

March 9, 2009

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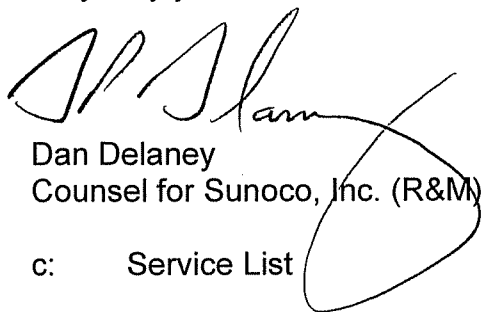
Hon. Harris T. Bock  
Hearing Officer  
Dispute Resolution Institute  
660 Two Logan Square  
18th and Arch Streets  
Philadelphia, PA 19103

Re: In the Matter of the Philadelphia Water Department's Proposed Increase in Rates for Water, Sewer and Wastewater Utility Services (Phase II).  
FY 2009-2012  
**Sunoco Sur-Reply Brief**

Dear Hearing Officer Bock:

Enclosed please find a copy of the Sur-Reply Brief of Sunoco, Inc. (R&M). As indicated on the enclosed Certificate of Service, all parties in this matter have been served with a copy of this document. Sunoco again requests the Hearing Officer to grant oral argument in this case for the reasons cited on page 12 of Sunoco's Reply Brief.

Very truly yours,

  
Dan Delaney  
Counsel for Sunoco, Inc. (R&M)

c: Service List

**BEFORE THE CITY OF PHILADELPHIA WATER DEPARTMENT  
HEARING OFFICER HARRIS T. BOCK PRESIDING**

In the Matter of the Philadelphia :  
Water Department's Proposed :  
Increase in Rates for Water and :                   FY2009-2012 Rates  
Wastewater Utility Services :  
(Phase II). :

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**CERTIFICATE OF SERVICE**

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I hereby certify that I have this day served a true and correct copy of the foregoing document upon the individuals listed, in the manner identified;

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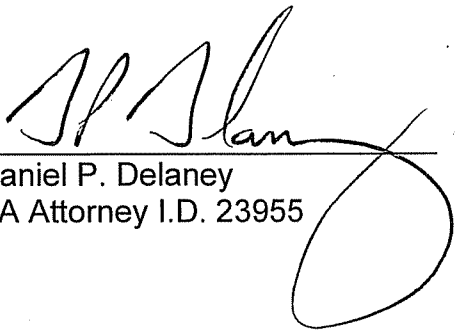
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## INTRODUCTION

Sunoco, Inc., R&M, ("Sunoco") replies in this brief to the arguments raised in the reply briefs of the Philadelphia Water Department ("PWD"), the Public Advocate, and the Next Great City Stormwater Subcommittee ("NGCSS") with regards to the PWD's Stormwater Management Service ("SWMS") charges proposed in its Regulations 304.0 et. seq. As stated in Sunoco's Initial and Reply Briefs, PWD lacks legal authority under any state statute, the City's Home Rule Charter ("Charter") or ordinances adopted by the City Council to assess and collect a SWMS charge. The arguments raised in the parties' Reply Briefs fail to address the fact that stormwater from the Point Breeze, Girard Point and West Yard parcels of the Sunoco Refinery property is collected, treated and discharged directly to the Schuylkill River under valid NPDES permits, without utilizing in any way the City's sanitary sewers, municipal separate stormwater sewers, or wastewater treatment system. As a result, stormwater from the vast majority of Sunoco's Philadelphia refinery property does not receive "sewage disposal services" from PWD, and therefore PWD has no authority under the Charter or Philadelphia Code to impose SWMS charges on those parcels. For the same reason, the proposed SWMS charges are not just, reasonable and non-discriminatory or equitably apportioned as to Sunoco.

## SUR-REPLY ARGUMENT

**I. THE CHARTER AND PHILADELPHIA CODE PROVIDE NO AUTHORITY TO PWD TO IMPOSE SWMS CHARGES UPON THOSE PROPERTIES OR PORTIONS OF PROPERTIES WHICH DO NOT RECEIVE SEWAGE DISPOSAL SERVICES FROM PWD.**

Sunoco's Initial Brief (pp. 19-46) and Reply Brief (pp. 2-10) explain PWD's lack of authority under the Charter, City Ordinances or State Statutes to impose SWMS charges on properties that do not receive sewage disposal services from PWD. It is undisputed in this record that Sunoco's Point Breeze, Girard Point and West Yard properties discharge all of their collected and treated stormwater directly to rivers of the Commonwealth pursuant to Pennsylvania Department of Environmental Protection ("PADEP") administered NPDES permits, and do not utilize in any way the City's sanitary sewer system, municipal separate stormwater sewer system, or PWD wastewater treatment facilities. See Sunoco Initial Brief at pp. 6-10; Reply Brief at pp. 6-10. Although the parties' reply briefs provide various arguments concerning the composition of stormwater and sewage,<sup>1</sup> all of the briefs fail to address the issue of whether the Point Breeze, Girard Point and West Yard properties are receiving "sewage disposal services" from PWD as required in order to justify the imposition of charges under Charter § 5-801 and Philadelphia Code ("Code") § 13-201.

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<sup>1</sup> PWD, Public Advocate and NGCSS all argue that stormwater may in some circumstances become sewage as a result of substances it mixes with on the ground. None of the parties have argued, however, that all stormwater is sewage.

**A. Charter § 5-801 and Code § 13-201 provide authority to PWD to set and collect rates only from customers receiving “sewage disposal services.”**

Charter § 5-801 (quoted on pp. 22-3 of Sunoco's Initial Brief) allows PWD, in accordance with standards established by City Council, to fix rates and charges for “supplying *sewage disposal services*,” with such rates to be set in an amount sufficient to cover (i) operating expenses, (ii) interest, and (iii) sinking fund charges on debt incurred “for ... *sewage disposal* purposes.” (Emphasis added). Code § 13-201, which implements Charter § 5-801, states that PWD may only fix and regulate “rates and charges for supplying *sewage disposal services*” (emphasis added) that are equitably apportioned among various classes of “consumers” and that are “just, reasonable, and nondiscriminatory . . . .”

The reply briefs of PWD, the Public Advocate, and NGCSS all cite cases purportedly in support of arguments that PWD’s interpretation of its authority under the Charter and Code must receive “strong deference” and be presumed to be correct. Sunoco submits that these arguments are unsupported by established principles of statutory construction for two reasons: (1) no deference to an administrative agency’s interpretation may be accorded unless the provisions of a statute are ambiguous (which is not the case here); and (2) because Charter § 5-801 and Code § 13-201 are a type of charging or taxing statute, they must be strictly construed, and cannot be accorded the type of broad and expansive interpretation proffered by PWD and the other parties.

The requirement imposed by Charter § 5-801 and Code § 13-201 that PWD must supply “sewage disposal services” before PWS can impose rates and charges on customers is unambiguous and explicit. Section 1921(c)(8) of the Statutory Construction Act, 1 Pa.C.S. §1921(c)(8), provides that deference to an administrative

agency's interpretation of a statute's legislative intent is necessary only when the language of the statute is ambiguous. In *Bethenergy Mines, Inc. v. Department of Environmental Protection*, 676 A.2d 711, 715 (Pa. Cmwlth Ct. 1996) the Commonwealth Court held that deference to an agency's interpretation of a statute is not required where the intent of the legislature is clear, and the agency's responsibility is then to give effect to the unambiguously expressed intent of the legislature. Because Charter § 5-801's requirement that PWD supply "sewage disposal services" before imposing fees is clear and unambiguous, no deference need be applied to PWD's interpretation of its authority under the Charter and Code to impose SWMS charges on Sunoco's Refinery property.

At the same time, the other parties' "deference" argument misses a critical statutory construction rule. Statutes and ordinances imposing charges and taxes are subject to a rule of strict construction. *Borough of Wilkinsburg v. School District of Wilkinsburg*, 148 A. 77, 80 (Pa. 1929) (strictly construing a charge imposed by ordinance); *Hamilton's Appeal*, 340 Pa. 17, 16 A.2d 32 (1940) (determining sewer charges imposed by ordinance to be an illegal tax, discussed *infra*); Section 1928(b)(3) of the Statutory Construction Act, 1 Pa. C.S. § 1928(b)(3), which requires taxing statutes to be given a strict construction. Although that Act does not expressly apply to ordinances, courts have frequently used the principles stated in the Act to interpret ordinances. See, e.g., *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 823 A.2d 108, 127 n. 31 (Pa. 2003); see also, *J and K Trash Removal, Inc. v. City of Chester*, 842 A.2d 983, 988-89 (Pa. Cmwlth Ct 204) (interpreting city business privilege tax); *Don Allen Chevrolet Co. v. Pittsburgh*, 200 A.2d 388, 390 (Pa. 1964) (interpreting city's mercantile tax ordinance). Given the strict construction mandate for interpreting

such tax-type provisions, PWD cannot invoke "deference" to invent an incredibly broad and expansive interpretation of "sewage disposal services" to encompass situations where no stormwater passes into or through any form of sewer or wastewater facility operated by PWD.

**B. PWD is not providing "sewage disposal services" to Sunoco's Point Breeze, Girard Point, or West Yard Properties.**

Neither the Charter nor the Philadelphia Code includes a definition of "sewage disposal services." Code § 1-103(3) provides that any word or phrase not specifically defined in the Code shall be construed according to common usage. Sunoco examined the definition of sewage disposal services under the Philadelphia Code and common usage in its Initial Brief (at p. 22-7). That analysis concludes that the only reasonable interpretation is that the term "sewage disposal services" refers to services associated with the "sewage" being disposed through use of PWD's sewer and wastewater treatment facilities (Sunoco Initial Brief at p.25).

PWD conducts a similar exercise on page 4 of its Reply Brief and concludes that "disposal services" can be reasonably construed to mean the conveyance or removal of substances defined as sewage, including stormwater runoff. No other party attempts a definition of the term "sewage disposal services" in their briefs.

Both Sunoco's and PWD's definitions of "sewage disposal services" require that "sewage" be disposed of, conveyed or removed. The undisputed evidence in this record, however, indicates that PWD is providing no disposal services to the Point Breeze, Girard Point and West Yard properties, whose stormwater is collected, treated and discharged into the Schuylkill River pursuant to valid NPDES permits. PWD

provides no "sewage disposal services" as to stormwater from such properties, and bears no costs related to stormwater collected and treated by Sunoco at these locations.

The briefs of NGCSS and the Public Advocate attempt to bypass the key term "sewage disposal services," and focus almost entirely on whether City's municipal separate storm sewers are "sewers" and whether stormwater flowing through the City's separate storm sewers might become polluted such as to qualify as "sewage." See Public Advocate Reply Brief at pp. 7-8, 10-11; NGCSS Reply Brief at pp. 2-3, 7-10. Both parties appear to miss the most important point: the stormwater from Sunoco's Point Breeze, Girard Point and West Yard properties does not enter or pass through **any PWD sewer** - not any PWD sanitary sewer, not any PWD combined sewer, not any PWD separate stormwater sewer, and not any other PWD wastewater facility. Even if stormwater conveyed by PWD-operated municipal separate stormwater sewers might theoretically become polluted, and qualify as "sewage," and therefore possibly be the subject of "sewage disposal services" rendered by the City, that point is entirely irrelevant to Sunoco's core point. The Point Breeze, Girard Point and West Yard properties do not contribute stormwater to any City sewer facility, and hence cannot conceivably be receiving sewage disposal services from PWD.

In sum, the provision of "sewage disposal services" to customers is unambiguously a prerequisite before charges can be imposed under Charter § 5-801 and Code § 13-201. Since the PWD's imposition of SWMS charges on the Point Breeze, Girard Point and West Yard properties is not authorized by the relevant provisions of the Charter and Code, the Hearing Officer must recommend that the

Commissioner exclude from SWMS charges properties which do not contribute stormwater conveyed by City-operated combined or separate stormwater sewers.

**C. PWD's impact and benefits arguments are inconsistent with the Charter and Code requirements and do not support the imposition of SWMS charges on Sunoco's Refinery property.**

PWD has again raised its impact and benefit argument in support of imposing SWMS charges on Sunoco's Philadelphia Refinery property on pp. 12-14 of its Reply Brief. Sunoco addressed this argument on pp. 4-10 of its Reply Brief. Briefly stated, PWD's argument is that the alleged impact of Sunoco's stormwater discharge pursuant to its NPDES permits supports the imposition of SWMS charges on Sunoco's property, even though the majority of stormwater is discharged pursuant to NPDES permits. This argument is unsupported by the record and inconsistent with the requirements of Charter § 5-801 and Code § 13-201.

The nature of the "impact" cited by the Department is a mystery in this record. Although Deputy Commissioner Katz mentioned an impact from Sunoco's NPDES discharges in his rebuttal testimony, he clarified in his cross-examination that his testimony was not meant to suggest that Sunoco was violating its NPDES permits or was in any way causing or contributing to a water quality violation. (Tr. p. 1034; 17-24). Mr. Katz further clarified that his testimony was not intended to suggest that Sunoco's NPDES discharges were degrading water quality or having adverse environmental effects. (Tr. p. 1036; 8;12). Mr. Katz also agreed that when the PADEP issues an NPDES permit, it presumes that discharges made pursuant to the permit's requirements are protective of the environment. (Tr. p. 1039; 10-13). There is no evidence in this record that Sunoco's NPDES discharges adversely impact the Schuylkill River. Indeed,

Mr. Katz agreed that PWD had no authority to monitor and enforce the terms and conditions contained in the Sunoco NPDES permits. (Tr. p. 1032; 6-11).

Significantly, the PWD's impacts and benefits argument does not mention the requirement of Charter § 5-801 and Code § 13-201 that sewage disposal services be provided to customers before rates and charges can be imposed. Sunoco submits that the PWD's argument is inconsistent with the requirements of these sections. In *Association of Community Organizations v. Guarino*, 512 A.2d 1312 (Pa. Cmwlth 1986), *Petition for Allowance of Appeal denied*, 514 Pa. 636, 522 A.2d 1106 (1987), the Commonwealth Court recognized that the PWD had no authority to modify rates or conditions of service that were not expressly authorized by the Charter or Code. In that case, the Court rejected PWD's effort to include additional conditions on the availability of senior citizen discounts and stated that the PWD could not impose additional criteria other than those identified in the Code, and inferred that PWD possessed no *implied authority* to change the criteria in the Code for seniors to receive reduced water rates. 522 A.2d at 1317. In the present case, PWD has no authority to vary the requirements of Charter § 5-801 and Code § 13-201 to now incorporate requirements concerning impacts and benefits of stormwater management as a prerequisite to the imposition of SWMS charges. As recognized by the Court in *Guarino*, PWD has no authority to alter the requirement that rates and charges can only be imposed pursuant to Charter § 5-801 and Code § 13-201 to customers who are receiving sewage disposal services from PWD. The Charter and Code provide no authority to the PWD to impose SWMS charges on the basis of impacts and benefits.

- D. The late filed testimony of Deputy Commissioner Katz should not be admitted into the record, and moreover, the testimony does not establish that PWD is providing sewage disposal services to all parcels of Sunoco's Refinery property.**

PWD has attached as Appendix B to its reply brief the affidavit of Deputy Commissioner Katz addressing the issue of whether there is sewage contained in PWD's separate stormwater system. Sunoco objects to the PWD's attempt to introduce the affidavit into the record of this proceeding at this late point. This affidavit is in effect additional testimony of Commissioner Katz which should have been included as part of PWD's presentation at the January 13, 2009 technical hearing. At that hearing, PWD presented Mr. Katz as a member of a PWD witness panel and he presented both rebuttal and surrebuttal testimony. (See Tr. pp. 908-1087, 1154-1190). PWD is now proffering this affidavit in an apparent effort to supplement Mr. Katz's extensive hearing testimony. Under this procedure, no party has had an opportunity to conduct discovery on the issues addressed in this testimony or cross-examine Deputy Commissioner Katz on the content of this new testimony .

The procedure PWD is attempting to follow with this late testimony is inconsistent with how both phases of this case were conducted, violates the due process rights of all parties to this proceeding, and Sunoco objects to it.<sup>2</sup> As the party with the burden of

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<sup>2</sup> The procedure followed by Sunoco in requesting the admission of its late-filed Exhibit G can be distinguished from the Department's proposed admission of Deputy Commissioner Katz's affidavit as part of its Reply Brief. Exhibit G was offered by Sunoco to supplement the previously filed written testimony of its witnesses concerning capital expenditures for the treatment facilities at the Sunoco Refinery property which was referenced in their testimony. The exhibit quantified prior year expenses for treatment facilities which were identified in Sunoco's direct testimony. Sunoco presented witnesses at the technical hearing who sponsored this testimony and were available to be cross-examined on its content, including the material describing Sunoco's expenditures on its waste treatment facilities. See Tr. pp. 1109-38. In this case, Mr. Katz is presenting testimony on new issues that should have been presented

proof to establish the reasonableness of the revised stormwater rates, PWD was required to support all aspects in its direct case at the technical hearing. Sunoco requests the Hearing Officer to not admit this late-filed testimony in the record of this proceeding.

Even hypothetically accepting at face value the content of the 28 paragraphs of Deputy Commissioner Katz's new testimony without discovery or cross-examination, this material does not support PWD's position that it is providing sewage disposal services to the Point Breeze, Girard Point and West Yard parcels of Sunoco's Refinery property. Mr. Katz's affidavit neither addresses nor acknowledges that these parcels discharge all of their collected and treated stormwater to rivers of the Commonwealth pursuant to PADEP-administered NPDES permits and do not utilize in any way the City's sewer system. Mr. Katz's late testimony provides no explanation how PWD is providing services to these parcels when no stormwater is discharged into any portion of the City's sewer system. Mr. Katz's late-filed testimony does not support the PWD's imposition of SWMS charges on the Point Breeze, Girard Point or West Yard properties.

**E. The Sewer Rental Act does not support the imposition of SWMS charges on Sunoco's Philadelphia Refinery property.**

Sunoco's initial brief includes an extensive discussion of the Act of July 18, 1935 (P.L. 1286, No. 402) *as amended*, ("Sewer Rental Act") at p. 27-33. As explained on p. 29 of that brief, the Pennsylvania Supreme Court held in *Hamilton's Appeal*, 340 Pa. 17, 22-4, 16 A.2d 32, 35 (1940), that a prior effort of the PWD to impose sewer charges,

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as part of PWD's case in chief. There is no opportunity to cross-examine Deputy Commissioner Katz on his late testimony or conduct discovery on it.

including a charge for stormwater, on properties that were not connected to the sewer system constituted an illegal tax which violated the uniformity provision of the Pennsylvania Constitution. The Sewer Rental Act and *Hamilton's Appeal* are not discussed in the briefs of PWD or NGCSS.<sup>3</sup> The Public Advocate's reply brief does discuss the Act and the case and attempts to distinguish them.

Relying on the case of *Medicus v. Upper Merion Township*, 475 A.2d 918 (Pa. Cmwlth. Ct. 1984), the Public Advocate argues that the Sewer Act must now be interpreted to include separate municipal stormwater sewers and therefore authorizes PWD to collect SWMS charges apart from any authority it has under the Charter and Code. (Reply Brief at 7-8). A close reading of the *Medicus* case does not support the expansive reading given it by the Public Advocate. *Medicus* actually concerns a claim brought pursuant to the Political Subdivision Tort Claims Act, where the central issue was whether a stormwater culvert should be considered within the term "sewer" for purposes of Section 202(b)(5) of that Act, 53 P.S. § 5311.202(b)(5). However, the argument that *Medicus* offers a definition of sewer that should be applied to the preexisting Sewer Rental Act is subject to a fatal flaw. As specifically noted in *Medicus*, the Political Subdivision Tort Claims Act is subject to a rule of liberal statutory interpretation, in contrast to taxing and charging statutes which must be strictly construed under 1 Pa. C. S. 1928(b). See *Medicus*, 475 A.2d at 921 (contrasting the strict construction applied to a sewage taxing statute, such as reviewed in *Borough of*

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<sup>3</sup> NGCSS cites the case of *Gericke v. Philadelphia*, 352 Pa. 60, 44 A.2d 233 (1945) in support of its holding permitting recovery of stormwater charges in sewer rates reviewed under the Sewer Rental Act. Unlike the situation examined in *Hamilton's Appeal*, the customers assessed the rate in *Gericke* were actually connected to the sewer system.

*Wilkinsburg, supra*, with the liberal construction applicable to other laws, such as the Political Subdivision Tort Claims Act).

The Public Advocate also attempts to distinguish the holding of the Supreme Court in *Hamilton's Appeal* from the SWMS program proposed by PWD in this case on the basis that the Hamilton case concerned sanitary sewer service and not stormwater. (Reply Brief at p.13-16). A close reading of the case, however, indicates that the Court reviewed the same issues as raised by PWD's current proposal. The Court's description of the 1940 ordinance which was the subject of the case clearly indicates that it also imposed charges for stormwater collection. (16 A.2d at 33). The Court found that the ordinance violated the requirement of equitable allocation under the Act and constituted a tax since it imposed charges on owners whose properties were not connected to the sewers and who received no services. (16 A.2d at 35). The same situation will exist for Sunoco's Point Breeze, Girard Point, and West Yard properties when PWD implements its SWMS proposal. These properties will be charged substantial SWMS charges even though they have no connection to the PWD's sewers and lawfully discharge treated stormwater into the Schuylkill River pursuant to valid NPDES permits. As explained in Sunoco's initial brief, the PWD's proposal for these properties violates the equitable allocation requirements of Charter § 5-801 and Code § 13-201 and constitutes an illegal tax under the Supreme Court's *Hamilton's Appeal* decision.

The Public Advocate's Reply Brief also contains an unsupported allegation that rainfall on Sunoco's property immediately becomes toxic and the equivalent of sewage. (Reply Brief at p. 10-11). There is no testimony or other evidence that supports this

statement in the Public Advocate's Reply Brief and Sunoco requests the Hearing Officer to disregard it.

**F. PWD's authority under the Charter to provide water supply does not authorize PWD to impose SWMS charges.**

NGCSS posits an argument that even if PWD lacks authority to impose SWMS charges under the rubric of "sewage disposal services," it might justify such charges as part of providing water supply services. NGCSS Reply Brief at p. 11. Not even the PWD ascribes to this theory. (See PWD Reply Brief at 2, admitting that the sole basis for the SMWS charges lies under Charter § 5-801).

NGCSS argues in its Reply Brief that PWD's authority to fix and regulate rates in connection with supplying water under Charter § 5-801 and its authority to investigate and adopt methods for improving the quality of the City's water supply under Charter § 5-800 also provide authority to regulate stormwater. (Reply Brief at p. 11). NGCSS is alone in making this argument.

NGCSS' argument is not supported by the Charter sections it cites. Neither section mentions stormwater or stormwater management. None of the rate design testimony presented by PWD in phase I or II of this case mentioned the use of PWD's water system either to develop the stormwater cost of service or to provide the SWMS services. Sunoco submits there is no clear and direct connection between the PWD's water authority and stormwater management such as to provide PWD with authority to implement the SWMS plan. As explained in the cases cited on p.19-22 of Sunoco's initial brief, PWD is an executive administrative agency of the City and only has such power to assess and collect fees and charges as specifically granted by state statute,

the Charter or ordinances adopted by City Council. The Charter sections concerning PWD's authority to supply water do not mention stormwater and do not provide authority to PWD to implement the SWMS program.

**G. PWD's and NGCSS' proposed findings of fact and conclusions of law should not be adopted by the Hearing Officer.**

PWD has again proposed findings of fact and conclusions of law in Appendix A to its Reply Brief. Sunoco's review of those findings and conclusions indicates that they are based in many cases on an inaccurate statement of Sunoco's positions and incorrect statements concerning PWD's authority under the Charter and Code. As a general matter, Sunoco requests the Hearing Officer not to adopt any of the PWD's proposed findings and conclusions that purport to explain Sunoco's positions or related conclusions of law. Specifically, Sunoco requests the Hearing Officer not to adopt the following PWD proposed findings of fact: 20, 31, 34, 48-51, 58-9, 62-71 and conclusion of law 22. NGCSS has also proposed findings of fact and conclusions of law on pp. 2-5 of its Reply Brief. Sunoco has reviewed these findings and conclusions and requests the Hearing Officer not to adopt any of the proposed conclusions of law contained on pp. 3-5 of that Brief. Sunoco believes that the proposed conclusions are inconsistent with established Pennsylvania law and rules of statutory construction and should not be adopted by the Hearing Officer.

**CONCLUSION**

For the foregoing reasons, Sunoco reiterates the prayer for relief set forth on pages 62-4 of its initial brief.

Respectfully submitted,



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