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May 26, 2015

VIA E-FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Whemco-Steel Castings, Inc. v. Duquesne Light Company
Docket No. C-2014-2459527

Dear Secretary Chiavetta:

On behalf of Whemco-Steel Castings, Inc., I have enclosed for electronic filing the Answer of Whemco-Steel Castings, Inc. to Motion to Compel Answers to Interrogatories and Requests for Production of Documents Propounded by Duquesne Light Company in the above-captioned proceeding.

Copies have been served on all parties as indicated in the attached Certificate of Service.

Sincerely,



Alan M. Seltzer

AMS/tlg

Enclosure

cc: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

WHEMCO-STEEL CASTINGS, INC.	:	
	:	
v.	:	DOCKET NO. C-2014-2459527
	:	
DUQUESNE LIGHT COMPANY	:	

**ANSWER OF WHEMCO-STEEL CASTINGS, INC. TO MOTION TO COMPEL
ANSWERS TO INTERROGATORIES AND REQUESTS FOR PRODUCTION OF
DOCUMENTS PROPOUNDED BY DUQUESNE LIGHT COMPANY**

WHEMCO-STEEL Castings, Inc. (“Whemco”) hereby responds to the Motion to Compel (“Motion”) filed by Duquesne Light Company (“Duquesne”), pursuant to this Commission’s regulations at 52 Pa. Code § 5.342(g)(1) as follows:

I. INTRODUCTION

1. The Motion and this Answer have their genesis in a discovery dispute between the Duquesne and Whemco regarding certain interrogatories propounded by Duquesne upon Whemco on April 29, 2015 (“Set II Discovery”).

2. Whemco objected timely to four interrogatories in the Set II Discovery, primarily on the basis of relevance and the necessity for Whemco to speculate in order to develop answers (“Objections”). Apparently not satisfied with the Objections, Duquesne filed the Motion seeking to compel responses to two of the four interrogatories. Whemco and Duquesne have discussed the Objections to determine if a resolution was possible, but have been unable to resolve their differences.

3. While Whemco understands and acknowledges the general breadth and scope of the Commission’s discovery regulations, it is appropriate to draw a line in this case since the interrogatories in question cannot reasonably be demonstrated to be relevant or lead to the admissibility of relevant information. In addition, they call for speculation and would require

Whemco to answer based on hypotheticals rather than facts. Accordingly, the Motion should be dismissed with prejudice.

II. BACKGROUND

4. On April 29, 2015 Duquesne served the Set II Discovery upon Whemco. All but four interrogatories in the Set II Discovery have been answered timely.¹

5. Whemco filed timely objections to Nos. 2, 3, 5 and 9 of the Set II Discovery, together with the basis for its Objections. Since Nos. 5 and 9 have been withdrawn, the only ones remaining in this dispute are Interrogatory Nos. 2 and 3.

6. For ease of reference, the interrogatories in the Set II Discovery subject to the Objections (“Interrogatories”), along with Whemco’s response thereto, are set forth below:

No. 2 - If Whemco had participated in Duquesne Light’s default service proceeding at Docket No. P-00072247 and opposed elimination of Rider No. 5, explain every substantive reason that Whemco would have alleged supporting its position.

Objection: Whemco objects to the foregoing written interrogatory on the ground that it is based on a speculative premise, compounded by a request for speculative information. As the question clearly and correctly indicates, Whemco did not participate in the referenced 2007 default service proceeding so the question is based on a speculative premise. In addition and because it did not participate in such proceeding, Whemco has no way to provide a substantive answer to such a hypothetical and speculative interrogatory. The interrogatory is also seeking information that is not relevant to the subject matter of this proceeding, including any claim or defense in this proceeding, since this case is not about what action Whemco would have potential taken *if* it had participated in the referenced default service proceeding and is not likely to lead to the discovery of admissible evidence. *See*, 52 Pa. Code § 5.321(c).

No. 3 – Fully explain all reasons why Whemco believes electric customers should receive distribution rate discounts for using or not using electricity at different times of the day.

¹ Nos. 5 and 9 of the Set II Discovery have been withdrawn by Duquesne.

Objection: Whemco objects to the foregoing written interrogatory on the ground that seeks broad and generic information about discounts relating to using electricity at different times of the day which is *not* an issue, claim or defense in this proceeding. Whemco has not proposed or supported Duquesne's distribution rate utilizing a discount for use of electricity at different times of the day. Accordingly, this interrogatory is seeking information that is not relevant to the subject matter of this proceeding, including any claim or defense in this proceeding since this case is not about Whemco's generic views of these time-of-use issues. Whemco asserted in its Formal Complaint in this proceeding that Duquesne, among other things, failed to lawfully and properly terminate the Rider No. 5 discount applicable to Rate L customers like Whemco in Duquesne's 2007 default service proceeding and thereafter failed to execute a contract under Rule 4 of Duquesne's tariff that the parties were negotiating in an effort to, among other things, ameliorate the substantial and adverse rate impacts on Whemco by the elimination of the Rider No. 5 discount effective January 1, 2011. *See*, 52 Pa. Code § 5.321(c).

III. ARGUMENT

A. The Relevance Standard for Discovery and Previous Limits Recognized by the Commission

7. The scope of permissible discovery in Commission proceedings is governed by the Commission's rules at 52 Pa. Code § 5.321. The presiding officer in any proceeding has broad discretion regarding the scope of discovery. For example, 52 Pa. Code § 5.321(b) specifically gives the presiding officer the authority to "vary provisions of this subchapter as justice requires."

8. There is little doubt that the Commission's regulations are intended to encourage discovery. However, there are reasonable and legitimate boundaries that cannot be exceeded. Among those limitations is that discovery can only be undertaken with respect to matters that are not privileged and which are "relevant to the subject matter involved in the pending action ..."²

² The Commission's rules also indicate that discovery may be conducted with respect to matters that, although they may be inadmissible at hearing, may nevertheless be permitted as long as the information sought appears reasonably calculated to lead to discovery of admissible evidence.

52 Pa. Code § 5.321(c). The Pennsylvania courts have said that “[e]vidence is relevant, if it tends to make a fact at issue more or less probable.” *LaVerne R. Martin v. Larry Soblotney*, 502 A.2d 1022, 1034 (Pa. 1983).

9. Despite the breadth of discovery permitted under the Commission’s regulations, the Commission has limited a party’s inquiry into issues which are not relevant to the issues in a pending matter. *Application of Newtown Artesian Water Company and Indian Rock Water Company*, 1990 Pa. PUC LEXIS 83, involved a proposed merger of two companies along with the abandonment of service by Indian Rock Water Company. Newtown Township (“Township”) petitioned to intervene in the merger case and filed a separate eminent domain case with the Commission. The Township submitted interrogatories in the merger proceeding concerning ratemaking matters and additional discovery in the eminent domain case. The merging companies objected to the interrogatories, and the Township filed a Motion to Compel. The Township believed it was entitled to pursue discovery “as to what costs can be saved if Indian Rock is acquired by eminent domain.” The ALJ denied the Motion to Compel and reasoned “[T]he saving of costs in a separate, legal proceeding on eminent domain is not relevant to the pending merger application proceeding. To argue in favor of discovery because of discovery’s potential effect on a separate proceeding is a blatant admission that the discovery sought is inappropriate and irrelevant to the case at bar.” 1990 Pa. PUC LEXIS 83 at 7.

10. In *Re Structural Separation of Bell Atlantic-Pennsylvania, Inc Retail and Wholesale Operations*, 2000 Pa. PUC LEXIS 49, the issue in the proceeding was limited to the form of structural separation of Bell Atlantic-Pennsylvania, Inc’s retail and wholesale operations. Bell Atlantic-Pennsylvania propounded thirteen interrogatories on NEXTLINK Pennsylvania, Inc. seeking to examine NEXTLINK’s business activities in Pennsylvania. NEXTLINK

objected by claiming that the information sought was not relevant to the subject matter of the proceeding and not reasonably calculated to lead to the discovery of admissible evidence. In resolving Bell Atlantic-Pennsylvania's Motion to Compel, the Commission ruled that Bell Atlantic-Pennsylvania sought information regarding the *need* for (not the form of) structural separation, a matter previously litigated before the Commission, and beyond the scope of the present proceeding. 2000 Pa. PUC LEXIS 49 at 18-19.

11. Therefore, based on the plain language of the Commission's discovery rules and the aforementioned Commission precedent, parties in a contested proceeding before the Commission do not have unbridled discretion to conduct discovery.

B. The Bases for Whemco's Objections

i. Interrogatory No. 2

12. In Interrogatory No. 2, Duquesne is seeking information about Whemco's supposed opposition to the elimination of the Rider No. 5 time of day discounts in Duquesne's 2007-2008 default service proceeding at Docket No. P-00072247 ("Default Service Proceeding"). This interrogatory contains the unstated premise that had Whemco chosen to participate in the Default Service Proceeding it would have been able to discern that elimination of the Rider No. 5 time of day discount from Rate L was an issue in the case. That premise is itself highly speculative because the issue of eliminating the Rider No. 5 discount applicable to Rate L customers like Whemco was neither mentioned in the petition filed by Duquesne instituting the Default Service Proceeding nor addressed in the testimony from Duquesne.

13. Consistent with the provisions of 52 Pa. Code § 5.321, Whemco objected to the Interrogatories on both relevance and speculative grounds, as well as that the interrogatories would require Whemco to engage in a hypothetical analysis lacking in factual support.

14. The facts relating to Interrogatory No. 2 are not in dispute. Whemco never participated in the Default Service Proceeding, never took any position on any issues in that proceeding since it was not a participant, did not know about any attempt in the Default Service Proceeding to eliminate the Rider No. 5 distribution rate discount from Rate Schedule L, and has never taken any position – for or against – the elimination of the Rider No. 5 time of day discounts. Thus, to answer this interrogatory would cause Whemco to engage in classic speculation, i.e., the forming of a theory or conjecture without firm evidence. Moreover, the speculation is retroactive. Duquesne seeks a 2007 era opinion from Whemco regarding a position it never took.

15. A party is not entitled to conduct discovery requiring a party opponent to speculate about matters for which it cannot reasonably develop a response.³ On this basis alone, Whemco should not be compelled to answer Interrogatory No. 2.

16. To determine whether certain discovery seeks relevant information, or information likely to lead to admissible evidence at the hearing, it is necessary to understand (i) the nature of the inquiry and (ii) the issues in the case to which the discovery is directed.

17. In this case, Whemco’s position on any attempted elimination of the Rider No. 5 discount in the Default Service Proceeding over 8 years ago is not relevant to the core issue in the formal complaint filed by Whemco initiating this proceeding (“Formal Complaint”). In the Formal Complaint, Whemco seeks refunds based on its assertions that Duquesne improperly terminated the Rider No. 5 distribution rate discount applicable to Whemco as a large commercial and industrial customer in the Default Service Proceeding by, among other things:

³ See, *Kerns v. Methodist Hospital*, 574 A.2d 1068 (Pa. Super. Ct. 1990) (holding that a subpoena to the Philadelphia Police Department requesting any records indicating the occurrence of criminal assaults in the area “was unquestionably speculative” and that a request for production of all of a hospital’s security log books for time periods prior to the assault was “likewise unquestionably speculative”).

(i) including distribution rate relief in a generation-related case; (ii) failing to provide lawful and constitutional advance notice to Whemco of the intended termination of the Rider No. 5 discount for Rate L customers like Whemco and failing to disclose the potential rate impact of such elimination on Whemco; (iii) failing to effect the termination of the Rider No. 5 discount in the Default Service Proceeding because there was no testimony or other evidentiary support for such relief; and (iv) failing to enter into a General Stipulation in the Default Service Proceeding that could lawfully and effectively terminate the Rider No. 5 discount applicable to large commercial and industrial customers like Whemco given the other errors noted above.

18. No claim or requested relief in the Formal Complaint raises or is predicated upon Whemco's position on the merits of termination of the Rider No. 5 discount applicable to large commercial and industrial customers like Whemco in the Default Service Proceeding. On the contrary, Whemco seeks refunds in the Formal Complaint associated with the *way* in which Duquesne attempted to eliminate Rider No. 5, not what Whemco's position would have been had it been a participant in the Default Service Proceeding, i.e., the merits of the elimination of time of day rates for distribution service. This interrogatory is simply not relevant to any issue in this case or likely to lead to admissible information. *See*, 52 Pa. Code § 5.321(c).

19. And, because Whemco was not a party to the Default Service Proceeding, has never taken a position on the elimination of the Rider No. 5 distribution rate discount and, most importantly, the Rider No. 5 discount *no longer exists*, it would literally be impossible and completely speculative for Whemco now in 2015 to opine on the elimination of the Rider No. 5 discount that occurred – unlawfully in Whemco's view – back in 2007 and 2008 during the Default Service Proceeding. It is simply not possible and Whemco should therefore not be

compelled through the artifice of discovery, to provide after the fact opinions of matters that are both irrelevant and untimely.

20. In an effort to circumvent the clear lack of relevance and speculative nature of Interrogatory No. 2, Duquesne claims that addressing the merits of eliminating time of day rates for distribution service is relevant to “determining whether to award a refund or not award a refund.” Motion ¶ 11. The Motion provides no legal support for this position.

21. The fact that the Commission may have the discretion in some circumstances to direct refunds, as alleged by Duquesne (Motion, ¶ 11), does not provide Duquesne a legal or other basis to compel Whemco in discovery to address the merits of the elimination of the Rider No. 5 discount which occurred eight years ago in a proceeding in which it was *not a party*.

22. Importantly, the Motion’s reliance on *Pa.P.U.C. v. Pennsylvania Gas and Water Co.*, 1982 Pa. PUC LEXIS 48, 56 Pa. PUC 433, 49 P.U.R.4th 356 (Order entered October 29, 1982) (“*PG&W*”) as *requiring* the Commission to consider the merits of eliminating Rider No. 5 in determining whether to award or not reward a refund is misplaced. First, *PG&W* is completely distinguishable from this proceeding on its facts. *PG&W* involved a multi-stage base rate proceeding and not a claim like this proceeding from a single customer for a refund based on the unlawful termination of a specific tariffed rate. Second, the refunds at issue at *PG&W* involved the totality of base rates allegedly charged to *all customers* which were later found to be unlawful. In this proceeding, Whemco’s refund claim is based – not on an improperly allowed option in a base rate case – but upon the unlawful elimination of a specific tariff provision applicable to Whemco as a large commercial and industrial customer. The factual differences between this proceeding and *PG&W* could not be more striking.

23. By focusing on the “merits” of the elimination of the Rider No. 5 distribution discount, Duquesne is diverting attention away from the fact that the Formal Complaint is seeking refunds for *procedural and legal errors* relating to Duquesne’s efforts in the Default Service Proceeding that have nothing to do with Duquesne’s, Whemco’s or even the Commission’s view about whether time of day rates should or should not be included in distribution service. Nor does the Formal Complaint address the hypothetical question of whether the Commission would have eliminated the Rider No. 5 discount for Rate L customers like Whemco had all the legal and procedural errors never existed in the Default Service Proceeding.

24. The Pennsylvania courts have long held that a party cannot hide behind its own procedural “blunders” or “slips” to escape responsibility for refunds.⁴ Allowing Duquesne’s frolic and detour into the merits of a wholly irrelevant and speculative inquiry about what Whemco would have done in a proceeding it never participated in should not be countenanced for any purposes in this proceeding – discovery or otherwise.

ii. Duquesne’s Reworded Interrogatory is Objectionable and Inappropriate

25. In an effort to address Whemco’s speculative objection to Interrogatory No. 2, Duquesne offers in the Motion (¶ 13) to reword the question, allegedly removing the objection, and then offering to withdraw Interrogatory Nos. 2 and 3 if the new question is acceptable to Whemco.

26. The new Duquesne interrogatory is as follows: “Explain all of Whemco’s substantive objections to the elimination of Rider No. 5.” This “new” question is neither new

⁴ *Duquesne Light Company v. Pennsylvania Public Utility Commission*, 117 Pa. Cmwlth 28, 543 A.2d 196 (Cmwlth Ct. 1988) (“[e]quity should not intervene where those seeking its aid are at least in part responsible for the circumstances which they now contend have produced the inequitable result”).

nor addresses the fundamental objection to these interrogatories. This revised question “assumes” that Whemco has substantive objections to the elimination of Rider No. 5. The fact is Whemco has taken no position on the issue because it is *not* an element of the Formal Complaint in this proceeding. Moreover, the Rider No. 5 discount for large commercial and industrial customers like Whemco no longer exists – having been unlawfully terminated as part of the Default Service Proceeding. Given these undisputed facts, Whemco’s “opinion” about a no longer existing rate discount is most assuredly not relevant to this proceeding. Duquesne’s revised interrogatory and offer to withdraw do not resolve the discovery dispute underlying the Objections.

iii. Interrogatory No. 3

27. Interrogatory No. 3, which asks Whemco why it believes electric customers should receive distribution rate discounts for using or not using electricity at different times of the day, is objectionable on the same bases and reasons identified above, which are incorporated by reference herein. Similar to Interrogatory No. 2, the question does not relate to any issue or claim in this case because Whemco has not advanced a position it is obligated to defend regarding the merits of customers utilizing time of day distribution rates.

28. As noted above, Whemco has not taken any substantive position in the Formal Complaint or otherwise regarding whether or not customers should be entitled to time of day distribution rate discounts. That issue is outside of and not related to the Formal Complaint and the relief requested therein. Therefore, Whemco should not be required to create a substantive position on this issue.

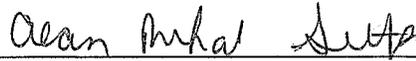
IV. CONCLUSION

29. Whemco should not be compelled to respond to Interrogatory Nos. 2 and 3 for the reasons specified herein.

WHEREFORE, Whemco requests that the Motion be denied and the Commission grant Whemco such other relief as is just and reasonable under the circumstances.

Respectfully submitted,

Dated: May 26, 2015



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