

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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Attorneys for West Goshen Township

WEST GOSHEN TOWNSHIP, :
 : Docket No. C-2017-2589346
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 v. :
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 SUNOCO PIPELINE, L.P., :
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**COMPLAINANT WEST GOSHEN TOWNSHIP’S ANSWER
TO SUNOSO PIPELINE L.P.’S MOTION FOR A PROTECTIVE ORDER**

Complainant West Goshen Township (“West Goshen” or “Township”) hereby responds to the motion for a protective order filed by Respondent Sunoco Pipeline, L.P.

INTRODUCTION

Sunoco has filed the instant motion seeking a blanket protective order for any document it produces in discovery that it chooses to designate as proprietary or confidential, and shifting the burden to the Township to challenge such a designation if it does not agree. Township does not dispute that there may be *some* documents that will be produced in discovery for which a protective order will be appropriate, but Complainant has a reasonable basis to believe that Sunoco will over designate documents as proprietary or confidential. For instance, Sunoco has refused to produce to the Township basic information for the safety of its residents, such as

Sunoco's emergency response plan, so that the Township can safely prepare its own emergency response plan incorporating same. The categories that Sunoco identifies as confidential, "operational information" and "engineering information", are overly broad and cannot be demonstrated as worthy of such protection.

Sunoco's request is problematic on many levels:

- a. The PUC recognizes the strong public policy of public access to information in administrative proceedings;
- b. The Complainant is a Township acting to protect its residents and using public funds to do so, increasing the importance of public access to information in this case;
- c. Sunoco has a highly organized and active communications department and outside media consulting firm that has sought to undermine the Township's position in this case in the eyes of the public, making public access to information even more important;
- d. Sunoco has not identified any particular document or specific piece of information it seeks to protect, only broad categories or classes of information that it seeks to have the ability to classify as proprietary or confidential, without any demonstration of the need to do so as required by the law;
- e. The proposed order shifts the burden to Township to challenge a designation as proprietary or confidential, rather than keeping the burden on the party seeking protection, as the law provides;
- f. Township is subject to the Right to Know Law. The public, both inside and outside the Township, has aggressively pursued documents under this law, related to the pipeline. While the Right to Know law provides an exception for documents subject to a Protective Order, if the Township agrees to or does not oppose such a broad over-reaching order, the Township will likely face Right to Know law appeals on the basis that the overly broad order was simply a way to get around the Right to Know Law. The Township will be compelled to expend resources defending such appeals;
- g. Vast amounts of engineering and operational information were already produced, without the protection of a protective order, and without Sunoco seeking such an order, in a concurrent Environmental Hearing Board case, casting great doubt on the necessity of such a blanket order; and

- h. Broad categories of engineering documents, soil tests, load calculations, turning radiuses for pipes and other general information contain generally understood information in the world of engineering, and not the type of proprietary information, such as the recipe for Coca Cola, that requires protection.

There is a strong policy of public access to documents involved in administrative proceedings. As noted in the recent case of *Lyft, Inc. v. PUC*, 145 A.3d 1235 (Pa.Cmwlt. 2016):

The Code and PUC regulations protect public access. The PUC is required to “make part of the public record” all documents it relies on in reaching a decision. 66 Pa. C.S. § 335(d). PUC regulations also provide that PUC records, including those of application proceedings, may be accessed by the public. 52 Pa. Code §§ 1.71-1.77. In particular: “[t]he [PUC’s] record maintenance system is intended to provide for the greatest degree of public access to [PUC] documents that is consistent with the exercise of the functions of the [PUC] under the act and other applicable laws.” 52 Pa. Code § 1.71. However, an exception may be made for a record containing proprietary information when the PUC determines its public release will cause substantial harm to the party seeking the exception. 66 Pa. C.S. § 335(d).

Lyft, Inc., 145 A.3d at 1242.

Notwithstanding this strong policy in favor of public access, the Commission’s Rules of Practice at Section 5.365 permit the issuance of protective orders:

(a) General rule for adversarial proceedings. A petition for protective order to limit the disclosure of a trade secret or other confidential information on the public record will be granted only when a party demonstrates that the potential harm to the party of providing the information would be substantial and that the harm to the party if the information is disclosed without restriction outweighs the public’s interest in free and open access to the administrative hearing process. A protective order to protect trade secrets or other confidential information will apply the least restrictive means of limitation which will provide the necessary protections from disclosure. In considering whether a protective order to limit the availability of proprietary information should be issued, the Commission or the presiding officer should consider, along with other relevant factors, the following:

1. The extent to which the disclosure would cause unfair economic or competitive damage.

2. The extent to which the information is known by others and used in similar activities.
3. The worth or value of the information to the party and to the party's competitors.
4. The degree of difficulty and cost of developing the information.
5. Other statutes or regulations dealing specifically with disclosure of the information.

52 Pa.Code 5.365.

A party seeking a protective order has a substantial burden to show that the disclosure of the information for which protection is sought will result in substantial harm, and that harm outweighs the significant public interest in open proceedings.” *Petition for Protective Order of GTE N. Inc.*, 1996 Pa. PUC LEXIS 95, *4-5, Dkt. No. G-00940402 (filed August 8, 1996). The Regulation requires the PUC to balance the alleged proprietary nature against the public interest in disclosure. *Id.* Proprietary nature of documents is viewed against a public policy favoring access to the administrative process. *Id.*

In light of this strong public policy in favor of public access, the Commission has considered and rejected many attempts to obtain protective orders for varying types of information. For example, in *Lyft, Inc., supra*, the Commonwealth Court upheld the denial of a protective order for raw data about the number of trips that Lyft made before getting PUC approval, as that data did not provide information to permit “customer targeting” or to cause “competitive harm.” *Lyft*, 145 A.3d at 1243.

For all of these reasons, and the reasons that follow, Sunoco’s motion for a protective order should be denied. Should Sunoco believe a particular document should be subject to a protective order, it should identify the document and demonstrate to the Court why it is proprietary or otherwise confidential.

RESPONSES TO SPECIFIC AVERMENTS

1) Admitted, with qualification. The matter involves the siting of such public utility facilities in the Township in accordance with certain promises made by Sunoco about the facilities and the location.

2) Admitted in part and denied in part. It is admitted that discovery requests will soon be propounded. As to whether the information sought will include information that is proprietary, may pose a security concern, or may be commercially sensitive, after reasonable investigation, Township is without sufficient information to determine the truth or falsity of this allegation and therefore it is denied. Only upon identification of such documents and an explanation as to why they might be proprietary or otherwise warrant protection will Township know the accuracy of this allegation. In addition, Township incorporates the entirety of the Introduction above into this response.

3) Denied as stated. The Township has agreed that if certain documents warrant protection, it will agree to a protective order as to those documents. However, any insinuation that the Township has ever agreed to a blanket protective order that shifts the burden to the Township to challenge whether a document should be protected, as opposed to the burden remaining with Sunoco to establish the need for protection, is denied.

4) Denied. The two protective orders, as writings, speak for themselves. By way of further answer, the case of *Commonwealth of Pennsylvania v. Energy Service Providers* was brought by the Office of Attorney General regarding alleged improper marketing and charging of variable rates. That case is not similar to the instant case seeking enforcement of a contract. Further, the information for which Energy Service Providers sought protection included personal information of its customers and employees, pricing, marketing and business

strategies. This information was proprietary and its disclosure would cause substantial competitive harm and loss of value of that information. The information being sought in the instant matter, general engineering type information, has no competitive value. Also, in *Energy Service Providers*, no one challenged the requested order, while the request is challenged in this case. The Commonwealth of Pennsylvania has far greater resources to challenge improper or overly broad proprietary designations, while in comparison, the Township is far leaner in staffing and resources and such legal challenges and Right to Know law issues can be devastating to its budget. Lastly, the Township incorporates the entirety of the Introduction above into this answer.

5) Admitted in part and denied in part. It is admitted that this language is set forth in the regulation and that the regulation is applicable. It is further admitted that the burden is on the party seeking the order to demonstrate the potential harm, which has not been done in this case. It is denied that this is the only consideration, as the alleged legal basis for the potential harm, such as whether the information is proprietary, must also be demonstrated. Lastly, the Township incorporates the entirety of the Introduction above into this answer.

6) Denied. There has been no showing, or even attempted explanation, as to how general engineering or operational information threatens security of the pipeline or exposes SPLP to competitive harm. There is a far stronger likelihood that the vast majority of documents will deal with the limits of the turning radius of a stretch of pipeline, conflicts with other utilities, selection criteria for various easements and rights of way, soil conditions and other general information unrelated to security or proprietary information.

7) Admitted in part and denied in part. It is admitted that there is a very strong and important public interest in free and open access to this administrative hearing process. It is

denied that this strong and important public interest is outweighed by any potential harm and there has been no showing that any documents likely to be produced are sensitive, confidential or proprietary. Indeed, no such documents have been identified at all.

8) Denied. This allegation is denied as a conclusion of law to which no response is required. While the proposed order may have complied with regulations with respect to *Commonwealth of Pennsylvania v. Energy Service Providers*, that case is unrelated and dissimilar to the instant case. In addition, in that case, the entry of the order was unopposed by the Commonwealth, which has far greater resources than the Township to challenge overly broad proprietary designations. The proposed order is not the least restrictive means of limitation in this case as neither the motion, nor the proposed order, specifies the documents or specific information to be protected. Further the proposed order shifts the burden to the Township to challenge whether a document is properly designated as proprietary or otherwise confidential, rather than keeping the burden where it belongs, with Sunoco as the party seeking the protection. Lastly, the Township incorporates the entirety of the Introduction above into this answer.

WHEREFORE, for all of the reasons set forth above, the Township respectfully requests that the Presiding Officer deny the Motion for a Protective Order. In the alternative, Township agrees to an Order in the form attached hereto.

HIGH SWARTZ LLP

By: 

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West Goshen Township

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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WEST GOSHEN TOWNSHIP,

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Docket No. C-2017-2589346

v.

SUNOCO PIPELINE, L.P.,

PROTECTIVE ORDER

AND NOW, THIS _____ day of _____, 2017, upon consideration of Respondent _____ (“Sunoco”) Motion for a Protective Order and Complainant West Goshen Township’s (“West Goshen” or “Township”) response thereto, it is hereby **ORDERED** that the Motion for a Protective Order is **GRANTED**, as follows.

WHEREAS, the parties seek to exert some control over the documents, information or records that are produced in discovery in this action (the “Litigation”); and

WHEREAS, the Court, after review, has determined that discovery in this Litigation involves the production of documents, information or records that one or more of the parties in good faith reasonably believes to contain information that is non-public, proprietary,

commercially sensitive and/or protected by statutory or other legal privilege or protection that requires immediate protection as set forth more fully in this Order; and

WHEREAS, the Township is a “local agency” under and subject to the Commonwealth of Pennsylvania’s Right to Know Law 65 P.S. § 67.101 *et seq.*, (the “RTKL”); and as such the Township has an obligation to provide access to “public records” as such term is defined in the RTKL; and therefore the Township may receive requests pursuant to the RTKL seeking access or copies of the documents, information and records produced by Sunoco in the Litigation as being public records (each such request herein referenced as a “RTKL request”).

WHEREAS, the Court, after review, has determined that certain documents, information or records to be produced by Sunoco in this litigation contain information that is non-public, proprietary, commercially sensitive and/or protected by statutory or other legal privilege or protection that requires immediate protection as set forth more fully in this Order; and

WHEREAS, the Township and Sunoco wish to protect against inadvertent disclosure of this non-public, proprietary, commercially sensitive and confidential information.

THEREFORE, IT IS ORDERED AND DECREED AS FOLLOWS:

1. If a Party believes in good faith that documents that have been requested in discovery contain information that is believes to contain information that is non-public, proprietary, commercially sensitive and/or protected by statutory or other legal privilege or protection that requires immediate protection, that Party, prior to production, may identify the document and identify the information contained therein that causes the need for protection. Thereafter, the Parties may either agree that the documents are confidential and enter into a stipulated order in the form of this Order, or if an agreement cannot be reached, the party seeking

protection may file a motion with this Court for protection for each document identified, consistent with this Order. Any documents subject to the protection of such an order, whether or not by agreement, shall be marked Confidential (such documents shall be referred to herein as “Confidential Records”), prior to producing same to the other Party in discovery, which records will not be released or disseminated outside of any use in the instant Litigation, shall be subject to this Order, exempted from the Pennsylvania RTKL, as otherwise noted herein, or as agreed in writing by the Township and Sunoco.

2. The following documents, information and records identified by Sunoco in discovery in this matter are hereafter designated by this Court Order to be “Confidential Records”, the disclosure of which is highly likely to cause significant harm to the business, operations or competitive position of Sunoco:

- a) _____
- b) _____
- c) _____

3. Documents designated herein as Confidential Records, copies thereof, and the information contained therein, shall be used by the parties solely for the purposes of the prosecution or defense of the Litigation, shall not be used by the receiving party for any business, commercial, competitive, personal, or other purpose, and shall not be disclosed by the receiving party except as set forth in Paragraphs 5 and 6 of this Order.

4. Documents designated herein as Confidential Records, copies thereof, and the information contained therein, are not subject to disclosure under the RTKL unless and until the restrictions in this Order are removed either by (a) written agreement of counsel for the parties; or (b) subsequent Order of the Court.

5. Documents designated herein as Confidential Records, copies thereof, and the information contained therein, may be disclosed by the Parties for review only by the following individuals, under the following conditions:

- a. Outside counsel (defined as any attorney at the parties' outside law firms who have entered an appearance in the Litigation).
- b. Any individual who is employed by a corporate or business entity party;
- c. Outside experts or consultants retained by the parties or their counsel or outside counsel for purposes of the Litigation, provided they confirm in writing their receipt of a copy of this Order, and their agreement to abide by it, and to subject themselves to the jurisdiction of this Court with respect to compliance or noncompliance with this Order;
- d. Secretarial, paralegal, clerical, duplicating, stenographic, assistant, and data processing personnel of the foregoing;
- e. The Court and court personnel;
- f. Any deponent may be shown or may examine any information, documents, or thing designated as "Confidential" or as a Confidential Record, if it appears that: the witness authored or received a copy of it; was involved in the subject matter described therein; is employed by or provided as a deponent by the party who produced the information, document, or thing; or if the producing party consents to such disclosure;
- g. Vendors retained by or for the parties to assist in preparing for pretrial discovery, trial, and/or hearings including, but not limited to: court reporters; litigation support personnel; jury consultants; individuals to

prepare demonstrative and audiovisual aids for use in the courtroom or in depositions or mock jury sessions, as well as their staff; stenographic and clerical employees whose duties and responsibilities require access to such materials; and

h. The parties.¹

6. Documents designated herein as Confidential Records, copies thereof, and the information contained therein, shall not be disclosed in any manner to any other individual absent a subsequent Order by the Court permitting its release or disclosure.

7. This Order is deemed as an Order of the Court pursuant to 65 P.S. § 67.305(a)(3) and 65 P.S. § 67.306.

8. In the event any person or entity challenges the Court's determination on any Confidential Record, or the Township's determination upon receiving a RTKL request not to release any Confidential Record pursuant to this Order, the Township will provide Sunoco with prompt written notice of such challenge or request, and Sunoco will assume the sole obligation to defend any such challenge or RTKL request. The Township agrees that it will cooperate with Sunoco in such effort, and will not release any such Confidential Record absent an agreement of the Parties, or a subsequent Order of a court of competent Jurisdiction permitting or ordering release or disclosure.

9. Any portion of depositions transcripts that discuss Confidential Records shall be deemed Confidential and subject to this Order.

10. To the extent consistent with applicable law, the inadvertent or unintentional disclosure of Confidential Records that were designated as such, regardless of whether the

¹ In the case of parties that are corporations, municipal corporations or departments thereof or other business entities, "parties" shall mean executives, trustees or other fiduciaries, officers or employees participating in decisions with reference to the Litigation.

information, document or thing was so designated at the time of the disclosure, shall not be deemed a waiver in whole or in part of a party's claim of confidentiality, either as to the specific document, record or information disclosed or as to any other material or information concerning the same or related subject matter. Such inadvertent or unintentional disclosure may be rectified by notifying in writing counsel for all parties to whom the material was disclosed that the material should have been designated as a "Confidential Record" within a reasonable time after disclosure, and working in good faith among counsel to thereafter mark the disclosed material "Confidential Record."

11. This Order shall not deprive any party of its right to object to discovery by any other party or on any otherwise permitted ground. This Order is being entered without prejudice to the right of any party to move the Court for its modification or for relief from any of its terms.

12. This Order shall survive the termination of the Litigation and shall remain in full force and effect unless modified or terminated by an Order of this Court or by the written stipulation of the parties filed with the Court.

13. The Court retains the right to allow disclosure of any subject covered by this Order or to modify this Order at any time in the interest of justice.

14. Within thirty (30) days following the final conclusion of the Litigation, each party or other individual subject to the terms of this Order shall: a) return to the originating source all originals and electronic media containing documents, records, and information designated by the producing party designated herein as a Confidential Record, or b) shred or otherwise destroy copies of such documents, records, and information designated as a Confidential Record; provided, however, that counsel for the parties in this Litigation may retain complete copies of

all transcripts, court filings and pleadings including any exhibits attached thereto for archival purposes, subject to the provisions of this Order.

15. Notwithstanding anything to the contrary in this Order, documents, records, and information designated as Confidential in this Litigation shall not include information that: (i) is now or subsequently becomes generally available to the public through no wrongful act or omission of the receiving party or anyone to whom the receiving party disclosed such information; (ii) the receiving party rightfully had in its possession on a non-confidential basis before disclosure to recipient by the disclosing party; (iii) a party independently developed without the use, directly or indirectly, of any Confidential Record; (iv) the receiving party rightfully obtains from a third party who has the right to transfer or disclose it; or (v) is provided to the receiving party without being prominently marked as "Confidential" or as a "Confidential Record", and has not been subsequently so marked pursuant to this Order.

SO ORDERED:

Elizabeth Barnes

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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WEST GOSHEN TOWNSHIP,

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SUNOCO PIPELINE, L.P.,

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2017, a true and correct copy of West Goshen Township's Answer to Sunoco Pipeline, L.P.'s Motion for Protective Order was served upon the party listed below by electronic filing, email, and U.S. Mail, first-class, postage prepaid, in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a party).

Honorable Elizabeth H. Barnes
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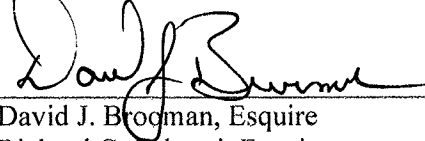
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A handwritten signature in black ink, appearing to read "David J. Brodman", written over a horizontal line.

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