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July 8, 2013

Via Hand Delivery and Electronic Mail

Honorable Dennis J. Buckley
Administrative Law Judge
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17101

RE: Columbia Water Company; Docket No. R-2013-2360798; **Answer of the Columbia Water Company in Opposition to the Office of Consumer Advocate's Motion to Compel Answer To OCA Set 1 Interrogatory No. 26**

Dear ALJ Buckley:

Enclosed is the Answer of the Columbia Water Company in Opposition to the Motion to Compel Answer filed by the Office of Consumer Advocate as noted in the above-referenced docket. Copies of this document have been served in accordance with the attached Certificate of Service.

If you have any questions regarding this filing, please do not hesitate to contact me.

Very truly yours,

Thomas J. Sniscak
William E. Lehman

Counsel to the Columbia Water Company

WEL/bes

Enclosure

cc: Per Certificate of Service
Rosemary Chiavetta, Secretary (via electronic filing)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No. R-2013-2360798
	:	
The Columbia Water Company	:	

**ANSWER OF THE COLUMBIA WATER COMPANY IN OPPOSITION
TO THE OFFICE OF CONSUMER ADVOCATE’S MOTION TO COMPEL
ANSWER TO OCA SET 1 INTERROGATORY NO. 26**

Pursuant to 52 Pa. Code §§ 5.103 and 5.342, the Columbia Water Company (“Columbia Water” or the “Company”), by and through its attorneys in the above-captioned proceeding, Hawke McKeon & Sniscak LLP, hereby answers the Office of Consumer Advocate’s (“OCA”) Motion to Compel Answer to OCA Set I Interrogatory No. 26 (the “Motion”). For the following reasons, the Motion is without merit and should be denied.

I. INTRODUCTION

OCA’s Interrogatory I-26 purports to seek information regarding an account labeled “Officers, Directors & Majority Stockholders” at page 1-15 of the Company’s rate filing. That account, which contains a claim of \$68,900, reflects the officers’ salaries paid to certain individuals who are both part-time officers and directors of the Company. In the Company’s 2008 rate case, OCA opposed the Company’s claim for director’s fees for directors who are also officers; OCA proposed to remove \$57,100 from the directors’ fees claimed under the novel theory that, despite the different obligations directors have, the Company is not entitled to recover the compensation paid to officer/directors for their services as directors. The ALJ rejected OCA’s proposal and found that the subject was a matter of managerial discretion. The Commission also rejected OCA’s proposed adjustment but said in Ordering Paragraph 5 of its

decision that, for officers who are also directors, “the Columbia Water Company shall, in future rate cases, provide an accounting of hours devoted by its officers to company business, in their roles as officers and directors, in relation to all other business interests.” Order, Docket No. R-2008-2045157, slip op. at 97 (June 10, 2009). Columbia Water Company will provide direct expert testimony on the subject of Ordering Paragraph 5 under the schedule set in this proceeding.¹

OCA appears to be resurrecting its rejected line of inquiry under a theory that it can force the Commission to micromanage compensation of utility boards of directors and officers, despite longstanding case law to the contrary.² Notably, the Company is claiming less expense (\$68,900) for the account at issue in this rate case, than the \$80,800 for said account that was accepted and approved in the 2008 rate case. See Order, Docket No. R-2008-2045157, slip op. at 32 (June 10, 2009). OCA’s obsession with this subject has led it to seek information that is far beyond the bounds of legitimate discovery, forcing the Company to waste time and incur unnecessary rate case expense. OCA has also, despite the Commission’s narrow directive, expanded its request to not just officers who are directors, but to directors and stockholders who are not.³

¹ The Company will provide the data for officers serving as directors as required by the Commission. OCA cites no basis for its unexplained expansion of the Commission’s directive to include directors who do not serve as officers or “majority shareholders.”

² The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code. The Public Utility Code does not grant the Commission the authority to act as a super board of directors for a public utility. Determining the employment practices and compensation of its directors, officers and employees is within the managerial discretion of a public utility. *N.A.A.C.P. v. Pennsylvania Pub. Util. Comm’n*, 290 A. 2d 704 (Pa. Cmwlth. 1972); *Meyers v. Pennsylvania Pub. Util. Comm’n*, 65 A.2d 256 (Pa. Super. 1949); *Cunningham v. Duquesne Light Company*, Docket No. C-00968286 (Order entered November 25, 1997). It is not within the Commission’s authority to interfere with the management of a public utility unless an abuse of its managerial discretion or arbitrary action has been shown. *Metropolitan Edison Co. v. Pennsylvania Pub. Util. Comm’n*, 437 A.2d 76 (Pa. Cmwlth. 1981). There is no allegation or indication of such abuse or arbitrary action in this case.

³ The second sentence of OCA Set I-26 states “for all officers, directors and majority shareholders”

Aside from the uncured ambiguity and inconsistency in OCA's questions, the Motion impermissibly seeks discovery, not of information relevant to the costs Columbia Water seeks to recover in its rate increase request, but of the personal finances and professional activities of its officers, directors and majority stockholders in entirely unrelated businesses. Specifically, OCA I-26 demands disclosure of "all business interests" of each officer, director and majority stockholder. It demands disclosure of the hours these individuals spend on such "other business interests." And it demands disclosure of "[a]ll compensation," including "salaries, fees stipends, reimbursed expenses, or any other form of compensation," that these individuals have received from "other business interests." This information is demanded for the years 2010, 2011, 2012 and 2013 year-to-date.

These demands are highly improper on their face. They are calculated to cause unreasonable annoyance, to impose unnecessary burden, and to embarrass; as such, they are barred by 52 Pa. Code § 5.361.⁴ The scope of permissible discovery is broad, but it is not limitless. A party may obtain discovery of information "which is relevant to the subject matter involved in the pending action." 52 Pa. Code § 5.321(c). The subject matter of this proceeding is the reasonableness of Columbia Water's rate increase request. Part of the expense sought to

⁴ See Objections of the Columbia Water Company to the Office of Consumer Advocate's Set I Interrogatory Number 26, etc., filed June 10, 2013:

Columbia Water objects to these overbroad requests on the basis that they request information that would cause unreasonable annoyance, oppression, burden or expense. The discovery, particularly subparts (a) and (c), is overbroad and is not relevant to the issues in this proceeding. The requests seek information specific to Columbia Water's "Officers, Directors & Majority Stockholders" business interests unrelated to the operation and direction of Columbia Water Company. This information does not have a bearing on the reasonableness of Columbia Water's rate increase request in this proceeding. Further, the requested information will not lead to the discovery of information which would be admissible in this proceeding. Accordingly, provision of the requested information by Columbia Water would pose an undue burden, unreasonable annoyance, oppression, embarrassment and public disclosure of personal financial information which clearly is utterly irrelevant. It would also require making of an unreasonable investigation.

be recovered is the compensation paid to the Company's part-time officer/directors.⁵ *The only proper questions relating to the claimed compensation expense are how much time these officer/directors actually spend for Columbia Water, what they do for Columbia Water, and what they are paid by Columbia Water.* The Company intends to address exactly those questions in its prefiled testimony to be submitted by July 12, 2013.⁶ The other private and personal business interests of the Company's officers, directors and shareholders, their time spent working for such other interests, and the compensation paid to them by other entities for such other work have no relevance whatsoever to their work for, and compensation by, Columbia Water.

OCA's intrusive and burdensome "only so many hours in the day" theory, pursuant to which hourly records of other businesses interests must be compiled for four years in order to show how much time is spent on Columbia Water business, was not endorsed by the Commission in the 2008 Order rate case, nor are such records required of other utilities. If OCA were right, and the "only so many hours in the day" concept were an acceptable norm for relevance or discovery permitted under 52 Pa. Code § 5.361, OCA – or any party – could conceivably ask any utility to produce four years of time records for all part-time employees, officers, directors and majority shareholders for all time spent on all activities other than Company business, such as unrelated employment, volunteer service, political advocacy, social events, church attendance, child care, shopping, doctor visits, exercise, meditation, television watching, Internet surfing, gardening, hunting, fishing, dog walking, bird watching, sleep – the list is literally endless. Good judgment and common sense must prevail to keep the focus on work performed for the Company. The Commission has never ventured into the irrelevant, unnecessary and expensive detail demanded by OCA and should not do so here.

⁵ "Majority shareholder" is not a "position" at all.

⁶ As noted above, the Company will provide this information for its officer/directors.

The discovery of such information is not “reasonably calculated to lead to the discovery of admissible evidence.” 52 Pa. Code § 321(c). To the contrary, the OCA’s requests require the disclosure of highly sensitive, personal financial information that is entirely unrelated to the operations and direction of Columbia Water. Moreover, they require the disclosure of potentially proprietary or competitively sensitive information of businesses that have nothing to do with Columbia Water. Such requests are oppressive and calculated to embarrass and, frankly, represent the bullying of a small and well-run water company on this one issue. OCA’s behavior here is contrary to the public interest, in that its overblown approach to what should be a simple issue is so disproportionate, burdensome and invasive that it will make it difficult for Columbia to retain or attract Directors or part time officers of the caliber that it has now. OCA never suggests in its motion that Columbia is not well run – and the statistics compiled by the Commission show that it is. Columbia is in the process of examining whether OCA demands such information from large utilities, and doubts at this point that it does.

OCA incorrectly suggests at pages 1 and 2 of the Motion that the Company did not consult with OCA or attempt to resolve the issues presented by its request. That is not true. The Company agreed to postpone the deadline for any motion to compel and did propose a solution. OCA never responded to discuss that proposal, and instead without consulting the Company filed the Motion just before the July 4, 2013 holiday,⁷ so that the 5 day response period is largely consumed by that holiday period. OCA also knew that the Company was occupied preparing its written testimony, which, under a schedule OCA had the Company agree to a few hours before OCA filed its motion, is due July 12, 2013. Given OCA’s actions, its assertion that it tried to

⁷ If one were cynical one might believe OCA filing the Motion a few days before the prehearing conference was calculated to give it the advantage of having a written document before the ALJ and that at the prehearing in the hope a ruling might occur without the Company having an opportunity, as permitted under the PUC’s regulations of responding in written Answer form. The Company has not yet reached the point of cynicism with OCA on this issue.

cooperate and its incorrect implication that the Company did not should receive no consideration. In fact, since the Company had informed OCA that the subject would be addressed in the Company's testimony, and since OCA's testimony under the agreed-to schedule is not due until August 5, 2013, OCA could have, and should have, waited until after the Company filed its testimony to decide if the production of further information was necessary.

Nothing in the Commission's rules or jurisprudence supports OCA's burdensome, annoying, embarrassing, oppressive and costly foray into the unrelated financial and business affairs of Columbia Water's officers, directors and shareholders. To the contrary, 52 Pa. Code § 5.361 bars such harassment. The Motion fails to demonstrate any relevance whatsoever of the requested information to the subject matter of this proceeding – Columbia Water's requested rate increase – or any plausible basis for concluding that the production of such information would lead to admissible information regarding the costs underlying the Company's rates. It therefore should be denied.

II. ARGUMENT

Discovery is not intended to allow parties to embark upon "fishing expeditions." *Johnson v. Lightcap*, 2008 WL 9405102 (Pa. Commw. Ct. July 11, 2008) (citing *McNeil v. Jordan*, 586 Pa. 413, 894 A.2d 1260 (2006)); *see, e.g., City of York v. Pennsylvania Pub. Util. Comm'n*, 3 Pa. Cmwlth. 270, 278, 281 A.2d 261, 265 (1971) ("Anything in the nature of a mere fishing expedition is not to be encouraged.") (quoting *In American Car & Foundry Company v. Alexandria Water Company*, 221 Pa. 529, 535, 70 A. 867, 869 (1908)), *aff'd*, 449 Pa. 136, 295 A.2d 825 (1972). Discovery requests may be objected to on the grounds that they are irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. *See* 52 Pa. Code § 5.321(c).

OCA asserts that the information demanded OCA I-26 “is relevant to the matter of [Columbia Water’s] water service and the costs of providing that service.” (Motion at 4) It then advances various arguments in support of this assertion, none of which withstands scrutiny. OCA argues that if Columbia Water’s part-time officers/directors “are employed by other entities on a full or a part time basis, it does call into question the reasonableness of the fees and salaries paid by [Columbia Water],” but it never explains how. (Motion at 4) Instead, OCA offers a series of baseless what-ifs as a substitute for relevance. Such unsupported speculation is an insufficient basis for discovery. *See, e.g., Johnson v. Lightcap*, 2008 WL 9405102 (Pa. Commw. Ct. July 11, 2008) (“When an appellant seeks no more than a “wholesale inspection” of personnel files, he must advance a greater showing of basis and necessity than simply unsupported speculation.”) (citing *Commonwealth v. Blakeney*, 946 A.2d 654 (2008)).

The reasonableness of the officer/director compensation paid by Columbia Water is determined solely by the responsibilities of the various part-time positions and the efforts of the officer/directors to fulfill those responsibilities, and the Company will produce that in its direct testimony. OCA is not entitled to discovery of either the officer/directors’ unrelated activities or the compensation they might receive for such activities.

A. THE TIME SPENT BY PART-TIME OFFICER/DIRECTOR’S ON OUTSIDE BUSINESS INTERESTS IS IRRELEVANT

The OCA argues that the information demanded by subparts (a) and (b) of OCA I-26 is relevant because “[a]n accounting of the hours spent on [Columbia Water] and non-[Columbia Water] business would allow the parties to assess the reasonableness of the fees and salaries paid to the officers/directors for ratemaking purposes.” (Motion at 4) This is demonstrably untrue. If a utility pays its officer/directors certain compensation to fulfill certain duties, the reasonableness of the compensation depends entirely on the value of the individual’s performance of duties.

Where, as in this case, the officer/directors are “on call” at all times, the reasonableness of their compensation **cannot** be determined by the time they spend on **other** business activities; rather, the only time that is even arguably relevant is the time they spend on **utility** business.⁸ OCA may want to micromanage this utility and move the utility management world to hourly compensation and comprehensive hourly records, but it cannot do away with the well-established principle of Commission deference to managerial discretion.

The Public Utility Code does not grant the Commission the authority to act as a super board of directors for a public utility. To the contrary, **determining the employment practices and compensation of its directors, officers and employees is within the managerial discretion of a public utility.** *N.A.A.C.P. v. Pennsylvania Pub. Util. Comm’n*, 290 A. 2d 704 (Pa. Cmwlth. 1972); *Meyers v. Pennsylvania Pub. Util. Comm’n*, 65 A.2d 256 (Pa. Super. 1949); *Cunningham v. Duquesne Light Company*, Docket No. C-00968286 (Order entered November 25, 1997). It is not within the Commission’s authority to interfere with the management of a public utility unless an abuse of its managerial discretion or arbitrary action has been shown. *Metropolitan Edison Co. v. Pennsylvania Pub. Util. Comm’n*, 437 A.2d 76 (Pa. Cmwlth. 1981). The OCA does not, and cannot, allege such abuse or arbitrary action here. Nor did the Commission so find on the exact issue in the 2008 rate case.

The irrelevance of the time spent by part-time officer/directors on non-utility activities to the reasonableness of their compensation is illustrated by the very ancient decision the OCA cites

⁸ If a hypothetical part-time officer/director were to fail to fulfill the responsibilities of her or his position with the Company, the cause of that failure – whether conflicting employment obligations, ill health, incompetence, chronic absenteeism, etc. – would be irrelevant to the question whether the cost of that officer/director’s compensation was reasonably incurred. An especially competent individual might fulfill her or his part-time duties completely while spending 1500 hours annually on other activities; an unqualified individual might fail to do so even if she or he spends zero hours on other employment. The relevant question is whether and how well the individual performs the part-time duties for which the Company has paid, irrespective of her or his other activities.

at pages 4-5 of its Motion. As the OCA candidly admits, in *Pennsylvania Public Utility Commission v. Blue Mountain Consolidated Water Co.*, 46 Pa. PUC 220 (1972), the Commission “reduced directors’ fees and salaries where the evidence provided regarding time spent on utility business did not support the utility’s claim.” (Motion at 4, emphasis added) The passage quoted by the OCA demonstrates that the proper focus is on time spent on utility business, not time spent on other activities:

Respondent charged \$16,452 for salaries of five general officers and executives during the test year ended March 31, 1971. The president of the water company testified that he spends about 35 percent of a 40-hour week on company matters and that the hours within that 35 percent limit might be any time during the week, including Sunday (Tr. 185). He also stated on the record that the secretary and the treasurer spend about 20 to 25 percent of their time and the chairman of the board spends about 10 to 20 percent of his time, on water company business (Tr. 174). In view of the limited participation by the officers in company operations, for rate making purposes, we reduce total salaries of general officers and executives by \$6,452.

...

Included in respondent's operating expenses in the test year are \$4,000 for directors’ fees for eight directors. The record shows that one meeting was held during the test year. In view of only one meeting being held during the test year, we allow \$400 for directors’ fees, for rate making purposes, and reduce expenses for directors’ fees by \$3,600.

Motion at 4-5 (quoting *Pennsylvania PUC v. Blue Mountain Consol. Water Co.*, 46 Pa. PUC at 235 (1972)) (emphasis added). Contrary to OCA’s theory of what the issue is and what is relevant, this passage shows that the Commission’s sole focus was on the amount of time spent by the company’s president “on company matters,” the time spent by other officers and the chairman of the board “on company business,” the participation by the officers “in company operations,” and the fact that the directors were obliged to attend only one meeting of the company’s board. While *Blue Mountain* arguably supports discovery of the hours spent by

Columbia Water's part-time officer/directors on company business, that is not the information sought by OCA I-26, which is directed solely at the "other business interests" of officers, directors and majority shareholders. Indeed, the request does not even mention time spent working for Columbia Water. In sum, the very case OCA relies upon to expand the focus of what is relevant belies OCA's own theory.⁹

The OCA also cites the Commission's order in Columbia Water's last base rate proceeding, in which it required the Company in its next base rate case to "provide an actual accounting of hours devoted by its officers to company business, in their roles as officers and directors, in relation to all other business interests." *Pennsylvania Pub. Util. Comm'n v. Columbia Water Co.*, Docket No. R-2008-2045157, Order at 41 (June 10, 2009) (cited in Motion at 5). The OCA argues that in order to determine the hours devoted by Columbia Water's officer/directors "in relation to all other business interests," it is "essential" for the Company to provide the actual hours spent on all other business interests. (Motion at 5) This is incorrect. As illustrated by the *Blue Mountain Consolidated Water Co.* decision quoted above (and by the OCA), it is the percentage of available working hours dedicated to utility business that the Commission has deemed relevant to officer and director compensation, not the number of hours actually spent working on non-utility business. This is reflected in the Commission's language in the last Columbia Water rate case: it requires the Company to provide "an actual accounting of hours" devoted to "company business in relation to all other business interests." It did not require an accounting of "[a]ll actual hours spent on other businesses" as demanded by the OCA. (OCA I-26(b).) OCA should not be permitted to amend the PUC's Order just because it

⁹ The only other decision cited by the OCA in support of this argument, *Burleson v. Pennsylvania Pub. Util. Comm'n*, 501 Pa. 433, 461 A.2d 1234 (1983), does not address the issue at hand and is apparently cited for the general proposition that Columbia Water must support its claims with substantial evidence.

continues to disagree with what evidence the Commission has deemed relevant to prove the reasonableness of director or officer fees.

Columbia Water will provide the information required by the Commission when it files its direct case on July 12, 2013. OCA may then seek discovery of the basis of the Company's submission and argue whether it satisfies the Commission's requirement. To require Columbia Water's officer/directors to recreate three and one-half years of "all" their time spent on other business interests (OCA I-26(b)), "whether paid or unpaid" (OCA I-26(a)), would be unreasonably burdensome and unnecessary.

B. THE COMPENSATION RECEIVED BY PART-TIME OFFICER/DIRECTORS' FOR OUTSIDE BUSINESS ACTIVITIES IS IRRELEVANT

Request OCA I-26(c) demands the production of "salaries, fees, stipends, reimbursed expenses, or any other form of compensation" paid to Columbia Water's officer/directors by business interests other than the Company. OCA argues that a comparison of the officer/directors' other income to their compensation paid by Columbia Water "may" shed light on the reasonableness of the latter. (Motion at 6.) OCA does not cite any authority or precedent for this novel supposition. That is because none exists. OCA's request, like the others in I-26, is boundlessly overbroad and never defines what might be a "business interest." It could, for example, include compensation from non-Company sources such as a pension, private 401(k) accounts, retirement trusts, wills, insurance, disability benefits, mileage and hotel reimbursement for private business, IRS refunds, and charity fundraiser drawings.

The essence of the OCA's argument is that officer/directors' total amount of personal income should somehow determine the amount of compensation they receive for their part-time work for the Company. In other words, according to OCA the compensation paid by a utility to its officers and directors should be reduced or eliminated if they receive some level of income

from unrelated sources. OCA offers no legal support whatsoever for this novel theory, nor does it articulate any nexus between the reasonableness of compensation paid to an individual for services rendered to a utility and the income received by the individual from non-utility sources. While OCA might favor a “total income” limit to the compensation a utility pays its officers and directors, such a limit contravenes basic principles of employment compensation and has no foundation in Pennsylvania law or Commission jurisprudence.

OCA concludes by making a wild assertion that the compensation information it seeks “may show” double billing for outside service claims, and it “may identify” potential affiliate issues. (Motion at 5.) Such rank speculation amounts to a classic fishing expedition, not a valid basis for discovery.¹⁰ If OCA has concerns about any specific outside service claims made by the Company in its filing, it should propound discovery requests focused on those claims. Indeed, OCA and I&E have propounded voluminous discovery on Columbia Water’s outside service claims, and the Company has been working hard to provide timely responses.

It is axiomatic that an individual’s financial resources and income are confidential, private matters. It is also well-understood that the compensation a non-regulated private business pays an employee is competitively sensitive information. Even public officials and employees paid with tax dollars are not required to disclose the amount of income they receive for (or the number of hours they spend on) their other activities.¹¹ Therefore, even if the

¹⁰ See, e.g., *Johnson v. Lightcap*, 2008 WL 9405102 (Pa. Commw. Ct. July 11, 2008) (unreported) (“Discovery is not intended to allow parties to embark upon ‘fishing expeditions’”) (citing *McNeil v. Jordan*, 586 Pa. 413, 894 A.2d 1260 (2006)); *City of York v. Pennsylvania Pub. Util. Comm’n*, 3 Pa. Cmwlth. 270, 278, 281 A.2d 261, 265 (1971) (“Anything in the nature of a mere fishing expedition is not to be encouraged.”) (quoting *In American Car & Foundry Company v. Alexandria Water Company*, 221 Pa. 529, 535, 70 A. 867, 869 (1908)), *aff’d*, 449 Pa. 136, 295 A.2d 825 (1972).

¹¹ The Public Official and Employee Ethics Act provides: “Except where an amount is required to be reported pursuant to subsection (b)(6) [relating to gifts] and (7) [relating to reimbursement of expenses for transportation, lodging and meals received in connection with public duties], the statement of financial interests need not include specific amounts for the items required to be listed.” 65 Pa. C.S. § 1105 (emphasis and insertions added).

compensation received by Columbia Water's part-time officer/directors from other business activities were marginally relevant – which it is not – that marginal relevance would be far outweighed by the annoyance, embarrassment, invasion of privacy and potential competitive harm that production of such information would cause to the officer/directors and their other part-time employers. Such harassment, if permitted, will only reduce the number of qualified individuals willing to serve as part-time officers and directors of Pennsylvania's utilities, to the ultimate detriment of the Company's ratepayers.

III. CONCLUSION

For all of the foregoing reasons, the OCA's motion to compel should be denied.

Respectfully submitted,



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Counsel to the Columbia Water Company

Date: July 8, 2013

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).

By First Class Mail and Electronic Mail

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Thomas J. Sniscak
William E. Lehman

Dated this 8th day of July 2013