

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania State Senator Andrew E. Dinniman	:	
	:	P-2018-3001453
v.	:	C-2018-3001451
	:	
Sunoco Pipeline, L.P.	:	

**INTERIM EMERGENCY ORDER AND
CERTIFICATION OF MATERIAL QUESTION**

On May 7 and 10, 2018, I conducted a hearing on the Amended Petition for Interim Emergency Relief filed on May 1, 2018 by Petitioner/Complainant Pennsylvania State Senator Andrew E. Dinniman (Senator Dinniman), against Respondent Sunoco Pipeline, L.P. (Sunoco) at Docket No. P-2018-3001453. The Amended Petition was filed concurrently with an Amended Complaint against Sunoco at Docket No. C-2018-3001451. These dockets are consolidated.

On April 30, 2018, a Hearing Notice was issued scheduling a hearing on May 7, 2018. A Prehearing Order was issued on May 2, 2018. A Corrected Hearing Notice was issued on May 4, 2018, scheduling hearings on May 7 and 10, 2018. Hearings were held on those dates. Appearing for Petitioner were Mark L. Freed, Esquire and Joanna Waldron, Esquire. Appearing for Respondent were Thomas J. Sniscak, Esquire, Whitney E. Snyder, Esquire, Robert D. Fox, Esquire, Neil S. Witkes, Esquire and Diana A. Silva, Esquire. Appearing for Intervenor Clean Air Council was Kathryn Urbanowicz, Esquire. Appearing *pro se* was Intervenor Virginia Marcille-Kerslake, an individual residing at 103 Shoen Road, Exton, PA 19341. The two transcripts filed on May 10 and 14, respectively, total 706 pages.

Specifically, Petitioner seeks an Interim Emergency Order: (1) enjoining Respondent from or continuing construction on Sunoco's Mariner East 2 pipeline (ME2) and Mariner East 2X (ME2X) in West Whiteland Township; (2) enjoining Respondent from

operating Mariner East 1; (3) directing Respondent to conduct extensive geophysical and geotechnical tests along the actual and proposed routes of ME1, ME2 and ME2X in West Whiteland Township; (4) directing Respondent to conduct a public risk assessment regarding persons, property and environment located within West Whiteland Township; (5) directing Respondent to disclose to Petitioner and his constituents the risks associated with Mariner East 1, 2 and 2X and activities associated with these pipelines; and (6) directing Sunoco to better inform emergency responders, hospitals, schools and township officials how to respond in the event of an emergency caused by a release or ignition of hazardous volatile gases transported in ME1, ME2 or ME2X. Exhibits P-1, 2 and 16.

DISCUSSION

Standing

On May 7, 2018, Sunoco made an oral motion pursuant to 52 Pa. Code § 5.103 to dismiss the Emergency Petition and Complaint pursuant to 66 Pa. C.S. § 701, alleging Senator Dinniman does not have a direct, substantial or immediate interest in the relief requested and that he lacks standing to bring the instant Complaint and Emergency Petition. N.T. 234-240. Sunoco contends that although Senator Dinniman was granted protestant status in *Application of Artesian Water, Inc. for approval to begin to offer, render, furnish or supply water service to the public in additional territory in portions of New Garden Twp., Chester County, Pennsylvania*, Docket No. A-2014-2451241, he was neither a complainant nor petitioner in that action; thus, it is distinguishable from the instant case. As 52 Pa. Code §5.72(b) only expressly authorizes an officer of the Commonwealth to intervene, Sunoco contends Senator Dinniman lacks standing to proceed as a Complainant/Petitioner. Additionally, Sunoco contends that because Senator Dinniman is not an attorney, he cannot represent individuals or the general interest of others. Sunoco argues that General Assembly members have standing in their official capacity to challenge governmental action only if it interferes with or impairs with the legislator's official power or authority to act as legislator and such is not the case here.

Contrarily, Senator Dinniman asserts that he is permitted by law to bring this action in his official capacity. He is a member of the General Assembly as a Senator and represents the 19th Senatorial District, which includes West Whiteland Township (N.T. 53-55).

Not only is he the representative of the individuals in the 19th District affected by the Mariner East project, he is additionally either currently or formerly a member of: (1) the standing Senate Environmental Resources and Energy Committee; (2) the Joint Legislative Air and Water Pollution Control and Conservation Committee; and (3) the Pennsylvania Pipeline Infrastructure Task Force, a group of experts and stakeholders that recommended policies, guidelines and best practices to guide expansion of pipeline infrastructure in the Commonwealth. The recommendations of the Task Force, and Senator Dinniman's participation therein, were topics of testimony throughout the hearing. (N.T. 47-48, 50-51, 57-58, 135, 137-140, 142, 205, 211, 222, 389, 399, 431, 433, 485, 580).

Senator Dinniman is a member of the General Assembly with the authority to receive, review and comment upon the Governor's annual expenditure plan for the Environmental Stewardship Fund under 27 Pa.C.S. § 6104, which funds in part the Chester County Conservation District and its oversight of the watersheds and water supply of West Whiteland Township. He receives annual, mandatory reports from the Commission under the Pennsylvania Public Utility Code. 66 Pa.C.S. § 320. He resides approximately two miles from ME1, ME2 and ME2X, and possesses knowledge of a local perspective on the potential effects essential to make a determination. Petition, ¶ 10; N.T. 52-53.

Disposition

Standing to participate in proceedings before an administrative agency is primarily within the discretion of the agency. *Pennsylvania Natural Gas Association v. T.W. Phillips Gas and Oil Co.*, 75 Pa. PUC 598 (1991). Generally, Pennsylvania courts have held that a person or entity has standing when the person or entity has a direct, immediate, and substantial interest in the subject matter of a proceeding. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282-284 (Pa. 1975).

66 Pa. C.S. § 701 provides in pertinent part:

The commission or any person, corporation, or municipal corporation having an interest in the subject matter, or any public utility concerned, may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation of any law

which the commission has jurisdiction to administer or of any regulation or order of the commission.

66 Pa. C.S. § 701.

The Commission's regulation at 52 Pa. Code § 1.21(b)(3) permits officers of government entities to represent those entities before the Commission. It is undisputed that legislators are granted standing in their official capacity to challenge agency actions that may implicate their legislative functions. Senator Dinniman challenges the Commission's decision on May 3, 2018, to reinstate transportation of hazardous liquids utilizing the ME1 pipeline. That Commission decision implicates his legislative function and entitles him to an opportunity to be heard by the Commission.

Further, the Commission stated in its May 3, 2018 Order regarding the *Petition of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission for the Issuance of an Ex Parte Emergency Order* at P-2018-3000281 as follows.

As a formal complainant in his own proceeding, Senator Dinniman has full party status and may proceed with litigation before the Commission including exercising the right of discovery, the presentation of testimony and evidence, and the cross-examination of opposing witnesses. Those opposed to the continued operation or construction of the ME pipelines may likewise present formal complaints to the Commission such as that filed by Senator Dinniman or may seek to intervene in the formal complaint filed by Senator Dinniman.

Petition of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission for the Issuance of an Ex Parte Emergency Order P-2018-3000281, (Order entered May 3, 2018 at 12).¹

¹ Prompted by a *Petition for Ex Parte Emergency Order* filed by the Commission's Bureau of Investigation and Enforcement, the Commission entered an Emergency Order March 7, 2018 at Docket No. P-2018-3000281 and ratified on March 15, 2018, suspending Sunoco's operations on ME1 due to numerous sinkholes (a/k/a subsidence) in West Whiteland Township exposing the active ME1 creating a risk to continued flow of hazardous liquids through ME1. By Order entered May 3, 2018, the Commission lifted this emergency stay subject to reporting requirements.

The Commission dismissed other petitions as well as Senator Dinniman's Petition to Intervene at P-2018-3000281 as moot; however, the Commission stated, "[w]ould-be intervenors can address their concerns regarding SPLP to the Commission through the Commission's formal complaint process and not through this emergency proceeding." *Id.* at 12. If similar formal complaints against Sunoco Pipeline L.P. regarding the Mariner East project are timely filed, they may be consolidated at C-2018-3001451 in the interest of judicial efficiency pursuant to 52 Pa. Code § 5.81. Alternatively, individuals/entities and statutory advocates with substantial and direct interests in the outcome of this consolidated proceeding may petition to intervene at C-2018-3001451.

Senator Dinniman was found to have standing under 52 Pa. Code § 5.72 to intervene in *Application of Artesian Water Pennsylvania, Inc.*, Docket No. A-2014-2451241 (Prehearing Order Denying Artesian Water Pennsylvania's Preliminary Objection to the Protest of Senator Andrew E. Dinniman entered March 13, 2015).

Other Pennsylvania Senators have had standing to proceed as complainants or intervenors in prior Commission cases. For example, Senator Vincent J. Fumo filed a complaint pursuant to 52 Pa. Code § 5.72 requesting declaratory and injunctive relief against Bell Atlantic-PA for violations of the Pennsylvania Telecommunications Act of 1993. Senators Roger A. Madigan and Senator Mary Jo White intervened in that proceeding pursuant to 52 Pa. Code § 5.72. *See Generally, Senator Vincent J. Fumo v. Bell Atlantic – Pennsylvania, Docket No. I-00980080*, Complaint filed October 19, 1998. *See also, Senator Fumo v. City of Philadelphia*, 972 A.2d 487, 497 (Pa. 2009); *Rydal-Meadowbrook Civic Ass'n v. Pa. Pub. Util. Cmm'n*, 173 Pa. Super. 380, 98 A.2d 481 (1953); *Corman v. NCAA*, 74 A.3d 1149, 1161 (Pa. Cmwlt. 2013). "[L]egislators, as legislators, are granted standing to challenge executive actions when specific powers unique to their functions under the Constitution are diminished or interfered with." *Fumo v. City of Philadelphia*, 972 A.2d 487, 497 (Pa. 2009) (*citing Wilt v. Beal*, 363 A.2d 876, 881 (Pa. Cmwlt. 1976)) (granting legislative standing to state legislators in a challenge to an agency action implicating the General Assembly's authority to license submerged lands within the Commonwealth).

Like the ALJs' finding in *Application of Artesian Water Pennsylvania, Inc.*, Docket No. A-2014-2451241, I also find that Senator Dinniman has standing to proceed with his complaint and emergency petition in keeping with the Commission's liberal construction of 66 Pa. C.S. § 701 and 52 Pa. Code §§ 1.21(c)(3); 1.22 and 5.72(b). Senator Dinniman did attempt to intervene at Docket No. P-2018-3000281 prior to the Commission's Order entered May 3, 2018. He is now represented by counsel in an adversarial proceeding before the Commission as an officer of a government entity or political subdivision within the meaning of the Commission's regulations. 52 Pa. Code §§ 1.21(c)(3); 1.22 and 5.72(b).

I find his testimony credible that his participation in this matter relates to his official duties as a Senator for the affected district. He is involved with several committees that address water issues. He has personal knowledge of the subject matter and has the responsibility of commenting on or approving expenditures related to water resources in Chester County. Consequently, Senator Dinniman's interest is direct because it will be adversely affected by the actions challenged in this Complaint and Emergency Petition. His interest is immediate because there is a close causal nexus between Senator Dinniman's asserted injury and the actions challenged. In addition, the interest is substantial because Senator Dinniman has a discernible interest other than the general interest of all citizens in seeking compliance with the law. Accordingly, the decision regarding this Emergency Petition will have a direct, immediate and substantial effect on Senator Dinniman. Accordingly, I find in favor of Petitioner on the issue of standing.

Petitions to Intervene

On May 4, 2018, Clean Air Council (CAC) and Virginia Marcille Kerslake, a *pro se* individual residing at 103 Shoen Rd., Exton, West Whiteland Twp., PA, filed petitions to intervene in the instant proceeding, respectively. Respondent did not oppose Ms. Kerslake's petition to intervene. N.T. 95-96. However, Respondent objected to CAC's petition to intervene arguing CAC has no direct or immediate interest and although CAC is a party to a hearing involving Respondent before the Environmental Hearing Board, this is insufficient to show standing in the instant case. N.T. 29-31, 95-96.

I find CAC meets the standard for eligibility to intervene pursuant to 52 Pa. Code § 5.72 as CAC has numerous members living in West Whiteland Twp. and along the pipeline route. Further, CAC has been actively engaged in this and other proceedings before the Commission and other jurisdictions regarding Respondent. *See Generally, Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Walnut Bank valve control station in Wallace Twp., Chester County, Pennsylvania is reasonably necessary for the convenience or welfare of the Public, P-2014-2411942 et. al.*² The outcome of the instant proceeding impacts active litigation within which CAC and Respondent are involved in other jurisdictional forums. N.T. 31-32. Thus, CAC and Ms. Kerslake are granted Intervenor status.

Petition for Interim Emergency Relief

An “emergency” is defined as “a situation which presents a clear and present danger to life or property or which is uncontested and requires action prior to the next scheduled public meeting.” 52 Pa. Code § 3.1. An “interim emergency order” is interlocutory. The purpose of an interim emergency order is to grant or deny injunctive relief during the pendency of a proceeding. 52 Pa. Code § 3.1. The purpose of granting injunctive relief is to maintain things as they are until the rights of the parties can be considered and determined after a full hearing. Further, the *status quo* that is to be preserved by preliminary injunction is the last actual, peaceable, lawful, and noncontested status which preceded the pending controversy. *Pa. PUC v. Israel*, 356 Pa. 400, 406, 52 A.2d 317, 321 (1947).

The standards that govern the issuance of interim emergency orders are set forth at 52 Pa. Code § 3.6. Section 3.6 requires that a petition for interim emergency relief be supported by a verified statement of facts that establishes the existence of the need for emergency relief, including facts to support the following:

² In that proceeding, on May 28, 2014, the Clean Air Council (CAC) filed preliminary objections to all 31 of Sunoco’s amended petitions. The preliminary objections argued that, pursuant to 52 Pa.Code § 1.101(a)(1), the Commission lacks jurisdiction over Sunoco’s amended petitions because Sunoco is not a public utility as defined by the Public Utility Code and is not a public utility corporation as that term is used in the Municipalities Planning Code (MPC). This position is similar to Senator Dinniman’s claim that Sunoco Pipeline, L.P. is not a public utility in the instant proceeding.

- (1) The petitioner's right to relief is clear.
- (2) The need for relief is immediate.
- (3) The injury would be irreparable if relief is not granted.
- (4) The relief requested is not injurious to the public interest.

52 Pa. Code § 3.6(b).

The Commission may grant interim emergency relief only when *all* the foregoing elements exist. *Glade Park East Home Owners Association v. Pa. PUC*, 628 A.2d 468, 473 (Pa. Cmwlth. 1993). Further, as to the first element, it is not necessary to determine the merits of the controversy in order to find that a petitioner's right to relief is clear; rather, the only required determination is that the petition raises substantial legal questions. *T.W. Phillips Gas and Oil v. Peoples Natural Gas*, 492 A.2d 776 (Pa. Cmwlth. 1985).

The party seeking relief bears the burden of proving that the facts and circumstances meet all four of the requirements in the Commission's Regulation. 66 Pa.C.S. § 332; 52 Pa. Code § 3.6(b). The burden of proof must be carried by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. den.*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Petitioner's evidence must be more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. PUC*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa. PUC*, 623 A.2d 6 (Pa. Cmwlth. 1993); 2 Pa. C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Commonwealth, Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

Section 3.10(a) provides that an order granting or denying interim emergency relief is immediately effective upon issuance by the Administrative Law Judge (ALJ) and that no stay of the order will be permitted pending Commission review of the order. 52 Pa. Code §3.10(b) requires the ALJ to certify the question of the grant or denial of relief to the Commission as a material question in accordance with 52 Pa. Code § 5.305.

Disposition:

1. Whether the Petitioner's Right to Relief is Clear

For Petitioner to meet the first criteria, he need not establish entitlement as an absolute right to relief on the underlying claim. Rather, in addition to satisfying the other three elements for interim emergency relief, he must establish that the underlying claim raises substantial legal questions. *T. W. Phillips Gas and Oil v. Peoples Natural Gas*, 492 A.2d 776 (Pa. Cmwlth. 1985).

The *status quo* in the instant case is that Mariner E1 is currently operational; however, drilling and construction is currently halted on the ME 2 and 2x lines in West Whiteland Township because the Company is seeking permission to change its DEP Permits and as of the date of this Order, has not yet received permission from the Department of Environmental Protection. N.T. 472 – 477. Sunoco Witness Gordon testified that major modifications have not yet been approved by the Department of Environmental Protection. N.T. 472-473. Sunoco intends to submit a major modification application for the Lisa Drive area which is located on a fault line. N.T. 473, 693. The company proposes flex bore for Drill 382 at Swedesford Rd., formerly Swedesford HDD. N.T. 473. Thus, it appears Sunoco still intends to use fluids in drilling. At the hearing on May 7, 2018, Sunoco's witness Gordon testified approximately 98% of the ME2 has been constructed so far consisting of approximately 330 out of 350 miles of pipe. N.T. 423-424; Exhibit SPLP 11. Respondent admitted it did not intend to continue construction until on or after July 1, 2018. N.T. 37, 44.

The underlying claim in the instant case raises substantial legal questions including but not limited to: 1) whether Respondent is a public utility; and 2) if so, whether Respondent is violating 66 Pa. Code §1501, which in part requires public utilities to “furnish and maintain adequate, efficient, safe and reasonable service and facilities, and make such repairs, changes, alterations, substitutions, extensions and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience and safety of its patrons, employees, and the public.” 66 Pa.C.S. § 1501.

The Commission and the Federal Energy Regulatory Commission (FERC) share jurisdiction over Sunoco Pipeline L.P.’s Mariner East projects in Pennsylvania. Issues related to the hazardous nature of the petroleum products involved in the pipeline transportation services, protection of public natural resources generally, and damage to drinking water supplies, and detrimental impacts on health, safety, welfare and property values implicate “the reasonableness and safety of the pipeline transportation services or facilities, matters committed to the expertise of the PUC by express statutory language.” *Delaware Riverkeeper Network v. Sunoco Pipeline L.P.*, 179 A.3d 670, 682 (Pa. Cmwlth. 2018) (*citing* 66 Pa. C.S. § 1505). “Sunoco’s decisions are subject to review by the PUC to determine whether Sunoco’s service and facilities ‘are unreasonable, unsafe, inadequate, insufficient, or unreasonable discriminatory, or otherwise in violation of the Public Utility Code’” *Id.* at 693 (*citing* 66 Pa. C.S. § 1505(a)).

While safety matters for Mariner East pipelines are officially under the purview of the U.S. Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (PHMSA), the Commission has a formal agreement with PHMSA to enforce the federal pipeline safety laws. The Commission has a workforce of 23 pipeline safety engineers within its Bureau of Investigation and Enforcement monitoring Sunoco’s compliance with the federal pipeline safety laws. Although I&E conducts pipeline integrity studies, the full reports and notes of investigations are not public due to Pennsylvania law requiring all state employees and agencies to strictly protect any confidential security information of public utilities. *Act 156 of 2006 - The Public Utility Confidential Security Information Disclosure Protection Act.*

1. If Respondent is a public utility, whether it is violating 66 Pa. Code § 1501 and whether the Commission should issue an Order under Section 1505 for the safety and accommodation of the public. 66 Pa. C.S. §1501 and 1505.

Within the past year, ME1 has experienced three leaks, all in high consequence areas.³ Although, there was no ignition, Sunoco failed to identify leaks on its pipeline and failed to report the leak or spill to proper authorities when they occurred. This appears to be on the surface a failure to follow proper protocol and safety procedure designed to protect the public. CAC Brief at 3. One leak occurred in Morgantown, Berks County, PA on April 1, 2017, and was discovered and reported by a landowner. From the time the landowner informed the operator of a probable leak, it took approximately 90 minutes to shut the pipeline down. In that time nearly 1,000 liquid gallons of a natural gas liquids mixture was released. Exhibit CAC-1. This is a dangerous quantity of hazardous gas. Since May 9, 2017, DEP has issued Sunoco over 50 Notices of Violation for IRs and other violations, including those occurring in West Whiteland Twp. Exhibits P-8, CAC-2 and CAC-3.

On January 11, 2018, the Pipeline and Hazardous Materials Safety Administration (PHMSA) at CPF 1-2018-5002 issued Sunoco a Notice of Probable Violation and Proposed Compliance Order alleging violations of construction requirements on ME2 in Marwest Hopedale, Ohio. PHMSA alleged a probable violation of the Pipeline Safety Regulations, Title 49, CFR § 195.204 (relating to inspection in general). N.T. 579, 16-21; Exhibit P-12. PHMSA found Sunoco failed to adequately inspect pipe bending during the ME2 project to ensure it was in accordance with Section 195.212(b). *Id.* at 2.

In April 2017, as horizontal directional drilling (HDD) began in earnest across the Commonwealth, the Department of Environmental Protection began receiving reports of drilling fluid spills a/k/a inadvertent returns (IRs) containing bentonite and other chemicals in the

³High consequence area as defined in 49 CFR 195.450 means (1) a commercially navigable waterway, which means a waterway where a substantial likelihood of commercial navigation exists; (2) a high population area, which means an urbanized area, as defined and delineated by the Census Bureau, that contains 50,000 or more people and has a population density of at least 1,000 people per square mile; (3) an other populated area, which means a place, as defined and delineated by the Census Bureau, that contains a concentrated population, such as an incorporated or unincorporated city, town, village, or other designated residential or commercial area; or (4) an unusually sensitive area, as defined in 49 CFR 95.6. *See* Exhibit CAC-1.

aggregate amount of hundreds of thousands of gallons. CAC Brief 5. Notices of Violations DEP File No. NOV 38 17 102, Sunoco Mariner East II – Pipeline Construction Inadvertent Returns. Multiple IRs occurred in West Whiteland Twp. See Notice of Violation dated May 3, 2018, regarding Permit Nos. E23-524 and ESG 01 000 15 001. The DEP has assessed civil penalties on two occasions, in January and April 2018 totaling over \$12,300,000. Once, the DEP did suspend construction on Mariner East 2 for more than a month. DEP Administrative Order in the Matter of Sunoco Pipeline, L.P. dated January 3, 2018. Exhibit P-8.

The Environmental Hearing Board has separately shut down horizontal directional drilling to build ME2 after granting a temporary supersedeas petition by CAC. July 25, 2017 Order, EHB Docket No. 2017-009-L. CAC argues Sunoco has breached an agreement to settle the supersedeas petition and CAC is seeking enforcement against Sunoco before the Environmental Hearing Board at Docket No. 2018-023-L.

Petitioner has shown Sunoco is putting West Whiteland Township's water supplies at risk by failing to adequately identify, document and avoid drilling through well or aquifer locations underground. N.T. 3-5, 24-25, 71, 87. In the 350-mile pipeline route, Sunoco only identified 22 private wells in its water permit applications. N.T. 14-15. At least fourteen wells have been adversely affected in West Whiteland Twp. N.T. 86, 16-20. Senator Dinniman saw numerous samples of well water from his constituents that "looked like something you would find in a toilet." N.T. 89, 358. One sample tested positive for bentonite. N.T. 149. Ms. Kerslake saw well samples from her neighbors that had turbidity. N.T. 358, 149. Although I am persuaded by Sunoco's witness Chrostowski to believe bentonite is the predominant ingredient in the drilling mud for HDD, and that it alone in small quantities does not pose a health or safety risk to humans through contact, Mr. Chrostowski admitted, "extremely high concentrations of bentonite could be hazardous to aquatic life." N.T. 324. Additionally, Mr. Chrostowski offered no opinion on whether bentonite had an adverse effect on water lines, pumps or other parts of a water well system. N.T. 312 - 325. Sunoco witness Gordon testified Sunoco intends to use flex bore in West Whiteland Twp. at Drill 382 in a permit modification package. Thus, Sunoco intends to drill with fluids in West Whiteland Twp. and I am persuaded by Petitioner's witness Sasowsky to find that the introduction of fluids underground in West Whiteland could result in sediment reaching water supplies, which is an unsafe condition. N.T. 267, 280. Additionally,

Dr. Sasowsky's credible testimony that bentonite can reduce water flow to a well shows Sunoco is operating in an unsafe manner, not in a manner designed to protect the destruction of aquifers and private wells. N.T. 279. Sunoco should have used modern electrical resistivity, gravity and seismic methods and should have had a geophysical baseline test results prior to HDD drilling in West Whiteland Twp. Proper testing could have uncovered the underlying geology along the route and could have potentially avoided damaging private wells and creating subsidence or "sink holes" in West Whiteland Twp. N.T. 683, Exhibit P-6. March 7, 2018 Emergency Order at P-2018-3000281. Exhibits SPLP 18, 19 and 20.

Regarding Lisa Drive, there is no dispute sink holes in this area are appearing on a fault line between carbonate Conestoga limestone and non-carbonate Octorara phyllite. Petitioner's witness Sasowsky credibly testified that carbonate rock touching non-carbonate rock tends to be a focus area for dissolution and karst development. N.T. 257. Acidic runoff from phyllite is neutralized when it hits limestone, and that neutralization reaction dissolves the rock. N.T. 259. Significant karst development occurs in many places in the boundary between non-carbonate and carbonate units. N.T. 259. These conditions are exacerbated by drilling activity associated with constructing ME2/2X. N.T. 226. I am not persuaded by the testimony of Sunoco's witness Demko, who testified the sink holes near Lisa Drive were caused by inactivity of drills caused by a DEP injunction, then resumed HDD activity or that the subsidence was unrelated to the karst or other geological formations at Lisa Drive. N.T. 678-679. I am not persuaded to find that it was only Sunoco's "pull-back" at this location that caused subsidence to occur or that the sink hole did not compromise the integrity of ME1 pipe "because only one side of a short section of pipeline was exposed and there was soil underneath the pipeline supporting it. N.T. 350-35, 678-679, Exhibits P-10 and P-11. Mr. Demko's testimony is inconsistent with eyewitness Mr. Kerslake who testified she was at the sinkhole on Lisa Drive on March 5, 2018 and knew "that they were filled with 10 or 11 cement truckloads full of fill." N.T. 351. Further, I find credible the testimony of Ms. Kerslake that "in addition to the sinkholes, there were depressions south of there uphill into the Lynetree development that were of concern on March 5." N.T. 351.

I find credible Ms. Kerslake's testimony that HDD drilling commenced on or about June 15, 2017 near Shoen Drive, and on the evening of June 22, 2017, she became aware

Sunoco, or its agents were using a generator around the clock to pump water out of a drill pit that was flooding down onto the site from a pilot hole. N.T. 335- 336. Despite this, she personally observed Sunoco or its agent, Percheron, continuing to drill Monday through Saturday while pumping water into trucks. N.T. 337. A land agent from Percheron, Mr. Riley, spoke to Ms. Kerslake on June 28 because she had complained about the generator running all night while she tried to sleep. N.T. 338. Mr. Riley stated he had no idea how long the generator would run and “that they had to keep doing this to prevent the site from flooding.” N.T. 338. The drilling eventually stopped on or about July 5, 2018, and the workers grouted the pilot hole to stop the flooding on or about July 8, 2018. N.T. 339. Once the hole was grouted and dried, Sunoco or its agents resumed drilling for days then stopped on or about July 10. N.T. 340. Two springs emerged on Ms. Kerslake’s property in line with ME1 and Sunoco dug a ditch on Ms. Kerslake’s property to divert the water from flowing onto the adjacent road. N.T. 342-350, Exhibit Nos. VK-1 and SPLP 47. The water continues to flow from the ground at 103 Shoen Rd., Exton. N.T. 343, 700. It is unknown what will happen to Ms. Kerslake’s property if drilling resumes. N.T. 346, 700-703. Flowing water is one of the requirements for subsidence as it can carry soil away and undermine a pipeline. VK Brief. Ms. Kerslake has a Bachelor of Science in earth science and a Master’s in soil chemistry. For 15 years she managed an analytical laboratory at the University of Guelph in Ontario, Canada specializing in soil analysis. N.T. 349. Her property is located upon a fault line between Ledger Dolomite and Chickies Quartzite formations. N.T. 348-349, 658, Exhibits P-10 and SPLP 47. I am not persuaded by Mr. Demko’s testimony that due to this geology, there is no need for further geologic investigation regarding potential impacts from the seeps on ME1 or that after completion of ME2 and ME2X, the seeps will not persist. N.T. 658.

I am further persuaded to find that even where no fluid is used in construction, a risk of subsidence remains in West Whiteland Twp. sufficient for me to recommend a stay of construction in West Whiteland Twp. on ME2 and/or ME2X until a record may be developed in this case upon which a more informed decision may be made by the Commission. Dr. Sasowsky testified open trenching does not remove all concerns and there is a possibility of hitting soil filled voids where only pseudo-stable soil can collapse. N.T. 267.

Additionally, there is a substantial issue regarding whether Sunoco has adequately created and trained its personnel and first responders of townships along its route regarding proper emergency response and evacuation procedures. Section 59.33(a) of the Commission's regulations provides that "Every 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. 52 Pa. Code § 59.33(a). Two large school districts have asked Governor Wolf what to do in an emergency. N.T. 62. Residents request specific instructions, but only receive boilerplate general information. N.T. 111. Chester County Emergency Services requested an emergency management plan and this request has not been fulfilled. N.T. 190. Sunoco's Pipeline Safety expert Zurcher did not know how people unable to run away from a vapor cloud should respond to such an incident. N.T. 579. Sunoco may have given safety pamphlets to 66,000 people along the 350-mile route, and to schools within .5 miles of the pipe. However, given that vapor clouds can move depending on weather conditions and people are mobile within their communities, this is insufficient. More public outreach should be done than the meetings already held and that shown in SPLP Exhibits 8, 11 and 46. N.T. 419, 540. All of these facts support a finding that Sunoco has failed to take reasonable efforts to warn and protect the public from danger.

Subpart O of 49 CFR part 192 and Sec. 195.452, also known as the Integrity Management (IM) regulations, require operators of gas transmission and hazardous liquid pipelines to institute a continual process for evaluation of pipeline integrity (see also: Guidance in Advisory Bulletin ADB-2012- 10, "Using Meaningful Metrics in Conducting Integrity Management Program Evaluations," 77 FR 72435, December 5, 2012). (Emphasis added). Specifically, Sec. Sec. 192.937 and 195.453(j) require that an operator have a continual process for the evaluation of pipeline integrity. The evaluation must consider the results of integrity assessments, data collection and integration, remediation, and preventative and mitigative actions in evaluating pipeline integrity. The operator must use the results from this evaluation to identify the threats specific to each pipeline segment that could impact a High Consequence Area (HCA) and the risk represented by those threats. The operator must perform assessments that are specific to those threats and then identify and implement appropriate remedial, preventative and

mitigative measures. Sections 192.945 and 195.452(k) require that an operator have methods to measure the effectiveness of their integrity management programs.

An operator's IM program must include the results of past and present integrity assessments, risk assessment information and data integrated from throughout the pipeline system. This information and its analysis must be considered when making decisions about remediation, preventive and mitigative actions.

The ability to integrate and analyze threat and integrity related data from many sources is essential for sustaining and continually improving safety performance and a proactive Integrity Management (IM) program. Operators must use the results from this integrated evaluation to identify the threats specific to each pipeline segment that could impact an HCA. The operator must then perform assessments that are specific to the identified threats and implement remedial, preventive and mitigative measures, as appropriate.

Integrity management regulations supplement PHMSA's prescriptive safety regulations with requirements that are more performance-based and process-oriented. One of the fundamental tenets of the IM program is that each individual pipeline has a unique risk profile that is dependent on factors including the pipeline's physical attributes, its geographical location, its design, its operating environment and the commodity it transports. Pipeline operators use this risk profile to identify appropriate assessment tools, set the schedule for performing integrity assessments and identify the need for additional preventive and mitigative measures such as lowering operating pressures, installing automatic or remote control shut-off valves and installing additional right-of-way markers, among other safety measures. If this risk profile information is unknown, unknowable, or uncertain, the pipeline should be operated more conservatively.

The Commission could comply with Act 156 of 2006 (The Public Utility Confidential Security Information Disclosure Protection Act) and at least require Sunoco to file a Comprehensive Written Plan in accordance with PHMSA's Advisory Bulletin ADB-2014-04 as it relates to the ME1 pipeline that has been in use for over a year because it is my belief that pipeline should be operated more conservatively if at all until further investigation is done by the

Commission's Bureau of Investigation and Enforcement – Pipeline Safety Section and until Sunoco makes its compliance filings pursuant to the Ordering Paragraph Nos. 3-6 of its May 3, 2018 Order at P-2018-3000281. Exhibits SPLP 9, 18 and 19. Whether Sunoco has failed to comply with the Code of Federal Regulations and other ASME, ASTM and API standards incorporated by reference therein is also an issue. Chairman Gladys Brown stated, "While the specific concerns outlined in the Commission's Emergency Order have been remedied, there are still legal vehicles for concerned citizens and entitles to have their voices heard." Statement of Chairman Gladys M. Brown at P-2018-3000281, May 3, 2018. For these reasons I find the Petitioner's right to relief is clear in that the claim raises substantial legal issues under the Commission's jurisdiction and a conservative approach towards continued operations at Mariner East in West Whiteland Twp. is warranted.

2. Whether the Need for Relief is Immediate

I am persuaded by the credible testimony of Senator Dinniman, Intervenor Kerslake and Petitioner's witness Sasowsky taken in conjunction with corroborative evidence of multiple leaks along ME1 within the past year, multiple IR, DEP regulation violations, and PHMSA notices of violations to find the need for relief is immediate.

Specifically, in April 2016, Sunoco received a Notice of Probable Violation for pipeline construction irregularities in Texas alleging Sunoco used unqualified welders and unqualified welding procedures to make more than 3,000 welds on PEX II. PHYMSA stated, "Upon discovery of these errant practices, Sunoco attempted to qualify welders by re-testing them after-the-fact. While this is not consistent with the requirements of Part 195, it is even more problematic that some of the welders . . . failed multiple qualification attempts." Notice of Probable Violation and Proposed Civil Penalty and Proposed Compliance Order dated April 28, 2016. Sunoco put PEX II in service despite this, upon which it promptly failed "in the vicinity of a girth weld." Sunoco failed to determine its pipeline had ruptured for 11 days and misreported underestimating the number of barrels of hazardous liquids leaked. September 14, 2016 Corrective Action Order. Sunoco's witness Gallagher testified when ME2 construction ends Steamfitters Local Union 420's workers will hopefully end up on other jobs. N.T. 498, 509. Witness Gallagher's family lives near or along the Mariner East. N.T. 512. Mr. Gallagher

believes the benefit of ME2 outweighs the risk related to the construction of the pipeline, but he testified how his welders x-ray every pipe weld and hydrostatic test before the line is put in service. N.T. 499. He did not testify that every weld on the ME1 pipeline was x-rayed or radiographed. Sunoco witnesses Zurcher and Gordon testified that ME1 is within 50 feet of private dwellings and industrial buildings and not covered by 4 feet of cover. N.T. 584. Although Witness Zurcher testified 49 CFR 195.210 only applies to new construction and his view is that a repurposed pipeline such as ME1 need not conform to this standard as the pipeline pre-dates the 1970's and the effective date of Chapter 195. N.T. 584-585. Witness Zurcher testified there is no correlation between depth of cover and the possibility of a pipeline event occurring. N.T. 548. He testified Sunoco has cathodic protection to prevent corrosion on the outside of its pipelines and runs in-line tool inspections to detect corrosion and deformities on the inside of the pipelines. N.T. 564-565. However, the undisputed evidence that ME1 is 87-year old 8-inch pipe transporting HVLs through an HCA and there is insufficient evidence to show whether the pipe has been properly tested for repurposing. There is no HAZOP report showing the integrity of the ME1 and its welds. No report was offered to show the pipe materials, pipe wall thickness, depth of cover over Mariner East 1, distance of Mariner East 1 from Mariner East 2 and 2x, distance of Mariner East 1 from residences, schools, hospitals, malls and other large gathering places. No comprehensive written plan as referenced by PHMSA's Advisory Bulletin ADB-2014-04 has been submitted. Exhibits P-1 and P-2.

It is unknown whether the welded seams along Mariner East 1 consist of oxygen-acetylene welding or electrical resistance welded seams and whether there have been radiographic inspections of the welded seams. The technologies available in the 1930's are not as good as they are today. For example, I do not believe electric resistance welding (ERW) was an available technology. Seamless pipe did not exist at that time. I have questions regarding the heat affected zones on the welds of ME1 and what the possible casualties' scenarios might be given certain hypothetical situations. There was no HAZOP analysis offered; rather, testimony from Sunoco witness Gordon that the ME 1 pipeline passed a hydrostatic test prior to operations. I presume that a cold drawn seamless pipe instead of a steel welded pipe from the 1930's would be a better engineering construction and less of a risk to the public safety. I question whether the repurposed pipe needed to go through weld tests, and whether this was done prior to operation. I

question whether the ME1 pipe meets today's engineering standards to hold the HVLs of ethane, butane and methane gases, especially so close to dwellings.

Recognizing that the ME1 was built along a right of way through a much less densely populated area than Chester County is now, Sunoco Pipeline should report the findings of any hydrostatic testing, any pig pipeline inspections, radiographic inspection of welds were done, and electrical resistance weld seams. Sunoco Pipeline should report its emergency response plan, practices and procedures including how it intends to coordinate with fire, police, PEMA, PHMSA, and State agencies in responding to a release or ignition of highly volatile liquids from its pipelines or appurtenances and whether its personnel will assist in evacuations. Sunoco should submit a plan to train to identify, classify and assess leaks of high volatile liquid gases to appropriate operating personnel in emergency procedures and administer drug and alcohol tests to all employees and contractors involved in responding to an incident. Sunoco should address whether it is willing to provide emergency responders with propane/butane/ethane mobile or fixed detector devices, Infrared Volatile Organic Compound (VOC) cameras, warning signs, tape and other equipment that might reasonably assist emergency responders and their own operating personnel in protecting the public safety.

Sunoco Pipeline LP should conduct further geophysical and geotechnical studies regarding Mariner 2 and 2x and should submit the results to the Commission. Sunoco should file a report with the Commission showing its internal procedures with respect to finding and reporting violations of the Code of Federal Regulations, Commission regulations or Department of Environmental Protection Orders and regulations. Prior to any construction, open cut or drilling activity in West Whiteland Township, Sunoco Pipeline, L.P. should be directed to notify the Commission's Bureau of Investigation and Enforcement such that a government inspector may be present during further construction activities.

For all of these reasons, I find there to be an imminent risk to the public and a need for immediate relief and further study to be done on ME1, ME2 and ME2X for the Commission and its Bureau of Safety Engineers to evaluate before construction should resume on ME 2 or ME2X in West Whiteland Twp. and before a potential catastrophic event occurs on

ME 1. Additionally, local and state government needs time to create emergency evacuation and notification plans and to educate the public before operations should resume.

I find credible the testimony of Sunoco witness Engberg, that Range Resources, a shipper on the ME1, may have to find an alternate method of transporting HVLs during a temporary shut-down. However, any projected loss of revenues by Mr. Engberg is insufficient to show a shut-down would be injurious to the public at large when weighed against the risk to the public in West Whiteland Twp. N.T. 608-635. Additionally, Sunoco witness Billman's estimated revenue loss for Sunoco is speculative as it includes estimated loss due to ME2 not being active. N.T. 608-635, Exhibit SPLP 40.

The rupture of a hazardous liquid pipeline at the welds of an 8-inch pipe in an HCA such as West Whiteland and the ignition of such a potential vapor cloud could have catastrophic results. It would be injurious to the public to not slow down this project for further safety and pipeline integrity tests and the development of as much a public integrity management plan as possible within the confines of *Act 156 of 2006 - The Public Utility Confidential Security Information Disclosure Protection Act*. A stay of operations would also provide needed time to develop and train Sunoco personnel, emergency responders, and State Agencies such as the Commission's Bureau of Investigation and Enforcement, Pipeline Safety Section, Pennsylvania Emergency Management Agency (PEMA), Pennsylvania Department of Transportation and Safety, Pennsylvania Department of Environmental Protection, and other relevant agencies. I am further not persuaded that Senator Dinniman should have to post a bond to stop the operations pursuant to 52 Pa. Code § 3.8(b). Senator Dinniman is in a contractual relationship with Sunoco over which there is a monetary amount in dispute.

3. Whether the Injury Would be Irreparable if Relief is not Granted

Monetary losses can satisfy the irreparable injury requirement of 52 Pa. Code § 3.7(a). *West Penn Power Co. v. Pa. Pub. Util. Comm'n*, 615 A.2d 951 (Pa. Cmwlth. 1992). If there is a great deal of uncertainty as whether Senator Dinniman's District which includes West Whiteland Township could recover possible losses, they have satisfied the irreparable injury requirement of 52 Pa. Code § 3.7(a)(3). *Id.* at 959. I find the relief sought is necessary to

prevent irreparable injury. The risk of physical injury or death in a densely populated area because of unsafe construction and operations constitutes irreparable harm. The Commission has already found this type of harm to be “catastrophic.” March 7, 2018 Emergency Order. SPLP Exhibit 20.

I believe given the release and accident history of Sunoco, there is a grave risk of rupture on ME1 potentially at a welded seam, and that water supplies have already been damaged in West Whiteland Twp. N.T. 97. Further contamination of public wells would endanger the public. N.T. 89, 358. Environmental damage can also be considered. *Commonwealth v. Kennedy*, 87 A.2d 605 (Pa. 1913). For these reasons, I find the injury would be irreparable if relief is not granted.

4. Whether the Interim Emergency Relief will be injurious to the public

Mr. Gordon testified an interim emergency order would delay the targeted completion deadline for the Mariner East project and would cause producers of propane, ethane and butane natural gas liquids (NGLs) a delay in being able to transport and ship their products through Pennsylvania; however, it is noted that horizontal directional drilling is currently shut down in West Whiteland Township due to water contamination from frac-outs. N.T. 89. Thus, there is insufficient evidence to show a substantial financial loss will be sustained by Sunoco’s customers pending a temporary interim injunction in this case.

Injunctive relief is crucial to protecting the public interest. Relief is sought on behalf of the public for safety and the convenience of the public within the meaning of 66 Pa. C.S. § 1501. The public needs protection from sinkholes, water contamination, damage to public and private property, degradation of natural resources, physical injury and death.

Any financial harm to Sunoco, a foreign for-profit corporation, or its shipper(s) is outweighed by the by the potential harm the public may sustain without Commission intervention at this critical juncture and prior to the completion and start of ME2 and 2X. Sunoco has made deliberate managerial decisions to proceed in what appears to be a rushed

manner in an apparent prioritization of profit over the best engineering practices available in our time that might best ensure public safety. Oil companies are free to protect their investments through tolling provisions in their leases. *Harrison v. Cabot Oil and Gas Corp.*, 110 A.3d 178, 186 (Pa. 2015). Any harm to Steamfitters Local Union 420's worker jobs is considered; however, Mr. Gallagher also testified safety and proper engineering design benefits workers and his family which resides along the pipeline. N.T. 498, 509. Further, the pipeline is 98% completed; thus, there will be fewer jobs regardless. If the pipelines can be built in a safe manner, then that benefits all. N.T. 511.

Conclusion:

In conclusion, Senator Dinniman has demonstrated by a preponderance of the evidence, and meeting all four requirements, that he is entitled to emergency interim relief pursuant to 52 Pa. Code § 3.6. Accordingly, the relief requested will be granted in the Ordering paragraphs below. Pursuant to the Commission's Rules of Practice and Procedure, this Order shall be immediately certified to this Commission for consideration and disposition in accordance with 52 Pa. Code § 5.305, pertaining to interlocutory review of a material question submitted by a presiding officer.

ORDER

THEREFORE,

IT IS ORDERED:

1. That Docket Nos. P-2018-3001453 and C-2018-3001451 are consolidated.
2. That Sunoco Pipeline L.P.'s oral motion to dismiss for lack of standing is denied.

3. That Virginia Marcille-Kerslake is granted Intervenor status.
4. That Clean Air Council is granted Intervenor status.
5. That Post-Emergency Hearing Exhibit Nos. VK-1 and SPLP 47 (photographs showing water running on Ms. Kerslake's property at 103 Shoen Rd.) are admitted into the record at consolidated Docket Nos. P-2018-3001453 and C-2018-3001451.
6. That the Amended Petition for Interim Emergency Relief filed on April 30, 2018 by Senator Dinniman is granted.
7. That Sunoco Pipeline L.P. is enjoined from beginning and shall cease and desist all current operation, construction, including drilling activities on the Mariner East 1, 2 and Mariner East 2X pipeline in West Whiteland Township, Pennsylvania until the entry of a final Commission Order ending the formal amended complaint proceeding at Docket No. C-2018-3001451.
8. That Sunoco Pipeline L.P. shall maintain sufficient minimum pressure in Mariner East 1 to avoid gasification of HVLs; however, the HVLs shall not be flowing and need not be purged from ME1 unless the Commission directs same through a further order.
9. That Sunoco Pipeline L.P. may reinstate utility transportation of hazardous liquids utilizing Mariner East 1 pipeline upon further Commission order.
10. That Sunoco Pipeline L.P. shall fully assess the condition, adequacy, efficiency, safety and reasonableness of ME1, ME2 and ME2X including but not limited to the integrity of the ME1 pipe and its welds and shall report its findings to the Commission including a HAZOP report.
11. That Sunoco Pipeline L.P. shall report the pipe materials, pipe wall thickness, depth of cover over Mariner East 1, distance of Mariner East 1 from Mariner East 2

and 2x, distance of Mariner East 1 from residences, schools, hospitals, malls and other large gathering places.

12. That Sunoco Pipeline shall report whether the welded seams along Mariner East 1 consist of oxygen-acetylene welding or electrical resistance welded seams and whether there have been radiographic inspections of the welded seams.

13. That Sunoco Pipeline shall report the findings of any hydrostatic testing, any pig pipeline inspections, radiographic inspection of welds were done, and electrical resistance weld seams.

14. That Sunoco Pipeline shall report its emergency response plan, practices and procedures including how it intends to coordinate with fire, police, PEMA, PHMSA, and State agencies in responding to a release or ignition of highly volatile liquids from its pipelines or appurtenances and whether its personnel will assist in evacuations.

15. That Sunoco shall submit a plan to train to identify, classify and assess leaks of high volatile liquid gases to appropriate operating personnel in emergency procedures and administer drug and alcohol tests to all employees and contractors involved in responding to an incident.

16. That Sunoco shall address whether it is willing to provide emergency responders with propane/butane/ethane mobile or fixed detector devices, Infrared Volatile Organic Compound (VOC) cameras, warning signs, tape and other equipment that might reasonably assist emergency responders and their own operating personnel in protecting the public safety.

17. That Sunoco Pipeline LP shall conduct geophysical and geotechnical studies regarding Mariner 2 and 2x in West Whiteland Township and shall submit the results to the Commission and parties in this case within thirty (30) days of the date of entry of this Order.

18. That Sunoco Pipeline LP shall file a report with the Commission within thirty days from the date of entry of this Order showing its internal procedures with respect to

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