



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

June 27, 2018

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Pennsylvania Public Utility Commission, Bureau of Investigation and
Enforcement v. Bushkill Group, Inc.
Docket No. C-2015-2512950
I&E Prehearing Memorandum

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Prehearing Memorandum of the Bureau of Investigation and Enforcement in the above referenced proceeding. Copies have been served on the parties of record in accordance with the Certificate of Service.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read "SM", is written over a light blue horizontal line.

Stephanie M. Wimer
Senior Prosecutor
PA Attorney ID No. 207522

Enclosures

cc: Honorable Dennis J. Buckley
As per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	
Complainant	:	
	:	
v.	:	Docket No. C-2015-2512950
	:	
Bushkill Group, Inc.,	:	
Respondent	:	

**PREHEARING CONFERENCE MEMORANDUM OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT**

TO ADMINISTRATIVE LAW JUDGE DENNIS J. BUCKLEY:

Pursuant to Section 5.222 of the Pennsylvania Public Utility Commission’s (“PUC”) or (“Commission”) regulations, 52 Pa. Code § 5.222, and the Order of Administrative Law Judge (“ALJ”) Dennis J. Buckley issued on June 13, 2018, the Bureau of Investigation and Enforcement (“I&E”) submits this Prehearing Conference Memorandum in connection with the above-captioned matter.

I. BACKGROUND

On November 15, 2015, I&E filed a Formal Complaint (“Complaint”) against the Bushkill Group, Inc. (“Bushkill” or “Company”) alleging violations of the Gas and Hazardous Liquids Pipeline Act, 58 P.S. §§ 801.101, *et seq.* (“Pipeline Act” or “Act 127”). Specifically, I&E asserts that Bushkill operates a propane distribution system at The Villas at Tree Tops and Fairway (“the Villas”), a property containing timeshare and vacation rental units located in Middle Smithfield Township, Monroe County. I&E avers that this propane distribution system is subject to the federal pipeline safety regulations because portions of the system serve ten (10) or more customers. 49 CFR § 192.1(b)(5)(i). As such, I&E asserts that Bushkill is a pipeline

operator, as defined in 58 P.S. § 801.102, and must comply with Act 127 and federal pipeline safety laws.

In the Complaint, I&E alleges that Bushkill failed to initially register with the Commission as an Act 127 pipeline operator in 2012, and failed to renew its registration on an annual basis for 2013, 2014 and 2015. I&E further alleges that Bushkill failed to maintain a procedural manual for operations, maintenance and emergencies and failed to comply with federal pipeline safety regulations requiring it to submit an incident report concerning a propane explosion, which was later determined to be non-jurisdictional, that occurred on its property on October 15, 2014. I&E seeks a civil penalty of \$70,000 for the above-described violations, requests that Bushkill file Act 127 registration forms from 2012 through 2015, and requests that Bushkill be directed to file annual Act 127 registration forms on a going-forward basis.

On December 16, 2015, Bushkill filed Preliminary Objections, which seek dismissal of the Complaint on grounds of insufficient specificity and legal insufficiency.¹ As Bushkill's Preliminary Objections alleged insufficient specificity in the Complaint, Bushkill did not file an Answer to I&E's Complaint pursuant to Section 5.101(e) of the Commission's regulations, 52 Pa. Code § 5.101(e).

On January 7, 2016, I&E filed an Answer to the Preliminary Objections of Bushkill and requested that the Preliminary Objections be dismissed and I&E's Complaint be sustained.²

By Hearing Notice dated January 27, 2016, an Initial Hearing was scheduled in this matter for Friday, February 26, 2016 at 10:00 AM in Harrisburg, PA before ALJ Buckley.

¹ By Secretarial Letter dated November 25, 2015 in the above-captioned proceeding, Bushkill was granted an extension of time until December 16, 2015 to file any pleadings in response to the Complaint.

² By Secretarial Letter dated December 22, 2015 in the above-captioned proceeding, I&E was granted an extension of time until January 7, 2016 to file its response to Bushkill's Preliminary Objections.

On February 22, 2016, I&E and Bushkill filed a Joint Motion for Continuance requesting a continuance of the Initial Hearing, which was granted by Interim Order dated February 25, 2016.

By Notice dated August 16, 2017, an Initial Prehearing Conference was scheduled for October 4, 2017 at 10:00 AM in Harrisburg. On September 20, 2017, the parties renewed their Joint Motion for Continuance.

By Notice dated November 16, 2017, a further Prehearing Conference was scheduled for January 3, 2018. On January 3, 2018, an off-the-record prehearing conference was held in which the parties were afforded until February 23, 2018 to hold settlement discussions.

On February 23, 2018, the parties submitted a joint status report requesting an additional sixty (60) days to continue settlement discussions. The status report also memorialized I&E's agreement to stay responses to its Set I Interrogatories and Requests for Production of Documents, which were served upon Bushkill on February 14, 2018, during the course of settlement discussions. The sixty (60) day continuance was granted.

On March 27, 2018, the parties provided the presiding ALJ with an update on the status of settlement discussions, noting that an in-person meeting was scheduled for March 28, 2018.

On April 23, 2018, the parties submitted an additional status report confirming that they had met as planned on March 28, 2018, remarking that progress was being made towards a potential resolution of this matter and requesting an additional sixty (60) day extension of time.

By Order dated April 26, 2018, the matter was continued until June 1, 2018 and the parties were directed to resolve the matter with an appropriate filing or provide a stipulation of facts to the extent practicable.

Unfortunately, by June 1, 2018, the parties advised the ALJ that they were unable to file an agreement fully resolving the matter or provide a comprehensive stipulation of facts. The

parties noted that Bushkill is in the process of merging with another company which resulted in some personnel changes, including a change to Bushkill's in-house counsel. The parties requested an additional sixty (60) day extension of time to earnestly pursue and hopefully finalize settlement discussions.

By Notice dated June 11, 2018, an Initial Telephonic Hearing was scheduled for June 28, 2018 at 10:00 AM.

By Corrected Hearing Notice dated June 12, 2018, an Initial Hearing was scheduled for June 28, 2018 in Hearing Room 5 of the Commonwealth Keystone Building in Harrisburg.

On June 13, 2018, I&E filed a Motion to Postpone the Initial Hearing by one day and to seek a ruling on the Preliminary Objections filed by Bushkill. If the Preliminary Objections were denied, I&E sought an Answer to its Complaint, that the stay of discovery be lifted and responses to its Set I Interrogatories and Requests for Production of Documents be provided in advance of the Initial Hearing.

By Hearing Notice dated June 3, 2018, the Initial Hearing was rescheduled for June 29, 2018.

Also on June 13, 2018, the parties received an Order from the presiding ALJ dated June 5, 2018, which denied Bushkill's Preliminary Objections and the parties' request for a further continuance.

Additionally, on June 13, 2018, the parties received an Order from the presiding ALJ that granted, in part, I&E's Motion to Postpone the Hearing by One Day. The Order converted the Initial Hearing scheduled for June 29, 2018 into a prehearing conference and directed the parties to submit a prehearing memorandum on or before June 27, 2018. I&E's request that the stay of discovery be lifted and for responses to its Set I Interrogatories and Requests for Production of Documents was held in abeyance pending Bushkill's Answer to I&E's Motion.

On June 22, 2018, Bushkill filed an Answer to I&E's Motion to Postpone the Hearing.

Also on June 22, 2018, Bushkill filed an Answer to I&E's Complaint and raised New Matter, to which I&E will timely respond.

I&E hereby submits this prehearing conference memorandum pursuant to the presiding ALJ's Order of June 13, 2018.

II. I&E PREHEARING CONFERENCE MEMORANDUM

A. Statement Regarding Possible Settlement of Case

On March 28, 2018, the parties met in-person to discuss a potential settlement of this matter. I&E asserts that significant progress was made during that meeting but additional time to discuss settlement was necessary, in part, due to the change in personnel related to the acquisition of Bushkill by another company. I&E remains optimistic that a full, amicable resolution of this matter may be achieved, and avers that the parties continue to actively discuss settlement including as recently as June 26, 2018. I&E further asserts that the parties were able to fully agree on two stipulations of fact by June 1, 2018; however, these two stipulations of fact were not submitted to the presiding ALJ as they were few in number and concerned ancillary details that did not touch upon the gist of I&E's Complaint.

At the same time, I&E understands that the matter must move forward due to the length of time that has passed since the initiation of the proceeding by I&E's Complaint on November 15, 2015. On June 11, 2018, an Initial Hearing was scheduled for June 28, 2018. Given that the matter was moving forward on a litigated track, in its June 13, 2018 Motion, I&E requested several items that it felt were necessary to litigate this proceeding, such as a ruling on Bushkill's Preliminary Objections,³ an Answer to I&E's Complaint and responses to I&E's Set I

³ As noted above, I&E was not served with the presiding ALJ's June 5, 2018 Order that denied Bushkill's Preliminary Objections until June 13, 2018.

Interrogatories and Requests for Production of Documents. I&E nonetheless remains open to settlement discussions.

B. Service List and Distribution List

The following prosecutor should be entered on the service list for I&E:

Stephanie M. Wimer
Senior Prosecutor
Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 772-8839
(717) 783-3458 (fax)
stwimer@pa.gov

I&E respectfully requests that the following individual be added to any e-mail distribution lists in this matter: Michael L. Swindler, Deputy Chief Prosecutor, mwindler@pa.gov.

C. Proposed Modifications to the Commission's Discovery Regulations

I&E does not propose any future modifications to the Commission's regulations pertaining to discovery at 52 Pa. Code §§ 5.321, *et seq.* I&E served a single set of Interrogatories and Requests for Production of Documents on February 14, 2018. The parties subsequently agreed to stay formal responses to I&E's discovery requests while the parties were pursuing settlement discussions. Bushkill has provided I&E with the information sought in its Set I Interrogatories and Requests for Production of Documents, with the caveat that such information is to be used for settlement purposes only. As the party with the burden of proof pursuant to 66 Pa.C.S. § 332, I&E simply requests that the information be submitted as formal discovery responses.

I&E does not foresee the need to conduct additional discovery but reserves the right to do so.

D. Proposed Schedule for Litigation

I&E intends to call an expert witness in this matter and, as such, believes that written testimony is appropriate pursuant to 52 Pa. Code § 5.412(a) (providing that use of written testimony in Commission proceedings is encouraged, especially in connection with the testimony of expert witnesses). Accordingly, written testimony is incorporated into the proposed litigation schedule that appears below:

August 28, 2018	I&E's written direct testimony served
October 2, 2018	Bushkill's written rebuttal testimony served
October 30, 2018	I&E's written surrebuttal testimony served
November 27, 2018	Close of discovery
December 18-19, 2018	Evidentiary hearing in Harrisburg
January 17, 2019	All parties file and serve Main Briefs
February 6, 2019	All Parties file and serve Reply Briefs

I&E respectfully suggests that its written direct testimony not be due until August 28, 2018, which will allow the parties to continue to focus on settlement negotiations in lieu of immediately expending time and resources on litigating.

I&E has shared the above proposed litigation schedule with Bushkill in an effort to develop a schedule that was mutually agreeable to both parties.

E. I&E Witnesses

I&E expects to call the following witness, whom I&E intends to qualify as an expert in pipeline safety as it relates to natural gas and hazardous liquids:

Michael Chilek
Fixed Utility Valuation Engineer Supervisor
Bureau of Investigation and Enforcement, Safety Division
Pennsylvania Public Utility Commission

P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-3416
mchilek@pa.gov

Mr. Chilek is expected to testify that Bushkill is a pipeline operator and provide the bases for his conclusion. Mr. Chilek is also expected to testify that Bushkill has never registered with the Commission as a pipeline operator pursuant to Act 127 and has failed to comply with federal pipeline safety regulations, which require the Company to maintain a procedural manual for operations, maintenance and emergencies regarding its propane distribution system and required the Company to immediately submit an incident report concerning a propane explosion that occurred on its property on October 15, 2014.

It is expected that Mr. Chilek's testimony will provide support for the requested relief sought by I&E, which includes imposition of a civil penalty in the amount of \$70,000.

I&E reserves the right to call additional witnesses and will advise accordingly.

F. Issues

The following is a list of issues and sub-issues that I&E intends to address in this proceeding. I&E reserves the right to address other issues, as it deems appropriate, if any such relevant issues arise.

1. I&E's allegation that Bushkill is a pipeline operator as defined in Act 127 at 58 P.S. § 801.102.
 - a. Bushkill is a pipeline operator because ten (10) or more timeshare or rental units are supplied propane from a single tank at the Villas, pursuant to 49 CFR § 192.1(b)(5)(i).
 - b. Alternatively, Bushkill is a pipeline operator because it serves more than one customer in a public place, pursuant to 49 CFR § 192.1(b)(5)(ii), as any member of the public may stay at the Villas.
2. Bushkill's alleged failure to comply with the requirements of pipeline operators, including the following:

- a. Submitting an initial pipeline operator registration form and then renewing the form on an annual basis, pursuant to 58 P.S. §§ 801.301(c) and 801.503(d);
 - b. Maintaining a procedural manual for operations, maintenance and emergencies, pursuant to 49 CFR § 192.605; and
 - c. Completing an incident report as soon as practicable regarding the October 15, 2014 incident that occurred on Bushkill's propane distribution system, pursuant to 49 CFR § 191.5.
3. I&E's requested relief in the form of a total civil penalty of \$70,000, pursuant to 66 Pa.C.S. § 3301, a directive that Bushkill be required to submit all past due Act 127 registration forms and be subject to Commission assessments associated with the jurisdictional pipeline miles reported, and a directive that Bushkill be required to timely submit Act 127 annual registrations on a going-forward basis.

Respectfully submitted,



Stephanie M. Wimer
Senior Prosecutor
PA Attorney ID No. 207522

Michael L. Swindler
Deputy Chief Prosecutor
PA Attorney ID No. 43319

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Date: June 27, 2018

Pennsylvania Public Utility Commission, :
Bureau of Investigation and Enforcement, :
Complainant :

v. :

Docket No. C-2015-2512950

Bushkill Group Inc., :
Respondent :

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Service by First Class Mail and Electronic Mail:

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Dated: June 27, 2018