

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

West Goshen Township	:	
	:	
v.	:	C-2017-2589346
	:	
Sunoco Pipeline, L.P.	:	

INTERIM EMERGENCY ORDER AND CERTIFICATION OF MATERIAL QUESTION

On July 18, 2017, I conducted a hearing on the Petition for Interim Emergency Relief filed on July 10, 2017 by Complainant West Goshen Township (West Goshen or Township), against Respondent Sunoco Pipeline, L.P. (Sunoco) at Docket No. C-2017-2589346. Specifically, Complainant seeks an Interim Emergency Order pursuant to 52 Pa. Code § 3.6 enjoining Respondent from beginning or continuing construction of a valve and any other facilities appurtenant thereto for Sunoco’s Mariner East 2 pipeline (ME2) in West Goshen Township, or any other location not specifically agreed to in Sunoco’s Settlement Agreement with the Township, until after the Commission issues a final order ending the formal amended complaint proceeding at Docket No. C-2017-2589346.

DISCUSSION

Legal Standards:

The purpose of an interim emergency order is to grant or deny injunctive relief during the pendency of a proceeding. 52 Pa. Code § 3.1. The purpose of granting injunctive relief is to maintain things as they are until the rights of the parties can be considered and determined after a full hearing. Further, the status quo that is to be preserved by preliminary injunction is the last actual, peaceable, lawful, and noncontested status which preceded the pending controversy. *Pa. PUC v. Israel*, 356 Pa. 400, 406, 52 A.2d 317, 321 (1947).

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

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

52 Pa. Code § 3.6 (b).

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

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

Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. PUC*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa. PUC*, 623 A.2d 6 (Pa. Cmwlth. 1993); 2 Pa. C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact

sought to be established. *Norfolk and Western Ry. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Commonwealth, Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

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

Disposition:

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

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

The underlying claim in the instant case raises substantial legal questions including but not limited to: 1) whether the Settlement Agreement requires Sunoco to construct any above-ground valve station facilities in the Township within the "SPLP Use Area"¹ unless Sunoco is unable to do so due to engineering constraints; (2) whether Sunoco gave the Township proper notice of an intent to relocate valve 344 from the SPLP Use Area to the Janiec Tract ²; (3) whether at the time of execution of the Settlement Agreement, Sunoco had plans and withheld material information about its plans for the ME2 phase pipeline; (4) whether Sunoco

¹ SPLP Use Area is that area of land on Boot Road, to the west of Route 202, which already has Sunoco facilities existing upon it. SPLP Additional Acreage is an undeveloped parcel located within the SPLP Use Area.

² Janiec 1 Tract is also referred to as SPLP Additional Acreage and is in the SPLP Use Area to the west of Route 202. Janiec 2 Tract is the property Sunoco condemned in May, 2016 and cleared for construction on July 6, 2017. Township Exhibits 9 and 20. Janiec 2 Tract is located on Boot Road, to the East side of Route 202.

always intended to site Valve 344 on the Janiec 2 Tract and misrepresented this intention at the time of the Settlement Agreement; (5) whether there are engineering constraints that prevent Sunoco from constructing Valve 344 on the SPLP Use Area; (6) whether the township has the right to review the alleged engineering constraints that might be identified as preventing the installation of valve facilities outside the SPLP Use Area; and (7) whether the Settlement Agreement grants Sunoco the right to locate valve facilities anywhere it wishes in the township other than on the SPLP Additional Acreage.

In 2014 Sunoco presented to the Township proposed improvements to its existing pump station in the Township, about its ME1 project. N.T. 47. Sunoco's existing pump station is located on the SPLP Use Area near the intersection of Boot Road and Route 202, to the north of East Boot Road and to the west of the Route 202 Southbound off-ramp. N.T. 47-48, Township Exhibits 1 and 2. To the north of the existing pump station is a separate four-acre parcel that was owned by the Janiec family and known as the "Janiec 1 Tract". N.T. 49-50. To the east of Route 202 and north of Boot Road was another wooded property also owned by the Janiec family and known as the "Janiec 2 Tract". N.T. 57-58, 17-22. Township Exhibit 2.

The Township's expert witness in pipeline safety, Richard Kuprewicz, reviewed documents including a piping instrument diagram for the Boot Road pump station regarding the Mariner East Phase 1 project (8-inch pipe) (ME1) in 2014 and later reviewed more documents from Sunoco regarding a Mariner East Phase 2 project (20-inch pipe) (ME2) on April 8, 2016. N.T. 118-120. He was not involved with any settlement negotiations to put any facilities at any locations. N.T. 121. Mr. Kuprewicz looked at the elevation profile, the siting and design of pump stations and valves and the integrity of the existing pipeline being refurbished. He made recommendations to the Township regarding the placement of flares, valve replacement and valve automation. N.T. 117-118. He agrees a valve should be placed where the pipe area close to the surface even if this occurs on the Janiec 2 property; however, no reason was ever given to him as to why Sunoco could not do horizontal directional drilling (HDD) at the SPLP use area. N.T. 126-127.

Mr. Kuprewicz testified that duplicative drilling, and needless removing and relocating of a built valve station and its appurtenances is costly as there is a duplication of

expenses and issues with permits associated with having to come up with a new HDD bore. Additionally, a duplicative construction effort is risky as there is an increase risk of HDD breakouts or frac-outs³, which could damage drinking water. A frac-out is when during boring, a drilling mixture of bentonite and water a crack-out or break-out occurs under pressure and the mixture escapes from the cylinder for boring and migrates into water, possibly drinking water wells. N.T. 128-129.

After consultation with counsel and Kuprewicz, the Township's Board of Supervisors together with witnesses LaLonde, Camp, and Brooman participated in the settlement negotiations on behalf of the Township. N.T. 56, 139. Richard Gordon, Don Zoladkiewicz, Kathleen Shea, and Christopher Lewis, Esquire ("Lewis") of Blank Rome participated in the settlement negotiations for Sunoco. N.T. 56. Kuprewicz was not involved in the settlement negotiations with Sunoco and did not receive copies of any drafts of the Settlement Agreement; his role was limited to safety review. N.T. 57, 120-121. After a year of negotiations, the Township and Sunoco reached the Settlement Agreement, which Sunoco signed in April 2015 and the Township Board of Supervisors approved in May 2015. N.T. 54-55, 222, Township Exhibit 4. This Agreement was certified and filed at the Commission at U-2015-2486071 on June 15, 2015. The Parties dispute the meaning of the Settlement. The Township avers the location of the valve on the SPLP Use Area was central to the agreement and that while entering into the Settlement Agreement, Sunoco was secretly planning to locate the valve on Janiec 2 Tract.

At the hearing on July 18, 2017, when asked whether a plan existed for the SPLP Use Area like the one developed for Janiec 2 Tract, Sunoco's witness Richard Gordon admitted, "there's not a plan like this one," referring to Township Exhibit "13," and not even a draft plan. N.T. 225-226, 230-231. There is evidence to show Mr. Gordon was aware of plans and recommendations from his engineering consultants to go forward with Janiec 2 Tract, while leading the Township to believe Sunoco would be placing the valve station on the Janiec 1 Tract. N.T. 225-229. Thus, there is a substantial legal issue with regard to whether Sunoco ever

³ The frac-out, or inadvertent return of drilling lubricant is a potential concern when the HDD is used under sensitive habitats, waterways and areas of concern for cultural resources.

notified the Township in a timely manner that it was unable to locate the valve on the SPLP Use Area. The map provided to the Township at the meeting is dated September 28, 2015 and identified as Township Exhibit 5. N.T. 69, 145. The map provided by Sunoco to the Township at the January 2016 meeting does not depict a valve station on the Janiec 2 Tract. N.T. 67-68, Township Exhibit 5. I am also persuaded by the testimony of Kristin Camp, who took notes at the meeting to make sure she understood everything that would be happening at the Janiec 2 Tract, because the Township wanted to know how Sunoco would impact the Traditions Project, which the board wanted to see go forward. N.T. 145-147. Township Exhibit 18. Ms. Camp kept her notes contemporaneously with the meeting to recall what exactly happened and there is nothing in her notes about a valve, which she would have written down if discussed. N.T. 147-150. Township Exhibit 18.

Additionally, in February 2017 Sunoco's engineer submitted to the Township subsequent erosion and sediment control plans, which included plans dated March 26, 2015 showing a valve station on the Janiec 2 Tract. N.T. 72, Township Exhibit 13.

Additionally, there is an issue whether Sunoco can feasibly and safely locate the valve on the SPLP Use Area, or whether this locale is restrained by sound reasonable engineering concerns. Mr. Gordon did not testify that the valve station is unable to be constructed on the SPLP Use Area, only that: (1) from an engineering standpoint it would not be "prudent" to site the valve on the SPLP Use Area, because it's extremely difficult and "potentially unsafe" (N.T. 194); (2) he noted challenges in constructability (N.T. 223); and (3) he does not know whether "it's practical" (N.T. 249). For these reasons, I find the Petitioner's right to relief is clear in that the underlying claim raises substantial legal questions.

2. Whether the Need for Relief is Immediate

I am persuaded by the credible testimony of Casey LaLonde, Township Manager for West Goshen Township, to find that on or about July 3, 2017 the Township received notice from Sunoco stating that it was starting construction on the Janiec 2 Tract within several weeks. N.T. 74. However, on July 6, 2017, the same date as the pre-conference hearing on the Township's Amended Complaint, Sunoco would not promise a stay of construction, and it began

clearing work on the Janiec 2 Tract. N.T. 30, 74-75, Township Exhibit 9. The clearing and grading of the Janiec 2 Tract, and the preparation of the construction entrance thereon, indicate that Sunoco intends to immediately begin construction of the valve station on the Janiec 2 Tract. N.T. 76. The Township also received notice from the Pennsylvania Department of Transportation that Sunoco was beginning work in the Janiec 2 Tract. N.T. 76. The Township requested that Sunoco cease operations on the Janiec 2 Tract until this case is decided by the PUC, but it refused. N.T. 30, 76. Sunoco's witness, Matthew Gordon, Project Manager of Mariner East Project, testified that work has commenced on the Janiec 2 tract. N.T. 213-214. Given these facts, I find the need for injunctive relief to be immediate.

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

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

Prior to Sunoco's use of the Janiec 2 Tract, in December, 2015, the Township approved a \$35 million land development project known as the Traditions Project. N.T. 82, Township Exhibit 11. The Traditions Project would have been the first facility of its kind in the Township, would have generated significant real estate tax and earned income tax revenue for the Township, and would have provided approximately \$200,000 of road improvements in the Township. N.T. 82-83. However, the developer abandoned the Traditions Project when Sunoco condemned the Janiec 2 Tract for its use on May 12, 2016. N.T. 83 – 84, 114. If Sunoco moved from the Janiec 2 Tract, the Traditions Project could happen. N.T. 84.

Construction has a negative impact on the Township including safety, transportation delays, dust, and noise. N.T. 63-64. Excessive HDD drilling needlessly increases the risk of frac-outs of bentonite drilling mixtures. N.T. 128-129. Approximately 25,000 to 36,000 vehicles use Boot Road in the Township each day and approximately 70,000 vehicles use

Route 202 through the Township each day (N.T. 63), so construction has as a significant impact on the Township.

The Township code at Chapter 69 requires a pre-construction meeting be held with the Township engineering at least 48 hours prior to construction commencing, including grubbing and clearing of a site. N.T. 74. Sunoco did not provide the Township with notice 48 hours before beginning grubbing and clearing of the Janiec 2 Tract. N.T. 75. There is evidence that the Settlement Agreement confined Sunoco's construction activities to Sunoco's existing pump station site and the SPLP Use Area, to minimize the impact to the Township residents and to minimize impeding access for firefighters entering and departing from the Goshen Fire Company, which is located adjacent to the Janiec 2 Tract. N.T. 63-64.

Additionally, there is evidence that if Sunoco installs a valve station on the Janiec 2 Tract, it could not later simply move the valve station to the SPLP Use Area, because the pipe might be too deep at the location of the SPLP Use Area. N.T. 127. If Sunoco installs the valve station on the Janiec 2 Tract, then is required to move the valve station to the SPLP Use Area, Sunoco would be required to re-drill and re-run the pipeline to the SPLP Use Area, creating a second round of risks to the public, including breakouts and frackouts within the Township. N.T. 127-128. If Sunoco continues construction as planned on the Janiec 2 Tract, but later must relocate the valve station to the SPLP Use Area, the Township will endure the noise, vibration, obstructions, and other negative consequences of the construction activities twice. N.T. 81. For these reasons, I find the injury would be irreparable if the injunctive relief is not granted:

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

Mr. Gordon testified an interim emergency order would delay the targeted completion deadline for the Mariner East project and would cause producers of propane, ethane and butane natural gas liquids (NGLs) a delay in being able to transport and ship their products through Pennsylvania; however, it is noted that horizontal directional drilling is currently shut down in other parts of Chester County due to water contamination from frac-outs. N.T. 246.

Thus, there is insufficient evidence to show a substantial financial loss will be sustained by Sunoco's customers pending a temporary interim injunction in this case.

West Goshen is not seeking to permanently stop construction of the Mariner East Pipeline; or even from running a pipeline through the Township altogether; however, it seeks enforcement of a Settlement Agreement in the interest of its residents. N.T. 81-82. At least at one point, in May, 2015 Sunoco appears to have agreed to constrictions on its imprint in the township. I fail to see how an injunction on construction on the Janiec 2 Tract until a final Commission decision regarding the amended complaint would be injurious to the public. Further, the status quo whereby there is no construction on Janiec 2 Tract would be maintained throughout the litigation of the complaint. Thus, the public would not be injured by the requested emergency interim relief.

Conclusion:

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

THEREFORE,

IT IS ORDERED:

1. That the petition for interim emergency relief, filed on July 10, 2017, by West Goshen Township is granted.

2. That Sunoco Pipeline L.P. is enjoined from beginning and shall cease and desist all current construction including: 1) constructing Valve 344; 2) constructing appurtenant facilities to Valve 344; and 3) horizontal directional drilling activities on the Janiec 2 Tract in West Goshen Township until the entry of a final Commission Order ending the formal amended complaint proceeding at Docket No. C-2017-2589346.

3. That the granting of relief by interim emergency order in the proceedings at Docket No. C-2017-2589346 is certified to the Commission as a material question requiring interlocutory review.

Date: July 24, 2017

Elizabeth Barnes
Administrative Law Judge

C-2017-2589346 - WEST GOSHEN TOWNSHIP v. SUNOCO PIPELINE L.P.

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