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May 23, 2013

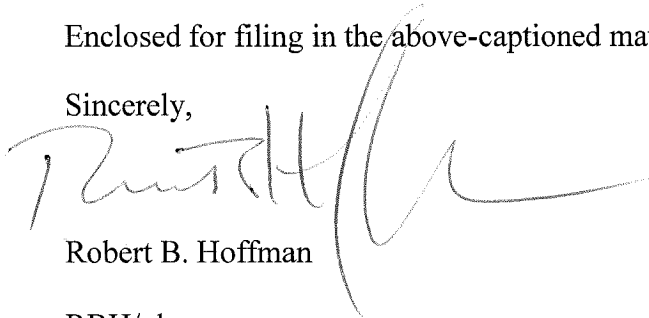
Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
PO Box 3265  
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed for filing in the above-captioned matter please find Respondent's Reply to Exceptions.

Sincerely,



Robert B. Hoffman

RBH/glp

Enclosures

cc: Heidi L. Wushinske (w encl)  
Wayne T. Scott (w encl)  
Office of Special Assistants (via email only)

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

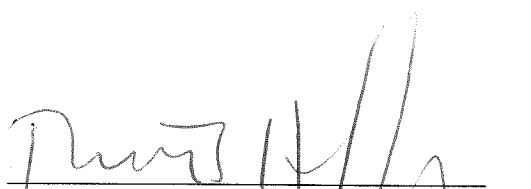
Pennsylvania Public Utility Commission,	)	
Bureau of Investigation and Enforcement	)	
Petitioner,	)	
v.	)	Docket No. C-2012-2297092
	)	(Judge Salapa)
Glacial Energy of Pennsylvania, Inc.	)	
Respondent.	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on May 23, 2013, I caused a true and correct copy of  
RESPONDENT’S REPLY TO EXCEPTIONS to be served upon the following persons by first  
class mail, postage prepaid, in accordance with the requirements of 52 Pa. Code § 1.54:

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COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission,  
Bureau of Investigation and Enforcement,

v.

Glacial Energy of Pennsylvania, Inc.,

DOCKET NO. C-2012-2297092

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REPLY TO I&E'S EXCEPTIONS TO THE INITIAL DECISION OF  
ADMINISTRATIVE LAW JUDGE DAVID A. SALAPA

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**Dated: May 23, 2013**

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Inc.*

## A. INTRODUCTION

In April 2012, the Bureau of Investigation and Enforcement (“I&E”) filed a Formal Complaint requesting revocation of the certificate of public convenience<sup>1</sup> of Glacial Energy of Pennsylvania, Inc. (“Glacial PA”), an electric generation supplier (“EGS”) in Pennsylvania. The sole basis for that request was that Glacial PA purportedly had an obligation to disclose in its April 22, 2009 EGS Application (the “Application”) its CEO’s former ownership interest and “experience” with Franklin Power Company (“Franklin”), a defunct retail electric provider in Texas that had been the subject of proceedings in 2005 and 2006 by the Public Utility Commission of Texas (“PUCT”). Complaint ¶ 19.

From the inception of this matter, Glacial PA has asserted that the Complaint was based on unsupportable legal arguments and, in particular, was based on I&E’s impermissible *post-hoc* rewriting of the Application. The Application simply did not request the information that I&E claims Glacial PA deliberately withheld; and if the question was not asked, I&E cannot complain that Glacial PA did not answer. Accordingly, Glacial PA filed a Motion for Summary Judgment, which Administrative Law Judge Salapa granted. I&E timely filed Exceptions to certain of the ALJ’s findings; Glacial PA now respectfully submits this Reply to those Exceptions.<sup>2</sup> Because I&E’s presentation makes it difficult to understand the broader picture of this proceeding, we have provided a brief introduction to assist the Commission with its evaluation.

Since obtaining its EGS license in Pennsylvania in July 2009, Glacial PA has been in good standing with the Commission and has provided reliable electric service to its customers. Significantly, I&E’s Complaint, including as amended on March 5, 2013,<sup>3</sup> contains no assertions

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<sup>1</sup> I&E’s Amended Complaint revises this request to a revocation of Glacial PA’s electric generation supplier license.

<sup>2</sup> For ease of reference, the numbered paragraphs herein correspond to the numbered Exceptions raised by I&E.

<sup>3</sup> Because the allegations of the original April 2012 Verified Complaint and the March 2013 Amended Complaint

criticizing Glacial PA's actions as an EGS, let alone contending that those actions violated the PUC's statutes or regulations. Instead, I&E seeks to revoke Glacial PA's EGS license – an extreme sanction under any analysis – simply because it is dissatisfied with Glacial PA's four-year-old answers to certain questions in its EGS Application.

More fundamentally, I&E's entire claim is based on convoluted and unsupported interpretations of basic terms in the EGS Application. Specifically, if one accepts I&E's contentions, Question 16 of the Application (the "Compliance" Question) not only requires identification of proceedings in which a specified entity or individual "has been a 'defendant' or 'respondent'" (as the Question plainly states), but this Question also requires identification of proceedings where those entities or individuals were *not* actually named parties (i.e. not defendants or respondents). I&E also contends that when that same Question requires information concerning the Applicant's "predecessor," the term "predecessor" includes any corporation formed by an individual while he is an investor in another corporation, regardless of whether the new corporation has assumed the rights and duties of the earlier corporation (and regardless of the undisputed chronology governing the entities involved). In both of these allegations, I&E departs markedly from the plain meaning of the language of the Question and the accepted understandings of the terms included therein. Yet I&E seeks to punish Glacial PA – severely – for not following I&E's self-serving, *ex post facto* interpretations, even though the Application never adopted these (or any other) definitions, nor has the Commission, to this date, ever done so. I&E even blames Glacial PA for what it deems the "incompleteness" of a Dun & Bradstreet report that Glacial PA submitted with its Application – notwithstanding the fact that that report was prepared by an independent third party, not Glacial PA, or that the "omitted"

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are substantively identical, Glacial PA uses the term "Complaint" here to mean both Complaints, except where otherwise specifically noted.

information was not actually requested in the Application. I&E similarly complains that the “professional resume” submitted by Glacial PA for Gary Mole in response to Question 19B of the Application is “incomplete” (although it does not allege any facts to show that the resume is *inaccurate*) – notwithstanding the absence of any express language in the Application or in the PUC regulations setting forth what information must be included in a “professional resume.” It is only via these far-fetched tactics that I&E attempts to support its current core assertion: that Franklin Power Company (“Franklin”), a Texas-licensed retail energy provider, is the predecessor of Glacial PA and/or an “affiliate” of one of Glacial PA’s shareholders and officers, Gary Mole, and that, accordingly, Glacial PA should have reported the “involvement” of Gary Mole with Franklin.

I&E has attempted throughout this proceeding to add arguments that go well beyond the allegations of its Complaint and the plain language of the EGS Application. I&E continues this trend in its Exceptions. For example, as mentioned above, I&E argues that various persons or entities were “affiliates” or “predecessors” of each other – but the Complaint and Amended Complaint make no such claims. As Administrative Law Judge Salapa correctly observed in his Initial Decision, the information I&E contends Glacial PA omitted was not requested under any reasonable construction of the Application’s relevant language. Applying the commonly used, legally supported definitions, Franklin is not Glacial PA’s predecessor; Gary Mole was not a “defendant/respondent” to any of the described proceedings; and Glacial PA’s responses in its Application were entirely reasonable.

Revoking an EGS license under these circumstances is wholly unwarranted. It creates a regulatory environment in which Applicants complete applications at their peril, faced with the possibility that, at any moment, I&E will attempt to reinterpret provisions that were seemingly

clear on their face and punish the Applicant for its “non-compliance.” Had the Application form clearly asked for the information I&E claims was improperly withheld, Glacial PA would have provided it. If I&E believes the Application form does not elicit information it believes the Commission should have, it should bring its concerns to the proper persons within the Commission and seek to have the Application form revised. It is grossly improper to try, years after the fact, to redefine what information an Application sought, and simultaneously punish Applicants for not having provided that subsequently defined broader set of information. The Commission, of course, has an important role in promoting consumer confidence by assuring that retail electric suppliers operate in a manner consistent with the legal requirements and provide reasonable service to electric consumers without deceptive or misleading tactics or marketing. But attacking an EGS that is otherwise acting reasonably for a non-existent “failure to declare on its initial application” will only serve to make potential entrants less willing to come to Pennsylvania, “chilling” the development of the Pennsylvania retail electric market. Indeed, the mere existence of the Complaint already has harmed Glacial PA’s reputation with both regulators and potential and existing customers.

The ALJ’s Initial Decision (“I.D.”) is based on applicable law, undisputed facts, and sound reasoning. I&E’s Exceptions provide no basis to overturn it. This meritless crusade to punish Glacial PA should be brought to an end. Accordingly, Glacial PA respectfully requests that the Commission deny I&E’s Exceptions, accept the ALJ’s Initial Decision in its entirety, and dismiss I&E’s Complaint.

**B. REPLY TO EXCEPTIONS**

**1. The ALJ Correctly Applied the Summary Judgment Standards.**

I&E’s first Exception argues in conclusory fashion that the ALJ failed to follow “well-established legal principles” applicable to motions for summary judgment. *See* Exceptions at 2-

3. Tellingly, I&E has pointed to no supporting reasons or examples of the ALJ's failure to do so nor does it identify which principles were purportedly erroneous or disregarded. Indeed, I&E's first Exception contains no citations to the Initial Decision or supporting reasons for the exception, in contravention of 52 Pa. Code § 5.533(b). Such a poorly supported exception must be denied.

In any event, the ALJ identified and applied the relevant summary judgment principles. Significantly, as the ALJ points out, Glacial PA's motion contends that I&E failed to assert facts sufficient to show a violation of 66 Pa. C.S. §2809(b) and 52 Pa. Code. §1.35(c). I.D. at 8. In such cases, "the non-moving party must come forward with sufficient evidence essential to preserve the cause of action," and that evidence "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)). Notwithstanding the benefit of having received all reasonable inferences, I&E has not sustained its burden to demonstrate any genuine dispute as to the material facts in this matter. The ALJ correctly looked to the applicable statutes and regulations, and to the language of the EGS Application itself, and concluded that I&E's arguments were not supported *as a matter of law*. Accordingly, I&E's first Exception must be denied.

**2. The ALJ Correctly Concluded that Glacial Was Not Required to Provide Information Regarding Gary Mole and Franklin Power Company.**

I&E's second Exception (which challenges the ALJ's Finding of Fact No. 9 and his findings at pages 12-14 of the Initial Decision) is premised on I&E's recently raised contention that Franklin is a predecessor of Glacial PA. Accordingly, I&E argues that, in response to

Question No. 16 of the EGS Application (the “Application”)<sup>4</sup>, Glacial PA should have disclosed the existence of earlier proceedings before the Public Utility Commission of Texas (“PUC”) regarding Franklin’s license. This argument suffers from two critical flaws.

First, while the ALJ is required to view the *evidence* in the light most favorable to the non-moving party and accept as true all well-supported *facts*, he is not required to accept as true I&E’s *legal arguments*, including arguments concerning the meaning of “predecessor” or “affiliate” as used in the Application. The ALJ, in the absence of any express definitions of “predecessor” and “successor” in the applicable PUC statutes and regulations, in the legislative history, or in the Application itself, correctly applied the commonly understood and utilized definitions of those terms and rejected I&E’s definitions. *See* I.D. at 12-13.

I&E’s rationale for its claim that Franklin is the “predecessor” of Glacial PA is based on incorrect factual assertions that, even if true, do not fall into any legally recognized theory of successor liability or corporate law (nor had I&E even offered any legal support for its “definitions” prior to submitting its Exceptions). Even more importantly, none of the terms in the Application for which I&E has offered its own “interpretations” were defined by the PUC, or otherwise the subject of PUC guidance. Further, not only are I&E’s “interpretations” of the Application questions *not* obvious (*i.e.*, interpretations that Glacial PA reasonably should have used), they are illogical and unreasonable. For example, I&E argues that Glacial PA somehow became the successor to Franklin because Gary Mole “formed Glacial [PA] during the pendency of the Franklin proceedings in Texas and while Franklin was still viable” – an assertion that is

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<sup>4</sup> Question No. 16 provides as follows: “COMPLIANCE: State specifically whether the Applicant, an affiliate, a predecessor of either, or a person identified in this Application has been convicted of a crime involving fraud or similar activity. Identify all proceedings by name, subject and citation, dealing with business operations, in the last five (5) years, whether before an administrative body or in a judicial forum, in which the Applicant, an affiliate, a predecessor of either, or a person identified herein has been a defendant or a respondent. Provide a statement as to the resolution or present status of any such proceedings.” *See* Glacial PA SOF Ex. A (Application); Complaint ¶ 13; I.D. at 11.

indisputably incorrect, as explained below – and “Gary Mole did not follow through with his promised capitalization of Franklin and assumed the assets of Franklin for Glacial [PA]” and “Glacial [PA] then stepped into the shoes of Franklin” – all unsupported allegations. *See* Exceptions at 3; *see also* Memorandum in Support of I&E’s Response to SOF (“I&E Brief”) at 5; Response to Glacial PA’s Statement of Undisputed Material Facts (“I&E Response to SOF”) at ¶ 24 (arguing that Franklin is Glacial PA’s predecessor). This theory of successorship is not supported by any legal authority, and, tellingly, I&E failed to address the legally accepted definitions of “successor” advanced by Glacial PA. *See* Glacial Summary Judgment Brief (“Glacial PA Br.”) at 8 (citing legal authorities including Black’s Law Dictionary (9<sup>th</sup> Ed. 2009)). The ALJ, relying on these same established legal authorities, properly rejected I&E’s expansive and unsupported definition, finding that merely having a “common thread,” as I&E now asserts (Exceptions at 3), is insufficient to confer predecessor/successor status on two distinct corporations.

Second, the ALJ correctly determined that Franklin was not the predecessor of Glacial PA, in light of the properly supported undisputed facts. In particular, I&E’s arguments conspicuously ignore the undisputed fact that Franklin ceased operating in 2005, when it surrendered its operating license, and was dissolved in 2006; but Glacial PA – the Applicant here – was not formed until 2009. *See* Statement of Undisputed Material Facts (“Glacial PA SOF”) ¶¶ 16-17 and Exhibits E-F thereto; I&E Response to SOF ¶¶ 16-17 (admitting, upon information and belief, that Franklin had ceased to exist as of March 1, 2006, and that Glacial PA was formed in 2009); PUCT Dkt. No. 31082, Item No. 3 (May 20, 2005 letter from Roger McAulay to the Texas PUC requesting surrender of license). Moreover, Glacial PA was formed for the sole purpose of selling electricity in *Pennsylvania*, and Franklin *never operated* in Pennsylvania.

Based on these undisputed facts, it is impossible to imagine how Glacial PA could have been formed “while Franklin was still viable” or “during the pendency of the Franklin proceedings in Texas” (I.D at 3, I&E Br. at 5). Similarly, the “facts” alleged by I&E, even if accepted as true, do not suggest that Glacial PA had been “vested with the rights and duties” of Franklin.<sup>55</sup> That one particular individual was “involved” in both companies surely does not produce such a result. Thus, even if one accepts I&E’s impossibly broad definition of “predecessor,” the “facts” put forward by I&E do not support its contention that Franklin was Glacial PA’s predecessor, and the ALJ properly rejected this argument.

As discussed further in connection with I&E’s fifth Exception, below (which poses a virtually identical argument based on I&E’s overbroad and inapposite definitions of “predecessor” and “affiliate”), I&E’s “facts” are little more than conjecture, and do not support its arguments. It is well-settled that 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.” *Infosage, Inc. v. Mellon Ventures, L.P.*, 896 A.2d 616, 626 (Pa. Super. 2006). Accordingly, I&E’s second Exception fails.

### **3. Whether Gary Mole Was a Shareholder or Director of Franklin Is Irrelevant**

I&E’s third Exception, which relates specifically to Question 19(B) of the Application (concerning Gary Mole’s resume), complains that the ALJ did not discuss the evidence submitted by I&E demonstrating Gary Mole’s purported role with Franklin, or otherwise explain how he concluded that “Gary Mole was merely an investor in Franklin.” Exceptions at 4. I&E asserts that Mole’s role with Franklin should have been included on his “professional resume”

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<sup>55</sup> See Black’s Law Dictionary (9<sup>th</sup> Ed. 2009), defining a “successor” as one who has been “vested with the rights and duties of an earlier corporation”; see also Glacial PA Br. at 8.

submitted with the Application because Mr. Mole was a shareholder and director of Franklin. I&E fails, however, to explain how being a shareholder is any different from being an investor. Accordingly, since the ALJ properly concluded that Glacial PA did not have an “obligation to include a summary of Mr. Mole’s investments as part of his resume,” I.D. at 17, this part of I&E’s third Exception fails. Furthermore, even if Mole were a director, there was no obligation that his “professional resume” contain that information, particularly as “resume” is not defined by the Application or the EGS regulations. I.D. at 17; *see also* Glacial PA SOF ¶28 and Ex. H.

Furthermore, the absence of specific discussion of I&E’s “evidence” in connection with this particular argument does not mean the ALJ failed to consider and weigh I&E’s evidence in reaching his conclusion. A judge is not required to explicitly address every single item of evidence proffered by the parties. Nor is the judge under a duty to consider – let alone be swayed by – unsworn out-of-court statements (*i.e.*, hearsay) on a motion for summary judgment – such as the unsworn written testimony referenced by I&E.<sup>6</sup> Rather, the ALJ is directed to consider “the pleadings and depositions, answers to interrogatories, admissions and supporting affidavits.” *See generally* 52 Pa. Code § 5.102(c); *see also* 52 Pa. Code § 5.102(d) (“the judgment sought will be rendered if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law.”); *see also South River Power Partners, L.P. v. West Penn Power Company*, Docket No. C-00935287, 1996 Pa. PUC LEXIS 175 at \*17-19 (Pa. PUC Nov. 6, 1996).

In any event, the purported “facts” contained in I&E’s unsworn testimony would not change the ALJ’s conclusion that Mole’s status as an investor did not require inclusion in his

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<sup>6</sup> I&E’s direct written testimony was filed on March 1, 2013 – the same date that Glacial PA filed its motion for summary judgment.

resume. *See* I.D. at 16-17. First, as previously mentioned, I&E does not explain how being a “shareholder” of Franklin is any different from being an “investor” in Franklin, or how either status warrants inclusion on a resume. *See* Exceptions at 4-5. (Significantly, I&E does not appear to challenge the ALJ’s finding that investments are not typically found on a resume; *see* I.D. at 17. Rather, I&E’s arguments are based on the ALJ’s purported lack of discussion of the evidence the ALJ considered in reaching his conclusion.) Indeed, it is undisputed that Gary Mole’s investment in Franklin was achieved via his ownership of shares of another entity, Touchdown Properties, LLC, which in turn owned shares in Franklin. *See, e.g.*, Glacial PA SOF ¶ 9; I&E Response to SOF ¶ 9 (admitting, upon information and belief, that “Mr. Mole was the sole shareholder of Touchdown Properties, LLC, which acquired 60% of Franklin’s stock”); *see also* I&E’s Answer to New Matter ¶ 33 (admitting that Mr. Mole did not hold shares in Franklin in his name); I&E’s Amended Answer to New Matter ¶ 33 (same); I.D. at 5. Similarly, the fact that Gary Mole (through Touchdown) may have held that ownership interest at the time the PUCT license revocation proceedings against Franklin were filed does not somehow convert this ownership interest into something that must appear on a professional resume.

Second, as the ALJ noted in his Initial Decision, the EGS regulations provide no guidance in determining what information the Commission wants included in a resume, nor is “resume” defined by the Statutory Construction Act of 1972. I.D. at 17. Even if Gary Mole had been a director of Franklin – which Glacial PA does not admit – I&E has presented no evidence to support a contention that directorships are typically included in professional resumes. Indeed, I&E’s sole argument regarding a “professional resume’s” required content was that the term “speaks for itself” and “has a commonly accepted meaning within the particular industry or profession in which it is being used” (but offered no evidence as to what that meaning *is*). *See*

I&E Brief at 9, I&E Response to SOF at ¶¶ 26-28. Similarly, nothing in the unsworn, out-of-court testimony of former Franklin employees Roger McAulay and Michael Petras addresses that issue or provides useful information concerning it.

I&E also complains that the ALJ failed to consider I&E's rebuttal testimony, which it filed on or about April 15, 2013. Exceptions at 5. I&E did not make this rebuttal testimony part of the summary judgment record, however. Instead, I&E would apparently put the burden on the ALJ to monitor the docket for new filings that are distinct from the summary judgment record and utilize them in his decision.<sup>7</sup> For the foregoing reasons, I&E's argument that the ALJ "should" have considered and discussed I&E's rebuttal testimony also fails.

As the ALJ astutely noted, I&E has not alleged any facts to show that the information provided by Glacial PA in response to Question 19(b) is *inaccurate*; rather, I&E argues that the resume provided for Gary Mole is incomplete. I.D. at 17. The ALJ had ample undisputed record evidence and legal support for his conclusion:

I cannot find that Glacial violated the Public Utility Code or Commission regulations by failing to disclose Mr. Mole's involvement with Franklin as part of his resume in response to Question 19B of its EGS application. Question 19B of the EGS application as it is worded does not require that information. Glacial provided the information required by Question 19B of its EGS application.

I.D. at 17. Accordingly, I&E's third Exception must be denied, and this part of the Initial Decision should be adopted by the Commission without alteration.<sup>8</sup>

#### 4. The ALJ Correctly Concluded that Glacial PA Should Not Be Held

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<sup>7</sup> I&E's argument that "there is no way that the ALJ could have considered" I&E's rebuttal testimony (Exceptions at 5) is also erroneous insofar as the Initial Decision was not filed until April 23, 2013.

<sup>8</sup> I&E also asserts that the ALJ concluded that Gary Mole's "prior regulatory experience" in Texas did not need to be included on his professional resume. *See* Exceptions at 4. Not only is the term "prior regulatory experience" in this context vague and undefined, but this purported "finding" is not actually part of the ALJ's conclusion, *see* I.D. at 17, nor was it discussed in the summary judgment briefing. Accordingly, the Commission should disregard this part of I&E's third Exception. *See also* the discussion regarding I&E's fifth Exception, below.

**Responsible for the Accuracy and Completeness of the Dun & Bradstreet Report.**

I&E's fourth Exception focuses entirely on the alleged "incompleteness" of a Dun & Bradstreet Report ("D&B Report") submitted as Attachment 8 to the Application. In this Exception, I&E effectively seeks to hold Glacial PA responsible for "choosing" to submit information that was *specifically requested* and was *from a source identified as acceptable* in the Application. As absurd as that contention is, I&E goes even further, seeking to hold Glacial PA responsible for the purported failure to provide information that *wasn't* requested in response to this Question. *See* Exceptions at 6. This inherently contradictory argument is meritless, and this Exception must accordingly be denied.

This Exception is based on Question 19A of the Application, which requested published financial and credit information, and also specifically identified Dun and Bradstreet as an acceptable form of "independent" financial service report. Question 19A – in response to which the D&B Report was submitted – specifically requests information demonstrating the applicant's "financial fitness commensurate with the service to be provided." *See* Application, Glacial PA SOF, Ex. A at Question 19A. This Question does not ask for information regarding the company's principals. Accordingly, the fact that the D&B Report, which indisputably provided financial fitness information, also included information on management and identified Gary Mole's antecedents as "undetermined" does not render Glacial PA's response to Question 19A – the only Question for which the D&B Report was submitted – incomplete or inaccurate. Indeed, as the ALJ aptly observed, "If the Commission believed that the D&B Report was incomplete or inadequate to demonstrate Glacial's financial fitness, it could have rejected Glacial's EGS application or requested additional information regarding Mr. Mole. The Commission chose not to exercise either of these options in processing Glacial's application." I.D. at 15-16.

Furthermore, the “incompleteness” asserted goes to a portion of the D&B Report that was non-responsive to the Question for which it was submitted. *See* Glacial PA Br. at 10-11. Glacial PA could have submitted only the pertinent pages of the Report, but instead provided the entire report, including the irrelevant information. *See* Application, Glacial PA SOF Ex. A, Attachment 3. Glacial PA submits that penalizing applicants for providing *more* information than was required (thereby incentivizing applicants to *withhold* information – the very practice complained of by I&E in this proceeding) is not a practice the Commission wishes to promote.

I&E’s assertions at page 7 of its Exceptions concerning the “ramifications of allowing the ALJ’s decision to stand on this matter” are similarly without support or merit. Specifically, I&E argues that adopting the ALJ’s Initial Decision “would permit any applicant to provide incomplete and omit possibly damaging information just by having a surrogate fill out its application thereby avoiding have to provide all necessary and relevant information,” Exceptions at 7. But Glacial PA does not suggest that use of a “surrogate” allows it to submit an inaccurate Application (and, indeed, Glacial PA affirmed that its Application was correct, truthful and complete; *see* Glacial PA SOF Ex. A (Application) at 14 (Affidavit of Joel Glassman)). Moreover, the Commission’s rules allow use of a “surrogate,” and, if in doubt, the Commission can always revise its application form accordingly.

In short, the “D&B Report” claim reveals the extent of I&E’s overreaching. The Commission should deny I&E’s fourth Exception and adopt the ALJ’s Initial Decision on this point in its entirety.

**5. The ALJ Correctly Concluded That Neither the Commission’s Statutes and Regulations nor the Application for EGS Authority Required Glacial to Disclose Mr. Mole’s Involvement with Franklin.**

In its fifth and final Exception, I&E argues that the EGS Application required Glacial to disclose “Gary Mole’s prior regulatory experience in Texas and his involvement with Franklin.”

Exceptions at 7. I&E's arguments in this Exception focus on the ALJ's analysis of Question 16 of the Application, and in particular I&E's unsupportable assertions that Franklin is the predecessor of Glacial and that Gary Mole is *himself, as an individual*, an affiliate of Franklin and/or Glacial PA.<sup>9</sup> Based on the foregoing, I&E argues that Question 16 required disclosure of Mr. Mole's "involvement" with Franklin. *See* Exceptions at 7-9.

I&E's central error is that the plain language of Question 16 does not support I&E's claim. Specifically, Question No. 16 states:

State specifically whether the Applicant, an affiliate, a predecessor of either, or a person identified in this Application has been convicted of a crime involving fraud or similar activity. Identify all proceedings by name, subject and citation, dealing with business operations, in the last five (5) years, whether before an administrative body or in a judicial forum, in which the Applicant, an affiliate, a predecessor of either, or a person identified herein has been a defendant or a respondent. Provide a statement as to the resolution or present status of any such proceedings

*See* Application, Glacial PA SOF, Ex. A; *see also* Complaint ¶ 13; I.D. at 11. As to I&E's assertion that this question required disclosure of "Gary Mole's prior regulatory experience in Texas and his involvement with Franklin," the plain language of this Question requires a contrary conclusion. As explained in Glacial PA's prior submissions, Mr. Mole was not a "defendant or a respondent" in any such proceedings, including the PUCT proceedings concerning Franklin, under any accepted definition of those terms (neither of which were defined in the Application). *See* Glacial PA Br. at 4-8. Nor is Franklin Glacial PA's (the Applicant's) predecessor, as explained in response to I&E's second Exception, above. Similarly, nothing in this Question asks for an individual's "prior regulatory experience." Once again, I&E's arguments go well beyond the plain language of the EGS Application.

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<sup>9</sup> These "predecessor"/ "affiliate" arguments are not part of the allegations in I&E's Complaint or Amended Complaint, but were raised for the first time in connection with this motion for summary judgment.

Furthermore, as discussed in connection with I&E's second Exception, above, the ALJ is not required to accept as true I&E's *legal arguments* concerning the interpretation of the definition of "predecessor" or "affiliate."<sup>10</sup> The unspecified "testimony and evidence" submitted by I&E (*see* Exceptions at 8) cannot overcome the simple fact, supported by undisputed record evidence, that Franklin is *not* the predecessor of Glacial PA (within the commonly accepted definition of that term, as used in the EGS Application), nor is Gary Mole an "affiliate" of Franklin or of Glacial PA (nor are Franklin and Glacial PA affiliates of each other). *See, e.g.*, Glacial PA Br. at 8-9; Glacial PA SOF ¶¶ 16-17 and Exhibits E-F thereto; I&E Response to SOF ¶¶ 16-17; *see also* I.D. at 5-6 (summarizing I&E's arguments underlying its assertion that Franklin is the predecessor of Glacial PA).<sup>11</sup> The mere fact that one individual was involved in both corporations is insufficient to confer legal status on two separate companies as predecessor and successor entities (or as affiliates); indeed, such a rule would turn the existing precedent and accepted practice and convention on its head.

Given the absence of any express definitions or guidance in the applicable regulations or regulatory history, the ALJ correctly applied the available definitions of "predecessor" and "affiliate." *See* I.D. at 12-13. Furthermore, I&E failed to identify any facts that the ALJ failed to consider in reaching his conclusion. *See generally* Exceptions at 7-9. Indeed, I&E's argument is bereft of citations to the record (again, in contravention of 52 Pa. Code § 5.533(b)), but relies

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<sup>10</sup> I&E purportedly quotes a definition of "affiliate" from Black's Law Dictionary, but does not provide any more specific citation. Glacial PA is unable to locate that definition in the recent versions of Black's Law Dictionary. *See* Exceptions at 9. *Compare* Glacial PA's Summary Judgment Brief at 9 n.5 (citing to Black's Law Dictionary (9<sup>th</sup> Ed. 2009) ("affiliate" includes "a subsidiary, parent, or sibling corporation."); *see also* I.D. at 13.

<sup>11</sup> I&E's primary proffered evidence on its "predecessor" argument is the unsupported and unsworn pre-filed 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 by an unexamined witness 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; *see also Rivera v. Philadelphia Gas Works*. No. C-2010-2164222, 2012 Pa. PUC LEXIS 33 at \*6 (Pa. PUC Jan. 12, 2012) ("Mere bald assertions, personal opinions or perceptions do not constitute evidence to bolster a claim.").

only on vague references to “testimony and evidence”. Accordingly, the Initial Decision should be accepted by the Commission without alteration.

Similarly, I&E’s latest articulation of what the Application actually sought (*see* Exceptions at 9, asserting that “It is the intent of the application to seek any experience that the applicant or any affiliate may have regarding regulatory experience”) has no support in the clear language of Question 16 of the Application, nor was this argument raised by I&E in its response to Glacial PA’s summary judgment motion.<sup>12</sup> (Furthermore, Glacial PA suspects that the correct inquiry is what the *Commission* seeks, not what the *Application* seeks.) As the ALJ pointed out, “Had the Commission wished to require more disclosure from EGS applicants it could have used more inclusive terms on its forms.” I.D. at 13. The Commission cannot punish an EGS for not answering questions the Application does not pose. In any event, I&E has neither explained what it means by “regulatory experience” (*see* note 8, *supra*) nor provided any facts to show that Mr. Mole had any “prior regulatory experience” in Texas (beyond what was disclosed in his resume). Accordingly, this belatedly raised conclusory argument does not warrant alteration of the ALJ’s Initial Decision.

Finally, I&E’s attempt to suggest that the result here would allow Bernie Madoff to avoid disclosure of his disreputable history is not only entirely inappropriate, but also false. If Mr. Madoff were to come before the Commission today in an attempt to obtain an EGS license (based on the 2009 application), the plain language of Question 16 would require him to identify the proceedings in which he was not only *a named respondent*, but was also convicted of a crime involving fraud or similar activity. *See generally SEC v. Madoff*, 08 CIV 10791 (S.D.N.Y.), *United States v. Madoff*, 09 Cr. 213 (S.D.N.Y.).

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<sup>12</sup> Moreover, I&E’s interpretations of the Application, raised for the first time in litigation, are not entitled to deference. *See 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); Glacial PA SJ Br. at 7.

I&E has once again ignored the plain language of the EGS application. The arguments raised in its fifth Exception are unsupported by either the applicable law or the record, and accordingly, must be dismissed, and the challenged portion of the Initial Decision accepted by the Commission without alteration.

**C. CONCLUSION**

For the foregoing reasons, Glacial PA respectfully requests that the Commission adopt the ALJ's Initial Decision in its entirety without alteration, and dismiss I&E's Complaint.

Respectfully submitted,

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