

LAW OFFICES  
PINNOLA & BOMSTEIN

MICHAEL S. BOMSTEIN  
PETER J. PINNOLA

ELKINS PARK OFFICE  
8039 OLD YORK ROAD  
ELKINS PARK, PA 19027  
(215) 635-3070  
FAX (215) 635-3944

100 SOUTH BROAD STREET, SUITE 2126  
PHILADELPHIA, PA 19110  
(215) 592-8383  
FAX (215) 574-0699  
EMAIL: mbomstein@gmail.com

MT. AIRY OFFICE  
7727 GERMANTOWN AVENUE, SUITE 100  
PHILADELPHIA, PA 19119  
(215) 248-5800  
Center City  
REPLY TO:

January 21, 2021

***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' POST-HEARING REPLY BRIEF**

Dear Secretary Chiavetta:

Attached for electronic filing with the Commission is Flynn Complainants' Post-Hearing Reply Brief.

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

Very truly yours,

/s/ Michael S. Bomstein  
MICHAEL S. BOMSTEIN

MSB:mik

cc: Per Certificate of Service

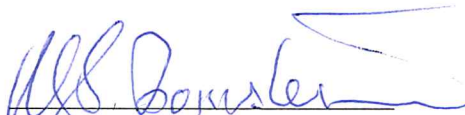
**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the within Post-Hearing Reply Brief upon the persons listed below as per the requirements of § 1.54 (relating to service by a party). The document has not been filed electronically on the Commission's electronic filing system.

*See attached service list.*

  
Michael S. Bomstein, Esq.

Dated: January 21, 2021

## SERVICE LIST

Thomas J. Sniscak, Esquire  
Kevin J. McKeon, Esquire  
Whitney E. Snyder, Esquire  
Hawke, McKeon & Sniscak LLP  
100 North Tenth Street  
Harrisburg, PA 17101  
tjsniscak@hmslegal.com  
kjmckeon@hmslegal.com  
wesnyder@hmslegal.com  
*Attorneys for Respondent SPLP*

Michael P. Pierce, Esquire  
Pierce & Hughes  
17 Veterans Square  
Media, PA 19063  
mppierce@pierceandhughes.com  
*Attorney for Edgmont Twp*

James C. Dalton, Esquire  
Unruh, Turner, Burke & Frees  
P.O. Box 515  
West Chester, PA 19381-0516  
jddalton@utbf.com  
*Attorney for West Chester Area*

Joseph Otis Minott, Esquire  
Alexander G. Bomstein, Esquire  
Ernest Logan Welde, Esquire  
Kathryn Urbanowicz, Esquire  
Clean Air Council  
135 South 19<sup>th</sup> St, Suite 300  
Philadelphia, PA 19103  
Joe\_Minott@cleanair.org  
abomstein@cleanair.org  
lwelde@cleanair.org  
kurbanowicz@cleanair.org

Robert Fox, Esquire  
Neil Witkes, Esquire  
Diana A. Silva, Esquire  
Manko, Gold, Katcher & Fox  
401 City Avenue, Suite 901  
Bala Cynwyd, PA 19004  
rfox@mankogold.com  
nwwitkes@mankogold.com  
dsilva@mankogold.com  
*Attorneys for Respondent SPLP*

Rich Raiders, Esquire  
Raiders Law  
321 East Main Street  
Annville, PA 17003  
rich@raiderslaw.com  
*Attorney for Andover Homeowners*

James J. Byrne, Esquire  
McNichol, Byrne & Matlawski  
1223 North Providence Road  
Media, PA 19063  
jjbyrne@mbmlawoffice.com  
*Attorney for Thornbury Twp*

Erin McDowell, Esquire  
3000 Town Center Blvd  
Canonsburg, PA 15317  
emcdowell@rangeresources.com  
*Attorney for Range Resources*

Hon. Elizabeth H. Barnes  
Administrative Law Judge  
Public Utility Commission  
400 North Street, 2<sup>nd</sup> Flr. L-M  
West  
Harrisburg, PA 17120  
ebarnes@pa.gov

Guy Donatelli, Esquire  
Vincent M. Pompo, Esquire  
Lamb McErlane PC  
24 East Market Street  
West Chester, PA 19382-0565  
gdonatelli@lambmcerlane.com  
vpompo@lambmcerlane.com  
abaumler@lambmcerlane.com  
*Attorneys for West Whiteland,  
Downingtown SD, Rose Tree  
Media Sch Dist, Sen Killion*

Anthony D. Kanagy, Esquire  
Garrett P. Lent, Esquire  
Post & Schell PC  
17 North Second St 12th Floor  
Harrisburg, PA 17101-1601 a  
akanagy@postschell.com  
glent@postschell.com  
*Attorney for Range Resources*

James R. Flandreau, Esquire  
Paul, Flandreau & Berger, LLP  
320 West Front Street  
Media, PA 19063  
jflandreau@pfblaw.com  
*Attorney for Middletown SD*

Leah Rotenberg, Esquire  
Mays Connrad & Rotenberg  
1235 Penn Avenue, Suite 202  
Wyomissing, PA 19610  
rotenberg@mcr-attorneys.com  
*Attorney for Twin Valley SD*

Mark L. Freed, Esquire  
Joanna A. Waldron, Esquire  
Curtin & Heefner, LLP  
2005 S Easton Road, Ste 100  
Doylestown, PA 18901  
mlf@curtinheefner.com  
jaw@curtinheefner.com  
*Attorney for Uwchlan Twp*

### ***PRO SE INTERVENORS:***

Thomas Casey, Esquire  
1113 Windsor Drive  
West Chester, PA 19380  
tcaseylegal@gmail.com

Melissa DiBernardino  
1602 Old Orchard Lane  
West Chester, PA 19380  
lissdibernardino@gmail.com

Virginia Marcielle-Kerslake  
103 Shoen Road  
Exton, PA 19341  
vkerslake@gmail.com

Laura Obenski  
14 South Village Avenue  
Exton, PA 19341  
ljobenski@gmail.com

Josh Maxwell  
4 West Lancaster Avenue  
Downingtown, PA 19335  
jmaxwell@downingtown.org

Rebecca Britton  
211 Andover Drive  
Canonsburg, PA 15317  
rbrittonlegal@gmail.com

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Michael Flynn, Rosemary Fuller,	:	
Michael Walsh, Nancy Harkins,	:	
Gerald McMullen, Caroline Hughes,	:	Docket No. P-2018-3006117
and Melissa Haines,	:	Docket No. C-2018-3006116
<i>Complainants,</i>	:	Docket No. C-2018-3005025
v.	:	Docket No. C-2019-3006898
	:	Docket No. C-2019-3006905
Sunoco Pipeline, L.P.,	:	Docket No. C-2018-3003605
<i>Respondents.</i>	:	

**FLYNN COMPLAINANTS'  
POST-HEARING REPLY BRIEF**

/s/ Michael S. Bomstein  
Michael S. Bomstein, Esq.  
Pinnola & Bomstein  
PA ID No. 21328  
Email: mbomstein@gmail.com  
Suite 705 Land Title Building  
100 South Broad Street  
Philadelphia, PA 19110  
Tel.: (215) 592-8383

Dated: January 19, 2021

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	:	Docket No. C-2019-3006905
Sunoco Pipeline, L.P.,	:	Docket No. C-2018-3003605
<i>Respondents.</i>	:	
	:	

Pursuant to the October 23, 2020 Briefing Order, and in accordance with 52 Pa. Code § 5.501, Flynn Complainants hereby submit this Post-Hearing Reply Brief.

Flynn Complainants have made and proven their case. Sunoco’s Main Brief (the “Sunoco Brief”) contains no surprises or powerhouse arguments to undercut that. Instead, the Brief is weakened by arguments that do not reflect the law and proposed findings of fact that are simply false or ignore contrary facts in the record.

The Complainants' Main Brief (the "Flynn Brief") already has addressed all of the topics raised in the Sunoco Brief. The instant brief, therefore, focuses only on certain of Sunoco's legal arguments that have no basis in law and factual claims that are not supported in the record. Based on the law and facts set forth below and in the Flynn Brief, and in light of the unpersuasive Sunoco Brief, the Commission should rule in favor of Flynn Complainants and grant the requested relief. The Pennsylvania public desperately needs that relief.

## II. ARGUMENT

Sunoco asserts in its Brief that the Flynn Complainants and aligned Intervenors are seeking injunctive relief but have not met the standard for granting such relief that is generally applied in Pennsylvania civil courts. The Commission plays a different role from the role played by civil courts, and those rules do not apply.

Sunoco bases its claims on evidence that supposedly shows its operation of the Mariner East pipelines “complies with or exceeds all regulatory requirements and is safe and reasonable under Section 1501 of the Public Utility Code. 66 Pa.C.S. § 1501.” (Sunoco Brief at 1). The record establishes the opposite.

Sunoco identifies four of Complainants’ arguments that it says are unsupportable either in fact or in law and argues that: (1) There is no legal basis for the claim that locating Mariner East pipelines in high consequence areas (“HCAs”) is unsafe and unreasonable under Section 1501; (2) Complainants have not demonstrated that Sunoco has failed to comply with PHMSA’s integrity management, corrosion control and cathodic protection requirements; (3) Complainants have not proved that Sunoco’s public awareness program falls below regulatory requirements; and (4) Flynn Complainants’ remaining “hodgepodge of allegedly unsafe conditions” is not a matter within the Commission’s jurisdiction.

Without reiterating the facts and law set forth in the Flynn Brief, Complainants rebut these arguments below, highlighting points where Sunoco’s argument is egregiously false.

A. **The Commission absolutely has the authority to find, and should find, that Sunoco’s siting of Mariner East is unlawful.**

Flynn Complainants have put on evidence that Mariner East operations and construction are unreasonably and dangerously close to homes and places of public gathering. Sunoco

contends, however, that claims based on the siting and location of its operations and pipelines are not within the Commission's jurisdiction. (Sunoco Brief at 85–87).

Sunoco's argument begins with the demonstrably false statement that “[i]t is undisputed that the Commission lacks jurisdiction over the siting and location of public utilities, including pipelines and related appurtenant equipment, such as valve stations.” (Sunoco Brief at 85). Of course, Flynn Complainants dispute this claim.

More important, Sunoco's position is plainly contrary to Commonwealth Court precedent that is not only directly relevant, but stems from yet another controversy surrounding Sunoco's Mariner East project. In *Delaware Riverkeeper Network v. Sunoco Pipeline L.P.*, 179 A. 3d 670, 682 (Pa. Cmwlth. 2018) (citing 66 Pa. C.S. § 1505), a panel of seven judges held:

[T]he Public Utility Code's provisions afford Plaintiffs a forum for their rights, and reasonable notice and hearing, on complaint that **the location** of Sunoco's utility facilities are [sic] unreasonable, unsafe, inadequate, insufficient, or unreasonably discriminatory, or otherwise in violation of the Public Utility Code. 66 Pa. C.S. §§ 701(entitled “Complaints”), 1505(a) (entitled “Proper service and facilities established on complaint”) ...

179 A.2d at 693-694. (Emphasis supplied).

*Delaware Riverkeeper* is not the only case in which our appellate courts have held that the Commission has *full* and *exclusive* authority over matters involving the location of public utility facilities. *See, e.g., County of Chester v PECO*, 420 Pa. 422, 425, 218 A. 2d 331 (1966) (courts will not originally adjudicate matters within PUC jurisdiction, including location of utility facilities) and *Flynn v. Middletown Township*, Commonwealth Court, 942 CD 2017 (Opinion, March 26, 2018) (unpublished decision) (Sunoco defeated Delaware County residents' challenge to company's violation of local setback ordinance based on PUC's exclusive



jurisdiction). These legal precedents, the first of which is binding, stand in direct opposition to the claim that it is undisputed that the PUC lacks jurisdiction over siting and location issues.

It is particularly outrageous that Sunoco is arguing now that the Commission has no siting jurisdiction given its role in developing these recent precedents. In 2014, West Goshen Township enacted a zoning ordinance with specific setback requirements to prevent pipeline construction in residential areas. The Delaware Riverkeeper Network and Chester County residents filed suit in the Chester County Court of Common Pleas, seeking an injunction. Sunoco filed Preliminary Objections to the Complaint, raising multiple arguments. For present purposes, the most significant was the contention that the court lacked jurisdiction because PUC had sole jurisdiction. The basis for that contention was that, even though the Commission was not expressly given such powers, all matters involving the petroleum product pipes were within the PUC's exclusive powers.

On a parallel track, Middletown Township (Delaware County) had a SALDO setback ordinance limiting pipeline siting so that a distance of at least 75 feet from the center of a right-of-way had to be maintained. Meghan Flynn and other local residents filed suit in Delaware County Common Pleas, seeking an injunction. Sunoco filed Preliminary Objections that were virtually identical to those filed in the Chester County case. The company argued the case could not be brought in Common Pleas Court because this Commission had exclusive jurisdiction over siting matters.

Sunoco counsel in the Middletown case emphasized the PUC's exclusive jurisdiction repeatedly during oral argument. The parties argued whether or not local courts had jurisdiction to decide a dispute over siting. Flynn plaintiffs contended the courts did. Sunoco argued that the courts did not and that the PUC did not just have jurisdiction, it had *exclusive* jurisdiction. In

further support of its position, Sunoco cited *Borough of Lansdale v. PECO*, 403 Pa. 647, 170 A.2d 565, 566-567 (1961) as follows:

Although we still possess the right of judicial scrutiny over the acts of the PUC, no principle has become more firmly established in Pennsylvania law than that the courts will not originally adjudicate matters within the jurisdiction of the PUC. Initial jurisdiction in matters concerning the relationship between public utilities and the public is in the PUC—not in the courts. It has been so held involving rates, service, rules of service, extension and expansion, hazard to public safety due to use of utility facilities, installation of utility facilities, **location of utility facilities**, obtaining, alerting, dissolving, abandoning, selling or transferring any right, power, privilege, service, franchise or property and rights to serve particular territory.

(Emphasis added; footnotes omitted).

Sunoco’s newest version of what the law requires is simply a reflection of whose ox is being gored. Its latest argument “looks the other way” and conspicuously fails to refer to *Delaware Riverkeeper, Flynn v. Middletown*, or *Borough of Lansdale*. Instead, it relies exclusively upon a single PUC decision, *West Goshen Township v. Sunoco Pipeline L.P.*, Docket No. C-2017-2589346, Opinion and Order at 10-11 [sic] (Order entered October 1, 2018).<sup>1</sup>

As has become Sunoco’s practice, Respondent has once again quoted a decision entirely out of context. While it is accurate to note that the PUC in *West Goshen Township* wrote that “the Commission’s authority regarding the siting of public utility facilities is limited,” (Sunoco Brief at 85), one would not know from Sunoco’s Brief that (1) the case involved the *location* of a proposed valve and appurtenant structure; (2) the Complainant sought and obtained interim emergency relief that enjoined Sunoco from *locating* that facility as proposed; (3) the Commission subsequent affirmed the granting of the emergency order; and (4) the Commission stated that the “The ALJ also aptly addressed in the Recommended Decision our safety

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<sup>1</sup> This case should not be confused with the separate zoning ordinance suit.

jurisdiction regarding pipeline facilities,” (Opinion and Order at 5). This case, therefore, stands for the proposition that a party *may* invoke the Commission’s powers to challenge the location of a petroleum products pipeline facility.

Additional support for Flynn Complainants’ position regarding siting is found in 49 C.F.R. § 195.210(a). That statute provides that “Pipeline right-of-way must be selected to avoid, as far as practicable, areas containing private dwellings, industrial buildings, and places of public assembly.” This minimum federal siting standard has been incorporated into Pennsylvania law via 52 Pa. Code § 59.33, which section incorporates federal pipeline safety regulations as the “minimum safety standards for all natural gas and hazardous liquid public utilities in this Commonwealth.” The PUC certainly has the authority to determine whether Sunoco’s Mariner East operations and construction have been designed to avoid such facilities “as far as practicable.”

Two Common Pleas judges have ruled that the PUC has exclusive jurisdiction over siting claims. The Commonwealth Court has agreed. Siting claims have been brought previously in the Commission, including recently in the West Goshen Township case, when Judge Barnes granted interim injunctive relief governing the location of Mariner East pipeline facilities. Throughout, and until now, Sunoco has argued strenuously that siting claims belong before the Commission. All of a sudden, Sunoco is arguing that the opposite is true—not only true, but “indisputably” true.

For all of these reasons, Sunoco’s siting argument must be dismissed.

**B. Complainants have raised and proven meritorious arguments about the Mariner East pipeline's corrosion and lack of integrity.**

Faced with compelling evidence raising concerns about the lack of pipeline integrity in the Mariner East system, Sunoco attacks the testimony of Dr. Zamanzadeh (“Dr. Zee”) and falls back on its written plans and its expert testimony. Sunoco’s cherry-picking of Dr. Zee’s testimony fails to undermine it.

And having a good plan is not evidence tending to prove that Sunoco’s utility service is safe, reasonable, or adequate. Following a good plan is, though it may not be sufficient. The company’s experts consistently testified either that (1) they have no knowledge of how the plans may or may not have been followed; or (2) the plans have been followed and they know that because Sunoco told them so.

Neither type of testimony should convince the Commission that the plans have been followed. Indeed, any testimony that the plans have been followed is inconsistent with the company’s history of repeated accidents and disasters. In the absence of tangible proof that Sunoco is operating and constructing Mariner East pipelines safely, adequately and reasonably, Respondent has failed to rebut Complainants’ § 1501 claims.

1. Dr. Zee’s testimony is not based upon an incomplete view of documents.

On January 15, 2020, Dr. Zee submitted his direct testimony in this case. At the outset, he stated that *his firm* had been retained to review certain documents and make recommendations. (Zee Direct at 6, ll. 17-23). When asked how his *firm* prepared *his* analysis, he stated, “At Matergenics my staff and I work collaboratively under my supervision.” (Zee Direct at 6, ll. 26-28).

When asked what documents the team had reviewed, he answered that 31,521 pages had been supplied as well as additional materials later on. (Zee Direct at 6, l. 31 – 7, l. 39). He later

stated, “[w]e reviewed *tens of thousands of pages of materials...*” (Zee Direct at 39, ll. 19-20). (Italics added).

Dr. Zee also identified a searchable software platform that his team used to look for key words in the 31,521 pages of material initially supplied. As regards that platform, he stated that, like other such platforms, “no one claims it has a 100% success rate” so relevant documents may not have been identified. (Zee Direct at 7, l. 41 – 8, l. 2).

During his September 30, 2020 testimony, Dr. Zee was asked how many documents that he, *personally*, had examined, the witness stated “ten thousand pages or so.” (N.T. 9/30/20 at 2151, 5). Sunoco now contends that Dr. Zee has reviewed *only* about 10,000 pages or so, “only about a third of the discovery that SPLP produced,” and that Dr. Zee admitted “relevant documents may not have been identified.” (Sunoco Brief at 46).

Sunoco’s point, of course, is to make it appear that Dr. Zee has drawn significant conclusions without looking at most of the relevant documents in this. It is obvious that Sunoco has distorted Dr. Zee’s testimony. This is yet another instance of Sunoco ignoring facts in order to make a point. Of course, the point would be worth making if it were true, as in the case of Sunoco’s own witnesses, Field and Garrity. Mr. Field’s own sweeping conclusions are offered by Sunoco with only the flimsiest documentary support. Flynn FOFs 257 and 258 illustrate this point.

In FOF 257, Complainants noted that the testimony of Mr. Field and Mr. Garrity showed they had not reviewed Sunoco records. At no point did they contest the *factual* findings noted by Dr. Zee in his Direct or Surrebuttal Testimony. (Zee Surrebuttal at 9, ll. 8-39; Zee, N.T. 9/30/20 at 2131, l. 25 - 2132, l. 3; Field Rebuttal at 5, ll. 18 - 22; 6, ll. 1-7).

In FOF 258, Complainants observed that, while Mr. Field vouched for the condition of the ancient pipelines going back decades, he acknowledged he had not seen Dig Reports dated prior to 2013 and *he was just relying on what Sunoco personnel told him*. He conceded further that he had no idea what corrosion occurred in 1940 and what corrosion occurred in 2010, seventy years later. (Field, N.T. 10/13/20 at 4124, ll. 3 - 23). (Field Rebuttal Test at 4, l. 21). (Field, N.T. 10/13/20 at 4126, ll. 11-13).

Dr. Zee's testimony is based on a full review of tens of thousands of pages of Sunoco documents, which is far more comprehensive than the parroting of Sunoco personnel that Sunoco's experts relied on.

2. Dr. Zee's testimony is not speculative.

Sunoco contends that Dr. Zee's testimony was impermissibly speculative and, therefore, it should be stricken. Sunoco raised this same argument in a Motion for Partial Summary Judgment. Judge Barnes did not agree with Sunoco. The company then raised the argument in a Motion in Limine that was argued during the hearing on September 30, 2020. (N.T. 9/30/20 at 2060, l. 19 – 2065, l. 10). Judge Barnes did not grant the motion at that time either.

Sunoco now has raised this groundless argument for the third time in the case. The argument, however, is belied by the very case cited by the company.

Sunoco says that "Dr. Zamandadeh's testimony is not competent evidence because it is equivocal and speculative and does not express the requisite degree of certainty." (Brief at 37). Sunoco furnishes a few examples of words used by Dr. Zee that suggest uncertainty. That is not the test, however, and Sunoco knows it because it quotes the proper standard before it ignores it.

Sunoco quotes from *Vertis Group, Inc. v. Duquesne Light Co.*, 2003 WL 1605744, Docket No. C-00003642 (subseq. history omitted) in support of the claim that expert testimony may not be equivocal. (SJM II at 3). Yet, in this case the Commission explicitly wrote that,

“Rather, expert testimony must be viewed *in its entirety* to assess whether it expresses the requisite degree of certainty.”

Sunoco has gone out of its way *not* to assess Dr. Zee’s testimony in its entirety. Complainants, on the other hand, laid out seven pages of detailed citations to Dr. Zee’s Direct and Surrebuttal testimony in the Answer to Sunoco’s Motion in Limine at ¶¶ 7 – 50, all of which are hereby incorporated by reference thereto. Quotes cherry-picked to mislead the Commission do not outweigh the cumulative testimony which is the standard for assessing competence of evidence.

3. Sunoco fails to rebut the need for an investigation of the 12-inch pipeline.

Flynn Complainants’ Proposed Findings of Fact set forth in great detail the basis for an investigation of the 12-inch pipeline and those findings will not be repeated here.

One would not know it from Sunoco’s brief, but Dr. Zee has stated that the case for investigation of the 12-inch line may be stronger than the case for the remaining life study of the 8-inch line. Further, if one compares the findings set out in Dr. Zee’s Direct Testimony to the allegations in the December, 2019 I&E case, the instant case clearly appears stronger.

It must also be observed that Sunoco expert John Zurcher came up with an additional argument for why an independent study need not be conducted: Sunoco is purportedly already doing what Dr. Zee is recommending. (N.T. 10/14/20 at 4460, l. 20 – 4461, l. 25); i.e., a new study would be redundant. (Sunoco Brief at 59).

Mr. Zurcher admitted on cross-examination, however, that he had not really compared what Dr. Zee was proposing to what Sunoco was already doing. (N.T. 10/14/20 at 4462, l. 14 – 4463, l. 1). This is hardly the picture of a credible witness; it is the picture of a witness-for-hire.<sup>2</sup>

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<sup>2</sup> Further instances of Mr. Zurcher’s lack of candor are furnished below in Section II.D.

4. Dr. Zee's opinion is sufficiently conclusive.

Dr. Zee has expressed a firm opinion that the 12-inch pipeline and the 8-inch pipeline are very similar and that enough data exist to support concern over the condition of the 12-inch line to warrant an independent investigation that would result in a proper determination of that pipeline's condition. Sunoco claims that an opinion that says more information is needed to form an opinion is not an opinion that meets the requirements of expert witness testimony.

Judge Barnes understood this claim does not make any sense on September 30 when she stated:

I think he's allowed to testify to that. He's testifying he doesn't have all of the data. He would like to have had more data. Either the data doesn't exist or the data does exist but he was not given it in order to make the scientific conclusion that he—[sic]... That's an issue. That's an issue, you know, before the Commission.

(N.T. 9/30/20 at 2064, ll. 10-19).

Sunoco's argument is that Complainants need to prove the condition of the 12-inch pipeline in order to be entitled to find out the condition of the pipeline. Yet, if Flynn Complainants had all the information on the 12-inch pipe that they needed, an investigation would not be needed. Sunoco's position makes no sense.

In the end, this issue is really quite simple: Are Flynn Complainants entitled to prove that investigation is warranted? If they are, then all that remains is for the ALJ to determine if the Complainants furnished sufficient evidence to warrant the inquiry. The question of how much evidence is sufficient, however, is nowhere addressed in Sunoco's brief and Sunoco has not cited to any authority in support of its position.



5. Mr. Field and Mr. Garrity have failed to overcome Dr. Zee's testimony.

The bulk of Sunoco's argument relative to pipeline integrity and corrosion control and remediation is on the order of Dr. Zee says "X" and we say "Y." Complainants' Findings of Fact address most of these points and will not be repeated here. To the extent that these claims may be deemed to implicate the witnesses' credibility, Complainants now wish to address them.

Mr. Garrity began his testimony by puffing up his credentials and supporting his claim with a lie. Mr. Garrity at one time had been president of NACE, an organization of corrosion professionals. The NACE website goes into great detail as to the requirements to meet its highest certification, the one held by Dr. Zee. Mr. Garrity stated that Dr. Zee and the organization's official website were both wrong, and that Dr. Zee's certification was not the highest in the organization. Garrity's testimony obviously was not credible.

Mr. Field and Mr. Garrity were aware that PHMSA served Sunoco with a Notice of Probable Violations for ME1 at Honey Brook in Chester County. Sunoco did not contest the factual allegations; the identification of probable violations; or the final order that recorded the violations for posterity.

Sunoco's witnesses had different explanations for the company's failure to contest. One was that PHMSA never complained about Sunoco's practices previously, almost as if it was an outrage that the government had started to enforce the law. Another explanation was that PHMSA was just plain wrong and that Sunoco's cathodic protection practices were not problematic. What Garrity and Field did agree on, however, was that there was no need for them to actually examine the data upon which PHMSA relied in making its findings.

It is for the ALJ to determine whether any of Sunoco's evidence relative to Honey Brook is credible. Whether or not a -0.850 mV or alternative standard was proper as of March, 2017, however, neither Field nor Garrity ever even bothered to explain previous readings of -628mV

and -739mV in the Morgantown vicinity (Flynn FOF 254), nor did they ever explain why there was any need to “vastly” improve applicable standard operating procedures.

Regarding the new, improved 2018 procedures, Field and Garrity both insisted that they were made operative simply by virtue of Energy Transfer’s acquisition of Sunoco’s assets. While that certainly has a surface plausibility, it fails entirely to explain eight additional standard operating procedures that went into effect in May, 2020—two years later—just prior to submission of their rebuttal testimony.

The procedures in question basically addressed specific criticisms that Dr. Zee raised in his January, 2020 testimony. Certainly, Energy Transfer did not acquire Sunoco a second time.

Mr. Field and Mr. Garrity were almost effusive in their endorsement of Sunoco’s integrity management program and its implementation. As noted above, however, both witnesses went out of their way not to examine relevant records. This also reflects on their credibility.

Both Field and Garrity have misstated the kind and quantity of evidence that supports Dr. Zee’s findings and conclusions. It simply is not the case that there have been no leaks on ME1. It simply is not the case that in-line inspection is a perfect tool for detecting anomalies. Moreover, Sunoco’s use of known data has not always led to prompt action, contrary to what their expert witnesses claim.

SPLP 00005715, for example, is the March 22, 2002 Sunoco report of the Darby Creek leak accident on February 21, 2002. The leak occurred four (4) months after an in-line inspection found a “reported feature.” Notwithstanding Field and Garrity’s accolades, this can hardly be characterized as a prompt response. The result in this case was a leak of more than 30,000 gallons of petroleum product.

The gasoline leak in November, 2019 next to Tunbridge Apartments in Middletown Township is an example of Sunoco not notifying the public of a leak event. However minor the event was, the evidence showed that the public called emergency services to complain of the smell and that Delaware County emergency services was left in the dark for a time. Likewise, the April, 2017 accident in Morgantown did not cause Sunoco to notify the public either.

This is hardly the picture of a smoothly functioning system that is “robust” and proactive, no matter what Field and Garrity have asserted. It is much more akin to a system along the lines described by Dr. Zee. Thus, the credibility of Field and Garrity must seriously be questioned, despite their credentials.

6. Additional Specific Responses to Sunoco’s Brief

- a. *Dr. Zee has not admitted that the pre-2018 procedures were adequate or that Sunoco has implemented its new procedures.*

Sunoco suggests that Dr. Zee agreed with the company’s own experts that its Integrity Management (IM) Plan and standard operating procedures were good practices and that they were implemented. In support of this claim, the company cites Zee Direct at 39, ll. 31-33 and Zee Surrebuttal at 4, ll. 24-25. (Sunoco Brief at 42). The cited testimony does not support Sunoco’s claims.

In his Direct Testimony, Dr. Zee stated in January, 2020 that the *existing* IM Plan “shows it to be reasonably comprehensive and detailed.” But, he goes on to note that “Sunoco’s IM practices have not followed good engineering standards or its own IM plan.” (Zee Direct at 39, ll. 31-38).

In his Surrebuttal Testimony, Dr. Zee states that, regarding the integrity assessment and corrosion control assessment and management practices in the immediate vicinity of the leak incident, “the practices *newly adopted* and shown in my table are good practices. Obviously,

they were adopted in response to the absence of such practices leading up to the incident. Second, the fact that they were adopted does not by itself mean they were *implemented*.” (Zee Surrebuttal at 4, ll. 23-27) (Italics added).

These excerpts from Dr. Zee’s testimony show that his approval was of the revised plans but that did not necessarily mean he was putting his imprimatur on their implementation. As for the prior plans and their implementation, Sunoco contends that “Notably, Dr. Zamanzadeh did not take issue with the specific procedures in JF-1RJ.” (Sunoco Brief at 44).

Ex. JF-1RJ was produced in connection with Field’s Rejoinder Outline, a document not served upon Flynn Complainants until mid-August, 2020. Thus, it of course would not have been addressed in Dr. Zee’s Direct or Surrebuttal Testimony. As for his testimony on September 30, 2020, it took place two weeks prior to the introduction of Ex. JF-1RJ into evidence.<sup>3</sup>

Nonetheless, while it is true that Dr. Zee did not explicitly critique the pre-2018 SOPs set forth in JF-1RJ, neither did Field, Garrity or Zurcher. The exhibit is a highly technical document and cannot readily be understood by a non-expert. None of Sunoco’s witnesses did anything remotely resembling a side-by-side comparison. The only comparison offered was by Mr. Field, who stated on October 13, 2020 that Sunoco had “conducted close interval potential surveys or CIP surveys in 2018, 2019 and ... the close interval data shows that the cathodic protection along the entire length of the lines has vastly improved.” (N.T. 10/13/20 at 4080, ll. 15-22). The exhibit is no grounds for a conclusion that the procedures are now acceptable.

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<sup>3</sup> It must also be noted that this confidential exhibit was not Bates stamped, meaning that Sunoco had failed to produce it in discovery. The same was also the case with several of the Field rebuttal exhibits; Sunoco in violation of its discovery obligations held back producing relevant documents until it suited its interests.

Mr. Field's testimony is a clear admission that the pre-2018 procedures were inferior and were failing to provide adequate cathodic protection. This is consistent with Dr. Zee's testimony.

- b. *Sunoco's critique of Dr. Zee's analysis of the DNV report is erroneous.*

Mr. Field's Ex. JF-5 is the DNV Report for Morgantown, another document that was deemed too confidential to disclose during discovery, but not too confidential to produce when it suited Sunoco's interests at trial.<sup>4</sup> It is Sunoco's contention that the DNV report contained a root cause analysis. (Sunoco Brief at 46). It is Dr. Zee's contention that it does not and his criticisms of the Report cover five pages of testimony. (N.T. 9/30/20 at 2079, l. 20 – 2084, l. 24). The evidence does not support Sunoco's view.

First, the DNV Report itself makes clear that it does not furnish a definitive opinion as to the cause of the corrosion. Both in the Executive Summary and in the Conclusion, the report says that "microbiologically influenced corrosion (MIC) *may* have contributed to the observed corrosion." (Zee Surrebuttal at 7, ll. 18-23). Applying standards raised repeatedly by Sunoco, this conclusion is insufficient to support expert opinion.

Second, the Report states that "Samples collected from the leak location (Location 1) and an area of external corrosion (Location 2) are not representative of the environment at the time the leak occurred. The area surrounding the leak location was wire brushed and leak Detection Liquid Snoop was used, compromising the area." (Zee Surrebuttal at 6, ll. 31-34).

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<sup>4</sup> The Morgantown accident took place on April 1, 2017. Sunoco filed a PHMSA report shortly after the event. The DNV Report, however, is dated September 1, 2017. This proceeding commenced in November, 2018, so at all pertinent times the Report was in Respondent's possession. The document is not Bates stamped, consistent with Complainants' contention that it was not previously produced.

Finally, unlike Mr. Garrity and Mr. Field, Dr. Zee explained point-by-point that a proper investigation would have involved examining adjacent pipe—such as the missing 75 feet—as well as performing soil analyses and, of course, not contaminating the leak site.

Sunoco takes great pains in its Brief at page 55 to argue that Dr. Zee’s suspicions regarding the presence of MIC elsewhere on the ME1 and on the 12-inch pipeline are unwarranted. The DNV Report, however, states explicitly that MIC may have contributed to the Morgantown corrosion problem. The fact that the two pipelines are very similar would naturally raise the possibility for MIC’s occurrence on the 12-inch line.

Mr. Garrity’s claim that Sunoco already has appropriate provisions to address MIC does not account for the possibility that, just as at Morgantown, it may have been a problem. As in other instances, there is often little evidence that Sunoco even implements its own procedures.

In light of the above, Sunoco’s criticism of Dr. Zee’s analysis is unfounded.

c. *Dr. Zee’s findings as to lack of a clear cathodic protection standard are correct.*

Complainants hereby incorporate by reference their FOFs relative to cathodic protection. Sunoco says, however, that Dr. Zee has just got it wrong.

Dr. Zee in his Surrebuttal Testimony had reviewed Sunoco CIS records—Zee Ex. 11 in particular—and written that different contractors had applied differing CIS standards. This led him to write that Sunoco seemed to have had no standard procedure and no clarity on the cathodic protection (CP) criteria to follow. (Zee Surrebuttal at 22, l. 35 – 23, l. 4).

On page 56 of its Brief, Sunoco writes that Mr. Field says that Dr. Zee’s comments on the company’s history of inconsistent cathodic protection are wrong. Mr. Field refers to the differing standards as a “progression of improvement.” (N.T. 10/13/20 at 4086, ll. 24-25). As observed above, the ALJ will have to weigh Mr. Field’s opinion in light of his experience,

credentials, reliance on what Sunoco personnel have told him, as well as his demonstrated lack of knowledge of Sunoco's own documents.

Sunoco also asserts Dr. Zee incorrectly stated that in Morgantown in April, 2017, the company did not have data to prove CP criteria were being met there. Field says that Sunoco did have such data. (Sunoco Brief at 56). If CP criteria were being met, however, there would not have been an undetected leak.

Mr. Field testified that Dr. Zee was incorrect to state that he had not found records of side drain measurements in the Morgantown vicinity. (*See, e.g., Zee Rebuttal at 15, ll. 14-19*). Field also says Dr. Zee is wrong in claiming there were no side drain measurements, but he does not identify any such measurements in Sunoco records for the period prior to the Morgantown accident.

Field testified that Dr. Zee was incorrect to state there were no close interval potential surveys ("CIPS") either when, in fact, Dr. Zee used such data in Zee Ex. 9. No citation to Dr. Zee's testimony is offered to support this statement. Ex. 9, however, shows that CIPS were performed but they were deficient in several material respects, including failure to take OFF measurements.

Sunoco is incorrect, therefore, when it contends that Dr. Zee's criticisms of the company's cathodic protection programs are meritless.

**C. In the context of Sunoco's construction and operation, it has sited Mariner East unsafely and unreasonably close to vulnerable populations.**

Alison Higgins' home is only five feet from ME2X. (Flynn FOF 75). The children's playing field in Exton has a Mariner East pipeline across the outfield (Flynn FOFs 79 and 80) that may be only about four feet below the surface. (Gordon Rebuttal at 2, l. 21-3, l. 2).

Sleighton Park in Middletown has a new Mariner East line that also may be only about four feet below the surface. (Flynn FOF 180).

Yet, Sunoco expert John Zurcher on November 30, 2018 responded under oath to the question of whether it would be “okay to run an HVL pipeline through a schoolyard,” by saying “I don’t think that would be possible. I don’t know how that would be allowed.” (N.T. 11/30/18 at 434, ll. 9-13). Indeed, it is not. For a variety of reasons, Sunoco should not be operating or building HVL lines in such locations.

1. Sunoco’s risk analysis does not meet all its obligations.

Sunoco contends that its construction practices are based on a risk analysis that is sufficient to meet its obligation to deliver safe service and, therefore, Complainants’ consequence argument is immaterial. How the Commission is to determine that Sunoco’s risk analysis is sufficient and properly informed its construction practices, however, remains a mystery. Sunoco did not offer that risk analysis into evidence in the confidential record or otherwise. Sunoco did not even offer a summary of the risk analysis into evidence. Indeed, not one of Sunoco’s witnesses furnished any such details.

Sunoco assumes that merely having done a risk analysis is proof that the Mariner East pipelines are “safe.” Obviously, invoking a black box of an analysis that could have proven the *lack* of safety of the pipelines does nothing to prove its safety, absent evidence that the record conspicuously lacks. The requirement in the Code of Federal Regulations to conduct such an analysis is separate and apart from the requirement in Section 1501 to furnish safe service. The one does not prove the other.

Further, Respondent contends that by lowering the risk, it meets any relevant statutory obligations. Lowering the risk of the pipelines by some arbitrary and unquantified amount does



not by itself mean they are “safe” as the term is used in Section 1501. It just means that Sunoco could have made the pipelines more dangerous if it tried. Section 1501 also requires more than safety; it requires operators to operate adequately and reasonably. The federal regulations do not have these independent requirements. The General Assembly did not include the adequacy and reasonableness requirements for them to be read as meaning nothing. *See* 1 Pa.C.S. § 1922(2) (statutes are to be read with all language having effect). The General Assembly intended that utility service be safe *and* reasonable *and* adequate. Sunoco does not even try to argue that its service is adequate or reasonable beyond merely invoking the words.

2. Analyzing consequences is necessary and reasonable.

Sunoco also contends that consequence analysis is immaterial. In doing so, it misapplies law, mischaracterizes Complainants’ argument, and has still not addressed any of the record evidence to the contrary from experts and emergency response professionals. With an extensive record now established, the consequences of an HVL pipeline rupture in the densely populated areas of Chester and Delaware County remain undisputed. Though Complainants have provided expert testimony on the importance of considering these consequences, it does not take an expert to understand that catastrophic consequences must not be ignored. To do so would be manifestly unreasonable.

Criticizing expert Jeff Marx’s testimony as being based upon an unlikely worst-case scenario (Sunoco Brief at 31-32), Sunoco contends that the *Povacz* case shows such testimony does not rise to the requisite level of probability to support an expert opinion. Once again, *Povacz* is offered out of context.

In *Povacz*, the complainant alleged that smart electric meters cause radiation that *may*, over time, harm property owners. Both the Commission and Commonwealth Court ruled that

was insufficient evidence to sustain complainant's burden of proof. The Court specifically stated that complainant *did not have to wait for her own actual injury* but she had to prove conclusively that smart meter radiation actually *does cause injury*. Her expert witness was not prepared to offer that opinion.

Flynn Complainants are not alleging that HVL ignition *may or may not* cause injury. They are alleging that if there is ignition following rupture, the results will absolutely be catastrophic. Smaller leaks still have the potential to cause fatalities. (Marx Direct at 48, ll. 19-21 and 50, ll. 7-13).

The evidence in support of that is the testimony of engineer Jeff Marx, as well as Sunoco's witnesses on cross-examination such as Mr. Zurcher. Not one of Sunoco's witnesses challenged Mr. Marx's consequence findings. Additional evidence in support of Mr. Marx's findings is contained in Sunoco's Canadian ethane pipeline rupture analysis as well as in the Delaware County risk assessment.

Both Mr. Marx and Mr. Zurcher agreed that the closer a person is to an HVL pipeline that explodes, the stronger the likelihood of burns or fatalities. Mr. Zurcher acknowledged that much in his labored responses to questions about an HVL ignition in a schoolyard. He never gave any evidence, however, that an explosion five feet from the Higgins home in Middletown or the Little League fields in Exton or Middletown would be any different.

Mr. Zurcher attempted to downplay the importance of assessing consequences by pivoting to risk, yet Mr. Zurcher's testimony on the risk being accounted for in high consequence areas was contradictory and, therefore, unpersuasive. In his testimony before Judge Barnes on November 30, 2018, Zurcher stated that risk could be and in fact was accounted for so that risk in high consequence areas is very small. (Zurcher Rebuttal at 18, ll. 7-8). Upon cross-

examination on October 14, 2020, however, he admitted that one could not predict where there would be an HVL pipeline rupture. (N.T. 10/14/20 at 4311, l. 16 – 4312, l. 8).

On the other hand, not only did Mr. Marx's conclusions about the devastating consequences of a pipeline rupture in Delaware or Chester County remain unrebutted, Mr. Boyce, the Director of Emergency Services for Delaware County, verified the need to understand consequences for purposes of emergency response. Thus, not only is consequence analysis material, it is necessary for public safety.

Unable to negate the substance of the consequence analysis, Sunoco has tried to obviate it in its entirety by arguing the law does not allow consequences to be considered.

Sunoco cites 52 Pa. Code § 59.33 to suggest that the minimum safety standards set out in federal law are the only standards by which its practices may be judged. Since there are no regulations that address consequence by itself, Respondent asserts that consequence may not be considered. The legal basis for this assertion is nowhere explained. In the absence of such legal authority, it is unreasonable, even reckless, to ignore analysis and information that can save lives.

3. Sunoco is accountable not just to federal standards, but protections established under Pennsylvania law.

Sunoco claims Flynn Complainants are alleging the violation of standards greater than those provided under federal law. Indeed, Sunoco is violating both federal law and also standards under state law that are more protective.

The General Assembly provided for such greater protections. 52 Pa. Code § 59.33 provides in pertinent part that:

(a) *Responsibility.* Each public utility shall at all times use every reasonable effort to properly warn and protect the public from danger, and shall exercise reasonable care to reduce the hazards to which employees, customers and others may be subjected to by reason of its equipment and facilities.

(b) *Safety code.* The minimum safety standards for all natural gas and hazardous liquid public utilities in this Commonwealth shall be those issued under the pipeline safety laws as found in 49 U.S.C.A. § § 60101—60503 and as implemented at 49 CFR Parts 191—193, 195 and 199...

This regulation obviously is stating in § 59.33(b) that safety standards for HVL pipelines may exceed those required under federal law—it sets only the “minimum,” not any maximum. In addition, § 59.33(a) goes above and beyond federal law, dictating that each public utility shall use “*every reasonable effort*” to protect the public from danger and to reduce hazards to which the public is subject by reason of the utility’s equipment and facilities. In their Complaint, Complainants have only invoked § 59.33 to make the point that they may rely upon federal authority because § 59.33 permits them to do so. Sunoco does not appear to question that.

Sunoco also asserts in its Brief that, “to the extent that Complainants allege a violation as the result of actions that are not prohibited or inaction that is not required by current federal pipeline safety regulations, or by proposed standards that are the subject of the Commissions proposed rulemaking docket, these allegations cannot satisfy the requirement to demonstrate a violation of applicable law or regulation.” (Sunoco Brief at 21).

Sunoco goes on to cite several PUC decisions in which the Commission supposedly required proof of violation of a *regulation*. One of those is *Smalls, Sr. v. U.G.I. Penn Natural Gas*, Docket Number C-2014-2421019, 2014 WL 6807073, \*3. In *Smalls, Sr.*, the ALJ wrote:

The Complainant presented no evidence that the Respondent violated **the Code**, Commission regulation or order, or any federal regulations. The Complainant presented a timeline of his meetings and conversations with various people, including the solicitor for Wilkes-Barre, councilmen, and attorneys. (Tr. at 9-39). The Complainant alleged fear for the safety of his wife and himself, but nowhere does the Complainant allege that the Respondent has violated **the Code** or any federal regulation.

(Emphasis added). *Smalls* is discussing the Public Utility Code, which is a statute, not a regulation.

In the next case cited, *Bennett v. U.G.I. Central Penn Gas*, Docket Number F-2013, 2014 WL 1747713, at \*10 the ALJ wrote:

The **statute** at 66 Pa.C.S. §1501 governs any allegations of unreasonable or inadequate service. Pursuant to 66 Pa.C.S. §1501, the Commission has original jurisdiction over the reasonableness and adequacy of public utility service. Elkin v. Bell Telephone Co., 372 A.2d 1203 (Pa. Super. 1977) aff'd 420 A.2d 371 (Pa. 1977); Behrend v. Bell Telephone Co., 243 A.2d 346 (Pa. 1968). As a general proposition, neither **the Public Utility Code** nor the Commission's regulations require public utilities to provide constantly flawless service. **The Public Utility Code** at 66 Pa.C.S. §1501 does not require perfect service or the best possible service but does require public utilities to provide reasonable and adequate service.

(Emphasis added). Again, the cases Sunoco cites do not stand for its proposition that violation of a *regulation* is required where the statute stands on its own.

In any event, Flynn Complainants have nowhere in this case suggested that they are entitled to relief without proof that there has been a violation of a statute or a regulation. Sunoco's suggestion that only violation of a *regulation* can merit relief, however, has no basis in the law or in the cases that they have cited.

Sunoco devotes additional space to suggest that Flynn Complainants have alleged Sunoco has violated *proposed* standards. (Sunoco Brief at 21). This argument is a complete red herring. Flynn Complainants are not alleging violation of non-existent standards or proposed standards; they only allege multiple violations of Pennsylvania statutes or applicable federal law.

It is only Sunoco that has rested a large portion of its argument on a contention entirely unmoored to existing law or regulation. Sunoco expert John Zurcher has repeatedly testified that the Commission ought not to give any weight to testimony based on the consequences of an

unintended HVL pipeline release. No law, no regulation, no engineering standard—nothing other than a personal bias—is cited in support of this opinion.

For all of the above reasons, Sunoco’s claim that its risk analysis meets all of its obligations, and its claim that consequences independent of risk may not be considered, are entirely without foundation.

**D. Sunoco’s public awareness program is and has been inadequate.**

Sunoco devotes five pages of its Main Brief (pages 65-69) to a discussion of Section 195.440 and API RP 1162. Respondent concludes that, “[i]n sum, the evidence is overwhelming that SPLP’s public awareness program complies in all respects with Section 195.440 and RP 1162.” Not one portion of those five pages, however, quotes directly from RP 1162. Not one page even bothers to summarize or paraphrase RP 1162’s requirements as they pertain to pipeline awareness obligations. This is not by inadvertence. Once again, Sunoco has left out the parts it does not like.

This failure did not begin with Sunoco’s Brief. Mr. Zurcher’s live testimony on October 14, 2020 set the backdrop for Sunoco’s Brief as it was filled with evasions and knowingly false statements relative to the interplay between RP 1162 and Section 195.440. As the ALJ is aware, one of the Flynn Complainants’ principal contentions is that federal law requires the public awareness brochures to contain information about adverse consequences of unintended HVL releases. Mr. Zurcher was determined to show that the law does not refer to consequences in general or specific consequences such as burns or fatalities.

On October 14<sup>th</sup>, Mr. Zurcher identified goals of a public awareness program, but he did not use the term “consequence.” He stated that PHMSA regulations use the term “hazards”

associated with a pipeline leak. He says “consequence is not something that was anticipated in the regulation or is typically part of these programs.” (N.T. 10/14/20 at 4234, l. 19 – 4235, l. 2).

Consequences most certainly are “part of these programs.” Mr. Zurcher knows this because he worked on standards for public awareness, having been “involved in the original publication of API 1162...having been involved in public awareness for 43 years.” (N.T. 10/14/20 at 4233, l. 33 – 4234, l. 13). Mr. Zurcher knew but did not disclose the fact that in API RP 1162, § 4.2 is entitled “Hazard and Prevention Measures,” and it says, “Operators should provide a very broad overview of potential hazards, **their potential consequences...**” (N.T. 10/14/20 at 4239, ll. 4-14) (emphasis added).

When confronted with the actual language of RP 1162, Zurcher claimed that RP 1162 may refer to consequences, but the actual federal pipeline safety regulations do not have that requirement. He stated that if RP 1162 “has language that’s over and above what the regulations require, the operator doesn’t have to follow that additional information. The regulations will always preempt the verbiage within the standard.” Thus, Sunoco then was under no duty to notify the affected public of the potential consequence of burns or fatalities. (N.T. 10/14/20 at 4239, l. 18-4240, l. 23). When he gave this testimony, however, he must have known it was false.

Mr. Zurcher was asked to identify where in the law it says that RP 1162 is merely advisory and the regulations would always preempt. Mr. Zurcher, who has put himself out as an expert and even a drafter of these regulations, could not identify where in the regulations it provides that operators do not have to meet the higher requirements of API RP 1162. He then told a half truth when he stated he was “not saying for sure that’s stated as such in there... I’m just telling you that within the pipeline industry, pipeline companies, I have not seen one that

actually discusses consequence.” (N.T. 10/14/20 at 4241, l. 13 – 4242, l. 3). Of course, many people exceed the speed limit, but that does not make speeding legal or safe.

Mr. Zurcher cannot credibly claim this lack of knowledge of the statute he helped author. Section 195.440 specifically states “[e]ach pipeline operator **must** develop and implement a written continuing public education program that follows the guidance provided in the American Petroleum Institute's (API) Recommended Practice (RP) 1162 (incorporated by reference, *see* § 195.3)” (emphasis added). Implementation of RP 1162, therefore, was made mandatory by Section 195.440.

In case there is any question about the obligatory effect of the language quoted above, Section 195.3 provides in pertinent part, “[t]he materials listed in this section have the full force of law.” Among those materials having the full force of law is Recommend Practice 1162 incorporated by reference in Section 195.440 (a), (b) and (c). Subsection (c) of 195.440 explicitly states that “[t]he operator must follow the general program recommendations, including baseline and supplemental requirements of API RP 1162, unless the operator provides justification in its program or procedural manual as to why compliance with all or certain provisions of the recommended practice is not practicable and not necessary for safety.” Witness Zurcher must have known this and lied about this as well.

Confronted with his lies, Sunoco’s expert sought to explain away the meaning of “consequence.” Without offering an explanation as to the source of his opinion, Zurcher talks about the difference between a potential hazard and a potential consequence: A product escaping from the pipeline is a hazard. You may be asphyxiated; that’s also a hazard. The consequence would be it may ignite. The consequence is subsumed in the definition of hazard. If flammable material catches on fire, that’s a consequence. (N.T. 10/14/20 at 4243, ll. 1-23).



When asked where one could find a definition of “consequence” as used in the regulations, the statutes, the API guidance, and the NACE standards, the witness stated he was uncertain but “the consequences are typically around injury to the public.” (N.T. 10/14/20 at 4245, ll. 16-18). He added that “a consequence being that hazardous material could catch on fire and have an impact on people or property.” (N.T. 10/14/20 at 4246, ll. 1 -12).

Looking again at Ex. JSZ-4, a public awareness brochure, one table contains a column marked “Natural Gas” and it refers to natural gas liquids. This is the most recent version of the brochure and Mr. Zurcher could find nothing in it about hazards or consequences. Mr. Zurcher was unable to explain why this is the case. (N.T. 10/14/20 at 4248, l. 1 – 4249, l. 12). Looking back at the earlier, 2018 version of the flyer, he agreed that it identified moderate irritation as something that can be caused by the release of HVLs from a pipeline. He agreed that if people are injured as a result of an explosion caused by a rupture, that is a potential consequence. He insisted, however, that the operator is not required by statute to notify the public of it. (N.T. 10/14/20 at 4251, ll. 6-22).

In the end, Sunoco expert John Zurcher agreed that if there is ignition there is a fire and one consequence could be property damage. Another is injury to persons or animals. Fatal injuries could occur, too. (N.T. 10/14/20 at 4257, l. 1 – 4258, l. 6).

In light of the foregoing, Sunoco’s claim that its public awareness program complies in all respects with Section 195.440 and RP 1162 is patently false.

**E. The Commission can and should consider environmental harms.**

Sunoco misleads the Commission with the argument that it “lacks jurisdiction to address environmental issues relating to the construction of ME/2X, as PADEP is the agency delegated with responsibility and authority to address such matters.” (Sunoco Brief at 93 et seq.). The

Commission and the Commonwealth Court have made clear that (1) DEP's jurisdiction and the Commission's jurisdiction overlap at times, (2) that overlap is salutary, and (3) so long as the Commission does not act to interfere with DEP's authority, the Commission has the responsibility to address jurisdictional environmental matters.

Looking at the cases Sunoco cites rather than its spurious arguments, they stand for the propositions that the Commission cannot enforce environmental statutes which expressly entrust implementation to the DEP (*Pickford v. PUC*, 4 A.3d 707, 709-14, nn. 3 & 4 (Pa. Cmwlth. 2010); *Baker and Blume v. Sunoco Pipeline, L.P.*, Dkt. No. C-2020-3022169, Initial Decision (Dec. 8, 2020), at 8); and the Commission cannot relitigate DEP's issuance of a permit (*Pickford*, 4 A.3d at 714; *Baker and Blume* at 12). Complainants do not seek enforcement of environmental statutes, nor do they seek to relitigate any DEP permits.

Sunoco takes a giant and unjustified leap in concluding that because DEP has authority to address certain aspects of Sunoco's construction pursuant to permits it issued to Sunoco, that authority is exclusive. (Sunoco Brief at 95.) Of course, Sunoco cites no authority for this preposterous proposition. The Commonwealth Court dealt with this question head-on in *Harrisburg Taxicab & Baggage Co. v. PUC*, 786 A.2d 288, 289 (Pa. Cmwlth. 2001). There, a taxi company complained that the Commission lacked authority to enforce regulations it violated relating to operating without a meter, failing to post fares, etc. *Id.* at 290. The Court explained, "Petitioner argues that the PUC lacks authority to exercise regulatory authority over the safe operation of taxicabs because the legislature specifically delegated that authority to DOT," the Pennsylvania Department of Transportation. *Id.*

The Court found that the "overlapping authority" was actually beneficial: "The PUC's decision to incorporate DOT regulations in an area where the two agencies possess overlapping

authority is in no way inappropriate. Rather such harmonization is salutary.” *Id.* at 293. The Commission can even go beyond what another agency with overlapping authority requires: “There is no support for Keystone’s assertion that the PUC cannot impose stricter safety standards for vehicles used in public taxicab service than DOT imposes on private vehicles.” *Keystone Cab Serv. v. Pa. PUC*, 54 A.3d 126, 129 (Pa. Cmwlth. 2012).

DEP plainly does not occupy the field when it comes to all environmental issues, as Sunoco argues. (*See* Sunoco Brief at 93). If it did, the Department of Conservation and Natural Resources, the Fish & Boat Commission, the Game Commission, and many other state agencies that also work to protect the environment in the Commonwealth would not exist. State law across a broad range of topics specifically directs the Commission to consider environmental matters and make its own determinations about them as well as ensure compliance with other environmental protection statutes and regulations. *See, e.g.*, 52 Pa. Code § 57.76(a)(3), (4) (impacts on environment of electrical line siting); 52 Pa. Code § 65.17(a), (f)(1)(iii) (sanitation and potability of public water); 52 Pa. Code § 75.64(b)(4) (ensuring alternative energy system applicants have “complied with environmental regulations”).

The question in the context of a complaint alleging violation of 66 Pa.C.S. § 1501 is simply where to draw the line between what is the province of the Commission versus that of DEP. The Commission recently answered that question in a June Opinion and Order finding that it had jurisdiction to prevent lead water lines from endangering the health of water service consumers. *See Implementation of Chapter 32 of the Public Utility Code Regarding Pittsburgh Water and Sewer Authority – Stage 1; Petition of Pittsburgh Water and Sewer Authority for Approval of Its Long-Term Infrastructure Improvement Plan*, Dkt. Nos. M-2018-2640802, M-2018-2640803, P-2018-3005037, and P-2018-3005039 (Opinion and Order, June 18, 2020), at

89-101. The line the Commission drew, including from the *Rovin* and *Pickford* Commonwealth Court cases Sunoco cited, is that the Commission's jurisdiction covers utility service, including "all acts done, rendered, or performed ... by public utilities" (66 Pa. C.S. § 102), except where it would "conflict with or impact the PA DEP's oversight authority or primary enforcement responsibilities." *Id.* at 99. Because lead in public water clearly implicates service and there was no conflict with DEP, the Commission had the responsibility to address the issue and the jurisdiction to do so.

The same analysis applies here with respect to Sunoco's construction practices, which are unquestionably acts done, rendered, and performed by Sunoco. Complainants are asking the Commission to take note of the totality of Sunoco's reckless construction and disregard for the safety and wellbeing of others, which includes the environmental damage but also the siting, the explosive potential, and other aspects of Sunoco's utility service. This all falls soundly within the Commission's jurisdiction under Section 1501. Complainants do not ask the Commission to revoke or alter the DEP permits for Mariner East, or in any way interfere with DEP's oversight responsibilities.

Sunoco points out in particular Complainants' arguments concerning sinkholes, flooding, and private well water contamination. DEP will be the first to tell the Commission that its jurisdiction does not include regulation of private wells. *See* PADEP, "General Information About Private Wells," <https://www.dep.pa.gov/Citizens/My-Water/PrivateWells/Pages/default.aspx> ("The PA Department of Environmental Protection (DEP) does not regulate private wells."). DEP has also not issued any permits that allow Sunoco to create sinkholes or flood properties. Unlike the complainants in some of the water quality

cases that the Commonwealth Court ruled on, Complainants here have not asked the Commission for a determination that anything DEP has expressly allowed is improper.

The Commission has already found that these same sorts of issues were squarely within its jurisdiction when it upheld in substantial part the May 24, 2018 *Interim Emergency Order* in the case brought by Senator Dinniman. *See State Senator Andrew E. Dinniman for Interim Emergency Relief*, Opinion and Order, Dkt. No. P-2018-3001453 *et al.* (June 14, 2018) generally and at 32. Sunoco conspicuously fails to mention, let alone reconcile, this recent, on-point, contrary precedent which it cites elsewhere in its brief. (*Compare* Sunoco Brief at 28 with Sunoco Brief at 93-96.) This alone is sufficient to establish that there is no legitimate question of the Commission's jurisdiction in this case.

In sum, granting relief here would in no way exceed the bounds of the Commission's authority or countermand the rulings of the Commonwealth or Supreme Courts. The authorities discussed above make that clear, and nothing Sunoco cites to suggests otherwise.

**F. Sunoco's economic argument is hollow and contradicted by its own witnesses.**

Sunoco's argument regarding the economic harm it contends will occur if the Commission shuts down all the Mariner East pipelines is remarkable for how far it goes in pretending that all the testimony contradicting the statements it cites never occurred. A simple comparison of Sunoco's Findings of Fact 321-353 to Flynn Complainants' Findings of Fact 185-219 bears this out.

Consider the testimony of Dr. Peter Angelides. Sunoco FOFs 336 and 337 assert that one-time construction impacts along for the life of the Mariner East pipeline project were expected to be equal to the cost of the project, \$6.14 billion dollars. Dr. Angelides on October 5, 2020 projected another \$900 million dollars in impact remained to occur.

Respondent in its Brief failed to mention that the project was over 99% completed and that on October 5<sup>th</sup> the witness anticipated no more than 2%—approximately \$120 million—remained to be spent. (FOF 205). That number jumped to \$900 million overnight—approximately 15%—when the witness returned the next day to revise his testimony. (FOF 206).

Flynn Complainants agree that Sunoco and its customers might experience some economic pain during some shutdown scenarios. Beyond that general statement, however, all of the quantification Sunoco’s witnesses did of the supposed harm fell to pieces on cross-examination. (*See* Flynn Brief, FOFs 185-217, Argument § G).

Sunoco misleads the Commission in pretending that never happened. This is just one more example of cutting out the parts of the record Sunoco does not like. Additionally, Sunoco presented no credible evidence that the broader Pennsylvania economy would suffer in any way, and failed to evaluate the ways in which the Pennsylvania economy would be better off if the pipelines were not operating.

It is important to note that all of the quantification that Sunoco did is based on relief that Flynn Complainants do not seek: “Complainant’s [sic] request to shut down SPLP’s public utility service.” (Sunoco Brief at 107). The most extensive relief Flynn Complainants have requested is the much narrower request for the Commission to enter “an order restricting the Certificates of Public Convenience for the Sunoco Pipeline L.P.’s provision of public utility service for petroleum products in Chester and Delaware Counties to exclude natural gas liquids service.” (Flynn Brief at 98). Sunoco did not bother to provide any testimony that quantified harm from any of the relief Flynn Complainants actually seek.

Sunoco also argues that it has established by “uncontradicted testimony of Richard Billman, Peter Angelides, Alan Enberg, and James Snell, [that] the Mariner East pipelines

provide significant economic and societal benefits to the Commonwealth and others.” The actual testimony does not support Sunoco’s statement. Mr. Billman’s testimony goes to the fact that butane, propane, and ethane are valuable commodities. But on cross-examination, he offered nothing but speculation about the supposed benefits of transporting those commodities on the Mariner East system. (*See* Flynn Brief, FOFs 185-194).

On cross-examination, Mr. Billman admitted that whether a shutdown would even harm Sunoco depended on the time of year. (N.T.10/2/20 at 2605, ll. 5-9). Sunoco ignores this admission and claims that “SPLP would lose these daily revenues and would not be able to recapture those revenues at a future time given the physical characteristics of pipeline capacity. (SPLP St. No. 10 at 3).” (Sunoco Brief at 110).

Immediately upon being asked about that statement by opposing counsel, Mr. Billman began to water it down, stating “you cannot make up *all* of it,” rather than that Sunoco cannot recapture *any* of it. (N.T.10/2/20 at 2605, ll. 1-7, emphasis added). Mr. Billman, having conceded this, never testified to an amount of losses to which he was certain. This is not useful to the Commission.

Sunoco’s argument that Dr. Angelides showed “significant economic and societal benefits” is even further from the truth. Sunoco fails to acknowledge it, but Dr. Angelides admitted on cross-examination that his “economic impact” numbers did not account for benefits *at all*. (N.T.10/6/20 at 3062, ll. 2-6). Instead, it “simply shows, if you take expenditures, how they ripple through the economy. And that’s obviously always a positive number.” (N.T.10/6/20 at 3061, l. 24 – 3062, l. 1).

Mr. Engberg’s testimony was so self-contradictory and based on a chain of unlikely assumptions that it provides no value to the Commission at all. (*See* Flynn Brief, FOFs 211-

215). And Mr. Snell only established that there might be some unquantified harm to his union members under the scenario that all Mariner East pipelines were shut down—again, not what Flynn Complainants are asking for.

Finally, Sunoco gets the big picture of the public costs and benefits backwards. Sunoco makes the outrageous and false claim that “Complainants and aligned Intervenors presented no evidence to dispute or contradict the economic benefits of SPLP’s continued public utility operations.” (Sunoco Brief at 107).

The entirety of the testimony by Complainants’ and Intervenors’ witnesses establishes that the Mariner East pipelines as built and operated by Sunoco have brought great harm to the Pennsylvania public and pose a huge threat to its residents and natural resources. It is self-evident that a pipeline disaster in a dense residential neighborhood is bad for the economy as well as for people’s lives.<sup>5</sup> In addition, evidence was given as to the value of lost lives. Evidence was given as to the contamination of private wells and public waters. Evidence was given as to multiple subsidence events in multiple locations. Thus, the idea that Complainants’ evidence is not competent to contradict the supposed unquantified “economic benefits” of the pipelines is entirely unfounded.<sup>6</sup>

To the extent Sunoco is merely arguing that Complainants did not put on a witness to testify that Sunoco has done its own accounting wrong, of course Complainants lack the insider knowledge to be able to do so. But Sunoco’s witnesses as to economic impact, having only considered maximum-damages scenarios and having taken back most of their testimony on

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<sup>5</sup> Dr. Angelides might argue otherwise. An explosion would require an expenditure to fix, which would then ripple through the economy, creating jobs. Since he never considers costs in his impact analysis, the ultimate positive dollar value might look rather impressive.

<sup>6</sup> It must also be pointed out that Sunoco’s expert testimony is not automatically credible by dint of their qualifications. It is well settled that experts may be believed or disbelieved just as lay witnesses may be believed or disbelieved. Mr. Zurcher’s dishonest and equivocal testimony relative to API RP 1162 is a good example.



cross-examination anyway, provide no useful or credible information for the Commission. As shown by the great weight of Complainants' evidence, the threat and damage to the public from the status quo far outweighs any harm that the requested relief might inflict on Sunoco.

**G. The relief Complainants seek is not civil equity injunctive relief.**

Flynn Complainants seek injunctive relief against Sunoco in their Complaint. Sunoco, however, now claims that Complainants have failed to meet standards applied in civil equity cases for the granting of a permanent injunction. (Sunoco Brief at 21-23). How those standards could possibly operate as a constraint on the Commission's traditional exercise of its plenary authority is nowhere explained.

The Commission has explicit statutory authority to issue an injunction upon a finding that a public utility is in violation of any provision of the Public Utility Code. Specifically, 66 Pa.C.S. § 502 provides as follows:

**Whenever the commission shall be of opinion that any person or corporation, including a municipal corporation, is violating, or is about to violate, any provisions of this part; or has done, or is about to do, any act, matter, or thing herein prohibited or declared to be unlawful; or has failed, omitted, neglected, or refused, or is about to fail, omit, neglect, or refuse, to perform any duty enjoined upon it by this part, or has failed, omitted, neglected or refused, or is about to fail, omit, neglect, or refuse to obey any lawful requirement, regulation or order made by the commission; or any final judgment, order, or decree made by any court, then and in every such case the commission may institute injunction, mandamus or other appropriate legal proceedings, to restrain such violations of the provisions of this part, or of the regulations, or orders of the commission, and to enforce obedience thereto.**

(Emphasis added).

As to the Commission's responsibility and authority to ensure safe, reasonable, and adequate services, 66 Pa.C.S. § 1505 provides the following additional authority and detail:

a) **General rule.**—Whenever the commission, after reasonable notice and hearing, **upon its own motion or upon complaint**, finds that the service or facilities of any public utility are unreasonable, unsafe, inadequate, insufficient, or unreasonably discriminatory, or otherwise in violation of this part, **the commission shall determine and prescribe, by regulation or order**, the reasonable, safe, adequate, sufficient, service or facilities to be observed, furnished, enforced, or employed, including all such repairs, changes, alterations, extensions, substitutions, or improvements in facilities as shall be reasonably necessary and proper for the safety, accommodation, and convenience of the public.

(Emphasis added).<sup>7</sup>

If Sections 502 and 1505 were not enough, Section 501 of the Public Utility Code states that:

(a) **Enforcement of provisions of part.**—In addition to any powers expressly enumerated in this part, the commission shall have full power and authority, and it shall be its duty to enforce, execute and carry out, by its regulations, orders, or otherwise, all and singular, the provisions of this part, and the full intent thereof; and shall have the power to rescind or modify any such regulations or orders. The express enumeration of the powers of the commission in this part shall not exclude any power which the commission would otherwise have under any of the provisions of this part.

(Emphasis added).

Sunoco now asks the Commission to disregard this clear-cut statutory authority to impose injunctive and other relief. Instead of applying these statutes, the company contends that standards applicable in civil equity cases automatically apply to PUC cases. The appellate cases that it cites, however, do not say or imply that at all. Neither do the PUC cases.

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<sup>7</sup> The Commission on its own initiative may also “institute injunction, mandamus or other appropriate legal proceedings, to restrain such violations of the provisions of this part, or of the regulations, or orders of the commission, and to enforce obedience thereto.” 66 Pa.C.S. § 501.

Sunoco devotes most of a long paragraph to standards applicable to requests for interim emergency relief, citing *Crums Mill Associates v. Dauphin Consolidated Water Supply Company*, *Buffalo Township v. Jones*, *Peoples Natural Gas Co. v. Pa. PUC*, *County of Allegheny County v. Commonwealth* and 52 Pa. Code § 3.6(b). Flynn Complainants, however, are not presently seeking interim emergency relief.

Sunoco identifies a number of Pennsylvania appellate decisions touching on permanent injunction standards in contexts that do not involve the Commission or its statutorily-derived enforcement authority. These include *Buffalo Township v. Jones*, *Woodward Twp. v. Zerbe*, and *Allen v. Colautti*. Conspicuous by their absence, however, are any citations to decisions—from appellate authority, the Commission, or otherwise—that state the common law permanent injunction standards are even applicable to Commission proceedings. They are not.

A good example of a PUC decision that simply assumes the Commission has permanent injunction authority is the recent case *Wilmer Baker v. Sunoco Pipeline, L.P.*, 2020 WL 5877007. In *Baker*, ALJ Barnes considered the complaint of a Cumberland County resident who challenged the operation of ME1 and the construction of ME2.

Judge Barnes ultimately entered an interim decision (“I.D.”) directing Sunoco to file a plan meeting six distinct criteria including corrective action plans designed to address insufficiencies or weaknesses revealed through specified evaluations and audits. I.D. 54-55. Sunoco filed exceptions but not one of them included a contention that the Commission failed to recognize or apply permanent injunction principles followed in state court. In the end, the Commission upheld the ALJ’s rulings but required that they be narrowed to the relief responsive to the issues raised in Mr. Baker’s complaint.

Sunoco fails to recognize that the role of a Common Pleas judge and the role of the Commission are markedly different. PUC has a safety mission and this role is enhanced by Section 1505's statement that PUC may act on its own *or* on complaint. Courts, on the other hand, may not proceed in the absence of a live case or controversy.

The sole limitation on PUC's authority to issue an injunction is found in 52 Pa. Code § 3.6. That provision explicitly sets out the hurdles a litigant must overcome in order to obtain temporary emergency relief. The Public Utility Code and PUC regulations notably impose no constraints on the Commission's authority to grant a permanent injunction, aside from the limitations inherent in the language of the statutes cited above. In ordering a permanent injunction—in particular under Section 1505—the Commission must first give reasonable notice, hold a hearing, and find a violation. An injunction is simply one of multiple remedies the Commission is permitted to impose in response to such violation.

In light of the foregoing, Sunoco's contention that state court permanent injunction standards must be met by Complaints has no foundation in statute, regulation or decisional authority.

### **III. RESPONSES TO PROPOSED FINDINGS OF FACT**

Sunoco's proposed findings of fact contain innumerable problems. For the sake of brevity, Flynn Complainants raise only the major ones below, which fall roughly into two categories: incorrect leaps of logic and simple factual errors. Each is organized by paragraph number in Sunoco's proposed findings of fact.

A. **Leaps of Logic**

10. Claim: It can be inferred from Marx's failure to perform an evaluation of likelihood or probability that if he had performed that analysis, it would not have supported the Flynn Complainants' allegations.

Response: This is a complete non sequitur. Marx testified without rebuttal that he had not been engaged to evaluate the likelihood or probability of an HVL release event.

11. Claim: It can be inferred that Marx has determined in those circumstances that pipelines are safe to be operated in high consequence areas.

Response: This is a complete non sequitur. The fact that Marx has been engaged by other parties to perform risk analyses for other HCAs does not lead to any conclusion about his findings for those HCAs or for Chester and Delaware Counties.

25. Claim: Marx has stated he is not aware of an HVL release the size of a rupture in HCAs. Therefore, such a release is unlikely in Chester and Delaware Counties.

Response: First, the answer relates to *ruptures*, as distinct from punctures and leaks. Marx testified in Surrebuttal at 8, ll. 15 - 39 where he stated he had found 64 instances of HVL releases in HCAs. "There have been 2 incidents classified as ruptures of HVL pipelines in high population HCAs (Sulfur, LA and Port Arthur, TX.)" (Surrebuttal at 8, ll. 29-30). Second, Marx said nothing to suggest a rupture is unlikely to occur in Chester or Delaware Counties. This conclusion is a complete non sequitur. Mr. Zurcher himself stated "I don't know how you could predict where a rupture is going to occur." (N.T. 10/14/20 at 312, ll. 3-4).

103. Claim: Availability of PHMSA website information meets Sunoco's obligations under Section 195.440(d).

Response: The notion that the identification of outreach content on a website meets Sunoco's outreach obligations under Section 195.440(d) is not supported by that section.

Section 195.440(a) states there must be a written continuing public education program. Nowhere in the evidence in this case has any witness testified that the public may find information on a website and that satisfies the company's obligations. This claim is no more logical than the claim that the existence of an integrity management program is proof that it has been implemented.

104. Claim: Aligned experts Boyce, Hubbard and Turner acknowledged that the public awareness mailers are consistent with information on PHMSA's website.

Response: The fact that *some* of the requirements of Section 195.440(d) have been met by the content in the flyers does not make the flyers sufficient. Being consistent is not tantamount to being sufficient. Nor does it mean that the existence of information on a website meets Sunoco's outreach obligations.

126-129. Claim: Complainants allege that the flyers are not clear as to what is meant by the term "safe distance." Sunoco says it is clear.

Response: Every single one of Sunoco's witnesses has stated that the public would have to look elsewhere to know what the flyer means by "safe distance." This, by itself, proves Flynn Complainants' point. Zurcher says the term may mean something different to each person. Some Sunoco witnesses stated it means a half mile. Others stated it must come from emergency responders. Sunoco's Brief goes so far as to suggest one can go to a workshop or get information from the company by signing an NDA. Each person's answer contained information nowhere found in the flyers.

277. Claim: Sunoco expert Dr. Bechtel commented on Complainants' subsidence claims by admitting drilling caused subsidence but this was satisfactorily addressed by providing residents with public water.

Response: Neither Dr. Bechtel nor any other Sunoco witnesses explained why this was deemed satisfactory. This approach is consistent with Sunoco's modus operandi, which is to do what it wants and write a check to cover damages.

354. Claim: Sunoco implies that because its experts are highly qualified, therefore, they are credible.

Response: This is one more non sequitur. Expert witnesses may be mistaken or inconsistent or even dishonest. Decisional authority is clear that experts may be believed or disbelieved just as lay witnesses may be believed or disbelieved.

#### B. Simple Factual Errors

16. Claim: Citing Marx's testimony at N.T. 9/29/20 at 1854, ll. 3-11, Sunoco asserts the evidence showed that Complainants had produced no evidence of consequences of leaks or punctures from the Mariner East pipelines. (Sunoco Brief at FOF 16).

Response 1: The Marx citation is inaccurate. All he said was that a rupture is less likely than a leak or puncture:

1  
2  
3 Q. Does your testimony present the model consequence  
4 of a puncture?  
5 A. No.  
6 Q. While you did not evaluate the likelihood or  
7 probability for purposes of your testimony, do you agree  
8 that a rupture, particularly the worst case rupture that you  
9 hypothesize in models is less likely than a leak or  
10 puncture?  
11 A. Yes, that is correct.

Response 2: Sunoco cites to N.T. 10/14/20 at 4331, Zurcher testimony. This testimony, however, was part of the proprietary record at Sunoco's request.

Response 3: Sunoco cites to a stipulation but Complainants have no idea what stipulation is being referred to. Complainants have no recollection of stipulating that they had produced no evidence of consequences of leak or puncture from the Mariner East Pipelines. The timeline

table in Flynn Complainants' Brief identifies leaks that damaged property in Chester and Berks Counties.

21. Claim: Marx's model from the standpoint of the Commission may be viewed as a "Black Box" the contents of which are unknown and which could bias Marx's conclusions.

Response: Marx testified also that he helped develop the CANARY software use to model pipeline releases. (Marx Direct at 7, ll. 2-15). Moreover, he identified many of the parameters that were utilized to model releases. (Marx Direct at 18, l. 16 -19, l. 2). Sunoco's argument would seem to apply to its own expert, Dr. Angelides. Dr. Angelides' firm purchased its own black box, IMPLAN, from a Minnesota firm. There was no evidence that he was involved in the design of the software used to model his own conclusions.

23. Claim: "It is inappropriate to consider a hypothetical rupture of the Mariner East pipelines in evaluating whether they are safe and reasonable to operate in a high consequence area. (N.T. 1861:8-25, Marx Test.; N.T. 1862:2-21, Marx Test; N.T. 4208:11-4210:8, Zurcher Test.)"

Response: This is a complete distortion of Marx's testimony. He simply agreed that to determine risk you must consider both factors:



8           Q.   And so when a risk is determined, safety is  
9   determined, it's not based only on the hypothetical worst  
10   case consequence. It considers some evaluation of the  
11   likelihood of a range of consequences, correct?

12               MR. MICHAEL BOMSTEIN: Objection, relevance.

13               JUDGE BARNES: (Inaudible) -- the question.

14               MR. WITKES: I'm sorry, Your Honor. I just  
15   couldn't hear you.

16               JUDGE BARNES: What is the relevance of the  
17   question?

18               MR. WITKES: That risk cannot be determined by  
19   looking solely at a consequence.

20               MR. MICHAEL BOMSTEIN: But we're not talking  
21   about risk here.

22               JUDGE BARNES: Apparently one side is. I'm  
23   going to overrule the objection.

24               THE WITNESS: So if you're framing things in  
25   risk, we must look at both consequence and likelihood, yes.

2           Q.    And that's why you and others engage in the kinds  
3   of activities that I hypothesized, driving a car, passenger  
4   on a train, putting your child or grandchild on a school  
5   bus, riding an elevator and many other activities that are  
6   allowed by law and subject to standards and regulation,  
7   because evaluation of the likelihood of a hypothetical worst  
8   case consequence is low, correct?

9           A.    Low or perceived as low, yes.

10          Q.    Right.  And so in determining whether an activity  
11   like that is safe to engage in, you consider a risk and  
12   consequence both, correct -- I'm sorry, probability and  
13   consequence both, correct?

14          A.    Yes.  As a generality, that's true, that we  
15   consider both sides of risk when we decide to engage in an  
16   activity, although it's not always well understood, what the  
17   consequences or the likelihood might be.

18          Q.    You understand that PHMSA regulations allow  
19   pipelines transporting HVLs in high consequence areas by  
20   population, correct?

21          A.    Yes.

34. Claim: "There is no evidence in the PHMSA database or elsewhere that SPLP is a substandard operator of HVL pipelines."

Response: The testimony of Eric Friedman in 2019 is such evidence. The violations at Honey Brook are such evidence. The undetected leak at Morgantown is such evidence. The 2002 Darby Creek leak, which was detected but ignored, is such evidence. This statement, therefore, is simply false.

46. Claim: "SPLP has followed and follows the applicable Integrity Management Plan and corrosion control and cathodic protections SOPs."

Response: The uncontested federal violations for Honey Brook prove otherwise. Dr. Zee's testimony shows otherwise. The admissions of Sunoco's expert witnesses under cross-examination also demonstrate that this is not true. Complainants' FOFs further support this response. The conclusory statements of Field, Garrity and Zurcher consistently belie the fact that they not only ignore relevant data, they have been instructed to ignore relevant data.

49. Claim: "SPLP's ME1 and 12-inch pipelines are being appropriately managed to ensure they are safe to operate."

Response: See No. 46 above.

60. Claim: When anomalies above a certain threshold are found, Sunoco acts responsibly to address them.

Response: Sunoco's own report for the 2002 Darby Creek accident shows that three months passed from detection until Sunoco responded to the more than 30,000-gallon leak. As for Morgantown, a clean in-line inspection and supposed Integrity Management protocols failed to detect or prevent the leak.

68. Claim: "There is no evidence to show that microbiologically-influenced corrosion [MIC] is an unmonitored or uncontrolled threat to the ME1 and 12-inch pipelines."

Response: Sunoco destroyed evidence that would likely have a bearing on a proper MIC determination. Sunoco also misplaced or put in storage a 75-foot pipeline segment that might have shed light on the presence of MIC. Complainants' FOFs also include evidence by Dr. Zee that contradicts this claim.

69. Claim: Sunoco implemented a MIC testing and sampling procedure.

Response: Sunoco produced more than 32,000 pages of documents in this case. If this claim were true, Mr. Garrity could have identified documents that prove the point. He did not. Dr. Zee gave evidence that he found no such documents in his record review.

72 and 73. Claim: Sunoco performs surveys that measure cathodic protection.

Response: If this is true, then the company must be doing the surveys wrong. Complainants' evidence based on Sunoco's own documents showed repeated examples of inadequate cathodic protection near Morgantown and, of course, at Honey Brook.

74. Claim: Cathodic protection on the two pipelines in 2018 and 2019 has vastly improved.

Response: The obvious implication of Mr. Field's claim here is that prior to those dates, cathodic protection was vastly worse. Without admitting the "improvement," Complainants agree that prior to 2018, cathodic protection was terrible.

82. Claim: Coal tar enamel coatings do not shield cathodic protection even when it is disbonded.

Response: Dr. Zee testified to the contrary. Moreover, it should be noted that Mr. Garrity ignored evidence of coal tar coating defects on both pipelines reflected in two tables found on page 11 of Dr. Zee's Direct Testimony. Because the table was redacted, the details are not discussed here.

85. Claim: Dr. Zee's remaining life study proposal is redundant with the current IM Plan.

Response: Mr. Zurcher was asked if he knew the extent of the remaining life study already ordered for ME1, he stated, "I don't think I am. I just don't recall." (N.T. 10/14/20, ll. 22-24). Further, many of the recommendations made by Dr. Zee called for investigatory steps

which were not identified by Mr. Zurcher as current IM practices. *See, e.g., Zee Direct* at 31, l. 18 – 39, l. 6.

210. Claim: Sunoco follows safe construction practices (Gordon).

Response: Widespread inadvertent returns and repeated subsidence say otherwise.

220. Claim: Bentonite is non-toxic.

Response: Mr. King has admitted that some bentonite contains lead, depending on the mining source. Further, it has been admitted that drilling mud also contains unknown substances. Sunoco has produced no evidence as to the source of its bentonite or the identity of the added chemicals. The question is not whether unleaded bentonite is safe to digest; it is whether this particular drilling mud is safe.

224. Claim: Citing Dr. Ariaratnam, that Sunoco uses best industry practices in the HDD installation process.

Response: Sunoco counsel stipulated that Dr. Ariaratnam is there only to “explain[] the drilling process in general. “He was not [asked] nor does he provide any opinions about the compliance history of the project. That is not in here. It’s outside the scope.” (N.T. 10/08/20 at 3794, l. 10-21). In other words, Sunoco may have documentation adopting best industry practices, but Dr. Ariaratnam did not testify that it implements them.

243. Claim: None of the aligned Complainants offered any expert testimony to support a claimed safety concern related to the pipeline construction.

Response: While this is correct in as far as it goes, there was substantial testimony that multiple subsidence events took place next to a township playing field, in the residential Lisa Drive neighborhood and even close to a railroad track, and there was substantial testimony about

water well contamination and flooding problems. Expert testimony is not needed to establish those safety problems.

253. Claim: None of the aligned Complainants offered any expert testimony to support “earth feature” concerns related to the pipeline construction.

Response: Again, while this is technically correct, there was substantial testimony that multiple subsidence events took place next to a township playing field, in the residential Lisa Drive neighborhood and even close to a railroad track. Moreover, the Commission has previously ordered an emergency stop to Sunoco’s construction due to ongoing problems, including subsidence. Expert testimony on that topic is not needed to establish the danger.

263. Claim: Sunoco responds appropriately when “earth features” occur.

Response: Neither Gordon nor anyone has denied Sunoco is causing subsidence and none have explained why the problem has been occurring if their collective expertise and preparation is as exceptional as Sunoco claims.

220 and 298. Claim: Sunoco contends that bentonite ingestion is not toxic to humans. (*See also*, N.T.10/7/20 at 3531, ll. 15-16 and 3408, ll. 6-10).

Response: Under cross-examination, Sunoco expert Richard King agreed that the FDA has issued warnings against bentonite ingestion and that the concern is related to lead in bentonite. (N.T. 10/7/20 at 3486, ll. 13-20 and 349, ll. 12-16). Further, Mr. King admitted that in the Fuller water quality test results he was only looking at standard water quality parameters which would not include unidentified proprietary components. (N.T. 10/7/20 at 3469, ll. 24-25).

278- 280. Claim: Sunoco’s drilling activities have caused seeps on the Kerslake property but Sunoco is not worried about them.

Response: Dr. Bechtel admits that the seeps on Kerslake's property are related to Mariner East construction activity. (N.T. 10/8/20 at 3615, ll. 1-2). In FOF 279, Dr. Bechtel stated that the seeps did not present a safety concern because the ground underneath is not karst. On cross-examination by Ms. Kerslake, however, he admitted that it is uncertain where the karst begins and ends at Shoen Road (N.T. 10/8/20 at 3693, ll. 4-5) and that the geology there is complex (N.T. 10/8/20 at 3630, l. 18). Dr. Bechtel, therefore does not know to a reasonable certainty that the seeps do not present a safety concern.

284-287. Claim: Inadvertent returns pose no long-term impact on environment or human health.

Response: Mr. King says some bentonite contains lead and he does not know if Sunoco's has lead or not in it. Under cross-examination, Sunoco expert Richard King agreed that the FDA has issued warnings against bentonite ingestion and that the concern is related to lead in bentonite. (N.T. 10/7/20 at 3486, ll. 13-20 and 349, ll. 12-16). Hence, the safety claim is not necessarily true. Dr. Ariaratnam also repeatedly testified that he was not making and was unable to make any statement as to the hydrogeological impacts of inadvertent returns.

321-353. Claim: Temporary or permanent shutdown of the Mariner East pipelines will harm both the companies involved in the project and the citizens of this Commonwealth.

Response: All of these claims have already been addressed in the Flynn Brief.

#### **IV. CONCLUSION**

As set forth herein and in the Flynn Complainants' Main Brief, Sunoco's construction and operation of its Mariner East pipeline system is unsafe and in violation of statutes and regulations governing the provision of public utility service. Nothing in Sunoco's Brief calls that

conclusion into question. The Commission should grant the relief sought to ensure that the Pennsylvania public is protected from this operator in accordance with the law.

Respectfully submitted,

/s/ Michael S. Bomstein

Michael S. Bomstein, Esq.

Pinnola & Bomstein

PA ID No. 21328

Email: mbomstein@gmail.com

Suite 705 Land Title Building

100 South Broad Street

Philadelphia, PA 19110

Tel.: (215) 592-8383

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