Hawke McKeon & Sniscak LLP
ATTORNEYS AT LAW

Thomas J. Sniscak
(717) 703-0800
tjsniscak@hmslegal.com

Whitney E. Snyder
(717) 703-0807
wesnyder@hmslegal.com

Kevin J. McKeon
(717) 703-0801
kjmckeon@hmslegal.com

Bryce R. Beard
(717) 703-0808
brbeard@hmslegal.com

100 North Tenth Street, Harrisburg, PA 17101 Phone: 717.236.1300 Fax: 717.236.4841 www.hmslegal.com

July 1, 2022

Via Electronic Filing

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

RE: Glen Riddle Station, L.P. v. Sunoco Pipeline L.P.; Docket No. C-2020-3023129; **SUNOCO PIPELINE L.P.'S PETITION FOR RECONSIDERATION OF JUNE 16, 2022 ORDER**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is Sunoco Pipeline L.P.'s Petition for Reconsideration of the June 16, 2022 Order in the above-referenced proceeding. Copies have been served in accordance with the attached Certificate of Service.

Because this document does not contain any new averments of fact, it does not require a verification.

If you have any questions, please feel free to contact the undersigned counsel.

Respectfully submitted,

/s/ Thomas J. Sniscak

Thomas J. Sniscak
Whitney E. Snyder
Kevin J. McKeon
Bryce R. Beard

Counsel for Sunoco Pipeline L.P.

BRB/jld/das
Enclosures
cc: Office of Special Assistants (via email - ra-OSA@pa.gov)

BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

GLEN RIDDLE STATION, L.P.	:		
	:		
v.	:	Docket No.	C-2020-3023129
	:		
SUNOCO PIPELINE L.P.	:		

SUNOCO PIPELINE L.P. PETITION FOR RECONSIDERATION OF JUNE 16, 2022 ORDER

Pursuant to Section 703(g) of the Pennsylvania Public Utility Code, 66 P.S. § 703(g), and Section 5.572 of the Pennsylvania Public Utility Commission's ("PUC") regulations, 52 Pa. Code § 5.572, Sunoco Pipeline L.P. ("SPLP") petitions the PUC to reconsider its June 16, 2022 Opinion and Order ("June 16 Order") in this matter and dismiss the formal Complaint.

I. INTRODUCTION

1. Reconsideration of the June 16 Order is warranted because in summarily affirming[1] the Initial Decision,[2] the June 16 Order overlooked and failed to consider key issues, evidence, law, and argument that raise significant questions as to the evidentiary and legal basis for the findings that SPLP's construction activities were unsafe or unreasonable. Ultimately, the June 16 Order demonstrates that it failed to consider that SPLP comprehensively planned its construction

[1] The June 16 Order considers each of SPLP's detailed, thorough exceptions in less than one page each.

[2] *Glen Riddle Station L.P. v. Sunoco Pipeline L.P.*, Docket No. C-2020-3023129 (Initial Decision issued March 8, 2022).

and designed and implemented various mitigation measures on Complainant Glen Riddle Station L.P.'s ("GRS") property[3] to ensure SPLP's construction would be safe and reasonable, that SPLP constantly informed and communicated with Complainant and communicated with residents regarding the construction, that there was no harm or proven risk of harm to anyone, no adverse events placing anyone's safety in jeopardy, and a total lack of any evidence that SPLP violated any law, regulation, or Commission order regarding pipeline safety or construction. In summarily affirming the Initial Decision, the June 16 Order ignored (did not even discuss) competent evidence and created subjective, *ex post facto* standards to find SPLP violated the Public Utility Code's mandate that utilities provide safe and reasonable service and facilities.

2. Thus, the June 16 Order overlooked significant and key evidence and legal principles to incorrectly uphold findings that SPLP's construction created an "unhealthy" amount of sound that put the hearing of people residing near the construction at risk, caused hazards that delayed emergency responder access to the area, and failed to provide enough information to the public about its construction. There is a menu of errors as to each of these findings that merit reconsideration and reversal.

3. The June 16 Order overlooks that while the Commission's authority to enforce the safe and reasonable standards is broad, due process draws boundaries on this authority that were not considered here. Due process prohibits the imposition of purely subjective *ex post facto* criteria of which SPLP had no notice through an adjudication to find SPLP violated the law. Instead, due process requires fair notice to entities of conduct required or proscribed because precision and

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

guidance are necessary for due process so that those enforcing the law do not act in an arbitrary or discriminatory way.[4] Here there is no specific law, regulation, or Commission order prohibiting the activities SPLP undertook or mandating that SPLP take a specific action it did not do. There was absolutely no notice to SPLP that its construction activities here were unreasonable or unsafe, particularly where SPLP undertook significant mitigative measures to ensure the safety and reasonableness of its pipeline construction.[5] By imposing newly created criteria of which SPLP had no prior notice to SPLP's past actions, the June 16 Order violates due process[6] and Pennsylvania's statutory regulatory review process by creating regulations through adjudication.[7] Because each of the June 16 Order's findings of violation are tainted by this error, the entire Order should be reconsidered and reversed. *Infra* Section III. A.

---

[4] *See, e.g.*, *F.C.C. v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2309 (2012) (explaining due process demands fair notice to entities of conduct required or proscribed and that precision and guidance are necessary for due process so that those enforcing the law do not act in an arbitrary or discriminatory way) ("*F.C.C. v. Fox*")

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

[6] Pa. Const., art. I, §§ 1, 11; U.S. Const., amends. V, XIV. *See, e.g.*, *F.C.C. v. Fox* at 2309 (2012) (explaining due process demands fair notice to entities of conduct required or proscribed and that precision and guidance are necessary for due process so that those enforcing the law do not act in an arbitrary or discriminatory way) ("*F.C.C. v. Fox*"); *Pa. State Bd. of Pharmacy v. Cohen*, 292 A.2d 277, 282-83 (Pa. 1972) (holding that no agency may substitute a statute or a rule with a "purely subjective criterion which may reflect merely the personal or professional views of individual members of the [agency].") ("*Cohen*").

[7] The Commonwealth Documents Law (45 P.S. §§ 1102, *et seq.*) and the Independent Regulatory Review Act (71 P.S. §§ 745.1, *et seq*.) require that regulatory changes occur through notice and comment procedures with accompanying governmental review, not as the result of administrative adjudications.

4. The June 16 Order also overlooks that it engages in arbitrary and discriminatory enforcement with its newly created standards for construction noise and emergency responder access, which are only applied to SPLP or, if the Commission intends to apply them on a non-discriminatory basis, then the Commission has made essentially all utility construction *de jure* unreasonable and unsafe and created standards with which no utility construction can comply. At its core, the June 16 Order upholds a finding that momentary construction sound levels associated with various common types of construction equipment are unsafe[8] and momentary potential delay of emergency responders due to the presence of construction vehicles and zones is unreasonable.[9] The Commission has ***never*** previously held that these activities or alleged impacts inherent in all utility major construction are unsafe or unreasonable. The June 16 Order either unfairly singles out SPLP for discriminatory enforcement or creates a sea change in the regulation of utility construction with which no utility major construction can comply. The Commission should do

[8] The June 16 Order upheld the finding that if sound levels during construction activities even momentarily exceed 75 decibels, then that construction is automatically hazardous, unsafe, and unreasonable. The 75 decibel standard is totally untethered from any Commission regulation, guidance or competent expert testimony, and falls well below the federal threshold that can potentially impair a person's hearing such that hearing protection should be worn. Based on Complainant's own evidence, if the Commission permits the ID to stand, a utility or its contractors working in a residential area using a chainsaw (110 decibels), gas powered lawn mower (85 decibels), welding machine (83 decibels), generator (84 decibels), or hydrovac truck (101 decibels) – would all be in immediate violation of Section 1501. *See* Exhibit GRS-27.

[9] The June 16 Order upheld the finding that if utility construction even theoretically imposes potential delay for emergency responder access to a residential property, the utility's construction is automatically hazardous, unsafe, and unreasonable. The ID overlooked that local emergency responders and the local municipality successfully tested access to the site and approved of the site layout and ability for emergency responders to access the property, and further overlooked evidence that no emergency responders were actually delayed during the active construction at the property. This new criterion means the common occurrence of lane or road closures to install or maintain utility facilities such as water mains or tree trimming has now become an automatic violation of Section 1501. The reality is upgrading, modernizing, or maintaining important utility infrastructure should be promoted, not discouraged or punished because it inevitably causes temporary reduced access and inconvenience.

neither and reconsider and reverse the June 16 Order's finding on construction sound and emergency responder access. *Infra* Section III. B.

5. As to the evidentiary basis for each finding of violation, the June 16 Order overlooked key evidence that SPLP presented in favor of incompetent evidence or no evidence at all, but instead subjective, lay, newly created standards. The June 16 Order, like the Initial Decision, failed to discuss let alone fully consider SPLP's expert, competent evidence on sound levels, emergency responder access, and public awareness. The Commission should reconsider and reverse each of the findings of violation based on the specific evidence that SPLP's actions were safe and reasonable and the lack of substantial evidence to the contrary. *Supra* Sections III. D, E, G.

6. The June 16 Order overlooked four legal issues that also merit reconsideration and reversal of all findings of violation: (1) the Complainant lacks standing to pursue claims on behalf of others (residents); (2) the Complaint was long ago moot; (3) the Complainant failed to show that SPLP's conduct did or would create proven exposure to harm; and (4) the Complaint was not verified. As a matter of law, a party cannot vindicate the rights of third parties who had an opportunity to be heard under well settled principles of standing – that is, the Commission cannot grant relief to GRS here on behalf of third-party tenants who could have but did not intervene or offer any testimony[10] on emergency response impacts or any deficiencies in SPLP's direct communications to the residents. The Commission failed to consider SPLP's argument that the Complaint that sought purely injunctive relief was moot long before the ID issued because construction was complete, warranting dismissal. The Commission thus overlooked that it has employed internally inconsistent rationales, arguing on one hand that its decision on substantive

[10] One tenant testified regarding being annoyed by construction sound.

issues is case-specific, but on the other that a finding that the Complaint is moot would force the Commission to apply its rationale from this case in future cases. Next, the Commission overlooked that GRS failed to either show an actual harm occurred or that SPLP's construction created a proven likelihood of exposure to harm. Finally, the Commission failed to adhere to the *mandatory* requirement that a legal action be instituted with a valid verification and failing to dismiss the Complaint, the June 16 Order harmed SPLP's substantive rights by finding violations and imposing a civil penalty. Reconsideration and reversal based upon any of these grounds results in dismissal of the Complaint.

7. The June 16 Order also overlooked the critical point of law that the Commission lacks jurisdiction over construction noise and fire safety, while simultaneously creating standards through this adjudication. Indeed, these standards fall outside the Commission's jurisdiction, and rather fall under other regulatory authority whether through municipal ordinances or workplace safety standards.

8. Finally, the June 16 Order overlooked the circumstances surrounding the late-raised request for civil penalty where GRS sought for the first time in its main brief for SPLP to be fined $2,000,000. The Commission overlooked SPLP's due process rights, particularly that these rights encompass more than just the right to file a reply brief – they include SPLP's right to an opportunity to be heard, present evidence, examine witnesses, and generally be apprised of the relief sought in a Complaint. Fining SPLP and issuing a civil penalty for alleged violations (49 of which out of 51 were not even pled in GRS's complaint), violates SPLP's due process right to present and defend regarding the *Rosi* civil penalty factors.

9. Accordingly, the Commission should reconsider its June 16 Order on these bases and find that SPLP's construction activities were not unsafe or unreasonable and dismiss the Complaint.

II. LEGAL STANDARDS

10. The Public Utility Code establishes a party's right to seek relief following the issuance of a decision. Such requests for relief must be consistent with Section 5.572 of the Commission's regulations and/or Section 703(g) of the Public Utility Code.

11. It is well settled that petitions made pursuant to Section 5.572 of the Commission's regulations or Section 703(g) of the Public Utility Code may properly raise any matters designed to convince the Commission that it should exercise its discretion to rescind or amend a prior order in whole or in part. The standard for granting a petition for reconsideration, modification or clarification were set forth in *Duick v. Pennsylvania Gas and Water Company*, Docket No. C-R0597001 et al., Order entered Dec. 17, 1982; 52 Pa. P.U.C. 553 (1982). Under the standards set forth in *Duick*, such petitions may properly raise any matter designed to convince the Commission that it should exercise its discretion to amend or rescind a prior Order, in whole or in part. Such petitions should succeed when they raise "new and novel arguments" not previously heard or considerations that appear to have been overlooked or not addressed by the Commission or in the record. *Id.* SPLP's specific requests for reconsideration below explain why its request meets the *Duick* standard.

III. REQUEST FOR RECONSIDERATION

12. SPLP explains below the key issues, evidence, law, and argument that the June 16 Order overlooked or did not consider that raise legitimate and significant questions as to the basis of the June 16 Order's findings. As such, reconsideration is necessary and appropriate. *See Metropolitan Edison Co. v. Pa. Public Utility Commission*, 22 A.3d 353, 373-74 (Pa.

Cmwlth.2011) (stating that "[a]lthough we agree with the Commission that it is not required to expressly consider each and every argument a party raises, it should expressly consider evidence and arguments that raise legitimate and significant questions…") (citations omitted).

A. THE JUNE 16 ORDER FAILS TO CONSIDER THE COMMISSION'S EXERCISE OF AUTHORITY MUST BE CABINED BY DUE PROCESS AND IN HOLDING SPLP VIOLATED THE LAW VIOLATED SPLP'S RIGHT TO DUE PROCESS

13. The June 16 Order held that even where SPLP did not violate any specific regulations, standards, or PUC orders prohibiting SPLP from making construction noise, requiring SPLP to ensure absolutely no delay occurred to first responders, or requiring SPLP to communicate every detail of its construction to residents, SPLP's activities violated the "safe and reasonable" statutory provisions in 66 Pa. C.S. § 1501 and the "reasonable effort" and "reasonable care" provisions in 52 Pa. Code § 52.33. These findings violate SPLP's right to due process because these findings penalize SPLP on the basis of purely subjective criteria of which SPLP had no advance notice. *Cohen*, 292 A.2d at 282-83 (holding that no agency may substitute a statute or a rule with a "purely subjective criterion which may reflect merely the personal or professional views of individual members of the [agency]."). These new *ex post facto* standards also violate the statutory requirement for notice and comment rulemaking, disregarding "fundamental fairness" that the Pennsylvania and Federal constitutional guarantees to due process require. *See, e.g.*, *South Hills Movers, Inc. v. Pa. Pub. Util. Comm'n*, 601 A.2d 1308, 1310 (Pa. Cmwlth. 1992) (reversing Commission decision that "retroactively imposes a new condition on certificate of authority" where "fundamental fairness requires that such general criteria be promulgated as published regulations through the rule-making process, instead of being adopted in an ad hoc, retroactive, case-by-case basis"); *F.C.C. v. Fox*, 132 S.Ct. at 2309 (explaining due process demands fair notice to entities of conduct required or proscribed and that precision and guidance are necessary for due

process so that those enforcing the law do not act in an arbitrary or discriminatory way); Pa. Const., art. I, §§ 1, 11; U.S. Const., amends. V, XIV. Moreover, the Commonwealth Documents Law (45 P.S. §§ 1102, *et seq.*) and the Independent Regulatory Review Act (71 P.S. §§ 745.1, *et seq*.) require that regulatory changes occur through notice and comment procedures with accompanying governmental review, not as the result of administrative adjudications.

14. The June 16 Order demonstrates that it failed to consider SPLP's specific arguments as to why and how these holdings violated due process. The Order mischaracterized SPLP's arguments as contending that the PUC does not have the authority to make a case-by-case determination of safe and reasonable utility conduct. Based on this misunderstanding of SPLP's due process arguments, the Order then summarily held based on the Commission's decision in the *Flynn* proceeding[11] that the Commission has "broad authority to make such determinations." June 16 Order at 25-27, 28-29.

15. Thus, the June 16 Order failed to consider that while the Commission does have broad authority to determine what is safe and reasonable, that authority must be cabined by due process, and in the specific circumstances here, the June 16 Order's exercise of authority was outside the bounds of what due process allows. Specifically, due process requires fair notice to entities of conduct required or proscribed because precision and guidance are necessary for due process so that those enforcing the law do not act in an arbitrary or discriminatory way. *F.C.C. v. Fox*, 132 S.Ct. at 2309. In *F.C.C. v. Fox*, the Supreme Court explained that that regulated parties should know what is required of them so they may act accordingly. *Id.* Moreover, due process requires that an agency should not change an interpretation of its regulations in an adjudicative proceeding where doing so would impose "new liability . . . on individuals for past actions which

[11] SPLP has appealed the *Flynn* decision and the proceeding is pending before the Commonwealth Court.

were taken in good-faith reliance on [agency] pronouncements." *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S.267, 295 (1974).

16. The June 16 Order violates these principles. The Commission has no regulation or orders that specifies standards for construction noise levels, emergency responder access, or information required to be provided to residents regarding construction. And even though the record shows SPLP acted in good faith to control and mitigate noise levels, ensure emergency responders had adequate access and ingress and egress to the residential area around the construction site, and provided repeated updates to the residents and Township regarding its construction activities, the Commission found SPLP's actions were unreasonable. These findings are clearly untethered from any specific standard, rule or regulation other than the PUC's own vague, post-hoc interpretations of unsafe and unreasonable conduct that were voiced for the first time in this proceeding. SPLP had no notice that its actions were prohibited or additional actions were required. Notably, there is no express finding in the June 16 Order of what specific conduct or lack thereof was unsafe and unreasonable. These findings of violation are outside the bounds of due process and as explained below, exhibit the exact arbitrary and discriminatory enforcement that due process is intended to prevent. The Commission should therefore reconsider its June 16 Order and find that SPLP did not act unsafely or unreasonably with regard to public awareness, sound levels and alleged emergency response delays.

B. THE JUNE 16 ORDER FAILED TO CONSIDER THE FINDINGS THAT CONSTRUCTION NOISE AND EMERGENCY RESPONDER ACCESS ARE UNSAFE OR UNREASONABLE CONSTITUTE ARBITRARY AND DISCRIMINATORY ENFORCEMENT AND THAT ENFORCING THESE NEW STANDARDS ON A NON-DISCRIMINATORY BASIS GOING FORWARD WILL RENDER VIRTUALLY ALL UTILITY CONSTRUCTION UNSAFE AND UNREASONABLE

17. The June 16 Order affirmed findings of violation regarding construction noise levels and emergency responder access to residences in the vicinity of SPLP's construction that

are inherent to nearly all utility construction. Finding SPLP's construction unsafe and unreasonable in these circumstances is arbitrary and discriminatory enforcement, particularly given the Commission has never previously found utility construction unreasonable or unsafe because such construction made too much noise or delayed access for emergency responders. Holding SPLP to a previously undisclosed and higher standard for utility construction than other utilities is arbitrary and discriminatory enforcement in violation of due process principles discussed above. *Supra* Section III. A.

18. But worse, if the Commission is to engage in non-discriminatory enforcement of its newly created standards for utility construction, the Commission is essentially finding nearly all utility construction is unsafe and unreasonable. The June 16 Order upheld findings that any momentary loud sounds from construction equipment or any theoretical delays for emergency responder access caused by traffic disruption or the presence of construction equipment at a utility construction site is a violation of Section 1501.[12] This is an unrealistic, unattainable, and unworkable standard for utilities. It frustrates the Commission's goal of promoting and providing for necessary utility infrastructure upgrades, maintenance, and repair. It is contrary to public policy.

[12] Under this standard, any utility construction that potentially causes delay of emergency responder access to a residential building (such as a temporary lane closure on a highway or the temporary staging of construction equipment that disrupts traffic flow or site access) is now an automatic violation of Section 1501. So too regarding sound levels. The ID specifically states: "The readings of 75 decibels to over 100 decibels are unreasonable, ***even for a short duration***, when viewed in light of Section 1501 of Public Utility Code, given the residential nature of the property at issue. 66 Pa. C.S. § 1501." ID at 48. Many types of equipment used in everyday utility maintenance and construction produce sound levels above 75 decibels; a chainsaw (110 decibels), gas powered lawn mower (85 decibels), welding machine (83 decibels), generator (84 decibels), or hydrovac truck (101 decibels) all exceed 75 decibels. Ex. GRS-27. If the Commission upholds the ID on this issue, all of these activities, which are commonly undertaken by public utilities every day throughout the Commonwealth, will also become an automatic violation of Section 1501. This is not, and cannot be, the law in Pennsylvania.

19. The June 16 Order failed to consider these issues. The Order summarily dismissed SPLP's arguments that the "standards" the order imposed would be violated by nearly all construction activities, holding the Commission's application is restrained to the case-by-case analysis of what is reasonable in the given circumstances and that sometimes the reasonableness standard was construed in SPLP's favor. June 16 Order at 29-31. Neither of these holdings actually addresses the issue that here SPLP was found to be in violation of 66 Pa. C.S. § 1501 and 52 Pa. Code § 59.33 for impacts on the public that are inherent in virtually all utility construction – noise and potential delay of emergency responder access. There are no specific facts distinguishing how the alleged impacts of SPLP's conduct are different from impacts of other common utility construction – noise and potential delay for access for emergency responders. This is arbitrary and discriminatory enforcement.

20. Holding necessary utility construction and maintenance conduct *de jure* unreasonable or unsafe, is a slippery slope with serious unintended consequences. Utilities understandably will be discouraged from pursuing necessary projects (particularly in residential areas), impacting and undermining the continuity of safe, reliable, and reasonable utility service (unlike the conduct here, which was both safe and reasonable). The Commission should therefore reconsider its June 16 Order and find that SPLP did not act unsafely or unreasonably with regard to sound levels and alleged emergency response delays.

C. THE JUNE 16 ORDER GRANTING RELIEF ON BEHALF OF OTHER POTENTIALLY AFFECTED THIRD PARTIES WAS WRONG AS A MATTER OF LAW AND NOT BASED ON SUBSTANTIAL EVIDENCE

21. The June 16 Order stated that GRS, the owner of Glen Riddle Station Apartments "has clear standing to bring the Complaint and the ALJ was within his discretion to consider the impact of the unreasonable and unsafe construction by Sunoco upon the more than 200 residents

of the Glen Riddle community." *Id.* at 32. The Order goes on to discuss the *Baker* decision[13] which allowed evidence and witness testimony of non-parties, and contorts this to support the finding that the ALJ in this proceeding was within his discretion to "consider such relevant evidence as the ALJ deemed appropriate." June 16 Order at 32. Ultimately, the Order held that the ALJ had "discretion to *hear such relevant evidence* as deemed necessary to *render a determination regarding the issues* presented." *Id.* (emphasis added). These holdings, however, fail to consider the true issue, which is standing to obtain relief on behalf of others. It is well-settled law that it is improper to grant relief for a third-party's interests.[14] The issue regarding standing is ***not*** whether it was proper for the ALJ to "consider relevant evidence." *Id.*

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

> There are three requirements for a party to have standing to litigate an issue: the party must have a substantial interest in the subject matter of the litigation; the interest must be direct; and the interest must be immediate and not a remote consequence…Both the

[13] *Baker v. Sunoco Pipeline, L.P.*, Docket Number C-2018-3004294 (Opinion and Order entered Sept. 23, 2020)

[14] *Infra* ¶ 22.

> immediacy and directness requirements primarily depend upon the causal relationship between the claimed injury and the action in question…Assuming that Petitioner has a substantial personal interest in having all ratepayers be provided with adequate notice, his claim for standing on behalf of all ratepayers nevertheless fails for want of an adequate causal relationship.

George v. Pa. Pub. Util. Comm'n, 735 A.2d 1282, 1286-87 (Pa. Cmwlth. 1999); *see also Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283 (Pa. Cmwlth. 2019).

23. The Commission's Order overlooked and did not address SPLP's argument and rather focused entirely on whether the ALJ had the discretion to *hear or consider evidence*. Consideration of evidence is distinct from the legal issues raised by SPLP in its Exceptions regarding standing[15] – that GRS, a property owner, cannot "vindicate the rights of a third party who has the opportunity to be heard." *Mid-Atlantic Power Supply Ass'n v. Pa. Pub. Util. Comm'n*, 746 A.2d 1196, 1200 (Pa. Cmwlth. 2000). Indeed, unlike *Baker,* there was no testimony on the record from any GRS tenant related to fire hazards or public communications. The June 16 Order rather relied upon mere allegations and speculation of undefined impacts – not substantial testimony or evidence from any GRS tenant. GRS's tenants had an opportunity to be heard in this proceeding if they so desired. That no tenant joined the Complaint as an intervenor, or testified as a witness to raise any issues regarding fire hazards or public communications, shows that GRS lacks standing to litigate and cannot be granted relief on tenants' behalf. There is no causal relationship between the civil penalty affirmed by the Commission on behalf of residents and GRS's formal Complaint seeking to enjoin construction at the property.

24. As the June 16 Order overlooked key legal requirements of standing and incorrectly construed SPLP's position as an argument related to receipt of evidence, the Commission should

[15] *See* SPLP's Exception 4.

grant reconsideration, find that GRS did not have standing on behalf of third-party tenants, and dismiss the Complaint.

D. THE JUNE 16 ORDER'S FINDING THAT SOUND LEVELS WERE UNSAFE OR "UNHEALTHY" OVERLOOKED THAT THE EVIDENCE ON WHICH ITS FINDINGS RELY IS NOT SUBSTANTIAL EVIDENCE AND FAILS TO CONSIDER KEY COMPETENT EVIDENCE

25. The June 16 Order affirmed findings that SPLP's construction created unsafe levels of sound to which residents were exposed. But there is absolutely no evidence (competent or otherwise) that any particular resident was in fact exposed to unsafe or "unhealthy" levels of sound. Moreover, there is no competent evidence that SPLP's construction created levels of sound that could impact human hearing; sound levels must be ongoing for a certain amount of time to impact hearing and there is no showing that sound was consistently produced at levels that could be unhealthy for human hearing. Moreover, the basis for finding that SPLP violated Section 1501 is 30 ***unauthenticated*** videos that GRS was incredulously permitted to enter into the record.

26. The June 16 Order demonstrates that it overlooked these issues. The June 16 Order summarily held a totality of the evidence supported the finding that sound levels were unsafe and gave four examples of statements from the Initial Decision allegedly supporting the findings. June 16 Order at 34. But none of these examples, alone or together, meet the substantial evidence standard, demonstrating the Commission overlooked significant evidentiary issues.

27. First, the Commission relied on the Initial Decision's summary that cites no evidence and disregards key evidence: "The sound mitigation measures undertaken by Sunoco allowed for unhealthy levels of sound to permeate the residences and offices at the [Glen Riddle property] and put [Glen Riddle] residents and employees at increased risk of hearing loss." This conclusory statement is not evidence. Moreover, the Commission failed to define its new standard of "unhealthy levels of sound," which is particularly problematic because there was extensive

expert witness testimony on standards of allowable levels of sound from various agencies and that SPLP's construction noise did not exceed these standards. SPLP MB at 53.

28. Next, the Commission relies upon decibel levels displayed in unauthenticated videos of a decibel level reader that Complainant failed to demonstrate was properly calibrated, and without any evidence of who took those readings, how they were taken, or where or when they were taken. There was no foundation laid by GRS for the introduction of these videos or related photographs – but over SPLP's objection they were allowed into evidence and relied upon in rendering the decision. Thus, these videos are not competent evidence on which to base a finding of fact.

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

Catherine J. Frompovich v. PECO Energy Co., Docket No. C-2015-2474602, 2018 WL 2149249, at *9 (Order entered May 3, 2018) (emphasis added).

29. The Commission relies on this incompetent evidence to find: in many videos there is either no sound wall present or the sound wall is open for some reason; in some of the videos, readings were taken indoors on a balcony or close to a building; and most of the readings in the videos show "high" decibel readings with the sound walls in place. June 16 Order at 34. The Commission dismissed the fatal authentication issue, reasoning that these findings were not based on "any one specific video or reading." *Id.* But this overlooks that ***ALL*** of the videos were completely unauthenticated, no witness laid the proper foundation for their admission, and none showed a decibel measurement on an instrument that was proven to be calibrated. The ID expressly acknowledged that the videos are less than 30 seconds in duration, that neither the videos themselves nor GRS provided any indication as to who took the videos or when they were taken, and that GRS provided no evidence that the measurement devices were properly calibrated. Instead, the ID speculates that it is "unlikely that the device used to take the measurements was not properly calibrated." ID at 48. To state the obvious, lack of authentication and calibration is not overcome by the fact that Complainant introduced multiple unauthenticated videos of uncalibrated decibel readers. Incompetent evidence cannot corroborate other incompetent evidence. *See, e.g.*, *Sule v. Philadelphia Parking Authority*, 26 A.3d 1240 (Pa. Cmwlth. 2010) (hearsay, which is incompetent evidence, cannot corroborate hearsay).

30. Moreover, in summarily dismissing SPLP's exceptions on this issue, the Commission also overlooked SPLP's evidence that it did not subject residents to unsafe levels of sound. SPLP offered an independent, qualified noise control engineer who reviewed the sound mitigation studies and plans SPLP had in place, reviewed readings GRS's unidentified video-taker

took, the readings SPLP took, and took his own readings of construction sounds, and concluded to a reasonable degree of engineering certainty that:

- the 24-hour noise exposure level experienced in the GRS apartments is not likely to exceed the OSHA 24-hour noise exposure threshold, SPLP St. No. 8-R, Harrison Rebuttal at 7:23-8:2;[16]
- the sound levels were below all EPA standards and CDC guidelines, SPLP St. No. 8-R, Harrison Rebuttal at 12:15-22;
- the sound level readings GRS took inside the apartment buildings were all below OSHA, CDC, and NIOSH guidelines, N.T. 726:19-727:15; and
- sound levels experienced inside the apartments are not high enough to cause hearing damage, and are therefore not unsafe. SPLP St. No. 8-R, Harrison Rebuttal at 7:22-8:4.

SPLP MB at 50-53.

31. The June 16 Order ***fails to even reference***, much less weigh or consider any of this competent, expert evidence. This is a capricious disregard of evidence.

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

Casne v. Workers' Comp. Appeal Bd. (Stat Couriers, Inc.), 962 A.2d 14, 19 n.5 (Pa. Cmwlth. 2008) (quotation marks and citation omitted). The June 16 Order's decision on this issue is reversible error; the Commission should reconsider its Order and hold that SPLP did not subject residents to unsafe levels of sound.

[16] GRS's own witness admitted that the proper method to take decibel readings is for a 24-hour period, not the momentary sound readings the June 16 Order relies upon. N.T. 425:24-428:13.

E. THE JUNE 16 ORDER'S FINDING THAT SPLP'S CONSTRUCTION CREATED UNSAFE CONDITIONS REGARDING EMERGENCY RESPONDER ACCESS OVERLOOKED THAT THE EVIDENCE ON WHICH ITS FINDINGS RELY IS NOT SUBSTANTIAL EVIDENCE AND FAILS TO CONSIDER KEY COMPETENT EVIDENCE

32. The June 16 Order finds in a one paragraph "analysis" that SPLP's construction created "fire hazards" and was thus unsafe. The June 16 Order thus overlooked the actual issue here, which were unproven allegations that SPLP's construction impeded emergency responders and thus SPLP should have taken more steps to allow for adequate emergency responder access. The June 16 Order deems the presence of construction equipment and vehicles as a *per se* fire hazard, apparently referring to the ability of fire apparatus to access the apartment buildings. This is conjecture and supposition, not substantial evidence. The June 16 Order overlooks that SPLP's evidence on this issue was not merely a single statement by an independent expert that SPLP's construction did not create new and different hazards.

33. Specifically, in addition to expert testimony on fire access safety, SPLP showed that it had preemptively worked directly with the local municipality and emergency responders to test access to the property using actual fire apparatus to ensure adequate, timely access to the apartment buildings during construction while SPLP's equipment was present on the site including modifying placement of various equipment,[17] and that in two actual 911 calls during construction the response time was within normal time frames. SPLP proved there was no delay in fact or likelihood of delay for emergency responder access to the apartment buildings. SPLP MB at 43-46

[17] The Township's memo expressly stated: "the response time for an aerial apparatus with the blocking off of parking spots in proximity to the pathway ***would not negatively impact on response time***" and "placement of aerial apparatus would not be impacted for life safety with the width of the pathway and the width of the parking lots." SPLP Ex. GN-6.

34. The June 16 Order overlooked and failed to consider these key pieces of evidence, instead upholding the ID's reasoning that since it was a residential area and there were construction vehicles and equipment present, there was necessarily unsafe and unreasonable delay. Again, that cannot be the standard as these circumstances are inherent in any utility major construction. The Commission should reconsider the June 16 Order to fully consider SPLP's evidence instead of mere supposition and reverse the finding of violation as to emergency responder access.

F. THE JUNE 16 ORDER FAILED TO CONSIDER AS A STRICT MATTER OF LAW THAT NO LAW, ORDER, OR REGULATION CREATES PUBLIC AWARENESS REQUIREMENTS FOR NEW PIPELINE CONSTRUCTION, AND THE ORDER'S RETROACTIVE PENALTY IS NOT SUPPORTED BY ANY LAW, ORDER, OR REGULATION.

35. The June 16 Order stated that the *Flynn* decision established the Commission's authority to regulate the reasonableness of SPLP's public outreach. Order at 25-28, 36-37. The June 16 Order went on to determine that Section 1501 of the Public Utility Code and Section 59.33 of the Commission's regulations applied to SPLP's public awareness requirements for new pipeline construction. *Id*. In rendering these determinations, the June 16 Order overlooked a critical distinction between this case and the *Flynn* proceeding – that as a strict matter of law, where the Commission in *Flynn* determined that 49 C.F.R. § 195 governs SPLP's public awareness program for *operating pipelines*, it does not govern public awareness for *new pipeline construction,* and that there are no public awareness requirements for new pipeline construction in any law, order, or regulation.

36. In particular, the June 16 Order cites the *Flynn* Order which, contrary to the Commission's instant ruling, expressly describes the federal regulatory and API RP 1162's obligations, rules, and standards for public awareness for *operators transporting product* – **not** construction activities. Tellingly, the June 16 Order's cited reasoning from *Flynn* states:

> Nor is Sunoco's argument [that the Commission is restrained in its regulation of Sunoco by specific minimum standards] support by any reasonable interpretation of 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 comprehensive as necessary to reach all areas **in which the operator transports hazardous liquid or carbon dioxide**." 49 C.F.R. § 195.440(f).

June 16 Order at 26-27 (emphasis added).

37. The Commission, therefore, appears to have critically overlooked the plain letter of the regulations governing SPLP's conduct, and misapplied distinguishable reasoning from *Flynn* in this case. The June 16 Order expressly quotes standards which it has stated apply to *operational pipelines*. This proceeding, at all times, was focused entirely on SPLP's *new pipeline construction* – not SPLP's operations transporting hazardous liquids via pipeline.

38. Nothing in SPLP's Public Awareness Plan applies to ***new*** pipeline construction (the only construction at issue here), and the June 16 Order is wrong as a matter of law. Both Part 195 and API RP 1162 are explicit that they do not apply to *new* pipeline construction.[18] The June 16 Order's erroneous finding that SPLP's Public Awareness Plan allows supplemental messaging during "maintenance/construction activity" ignores that: 1) Section 195.440 is clearly inapplicable to *new construction*; and 2) the "maintenance/construction activity" cited falls under the regulatory

[18] Specifically, Part 195 is divided into various subparts, each dealing with different topics. Section 195.440, on which GRS relies, is located in Subpart F – "Operation and Maintenance," not Subpart D – "Construction." Moreover, Part 195 adopts by reference American Petroleum Institute Recommended Practice 1162 ("API RP 1162"), which governs public awareness standards. 49 C.F.R. 195.440(a). API RP 1162 expressly states it does not apply to new pipeline construction:

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

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

framework for Part 195's "Operations and Maintenance" and applies expressly to operational pipelines not ***new*** pipelines under construction.

39. With no regulatory rule or standard governing SPLP's new pipeline construction communication requirements, the June 16 Order further applies the Commission's general powers under 66 Pa. C.S. § 1501 and its regulations at 59 Pa. Code § 59.33(a) to create communication and outreach standards for SPLP's new pipeline construction. This overlooks that the Commission failed to provide SPLP with notice of what standards it is expected to align its conduct with regarding public outreach and functions as a retroactive adjudicatory rulemaking, followed with a retroactive imposition of civil penalty, which fundamentally denies SPLP of due process of law. *Supra* Section III(A).

40. As the June 16 Order overlooked significant legal issues and misapplied the *Flynn* proceeding as applicable here to SPLP's new pipeline construction, and further created new, retroactive standards under 66 Pa. C.S. § 1501 and 59 Pa. Code § 59.33(a) of which SPLP had no notice to conform its conduct, the Commission should grant reconsideration, find as a matter of law that Part 195 and API RP 1162 do not create standards for new pipeline construction public outreach, and dismiss the Complaint.

G. THE JUNE 16 ORDER OVERLOOKED KEY EVIDENCE WHEN IT FAILED TO CONSIDER THE RECORD OF SPLP'S COMMUNICATIONS WITH GRS RESIDENTS.

41. The June 16 Order determined, without citations to record evidence, that SPLP's public outreach and communication to GRS residents were insufficient. Order at 38. The Order went on to conclude that the ALJ was within his discretion to determine and weigh the evidence that was presented. *Id.* The June 16 Order, however, appears to have overlooked the fact that GRS failed to present a *prima facie* case that SPLP's communications with residents violated anything, and ignored the comprehensive substantial evidence showing SPLP's extensive communications

with GRS residents which were both meaningful and informative to keep GRS's residents aware of the construction activities at the GRS property. The Order went on to affirm a violation of 66 Pa. C.S. § 1501 and 52 Pa. Code § 59.33 of the Commission's regulations with no analysis of any of the substantial evidence of record. *Id.*

42. The June 16 Order did not provide any analysis of the substantial evidence of record, let alone SPLP's key evidence showing: 1) notwithstanding GRS's demand that SPLP not directly contact its tenants and the day-to-day difficulties it imposed, SPLP nevertheless informed GRS residents through mailers, signage, a 24/7 hotline where residents could make direct calls, notices to related entities, holding a virtual town hall meeting, and the provision of rent relief directly to residents; and 2) that GRS presented no evidence to establish a *prima facie* case that the communications SPLP made to residents despite GRS's attempt to prevent communication were untimely or insufficient. With this lack of analysis of the substantial evidence, the June 16 Order both overlooked and failed to consider substantial evidence, and simply affirmed the ID's incomplete record analysis which capriciously disregarded key substantial evidence of record.[19]

43. Under well settled Pennsylvania law, to obtain *any* relief GRS has the burden under 66 Pa. C.S. § 332(a) to prove the elements of its claims that SPLP violated the Public Utility Code, a Commission regulation or Commission order.[20] Importantly, the Commission's adjudication *must* be supported by "substantial evidence" in the record[21] where "substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[22] More

[19] *See* SPLP Exception No. 8.

[20] *Samuel J. Lansberry, Inc. v. Pa. PUC,* 578 A.2d 600 (Pa. Cmwlth. 1990), *appeal denied*, 602 A.2d 863 (Pa. 1992)("*Lansberry*"); *Se-Ling Hosiery v. Margulies,* 70 A.2d 854 (Pa. 1950); *West Penn Power Co. v. Pa. PUC,* 478 A.2d 947, 949 (Pa. Cmwlth. 1984)

[21] 2 Pa. C.S. § 704; *Lansberry*, 578 A.2d at 602

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

is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.[23] A legal decision must be based on real and credible evidence that is found in the record of the proceeding affording the utility the opportunity to respond.[24] Only where a complainant presents evidence sufficient to establish a *prima facie* case does the burden to rebut complainant's evidence shifts to the respondent; if the evidence that the respondent presented is of co-equal weight, then the complainants have not satisfied their burden of proof and must provide some additional evidence to rebut that of the respondent.[25] While the burden of going forward with evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission.[26]

44. Nothing in the June 16 Order describes either how GRS met its burden of proof to show that SPLP's communications with GRS's residents were insufficient, nor establishes how GRS established a *prima facie* case on this issue – a key consideration that was overlooked and not addressed by the Commission. Indeed, a Commission order must be supported by substantial evidence in the record – yet the Commission did not discuss any evidence to support its decision, let alone analyze and discuss how SPLP's substantial evidence of record could so hastily be disregarded.

---

[23] *Norfolk & Western Ry. Co. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. Of Review*, 166 A.2d 96 (Pa. Super. 1961); *Murphy v. Comm. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

[24] *Pocono Water Co. v. Pa. PUC*, 630 A.2d 971, 973-74 (Pa. Cmwlth. 1993) (finding that the Commission violated the utility's due process rights "because it assessed liability after determining an issue which [the utility] had not been afforded a reasonable opportunity to defend at the hearing."); *Duquesne Light Co. v. Pa. PUC*, 507 A.2d 433, 437 (Pa. Cmwlth. 1986) (holding that the Commission violated the utility's due process rights because the utility was "not given adequate notice of the specific conduct being investigated, and hence its defense was gravely prejudiced.")

[25] *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 461 A.2d 1234 (Pa. 1983).

[26] *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

45. As the June 16 Order overlooked and capriciously disregarded[27] substantial evidence of SPLP's communications with GRS residents, and where GRS failed to establish a *prima facie* case at the outset, the Commission should reconsider its finding that SPLP violated of the Commission's general powers under 66 Pa. C.S. § 1501 and its regulations at 52 Pa. Code § 59.33(a).

H. THE JUNE 16 ORDER OVERLOOKED A KEY LEGAL ISSUE REGARDING GRS'S LATE-RAISED REQUEST FOR CIVIL PENALTY WHICH VIOLATED SPLP'S DUE PROCESS RIGHTS – AN OPPORTUNITY TO BE HEARD ON AN ISSUE IS NOT FULFILLED SIMPLY BY THE ABILITY TO SUBMIT A REPLY BRIEF TO NEVER BEFORE SOUGHT RELIEF

46. The June 16 Order affirmed that because SPLP submitted a reply brief addressing GRS's late-requested $2,000,000.00 civil penalty, SPLP was not "deprived of the opportunity to be heard" regarding newly sought relief raised for the first time in GRS's main brief. Order at 39-40. The Order further did not analyze or address how SPLP's due process rights were protected regarding SPLP's rights to an opportunity to be heard, to be apprised of evidence on the *Rosi* factors/civil penalty, or SPLP's right to offer evidence in explanation or rebuttal. *Id.* Further, the Order failed to address a critical point – where **49 of the 51 violations** affirmed by the Commission were never alleged in GRS's pleadings, SPLP lacked notice and a fair opportunity to be heard regarding the imposition of civil penalties or the application of the *Rosi* factors on those Commission affirmed violations. *Id.*

[27] As the Commonwealth Court has held:

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

Casne v. Workers' Comp. Appeal Bd. (Stat Couriers, Inc.), 962 A.2d 14, 19 n. 5 (Pa. Cmwlth. 2008) (internal quotation and citation omitted).

47. The June 16 Order affirming GRS's late requested civil penalty should be reconsidered because the Order failed to consider SPLP's fundamental due process rights. The Commission, as an administrative body, is bound by the due process provisions of constitutional law and by principles of common fairness. *Hess v. Pa. Pub. Util. Comm'n*, 107 A.3d 246, 266 (Pa. Cmwlth. 2014). Among the requirements of due process are notice and an opportunity to be heard on the issues, to be apprised of the evidence submitted, to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. *Id*. Moreover, "the right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1, 18 (1938) (*Morgan*). Thus, the "requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." *Id*.

48. Under well settled law, by GRS raising its late civil penalty request in its Main Brief, SPLP was not given notice or apprised of GRS's new sought relief to allow any evidence to be submitted to address the Commission's *Rosi* analysis (of which GRS did not present *any* such evidence in the record). SPLP was deprived of its due process right to present rebuttal evidence on the late requested $2,000,000.00 civil penalty and *Rosi* factors, and the June 16 Order failed to explain how SPLP had a reasonable opportunity to know of the late raised claims not presented until after pleadings and hearings had long closed. These are all considerations overlooked by the Order and are not simply matters the Commission can chose to ignore– due process of law is a fundamental right by which the Commission is bound.

49. As the June 16 Order overlooked and did not address SPLP's fundamental due process rights when granting GRS's late-requested civil penalty, the Commission should

reconsider its approval of the ID's application of the *Rosi* factors and imposition of civil penalty, especially where 49 of the 51 violations affirmed by the Commission were never pleaded by GRS thereby failing to provide SPLP adequate notice and an opportunity to be heard. The Commission has a duty to provide due process and reconsider its Order which overlooked these principles.

I. THE JUNE 16 ORDER FAILED TO CONSIDER DISMISSING THE COMPLAINT AS MOOT WILL NOT IMPACT THE COMMISSION'S ENFORCEMENT AUTHORITY BECAUSE IT IS A CASE-BY-CASE DECISION IN A THIRD-PARTY COMPLAINT PROCEEDING.

50. The June 16 Order found completion of construction did not render the Complaint moot, even though the Complaint only sought relief related to enjoining or restraining *active* construction because to find the Complaint moot would prevent the Commission from enforcing the Public Utility Code:

> To hold such a standard would significantly impair the Commission's ability to find any violations of the Public Utility Code if such violations were to disappear as soon as construction on any project by a utility is completed.

Order at 41 (citing ID at 70-72).

51. The June 16 Order overlooks fundamental notions of law regarding the requirements of justiciability and mootness, while also failing to understand that finding the Complaint moot will not create a broadly applicable principle harming the Commission's enforcement authority. More specifically, the requirements of justiciability -- that an actual case or controversy exist at all stages of litigation – cannot not be excused to render relief that is not requested in a Complaint concerning construction that is no longer active, even where the Commission may desire to do so. Moreover, finding that the Complaint is moot does not detrimentally impact the Commission's enforcement authority because the Commission is not sitting as an enforcement tribunal in this proceeding, but is acting as an adjudicator to determine

whether the specific relief requested by a third party in a complaint should be granted. Moreover, as the Commission has recognized in other parts of the June 16 Order, cases are decided on a "case-by-case" basis. If the Commission properly finds that the Complaint is moot, such a finding will be based on the facts and circumstances specific to the instant matter, and will not create a broadly applicable standard that would significantly impair the Commission's ability to find violations of the Public Utility Code.

52. The June 16 Order misapplies the requirements of justiciability and does not consider fundamental notions of law regarding mootness. An actual case or controversy must exist ***at all stages*** of the judicial or administrative process.[28] Indeed, the Order failed to comprehend that because the Complaint only sought injunctive relief for conduct that has since been completed, Pennsylvania law requires that this intervening change in the factual posture of the case indeed requires its dismissal as moot.[29] The Order, by refusing to require an actual case in controversy at all times in this matter, allowed GRS to advance its prime motivating purpose for this proceeding which was proven by the record evidence – that GRS is using and abusing the Commission's procedures to further leverage GRS's monetary demands from SPLP regarding unproven business losses and the value of the temporary easement taking – issues that are beyond the Commission's jurisdiction.[30] Thus, the Commission should not step into the shoes of a complainant to render

[28] *See Util. Workers Union of Am., Loc. 69, AFL-CIO v. Pub. Util. Commn.*, 859 A.2d 847, 849–50 (Pa. Cmwlth. 2004). ("It is well-established that an actual case or controversy must exist at all stages of the judicial or administrative process. If not, the case is moot and will not be decided by this court. *Musheno v. Dep't of Pub. Welfare,* 829 A.2d 1228 (Pa. Cmwlth. 2003).")

[29] *See Allen v. Birmingham Twp.*, 244 A.2d 661 (Pa. 1968) (appeal from denial of injunction to prevent excavation of land held moot where excavation had already been completed); *Strassburger v. Philadelphia Record Co.*, 6 A.2d 922 (Pa. 1939) (appeal from denial of injunction to prevent annual shareholder meeting held moot where meeting had already been held according to by-laws); *In re Gross,* 382 A.2d 116, 121 (Pa. 1978) (appeal involving intervening change in factual posture as the patient was no long being administered medication by provider against his will).

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

relief where the requirements of justiciability are not met, even where it may desire to do so. These fundamental issues, which were overlooked, warrant the Commission reconsidering its Order failing to dismiss the complaint as moot.

53. Furthermore, finding that the Complaint is moot does not create a broadly applicable standard that hampers the Commission's ability to enforce the Public Utility Code. This overlooks a key legal separation of powers distinction – here the Commission is sitting as an adjudicator of a third-party complaint seeking specific injunctive relief that was moot before the proceeding was briefed. The Commission is not acting in its enforcement authority here and holding this Complaint moot has no impact on the Commission's ability to enforce the Public Utility Code or its regulations when acting within its enforcement powers.

54. Moreover, the June 16 Order expressly held the Commission has authority to render determinations on a case-by-case basis. Order at 25. Importantly, the Commission stated:

> …we reject Sunoco's premise[31] that the Commission is prohibited from conducting a case-by-case analysis of what is "safe" and "reasonable service" with the given facts.

Order at 25. The Order went on to cite the *Flynn* proceeding for the same principle that the Commission asserts it can determine what is "reasonable service" under Section 1501 on a case-by-case basis. Order at 26-27 (citing *Flynn* at 85). The June 16 Order relied upon this reasoning multiple times. *See* Order at 37, 44.

55. However, the June 16 Order does not consider that its holdings against SPLP regarding finding violations on a case-by-case basis are internally inconsistent with its rationale for refusing to find the complaint moot. On one hand, the Commission determined that its

[31] As explained above, SPLP did not argue the Commission does not have authority to make evidence-based findings on a case-by-case basis, but rather that the Commission's authority is cabined by due process and the Commission cannot hold SPLP to unannounced standards or higher standards than other similarly situated utilities.

regulation of pipeline construction and disposition of complaints by third parties are on a case-by-case basis and so do not impact other utilities. On the other hand, in determining that the completion of construction at the GRS property did not render the Complaint moot, the Commission flipped its logic and found that the Commission *cannot* dismiss GRS's complaint on mootness grounds because to do so would diminish the Commission's ability to enforce the Public Utility Code. This is incorrect and the requirements of justiciability should not be excused on this basis.

56. Moreover, the Commission has a process to prevent cases from becoming moot – seeking interim injunctive relief. That this proceeding was rendered moot in no way impacts the Commission's enforcement abilities. This arbitrary application fails both logic and reason, and the June 16 Order overlooked the conflict it created. The Commission does not impair its enforcement authority if it dismisses this Complaint as moot.

57. For these reasons, the Commission should reverse its decision not to dismiss the complaint as moot. By not doing so, the Commission misapplies the basic requirements of justiciability – that a case and controversy must exist at all stages of litigation. The Commission cannot render relief where none is warranted, even where it may desire to do so. Moreover, the Commission should not excuse these requirements based upon an incorrect finding that it will inhibit the Commission's enforcement authority, which it will not. Rather, this complaint should be dismissed as moot based on the facts and circumstances specific to this case under well settled Pennsylvania law.

J. THE JUNE 16 ORDER FAILED TO CONSIDER THAT *POVACZ* REQUIRES A COMPLAINANT TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT A UTILITY'S CONDUCT WOULD CREATE "A PROVEN EXPOSURE TO HARM."

58. The June 16 Order adopted the finding that neither Section 1501 nor Section 59.33 of the Commission's regulations requires actual harm to have occurred for a violation to be found.

Order at 42. The Order cites the Commonwealth Court's discussion of the PUC's position in *Povacz v. Pa. PUC*, that the PUC's authority extends to claims seeking to prevent harm. Order at 43 (citing *Povacz v. Pennsylvania Pub. Util. Comm'n.,* 241 A.3d 481, 493 (Pa. Cmwlth. 2020), appeal granted, 253 A.3d 220 (Pa. 2021)). This recitation of the law, however, is incomplete, creates an overly simplistic view of a complainant's burden of proof, and the Commission overlooked the Commonwealth Court's actual holding.

59. When discussing the PUC's arguments regard "Burden of Proof – Conclusive vs. Potential Harm," the Commonwealth Court stated:

> The PUC found the ALJ correctly imposed a burden of proof requiring Consumers to demonstrate adverse health effects by a preponderance of the evidence. This required Consumers to prove that there was a "conclusive causal connection" between RF exposure from smart meters and adverse human health effects.
>
> The PUC concedes Consumers were not required to prove harm had actually occurred; the PUC'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."** ***Povacz*** **(Pa. P.U.C., No. C-2015-2475023, filed Mar. 28, 2019), slip op. at 29. The PUC 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.**

Povacz v. Pennsylvania Pub. Util. Commn., 241 A.3d 481, 493 (Pa. Cmmw. 2020), *appeal granted,* 253 A.3d 220 (Pa. 2021) (emphasis added).

60. The June 16 Order thus failed to consider the correct burden of proof standard which GRS was required to meet – that by a preponderance of the evidence SPLP's conduct would create a "proven exposure to harm." In failing to consider the holding of *Povacz*, the June 16 Order affirmed relief not only where GRS failed to present any evidence that proved SPLP's construction

activities exposed Complainant to harm, but where there was no evidence that any actual harm ever occurred to any GRS employee or member of the public at the property. The June 16 Order should be reconsidered because it failed to consider that *Povacz* requires a showing of a "proven exposure to harm" which GRS failed to meet, which is further supported by the fact that no evidence of actual harm is contained in the record.

K. THE JUNE 16 ORDER FAILED TO CONSIDER THAT THE PUC, AS A MATTER OF LAW, LACKS JURISDICTION OVER SOUND AND FIRE SAFETY.

61. The June 16 Order found the PUC has jurisdiction over sound and fire safety where the PUC's jurisdiction over these issues is not defined in any statute, regulation, or order requiring or defining applicable sound and fire safety standards. Order at 44. The Order summarily denied SPLP's exception without further explanation. *Id.*

62. With no reasoning presented, the Commission's June 16 Order appears to have overlooked and failed to consider SPLP's legal arguments that the Commission lacks jurisdiction over construction noise and local emergency responder access to property. The June 16 Order, by adopting the ID, initially recognized the limited nature of the Commission's jurisdiction and that the Commission cannot exercise authority over municipal ordinances governing sound or emergency responder access, such as Middletown Township's fire code (which has provisions for access to property for emergency responders) and construction work ordinances relating to noise, or OSHA workplace sound level regulations. *See, e.g.,* ID at 41. Regardless of this analysis, the ID nonetheless exercised jurisdiction of these exact issues, and the June 16 Order overlooked SPLP's arguments that the PUC lacks jurisdiction. The June 16 Order goes on to overlook that where there are no standards in the PUC statues or regulations regarding construction sound, the ID erroneously created its own standards for sound and emergency responder access, usurping jurisdiction under the guise of safety and reasonableness concerns. *See, e.g.,* ID at 41.

63. Ultimately, regardless of the June 16 Order not analyzing this issue, the Commission does not have jurisdiction to make determinations about sound levels or emergency responder access, particularly when SPLP is subject to and abided by the municipality's ordinances that impose those standards on SPLP during its construction activities. Therefore, the Commission should reconsider its order as it overlooked and failed to address SPLP's argument that the Commission lacks jurisdiction to make initial findings over construction noise and emergency responder access and dismiss the Complaint.

L. THE JUNE 16 ORDER FAILED TO CONSIDER SPECIFIC CASELAW AND ARGUMENT THAT THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF VALID VERIFICATION AND FAILURE TO DO SO HARMED SPLP'S SUBSTANTIVE RIGHTS.

64. The June 16 Order held that because years of litigation had already occurred, it is appropriate to disregard an "error or defect in procedure" regarding GRS's invalid verification of the complaint. Order at 46. The Order further stated, without reasoning or support, that "Sunoco's substantive rights have not been harmed in any manner." This finding overlooked and ignored the caselaw finding invalid verification warrants dismissal and that continuation of this matter in fact harmed SPLP's substantive rights.

65. The June 16 Order overlooked SPLP's exceptions which provided precedential cases showing that an invalid verification is not simply a mere defect in procedure that can be disregarded – it is a ***mandatory*** requirement for a legal action to exist. *See Schellhammer v. Pa. Pub. Util. Comm'n*, 629 A.2d 189, 192-93 (Pa. Cmwlth. 1993) (holding that a document filed with the Commission that does not include an affidavit or verification is not entitled to notice and hearing); *Pa. Pub. Util. Comm'n v. Salem Trans, Inc.*, Docket No. A-00115591F0001, 2002 WL 34558719 (Opinion and Order entered Oct. 30, 2002) ("Verification is essential to the integrity of Commission process… Accepting an unverified petition is tantamount to admitting the testimony

of an unsworn witness at hearing or trial. The judicial body has no assurance that the witness is telling the truth under either oath to God or threat of criminal prosecution… As such, the Letter Petition should not have been accepted for filing by the Commission's Secretary's Bureau."). Rather than addressing these points of law, the June 16 Order simply disregarded the invalid verification under 52 Pa. Code § 1.2(a), which is something it cannot do.

66. As a result, SPLP's substantive rights *were* harmed by allowing this invalid verification. If the complaint was dismissed as it should be, so would the findings against SPLP and the $51,000 civil penalty. By disregarding this clear showing that SPLP was harmed by the continuation of this Complaint which lacked a valid verification, the Commission has perpetuated a harm, ultimately resulting in a findings and fines from a defective complaint. Therefore, the Commission should reconsider the June 16 Order as it overlooked the ***mandatory*** requirement that a complaint have a valid verification in order to institute a legal action and dismiss the Complaint.

IV. CONCLUSION

WHEREFORE, Sunoco Pipeline L.P. respectfully requests the Commission reconsider its June 16 Order and dismiss the Complaint.

Respectfully submitted,

/s/ Thomas J. Sniscak

Thomas J. Sniscak, Esq. (PA ID No. 33891)
Kevin J. McKeon, Esq. (PA ID No. 30428)
Whitney E. Snyder, Esq. (PA ID No. 316625)
Bryce R. Beard, Esq. (PA ID No. 325837)
HAWKE, MCKEON & SNISCAK LLP
100 North Tenth Street
Harrisburg, PA 17101
Tel: (717) 236-1300
tjsniscak@hmslegal.com
kjmckeon@hmslegal.com
wesnyder@hmslegal.com
brbeard@hmslegal.com

Diana A. Silva, Esq. (PA ID No. 311083)
MANKO, GOLD, KATCHER & FOX, LLP
401 City Avenue, Suite 901
Bala Cynwyd, PA 19004
Tel: (484) 430-5700
dsilva@mankogold.com

Attorneys for Respondent Sunoco Pipeline L.P.

Dated: July 1, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the forgoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

VIA ELECTRONIC MAIL ONLY

Samuel W. Cortes, Esquire
Ashley L. Beach, Esquire
Fox Rothschild LLP
747 Constitution Drive, Suite 100
Exton, PA 19341
(610) 458-7500
scortes@foxrothschild.com
abeach@foxrothschild.com

/s/ Thomas J. Sniscak
Thomas J. Sniscak, Esq.
Whitney E. Snyder, Esq.
Kevin J. McKeon, Esq.
Bryce R. Beard, Esq.

Dated: July 1, 2022