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March 28, 2022

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 EXCEPTIONS TO INITIAL DECISION

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is Sunoco Pipeline L.P.'s Exceptions to the March 8, 2022 Initial Decision of Deputy Chief Administrative Law Judge Joel H. Cheskis in the above-referenced proceeding. 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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WES/das
Enclosures

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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

EXCEPTIONS

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Attorneys for Respondent Sunoco Pipeline L.P.

Dated: March 28, 2022

Table of Contents

Pursuant to 66 Pa. C.S. § 332(h) and 52 Pa. Code § 5.533, Sunoco Pipeline L.P. (SPLP) files these exceptions to the March 8, 2022 Initial Decision (ID) of Administrative Law Judge Joel Cheskis.

I. INTRODUCTION AND SUMMARY

The Initial Decision is replete with reversible errors but most significantly infringes on SPLP's due process rights by concluding SPLP violated Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501, and Section 59.33(a) of the Commission's regulations, 52 Pa. Code § 59.33(a), through vague creation of new regulatory requirements with no way for the regulated entity to have advanced knowledge of the standard to which it was held. Faced with proof that SPLP comprehensively planned its construction and designed and implemented various mitigation measures on Complainant Glen Riddle Station L.P.'s (GRS) property[1] to ensure its construction would be safe and reasonable, that SPLP constantly informed and communicated with Complainant regarding the construction, that there was no harm to anyone and no adverse events placing anyone's safety in jeopardy, and a total lack of any evidence that SPLP violated any law, regulation, or Commission order regarding pipeline safety or construction, the ID ignored (did not even discuss) competent evidence and created its own subjective, *ex post facto* standards to find SPLP violated the Public Utility Code's mandate that utilities provide safe and reasonable service and facilities. The ID *subjectively* interpreted "safe" and "reasonable" based not on a legal interpretation but rather upon what the ALJ "thought" *subjectively* should be construction practices. If the ID were to stand, it would result in the unintended consequence where standard construction procedures employed by virtually any Pennsylvania utility that create noise, hypothetical first responder delays,[2] or any temporary inconveniences would immediately become a Section 1501 violation. That is not, and cannot become, the state of the law in Pennsylvania for public utilities. The ID used these vague catchall terms, untethered from any law, regulation, or even guidance to find SPLP violated the law based on the decision-maker's personal views. The ID thus creates vague conditions for enforcement subject to the whims of decision-makers of which SPLP had no fair notice. This is a violation of due process[3] as well as a failure to interpret and apply Section

[1] SPLP owns a pre-existing pipeline right-of-way through GRS's property, predating the original construction of the apartment buildings by GRS. Since then, SPLP was voluntarily given additional easements, or received temporary easements through condemnation actions at the property. *See* ID at 5-6; FoFs Nos. 3-10.

[2] As discussed below, there is absolutely no evidence of any actual first responder delays for this construction project.

[3] Pa. Const., art. I, §§ 1, 11; U.S. Const., amends. V, XIV. *See, e.g.*, *F.C.C. v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2309 (2012) (explaining due process demands fair notice to entities of conduct required or proscribed and that precision and guidance are necessary for due process so that those enforcing the law do not act in an arbitrary or discriminatory way) ("*F.C.C. v. Fox*"); *Pa. State Bd. of Pharmacy v. Cohen*, 292 A.2d 277, 282-83 (Pa. 1972) (holding

1501 correctly. It is also a violation of Pennsylvania's statutory regulatory review process.[4] SPLP Exceptions 1-2.

More specifically, adopting the ID's subjective standards would be a sea change in Commission regulation that will effectively make everyday utility construction and maintenance projects *de jure* violations of Section 1501. It also will discourage the use of certain less intrusive and best practice construction processes used daily by Pennsylvania utilities because they make "noise" or cause "inconvenience"— despite being temporary, and in the case here, standard measures that mitigate the same "noise" and "inconvenience" that the ID finds to be violations in and of themselves.[5] The ID creates two subjective standards that almost all utility construction and maintenance projects in residential areas would violate on a routine basis, and therefore creates a standard by which no utility could ever comply.

First, the ID found that if sound levels during construction activities even momentarily exceed 75 decibels, then that construction is automatically hazardous, unsafe, and unreasonable. As detailed below, the 75 decibel standard is totally untethered from any Commission regulation, guidance or competent expert testimony, and falls well below the federal threshold that can impair a person's hearing. The new rule is created by the ID, rather than by rulemaking, and is unlawful for that reason alone. Based on Complainant's own evidence,[6] if the Commission permits the ID to stand, a utility or its contractors working in a residential area using a chainsaw (110 decibels), gas powered lawn mower (85 decibels), welding machine (83 decibels), generator (84 decibels), or hydrovac truck (101 decibels) – would all be in immediate violation of Section 1501. The Commission has never found a utility in violation of the Public Utility Code or Commission regulation for sound related to routine maintenance and construction activities, and the Commission should not deviate now by adopting the new standards created in the ID. In short, the ID on

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that no agency may substitute a statute or a rule with a "purely subjective criterion which may reflect merely the personal or professional views of individual members of the [agency].") ("*Cohen*").

[4] 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.

[5] As some of many examples, SPLP: installed sound walls around the active workspaces (even though not required by law or regulation) to mitigate noise from the temporary hydrovac excavation (an industry wide and safe practice for locating underground utilities compared to less noisy alternative methods of excavation); offered and provided rent relief to just under 100 units to mitigate construction inconveniences or to allow residents to temporarily relocate during the temporary construction (N.T. 243); worked with local municipal and fire officials regarding access and egress to the construction and sufficiency of emergency response capability; had a hotline available to residents as well as multiple written communications directly to residents which included website communication and information; and held a public video forum for residents and for GRS.

[6] *See* Exhibit GRS-27.

this issue combined the roles of expert witness, advocate, and judge, drawing scientific conclusions based on a lay ALJ's solitary review of videos and photographs[7] instead of science. Worse still, in deciding the issue the ID did not even mention, much less fairly summarize or evaluate, SPLP's independent, qualified noise control engineer's expert testimony, leaving the Commission with an unbalanced and incomplete account of the record on this issue.

Second, the ID creates an entirely new, unattainable and inappropriate standard by proclaiming that if utility construction even theoretically imposes potential delay for emergency responder access to a residential property, the utility's construction is automatically hazardous, unsafe, and unreasonable. This arbitrary standard and conclusion in the ID was reached despite local emergency responders and the local municipality having successfully tested access to the site and approved of the site layout and ability for emergency responders to access the property, and despite evidence that no emergency responders were actually delayed during the active construction at the property. Creating a new rule and a retroactive one at that, declaring that utilities cannot temporarily impede traffic into or out of areas where utility construction is required cannot be the standard for a Section 1501 violation. If it is, then the common occurrence of lane or road closures to install or maintain utility facilities such as water mains has now become an automatic violation of Section 1501. The reality is upgrading, modernizing, or maintaining important utility infrastructure should be promoted,[8] not discouraged or punished because it inevitably causes temporary reduced access and inconvenience, which is the immediate and real effect of this ID. The ID cannot be upheld. SPLP Exception 3.

Moreover, although the Complainant in this case is GRS, rather than the GRS tenants themselves, the ID *sua sponte* finds that the "unreasonable service" was provided to the *non-party* tenants. That the tenants did not themselves complain to the Commission is itself compelling evidence that the ID is wrong on the facts. Regardless, the law is clear, GRS does not have standing to pursue claims on behalf of others – but the ID improperly found that GRS has such standing by making the findings and granting the relief for alleged impacts to the tenants as if they were parties. SPLP Exception No. 4.

[7] ID at 46-48.

[8] Indeed, the General Assembly and the Commission promote utility infrastructure; for example, by the legislation and implementation of the same by Commission for Long Term Infrastructure Improvement Plans ("LTIIPs") and by Distribution System Improvement Charges ("DSICs").

The ID further errs in departing from the ALJ's own prior orders[9] and exercising jurisdiction over sound levels and the ability for local emergency responders to access a property: but the law is clear, the Commission simply lacks jurisdiction over these technical determinations. These issues are inherently within the province of the local municipality's traditional "police powers." Moreover, there is no evidence SPLP violated any Middletown Township ordinance during the construction at the GRS property. SPLP Exception 13.

The ID also uses incompetent evidence to find violations of its new *ex post facto* standards it created and sometimes does not rely on any evidence at all, but its own whims of whether something was unsafe or unreasonable. GRS did not meet its burden of proof to show that SPLP's construction sounds, emergency responder access, or communications violated the Public Utility Code, a Commission regulation, or a Commission order; this is obvious from even a cursory review of the actual evidence. That the ID capriciously disregarded SPLP's substantial evidence that its construction and communications were safe and reasonable is likewise clear from the record. Tellingly, the ID failed to even mention SPLP's evidence, which is a clear departure from standard Commission practice in IDs to fairly and fully state the positions and evidence of both parties. Making decisions that are not based on substantial evidence and capriciously disregarding competent evidence is reversible error. SPLP Exception Nos. 5-6, 8.

The ID further errs as a matter of law in finding that SPLP violated any *legally required* public awareness law, regulation or Order. It misapplied PHMSA's public awareness requirements, failing to recognize that they do not apply to new pipeline construction and as a matter of law only apply to operating pipelines. In short, although SPLP went above and beyond what was required for public awareness communications under applicable law, the ID first invented requirements that do not exist and then faulted SPLP for not knowing or following them. This is not only a clear error of law, it is a *de facto* impermissible rulemaking and a violation of due process, both by leveling of a civil penalty for an alleged violation where no specific legal requirement exists, and also by retroactively creating and then applying a new legal standard. SPLP Exception No. 7.

Next, the ID erred in assessing a civil penalty under the *Rosi* factors. A civil penalty is wholly inappropriate here, where the Complainant only requested civil penalties for the first time in its Main Brief, and where the ID ordered such penalty on violations never raised in the Complaint in the first place. This

[9] *See, e,g,*, *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 Jan. 28, 2021) ("January 28, 2021 Order").

too violates SPLP's due process rights and denied SPLP the opportunity to be heard and defend against application of the *Rosi* factors in the record. The ID also applied the *Rosi* factors arbitrarily, especially where, as here, GRS failed to meet its burden of proof that SPLP violated any law or regulation and where the ID created subjective, *ex post facto* standards in order to find violations. SPLP Exception 9.

Finally, the ID erred on three additional critical points of law. First, given that absolutely no harm occurred and construction was completed prior to hearing, the ID erred in failing to dismiss the complaint as moot. SPLP Exception 10. Second, because no harm occurred here, the ID erred in finding the Complaint could be sustained even in part. SPLP Exception 11. Third, the ID erred by failing to dismiss the Complaint because it lacked a valid verification, a fatal flaw that the ID acknowledged but waived; proper verification is *mandatory and cannot be waived*. SPLP Exception 13.

II. EXCEPTIONS

SPLP Exception 1. The ID infringes upon SPLP's due process rights, violates the regulatory rulemaking process, and acts beyond the Commission's jurisdiction and expertise in holding that construction activities that are not proscribed by Commission or PHMSA regulations violate 66 Pa. C.S. § 1501 or 52 Pa. Code § 59.33(a). ID at 38-51, FoF Nos. 12-37, 48-55, CoL No. 20.

In holding that SPLP violated Section 1501 of the Public Utility Code and Section 59.33(a) of the Commission's regulations, the ID utilized the statutory terms "safe" and "reasonable" as vague, undefined catchalls to impose a subjective, *ex post facto* standard to judge SPLP's actions where no specific regulations exist. ID at 31-32. The ID violates SPLP's due process rights because it penalizes SPLP on the basis of purely subjective criteria of which SPLP had no advance notice. *Cohen*, 292 A.2d at 282-83 (holding that no agency may substitute a statute or a rule with a "purely subjective criterion which may reflect merely the personal or professional views of individual members of the [agency]."). [10] These new ex post facto standards also violate the statutory requirement for notice and comment rulemaking, disregarding "fundamental fairness" that the Pennsylvania and Federal constitutional guarantees to due process require. *See, e.g.*, *South Hills Movers, Inc. v. Pa. Pub. Util. Comm'n*, 601 A.2d 1308, 1310 (Pa. Cmwlth. 1992) (reversing Commission decision that "retroactively imposes a new condition on certificate of authority" where "fundamental fairness requires that such general criteria be promulgated as published regulations through the rule-making process, instead of being adopted in an ad hoc, retroactive, case-by-

[10] SPLP notes that it is not arguing that Section 1501 standing alone is vague, but that the ID's interpretation and use of 1501 here takes advantage of vagueness to create subjective standards because "safe" and "reasonable" are not interpreted using regulations specific to the conduct at issue.

case basis"); *F.C.C. v. Fox*, 132 S.Ct. at 2309 (explaining due process demands fair notice to entities of conduct required or proscribed and that precision and guidance are necessary for due process so that those enforcing the law do not act in an arbitrary or discriminatory way); Pa. Const., art. I, §§ 1, 11; U.S. Const., amends. V, XIV. 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.

There are no Commission rules, regulations, or orders that prohibit or govern the particular conduct that Complainants objected to in this case – construction sound and emergency responder access. Neither the Pipeline and Hazardous Materials Safety Administration (PHMSA) regulations,[11] nor the PUC's regulations at 52 Pa. Code, nor the Public Utility Code, nor any Commission order either mandate or prohibit any particular actions regarding sound, or contain any standards whatsoever regarding allowable levels of sound that utility construction may generate. So too regarding utility construction temporary traffic patterns and potential impacts on emergency responder access to property. Nonetheless, the ID ignored standards that could have guided the decision[12] (such as other expert agency guidance, regulations, or municipal standards), and instead created entirely subjective standards relying on 66 Pa. C.S. § 1501 and 52 Pa. Code § 59.33 to find that SPLP's pipeline construction was unsafe or unreasonable.

For example, with respect to the sound levels during construction, the ID arbitrarily concludes that minimal point-in-time sound measurements are sufficient to demonstrate unreasonableness under Section 1501, and to find that SPLP violated Section 1501 because GRS provided evidence of point-in-time sound levels above 75 decibels. ID at 50. There is no such regulatory standard. The ID, if upheld, violates SPLP's due process rights because it creates vague conditions for enforcement and fails to give SPLP fair notice as to what conduct is unlawful. *See Cohen*, 292 A.2d at 282-83 (holding that no agency may substitute a statute or a rule with a "purely subjective criterion which may reflect merely the personal or professional views of individual members of the [agency].").

Vague and newly-created regulations through adjudication deny due process in two ways: "they do not give fair notice to people of ordinary intelligence that their contemplated activity may be unlawful, and

[11] The PUC incorporates by reference 49 C.F.R. Part 195. 52 Pa. Code § 59.33(b).

[12] As described below, SPLP does not concede the Commission has jurisdiction over these issues.

they do not set reasonably clear guidelines for law enforcement officials and courts, thus inviting arbitrary and discriminatory enforcement." *Park Home v. City of Williamsport*, 680 A.3d 835, 838 (Pa. 1996). Pennsylvania law is clear, and holds that a statute or regulation is vague and unenforceable where terms are not defined or there is no reasonable standard by which the regulated party is supposed to act. *See e.g.*, *Watkins v. State Bd. of Dentistry*, 740 A.2d 760, 765 (Pa. Cmwlth. 1999) (holding that the term "appropriate monitoring equipment" is vague because the term is not defined and the term "appropriate" is subject to many different meanings) (*Watkins*). Moreover, it is also established Pennsylvania law that regardless of the public policy concerns that underlie a statute or regulation, such objectives, no matter how appealing, cannot contravene constitutional due process. *Cohen*, 292 A.2d at 283. Ultimately, no agency may substitute a statute or a rule with a "purely subjective criterion which may reflect merely the personal or professional views of individual members of the [agency]." *Watkins*, 740 A.2d at 764 (quoting *Cohen*, 292 A.2d at 282). Decisions that penalize entities for conduct of which an agency has given no fair notice can be penalized also violates SPLP's federal constitutional rights. As the Supreme Court has stated:

> The fundamental principle that laws regulating persons or entities must give fair notice of what conduct is required or proscribed, see, *e.g., Connally v. General Constr. Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322, is essential to the protections provided by the Fifth Amendment's Due Process Clause, see *United States v. Williams,* 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650, which requires the invalidation of impermissibly vague laws. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Ibid.* The void for vagueness doctrine addresses at least two connected but discrete due process concerns: Regulated parties should know what is required of them so they may act accordingly; and precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.

F.C.C. v. Fox, 132 S.Ct. at 2309. *See Cohen* (discussing penalty for conduct not specifically defined or prohibited by statutes renders statute unconstitutional on grounds of vagueness in violation of the Due Process Clause of the Fourteenth Amendment).

The ID violates SPLP's due process rights because it establishes a vague reading of Section 1501 of the Public Utility Code and Section 59.33(a) of the Commission's regulations by inviting arbitrary and discriminatory enforcement subject to the whims and personal views of individual members of the agency.

Stated another way, it impermissibly expands the scope of punishable conduct without fair and proper notice to SPLP[13] and in disregard for prior jurisdictional rulings in this matter under the concepts of the law of the case doctrine.[14] *Info Connections, Inc. v. Pa. Pub. Util. Comm'n*, 630 A.2d 498, 502 (Pa. Cmwlth. 1993) (holding that a public utility cannot "be penalized for [an] omission when it was under no duty to take action"); *Com. v. Thur*, 906 A.2d 552, 560 (Pa. Super. 2006) ("Due process demands that a statute not be vague. A statute is vague if it fails to give people of ordinary intelligence fair notice as to what conduct is forbidden, or they cannot gauge their future, contemplated conduct, or if it encourages arbitrary or discriminatory enforcement." (internal citations omitted)).

The Commission provides the yardstick by which to measure safety and reasonableness in its existing regulations. For hazardous liquid public utility pipelines, like ME2/2X, the Commission has adopted the federal PHMSA standards. 52 Pa. Code § 59.33(b). Accordingly, the federal regulations are the measure by which SPLP and other hazardous liquid public utilities are supposed to be judged, not the newly-created arbitrary and subjective standards set forth in the ID. Notably, the Commission currently has a proposed rulemaking regarding pipeline safety,[15] and nowhere in the proposed rulemaking does the Commission seek to regulate the conduct of hazardous liquid public utilities related to sound levels during

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[13] In addition, earlier in the proceeding ALJ Cheskis correctly dismissed municipal law issues concerning alleged violations of sound, fire code, parking, and fencing ordinances because these issues are outside the scope of the Commission's limited expertise and jurisdiction. January 28, 2021 Order at 7; *see* ID at 41. In an abrupt reversal, the ID would seek to assert jurisdiction over these same areas anyway by assessing whether a sound wall or noise levels create a safety concern. As the Commission does not have the jurisdiction to interpret municipal ordinances or the necessary expertise to address these municipal law issues, it is unreasonable to now make these same determinations under Section 1501, particularly without any regulations, standards, guidelines, or expertise on which to base its decision. *Supra* Exception 12.

[14] "Although it is often said that the law of the case doctrine does not limit the power of trial judges to reconsider their prior decisions, ... the court must take appropriate steps so that the parties are not prejudiced by reliance on the prior ruling." *Bienert v. Bienert*, 168 A.3d 248, 254–55 (Pa. Super. 2017) (quoting *Williams v. Runyon*, 130 F.3d 568, 573 (3d Cir. 1997)).

> [T]he considerations that underlie the doctrine also strongly weigh in favor of adherence by a trial judge to a decision by that same judge earlier in the case:
>
> > [L]aw of the case doctrine ... saves both litigants and the courts from duplications of effort. If permitted to argue and brief the same issue repeatedly during the course of the same litigation, some litigants would be indefatigable in their efforts to persuade or to wear down a given judge in order to procure a favorable ruling. Such use of clients' finances, legal counsels' time and energy, and judicial resources is wasteful from a systemic perspective.

Bienert, 168 A.3d at 254 (citations omitted).

[15] 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").

construction or the placement of sounds walls. *See* NOPR Order. That the Commission does not even intend to create specific parameters for the conduct at issue here further demonstrates the lack of fair notice to SPLP, and that these issues are outside the Commission's purview and the ALJ correctly dismissed these issues earlier in the proceeding and erroneously addressed them in the ID.[16]

SPLP has demonstrated in its briefs and further shows in these exceptions, that the complainant has failed to demonstrate that SPLP's actions violated any of the federal standards the Commission has adopted. SPLP's actions were reasonable and safe. To hold otherwise based on new, case-specific one-time standards deprives SPLP of its due process rights by impermissibly and retroactively expanding the scope of the conduct the Commission regulates. If the Commission desires to develop standards governing the placement of sounds walls or limiting sound levels during utility construction or maintenance activities,[17] such topics can only be dealt with through a rulemaking, rather than in the context of an adjudication. *See Meghan Flynn et al v. Sunoco Pipeline L.P.*, Docket No. C-2018-3006116, Opinion and Order at Ordering Paragraphs 11-14 (Order entered Nov. 18, 2021) (denying multiple requests and referring those issues to the Commission's Rulemaking Proceeding at Docket No. L-2019-3010267).

SPLP Exception 2. The ID infringes upon SPLP's due process rights in holding that SPLP's communication and outreach to residents regarding new pipeline construction violates 66 Pa. C.S. § 1501, 52 Pa. Code § 59.33(a) or the Commission's *Dinniman* Order, which was reversed and dismissed on appeal. ID at 63-69; FoF Nos. 45, 46, 53, 54, 55; CoL Nos. 17, 20.

The ID held that SPLP violated Section 1501 of the Public Utility Code, Section 59.33(a) of the Commission's regulations, and the dismissed *Dinniman* Order[18] utilizing the vague, undefined catchall of "unsafe service" to review SPLP's Public Awareness Plan and related federal regulations. ID at 63-64. The ID further held that SPLP's communications "do not constitute continuous improvement in communications efforts that is required by Sunoco." ID at 64 (referencing *Dinniman* Order). As both SPLP's Public Awareness Plan and the federal regulations do not apply to SPLP's new pipeline construction (*infra* Exception 7), the ID violated SPLP's due process rights by creating purely subjective criteria for

[16] *Supra* n. 14.

[17] The ID's conclusion that the random point-in-time samples taken – which were not properly authenticated by any witness - was a clear error, as is the improper extrapolation that essentially determined that those measurements were representative of all sound levels during the entire period of construction activity – which they were not. Finding a violation on that basis and fining SPLP based on such an assumption is equally erroneous.

[18] *Dinniman v. Sunoco Pipeline, L.P*, Docket No. C-2018-3001451 (Opinion and Order entered June 15, 2018) ("*Dinniman* Order"), *dismissed* by *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283 (Pa. Cmwlth. 2019) ("*Dinniman*").

communication and outreach to GRS' residents of which SPLP had no fair notice under 66 Pa. C.S. § 1501, 52 Pa. Code § 59.33, and any Commission Order. *See Cohen*.

As discussed below,[19] there are no Commission rules, regulations, or orders that govern communications with the public on new pipeline construction. While SPLP maintains and complies with its Public Awareness Plan under 49 C.F.R § 195.440 and API RP 1162, neither the federal regulation nor the adopted guidance, the Public Utility Code, the PUC's regulations, or the 2018 *Dinniman* Order mandate or require any particular communication requirements or standards whatsoever that apply to the new pipeline construction activities at issue here.[20] In ignoring these indisputable legal points, the ID instead created its own subjective standards relying on 66 Pa. C.S. § 1501, 52 Pa. Code § 59.33, and the dismissed *Dinniman* Order to find that SPLP's communications to GRS residents were unsafe.

In coming to this conclusion, while acknowledging that SPLP's communications to residents "were helpful,"[21] the ID nonetheless ignored the substantial evidence of record that SPLP extensively communicated with GRS and GRS residents prior to and throughout construction, *see infra* Exception 8, and created its own subjective and unspecified standards. Therefore, the ID fails to give SPLP fair notice of what contemplated conduct is unlawful, which the Commission cannot do. *See Cohen*, 292 A.2d at 282-283.

As discussed above in Exception 1, vague regulations deny due process in two ways: they do not give fair notice that a contemplated activity may be unlawful and do not set reasonably clear guidelines for enforcement. *Park Home v. City of Williamsport*, 680 A.2d 835, 838 (Pa. 1996). The Commonwealth Court has held that a statute or regulation is vague and unenforceable where terms are not defined or there is no reasonable standard by which the regulated party must act. *Watkins v. State Bd. of Dentistry*, 740 A.2d 760, 765 (Pa. Cmwlth. 1999). Public policy concerns, no matter how appealing, cannot contravene constitutional due process[22] and no agency may substitute a statute or rule with purely subjective criterion reflecting merely the personal or professional views of individual members of an agency.[23]

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[19] *Infra* Exception 7.

[20] Indeed, as discussed *infra* Exception 7, the only public awareness communication requirements that have enforceable standards fall under 49 C.F.R. Part 195 subpart F "Operations and Maintenance" and not subpart D "Construction."

[21] Referencing SPLP's testimony and exhibits regarding communication to residents, stating "these efforts of Sunoco were helpful." ID at 66.

[22] *Cohen*, 292 A.2d at 283.

[23] *Watkins*, 740 A.2d at 764.

Rather than the ID's subjective criteria, the Commission has in fact adopted the hazardous liquid pipeline federal standards. 52 Pa. Code § 59.33(b). The federal standards are thus the measure of the adequacy of SPLP's communications. While the current proposed rulemaking amending Chapter 59 does include additional standards for a utility's communications to the public during operations and maintenance activities, nowhere in the proposed rulemaking does the Commission propose to subject new pipeline construction to those requirements.[24] This further demonstrates that SPLP lacked fair notice that the ID would devise its own subjective criteria to evaluate SPLP's communications to GRS residents.

In briefing and as discussed below in these Exceptions,[25] SPLP has shown that its communications to GRS residents were reasonable and kept the residents informed to ensure their safety. At no time did SPLP's communications violate any federal standards, the Public Utility Code, the Commission's regulations, or any Commission Order. By holding otherwise, the ID deprives SPLP of its due process rights by impermissibly and retroactively expanding the scope of punishable conduct. If the Commission desires to develop standards governing supplemental communications to the public during new pipeline construction, these topics should be explored through formal rulemaking, rather than the imposition of subjective criteria in the context of an adjudication.

SPLP Exception 3. The ID erred in creating *ex post facto* standards that essentially make any utility construction or maintenance a violation of 66 Pa. C.S. § 1501 and 52 Pa. Code § 59.33(a). ID at 38-51, FoF Nos. 12-37, 48-55, CoL No. 20.

At its core, the ID holds that any momentary loud sounds from construction equipment or any theoretical delays for emergency responder access caused by traffic disruption or the presence of construction equipment at a utility construction site is a violation of Section 1501. ID at 44. This is an unrealistic, unattainable, and unworkable standard for utilities. It frustrates the Commission's goal of promoting and providing for necessary utility infrastructure upgrades, maintenance, and repair. It is contrary to public policy.

If this standard is upheld, any utility construction that potentially causes delay of emergency responder access to a residential building (such as a temporary lane closure on a highway or the temporary staging of construction equipment that disrupts traffic flow or site access) is now an automatic violation of

[24] NOPR Order.

[25] *Infra* Exception 7 and 8.

Section 1501. So too regarding sound levels. The ID specifically states: "The readings of 75 decibels to over 100 decibels are unreasonable, ***even for a short duration***, when viewed in light of Section 1501 of Public Utility Code, given the residential nature of the property at issue. 66 Pa. C.S. § 1501." ID at 48. As discussed elsewhere in these Exceptions, there is no scientific basis for this conclusion. Instead, it is based on the ALJ's layman's review of videos and photographs, sitting as judge, advocate, and expert witness.[26] As Complainant's own evidence shows, many types of equipment used in everyday utility maintenance and construction produce sound levels above 75 decibels; a chainsaw (110 decibels), gas powered lawn mower (85 decibels), welding machine (83 decibels), generator (84 decibels), or hydrovac truck (101 decibels) all exceed 75 decibels. Ex. GRS-27. If the Commission upholds the ID on this issue, all of these activities, which are commonly undertaken by public utilities every day throughout the Commonwealth, will also become an automatic violation of Section 1501. This is not, and cannot be, the law in Pennsylvania.

This holding, if allowed to stand, would be a monumental sea change in Commission regulation. There is not a single Commission decision finding that utility conduct was unsafe or unreasonable because it created loud sounds or theoretically could have delayed emergency responder access to residences. Such potential consequences are inherent in nearly every single utility construction or maintenance project that uses heavy machinery in a residential, densely populated area. The Commission cannot make necessary utility construction and maintenance *de jure* violations of the law, yet that is exactly what the ID has done. Holding everyday, necessary utility construction and maintenance conduct *de jure* unreasonable or unsafe, particularly where, as here, the utility planned for and implemented significant mitigation measures is a slippery slope with serious unintended consequences. Utilities understandably will be discouraged from pursuing necessary projects (particularly in residential areas), impacting and undermining the continuity of safe, reliable, and reasonable utility service (unlike the conduct here, which was both safe and reasonable). The Commission should therefore overturn the ID to find that SPLP did not act unsafely or unreasonably with regard to sound levels and alleged emergency response delays.

[26] ID at 46-48.

SPLP Exception 4. The ID erred in finding GRS could bring this complaint on behalf of its tenants. ID generally, FOF Nos. 18, 41-45, 48-55, COL No. 20.

The ID improperly granted relief, *sua sponte*, on behalf of the residents of GRS based upon harm residents allegedly suffered. Not a single one of GRS tenants is a party to this action, and GRS does not have standing to vindicate its tenants' rights before the Commission.

It is well-settled that a party cannot "vindicate the rights of a third party who has the opportunity to be heard." *Mid-Atlantic Power Supply Ass'n v. Pa. Pub. Util. Comm'n*, 746 A.2d 1196, 1200 (Pa. Cmwlth. 2000) (citing *Pa. Dental Ass'n v. Cmwlth., Dep't of Health,* 461 A.2d 329 (Pa. Cmwlth. 1983)) (*Mid-Atlantic Power Supply*). In *Mid-Atlantic Power Supply*, the court held that PECO Energy Company ("PECO") lacked standing to pursue its claim that a Commission order violated the privacy rights of its ratepayers because PECO does not represent its ratepayers' interests. *Id*. at 1200. Similarly, the Commonwealth Court upheld a Commission decision finding that State Representative Camille "Bud" George lacked standing as an individual to litigate and seek a claim of relief on behalf of all ratepayers, reasoning:

> There are three requirements for a party to have standing to litigate an issue: the party must have a substantial interest in the subject matter of the litigation; the interest must be direct; and the interest must be immediate and not a remote consequence…Both the immediacy and directness requirements primarily depend upon the causal relationship between the claimed injury and the action in question…Assuming that Petitioner has a substantial personal interest in having all ratepayers be provided with adequate notice, his claim for standing on behalf of all ratepayers nevertheless fails for want of an adequate causal relationship.

George v. Pa. Pub. Util. Comm'n, 735 A.2d 1282, 1286-87 (Pa. Cmwlth. 1999).

Most recently, in an action involving SPLP and the Mariner East 2/2X pipeline, the court admonished the Commission for *sua sponte* finding a complainant had personal standing to litigate claims on behalf of others. *Dinniman*, 217 A.3d at 1289 ("The PUC erred in raising the issue of personal standing *sua sponte* and injecting this theory of standing into the case"). Collectively, these cases demonstrate that there is no ability or right for a complainant before the Commission to act as a private attorney general; the Commission cannot confer that right *sua sponte*.

Likewise, based on this well-settled legal principle, the Commission has routinely rejected a request for relief improperly raised by a complainant on behalf of someone else's interests. *David Bookstaber v. PECO Energy Co.*, Docket No. C-20031314, 2004 WL 2983032 (Opinion and Order entered Nov. 23, 2004) (concurring with the special agent "that the Complainant's request for relief on behalf of all PECO

customers [be] dismissed for lack of standing"); *Petition of Sunrise Energy, LLC for Clarification of Electronic Distribution Company Tariffs that Address Renewable Energy Net Metering*, Docket No. P-2013-2398185, 2014 WL 1266181, at *10 (Opinion and Order entered Mar. 20, 2014) (denying petition where petitioner did not have any immediate interest in the matter and could not seek relief on behalf of other potentially affected parties); *Rose A. Maloy v. Metropolitan Edison Co.*, Docket No. F-2015-2513075, 2016 WL 637949, at *8 (Initial Decision entered Jan. 21, 2016), *affirmed* (Final Order entered Apr. 5, 2016) (dismissing landlord claim for relief on behalf of tenant because landlord did not have standing to pursue claim on behalf of tenant).

The ID disregards this fundamental legal principle and grants relief, *sua sponte*, on behalf of GRS residents – who are not parties to this proceeding – based upon alleged and speculative harms the ID claims they have suffered. For instance, when discussing the fire hazards, the ID stated:

> Where issues of community safety are concerned, this Commission possesses irrefutable authority to exercise its jurisdiction. In this case, given the circumstance of major construction in close proximity to a residential area, extra efforts were required that were not taken by Sunoco. More should have been done by Sunoco where the well-being and *safety of more than 200 Pennsylvanians was at issue*. Expert testimony is not required for this conclusion.

ID at 41 (emphasis added) (citations omitted). Regarding the noise levels, the ID stated the following:

> Finally, given that the property involved both a construction site and a place where residents live, both the OSHA standard of 85 decibels and the CDC/EPA standard of 75 decibels are instructive. As such, it is clear that there were 17 incidents of readings higher than 85 decibels and an additional six incidents of readings of between 75 and 85 decibels for a total of 23 incidents of unreasonably high noise levels at the construction site. Given the nature of this construction site, *Sunoco should have done more to mitigate noise levels, especially knowing residents are home during a pandemic*.

ID at 51-51 (emphasis added). Regarding the communication issues, the ID stated:

> *Sunoco is commended for many attempts to communicate with the Glen Riddle property owners, and its counsel, as well as elected officials, emergency responders, the school district, etc*. The construction was a major undertaking that required significant communications to those parties. *However, the communications to the people who were impacted the most by the construction – the residents of Glen Riddle – was not reasonable and fell short of what was required by the Public Awareness Plan….*

ID at 69 (emphasis added). Indeed, in every respect, the ID's findings are erroneously based upon alleged and speculative harm to residents of GRS – but no GRS resident was a party to this case. Moreover, the ID's findings are not based upon any demonstrated direct and immediate harm to GRS, the actual (and

only) Complainant. The ID in fact commends SPLP on how it handled communications with GRS. ID at 69.

Notably, GRS residents could have intervened, or brought their own action – but chose not to participate. Thus, it is not appropriate for the ID to grant relief on the residents' behalf. To otherwise uphold a decision on this basis would overturn long-standing legal precedent.

Accordingly, the Commission should reject the ID's findings based on alleged harm to GRS residents. The residents did not complain to the Commission, they are not parties to this action, and their interests are not properly before the Commission. *See Mid-Atlantic Power Supply*, 746 A.2d at 1200. The only relief that can be granted is on behalf of GRS itself based upon harm immediate and direct to GRS' interests, which as SPLP has demonstrated elsewhere in these Exceptions, has not been proven and is not warranted.

SPLP Exception 5. The ID erred in holding that construction sound violated 66 Pa. C.S. § 1501 and 52 Pa. Code § 59.33(a) because its finding was not based on substantial evidence, and because the ID capriciously disregarded and failed to mention key competent evidence. ID at 44-51, 70, FoF Nos. 12-27, 48, CoL No. 20.

In finding that construction produced "hazardous sounds" the ID concedes it relied on unauthenticated videos and other incompetent evidence. In so doing, the ID ignored the competent expert evidence of record that explains what could constitute hazardous sound levels and that demonstrated that the sound levels at the property were not in fact harmful to anyone. Thus, the ID's finding that SPLP's construction created unsafe sound levels in violation of Section 1501 and the Commission regulations at Section 59.33(a) is not based on substantial evidence,[27] represents a capricious disregard of the record evidence, and cannot be adopted. In fact, the record evidence shows that SPLP appropriately planned for and mitigated construction sound. Importantly, in addition to the carefully engineered sound mitigation measures implemented, SPLP offered rent relief[28] (i.e. to pay the rent of any GRS resident) for the period

[27] The Commission's adjudications must be supported by "substantial evidence" in the record. 2 Pa. C.S. § 704; *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990), appeal denied, 602 A.2d 863 (Pa. 1992)("*Lansberry*"). "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 Bd.*, 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. Pub. Util. Comm'n*, 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 Pub. Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

[28] SPLP provided rent relief to just under 100 units to mitigate construction inconveniences or to allow residents to temporarily relocate during the temporary construction (N.T. 243)

when construction was ongoing, which compensated tenants for any inconvenience and for any annoyance construction sound may have caused during the period of temporary construction.

The ID's basis for finding that SPLP violated Section 1501 is 30 videos GRS entered into the record that show moment-in-time decibel readings greater than 75.[29] The ID expressly acknowledges that the videos are less than 30 second in duration, that neither the videos themselves nor GRS provided any indication as to who took the videos or when they were taken, and that GRS provided no evidence that the measurement devices were properly calibrated. Instead, the ID speculates that it is "unlikely that the device used to take the measurements was not properly calibrated." ID at 48. Plainly, the video evidence the ID relies upon is not competent evidence. It is entirely unauthenticated – there is no proof of who took the video or when or that the readings were taken on a device calibrated to ensure accurate readings; i.e. there is no proof that the videos are what GRS claims them to be. These videos should never have been admitted into the record in the first place, as they are entirely unauthenticated hearsay. But, the ID improperly overruled SPLP's objections to this effect. N.T. 271-272.

The Commission cannot rely upon incompetent, unauthenticated, and inadmissible evidence. To do so is reversible error.

> [W]hile the strict rules of evidence have been relaxed in agency hearings under the Commonwealth's Administrative Agency Law, *see* 2 Pa. C.S. § 505, there has not been an abandonment of all rules. *Ronald and Beverly Dawes v. Pennsylvania Gas and Electric,* F-2013-2361655 (Initial Decision Issued January 14, 2014) (related to authentication per Pa. R.E. Rules 901 of a third-party recording of a customer call and application of Best Evidence Rule, Pa. R.E, Rules 1001 and 1002). For evidence relied upon in an administrative proceeding to be considered competent, the evidence must be authenticated and follow the applicable hearsay rules.
>
> Under the Pennsylvania Rules of Evidence, Rule 901, parties to a hearing are required to satisfy the requirement of authenticating or identifying an item of evidence. To do so, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Pa. R.E., Rule 901. The rationale for requiring authentication is that it provides a measure of protection against fraud or mistaken attribution of a writing to a person who fortuitously has the same name as the author. *Commonwealth v. Brooks,* 508 A. 2d 316 (Pa. Super. 1986); *Commonwealth v. Harrison,* 434 A.2d 808 (Pa. Super. 1981). ***Improper authentication can lead to reversal on appeal.*** *Kopytin v. Aschinger,* 947 A.2d 739 (Pa. Super. 2008). ***As it is the duty of the ALJ to ensure that the evidentiary record is solid and reliable, permitting improper authentication is a breach of that duty***. *See Moore*.

[29] ID at 46-48.

Catherine J. Frompovich v. PECO Energy Co., Docket No. C-2015-2474602, 2018 WL 2149249, at *9 (Order entered May 3, 2018). The ID's finding should be overturned for this reason.

In ruling against SPLP on this issue, the ID wholly ignored SPLP's expert testimony that explained when and how sound levels should be deemed potentially harmful, and how sound levels should be measured for compliance with safety standards (such as measuring for a 24-hour duration and inside apartment units with windows closed), instead substituting its own theories and relying on incompetent expert testimony. ID at 48-50. Specifically, while the ID says it finds the OSHA regulatory standard and EPA and NIOSH guidance "instructive" it completely misapplies the incompetent evidence to those standards. ID at 49-51. The ID finds that moment-in-time readings, not taken inside the apartment buildings with the windows closed, that show greater than 75 decibels are sufficient to show sanctionable hazardous noise levels to residents. ID at 49-50.

Without discussing SPLP's expert testimony ***at all***, the ID relied on the testimony of GRS's Mr. Culp, who is not a qualified expert in sound engineering and is not competent to testify as to what constitutes hazardous levels of sound or whether any such levels occurred at the GRS property. Mr. Culp admitted he is not an acoustical engineer and has never designed sound mitigation or sound walls. N.T. 456:21-457:24. He is not qualified to testify as an expert as to noise mitigation or harmful levels of sound. Qualified expert testimony is yet another evidentiary standard the ID ignored but the Commission cannot.[30] Mr. Culp's

[30] Pa. R.E. 702; *see Randall v. PECO Energy Co.*, No. C-2016-2537666, 2019 WL 2250792, at *43 (Order entered May 9, 2019) (citing *Gibson v. Workers' Comp. Appeal Bd.*, 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, 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); *see also, Application of Shenango Valley Water Co.*, No. A-212750F0002, 1994 WL 932364, at *19 (Recommend Decision dated Jan. 25, 1994), adopted as modified by *In re: Shenango Valley Water Co.*, 1994 WL 843011 (Opinion and Order entered July 12, 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).

testimony is not competent expert testimony and cannot be relied upon.[31] Moreover, Mr. Culp's own alleged evidence belies his conclusions. Mr. Culp relied upon Ex. GRS-27, which contains various guidance and standards from EPA, OSHA, and NIOSH. Every single one of these standards requires that a person be subjected to a certain decibel level for a certain *period of time* before sound levels are potentially harmful to hearing. Ex. GRS-27 at 3 (NIOSH recommended exposure limit of 85 decibels ***over 8 hours***), 14 (EPA recommends maintaining *environmental* noise below 75 decibels ***over 8 hours***), 265 (OSHA standard for workplace ear protection when sound exceeds 85 decibels ***over 8-hour weighted average***); SPLP St. No. 8, Harrison Rebuttal at 6 (OSHA threshold for hearing damages is 85 decibels ***over 24-hours***). It is unclear what evidence or standard the ID relied upon to find *momentary* sound levels over 75 decibels are hazardous levels of noise. There is nothing in the record to support such a finding. Moreover, even a few months of exposure at these sound levels is not associated with any meaningful risk of hearing impairment. As shown in Ex. GRS-27 at 308, the estimated excess risk of incurring material hearing impairments as a function of average daily noise exposure ***over a 40-year working lifetime*** at 80 decibels is between zero and five percent. Considering the substance of the regulations, guidance, and reports on which Mr. Culp and the ID improperly rely, the lack of substantial evidence of hazardous noise levels occurring inside the apartments and GRS' failure to meet its burden of proof is obvious.

Moreover, careful review of the location of the GRS sound readings is imperative to a finding that sound levels caused a hazard to tenants residing in the apartments. The ID acknowledges that the readings upon which it relies were taken at various locations on the property, including directly outside the sound walls, but reasons this to be irrelevant to its finding that residents were subjected to hazardous noise levels. This flawed reasoning stems from the unsupported belief that a momentary exposure to levels of sound present on the property can cause hearing impairment – as shown in Ex. GRS-27, that is simply untrue. No substantial evidence of record supports a finding that construction sound was unsafe or unreasonable or violated any applicable regulatory standard.

In stark contrast to GRS's incompetent, non-substantial evidence upon which the ID relied, SPLP offered an independent, qualified noise control engineer who reviewed the sound mitigation studies and

[31] As discussed in SPLP's briefs, SPLP continues to object to the admission into the record and any reliance on testimony of any witness not an expert in the field in which they testified, testimony beyond an expert's field of expertise, and lay opinion testimony by non-experts. This includes, in addition to Mr. Culp, GRS witnesses Mr. Burns, Mr. Davidson, Mr. Henry, and Messrs. Iacobucci. *See, e.g.*, SPLP MB at 11-16, 57-58; SPLP RB at 12-14.

plans SPLP had in place, reviewed readings GRS's unidentified video-taker took, the readings SPLP took, and took his own readings of construction sounds, and 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 MB at 50-53.

The ID ***fails to even reference***, much less weigh or consider any of this evidence, and failed to even recount it for the Commission. This is a capricious disregard of evidence.

> A capricious disregard of evidence exists when there is a willful and deliberate disregard of competent testimony and relevant evidence which one of ordinary intelligence could not possibly have avoided in reaching a result. The meaning of arbitrary includes founded on prejudice or preference rather than on reason or fact.

Casne v. Workers' Comp. Appeal Bd. (Stat Couriers, Inc.), 962 A.2d 14, 19 n.5 (Pa. Cmwlth. 2008) (quotation marks and citation omitted). The ID contains major reversible errors and the Commission cannot uphold the ID's findings that construction sounds were a violation of anything.

SPLP Exception 6. The ID erred in holding that SPLP created a "fire hazard" in violation of 66 Pa. C.S. § 1501 and 52 Pa. Code § 59.33(a) because its finding was not based on substantial evidence and capriciously disregards or fails to mention key competent evidence. ID at 38-44, 70, FoF Nos. 29-37, 48, CoL No. 20.

The ID erroneously finds that SPLP's placement of the sound walls (which were necessary to mitigate construction noise) and the presence of construction vehicles and equipment at the site, created theoretical "fire hazards" because they could potentially delay access for emergency responder vehicles. ID at 40-44. The finding is theoretical because there is no evidence that emergency responders were delayed or could have been delayed in responding to a potential fire at the property. The ID claims no expert testimony is necessary for this conclusion. ID at 41. Instead, it substitutes its own analysis, concluding that

based on photographs of the property showing the location of sound walls, the height of the sound walls, and the presence of construction vehicles on the site, a delay of a "few moments" could occur and that even the possibility of a delay of a few minutes creates a condition that is unsafe and unreasonable. ID at 40.

The ID's newly created standard is not based on substantial evidence. There is no showing that the theoretical, temporary delay of emergency responder access to a residential area, which is inherent in any type of large construction project (such as temporary lane closures to repair or replace water mains), is different here from any other type of utility construction or maintenance that requires lane closures. All could theoretically delay emergency response times. The Commission has never found that the placement of construction mitigation measures (such as sound walls or safety barriers surrounding a workspace), presence of construction vehicles or equipment, or other temporary, potential impediments to access to a property is unsafe or unreasonable, even though this is a scenario that happens daily throughout the Commonwealth.

Second, there is no substantial evidence that there would in fact be delay for emergency responders. The ID just holds this is inherently so given the layout of the premises. The ID errs in disregarding the undisputed fact that SPLP worked with the Township to test emergency responder access to the property. Fire apparatus was brought to the site on multiple occasions to test the ability of first responders to gain access. SPLP modified the positioning of the sound walls to accommodate necessary access in response to the tests. Both the first responders and the Township concluded after the modifications were made that fire apparatus and other emergency vehicles could access the buildings. This is key evidence because the entity that would perform the emergency response concluded and in fact demonstrated that they could adequately do so. SPLP Ex. GN-6. Moreover, this ensured that emergency responders were aware of the specific layout of the construction site and could modify their response accordingly.

The ID erroneously reasons that the Township's conclusion does not matter, because the Township was not applying Section 1501 of the Public Utility Code. ID at 41. That is a distinction that ignores reality and invades the Township's sphere of expertise and jurisdiction. The ID failed to identify – because it cannot – what alleged consideration the Township did not take into account. The Township's memo expressly stated: "the response time for an aerial apparatus with the blocking off of parking spots in proximity to the pathway ***would not negatively impact on response time***" and "placement of aerial apparatus would not be impacted for life safety with the width of the pathway and the width of the parking

lots." SPLP Ex. GN-6. The ID on these issues is outside of the Commission's expertise. Instead, the ID relies on Section 1501, which provides no guiding standard.

The ID further erroneously finds that SPLP "did nothing" to mitigate potential delay for emergency responders. Yet, the ID omits key evidence that refutes this incorrect statement: SPLP worked with the Township as described above to test access to the property; in doing so SPLP realigned the placement of the sound walls and the layout of its construction site; SPLP worked with the Township to ensure that emergency responders were aware of the layout of the construction site; emergency responders were in fact able to timely access the property during two events where a 911 call was placed (which the ID misconstrues as "fortunate"); and SPLP proved through expert testimony that the distance between the sound walls and the apartment buildings "allows sufficient space for fire department personnel to access and deploy ground ladders to upper floors of the adjoining buildings." SPLP MB at 43-46; SPLP St. No. 1, Noll Rebuttal at 9-14.

The ID also errs in not finding emergency response expert Mr. Gregory Noll credible, but also completely fails to even discuss, reference, or cite his expert conclusions and disclose them to the Commission. The ID capriciously disregards his expert analysis, particularly where the Commission has relied upon and found his testimony credible in multiple proceedings.[32] Where the ID relied on the ALJ's layman's review of photographs, Mr. Noll conducted a 360-degree walk around of the construction site, on-site review and measurements, site maps, review of Township conclusions, and his deep well of professional experience to conclude to a reasonable degree of certainty: "the temporary sound walls do not represent a fire hazard and do 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. The ID does not analyze, weigh, or even reference Mr. Noll's expert conclusions. This is clear error.

SPLP planned for and mitigated the potential for emergency responders to be delayed. There is no evidence that emergency response would have been delayed so as to impact the safety of anyone on the property. The ID's findings should not be adopted.

[32] *See*, *e.g.*, *Flynn et al v. Sunoco Pipeline L.P.*, Docket No. C-2018-3006116, Initial Decision at 167 (entered Apr. 12, 2021) (ALJ Barnes) ("I am persuaded by the credible testimonies of SPLP witnesses Noll and Zurcher…") (adopted by Commission Order).

SPLP Exception 7. The ID erred in holding that public awareness requirements apply to new pipeline construction, setting up a *de facto* regulation and retroactively penalizing SPLP, ignoring that there is no statute, regulation or Order requiring new construction public awareness, and then fining SPLP when SPLP undertook a level of communications that was unparalleled, despite no legal requirement to do so in this construction context. ID at 63-69; FoF Nos. 45, 46, 53, 54, 55; CoL Nos. 17, 20.

The ID erred as a matter of law when holding that SPLP's Public Awareness Plan under 49 C.F.R § 195.440 and API RP 1162 applies to ***new*** pipeline construction. ID at 63. The ID arbitrarily reasoned that SPLP's "Public Awareness Plan applies, at least in part, to the construction activities performed by Sunoco at the Glen Riddle property and, therefore, by extension to the residents of Glen Riddle" because: 1) portions of the Public Awareness Plan include clauses for "maintenance/construction activity," 2) GRS residents impacted by new pipeline construction were considered "Affected Public;" and 3) the Plan provides that supplemental messages may be employed. ID at 63. The ID goes on to advocate that regardless of the whether the Public Awareness Plan or federal regulations are applicable to new pipeline construction, 66 Pa. C.S. § 1501 and 52 Pa. Code 59.33(a) create additional communication requirements for SPLP,[33] and further relied on the Commission's Order in *Dinniman* for the proposition that SPLP was ordered to "continuously improve its communications to the public." ID at 67. None of these bases cited by the ID is correct.

The ID's conclusion that SPLP's Public Awareness Plan applies to ***new*** pipeline construction (the only construction at issue here), is wrong as a matter of law. SPLP MB at 27-31. Both Part 195 and API RP 1162 are explicit that they do not apply to *new* pipeline construction.[34] The ID's holding that portions of SPLP's Public Awareness Plan that allows supplemental messaging during "maintenance/construction activity" ignores that: 1) Section 195.440 is clearly inapplicable to *new construction*; and 2) the "maintenance/construction activity" cited by the ID falls under the regulatory framework for Part 195's "Operations and Maintenance" and applies to operational pipelines not ***new*** pipelines under construction.

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[33] ID at 64.

[34] 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," 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).

The ID also erroneously held that the Commission's general powers under 66 Pa. C.S. § 1501 and its regulations at 52 Pa. Code § 59.33(a) create enforceable communication and outreach standards for SPLP's new pipeline construction, stating "it is clear that Sunoco's construction activities at the Glen Riddle property violate the Public Utility Code or a Commission regulation." ID at 64. To the extent that 52 Pa. Code § 59.33(a) is an enforceable regulation, it merely 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." 52 Pa. Code § 59.33(a). SPLP MB at 28-30. The ID failed to even discuss this standard or how it applies to SPLP's conduct. What the record does show, as discussed below in SPLP's Exception 8, is that SPLP has met the "every reasonable effort" standard when communicating with GRS's residents. SPLP's extensive communications with GRS and its residents,[35] 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. Further, the ID arbitrarily applies 52 Pa. Code § 59.33(a) without employing any rationale or legal reasoning as to its enforceability in this matter, and rather on a basis of preference rather than reason which the Commission must overturn.

Moreover, the ID erred in creating regulatory standards where no standards exist, rather than referring the issues to the Commission's current rulemaking process to amend Chapter 59 of its regulations. 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 and the ID's holding otherwise is in error.

Finally, the ID relies on a reversed and dismissed Commission order as authority for the proposition that the SPLP's communications with GRS residents failed "the Commission's directive to continuously

[35] *See* SPLP MB at 31-38.

improve its communications to the public as is required in Dinniman." ID at 67 (citing *Dinniman* Order). The ID goes on to hold that "the communications to the people who were impacted the most by the construction – the residents of Glen Riddle – was not reasonable and fell short of what was required by the Public Awareness Plan, **Dinniman**, Section 1501 and Section 59.33. 66 Pa. C.S. § 1501; 52 Pa. Code § 59.33…." ID at 69. (emphasis added). Of course, the *Dinniman* Order is not an enforceable and binding requirement on SPLP. It is not precedent at all. The ID itself recognizes that the *Dinniman* Order was reversed and dismissed by the Commonwealth Court at *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283 (Pa. Cmwlth. 2019). *See* ID at 13.[36] In response, the Commission, as directed by the Commonwealth Court, dissolved the interim emergency injunction and dismissed the Dinniman Petition and Complaint by Secretarial Letter on September 19, 2019. *Dinniman v. Sunoco Pipeline, L.P*, Docket No. C-2018-3001451, Letter (dated Sept. 19, 2019). As a result, nothing in the *Dinniman* Order creates a binding standard of conduct that is enforceable on SPLP, and even if it did, the undefined standard of "continuous improvement" relied on by the ID would be woefully insufficient notice of specific communications standards. Indeed, even if the Commonwealth Court had not reversed the *Dinniman Order*, the Commission's June 15, 2018 Opinion and Order at Docket No. C-2018-3001451 did not order SPLP to demonstrate how it intended to "better" communicate with the public or what standards the Commission sought to enforce in the future. The *Dinniman Order* simply directed SPLP to file with the Commission its existing plans and procedures, and SPLP complied.[37] The ID's plain legal error of relying on a reversed Commission order that in any event contained a vague standard that is inapplicable in this context cannot be upheld.

In summary, the ID erred as a matter of law in finding that SPLP did not comply with its Public Awareness Plan, or violated 49 C.F.R § 195.440, API RP 1162, 66 Pa. C.S. § 1501, 52 Pa. Code § 59.33(a), or any Commission Order when holding SPLP's communications with GRS, GRS residents, and the public related to SPLP's new pipeline construction was untimely or insufficient.

[36] ID at 13 states: "On appeal, however, the Pennsylvania Commonwealth Court issued a reported Opinion on Sunoco's interlocutory appeal limited to the issue of standing finding that Senator Dinniman lacked either personal or legislative standing to file the complaint and related emergency petition and directed that the Commission's emergency injunction be dissolved and **the underlying complaint dismissed**." (emphasis added).

[37] *See* SPLP's Compliance Filings dated June 22, 2018 at Docket No. C-2018-3001451.

<u>SPLP Exception 8</u>. The ID erred in holding that SPLP's communications and outreach to GRS residents violated 66 Pa. C.S. § 1501 and 52 Pa. Code § 59.33(a) because it capriciously disregarded or failed to mention key substantial evidence of record. ID at 63-69; FoF Nos. 45, 46, 53, 54, 55; CoL Nos. 17, 20.

While the ID stated that SPLP's communications to GRS residents "were helpful,"[38] the ID went on to erroneously hold that communications with GRS residents were untimely or insufficient to provide residents the necessary awareness of construction activities. ID at 63. The ID further held that under SPLP's public awareness plan, and generally under 66 Pa. C.S. § 1501, SPLP's communications with residents were required to be "more detailed and specific…. regarding the significant impact on the daily lives of the residents of Glen Riddle…" ID at 66. The ID erred when making this finding because: 1) the ID capriciously disregarded the substantial record evidence that GRS demanded SPLP not contact residents directly and to *only* communicate through Counsel and disregarded SPLP's extensive communications with residents (regardless of GRS's demand) including mailers, signage, hotline calls and direct return calls, the notices provided by other governing entities, a virtual townhall meeting, and, most importantly, the provision of rent relief provided directly to residents, regardless of GRS's demands otherwise ; and 2) GRS failed to meet its burden to establish a *prima facie* case that SPLP's communications were untimely or insufficient to residents.

At the outset, it is important to delineate the Complainant's burden of proof, what is substantial evidence, and what is required to establish a *prima facie* case – all requirements the ID simply disregarded in finding that SPLP's communications with residents were untimely or insufficient. SPLP provided the legal standards on burden of proof in its Main Brief at pages 5-6, and references those as if set forth in full. In short, to obtain *any* relief GRS has the burden under 66 Pa. C.S. § 332(a) to prove the elements of its claims that SPLP violated the Public Utility Code, a Commission regulation or Order, or a Commission-approved tariff.[39] Importantly, the Commission's adjudication *must* be supported by "substantial evidence" in the record[40] where "substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[41] More is required than a mere trace of evidence or a suspicion of the

[38] Referencing SPLP's testimony and exhibits regarding communication to residents, stating "these efforts of Sunoco were helpful." ID at 66.

[39] *Lansberry,* 578 A.2d 600; *Se-Ling Hosiery v. Margulies,* 70 A.2d 854 (Pa. 1950); *West Penn Power Co. v. Pa. Pub. Util. Comm'n,* 478 A.2d 947, 949 (Pa. Cmwlth. 1984).

[40] 2 Pa. C.S. § 704; *Lansberry*, 578 A.2d at 602.

[41] *Consolidated Edison Co. of New York v. National Labor Relations Bd.*, 305 U.S. 197, 229 (1938)

existence of a fact sought to be established.[42] 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.[43] Only where a complainant presents evidence sufficient to establish a *prima facie* case does the burden to rebut 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.[44] 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.[45] The ID's finding that SPLP's communications with residents were untimely or insufficient fails to comply with these basic principles.

A. <u>The ID capriciously disregarded or failed to mention key substantial evidence of record that SPLP's communications with residents, despite GRS's demand that direct communication to residents not occur, were adequate and reasonable under 66 Pa. C.S. § 1501.</u>

The record shows that even where SPLP was curtailed by GRS's demand that SPLP only communicate to GRS and its residents through Counsel <u>*and*</u> where GRS even refused to provide construction related notifications to residents as requested by SPLP, SPLP did timely and sufficiently communicate with GRS's residents and did so above and beyond any statutory or regulatory requirement.[46] Even though GRS failed to meet its burden of proof as discussed below, SPLP nevertheless presented substantial evidence that it extensively communicated with residents through mailers, signage, hotline calls and direct return calls, notices provided to the Township that were posted on the Township website, a virtual townhall meeting, and, most importantly, the provision of rent relief provided directly to residents.

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[42] *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 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 Pub. Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

[43] *Pocono Water Co. v. Pa. Pub. Util. Comm'n*, 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. Pub. Util. Comm'n*, 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.").

[44] *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 461 A.2d 1234 (Pa. 1983).

[45] *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

[46] *See* SPLP St. No. 2-R at 14:13-18, citing Exhibit DA-24 (letter from GRS Counsel stating "no communication is to occur with my client directly until we have an agreement here. All communications should go through me."); *see also*, SPLP St. No 3-R at 7:3-5; SPLP St. No. 3-R at 10:9-11:9 (noting that GRS refused to post information provided by SPLP of planned construction activities, and SPLP subsequent communications with GRS residents).

See SPLP MB at 38-39.[47] While the ID recognized these significant measures, even stating that such measures "were helpful," the ID disregarded this evidence and injected arbitrary reasoning that even with the substantial evidence of SPLP's communication to residents, SPLP was required pursuant to a vague and subjective interpretation of Section 1501 to provide "more detailed and specific communications regarding the significant impact of the daily lives of the residents of Glen Riddle…". ID at 66. The ID's pontification that SPLP *should have done more*, without saying *what* SPLP should have done or how SPLP was required to do more under any enforceable standard (i.e., a standard that would have given SPLP the required advance notice of what it is required to do in compliance with due process),[48] is the definition of a capricious disregard for the evidence of record, and is an arbitrary ruling founded on preference rather than on reason or fact. As the Commonwealth Court has held:

> A capricious disregard of evidence exists when there is a willful and deliberate disregard of competent testimony and relevant evidence which one of ordinary intelligence could not possibly have avoided in reaching a result. The meaning of arbitrary includes founded on prejudice or preference rather than on reason or fact.

Casne, 962 A.2d at 19 n. 5 (internal quotation and citation omitted). The ID's holding that SPLP's communications with residents were untimely and insufficient under 66 Pa. C.S. § 1501 is the definition of

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[47] SPLP's Main Brief at 38-39 provided:

> 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 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.

[48] *See* SPLP's Exception 2 above.

arbitrary and capricious, and a complete dereliction of imposition of critical legal standards of burden of proof, substantial evidence, and due process that the Commission cannot let stand under well settled Pennsylvania law. Therefore, the Commission must reject the ID's holding the SPLP's communications with GRS's residents were untimely and insufficient as this finding of violation of 66 Pa. C.S. § 1501 has no evidentiary or legal basis.

B. GRS failed to meet its burden of proof to establish a *prima facie* case through substantial evidence that SPLP's communications with residents was untimely or insufficient under any specific legal requirement of any law, regulation or Order.

The ID erred when it held that SPLP's communications to GRS residents were untimely or insufficient as such a finding is not supported by substantial evidence of record, and GRS failed to meet its burden of proof to establish a *prima facie* case that SPLP's communications to residents was untimely or insufficient. Tellingly, the ID fails to *cite a single piece of testimony or evidence from the record* offered by GRS, the party with the burden of proof, to support the holding that SPLP's communications to residents were untimely or insufficient. *See* ID at 9-10 (Findings of Facts Nos. 38-47); *see also,* ID at 60-69 (analysis "Section VI – Communications with Public"). In particular, Section VI of the ID relies on mere hypotheticals, generalities or arguments related to communication to GRS management, *not to residents.* [49] The ID did not establish how it believed GRS met its burden of proof regarding communications with residents, and without doing so, the ID arbitrarily ignored GRS' fundamental requirement to present substantial evidence to be granted any relief.

Worse, the ID then conducts a one-sided breakdown and misinterpretation of SPLP's witness testimony *as if SPLP had the burden of proof on this issue.*[50] It did not. GRS had the burden to prove all aspects of its complaint and where GRS failed to present substantial evidence regarding whether communications with GRS residents was untimely or insufficient, the burden *does not* shift to SPLP to rebut where there is no prima facie showing. The ID is, therefore, critically flawed in finding SPLP in

[49] Indeed, the only testimony and evidence presented by GRS cited in Section VI regarded only communications on construction plans (citing GRS St. 1-SR at 31-34; GRS St. 2-SR at 3); communications on the location of sound walls (citing GRS St. 2-SR at 5; GRS St. 30SR at 2); and that without proper communications to GRS Management, other safety aspects could not be addressed (citing GRS St. 3-SR at 3). *See* ID at 67-68.

[50] *See* ID at 68 stating "Sunoco has not otherwise made any arguments that support rejecting a finding that Sunoco's communications to the public regarding the construction activities at the Glen Riddle site violated the Public Utility Code or the Commission's regulations."

violation of 66 Pa. C.S. § 1501,[51] as GRS did not meet its required burden of proof to present substantial evidence that SPLP's communications with GRS residents were untimely or insufficient.

Moreover, the ID did not simply fail to cite GRS' evidence on this point from the record, *there was no competent evidence sponsored by GRS to support this finding*. GRS put forth no witness testimony, no exhibits, no testimony from residents on whether SPLP's communications with GRS residents was untimely or insufficient. Rather, GRS's evidence focused entirely on GRS management and GRS Counsel's communications with SPLP regarding alleged safety concerns. *See generally* GRS St. No 2; GRS St. No. 1-SR. Most of the communications were between SPLP and GRS counsel-of-record, which GRS sought to include in the record over SPLP's objection,[52] that are pure hearsay alleging unsworn allegations[53] which cannot be accepted for the truth of the matter asserted.[54]

Related to residents, GRS offered at most speculation or non-expert opinions on SPLP's communication requirements with GRS or its residents. *See* GRS St. No. 2 at 5:18-6:2 (lay opinion testimony discussing alleged communication requirements under the Public Utility Code which are not substantial evidence); GRS St. No. 1-SR at 12:9-10 (discussing alleged request at a March 5, 2021 meeting regarding bi-weekly updates to GRS management and residents); GRS St. No. 1-SR at 27:1-27 (discussing SPLP's requests that GRS publish additional safety information to GRS residents). GRS also presented and mischaracterized hearsay exhibits, which SPLP objected to,[55] of alleged "resident complaints" which were not verified or testified to by the alleged person complaining, and do not address whether SPLP's communications were sufficient. This is not substantial evidence that communications with residents was untimely or insufficient. Further, the only resident testimony GRS offered, the testimony of Mrs. Johanna Rincon, did not discuss any concerns with SPLP's communications with residents or that communications

[51] ID at 66.

[52] *Walker v. Unemployment Comp. Bd. of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976) ("[h]earsay evidence, properly objected to, is not competent evidence to support a finding.") ("a finding of fact based solely on hearsay will not stand"); *Chapman v. Unemployment Comp. Bd. of Review*, 20 A.3d 603, 610, n. 8 (Pa. Cmwlth. 2011)

[53] GRS also stipulated that these counsel-of-record's emails would not be used for the truth of the matter asserted, and rather simply "to demonstrate GRS's Counsel's attempts to communicate." See SPLP RB at 8-12.

[54] These are precisely the types of communications that lack trustworthiness due to the bias involved. *Ganster v. Western Pa. Water Co.*, 504 A.2d 186, 190 (Pa. Super. 1985) ("[I]t is essential that no lack of trustworthiness appear in the source of information or the method or circumstances of preparation."); *see Milano v. Commerce Square Partners*, 2017 WL 3037509 (Pa. Super. 2017) (unreported) (affirming trial court's exclusion of hearsay e-mails lacking trustworthiness because it was based upon additional hearsay).

[55] *Walker*, 367 A.2d at 370 ("[h]earsay evidence, properly objected to, is not competent evidence to support a finding.") ("a finding of fact based solely on hearsay will not stand"); *Chapman*, 20 A.3d at610, n. 8.

were untimely or insufficient. *See* GRS St. No 4.[56] Given GRS completely fails to present substantial evidence on communications to residents, the ID erred in finding SPLP in violation of its public awareness obligations to residents, and GRS failed to establish a prima facie case that SPLP did not adequately communicate.

GRS failed to argue in its Main Brief or its Reply Brief[57] that communications with residents were untimely or insufficient. GRS argued communication failures regarding construction at the property, but these arguments focused entirely on SPLP's alleged failure to communicate with GRS management and counsel.[58] None of these arguments related to whether SPLP's communications *with residents* violated 66 Pa. C.S § 1501, and indeed GRS put forth no evidence or arguments that SPLP's communications with residents were untimely or insufficient. On this basis, the ID arbitrarily held that SPLP violated 66 Pa. C.S. § 1501 with a complete lack of substantial evidence which the Commission must overrule under well settled Pennsylvania law.

SPLP Exception 9. The ID erred in determining the appropriate civil penalty when applying the *Rosi* factors. ID at 75-82.

The ID erred when it: 1) determined that the boilerplate notice in the Secretarial Letter serving the December 3, 2020 Formal Complaint[59] provided SPLP proper notice and opportunity to defend against the implication of a civil penalty which was raised for the first time in GRS' September 24, 2021 Main Brief; 2) required SPLP, the party *without* the burden of proof, to file a petition to reopen the record to if it wanted to present evidence on the *Rosi* Factors; and 3) applied the *Rosi* standards in an arbitrary manner founded

[56] Mrs. Rincon testified regarding noise and vibrations (GRS St. No. 4 1:17-2:5), parking spot impacts and availability (GRS St. No. 4 2:6-10), and school bus stop relocation (GRS St. No. 2:10-13).

[57] GRS's Reply Brief did not discuss any communication related topics. *See generally* GRS Reply Brief.

[58] *See* GRS Main Brief at 53-57. In summary GRS argued: 1) SPLP's communication with GRS management or its counsel's was insufficient (GRS MB at 55; citing GRS St. No. 1-SR); 2) Communication regarding sound walls was insufficient (GRS MB at 55; citing GRS St. No. 3); 3) communication regarding workspace delineation was insufficient (GRS MB at 55; citing GRS St. 1); 4) communication regarding alleged leak of materials was insufficient (GRS MB at 55; citing GRS St. 1-SR); 5) communication regarding Calciment was insufficient (GRS MB at 55; citing Exhibit GRS-135); 6) communication regarding signage was insufficient (GRS MB at 56); and 7) communication regarding the water line strike was insufficient (GRS MB at 56).

[59] Notably, the Complaint did not seek civil penalties and the content of the complaint only encompassed allegations regarding 2 of the 51 violations found in the ID.

on preference rather than on reason or fact. ID at 75-85. This critical violation of due process and arbitrary reasoning cannot be upheld.

A. <u>Where the Formal Complaint did not seek civil penalties nor even include any allegations related to 49 of the 51 violations found in the ID, the Commission's boilerplate Secretarial Letter serving the Complaint did not comply with due process.</u>

The ID erred in finding that SPLP's due process rights were not violated by GRS's eleventh hour request for civil penalty; GRS requested the relief for the first time in its Main Brief. SPLP's RB at 41-47. In reaching this conclusion, the ID inappropriately found that the Commission's boilerplate Secretarial Letter which accompanies the service of formal complaints satisfied SPLP's due process. As the ID stated, the Commission's December 3, 2020 letter stated "if you **fail to answer the complaint** within twenty (20) days of the above date service, the claims against you may be deemed admitted, the case may go forward *and a penalty may be entered against you* by the Commission without further notice." ID at 84 (italic emphasis original, bold emphasis added). This boilerplate language, as discussed below, does not inoculate against the due process violation of entertaining GRS's late requested relief, and further cannot comply with fundamental due process, as **49 of the 51** violations found in the ID were not "claims against" SPLP considered by the December 3, 2020 Letter raised in the plain language of the Complaint. Indeed, the Complaint did not even allege violations of noise or failures or communication with residents. Moreover, the letter was specific to consequences of failing to answer the Complaint, and gave no notice that civil penalties could be raised and considered for the first time at the briefing stage of litigation.

The Formal Complaint raised the following allegations: 1) the November 18, 2021 meeting and fire/sound wall concerns (Complaint at 11); 2) parking and traffic concerns (Complaint at 14); 3) demarcation of worksite concerns (Complaint at 17); 4) construction workers not comply with COVID-19 protocols (Complaint at 17); 5) alleged leaks from construction equipment (Complaint at 19); 6) structural concerns for GRS's buildings (Complaint at 22); and 7) storm drainage concerns (Complaint at 23). While SPLP has excepted to the ID's finding of violations regarding the fire hazards, s*upra* Exception 6, taking the Complaint together with the Commission's Secretarial Letter relied on by the ID at face value, the *only* violations which the Complaint and Letter provided SPLP adequate notice of was the general concerns for "Fire Hazards." The ID's findings of **49 violations** – 46 violations regarding noise levels (23 violations of 66 Pa. C.S. § 1501, 23 violation of 52 Pa. Code § 59.33), and 3 violations regarding communications with GRS residents (1 violation of 66 Pa. C.S. § 1501, 1 violation of 52 Pa. Code § 59.33, and 1 violation of

SPLP Public Awareness Plan) – ***were not alleged in the complaint*** and therefore the Commission's boilerplate Secretarial Letter serving the Complaint did not comply with SPLP's due process rights where it would later be found in violation for issues never pleaded in the Complaint. Worse, as GRS never amended its formal complaint to include these matters at any point during the proceeding or to seek a civil penalty until GRS requested the new relief in its September 21, 2021 Main Brief, SPLP was never given formal notice that the Commission may impose civil penalties for matters and issues never pled, and the ID disregarded and violated SPLP's fundamental due process rights.

The Commission, as an administrative body, is bound by the due process provisions of constitutional law and by principles of common fairness. *Hess v. Pa. Pub. Util. Comm'n*, 107 A.3d 246, 266 (Pa. Cmwlth. 2014). Among the requirements of due process are notice and an opportunity to be heard on the issues, to be apprised of the evidence submitted, to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. *Id*. Moreover, "the right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1, 18 (1938). Thus, the "requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." *Id*.

Therefore, where the ID dismissed SPLP's due process concerns and relied solely on boilerplate language of the Commission's Secretarial Letter serving the Complaint in this matter, the ID must be overturned, as the Commission is bound by due process and principles of common fairness. SPLP was not given notice of or a fair opportunity to be heard regarding the imposition of civil penalties and the application of the *Rosi* factors to **49 of the 51 violations** found in the ID. The Commission has a duty to protect SPLP's due process rights and overturn the ID's summary and arbitrary disregard when ordering civil penalties in this proceeding.

B. The ID erred when holding that SPLP, the party without the burden of proof, should have filed a petition to reopen the record to present evidence on the *Rosi* factors and that SPLP had general notice that civil penalties found may be imposed under the Public Utility Code.

The ID goes on to hold that SPLP should have filed a petition to reopen the record in response to GRS's Main Brief, and that SPLP, generally as a Public Utility, had notice that violations could result in civil penalties. ID at 84-85. The ID held:

> to the extent that Sunoco wished to do so, it too could have also filed a petition to reopen the record in this matter for purposes of presenting evidence on the *Rosi* factors. Sunoco did not do so and therefore cannot not now be found to have lacked notice and an opportunity to be heard regarding the imposition of a civil penalty in this case. Finally, as a certificated public utility, Sunoco has general notice that its violations of the Public Utility Code or Commission regulations could result in the imposition of a civil penalty.

ID at 84-85. First, SPLP does not have the burden of proof and the ID erroneously implies that SPLP had the burden to reopen the record to present evidence. This holding completely disregards the basic fundamentals of complaint proceedings where the Complainant, at all stages, has the burden of proof under well settled Pennsylvania Law.[60] Second, GRS entirely failed to meet its burden of proof on any of the *Rosi* factors, and did not even present argument on the *Rosi* factors in its briefing. SPLP RB at 47-53. Therefore, SPLP was not required to seek to reopen the record to present evidence where GRS utterly failed to meet its burden on the *Rosi* factors in the first place, let alone present legal argument on the *Rosi* factors in seeking a civil penalty for the first time in its Main Brief. The Commission must overturn the ID's holding that SPLP was required to reopen the record to present evidence on the *Rosi* factors.

C. The ID applied the *Rosi* factors in an arbitrary manner founded on preference rather than on reason or fact.

The ID applied the *Rosi* factors in an arbitrary manner founded on subjective preference and in complete disregard for prior Commission analysis of these factors. As an initial matter, SPLP discussed how each of the *Rosi* factors does not warrant imposing civil penalties and how GRS did not meet its burden to permit civile penalties in its Reply Brief at 47-53. SPLP incorporates that analysis as if set forth in full in this exception.

In short, the ID made arbitrary decisions on multiple of the *Rosi* factors. On the first factor "whether conduct was of a serious nature," the ID advocated that because of the arbitrary findings on fire hazards, noise volumes, and communications with residents, "extreme care should have been taken but was not" and therefore warranted a higher civil penalty. ID at 77. SPLP addressed this factor at page 48 of its Reply Brief. Under the ID's logic, and even where a utility takes all reasonable steps and care to undertake construction, all utility construction would be "of a serious nature" warranting civil penalties – if such a holding stands, it would cripple construction of utility infrastructure in the Commonwealth. Further, the finding of a "serious nature" ignores a critical fact – SPLP provided rent relief to those most impacted by the

[60] *Lansberry,* 578 A.2d 600; *Se-Ling Hosiery v. Margulies,* 70 A.2d 854 (Pa. 1950); *West Penn Power Co. v. Pa. Pub. Util. Comm'n,* 478 A.2d 947, 949 (Pa. Cmwlth. 1984).

construction, GRS residents, so that they may relocate or find other accommodations during the temporary construction activities. Failing to consider these factors, the ID erroneously held that the first *Rosi* factor warranted a higher civil penalty based on purely arbitrary factors not supported by the record.

Regarding the third factor, which SPLP discussed in its Reply Brief at page 48, "whether the conduct at issue was Intentional or Negligent," the ID arbitrarily imposed a higher civil penalty on the basis that "performing major construction is intentional." ID at 78. However, this finding ignores the fact that while all utility construction is indeed "intentional" that does not automatically make a showing that any subsequent violation is *de facto* intentional as well. This is especially true here, where SPLP took significant mitigating steps regarding construction and exercised reasonable care, and even had approval of the sound wall location and other factors from local governing bodies that the construction would not impact an emergency response. Therefore, the ID erred in applying the third factor.

Regarding the fourth factor, whether SPLP modified its practices or procedures, the record is clear that SPLP made ongoing and significant modifications to its construction plans to reduce worksite impacts through coordination with the Township, and with GRS representatives. *See* SPLP Reply Brief at 50-51. Indeed, the fact that SPLP used sound walls at this worksite, provided financial mitigation to GRS's residents, hosted a virtual town hall, provided extensive communication to residents and GRS management, coordinated with the local school district, worked directly with the Township to ensure safe sound wall placement, and provided GRS residents with bottled water is by definition a showing of a continued modification of SPLP's conduct during construction which the ID arbitrarily ignored. Therefore, the ID erred in applying the fourth factor.

Regarding the fifth factor, the number of customers affected, SPLP discussed how GRS failed to show that residents voiced concerns or presented substantial evidence of any negative impact to residents in its Reply Brief at page 51. The ID, however, held that because the apartment complex had 124 units, with more than 200 people living there, "a large number of people were impacted by Sunoco…" ID at 79. Astonishingly, ALJ Cheskis has previously found in other matters under the fifth *Rosi* factor that in circumstances that involved greater numbers of affected people, a civil penalty was not warranted.[61] This

[61] In *Pa. Pub. Util. Comm'n v. Continental Communications LLC, and Hickory Hills MHC, LLC*, ALJ Cheskis found under the fifth *Rosi* factor that where a fatality occurred in a propane distribution explosion impacting "over 300 individual sites" of an entire mobile home community, notably where 2 properties were rendered uninhabitable, and where violations lasted over two years, ALJ Cheskis applied this factor holding "the number of customers affect ***was only a few***" and while the duration of violations was long, "the number of customers affected was minimal." *Pa. Pub.*

further demonstrates the completely arbitrary nature of the ID's application of the *Rosi* factors. While the Commission's prior holdings under the *Rosi* factors are not binding, the ALJ's arbitrary finding against SPLP on the fifth *Rosi* factor when previously the same ALJ found that **over double** the number of impacted people (over 300 individual sites) did not suffice, the finding here cannot be upheld. Indeed, where, as here, only 124 apartment units were affected for just over 6 months and where GRS residents were given financial assistance by SPLP to relocate if they desired during construction, a lesser civil penalty under the fifth factor is warranted and in line with prior Commission decisions.

Finally, under the remaining *Rosi* factors, Nos. 6 and 8, the ID erred in finding a higher civil penalty was warranted. ID at 80-83. Neither of these factors weigh in favor of civil penalty. SPLP RB at 51-53. In particular, regarding No. 6 – Compliance History and No. 8 – Amount of Civil Penalty Necessary to Deter Future Conduct, the ID held that because SPLP has had violations in other matters, and this is not "an isolated incident" a higher penalty is warranted. This arbitrary finding cannot stand - no other litigation regarding SPLP's compliance with the Public Utility Code found SPLP in violation of noise, fire hazards, or *new* pipeline construction communications.[62] There is no record of SPLP's non-compliance on these issues, and the ID's holding lacks foundational support.

Therefore, the Commission should overrule the ID's arbitrary analysis on the first, third fifth, sixth, and eighth *Rosi* factors for the reasons discussed above and in SPLP's Reply Brief and find that these factors do not warrant the imposition of a higher civil penalty.

SPLP Exception 10. The ID erred in failing to dismiss the complaint as moot. ID at 70-71.

The ID erred when holding the Complaint was not rendered moot by the completion of construction. ID at 70-71. As SPLP argued in its Main Brief at 20-23, GRS only alleged and requested relief regarded SPLP's active construction, which the ID recognized was completed as of July 13, 2021. ID at 70. Indeed, the only relief requested in the Complaint sought the "enjoining and restraining. . . of further work at the property" which was rendered moot by the completion of construction as GRS Counsel's admitted.[63] *See*

Util. Comm'n v. Continental Communications, LLC, and Hickory Hills MHC, LLC, Docket No. C-2015-2468131, Initial Decision at 20-21 (Decision entered June 7, 2016) (adopted in full by Opinion and Order dated Aug. 11, 2016).

[62] To the extent the Commission's Order in *Flynn et al v. SPLP*, (which SPLP has appealed to the Commonwealth Court) can be described as finding SPLP in violation of public awareness requirements relating to new pipeline construction, that is an issue that was not decided until after briefing occurred in this case, so it provided no fair notice, and is incorrect as a matter of law and at issue on appeal.

[63] N.T. 10:19-22 (discussing scheduling and GRS's counsel's request for expedited treatment of the proceeding on concerns of mootness) "So the schedule that was omitted from opposing counsel's statement there was the schedule

Complaint at page 28. The ID goes on to cite 66 Pa. C.S § 1501 and 52 Pa. Code § 59.33(a) to support the holding that completion of a complained of event, without incident or harm to any party, does not impair the Commission's ability to find violations under the Public Utility Code. ID at 71.

The ID, however, misses critical points as to why the circumstances of *this* matter and the completion of construction do warrant dismissing the complaint as moot. First, the ID fails to address the fundamental point of law that an actual case or controversy must exist ***at all stages*** of the judicial or administrative process.[64] Indeed, the ID failed to apprehend that because the Complaint only sought injunctive relief for conduct that has since been completed, Pennsylvania law requires that this intervening change in the factual posture of the case indeed requires its dismissal as moot.[65] As discussed in SPLP's Main Brief at 22-23, by refusing to require an actual case in controversy at all times in this matter, the ID has allowed GRS to continue its prime motivating purpose for this proceeding which was proven by the record evidence – that GRS is using and abusing the Commission's procedures to further leverage GRS's monetary demands from SPLP regarding unproven business losses and the value of the temporary easement taking – issues that are beyond the Commission's jurisdiction.[66] While the ID disregarded this key point, the Commission should overrule the ID and dismiss the complaint as moot as the Commission should not condone litigants weaponizing the Commission's procedures with unwarranted allegations to threaten a public utility into monetary settlement.

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that *he's called for to resolve these safety issues*. ***Calls for them to be resolved when they're all moot***." (emphasis added).

[64] *See Util. Workers Union of Am., Loc. 69, AFL-CIO v. Pa. Pub. Util. Comm'n.*, 859 A.2d 847, 849–50 (Pa. Cmwlth. 2004). ("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).")

[65] *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); *see also, 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); *see also, In re Gross,* 382 A.2d 116 (Pa. 1978) (appeal involving intervening change in factual posture as the patient was no long being administered medication by provider against his will).

[66] *See* SPLP St. No. 2-R at 17:4-19:5; 19:8-16; Exhibits DA-30, 31, 32, 33, 34, 35, 36.

<u>SPLP Exception 11</u>. The ID erred when holding that 66 Pa. C.S. § 1501 or 52 Pa. Code § 59.33 does not require actual harm to have occurred for a violation to be found. ID at 71.

The ID erred when it held that GRS was not required to prove actual harm in this matter to find a violation of the Public Utility Code or the Commission's regulations, stating:

> While it is fortunate that the construction was completed without any major accidents or injuries, that does not negate the fact that violations of the Public Utility Code or a Commission regulation have occurred. **Nothing in Section 1501 of the Public Utility Code or Section 59.33 of the Commission's regulations requires actual harm to have occurred for a violation to be found**.

ID at 71 (emphasis added). However, to establish that the SPLP's construction was not "safe" within the meaning of Section 1501, GRS was required to prove "by a preponderance of the evidence that the utility's proposed conduct would create a 'proven exposure to harm.'" *Povacz v. Pa. Pub. Util. Comm'n*., 241 A.3d 481 (Pa. Cmwlth. 2020), *appeal granted,* 253 A.3d 220 (Pa. 2021) ("*Povacz*"). In *Povacz*, the Commission concluded that complainants are required to prove by a "preponderance of the evidence . . . that a utility's service or facilities *will cause harm*." *Povacz v. PECO Energy Co.*, Docket No. C-2015-2475023, Opinion and Order at 29 (Order entered Mar. 28, 2019) (emphasis added). There, Commission rejected the consumers' position that complainants could meet their burden of proof by showing only the "potential" for harm. Rather, the Commission held that, as complainants, the consumers had the burden to prove a utility's service or facilities "will cause harm."[67] On appeal, the Commonwealth Court expressly affirmed the burden of proof standard that the Commission applied, *Povacz*, 241 A.3d at 494, while remanding to the Commission for further proceedings.[68]

Similar to the holding in *Povacz*, the Commission should find that where, as here, GRS failed to prove actual harm as recognized by the ID,[69] GRS's theoretical allegations of hazards where no harm actually occurred does not meet the standard required to find a violation under Section 1501. Therefore, the

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[67] "Our concern with the Complainants' "potential for harm" or "capable of causing harm" standard under Section 1501, ***which we reject***, is that it allows the mere demonstration by a preponderance of the evidence that a hazard exists in utility service to be sufficient to prevail under Section 1501 . . . . The Complainants' standard rests upon a logical fallacy that equates any hazard with exposure to harm, and on that basis, according to Complainants, all hazards must be removed from utility service or facilities in order to be safe. However, even a lay person knows that public utility operations are not as a general matter, hazard free." *Povacz* Opinion and Order at 30 (emphasis added).

[68] SPLP notes that the *Povacz* proceeding is currently on appeal to the Pennsylvania Supreme Court, where oral arguments were heard on December 7, 2021. SPLP reserves the right to notify the Commission of the Supreme Court's disposition of the "potential for harm" standard should an Opinion be issued during the pendency of the Commission's consideration of these exceptions.

[69] ID at 71.

Commission should overrule the ID and find that GRS was required to prove actual harm to satisfy its burden, and as it failed to do so, SPLP cannot be found in violation Section 1501.

SPLP Exception 12. The ID erred in exercising jurisdiction over sound and fire safety. ID at 16, 38-51, 70, FoF Nos. 12-27, 29-37, 48-55, CoL No. 20.

SPLP has argued at length that the Commission lacks jurisdiction over issues of construction noise and local emergency responder access to property.[70] SPLP MB at 39-41. These are not subjects within the Commission's realm of expertise. On one hand, the ID recognized the limited nature of the Commission's jurisdiction and that the Commission cannot exercise authority over municipal ordinances governing sound or emergency responder access, such as Middletown Township's fire code (which has provisions for access to property for emergency responders) and construction work ordinances relating to noise, or OSHA workplace sound level regulations. *See, e.g.*, ID at 41. Yet with the other hand, the ID goes on to exercise jurisdiction over these exact issues in disregard for the prior jurisdictional ruling ignoring the concepts of the law of the case doctrine.[71] *Id.* Apparently further recognizing that the Commission lacks jurisdiction to apply these standards, the ID just ignores them and finds it can create its own standards for noise and emergency responder access and usurp jurisdiction in the name of alleged safety and reasonableness concerns. *E.g.*, *id.* Instead, and as the ALJ has previously recognized, the entity with jurisdiction over the subject matter must first decide that a regulation or ordinance has been violated. Then, that finding of violation can be used by the Commission.

> 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 (emphasis added). Thus, the Commission does not have jurisdiction in the first instance to make determinations about sound levels or emergency access, particularly when SPLP is subject

[70] To the extent SPLP has addressed issues that are beyond the Commission's jurisdiction in its brief and these exceptions, it is not to be construed that SPLP believes these issues should be decided in this case, but it is because over SPLP's objection and motion practice that sought to exclude these issues from the hearing, testimony was nevertheless allowed to be entered into the record on each of these topics, and SPLP was required to provide responsive testimony to protect its appellate rights should the Commission act beyond its limited authority and issue any findings on these matters in this case.

[71] *See supra* n. 13.

to the municipality's ordinances that impose those standards and SPLP follows those standards. Utilities already must comply with the crazy quilt of local regulations for noise and fire codes across the state that differ jurisdiction by jurisdiction. Adding on yet another layer of *ex post facto* standards as the ID has done is not within the Commission's jurisdiction and is not sound policy.

SPLP Exception 13. The ID erred in failing to dismiss the Complaint for lack of valid verification. ID at 71-73.

The ID recognized that the Commission's requirements for verification for complaints are ***mandatory*** and that the verification may have been signed by the wrong person, but reasoned that this could be disregarded as a defect of procedure pursuant to 52 Pa. Code § 1.2(a). ID at 72-73. It is not a mere defect of procedure but is a ***mandatory*** requirement for a legal action to exist. *See Schellhammer v. Pa. Pub. Util. Comm'n*, 629 A.2d 189, 192-93 (Pa. Cmwlth. 1993) (holding that a document filed with the Commission that does not include an affidavit or verification is not entitled to notice and hearing); *Pa. Pub. Util. Comm'n v. Salem Trans, Inc.*, Docket No. A-00115591F0001, 2002 WL 34558719, (Opinion and Order entered Oct. 30, 2002) ("Verification is essential to the integrity of Commission process… Accepting an unverified petition is tantamount to admitting the testimony of an unsworn witness at hearing or trial. The judicial body has no assurance that the witness is telling the truth under either oath to God or threat of criminal prosecution… As such, the Letter Petition should not have been accepted for filing by the Commission's Secretary's Bureau."). The ID essentially decided to look the other way and erred in not dismissing the Complaint. As SPLP explained, 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. 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. SPLP MB at 25. The ID reasoning that this is just an error of procedure that does not affect SPLP's substantial rights and can be

disregarded is incorrect. Failure to properly verify a complaint results in the complaint being a legal nullity and removes the power of the Commission to act further. *See Samall Associates, Inc. v. Delaware Valley Utilities, Inc.*, Docket No. C-20016060 (Order entered Feb. 28, 2002) (holding that an improperly verified complaint by someone other than an officer of an organization cannot be amended because it has never been perfected and, therefore, is not a complaint and should be dismissed); *Pittston Area Taxi, Inc.*, Docket No. A-00107287, 2002 WL 34558654 (Order entered July 26, 2002) (stating that failure to provide a verification for petition for reinstatement would result in dismissal). The ID should not be adopted on this point and the Complaint should be dismissed.

III. CONCLUSION

WHEREFORE, for the reasons stated above, SPLP respectfully requests the Commission modify the ID consistent with these exceptions.

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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