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April 11, 2013

**Via Electronic Filing**

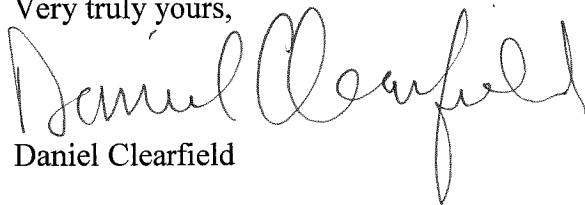
Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Re: *Pennsylvania PUC, Bureau of Investigation and Enforcement v.  
Glacial Energy of Pennsylvania, Inc.*; Docket No. C-2012-2297092

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Glacial Energy of Pennsylvania, Inc.'s Motion for Leave to File Reply Re: Motion for Summary Judgment along with a proposed Order with regard to the above-referenced matter. Please note that the proposed Reply is attached to the motion as Exhibit A. Copies to be served in accordance with the attached Certificate of Service.

Very truly yours,



Daniel Clearfield

Enclosure

cc: Hon. David Salapa, w/enc.  
Cert. of Service w/enc.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

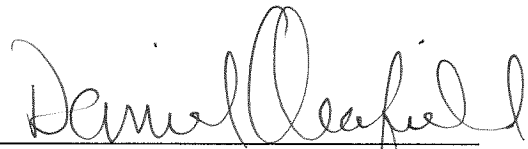
|   |   |                           |
|---|---|---------------------------|
| Pennsylvania Public Utility Commission, | ) |                           |
| Bureau of Investigation and Enforcement | ) |                           |
| Petitioner,                             | ) |                           |
| v.                                      | ) | Docket No. C-2012-2297092 |
|   | ) |                           |
| Glacial Energy of Pennsylvania, Inc.    | ) |                           |
| Respondent.                             | ) |                           |

**CERTIFICATE OF SERVICE**

I hereby certify that on April 11, 2013, I caused a true and correct copy of Respondent Glacial Energy of Pennsylvania's Motion for Leave to File Reply Re: Motion for Summary Judgment, along with Exhibit A thereto (Proposed Reply in Further Support of Motion for Summary Judgment) and a proposed Order, to be served upon the following persons by first class mail, postage prepaid, in accordance with the requirements of 52 Pa. Code § 1.54, and by email as indicated:

Heidi L. Wushinske  
Prosecutor  
Bureau of Investigation and Enforcement  
P.O. Box 3265  
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[hwishinske@pa.gov](mailto:hwishinske@pa.gov)

Wayne T. Scott  
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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

|  |   |                           |
|--|---|---------------------------|
| Pennsylvania Public Utility Commission,  | ) |                           |
| Bureau of Investigation and Enforcement, | ) |                           |
| Petitioner,                              | ) |                           |
| v.                                       | ) | Docket No. C-2012-2297092 |
|  | ) |                           |
| Glacial Energy of Pennsylvania, Inc.,    | ) |                           |
| Respondent.                              | ) |                           |

**ORDER**

AND NOW, this        day of April, 2013, upon consideration of Respondent's Motion For Leave to File Reply Re: Motion For Summary Judgment and response thereto, and finding that the Reply may aid in the determination of that Motion, it is hereby Ordered that the Motion is GRANTED. Respondent is given leave to file the Reply attached as Exhibit A to the Motion.

\_\_\_\_\_  
DAVID A. SALAPA  
ADMINISTRATIVE LAW JUDGE

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

|  |   |                           |
|--|---|---------------------------|
| Pennsylvania Public Utility Commission,  | ) |                           |
| Bureau of Investigation and Enforcement, | ) |                           |
| Petitioner,                              | ) |                           |
| v.                                       | ) | Docket No. C-2012-2297092 |
|  | ) | Judge Salapa              |
| Glacial Energy of Pennsylvania, Inc.,    | ) |                           |
| Respondent.                              | ) |                           |

**RESPONDENT’S MOTION FOR LEAVE TO FILE  
REPLY RE: MOTION FOR SUMMARY JUDGMENT**

Respondent Glacial Energy of Pennsylvania, Inc. (“Glacial PA”) respectfully moves, pursuant to 52 Pa. Code §§ 5.11 -.12, for leave to file a Reply, in the form attached hereto, in support of its pending Motion for Summary Judgment. In support of this request, Glacial PA states as follows:

1. Glacial PA holds a duly authorized electric generation supplier (“EGS”) license issued by the Pennsylvania Public Utility Commission (“Commission” or “PUC”), License No. A-2009-2109572, granted in April 2009.
2. The original Complaint in the captioned action, filed April 5, 2012, sought, and the Amended Complaint, filed March 5, 2013, seeks revocation of Glacial PA’s license based upon asserted misrepresentations in its EGS Application.
3. On March 1, 2013, Glacial PA filed a Motion for Summary Judgment in the form of a supporting Brief and Statement of Undisputed Facts. On March 23, 2013, the Bureau of Investigation and Enforcement (“I&E”) filed its response, including a Memorandum (“I&E Brief”) and a Response to the Statement of Facts (“I&E Response to SOF”) (collectively, “I&E Response”).
4. I&E’s Response includes a number of new arguments and relies on evidence not yet introduced at the time Glacial PA filed the underlying Motion for Summary Judgment. Glacial

PA believes I&E's new arguments to be specious and its new evidence insufficient to defeat Glacial PA's motion, and believes it would assist the Administrative Law Judge if Glacial PA were to file a short reply brief outlining its views on these newly raised arguments and newly introduced evidence.

5. Among the new arguments raised by I&E are the following:

- A. That the reference in Question No. 16 of the Application to administrative or court actions in which "the Applicant, an affiliate, a predecessor of either, or a person identified herein has been a *defendant* or a *respondent*" (emphasis added) extends to proceedings in which "a person identified herein" was *not* a named defendant/respondent, as long as a company in which that person was "involved" was a named defendant/ respondent. *See, e.g.*, I&E Response to SOF ¶¶ 15, 22; I&E Brief at 6. I&E makes this argument to support its contention that Glacial PA was required to identify Texas proceedings against a distinct Texas corporation in response to Question No. 16 of the Application.
- B. That the term "predecessor" as used in Question No. 16 includes a company formed by an individual while another company that same individual was materially involved with was still viable. *See* I&E Response to SOF ¶ 24, I&E Brief at 5. I&E makes this argument to support its contention that Franklin was a predecessor of Glacial PA.
- C. That an "affiliate," as used in Question No. 16 of the Application, is not limited to "corporate affiliates of the Applicant," but extends to *individuals* who are or were "affiliated" with the Applicant. *See* I&E Brief at 8.
- D. That "the Commission's interpretation of its own application question is entitled to deference," and that this deference extends to I&E's assertions as to what the Application's questions mean and what information should be provided in an applicant's responses (notwithstanding the fact that I&E is *not* the Commission; I&E did not prepare the Application; and I&E's position has been first advanced in litigation, a situation under which its position is entitled to no deference. *See Malt Bevs. Distribs. Ass'n v. Pa. Liquor Control Bd.*, 974 A.2d 1144, 1154 (PA 2009)).

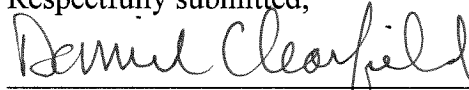
6. The new evidence relied upon by I&E includes the (unsworn) Direct Testimony of Scott Granger, Michael Petras, and Roger McAuley, and exhibits thereto.

7. Glacial PA has prepared a short Reply addressing these new points. *See Exhibit A* hereto.

8. Glacial PA respectfully states its view that this Reply would assist the Administrative Law Judge in decision of the pending Motion for Summary Judgment.

Wherefore, based on the foregoing, Glacial PA respectfully requests leave to file a Reply in the form attached hereto.

Respectfully submitted,



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*Admitted Pro Hac Vice*

*Attorneys for Glacial Energy of  
Pennsylvania, Inc.*

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

|  |   |                           |
|--|---|---------------------------|
| Pennsylvania Public Utility Commission,  | : |                           |
| Bureau of Investigation and Enforcement, | : |                           |
| Complainant                              | : |                           |
|  | : | Docket No. C-2012-2297092 |
| v.                                       | : |                           |
|  | : |                           |
| Glacial Energy of Pennsylvania, Inc.,    | : |                           |
| Respondent                               | : |                           |

**GLACIAL ENERGY OF PENNSYLVANIA, INC.’S  
REPLY IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Glacial Energy of Pennsylvania, Inc. (“Glacial PA”) respectfully submits this Reply in Further Support of its Motion for Summary Judgment pursuant to 52 Pa. Code § 5.102 and the Order of April \*\*\*, 2013. As set forth herein and in Glacial PA’s March 1, 2013 moving brief (hereinafter “Glacial PA Brief” or “Glacial PA Br.”) and the associated Statement of Facts and exhibits thereto (“Glacial PA SOF”)<sup>1</sup>, the Bureau of Investigation and Enforcement (“I&E”) has failed to meet its burden to identify material facts in dispute, and its arguments are unsupported by the applicable law and the plain language of the Application<sup>2</sup>. Accordingly, Glacial PA is entitled to summary judgment.

**PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT**

By and large, I&E’s Response to Glacial PA’s Statement of Undisputed Material Facts (“I&E Response to SOF”) and Memorandum in Support of I&E’s Response to SOF (“I&E Brief”) (collectively, “I&E’s Response”) fails to address the many defects in I&E’s Complaint

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<sup>1</sup> As I&E correctly points out in its Response to Glacial PA’s Statement of Undisputed Material Facts, Glacial PA inadvertently attached I&E’s objection to Document Request 8, rather than Interrogatory 8, as Exhibit I to the Glacial SOF. A corrected version of Exhibit I was filed on March 29, 2013.

<sup>2</sup> Glacial PA’s application for approval to become an electric generation supplier (“EGS”), submitted to the Pennsylvania Public Utility Commission (“PA PUC”) on April 22, 2009. *See* Glacial PA SOF, Exhibit A.

and related allegations that Glacial PA had identified in its initial Brief. Instead, I&E repeats the same tired arguments – that Gary Mole had a substantial role in the management of Franklin; that the Texas PUC’s allegations, as set forth in its Notice of Violation to Glacial Energy of Texas – a different entity, subject to different regulatory requirements (i.e. those of the Texas PUC) – somehow govern in this Pennsylvania matter under Pennsylvania law against Glacial PA; and arguments that Glacial PA’s answer to one question in an Application somehow translates to a deficiency in a completely different question. For the reasons set forth in Glacial PA’s Brief, these arguments cannot save I&E’s Complaint<sup>3</sup>, as I&E simply cannot demonstrate that Glacial PA did not provide information that was not requested in the Application.

That said, I&E does introduce a few new arguments and new “facts” to which Glacial PA has not had an opportunity to respond, necessitating its request to file this Reply. Among other things, I&E’s Response relies heavily on written testimonial statements that had not yet been submitted when Glacial PA filed its motion, and which Glacial PA has therefore not addressed. As explained herein, however, neither this new “evidence” nor I&E’s inventive arguments can save this matter from summary judgment, as I&E has not sustained its burden to demonstrate any genuine issues as to the material facts in this matter. “When a motion for summary judgment is based on insufficient evidence to support the factual basis for the cause of action or defense, the non-moving party must come forward with sufficient evidence essential to preserve the cause of action. ... The evidence adduced by the non-moving party must be of such a quality that a jury could return a favorable verdict to the non-moving party on the issue or issues challenged by a summary judgment request.” *Infosage, Inc. v. Mellon Ventures, L.P.*, 896 A.2d 616 (Pa. Super. 2006) (citing *McCarthy v. Dan Lepore & Sons Co., Inc.*, 724 A.2d 938, 940 (Pa. Super. 1998)).

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<sup>3</sup> I&E filed an Amended Complaint on March 5, 2013, which is virtually identical to its original Complaint, and contains no new facts or allegations.

Furthermore, I&E's arguments are based on tortured reasoning and misguided interpretation of the Application that goes well beyond the plain language contained within the four corners of that instrument. Accordingly, I&E's arguments fail, and Glacial PA's motion must be granted.

Glacial PA's response to the new arguments and "facts" raised by I&E follows below.

### ARGUMENT

#### **A. Gary Mole Was Not a Defendant or Respondent in the Energy West Resources License Revocation Proceedings**

As explained in Glacial PA's Brief (pages 4-8), the language of Question No. 16 of the Application is straightforward. This Question asks the Applicant for certain information concerning proceedings dealing with business operations in which "the Applicant, an affiliate, a predecessor of either, or a person identified herein has been *a defendant or a respondent*" (emphasis added). I&E seeks to avoid the plain language of this Question, arguing that Gary Mole's purported "involvement" with Franklin – *by itself* – somehow brings the Texas PUC license revocation proceedings for Energy West Resources ("EWR") d/b/a Franklin Power Company ("Franklin") within the scope of this Question – notwithstanding the fact that Mole himself was not a defendant or respondent in the proceedings. Tellingly, but not surprisingly – the Texas PUC documents truly speak for themselves as to who were defendants or respondents – I&E has not identified any evidence or law to support this theory. In short, I&E would have this tribunal rule that this Question requires applicants to provide information on proceedings in which "a person identified" in the Application was not actually a named defendant or respondent simply because a company in which that person was "involved" was a named defendant or respondent. *See, e.g.*, I&E's Response to SOF ¶¶ 15, 22; I&E Brief at 6. This argument goes well beyond any reasonable interpretation of Question No. 16, which expressly calls only for information for cases in which "a person identified herein has been *a defendant or a respondent*"

(emphasis added). This argument is not, as I&E argues (I&E Brief at 5), a “mischaracteriz[ation]” of the Texas revocation proceedings, but simply a plain reading of the Question asked in the Application as applied to the Complaints in the Texas proceedings.

Moreover, even if, as I&E argues, Mole had been an “integral part” of Franklin (*see* I&E Brief at 6), Question No. 16 *still* would not have required disclosure of the Texas license revocation proceedings because Mole *himself* was not a defendant or a respondent and that is what the question asks. *See* Glacial PA Br. at 5-6. Similarly, even if the term “affiliate” of the Applicant extended to individuals such that Gary Mole himself would be an “affiliate” of Glacial PA, as I&E implies at page 8 of its Brief (and which Glacial PA disputes, as set forth in Section C, below), Question No. 16 would not have required disclosure because, again, Mole *himself* was not a defendant or a respondent. As I&E admits (*see* I&E’s Response to SOF ¶¶ 13-15, 22), “the TXU Complaint and the CenterPoint Complaint speak for themselves with regard to named defendants” – and Gary Mole appears nowhere in the Complaints or in the record of those proceedings.

**B. I&E’s Definition of “Predecessor” Has No Basis in Fact or Law**

I&E’s asserts that “predecessor,” as used in Question No. 16, includes, in essence, a company that an individual formed while another company that this same individual was “involved” with was still viable. That conclusion defies logic. Not surprisingly, I&E is unable to provide any legal support for this novel definition, in the case law or otherwise. *See* I&E Brief at 5, I&E Response to SOF at ¶ 24.<sup>4</sup> I&E further ignores the definitions of “predecessor” and

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<sup>4</sup> I&E’s only proffered evidence on this point is the unsupported and currently unsworn testimony of I&E witness Michael Petras that he “believes” Glacial Energy is the alter-ego of Franklin Power and it continued Franklin’s operations. This “belief”, submitted from a clearly biased witness (*see generally Petras v. Mole*, 3:11-CV-1403-N (N.D. Texas)) who does not define the terms he applies and is, at best, discussing other Glacial entities, not Glacial PA, is clearly not “of such a quality that a jury could return a favorable verdict to the non-moving party on the issue or issues challenged by a summary judgment request.” *Infosage*, 896 A.2d at 625. It is well-settled that

“successor” advanced by Glacial PA in its Brief. *See, e.g.*, Glacial PA Br. at 8. Merely having a “common thread,” as I&E alleges, is insufficient to confer legal status on two wholly separate companies as predecessor and successor entities; indeed, such a rule would turn the existing precedent and accepted practice and convention on its head.

Even if I&E’s constructions of these terms were accepted, they fail on the undisputed facts here. In this respect, I&E ignores the vital fact that Franklin ceased operating in 2005, when it surrendered its operating license, and was dissolved the following year; but Glacial PA – the Applicant here – was not formed until several years later, in 2009. *See* Glacial PA SOF ¶¶ 16-17 and Exhibits E- F thereto; I&E Response to SOF ¶¶ 16-17; Texas PUC Dkt. No. 31082, Item No. 3 (May 20, 2005 letter from Roger McAulay to the Texas PUC requesting surrender of license). It is hard on those facts to see the link between Franklin and Glacial PA, other than the same individual was involved in both. Thus, even if one accepts I&E’s incredible definition of “predecessor,” Franklin could not have been a predecessor to Glacial PA, because Glacial PA was formed years *after* Franklin had utterly ceased to exist.

**C. I&E’s Interpretation of “Affiliate” in Question No. 16 Is Inconsistent with Basic Principles of Statutory Interpretation**

I&E argues that the term “affiliate” as used in Question No. 16 is not limited to “corporate affiliates of the Applicant” but extends to individuals who are or were “affiliated” with the Applicant. I&E’s arguments, however, improperly view the word “affiliate” in isolation, and not within the context of the surrounding language or the Application as a whole. This is contrary to basic tenants of both contract and statutory interpretation, which require an instrument to be viewed as a whole, and so as to avoid rendering any language superfluous. *See*,

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in determining whether there is a legitimate dispute of fact so as to require denial of a summary judgment motion, “a jury may not be permitted to reach its verdict on the basis of speculation and conjecture.” *Id.* at 626.

*e.g., PPL Electric Utilities Corp. v. Pennsylvania Public Utility Commission*, 912 A.2d 386, 400-401 (Pa. Commw. 2006) (proper approach is to consider the “entire instrument as a whole...giving effect, as far as possible, to every word, clause and sentence,” and “attributing words with meanings which are generally used, understood, and accepted.”); *see also Atlantic Richfield Co. v. Razumic*, 480 Pa. 366, 372, 390 A.2d 736, 739 (1978) (“a writing must be interpreted as a whole, giving effect to all its provisions”).

I&E’s interpretation is inconsistent with uses of the term “affiliate” elsewhere in the Application, which clearly relate to corporate affiliates, not “affiliated persons.” *See, e.g.,* Question No. 6 (asking for information regarding “Affiliate[s] of the Applicant” doing business in Pennsylvania, including “whether the affiliate(s) are jurisdictional public utilities”); Question No. 19 (asking for information regarding “parent, affiliated or subsidiary companies”).

Additionally, if the Commission had intended I&E’s interpretation of Question No. 16, it could (and should) have written that Question as follows: “the Applicant, a person identified herein, or an affiliate or predecessor of either.” Instead, the order is “the Applicant, an affiliate, a predecessor of either, OR a person identified herein.” The fact that Question No. 16 is written the way it is demonstrates that I&E’s tortured interpretation is not what the Application requires.

On a more basic, level, I&E’s argument that Glacial PA’s argument that the term “affiliate” refers only to the Applicant’s corporate affiliates is “pure invention,” I&E Brief at 8, is inconsistent with the very purpose of the document at issue: an Application to become an EGS provider, submitted by a named Applicant – here, Glacial PA. Under I&E’s interpretation, this question has no bounds, but could require information for an “affiliate” of anything or anyone, or an affiliate of an affiliate. Clearly, such an open-ended interpretation, which goes well beyond disclosure of “an entity’s prior business operations” (I&E Brief at 8), does not serve the public

interest. It is important to test I&E's construction against the range of situations in which it would be applied, not just this case.

**D. I&E's Interpretation of the Application Is Not Entitled to Deference**

I&E argues that "the Commission's interpretation of its own application question is entitled to deference," and that this principle, in turn, applies to I&E's assertions as to what the Application's questions mean and what information should be provided in an applicant's responses. I&E's argument here suffers from several critical defects: (i) it is premised on a lack of clarity in the statute, whereas here, the statute (or more to the point, the Application implementing the mandate of the statute) is not ambiguous (*see* Glacial PA Br. at 7); (ii) the interpretation being advanced is I&E's interpretation, and not the Commission's interpretation; and (iii) this interpretation is being advanced for the first time in litigation – a situation in which agency interpretation (even if applicable here) is not entitled to deference. *See* Glacial PA Br. at 7 (citing to *Seeton v. Pa. Game Comm'n*, 937 A.2d 1028, 1037 (Pa. 2007); *see also* *Malt Bevs. Distribs. Ass'n v. Pa. Liquor Control Bd.*, 974 A.2d 1144, 1154 (Pa. 2009).


It is quite novel, and raises serious Due Process concerns, to suggest that the *prosecution's* interpretation of a statute or document at issue receives deference. Indeed, this results in a commingling of prosecutory and adjudicatory functions that Pennsylvania law has long prohibited, in which the prosecutor, by virtue of his ability to determine what the law is, effectively becomes the adjudicator as well. *See* *Lyness v. Commw. State Board of Medicine*, 605 A.2d 1204 (Pa. 1992).

For the foregoing reasons, I&E's interpretation of the Application is not entitled to deference.

WHEREFORE, Respondent Glacial PA respectfully requests that the Commission act expeditiously to grant its motion for summary judgment.

Dated: April 11, 2013

Respectfully submitted,



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