

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Meghan Flynn	:	
Rosemary Fuller	:	
Michael Walsh	:	
Nancy Harkins	:	C-2018-3006116
Gerald McMullen	:	P-2018-3006117
Caroline Hughes and	:	
Melissa Haines	:	
	:	
	:	
v.	:	
	:	
	:	
Sunoco Pipeline, L.P.	:	

**SECOND INTERIM ORDER**

**Granting in Part and Denying in Part Preliminary Objections to Amended Complaint;  
Granting the Bureau of Investigation and Enforcement’s Petition to Withdraw  
Intervention; Granting Petitions to Intervene; and Denying Complainants’ Application for  
Subpoena**

Procedural History

On December 11, 2018, I issued an Order Denying Petition for Emergency Interim Relief and Certifying Material Question in the above-captioned matter. Also on December 11, 2018, Sunoco Pipeline, L.P. (Sunoco or Respondent) filed an Answer and New Matter as well as Preliminary Objections to Complainants’ Formal Complaint. On December 18, 2018, the Commission’s Bureau of Investigation and Enforcement (I&E) exercised its authority to intervene pursuant to 52 Pa. Code §§ 5.72(b) and 5.74(b)(4). I&E filed a Brief Regarding the Certification of Material Question as well as a Notice of Intervention on December 18, 2018. On December 19, 2018, Respondent filed a letter “reply brief” in response to I&E’s intervention

seeking to amend its Answer to the Petition for Interim Emergency Relief and an Amended Answer deleting Respondent's assertion that I&E had opined the 12-inch pipeline was safe.

On December 21, 2018, Complainants filed an Amended Complaint raising issues regarding the integrity management plan of Respondent, particularly as it relates to the 12-inch workaround pipeline and compliance with federal standards. Complainants also amended their relief requested to include, among other things, an order directing that an independent contractor conduct a remaining life study of Mariner East 1 (ME1) and the 12-inch sections of the workaround pipeline to determine the forecasted retirement age of ME1.

On December 27, 2018, I&E filed a Petition to Withdraw Intervention in the present matter in reliance on Respondent's Amended Answer to the Petition for Interim Emergency Relief.

On January 7, 2019, Respondent filed an Answer to Amended Complaint.<sup>1</sup> On January 10, 2019, Respondent filed an Answer and Preliminary Objections to the Amended Complaint. The Answer denies that Sunoco Pipeline, L.P. (Sunoco or Respondent) "cobble[d] together" the 12-inch workaround pipeline referenced in the Amended Complaint and avers that since 1937, when the pipeline was originally constructed, it has undergone routine maintenance and significant upgrades including a \$30 million upgrade in 2016 that included multiple inline inspections and hydrotesting to the approximately 24-mile portion of the pipeline segment reversed. Answer to Amended Complaint at 4. Sunoco denies that its Public Awareness Plan is in violation of any applicable regulation. *Id.* at 6.

On January 16, 2019, Downingtown Area School District (Downingtown) filed a Petition to Intervene. On January 18, 2019, Complainants filed a Reply to New Matter and Response In Opposition to Preliminary Objections. Also on January 18, 2019, Rose Tree Media School District (Rose Tree) filed a Petition to Intervene. On January 22, 2019, Twin Valley

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<sup>1</sup> Since January 9, 2019, the following individuals/entities filed letters in support of the Amended Complaint: Terri L. Priest; Mayor Josh Maxwell; Libby Madarasz; Marcia L. Gentry; Kathleen Hester; Christina Morley; Robert W. and Lou Ann Atkinson; Judith McClintock; Annette Murray; Lora Snyder; Judi Di Fonzo; Linda Yu; Uwchlan Twp.; Margaret S. Tompkins; Thornbury Twp.; Representative Carolyn T. Comitta; Pamela Onyx; Carrie Gross; and Eve Miari. These letters are being considered as comments rather than petitions to intervene as they do not comply with 52 Pa. Code §5.72.

School District (Twin Valley)<sup>2</sup> and East Goshen Township (East Goshen) filed Petitions to Intervene.

On February 1, 2019, the Commission entered an Opinion and Order affirming an Order Denying Interim Emergency Relief pursuant to 52 Pa. Code §§ 3.6 – 3.8 and 5.305(e)(3). The Commission returned the matter to the Office of Administrative Law Judge (OALJ) for disposition of the Amended Complaint. The Opinion and Order is silent with regard to I&E's Petition to Withdraw Intervention. To date, there have been no objections to I&E's petition seeking withdraw intervention.

On February 4, 2019, West Whiteland Township (West Whiteland) filed a Petition to Intervene. On February 5, 2019, Sunoco filed an Answer to Petition to Intervene of Downingtown Area School District. On February 7, 2019, Sunoco filed Answers to the Petitions to Intervene of Twin Valley and Rose Tree. On February 13, 2019, Uwchlan Township (Uwchlan) filed a Petition to Intervene. On February 21, 2019, Middletown Township (Middletown) filed a Petition to Intervene. On February 25, 2019, Delaware County filed a Petition to Intervene. On February 25, 2019, Downingtown filed a Response to Sunoco's Answer. On the same date, Sunoco filed an Answer Opposing the Petition to Intervene of West Whiteland Township. On February 27, 2019, Sunoco filed a Response in Opposition to the Intervention of the Rose Tree Media School District. On February 28, 2019, Complainants filed an Application for Issuance of a Subpoena.<sup>3</sup>

On March 4, 2019, the West Chester Area School District (West Chester) filed a Petition to Intervene. Also on March 4, 2019, Sunoco filed: 1) Preliminary Objections to the Answer of Rose Tree School Media School District; 2) Preliminary Objections to the Answer of Downingtown Area School District; and 3) Answer Opposing Intervention of Uwchlan Township. On March 11, 2019, I&E and Sunoco filed Objections to the Application for Issuance of Subpoena.

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<sup>2</sup> On the same day, Twin Valley School District filed a Corrected Petition to Intervene.

<sup>3</sup> Although Complainants properly served copies of the Application upon the presiding officer and opposing counsel, the Application was deficient as it was neither served upon the Bureau of Investigation and Enforcement nor Law Bureau as required by 52 Pa. Code §§ 5.421(c)(1) and (4).

Preliminary Objections to the Amended Complaint are now ripe for a decision. I&E's Petition to Withdraw Intervention is ripe for a decision. The Petitions to Intervene of Rose Tree School Media School District, Downingtown Area School District, Twin Valley School District, East Goshen Township, West Whiteland Township, Uwchlan Township, Middletown Township and Delaware County are ripe for a decision. Finally, the Application for Issuance of a Subpoena is ripe for a decision.

#### Preliminary Objections to Amended Complaint

The Commission's Rules of Practice and Procedure permit parties to file preliminary objections. The grounds for preliminary objections are limited to those set forth in 52 Pa. Code §5.101(a) as follows:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.
- (7) Standing of a party to participate in the proceeding.

52 Pa. Code §5.101(a).

Commission preliminary objection practice is analogous to Pennsylvania civil practice regarding preliminary objections. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa PUC LEXIS 69, Docket No. C 00935435 (July 18, 1994). Preliminary objections in civil practice requesting dismissal of a pleading will be granted only where the right to relief is clearly warranted and free from doubt. *Interstate Traveller Services*,

*Inc. v. Pa. Dept. of Environment Resources*, 406 A.2d 1020 (Pa. 1979); *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 595 A.2d 172 (Pa. Super. 1991). The Commission follows this standard. *Montague v. Philadelphia Gas Company*, 66 Pa. PUC 24 (1988).

The Commission may not rely upon the factual assertions of the moving party but must accept as true for purposes of disposing of the motion all well pleaded, material facts of the nonmoving party, as well as every inference from those facts. *County of Allegheny v. Commonwealth of Pennsylvania*, 490 A. 2d 402 (Pa. 1985); *Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa.*, 551 A.2d 602 (Pa. Cmwlth. 1988). The Commission must view the complaint in this case in the light most favorable to Ms. DiBernardino and should dismiss the complaint only if it appears that she would not be entitled to relief under any circumstances as a matter of law. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

The Commission regulation at 52 Pa. Code §5.21(a) states that a person may file a formal complaint claiming violation of a statute that the Commission has jurisdiction to administer. The regulation at 52 Pa. Code §5.21(d) authorizes the Commission to dismiss a complaint if a hearing is not necessary and authorizes preliminary objections to be filed in response to a complaint.

The regulation at 52 Pa. Code §5.101(a)(4) permits the filing of a preliminary objection to dismiss a pleading for legal insufficiency. The provision at 52 Pa. Code §5.101(a)(4) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa. C.S. §703(a); *Lehigh Valley Power Committee v. Pa. Pub. Util. Comm'n*, 563 A.2d 548, 557 (Pa. Cmwlth. 1989); *S.M.E. Bessemer Cement, Inc. v. Pa. Pub. Util. Comm'n*, 540 A.2d 1006 (Pa. Cmwlth. 1988); *White Oak Borough Authority v. Pa. Pub. Util. Comm'n*, 103 A.2d 502 (Pa. Super. 1954).

In order to be legally sufficient, a complaint must set forth “an act or thing done or omitted to be done or about to be done or omitted to be done by the respondent in violation, or

claimed violation, of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission.” 52 Pa. Code §5.22(a)(4). Here, the complaint alleges facts that could be construed as a violation by Sunoco of a statute, regulation or order which the Commission has jurisdiction to administer by failing to provide adequate, reasonable service and facilities.

The statute at 66 Pa.C.S. §1501 governs any allegations of unreasonable or inadequate service. Pursuant to 66 Pa.C.S. §1501, the Commission has original jurisdiction over the reasonableness and adequacy of public utility service. *Elkin v. Bell Telephone Co.*, 372 A.2d 1203 (Pa. Super. 1977) aff’d 420 A.2d 371 (Pa. 1977); *Behrend v. Bell Telephone Co.*, 243 A.2d 346 (Pa. 1968). As a general proposition, neither the Public Utility Code nor the Commission’s regulations require public utilities to provide constantly flawless service. The Public Utility Code at 66 Pa.C.S. §1501 does not require perfect service or the best possible service but does require public utilities to provide reasonable and adequate service. *Analytical Laboratory Services, Inc. v. Metropolitan Edison Co.*, Docket No. C-2006608 (Order entered December 21, 2007); *Emerald Art Glass v. Duquesne Light Co.*, Docket No. C-00015494 (Order entered June 14, 2002); *Re: Metropolitan Edison Co.*, 80 PAPUC 662 (1993).

The Commission regulations at 52 Pa.Code § 59.33, promulgated pursuant to 66 Pa.C.S. § 1501, require that hazardous liquid utilities shall have minimum safety standards consistent with the pipeline safety laws at 49 U.S.C. §§ 60101-60503 and the regulations at 49 CFR Parts 191-193, 195 and 199. The Commission regulations adopt federal safety standards for hazardous liquid facilities. These standards include what materials must be used for new hazardous liquid pipelines, how those pipelines should be constructed, as well as corrosion control, maintenance and testing of existing hazardous liquid pipelines. The standards also address emergency preparedness and public awareness plans. 49 CFR §195.440 (relating to public awareness).

Motion to Strike Count IV and paragraphs E, 61-81 and 111-118 of the Amended Complaint

Sunoco’s Position

Sunoco argues Count IV and paragraphs E, 61-81, and 111-118 should be stricken pursuant to 52 Pa. Code § 5.101(a)(4) as legally insufficient for two reasons. First, Complainants cannot litigate integrity of the pipelines as their counsel admitted integrity issues were not a part of the consolidated proceeding. Second, Complainants cannot incorporate I&E's Complaint at Docket No. C-2018-3006534 into its Amended Complaint by way of reference and ask for the same relief.

Sunoco contends that Complainants fail to allege that the Morgantown incident or those past occurrences averred in the I&E Complaint proceeding at C-2018-3006534 have in any way impacted them, let alone had the required direct, immediate, and substantial impact required for standing. Accordingly, Count IV should be dismissed and paragraphs E, 61-81, and 111-118 should be stricken pursuant to 52 Pa. Code § 5.101 (a)(4) as legally insufficient

#### Complainants' Position

Conversely, Complainants argue their counsel did not admit integrity issues are not a part of this Amended Complaint proceeding. Counsel merely stated it had no evidence to offer at the preliminary emergency petition level regarding the integrity of the pipelines in question. Complainants contend they never waived a right to allege the integrity of the pipeline is an issue in this proceeding.

#### Disposition

I agree with Complainants that although for the purpose of the Emergency Petition, no evidence regarding the integrity of the pipelines was offered, Complainants did not expressly waive any right to raise pipeline integrity as an issue in the underlying complaint proceeding. Additionally, Complainants are within their rights to amend a complaint at this early stage before a litigation schedule is established. Paragraphs E, 61-73, are averments pertaining to Sunoco's Integrity Management Program and will not be stricken as such averments are relevant to the relief requested.

However, I agree with Sunoco that the following sentence in Paragraph 74 should be stricken from the Amended Complaint: “Complainants hereby incorporate the averments of the BIE Complaint by reference thereto, as though set forth more fully at length hereinbelow.” Amended Complaint at 20. Although Complainants argue this incorporation by reference is “as concise as possible” and has attached as Exhibit C to its Amended Complaint the I&E Complaint against Sunoco at Docket No. C-2018-3006534, the I&E Complaint alleges violations of the United States Code, federal pipeline safety regulations and Commission regulations for allegations pertaining to an investigation that I&E conducted of an April 1, 2017 ethane and propane leak that occurred on ME1 in Morgantown, Berks County, Pennsylvania, which led I&E to examine Sunoco’s corrosion control program and cathodic protection practices. As of today, the I&E Complaint has not been assigned to any Administrative Law Judge (ALJ) for the scheduling of hearings or rulings on outstanding petitions to intervene. Further, the parties in that proceeding have indicated they have a settlement in principle which they intend to reduce to writing and submit as a joint petition for settlement for the Commission’s consideration directly.

The Commission’s regulations at 52 Pa. Code § 5.22 require “a clear and concise statement of the act or omission being complained of.” *Id.* Instead of making averments, Complainants appear to be pleading a separate complaint by mere reference that was filed first and is currently pending before the Commission. I find this impermissibly vague. Thus, I will strike the sentence in Paragraph 74.

Paragraphs 111-118 allege Sunoco has failed to share a written integrity management program or risk analysis or relevant portions thereof with the public and that it is in violation of 49 CFR §§ 195.452(b)(c) and (j). Paragraph 118 requests an independent contractor to conduct a remaining life study of the ME1 and 12-inch workaroud pipelines. I am not persuaded by Sunoco’s argument to strike these paragraphs even though they are similar relief as requested by I&E in a separate proceeding. These paragraphs are verified by lay persons as opposed to experts. However, Section 1.36 of the Commission’s regulations has no such requirement that only an expert can verify the averments. 52 Pa. Code § 1.36. In the event that this relief requested becomes moot at a future date because it occurs as a result of the resolution of the I&E complaint proceeding, it may be denied as moot or Complainants may withdraw this request for relief.



### Failure to join necessary parties

#### Sunoco's Position

Sunoco also contends the Amended Complaint should be dismissed pursuant to 52 Pa. Code § 5.101(a)(5) because Complainant failed to join necessary parties that will be directly adversely affected if the relief is granted, including Sunoco's current shipper, Range Resources, and businesses relying on deliveries or future deliveries such as the Marcus Hook Industrial Plant. Sunoco asserts the enjoining or delaying operations of Sunoco will infringe upon the rights of its shippers who pay tariffed rates to ship product as well as those persons or entities in contractual relationships with its shippers and the Marcus Hook Industrial Plant.

#### Complainant's Position

Conversely, Complainants' argue no joinder of additional parties is required.

#### Disposition

A necessary party is one whose rights are so connected to the claims of litigants that no relief can be granted without infringing upon those rights. *Pennsylvania Fish Commission v. Pleasant Twp.*, 388 A.2d 756, 759 (Pa.Cmwlt. 1978). Sunoco offers no compelling authority or precedent for such a legal requirement to join additional parties to this proceeding. Range Resources – Appalachia, LLC is already an intervenor in this proceeding. Anyone may petition to intervene. Accordingly, I find in favor of Complainant on this issue.

### Geographic Scope of Relief

#### Sunoco's Position

In the alternative, Sunoco requests relief be limited by geographic scope to limit claims to the townships wherein the Complainants reside.

## Complainants' Position

Conversely, Complainants request standing to question pipeline integrity throughout Pennsylvania.

## Disposition

Complainants must have a direct, substantial, and immediate interest in order to pursue any complaint allegation.

[A]ny 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 [PUC] has jurisdiction to administer, or of any regulation or order of the [PUC].

66 Pa.C.S. § 701. To bring a formal complaint under Section 701 (i.e. to have “an interest”), Complainants “must have a direct, immediate and substantial interest.” *See, e.g., Mun. Auth. of Borough of West View v. PUC*, 41 A.3d 929, 933 (Pa. Commw. Ct. 2012) (“In order to have standing to pursue a formal complaint before the PUC under Section 701 of the Code, the complainant ‘**must have a direct, immediate, and substantial interest** in the subject matter of the controversy.’”) (emphasis added) (quoting *Waddington v. PUC*, 670 A.2d 199, 202 (Pa. Commw. Ct. 1995)); *Hatchigan v. PECO*, Docket No. C-2015-2477331 2016 WL 3997201, at \* 6 (Order entered Jul. 21, 2016) (“In order to have standing to pursue a formal complaint before the Commission under Section 701, the complainant **must have a direct, immediate, and substantial interest in the subject matter of the controversy.**”).

On this issue, I agree with Sunoco that Complainants do not have standing to bring a claim regarding the pipeline for issues all across Pennsylvania for which they claim standing. The Commonwealth Court recently issued an opinion in *Friends of Lackawanna v. Dunmore Borough Zoning Hearing Bd.*, 186 A.3d 525, 534–35 (Pa. Commw. Ct. 2018), *reargument denied* (June 26, 2018), holding that where standing based on proximity is alleged, there must be “discernable adverse effects” that infringe on the use and enjoyment of property,

not just mere proximity or aesthetic concerns. Slip. Op. at 7 (finding homeowners within a quarter to a half mile of landfill had standing to challenge expansion of landfill where they experienced “pungent odors of rotting garbage, dust, bird droppings, and truck traffic directly affecting their properties.”).

In *DiBernardino v. Sunoco Pipeline L.P.*, Order Granting In Part And Denying In Part Preliminary Objections To Amended Complaint at 11 (Order entered Dec. 21, 2018), I found a *pro se* Complainant had personal standing as follows:

Therefore, I find Complainant has personal standing to file the instant Complaint regarding safety of the pipeline in proximity to Saints Peter and Paul School in East Goshen Township. I am persuaded to limit the scope of relief claimed to whether Sunoco’s operations should be enjoined in East Goshen Township as although Complainant avers that she and her family spend much of their time in the “probable impact radius of the Mariner East Project” through multiple townships and counties, she is unspecific as to what counties and townships in addition to East Goshen Township. Amended Complaint at 4.

The Commission has regularly had to consider documentary, statistical and testimonial evidence throughout its history to evaluate whether actions of utilities, their employees and their contractors comply with the Public Utility Code and pertinent regulations promulgated thereunder. In the instant case, allegations relating to incidents pertaining to the Mariner East Project outside of the area in East Goshen Township where the Saints Peter and Paul School is located may be relevant to the issue of whether it is safe to operate ME1 and ME2 and ME2X in East Goshen Township in close proximity to Complainant’s children’s school.

At this preliminary stage in the litigation proceedings, I am unpersuaded to find averments in the Amended Complaint are “scandalous and impertinent” or to strike portions of the complaint that Sunoco argues are irrelevant because they allege past occurrences that have no relationship to whether it is safe to operate the pipelines in East Goshen Township.

*Id.* at 11.

In the instant case, Complainants do not have standing to represent other individuals, schools or entities. However, as these Complainants aver that they work, reside, and educate their children in multiple townships located in Chester and Delaware Counties, I will limit the scope of Complainants’ standing to Delaware County and Chester County. I am not prepared to strike references to the outstanding I&E complaint as I am not prepared to rule that alleged past occurrences of leaks on the ME1 line or 12-inch workaround pipeline have no

relationship or relevance to whether it is safe to operate these pipelines in Delaware and Chester Counties.

### Failure to Attach Documents

#### Sunoco's Position

Sunoco contends that portions of the Amended Complaint should also be stricken pursuant to 52 Pa. Code § 5.101(a)(2) for failure to comply with the requirements for formal complaints at 52 Pa. Code 5.22(a)(2), which states:

a document, or the material part thereof, or a copy must be attached when a claim is based upon the document, the material part thereof, or a copy. If the document, the material part thereof, or a copy is not accessible, the complaint must set forth that the document, the material part thereof, or the copy is not accessible and the reason, and set forth the substance of the document or material part thereof.

Sunoco argues that the Amended Complaint relies on documents but fails to attach such documents. Amended Complaint at 43 (relying upon school district letters), 82-83 (relying upon Delaware County Council "risk assessment"). This fails to comply with the requirement to attach documents, which is required to provide fair notice to Sunoco of the allegations against it. Accordingly, Sunoco argues that Amended Complaint paragraphs 43, 82-83 should be stricken for failure to comply with the requirements for formal complaints for failure to attach documents relied upon.

#### Complainants' Position

Complainants contend that a mere reference to a statute or report does not require attachment to a complaint.

## Disposition

I disagree as a mere reference to a statute or report does not require attachment to a complaint. Such documents may be obtained through the discovery process in this proceeding.

## Motion to Strike Allegations Unrelated to Public Utilities

### Sunoco's Position

Sunoco contends that pursuant to 52 Pa. Code § 5.101(a)(1), portions of the Amended Complaint should be stricken because the law is clear and free from doubt that the Commission does not have jurisdiction over allegations unrelated to public utilities. Sunoco avers that Complainants allege inadequacies with the Chester County's and Delaware County's emergency response agencies and the services they provide regarding "reverse 911" capabilities. Sunoco argues that the Commission does not have jurisdiction over complaints regarding Chester County's and Delaware County's emergency response agencies, as they are not "public utilities" as defined in the Code. Accordingly, Amended Complaint Paragraphs 50-52 should be stricken because the Commission lacks jurisdiction over the averments.

### Complainants' Position

Conversely, Complainants argue that they are not raising claims against their local emergency responders. Rather, Sunoco is mischaracterizing the Amended Complaint.

## Disposition

I agree with Complainants that nothing in the Amended Complaint requests the Commission direct any local emergency service or other agency to do specific performance. It is uncontested the Commission has no authority to issue directives to County-level emergency responders. I find in favor of Complainants on this issue.

## Failure to verify the alleged facts with an expert's verification

### Sunoco's Position

Sunoco argues the Amended Complaint should be dismissed pursuant to 52 Pa. Code § 5.101(a)(2) because of failure to verify the alleged facts with an expert's verification. Respondent contends Complainants are 7 individuals, none of whom are experts in the field of pipeline safety and any averments used for the basis of their Amended Complaint consisting of technical conclusions require expert verification under 52 Pa. Code § 1.36. Without this basis, the Amended Complaint should be dismissed pursuant to § 5.101(a)(5) for failing to conform with 52 Pa. Code § 1.36.

### Complainants' Position

Complainants argue there is no such express requirement in Section 1.36.

### Disposition

I agree with Complainants on this issue, as there is no such express requirement regarding verifications in Section 1.36. Further, Sunoco offers no caselaw precedent to show same.

### Petitions to Intervene

### Sunoco's Position

Sunoco objects to the intervention of Downingtown, Uwchlan, Rose Tree, Middletown, and West Whiteland as untimely with no "good cause" shown.

### Intervenors' Positions

The school districts all have schools located in Delaware County and/or Chester County in close proximity and within a "blast zone" to the ME1, ME2, ME2X and/or 12-inch workarround pipeline, (collectively "Mariner East Project"). Each school district seeks

intervention requesting the Commission order Sunoco perform continued and ongoing line inspection and geophysical testing and analysis in the areas of their respective schools and report results of these inspections and geophysical tests on a timely basis to the school districts. The school districts' request that in the absence of testing, inspection or the delivery of timely reports, that show the pipelines do not pose any risk to the school district's properties, that ME pipelines immediately cease operations until Sunoco performs all necessary corrective actions as approved by I&E and the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) prior to resuming operations and/or construction. The school districts also want Sunoco to develop I&E-approved protocols for testing, to install mass early warning systems, and public education and awareness plans. Downingtown specifically wants a relocation of a valve station on Dorlan Mill Road. Twin Valley School District has schools in Chester County and Berks County in proximity to the Mariner East Project.

East Goshen Township petitioned to intervene averring Sunoco's facilities traverse East Goshen and are in close proximity to residential dwellings and public assembly areas. The lack of adequate emergency planning and public awareness directly affects the ability of East Goshen to monitor and implement an Emergency Evacuation Plan.

West Whiteland Township avers it is a township located in Chester County with a population of over 18,000 within 13 square miles and a density of more than 1,400 persons per square mile. The pipelines of Sunoco come or are proposed to come into the township through the center of the commercial district, next to the largest mall in the County, run behind the County library, are under Route 30 and Amtrak/SEPTA rail lines and within close proximity to schools, senior care facilities and apartment complexes. West Whiteland further avers that construction has caused turbulence in residential wells and sinkholes to appear along Sunoco's pipelines within the township, specifically at Lisa Drive.

West Whiteland, Uwchlan and Middletown Townships all aver they have direct, substantial and immediate interests in this matter and request mass early warning notification systems within their townships and a comprehensive public education or emergency response plan. Middletown additionally avers an incident occurred in its township on May 21, 2018, when a recently installed but inactive section of ME2 was struck by a construction backhoe of

Aqua America because Aqua and ETP failed to properly ascertain the depth of the ME2 pipeline prior to digging. Middletown was never directly contacted by ETP about the incident.

Finally, the County of Delaware petitions to intervene averring it has a population of 563,000 whose residents are directly affected by the Mariner East Project particularly as it relates to public health and safety. Delaware County has a direct and substantial interest in the proceeding which is not represented by any other party.

### Disposition

Section 5.72 of the Commission's regulations governs intervention. 52 Pa. Code § 5.72. This Section provides that "a petition to intervene may be filed by a person claiming a right to intervene or an interest of such nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought." 52 Pa.Code § 5.72(a). Section 5.72 also provides that the right or interest supporting intervention may be one of the following:

- (1) A right conferred by statute of the United States or of the Commonwealth.
- (2) An interest which may be directly affected and which is not adequately represented by existing participants, and as to which the petitioner may be bound by the action of the Commission in the proceeding.
- (3) Another interest of such nature that participation of the petitioner may be in the public interest.

52 Pa.Code § 5.72(a)(1)-(3). Commission regulations also govern the form, content and timing of Petitions to Intervene.

In particular, Section 5.74 provides deadlines by which Petitions to Intervene shall be filed. This includes filing the Petition no later than the date fixed for the filing of responsive pleadings in an order or notice with respect to the proceedings and no later than the date fixed for filing protests as published in the Pennsylvania Bulletin. 52 Pa.Code § 5.74(b)(1)-(2). To date, there has not been any publication in the Pennsylvania Bulletin. Also, there is not fixed date in any order.



Both of these provisions, however, include “absent good cause shown” provisions that allow for exceptions to the regulations under certain circumstances. *Id.*; see also, 52 Pa.Code § 5.74(c) (“intervention will not be permitted once an evidentiary hearing has concluded absent extraordinary circumstances.”) (emphasis added); *Pennsylvania Public Utility Comm’n, Bureau of Investigation and Enforcement v. West Penn Power Co.*, Docket No. C-2012-2307244, Opinion and Order (entered Aug. 29, 2013) (West Penn) (“The Commission has been liberal in interpreting this ‘good cause’ requirement, particularly where the grant of intervention will not delay the orderly progress of the case, significantly broaden the issues or shift the burden of proof.”).

In this case, there is good cause that warrants granting the Petitions to Intervene and allowing these local government entities and school districts to participate in this proceeding at this juncture. The impact of the Mariner East Project throughout Pennsylvania is being extensively examined by the Commission, the Pennsylvania General Assembly, County and municipal authorities. The Petitioners have unique interests in this case which are directly affected as they are the responsible authorities for emergency management and public education in their townships, counties and school districts. The Mariner East Project runs through the jurisdictional boundaries of these Petitioners or within the “blast zones” of these Petitioners. The relief requested of the school districts of additional line inspection and geophysical testing in the areas of their schools as well as the development and installation of a mass early warning notification system and public education plan for evacuations is slightly broadening of the scope of the Amended Complaint. However, it is not so broadening to warrant a denial of intervention.

There is judicial efficiency in permitting intervention rather than requiring each entity to file separate complaints further congesting the docket system at the Commission, as all of these Petitions to Intervene raise issues essentially overlapping issues previously raised by Complainants concerning safety and emergency preparedness in the Chester County and Delaware County areas. The Intervenors have common and separate interests that are substantial, immediate and direct in the outcoming of this proceeding. Many want further testing, inspection, and reporting. Many want I&E-approved protocols for testing, the installation of mass early warning systems, and public education and awareness plans. Further, I am

unpersuaded by Sunoco's legal argument that the petitions seek relief contrary to law that the Commission cannot order and the pursuit of which is a waste of money and time of all involved including the Commission. Thus, there is good cause to grant intervention.

In granting intervention, however, Intervenors will be required to take the case as it currently stands. Sunoco is correct that intervenors generally take the record as they find it at the time of intervention. Therefore, the orderly progress of the case will be maintained, the issues will not be significantly broadened beyond those issues in their petitions concerning the geographical boundaries of Delaware County and Chester County. Twin Valley with schools in Chester County and Berks County may intervene as it has the Twin Valley Elementary School in Elverson Borough, Chester County. Also, the burden of proof will not be shifted.

#### Application for Issuance of Subpoena

#### Complainants' Position

Complainants filed an Application for Issuance of Subpoena alleging that since they incorporated by reference the I&E complaint proceeding, all discoverable records and documents in that case are discoverable in the present case. Complainants seek: 1) records and documents turned over to I&E by Sunoco in the course of the investigation of the Morgantown Incident; and 2) additional records and documents furnished to I&E by Sunoco since the conclusion of that investigation. Additionally, Complainants seek records and documents created by I&E in its investigation of the Morgantown Incident.

#### Sunoco's Position

Sunoco contends that the Application fails to comply with 52 Pa. Code § 5.421(b)(1) in that it fails to adequately describe the materiality and scope of the documents sought. The Application fails to state how records provided by Sunoco to BIE and/or created by BIE pursuant to its investigatory authority related to the Morgantown Incident are material to the issue in this proceeding. Complainants attempt to incorporate the BIE Morgantown Complaint and/or the issues therein should not be allowed in this proceeding. Complainants also lack

standing and fail to allege that the Morgantown incident or those past occurrences have in any way impacted them, let alone had the required direct, immediate, and substantial impact required for standing. Therefore discovery seeking information regarding those claims is irrelevant.

Moreover, BIE's Morgantown Complaint has resulted in a settlement in principle with a Joint Petition for Settlement forthcoming that will allow for a public comment period for interested persons prior to the Commission deciding whether to approve that settlement. Allowing Complainants to open litigation of that settled Complaint is against Commission policy. Allowing a Complainant to essentially act as a third-party attorney general and litigate a complaint that the actual prosecutor brought against Sunoco is improper and has a chilling effect on settlements. If Sunoco is subject to litigation for the same claims it has settled with BIE here, that takes away Sunoco's incentives to settle cases and agree to terms that promote public safety where it is subject to litigation of those same claims before the same regulatory body regardless of such settlement. Complainants were not discernably affected by the events of the Morgantown Complaint. To the extent Complainants assert any interest concerning the BIE Complaint, they can submit comments to the Commission concerning the Joint Petition for Settlement at that docket.

#### I&E's Position

I&E objects to the Application for Issuance of Subpoena pursuant to 52 Pa. Code § 5.421(f). Specifically, I&E argues that it is charged with representing the public interest in ratemaking and service matters before the OALJ and enforcing compliance with state and federal gas safety laws and regulations pursuant to its authority at 66 Pa. C.S. § 308.2(a)(11). I&E retains independent prosecutorial discretion to initiate investigations and formal complaint proceedings before the Commission. I&E seeks a denial of the Application on the grounds that I&E was not properly served a copy of the Application. Further, the Application seeks disclosure of privileged or otherwise protected documents pertaining to an investigation and settlement negotiation between I&E and Sunoco in violation of 52 Pa. Code §§ 5.321(c) and 5.361(a)(3). I&E also claims the records sought contain Confidential Security Information (CSI) and pursuant to the CSI Disclosure Act, 35 P.S. §§ 2141.1 – 2141.6 should not be disclosed to the general public. Requests for Sunoco's documents should be addressed to

Sunoco, not I&E. The documents are exempt from disclosure under the attorney work product privilege and attorney-client privilege. Additionally, offers of settlement are privileged and not discoverable. I&E also argues the records are duplicative of and subsumed by I&E's Complaint proceeding, which raised allegations to the Morgantown Incident first. I&E is concerned that the continuation of its Complaint through the Amended Complaint of Complainants may discourage settlement of I&E's enforcement action if Sunoco is forced to litigate the same allegations twice. Thus, Complainants' request for documents should be denied pursuant to the doctrine of *lis pendens*. Finally, I&E contends the request is overbroad and unduly burdensome on I&E. 52 Pa. Code § 5.361(a)(4).

### Disposition

As the Application seeks records and documents turned over to I&E in the course of its investigation into the Morgantown Incident involving the Mariner East 1 pipeline, and because I&E is an Intervenor in this proceeding, Complainants should have served a copy upon the Law Bureau and I&E with a notice to plead pursuant to 52 Pa. Code §5.421(c)(1) and (4). However, the Commission's regulations also allow Presiding Officers the authority to "regulate the course of the proceeding." 52 Pa.Code § 5.483(a). Liberal construction is allowed to "secure the just, speedy and inexpensive determination of every action or proceeding" and the "presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties." 52 Pa.Code § 1.2(a); see also, 52 Pa.Code § 1.2(c) ("presiding officer at any stage of an action or proceeding may waive a requirement of this subpart when necessary or appropriate, if the waiver does not adversely affect a substantive right of a party."). As such, I am disregarding the service deficiency as I electronically forwarded the Application to Director Bohdan Pankiw, Chief Counsel of the Law Bureau, and Director Richard Kanaskie of the Bureau of Investigation and Enforcement on March 1, 2019 for any objection or comments to the Application from these Bureaus within 10 days, March 11, 2019.

Regarding substantive objections, the information sought is relevant because it seeks information regarding the integrity of Sunoco's pipelines. However, the Application seeks unspecified "additional records and documents furnished to BIE by Sunoco since the conclusion

of that [Morgantown Incident] investigation.” This request, which encompasses any record furnished by Sunoco to BIE regardless of the subject or purpose of the record, is overly broad and unduly burdensome to I&E. Documentation could be sought directly from Sunoco. While discovery is broad in Pennsylvania, parties are not entitled to engage in “fishing expeditions.” *Land v. State Farm Mut. Ins. Co.*, 600 A.2d 605, 608 (Pa. Super. 1991).

Further, the Application fails to comply with 52 Pa. Code § 5.421(b)(2) by failing to identify facts to be proved by the documents in sufficient detail to indicate the necessity of the documents. The Application seeks the release of records related to BIE’s decision making and exercise of prosecutorial discretion, which are privileged. 52 Pa. Code. § 5.361(a)(3).

The Subpoena defines the scope of the records sought as any records related to the Morgantown Incident provided to and/or created by BIE, including “without limitation, correspondence, memoranda, notes, diaries, statistics, letters, telegrams, minutes, releases, agendas, opinions, reports, studies, test results...” Application, Exhibit A. This unrestrained request implicates records subject to the deliberative process privilege that would expose confidential deliberations of law reflecting agency opinions, recommendations and advice related to I&E’s prosecutorial and investigatory determinations, including initiation of the formal complaint at C-2018-300653. *Commonwealth v. Pa. Pub. Util. Comm’n*, 331 A.2d 598 (Pa. Cmwlt. 1975) (finding PUC technical staff reports used to determine the appropriateness of utility tariff changes were not discoverable because they revealed the PUC’s decision-making process). *See also, Columbia Gas Transmission Corp. v. Piper*, 615 A.2d 979 (Pa. Cmwlt. 1992) (party may not use expert report of another party); *see also, Spino v. John S. Tilley Ladder Co.*, 671 A.2d 726 (Pa. Super. 1996) *aff’d* 696 A.2d 1169 (Pa. 1997) (party may not use subpoena to compel an expert opinion). The Application will also be denied pertaining to documentation marked as CSI, because each must be reviewed for redaction of confidential and privileged information, which is unduly burdensome. 52 Pa. Code. § 5.361(a)(2). Complainants may seek CSI information through discovery requests directed to Sunoco pursuant to a protective order in this case.

## ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objections filed by Sunoco Pipeline, L.P. at Docket No. C-2018-3006116 are granted in part and denied in part.
2. That Complainants have personal standing to file the instant Complaint regarding safety of the pipeline in proximity to the County of Delaware and the County of Chester, Pennsylvania.
3. That Complainants have no standing to assert claims to enjoin operations of Sunoco Pipeline, L.P. outside Delaware County or Chester County, Pennsylvania.
4. That the following sentence in Paragraph 74 of the Amended Complaint at Docket No. C-2018-3006116 is hereby stricken: “Complainants hereby incorporate the averments of the BIE Complaint by reference thereto, as though set forth more fully at length hereinbelow.”
5. That the Commission’s Bureau of Investigation and Enforcement’s Petition to Withdraw Intervention filed on December 27, 2018 at Docket Nos. C-2018-3006116 and P-2018-3006117 is granted.
6. That the Bureau of Investigation and Enforcement shall be removed from the service list at Docket Nos. C-2018-3006116 and P-2018-3006117.
7. That the following Petitioners are granted Intervenor status: 1) Downingtown Area School District; 2) Rose Tree Media School District; 3) Twin Valley School

District; 4) East Goshen Township; 5) West Whiteland Township; 6) Uwchlan Township; 7) Middletown Township; and 8) County of Delaware.

8. That Complainants' Application for Issuance of Subpoena filed on February 28, 2019 is denied.

9. That a telephonic call-in prehearing conference shall be scheduled and the parties will be given notice.

Dated: March 12, 2019

\_\_\_\_\_  
/s/  
Elizabeth H. Barnes  
Administrative Law Judge

**C-2018-3006116, P-2018-3006117- MEGHAN FLYNN, ROSEMARY FULLER,  
MICHAEL WALSH, NANCY HARKINS, GERALD MCMULLEN, CAROLINE HUGHES,  
MELISSA HAINES V. SUNOCO PIPELINE LP**

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