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April 11, 2018

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Filing Room
Harrisburg, PA 17120

Re: West Goshen Township and Concerned Citizens of West Goshen Township v. Sunoco Pipeline L.P.; Docket No. C-2017-2589346; **SUNOCO PIPELINE, L.P.'S MOTION TO STRIKE TESTIMONY OF WEST GOSHEN TOWNSHIP AND REQUEST FOR EXPEDITED RESPONSE**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is Sunoco Pipeline, L.P.'s Motion to Strike Testimony of West Goshen Township and Request for Expedited Response in the above-referenced matter. Copies of this Motion have been served in accordance with the attached Certificate of Service.

If you have any questions regarding this filing, please contact the undersigned.

Very truly yours,

Thomas J. Sniscak

Thomas J. Sniscak
Kevin J. McKeon
Whitney E. Snyder
Counsel for Sunoco Pipeline, L.P.

TJS/WES/das
Enclosures

cc: Honorable Elizabeth H. Barnes (via email and first-class mail)
Per Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

NOTICE TO PLEAD

Pursuant to 52 Pa. Code § 5.103, you are hereby notified that, if you do not file a written response to the enclosed SUNOCO PIPELINE LP'S MOTION TO STRIKE TESTIMONY SUBMITTED ON THE MERITS BY WEST GOSHEN TOWNSHIP AND REQUEST FOR EXPEDITED RESPONSE within ten (10) days from service of this notice, a decision may be rendered against you. Any Response to the Motion to Strike Testimony must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for Sunoco Pipeline, L.P., and where applicable, the Administrative Law Judge presiding over the issue.

File with:
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Second Floor
Harrisburg, PA 17120

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

SUNOCO PIPELINE LP'S MOTION TO STRIKE TESTIMONY SUBMITTED ON THE MERITS BY WEST GOSHEN TOWNSHIP AND REQUEST FOR EXPEDITED RESPONSE

Pursuant to 52 Pa. Code § 5.103, Sunoco Pipeline LP (SPLP) respectfully request that Your Honor strike portions of West Goshen Township's (WGT) testimony and exhibits, (originally presented at the July 18, 2017 hearing and resubmitted and incorporated by reference in WGT's February 1, 2018 testimony and exhibits) because the testimony and exhibits are inadmissible pursuant to the parole evidence rule and pursuant to 52 Pa. Code § 5.231(d), which protects disclosure of settlement negotiations and communications. SPLP also requests that WGT be ordered to respond to this motion in 10 days so that Your Honor has sufficient time to rule on this matter before hearing scheduled to commence on April 25, 2018. SPLP submits this Motion after its recent receipt of WGT's Surrebuttal Testimony to move to strike for efficiency so that SPLP would not have to file multiple motions to strike in the event WGT included parole evidence or settlement negotiations or discussions evidence in its Surrebuttal.

I. BACKGROUND AND SUMMARY

1. At the July 18, 2017 hearing for an interim emergency injunction, counsel for SPLP made a motion in limine to exclude "all testimony and extrinsic evidence regarding the intent of the settlement agreement." Tr. at 41: 10-13. Your Honor stated:

> ***At this time*, it appears to me from the arguments that I've already heard from counsel even at the prehearing conference, that there may be some ambiguity in the language of the settlement agreement.** Both sides were pointing to the same paragraphs and saying, well, Your Honor, applying the plain language doctrine, it clearly means this or it clearly means that.
>
> So **I'm not going to *at this point* exclude evidence.** However, you may object throughout today's hearing.

Tr. at 44:12-22 (emphasis added). Counsel for SPLP then stated his continuing objection to such evidence, which Your Honor "noted and I suppose overruled ***at this point***." Tr. at 44:22-45:1.

A. Summary of SPLP Argument and Motion:

2. SPLP now moves to strike the testimony to which it objected from this proceeding because it is inadmissible under the parole evidence rule and the Commission's regulations prohibiting admission evidence regarding settlement negotiations and discussions. SPLP understands Your Honor's hesitancy to exclude evidence at the interim emergency injunction stage considering the Commission's regulations requiring a fast track hearing and decision and the presentation of a bench memo that did not allow WGT the time to respond in writing. *See* 52 Pa. Code §§ 3.6a, 3.7.

3. However, it is important to note that the expedited hearing on the issue of issuing an emergency order/injunction or not ***was not a determination on the merits of the case but rather on the narrow issue on whether an emergency order/injunction should be issued***

pending a determination and testing at hearing of merits evidence presented by the parties.[1] Consequently, since rulings on injunctions are not and may not be considered or deemed rulings on the merits of the underlying proceeding under Pennsylvania law,[2] WGT's attempt to introduce such parole evidence and confidential settlement communications as evidence at the merits stage of the proceeding requires a ruling on the merits. The Commission's Rules vest the Presiding Officers with the authority to control the receipt of evidence, including ruling on the admissibility of evidence, 52 Pa. Code § 5.403(a)(1), and directs them to "actively employ these powers to direct and focus the proceedings consistent with due process," *id.* § 5.403(b).

i. Differing interpretations of an Agreement term do not mean the term is ambiguous and subject to extraordinary resort to parole evidence. Instead, the express language of the Agreement must be used and applied.

4. SPLP respectfully submits, for the reasons that follow in this motion, that each party interpreting the same Settlement Agreement language differently ***does not, as a matter of Pennsylvania law, equal ambiguity and allow for the introduction of parole evidence.***[3] It simply means the parties interpret it differently, and the court, here the Commission, must decide and apply ***the express terms*** of the language at issue. Here, the key provision is whether the valve at issue can or cannot be located on the SPLP Use Area ***"due to engineering constraints."*** There is nothing ambiguous about the Settlement Agreement making placement of the valve subject to engineering constraints. Under longstanding Pennsylvania law, a party to a contract

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[1] *Buck Hill Falls Co. v. Clifford Press*, 791 A.2d 392, 397 (Pa. Super. 2002) ("In contrast to a permanent injunction, a decision regarding a preliminary injunction is not binding for purposes of a final adjudication."); *see also Humphreys v. Cain*, 477 A.2d 32, 35 (Pa. Cmwlth. 1984).

[2] *Id.*

[3] *Metzger v. Clifford Realty Corp.*, 476 A.2d 1, 5 (Pa. Super. 1984) ("A contract is not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends; and ***a contract is not rendered ambiguous by the mere fact that the parties do not agree upon the proper construction***.").

has a very steep burden of proving language is so ambiguous that its express language should be disregard and superseded via parole evidence driven interpretation. WGT has plainly failed to carry its burden here.

5. Notably, the testimony which is the subject of this motion is not anything that addresses "engineering constraints" but rather is testimony about what WGT's special utility counsel and its Solicitor each thought or hoped the Agreement to mean. WGT's Township manager similarly offered his wishful interpretation of the Agreement. Engineering constraints means engineering constraints. That is not ambiguous in the Agreement and WGT cannot use the extreme vehicle of parole evidence to bootstrap its ambiguity/parole evidence argument. Instead, this Your Honor and this Commission should do what courts do, which is to apply the express terms of the Agreement relative to whether engineering constraints exist and whether the Agreement contains the reporting or other requirements WGT claims exist. Stated differently, the legal exercise is objective application of the Agreement and not a subjective exercise to re-write it as WGT invites.

6. Frankly, WGT's argument lacks believability. It would have Your Honor and this Commission accept that after an extensive negotiation among SPLP and WGT's special counsel and its Solicitor resulting in an Agreement that WGT's attorneys had negotiated, drafted or edited, that WGT then signed an ambiguous agreement. That is beyond the legal pale. WGT's attempt to write terms out of the contract such as certain actions being subject to "engineering constraints" and to write in reporting and other terms that appear nowhere in the Agreement must be rejected.

7. Additionally, the testimony of the two WGT attorneys and its Manager that this motion seeks to strike violates a fundamental regulation in Commission and legal proceedings that prohibits evidence disclosing settlement negotiation communications and discussions.

8. In sum, WGT's distaste for public utility pipelines, that were certificated by the Commission as necessary and proper to serve the needs of the public, is no justification for its testimony at issue which flouts the parole evidence prohibition rule and disregards non-disclosure of settlement matters. It is little more than a theatrical play to portray SPLP unfairly and to garner sympathy and must be rejected. The Agreement speaks for itself and its terms should applied to the facts regarding engineering constraints and what notifications are expressly required, not terms any party wishfully thinks should be embellished to suit its agenda.

ii. The Parole Evidence Rule & 52 Pa. Code § 5.231(d) bar admission of WGT's Evidence

9. Specifically, SPLP moves to strike the following testimony and exhibits:

WGT Witness	Transcript Cite
Lalonde	58:12-62:23
Lalonde	63:5-14
Camp	154:13 "but"-155:4
Brooman	160:10-167:10
Brooman	169:9-171:25
Brooman	172:7-173:15

WGT Exhibit	Description
Township Exhibit 14	Settlement email and attachments
Township Exhibit 15	Settlement email and attachments
Township Exhibit 16	Settlement email and attachments
Township Exhibit 17	Settlement email and attachments

10. As discussed below, the testimony and exhibits SPLP seeks to strike all pertain to WGT's witnesses' perception of the discussion and negotiations culminating in the Settlement Agreement and how those perceptions inform interpretation of the Settlement Agreement. This is exactly the type of evidence the parole evidence rule bars, unless the Settlement Agreement is first found ambiguous without reference to such parole evidence. The parol evidence rule preserves the integrity of written agreements by precluding extrinsic evidence that contradicts the

final written agreement. *Rose v. Food Fair Stores, Inc.*, 262 A.2d 851 (Pa. 1970). Ambiguity is a necessary question of law that must be definitively decided prior to admission of parole evidence. *Thomas Rigging & Const. Co., Inc. v. Contraves, Inc.*, 798 A.2d 753, 756 (Pa. Super 2002) ("We first analyze the lease to determine whether an ambiguity exists requiring the use of extrinsic evidence."); *see also MCI WorldCom Commc'ns, Inc. v. Pub. Util. Comm'n*, 826 A.2d 919, 924 (Pa. Cmwlth. 2003), *appeal granted on other grounds, cause remanded*, 578 Pa. 166 (2004). Your Honor has not definitively ruled that the Settlement Agreement is ambiguous. Tr. 44:12-15 ("At this time, it appears to me from the arguments that I've already heard from counsel even at the prehearing conference, that there may be some ambiguity in the language of the settlement agreement."). As discussed below, the contract is not ambiguous and plainly speaks for itself as to what is mandatory and what is subject to contingencies.

11. Moreover, even if ambiguity exists (which it does not), ambiguity cannot justify such inadmissible evidence which cannot be permitted where it discloses privileged and inadmissible settlement negotiations. *See* 52 Pa. Code § 5.231(d). That rule is based upon sound policy: it is the Commission's policy under 52 Pa Code § 5.231(a) to "encourage settlements;" and, disclosing settlement negotiation content will discourage settlements as the parties will either not settle or be unwilling to negotiate for fear that these negotiations will be, as here, mischaracterized and used against them. To our knowledge, there has never been a case where this Commission has admitted settlement negotiation content or communication over objection of a party to the settlement. In fact, research only shows that such settlement content has not been allowed into evidence, as discussed below.

12. As discussed below, the Settlement Agreement by its plain terms is not ambiguous and WGT's arguments that is ambiguous rely on parole evidence, which is not admissible for such purpose, i.e. parole evidence cannot be used to make a contract ambiguous. *Preston v. Saucon Valley Sch. Dist.*, 666 A.2d 1120, 1126–27 (Pa. Cmwlth. 1995) ("an ambiguity may be revealed by extrinsic evidence, ***if that extrinsic evidence is not barred by the parole evidence rule***") (emphasis added). Moreover, any ambiguity that may allegedly have existed concerning the location of Valve 344 on the Janiec 2 parcel is now moot. SPLP has represented that it will not locate a valve in the Township, rendering interpretation of the Settlement Agreement regarding whether a valve could be placed on the Janiec 2 parcel unnecessary to resolution of this proceeding.

13. To the extent WGT continues to argue it is asserting fraud in the execution, another exception allowing the admission of parole evidence, the parole evidence itself shows this is not in fact WGT's claim. Fraud in the execution is where "the party proffering the evidence contends that he or she executed the agreement because he or she was defrauded by being led to believe that the document he or she was signing contained ***terms that were actually omitted therefrom.***" *1726 Cherry St. P'ship by 1726 Cherry St. Corp. v. Bell Atl. Properties, Inc.*, 439 Pa. Super. 141, 147 (1995) (emphasis added). This must be distinguished from fraud in the inducement, which is not an exception to the parole evidence rule. Fraud in the inducement is where "the party proffering evidence of additional prior representations does not contend that the parties agreed that the additional representations would be in the written agreement, but rather claims that the representations were fraudulently made and that but for them, he or she never would have entered into the agreement." *Id.*

14. WGT's wrongly interpreted and applied fraud argument is that WGT, represented by competent attorneys, was allegedly led to believe that Section II. of the Settlement Agreement, labeled "Pertinent Information Provided by SPLP" and beginning with "SPLP has provided WGT and WGT's consulting expert with the following information," Settlement Agreement at 2, actually contained covenants, when the parties' covenants were clearly contained in Section IV., labeled "The Parties' Promises, Covenants and Agreements" and begins with "Based on the SPLP Information recited in Section II of this Agreement, the Parties agree to make the following promises, covenants and agreements." This is not fraud in the execution, which would be a scenario where SPLP represented a term was contained in the Settlement Agreement that was actually omitted. The Settlement Agreement does contain the information WGT alleges SPLP said would be construed as a covenant. Instead, WGT is actually claiming that SPLP allegedly told WGT that even though the terms were included as information, not binding covenants, SPLP allegedly would interpret them as covenants. This is not a fraud in the execution, but instead a meritless fraud in the inducement claim.[4]

15. Moreover, given that WGT is now attempting to use its testimony and certain exhibits from the preliminary injunction hearing as its direct testimony on the merits of the proceeding, SPLP objects to admission of the testimony because it violates 52 Pa. Code §

[4] *See 1726 Cherry St. P'ship by 1726 Cherry St. Corp. v. Bell Atl. Properties, Inc.*, 439 Pa. Super. 141, 153 (1995) (discussing *Iron Worker's Sav. & Loan Ass'n v. IWS, Inc.*, 424 Pa.Super. 255, 622 A.2d 367 (1993)) ("a panel of this court enforced the written terms of a promissory note against the debtor despite the debtor's allegation that the creditor had orally and fraudulently assured the debtor that the written terms of the note would not be enforced"); *Iron Workers*, 622 A.2d at 372-373 ("Second, we must consider whether Iron Worker's fraudulently induced Eagleview to execute the mortgage note by misrepresenting that it would extend the term of the loan. Eagleview argues that representatives of Iron Worker's assured him that it would extend the term of the loan to two years and that the eighteen month term was necessary to comply with federal banking regulations. . . . Instantly, Eagleview alleges fraud in the inducement, not execution. Simply put, a party cannot justifiably rely upon prior oral representations, yet sign a contract denying the existence of those representations. Eagleview executed the mortgage note with the knowledge that the note mandated a eighteen month repayment period. It cannot now allege that Iron Worker's assured Eagleview that the note did not mean what it said. This is precisely the type of claim that the parol evidence rule was designed to bar. If Eagleview relied on the alleged representation of a two year loan term, then it should have protected itself by incorporating the two year loan term into the mortgage note. Eagleview, having failed to include the two year loan term in the mortgage note between itself and Iron Worker's, is bound by its precise terms.") (internal citations and quotations omitted).

5.231(d), which prevents admission of settlement discussions and negotiations. *See Mari Jo Jensen*, Pa. PUC Docket No. F-2011-2270675, 2012 WL 6706639, at *1, n.1 (order entered Dec. 20, 2012) ("Those portions of the Complainant's statement of facts and requested relief that refer to offers of settlement made by PECO to the Complainant during settlement discussions have been omitted pursuant to 52 Pa. Code § 5.231(d), which provides that '[o]ffers of settlement, of adjustment, or of procedure to be followed, and proposed stipulations not agreed to by every party, including proposals intended to resolve discovery disputes, will not be admissible in evidence against a counsel or party claiming the privilege.'").

II. ARGUMENT

A. Parole Evidence is Inadmissible and Should be Stricken

16. "While the [Public Utility Commission] as an administrative agency having quasi-judicial functions is not limited by the strict rules relating to the admissibility or exclusion of evidence and actions at law, the essential principles should be observed." *Pittsburgh and Lake Erie Railroad Company v. Pennsylvania Public Utility Commission*, 85 A.2d 646, 653 (Pa. Super. Ct. 1952). Accordingly, while not strictly bound by the rules of evidence, the essential principles thereof can be relied upon in proceedings before the Commission. *Bleilevens v. Commonwealth State Civil Service Commission*, 312 A.2d 109, 111 (Pa. Cmwlth. 1973).

17. The Commonwealth Court has held the parole evidence rule applicable to Commission proceedings, stating: "[T]he initial question is a legal one-whether the language [in the agreement] is ambiguous. If it is clear, it is a question of law. If it is ambiguous, however, what the agreement means is determined by the surrounding facts and circumstances and that is a decision for the trier of fact." *MCI WorldCom Commc'ns, Inc. v. Pub. Util. Comm'n*, 826 A.2d 919, 924 (Pa. Cmwlth. 2003).

18. "The parol evidence rule preserves the integrity of written agreements by precluding extrinsic evidence that contradicts the final written agreement." *Rose v. Food Fair Stores, Inc.*, 262 A.2d 851 (Pa. 1970). "Put differently, the law views written agreements to not only be the best, but the only evidence of the agreement and therefore, absent ambiguity, fraud, or mistake, parol (extrinsic) evidence is excluded." *LeDonne v. Kessler*, 389 A.2d 1123 (Pa. Super. 1978).

19. WGT has argued two exceptions to the parole evidence rule apply here. First, WGT incorrectly argued the Settlement Agreement is ambiguous. It is not, and this bootstrap attempt of saying it is ambiguous based on parole evidence, subjective beliefs, or subjective characterizations of intentions, does not make it so. Second, WGT, argued it is claiming fraud in the execution, but that is not truly WGT's claim. Neither of these exceptions apply and the parole evidence is therefore inadmissible and should be stricken.

i. <u>The Settlement Agreement is Not Ambiguous</u>

20. Regarding the ambiguity exception, the Commonwealth Court has explained:

> The intention of the parties is the paramount consideration in contract interpretation. This intention may be ascertained from the document itself when the terms are clear and unambiguous. ***A contract is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense.*** Where an ambiguity exists, parole evidence is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is created by the language of the instrument or by extrinsic or collateral circumstances. Thus, ***if a contract is not patently ambiguous, an ambiguity may be revealed by extrinsic evidence, if that extrinsic evidence is not barred by the parole evidence rule***, and once this ambiguity is revealed, parole evidence regarding the intent of the parties is admissible.
>
> . . .
>
> The determination of whether a contract provision is ambiguous is a question of law resolved by the court, while resolution of

> conflicting parole evidence, as to what was intended by the parties relevant to the ambiguous provision, is for the trier of fact.

Preston v. Saucon Valley Sch. Dist., 666 A.2d 1120, 1126–27 (Pa. Cmwlth. 1995) (internal citations and quotations omitted).

21. When a contract's meaning can be ascertained from the document itself and knowledge of simple facts surrounding the contract, then it is not ambiguous and thus parol evidence is not admissible. *Metzger v. Clifford Realty Corp.*, 476 A.2d 1, 5 (Pa. Super. 1984). Further, a contract is not ambiguous simply because the parties do not agree on its construction. *Id.* It is a question of law to determine whether the contract contains ambiguous language. *Id.*

22. Here, the plain terms of the Settlement Agreement are unambiguous. Section II. of the Settlement Agreement, is labeled "Pertinent Information Provided by SPLP" and begins with "SPLP has provided WGT and WGT's consulting expert with the following information." Settlement Agreement at 2. Section IV., is labeled "The Parties' Promises, Covenants and Agreements" and begin with "Based on the SPLP Information recited in Section II of this Agreement, the Parties agree to make the following promises, covenants and agreements." Settlement Agreement at 5.

23. Thus, there is one covenant relevant to WGT's Complaint, contained in Section IV.A.1.a., which states:

> Because of its existing Pump Station Facility at Boot Road, ***except with respect to the SPLP Use Area***, SPLP covenants and agrees that it ***shall*** not construct or install any pump stations, VCUs ***or above-ground permanent public utility facilities on the SPLP Additional Acreage*** for any phase of the Mariner East Project. SPLP also agrees that, except for the SPLP Use Area, any use of the SPLP Additional Acreage for staging construction, laydown or other operational activity will be temporary, and SPLP will restore the surface to its former condition following the completion of such activity. SPLP will execute and record a deed restriction reflecting this limitation within sixty (60) days of the Effective

> Date of this Agreement, in a form substantially similar to the Form of Dated Restriction attached hereto as Appendix 4. SPLP will provide copies of the recorded deed restriction to counsel for WGT and CCWGT within five business days of the date of recording.

This provision shows SPLP's binding agreement that it ***shall*** not place above ground facilities (including Valve 344) on the SPLP Additional Acreage. The SPLP Additional Acreage has a specific meaning, which is the Janiec parcel described on page 3 of the Settlement Agreement as parcel number 52-0-10-10.1, referred to in this proceeding as Janiec 1. WGT's Amended Complaint alleges SPLP proposed to install the valve on parcel number 52-3-60, known as Janiec 2, which is ***not*** the SPLP Additional Acreage. Amended Complaint at 17. SPLP did not even have property rights to Janiec 2[5] at the time it signed the Settlement Agreement. There is no ambiguity as to what SPLP promised WGT under the plain terms of the contract regarding the location of the valve.

24. As to notice of engineering constraints, the Settlement Agreement is likewise unambiguous. There is no binding promise that SPLP will provide any specific type of notice within any specific time frame regarding location of the valve. *See* Settlement Agreement at Section IV.A.1.

25. Section II. of the Settlement Agreement is likewise unambiguous contrary to WGT's claim. There, SPLP provided the following information:

> The pump station, the vcu and all accessory and appurtenant above-ground facilities associated with all phases of the Mariner East Project will be maintained within the present active site, Parcel No. 52- 1-8-U, on which the existing Boot Road Pump Station currently operates (the "SPLP Existing Site"), except that a remote operated valve station will be constructed and maintained on SPLP's adjacent 4.42 acre property, Parcel No. 52-0-10-10.1, also known as the former Janice Tract, (the "SPLP Additional Acreage"). The proposed location of such valve station on the

[5] Moreover, the subsequent issue of placement of a Valve on Janiec 2 is moot.

> SPLP Additional Acreage is depicted on the map attached hereto as Appendix 1 and incorporated by reference (the "SPLP Use Area"). ***Subject to any engineering constraints, SPLP intends to construct the valve station in the general area depicted on the map attached hereto as Appendix 1. If due to engineering constraints, SPLP is unable to construct the valve station in the SPLP Use Area, SPLP will notify WGT.*** Nothing in this Settlement Agreement constitutes an authorization or agreement for SPLP to construct the valve station in any location on the SPLP Additional Acreage other than in the SPLP Use Area.
>
> As of the date of execution of this Agreement, SPLP has no plan or intention to construct any additional above-ground permanent utility facilities in WGT except as otherwise expressly set forth in this Agreement.

26. Settlement Agreement at II.A.2.-3 (emphasis added). This information indicates SPLP's intent to place the valve on the SPLP Use Area, subject to engineering constraints and that it had no intent as of the date of the Settlement Agreement to place a valve elsewhere in the Township. It also indicates SPLP will notify WGT. There is no ambiguity here. There is no requirement that SPLP place a valve at any specific location in WGT. What the witnesses at issue, legal or otherwise, thought or hoped or interpreted to suit their wishes, is irrelevant and inadmissible. The language of the Agreement speaks for itself and must be applied pursuant to its express terms not wishful terms by those offering parole evidence. *Preston v. Saucon supra* (if a term is not ambiguous then resort to parole evidence is barred). There is no requirement that SPLP provide any specific type of notice or documents within any time frame. This is what the parties agreed and parole evidence cannot be introduced to alter these unambiguous terms or make these terms ambiguous and subject to amendment to suit WGT's fancy and agenda regarding the pipelines.

27. WGT attempts to create ambiguity by relying on parole evidence, and that bootstrap attempt is highly improper. The document must be read according to its plain terms, and not with self-serving subjective interpretations. What is says is not ambiguous. Relying on

parole evidence to create ambiguity is placing the cart before the horse. It is not a permissible way to find ambiguity as a matter of law, and is not an admissible use of parole evidence. Circumstances outside the plain terms of the contract (extrinsic evidence) can create ambiguity, ***but that extrinsic evidence cannot be parole evidence.*** *Preston v. Saucon Valley Sch. Dist.*, 666 A.2d 1120, 1126–27 (Pa. Cmwlth. 1995) ("Where an ambiguity exists, parole evidence is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is created by the language of the instrument or by extrinsic or collateral circumstances. Thus, ***if a contract is not patently ambiguous, an ambiguity may be revealed by extrinsic evidence, if that extrinsic evidence is not barred by the parole evidence rule***") (emphasis added).

28. For example, Mr. Lalonde represented various "promises" he claims that SPLP made during settlement negotiations regarding the location of the valve, *e.g.* Tr. at 58:12-16 (stating SPLP never indicated possibility of valve on Janiec 2), 59:18-60:5 (stating SPLP said valve station would be on existing foot print of pump station), and then says those "promises" appear in Section II.A.1, the background information section. *E.g.* Tr. at 60:18-61:4 (in response to question "Was it your understanding that the promises about the location of the facilities by Sunoco was contained in this agreement" Mr. Lalonde stated "yes" and said Section II.A.1 contained such promises), 61:15-20 (same), 61:24-62:3 (same), 62:8-9 (answering he considered Section II.A.1 to be promises because they were the promises made leading up to the execution of the contract). Again, what is relevant is what the Settlement Agreement (which was reviewed and presumably approved and recommended for signature by WGT by its Solicitor and attorneys) says, not what Mr. Lalonde understood or wished it to say.

29. Mr. Lalonde goes on to introduce parole evidence in the same way regarding the engineering constraints and notification, stating that "If there were engineering constraints, they would have to notify us, bring it to our attention, and the would use -- if they had to extend you

know, 50 feet, 100 feet into the remaining acreage, they would notify us, we would discuss it, and we'd go from there." Tr. 62:13-23. This is not a promise or concept contained in the contract, but instead Mr. Lalonde's understanding based allegedly on oral representation from SPLP during settlement negotiations. Mr. Lalonde's alternate "interpretations," based not on the clear terms of the contract, but instead on these alleged oral representations alleged settlement discussions, is not an interpretation that can or does create ambiguity in the contract that would allow admission of parol evidence. It is parole evidence contrary to the plain terms of the contract and is not admissible.

30. WGT Solicitor Ms. Camp likewise submitted parol evidence testimony concerning engineering constraints and notice when she stated, in response to the question "Can you point me to any language in this settlement agreement that requires Sunoco to provide the engineering documents to the township in connection with those constraints" that there was no section of the agreement, but based on the relationship between the parties established prior to the Settlement Agreement and her understanding SPLP would "strike a conversation and notification to the township." Again, this is contrary to the plain terms of the Settlement Agreement because the Settlement Agreement has no such provision and it is inadmissible parole evidence. This parole evidence cannot be the basis for finding ambiguity in the Settlement Agreement. It is the very cart before the horse misuse of the applicable legal doctrine that the Ccourts forbid: where parole evidence is offered to create ambiguity. Such use is barred. *Preston v. Saucon, supra.*

31. Mr. Brooman's testimony is the most egregious use of parole evidence, introducing preliminary term sheets that he admitted were not the final agreement between the parties and associated communications (Township Exhibits 14-17), and then explaining surrounding discussions and what the term sheets meant to him. For example, he alleges that the

parties discussed during negotiations that the factual information contained in Section II was always meant by the parties to be some sort of secret covenant and thus Section II should be interpreted as SPLP covenants. Tr. at 161:19-163:13. Mr. Brooman likewise used Township Exhibit 17 to bootstrap his interpretation of the Settlement Agreement that if the valve site moved, it would only move within the SPLP Use Area. Tr.172:7-173:15. The trouble with his testimony, is that the Agreement does not say what he wishes it to say if one looks at its express language. Again, this is extrinsic evidence of alleged representations contrary to the plain and unambiguous terms of the Settlement Agreement – the exact definition of parol evidence. It cannot be used to bootstrap interpretation of the Settlement Agreement to make the Settlement Agreement ambiguous and is clearly inadmissible.

32. The Settlement Agreement is not ambiguous. WGT cannot improperly use parole evidence to create ambiguity because parol evidence is only admissible once a contract has been found to be ambiguous. This parol evidence should be stricken.

iii. <u>WGT is not alleging Fraud in the Execution</u>

33. Regarding the fraud exception, parole evidence is admissible for an allegation of fraud in the execution, but not fraud in the inducement. *1726 Cherry St. P'ship by 1726 Cherry St. Corp. v. Bell Atl. Properties, Inc.*, 439 Pa. Super. 141, 147 (1995). Fraud in the execution is where "the party proffering the evidence contends that he or she executed the agreement because he or she was defrauded by being led to believe that the document he or she was signing contained terms that were actually omitted therefrom." *Id.* In contrast, fraud in the inducement is where "the party proffering evidence of additional prior representations does not contend that the parties agreed that the additional representations would be in the written agreement, but rather claims that the representations were fraudulently made and that but for them, he or she never would have entered into the agreement." *Id.*

34. WGT's fraud argument is that WGT, represented by competent attorneys, was allegedly led to believe that Section II. of the Settlement Agreement, labeled "Pertinent Information Provided by SPLP" and beginning with "SPLP has provided WGT and WGT's consulting expert with the following information," Settlement Agreement at 2, actually contained covenants, when the parties' covenants were clearly contained in Section IV., labeled "The Parties' Promises, Covenants and Agreements" and begins with "Based on the SPLP Information recited in Section II of this Agreement, the Parties agree to make the following promises, covenants and agreements."

35. Counsel for WGT argued, "to the extent that these are now being considered mere background facts as opposed to covenants, this is fraud in the execution because the agreement was that these were our promises to you. We're going to call them facts. Now we have an executed contract that sets them forth. Their written as promises in the contract. They're just not under the promises section, and now they're saying that they're not covenants that we have to rely upon." Tr. at 43:15-16. The alleged "agreement" counsel was referring to is not an "agreement" but was a pre-contractual settlement discussion about how an eventual Settlement Agreement might be ***interpreted*** based on settlement discussions at that time but, importantly, it does not and cannot speak to the terms the Settlement Agreement as that document actually evolved into a final Agreement.

36. WGT's argument is an attempt to create a (a meritless) fraud in the inducement claim,[6] not fraud in the execution. Fraud in the inducement is not subject to use of parole evidence in interpreting a contract, and even if it was, there was no fraud in the inducement as WGT and its representatives had repeated opportunities to review and edit the express terms of

[6] This WGT argument would have the Commission believe that WGT and its counsel did not review the Agreement when finalized for suitability and signed it anyway regardless of what it expressly provided.

the Agreement before signing it. *See 1726 Cherry St. P'ship by 1726 Cherry St. Corp. v. Bell Atl. Properties, Inc.*, 439 Pa. Super. 141, 153 (1995) (discussing *Iron Worker's Sav. & Loan Ass'n v. IWS, Inc.*, 424 Pa.Super. 255, 622 A.2d 367 (1993)) ("a panel of this court enforced the written terms of a promissory note against the debtor despite the debtor's allegation that the creditor had orally and fraudulently assured the debtor that the written terms of the note would not be enforced").

37. Fraud in the execution would be a scenario where SPLP represented that a term was contained in the Settlement Agreement that was actually omitted. The parole evidence by Mr. Brooman's testimony actually refutes any fraud in the execution, where he explained that originally there were certain covenants, but SPLP would not accept those covenants and instead was only willing to agree to providing WGT with certain information. *See* Settlement Agreement at II. ("Pertinent Information Provided by SPLP"). The parties legally agreed to the actual factual information and actual covenants in the Settlement Agreement. WGT was not under the impression that actual covenants would appear in the terms of the Settlement Agreement. *See* Tr. at 162:12-18. The Settlement Agreement does contain the information WGT alleges SPLP said would be construed as a covenant. That information is not omitted; it is contained as a factual representation, not a covenant as a review of the covenants clearly indicates. *See* Settlement Agreement at Section IV. ("The Parties' Promises, Covenants and Agreements").

38. WGT is not alleging that it thought terms were stated in the Settlement Agreement, but that those terms actually were omitted. WGT is claiming that SPLP allegedly told WGT that even though the terms were included as information, not binding covenants, SPLP allegedly would interpret them as covenants. This is not a fraud in the execution claim, but instead a meritless fraud in the inducement claim. *Iron Workers*, 622 A.2d at 372-373 ("Second,

we must consider whether Iron Worker's fraudulently induced Eagleview to execute the mortgage note by misrepresenting that it would extend the term of the loan. Eagleview argues that representatives of Iron Worker's assured him that it would extend the term of the loan to two years and that the eighteen month term was necessary to comply with federal banking regulations. . . . Instantly, Eagleview alleges fraud in the inducement, not execution. Simply put, a party cannot justifiably rely upon prior oral representations, yet sign a contract denying the existence of those representations. Eagleview executed the mortgage note with the knowledge that the note mandated a eighteen month repayment period. It cannot now allege that Iron Worker's assured Eagleview that the note did not mean what it said. This is precisely the type of claim that the parol evidence rule was designed to bar. If Eagleview relied on the alleged representation of a two year loan term, then it should have protected itself by incorporating the two year loan term into the mortgage note. Eagleview, having failed to include the two-year loan term in the mortgage note between itself and Iron Worker's, is bound by its precise terms.") (internal citations and quotations omitted).

39. WGT's claim is fraud in the inducement (which is meritless), and fraud in the inducement is ***not*** an exception to the parol evidence rule. Accordingly, the parol evidence should be stricken.

B. <u>The Parole Evidence is Also Inadmissible Regarding Settlement Negotiations and Discussions</u>

40. 52 Pa. Code § 5.231 encourages settlements, and in doing so, prohibits the admission of settlement discussions and negotiations:

> (a) It is the policy of the Commission to encourage settlements.
>
> . . .

> (d) Offers of settlement, of adjustment, or of procedure to be followed, and proposed stipulations not agreed to by every party, including proposals intended to resolve discovery disputes, will not be admissible in evidence against a counsel or party claiming the privilege.

Id. *Mari Jo Jensen*, Docket No. F-2011-2270675, 2012 WL 6706639, at *1, n.1 (order entered Dec. 20, 2012) ("Those portions of the Complainant's statement of facts and requested relief that refer to offers of settlement made by PECO to the Complainant during settlement discussions have been omitted pursuant to 52 Pa. Code § 5.231(d)"); *Joseph Black*, Docket No. C-20030069, 2006 WL 6609318, at *2–3 (order entered Jan. 27, 2006) ("The Complainant sought to offer into evidence his discussion with the Respondent, wherein the Respondent offered to bury the electrical lines underground as a solution to the Complainant's concerns. When the Respondent objected to this testimony, the ALJ sustained the Respondent's objections in support of their claim of privilege for proposals of settlement not agreed to among the parties. Consequently, the Complainant could not offer into evidence any matters discussed during the informal meeting. After reviewing the facts and the law on this issue, we agree with the ALJ's decision to sustain Respondent's objection of the privileged nature of the proposals of settlement.").

41. The inadmissibility of evidence and communications regarding settlement negotiations and discussion is key to the policy of encouraging settlement because settlements require parties to be willing to talk openly. Parties will not be willing to engage in such discourse if they know their communications and term sheets can later be used against them in court. The fact is positions change and concessions are offered without admission and should not and cannot be used against a party as that would discourage settlements. What matters is what the Settlement Agreement says, not the to and fro and on the table off the table discussions on the issues.

42. This is especially true of Township Exhibits 14-17. Notably, each of the parties took the time and were careful to brand and indicate that these were confidential settlement communications, evidencing their assertion of this protections. The documents are labeled: "CONFIDENTIAL SETTLEMENT OFFER" (Township Exhibit 14 at 1, email transmittal); SETTLEMENT DOCUMENT PRIVILEGED AND CONFIDENTIAL (Township Exhibit 14, 15, 16 at 2, Term Sheet); "For settlement purposes only" (Township Exhibit 16 and 17 at 1, transmittal email). Disclosing settlement negotiation content will discourage settlements as the parties will either not settle or be unwilling to negotiate for fear that these negotiations will be, as here, mischaracterized and used against them to unwind an Agreement or to amend it based on parole evidence that is not only subjective, but can change as it predates the Agreement. To our knowledge, there has never been a case where this Commission has admitted settlement negotiation content or communication over objection of a party to the settlement.

43. Those emails and term sheets do not represent the final agreement of the parties, which is evidence in the Settlement Agreement itself, but instead confidential settlement communications that are inadmissible under the Commission's own regulations. Indeed, WGT's counsel who offered parole evidence conceded that there is a difference between a term sheet for purposes of settlement negotiations and a final Agreement.[7] The same is true of the testimony discussing the settlement negotiations and how those negotiations informed the witnesses understanding of the Settlement Agreement discussed above. Accordingly, this evidence should likewise be stricken as inadmissible under 52 Pa. Code § 5.231.

[7] Tr. at 169:3-8.

III. CONCLUSION

WHEREFORE, SPLP respectfully requests Your Honor Strike from the record the following testimony and exhibits on the grounds discussed above. SPLP also requests that WGT be directed to file an answer within 10 days.

WGT Witness	Transcript Cite
Lalonde	58:12-62:23
Lalonde	63:5-14
Camp	154:13 "but"-155:4
Brooman	160:10-167:10
Brooman	169:9-171:25
Brooman	172:7-173:15

WGT Exhibit	Description
Township Exhibit 14	Settlement email and attachments
Township Exhibit 15	Settlement email and attachments
Township Exhibit 16	Settlement email and attachments
Township Exhibit 17	Settlement email and attachments

Respectfully submitted,

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DATED: April 11, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party). This document has been filed electronically on the Commission's electronic filing system.

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