

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

West Goshen Township

v.

Sunoco Pipeline, L.P.

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C-2017-2589346

RECOMMENDED DECISION
NON-PROPRIETARY VERSION

Before
Elizabeth H. Barnes
Administrative Law Judge

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I. INTRODUCTION

This Decision recommends that the Commission grant in part and deny in part the Second Amended Complaint of West Goshen Township (WGT, Township, or Complainant) against Sunoco Pipeline, L.P.¹ (Sunoco, SPLP, or Respondent) to enforce a Settlement Agreement (Agreement). It is specifically recommended that Sunoco be: 1) enjoined from constructing or locating a valve or its appurtenances on the Janiec 2 Tract or anywhere else in WGT except for the SPLP Use Area unless Sunoco first obtains written consent from WGT; 2) directed to provide all engineering documents and plans to Richard Kuprewicz of Accufacts, Inc. related to Mariner East 2 and 2X between the valve at Eagle Pump Station and the valve at Middletown Road, as well as any and all plans to eliminate the valve in West Goshen Township and automate a valve 2.5 miles from West Goshen Township; and 3) directed to file an affidavit at Docket No. C-2017-2589346 attesting to having located remote control valves or automatic shut-off valves² at MP 335 (Eagle Pump Station), MP 34.1 (East Lincoln Highway) and MP 350.5 (Middletown Road), all of which are in proximity to but not within the legal boundaries of West Goshen Township. In all other respects, the Second Amended Complaint should be denied and dismissed.

II. HISTORY OF PROCEEDINGS

By way of background, the instant case stems from an Agreement between Sunoco, Concerned Citizens of West Goshen Township³ (CCWGT), and WGT. The Agreement

¹ Sunoco holds a certificate of public convenience at Docket No. A-140001 for the intrastate transportation of petroleum products and refined petroleum products in certain counties of the Commonwealth, including Chester County. The Commonwealth Court determined Sunoco to be a public utility corporation within the meaning of the Business Corporation Law of 1988, 15 Pa.C.S. § 1103. *In re Sunoco Pipeline, L.P.*, 143 A.3d 1000 (Pa.Cmwlth. 2016) (*en banc*), *appeal denied*, 164 A.3d 483 (Pa. 2016).

² A remote control valve (RCV) is a valve equipped with electric or gas-powered actuators to operate (open or close) the valve based on an order (signal) from a remote location, such as a gas control room. The valve can be closed remotely. There is human intervention with a remote-control valve as opposed to automatic shut-off valves (ASV) that do not allow or require human evaluation or interpretation of information surrounding an event to determine if the event is a legitimate incident and will close automatically. AGA White Paper, *Automatic Shut-off Valves and Remote-Control Valves on Natural Gas Transmission Pipelines*, March 25, 2011, AGA Distribution & Transmission Engineering Committee, March 25, 2011.

³ CCWGT is an *ad hoc* association of residential homeowners each of whom owns and resides on property either adjacent to or within approximately 1,000 feet of the properties owned by Sunoco on Boot Rd., West Goshen Twp.

was filed on May 15, 2015, and certified effective by the Commission on June 15, 2015, pursuant to Section 507 of the Public Utility Code, 66 Pa. C.S. § 507, at Docket No. U-2015-2486071. The Agreement resolved challenges raised by WGT and CCWGT at Docket Nos. P-2014-2411966⁴ and C-2014-2451943⁵ pertaining to Sunoco's status as a public utility and its proposed operation of a pump station on property near Boot Road in West Goshen Township in connection with Sunoco's Mariner East Project. Sunoco's Amended Petition at Docket No. P-2014-2411966 was deemed withdrawn by Final Order entered on May 25, 2015. One day after the effective date of the Agreement, on June 16, 2015, CCWGT filed a certificate of satisfaction at Docket No. C-2014-2451943, indicating its complaint had been satisfied.

Thereafter, on February 17, 2017, WGT filed a Formal Complaint commencing the instant action against Respondent at C-2017-2589346. The original Complaint sought enforcement of the Agreement between the parties. Specifically, WGT sought enforcement of Sunoco's agreement (1) to not locate any above ground facilities within the Township except at its existing pump station site; and (2) that construction of a block valve (Valve 344) for the Mariner East 2 (ME 2) pipeline take place only on a defined area within the Township identified by the parties as the SPLP Additional Acreage, and unless unable to do so due to engineering constraints, in a specific area of the SPLP Additional Acreage known as the SPLP Use Area. WGT Complaint at 9.

On February 21, 2017, the Complaint was served upon Respondent. On March 10, 2017, an Answer and New Matter and a Motion to Strike Complainant's Request for Attorney's Fees were filed. On March 29, 2017, WGT filed a First Amended Complaint alleging violations and material breaches of Paragraphs II.A, II.A.2, II.A.3 and IV.A of the Agreement. WGT requested: 1) a declaratory order that Sunoco had materially breached the

⁴ *Petition of Sunoco Pipeline, L.P. for a finding that a building to shelter the Boot pump station in West Goshen Twp., Chester County, Pennsylvania is reasonably necessary for the convenience or welfare of the public*, P-2014-2411966, Final Order entered May 28, 2015.

⁵ *Concerned Citizens of West Goshen Twp. v. Sunoco Pipeline, L.P.*, Docket No. C-2014-2451943. CCWGT's complaint alleged the proposed pump station was an unsafe or unreasonable public utility facility in a residential area in violation of 66 Pa.C.S. § 1501 and that the Commission should issue an order pursuant to 66 Pa.C.S. § 1505 directing Sunoco to alter or relocate the proposed pump station. According to the complaint, Sunoco failed to consult with local officials concerning the location of the pump station with regard to emergency response plans or evacuation plans in the event of a spill. The case closed by operation of law after CCWGT filed a Certificate of Satisfaction dated June 16, 2015.

Agreement; 2) a directive that Sunoco cease and desist with actions in support of constructing, installing or operating any valve or appurtenant facilities for the ME2 pipelines on any property located in West Goshen Township other than the SPLP Use Area without the express written consent of the Township and CCWGT; and 3) a directive that Sunoco remove any valve or appurtenant facilities for ME 2 pipelines that have been installed on any property located in WGT other than on the SPLP Use Area within thirty days of the Commission's ruling or face sanctions. The First Amended Complaint removed a count relating to the automation of a valve on the ME1 pipeline that SPLP automated after the filing of the Complaint and withdrew a request for attorney's fees and costs. First Amended Complaint at 6-7. The First Amended Complaint was served on Sunoco on March 30, 2017.

On April 17, 2017, a Notice was issued scheduling an Initial Prehearing Conference on May 23, 2017 and assigning me as presiding officer. This prehearing conference was later rescheduled to July 6, 2017 per the parties' request for a continuance due to settlement negotiations. On May 22, 2017, Sunoco filed a Motion for Judgment on the Pleadings. On June 12, 2017, WGT filed an Answer to the Motion for Judgment on the Pleadings. On July 6, 2017, a prehearing conference was held at which time WGT asked Sunoco for a verbal commitment to cease construction of the valve on Janiec 2 until after the Commission rendered a final decision in the instant complaint proceeding. Sunoco refused to make such an assurance. Tr. 3-33. On July 7, 2017, WGT filed a Petition for Ex Parte and Interim Emergency Orders.

On July 24, 2017, an Interim Emergency Order and Certification of Material Question was issued. Concurrently, on July 24, 2017, an Order Denying Motion for Judgment on the Pleadings and Motion to Stay Discovery was issued. The latter Order established a procedural schedule in Ordering Paragraph No. 5. On July 26, 2017, a Hearing Notice was issued scheduling evidentiary hearings on April 25 and 26, 2018. A Protective Order was issued on September 1, 2017.

On October 19, 2017, Sunoco filed a Motion to Modify the Procedural Schedule. On October 26, 2017, the Commission entered an Opinion and Order (*October 2017 Order*) affirming the Interim Emergency Order. On November 13, 2017, an Order Denying Motion to

Modify Procedural Schedule was issued. On November 17, 2017, Sunoco filed a Petition for Interlocutory Review and on November 21, 2017, Sunoco filed a Petition to Rescind or Discontinue the October 26, 2017 Commission Order.

On January 9, 2018, the Commission entered an Opinion and Order (*January 2018 Order*) denying Sunoco's request for rescission of the Commission's October 26, 2017 Order but discontinuing the injunction of Ordering Paragraph No. 3 which had enjoined Sunoco from: (1) constructing Valve 344 on the Janiec 2 Tract; (2) constructing appurtenant facilities to Valve 344 on the Janiec 2 Tract; (3) horizontal drilling (HDD) activities related to Valve 344 on the Janiec 2 Tract; and 4) constructing Valve 344 at a location that is in dispute under the Settlement Agreement. The January 9, 2018 Opinion and Order also directed in Ordering Paragraph No. 4 that the Office of Administrative Law Judge return this matter "for final consideration and resolution no later than the September 20, 2018 Public Meeting." *January 2018 Order* at 22.

On January 24, 2018, WGT filed a Petition for Reconsideration or, in the alternative, Amendment of the Commission's Order entered January 9, 2018. In response to the Township's Petition for Reconsideration of the January 9, 2018 Order, SPLP advised that it no longer intended to place a valve on the ME2 in WGT because it now intended to install an automated valve 2.5 miles upstream of the SPLP Use Area, with the next valve being 5.9 miles downstream of the SPLP Use Area at Middletown Road. SPLP contended it did intend to place a valve on the SPLP Use Area at the time it entered into the Agreement; however, SPLP never intended to agree unconditionally to do this as evidenced by the language, "Subject to any engineering constraints, SPLP intends to construct the valve station in the general area depicted on the map attached hereto as Appendix 1." Agreement at 3. On March 15, 2018, the Commission entered an Opinion and Order denying the Petition for Reconsideration.

On April 11, 2018, Sunoco filed a Motion to Strike Testimony of West Goshen Township and Request for Expedited Response. The Township submitted a Motion to Amend the First Amended Complaint and a Second Amended Formal Complaint to Enforce Settlement on April 17, 2018. Even though Sunoco represented in a pleading that it no longer intended to

construct a valve on the Janiec 2 property, there was no Commission Order precluding it from doing so in the future. WGT still requested the Commission find Sunoco has breached an agreement to construct a valve in the SPLP Use Area located within the SPLP Additional Acreage. Tr. 260, WGT April 17, 2018 Motion at 3. WGT requested enforcement of this provision and a directive that the valve be built on the SPLP Use Area on the west side of Route 202 and not on the Janiec 2 Property located on the east side of Route 202 within West Goshen Township. Unless otherwise noted, references herein to WGT's Complaint shall mean the Second Amended Complaint. On April 20, 2018, WGT filed an Answer to Sunoco's Motion to Strike Testimony. On April 23, 2018, Sunoco filed an Answer to Motion to Amend First Amended Complaint but did not oppose the motion or Second Amended Complaint. Tr. 259-273.

The evidentiary hearings were held on April 25 and 26, 2018. Appearing for Sunoco were Thomas J. Sniscak, Esquire and Whitney E. Snyder, Esquire. Appearing for West Goshen Township were Richard C. Sokorai, Esquire, David J. Brooman, Esquire and Mark R. Fischer, Jr., Esquire. On May 3, 2018, transcripts for the April 25 and 26 hearings were filed. Tr. 255-617. On May 24, 2018, Sunoco informally requested an extension of time to file main and reply briefs from May 29 and June 18 to June 5 and 25, 2018, respectively. On June 5, 2018, Sunoco filed an unopposed Request to Move Direct Testimony of Dr. Samuel T. Ariaratnam and Exhibit No. SA-1 into the record. An Interim Order was entered on June 6, 2018 admitting Dr. Ariaratnam's testimony and exhibit, directing reply briefs be filed by June 25, 2018, and closing the evidentiary record for decision writing. On June 5, 2018, Main Briefs were filed and on June 25, 2018, Reply Briefs were filed. This case is ripe for a decision.

III. FINDINGS OF FACT

1. Complainant West Goshen Township is a Township of the Second Class, organized and existing under the laws of the Commonwealth of Pennsylvania, with a principal place of business located at 1025 Paoli Pike, West Chester, Pennsylvania 19380. Exhibit Twp. 4.

2. Respondent Sunoco Pipeline L.P. is a public utility pipeline operator that has undertaken a project known as the Mariner East Project, designed to transport ethane,

methane and butane, which are gases that become highly volatile liquids (HVLs) when pressurized, from Western portions of Pennsylvania to the Marcus Hook Facility along the Delaware River, in Marcus Hook, Delaware County, Pennsylvania. Tr. 180-182.

3. The first phase of the Mariner East Project, Mariner East 1 (ME1), involves the repurposing of an existing 8-inch pipe built in 1931, which had carried petroleum products like gasoline and diesel fuel from Marcus Hook to Western portions of Pennsylvania for distribution within the State of Pennsylvania. Tr. 180-181.

4. ME1 traverses through WGT and is now carrying highly volatile liquids of ethane, methane and butane from West to East mostly for storage, processing, and export. Tr. 180-181.

5. Sunoco is constructing additional 16 and 20-inch pipelines intended to also carry HVLs in a second phase, known as the Mariner East 2 and 2X (ME2 and ME2X) Project. Tr. at 180-181.

6. Sunoco is currently constructing its Mariner East 2 pipeline, which traverses WGT. Tr. 180-181.

7. In May 2015, SPLP, CCWGT and WGT executed a Settlement Agreement related to Mariner East 1 and ME2 that was filed with the Commission on May 15, 2015, pursuant to 66 Pa. C.S. § 507 (requiring agreements between public utilities and municipalities to be filed with the Commission). Exhibit Twp. 4.

8. The Agreement required SPLP to locate a valve (Valve 344) on the SPLP Use Area unless engineering constraints made Sunoco unable to locate the valve there. Settlement Agreement (Exhibit Twp. 4) at IV.A.1.a., II.

9. After further study subsequent to the Settlement Agreement, Witness Gordon, Project Manager for the Mariner East Project discovered “engineering constraints” rendering the then proposed Valve 344 site unsuitable and unsafe. SPLP St. No. 1, 3-6.

10. SPLP discovered that on balance the same level of valve system performance could be provided by eliminating Valve 344 and converting the next upstream valve, just 2.5 miles upstream at East Lincoln Highway, from manual to automated. SPLP St. No. 1 at 3-4, 6-9; SPLP St. No. 2; SPLP Ex. PV-2 (Highly Confidential).

11. By using the next upstream valve at East Lincoln Highway, the response performance improved from the Settlement Agreement configuration. SPLP Ex. PV-2 at Table E-1(Highly Confidential).

12. The downstream performance between the then proposed Valve 344 site and the next downstream valve is negligible and insignificant compared to the Settlement Agreement valve configuration and features, as described by a pipeline safety expert as being the difference between travelling “50 miles per hour compared to 50.05 miles per hour.” SPLP St. No. 2 at 5-6, 10-13; SPLP Ex. PV-2; SPLP St. No. 2-RJ at B.; Tr. at 594, 612⁶.

13. Eliminating the ME2 pipeline valve from West Goshen Township while automating the upstream valve does not create a safety reason for requiring Valve 344 on the SPLP Use Area as on balance it essentially is the same performance-wise as the Settlement Agreement Valve 344 configuration and valve system features. SPLP St. No. 2 at 5-6, 10; SPLP Ex. PV-2; SPLP St. No. 2-RJ at B.; Tr. at 594, 612.

14. Engineering constraints prevent SPLP from placing a ME2 pipeline valve on the SPLP Use Area as it had originally intended. Settlement Agreement (Exhibit Twp. 4) at

⁶ It is noted this quote is from the proprietary/confidential record in this hearing at page 612 of the Transcript; however, as Sunoco has disclosed Mr. Vieth’s testimony in its public version Main Brief at page 2, Sunoco has waived the confidential treatment by not designating it as confidential in its Main Brief. See 52 Pa. Code § 102.3(c).

II; SPLP St. No. 1; SPLP St. No. 3; SPLP St. No. 4; SPLP St. No. 5 SPLP St. No. 6; Tr. at 346, 383-384, 435-436, 448, 536, 539, 540-541; SPLP Hearing Exhibit 3.

15. Regarding the western portion of the pipeline, those engineering constraints include the congestion of utilities in the right-of-way and improbability to obtain a permit for open cut construction. SPLP St. No. 1 at 11; SPLP St. No. 3 at 2-4; Tr. at 188-189, 346, Exhibit Twp. 13.

16. "Engineering constraints" within the meaning of the Agreement include minimum curvature issues (the extent to which the pipe can be bent without negatively impacting its strength) and the geology beneath Route 202 (which would cause safety issues for traffic), which prevent installation of the valve on the SPLP Use Area using HDD. SPLP St. No. 1 at 13-14; SPLP St. No. 4 at 2; Tr. at 384; SPLP St. No. 5 at 5; Tr. at 536-546; SPLP Hearing Exhibit 3; SPLP St. No. 6 at 4-6; Tr. at 435-436.

17. Open cut construction near the SPLP Use Area would be difficult due to the numerous underground utilities including an Aqua American Pennsylvania facility and tanks, and because PennDOT might deny an application for highway occupancy permit to open cut Boot Road or Route 202. SPLP St. No. 1 at 10.

18. Engineering constraints also prevent SPLP from placing a valve on the SPLP Additional Acreage. Tr. at 542-544, 546; see also SPLP St. No. 5 at 5-8; Tr. at 536-541.

19. SPLP did not know whether placing a valve on the SPLP Use Area was feasible at the time of the Settlement Agreement because it did not yet have geotechnical data or utility locate data, which is why SPLP built into the Agreement that if engineering constraints were present making SPLP unable to build the valve on SPLP Use Area, the valve would not be located on the SPLP Use Area. Tr. at 529-530.

20. SPLP obtained data later in 2015 and then concluded that engineering constraints prohibited placement of the valve on the SPLP Use Area in approximately November or December of 2015. SPLP St. No. 1 at 13-16.

21. On January 20, 2016, SPLP representatives Matthew Gordon, Donald Zoladkiewicz, Ivana Wolfe, and Shannon Gwin met with, *inter alia*, WGT representatives Casey Lalonde and Kristin Camp, and SPLP informed WGT that it would not locate the valve on the SPLP Use Area, but instead would locate the valve on the Janiec 2 tract due to engineering constraints, which were explained to them and showed in construction alignment sheets and diagrams of the site. SPLP St. No. 1 at 17; SPLP St. No. 7 at 1-4; SPLP St. No. 8 at 1-2; SPLP St. No. 9 at 1-2; SPLP DZ-1 (Highly Confidential).

22. At the January 20, 2016 meeting, Ms. Camp demonstrated that she understood the relocation of the valve when she voiced her concerns that the fencing and/or landscaping for the new Janiec 2 valve location would not be aesthetically pleasing, unlike the existing Boot Road pump station on the SPLP Use Area. SPLP St. No. 7 at 3; SPLP St. No. 8 at 2; SPLP St. No. 9 at 2.

23. SPLP again gave WGT notice of its decision to relocate the valve later in 2016 and again in 2017. SPLP St. No. 1 at 17.

24. SPLP gave WGT notice of its November 2017 decision not to locate a valve in the Township via its pleadings and testimony in this proceeding. SPLP St. No. 1 at 3; SPLP St. No. 2.

25. SPLP provided WGT and its safety expert, Mr. Kuprewicz, with the updated information pertinent to safety review in SPLP's testimony and exhibits, but it still has a duty going forward to provide information until Mariner East project construction is completed. SPLP St. No. 1 at 7; SPLP St. No. 2; SPLP Ex. PV-3; SPLP St. No. 2-RJ at B.8.

IV. DISCUSSION

A. Legal Standards

As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Public Utility Code (Code). 66 Pa. C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the Respondent is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant's evidence must be more convincing, than that presented by the Respondent. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, the Commission's decision must be supported by substantial evidence in the record. It is axiomatic that a legal decision must be based on real and credible evidence that is found in the record of the proceeding. *Pocono Water Co. v. Pa. Pub. Util. Comm'n*, 630 A.2d 971, 973-74 (Pa. Cmwlth. 1993) (finding that the Commission violated the utility's due process rights "because it assessed liability after determining an issue which [the utility] had not been afforded a reasonable opportunity to defend at the hearing."); *Duquesne Light Co. v. Pa. Pub. Util. Comm'n*, 507 A.2d 433, 437 (Pa. Cmwlth. 1986) (holding that the Commission violated the utility's due process rights because the utility was "not given adequate notice of the specific conduct being investigated, and hence its defense was gravely prejudiced."). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by the Complainant of evidence sufficient to initially establish a *prima facie* case, the burden of going forward with the evidence, to rebut the evidence of the Complainant, shifts to the Respondent. If the evidence presented by the Respondent is of co-equal weight, the Complainant has not satisfied his burden of proof. The Complainant now must provide some additional evidence to rebut that of the Respondent. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa.Cmwlth. 2001). In sum, WGT always has the burden of proof in this proceeding.

B. Settlement Agreement

The pertinent provisions of the Settlement Agreement relied upon in the Township's Complaint provide as follows:

II. Pertinent Information Provided by SPLP

A. SPLP has provided WGT and WGT's consulting expert with the following information ("SPLP Information"). WGT and CCWGT expressly rely on the accuracy of the SPLP Information in reaching this Agreement.

1. As used herein, the phrase "Mariner East Project" refers to the existing Mariner East 1 pipeline and appurtenant facilities, and all additional pipelines and appurtenant facilities to be owned and/or operated by SPLP in WGT for the transportation of propane, ethane, butane and/or other natural gas liquids.
2. The pump station, the VCU and all accessory and appurtenant above-ground facilities associated with all phases of the Mariner East Project will be maintained within the present active site, Parcel No. 52-1-8-U, on which the existing Boot Road Pump Station currently operates (the "SPLP Existing Site"), except that a remote operated valve station will be constructed and maintained on SPLP's adjacent 4.42 acre property, Parcel No. 52-0-10-10.1, also known as the former Janiec Tract (the "SPLP Additional Acreage"). The proposed location of such valve station on the SPLP Additional Acreage is depicted on the map attached hereto as Appendix 1 and incorporated by reference (the "SPLP Use Area"). Subject to any engineering constraints, SPLP intends to construct the valve station in the general area depicted on the map attached hereto as Appendix 1. If due to engineering constraints, SPLP is unable to construct the valve station in the SPLP Use Area, SPLP will notify WGT. Nothing in this Settlement Agreement constitutes an authorization or agreement for SPLP to construct the valve station in any location on the SPLP Additional Acreage other than in the SPLP Use Area.

3. As of the date of execution of this Agreement, SPLP has no plan or intention to construct any additional above-ground permanent utility facilities in WGT except as otherwise expressly set forth in this Agreement.

* * *

IV. The Parties Promises, Covenants and Agreements

A. Based on the SPLP Information recited in Section II of this Agreement...

* * *

2. WGT covenants and agrees as follows:

e. With respect to Mariner East 2, SPLP agrees, upon the execution of a mutually agreeable confidentiality agreement, that it will provide to Accufacts, Inc., or a person or entity acting for WGT that is similarly a nationally recognized expert in the field of liquids pipeline safety ("Liquids Pipeline Safety Expert") information relating to Mariner East 2 of a similar nature that was provided regarding Mariner East 1 for review by the Liquids Pipeline Safety Expert. WGT and its expert will meet and confer with SPLP with respect to any concerns the Liquid Pipeline Safety Expert may have related to safety and SPLP will be provided an opportunity to respond thereto, before WGT would file any formal protest or other action raising any safety issue related to Mariner 2 East.

Exhibit Twp. 4 (Emphasis added).

C. Issues

Issues raised with the Second Amended Complaint include the following.

1. Whether there are "engineering constraints" that make Sunoco "unable" to construct a Valve station on the SPLP Use Area and/or SPLP Additional Acreage Area.
2. If "engineering constraints" exist such that Sunoco is "unable" to construct a valve station on the SPLP Use Area and/or SPLP Additional Area, whether Sunoco properly notified WGT of these constraints and whether its obligation to build a valve in WGT ends.

3. Whether Eliminating the Valve in WGT is Unsafe and if so, whether Sunoco should be directed to construct a remote operated valve on the SPLP Use Area or SPLP Additional Acreage in connection with the construction or installation of the ME2 and ME2X facilities in WGT.
4. Whether Sunoco has breached its June 15, 2015 Agreement with West Goshen Township, specifically Paragraphs II.A., II.A.2, II A.3, and IV.A.
5. Whether the Agreement between the parties should be revised or modified by the Commission.

1. Whether there are “engineering constraints” that make Sunoco “unable” to construct a valve station on the SPLP Use Area and/or SPLP Additional Acreage Area within the meaning of the Agreement.

a. West Goshen Township’s Position

WGT contends the burden of proving by a preponderance of evidence that there were “engineering constraints” that make Sunoco “unable” to construct the Valve station on the SPLP Use Area and/or SPLP Additional Acreage Area is on Sunoco. While the Township bears the burden to prove that the Settlement Agreement requires SPLP to install the Valve on the SPLP Use Area, Sunoco bears the burden to prove that engineering constraints make it unable to install the Valve as required by the Agreement. WGT cites as authority *Sabella v. Appalachian Dev. Corp.*, 103 A.3d 83, 93 (Pa. Super. 2014) (“A defendant asserting an affirmative defense has the burden of proof as to that affirmative defense.”) (citing *Reott v. Asia Trend, Inc.*, 55 A.3d 1088, 1092 (Pa. 2012)); *Madison Const. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 106 (Pa. 1999) (an exclusion in an insurance contract is an affirmative defense and insurer bears the burden of proving such defense); *Doud v. Hines*, 112 A. 528, 529 (Pa. 1921) (the burden of proof shifts to the defendant when he sets up an affirmative defense).

WGT contends that SPLP has not carried its burden of proving that “engineering constraints” make it “unable” to construct the Valve in the SPLP Use Area. SPLP has not met its obligation to provide the clear and precise evidence necessarily needed for it to avoid its contractual obligation to install the Valve in the Township. See *Schoble v. Schoble*, 37 A.2d 604, 605 (Pa. 1944). WGT contends SPLP produced no evidence to establish that it made a

reasonable investigation into whether the Valve could be installed on the SPLP Use Area or the larger adjacent SPLP Additional Acreage before attempting to move the Valve to the Janiec 2 Tract.

b. Sunoco's Position

Sunoco contends the burden of proof remains with WGT as "engineering constraints" are not an affirmative defense listed in the PA Rules of Civil Procedure. Pa.R.C.P. 1030. Also, the engineering constraints term is not an exclusion clause like the insurance contract contexts that WGT cites. The engineering constraints term is a condition precedent for which WGT as the Complainant bears the burden of proof. *Peters v. World Mut. Health & Accident Ins. Co. of Pennsylvania*, 213 A.2d 116 (Pa.Super. 1965) (party seeking performance under the contract bears burden of proof for a condition precedent). Even if the Commission were to place the burden of proving engineering constraints upon Sunoco, a preponderance of the evidence shows that engineering constraints exist. Sunoco contends WGT failed to meet its burden of proving there were not engineering constraints that made Sunoco unable to perform its duty to construct the Valve on the SPLP Use Area.

c. Disposition

Regarding burden of proof, a "condition subsequent" terminates an already existing duty to perform, while a "condition precedent" triggers a duty to perform. Black's Law Dictionary 312 (8th ed. 2004). C.J.S. Contracts §§ 356, 356-357. The party seeking to establish that a duty arose as a result of the occurrence of a condition precedent has the burden of proof [WGT in this case]. The party seeking to establish that an existing duty to perform has been terminated by a condition subsequent has the burden of proof [Sunoco in this case]. *Ewell v. Those Certain Underwriters of Lloyd's, London Subscribing to Policy Number LSP 110000249*, 2010 WL 3447570 (Superior Court of Delaware, August 27, 2010).

The following sections of the Restatement (Second) of Contracts apply.

§ 224. Condition Defined.

A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.

§ 230. Event That Terminates a Duty.

- (1) Except as stated in Subsection (2), if under the terms of the contract the occurrence of an event is to terminate an obligor's duty of immediate performance or one to pay damages for breach, that duty is discharged if the event occurs.
- (2) The obligor's duty is not discharged if occurrence of the event
 - (a) is the result of a breach by the obligor of his duty of good faith and fair dealing, or
 - (b) could not have been prevented because of impracticability and continuance of the duty does not subject the obligor to a materially increased burden.
- (3) The obligor's duty is not discharged if, before the event occurs, the obligor promises to perform the duty even if the event occurs and does not revoke his promise before the obligee materially changes his position in reliance on it.

Some Pennsylvania cases no longer use the term "condition subsequent" and likewise replace it with the term "event that terminates a duty." See *Boro Construction, Inc. v. Ridley School Dist.*, 992 A.2d 208 (Pa. Cmwlth. 2010) (condition precedent); *Beaver Dam Outdoors Club v. Hazleton City Authority*, 944 A.2d 97 (Pa. Cmwlth. 2008) (condition precedent). In the *Hazleton* case, the Commonwealth Court rejected the Hazleton City Authority's position that an engineering certificate was a condition precedent to a valid lease with a hunting and fishing club. See also, *Cambria Sav. and Loan Ass'n v. Gross' Estate*, 439 A.2d 1236 (Pa. Super. 1982) (condition subsequent or event that terminates a duty). The Superior Court in the *Cambria Sav.* case replaced the term "condition subsequent" with "event that terminates a duty" pursuant to Section 230 of the Restatement (Second) of Contracts. It also approved of referring to a "condition precedent" as simply a "condition."

When performance of a duty under a contract is due, any nonperformance is a breach." Restatement (Second) of Contracts at § 235(2). See also *Sufalla v. Widmer*

Engineering, Inc., 837 A.2d 459 (Pa. Super. 2003). An Agreement is a meeting of minds with the understanding and acceptance of reciprocal legal rights and duties as to particular actions or obligations, which the parties intend to exchange, a mutual assent to do or refrain from doing something. A unilateral mistake will not void a contract. *Herman v. Stern*, 419 Pa. 272, 213 A.2d 594 (1965). Generally, if a mistake is not mutual, but unilateral and is not due to the fault of the one not mistaken, there is no basis for relief. *McFadden v. American Oil Company*, 257 A.2d 283 (Pa. Super. 1969). All the terms of the contract must be given meaning, including the headings. *Central Dauphin Sch. Dist. v. American Cas. Co.*, 426 A.2d 94, 96 (Pa. 1981).

The Commission in its *October 2017 Order* and *January 2018 Order*, “found compelling the legal issues developed by the Township on the record pertaining to whether, at the time of the execution of the Settlement Agreement, Sunoco misrepresented its intention to site Valve 344 and whether Sunoco withheld material information about its plans for Mariner East 2.” *January 2018 Order* at 10-11.

The following terms of the Agreement qualify SPLP’s duty to build a valve on SPLP Use Area, “Subject to any engineering constraints, SPLP intends to construct the valve station in the general area depicted on the map attached hereto as Appendix 1.” Exhibit Twp. 4. I find the existence of “engineering constraints” making Sunoco “unable” to locate the Valve on the SPLP Use Area triggers a duty to notify the Township; however, it also ends Sunoco’s obligation to place a valve in the Township altogether. Thus, the condition of “engineering constraints” acts not only as a condition precedent to notification, but also as a condition subsequent ending Sunoco’s obligation to place a valve in WGT, specifically the SPLP Use Area without further notification to WGT. Sunoco bears the burden of proving engineering constraints existed making it unable to perform, thus ending its duty to build the valve within the SPLP Use Area of the Township as had been promised. WGT bears the burden of proving it was not properly notified of engineering constraints within the meaning of the Agreement.

The term “engineering constraints” is not defined in the Agreement. Webster’s Dictionary defines engineering as a noun and not an adjective as it is used in the Agreement modifying the word “constraints.” Engineering n 1: the activities or functioning of an engineer

2: the science by which the properties of matter and the sources of energy in nature are made useful to man in structures, machines and products. Constraint is defined in pertinent part as follows 1.b) the quality or state of being checked, restricted, or compelled to avoid or perform some action; c) a constraining agency: a constricting, regulating or restricting force; d) a restriction or limitation that contains a motion or other process; 2. Compulsion by circumstances: the force of necessity. Webster's Third New International Dictionary at 752, 489 (1976). From these definitions I interpret "engineering constraints" to mean restrictions upon some actions due to compelling scientific principles of engineering. These constraints should compel an engineer with reasonable certainty to act or avoid acting in a specific way with regard to the promised design of the project. The word "unable" is used in the Agreement. Unable is defined as follows, Unable adj.: not able: incapable: as 1) unqualified, incompetent. Marriam-Webster's Collegiate Dictionary at 1284 (10th ed. 1998).

In the Order Denying Motion for Judgment on the Pleadings and Motion to Stay Discovery, I found the terms "notify" and "engineering constraints" to be ambiguous as more than one reasonable interpretation was plausible. Order at 6-7. A court may not interpret a settlement agreement unless it first determines that the agreement is ambiguous or capable of more than one interpretation. *Krizovensky v. Krizovensky*, 624 A.2d 638 (Pa. Super. 1993). When contract terms are ambiguous and susceptible of more than one reasonable interpretation... the court is free to receive extrinsic evidence, i.e. parol evidence to resolve the ambiguity. *Id.* at 642. Thus, extrinsic parol evidence is considered. There is a disagreement over the meaning of the following statement in the Agreement: "Subject to any engineering constraints, SPLP intends to construct the valve station in the general area depicted in that SPLP Use Area." Exhibit Twp. 4. WGT argues this means the valve would be placed upon the SPLP Additional Acreage unconditionally without qualification. The only qualification or condition was whether it would go entirely on the SPLP Use Area, a smaller parcel within the larger SPLP Additional Acreage Area (located farthest from houses along Mary Jane Lane and closest to the South Bound offramp from 202 to Boot Rd.) or if it would spill out into the SPLP Additional Acreage. Tr. 496. See Exhibits R-4 and SPLP Hearing Exhibit 2 (Map showing Mary Jane Lane, SPLP Additional Acreage and SPLP Use Area).

Sunoco Witness Gordon did not agree with that interpretation. Tr. 496-497. Mr. Gordon testified on July 18, 2017 that to construct the valve, the pipeline must come to the surface in the location of the valve. Thus, to place the valve on the SPLP Use Area, SPLP must be able to construct the pipeline such that the pipeline can approach the valve from each direction and meet the ground surface at the valve site. There are two general approaches to engage in this construction – open cut and HDD. Regarding the western portion of the pipeline, WGT made no challenge to SPLP’s testimony that HDD cannot be used.

I am persuaded by Witness Gordon to find that due to the highly congested nature of the existing private and municipal utilities facilities, including Aqua Pennsylvania, Inc., a water utility with facilities underneath and along Boot Road to the West of the SPLP Use Area, and the unlikelihood of obtaining a permit to open cut Boot Road, using open cut construction to install the pipeline to allow a valve to be placed on the SPLP Use area is impracticable. SPLP St. No. 1 at 11-12. Mr. Gordon testified as follows.

Various obstacles and engineering constraints make open cutting Boot Rd. impracticable and likely unsafe. First, there are numerous other underground facilities of other utilities already located in and along Boot Road. These utilities often have interconnections, such as water lines running to various houses. Because of this congestion in the open cut path it would be difficult to install the pipeline here and would result in installing the line at a greater depth and down the middle of Boot Rd.

Second, closing this segment of Boot Road means we would have to detour traffic and the detour routes do not seem viable. Boot Road is very heavily trafficked, carrying approximately 16, 441 vehicles per day on the segment of the road that would be shut down.

Third, because of the lack of viable detour options, it is unlikely PennDOT would approve a permit to open cut Boot Road. Fourth, if a permit were approved, PennDOT would likely require us to only work at night and this would likely conflict with WGT’s noise ordinance.

SPLP St. No. 1 at 11-12.

Additionally, Mr. Gordon testified that there were minimum radius curvature constraints in HDD drilling from under Route 202 up to the surface on the SPLP Use Area. Mr.

Gordon stated that the underlying geology including “fractured/weathered” earth contributes to his finding that SPLP Use Area is unsuitable for Valve 344. Mr. Gordon testified, “ To reach a depth that would be proper to avoid the risk of inadvertent returns⁷ or heaving of Route 202, we would have to go much deeper than what the curvature of the drill radius will allow. Sunoco should not use a radius of less than 2,000 feet for the 20-inch pipeline – an industry standard.” St. 1 at 13.

Also, existing structures (including tanks and a pumping station owned by Aqua America Pennsylvania located on the SPLP Use Area) impede the ability to line up the pipe with the drill rig and the ability to pull the pipe through the HDD hole in the SPLP Use Area. Tr. 489, SPLP St. 1 at 12-13. Further, HDD installation and the construction of a valve at the SPLP Use Area would necessitate drilling under a house located at the corner of Mary Jane Lane and Boot Road at Parcel No. PA-CH-0307.001. Tr. 187-188, Exhibits R-4 and R-5. Thus, SPLP was constrained by that factor as well. The Company may have had to acquire that residence on Mary Jane Lane and tear it down. SPLP St. No. 1 at 12. Tr. 187. Witness Gordon testified that the feasibility of getting a Valve into SPLP Use Area is “extremely difficult” and “potentially unsafe.” Tr. 194, 466, SPLP Exhibits MG-2 (Econosult report), MG-3 (SPLP’s ME 2 safety report) and MG-4 (updated drill profile).

Sunoco’s current plans to not place a valve in the Township include a drill profile that travels deeper under Route 202 than had been originally planned and may minimize the risks of inadvertent return onto Route 202 and the heaving⁸ of Route 202 due to inadvertent return under the Boot Rd. off-ramp and four-lane highway. See updated drill profile at Exhibit MG-4. Route 202 is a major interstate traversed by thousands of motorists daily. To the extent that Sunoco’s new plan will avoid IRs under and upon Route 202 and the ramps to and from Boot Road that would interfere with the flow of traffic, this is reasonable and may assist Sunoco in complying with its inadvertent return plan as filed pursuant to 25 Pa. Code §78a.68a (relating to

⁷ Inadvertent return (IR) is when drilling fluids, under pressure in the bore hole, escape through the annular space between the drill pipe, the bit assembly and the bore hole wall, and migrate through a fracture or softer, unconsolidated soils, a fracture in the rock, to the surface. N.T. 399. IRs are sometimes also referred to as “frac-outs” or “breakouts.” N.T. 128-129.

⁸ Heaving is the uneven raising of an asphalt road due to pressure from beneath.

HDD for oil and gas pipelines) and 52 Pa. Code §102.5(1) (relating to permit requirements) as well as the Clean Streams Law when conducting HDD. SPLP St. No. 1 at 14.

Mr. Gordon presented evidence of this as well:

As I explained in my July 18, 2017 hearing testimony, the need for and the location of Valve 344, like many other elements of any major construction project, has been subjected to ongoing evaluation and reevaluation. Circumstances change and there is a need for flexibility and managerial discretion. The siting of Valve 344 on the SPLP Use Area was conditioned upon not having engineering constraints. There can be a need to develop a new solution when something that was hoped to be practical and prudent turns out not to be due to engineering constraints that come to light during the construction process.

First, SPLP wanted and intended to place Valve 344 on the SPLP Use Area and thus expressed that intent in the Settlement Agreement. SPLP's initial preference, subject to engineering prudence and an absence of engineering constraints, is to locate all of its above ground facilities close together for efficiency and maintenance purposes, so placing Valve 344 on the SPLP Use Area, which contains the Pump Station for the ME1 line, made the most sense at that time and appeared to be practical. That initial belief or hope, however, did not prove out under subsequent and further evaluation and engineering review.

Second, we already owned the SPLP Use Area, meaning we would not have to acquire another parcel on which to place Valve 344. But we did not, relative to the drilling and construction that would have to be done to locate Valve 344 on the SPLP Use Area, have all the subsurface utility locate data for other utility facilities until the fall or winter of 2015, and did not have results of a geotechnical analysis prior to March of 2015. We never represented to WGT that our decision as to the Valve 344 site was final and inflexible or that we had all analyses completed that would allow us to make this determination. That is why the Settlement Agreement made that initial plan subject to "engineering constraints." Unfortunately, the SPLP Use Area did not pass the engineering constraints requirement. We decided Valve 344 could not be placed on the SPLP Use Area due to engineering constraints in November or December 2015 and first notified WGT in January of 2016, as Mr. Zoladkiwicz explains in his testimony.

Third, it makes no sense that SPLP would have some plan not to put Valve 344 on the SPLP Use Area if that location were suitable. We own that parcel and using it for Valve 344 would have saved us the approximately \$2 million-dollar cost to purchase the Janiec 2 property, which did not suffer from the engineering constraints, to relocate Valve 344.

Fourth, it makes no sense that we would choose not to locate Valve 344 on the SPLP Use Area if it were possible from an engineering perspective to do so, knowing that choice could expose the project to time-consuming litigation that could slow the progress of our overall project. So, WGT's conspiracy angle makes no sense to me. Instead, what continues and will continue is the reality that we cannot and will not locate a valve at a site that is unsuitable and presents significant safety concerns due to its location and construction. And, as it turns out, with reevaluation and modifications to ME2 elsewhere, there is no need for Valve 344; so, the debate on whether Valve 344 should go on the unsuitable SPLP Use Area has no practical point.

Q. Did SPLP misrepresent its intentions to WGT prior to executing the Settlement Agreement concerning the site of Valve 344?

A. No, as I explained above, it was an evolving process. We wanted to place Valve 344 on the SPLP Use Area, and our initial plan was to do so. We did not – and could not – guarantee that this would be the ultimate location of Valve 344 or that we had completed all of the analysis necessary to confirm we could locate Valve 344 on the SPLP Use Area. Again, the Settlement Agreement expressly provides for change of the location of Valve 344 due to engineering constraints. Settlement Agreement at Section II.A.2.

SPLP St. 1 at 15-17.

Given this parol evidence, I find that Sunoco did intend at the time it entered into the Agreement on May 15, 2015, to construct Valve 344 on the SPLP Use Area, but that it was not unconditionally promising the construction of a Valve in that Area. The agreement to construct was subject to a condition that there were no engineering constraints making Sunoco “unable to construct the valve station in the SPLP Use Area . . .” Exhibit Twp. 4 at 3.

The Agreement contains a covenant to construct a valve in the SPLP Use Area subject to the condition that there are no engineering constraints preventing placement of the valve on the SPLP Use Area. WGT was aware there might be engineering constraints. The language discloses that. Sunoco Witness Gordon's testimony is credible and shows he was not sure construction could be done in the confined SPLP Use Area space. The Company had not yet completed its geotechnical studies. “Engineering constraints” act as a condition precedent to notifying the Township of such constraints. The constraints act as a condition subsequent

negating the obligation of Sunoco to construct the Valve in SPLP Use Area. I am not persuaded to find the background information section of the Agreement contradicts or overrides the covenant clauses. I believe the best interpretation of the Agreement is that WGT had confined Sunoco's construction of above-ground structures to an area close to Sunoco's existing imprint and facilities in the Township. At the time the parties entered into the Agreement, Sunoco intended to construct a valve in the Township, but later determined that by automating and/or building valves in adjacent townships, it would be prudent to not construct a valve in WGT. The Agreement placed an obligation upon Sunoco to confine the building of a valve to the SPLP Use Area located within the greater SPLP Additional Acreage. The Agreement does not permit Sunoco to construct the valve elsewhere in the Township, beyond the SPLP Use Area, without a modification to the Agreement, or the written consent of the Township. If Sunoco had constructed Valve 344 Boot Rd. on the Janiec 2 property without notifying or obtaining written approval from WGT, Sunoco would have been in breach of contract as I believe the Agreement requires such notification or approval. However, as Sunoco is abandoning plans to build a valve on Boot Rd. and is instead placing remotely operated valves outside the Township at Eagle Pump Station, East Lincoln Hwy and Middletown Road, there is no breach. SPLP St. No. 2-RJ.

I find credible the testimony of WGT Witness Carlin regarding highway occupancy permits. Mr. Carlin testified he is a transportation engineer who plans traffic safety during construction activities, including designing detours and seeking PennDOT approvals for road construction, utility installation and construction projects. Complainant St. No. 7 at 1-2, Tr. 304-311, Exhibits Twp. 25, 27-28. Mr. Carlin agreed with Mr. Gordon's testimony that in order to place the valve on SPLP Use Area, an open cut trench on Boot Road would likely cause a temporary closing of Boot Road with detoured traffic as more than one lane would be impacted. C St. 7 at 3, C St. 10 at 1. Mr. Carlin recommended several detour routes and believed PennDOT would be willing to approve such detours. C St. 7 at 4-5, C St. 10 at 1-3. He further opined as to an estimated cost of the opening, restoration and traffic control at \$1.2 million with contingencies as compared to an estimated \$3.9 million if HDD drilling as is currently planned. C St. 7 at 6, Exhibit Twp. 28. Mr. Carlin testified PennDOT never gave an official position with regard to whether it would have approved an open cut installation plan on Boot Rd. C St. 10 at 1-3. I agree with Mr. Carlin in this regard. Although Sunoco Witness Cotter may have had a

preliminary meeting with PennDOT employees present, Sunoco never applied for a highway occupancy permit in West Goshen Township and there is no official PennDOT position in the record regarding whether PennDOT would have approved or denied a petition for a highway occupancy permit regarding Boot Rd. SPLP St. 3 and 3-RJ, Tr. 346, 361-362, 364, 373-374.

In evidence are only the two conflicting transportation engineer opinions of Mr. Carlin versus Mr. Cotter that PennDOT would or would not have approved such a petition. This is insufficient for me to conclude PennDOT conclusively would not have approved such a petition given none was submitted for approval to PennDOT. However, Mr. Cotter's testimony is sufficient for me to find PennDOT might not have approved a highway occupancy permit. The cost/benefit analyses on both sides are unpersuasive. Costs related to a projected delay in the Mariner East project were not considered by Mr. Carlin. Tr. 365-366. Mr. Cotter considered costs based upon projected delays based upon his belief that PennDOT would delay the project. Mr. Cotter admitted he did not include the potential for inadvertent return in HDD in his cost/benefit analysis "because that is usually a responsibility of the contractor." Tr. 369. There are too many assumptions and little corroborative evidence in the cost/benefit analyses of Mr. Cotter and Mr. Carlin for me to be persuaded to adopt either one as a finding of fact.

Sunoco's Expert Witness Hess, a geologist, reviewed the geologic data SPLP had collected on which it based its decision and concluded Mr. Gordon was correct that the drill path alternatives necessary to place a valve on the SPLP Use Area all come at a great risk of inadvertent return and potential heaving of the highway. Tr. 278-382. Mr. Hess explained that the key feature of the geology is not the specific type of material, but that it is highly weathered, intensely fractured, and decomposed. SPLP St. No. 4 at 2-3. Due to the weathered, intensely fractured nature and unconsolidated character of shallow cover materials, an IR is possible when you are closer to the surface. Tr. 397. Relying on Mr. Antoni and Dr. Ariaratnam's evaluation of the necessary drill path and their conclusions that such a steep drill path cannot be constructed to reach the industry preferred minimum 20 feet of competent bedrock cover, Mr. Hess concluded that it would be inappropriate to use HDD to install the valve at SPLP Use Area based on the geology due to the risk of inadvertent returns under Route 202. SPLP St. No. 4 at 2-5,

SPLP Exhibit DH-2, Tr. 380-383. WGT did not refute Mr. Hess's conclusions regarding geology or the risk of inadvertent return. Tr. at 384.

I find Mr. Hess' testimony to be credible and persuasive to find engineering constraints exist such that it would be inappropriate to place the valve at SPLP Use Area due to the higher risk of inadvertent returns under the Boot Road Southbound off-ramp and Route 202. Tr. 399-401. Although Mr. Hess testified he was unaware of any standard depth that would eliminate any risk of IR, a preferred minimum of 20 feet of bedrock cover is desirable between Route 202 and the HDD. Tr. 400-401. HDD drilling under Route 202 horizontally, then arcing sharply towards the surface at SPLP Use Area would be more likely to cause IR than the current proposal of not constructing a valve in WGT, or if required to do so, constructing the valve at Janiec 2. This is because the pipe would not have to be drawn to the surface in the SPLP Use Area. Traffic on Boot Road travels on a bridge over-pass over Route 202 and there are steep embankments on either side. The SPLP Use Area is at the top of the embankment closest to where the Boot Road off-ramp from Route 202 South meets Boot Road. See SPLP Hearing Exhibits 2 and 3 and Exhibit R-4. Sunoco has experience with heaving at another major 4-lane interstate when pipe was pulled through and was a safety issue until mitigated. Tr. 401. SPLP Exhibit MG-4, SPLP Hearing Exhibit 2, and SPLP Hearing Exhibit 3. I do not know the depth at which Sunoco was HDD drilling under this other major highway when it experienced IR. I am not convinced there is any guarantee no matter what depth the HDD drilling occurs that there will not be any IR under Route 202. Nonetheless, I am persuaded by the engineers testifying that risk of IR is lessened the deeper the cut under bedrock and that IR would be minimized by an alternate placement of the valve from SPLP Use Area to Janiec 2 or to not construct it at all on either side of Route 202 along Boot Road.

Sunoco Witness Antoni, Chief Pipeline Engineer, Energy Operations Manager and Senior Vice President at STV Energy Services, Inc. testified to a reasonable degree of engineering certainty that HDD from the Janiec 2 site to the SPLP Use Area is not practically feasible. SPLP St. No. 5 at 1. Mr. Antoni also opined to a reasonable degree of engineering certainty that use of a shaft excavation site is not a viable option. SPLP St. No. 5 at 1-2. Mr. Antoni testified:

Although there's no requirements that the HDD remain 20 feet under the bedrock below Route 202 and no SPLP witness has alleged such requirement, based on my experience in the design and implementation of HDDs, this depth is recommended to minimize the risk of inadvertent returns in a very sensitive area. The drilling fluids will be regularly monitored during construction regardless of the depth. That does not eliminate the risk of an inadvertent return.

Tr. 537. Mr. Antoni analyzed all the potential drill design paths to place a valve on the SPLP Use Area or even the SPLP Additional Acreage. Tr. at 536-544, 546. He concluded none are feasible. *Id.*; see also SPLP St. No. 5 at 5-8; Tr. at 536-541. He explained in detail how minimum curvature issues prevent any HDD path from reaching an adequate depth of cover for the drill path surfacing on the SPLP Use Area and the Janiec 2 tract. SPLP St. No. 5 at 5-8.

WGT presented no evidence to refute Mr. Antoni's testimony other than WGT's Expert Witness Kuprewicz's Surrebuttal testimony as follows: "If the HDD is configured such that the HDD enters at the SPLP Use Area and the Valve is installed there at the surface, there is no apparent reason to re-surface at the Janiec 2 Tract." C St. No. 8 at 5. This testimony alone is insufficient to refute the testimonies of Mr. Antoni, Mr. Hess and Dr. Ariaratnam.

WGT Witness Kuprewicz is President of Accufacts, Inc. specializing in gas and liquid pipeline investigation, auditing, risk management, siting, construction, design, operation, maintenance, leak detection, etc. Exhibit Twp. 12. He has over 40 years of experience in the energy industry, with pipelines and refining. Tr. 115. He holds a BS in Chemical Engineering, a BS in Chemistry and an MBA. He serves on the federal Technical Hazardous Liquid Pipeline Safety Standards Committee, a committee advising the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) on pipeline safety regulations. Exhibit Twp. 12. Mr. Kuprewicz was accepted as an expert in pipeline safety. Tr. 116-117.

Much of Mr. Kuprewicz's testimony focused on the distance between valves on ME2 and the safety of valve placement within the Township. Mr. Kuprewicz agreed with

Sunoco's agent Mike Slough in April of 2016 about HDD under Route 202, and well below the pump station exiting on the east side of Route 202. Mr. Kuprewicz agreed that would be an ideal place to put a valve because it was close to the surface. Tr. 123. He testified, "Well, the HDD, where it comes out drives the potential for where a valve might want to be placed." Tr. 126. I find Mr. Kuprewicz' testimony credible that he did not discuss the removal of the proposed valve from the SPLP Use Area *per se* in April 2016. Tr. 125-126. Mr. Kuprewicz' testimony that if Sunoco puts the pipe 75 feet deep into the ground the way they want to now, they cannot simply add a valve later to the SPLP Use Area because the pipe will be too far underground for a valve is credible. Tr. 127. Mr. Kuprewicz testified that for the pipe to go under the Boot Road Pump Station it would have to go "somewhere like 75 feet deep, which there's no way you can get a valve there." Tr. 127. Mr. Kuprewicz admitted that he had conversations with Mr. Slough and knew Sunoco had plans to HDD under Route 202 coming to the surface on Janiec 2 and that it was a logical place for a valve. Tr. 132. He did not have conversations with Mr. Slough as to whether placement of a valve on SPLP Use Area would be prudent. Tr. 133.

I am persuaded to find "engineering constraints" exist making Sunoco unable to construct Valve 344 on the SPLP Use and/or SPLP Additional Acreage Areas in part from the credible testimony and accompanying drawing of Mr. Antoni who used a board to draw a rough profile starting at the SPLP Use Area of the grade showing a "pinch point" created due to topography as the drilling would approach Route 202 on the west side creating a significant risk of IR regardless of whether the drill path resurfaces at Janiec 2 or continues on to the Green Hill drill. Tr. 540-542. SPLP Hearing Exhibit 3.

I am persuaded by the credible testimonies of Sunoco Witnesses Gordon, Hess, Antoni and Dr. Ariaratnam regarding placement of the valve as they testified that surfacing on the Janiec 2 tract to meet ME2 is less risky than extending the drill, Tr. at 539, and extending the drill does not solve the geology issues and minimum curvature problems with having an entry point on the SPLP Use Area. Tr. at 540-541, SPLP Hearing Exhibit 3.

Dr. Ariaratnam also analyzed SPLP's construction design decisions, focusing on "how that project should best be undertaken to minimize a public safety and disturbance to the

general public and environmental impacts.” Tr. at 430. He testified, “There are engineering, site and soil constraints that would make HDD unsuitable and risky due to the likelihood of inadvertent returns, which would significantly disrupt surface traffic. He opined with a reasonable degree of engineering certainty that HDD would be inappropriate under these circumstances to use HDD to bring the pipeline into the SPLP Use Area from the Phoenixville Pike to the east. SPLP St. No. 6 at 4-6. Dr. Ariaratnam also explained, based on his experience and visit to the site, that any exit/entry point suffers from the same “pinch point” issue Mr. Antoni described. Tr. at 435-436, 448.

The Agreement provides in pertinent part, “If due to engineering constraints, SPLP is unable to construct the valve station in the SPLP Use Area, SPLP will notify WGT.” I interpret this clause to describe an event that will terminate Sunoco’s duty to perform the act of constructing the valve on the SPLP Use Area. That duty was discharged due to engineering constraints, as described by geotechnical reports and the testimonies of Witnesses Gordon, Dr. Ariaratnam, Antoni and Vieth show. However, Sunoco’s obligation to build the valve is not discharged if the constraints are a result of Sunoco’s breach of a duty of good faith and fair dealing, or if the engineering constraints could not have been prevented because of impracticability and continuance of the duty did not subject the obligor to a materially increased burden. See § 230(2)(a)(b) Restatement (Second) of Contracts.

The Aqua facilities, other utility underground facilities near or under Boot Road, geography of the land and proximity to Route 202 and the homes on Mary Jane Lane were all in existence prior to Sunoco’s execution of the Agreement. This is evidence to suggest Sunoco knew at the time it entered the May 15, 2015 Agreement that engineering constraints existed at the SPLP Use Area and the evidence also shows Sunoco had preliminary plans at that time to bring the pipe to the surface at Janiec 2, where a valve station could go. However, I am persuaded by Mr. Gordon’s testimony that he intended on May 15, 2015 to install the Valve 344 at SPLP Use Area, but he was still waiting for geotechnical studies and was not yet committed to that design. None of the engineering constraints were caused by Sunoco’s bad faith.

The condition of “engineering constraints” allows for a discharge of Sunoco’s duty to build a valve at SPLP Use Area. The “engineering constraints” create a condition upon which WGT agreed. Also, requiring Sunoco to continue a duty to place the Valve on SPLP Use Area subjects Sunoco to a materially increased burden than that to which it agreed on May 15, 2015. For these reasons, I find Sunoco’s duty to construct a Valve on SPLP Use Area was discharged by “engineering constraints” making Sunoco “unable” to perform that which it had promised, a valve located on the SPLP Use Area. Thus, I find in favor of Sunoco on this issue.

2. If “engineering constraints” exist such that Sunoco is “unable” to construct a valve station on the SPLP Use Area and/or SPLP Additional Area, whether Sunoco notified WGT of these constraints and whether its obligation to build a valve in WGT ends

a. West Goshen Township’s Position

WGT argues the Agreement contains promises: (1) to maintain all of its above-ground facilities for all phases of the Mariner East Project at Sunoco’s existing site in the Township and (2) to construct a remote operated valve station on the SPLP Additional Acreage with a designated location therein called the SPLP Use Area. Use of the word “will” within the provisions indicates a promise. WGT contends that even if “engineering constraints” existed within the meaning of the Agreement, Sunoco’s obligation to build a valve within the Township was not terminated by evidence of the following language,

Nothing in this Settlement Agreement constitutes an authorization or agreement for SPLP to construct the valve station in any location on the SPLP Additional Acreage other than in the SPLP Use Area.

As of the date of execution of this Agreement, SPLP has no plan or intention to construct any additional above-ground permanent utility facilities in WGT except as otherwise expressly set forth in this Agreement.

Id. at Paragraph II.A.2. and 3.

WGT contends this language shows if Sunoco is unable to locate the Valve on the SPLP Use Area due to engineering constraints, it must notify the Township, the parties would confer, and the Township would provide authorization to locate the Valve at a different location

on the SPLP Additional Acreage. If Sunoco could locate the Valve anywhere in the Township, there would be no reason to represent that it has no plan or intention to construct any other above-ground facilities in the Township other than on the SPLP Use Area. WGT Main Brief at 34.

WGT contends that indirect notification occurred in mid-December via an Applicant Developer regarding a Traditions project on Janiec 2, then also indirectly via Bob Hall, President of Goshen Fire Company, who at an early January Board meeting with the Board and Developer present, claimed Sunoco had approached him for easement/access to Janiec 2. Tr. 142. WGT claims Sunoco should have been the first to directly notify the Board of Supervisors but did not do so until a January 20, 2016 meeting.

b. Sunoco's Position

Conversely, Sunoco argues the Settlement Agreement is not ambiguous and the language should be interpreted by its plain meaning. Sunoco cites the case of *Metzger v. Clifford Realty Corp.*, 476 A.2d 1 (Pa. Super. 1984) as authority for its position. Sunoco contends that it provided notice on January 20, 2016, and this is sufficient to satisfy the meaning of the word "notify" within the Agreement. The agreement is not ambiguous in this regard, but even with parol evidence, substantial evidence shows no obligation to consult with or obtain approval from the Township to place a valve anywhere other than SPLP Use or SPLP Additional Acreage Areas within in the Township. Sunoco claims it is not required to notify WGT of an intent to automate or place remotely operated valves near but outside the boundaries of WGT.

c. Disposition

A review of the Agreement in the instant case shows it to be devoid of any indication that there was an unconditional promise on the part of Sunoco to build a Valve station on the SPLP Use Area. Additionally, although it states: "If due to engineering constraints, SPLP is unable to construct the valve station in the SPLP Use Area, SPLP will notify WGT," there is no specific language to support WGT's contention that "notify" also means that Sunoco

agrees to conduct further geophysical or geotechnical studies within the Additional Acreage, consult with WGT employees, and seek approval to relocate a valve outside the SPLP Use Area, but still within the Township. Neither is there any intent expressed within the Agreement that WGT required or Sunoco agreed to notify WGT of plans to repurpose, automate or build valve stations in close proximity but outside WGT. If such were the intent of the parties, language expressing those covenants would have been included. There is insufficient evidence for me to infer that further geophysical or geotechnical studies within the Additional Acreage Area were agreed to.

I have considered Witness Camp's testimony that the pertinent phrase meant the following: "subject to engineering constraints that are disclosed and evaluated, provided to the Township, and that their engineers could also evaluate and concur that that made sense, that there were in fact engineering constraints. It wasn't just going to be, Sunoco says it is and therefore there's engineering constraints." Tr. 154. However, when asked where in the agreement is a requirement that Sunoco provide engineering documents to the Township in connection with those constraints, she admitted, "There's no section of the agreement, but there had been a long relationship established between the township, the township experts, the township engineers and Sunoco engineers with respect to the Mariner project." Tr. 154.

WGT Witness Camp testified she served as general solicitor for WGT and participated in the Agreement negotiations and the January 20, 2016 meeting with Sunoco. Tr. 136-137, 143. She testified:

The existing pump station had been there since the 1930's, you know, rather industrial looking in a residential area, but people are used to it. It's been there. So, one of the goals of the supervisors was that any expansion or any additional facilities that Sunoco would need to build related to Mariner 1 would be contained within that same parcel . . . Janiec 1 tract, the 4.42 acres adjacent to the Boot Road pump station. The board wanted to make sure that if anything had to be constructed related to Mariner 1 or Mariner 2 I guess at that point, it really would be contained within those two parcels to the west of Route 202. The other concerns were really just safety issues, a lot of people, you know, now learning for the first time what Mariner 1 and Mariner 2, what types of liquids or gas would be transported through the pipes.

Tr. 137-138.

Ms. Camp testified that in December of 2015 a developer of the Traditions project (a proposed 114 unit retirement development) notified WGT that Sunoco had approached him asking for easements to be able to access the Janiec 2 or Traditions site. WGT was concerned the fire company operations would be adversely affected as well as the Traditions project by an easement. Tr. 142. Afterwards, on January 20, 2018, a WGT Board meeting was held with representatives from Sunoco and its land agent, Percheron, present. They provided Ms. Camp with a map showing the area of the Janiec 2 tract to be used as a laydown area. Exhibit Twp. 5. Tr. 144-145. Although Ms. Camp recalls Sunoco represented the Janiec 2 area would be a laydown area for temporary storage during construction, she did not recall Sunoco stating a valve station would be moved from Janiec 1 to Janiec 2. Tr. 145-147.

WGT Witness LaLonde, Township Manager, admitted on cross examination that there was no deadline for notification, no requirement that notice be in writing or that the Township had the right to review or consent to the engineering determination of the company. Tr. 96. Neither Sunoco nor WGT intended for Sunoco to construct a Valve on SPLP Use Area if there were engineering constraints making Sunoco unable to perform.

Witness LaLonde testified his primary concern was for the Mary Jane Lane neighborhood adjacent to Janiec 1 (Additional Acreage Area) and “potential construction activities . . . dust, noise, construction activities, anything that a large-scale development would bring to a neighborhood.” Tr. at 52. He testified, “The Board of Supervisors and our township staff, we were very concerned about obviously safety . . . the health, safety, welfare of our residents. . . . also about the various new equipment that was going to be installed at the pump station, including the vapor combustion unit.” Tr. At 55. “Our main concern was safety first and secondary aesthetics and trying to maintain everything on this one site without having these facilities then spread out all over the township.” Tr. At 55. There was never any mention by Sunoco of a possibility of facilities being placed to the area immediately east of Route 202 (Janiec 2) prior to execution of the Agreement. Tr. At 58. Witness LaLonde testified, “if there were any engineering constraints, they [Sunoco] would have to notify us, bring it to our attention, and they would use – if they had to extend, you know, 50 feet, 100 feet into the

remaining acreage, they would notify us, we would discuss it, and we'd go from there." Tr. at 62.

Since 2009, WGT had been reviewing an application to build a \$35 million Traditions retirement home development on the Janiec 2 property located east of Route 202 on Boot Rd. Tr. 66, 82. The independent living facility would have provided 114 units to a market demographic of 75-85-year olds with tax revenues and \$200,000 of road improvements to Boot Rd." Tr. 82-83. Sunoco condemned Janiec 2. Tr. 83-84, Twp. Exhibit 20. It was at a January 2016 Board meeting with Sunoco when WGT was first directly notified of Sunoco's intent to build Valve 344 on the Janiec 2 property. The Board had been indirectly notified by the developer Applicant for the Traditions project in December 2015. Tr. 67-69. Exhibit Twp. 5. Later at a Board meeting in early January 2016, Bob Hall, President of the Goshen Fire Company notified the Board that Sunoco had approached him to gain access to Janiec 2. Tr. 142. Sunoco had civil construction plans for Sunoco Block Valve at Boot Rd. as of June 12, 2015. Tr. 70-71. Exhibits Twp. 5 and Twp. 6.

Mr. Gordon testified that when the negotiation team came to him with technical questions about the site, he was in the design phase on Mariner 2, so his goal was to keep that valve on the same site because it would be more convenient for operations and maintenance to keep all equipment in the same footprint. At the same time, he did not know if it was going to be feasible because he didn't have geotechnical reports or subsurface utility locate data, so he wasn't even sure he could "get into that site." Tr. 529-530. On or about January 20, 2016, Witness Gordon did meet with the Township to explain the engineering constraints and what the design change proposed was, "and then [SPLP] permitted it with the township." Tr. 489-499, Exhibit Twp. 8. Mr. Gordon showed Mr. Kuprewicz reports that were available for ME1 and ME2. Tr. 531. However, Mr. Gordon testified, "I don't recall specifically saying that we needed to try to put it on the additional acreage. That doesn't ring a bell." Tr. 501.

I find credible the testimony of Witness Gordon who testified Sunoco provided notice as early as January 20, 2016 at a meeting that WGT Witnesses Camp, LaLonde and Kuprewicz attended with Sunoco Witnesses Gordon, Gwin and Zoldadkiewicz regarding a

relocation of the valve from SPLP Use Area to Janiec 2. Mr. Gordon and Mr. Zoldadkiewicz provided plans or drawings to WGT showing the valve would be located east of Route 202 on Janiec 2, Boot Road. SPLP St. No. 1 at 17. SPLP St. No. 8 at 1-2. Sunoco Witness Gwin corroborates their testimony. She testified, "Moving the valve was certainly discussed. In particular, I clearly recall Attorney Camp asking if SPLP would do the decorative or landscape measures discussed for the planned Janiec 2 valve." SPLP St. No. 8 at 2, Tr. 336-338. Their testimonies refute Ms. Camp's testimony that she did not recall a discussion of a valve relocation to Janiec 2.

Witness Zoldadkiewicz testified he was present at the January 20, 2016 meeting and that he provided the attendees with a map (Exhibit Twp. 5) showing the pipeline corridor through WGT and he informed LaLonde and Camp of the relocation of the valve from the west side to the east side of Route 202, onto the Janiec 2 parcel. Mr. Zoldadkiewicz also testified he showed the attendees Construction Alignment sheets showing construction plans with the Valve 344 on Janiec 2, but he did not give the WGT attendees copies because they contained sensitive security information. SPLP St. No. 7 at 2, Exhibit DZ-1, Tr. 319-328.

It may be a unilateral mistake that WGT believed that "notify" implied "and obtain approval from" but such a mistake does not void the contract. Oral notice of engineering constraints occurred on January 20, 2016 satisfying the "notify" requirement within the Agreement. Although WGT heard from two other persons in mid-December and early January before being notified by Mr. Gordon and Mr. Zoldadkiewicz directly on January 20, 2016, I find the notification reasonably timely as it is close in proximity to the time Sunoco realized it had engineering constraints making it unable to place the Valve at the SPLP Use Area. Notification was relatively timely to when Sunoco condemned the Janiec 2 Tract and determined it would forgo building the Valve on the west side of Route 202 in favor of building it on the east side. I find in favor of Sunoco on this issue.

3. Whether Eliminating the Valve in WGT is Unsafe and if so, whether Sunoco should be directed to construct a remote operated valve on the SPLP Use Area or SPLP Additional Acreage Area in connection with the construction or installation of the ME2 and ME2X facilities in WGT.

a. West Goshen Township's Position

Regardless of whether or not Sunoco builds a new valve 2.5 miles upstream from the WGT boarder, the Township continues its claim that SPLP must be required to install the Valve on the SPLP Additional Acreage within the Township as promised in the Settlement Agreement. If SPLP chooses to also have a valve 2.5 miles upstream, that is even better, but that is a decision for SPLP. It was SPLP's unilateral, surprise changing of its plans, without a safety review by the Township's expert per the Settlement Agreement, that results in a shorter valve spacing if the Agreement is enforced in WGT's opinion.

WGT argues that SPLP itself recognized and self-imposed the 7.5-mile valve-spacing guideline under ASME B31.4, until it sought to evade its obligations under the Settlement Agreement. Mr. Gordon's testimony confirmed that the current 8.4-mile spacing between the valves upstream and downstream of the Township, if SPLP eliminates Valve 344 as currently planned, would be the longest stretch between ME2 valves in a suburban populated area. Tr. at 520. WGT offers the testimony of Mr. Kuprewicz to support its claim that ASME B31.4, Section 434.15.2(e), Valve Spacing guides the Commission to require a Valve 344 within the Township.

Mr. Kuprewicz admits the Valve Spacing engineering guideline is not a codified federal or state regulation; however, it is used as an industry guideline for the construction of pipelines, such as ME 2 that will be used for the transportation of hazardous liquids, such as liquefied petroleum gases (LPGs), which are classified as HVLs under federal pipeline safety regulations. C St. 2 at 3. The ASME B31.4 standard provides guidance but is silent on other important safety issues to be considered in determining adequate pipeline valve spacing (such as pipeline diameter, pump station location and additional safety equipment such as flares and terrain) that could significantly affect highly populated areas in the event of a catastrophic

pipeline release. C St. 2 at 4. Mr. Kuprewicz testified that “SPLP’s decision to eliminate Valve 344 results in the Township sitting in an apparent fifteen mile stretch of pipeline between remotely operated valves upstream and downstream of the Township.” C St. 2 at 4-5. Mr. Kuprewicz believes hundreds of thousands of gallons of HVL will be available for release into the Township if there is a pipeline emergency such as a rupture of the pipe due to an increased distance between remotely operated valves. C St. 2 at 5.

b. Sunoco’s Position

Sunoco contends that eliminating the valve does not create safety issues and will not have a negative impact on the Township. SPLP MB at 21-27. SPLP contends there is an 8.4 mile distance between valves not 15 miles as Mr. Kuprewicz claimed. SPLP Sts. No. 2 and 2-RJ.

c. Disposition

The Commission’s Regulations regarding Gas Service are in Chapter 59 of the Pennsylvania Code. Section 59.33 provides in pertinent part:

§ 59.33. Safety.

(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, including all subsequent amendments thereto. Future Federal amendments to 49 CFR Parts 191—193, 195 and 199, as amended or modified by the Federal government, shall have the effect of amending or modifying the Commission’s regulations with regard to the minimum safety standards for all natural gas and hazardous liquid public utilities. The amendment or modification shall take effect 60 days after the effective date of the Federal amendment or modification, unless the Commission publishes a

notice in the *Pennsylvania Bulletin* stating that the amendment or modification may not take effect.

(c) *Definition.* For the purposes of this section, “hazardous liquid public utility” means a person or corporation now or hereafter owning or operating in this Commonwealth equipment or facilities for transporting or conveying crude oil, gasoline, petroleum or petroleum products, by pipeline or conduit, for the public for compensation.

* * *

52 Pa. Code § 59.33(a)–(c).

The Commission’s regulations at 52 Pa.Code, Chapter 59 do not have a valve spacing requirement. Further, although the Federal Energy Regulatory Commission (FERC) has a project-specific review and approval process over FERC-jurisdictional natural gas pipelines, which includes siting and analysis of environmental impacts, to my knowledge Sunoco’s Mariner East Project is considered a non-FERC jurisdictional project, which could be subject to siting review and analysis if the Pennsylvania Public Utility Code delegated statutory authority to the Commission with that mandate. *See generally* Title 66 Pa. C.S. The Public Utility Code.

Currently, the Commission’s siting authority over this pipeline is limited. While safety matters for the Mariner East pipelines are officially under the purview of the 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. *Act 156 of 2006 - The Public Utility Confidential Security Information Disclosure Protection Act.* Thus, the Commission may consider whether Sunoco is complying with the Code of Federal Regulations (CFR) Parts 191 – 195, in determining whether it is operating in a safe and reasonable manner in compliance with 66 Pa. C.S. § 1501 *et seq.* and 52 Pa. Code § 59.33.

49 CFR 195.260(c) applies to the facts in this case and provides as follows:

A valve must be installed at each of the following locations:

* *

(c) On each mainline at locations along the pipeline system that will minimize damage or pollution from accidental hazardous liquid discharge, as appropriate for the terrain in open country, for offshore areas or for populated areas.

49 CFR Part 195.260(c).

ASME B31.4, Section 434.15.2(e) provides:

In order to facilitate operational control, limit the duration of an outage, and to expedite repairs, mainline block valves shall be installed at 7.5 mile (12 km) maximum spacing on piping systems transporting LPG or liquid anhydrous ammonia in industrial, commercial and residential areas.

ASME B31.4, Section 434.15.2(e). C St. 2 at 3.

I am persuaded to find an 8.4 mile instead of a 15-mile distance is between the upstream and downstream valves outside of WGT based upon the testimony of Witness Gordon and Witness Vieth. SPLP St. No. 2 at 2 and 2-RJ at 1. ASME B31.4 is neither a law nor a regulation, which the Commission can enforce *per se*. It is an engineering standard based upon the best engineering practices of the industry. The fact that it is not being adhered to can be considered by the Commission in its analysis as to whether Section 59.33 of the Commission's regulations or Section 1501 *et. seq.* of the Public Utility Code are violated, but there is no codification or incorporation of ASME B31.4 in Title 49 CFR Part 195, so I am not persuaded to find a violation of Section 59.33 or a federal regulation based upon the distance of .9 miles over the ASME B31.4 limit of 7.5 miles between valves alone. I am unpersuaded that the Commission should direct Sunoco to comply with ASME B31.4 and place a valve on the SPLP Use Area in order to keep linear distance between valves below 7.5 miles.

I am persuaded by the testimony of Witness Vieth that he has considered: 1) the Stantec Report dated March 1, 2018 (SPLP Ex. PV-2); 2) a detailed analysis of the volumes of product expected to be released in the event of a pipeline rupture in or near WGT in the section of pipe between valves; 3) the containment ability via block valves; and 4) the emergency flow restricting devices, and his opinion that elimination of the valve presents no safety concerns and has a negligible effect. *See generally* SPLP St. Nos. 2 and 2-RJ; SPLP Ex. PV-2. Mr. Vieth is

an expert in pipeline risk and integrity management. He has over 30 years of technical expertise related to risk and integrity management of pipelines, including HVL pipelines, is the past Vice Chair of the ASME B.31.4 Standards, has been awarded the designation of ASME Fellow, and has testified as an expert in over 50 matters. SLPL St. No. 2 at 1:5-19; SPLP Ex. PV-1 (Curriculum Vitae of Patrick Vieth).

Mr. Vieth testified:

The valve has been eliminated from the design for the reasons provided in prior testimony. Based upon the configuration presented in Figure 1. Analyses were performed and concluded that the elimination of Mile Post 344 Boot Road had negligible effect on the consequence radius. And that ties back into Figure 1 that we just described where the modeling considered the valve locations highlighted in green along with the effects of the Boot Road valve.

The three scenarios that were modeled were around taking a look at the automation of the just upstream valve and the elimination of Boot Road valve and the intermediate scenarios to take a look at the effects of dispersion modeling.

TR. 578-579

[BEGIN HIGHLY CONFIDENTIAL]

[REDACTED]

[REDACTED]

[REDACTED]

[END HIGHLY CONFIDENTIAL] Mr. Vieth opined that “SPLP’s decision here to eliminate Valve 344 is supported by sound existing technical, operational, and safety reasons including adding automated control at the immediately upstream Valve and appropriate consideration of the assessment analysis to evaluate the effects.” SPLP St. No. 2 at 10-13.

Mr. Vieth also concluded that the analysis shows “the elimination of MP 344 (Boot Road) valve had negligible effect on the consequence impact radius.” SPLP St. No. 2-RJ at A.2., Tr. at 578. He explained that this negligible effect means minimal, similar to “the effects of, say, driving at 50 miles per hour compared to 50.05 miles per hour, that it’s a very minimal or negligible effect.” Tr. at 612.

Mr. Vieth testified, “Approximately 7.5 miles is a typical spacing for this type of pipeline” and he “often uses ASME-B31.4 and other standards and regulations in his analysis.” Tr. 608-611. I find Mr. Vieth’s testimony to be credible that ASME B31.4 is a standard for operational consideration, for isolation, and for repairs. Tr. 611. However, I believe it is also for the safety of people, property, and the environment given the Introduction to ASME B31.4 – Pipeline Transportation Systems for Liquids and Slurries, which states, “The Code sets forth engineering requirements deemed necessary for safe design and construction of pressure piping. While safety is the basic consideration, this factor alone will not necessarily govern the final specifications for any piping system.” Pipeline Transportation Systems for Liquids and Slurries, ASME Code for Pressure Piping, B31.4-2012 Introduction.

The Stantec Report quantifies and demonstrates the lack of negative consequences of eliminating the valve while upgrading the valve 2.9 miles upstream from the eliminated valve. As Mr. Vieth explained it is reasonable to estimate the results of consequence modeling prior to completing the modeling. Tr. at 590. Mr. Gordon testified that in fact the Stantec Report was initiated in 2017. Tr. at 473. Moreover, as Mr. Gordon testified, SPLP did other analyses which were considered prior to the decision to eliminate the valve.

consultants looked at various hydraulic models as well as the models we run from a safety standpoint, and we also look at it from an operational standpoint as to where we're pulling in our pressure point analysis, our leak warn, leak detection system and our automated shutdown systems, and determine that there is a de minimis impact.

Tr. at 471. WGT Witness Kuprewicz has stated "There is no absolute 'one-size fits all' solution to the placement of mainline valves on liquid pipelines, especially because valving with remote actuation can introduce additional operational complexities for a pipeline." Township Ex. 22 at 7. Mr. Kuprewicz admits the valve spacing guidance is not a federal regulation or requirement. SPLP St. No. 2 at 2. SPLP's engineering design basis memorandum provides guidance that valve spacing will be approximately 7.5 miles. *Id.* at 4-5. SPLP's elimination of the valve is consistent with the engineering design basis memorandum. Further, WGT offers no federal regulation or caselaw precedent to show the ASME B31.4 valve spacing standard has been codified as a regulation or design specification that *per se* substitutes or overrides experienced engineering judgment. I am persuaded by Mr. Vieth's testimony on this issue and find in favor of Sunoco.

4. Whether Sunoco has breached its June 15, 2015 Agreement with West Goshen Township, specifically Paragraphs II.A., II.A.2, II A.3, and IV.A.

a. West Goshen Township Position

WGT claims SPLP has breached its obligations under Paragraph II.A.2. of the Settlement Agreement in several ways. First, SPLP began work to install the Valve on the Janiec 2 Tract, until being stopped by the Interim Emergency Order. SPLP's actions violated its promise not to install any above-ground facilities for the Mariner East Project anywhere in the Township except its existing facility in the Township and the SPLP Use Area. Second, SPLP has eliminated the Valve from its Mariner East Project plans. SPLP's unilateral decision to eliminate the Valve violates its promise to install the Valve on the SPLP Additional Acreage, specifically on the SPLP Use Area, under Paragraph II.A.2. Third, SPLP failed to notify the Township of its alleged engineering constraints regarding the Valve and confer with the Township to seek its permission for a new location for the Valve on the SPLP Additional Acreage, in violation of Paragraph II.A.2. of the Settlement Agreement.

Based upon these breaches of the Settlement Agreement, the Township requests specific performance as a remedy. *Lackner v. Glosser*, 892 A.2d 21, 31 (Pa. Super. 2006) (citing *Clark v. Pennsylvania State Police*, 436 A.2d 1383, 1385 (Pa. 1981)). Specifically, WGT requests the Commission issue an order confirming that the Settlement Agreement precludes SPLP from installing any above-ground facilities anywhere in the Township other than the SPLP Use Area, without prior Township approval. Further, the Commission should require SPLP to make a full, reasonable engineering evaluation of the alleged “engineering constraints” complicating the installation of the Valve on the SPLP Use Area and disclose those findings to the Township. To the extent that engineering constraints do in fact make SPLP unable to install the Valve on the SPLP Use Area, the Commission should require SPLP to evaluate new locations for the Valve on the SPLP Additional Acreage. Such directives would result in SPLP complying with the bargained-for promises in the Agreement.

b. Sunoco’s Position

Sunoco claims it did not breach the Agreement. But even if it did, the Agreement already provides for a remedy, the ability to file a safety complaint with the Commission, which WGT did by amending its First Amended Complaint. WGT filed its Second Amended Complaint to add a count that SPLP must place a valve in the Township or it will have a “negative consequence to the Township and its residents.” Second Amended Complaint. Sunoco argues that WGT’s request for affirmative injunctive relief is overly broad and vague. WGT’s introduction of new relief or to claim as a fact that new or additional geological studies should be done ignores that it, as the party with the burden of proof, could have done so but did not and now should not be afforded a second bite at the apple. *See* 52 Pa. Code § 5.243(e)(2)-(3). WGT’s doing so for the first time in its brief violates the fundamental due process rights of SPLP because it was not afforded an opportunity to test through discovery or at hearing this new request and factual supposition, or to adduce evidence against the request. *Pocono Water Co. v. Pa. Pub. Util. Comm’n*, 630 A.2d 971, 973 (Pa.Cmwlth. 1993).

Sunoco contends that there is no evidence that SPLP could not place the valve on the SPLP Use Area later if required in the future. To the contrary, Mr. Gordon explained that

SPLP could “add a valve later in between the points of the HDD.” Tr. at 514. Where the pipeline surfaces at Janiec 2, SPLP could loop back over to the SPLP Use Area to place the valve there, but just like the other construction methods to place a valve on the SPLP Use Area, Sunoco does not believe it would be safe to do so. In fact, it would be risky and inadvisable as its very experienced expert witness team concluded. Tr. at 514. Mr. Gordon illustrated this procedure at trial, SPLP Hearing Exhibit 2, explaining that the upper blue lines would be an additional HDD that could be done later to loop back to the SPLP Use Area to place a valve there. Tr. at 524, SPLP Hearing Exhibit 2.

c. Disposition

Injunctive relief must be narrowly tailored to abate the harm complained of. *Pye v. Com. Ins. Dep’t*, 372 A.2d 33, 35 (Pa.Cmwlt. 1977) (“An injunction is an extraordinary remedy to be granted only with extreme caution”); *Woodward Twp. v. Zerbe*, 6 A.3d 651, 658 (Pa.Cmwlt. 2010) (“Even where the essential prerequisites of an injunction are satisfied, the court must narrowly tailor its remedy to abate the injury”); *West Goshen Township v. Sunoco Pipeline L.P.*, Docket No. C-2017-2589346 at 17-18 (Order entered Mar. 15, 2018).

As stated previously, I find that if Sunoco had constructed Valve 344 Boot Rd. on the Janiec 2 property without notifying or obtaining written approval from WGT, Sunoco would have been in breach of contract as I believe the Agreement requires such notification or approval. However, as Sunoco is abandoning plans to build a valve on Boot Rd. and is instead placing remotely operated valves outside the Township at Eagle Pump Station, East Lincoln Hwy and Middletown Road, there is no breach. SPLP St. No. 2-RJ.

Although the Commission denied WGT the relief it requested in a Petition for Reconsideration, I recommend the Commission reconsider granting a very narrowly tailored injunction similar to which Sunoco had no opposition in its original Petition to Rescind or Discontinue the October 26 Order. An ordering paragraph prohibiting Sunoco from engaging in activities inconsistent with installation of the Valve on the SPLP Use Area without WGT’s written consent would prohibit Sunoco from changing its plans again and deciding to construct a

valve on Janiec 2, which may interfere with West Goshen Township's development and emergency operations on or adjacent to Janiec 2.

As the Commission noted in its *January 2018 Order*, Sunoco requested in a Petition to Rescind Emergency Order an order not only rescinding or discontinuing Ordering Paragraph No. 3 of the *October 2017 Order*, but also enjoining Sunoco from "(a) not locating for the Mariner East 2 line Valve 344 on the Janiec 2 Tract or conducting the activities relative to Valve 344 which were the subject of the injunction as specified in Ordering Paragraph No. 3 of the October 2017 Order; and, not locate such a valve for the ME 2 line anywhere in West Goshen Twp. " *January 2018 Order* at 14-15 citing Sunoco's Petition at 3-4. Sunoco was willing to accept as a condition of approval of its Petition that it would not locate Valve 344 on the Janiec 2 Tract or elsewhere in the Township without the written consent of WGT. If Sunoco was willing and WGT would like assurance that the valve will not be built on the Janiec 2 Tract, then I recommend this injunction subject to WGT's consent be directed.

Further, Sunoco has indicated plans to locate remotely operated valves at Eagle Pump Station, East Lincoln Highway and Middletown Road in proximity to WGT. I recommend the Commission require Sunoco to file affidavits when it has implemented these plans and completed installation.

Finally, although I find no breach of contract, I agree with WGT that Sunoco has an on-going duty to provide Accufacts, Inc.'s representative Mr. Kuprewicz with plans on an on-going basis until Mariner East 2 and 2X are completed in the vicinity of WGT. I recommend the Commission grant WGT the relief it requested of directing Sunoco to share its plans with Mr. Kuprewicz for his continued safety reviews during the duration of the Mariner East 2 and 2X project.

5. Whether the Agreement between the parties should be revised or modified by the Commission.

a. West Goshen Township's Position

WGT opposes revision of the Agreement. WGT requests enforcement of the terms of the Agreement.

b. Sunoco's Position

The parties agree that the Commission can reform the Settlement Agreement where it is in the public interest to do so. WGT MB at 38-39 *see also ARIPPA v. Pa. Pub. Util. Comm'n*, 792 A.2d 636, 662 (Pa.Cmwlt. 2002) (private agreements are subject to change by the Commission to conform to the public interest). Sunoco contends that if any violation of the Settlement Agreement is found, the Commission has the power to modify the Agreement consistent with the public interest – i.e. removing any alleged agreement to place a valve in the Township on the SPLP Use Area. If the Commission deems it necessary to place a valve in WGT, then Sunoco is still willing to place the valve on the Janiec 2 tract.

c. Disposition

At various times during these proceedings, the dispute over the terms of the Settlement Agreement has given rise to questions regarding the Commission's power to reform contractual agreements under the Public Utility Code. Section 508 of the Public Utility Code provides:

The commission shall have power and authority to vary, reform, or revise, upon a fair, reasonable, and equitable basis, any obligations, terms, or conditions of any contract heretofore or hereafter entered into between any public utility and any person, corporation, or municipal corporation, which embrace or concern a public right, benefit, privilege, duty, or franchise, or the grant thereof, or are otherwise affected or concerned with the public interest and the general well-being of this Commonwealth. Whenever the commission shall determine, after reasonable notice and hearing,

upon its own motion or upon complaint, that any such obligations, terms, or conditions are unjust, unreasonable, inequitable, or otherwise contrary or adverse to the public interest and the general well-being of this Commonwealth, the commission shall determine and prescribe, by findings and order, the just, reasonable, and equitable obligations, terms, and conditions of such contract. Such contract, as modified by the order of the commission, shall become effective 30 days after service of such order upon the parties to such contract.

66 Pa.C.S. § 508.

Section 508 does not set forth precise guidelines for when and how the Commission may exercise its contract reformation authority. *Shenango Twp. Bd. of Sup'rs v. Pa. Pub. Util. Comm'n*, 686 A.2d 910, 913–14 (Pa.Cmwlt. 1996). “Section 508 must be read *in pari materia* with other sections of the Public Utility Code that may be relevant to determining if a particular factual scenario is a proper subject for the exercise of the Commission's contract reform power.” *Id.* (quoting *Columbia Gas of Pennsylvania, Inc. v. Pa. Pub. Util. Comm'n*, 535 A.2d 1246, 1248 (Pa.Cmwlt. 1988) (internal citations omitted)). Based on the language of Section 508, the clear focus of the inquiry is whether reformation is required because a contractual provision is “adverse to the public interest and the general well-being of this Commonwealth.” *See* 66 Pa.C.S. § 508.

WGT argues that reformation of the Settlement Agreement under Section 508 in order to allow SPLP to eliminate the Valve, as it has proposed, would contradict the very purpose of Section 508 by making the Settlement Agreement “adverse to the public interest,” by making the portion of the ME2 pipeline running through the Township less safe to the Township residents.

Where terms or condition of an agreement are “unjust, unreasonable or inequitable, or otherwise contrary or adverse to the public interest and general well-being of the Commonwealth,” the Commission shall determine the terms and conditions that will rectify that situation. *October 2017 Order citing Octoraro Railway, Inc. v. Pa. Pub. Util. Comm'n*, 482 A.2d 278 (Pa.Cmwlt. 1984). Authority delegated by the General Assembly to the Commission

under Section 508 the Public Utility Code to modify contracts implies an authority to rule on their validity. *October 2017 Order* at 21.

Generally, the Commission's authority regarding the siting of underground public utility facilities is limited and stems from Section 10619 of the Pennsylvania Municipalities Planning Code (MPC), 53 P.S. § 10619, which provides that the Commission is authorized to determine, upon petition by such public utility and after notice and opportunity for a hearing, whether a building proposed by a public utility is "reasonably necessary for the convenience or welfare of the public." See 53 P.S. § 10619.

Additionally, it is well-settled that the Commission does not have jurisdiction to award compensatory damages, attorney's fees or costs. *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 383 A.2d 791 (1977). *Edward Kovler and Elena Glozman v. PECO Energy Company*, Docket No. C-2013-236555, 2013 WL 6248460 (2013). However, the Commission has the authority to reform a contract between a municipal corporation and a public utility pursuant to 66 Pa. C.S. § 508. *Consolidated Rail Corporation v. City of Harrisburg*, 842 A.2d 369 (Pa. 2004).

The Commission's authority is not unrestricted. The Pennsylvania Supreme Court in *Philadelphia v. Pa. Pub. Util. Cmm'n*, 296 A.2d 804 (Pa. 1972) established that the Commission's power to reform contracts is limited to modifying contracts only to protect the public interest. The Commission is not authorized to impair pre-existing contractual rights and duties except under limited circumstances, *i.e.* those adversely affecting the public welfare. *Director General of Railroad v. West Penn Railways Co.*, 126 A. 767 (Pa. 1924). The Commission's power to set aside contracts does not apply to a contract which does not affect the common welfare by directly influencing rates or actual operations of the public utility. *Pittsburgh and Lake Erie Railroad Co. v. McKees Rocks Borough*, 135 A. 227 (Pa. 1926). The Commission cannot revise the Settlement Agreement between Sunoco and WGT merely because one of the parties no longer likes the bargain; however, the Commission may revise the contract if it adversely affects the public welfare. *Id.* Issues concerning the reasonableness, adequacy, and sufficiency of public utility service, be they contractual or otherwise, are squarely within the

Commission's jurisdiction. 66 Pa. C.S. §§ 1501 and 1505; *Disanto v. Dauphin Consolidated Water Supply Co.*, 291 Pa. Super. 440, 436 A.2d 197 (1981).

The Settlement Agreement at Paragraph IV.A.2.e. provides:

With respect to Mariner East 2, SPLP agrees, upon the execution of a mutually agreeable confidentiality agreement, that it will provide to Accufacts, Inc., or a person or entity acting for WGT that is similarly a nationally recognized expert in the field of liquids pipeline safety ("Liquids Pipeline Safety Expert") information relating to Mariner East 2 of a similar nature that was provided regarding Mariner East 1 for review by the Liquids Pipeline Safety Expert. WGT and its expert will meet and confer with SPLP with respect to any concerns the Liquid Pipeline Safety Expert may have related to safety and SPLP will be provided an opportunity to respond thereto, before WGT would file any formal protest or other action raising any safety issue related to Mariner 2 East.

Exhibit Twp. 4 at Paragraph IV.A.2.e.

The Township acknowledges that SPLP provided to Accufacts, Inc. information relating to Mariner East 2, leading to the preparation of Richard Kuprewicz's January 6, 2017 report. *See* Exhibit Twp. 23. However, after that report was issued, in November 2017 SPLP changed its plans for ME2 and eliminated the valve from the Township. *See* SPLP's November 21, 2017 Petition to Rescind or Discontinue the October 26 Order. Prior to that filing, SPLP did not provide any new information to Kuprewicz/Accufacts for a safety review of ME2 with the Valve eliminated from the Township, constituting a breach of Paragraph IV.A.2.e. of the Settlement Agreement. Twp. St. No. 8 at 1. Not until March 2018 did SPLP provide any documentation about its "release assessment" relating to the elimination of the Valve, in the form of the Stantec Report (SPLP Exhibit PV-2). *Id.* However, Kuprewicz indicated in his testimony the limitations of the Stantec Report and additional information needed to properly assess the safety of the revised ME2 plan. *Id.* at 2-4.

While SPLP cited a detailed review in connection with its elimination of the Valve, SPLP has provided no other detailed information to Kuprewicz/Accufacts for a safety review of SPLP's revised ME2 plans impacting the Township. Twp. St. No. 8 at 5.

The Township negotiated for a review by Accufacts of the safety of the ME2 pipeline. SPLP's changes to the plan for the ME2 pipeline clearly impact Accufacts' prior safety review, requiring further review as contemplated by the Settlement Agreement. Therefore, SPLP should be ordered to comply with said provision and produce to Accufacts for review its revised ME2 plans and any other documents and information on which it based its elimination of the valve.

Sunoco contends that WGT falsely alleges that Sunoco was required under the Settlement Agreement to give some particularized notice to WGT of the changes regarding the valve and did not do so. Sunoco did provide WGT with notice on January 20, 2016 at an in-person meeting, as four of Sunoco's witnesses testified. Sunoco contends the Agreement did not require Sunoco to provide information in any specific form, and in fact did not require the company to update the information previously provided at all. Sunoco contends it did provide WGT and Mr. Kuprewicz with the information pertinent to his safety review in its testimony.

I agree with WGT that the clause at Paragraph IV.A.2.e is an ongoing obligation of Sunoco during the construction phase of Mariner East 2 and 2X, to provide Mr. Kuprewicz and Accufacts, Inc. more information for review as requested by WGT regarding the automation of valves in proximity to the Township and the removal from its plans of Valve 344 at Boot Road. As information becomes readily available regarding the project, it should be provided to Accufacts' representative Mr. Kuprewicz. Thus, I recommend the Commission direct that be done as a remedy. However, I recommend the Commission not amend the Agreement pursuant to 66 Pa.Code § 508 by removing the valve requirement altogether. Instead, I recommend the Commission issue the Ordering paragraphs at the end of this recommended decision.

V. CONCLUSION

In conclusion, I find Sunoco has shown by a preponderance of evidence that there are engineering constraints making it unable to construct a Valve on the SPLP Use Area and/or SPLP Additional Acreage located at Parcel No. 52-1-8-U in West Goshen Township. As a result, Sunoco's duty to locate a Valve on the SPLP Use Area and/or SPLP Additional Acreage has ended because Sunoco's duty to construct the valve was conditioned upon there being no engineering constraints making the company unable to perform. WGT has not shown by a preponderance of evidence that Sunoco has breached its promise to make a full and reasonable engineering evaluation of the alleged 'engineering constraints' complicating the installation of the Valve on the SPLP Use Area or that Sunoco has failed to notify and disclose those findings to the Township. I find this promise has been fulfilled and Sunoco has already evaluated whether the Valve could be located in other areas of the larger SPLP Additional Acreage but has rejected that plan based upon the same engineering constraints.

By automating or placing remote controlled valves in proximity but not within the legal boundaries of WGT while foregoing plans to build the Boot Road Valve 344 within WGT, Sunoco is compliant with its agreement to maintain all of its above-ground facilities for all phases of the Mariner East Project at its existing site in the Township. As long as Sunoco follows through with its latest engineering design plan regarding valves, Sunoco will be compliant with the Pennsylvania Public Utility Code, Commission regulations, and 49 C.F.R. § 195.260 regarding the issues presented in this case. I find Sunoco did not breach the notice of engineering restraints requirement in the Agreement. If Sunoco had constructed the valve on Janiec 2 instead of ceasing construction in compliance with an Interim Emergency Order, then this action would have been a breach of Agreement. However, as only the land was cleared and no valve or appurtenances were built, there is no breach.

I do not find that Sunoco breached the Agreement by eliminating Valve 344 from being placed in WGT at all because Sunoco did notify the Township of its engineering constraints in the SPLP Use Area as well as the SPLP Additional Acreage Area in compliance with the Agreement. Sunoco was constricted to building the Valve on these properties only if

they built a valve in the Township. Since Sunoco has taken the valve out of the Township, there is no affirmative duty to build the valve on the SPLP Use Area. There is insufficient evidence and precedent to support a legal requirement to build a Valve within the Township now that Sunoco intends to automate and/or build additional remote valves upstream and downstream in close proximity to WGT.

On November 21, 2017, Sunoco agreed to being constrained to not locating Valve 344 for the ME 2 line on Janiec 2 or elsewhere in WGT as long as it could resume HDD in the Township. I recommend the Commission constrain Sunoco's actions to this extent such that the Township may have an expectation that Sunoco will not again attempt to build a valve station on Janiec 2 adjacent to West Goshen Township's Fire Station. Finally, Sunoco should be directed to share engineering plans with Mr. Kuprewicz, President of Accufacts, Inc. for the duration of the construction of Mariner East 2 and 2X.

VI. CONCLUSIONS OF LAW

1. WGT has the burden of proof and has not met it in part. 66 Pa. C.S. § 332(a); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa.Cmwlth. 1990), alloc. denied, 529 Pa. 654, 602 A.2d 863 (1992); *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

2. As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Public Utility Code (Code). 66 Pa. C.S. § 332(a).

3. To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the Respondent is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa.Cmwlth. 1990), alloc. denied, 529 Pa. 654, 602

A.2d 863 (1992). That is, the Complainant's evidence must be more convincing, than that presented by the Respondent. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

4. The Commission's decision must be supported by substantial evidence in the record. It is axiomatic that a legal decision must be based on real and credible evidence that is found in the record of the proceeding. *Pocono Water Co. v. Pa. Pub. Util. Comm'n*, 630 A.2d 971, 973-74 (Pa.Cmwlth. 1993) (finding that the Commission violated the utility's due process rights "because it assessed liability after determining an issue which [the utility] had not been afforded a reasonable opportunity to defend at the hearing."); *Duquesne Light Co. v. Pa. Pub. Util. Comm'n*, 507 A.2d 433, 437 (Pa.Cmwlth. 1986) (holding that the Commission violated the utility's due process rights because the utility was "not given adequate notice of the specific conduct being investigated, and hence its defense was gravely prejudiced."). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980).

5. Upon the presentation by the Complainant of evidence sufficient to initially establish a prima facie case, the burden of going forward with the evidence, to rebut the evidence of the Complainant, shifts to the Respondent. If the evidence presented by the Respondent is of co-equal weight, the Complainant has not satisfied his burden of proof. The Complainant now must provide some additional evidence to rebut that of the Respondent. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

6. While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

7. The Settlement Agreement is ambiguous and parol evidence should be considered in interpreting the terms of the Agreement. *Metzger v. Clifford Realty Corp.*, 476 A.2d 1, 5 (Pa. Super. 1984).

8. The parol evidence rule preserves the integrity of written agreements by precluding extrinsic evidence that contradicts the final written agreement. *Rose v. Food Fair Stores, Inc.*, 262 A.2d 851 (Pa. 1970).

9. It is axiomatic, however, that '(t)o determine an agreement, a writing must be interpreted as a whole, giving effect to all its provisions. *Atlantic Richfield Co. v. Razumic*, 390 A.2d 736, 739 (Pa. 1978).

10. SPLP promised to place a valve in the Township; however, that covenant was subject to engineering constraints making SPLP unable to perform. Settlement Agreement (Exhibit Twp. 4) at Section II.

11. SPLP promised to notify WGT if engineering constraints made SPLP unable to perform the duty of constructing Valve 344 on SPLP Use Area and/or SPLP Additional Area. Settlement Agreement (Exhibit Twp. 4) at Section II, IV.

12. SPLP did not promise to confer and seek authority from WGT after notifying WGT of the engineering constraints.

13. SPLP did not misrepresent its intentions in the Settlement Agreement. SPLP St. No. 1 at 16-17.

14. The Commission has the power to reform settlement agreements involving utilities where it is in the public interest to do so. See, e.g., *ARIPPA v. Pa. Pub. Util. Comm'n*, 792 A.2d 636, 662 (Pa. Cmwlth. 2002).

15. Enjoining SPLP from constructing or locating a valve or its appurtenances on the Janiec 2 Tract without WGT's written consent would not be injurious to the public. See SPLP Petition for Rescission of Interim Emergency Order.

16. Removing any alleged covenant to place a valve in the Township on the SPLP Use Area from the Agreement through revision is not warranted. See, e.g., *ARIPPA v. Pa. Pub. Util. Comm'n*, 792 A.2d 636, 662 (Pa. Cmwlth. 2002).

17. When performance of a duty under a contract is due, any nonperformance is a breach. Restatement (Second) of Contracts at § 235(2). See also *Sufalla v. Widmer Engineering, Inc.*, 837 A.2d 459 (Pa. Super. 2003).

18. Sunoco Pipeline, L.P. is obliged under Paragraph IV.A.2.e of the Settlement Agreement to continue providing all engineering documents and plans to Richard Kuprewicz of Accufacts, Inc. for safety reviews related to Mariner East 2 and Mariner East 2X between the valve at Eagle and the valve at Middletown and regarding Sunoco Pipeline, L.P.'s plans to eliminate a valve in West Goshen Township and automate a valve approximately 2.5 miles from the Township.

19. Sunoco has not breached the Settlement Agreement.

VII. ORDER

THEREFORE,

IT IS RECOMMENDED,

1. That West Goshen Township's Amended Complaint is granted in part and denied in part consistent with the body of this decision.

2. That Sunoco Pipeline, L.P. is enjoined from constructing or locating a valve or its appurtenances on the Janiec 2 Tract or anywhere else in West Goshen Township except for the SPLP Use Area without first consulting with and obtaining the express written consent of West Goshen Township.

3. That Sunoco Pipeline, L.P. shall provide all engineering documents and plans to Richard Kuprewicz of Accufacts, Inc. for safety reviews related to Mariner East 2 and Mariner East 2X between the valve at Eagle and the valve at Middletown and regarding Sunoco Pipeline, L.P.'s plans to eliminate a valve in West Goshen Township and automate a valve approximately 2.5 miles from the Township within thirty (30) days of the date of entry of a final Order at C-2017-2589346 and shall file an affidavit attesting service has been made within forty-five (45) days.

4. That Sunoco Pipeline, L.P. shall file an affidavit at Docket No. C-2017-2589346 attesting to the fact that it has installed remotely operated or automatic valves at MP 335-Eagle Pump Station, MP 341.1-East Lincoln Highway and MP 350.5-Middletown Road, all in proximity to West Goshen Township, within thirty days (30) of said installation, which shall occur no later than 120 days after the date of entry of a final Order in this proceeding.

5. That in all other respects, West Goshen Township's Complaint is denied and dismissed.

6. That upon the filing of affidavits per Ordering Paragraphs No. 3 and 4, Docket No. C-2017-2589346 shall be closed.

Date: July 16, 2018

/s/
Elizabeth Barnes
Administrative Law Judge