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December 14, 2018

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor  
Harrisburg, PA 17120

**VIA HAND DELIVERY**

**RE: Giant Eagle, Inc.; Guttman Energy, Inc.; Lucknow-Highspire Terminals, LLC;  
Monroe Energy, LLC; Philadelphia Energy Solutions Refining and Marketing,  
LLC; and Sheetz, Inc. v. Laurel Pipe Line Company, L.P.;  
Docket No. C-2018-3003365**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is the PUBLIC VERSION of the Brief of Giant Eagle, Inc., Guttman Energy, Inc., Lucknow-Highspire Terminals, LLC, Monroe Energy, LLC, Philadelphia Energy Solutions Refining and Marketing, LLC, and Sheetz, Inc. in Support of Petition for Certification of a Ruling on a Discovery Matter, in the above-referenced proceeding. We are also submitting a HIGHLY CONFIDENTIAL VERSION of the Brief in a sealed envelope marked "HIGHLY CONFIDENTIAL" and request proprietary treatment of the same.

As shown by the attached Certificate of Service, all parties to this proceeding are being duly served.

Please date stamp the extra copy of this transmittal letter and kindly return it for our filing purposes. If you have any questions concerning this matter, please contact the undersigned. Thank you.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By

Adeolu A. Bakare

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Enclosure

c: Administrative Law Judge Eranda Vero (via E-Mail and First-Class Mail)  
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**PUBLIC VERSION**

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Giant Eagle, Inc.; Guttman Energy, Inc.;	:	
Lucknow-Highspire Terminals, LLC;	:	
Monroe Energy, LLC; Philadelphia Energy	:	
Solutions Refining and Marketing, LLC;	:	Docket No. C-2018-3003365
and Sheetz, Inc.	:	
	:	
Complainants.	:	
	:	
v.	:	
	:	
Laurel Pipe Line Company, L.P.	:	
	:	
Respondent	:	
	:	

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**BRIEF OF GIANT EAGLE, INC.; GUTTMAN ENERGY, INC.; LUCKNOW-HIGHSPIRE  
TERMINALS, LLC; MONROE ENERGY, LLC; PHILADELPHIA ENERGY SOLUTIONS  
REFINING & MARKETING, LLC; AND SHEETZ, INC.  
IN SUPPORT OF  
PETITION FOR CERTIFICATION OF A RULING ON A DISCOVERY MATTER**

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Dated: December 14, 2018

**RECEIVED**  
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SECRETARY'S BUREAU

**PUBLIC VERSION**

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### I. INTRODUCTION

Pursuant to Section 5.304(d) of the Pennsylvania Public Utility Commission's ("PUC" or "Commission") regulations, 52 Pa. Code § 5.304(d), Giant Eagle, Inc., Guttman Energy, Inc., Lucknow-Highspire Terminals, LLC, Monroe Energy, LLC, Philadelphia Energy Solutions Refining and Marketing, LLC, and Sheetz, Inc. (collectively, the "Complainants") hereby file this Brief with the Commission in support of the Complainants' December 7, 2018 Petition for Certification of a Ruling on a Discovery Matter ("Petition"). In their Petition, the Complainants ask Your Honor to certify the below questions to the Commission for review pursuant to Section 5.304(a)(2) of the PUC's regulations, 52 Pa. Code § 5.304(a)(2):

The proposed Questions for Certification are as follows:

Whether it was appropriate to sustain privilege/doctrine claims under 52 Pa. Code § 5.323(a) of the Commission's regulations for documents that address *factual* matters relating to the operational feasibility of a public utility's bi-directional service on a segment of a petroleum products pipeline and not party representative opinions on a *legal* claim or defense regarding whether the commencement of bi-directional service will impair and thus abandon to some extent that public utility's existing intrastate petroleum products pipeline transportation service.

Proposed Answer: No.

In a proceeding concerning the operational impacts of Laurel's bi-directional service on existing east-to-west service, do Complainants have substantial need for the operational analyses of bi-directional service conducted by Laurel's employees and technical consultants and cannot otherwise obtain the information by other means without undue hardship such that Laurel cannot withhold such analyses under claim of Work Product Privilege/Doctrine?

Proposed Answer: Yes.

The central issue in this proceeding is whether Laurel Pipe Line L.P.'s ("Laurel") proposal to implement bi-directional pipeline service on the segment of its existing petroleum products pipeline between Eldorado and Pittsburgh, Pennsylvania – which would convert the existing westbound intrastate service into a combination of services moving in both eastbound and westbound directions at various times – constitutes a legal abandonment of any portion of the current westbound uni-directional service.

These Questions involve important issues of law, and their resolution is essential in order to timely resolve the above-docketed proceeding, prevent irreparable harm, and avoid substantial prejudice to the

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Complainants that would otherwise result from the Order Regarding Complainants' Motion to Compel entered on December 4, 2018 ("December 4 Order").<sup>1</sup> The harm and prejudice caused by the December 4 Order cannot be cured during the ordinary course of Commission review at the end of the proceeding, and thus it is critical that the issue be addressed by the PUC at this time.

### II. PROCEDURAL HISTORY

On July 12, 2018, the Complainants filed a Formal Complaint ("Original Complaint"), to which Laurel filed Preliminary Objections on August 1, 2018. In lieu of responding to Laurel's Preliminary Objections, the Complainants filed an Amended Complaint on August 8, 2018 pursuant to Section 5.91(b) of the PUC's regulations, 52 Pa. Code § 5.91(b) ("Amended Complaint"). The Amended Complaint addressed Laurel's decision to commence operating the Eldorado to Midland segment of the Laurel Pipeline bi-directionally without receiving prior PUC approval, despite the Presiding Administrative Law Judge's ("ALJ") and the Commission's prior rejections of Laurel's legal position that the Commission has no jurisdiction to consider impacts of proposed pipeline system changes on existing intrastate public utility service.<sup>2</sup>

On August 17, 2018, the Complainants issued Set I Interrogatories and Requests for Production of Documents (collectively, "Interrogatories") to Laurel in order to discover, among other things, whether Laurel studied realistic service scenarios and existing conditions to support its position that bi-directional operation of Duncansville-Coraopolis segment of the Laurel Pipeline will not impair existing westbound intrastate service.

On September 12, 2018, Laurel provided "answers" to the Interrogatories ("Answers"), the substance of which was limited to a Privilege Log purporting to claim that every such document allegedly responsive to

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<sup>1</sup> The December 4 Order was issued at Docket No. P-2018-3004857, which addressed the previously consolidated matter of Complainants' Second Petition for Interim Emergency Relief. This appears to be an error as Complainants' Second Motion to Compel was filed at the above-captioned Docket No. C-2018-3003365.

<sup>2</sup> These rejections occurred when the Commission issued its July 12, 2018 Order in the proceeding where Laurel proposed a full reversal of the Coraopolis to Eldorado segment of its intrastate pipeline, and when the ALJ denied Laurel's Preliminary Objections in this complaint proceeding.

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the Interrogatories is protected from disclosure to the Complainants by a recognized privilege – *i.e.*, the Work Product Privilege (Doctrine) and/or the Attorney-Client Communication Privilege.

In response to Laurel's Answers provided on September 12, 2018, the Complainants expressed concerns regarding the comprehensiveness and legality of the Privilege Log provided by Laurel.

On October 5, 2018, Laurel provided to the Complainants a "supplemental response" to Interrogatory No. 2, which contained an updated privilege log listing the following documents claimed to be privileged and, thus, not subject to disclosure to the Complainants ("Updated Privilege Log"):

- a. 2/17/2018 Laurel Bi-directional Scheduling Analysis ("Item 1")
- b. 2/17/2018 Laurel Bi-directional Scheduling Analysis mjk comments ("Item 2")
- c. 2/21/2018 Laurel Scheduling Analysis (Email) ("Item 3")
- d. 2/21/2018 Laurel Scheduling Analysis ("Item 4")
- e. 2/21/2018 Volume Scenarios for Analysis ("Item 5")
- f. 3/1/2018 Laurel Scheduling Analysis ("Item 6")
- g. 5/24/2018 Laurel Bidirectional ("Item 7")

On October 12, 2018, Complainants filed a Motion to Compel ("October 12 Motion to Compel") seeking production of the seven items identified in Laurel's Updated Privilege Log. The Updated Privilege Log was attached to the Complainants' October 12 Motion to Compel and is incorporated by reference herein.

On October 19, 2018, Laurel filed its Answer to the October 12 Motion to Compel.

On October 24, 2018, Your Honor issued an Order addressing the October 12 Motion to Compel ("October 24 Order"). The October 24 Order denied Laurel's claims of Attorney Client Privilege as to Items 4 and 5, but conditionally recognized Attorney Client Privilege protection for Item 3.<sup>3</sup> With regard to Laurel's claims of privilege under the Work Product Doctrine, the October 24 Order granted Complainants' October 12

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<sup>3</sup> With regard to Item 3, the October 24 Order did not require Laurel to further respond on the assumption that Item 3 is a perfunctory email through which Items 4 and 5 were transmitted with no substantive comments. October 24 Order, at 3-4. Laurel should be required to provide Item 3 if the document is other than a perfunctory "cover" email through which Items 4 and 5 were transmitted. *Id.*

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Motion to Compel as to Items 1 and 4-7 and directed Laurel to provide the requested documents by October 31, 2018, subject to redacting privileged information consistent with Section 5.323(a) of the Commission's regulations, 52 Pa. Code § 5.323(a).

On October 31, 2018, Laurel served Complainants with a further Supplemental Response to Complainants' Set I, No. 2 discovery request, including partially redacted documents identified as Items 1 and 4-7 ("Redacted Documents"). Those items were collectively attached to the Complainants' Second Motion to Compel (discussed below) as Highly Confidential Appendix A.

On November 13, 2018, the Complainants filed a Second Motion to Compel ("Second Motion to Compel") indicating that Laurel's further Supplemental Response fails to comply with the October 24, 2018, Order with regard to redaction of any privileged information or the Protective Order issued by Your Honor prescribing the standards for Confidential and Highly Confidential designations.

On November 19, 2018, Laurel filed its Answer to the Second Motion to Compel.

On December 4, 2018, Your Honor issued a ruling denying Complainants' Second Motion to Compel.

On December 7, 2018, the Complainants filed the Petition with the PUC requesting that Your Honor grant certification of the above Questions for review by the Commission.

### **III. SUMMARY OF ARGUMENT**

The primary issue in this proceeding is whether Laurel's proposal to implement bi-directional service on the portion of the Laurel Pipeline between Coraopolis and Duncansville, Pennsylvania constitutes an abandonment of any portion of the current westbound uni-directional service. In order to develop the facts necessary to satisfy their burden of proof, the Complainants issued the aforementioned Interrogatories to discern, among other things, the analyses and models on which Laurel relies in alleging that bi-directional service would not impact westbound shipments on affected segments of the Laurel Pipeline.

Interrogatory No. 2 requested any support for a publicly filed affidavit prepared for Laurel by Michael J. Kelly. The affidavit claimed that the commencement of bi-directional service on the segment of the Laurel Pipeline between Eldorado and Pittsburgh (now clarified as Duncansville and Coraopolis) will not impact the

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Complainants' existing westbound intrastate service. By denying Complainants' Second Motion to Compel, the December 4 Order ignores Laurel's waiver of any Work Product Privilege and effectively allows Mr. Kelly's opinions to be a matter of record, but prevents the Complainants from reviewing the documents he consulted in forming those opinions. Commission action is necessary to prevent substantial prejudice to Complainants that results from foreclosing their ability to obtain and assess the basis for Mr. Kelly's assertions.

This Petition is further warranted by Your Honor's determination that the redacted items are protected from discovery under the Work Product Doctrine.<sup>4</sup> The information requested in Interrogatory No. 2 are clearly *factual* matters regarding the operational feasibility of Laurel's bi-directional proposal and are directly relevant to whether any material alteration to Laurel's existing uni-directional, westbound service on the Laurel Pipeline between Eldorado and Pittsburgh constitutes an abandonment of service.<sup>5</sup> As such, it is evident that the alleged privileged documents are not the preparer's opinion or perspective on the value or merit of a legal claim or defense regarding abandonment of service; rather, those documents relate to operational facts about how di-directional service may or may not work in practice.

In addition, the December 4 Order erred in finding no "reasonable grounds to conclude that the Complainants have substantial need for the redacted information to prepare their case and cannot, without undue hardship, obtain its substantial equivalent by other means."<sup>6</sup> The only way in which the Complainants can evaluate the credibility of Mr. Kelly's assertions about the implementation of bi-directional service is to obtain and assess the information on which Mr. Kelly relies in making the assertion. Laurel has acknowledged

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<sup>4</sup> December 4 Order at 3 (emphasis added). Pursuant to Section 5.323(a) of the PUC's Regulations, "With respect to the representative of a party other than the party's attorney, **discovery may not include disclosure of his mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy, tactics or preliminary or draft versions of written testimony or exhibits**, whether or not final versions of the testimony or exhibits are offered into evidence." 52 Pa. Code § 5.323.

<sup>5</sup> In denying Laurel's Preliminary Objections, Your Honor expressly found that "[w]hether or not Respondent's initiation of bi-directional service on the Pittsburgh-Altoona section of the Laurel pipeline amounts to full or partial abandonment of service is a **question of fact** which may not be disposed of through preliminary objections." Order on Respondent's Preliminary Objection, p. 7.

<sup>6</sup> *Sullivan v. Warminster Twp.*, 274 F.R.D 147, 152 (E.D. Pa. 2011) (citing *United States v. Rockwell Int'l*, 897 F.2d 1255, 1266 (3d Cir. 1990)).

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that the information it is seeking to protect is relevant and responsive; the only question is whether it is subject to a privilege. For many reasons, it is not and, thus, should be disclosed to Complainants.

Accordingly, the Complainants respectfully request that Your Honor certify the above Questions for review by the PUC.

### IV. ARGUMENT

#### A. Certification of the Questions and a Stay of the Proceedings are Necessary

Section 333(h) of the Public Utility Code ("Code") and Section 5.304(a)(2) of the Commission's regulations authorize the Commission to review the ruling of an ALJ on discovery matters where such ruling involves important questions of law or policy and interlocutory review will prevent substantial prejudice or expedite the conduct of the proceedings. *See* 66 Pa. C.S. § 333(h); *see also* 52 Pa. Code § 5.304(b), (c)(3).

In contrast to routine discovery matters, the certified Questions directly relate to the Complainants' ability to seek discovery on the very issues underlying the Amended Complaint and assigned for litigation before the Presiding ALJ. These Questions must be resolved immediately to expedite the course of the proceeding and to prevent substantial prejudice. Addressing questions so fundamental to the key issues in this proceeding through a later remand order would require the parties to entirely re-litigate the case, a clearly wasteful and inefficient process for the PUC, Your Honor and the parties. While the Commission generally disfavors interlocutory review, it has specifically granted interlocutory review of discovery-related matters, where a remand following litigation would otherwise have been necessary.<sup>7</sup> The Commission has also granted interlocutory review "to obviate the need for additional time and expense."<sup>8</sup>

If allowed to stand, the December 4 Order would allow Laurel to unreasonably withhold responsive and relevant information through an inappropriately broad application of the Work Product Doctrine. The December 4 Order would bar the Complainants from propounding discovery addressing material factual

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<sup>7</sup> *See Pennsylvania Public Utility Commission v. Peoples Natural Gas Company*, 68 Pa. PUC 326 (October 17, 1988), slip op., p. 4.

<sup>8</sup> *See Philadelphia Gas Works Universal Service and Energy Conservation Plan: Joint Petition for Interlocutory Review, Answer to a Material Question and Approval of a Settlement*, 2009 Pa. PUC LEXIS 2238 (January 1, 2001), at \*5.

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matters raised in the Amended Complaint and in Laurel's Answer and New Matter. A resolution of the certified Questions is necessary to ensure unprejudiced access to material facts and preclude duplicative and expensive litigation. Additionally, because the parties to this proceeding have agreed to proceed with discovery and develop a procedural schedule upon completion of initial discovery, and the December 4 Order precludes the Complainants from timely seeking and obtaining discovery of material facts relating to the bi-directional service along a portion of the Laurel Pipeline, the Complainants request that the ALJ grant a stay of proceedings to bar scheduling of dates for testimony, hearings, or briefs pending disposition of the certified Questions. Accordingly, the Complainants request that the Presiding ALJ certify the Questions to the Commission for interlocutory review.

### **B. The December 4 Order Improperly Sustained Laurel's Claims of Privilege Under the Work Product Doctrine**

Notably, the December 4 Order concerns only privilege claims under the Work Product Doctrine. As acknowledged by Laurel, the ALJ's prior October 24 Order addressed Laurel's claims of Attorney Client Privilege by rejecting Laurel's assertion of Attorney Client Privilege as to Items 4 and 5 and conditionally recognizing Laurel's assertion of Attorney Client Privilege for Item 3.<sup>9</sup> Accordingly, the privilege claims at issue here relate solely to Laurel's redaction of information in Items 1 and 4-7 pursuant to the Work Product Doctrine.

The December 4 Order sustained Laurel's Work Product Doctrine claim on Items 1 and 4-7 after finding the documents to be "sufficiently indicative that the redacted analysis, comments, or notes contain the mental impressions, conclusions, or opinions of the preparer with regard to the operational feasibility of the proposed bi-directional service."<sup>10</sup> Even if true, this finding alone fails to justify application of the Work Product Doctrine, because the Commission's regulations and applicable law limit the protections of the Work

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<sup>9</sup> October 24 Order, at 3; *see also* Laurel Answer to Second Motion to Compel, at 11 (stating "[a]s an initial matter, Laurel notes that its redactions to Item Nos. 1 and 4-7 were limited to party representative work product, as Your Honor's Order denied Laurel's claims of attorney-client communication with respect to Item Nos. 4 and 5.").

<sup>10</sup> December 4 Order, at 3.

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Product Doctrine to such mental impressions, conclusions, or opinions "respecting the value or merit of a claim or defense or respecting strategy, tactics or preliminary or draft versions of written testimony or exhibits..."<sup>11</sup>

To the contrary, the Complainants seek only the operational basis for Laurel's representation that it can offer bi-directional service on a single pipeline segment without impairing the current operation of its westbound service on the same pipeline segment. Laurel's internal deliberations regarding the operational feasibility of bi-directional service are general business matters related to factual determinations, not information developed to assess the merits of legal claims or defenses or strategy. Accordingly, the Commission should reject Laurel's claims of Work Product Privilege and direct Laurel to provide unredacted versions Items 1 and 4-7.

### ***I. Attorney Work Product Doctrine – Legal Standard***

In the seminal case of *Hickman v. Taylor*,<sup>12</sup> the United States Supreme Court first recognized the attorney work product doctrine based on the principle that allowing attorneys to prepare their cases without fear that their work product would be used against their clients advances the adversarial system.<sup>13</sup>

The Work Product Doctrine is codified in Federal Rule of Civil Procedure 26(b). The United States Supreme Court has referred to the Work Product Doctrine as a "qualified privilege for certain materials prepared by an attorney 'acting for his client in anticipation of litigation.'"<sup>14</sup> The Third Circuit has stated that a document is created in anticipation of litigation when, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation."<sup>15</sup> However, under the federal rules, those materials claimed to be covered by the attorney work product privilege may nonetheless be discovered if they are otherwise discoverable [i.e. relevant

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<sup>11</sup> 52 Pa. Code § 5.323.

<sup>12</sup> 329 U.S. 495 (1947).

<sup>13</sup> *Id.* at 510–11.

<sup>14</sup> *United States v. Nobles*, 422 U.S. 225, 237-38 (1975) (quoting *Hickman v. Taylor*, 329 U.S. 495, 508 (1947)). See also *Commonwealth v. Kennedy*, 876 A.2d 939, 945 (Pa. 2005).

<sup>15</sup> *Sullivan v. Warminster Twp.*, 274 F.R.D. 147, 152 (E.D. Pa. 2011) (citing *United States v. Rockwell Int'l*, 897 F.2d 1255, 1266 (3d Cir. 1990)).

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or likely to lead to relevant evidence] and the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.<sup>16</sup>

The Commission's regulations at 52 Pa. Code § 5.323 not only adopt the attorney work product rules contained in Rule 4003.3 of the Pennsylvania Rules of Civil Procedure, but also make it clear (and unlike the federal rules) that merely because a document is prepared in anticipation of litigation or hearing by an attorney or a non-attorney representative, a party may still obtain it in discovery:

### § 5.323. Hearing preparation material.

(a) *Generally.* Subject to this subchapter and consistent with Pa. R.C.P. 4003.3 (relating to scope of discovery trial preparation material generally), a party may obtain discovery of any matter discoverable under § 5.321(b) (relating to scope) even though prepared in anticipation of litigation or hearing by or for another party or by or for that other party's representative, including his attorney, consultant, surety, indemnitor, insurer or agent. The discovery may not include disclosure of the mental impressions of a party's attorney or his conclusions, opinions, memoranda, notes, summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery may not include disclosure of his mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy, tactics or preliminary or draft versions of written testimony or exhibits, whether or not final versions of the testimony or exhibits are offered into evidence.

52 Pa. Code § 5.323(a) (emphasis added).

The Work Product Doctrine provides even broader protections than the attorney client privilege.<sup>17</sup> However, it is not unbounded, as reflected in the federal rules and confirmed by the Commission's regulations at 52 Pa. Code § 5.323(a).

### **2. *Laurel Has Waived any Claim to Privilege Under the Work Product Doctrine***

The Affidavit of Michael J. Kelly forming the basis of the Complainants' Set 1, No. 2 Interrogatory was initially filed at the Federal Energy Regulatory Commission ("FERC") as support for a Petition for Declaratory Order ("PDO") filed by Laurel and its affiliate seeking approval of tariff rates for interstate service on the bi-directional pipeline. While Laurel did not initiate PUC review of its proposal for bi-directional

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<sup>16</sup> Fed. R. Civ. P. 26(b)(3)(i) and (ii).

<sup>17</sup> *Comm. v. Noll*, 662 A.2d 1123, 1126 (Pa. Super. Ct. 1995) (citing *In re Grand Jury Matter*, 147 F.R.D. 82, 86 (E.D. Pa. 1992)).

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service, the same affidavit became part of this PUC record when Laurel attached it to its Answer to the Complainants' Amended Complaint.

In that Affidavit, Mr. Kelly expressly represents that "Buckeye and Laurel have assessed a range of potential **operating scenarios**, and have confirmed that they could if necessary (which is highly unlikely) physically transport the full 40,000 bbls./day of west-to-east shipments under the Project as well as more than 120,000 bbls/day of east-to-west volumes, and the highest monthly volume moved on the Coraopolis-Eldorado segment in the past ten years is approximately 120,000 bbls./day."<sup>18</sup> To test this claim, the Complainants issued their Set I, Interrogatory 2 asking Laurel to "provide the active model, including all inputs, the analysis, and the results for the range of scenarios evaluated by Laurel of any affiliate of Laurel which are referenced in the Affidavit of Mr. Michael J. Kelly at paragraph 22 as part of the FERC Answer, Internal Appendix B, attached to the Answer."<sup>19</sup>

Litigants, including the Complainants, would not generally expect standard discovery requests for documents relied upon by company fact witnesses to elicit privileged information. In fact, the Supreme Court of the United States has deemed the Work Product Doctrine to be waived where the party claiming privilege presents the applicable representative as a witness. Specifically, the Court found that:

The privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived. Here respondent sought to adduce the testimony of the investigator and contrast his recollection of the contested statements with that of the prosecution's witnesses. Respondent, by electing to present the investigator as a witness, waived the privilege with respect to matters covered in his testimony. Respondent can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination.

United States v. Nobles, 422 U.S. 225, 239-240 (internal citations omitted).

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<sup>18</sup> Laurel Answer to Amended Complaint, Appendix B, Internal Appendix B, at 2.

<sup>19</sup> Complainants' October 12 Motion to Compel, Appendix A.



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Per the above descriptions, these documents uniformly present technical and operational analyses of Laurel's implementation of bi-directional service without the slightest indication that the material was prepared to address the "value or merit of a claim or defense or respecting strategy, tactics or preliminary or draft versions of written testimony or exhibits" as required to invoke the Work Product Doctrine under Commission regulations.<sup>21</sup>

When issuing the December 4 Order, the Presiding ALJ may have relied upon inaccurate statements in Laurel's Answer to the Second Motion to Compel. In that Answer, Laurel stated that "Pennsylvania appellate courts have confirmed that, under Pennsylvania law, the work product doctrine protects the mental impressions, conclusions and **opinions of a party's non-attorney** representative respecting the value or merit of a claim or defense or respecting strategy or tactics, regardless of whether or not it was prepared in anticipation of litigation."<sup>22</sup> Laurel's conclusion misstates the very case law that Laurel cites in its Answer. The Superior Court of Pennsylvania, in *Clemens re NCAA (In re Estate of Paterno)*, 168 A.3d 187, 199-200 (Pa. Super. 2017), determined that the Work Product Doctrine extends beyond materials prepared in anticipation of litigation, but only in the context of addressing the mental impressions of a party's attorney.<sup>23</sup> The court specifically noted that such "protection of an attorney's mental impression is unqualified" under Pa.R.C.P. No. 4003.3.<sup>24</sup>

Importantly, Pa.R.C.P. No. 4003.3 mirrors the pertinent language in Section 5.323(a) of the Commission's regulations, which prescribes separate standards for protection of attorney work product and work product from a representative other than an attorney.<sup>25</sup> Notably, the rule establishes broad protections for attorney work product, stating that "[t]he discovery may not include disclosure of the mental impressions

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<sup>21</sup> 52 Pa. Code § 5.323(a).

<sup>22</sup> Laurel Answer to Second Motion to Compel, at 10. (emphasis added).

<sup>23</sup> See *id.* citing *Bagweel v. Pennsylvania Office of Attorney General*, 116 A.3d 145, 148 (Pa. Cmwlth. Ct. 2015). The court found that for attorney work product, the Work Product Doctrine can protect information provided prior to the anticipation of litigation. *Id.*

<sup>24</sup> See *id.*

<sup>25</sup> 52 Pa. Code § 5.323(a).

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of a party's attorney or his conclusions, opinions, memoranda, notes, summaries, legal research or legal theories." In contrast, the non-attorney work product protections apply in a narrower context:

With respect to the representative of a party other than the party's attorney, discovery may not include disclosure of his mental impressions, conclusions or opinions respecting the **value or merit of a claim or defense or respecting strategy, tactics or preliminary or draft versions of written testimony or exhibits**, whether or not final versions of the testimony or exhibits are offered into evidence.<sup>26</sup>

Consistent with Section 5.323(a) of the Commission's regulations and Pa.R.C.P. No. 4003.3, the Work Product Doctrine protects materials in the nature of draft testimony or notes from a strategy meeting between internal employees and counsel. It does not protect documents prepared in the general course of business from disclosure. Laurel's arguments in its Answer conflate these separate standards.

As noted above, Laurel claims the Work Product Doctrine applies to Items 1 and 4-7. Laurel offers no indication that these documents relate to litigation preparation, other than unsupported averments in the Updated Privilege Log that the documents were "prepared at request of counsel."<sup>27</sup> Further, the Updated Privilege Log indicates that Items 1, 6, and 7 were distributed only to operational personnel rather than counsel.<sup>28</sup> And while Items 4 and 5 were provided to a group of individuals including counsel, the Commission would be hard-pressed to identify a function more appropriately categorized as "regular course of business" for a pipeline operator than assessing and analyzing the operational feasibility of its services under different nomination scenarios.<sup>29</sup> The information provided by Laurel supports a finding that Items 1 and 4-7 were prepared by operational personnel in the general course of business.

In light of these critical clarifications and the ALJ's apparent reliance on Laurel's demonstrably inaccurate characterization of the law regarding the Work Product Doctrine, certification of the Questions is

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<sup>26</sup> *Id.*

<sup>27</sup> Complainants October 12 Motion to Compel, Appendix C.

<sup>28</sup> Complainants understand that Patrick Monaghan is in-house counsel for Buckeye. See Laurel Answer to October 12 Motion to Compel, at 19. The remaining personnel identified in the Updated Privilege Log are non-attorneys.

<sup>29</sup> *Smithkline*, 232 F.R.D. at 478 (stating that "[f]urthermore, documents prepared in the regular course of business rather than for purposes of the litigation are not eligible for work-product protection, even if the prospect of litigation exists.").

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necessary to prevent duplicative and expensive litigation that would follow if and when the question is resolved in a Commission order or on appeal.

**C. Even if Privileged, Laurel Must Disclose the Information Redacted from Items 1, 6, and 7, Because the Complainants Have Demonstrated Substantial Need for the Redacted Information Such that They Cannot, Without Undue Hardship, Obtain its Substantial Equivalent by Other Means**

In the event the Commission sustains the ALJ's finding of privilege with respect the Redacted Documents, the Complainants alternatively assert the December 4 Order erred in finding that the Complainants failed to meet the alternative standard for disclosure of information otherwise privileged under the Work Product Doctrine.

The December 4 Order found a lack of "reasonable grounds to conclude that the Complainants have substantial need for the redacted information to prepare their case and cannot, without undue hardship, obtain its substantial equivalent by other means."<sup>30</sup> The factual information being sought in this discovery is central to the Complainants' case and known only to Laurel and its representatives. Absent full disclosure of the internal materials relied upon by Laurel's operational personnel, including Mr. Kelly, the Complainants cannot rigorously examine the factual basis underlying the representations in Laurel's pleadings or any forthcoming testimony regarding the operational feasibility of bi-directional service.

For example, the Complainants have already encountered a situation illustrating the prejudice arising from Laurel's redactions. Item 7, titled "Laurel Bidirectional," includes [BEGIN HIGHLY CONFIDENTIAL]  
[REDACTED]  
[REDACTED] [REDACTED]  
[REDACTED] [END HIGHLY CONFIDENTIAL]. Similarly, in response to Complainants' Set IV, Interrogatory No. 1, attached hereto as Appendix A, Laurel provided narrative descriptions of the four options for bi-directional service, including "(1) virtual swaps with one path:

<sup>30</sup> *Sullivan v. Warminster Twp.*, 274 F.R.D 147, 152 (E.D. Pa. 2011) (citing *United States v. Rockwell Int'l*, 897 F.2d 1255, 1266 (3d Cir. 1990)).

<sup>31</sup> See Second Motion to Compel, Appendix A.

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(2) controlled swaps to specific line fills; (3) full reversal to accommodate east to west and then west to east service; and (4) a swap/reversal hybrid."<sup>32</sup> However, while the narrative responses to Complainants' Set IV, Interrogatory No. 2 discuss pros and cons with regard to the first three options, Laurel makes no reference to cons when discussing the swap/reversal hybrid option ultimately selected by Laurel for implementation.

[BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]. This scenario presents just one example of the harms associated with Laurel's redactions. To the extent the Commission finds that the Work Product Doctrine applies to the materials relied upon by Mr. Kelly in preparing his Affidavit, the Commission must grant the Complainants' access to such materials as the only means to assess the veracity of his claims that Laurel can implement bi-directional service on a pipeline segment without impairing existing uni-directional service on the same segment.

**V. CONCLUSION**

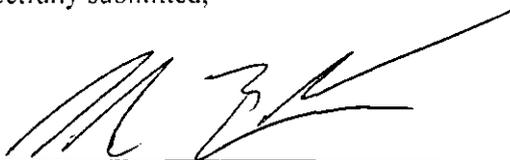
**WHEREFORE**, the Complainants respectfully request that: (i) the ALJ grant certification as requested in the Petition, (ii) the ALJ stay development of a litigation schedule pending disposition of the Questions, (iii) the Commission answer the Questions consistent with this brief and direct Laurel to provide unredacted copies of Items 1 and 4-7 as defined herein, (iv) the Commission reverse the December 4 Order, and (v) the Commission grant such other relief as may be just and reasonable under the circumstances.

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<sup>32</sup> See Appendix A.

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Respectfully submitted,



Dated: December 14, 2018

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Laurel Pipe Line Company, L.P.  
Response to Interrogatories of  
Complainants, Set IV  
Dated November 13, 2018  
**Docket No. C-2018-3003365**

M.J. Kelly and T.J. Zeth  
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- Q. 1. Identify and describe all efforts You have undertaken to evaluate and support Your view/position that the proposed introduction of bidirectional service on the Laurel Pipeline will not impair the existing availability, type, nature and extent of intrastate east to west petroleum product transportation service being provided via the Laurel Pipeline. Provide all documents you relied upon or otherwise reviewed in preparing Your answer.
- A. 1. Buckeye/Laurel evaluated a range of operating scenarios to determine whether or not bidirectional service could be provided over the segment of the L718 line located between Eldorado, Pennsylvania and Coraopolis, Pennsylvania. These informal evaluations were conducted during in-person meetings and considered the design parameters of existing and new assets. In particular, Buckeye/Laurel evaluated whether the existing system could transition from western to eastern flow and eastern to western flow, accommodating peak historical volumes in either direction. It was determined that Laurel's existing assets could make this transition. Based off these discussions, Buckeye/Laurel determined that bidirectional service could be provided over the segment of the L718 line located between Eldorado, Pennsylvania and Coraopolis, Pennsylvania. Please also see Laurel's supplemental response to Set I, No. 2 dated October 31, 2018 and the associated documents.

Once it was determined that bidirectional service could be provided over the segment of the L718 line located between Eldorado, Pennsylvania and Coraopolis, Pennsylvania, Laurel reviewed several options for how bidirectional service would be provided, including: (1) virtual swaps with one path; (2) controlled swaps to specific line fills; (3) full reversal to accommodate east to west and then west to east service; and (4) a swap/reversal hybrid. Each of these options is more fully explained below.

**1) Swaps holding to a single path:** Under this method, the scheduler would virtually ticket deliveries to Eldorado and Coraopolis and exchange eastern barrel nominations for Midwest barrel nominations. Beyond this bi-directional virtual swapping, product would only flow in one direction. Any excess barrels would be held back until it would be logistically possible to deliver such barrels on the current flow path or reverse the line direction in its entirety for the following cycle. This method was rejected because it was not as flexible as the swap/reversal hybrid method that the Company ultimately pursued.

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**2) Controlled swaps to specific line fills:** This method is similar to the virtual swap method described above, in that the scheduler would virtually ticket deliveries to control the flow path. However, under a controlled swap to specific line fills method, the pipeline would operate in a bi-directional manner within each given cycle, to the extent that the pipeline could only be reversed to accommodate predetermined barrel amounts. This method was originally considered because, at the time, Laurel/Buckeye's computer assisted scheduling tool was incapable of reversing a variable amount and, therefore, hand orders would need to be produced if the scheduled movement was not consistent with a predetermined volume. This method was rejected as it would require some barrels to be held back to ensure that only specific pipe segments were reversed and because Laurel/Buckeye ultimately upgraded and modified their computer assisted scheduling tool to have variable reversal capability.

**3) Full reversal:** This method would involve Laurel/Buckeye physically pumping barrels to their destinations as nominated from east to west and then immediately following the east to west movement with a movement of barrels from west to east. Under this method the eastern flow path barrels destined for Eldorado would be sent beyond to Coraopolis, stopping just before delivery. Then the line would be set with product from the west and these barrels could be returned to Eldorado when the west to east barrels were injected into the pipe. This method was rejected because it would result in longer transit times in comparison to the swap/reversal hybrid method pursued by the Company. In addition it would also impose a requirement to have a minimum cycle from both directions and would require terminals to significantly change their delivery routine to accommodate larger deliveries than are currently delivered over the pipeline.

**4) Swap/reversal hybrid:** The swap/reversal hybrid method involves a virtual swap of all available barrels, in tandem with the ability to physically reverse the line, as demand requires. The company initially reviewed the other methods described above, because it was uncertain if the Company's computer assisted scheduling tool could be reprogrammed to produce a schedule that would accommodate reversals involving variable barrel counts. Ultimately Laurel/Buckeye elected to pursue this option as the method to provide bi-directional service and invested in the needed alterations to the computer assisted scheduling tool. Please see (C) LAUB000001291-LAUB000001296.

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Under the swap/reversal hybrid method any given amount of product can be scheduled to move to points west of Eldorado to any extent needed, which would ensure the delivery of all barrels and place the line in a position to be transitioned from east/west flow-path service to west/east flow-path service or vice versa.

Ultimately, Laurel determined that the swap/reversal hybrid method described above best accommodated the interests of its shippers and would avoid certain inefficiencies associated with other methods. For instance, a swap/reversal hybrid would avoid transit time delays associated with the virtual swaps under a one path method. In addition, the swap/reversal hybrid would avoid the cycle time increases associated with physically pumping every barrel and the associated line fills in each direction under the full reversal method. Furthermore, the swap/reversal hybrid method would, in many cases, add additional flexibility to delivery times. In sum, the swap/reversal method would permit all intended shipments to reach their intended destination, without abnormal delays in timing.

In order to implement this option, Laurel reviewed its access to current tankage (see Laurel's response to Compl-LAU-II-5 and Compl-LAU-II-6) and whether additional tankage would be required (see Laurel's response to Compl-LAU-II-33), conducted an Integrity Review (see Laurel's responses to Compl-LAU-II-10 through 18 and Attachment Compl-LAU-II-10), and completed several engineering studies (see Laurel's responses to Compl-LAU-II-19 through 25 and the associated documents). In addition, Laurel has updated its scheduling system, Emerson PipeWorks - PipeScheduler, to enhance the reversal capability on the L718 line (see (C) LAUB000001291-LAUB000001296) and accommodate the swap/reversal hybrid method it intends to use.

Laurel also notes that it conducted extensive engineering analyses related to the previously proposed full reversal, which contemplated the provision of bidirectional service in order to accommodate the transition of the segment of the pipeline located between Coraopolis and Eldorado from west-to-east to east-to-west service, in the event that unexpected or emergency conditions required service to be provided from the east. Please see Laurel's responses and associated Attachments to Complainants Set II, Numbers 4-6, 19-26. Laurel also reviewed these engineering analyses as part of its consideration of bidirectional service.

Having conducted these efforts, Laurel determined that the implementation of bidirectional flow on the L718 line between Eldorado, PA and Coraopolis, PA will not impair existing intrastate east to west service.

## CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of Section 1.54 (relating to service by a participant).

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