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Via Overnight Mail – Deposit Receipt Enclosed

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MAY 16 2018

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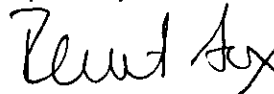
Re: *Pennsylvania State Senator Andrew E. Dinniman v. Sunoco Pipeline L.P.*,
Docket No. C2018-3001451 (Formal Complaint)

Pennsylvania State Senator Andrew E. Dinniman v. Sunoco Pipeline L.P.,
Docket No. P-2018-3001453 (Petitioner for Interim Emergency Relief)

Dear Ms. Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is Respondent Sunoco Pipeline L.P.'s Post-Hearing Brief in Opposition to Amended Petition for Emergency Relief (Public Version) in the above-referenced matters. A copy of the enclosed has been served in accordance with the attached Certificate of Service. If you have any questions regarding this filing, please do not hesitate to contact me.

Respectfully submitted,



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For MANKO, GOLD, KATCHER & FOX, LLP

RDF/bad/11842-009

Enclosure

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA STATE SENATOR
ANDREW E. DINNIMAN,

Petitioner,

v.

SUNOCO PIPELINE L.P.,

Respondent.

Docket No. C-2018-3001451

PENNSYLVANIA STATE SENATOR
ANDREW E. DINNIMAN,

Petitioner,

v.

SUNOCO PIPELINE L.P.,

Respondent.

Docket No. P-2018-3001453

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**RESPONDENT SUNOCO PIPELINE L.P.'S POST-HEARING BRIEF
IN OPPOSITION TO AMENDED PETITION FOR EMERGENCY RELIEF**

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I. Summary of Argument and Statement of the Case.

A. Summary of Argument.

Sen. Dinniman failed to offer any evidence to meet his burden to obtain the interim emergency relief requested, which is only available as a “quick but temporary response to an imminent threat to life and/or property which would be irreparable if not addressed immediately.” *Core Communications, Inc. v. Verizon Pennsylvania Inc.*, Dkt. No. P-2011-2253650. Rather than proffer evidence to prove an imminent safety threat, Sen. Dinniman testified that SPLP had not satisfied him that it is safe to operate ME1 and safe to construct ME2/ME2X, and provided hearsay testimony that he is aware that his constituents claim to be concerned, so there must be an issue. But Sen. Dinniman failed to offer any evidence to establish the imminent safety threat necessary to obtain interim emergency relief, relying on events that occurred on Shoen Rd. over eight months ago that did not pose an imminent threat to life or property then, and events that occurred on Lisa Dr. in February 2018, which the Commission recently determined by 5-0 vote did not create any impact to the integrity of ME1 when it authorized SPLP to reinstate transportation of hazardous liquids on that ME1 pipeline. SPLP Ex. 20.

Although Sen. Dinniman identified an engineer as an expert purportedly regarding pipeline safety to testify at the hearing, the engineer never testified. The engineer’s failure to testify is a concession that he would not have supported Sen. Dinniman’s allegations, and left no expert opinion to connect the hearsay testimony of complaints and concerns to an actual risk to the structural integrity of the pipelines. And while Sen. Dinniman did call an expert witness in geology and hydrogeology, that expert (Ira Sasowsky) only offered a single opinion to a reasonable degree of scientific certainty – “it’s in everybody’s best interest . . . to have it be safe,” which means that “an extra degree of care is needed to minimize the likelihood of

problems.” Tr. at 296:4-9. Sasowsky offered that opinion without knowing or evaluating the geologic and geophysical investigations that had been done, and without even first visiting West Whiteland Township because “[t]here just wasn’t time” to do so in the three and one-half weeks since he was engaged. Tr. at 280:22-24; 294:25-295:5. More importantly, that opinion amounts to nothing more than a truism – it’s best to be safe and to use extra care – without any opinion that SPLP is not being safe and is not using extra care. It falls woefully short of satisfying Sen. Dinniman’s burden to prove a “clear and present danger to life or property” that would support the extraordinary, emergency relief requested. In sum, to obtain the interim emergency relief requested, Sen. Dinniman must offer actual evidence that ME1, and ME2 and ME2X are unsafe and cannot meet his burden of proof through his generalized grievances or allegations about these or other pipelines or about claims of SPLP’s non-compliance with environmental permits in locations outside of West Whiteland Township.

In sharp contrast, SPLP offered uncontradicted evidence to prove that there is no imminent threat to life or property, even though it is not SPLP’s burden to disprove allegations that Sen. Dinniman made in his Petition for Interim Emergency Relief:

- SPLP is a public utility and the pipelines are public utility equipment or features; SPLP Ex. 42.
- The Commonwealth Court and this Commission have repeatedly so held. *E.g.*, *Delaware Riverkeeper Network v. Sunoco Pipeline L.P.*, 179 A.3d 670, 682 (Pa. Commw. Ct. 2018).
- Drilling mud primarily consists of water and bentonite, which is non-toxic, and the inadvertent return of drilling mud does not create a risk to human health. SPLP Ex. 24; Tr. at 312:23-315:1.
- There were no inadvertent returns of drilling mud at Shoen Rd., the loss of water and water pressure experienced at a few private drinking water wells was temporary, all of those on private wells have been offered connections to public water, and there were no impacts to public water wells. Tr. 417:21-419:2; 657:9 – 658:15.

- The seeps of Ms. Kerslake's property have not and will not impact the structural integrity of ME1, have not created and will not create a safety risk, have been temporarily managed, and will be further addressed when the Shoen Rd. drilling is completed. Tr. at 658; 16-661; 14; SPLP Ex. 47.

- The Lisa Dr. sinkholes did not endanger residents or occupied dwellings and did not impair the structural integrity of ME1, and there is no risk of sinkholes in the future. SPLP Ex. 17, 18, 19, 22; Tr. at 686; 12-24. In any event, the Commissioner's 5-0 Order reinstating utility service on ME1 contains conditions to ensure ME1's structural integrity through construction of ME2/ME2X. SPLP Ex. 20.

- A pipeline's depth does not increase the risk of failure and does not increase the risk of catastrophic injury, and the regulatory requirement for additional cover for pipelines constructed within 50' of an occupied dwelling does not apply retroactively to ME1. Tr. at 548:25-551:18; 49 C.F.R. § 195.200.

- SPLP has appropriate procedures in place to construct ME2/ME2X, which is largely co-located with ME1; and SPLP has demonstrated the ability to implement those procedures by constructing over 300 miles of ME2 across the Commonwealth without any evidence of damage to the integrity of ME1. Tr. at 404:9-407:17; SPLP Exs. 26-33; Tr. at 408; 4-6; 423:20-424:3; Tr. at 552:15-554:3.

- A shutdown of these pipelines will adversely affect the public interest by virtue of lost union jobs, lost royalties, and lost revenues and associated economic benefits to SPLP, shippers and related industries.

- Pipelines are the safest means of transporting hazardous liquids, and it is safe to operate ME1 and safe to construct ME2/ME2X in the geology present in West Whiteland Township, with demonstrated procedures in place to manage the integrity of the pipelines near people and structures. Tr. at 528:23-531:5; 534:3-23; 536:23-540:2.

- SPLP has a proper pipeline integrity management plan in place and has properly identified the risks to the public, public officials and emergency responders, with easily-understandable safety information readily available. Tr. at 540:3-546:10; SPLP Exs. 9-11.

B. Statement of the Case.

1. Sen. Dinniman seeks interim emergency relief to shut down the construction of ME2 and ME2X, and to shut down the operation of ME1.

On April 25, 2018, State Senator Andrew E. Dinniman ("Sen. Dinniman") filed a Formal Complaint and a Petition for Interim Emergency Relief against Sunoco Pipeline L.P. ("SPLP").

As his initial relief, Sen. Dinniman sought to shut down the construction of SPLP's Mariner East 2 ("ME2") and Mariner East 2X ("ME2X") pipelines in West Whiteland Township on an interim emergency basis and permanently. On April 30, 2018, Sen. Dinniman amended his complaint and petition for interim emergency relief. In his amendments, Sen. Dinniman added claims seeking to shut down the operation of SPLP's Mariner East 1 ("ME1") pipeline on an interim emergency basis and permanently.

2. By 5-0 vote, the Commission ordered that SPLP may reinstate utility transportation services on ME1.

By Order dated May 3, 2018, the Commission after a comprehensive investigation, testing, and measures directed by said Order, unanimously approved the recommendation of the Pipeline Safety Section of the Commission's Bureau of Investigation and Enforcement ("BIE") to reinstate utility transportation of hazardous liquids on SPLP's ME1 pipeline, subject to enumerated conditions. SPLP Ex. 20 at 13.

BIE engaged an independent geophysical consulting firm, ARM Group, Inc., which monitored SPLP's testing and reviewed the data generated. SPLP Ex. 20 at 7; SPLP Ex. 19. BIE and its geophysical consultant spent over 260 hours to meet with SPLP and review all of the data generated. SPLP Ex. 20 at 8. As a result of these investigations, BIE and its consultant opined "that the integrity of the ME1 pipeline remains intact" and "that the integrity of the ME1 pipeline has not been compromised" SPLP Ex. 20 at 9. As a result of these studies and recommendations, the Commission voted 5-0 to allow ME1 to be placed back into service, subject to explicit conditions – including notice of subsidences, notification to BIE of any changes in construction of ME2/ME2X, and filing with BIE of periodic reports, some of which conditions continue for six months following construction. SPLP Ex. 20 at 13-14.

3. The Commission concluded from the investigation by SPLP, BIE, and BIE's independent consultant that ME1 is safe and structurally sound, and Sen. Dinniman offered no evidence to the contrary.

Sen. Dinniman offered testimony from three witnesses – himself, Ira Sasowsky (an expert in geology and hydrogeology), and Virginia Marcille-Kerslake (a constituent who lives on Shoen Rd.). The only evidence that Sen. Dinniman offered that conceivably relates to the structural integrity of ME1 was his lay opinions and personal observation of what he claimed to see when he observed a sinkhole related to the horizontal directional drilling (“HDD”) on Lisa Dr. But there was conflicting, more credible scientific testimony from SPLP’s expert in geology and hydrogeology (David Demko, P.G.), who testified that the sinkhole did not comprise the structural integrity of the partially-exposed pipeline because only one side of a short section of pipeline was exposed, and there was soil underneath the pipeline supporting it. Tr. at 687:3-18.

In any event, as discussed above, the subsequent investigation of ME1 confirmed that the sinkhole did not impair ME1’s structural integrity, and the Commission concluded “that the integrity of ME1 pipeline remains intact” and “the integrity of the ME1 pipeline has not been comprised” by the Lisa Dr. sinkholes. SPLP Ex. 20 at 9. While Sen. Dinniman identified a professional engineer as a proposed expert witness, Sen. Dinniman did not call the professional engineer to testify. The one expert that Sen. Dinniman did call, Dr. Sasowsky, admitted that he was not asked to render an opinion on ME1’s structural integrity and is not qualified to render such an opinion:

Q. . . . Same with ME1, you’re not offering any opinion as to the safe operation of ME1, correct?

A. I don’t recall being asked, so I haven’t offered.

Q. Do you have an opinion to a reasonable degree of scientific certainty about the integrity of ME1?

A. I can't render an opinion on that because that seems like an engineering question to me. No, I don't have an opinion on that.

Tr. at 283:22-284:1.

4. The construction of ME2/ME2X will not cause subsidences or sinkholes that will adversely impact the structural integrity of ME1, and Sen. Dinniman offered no evidence to the contrary.

Sen. Dinniman conceded that sinkholes develop from time to time in West Whiteland Township from events wholly unrelated to SPLP's construction of ME2/ME2X. Tr. at 55:23-56:6. Yet, there was no testimony that any of those sinkholes adversely impacted the structural integrity of ME1 (which has operated safely since the 1930s) or any of the other transmission pipelines located in West Whiteland Township.

Sen. Dinniman's expert in geology and hydrogeology, Ira Sasowsky, conceded that a pipeline can be safely constructed in Karst "with proper procedures and enough money." Tr. at 287:18-19. There is no evidence that SPLP's procedures to construct ME2/ME2X are improper. And there is no evidence that SPLP lacks the financial resources to construct ME2/ME2X in West Whiteland Township. Sasowsky conceded that he had not done any evaluation of the cause of sinkholes at Lisa Dr. Tr. at 281:6-22. Sasowsky further conceded that he has no opinion whether any sinkhole will develop in the future at any particular location with respect to any of the construction remaining in West Whiteland Township. Tr. at 290:4-9.

In contrast, SPLP's expert in geology and hydrogeology, David Demko, P.G., testified that, in his opinion, no further sinkholes will develop from the construction remaining in West Whiteland Township. Tr. at 661:8-23, 665:18-666:7, 668:13-25, 669:17-670:5, 670:25-671:11, 672:9-20, 673:22-674:6, 686:12-24. Mr. Demko described the geological investigations performed in each area and testified that there is no risk of subsidence from construction of ME2/ME2X. Tr. at 654:15-656:10.

5. **The construction of ME2/ME2X does not create a risk of IRs that will endanger public and private drinking water supplies.**

Sen. Dinniman's only evidence that inadvertent returns ("IRs") of drilling mud will endanger drinking water supplies is a listing of SPLP's reported IRs in the past and Sen. Dinniman's unsupported hearsay claim that an IR occurred on Shoen Rd., which he believes to have damaged private water wells. Neither establishes that the future construction of ME2/ME2X will damage public or private drinking water supplies.

IRs occur during an HDD when drilling mud is released. SPLP has reported IRs in the past, but there was no evidence proffered that any of the IRs caused an adverse impact to public or private drinking water supplies. No IR occurred at Shoen Rd., and samples taken of the private water wells and from the seeps on Ms. Kerslake's property did not show the presence of any constituents of drilling mud.¹ Tr. at 656:17-18, 657:21-658:9.

For the five HDDs that remain to be completed in West Whiteland Township, there is no evidence that an IR will occur, let alone that an IR will release drilling mud that adversely impacts public or private drinking water wells. Sasowsky conceded that he has no opinion to a reasonable degree of scientific certainty that an IR will occur in the future. Tr. at 289:24-290:9. And even if an IR were to occur in the future, SPLP must follow an approved plan – a plan approved by the Pennsylvania Department of Environmental Protection and intervenor Clean Air Council – to contain and clean up the released drilling mud, which mitigates any impact to the environment. SPLP Ex. 8. And even if drilling mud released from and IR were to reach a

¹ The Shoen Rd. HDD resulted in the loss of water and sedimentation to some private water wells. Thirty-five wells were sampled, and none showed the presence of any contaminants. Some of the samples contained sediment. The water levels of all of the wells have since rebounded to their original water elevations. Nevertheless, SPLP has offered connections to public water to all residences on private water wells near Shoen Rd., whether or not they experienced a loss of water or sedimentation, and all but two homeowners have been connected to public water. SPLP will reconnect each homeowner to their private water supply after construction is completed, if they request it. Tr. at 417:23-419:2, 656:9-657:12.

drinking water well, it poses no risk of adverse health effects to humans. Tr. at 312:19-315:1.

Dr. Chrostowski's testimony on this point was un rebutted.

6. **SPLP has made appropriate efforts to warn and protect the public from potential dangers, and has an appropriate pipeline integrity management plan in place for those pipelines required to have such a plan.**

Sen. Dinniman asserts that SPLP has not properly warned the public. He offered no evidence on what would be a proper warning or why SPLP's warnings are inadequate. He did not offer testimony of an expert to opine on the claimed inadequacy of SPLP's public outreach and warnings. His only evidence of inadequate warnings is hearsay from his constituents and hearsay that two school districts claim not to know how to respond in the unlikely event of a catastrophic failure of a pipeline.

In fact, SPLP has a well-developed public awareness program, which is described, in part, in a February 2, 2018 letter from Chairman Brown to Governor Wolf. SPLP Ex. 9. SPLP sent out public-awareness mailings to all persons living within one-quarter mile of the pipelines. More than 200,000 residents in Chester County received the mailing. Separate mailings went to public officials, including to Sen. Dinniman. SPLP conducted trainings for more than 2,000 emergency responders and public officials at more than sixteen meetings held during 2017. Tr. at 419:6-421:25.

In addition, SPLP provided detailed emergency preparedness information to all schools located within one-half mile of the pipelines, and had two meetings with Chester County emergency responders attended by approximately 90 persons. Chester County hazmat personnel attended those meetings. Representatives of the West Whiteland Township Fire Department attended those meetings. The meetings included a detailed power point presentation, which described the health hazards from exposure to vapors that may be released from a pipeline,

described what to do in the case of exposure, identified the potential danger zones in the event of a release, explained emergency-response procedures, how to recognize a release, and what to do in the event of a release. Tr. at 422:1-423:16; SPLP Ex. 11.

As John Zurcher explained in detail, SPLP also has safety information readily available on its website. The website has a tab for “public awareness and safety.” If you click on the tab for “public awareness,” it takes you to a page on its website that contains a chart with two forms of detailed pipeline safety brochures. Tr. at 540; 3-23. The version available for members of the public contains appropriate warnings to the public in the event of a pipeline failure. It explains the three ways to recognize a leak – sight, sound and smell. It tells you what to do in the event of a leak. First, turn off equipment and eliminate any ignition source. Second, leave the area by foot and stay upwind. Third, call 911 or your local emergency responders. The brochure also tells you what not to do. SPLP Ex. 46. Clearly, any school district and others could devise an emergency response plan to do the things that the brochure advises to do in the event of a leak, and to not do the things that the brochure advises not to do.

SPLP also has a pipeline integrity management plan that complies with all applicable safety standards and all safety regulations. Tr. at 545:19-546:10. By regulation, SPLP is not required to have it apply to ME2/ME2X until one year after they are placed in service. 49 C.F.R. §195.452(b).

7. **The depth of ME1 does not increase the risk of its damage during construction of ME2/ME2X and does not increase the risk of damage in the unlikely event of a catastrophe.**

Sen. Dinniman made allegations that ME1’s depth increases the risk of damage from a catastrophe and increases the risk of damage during construction of ME2/ME2X, but offered no evidence to support either allegation. Nevertheless, SPLP offered substantial, un rebutted

evidence to prove that neither allegation is true. In fact, Sen. Dinniman offered no competent evidence on the depth of ME1.

John Zurcher, SPLP's expert on pipeline safety, testified that the risks of pipeline failure and damage from pipeline failure have no correlation to the pipeline's depth:

I've looked at the data and talked about this at great depth within the industry, but there is no correlation between depth of cover and the possibility of a pipeline event occurring.

Tr. 548:25-550:8. SPLP has processes and procedures in place to prevent pipeline failures and to detect and correct potential impacts to the pipeline's integrity. SPLP has cathodic protection to prevent corrosion on the outside of its pipelines. SPLP runs in-line tool inspections to detect for corrosion and deformities on the inside of its pipelines. It makes its pipelines to avoid damage from excavation, and it has a representative present during a third-party excavation. SPLP has other policies and practices that properly address all of the potential causes of pipeline failure.

Tr. at 564:6-565:6; SPLP Ex. 33; Tr. at 536:23-538:3; 539:4-19.

Sunoco also has detailed requirements that apply during construction of ME2/ME2X to protect the integrity of ME1 during construction. SPLP knows the exact location of ME1. It marks all other utilities. It has a spotter during construction to ensure that the contractors do not come in contact with ME1. It follows the standards developed by the Interstate Natural Gas Association of America about precautions taken when doing parallel construction. Its construction contracts and standards meet all applicable standards to protect against the risk of damage to ME1 during construction of ME2/ME2X. Tr. at 552:15-554:3. And importantly, there is no evidence of any damage to the structural integrity of ME1 during the more than 300 miles of ME2 already constructed.

8. It is safe to co-locate ME2/ME2X with ME1, and the geology in West Whiteland Township is safe for pipelines.

There are numerous existing pipelines in West Whiteland Township, SPLP Ex. 2, including ME1, which has operated safely since the 1930s. Sasowsky conceded that one can safely construct a pipeline in Karst features, Tr. at 287:18-19, and he had no opinion about the structural integrity of ME1. Tr. at 283:22-284:1. Sen. Dinniman offered no evidence that the ME1, ME2 and ME2X pipelines were unsafe to operate in West Whiteland Township.

John Zurcher, SPLP's expert in pipeline safety and integrity, testified that pipelines can and do operate safely in all types of geology. Within the Commonwealth, there are over 3,000 miles of transmission pipelines, and not a single instance where a pipeline has failed due to the surrounding geology:

There's never been a failure of a pipeline in one of these areas caused by geology or a sinkhole or even mining subsidence that we have here in Pennsylvania.

Tr. at 538:4-22. Similarly, David Demko, P.G., SPLP's expert in geology and hydrogeology, testified that it is safe to construct and operate ME1, ME2 and ME2X in the geology of West Whiteland Township.

SPLP evaluated alternate routes for ME2 and ME2X and avoided proximity to private dwellings and places of public assembly as far as practicable. As part of this evaluation, SPLP concluded that it was preferable and safer to co-locate pipelines rather than impact tens of miles of existing greenfields and create fragmented forest and habitat for bog turtle, an endangered species. Tr. at 390:25-393:6. The Governor's Task Force on Pipelines recommended co-location, where feasible. SPLP Ex. 16. In addition to environmental benefits, there are important safety reasons why co-location is preferred and safer. First, when a pipeline is co-located with an existing pipeline, the affected community, public officials, and emergency

responders are already informed of the presence of a pipeline. Second, the pipeline operator's personnel are already available to respond. Third, excavators and other third-party contractors are already aware of the presence of the existing pipeline, which is well marked. Finally, as long as there is proper separation between pipelines, the failure of one pipeline is not going to cause a co-located pipeline to fail. In fact, there has never been a case where the failure of one pipeline has caused a co-located pipeline to fail. "As long as you're more than ten feet away, you won't damage the pipeline from the blast." Tr. at 389:5-39:24; 551:25-553:6.

9. Shutting down construction of ME2/ME2X or operation of ME1 will damage SPLP and the public.

Sen. Dinniman proffered no evidence of the public impact of shutting down SPLP's pipelines. In contrast, SPLP offered compelling evidence of the damage to the public interest if the interim emergency relief requested were to be granted.

In its 5-0 Order reinstating utility service on ME1, the Commission acknowledged the damage to the public interest from ME1's prior shutdown:

That said, the Commission is cognizant of the economic effect of ordering the suspension of ME1 service. Natural gas liquid pipelines play a vital role in many industries given that these petroleum products serve as industrial feedstocks as well as additives to gasoline. The Commission understands that shippers that utilize ME1 as customers, and users of products transported by ME1 either have had to suspend operations or look elsewhere for supplies due to the ME1 closure occasioned by the safety threat imposed by the Lisa Drive subsidence.

SPLP Ex. 20 at 10.

SPLP offered additional testimony to support and particularize the injury to the public interest if the interim emergency relief requested were to be granted. Anthony Gallagher, business manager of Steamfitters Local Union 420, explained the significant job losses that would be suffered if the pipelines were shut down. Tr. at 484-23-513:6. Alan Enberg, Director

of Liquids Marketing for Range Resources, identified his company's investment in the Commonwealth of over \$7 billion as an independent gas exploration and production company and the more than \$2 billion in royalty fees paid to landowners, mostly in southwestern Pennsylvania. Tr. at 605:12-606:9. Mr. Enberg then testified on the highly confidential record. Tr. at 608:13-619:6. Richard Billman, SPLP's Vice President of Business Development, also testified on the highly confidential record. Tr. at 621:22-631:9.

II. Legal Argument

A. Sen. Dinniman lacks standing to bring a complaint or petition for emergency relief.

To have standing to bring the Petition for Interim Emergency Relief, Sen. Dinniman must have standing to bring the Complaint because a petition for emergency relief requires an underlying proceeding. 52 Pa. Code § 3.6(a) ("A party may submit a petition for an interim emergency order *during the course of a proceeding.*") (emphasis added). The only proceeding here is a Complaint, so Petitioner must be able to meet the standing requirements regarding a Complaint.

Sen. Dinniman's counsel initially represented to Your Honor at a scheduling conference that the Senator had to be a participant in his representational capacity due to his "arrangement" with counsel. At hearing, Sen. Dinniman testified that the "arrangement" is that the Senate Democratic Caucus has retained and paid for his counsel. Tr. at 120:17-122:14. On that basis, it is clear that Sen. Dinniman must be litigating this matter solely in his representational capacity because otherwise he would be accepting public funds for a private individual lawsuit.

Regardless, for the reasons set forth below, Sen. Dinniman lacks standing in either his representational or individual capacity because he did not and cannot show that he has the required direct, immediate, and substantial interest. Under clear and controlling appellate

precedent, sitting on legislative committees related to energy or the environment, having constituents that complain to him about pipelines, and living within two miles of the Mariner East pipelines are not are not sufficient interests to meet that standing.

1. **Standing before the Commission requires that the Complainant or Petitioner have a direct, substantial and immediate interest.**

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.*”).

2. **Sen. Dinniman does not having standing in a representational or official capacity.**

a. **Sen. Dinniman cannot represent the interest of others in his personal capacity.**

It is black-letter law that to have standing, a party must have a personal interest and cannot represent the general interest of others in ensuring compliance with the law. *See, e.g., Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 280–81 (Pa. 1975) (“[I]t is not sufficient for the person claiming to be ‘aggrieved’ to assert the common interest of all citizens in procuring obedience to the law.”).

Likewise, as a non-lawyer, Sen. Dinniman does not have representational standing – he can only represent his own interests, not the interests of others. *See, e.g., Tomko v. Duquesne Light Co.*, Dkt. No. C-2016- 2577571, at 7-8 (Order entered Jul. 20, 2017) (affirming ALJ Calvelli’s conclusion that a non-lawyer utility customer attempting to represent other customers’ interests in addition to his own lacked standing to pursue the interests of others).

b. Sen. Dinniman cannot represent the interests of others in his official capacity.

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). 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. 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).

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. Am. Compl. at 13; Am. Pet. at 12; *see also* Tr. at 56:7-57:4.

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.

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* Am. Compl. ¶¶ 10-14; Petition ¶¶ 9-13. 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*.

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 standard necessary to bring a complaint. Rather, a protestant is akin to a commentator 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. And finally, 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.

3. **Sen. Dinniman does not have standing in his individual capacity.**

"The 'keystone to standing in these [individual] terms is that the person must be negatively impacted in some real and direct fashion.'" *Markham*, 136 A.3d at 140 (quoting *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 660 (Pa. 2005)). The Pennsylvania Supreme Court has held, where, as here, no specific, individual injury is alleged from the actions complained of, there is no standing to bring a complaint. *Carlino v. Whitpain Investors*, 453 A.2d 1385, 1386–87 (Pa.1982). The Court explained:

In particular, it is not sufficient for the person claiming to be "aggrieved" to assert the common interest of all citizens in procuring obedience to the law. This rule respecting standing is not intended to bar from relief persons injured by breach of a public duty merely because many others have incurred similar injuries as a consequence of that breach; rather, the "concern is to distinguish those who have suffered some individual injury from those asserting only the common right of the entire public that the law be obeyed." Since the instant complaint, although containing a broad assertion that deficiencies in the access road will "have a unique impact" on appellants, fails to specify any *individual injury* attributable to deficiencies in the roadway itself and in preparatory studies, appellants must be regarded as lacking standing to raise such objections to PennDOT's action.

Id. (emphasis added) (citations and footnotes omitted).

Sen. Dinniman admitted that he is not adversely affected by SPLP's or the Commission's actions: (i) he has never had a sinkhole on his property." "I have not had a sinkhole on my property because I don't live in the valley where the problems are." Tr. at 125:5-7. Instead, he lives on a hill that is not impacted.; (ii) he is on public water, does not have a private well, and his public water supply has not been impacted. Tr. at 125:12-20; and (iii) no inadvertent return has impacted his property. Tr. at 126:10-12.

Instead, as the sole basis for his standing in a personal capacity, Sen. Dinniman alleges that he is a resident of West Whiteland Township who lives two miles from the pipelines. Tr. at 52:17-18, 53:2-4. But, *mere proximity to the pipeline does not create an interest sufficient for standing*. Notably, the Commonwealth Court recently issued an opinion in *Friends of Lackawanna v. Dunmore Borough Zoning Hearing Bd.*, Dkt. No. 656 C.D. 2017 (Pa. Commw. Ct. May 7, 2018), that where standing based on proximity is alleged, there must be "discernable adverse effects" that infringe on the use and enjoyment of property, not just mere proximity or aesthetic concerns. Slip. Op. at 7 (finding homeowners within a quarter to a half mile of landfill had standing to challenge expansion of landfill where they experienced "pungent odors of rotting garbage, dust, bird droppings, and truck traffic directly affecting their properties.").

Notably, not a single paragraph in Sen. Dinniman's Petition for Emergency Relief where he attempts to establish the burden that he must meet for interim emergency relief (¶¶ 60-98) alleges any harm or injury specific to him. Specifically, all the harms that he alleges relate to others or the public in general. *See, e.g., id.* at ¶ 62 (general allegations about harm to the drinking water of others); ¶ 63 (alleging danger to homes, dwellings, residents, and "other individuals"); ¶ 72 (alleging confusion of the public); ¶ 73 (alleging harm to school district). The same was true for Sen. Dinniman's testimony which was based largely on hearsay from third

party complaints for which he lacked personal knowledge. Such alleged harms, common to any citizen living in West Whiteland Township, do not establish a substantial interest for him as an individual. “A party has a substantial interest in the outcome of litigation if his interest surpasses that ‘of all citizens in procuring obedience to the law.’” *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009).

B. Sen. Dinniman must meet his burden of proof to establish a clear and present danger on each of four elements to obtain interim emergency relief.

The purpose of an interim *emergency* order is to grant or deny injunctive relief during the pendency of a proceeding. 52 Pa. Code § 3.1. “Emergency” is defined in the Commission’s Regulations as “[a] situation which *presents a clear and present danger to life or property* or which is uncontested *and requires action prior to the next scheduled public meeting.*” *Id.* (emphasis added.)

The standards that govern the issuance of interim emergency orders are set forth at 52 Pa. Code § 3.6. A Petitioner who seeks the Commission to enter an order for interim emergency relief must establish four elements:

- (1) The petitioner’s right to relief is clear;
- (2) The need for relief is immediate;
- (3) The injury would be irreparable if relief is not granted; and
- (4) The relief requested is not injurious to the public interest.

52 Pa Code. § 3.6(b). Interim emergency relief is only available when petitioner proves *each of these elements*. *Glade Park East Home Owners Ass’n v. Pa. PUC*, 628 A.2d 468, 473 (Pa. Commw. Ct. 1993). Interim emergency relief also requires that Petitioner prove that an emergency exists as opposed to offering inferences, conjecture or concerns. *Peoples Natural Gas Co. v. PUC*, 555 A.2d 288, 291 (Pa. Commw. Ct. 1989) (reversing Commission decision entering injunction where no evidence of emergency); Order Denying Interim Emergency Relief, *Buffalo-Lake Erie Wireless Sys. Co. v. Verizon-PA*, Dkt. No. C-2010-2158408 (Mar. 2, 2010)

(Colwell, J.) at 10 (“BLEW”) (*Edan Transp. Corp. v. PUC*, 623 A.2d 6 (Pa. Commw. Ct. 1993)).

The petitioner’s burden is very steep. Petitioner must establish each of these elements by a preponderance of the evidence. 66 Pa. C.S. § 332(a) (“proponent of a rule or order has the burden of proof”); *Samuel J. Lansberry, Inc. v. PUC*, 134 Pa. Cmwth. 218, 222-23 (Pa. Commw. Ct. 1990) (“The litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.”).

Failure to prove even a single element requires the Commission to deny a petition for interim emergency relief. *Crums Mill Assoc. v. Dauphin Consol. Water Supply*, Dkt. No. C-00934810 (Order entered April 16, 1993), slip op. at 4 (failure of a petitioner to meet any one of four elements requires denial of relief); *Peoples Natural Gas Co. v. PUC*, 555 A.2d at 291 (reversing Commission’s reversal of ALJ’s decision to deny interim emergency order because ALJ found that evidence did not establish an emergency circumstance). The findings of fact “necessary to support an adjudication of the Commission must be based upon substantial evidence, which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Trimac Transp. East, Inc.*, Dkt. No. M-2012-2314062 (Order entered Nov. 13, 2012), at 2.

1. Petitioner must present competent evidence to meet its burden

A petitioner must provide more “than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.” *Petition of Norfolk Southern Railway Co.*, Dkt. No. C-00019560, 2011 WL 6122882 (Order entered Dec. 1, 2011), at 8 (citing *Norfolk & Western Ry. v. PUC*, 413 A.2d 1037 (Pa. 1980)); *Erie Resistor Corp. v. Unemployment Comp. Bd. Of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Dep’t of Pub. Welfare, White Haven Center*, 480 A.2d 382 (Pa. Commw. Ct. 1984). Petitioner bears both the burden of production and the

burden of persuasion. *Hurley v. Hurley*, 754 A.2d 1283 (Pa. Super. 2000). Unlike the burden of production, the burden of persuasion “includes determinations of credibility and acceptance or rejection of inferences....” *BLEW* at 11-12 (citing *Suber v. Pa. Comm’n on Crime & Delinquency*, 885 A.2d 678 (Pa. Commw. Ct. 2005)).

Moreover, certain evidence, even though it may have been admitted into the record, is not competent evidence to meet Petitioner’s burden of proof. *See Gruelle c/o Toll Diversified Props., Inc. v. PPL Electric Util. Corp.*, Dkt. No. C-2015-2463573, 2015 WL 7873828, at *10–12 (Order entered Oct. 27, 2015) (Colwell, ALJ.).

a. Hearsay cannot support emergency relief.

Hearsay evidence that is properly objected to, is not competent to support a finding in an administrative hearing. Likewise, hearsay evidence admitted without objection may support a finding only if corroborated by other competent evidence in the record. *Anderson v. Pa. Dept. of Pub. Welfare*, 468 A.2d 1167 (1983). A finding of fact based solely on hearsay will not stand. This is known as the *Walker* rule, which the Commission follows. *Walker v. Unemployment Comp. Bd. of Review*, 367 A.2d 366, 370 (Pa. Commw. Ct. 1976). *See also, Bridges v. Wixon*, 326 U.S. 135 (1945). For this reason, Pennsylvania courts do not regard the hearsay rule as a technical rule of evidence, but a basic, vital and fundamental rule of law, which ought to be followed by administrative agencies at those points in their hearings when facts crucial to an issue are sought to be placed upon the record. *Bleilevens v. Pa. State Civil Service Commission*, 312 A.2d 109, 111 (Pa. Commw. Ct. 1973).

b. Lay opinion cannot support emergency relief.

Likewise, lay opinions on matters requiring scientific, technical or specialized knowledge are not competent evidence to support a finding of fact. *Pickford v. Pennsylvania-American Water Co.*, Dkt. No. C-2007-8029, 2009 WL 1514962 (Order entered May 14, 2009); Pa. R.E.

701(c) (“If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is . . . not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”). Similarly, a lay witness’s references to reports or conclusions of others is not substantial evidence, as the lay witness cannot rely on that type of information in reaching a conclusion. *See* Pa.R.E. 701 and 703. Instead, that is the role of a qualified expert witness. That a witness may be an elected public official does not make him an expert on scientific and technical matters such as geology, pipeline construction, pipeline safety, or emergency response.

c. Inference, conjecture or concerns cannot support emergency relief.

A petitioner cannot meet the burden of proving an emergency by offering inference, conjecture or concerns in highly technical matters, such as this matter. *Petition of Norfolk Southern Railway Co.*, Dkt. No. C-00019560, 2011 WL 6122882 (Order entered Dec. 1, 2011). (“More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.”). The standard is not what might happen or what personal concerns one holds. Rather, the standard is that an emergency in facts exists. *Peoples Natural Gas Co.*, 555 A.2d at 291 (reversing Commission’s reversal of ALJ’s decision to deny interim emergency order because ALJ found that evidence did not establish an emergency circumstance).

d. Past remedied, resolved, or no longer existing occurrences are not a basis for finding an existing immediate emergency.

The issue in an emergency petition proceeding is not whether past remedied or resolved occurrences happened, but if there is any utility activity that is an immediate emergency under facts as they exist today. An attempt to point to past matters to attempt to portray the utility in a bad light is not a substitute for the factual proof required to show an emergency exists today. Pennsylvania law is clear – past conduct or harm cannot form the basis for injunctive relief. *See e.g., Kuren v. Luzerne Cnty.*, 637 Pa. 33, 86 (Pa. 2016) (“[A] suit for an injunction deals

primarily not with past violations, but with threatened future ones.”) (quoting *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928)); *Den-Tal-Ez, Inc. v. Siemens Capital Corp.*, 389 Pa. Super. 219, 255 (Pa. Super. 1989) (“as to injunctive relief, our focus is necessarily prospective. The proper inquiry is not whether the defendant has [suffered harm], but whether there is a sufficient likelihood, or substantial threat, of defendant doing so in the future.”); *South Fayette Twp. v. Commw.*, 477 Pa. 574, 583 (Pa. 1978) (vacating preliminary injunction issued by Commonwealth Court to prevent operation of juvenile treatment facility in township where township’s “sole proof of anticipated injury was evidence of incidents occurring months and years before the hearing,” and where township “made no showing [that] the problems complained of presently exist”); *Three Cnty. Servs., Inc. v. Phila. Inquirer*, 337 Pa. Super. 241, 246 (Pa. Super. 1985) (past conduct does not provide a basis for injunctive relief).

C. Sen. Dinniman has not satisfied any of the elements for emergency relief.

Sen. Dinniman has failed to provide any evidence – let alone substantial evidence – to satisfy the heavy burden of showing that ME1 or ME2 are unsafe, that the construction of the ME2 and ME2X presents a safety concern in West Whiteland Township, or that such construction would risk the safety or integrity of ME1 in West Whiteland Township.

1. Sen. Dinniman has not established that he is entitled to relief or that irreparable injury will result unless the Petition is granted.

While a petitioner must prove that its right to relief is clear, its burden relative to the merits does not end there, and it must establish facts that prove that irreparable injury will result if emergency relief is not granted. That burden cannot be met by offering mere allegation, inference, lay opinion, incompetent evidence, and conjecture. *Petition of Norfolk Southern Railway Co.*, Dkt. No. C-00019560, 2011 WL 6122882, at * 8 (Order entered Dec. 1, 2011). (“More is required than a mere trace of evidence or a suspicion of the existence of a fact sought

to be established.”). Sen. Dinniman failed to present any competent evidence, much less sufficient evidence to meet his burden of proving any of his allegations as to the safety of ME1, ME2 or ME2X.

a. **The geology in West Whiteland Township is competent for the safe operation of ME1 and for the construction and operation of ME2/ ME2X.**

Sen. Dinniman has not met, and cannot meet, his burden of proving that the geology in West Whiteland Township is unsafe for the construction of ME2/ME2X or the operation of ME1. The only expert opinion that Sen. Dinniman offered was from Ira Sasowsky, who opined that when SPLP does work in Karst areas, SPLP should take extra precautions to minimize the likelihood of problems from occurring, which includes performing additional geological or geophysical investigations in Karst areas. *See* Tr. at 296:7-10. This evidence, which is a truism, is insufficient to meet Sen. Dinniman’s burden of proof.

Sasowsky did not identify what geological or geophysical tests were necessary in West Whiteland Township, or that SPLP has failed to perform such tests. Sasowsky admitted that he did not review any of the geophysical work that was completed in West Whiteland Township, other than the ARM report for the subsidence in the Lisa Drive area. Tr. at 282:12-23. Sasowsky did not review the permit applications for ME2, or the permit modifications that have been submitted to PADEP to modify certain HDDs in West Whiteland Township to be constructed by open cut and a series of bores, or the geotechnical and geophysical studies on which the permit modifications were based. Tr. at 282:24-283:2. In fact, Sasowsky admitted that he did not even know which construction methods would be used for installation of the ME2 pipeline in West Whiteland Township. Tr. at 285:21-2. Sasowsky did not offer any opinion whether it was safe to operate ME1 or ME2 in Karst geology, he did not offer any opinion regarding the integrity of ME1, and admitted that has never overseen the construction of a

pipeline using HDD through Karst. Tr. at 283:3-284:6. Remarkably, Sasowsky admitted that he has never been to West Whiteland Township and has not examined the geology in West Whiteland Township other than looking at general geological maps and databases. Tr. at 248:22, 281:3-5. Sasowsky stated that he intends to visit West Whiteland Township and the Lisa Drive site in the future, which is an admission that on-site evaluation of geological conditions is important and necessary in order to render an opinion regarding the geology of the area.² Tr. at 295:6-8. Yet, Dr. Sasowsky did not do so before he testified.

In short, Sen. Dinniman's only evidence is that when a pipeline is constructed in Karst, it is advisable to take extra precautions. The only specific precaution that Sasowsky noted was increased stormwater controls in Karst areas (Tr. at 268:9-17) – which SPLP has adopted as a best management practice and implements for the construction of ME2. Tr. at 395:1-11 (Gordon testimony, describing best management practices in Karst Plan); SPLP Ex. 7, Karst Plan at 6-7, 11-13 (describing best management practices for construction in Karst, including stormwater management). Sen. Dinniman has not presented any competent evidence to demonstrate that SPLP has failed to take adequate precautions when working in Karst in West Whiteland Township, that SPLP has failed to properly assess the geology in West Whiteland Township, or that SPLP has failed to properly minimize the likelihood that problems will occur during construction, erring on the side of caution.

Even though Sen. Dinniman did not meet his burden of proof on this issue, the abundant evidence presented by SPLP demonstrates that SPLP has properly assessed the geology in West Whiteland Township and that the continued operation of ME1 and the construction of ME2/ME2X in West Whiteland in that geology is safe. SPLP presented un rebutted expert

² SPLP's geologist expert, Demko testified that it is "critical" to observe geological conditions first-hand in order to render an opinion or offer advice regarding the geology of an area. Tr. at 655:13-656:4.

testimony from David Demko, P.G. a licensed professional geologist who is responsible for overseeing the geological aspects of ME2/ME2X construction in Chester County, including all construction locations in West Whiteland Township. Tr. at 643:1-16. Demko has personal knowledge of all HDD and other construction activities in West Whiteland Township, has reviewed the geology and geophysical data for each construction location in West Whiteland Township and has performed geological testing to ensure that construction is being performed in competent geology. Tr. at 644:1-19. Demko testified that SPLP collected geological borings for each HDD location that was included in SPLP's original applications to PADEP for the ME2/ME2X permits, SPLP conducted additional geotechnical borings at each of the proposed HDD locations, additional geophysical investigation was completed for any locations that crossed Karst, and SPLP performed a fracture trace analysis for all locations in West Whiteland Township and Chester County. Tr. at 654:21-655:12. While Sasowsky did not identify what additional geological or geophysical tests should be conducted, Demko testified that erring on the side of caution SPLP performed all appropriate geological and geophysical evaluations throughout West Whiteland Township, and that no additional geologic or geophysical testing is needed. Tr. at 689:8-18.

In contrast to Sasowsky, Demko has personally visited the construction sites in West Whiteland Township at least two dozen times. Tr. 656:5-10. Demko further testified to a reasonable degree of scientific certainty that for each construction location in West Whiteland Township: (1) the construction of the ME2/ME2X pipelines is safe in the underlying geology; (2) the use of open cut, bore, or HDD at each location did not present any risk of subsidence; and, (3) the construction of ME2/ME2X does not create a safety risk for ME1. Tr. at 661:11-23 (HDD S3-0360); 665:18-666:7 (North Pottstown Pike permit modification area); 668:13-670:5

(Swedesford Road permit modification area); 671:4-10 (HDD S3-0401); 686:12-24 (HDD S3-400, modification to open cut and bore); 672:9-20 (HDD S3-0410); 673:22-6 (HDD S3-0421).

Demko also confirmed that you cannot install a pipeline in either Chester County or West Whiteland Township without encountering Karst, and that multiple pipelines other than ME1 and ME2 have been constructed in Chester County and West Whiteland Township successfully and without any safety concerns. Tr. at 645:25-647:10; *see also* SPLP Ex. 1, Map of Karst in Pennsylvania; SPLP Ex. 2, Map of Karst in Chester County and existing pipelines. Sen. Dinniman agreed that Chester County has “the third highest number of pipelines of any county in the Commonwealth,” but did not point to any concerns regarding any other pipelines in West Whiteland Township or Chester County³ that cross Karst. Tr. at 157:3-5. Both Sen. Dinniman Sasowsky admitted that it was possible to construct a pipeline safely through Karst with proper procedures and sufficient funding. Tr. at 162:11-14 (pipelines can be constructed safely in Karst); Tr. at 287:18-21 (“you can safely construct in karst with proper procedures and enough money”). SPLP’s project manager, Matthew Gordon, SPLP’s project manager, testified that there is sufficient funding to implement the prevention and mitigation measures identified in the Karst Plan in West Whiteland Township. Tr. at 12-15.

Demko agreed, and testified that in his professional opinion, pipelines could be safely installed in Karst using open cut, bores, and HDDs, (Tr. at 647:11-20) and that SPLP has

³ Transmission pipelines for natural gas and hazardous liquids are prevalent in West Whiteland, in Chester County, and throughout the Commonwealth. *Melso v. Sun Pipeline Co.*, 394 Pa. Super. 578, 587 (Pa. Super. 1990) (overruling summary judgment and holding that a Sunoco transmission pipeline through a residential area in Bucks County was not an abnormally dangerous activity imposing strict liability upon Sunoco for a leak from the pipeline caused by a third-party, noting that the transmission on land of natural gas and petroleum products by pipeline, train or motor vehicle, is a common activity in a highly industrialized society such as our own.”). Despite acknowledging that other pipelines cross Chester County and cross Karst, the only pipelines that Sen. Dinniman is attempting to shut down are ME1 and ME2/ME2X. Tr. at 158:3-7; 161:6-13. In fact, Sen. Dinniman testified that his property is crossed by a pipeline from another company, Williams, and that “[t]he line was there before me, so I just simply accept it as a reality.” Tr. at 130:4-6.

installed ME2 in other locations along the pipeline route safely using HDD. Tr. at 687:23-5.

Despite the fact that pipelines can be safely installed in Karst, Demko confirmed that SPLP has taken the most conservative approach, and has eliminated HDDs as a construction method in all locations where the route of ME2/ME2X crosses Karst in West Whiteland Township.⁴ Tr. at 687:19-22. SPLP has two pending permit modifications submitted to PADEP that will eliminate the use of HDD in the remaining Karst areas in West Whiteland township. See SPLP Ex. 5, Permit Modification Application for North Pottstown Pike (HDD S3-0370); SPLP Ex. 6, Permit Modification Application for Swedesford Road (HDD S3-0381 and S3-0382); see also Tr. at 661:24-663:8, 666:8-668:16 (Demko testimony on permit modifications); Tr. at 409:11-412:8, 412:9-414:18 (Gordon testimony on permit modifications).

At Lisa Drive, there is no evidence that the geology in that area is unsafe for the continued operation of ME1 and for the construction of ME2/ME2X. In fact, the investigation and remediation of the subsidence at Lisa Drive that was performed by SPLP under the guidance and oversight of BIE and PHMSA confirmed that the localized subsidence did not impact the integrity of ME1. SPLP performed an in-line inspection tool run through ME1 and conducted geophysical testing in the surrounding area that included electrical resistivity, seismic (MASW) and micro-gravity tests, all of which confirmed the limits of the subsidence, that there was no Karst in this area and there were no issues regarding the integrity of ME1. See Tr. at 681-683;

⁴ To the extent that Sen. Dinniman refers to a chart prepared by SPLP in response to PADEP's January 3, 2018 Administrative Order (i.e. P-18) regarding the work that remains to be completed in West Whiteland Township, on its face that chart reflects that the HDDs in North Pottstown Pike and Swedesford Road have a pending permit modification to change from HDD to open cut. Moreover, this document was submitted to PADEP in late-January, and therefore does not reflect the subsequent changes to construction plans that SPLP has agreed to in response to the Lisa Drive subsidence. The current status of future construction in the Lisa Drive area is reflected in SPLP's prior submissions to the Commission, as reflected in the ARM report (SPLP Ex. 19, ARM Report at 3, "It is ARM's opinion that SPLP has mitigated this concern by changing the next pipeline installation in this area from an HDD installation to a trenching/direct burial installation), and also by the testimony of Matt Gordon (Tr. at 415:12-16), and Demko (Tr. at 674:14-24), which both confirmed that future pipeline installation at Lisa Drive would be through an open cut method.

see also SPLP Ex. 19, ARM Report; see [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL].

SPLP's investigation of the integrity of ME1 was confirmed by an independent consultant retained by BIE – ARM Group, Inc. See SPLP Ex. 19. ARM produced a summary report that detailed the tasks completed by SPLP, BIE and ARM. BIE confirmed the integrity of ME1, and concluded that the pipeline was safe and that it could be put back into service. See SPLP Ex. 18, BIE Concurrence for Reinstatement of ME1. BIE concluded that it “is of the opinion that the integrity of the ME1 pipeline has not been compromised by the soil subsidence events that triggered this investigation and consequently.” SPLP Ex. 18 at 10. The Commission agreed, and on May 3, 2018 issued its unanimous order to reinstate utility service on ME1. See SPLP Ex. 20 at 13. Sen. Dinniman presented no evidence to contradict the Commission's determination that the integrity of ME1 is sound and that the pipeline can continue to safely operate in West Whiteland Township.

And finally, Demko's unrebutted testimony establishes that the cause of the subsidence that exposed a small section of ME1 (which was supported by soil both underneath and on its sides) was not the geology of Lisa Drive, but rather the fact that the borehole was left open for 45 days despite SPLP's request to PADEP to complete the drill to avoid the very subsidence that

occurred. Tr. at 680:12-681:2, 687:3-18. Demko opined to a reasonable degree of scientific certainty that the subsidence would not have occurred if PADEP had allowed SPLP to complete the drill as requested. Tr. at 680-25-681:2. In sharp contrast, when asked directly, Sasowsky could offer no opinion as to the cause of the subsidences at Lisa Drive. Tr. at 281:13-22.

Because Sen. Dinniman has not met his burden on the central issue that the geology in West Whiteland Township is unsafe for the construction and operation of pipelines, the Petition should be denied.

b. Sen. Dinniman has not proven that the construction of ME2 creates a risk of subsidence or sinkholes in West Whiteland Township.

Sen. Dinniman asserts that the continued construction of ME2/ME2X in West Whiteland Township creates the risk that subsidence or sinkholes will occur in the future. Am. Pet. ¶ 63. There is no evidence that the continued construction of ME2/ME2X in West Whiteland Township will cause subsidence. Sasowsky confirmed that he could not offer an opinion that sinkholes will develop at any particular location with respect to the remaining construction of ME2. Tr. at 290:4-9. In contrast, Demko, who has fully evaluated the geology in West Whiteland Township, testified that in his expert opinion to a reasonable degree of scientific certainty, there is no risk of subsidence from any of the remaining construction activities in West Whiteland Township. Tr. at 661:11-23, 665:18-666:7, 668:13-670:5, 671:4-10, 672:9-20, 673:22-6. 686:12-24. Moreover, none of the future HDDs to be completed in West Whiteland will occur in Karst – SPLP has voluntarily eliminated the HDDs at North Pottstown Pike and Swedesford Road, and will construct the second pipe at Lisa Drive using an open cut construction method. *See* Tr. at 687:19-22, 661:24-663:8, 666:8-668:16, 409:11-412:8, 412:9-414:18; *see also* SPLP Ex. 5, SPLP Ex. 6.

To the extent Sen. Dinniman points to the subsidence at Lisa Drive as evidence that the construction of ME2/ME2X will cause subsidences in the future, there is no evidence that even if subsidence occurred, that it would affect the integrity or safety of ME1. In fact, the circumstances at Lisa Drive show the exact opposite – that subsidence can occur near ME1 but that ME1 will not be compromised. Pipeline safety expert John Zurcher testified that pipelines can be built, and have been built, safely in various geological conditions, including areas of Karst, and that there has never been a pipeline incident or release that was caused by subsidence. Tr. at 538:4-22. Zurcher testified that there are over 3,000 miles of transmission pipelines in Pennsylvania, and there is no instance of subsidence causing any issues with the integrity of a pipeline. Tr. at 538:10-14. And even if there were a concern that subsidence could occur in the future, Zurcher confirmed that SPLP has no less than seven⁵ operating procedures to assess whether subsidence has undermined any section of its pipelines, to address exposure of a pipeline, and to address adequate cover above a pipeline. Tr. at 539:2-19.

There is no evidence to support Sen. Dinniman's allegations that the continued construction of ME2 in West Whiteland Township will cause subsidence of sinkholes, or that even if such subsidence occurred, they would impact the integrity of ME1.

c. Sen. Dinniman has not presented any evidence that the construction of ME2/ME2X in West Whiteland Township will endanger public or private drinking water supplies.

There was no evidence presented at the hearing that any inadvertent return of drilling mud that occurred in West Whiteland impacted any private or public water supplies, or that even if an IR were to occur in the future, that the constituents of drilling mud pose any human health

⁵ See e.g., SPLP Ex. 33, Liquids SOP, at HL.8 (Lowering or Raising In-Service Pipelines), HL.10 (Excavation Backfill), HL.21 (Inspection of ROW Crossings), HLI.24 (Management of Depth of Cover and Evaluation), HLI.26 (Mining Subsidence and Soil Slippage), HL.28 (Right-of-Way Encroachments), HLI.29 (Right-of-Way Maintenance), HLI.30 (Mechanical Damage).

or toxicological risk. The only testimony presented on this issue was not evidence, but simply Sen. Dinniman's unsubstantiated allegations that an IR occurred at the Shoen Road area and that one resident showed him a bottle of cloudy water. Tr. at 89:12-22, 90:4-7, 148:10-12. First, the Senator's statement is hearsay and cannot support any basis for relief. *See e.g., Anderson v. Pa. Dept. of Pub. Welfare*, 79 Pa. Cmwlth 182, 186 (Commw. Ct. 1983); *Gruelle c/o Toll Diversified Properties, Inc.*, Dkt. No. C-2015-2463573, 2015 WL 7873828, at *11 (Order entered Oct. 27, 2015) (Colwell, J.). Sen. Dinniman did not present any testimony from any resident to establish that an IR occurred at Shoen Road, and did not introduce any sampling results to support his allegation that drilling mud entered a water supply well.

The issues at Shoen Road were well documented – there was never an IR of drilling mud at that location, but rather the HDD encountered a shallow aquifer that resulted in the drawing down of certain landowners' wells. Tr. at 657:13-20. The private water supplies in the Shoen Road area have been fully remediated by connecting the entire neighborhood to public water at SPLP's expense.⁶ Tr. at 418:15-18. Sen. Dinniman admitted that he did not have any information that an IR of drilling mud actually occurred at Shoen Road, and that all he knew was that private wells went dry in the area. Tr. at 146:8-11. Moreover, even if an IR were to occur, Sen. Dinniman presented no evidence that exposure to drilling mud either caused or could cause any human health or toxicological effects. In fact, Sen. Dinniman agreed that he did not have any evidence that drilling mud has any toxicological effects on human health, admitted that bentonite is in cosmetic products, baby products, and that bentonite is used to dress wounds. Tr. at 146:16-147:4.

⁶ There are only two residents in the Shoen Road area who are not yet connected to public water – one who has refused to connect, and one who has accepted SPLP's offer but is waiting for access across neighboring property owned by Intervenor Kerslake. *See* Tr. at ___.

Sen. Dinniman's understanding of the benign nature of the materials used in HDDs was confirmed by SPLP's toxicologist expert, Dr. Paul Chrostowski. Dr. Chrostowski testified that there are no human health or toxicological risks from the materials used in the HDD process, which primarily consist of water, non-toxic bentonite clay and other approved non-toxic additives. Tr. at 312:12-14. Dr. Chrostowski testified that in his expert opinion to a reasonable degree of scientific certainty, the materials used in HDDs "do not pose a health and safety risk to human beings . . . either through water or through soil." Tr. at 312:25-313:3. Dr. Chrostowski testified that bentonite is a very common material that is approved by the Food and Drug Administration as a food additive and for cosmetics and personal care products, that bentonite can be found in numerous consumer products, is used in medical applications, and recent studies have found that bentonite can be used for antibiotic applications to kill bacteria. Tr. at 313:4-24. Bentonite is approved by the National Sanitation Foundation for use in drinking water treatment, and bentonite is used for casing in residential wells, and used to treat water to remove other particulate matter and bacteria from water supplies. Tr. at 315:13-16. Dr. Chrostowski's expert opinion was that if a person came into contact with any of the materials used in HDD operations because they are classified as low toxicity, the person would not suffer any adverse health effects. Tr. at 314:23-315:1.

Likewise, Sen. Dinniman failed to present any evidence that construction of ME2/ME2X in West Whiteland Township would cause any potential impacts to public water supplies. In fact, the only evidence presented regarding potential impacts to public water supplies in West Whiteland Township is that SPLP chose to voluntarily redesign the proposed HDD at Swedesford Road to avoid any potential issues with an Aqua public water supply in the area near the proposed HDD. *See* SPLP Ex. 6, Swedesford Rd. Major Permit Modification; *see also* Tr. at

413:15-414:12 (Gordon testimony regarding voluntary change in construction method to address Aqua's concerns.) SPLP performed hydraulic and geological testing in the Swedesford Road area and adopted the most conservative approach by eliminating the HDD and replacing it with open cut construction, a series of conventional bores, and one short FlexBor. *See* SPLP Ex. 6; *see also* Tr. at 413:15-414:12. Matthew Gordon testified that Aqua has concurred in this permit modification and that the open cut and FlexBor will not impact Aqua's public water supply. Tr. at 414:9-12.

Sen. Dinniman has not, and cannot sustain his burden of proving that the construction of ME2/ME2X has caused or has the potential to cause damage to private or public drinking water supplies in West Whiteland Township. There was no IR of drilling mud at Shoen Road, and the entire neighborhood has been offered connections to public water. Nor is there any evidence that construction in West Whiteland Township will endanger any public or private water supplies in the future – to the contrary, the evidence demonstrates that SPLP avoided any potential risks by redesigning the construction method in the Swedesford Road area.

d. SPLP has conducted an extensive public outreach program that adequately informs the public how to respond if a pipeline-related emergency occurs.

Sen. Dinniman alleges that SPLP failed to properly communicate how the public should respond in the event of a pipeline emergency. *See* Am. Pet. ¶¶ 67-74. In support of these arguments, Sen. Dinniman offered hearsay that his constituents have expressed concerns to him that they do not know what to do in the event of a release from one of the pipelines. Tr. at 61:5-63:1. Sen. Dinniman's testimony is hearsay and is not supported by the evidence presented on the record, which demonstrates that SPLP has conducted a robust public outreach program with the community. *See e.g., Anderson*, 79 Pa. Cmwlth at 186; *Debbie Gruelle c/o Toll Diversified Properties, Inc.*, Dkt. No. C-2015-2463573, 2015 WL 7873828, at *11.

SPLP performed a robust public outreach program for the ME2/ME2X pipelines, which included direct mailings to over 66,000 individuals, including all property owners within 1/4 mile from ME2 (20,000 individuals in Chester County), 2,300 public officials (150 in Chester County), including Sen. Dinniman), emergency responders, schools, and excavating companies. *See* SPLP Ex. 9, Letter from Chairman Brown to Governor Wolf (Feb. 2, 2018) at 2; *see also* Tr. 419:20-423:16.⁷ Sen. Dinniman admitted that he received a copy of a letter and brochure sent by SPLP to public officials regarding its pipelines in the area. Tr. at 188:18-22; *see also* SPLP Ex. 10, Letter to Public Officials and Brochure (Oct. 21, 2016). This letter and accompanying brochure describes among other things, how local emergency responders are trained in the event of a pipeline incident occurs, how to recognize a leak, how to identify the location of a buried pipeline, and how public officials can assist to maintain the safety and integrity of pipelines. *See* SPLP Ex. 10. SPLP also sent a similar mailing directly to homeowners, which describes how to recognize a pipeline leak and what to do in the event a leak occurred. *See* SPLP Ex. 46 (Community Pipeline Brochure).

In addition to the direct mailings, SPLP conducted training for over 2,000 emergency responders and public officials at 16 meetings in 2017, including two separate meetings in Chester County that 90 emergency responders attended, *See* SPLP Ex. 9 at 2; *see also* Tr. at 421:17-423:16. A copy of the presentation that SPLP made at these meetings includes detailed information about the health hazards of natural gas liquids, what type of medical care to provide, how to manage a pipeline incident, emergency response procedures, how to recognize a pipeline release, and what emergency response to take depending on whether the release was ignited. *See* SPLP Ex. 11, Mariner Emergency Responder Outreach Presentation. Zurcher, a pipeline safety

⁷Matthew Gordon testified that notices went beyond that referenced by Chairman Brown to all residents within ¼ mile of ME2. Tr. 419:20-423:16.

expert, reviewed SPLP's public outreach materials and confirmed that, in his expert opinion, SPLP's materials provided the appropriate and necessary information regarding how a member of the public should respond in the event a pipeline release occurs. *See* Tr. at 545:9-18. Zucher confirmed that SPLP's public outreach materials provided adequate disclosures of dangers to the public, public officials, and emergency responders, and that SPLP's materials followed industry standards, and that "it has been determined that these are the methods that are most effective" for communicating to the public. Tr. at 545:14-18, 561:3-5 ("I talked earlier about the public awareness program, and believe everything the public needs to know is within that program.").

Sen. Dinniman's Petition should be denied, because there is no evidence that SPLP has failed to properly and adequately warn the public of any risks or dangers associated with its pipelines.

- e. **SPLP has an appropriate integrity management plan which is highly confidential. SPLP is not required to incorporate ME2/ME2X into its integrity management plan until the construction of ME2/ME2X is complete.**

Sen. Dinniman alleges that SPLP does not have an integrity management plan and that as a result, the public lacks the information it needs to understand how to respond in the event an emergency occurs. *See* Am. Pet. ¶¶ 72-74. Sen. Dinniman points to letters from the Downingtown School District (Ex. P-1) and the West Chester Area School District (Ex. P-2) to Governor Wolf that request the Governor require SPLP to release its integrity management plan to the public, and asserting that these school districts do not know how to respond to an emergency unless they obtain a copy of the plan.

As pipeline safety expert Zucher testified, Sen. Dinniman conflates two separate concepts – integrity management that sets forth practices and procedures to confirm the integrity of the pipeline, and emergency response to a pipeline release once it occurs:

The integrity management program deals with the company's process for how to confirm the integrity of the pipeline. The emergency response is the company's process for how to respond to an emergency once or if a pipeline has failed.

Tr. at 18-22. As set forth above, SPLP's public outreach program fully and adequately informs the public, public officials, and first responders what to do in the event a pipeline release occurs.

In contrast, as Zurcher testified and explained, the integrity management evaluates nine separate threats to pipeline integrity that could cause the pipeline to fail, determines the likelihood that such a threat could occur, and evaluates the consequence of an event occurring.

Tr. at 519:12-25. Pipeline companies, including SPLP, use this information to create a risk ranking of their pipeline assets, and then develop assessment techniques, such as pressure testing, hydrostatic testing, in-line inspection, and direct assessment for corrosion. Tr. at 520:1-15.

Zurcher reviewed SPLP's integrity management plan, and testified that it was his expert opinion that SPLP's plan is in conformance both with industry standards and pipeline safety regulations, and that "it's a very adequate document for how the company manages the integrity of their pipelines." Tr. at 545:19-546:10. Both the Commission and PHSMA review SPLP's integrity management plan on an annual basis. See SPLP Ex. 9, Chairman Brown Letter at 1. There is no evidence that SPLP's existing integrity management plan is inadequate or that it fails to comply with all applicable regulations.

Sen. Dinniman admits that SPLP is not required to incorporate ME2 into its existing integrity management plan until *after* ME2 is built – "it is my understanding that they have one year to put that in place." Tr. at 193. On this point, Sen. Dinniman is correct – the applicable regulations found at 49 C.F.R. §§ 195.452(b)(1) require all pipelines that are constructed or converted after May 29, 2001 to develop a written integrity management plan that addresses the particular pipeline within "1 year after the date the pipeline begins operation." There is no

requirement that SPLP already have incorporated ME2/ME2X into its integrity management plan, even though SPLP has done so.

Regardless, the Commission cannot order SPLP's integrity management plan to be released to the public, as Sen. Dinniman requests in his Petition. Gordon testified that the integrity management plan is a highly confidential document that is protected by 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.") *See* Tr. at 424:16-20. The Commission cannot, in granting Sen. Dinniman's Petition, issue an order that releases confidential security information – doing so would violate the Security Act. 35 P.S. § 2146.

f. **SPLP selected a route for ME2/ME2X that is appropriate and satisfies PHMSA regulatory requirements.**

Sen. Dinniman alleges that ME2/ME2X will be located within 50 feet of residential dwellings and places of public assembly in West Whiteland Township, which does not comply with PHMSA requirements that require SPLP to avoid these areas "as far as **practicable.**" Am. Pet. ¶¶ 75-78 to 49 C.F.R. § 195.210(a)-(b) (emphasis added). The uncontradicted evidence demonstrates that SPLP avoided private dwellings, industrial buildings, and places of public assembly along the of ME2 in West Whiteland Township as far as practicable, and that SPLP complies with the requirement to install ME2 with an additional twelve inches of cover in West Whiteland Township.

SPLP took every effort to select a route for ME2/ME2X that avoided impacts to the public and the environment as far as practicable. Matthew Gordon testified that in selecting a route for ME2/ME2X, SPLP evaluated safety, environmental, cultural, geological, and constructability considerations. Tr. at 389:4-393:5. SPLP also evaluated alternatives to locating

ME2/ME2X in West Whiteland Township, which were ultimately rejected because alternative routes would impact tens of additional miles of previously unimpacted areas, and would have resulted in forest and habitat fragmentation. Tr. at 397:15-25. SPLP had significant concerns about habitat fragmentation in Chester County because of the presence of habitat for the bog turtle, a threatened and endangered species. Tr. at 390:11-13. Gordon testified that after significant evaluation of available and practicable routes, SPLP determined the most practicable, feasible, and safest route for ME2/ME2X in West Whiteland Township was to co-locate ME2/ME2X within the existing ME1 right-of-way, except for a small area where ME1 passes beneath the Exton Bypass/Route 30, where technical constraints in that small area made co-location impracticable. See SPLP Ex. 3, Co-location Map; see also Tr. at 398:18-19, 399:9-15 (describing co-location in West Whiteland, and that existing pipeline installed at 90-degree angle).

As Gordon testified, the co-location of ME2 with ME1 in West Whiteland Township is also consistent with the recommendations of the Governor's Pipeline Task Force (of which Sen. Dinniman was a member), which recommends using existing right-of-way corridors and for pipelines to be co-located with other infrastructure to minimize new disturbances. Tr. at 389:4-8, 399:3-6; see also SPLP Ex. 16, Siting and Routing Workgroup Recommendation #1 ("Pipeline companies should utilize practices appropriate for the individual project that can reduce the impacts from land use changes. Depending on the type of project, this approach should consider using existing corridors, co-locating with other infrastructure, or coming projects when feasible to minimize new disturbance."). Gordon concluded that SPLP had avoided routing the ME2 and ME2X pipelines within 50 feet of private dwelling and places of assembly "as far as practicable." Tr. at 399:19-22.

Moreover, co-locating ME2/ME2X within the same right-of-way as ME1 actually increases safety of the pipelines. As Gordon testified, existing utility corridors are well marked and the public is generally familiar with their existing location, which adds an additional level of awareness for contractors and homeowners who may do work in the area. Tr. at 389:16-25. ME1 has been safely operating in the same right-of-way where ME2 is in the process of being constructed for over 80 years, which Gordon testified is additional consideration in support of locating another utility in the same location. Tr. at 390:18-24. Pipeline safety expert Zurcher agreed that co-locating pipelines in existing utility corridors increases safety of the pipelines and the public:

It's actually safer to limit the amount of right-of-way out there that has pipelines in it . . . when pipelines are collocated together, everybody that lives along that pipeline has a better opportunity of receiving information, the emergency responders. You're [not] trying to train or qualify new people. And what you're trying to do here is, you have a much more informed community, public officials, everybody else because now they're familiar with the pipelines. Also, by being co-located, the company's personnel are available to respond to an emergency if needed, and they're located along, and closer to the pipeline facility for quick response.

Tr. at 535:17-536:10.

Further, pursuant to Section 210, if the pipeline is within 50 feet of the structure, the pipeline simply requires an additional 12 inches of cover. 49 C.F.R. § 195.210(b). As Zurcher testified, when ME2/ME2X is installed within 50 feet of a residential structure, industrial site, or place of public assembly, they are buried at a depth of 48 inches – 12 inches more than the 36-inch requirement listed in 49 C.F.R. § 195.248. Tr. at 585:2-9. In fact, SPLP goes further, and includes the additional 12 inches of cover for all locations in Chester and Delaware County, where the ME2/ME2X pipeline is buried at a minimum of 48 inches deep. SPLP's contracts and specifications for ME2/ME2X expressly require contractors to install the pipelines with a

minimum of 48 inches of cover in all areas other than road crossing crossings, which are installed with a minimum of 60 inches of cover. *See* SPLP Ex. 33, Scope of Work, Spread 6, Section 10.5.2 (“Contractor to install pipeline with a minimum of 48” of cover in all areas with the exception of 60” of cover on all road crossing barrow ditches and creeks or as indicated on permits and stakeholder line list.”), and Section 14.1 (“The standard minimum cover of installed pipeline is 48-inches in all areas, with the exception of 60-inches on road crossings.”).

Thus, there is no factual or legal basis to support Sen. Dinniman’s allegations that SPLP has failed to comply with the PHMSA Section 210 regulations in selecting a route for ME2. Sen. Dinniman has failed to present any evidence that the route of ME2 failed to avoid residences, industrial areas, and places of public assembly as far as practicable, or that SPLP has failed to comply with the requirements to add an additional 12-inches of cover above ME2 in these areas.

g. ME1 is exempt from PHMSA siting and burial depth regulations.

Sen. Dinniman alleges that ME1 is buried at less than 48 inches, which increases the risk of damage to ME1 during construction of ME2/ME2X and increases the risk of damage to property and injury to the public in the event of a release. Am. Pet. ¶¶ 79-84. Sen. Dinniman cites to 49 C.F.R. § 195.248 of the PHMSA regulations, which requires pipelines to be buried at specified depths depending on location, including 36-inches for industrial, commercial, or residential areas.

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 (emphasis added); *see also*

Tr. at 549:5-10 (Zurcher testimony regarding Part 195, Section 200 “only applies to new construction.”). 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); *see also* Tr. at 549:11-14 (Zurcher testimony noting that the Pipeline Safety Act of 1968 “specifically forbids retroactive application of those design and construction [standards] to existing pipelines.”). 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.

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.”). Zurcher confirmed that when ME1 changed service, SPLP complied with these requirements and pressure tested the ME1 pipeline at 160%, which significantly exceeded the regulatory requirements for pressure testing

of 125%. Tr. at 586:9-14. As Zurcher noted, SPLP “went above and beyond to prove that that pipeline was going to be fit for service.” Tr. at 586:13-14.

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, Sen. Dinniman cannot meet his burden of establishing that emergency interim relief should be granted.

- h. **The depth of ME1 and its co-location with ME2 does not increase the risk of damage to the pipeline, property damage, or injury to the public during construction of ME2/ME2X in West Whiteland Township.**

Sen. Dinniman alleges that ME1 is buried at less than 48 inches, which increases the risk of damage to ME1 during construction of ME2/ME2X and increases the risk of damage to property and injury to the public in the event of a release. Am. Pet. ¶¶ 79-84. Sen. Dinniman failed to present any engineering or scientific evidence on this issue, despite previously identifying a licensed engineer as a potential witness for the hearing. Regardless, the uncontroverted evidence presented by SPLP demonstrates that the depth at which ME1 is buried and the location of ME1 in proximity to ME2/ME2X has no bearing on the risk of damage to the pipeline during construction of ME2/ME2X.

Zurcher testified that the depth of cover does not correlate to an increased risk of damage to an existing pipeline that is buried at less than 48 inches of cover, that the threats that could damage the integrity of an existing pipeline (such as corrosion, cracking, operator error, weather and outside forces), are independent of depth, and that there is “no correlation between depth of cover and the possibility of a pipeline event occurring.” Tr. at 549:17-19; *see also id.* at 549-551. Zurcher testified that the only possible threat to the integrity of a pipeline where depth could be an issue is an excavation damage incident. Tr. at 551:2-5. Zurcher evaluated available

data on pipeline incidents nationally and determined in his expert opinion, there is no correlation between pipeline safety and depth of cover, and that in fact deeper pipelines may have a greater risk of being impacted during construction than shallower pipelines:

The average depth of a pipeline that has leaked in the United States, on average, the depth is 52 inches. It's not going to be more likely to get struck because its shallower. In fact, when it comes to being struck . . . it's not going to be catastrophically damaged from the lighter equipment that might be close to the surface, but when they have to dig down and get it deep, it's a big piece of equipment, and if it comes in contact with the pipeline, it could be more damage to the pipeline. There is no correlation with depth, none whatsoever, with pipeline safety.

Tr. at 549:17-550:8. Zurcher reviewed the construction procedures for ME2/ME2X, and confirmed that in his expert opinion, they protect against the risk of damage to ME1 during construction and that "they are absolutely adequate for the construction of this pipeline." Tr. at 553:17-554-3. Zurcher confirmed SPLP adopts the Interstate Natural Gas Association standards on doing parallel construction, and that prior to construction, SPLP locates the exact location of ME1, has all utilities marked through the one-call procedure. And during active construction, SPLP uses a spotter who watches the existing pipeline and construction equipment to ensure the contractors are not getting near the existing pipeline. Tr. at 552:18-553:6

Zurcher also confirmed that depth of cover does not affect the extent of damage caused by the release of materials from a pipeline. As Zurcher testified, if a failure were to occur, the fluid in the pipeline would come to the surface, and that "[i]t may be a millisecond or two longer if its down three feet versus one feet, but it's negligible amount as far as timing goes." Tr. at 551:16-18. Nor does the co-location of ME1 and ME2/ME2X create any increased risk should one of the pipelines fail. Zurcher confirmed that there never has been instance where a release from one pipeline impacted an adjacent pipeline:

[T]here has never been a pipeline failure or one pipeline failing caused another one to fail. That has never happened. So long as we maintain the proper separation, the one pipeline failure is not going to affect another.

Tr. at 552:10-14. Zurcher testified that ME2 is being installed a minimum of 10 feet away from existing pipelines, which is the industry standard and also the minimum distance for the use of explosives near a pipeline. Tr. at 552:2-9.

Sen. Dinniman presented no evidence in support of his allegation that the depth of ME1 and its proximity to ME2 increases the risk of damage to ME1 during construction, or that the location of the two pipelines near each other increases the risk of property damage or injury to the public in the event of a release.

i. Notices of violations and consent orders are not evidence and cannot be used to support a petition for interim emergency relief.

At the conclusion of his case in chief, Sen. Dinniman attempted to admit notices of violations and consent orders issued by PADEP and PHMSA to attempt to create an inference that SPLP's past conduct indicates future risks that may occur during the construction of ME2/ME2X in West Whiteland Township. First, as a matter of law, past conduct or harm cannot form the basis for injunctive relief. *See e.g., Kuren v. Luzerne Cnty.*, 637 Pa. 33, 86 (Pa. 2016) (“[A] suit for an injunction deals primarily not with past violations, but with threatened future ones.”) (quoting *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928)). The documents that Sen. Dinniman identified related to ME2 construction were neither confined to West Whiteland Township, nor confined to issues related to the pipeline safety, but rather relate to environmental and other issues that are wholly outside the scope of Sen. Dinniman's Petition. Moreover, a notice of violation or a consent order is not evidence. A notice of violation is merely an allegation by a government agency that a violation has occurred – it is not evidence

that the alleged violation in fact occurred. The consent orders that were identified at the hearing reflect settlements of disputed claims, and contain a specific provision that expressly prohibits the use of the factual findings therein in any other proceeding or by any other party. *See e.g.*, P-7 at ¶ 2(b) (“The parties do not authorize any other persons to use the findings in this Consent Order and Agreement in any matter or proceeding.”); P-13 at ¶ 3(b) (same); P-14 at ¶ 2(b) (same). Moreover, Sen. Dinniman offered no factual or expert testimony that link any of the events described in the notices of violations of consent orders with any concern regarding integrity of ME1 or safety during construction of ME2/ME2X.

The only notices of violation that relate in any way to activities in West Whiteland Township are Lisa Drive and Shoen Road. As demonstrated above, for Lisa Drive, Sen. Dinniman offers no expert testimony that the cause of the subsidence was geology – Sasowsky confirmed that he had not evaluated why the subsidence occurred and had no opinion as to why it occurred. Tr. at 281:13-22. In contrast, Demko’s testimony was that the subsidence was the result of leaving the HDD bore hole open for an extended period of time, and a vacuum effect that was created during pipe pullback in the area. Tr. at 680:12-681:2. Most importantly, the Commission has already determined that the subsidence at Lisa Drive did not impact the integrity of ME1. *See* SPLP Ex. 18, BIE Concurrence; SPLP Ex. 20, Commission’s May 3, 2018 Order. And SPLP has presented the un rebutted expert testimony of Demko that the future construction activities in West Whiteland will not result in subsidence. Tr. at 661:11-23, 665:18-666:7, 668:13-670:5, 671:4-10, 672:9-20, 673:22-6. 686:12-24.

For Shoen Road, there is no evidence that there has been any impact to private water supplies in any other location in West Whiteland Township. All residents in the Shoen Road area who had an impact to his or her water supply were offered temporary water, were offered to

be connected to a permanent public water supply at SPLP's expense, and all but two residents accepted this offer and have been connected to public water. Tr. at 418:15-18. Moreover, the unrebutted evidence presented through Demko's expert testimony is that there has been no evidence of a contaminant or drilling mud in those wells, the water levels in the private wells at Shoen Road have already rebounded to pre-construction levels, and that the wells will remain at those pre-construction levels after construction in the area is complete. Tr. at 658:10-15, 660:16-661:7.

None of the notices of violation or consent orders can support a Petition for Emergency Relief – the law is clear that injunctive relief must be based on future, rather than past conduct, there is no connection between the notices of violation and consent orders and any potential safety risks in West Whiteland Township, and there is no evidence that the circumstances at Lisa Drive or Shoen Road will reoccur in the future.

j. There is no risk to the safety or integrity of ME1 or the Kerslake property from the construction activities of ME2 and ME2X.

Intervenor Virginia Kerslake testified of the alleged impacts to her property from the construction of ME2. Ms. Kerslake's primary concerns were aesthetic. She did not identify a single safety concern to her property. Ms. Kerslake acknowledged that she is on public water, so she has suffered no impact to a private well. Tr. at 3409:11-14. Ms. Kerslake conceded that there was no sinkhole on her property, Tr. at 360:2-4 and there was no inadvertent return of drilling mud on her property, Tr. at 360:5-7, and no flooding of her home. Tr. at 365:2-7.

Ms. Kerslake did testify that the construction of ME2 has caused two seeps to appear on her property. Ms. Kerslake concedes that SPLP has already paid her for a plan to re-landscape the area where the seeps have occurred and to pay for the replacement landscaping. Tr. at 344:18-24. She offered no testimony that the seeps will persist after ME2 and ME2X

construction is complete, nor did she offer any testimony that the seeps impact the integrity or safety of ME1.

In sharp contrast, SPLP offered unrebutted testimony from geologist Demko to a reasonable degree of scientific certainty that:

- (i) he and his team have regularly performed inspections of the seeps on Ms. Kerslake's Property to determine whether any water that flows from the seeps on the surface downhill toward Shoen Road has caused any surface depressions at, on or near the ME1 right-of-way;
- (ii) there are no such surface depressions;
- (iii) the seeps on the Kerslake Property have not and will not impact the structural integrity of ME1;
- (iv) based on his review of the geology in the areas of the Kerslake Property, including geologic tests and studies conducted to date there is no Karst in this area, but instead Chickies Quartzite, which is not Karst. As a result, there is no need for any further geologic investigations regarding potential impacts from the seeps on ME1; and
- (v) After completion of ME2 and ME2X, the seeps will not persist.

Tr. at 658:16-661:23; SPLP Ex. 47 Demko Aff.

Based on all of the above, there is no evidence that there is any safety risk relating to the seeps on Ms. Kerslake's property.

2. Sen. Dinniman has not proven that the need for relief is immediate.

Sen. Dinniman's primary prayer for relief seeks to halt the operation of ME1 throughout the Commonwealth, and to stop the construction of ME2 and ME2X in West Whiteland Township, because he alleges that the construction of ME2 and ME2X is unsafe and because the continued construction of ME2 and ME2X will undermine the structural integrity of ME1. SPLP stated on the record at the hearing that there will be no construction of ME2 and ME2X from now until July 1, 2018. Tr. at 37:14-17, 44:8-12. It is self-evident then, that there can be no imminent safety risk to the public or to ME1 from the construction of ME2 and ME2X, and no emergency as defined in 52 Pa. Code §3.1, when no such construction of ME2 and ME2X is

occurring before the next Commission meeting scheduled for June 14, 2018. Therefore, there is no need for interim emergency relief.

Moreover, the Commission's Order of May 3, 2018 authorizing the restart of ME1 (SPLP Ex. 20) contains detailed conditions to ensure the safe operation and integrity of ME1 even after the construction of ME2 and ME2X restarts in West Whiteland Township. For these reasons, there is no need for any immediate relief in this matter. On that basis alone, Sen. Dinniman's request for interim emergency relief should be denied.

3. **Sen. Dinniman has not proven that the relief he requests will not be injurious to public interest.**

Even though Sen. Dinniman bears the burden of proof to meet each element of emergency injunctive relief, he did not present any evidence of the fourth prong, that the relief requested is not injurious to the public interest. In contrast, SPLP has shown that the requested injunctions will injure, if not have a devastating effect upon, the public interest, including SPLP, its customers, union and non-union jobs, economic growth, property owners in Southwestern Pennsylvania who have gas leases and will be deprived of millions of dollars in royalties, the once idle and now resurrected Marcus Hook refineries and growth thereof, and other people and businesses (restaurants, hotels, contractors, equipment vendors, local businesses, etc.) that rely on these projects. SPLP's evidence and testimony proves that economic impact from the requested emergency relief can run into tens of millions of dollars or more in the short term, and hundreds of millions of dollars or more in the long run.

While the Senator repeatedly said that he brought this action based on his or his constituent's safety concerns, it is telling that Sen. Dinniman largely did not attend⁸ the second day of hearings when SPLP had its pipeline construction manager address safety practices and

⁸ The Senator very briefly attended the hearing on Thursday in the morning.

when a nationally-known pipeline expert addressed pipeline safety. He also was not present when testimony was given by the Steamfitters Union official about the negative effect that the requested relief would have on the Commonwealth and union jobs and growth of the Marcus Hook and related facilities that rely on ME1 and will rely on ME2. Similarly, he was absent when testimony occurred regarding the great harm his relief requested would have on suppliers, like Range Resources, who has been at the forefront of the Commonwealth's Marcellus Shale development, and on Pennsylvanians particularly in Southwest PA who stand to lose millions of dollars in royalties and the adverse impact on businesses and PA jobs if the vital ME1 and planned ME2 public utility facilities are stopped or ended.

Similarly, had Sen. Dinniman attended, he would have heard that he unwittingly is promoting less safe means of transporting natural gas liquids than by pipeline. The demand for natural gas liquids will not disappear. So increased use of trucking and railroads, which are statistically less safe means of transportation, will occur. There are roads and railroads that traverse Sen. Dinniman's district on which these products will be transported on the way from their source in western PA to destinations such as the Marcus Hook facilities in southeastern PA.

The Commission expressly recognized just two weeks ago that injunction of SPLP comes at a cost to the public interest:

the Commission is cognizant of the economic effect of ordering the suspension of ME 1 service. Natural gas liquid pipelines play a vital role in many industries given that these petroleum products serve as industrial feedstocks as well as additives to gasoline. The Commission understands that shippers that utilize ME 1 as customers, and users of products transported by ME 1 either have had to suspend operations or look elsewhere for supplies due to the ME 1 closure occasioned by the safety threat imposed by the Lisa Drive subsidence.

SPLP Ex. 20, May 3, 2018 Order at 10.

The Commission further explained that ME1 plays a “vital role” and thus its operation is in the public interest, as shown by the fact that SPLP holds a certificate of public convenience. *See* 66 Pa. C.S. § 1103(a) (“A certificate of public convenience shall be granted by order of the commission, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.”).

Harm to SPLP as a utility is harm to the public interest. SPLP presented uncontested and un rebutted testimony of Mr. Richard Billman, Vice President Business Development, that SPLP will be seriously injured if operation of ME1 is enjoined. *See* Tr. at 625:1-627:9; SPLP Ex. 40

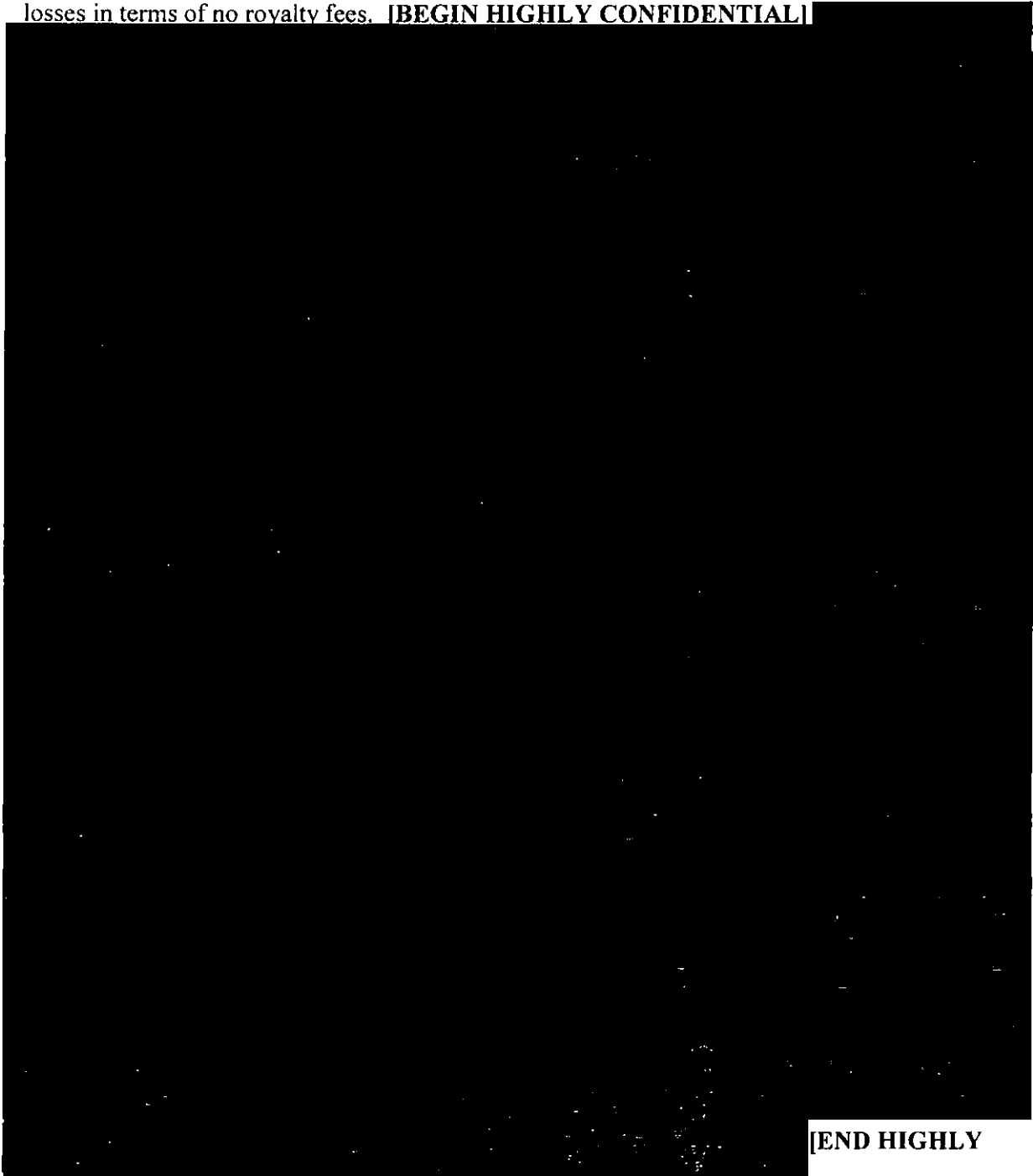
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As to SPLP’s customers, Range Resources submitted the testimony of Mr. Alan Engberg, Director of Liquids Marketing, to explain that Range Resources will be harmed if the ME1 pipeline is enjoined from operating. Mr. Engberg testified that Range “since 2004, has invested over \$7 billion in Pennsylvania” and that its royalty holders (Pennsylvania land owners that have leased their oil and gas rights to Range) have been paid about “\$2 billion in royalty fees to landowners, mostly in southwestern PA.” Tr. at 606:2-7. Obviously, if ME1 and ME2 are not able to get the commodities from the landowners’ property to the market they will suffer huge

losses in terms of no royalty fees. **[BEGIN HIGHLY CONFIDENTIAL]**



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As to workers and jobs, Mr. Anthony Gallagher, the Business Manager of Steamfitters Local Union 420 (LU 420), which has approximately 4,700 members, testified that LU 420's

membership provides labor and expertise constructing ME2 and maintaining ME1. Tr. at 485:20-487:7. He explained that enjoining operation of ME1 and/or construction of ME2 “will totally stymie not only . . . our local economy, but it would also put a damper on the building trades as a whole, not just LU420.” Tr. at 487:8- 488:5. He opposes the Petition, and testified that on average each LU 420 member working projects on or related to ME1, ME2 or Marcus Hook facilities, could lose approximately \$900.00 per day if ME1 is shut down and/or ME2 construction is halted. Tr. at 489:1-10. Mr. Gallagher explained that in opposing the Petition he is not putting jobs or economic harms over safety, especially considering he and his members work on and live near both pipelines. Tr. at 499:1-7, 511:5-6. Mr. Gallagher also discussed that Pennsylvania lost out on a major economic opportunity due to all of the delays and disruptions of construction of the ME2 pipeline, when Braskem cancelled its planned \$400 million expansion in Marcus Hook and instead built the facility in Texas. Tr. at 489:11-490:4.

In sum, SPLP has presented overwhelming evidence of the harm to the public interest that will result from enjoining operation of ME1 and construction of ME2. Sen. Dinniman presented no evidence on harm to the public. He cannot prevail on this prong, and its request for relief fails.

D. SPLP is a public utility and ME1 and ME2 are public utility facilities providing public utility service.

This Commission⁹ and the Commonwealth Court have each repeatedly ruled that SPLP is

⁹ The Commission has reaffirmed in at least five final orders that Sunoco Pipeline 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, Pennsylvania*, 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*

a public utility.¹⁰ Nonetheless, Sen. Dinniman challenges SPLP's public utility status in both his complaint and petition. SPLP is a public utility, and Sen. Dinniman's arguments are meritless. At the outset, Sen. Dinniman 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. Moreover, Sen. Dinniman presented absolutely no evidence that SPLP's Mariner East Pipelines are not public utility facilities. In contrast, SPLP's certificates of public convenience alone are conclusive evidence of its public utility status. See SPLP Ex. 42.

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 intra¹¹ 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 Oct. 2, 2014).

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). 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.

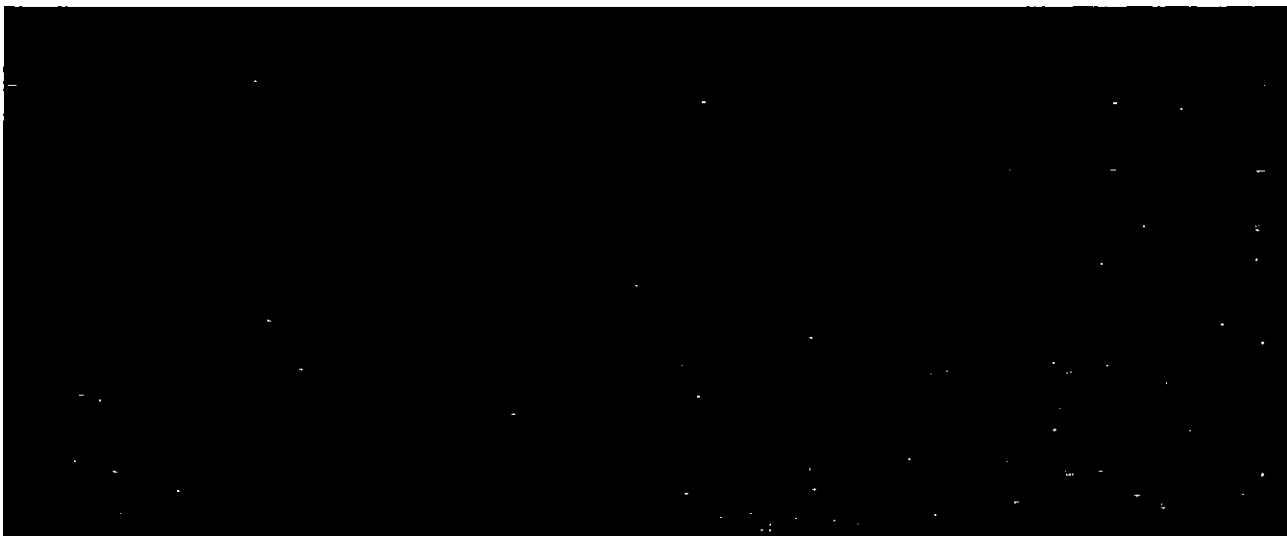
¹⁰ See *In re Condemnation by Sunoco Pipeline, L.P. (Martin)*, 143 A.3d 1000 (Pa. Commw. Ct. 2016), *allocator denied*, 164 A.3d 485 (Pa. 2016); *In re Condemnation by Sunoco Pipeline L.P. (Katz)*, 2017 Pa. Commw. LEXIS 425 (Pa. Commw. Ct. July 3, 2017); *In re Condemnation b Sunoco Pipeline L.P. ("Andover")*, 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).

¹¹ Range's witness expressly testified that Range uses ME1 for intrastate shipments. Tr. at 616:9-13.

E. If the petition is granted, the Commission must require Sen. Dinniman to post a bond equal to the damages that SPLP will suffer.

While SPLP believes that there is no basis in law or fact for the requested injunction, SPLP nevertheless requests that if an injunction were to be ordered, prior to that injunction becoming effective, Sen. Dinniman must post a bond. 52 Pa. Code § 3.8(b) expressly provides for the Commission to require Petitioner to post a bond in the event injunctive relief is granted. *Id.* (“An order following a hearing on a petition for interim emergency relief may require a bond to be filed in a form satisfactory to the Secretary and will specify the amount of the bond.”). The requested injunctions, if granted, will cause extreme financial harm to SPLP, for which Petitioner must post bond because if the injunction is later dissolved, SPLP is entitled to seek in the court of common pleas, its damages resulting from the incorrectly entered injunction. The only way to ensure SPLP will be able to recover these damages from Petitioner is if he is required to post a bond. At hearing, SPLP established it will incur the following damages if the requested injunctions are ordered:

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Accordingly, SPLP requests the following bond amounts if the relevant injunction is issued:

- Injunction of ME1 Operation: \$25,422,00.00
- Injunction of ME2 Construction: \$70,680,000.00
- Injunction of both ME1 and ME2: \$96,102,000.00

Since the 1800s, Pennsylvania courts have recognized the requirement at common law to post a bond when seeking an injunction, and that common law rule has been codified in Pennsylvania's Rule of Civil Procedure. Pa. R.C.P 1531 (b); *see also Lawrence Cnty v. Brenner*, 582 A.2d 79, 84 (Pa. Commw. Ct. 1990) ("Failure to post a bond when either special relief or a preliminary injunction is being sought nullifies both the injunction and any disposition in the pending matter.") (citing *Rosenzweig v. Factor*, 457 Pa. 492, 327 A.2d 36 (Pa. 1974)). Since Sen. Dinniman is not an officer of the Commonwealth (which requires that the individual be able to bind the Commonwealth), Sen. Dinniman should be required to post a bond whether he is suing in his representational or individual capacity.

The reason for the bond requirement is two-fold. "For one, it serves to compensate a wrongfully enjoined party. It also serves to 'deter[] rash applications for interlocutory orders; the bond premium and the chance of liability on it cause plaintiff to think carefully beforehand.'" *Synthes, Inc. v. Gregoris*, 228 F.Supp.3d 421, 447 (E.D. Pa., 2017) (citing *Sprint Comm'cns Co. L.P. v. CAT Comm'cns Intern., Inc.*, 335 F.3d 235, 241 n.5 (3d Cir. 2003) and *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 804 (3d Cir. 1989)).

This reasoning applies with equal force to the Commission's emergency injunctive relief procedures and the petition for interim emergency relief filed by Dinniman. Preliminary injunctive relief is a fast-track procedure with the potential for litigation ambush with no bar to getting to a hearing. The defending party has at most 10 days to prepare a defense, while the

petitioning party had as much time as it wanted to prepare its case prior to filing. Indeed, Sen. Dinniman's Petition relies in part upon actions at Shoen Road that occurred ten months ago. The ALJ's decision, which is due only 15 days after the petition is filed, becomes operative in enjoining the requested activity before the Commission even reviews it. The Commission can and has in the past taken longer than the prescribed 30-day period to review the injunction. It is a process tilted heavily in favor of the petitioning party by the prescribed procedure.

Recognizing this, a petitioning party is required to have some risk if it goes so far as to seek a preliminary injunction, disrupts a business, utility operations, causes losses then loses on the merits. Thus, where a preliminary injunction is granted and then overturned, the party against whom the injunction was improperly granted is entitled to damages. When enjoining public utility actions, such as here, those damages can be enormous and may come at the expense of rate payers as business expenses. But, without a bond, there is absolutely no guarantee the petitioning party will later be able to pay those damages and the utility may be unable to recover them.

In fact, the Commission's regulations state the Commission "may" require a bond, and in a case like this one, it must under controlling Pennsylvania law. That the Commission cannot issue damages is irrelevant to whether the Commission must require a bond be posted for this injunction. Establishing a bond is not awarding damages. There is a bifurcated process where the Commission determines the merits of a case within its jurisdiction, but the court determines any award of damages. *See e.g. Elkin v. Bell Tel. Co. of Pa.* 420 A.2d 371 (Pa. 1980). If the Commission has jurisdiction to enjoin a utility from conducting business or construction, it must have jurisdiction to require a bond for the utility to recover its costs at the civil damage award

phase in the event the injunction is wrongly issued. Otherwise, the Commission would be writing out of its regulation the bond reference.¹²

III. Conclusion

Sen. Dinniman has failed to present the necessary evidence to sustain his burden of proof on any of the issues raised. In fact, the evidence presented by SPLP confirms that: the integrity of ME1 is sound and ME1 is safe to operate, as it has done for the last 80 years; the geology in West Whiteland Township is adequate and appropriate for the continued operation of ME1 and the construction of ME2/ME2X; that the construction of ME2/ME2X has not, and will not, endanger the integrity of ME1 and does not present a safety risk to the public; the construction of ME2/ME2X will not impact any water supplies in West Whiteland Township; SPLP properly and adequately warned the public of the risks associated with ME1 and ME2/ME2X; and, the location and depth of ME1 and ME2/ME2X are safe and conform with regulatory requirements. Moreover, there is no need for immediate relief because no construction on ME2 and ME2X will occur until at least July 1, 2018, and granting such relief will be injurious to the public interest causing extreme adverse impacts to a public utility, its customers, gas leaseholders, related businesses and union workers. Sen. Dinniman's Petition must, therefore, be denied.

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Respectfully submitted,

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¹² While the Commission refused to make Petitioner, West Goshen post a bond when it granted a preliminary injunction to halt construction of ME2 in Docket No. C-2017-2589346, that decision was based in part on the fact that SPLP had not offered evidence of the damages it would incur. *Interim Emergency Order and Certification of Material Question*, Dkt. No. C-2017-2589346 (Order entered Oct. 26, 2017). As discussed above, SPLP has presented that evidence here. Moreover, that decision is not binding on this proceeding. *See, e.g., Appeal of Little Britain Tp. From Decision of Zoning Hearing Bd. of Little Britain Tp.*, Lancaster County, Pa., 651 A.2d 606, 611 (Pa. Cmwlth. 1994) ("A preliminary injunction cannot serve as a judgment on the merits since by definition it is a temporary remedy granted until that time when the party's dispute can be completely resolved.").

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Dated: May 16, 2018

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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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