



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

January 2, 2019

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. Xtreme Energy Company
Docket No. C-2017-2599145
I&E Answer to Motion to Compel

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Answer of the Bureau of Investigation and Enforcement to the Motion to Compel of Xtreme Energy Company ("Xtreme") relating to Xtreme's Interrogatories and Requests for Production of Documents, Set III, No. 9, in the above-referenced proceeding.

Copies are being served on the parties of record in accordance with the attached Certificate of Service.

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

Sincerely,

A handwritten signature in cursive script, appearing to read "SMW", is written in black ink.

Stephanie M. Wimer
Senior Prosecutor
Attorney ID No. 207522

Enclosure

cc: Honorable Joel H. Cheskis
Michael L. Swindler, Deputy Chief Prosecutor
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-2017-2599145
	:	
Xtreme Energy Company,	:	
Respondent	:	

**ANSWER OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT TO
THE MOTION TO COMPEL OF XTREME ENERGY COMPANY RELATING
TO INTERROGATORIES AND REQUESTS FOR PRODUCTION OF
DOCUMENTS, SET III, NO. 9**

TO THE HONORABLE DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE JOEL
H. CHESKIS:

Pursuant to 52 Pa. Code § 5.342(g)(1), the Bureau of Investigation and Enforcement (“I&E”) of the Pennsylvania Public Utility Commission (“Commission”), by and through its prosecuting attorneys, hereby files this Answer to the Motion to Compel filed by Xtreme Energy Company (“Xtreme” or “Company”) on December 28, 2018, relating to the Interrogatories and Requests for Production of Documents, Set III, No. 9, propounded by Xtreme on December 14, 2018. In support thereof, I&E avers as follows:

I. INTRODUCTION

On December 21, 2018, I&E submitted to Xtreme a limited Objection regarding a single discovery request contained in the third set of Interrogatories and Requests for Production of Documents that were directed to I&E. The discovery request in question

seeks a communication made by a Commission employee to an I&E prosecutor for the purpose of seeking legal consultation in anticipation of administrative litigation before the Commission. This Commission employee serves as I&E's prosecutorial liaison as well as I&E's witness in this proceeding and thus, I&E asserts that such communication is privileged and not discoverable. Xtreme disagreed with I&E's position set forth in the Objection and Xtreme filed the instant Motion to Compel. A procedural history of this matter follows.

On April 12, 2017, I&E filed a Formal Complaint ("Complaint") against Xtreme alleging that Xtreme failed to comply with Section 2303(c) of Act 13 of 2012, known as the unconventional Gas Well Impact Fee Act ("Act 13"), 58 Pa.C.S. § 2303(c), in that it has not paid the impact fees and administrative charges imposed under Act 13 for its two unconventional gas wells operating in Pennsylvania related to the 2014 and 2015 calendar years. I&E's Complaint requested that Xtreme be ordered to pay its past due impact fees and administrative charges in the amount of \$70,600 plus interest and penalties of \$19,768. I&E also requested that Xtreme be ordered to pay an administrative civil penalty of \$21,180, for a total amount due of \$111,548.

On May 18, 2017, after receiving a ten-day extension of time to respond, Xtreme filed an Answer and New Matter denying the various material averments of I&E's Complaint. On June 6, 2017, I&E filed a Reply denying the averments raised in Xtreme's New Matter.

This matter was originally scheduled for an initial hearing on May 2, 2018 before presiding Deputy Chief Administrative Law Judge Joel H. Cheskis ("presiding Deputy

Chief ALJ”), but was converted into a prehearing conference upon consideration of a Motion to Convert filed by Xtreme. A prehearing conference was then held on May 2, 2018, following which the parties were asked to submit memoranda of law regarding two issues: (1) whether the hearing should be conducted with live testimony or pre-served written testimony; and (2) whether the proceeding should be held in abeyance pending the Supreme Court’s action in *Snyder Brothers, Inc. v. Pa. Pub. Util. Comm’n*, 2018 WL 6817092, 47 and 48 WAP 2017 (Pa. December 28, 2018) (“Snyder Brothers”). The parties submitted their respective memoranda of law on June 4, 2018.

On June 25, 2018, the presiding Deputy Chief ALJ issued a prehearing order determining that the matter will not be held in abeyance pending the Supreme Court’s action in *Snyder Brothers* and requesting that the parties submit an agreed upon schedule for litigating the matter, including the submission of pre-served written testimony. A scheduling order was issued on July 6, 2018 memorializing the litigation schedule that was agreed upon by the parties.

On September 4, 2018, I&E filed an Amended Complaint updating allegations against Xtreme to include violations pertaining to the 2016 calendar year. I&E’s Amended Complaint requested that Xtreme be ordered to pay its past due impact fees and administrative charges for the 2014, 2015 and 2016 calendar years in the amount of \$100,900 plus interest and penalties of \$28,252. I&E also requested that Xtreme be ordered to pay an administrative civil penalty of \$31,770, for a total amount due of \$160,922. Additionally, on September 4, 2018, I&E served I&E Statement No. 1, the

written Direct Testimony of Amy Zuvich of the Commission's Bureau of Administration, who is I&E's witness in this proceeding.

On September 27, 2018, Xtreme filed an Answer and New Matter in response to I&E's Amended Complaint denying the various material averments made by I&E.

On October 16, 2018, Xtreme served Xtreme Statement No. 1, the written Rebuttal Testimony of Michael Hahn, Xtreme's witness in this proceeding.

On October 17, 2018, I&E filed a Reply to Xtreme's New Matter.

On November 16, 2018, I&E served I&E Statement No. 1-SR, the written Surrebuttal Testimony of Amy Zuvich.

An evidentiary hearing is scheduled in this matter on January 9 and 10, 2019.

Throughout the pendency of this proceeding, the parties have conducted discovery pursuant to the Commission's regulations at 52 Pa. Code § 5.321 *et seq.* On December 14, 2018, Xtreme served its Interrogatories and Requests for Production of Documents, Set III, directed to I&E. Among Xtreme's twenty-three (23) Interrogatories and/or Requests for Production of Documents set forth in Set III, many of which contain multiple subparts, Xtreme Set III, No. 9 ("Xtreme-III-9") seeks information that is beyond the scope of permissible discovery in that it relates to a matter which is privileged pursuant to 52 Pa. Code § 5.361(a)(3). Aside from Xtreme-III-9, I&E has fully and completely answered all of Xtreme's Set I and Set II Interrogatories and Requests for Production of Documents, even matters which I&E considers to be duplicative and arguably irrelevant, and intends to fully and completely answer all of Xtreme's Set III Interrogatories and Requests for Production of Documents aside from the aforementioned

request. However, it is I&E's position that Xtreme-III-9 impermissibly requests disclosure of an attorney-client communication and should be stricken.

On December 19, 2018, prior to the service of the I&E's Objection, I&E communicated with Xtreme to explain the basis for I&E's issue with Xtreme-III-9 and attempted amicably resolve the matter without being required to submit an Objection. However, due to time constraints associated with the Commission's closure on December 24, 2018,¹ the parties were not able to meaningfully discuss the merits of the Objection before the deadline and I&E was required to serve the Objection on December 21, 2018. Following the service of I&E's Objection and prior to the filing of the Motion to Compel, Xtreme communicated to I&E on December 26, 2018 the basis for its disagreement with I&E's position. Thus, the parties' attempts to resolve this narrow dispute were unsuccessful.

II. ARGUMENT

In proceedings before the Commission, a participant 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 or participant. 52 Pa. Code § 5.321(c). Section 5.321(c) of the Commission's regulations further provides that "[i]f is not ground for objection that the information sought will be inadmissible at hearing if

¹ The home page of the Commission's website, www.puc.pa.gov, indicated that the Secretary's Bureau was nevertheless accepting filings until 4:30 PM on December 24, 2018, the date that I&E's Objections were due.

the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.*

Further, Section 5.361 of the Commission’s regulations specifically limits the scope of discovery in proceedings before the Commission. In particular, Section 5.361 provides the following:

- (a) Discovery or deposition is not permitted which:
 - (1) Is sought in bad faith.
 - (2) Would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or participant.
 - (3) **Relates to a matter which is privileged.**
 - (4) Would require the making of an unreasonable investigation by the deponent, a participant or witness.

52 Pa. Code § 5.361(a)(emphasis added).

I&E asserts that Xtreme-III-9 seeks information that is not permitted because it relates to an attorney-client communication, a matter which is privileged. As such, I&E requests that Xtreme-III-9 be stricken.

Xtreme-III-9 states as follows:

Reference I&E Statement No. 1-SR, page 10. You refer to a written summary you made 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.

By way of context, I&E Statement No. 1-SR, page 10, discusses notes prepared by I&E witness Amy Zuvich after her April 8, 2016 telephone conversation with Mr. Hahn of Xtreme in which she informed Mr. Hahn of Xtreme's Act 13 obligations.² Ms. Zuvich testified as follows:

“However, after the call, I prepared a written summary of the call **for I&E prosecutors.**” I&E Statement No. 1-SR, page 10, lines 18-19 (emphasis added).

The existence of this written summary, and not the contents, was only referenced in the Surrebuttal Testimony of I&E's witness because Xtreme had erroneously argued that Ms. Zuvich indicated that she did not take notes of her telephone conversation with Mr. Hahn.³ Xtreme's witness, Mr. Hahn, claims that he does not recall having any telephone conversation with Ms. Zuvich⁴ and, thus, the existence of Ms. Zuvich's written summary of the call is significant in that it lends credence to her testimony that the call indeed occurred.

On behalf of the Bureau of Administration, Ms. Zuvich provided her written summary of the telephone conversation to I&E for prosecution of this matter pursuant to Section 1304 of the Commission's internal Procedures Manual. The Commission has designated I&E as the prosecutory bureau responsible for enforcing compliance with actions before the Commission. 66 Pa.C.S. § 308.2(a)(11); *See also Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852

² See I&E Statement No. 1, page 8, line 22 and page 9, line 1.

³ Xtreme Statement No. 1 at 8, lines 6-7.

⁴ Xtreme Statement No. 1 at 8, lines 8-10.

(August 11, 2011) (delegating authority to initiate proceedings that are prosecutory in nature to I&E). The Commission's internal Procedures Manual permits non-prosecutory bureaus within the Commission to refer matters to I&E for potential prosecution. *See* Sections 1304 and 1307 of the Commission's Procedures Manual. Indeed, it is often employees of Commission bureaus other than I&E prosecutor staff who interact with utilities and other entities subject to the Commission's jurisdiction and are in positions to observe regulatory violations. They are the "eyes" and "ears" of the Commission. Their communications, which may contain impressions, observations and explanations, are provided to I&E in writing and are evaluated by I&E prosecutors to determine whether the described actions warrant prosecution. The employees who interacted with the entity, observed the alleged violation(s) and made the referral to I&E then generally serve as I&E's prosecutorial liaisons in future enforcement proceedings.

I&E thus argues that Ms. Zuvich's written summary is a protected communication under the attorney-client privilege. 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. The Pennsylvania Supreme Court promulgated the Rules of Professional Conduct in which a lawyer is also precluded from revealing information relating to representation of a client unless, *inter alia*, the client gives informed consent. Pa.R.P.C. § 1.6(a). 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). The “attorney-client privilege is at the heart of the adversary system; its purpose is to support that system by promoting loyalty and trust between an attorney and a client” and seeks to promote the administration of justice. *Commonwealth of Pa. v. Williams*, 86 A.3d 771 (Pa. 2014), citing *In re: Ford Motor Company*, 110 F.3d 954 (3d Cir. 1997).

Commonwealth Court has previously held that communications between employees of a state agency and the agency’s legal counsel may be protected by the attorney-client privilege and not subject to disclosure. In *Heavens v. Pa. Dep’t of Env’tl. Prot.*, 65 A.3d 1069 (Pa. Cmwlth. 2013), the Pennsylvania Department of Environmental Protection (“DEP”) partially denied a Right to Know Law (“RTKL”) request for copies of files relating to DEP’s investigation of a fire at a gas well. DEP’s denial was based, in part, on its assertion that the material requested was protected from disclosure under the attorney-client privilege. The Office of Open Records (“OOR”) concluded that DEP had met its burden in demonstrating that the requested records were protected from disclosure. In affirming the OOR, Commonwealth Court found that DEP demonstrated that the records “contain communications made to and by DEP counsel for the purpose of providing professional legal advice concerning legal issues arising out of DEP’s investigation . . . of the well site fire.” *Heavens*, 65 A.3d at 1076.

In the matter at hand, Ms. Zuvich’s written summary was provided to I&E prosecutors for the purposes of providing professional legal advice concerning Xtreme’s

compliance with Act 13 and to evaluate the necessity of a prosecution. Ms. Zuvich's written summary served as the basis for the Bureau of Administration's referral of the instant matter to I&E and Ms. Zuvich is serving as I&E's prosecutorial liaison for the purposes of this proceeding, pursuant to Section 1304(B) of the Commission's internal Procedures Manual. An affidavit from Ms. Zuvich is attached hereto as I&E Attachment A.

I&E strongly asserts that Ms. Zuvich's written summary must be preserved as confidential pursuant to the attorney-client privilege and not disclosed. Her summary is no different than a written communication between Mr. Hahn of Xtreme and Mr. Hahn's counsel. If Ms. Zuvich is required to disclose the written communication that she made to I&E in anticipation of the instant enforcement action, then it would only be fair to require Xtreme to disclose any and all written communications between its witness and legal counsel. Such a result would be absurd.

Moreover, if Ms. Zuvich's written summary were to be disclosed, there will be a chilling effect on communications from Commission bureaus/potential prosecutorial liaisons to I&E. Such communications are essential to I&E to protect the public interest by enforcing compliance as it is Commission employees who often observe violations and bring those violations to I&E's attention.

In addition, Ms. Zuvich did not waive the attorney-client privilege in her Surrebuttal Testimony. She clearly stated that she prepared a written summary of the telephone conversation to I&E prosecutors. At no point was the document or its contents

disclosed. To the contrary, the essence of this discovery dispute is to protect the disclosure of the document.

Just as was the case in *Heavens*, Ms. Zuvich approached I&E for professional legal advice to evaluate Xtreme's compliance with Act 13 and make a determination whether a formal enforcement action was warranted. Such communication must be preserved as confidential and not disclosed. In summary, Xtreme-III-9 should be stricken.

I&E nevertheless recently learned of the existence of an internal notation made by Ms. Zuvich in the Commission's Act 13 computer system that documented her conversation with Mr. Hahn on April 8, 2016 shortly after the phone call took place. In the spirit of compromise, I&E intends to produce this document to Xtreme in response to Xtreme-III-9, which should hopefully resolve Xtreme's concerns regarding the occurrence and content of Ms. Zuvich's telephone call to Mr. Hahn without divulging privileged communication.

III. ANSWER

As further support to deny Xtreme's Motion to Compel, I&E offers the following responses in enumerated fashion:

1. Admitted in part, denied in part. It is denied that Xtreme began operating two unconventional gas wells in Pennsylvania in 2015 and strict proof thereof is demanded. The remaining averments in Paragraph 1 are admitted.
2. Admitted.

3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted.
7. Admitted.
8. Admitted.
9. Admitted.
10. Admitted.
11. Admitted in part, denied in part. It is only admitted that Xtreme seeks production of the written summary requested in Xtreme-III-9. It is denied that I&E is required to produce the written summary because it concerns a privileged matter.
12. Admitted.
13. The averments contained herein are conclusions of law to which no response is required. To the extent a response is required, the averments are denied. By way of further answer, 52 Pa. Code § 5.321 speaks for itself.
14. The averments contained herein are conclusions of law to which no response is required. To the extent a response is required, the averments are denied. By way of further answer, 52 Pa. Code § 5.323 speaks for itself.
15. The averments contained herein are conclusions of law to which no

response is required. To the extent a response is required, the averments are denied. By way of further answer, 52 Pa. Code § 5.361 speaks for itself.

16. Denied. It is denied that Ms. Zuvich's testimony discusses, as opposed to references, a written summary that she prepared for I&E prosecutors following her telephone conversation with a representative from Xtreme. By way of further answer, aside from this written summary, Ms. Zuvich's telephone log on April 8, 2016 and the notations that she made in the Commission's Act 13 computerized system also serve to enhance her credibility that she discussed Act 13 with Xtreme.
17. Admitted in part, denied in part. It is only admitted that the averment accurately represents Xtreme-III-9. It is denied that Xtreme-III-9 is lawful or appropriate in that it seeks privileged matter from I&E.
18. Admitted.
19. Admitted in part, denied in part. It is only admitted that Xtreme disagrees that I&E's written summary is protected from discovery due to the attorney-client privilege. The remaining averments in Paragraph 19 are denied for the reasons set forth in the Argument section of I&E's Answer.
20. The averments contained herein are conclusions of law to which no response is required. To the extent a response is required, the averments are denied. By way of further answer, 42 Pa.C.S. § 5928 speaks for itself.

21. The averments contained herein are conclusions of law to which no response is required. To the extent a response is required, the averments are denied. By way of further Answer, Ms. Zuvich never revealed the contents of the written communication she made to I&E prosecutors and only testified about the existence of the communication to defend herself from an accusation advanced by Xtreme that Ms. Zuvich made no notation of the conversation.
22. The averments contained herein are conclusions of law to which no response is required. To the extent a response is required, the averments are denied. By way of further answer, I&E's Objection speaks for itself.
23. The averments contained herein are conclusions of law to which no response is required. To the extent a response is required, the averments are denied. By way of further answer, 66 Pa.C.S. § 502 speaks for itself.
24. The averments contained herein are conclusions of law to which no response is required. To the extent a response is required, the averments are denied. By way of further answer, the Commission's Reorganization Order speaks for itself.
25. Denied. Any implication that Ms. Zuvich, who is serving as I&E's prosecutorial liaison in this matter, is not I&E's client for the purposes of protecting her communications to I&E prosecutors is denied.
26. Denied. Persons serving as prosecutorial liaisons and I&E prosecutors form an attorney-client relationship in that I&E prosecutors assist liaisons

with hearing preparation and discovery, consult with them regarding goals or aims of a particular proceeding that would serve the public interest or the interest of their bureau, and generally advise them. If the written communication at issue were to be disclosed and not barred by attorney-client privilege, then opposing parties could request any and all notes of an I&E prosecutorial liaison/witness that were made to legal counsel without I&E being able to request the same. Such a result would give opposing parties an unfair advantage to I&E in every proceeding before the Commission.

27. The averments contained herein are conclusions of law to which no response is required. To the extent a response is required, the averments are denied. By way of further answer, 66 Pa.C.S. § 308(b) and the Commission's Reorganization Order speaks for itself.
28. Denied. It is denied that the written summary at issue was not provided to I&E prosecutors for the purpose of providing professional legal advice concerning Xtreme's compliance with Act 13. It is also denied that the telephone call has no bearing on whether Xtreme is in compliance with Act 13 and whether an enforcement action was warranted, for it is during this phone call that Ms. Zuvich personally advised Mr. Hahn of Xtreme of Act 13.
29. Denied. The averments in Paragraph 29 are denied. By way of further answer, Ms. Zuvich sought the initiation of an enforcement action by I&E

through her written summary of her interaction with Xtreme. I&E prosecutors have advised Ms. Zuvich throughout this entire process.

30. Denied. The averments in Paragraph 30 are denied. By way of further answer, the affidavit from Ms. Zuvich, which is attached hereto as I&E Attachment A, demonstrates that the written communication she made to an I&E prosecutor sought legal assistance from I&E and that she has been counseled and advised by I&E prosecutors throughout the pendency of this proceeding.
31. Admitted in part, denied in part. It is only admitted that this proceeding involves prosecution of a formal complaint. The remaining averments contained herein are conclusions of law to which no response is required. To the extent a response is required, the averments are denied. By way of further answer, 52 Pa. Code §5.323(a) speaks for itself.
32. Denied. The averments of Paragraph 32 are denied. By way of further answer, Ms. Zuvich's testimony in and of itself is credible and is supported not only by the written summary she prepared for I&E prosecutors, but also her telephone log and the notations that she made in the Commission's Act 13 computerized system following her telephone conversation with Mr. Hahn. Fundamental fairness would dictate that Mr. Hahn disclose all written communications he had with counsel concerning this proceeding. Moreover, Ms. Zuvich did not waive the communication or place it at issue in this proceeding. Indeed, it was Mr. Hahn who testified that Ms. Zuvich

had no notes of the telephone conversation. Ms. Zuvich responded by testifying about the existence, but not the contents, of this communication she prepared for I&E prosecutors.

33. Denied. The averments of Paragraph 33 are denied. By way of further answer, Ms. Zuvich's testimony alone, without the written summary she made to I&E prosecutors, is competent evidence. Moreover, Ms. Zuvich's testimony about the existence and nature of the call is supported by her telephone log on April 8, 2016 and the notations that she made in the Commission's Act 13 computerized system.

34. Denied. The averments of Paragraph 34 are denied. By way of further answer, I&E incorporates its response to Paragraph 33, *supra*.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, the Bureau of Investigation and Enforcement respectfully requests that Your Honor deny the Motion to Compel of Xtreme Energy Company and strike Xtreme's Interrogatory and Request for Production of Document, Set III, No. 9.

Respectfully submitted,



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

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

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 772-8839
stwimer@pa.gov

Date: January 2, 2019

Pennsylvania Public Utility
Commission, Bureau of Investigation
and Enforcement,

Complainant

v.

Xtreme Energy Company,
Respondent

Docket No. C-2017-2599145

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:

Karen O. Moury, Esquire
Carl R. Shultz, Esquire
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
kmoury@eckertseamans.com
cshultz@eckertseamans.com

Counsel for Xtreme Energy Company



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

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 772.8839
stwimer@pa.gov

Dated: January 2, 2019