

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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July 23, 2014

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105-3265


Re: Utility Workers of America
System Local 102
Robert T. Whalen
v.
West Penn Power Company
Docket No. C-2014-2404308

Dear Secretary Chiavetta:

Enclosed please find the Joint Motion for Reconsideration of Third Interim Order in the above referenced proceeding.

Copies have served as indicated on the enclosed Certificate of Service.

Sincerely,


Hobart J. Webster
Assistant Consumer Advocate
PA Attorney I.D. # 314639

Enclosures

cc: Honorable Katrina Dunderdale
Certificate of Service

182285

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Robert T. Whalen, Complainant

v.

Docket No. C-2014-2404308

West Penn Power Company, Respondent

JOINT MOTION FOR RECONSIDERATION OF
THIRD INTERIM ORDER

Pursuant to 52 Pa. Code § 5.103, Complainant Robert T. Whalen (“Complainant”) and the Office of Consumer Advocate (“OCA”) file this Joint Motion respectfully requesting Administrative Law Judge Katrina L. Dunderdale (“the ALJ”) to reconsider her Third Interim Order dated July 18, 2014 based on the additional information contained herein. Counsel for Complainant has conferred with Counsel for Respondent West Penn Power (“Respondent”), who reports that Respondent does not join in this Motion but also does not oppose it.¹

In support of this Joint Motion, Complainant and the OCA state as follows:

1. This proceeding was initiated by the filing of a Formal Complaint by Complainant on February 4, 2014.
2. On February 7, 2014, Complainant served a first set of interrogatories and requests for production of documents on Respondent.
3. Respondent objected to all of those interrogatories and requests for production of documents on February 20, 2014. The objections alleged, inter alia, that Complainant UWUA lacked standing and, therefore, had no right to conduct discovery in this matter.

¹ Respondent West Penn Power (“Respondent”) does not join in this motion, however, the Respondent does not oppose the relief requested.

4. On February 26, 2014, Respondent timely filed Preliminary Objections and an Answer and New Matter. Those pleadings formally raised the issue of UWUA's lack of standing, as well as other issues.

5. On February 28, 2014, counsel for Complainant and Respondent reached an informal agreement concerning discovery, as provided for in 52 Pa. Code § 5.322. In that agreement, counsel agreed to hold all discovery in abeyance until the ALJ issued a ruling on Respondent's Preliminary Objections. A copy of that informal discovery agreement is attached hereto as Appendix A.

6. After the timely filing of various responsive pleadings, the ALJ convened a telephonic prehearing conference on April 17, 2014, in which Complainant and Respondent reiterated their positions orally.

7. The OCA intervened in this matter on April 24, 2014.

8. On June 5, 2014, the ALJ issued her Second Interim Order in which Respondent's Preliminary Objections were granted in part and denied in part.

9. Without consulting with counsel concerning either their availability or the status of this case, the Commission issued a scheduling notice on June 6, 2014, that scheduled an evidentiary hearing in this matter for August 5, 2014.

10. On June 17, 2014, Complainant timely filed an Amended Complaint in response to the ruling made by the ALJ in the Second Interim Order. Such an amendment is specifically provided for in 52 Pa. Code § 5.101(h) within 10 days (plus three days when service is by first class mail) after a presiding officer issues a ruling on preliminary objections.

11. Respondent timely filed Preliminary Objections and an Answer to the Amended Complaint on June 23, 2014.

12. On that same date, Respondent filed its first set of interrogatories and requests for production of documents on Complainant.

13. On July 3, 2014, Complainant timely filed objections to certain of Respondent's interrogatories and requests for production of documents.

14. On July 8, 2014, Complainant served a new first set of interrogatories and requests for production of documents on Respondent.

15. On July 8, 2014, Complainant filed a Notice that informed the parties and ALJ that Complainant would be further amending the complaint in response to Respondent's Preliminary Objections, as provided in 52 Pa. Code § 5.91(b).

16. Complainant timely filed a Second Amended Formal Complaint on July 14, 2014.

17. On that same date, Complainant answered those interrogatories and requests for production of documents to which Complainant had not objected.

18. On that same date, counsel for Complainant and Respondent also held detailed informal telephone conferences concerning discovery matters, as provided in 52 Pa. Code § 5.322. As a result of those conferences, Complainant and Respondent resolved all of Complainant's objections to Respondent's interrogatories and requests for production of documents. That resolution included Respondent withdrawing several of its requests, and Complainant committing to provide Respondent with certain information on an informal basis.

19. During those conferences on July 14, 2014, counsel for Complainant and Respondent both realized that it would not be feasible to hold an evidentiary hearing on August 5, 2014, as scheduled. The parties were still engaged in discovery, with Respondent's answers to Complainant's interrogatories and requests for production of documents not due until August 4,

2014. The parties also were still exchanging pleadings, with Respondent's answer to the Second Amended Complaint not due until August 4, 2014, the day before the scheduled hearing.

20. On that same day, and between telephone conferences, Respondent's and Complainant's clients separately informed their counsel that they were holding settlement conferences that addressed several issues, including the issues raised in this proceeding. The clients separately asked their attorneys if it would be possible to have the hearing delayed to allow them with time to conclude their negotiations.

21. In addition, counsel informed each other of various scheduling concerns each had that would make it impractical to adequately prepare for hearings on August 5. For example, Respondent's lead counsel had recently returned from a 10-day vacation and had five other matters scheduled for hearings and conferences during the week of August 4. Similarly, Complainant's counsel was about to leave on a long-scheduled vacation out of the country (from July 15 through 30) during which access to the Internet and telephone service would be limited.

22. As a result of their mutual concerns about discovery, pleadings, and personal schedules, and consistent with the professional courtesy counsel have shown to each other over their many years of working with each other, counsel for Complainant and Respondent agreed to seek a continuance in this matter. They conferred with counsel for the OCA who concurred with the request.

23. As a further courtesy, counsel for Complainant agreed to provide Respondent with an extension of time to answer or object to interrogatories, until August 11, 2014.

24. Immediately after reaching their informal agreement (at approximately 4:00 pm on July 14), counsel for all parties filed a joint request with the ALJ seeking a postponement of the August 5 hearing.

25. On July 18, 2014, the ALJ issued her Third Interim Order in which she denied the parties' joint request for a continuance.

26. The Third Interim Order held: "There has been more than sufficient time for both parties to engage in discovery and conduct negotiations on a straightforward issue. Therefore, it is my determination the joint request for a continuance is unreasonable and fails to show sufficient cause exists, under the circumstances. The request will be denied." Third Interim Order, p. 2.

27. The Complainant and OCA respectfully request the ALJ to reconsider the Third Interim Order based on the foregoing additional information. As is apparent from the timeline set forth above (some of which was not available to the ALJ because it concerned informal agreements among counsel regarding discovery), counsel for all parties have been diligent in their prosecution of this matter. Complainant attempted to begin discovery immediately after initiating this matter, but Respondent understandably objected to expending resources on discovery when it believed Complainant UWUA lacked standing. Counsel agreed, therefore, that discovery would not be conducted until a ruling was received on the issue of standing.

28. After that ruling was received, Complainant exercised his right to amend the Formal Complaint – first in response to the ALJ's ruling on Preliminary Objections and a second time in response to further Preliminary Objections that raised matters not addressed by the ALJ's Second Interim Order.

29. Respondent initiated discovery in response to the Amended Complaint, and Complainant initiated discovery while preparing the Second Amended Complaint – all in an attempt to move this matter forward as expeditiously as possible.

30. Despite these efforts of counsel on both sides, we respectfully urge that it is impractical to hold a hearing on August 5. Complainant will not see Respondent's answer to the Second Amended Complaint until the day before the hearing (or perhaps after the hearing if the answer is not served electronically). It is expected that the answer may give rise to further discovery requests or may simplify the issues for hearings (if certain facts are admitted, for example).

31. Similarly, Complainant will not see responses to his interrogatories and requests for documents until the day before the hearing (or later if the parties' informal agreement to provide interrogatory answers on August 11, 2014, is allowed to take effect). Those interrogatories request information about the specific reasons Respondent did not read Complainant's meter on certain dates, the number of customers similarly affected on Complainant's meter reading route (which could be relevant to the issue of civil penalties, since the Commission's Policy Statement on civil penalties includes as a criterion the number of customers similarly affected, 52 Pa. Code § 69.1201(c)(5)), various documents related to the estimating of Complainant's meter on certain dates, and other matters directly related to the dispute between the parties. It is expected that the answers to discovery may give rise to further discovery requests or may simplify the issues for hearings, but only if counsel have an adequate opportunity to review and understand the significance of those responses prior to a hearing.


32. The Commission has long encouraged members of the Utility Bar to conduct themselves with the highest level of professionalism and to extend appropriate courtesies to opposing counsel. As long-standing members of the Utility Bar, counsel for all parties pride themselves on attempting to live up to these high standards of professionalism. While we often disagree on substantive issues, we have always treated one another with respect, reached

informal agreements regarding discovery, conducted ourselves professionally, and provided reasonable accommodations to opposing counsel when necessary to avoid personal and professional conflicts.

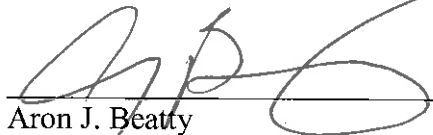
33. The undersigned counsel for Complainant and OCA recognize that the request submitted to the ALJ on July 14, 2014, was prepared quickly (because we wanted to inform the ALJ of our agreement as quickly as possible and because Complainant's counsel was leaving the country the following day), and did not fully set forth all of the relevant facts.

34. We respectfully request, therefore, that in light of the full recitation of facts contained herein, the ALJ reconsider her Third Interim Order and grant the relief requested in the July 14, 2014, letter. Specifically, we again request that the hearing scheduled for August 5, 2014, be postponed to give all the parties time to complete pleadings, discovery, and settlement negotiations; and that the parties provide the ALJ with a status report on or before August 29, 2014.

Respectfully Submitted,



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Tanya J. McCloskey
Acting Consumer Advocate
Dated: July 23, 2014

APPENDIX A

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ATTORNEY • CONSULTANT

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February 28, 2014

Brian C. Wauhop, Esq.
Buchanan Ingersoll & Rooney PC
409 North Second Street, Suite 500
Harrisburg, PA 17101

By electronic mail (brian.wauhop@bipc.com) and first class mail

Re: William J. Sterner (represented by Utility Workers
Union of America System Local 102) v. West Penn
Power Company
Pa. PUC Docket C-2014-2404304

Martin P. Baronner (represented by Utility Workers
Union of America Branch 180 - System Local 102) v.
Pennsylvania Electric Company
Pa. PUC Docket C-2014-2404307

Robert T. Whalen (represented by Utility Workers
Union of America System Local 102) v. West Penn
Power Company
Pa. PUC Docket C-2014-2404308

Dear Brian:

This letter reflects my understanding of an informal agreement we have reached concerning discovery in the above-referenced proceedings. We reached this agreement in accordance with 52 Pa. Code § 5.322 which encourages parties to enter into informal agreements to modify the procedures for discovery. If anything in this letter is inconsistent with your understanding, please call me so we can be certain that we have an agreement.

We have agreed to hold all discovery in abeyance until there is a ruling on the Respondents' Preliminary Objections that were filed on February 26, 2014, in each of the above-referenced proceedings. This agreement applies to all attempts to conduct discovery through whatever means, as well as any related pleadings (such as objections and motions to compel). In particular, we have agreed to toll the due date for responses to all pending discovery requests; to toll the due date for filing motions to compel in response to the Objections that the Respondents filed on February 20, 2014; and to refrain from issuing further interrogatories, requests for production of documents, requests for admissions, or conducting any other types of discovery.

Brian C. Wauhop, Esq.
February 28, 2014
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If a ruling is issued that permits one or more of these cases to move forward, then I will call you to attempt to resolve informally your Objections to interrogatories and requests for production of documents without the filing of motions to compel. If those discussions are unsuccessful, then at that time we will agree on a due date for the filing of motions to compel.

Please let me know if anything in this letter is inconsistent with your understanding. Thank you again for your cooperation.

Sincerely,

A handwritten signature in cursive script, appearing to read "Scott".

CERTIFICATE OF SERVICE

Utility Workers of America
System Local 102
Robert T. Whalen

v.

West Penn Power Company

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C-2014-2404308

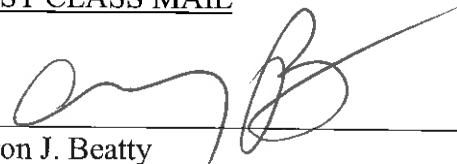
I hereby certify that I have this day served a true copy of the foregoing document, the Joint Motion for Reconsideration of Third Interim Order, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 23rd day of July 2014.

SERVICE BY E-MAIL & FIRST CLASS MAIL

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