**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Meghan Flynn : C-2018-3006116

Rosemary Fuller : P-2018-3006117

Michael Walsh :

Nancy Harkins :

Gerald McMullen :

Caroline Hughes and :

Melissa Haines :

Andover Homeowners Association : C-2018-3003605

Melissa DiBernardino : C-2018-3005025

Rebecca Britton : C-2019-3006898

Laura Obenski : C-2019-3006905

 :

 v. :

 :

 :

Sunoco Pipeline, L.P. :

**ORDER DENYING COMPLAINANT MELISSA DIBERNARDINO’S MOTION TO PRESERVE POTENTIAL EVIDENCE**

On December 11, 2019, Complainant Melissa DiBernardino (Complainant or Ms. DiBernardino) filed a Motion to Preserve Potential Evidence (Motion). Ms. DiBernardino seeks an Order directing Sunoco Pipeline, L.P. (Respondent, SPLP, or Sunoco) to mark and preserve pieces of pipe depicted in photographs marked Exhibits 4-6 attached to the Motion if they are parts of the same pipe depicted in Exhibit 1 attached to the Motion. Exhibit 1 appears to be the same photo as was admitted into evidence at the November 20, 2019 hearing as DiBernardino Exhibit No. 17. N.T. 1569. Complainant also requests that she and her witness be allowed entry onto a construction site controlled by SPLP in order to take photographs of pipes. She cites as authority for her request 52 Pa Code § 5.349. Motion at 2. Complainant requests an expedited ruling on her Motion. By e-mail correspondence, I shortened the deadline for an answer to the Motion to December 23, 2019.

Sunoco filed an Answer Opposing DiBernardino Motion to Preserve Potential Evidence on December 23, 2019. Sunoco claims the relief requested is moot and the portion of pipe is not potential evidence. The portion of pipe sticking up from the ground and pictured in Exhibit MD-17, Motion Exhibit 1 was removed on June 4, 2019 and scrapped to clear workspace for the next Horizontal Directional Drilling (HDD), while the remainder of the pipe underground was capped and backfilled until it is time to connect this pipe to the next HDD. This pipe will remain capped until the next HDD is completed at this location, at which time the pipe will be tied into the pipe pulled through for that HDD. SPLP attached to its Answer an Attachment A, the Affidavit of Joseph Perez, Project Manager, who stated that the photographs depict industry standard construction practices. SPLP is not removing and replacing pipe as Ms. DiBernardino alleges. It finished one HDD, cut off excess pipe to clear workspace on a compact construction site where it is also constructing the connecting HDD, and once both HDDs are done, the two pipe strings will be connected. Sunoco avers that removal of the top 5.9 feet of pipe occurred five months prior to the hearing on November 20, 2019. To the extent Ms. DiBernardino is attempting to obtain this piece of pipe, SPLO argues that request should be denied as Ms. DiBernardino has not made this request in the discovery process. Therefore, SPLP has been deprived of its rights to object and an order compelling discovery cannot be obtained until after discovery has been properly requested and served, the responding party either objects or fails to answer, and then a motion to compel is filed. 52 Pa. Code §§ 5.349, 5.371.

Sunoco also contends the relief requested should be denied because allowing access to SPLP’s construction site is unnecessary as this site is not evidence of what Ms. DiBernardino is alleging and there are less intrusive and safer means for Ms. DiBernardino to obtain the information she seeks. Permitting such discovery will create a cascading undue burden on SPLP if other parties attempt to gain additional access to other SPLP construction sites or facilities based on a ruling here that Ms. DiBernardino is entitled to do so.

Ms. DiBernardino filed a Reply to SPLP’s Answer Opposing Motion to Preserve Potential Evidence on December 31, 2019. In it she stated, “With the ‘deadman’ pipes shown in my photos no longer at the site and apparently the top 5.9 feet of the pipe of concern being ‘scrapped,’ my request would seem useless and even impossible now. However, I would respectfully request that SPLP pull through the remainder of the pipe of concern to show whether or not the damage continues throughout the pipe.” Reply at 9. The Motion is ripe for a decision.

## Disposition

## The pipe Ms. DiBernardino wishes to be marked and preserved as depicted in Exhibit 1 attached to the Motion (previously entered into evidence on November 20, 2019 at Exhibit MD-17 at N.T. 1569) is no longer in existence according to the sworn affidavit of Joseph Perez, Vice President of Technical Services, Operations and Engineering. Mr. Perez stated in pertinent part:

The pipe in Exhibit 1 is the 16-inch pipe installed via HDD known as HDD 500.

Consistent with standard construction practices, on June 4, 2019 (months before Ms. DiBernardino testified and presented Exhibit 1 to the Motion at hearing, which was the first time she raised this issue to SPLP), the top 5.9 feet of the pipe was cut off to below grade. Thus, the entire portion of the 16-inch pipe pictured in Exhibit 1 was removed and disposed as part of standard construction practice more than 5 months before Ms. DiBernardino first presented the photograph as part of her lay testimony at the November 2019 hearing. Again consistent with standard construction practice, the end of the 16-inch pipe remaining in place below the surface had a plate welded to the end, and the area was backfilled to clear workspace for construction of HDD 490, the next segment of pipe. Referencing Motion Exhibit 4, included as **Attachment B**, the backfilled, capped pipe is approximately where SPLP has drawn a blue circle on this exhibit. This workspace is very compact. The pipe was cut and backfilled so it is out of the way while construction of HDD 490 takes place.

Contrary to Ms. DiBernardino’s assertion, SPLP did not remove the already completed HDD 500 16 inch pipe and replace it with [another] pipe. Instead, the pictures attached to the Motion show what are referred to as “deadman” pipe and casing pipe – neither of these are the actual pipe that transports product. The discarded end of the pipe that transports product is what was pictured in Exhibit 1.

A “deadman” pipe is a pipe that is driven into the ground to hold the HDD machine in place during construction. A casing pipe is used during the construction process to contain the transportation pipes.

Exhibit 2 shows both a casing pipe and a deadman pipe. The casing pipe is in the foreground and the deadman pipe is next to the barrier in the background.

Exhibits 3 and 6 show deadman pipes.

Exhibits 4 and 5 are overhead pictures of the construction site. The pipe going into the ground is casing pipe for the next HDD.

The removed portion of the 16-inch pipe in Exhibit 1 was scrapped, consistent with standard construction practice of how SPLP disposes of pieces of unused pipe under 10 feet in length.

Once construction of HDD 490 is completed, the 16-inch pipes for HDD 500 and HDD 490 will be “tied in,” meaning that the two segments will be connected. To complete the tie- in, SPLP will excavate approximately eight feet, cut off the additional excess ends of pipe, and then weld the pipes together from HDD 490 and HDD 500.

\* \* \* \*

The pipe pictured in Exhibit 1 is not representative of the pipe beneath the ground. SPLP pulls the pipe through the HDD hole until there are no visible scratches to the coating because the portion of pipe first pulled through will have the greatest amount of damage to the coating. There are numerous reasons why the coating on the end of a pipe installed by HDD may be damaged as shown in the portion of pipe pictured in Exhibit 1 to Ms. DiBernardino’s motion, including that coating is removed for welding on the end cap, coating is removed to perform the resistivity testing described above, or it could have been scraped off in the construction process. But as described above, as part of standard construction practice, the end of the pipe on which the coating is scratched is never intended to be left in the ground for use; instead, the end is removed and disposed.

SPLP Answer Attachment A, Affidavit of Joseph Perez, Project Manager.

I agree with SPLP that the Motion is in part moot because the portion of pipe requested to be preserved is no longer in existence. Ms. DiBernardino concedes her requests seems “useless and even impossible now.” DiBernardino Reply at 9. Additionally, the Motion will be denied because the Motion improperly directly requests an Order compelling a utility to permit entry upon designated land in possession or control of the utility for the purpose of inspecting and photographing prior to serving upon the utility a request for such permission.

Section 5.349(a)(2) permits a party to serve upon another party a request for permission to enter designated land for photographing. 52 Pa. Code § 5.349(a)(2). There is no evidence Ms. DiBernardino first served such a request upon Sunoco prior to her Motion. Section 5.349 lays out the procedures that a request must be served, and the responding party may either respond or object. If the responding party does not respond or objects, the requesting party may then move for an order compelling discovery.

Section 5.371 allows the presiding officer, upon motion, to make an order compelling discovery when a party fails to answer discovery or files objections to discovery:

 (a)  The Commission or the presiding officer may, on motion, make an appropriate order if one of the following occurs:

   (1)  A party fails to appear, answer, file sufficient answers, file objections, make a designation or otherwise respond to discovery requests, as required under this subchapter.

52 Pa. Code § 5.371.

SPLP has been deprived of its rights to object to discovery and an order compelling discovery is premature until after discovery has been properly requested and served, the responding party either objects or fails to answer, and then a motion is filed. 52 Pa. Code §§ 5.349, 5.371.

ORDER

THEREFORE,

IT IS ORDERED:

1. That Melissa DiBernardino’s Motion to Preserve Potential Evidence filed on December 11, 2019 is denied.

Date: January 2, 2020 /s/

 Elizabeth H. Barnes

 Administrative Law Judge

**C-2018-3006116 et. al.- MEGHAN FLYNN et. al. v. SUNOCO PIPELINE LP**

*(Revised 10/21/19)*

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