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May 21, 2018

VIA ELECTRONIC FILING

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

Re: Pennsylvania State Senator Andrew E. Dinniman v. Sunoco Pipeline L.P.; Docket No. C-2018-3001451; P-2018-3001453; **SUNOCO PIPELINE L.P.'S PRELIMINARY OBJECTIONS TO THE AMENDED COMPLAINT OF SENATOR ANDREW E. DINNIMAN**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is Sunoco Pipeline L.P.'s Preliminary Objections to the Amended Complaint of Senator Andrew E. Dinniman in the above-referenced proceeding.

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.

WES/das
Enclosure
cc: Per Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA STATE SENATOR ANDREW E. DINNIMAN,	:	
Complainant,	:	
v.	:	Docket No. C-2018-3001451 P-2018-3001453
SUNOCO PIPELINE L.P.,	:	
Respondent.	:	

NOTICE TO PLEAD

You are hereby advised that, pursuant to 52 Pa. Code § 5.61, you may file a response within ten (10) days of the attached preliminary objections. Any response 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

Respectfully submitted,

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Dated: May 21, 2018

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA STATE SENATOR ANDREW E. DINNIMAN,	:	
Complainant,	:	
v.	:	Docket No. C-2018-3001451 P-2018-3001453
SUNOCO PIPELINE L.P.,	:	
Respondent.	:	

PRELIMINARY OBJECTIONS OF SUNOCO PIPELINE L.P.
TO THE AMENDED COMPLAINT OF SENATOR ANDREW E. DINNIMAN

Pursuant to 52 Pa. Code § 5.101, Sunoco Pipeline L.P. (SPLP) submits these Preliminary Objections to Senator Dinniman's April 30, 2018 Amended Complaint (Complaint) in the above captioned proceeding and requests the Complaint be dismissed.

I. INTRODUCTION

1. The Complaint should be dismissed in its entirety pursuant to 52 Pa. Code § 5.101(a)(7) because Sen. Dinniman lacks standing to bring the Complaint. Sen. Dinniman has admitted that he is bringing the Complaint solely in his official capacity as a state legislator. Brief of Petitioner in Support of Amended Petition for Interim Emergency Relief, at 20 (filed May 16, 2018). It is clear and free from doubt that Sen. Dinniman does not have standing in such capacity because none of the issues he raises in his complaint are of the type that interfere with his mandatory legislative duties, i.e. voting on legislation.

2. The Complaint should likewise be dismissed in its entirety pursuant to 52 Pa. Code § 5.101(a)(5) because Sen. Dinniman has failed to join necessary parties that will be directly adversely affected if the relief requested is granted, including SPLP's current and future shippers such as Range Resources, royalty owners who will lose their payments if the petroleum products from their land is shut in because it cannot be delivered due to enjoining operation/constructions of the Mariner East pipelines, and the business that rely on deliveries or future deliveries from the Mariner East pipelines, such as the Marcus Hook Industrial Plant.

3. Counts II – V of the Complaint should be dismissed pursuant to 52 Pa. Code § 5.101(a)(4) because they are each legally insufficient.

a. Count II is legally insufficient because the Senator seeks relief that is illegal pursuant to Public Utility Confidential Security Information Disclosure Protection Act, 35 P.S. §§ 2141.1 et seq., because he seeks disclosure of SPLP's integrity management plan and risk assessment. Moreover, there is no legal or regulatory requirement that SPLP disclose these documents, and therefore the Senator has failed to allege any violation of law or regulation for which relief could be granted. Accordingly, it is clear and free from doubt that SPLP cannot be required to release these documents and has not violated any law or regulation by not releasing these documents.

b. Count III is legally insufficient because SPLP has not violated any law or regulation in choosing the route of its ME2/ME2X pipelines because no law or regulation prohibits SPLP from locating these pipelines within 50 feet of a dwelling; therefore, the Senator has failed to allege any violation of law or regulation for which relief could be granted. Moreover, any such claim is barred by the doctrine of laches. It was publicly known since at least 2014 that the ME2/ME2X pipelines would be

constructed in the existing right of way for the ME1 pipeline, i.e. the Senator knew or should have known of the circumstances giving rise to the allegations averred in Count III over 4 years ago. Yet the Senator did not bring his claim until 2018, after SPLP has already begun and completed 98% of the construction of the ME2 pipeline. Any change to the location of the route of the pipelines at this point is extremely prejudicial to SPLP. Accordingly, it is clear and free from doubt that SPLP has not violated any regulation with respect to the chosen route of the ME2/ME2X pipelines and that laches bars any challenge thereto.

c. Count IV is legally insufficient because there is no applicable regulation governing the depth requirement of the ME1 pipeline because the pipeline was built prior to the Pipeline and Hazardous Materials Safety Administration (PHMSA) depth regulations, which do not have retroactive effect. Accordingly, it is clear and free from doubt that SPLP has not violated any regulation with respect to the depth of the ME1 pipeline.

d. Count V is legally insufficient because the Commission and the Commonwealth Court have repeatedly ruled that SPLP is a public utility. SPLP continues to hold itself out to provide intrastate transportation of petroleum products and thus there can be no argument that SPLP is not a public utility. Importantly, any argument that SPLP is not a public utility because of the type of product it ships (propane, ethane, butane) has been conclusively rejected. Any argument that SPLP is not a public utility because it only serves shippers, and not individual retail customers, has been conclusively rejected. Any argument that SPLP is not a public utility because it uses its pipelines for both intra and interstate service, and may use the pipelines for greater volumes of interstate service has been conclusively rejected. *See Petitions of Sunoco*

Pipeline L.P. for findings that buildings to shelter utility facilities are reasonably necessary for the convenience or welfare of the public, Docket Nos. P-2014-2411941 *et al.*, at 25, 36-38 (Order entered Oct. 2, 2014).

II. ARGUMENT

A. Legal Standard

4. The Commission's regulations allow a respondent to file preliminary objections to a complaint. 52 Pa. Code § 5.101. Preliminary motion practice before the Commission is similar to that utilized in Pennsylvania civil practice. *Equitable Small Transportation Interveners v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, PUC Docket No. C-00935435 (July 18, 1994) (citing Pa. R.C.P 1017). A preliminary objection in civil practice seeking dismissal of a pleading will be granted where relief is clearly warranted and free from doubt. *Interstate Traveller Services, Inc. v. Pa. Dept. of Environmental Resources*, 406 A.2d 1020 (Pa. 1979).

5. In determining whether to sustain preliminary objections, all well-pleaded material, factual averments and all inferences fairly deducible therefrom are presumed to be true. *Marks v. Nationwide Ins. Co.*, 762 A.2d 1098, 1099 (Pa. Super. Ct. 2000), *appeal denied*, 788 A.2d 381 (Pa. 2001). The pleaders' conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinion should not be considered to be admitted as true. *Id.* The preliminary objections should be sustained if, based on the facts averred by the plaintiff, the law says with certainty that no recovery is possible. *Soto v. Nabisco, Inc.*, 32 A.3d 787, 790 (Pa. Super. Ct. 2011), *appeal denied*, 50 A.3d 126 (Pa. 2012).

B. Preliminary Objection 1: The Senator Does Not Have Standing

6. Pursuant to 52 Pa. Code § 5.101(a)(7), the entire Complaint should be dismissed because the law is clear and free from doubt that the Senator does not have standing to bring it.

7. The Public Utility Code and controlling precedent make clear that a Complainant ***must*** have a direct, substantial, and immediate interest.

> [A]ny person, corporation, or municipal corporation having an interest in the subject matter, or any public utility concerned, may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the [PUC] has jurisdiction to administer, or of any regulation or order of the [PUC].

66 Pa.C.S. § 701. To bring a formal complaint under Section 701 (i.e. to have "an interest"), Complainant "must have a direct, immediate and substantial interest." *See, e.g.*, *Mun. Auth. of Borough of West View v. PUC*, 41 A.3d 929, 933 (Pa. Commw. Ct. 2012) ("In order to have standing to pursue a formal complaint before the PUC under Section 701 of the Code, the complainant '***must have a direct, immediate, and substantial interest*** in the subject matter of the controversy.'") (emphasis added) (quoting *Waddington v. PUC*, 670 A.2d 199, 202 (Pa. Commw. Ct. 1995)); *Hatchigan v. PECO*, Dkt. No. C-2015-2477331 2016 WL 3997201, at * 6 (Order entered Jul. 21, 2016) ("In order to have standing to pursue a formal complaint before the Commission under Section 701, the complainant ***must have a direct, immediate, and substantial interest in the subject matter of the controversy***.").

8. The Senator has admitted he is solely bringing the Complaint in his official capacity. Brief of Petitioner in Support of Amended Petition for Interim Emergency Relief, at 20 (filed May 16, 2018).

9. General Assembly members have standing in their official capacity to challenge governmental action only if it interferes with or impairs the legislator's official power or authority to act as a legislator. Those circumstances are not present, where, as here, the Senator's allegations relate to the PUC's or DEP's application of ***existing law*** or SPLP's alleged actions regarding ***existing law***, as opposed to his ability to complete legislative duties. The Supreme Court's most recent statement on legislative standing makes clear that legislative standing is extremely limited, and not applicable here:

> What emanates from our Commonwealth's caselaw, and the analogous federal caselaw, is that ***legislative standing is appropriate only in limited circumstances***. Standing exists only when a legislator's direct and substantial interest in his or her ability to participate in the voting process is negatively impacted, or when he or she has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator, (finding standing due to alleged usurpation of legislators' authority to vote on licensing). ***These are injuries personal to the legislator, as a legislator.*** By contrast, ***a legislator lacks standing where he or she has an indirect and less substantial interest in conduct outside the legislative forum which is unrelated to the voting or approval process, and akin to a general grievance about the correctness of governmental conduct, resulting in the standing requirement being unsatisfied.***

Markham v. Wolf, 136 A.3d 134, 145 (Pa. 2016) (citing *Fumo v. City of Philadelphia*, 972 A.2d 487, 502 (Pa. 2009)) (emphasis added).

10. The Court in *Markham* explained that limiting legislative standing is required, or a legislator would essentially be allowed to bring a case whenever he or she wanted to challenge compliance with the law:

> Indeed, taking the unprecedented step of allowing legislators standing to intervene in, or be a party to, any matter in which it is alleged that government action is inconsistent with existing legislation would entitle legislators to challenge virtually every interpretive executive order or action **(or inaction)**. Similarly, it would seemingly permit legislators to join in any litigation in

> which a court might interpret statutory language in a manner purportedly inconsistent with legislative intent.

(emphasis added). *Markham v. Wolf*, 136 A.3d at 145.

11. Importantly, the Commission itself has asserted and prevailed on the argument that a legislator did not have legislative standing to pursue a claim on the behalf of other ratepayers or his constituents. *George v. PUC*, 735 A.2d 1282 (Pa. Commw. Ct. 1999).

12. Sen. Dinniman has not shown and cannot show any interference or impairment of his legislative duties or functions. To support his standing in his official capacity, Sen. Dinniman alleges five irrelevant aspects about himself, as he did in *Artesian*: (i) as a member of the standing Senate Environmental Resources and Energy Committee; (ii) a member of the Joint Legislative Air and Water Pollution Control and Conservation Committee; (iii) as a member of the General Assembly with the authority to receive, review and comment upon the Governor's annual expenditure plan for the Environmental Stewardship Fund under 27 Pa.C.S. § 6104; (iv) as a member of the Pennsylvania Pipeline Infrastructure Task Force; and (v) as the representative of the individuals in the 19th District which includes the area of West Whiteland Township affected by the Project. Complaint at 13; *see also* Tr. at 56:7-57:4.

13. None of these alleged bases for standing falls within the legislative functions *Markham* discusses. More importantly, Sen. Dinniman does not allege how his right to vote or other mandatory legislative functions are or even could be interfered with or impaired by SPLP or any Commission action in this proceeding. Instead, the Senator is trying to bring a claim on behalf of West Whiteland Township residents to challenge SPLP's, the Commission's, and DEP's actions or inaction under existing law. *See e.g.*, Tr. at 173:4-174:18. The Senator's interest is not legislative in nature (i.e. to protect or allow him the ability to vote on law) and

does not grant him standing. In fact, Sen. Dinniman testified expressly about his ability to propose and vote on legislation that is unaffected by this matter. Tr. at 173:6-10.

14. Petitioner relies solely on the decision in *Application of Artesian Water*, Dkt. No. A-2014-2451241 (Fordham, J. and Heep, J. 2014), as a basis for his representational standing. *See* Tr. 59:3-14; *see also* Complaint at ¶¶ 10-14. Both Sen. Dinniman and his counsel alleged during the hearing that *Artesian* establishes that Sen. Dinniman has already been found to have standing in matters before the Commission. Tr. at 214:25-215:15, 241:15-24. That is simply untrue. *Artesian* is entirely distinguishable from this matter and has also been overruled by *Markham,* which was decided two years after *Artesian.*

15. *Artesian* was an ALJ decision that granted Sen. Dinniman protestant status to intervene in a proceeding initiated by another, ***not complainant or petitioner status to create and maintain an action.*** That distinction is critical because, unlike a complainant or petitioner, a protestant need not establish the stringent direct, immediate, and substantial interest necessary to bring a complaint. Rather, a protestant is akin to a commentor who participates in an existing protest case to comment on whether that pending application is in the public interest. Allowing Sen. Dinniman to appear as a protestor has no precedential value for the more stringent standing requirements for a Petitioner or Complainant to initiate an action. Moreover, *Artesian* was never even reviewed and upheld by the Commission. Petitioner's reference to various cases cited in the Senator's attempt to intervene in Dkt. No. P-2018-3000281 likewise suffer from the same flaw, namely, that none of those cases involved the Senator's standing as a complainant.

16. Sen. Dinniman's May 16, 2018 brief also attempts to rely on *Corman v. NCAA*, 74 A.3d 1149 (Pa. Commw. Ct. 2013) for the proposition that he has standing in his official capacity. But *Corman* is wholly distinguishable and in fact shows that the Senator here does not

have standing. In *Corman*, the court found that Senator Corman had standing because the statute at issue expressly and specifically granted him oversight responsibility for collection of debts under the statute. *Id.* at 1161 ("Here, the legislature statutorily vested certain specifically-identified individuals, including Senator Corman, with the right to 30 days advance notice of proposed expenditures from the Fund in order to review and comment upon the proposed expenditures. . . . In essence, the legislature invested those named individuals with oversight responsibility and authority regarding the monies subject to the Endowment Act. Therefore, Senator Corman has more responsibility under the Endowment Act beyond his legislative function because he has specific statutory obligations."). Here, Sen. Dinniman has not been statutorily vested with any such responsibilities. His Complaint arises under the Public Utility Code, over which no legislator has any responsibility beyond their legislative functions.

17. Sen. Dinniman clearly and plainly does not have standing to bring the Complaint. Therefore, the Complaint should be dismissed in its entirety.

C. <u>Preliminary Objection # 2: The Complaint Fails to Join Necessary Parties</u>

18. Pursuant to 52 Pa. Code § 5.101(a)(5), the Complaint should be dismissed because it fails to join necessary parties.

19. "A necessary party is one whose rights are so connected with the claims of the litigants that no relief can be granted without infringing upon those rights." *Pennsylvania Fish Commission v. Pleasant Tp.*, 388 A.2d 756, 759 (Pa. Commw. Ct. 1978).

20. SPLP's shippers on the Mariner East pipelines are necessary parties because they, as public utility customers, have a right to obtain service from SPLP. The relief requested here of enjoining operation of SPLP will infringe upon those rights. Regarding ME2, SPLP held an open season and obtained binding contractual commitments to serve certain shippers. Delaying the construction of ME2 infringes on those contractual rights. Moreover, some of those shippers.

such as Range Resources, pay royalties to landowners for their mineral rights. If injunction of operation/construction of the Mariner East pipelines is granted, product may become shut-in, meaning those royalty payments will stop. Likewise, other businesses depend on deliveries from the Mariner East Pipelines, such as the Marcus Hook Industrial Complex. Shutting down the pipelines infringes on their ability to operate their businesses.

21. The people and businesses that depend on the Mariner East public utility service are all necessary parties. The Complaint failed to join these parties, and these parties have not been given formal notice of the Complaint given it was not required to be published in the Pennsylvania Bulletin. Accordingly, the Complaint should be dismissed for failure to join necessary parties.

D. Preliminary Objection #3: Counts II, III, IV, and V Should be Dismissed for Legal Insufficiency.

22. In order to be legally sufficient, a complaint must set forth "an act or thing done or omitted to be done or about to be done or omitted to be done by the respondent in violation, or claimed violation, of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission." 52 Pa. Code § 5.22(a)(4); *see, e.g., James Drake v. Pennsylvania Electric Co.*, Docket No. C-2014-2413771, Initial Decision Sustaining Preliminary Objection and Dismissing Complaint, 2014 WL 2003281, *4 (May 7, 2014).

23. **Count II.** Count II alleges SPLP has failed to "use every reasonable effort to properly warn and protect the public from danger" because SPLP will not publicly disclose its integrity management plan or risk assessment. Complaint at ¶¶ 69-76. However, SPLP is under absolutely no duty to disclose its integrity management plan or risk assessment, and in fact, the Commission ordering SPLP to do so would violate the Public Utility Confidential Security Information Disclosure Protection Act, 35 P.S. §§ 2141.1 et seq., and the Commission's

corresponding regulations, 52 Pa. Code. §§ 102.1-102.4 ("Security Act."). As SPLP Witness Matthew Gordon testified, the integrity management plan is a highly confidential document that is protected by the Security Act. The Commission cannot issue an order that releases confidential security information – doing so would violate the Security Act. 35 P.S. § 2146. Accordingly, the Commission cannot issue the relief Count II requests, and Count II should be dismissed as legally insufficient.

24. Moreover, SPLP's decision to keep its integrity management plan and risk assessment confidential and protected from disclosure is not a violation of any law or regulation. The only regulation the Complaint alleges SPLP has violated does not apply to SPLP. The Complaint cites 52 Pa. Code § 59.33(a) for the proposition that SPLP has a duty to "use every reasonable effort to properly warn and protect the public from danger." However, this section of the Commission's regulations only applies to a very specific subset of public utilities, which does not include SPLP.

25. Chapter 59 has its own set of definitions applicable to the regulations within that chapter. *Id.* at § 59.1. It defines "public utility" as "Persons or corporations owning or operating in this Commonwealth equipment or facilities for producing, generating, transmitting, distributing, or furnishing gas for the production of light, heat, or power to or for the public for compensation. The term does not include a producer or manufacturer of gas not engaged in distributing the gas directly to the public for compensation." *Id.* SPLP does not transmit or distribute "gas." Instead, SPLP transports hazardous liquids, which the Commission has ruled fall within the category of petroleum products. *See, e.g., Petition of Sunoco Pipeline, L.P. for Amendment of the Order Entered on August 29, 2013*, Opinion and Order, Docket No. P-2014-2422583 at n.5 (Order entered Jul. 24, 2014).

> The Commission has interpreted the definition of "petroleum products" broadly to encompass what would otherwise be an exhaustive list of products. *See, Petition a/Granger Energy a/Honey Brook, LLC*, Docket No. P-00032043, at 9 (Order entered August 19, 2004). This list includes propane. This is consistent with the definition of "petroleum gas" in the federal gas pipeline transportation safety regulations at 49 C.F.R. Part 192. Part 192 has been adopted by the Commission and defines "petroleum gas" to include propane. 49 C.F.R. § 192.3. Our interpretation is also consistent with the definition of "petroleum" in the federal hazardous liquids pipeline safety regulations at 49 C.F.R. Part 195. Part 195 has also been adopted by the Commission and defines "petroleum" to include natural gas liquids and liquefied petroleum gas, which can include propane. 49 C.F.R. § 195.2.

Id.

26. In fact, 52 Pa. Code § 59.33(b)-(c) shows that § 59.33(a) does not apply to hazardous liquids pipelines and thus does not apply to SPLP. Subsection (b) expressly states that the Commission incorporates PHMSA regulations in 49 C.F.R. as the safety standards applicable to hazardous liquids pipelines, and uses the more specific term "hazardous liquid public utilities." Subsection (c) defines "hazardous liquid public utility" as "a person or corporation now or hereafter owning or operating in this Commonwealth equipment or facilities for transporting or conveying crude oil, gasoline, petroleum or petroleum products, by pipeline or conduit, for the public for compensation." 52 Pa. Code § 59.33(c). Accordingly, the PHMSA regulations are the safety standards applicable to SPLP, not the Commission's more specific regulations applicable to a different subset of public utilities. Moreover, even if subsection (a) did apply to SPLP, again there is absolutely no duty within that subsection to disclose confidential infrastructure security information, including SPLP's integrity management plan and risk assessment.

27. PHMSA regulations require SPLP to have an integrity management plan and to incorporate its pipelines into that plan within one year of the pipeline becoming operational. ME2/ME2X are not yet operational and thus SPLP is not even required to have an integrity management plan incorporating these pipelines, let alone disclose it. There is no PHMSA regulation that requires either explicitly nor implicitly that SPLP disclose its integrity management plan or risk assessment plan. Accordingly, SPLP's confidential treatment of its integrity management plan and risk assessment is not a violation of any law or regulation and Count II of the Complaint should be dismissed as legally insufficient. In fact, SPLP's confidential treatment of these documents is a prudent and safe decision given the sensitive nature of this information that if publicly disclosed puts SPLP's facilities in danger of attack.

28. **Count III.** Count III alleges that SPLP has violated 49 CFR § 195.210(a) because the ME2/ME2X pipelines will be located in areas containing private dwellings and places of public assembly. Complaint at ¶¶ 78-80. However, that these pipelines (constructed in the same right-of-way as the existing ME1 pipeline consistent with recommendation of the Governor's pipeline infrastructure task force) traverse areas with private dwellings and places of public assembly is not a violation of this regulation (or any other).

29. 49 C.F.R. § 195.210 expressly allows pipelines to be located near private dwellings and places of public assembly where proper precautions are taken, and there is no allegation SPLP has not taken such precautions.

> (a) Pipeline **right-of-way must be selected to avoid, as far as practicable**, areas containing private dwellings, industrial buildings, and places of public assembly.
> (b) No pipeline may be located within 50 feet (15 meters) of any private dwelling, or any industrial building or place of public assembly in which persons work, congregate, or assemble, **unless it is provided with at least 12 inches (305 millimeters) of cover in addition to that prescribed in § 195.248.**

Id. (emphasis added). Accordingly, Count III fails to state a violation of a regulation or law and should be dismissed.

30. Moreover, the allegations of Count III are barred by laches.

> The doctrine of laches provides that an action can be barred if one party can show delay arising from the other party's failure to exercise due diligence and prejudice from that delay. *Kehoe v. Gilroy*, 320 Pa.Super.Ct. 206, 467 A.2d 1 (1983). A six-year delay in filing a claim raises a presumption of unreasonable delay. A. Stucki Co. v. Schwam, 638 F.Supp. 1257 (E.D.Pa.1986). The Commission recently recognized the doctrine of laches, or non pros, as appropriate when a delay in filing an action or failing to prosecute results in the unavailability of witnesses and no compelling reason has been shown for that delay or failure. *Pennsylvania P.U.C. v. West Penn Power Company,* Docket No. C-21608, Order dated February 19, 1988.

Dolman v. Pennsylvania Power and Light Co., 72 Pa.P.U.C. 353, Docket No. C-892353 (Order entered Apr. 30, 1990).

31. Here, it has been public knowledge since at least 2014 that the ME2/ME2X pipeline would be located in the right-of-way of the ME1 pipeline. *See, e.g., Application of Sunoco Pipeline L.P. for Issuance of a Certificate of Public Convenience and other such approvals, if any, as may be necessary under the Pennsylvania Public Utility Code, evidence approval to extend its service territory for transportation of petroleum products and refined petroleum products by pipeline into Washington County*, Dkt. A-2014-2425633, Application at ¶ 23 (filed on Jun. 6, 2014 and published on June 22, 2014) (noting the second phase of the Mariner East project would include construction of a 16 inch or large pipeline, paralleling the ME1 pipeline). Complainant had all the information he needed to bring a claim regarding the location of the pipelines over 4 years ago and has failed to exercise due diligence by waiting until now to bring this claim.

32. Moreover, SPLP is highly prejudiced because construction of the lines has already begun and permits have already been acquired. To be faced now with the possibility that SPLP would have to relocate or be unable to finish construction of the pipeline due to this Complaint because of the Complainant's lack of due diligence in bringing this claim is exactly the type of claim laches is meant to bar. Accordingly, Count III is barred by laches and should be dismissed.

33. **Count IV.** Count IV alleges that the ME1 pipeline violates PHMSA regulations because of the depth of cover. But the PHMSA regulations in question do not apply to the ME1 pipeline as a matter of law. Complaint paragraphs 82-87 allege that because some portions of the ME1 pipeline may be both within 50 feet of a private dwelling and less than 48 inches underground, SPLP has violated 49 C.F.R. § 195.210(a). However, the ME1 pipeline was built before these regulations were promulgated, and as a matter of the law these regulations are not retroactive.

34. The cited regulations do not apply to ME1. Subpart D of the PHMSA regulations, entitled "Construction," "prescribes minimum requirements for constructing new pipeline systems with steel pipe, and for relocating, replacing, or otherwise changing existing pipeline systems that are constructed with steel pipe." 49 C.F.R. § 195.200. When Congress enacted the Pipeline Safety Act of 1968, codified at Title 49, Chapter 601 of the U.S. Code, Congress did not make design, installation, or construction standards retroactive on existing pipelines:

> (b) Nonapplication. – A design, installation, construction, initial inspection, or initial testing standard does not apply to a pipeline facility existing when the standard is adopted.

49 U.S.C. § 60104(b). Sen. Dinniman acknowledges this, and admits that the cited PHMSA regulations do not apply to ME1, which was installed decades prior to the adoption of the applicable regulations.

35. To the extent that there is any argument that the PHMSA siting or depth-of-cover regulations apply to ME1 because ME1 changed service from a petroleum product pipeline to a natural gas liquids pipeline, PHMSA has already addressed this issue. In 2014, PHMSA issued an Advisory Bulletin published in the Federal Register that confirmed if a company changed product type or flow direction in an existing "grandfathered" pipeline, the company was not required to meet the Chapter 200 design and construction requirements applicable to new pipelines, as long as appropriate pressure testing of the pipeline was completed. *See* 79 Fed. Reg. 56121 (Sept. 18, 2014) ("Conversion to service allows previously used steel pipelines to qualify for use without meeting the design and construction requirements applicable to new pipelines, but the regulations require the pipeline be tested in accordance with 192 subpart J or 195 subpart E per §§ 192.14(a)(4) and 195.5(a)(4) respectively."). SPLP Witness Zurcher confirmed that when ME1 changed service, SPLP compiled with these requirements and pressure tested the ME1 pipeline at 160%, which significantly exceeded the regulatory requirements for pressure testing of 125%.

36. Because Chapter 200 of the PHMSA regulations is not retroactive, and SPLP met and exceeded pressure testing requirements when ME1 changed service and flow direction, Count IV of the Complaint fails to allege a violation of regulation and should be dismissed.

37. **Count V.** Count V alleges that SPLP is not a public utility. This Commission and the Commonwealth Court have each repeatedly ruled that SPLP is a public utility.[1] Nonetheless, Complaint paragraphs 89-94 challenges SPLP's public utility status. SPLP is a public utility, and the Commission has already conclusively rejected any argument to the contrary. The Commission has reaffirmed in at least five final orders that SPLP is a public utility and recognized the Mariner East service is public utility service. *Petitions of Sunoco Pipeline L.P. for findings that buildings to shelter utility facilities are reasonably necessary for the convenience or welfare of the public*, Dkt. Nos. P-2014-2411941 et al. (Order entered Oct. 2, 2014); *Petition of Sunoco Pipeline, L.P. for Amendment of the Order Entered on August 29, 2013*, Opinion and Order, Dkt. No. P-2014-2422583 (Order entered Jul. 24, 2014); *Sunoco Pipeline L.P. Request for Approval of Tariff Pipeline-Pa P.U.C. No. 16 and Waiver of 52 Pa. Code § 53.52(b)(2) and (c)(1) through (5)*, Dkt. No. R-2014-2426158 (Order entered Aug. 21, 2014); *Application of Sunoco Pipeline L.P. for Approval of the Right to Offer, Render, Furnish or Supply Intrastate Petroleum and Refined Petroleum Products Pipeline Service to the Public in Washington County, Pennsy*lvania, Dkt. No. A-2014-2425633 (Order entered Aug. 21, 2014); *Sunoco Pipeline L.P. Supplement No. 2 Tariff Pipeline-Pa. P.U.C. No. 16 and Letter Request for Waiver of 52 Pa. Code § 53.52(b)(2) and (c)(1) through (5)*, Dkt. No. R-2014-2452684 (Order entered January 15, 2015); *Sunoco Pipeline L.P. Supplement No. 2 Tariff Pipeline-Pa. P.U.C. No. 16*, Dkt. No. R-2015-2465141 (Order entered March 26, 2016).

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[1] *See In re Condemnation by Sunoco Pipeline, L.P. (Martin)*, 143 A.3d 1000 (Pa. Commw. Ct. 2016), *allocatur denied*, 164 A.3d 485 (Pa. 2016); *In re Condemnation by Sunoco Pipeline L.P. (Katz)*, 2017 Pa. Commw. LEXIS 425 (Pa. Commw. Ct. July 3,2017); *In re Condemnation b Sunoco Pipeline L.P. (Andover)*, 2017 Pa. Commw. Unpub. LEXIS 801 (Pa. Commw. Ct. Oct. 24,2017); *In re Condemnation by Sunoco Pipeline L.P. (Gerhart)*, 2017 Pa. Commw. Unpub. LEXIS 335 (Pa. Commw. Ct. May 15,2017); *In re Condemnation by Sunoco Pipeline L.P. (Homes for America, Inc.)*, 2017 Pa. Commw. Unpub. LEXIS 378 (Pa. Commw. Ct. May 24,2017), *allocatur denied*, No. 429 MAL 2017, _ A.3d _ (Pa. Jan. 22, 2018); *In re Condemnation by Sunoco Pipeline L.P. (Blume)*, 2017 Pa. Commw. Unpub. LEXIS 386 (Pa. Commw. Ct. May 26, 2017); *In re Condemnation by Sunoco Pipeline L.P. (Perkins)*, 2017 Pa. Commw. Unpub. LEXIS 470 (Pa. Commw. Ct. June 29, 2017).

38. The Commission's numerous legal findings that SPLP and its provision of intrastate transportation of petroleum products is binding and cannot be relitigated here. 66 Pa.C.S. § 316 ("Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review."). *See also* SPLP Ex. 42, PUC orders establishing ME1 and ME2 as public utilities.

39. At the outset, Complainant must concede that SPLP is a public utility because if SPLP were not a public utility, the Commission and Your Honor have no jurisdiction to enjoin SPLP from anything, which is the relief the Complaint requests.

40. Moreover, SPLP's certificates of public convenience alone are conclusive evidence of its public utility status. *See* SPLP Ex. 42.

41. The Complaint appears to challenge SPLP's public utility status based on the type of product shipped, that SPLP ships on both an intra and interstate basis, or that SPLP does not provide service to or for the public for compensation. The Commission has already ruled and rejected these arguments. *See Petitions of Sunoco Pipeline L.P. for findings that buildings to shelter utility facilities are reasonably necessary for the convenience or welfare of the public*, Docket Nos. P-2014-2411941 et al., at 25, 36-38 (Order Oct. 2, 2014).

42. Any argument that SPLP is not a public utility because of the type of product it ships (propane, ethane, butane) has been conclusively rejected. "'[P]etroleum products' – is a broad term that includes both propane and ethane" . . . "the undefined term 'petroleum products,' as used in Section 102 of the Code [has] a broad meaning as a 'catch all phrase' to include what would otherwise be an exhaustive list of products." The Commission thus expressly found

public utility service encompasses transportation of propane and ethane. Under this broad interpretation, petroleum product likewise undoubtedly includes butane. *Id.* at 38.

43. Any argument that SPLP is not a public utility because it only serves shippers, and not individual retail customers, has been conclusively rejected.

- "The view that Sunoco's services do not constitute public utility services because no retail end-users are specifically identified conflicts with applicable law, including the definition of 'public utility' set forth in Section 102(1)(v) of the Code and our more recent decision the *Laser June 2011 Order*, in which we found that Laser's provision of service as a midstream gathering pipeline operator that transported natural gas from producer wills to an interstate pipeline constituted service "for the public." *Id.*
- "[A] retail component is not a requirement for public utility service." *Id.* (citing numerous cases).
- "[W]hether a service is considered to be offered for the public does not depend on the number of persons who actually use the service. Rather, the determination depends on the service offering and whether the service is available to all members of the public, or a class of the public, who may require the service." *Id.* at 37.

44. Any argument that SPLP is not a public utility because it uses its pipelines for both intra[2] and interstate service, and may use the pipelines for greater volumes of interstate service has been conclusively rejected. SPLP's "authority is not limited to a specific pipe or set of pipes, but rather, includes both the upgrading of current facilities and **the expansion of existing capacity** as needed for the provision of the authorized service within the certificated territory." *Id.* at 39.

[2] Range Resources' witness expressly testified that Range uses ME1 for intrastate shipments. Tr. at 616:9-13.

45. SPLP's provision of intrastate transportation of petroleum products, regardless of whether SPLP also provides interstate transportation service, is public utility service regarding both the Mariner East 1 and 2 pipelines. Notably, the Commission **rejected** Clean Air Counsel's arguments that:

- Comparing volumes of intrastate shipments to interstate shipments informs public utility status, i.e. a primary purpose test, *id.* at 25;
- The amount of intrastate shipments informs whether service is to or for the public, *id.* at 25;
- Serving a limited number of specialized shippers informs whether service is to or for the public, *id.* at 25; and
- That because FERC regulates SPLP as a common carrier, not a utility, that informs whether SPLP is a PUC jurisdictional public utility, *id.* at 27.

46. Accordingly, it is clear and free from doubt that SPLP and its Mariner East pipelines are public utilities and Count V should be dismissed.

III. CONCLUSION

WHEREFORE, SPLP respectfully requests the Complaint be dismissed in its entirety because Complainant lacks standing. In the alternative, SPLP respectfully requests Complaint Counts II, III, IV, and V be dismissed for lack of legal sufficiency.

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Attorneys for Respondent Sunoco Pipeline L.P.

Dated: May 21, 2018

VERIFICATION

I, Matthew Gordon, certify that I am Project Director, for Sunoco Pipeline LP, and that in this capacity I am authorized to, and do make this Verification on their behalf, that the facts set forth in the foregoing document are true and correct to the best of my knowledge, information and belief, and that Sunoco Pipeline LP, expects to be able to prove the same at any hearing that may be held in this matter. I understand that false statements made therein are made subject to the penalties of 18 Pa. C.S. §4904, relating to unsworn falsifications to authorities.

Matthew Gordon
Project Director

DATED: 5/21/18

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the forgoing 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 and served via overnight mail on the following:

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Dated: May 21, 2018