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September 26, 2017

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA. Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

**Re: West Goshen Township v. Sunoco Pipeline, L.P.
Docket No. C-2017-2589346**

Dear Secretary Chiavetta:

Enclosed please find West Goshen Township's Response to Sunoco Pipeline, L.P.'s Motion to Dismiss Objections and Compel Production of Documents together with a Certificate of Service in the above-referenced case.

Thank you.

Sincerely,

Richard C. Sokorai

RCS:jmg

Enclosure

Cc: Honorable Elizabeth H. Barnes (via email & U.S. Mail)
Christopher Lewis, Esquire (via email & U.S. Mail)
Michael Montalbano, Esquire (via email & U.S. Mail)
Frank Tamulonis, Esquire (via email & U.S. Mail)

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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WEST GOSHEN TOWNSHIP,	:	
Petitioner	:	Docket No. C-2017-2589346
	:	
v.	:	
	:	
SUNOCO PIPELINE, L.P.,	:	
Respondent	:	

**RESPONSE OF PETITIONER WEST GOSHEN TOWNSHIP TO
RESPONDENT’S MOTION TO DISMISS OBJECTIONS AND COMPEL
PRODUCTION OF DOCUMENTS**

Petitioner, West Goshen Township (“Township”), is hereby responds to the Motion to Dismiss Objections and Compel Production of Documents filed by Respondent Sunoco Pipeline, L.P.’s (“Sunoco” or “SPLP”) on September 21, 2017.

I. INTRODUCTION

On August 21, 2017, SPLP propounded discovery requests on the Township. Within twenty days, the Township timely responded to the vast majority of the discovery requests, providing 2222 documents. However, there were several requests that were not proper under the rules, including documents seeking attorney client communications, which requests are specifically prohibited by the Rules (See 52 Pa. Code 5.361(a)(3)), and therefore the Township

also served objections contemporaneously with the discovery responses, which is customary in Pennsylvania civil actions, but not within the time period set forth in the PUC rules which provide that objections shall be served within ten days. This error was not a willful disregard of the rules nor prejudicial to SPLP. Further, even if the objections were overruled, it would not suddenly make Sunoco's request for attorney client privilege material suddenly discoverable under the rules.

Sunoco also contends that the attorney client privilege was somehow waived for "all communications" between Kristin Camp and WGT" relating to "the siting of Valve 344 or any other above ground public utility facility by SPLP" because Ms. Camp testified at trial about her notes at a specific meeting memorializing what was discussed in that particular meeting. However, the notes were not a communication, they were her own notes. Second, even if there were a waiver of communications about the subject, the subject would be what was discussed at the particular meeting, not "all communications. . . relating to the siting of Valve 344 or other above ground facilities."

The remainder of SPLP's complaints seem to be about not being satisfied with scope of the documents produced by the Township because they do not include communications involving township supervisors or minutes of executive sessions. All non privileged emails to and from Township supervisors were searched and produced. Minutes are not taken of executive sessions, and even if they were, they would all be privileged.¹ Just because SPLP is not satisfied with the number of emails does not mean more emails exist.

¹ Under the Sunshine Act only very narrowly defined subjects are able to be discussed in executive session, such as litigation strategy, and either Kristin Camp or David Brooman participated in all such sessions.

II. ARGUMENT

A. Township's objections should not be ignored simply because they were not filed within 10 days.

There is no dispute that Township served its answers and objections 20 days after being served with the interrogatories and documents requests. There is also no dispute that the Rules provide that objections are to be filed within 10 days of service of the requests. The dispute lies with SPLP's contention that all reasonable and lawful objections should be completely disregarded merely because the objections were inadvertently filed late, with no evidence of malice, disruption or obstruction and no evidence of prejudice to SPLP.

52 Pa.Code §5.342(e) provides that the objecting party shall serve objections within 10 days of service of interrogatories. However, the rule does not provide that any objections not made within that time frame are automatically deemed waived. Nor does any case law cited by SPLP.

SPLP has cited one case in support of its contention that Township's narrowly tailored objections should be disregarded because they were served outside of 10 days: *Smolsky v. Global Tel Link Corporation*, 2009 Pa.PUC LEXIS 455 (Pa. PUC 2009). However, a review of the case reveals that case is not factually or legally similar to the instant matter, does not discuss the notion of disregarding objections beyond 10 days, and does not issue penalties for failure to timely object as stated by SPLP.

Smolsky involved a claim by a consumer that pre-paid calling cards sold by the respondent utility had hidden charges. The utility was issued a civil fine of \$5,750 for "numerous violations including the failure to timely file Answers to the Complaint and the Amended Complaint", pursuant to 66 Pa.C.S. §3301, that permits civil penalties against regulated entities. *Smolsky*, 2009 WL 161794, p. 2, 5. (Pa.PUC 2009). The series of rule

violations were found to be intentionally dilatory and that the company litigated the matter in bad faith. *Smolsky* at p. 7. The list of numerous violations included:

Failure to appoint counsel	\$500
3 failures to timely respond to discovery.	\$1500
Refusal to answer discovery requests without objecting	\$500
Intentionally false discovery responses	\$1000
Negligently poor interrogatory responses	\$1600

Smolsky had nothing to do with overruling objections because they were filed after the 10 day limit. It was a statutory civil penalty against a regulated entity that was found to have intentionally and repeatedly obstructed prosecution of the case. This is simply not analogous to a litigant that served its objections with its complete verified responses on the due date as is customary in civil cases. There is no evidence of obstruction, prejudice to Sunoco, or even an impact on the ability on the administration of the case. Therefore, the objections should not be simply disregarded on the basis that they were served after 10 days.

In addition, regardless as to when the objections were served, the PUC rules specifically prohibit discovery that seeks privileged information. See 52 Pa.Code. §5.361(a)(3) (discovery is not permitted which relates to matter which is privileged.) Therefore, regardless as to whether the objection was timely, the fact remains that SPLP's requests is beyond the express scope of discovery as set forth in the rules and should not be permitted.

B. Attorney Client Privilege was not waived as to all communications about the siting of the valve

First, it should be noted that SPLP is confusing two separate privileges in its motion: the attorney work product privilege and the attorney client communications privilege. These are separate issues and should be dealt with separately. The protection against discovery of work

product is designed to shelter the mental processes of an attorney, providing a privileged area within which he can analyze and prepare a clients case. *See Estate of Paterno v. NCAA*, 2017 Pa.Super. 247 (2017). The attorney client privilege has the purpose of fostering the free and open exchange of relevant information between the lawyer and his client. *See Gillard v. AIG Insurance*, 15 A.3d 44 (Pa. 2011).

The only document admitted at the hearing related to attorney work were attorney notes of Township Solicitor, Kristin Camp, memorializing the occurrence and substance of a meeting in January of 2016, in which meeting SPLP maintains it advised the Township that it was going to put the valve station, not where agreed, but on a separate property. The Township denied this and Ms. Camp explained that her notes made contained no such representations. The notes were not communicated to anyone and no attorney client communications were introduced. Blacks Law Dictionary defines a communication as “the expression or exchange of information by speech, writing or gestures”. *See Blacks Law Dictionary, Seventh Edition* 1999. These notes, as they did not involve an exchange of information, were not a communication.

Township agrees that if it tried to redact the notes of the meeting, SPLP would be entitled to the entirety of those notes, as they would be entitled to all notes regarding the substance of the meeting. However, SPLP has been provided all of the notes of the meeting, without redaction. What they seek is any note or communication between the Township and its Solicitor that discusses the valve station at all, including litigation strategy, evaluation of strengths and weaknesses of claims and questions and statements seeking legal advice.

SPLP does not dispute that West Goshen is Ms. Camp’s client; that Ms. Camp is a member of the bar; or that the communications between them related to legal advice would otherwise be privileged, or that the privilege is claimed, putting the only issue in dispute as being

whether the privilege has been waived. *See e.g. Red Vision Sys. Inc. v. Nat'l Real Estate Info. Servs. LP.*, 108 A.3d 54, 62-63 (Pa.Super. Ct. 2015), cited by SPLP. Rather, SPLP maintains that Township has put the privileged communications between Ms. Camp and the Township at issue in the litigation.

The evidence cited by defendants that it maintains are communications disclosed are: the Township's motivation for bringing the complaint, the negotiation process with SPLP, Camp's meeting notes from the meeting with SPLP. The closest evidence to even approach a communication is Camp's testimony that she never advised the Board of Supervisors that SPLP's construction activities would have a permanent impact on an independent living community called Traditions of America. This is not a disclosure of a communication, but rather, a confirming of a lack of communication. Even if it is deemed a communication it was offered for, and relevant only to, the issue of what was discussed regarding the valve placement at the January 2016 meeting. Therefore, if it is a waiver, the waiver should be limited to communications related to what was discussed at the January 2016 meeting.²

The purpose of the attorney-client privilege is "to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. *Upjohn Company v. United States*, 449 US 383, 389, 101 S.Ct 677 (1981) *cited in Nationwide Mut. Ins. Co. v. Fleming*, 992 A.2d 65, 68 (Pa. 2010). The privilege recognizes that such advice or advocacy depends upon the lawyer's being fully informed by the client. *Id.*

It is clear the privilege and the policy behind it in Pennsylvania is important, so important that it was codified. *See* 42 Pa.C.S.A. §5928. There is no case to suggest that a limited

² To Township's knowledge, such communications are limited to one such memo from Camp to the Board of Supervisors.

disclosure of a note memorializing a meeting, that is not a communication, would somehow cause a waiver of a privilege regarding the entire subject of a case. Should it be found that there is a waiver of the privilege related to what was communicated to the Board of Supervisors about the substance of the January 2016 meeting, the overruling of the objection and/or the order to produce should be limited to that subject.

C. The Requests objected to are overly broad

Township made a series of objections related to all documents that “mention or relate to” certain subjects such as the valve station or the Settlement Agreement, which SPLP discusses in Section C of its motion. The Township provided full responses to these questions as best as it could interpret the question. However, on their face, these requests are overly broad, to the extent that extend to documents that “mention or relate to” without any context such as communication, meeting note or other type of document should be searched for. It is an unreasonable burden to simply search every document in the Township to determine if there is a mere mention of a particular word. The Township has performed a diligent search for all documents requested. Therefore, an objection was asserted as a protective measure to the extent SPLP has a more expansive view of what “mentions or relates to means”, the disagreement about which is foreseeable as will be seen in the argument below.

D. The Township’s Document Production is not deficient

SPLP assumes that certain types, or more of certain types of documents exist and therefore, files a motion that the Township’s production must be deficient. For instance, the Township produced a number of emails to and from Supervisors in response to SPLP’s request. However, SPLP assumes that there must have been more so asserts that Supervisor’s mailboxes were not searched. This is an incorrect assumption.

SPLP incorrectly assumes that minutes are taken at executive sessions, when they are not. Minutes of the public meetings were produced as requested. SPLP complains that Mr. LaLonde must have documents of a meeting he attended, but does not point to what document they maintain he has that he did not produce.

Township has produced 2222 pages of documents in response to the discovery requests, representing a thoughtful and thorough production of all non privileged materials. The Township does not have an obligation to create documents to produce.

III. CONCLUSION

The Township produced 2222 pages of documents responsive to the discovery requests and has no obligation to create documents to produce. The production of an attorney's notes memorializing a meeting, which is not a communication, does not waive the attorney client privilege. Even if the privilege were waived, it would be limited to the subject of the memo, what was discussed at the January 2016 meeting and nothing more. The motion to dismiss objections and compel further document production should be denied.

WHEREFORE, West Goshen Township respectfully requests that the motion to dismiss objection and compel further document production be denied.

HIGH SWARTZ LLP

By: 

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Date: 9/26/17

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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Attorneys for West Goshen Township

WEST GOSHEN TOWNSHIP,

v.

SUNOCO PIPELINE, L.P.,

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Docket No. C-2017-2589346

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2017, a true and correct copy of West Goshen Township's Response to Sunoco Pipeline, L.P.'s Motion to Dismiss Objections and Compel Production of Documents was served upon the parties listed below by 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).

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