**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Meghan Flynn :

Rosemary Fuller :

Michael Walsh :

Nancy Harkins : C-2018-3006116

Gerald McMullen : P-2018-3006117

Caroline Hughes and :

Melissa Haines :

Andover Homeowners Association : C-2018-3003605

Melissa DiBernardino : C-2018-3005025

Rebecca Britton : C-2019-3006898

Laura Obenski : C-2019-3006905

:

v. :

:

Sunoco Pipeline, L.P. :

**ORDER**

**Granting Intervenor Josh Maxwell’s Petition to Withdraw Intervention, Denying Sunoco Pipeline, L.P.’s Motion In Limine to Limit Testimony of Rosemary Fuller, Denying Sunoco Pipeline L.P.’s Motions for Partial Summary Judgment, Denying Flynn Complainants’ Motion for Partial Summary Judgment, and Granting in Part and Denying in Part Sunoco Pipeline, L.P.’s Motion In Limine to Narrow Issues**

On July 28, 2020, Sunoco Pipeline, L.P. (SPLP, Sunoco or Respondent) filed a Motion For Partial Summary Judgment Regarding Integrity Management Corrosion Control and Cathodic Protection. On July 29, 2020, SPLP filed a Motion For Partial Summary Judgment Regarding Consequence Without Probability. Pro se Complainants Britton, DiBernardino and Obenski filed Answers in response to these motions. Andover Homeowners Association and the Flynn Complainants[[1]](#footnote-1) also filed Answers.

On August 13, 2020, Flynn Complainants filed a Motion for Finding of Spoliation; however, on August 17, 2020, they requested leave to withdraw the Motion.

SPLP filed a Motion In Limine to Limit Testimony of Rosemary Fuller on August 14, 2020 and Exhibit E to the Motion was filed on August 17, 2020. Although Flynn Complainants served copies of their response to this motion on September 1, 2020, the response was not filed with the Commission and an electronic copy of it was not served upon the presiding officer until September 24, 2020,

SPLP filed two Motions to Consider Replies to Answers to its Motions for Partial Summary Judgment. Flynn Complainants filed responses to SPLP’s Motions to Consider Replies on August 26, 2020.

On August 27, 2020, Flynn Complainants filed a Motion for Partial Summary Judgment. On September 1, 2020, Flynn Complainants filed an Amended Motion for Partial Summary Judgment.

On September 16, 2020, SPLP filed an Answer to the Flynn Complainants’ Amended Motion for Partial Summary Judgment. On the same date, SPLP filed a Motion In Limine to Narrow Issues.

On September 22, 2020, Flynn Complainants filed a Motion to Submit Additional Evidence. On September 23, 2020, Flynn Complainants filed an Answer to SPLP’s Motion In Limine. On September 24, 2020, Flynn Complainants filed a Reply to Sunoco’s Answer to Motion for Partial Summary Judgment. Answers to the Flynn Complainants’ Motion to Submit Additional Evidence are due Monday, September 28, 2020. A ruling on that motion will be made after an answer is received. Other motions are ripe for a decision.

The Commission’s regulations at 52 Pa. Code §5.102(d)(1) set forth the standard of review for summary judgment motions:

(1) *Standard for grant or denial on all counts*. The presiding officer will grant or deny a motion for judgment on the pleadings or a motion for summary judgment, as appropriate. The judgment sought will be rendered if the applicable pleadings, depositions, answer to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.

52 Pa.Code § 5.102(d)(1).

When deciding on a motion for summary judgment, all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Thompson Coal Co. v. Pike Coal Co.,* 488 Pa. 198, 412 A.2d 466 (1979). However, once a motion for summary judgment is properly made and supported, it is generally accepted that the nonmoving party may not simply rest upon the mere allegations or denials of its pleading, but must set forth facts showing that there is a genuine issue for trial. *Fiffick v. GAF Corporation,* 603 A.2d 208 (Pa. Super. 1991) (Discussing the Pennsylvania Rules of Civil Procedure);  *Anderson v. Liberty Lobby, Inc., Inc.,* 477 U.S. 242 (1986) (Discussing the Federal Rules of Civil Procedure)*.*

In the instant case, there are material facts in dispute. In their Motion for Partial Summary Judgment, Flynn Complainants contend SPLP did not produce risk assessments in discovery and SPLP contends that it did produce risk assessments in discovery. SPLP contends Complainants have failed to present a genuine issue of material fact for hearing and have failed to meet their burden of proof to show a violation of the Public Utility Code, Commission regulations, or Commission Order regarding the integrity management, corrosion control, and cathodic protection of the Mariner East 1 and 12-inch pipelines, entitling SPLP to judgment as a matter of law.

Conversely, Complainants contend there remain genuine issues as to material facts regarding the integrity management, corrosion control and cathodic protection of the ME 1 and 12-inch workaround pipelines.

SPLP also contends that Complainants have failed to present any evidence, much less substantial evidence necessary to sustain their burden, of the probability or risk of a catastrophic or other release from ME2. SPLP argues that the potential consequences of a catastrophic release, without evidence of the likelihood of that release occurring, does not render ME2 unsafe within the meaning of Section 1501 as a matter of law. Complainants’ arguments that ME2 is unsafe simply because it is located in high consequence areas in Delaware and Chester counties directly contravenes the Commission’s regulations. Therefore, SPLP is entitled to summary judgment on this issue as a matter of law.

Conversely, Andover Homeowners’ Association argues that its witness, Eric Friedman, testified that Sunoco is the highest risk operator in the United States pipeline business. He specifically discussed, as admitted into evidence, release and incident data from the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) showing that Sunoco had more incidents and a higher incident rate than other comparable pipeline operators. Also in evidence is a variety of consequence analyses from various sources, including Delaware County, a citizens group, and Sunoco’s Canadian affiliate showing the horrific consequences of a highly volatile liquid (“HVL”) hazardous materials release which could occur on the Mariner East system. Further, several witnesses at the lay hearings, including Mr. Friedman, Ms. Caroline Hughes, Ms. Rebecca Britton, and various school district representatives, testified that the Mariner East pipeline was placed within several feet of their homes, schools, businesses, including restaurant kitchens less than 100 feet from a valve site, and extended care facilities. Finally, Mr. Tim Boyce’s written testimony is that he, as the person responsible for Delaware County emergency response, cannot provide any reasonable response to any significant Mariner East incident.

Complainant Britton argues SPLP’s Motion for Partial Summary Judgment should be denied there is evidence in the record showing a lack of disclosure of the hazards of the Mariner East pipelines, with specific reference to the valve located at the Marsh Creek 6th grade center. Ms. Britton argues SPLP should be required to create and share a complete hazard analysis with the state. She requests the hazard analysis be shared with the township and County within which she resides such that officials may have effective management programs.

Complainant DiBernardino argues that SPLP and counsel, even if willing, could not provide the actual probability/likelihood of a leak on the Mariner East Pipelines. Without the ability to determine the probability, there is no credible way to determine the risk. Without a proper risk analysis, one cannot create an adequate integrity management plan and therefore, SPLP is out of compliance with 49 CFR § 195.452 - Pipeline integrity management in high consequence areas.

Complainant Obenski argues that discovery is still open in the case. Construction of the Mariner East project has continued, uninterrupted, despite a delay in these proceedings, and as a result, damages and violations to her community have continued to accrue. The testimony provided so far in these proceedings, especially at the expert testimony level, deserves full consideration before the Commission. Complainants also deserve a full opportunity to consider the evidence and testimony submitted on behalf of other aligned parties.

I find that the evidence admitted so far and the pleadings, depositions, answers to interrogatories and admissions, together with affidavits, show that there are genuine issues as to whether Respondent violated any statute, Commission regulation, or Commission order; thus, SPLP is not entitled to judgment as a matter of law. Additionally, Flynn Complainants are not entitled to partial summary judgment because they allege there was no risk assessment/analysis ever performed on ME 1 or ME 2. SPLP contends risk assessments are in existence and the operator is entitled to defend its position against the allegations of Flynn Complainants.

Regarding the outstanding motion in limine to exclude/limit the written testimonies of Rosemary Fuller, although she is a lay witness, she may testify as to her water issues and refer to a lab report. She may also testify as to her actions and regarding facts of which she has personal knowledge. SPLP’s Motion in Limine will be denied. I will rule on the Motion to Submit Additional Evidence filed by Flynn Complainants at the September 29, 2020 hearing, after SPLP has had an opportunity to respond in writing by September 28, 2020.

Regarding SPLP’s Motion in Limine to Narrow Issues, Flynn Complainants admit that their request for an independent consultant’s remaining life study of ME1 is now moot as the same relief has been granted in a separate complaint proceeding. However, they contend a remaining life study should also be done on the 12-inch workaround pipeline traversing through their Counties of residence. I agree with Flynn Complainants, that the issues will be narrowed to whether the Commission should direct an independent remaining life study on the 12-inch workaround pipeline. SPLP’s Motion in Limine will be granted in part and denied in part.

THEREFORE,

IT IS ORDERED:

1. That Josh Maxwell’s status as a pro se intervenor in this proceeding is rescinded.

1. That Sunoco Pipeline, L.P.’s Motions to Consider Replies to Answers to its Motions for Partial Summary Judgment are granted.
2. That Sunoco Pipeline, L.P.’s Motion For Partial Summary Judgment Regarding Integrity Management Corrosion Control and Cathodic Protection is denied.
3. That Sunoco Pipeline, L.P.’s Motion For Partial Summary Judgment Regarding Consequence Without Probability is denied.
4. That Flynn Complainants’ Motion for Finding of Spoliation is deemed withdrawn.
5. That Sunoco Pipeline, L.P.’s Motion In Limine to Limit Testimony of Rosemary Fuller filed on August 14, 2020 is denied.
6. That the Flynn Complainants’ Amended Motion for Partial Summary Judgment filed on September 1, 2020 is denied.
7. That Sunoco Pipeline, L.P.’s Motion In Limine to Narrow Issues is Granted in Part and Denied in Part.
8. That the relief requested of an independent consultant conducting a remaining life study on Mariner East 1 is stricken as moot; however, the relief requested of an independent consultant conducting a remaining life study on the 12-inch workaround pipeline in Chester and Delaware Counties remains in the Flynn Complainants’ complaint.

Date: September 25, 2020 /s/

Elizabeth Barnes

Administrative Law Judge

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

*(Revised 9.25.20)*

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1. Meghan Flynn, Rosemary Fuller, Michael Walsh, Nancy Harkins, Gerald McMullen, Caroline Hughes, and Melissa Haines. [↑](#footnote-ref-1)