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December 4, 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:

This office represents West Goshen Township in the above referenced matter pending before the Commission.

Enclosed for filing is West Goshen Township's Brief in Opposition to Sunoco Pipeline, L.P.'s Petition for Interlocutory Commission Review and Answer to Material Questions filed on November 17, 2017, along with a Certificate of Service relating thereto.

If you have any questions or concerns, please feel free to contact me.

Respectfully,

Richard C. Sokorai

RCS:pro/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)
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BEFORE THE PENNSYLVANIA PUBLIC UTILITIY COMMISSION

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

**WEST GOSHEN TOWNSHIP’S BRIEF IN OPPOSITION TO SUNOCO PIPELINE,
L.P.’S PETITION FOR INTERLOUCTORY COMMISSION REVIEW AND ANSWER
TO MATERIAL QUESTIONS**

West Goshen Township (“Township”), through its attorneys, High Swartz LLP, pursuant to 52 Pa. Code § 5.302(b) and the Secretarial Letter issued on November 21, 2017, respectfully submits this Brief in opposition to Sunoco Pipeline, L.P.’s (“SPLP”) Petition for Interlocutory Commission Review and Answer to Material Questions filed on November 17, 2017.

SPLP is asking the Commission to review and overturn a decision by Administrative Law Judge Elizabeth Barnes (“ALJ”) denying SPLP’s request to, among other things, impose a burden on the Township to present an expert report demonstrating prima facie evidence that SPLP’s purported reasons for violating a settlement agreement were false. SPLP felt this report should be produced by November 28, 2017, despite the fact that it had withheld approximately

12,000 discovery documents and did not produce them until November 21, 2017, after an order by the ALJ, and despite the Thanksgiving holiday immediately preceding this deadline.

The Commission must deny SPLP's petition for interlocutory review, or alternatively answer the proposed material questions in the negative, because:

(1) While SPLP claims prejudice for not being able to reply to new matter facts regarding drilling operations in other parts of the Commonwealth, the ALJ's order did not rely upon such facts and expressly excluded consideration of such evidence;

(2) SPLP requested and received an expedited answer deadline and decision on its motion, but did not ask for time to file a reply to the purported new matter;

(3) Even though SPLP's motion asked that the Township's answer deadline be reduced from 20 to 10 days (a reduction to 15 was granted), SPLP did not file any reply to the purported "new matter" in the eleven days between the Township's answer and the ALJ's order; and

(4) SPLP's petition is simply an attempt to usurp the authority vested in the ALJ with respect to the procedural schedule because SPLP is unhappy with her decision, for no compelling reason. The procedural schedule in this matter is halfway over, with the Township's initial written testimony due in less than two months. Changing that schedule at this juncture simply makes no sense and would severely prejudice the Township.

I. STATEMENT OF PERTINENT FACTS

On February 17, 2017, the Township filed this matter to enforce SPLP's contractual obligations to put a valve in the Township in connection with its Mariner East 2 ("ME2") pipeline project, in accordance with promises and representations in a settlement agreement between the parties ("Settlement Agreement"). SPLP filed a motion for judgment on the pleadings, essentially claiming its promises were not really promises, or in the alternative, that its promises were not enforceable. On July 7, 2017, because SPLP was attempting to violate the

Settlement Agreement by putting the subject valve at a different location, the Township filed a petition for an interim emergency order. On July 24, 2017, after a hearing on the Township's petition, the ALJ entered orders granting the interim emergency order, denying SPLP's motion for judgment on the pleadings, and setting a procedural schedule for the case, which included a discovery process and set the deadline for the Township's initial evidence for February 1, 2018.

Despite the procedural schedule having been set nearly three months earlier, and despite having admittedly withheld documents from discovery production at the time of filing, on October 19, 2017, SPLP filed a motion to modify the procedural schedule ("Motion").¹ The Motion sought to fast-track the case based on SPLP's continual argument that this case alone is holding up the installation of its ME2 pipeline. The "modified schedule" proposed in SPLP's Motion not only removed any time for the Township to prepare its case, but also, under the guise of bifurcating the case, added a substantive hurdle for the Township by proposing a November 28, 2017 deadline² for the Township to make a prima facie showing that SPLP's purported reasons for violating its promises under the Settlement Agreement are false. Because SPLP was in such a rush to start construction in violation of the Settlement Agreement, its Motion included a request to shorten the Township's deadline to answer to the Motion from the twenty (20) days provided under 52 Pa. Code § 5.103(c) to ten (10) days. SPLP, wanting a quick decision, did not ask for time to reply to any new matter.³ The ALJ agreed to shorten the Township's answer deadline to fifteen (15) days, resulting in the Township filing its answer to the Motion ("Answer") on November 3, 2017. Eleven days then passed without SPLP filing any reply to the

¹ Pursuant to a discovery order overruling its objections, SPLP served a supplemental document production of approximately 12,000 pages on November 21, 2017, which the Township is currently reviewing.

² Immediately following the Thanksgiving holiday.

³ SPLP falsely alleged in the Motion that the Township is the only place in the Commonwealth where it had not resumed horizontal directional drilling ("HDD") for the ME2 pipeline. In its Answer to the Motion, the Township demonstrated that this allegation was false, which SPLP now maintains is "new matter" to which it should have been permitted to reply.

purported “new matter” in the Answer, or making any request by SPLP to file a reply before the ALJ issued a decision. ALJ Barnes issued an Order denying SPLP’s Motion on November 14, 2017 (“Order”). A copy of the Order is attached hereto at Appendix “A.” SPLP then filed its petition for interlocutory review of the Order (“Petition”) on November 17, 2017.

II. ARGUMENT IN OPPOSITION TO INTERLOCUTORY REVIEW

After requesting and being granted an expedited schedule on the Motion, SPLP now comes before the Commission complaining that it did not get enough time to reply to “new matter” set forth in the Township’s Answer to the Motion. Contrary to SPLP’s arguments, interlocutory review of the Order is not warranted in this instance for several significant reasons.⁴

First and foremost, SPLP’s Motion fails to point out that the ALJ’s Order never even cites the purported “new matter” (related to the status of HDD operations throughout the Commonwealth) on which SPLP bases its request for interlocutory review. Instead, the Order expressly explains that the ALJ did not even consider the dispute over facts related to HDD operations throughout the Commonwealth because the such facts were not “currently in evidence.” *See* Order at p. 5. The only item that the Order references with respect to the ME2 pipeline status is the Corrected Stipulated Order in a matter before the Pennsylvania Environmental Hearing Board, which SPLP attached to its Motion. *See id.* The ALJ’s Order does not reference the Affidavit of Alex Bomstein or any other information in the Township’s Answer that SPLP characterizes as “new matter.” *See id.* at pp. 3-5. The complete omission of

⁴ The Commission’s standards for interlocutory review are well-established, as follows:
Section 5.302(a) of our Regulations, 52 Pa. Code § 5.302(a), requires that the petition “state ... the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.” The pertinent consideration is whether interlocutory review is necessary in order to prevent substantial prejudice - that is, the error and any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review process.
Ctr. Park Historic Dist., Inc. v. UGI Utilities, Inc., C-2015-2516051, 2017 WL 634308, at *4 (Feb. 9, 2017) (citations omitted).

any reference to that information in the Order, along with the Order's specific refusal to modify the schedule based on non-record facts, indicates that the ALJ's decision was strictly based on the timing of the Motion, the complexity of the issues raised in the case, and the potential prejudice to the Township of modifying the schedule several months into the case, not the "new matter" as claimed by SPLP. *See* Order at pp. 4-5.

Second, despite touting the time-sensitive nature of its Motion, SPLP now makes the inconsistent argument that its "due process rights" were violated because it did not get enough time to reply to "new matter" in the Township's Answer. SPLP had no problem asking the ALJ to reduce the time for the Township's Answer, but now cries foul because it did not get the full twenty (20) days under 52 Pa. Code § 5.63 to reply to the purported "new matter," which it did not even ask to be able to do when requesting to truncate the process. Further, after requesting that expedited decision on its Motion, SPLP allowed eleven (11) days to pass between the filing of the Township's Answer and the ALJ's Order without filing any reply to the purported "new matter" or even asking the ALJ not to rule until it filed a reply. SPLP had sufficient time to reply to the "new matter," more than it wanted the Township to have to answer the Motion, and it allowed that time to pass without taking any action. The Commission should not reward SPLP's unclean hands with interlocutory review just because SPLP is unhappy with the result of the Order, especially when it is evident that the facts addressed in the "new matter" were not even considered.

Third, SPLP's clear aim in filing the Petition for interlocutory review is to try to get the procedural schedule out of the ALJ's hands where it belongs, and into the hands of the Commission, banking on Commissioner Sweet's comments on the procedural schedule during the Commission's October 26, 2017 public hearing. *See* SPLP's Petition at ¶ 7. SPLP's Motion

is simply an attempt to usurp the ALJ's authority to "control the receipt of evidence" and "regulate the course of the proceeding," despite the lack of any compelling reason for interlocutory review of the ALJ's Order. *See* 52 Pa. Code § 5.403(a) and 52 Pa. Code § 5.483(a). The procedural schedule in this case was set on July 24, 2017, over four months ago and the Township has relied upon that schedule ever since. The Township's initial written testimony is now due on February 1, 2018, a period of less than two months, a portion of which includes the holiday season. As the ALJ's Order pointed out, and which SPLP continually refuses to accept, the case involves extensive documentary discovery and requires expert witness review. Some of the deadlines proposed in SPLP's Motion have now passed or will in the coming days, leaving open the question of what modification SPLP is even seeking at this point. Given the complexity and current status of the case, as noted in the ALJ's Order, there is no compelling legal or practical reason at this point to modify the procedural schedule in this case.

For the foregoing reasons, there is no compelling reason for the Commission to undertake interlocutory review of the ALJ's Order and SPLP's Petition must be denied.

III. ARGUMENT IN OPPOSITION TO THE MATERIAL QUESTIONS PROPOSED FOR INTERLOCUTORY REVIEW

As required by 52 Pa. Code § 5.302(b), and in the event that the Commission decides to grant interlocutory review, the Township addresses the merits of the three material questions set forth in SPLP's Petition, all of which should be answered in the negative.

- A. The ALJ did not deprive SPLP of its procedural and substantive due process rights by denying SPLP's Motion, because she did not rely on the "new matter" alleged in the Township's Answer.

As set forth above, the ALJ's Order denying SPLP's Motion does not rely upon, or even reference, the purported "new matter" set forth in the Township's Answer. *See* Order. Rather, the only information referenced in the Order beyond the procedural schedule itself and status of these proceedings is the Corrected Stipulated Order from the EHB proceedings involving SPLP, which SPLP itself attached to its Motion. *See* Order at p. 5 *and* SPLP Motion at ¶ 16. Further the ALJ refused to rely upon that information as evidence of the status of the ME2 pipeline project, because it assumed facts not in evidence. *See* Order at p. 5. Therefore, by its very words, the Order negates SPLP's basis for its Petition and shows there is no substantial prejudice to be prevented with respect to the ALJ's denial of SPLP's Motion.

In addition, any alleged prejudice to SPLP posed by the purported "new matter" was not "substantial." SPLP sought an expedited ruling on its Motion, then took no action to file a reply to the "new matter" in the eleven days between the Township's Answer and the ALJ's Order, nor any action to assure its time to do so. If the "new matter" information was so significant, SPLP should have taken action to preserve its right to reply to the information. Instead it sat on its hands and is now trying to use the "new matter" as a reason to overturn a decision it did not like. SPLP's attempt to decry a "due process" violation under these circumstances is disingenuous at best.

For these reasons, as more fully discussed in Section II above, the first material question in SPLP's Petition must be answered in the negative.

B. The Commission should not decide SPLP's Motion to modify the procedural schedule because it would usurp the powers conferred upon the ALJ.

SPLP's Petition argues that the Commission should decide its Motion under the guise that the ALJ has relied upon incorrect, prejudicial information in issuing the denial Order. However, SPLP's true goal is to usurp the ALJ of any power over the procedural schedule in hopes of gaining a more favorable schedule from the Commission. This is made clear by SPLP's reference to Commissioner Sweet's October 26, 2017 public hearing comments regarding the procedural schedule. SPLP is unhappy with the ALJ's well-reasoned denial of its Motion, and her prior determinations in setting the procedural schedule based on the complexity of the underlying contractual and engineering issues involved in this case, so it is seeking another ear. However, the Commission's Rules confer upon the ALJ the authority to "control the receipt of evidence" and "regulate the course of the proceeding." *See* 52 Pa. Code § 5.403(a) and 52 Pa. Code § 5.483(a). The ALJ, who has presided over an evidentiary hearing in the case already and has a deeper knowledge of the issues involved, should not be stripped of this authority over SPLP's sour grapes. SPLP fails to assert a compelling reason for overruling the ALJ's Order, nor any reason why the ALJ should not be the one to determine any modification to the procedural schedule if the Commission feels such a modification is warranted.

Therefore, the second material question set forth in SPLP's Petition should be answered in the negative.

C. SPLP's Motion to modify the procedural schedule should not be granted because modifying the schedule at this late juncture would severely prejudice the Township.

SPLP of course argues that by definition granting SPLP's Motion would expedite the proceedings because it would result in a significant modification of the procedural schedule. However, as the ALJ's Order stated, modifying that schedule would impose substantial prejudice on the Township at this juncture in the proceedings, not prevent it as contemplated by 52 Pa. Code § 5.302(a). Contrary to SPLP's characterizations, the current procedural schedule does not needlessly protract a simple case. Rather, the ALJ, who is more intimately involved with the details of the case, even noted in the Order that this case involves complex engineering and safety issues pertaining to the ME2 pipeline. The ALJ further pointed out that SPLP was ordered to produce additional discovery documents by November 21, 2017, which ultimately consisted of approximately 12,000 additional pages of documents. This document production alone indicates the extensive information underlying the parties' dispute. Such complex issues should not be downplayed, and rushed through an expedited procedural schedule, in the interest of getting a pipeline into the ground and volatile fuels running through it. SPLP is quick to point out the benefits it is providing the economy of Pennsylvania with the ME2 pipeline, but at what risk if it is not made to comply with the obligations to which it agreed with some of those very citizens of this Commonwealth.

Finally, it is now unclear what type of modification to the procedural schedule SPLP is seeking, in that several of the new deadlines it proposed have now passed or will soon pass, and the deadline for the Township's written testimony is just under two months away.

For the reasons set forth herein and in the Township's Answer to the Motion, as well as the reasons set forth in the ALJ's Order denying the Motion, SPLP's third material question

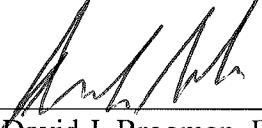
should be answered in the negative, and the procedural schedule should not be disturbed in this matter.

IV. CONCLUSION

For the reasons set forth herein, the Township respectfully requests that the Commission deny SPLP's Petition for interlocutory review of the ALJ's Order denying SPLP's Motion to modify the procedural schedule in this matter. Alternatively, if interlocutory review is granted, the Township requests that the Commission answer all of the material questions set forth in SPLP's Petition in the negative.

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By: _____


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12/4/17

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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 :
 : Docket No. C-2017-2589346
 v. :
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 SUNOCO PIPELINE, L.P. :

CERTIFICATE OF SERVICE

I hereby certify that I have on December 4, 2017 served a true and correct copy of West Goshen Township’s Brief in Opposition to Sunoco Pipeline, L.P.’s Petition for Interlocutory Commission Review and Answer to Material Questions filed on November 17, 2017, upon the individuals 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).

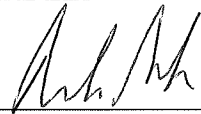
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12/4/17