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January 9, 2020

BY 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 EXCEPTIONS**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is Sunoco Pipeline L.P.'s Exceptions to the December 18, 2019 Initial Decision of Administrative Law Judge Elizabeth Barnes in the above-captioned proceeding.

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

Very truly yours,

Thomas J. Sniscak

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

WES/das
Enclosure

cc: Gladys Brown Dutrieuille, Chairman (via first class mail)
David W. Sweet, Vice Chairman (via first class mail)
Andrew G. Place, Commissioner (via first class mail)
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Hon. Elizabeth H. Barnes, (via email ebarnes@pa.gov)
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).

BY OVER-NIGHT FEDERAL EXPRESS

WILMER JAY BAKER
430 RUN ROAD
CARLISLE PA 17015

Thomas J. Sniscak

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

Dated: January 9, 2020

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 EXCEPTIONS

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Pursuant to 66 Pa. C.S. § 332(h) and 52 Pa. Code § 5.533, Sunoco Pipeline L.P. (SPLP) files these exceptions to the December 18, 2019 Initial Decision (ID) of Administrative Law Judge Elizabeth Barnes.

I. INTRODUCTION AND SUMMARY OF EXCEPTIONS

The ID correctly denied most of the relief Complainant Wilmer Baker seeks against SPLP for its pipeline operations in Cumberland County, finding that some requests are beyond the Commission's jurisdiction, others are the subject of a pending rulemaking, and that most lack evidentiary support.

On issues relating to SPLP's "public awareness" duties to Mr. Baker, however, the ID misused Mr. Baker's complaint to penalize SPLP for failing to fulfill public awareness obligations SPLP does not owe either to Mr. Baker or to Cumberland County governmental authorities. The ID ignored that the Commission has already reviewed SPLP's public awareness program and did not find it inadequate.[1] The ID likewise misused Mr. Baker's complaint as a pretext for preemptively, selectively, and mandatorily enjoining SPLP to undertake public awareness obligations that do not presently exist, while the wisdom of these very requirements is the subject of ongoing debate in an Advanced Notice of Proposed Rulemaking (ANOPR) presently pending before the Commission.[2] In bending the complaint to this purpose, the ID

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[1] 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 Paragraph 6. 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).

[2] The ID correctly denied Mr. Baker's requested relief for an early warning system and the addition of odorant because those proposals are at issue in the pending ANOPR, and deserve the full vetting from

raised non-record factual and legal claims Mr. Baker never made; misinterpreted and misapplied pipeline safety law and regulations; misinterpreted and misapplied burden of proof, evidentiary, and relief standards; and misconstrued and ignored record evidence. Stated differently, the ID improperly usurped Mr. Baker's complaint and acted as his advocate[3] in order to rewrite the law applicable to SPLP on public awareness requirements.

Aside from overreaching to conclusions neither the facts or the law support, the ID's public awareness decision violated SPLP's due process rights. Its basis for finding that Mr. Baker was entitled to receive a public awareness brochure from SPLP in 2018 hinges on its own *sua sponte* post-record-closing misinterpretation of testimony an SPLP witness gave in a previous Commission proceeding that was never offered into the record in this case, to which SPLP had no chance to respond. Its basis for imposing prospective mandatory injunctive relief is a notion of what the law should be rather than what it is.

As set forth in the following detailed exceptions, the numerous errors on this issue render the ID's public awareness decision unsupportable.

In *SPLP Exception 1*, SPLP explains that Mr. Baker's primary "public awareness" accusation, which the ID credited – that SPLP failed in its obligation to provide him a public awareness brochure in 2018 because he resides within 1,000 feet of the pipeline – has no basis in fact. Mr. Baker himself did not testify that his property is within 1,000 feet, and never disputed SPLP's verified statement in its Answer and New Matter that Mr. Baker's property is in fact over 1,300 feet from the Mariner East pipelines. The Administrative Law Judge (ALJ) improperly advocated for him and elicited testimony from another witness for the Complainant, who "guessed" that Mr. Baker's property was less than 1,000 feet from the pipelines.

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interested stakeholders, but inexplicably and arbitrarily failed to apply the same reasoning to public awareness issues which also are the subject of the ANOPR. ID at 1.

[3] The Administrative Law Judge and the Commission cannot act as advocates for parties and raise *sua sponte* theories, contentions and factual and legal positions when adjudicating a Complaint. *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283, 1289 (Pa. Cmwlth. 2019).

Relying exclusively on that "guess" as fact and disregarding both SPLP's verified pleading and the testimony of SPLP's Senior Vice President, the ID proposes to fine SPLP. But Mr. Baker had the burden of proof on the issue and did not carry it with the self-serving "guesstimate" the ALJ solicited. As the Commission grounds its decisions on facts, not guesses or speculation, the only supportable conclusion here is that Mr. Baker has not carried his burden to show that he even lives within the 1,000-foot mailing zone of required public awareness information dissemination in 2018.

In *SPLP Exception 2*, SPLP explains that the ID compounded its error addressed in Exception 1 by finding a violation of regulation on the basis that SPLP did not mail Mr. Baker a public awareness brochure every two years. To make this finding, the ID assumes without credible basis that Mr. Baker resides within 1,000 feet of the pipelines, and then *sua sponte* raises, misinterprets, and relies on *extra-record evidence*[4] from a previous proceeding. SPLP had no notice this prior testimony would be considered and was thus deprived of the ability to explain why the ALJ was misinterpreting the prior testimony and present alternative or additional facts, violating SPLP's right to due process. Complainant never raised the issue, but the ID, again improperly acting as an advocate, presented this non-record evidence and argument for him.

In *SPLP Exception 3*, SPLP explains that the ID's finding that the only time Mr. Baker received a public awareness brochure was five years ago is unsupported by the cited evidence and further confuses SPLP's obligation to provide such information. SPLP has an obligation to provide such brochures every two years. In 2014 and 2016, its public awareness program voluntarily provided that residents within 1,320 feet of the pipelines would receive brochures (even though the distance the regulation requires is only 660-1,000 feet). As Mr. Baker resided within 1,320 feet, SPLP mailed the brochures to him in 2014 and 2016. No mailing was made to Mr. Baker in 2018 because in the interim SPLP revised its distance requirement

[4] As discussed below, it is fundamental that extra-record evidence may not be considered.

to 1,000 feet, which it was and is entitled to do. No evidence supports the finding that the last brochure Mr. Baker received was sent five years before the complaint was filed.

In *SPLP Exception 4*, SPLP explains that there is not substantial evidence that witness Van Fleet – another witness supporting Mr. Baker's complaint but who neither intervened nor filed her own complaint – did not receive SPLP's public awareness brochures. The ID also misinterprets public awareness standards regarding addressing of its mailings.

In *SPLP Exception 5*, SPLP explains there is not substantial evidence that Lower Frankford Township did not receive SPLP's public awareness brochures.

In *SPLP Exception 6,* SPLP explains that, contrary to the ID's finding, SPLP is under no legal requirement to attend a meeting open to the public and its actions have not violated law or regulation. The ID misinterprets the applicable public awareness standards, imposing on SPLP standards it believes the regulations should require, thus creating new standards in violation of SPLP's due process rights, the Commonwealth Documents Law, the Independent Regulatory Review Act, and SPLP's right to exercise managerial discretion. The ID ignores that public awareness regulations and standards are performance based, not prescriptive, and that SPLP's public awareness program is achieving the required regulatory objectives without attending or holding the meetings the ID faults SPLP for eschewing. The ID also misinterprets record evidence concerning the meetings, missing most significantly the fact that public officials, not SPLP, cancelled the scheduled meeting with Cumberland County Commissioners.

In *SPLP Exception 7*, SPLP explains the ID erred in ordering relief where it did not find a violation regarding SPLP's emergency responder outreach and training. Moreover, the ID ignored substantial evidence that SPLP goes above and beyond regulatory requirements with its MERO training program held in Cumberland County from 2014-2017. The record shows SPLP is willing to provide additional training, has offered to do so in Cumberland County, and SPLP remains willing to do so.

In *SPLP Exception 8*, SPLP explains that the injunctive relief ordered is improper, even if the ID is upheld in finding a violation – which there is no basis in fact or law to do. The ID only found one

violation of law (which SPLP disputes) – SPLP's failure to mail Complainant Baker a public awareness brochure every two years. The ID admits no harm in fact occurred from this alleged violation. Yet, the ID goes on to improperly order significant injunctive relief well beyond the alleged violation and well beyond the relief to Complainant as if he were a private attorney general. Pennsylvania law makes clear that Mr. Baker cannot act as a private attorney general. Nor is the ALJ empowered to craft remedies or directives beyond the confines of the Complainant's case. In doing so, the ID ignores black letter legal principles that injunctive relief must be narrowly tailored to abate the alleged harm complained of, and that mandatory injunctions such as ordered here require a very strong showing in order to obtain relief. The only injunction appropriate to the alleged violation would be to require SPLP to mail Complainant a public awareness brochure; wholesale reworking of SPLP's entire public awareness program is simply not on the menu. The relief also ignores SPLP's public awareness program, which shows SPLP is already implementing much of the relief ordered. Instead, the ALJ in effect unlawfully promulgated regulations or standards which she believes should be complied with despite conceding these matters already are issues pending before the Commission in ongoing rulemaking proceedings.

Finally, SPLP excepts to various legal and evidentiary issues in *SPLP Exceptions 9-11*. The ID should be reversed on these points and the Complaint dismissed in its entirety.

II. EXCEPTIONS

SPLP Exception 1. **The ID erred in finding Complainant resides within 1,000 feet of the Mariner East pipelines.**

The ID erroneously found that Complainant lives within 1,000 feet of the Mariner East pipelines, ID at pp. 1, 2, 4, 26-31, FOF 1, COL 17, when the only reliable evidence of record shows Complainant lives over approximately 1,300 feet from the Mariner East pipelines. N.T. 372. The ID relies on three record cites for the finding that Complainant lives 1,000 from the Mariner East pipelines. ID at p. 4, FOF 1 (citing N.T. 25, 42, 372), two of which are wholly insufficient support for this finding and one of which shows, to the contrary, Complainant's property is over 1,300 feet from the Mariner East pipelines. The

record at N.T. 25 and 42 does not even mention the distance Complainant lives from the pipelines. They do not provide any support for this finding. In fact, and contrary to the ID, Complainant never testified that he lived within 1,000 feet of the pipeline and never disputed SPLP's verified statement in its Answer and New Matter that Complainant lived over approximately 1,300 feet from the pipeline. *See generally* N.T. 41-117. Contradicting the ID's finding, the final citation the ID relies upon, N.T. 372, is SPLP witness Joseph Perez, a Senior Vice President for SPLP, testifying to the correct distance Complainant lives from the pipelines: "Complainant's property is approximately over 1,300 feet from the Mariner East 1 pipeline route." Mr. Perez confirmed that this statement is true and correct to the best of his knowledge and belief. N.T. 372.

The ID erred in disregarding SPLP's evidence in favor of nothing more than a "guesstimate". Even though Complainant proffered no evidence of the distance of his property from the Mariner East pipelines, the ALJ Judge erroneously elicited[5] testimony from Complainant's son, who was clearly guessing when he responded: "I would say less than a thousand feet." N.T. 129-130. Moreover, that Mr. Baker received a public awareness brochure in the past is not evidence that he lives within 1,000 feet of the Mariner East pipelines. ID at p. 30. As explained in the next exception, the mailing zone from SPLP's public awareness mailings changed over time, as allowed by the relevant public awareness regulations, which is not inconsistent with law or regulation and is not a violation of anything. 49 C.F.R. Part 195.402(a) requires that public awareness programs be annually reviewed and updated. That Mr. Baker received a mailing in the past does not mean he should have received mailings every two years. The ID is incorrect.

Complainant has the burden of proof. 66 Pa. C.S. § 332(a). Complainant came forward with no evidence of his own that he lived within 1,000 feet of the pipeline. Instead, the ALJ elicited and relied upon guesstimate testimony to support this finding. SPLP rebutted this evidence with its own sworn testimony

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[5] The Administrative Law Judge and the Commission cannot act as advocates for parties and raise *sua sponte* theories, contentions and factual and legal positions when adjudicating a Complaint. *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283, 1289 (Pa. Cmwlth. 2019).

from a Senior Vice President, consistent with its verified Answer and New Matter, that Complainant's property is approximately over 1,300 feet from the Mariner East pipelines. Complainant did not meet his burden of proof on this issue – Complainant's evidence is not more convincing than that presented by Respondent. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950). At the very least, SPLP's evidence on this issue is of co-equal weight with Complainant's evidence, and under that circumstance, Complainant still fails to meet his burden of proof because he provided no additional evidence to rebut SPLP's evidence. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 461 A.2d 1234 (Pa. 1983) (discussed and cited in ID at p. 57, COL 10). Accordingly, the ID erred in finding Complainant resides within 1,000 feet of the Mariner East pipelines.

SPLP Exception 2. **The ID erred in finding SPLP was required to mail Complainant a public awareness brochure every two years and thus violated 49 CFR § 195.440 and API RP 1162 and this finding violates SPLP's due process rights.**

The ID incorrectly found that SPLP violated federal regulation 49 C.F.R. § 195.440 and API RP 1162 guidance because it allegedly has not mailed Complainant a public awareness brochure every two years. ID at pp. 2, 4-5, 26-31, FOF 1, 4, 6, 11, 14, COL 17. This finding relies on a series of fundamental errors.

SPLP as a pipeline operator is required to create and implement a public awareness program that follows guidance set forth in API RP 1162. 49 C.F.R. § 195.440. The applicable federal regulation for public awareness promulgated by the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) incorporates by reference certain provisions of API RP 1162. In its guidance, API RP 1162 requires targeted distribution of print materials every two years for the "affected public." API RP 1162, Table 2-1.1. API RP 1162 recommends a mailing or "buffer" zone for distribution of these print materials of a "minimum" of 660 feet on each side of a pipeline or "as much as 1000 feet in some cases." API RP 1162, Appendix B at B.1.1 (not incorporated by reference into 49 C.F.R. § 195.440). API RP 1162 was developed and is intended as resource that can assist operators in their efforts. It provides the operator with the elements of a recommended baseline Public Awareness Program.

However, it also gives the operator the discretion and flexibility to determine when and how to enhance the program to provide the appropriate level of public awareness outreach.

The only evidence of record here is that SPLP's public awareness program as of the 2018 brochure mailing required SPLP to mail its public awareness brochure to the affected public of residents with property located within 1,000 feet of its pipelines. N.T. 342, 370, 372, SPLP Exhibit 2 at 589-593. SPLP did just that. *Id.* Therefore, the ID, without citation to authority, errs when it finds that SPLP as of 2018 had a legal requirement to mail its public awareness brochure to a mailing or buffer zone of 1,320 feet. ID at 28-30. Amplifying this error, the ID improperly advocates for Complainant,[6] when it introduced and relied upon testimony from the *Dinniman* proceeding[7] not of record in this proceeding in violation of SPLP's due process rights. SPLP had no notice or opportunity to rebut this *sua sponte* introduction of non-record testimony. Compounding that due process violation, the ID incorrectly credits that non-record testimony to SPLP witnesses Zurcher and Perez and finds their testimony on mailing buffer zones inconsistent with the non-record testimony. ID at p. 29. In fact, the extra-record testimony was from Mr. Gordon, not Mr. Perez or Mr. Zurcher, and as explained below it is not inconsistent.

Relying on this non-record evidence violates SPLP's due process rights, the Public Utility Code and the Commission's regulations. While a record of another proceeding can be incorporated by reference or official notice can be taken of certain facts, notice of the intent to do so and opportunity to respond is required, and none was provided here. This violates due process. *See, e.g. Pocono Water Co. v. Pa. P.U.C*, 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."). *Kowenhoven v. County of Allegheny*, 901 A.2d 1003, 1010 (Pa. 2006) ("Due process principles apply to quasi-judicial or administrative proceedings, and require

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[6] *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d at 1289.

[7] Docket No. P-2018-3001453.

an opportunity, inter alia, to hear the evidence adduced by the opposing party, cross-examine witnesses, introduce evidence on one's own behalf, and present argument.") (internal citation omitted). Pennsylvania appellate courts have reversed Commission orders that were based, even in part, on facts outside the administrative record. *Equitable Gas Co. v. Pa. P.U.C*, 405 A.2d 1055, 1059 (Pa. Cmwlth. 1979) ("... we must hold that the PUC erred as a matter of law by determining the value of Equitable's securities from evidence outside the record."); *United Natural Gas Co. v. Pa. P.U.C*, 33 A.2d 752, 758 (Pa. Super. 1943) ("None of these figures appear in the record . . . No opportunity was afforded appellant to dispute or discuss them or show their inapplicability to the question.").

Reliance on non-record evidence is also precluded by the Commission's own regulations, which provide: "After the record is closed, additional matter may not be relied upon or accepted into the record unless allowed for good cause shown by the presiding officer or the Commission upon motion." 52 Pa. Code § 5.431(b); *see, e.g., Third Ave. Realty ltd. Partners v. Pennsylvania-American Water Co.*, Docket No. C-2008-2072920, p. 10 (Initial Decision issued Oct. 13, 2010) (striking "those portions of the Complainant's reply brief that improperly attempt to introduce new evidence or raise arguments contrary to evidence presented by its witness.").

Moreover, the Public Utility Code specifies that SPLP is entitled to notice and opportunity to be heard where the decisionmaker takes official notice of facts not appearing in the evidence in the record:

> (e) Official notice of facts.--When the commission's decision rests on official notice of a material fact not appearing in the evidence in the record, **upon notification that facts are about to be or have been noticed, any party adversely affected shall have the opportunity upon timely request to show that the facts are not properly noticed or that alternative facts should be noticed.** The commission in its discretion shall determine whether written presentations suffice, or whether oral argument, oral evidence, or cross-examination is appropriate in the circumstances. Nothing in this subsection shall affect the application by the commission in appropriate circumstances of the doctrine of judicial notice.

66 Pa. C.S. § 332(e) (emphasis added). It is unclear whether the ID is actually taking official notice of the extra-record evidence or just using improper extra-record evidence. ID at 29. Regardless, SPLP was given no notice of these non-record facts and has been given no opportunity to be heard on rebuttal facts.

This is not just a procedural issue – the ALJ was wrong in deciding the extra-record testimony shows a violation of law,[8] and SPLP would have proven that had it been given the chance.

Specifically, the ID improperly considered and relied upon SPLP witness Mr. Gordon's May 2018 testimony from the *Dinniman* proceeding that discussed a mailing that occurred prior to SPLP's fall 2018 public awareness mailing:

> Q. Okay. I'm sorry. This is a letter from Gladys M. Brown, Chairman of the Public Utility Commission, to the Honorable Thomas Wolf, Governor of the Commonwealth Pennsylvania, dated February 2nd, 2018.
> Have you seen this letter before?
> A. Yes.
> Q. If you turn to page 2, the third paragraph, says, and I'm going to quote this, "The Commission also understands that in 2017, Sunoco sent public awareness program mailings to approximately 66,000 people. This includes property owners within one eighth of a mile a Sunoco pipeline, public officials, emergency responders, schools and excavating companies." Do you see that?
> A. Yes.
> Q. Is that accurate?
> A. Yes. We actually went further than that, but yes.
> Q. When you say you went further, further than an eighth a mile?
> A. Yes. We went a quarter-mile.
> Q. How many people in Chester County got that information?
> A. Approximately, 20,000.

Dinniman, Transcript dated May 10, 2018 at 419-420. This testimony is clearly discussing the mailing done prior to 2018 and was given by Mr. Gordon – not Mr. Zurcher and not Mr. Perez as the ID incorrectly states. Yet the ID, without providing SPLP with its right to be heard, interpreted this to mean a "concerning" inconsistency or that SPLP's witnesses were "mistaken":

> It is possible that the mailing communication buffer is decreasing from 1,320 in May 2018 to 1,000 in July 2019. That might reconcile the

[8] To the extent SPLP is required to request the opportunity to present alternative facts pursuant to 66 Pa. C.S. § 332(e), it is doing so in these exceptions.

> conflicting testimony between Mr. Perez and Mr. Zurcher as to the parameters of the mailings. Possibly one of them is mistaken. Even if 1,000 feet surpasses a 660 foot basic minimum requirement, the inconsistency of the communications buffer is of concern. If there is a conflict of opinion, perhaps there are inconsistent mailings to individuals residing between 1,000 and 1,320 feet.
>
> Regardless, if it is Sunoco's policy to mail safety pamphlets to those individuals residing within 1,000 or 1,320 feet of a pipeline right of way, then the fact that Mr. Baker received a pamphlet in the mail at least one time, is substantial evidence that he resides within the prescribed limit and should have been receiving the pamphlet or other written materials from Sunoco on a two-year interval as per Sunoco's public awareness plan. I find Mr. Baker has met his burden of proving his claim that Sunoco should have been but did not send him public information on a two-year interval per its public awareness plan in violation of the recommended practice of API 1162 as incorporated in 49 C.F.R. § 195.440, as incorporated in 52 Pa. Code §59.33 and 66 Pa. C.S. § 1501.

ID at p. 30. The ALJ made this finding despite that it is not only permissible but legally required for an operator to annually update its public awareness program. 49 C.F.R. § 195.402(a). Moreover, had SPLP been on notice that the ALJ would consider Mr. Gordon's testimony concerning mailings prior to 2018, it would have presented the following evidence:

- Prior to implementing the Energy Transfer public awareness program in 2018, as of 2016 SPLP was utilizing a mailing buffer of 1,320 feet (a quarter mile) on either side of the pipeline. This is what Mr. Gordon testified to and explains why Mr. Baker received the public awareness brochure in 2014 and 2016.
- In April 2018, SPLP transitioned to Energy Transfer's public awareness program, which included a mailing buffer of 660 feet (an eighth of a mile) on either side of the pipeline. The April 2018 public awareness program mailing buffer procedure was included as Exhibit 33 at pp. 217-224 in the *Dinniman* proceeding.

- Prior to the fall 2018 public awareness mailing, SPLP expanded the mailing buffer of its public awareness program to 1,000 feet on either side of the pipeline.[9] This is what Mr. Perez testified to in the *Flynn* proceeding, which testimony was properly incorporated into this proceeding. N.T. 342; SPLP Exhibit 2. This is also why Mr. Baker did not receive the 2018 mailing – his property is not within the 1,000-foot mailing buffer.
- In 2019, SPLP voluntarily implemented a supplemental mailing to residents residing beyond the 1,000-foot mailing buffer. Mr. Baker was sent this mailing in 2019.

Because Mr. Gordon's prior testimony was not of record here and SPLP had no notice that it could or would be considered here, SPLP was unaware that there were allegations or that extra-record evidence would be considered and misconstrued that SPLP's mailing buffer for the 2018 public awareness brochure was greater than 1,000 feet or that it had not complied with mailing distances applicable in the past. SPLP was deprived of its right to be heard.

Put simply Mr. Gordon's prior testimony and Mr. Perez or Mr. Zurcher's testimony are entirely consistent. They reflect the mailings implemented for different time periods, and explain why Complainant received a public awareness brochure in the past. Moreover, neither 49 C.F.R. Part 195 nor API RP 1162 expressly require a mailing buffer greater than 660 to 1,000 feet. API RP 1162, Appendix B ("...it is recommended that transmission operators provide communications within a minimum coverage area distance of 660 feet on each side of the pipeline, or as much as 1000 feet in some cases."). To the extent a pipeline operator designates a mailing or buffer zone greater than 1,000 feet in its public awareness program, it must mail that distance. A pipeline operator has the discretion to modify its public awareness program and is required to review its plan annually, pursuant to 49 C.F.R. § 195.402(a). The ID cites no law that supports stripping an operator of its regulatory discretion and substituting the ALJ's vision of what

[9] At no time did SPLP utilize the minimum 660 feet for its mailing zone since HVL service began.

should be done. SPLP's public awareness program was and is consistent with the current federal regulations. SPLP followed and implemented its public awareness program as it has been changed and updated over time. The ID erred when it took this non-record evidence out of context to assume that the mailing buffer implemented prior to 2018 was current for mailings in 2018.

The ID further erred when it ignored the only pertinent evidence of record – SPLP's public awareness program in 2018 required a 1,000-foot mailing buffer and SPLP complied with this requirement. N.T. 342, 370, 372, SPLP Exhibit No. 2.

SPLP Exception 3. **The ID erred in finding Complainant received SPLP's Public Awareness Brochure five years ago.**

The ID incorrectly finds "Wilmer Baker received a safety manual entitled, "Important Safety Message" from Respondent five years ago." ID at p. 4, FOF 4. The ID cites 3 portions of the transcript for this finding (N.T. 42, 356-357, 372), none of which amount to substantial evidence sufficient to make this finding. N.T. 42 consists in relevant part of Complainant stating:

> I received a manual which was five years down the road from the time I should have been receiving it. I should receive it every two months -- or two years.

Id. This statement is ambiguous concerning when Complainant allegedly received the mailing. The ID cites N.T. 372 but that page says nothing regarding this finding. Further, N.T. 356-357 is testimony directly contrary to Mr. Baker receiving a mailing five years from when the Complaint was filed in 2018 – it explains SPLP's two year public awareness brochures were mailed in 2014, 2016, and 2018. SPLP in its answer admitted only that it mailed Complainant a public awareness brochure "approximately" five years ago. In fact, and as discussed in Exception 2 *supra*, Mr. Baker received the 2014 and 2016 mailings pursuant to SPLP's public awareness program in place at that time.

SPLP Exception 4. **The ID erred to the extent it considered either (i) mailing public awareness brochures addressed to "resident" at apartment buildings or (ii) Ms. Van Fleet's receipt of SPLP's public awareness brochures to be a violation.**

While unclear on this point, the ID appears to find a violation of API RP 1162 and order relief for SPLP mailing its public awareness brochures to "resident" instead of a named addressee for residents that may reside in an apartment that they lease. ID at pp. 5, 9, 28, 30, FOF 5, 43-44. The ID also errs in finding Ms. Van Fleet, a tenant in a house, did not receive SPLP's public awareness brochures. *Id.* The record shows Ms. Van Fleet did receive these pamphlets. N.T. 170-171. Moreover, this issue is not a violation of law or an issue for which Complainant has standing to raise and thus not an issue that can be adjudicated in this proceeding.

The ID incorrectly finds Ms. Van Fleet only received one of SPLP's public awareness brochures from 2014-2018. ID at p. 9, 29 FOF 43-44. Ms. Van Fleet admitted she did receive these brochures, one directly from SPLP and the others her Landlord shared with her because "he had it sent to him":

> as a renter we have only ever received one publication from Sunoco in the 40 years we have lived on that property. **The only information we got was through our landlord. He had it sent to him.**

N.T. 170-171 (emphasis added). Thus, Complainant's own evidence shows Ms. Van Fleet did receive the materials.

Complainant did not present substantial evidence and he consequently did not meet his burden of proof to show that Ms. Van Fleet was not mailed a public awareness brochure. Ms. Van Fleet made an allegation she did not receive some brochures directly from SPLP. N.T. 171-172. SPLP presented competent and reliable evidence (a portion of business records and the testimony of Mr. Perez explaining and verifying those records) that brochures were mailed to Ms. Van Fleet's address. N.T. 356-359; SPLP Exhibit 28. Thus, Complainant presented merely testimonial allegations from a witness that she did not receive a brochure, while SPLP's evidence (business records and testimony from the person ultimately responsible for the mailings) shows the brochure was mailed. SPLP's evidence is more credible and Complainant's evidence is not more convincing than that presented by Respondent. *Se-Ling Hosiery v.*

Margulies, 70 A.2d 854 (Pa. 1950). Instead of properly weighing and applying burden of proof law to this evidence, the ID engaged in improper speculation that SPLP did mail the brochure, but Ms. Van Fleet did not receive it because she does not own the property. ID at pp. 9, 28, FOF 43-44. This is improper speculation a contrary to record evidence.

At the very least, SPLP's evidence on this issue is of co-equal weight with Complainant's evidence, and under that circumstance, Complainant still fails to meet his burden of proof because he provided no additional evidence to rebut SPLP's evidence. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 461 A.2d 1234 (Pa. 1983) (discussed and cited in ID at p. 57, COL 10).

Regarding the ID's discussion of SPLP utilizing "resident" at a street address instead of a named individual, the ID is wrong to the extent it found this to be a violation of law and ordered relief based on that finding. ID at 30. The ID quotes API RP 1162, Appendix B.1.1, which is dispositive of finding any violation of law, particularly as there is no showing on the record that Ms. Van Fleet lives in an apartment. API RP 1162, Appendix B.1.1. states:

> Some examples of how an operator may determine specific affected public stakeholder addresses along the pipeline, such as within a specified distance either side of the pipeline centerline, include the use of nine-digit zip code address databases and geo-spatial address databases. These databases generally provide only the addresses and not the names of the persons occupying the addresses. **Broad communications to this audience are typically addressed to "Resident." It is important to note that when contacting apartment dwellers, individual apartment addresses should be used, not just the address of the apartment building or complex.**

Id. (emphasis added). Thus, API RP 1162, Appendix B (which is not a legal standard as it is not incorporated by reference in 49 C.F.R. Part 195) specifically recognizes that mailers are often addressed to "residents." Concerning apartment dwellers – that provision is irrelevant here. Also, there is no record evidence that Ms. Van Fleet lives in an apartment. In fact, she testified that she rents "at a farm where we've been the caretakers for 40 years." N.T. 171. There is no violation of law here and relief to apartments

or anyone cannot be ordered regarding that alleged violation. *West Penn Power Co. v. Pa. Pub. Util. Comm'n*, 478 A.2d 947, 949 (Pa. Cmwlth. 1984).

Finally, Complainant does not have standing to pursue the issue of whether another person received a public awareness brochure. *See Sunoco Pipeline L.P. v. Dinniman,* 217 A.3d 1283, 1287 (Pa. Cmwlth. 2019) (holding lack of personal standing where "[t]he Complaint did not allege harm to Senator Dinniman's property nor harm to his person, and the hearing before the ALJ did not yield evidence of either type of harm.") (citing *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 283 (Pa. 1975)); *Municipal Authority Borough of West View v. Pa. Pub. Util. Comm'n*, 41 A.3d 929, 933 (Pa. Cmwlth. 2012). "Stated simply, standing requires the complainant to be 'negatively impacted in some real and direct fashion.'" *Id.* at 1288 (citing *Markham* v. *Wolf,* 136 A.3d 134, 140 (Pa. 2016) (quoting *Pittsburgh Palisades Park, LLC* v. *Commonwealth,* 888 A.2d 655,660 (Pa. 2005))). Thus, this evidence on this issue should not have been admitted and this issue cannot be adjudicated as part of Complainant's case.

SPLP Exception 5. **The ID erred in finding Lower Frankford Township was not provided with a public awareness brochure.**

The ID finds that Lower Frankford Township was not provided with a public awareness brochure based on a disputed interpretation of incompetent hearsay evidence that the ALJ allowed into the record over objection. ID at pp. 6, 33, FOF 19 (citing N.T. 42). SPLP properly objected to this testimony at hearing. N.T. 45-46. Under the *Walker* rule,[10] properly objected to hearsay cannot support a finding of fact in an administrative agency proceeding. Thus, admitting into the record objected to hearsay on the basis

[10] *See Sule v. Philadelphia Parking Auth.*, 26 A.3d 1240, 1243 (Pa. Cmwlth. 2011) ("*Sule*") ("As a general rule, the Pennsylvania Rules of Evidence are not applicable to hearings conducted before Commonwealth agencies. 2 Pa.C.S. § 505.5 Nevertheless, it is well-settled that hearsay evidence, properly objected to, is not competent evidence to support a determination of an agency. *Chapman v. Unemployment Compensation Board of Review*, 20 A.3d 603, 610, n. 8 (Pa.Cmwlth.2011). Under the so-called *Walker* rule, however, if hearsay evidence is admitted without objection, it will be given its natural probative effect and may support a finding by the agency, if it is corroborated by any competent evidence in the record. *Walker v. Unemployment Compensation Board of Review*, 27 Pa.Cmwlth. 522, 367 A.2d 366, 370 (1976) (emphasis added).").

that it is a matter of what weight it is to be given is contrary to *Walker* because the hearsay cannot be relied upon – it is not a matter of weight to be given to the hearsay. The ID provides no discussion on this hearsay issue, simply citing N.T. 42, which is Complainant (who is a resident, not an officer or employee or elected official of the Township) stating: "They contacted me and asked for a safety manual they had nothing to do with, they didn't know anything about." This is obviously pure hearsay (Complainant stating an unnamed person told him) that is not competent to support a finding of fact. *Supra Sule*. So too with other record hearsay evidence that the ID fails to cite, which is a letter from the Township Secretary to Mr. Baker stating: "I asked them to bring copies of the "Important Safety Message" flyers." Exhibit C-1. First, this document does not show that the Township did not receive a mailer, only that the author asked SPLP to bring some brochures to the Township meeting. Moreover, all of this "evidence" is hearsay, cannot be corroborated by hearsay, and thus is incompetent to support a finding of fact. *See supra Sule* (discussing *Walker* rule). The only competent evidence of record is that SPLP mails public awareness brochures for public officials and mailed the brochure to this Township. SPLP Ex. No. 2 at 589-590. The ID must be reversed on this point.

SPLP Exception 6. **The ID errs in finding SPLP was or is required to attend a public meeting in Lower Frankford Township or Cumberland County or that there have been insufficient public outreach meetings in Cumberland County.**

The ID is incorrect in finding that there is any requirement that SPLP hold or attend meetings with the public at large for public awareness and that not doing so means there is insufficient public outreach or public awareness program implementation in Cumberland County. ID at pp. 1, 6-11, 31-37, FOF 16, 22-24, 32-37, 48-52, 54-55, COL 13-16. To come to this conclusion, the ID misinterprets the applicable regulations, violates due process by creating new regulatory standards without a rulemaking and holding SPLP non-compliant with such standards, ignores record evidence of SPLP's compliance and misconstrues the record.

A. **There is no requirement that SPLP hold or attend meeting with the public.**

As the ID recognizes, public awareness requirements are set forth in 49 C.F.R. § 195.440 and provisions of API RP 1162 that are incorporated by regulation in the federal regulations. ID at p. 35. The ID goes astray when it imputes a legal requirement for a pipeline operator to hold or attend meetings open to the public as part of a public awareness program. Neither 49 C.F.R. § 195.440, API RP 1162, or SPLP's Public Awareness Program, SPLP Exhibit 33 at pp. 33-50, have any such requirement.

API RP 1162 sets forth certain baseline public awareness activities that each operator must include in its program. API RP 1162, Section 2.8. Regarding the "affected public" of nearby residents, the baseline requirement is to mail print materials to the "affected public" every two years. API RP 1162 Section 2.8, Table 2-1.1.

In addition to these baseline requirements, API RP 1162 gives an operator recommendations on when it should consider enhancing its baseline program and how. *Id.* at Section 6. For the "affected public," API RP 1162 recommends that a pipeline operator should consider supplementing its public awareness program under four circumstances with a recommended supplementation method for each. *Id.* at Section 6.3.1. The first two circumstances are not applicable here and the ID did not find them to be – elevated potential for third party damage and a heavily developed urban area.

The third circumstance, which the ID both *sua sponte* and erroneously found applicable is "right-of-way encroachments have occurred frequently." ID at 53-54. Right-of-way encroachment[11] means persons other than SPLP occupying SPLP's right-of-way. When API RP 1162 refers to new construction developments, it means construction on SPLP's ROW by others, not SPLP's pipeline construction. API RP 1162 Section 6.3.1. API RP 1162 is not applicable to new construction. It states: "This guidance is

[11] Black's Law Dictionary defines Encroachment as "An interference with or intrusion onto another's property." ENCROACHMENT, Black's Law Dictionary (11th ed. 2019).

not intended to focus public awareness activities appropriate for new pipeline construction." *Id.* at Section 1.2. The ID incorrectly reasons that there are "significant right-of-way encroachments including new construction occurring in Upper and Lower Frankford Townships." SPLP is not encroaching on its own right-of-way when it constructs. There is absolutely no record evidence of frequent right-of-way encroachment and the ID cites none. This circumstance for supplementing a public awareness program is not present here.

The fourth circumstance is "the potential for concern about consequences of a pipeline emergency is heightened." API RP 1162 Section 6.3.1. While the ID finds there is heightened public sensitivity regarding pipeline emergencies, it cites no record evidence for this finding. ID at 53-54. The only record evidence here is that (1) Mr. Baker and his son want SPLP to have a public meeting; and (2) the Cumberland County Board of Commissioners passed a resolution (only two days prior to the evidentiary hearing here) urging the Commission to make public awareness meetings a requirement. Exhibit C-26. However, there is no evidence of heightened concerns for consequences of a pipeline emergency by the public at large. The Resolution makes no such statement and this fact cannot simply be inferred – there must be substantial evidence to support it.

Even if this circumstance is present warranting supplemental outreach, it at most means that SPLP should "consider" – but is not required to implement – the supplemental activities for the circumstance, which do not include holding or attending a public meeting. API RP 1162 Section 6.3.1. Instead, API RP 1162 advises that the operator should ***consider*** widening the coverage area.

There is no legal requirement that SPLP hold or attend a public meeting. Further, the Commission is considering whether or not it should promulgate regulations on whether to make a public utility attend a public meeting a requirement of a public awareness program. *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").

Finding SPLP in violation of law or regulation where the regulation has not been promulgated yet violates SPLP's right to due process and constitutes an improper rulemaking, as the ID recognizes elsewhere:

> Mr. Baker's requests for an early warning alarm system for residents residing within 1,000 feet of the pipeline and an odorant are worthy of consideration; however, further notice and opportunity to be heard ought to be provided to interest groups and stakeholders to ensure due process rights are not violated before there are such requirements. There are no current federal regulations nor any state regulations specific to Pennsylvania requiring Sunoco to either place an early warning system at specific distance intervals across its pipelines, nor to place an odorant in the HVLs being transported.

ID at 39.

The ID also errs by relying on an alleged public policy of social desirability for SPLP to attend public awareness meetings to educate the public. ID at 36. Where this public policy comes from or who believes it is "desirable" is unknown. Regardless, if the ID is attempting to facilitate more personal contact between SPLP and residents, there is already an avenue in place for that. SPLP's public awareness brochure contains a non-emergency phone number any stakeholder can call to ask questions. Exhibit C-2. Moreover, when adjudicating a formal complaint, the standard is that the complainant must show a violation of law or existing regulation, as opposed to potential future regulation, before the Commission can order relief. *Supra West Penn.* That the ALJ or even the Commission may believe it is desirable for SPLP to do more cannot be the basis for finding a violation.

The ID also fails to recognize that PHMSA regulations and API RP 1162 are not prescriptive in nature – they are performance based. Unlike many agencies that use prescriptive regulatory standards where 'one size fits all,' PHMSA's regulations are largely performance based, intended to establish standards that are then tailored to individual systems. They allow operators a high degree of flexibility to adapt their programs and plans to fit their particular circumstances

Under these regulations, each operator is required to develop and implement procedures, specific to its own system, in a manner that will meet or exceed the minimum federal standards, including the public awareness program. Those procedures, in turn, become enforceable by PHMSA and the Commission. *See*

e.g., *Interpretation Letter from J. Caldwell, Director, OPS to H. Garabrant* (April 22, 1974) ("the procedures of an operating and maintenance plan are as binding on the operator as the federal standards").

> Rather than telling operators what to do, the regulations tell them what level of safety to achieve. [...] There is tremendous variation between pipeline operators and between pipeline facilities. In order for one set of regulations to be comprehensive in scope, it would have to be quite lengthy and detailed. It would have to prescribe what operating, maintenance and emergency procedures are appropriate for all conceivable scenarios. The performance-based regulations reject this approach. They tell operators what level of safety must be achieved but do not spell out all of the steps necessary to get there.

Final Order, In re: Kaneb Pipe Line, CPF No. 53509 (Feb. 26, 1998). Thus, to find SPLP violated API RP 1162, the Commission would have to find that SPLP's public awareness program and implementation thereof is not achieving the necessary level of performance. There is no record evidence of that. Even if there were, Mr. Baker is not a private attorney general and lacks standing to argue for public awareness activities for anyone but himself. The ID expressly found no harm to Mr. Baker or anyone else, ID at 54, yet it finds violations and orders relief and requirements beyond law and the record while ignoring that mandatory meeting with the public is a subject of the Commission's pending rulemaking. Moreover, as shown *infra* Section II, SPLP Exception 6, C., the record evidence shows that SPLP's public awareness program is achieving required objectives – making the affected public aware of one call systems, possible hazards from unintended releases, recognizing a leak, steps to take in the event of a leak, and procedures to report. There is no basis to find a violation here.

B. Creating new regulatory standards and holding SPLP retroactively non-compliant with such standards violates due process and regulatory statutes and SPLP's right to managerial discretion

The ID errs when it finds SPLP non-compliant with regulations where it essentially creates a new regulatory standard and then retroactively applies that standard and finds SPLP in violation of it. As demonstrated above, there is no legal requirement that SPLP hold a public meeting for public awareness. *Supra* Section II, SPLP Exception 6, A. In fact, the Commission is considering promulgating a regulation to impose this requirement – confirming there is no such regulation now. *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").

So, when the ID holds that SPLP's public awareness program is insufficient for failure to hold or attend such a meeting in Cumberland County, it is creating a standard in violation of due process. 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 (i.e., 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 and 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 C.F.R. 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.").

Likewise, the Commonwealth Documents Law and the Independent Regulatory Review Act require that change in regulation must take place through the notice and comment procedures with accompanying governmental review, not administrative adjudications.

Moreover, this is a matter of SPLP's managerial discretion, and the ALJ cannot interfere with that or act as a super board director:

> The Commission's authority to interfere in the internal management of a utility company is limited. *See, e.g., Bell Telephone Co. of Pennsylvania v. Driscoll*, 343 Pa. 109, 21 A.2d 912 (1941); *Northern Pennsylvania Power Co. v. Pennsylvania Public Utility Commission*, 333 Pa. 265, 5 A.2d 133 (1939); *Coplay Cement Manufacturing Co. v. Public Service Commission*, 271 Pa. 58, 114 A. 649 (1921). The Commission is not empowered to act as a super board of directors for the public utility companies of this state. *Northern Pennsylvania Power Co., supra.* Concerning a utility company's right of self-management, our state Supreme Court in the Coplay Cement case said:
>
> > (T)he company manages its own affairs to the fullest extent consistent with the protection of the public's interest, and only as to such matters is the commission authorized to intervene, and then only for the special purposes mentioned in the act. (Emphasis in original.)
>
> 271 Pa. at 62, 114 A. at 650.
>
> It is also fundamental that the Commission has an ongoing duty to protect the public from unreasonable rates while insuring that utility companies are permitted to charge rates sufficient to cover their costs and provide a reasonable rate of return. *Commonwealth v. Duquesne Light Co.*, 469 Pa. 415, 366 A.2d 242 (1976). Recognizing the Commission's duty to the public and a utility's right of self-management, our courts adopted the further proposition that it is not within the province of the Commission to interfere with the management of a utility unless an abuse of discretion or arbitrary action by the utility has been shown. *Lower Chichester Township v. Pennsylvania Public Utility Commission*, 180 Pa.Super. 503, 511, 119 A.2d 674, 678 (1956); *Pittsburgh v. Pennsylvania Public Utility Commission*, 173 Pa.Super. 87, 92, 95 A.2d 555, 558 (1953); *see Pennsylvania R. R. v. Pennsylvania Public Utility Commission*, 396 Pa. 34, 40, 152 A.2d 442, 425 (1959); *Bell Telephone Co. of Pennsylvania v. Pennsylvania Public Utility Commission*, 17 Pa.Cmwlth. 333, 339-40, 331 A.2d 572, 575 (1975).

Metropolitan Edison Co. v. Pa. Pub. Util. Comm'n, 437 A.2d 76, 80 (Pa. Cmwlth. 1981).

Given SPLP is complying with applicable standards as described above and no harm has occurred to anyone, ID at p. 54, it clearly has not abused its managerial discretion and the Commission cannot interfere with it.

C. **Complainant has not offered substantial evidence that failure to attend or hold a public awareness meeting with the public is a violation of law or regulation or that SPLP's public awareness program is not meeting its goals of educating the public.**

The ID also errs in finding that there is sufficient evidence to show failure to attend or hold a public awareness meeting is a violation of any regulation. To the contrary, the evidence shows that SPLP's public awareness program is compliant and that it is achieving the goal of public awareness. *See, e.g.* N.T. 303:13-20. Regarding regulatory compliance for the affected public, 49 C.F.R. § 195.440 states:

> (d) The operator's program must specifically include provisions to educate the public, appropriate government organizations, and persons engaged in excavation related activities on:
>
> (1) Use of a one-call notification system prior to excavation and other damage prevention activities;
>
> (2) Possible hazards associated with unintended releases from a hazardous liquid or carbon dioxide pipeline facility;
>
> (3) Physical indications that such a release may have occurred;
>
> (4) Steps that should be taken for public safety in the event of a hazardous liquid or carbon dioxide pipeline release; and
>
> (5) Procedures to report such an event.

Id. API RP 1162 states:

> 2.3 REGULATORY COMPLIANCE This RP is intended to provide a framework for Public Awareness Programs designed to help pipeline operators in their compliance with federal regulatory requirements found in 49 CFR Parts 192 and 195. The three[12] principal compliance elements include:
>
> 2.3.1 Public Education (49 CFR Parts 192.616 and 195.440): ***These regulations require pipeline operators to establish continuing education programs to enable the public, appropriate government organizations, and persons engaged in excavation-related activities to recognize a pipeline emergency and to report it to the operator and/or the fire, police, or other appropriate public officials.*** The programs are to be provided in both English and in other languages commonly used by a significant concentration of non-English speaking population along the pipeline.

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[12] The other two principle areas of compliance relate to emergency responder liaison activities and excavation damage prevention, not the affected public. API RP 1162, Sections 2.3.2 and 2.3.3.

Id. (emphasis added).

Thus, the program must make the public aware of one call systems, possible hazards from unintended releases, recognizing a leak, steps to take in the event of a leak, and procedures to report. As nationally renowned pipeline safety and API expert Mr. Zurcher concluded after significantly detailed testimony, SPLP's public awareness program and implementation thereof do just that:

> 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. Concerning the public awareness brochure, Mr. Zurcher testified at length that the use of a mailing brochure is standard in the industry and contains all of the information necessary to educate the public on these topics. SPLP Exhibit 21 at N.T. 541-544. As Mr. Zurcher also testified, these materials and more are available on Energy Transfer's website. SPLP Exhibit 1 at N.T. 381. Moreover, SPLP has shown numerous times that its public outreach program complies with regulatory requirements.[13]

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[13] 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 Paragraph 6. 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).

Contrary to the regulations on public awareness and this evidence, the ID found the following evidence supportive of a violation:

> Complainant, through his testimony and the testimonies of Mr. Blume, Jon Baker, Mr. Robinson, Ms. Van Fleet, as well as the letters and Cumberland County Resolution made a *prima facie* showing that SPLP's public awareness outreach in Cumberland County is not meeting regulatory requirements. The township scheduled an in-person meeting with SPLP for the purpose of general public education/awareness on July 10, 2018, and the last minute cancellation with no evidence of a subsequent meeting being held thereafter is inconsistent with industry standards and PHMSA regulations. N.T. 236.

ID at p. 35. In referencing all the alleged evidence of SPLP's public awareness outreach, the ID cites no specific portions of such evidence. This evidence does not demonstrate SPLP's public awareness program is non-compliant. No witness that actually provided testimony on the subject identified any specific information that SPLP is required to provide and did not. Complainant testified he wants a public meeting with SPLP and that SPLP did not attend a Lower Frankford Township Supervisors meeting. *See, e.g.*, N.T. 43. Nowhere does Complainant demonstrate that SPLP's public awareness program and activities do not provide adequate information as required under 49 C.F.R. Part 195. To the contrary, he has all the information he needs in the public awareness brochure he retained and entered into the record. Exhibit C-2; SPLP Exhibit 21 at N.T. 541-544. Mr. Robinson only testified that he was at the July 10, 2018 Township meeting. He presented no evidence that SPLP's public awareness program is deficient. N.T. 120-27. Mr. Jon Baker (Complainant's son) did testify that he believes a public awareness meeting is necessary to disseminate information. N.T. 132. However, just like Complainant, Mr. Jon Baker did not demonstrate that SPLP's public awareness program and activities do not provide adequate information. Like his father who resides at the same address, he has all the information required in the public awareness brochure that Complainant retained and entered into the record. Exhibit C-2; SPLP Exhibit 21 at N.T. 541-544. Mr. Blume presented no evidence that SPLP's public awareness program is deficient. N.T. 137-159. Ms. Van Fleet presented no evidence of wanting a meeting or having unanswered questions regarding public awareness. N.T. 162-175. The only evidence she presented on public awareness pertained to mailings,

which is addressed *supra* SPLP Exception 4. There is no evidence to show SPLP's public awareness program or its implementation thereof are inconsistent with law or regulations.

Regarding the letters from Upper Frankford Township Supervisors and the Cumberland County Commissioners, these letters demonstrate SPLP did not attend a Board of Supervisors Meeting in Lower Frankford Township and that both entities want SPLP to attend a meeting open to the public. However, that does not demonstrate non-compliance with regulations because, as discussed *supra* there is no requirement for SPLP to hold or attend public meetings – doing so is within the operator's discretion. Moreover, the Resolution makes no indication that the public is somehow lacking required information on pipeline location or safety or that SPLP's public awareness brochures are not accomplishing regulatory objectives.

D. Lower Frankford and Cumberland County Meetings

The ID misconstrues the facts regarding SPLP not attending a meeting in Lower Frankford Township and circumstances surrounding a cancelled meeting in Cumberland County that in actuality public officials canceled, not SPLP. SPLP wants to make clear that it has been and is willing to meet with Cumberland County public officials, Lower Frankford Township public officials, and emergency responders.

First, the ID cites no record evidence for characterizing that the meeting SPLP was going to attend in Lower Frankford Township was scheduled "for the purpose of general public education/awareness." Instead, the record shows that the meeting was a regularly scheduled Township Supervisors meeting and the meeting did occur. Exhibit C-8, N.T. 42-44. SPLP was unaware when agreeing to attend the meeting that the media would be invited and as SPLP Witness Curtis Stambaugh explained:

> 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 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.

N.T. 378. SPLP never agreed to a public spectacle of a meeting to be covered in the media invited and prompted by anti-pipeline persons, particularly where SPLP intended to discuss sensitive information. Not attending this meeting is not a violation of regulation or law. Moreover, SPLP has reiterated to both the Township and Cumberland County that it is willing to meet with public officials and emergency responders and provide additional training. Exhibit C-10. There was an additional meeting scheduled in Cumberland County with its Commissioners, but public officials cancelled that meeting, ***not SPLP***. N.T. 378. Any finding or implication that SPLP cancelled that meeting with County Commissioners is incorrect and unsupported.

The ID further errs when it finds SPLP did not attend the Lower Frankford Township meeting to "avoid speaking to individuals it believes will file or have filed complaints against the utility." ID at p. 35.[14] There is no competent record evidence for this finding and the ID cites none. This is also inconsistent with the ID's FOF 36, which states SPLP did not attend the meeting because "it might discuss security-sensitive information and refused to participate in a meeting open to the media." Additionally, the timing also makes no sense. The Township regular meeting was on July 10, 2018. Mr. Baker did not file his Complaint until a month later – August 10, 2018. ID at p.2. The ID essentially speculates that SPLP knew a month beforehand that Mr. Baker would file a Complaint, and thus refused to attend the meeting. This finding in the ID would require clairvoyance by SPLP. In any event, there is no competent evidence to support the ID's finding that SPLP did not attend the Township's regular meeting to avoid Mr. Baker. The ID's conjecture on this point is wrong.

The only evidence in the record of SPLP not attending meetings due to litigation is hearsay and supposition. Exhibit C-11 is a letter from Robert F. Young. While the letter itself may fit within the hearsay

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[14] Even if the ID were correct (which it is not) that SPLP declined to appear due to threatened or pending litigation that is not a violation of anything and it is not uncommon for persons, corporations, agencies, government officials, not to discuss in a public forum litigation that is threatened or pending.

exceptions, that does not mean every statement within the letter is an exception to hearsay. In particular, Mr. Young represents that based on conversations he had with counsel for the County and SPLP, SPLP cancelled the meeting based on the belief Mr. Baker would file a Complaint. This is Mr. Young's representation of what others (not SPLP) said. The supposition and speculation on why SPLP did not attend the Township meeting did not come from SPLP's counsel and in fact there was no three-way conversation. Mr. Young apparently spoke with each separately. At most, Mr. Young was stating what one of the two told him and since it was not SPLP, then it must have been whomever he talked to at the County (and it possibly may have been not counsel for the County) but one of the then and now former Commissioners speculating as to why SPLP did not attend. The speculation and hearsay by others as to SPLP's reasons cannot support a finding of fact without competent corroborating evidence, of which there is none and which by law cannot be hearsay itself. *Supra Sule.*

As SPLP has reiterated, it is willing to hold or attend meetings with public officials such as the Lower Frankford Supervisors and the Cumberland County Commissioners. N.T. 378; Exhibit C-10. However, that willingness whether in the past, present or future cannot be misinterpreted and misapplied into incorrectly making a "willingness" into a legal obligation to do so.

SPLP Exception 7. **The ID errs in ordering SPLP to conduct additional emergency responder training.**

The ID apparently finds no violation of law, but orders, in the nature of setting quasi-regulations, SPLP to "provide additional training to emergency officials/responders in Cumberland County as requested in a timely manner in addition to its CoRE and MERO training." ID at pp. 9, 38, 54, FOF 38-40. This directly contradicts controlling law the ID relies upon elsewhere that holds the Commission when adjudicating a complaint cannot order relief unless a violation of law is found. ID at pp. 54, 56, COL 3 (citing *West Penn*). The ID erred in misapplying burden of proof law as Mr. Baker failed to prove by any competent evidence that SPLP is not providing sufficient training to emergency officials and responders. Indeed, SPLP provided the only legally competent evidence. SPLP proved SPLP held MERO trainings in

Cumberland County from 2014-2017, participated in annual CoRE trainings including one specifically held in August 2019 for Cumberland County, via expert testimony that the MERO trainings are effective, comprehensive, and compliant. N.T. 219-226, 230-237, 272-273, 303-304, 342-343, 354-356; SPLP Exhibits 3, 8-18, 20.

Moreover, the ID again fails to apply burden of proof law when stating: "It is difficult for me to evaluate the effectiveness of the MERO or CoRE training exercises as there is lack of evidence of evaluations and no emergency officials testified that they require more training." ID at 38. The ID's job in adjudicating this Complaint by Mr. Baker is not to evaluate effectiveness of the program. The ID's job is to discern what evidence is on the record on this issue and determine whether Complainant met his burden of proof to show SPLP's emergency responder training is in violation of law or regulation. *Supra West Penn.* The ID cites absolutely no evidence that SPLP's emergency responder training is in any way inadequate. There is no such evidence and Complainant wholly failed to meet his burden of proof, particularly in light of SPLP's substantial evidence of its robust emergency responder training.

The ID also fails to recognize SPLP's MERO training is already a supplemental enhancement to SPLP's public awareness baseline program. There is a general preference in API RP 1162 that SPLP have personal contact with emergency officials but API 1162 provides flexibility to operators as to the means of that communication. SPLP fulfills this contact requirement through annual CoRE trainings that are jointly held with other operators and through annual mailings to emergency officials. SPLP goes above and beyond these requirements with its supplemental MERO training.

There is also no evidence of record that any emergency responders or public officials have requested additional training for Cumberland County. In fact, the record shows that SPLP offered just such additional training in 2019, and that the County/Lower Frankford were not interested. Exhibit C-10. Moreover, the record shows that at least 11 employees or those affiliated with the Cumberland County Department of Emergency Services, Cumberland County Hazmat, or Cumberland County Local Emergency Planning Committee (LEPC) have attended a MERO session, as well as 2 people employed by

or affiliated with Lower Frankford Township. SPLP Exhibits 12-18. Again, SPLP is still willing to hold additional trainings if these entities request such training. N.T. 378. But again, this willingness cannot be converted into a legal requirement particularly where there is no competent evidence of record that training is insufficient or that there is any violation of a regulation or statute. This complaint should not be used as a pretext to impose what the ID believes it prefers law should be; rather it should be confined to the record and what the law is.

There is absolutely no basis to order relief concerning SPLP's emergency responder training and outreach, and that issue will be addressed in the rulemaking the Commission is considering. Moreover, the relief is so open ended that it essentially delegates SPLP's managerial discretion to these non-parties regarding additional training: "Sunoco is directed to provide as training as requested by those parties." Leaving the timing, amount and type of training solely to the discretion of others is unwarranted and improper, particularly where they have made no request for such training.

SPLP Exception 8. **The ID erred in ordering injunctive relief that is not narrowly tailored to the alleged and incorrect violations found.**

The ID incorrectly finds SPLP violated 19 C.F.R. Part 195 and API RP 1162 because it did not send Complainant a public awareness brochure every two years. As explained in SPLP Exceptions 2-4, these findings are incorrect and must be overturned. This is the ONLY violation of law that the ID specifically finds. *See generally* ID; *see also* ID at p. 55-59 (Conclusions of Law). In the alternative, even if SPLP's conduct of not mailing Complainant a public awareness brochure every two years is a violation of law, the relief the ID ordered is improper. As both Administrative Law Judge Barnes and this Commission have recognized, injunctive relief must be narrowly tailored to abate the harm complained of:

> 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).

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). Here, the ID (incorrectly) found a violation of law in SPLP not mailing Complainant a public awareness brochure every two years. As the ID admits, there is no harm, ID at p. 54 – at most, this was an administrative error—even though she erred in the conclusion that this is a violation. Moreover, there is no actual evidence of any harm, administrative error, or legal violation from Complainant not receiving the public awareness brochure every two years. SPLP has clearly accomplished the objectives API RP 1162 proscribes – Mr. Baker aware of the general location of the pipelines and had retained the prior public awareness mailing so had information concerning how to recognize a leak, the potential hazards, and what to do in the event of a leak. SPLP Exhibit 21 at N.T. 541-544. The injunctive relief tailored to this alleged violation would be to order SPLP to in the future mail Complainant the public awareness brochure (which it is already doing). Complainant only has standing to pursue this Complaint on behalf of himself.[15] Instead, the ALJ improperly orders much broader and unmerited relief in the form of unpromulgated regulations to effectuate her vision of how SPLP should operate, which is far beyond the concerns Complainant raised and his home county of Cumberland (*see* Ordering Paragraph 10 below):

> 7. That Sunoco Pipeline, L.P. is directed to contact the Lower Frankford Township Supervisors and Cumberland County Commissioners within thirty (30) days of the date of entry of a final order for the purpose of scheduling a public awareness/education meeting(s) to be held in Cumberland County.
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> 8. That absent exigent circumstances, Sunoco Pipeline, L.P. is directed to appear at the scheduled meeting referenced in Ordering Paragraph No. 7
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> 9. That Sunoco Pipeline, L.P. is directed meet with the Cumberland County Department of Public Safety and Cumberland County Board of Commissioners with thirty (30) days of the entry of the Final Order in this

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[15] *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283, 1287 (Pa. Cmwlth. 2019) (citing *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 283 (Pa. 1975)); *Municipal Authority Borough of West View v. Public Utility Commission*, 41 A.3d 929, 933 (Pa. Cmwlth. 2012).

> proceeding to discuss additional communications and training and that Sunoco is directed to provide such training as requested by those parties.
>
> 10. That within ninety (90) days of the Final Order in this proceeding, Sunoco Pipeline, L.P. shall submit to the Commission for review a written plan to enhance its public awareness and emergency training plans and record keeping including but not limited to addressing: 1) the broadening of communication coverage areas beyond 1,320 feet; 2) shortening intervals for communications; 3) use of response cards and social media; 4) supplemental program enhancements to emergency training programs; 5) internal or external audits to evaluate the effectiveness of its programs; and 6) corrective action plans to address any insufficiencies or weaknesses revealed through its evaluations and audits.
>
> 11. That included as part of its plan referenced in Ordering Paragraph No. 10, Sunoco Pipeline, L.P. shall at minimum complete or plan to complete in a timely manner an audit or review of its public awareness program and shall ultimately submit to the Commission within six (6) months from the date of entry of a final order a baseline evaluation of its public awareness program through either an internal self-assessment using an internal working group or through third-party auditors where the evaluation is undertaken by a third-party engaged at Sunoco Pipeline, L.P.'s cost.

ID at p. 61. This relief is wholly improper where, as here, there is absolutely no showing that SPLP's public awareness program or implementation thereof generally is in violation of any law or regulation. The ID's sole violation finding (which as in detailed above, was wrong and was based on incorrect factual assumptions and hearsay) still gives relief that is far beyond the scope of Mr. Baker and his interest in public awareness as he lacks standing to seek relief for anyone other than himself. The ID went well beyond those confines and committed legal error in essentially crafting its own regulations and requirements not to mention preempting the pending rulemaking on the subject.

Moreover, this relief is not just an injunction, but a mandatory injunction requiring affirmative action on SPLP's part. The Commonwealth Court held that 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. *Woodward Twp. v. Zerbe*, 6 A.3d 651 (Pa. Cmwlth. 2010) (citing *Big Bass Lake Community Association v. Warren*, 950 A.2d 1137, 1144 (Pa. Cmwlth. 2008)). The case for a mandatory injunction must be made by a very strong showing, one stronger than that required for a restraining-type

injunction. *Id.* at 1145. The showing here, even if sufficient to show a violation of law (which it does not, *supra* SPLP Exceptions 2-7) is not the strong showing required to impose the mandatory injunction the ID orders.

The ID must be reversed on this injunctive relief not only based on the above principles of law (that none of this relief is narrowly tailored to abate the harm complained of and that there is not a strong enough showing to merit mandatory injunctive relief), but also regarding Paragraph 10, because this relief completely ignores record evidence of SPLP's public awareness program or issues SPLP would have presented evidence of had it been on notice its entire public awareness program was being challenged. The ID orders relief not based on record evidence on issues not raised in this proceeding. If SPLP had notice of these issues, it would have pointed out that SPLP is already doing what the ID orders, as shown in the table below:

Ordered Relief	**Facts**
1) the broadening of communication coverage areas beyond 1,320 feet	SPLP has already done this in its 2019 supplemental mailing. This information was not presented as part of the record as SPLP had no notice that its current mailing buffer was at issue here (and in fact, Complainant never alleged this and this issue and fact was found or raised *sua sponte* by the ID in violation of the Commonwealth Court's decision *Dinniman supra* which found *sua sponte* determinations like this to be contrary to law).
2) shortening intervals for communications	SPLP has already done this as a supplemental activity. API RP 1162 requires a mailing every two years. SPLP completed mailings for the affected public most recently in 2018 and 2019. This information was not presented as part of the record as SPLP had no notice that its current mailing timeframe was at issue here (and in fact, Complainant never alleged this and this issue and fact was found or raised *sua sponte* by the ID in violation of the Commonwealth Court's decision *Dinniman supra* which found *sua sponte* determinations like this to be contrary to law).
3) use of response cards and social media	SPLP already utilizes social media to increase awareness of API RP 1162 baseline messages. Response cards not required under API RP 1162. SPLP utilizes a number of communication methods to encourage two-way communication and feedback from stakeholders including, email, project websites, surveys and focus groups. Moreover, there is a phone number on SPLP's public awareness brochures that stakeholders can call to relay comments and questions.
4) supplemental program enhancements to emergency training programs;	SPLP has already done this with its MERO training and this is on the record of this proceeding. SPLP's MERO training is supplemental outreach, above and beyond the baseline requirements.

5) internal or external audits to evaluate the effectiveness of its programs	SPLP already does this. Public Awareness program at 7.6.1.
6) corrective action plans to address any insufficiencies or weaknesses revealed through its evaluations and audits	SPLP already does this. Public Awareness program at 7.6.1. API RP 1162 states an operator may need to make changes in the program based on the results of their evaluation. SPLP has made modifications based on results of the evaluation to improve effectiveness of the program.

Accordingly, the ID's relief ordered for the incorrect finding that SPLP was required to but did not mail Complainant a public awareness brochure every two years must be overturned.

The ID also erred to the extent it is ordering SPLP to implement whatever the public may want based on response cards from the public. ID at p. 31. Again, the relief is so open ended that it essentially delegates SPLP's managerial discretion to these non-parties. Such relief is improper.

Finally, by raising *sua sponte* issues and arguments regarding public awareness and relying on extra record testimony to order relief in the form of essentially a prosecution of SPLP's public awareness program, the ID acts as an advocate for Complainant. This is not allowed. *Sunoco Pipeline L.P. v. Dinniman,* 217 A.3d at 1289. This also violates SPLP's due process rights to notice and opportunity to be heard on these issues.

SPLP Exception 9. **The ID erred in including irrelevant findings of fact on issues Complainant lacks standing to pursue or issues irrelevant to the Complaint.**

Complainant does not have standing to pursue issues which do not affect him. He must have a direct, immediate, and substantial interest to warrant personal standing. *Sunoco Pipeline L.P. v. Dinniman,* 217 A.3d 1283, 1287 (Pa. Cmwlth. 2019) (citing *William Penn Parking Garage, Inc. v. City of Pittsburgh,* 346 A.2d 269, 283 (Pa. 1975)); *Municipal Authority Borough of West View v. Pa. Pub. Util. Comm'n,* 41 A.3d 929, 933 (Pa. Cmwlth. 2012). "Stated simply, standing requires the complainant to be 'negatively impacted in some real and direct fashion.'" *Id.* at 1288 (citing *Markham* v. *Wolf,* 136 A.3d 134, 140 (Pa. 2016) (quoting *Pittsburgh Palisades Park, LLC* v. *Commonwealth,* 888 A.2d 655, 660 (Pa. 2005))).

In *Sunoco Pipeline L.P. v. Dinniman*, the Commonwealth Court reversed the Public Utility Commission's *sua sponte* theory that State Senator Dinniman had personal standing to file a formal

complaint. *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283, 1289 (Pa. Cmwlth. 2019). In that case, the Commonwealth Court held "[t]he Complaint did not allege harm to Senator Dinniman's property nor harm to his person, and the hearing before the ALJ did not yield evidence of either type of harm." *Id.*

Here, the same holds true for various issues raised at hearing that the ID erred in incorporating as findings of fact. Allegations and issues raised on behalf of others, particularly Complainant's witnesses, do not and cannot "negatively impact [Mr. Baker] in some real and direct fashion." *Id.* at 1288. Indeed, the ID expressly found Complainant has not been harmed. ID at p. 54.

As shown in the table below, the ID makes various findings of facts that Complainant does not have standing to pursue. The ID also makes various otherwise irrelevant findings of fact that should also not be included in any final Commission decision in this proceeding. SPLP excepts to these findings on these bases: FOF 15- 20, 29-31, 42-44, 52, 62-66, 70-71, 73, 76-80.

SPLP Exception 10. **The ID erred in admitting various hearsay documents.**

In addition to the hearsay evidence the ID improperly admitted contrary to *Walker* and relied upon discussed in various Exceptions above, SPLP excepts to the admission of various other hearsay documents that cannot be relied upon for any finding of fact because SPLP properly objected to their admission. SPLP excepts to admission of the following exhibits as discussed in its Main Brief at pages 23-27:

Complainant's Exhibit Number	Reporter's description	N.T.
7	(7/14/18 Newspaper article by Zack Hoopes)	N.T. 59
9	(8/15/18 Newspaper 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
18	(fact sheet from International Trade Administration)	N.T. 96
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

SPLP Exception 11. **The ID erred in interpreting application of Pipeline Safety Laws and Regulations to existing pipelines.**

The ID *sua sponte* incorrectly sets forth the law on retroactive applicability of Pipeline Safety Law and Regulations. ID at pp. 23-25. SPLP never alleged, argued, or briefed the proposition that the Pipeline Safety Act or 49 C.F.R. Part 195 generally do not apply to ME1 because it was constructed prior to promulgation of Part 195. The ID's consideration and holding on this issue is dicta and it is wrong.

The ID incorrectly states that "there is no express exception to the application of Part 195 to any pipeline facilities in existence on the date Part 195 in general was adopted." This is directly contrary to the Pipeline Safety Act, which states: "[a] design, installation, construction, initial inspection, or initial testing standard does not apply to a pipeline facility existing when the standard is adopted." 49 U.S.C. § 60104(b). Moreover, there are such exceptions in the Part 195 regulations. For example, 49 C.F.R. § 195.200 contains a limiting provision for the entirety of the Construction subsection of regulations (49 C.F.R. §§ 195.202-195.266):

> This subpart prescribes minimum requirements for constructing new pipeline systems with steel pipe, and for relocating, replacing, or otherwise changing existing pipeline systems that are constructed with steel pipe. However, this subpart does not apply to the movement of pipe covered by §195.424.

49 C.F.R. Part 195.200.

The ID is also wrong that there are not Constitutional limitations on retroactive application of regulations. ID at n.5. Retroactive application of regulations is prohibited by both the U.S. and Pennsylvania constitutions. The U.S. Constitution, Article I, Section 9 applies to federal law, and Article I, Section 10 extends that prohibition to the States. The Pennsylvania Constitution acknowledges the prohibition on *ex post facto* laws at Article I, Section 17. Pennsylvania law clearly established that an agency may not promulgate retroactive regulations or apply regulations retroactively where retroactivity

would "destroy vested rights, impair contractual obligations or violate the principles of due process and *ex post facto* laws." *R&P Serv's, Inc. v. Dept. of Rev.*, 541 A.2d 432, 434 (Pa. Cmwlth. 1988). The Commission should either properly set forth the law on this issue or omit it from any final order as it is dicta and incorrect.

III. CONCLUSION

WHEREFORE, Sunoco Pipeline L.P. respectfully request the Pennsylvania Public Utility Commission reject and modify the Initial Decision of Administrative Law Judge Elizabeth Barnes consistent with these exceptions and dismiss the Complaint in its entirety with prejudice.

Respectfully submitted,

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