

PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG PENNSYLVANIA 17120

Amended Petition of State Senator Andrew E.
Dinniman for Interim Emergency Relief;
Pennsylvania State Senator Andrew E.
Dinniman

Public Meeting held June 14, 2018
3001453-OSA
P-2018-3001453; C-2018-3001451

v.

Sunoco Pipeline, L.P.

MOTION OF CHAIRMAN GLADYS M. BROWN

Before the Commission is the *Interim Emergency Order and Certification of Material Question (Interim Emergency Order)* issued by Administrative Law Judge Elizabeth Barnes (ALJ) on May 24, 2018, which granted the Petition of Senator Andrew E. Dinniman and is now before the Commission pursuant to our regulations providing for Commission review of interim emergency orders.¹ The material question is as follows:

Whether the evidentiary record supports the provisions of the *Interim Emergency Order* which (a) enjoins Sunoco from all current operation on Mariner East 1 [ME 1]; and (b) enjoins construction, including drilling activities on the Mariner East 2 [ME 2] and Mariner East 2X [ME 2X] pipelines, all in West Whiteland Township, Pennsylvania until the entry of a final Commission Order in the formal complaint proceeding at Docket No C-2018-3001451?

As a preliminary matter, Sunoco challenges the ability of Senator Dinniman to exercise representational/legislative standing to prosecute this case and the underlying formal complaint.² The ALJ found that the prior Commission orders in other dockets³ supported a finding that the Senator was entitled to such status in the present case. While I do not concede that the cases, largely where legislators were granted intervenor status in other dockets, would justify granting representation/legislative standing in this case, here Senator Dinniman actually lives in West Whiteland Township and has standing as a resident and property owner. The Parties have already engaged in extensive litigation and have brought the substantive issues surrounding the *Interim Emergency Order* before the Commission for decision. Therefore, we are hard pressed to find that the question of standing is anything but moot at this point.

The grant of an interim emergency order requires that the petitioning party prove all four parts of a four-prong test, proving:

- (1) The petitioner's right to relief is clear.

¹ 52 Pa. Code § 3.10(b).

² Note that our May 3rd Order in a prior case, *Petition of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission for the Issuance of an Ex Parte Emergency Order*, Docket No. P-2018-3000281 ("Ex Parte Order"), stated that Senator Dinniman had full party status in his own complaint case did not specify whether his status was in his own right or representation/legislative in nature.

³ *Senator Vincent J. Fumo v. Bell Atlantic – Pennsylvania*, Docket No. I-00990080 (1998) (*Senators Roger A. Madigan and Senator Mary Jo White intervened*).

- (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.⁴

These four factors will be addressed as they apply to both the existing ME 1 and the two pipelines under construction, ME 2 and ME 2X.

1. Whether the Petitioner's right to relief is clear.

The ALJ found that the stated standard in the regulation, advocated by Sunoco, that there is a clear and present danger to life or property, should be read as it has been in civil courts to mean that substantial legal questions have been raised.⁵ I note that no Commission cases using that standard were cited.

The ALJ reasoned that the continued operation of ME 1 could create a clear and present danger to life or property, in part because of the recent occurrence of sinkholes along Lisa Drive in West Whiteland Township.⁶ I do not agree that the integrity of ME 1 remains at issue as Sunoco performed all of the necessary steps as directed in that matter to the satisfaction of the Commission's Gas Safety Division of our Bureau of Investigation & Enforcement (BI&E). While the record contains accounts of Sunoco's mishaps in other jurisdictions and other pipelines, there is no new, credible evidence to support a finding that the continued operation of ME 1 poses a clear and present danger to life or property in West Whiteland Township.

The construction for ME 2 and ME 2X has posed more serious challenges to the citizens of West Whiteland Township, specifically the horizontal directional drilling (HDD) and its effect on local residential and commercial wells. I note that Sunoco has ceased this type of activity in West Whiteland Township and has applied to the Department of Environmental Protection (DEP) for a change in its permits to allow it to proceed in a fashion other than that already approved by the DEP.⁷ Although Sunoco testified that it is not continuing with construction until the DEP permit is issued in West Whiteland Township, it is prudent to require that the permit be in place prior to restarting work on ME 2 and ME 2X. Because of the record evidence regarding HDD and the impact to wells within West Whiteland Township, the Petitioner's right to relief is clear.

2. Whether the Need for Relief is Immediate.

The ALJ relied upon evidence from other jurisdictions and DEP violations to find that Sunoco's construction practices were sufficiently alarming to justify an immediate stop to both construction on the new lines and operations on ME 1. While I recognize that the construction

⁴ 52 Pa. Code § 3.6(b).

⁵ Interim Emergency Order at 9, citing *T.W. Phillips Gas and Oil v. Peoples Natural Gas*, 492 A.2d 776 (Pa. Cmwlth. 1985). But see, *Petition of Direct Energy Services, LC for Emergency Order Approving a Retail Aggregation Bidding Program for Customers of Pike County Light & Power Company*, Docket No. P-00062205 (Order entered April 20, 2006); *Petition of National Fuel Gas Distribution Corp. for Emergency Order Granting a Temporary Waiver of Certain Tariff Rules Related to Transportation Service*, Docket Nos. P-961022 and P-061021 (Order entered March 19, 1996)(both cases using the "clear and present danger to life or property" standard).

⁶ *Ex Parte Order*.

⁷ At the time of this public meeting, DEP had not issued the new permit.

caused a number of DEP violations and subsequent civil penalties, these concerns are specific to new construction and have no bearing on the continued operation of ME 1. Accordingly, this prong is not met for ME 1.

However, the need for relief is immediate for ME 2 and ME 2X because Sunoco could resume construction on ME 2 and ME 2X as soon as DEP issues the permits.

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

Again, it is the contamination or disturbance of public wells and harm that further subsidence could cause to ME1 that drive the ALJ's finding that the injury would be irreparable if the emergency relief is not granted. This is caused by the construction of the new pipelines and not by the continued operation of ME 1. Therefore, this prong is not met for ME1.

While there is insufficient evidence to support a finding that ME 1 is being operated unsafely in West Whiteland Township, I do find that there is sufficient evidence to support a finding that the construction on ME 2 and ME 2X should remain halted until Sunoco meets the requirements that will be imposed by this Motion. Accordingly, this prong is met for ME 2 and ME 2X.

4. Whether the Interim Emergency Relief is Injurious to the Public

I wholeheartedly agree with the ALJ that the risk of physical injury or death because of unsafe construction is catastrophic. However, there is also a very real harm to the public economically in the continued shutdown of ME 1, which plays an important role in local, state and the national economy.⁸

The primary concern of this Commission is the safety of the public as well as the safety of the utility workers. Regardless of the monetary costs involved in shutting down a ME 1, the Commission will not hesitate to shut it down when and if the conditions indicate that there is an imminent threat to that safety. In fact, quite recently, the Commission did just that. However, where there is no sign of imminent danger, the evidence presented by Sunoco regarding the economic harm that is caused by the shutdown of ME 1 is difficult to ignore as it measures in the millions, affecting the jobs and businesses of many Pennsylvanians. I reiterate that Sunoco has performed all of the necessary steps as directed in that matter to the satisfaction of the Commission's BI&E. Under these circumstances, the relief requested is in fact, injurious to the public interest, and this factor has also not been met for ME 1.

ME 2 and ME 2X present a different scenario, as the construction is yet to be completed and the Commission can ensure that Sunoco meets requirements consistent with safe practices. Any economic injury to the utility or the public in continuing the injunction on construction of ME 2 and ME 2X is outweighed by the risk posed to the continued safe operation of ME 1 and the contamination of water wells and the direct impact on local residents and their properties in

⁸ See Amicus Curiae Brief of Range Resources, testimony of Alan Engbert, Tr. 604; testimony of Anthony Gallagher, Steamfitters Local 420; Braskem, Tr. 490; testimony of Richard Billman, Vice President of Business Development, Energy Transfer Partners and Sunoco Pipeline, LP, Tr. 621;

the township. Until the requirements set forth below are satisfied with regard to construction of ME 2 and ME 2X, this fourth prong is met.

It is important to point out that the underlying complaint may support a different conclusion following completion of the litigation before the ALJ. Our decision today only addresses whether interim emergency relief in the form of an injunction shutting down the operation of ME 1, ME 2, and ME 2X should be granted.

Upon review of the record in this matter, I find that Sunoco must provide additional information in the Formal Complaint Proceeding in order for the Commission to determine whether construction can safely restart on the ME 2 and ME 2X pipelines in West Whiteland Township. Consistent with the *Interim Emergency Order*, Sunoco is directed to file the following information within twenty days of the entry date of the Commission's Order pursuant to this Motion:

1. Inspection and testing protocols, including but not limited to:
 - a. Preventative inspection and maintenance
 - b. Leak detection and repairs
 - c. Frequency of inspections and testing
2. Comprehensive emergency response plan, including but not limited to:
 - a. Communications and coordination necessary to report and respond to a release or ignition of highly volatile liquids from pipelines or appurtenances
 - b. Public educational materials and notification protocols intended to instruct how affected parties along the right-of-way should respond and how Sunoco will notify the public in the event of a pipeline-related incident
 - c. Specific procedures pertaining to coordination with state and local officials, local fire, police, the Pennsylvania Emergency Management Agency (PEMA), the Pipeline and Hazardous Materials Safety Administration (PHMSA), this Commission, and other utilities located in West Whiteland Township in responding to an incident
3. Current safety training curriculum for employees and contractors, including but not limited to:
 - a. Proper pipeline construction, operation and maintenance
 - b. Identification of leaks and procedures for alerting emergency personnel

In addition, we require that Sunoco provide a verification or affidavit that the Department of Environmental Protection has issued the appropriate permission for continued construction of Mariner East 2 and Mariner East 2X in West Whiteland Township, when it is granted.

Sunoco is reminded that the requirements established in the prior docket, *Petition of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission for the Issuance of an Ex Parte Emergency Order*, Docket No. P-2018-3000281 (Order entered May 3, 2018), remain in effect. I also expect that Sunoco will continue to cooperate and to work closely with the BI&E, including giving advance notice and coordination of any construction, including and especially construction involving drilling.

I note further that any confidential information that must be included in this filing is subject to Commission rules and the protective order in effect in this docket.

We will not decide today the validity of the remainder of the ALJ's ordering paragraphs which direct Sunoco to report certain facts, to develop and implement training, to educate the first responders and to conduct additional tests. We look forward to a closer review, through the formal complaint proceeding, of the submission of additional evidence of Sunoco's geophysical and geotechnical studies and analyses, including resistivity, seismic and gravity, in any areas in West Whiteland Township where Sunoco will use HDD.

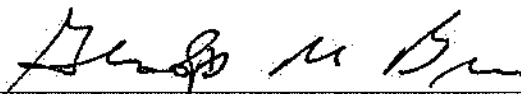
Sunoco shall file and serve the documents listed in this Motion, and the other Parties to this docket shall have ten days to file an opinion on whether the content of the filing satisfies items number 1-3 above. All requested documents shall also be filed with the Commission's Office of Special Assistants which will evaluate the Sunoco filings and any responses filed thereto by the Parties, and will prepare a public meeting report for the next reasonably possible public meeting.

THEREFORE, I MOVE;

1. That the material question certified to the Commission:
Whether the evidentiary record supports the provisions of the *Interim Emergency Order* which (a) enjoins Sunoco from all current operation on Mariner East 1; and (b) enjoins construction, including drilling activities on the Mariner East 2 and Mariner East 2X pipelines, all in West Whiteland Township, Pennsylvania, until the entry of a final Commission Order in the formal complaint proceeding at Docket No C-2018-3001451?
Section (a) is answered in the negative; and Section (b) is answered in the affirmative.
2. That ALJ's Interim Emergency Order is modified in part consistent with this Motion.
3. That the Petition for Interim Emergency Relief filed by Senator Andrew E. Dinniman is granted, in part, and denied, in part, consistent with this Motion.
4. That Ordering Paragraph No. 5 of the *Interim Emergency Order* is reversed and the injunction against operation of the Mariner East 1 pipeline is dissolved and resumption of operations of the pipeline is authorized, consistent with the processes and directives as contained in the Commission Order entered at *Petition of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission for the Issuance of an Ex Parte Emergency Order*, Docket No. P-2018-3000281 (Order entered May 3, 2018).
5. That the injunction against construction of Mariner East 2 and Mariner East 2X remains in effect until this Commission lifts it.
 - a. That, in order to seek resumption of construction on Mariner East 2 and Mariner East 2X, Sunoco shall file and serve to the parties of record and the Office of Special Assistants the following information within twenty (20) days of the entry date of the Order pursuant to this Motion:
 - i. Its inspection and testing protocols, including but not limited to:
 1. Preventative inspection and maintenance
 2. Leak detection and repairs
 3. Frequency of inspections and testing
 - ii. Its comprehensive emergency response plan, including but not limited to:

1. Communications and coordination necessary to report and respond to a release or ignition of highly volatile liquids from pipelines or appurtenances
 2. Public educational materials and notification protocols intended to instruct how affected parties along the right-of-way should respond and how Sunoco Pipeline will notify the public in the event of a pipeline-related incident
 3. Specific procedures pertaining to coordination with state and local officials, local fire, police, the Pennsylvania Emergency Management Agency, the Pipeline Hazardous Materials Safety Administration, this Commission, and other utilities located in West Whiteland Township in responding to an incident
- iii. Current safety training curriculum for employees and contractors, including but not limited to:
1. Proper pipeline construction, operation and maintenance
 2. Identification of leaks and procedures for alerting emergency personnel.
6. That Sunoco provide a verification or affidavit that the Department of Environmental Protection has issued the appropriate permission for continued construction of Mariner East 2 and Mariner East 2X in West Whiteland Township, when it is granted.
 7. That any Party to the Petition docket may file and serve a response to items No. 1-3 as outlined in this Motion within ten (10) days of service of the Sunoco filings which may address whether Sunoco's information fully addresses the issues in this directive.
 8. That all requested information be served on the Commission's Office of Special Assistants.
 9. That upon receipt of any responses to Sunoco's filing pursuant to the prior ordering paragraphs, the Office of Special Assistants shall prepare a report for the Commission's consideration at the next reasonably possible public meeting.
 10. That the Complaint filed by Senator Andrew E. Dinniman against Sunoco Pipeline, L.P., at Docket No. C-2018-3001451 is to proceed at the Office of Administrative Law Judge for appropriate proceedings.
 11. That a copy of the Commission's Order pursuant to this Motion be served upon the Pennsylvania Department of Environmental Protection and the Commission's Bureau of Investigation & Enforcement.
 12. That the Commission's Office of Special Assistants prepare an appropriate order consistent with this motion.

June 14, 2018
DATE


Gladys M. Brown, Chairman