaner Rebuttal at 7:18-22; Exhibit DA-11. Subsequently, GRS began its slinging of unfounded allegations at SPLP regarding alleged lapses in communication of construction details, conflating the purpose of the Vibra-Tech inspection and the preconstruction meeting previously discussed, and accusing the structural inspection personnel of not providing construction details upon demand. SPLP St. No. 2-R, Amerikaner Rebuttal at 8:1-9:9; Exhibits DA-12, DA-13. SPLP attempted without success to correct GRS's misconceptions of the Vibra-Tech inspection and the proposed preconstruction meeting. SPLP St. No. 2-R, Amerikaner Rebuttal at 8:1-9:9.

- In early November, SPLP extensively communicated with GRS to schedule the Vibra-Tech inspection completion and the pre-construction meeting. SPLP St. No. 2-R, Amerikaner Rebuttal at 9:10-20; Exhibit DA-14, DA-15. The follow-up Vibra-Tech inspection occurred November 12, and the parties agreed to the November 18 preconstruction meeting. SPLP further outlined the background for the preconstruction meeting and provided answers to prior construction related questions GRS posed. SPLP St. No. 2-R, Amerikaner Rebuttal at 9:10-20.

- On November 18, 2020, SPLP convened a preconstruction meeting on site at GRS; seven representatives of SPLP and several GRS representatives attended. SPLP St. No. 2-R, Amerikaner Rebuttal at 10:1-3; SPLP St. No. 4-R, Fye Rebuttal at 4:10 – 9:9. The discussion included: 1) SPLP's installation method; 2) phases of construction and details of each phase including surveying, utility location, sound wall installation, equipment mobilization, excavation of bore pit, trenching and tie-in, back-fill, demobilization, and restoration; 3) plans and protocols to ensure buried utilities were protected and repair measures should damage occur; and, 4) many other pieces of relevant construction information for the property regarding Mariner East 2/2X Project Modification – HDD 620. SPLP St. No. 2-R, Amerikaner Rebuttal at 10:4 – 11:3; SPLP Exhibit DA-16, DA-17. Specifically, regarding the discussions on sound wall installation, SPLP provided at the November 18 meeting and in subsequent emails the details of installation, location, and other characteristics of the noise mitigation steps to be taken. SPLP St. No. 2-R, Amerikaner Rebuttal at 11:4-21; Exhibit DA-18. Additionally, SPLP advised that surveying and utility location would occur prior to Thanksgiving, but that sound wall installation would not begin until after the holiday. SPLP St. No. 2-R, Amerikaner Rebuttal at 12:2-23. Finally, the parties at the November 18, 2020 meeting discussed traffic related concerns, and SPLP explained its Temporary Access Road Easement, flaggers, safe driving training, and other aspects to ensure safe truck ingress and egress. *Id.* at 13:1-10.

- Following the preconstruction meeting, communications intensified further, resulting in daily communications between SPLP and GRS. *See* SPLP St. No. 2-R, Amerikaner Rebuttal at 13:11 – 14:12; Exhibit No. DA-19, DA-20, DA-21, DA-22, DA-23. In particular, SPLP communications during this time dealt with GRS attempts to deny SPLP's surveyors access to the easements to establish boundaries, to deny SPLP access to locate underground utilities, GRS's mischaracterizations of the information SPLP conveyed at the preconstruction meeting, allegations and threats of suit by GRS that various SPLP individuals trespassed on GRS property outside of the boundaries of SPLP's easements, and various other baseless, exaggerated, or completely unfounded allegations by GRS. SPLP St. No. 2-R, Amerikaner Rebuttal at 13:11 – 14:12.

- On November 20, 2020, GRS sent a list of questions to SPLP and demanded that SPLP no longer communicate directly to GRS personnel, thereby requiring all future SPLP communications with GRS occur through counsel. *Id*. at 14:13-18; Exhibit DA-24. SPLP responded to the questions and provided voluminous information to answer GRS's questions. SPLP St. No. 2-R, Amerikaner Rebuttal at 14:19 – 15:19.

As shown above in a non-exhaustive analysis of the record on pre-construction communications, SPLP communicated extensively and reasonably with GRS regarding the upcoming construction at the site and answered countless questions from GRS counsel and GRS management regarding planned construction. SPLP's pre-construction communications were at all times reasonable and prudent.

b. *Communications during active construction (December 2020 – June 2021)*

Even though GRS filed its Complaint on December 2, 2020, SPLP nonetheless continued to extensively communicate regarding the status of construction through GRS Counsel. SPLP addressed GRS's concerns and allegations, no matter how exaggerated or inaccurate those concerns and allegations were. *See*, *e.g.*, SPLP St. No. 2-RJ, Amerikaner Rejoinder at 4:9-17. SPLP also reasonably and sensibly communicated with GRS residents. *See*, *e.g.*, SPLP St. No. 7-R, McGinn Rebuttal at 11:6-12:23; SPLP Exhibit No. JM-5. SPLP provided ongoing construction updates to GRS residents. SPLP St. No. 7-R, McGinn Rebuttal at 11:6-12:23. SPLP provided rent relief to GRS residents. *Id.*; *see also* SPLP St. No. 7-RJ, McGinn Rejoinder at 2:16-18; N.T. 243:2-

9. Residents could contact SPLP through its community hotline to get answers to their concerns. SPLP St. No. 7-R, McGinn Rebuttal at 11:6-12:23.

A clear theme and pattern quickly became apparent in the communications from GRS to SPLP during active construction: 1) GRS would observe something occurring on the site; 2) GRS would have its counsel immediately send an email to SPLP accusing SPLP of some misconduct, impropriety, or even crime and demand an immediate response; 3) SPLP would respond to each of these emails either requesting support or documentation for GRS's allegations, or explaining why no misconduct had occurred; 4) GRS would then drop their baseless email accusations and the communication thread ceased. SPLP St. No. 2-RJ, Amerikaner Rejoinder at 4:9-17.[9] As summarized below, SPLP's extensive communications during active construction were both reasonable and prudent in responding to GRS:

- In December 2020, SPLP continued frequent communications with GRS to address its concerns and allegations. On December 10, SPLP responded with a point-by-point analysis of GRS's "safety concerns" raised in Exhibit P to the Complaint, provided an initial plan of the sound wall layout to be installed and the sound wall specifics with the final plan sent January 11, 2021, and addressed firetruck ingress and egress concerns. SPLP St. No. 2-R, Amerikaner Rebuttal at 16:5-18; Exhibit DA-25 – DA-28. Also on December 10, 2020, SPLP sent a letter to all GRS residents and management regarding upcoming construction activities, and provided its community hotline to field any questions. SPLP Exhibit JM-6. Also during this time, SPLP worked closely with Middletown Township emergency response officials and Rose Tree Media School District to resolve ingress and egress concerns and temporary bus stop locations. SPLP St. No. 7-R, McGinn Rebuttal at 12:5-11. On December 14, GRS alleged SPLP's activities were causing damage to walls within the residential apartment units and provided close-up photos, but never allowed SPLP to assess the alleged damage or provide any additional response to SPLP's requests to investigate the issue. SPLP St. No. 2-R, Amerikaner Rebuttal at 16:19-17:3; Exhibit DA-29. Additionally, during December 2020, GRS sent multiple threats that it would

[9] Indeed, that GRS continued this pattern of unsupported accusations towards SPLP through counsel, and then failing to substantiate them when asked to do so, or to provide details and proof, (SPLP St. No. 2-RJ, Amerikaner Rejoinder at 4:9-17), demonstrates that GRS management's strategy was to turn every encounter with SPLP into potential litigation fodder rather than an opportunity to work through issues together to achieve minimal disruption for GRS residents. Throughout the construction, GRS's focus remained on achieving financial gains for GRS's owners and management, which created a constant obstacle to ameliorating the temporary inconveniences for GRS residents that the presence of construction activities inevitably created.

weaponize the Commission's Emergency Petition for Interim Relief procedures unless SPLP met its monetary settlement demand. SPLP St. No. 2-R, Amerikaner Rebuttal at 17:4 – 19:16.

- From January to April 2021, SPLP provided extensive communications to GRS and its residents including providing letters to residents on how to obtain rent relief, fact sheets, and updates on construction activity. SPLP St. No. 7-R, McGinn Rebuttal at 11:6 - 12:23; SPLP Exhibit No. JM-5. SPLP provided just under 100 residents with rent relief during construction from January forward. N.T. 243:2-9. Additionally, SPLP responded to many of GRS's emails and allegations, and in particular hosted the virtual town hall on February 23, 2021, to answer questions from residents regarding construction, including signage at the site. SPLP St. No. 7-R, McGinn Rebuttal at 12:15-23; SPLP St. No. 3-R, Becker Rebuttal at 10:9 – 11:9; SPLP St. No. 4-R, Fye Rebuttal at 4:19-22. Additionally, SPLP responded to and addressed GRS's concerns regarding the use of Calciment™ at the property. SPLP St. No. 2-RJ, Amerikaner Rejoinder at 8:7-10.

- In May 2021, a waterline broke within the pipeline right of way. SPLP responded swiftly and efficiently to rectify the break and communicated extensively with GRS including day-of in-person meetings on steps for repairs and restarting service, follow-up testing requests, continued support for residents by providing bottled water for weeks when GRS disputed, without any basis, that the public water provided by Aqua was safe to drink, even after it was cleared through initial testing post-repair. *See* SPLP St. No. 2-RJ, Amerikaner Rejoinder at 8:11-9:14; SPLP St. No. 4-RJ, Fye Rejoinder at 2:7 – 6:8; N.T. 171-176.

As shown above, SPLP kept open a continuous line of communications with GRS during active construction, responded to countless inquires and accusations, and regularly provided useful information to GRS residents and management – all of which shows that SPLP's communications during active construction were reasonable and sensible, and went above and beyond what was reasonable and necessary – or what is typical practice in utility construction projects. Indeed, at no point did SPLP simply ignore or dismiss GRS's constant inquiries – the record clearly shows that at all times SPLP responded to and addressed GRS's concerns, and that SPLP actively responded to those concerns in a prompt appropriate manner that went well-beyond what the company did for any other single property owner across the entire Mariner East project. As SPLP's Joe McGinn testified:

> GRS has been and continues to be far more demanding than any other site or property owner anywhere in Middletown Township or for that matter, the entire state, in its complaints, requests for additional information, and requests for day-to-day modifications of our usual procedures that others have appreciated or at least not complained about. We have been as responsive as we can be given the circumstance of being in litigation with GRS in at least three legal proceedings, one before the PUC that GRS commenced in late 2020; a right to know proceeding; and a common pleas court proceeding involving SPLP's need for Easements for a Temporary Work Space and Temporary Access Roads.

SPLP St. No. 7-RJ, McGinn Rejoinder at 1:18-22. SPLP's continuous line of communications with GRS during construction, even while dealing with active litigation on multiple fronts, was both reasonable and prudent, and did not reflect that SPLP violated any Commission rule, regulation, or order that is applicable to utility construction.

3. SPLP took every reasonable effort to satisfy GRS's communication demands, SPLP communicated all required construction information to Middletown Township and other agencies, and SPLP provided safety information and reparations to GRS's residents.

As shown above, both before and during active construction at the property, SPLP provided GRS with an open communication channel. SPLP St. No. 2-R, Amerikaner Rebuttal at 14:13-18; Exhibit DA-24. The level of attention GRS demanded and the amount of time it consumed for SPLP was unparalleled in the entirety of SPLP's statewide Mariner East pipeline construction project, and SPLP's attention to the demands of GRS management was far in excess of what SPLP provided to any other landowner. SPLP St. No. 2-RJ, Amerikaner Rejoinder at 8:3-5; SPLP St. No. 7-RJ, McGinn Rejoinder at 1:18-22. The record clearly shows that SPLP undertook all reasonable efforts to satisfy GRS management's ever escalating and unreasonable demands.

Further, the record is clear that SPLP communicated extensively with local government, including Middletown Township and Delaware County, regarding all aspects of new pipeline construction and ongoing operations of pipelines within their borders. SPLP St. No. 7-R, McGinn

Rebuttal at 8-11; Exhibit SPLP JM-4. It is undisputed that SPLP extensively communicated with relevant municipal and county officials regarding construction above and beyond the requirements of 49 C.F.R. Part 195 and API RP 1162. SPLP St. No. 7-R, McGinn Rebuttal at 8:14–9:13. SPLP also participates in bi-weekly meetings with townships across Delaware County, including Middletown Township where GRS is located. *Id*. Finally, SPLP has provided extensive grants, training through the Mariner Emergency Responder Outreach program ("MERO") and other sources, and equipment to Middletown Township emergency officials well beyond any regulatory requirement. *Id.*; *see also* SPLP St. No. 1-R, Noll Rebuttal at 6:19-7:22.

With respect to the GRS property, SPLP worked extensively with Middletown Township[10] to ensure that emergency vehicles could enter and exit the GRS property during active construction without complication, and SPLP implemented Middletown's officials' recommendations to further ensure access. SPLP St. No. 3-R, Becker Rebuttal at 16:13-19. The live trial-run events Middletown Township emergency officials conducted at the GRS property demonstrate that SPLP took all reasonable steps to ensure the GRS worksite was safe during active construction and that any emergency response could be safely performed at the GRS property. *Id.* at 12:9-11; SPLP St. No. 1-R, Noll Rebuttal at 16:15 - 17:16. The record shows that in all aspects of SPLP's operations and construction, SPLP always kept close lines of communication with public officials and emergency response personnel during construction at the GRS property.

Finally, the record shows that SPLP provided substantial financial mitigation to the residents/renters at GRS. SPLP St. No. 7-RJ, McGinn Rejoinder at 2:16-18; SPLP Exhibit JM-5; N.T. 243:2-9. As an initial matter, it is important to note that very few residents raised complaints

[10] GRS has filed lawsuits against Middletown Township related to the construction at the property, including a complaint in the U.S. District Court for the Eastern District of Pennsylvania and appeals of two of the Township's denials of Right-To-Know requests seeking, *inter alia*, documents exchanged between SPLP and the Township.

regarding SPLP's construction either directly to SPLP through the community hotline, or through the February 23 Townhall, or directly to construction crews on site. SPLP St. No. 7-R, McGinn Rebuttal at 12:15-23; SPLP St. No. 4-R, Fye Rebuttal at 5:4-5. Additionally, as discussed above, on top of SPLP's required bi-annual public awareness brochures for active operating pipelines most recently sent in September 2020 to the affected public, SPLP provided letters, fact sheets, construction updates, a 24/7 community hotline, refrigerator magnets with contact information, substantial public information at www.papipelinesafety.com and http://marinerpipelinefacts.com, and rent relief to GRS residents during construction – all of which go far above and beyond any standard of reasonableness for communications with residents during SPLP's new pipeline construction. SPLP St. No. 7-R, McGinn Rebuttal at 11:10–12:23. None of SPLP's enhanced communication efforts were required by the Public Utility Code or Commission regulation, but SPLP nevertheless communicated extensively regarding new pipeline construction with GRS residents, providing safety information, resources, and accommodations, which demonstrates that SPLP took every reasonable effort to properly communicate with the public.

Taken as a whole, SPLP's communications with GRS counsel and management, GRS residents, and the local township and county governments, were sensible and reasonable, and consistent with SPLP's statewide procedures across the entire Mariner East pipeline project. GRS's allegations and mischaracterizations to the contrary are baseless. GRS failed to meet its burden of proof regarding its claims that SPLP failed to properly communicate with GRS and its residents regarding construction, and the Commission should therefore dismiss the Complaint.

D. Sound, Fire Code, Parking, Fencing Ordinances, Health Declarations, And Environmental Issues Are Beyond The Scope Of The Commission's Jurisdiction.

As Your Honor has already held, the allegations of GRS's Complaint regarding the scope and validity of easements, issues grounded in municipal law including sound, fire code, parking,

and fencing ordinances, Governor Wolf/Department of Health COVID-related face covering mandates, and environmental regulations should all be dismissed as outside the scope of the Commission's limited expertise and jurisdiction. *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 at 7 (Order entered January 28, 2021) ("January 28, 2021 Order").

The Commission may not exceed its jurisdiction and must act within it. *City of Pittsburgh v. Pa. Pub. Util. Comm'n*, 43 A.2d 348 (Pa. Super. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano,* 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992). As a creation of the legislature, the Commission possesses only the authority that the state legislature has specifically granted to it in the Public Utility Code. 66 Pa. C.S. §§ 101, *et seq*. Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell*, 383 A.2d 791 (Pa. 1977).

When granting SPLP's preliminary objections to the Complaint, Your Honor described the scope of this proceeding:

> For example, the Commission has no jurisdiction to hear arguments regarding the scope and validity of an easement. Similarly, **the Commission generally lacks jurisdiction to adjudicate claims regarding violations of Municipal law, including parking spaces and fencing, the Governor's or Health Department's face covering mandates or environmental regulations that are beyond the scope of the Public Utility Code or a Commission order or regulation.** To the extent that Sunoco **may be found to have violated municipal law, face covering mandates or environmental regulations by a court that has jurisdiction to hear such claims,** or the easement pertains to a utility issue such as inspection of structures and water piping, **then such a finding may be used to demonstrate that Sunoco is also violating the Public Utility Code by providing unsafe service. The Commission,**

> **however, lacks jurisdiction to make such an initial finding.** To the extent that Glen Riddle has raised those issues, Sunoco's preliminary objection will be granted in part.

January 28, 2021 Order at 7 (all emphasis added).

GRS presented no evidence that any regulatory agency or municipal entity having jurisdiction over these issues found SPLP to be in violation of any applicable code or regulatory provision for the construction at the GRS property. To the contrary, and as described in Section V(E) *infra*, SPLP complied with Middletown Township ordinances and requirements, as well as DEP environmental and permitting regulations as they related to the pipeline construction. GRS's claims related to each of these issues should be dismissed.[11]

E. SPLP's Construction Was Safe And Reasonable And GRS Did Not Show Otherwise.

SPLP started construction at GRS in late November 2020 and completed construction and final restoration, including seeding and laying sod in the construction area as of July 13, 2021. SPLP St. No. 3-R, Becker Rebuttal at 6:16-17; N.T. 640:7-11; Davidson Cross Exhibit No. 1 (Aerial Photo of GRS Property on July 9, 2021 showing construction complete) (admitted N.T. 349:7-8). Throughout the construction and restoration at the GRS property, SPLP adhered to construction and safety practices that were specifically tailored to the GRS property and Middletown Township specifications. GRS complains about various issues tangential to pipeline construction, including emergency responder access to the property, traffic and pedestrians on the property, construction sound levels and mitigation efforts, vibrations, materials used on the property, environmental permitting issues, and water service interruption. GRS alleged SPLP's

[11] To the extent SPLP has addressed issues that are beyond the Commission's jurisdiction in this brief, it is not to be construed that SPLP believes these issues should be decided in this case, but it is because testimony was entered into the record on each of these topics and SPLP must protect its appellate rights should the Commission act beyond its limited authority and issue any findings on these matters in this case.

conduct was unsafe because of potential detrimental consequences allegedly stemming from these issues, but as detailed below, the record shows none of the detrimental consequences occurred:

- emergency responders were able to access the property within the same response time during construction as prior to construction;
- there were no traffic or pedestrian incidents on the property;
- school children accessed the temporary bus stop without incident;
- no resident's hearing was damaged from construction noise;
- vibrations from construction did not cause injury or damage;
- no construction materials or chemicals harmed anyone;
- while water service was temporarily disrupted, the water was safe to consume; during the interim between the break in the water line and confirmation of the safety of the water, SPLP provided bottled water for residents.

Since GRS failed to prove any actual harmful consequences occurred or that there was a high probability of a harmful consequence occurring, GRS cannot establish general lack of safety or adequacy or reasonableness under Section 1501. GRS is left with showing SPLP's actions or inactions violated a specific standard over which the Commission has jurisdiction. But GRS did not prove any of SPLP's practices or chosen methods violated the Public Utility Code, a Commission regulation, or a Commission order. Nor did GRS prove any regulatory body found that SPLP violated any standard over which the Commission lacks jurisdiction. To the contrary, SPLP's practices and methods at the site were safe, adequate, and reasonable as detailed below. Moreover, as courts have recognized, SPLP has managerial discretion regarding its construction practices and therefore has the right to proceed how it chooses so long as its activities are not in violation of law, regulation, or Commission order. Managerial discretion is the Commission and court-recognized legal principle that provides it is up to a utility's management to determine how and when to manage and maintain its facilities within the bounds of the Public Utility Code and

the Commission's regulations. *See Metropolitan Edison Co. v. Pa. PUC*, 437 A.2d 76, 80 (Pa. Cmwlth. 1981). That GRS and its lay witnesses or its offered experts had other ideas or preferences is of no legal consequence because SPLP's construction practices were a proper exercise of its managerial discretion. In sum, GRS has not met its burden of proof to show anything SPLP did was unsafe or unreasonable, and therefore the Complaint should be dismissed.

1. There was safe and reasonable ingress, egress, and emergency responder access to GRS apartments during construction.

"[N]othing about the construction work has created a new or different hazard than the hazards that already pre-existed at the property." SPLP St. No. 1-R, Noll Rebuttal at 15:21-16:2. At the GRS site, SPLP utilized sound walls which are temporary, engineered, tall barriers surrounding the pipeline construction site. While not a requirement for pipeline construction under any applicable law or regulation, these sound walls advanced safety at the site in two ways. Sound walls here both prevented unauthorized personnel from accessing the worksite while construction was active and also mitigated sound levels from the construction and the effect of sound on local residents in the apartment complex. SPLP St. No. 4-R, Fye Rebuttal at 14:3-10.

Contrary to GRS allegations, the sound walls did not create a safety issue or violation. SPLP ensured that placement of the sound walls would still allow for emergency responders to access all of the GRS buildings if and as necessary during an emergency. SPLP worked with the Township through multiple design iterations to ensure access, and moreover, the Township tested the ability for its emergency vehicles to access the property.[12] SPLP St. No. 3-R, Becker Rebuttal at 16:13-17. In fact, there were two emergency response events at GRS apartments during the

[12] All of these efforts were despite GRS's total lack of willingness to cooperate. GRS refused even the most simple of requests, such as requiring a few of its abundant parking spots to remain vacant for greater enhancements to emergency vehicle access. *See* SPLP St. No 3-R, Becker Rebuttal at 20:11-15; SPLP Exhibit DA-35.

period of SPLP's construction (one for an odor investigation and one for a fire investigation), and "emergency responders were able to access the property and respond to the emergency events within their normal response time and without any access issues into the apartment complex." SPLP St. No. 1-R, Noll Rebuttal at 16:4-13.

Emergency planning and response expert Mr. Gregory Noll[13] reviewed the placement and location of the sound walls at the GRS apartment and opined:

> to a reasonable degree of certainty that the temporary sound walls do not represent a fire hazard and not impact fire department access / egress from the five apartment buildings that make up the apartment complex at a level that is significantly different than what was present prior to their installation.

SPLP St. No. 1-R, Noll Rebuttal at 8:17-9:3.

Mr. Noll specifically disagreed with Complainant's concerns regarding emergency vehicle access. He conducted a 360-degree walk around of the construction site. Based on his on-site review of the location of the sound barrier and the available road space he "did not see any issues that would not allow the fire department to either effectively position their apparatus or access a building that did not previously exist before installation of the sound barrier." SPLP St. No. 1-R, Noll Rebuttal at 9:5-12. Mr. Noll and Mr. Becker testified that the sound walls were approximately 18 feet away from the buildings, "which allows sufficient space for fire department personnel to access and deploy ground ladders to the upper floors of the adjoining buildings." SPLP St. No. 1-R, Noll Rebuttal at 10:9-3.

In contrast, GRS Witness Mr. Culp is not an expert in emergency response and is not competent to offer expert opinion testimony on the issue of emergency response. *See*, *e.g.*,

[13] Noll is a renowned expert in his field with over fifty years of experience in emergency response training, including for pipelines. Noll is a recipient of numerous awards and honors in this discipline and a member of many codes and standards committees for emergency response. SPLP St. No. 1, Noll Direct at 1:1-5:23; SPLP Ex. No. GN-1.

Bergdoll v. York Water Co. supra (witness's expert testimony is limited to those issues within his or her specific expertise). Mr. Culp failed to raise any valid concerns regarding access to the property in the event of an emergency. SPLP St. No. 1-R, Noll Rebuttal at 10:14-11:2. Mr. Culp's concerns were invalid because: Middletown Township physically visited the site with two different fire vehicle aerial apparatus to evaluate both apparatus access and placement of ground ladders; the Township's Emergency Management Coordinator provided SPLP with recommendations to facilitate improved access and ladder placement during construction; and SPLP accepted and implemented all of the Township's recommendations. SPLP St. No. 1-R, Noll Rebuttal at 10:18-11:2.

Likewise, Mr. Culp's concerns regarding turnaround space for fire vehicles were incorrect. As Mr. Noll explained, Mr. Culp's allegation that there was a possibility that emergency vehicles will not maneuver as necessary in the time of an emergency does not reflect the reality of emergency response because once fire department vehicles access the property and are positioned, there is very low probability they would need to move or reposition an apparatus. SPLP St. No. 1-R, Noll Rebuttal at 11:7-17.

Further, Mr. Noll explained that because the pipeline construction project is temporary (i.e. the sound walls were only in existence during the period construction took place and removed once construction was complete), the International Fire Code (IFC) provisions GRS raised as potential concerns also do not apply. SPLP St. No. 1-R, Noll Rebuttal at 9:21-10:2, 11:19-12:6. Mr. Noll further opined that even if the IFC Appendix D provisions did apply, there was no reason for concern and Mr. Culp misconstrued or misunderstood the provisions he alleged SPLP violated. SPLP St. No. 1-R, Noll Rebuttal at 12:6-15.

GRS witness Mr. Davidson opined that it was unsafe not to keep a looped road configuration on the GRS property based on IFC Appendix D. But Appendix D is neither applicable due to this being temporary construction nor a static standard for the Commission to apply. Instead, Appendix D is a guide for local officials who have jurisdiction over this issue. IFC, Appendix D, User Note ("This Appendix, like Appendices B and C, is a tool for jurisdictions looking for guidance in establishing access requirements"). Moreover, Mr. Davidson, who has no experience in emergency response when an emergency occurs, did not visit the site or perform any of his own measurements or tests. His opinion ignores the findings of the Township Fire Code Official that were based on actual testing of the site with the Township's fire apparatus discussed above. SPLP St. No. 1-R, Noll Rebuttal at 10:18-11:2. The Township did not find a lack of compliance with the IFC. The Commission does not have jurisdiction to overturn that Township decision. SPLP appropriately worked with the Township to ensure safe and adequate access for emergency responders to the GRS apartments.

Based on his experience, Mr. Noll explained access issues for emergency response vehicles are not unique to sites like the GRS apartments and that the access routes available during SPLP's construction were consistent with and not materially different from the layout that existed prior to SPLP's construction. SPLP St. No. 1-R, Noll Rebuttal at 13:17-14:8. It is common for emergency responders to navigate tight roadways or access areas to respond to an emergency and responders are routinely familiar with those areas and locations within their community where access can be a challenge. SPLP St. No. 1-R, Noll Rebuttal at 14:10-17. There is no evidence that SPLP's construction created a circumstance where the Township could not adequately and safely access the GRS apartments with emergency responder apparatus.

2. SPLP utilized appropriate barricades and traffic control on the property to protect vehicles and pedestrians.

SPLP took reasonable and adequate steps to ensure that its construction site and vehicles did not cause safety issues to other vehicles or pedestrians.

SPLP had American Traffic Safety Services Association (ATSSA) certified flaggers and/or spotters on site anytime construction vehicles were present to direct traffic flow on the property and on Glen Riddle Road. SPLP St. No. 4, Fye Rebuttal at 8:18-20, 11:11-12. These personnel had radio communication with the construction vehicles on site so that drivers could be warned and made aware of other traffic and pedestrians in or near their path. All construction drivers are trained in defensive driving, including being alert for pedestrians and third-party vehicles. SPLP St. No. 4, Fye Rebuttal at 11:9-11.

Construction did not block any existing sidewalks on the property. SPLP secured the entire active construction work site and had jersey barricades at the three entry/exit points of the work site that were only moved for authorized personnel or vehicles to access the construction site.[14] SPLP St. No. 4, Fye Rebuttal at 4:4-5, 13:20-22, 14:3-7; SPLP St. No. 3-R, Becker Rebuttal at 17:13-14. SPLP communicated with the local school district regarding temporarily moving the school bus stop and paid for provision of additional crossing guards to ensure safety of school children at the apartment complex. Commission regulations do not require any of these steps, but SPLP took them anyway to make sure its construction did not create safety issues for others on the GRS property.[15]

[14] The only unauthorized persons who ever attempted or did come into the construction workspace were GRS management and employees. SPLP St. No. 4, Fye Rebuttal at 13:23-34.

[15] This is in stark contrast to other construction activity that took place on GRS property. SPLP Witness Fye observed serious lapses in basic safety procedures at the GRS property unrelated to SPLP construction. SPLP St. No. 4, Fye Rebuttal at 5:16-6:11. Specifically, he saw a GRS contractor in October/November 2020 doing grade work on the GRS property. The contractor had no traffic control, no signs, no flaggers.

Transportation engineering expert Mr. Chad Farabaugh evaluated Complainant's allegations of unsafe traffic and pedestrian patterns during construction. He reviewed the traffic patterns in place at the GRS property as they existed prior to construction, visited the construction work area within SPLP's right-of-way on the property during active construction, and reviewed aerial imagery depicting the workspace, sound wall arrangement, and traffic/pedestrian patterns during construction. He concluded to a reasonable degree of engineering certainty:

- "[SPLP has] taken reasonable, thorough steps to ensure that its employees and vendors have been educated on requirements for operating vehicles and equipment within the workspace and access routes within the GRS property"
- There are not "unreasonable or unsafe burdens on motorists"
- "I disagree with Mr. Culp's testimony that the construction workspace is unsafe for motorists and pedestrians"
- "I did not observe the unsafe conditions Mr. Culp says are present at the property."
- "PennDOT and Federal Highway Administration (FHWA) guidelines are aspirational, not a regulatory requirement applicable to the construction of the Mariner East 2/2X pipelines at this location."
- The temporary school bus location "is no different, and is not less safe just because of its proximity to a construction area or location at the driveway to the apartment complex" and is "safer for school bus pick up and drop off, in fact much safer than many other typical and acceptable school bus stop locations."

SPLP St. No. 5-R, Farabaugh Rebuttal at 4:11-13, 5:11-12, 8:19-20, 9:9-10, 9:15-17, 12:18-13:4.

In general, GRS's concerns regarding traffic and pedestrian safety were generalized and non-specific. SPLP St. No. 3-R, Becker Rebuttal at 9:2-12. Had GRS voiced specific concerns

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They left equipment and materials in the parking lot secured only by an orange cone, so any child or adult resident could have walked right up to the equipment and materials. There was no safety fencing. SPLP St. No. 4, Fye Rebuttal at 5:20-6:1. A cement truck could not find the GRS site and was stopped halfway on Glen Riddle Road and the road shoulder. He asked Mr. Fye if he had seen any cement trucks on sites near the area. Mr. Fye pointed to the GRS site and told him there was work being done there. The cement truck drove onto the GRS property and dumped his truck at the site. SPLP St. No. 4, Fye Rebuttal at 6:1-8. Compared to GRS's own contractors, SPLP's construction was undeniably safe and exceeded industry standards. SPLP St. No. 4, Fye Rebuttal at 8-11.

SPLP would have further studied the issue and provided a solution if possible. SPLP St. No. 3-R, Becker Rebuttal at 9:2-12.

GRS's concerns regarding pedestrian access for travel between the eastern side of the property and the western side of the property are at most a convenience issue. In contrast, protecting the safety of residents by keeping them out of the construction site was paramount to SPLP. SPLP St. No. 3-R, Becker Rebuttal at 17:13-14. As to convenience, there was never a pre-existing sidewalk or designated pedestrian pathway connecting the east and west side of the apartment complex. SPLP St. No. 4-R, Fye Rebuttal at 12:20-21. The construction area, which occupies most of the space on the property that separates the eastern and western sides needed to be inaccessible except to authorized construction personnel for the safety of GRS residents. SPLP St. No. 4, Fye Rebuttal at12:14-16. There was no way to safely construct an east-west pedestrian walkway through the middle of the construction site. SPLP St. No. 3-R, Becker Rebuttal at 17:10-11. GRS's allegations that construction closed sidewalks is false; there were no pre-existing sidewalks closed because of SPLP's construction and there were no sidewalks within the construction area. SPLP St. No. 4, Fye Rebuttal at 12:19-20. Regardless of the existence of SPLP's construction, pedestrians would either have to walk the parking lot or grassy areas with significant grade to get between the east and west sides of the complex. SPLP St. No. 4-R, Fye Rebuttal at 12:21-13:2; SPLP St. No 5-R, Farabaugh Rebuttal at 13:16-14:6.

Further, GRS's concerns alleging lack of available parking have no foundation in evidence. At no time was there ever a shortage of parking at the GRS property. SPLP presented aerial photos showing parking vacancies in the GRS parking lot during all periods of the day and week. SPLP St. No. 3-R, Becker Rebuttal at 14:17-16:5; SPLP Exhibit JB-2. At no time was there insufficient parking for the GRS residents because of SPLP's active construction.

Last, GRS's alleged safety concerns regarding temporary relocation of the school bus stops ignore that SPLP coordinated with the local school district, Rose Tree Media, to determine where to temporarily move the bus stop from the outset before construction began, confirmed crossing guards would be present, and paid for those crossing guards. SPLP St. No. 3-R, Becker Rebuttal at 16:20-23. The temporary school bus pickup stops were safe and in fact safer than many typical school bus stop locations, which are very often placed in active roadways or along the shoulder of a road. SPLP St. No 5-R, Farabaugh Rebuttal at 13:2-4.

3. Noise from construction did not present a safety issue.

At the GRS property SPLP installed sound walls designed for this type of construction to mitigate the noise stemming from construction machinery. SPLP St. No. 3-R, Becker Rebuttal at 11:15-18. Prior to construction, SPLP hired an acoustical engineering consultant from the sound wall manufacturer, Behrens and Associates Inc, to evaluate and model potential sound the construction would create and provided the assessment to GRS. SPLP St. No. 3-R, Becker Rebuttal at 11:18-22. Behrens verified the effectiveness of the sound walls on two separate occasions during construction. SPLP St. No. 3-R, Becker Rebuttal at 11:22-24.

At no time did noise levels present a safety issue. While GRS refused to allow SPLP to take sound readings outside of SPLP's easement, i.e., inside the apartment buildings (where all parties agreed would be the most accurate measurement of the potential effect of noise or residents), the sound levels inside the apartment buildings would necessarily be significantly less than the sound levels within the worksite given distance and the mitigating effect of the sound walls and apartment walls and windows. SPLP St. No. 8-R, Harrison Rebuttal at 6:13-14.

Even the sound levels within SPLP's easement, where sound levels would be loudest, did not exceed safe levels. Within the work area, where only authorized personnel were allowed to go, SPLP's contractor Michels performed sound level readings twice a day. Michels' safety

department monitored this data to decide whether workers within the site would be required to wear ear protection pursuant to OSHA regulations. See generally 29 C.F.R. Chapter XVII. At no time did the sound levels within the work site exceed the threshold for levels above which ear protection must be worn. SPLP St. No. 4-R, Fye Rebuttal at 9:15-24; SPLP Exhibit JF-1. SPLP also engaged the company that designed the sound walls to come back out to the worksite to check the effectiveness of the sound walls. The company noted some areas of potential improvement, and SPLP installed additional sound mitigation measures around the louder objects within the site and added walls that were higher in the back corner and top of the parking lot to further reduce sound levels from travelling outside the site. SPLP St. No. 4-R, Fye Rebuttal at 10:1-9.

Noise control engineering expert Seth Harrison, P.E. both reviewed the sound readings SPLP performed, those that GRS performed, and he performed his own readings on SPLP's easement. SPLP St. No. 8-R, Harrison Rebuttal at 6:5-9, 9:8-10:14. He found to a reasonable degree of professional certainty that based on his measurements, the 24-hour exposure level was below the OSHA standard for hearing damage. SPLP St. No. 8-R, Harrison Rebuttal at 6:19-22. Mr. Harrison also concluded the sound measurements GRS presented are inaccurate and unusable for the purpose of determining the safety of construction-related noise because: the readings were taken at gates or other openings in the sound barrier, which will yield higher levels than those within the apartment buildings; the loudest measurements were from the hydrovac truck, which was only at the site periodically throughout the day and for a few minutes at a time, yielding momentary measurements that are not indicative of the sound levels over the course of the workday; it was unclear whether the GRS had calibrated the measuring device it used prior to each day of measurements and no calibration data was presented; and the sound level meter was often placed on a window sill, car trunk, or other surface, which results in a rise in sound level due to

the addition of sound that reflects from the surface. SPLP St. No. 8-R, Harrison Rebuttal at 6:9-19, 7:1-11. Based on all of the data, Mr. Harrison concluded to a reasonable degree of engineering certainty that:

- the 24-hour noise exposure level experienced in the GRS apartments is not likely to exceed the OSHA 24-hour noise exposure threshold, SPLP St. No. 8-R, Harrison Rebuttal at 7:23-8:2;
- the sound levels were below all EPA standards and CDC guidelines, SPLP St. No. 8-R, Harrison Rebuttal at 12:15-22;
- the sound level readings GRS took inside the apartment buildings were all below OSHA, CDC, and NIOSH guidelines, N.T. 726:19-727:15; and
- sound levels experienced inside the apartments are not high enough to cause hearing damage, and are therefore not unsafe. SPLP St. No. 8-R, Harrison Rebuttal at 7:22-8:4.

SPLP's mitigation of the sound levels at the property was not a regulatory requirement, but SPLP went above and beyond to ensure its noise did not create a safety issue at the GRS apartments. As Mr. Harrison explained, noise mitigation like the sound walls SPLP installed here is not a requirement for the general public for construction projects unless a local ordinance establishes a specific quantitative sound level limit. SPLP St. No. 8-R, Harrison Rebuttal at 9:1-4. Middletown Township's noise ordinance does not contain a specific quantitative sound level limit, but instead prohibits construction related noise from 9:00 PM – 7:00 AM.[16] SPLP St. No. 8-R, Harrison Rebuttal at 5:4-16. Moreover, there is no applicable regulation specifying a safe or unsafe level of construction noise for the general public. The OSHA standards referenced above were used as guideposts. The OSHA standards only apply to protecting workers from the effects of occupational noise exposure. *See* 29 C.F.R. § 1910.95; GRS St. No. 3, Culp Direct at 5:13-15.

GRS's testimony fails to establish that SPLP's construction noise created an unsafe condition. While Mr. Wittman opined noise levels existed in which GRS residents and staff could suffer hearing loss, he provided no probability of this occurring and there is no evidence anyone

[16] There is no evidence that SPLP violated this ordinance.

suffered any harm to their hearing. Mr. Wittman admitted neither he nor GRS undertook the sampling needed to make this determination. N.T. 425:24-428:13. Mr. Wittman also references various other guidelines, which are not regulatory standards, particularly CDC and NIOSH guidance. However, there is no evidence that sound levels inside the apartments exceeded the CDC or NIOSH guidance levels. Mr. Harrison reviewed all of the GRS sound readings, and all that were taken inside apartments all showed readings below the CDC and NIOSH guidance. N.T. 726:19-727:15. Construction noise was adequately mitigated and did not violate the Public Utility Code, a Commission regulation, or Commission order.

4. SPLP's construction did not cause vibrations at levels that could impact the safety of the GRS Apartment structures.

Vibrations from SPLP's construction did not cause a structural safety issue to the GRS Apartments. As Mr. Becker testified, based on experience with pipeline construction at other locations, he is confident that vibrations from SPLP's construction are not strong enough to cause any major structural damage to the GRS Apartments that would implicate the safety of the structures or residents. SPLP St. No. 3-R, Becker Rebuttal at 13:19-22. Nonetheless in compliance with the easement between SPLP and GRS, SPLP had Vibra-tech perform a pre-construction foundation inspection to be compared to a post-construction inspection to determine whether any minor damage occurred. SPLP St. No. 3-R, Becker Rebuttal at 13:22-14:8.

SPLP also performed ongoing vibration monitoring on site. SPLP St. No. 3-R, Becker Rebuttal at 14:9-13. Mr. Harrison reviewed the vibration monitoring reports, SPLP Exhibits SH-6, SH-7, SH-8. SPLP St. No. 8-R, Harrison Rebuttal at 13:3-6. The peak level of vibration for each monitor is below the vibration threshold for building damage in each report. SPLP St. No. 8-R, Harrison Rebuttal at 13:6-7. Mr. Harrison opined to a reasonable degree of engineering certainty that consistent with the vibration monitoring reports, the monitored vibrations levels were

not strong enough to cause damage to the surrounding structures. SPLP St. No. 8-R, Harrison Rebuttal at 13:12-16.

GRS failed to provide substantial evidence that vibrations from SPLP's construction caused a safety issue to the GRS Apartments. The only GRS qualified expert that opined on the issue merely stated: "I have serious concerns that the GRS structures sustained serious damage resulting from construction vibrations." GRS St. No. 4, Whitman Surrebuttal at 20:9-10. This is vague, speculative, and is not competent evidence. *See e.g.*, *Vertis Group supra* (expert testimony that alleges mere possibility or concern lacks requisite degree of certainty to be accepted as competent evidence). GRS has not proved vibrations from SPLP's construction caused any safety issue with the GRS Apartment structures.

5. SPLP's construction did not create toxicity or environmental issues.

GRS alleged various issues, unsupported by any record evidence, related to materials used in construction or environmental permitting, none of which were or could be proven to be violations of the Public Utility Code, a Commission regulation, or Commission order. First and foremost, as noted above, these claims should be dismissed or denied as the Commission lacks jurisdiction over environmental permitting issues. And even if they were properly within the limited scope of the Commission's jurisdiction, GRS failed to demonstrate that any alleged issue was a violation or resulted in a significant safety concern.

a. *Truck and Equipment Leak Prevention and Containment*.

SPLP used safe and appropriate procedures to prevent and contain potential leaks during the construction operations – which is a requirement of and specifically governed by SPLP's DEP permits for the Mariner East pipeline project. SPLP's contractor Michels had strict procedures in place to contain any disturbance within the work site and prevent leaks, including inspections for potential leaks multiple times a day. SPLP St. No. 4-R, Fye Rebuttal at 14:17-15:12. Whenever

tanks were filled there was a spotter to watch for spillage or leaks. SPLP St. No. 4-R, Fye Rebuttal at 14:17-15:12. On November 27, 2020, a very small hydraulic fluid leak from a Michels hydrovac truck occurred. SPLP St. No. 4-R, Fye Rebuttal at 14:17-15:12. GRS exaggerated this minor event. Even though the leak was less than the threshold DEP requires to be reported, SPLP nevertheless provided DEP with a courtesy notification of this incident. Like all Michels trucks and equipment, the truck has a spill kit to quickly capture any leaks. The leak was instantaneously contained, cleaned up, and the leaking area of the vehicle was temporarily stabilized and removed from the site. SPLP St. No. 4-R, Fye Rebuttal at 14:17-15:12. This small leak was not a violation of anything, much less a violation of anything over which the Commission has jurisdiction.

b. *Use of Clean Fill.*

Contrary to GRS's wrong accusation, SPLP complied with environmental regulations regarding fill materials used on the property. SPLP only used clean fill that was certified in accordance with the procedures established by DEP's Bureau of Waste Management, which includes a third party environmental/engineering firm sampling the material, determining the fill is acceptable, and filling out the applicable DEP forms. SPLP St. No. 4-R, Fye Rebuttal at 15:21-16:9. An example of a DEP clean fill certification form and summary of testing and results is contained in SPLP Exhibit JF-2. SPLP St. No. 4-R, Fye Rebuttal at 15:21-16:9. GRS presented no evidence to the contrary, other than unfounded allegations, and did not dispute the clean fill certifications that were provided, nor could they have done so.

c. *Stormwater Management*.

Contrary to yet another of GRS's incorrect and exaggerated allegations, SPLP complied with both DEP and Township permits issued for stormwater management during the construction activity. There were environmental inspectors frequently on site to ensure all activities were in compliance with these permits. SPLP St. No. 4-R, Fye Rebuttal at 16:22-17:9. At one point during

construction, a storm drain on site was covered with geotextile fabric and rock to protect the inlet because it is within the work zone – a best management practice that was specifically required by the DEP and Township permits for this construction workspace. The fabric ensured sedimentation did not reach the stormwater system but that water could still pass through. Further, if any stormwater issues arise on site after construction, SPLP will address them to ensure the site is property restored to preexisting conditions. SPLP St. No. 4-R, Fye Rebuttal at 16:22-17:9. Regardless, no issues related to stormwater demonstrate any violation of any rule, regulation or order over which the Commission has jurisdiction, or otherwise demonstrates that SPLP's construction was unsafe.

d. *Use of Calciment.*

Contrary to GRS's next incorrect accusation, use of Calciment at the site was safe and reasonable. Dr. Brian Magee, an expert in the field of human toxicology and risk assessment, testified to a reasonable degree of scientific certainty that:

- Calciment used during SPLP's construction at the GRS apartments did not cause any harm to residents at the GRS Apartments. N.T. 137:14-22, 142:25-143:9.

- Calciment is a product that's used widely in the construction industry and by homeowners for a variety of purposes. N.T. 134:6-9, 135:5-15.

- Calciment was used for ten days on the work site at GRS to solidify the wet cuttings that came from drilling so the cuttings could be carried off site for disposal. N.T. 134:9-19.

- Calciment only presents human health risk if people are exposed to dust in their eyes or lungs for long periods of time. N.T. 136:24-137:12.
- Construction data from a particulate monitor on site monitored for respirable dust almost every day during construction and that data showed very low levels of particulates, levels that are typically found in air everywhere, including throughout Delaware County. N.T. 138:1-140:11.

- Settled Calciment dust is of large size and is not respirable, has very low risk and hazard, and did not implicate health concerns. N.T. 140:18-141:10.

- GRS videos allegedly showing Calciment dust in fact showed water vapor and to the extent any of the visible material was Calciment dust, it was too large to be respirable and thus a very low risk and hazard. N.T. 141:19-142:23.

GRS's speculative allegation that Calciment could have caused harm is unsupported and GRS failed to provide substantial evidence to support its claim. Neither GRS witness who testified on the topic is an expert in toxicology and thus any opinion they gave on Calciment is not substantial evidence. *See, e.g.*, *Bergdoll v. York Water Co. supra* (witness's expert testimony is limited to those issues within his or her specific expertise). Similarly, GRS lay witness Stephen Iacobucci's lay opinion is not substantial evidence and cannot be relied upon. Pa. R.E. 701(c) ("If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is . . . not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.").

GRS witness Mr. Henry, who is an industrial hygienist, not a toxicologist, only concluded that Calciment "could cause irritation [sic] the eyes, skin, respiratory system and gastrointestinal tract". GRS St. No. 5-SR, Henry Surrebuttal at 4:15-16. Aside from lacking expert qualifications on toxicology and thus should be disregarded,[17] his statement is speculative and uncertain and thus is not substantial evidence and should be rejected. *Vertis Group supra* (expert testimony that alleges mere possibility or concern lacks requisite degree of certainty to be accepted as competent evidence). Further, Mr. Henry admitted he did not have the information necessary to form a conclusion that Calciment as used here was harmful; he had no information on the amount of Calciment used and his only review of potential exposure was based on the GRS videos that Dr. Magee explained showed water vapor, not Calciment. N.T. 322:7-13, 322:20-323:3. Mr. Henry's

[17] *See, e.g.*, *Bergdoll v. York Water Co. supra* (witness's expert testimony is limited to those issues within his or her specific expertise).

attempt to offer expert testimony outside his area of expertise is not substantial evidence and may not be accepted. As the Commission does not have jurisdiction over any of these allegations regarding air quality or environmental materials used on site, these unsupported and unqualified allegations or conclusions should be dismissed. In any event, GRS has failed to show SPLP violated the Public Utility Code, Commission regulation, or Commission order.

6. SPLP appropriately located underground utilities and reasonably responded to a water line break.

SPLP took all reasonable and appropriate steps to locate underground utilities on the GRS property and when a water line broke (which SPLP did not strike), SPLP went above and beyond in response, providing bottled water for residents, ensuring the issue was repaired, and making sure residents had water that was safe to use and drink. SPLP St. No. 4-R, Fye Rebuttal at 6:13-23; SPLP St. No. 4-RJ, Fye Rejoinder at 3:2-16. Prior to the beginning of construction, SPLP utilized the One Call procedures, a four-way sweep to locate underground utilities, and a hydrovac truck to excavate and locate underground utilities. SPLP St. No. 4-R, Fye Rebuttal at 6:16-19. SPLP also asked GRS for records of utilities within the complex. SPLP St. No. 4-R, Fye Rebuttal at 6:13-14. GRS did not provide these records, so SPLP in addition to the methods above sought access to the GRS utility rooms so they could see any utilities coming into the buildings. SPLP St. No. 4-R, Fye Rebuttal at 6:12-18. In the process, SPLP found an exposed electrical line and repaired it. SPLP St. No. 4-R, Fye Rebuttal at 6:20-23. SPLP used flume pipe and straps to protect all utilities that were exposed in the construction workspace. N.T. 482:3-9.

At approximately midmorning on May 26, 2021, construction personnel saw water bubbling to the surface within SPLP's work zone and determined it was a water leak from a GRS water line. SPLP St. No. 4-RJ, Fye Rejoinder at 3:2-4. Within approximately five hours, SPLP had the line located, repaired, the local public water utility Aqua PA turned the main on again, and

SPLP had the GRS waterline ready to be tested and placed back into service. SPLP St. No. 4-RJ, Fye Rejoinder at 3:4-6. While the water was out-of-service, SPLP delivered bottled water and Port-a-Potties to the GRS property to minimize any inconvenience to residents. SPLP St. No. 4-RJ, Fye Rejoinder at 3:6-8. SPLP involved all stakeholders in the process and decision making, including GRS, DEP, Aqua, and the Township. SPLP St. No. 4-RJ, Fye Rejoinder at 3:8-9. SPLP believed GRS had given the Aqua-certified plumber who did the repair permission to turn the water back on after the repair was complete. SPLP St. No. 4-RJ, Fye Rejoinder at 3:9-11. When SPLP arrived the next morning to test the water, GRS refused to allow testing. SPLP St. No. 4-RJ, Fye Rejoinder at 3:13-14. Instead, GRS performed its own testing in a process that dragged on for more than two weeks, based on recommendations from a hydrogeologist who admitted he is not qualified to opine on the safety of drinking water and who recommended a host of unnecessary testing because he assumed with no evidence that there was a petroleum related release or spill associated with the water line break. SPLP St. No. 4-RJ, Fye Rejoinder at 3:14-15; GRS St. No. 8-SR, Burnes Surrebuttal at 3:10-12; N.T.393:21-25, 403:23-405:2, 410:5-24. Nonetheless, SPLP continued to provide bottled water for the residents during this entire time. SPLP St. No. 4-RJ, Fye Rejoinder at 3:15-16.

SPLP took all reasonable steps to protect underground utilities, and when a waterline broke, took all reasonable steps to ensure its repair while minimizing inconvenience to residents. SPLP did not violate the Public Utility Code, Commission regulation, or a Commission order.

VI. CONCLUSION

SPLP respectfully requests that Your Honor conclude that the complaint is moot and that GRS failed to meet its burden of proof and the Complaint should be dismissed and denied.

Respectfully submitted,

/s/ Thomas J. Sniscak

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Dated: September 24, 2021

APPENDIX A

SUNOCO PIPELINE L.P.'S
PROPOSED FINDINGS OF FACT

In accordance with Commission Rules 5.501 and 5.502, 52 Pa. Code §§ 5.501-5.502, and Your Honor's July 14, 2021 Briefing Order, Respondent Sunoco Pipeline L.P. ("SPLP") respectfully submits the following proposed findings of fact.

I. Background.

1. The Complainant in this case is Glen Riddle Station, L.P., ("GRS") a Pennsylvania limited partnership.

2. The Respondent in this case is Sunoco Pipeline L.P., ("SPLP") a Texas limited Partnership and certificated Pennsylvania public utility.

3. SPLP owns a pre-existing pipeline right-of-way through the Glen Riddle Station Apartments ("the Property") which has existed since approximately 1931, predating the original construction of the apartment buildings.

4. In 1971, the apartment buildings were constructed at the Property abutting against and straddling the pre-existing pipeline right-of-way through the property. SPLP St. No. 7-R, McGinn Rebuttal at 4:6-14; SPLP Exhibit JM-9 at page 1-2.

5. On June 20, 2016, GRS through Raymond Iacobucci voluntarily and for compensation gave SPLP a permanent easement for the construction of additional pipelines through the Property for compensation. SPLP St. No. 2-R, Amerikaner Rebuttal at 2:6-20.

6. In June 2020, SPLP filed a condemnation to acquire a temporary workspace easement and a temporary access road easement as it was unable to obtain a voluntary easement from GRS. SPLP St. No. 2-R at 2:21 – 4:6; *See* SPLP Exhibit DA-2, DA-3.

7. SPLP's preconstruction inspections at the Property began in October 2020, with construction of the ME2 and ME2X pipelines at the Property beginning in November 2020.

8. Construction at the property was completed prior to July 9, 2021 with site restoration occurring as of the hearings on July 13, 2021. N.T. 640:7-11; Davidson Cross Exhibit No. 1.

II. Mootness.

9. GRS raised two categories of allegations regarding SPLP's construction at Complainant's property: 1) SPLP's communications regarding ***active*** construction (see Section C of Complaint), which GRS alleged needed to be improved during construction; and, 2) SPLP's implementation of construction activities (see Section D of Complaint). The only relief sought by GRS was "that the Commission enter an order enjoining and restraining Respondent from engaging in ***any further work at the property*** until the submission to and approval by the Commission of a comprehensive plan and work schedule that address the safety issues…" Complaint at p. 28.

10. Counsel for GRS acknowledged and admitted on the record that the completion of construction would render the entire complaint and the construction safety issues raised therein "moot." N.T. 10:19-22.

11. No actual case or controversy remains for the Commission to adjudicate, nor is there any ability for GRS to obtain the only relief sought in the Complaint that the Commission review "a comprehensive plan and work schedule" related to SPLP's construction. Complaint at p. 28.

III. Procedural Failings

12. In response to the Complaint, SPLP timely filed an Answer and New Matter, which included a Notice to Plead. *See* SPLP Answer and New Matter, filed and served December 23, 2020. SPLP's New Matter properly incorporated by reference its denial and counterstatement of factual and legal allegations contained in its Answer. *Id*. at ¶ 135; *see* 52 Pa. Code § 1.33 (allowing for incorporation by reference). GRS failed to submit a Reply to New Matter and as such has admitted to it or has waived any challenge not raised when it could have but did not.

13. Stephen Iacobucci verified the Complaint, but was not authorized to do so. The Complainant is Glen Riddle Station L.P., which is a limited partnership. Stephen Iacobucci testified he is not an employee of Glen Riddle Station L.P. GRS St. No. 1, Stephen Iacobucci Direct at 1:8-10. The company Stephen does own is not a general partner in Glen Riddle Station L.P. N.T. 267:24-269:5. Instead, the sole general partner of Glen Riddle Station L.P. is RIC General Partner, LLC. Exhibit GRS-3 at 7. The person that can act on behalf of Glen Riddle Station L.P. through RIC General Partner LLC is its sole member, Raymond Iacobucci. *Id.* He did not verify the complaint and consequently it is unsworn and defective at the outset.

IV. Abuse of Commission Processes

14. Throughout the communications between SPLP and GRS, GRS sought significant monetary payments regarding unproven businesses losses and the value of the temporary easement taking in exchange for withdrawing or settling the complaint before the Commission. Those requests attempted to improperly leverage the Commission's processes to seek settlement on matters outside the Commission's jurisdiction. SPLP St. No. 2-R, Amerikaner Rebuttal at 19:8-16.

15. The record shows that GRS explicitly linked the monetary settlement with the litigation of this proceeding, including threats of filing a Petition for Interim Emergency Relief to leverage settlement, which is a misuse of the Commission's limited resources. SPLP St. No. 2-R, Amerikaner Rebuttal at 17:4 – 19:5; Exhibits DA-30, 31, 32, 33, 34, 35, 36.

V. Communications

16. GRS and SPLP engaged in extraordinary extensive communications regarding SPLP's construction at the Property, even while GRS's demands went well-beyond the demands of any other property owner across the entire pipeline project statewide. SPLP St. No. 7-RJ, McGinn Rejoinder at 1:14-22. *See also* SPLP St. No. 2-RJ, Amerikaner Rejoinder at 8:3-5.

17. SPLP's public awareness plan does not apply to communications regarding new pipeline construction, and the record shows that SPLP complied with its public awareness obligations for its operation pipelines under 49 C.F.R. § 195.440 and API RP 1162. SPLP St. No. 7-R, McGinn Rebuttal at 6:1-8, 7:9-21; SPLP Exhibit JM-3.

18. SPLP extensively communicated with GRS prior to construction, beginning in 2016 and escalating as of April 2020, leading to near daily communications between SPLP and GRS in October and November 2020. SPLP St. No. 2-R, Amerikaner Rebuttal at 2:21 – 15:19; SPLP Exhibit DA-1 – DA-24; SPLP St. No. 2-RJ, Amerikaner Rejoinder at 6:14-7:2; SPLP St. No. 4-R, Fye Rebuttal at 4:10-9:9

19. During active construction at the Property, SPLP continued to extensively, patiently, and openly communicate with GRS to address GRS's alleged safety concerns and other matters involved with active construction despite GRS' exaggerated and/or incorrect allegations and pattern and practice of the same in almost daily exchanges of emails or calls before and during construction. SPLP St. No. 2-R, Amerikaner Rebuttal at 16:5 - 17:3; SPLP Exhibit DA 25-28.

20. SPLP worked closely with Middletown Township emergency response officials and Rose Tree Media School District to resolve ingress and egress concerns and temporary bus stop locations. SPLP St. No. 7-R, McGinn Rebuttal at 12:5-11.

21. SPLP reasonably and sensibly communicated with GRS residents by providing ongoing construction updates, rent relief, and answers to resident's questions and concerns. SPLP St. No. 7-R, McGinn Rebuttal at 11:6 – 12:23; SPLP Exhibit No. JM-5; SPLP St. No. 7-RJ, McGinn Rejoinder at 2:16-18; N.T. 243:2-9.

22. SPLP offered rent relief to all GRS residents, and in fact provided rent relief to just under 100 GRS residents during construction from January 2021 forward. SPLP St. No. 7-R, McGinn Rebuttal at 11:10-13; SPLP Exhibits JM-5, JM-6; N.T. 243:2-9.

23. SPLP hosted a virtual town hall on February 23, 2021, to answer questions from residents regarding construction, including signage at the site. SPLP St. No. 7-R, McGinn Rebuttal at 12:15-23; SPLP St. No. 3-R, Becker Rebuttal at 10:9 – 11:9; SPLP St. No. 4-R, Fye Rebuttal at 4:19-22.

24. In May 2021, when a waterline broke within the pipeline right-of-way, SPLP responded swiftly to rectify the break and communicated extensively with GRS in-person and through requests for follow-up testing and provided GRS residents with bottled water for weeks until GRS management took an extended and unnecessary time period to complete supplemental water quality testing, even though Aqua PA indicated the water was potable. SPLP St. No. 2-RJ, Amerikaner Rejoinder at 8:11-9:14; SPLP St. No. 4-RJ, Fye Rejoinder at 2:7 – 6:8; N.T. 171-176.

VI. Construction

25. At the GRS site, SPLP utilized sound walls which are often used in the industry as temporary, engineered, tall barriers surrounding the pipeline construction site. While not a

requirement for pipeline construction under any applicable law or regulation, these sound walls advanced safety at the site in two ways. First, the sound walls at the Property prevented unauthorized personnel from accessing the worksite while construction was active. Second, the sound walls mitigated sound levels from the construction and the effect of sound on local residents in the apartment complex. SPLP St. No. 4-R, Fye Rebuttal at 14:3-10.

26. SPLP, after consultation and approval by Middletown Township, ensured that placement of the sound walls would still allow for emergency responders to access all of the GRS buildings if and as necessary during an emergency. SPLP worked with the Township through multiple design iterations to ensure access, and moreover, the Township tested the ability for its emergency vehicles to access the Property. SPLP St. No. 3-R, Becker Rebuttal at 16:13-17.

27. There were two emergency response events at GRS apartments during the period of SPLP's construction (one for an odor investigation and one for a fire investigation), and the record unequivocally shows "emergency responders were able to access the property and respond to the emergency events within their normal response time and without any access issues into the apartment complex." SPLP St. No. 1-R, Noll Rebuttal at 16:4-13. GRS offered no evidence that emergency responders were in fact ever unable to access the Property during construction for any specific event.

28. SPLP witness Mr. Gregory Noll, a nationally renowned expert in emergency response and planning, opined as an expert in his field to a reasonable degree of certainty that the temporary sound walls did not represent a fire hazard and did not impact fire department access / egress from the five apartment buildings that make up the apartment complex at a level that is significantly different than what was present prior to their installation. SPLP St. No. 1-R, Noll Rebuttal at 8:17-9:3.

29. Mr. Noll conducted a 360-degree walk around of the construction site. Based on his on-site review of the location of the sound barrier and the available road space he "did not see any issues that would not allow the fire department to either effectively position their apparatus or access a building that did not previously exist before installation of the sound barrier." SPLP St. No. 1-R, Noll Rebuttal at 9:5-12.

30. The sound walls were approximately 18 feet away from the buildings, "which allows sufficient space for fire department personnel to access and deploy ground ladders to the upper floors of the adjoining buildings," as SPLP Expert Noll concluded. SPLP St. No. 1-R, Noll Rebuttal at 10:9-3.

31. GRS witness Mr. Culp, who is not an expert in emergency planning or response, failed to raise any valid concerns regarding access to the Property in the event of an emergency. SPLP St. No. 1-R, Noll Rebuttal at 10:14-11:2.

32. The Township's Emergency Management Coordinator provided SPLP with recommendations to facilitate improved access and ladder placement during construction; and SPLP accepted and implemented all of the Township's recommendations. SPLP St. No. 1-R, Noll Rebuttal at 10:18-11:2.

33. GRS' Mr. Culp's allegation that there was a possibility that emergency vehicles would not maneuver as necessary in the time of an emergency did not reflect the reality of emergency response because once fire department vehicles access the Property and are positioned, there is very low probability they would need to move or reposition apparatus. SPLP St. No. 1-R, Noll Rebuttal at 11:7-17.

34. GRS witness Mr. Davidson, who admittedly has no experience in emergency response when an emergency occurs, did not visit the site or perform any of his own measurements

or tests. N.T. 331:5-8, 342:6-18. His opinion ignores the findings of the Township Fire Code Official that there was no violation of compliance with the International Fire Code and that were based on actual testing of the site with the Township's fire apparatus. SPLP St. No. 1-R, Noll Rebuttal at 10:18-11:2.

35. Access routes available during SPLP's construction were consistent with and not materially different from the layout that existed prior to SPLP's construction. SPLP St. No. 1-R, Noll Rebuttal at 13:17-14:8.

36. SPLP had American Traffic Safety Services Association (ATSSA) certified flaggers and/or spotters on site anytime construction vehicles were present to direct traffic flow on the Property and on Glen Riddle Road. SPLP St. No. 4, Fye Rebuttal at 8:18-20, 11:11-12. These personnel had radio communication with the construction vehicles on site so that drivers could be warned and made aware of other traffic and pedestrians in or near their path. All construction drivers are trained in defensive driving, including being alert for pedestrians and third-party vehicles. SPLP St. No. 4, Fye Rebuttal at 11:9-11.

37. Construction did not block any existing sidewalks on the Property. SPLP secured the entire active construction work site and had jersey barricades at the three entry/exit points of the work site that were only moved for authorized personnel or vehicles to access the construction site. SPLP St. No. 4, Fye Rebuttal at 4:4-5, 13:20-22, 14:3-7.; SPLP St. No. 3-R, Becker Rebuttal at 17:13-14.

38. Transportation engineering expert Mr. Chad Farabaugh evaluated Complainant's allegations of unsafe traffic and pedestrian patterns during construction. He reviewed the traffic patterns in place at the GRS property as they existed prior to construction, visited the construction work area within SPLP's right-of-way on the Property during active construction, and reviewed

aerial imagery depicting the workspace, sound wall arrangement, and traffic/pedestrian patterns during construction. He concluded to a reasonable degree of engineering certainty:

- "[SPLP has] taken reasonable, thorough steps to ensure that its employees and vendors have been educated on requirements for operating vehicles and equipment within the workspace and access routes within the GRS property"
- There are not "unreasonable or unsafe burdens on motorists"
- The temporary school bus location "is no different, and is not less safe just because of its proximity to a construction area or location at the driveway to the apartment complex" and is "safer for school bus pick up and drop off, in fact much safer than many other typical and acceptable school bus stop locations."

SPLP St. No. 5-R, Farabaugh Rebuttal at 4:11-13, 5:11-12, 8:19-20, 9:9-10, 9:15-17, 12:18-13:4.

39. Protecting the safety of residents by keeping them out of the construction site was paramount to SPLP. The construction area, which occupied most of the space on the Property that separates the eastern and western sides, was secured except to authorized construction personnel for the safety of GRS residents. GRS's concerns regarding pedestrian access for travel between the eastern side of the Property and the western side of the Property were not a safety concern, and were at most a convenience issue GRS raised on behalf of its residents but GRS offered no resident testimony on this point. SPLP St. No. 3-R, Becker Rebuttal at 17:13-14; SPLP St. No. 4, Fye Rebuttal at12:14-16.

40. No pre-existing sidewalk was closed due to SPLP's construction, there was never a pre-existing sidewalk or designated pedestrian pathway connecting the east and west sides of the apartment complex, and there was no way to safely construct an east-west pedestrian walkway through the middle of the construction site. SPLP St. No. 4-R, Fye Rebuttal at 12:19-21; SPLP St. No. 3-R, Becker Rebuttal at 17:10-11.

41. At no time was there ever a shortage of parking at the GRS property. SPLP presented aerial photos showing parking vacancies in the GRS parking lot during all periods of the day and week. SPLP St. No. 3-R, Becker Rebuttal at 14:17-16:5; SPLP Exhibit JB-2.

42. SPLP coordinated with the local school district, Rose Tree Media, to determine where to temporarily move the bus stop from the outset before construction began, confirmed crossing guards would be present, and paid for those crossing guards. SPLP St. No. 3-R, Becker Rebuttal at 16:20-23. The temporary school bus pickup stops were safe and in fact safer than many typical school bus stop locations, which are very often placed in active roadways or along the shoulder of a road. SPLP St. No 5-R, Farabaugh Rebuttal at 13:2-4.

43. At the GRS property SPLP installed sound walls designed for this type of construction to mitigate the noise stemming from construction machinery. SPLP St. No. 3-R, Becker Rebuttal at 11:15-18. Prior to construction, SPLP hired an acoustical engineering consultant from the sound wall manufacturer, Behrens and Associates Inc, to evaluate and model potential sound the construction would create and provided the assessment to GRS. SPLP St. No. 3-R, Becker Rebuttal at 11:18-22. Behrens verified the effectiveness of the sound walls on two separate occasions during construction. SPLP St. No. 3-R, Becker Rebuttal at 11:22-24.

44. GRS refused to allow SPLP to take sound readings outside of SPLP's easement, i.e. inside the apartment buildings. The sound levels inside the apartment buildings would necessarily be significantly less than the sound levels within the worksite given distance and the mitigating effect of the sound walls and apartment walls and windows. SPLP St. No. 8-R, Harrison Rebuttal at 6:13-14.

45. Sound levels within SPLP's easement, where sound levels would be loudest, did not exceed safe levels. Michels performed sound level readings twice a day. At no time did the sound levels within the work site exceed the threshold for levels above which ear protection must be worn. SPLP St. No. 4-R, Fye Rebuttal at 9:15-24; SPLP Exhibit JF-1.

46. Noise control engineering expert Seth Harrison, P.E. both reviewed the sound readings SPLP performed, those that GRS performed, and he performed his own readings on SPLP's easement. SPLP St. No. 8-R, Harrison Rebuttal at 6:5-9, 9:8-10:14. He found to a reasonable degree of professional certainty that based on his measurements, the 24-hour exposure level was below the OSHA standard for hearing damage. SPLP St. No. 8-R, Harrison Rebuttal at 6:19-22.

47. Mr. Harrison concluded to a reasonable degree of engineering certainty that:

- the 24-hour noise exposure level experienced in the GRS apartments was not likely to exceed the OSHA 24-hour noise exposure threshold SPLP St. No. 8-R, Harrison Rebuttal at 7:23-8:2;
- the sound levels were below all EPA standards and CDC guidelines, SPLP St. No. 8-R, Harrison Rebuttal at 12:15-22;
- the sound level readings GRS took inside the apartment buildings were all below CDC and NIOSH guidelines, N.T. 726:19-727:15; and
- sound levels experienced inside the apartments were not high enough to cause hearing damage, and therefore were not unsafe. SPLP St. No. 8-R, Harrison Rebuttal at 7:22-8:4.

48. While GRS witness Mr. Wittman opined noise levels existed in which GRS residents and staff could suffer hearing loss, he provided no probability of this occurring and there is no evidence anyone suffered any harm to their hearing. Mr. Wittman admitted neither he nor GRS undertook the sampling needed to make this determination. N.T. 425:24-428:13.

49. Vibrations from SPLP's construction did not cause a structural safety issue to the GRS Apartments. SPLP had Vibra-tech perform a pre-construction foundation inspection to be compared to a post-construction inspection to determine whether any minor damage occurred. SPLP St. No. 3-R, Becker Rebuttal at 13:22-14:8. SPLP also performed ongoing vibration monitoring on site. SPLP St. No. 3-R, Becker Rebuttal at 14:9-13. Mr. Harrison reviewed the vibration monitoring reports, SPLP Exhibits SH-6, SH-7, SH-8. SPLP St. No. 8-R, Harrison

Rebuttal at 13:3-6. The peak level of vibration for each monitor was below the vibration threshold for building damage in each report. SPLP St. No. 8-R, Harrison Rebuttal at 13:6-7. Mr. Harrison opined to a reasonable degree of engineering certainty that consistent with the vibration monitoring reports, the monitored vibrations levels were not strong enough to cause damage to the surrounding structures. SPLP St. No. 8-R, Harrison Rebuttal at 13:12-16.

50. SPLP used safe and appropriate procedures to prevent and contain potential leaks from vehicles and construction equipment during construction operations – which is a requirement of and specifically governed by SPLP's DEP permits for the Mariner East pipeline project. SPLP St. No. 4-R, Fye Rebuttal at 14:17-15:12.

51. SPLP only used clean fill that was certified in accordance with the procedures established by DEP's Bureau of Waste Management, which includes a third party environmental/engineering firm sampling the material, determining the fill is acceptable, and filling out the applicable DEP forms. SPLP St. No. 4-R, Fye Rebuttal at 15:21-16:9. Examples of the clean fill certifications for materials at the Property were admitted as evidence, demonstrating that SPLP complied with the appliable clean fill requirements. *See* SPLP Exhibit JF-2.

52. SPLP complied with both DEP and Township permits issued for stormwater management during the construction activity. There were environmental inspectors frequently on site to ensure all activities were in compliance with these permits. SPLP St. No. 4-R, Fye Rebuttal at 16:22-17:9.

53. Use of Calciment at the site was safe and reasonable. Dr. Brian Magee, an expert in the field of human toxicology and risk assessment, testified to a reasonable degree of scientific certainty that:

- Calciment used during SPLP's construction at the GRS apartments did not cause any harm to residents at the GRS Apartments. N.T. 137:14-22, 142:25-143:9.

- Calciment is a product that's used widely in the construction industry and by homeowners for a variety of purposes. N.T. 134:6-9, 135:5-15.

- Calciment was used for ten days on the work site at GRS to solidify the wet cuttings that came from drilling so the cuttings could be carried off site for disposal. N.T. 134:9-19.

- Calciment only presents human health risk if people are exposed to dust in their eyes or lungs for long periods of time. N.T. 136:24-137:12.

- Construction data from a particulate monitor on site monitored for respirable dust almost every day during construction and that data showed very low levels of particulates, levels that are typically found in air everywhere, including throughout Delaware County. N.T. 138:1-140:11.

- Settled Calciment dust is of large size and is not respirable, has very low risk and hazard, and did not implicate health concerns. N.T. 140:18-141:10.

- GRS videos allegedly showing Calciment dust in fact showed water vapor and to the extent any of the visible material was Calciment dust, it was too large to be respirable and thus a very low risk and hazard. N.T. 141:19-142:23.

54. GRS witness Mr. Henry admitted he did not have the information necessary to form a conclusion that Calciment as used here was harmful; he had no information on the amount of Calciment used and his only review of potential exposure was based on the GRS videos that Dr. Magee explained showed water vapor, not Calciment. N.T. 322:7-13, 322:20-323:3.

55. SPLP took all reasonable and appropriate steps to locate underground utilities on the GRS property and when a water line broke (which SPLP did not strike), SPLP went above and beyond in response, providing bottled water for residents, ensuring the issue was repaired, and making sure residents had water that was safe to use and drink. SPLP St. No. 4-R, Fye Rebuttal at 6:13-23; SPLP St. No. 4-RJ, Fye Rejoinder at 3:2-16.

Respectfully submitted,

/s/ Thomas J. Sniscak

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Dated: September 24, 2021

APPENDIX B

SUNOCO PIPELINE L.P.'S
PROPOSED CONCLUSIONS OF LAW

In accordance with Commission Rules 5.501 and 5.502, 52 Pa. Code §§ 5.501-5.502, and Your Honor's July 14, 2021 Briefing Order, Respondent Sunoco Pipeline L.P. ("SPLP") respectfully submits the following proposed conclusions of law:

I. Burden of Proof

1. As the proponent of a rule or order, Glen Riddle Station L.P. ("GRS") has the burden under Section 332(a) of the Public Utility Code (Code), 66 Pa. C.S. § 332(a), to prove the elements of their claims by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC,* 578 A.2d 600 (Pa. Cmwlth. 1990), *appeal. denied*, 602 A.2d 863 (Pa. 1992).

2. To establish a fact or claim by a preponderance of the evidence means to offer the greater weight of the evidence, or evidence that outweighs, or is more convincing than, the probative value of the evidence presented by the other party. *Se-Ling Hosiery v. Margulies,* 70 A.2d 854 (Pa. 1950).

3. To satisfy their burden of proof, GRS must show that SPLP is responsible or accountable for the problems alleged in the Complaint. *Patterson v. Bell Telephone Co. of Pennsylvania,* 72 Pa. P.U.C. 196 (1990). "The offense must be a violation of the Public Utility Code (Code), a Commission Regulation or Order or a violation of a Commission-approved tariff." *Baker v. SPLP*, Docket No. C-2018-3004294, Opinion and Order at 6 (Order entered Sept. 23, 2020) (citing 66 Pa. C.S. § 701) ("*Baker*").

4. The Commission's adjudications must be supported by "substantial evidence" in the record. 2 Pa. C.S. § 704; *Lansberry*, 578 A.2d at 602. "Substantial evidence" is such relevant

evidence that a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Co. of New York v. National Labor Relations Board*, 305 U.S. 197, 229 (1938).

5. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980) (*Norfolk*); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1961); *Murphy v. Comm. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

6. A legal decision must be based on real and credible evidence that is found in the record of the proceeding. *Pocono Water Co. v. Pa. PUC*, 630 A.2d 971, 973-74 (Pa. Cmwlth. 1993); *Duquesne Light Co. v. Pa. PUC*, 507 A.2d 433, 437 (Pa. Cmwlth. 1986).

7. Upon presentation of evidence sufficient to initially establish a *prima facie* case, the burden to rebut the complainant's evidence shifts to the respondent. If the evidence that the respondent presented is of co-equal weight, then the complainants have not satisfied their burden of proof. Complainants now must provide some additional evidence to rebut that of the respondent. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 461 A.2d 1234 (Pa. 1983).

8. While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on Complainants as the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

II. Legal Standard for Pipeline Safety

9. The Commission regulations at 52 Pa. Code § 59.33, promulgated pursuant to 66 Pa. C.S. § 1501, require that hazardous liquid utilities shall have minimum safety standards

consistent with the pipeline safety laws at 49 U.S.C. §§ 60101-60503 and the regulations at 49 C.F.R. Part 195. The Commission's regulations adopt federal safety standards for hazardous liquid facilities.

10. Under Section 1501 of the Code, "[e]very public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities . . . ." 66 Pa. C.S. § 1501.

11. To find that pipeline construction is unsafe requires proof that it violates applicable regulatory standards that address pipeline safety. *See, e.g.*, *Info Connections, Inc. v. Pa PUC*, 630 A.2d 498, 502 (Pa. Cmwlth. 1993) (where no regulation imposes duty to act, failure to take such action is not a violation) (citing *Commonwealth v. Stein*, 546 A.2d 36 (1988), *cert. denied*, 490 U.S. 1046, 109 S.Ct. 1953, 104 L.Ed.2d 422 (1989) (administrative rules and regulations must be written, must describe with particularity what is forbidden, and must create standards that eliminate vagueness and uncertainty)); *Smalls, Sr. v. UGI Penn Natural Gas, Inc.*, No. C-2014-2421019, 2014 WL 6807073 (Initial Decision entered Oct. 24, 2014) (Ember S. Jandebeur, J.) (Final by Act 294, Dec. 30, 2014); *Bennett v. UGI Central Penn Gas, Inc.*, Docket No. F-2013-2396611, 2014 WL 1747713 (Initial Decision entered Apr. 10, 2014) (David A. Salapa, J.) (Final by Act 294, May 29, 2014).

12. Here, to find that the construction of the Mariner East 2/2X pipelines at the GRS property is unsafe, GRS must prove by a preponderance of the evidence that SPLP violated an applicable regulatory standard in 49 C.F.R. Part 195, which is the set of federal regulations that govern hazardous liquid pipelines.

13. "Complainant's assertions, regardless of how honest or strong, cannot form the basis of a finding . . . since assertions, personal opinions or perceptions do not constitute factual evidence." *Herring v. Metropolitan Edison*, Docket No. F-2016-2540875, 2017 WL 3872590 at 3

(Order entered Aug. 31, 2017) (citing *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987)).

14. The Commonwealth Documents Law and the Independent Regulatory Review Act require that regulatory changes occur through notice and comment procedures with accompanying governmental review, not as the result of administrative adjudications. *Baker* at 26 (citing *Advance Notice of Proposed Rulemaking Regarding Hazardous Liquid Public Utility Safety Standards at 52 Pa. Code Chapter 59*, Docket No. L-2019-3010267 (Order entered Jun. 13, 2019)).

III. Standards for Injunctive Relief

15. "[I]n order for the PUC to sustain a complaint brought under this section [66 Pa. C.S. § 1501], the utility must be in violation of its duty under this section. Without such a violation by the utility, the PUC does not have the authority, when acting on a customer's complaint, to require *any* action by the utility." *West Penn Power Co. v. Pa PUC, 478 A.2d 947, 949 (Pa. Cmwlth. 1984) (emphasis added); see also Township of Spring. v. Pennsylvania-American Water Co.,* Dkt. Nos. C-20054919 et al., 2007 WL 2198196, at *6 (Order entered July 27, 2007) ("If we were to order PAWC to conduct testing of the property in the Stonegate community, we would have to base that order on credible evidence that some act or omission by PAWC in violation of the Code or our Regulations would be remedied by the testing.") (citing *West Penn*); *Baker* at 6.

16. "Injunctive relief must be narrowly tailored to abate the harm complained of." *Pye v. Com. Ins. Dep't*, 372 A.2d 33, 35 (Pa. Cmwlth. 1977) ("An injunction is an extraordinary remedy to be granted only with extreme caution"); *Woodward Twp. v. Zerbe*, 6 A.3d 651, 658 (Pa. Cmwlth. 2010) ("Even where the essential prerequisites of an injunction are satisfied, the court must narrowly tailor its remedy to abate the injury"); *West Goshen Township v. Sunoco Pipeline L.P.*, Docket No. C-2017-2589346 at 17-18 (Order entered Mar. 15, 2018); *West Goshen Township v.*

Sunoco Pipeline L.P., Docket No C-2017-2589346, Recommended Decision at 42 (Barnes, J.) (adopted in full by Commission by Order dated Oct. 1, 2018). *See also Baker* at 26.

17. An injunction that commands the performance of an affirmative act, a "mandatory injunction," is the rarest form of injunctive relief and is often described as an extreme remedy. *Woodward Twp. v. Zerbe,* 6 A.3d 651 (Pa. Cmwlth. 2010) (citing *Big Bass Lake Community Association v. Warren*, 950 A.2d 1137, 1144 (Pa. Cmwlth. 2008)). The case for a mandatory injunction must be made by a very strong showing, one stronger than that required for a restraining-type injunction. *Id.* at 1145.

IV. Evidentiary Standards for Expert Opinions and Lay Witness Testimony

18. Pennsylvania Rule of Evidence 702 establishes the standard for the admission of expert testimony, as follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;
>
> (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and
>
> (c) the expert's methodology is generally accepted in the relevant field.

Pa. R.E. 702

19. The Pennsylvania Rules of Evidence, including Rule 702, are applied by the Commission in its administrative hearings and proceedings. *See e.g. Gibson v. WCAB*, 861 A.2d 938, 947 (Pa. 2004) (holding, in part, that notwithstanding the statutory maxim of 2 Pa. C.S. § 505, which mandates a relaxation of the strict rules of evidence in agency hearings and proceedings, the "evidentiary Rules 602, 701, and 702 are applicable to agency proceedings in general").

20. To the extent that a witness is found to possess specialized knowledge to qualify as an expert on certain subject matters, the witness's expert testimony is limited to those issues within his or her specific expertise. *See Bergdoll v. York Water Co.*, No. 2169 C.D. 2006, 2008 WL 9403180, at *8–9 (Pa. Cmwlth. 2008) (unreported); *see also, Application of Shenango Valley Water Co.*, No. A-212750F0002, 1994 WL 932364, at *19 (Jan. 25, 1994).

21. An expert opinion exhibiting equivocation and speculation based on mere possibilities is not competent evidence. *Vertis Group, Inc. v. Duquesne Light Co.*, 2003 WL 1605744, Docket No. C-00003643 (Order entered Feb. 24, 2003), *aff'd,* 840 A.2d 390 (Pa. Cmwlth. 2003), *appeal denied,* 859 A.2d 770 (Pa. 2004).

22. Lay opinions on matters requiring scientific, technical or specialized knowledge are not competent evidence to support a finding of fact. Pa. R.E. 701(c) ("If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is . . . not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.").

23. A lay witness is not qualified to testify or offer exhibits related to any issues outside of direct personal knowledge. *Lamagna v. Pa. Elec. Co*., Docket No. C-2017-2608014, 2018 WL 6124353, at *20 (Oct. 30, 2018) (final by Act 294, Dec. 21, 2018) (lay witness was "not qualified to testify or offer exhibits related to health and safety issues outside of her direct personal knowledge").

24. To the extent that a lay witness offers references to reports or conclusions of others, these may not be considered as substantial evidence because a lay witness cannot rely on such information in reaching a conclusion; rather, that is the role of a qualified expert witness. Compare Pa. R.E. 701 with Pa. R.E. 703.

25. While a factfinder may weigh the opinion testimony of a qualified expert, any such testimony of an unqualified lay witness must be excluded and should not be given any evidentiary weight. *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004); *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 528 (Pa. 1995).

26. Lay witness testimony on technical issues such as health, safety, and the probability of structural failure should be rejected as these necessarily "require expert evidence to be persuasive enough to support the proposing party's burden of proof." *Application of PPL Elec. Utilities Corp.*, Docket No. A-2009-2082652, 2010 WL 637063, at *11 (Feb. 12, 2010) (emphasis added); *Pickford v. Pub. Util. Comm'n*, 4 A.3d 707, 715 (Pa. Cmwlth. 2010); *Lamagna v. Pa. Elec. Co.*, C-2017-2608014, 2018 WL 6124353, at *20 (Oct. 30, 2018).

27. If a party is relying upon circumstantial evidence to reasonably infer a factual conclusion, "'the evidence must be adequate to establish the conclusion sought and must so preponderate in favor of that conclusion so as to outweigh . . . any other evidence and reasonable inferences therefrom which are inconsistent therewith.'" *Monaci v. State Horse Racing Com'n*, 717 A.2d 612, 618 (Pa. Cmwlth. 1998), 717 A.2d at 618 (quoting *Flagiello v. Crilly*, 187 A.2d 289, 290 (Pa. 1963)).

28. Circumstantial evidence has been defined as "evidence of one fact, or of a set of facts, from which the existence of the fact to be determined may reasonably be inferred," W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 39, at 242 (5th ed.1984), in contrast to direct evidence where there is direct eyewitness testimony of the ultimate fact to be determined." *Monaci*, 717 A.2d at 618.

V. Mootness

29. "It is well established that an actual case or controversy must exist at all stages of the judicial or administrative process. If not, the case is moot and will not be decided…" *Util.*

Workers Union of Am., Loc. 69, AFL-CIO v. Pub. Util. Commn., 859 A.2d 847, 849–50 (Pa. Cmmw. 2004); citing *Musheno v. Dep't of Pub. Welfare,* 829 A.2d 1228 (Pa.Cmwlth.2003).

30. Where only injunctive relief is sought, the fact that the event sought to be enjoined has already been completed creates an intervening change in the factual posture of the case rendering the matter moot. *See Allen v. Birmingham Twp.*, 430 Pa. 595, 244 A.2d 661 (1968) (appeal from denial of injunction to prevent excavation of land held moot where excavation had already been completed); *Strassburger v. Philadelphia Record Co.*, 335 Pa. 485, 6 A.2d 922 (1939) (appeal from denial of injunction to prevent annual shareholder meeting held moot where meeting had already been held according to by-laws); *In re Gross,* 382 A.2d 116, 121 (Pa. 1978) (appeal involving intervening change in factual posture as the patient was no long being administered medication by provider against his will).

31. The only relief requested by GRS was to enjoin and restrain SPLP from engaging in further work at the property until the submission to and approval by this Commission of a comprehensive plan and work schedule. Complaint at page 28. This relief is moot as SPLP's construction is complete. N.T. 640:7-11; Davidson Cross Exhibit No. 1.

VI. GRS failure to reply to New Matter and lack of authority verify the Complaint.

32. GRS failed to file a reply to SPLP's timely filed New Matter which properly incorporated by reference its denial and counterstatement of factual and legal allegations contained in its answer. *See* SPLP Answer and New Matter filed and served December 23, 2020; 52 Pa. Code § 1.33.

33. GRS's failure to reply to SPLP's New Matter results in admission of the allegations therein. *See* 52 Pa. Code § 5.63(b); *see*, *e.g. Stefanowicz v. Pennsylvania-American Water Co.*,

Docket No. C-22078165, 2008 WL 8014613 at *4 (Pa. PUC May 22, 2008); *see also Ciabattoni v. Rounsville t/a Schuylkill Valley Airport Shuttle*, Docket No. C-2009-2097477, 2009 WL 2986733 at *4 (Pa. PUC Sept. 11, 2009); *Brenda Smith v. Blue Pilot Energy LLC and PPL Electric Utilities Corp.*, Docket F-2015-2472890, 2018 WL 4204537 (Initial Decision Jul. 9, 2018).

34. GRS failed to show that Stephen Iacobucci was authorized to sign the verification to the Complaint on behalf of Glen Riddle Station L.P. in violation of 52 Pa. Code § 1.36.

VII. GRS has not satisfied its burden of demonstrating that SPLP's communications violated the Public Utility Code, the Commission's regulations, 49 C.F.R. § 195.440 or API RP 1162, or a Commission order

35. GRS has not met its burden of establishing that the communications regarding SPLP's new pipeline construction violated any law or regulation over which the Commission has jurisdiction or Commission order and thus cannot obtain any relief. *West Penn*, 478 A.2d at 949 ("We hold that in order for the PUC to sustain a complaint brought under this section [66 Pa. C.S. § 1501], the utility must be in violation of its duty under this section. Without such a violation by the utility, the PUC does not have the authority, when acting on a customer's complaint, to require any action by the utility."); *Baker* at 6.

36. GRS's use of the term "public awareness" to include any communication between SPLP and GRS regarding new pipeline construction is not supported by the law. "Public awareness" under 49 CFR § 195.440 and API RP 1162 expressly does not apply to new pipeline construction. 49 C.F.R. § 195.440 (located under Subpart F – "Operation and Maintenance" not Subpart D – "Construction"); API RP 1162 (states "This guidance is not intended to focus on public awareness activities appropriate for new pipeline construction…").

37. The Commission's regulations at 52 Pa. Code Chapter 59 also do not impute a requirement or written standard for SPLP's new pipeline construction communications. 52 Pa.

Code Chapter 59. However, 52 Pa. Code § 59.33(a) requires that utilities "shall at all times use every reasonable effort to properly warn and protect the public from danger, and shall exercise reasonable care to reduce the hazards to which …. others may be subjected to by reason of its equipment and facilities." The record shows SPLP undertook every reasonable effort to properly warn and protect the public in the extensive communications between SPLP and GRS, GRS residents, and local government to address worksite safety precautions at the property both prior to and during construction activities.

38. The Commission is currently considering amendments to its regulations at 52 Pa. Code Chapter 59. *Notice of Proposed Rulemaking Regarding Hazardous Liquid Public Utility Safety Standards at 52 Pa. Code Chapter 59*, Notice of Proposed Rulemaking Order, Docket No. L-2019-3010267 (Order entered July 15, 2021). The proposed regulations do not contemplate establishing communication requirements pertaining to new pipeline construction.

VIII. The Commission's Jurisdiction

39. As a creation of the legislature, the Commission possesses only the authority that the state legislature has specifically granted to it in the Public Utility Code. 66 Pa. C.S. §§ 101, et seq; *Pickford v. Public Utility Com'n*, 4 A.3d 707, 713 (Pa. Cmwlth. 2010). Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell*, 383 A.2d 791 (Pa. 1977). The Commission may not exceed its jurisdiction and must act within it. *City of Pittsburgh v. Pa. Pub. Util. Comm'n*, 43 A.2d 348 (Pa. Super. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano,* 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992).

40. The Public Utility Code does not confer jurisdiction to the Commission to make initial findings regarding the scope and validity of easements, issues of municipal law including sound, fire code, parking, and fencing ordinances, and environmental regulations. 66 Pa. C.S. §§ 101 *et seq*.

IX. GRS has not satisfied its burden of demonstrating that SPLP's construction was unsafe and unreasonable.

41. Section 1501 of the Public Utility Code requires public utilities to maintain adequate, safe, and reasonable service and facilities. 66 Pa. C.S. § 1501.

42. Managerial discretion is the Commission and court-recognized legal principle that provides it is up to a utility's management to determine how and when to manage and maintain its facilities within the bounds of the Public Utility Code and the Commission's regulations. *See Metropolitan Edison Co. v. Pa. PUC*, 437 A.2d 76, 80 (Pa. Cmwlth. 1981).

43. GRS failed to prove that SPLP's construction was unsafe or unreasonable, and the record does not show any unsafe, unreasonable, or detrimental consequences of the issues raised tangential to pipeline construction at the property including: traffic and emergency responder ingress and egress; barriers, signage, and traffic controls implemented to protect vehicles and pedestrians; noise from construction activities; vibrations from construction and impact on structures; toxicity or environmental issues including a truck and equipment leak, use of clean fill, storm water management, or the use of Calciment; or the impact on underground utilities including the water line break.

44. There is no evidence to support a finding that SPLP's practices or chosen methods violated the Public Utility Code, a Commission regulation, or a Commission order, and SPLP's construction methodologies and extra precautions taken at the GRS property above its normal construction procedures falls within reasonable conduct and SPLP managerial discretion.

45. GRS has not met its burden to show a violation of any law or regulation over which the Commission has jurisdiction or any Commission order with respect to SPLP's construction and thus cannot obtain any relief. *West Penn*, 478 A.2d at 949 ("We hold that in order for the PUC to sustain a complaint brought under this section [66 Pa. C.S. § 1501], the utility must be in violation of its duty under this section. Without such a violation by the utility, the PUC does not have the authority, when acting on a customer's complaint, to require any action by the utility."); *Baker* at 6.

Respectfully submitted,

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Dated: September 24, 2021

APPENDIX C

SUNOCO PIPELINE L.P.'S
PROPOSED ORDERING PARAGRAPHS

In accordance with Commission Rules 5.501 and 5.502, 52 Pa. Code §§ 5.501-5.502, and Your Honor's July 14, 2021 Briefing Order, Respondent Sunoco Pipeline L.P. ("SPLP") respectfully submits the following proposed ordering paragraphs:

THEREFORE,

IT IS ORDERED:

1. That the Complaint of Glen Riddle Station L.P. at Docket No. C-2020-3023129 against Sunoco Pipeline L.P. is dismissed and denied with prejudice.

2. That Docket No. C-2020-3023129 be marked closed.

Respectfully submitted,

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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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