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August 30, 2019

VIA ELECTRONIC FILING

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

Re: Wilmer Baker v. Sunoco Pipeline L.P.; Docket No. C-2018-3004294; **SUNOCO PIPELINE L.P.'S MAIN BRIEF**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is Sunoco Pipeline L.P.'s Main Brief in the above-captioned proceeding.

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

Very truly yours,

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

WES/das/jld
Enclosure
cc: Hon. Elizabeth H. Barnes, (Electronic ebarnes@pa.gov and first class mail)
Per Certificate of Service

CERTIFICATE OF SERVICE

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

VIA PERSONAL HAND DELIVERY ON AUGUST 30, 2019
AND OVER-NIGHT FEDERAL EXPRESS

WILMER JAY BAKER
430 RUN ROAD
CARLISLE PA 17015

Thomas J. Sniscak, Esquire
Whitney E. Snyder, Esquire

Dated: August 30, 2019

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

WILMER BAKER	:	
	:	
Complainant,	:	
	:	
v.	:	
	:	Docket No. C-2018-3004294
SUNOCO PIPELINE L.P.,	:	
	:	
Respondent.	:	
	:	

RESPONDENT SUNOCO PIPELINE L.P.'S MAIN BRIEF

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Dated: August 30, 3019

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I. INTRODUCTION, STATEMENT OF THE CASE, STATEMENT OF ISSUES INVOLVED, AND SUMMARY OF ARGUMENT

This is a case where Complainant, the party with the burden of proof, has universally failed to meet his burden to prove Sunoco Pipeline L.P. (SPLP) violated pipeline safety laws or regulations. Complainant must prove SPLP violated a law or regulation to obtain any relief.[1] Yet Complainant submitted no credible or competent evidence to support his allegations that SPLP's pipelines or practices are unsafe or otherwise in violation of pipeline safety laws or regulations. Complainant also wholly failed to support some of the claims in his Complaint.

The record shows Complainant's allegations are neither credible nor entitled to weight, and are insufficient to grant any relief:

- Complainant repeatedly and publicly alleged, in both his Complaint and at an anti-pipeline rally at the Capitol, that the ME1 pipeline is made of iron pipe without investigating his assertion and when he found out it the pipeline is made of steel never corrected these allegations. N.T. 106:11-108:7.
- Complainant testified that he made mistakes in researching his case. N.T. 108:12-13.
- Complainant admitted that at an anti-pipeline rally at the Capitol he stated that SPLP told local government to go to hell as if SPLP had actually said that, but he admitted that this was his own statement and not something SPLP had said. N.T. 110:23-111:24.
- Complainant admitted that while he gave lay opinion testimony that SPLP was using "substandard steel," he had even not looked at what the actual standards are

[1] *West Penn Power Co. v. Pennsylvania Public Utility Comm'n*, 478 A.2d 947, 949 (Pa. Cmwlth. 1984) ("We hold that in order for the PUC to sustain a complaint brought under this section [66 Pa. C.S. § 1501], the utility must be in violation of its duty under this section. **Without such a violation by the utility, the PUC does not have the authority, when acting on a customer's complaint, to require any action by the utility**.") (emphasis added); *Township of Spring et al. v. Pennsylvania-American Water Company*, Docket Nos. C-20054919 et al, 2007 WL 2198196 at *6 (Order entered Jul. 27, 2007) ("If we were to order PAWC to conduct testing of the property in the Stonegate community, we would have to base that order on credible evidence that some act or omission by PAWC in violation of the Code or our Regulations would be remedied by the testing.") (citing *West Penn*).

in the 49 C.F.R. Part 195 regulations that discuss steel and design requirements applicable to the Mariner East pipelines. N.T. 105:15-20. Complainant then admitted that he did not do an analysis to see if SPLP's pipes meet those standards. N.T. 106:3-5.

- Complainant did not know whether 49 C.F.R. Part 192 or 195 applied to SPLP's Mariner East pipelines and relied on the Part 192 regulations in Exhibit C-19 (which clearly states 49 C.F.R. Part 192), that are for natural gas pipelines and inapplicable to the Mariner East pipelines. N.T. 114:9-116:10.
- Complainant testified that he did not know whether the Plains Justice article, Exhibit No. C-15, that he relied upon to allege SPLP was using substandard steel for the ME2 pipeline was about the ME2 pipeline. N.T. 108:16-20.
- Complainant attempted to rely on and have an exhibit admitted into the record that was taken from dragonpipediary.com. N.T. 99:16-24.
- Complainant admitted that while he is criticizing SPLP for not meeting with emergency responders he had not attended any of the emergency responder trainings SPLP held and was not aware of these trainings. N.T. 109:19-110:22.
- Complainant alleged he had talked to someone at SPLP about a "loophole" in regulations, but he could not identify or describe the person he allegedly spoke with. N.T. 116:11-23.

Complainant was not qualified to give any opinion testimony regarding SPLP's pipelines. Moreover, ***that a lay witness may possess some level of knowledge and education in a related subject does not make him an expert on specialized and technical matters such as geology, pipeline construction, pipeline safety, or emergency response, and such unqualified testimony is not credible evidence***. *See* Opinion and Order, *Amended Petition of State Senator Andrew E. Dinniman for Interim Emergency Relief*, P-2018-3001453 *et al.* (June 14, 2018) (acknowledging lack of expert testimony regarding technical geological concerns, thereby necessarily rejecting testimony of lay witness on geological issues without regard for lay witness's purportedly related education and experience.); *see also*, Joint Statement of Commissioners Coleman and Kennard, *Amended Petition of State Senator Andrew E. Dinniman for Interim Emergency Relief*, P-2018-3001453 *et al.* (June 14, 2018) (acknowledging "no credible *evidence of record* to indicate that a

clear and present danger exists with respect to the construction activities on ME2 and ME2X in West Whiteland Township" when hearing transcript was "devoid of any expert witness testimony that, to a reasonable degree of scientific certainty, there is a credible and immediate harm with the construction of these lines."). As such all of his opinion testimony should not have been admitted into the record, and his opinion testimony cannot be relied upon to support any finding of fact.[2] Given this lack of credibility and competence, Complainant's testimony can be given no weight and cannot support a finding of fact or any relief requested.

The only other witness Complainant presented who was potentially competent to testify to an opinion was Christina DiGiulio. While she may have some related knowledge, as explained in the preceding paragraph, her opinion testimony cannot be relied upon to support any finding of fact because she is not an expert in pipeline design, construction, or operation. Notably, Ms. DiGiulio testified and conceded that she did not find SPLP had violated any law or regulation. N.T. 202:19-24.

Complainant then presented the testimony of four other non-expert witnesses. The only testimony three of these witnesses presented relevant to the Complaint was that they attended a Lower Frankford Township Board of Supervisors meeting and that SPLP did not attend that meeting. N.T. 120:10-15 (Robinson), 129:1 (Jon Baker), 137:5-13 (Blume). SPLP was not under any requirement to attend such a meeting, and its non-attendance is not a violation of law or regulation. N.T. 303:13-304:2. SPLP does not dispute that the Township Supervisors held a meeting and that SPLP did not attend that meeting. Assistant General Counsel for SPLP, Curtis Stambaugh, presented the only competent and credible evidence regarding SPLP's non-

[2] *Infra* Section III.A.1.

attendance, explaining that SPLP had been informed on the eve of the meeting that landowners had invited the media. N.T. 377:24-378:13. SPLP did not attend because some of the information to be discussed in the meeting could be security-sensitive, and thus SPLP was not going to participate in a meeting that was open to the media. *Id.* He explained that SPLP has reiterated multiple times since then that it is willing to meet with the Township. *Id.* Again, SPLP was not under any requirement to attend such a meeting, and its non-attendance is not a violation of law or regulation. N.T. 303:13-304:2.

Complainant's fourth fact witness, Ms. Van Fleet, testified that the ME1 pipeline is exposed in Lower Frankford Township and that she sent an email to Ian Woods at PHMSA regarding this exposure. N.T. 159:22-23, 162:14-16; Exhibit C-3. Exhibit C-3 shows that Ian Woods responded that SPLP had informed PHMSA that they had engaged an engineering firm to study the pipeline exposure and that after the study was done, SPLP would apply to DEP for permits to remediate the exposure. N.T. 162:24-163:7; Exhibit C-3. SPLP does not dispute that this very small exposure exists. As pipeline safety expert Mr. John Zurcher explained, pipeline exposures are an extremely common occurrence. N.T. 300:2-14. Just because a pipeline is exposed does not mean there is a safety issue or that a law or regulation has been violated; instead, pipeline operators are required to evaluate the exposure and remediate when and where necessary per applicable PHMSA regulations. N.T. 300:12-301:13. Complainant presented absolutely no evidence linking this exposure to any type of safety concern.

Despite Complainant's failure to present credible, competent evidence to support the allegations in his Complaint and meet his burden of proof, SPLP has shown his allegations are meritless. Notably, that SPLP exceeds many regulatory requirements Complainant alleges SPLP

violated, is information SPLP has made publicly available online for years and that SPLP gave to Complainant prior to hearing. SPLP Exhibit No. 19 (Above and Beyond Fact Sheet).

1. **Public Awareness and Emergency Response**. SPLP's emergency management expert, Mr. Noll, agreed that SPLP's emergency response outreach and training program is adequate and provides all information that is necessary for the public and emergency responders to identify a pipeline release and to respond to a pipeline-related emergency, and is consistent with industry standards and PHMSA regulations. N.T. 236:4-17. Mr. Noll and Mr. Perez presented extensive evidence of trainings SPLP made available to first responders in Cumberland County, including upcoming training that has been scheduled. N.T. 219:20-233:7 (Noll); 354:1-356:19 (Perez); SPLP Exhibit Nos. 2-3, 8-18, 20, 22, 23. Complainant's allegations regarding non-attendance at a Township Supervisors meeting are irrelevant because this is not a requirement under pipeline safety laws or regulations. N.T. 303:13-304:2. Further evidence of the non-requirement of attendance at local municipality governmental meetings is that the Commission is considering whether or not it should promulgate regulations on this issue to make it a requirement. *See Advance Notice of Proposed Rulemaking Order*, Docket No. L-2019-3010267, ANOPR Order at 19-20 (Order entered Jun. 13, 2019) (requesting comments on "[r]equiring periodic public awareness meetings with municipal officials and the public"). SPLP's public awareness plan and activities in Cumberland County follow the applicable regulations and industry standards. As SPLP pipeline safety expert Mr. Zurcher testified:

> Q. In your expert opinion, and to a reasonable degree of professional certainty, has SPLP taken all required steps regarding public awareness education and communication in Cumberland County?

> A. In my opinion, absolutely. They not only follow the regulations, but they follow the industry standard, the API-1162, so they have met all of the requirements of those documents.

N.T. 303:13-20. SPLP appropriately mailed a public awareness pamphlet to Complainant and Complainant's witness Ms. Van Fleet. N.T. 356:21-357:19. SPLP has shown numerous times that its public outreach program complies with regulatory requirements.[3]

2. **Imported pipe allegation**. There is no law prohibiting SPLP from using pipe or steel manufactured in other countries. Moreover, this is not an issue over which the PUC has jurisdiction. Complainant presented absolutely no evidence that pipe or steel manufactured in a foreign country is somehow related to safety generally or specifically with respect to the ME2X pipeline. To the contrary, pipeline safety expert Mr. John Zurcher explained that all pipe must be manufactured to PHMSA standards, that these

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[3] For example, in its June 14, 2018 Order in the Dinniman matter, Docket No. P-2018-3001453, the Commission required SPLP to submit a compliance filing that included its public awareness program and emergency response program and associated materials. *Id.* at 48, Ordering ¶ 6. The Commission, before even seeing this filing, allowed the ME1 pipeline to resume operation, despite arguments that SPLP's public awareness program was inadequate. June 14, 2018 Order at 5-6 (explaining Count II of Petition alleged "Sunoco has failed to warn and protect the public from danger or reduce the hazards to the public by reasons of its equipment and facilities"), Order ¶¶ 1, 3 (allowing ME1 to resume operation).

SPLP made the required filing (the relevant excerpt of which is SPLP Exhibit No. 23 in this proceeding), and the Commission expressly found:

> The documentary materials provided by Sunoco, on their face, indicate communication to the affected public and stakeholders concerning the Mariner East Pipeline projects. Therefore, we conclude Sunoco has established that it has complied with standard notice procedures of DEP and its internal policies and such procedures, as outlined, comply with the requirements of Ordering Paragraph No. 6.

Opinion and Order, *Amended Petition of State Senator Andrew E. Dinniman for Interim Emergency Relief*, P-2018-3001453 *et al*. 24-25 (Aug. 2, 2018).

standards are international standards, and that SPLP's pipe used for the ME2 and 2X pipelines exceeded the requirements for these standards. N.T. 276:11-21, 280:2-281:11, 284:10-20, 285:10-19. In any event, Mr. Baker was wrong in that the record clearly shows American steel and pipe was used for ME2, SPLP Exhibit No. 4 ("Pipe manufactured, sampled, tested, and inspected in accordance with the specification(s) and meets requirements. Steel cast and coils rolled at US Steel, Gary, IN. Pipe manufactured at Stupp Corporation, Baton Rouge, LA.") and equally high quality imported steel, that exceeds PHMSA standards, was used for ME2X.

3. **Pipeline Design Standards**. Complainant presented absolutely no evidence that SPLP's steel, pipes, and pipeline design do not comply with the applicable regulatory standards or are somehow "substandard". In fact, his own alleged "expert" (who is not an expert in pipeline safety), admitted that she did not conclude SPLP was in violation of any regulations. N.T. 202:19-24. SPLP witness Perez explained that Complainant's allegation is illogical. It would make no sense for SPLP to try to use substandard pipe to save money where SPLP intends to utilize these pipelines safely and reliably for a long time and the cost of pipe is only approximately $180 million out of a $2.5 billion project (approximately 7%). N.T. 348:2-349:2. Moreover, Mr. John Zurcher, Pipeline Safety Expert, explained how the PHMSA regulations work, demonstrated how they apply to SPLP's pipelines, and proved his conclusion that SPLP's pipes ***exceed*** regulatory requirements. N.T. 276:11-21, 280:2-281:11, 284:10-20, 285:10-19. Mr. Perez concurred with the facts Mr. Zurcher presented and relied upon and concurred with Mr. Zurcher's conclusions. N.T. 343:18-344:5.

4. **Pipeline Exposure**. Complainant presented no evidence on this issue other than the existence of the exposure, which SPLP does not dispute. A pipeline exposure is not a violation of law or regulation. Pipeline exposures in any utility industry that uses pipes are an extremely common occurrence. N.T. 300:2-14. The applicable PHMSA regulations require that pipeline operators examine and monitor pipeline exposures and remediate on an appropriate timeline. N.T. 300:2-301:13; *see, e.g.*, 49 C.F.R. Parts 195.401(b), 195. 412, 195.422. Here, SPLP has taken the required steps, appropriately concluded the exposure is not a safety issue requiring immediate remediation and is awaiting a permit from DEP to allow it to remediate the exposure. N.T. 301:13-18, 350:2-351:23, 352:8-353:25.

5. **Welding Requirements**. Complainant alleged for the first time at the hearing that a picture of a pipe joint showed that SPLP had riveted pipes together. Mr. Baker under cross clearly admitted he is not an expert on pipelines or a certified welder of pipelines under PHMSA regulations and thus he is not an expert and could not give opinion testimony on this issue. His testimony cannot be relied upon. Moreover, his testimony lacks any credibility. He never actually saw in person the weld he wrongly claimed had riveted brackets or braces, which he speculated was evidence of the welds or pipe being substandard. Instead, he made his groundless testimony claims based solely on a picture that he had not taken, and if anything, only demonstrated he was giving opinions about pipeline welding when he has absolutely no experience or expertise in pipeline welding or understanding of the applicable regulatory requirements or processes. In contrast, SPLP expert witness Mr. Zurcher and Mr. Perez proved that the picture did not show that the pipe had been riveted together, but instead the marking Complainant incorrectly alleged were rivets were actually marks in the pipeline in the first layer coating left by the line-up clamp,

which holds two pieces of pipe in place while they are being welded. N.T. 293:3-294:9, 295:4-21 (Zurcher), 343:18-344:5 (Perez); SPLP Exhibit 27. The blue color of the marks shows that nothing had penetrated the pipe (like a rivet) because that blue is the first layer of coating on the pipe and had not been damaged. *Id.* SPLP does not rivet its pipes or use "sleeves." *Id.* Instead, it uses clamps to align the two sections of pipe for optimum welding joinder and the clamps leave non-damaging cosmetic marks which, are recoated during the extensive final conditioning of the pipe before covering. N.T. 316:25-317:7, 318:5-13. Moreover, SPLP goes above and beyond the regulatory requirement of x-raying 10% of welds; it inspects 100% of its welds, to ensure that its welds and processes comply with regulatory requirements which incorporate industry standards. N.T. 296:22-297:25 (Zurcher), 345:17-21 (Perez).

6. **Injunctive Relief – Odorant and Public Alarms**. The regulations applicable to the Mariner East Pipelines, 49 C.F.R. Part 195, N.T. 292:1-17, do not require or suggest that SPLP must add odorant to the products in its pipelines or develop some type of public alarm system. N.T. 310:1-8, 322:17-22 (Zurcher), 343:18-344:5 (Perez); *compare* 49 C.F.R. Part 195 (which does not reference or require odorization of liquid pipelines) *with* 49 C.F.R. Part 192.625 (which requires odorization of certain natural gas pipelines). Further evidence of the non-requirement of odorant and alarm systems is that the Commission is considering whether or not it should promulgate regulations on these issues. *See Advance Notice of Proposed Rulemaking Order*, Docket No. L-2019-3010267, ANOPR Order at 19-20 (Order entered Jun. 13, 2019) (requesting comments on "notification criteria" and "odorant utilization"). The Commission cannot just order injunctive relief where there is no violation of law or regulation that such relief will remedy.

West Penn Power Co. v. Pennsylvania Public Utility Comm'n, 478 A.2d 947, 949 (Pa. Cmwlth. 1984) ("We hold that in order for the PUC to sustain a complaint brought under this section [66 Pa. C.S. § 1501], the utility must be in violation of its duty under this section. **Without such a violation by the utility, the PUC does not have the authority, when acting on a customer's complaint, to require any action by the utility**.") (emphasis added); *Township of Spring et al. v. Pennsylvania-American Water Company*, Docket Nos. C-20054919 et al, 2007 WL 2198196 at *6 (Order entered Jul. 27, 2007) ("If we were to order PAWC to conduct testing of the property in the Stonegate community, we would have to base that order on credible evidence that some act or omission by PAWC in violation of the Code or our Regulations would be remedied by the testing.") (citing *West Penn*).

Complainant has not shown any violation of law or regulation that adding odorant or designing some form of public alarm system would remedy, let alone addressed the substantive issues with ordering such relief that SPLP's expert witnesses addressed.

II. BURDEN OF PROOF AND LEGAL STANDARDS

A. Burden of Proof

As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Public Utility Code (Code). 66 Pa. C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the Respondent is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa.*

PUC, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant's evidence must be more convincing, than that presented by the Respondent. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, the Commission's decision must be supported by substantial evidence in the record. It is axiomatic that a legal decision must be based on real and credible evidence that is found in the record of the proceeding. *Pocono Water Co. v. Pa. PUC*, 630 A.2d 971, 973-74 (Pa. Cmwlth. 1993) (finding that the Commission violated the utility's due process rights "because it assessed liability after determining an issue which [the utility] had not been afforded a reasonable opportunity to defend at the hearing."); *Duquesne Light Co. v. Pa. PUC*, 507 A.2d 433, 437 (Pa. Cmwlth. 1986) (holding that the Commission violated the utility's due process rights because the utility was "not given adequate notice of the specific conduct being investigated, and hence its defense was gravely prejudiced."). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by the Complainant of evidence sufficient to initially establish a *prima facie* case, the burden of going forward with the evidence, to rebut the evidence of the Complainant, shifts to the Respondent. If the evidence presented by the Respondent is of co-equal weight, the Complainant has not satisfied his burden of proof. The Complainant now must provide some additional evidence to rebut that of the Respondent. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party

seeking affirmative relief from the Commission. *Milkie v. Pa. PUC,* 768 A.2d 1217 (Pa. Cmwlth. 2001). In sum, Complainant always has the burden of proof in this proceeding.

B. Expert and Opinion Evidentiary Standards

1. Standards for Expert Qualification

Pa. R.E. 702 sets forth the standard for the qualification of expert witnesses and provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;
> (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and
> (c) the expert's methodology is generally accepted in the relevant field.

225 Pa. Code Rule 702; *see Randall v. PECO Energy Co.*, No. C-2016-2537666, 2019 WL 2250792, at *43 (Pa. P.U.C. May 9, 2019), *citing Gibson v. WCAB*, 580 Pa. 470, 485-86, 861 A.2d 938, 947 (Pa. 2004) (holding, in part, that notwithstanding the statutory maxim of 2 Pa. C.S. § 505, which mandates a relaxation of the strict rules of evidence in agency hearings and proceedings, the "evidentiary Rules 602, 701, and 702 are applicable to agency proceedings in general…"). To the extent a witness is found to possess specialized knowledge to qualify as an expert on certain subject matters, **the witness's expert testimony is limited to those issues within their specific expertise**. *See Bergdoll v. York Water Co.*, No. 2169 C.D. 2006, 2008 WL 9403180, at *8–9 (Pa. Cmwlth. 2008) (unreported) (prohibiting independent contractors from offering expert testimony on water source and cause of sewer blockage; while witnesses were qualified to offer certain

testimony as to facts and the extent of damage at issue, the source of the water and cause of the sewer blockage at issue "was not within their expertise"); *see also, Application of Shenango Valley Water Co.*, No. A-212750F0002, 1994 WL 932364, at *19 (Jan. 25, 1994) (President of water company was "not qualified to provide expert testimony regarding the ratemaking value of utility property" when, notwithstanding his skills and expertise as to the operation of a public utility, he was "…not a registered professional engineer and has never been a witness concerning valuation of utility property in any proceeding before the Commission… lacks of knowledge regarding standard ratemaking conventions concerning capital stock as an item of rate base, cash working capital and the ratemaking requirements of Section 1311 of the Public Utility Code.")(internal record citations omitted).

2. Lay Witness Testimony is Limited to Direct Personal Knowledge

Lay opinions on matters requiring scientific, technical or specialized knowledge are not competent evidence to support a finding of fact. 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."). Although the Pennsylvania Rules of Evidence are not strictly adhered to by the Commission, **the Pennsylvania Supreme Court has recognized that any relaxation of the rules of evidence in administrative settings cannot permit lay witnesses to testify to technical matters "without personal knowledge or specialized training."** *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004) (holding Rules of Evidence 602 (personal knowledge), 701 (opinion testimony by lay witnesses) and 702 (testimony by expert witnesses) generally applicable in agency proceedings); Nancy Manes, C-20015803, 2002 WL 34559041, at *1 (May 9, 2002) (the Commission abides by the Pennsylvania Supreme Court's standard "that a person qualifies as an expert witness if, through education,

occupation or practical experience, the witness has a reasonable pretension to specialized knowledge on the matter at issue."). Accordingly, **the Commission has consistently rejected lay witness is not qualified to testify or offer exhibits related to any issues outside of direct personal knowledge.** *Lamagna v. Pa. Elec. Co.*, C-2017-2608014, 2018 WL 6124353, at *20 (Oct. 30, 2018) (lay witness was "not qualified to testify or offer exhibits related to health and safety issues outside of her direct personal knowledge."). Moreover, **to the extent a lay witness offers references to reports or conclusions of others, these may not be considered as substantial evidence because a lay witness cannot rely on such information in reaching a conclusion** – rather, that is the role of a qualified expert witness. *Compare* Pa. R.E. 701 *with* Pa. R.E. 703.

While a fact finder may weigh the opinion testimony of a qualified expert, any such testimony of an unqualified lay witness must be excluded and should not be given any evidentiary weight. *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004); *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 528 (Pa. 1995). Accordingly, **the Commission has consistently rejected lay witness testimony on technical issues such as health, safety, and the probability of structural failure as these necessarily "*require* expert evidence to be persuasive enough to support the proposing party's burden of proof."** *Application of PPL Elec. Utilities Corp.*, A-2009-2082652, 2010 WL 637063, at *11 (Jan. 14, 2010) (emphasis added); *Pickford v. Pub. Util. Comm'n*, 4 A.3d 707, 715 (Pa. Cmwlth. 2010) (**ALJ "properly disregarded" testimony from 13 lay witnesses related to concerns and personal opinions about damage to pipes, lead leaching, toxicity to fish and home filtration expenses because "the nature of these opinions … was scientific and required an expert.**"); *Lamagna v. Pa. Elec. Co.*, C-2017-2608014, 2018 WL 6124353, at *20

(Oct. 30, 2018) (finding that **lay witness testimony and exhibits regarding technical health and safety issues "carry no evidentiary weight and … were properly objected to and excluded**.). Moreover, **that a lay witness may possess some level of knowledge and education in a related subject does not make him an expert on specialized and technical matters such as geology, pipeline construction, pipeline safety, or emergency response, and such unqualified testimony is not credible evidence**. *See* Opinion and Order, *Amended Petition of State Senator Andrew E. Dinniman for Interim Emergency Relief*, P-2018-3001453 *et al.* (June 14, 2018) (acknowledging lack of expert testimony regarding technical geological concerns, thereby necessarily rejecting testimony of lay witness on geological issues without regard for lay witness's purportedly related education and experience.); *see also*, Joint Statement of Commissioners Coleman and Kennard, *Amended Petition of State Senator Andrew E. Dinniman for Interim Emergency Relief*, P-2018-3001453 *et al.* (June 14, 2018) (acknowledging "no credible *evidence of record* to indicate that a clear and present danger exists with respect to the construction activities on ME2 and ME2X in West Whiteland Township" when hearing transcript was "devoid of any expert witness testimony that, to a reasonable degree of scientific certainty, there is a credible and immediate harm with the construction of these lines.").

C. Hearsay Evidentiary Standards

Your Honor correctly and succinctly set forth the evidentiary standards regarding hearsay in *Evangeline Hoffman-Lorah v. PPL Electric Utilities Corporation*:

> Hearsay is an out-of-court statement made by a declarant that is offered by a party to prove the truth of the matter asserted in the statement. See Pa. R.E. 801. The general rule against hearsay is that hearsay is inadmissible at trial unless it falls into one of the recognized exceptions to the hearsay rule pursuant to the Pennsylvania Rules of Evidence, other rules prescribed by the

Pennsylvania Supreme Court, or statute. See Pa.R.E. 801, 802, 803, 803.1, 804. The rationale for the rule against hearsay is that hearsay lacks the guarantees of trustworthiness to be considered by the trier of fact; however, exceptions have been fashioned to accommodate certain classes of hearsay that are substantially more trustworthy than hearsay in general, and thus merit exception to the rule against hearsay. See e.g. *Commonwealth v. Kriner*, 915 A.2d 653 (Pa. Super. 2007); *Commonwealth v. Cesar*, 911 A.2d 978 (Pa. Super. 2006); *Commonwealth v. Bruce*, 916 A.2d 657 (Pa. Super. 2007).
Under the relaxed evidentiary standards applicable to administrative proceedings, see 2 Pa. C.S. § 505, it is well-settled that simple hearsay evidence, which otherwise would be inadmissible at a trial, generally may be received into evidence and considered during an administrative proceeding. *D'Alessandro v. Pennsylvania State Police*, 937 A.2d 404, 411, 594 Pa. 500, 512 (2007) (D'Alessandro). The Supreme Court of Pennsylvania stated: "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pa. R.E. 801(c). Hearsay evidence is normally inadmissible at trial unless an exception provided by the Pennsylvania Rules of Evidence, jurisprudence, or statute is applicable. Pa.R.E. 802. Complicating this general rule in the administrative law context, however, is Section 505 of the Administrative Agency Law: "Commonwealth agencies shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received. Reasonable examination and cross-examination shall be permitted." 2 Pa. C.S. § 505. Therefore, hearsay evidence may generally be received and considered during an administrative proceeding. See *A.Y. v. Pa. Dep't of Pub. Welfare, Allegheny County Children & Youth Serv.*, 537 Pa. 116, 641 A.2d 1148, 1150 (1994).

However, whether simple hearsay may support a finding of an agency depends on whether the evidence meets the criteria of the *Walker/Chapman* rule. The *Walker/Chapman* rule provides that simple hearsay evidence may support an agency's finding of fact so long as the hearsay is admitted into the record without objection and is corroborated by competent evidence in the record. See *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976) (*Walker*) (citations omitted); see also *Chapman v. Unemployment Compensation Board of Review*, 20 A.3d 603, 610, n.8 (Pa. Cmwlth. 2011) (*Chapman*).

Under Pennsylvania's *Walker/Chapman* Rule, it is well-established that "[h]earsay evidence, properly objected to, is not competent

> evidence to support a finding." Even if hearsay evidence is "admitted without objection," the ALJ must give the evidence "its natural probative effect and may only support a finding . . . if it is corroborated by any competent evidence in the record," as "a finding of fact based solely on hearsay will not stand." *Walker* at 370 (citations omitted).
>
> To be "properly objected to" in an administrative proceeding, the hearsay evidence must not fall within one of the recognized exceptions to the rule against hearsay. Hearsay that falls within one of the recognized exceptions to the hearsay rule is competent evidence that may be relied upon by the agency. See *Chapman*, supra, n. 8 (finding that the Board properly relied upon a party's admission as competent evidence as a recognized exception to the hearsay rule); see also *Sanchez v. PPL Electric Utilities Corporation*, Docket No. C-2015- 2472600 (Order entered July 21, 2016) (*Sanchez*) (finding that testimony related to the issuance of a termination letter fell within the business records exception to the hearsay rule, and, therefore, was not simple hearsay, and was competent evidence to be relied upon in the proceeding to determine whether the complainant satisfied her burden of proof); see also Pa.R.E. 802, 803, 803.1 and 804.
>
> Moreover, hearsay cannot corroborate hearsay. See *Sule v. Philadelphia Parking Authority*, 26 A.3d 1240, 1244 (Pa. Cmwlth. 2011), citing *J.K. v. Department of Public Welfare*, 721 A.2d 1127, 1133 (Pa. Cmwlth. 1998) (noting substantial evidence did not exist because there was no non-hearsay evidence to corroborate hearsay testimony).

Evangeline Hoffman-Lorah v. PPL Electric Utilities Corporation, Docket No. C-2018-2644957, Initial Decision at 16-18 (Nov. 14, 2018) (ALJ Barnes).

D. Standards for Injunctive Relief

Complainant must prove SPLP violated a law or regulation to obtain <u>any</u> relief. *West Penn Power Co. v. Pennsylvania Public Utility Comm'n*, 478 A.2d 947, 949 (Pa. Cmwlth. 1984) ("We hold that in order for the PUC to sustain a complaint brought under this section [66 Pa. C.S. § 1501], the utility must be in violation of its duty under this section. **<u>Without such a violation by</u>**

the utility, the PUC does not have the authority, when acting on a customer's complaint, to require any action by the utility.") (emphasis added); *Township of Spring et al. v. Pennsylvania-American Water Company*, Docket Nos. C-20054919 et al, 2007 WL 2198196 at *6 (Order entered Jul. 27, 2007) ("If we were to order PAWC to conduct testing of the property in the Stonegate community, we would have to base that order on credible evidence that some act or omission by PAWC in violation of the Code or our Regulations would be remedied by the testing.") (citing *West Penn*).

E. Legal Standard for Pipeline Safety

The Commission clearly has upheld that factual determinations cannot be based upon a subjective standard made by a lay person: "Complainant's assertions, regardless of how honest or strong, cannot form the basis of a finding…since assertions, personal opinions or perceptions to not constitute factual evidence." *Herring v. Metropolitan Edison*, Docket No. F-2016-2540875, 2017 WL 3872590 at 3 (Order entered Aug. 31, 2017) (citing *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987)). Moreover, and with all due respect, how a lay person may feel about being safe or unsafe or what they may want is not evidentiary standard to be applied in adjudicating a Complaint and is no substitute for qualified expert testimony or science-based evidence as to whether a utility facility is safe or unsafe. Instead, to find a safety violation regarding pipelines, there must be a violation of the applicable regulatory standards (here 49 C.F.R. Part 195, N.T. 292:1-17). *See, e.g., Smalls, Sr.* v. *UGI Penn Natural Gas, Inc.*, No. C-2014-2421019, 2014 WL 6807073 (Pa. P.U.C. Oct. 24, 2014) (Ember S. Jandebeur, J.) (Final by Act 294) (reasoning because there are safety regulations that apply to gas pipelines, but there was no federal or state regulation that prohibited the specific action of placing a gas line within close proximity to a home there cannot be a violation since there was not a set standard) (finding no

safety violation where Complainant failed to show violation of relevant portion for 49 C.F.R.); *Bennett v. UGI Central Penn Gas, Inc.*, No. F-2013-2396611, 2014 WL 1747713 (Pa. P.U.C. Apr. 10, 2014) (David A. Salapa, J.) (Final by Act 294) ("In the absence of any evidence that [UGI] failed to comply with these regulations [49 CFR 191-93, 195, 199], I cannot conclude that [UGI] acted unreasonably or violated any Commission regulation in failing to prevent the leaks that occurred at the Complainant's property.").

Moreover, the Commonwealth Documents Law and the Independent Regulatory Review Act require that regulatory change must take place through the notice and comment procedures with accompanying governmental review, not administrative adjudications. Thus, what witnesses may think the law or regulations should require in terms of safety is not and cannot be the standard for adjudicating this Complaint.

As SPLP expert witness Zurcher explained, as authorized by the federal Pipeline Safety Act it is 49 C.F.R. Part 195 that applies to the Mariner East pipelines, which carry natural gas liquids:

> By law, by the statute -- it's actually 49 USC 60101 et sequentes, so the actual statute signed by the President in 1968, and reauthorized every four years, prohibit liquid operators from using the pipeline safety regulations for gas, and conversely, gas operators cannot use the liquid regulations for their operation. Two sets of regulation, one for natural gas, which is predominantly
> methane, and then one for hazardous liquids, which is everything from butanes, propanes, pentanes, every other type of liquid that would be in there.
>
> So 195 is hazardous liquid, 192 is natural gas. You're not allowed to intermix them, you have to follow each one of those separately for each product pipeline.

N.T. 292:1-17; *compare, e.g.*, 49 U.S.C. § 60109(a)(1)(A) (requiring establishment of regulations for criteria for gas pipeline facilities in high-density population areas) *with* § 60109(a)(1)(B)

(requiring establishment of regulations for criteria for hazardous liquid pipeline facilities in high-density population areas).

III. ARGUMENT

A. Evidence That Should Not Have Been Admitted and Cannot Be Relied Upon

1. Mr. Baker Is Not An Expert In Pipeline Safety Or Welding

None of Mr. Baker's opinion testimony can be given any weight because the record demonstrates he is not an expert in pipeline welding or pipeline safety. Complainant, who was a welder, but has no experience or qualifications regarding welding pipelines, was unaware of the qualification requirements for welders to be certified to weld Part 195 pipelines, and he is not qualified under those regulatory requirements. N.T. 76:14-77:1. Complainant said he welded at Frog and Switch for 37 years, "but it has nothing to do with pipelines." N.T. 79:13-21. Complainant is not an engineer and does not have a college degree. N.T. 74:1-23. He admitted he has no education in fluid mechanics, alarm systems for pipelines, or any other degrees. N.T. 74:24-75:1. Complainant has never worked for a pipeline company. N.T. 76:6-8. Complainant admitted that he had not read the American Society of Mechanical Engineers (ASME) guidelines and had not heard of the National Association of Corrosion Engineers 77:2-78:2. Mr. Baker was accepted as an expert in welding, but not with regard to "pipelines such as are used in the Mariner East project." N.T. 79:24-80:1.

Complainant also testified that he attended respirator training in 1991 for "confined environments for leakage of chemicals." N.T. 69:12-24, 71:11-25; Exhibit No. C-13. Complainant admitted that his training was related to indoor facilities, while pipelines are outdoor facilities. N.T. 75:8-25. Complainant did not have any training since 1991. N.T. 76:2-5. Complainant was not qualified as and did not testify as an expert in emergency response.

Given Mr. Baker is not an expert in pipeline safety or pipeline welding, the law is clear that none of his opinion testimony on these issues (pipeline welding, use of steel for pipelines,

pipeline design standards, emergency responder issues, etc.) was admissible, and none of it can be relied upon. While a fact finder may weigh the opinion testimony of a qualified expert, any such testimony of an unqualified lay witness must be excluded and should not be given any evidentiary weight. *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004); *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 528 (Pa. 1995). Accordingly, **the Commission has consistently rejected lay witness testimony on technical issues such as health, safety, and the probability of structural failure as these necessarily "*require* expert evidence to be persuasive enough to support the proposing party's burden of proof."** *Application of PPL Elec. Utilities Corp.*, A-2009-2082652, 2010 WL 637063, at *11 (Jan. 14, 2010) (emphasis added); *Pickford v. Pub. Util. Comm'n*, 4 A.3d 707, 715 (Pa. Cmwlth. 2010) (**ALJ "properly disregarded" testimony from 13 lay witnesses related to concerns and personal opinions about damage to pipes, lead leaching, toxicity to fish and home filtration expenses because "the nature of these opinions … was scientific and required an expert.**"); *Lamagna v. Pa. Elec. Co.*, C-2017-2608014, 2018 WL 6124353, at *20 (Oct. 30, 2018) (**finding <u>that lay witness testimony and exhibits regarding technical health and safety issues "carry no evidentiary weight and … were properly objected to and excluded</u>**.).

Moreover, **that a lay witness may possess some level of knowledge and education in a related subject does not make him an expert on specialized and technical matters such as geology, pipeline construction, pipeline safety, or emergency response, and such unqualified testimony is not credible evidence**. *See* Opinion and Order, *Amended Petition of State Senator Andrew E. Dinniman for Interim Emergency Relief*, P-2018-3001453 *et al.* (June 14, 2018) (acknowledging lack of expert testimony regarding technical geological concerns, thereby necessarily rejecting testimony of lay witness on geological issues without regard for lay witness's

purportedly related education and experience.); *see also*, Joint Statement of Commissioners Coleman and Kennard, *Amended Petition of State Senator Andrew E. Dinniman for Interim Emergency Relief*, P-2018-3001453 *et al.* (June 14, 2018) (acknowledging "no credible *evidence of record* to indicate that a clear and present danger exists with respect to the construction activities on ME2 and ME2X in West Whiteland Township" when hearing transcript was "devoid of any expert witness testimony that, to a reasonable degree of scientific certainty, there is a credible and immediate harm with the construction of these lines.").

2. Hearsay Documents That Cannot Be Relied Upon

The following table of Complainant's exhibits are pure hearsay, were properly objected to, and cannot be relied upon to form a finding of fact:

Complainant Exhibit Number	Transcript Description	Transcript Cite
7	(7/14/18 article by Zack Hoopes)	N.T. 59
9	(8/15/18 article by Zack Hoopes)	N.T. 62
12	(Undated article by Zack Hoopes)	N.T. 65
13	(United Steelworkers training pamphlet, certificate and 8/28/91 letter)	N.T. 71
14	(Pamphlet, SOS Rally)	N.T. 80
15	(6/28/10 article from Plains Justice)	N.T. 83
23	(article from State Impact, 3/21/19)	N.T. 101
Complaint Cross Exhibit 1	(Excerpt from Transcript of Veterans Affairs and Emergency Preparedness Committee dated 05/30/2019)	N.T. 264

Complainant Exhibits 7, 9, 12, and 23 are all news media articles. They are pure hearsay and cannot be relied upon. Pa. R.E. 801 provides: "Hearsay means a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." The exceptions to hearsay do not include an exception for news articles. *See* Pa. R.E. 803, 803.1, and 804; *Com. v. Castro*, 93

A.3d 818, 819 (Pa. 2014) ("The Superior Court erred in treating the article as containing evidence; the article contains allegations that suggest such evidence may exist, but allegations in the media, whether true or false, are no more evidence than allegations in any other out-of-court situation. Nothing in these allegations, even read in the broadest sense, can be described as 'evidence'.").

None of these exhibits were even discussed at hearing or shown to be relevant or corroborated by non-hearsay. SPLP objected to the admission of each of these exhibits. They cannot be used as evidence to support a finding of fact.

> whether simple hearsay may support a finding of an agency depends on whether the evidence meets the criteria of the *Walker/Chapman* rule. The *Walker/Chapman* rule provides that simple hearsay evidence may support an agency's finding of fact so long as the hearsay is admitted into the record without objection and is corroborated by competent evidence in the record. See *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976) (*Walker*) (citations omitted); see also *Chapman v. Unemployment Compensation Board of Review*, 20 A.3d 603, 610, n.8 (Pa. Cmwlth. 2011) (*Chapman*).

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Complainant Exhibits 13 and 14 are pamphlets from a private entity. They are pure hearsay and cannot be relied upon. Pa.R.E. 801 provides: "Hearsay means a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." The exceptions to hearsay do not include an exception for this type of information. *See* Pa.R.E. 803, 803.1, and 804.

None of these exhibits were corroborated by non-hearsay and their relevancy is questionable. SPLP objected to the admission of each of these exhibits. They cannot be used as evidence to support a finding of fact.

> whether simple hearsay may support a finding of an agency depends on whether the evidence meets the criteria of the *Walker/Chapman* rule. The *Walker/Chapman* rule provides that simple hearsay evidence may support an agency's finding of fact so long as the hearsay is admitted into the record without objection and is corroborated by competent evidence in the record. See *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976) (*Walker*) (citations omitted); see also *Chapman v. Unemployment Compensation Board of Review*, 20 A.3d 603, 610, n.8 (Pa. Cmwlth. 2011) (*Chapman*).

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Complainant Exhibit 15 is a Plains Justice article. Again, there is no hearsay exception applicable to this article. Moreover, Complainant, who introduced the article and relied upon it for his non-expert opinion regarding pipeline steel standards and design does not fit within the hearsay exception for experts. The Commission has consistently found that a lay witness is not qualified to testify or offer exhibits related to any issues outside of direct personal knowledge. *Lamagna v. Pa. Elec. Co.*, C-2017-2608014, 2018 WL 6124353, at *20 (Oct. 30, 2018) (lay witness was "not qualified to testify or offer exhibits related to health and safety issues outside of her direct personal knowledge."). Moreover, to the extent a lay witness offers references to reports or conclusions of others, these may not be considered as substantial evidence because a lay witness cannot rely on such information in reaching a conclusion – rather, that is the role of a qualified expert witness. *Compare* Pa. R.E. 701 *with* Pa. R.E. 703. SPLP objected to the admission this exhibit. It cannot be used as evidence to support a finding of fact.

> whether simple hearsay may support a finding of an agency depends on whether the evidence meets the criteria of the *Walker/Chapman* rule. The *Walker/Chapman* rule provides that simple hearsay evidence may support an agency's finding of fact so long as the hearsay is admitted into the record without objection and is corroborated by competent evidence in the record. See *Walker v.*

> *Unemployment Compensation Board of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976) (*Walker*) (citations omitted); see also *Chapman v. Unemployment Compensation Board of Review*, 20 A.3d 603, 610, n.8 (Pa. Cmwlth. 2011) (*Chapman*).

Evangeline Hoffman-Lorah v. PPL Electric Utilities Corporation, Docket No. C-2018-2644957, Initial Decision at 16-18 (Nov. 14, 2018) (ALJ Barnes).

Complainant Cross Exhibit 1 is a transcript of a legislative committee hearing. While there is a hearsay exception for prior testimony statements, that exception requires the witness to testify in the current proceeding be subject to cross-examination about the prior statement.

> The following statements are not excluded by the rule against hearsay if the declarant testifies and is subject to cross-examination about the prior statement:
>
> (1) *Prior Inconsistent Statement of Declarant-Witness.* A prior statement by a declarant-witness that is inconsistent with the declarant-witness's testimony and:
>
> (A) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition;
>
> (B) is a writing signed and adopted by the declarant; or
>
> (C) is a verbatim contemporaneous electronic recording of an oral statement.

Pa.R.E. 803.1. None of the people that testified in Cross Exhibit 1 testified in this proceeding and none were available for cross-examination here. Accordingly, the Complainant Cross Exhibit 1 Transcript is pure hearsay, SPLP repeatedly objected to its admission, and it cannot form the basis of a finding of fact.

> whether simple hearsay may support a finding of an agency depends on whether the evidence meets the criteria of the *Walker/Chapman* rule. The *Walker/Chapman* rule provides that simple hearsay evidence may support an agency's finding of fact so long as the hearsay is admitted into the record without objection and is

> corroborated by competent evidence in the record. See *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976) (*Walker*) (citations omitted); see also *Chapman v. Unemployment Compensation Board of Review*, 20 A.3d 603, 610, n.8 (Pa. Cmwlth. 2011) (*Chapman*).

Evangeline Hoffman-Lorah v. PPL Electric Utilities Corporation, Docket No. C-2018-2644957, Initial Decision at 16-18 (Nov. 14, 2018) (ALJ Barnes).

B. Public Awareness and Emergency Response

The entirety of Complainant's evidence on this issue consists of evidence of a fact not in dispute – SPLP did not attend a Township Supervisors meeting. There is no requirement that SPLP attend a Township Supervisors meeting N.T. 303:13-304:2. Further evidence of the non-requirement of attendance at local municipality governmental meetings is that the Commission is considering whether or not it should promulgate regulations on these issues. *See Advance Notice of Proposed Rulemaking Order*, Docket No. L-2019-3010267, ANOPR Order at 19-20 (Order entered Jun. 13, 2019) (requesting comments on "[r]equiring periodic public awareness meetings with municipal officials and the public"). The rest of Complainant's argument consists of non-expert opinions and assertions (which are not competent evidence) that SPLP has not properly trained emergency responders. *See, e.g.*, N.T. 58:5-15. Yet apparently, neither Complainant nor his son were aware that SPLP had in fact provided multiple trainings for first responders in Cumberland County. N.T. 109:19-110:22 (Wilmer Baker), 130:24-131:17 (Jon Baker). Thus, the standard for proof of fact is hard evidence in support, not what a complainant believes or is unaware. *Herring v. Metropolitan Edison*, Docket No. F-2016-2540875, 2017 WL 3872590 at 3 (Order entered Aug. 31, 2017) ("Complainant's assertions, regardless of how honest or strong, cannot form the basis of a finding…since assertions, personal opinions or perceptions to not

constitute factual evidence.") (citing *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987)). Given that there is no requirement that SPLP attend a Township Supervisors meeting, Complainant has completely failed to meet his burden of proof on this issue.

SPLP explained why it did not attend the Township Supervisors meeting and that it has reiterated to the Township that it is willing to meet and provide additional training:

> [T]he original meeting that was to be with the Lower Frankford Township Supervisors was at their request. We were going to attend. We do this regularly with other townships across the project.
> …
> On the eve of that meeting, so the evening before, we were advised that the media had been invited by landowners to attend, and we notified the supervisors that because some of the information we would discuss in that meeting could be security-sensitive information, we were not going to participate in a meeting that was open to the media. We reiterated to them at that time, and have reiterated multiple times since then, that we are willing to meet as the original meeting had been planned.
> …
> Ultimately, there was a meeting that was set up by Representative Greg Rothman, who is one of the state representatives for Cumberland County. The meeting was to occur at the courthouse in Cumberland County. That meeting was canceled by Representative Rothman. I do not know all the circumstances behind which he canceled that meeting, but we have continued to reiterate that we are willing to meet.

N.T. 377:24-379:3 (Stambaugh).

Despite Complainant's failure to make a *prima facie* showing, SPLP has proven that its emergency responder training and public awareness outreach comply with and exceed regulatory requirements. SPLP's emergency management expert, Mr. Noll, agreed that SPLP's emergency response outreach and training program is adequate and provides all information that is necessary for the public and emergency responders to identify a pipeline release and to respond to a pipeline-related emergency, and is consistent with industry standards and PHMSA regulations. N.T. 236:4-17. Mr. Noll and Mr. Perez presented extensive evidence of trainings SPLP made available to first

responders in Cumberland County over the past six years. N.T. 219:20-233:7 (Noll); 354:1-356:19 (Perez) SPLP Exhibit Nos. 2-3, 8-18, 22, 23. SPLP makes sure that first responders and others are invited but cannot require first responders to attend these trainings. N.T. 225:9-226:6.

Regarding public awareness generally, SPLP witness Mr. Perez testified that he oversees the companies' public awareness and emergency response teams. SPLP Exhibit No. 2 at N.T. 585, 589. Mr. Perez testified that SPLP has a robust public awareness program that engages the community, utilizing a variety of methods, including meetings, mailings, and specialized training. SPLP Exhibit No. 2 at N.T. 589. The primary goal of the plan is to raise awareness with the public and other stakeholders of SPLP's facilities and to ensure that everybody knows where the pipelines are located. SPLP Exhibit No. 2 at N.T. 590. SPLP mailed public outreach brochures in September 2018 to the affected public (all residents, businesses, farms, schools, and other places of congregation within 1,000 feet of each side of the pipeline), excavators, public officials, and emergency response organizations. SPLP Exhibit No. 2 at N.T. 590. These brochures were sent to:

- 40,046 members of the affected public;
- 16,338 excavators;
- 4,384 public officials; and
- 3,301 emergency response organizations.

SPLP Exhibit No. 2 at N.T. 593. SPLP completes this mailing every two years consistent with PHMSA regulations, which includes American Petroleum Institute (API) Recommended Practice (RP) 1162 (incorporated by reference, 49 C.F.R. Part 195.3(b)(8)). SPLP Exhibit No. 2 at N.T. 591; 49 C.F.R. Part 195.440. Notably, SPLP goes beyond the minimum 660-foot planning area applied by API RP 1162 and PHMSA regulation 195.440(a) for public awareness mailings by using a 1,000-foot mailing zone. SPLP Exhibit No. 2 at N.T. 592.

Mr. Zurcher concluded SPLP's public awareness in Cumberland County follows applicable regulations and industry standards:

> Q. In your expert opinion, and to a reasonable degree of professional certainty, has SPLP taken all required steps regarding public awareness education and communication in Cumberland County?
> A. In my opinion, absolutely. They not only follow the regulations, but they follow the industry standard, the API-1162, so they have met all of the requirements of those documents.

N.T. 303:13-20.

In sum, Complainant wholly failed to meet his burden of proof to present a *prima facie* case and SPLP, despite his evidentiary failure, has proven its emergency response training and public awareness programs meet or exceed regulatory requirements.

C. Imported Pipe

Complainant referred to "steel dumping" for his claim that foreign manufacturers of steel pipe are selling "illegal pipe" at below-cost prices on the American market. N.T. 96. Complainant also asserts that SPLP should acquire its pipes from local manufacturers in Steelton. N.T. 112-113. Complainant presented Exhibit C-18 to support his contentions. N.T. 112-113.

Complainant's "steel dumping" claims are (1) wholly irrelevant because this is not an issue over which the Commission has jurisdiction and (2) are incorrect in fact. Investigations into trade and imports that Complainant tries to raise here and referenced in C-18 are carried out pursuant to the Tariff Act of 1930, 19 U.S. Code Chapter 4. They are explicitly within the federal jurisdiction of the U.S. Department of Commerce and the U.S. International Trade Commission. *See* 19 U.S.C.A. §§ 1330 *et seq*. This Commission is without authority or jurisdiction to address foreign trade in any manner, including Complainant's allegations here.

There is no legal or regulatory requirement that SPLP purchase its pipes or steel from American companies. N.T. 276:11-15 (Zurcher); N.T. 343:18-344:5 (Perez). Moreover, the PHMSA steel and pipeline standards are international standards, so that a pipe or steel may be foreign has no bearing on its compliance with pipeline safety regulations or law. N.T. 276:11-277:6 (Zurcher); N.T. 343:18-344:5 (Perez). In any event, Mr. Baker was wrong in that the record clearly shows American steel and pipe was used for ME2, SPLP Exhibit No. 4 ("Pipe manufactured, sampled, tested, and inspected in accordance with the specification(s) and meets requirements. Steel cast and coils rolled at US Steel, Gary, IN. Pipe manufactured at Stupp Corporation, Baton Rouge, LA."). Mr. Baker clearly failed to make a reasonable investigation into his allegations as he was provided with this document prior to hearing.

D. Pipeline Design Standards

Complainant testified that he believes SPLP uses substandard steel based on a hearsay exhibit that should not have been admitted in the record and which Complainant did not show has any relationship to SPLP's pipelines or the steel of which they are constructed. N.T. 82:11-21, 85:2-16; Exhibit C-15. Exhibit C-15 is a paper authored by an advocacy group, Plains Justice regarding steel issues certain pipeline operators used (not SPLP or Energy Transfer) in 2007-2009. Exhibit C-15. Complainant alleged that steel graded "X65 is below minimum standard for this type of operation by the federal government, but the allow it" calling this a "loophole." N.T. 85:12-16. Complainant testified that SPLP is using pipes marked X65 in the construction of its ME2 pipeline and gave an opinion that these are below standard and X70 is the minimum standard SPLP should use. N.T. 86:1-21, 97:21-98:6; Exhibit No. C-19.

None of this opinion testimony was admissible and none of it can be relied upon because Mr. Baker is not an expert in this field. *Supra* Section III.A.1. Moreover, he is wrong as explained below by SPLP expert witnesses who have knowledge of steel quality, standards, and regulations as opposed to Mr. Baker's speculation and unsubstantiated claims. More critical, Complainant's own alleged expert who examined this issue testified that she did not conclude that SPLP was in violation of any regulation. N.T. 197:23-202:2, 202:19-24. Complainant completely failed to present a *prima facie* case on this issue.

As Mr. Perez explained, it would make no business sense for SPLP to try to save money by using pipe or steel that does not meet regulatory standards where the costs of pipe are only approximately 7% of the total project costs and SPLP intends to use these pipelines for a long time to reliably and safely transport product:

> Q. Now, I want to talk a little bit more in the sort of macro and what makes or doesn't make common sense. Can you speak to the total cost of the project, what part of that cost is associated with the pipes themselves, and can you explain whether or not, looking at that comparison, it makes sense or would not make sense for any normal-thinking business to scrimp on the cost of pipe?
>
> A. Sure. As part of the testimony over the last day-and-a-half, there's been questions relative to the quality of pipe that we were installing relative to these two projects. The one thing that Mr. Sniscak is referring to is the total cost for our project, and maybe you've seen this, is around $2.5 billion, of which about $180 million of that is pipe related as far as materials go. There is absolutely no reason why we would cut that out and make that a low priority. It is important to us that that is top of the line and meets the requirements of our standards and the regulations.
>
> Q. When the company constructs a pipe, and specifically pipes of this sort, the ME2 and ME2X, do they want it to last a short time, a medium time, or a long time?
>
> A. Oh, absolutely, we want the pipe to last for a long time. We're focused on, again, the safety, reliability, ensuring that the

> compliance is there, and again, we are looking to operate this pipeline for a long time.

N.T. 348:2-349:2

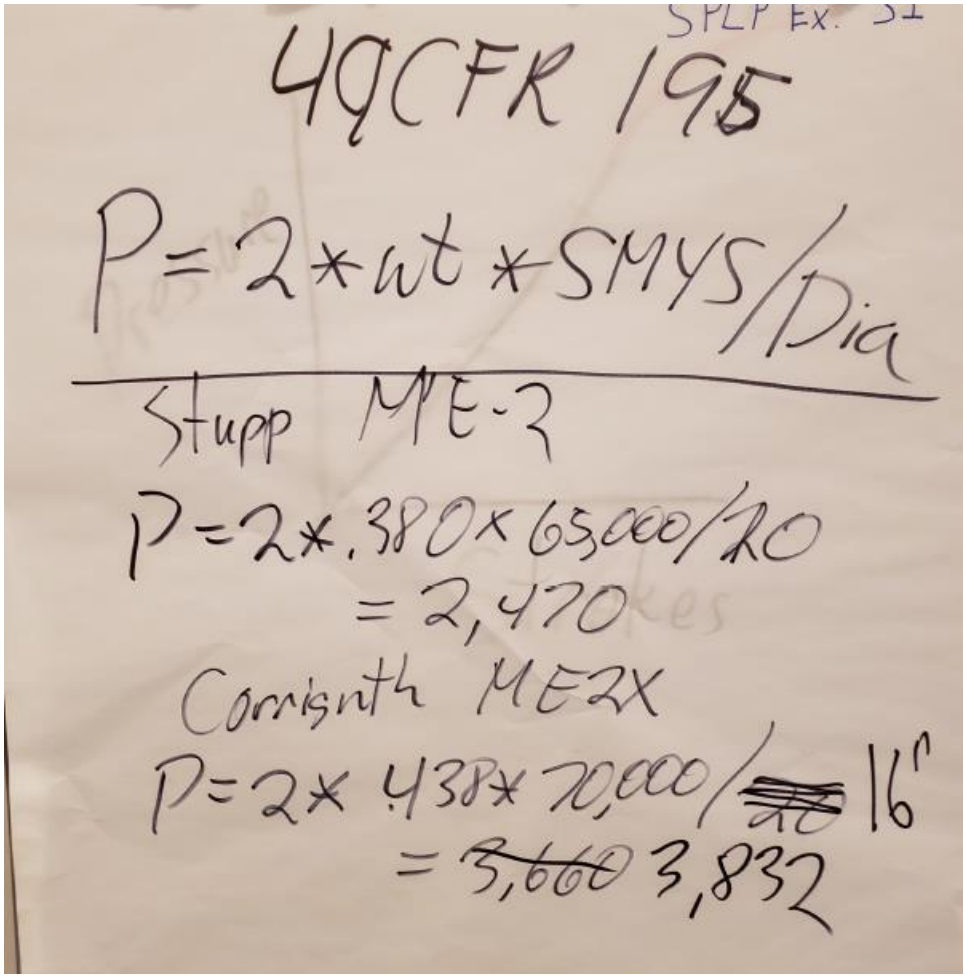
Moreover, despite Complainant's unsupported allegations, SPLP proved they are totally meritless and that SPLP's steel, pipe, and pipeline design standards exceed regulatory requirements. SPLP pipeline safety expert Mr. John Zurcher first explained how the regulations work:

> The [API] 5L standard was developed by the American Petroleum Institute a long time ago, and it is updated, Your Honor, every two years, so it technically correct at any point in time. That standard is in turn a reference, actually incorporated by reference into the pipeline safety regulations. For hazardous liquid pipelines, that 195.106, which deals with the design of those materials. So the standards tell the pipe manufacturers exactly how they are able to make that pipe.
>
> In addition, since it is API line pipe, API provides services for the industry, for the government, and for the pipe manufacturers. They do quality control checks. They review the companies' procedures on how to manufacture the pipe . . . a very rigorous, very formal process for the approval of the manufacturing technique as well as the ongoing quality control and inspection of the manufacturing technique regardless of where that pipe is made.
>
> …
>
> Within the regulations in paragraph 106 of part 195, there's a rather simple formula for the determination of the strength of a pipeline. This formula is used by the industry, as provided by the regulation, for how to determine the strength of the pipeline, that internal hoop stress, if you will, or how much pressure that pipeline can contain.
>
> …
>
> What we're talking about here is the formula is 2 times the wall thickness of the pipe in inches, and then it is times the specified minimum yield strength of the pipe, and that value is given in the purchase order of that pipe and provided on the material take-off records from the manufacturer. The last number is then divided by the diameter of the pipe. Now, that's the outside diameter of the pipe; not the inside diameter of the pipe. The formula itself is very conservative, because again, I'm looking at outside diameter versus the inside, I'm looking at the wall thickness as specified by

> the manufacturer, not the actual wall thickness, it's always thicker, and then the specified minimum yield. DOT limits us to the specified yield. We've heard X65 and X70. That means 65,000 pounds tensile strength or 70,000 pounds tensile strength. Even though the pipe may have tensile values that are much, much higher than that, you're not allowed to use them; you have to use that specified minimum yield.

N.T. 277:13-279:22. Mr. Zurcher then applied this formula to SPLP's ME2 and ME2X pipelines.

SPLP Exhibit No. 31:



As Mr. Zurcher explained:

> I'm going to talk about the Stupp pipe for ME2 first. When I go through the formula as provided there, it's 2 times, and then the wall thickness of that pipe is 0.380 inches, and the specified minimum yield strength of that pipe was 65,000, and the diameter of that pipe

> was 20 inches, so when I do the math there, I very quickly see the actual strength of that pipe is 2,470 pounds, meaning that I could have up to 2,470 pounds and by design that pipe will withhold that pressure.
>
> As I mentioned, though, there are two other factors that are in the formula. The first one is called a joint factor. It's designated by the letter "E" as in elephant. That joint factor varies depending on the pipe, but since 1970, all the joint factors have been, so we kind of ignore that for new pipelines. The second item is a safety factor, and DOT mandates the safety factor at .72, so you would have to now multiply both of those yield strength numbers by .72, and for the Stupp pipe, you would end up with a 1,778 pound potential maximum operating pressure, and for the Corinth pipe, it would come out at 2,760, approximately, for that internal strength that you would be allowed to operate that pipeline at.
>
> One other thing I point out here is every single joint of pipe, when that pipe is rolled in the pipe mill, it's pressure tested in the pipe mill. In the case of the Stupp pipe, it was pressure tested at that value of 2,480, so it was tested to 100 percent of the calculated yield strength of the pipe. For the Corinth pipe, it was actually pressure tested to 3,660, which is 95 percent of the yield strength of that pipe. So every single joint gets tested to do two things. One is confirm that it is actually as strong as you calculated, and secondly, to show that there's no flaws that are going to fail in the immediate future.

N.T. 280:2-281:11.

The Stupp pipe used for ME2 is shown in SPLP Exhibit No. 4, which is the certificate accompanying the pipe.

> It states 20-inch, 0.380 inch, and then it says API-5L, so all that information is there. In the upper right- hand corner, it gives you that hydrostatic pressure test that was done at the mill.

N.T. 283:13-24 (Zurcher), 347:12-18 (Perez) (authenticating records). The Corinth pipe used for ME2X is shown in SPLP Exhibit No. 5.

> It's the material take-off and material test certificates for the Corinth pipe. Again, that same information is on these sheets. These sheets are provided by the manufacturer to verify what you, the purchaser, actually bought.

N.T. 284:5-9 (Zurcher), 347:12-18 (Perez) (authenticating records).

Mr. Zurcher then concluded that SPLP's pipes are not substandard and based solely on these design standards these pipelines could be operated well above the maximum operating pressure SPLP uses and will use.

> This is not substandard at all. There are different values for the yield strength and there are different values for wall thickness and different values for the diameter, but we're required by regulation to go through this formula, and then you are limited to your operating pressure based on that upper limit of the formula. There's no substandard part to this at all, this is all good pipe.

N.T. 284:10 - 20. Mr. Perez testified that the MOP that SPLP operate and will operate at for ME2 and ME2X is 1,480 PSI. N.T. at 349:11-16. Mr. Zurcher's calculations above show that (again, based solely on the design factor issue Complainant raised, not other limiting factors that SPLP takes into account) these pipelines could be operated at much higher pressures.

Mr. Zurcher also explained that while the specified minimum yield strength of this pipe may be 70,000, SPLP Exhibit No. 5 shows:

> [t]he actual yield strength of that pipe is between 77,000 and 82,000. . . So it's actually . . . ten percent stronger than that specified minimum yield strength, so we're buying really tough materials here; this is really tough stuff intended to safely transport gas or hazardous liquids.

N.T. 285:1-7.

Moreover, the pipe in question is actually the PSL-2 standard, a higher standard than what the regulations require.

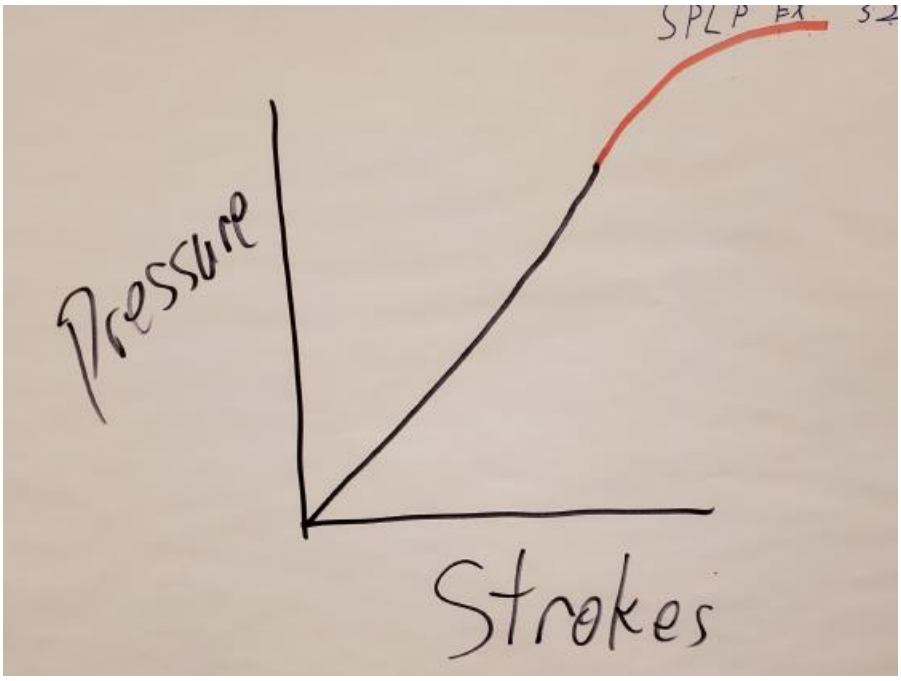
> PHMSA requires pipeline operators to buy pipe that meets the API-5L standard, but they only require you to meet the minimum requirements of that standard. There is a much more rigorous

> portion of that standard and it's designated PSL-2. This is a much more rigorous part of the standard. There is additional testing that's done, there's additional certification tests done and so forth and so on. So all this pipe, if you'll notice on these mill test certificates, met the PSL-2 requirements, and that includes the chemistry and the strength of the pipe.

N.T. 285:10-19.

Finally, Mr. Zurcher debunked Complainant's baseless accusation that the issues present in the Plains Justice Article (Complainant Exhibit No. C-15) could be present here.

> Q. I had reviewed one of complainant's exhibits that brought up an issue that hydro tests, the types at issue there, they weren't failing the hydro tests because the pipe was expanding, like you said. So my question is: is Sunoco, with their pipes, doing any type of tests that would make sure the pipes that they ' re using, this isn't going to happen there?
>
> A. The answer is yes, and I would love to explain it to you for just a minute, if I could, but first of all, understand, I did write the pressure test standard for API-1102. These companies that we're talking about did not follow that standard. Sunoco follows the standard. But what I want to explain to you is that during the pressure test, you can actually monitor the pipeline to see if it's expanding, and if it does expand, you're going to shut down the pressure test and go back and try to figure out what the issues were and correct it or lower the pressure in the pipeline. But it turned out to be a rather straightforward, I'm not going to say simple, but rather straightforward methodology, and I would love to draw you one more picture, Your Honor, if that's all right.
> . . .



On the left-hand side, on that axis, we could have monitored the pressure during the pressure tests, and we do that with gauges and recording instrumentation. But, first of all, understand, the pipeline, as you know, is completely filled with water first off, so it's water in the pipeline only. To raise the pressure during a hydro test or a pressure test, I have to inject additional water into the pipeline to raise the pressure, and we do this with high pressure pumps. Every time that pump strokes, it's going to inject a certain volume of water into the pipeline, and I can count the strokes of the pump and I can watch the gauge as we watch the pressures build up. What I've tried to illustrate on this line is, for example, every stroke of the pump, if it raises the pressure one pound, I'm going to get a straight line, and we will monitor that. But as soon as I get to the level that I've indicated in the red, as soon as *you* see that stroke pressure plot start to get off that straight line, starts to curve to the right, that is telling you that you are expanding the pipe, and then the pipeline operators can shut it down.

This is the procedure that Sunoco uses when they pressure test pipelines, and that ensures that they do not have any issues during the pressure tests that would compromise the integrity of the pipe.

N.T. 289:7-291:16; SPLP Exhibit No. 32.

Mr. Perez concurred with the facts Mr. Zurcher presented and relied upon and concurred with Mr. Zurcher's conclusions. N.T. 343:18-344:5.

In sum, Complainant wholly failed to meet his burden of proof to present a *prima facie* case and SPLP, despite his evidentiary failure, has proven its steel, pipe, and pipeline design exceed regulatory requirements.

E. Pipeline Exposure

Complainant presented evidence that the ME1 pipeline has a very small exposure near McClure's Gap, Cumberland County in a forested or very rural area and is approximately a quarter of a mile from the nearest building.[4] SPLP does not dispute this. Complainant failed to demonstrate a *prima facie* case on this issue – he presented no testimony or evidence that this exposure is a violation of regulation or law or is otherwise unsafe. It is not. Mr. Zurcher explained that pipeline exposures are a common occurrence, that mere exposure is not a violation of pipeline safety law or regulation, and that when an exposure occurs, the operator must evaluate it and remediate it if and when necessary:

> Q. Are pipeline exposures a common occurrence in the pipeline industry?
>
> A. Yes, they are. When I was the director of the Tenneco Pipeline system, I had anywhere from 3,000 to 5,000 exposures per year that I was dealing with. When I was the manager of pipeline safety for Panhandle Eastern Company, I had two to three thousand a year.

[4] Complainant's witness Ms. Van Fleet, who lives in Lower Frankford Township, Cumberland County, N.T. 159:22-23, testified that she sent an email to Ian Woods at PHMSA in October 2016 regarding an exposed pipeline on the property where she lives. N.T. 162:14-16; Exhibit C-3. Exhibit C-3 shows that Ian Woods responded that SPLP had informed PHMSA that they had engaged an engineering firm to study the pipeline exposure and that after the study was done, SPLP would apply to DEP for permits to remediate the exposure. N.T. 162:24-163:7; Exhibit C-3. Ms. Van Fleet also stated she took the pictures of the exposure in Exhibit C-24. N.T. 163:16-21. Ms. Van Fleet stated the pipeline is still exposed. N.T. 163:25-164:1.

> Your Honor, I can go through and cite you all kinds of numbers, but I'm going to tell you, there are hundreds of thousands of locations across the United States where pipelines are exposed. It is not an issue, for the most part, but companies are required to evaluate that exposure and remediate it where it's necessary.
>
> Q. Thank you. And I think you've anticipated my next question, but could you explain in a little bit more detail what the PHMSA requirements are for exposures?
>
> A. Right. First of all, I've got to go back just a little bit. PHMSA does not require pipelines to be buried; that is not a requirement of the regulations. Furthermore, if they are buried, then PHMSA does specify the depth of burial, if they're buried, but there are hundreds of millions of above-ground pipelines in the United States.
>
> Everywhere you go, there's pipelines above ground. That's okay. But where they are below ground, they must be buried during construction to a certain depth, typically 30 to 48 inches. Then there is no requirement in the regulation to maintain that depth of cover. So if the cover is removed, or erosion or anything else, there's no requirement in the regulations to replace that cover or do anything; it's just not there.
>
> But there is a general clause of the regulations where the operator is obligated to look at those types of exposures and make a determination as to whether it needs to be remediated or not, and for the most part, I'm going to say that it gets covered back up again or gets relocated or something. But, Your Honor, there are hundreds of thousands of these types of locations. They are not hazardous.

N.T. 300:2-301:13; *see, e.g.*, 49 C.F.R. Parts 195.401(b), 195.412, 195.422.

Regarding the exposure here, Mr. Zurcher explained that the exposure is not hazardous and does not create a potential for damage to the pipeline:

> The one I looked at is not a hazardous situation, it's not in a stream where there are logs coming down a river or big boulders being forced down a river or something that would damage the pipeline. The potential for damage doesn't exist in this particular location, in my opinion.

N.T. 301:13-18*; see also* N.T. 329:3-13 (explaining exposure to water not is not an issue and to extent coating could be damaged, SPLP will remediate it). As Mr. Perez testified, contact with water has a positive effect on cathodic protection of the pipeline. N.T. 346:19-25.

Mr. Perez explained the steps SPLP has taken and will take to remediate this exposure and that because this exposure is in a wetland, SPLP requires and is awaiting approval of a permit from DEP to remediate this exposure:

> Q. Now, I'd like to shift gears a little bit and have you address the McClure's Gap exposure. Can you walk us through the chronology of the company's addressing that exposure?
>
> A. I can.
>
> Q. Please do then.
>
> A. As Ms. Van Fleet mentioned in her testimony yesterday, it goes back to our initial review of this goes back to August of 2017. There was an effort for us to develop a solution for this location. We went through, had a proposal put together where we were going to utilize what the industry calls an Ercon mat. It's essentially to provide mechanical protection; it's multiple concrete mats ls connected with a cable. You would place it over the pipeline to make sure there were no issues relative to
>
> JUDGE BARNES: Can you just spell Ercon?
>
> THE WITNESS: Ercon is E-R-C-0-N.
>
> JUDGE BARNES: Mat?
>
> THE WITNESS: Yes, M-A-T.
>
> JUDGE BARNES : Go ahead.
>
> THE WITNESS: So we completed that proposal in early 2018, I think February of 2018, and then we began the field work tied to that in June. We went through that with our contractors as far as Ercon and supporting engineering companies for that, and then we provided a pre-op meeting. We met with the Pennsylvania DEP in

> October 2018 to review our plans, and at that time they reject ed our proposal to utilize the Ercon mat.
>
> What happened from there is we had to go and evaluate other options again in October and November and came back with the decision to use what is called rock bane, B-A-N-E, and that was a solution that was acceptable to DEP.
>
> That was in December of 2018, and the approval for that decision took place with the DEP in February of 2019, so this year.
>
> BY MR. SNISCAK:
> Q. Was there any intervening feedback from the PA Fish and Boat Commission?
>
> A. Yes, there were some additional approvals that we had to have prior to being able to submit the permit application to the DEP, which is just part of this process, and we recently received approval from the Pennsylvania Fish and Boat Commission in April of 2019 this year. Since then, the application was submitted here in June of 2019. So once we receive the permit, then we can proceed with that repair.

N.T. 350:2-351:23.

Mr. Perez also explained the size and areas of the exposure, that SPLP has been and is monitoring it, and that is does not present a safety concern:

> Q. Can you describe the exposure itself?
>
> A. From the pictures that I received from our team on the operations side, it appears to be about a three-foot long section of exposure where the top quarter of the pipe is exposed. It's in a rural area, as what was described before. There's not a lot of activity. I think the nearest dwelling is about a quarter of a mile away, so access to the site from a third party is pretty low.
>
> Q. It's in a wetland; correct?
>
> A. That's correct.
>
> Q. Is it in just an open area wetland or is it in a little, as the pictures show, a little drainage ditch?

A. It appears to be a drainage ditch, is what it is. It's just again, pretty small . We don't expect any debris to be flowing from that that would impact the pipeline, that would impact the coating. As part of what we do, we also inspect these lines annually . For any exposed pipe, our standards require that we inspect them on an annual basis, and we have the inspections since this had come up.

Q. Do any of your consultants who are working on let's call it the actions you're going to take in the future on this to address it, do they go out there periodically, too, and look at it? Are there more sets of eyes on it than just the inspectors from the company?

A. For the team that will be supporting the rock bane solution, they would go back out there, in addition to our operations team, for the constant monitoring, evaluation, so that should a change take place, any required change in the design could be modified accordingly.

Q. Is the company conducting itself under the methods and procedures under the PHMSA regulations relative to exposures?

A. Yes.

Q. You heard Mr. Zurcher explain that exposures on pipelines are something that is sort of endemic and natural. In your experience, are most of these caused by washouts?

A. Yes. Some are caused by washouts, yes.

Q. And to you and to the company, does an exposure equal an emergency, or does it just equal an exposure?

A. It just equals an exposure. We base that off of our evaluation of where it is, what potential issues are surrounding that location, but no, it does not equate to an emergency just because it's exposed.

N.T. 352:8-353:25.

F. Welding Requirements

Complainant testified regarding a PHMSA Advisory Bulletin regarding girth welds from nine years ago to try to allege that the issues there are present with SPLP's pipes and that SPLP is trying to cover it up by using sleeves to cover its welds. N.T. 90:22-92:11; Exhibit No. C-17. He

opined based on a picture, Exhibit No. SPLP 27 at page 1, that SPLP was putting a sleeve or collar over the ends of its pipes over the weld and then riveting the sleeve over the pipe. N.T. 92:13-95:15. Complainant did not see SPLP's pipes, only a picture. N.T. 95:8-15. Again, Mr. Baker is wrong in his allegations.

Again, none of this opinion testimony was admissible and none of it can be relied upon because Mr. Baker is not an expert in this field. *Supra* Section III.A.1. To reiterate: Complainant, who was a welder, but has no experience or qualifications regarding welding the type of pipelines at issue here, was unaware of the qualification requirements for welders to be certified to weld Part 195 pipelines, and he is not qualified under those regulatory requirements. N.T. 76:14-77:1. Complainant said he welded at Frog and Switch for 37 years, "but it has nothing to do with pipelines." N.T. 79:13-21. Complainant is not an engineer and does not have a college degree. N.T. 74:1-23. He has no education in fluid mechanics, alarm systems for pipelines, or any other degrees. N.T. 74:24-75:1. Complainant has never worked for a pipeline company. N.T. 76:6-8. Complainant admitted that he had not read the American Society of Mechanical Engineers (ASME) guidelines and had not heard of the National Association of Corrosion Engineers 77:2-78:2. Mr. Baker was accepted as an expert in welding, but not with regard to "pipelines such as are used in the Mariner East project." N.T. 79:24-80:1.

Thus, Complainant wholly failed yet again to present a *prima facie* case on this issue. Nonetheless, SPLP proved his allegations totally false. Pursuant to PHMSA regulations, welding of the pipelines at issue were performed by qualified welders in accordance with qualified welding procedures per industry standards incorporated to PHMSA rules. 49 C.F.R. Part 195.214. Further, SPLP x-rayed 100% of its welds and made necessary repairs, meeting and exceeding PHMSA

regulations. 49 C.F.R. Parts 195.230; 195.243. As Mr. Zurcher explained with respect to the photograph at issue (SPLP Exhibit No. 27):

> This is two joints of pipe that have been welded together. Down the middle you can see a very impressive weld, the girth weld. What looks to be a little bit of red or so forth on either side is actually the bare steel, and then to the right of that is actually the coating system, the external coating system, that was put on the pipe during the manufacturing process.
>
> I will point out that there are actually two different coating systems on this particular piece of pipe. What you see in blue is actually a fusion bonded epoxy coating that is put on there for corrosion control purposes. What looks to be that light tan or maybe white on the copy that you have is a second coating system, it's an abrasion resistance overlay, so that's a second coating system.
> Now, what you see, what Mr. Baker identified as what looked to him like rivets in the pipeline, those are not rivets at all. If you will look closely, you can actually see the blue, which is the FBE coating, under there, so the pipe was not penetrated. It's against the regulations to rivet a pipeline.
> …
> They're just scrapes of the coating, is all they are, Your Honor. There is no detrimental aspect to that at all.
> JUDGE BARNES: Scrapes of the coating where rivets were?
> THE WITNESS : They are not rivets, they are just scratches in the coating.

N.T. 293:3-294:9.

Mr. Zurcher explained page 2 of SPLP Exhibit No. 27 demonstrated what left the marks in the coating that Complainant falsely alleged were rivets:

> That is what caused those marks in the pipeline coating. You will see that this is what's called a line-up clamp. This is used on the pipeline projects, so as I 'm about to weld two pieces of pipe
> together, I put this clamp around it to hold it in place, and you can see the chain on that clamp, and that chain is what left those marks in the coating. Now, that coating will be completely removed and replaced with new coating before the pipeline is put in the ground; and the coating quality will be checked again before that pipeline is put in the ground. So this is not an issue at all. This has nothing to

> do with pipe integrity or manufacture. It's a mark on a coating from a line-up clamp that would be or was the coating was replaced.
>
> BY MS. SNYDER:
>
> Q. Is there any kind of sleeve used on this pipeline?
>
> A. No, there is not, none of these pipelines. No sleeve at all.

N.T. 295:4-21. Mr. Zurcher also explained that this marking on the coating from clamping to perform welding was repaired and inspected before the pipeline was placed in the ground and that this is typical industry practice – "how it's done." N.T. 316:25-317:7; 318:5-13.

Moreover, SPLP x-rays 100% of its welds:

> Again, every single weld that's done is then, in the Sunoco case, it's actually x-rayed to make sure that those welds are, in fact, satisfactory, near perfect. Similar to the x-ray you get on a tooth, it looks for cavities and cracks. The same type of things with this, we're looking for cavities and cracks in the weld. If it passes, that's good. All of those procedures and processes for x -ray and non-destructive testing again are enforced with rigorous standards that the industry, in conjunction with PHMSA and other stakeholders, has developed, and then all the technicians that do the x - rays are actually qualified as well to do that. PHMSA regulations have a lot on qualifications of the welders and the procedures and so forth and so on. A very rigorous, very specialized process.
>
> Q. I think you mentioned Sunoco x -rays every single one of its welds. How many welds, or what percentage, is Sunoco required to x-ray?
>
> A. For the pipelines going across the countryside, they're only required to x -ray 10 percent of the welds, so, again, Sunoco is x -raying 100 percent of the welds. If any defect is found in the weld, they'll repair it in accordance with the industry standards, x -ray it again, and confirm again that it's good, so this process goes on over and over again for every weld.
>
> JUDGE BARNES: Are you specifically referring to the Mariner East 2 and 2X?

> THE WITNESS: Yes. The 2X to the point of what the construction has been so far and what the intent is in the future.

N.T. 296:22-297:25. Mr. Perez concurred with the facts Mr. Zurcher presented and relied upon and concurred with Mr. Zurcher's conclusions. N.T. 343:18-344:5.

In sum, Complainant wholly failed to meet his burden of proof to present a *prima facie* case and SPLP, despite his evidentiary failure, has proven its welding practices exceed regulatory requirements.

G. Injunctive Relief (Public Alarms System and Odorant)

Complainants testimony on these issues consisted of whether odorant or alarm systems might be a good idea and/or could be done. N.T. 104:20-21, 141:24-25, 147:1-4, 186:19-188:17. None of that is relevant or persuasive or competent evidence to require SPLP to do either of these things. The regulations applicable to SPLP's Mariner East pipelines do not require odorant or public alarm systems. N.T. 310:1-8, 322:17-22 (Zurcher), 343:18-344:5 (Perez). Further evidence of the non-requirement of odorant and alarm systems is that the Commission is considering whether there is any need or reason to promulgate regulations on these issues. *See Advance Notice of Proposed Rulemaking Order*, Docket No. L-2019-3010267, ANOPR Order at 19-20 (Order entered Jun. 13, 2019) (requesting comments on "notification criteria" and "odorant utilization").

Safety is not a subjective standard subject to lay person interpretation, opinions, or feelings. *Herring v. Metropolitan Edison*, Docket No. F-2016-2540875, 2017 WL 3872590 at 3 (Order entered Aug. 31, 2017) ("Complainant's assertions, regardless of how honest or strong, cannot form the basis of a finding…since assertions, personal opinions or perceptions to not constitute factual evidence.") (citing *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987)). Moreover, how people may feel or what they may want is not the standard to be applied

in adjudicating a Complaint. Instead, to find a safety violation regarding pipelines, there must be a violation of the applicable regulatory standards (here 49 C.F.R. Part 195). *See, e.g.*, *Smalls, Sr.* v. *UGI Penn Natural Gas, Inc.*, No. C-2014-2421019, 2014 WL 6807073 (Pa. P.U.C. Oct. 24, 2014) (Ember S. Jandebeur, J.) (Final by Act 294) (reasoning because there are safety regulations that apply to gas pipelines, but there was no federal or state regulation that prohibited the specific action of placing a gas line within close proximity to a home there cannot be a violation since there was not a set standard) (finding no safety violation where Complainant failed to show violation of relevant portion for 49 C.F.R.); *Bennett v. UGI Central Penn Gas, Inc.*, No. F-2013-2396611, 2014 WL 1747713 (Pa. P.U.C. Apr. 10, 2014) (David A. Salapa, J.) (Final by Act 294) ("In the absence of any evidence that [UGI] failed to comply with these regulations [49 CFR 191-93, 195, 199], I cannot conclude that [UGI] acted unreasonably or violated any Commission regulation in failing to prevent the leaks that occurred at the Complainant's property.").

Moreover, the Commonwealth Documents Law and the Independent Regulatory Review Act require that regulatory change must take place through the notice and comment procedures with accompanying governmental review, not administrative adjudications. Thus, what witnesses may think the law or regulations should require in terms of safety is not and cannot be the standard for adjudicating this Complaint.

IV. CONCLUSION

WHEREFORE, SPLP respectfully requests that Your Honor conclude Complainant has not met his burden of proof to show Respondent violated the law or regulation and dismiss the Complaint with prejudice. Your Honor and the Commission do not have authority to order any relief where Respondent has not violated the law or regulations. *West Penn Power Co. v. Pennsylvania Public Utility Comm'n*, 478 A.2d 947, 949 (Pa. Cmwlth. 1984) ("We hold that in

order for the PUC to sustain a complaint brought under this section [66 Pa. C.S. § 1501], the utility must be in violation of its duty under this section. **Without such a violation by the utility, the PUC does not have the authority, when acting on a customer's complaint, to require any action by the utility**.") (emphasis added); *Township of Spring et al. v. Pennsylvania-American Water Company*, Docket Nos. C-20054919 et al, 2007 WL 2198196 at *6 (Order entered July 27, 2007) (" If we were to order PAWC to conduct testing of the property in the Stonegate community, we would have to base that order on credible evidence that some act or omission by PAWC in violation of the Code or our Regulations would be remedied by the testing.") (citing *West Penn*).

Respectfully submitted,

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APPENDIX A

A. Findings of Fact

1. Complainant is Mr. Wilmer Baker who resides at 430 Run Road, Carlisle, Cumberland County, PA. N.T. 41:17-19.

2. Respondent is Sunoco Pipeline L.P. (SPLP), a Pennsylvania certificated public utility.

3. SPLP operates the Mariner East 1 (ME1) (8-inch) and Mariner East 2 (ME2) (20-inch) pipelines.

4. SPLP is constructing the Mariner East 2X (ME2X) (16-inch) pipeline.

5. Portions of the ME1, ME2, and ME2X pipelines traverse Cumberland County.

6. Complainant resides approximately 1,300 feet from the Mariner East pipeline right-of-way. N.T. 372:2-3.

7. Complainant, who was a welder, but has no experience or qualifications regarding welding the type of pipelines at issue here, was unaware of the qualification requirements for welders to be certified to weld Part 195 pipelines, and he is not qualified under those regulatory requirements. N.T. 76:14-77:1. Complainant said he welded at Frog and Switch for 37 years, "but it has nothing to do with pipelines." N.T. 79:13-21. Complainant is not an engineer and does not have a college degree. N.T. 74:1-23. He has no education in fluid mechanics, alarm systems for pipelines, or any other degrees. N.T. 74:24-75:1. Complainant has never worked for a pipeline company. N.T. 76:6-8. Complainant admitted that he had not read the American Society of Mechanical Engineers (ASME) guidelines and had not heard of the National Association of Corrosion Engineers 77:2-78:2. Mr. Baker was accepted as an expert in welding, but not with regard to "pipelines such as are used in the Mariner East project." N.T. 79:24-80:1.

8. Complainant testified he received a "safety manual" and contacted Lower Frankford Township. N.T. 42:17-18; Exhibit No. C-2. Complainant testified that he went to a July 10 Township Supervisors meeting and SPLP did not attend. Tr. 42:22-24.

9. SPLP had been informed on the eve of the meeting that landowners had invited the media. N.T. 377:24-378:13. SPLP did not attend because some of the information to be discussed in the meeting could be security-sensitive, and thus SPLP was not going to participate in a meeting that was open to the media. *Id.* SPLP has reiterated multiple times since then that it is willing to meet with the Township. *Id.*

10. SPLP's emergency response outreach and training program is adequate and provides all information that is necessary for the public and emergency responders to identify a pipeline release and to respond to a pipeline-related emergency, and is consistent with industry standards and PHMSA regulations. N.T. 236:4-17.

11. Mr. Noll and Mr. Perez presented extensive evidence of trainings SPLP made available to first responders in Cumberland County, including upcoming training that has been scheduled. N.T. 219:20-233:7 (Noll); 354:1-356:19 (Perez); SPLP Exhibit Nos. 2-3, 8-18, 20, 22, 23. SPLP makes sure that first responders and others are invited but cannot require first responders to attend these trainings. N.T. 225:9-226:6.

12. SPLP appropriately mailed a public awareness pamphlet to Complainant and Complainant's witness Ms. Van Fleet. N.T. 42:17-18; 356:21-357:19.

13. SPLP has a robust public awareness program that engages the community, utilizing a variety of methods, including meetings, mailings, and specialized training. SPLP Exhibit No. 2 at N.T. 589. The primary goal of the plan is to raise awareness with the public and other stakeholders of SPLP's facilities and to ensure that everybody knows where the pipelines

are located. SPLP Exhibit No. 2 at N.T. 590. SPLP mailed public outreach brochures in September 2018 to the affected public (all residents, businesses, farms, schools, and other places of congregation within 1,000 feet of each side of the pipeline), excavators, public officials, and emergency response organizations. SPLP Exhibit No. 2 at N.T. 590. SPLP completes this mailing every two years consistent with PHMSA regulations, which includes American Petroleum Institute (API) Recommended Practice (RP) 1162 (incorporated by reference, 49 C.F.R. Part 195.3(b)(8)). SPLP Exhibit No. 2 at N.T. 591; 49 C.F.R. Part 195.440. Notably, SPLP goes beyond the minimum 660-foot planning area applied by API RP 1162 and PHMSA regulation 195.440(a) for public awareness mailings. SPLP Exhibit No. 2 at N.T. 592.

14. SPLP uses some foreign steel and pipe for its ME2X pipeline. SPLP Exhibit No. 5.

15. American steel and pipe was used for ME2, SPLP Exhibit No. 4 ("Pipe manufactured, sampled, tested, and inspected in accordance with the specification(s) and meets requirements. Steel cast and coils rolled at US Steel, Gary, IN. Pipe manufactured at Stupp Corporation, Baton Rouge, LA.").

16. The steel and pipe used for the ME2X pipeline could support a maximum operating pressure up to 2,760 PSI and the steel and pipe used for the ME2 pipeline could support a maximum operating pressure up to 1,778 PSI. N.T. 277:13-279:22, 280:2-281:11, SPLP Exhibit Nos. 4, 5, 31.

17. The MOP that SPLP operates and will operate at for ME2 and ME2X is 1,480 PSI. N.T. at 349:11-16.

18. The steel and pipe used for the ME2X and ME2 pipelines is the API 5L, PSL-2 standard. N.T. 285:10-19.

19. The procedures SPLP uses to hydrotest its Mariner East pipelines ensures that they do not have any issues during the pressure tests that would compromise the integrity of the pipe. N.T. 289:7-291:16; SPLP Exhibit No. 32.

20. The ME1 pipeline has a very small exposure near McClure's Gap, Cumberland County in a forested or very rural area and is approximately a quarter of a mile from the nearest building. N.T. 159-164; N.T. 352:8-353:25.

21. As pipeline safety expert Mr. John Zurcher explained, pipeline exposures are an extremely common occurrence. N.T. 300:2-14.

22. The small pipeline exposure here is not a hazard or safety issue and the pipeline is not in danger of being damaged due to the exposure. N.T. 301:13-18, N.T. 352:8-353:25; *see also* N.T. 329:3-13 (explaining exposure to water not is not an issue and to extent coating could be damaged, SPLP will remediate it). As Mr. Perez testified, contact with water has a positive effect on cathodic protection of the pipeline. N.T. 346:19-25.

23. SPLP and various contractors have been monitoring this exposure since it occurred. N.T. 352:8-353:25.

24. Because the exposure is in a wetland, SPLP requires and is awaiting a permit from DEP to remediate the exposure. N.T. 350:2-351:23.

25. SPLP developed an initial remediation plan for this exposure using an Ercon mat and submitted that proposal to DEP in mid-2018 at a meeting with DEP. N.T. 350:2-351:23.

26. In October 2018, DEP rejected that proposal. N.T. 350:2-351:23.

27. Since then, SPLP has developed a remediation measure called a rock bane, which DEP has found acceptable as of February 2019. N.T. 350:2-351:23.

28. SPLP submitted the official permit application to DEP in June 2019 and is awaiting its approval. N.T. 350:2-351:23.

29. SPLP Exhibit 27 (page 1 of which is part of Complainant's Exhibit C-4) is a photograph of two pipeline joints welded together. The picture shows marks in the coating of the pipeline due to the line-up clamp which is used to hold the pipe in place while it is being welded. The picture does not show that the pipelines were riveted or that a sleeve or collar was used. N.T. 293:3-294:4, 295:4-21, SPLP Exhibit 27; N.T. 343:18-344:5, 295:4-21.

30. Prior to the pipe being placed in the ground and covered, the coating is removed and replaced and inspected again. N.T. 295:4-21; N.T. 343:18-344:5; N.T. 343:18-344:5.

31. As a construction practice, SPLP x-ray inspects 100% of its welds for the ME2 and ME2X pipelines. N.T. 296:22-297:25, 343:18-344:5.

B. Conclusions of Law

1. Complainant must prove SPLP violated a law or regulation to obtain any relief. *West Penn Power Co. v. Pennsylvania Public Utility Comm'n*, 478 A.2d 947, 949 (Pa. Cmwlth. 1984) ("We hold that in order for the PUC to sustain a complaint brought under this section [66 Pa. C.S. § 1501], the utility must be in violation of its duty under this section. **Without such a violation by the utility, the PUC does not have the authority, when acting on a customer's complaint, to require any action by the utility**.") (emphasis added); *Township of Spring et al. v. Pennsylvania-American Water Company*, Docket Nos. C-20054919 et al, 2007 WL 2198196 at *6 (Order entered Jul. 27, 2007) ("If we were to order PAWC to conduct testing of the property in the Stonegate community, we would have to base that order on credible evidence that some act or omission by PAWC in violation of the Code or our Regulations would be remedied by the testing.") (citing *West Penn*).

2. Complainant has the burden of proof and has not met it. 66 Pa. C.S. § 332(a); *Samuel J. Lansberry, Inc. v. Pa. PUC,* 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied,* 529 Pa. 654, 602 A.2d 863 (1992); *Se-Ling Hosiery v. Margulies,* 364 Pa. 45, 70 A.2d 854 (1950).

3. Because Complainant did not meet his burden of proof, no relief can be ordered in this proceeding. *Supra West Penn, Township of Spring.*

4. As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Public Utility Code (Code). 66 Pa. C.S. § 332(a).

5. To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the Respondent is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Telephone Company of Pennsylvania,* 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC,* 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied,* 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant's evidence must be more convincing, than that presented by the Respondent. *Se-Ling Hosiery v. Margulies,* 364 Pa. 45, 70 A.2d 854 (1950).

6. The Commission's decision must be supported by substantial evidence in the record. It is axiomatic that a legal decision must be based on real and credible evidence that is found in the record of the proceeding. *Pocono Water Co. v. PUC,* 630 A.2d 971, 973-74 (Pa. Commw. Ct. 1993) (finding that the Commission violated the utility's due process rights "because it assessed liability after determining an issue which [the utility] had not been afforded a reasonable opportunity to defend at the hearing."); *Duquesne Light Co. v. PUC,* 507 A.2d 433, 437 (Pa. Commw. Ct. 1986) (holding that the Commission violated the utility's due process rights because the utility was "not given adequate notice of the specific conduct being

investigated, and hence its defense was gravely prejudiced."). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC,* 489 Pa. 109, 413 A.2d 1037 (1980).

7. Upon the presentation by the Complainant of evidence sufficient to initially establish a *prima facie* case, the burden of going forward with the evidence, to rebut the evidence of the Complainant, shifts to the Respondent. If the evidence presented by the Respondent is of co-equal weight, the Complainant has not satisfied his burden of proof. The Complainant now must provide some additional evidence to rebut that of the Respondent. *Burleson v. Pa. PUC,* 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd,* 501 Pa. 433, 461 A.2d 1234 (1983).

8. While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC,* 768 A.2d 1217 (Pa. Cmwlth. 2001).

9. Lay witness assertions, opinions or perceptions do not constitute evidence. *Herring v. Metropolitan Edison,* Docket No. F-2016-2540875, 2017 WL 3872590 at 3 (Order entered Aug. 31, 2017) ("Complainant's assertions, regardless of how honest or strong, cannot form the basis of a finding…since assertions, personal opinions or perceptions to not constitute factual evidence.") (citing *Pa. Bureau of Corrections v. City of Pittsburgh,* 532 A.2d 12 (Pa. 1987)).

10. Notwithstanding the statutory maxim of 2 Pa. C.S. § 505, which mandates a relaxation of the strict rules of evidence in agency hearings and proceedings, the "evidentiary Rules 602, 701, and 702 are applicable to agency proceedings." *Randall v. PECO Energy Co.,*

No. C-2016-2537666, 2019 WL 2250792, at *43 (Pa. P.U.C. May 9, 2019), *citing Gibson v. WCAB*, 580 Pa. 470, 485-86, 861 A.2d 939, 947 (Pa. 2004).

11. Pa. R.E. 702 sets forth the standard for the qualification of expert witnesses and provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;
> the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and
> the expert's methodology is generally accepted in the relevant field.

225 Pa. Code Rule 702.

12. To the extent a witness is found to possess specialized knowledge to qualify as an expert on certain subject matters, **the witness's expert testimony is limited to those issues within their specific expertise**. *See Bergdoll v. York Water Co.*, No. 2169 C.D. 2006, 2008 WL 9403180, at *8–9 (Pa. Cmwlth. 2008) (unreported) (prohibiting independent contractors from offering expert testimony on water source and cause of sewer blockage; while witnesses were qualified to offer certain testimony as to facts and the extent of damage at issue, the source of the water and cause of the sewer blockage at issue "was not within their expertise"); *see also, Application of Shenango Valley Water Co.*, No. A-212750F0002, 1994 WL 932364, at *19 (Jan. 25, 1994) (President of water company was "not qualified to provide expert testimony regarding the ratemaking value of utility property" when, notwithstanding his skills and expertise as to the operation of a public utility, he was "…not a registered professional engineer and has never been a witness concerning valuation of utility property in any proceeding before the Commission…

lacks of knowledge regarding standard ratemaking conventions concerning capital stock as an item of rate base, cash working capital and the ratemaking requirements of Section 1311 of the Public Utility Code.")(internal record citations omitted).

13. Lay opinions on matters requiring scientific, technical or specialized knowledge are not competent evidence to support a finding of fact. 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."). Although the Pennsylvania Rules of Evidence are not strictly adhered to by the Commission, **the Pennsylvania Supreme Court has recognized that any relaxation of the rules of evidence in administrative settings cannot permit lay witnesses to testify to technical matters "without personal knowledge or specialized training."** *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004) (holding Rules of Evidence 602 (personal knowledge), 701 (opinion testimony by lay witnesses) and 702 (testimony by expert witnesses) generally applicable in agency proceedings); Nancy Manes, C-20015803, 2002 WL 34559041, at *1 (May 9, 2002) (the Commission abides by the Pennsylvania Supreme Court's standard "that a person qualifies as an expert witness if, through education, occupation or practical experience, the witness has a reasonable pretension to specialized knowledge on the matter at issue."). Accordingly, the Commission has consistently found that a lay witness is not qualified to testify or offer exhibits related to any issues outside of direct personal knowledge. *Lamagna v. Pa. Elec. Co.*, C-2017-2608014, 2018 WL 6124353, at *20 (Oct. 30, 2018) (lay witness was "not qualified to testify or offer exhibits related to health and safety issues outside of her direct personal knowledge.").

14. To the extent a lay witness offers references to reports or conclusions of others, these may not be considered as substantial evidence because a lay witness cannot rely on such

information in reaching a conclusion – rather, that is the role of a qualified expert witness. *Compare* Pa. R.E. 701 *with* Pa. R.E. 703.

15. While a fact finder may weigh the opinion testimony of a qualified expert, any such testimony of an unqualified lay witness must be excluded and should not be given any evidentiary weight. *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004); *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 528 (Pa. 1995).

16. Lay witnesses cannot testify on technical issues such as health, safety, and the probability of structural failure as these necessarily "require expert evidence to be persuasive enough to support the proposing party's burden of proof." Application of PPL Elec. Utilities Corp., A-2009-2082652, 2010 WL 637063, at *11 (Jan. 14, 2010) (emphasis added); Pickford v. Pub. Util. Comm'n, 4 A.3d 707, 715 (Pa. Cmwlth. 2010) (ALJ "properly disregarded" testimony from 13 lay witnesses related to concerns and personal opinions about damage to pipes, lead leaching, toxicity to fish and home filtration expenses because "the nature of these opinions … was scientific and required an expert."); Lamagna v. Pa. Elec. Co., C-2017-2608014, 2018 WL 6124353, at *20 (Oct. 30, 2018) (finding that lay witness testimony and exhibits regarding technical health and safety issues "carry no evidentiary weight and … were properly objected to and excluded.).

17. That a lay witness may possess some level of knowledge and education in a related subject does not make him an expert on specialized and technical matters such as geology, pipeline construction, pipeline safety, or emergency response, and such unqualified testimony is not credible evidence. *See* Opinion and Order, *Amended Petition of State Senator Andrew E. Dinniman for Interim Emergency Relief*, P-2018-301453 *et al.* (June 14, 2018) (acknowledging lack of expert testimony regarding technical geological concerns, thereby necessarily rejecting

testimony of lay witness on geological issues without regard for lay witness's purportedly related education and experience.); *see also*, Joint Statement of Commissioners Coleman and Kennard, *Amended Petition of State Senator Andrew E. Dinniman for Interim Emergency Relief*, P-2018-301453 *et al.* (June 14, 2018) (acknowledging "no credible *evidence of record* to indicate that a clear and present danger exists with respect to the construction activities on ME2 and ME2X in West Whiteland Township" when hearing transcript was "devoid of any expert witness testimony that, to a reasonable degree of scientific certainty, there is a credible and immediate harm with the construction of these lines.").

18. Complainant is not an expert in pipeline welding, emergency response, or pipeline safety in general. N.T. 79:24-80:1. Thus, none of his opinion testimony can be given any weight.

19. Ms. DiGiulio was offered as an expert in chemistry, but she is not an expert in pipeline safety subject matter. N.T. 177:10-185:24. Thus, none of her opinion testimony regarding pipeline safety can be given any weight.

20. Complainant witnesses Jon Baker, Rolfe Blume, Kim Van Fleet, and Eric Robinson are not experts witnesses and thus none of their opinion testimony can be given any weight.

21. Hearsay is an out-of-court statement made by a declarant that is offered by a party to prove the truth of the matter asserted in the statement. See Pa.R.E. 801. The general rule against hearsay is that hearsay is inadmissible at trial unless it falls into one of the recognized exceptions to the hearsay rule pursuant to the Pennsylvania Rules of Evidence, other rules prescribed by the Pennsylvania Supreme Court, or statute. See Pa.R.E, 801, 802, 803, 803.1, 804. The rationale for the rule against hearsay is that hearsay lacks the guarantees of trustworthiness to be considered by the trier of fact; however, exceptions have been fashioned to accommodate certain classes of hearsay that are substantially more trustworthy than hearsay in general, and thus merit exception

to the rule against hearsay. See e.g. *Commonwealth v. Kriner*, 915 A.2d 653 (Pa. Super. 2007); *Commonwealth v. Cesar*, 911 A.2d 978 (Pa. Super. 2006); *Commonwealth v. Bruce*, 916 A.2d 657 (Pa. Super. 2007).

22. Whether simple hearsay may support a finding of an agency depends on whether the evidence meets the criteria of the *Walker/Chapman* rule. The *Walker/Chapman* rule provides that simple hearsay evidence may support an agency's finding of fact so long as the hearsay is admitted into the record without objection and is corroborated by competent evidence in the record. See *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976) (*Walker*) (citations omitted); see also *Chapman v. Unemployment Compensation Board of Review*, 20 A.3d 603, 610, n.8 (Pa. Cmwlth. 2011) (*Chapman*).

23. Under Pennsylvania's *Walker/Chapman* Rule, it is well-established that "[h]earsay evidence, properly objected to, is not competent evidence to support a finding." Even if hearsay evidence is "admitted without objection," the ALJ must give the evidence "its natural probative effect and may only support a finding . . . if it is corroborated by any competent evidence in the record," as "a finding of fact based solely on hearsay will not stand." *Walker* at 370 (citations omitted).

24. To be "properly objected to" in an administrative proceeding, the hearsay evidence must not fall within one of the recognized exceptions to the rule against hearsay. Hearsay that falls within one of the recognized exceptions to the hearsay rule is competent evidence that may be relied upon by the agency. See *Chapman*, supra, n. 8 (finding that the Board properly relied upon a party's admission as competent evidence as a recognized exception to the hearsay rule); see also *Sanchez v. PPL Electric Utilities Corporation*, Docket No. C-2015- 2472600 (Order entered July 21, 2016) (*Sanchez*) (finding that testimony related to the issuance of a termination letter fell

within the business records exception to the hearsay rule, and, therefore, was not simple hearsay, and was competent evidence to be relied upon in the proceeding to determine whether the complainant satisfied her burden of proof); see also Pa.R.E. 802, 803, 803.1 and 804.

25. Hearsay cannot corroborate hearsay. See *Sule v. Philadelphia Parking Authority*, 26 A.3d 1240, 1244 (Pa. Cmwlth. 2011), citing *J.K. v. Department of Public Welfare*, 721 A.2d 1127, 1133 (Pa. Cmwlth. 1998) (noting substantial evidence did not exist because there was no non-hearsay evidence to corroborate hearsay testimony).

26. The exceptions to hearsay do not include an exception for news articles. *See* Pa.R.E. 803, 803.1, and 804; *Com. v. Castro*, 93 A.3d 818, 819 (Pa. 2014) ("The Superior Court erred in treating the article as containing evidence; the article contains allegations that suggest such evidence may exist, but allegations in the media, whether true or false, are no more evidence than allegations in any other out-of-court situation. Nothing in these allegations, even read in the broadest sense, can be described as 'evidence'.").

27. A lay witness is not qualified to testify or offer exhibits related to any issues outside of direct personal knowledge. *Lamagna v. Pa. Elec. Co.*, C-2017-2608014, 2018 WL 6124353, at *20 (Oct. 30, 2018) (lay witness was "not qualified to testify or offer exhibits related to health and safety issues outside of her direct personal knowledge."). Moreover, to the extent a lay witness offers references to reports or conclusions of others, these may not be considered as substantial evidence because a lay witness cannot rely on such information in reaching a conclusion – rather, that is the role of a qualified expert witness. *Compare* Pa. R.E. 701 *with* Pa. R.E. 703.

28. While there is a hearsay exception for prior testimony statements, that exception requires the witness to testify in the current proceeding be subject to cross-examination about the prior statement.

> The following statements are not excluded by the rule against hearsay if the declarant testifies and is subject to cross-examination about the prior statement:
>
> (1) Prior Inconsistent Statement of Declarant-Witness. A prior statement by a declarant-witness that is inconsistent with the declarant-witness's testimony and:
>
> (A) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition;
>
> (B) is a writing signed and adopted by the declarant; or
>
> (C) is a verbatim contemporaneous electronic recording of an oral statement.
>
> Pa.R.E. 803.1.

29. Based on the above Pennsylvania Rules of Evidence regarding hearsay and the *Walker/Chapman* Rule, the following exhibits cannot be relied upon to support a finding of fact: Complainant Exhibits C-7, C-9, C-12, C-13, C-14, C-15, C-23, Complainant Cross Exhibit 1.

30. To find a safety violation regarding pipelines, there must be a violation of the applicable regulatory standards (here 49 C.F.R. Part 195, N.T. 292:1-17). *See, e.g.*, *Smalls, Sr*. v. *UGI Penn Natural Gas, Inc.*, No. C-2014-2421019, 2014 WL 6807073 (Pa. P.U.C. Oct. 24, 2014) (Ember S. Jandebeur, J.) (Final by Act 294) (reasoning because there are safety regulations that apply to gas pipelines, but there was no federal or state regulation that prohibited the specific action of placing a gas line within close proximity to a home there cannot be a violation since there was not a set standard) (finding no safety violation where Complainant failed to show violation of relevant portion for 49 C.F.R.); *Bennett v. UGI Central Penn Gas, Inc.*, No. F-2013-2396611, 2014 WL 1747713 (Pa. P.U.C. Apr. 10, 2014) (David A. Salapa, J.) (Final by Act 294) ("In the absence of any evidence that [UGI] failed to comply with these

regulations [49 CFR 191-93, 195, 199], I cannot conclude that [UGI] acted unreasonably or violated any Commission regulation in failing to prevent the leaks that occurred at the Complainant's property.").

31. The applicable public awareness and emergency responder regulations, 49 C.F.R. Part 195.403, 49 C.F.R. Part 195.3(b)(8) (incorporating American Petroleum Institute (API) Recommended Practice (RP) 1162), 49 C.F.R. Part 195.440, do not require SPLP to attend any particular municipality meeting.

32. SPLP did not violate the law or regulation when it did not attend a Township Supervisors meeting.

33. Complainant has not met his burden of proof to show that SPLP's public awareness program or emergency response training are in violation of any law or regulation.

34. SPLP has proven that its public awareness program and emergency responder training comply with and/or exceed legal and regulatory requirements. N.T. 303:13-20 (Zurcher), 233:8-15, 234:10-15, 236:4-17 (Noll).

35. The Commission lacks jurisdiction over trade and import laws, which are within the federal jurisdiction of the U.S. Department of Commerce and the U.S. International Trade Commission. *See* 19 U.S.C.A. §§ 1330 *et seq*.

36. There is no law or regulatory requirement that SPLP obtain its steel or pipe from U.S. manufacturers. N.T. 276:11-15 (Zurcher); N.T. 343:18-344:5 (Perez).

37. Applicable regulatory requirements regarding steel and pipe manufacture are international standards, so that a pipe or steel may be foreign has no bearing on its compliance with pipeline safety regulations or law. N.T. 276:11-277:6 (Zurcher); N.T. 343:18-344:5 (Perez).

38. 49 CFR Part 195 contains relevant and applicable standards regarding steel, pipe, and pipeline design, including incorporating the API 5L standard. *See, e.g.*, 49 CFR Part 195.106.

39. Complainant failed to prove that SPLP's ME2 and ME2X pipelines do not meet applicable standards for steel, pipe, and pipeline design.

40. SPLP proved its ME2 and ME2X pipelines exceed standards for steel, pipe, and pipeline design. N.T. 277:13-279:22, 280:2-281:11, 284:5-9, 284:10 - 20, 285:1-7, 285:10-19, 289:7-291:16 (Zurcher); SPLP Exhibit Nos. 4, 5, 31, 32, 343:18-344:5 (Perez).

41. 49 CFR Part 195 contains the relevant and applicable standards regarding pipeline exposures. Under these regulations, a pipeline exposure is not a violation of law or regulation. These regulations require a pipeline operator to monitor and remediate exposures if and when necessary. N.T. 300:2-301:13; *see, e.g.*, 49 C.F.R. Parts 195.401(b), 195. 412, 195.422.

42. Complainant failed to prove SPLP violated the law or regulation regarding small exposure at issue in this proceeding.

43. SPLP has not violated the regulations or law regarding the small pipeline exposure near McClure's Gap Road at issue in this proceeding. N.T. 301:13-18, 329:3-13, 346:19-25, 350:2-351:23, 352:8-353:25.

44. 49 C.F.R. Part 195 contains regulations for welding of pipelines including qualifications for welders and procedures per industry standards incorporated into PHMSA regulations. 49 C.F.R. Part 195.214, 195.230, 195.243.

45. Complainant failed to prove SPLP violated the law or regulation regarding its welding practices.

46. SPLP proved that its welding practices and procedures meet and/or exceed regulatory requirements.

47. Applicable safety laws and regulations do not require odorant or a public alarm system regarding SPLP's Mariner East pipelines. *See generally* 49 C.F.R. Part 195; N.T. 310:1-8, 322:17-22 (Zurcher), 343:18-344:5 (Perez). *Compare* 49 C.F.R. Part 195 (which does not reference or require odorization of liquid pipelines) *with* 49 C.F.R. Part 192.625 (which requires odorization of certain natural gas pipelines). Further evidence of the non-requirement of odorant and alarm systems is that the Commission is considering whether or not it should promulgate regulations on these issues. *See Advance Notice of Proposed Rulemaking Order*, Docket No. L-2019-3010267, ANOPR Order at 19-20 (Order entered Jun. 13, 2019) (requesting comments on "notification criteria" and "odorant utilization").

48. Ordering SPLP to add odorant to the product in its pipelines or create and install some type of public alarm system would be a mandatory injunction that cannot be imposed based on the record of this proceeding.

C. Proposed Ordering Paragraphs

1. That the Formal Complaint filed by Mr. Wilmer Baker at Docket No. C-2018-3004294 is dismissed.

2. That the Secretary's Bureau shall mark Docket No. C-2018-3004294 closed.