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December 28, 2018

**Via Electronic Filing**

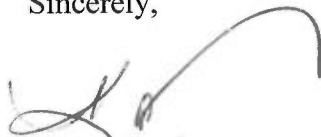
Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Re: Pa. P.U.C. Bureau of Investigation and Enforcement v. Xtreme Energy Company  
Docket No. C-2017-2599145

Dear Secretary Chiavetta:

Enclosed for electronic filing, please find Xtreme Energy Company's Motion to Compel Production of Document Requested by Set III-9 with regard to the above-captioned matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Karen O. Moury  
KOM/lww  
Enclosure

cc: Hon. Joel Cheskis w/enc.  
Cert. of Service w/enc.

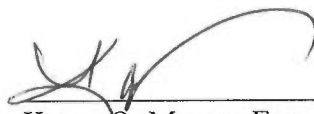
**CERTIFICATE OF SERVICE**

I hereby certify that this day I served a copy of Xtreme Energy Company's Motion to Compel Production of Document Requested by Set III-9 upon the person listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

**Via Email and First Class Mail**

Stephanie M. Wimer, Esq.  
Senior Prosecutor  
Bureau of Investigation & Enforcement  
PA Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265  
[stwimer@pa.gov](mailto:stwimer@pa.gov)

Date: December 28, 2018



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Karen O. Moury, Esq.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, :  
Bureau of Investigation and Enforcement, : Docket No. C-2017-2599145  
Complainant :  
v. :  
Xtreme Energy Company, :  
Respondent :  
:

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**NOTICE TO PLEAD**

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**TO: Pa. Public Utility Commission  
Bureau of Investigation and Enforcement  
Stephanie M. Wimer, Senior Prosecutor  
Michael L. Swindler, Deputy Chief Prosecutor  
P.O. Box 3265  
Harrisburg, PA 17105-3265**

You are hereby notified that a response to the attached **Motion to Compel** of Xtreme Energy Company must be filed within 5 days of the date of service.


All pleadings, such as a response to a Motion to Compel, must be filed with the Secretary of the Pennsylvania Public Utility Commission with a copy served to counsel for Xtreme Energy, and where applicable, the Administrative Law Judge presiding over the proceeding.

File with:

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
PO Box 3265  
Harrisburg, PA 17105-3265

With a copy to:

Karen O. Moury, Esquire  
Carl R. Shultz, Esquire  
Eckert Seamans Cherin & Mellott, LLC  
213 Market Street, 8<sup>th</sup> Floor  
Harrisburg, PA 17101



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Karen O. Moury, Esquire

Date: December 28, 2018

Attorneys for Xtreme Energy Company

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	Docket No. C-2017-2599145
Complainant	:	
v.	:	
	:	
Xtreme Energy Company,	:	
Respondent	:	

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**XTREME ENERGY COMPANY'S  
MOTION TO COMPEL PRODUCTION OF DOCUMENT  
REQUESTED BY SET III-9**

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TO DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE JOEL H. CHESKIS:

Pursuant to 52 Pa. Code § 5.342(g), Xtreme Energy Company (“Xtreme”) files this Motion to Compel, requesting that the presiding officer issue an Interim Order directing the Bureau of Investigation and Enforcement (“I&E”) to provide a full and complete response to Xtreme Interrogatories and Requests for Production of Documents, Set III-9. Although I&E’s witness, Ms. Amy Zuvich, referred to a written summary she prepared regarding an alleged telephone conversation she had with a representative of Xtreme in April 2016, I&E has objected to the production of that written summary. I&E’s reliance on the attorney-client privilege to avoid production of the summary is misplaced since I&E’s prosecutors and Ms. Zuvich do not have an attorney-client relationship. Even if it were privileged, any protection has been waived through Ms. Zuvich’s reference to and reliance on it in testimony. Moreover, Ms. Zuvich did not prepare the summary for the purpose of obtaining professional legal advice. Rather, she prepared the summary in anticipation of litigation and hearing, which the Commission regulations clearly entitle parties to obtain through discovery. 52 Pa. Code § 52 Pa. Code § 5.323(a). In further support hereof, Xtreme Energy avers as follows.

## **I. BACKGROUND**

1. This proceeding was initiated by I&E through the filing of a Formal Complaint, which was served on Xtreme by Secretarial Letter dated April 17, 2018, and involves disputes concerning the responsibility of Xtreme, pursuant to Act 13 of 2012, 58 Pa.C.S. §§ 2301-2318, for the payment of impact fees and administrative charges for two unconventional gas wells that it began operating in 2015.

2. Xtreme obtained a ten-day extension for filing responsive pleadings and timely filed an Answer and New Matter on May 18, 2017. I&E filed a Reply to New Matter on June 6, 2017.

3. A prehearing conference was held on May 2, 2018.

4. The parties thereafter agreed to a litigation schedule, which was memorialized by a Scheduling Order dated July 6, 2018.

5. I&E served the Direct Testimony of Ms. Zuvich, I&E Statement No. 1, on September 4, 2018.

6. I&E filed an Amended Complaint, which was served on Xtreme by Secretarial Letter dated September 7, 2018. Xtreme filed an Answer and New Matter to the Amended Complaint on September 27, 2018. I&E filed a Reply to New Matter on October 17, 2018.

7. Xtreme served the Rebuttal Testimony of Michael Hahn, Xtreme Statement No. 1, on October 16, 2018.

8. I&E served the Surrebuttal Testimony of Ms. Zuvich, I&E Statement No. 1-SR, on November 16, 2018.

9. On December 14, 2018, Xtreme served Interrogatories and Requests for Production of Documents, Set III, on I&E.

10. I&E served an Objection to Discovery on Xtreme on December 21, 2018, objecting to Set III-9, which requests a written summary of a telephone conversation that is referenced in Ms. Zuvich's Surrebuttal Testimony. A full copy of I&E's Objection to Xtreme's Interrogatories and Request for Production of Documents-Set III-9 is attached as Exhibit A.

11. By this Motion, Xtreme respectfully requests that I&E be directed to provide the written summary sought by Set III-9.

12. Evidentiary hearings are scheduled for January 9 and 10, 2019.

## **II. ARGUMENT**

### **A. Commission Regulations Governing Discovery**

13. Under Section 5.321 of the Commission's regulations, "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 52 Pa. Code § 5.321(c).

14. Under Section 5.323 of the Commission's regulations, a party may obtain discovery of matters within the scope of Section 5.321(c) "even though prepared in anticipation of litigation or hearing by or for another party or for that other party's representative, including his attorney, consultant, surety, indemnitor, insurer or agent." 52 Pa. Code § 5.323(a).

15. Discovery that is not permitted by the Commission's regulations includes that which is sought in bad faith; would cause unreasonable annoyance, embarrassment, oppression,

burden or expense to the deponent, a person or party; relates to a matter which is privileged; and would require the making of an unreasonable investigation by the deponent, a party or witness. 52 Pa. Code § 5.361(a).

**B. Discovery Dispute**

16. In I&E Statement No. 1-SR, page 10, Ms. Zuvich discusses notes that she prepared after a call that she states she had with an Xtreme representative on April 8, 2016. The purpose of this testimony was to enhance Ms. Zuvich's credibility about the nature and content of the call, which I&E has relied upon in seeking the imposition of significant Act 13 penalties and administrative civil penalties in this proceeding. See I&E Statement No. 1 at 42.<sup>1</sup>

17. Xtreme III-9 states as follows:

Reference I&E Statement No. 1-SR, page 10. You refer to a written summary of the call that you describe as having occurred on April 8, 2016.

(a) Please indicate the date on which you prepared the written summary.

(b) Please provide a copy of the written summary.

18. I&E asserts that the written summary requested by Xtreme Set III-9 is not discoverable because it relates to an attorney-client communication, a matter which is privileged. Objection, at 5.

19. Xtreme disagrees with I&E that the written summary is protected from discovery due to the attorney-client privilege. The attorney-client privilege is inapplicable because I&E prosecutors do not have an attorney-client relationship with the witness, Ms. Zuvich, and they were not providing professional legal advice to her in connection with the written summary that she prepared. Moreover, even if it had been an attorney-client communication, the privilege was

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<sup>1</sup> The numerous instances in which Ms. Zuvich referenced the call appear in Paragraph 34 of this Motion.

waived when Ms. Zuvich testified about the written summary. Finally, the Commission's regulations clearly provide that information that was prepared in anticipation of litigation or hearing by or for another party may be obtained through discovery.

**C. Inapplicability of Attorney-Client Privilege**

**1. Attorney Client Privilege Narrowly Construed**

20. The attorney-client privilege makes counsel incompetent to testify to confidential communications made by his client and it prohibits compelling the client to disclose the communications. 42 Pa.C.S. § 5928.

21. Pennsylvania courts narrowly construe the attorney-client privilege because it undermines the fact-finding process of our judicial system. *See Joyner v. Se. Pa. Transp. Auth.*, 736 A.2d 35, 38 (Pa. Cmwlth. Ct. 1999). In Pennsylvania, a party invoking the attorney-client privilege must establish the following elements:

- (a) The asserted holder of the privilege is one sought to come a client;
- (b) The person to whom the communication was made is a member of the bar of a court, or his subordinate;
- (c) The communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and
- (d) The privilege has been claimed and is not waived by the client.

*Red Vision Sys., Inc. v. Nat'l Real Estate Info. Servs., L.P.*, 108 A.3d 54, 62-63 (Pa. Super. Ct. 2015). As to the waiver of a privilege, it is axiomatic that a party waives the attorney-client privilege when the party places the privileged communications at issue in the litigation. *Salsman v. Brown*, 51 A.3d 892, 895, n. 3 (Pa. Super. Ct. 2012).

22. Under the case law cited by I&E, the attorney-client privilege requires the existence of a relationship in which an attorney is acting in his or her professional capacity as a lawyer. *Okum v. Commonwealth of Pa.*, 465 A.2d 1324, 1325 (Pa. Cmwlth. 1983), citing *In re Fogg's Estate*, 94 A. 453 (Pa. 1915). The key is to determine whether there has been a professional consultation with an attorney, who acts or advises as such. *Okum*, 465 A.2d at 1325, citing *Alexander v. Queen*, 97 A. 1063 (Pa. 1916).

## 2. No Attorney-Client Relationship

23. Section 502 of the Public Utility Code (“Code”), empowers the Commission to institute legal proceedings to enforce the Code, Commission regulations and Commission orders. 66 Pa. C.S. § 502.

24. Pursuant to Code Section 502, the Commission has delegated its authority to I&E to “participate in all Commission proceedings and to initiate enforcement actions and prosecutions in the public interest.” *Implementation of Act 128 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011) (“*August 11 Reorganization Order*”), at 5. Specifically, in the *August 11 Reorganization Order*, the Commission created I&E, following the abolition of the former Office of Trial Staff, to serve “as the prosecutory bureau for purposes of representing the public interest in ratemaking and service matters before the Office of Administrative Law Judge.” *August 11 Reorganization Order* at 5.

25. Therefore, in this proceeding, I&E is exercising the prosecutory authority delegated to it by the Commission, and acting on behalf of the Commission. To the extent that I&E has a client other than “the public interest,” the client would be the Commission.

26. I&E prosecutors do not serve in the capacity as attorneys representing Ms. Zuvich, or for that matter, even the Bureau of Administration. Rather, the Commission’s other bureaus

serve in a referral and supportive role in connection with I&E's enforcement and prosecutory functions.<sup>2</sup> Referring matters and supporting I&E's prosecutory functions do not make the other bureaus, and especially the staff members within those bureaus, clients of I&E for purposes of invoking the attorney-client privilege in a prosecutory proceeding, such as this Complaint.

27. Notably, the *August 11 Reorganization Order* did not, and could not, alter the Law Bureau's role as the Commission's chief legal adviser and its statutory obligation to "advise the commission on any and all matters." 66 Pa. C.S. § 308(b).<sup>3</sup> While Section 308(b) also authorizes the Law Bureau to perform prosecutory functions, it does not impose any such statutory obligation on the Law Bureau, and the Commission decided through the *August 11 Reorganization Order* to assign all prosecutory functions and staff to I&E.

### 3. Not Providing Legal Advice as Counsel

28. In addition to lacking the necessary attorney-client relationship, I&E also was not providing legal advice to Ms. Zuvich in connection with the written summary of the conversation that she provided to the I&E prosecutors. Nothing about the alleged telephone call has any bearing on whether Xtreme is in compliance with Act 13 and enforcement actions are warranted; therefore, with respect to the written summary, I&E was not providing "professional legal advice concerning Xtreme's compliance with Act 13." Objection, at 7.

29. To the contrary, Ms. Zuvich provided the written summary to I&E to assist with the prosecution of Xtreme – not to be represented by or receive legal advice from I&E. Simply,

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<sup>2</sup> See, e.g., Commission's Keystone Connection issued after adoption of the *August 11 Reorganization Order* ([http://www.puc.pa.gov/General/publications\\_reports/pdf/KC\\_Summer\\_11.pdf](http://www.puc.pa.gov/General/publications_reports/pdf/KC_Summer_11.pdf)) (On Page 25, the Commission characterized technical staff from other bureaus as being temporarily assigned to I&E as necessary to handle prosecutions in their areas of expertise).

<sup>3</sup> The "commission" does not mean just the Commissioners but also includes its bureaus and staff. See *Pa. P.U.C. v. Seder*, 635 Pa. 570, 581-583 (2016), 2016 Pa. LEXIS 1076.

no attorney-client relationship exists and I&E does not serve in the role of providing professional legal advice to other bureaus – a role that has been reserved by the statute for the Law Bureau.

30. By contrast, in *Heavens v. Pa. Dep't of Env'tl. Prot.*, 65 A.3d 1069 (Pa. Cmwlth. 2013), which is relied upon by I&E in this proceeding, the agency asserted the attorney-client privilege in the context of a Right to Know Law request submitted for records related to an investigation. In support, the agency presented affidavits of its program manager, legal counsel to the bureau and a special investigator. Notably, in *Heavens*, the attorney was described as the counsel for the bureau with whom he was communicating. Also, the affidavits made clear that the records contained communications to and by agency counsel for the purpose of providing legal advice concerning legal issues arising out of the agency's investigation. The affidavits also made clear that the legal communication has remained confidential and has not been disclosed to third parties that are not part of the attorney-client relationship. Therefore, the agency was found to have met its burden. Here, I&E has not established any of these facts and otherwise has not met its burden of showing that the written summary is protected by the attorney-client privilege.

31. In any event, this proceeding has evolved beyond the point of being an investigation since it involves the prosecution of a formal complaint. The Commission's regulations leave no doubt that information that was prepared in anticipation of litigation or hearing by or for another party may be obtained through discovery. 52 Pa. Code § 5.323(a).

32. Allowing access to such information is a matter of fundamental fairness. Particularly here where the written summary that I&E is seeking to withhold from Xtreme is being used by I&E to enhance the credibility of Ms. Zuvich as a witness and to bolster I&E's request for the imposition of significant monetary penalties, fundamental fairness dictates that Xtreme be

provided with a copy of it.<sup>4</sup> Moreover, even if an attorney-client privilege ever existed, it was waived when Ms. Zuvich discussed the written summary in her Surrebuttal Testimony.

**D. Alternatively, Certain Testimony Should Be Stricken.**

33. I&E cannot have it both ways. If I&E is not required to produce the written summary of the call, then all of Ms. Zuvich's direct and surrebuttal testimony concerning the call that she describes as having occurred on April 8, 2016 should be stricken. Without access to the written summary of the call, Xtreme will have been denied adequate opportunity to be heard on the issues that are raised by Ms. Zuvich's testimony.

34. The testimony that should be stricken from I&E Statement No. 1 appears on the following pages/lines: page 8, line 21, through page 9, line 20; page 12, lines 15 and 16; page 24, lines 1 and 5; page 41, line 7; page 42, lines 13-18; page 44, lines 15-17; page 46, lines 18-22; and page 47, lines 19-20. The testimony that should be stricken from I&E Statement No. 1-SR appears on the following pages/lines: page 3, lines 4-5; page 4, lines 2-11; page 9, lines 16-20; pages 10, 11, 12; page 13, lines 1-7; page 30, lines 3-4; page 30, lines 7-16; page 33, lines 14-17. Also, I&E Exhibit SR-1, SR-4 and SR-5 relate to the call.

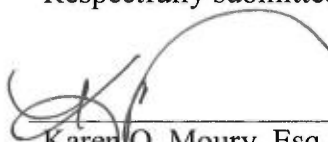
**III. CONCLUSION**

WHEREFORE, Xtreme Energy Company respectfully requests that the presiding officer grant this Motion to Compel, directing the Bureau of Investigation and Enforcement to produce the document requested by Xtreme III-9.

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<sup>4</sup> See Pennsylvania Rules of Evidence, Rule 612 (a witness may use a writing to refresh memory while testifying, adverse parties are permitted to inspect the document) and Rule 613 (a witness' credibility may be impeached if testimony differs from prior written statements).

Respectfully submitted,



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Date: December 28, 2018

Attorneys for  
Xtreme Energy Company