

**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;	:	C-2018-3003365
and Sheetz, Inc.	:	
	:	
	:	
v.	:	
	:	
Laurel Pipe Line Company, L.P.	:	

**ORDER
ON PETITION FOR CERTIFICATION**

NON-PROPRIETARY VERSION

On August 17, 2018, Giant Eagle, Inc., Lucknow-Highspire Terminals, LLC, Monroe Energy, LLC, Philadelphia Energy Solutions Refining and Marketing, LLC, and Sheetz, Inc. (Giant Eagle, Inc., et al, or Complainants) served Set I Interrogatories (Discovery) upon Laurel Pipe Line Company, L.P. (Respondent or Laurel).

Complainants' Set I Interrogatories posed the following two discovery questions to the Respondent in this case:

1. *Identify, describe and provide all Documents showing each assessment, analysis, study, and/or investigation (and all conclusions thereof) of various operating scenarios conducted by or for Laurel and any affiliate of Laurel in connection with any bidirectional pipeline transportation service along the Coraopolis-Eldorado segment of the Laurel pipeline (Line 718) within the last five (5) years.*

2. *Re the July 17, 2018 Answer of Laurel Pipe Line Company, L.P. to the Petition for Interim Emergency Relief, Docket No. P-2018-3003368 ("Answer"): provide the active model, including all*

inputs, the analysis, and the results for the range of scenarios evaluated by Laurel or 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.

On September 12, 2018, Laurel submitted its response to Interrogatory Set I, No. 1. Laurel's response to Interrogatory Set I, No. 2 consisted of a Privilege Log and several statements explaining that paragraph 22 of Mr. Kelly's Affidavit in the FERC Answer makes no reference to a model, instead referring to a range of scenarios reviewed by Laurel. See Laurel's Answer to Complainants' Second Motion to Compel, Appendix B.

On October 5, 2018, Laurel supplemented its response to Interrogatory Set I, No. 2 by providing an Updated Privilege Log concerning the same seven items identified in the initial Privilege Log.

On October 12, 2018, Complainants filed a Motion to Compel and Request for Shortened Response Period (Motion to Compel, or Motion). In the Motion, the Complainants argue that the Updated Privilege Log submitted by the Respondent in response to Interrogatory Set I, No. 2 does not justify Laurel's withholding of documents that are responsive to this discovery question.

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

On October 24, 2018, I issued an Order denying the Motion to Compel with regard to Item No. 2 of the Updated Privilege Log, and granting it with regard to Items Nos. 1, 3-7 of the Updated Privilege Log. The Order directed the Respondent to produce these documents to the Giant Eagle, Inc., et al, by no later than October 31, 2018, but allowed Laurel to redact any portion of the documents that included privileged information, in accordance with 52 Pa.Code § 5.323(a).

On October 31, 2018, Laurel served supplemental responses to Interrogatory Set I, No. 2 as instructed by the October 24, 2018 Order.

On November 13, 2018, the Complainants filed a Second Motion to Compel and Request for Shortened Response Period (Second Motion to Compel, or Second Motion) requesting, *inter alia*, that I issue an order: 1) compelling Laurel to limit redacted materials to privileged information consistent with the October 24 Order; 2) denying Laurel's entire claim of privilege for Items Nos. 5 and 7; 3) ordering Laurel to provide Item No. 2 and disclose all emails not specifically exempted from disclosure by the October 24 Order; or in the alternative, conduct an *in camera* review of Items Nos. 1-7.

On November 19, 2018, Laurel filed its Answer to the Second Motion to Compel, along with the supplemental responses served on the Complainants on October 31, 2018. In its Answer, Laurel insisted that it had not redacted non-privileged facts. Instead, it argued that it had redacted only “its party representatives’ mental impressions and conclusions respecting its claim or defense that the provision of bidirectional service will not impair existing east-to-west intrastate service.” Answer, ¶ 20.

By Order dated December 4, 2018, I denied the Complainants’ Second Motion to Compel after finding that Laurel’s redaction of the documents was not excessive, and that Complainants had failed to show that they have a substantial need for the redacted information to prepare their case and cannot, without undue hardship, obtain its substantial equivalent by other means. Order, at 3. In addition, I rejected as baseless the Complainants’ arguments that: 1) Laurel improperly claimed that Items 5 and 7 in the Updated Privilege Log contain privileged material, having failed to classify these documents as such when they were first created; and 2) Laurel omitted e-mails from its October 21 supplemental responses. *Id.* at 3-4.

On December 7, 2018, the Complainants filed a Petition for Certification of a Ruling on a Discovery Matter (Petition), requesting interlocutory review of the December 4, 2018 Order and a stay in the development of a litigation schedule pending disposition of the Questions.

The proposed Questions for Certification are as follows:

1. *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.*
2. *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?*

According to the Complainants the Material Questions involve important issues of law and policy, the resolution of which is necessary to expedite the conduct of the above-docketed proceeding and prevent irreparable harm and substantial prejudice to the Complainants that would otherwise result from the presiding ALJ's Order and cannot be cured during the ordinary course of Commission review. Petition, FN # 1.

On December 14, 2018, the Complainants filed a Brief in support of the Petition. Also on December 14, 2018, the Respondent filed a Brief in opposition to the Petition.

The Pennsylvania Public Utility Code ("Code") states that:

an interlocutory appeal from a ruling of the presiding officer on discovery shall be allowed only upon certification by the presiding officer that the ruling involves an important question of law or policy which should be resolved at that time. Notwithstanding the presiding officer's certification, the commission shall have the authority to dismiss summarily the interlocutory appeal if it should appear that the certification was improvident. An interlocutory appeal shall not result in a stay of the proceedings except upon a finding by the presiding officer and the commission that extraordinary circumstances exist.

66 Pa. C.S. § 333(h). In addition, section 5.304 of the Commission's regulations regarding interlocutory review of discovery matters states that:

(a) *General*. Rulings of presiding officers on discovery are not subject to interlocutory review unless one or more of the following apply:

(1) Interlocutory review is ordered by the Commission.

(2) Interlocutory review is certified by the presiding officer.

(3) The ruling has as its subject matter the deposing of a Commissioner or Commission employee.

(b) *Standard for certification*. A presiding officer may certify that a discovery ruling is appropriate for interlocutory review when the ruling involves an important question of law or policy that should be resolved immediately by the Commission.

52 Pa. Code § 5.304.

Interlocutory reviews of discovery orders are generally disfavored and are only permitted in limited circumstances. *See MCI WorldCom Communications, Inc. v. Verizon Pennsylvania Inc.*, Docket No. C-00015149, at pp. 14-15 (Order entered Nov. 13, 2001) (“*MCI WorldCom*”). Important questions of law or policy are not implicated by routine discovery rulings that deem information outside the scope of a case to be irrelevant. *See Whemco-Steel Castings, Inc. v. Duquesne Light Company*, Docket No. C-2014-2459527, at pp. 4-5 (Interim Order issued by Administrative Law Judge Jeffrey A. Watson Aug. 27, 2015) (“*Whemco-Steel*”); *see also Pa. Pub. Util. Comm’n v. Dauphin Consolidated Water Supply Co.*, 1987 Pa. PUC LEXIS 215, at *9 (Opinion and order entered Aug. 21, 1987) (“*Dauphin Consolidated*”) (“there is nothing exceptional about disputes over the scope of discovery...”).

In the instant case, the discovery Orders dated October 24, 2018 and December 4, 2018, addressed a single interrogatory, Complainants’ Interrogatory Set I, No. 2, which essentially requests the support for a publicly filed affidavit by Michael Kelly in a related proceeding claiming that the commencement of bi-directional service on the Eldorado-Pittsburgh section of the Laurel pipeline will not impair the existing intrastate service offered by the

Respondent. See Complainants' Petition ¶ 5. By way of a response to Complainants' Interrogatory Set I, No. 2, Respondent submitted a Privilege Log¹ containing seven items, essentially claiming that Mr. Kelly's statements were based on the content of those items or documents which were protected from discovery either as a work product or as attorney-client communication.

As mentioned above, the October 24, 2018 Order directed Laurel to produce Items Nos. 1, 3-7 of the Updated Privilege Log to the Giant Eagle, Inc., et al, by no later than October 31, 2018, but allowed Laurel to redact any portion of the documents that include privileged information, in accordance with 52 Pa.Code § 5.323(a).

In accordance with the October 24, 2018 Order, Laurel turned over to the Complainants Items Nos. 1, 4-7 of the Updated Privilege Log. A review of the documents revealed that:

- Item No. 1 is a 5-page PowerPoint document. Laurel's redaction affects only a slide titled [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]
- Item No. 4 is a 9-page PowerPoint document. Laurel's redaction of Item No. 4 affects a single sentence on a slide titled [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] as well as the lower portions of three slides partially titled [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [REDACTED] [END HIGHLY CONFIDENTIAL] respectively. The redacted portions are immediately preceded by the phrase [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [REDACTED] [END HIGHLY CONFIDENTIAL]
- Item No. 5 is a 6-page print-out of an Excel spreadsheet. Laurel's redaction of Item No. 5 affects only one of the six columns of the spreadsheet. The redacted column is titled [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]
- Item No. 6 is a 9-page PowerPoint document. Laurel's redaction of Item No. 6 in the Updated Privilege Log affects a single sentence on a slide titled [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] as well as the lower portions of three slides titled [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [REDACTED]

¹ Respondent later submitted an Updated Privilege Log at the request of the Complainants. The Updated Privilege Log contained the same seven items but more explanation and details in terms of their nature and recipients.

[REDACTED] [END HIGHLY CONFIDENTIAL] respectively.

- Item No. 7 is a 29-page PowerPoint document. Laurel's redaction of Item No. 7 in the Updated Privilege Log affects only three slides consisting of columns titled [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]

The content and layout of the documents submitted by Laurel on October 31, 2018, along with the phrases introducing the redacted portions therein are indicative that the redacted information contains the mental impressions, conclusions or opinions of the preparer with regard to what Laurel has claimed to be one of its potential defenses in this proceeding, i.e. that the provision of bidirectional service will not impair existing east-to-west intrastate service. See Answer, ¶ 20. The redacted portions appear adequately limited to “**the mental impressions, conclusion or opinions of a representative of [Laurel] respecting the value or merit of a claim or defense or respecting strategy, tactics...**”, revealing the overwhelming majority of the documents comprising Items Nos. 1, 4-7 of the Updated Privilege Log. 52 Pa.Code § 5.323. (Emphasis added).

Yet in their Petition, the Complainants make the all-encompassing claim that the redacted sections should not be exempt from discovery because they “contain *factual* matters regarding the operational feasibility of the bi-directional service and are necessary for the development of the Complainants’ case.” Petition, ¶ 6. (Emphasis in the original). They argue that this factual information is central to Complainant’s case and only known to Laurel and its representatives but provide no grounds for their belief. *Id.* Without more, merely claiming that privileged information contains factual matters crucial to a party’s case and known only to the opposing party is insufficient to remove the protection from discovery allowed to such information.

Neither in the Petition nor in their supporting Brief, do the Complainants provide a basis for their claim that redacted information in sections titled [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] contain anything other than the mental impressions,

conclusion or opinions of a representative of Laurel respecting the value or merit of a claim or defense or respecting strategy, tactics, let alone that they contain factual matters not found in the rest of the documents already revealed in Laurel's supplemental responses to Items Nos. 1, 4-7 of the Updated Privilege Log. Similarly, the Complainants fail to account or explain how Laurel's response to the rest of Complainants' discovery requests – in particular, Complainants' Interrogatory Set I, No. 1, which asks Laurel to provide *all Documents showing each assessment, analysis, study, and/or investigation (and all conclusions thereof) of various operating scenarios conducted by or for Laurel and any affiliate of Laurel in connection with any bidirectional pipeline transportation service along the Coraopolis-Eldorado segment of the Laurel pipeline (Line 718) within the last five (5) years*, and the responses to which the Complainants are not disputing – do not provide non-privileged information that is substantially equivalent to the information redacted from Items Nos. 1, 4-7. See Laurel's Brief at 10-11.

In their Brief, the Complainants argue that the Work Product Doctrine does not protect the redacted information from discovery because the documents that comprise Items 1 and 4-7 are business document that are the normal and customary subjects of discovery. According to the Complainants, the Work Product Doctrine does not protect from disclosure documents prepared by party representatives in the regular course of business. Complainants' Brief at 11-13. They argue that for a party's non-attorney representatives, the Doctrine's protection should only extent to information is in the nature of draft testimony or notes from a strategy meeting between internal employees and counsel in anticipation of litigation. Complainants' Brief at 12-13.

The Complainants' argument does not comport with the provisions of 52 Pa. Code § 5.323(a) which specifically state that “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....*”² (Emphasis added). In addition, by arguing that the Work Product

² Incidentally, in claiming that Items 1 and 4-7 were prepared in Laurel's regular course of business and not in anticipation of litigation, Complainants ignore the timeline of Laurel's filing with the Federal Energy Regulatory Commission (FERC) at Docket No. OR18-22-000. In particular, on April 30, 2018, Laurel and its affiliate Buckeye Pipe Line Company, L.P. filed a Petition for Declaratory Order (PDO)with FERC at Docket No. OR-18-22-000 proposing to begin a joint service that will ship petroleum products from origin points in Michigan, Ohio and Pennsylvania and transport those products to destination points in Ohio and Pennsylvania. On June 12,

Doctrine should protect a party's non-attorney representative only to the extent the information is in the nature of draft testimony or notes from a strategy meeting *between internal employees and counsel*, the Complainants disregard the clear language of 52 Pa. Code § 5.323(a) or, at least, attempt to read in it restrictions that the regulation does not include.

Lastly, the Complainants claim that Laurel has waived any privilege under the Work Product Doctrine because in the Affidavit that Mr. Kelly filed with FERC he represented that "Buckeye and Laurel have assessed a range of potential **operating scenarios**, and have confirmed that they could if necessary ... physically transport the full 40,000 bbls/day of the 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." Petition, at 10, *citing* Laurel's Answer to Amended Complaint, Appendix B, Internal Appendix B, at 2. (Emphasis in the Petition). Complainants argue that their Set I, Interrogatory No. 2 seeks the supporting information for Mr. Kelly's statement. Petition, at 10.

The Complainant's claim that Laurel has waived the Work Product privilege with regard to the documents that make up Items. 1 and 4-7 of the Updated Privilege Log is untimely, being first raised in their Brief, instead of their Petition. By failing to raise this issue in their Petition, the Complainants have deprived the Respondent of notice and opportunity to respond to it. The claim is also overbroad as it encompasses, without distinction or detail, the entirety of the documents that comprise Items. 1 and 4-7 of the Updated Privilege Log. The Complainants fail to explain how Mr. Kelly's statement, *supra*, waives the Respondent's Work Product privilege as

2018, the Complainants filed a timely Protest to the PDO at FERC. Then on July 12, 2018, the Complainants filed the present formal Complaint against the Respondent challenging Respondent's intention to initiate bi-directional service in the Eldorado-Pittsburgh portion of the pipeline.

The documents that comprise Items 1 and 4-7 were prepared between February 17, 2018 and May 24, 2018. See Laurel's Answer to Complainants' Second Motion to Compel, Appendix D. The Complainants acknowledge in their Set I, Interrogatory # 2, that these documents were relied upon by Mr. Michael J. Kelly in his Affidavit as part of the FERC Answer, and they do not refute that their present Complaint before the Commission is a direct segue to Laurel's FERC filing. Consequently, the timeline of the FERC and Commission proceedings lends more credibility to Laurel's position that the documents in question were prepared in anticipation of litigation and at the request of Laurel's counsel, than to Complainants' argument that they were prepared during the course of regular business. See Laurel's Answer to Complainants' Second Motion to Compel, Appendix D.

to redacted information in sections titled [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]
[REDACTED] [END HIGHLY
CONFIDENTIAL]

At the heart of the present Petition lays a standard discovery ruling regarding privilege. As such, it falls within the routine scope of discovery and does not raise an issue that is either novel or of such importance that it merits interlocutory review by the Commission. The Complainants fail to identify the question(s) of law or policy to be resolved by certifying the questions and they have failed to demonstrate that the discovery of the requested information is necessary to prevent substantial prejudice to the parties or expedite the conduct of this proceeding. The Petition does not raise any issue that cannot be satisfactorily cured during the normal Commission review process, see *Application of Rasier-PA, LLC*, PUC Docket No. P-2014-2431743 (Opinion and Order entered July 24, 2014), or even during the normal discovery process.

The Material Questions presented in the Petition do not involve important issues of law or policy that should be resolved immediately by the Commission. A stay of the proceedings is not necessary in order to protect the substantial rights of the parties in this matter. The Petition is denied.

THEREFORE,

IT IS ORDERED:

1. That the Petition for Certification of a Ruling on a Discovery Matter filed by Giant Eagle, Inc., Guttman Energy, Inc., Lucknow-Highspire Terminals, LLC, Monroe Energy, LLC, Philadelphia Energy Solutions Refining and Marketing, LLC, and Sheetz, Inc. is denied.

2. That the request for a stay of the proceedings in this matter made by Giant Eagle, Inc., Guttman Energy, Inc., Lucknow-Highspire Terminals, LLC, Monroe Energy, LLC, Philadelphia Energy Solutions Refining and Marketing, LLC, and Sheetz, Inc. is denied.

December 19, 2018

_____/s/
Eranda Vero
Administrative Law Judge

C-2018-3003365 GAIN EAGLE INC.;
LAUCKNOW-HIGHSPIRE TERMINALS, LLC;
MONROE ENERGY; PHILADELPHIA ENERGY
REFINING AND MARKETING, LLC;
AND SHEETZ, INC.

SERVICE LIST

ALAN M SELTZER ESQUIRE
JOHN F POVILAITIS ESQUIRE
BUCHANAN INGERSOL & ROONEY PC
409 N 2nd STREET STE 500
HARRISBURG PA 17101

ACCEPTS E-SERVICE

Counsel to Philadelphia Energy Solutions Refining and Marketing

ROBERT A WEISHAAR JR
MCNEES WALLACE & NURICK LLC
1200 G STREET NW
SUITE 800
WASHINGTON DC 20005

ACCEPTS E-SERVICE

ADEOLU A BAKARE ESQUIRE
MCNEES WALLACE & NURICK LLC
100 PINE STREET
PO BOX 1166
HARRISBURG PA 17108-1166

ACCEPTS E-SERVICE

*Counsel to Lucknow-Highspire Terminals, LLC;
Sheetz, Inc.; and Guttman Energy, Inc.*

KEVIN J MCKEON ESQUIRE
WHITNEY E SNYDER ESQUIRE
TODD S STEWART ESQUIRE
HAWKE MCKEON & SNISCAK LLP
100 NORTH TENTH STREET
HARRISBURG PA 17101

ACCEPTS E-SERVICE

Counsel to Monroe Energy, LLC.

JONATHAN D MARCUS ESQUIRE*
DANIEL J STUART ESQUIRE
SCOTT D LIVINGSTON ESQUIRE
MARCUS & SHAPIRA LLP
100 OXFORD CENTRE 35TH FLOOR
301 GRANT STREET
PITTSBURGH PA 15219
Counsel for Giant Eagle, Inc.
***ACCEPTS E-SERVICE**

DAVID B MACGREGOR ESQUIRE
ANTHONY D KANAGY ESQUIRE
GARRETT P LENT ESQUIRE
POST & SCHELL PC
17 N 2ND STREET 12TH FLOOR
HARRISBURG PA 17101-1601
ACCEPTS E-SERVICE
Counsel for Laurel Pipe Line Company, LP

CHRISTOPHER J BARR ESQUIRE
JESSICA R ROGERS ESQUIRE
POST & SCHELL PC
607 14TH STREET NW
SUITE 600
WASHINGTON DC 20005-2006
***ACCEPTS E-SERVICE**
Counsel for Laurel Pipe Line Company, LP

TIMOTHY K MCHUGH ESQUIRE
BUREAU OF INVESTIGATION & ENFORCEMENT
PA PUBLIC UTILITY COMMISSION
PO BOX 3265
HARRISBURG PA 17105-3265
ACCEPTS E-SERVICE

LAUREL PIPE LINE COMPANY
FIVE TEK PARK
999 HAMILTON BOULEVARD
BREINIGSVILLE PA 18031

RICHARD E POWERS JR
JOSEPH R HICKS
VENABLE LLP
600 MASSACHUSETTS AVENUE NW
WASHINGTON DC 20001