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REPLY TO:
Center City

April 24, 2019

Via Electronic Filing

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

Re: Flynn, et al. v. Sunoco Pipeline L.P., Docket Nos. C-2018-3006116 and
P-2018-3006117

**COMPLAINANTS' RESPONSE TO SUNOCO'S
MOTION FOR AMENDED PROTECTIVE ORDER**

Dear Secretary Chiavetta:

Attached for electronic filing with the Commission is Complainants' Response to
Sunoco's Motion for Amended Protective Order.

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

Very truly yours,


MICHAEL S. BOMSTEIN, ESQ.

MSB:mik

cc: Judge Barnes (Via email and First Class Mail)
Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Meghan Flynn	:	
Rosemary Fuller	:	
Michael Walsh	:	
Nancy Harkins	:	C-2018-3006116
Gerald McMullen	:	P-2018-3006117
Caroline Hughes and	:	
Melissa Haines	:	
	:	
	:	
v.	:	
	:	
Sunoco Pipeline, L.P.	:	

**FLYNN COMPLAINANTS' RESPONSE TO SUNOCO'S
MOTION FOR AMENDED PROTECTIVE ORDER**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE ELIZABETH H. BARNES:

Sunoco now has filed a Motion for Amended Protective Order that seeks to modify the existing Order, ostensibly for the purpose of protecting a third category of discovery information that the company refers to as "Confidential Security Information" ("CSI"). The motion is premised on concern for the potential for cyber hacking and other leaking of extremely sensitive information due to the great number of intervenors and others participating in this case.

Sunoco's proposed remedy is to narrow the number of persons able to obtain the information and limit review of information to a specific geographic locale where a proctor will make sure that the information is neither copied nor photographed. How this process will enable parties to obtain usable evidence is nowhere explained.

In support of their response, Flynn Complainants aver as follows:

1. Admitted.

2. Admitted.

3. Denied as stated. Admitted that state and federal statutes protect certain information.

Denied that Sunoco's designation of CSI is likely to be limited to extremely sensitive material.

As recently as March 12, 2019, for example, a BI&E engineer named Sunil R. Patel wrote in a sworn affidavit that:

All of the technical records provided to me by Sunoco Pipeline, L.P. ("Sunoco") during the course of I&E's investigation of the Morgantown Incident and since the conclusion of the same investigation were marked by Sunoco as being proprietary and confidential information as well as confidential security information.

(Italics added.)

Lest anyone think that this involved only a few documents, in a separate filing BI&E stated that these particular records consisted of thousands of pages. The Bureau wrote that "Sunoco provided *thousands* of pages of documents to I&E related to the Morgantown Incident during and after the investigation." (Objection to Complainants' Application for Subpoena at 8) (Italics added).

Complainants deny the assertion that the availability of the information they are seeking "could result in providing bad actors, such as terrorists, information to harm SPLP's facilities and the public." This is a factual assertion that involves a serious matter the resolution of which absolutely necessitates a fact-finding proceeding in which Sunoco must identify the materials in question and then justify the claim that the materials are highly sensitive CSI.

The Public Utility Confidential Security Information Disclosure Protection Act ("CSI Act"), 35 P.S. §§ 2141.1 to 2141.6, is cited by Sunoco in support of its CSI claims. The CSI Act, however, does not even apply to discovery requests propounded to public utilities; it relates solely to exchanges of information between the PUC and other Commonwealth agencies.

Sunoco also cites to 49 U.S.C. §60138, which relates to the authority of the federal government to limit dissemination of public utilities' response plans in the interest of public safety. Complainants do not challenge that authority, but it really is beside the point.

Neither statute sets standards for a factual determination of whether confidential security claims are grounded in fact or in speculation. Complainants submit that the determination in this case should be made by the ALJ in a fact-finding setting and not simply upon a review of unsupported claims set forth in papers submitted by respondent Sunoco.

4. Denied as stated. Complainants agree that only those persons and entities that have signed a proper protective order stipulation should be able to participate in review of documents that the ALJ has determined are confidential. The identification of such persons and entities is a factual matter that also requires a fact-finding determination by the ALJ and which cannot be resolved simply by a review of unsupported claims set forth in papers submitted by respondent Sunoco. As regards concerns over cyber hacking, Sunoco assumes that production must be digital. Sensitive documents can easily be photocopied and delivered without any resort to the internet.

5. Denied as stated. Complainants have alleged that Sunoco is shipping HVLs and is planning further shipments of HVLs on two or more pipelines right next to their homes, schools, public facilities and places of business and recreation. Sunoco has information bearing on whether these allegations are true, mostly true, or not true at all. Until recently, Sunoco has not even responded to Complainants assertion that Sunoco actually has performed hazard/risk assessments that assess the impact to health, safety and the environment from leaks, fires and explosions on the pipelines. If this information is not made available to Complainants, and the

culpable party with control of the information is allowed not to disclose it, then Complainants will be unable to prove their case.

Complainants have now learned that the Commission has just filed a response to a Right-to-Know Request by Eric Friedman in opposition to his efforts to obtain information from BI&E related to the Morgantown incident of April 1, 2017. (Copy of Response attached as Ex. "A" hereto). In the Commission's April 15, 2019 response, based on an affidavit of Paul Metro, it identified three separate Hazard Assessments that Sunoco conducted relating to ME1, ME2 and the "re-route of ME2" (the workaroud pipeline). (Response at 2). Production of these Hazard Assessments to Complainants is critical to prosecution of their case.

Complainants also note that the BI&E's concerns about release of CSI to terrorists could reveal the potential for mass destruction. In no fewer than five instances, the response states plainly that an explosion could result in mass destruction. (Response at 3 and 5). The Metro Affidavit expresses concern over the potential for mass destruction on pages 2 and 3.

Sunoco has hitherto denied in this and other proceedings that the likelihood of an explosion is trivial and that Complainants' concerns over possible death, damage and injury damage from an explosion are overstated. Indeed, the company routinely sends out colored flyers touting the pipeline's safety. See, e.g., Exhibit "B" hereto. Now, when it suits the company, it turns out that its hazard assessments contain information about the potential for mass destruction. Suddenly, the non-dangerous pipelines are dangerous.

Sunoco makes the arbitrary assertion that it "cannot simply provide to eleven separate counsels that may then disseminate such information to a larger group." (Motion at 4). The respondent does not suggest what the right number is.

6. Denied as stated. The proposed Amended Order suffers several major defects:

- First, CSI information is only to be available in the presence of a proctor in Bala Cynwyd, Pennsylvania. Complainants have begun to work with two expert consultants. One lives and works in Pittsburgh. The other lives and works in Ontario, Canada.
- Second, the restrictions on production make the proposed in-person review entirely useless. Section 7 of the Order prohibits copying, photographing and note taking during the proctored session without authorization of Sunoco's counsel.
- Third, Section 6(iv) defines permissible reviewing representatives in such a restrictive manner that it is unlikely any of Complainants' representatives will be permitted to review CSI. Abiding by the restrictions requires information about Sunoco's relationships and business dealings that Sunoco has refused to disclose, thus blindly subjecting Complainants' representatives to a broad veto power. E.g., an employee of an affiliate of a shipper may not become a reviewing representative. Sunoco has in all prior proceedings refused to identify its shippers. As to its competitors, one also is left in a quandary and as to affiliates, oftentimes affiliates can be in an unrelated industry. This ambiguous language leaves even more discretion in Sunoco's hands.
- Fourth, in light of the recent revelation by BI&E that all materials supplied by Sunoco were stamped in some restrictive manner, the definition of "proprietary information" proposed by Sunoco is no longer acceptable because it obviously fails to distinguish between legitimate protected material and material that respondent would just prefer not to come to light. The data from the Morgantown investigation already has been publicly disclosed through publication of the BI&E

complaint against the company. The world now knows that Sunoco's shoddy practices led to that accident. Those practices certainly present a danger to Sunoco's public image. Further, CSI is supposedly protected for national security reasons, not because Sunoco has a proprietary interest in the contents. Finally, just by stamping a document with the word "confidential" does not by any means *make it* proprietary.

- Paragraph 17 of the proposed protective order also improperly places the burden on Complainants to challenge each piece of paper stamped confidential. The burden should be on Sunoco to justify the classification for each document so marked.

7. Denied as stated. Complainants are not proposing unrestricted access.

8. Admitted.

9. Denied as stated. The CSI protection Act does not apply to the instant case.

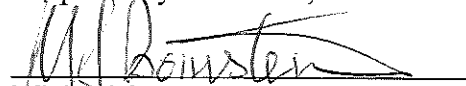
10. Denied as stated. Complainants answer to ¶ 6 above is hereby incorporated by reference thereto.

11. Denied as stated. Complainants answer to ¶ 6 above is hereby incorporated by reference thereto.

12. Denied as stated. Complainants answer to ¶ 6 above is hereby incorporated by reference thereto.

WHEREFORE, Complainants request that Your Honor (a) not issue Sunoco's proposed Amended Protective Order, and (b) keep the existing protective order in place at least until such time as a fact-finding hearing is conducted to determine whether an amendment may be ordered that protects the right of Complainants to prosecute their case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M. Bomstein", is written over a horizontal line.

Michael S. Bomstein, Esq.

Pinnola & Bomstein

PA ID No. 21328

Email: mbomstein@gmail.com

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100 South Broad Street

Philadelphia, PA 19110

Tel.: (215) 592-8383

Attorney for Complainants

Dated: April 24, 2019

EX. “A”



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

April 15, 2019

OOB Docket# AP 2019-0502

Kelly Isenberg, Esquire
Appeals Officer
Commonwealth of Pennsylvania
Office of Open Records
333 Market St., 16th Floor
Harrisburg PA 17101-2234

Via Email (kisenberg@pa.gov)

Re: Pa PUC Response – OOB Appeal Docket #AP 2019-0502

To the Honorable Appeals Officer Isenberg:

I. Procedural History

On Monday, February 4, 2019, Mr. Friedman (Requestor) submitted the following Right-to-Know Law (RTKL) (65 P.S. §§ 67.101 *et seq.*) request (Request) to the Pennsylvania Public Utility Commission (PUC or Commission):

Background

On January 31, 2019, representatives of the Public Utility Commission appeared at a public meeting in East Goshen Township, Chester County. Event sponsor Rep. Carolyn Comitta provided an opportunity for the public to ask questions and receive PUC responses. During my opportunity at the microphone, I had the following exchange with PUC representative Paul Metro:

Q: You have an estimate of the blast radius that's associated with an accident on an HVL pipeline, yes?

A: We have reviewed the "buffer zone" calculation that's required by federal regulations.

Q: Do YOU have an estimate of what that distance looks like?

A: Pardon me, I couldn't hear the...

Q: Do you have an estimate of what that distance is?

A: Yes.

A video recording of this exchange is at <https://youtu.be/bpbj10JXQOk>

Request

Under Pennsylvania's Right-to-Know law, I respectfully request all records in the possession of Paul Metro, his superiors or subordinates, that relate to the calculation or estimation of the range at which thermal or overpressure events related to accidents on hazardous, highly volatile liquids (HVL) pipelines may be experienced. This request does not seek information provided by Sunoco if that information has been designated as confidential security information. Rather, it seeks records containing or related to calculations or estimates of blast radius (Sunoco's term) or "buffer zone" (PUC's term) regarding accidents or releases from HVL pipelines in the possession of the PUC, including (but not limited to) information that was produced for PUC by an external source or that was developed internally.

Records responsive to this request are requested in electronic format, if they exist in that format (e.g. PDF)."

On Monday, March 11, 2019, the Commission denied Mr. Friedman's RTKL Request (PUC RTKL 2019-0007).

On Monday, April 1, 2019, the Requestor filed this Appeal (Appeal) to the Office of Open Records (OOR). The Appeal was defective because it did not include a copy of the Commission's Final Response. Requestor cured the defect on April 2, 2019.

On Tuesday, April 2, 2019, OOR notified the PUC of the Appeal, providing the PUC with seven business days to file a response to the Appeal, or until Thursday, April 11, 2019.

Due to the defective Appeal, the PUC requested an extension to file its response, and on Friday, April 5, 2019, OOR granted the PUC's request for three additional days to respond, or until Monday, April 15, 2019.

II. Argument

A. The Responsive Records

The PUC conducted a thorough search for all responsive records. Chiavetta Affidavit ¶ 2. The responsive records consist of three Reports: Hazard Assessment for ME1; Hazard Assessment for ME2 Pipeline; and Hazard Assessment for Re-route of ME2 near Chester & Delaware County, as well as Commission Inspection Reports of these pipelines in which there are references and reviews of these Hazard Assessments. Metro Affidavit ¶¶ 4, 5. The three Reports were all submitted by Sunoco marked as confidential. Metro Affidavit ¶ 4. These responsive records are part of active and ongoing Commission investigation of these pipelines. Metro Affidavit ¶¶ 2, 3. The Commission does not have any requested records other than records that are part of these Commission's investigations. Metro Affidavit ¶ 6; Chiavetta Affidavit ¶ 4.

B. RTKL Exemptions for Safety of the Public and Public Utility Facilities

The RTKL prohibits disclosure of records that “would be reasonably likely to jeopardize or threaten public safety” or “which creates a reasonable likelihood of endangering the safety or the physical security of a ... public utility, resource, infrastructure, [or] facility,” including “infrastructure records that expose or create a vulnerability through disclosure.” 65 P.S. § 67.708(b)(2) and (3). (Underlining added for emphasis.)

Mr. Metro, the Manager of the Office of the Safety Division, Pipeline Safety Section of the Commission, states that in his professional opinion, disclosure of the Report, designated as CSI, would compromise security against sabotage or criminal or terrorist acts, and non-disclosure is necessary for the protection of life, safety, public property or public utility facilities. Metro Affidavit ¶¶ 7, 8.

Specifically, Mr. Metro, in his professional opinion, reasonably believes that release of the Reports, designated as CSI, would compromise security against sabotage or criminal or terroristic acts regarding pipeline facilities by illustrating the extent of the impact zone, including casualty and damage assessments at various ranges, regarding an accident (or sabotage event) on a pipeline. The reports explicitly provides how such an assessment can be made (as well as the assessment for these particular pipelines); information which could clearly be used by a terrorist to plan an attack a pipeline (and particularly on the Sunoco pipelines, as it contains the specific operating parameters of the pipeline) to cause the greatest possible harm and mass destruction to the public living near such facilities. Metro Affidavit ¶ 9. In addition, Mr. Metro believes that release of the Reports would allow for awareness of the potential effectiveness of a sabotage act on a pipeline to harm the public and create mass destruction, thereby potentially inciting such acts and creating a great risk to public safety. Metro Affidavit ¶ 10. Finally, Mr. Metro notes that he arrived at his professional opinion in consultation with numerous other technical gas safety staff at the Commission, all of which agree with his professional assessment. Metro Affidavit ¶ 11.

Based on the foregoing, the requested records are exempt from disclosure as CSI pursuant to these exemptions of the RTKL. The Commission notes that the Requestor specifically limited his request: “This request does not seek information provided by Sunoco if that information has been designated as confidential security information.” Request.

C. Public Utility Confidential Security Information Disclosure Protection Act

The Public Utility Confidential Security Information Disclosure Protection Act (PUCSIDPA) (Also referred to as Act 156 of 2006) (35 P.S. §§ 2141.1 – 2141.8) prohibits disclosure of “Confidential Security Information” (CSI). 35 P.S. § 2141.5(a). CSI is “information contained within a record maintained by an agency in any form, the disclosure of which would compromise security against sabotage or criminal or terrorist acts and the non-disclosure of which is necessary for the protection of life, safety, public property or public utility facilities.” 35 P.S. § 2141.2. (Underlining added for emphasis.)

The public utility is responsible for determining whether a record or portion thereof contains confidential security information. When a public utility identifies a record as containing confidential security information, it must clearly state in its transmittal letter, upon submission to an agency, that the record contains confidential security information . . . 35 P.S. § 2141.3(a).

Section 2141.3(c)(4) of PUCSIDPA provides:

(4) Agency review of the public utility's designation or request to examine records containing confidential security information shall be based on consistency with the definition of confidential security information contained in this act or when there are reasonable grounds to believe disclosure *may* result in a safety risk, including the risk of harm to any person, or mass destruction.

35 P.S. § 2141.3(c)(4). (Underlining and italics added for emphasis.)

PUCSIDPA defines a number of key terms in these sections:

“Terrorist act.” Any act or acts constituting a violent offense intended to:

- (1) intimidate or coerce a civilian population;
- (2) influence the policy of a government by intimidation or coercion; or
- (3) affect the conduct of a government.

“Violent offense.” An offense under 18 Pa.C.S. Pt. II (relating to definition of specific offenses), including an attempt, conspiracy or solicitation to commit any such offense, which is punishable by imprisonment of more than one year and involves an act dangerous to human life or property.

“Dangerous to human life or property.” A violent act or an act which is intended to or likely to cause death, serious bodily injury or mass destruction.

“Mass destruction.” An act which is intended to or likely to destroy or cause serious damage to facilities, public or private buildings, places of public accommodation or public works under circumstances evincing depraved indifference to human life or property.

35 P.S. § 2141.2. (Definitions.) (Underlining added for emphasis.)

The PUC has issued regulations to effectuate PUCSIDPA at 52 Pa. Code §§ 102.1 – 102.4. Section 102.4(b) of the 52 Pa. Code provides:

§ 102.4. Challenge procedures to confidentiality designation. . . .

(b) Relevant factors to be considered for requests to review.

. . . If the Commission determines that there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person, or mass destruction, the Commission will deny the request.

. . .

52 Pa. Code § 102.4. (Underlining added for emphasis.)

The PUC conducted a thorough search for all responsive records. Chiavetta affidavit ¶ 2. The responsive records consist of three Reports: Hazard Assessment for ME1; Hazard Assessment for ME2 Pipeline; and Hazard Assessment for Re-route of ME2 near Chester & Delaware County, as well as Commission Inspection Reports of these pipelines in which there are references and reviews of these Hazard Assessments. Metro Affidavit ¶¶ 4, 5. The three Reports were all submitted by Sunoco marked as confidential. Metro Affidavit ¶ 4. These responsive records are part of active and ongoing Commission investigation of these pipelines. Metro Affidavit ¶¶ 2, 3. The Commission does not have any requested records other than records that are part of these Commission's investigations. Metro Affidavit ¶ 6; Chiavetta Affidavit ¶ 4.

Based on the standards for nondisclosure set forth in PUCSIDPA, the Reports and Inspection Reports are exempt from disclosure. The Report and Inspection Reports are "Confidential Security Information" within the meaning of The Public Utility Confidential Security Information Disclosure Protection Act (PUCSIDPA) (35 P.S. §§ 2141.1 – 2141.8). Mr. Metro, the Manager of the Office of the Safety Division, Pipeline Safety Section of the Commission, states that in his professional opinion, disclosure of the Reports and the Inspection Reports would compromise security against sabotage or criminal or terrorist acts, and non-disclosure is necessary for the protection of life, safety, public property or public utility facilities. Metro Affidavit ¶ 7. He based his opinion on consistency with the definition of Confidential Security Information contained in PUCSIDPA and on that there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person, or mass destruction. Metro Affidavit ¶ 8.

Specifically, Mr. Metro, in his professional opinion, reasonably believes that release of the Reports and Inspection Reports would compromise security against sabotage or criminal or terroristic acts regarding pipeline facilities by illustrating the extent of the impact zone, including casualty and damage assessments at various ranges, regarding an accident (or sabotage event) on a pipeline. The Reports and Inspection Reports explicitly provide how such an assessment can be made (as well as the assessment for this particular pipeline); information which could clearly be used by a terrorist to plan an attack a pipeline (and particularly on the Sunoco pipelines, as it contains the specific operating parameters of the pipelines) to cause the greatest possible harm and mass destruction to the public living near such facilities. Metro Affidavit ¶ 9. In addition, Mr. Metro believes that release of the Reports and Inspection Reports would allow for awareness of the potential effectiveness of a sabotage act on a pipeline to harm the public and create mass destruction, thereby potentially inciting such acts and creating a great risk to public safety. Metro Affidavit ¶ 10. Finally, Mr. Metro notes that he arrived at my professional opinion that

the Report is Confidential Security Information in consultation with numerous other technical gas safety staff at the Commission, all of which agree with his professional assessment. Metro Affidavit ¶ 11.

Based on the foregoing, the requested records are exempt from disclosure as CSI pursuant to PUCSIDPA. Additionally, the RTKL only requires disclosure of “public records.” Since PUCSIDPA prohibits disclosure, the Reports, by definition are not a public records and cannot be disclosed. 65 P.S. § 67.102 and 301(a). The Commission notes that the Requestor specifically limited his request: “This request does not seek information provided by Sunoco if that information has been designated as confidential security information.” Request.

Note that “A public official or public employee who acquires a public utility record or portions thereof which contain confidential security information or any reproduction of a public utility record or portion thereof which contains confidential security information and who knowingly or recklessly releases, publishes or otherwise discloses a public utility record or portion thereof which contains confidential security information or any reproduction of a public utility record or portion thereof which contains confidential security information commits a misdemeanor of the second degree subject to prosecution by the Attorney General and shall, upon conviction, be sentenced to pay a fine of not more than \$5,000 plus costs of prosecution or to a term of imprisonment not to exceed one year, or both, and shall be removed from office or agency employment.” 35 P.S. § 2141.6. (Underlining added.)

D. Noncriminal Investigation Exemption

The noncriminal investigation exemption of the RTKL (65 P.S. § 67.708(b)(17)) exempts from disclosure “a record of an agency relating to a noncriminal investigation,” including “investigative materials, notes, correspondence and reports,” and records that would, if disclosed, “reveal the institution, progress or result of an agency investigation.” 65 P.S. § 67.708(b)(17) and (b)(17)(iv)(A). This exemption is quite broad by the language of the exemption, as it covers records relating to a noncriminal investigation, or that would reveal “the institution, progress, or result of” an agency investigation. Webster’s Third New International Dictionary (Unabridged) (1971) defines “relating” as “present participle of relate – to show or establish a logical or causal connection between,” and “reveal” as “to make (something secret or hidden) publicly known: to open up to view.” Use of these broad terms indicates the breadth of this exemption, as it exempts from disclosure records logically or casually connected with the investigation, or records that would make publicly known the institution of the investigation, the progress of the investigation, or the result of the investigation.¹

To successfully assert the noncriminal investigative records exemption, the agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. Pa. Dep’t of Health v. Office of Open Records, 4 A.3d 803, 810-11 (Pa.Cwlth. 2010). Further, the inquiry, examination or

¹ The noncriminal investigation exemption does have an exception to the exemption regarding disclosability of some possible outcomes of the investigation; however, the investigation is active and ongoing and therefore these exceptions are not applicable. Metro Affidavit ¶¶ 2, 3.

probe must be “conducted as part of an agency’s official duties.” Id. at 814.

The Commission’s statutory authority to investigate pipeline matters as part of the PUC’s official duties is provided by the Public Utility Code (66 Pa.C.S. §§ 101 *et. seq.*). The Public Utility Code provides: “Public Utility: (1) Any person or corporations now or hereafter owning or operating in the Commonwealth equipment or facilities for: (v) Transporting or conveying natural or artificial gas, crude oil, gasoline, or petroleum products, materials for refrigeration, or oxygen or nitrogen, or other fluid substances, by pipeline or conduit, for the public for compensation.” 66 Pa.C.S. § 102. “The commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth.” 66 Pa.C.S. § 501(b). “Every public utility . . . affected by or subject to any regulations or orders of the commission . . . shall observe, obey, and comply with such regulations or orders, and the terms and conditions thereof.” 66 Pa.C.S. § 501(c). Finally, “[w]henever the commission shall be of opinion that any person or corporation . . . is violating, or is about to violate, any provisions of this part . . . then in every such case the commission may institute injunction, mandamus or other appropriate legal proceedings, to restrain such violations of the provisions of this part, or of the regulations, or orders of the commission, and to enforce obedience thereto.” 66 Pa.C.S. § 502.

To effectuate this authority, the Commission created the Bureau of Investigation and Enforcement (BIE) in 2011 to perform the prosecutory functions of the Commission. *Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Commission Order entered August 11, 2011). BIE is charged with, *inter alia*, representing the public interest “in enforcing compliance with the state and federal . . . gas safety laws and regulations.” *Id.* at 5; *See also* 66 Pa.C.S. § 308.2(a)(11) (Statutory section explicitly creating BIE). As shown by this broad statutory grant of powers, it is part of the Commission’s official duties to investigate pipeline matters such as Sunoco’s ME1, ME2, and ME2-Bypass pipelines.

The Commonwealth Court has recognized the PUC’s broad authority to conduct noncriminal investigations “to determine . . . if utilities are in compliance with the Public Utility Code, . . . the [United States Department of Transportation Pipeline and Hazardous Materials Safety Administration] and other applicable state and federal regulations.” Pa. Pub. Utility Comm’n v. Gilbert, 40 A.3d 755, 760 (Pa.Cmwlth. 2012).

The Commission conducted (and is still conducting) “a systematic or searching inquiry, a detailed examination, or an official probe” of Sunoco’s ME1, ME2, and ME2-Bypass pipelines. Metro Affidavit ¶¶ 2,3. (Please take Judicial Notice that Sunoco Pipeline, L.P. is a jurisdictional “public utility,” having received a Certificate of Public Convenience at A-140111, that is engaged in, *inter alia*, the intrastate transportation of hazardous liquids.) Paul Metro, Manager of the Office of the Safety Division, Pipeline Safety Section of the Commission, oversees the investigation of these matters. Metro Affidavit ¶¶ 1, 2, 3. These investigations began on or about April 1, 2017, and has been active and ongoing since that time. Metro Affidavit ¶¶ 2, 3. On December 13, 2018, Mr. Metro directed the Commission’s Bureau of Investigation and Enforcement (BIE) to file a Formal Complaint at C-2018-3006534 against

Sunoco Pipeline L.P. a/k/a Energy Transfer Partners regarding ME1. This proceeding is active and ongoing. Metro Affidavit ¶ 2.

As shown above, the Commission is carrying out official investigations conducted as part of its official duties. The Commission does not have any requested records other than records that are part of these Commission's investigations. Chiavetta Affidavit ¶ 4; Metro Affidavit ¶ 6. Consequently, the noncriminal investigation exemption of the RTKL exempts from disclosure all of the Commission's records within the scope of the Request.

E. Additional Reason Why the Requested Records are Exempt from Disclosure

For the reasons stated above, the Commission asserts that PUCSIDPA and the CSI and noncriminal investigation exemption of the RTKL exempts from disclosure all of the Commission's records that are responsive to the Request. However, in order to preserve the Commission's rights, the Commission will assert all applicable reasons why the requested records cannot be disclosed.

1. Deliberative Process Privilege

In Commonwealth Acting ex rel. Unified Judicial Sys. v. Vartan, 733 A.2d 1258 (Pa. 1999), the Pennsylvania Supreme Court held that the deliberative process privilege "covers 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" The RTKL defines privilege to include "[t]he attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth." 65 P.S. § 67.102. (Underlining added.)

Similarly, "[t]he internal, predecisional deliberations of an agency, its members, employees or officials . . . including predecisional deliberations relating to a . . . contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations" are exempt from disclosure under the RTKL. 65 P.S. § 67.708(b)(10)(i)(A). Some of the requested records reflect deliberations by BIE staff regarding the contemplated strategies for the investigations as well as the decision to file a formal complaint, and therefore are not disclosable pursuant to this common law legal privilege and this exemption of the RTKL. Also, pursuant to Section 102 of the RTKL, such records subject to a legal privilege are not "public records" and are therefore not subject to the RTKL's requirement to provide public records. 65 P.S. § 67.102 and 301(a).

III. Conclusion

The Commission timely answered the Request, and properly denied the Request because all requested records are exempt from disclosure pursuant to PUCSIDPA, and the CSI and noncriminal investigation exemptions of the Right-to-Know Law. The Commission respectfully requests that the Office of Open Records find that the Commission complied with the Right-to-Know Law and properly denied the Request, and mark the matter closed.

If the Supporting Affidavits are deemed insufficient, the PUC demands, consistent with minimum due process standards given the extremely limited seven-day response time, *in camera* review of all the responsive records. In addition, the PUC reserves the right to supplement this response to support the assertion of the additional reasons for nondisclosure if the OOR rejects application of PUCSIDPA and the Right-to-Know Law's CSI and noncriminal investigation exemptions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'SK Bainbridge', written over a horizontal line.

Steven K. Bainbridge
Assistant Counsel
Pa. Atty. I.D. 91018

Enclosures

Chiavetta Affidavit with attachments
Metro Affidavit

Service (Via Email Only)

Mr. Eric Friedman
2 Fallbrook Ln
Glen Mills PA 19342
Eric.law.friedman@gmail.com

**COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS**

Eric Friedman

v.

OOR AP 2019-0502

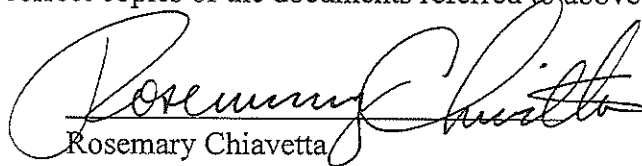
Pennsylvania Public Utility Commission

**AFFIDAVIT OF
ROSEMARY CHIAVETTA, SECRETARY
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Before me, the undersigned notary public, this day, April 15, 2019, personally appeared Rosemary Chiavetta, Secretary of the Pennsylvania Public Utility Commission, to me known, who being duly sworn according to law, deposes the following:

I, **Rosemary Chiavetta**, say that I am authorized to make this affidavit on behalf of the Pennsylvania Public Utility Commission (Commission or PUC), being an employee of the Commission as Secretary, and having the duty as records custodian for the Commission of maintaining all records for the Commission, and having knowledge of the facts relevant to the present matter, the facts set forth are true and correct to the best of my knowledge, information and belief, and I expect to be able to prove the same at any hearing hereof, attest as follows:

- 1) In my capacity as Open Records Officer (ORO) of the Commission, on Monday, February 4, 2019, I received Mr. Friedman's Right-to-Know Law (RTKL) request by email, which was docketed as PUC RTK 2019-0007. The Request is attached hereto.
- 2) Following a thorough search for all responsive records, on March 11, 2019, I sent the Commission's Response to the Requestor. The Commission's Response is attached hereto.
- 3) The Commission's Bureau of Investigation and Enforcement (BIE) has initiated various investigations against Sunoco Pipeline L.P. a/k/a Energy Transfer Partners. These investigations are active and ongoing.
- 4) The Commission does not have any responsive records other than those that are part of these Commission investigations.
- 5) The attached documents are true and correct copies of the documents referred to above.



Rosemary Chiavetta
Secretary
Pennsylvania Public Utility Commission

Subscribed and sworn to before me this
April 15, 2019.

Notary Public

COMMONWEALTH OF PENNSYLVANIA

NOTARIAL SEAL
Joanna McElroy, Notary Public
City of Harrisburg, Dauphin County
My Commission Expires May 12, 2020
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

Trout, Doreen

From: Eric Friedman <eric.law.friedman@gmail.com>
Sent: Monday, February 04, 2019 1:57 PM
To: Chiavetta, Rosemary
Subject: [External] Request for records under Pennsylvania's Right-to-Know statute

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.

Background

On January 31, 2019, representatives of the Public Utility Commission appeared at a public meeting in East Goshen Township, Chester County. Event sponsor Rep. Carolyn Comitta provided an opportunity for the public to ask questions and receive PUC responses. During my opportunity at the microphone, I had the following exchange with PUC representative Paul Metro:

Q: You have an estimate of the blast radius that's associated with an accident on an HVL pipeline, yes?

A: We have reviewed the "buffer zone" calculation that's required by federal regulations.

Q: Do YOU have an estimate of what that distance looks like?

A: Pardon me, I couldn't hear the...

Q: Do you have an estimate of what that distance is?

A: Yes.

A video recording of this exchange is at <https://youtu.be/bpbj10JXQOk>

Request

Under Pennsylvania's Right-to-Know law, I respectfully request all records in the possession of Paul Metro, his superiors or subordinates, that relate to the calculation or estimation of the range at which thermal or overpressure events related to accidents on hazardous, highly volatile liquids (HVL) pipelines may be experienced. This request does not seek information provided by Sunoco if that information has been designated as confidential security information. Rather, it seeks records containing or related to calculations or estimates of blast radius (Sunoco's term) or "buffer zone" (PUC's term) regarding accidents or releases from HVL pipelines in the possession of the PUC, including (but not limited to) information that was produced for PUC by an external source or that was developed internally.

Records responsive to this request are requested in electronic format, if they exist in that format (e.g. PDF).

Thank you,

Eric Friedman
2 Fallbrook Lane
Glen Mills PA 19342



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
400 NORTH STREET, HARRISBURG, PENNSYLVANIA 17120

IN REPLY PLEASE
REFER TO OUR FILE

PUC RTK 2019-0007

March 11, 2019

Eric Friedman
2 Fallbrook Lane
Glen Mills, PA 19342

Final response sent via Email only:
Eric.law.friedman@gmail.com

Dear Mr. Friedman:

By this letter, the Pennsylvania Public Utility Commission (Commission or PUC) responds to your Right to Know request filed pursuant to the provisions of Pennsylvania's Right to Know Law (RTKL), 65 P.S. §§ 67.101 et seq., *as amended*. In your request received Monday, February 4, 2019, you stated:

"Background

On January 31, 2019, representatives of the Public Utility Commission appeared at a public meeting in East Goshen Township, Chester County. Event sponsor Rep. Carolyn Comitta provided an opportunity for the public to ask questions and receive PUC responses. During my opportunity at the microphone, I had the following exchange with PUC representative Paul Metro:

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A: We have reviewed the "buffer zone" calculation that's required by federal regulations.

Q: Do YOU have an estimate of what that distance looks like?

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Q: Do you have an estimate of what that distance is?

A: Yes.

A video recording of this exchange is at <https://youtu.be/bpbj10JXQOk>

Request

Under Pennsylvania's Right-to-Know law, I respectfully request all records in the possession of Paul Metro, his superiors or subordinates, that relate to the calculation or estimation of the range at which thermal or overpressure events related to accidents on hazardous, highly volatile liquids (HVL) pipelines may be experienced. This request does not seek information provided by Sunoco if that information has been designated as confidential security information. Rather, it seeks records containing or related to calculations or estimates of blast radius (Sunoco's term) or

"buffer zone" (PUC's term) regarding accidents or releases from HVL pipelines in the possession of the PUC, including (but not limited to) information that was produced for PUC by an external source or that was developed internally.

Records responsive to this request are requested in electronic format, if they exist in that format (e.g. PDF)."

Your request is denied.

The documents responsive to your request have been designated as confidential security information (CSI), and therefore, as your request indicated, you are not seeking such documents. To the extent that your request does seek such documents, the Commission must deny your request, since the documents are designated CSI. Additionally, the documents are part of a noncriminal investigation and therefore are exempt from disclosure under the RTKL.

The Public Utility Confidential Security Information Disclosure Protection Act (PUCSIDPA) (35 P.S. §§ 2141.1 – 2141.8) prohibits disclosure of "Confidential Security Information" (CSI). 35 P.S. § 2141.2 (Definitions). CSI is "information contained within a record maintained by an agency in any form, the disclosure of which would compromise security against sabotage or criminal or terrorist acts and the non-disclosure of which is necessary for the protection of life, safety, public property or public utility facilities." 35 P.S. § 2141.2. The documents requested were designated as CSI and are not disclosable.

In addition, the RTKL provides for exemptions for CSI. The RTKL prohibits disclosure of records that "would be reasonably likely to jeopardize or threaten public safety" or "which creates a reasonable likelihood of endangering the safety or the physical security of a ... public utility, resource, infrastructure, [or] facility," including "infrastructure records that expose or create a vulnerability through disclosure." 65 P.S. § 67.708(b)(2) and (3). Therefore, the documents requested are not disclosable under the RTKL.

Finally, the documents are exempt from disclosure pursuant to the noncriminal investigation provision of the RTKL (65 P.S. § 67.708(b)(17)), which exempts from disclosure "records of an agency relating to a noncriminal investigation," including "investigative materials, notes, correspondence and reports," and records that would "reveal the institution, progress or result of an agency investigation." 65 P.S. § 67.708(b)(17).

For all of the reasons stated, the records requested are exempt from disclosure.

This response constitutes the final response of the Commission to your RTK Law Request.

NOTICE OF RIGHT TO APPEAL

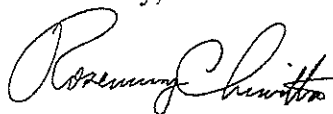
If you believe the PUC has wrongfully denied any part of your request, you may appeal within 15 business days from the date of this letter to:

Office of Open Records
16th Floor
333 Market Street
Harrisburg, PA 17126-0333

If you choose to file an appeal, you must do so within 15 business days of the mailing date of the agency's response. 65 P.S. § 67.1101. Please note that a copy of your original Right-to-Know request and this denial letter must be included when filing an appeal. The law also requires that you state the reasons why the record is a public record and address the reasons the Agency denied your request. Visit the Office of Open Records website at <http://openrecords.pa.gov> for further information on filing an appeal.

Please be advised that this correspondence will serve to close this record with our office as permitted by law.

Sincerely,

A handwritten signature in cursive script, appearing to read "Rosemary Chiavetta".

Rosemary Chiavetta
Secretary and Right to Know Officer
Pa Public Utility Commission

cc: Steven Bainbridge, PUC Assistant Counsel
Right to Know File PUC RTK 2019-0007

**COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS**

Eric Friedman

v.

Pennsylvania Public Utility Commission

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:
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OOR AP 2019-0502

**AFFIDAVIT OF
PAUL J. METRO, MANAGER
OFFICE OF THE SAFETY DIVISION, PIPELINE SAFETY SECTION
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Before me, the undersigned notary public, this day, April 15, 2019, personally appeared Paul J. Metro, Manager of the Safety Division, Pipeline Safety Section of the Pennsylvania Public Utility Commission, to me known, who being duly sworn according to law, deposes the following:

I, **Paul J. Metro**, say that I am authorized to make this affidavit on behalf of the Pennsylvania Public Utility Commission (Commission or PUC), being an employee of the Commission as Manager of the Safety Division, Pipeline Safety Section, and having the responsibility for investigating, analyzing, and responding to pipeline safety issues in Pennsylvania, and having knowledge of the facts relevant to the present matter, the facts set forth are true and correct to the best of my knowledge, information and belief, and I expect to be able to prove the same at any hearing hereof, attest as follows:

- 1) In my capacity as Manager of the Safety Division, Pipeline Safety Section of the Commission, I oversee Commission investigations of gas and hazardous volatile liquid pipelines.
- 2) On or about April 1, 2017, the Commission commenced an official investigation of the "Mariner East 1" (ME1) pipeline under my oversight. The investigation is active and has been ongoing since that time. On December 13, 2018, the Commission's Bureau of Investigation and Enforcement (BIE) filed a Formal Complaint C-2018-3006534 against Sunoco Pipeline L.P. a/k/a Energy Transfer Partners (Sunoco) to continue this investigation. This proceeding is active and ongoing.
- 3) The Commission also has these additional investigations of Sunoco pipelines: March 2018 Investigation of ME1 ("Lisa Drive" Investigation of ME1); Investigation of "Mariner East 2" (ME2); and July 2018 Investigation of "Mariner East 2 – Bypass" (ME2-bypass). All of these investigations are active and ongoing.
- 4) The Commission records that "relate to the calculation or estimation of the range at which thermal or overpressure events related to accidents on hazardous, highly volatile liquids (HVL) pipelines may be experienced," (also described as "containing or related to calculations or estimates of blast radius (Sunoco's term) or "buffer zone" (PUC's term) regarding accidents or releases from HVL pipelines in the possession of the PUC, including (but not limited to)

information that was produced for PUC by an external source or that was developed internally”) (that is, the requested records), consist of the following, all filed with the Commission by Sunoco Pipeline L.P. a/k/a Energy Transfer Partners (and marked as Confidential by Sunoco). These records are part of the active and ongoing investigations of these pipelines. These records were produced to the Commission by Sunoco and are marked as confidential.

Hazard Assessment for ME1

Date: 12-17-2013

Pages: 56

Hazard Assessment for proposed ME2 Pipeline

Date 3-27-2017

Pages: 67

Hazard Assessment for Re-route of ME2 near Chester & Delaware County

Date: 10-5-2018

Pages: 33

5) In addition to the three reports indicated in paragraph four, the Commission has requested records in the form of Inspection Reports created by Commission Safety Staff in which there are references and reviews of these Hazard Assessments. These Inspection Reports are part of the active and ongoing investigations indicated above.

6) The Commission does not have any requested records other than records that are part of these Commission’s investigations.

7) The requested records are “Confidential Security Information” within the meaning of The Public Utility Confidential Security Information Disclosure Protection Act (PUCSIDPA) (35 P.S. §§ 2141.1 – 2141.8). In my professional opinion, disclosure of the requested records would compromise security against sabotage or criminal or terrorist acts, and non-disclosure is necessary for the protection of life, safety, public property or public utility facilities.


8) I based my opinion on the definition of “confidential security information” contained in PUCSIDPA and on that there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person, or mass destruction.

9) In my professional opinion, release of the requested records would compromise security against sabotage or criminal or terroristic acts regarding pipeline facilities by illustrating the extent of the impact zone, including casualty and damage assessments at various ranges, regarding an accident (or sabotage event) on a pipeline. These Reports and Inspection Reports explicitly provides how such an assessment can be made (as well as the assessment for this particular pipeline); information which could clearly be used by a terrorist to plan an attack a pipeline (and particularly on these Sunoco pipelines, as they contains the specific operating parameters of the pipelines) to cause the greatest possible harm and mass destruction to the public living near such facilities. e

10) In my professional opinion, release of the requested records would allow for awareness of the potential effectiveness of a sabotage act on a pipeline (and in particular on these pipelines) to

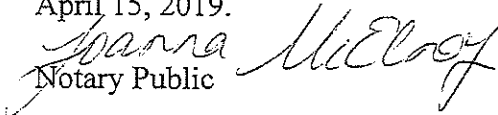
harm the public and create mass destruction, thereby potentially inciting such acts and creating a great risk to public safety.

11) I arrived at my professional opinion that the requested records are Confidential Security Information in consultation with numerous other technical gas safety staff at the Commission, all of which agree with my professional assessment.

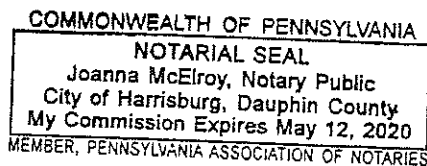


Paul J. Metro
Manager of the Safety Division
Pipeline Safety Section
Pennsylvania Public Utility Commission

Subscribed and sworn to before me this
April 15, 2019.



Notary Public



EX. “B”

MARINER EAST 2

NEWS & VIEWS



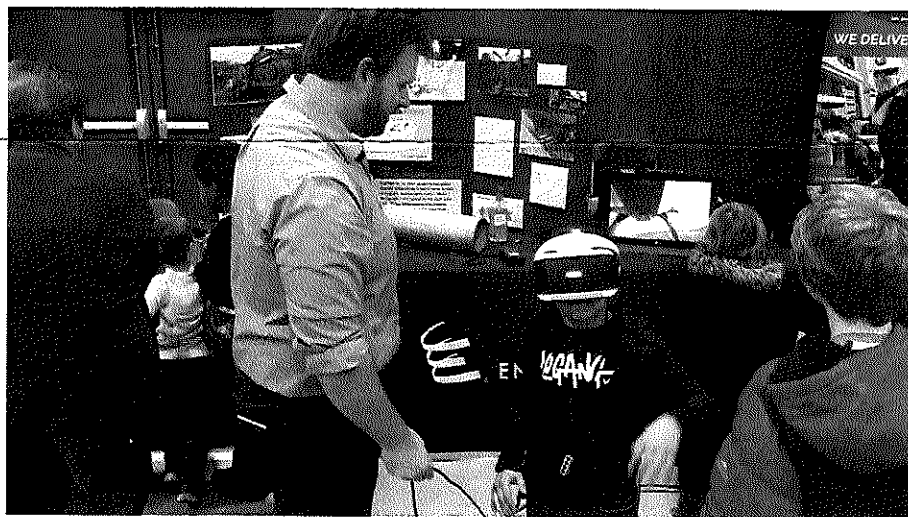
Welcome to Mariner East News & Views – information to keep you updated on Energy Transfer's Mariner East system.

Beyond the Pipeline

The Mariner East 2 pipeline system enables safe and efficient delivery of domestically produced natural gas to Northeast markets, representing new economic opportunity for the commonwealth and its citizens. The ability of new companies to take advantage of affordable feedstock for plastics and energy to fuel new types of manufacturing makes the Mariner East 2 system an exciting part of Pennsylvania's future.

As we look to the future, we feel it is important to stress our great respect for Pennsylvania's rich oil and gas history, and its continued influence within the industry. We also recognize Sunoco's important legacy in the state, once Sun Oil, and the role it has played in local economies and Pennsylvania communities for generations. We have proudly called it our own since 2012.

We currently have 1,035 full-time employees in Pennsylvania, with offices and operations centers in Delaware, Chester, Berks, Dauphin and Butler counties. We safely operate nearly 3,000 miles of pipeline infrastructure and gathering systems, as well as terminal and storage assets, in Pennsylvania.



Energy Transfer employees participated in the Science Festival held at Penn College of Technology. The event saw 1,500 middle school students attend from the area during the day and was open to the public in the evening. Students were able to take a virtual reality tour of an operating compressor station and learn about the numerous safety aspects of a pipeline. Energy Transfer was one of the main sponsors of the festival.

Energy Transfer Community Contributions

Our presence here as a corporate citizen, employer and benefactor continues to have a positive impact on communities and citizens throughout the commonwealth.

During the last five years, Energy Transfer has contributed more than \$5.8 billion to Pennsylvania's economy including more than \$7 million in donations to local causes from our Energy Transfer/Sunoco Foundation and corporate commitments. In the last five years, we have contributed:

Energy Transfer's benefits to Pennsylvania 2014-18:

TOTAL

\$5,854,833,110

PAYROLL TAXES

\$50,430,451

WAGES

\$3,786,170,472

SALES TAX

\$1,958,729,374

PROPERTY TAXES

\$52,231,000

ENERGY TRANSFER/SUNOCO FOUNDATION CONTRIBUTIONS


\$4,224,700

COMMUNITY CONTRIBUTIONS

\$3,047,113

E

Mariner East 2X Construction Underway in Pennsylvania

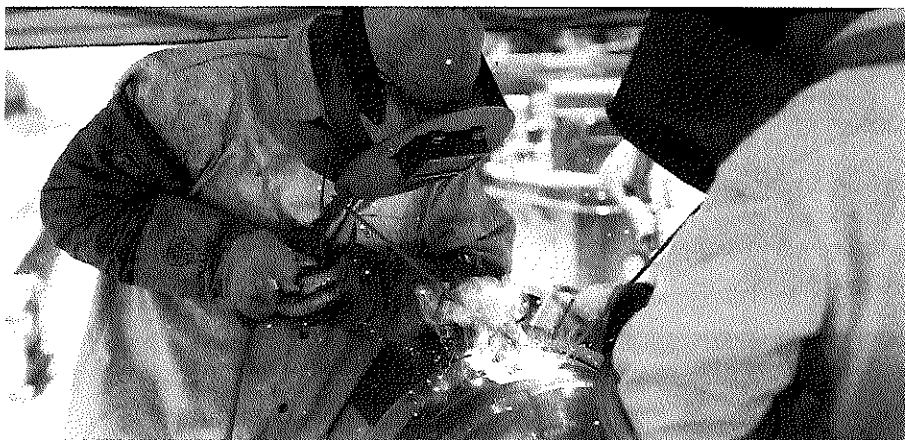
Construction is underway in Pennsylvania to complete work on the Mariner East 2X pipeline. Mainline construction of the 16-inch pipeline is 99 percent complete, with the remaining work including horizontal directional drills, pipeline tie-ins and restoration. We expect the Mariner East 2X pipeline to be in service before the end of 2019. 

Pipeline Conversion and Safety

We would like to address inaccurate information regarding the requirements, safety and best practices of changing the product being shipped through a pipeline. Changing the type of product transported on a pipeline is commonly done in our industry, and has been for years. Specific to our 12-inch pipeline that has been converted from transporting refined products to transporting natural gas liquids, it is being claimed that converting it is against Pipeline and Hazardous Materials Safety Administration (PHMSA) regulations. This is not true.


In fact, PHMSA released an [advisory bulletin](#) describing specific notification requirements and general operating and maintenance guidelines, as well as integrity management actions regarding flow reversals, product changes and conversion to service.

After making \$30 million worth of upgrades to the 12-inch pipeline in 2016 and working closely with PHMSA, we began the flow of natural gas liquids through a portion of this pipeline as an interim solution to bring Mariner East 2 in service.



PHMSA required that we take specific actions and submit a comprehensive plan to the regulatory agency before using the 12-inch pipeline, which was done prior to the change of product flow. PHMSA was satisfied with our approach to converting the 12-inch pipeline to transport natural gas liquids.

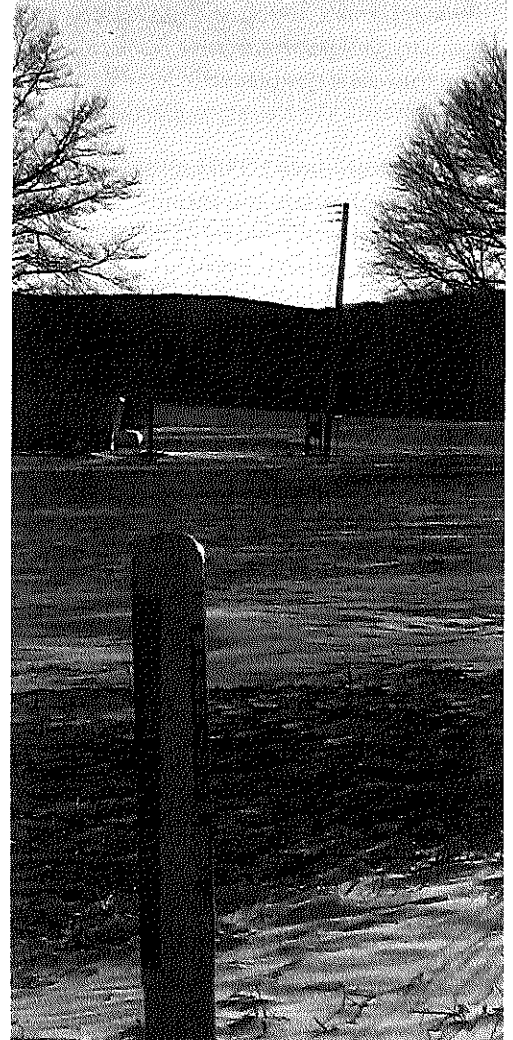
Additionally, West Goshen Township contracted an independent, third-party agency to evaluate the safety of the upgraded 12-inch pipeline. This independent organization issued a report in 2018 that concluded that the 12-inch pipeline meets and often exceeds federal safety regulations for high-volume liquid transmission pipeline service. The report showed that we went above and beyond federal standards to ready this pipeline for the safe transportation of natural gas liquids.

At Energy Transfer, we are proud of the work we've done to bring this pipeline safely into service. We remain committed to Pennsylvania, its regulatory agencies and its local communities, and we plan to continue this momentum as we finish construction of the remaining portions of the Mariner East pipeline system. 

Pipelines Power Through Polar Vortex

In February, pipelines all over the Northeast were put to the test as a polar vortex descended on the region, creating record-breaking low temperatures. Thankfully, reliable pipelines transported energy to heat our homes and keep the lights on during this cold streak because they are buried below the freeze line. This included local propane access for many Americans, especially critical here at home in Pennsylvania.

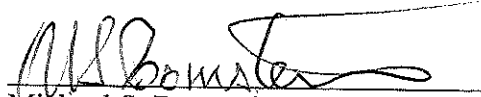
According to the Energy Information Administration, more than 200,000 homes in Pennsylvania use propane for heat. With the Mariner East 2 pipeline transporting propane for local distribution in eastern Pennsylvania, this project remains vital to the state and its residents. Besides increasing the supply of propane to eastern Pennsylvania, the Mariner East 2 system helps keep prices affordable, especially during the demand spike in extremely low temperatures during 2018.



CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the persons 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 on the following via electronic and first-class mail:

SEE ATTACHED LIST


Michael S. Bomstein

Dated: April 24, 2019

(PARTIES LIST UPDATED MARCH 28, 2019)

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