



HIGH SWARTZ
Attorneys At Law LLP

Richard C. Sokorai, Esquire
(610) 275-0700
Email: RSokorai@highswartz.com
www.highswartz.com

June 25, 2018

VIA: Electronic Filing

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

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

Dear Secretary Chiavetta:

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

Enclosed for filing is West Goshen Township's Reply Brief, copies of which were served upon the individuals listed below and in the enclosed Certificate of Service in accordance with 52 Pa. Code § 1.54.

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

Respectfully yours,

Richard C. Sokorai

RCS:jmg

Enclosure

cc: Honorable Elizabeth H. Barnes (via email & U.S. Mail)
Thomas J. Sniscak, Esquire (via email & U.S. Mail)
Kevin McKeon, Esquire (via email & U.S. Mail)
Whitney E. Snyder, Esquire (via email & U.S. Mail)
Mark R. Fischer, Jr., Esquire (via email)
David J. Brooman, Esquire (via email)

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

WEST GOSHEN TOWNSHIP'S REPLY BRIEF

HIGH SWARTZ LLP
David J. Brooman, Esquire (I.D. No. 36571)
Richard C. Sokorai, Esquire (I.D. No. 80708)
Mark R. Fischer, Jr., Esquire (I.D. No. 94043)
40 East Airy Street
Norristown, PA 19404
(t) 610-275-0700
(f) 610-275-5290
dbrooman@highswartz.com
rsokorai@highswartz.com
mfischer@highswartz.com
Attorneys for West Goshen Township

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Complainant, West Goshen Township, through its attorneys, High Swartz LLP, respectfully submits its Reply Brief in response to the arguments raised in Respondent Sunoco Pipeline, L.P.'s Main Brief filed on June 5, 2017 ("SPLP's Main Brief").

The arguments set forth in SPLP's Brief are substantially addressed in the Township's Post-Hearing Brief filed on June 5, 2018 ("Township's Main Brief").¹ However, SPLP's Main Brief contains various mischaracterizations of the Township's position in this case and misstatements of the applicable law. The reply set forth below addresses these erroneous arguments by SPLP.

I. REPLY ARGUMENT

A. The Township's position has not changed.

Throughout its Main Brief, SPLP argues that the Township's position regarding the Valve has changed during the course of the proceedings. This is simply false. The Township has maintained one consistent position throughout these proceedings – that the Settlement Agreement must be enforced. The *focus* of the Township's case has changed from time to time over the last year, but only because of the constantly shifting sands the Township has faced due to SPLP's secret pipeline redesigns and position switches to avoid its obligations under the Settlement Agreement, to avoid the Injunction, and to tailor its purported promises to fit existing plans for the Mariner East Pipelines.

First, at the time of the Settlement Agreement, SPLP promised that the Valve would be installed on the SPLP Additional Acreage, and promised to locate it on the SPLP Use Area, unless engineering constraints made it unable to do so. The valve in the Township was an important safety feature that was reviewed and approved by the Township's safety expert before the Agreement was executed. Throughout 2017, SPLP itself acknowledged the importance of

¹ The defined terms identified and used in the Township's Main Brief are incorporated herein by reference.

the Valve when it posited that it must be located in the Township (albeit on Janiec 2). Then, when the Commission enjoined construction based on SPLP's secret Janiec 2 plan, SPLP allegedly changed its plan and eliminated the Valve altogether, which the Township learned only through SPLP pleadings filed with the Commission, and the design for which was not offered for a safety review by the Township's expert as required by the Settlement Agreement. Then, weeks before trial, after the Township's expert offered testimony about the hazards of the elimination of the Valve and the apparent 15-mile gap between automated valves, SPLP offered prepared testimony of its own experts revealing yet another secret change, converting a valve upstream of the Township. SPLP also failed to provide any information regarding that design change to the Township's expert for a safety review per the Agreement. SPLP's unilateral, secret design changes, which spring-up at tactically advantageous times for SPLP in the litigation (during the reconsideration period for the Injunction and weeks before trial, after the Township had submitted its initial testimony outlines), have forced the Township to play a veritable game of "Whack-a-Mole," just to enforce the basic terms of the Settlement Agreement. While the Township has been forced to shift the focus of its case among the various provisions of the Settlement Agreement to oppose each of SPLP's surprise changes, the Township's primary aim – enforcing the Settlement Agreement – has remained consistent.

In conjunction with this "position-shifting" argument, SPLP falsely accuses the Township of claiming that a valve must be installed 2.5 miles from the next upstream valve, contrary to the 7.5-mile valve-spacing guideline promoted by the Township's witnesses. At no time has the Township ever offered any evidence or made any argument that there must be a valve in the Township that is 2.5 miles from the next upstream valve. Rather, the Township has only argued that SPLP must be required to install the Valve on the SPLP Additional Acreage

within the Township as promised in the Settlement Agreement. If SPLP chooses to also have a valve 2.5 miles upstream, that is even better, but that is a decision for SPLP. It was SPLP's unilateral, surprise changing of its plans, without a safety review by the Township's expert per the Settlement Agreement, that resulted in a shorter valve spacing when the Agreement is enforced.² Further, the evidence presented shows that SPLP itself recognized and self-imposed the 7.5-mile valve-spacing guideline under ASME B31.4, until it sought to evade its obligations under the Settlement Agreement. In fact, Gordon's testimony confirmed that the current 8.4-mile spacing between the valves upstream and downstream of the Township, if SPLP eliminates Valve 344 as currently planned, would be the longest stretch between ME2 valves in a suburban populated area. *See* NT-4/25/18 at 520:11-521:14. With this argument, SPLP is just attempting to spin its own ever-changing position into the Township making differing demands regarding the Valve and valve spacing.

Therefore SPLP's arguments on the parties' changing positions must be ignored.

B. SPLP misapplies the burden of proof applicable to "engineering constraints."

SPLP's Brief highlights the fundamental difference between the cases presented by the Township and SPLP. The Township has been pursuing a breach of contract case before the Commission, as required by the venue provision of the Settlement Agreement. SPLP, however, has chosen not to defend the case as a breach of contract claim (knowing it has clearly breached the Agreement in numerous respects), but rather deflect attention from its breaches by treating and defending the case as if it were a "safety complaint" regarding the location of the Valve. This divide is evident from SPLP's misapplication of the applicable burden of proof. SPLP

² It is important to note that SPLP has stressed the importance of its "managerial discretion" and has admitted that there is no agreement or regulation that prevents it from eliminating the newly automated upstream valve. Therefore, the other valve could simply be eliminated and the Township could not stop it.

spends considerable time in its Main Brief arguing that the Township failed to meet its burden of proving that “engineering constraints do not exist.” *See* SPLP Brief at, *inter alia*, p. 10, 27. However, the Township has no such burden as explained in the Township’s Main Brief. The “engineering constraints” language in the Settlement Agreement is an exculpatory condition raised by SPLP as a basis for not installing the Valve in the Township. As such, the “unable due to engineering constraints” argument is an affirmative defense raised by SPLP and therefore the burden lies with SPLP to prove not just that engineering constraints exist, but also that the engineering constraints make them unable to install the Valve on the SPLP Use Area.³

Therefore, the Township had no burden with respect to engineering constraints and SPLP’s arguments to that effect should be disregarded.

C. The Township does not maintain that the Settlement Agreement constitutes an unconditional promise to put the Valve on the SPLP Use Area.

SPLP’s Main Brief also accuses the Township of claiming that the Settlement Agreement contains an “unconditional promise” regarding the installation of the Valve. *See* SPLP’s Brief at, *inter alia*, p. 1. This argument confirms that SPLP continues to miss the mark on what the Township seeks in this case. It is very clear from the record that the Township has never claimed that the Settlement Agreement contains an “unconditional promise” to install the Valve on the SPLP Use Area. The Township has consistently posited that the provisions of the Settlement Agreement pertaining to the Valve require its placement on the SPLP Additional Acreage and, unless unable to do so due to engineering constraints, on the SPLP Use Area specifically. What the Township has correctly focused on is that SPLP’s obligations under the Settlement Agreement do not stop even if SPLP is able to prove “engineering constraints.”

³ Throughout this case, SPLP has also chosen to ignore the important qualification of the term “engineering constraints” in the contract. Engineering constraints always exist. Rather the standard under the Agreement is whether these engineering constraints render SPLP unable to place the valve on the SPLP Use Area.

Rather, the Settlement Agreement expressly states that engineering constraints must make SPLP unable to locate the Valve on the SPLP Use Area, and if so proven, then the Agreement required SPLP to notify the Township to figure out where else on the SPLP Additional Acreage it should go.

SPLP argues that it provided “notice” to the Township that it was not installing the Valve on the SPLP Use Area and instead was installing it on Janiec 2. However, even if this were correct (which the record shows it is not), SPLP conveniently ignores that it still failed to comply with the next requirement of the Settlement Agreement, in that the alleged notice was provided after SPLP had already changed its plan and unilaterally relocated the planned Valve to another location within the Township (Janiec 2), without any input from the Township. Further, SPLP continued to violate the terms of the Settlement Agreement by then eliminating the Valve altogether, despite the clear language that it will install the Valve on the SPLP Additional Acreage.

Throughout all of this, SPLP justifies its actions by claiming that its “managerial discretion” must be recognized to allow it to determine valve locations and the design of the pipeline without regard to any promises it makes. *See* SPLP’s Brief at, *inter alia*, p. 3.

However, this argument contradicts an underlying purpose of the Settlement Agreement, i.e. that SPLP agreed to concede some managerial discretion by agreeing, in exchange for valuable consideration, to install the Valve and other facilities for Mariner East only in a specific location within the Township. SPLP’s refusal to acknowledge this underlying concept of the Settlement Agreement, and accordingly work with the Township to resolve the dispute, has required the continued pursuit of this litigation.

D. SPLP misunderstands the purpose of the parol evidence introduced at the hearing.

In another effort to negate its promises regarding the Valve, SPLP argues that the parol evidence introduced in the case indicates that the Township never required the Valve. *See* SPLP's Brief at p. 20. After ALJ Barnes ruled that the Settlement Agreement is ambiguous, the Township introduced parol evidence to address one issue – why SPLP's promises were listed under the heading "Pertinent Information Provided by SPLP." SPLP did not introduce any evidence to the contrary. The parol evidence did not, nor was it intended to, address whether the Township wanted or requested the Valve and SPLP's arguments in this regard must be rejected. To be sure, parol evidence is not needed on this point, as the promise is clear that SPLP "will" install the Valve as indicated. If SPLP thinks this point was somehow vague, it did not seek to address the issue with its own parol evidence.

Moreover, whether or not it was the Township that first requested the Valve in the settlement discussions is irrelevant to whether SPLP agreed to install it in the Township. SPLP included the promise to install the Valve on the SPLP Additional Acreage and the Township relied upon that promise, along with all other promises, in approving the Settlement Agreement. By comparison, if a buyer and seller agree on the sale of home, and the seller offers to include the refrigerator in the sale but then removes the refrigerator from the home before closing, the seller has breached the contract regardless of whether the buyer ever specifically requested the refrigerator. Here the Settlement Agreement specifically states that the Township relied upon the information and promises made by SPLP in entering into the Agreement, which included the promise that SPLP will install the Valve in the Township as described in the Agreement. Therefore, by eliminating the Valve, SPLP has breached the Agreement.

E. **SPLP's argument that the Settlement Agreement does not require it to provide updated ME2 information to the Township's safety expert defies logic.**

SPLP opposes the Township's claim that SPLP failed to provide updated ME2 information to Kuprewicz, the Township's safety expert, by arguing, *inter alia*, that it had no obligation to provide any *updated* information. *See* SPLP's Brief at p. 50. Again, SPLP proposes a convenient interpretation of the Settlement Agreement that it had no obligations to the Township after the ink dried. However, in order for Kuprewicz's ME2 safety report to have any value, it obviously needs to be based on SPLP's current plan for ME2 within the Township. It would make no sense for such a provision to be in the contract if, immediately after Kuprewicz completed his ME2 report, SPLP could change its plans and never provide any new information for Kuprewicz to consider, making his report irrelevant. Rather, the Settlement Agreement must be read to require SPLP to provide its actual, current plans and information to Kuprewicz, so that he could properly assess that information against his prior report and provide the Township with any revisions to his conclusions on the safety of the pipeline within the Township.

SPLP also argues around this obligation by contending that it already provided any new information through its testimony and evidence in this case. However, as Kuprewicz stated in his Surrebuttal Testimony (Township Statement No. 8 at 4:5-19), SPLP failed to provide information particularly relevant to his analysis after it changed its plans for the Valve in late 2017. Kuprewicz's testimony also confirmed that he was forced to guess on the valve spacing after the late-2017 changes, because SPLP never produced any updated plans to the Township. In fact, the secret plan changes were not even identified until SPLP submitted its testimony outlines in March 2018, weeks before trial, and after the Township had already submitted its testimony outlines. Now SPLP wants Kuprewicz and the Township to rely upon the representations made in the Stantec report, which SPLP's hired witnesses even acknowledged

was prepared to support SPLP's already-chosen position in the case, months after it performed its analysis on the removal of the Valve, and the underlying data for said study was not even disclosed.

Therefore, it is imperative that SPLP comply with its disclosure requirements under the Settlement Agreement and provide updated, current plans and information for all phases of the Mariner East project relevant to the Township directly to Kuprewicz until the project is completed.

F. SPLP's argument for modification of the Settlement Agreement is not supported by the law or the public interest.

SPLP argues that if the Settlement Agreement is interpreted to require a Valve within the Township, the Commission should exercise its authority to reform contracts to eliminate the requirement or change the details, citing *ARIPPA v. P.U.C.*, 792 A.2d 636 (Pa. Commw. Ct. 2002) in support of the proposition. However, the *ARIPPA* case involved a utility merger, with the settlement modification at issue relating to rate issues caused by the merger. *See ARIPPA*, 792 A.2d at 658-660 (discussing non-unanimous settlements in rate cases) and 661-662 (discussing modification). In fact, the Commission's authority to modify contracts with a utility is best suited for, and most often exercised in, cases where the contract at issue impacts rates or other economic burdens upon one of the contracting parties. *See, e.g., PPL Elec. Utilities Corp. v. Pa. P.U.C.*, 912 A.2d 386, 409-10 (Pa. Commw. Ct. 2006) (stating that the Commission has authority to act pursuant to 66 Pa.C.S.A. § 508 where an agreement entered into by a could impair its ability to set just and reasonable rates); *Shenango Twp. Bd. of Sup'rs v. Pa. P.U.C.*, 686 A.2d 910, 912 (Pa. Commw. Ct. 1996) (regarding utility reimbursement for township's cost of constructing water facilities). In this case, modification of the Settlement Agreement would eliminate a non-economic safety obligation, i.e. the installation of the Valve within the

Township, negotiated by a public entity charged with the health, safety and welfare of its residents.

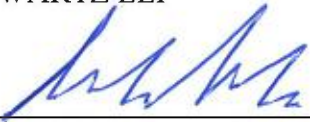
Therefore, as discussed in the Township's Main Brief, it would not be appropriate for the Commission to exercise its contract modification power in the context of this case.

II. CONCLUSION

For the reasons set forth above and in the Township's Main Brief, the Township respectfully requests that the Commission issue an Order containing the proposed ordering paragraphs set forth in its Main Brief.

HIGH SWARTZ LLP

By: _____


David J. Brooman, Esquire
Richard C. Sokorai, Esquire
Mark R. Fischer, Jr., Esquire
Attorneys for Complainant
West Goshen Township

Date: _____

6/25/18

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

David J. Brooman, Esquire (I.D. No. 36571)
Richard C. Sokorai, Esquire (I.D. No. 80708)
Mark R. Fischer, Jr., Esquire (I.D. No. 94043)
HIGH SWARTZ, LLP
40 East Airy Street
Norristown, PA 19404
(t) 610-275-0700
(f) 610-275-5290
dbrooman@highswartz.com
rsokorai@highswartz.com
mfischer@highswartz.com

Attorneys for West Goshen Township

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

CERTIFICATE OF SERVICE

I Richard C. Sokorai, Esquire, hereby certify that on June 25, 2018, I served a true and correct copy of West Goshen Township's Reply Brief upon the parties listed below by email and U.S. Mail, first-class, postage prepaid, in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a party).

The Honorable Elizabeth H. Barnes
Administrative Law Judge
PA. Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
EBARNES@pa.gov

Thomas J. Sniscak, Esquire
Kevin J. McKeon, Esquire
Whitney E. Snyder, Esquire
Hawke McKeon & Sniscak, LLP
100 North Tenth St.
Harrisburg, PA 17101
tjsniscak@hmslegal.com; kjmckeon@hmslegal.com
wesnyder@hmslegal.com
Attorneys for Sunoco Pipeline L.P

HIGH SWARTZ LLP

By:  _____

David J. Brooman, Esquire
Richard C. Sokorai, Esquire
Mark R. Fischer, Jr., Esquire
Attorneys for West Goshen Township

Date: 6/25/18