**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

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|  | Public Meeting held March 15, 2018 |
| Commissioners Present:  Gladys M. Brown, Chairman  Andrew G. Place, Vice Chairman  Norman J. Kennard  David W. Sweet  John F. Coleman, Jr. |  |
| West Goshen Township  v.  Sunoco Pipeline, L.P. | C-2017-2589346 |
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**OPINION AND ORDER**

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**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is a Petition for Interlocutory Review and Answer to Material Questions (Petition) filed on November 17, 2017, by Sunoco Pipeline, L.P. (Sunoco) in the above-captioned proceeding. Sunoco filed a Brief in Support of the Petition (Brief in Support) on December 4, 2017. West Goshen Township (the Township) filed a Brief in Opposition to the Petition (Brief in Opposition) on December 4, 2017.

In its Petition for Interlocutory Review, Sunoco seeks interlocutory Commission review and answer to the following Material Questions:

(1) Did the ALJ deprive Sunoco of its procedural and substantive due process rights by denying Sunoco’s Motion to Modify in reliance on the new facts alleged in the Township’s Answer to Motion without giving Sunoco the opportunity afforded by 52 Pa. Code § 5.63 to reply to such new matter?

(2) Should the Commission decide Sunoco’s Motion to Modify the procedural schedule in light of Sunoco’s reply to the new matter raised in the Township’s Answer to Motion, rather than remanding it to an ALJ who has already ruled and reached conclusions upon the Motion to Modify in reliance on such new matter?

(3) Should Sunoco’s Motion to Modify the procedural schedule be granted?

Sunoco requests that the Commission answer the Material Questions in the affirmative. Petition for Interlocutory Review at 2.

For the reasons more fully discussed below, we decline to answer the Material Questions.

**History of the Proceeding**

On March 30, 2017, the Township filed an Amended Complaint (Complaint) against Sunoco, at the instant Docket No. C-2017-2589346, seeking enforcement of a Settlement Agreement filed at Docket No. U-2015-2486071, pertaining to, *inter alia*, Sunoco’s proposal to site Valve 344 on the Janiec 2 Tract. On April 17, 2017, Sunoco filed an Answer to the Complaint and New Matter. Sunoco denied the material allegations in the Complaint and averred that siting Valve 344 on the Janiec 2 Tract would not constitute a violation of the Settlement Agreement. On May 5, 2017, the Township filed an Answer to the New Matter.

On July 10, 2017, the Township filed a Petition seeking, *inter alia*, an Interim Emergency Order (Emergency Petition) pursuant to 52 Pa. Code § 3.6, to enjoin Sunoco from beginning or continuing construction of a valve and any other facilities appurtenant to Sunoco’s Mariner East 2 Pipeline on the Janiec 2 Tract, or at any location not specifically agreed to in the Settlement Agreement, until after the Commission issues a final order on the Complaint. On July 17, 2017, Sunoco filed an Opposition to the Township’s Emergency Petition.

On July 18, 2017, Administrative Law Judge (ALJ) Barnes conducted a hearing on the Emergency Petition. The hearing record includes twenty Township exhibits, fifteen Sunoco exhibits, and a 254-page transcript. Both Parties filed Briefs regarding the Emergency Petition on July 24, 2017.

In the *Interim Emergency Order and Certification of Material Question* issued by ALJ Barnes on July 24, 2017 (*July 24 Order*), the ALJ granted the Township’s Emergency Petition and certified the decision to grant interim emergency relief to the Commission as a material question to be processed in accordance with Section 5.305 of the Commission’s Regulations, 52 Pa. Code § 5.305. On July 31, 2017, the Township and Sunoco each filed a Brief pertaining to the *July 24 Order*.

By an Order Denying Motion for Judgment on the Pleadings and Motion to Stay Discovery, dated July 24, 2017, the ALJ established the following procedural schedule:

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| Direct Testimony of the Township | February 1, 2018 |
| Rebuttal Testimony of Sunoco | March 1, 2018 |
| Surrebuttal Testimony of the Township | April 2, 2018 |
| Oral rejoinder outlines | April 19, 2018 |
| Hearings | April 25 & 26, 2018 |
| Main Briefs | May 28, 2018 |
| Reply Briefs | June 18, 2018 |

By Order entered October 26, 2017 (*October 2017 Order*), the Commission answered the Material Question in the affirmative, granted the Township’s Emergency Petition, and referred this matter back to the Office of Administrative Law Judge (OALJ). The Commission specifically directed the following:

That Sunoco is enjoined from beginning and shall cease and desist from the following: (1) constructing Valve 344 on the Janiec 2 Tract; (2) constructing appurtenant facilities to Valve 344 on the Janiec 2 Tract; (3) horizontal directional drilling activities related to Valve 344 on the Janiec 2 Tract; and (4) constructing Valve 344 at a location that is in dispute under the Settlement Agreement until the entry of a final Commission Order ending the formal amended complaint proceeding at Docket No. C-2017-2589346.

*October 2017 Order* at 34, Ordering Paragraph No. 3.

On October 19, 2017, Sunoco filed a Motion to Modify the Procedural Schedule (Motion to Modify). Sunoco requested that the Township be required to file its response to the Motion within ten days of service. Motion to Modify at 3. Sunoco argued that the procedural schedule the ALJ established could significantly delay the completion of the Mariner East 2 Pipeline. Sunoco stated that it resumed horizontal directional drilling (HDD) at its remaining drilling locations in the Commonwealth, and the pipeline, except for the Township’s portion, would be completed and ready to deliver product by the fourth quarter of 2017 or early 2018. Sunoco averred that the HDD site in the Township was the only location where drilling would not resume for the foreseeable future and would soon be the only segment of the pipeline that was unfinished. *Id*. at 4. Sunoco requested that the procedural schedule be shortened by three months, so that hearings would be held on January 22 and 23, 2018, instead of April 25 and 26, 2018. *Id*. at 10. In support of its position that it is resuming HDD in Pennsylvania, Sunoco attached a Corrected Stipulated Order from the Environmental Hearing Board dated August 10, 2017, at Docket No. 2017-009-L (Corrected Stipulated Order) to its Motion. Motion, Exhibit B.[[1]](#footnote-1)

By Order dated November 1, 2017, the ALJ shortened the normal response period for motions from twenty-days to fifteen days, with a response to the Motion to Modify due by November 3, 2017.

On November 3, 2017, the Township filed an Answer (Answer to Motion). The Township stated that its witnesses’ direct testimony is due on February 1, 2018, and the Township has been relying upon the current schedule, which has been in place for three months, since July 24, 2017. Answer to Motion at 1. The Township averred that it would be prejudiced if the procedural schedule were changed at this late date, specifically, if the Township was required to produce expert testimony within twenty days of November 8, 2017, the date Sunoco claimed it would produce responses to discovery requests. *Id*. at 1-2. The Township argued that Sunoco was asserting false facts to support its position that it was engaged in HDD drilling everywhere else in the Commonwealth except for the Township and that only the current procedural schedule would delay completion of the Mariner East 2 Project. The Township objected to any bifurcation of the proceedings and contended that construction delays were within Sunoco’s control because it refused to abide by the Settlement Agreement. The Township asserted that there were multiple locations where HDD had not resumed following DEP shutdowns. *Id*. at 2. The Township referenced the Affidavit of Alex Bomstein, attached to its Answer to Motion as Exhibit A (Bomstein Affidavit), in support of its statement that DEP represented that there were HDD sites in the Commonwealth for which plans were not resubmitted and HDD had not resumed. *Id*. at 6-7.

By Order dated November 14, 2017 (*November 14 Order*), ALJ Barnes denied the Motion to Modify. On November 17, 2017, Sunoco filed a Reply to New Matter Contained in the Township’s Answer to Motion (Reply to New Matter).

Also on November 17, 2017, Sunoco filed the instant Petition relating to the ALJ’s *November 14 Order*. Both Sunoco and the Township thereafter requested an extension on the deadline for filing briefs. By Secretarial Letter issued November 21, 2017, the Commission established December 4, 2017, as the due date for filing briefs and waived the thirty-day period for consideration set forth in 52 Pa. Code § 5.303 to afford adequate time to address the questions raised. On December 4, 2017, Sunoco filed its Brief in Support, and the Township filed its Brief in Opposition.

On November 21, 2017, Sunoco filed a Petition to Rescind or Discontinue (Petition to Rescind) relative to the *October 2017 Order*. On December 1, 2017, the Township filed an Answer to the Petition to Rescind. By Order entered January 9, 2018 (*January 2018 Order*), the Commission: (1) denied Sunoco’s request for rescission of the *October 2017 Order*; (2) discontinued the injunction in the *October 2017 Order*, effective on the entry date of the *January 2018 Order*; and (3) provided that the OALJ return the matter to this Commission for final consideration and resolution no later than the September 20, 2018 Public Meeting.

On January 24, 2018, the Township filed a Petition for Reconsideration or, in the Alternative, Amendment (Reconsideration Petition), seeking the following:

(1) reconsideration of the *January 2018 Order* and (2) certification of the *January 2018 Order* to the Commonwealth Court.[[2]](#footnote-2) Sunoco filed an Answer Opposing the Reconsideration Petition on February 5, 2018.

**Discussion**

**Legal Standards**

As a preliminary matter, we note that any issue we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. [*Consolidated Rail Corp. v. Pa. PUC,* 625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also see, generally,* [*University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

Sunoco filed its Petition pursuant to Section 5.302 of the Commission’s Regulations, 52 Pa. Code § 5.302. During the course of a proceeding and pursuant to the provisions of 52 Pa. Code § 5.302, a party may seek interlocutory review and answer to a material question which has arisen or is likely to arise. The standards for interlocutory review are well established. 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. *Joint Application of Bell Atlantic Corp. and GTE Corp.,* Docket No. A-310200F0002, *et al.* (Order entered June 10, 1999); *Pa. PUC v. Frontier Communications of Pa. Inc.,* Docket No. R‑00984411 (Order entered February 11, 1999); *In re: Knights Limousine Service, Inc*., 59 Pa. P.U.C. 538 (1985).

Pursuant to 52 Pa. Code § 5.303, the Commission may take one of the following courses of action on requests for interlocutory review and answer to a material question:

(1) Continue, revoke or grant a stay of proceedings if necessary to protect the substantial rights of the parties.

(2) Determine that the petition was improper and return the matter to the presiding officer.

(3) Decline to answer the question.

(4) Answer the question.

Generally, Petitions for Interlocutory Review are not favored, as the preferred approach is to permit proceedings to move forward in the normal course in order to provide all parties, the presiding officer, and the Commission with a full opportunity to develop the record, brief issues, and present arguments at each stage. *Re: Philadelphia Gas Works Universal Service and Energy Conservation Plan*, Docket No. M-00072021 (Order entered October 23, 2009), at 3.

***November 14 Order***

In the *November 14 Order*, the ALJ denied Sunoco’s Motion to Modify. The ALJ found that the current litigation schedule, which is approximately eighty-five days longer than the hearing date Sunoco originally proposed and 229 days shorter than the date the Township proposed, was a reasonable compromise given the complexity and subject matter of the proceeding. The ALJ stated that even if Sunoco provided full and complete responses to certain Interrogatories by November 22, 2017, it would be unfair to require the Township to serve its expert(s)’ report(s) regarding the feasibility of siting the valve on the SPLP Use Area by November 28, 2017, or to serve direct written testimony by December 8, 2017, over a Thanksgiving holiday time period. The ALJ also stated that expediting the due date for a report and direct testimony by three months when the Township had relied on the current schedule could negatively affect the Township’s substantive rights. *November 14 Order* at 4. The ALJ noted that production of such an expert report was a newly proposed preliminary deadline in the procedural schedule introduced three months after the initial litigation schedule was entered and that Sunoco should have made the request sooner. *Id*. at 5.

The ALJ reasoned that she was not persuaded to shorten the time frame based on Sunoco’s assertion that it had resumed HDD at its remaining drilling locations in the Commonwealth and that the entire pipeline, except for the Township portion, would be complete and ready to deliver product by the fourth quarter of 2017 or early 2018. The ALJ stated the following:

Sunoco has not yet completed the installation of the Mariner East 2 pipeline in all other areas of the Commonwealth and its assertion that [the] Township’s segment will soon be the only segment of the pipeline that remains unfinished assumes facts not currently in evidence. The Corrected Stipulated Order contains many terms and conditions including re-evaluations and reports required prior to resuming HDD. Motion, Exhibit B. The Corrected Stipulated Order does not direct unconditional HDD activities resume at all [fifty-five] sites, and I am not persuaded by it to find that but for the procedural schedule in the instant case, the entire Mariner East 2 Project would be completed by the first quarter of 2018.

**Positions of the Parties**

In support of its Petition, Sunoco first avers that the Commission should grant interlocutory review of the *November 14 Order*. Brief in Support at 6. Sunoco states that the Commission has previously considered petitions for interlocutory review “that seek to change a schedule previously approved by a presiding officer when there are allegations from a party that substantial prejudice may occur.” *Id*. at 7 (citing *Joint Application of Equitable Resources, Inc*., Docket No. A-122250F5000 (Order entered July 21, 2006)) (*Equitable Resources*). Sunoco argues that compelling reasons for interlocutory review exist in this case, specifically, that the protracted procedural schedule is acting as a roadblock to Sunoco’s completion of Mariner East 2 and the associated benefits to the Commonwealth citizens. Brief in Support at 7-8. Sunoco also argues that its Motion to Modify sought to remove this roadblock, and the ALJ erred by denying the Motion to Modify without giving Sunoco the opportunity to correct the mischaracterizations set forth as unlabeled New Matter in the Township’s Answer to Motion. Sunoco contends that the protracted procedural schedule will cause unnecessary delay in the operation of Mariner East 2, and reversal and remand after Exceptions will not cure the prejudice to Sunoco or the detriment to the Commonwealth resulting from such delay. *Id*. at 8.

Second, Sunoco avers that the ALJ deprived Sunoco of its procedural and substantive due process rights by denying Sunoco’s Motion to Modify in reliance on new facts the Township alleged in its Answer to Motion without providing Sunoco the opportunity to reply to the New Matter, consistent with 52 Pa. Code § 5.63. Sunoco states that as the party with the burden of proof, it had the right to open and close the record on its Motion. Brief in Support at 9 (citing 52 Pa. Code § 5.242(a)). Sunoco asserts that the Township’s Answer to Motion mischaracterized Sunoco’s statements about the timeline for completion of Mariner East 2 and the impact of DEP’s HDD permitting process and then condemned those statements as false based on the Bomstein Affidavit attached to the Township’s Answer to Motion. Brief in Support at 9 (citing Answer to Motion at 2, 32). Sunoco contends that while not labeled as new matter as required by 52 Pa. Code § 5.62(b), the Township’s mischaracterizations and averments constituted New Matter, and Sunoco had the right to reply to the New Matter within twenty days of service, or by November 23, 2017. Sunoco indicates that, instead, the ALJ issued the *November 14 Order* denying Sunoco’s Motion to Modify just eleven days after the Township filed its Answer to Motion and unlabeled New Matter. Brief in Support at 9. Sunoco argues that this was not harmless error because the ALJ relied on the Township’s mischaracterizations and misleading assertions. *Id*. at 9-10.

Sunoco states that the ALJ noted the Township’s contention that Sunoco was “asserting false facts to support its position” and that “delays in construction are within Sunoco’s control and self-imposed.” *Id*. at 10 (citing *November 14 Order* at 3, 4). Sunoco also cites to the ALJ’s following statement:

I am not persuaded . . . to shorten the time-frame because of Sunoco’s assertion that it has resumed HDD at its remaining drilling locations in the Commonwealth and the entire pipeline, except for the [Township] portion, will be complete and ready to deliver product by the fourth quarter of 2017 or early 2018. Sunoco has not yet completed the installation of the Mariner East 2 Pipeline in all other areas of the Commonwealth and its assertion that [the] Township’s segment will soon be the only segment of the pipeline that remains unfinished assumes facts not currently in evidence.

Brief in Support at 10 (quoting *November 14 Order* at 5). Sunoco avers that the “facts not currently in evidence” that the ALJ cited are the facts set forth in Sunoco’s Reply to New Matter and the supporting affidavit that Sunoco timely filed on November 17, 2017, to set the record straight. Sunoco states that these facts establish Mariner East 2 will be delayed unless the procedural schedule is accelerated, that such a delay is unnecessary and unjustified, and that the Township’s attempt to blame the delay on DEP’s permitting process is self-serving and unsupported. Brief in Support at 10 (citing Reply to New Matter at 7-8; Affidavit of Larry Gremminger).

Third, Sunoco avers that the Commission should decide its Motion to Modify rather than remanding the Motion to Modify to the ALJ for disposition. Brief in Support at 10. Sunoco states whether the schedule in this proceeding should be modified to eliminate delay is now a straightforward question, since Sunoco has had the opportunity to reply to the Township’s New Matter and the record on this issue is complete. Sunoco believes a remand to the ALJ for further proceedings is unnecessary and contrary to the public interest, because a remand would further delay the realization of the substantial public benefits associated with the Mariner East Project. *Id*. at 11.

Fourth, Sunoco asks the Commission to grant its Motion to Modify, stating that the Commission has previously modified proceedings to facilitate their speedy resolution and has previously recognized the need for expedited proceedings when the circumstances so require. *Id*. (citing *A. Moses, Inc. v. Verizon Pennsylvania Inc*., Docket No. C-2010-2205259 (Order entered November 4, 2011); *Re PECO Energy Company*, 87 Pa. P.U.C. 718 (1997)). Sunoco avers that this proceeding is a single-count contract dispute concerning the siting of Valve 344 within the Township municipal limits, the contract interpretation issues are straight-forward, and the engineering constraints Sunoco noted regarding the siting of Valve 344 can be readily confirmed or denied. Brief in Support at 11. Sunoco indicates that it has resumed its HDD program for the remaining drill sites, including the DEP review process for the sites that are subject to the Corrected Stipulated Order. *Id*. at 12. Therefore, Sunoco states that but for the construction delay in the Township caused by the preliminary injunction and the protracted procedural schedule in this case, the initial Mariner East 2 Pipeline could be operational during the second quarter of 2018. *Id*. at 12, 13. Sunoco specifically requests that the Commission grant its Motion to Modify, with the following modifications: (1) that Reply Briefs be filed and served no later than March 5, 2018; (2) that the Parties and the ALJ develop and adopt a schedule for discovery, written testimony, hearings, and Main Briefs so as to permit the filing of Reply Briefs no later than March 5, 2018; and (3) that the ALJ certify the record in this matter to the Commission for decision on or before March 26, 2018. *Id*. at 14.

In its Brief in Opposition, the Township avers that interlocutory review is not warranted for several reasons. First, the Township argues that the ALJ did not deprive Sunoco of its due process rights by denying the Motion to Modify because the ALJ did not rely on the “New Matter” in the Township’s Answer to the Motion. The Township states that in the *November 14 Order*, the ALJ does not cite to the purported New Matter related to the status of HDD operations in the Commonwealth on which Sunoco bases its request for interlocutory review. Brief in Opposition at 4, 7. The Township asserts that the ALJ expressly explained that she did not consider the dispute concerning facts related to HDD operations in the Commonwealth because such facts were not “currently in evidence.” *Id*. (citing *November 14 Order* at 5). The Township notes that the only document the ALJ references regarding the Mariner East 2 Pipeline status is the Corrected Stipulated Order that Sunoco attached to its Motion to Modify. *Id*. The Township indicates that the ALJ does not reference the Bomstein Affidavit or any other information that Sunoco argues is New Matter. Brief in Opposition at 4. As such, the Township contends that the omission of any reference to that information, as well as the ALJ’s decision not to modify the schedule based on non-record facts, demonstrates that the ALJ’s determination was based on only the timing of the Motion to Modify, the complexity of the issues in the case, and the potential prejudice to the Township of modifying the schedule. *Id*. at 5, 7 (citing *November 14 Order* at 4-5). The Township continues that any alleged prejudice to Sunoco based on the purported New Matter was not substantial. The Township states that Sunoco sought an expedited ruling on its Motion to Modify, but failed to file a reply to the New Matter in the eleven days between the Township’s Answer to the Motion and the *November 14 Order* or to take any action to preserve its right to file a reply. Brief in Opposition at 5, 7.

Second, the Township avers that the Commission should not decide Sunoco’s Motion to Modify because it would usurp the ALJ’s powers to “control the receipt of evidence” and “regulate the course of the proceeding,” despite the lack of a compelling reason for interlocutory review. Brief in Opposition at 6, 8 (citing

52 Pa. Code §§ 5.403(a) and 5.483(a)). The Township states that the ALJ has presided over a hearing in this proceeding and has a deep knowledge of the issues involved. The Township argues that Sunoco fails to assert a compelling reason to overrule the ALJ’s *November 14 Order* or any reason that the ALJ should not make a modification to the procedural schedule if such a modification is warranted. Brief in Opposition at 8.

Third, the Township states that it would be severely prejudiced by a modification to the procedural schedule at this late juncture. The Township argues that contrary to Sunoco’s contentions, the current procedural schedule does not protract a simple case. The Township avers that as the ALJ noted, this case involves complex engineering and safety issues relating to the Mariner East 2 Pipeline. The Township points out that Sunoco was directed to produce additional discovery documents consisting of 12,000 pages by November 21, 2017, and that alone indicates the extensive information underlying the Parties’ dispute. The Township believes that the complex issues in this case should not be rushed through an expedited procedural schedule, particularly since Sunoco may be placing Pennsylvania citizens at risk by not complying with the obligations in the Settlement. The Township also avers that the form of modification Sunoco is requesting is unclear, as several of the new deadlines Sunoco proposed have now passed or will soon pass, and the deadline for the Township’s written testimony is under two months away. Brief in Opposition at 9. Accordingly, the Township requests that the Commission deny Sunoco’s Petition or, alternatively, answer the Material Questions in the Petition in the negative. *Id*. at 10.

**Disposition**

Based on developments in this proceeding, particularly our determination in the *January 2018 Order* to discontinue the injunction in the *October 2017 Order* pertaining to the construction of Valve 344 on the Janiec 2 Tract, we find that there are no compelling reasons for interlocutory review. The crux of Sunoco’s argument is that it will be substantially prejudiced by a construction delay in the Township caused by the injunction in the *October 2017 Order* and the protracted procedural schedule in this case. Sunoco argues in its Brief in Support and in its Reply to New Matter that both the injunction and the current procedural schedule are a “roadblock” to making Mariner East 2 operational, as the pipeline would otherwise be capable of delivering product by early 2018.

This argument has essentially become moot since the entry of our *January 2018 Order* granting Sunoco’s request for a discontinuance of the injunction. The *January 2018 Order* provides the following, in relevant part:

While we are denying Sunoco’s request for rescission, we shall grant Sunoco’s request for a discontinuance of the injunction ordered in the *October 2017 Order* on a going forward basis. The *October 2017 Order* was predicated on Sunoco constructing Valve 344 in the Township. Because Sunoco has stated on the record that it will not construct the valve within the Township, the specific action from which Sunoco was enjoined is moot. Sunoco specifically indicated in its Petition that it will not locate Valve 344 on the Janiec 2 Tract and conduct the activities related to Valve 344 that were the subject of the injunction specified in Ordering Paragraph No. 3 of the *October 2017 Order* and that it would not locate such a valve anywhere in the Township. As such, we find it reasonable to discontinue the injunction in our *October 2017 Order*, effective on the entry date of this Opinion and Order. We emphasize that discontinuing the injunction regarding construction of Valve 344 on a going forward basis will not impact the Township’s ability to prosecute the issues raised in its Complaint in any way.

*January 2018 Order* at 20. Due to our determination to discontinue the injunction on a going forward basis and Sunoco’s representations that it does not plan to construct Valve 344 on the Janiec 2 Tract or elsewhere within the Township, there is no longer any basis for Sunoco’s arguments that any aspect of the procedural schedule or this proceeding is preventing Sunoco from completing its work on the Mariner East 2 Pipeline or is otherwise resulting in substantial prejudice to Sunoco. Accordingly, we will not grant interlocutory review or modify the ALJ’s procedural schedule on this ground. *See* *Equitable Resources* at 7 (holding we are reluctant to interfere with procedural scheduling matters and only have “considered petitions that seek to change a schedule previously approved by a presiding officer when there are allegations from a party that substantial prejudice may occur”).

Similarly, the Parties’ positions relating to the impact that the DEP’s HDD permitting process and the Corrected Stipulated Order have on the status of Sunoco’s progress on the Mariner East 2 Pipeline are irrelevant.[[3]](#footnote-3) Given the current status of this proceeding and the discontinuance of the injunction, there is no compelling reason for us to expend time and resources to consider the Township’s Answer or the Bomstein Affidavit and Sunoco’s Reply to New Matter responding to the Township’s documents to make a determination on the Motion to Modify.[[4]](#footnote-4)

Moreover, at this stage of the proceeding, many of the procedural time frames the ALJ established have passed or are soon approaching. We will maintain the time frame we established in our *January 2018 Order* that the OALJ return this matter to us for final consideration and resolution no later than the September 20, 2018 Public Meeting. Given our determination in the *January 2018 Order* and Sunoco’s indications that it no longer plans to construct a valve on the Janiec 2 Tract, some of the contested issues in this proceeding may have been reduced, and this may shorten the time needed for the Parties and the ALJ to conclude the proceeding. We will not, however, interfere with the ALJ’s discretion to make procedural determinations in this case. As we stated in the *January 2018 Order*, the Parties and the ALJ have procedural avenues at their disposal to focus or narrow the issues in this case, if necessary, including settlement, motions made by the Parties, and the ALJ’s authority to exclude irrelevant or immaterial evidence and otherwise regulate the course of the proceeding pursuant to

52 Pa. Code § 5.483(a) and to control the receipt of evidence pursuant to

52 Pa. Code § 5.403(a). *See January 2018 Order* at 20-21.

**Conclusion**

Based upon the developments in this proceeding, particularly our determination in the *January 2018 Order* to discontinue the injunction pertaining to the construction of Valve 344 on the Janiec 2 Tract, we decline to answer the Material Questions Sunoco has presented, consistent with this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That with regard to the Petition for Interlocutory Review and Answer to Material Questions Sunoco Pipeline, L.P. filed on November 17, 2017, we decline to answer the following Material Questions:

(a) Did the ALJ deprive Sunoco of its procedural and substantive due process rights by denying Sunoco’s Motion to Modify in reliance on the new facts alleged in the Township’s Answer to Motion without giving Sunoco the opportunity afforded by 52 Pa. Code § 5.63 to reply to such new matter?

(b) Should the Commission decide Sunoco’s Motion to Modify the procedural schedule in light of Sunoco’s reply to the new matter raised in the Township’s Answer to Motion, rather than remanding it to an ALJ who has already ruled and reached conclusions upon the Motion to Modify in reliance on such new matter?

(c) Should Sunoco’s Motion to Modify the procedural schedule be granted?

1. That this matter is returned to the Office of Administrative Law Judge.

**BY THE COMMISSION**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: March 15, 2018

ORDER ENTERED: March 15, 2018

1. The Corrected Stipulated Order required Sunoco to notify all landowners and water supply owners within 450 feet of future HDDs and provide additional opportunities for water testing for those owners. Sunoco was also required to perform a re-evaluation of certain areas where HDD activity would occur, including those in Chester County. Such reports are subject to DEP’s review and approval. [↑](#footnote-ref-1)
2. The Reconsideration Petition is being separately considered in another Opinion and Order in this proceeding. [↑](#footnote-ref-2)
3. While not relevant to our determination herein, we note that the status of DEP’s actions relating to the Mariner East 2 Pipeline have changed since the Parties made their filings in this proceeding. By Administrative Order dated January 3, 2018, DEP suspended various construction permits associated with the Mariner East 2 Pipeline until Sunoco meets the requirements in that Order. [↑](#footnote-ref-3)
4. Based on our review of the *November 14 Order* and the Township’s filings, it appears that the ALJ did not rely on the information in the Township’s Answer or the Bomstein Affidavit regarding the impact of DEP’s HDD permitting process. [↑](#footnote-ref-4)