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September 16, 2019

VIA ELECTRONIC FILING

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

Re: Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Sunoco Pipeline L.P. Docket Number C-2018-3006534; **SUNOCO PIPELINE L.P.'S REPLY COMMENTS**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is Sunoco Pipeline L.P.'s Reply Comments.

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

Very truly yours,

Thomas J. Sniscak

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

WES/das
Enclosure

cc: Honorable Elizabeth H. Barnes
Per Certificate of Service

BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA PUBLIC UTILITY COMMISSION, BUREAU OF INVESTIGATION AND ENFORCEMENT Complainant,	:	
v.	:	Docket No. C-2018-3006534
SUNOCO PIPELINE L.P., Respondent.	:	

REPLY COMMENTS OF SUNOCO PIPELINE L.P.

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Dated September 16, 2019

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Sunoco Pipeline L.P. (SPLP) submits these Reply Comments in response to the comments of West Goshen Township (WGT), West Whiteland Township (WWT), and Megan Flynn *et al*'s (Flynn), (collectively, Intervenors[1]) to the Joint Petition for Settlement and Addendum[2] (Settlement) that SPLP and the Commission's Bureau of Investigation and Enforcement (BI&E) entered into that fully resolves this proceeding.

Concurrent with these Reply Comments, SPLP is filing two Motions to Strike regarding the Flynn and WGT Comments respectively. Your Honor expressly held:

> In granting intervention, the Intervenors will be **required to take the case as it currently stands seven months after the filing of the Complaint commencing this proceeding and following the submission of a settlement petition**. The orderly progress of the case will be maintained, the **issues will not be significantly broadened**, and the burden of proof will not be shifted. **Intervenors will be precluded from introducing evidence into the record**.

Bureau of Investigation and Enforcement v. SPLP, Docket No. C-2018-3006534, Order Granting Petitions to Intervene at 17 (Order entered July 15, 2019) (ALJ Barnes) (emphasis added). Both Flynn and WGT ignored Your Honor's ruling, attempting to introduce evidence and broaden issues as well as including impertinent and scandalous allegations in their comment filings, as detailed in SPLP's Motions to Strike. This flagrant disregard of Your Honor's clear and appropriate condition of intervention, which is based on the longstanding Pennsylvania law that an Intervenor (particularly Flynn, given they sat without acting and only intervened 7 months after the

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[1] Other persons were granted intervention in this proceeding. As used herein, Intervenors only refers to those that filed comments.

[2] On June 28, 2019, SPLP and BI&E filed an Addendum to the Settlement. The Addendum modifies the Settlement Agreement Condition of Settlement at Paragraph 21 in exchange for SPLP not exercising its withdrawal from the Settlement at this time due to the Commission's not considering the Settlement directly and instead referring the matter to an Administrative Law Judge for determinations of what, if any, further process is due or appropriate.

Complaint's filing) takes the case as it stands upon intervention, should be enforced and such behavior by WGT and Flynn should not be rewarded.[3]

I. INTRODUCTION AND SUMMARY OF ARGUMENT

A. Commission Policy Is To Encourage Settlements And Intervenor Flynn And WGT's Positions Discourage Settlements And Are Contrary To Well-Established Law

It is the express policy of the Commission as well as Your Honor "to encourage settlements."[4] The Settlement meets the public interest standard and should be approved without modification for a myriad of compelling reasons. Most importantly, the Settlement promotes public safety and achieves results that could not be achieved via litigation as the Settlement will have SPLP voluntarily go above and beyond applicable law and regulation.[5] Specifically, the Settlement will have SPLP undertake a Remaining Life Study (which Governor Wolf requested in his February 19 press release[6]) and accelerate In-Line Inspections and Close Interval Potential Surveys (among other terms that provide affirmative benefits).

B. The Settlement Contains Terms That Are Above And Beyond Existing Law And Regulations That SPLP Voluntarily Is Willing To Perform

The Commission could not order SPLP to perform these above and beyond provisions involuntarily as a result of this litigation because these measures are not required under current

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3 SPLP should not be required to reply to these improper materials.

4 52 Pa. Code § 5.231. ("It is the policy of the Commission to encourage settlements.")

5 *See* I&E Statement in Support of Joint Petition for Settlement at p. 5 ("I&E submits that the Settlement constitutes a reasonable compromise of the issues presented and achieves a preferable outcome compared to one that would have been reached through litigation in that SPLP has agreed to perform actions above and beyond those required by any applicable law or regulation").

6 Press Release, Governor Wolf Issues Statement on DEP Pipeline Permit Bar (Feb. 8, 2019) (available at https://www.governor.pa.gov/newsroom/governor-wolf-issues-statement-dep-pipeline-permit-bar/)

regulations. The Commission implicitly acknowledges this regarding inspection and survey frequency of testing in its June 13, 2019 Advanced Notice of Proposed Rulemaking at Docket No. L-2019-3010267 ("ANOPR") when it seeks to potentially implement more stringent regulations regarding frequency of these tests. *See* ANOPR at 16-19. State Senator Andrew Dinniman also essentially concedes that a remaining life study is not currently a regulatory requirement when he proposed a bill that would require such study and require the Commission to implement regulations regarding such study. SB 677 of 2019.[7] To order SPLP to comply with regulations or law that have not even been drafted yet is *de facto* and illegal retroactive regulation that does not comport with longstanding Pennsylvania law, including its Constitution, The Commonwealth Documents Law, and the Regulatory Review Act.

C. Mandatory Injunctive Relief Sought Or Implied By Intervenors Flynn And WGT Is Unlawful, Inappropriate And Contrary To The Public Interest

Mandatory injunctive relief, an extreme remedy, requiring action above and beyond regulatory requirements could not be obtained through litigation because an injunction must be narrowly tailored to abate the harm complained of and here there is no condition to abate.

> Injunctive relief must be narrowly tailored to abate the harm complained of. *Pye v. Com. Ins. Dep't*, 372 A.2d 33, 35 (Pa.Cmwlth. 1977) ("An injunction is an extraordinary remedy to be granted only with extreme caution"); *Woodward Twp. v. Zerbe*, 6 A.3d 651, 658 (Pa.Cmwlth. 2010) ("Even where the essential prerequisites of an injunction are satisfied, the court must narrowly tailor its remedy to abate the injury"); *West Goshen Township v. Sunoco Pipeline L.P.*, Docket No. C-2017-2589346 at 17-18 (Order entered Mar. 15, 2018).

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[7] (available at https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2019&sessInd=0&billBody=S&billTyp=B&billNbr=0677&pn=0871)

West Goshen Township v. Sunoco Pipeline L.P., Docket No C-2017-2589346, Recommended Decision at 42 (Barnes, J.) (adopted in full by Commission by Order dated Oct. 1, 2018). Moreover, the injunctive relief here would be a mandatory injunction, which is the rarest form of injunctive relief and an "extreme remedy":

> An injunction that commands the performance of an affirmative act, a mandatory injunction, is the rarest form of injunctive relief and is often described as an "extreme" remedy. The case for a mandatory injunction must be made by a very strong showing, one stronger than that required for a restraining-type injunction.

Woodward Tp. v. Zerbe, 6 A.3d 651, 658 (Pa. Cmwlth. 2010) (citing *Big Bass Lake Community Assoc. v. Warren*, 950 A.2d 1137, 1145 (Pa. Cmwlth. 2008)).

SPLP submits the Complaint does not allege facts that show a violation of law requiring a mandatory injunction as a remedy, and thus no legal basis to order SPLP to increase the frequency of its testing or perform a remaining life study. Moreover, the Intervenors are limited to and dependent upon the Complaint as their status is completely dependent and cannot proceed if the Complaint is withdrawn or marked satisfied.[8] Therefore such mandatory injunctive relief would not be available if this proceeding were litigated and it is not available to Intervenors.

D. Intervenors Misstate And Misapply The Well-Established Standard For Approving A Settlement - Whether The Settlement Is In The Public Interest; Not Whether The Additional Relief (Which Impermissibly Expands The Scope Of Issues) An Intervenor Wants Should Be Granted

The Comments filed do not merit rejection or modification of the Settlement. "It is the policy of the Commission to encourage settlements." 52 Pa. Code § 5.231(a). The standard for approval of the Settlement is not whether Intervenors—who are anti-pipeline in other proceedings-

[8] *See, e.g., Bureau of Investigation and Enforcement v. SPLP*, Docket No. C-2018-3006534, Order Granting Petitions to Intervene at 15 (Order entered July 15, 2019).

-oppose it, allege it does not provide all of the relief requested in the Complaint[9] (which by the nature of a settlement is a preposterous assertion), and/or want different or additional terms fit their opposition philosophy. Instead, the benchmark for determining the acceptability of a settlement is whether the proposed terms and conditions are in the public interest. *Pa. PUC v. Philadelphia Gas Works*, Docket No. M-00031768 (Order entered January 7, 2004).

The Commission "evaluate[s] whether a proposed settlement satisfies the 'public interest' standard by a preponderance of the evidence of benefits, and **such burden can be met by showing a likelihood or probability of public benefits that need not be quantified or guaranteed**." *Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc.*, Docket No. C-2014-2427657, Final Opinion and Order at 36 (Order entered June 30, 2016). The public interest includes more than just the interest of the parties and intervenors in litigation:

> This Commission has historically defined the public interest as including ratepayers, shareholders, and the regulated community. *See Pa. PUC v. Bell Atlantic-Pennsylvania, Inc.*, Docket No. R-00953409 (Order entered September 29, 1995). What is in the public interest is decided by examining the effect of the proposed Settlement on these "stakeholder" entities. *Id.*

Id. at 36. Notably, Intervenors are not private attorneys general as such status does not exist under Pennsylvania law[10] and thus cannot purport to represent general interests of ratepayers,

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9 Flynn Comments at 13-16.

10 *Flynn et al. v. SPLP*, Dockets Nos. C-2018-3006116, Order Granting in Part and Denying in Part Complainants' Motion for Reconsideration of Second Interim Order at 5-6 (Order entered June 6, 2019) (Barnes, J.) ("The Complainants do not have the statutory authority under 66 Pa.C.S. §§ 308 and 701 as well as 52 Pa.Code § 1.8 as I&E to bring such a complaint against Respondent."). Instead, that is the statutory duty of BI&E. Pursuant to 66 Pa. C.S. §§ 308, 701, and 52 Pa. Code § 1.8, BI&E is vested with the statutory enforcement and prosecutorial authority to bring Complaints to protect the public interest for violations of the Public Utility Code and the Commission's regulations. ***"BI&E will serve as the prosecutory bureau for purposes of representing the public interest*** . . . and enforcing compliance with the state and federal . . . gas safety laws and regulations." *Implementation of Act 129 of 2008 - Organization of Bureaus and Offices*, Docket No. M-2008-2071852, Final Procedural Order at 5 (Order entered Aug. 11, 2011) (emphasis added).

shareholders, other individuals, or the regulated community. Intervenors cannot hijack BI&E's Complaint and dictate what result BI&E, who by statute represents the interest of the entire public, finds acceptable and benefits the public. Allowing these opportunistic Intervenors to do so will cause utilities or pipelines subject to the Commission's jurisdiction to be unwilling to negotiate resolution of BI&E complaints with BI&E if the settlement then becomes a blank check for intervenors, such as 7-month late Intervenor Flynn here, to pen upon extra terms or conditions reflecting their individual interests. Such result is far from a policy of encouraging settlements. In actuality, many of the features of the Settlement, ***including the Governor's request for a Remaining Life Study, would be well underway but instead have been delayed numerous months and perhaps more until the Commission finally rules on the Settlement as a consequence of allowing these entities to intervene and delay the Settlement.*** That delay neither encourages settlement, and to the extent it has delayed implementation (not to mention causing scheduling and delay costs) of the mutually agreed public safety features of the settlement, fails promote promptly public safety.

Additionally, "the parties in settled cases will be afforded flexibility in reaching amicable resolutions to complaints and other matters so long as the settlement is in the public interest." 52 Pa. Code § 69.1201(b). ***So, the question is simple: does the Settlement promote the public interest greater than the status quo? The question is not: does the Settlement promote additional relief and expanded issues that Intervenors, not statutorily empowered to represent the general public, want to pursue as part of their opposition to pipelines.***

That Intervenors have been granted intervention is irrelevant as to the weight of their Comments. As Your Honor recognized: "I&E and Sunoco have entered into a Settlement in full resolving the Complaint in this proceeding and although intervention is granted, intervenors have

no rights that survive discontinuance of this proceeding." *Bureau of Investigation and Enforcement v. SPLP*, Docket No. C-2018-3006534, Order Granting Petitions to Intervene at 15 (Order entered July 15, 2019) (ALJ Barnes) (July 15 Order). The Commission has consistently and recently in the context of the SPLP pipeline at issue in approving a pleading discontinuing a proceeding, recognized longstanding Pennsylvania law that an intervenor has no right independent to a complainant or petitioner to proceed to separately pursue claims made by a complainant or petition when the complaint or petition has been resolved:

> An intervenor's role in proceedings before this Commission is on a non-party basis, meaning that the initiating and responding parties can drive the outcome without regard to the alleged interests of would-be intervenors.

Petition of the Bureau of Investigation and Enforcement of The Pennsylvania Public Utility Commission for the Issuance of an Ex Parte Emergency Order, Docket No. P-2018-3000281 at 10 (Order entered May 3,2018) (citing 52 Pa. Code § 5.75(c)) ("Rights upon grant of petition. Admission as an intervenor will not be construed as recognition by the Commission that the intervenor has a direct interest in the proceeding or might be aggrieved by an order of the Commission in the proceeding. Intervenors are granted no rights which survive discontinuance of a case.").

Thus, as Your Honor stated:

> In granting intervention, the Intervenors will be **required to take the case as it currently stands seven months after the filing of the Complaint commencing this proceeding and following the submission of a settlement petition**. The orderly progress of the case will be maintained, the **issues will not be significantly broadened**, and the **burden of proof will not be shifted**. **Intervenors will be precluded from introducing evidence** into the record.

July 15 Order at 17 (emphasis added). Moreover, "Intervenors' involvement is not on behalf of "all others similarly situated,'" and thus Intervenors cannot pursue issues on behalf of others. *Id.* at 18.

E. Intervenors attempt to act as private attorney generals is impermissible under law and usurps authority the General Assembly delegated to BI&E

Your Honor has also recognized that Intervenors lack authority to function essentially as a "private attorney general" to pursue the Complaint or terms of the Settlement on behalf of the general public. *Flynn et al. v. SPLP*, Dockets Nos. C-2018-3006116, Order Granting in Part and Denying in Part Complainants' Motion for Reconsideration of Second Interim Order at 5-6 (Order entered June 6, 2019) (Barnes, J.) ("The Complainants do not have the statutory authority under 66 Pa.C.S. §§ 308 and 701 as well as 52 Pa.Code § 1.8 as I&E to bring such a complaint against Respondent."). Instead, that is the statutory duty of BI&E. Pursuant to 66 Pa. C.S. §§ 308, 701, and 52 Pa. Code § 1.8, BI&E is vested with the statutory enforcement and prosecutorial authority to bring Complaints to protect the public interest for violations of the Public Utility Code and the Commission's regulations. "***BI&E will serve as the prosecutory bureau for purposes of representing the public interest*** . . . and enforcing compliance with the state and federal . . . gas safety laws and regulations." *Implementation of Act 129 of 2008 - Organization of Bureaus and Offices*, Docket No. M-2008-2071852, Final Procedural Order at 5 (Order entered Aug. 11, 2011) (emphasis added).

F. Summary Of Response To Intervenors' Specific Allegations

SPLP's responses to specific allegations are detailed in Section III. *infra.* Intervenors' allegations that the Settlement terms are "illusory" or that specific terms are not in the public interest because Intervenors believe the terms should be altered to either their preference or

pipeline opponent (in the case of Flynn) preferences are factually and/or legally incorrect, misconstrue the terms of the Settlement, and/or make unfounded assumptions:

- Flynn's and WGT's confused assertion that the geographic scope of ILI requirements is unclear misconstrues the plain terms of the Settlement and their misunderstanding is no basis to deny or modify the Settlement;
- Flynn's and WGT's assertion that the civil penalty is too low ignores how the Commission determines whether the amount of the penalty is sufficient and the comparable cases that show the civil penalty is proper and substitutes its judgment for that of BI&E who has more knowledge, expertise, and experience than Flynn and WGT have;
- Flynn's and WGT's vacuous assertion that the expert utilized for the Remaining Life Study will not be independent because SPLP will propose three independent experts ignores that the experts SPLP proposes must in fact be independent, that BI&E ultimately gets to choose the expert, and is an unfounded assumption that independent experts will not be proposed and chosen;
- WGT's and WWT's assertions that the Remaining Life Study should be released to the public and/or these entities in full without regard to Confidential Security Information is irresponsible, does not promote infrastructure security, in that it ignores the public safety policy of preventing release of this information which the Legislature clearly recognized in enacting The Confidential Infrastructure Security Information Act;
- Flynn's argument that the Remaining Life Study is inadequate and does not provide relief beyond an existing requirement because the Governor told the PUC to order SPLP to do this in a press release ignores the statutory independence of the PUC and due process;
- Flynn's odd argument that after the ILI terms of the Settlement are complete there is nothing stopping SPLP from never running an ILI tool again misconstrues the

Settlement and ignores pipeline safety regulations regarding ILI run intervals and also BI&E's and PHMSA's enforcement authority;

- Flynn's argument that because SPLP has already revised its procedures that BI&E requested be revised means that this term is not in the public interest ignores that expeditious resolution via the implementation of revised procedures, as SPLP has effectuated here, is the essential policy consideration of the Policy Statement and would promote terrible public policy, encouraging utilities to wait until resolution of a complaint to comply and cooperate with BI&E;
- Flynn's argument that incorporating terms into a settlement that require adherence to law and regulations is not a public benefit ignores the obvious public benefit of compliance with the law and that including such term in a settlement does provide a benefit in that violation of the pertinent law or regulation would not only result in a standalone violation, but also violation of the Settlement; and
- WGT's claims that its obtaining an injunction proves either legally violative actions or inactions, as if it were precedent or proves anything on the merits, is unfounded and such puffery is refuted by it losing on the merits of the underlying complaint not to mention that it is basic law that determinations on injunctions/emergency orders are not precedent but only interim relief pending a decision on the merits.

As detailed in Section III.E. the general theme of the Comments is that Flynn and WGT feel BI&E has inadequately undertaken its investigation and enforcement duties and that Intervenors have the authority to dictate terms of the Settlement, force BI&E to litigate this Complaint, and/or oversee BI&E's actions. This completely ignores BI&E's statutory enforcement and investigation duties and expertise and that Commenters lack of authority to essentially act as a private attorney general to enforce pipeline safety law or oversee BI&E's duties.

Moreover, these arguments do not show the Settlement is not in the public interest. That Intervenors would prefer different settlement terms does not mean that the Settlement does not affirmatively benefit the public. Intervenors arguments ignore that the Commission "evaluate[s]

whether a proposed settlement satisfies the 'public interest' standard by a preponderance of the evidence of benefits, and **such burden can be met by showing a likelihood or probability of public benefits that need not be quantified or guaranteed**." *Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc.*, Docket No. C-2014-2427657, Final Opinion and Order at 36 (Order entered June 30, 2016). The Settlement clearly meets this standard as detailed in Section II.B. *infra.*

II. APPROVAL OF THE SETTLEMENT IS IN THE PUBLIC INTEREST

A. Legal Standard

1. Public Interest Standard

"It is the policy of the Commission to encourage settlements." 52 Pa. Code § 5.231(a). "The focus of inquiry for determining whether a proposed settlement should be recommended for approval is not a 'burden of proof' standard, as is utilized for contested matters." *Pa. Pub. Util. Comm'n et al v. City of Lancaster - Bureau of Water*, Docket Nos. R-2010-2179103 *et al*, Final Opinion and Order at 11 (Order entered July 14, 2011). Instead, the benchmark for determining the acceptability of a settlement is whether the proposed terms and conditions are in the public interest. *Pa. PUC v. Philadelphia Gas Works*, Docket No. M-00031768 (Order entered January 7, 2004).

The Commission "evaluate[s] whether a proposed settlement satisfies the 'public interest' standard by a preponderance of the evidence of benefits, and **such burden can be met by showing a likelihood or probability of public benefits that need not be quantified or guaranteed**." *Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc.*, Docket No. C-2014-2427657, Final Opinion and Order at 36 (Order entered June 30, 2016). The public interest includes more than just the interest of the parties and intervenors in litigation:

> This Commission has historically defined the public interest as including ratepayers, shareholders, and the regulated community. *See Pa. PUC v. Bell Atlantic-Pennsylvania, Inc.*, Docket No. R-00953409 (Order entered September 29, 1995). What is in the public interest is decided by examining the effect of the proposed Settlement on these "stakeholder" entities. *Id.*

Id.

The Commission's policy statement, *Factors and Standards for Evaluating Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations* ("policy statement"), 52 Pa. Code § 69.1201, sets forth ten factors that may be considered in evaluating whether a civil penalty for violating a Commission order, regulation or statute is appropriate, as well as if a proposed settlement for a violation is reasonable and approval of the settlement agreement is in the public interest.

Flynn and WGT's suggestion that each factor of the policy statement must be strictly applied is belied by 52 Pa. Code § 69.1201(b), which provides in relevant part:

> **When applied in settled cases, these factors and standards will not be applied in as strict a fashion as in a litigated proceeding. The parties in settled cases will be afforded flexibility in reaching amicable resolutions to complaints and other matters so long as the settlement is in the public interest.**

Id. (emphasis added). Contrary to Intervenors' interpretation, the Commission is statutorily mandated to consider whether the terms and conditions of the Settlement are in the public interest based on the terms of the settlement as a whole. *Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc.*, Docket No. C-2014-2427657, Initial Decision at 59 (Initial Decision entered Nov. 19, 2015) (ALJ Barnes and ALJ Cheskis) (rejecting the argument that settlement not in the public interest based on argument that the civil penalty in the settlement insufficient to deter future violations on the principle that "the settlement must be considered as a whole, not piecemeal.") (Adopted in relevant part with unrelated modification by Final Order entered July 14, 2016 at p.

67) ("The ALJs discussed the pertinent Commission Settlement Guidelines, or Rosi factors, at pages 51-63 of the Initial Decision. We concur with the ALJs' analysis in determining the amount of the penalty against IDT in this proceeding as well as their discussion addressing the public interest benefits in support of granting the Joint Petition for Approval of Settlement. For the sake of brevity, the ALJs' analysis and discussion of the Commission Settlement Guidelines are incorporated herein by reference.").

2. Scope of Comments and Role of Intervenors

As Your Honor recognized: "I&E and Sunoco have entered into a Settlement in full resolving the Complaint in this proceeding and although intervention is granted, intervenors have no rights that survive discontinuance of this proceeding." *Bureau of Investigation and Enforcement v. SPLP*, Docket No. C-2018-3006534, Order Granting Petitions to Intervene at 15 (Order entered July 15, 2019) (ALJ Barnes) (July 15 Order). An intervenor has no right to proceed to separately pursue claims made by a complainant when the complaint has been resolved:

> An intervenor's role in proceedings before this Commission is on a non-party basis, meaning that the initiating and responding parties can drive the outcome without regard to the alleged interests of would-be intervenors.

Petition of the Bureau of Investigation and Enforcement of The Pennsylvania Public Utility Commission for the Issuance of an Ex Parte Emergency Order, Docket No. P-2018-3000281 at 10 (Order entered May 3,2018) (citing 52 Pa. Code § 5.75(c)) ("Rights upon grant of petition. Admission as an intervenor will not be construed as recognition by the Commission that the intervenor has a direct interest in the proceeding or might be aggrieved by an order of the Commission in the proceeding. Intervenors are granted no rights which survive discontinuance of a case.").

Thus, as Your Honor stated:

> In granting intervention, the Intervenors will be **required to take the case as it currently stands seven months after the filing of the Complaint commencing this proceeding and following the submission of a settlement petition**. The orderly progress of the case will be maintained, the **issues will not be significantly broadened**, and the **burden of proof will not be shifted**. **Intervenors will be precluded from introducing evidence** into the record.

July 15 Order at 17. Moreover, "Intervenors' involvement is not on behalf of "all others similarly situated,'" and thus Intervenors cannot pursue issues on behalf of others. *Id.* at 18.

Your Honor has also recognized that Intervenors lack authority to essentially function as a "private attorney general" to pursue the Complaint or terms of the Settlement on behalf of the general public. *Flynn et al. v. SPLP*, Dockets Nos. C-2018-3006116, Order Granting in Part and Denying in Part Complainants' Motion for Reconsideration of Second Interim Order at 5-6 (Order entered June 6, 2019) (Barnes, J.) ("The Complainants do not have the statutory authority under 66 Pa.C.S. §§ 308 and 701 as well as 52 Pa.Code § 1.8 as I&E to bring such a complaint against Respondent."). Instead, that is the statutory duty of BI&E. Pursuant to 66 Pa. C.S. §§ 308, 701, and 52 Pa. Code § 1.8, BI&E is vested with the statutory enforcement and prosecutorial authority to bring Complaints to protect the public interest for violations of the Public Utility Code and the Commission's regulations. **"BI&E will serve as the prosecutory bureau for purposes of representing the public interest** . . . and enforcing compliance with the state and federal . . . gas safety laws and regulations." *Implementation of Act 129 of 2008 - Organization of Bureaus and Offices*, Docket No. M-2008-2071852, Final Procedural Order at 5 (Order entered Aug. 11, 2011) (emphasis added).

B. The Joint Settlement is in the Public Interest

The Settlement is in the public interest because it promotes public safety and SPLP has agreed to take steps above and beyond statutory and regulatory requirements that SPLP believes the Commission could not unilaterally order SPLP to undertake involuntarily if this Complaint had been fully litigated. The Settlement avoids the time and costs to the Parties and the Commission of full litigation, including potential appeals.

SPLP has acted in good faith to comply with BI&E's investigation since notifying BI&E of the pin-hole leak on the day it occurred. SPLP had a laboratory analysis conducted of the segment of the pipeline where the leak occurred and provided the results to BI&E. SPLP also complied with extensive requests for data. SPLP also notes that the incident did not result in injury to anyone.

This Settlement is clearly in the public interest as it "effectively addresses I&E's allegations that are the subject of the I&E Complaint proceeding, promotes public and facility safety, and avoids the time and expense of litigation, which entails hearings, travel for Respondent's witnesses, and the preparation and filing of briefs, exceptions, reply exceptions, as well as possible appeals." Settlement at 8. As recognized by I&E in its Statement in Support, because the Settlement contains safety and integrity features that substantially exceed what is required under prevailing law and applicable regulations and, importantly, exceeds what could be legally ordered by this Commission,[11] expeditious approval is in the public interest.

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[11] BI&E Statement in Support at 5 ("I&E submits that the Settlement constitutes a reasonable compromise of the issues presented and achieves a preferable outcome compared to one that would have been reached through litigation in that SPLP has agreed to perform actions above and beyond those required by any applicable law or regulation").

Analysis of the Policy Statement factors shows that the Settlement is reasonable and that expeditious approval of the Settlement is in the public interest.

1. Nature of Conduct

The first factor noted in the policy statement asks:

> Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.

52 Pa. Code § 69.1201(c)(1). While SPLP agrees that pipeline safety is a serious subject and concern, given the denial of wrongdoing, this factor is inapplicable here where there has been no determination of whether the alleged conduct violated the law and SPLP has not conceded any such wrongdoing. Specifically, as set forth in SPLP's January 31, 2019 Answer and April 3, 2019 Statement in Support, SPLP disagrees that its cathodic protection practices and procedures were not compliant with applicable law and regulations. SPLP likewise explained that just because a pin-hole leak occurred, does not mean SPLP violated any law or regulation. *Bennett v. UGI Central Penn Gas, Inc.*, Docket No. F-2013-239661 (Initial Decision entered April 22, 2014) (Final by operation of law); *see also Emerald Art Glass v. Duquesne Light Co.*, Docket No. C-000 15494, 2002 WL 31060581 (June 14, 2002). SPLP argued that the allegations that SPLP violated federal pipeline safety law and regulations was based on BI&E's after-the-fact subjective interpretations of federal regulations and that applying such interpretations to SPLP was akin to retroactive rulemaking that violates due process. SPLP also explained that the Federal pipeline safety regulations that the Pipeline and Hazardous Materials Safety Administration (PHMSA) has promulgated are performance based, intended to establish minimum safety standards that are then tailored within the discretion of the pipeline operator to individual systems.

In sum, given that this case has led to a Settlement that resolves this proceeding without requiring the time and costs of litigating and deciding the merits of the Complaint, which the Commission encourages, any determination as to the merits of BI&E's allegations is prohibited at this stage and should not be considered in determining whether the Settlement is in the public interest.

2. Consequences of Conduct

The second factor identified by the policy statement looks to "[w]hether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty." As affirmed in BI&E's statement in support: "No serious consequences, such as personal injury or damage to buildings, occurred with respect to the allegations advanced by I&E in its Complaint." BI&E Statement at 11. This factor weighs in favor of approval.

3. Modification of Internal Practices or Procedures

The next applicable factor[12] asks:

> Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the

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[12] Whether the conduct was intentional or negligent is not applicable to settled cases per 52 Pa. Code § 69.1201(c)(3), and is thus inapplicable here. Notably, to the extent the Commission has found substantial monetary penalties warranted, it was the application of (c)(3) that supported imposition of such penalties. *See HIKO Energy, LLC v. Pennsylvania Pub. Util. Comm'n*, 163 A.3d 1079, 1103 (Pa. Cmwlth.), aff'd, 209 A.3d 246 (Pa. 2019) (emphasis in original) ("Additionally, the third penalty factor, which involves a determination of whether the conduct at issue is intentional or negligent, and which the PUC considered of great import here, 'may only be considered in evaluating litigated cases.' 52 Pa. Code § 69.1201(c)(3).); *see also* Section III.B. *infra*.

> conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

52 Pa. Code § 69.1201(c)(4). As the Settlement confirms, revised procedures have already been implemented to BI&E's satisfaction:

> D. Revision of Procedures:
>
> The Parties agree that SPLP's May 2018 revisions to procedures Energy Transfer SOP HLD.22 have addressed I&E's requested relief set forth in Paragraphs 47(c)-(d) of the Complaint.
>
> E. Implementation of Revised Procedures:
>
> The Parties agree that SPLP has implemented the revised procedures and has fulfilled I&E's requested relief set forth in Paragraphs 47(c)-(d) of the Complaint.

Settlement at 10. The expeditious implementation of revised procedures is clearly in the public interest and this factor weighs in favor of approval of the Settlement.

4. Number of Customers Affected and Duration

The next factor, 52 Pa. Code § 69.1201(c)(5), looks to the "number of customers affected and the duration of the violation." Notably, none of the Intervenors or parties are customers of SPLP. Therefore, no Intervenor has standing to raise this factor – none of them are customers of the ME1 pipeline. If and since SPLP's customers do not seek to be heard on this issue, there is no reason for the Commission to consider it. Nonetheless, even if Intervenors did possess standing to raise this issue, Flynn's bold assertion that "[w]ithout this information [the number of customers affected], the Commission cannot evaluate the proposed settlement"[13] is defeated by the plain language of the policy statement, which provides for the Commission's liberal consideration of the Policy Statement factors in settled proceedings. Furthermore, the suggestion that any one factor in the policy statement could be dispositive is belied by the Commission's wide-latitude in

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13 Flynn Comments at 21.

application of the policy statement's discretionary factors and overall duty to consider the Settlement as a whole. *See* Section II.A. *supra*.

5. Compliance History

The next factor, SPLP's compliance history, likewise weighs in favor of approval of the settlement. Specifically, this factor looks to:

> The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas *frequent, recurrent violations by a utility* may result in a higher penalty.

52 Pa. Code § 69.1201(c)(6) (emphasis added). As BI&E confirms: "**the Commission has not expressly found SPLP in violation of any law or regulation, or directed SPLP to pay a civil penalty in connection with a violation.**" BI&E Statement in Support at 14 (emphasis added).

Unable to rebut the fact of SPLP's PUC compliance history and oblivious to the clear directive of 52 Pa. Code § 69.1201(c)(6), WGT and Flynn attempt to smear SPLP by raising unrelated alleged regulatory interactions involving SPLP, from interactions with other agencies, in other states, and regardless if a violation was found.[14] The plain language of 52 Pa. Code § 69.1201(c)(6) and SPLP's due process rights prohibit this result. To be clear, the Commission's consideration is limited to "frequent, recurrent violations by a utility," i.e., whether the utility has been found in violation of the Pennsylvania Public Utility Code or Commission regulation. To the extent Flynn and West Goshen direct the Commission's attention to SPLP's alleged activity in other states and before other agencies, such activity cannot be considered here. That type of

[14] Flynn Comments at 23-34; WGT Comments at 7-9.

advocacy and citation to other states and other non-Pennsylvania pipelines was rejected by the Commission as evidence to find even a substantial question of law, let alone an actual violation.[15]

Regarding Commission proceedings, WGT alleges that SPLP violated a 2015 Settlement Agreement with WGT for which WGT filed a complaint with the Commission.[16] In fact, Your Honor and the Commission found that **SPLP DID NOT VIOLATE THE AGREEMENT**. *West Goshen Township v. Sunoco Pipeline L.P.*, Docket No. C-2017-2589346 (Order entered Oct 1, 2018) at 15 (ALJ finding that SPLP did not breach duty of good faith and fair dealing), 16 (ALJ finding that SPLP satisfied notice provisions of agreement), 18 ("**The ALJ found that Sunoco did not breach the Agreement**"), 22 (adopting ALJ Barnes' Recommended Decision in full).

Pipeline opponent Flynn falsely alleges that the Commission has found SPLP "to be a regular, repeat violator."[17] The only support Flynn provides for this exaggeration is the ALJ Interim Emergency Order in the Dinniman proceeding that under law is neither precedent nor a final determination on the merits. First, that Order was not a Commission order and the Commission overturned that Order regarding ME1. Second, that Order was issued on an emergency basis and where the standard was whether a substantial question of law was presented, where SPLP was not afforded a full and fair hearing on the merits, and where there has been no final determination of a violation of law on the merits. A preliminary injunction is not precedent under Pennsylvania law.[18] Any implication by Flynn that a preliminary injunction is proof a violation where, rather, it is no more than a finding that there is a chance to prevail on the merits,

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15 *State Senator Dinniman v. SPLP*, Docket Nos. P-2018-3001453 et al, Order and Opinion at 35, 39-40 (Order entered June 15, 2018).

16 WGT Comments at 3, 8.

17 Flynn Comments at 22.

18 *Buck Hill Falls Co. v. Clifford Press*, 791 A.2d 392, 397 (Pa. Super. 2002) ("In contrast to a permanent injunction, a decision regarding a preliminary injunction is not binding for purposes of a final adjudication."); *see also Humphreys v. Cain*, 477 A.2d 32, 35 (Pa. Cmwlth. 1984).

is a direct contravention of the law and simply false advocacy. To find that such interim injunctive-type order as evidence of a violation of law prejudges that proceeding when the merits are not yet concluded and violates SPLP's due process rights.

WGT likewise alleges that the Dinniman proceeding and the BI&E Ex Parte Emergency Order proceeding are evidence of a violation and non-compliance[19] and is incorrect for the same reasons - simply inexcusable advocacy to treat a decision on an injunction as a determination on the merits. WGT is wholly incorrect that the Commission "exercised its prosecutorial discretion not to impose civil penalties with these clear, legal violations." First, there was no finding of violation and could not be as stated above. Second, the Commission may only impose civil penalties when a violation is found via a final adjudication on the merits as ex parte and interim emergency proceedings may only result in injunctive relief. *See* 52 Pa. Code §§ 3.1-3.11.

Contrary to WGT and Flynn's incorrect, inflammatory and irrelevant accusations, SPLP's compliance history before the Commission weighs heavily in favor of approval of the Settlement.

6. Cooperation with Commission Investigation

The next factor asks: "whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty." 52 Pa. Code § 69.1201(c)(7).

As confirmed by BI&E, SPLP has fully cooperated with BIE and acted in good faith and complied with BI&E's investigation and worked via lengthy and fulsome negotiations towards efficient and fair resolution embodied in the Settlement. BI&E Statement in Support at 14 ("SPLP has been forthcoming with information and has cooperated with the I&E Safety Division and

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[19] WGT Comments at 7.

prosecutory staff."). The fact that a biased chronic pipeline opponent such as Flynn has a distaste for SPLP is no basis to deny a public safety facilitating settlement with BI&E.

Flynn argues that both SPLP and BI&E have acted in bad faith in entering into a settlement that included terms above and beyond regulatory requirements.[20] Flynn Comments at 33-34. This is nonsense. Contrary to Flynn's suggestion, both BI&E and SPLP have acted in good faith in securing a settlement that resolves BI&E's concerns efficiently without the need for litigation. That the Settlement provides for greater relief than SPLP believes could have achieved through litigation is not suggestive of bad faith, but rather supports that the Settlement is in the public interest as it provides certainty in obtaining the unprecedented study (not required under existing law or regulation) sought here. *See* BI&E Statement in Support at 5 ("I&E submits that the Settlement constitutes a reasonable compromise of the issues presented and achieves a preferable outcome compared to one that would have been reached through litigation in that SPLP has agreed to perform actions above and beyond those required by any applicable law or regulation"). Regardless, Flynn's unsupported speculation regarding SPLP and BI&E's interactions, and its cheap attempt to impugn the integrity of SPLP and BI&E in this proceeding deserves no weight and just shows chronic pipeline opponent Flynn has a penchant to turn on anyone who allows the pipelines at issue to function. BI&E is the investigatory body in the best independent and legislatively created and appointed position to speak to SPLP's cooperation with its investigation, and affirms that SPLP has been a cooperative and forthcoming with BI&E's safety division and prosecutors. Thus, this factor also weighs heavily in favor of approval.

[20] At other portions of Flynn's Comments they claim the terms of Settlement are "illusory" which is refuted by their argument here that the Settlement terms are more extensive than existing law and regulation.

7. *Appropriate Amount to Deter Future Violations and Similar Commission Cases*

The Settlement provides for a civil penalty of Two Hundred Thousand Dollars ($200,000), which may not be claimed as a tax deduction by operation of law. Settlement at 5. This substantial penalty, which is 89% of the penalty BI&E sought in the Complaint is sufficient to deter SPLP from committing future violations and in line with civil penalties that have been previously imposed by the Commission for pipeline failures related to corrosion. *See* BI&E Statement at 15-16. Moreover, the Settlement requires SPLP to conduct other actions which have significant financial impacts on SPLP that must be weighed into the total deterring effect for future violations. For instance, SPLP agreed to conduct In-Line Inspections and Close Interval Surveys in shorter time periods than required under the law. SPLP Statement in Support at 12. Notably, increasing the frequency of Close Interval Surveys will cost approximately $350,000 per survey. *Id.* SPLP also must pay for the expert to conduct the Remaining Life Study, which will entail significant time and fees and ongoing annual updates. The costs of these additional Settlement terms, along with the $200,000 civil penalty, is in line with Commission precedent and is a sufficient deterrent to prevent similar future occurrences. *See Pa. Pub. Util. Comm'n v. Columbia Gas of Pennsylvania, Inc.*, Docket No. M-2009-1505396, Opinion and Order at 8. (Order entered Aug. 3, 2010) (Finding that when considering the proposed settlement as a whole, the civil penalty was adequate). Completely lost on Flynn is that none of these additional voluntary commitments could be ordered after litigation.[21] Their bias and myopic mission to stop pipelines for the sake of stopping pipelines and relationship to those who oppose fossil fuels should be disregarded for the bias it represents.

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[21] *Supra* Section I.C.

8. Additional Factors Supporting Approval

The tenth factor considers "other relevant factors." 52 Pa. Code § 69.1201(c)(10). SPLP agrees with BI&E that an additional relevant factor — whether the case was settled or litigated — "is of pivotal importance to this Settlement Agreement." BI&E Statement in Support at 18. This is especially true here where no violation has been found by the Commission and SPLP is prepared to contest BI&E's allegations through litigation. As BI&E explains in its Statement in Support:

> Reasonable settlement terms can represent economic and programmatic compromise but allow the parties to move forward and to focus on implementing the agreed upon remedial actions. Significantly, I&E asserts that it was able to obtain relief by virtue of this Settlement that it would not have otherwise been successful in obtaining had this matter been fully litigated as SPLP has agreed to perform measures above and beyond what the applicable laws and regulations require.

Id.

III. SPECIFIC REPLIES TO INTERVENORS' COMMENTS

Intervenor WGT and Flynn's allegations that the Settlement terms are "illusory" or that specific terms are not in the public interest because Intervenors believe the terms should be altered to their preference are factually and/or legally incorrect, misconstrue the terms of the Settlement, and/or make unfounded assumptions. As detailed below:

- Flynn's and WGT's confused assertion that the geographic scope of ILI requirements is unclear misconstrues the plain terms of the Settlement;
- Flynn's and WGT's assertion that the civil penalty is too low ignores how the Commission determines whether the amount of the penalty is sufficient and the comparable cases that show the civil penalty is proper and substitutes its judgment for that of BI&E who has more knowledge, expertise, and experience than Flynn and WGT have;

- Flynn's and WGT's vacuous assertion that the expert utilized for the Remaining Life Study will not be independent because SPLP will propose three independent experts ignores that the experts SPLP proposes must in fact be independent, that BI&E ultimately gets to choose the expert, and is an unfounded assumption that independent experts will not be proposed and chosen;
- WGT's and WWT's assertions that the Remaining Life Study should be released to the public and/or these entities in full without regard to Confidential Security Information is irresponsible, does not promote infrastructure security, in that it ignores the public safety policy of preventing release of this information which the Legislature clearly recognized in enacting The Confidential Infrastructure Security Information Act;
- Flynn's argument that the Remaining Life Study is inadequate and does not provide relief beyond an existing requirement because the Governor told the PUC to order SPLP to do this in a press release ignores the statutory independence of the PUC and due process;
- Flynn's odd argument that after the ILI terms of the Settlement are complete there is nothing stopping SPLP from never running an ILI tool again misconstrues the Settlement and ignores pipeline safety regulations regarding ILI run intervals and also BI&E's and PHMSA's enforcement authority;
- Flynn's argument that because SPLP has already revised its procedures that BI&E requested be revised means that this term is not in the public interest ignores that expeditious resolution via the implementation of revised procedures, as SPLP has effectuated here, is the essential policy consideration of the Policy Statement and would promote terrible public policy, encouraging utilities to wait until resolution of a complaint to comply and cooperate with BI&E; and
- Flynn's argument that incorporating terms into a settlement that require adherence to law and regulations is not a public benefit ignores the obvious public benefit of compliance with the law and that including such term in a settlement does provide a

benefit in that violation of the pertinent law or regulation would not only result in a standalone violation, but also violation of the Settlement.

As detailed in Section III.F. the general theme of WGT and Flynn's Comments is that they feel BI&E has inadequately undertaken its investigation and enforcement duties and that they have the authority to dictate terms of the Settlement, force BI&E to litigate this Complaint, enforce pipeline safety law and regulations and/or oversee BI&E's actions. This completely ignores BI&E's statutory enforcement and investigation duties and expertise and that Commenters lack of authority to essentially act as a private attorney general to enforce pipeline safety law or oversee BI&E's duties.

Moreover, these arguments do not show the Settlement is not in the public interest. That Intervenors would prefer different settlement terms does not mean that the Settlement does not affirmatively benefit the public. Intervenors arguments ignore that the Commission "evaluate[s] whether a proposed settlement satisfies the 'public interest' standard by a preponderance of the evidence of benefits, and **such burden can be met by showing a likelihood or probability of public benefits that need not be quantified or guaranteed**." *Commonwealth of Pennsylvania, by Attorney Gen. Kathleen G. Kane, Through the Bureau of Consumer Prot., Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc.*, Docket No. C-2014-2427657, Final Opinion and Order at 36 (Order entered June 30, 2016) . The Settlement clearly meets this standard as detailed in Section II.B. *supra.*

A. Geographic Scope

Intervenors WGT and Flynn claim that it is "unclear" whether The Settlement is geographically limited to segments of ME1 or includes the entire pipeline. Flynn Comments at 14; WGT Comments at 2. The Settlement clearly requires after the ILI runs of two identified

portions of MEl that SPLP conduct two additional ILI runs of the entire MEl pipeline at 18-month intervals. Settlement at p. 7, C.a. ("Thus, the Parties agree that SPLP will conduct the two remaining ILI runs in April 2019 or within 60 days of MEl resuming service, then conduct ILI run #1 of MEl eighteen (18) months after the date SPLP enters into an agreement with I&E, and then conduct ILI run #2 of MEl eighteen (18) months after the completion of ILI run #1."). Had WGT and Flynn properly considered all terms and conditions of the Settlement, as the Commission is bound to do, they would have fully appreciated the scope and unprecedent nature of the studies effectuated by Settlement.

B. Civil Penalty

Flynn's claim that the civil penalty amount "provides no meaningful relief" and WGT's claim that the civil penalty is "disproportionately low,"[22] are defeated by SPLP's compliance history and Commission application of the Policy Factors. *See* Section II.B.5. *supra.*

WGT, who recently failed to prove its latest complaint which Your Honor and the Commission rejected, calls for the maximum civil penalty of $2,000,000 to "send [a] message," yet fails to identify any instance where SPLP was found in violation of the PUC's regulations, or any support generally to warrant a maximum penalty being assessed here. Notwithstanding WGT's inflammatory and irrelevant attacks against SPLP,[23] its assertion of SPLP's "wanton disregard for public safety and protection of the environment" is without merit. So too regarding Flynn's irrelevant, improper, incorrect, and/or unsupported allegations they claim relate to compliance.[24]

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22 Flynn Comments at 10, 34; WGT Comments at 6-8.

23 WGT referenced a prior settlement agreement dispute between it and SPLP where Your Honor and the Commission found SPLP had not breached the settlement agreement, unrelated enforcement actions by other agencies not under this Commission's jurisdiction, and the February 2019 statement by Governor Tom Wolf.

24 Flynn Comments at 21-34.

Given SPLP's actual history of relevant compliance, *supra* Section II.B.5, the maximum penalty WGT proposes or a higher penalty than provided in the Settlement bears no rational relation to the alleged offenses, and imposition of such a penalty in this circumstance would violate SPLP's due process rights under the U.S. and Pennsylvania Constitutions. *See St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919) (state-ordered monetary penalties violate due process clause's guarantee against unlawful deprivation of property when penalties are "wholly disproportioned to the offense and obviously unreasonable").

Contrary to WGT's assertions, its false allegation of "wanton disregard" cannot be considered in reviewing whether the Settlement is in the public interest as the conduct at issue should only be considered in evaluating litigated cases (where conduct is actually determined to be in violation of the law or regulation), and not cases which have resulted in settlement between the parties where there is no admission of violation of law or regulation. *See* 52 Pa. Code § 69.1201(c)(3); *See also HIKO Energy, LLC v. Pennsylvania Pub. Util. Comm'n*, 163 A.3d 1079, 1103 (Pa. Cmwlth.), *aff'd*, 209 A.3d 246 (Pa. 2019)(emphasis in original) ("Additionally, the third penalty factor, which involves a determination of whether the conduct at issue is intentional or negligent, and which the PUC considered of great import here, "may only be considered in evaluating litigated cases." 52 Pa. Code § 69.1201(c)(3) (emphasis added). Indeed, when conduct is deemed intentional, it may result in a higher penalty. *Id.*").

In its statement, BI&E details numerous past Commission decisions in similar situations of pipeline failures attributable to corrosion and provides distinguishing factors of each to the instant matter. BI&E Statement at 15-18. Notably, each of these similar situations resulted in an explosion, fire, injury, or destruction of property in contrast to the pin-hole leak here that resulted in minimal product release. *Id.* The proposed civil penalty here is proportional to the outcome and

has a proportional deterring effect. Here, there was no explosion, fire, injury, or destruction of property that resulted. In fact, the civil penalty assessed, as stated by BI&E, is greater than cases where significant fatalities, injuries, and property damage had occurred. *Id.* WGT's assertion that the maximum penalty of $2,000,000 should be assessed and Flynn's characterization of the penalty as "disproportionately low" are unsupported, especially where the current civil penalty and SPLP's agreed upon remedial measures are substantial and sufficient to deter SPLP from future occurrences.

C. Remaining Life Study

1. Independent Expert

SPLP has agreed to retain an independent expert, selected by I&E to perform the Remaining Life Study of ME1. WGT and Flynn misinterpret this term to incorrectly allege that lack of BI&E oversight does not provide for selection of a truly "independent" expert and that SPLP has significant "control" over the expert selection process. Flynn Comments at 10-11; WGT Comments at 9-10. Neither is true. First, these arguments rely on the assumption that SPLP will violate the Settlement by not proposing independent experts – such assumption is unwarranted and cannot be made. Next, BI&E is the decisionmaker with control over the ultimate selection of the expert. Moreover, the Settlement requires the three independent experts SPLP proposes be (1) qualified and (2) have previously conducted independent studies for governmental agencies. Settlement at 5. Contrary to these WGT and Flynn's misinterpretation, if SPLP fails to propose independent experts, then it has not complied with the Settlement. Moreover, this term far from provides SPLP with total control over the process; instead, the process will allow for efficient selection of a qualified expert as SPLP is in the best position to identify and screen for experts that

are unqualified or not independent and BI&E ultimately gets to choose the independent expert that will conduct the study.

2. Public Release of Remaining Life Study

The Settlement provides that a summary of the independent expert's findings as to the Remaining Life Study will be publicly available, excluding proprietary information or Confidential Security Information (CSI). WGT and WWT argue that the Remaining Life Study should be released in full, either to the public at large[25] or to the Townships.[26] Such a release is against public policy, and would harm the public interest by endangering public safety and the safety of SPLP's pipeline operation. WGT and WWT's arguments disregard public safety by seeking public release of CSI. They ignore or would render nugatory the legislation that expressly seeks to protect CSI for public safety reason and their hope to fish for information to further their distaste for the pipeline at issue is no reason to disregard legislation and public safety.

While certain observations concerning the characteristics of SPLP's HVL pipelines – such as their general path or the location of the above-ground valves – can be seen at the surface level, the Remaining Life Study will contain far more detailed information than anything that could be obtained through surface-level observation. In any event, having surface facilities does not and cannot trump or negate the legislation protecting CSI discussed below. In addition to privileged and/or confidential proprietary information that may be included in the Study, the disclosure of which would cause substantial harm to the competitive position of SPLP, the Remaining Life Study requires certain confidential security information be included relating to SPLP's pipeline. The release of this information would create a much more significant risk to the security and

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25 WGT Comments at 10.

26 WWT Comments at 4.

integrity of the Pipelines than anything that could be obtained through surface-level observation. Specifically, providing an individual or group of individuals with the detailed calculations contained in the Remaining Life Study would give someone with malicious intent knowledge necessary to breach, damage or destroy the pipelines, putting the public at risk. The General Assembly has recognized the importance of protection of such information via passage of The Public Utility Confidential Security Information Disclosure Protection Act, 35 P.S. § 2141.1 to 2141.6, which specifically provides for special procedures for the handling and protection of a public utility's information that could compromise security or endanger life, safety, or public utility facilities. The necessity for protection of such information is based on substantial national security concerns. As explained in a recent GAO report:

> According to TSA, pipelines are vulnerable to physical attacks—including the use of firearms or explosives—largely due to their stationary nature, the volatility of transported products, and the dispersed nature of pipeline networks spanning urban and outlying areas. The nature of the transported commodity and the potential effect of an attack on national security, commerce, and public health make some pipelines and their assets more attractive targets for attack. Oil and gas pipelines have been and continue to be targeted by terrorists and other malicious groups globally.[27]

WGT's blithe suggestion that such sensitive security information may be released in full to the public illustrates the need for protection of this information. Unlike the Commission and BI&E, which possess the technical expertise and CSI Act procedures that will ensure appropriate protection of SPLP's CSI information, WWT and WGT's arguments demonstrate that they do not appreciate the nature of CSI nor the national security concerns associated with its protection, and

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[27] U.S. Gov't Accountability Off., GAO-19-48, Critical Infrastructure Protection Actions Needed to Address Significant Weaknesses in TSA's Pipeline Security Program Management, pgs. 10-11 (Dec. 2018), available at https://www.gao.gov/assets/700/696123.pdf.

most importantly, do not possess the procedures necessary to ensure protection of SPLP's CSI as required by the CSI Act.

To the extent the Townships acknowledge any need to protect CSI related to SPLP's pipeline, they misunderstand the statutory protections implicated. Contrary to the Townships assurance, that the Right-to-Know law and Sunshine Act do not provide sufficient protection for the CSI information at issue here – a fact the General Assembly recognized through the additional protections provided in the CSI Act, including the exclusion of such information under the Right-to-Know law. Contrary to the Townships assertions, the purpose of the Right-to-Know law and Sunshine Act is public disclosure, not the protection of information from disclosure, and SPLP's third-party due process rights under these statutes are minimal. *Pennsylvania State Education Association ex rel. Wilson v. Commonwealth*, 50 A.3d 1263, 1277 (Pa. 2012) (recognizing the absence of procedural due process under the RTKL for third parties with a direct interest in the information requested from an agency). The statutory scheme is clear – dissemination of the Remaining Life Study to the extent the Townships request is contrary to law and public policy and would pose a significant risk to SPLP's infrastructure, employees, and the public at large. Thus, the Settlement's protection of such information is reasonable and in the public interest.

3. Adequacy of Remaining Life Study

That Flynn argues that the Remaining Life Study is an inadequate term as it does not provide additional relief above and beyond what was recommended by the Governor and DEP merely illustrates Flynn's ongoing confusion regarding the Commission's authority.[28] This is another nonsensical argument. The PUC is an independent agency under the legislative branch and is not subject to any above or beyond mandate as Flynn's advocacy concocts—note the

[28] *See* Section III.F. *infra*.

absence of any legal support by Flynn's counsel. Moreover, the suggestion that a statement in a press release could override all due process considerations of notice and hearing to find a violation of law, which is the only circumstance the Commission could potentially attempt to order such relief, is completely contrary to Federal and Pennsylvania Constitutional due process requirements. *See West Penn Power Co. v. Pa. Pub. Util. 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, 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."). Likewise, the Commission is not subordinate to DEP or its policy. *See Application of Cmv Sewage Co., Inc.*, Docket No. A-230056F2002, 2008 WL 5786553, at *7 (Pa. PUC Dec. 23, 2008) ("The Commission cannot abdicate its statutory responsibility to determine what is in the public interest merely because of another Commonwealth agency's policy.").

If anything, Flynn's specious argument works at cross-purposes with SPLP and BI&E's intent to effectuate on an SPLP voluntary basis what the Governor suggested and is rank opportunism by a pipeline opponent to fight against what BI&E agreed is a reasonable implementation of the Governor's suggestion and BI&E's request for relief.

D. ILI Frequency

Flynn next argues that the only post-study obligations are (a) an annual report; (b) conduct of CIS; and (c) collaboration with BIE to agree on ILI interval period and that there "nothing barring SPLP from simply choosing to never do an ILI run again." Flynn Comments at 12. Once again, Flynn ignores the Commission and BI&E's statutory enforcement authority and pipeline safety regulations. *See* Section III.F. *infra*. Pursuant to 49 C.F.R. § 195.452 for pipelines in high consequence areas, which include the areas of Chester and Delaware county where the ME1 pipeline is located (all Intervenors are located in these counties), SPLP must have and follow an

integrity management plan that includes assessment of integrity on five-year intervals not to exceed 68 months that utilizes assessment methods such as in-line inspections. Those in-line inspections are required to comply with the standards in § 195.591. BI&E is required to perform its statutory duty to enforce such regulations – the Settlement does not change that.

Flynn's argument also misconstrues the plain terms of the Settlement, which provide for cooperation between SPLP and BI&E regarding the frequency of ILIs. The Settlement clearly contemplates SPLP continuing its practice of performing ILIs. The Settlement states:

> At the conclusion of the three-year ILI period, the Parties agree that SPLP shall retain an independent consulting firm to assist in establishing a reassessment interval using corrosion growth analysis and will meet with I&E to discuss SPLP's planned ILI inspection frequency. I&E is not required to wholly accept the interval recommendations proposed by SPLP's independent consultant. Should the ILI interval recommendation not be wholly accepted by I&E, I&E and SPLP agree to collaborate using best efforts to arrive at a mutually acceptable ILI interval period.

Settlement at P 17.C.a.

E. Revision of Procedures & Pipeline Replacement

While SPLP does not believe its prior procedures were non-compliant, SPLP voluntarily revised these procedures prior to the Complaint being filed in this matter, demonstrating good faith and cooperation with BI&E concerning pipeline safety. These procedures have already been implemented. Flynn argues that provisions (D) and (E) of the Settlement, which relate to the revision of procedures and implementation of revised procedures, reflect changes made prior to the Settlement and independent of the complaint, and therefore do not provide any new relief and do not show the Settlement is in the public interest. Flynn Comments at 9. The suggestion that SPLP's implementation of procedures prior to final resolution of the complaint cannot support approval of the Settlement is contrary to logic and the public interest. Notably, the policy statement

considers "[t]he amount of time it took the utility to correct the conduct once it was discovered." § 1201(c)(4). This provision recognizes what Flynn ignores – expeditious resolution via the implementation of revised procedures, as SPLP has effectuated here, is the essential policy consideration. SPLP's motive and/or concession that any revision was necessary based on BI&E's specific allegations is irrelevant when the allegedly offending procedures have been modified to BI&E's satisfaction. BI&E Statement in Support at 11-12; *see* Section II.B.3 *supra*. Flynn's interpretation is contrary to public policy as it encourages utilities to delay remedy of procedures until settlement approval and has no persuasive value.

Flynn's argument that Settlement provision (F) (regarding pipeline replacement as it relates to corrosion) does not support approval of the Settlement, is also baseless. Flynn Comments at 9. Contrary to Flynn's suggestion, there is no requirement that every provision of the Settlement entail relief that requires SPLP to go above and beyond regulatory requirements. This argument overlooks that a requirement to comply with legal requirements in a settlement does provide additional relief because violation would result in not just violation of the law, but violation of the Settlement too. Regardless, even if compliance with the law was not an obvious public benefit, the Commission's public interest analysis requires consideration of the public interest based on the Settlement as a whole. Considering the Settlement as a whole, SPLP has agreed to undertake various actions that go well above and beyond statutory and regulatory requirements concerning pipeline safety to ensure MEI continues to provide safe public utility service – this result is clearly in the public interest warranting expeditious approval of the Settlement.

Finally on this point, Flynn also misunderstands the basic nature of a settlement, which includes give and take and such give and take is not to be twisted, as Flynn does, into evidence of an admission or omission of anything.

F. Enforcement Authority

Flynn argues that the Settlement generally provides "no teeth" for enforcement and "no process for BIE to verify, validate or direct improvements" based on the Remaining Life Study. Flynn Comments at 11. This is wrong. Moreover, the theme of all of the Comments is that Intervenors—who, such as Flynn, repeatedly through their advocacy and presentation of their emergency order petition and hearing thereon demonstrate an alarming lack of understanding of pipeline safety, integrity and operations-- "feel" BI&E has inadequately undertaken its investigation and enforcement duties, second guess BI&E, and believe they have the authority to dictate terms of the Settlement, force BI&E to litigate this Complaint, and/or oversee BI&E's actions. This too is wrong. These arguments completely ignore BI&E's statutory enforcement and investigation duties and expertise and that Commenters lack of authority to essentially act as a private attorney general to enforce pipeline safety law or oversee BI&E's duties.

BI&E's investigation and enforcement authority does not need to be spelled out in a settlement when this authority is already conferred by statute. 66 Pa .C.S. § 501(b) ("The commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth."), § 502 ("Whenever the commission shall be of opinion that any person or corporation ... is violating, or is about to violate, any provisions of this part ... then in every such case the commission may institute injunction, mandamus or other appropriate legal proceedings, to restrain such violations of the provisions of this part, or of the regulations, or orders of the commission, and to enforce obedience thereto."); *see Pa. Pub. Utility Comm'n v. Gilbert*, 40 A.3d 755, 760 (Pa. Cmwlth. 2012) (recognizing the PUC's broad authority to conduct noncriminal investigations "to determine ... if utilities are in compliance with the Public Utility Code, ... the [United States Department of Transportation

Pipeline and Hazardous Materials Safety Administration] and other applicable state and federal regulations."). The Settlement need not provide for SPLP's acquiescence to the Commission's authority as this is likewise a statutory mandate. 66 Pa.C.S. § 501(c) ("Every public utility ... affected by or subject to any regulations or orders of the commission ... shall observe, obey, and comply with such regulations or orders, and the terms and conditions thereof.").

Pursuant to 66 Pa. C.S. §§ 308, 701, and 52 Pa. Code § 1.8, BI&E is vested with this statutory enforcement and prosecutorial authority, including to bring complaints to protect the public interest for violations of the Public Utility Code and the Commission's regulations. "**BI&E will serve as the prosecutory bureau for purposes of representing the public interest** . . . and enforcing compliance with the state and federal . . . gas safety laws and regulations." *Implementation of Act 129 of 2008 - Organization of Bureaus and Offices*, Docket No. M-2008-2071852, Final Procedural Order at 5 (Order entered Aug. 11, 2011) (emphasis added).

In contrast, "Intervenors' involvement is not on behalf of "all others similarly situated,'" and thus Intervenors cannot pursue issues on behalf of others. July 15 Order at 18.

Your Honor has also recognized that Intervenors lack authority to essentially function as a "private attorney general" to pursue the Complaint or terms of the Settlement on behalf of the general public. *Flynn et al. v. SPLP*, Dockets Nos. C-2018-3006116, Order Granting in Part and Denying in Part Complainants' Motion for Reconsideration of Second Interim Order at 5-6 (Order entered June 6, 2019) (Barnes, J.) ("The Complainants do not have the statutory authority under 66 Pa.C.S. §§ 308 and 701 as well as 52 Pa.Code § 1.8 as I&E to bring such a complaint against Respondent.").

Thus, WGT and WWT's argument that they require the Remaining Life Study for oversight and should have the ability to comment on it or are entitled to a more detailed study for their area[29] is legally incorrect – they do not have the legal authority for oversight of public utilities. *See also Delaware Riverkeeper Network v. Sunoco Pipeline L.P.*, 179 A.3d 670 at 691 (Pa. Cmwlth. 2018), *allocator denied*, 192 A.3d 1106 (Pa. 2018).

Likewise, Flynn's attempt to step into BI&E's prosecutory and investigatory shoes to argue the Settlement is inadequate because they allege that 12-inch pipeline should be addressed in this proceeding,[30] that segments of pipe SPLP replaced on ME1 must be investigated, and that Flynn is entitled to know and discern themselves the quality of SPLP's revised procedures must be rejected. Intervenors cannot dictate the terms of the Settlement or raise new issues and these allegations have no bearing on whether the Settlement is in the public interest.

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29 WGT Comments at 3, 10; WWT Comments at 3-6.

30 Again, contrary to its being a late Intervenor who under law and Your Honor's Order cannot expand issues and takes the case as it finds it, Flynn once more disregards the rule and tries to expand the issues and the Complaint itself. Such blatant attempts should be specifically rebuked.

IV. CONCLUSION

WHEREFORE, SPLP respectfully requests Your Honor expeditiously approve the Settlement without modification and reject the flawed and baseless comments of the Intervenors.

Respectfully submitted,

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Dated: September 16, 2019

CERTIFICATE OF SERVICE

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

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