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REPLY TO:

Center City

August 13, 2020

Electronic Filing

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

Re: Flynn, et al. v. Sunoco Pipeline L.P.,
Docket Nos. C-2018-3006116, P-2018-3006117
DiBernardino, Docket No. C-2018-3005025 (consolidated)
Britton, Docket No. C-2019-3006898 (consolidated)
Obenski, Docket No. C-2019-3006905 (consolidated)
Andover, Docket No. C-2018-3003605

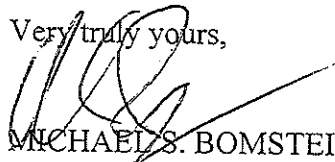
**FLYNN COMPLAINANTS' ANSWER TO SUNOCO'S
MOTION FOR PARTIAL SUMMARY JUDGMENT ON
CONSEQUENCE WITHOUT PROBABILITY**

Dear Secretary Chiavetta:

Attached for electronic filing with the Commission is Flynn Complainants' Response to Sunoco's Motion for Partial Summary Judgment on Consequence without Probability.

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

Very truly yours,


MICHAEL S. BOMSTEIN, ESQ.

MSB:mik

cc: Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MEGHAN FLYNN	:	
ROSEMARY FULLER	:	
MICHAEL WALSH	:	
NANCY HARKINS	:	
GERALD MCMULLEN	:	DOCKET NO. C-2018-3006116
CAROLINE HUGHES and	:	DOCKET NO. P-2018-3006117
MELISSA HAINES	:	DOCKET NO. C-2018-3005025
Complainants	:	DOCKET NO. C-2019-3006898
v.	:	DOCKET NO. C-2019-3006905
	:	DOCKET NO. C-2018-3003605
	:	
SUNOCO PIPELINE L.P.,	:	
Respondent	:	

**FLYNN COMPLAINANTS' RESPONSE TO SUNOCO'S MOTION FOR PARTIAL
SUMMARY JUDGMENT ON CONSEQUENCE WITHOUT PROBABILITY**

I. Introduction

A. Overview of Sunoco's Motion

Sunoco contends that a consequence analysis such as the one Flynn Complainants have furnished is meaningless because Complainants have not offered any evidence of the likelihood that a release will actually occur. Sunoco asks the ALJ to create new law and impose a burden upon Complainants to prove that a release is probable; failing that, the company contends, Complainants cannot demonstrate that the pipelines in the high consequence areas of Chester and Delaware Counties are unsafe within the meaning of 66 Pa.C.S.A. § 1501.

In support of this contention, Sunoco first makes an estoppel argument, asserting that both the PUC and ALJ Barnes already have taken this position. Specifically, Sunoco claims that "Administrative Law Judge Elizabeth H. Barnes ("ALJ Barnes") and the unanimous Commission held that evidence of the consequences of a release from ME2 without evidence of the probability of that release actually occurring is insufficient to establish that ME2 violates Section

1501 of the Public Utility Code.” (Motion for Partial Summary Judgment on Consequence (“MSJ I”) at 1).

Sunoco also raises an entirely separate point. The company argues that it has been authorized by federal and state law to locate ME2 in a high consequence area. Hence, it follows that a claim by Complainants that ME2 is unsafe within the meaning of § 1501 cannot be sustained.

B. Summary of Flynn Complainants’ Argument

As shown below, Sunoco’s argument suffers from an economy of candor.

First, neither the Commission nor Judge Barnes said or implied that “evidence of the consequences of a release from ME2 without evidence of the probability of that release actually occurring is insufficient to establish that ME2 violates Section 1501 of the Public Utility Code.” What they did write instead is quoted at length below.

Second, the statute and regulation cited by Sunoco do not support Sunoco’s claim either. Neither 49 U.S.C.A. §60109 nor 49 CFR § 190.452 says what is being claimed. Indeed, as Sunoco counsel well know, the siting of HVL pipelines is not within the purview of PHMSA. The fact is that neither the federal government nor the state government has specifically reviewed the question of whether or not Sunoco’s operation of HVL service in Chester or Delaware is safe.

In addition, just because an HVL pipeline may operate in a high consequence area does not mean that it is a good idea in *every* high consequence area, or under *all* circumstances. Moreover, under § 1501, whether or not a pipeline is safe, its operations may still not be adequate or reasonable. Sunoco has incorrectly conflated three distinct notions.

Finally, having now submitted its rebuttal case, it can safely be said that (a) Sunoco itself has done at least five separate consequence-only analyses, and (b) *there is no documentary evidence that Sunoco ever did a probability assessment or risk analysis relative to the ME1 or ME2 pipelines.*

As shown below, there also are material facts in dispute that entitle Complainants to a full hearing. Under the circumstances, Sunoco is not entitled to partial summary judgment.

II. Responses to Sunoco's Factual Averments

1. Denied as stated. Ultimately, cessation of all Mariner East operations would be desired by Flynn Complainants. The Second Amended Complaint, however, sets forth the scope of Complainants' claims as well as the relief requested. Sunoco's allegation is a complete distortion of what the Complaint says and what it seeks. Among other things, in Count IV Complainants seek a thorough, independent examination of the condition of the existing HVL pipelines throughout the Commonwealth in order to make a proper determination as to what remediation is required. The Complaint also seeks compliance with the public awareness provisions of federal regulations. Further, the Complaint seeks removal of HVL operations from the high consequence areas of Chester and Delaware Counties. Finally, the Complaint seeks such other and further relief as may be appropriate.

2. Admitted.

3. Denied as stated. Sunoco ignores Complainants' claim that Sunoco's operation of the Mariner East pipelines is or will be inadequate or unreasonable. The Statutory Construction Act's requirement that the plain language of a statute may not be disregarded seems to have escaped Sunoco.

4. Admitted.

5. Denied as stated. The only *expert* testimony on consequences in this case is the testimony of Mr. Marx. Documents admitted into evidence included the Canadian report commissioned by Sunoco. In addition, there are four separate hazard assessments Sunoco has marked as “CSI” that Complainants will seek to introduce into evidence either by stipulation or motion.

6. Admitted.

7. Admitted.

8. Admitted.

9. Denied as stated. In its January, 2019 Order, in the context of a request for *emergency* relief, the Commission wrote:

Based upon our review of the Material Question, whether the December 11, 2018 Order of presiding ALJ Barnes should be affirmed as the Complainants/Petitioners have not shown that they are entitled to interim **emergency** relief, we find that the Order is thorough and well-reasoned, and there is insufficient evidence of record to reverse it.

On consideration of the pleadings, testimony and exhibits of the Parties, ALJ Barnes recommended that the Petition seeking interim **emergency** relief be denied. The presiding ALJ was not persuaded that the Petitioners established the requisite existence of an “**emergency**” so as to support granting interlocutory injunctive relief under the Commission’s regulations... (Emphasis added).

What Judge Barnes actually wrote in her December 11, 2018 Order related solely to the kinds of evidence needed to obtain an injunction based on the existence of an *emergency* within the meaning of 52 Pa. Code 3.1:

Without evidence regarding pipeline integrity, the risk or probability of fatalities regarding ME1 or ME2, or evidence of past releases along the Mariner East Project, Petitioners have failed to show a clear and present danger to human life or property within the meaning of 52 Pa. Code §3.1.

Judge Barnes wrote that, in order to establish the right to emergency relief, Flynn Complainants would have been required to prove a disaster was imminent. Because Complainants did not present evidence at the time of pipeline integrity, did not present evidence of the risk or probability of fatalities regarding ME1 or ME2, and did not present evidence of past releases along the Mariner East Project, the petitioners had not met their burden of proof under § 3.1. The instant proceeding, however, does contain evidence relating to pipeline integrity and evidence of past releases on the Mariner East pipeline. In citing to Judge Barnes' decision, therefore, Sunoco simply left out the parts it did not like.

10. Denied as stated. Admitted the statement is an accurate quote. Denied that Flynn Complainants are alleging that a pipeline explosion is imminent and, therefore, the comparison is entirely inapposite.

11. Denied as stated. Admitted the statement is an accurate quote. Denied that Flynn Complainants are alleging that a pipeline explosion is imminent and, therefore, the comparison is entirely inapposite. It is clear that the Commission wrote that it was not ruling upon whether Complainants might be able to prove any of their allegations in the Complaint case, yet Sunoco now seems to be alleging that the ruling does have a bearing on proof of the allegations in the Second Amended Complaint.

12. Admitted.

13. Denied as stated. Once again, Sunoco's description of the Flynn Complainants' case is inaccurate, as set out more fully above in ¶ 1.

14. Admitted.

15. Admitted.

16. Denied as stated. A colloquy established that while risk was not part of the Flynn Complainants' case, it was at least part of Ms. Britton's case. Flynn counsel acknowledged that fact. Judge Barnes stated that she always thought risk was part of the case. Flynn counsel stated, "Your Honor, I understand. It's not part of our case, may be part of hers." Judge Barnes then stated, "Okay" and the case moved on. (N.T. 1174 at ll. 11- 13). Sunoco is now alleging that the judge's comment indicated that risk was part of the Flynn case and that her prior decision showed that even in a non-emergency situation risk had to be demonstrated. The Judge never said that or implied that in her previous decision and the PUC did not say or imply it either.

17. Denied as stated. Risk is not the entire predicate for the claim that the presence of ME2 in Chester and Delaware Counties is unsafe. Neither is risk the predicate for other claims under § 1501 or 49 CFR § 195.440.

18. Denied as stated. Admitted that no testimony quantifying risk was presented. Denied that the Marx direct testimony "simply repeated his testimony" from the November, 2018 injunction hearing.

19. Denied as stated. Admitted that Marx offered no probability analysis. The remainder of the averment is denied both because it is incorrect and it is a legal conclusion rather than a statement of undisputed fact.

20. Admitted.

21. Admitted.

22. Admitted.

23. Denied as stated. Marx does not state his testimony is "sufficient." Sufficient for what? Sunoco does not furnish an answer to this question.

24. Denied as stated. Admitted only that Marx did not perform a risk analysis.

III. Sunoco's Argument

A. Response to Sunoco's Argument Summary

25. For all the reasons set forth above already Sunoco's argument fails. Sunoco's reliance on the *Povacz* and *Randall* cases also is misplaced; there is no connection between those cases and the Judge's ruling on Flynn Complainants' request for injunctive relief. Judge Barnes based her ruling on § 3.1, not § 1501. Moreover, the facts in those two cases are easily distinguishable.

In *Povacz*, a PECO electricity consumer claimed that a smart meter proposed to be installed at her home would expose her to radio frequency fields that would be harmful to her health. Smart meter installation had already been approved by the state legislature.

Povacz's Complaint alleged that she was uniquely sensitive to RF emissions and her health would be adversely affected by installation. She claimed that this would violate rights under § 1501 by creating an unsafe and unreasonable situation. *Povacz* alleged she could meet her burden of proof by showing that the meter had the potential to harm her. The Commission ruled instead that she needed to prove that smart meter usage would exacerbate or adversely affect her health. Ms. *Povacz's* expert, however, testified that he could not say that RF emissions did or would cause the symptoms she was claiming.

Unlike the *Povacz* case, Sunoco knows what will happen in the event of a catastrophic HVL release. Indeed, Sunoco does not deny it. Three of the four hazard reports go into great detail as to fatalities and serious injuries that would result. Jeff Marx's unrebutted testimony, to a reasonable scientific certainty, establishes this as well. There is no conjecture or speculation on this point, unlike the facts in *Povacz*.

Randall involved a similar, simple causation analysis. In *Randall*, Complainants also sought to opt out from smart meters based on alleged health risks. As in *Povacz*, the customer's expert Dr. Marino testified there was no evidence to warrant the statement that a smart meter will, would or did harm the Complainants. As in the earlier case, there were two issues to resolve. First, sufficiency of causation. Second, whether § 1501 would afford Complainants relief. The PUC found causation had not been established and that because of that complainant had not shown the potential exposure was "unsafe."

A relevant case nowhere mentioned by Sunoco is *Mattu v. West Penn Power Co.*, C-2016-2547322 (2018). In *Mattu*, complainant had vegetation on his property that was periodically removed by mechanical means. West Penn proposed to change that arrangement by using herbicides instead. Mattu claimed that this could permanently damage two private wells that were the only source of water on his property.

The Commission found that West Penn's actions were consistent with its management plan and did not violate the Code, a regulation or a Commission order, but it would be inequitable to allow the company to proceed with its plan on Mr. Mattu's property. The Commission explicitly stated that it found West Penn's plan unreasonable as applied to complainant. Mattu carried his burden of proof to show the risk of contamination was too great to ignore and on balance West Penn could use a different method of vegetation management.

In *Mattu*, the Commission used the term "risk" interchangeably with "probability." At the same time, the possible terrible outcome – destruction of all water supplies – was what factored into the decision to find in favor of complainant. West Penn had been approved to use its herbicidal management plan and Mattu wanted an exception. The Commission did not credit

West Penn's argument that the plan had been approved and no exceptions were possible. The lynchpin of the decision was reasonableness, not safety.

With respect to instant Complainants' siting claims, Sunoco's argument is equally dubious. Sunoco argues that a plan has been approved and, therefore, no further inquiry is possible. *Mattu* says otherwise. The outcome of herbicidal management on Mattu's property was a possibility, not a certainty. But if disaster struck, no access to water would remain. In the instant case, the outcome of ME operations running through Delaware and Chester Counties is a possibility, not a certainty. But if disaster strikes, that outcome—according to Sunoco's own hazard assessments—is a major catastrophe. The Commission has the ability to prevent that outcome by finding that avoiding the possible harm is reasonable.

26. Denied. The fact that a practice has been approved does not make it safe nor does it make it wise, adequate or reasonable. Marx does not “contradict” regulations in his testimony. This claim is a red herring in its entirety.

27. Denied. ¶ 26 above is hereby incorporated.

28. Denied as stated. It is not disputed that Complainants have not offered and will not offer evidence of the particular probability that a pipeline release or failure might occur. There are other relevant facts that have not been addressed or even alluded to, however, that make Complainants' consequence analysis relevant.

IV. RESPONSE TO SUNOCO'S ARGUMENT

A. Legal Standards

29. Denied as stated. The Second Amended Complaint contains factual averments that are material to distinct claims set forth in that pleading. This averment is imprecise and inaccurate and overgeneralizes the basis for a partial summary judgment.

Sunoco has identified two issues among many in this case. One is whether a consequence-only analysis is insufficient for Flynn Complainants to succeed on one of their claims, the claim that the siting of Mariner East pipelines in Delaware and Chester counties violates § 1501. Sunoco contends that Complainants do not have sufficient evidence to prove that siting is unsafe. The company does not contend that the evidence is insufficient to show that the siting is inadequate or unreasonable. Second, Sunoco argues that its putative compliance with federal regulations in the siting of the pipelines in Delaware and Chester Counties estops Complainants from claiming the siting violates § 1501.

Sunoco's motion does not touch upon or address the importance of making the public aware of the possible hazards of an HVL release or explosion. Flynn Complainants are aware of six (6) undisputed consequence analyses and yet Sunoco's public awareness brochures divulge no information showing likely fatalities or serious injuries. Consequence analysis is most certainly relevant to Complainants' claims under 49 CFR §195.440.

Sunoco's motion also fails because it analogizes Flynn Complainants' claims to the personal injury claims in the smart meter cases of *Povacz* and *Randal*. The analogy has no merit. First, the opinion expressed by Jeff Marx is given to a reasonable professional certainty. Second, the opinion is unequivocal and describes in great detail what is likely to happen under certain precisely delineated circumstances.

30. Denied as stated. It is indisputable that partial summary judgment is permitted by the rules. Again, however, Sunoco paints with too broad a brush. The granting of the present motion will not resolve the case.

31. Admitted.

32. Admitted.

33. Admitted.

34. Admitted.

35. Admitted.

36. Admitted.

37. Admitted.

38. Admitted.

39. Denied as stated. While this averment is accurate it is nonetheless inapposite because it sheds no light on Sunoco's contention that a consequence analysis by itself is meaningless.

40. Denied as stated. This case has nothing to do with managerial discretion and Flynn Complainants do not have the burden of proving such abuse.

41. Denied as stated. Flynn Complainants are not seeking preliminary injunctive relief and these cases are inapposite.

B. Proof of Risk is not required in this Case.

42. Denied as stated. Admitted (once again) that no evidence has been or will be presented on the probability of a release or failure. Denied that the evidence does not support relief under § 1501. Jeff Marx's testimony explains in great depth why consequence analysis is important. Sunoco has offered not one iota of evidence or expert opinion to rebut Marx, other than an unsupported, off-the-cuff remark by Mr. Zurcher simply stating that the probability of an event must be considered.

Mr. Marx's consequence analysis is also relied upon by safety expert Timothy Boyce. The use of the Marx analysis by Mr. Boyce is not even mentioned by Sunoco.

As the proponent of the position that risk must be considered, Sunoco has its own burden of proof. Where is that proof? It is not in the rebuttal testimony and it is not in any affidavits in support of the instant motion.

43. Denied as stated. Flynn Complainants are not seeking a shutdown unless a PUC-appointed expert supports a shutdown. A decision like that must be evidence-based. That evidence can only come from an independent investigation.

44. Denied as stated. Once again, the standard for a preliminary injunction is not the same as the standard for the relief sought by Flynn Complainants.

45. Denied as stated. This averment is just a repetition of a repetition of a repetition of previous averments and all previous responses are hereby incorporated.

46. Denied as stated. This averment is just a repetition of a repetition of a repetition of previous averments and all previous responses (including ¶ 45 above) are hereby incorporated.

47. Denied as stated. This averment is just a repetition of a repetition of a repetition of previous averments and all previous responses (including ¶¶ 45 and 46 above) are hereby incorporated.

48. Denied as stated. This averment is just a repetition of a repetition of previous averments and all previous responses regarding what the judge and Commission did are hereby incorporated.

49. Denied as stated. Once again, the ruling related to a claim for preliminary injunctive relief and involved § 3.1, not § 1501. The remainder of the averment is accurate but incomplete as it oversimplifies and misapplies *Povacz*.

50. Denied as stated. This averment is accurate but incomplete as it oversimplifies and misapplies *Povacz*.

5. John Zurcher, for one, states in his rebuttal testimony that “[i]t is inappropriate to consider the consequence of an event without also considering the likelihood of an event occurring” (Zurcher at 21, ll. 3-4). While he goes on to talk about steps Sunoco takes to mitigate risk (Zurcher at 21, ll. 5-19), nowhere in his testimony does he explain either in lay terms or engineering terms *why* it is inappropriate to consider consequences without discussing probability. His statement is presented as a professional opinion, yet the factual predicate for his opinion is never laid out. (*Cf.*, Marx Surrebuttal at 2, ll. 24 -32).

6. Jeff Marx, on the other hand, explains in his surrebuttal testimony that a consequence analysis is sometimes useful quite apart from a probability analysis. First, he points out that Sunoco itself “obtained its own consequence analyses in connection with the proposed Mariner East 2 (ME2) pipelines. That analysis, to my knowledge, was not risk-based, nor has it been made public.” (Marx Surrebuttal at 2, ll. 42 – 44).

7. Mr. Marx also points out that persons living near the ME pipeline route may have consequence-based concerns tied to (a) switch from crude oil to HVLs on existing ancient pipelines; (b) installation of much larger new lines with greater potentially negative consequences; and (c) risk being imposed on residents versus voluntary assumption of other kinds of risk. (Marx Surrebuttal at 3, ll. 1 – 22).

8. Apart from Jeff Marx’s testimony, there is other evidence that Sunoco has based decisions on potential consequences only: Sunoco has four hazard assessments classified as CSI. Sunoco has said the classification is based on the need to protect against potential terrorist activity. (*See, generally*, Sunoco’s December 2, 2019 Answer to Motion to Reclassify.)

9. Sunoco has never identified the seriousness of the supposed terrorist threat. The probability of a terrorist attack on ME2 in Chester County or Delaware County has never been

analyzed, To the best of Complainants' knowledge, no determination of that risk has ever been calculated. Hence, what Mr. Zurcher claims and what Sunoco in its pending motion claims are completely at odds with what Sunoco does.

10. Sunoco's real-world concerns about the consequences of a release or rupture are mirrored in the actual consequence analysis done by Mr. Marx and made part of his direct testimony. (Marx Direct, App. A, Table A-1) An excerpt of his results is shown below:

**APPENDIX A
ESCAPE ANALYSIS DETAILED RESULTS**

**Table A-1
Impacts for Potential Escape Away from Flame**

Pipeline	Operating Pressure [psig]	Starting Distance [ft]	Escape Speed [mph]	Time to Burns [s]	Time to Fatality [s]
ME2	1480	500	3	2	8
			4	2	8
			5.6	2	9
		700	3	6	50
			4	7	escape
			5.6	7	escape
		1100	3	45	escape
			4	51	escape
			5.6	escape	escape

11. The above table was designed to be self-explanatory. As can readily be seen, for a pipe operating at 1480 psig, nine (9) separate scenarios are demonstrated based upon a person's location relative to the release at the time of the release and also how fast a person was traveling away from a flame.

12. Using these variables, it is seen that anyone within 500 feet is either burned or killed.

13. A person who is 700 feet away who walks 1 mile in 20 minutes is still injured or killed. Burns will occur within the first 2 seconds; death within 9 seconds.

14. If a person who is 700 feet away can walk a mile in 10.7 minutes, that person will escape but with burns within 7 seconds.

15. No data have been presented as to the ability of a person with a walker or in a wheelchair to attain any particular escape velocity in fleeing an HVL release or explosion.

16. The ALJ may take judicial notice, however, that there exists a whole class of elderly and disabled persons who are unable to walk a mile in 20 minutes or less.

17. Mr. Marx developed a detailed timeline for two distinct events.(Marx Direct at 43, l. 19 - 46, l. 3). Timothy Boyce, in his direct testimony as Director of Delaware County Emergency Services, adopted by reference Mr. Marx's testimony regarding the timelines for the two distinct release events. (Boyce Direct at 14, l. 8 - 18, l. 8).

18. None of Sunoco's experts has questioned the said timelines.

19. Based upon the Marx timelines, there is no set of circumstances under which first responders will arrive at the scene of an HVL release or rupture in less than five minutes.

20. Based upon the Marx analysis and timelines, all of the predicted injuries and fatalities will occur long before any first responders arrive on the scene.

21. Sunoco has produced for Flynn Complainants four separate hazard/spill analyses, the contents of which at present remain marked CSI. Complainants intend to introduce those analyses into the proprietary record at the upcoming hearing. Three of the four analyses describe injuries and fatalities following releases and ruptures of HVLs.

22. Flynn Complainants previously introduced into evidence Sunoco's hazard analysis for a Canadian HVL pipeline. That report identifies a hazard zone surrounding a release or rupture of HVLs. (Ex. Friedman - 13).

23. By way of further response, Sunoco cannot now argue that consequences without calculated probability is insufficient to establish a danger, having relied on sworn declarations and argument to the contrary in a previous administrative proceeding.

24. Specifically, in several proceedings before the Office of Open Records, including at Docket Nos. 2019-0502, 2019-0358, and 2019-1325, Sunoco resisted a request from the Commission to furnish documents concerning the Mariner East pipelines. Sunoco cited to 65 P.S. Public Officers § 67.708(b)(3), exempting from disclosure records that, if public, would cause a “reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system...”

25. In those proceedings, Sunoco provided no evidence of probability, arguing that the disclosure of certain records “would jeopardize the security of ET and its employees” and would facilitate destruction of the pipelines by “someone with malicious intent.” In other words, irrespective of probability, the consequences would be too great to risk disclosure. (Copy of ET’s affidavits attached hereto as Exhibits “A” and “B.”)

26. Perhaps even more pertinently, the Commission itself argued the same thing. In a sworn affidavit, Mr. Paul Metro, former Manager of the Safety Division, Pipeline Safety Section, wrote: “In my professional opinion, release of the requested records would allow for awareness of the potential effectiveness of a sabotage act on a pipeline (and in particular on these pipelines) to harm the public and create mass destruction, thereby potentially inciting such acts and creating a great risk to public safety. I arrived at my professional opinion that the requested records are [CSI] in consultation with numerous other technical gas safety staff at the Commission, all of which agree with my professional assessment.” (Copy of Metro’s Affidavit attached hereto as

Exhibit “C.”). Thus, this very Commission issued a very significant professional opinion without at all quantifying risk—just as the Flynn Complainants have done here.

27. In the 2019-0502 case, the Office of Open Records agreed with Sunoco and with the Commission relative to Sunoco’s secret hazard assessments. “Accordingly, the Commission has demonstrated that the disclosure of the three responsive Hazard Assessment Reports produced by ETP/SPLP and the security related content *would endanger the safety and security of the pipelines* and that the Hazard Assessment Reports were properly withheld under Section 708(b)(3) of the RTKL” (emphasis added). *See* Final Determination in OOR Dkt. No. 2019-0502, at pages 14-15, available at <https://www.openrecords.pa.gov/Documents/FinalDet/41453.pdf>" <https://www.openrecords.pa.gov/Documents/FinalDet/41453.pdf>.

28. Importantly, Sunoco has no evidence that it has factored risk into *any* of its calculations or plans. Witness Zurcher testified blithely about HVL pipelines in general being safe and having less risk than other means of transporting HVLs. He offers no data or concrete information, however, that Sunoco, as opposed to the industry as a whole, has quantified the risk of operating HVL pipelines in the Commonwealth or in Delaware or Chester Counties in particular.

29. Mr. Marx addresses this glaring deficiency in his surrebuttal testimony as follows:

There is an additional problem with this testimony. It makes assumptions based on facts not in the record. It assumes that Sunoco’s particular HVL pipelines – the operational ME1 and 12-inch workaround lines, as well as the ME2 lines under construction – pose a specific and constant level of risk along the pipeline route. That risk, however, is not defined by Mr. Zurcher. If that risk has been defined by a Sunoco analysis, it has not been made public. And if such a definition exists, it seems that it would have been useful to Mr. Zurcher’s testimony.

(Marx Surrebuttal at 5, ll. 29 – 34).

30. 49 USC § 60109(g)(B) governs pipeline integrity requirements. It states explicitly that integrity can be maintained by

using pipeline route surveys, depth of cover surveys, pressure tests, external corrosion direct assessment, or other technology that the operator demonstrates can further the understanding of the condition of the pipeline facility are completed on a schedule **based on the risk that the pipeline facility poses to the high consequence area in which the pipeline facility is located.**

(Emphasis added).

31. Thus, the bedrock of integrity maintenance is a risk assessment that *Sunoco* is supposed to have conducted in Chester and Delaware Counties. There is no evidence in this case that Sunoco ever conducted such an assessment for Chester County, Delaware County or anywhere in the entire Commonwealth.

32. Finally, 49 CFR § 195.440, relating to public awareness, mandates disclosure of *possible hazards* from unintended releases. Further, the PUC itself in February, 2018 directed Sunoco to furnish consequence information. (Ex. Friedman – 9). Despite all these requirements, Sunoco’s public awareness brochures disclose none of this information.

VI. Complainants’ Argument

33. The parties agree that risk and consequence are distinct notions. Sunoco’s claim, however, that a consequence analysis by itself is meaningless, is at odds with claims it has made elsewhere and is belied by its own conduct.

34. Sunoco did not perform four separate consequence analyses for the Mariner East Project and an additional one in Canada in the belief that consequence is irrelevant. Sunoco did not take the opposite position in open-record proceedings because it did not believe consequence by itself may be relevant.

35. The claim that only risk is a relevant determinant of Sunoco's compliance with its obligations under § 1501 is not supported by the statute and it is not supported by the decisional authority upon which Sunoco relies.

36. Under 49 U.S.C.A. 60109, Sunoco's integrity management program was mandated to be grounded on a prior assessment of risk. Sunoco is in blatant violation of that mandate and in absence of any evidence of risk assessment its entire integrity management program is unlawful.

37. The suggestion that Sunoco has even factored risk into its siting decisions is supported by nothing in the evidence to date other than a conclusory statement by witness Zurcher. Based on the record as it stands, it is abundantly clear that Sunoco's actions (in contrast to its words) focused solely on consequences.

38. Evidence as to consequences in this proceeding has been developed for multiple reasons, none of which is addressed by Sunoco in its motion. First, just as no reasonable person would establish a home next to a bomb factory, no reasonable person would voluntarily have an HVL pipeline next to her home either. This has been addressed by the unrebutted testimony of Jeffrey Marx.

39. While Complainants are not quantifying the risk, all parties agree that a risk exists. The recent tragedy in Beirut, however, illustrates that the consequences of having high volumes of explosive materials in crowded areas can simply be too devastating to be reasonable, no matter the associated probability of their explosion.

40. Evidence in this case shows that Mariner East is running lines within mere feet of Alison Higgins' home. Sunoco expert John Zurcher lives nowhere near HVL lines but, just in

case, he has multiple combustible gas detectors throughout his home. That decision is based on consequence, not risk.

41. A second, equally important reason to emphasize consequences is that the public is entitled to know of the horrific events that will be visited upon it upon the occurrence of an HVL catastrophe. This entitlement is not based on Complainants' subjective sense of right and wrong; it's the law.

42. Unrebutted evidence of the regulatory requirements imposed on Sunoco under 49 CFR § 195.440 shows that a public utility is *mandated* to disclose *possible* hazards from unintended releases.¹ Possible hazards of course means possible consequences. Further, the PUC itself in February, 2018 directed Sunoco to furnish this information. Despite all these requirements, Sunoco's public awareness brochures disclose none of this information.

43. As the proponent of its summary judgment motion, Sunoco bears the burden of showing that there are no material facts in dispute with respect to Complainants' legal claims.

44. Sunoco's first claim is that Flynn Complainants' siting argument cannot succeed without evidence of risk and it is Complainants' burden to show that that evidence exists.

45. Three propositions are advanced by Sunoco in support of that claim. First, John Zurcher says so and therefore it must be true. Complainants have shown above that argument is fallacious. John Zurcher expressed his opinion on the importance of considering risk. His failure to furnish the factual predicate for his conclusion entirely undercuts his conclusion. "Assertions, regardless of how honest or strong, cannot form the basis of a finding in his favor.

¹ "The operator's program must specifically include provisions to educate the public, appropriate government organizations, and persons engaged in excavation related activities on... [p]ossible hazards associated with unintended releases from a hazardous liquid or carbon dioxide pipeline facility..."

Assertions, personal opinions or perceptions do not constitute factual evidence.” *Pennsylvania Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

46. The second proposition is that for purposes of § 1501, Sunoco contends the HVL pipelines are safely sited because the probability of an untoward event is relatively low. The probability of an HVL release in Chester and Delaware County, however, has not been established in this case and sweeping generalities about safety cannot overcome the plain language of the mandate of 49 U.S.C.A. § 60109. Further, Sunoco has not defined “safe” or referred to any statutory or regulatory definition of “safe” so as to prove its claim that “safe” equals an acceptably low risk.

47. Sunoco’s position also is founded in part on the notion that the risk of HVL operations in the Commonwealth and in Delaware and Chester Counties in particular has been quantified and determined acceptable when in fact Sunoco has presented no evidence that this is true. A summary judgment movant has its own burden of proof and Sunoco has not met it.

48. Further, Sunoco offers no authority for the proposition that a sufficiently serious consequence is not a reason to consider HVL service unsafe, inadequate or unreasonable.

49. Sunoco’s argument in the instant matter is the precise opposite of its argument in multiple open records cases. In those matters, Sunoco was successful. Thus, Sunoco has admitted that circumstances exist in which consequences must be considered even though risk is not quantified. The same is true here.

49. Sunoco asserts that pipeline safety regulations permit siting of HVL service in Chester and Delaware Counties and that this estops Flynn Complainants from making any claim that the siting is unsafe, inadequate or unreasonable. The notion that the law allows Sunoco to

do something in general does not, however, mean that in a particular case, such as Chester and Delaware Counties, it is a good idea or that it is safe, adequate or reasonable.

50. 49 CFR § 195.440 says that a public utility is *mandated* to disclose possible hazards from unintended releases. Further, the PUC itself in February, 2018 directed Sunoco to furnish this information. Despite all these requirements, Sunoco's public awareness brochures disclose none of this information. Said failure confirms the allegations in the Complaint and preclude summary judgment.

51. In the final analysis, for purposes of a summary judgment motion, it is Complainants' burden to show that they have sufficient evidence to prove their claims.

52. It is clear that Sunoco has failed to demonstrate that a consequence analysis without a probability assessment is meaningless.

53. It is clear that Sunoco has failed to show any authority for the proposition that lack of a risk assessment is fatal to Flynn Complainants' case.

54. Complainants are entitled under 49 CFR § 190.440 to offer evidence of possible hazards of HVL releases and the Marx direct and surrebuttal testimony is competent evidence of possible hazards.

55. Complainants are entitled under § 1501 to offer evidence that siting of HVL service in Chester and Delaware Counties is unsafe, inadequate or unreasonable. Flynn Complainants' lay testimony and the Marx direct and surrebuttal testimony are competent evidence that siting of HVL service in Chester and Delaware Counties is unsafe, inadequate or unreasonable.

VII. CONCLUSION

For all of the above reasons Complainants request that Sunoco's Motion for Partial Summary Judgment be denied.

Respectfully submitted,

/s/ Michael S. Bomstein

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Dated: August 13, 2020

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of Flynn Complainants' foregoing Answer upon the persons listed below as per the requirements of § 1.54 (relating to service by a party).

See attached service list.

/s/ Michael S. Bomstein
Michael S. Bomstein, Esq.

Dated: August 13, 2020

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EX. "A"

**BEFORE THE
PENNSYLVANIA OFFICE OF OPEN RECORDS**

IN THE MATTER OF:

ERIC FRIEDMAN,

Requester,

vs.

PENNSYLVANIA PUBLIC UTILITY
COMMISSION,

Respondent.

Docket No. 2019-1325

**DECLARATION IN SUPPORT OF DIRECT INTEREST PARTY
ENERGY TRANSFER**

1. I, Todd Nardoizzi, am the Senior Manager of Department of Transportation Compliance of Energy Transfer (ET).

2. ET owns Sunoco Pipeline L.P. (SPLP), a jurisdictional "public utility" holding a certificate of public convenience issued by the PUC, which operates the Mariner East 1 (ME1) and Mariner East 2 (ME2) pipelines.

3. Part of my job responsibilities require me to ensure the protection and safety of ET assets, including ET and/or SPLP's records and other documents.

4. I have knowledge of records submitted to the Pennsylvania Public Utility Commission and possibly implicated by the June 9, 2019 requests for:

2. All transmittal letters submitted to the PUC by Sunoco Pipeline, or any parent or subsidiary of Sunoco Pipeline, as the term "transmittal letter" is used in 52 Pa. Code Section 102.3(b)(1).

3. All records that were submitted to the PUC along with the transmittal letters specified in item 2 above that fall in the category of "Records that are public in nature and subject to the Right-to-Know Law," in accordance with 52 Pa. Code Section 102.3(b)(2)(i).

5. ET regularly submits information to the PUC through applications for operational approvals, through litigation of complaints and protests to which ET is a party, and through regulatorily-required compliance filings. These filings encompass a broad range of information in a variety of forms, including technical reports, locational drawings, and operational standards, submitted to the agency or its bureaus in applications, petitions, other pleadings, discovery responses, briefs, testimony, exhibits, letters, etcetera.

6. Since 2008, ET has submitted substantial information regarding the operation, location, and vulnerabilities of ET's pipeline, which it treats as confidential security information in accordance with the provisions of the Public Utility Confidential Security Information Disclosure Protection Act (35 P.S. §§2141.1 to 2141.6).

7. Records in possession of the PUC that contain ET's confidential security information are of sufficient detail that, if disclosed, could be used to facilitate damage or disruption to ET's pipelines. While certain observations concerning the characteristics of ET's pipeline facilities – such as their general path or the location of the above-ground valves – can be seen at the surface level, the types of confidential security information frequently provided to the PUC reflects far more detailed information than anything that could be obtained through surface level observation. The release of this information would create a much more significant risk to the security and integrity of the ME 1 and ME 2 pipelines than anything that could be obtained through surface-level observation. Specifically, public disclosure of ET's detailed confidential security information in possession of the PUC would give someone with malicious intent the knowledge

necessary to breach, damage or destroy the pipelines, potentially resulting in the compromise of life, safety, public property, public utility facilities, and other private property.

8. ET maintains strict access control of records containing confidential security and proprietary information by limiting disclosure to authorized, essential personnel and government agencies with the jurisdiction to require disclosure of such documents.

9. ET operates pipeline systems in the competitive natural gas liquids pipeline industry. Since 2008, ET has provided the PUC with numerous records containing commercial and financial information regarding ET's operations. This information includes details regarding ET's specialized business practices and operations that was developed after investing significant time and resources. For example, SPLP is required to create various procedures and plans for construction, operation, and maintenance of its pipelines pursuant to 49 C.F.R. Part 195. Each pipeline operator is required to have its own such procedures and plans. SPLP has invested significant time and resources to create these proprietary documents that have substantial economic value within the industry.

10. Since 2008, ET has consistently provided the PUC with valuable trade secret information, such as processes, formulas, and plans, which may be implicated by the requests. This information includes details regarding ET's specialized business practices and operations, which derive their value from not being generally known. This information is the result of ET's years of experience operating its pipeline system and significant monetary investment in the development of its proprietary processes.

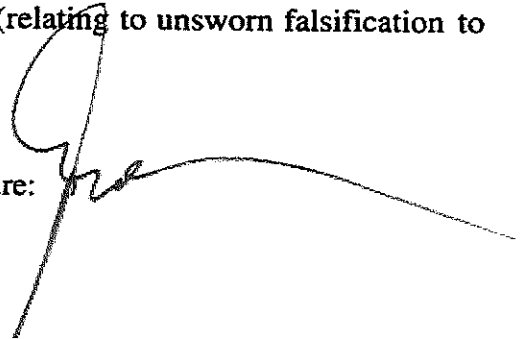
11. ET treats its proprietary and trade secret information as confidential and takes substantial steps to guard its secrecy, including limiting access to proprietary and trade secret

information to authorized personnel and requiring non-disclosure agreements prior to disclosing such proprietary information to third parties.

I, Todd Nardozzi, hereby state that the facts above set forth are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Date: 8/17/19

Signature:

A handwritten signature in black ink, appearing to be 'Todd Nardozzi', written over a horizontal line.

EX. "B"

**BEFORE THE
PENNSYLVANIA OFFICE OF OPEN RECORDS**

IN THE MATTER OF:

ERIC FRIEDMAN,

Requester,

vs.

PENNSYLVANIA PUBLIC UTILITY
COMMISSION,

Respondent.

Docket No. 2019-0358

**DECLARATION IN SUPPORT OF DIRECT INTEREST PARTY
ENERGY TRANSFER PARTNERS**

1. I, Garrett A. Ray, am a Specialist – Regulatory Compliance of Energy Transfer Partners (ETP).
2. ETP owns Sunoco Pipeline L.P. (SPLP), which operates the Mariner East 1 (ME1) pipeline.
3. Part of my job responsibilities require me to ensure the protection and safety of ETP assets, including ETP and/or SPLP's records and other documents.
4. I have knowledge of records submitted to the Pennsylvania Public Utility Commission and possibly implicated by the February 25, 2019 request for "[a]ll records or documents in the custody, possession or control of the Bureau of Investigation and Enforcement (BIE) of the Pennsylvania Public Utility Commission that pertain to the accident that was

discovered April 1, 2017 in Morgantown on Sunoco's 'Mariner East 1' pipeline." (hereinafter referred to as the "Requested Records").

5. To the extent the Requested Records exist, ETP and SPLP treat this material as confidential security information. To the extent ETP and/or SPLP has voluntarily provided such confidential information to PUC investigators, the information was marked in substantial compliance with the provisions and procedures specified by the Public Utility Confidential Security Information Disclosure Protection Act (35 P.S. §§ 2141.1 to 2141.6), Pipeline and Hazardous Materials Safety Administration (PHMSA) regulation, 49 CFR § 105.30, and/or the Pennsylvania Right to Know law...

6. While certain observations concerning the characteristics of the ME1 pipeline – such as their general path or the location of the above-ground valves – can be seen at the surface level, the Requested Records seek far more detailed information than anything that could be obtained through surface-level observation. The release of this information would create a much more significant risk to the security and integrity of the ME1 pipeline than anything that could be obtained through surface-level observation.

7. To the extent ETP and/or SPLP have provided Pennsylvania Public Utility Commission (Pa. PUC) investigators with the Requested Records or related information, Pa. PUC's investigators are prohibited from disclosure of these records.

8. In line with the confidential nature of the Requested Records, ETP and SPLP maintain strict access control of these documents with disclosure limited to authorized, essential personnel and government agencies with the jurisdiction to require disclosure of such documents.

I, Garrett A. Ray, hereby state that the facts above set forth are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Date: March 22, 2019

Signature: 

EX. "C"

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

Eric Friedman

v.

Pennsylvania Public Utility Commission

00R AP 2019-0502

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

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

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

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

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

Hazard Assessment for ME1

Date: 12-17-2013

Pages: 56

Hazard Assessment for proposed ME2 Pipeline

Date 3-27-2017

Pages: 67

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

Date: 10-5-2018

Pages: 33

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

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

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

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

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

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

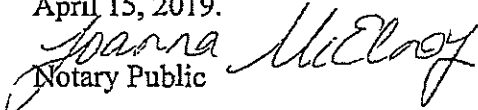
harm the public and create mass destruction, thereby potentially inciting such acts and creating a great risk to public safety.

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



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

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



Notary Public

