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April 7, 2022

VIA ELECTRONIC FILING

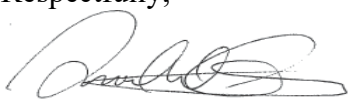
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

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

Dear Secretary Chiavetta:

Enclosed for electronic filing with the Pennsylvania Public Utility Commission is the Reply Of Glenn Riddle Station, L.P., To Sunoco Pipeline L.P.'s Exceptions to the Initial Decision in the above-referenced matter. If you have any questions with regard to this filing, please do not hesitate to contact me. Thank you.

Respectfully,



Samuel W. Cortes

SWC:jcc
Enclosure

cc: Per Certificate of Service
Commission's Office of Special Assistants (via email to ra-OSA@pa.gov)

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY OF GLEN RIDDLE STATION, L.P., TO THE EXCEPTIONS OF SUNOCO PIPELINE, L.P., TO THE MARCH 8, 2022 INITIAL DECISION

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Dated: April 7, 2022

Pursuant to the Commission's Letter of March 8, 2022, Glen Riddle Station, L.P. ("GRS"), submits its Reply to the Exceptions (the "Exceptions") of Sunoco Pipeline, L.P. ("Sunoco"), to the March 8, 2022, Decision of the Office of Administrative Law Judge (the "Decision").

I. INTRODUCTION AND SUMMARY OF REPLIES TO EXCEPTIONS

Sunoco's Exceptions, like its prior submissions and its conduct that caused this lawsuit, demonstrate that Sunoco believes that it is above-the-law. [See Sunoco's Main Brief, p. 42 ("[Sunoco] has managerial discretion regarding its construction practices and therefore ***has the right to proceed how it chooses*** so long as its activities are not in violation of law, regulation, or Commission order"); Exceptions, p. 5 (the [Decision] utilized the statutory terms "safe" and "reasonable" as vague, undefined catchalls to impose a subjective, *ex post facto* standard ***to judge Sunoco's actions where no specific regulations exist***").] Unless Sunoco kills someone, causes serious injury, or engages in conduct with a "high probability" of causing a tragic outcome, Sunoco tells GRS and the Commission to leave Sunoco to its own devises. [See Sunoco's Main Brief, p. 42 ("Since GRS failed to prove ***any actual harmful consequences occurred or that there was a high probability of a harmful consequence occurring,*** GRS cannot establish general lack of safety or adequacy or reasonableness under Section 1501") (emphasis added); Exceptions, p. 5 ("***because no harm occurred here***, the [Decision] erred in finding that the Complaint could be sustained even in part") (emphasis added).] Now, confronted with the consequences of its 51 separate, serious violations of law, Sunoco makes these same outrageous claims and adds new outrageous claims – e.g., (a) that Sunoco cannot violate laws that use the terms "safe" and "reasonable" because Sunoco does not know what those terms mean, (b) that the Commission lacks jurisdiction to address the very same safety issues that Sunoco argued a federal court should abstain from deciding because they fall within the Commission's exclusive jurisdiction, and (c) that the Commission should ignore the plain language of specific statutes and regulations and interpret them as if they do not exist. Sunoco's words and actions continue to demonstrate Sunoco's flagrant disregard for the law, safety, the citizens of Pennsylvania, and the Commission itself.

As Sunoco's Exceptions further demonstrate, Sunoco is unrepentant and will continue to put its own profits ahead of our citizens' safety until a tragedy occurs. The Commission has the power and the duty to protect the public from Sunoco and reduce the likelihood of a tragic outcome. The safety of our Commonwealth and its citizens demands a full affirmance of the well-reasoned decision of Deputy Chief Administrative Law Judge Joel Cheskis ("ALJ Cheskis") and heightened scrutiny for Sunoco's unabated recklessness.

II. REPLY TO EXCEPTIONS

Sunoco misstates its obligations under the Public Utility Code and related regulations, the jurisdiction of the Commission, the prior rulings in this case and in others, the evidence presented at trial, the findings and conclusions set forth in the Decision, and, most egregiously, the impact of the foregoing on its obligations to the public. Sunoco's Exceptions must fail, and the Commission should adopt the sound Decision of ALJ Cheskis in its entirety.

Exceptions 1, 2, 3, 7 and 12: Sunoco's Claim That The Commission Cannot Require Sunoco To Be "Safe" Must Fail.

Sunoco repeatedly and vehemently invites the Commission to ignore the plain language of Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501 ("Section 1501"), and Section 59.33 of the Commission's regulations, 52 Pa. Code § 59.33 ("Section 59.33"), arguing that the Commission cannot expect Sunoco to understand the meaning of the terms "safe" and "reasonable." [Exceptions, pp. 5-12.] Nor should the Commission, says Sunoco, expect Sunoco to provide service that complies with what Sunoco characterizes as "vague" terms – i.e., "safe" and "reasonable." [Id.] Sunoco's claim that it does not and cannot know the meaning of "safe" or "reasonable" is as flawed as it is ironic under the circumstances of this case. The Commission has already rejected a similar claim by Sunoco, finding that Sunoco's "restrictive reading of the Code would unduly tie [the Commission's] hands when dealing with potentially unreasonable, unsafe, or dangerous public utility services or facilities." [See Flynn, et. al. v. Sunoco Pipeline, L.P., Docket No. C-2018-3006116, Opinion and Order, Nov. 18, 2021 (referred to as the "Flynn Case"), pp. 86-87.]

Although Sunoco characterized its "safety" Exception as five separate Exceptions, Sunoco's Exceptions 1, 2, 3, 7, and 12 are essentially the same. Each asks the Commission to ignore the plain language of Sections 1501 and 59.33 for at least one of the following reasons:

- Exception 1 – Sunoco did not know that it must perform its work safely;
- Exception 2 – Sunoco did not know that it must communicate with the public reasonably to provide for the safety of those affected by its work;
- Exception 3 – the Decision creates new, unreasonably strict requirements that demand Sunoco be "reasonably safe;"
- Exception 7 – the Commission cannot require Sunoco to communicate with the public reasonably to provide for safety of those affected by its work; and
- Exception 12 – the Commission lacks the jurisdiction to require Sunoco to be safe.

[See Exceptions, generally.]

In addition to the absurdity of Sunoco's safety arguments and ALJ Cheskis' well-reasoned Decision, the Commission should also reject Sunoco's Exceptions 1, 2, 3, 7, and 12 for the following reasons: (1) binding principles of statutory construction require this outcome, and (2) the Commission has the jurisdiction, and the duty, to impose the relief stated in the Decision.

(1) Binding Principles Of Statutory Construction Require The Commission To Reject Sunoco's Request That The Commission Ignore Sections 1501 And 59.33.

Sunoco's arguments concerning Sections 1501 and 59.33 are absurd and contrary to binding statutory law. The Commission should reject them.

On one hand, Sunoco argues that the Commission must interpret Sections 1501 and 59.33 using "regulations specific to the conduct at issue." [Exceptions, p. 5, fn. 10.] If no specific regulation exists, then Sections 1501 and 59.33 do not exist, according to Sunoco. [Id.] To support this argument, Sunoco reasons that the law would require it to perform all work "reasonably" and "safely" – standards Sunoco seeks to avoid by arguing that it cannot understand them. [Exceptions, generally.] Apparently, this is too much to ask of Sunoco. [Id.]

On the other hand, Sunoco argues that the Commission must ignore Sections 1501 and 59.33 when a more specific regulation or provision is already in place. [Exceptions, pp. 10-11 (arguing that Sections 1501 and 59.33 do not expand Sunoco's obligations under its Public Awareness Plan).] Sunoco claims that these more specific regulations essentially supplant Sections 1501 and 59.33. [Id.]

In other words, Sunoco invites the Commission to adopt an interpretation of Sections 1501 and 59.33 that would exempt Sunoco from complying with them when no specific law or regulation applies and when a specific law or regulation applies. Thus, following Sunoco' s "logic," no circumstance ever exists where it must comply with Sections 1501 or 59.33. [See Exception 2, p. 9.]

In addition to achieving the outrageous and dangerous result described above, Sunoco's argument violates binding statutory law. The rules of statutory construction require the Commission to "ascertain and effectuate the intention of the General Assembly" when interpreting statutes and regulations. 1 Pa. C.S. § 1921; see also Bailey v. Zoning Bd. of Adjustment of Phila., 801 A.2d 492, 502 (Pa. 2002); and Silverman v. Eastrich Multiple Investor Fund, L.P., 51 F.3d 28, 31 (3d. Cir. 1995) (explaining that this "basic tenet of statutory construction [is] equally applicable to regulatory construction….)] In doing so, the Commission must give effect to the clear words of an unambiguous statute or regulation. Id. In other words, the plain language is controlling unless the statute or regulation is ambiguous. 1 Pa. C.S. § 1921; Bayada Nurses, Inc. v. Com., 8 A.3d 866, 880-881 (Pa. 2010); see also Breighner v. Chesney, 301 F. Supp. 2d 354, 361 (M.D. Pa. 2004) (recognizing that "plain meaning" is the "touchstone" in the construction of a statute and that "extrinsic evidence of statutory purpose … can never contravene the plain meaning of the text"). When the words of a statute or regulation are clear and unambiguous, a court may not look beyond the plain meaning of the statute. Id.

Although Sunoco suggests that it does not challenge Sections 1501 and 59.33 as written,[1] its

[1] If Sunoco intended to challenge the validity of Sections 1501 and 59.33 for "vagueness," it should have filed a complaint with the Commission. See 66 Pa. C.S.A. § 701 (West) (providing that "any public utility, or other person, or corporation likewise may complain of any regulation or order of the commission, which the complainant is or has been required by the commission to observe or carry into effect"). Sunoco filed no such complaint.

assertions would nullify Sections 1501 and 59.33 and yield an absurd construction (exempting Sunoco from compliance), as stated above. [Exceptions, p. 5, fn. 10.] The Commission must avoid such constructions. The Flynn Case, pp. 86-87; 1 Pa. C.S. § 1921. Sunoco's Exceptions fail for this reason alone.

Additionally, Sunoco does not and cannot reasonably suggest that Sections 1501 or 59.33 are ambiguous. Thus, they must be interpreted as written. Rossi, 860 A.2d at 66; Silverman, L.P., 51 F.3d at 31; Valle-Velez, 995 A.2d at 1270. Sunoco's proffered exemption from compliance is found nowhere within the plain language of Sections 1501 or 59.33.

"Safe" and "reasonable" are well-understood terms. "Reasonable" is defined by Merriam-Webster as "not extreme or excessive," and "safe" is defined as "free from harm or risk." See https://www.merriam-webster.com/dictionary. Thus, the applicable statutory and regulatory language requires Sunoco to make efforts that are not extreme or excessive to ensure the public is free from harm that could result from its work. 1 Pa. C.S. § 1921; Rossi, 860 A.2d at 66; Silverman, L.P., 51 F.3d at 31; Valle-Velez, 995 A.2d at 1270. ALJ Cheskis correctly followed the binding statutory principles of construction in his Decision to find Sunoco in violation of Sections 1501 and 59.33. [Decision, generally and at pp. 15-17.]

In fact, Sunoco itself understands the meaning of "safe" as used in Sections 1501 and 59.33. Sunoco demonstrated this understanding when it quoted ALJ Cheskis to articulate the Commission's expansive jurisdiction over Sunoco to the United States District Court for the Eastern District of Pennsylvania. Glen Riddle Station, L.P. v. Middletown Twp., No. 2:21-cv-00286-PSD, Sunoco Pipeline L.P.'s Reply Brief As *Amicus Curie*, pp. 10-11, and Memorandum of Law in Support of Sunoco Pipeline L.P.'s Motion for Leave to File Amicus Brief, p. 10, (E.D. Pa. 2021) (both filings attached collectively as Exhibit A and are referred to herein as the "Eastern District Representations"). In that case, discussed more fully in Section (2), below, Sunoco argued that the Commission was the exclusive forum for GRS to address issues regarding Sunoco's ***safety***:

> [ALJ Cheskis' Preliminary Objection Order] provides that, although the [Commission] does not have jurisdiction to make an initial finding whether allegedly unsafe activity violates a municipal code, state mandate, or regulation

> ***the [Commission] does have jurisdiction to address whether an allegedly unsafe activity constitutes the public utility providing an unsafe service under Sections 1501 and 1505 of the Public Utilities Code***.

[Id., pp. 10-11 (emphasis added).] Sunoco obviously understood what "safe" meant when it articulated the Commission's jurisdiction in federal court.

Sunoco's incredible assertions are further discredited by the decision in the Flynn Case where Sunoco filed a nearly identical exception that the Commission rejected. See The Flynn Case, p. 85. Sunoco argued that the Initial Decision by Administrative Law Judge Barnes ("ALJ Barnes") improperly imposed requirements on Sunoco that exceeded existing regulations, including those within the Public Awareness Plan, when it required Sunoco to take certain steps to communicate with the public impacted by its construction. Id. The Commission rejected Sunoco's argument that the Commission cannot regulate the safety of Sunoco's conduct unless a regulation specifically addresses the alleged conduct. Id. In so doing, the Commission adopted the Initial Decision of ALJ Barnes, as follows:

> … any determination of what is "reasonable service" under Section 1501 is done on a case-by-case analysis and is subject to ***the Commission's broad authority to make such determinations to assure that the public utility service and facilities are safe and reasonable***.
>
> …
>
> In implementing [the] directive [in Section 59.33], the Commission is not precluded from exercising its power and authority simply because Sunoco has complied with certain minimum standards or because related public awareness issues are being considered in a pending rulemaking proceeding. ***Such a restrictive reading of the Code would unduly tie our hands when dealing with potentially unreasonable, unsafe, or dangerous public utility services or facilities.*** We cannot allow such a low bar to be set to preclude us from exercising our power and authority under the Code and our Regulations to protect public utility customers, employees, and the public at large.
>
> …
>
> Nor is Sunoco's argument [that the Commission is restrained in its regulation of Sunoco by specific minimum standards] supported by any reasonable interpretation of the CFR***. Nowhere in the CFR does it state that operators may meet minimum standards and nothing more is required of them.*** To the contrary, the CFR, which incorporates the guidance provided in API RP 1162, states that "[t]he [public awareness] program and the media used must be as comprehensive as necessary to reach all areas in which the operator transports hazardous liquid or carbon dioxide." 49 C.F.R. § 195.440(f) (emphasis added).

> Additionally, the CFR expressly requires enhancement of a public awareness program where the pipeline is located in a high consequence area.

[Id. (emphasis added).]

Here, like the above discussion from the Flynn Case, the Decision applies Section 1501 and 59.33 (following binding principles of statutory construction) through a fact-specific lens – in this instance, what transpired at GRS - and finds that Sunoco was unsafe. [Decision, generally.] The Decision does not expand the scope of the Public Utility Code or related regulations, nor does it set specific standards for future conduct. The fact-specific inquiry included, in part, as follows: the 200 Pennsylvanians living in extraordinarily close proximity to Sunoco's major construction; the need for Sunoco to continue to improve its communications with the public – particularly during the global pandemic that forced those 200+ individuals to work and attend school from home during construction; the specific location, size, configuration, and stationary nature of the sound walls utilized; and Sunoco's failure to take basic, readily available steps to mitigate the hazards despite their reasonable availability. [Compare, Exceptions, pp. 9-12 (arguing that the Decision sets new, arbitrary standards); with Decision, pp. 33, 41-43; 47-50.]

As ALJ Cheskis recognizes, if the Commission could not regulate Sunoco's dangerous conduct absent a specific regulation (as Sunoco suggests), Sunoco would do whatever it wants and could wreak havoc on our Commonwealth – or as ALJ Chesksis stated in the context of harmful noise, "[c]ertainly, lack of regulation stating a specific noise level limit does not meant that Sunoco can be as loud as it wants to be." [Decision, p. 50.] If adopted, Sunoco's argument would allow it to expose Pennsylvanians to noise so loud it deafens them without consequence from Sunoco's regulator. This is patently absurd and would set an extraordinarily dangerous precedent. Such an absurd construction must be avoided. 1 Pa. C.S. § 1921.

As to the cases Sunoco purports to rely on to save its outrageous argument here, the Decision does not apply "new criterion" or a new regulation; instead, the Decision correctly applies the existing standards to the facts before it. Compare Decision, pp. 44, 46, 49-51, 86-88 9 (applying the existing requirements set forth in Sections 59.33 and 1501 requiring Sunoco to "provide safe and reasonable service" and to exercis[e]

reasonable care to reduce the hazards to which employees, customers and others may be subjected…" to Sunoco's failures with respect to fire safety, noise hazards, and communications), with South Hills Movers, Inc. v. Pa. Public Utility Comm'n, 601 A.2d 1308, 1310 (Pa. Commw. Ct. 1992) (finding that the Commission erred in imposing a new condition to obtain a certificate of authority that was not present in the relevant published criteria); and F.C.C. v. Fox Television Stations, Inc., 132 S.Ct. 2307, 2310 (2012) (finding that it was the retroactive application of a new standard pertaining to the use of expletives on broadcast television violated the due process rights of the broadcasters).

Sections 1501 and 59.33 require Sunoco to provide reasonably safe service and reduce the hazards to which its work exposes the public. They are plain on their face and have been applied previously by the Commission against Sunoco. The Flynn Case; Baker v. Sunoco Pipeline, L.P., Case No. C-2018-3004294, 2020 WL 5877007 (Pa. P.U.C. Sept. 17, 2020); see also [Decision (explaining that both parties have "cited frequently" to Sections 1501 and 59.33).] Sunoco and all public utilities are on notice of this and of all existing law. Adopting the construction proffered by Sunoco would violate the most basic principles of statutory construction codified by our legislature. 1 Pa. C.S. § 1921. Thus, the Commission should reject Sunoco's absurd invitation to depart from established law.

(2) The Commission's Jurisdiction And Sunoco's Own Admissions Require The Commission To Reject Sunoco's Request That The Commission Ignore Sections 1501 and 59.33.

Sunoco rehashes its assertion that the Commission lacks jurisdiction to consider safety standards outside of what Sunoco characterizes as specific regulations. [Exception Nos. 1 and 12, pp. 8 fn. 13, 38-39.][2] Sunoco asks the Commission to ignore Sunoco's obligations to provide reasonable and safe service and to take measures to avoid the hazards to which it exposes the public. [Id.] ALJ Cheskis repeatedly addressed this argument in this case, explaining that "where issues of community safety are

[2] GRS incorporates Section III, pp. 7-11 in its Reply Brief as though set forth here in full. In the Reply Brief, GRS sets forth the case law supporting the Commission's authority to consider, albeit not rule on, safety standards other than those set forth in the Public Utility Code and related regulations when evaluating Sunoco's actions.

concerned, this Commission possesses irrefutable authority to exercise its jurisdiction." [Decision, p. 41, citing Re: Consolidated Rail Corp., 56 Pa. P.U.C. 367 (1974); see also Order Granting In Part And Denying In Part Preliminary Objections (filed January 28, 2021).]

Sunoco not only understood ALJ Cheskis' rulings on this issue throughout the case, but, as set forth above, it quoted the exact language ALJ Cheskis wrote in the Order Granting In Part And Denying In Part Preliminary Objections to articulate the Commission's expansive jurisdiction over Sunoco for the United States District Court for the Eastern District of Pennsylvania. [The Eastern District Representations.] In February 2021, while this case was pending, Sunoco moved the United States District Court for the Eastern District of Pennsylvania to intervene in a lawsuit that GRS filed against Middletown Township relating to the same hazardous fire safety issues addressed in the Decision. [Id.]

Sunoco argued for an opportunity to file an amicus brief in the District Court so that it could provide "important legal, technical, and policy-related arguments related to public utilities like Sunoco Pipeline…." [Id.] The "important argument" Sunoco made to the District Court is the exact opposite of what it argues to the Commission now – Sunoco asked the District Court to recognize the Commission's extensive jurisdiction over Sunoco's unsafe actions and GRS's claims regarding the fire hazards created by Sunoco's sound walls. [Id., pp. 10-11.] The District Court ultimately agreed with Sunoco, dismissing the case on the basis that GRS's safety complaints should be heard before the Commission.[3] Sunoco is bound by that decision. See Marazas v. W.C.A.B. (Vitas Healthcare Corp.), 97 A.3d 854, 859 (Pa. Commw. Ct. 2014) (explaining that "a party to an action is estopped from assuming a position inconsistent with his or her assertion in a previous action, if his or her contention was successfully maintained.")

[3] Further briefing regarding the District Court case is set forth in Complainant's Response to Respondent's Motion to (1) enforce the January 28, 2021 Order Granting in Part and Denying in Part Preliminary Objections, (2) to Strike Testimony and (3) Request for Expedited Response Period. (filed March 31, 2021).

(3) The Commission Must Reject Sunoco's Request That The Commission Ignore Sections 1501 And 59.33 Because The Mariner East 2 Is "New Construction".

Sunoco asserts that the Commission should not require it to communicate in a reasonable and safe manner with the public because Mariner East 2 is "new" construction, suggesting that the Commission attach different standards to its work on Mariner East 2 and Mariner East 1. [Exceptions, 2 and 7, generally.][4] In addition to ALJ Cheskis' well-reasoned discussion of Sunoco's obligations, Sunoco's argument also fails because it conflicts with the Commission's and the Pennsylvania Commonwealth Court's treatment of the Mariner East 2 pipeline. Furthermore, the Flynn Case already resolved this same issue against Sunoco.

The Commission treats Mariner East 1 and Mariner East 2 – which largely traces the Mariner East 1[5] – identically as to the Commission's authority to regulate Sunoco. In re: Pipeline, L.P., 143 A.3d 1000, 1007-08 (Pa. Commw. Ct. 2016) (recognizing that the Commission did not differentiate between pipelines when exercising authority over the Mariner East). Likewise, the Commonwealth Court treats Mariner East 1 and Mariner East 2 identically as to Sunoco's condemnation power. Id., 1008-09.

In other words, Sunoco has the same authority to condemn with respect to the new construction associated with Mariner East 2 and the existing construction associated with Mariner East 1. Thus, Sunoco should be subject to the same oversight. Sunoco's argument to the contrary is absurd and unsupported by any law, and the Commission should treat it as such.

As to the Flynn Case, there, the Commission explained that Sunoco's Public Awareness Plan applies to both Mariner East pipelines: "The Pipeline Safety Act, 49 C.F.R. Part 195, applies to ***the***

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[4] GRS addressed Sunoco's "new construction" argument in its Reply Brief, Section II, pp. 6-7, which is incorporated here as though set forth in full. ALJ Cheskis also addressed the same argument in the Decision, explaining that specific portions of the Public Awareness Plan specifically apply to Sunoco's work. [Decision, pp. 63-64.] ALJ Cheskis further explained that Sections 1501 and 59.33 authorize the Commission to address Sunoco's dangerously negligent communication with the residents and employees of [GRS] even if the Public Awareness Plan did not apply here. [Id.]

[5] That the work on Mariner East 2 is adjacent to Mariner East 1, including at GRS, should preclude Sunoco's absurd argument here because the work necessarily involves an existing pipeline as well as "new" construction.

Mariner East pipelines, which carry natural gas liquids." The Flynn Case, p. 21 (emphasis added). The Commission reasoned as follows:

> The American Petroleum Institute's Recommended Practice 1162, First Edition (API RP 1162) is incorporated by reference into Part 195.440. *See* Part 195.3. ***API RP 1162 recognizes that there cannot be a "one-size-fits-all" public awareness program.*** "[S]ome geographic areas have a low population, low turnover in residents, and little development or excavation activity; whereas other areas have very high population, high turnover, and extensive development and excavation activity." API RP 1162 at §2.6. ***Hence, API RP 1162 provides that there are situations where it is appropriate to enhance or supplement the baseline public awareness program.*** API RP 1162 at §1.3.5.

Id. (emphasis added.)

Here, as in the Flynn Case, ALJ Cheskis' Decision correctly finds that the Public Awareness Plan applies to Sunoco's work at GRS because "there are several provisions of the Public Awareness Plan that pertain to the construction of pipelines, not just operation of pipelines." [Decision, p. 63.]

Exception 4: Sunoco's Claim That A Property Owner Lacks Standing To Assert Claims Regarding Activity On Its Property Must Fail.

In an issue that Sunoco raises here for the first time, Sunoco argues that GRS – the undisputed owner of the Property at issue – lacks standing to file a Complaint with the Commission regarding Sunoco's dangerous conduct on GRS's Property itself.

Section 701 of the Public Utility Code addresses standing as follows:

> The commission, or any person, corporation, or municipal corporation having an interest in the subject matter, or any public utility concerned, may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.

66 Pa. C.S. § 701; see also 52 Pa. Code § 5.21(a) ("A person complaining of an act done . . . by a person subject to the jurisdiction of the Commission, in violation, or claimed violation of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission, may file a formal complaint with the Commission.").

Here, it cannot be genuinely disputed that GRS has standing to file a Complaint given that it clearly has a vested interest in Sunoco's operations conducted ***on GRS's own Property***.

See 66 Pa. C.S. § 701. Nevertheless, Sunoco criticizes the Decision because ALJ Cheskis reached the obvious conclusion that Sunoco's violations negatively affected the lives of the 200+ Pennsylvanians who make the apartment complex on GRS's Property their home.

Sunoco made, and lost, a similar argument in Baker v. Sunoco Pipeline, L.P., Case No. C-2018-3004294, 2020 WL 5877007 (Pa. P.U.C. Sept. 17, 2020). In Baker, Sunoco relied upon Sunoco Pipeline L.P. v. Dinniman, 217 A.3d 1283, 1287 (Pa. Commw. Ct. 2019), to argue that the ALJ erred by making findings relating to the complainant's neighbors, who were non-parties. Id., 2020 WL 5877007, at *11. The Commission rejected Sunoco's argument, holding that the complainant, who lived near Sunoco's construction, clearly had standing. Id., at *11. The Commission further held that the ALJ acted within her discretion in considering all of Sunoco's relevant conduct, including, but not limited to, Sunoco's failure to properly communicate with the complainant's non-party neighbors and other non-parties:

> [W]ith respect to Sunoco's Exception No. 9, in which Sunoco avers that the ALJ erred as a factual matter by reaching findings of fact on issues the Complainant lacks standing to pursue or issues irrelevant to the Complaint. We disagree. The ALJ retains authority to determine the scope and relevancy of evidence in a proceeding, which the Commission will not set aside unless there is a finding of an abuse of discretion or that the finding lacks substantial evidence.
>
> The findings referenced by Sunoco . . .are findings within the ALJ's reasonable discretion to determine to be relevant to the present proceeding related to the Company's actual practices regarding operation of the Mariner East Pipeline within the Commonwealth. While the facts found may not be material to any given disposition ultimately reached by the ALJ, the ALJ is free to admit to the record whatever relevant evidence is presented at hearing by the parties. We find nothing in Sunoco's argument to persuade us that the ALJ's findings were not relevant to the present proceeding concerning the Company's practices regarding operation of the Mariner East Pipeline.
>
> We expressly reject Sunoco's reliance on the Court's analysis in Sunoco Pipeline, L.P. v. Dinniman, 217 A.3d 1283, 1287 (Pa. Cmwlth. 2019) (holding lack of personal standing where "[t]he Complaint did not allege harm to Senator Dinniman's property nor harm to his person, and the hearing before the ALJ did not yield evidence of either type of harm."), as a basis to conclude that the ALJ's factual findings were in error. The holding in Dinniman did not review an ALJ's evidentiary finding based on relevancy, but rather, narrowly focused on the Commission's consideration of the Complainant's standing to bring a complaint. Dinniman has no application where, as here, the Complainant has

> established standing to raise questions and offer all relevant evidence pertaining to the reasonableness of Sunoco's practices regarding operation of the Mariner East Pipeline in Cumberland County including, public awareness in the form of both direct mailings to individuals and the public outreach meetings conducted, the adequacy of safety alarms, and materials used in construction of the pipeline which operates in close proximity to the Complainant's residence, and through the County in which the Complainant resides.

Id., at *11.

Here, Sunoco's construction bisected a densely-populated apartment complex owned by GRS, which houses over 200+ Pennsylvanians, and which is the worksite of GRS's employees. [GRS St. 1 at 2; GRS St. 2 at 2; GRS St. 3 at 3; GRS St. 7 at 3.] Sunoco's construction created dangerous conditions on GRS's Property that threatened the safety of GRS's employees and tenants, and threatened damage to GRS's Property.[6] As the Commission determined in Baker, the Code vests ALJ Cheskis with broad discretion to consider all facts relevant to whether Sunoco complied with its statutory obligations. ALJ Cheskis properly exercised this discretion here. Accordingly, Sunoco's Exception No. 4 should be overruled.

Exception 5: Sunoco's Claim That The Decision's Evaluation Of The Evidence Regarding Noise Is Arbitrary And Capricious Must Fail.

Sunoco's Exception No. 5 should be overruled because (1) Sunoco waived any objection to the authenticity of GRS-5 and GRS-33 (i.e., videos depicting Sunoco's dangerous noise); and (2) ALJ Cheskis' decision that Sunoco's noise levels violated Sections 1501 and 59.33 is based on substantial evidence.

[6] Stating the obvious, a landlord has certain duties to its tenants related to the condition of the leased property. Echeverria v. Holley, 142 A.3d 29, 36 (Pa. Super. Ct. 2016) (explaining that "a landlord is under a duty to maintain his property in a safe condition.") Obviously, Sunoco's conduct impacted GRS's obligation to fulfill those duties.

(1) Sunoco Waived Any Authenticity Objection To GRS-5 And GRS-33.

Sunoco waived any objection to the authenticity of the thirty (30) videos documenting Sunoco's noise violations (i.e., GRS-5 and GRS-33) by failing to assert any objections to their authenticity prior to, or during, the hearing itself. See Deidra Alston v. Nat'l Fuel Gas Distribution Corp., No. F-2011-223687, 2013 WL 5488637, at *8 (Pa. P.U.C. 2013). In Deidra, Commission denied a Petition for Reconsideration regarding the admissibility of certain exhibits finding "[most] importantly, [] [petitioner] raised no objections when [respondent's counsel] moved the admission of [the exhibits into the record at trial.] ***Thus, any possible objections to the exhibits were waived upon their admission into the record.***" Id. (emphasis added); see also Waldorf v. Shuta, 142 F.3d 601, 629 (3d Cir. 1998) ("[I]t is clear that a party who fails to object to errors at trial waives the right to complain about them following trial."); Jackson v. City of Pittsburgh, No. 07-111, 2011 WL 3443951, at *8 (W.D. Pa. Aug. 8, 2011) ("Generally, a party is not entitled to receive a new trial for objections to evidence that he did not make at or prior to the initial trial, even if they may have been successful.")

Here, Sunoco, stating the obvious, failed to timely object to the admission of GRS-5 and GRS-33 on authenticity grounds. [See T.T. 265:19-266:3 (admitting relevant written testimony and exhibits "subject to Cross Examination and any timely motions….")] Sunoco did not object to the admission of GRS-5 or GRS-33 on authenticity grounds before the hearing, during the hearing, or in the so-called Motion in Limine it filed after the hearing. [See Id., 266:3-297:6.; Sunoco's Motion in Limine on Unresolved Hearing Objections (objecting to GRS-5 and GRS-33 only on relevance grounds, which objections were overruled).] Sunoco's authenticity objections are, therefore, waived.

(2) ALJ Cheskis' Decision That Sunoco's Noise Levels Violated Sections 1501 And 59.33 Is Based On Substantial Evidence.

"ALJs retain broad discretion to determine the scope and admissibility of evidence as relevant to a given proceeding." Baker, 2020 WL 5877007, at *10 (citing 66 Pa. C.S. § 331(d)(3) (pertaining to authority of the presiding officer), 52 Pa. Code §§ 5.483 (pertaining to authority of presiding officer), 5.403 (pertaining to control of receipt of evidence), 5.103 (pertaining to authority to rule on motions),

5.222 (pertaining to prehearing conference in non-rate proceedings to oversee evidentiary matters for orderly conduct and disposition of the proceeding and furtherance of justice), and 5.223 (pertaining to authority of presiding officer at conferences)). "The Commission will typically not disturb the ALJ's evidentiary rulings or findings of fact unless it is determined to be an abuse of discretion or otherwise lacks substantial evidence." Id.; see also Casne v. W.C.A.B. (Stat Couriers, Inc.), 962 A.2d 14, 19 (Pa. Commw. Ct. 2008) ("Credibility determinations are more than a series of individual findings. Rather, they represent the evaluation of a total package of testimony in the context of the record as a whole, and reflect subtle nuances of reasoning that may not be fully articulated, nor even fully appreciated, by the fact-finder. Accordingly, we believe that, even where a [workers' compensation judge] has based a credibility determination on a cold record, substantial deference is due. We must view the reasoning as a whole and overturn the credibility determination only if it is arbitrary and capricious or so fundamentally dependent on a misapprehension of material facts, or so otherwise flawed, as to render it irrational.") (cited by Sunoco, Exceptions, p. 19).

Here, Sunoco does not dispute ALJ Cheskis' findings that Sunoco's construction generated noise levels in excess of 80 decibels, and at times as high as 100+ decibels. [Decision, p. 47.] Instead, Sunoco bases its objection on a misstatement of the Decision. Sunoco asserts that ALJ Cheskis found that "moment-in-time readings not taken inside the apartment building with the windows closed, that show greater than 75 decibels are sufficient to show sanctionable hazardous noise levels to residents." [Exceptions, p. 17.] ALJ Cheskis, however, undertakes a detailed analysis relying on multiple findings regarding Sunoco's lack of safety surrounding noise to conclude that Sunoco's actions violated Sections 1501 and 59.33, including, without limitation, as follows:

- The sound mitigation measures undertaken by Sunoco allowed for unhealthy levels of sound to permeate the residences and offices at the [GRS Property] and put [GRS] residents and employees at increased risk of hearing loss [Decision, p. 48];

- …in many of the videos there is either no sound wall present or the sound wall is open for some reason [Id.];

- …in some of the videos, readings were taken indoors, on a balcony or close to a building [Id.]; and

- Most of the readings in the videos that are admitted into the record show the high decibel readings with the sound walls in place [Id., p. 49.]

ALJ Cheskis emphasized that his conclusion that Sunoco's noise violated Sections 1501 and 59.33 was based on the totality of the evidence, not on any one specific video or reading. [Id., pp. 48-51.]

In addition to failing to appreciate the fact-specific decision making of ALJ Cheskis, Sunoco also premises its exception on its refusal to acknowledge that evidence of actual harm or injury is not required here. ALJ Cheskis did not need to find that someone's ear drums burst because of Sunoco's noise. Instead, the Public Utility Code vests the ALJ with broad discretion to determine that Sunoco's noise levels were unsafe given all the complicating factors presented in this case, including, but not limited to, construction occurring during a pandemic when most GRS residents worked or attended school from home. [Decision, p. 86.]

Additionally, Sunoco's contention that no evidence established the harm that can occur from even a momentary exposure to high decibel noise is false. GRS's witness, Jeffrey A. Davis, M.D., a licensed, practicing otolaryngologist, testified that even temporary exposure to the noise levels that Sunoco generated put the public at risk:

> At 80-85 decibels, CDC indicates that hearing loss can occur after 2 hours of exposure. At 95-100 decibels, hearing loss can occur after just 15 minutes of exposure. Likewise, the National Institute for Safety and Occupational Health ("NIOSH") recommends using ear protection whenever noise exceeds 85 decibels for any time period because of certain sensitives to noise. See GRS-177. My understanding is that Sunoco never communicated to any GRS employees or residents the need for ear protection at any time.

[GRS Stmt. No. 10 (Davis Surrebuttal), p. 3:21-4:2.] Sunoco does not dispute that it failed to communicate the need for ear protection to any GRS employees or residents before creating these dangerous levels of noise.

Sunoco's own expert witness on noise, Seth Harrison, testified that he took readings of a hydrovac truck on the GRS Property that he recalled to be "in the 90s, 90 decibels," which he measured from a

distance of "10 to 30 feet" and described as "quite high." [TR, 715:8-19.] He learned, for the first time when preparing for his testimony at the hearing, that Sunoco generated this extraordinary noise without prior warning to anyone, and without any sound mitigation in place. [TR, 716:19-717:18.] This is outrageous.

ALJ Cheskis acted well within his authority in weighing the evidence presented on Sunoco's noise violations and issuing a ruling in GRS's favor. Casne, 962 A.2d at 19. Accordingly, the Commission should overrule Sunoco's Exception No. 5.

Exception 6: Sunoco's Claim That The Decision's Evaluation Of The Evidence Regarding Fire Hazards Is Arbitrary and Capricious Must Fail.

ALJ Cheskis' determination that Sunoco violated Sections 1501 and 59.33 by failing to remedy the new and different fire hazards that it created at the Property is supported by substantial evidence.

Throughout the proceedings before ALJ Cheskis, Sunoco took the absurd position that "nothing about the construction work created a new or different [fire] hazard than the hazards that already pre-existed at the property." [Decision, p. 42 (citing Sunoco St. 1-R, at 15-16).] ALJ Cheksis correctly concluded that this position (proffered by Sunoco's "expert," Gregory Noll [GRS Main Brief, p. 39]) is not credible because the construction obviously created new fire hazards "through the presence of large constructions vehicles, large sound barriers, additional traffic congestion, etc.," all of which were thrust into the middle of a densely-populated residential community. [Decision, p. 42.] Sunoco's incredible testimony on this topic is consistent with Sunoco's willful ignorance to the harmful consequences of its actions and its above-the-law attitude.

As ALJ Cheskis correctly concluded, GRS presented substantial evidence that Sunoco could have mitigated the fire hazards and achieved the critical safety measure of looped access to the Property by utilizing a gravel logging road. [Decision, p. 42; GRS Main Brief, p. 34-35 (establishing that Sunoco's elimination of looped access violated the International Fire Code (the "IFC")).] Sunoco does not dispute that it failed to implement this reasonable and readily available safety measure. [Decision, p. 42.] Instead, Sunoco (1) cites to its alleged compliance with some unofficial memorandum ostensibly authored by a

Middletown Township employee, (2) claims that the hazards it created were "temporary" and, (3) argues that the Commission cannot regulate its conduct because no one was killed or maimed. ALJ Cheskis reviewed and properly rejected each of these arguments. [Exceptions, pp. 19-21.]

First, as ALJ Cheskis correctly determined, "whether the Township approved of Sunoco's activities or not does not impact whether such additional hazards violate the Public Utility Code." [Decision, p. 42.] GRS presented substantial evidence that the Township's unofficial memorandum is not a variance to the standards established by the IFC – which are evidence of the minimal safety standard (GRS Stmt 6, p. 7) that Sunoco clearly violated. [GRS's Main Brief, pp. 36-39.]

Second, Sunoco's suggestion that its work on the Property was "temporary" is, consistent with the totality of its arguments, absurd. [GRS Brief, p. 38.] Sunoco's work on the Property continued for almost one year, which is not "temporary"[7] by any measure. [Id.] In any event, as ALJ Cheskis correctly held, whether the fire hazards created were temporary "does not negate the fact that the fire hazards were created." [Decision, p. 43 ("Regardless of how long the fire hazards existed, they did exist and Sunoco's failure to reduce or eliminate them is a violation of the Public Utility Code.")]

Finally, as ALJ Cheskis correctly determined, that no one was killed or seriously hurt does not excuse Sunoco's recklessness. Actual harm or injury is not required to show a violation of the Public Utility Code or a Commission regulation. [See Response to Exception 11, below (citing Povacz v. Pa. Pub. Util. Comm'n., 241 A.3d 481 (Pa. Commw. Ct. 2020)).] GRS presented substantial evidence that Sunoco's sound wall placement created avoidable fire hazards in the middle of densely-populated, garden apartment residential community, which lacks a sprinkler system and has wooden roofs. [GRS Main Brief, pp. 37-38.] Sunoco ignores the characteristics of this project (and the effect that it had on the 200+ Pennsylvanians living and working at the Property during a pandemic) to argue that it may construct its pipeline through such a residential community using the same safety standards (or lack thereof) that it uses at vastly different

[7] See GRS Main Brief, p. 38 (citing T.T. (Etzel) 369:14-370:23 (testifying that, according to PennDOT guidelines, a "temporary" project is 72 hours or less.)

sites across the Commonwealth. The Public Utility Code vests the ALJ with broad discretion to determine what is "reasonable" under Section 1501 on a case-by-case basis exactly because the standards that apply to pipeline construction on an undeveloped property are not the same as those that apply to a construction site in the center of a densely populated residential apartment complex. The Flynn Case, p. 88. Accordingly, ALJ Cheskis properly exercised his discretion by agreeing with the testimony of GRS's expert witness, Jim Davidson, who concluded that "fire personnel shouldn't have to overcome avoidable challenges and problems created by Sunoco and may not have the luxury of the time necessary to do so." [Decision, p. 42.] The Commission should affirm this.

Exception 8: Sunoco's Claim That The Decision's Evaluation Of The Evidence Regarding Communication Failures Is Arbitrary And Capricious Must Fail.

As stated in Baker, "the Code and Commission Regulations vest the Commission's ALJs with authority to preside over the receipt and render determinations on the relevance of evidence at hearings." Id., 2020 WL 5877007, at **9–10. The Commission "expressly consider[s] the presiding ALJ's broad authority to oversee and rule on the scope of and admissibility of evidence in a proceeding, as set forth in statute at Section 331(d)(3) of the Code…." [Id. citing, 66 Pa. C.S. § 331(d)(3); 52 Pa. Code §§ 5.483, 5.403, 5.103, 5.222, and 5.223.] ALJs have "broad discretion to determine the scope and admissibility of evidence as relevant to a given proceeding." [Id,] As such, "the Commission will typically not disturb the ALJ's evidentiary rulings or findings of fact unless it is determined to be an abuse of discretion or otherwise lacks substantial evidence." [Id.]

Here, the Commission should not disturb ALJ Cheskis' findings with respect to Sunoco's communication failures. The Decision discusses testimonial evidence submitted by GRS that ALJ Cheskis found to demonstrate that Sunoco's communications required prompting from GRS and failed to provide a reasonable level of information to the affected public. [Decision, p. 67 (citing GRS St. 1-SR at 5, 31-34; GRS St.2-SR at 3, GRS St.3 at 3).] The Decision also cites the Rebuttal Testimony of Joseph McGinn, Vice President of Public and Governmental Affairs for Energy Transfer Partners, where ***Sunoco*** specifically asked Mr. McGinn to respond to "various witnesses for [GRS]in [their] direct pre-submitted

testimony and exhibits [who] have all alleged that Sunoco does not engage in sufficient communication and notification with it and to its residents." [Decision, p. 65; Sunoco Statement No. 7-R, p, 8:14-21.]

ALJ Cheskis also specifically addressed all of the evidence that Sunoco alleges he "disregarded," as set forth below:

Evidence Sunoco alleges the Decision disregarded	**The Decision addressing that evidence**
The use of mailers, signage, hotline calls and direct return calls, [Exceptions, p. 26.]	"A general mailing such as Sunoco Exhibit JM-3 …is not helpful to the residents of [GRS]…." [Decision, p. 64.] "[General mailers, hotline, and a belatedly convened town hall] are also not adequate to satisfy Sunoco's obligations under the Public Utility Code and Commission regulations to communicate with the public. [Id., p. 65.] "Toll-free hotlines, information on websites and refrigerator magnets were not sufficient." [Id., p. 66.] "A general brochure that was sent every two years did not provide necessary information needed regarding how the construction was to impact the daily lives of the residents living in such close proximity to the construction. Nor is a virtual town hall meeting that was held weeks after the construction, and many related problems, began." [Id., 69.]
Notices posted on the Township website, [Id.]	"While it may then be incumbent upon the township and other officials to communicate with the residents, that does not absolve Sunoco of its obligation under the Public Utility Code and the Commissions' regulations to communicate *with the residents* as well…" [Id., p. 65 (emphasis in original.)]
Virtual Townhall meeting, [Id.]	"While a virtual town hall was held, it was not held until February 23, 2021." [Id., p. 66.] Additionally, the virtual town hall meeting was the result of GRS's counsel filing an emergency petition before the Commission – not an effort that Sunoco undertook on its own. See Stmt 1SR-GRS Surrebuttal Testimony of Stephen Iacobucci.

Rent relief, [Id.]	Although the Decision does not specifically address rent relief, it is unclear how this is relevant to safety.
Communications through counsel	"…all of the communications to which Mr. Amerikaner testified, and every exhibit sponsored by Mr. Amerikaner, were not sufficient to notify the residents of [GRS.]" [Id., p. 67.]

As set forth above, GRS plainly met its *prima facie* burden.

Exception 9: Sunoco's Claim That The Decision Did Not Properly Apply The Rosi Factors Must Fail.

ALJ Cheskis thoroughly addressed the Rosi Factors in the Decision. [Decision, pp. 75-85.] Sunoco's primary argument - that, yet again, it claims not to be on notice of the consequences of violating the Public Utility Code and related obligations - is without merit for the reasons discussed above and in the Decision. If anything, this argument further highlights Sunoco's above-the-law attitude that the Commission must sanction.

Exception 10: Sunoco's Claim That The Decision Is "Moot" Because It Completed Its Work Must Fail.

The Commission should overrule Sunoco's Exception No. 10 because Sunoco's completion of construction on the Property does not negate or "moot" Sunoco's numerous serious violations of the Public Utility Code.

The Commission may impose civil penalties to protect the public interest, regardless of whether such relief was specifically requested in the Complaint. [See GRS's Reply Brief, pp. 13-14 (citing Piluso v. The Peoples Natural Gas Co., No. C-00956749, 1996 WL 944311, at *1 (Pa. P.U.C. Jan. 10, 1996)).] Additionally, the Pennsylvania Rules of Civil Procedure grant courts leave to award relief that is different than what was initially sought in a complaint, even after the entry of a verdict on the complaint. [Id. (citing Harvey v. Duling Properties, LLC, No. 4133, 2039, 2008 WL 4176754, *1 (Pa. Ct. Com. Pls. Phila. Cnty. July 28, 2008) (granting leave to amend complaint to add request for punitive damages ***after*** verdict against defendant was entered by jury)); see also Standard Pipeline Coating Co., Inc. v. Solomon & Teslovich, Inc., 496 A.2d 840, 844 (Pa. Super. Ct. 1985) (holding, a party may amend a pleading "at any time" to "conform the pleadings to the evidence offered or admitted," and that the right to amend must be granted liberally).]

Here, ALJ Cheskis correctly rejected Sunoco's argument that "an actual case or controversy" ceased to exist when Sunoco completed construction at the property. [Decision, p. 71.] GRS's Complaint alleged that Sunoco violated the Public Utility Code and the Commission's regulations. As ALJ Cheskis correctly concluded, those violations were not negated or absolved simply because construction completed. [Decision, p. 71.] The "ability to impose a civil penalty or some other corrective measure remains regardless of whether Sunoco has completed the construction project." [Decision, p. 71.]

Further, ALJ Cheskis addressed and properly rejected Sunoco's allegation that GRS was using the Commission's complaint process to "bolster its settlement leverage" because sufficient evidence had been presented establishing that Sunoco violated the Public Utility Code and Commission regulations. As stated by ALJ Cheskis, "nothing is inappropriate about GRS's complaint." [Decision, p. 74.] Accordingly, the Commission should overrule Sunoco's Exception No. 10.

SPLP Exception 11: Sunoco's Claim Attempting To Limit The Commission's Authority To Actual Harm Rather Than Threatened Harm Must Fail.

The Commission should overrule Sunoco's Exception No. 11 because Sunoco bases this exception entirely on a misrepresentation of the holding in Povacz v. Pa. Pub. Util. Comm'n., 241 A.3d 481 (Pa. Commw. Ct. 2020), appeal granted, 253 A.3d 220 (Pa. 2021).

In Povacz, several consumers filed complaints with the Commission seeking orders precluding PECO from installing wireless smart meters in or on their homes. Complainants argued that they were hypersensitive to emissions of radiofrequency electromagnetic energy ("RF") and that, given their health issues, PECO's installation of the wireless smart meters violated Section 1501.

Contrary to Sunoco's representations, the Commonwealth Court in Povacz did *not* hold that a complainant must prove that he or she actually suffered harm as a result of the utility's unsafe service. To the contrary, the court held that the Commission's "***authority extends to claims seeking to prevent harm***":

> The [Commission] concedes Consumers were not required to prove harm had actually occurred; **the [Commission]'s authority extends to claims seeking to prevent harm**. However, where prevention of harm was Consumers' aim, the burden of proof still required demonstration by a preponderance of the evidence that the utility's proposed conduct would create a "proven exposure to harm." **The [Commission] argues that**

> **although the occurrence of harm need not be certain, or even probable,** Consumers incorrectly equated any hazard, however slight, with exposure to harm. … The court in Naperville I acknowledged the plaintiffs' contention that "certain doctors believe that over time the public's cumulative exposure to low-level RF from devices such as cell phones, radio towers, and smart meters may pose health risks, such that more accurate guidelines and standards regarding the safety of RF exposure are necessary." Nonetheless, the court concluded "[t]he bare allegation that it is unknown whether [p]laintiffs are actually being harmed by the level of RF waves emitted from one smart meter is insufficient" to raise a claim for relief that is more than speculative.

Povacz, 241 A.3d at 493–94 (emphasis added).

ALJ Cheskis' well-reasoned Decision is consistent with the Commonwealth Court's holding in Povacz. Moreover, it is absurd for Sunoco to attempt to analogize the obvious and scientifically accepted safety risks presented by the hazards here with the unstudied effects of RF exposure at issue in Povacz. The Commission should overrule Sunoco's Exception No. 11.

Exception 13: Sunoco's Claim That The Commission Should Disregard Its Failures Because Of Alleged Procedural Defects Must Fail.

The Commission should overrule Sunoco's Exception No. 13 because (1) Sunoco waived any objection to GRS's verification of the Complaint by failing to raise them through its Preliminary Objections, and (2) ALJ Cheskis properly rejected Sunoco's argument regarding GRS's verification pursuant to 52 Pa. Code § 1.2(a).

(1) Sunoco Waived Any Objections To GRS's Verification Of The Complaint.

The proper and **exclusive** procedure for objecting to defects in a verification to a complaint is to file preliminary objections. U.S. Bank Nat. Asss'n v. Corteal, No. 1242 EDA 2014, 2014 WL 10752250, at *2 (Pa. Super. Ct. Dec. 3, 2014) (citing Pa. R.C.P. 1028(a)(2)). "The failure to file preliminary objections to defects in the form of a complaint constitutes an irrevocable waiver." Id. (holding that defendant waived any objections to the verification of the complaint, which was signed by an employee of the plaintiff's agent, instead of by an employee of the plaintiff itself, by failing to file preliminary objections to the complaint).

Here, Sunoco did not object to GRS's verification to its Complaint when Sunoco filed its Preliminary Objections. [See Docket C-2020-3023129.] Therefore, Sunoco waived this argument.

(2) ALJ Cheskis Properly Rejected Sunoco's Argument Regarding GRS's Verification Pursuant To 52 Pa. Code § 1.2(a).

As ALJ Cheskis properly concluded, pursuant to 52 Pa. Code § 1.2(a), the Commission or presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure that does not affect the substantive rights of the parties, including, but not limited to, an alleged defect in a verification. [Decision, p. 72.]

The cases cited by Sunoco do not support its argument that GRS's Complaint should be dismissed based on an alleged verification error after a full evidentiary hearing. See Schellhammer v. Pa. Pub. Util Comm'n, 629 A.2d 189, 192-93 (Pa. Commw. Ct. 1993) (holding, letter regarding proposed utility rates addressed to the Commission was not a "complaint" entitling author to notice and a hearing before the Commission because, among other reasons, the letter did include any verification); Pa. Pub. Util. Comm'n v. Salem Trans., Inc., No. A-00115591F001, 2002 WL 34558719 (Oct. 30, 2002) (granting an unverified petition for reinstatement, conditioned upon the filing of a verification or affidavit within ten days of the date of the Commission's order); Samall Assocs., Inc. v. Delaware Valley Utilities, Inc., No. C-20016060, 2002 WL 31007804 (Pa. P.U.C. Feb. 28, 2002) (Feb. 28, 2002) (striking the complaint based on a verification defect at the preliminary objection stage, without prejudice to complainant's right to file a verified complaint).

Here, Stephen Iacobucci executed the verification on GRS's behalf as GRS's Property Manager, and did so with GRS's authority, as stated in the verification. [See Verification to Complaint.] Sunoco never objected to the verification at any point during these proceedings, or even questioned Stephen Iacobucci's authority to take the verification when presented with the opportunity during cross-examination. [Decision, pp. 72-73.] Accordingly, Sunoco cannot credibly argue that its substantive rights

were harmed by GRS's verification. The Commission should, therefore, overrule Sunoco's Exception No. 13.

III. CONCLUSION

WHEREFORE, for the reasons stated above, GRS respectfully requests the Commission deny Sunoco's request to modify the Decision consistent with Sunoco's Exceptions.

Respectfully submitted,

FOX ROTHSCHILD LLP

Dated: April 7, 2022

By: _____

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COMMONWEALTH OF PENNSYLVANIA
BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that, on April 7, 2022, I served a true and correct copy of Complainant's Reply to the Exceptions of Respondent to the March 8, 2022 Initial Decision upon the persons listed below and by the methods set forth below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party):

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GLEN RIDDLE STATION, L.P., Plaintiff, v. MIDDLETOWN TOWNSHIP, Defendant.	Case No.: 2:21-cv-00286-PSD

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Glen Riddle Station, L.P. ("GRS") invites this Court to hear what amounts to a fast-track appeal of GRS's (meritless) municipal code grievance with Defendant Middletown Township ("Township"). The Court should decline GRS's invitation and dismiss this suit for lack of jurisdiction.

I. GRS FAILS TO ESTABLISH THAT THIS COURT HAS SUBJECT MATTER JURISDICTION OVER COUNT I.

GRS claims that, "pursuant to 28 U.S.C. § 1331, the Court has original jurisdiction" over Count I. *See* Pl.'s Suppl. Mem. of Law in Supp. of Mot. for Peremptory J. ("Pl.'s Suppl. Mem.," ECF No. 13) at 9. But, a court does not have jurisdiction under 28 U.S.C. § 1331 where the proposed federal cause of action "appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Bell v. Hood*, 327 U.S. 678, 682-83 (1946); *see also, e.g.*, *Kulick v. Pocono Downs Racing Ass'n, Inc.*, 816 F.2d 895, 899 (3d Cir. 1987). Count I fails this test. GRS's wholly insubstantial procedural due process claim, which is based on an invented "property interest" that the Third Circuit and other federal courts have already rejected, cannot support federal jurisdiction.

GRS's supplemental memorandum does nothing to address this fatal flaw in its pleading. For instance, GRS relies heavily on the uncontroversial principle that federal courts have authority to hear 42 U.S.C. § 1983 cases against local governmental entities. *See* Pl.'s Suppl. Mem. at 9. Federal courts obviously hear

Section 1983 cases against municipalities like the Township on a regular basis. But, GRS's reasoning glosses over the real problem with its Complaint against the Township here: GRS improperly bases its Section 1983 procedural due process claim on an alleged "property interest" that has been barred by Third Circuit and district courts. *See* Sunoco Pipeline L.P.'s Br. as *Amicus Curiae* ("Sunoco Br.," ECF No. 12-1) at 15-18. For this reason, Count I is "wholly insubstantial and frivolous" and cannot sustain federal jurisdiction. *Bell*, 327 U.S. at 682-83.

Specifically, although GRS admits that, "[t]o state a claim under § 1983 for deprivation of procedural due process rights, a plaintiff must allege that (1) he was deprived of an individual interest that is encompassed within the Fourteenth Amendment's protection of life, liberty, or property," Pl.'s Suppl. Mem. at 8 (quoting *Hill v. Borough of Kutztown*, 455 F.3d 225, 233-34 (3d Cir. 2006)), GRS cites no case to show that it has a cognizable Fourteenth Amendment property interest in enforcement of the municipal fire code or inspection of Sunoco Pipeline's temporary sound wall plan.

GRS's proffered cases all fall short in this regard. For instance, GRS cites *Hazzouri v. West Pittston Borough*, 416 F. Supp. 3d 405, 411 (M.D. Pa. 2019), for the proposition that "the court had jurisdiction pursuant to 28 U.S.C. § 1331 over the claims brought against a Pennsylvania borough pursuant to 42 U.S.C. § 1983." Pl.'s Suppl. Mem. at 9. But, unlike in this case, in *Hazzouri*, the plaintiffs asserted

a valid property interest as the basis for their procedural due process claim. *Hazzouri*, 416 F. Supp. 3d at 411. Specifically, the *Hazzouri* plaintiffs alleged that a municipal official had intentionally (and selectively) deprived them of a specific monetary benefit to which they were entitled under federal law. *Id*. Because the *Hazzouri* plaintiffs identified a bona fide, personal federal statutory entitlement as the basis for their § 1983 procedural due process claim, the Court held that "the plaintiffs have sufficiently alleged a protected property interest in funds" from the federal statute "to support their procedural due process claim." *Id.* at 416. GRS, in contrast, has not identified this type of bona fide, personal interest. GRS alleges only that it was deprived of a specious "property interest" in enforcement of a fire code provision against another entity. *See* Pl.'s Suppl. Mem. at 10. This "interest" has been foreclosed by prior Third Circuit precedent and by district courts in the Third Circuit and elsewhere. *See* Sunoco Br. at 15-18.

GRS also points to *Billings v. Keim*, No. CIV. A. 91-1146, 1991 WL 251061 (E.D. Pa. Nov. 21, 1991). But *Billings* cannot—as GRS suggests—stand for the assertion that GRS has pleaded a substantial federal question because the plaintiff in *Billings* did not successfully plead a viable cause of action. In *Billings*, the Court dismissed plaintiff's procedural due process claim with prejudice at the pleading stage for untimeliness, but noted that, "it seems highly unlikely that plaintiffs could have prevailed, even if suit had been timely" because of "other

seemingly insuperable obstacles to the claims alleged," including deficiencies in the plaintiff's pleaded theory of their property interest at stake in the case. *Id.* at *2. *Billings* does not alter the conclusion that GRS has not pleaded a substantial federal question here.

GRS's citation to *Ward ex rel. Jensen v. Richland Township*, No. 3:09-CV-2, 2011 WL 3813101 (W.D. Pa. Aug. 29, 2011), similarly fails to bolster its insubstantial procedural due process claim. In *Ward*, the Court noted the plaintiff's "complete failure to provide proof or documentation of any kind, to establish any sort of pattern, or even to establish that Richland Township police officers caused their injury," and therefore found that "no rational jury could conclude that Richland Township was responsible for violating Plaintiffs' constitutional rights." *Id.* at *7. *Ward*—like *Billings* and *Hazzouri*—therefore cannot stand for the proposition that GRS's alleged property interest in enforcement of the fire code can sustain federal jurisdiction.

In sum, GRS has presented the Court with no other support for its § 1983 claim. GRS fails to assert any right arising under the Constitution or laws of the United States. Instead, it asserts a specious property interest that has been foreclosed by relevant law. *See* Sunoco Br. at 15-18 (discussing *Wooters v. Jornlin*, 477 F. Supp. 1140 (D. Del. 1979), *aff'd,* 622 F.2d 580 (3d Cir. 1980); *Bullock v. Klein*, No. 07-0621, 2008 WL 11364242 (E.D. Pa. Oct. 23, 2008), *aff'd,*

341 F. App'x 812 (3d Cir. 2009)). Therefore, Count I is "wholly insubstantial and frivolous" and cannot sustain federal jurisdiction. *Bell*, 327 U.S. at 682-83.

II. GRS FAILS TO JUSTIFY THE EXERCISE OF SUPPLEMENTAL JURISDICTION OVER COUNT II.

GRS's supplemental memorandum similarly fails to present persuasive reasons why this Court should exercise supplemental jurisdiction over GRS's state law mandamus claim under 28 U.S.C. § 1367.

A. GRS Fails to Refute that the Court Should Decline to Exercise Supplemental Jurisdiction under 28 U.S.C. § 1367(c)(1).

GRS is incorrect that "[t]he Mandamus Claim does not raise a novel or complex issue of Pennsylvania law." Pl.'s Suppl. Mem. at 14. GRS alleges that "federal courts sitting in Pennsylvania, including the Third Circuit, have already established the precedent that Pennsylvania state law mandamus claims are not novel or complex and do not warrant a declination of supplemental jurisdiction." *Id.* In support of this proposition, GRS cites *Arnold v. Blast Intermediate Unit 17*, 843 F.2d 122 (3d. Cir. 1988), and *Omnipoint Communications Inc. v. Penn Forest Township*, 42 F. Supp. 2d 493 (M.D. Pa. 1999). But, GRS's cases fail to support its argument because GRS's cases do not take up state law mandamus claims at all.

In *Arnold*, the Court was asked to enforce, pursuant to Federal Rule of Civil Procedure 69(a), "a federal judgment obtained under a federal employment discrimination statute against an unincorporated public entity established by a state

legislature." *Arnold*, 843 F.2d at 123. Federal Rule of Civil Procedure 69 is not a "state law," and a proceeding to enforce a judgment pursuant to Federal Rule 69 is not a "state law mandamus claim." In contrast, here, GRS asks this Court to decide the merits of a legally and factually complex code dispute involving temporary sound walls erected by a public utility engaged in a project certificated to expand state public utility service, and then mandate that a local governmental entity enforce GRS's interpretation of the municipality's own code. GRS's request is therefore of a completely different kind than that at issue in *Arnold*.

Omnipoint also fails to support GRS's argument. In *Omnipoint*, unlike here, the plaintiff did not pursue a state law mandamus claim in federal court. Rather, the plaintiff asserted a *federal statutory claim*. 42 F. Supp. 2d at 498. In *Omnipoint*, the plaintiff alleged that municipal officials improperly denied the plaintiff permission to construct telecommunications equipment on the plaintiff's property without due process, in violation of the Telecommunications Act of 1996, in which Congress specifically "extended federal court jurisdiction [over] local zoning decisions affecting the placement of communications antennae needed to create a seamless system for the transmission of wireless communications." *Id.* at 495. In contrast, Congress has not extended federal court jurisdiction to local fire code enforcement decisions, and GRS does not (and cannot) point to any basis for federal court jurisdiction over local decisions about how to interpret and

whether and how to enforce municipal fire codes. GRS's citation to *Omnipoint* is therefore unpersuasive.

Instead, even if this Court were to decide that it could issue a writ of mandamus to a state or local agency or official, for this Court to rule on GRS's mandamus claim, it would have to first rule on the merits of GRS's underlying assertions about complex issues of state and local government law, as applied to temporary sound walls and public utilities. For instance, the Court would likely have to determine, as a threshold matter, whether the municipality's alleged duty in this case is purely ministerial, as would be required for mandamus to be appropriate under any circumstance. *See* Sunoco Br. at 22-23. As such, the Court should decline to exercise jurisdiction under 28 U.S.C. § 1367(c)(1).

B. GRS Fails to Demonstrate that the Court Should Not Decline to Exercise Jurisdiction under the Other Provisions of 28 U.S.C. § 1367(c).

GRS's attempts to rebut the persuasive reasons for declining supplemental jurisdiction under the other three subsections of 28 U.S.C. § 1367(c) also fail.

For instance, in urging the Court not to decline jurisdiction under 28 U.S.C. § 1367(c)(2), GRS asserts that its mandamus claim "does not substantially predominate because the gravamen of this action is a due process violation." Pl.'s Suppl. Mem. at 17. GRS mischaracterizes its claims: the gravamen of this action is not GRS's flimsy and unsubstantiated due process claim for which, as explained

above, it puts forward no support. Rather, the gravamen of this action is GRS's mandamus claim, which calls for "extraordinary relief that is rarely invoked," *In re Federal-Mogul Glob., Inc.*, 300 F.3d 368, 378 (3d Cir. 2002) (quoting *In re United States*, 273 F.3d 380, 385 (3d Cir. 2001)). GRS's request that the Court issue a writ of mandamus to a local governmental body requiring the local governmental body to enforce its own code regulations in a particular (and contested) way is a substantially broader and more intrusive request than its request for damages or declaratory judgment in Count I. *See* Sunoco Br. at 23-24.

GRS also fails to credibly rebut the argument that the Court should decline jurisdiction under § 1367(c)(3). GRS relies on the fact that the Court has not yet dismissed GRS's due process claim, but does nothing to rebut the argument that, if the Court does dismiss Count I, there is no reason to exercise supplemental jurisdiction over Count II. Therefore, if the Court dismisses Count I, it should also dismiss Count II. *See* Sunoco Br. at 21-22.

Finally, GRS fails to persuasively argue that this case does not present the type of exceptional circumstance that would warrant declining jurisdiction under § 1367(c)(4). As described above, GRS cites no case in which a federal court exercised jurisdiction over a state law mandamus claim and, as noted in Sunoco's Brief, this Court does not have authority to do so. *See* Sunoco Br. at 24-25. These

circumstances present exactly the type of situation in which the Court may decline to exercise jurisdiction over a plaintiff's state law claim.

III. GRS HAS NOT REBUTTED THE MOST IMPORTANT GROUNDS FOR ABSTENTION.

GRS argues at length why the Court should not abstain from exercising jurisdiction pursuant to the Supreme Court's decision in *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941) ("*Pullman*"). *See* Pl.'s Suppl. Mem. at 28-30. But, *Pullman* does not apply, and neither Sunoco Pipeline nor the Township assert that it does. Therefore, GRS's arguments on abstention are irrelevant. GRS fails to address the abstention doctrines that do apply: *Burford v. Sun Oil Company*, 319 U.S. 315 (1943), and *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). *See* Sunoco Br. at 26-32.

In conducting the relevant *Burford* and *Colorado River* analyses, the Court should not credit GRS's various mischaracterizations of the ongoing state proceedings. For instance, GRS asserts that "the PUC has already found that it lacks jurisdiction to adjudicate issues like those present in this case." *See* Pl.'s Suppl. Mem. at 30. GRS points to a recent order from the PUC proceeding in which the Administrative Law Judge held that the PUC did not have jurisdiction "to adjudicate claims regarding violations of municipal law, including parking spaces and fencing, the Governor's or Health Department's face covering mandates or environmental regulations that are beyond the scope of the Public

Utility Code or a Commission order or regulation." (*See* ECF No. 12-1, Ex. 9 ("PUC Order") at 7.) GRS's characterization of the PUC's Order is misleading.

Contrary to GRS's assertion, the PUC retained jurisdiction over the underlying safety issues at the site that are also ultimately at issue in this case. *See* Sunoco Br. at 11-12 & n.3. The PUC Order provides that, although the PUC does not have jurisdiction to make an initial finding whether allegedly unsafe activity violates a municipal code, state mandate, or regulation, the PUC does have jurisdiction to address whether an allegedly unsafe activity constitutes the public utility providing an unsafe service under Sections 1501 and 1505 of the Public Utilities Code. Indeed, GRS recently served discovery requests in the PUC Action seeking documents and information relating to the temporary sound walls.

And, to the extent that GRS seeks to claim, in the PUC, that an activity is unsafe because it violates a municipal law, state mandate, or regulation, the PUC Order effectively directs GRS to exhaust its claims before other state tribunals that do have initial jurisdiction over those claims first. Accordingly, the PUC Order states:

> Certainly, the Commission has jurisdiction to hear claims that a utility is providing unsafe service. As noted in the complaint, Section 1501 of the Public Utility Code specifically requires that "every public utility shall furnish and maintain adequate, efficient, safe and reasonable service and facilities." 66 Pa.C.S. § 1501. Section 1505 of the Public Utility Code also requires the services and facilities to be safe. 66 Pa.C.S. § 1505. . . . 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.

PUC Order at 7.

In other words, the PUC Order did not eliminate state court jurisdiction over the safety-related issues that GRS asks this Court to determine under Pennsylvania law, nor did it relinquish the PUC's own jurisdiction over safety-related issues. Instead, the PUC Order indicated that before the PUC may rule on whether an alleged violation of a municipal code, state mandate, or regulation also violates the Public Utility Code, GRS must exhaust its other state remedies concerning those alleged violations. Alleged violations of municipal law may be challenged by a lawsuit brought in the Court of Common Pleas; alleged violations of face covering mandates can be reported to the Department of Health online or can be reported to law enforcement if necessary at the Governor's website;[1] and alleged violations of environmental regulations may be reported to the Department of Environmental

[1] *See* https://apps.health.pa.gov/covidcomplaint, last accessed Feb. 6, 2021; https://www.governor.pa.gov/newsroom/state-local-agencies-remind-pennsylvanians-of-covid-19-mitigation-enforcement-roles-advise-how-to-report-suspected-violations/, last accessed Feb. 6, 2021.

Protection ("DEP"), and decisions of the DEP may be appealed to the Environmental Hearing Board.

Accordingly, just because the PUC directed GRS to exhaust its other state law remedies before relying on such alleged violations in the PUC does not mean that GRS can run in essentially the opposite direction—to federal court—and have this Court rule on matters that are appropriately before, for instance, the Pennsylvania Department of Health. Instead of doing so, GRS asks this federal court to insert itself into a state dispute, displacing well-established state administrative and judicial tribunals with the necessary subject matter expertise and familiarity with relevant state and local regulations to efficiently and effectively resolve this dispute. In other words, GRS has done nothing to rebut the compelling reasons for the Court to abstain from exercising jurisdiction over this case under *Burford* or *Colorado River*.

CONCLUSION

The Court should dismiss the Complaint.

February 8, 2021

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GLEN RIDDLE STATION, L.P., Plaintiff, v. MIDDLETOWN TOWNSHIP, Defendant.	Case No.: 2:21-cv-00286-PSD

CERTIFICATION OF COUNSEL FOR AMICUS CURIAE

Counsel for *amicus curiae* Sunoco Pipeline L.P. authored this Reply Brief. No party or party's counsel contributed money that was intended to fund preparing or submitting the Reply Brief, and no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this Reply Brief.

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IN THE UNITED STATES DISTRICT COURT
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GLEN RIDDLE STATION, L.P., Plaintiff, v. MIDDLETOWN TOWNSHIP, Defendant.	Case No.: 2:21-cv-00286-PSD

MEMORANDUM OF LAW IN SUPPORT OF SUNOCO PIPELINE L.P.'S MOTION FOR LEAVE TO FILE AMICUS BRIEF

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PRELIMINARY STATEMENT

Glen Riddle Station L.P.'s ("GRS") Complaint against Middletown Township (the "Township") seeks to use this federal forum as an end-run on the state administrative tribunals that are tasked with deciding GRS's complex and hyper-technical dispute with Sunoco Pipeline L.P. ("Sunoco Pipeline"), a certificated public utility. This Court does not have—or, in the alternative, should decline to exercise—subject matter jurisdiction over GRS's request for interference. The Court should grant Sunoco Pipeline leave to file a brief *amicus curiae* in opposing the Court's exercise of jurisdiction in this case.

IDENTITY AND INTEREST OF AMICUS CURIAE

Sunoco Pipeline is constructing the Mariner East 2 pipeline project across Pennsylvania, including at the Glen Riddle Station Apartments property owned by GRS ("Property"), pursuant to its status as a public utility regulated by the Public Utility Commission ("PUC"). *See In re Sunoco Pipeline L.P.* ("*Martin*"), 143 A.3d 1000 (Pa. Commw. Ct. 2016) (*en banc*), *allocatur denied*, 164 A.3d 485 (Pa. 2016). Sunoco Pipeline has certificates of public convenience and necessity from the PUC for the Mariner East 2 pipelines, pursuant to which the construction of the pipelines is determined to be in the public interest and Sunoco Pipeline is to provide the certificated Mariner East 2 service. *See Martin*, 143 A.3d at 1005-11.

Sunoco Pipeline (or its predecessors) have maintained and continuously operated pipelines running through the Property since the 1930s. Two existing Sunoco Pipeline pipelines run through the Property, pursuant to easements granted in the 1930s, before GRS built the Glen Riddle Station Apartments on the Property. On June 20, 2016, GRS granted Sunoco Pipeline an additional "non-exclusive fifty foot (50') wide free and unobstructed permanent easement in order to construct, operate and maintain two (2) below ground pipelines . . . and any appurtenant facilities including, above-ground markers, in, over, through, across, under, and along" the Property. (Ex. 1, p. 1, second intro. para.).[1]

The Permanent Easement contemplates that Sunoco Pipeline would "install the Pipelines via horizontal directional drilling" unless "conditions beyond Grantee's control necessitate" a change. (Ex. 1, ¶ 2). To facilitate the new installation method at the Property, Sunoco Pipeline required additional temporary space. When attempts to negotiate with GRS to acquire the right to use temporary space at the Property by agreement failed to reach such an agreement, on May 14, 2020, Sunoco Pipeline filed a Declaration of Taking in the Court of Common Pleas of Delaware County to condemn a Temporary Workspace Easement and a Temporary Access Road Easement on the Property to complete the construction of

[1] Exhibit references are the exhibits to the proposed Amicus Curiae Brief, Exhibit A hereto.

the Mariner East 2 pipelines, Case No. CV-2020-003193. (Ex. 2). GRS did not file preliminary objections to the Declaration of Taking and so, following the expiration of the time to file preliminary objections, Sunoco Pipeline filed a petition to deposit the estimated just compensation with the Court under 26 Pa.C.S. §§ 307, 521, and 522. (Ex. 3). On October 23, 2020, Judge Dozor issued an order granting Sunoco Pipeline's petition and, under 26 Pa.C.S. § 307(a), Sunoco Pipeline was then "entitled to possession or right of entry" to the Temporary Easements. (Ex. 4).

Under the Temporary Workspace Easement, Sunoco Pipeline and its "agents, employees, designees, contractors, guests, invitees, successor and assigns" have an unfettered right to access the Temporary Workspace Easement areas "for the purposes of establishing, laying, constructing, reconstructing, installing, realigning, modifying, replacing, improving, altering, substituting, operating, maintaining, accessing, surveying, and inspecting" the pipelines. (Ex. 2 at Exhibit C, "Temporary Workspace Easement"). Under the Temporary Access Road Easement, Sunoco Pipeline and its "agents, employees, designees, contractors, guests, invitees, successors and assigns, and all those acting by or on behalf of it" have the right to "unobstructed passage of persons, vehicles, equipment and/or machinery" over the Glen Riddle property for the purposes identified above. (Ex. 2 at Exhibit D, "Temporary Access Road Easement"). The Temporary Access

Road Easement allows for shared use of the roads condemned, and GRS may use the roads during the term of the Temporary Access Road Easement, but only to the extent that "such use does not conflict with the terms and conditions of this Temporary Access Road Easement or otherwise hinder, conflict or interfere with Condemnor's [Sunoco Pipeline's] rights hereunder." (*Id.*).

The DEP has issued to Sunoco Pipeline the permits and permit modifications necessary for Sunoco Pipeline to construct the pipeline through the Property. (*See* DEP Press Release, Sept. 22, 2020, https://www.ahs.dep.pa.gov/NewsRoomPublic/articleviewer.aspx?id=21868&typeid=1, last visited Feb. 2, 2021; DEP Ch. 105 Permit Major Modification Approval, http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/Addendums_to_Chapters_105_and_102/DEP's%20Major%20Amendment%20Approval,%20Chapter%20105,%20E23-524%20–%20HDD%200620.pdf, last visited Feb. 2, 2021; DEP Ch. 102 Permit Major Modification Approval, http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/Addendums_to_Chapters_105_and_102/DEP's%20Major%20Amendment%20Approval,%20Chapter%20102,%20ESG0100015001%209-25-2020%20(PDF).pdf, last visited Feb. 2, 2021.)

In addition, Sunoco Pipeline obtained from Middletown Township original (in 2017) and amended (in November 2020) Erosion and Sediment Control Plan

(ESCP-17-00007) and Post-Construction Stormwater Management Plan (SWM-17-00002) permits; and (on November 13, 2020) a Grading and Excavating Permit (Permit No. 25237, *see* Ex. 5). The sixth condition of approval in the Grading Permit reads as follows:

> 6. Temporary walls must be utilized as needed to reasonably suppress excessive sound and light and screen construction activity from residential properties where work is being completed in close proximity to such properties.

(Ex. 5). No other requirements were imposed regarding the temporary sound walls.

No other local permits, including zoning or subdivision and land development permits, were required before Sunoco Pipeline could begin pipeline construction work. *See* Ex. 6, Letter from James Flandreau to George Kroculick, Esq. (counsel for Sunoco Pipeline) and Samuel Cortes, Esq. (counsel to GRS), dated December 10, 2020, at p. 2, first para.

Throughout 2020 and into January 2021, as it has done in connection with all pipeline construction in the Township, Sunoco Pipeline engaged in an extensive dialogue with GRS and with the Township regarding the details of its construction plans for the Property, including the proposed location of the temporary sound walls.

Sunoco Pipeline communicated information about its construction plans to GRS by email and telephone conversations with GRS's counsel beginning in April 2020 and continuing throughout the summer and into the fall. Once the DEP approved the permit modifications in November 2020, shortly before the commencement of construction activities at the Property, Sunoco Pipeline and GRS held an in-person meeting at the Property on November 18, 2020, during which Sunoco Pipeline described the aspects of the work area, including the general placement of the temporary sound walls. Sunoco Pipeline explained to GRS at this meeting that the exact location of the temporary sound walls had not been determined and would not be determined until Sunoco Pipeline had completed the process of surveying the boundaries of its Permanent and Temporary Easements and locating buried underground utilities at the Property.

The Township also requested information from Sunoco Pipeline regarding, among other things, the proposed location of the temporary sound walls, as part of the Grading Permit issuance process described above. *See* the memorandum from Eric J. Janetka, P.E., Township Engineer, dated December 9, 2020, attached to Ex. 6, the Letter from James Flandreau:

> The Township requested sound wall information during the review of the Grading and Excavating Permit but it is our understanding this information had not yet been developed by Sunoco/ETP as they needed to investigate utilities before preparing a final sound wall layout. Utility investigation requires a Grading and Excavating Permit

> from the Township. Upon receipt of that permit from the Township, the applicant began utility investigation necessary to develop more detailed information on staging and sound wall installation at Glen Riddle Apartments. Although the apartment complex seems to believe they alerted the Township to potential fire safety issues related to the walls, the communication on review of potential issues related to the walls had already been set in motion long before activity started at the Glen Riddle Apartment complex. The utility investigation had to conclude before sound wall design could be completed and presented to the Township for reaction. Grading Permit had to be approved in order for utility investigation to commence. Until sound wall layout information was received, the Township was unable to provide guidance regarding potential fire safety or traffic control issues. Now that the Township has received draft "project site overview" plan, it can proceed with the same fire safety and traffic control evaluation process that has been utilized effectively since 2017.

(*Id.*) The Township provided this memorandum to GRS and Sunoco Pipeline on December 10, 2020. (*Id.*).

Following initial submission by Sunoco Pipeline of a proposed temporary sound wall plan, the Township and local fire companies held several meetings at the Property to test, on site, the use of fire and emergency equipment and vehicles in connection with the proposed temporary sound wall layout to ensure that fire and emergency equipment and vehicles could access all portions of the Property. These meetings occurred at the Property on December 1, 2020; December 10, 2020; and December 22, 2020. Sunoco Pipeline adjusted the temporary sound wall layout to address any potential concerns raised by the Township and the Fire

Marshal regarding the ease with which fire and emergency equipment and vehicles could access certain portions of the Property and then leave the Property expeditiously once the emergency response was complete.

Sunoco Pipeline submitted the final temporary sound wall plan to the Township in early January. (*See* Ex. 7 (which is also Ex. A to the Complaint)). As noted in the Complaint, the Township concluded that this plan allows for safe ingress and egress of fire and emergency equipment and vehicles, including fire trucks, to all portions of the Property.

Temporary sound wall installation was completed, in accordance with the final temporary sound wall plan, and within the boundaries of Sunoco Pipeline's easements, and Sunoco Pipeline is in the process of constructing the Pipelines through the Property.

In December 2020, GRS brought an action, captioned *Glen Riddle Station Associates, L.P. v. Sunoco Pipeline L.P.,* Docket No. C-2020-3023129, before the PUC (the "PUC Action"), raising various safety concerns. (Ex. 8 & 9). That PUC Action remains pending.

REASONS WHY MOTION FOR LEAVE SHOULD BE GRANTED

The role of an amicus is to assist the Court "in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of

difficult issues so that the court may reach a proper decision." *Newark Branch, N.A.A.C.P. v. Harrison*, 940 F.2d 792, 808 (3d Cir. 1991) (internal quotation omitted). "A district court has inherent authority to designate amici curiae to assist it in a proceeding." *Liberty Res., Inc. v. Phila. Hous. Auth.*, 395 F. Supp. 2d 206, 209 (E.D. Pa. 2005). Federal district courts in Pennsylvania regularly permit non-parties to file amicus briefs. *See, e.g.*, *Burlington v. News Corp.*, No. CIV.A. 09-1908, 2015 WL 2070063, at *3 (E.D. Pa. May 4, 2015) (denying intervention motion but permitting amicus brief to be filed); *Shank v. E. Hempfield Twp.*, No. 09-CV-02240, 2010 WL 2854136, at *3 (E.D. Pa. July 20, 2010); *Perry v. Novartis Pharma. Corp.*, 456 F. Supp. 2d 678, 687 (E.D. Pa. 2006); *Liberty Res., Inc.*, 395 F. Supp. 2d at 209. Ultimately, the inquiry is whether the proposed amicus has "a sufficient 'interest' in the case" and whether its proposed brief will be helpful and relevant. *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 129 (3d Cir. 2002) (Alito, J.) (quoting Fed. R. App. P. 29(b)).

The Court should permit the filing of the attached *amicus curiae* brief in this case.

First, it apparent from the very relief that GRS seeks in the Complaint—an order affecting "configuration" of Sunoco Pipeline's temporary sound walls and "direct[ing] anyone on the Property, including Sunoco Pipeline, L.P., to stop all

pipeline work at the Property . . . "—that Sunoco Pipeline has the requisite "sufficient interest" in the case. *See* ECF No. 3-1 at 1.

Second, the proposed amicus brief will be helpful and relevant to the Court. As described in the attached proposed amicus brief, as a certificated public utility, Sunoco Pipeline is subject to a complex regulatory scheme that is implicated by this case. Moreover, as described above, Sunoco Pipeline has unique knowledge regarding the dispute between GRS and the Township, as well as the pending PUC Action GRS instituted over its alleged safety concerns. Sunoco Pipeline's amicus brief provides additional important legal, technical, and policy-related arguments related to public utilities like Sunoco Pipeline that will assist the Court. Indeed, "[e]ven when a party is very well represented, an *amicus* may provide important assistance to the court" by ensuring the court understands how its ruling could affect entities not before the court. *Neonatology Assocs.*, 293 F.3d at 132.

As such, Sunoco Pipeline respectfully submits that the arguments in the attached amicus brief will be helpful to the Court in deciding GRS's motion.

CONCLUSION

For these reasons and for those set forth in the accompanying Exhibit A, Sunoco Pipeline requests leave to file the Brief of *Amicus Curiae* attached as Exhibit A, and that Exhibit A be docketed as such. A proposed Form of Order is enclosed.

Respectfully submitted,

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February 2, 2021

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