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June 15, 2015

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed please find the Brief of Duquesne Light Company in Support of Its Petition for Certification of a Discovery Ruling for Interlocutory Review in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,

Anthony D. Kanagy

ADK/skr
Enclosure

cc: Certificate of Service
Honorable Jeffrey Watson

CERTIFICATE OF SERVICE

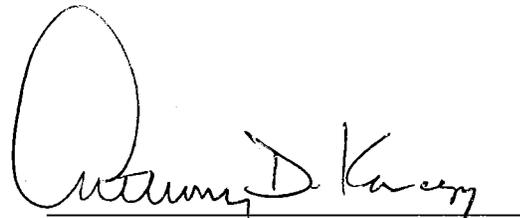
I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**DUQUESNE LIGHT COMPANY BRIEF IN SUPPORT OF
PETITION FOR CERTIFICATION OF A
DISCOVERY RULING FOR INTERLOCUTORY REVIEW**

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I. INTRODUCTION

On December 23, 2014, Whemco-Steel Castings, Inc. (“Whemco”) filed the above-captioned Complaint with the Pennsylvania Public Utility Commission (“Commission”) alleging that Duquesne Light Company (“Duquesne Light” or the “Company”) improperly eliminated Rider No. 5 Time-of-Day Discounts from the Company’s tariff. In its Complaint, Whemco requests a refund of Duquesne Light’s existing tariff rates that have been in effect since January 1, 2011. Because Whemco’s Complaint is against Duquesne Light’s existing rates, Whemco has the burden of proof in this proceeding. *Brockway Glass Co. v. Pa. P.U.C.*, 437 A.2d 1067, 63 Pa. Cmwlth. 238 (1981). On January 21, 2015, Duquesne Light filed its Answer and New Matter to Whemco’s Complaint. In its Answer and New Matter, Duquesne Light denied the substantive averments of Whemco’s Complaint and explained that the elimination of Rider No. 5 was lawful and in compliance with applicable Commission orders.

On April 29, 2015, Duquesne Light served its Interrogatories and Requests for Production of Documents, Set II (“Set II Discovery”) on Whemco. On May 8, 2015, Whemco filed its objections to Questions 2, 3, 5 and 9 of the Set II Discovery. Pursuant to discussions with Whemco, Duquesne Light agreed to withdraw Questions 5 and 9. Duquesne Light also proposed to revise Questions 2 and 3. However, the parties were not able to reach a compromise regarding Questions 2 and 3.

On May 18, 2015, Duquesne Light filed a Motion to Compel Whemco to respond to Questions 2 and 3. On May 26, 2015, Whemco filed an answer to the Motion to Compel. On June 4, 2015, the ALJ issued the Interim Order which denied Duquesne Light’s Motion to Compel.

On June 8, 2015, Duquesne filed a Petition for Certification of a Discovery Ruling For Interlocutory Review (“Petition”), pursuant to 52 Pa. Code § 5.304. In its Petition, Duquesne

Light requests that Administrative Law Judge Jeffrey A. Watson (the “ALJ”) certify the ruling in the *Interim Order Denying the Motion of Duquesne Light Company to Compel Answers to Interrogatories and Requests for Production of Documents Propounded by Duquesne Light Company on Whemco-Steel Castings, Inc., Set II (“Interim Order”)* dated June 4, 2015 to the Commission.

In the *Interim Order*, the ALJ denied Duquesne Light’s Motion to Compel Whemco to answer questions related to: (1) Whemco’s substantive opposition to the elimination of Rider No. 5 – Time of Day Discounts (“Rider No. 5”) for distribution service; and (2) why Whemco believes electric customers should receive distribution rate discounts for using or not using electricity at different times of the day. In the *Interim Order*, the ALJ recognized that the Commission’s regulations allow for a broad scope of discovery to include relevant matters related to the claim or defenses of the party seeking discovery. However, the ALJ then denied Duquesne Light’s Motion to Compel on the grounds that Whemco’s Complaint was based on alleged procedural and legal errors for eliminating Rider No. 5, not the substantive reasons for eliminating Rider No. 5. *Interim Order*, pp. 10-11.

Duquesne Light agrees that Whemco’s Complaint conveniently sidesteps any argument related to the substantive reasons for eliminating Rider No. 5. However, the fact that Whemco’s Complaint avoids the substantive reasons for eliminating Rider No. 5 is not the standard for determining the relevance of whether that issue should be considered in this proceeding. Under the Commission’s discovery rules, Duquesne Light is permitted to ask discovery questions related to its defense of the Complaint. One of Duquesne Light’s defenses in this proceeding will be that the Commission should exercise its discretion not to award Whemco refunds of Rider No. 5 under Section 1312 of the Public Utility Code, 66 Pa. C.S. § 1312, because Rider

No. 5 should have been eliminated for substantive reasons. Duquesne Light's discovery questions to Whemco regarding its substantive position regarding the elimination of Rider No. 5 and why it believes that customers should receive distribution rate discounts for using or not using electricity at different times of the day are relevant to Duquesne Light's defense of this proceeding and are not speculative. Duquesne Light will be substantially prejudiced if its Petition for Certification is denied because Duquesne Light will not be provided with information concerning Whemco's claimed basis for elimination of Rider No. 5 in preparing its defense to Whemco's claim for refunds. Certifying this discovery ruling to the Commission is appropriate to resolve an important question of law regarding the relevance of information that is important to Duquesne Light's defense and that could materially impact the outcome of this proceeding. The Commission should immediately resolve this issue to avoid the potential for remand of this proceeding to the ALJ after an incomplete record is developed and an Initial Decision is prepared and presented to the Commission.

II. QUESTION PRESENTED

Whether Whemco should be required to respond to discovery questions regarding the substantive merits of the elimination of a time of day rate for distribution service?

III. ARGUMENT

A. THE *INTERIM ORDER* INVOLVES AN IMPORTANT QUESTION OF LAW AND SHOULD BE CERTIFIED TO THE COMMISSION FOR IMMEDIATE RESOLUTION.

Section 5.304(b) of the Commission's regulations sets forth the standards for certifying a discovery ruling to the Commission. 52 Pa. Code § 5.304(b). This Regulation provides that:

A presiding officer may certify that a discovery ruling is appropriate for interlocutory review when the ruling involves an important question of law or policy that should be resolved immediately by the Commission.

The *Interim Order* addresses an important question of law in this proceeding regarding whether Whemco should be required to provide responses to data requests on issues that are relevant to one of Duquesne Light's defenses in this proceeding. Whemco is attempting to limit the scope of this proceeding to procedural and legal issues. Whemco's attempts to limit the scope of this proceeding to procedural and legal issues is improper and should be denied. As explained in more detail below, Duquesne Light will be substantially prejudiced in its ability to defend itself if Whemco is not required to answer questions regarding its position on the substantive merits of eliminating a time of day discount to distribution rates.

Duquesne Light recognizes that under the Commission's standards, errors which can be satisfactorily cured during the normal review process are not suitable for interlocutory review. See *Pa. P.U.C. v. Dauphin Consolidated Water Supply Company*, Docket No. R-860350, 1987 Pa. PUC LEXIS 215, 65 Pa. P.U.C. 12, Order entered August 21, 1987 ("*Dauphin Consolidated*"). In *Dauphin Consolidated*, the Commission denied a Petition for Interlocutory Review filed by Dauphin Consolidated in opposition to an ALJ Order granting a motion to compel. The Commission ruled that the discovery dispute was not exceptional and could be cured during the normal review process. Importantly, the Commission noted that:

“... a line of inquiry which may or may not be directly relevant should **not** be cut off prematurely in the name of expedition.”

Dauphin Consolidated, 1987 Pa. PUC LEXIS 215, *9 (emphasis supplied).

Duquesne Light notes that its Petition for Interlocutory Review is distinguished from *Dauphin Consolidated* because this matter cannot be corrected by the Commission in the due course of the proceeding, unless remanded, because the record will be void of Whemco's responses to Duquesne Light's discovery questions. The Commission is not able to review evidence that is not in the record. Moreover, the Commission's holding in *Dauphin*

Consolidated that a line of inquiry which may or may not be directly relevant should not be cut off prematurely should be followed in this proceeding. Duquesne Light's questions to Whemco regarding its position on the substantive merits of eliminating Rider No. 5 should not be cut off.

In addition, the Commission should resolve this issue immediately to expedite the conduct of this proceeding. If this issue is not resolved now, the record will not be fully developed. If the Commission later agrees with Duquesne Light that Whemco should answer questions regarding Whemco's substantive basis for eliminating Rider No. 5, the proceeding would have to be remanded to the ALJ for further development of the record. This would waste resources, including the Commission's, Duquesne Light's and Whemco's time, and cause unnecessary delay. Immediate resolution of this issue will prevent waste of resources and unnecessary delay.

For the reasons explained herein, Duquesne Light's request for certification meets the standards set forth in 52 Pa. code § 5.304(b).

B. INFORMATION REGARDING THE SUBSTANTIVE MERITS OF ELIMINATING RIDER NO. 5 IS RELEVANT IN THIS PROCEEDING.

In this proceeding, Whemco argues that its request for refunds associated with Rider No. 5 solely relate to procedural and legal arguments and that it should not be required to give its position regarding the substantive reasons for eliminating Rider No. 5. Whemco attempts to limit this proceeding to procedural and legal arguments and attempts to ignore the substantive reasons for eliminating Rider No. 5. This is improper.

Whemco's claim for a refund in this proceeding is based upon Section 1312 of the Public Utility Code, 66 Pa. C.S. § 1312, which provides that the Commission "shall have the power and authority" to award refunds. It must be emphasized that the Commission is not required to order refunds which are authorized by Section 1312 but has the discretion to award refunds.

The case law is clear that refunds are not mandatory. In *Pa. P.U.C. v. Pennsylvania Gas and Water Company*, Docket No. C-80031919, 1982 Pa. PUC LEXIS 48, 56 Pa. P.U.C. 433, Order entered October 29, 1982 (“*PG&W*”), the Commission stated as follows:

The Staff and the OCA take the position that refunds are compelled by reason of the Court's decision in the Cheltenham case, *supra*. We disagree. In our view, the Court's decision in the Cheltenham case should not be construed to interpret Section 313(a) of the Public Utility Law, 66 P.S. § 1153(a) as mandating refunds. In our view, the Legislature conferred upon the Commission authority to order refunds, without specific guidance or limitation and therefore at its sound discretion. This conclusion is amply supported by the decisions in *Equitable Gas Co. v Pennsylvania Pub. Utility Commission (1954) 174 Pa Super Ct 450, 102 A2d 235*; *Magee Carpet Co. v Pennsylvania Pub. Utility Commission (1954) 174 Pa Super Ct 438, 102 A2d 229*; and, *Lancaster Ice Manufacturing Co. v Pennsylvania Pub. Utility Commission (1958) 185 Pa Super Ct 615, 22 PUR3d 187, 138 A2d 262*, as well as numerous decisions from other jurisdictions. More specifically in *Magee* the Court said (*174 Pa Super Ct at p. 449*):

"We find nothing in the language of section 313(a) which makes it mandatory for the Commission to award refunds [*27] under a defective fuel adjustment clause, although it has the 'power and authority' to do so."

Similarly in *Equitable Gas Co. v Pennsylvania Pub. Utility Commission, supra*, the Superior Court stated (*174 Pa Super Ct at pp. 456, 457*):

"To adopt the interpretation of sections 308(b) and 313(a) for which the Company argues would unduly limit the Commission in exercise of its administrative discretion and reduce rate making, especially in the matter of the effect of suspension on ultimate rates and refunds, to the application of a fixed mathematical formula. It is obvious that these sections should be construed as giving the Commission certain discretionary power within the limits of the statute. See *City of Pittsburgh v Pennsylvania Public Utility Commission, supra, 171 Pa Super Ct 187, 96 PUR NS 161, 90 A2(1607)*; *Magee Carpet Co. v Pennsylvania Pub. Utility Commission (1954) 174 Pa Super Ct 438, 102 A2d 229*. This discretionary power is a necessary corollary of the Commission's function as a fact-finding and administrative body. Had there been an intention to limit the discretion of the Commission it would

have been expressed. Cf. section 310(e) of the Public Utility Law [*28] of 1937; 66 PS § 1150."

In *Lancaster Ice Manufacturing Co. v Pennsylvania Pub. Utility Commission, supra*, the Superior Court again held that (185 Pa Super Ct at p. 627, 22 PUR3d at p. 194):

"In reparations the Commission's jurisdiction is equitable in nature; *Centre County Lime Co. v Pennsylvania Pub. Service Commission (1931) 103 Pa Super Ct 179, 157 Atl 815; Chambersburg Gas Co. v Pennsylvania Pub. Service Commission (1935) 120 Pa Super Ct 206, 14 PUR NS 106, 182 Atl 94*; and the Commission is not without discretion in exercising its equitable powers: *Magee Carpet Co. v Pennsylvania Pub. Service Commission (1954) 174 Pa Super Ct 438, 102 A2d 229.*"

In addition, the Commonwealth Court has held that the Commission's ability to award refunds under Section 1312 of the Public Utility Code is discretionary. In *National Fuel Gas Distribution Corporation v. Pa. P.U.C.*, 76 Pa. Cmwlth. 102, 464 A.2d 546 (1983), the Commonwealth Court stated as follows:

Whether to require a refund under Code Section 1312 of monies previously collected by a utility is a matter charged by subsection (a) of that provision to the sound discretion of the Commission.

National Fuel, 76 Pa. Cmwlth. 102, 121, 464 A.2d 546, 555-556.

In its Answer to Duquesne Light's Motion, Whemco argues that *PG&W* is distinguishable from this proceeding because: (1) *PG&W* involved a base rate proceeding and not a claim for a refund from a single customer, and (2) the refunds at issue in *PG&W* involved the totality of base rates charged to all customers. Whemco Answer, p. 8. Whemco's distinctions are not relevant to the core issue that Duquesne Light is relying on in the *PG&W* case – that the Commission has discretion to award or not to award refunds of base rate charges under Section 1312. The Commission's discretion not to award refunds under Section 1312 applies to all rates whether it is raised in a base rate proceedings or an individual customer complaint proceeding. Likewise, the Commission's discretion not to award refunds under

Section 1312 applies to both refunds that are based on the totality of base rates charged to customers or an individual Rider charged to a subset of customers. Section 1312 does not distinguish between types of refund proceedings but gives the Commission discretion not to award refunds in all proceedings under Section 1312. Whemco's attempts to distinguish the holding in *PG&W* are not relevant to the core issue that Duquesne Light is relying on – the Commission's discretion under Section 1312.

In addition, the Commission's regulations specifically allow discovery that is relevant to a party's defense of its case. Section 5.321(c) provides

(c) *Scope.* Subject to this subchapter, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, **whether it relates to the claim or defense of the party seeking discovery** or to the claim or defense of another party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

52 Pa. Code § 5.321(c)(emphasis supplied).

Because the Commission has discretion to award refunds, the substantive reasons for eliminating Rider No. 5 – a time of day discount for distribution service – are relevant to Duquesne Light's defense of this proceeding. Because the Commission has such discretion, Duquesne Light is entitled to present evidence that the Commission should exercise its discretion to not award refunds: (1) because Rider No. 5 should have been eliminated for substantive reasons, and (2) because customers should not receive a distribution rate discount for using electricity at different times of the day. Therefore, it is also appropriate and relevant for

Duquesne Light to seek discovery regarding Whemco's substantive position on the elimination of time of day discounts for distribution service so that Duquesne Light can prepare its defense.

The Commission's regulations clearly allow for and encourage a broad scope of discovery. Section 5.321 provides that a party may obtain discovery regarding any matter which is relevant to the party's defense. 52 Pa. Code § 5.321. The discovery questions at issue are not burdensome, not privileged, are not sought in bad faith, would not cause unreasonable expense and do not require Whemco to undertake an unreasonable investigation. See 52 Pa. Code § 5.361. Whemco should be required to answer these questions because they are relevant to Duquesne Light's defense and are necessary in order to develop a complete record in this proceeding.

In its Answer, Whemco cites two cases in support of its argument that it should not be required to answer questions regarding the substantive reasons for eliminating Rider No. 5. The first case cited by Whemco is *Application of Newtown Artesian Water Company and Indian Rock Water Company*, 1990 Pa. P.U.C. LEXIS 83, where the presiding ALJ denied discovery in one proceeding that was relevant in a separate proceeding. Whemco Answer, p. 4. The *Newtown Artesian* case is materially distinguishable from this proceeding because the discovery at issue in *Newtown Artesian* involved ratemaking and eminent domain questions that were asked in a separate merger proceeding. The questions Duquesne Light is asking Whemco in this proceeding are not related to a separate proceeding. The questions that Duquesne Light is asking Whemco to answer in this proceeding relate to the core issue in this same proceeding – the elimination of Rider No. 5. Duquesne Light is asking Whemco these questions because they are relevant to Duquesne Light's defense in this proceeding and will allow a complete record to be developed.

Whemco also cites *Re Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations*, 2000 Pa. P.U.C. LEXIS 49 (“*Bell-Atlantic*”) as support for its argument that it should not be required to answer substantive questions regarding the elimination of Rider No. 5. Again, this case is distinguishable. In its Answer, Whemco admits that the matters asked in discovery in *Bell-Atlantic* were previously litigated before the Commission. In addition, the *Bell Atlantic* case involved the structural separation of an existing entity, and the discovery questions asked for information related to a subsidiary’s business activities. These are two separate issues. The questions that Duquesne Light is asking Whemco to respond to relate to the same issue in this proceeding – the elimination of Rider No. 5. The *Bell Atlantic* case cited by Whemco is not applicable to this case.

Whemco also argues that Duquesne Light’s questions are speculative. Duquesne Light disagrees. The core issue raised by Whemco in this case is the elimination of Rider No. 5. It is not speculative to ask Whemco to explain the substantive reasons it opposes elimination of Rider No. 5. It also is not speculative for Whemco to explain why it believes electric customers should receive distribution rate discounts for using or not using electricity at different times of the day. Duquesne Light is not asking Whemco to speculate – Duquesne Light is asking for Whemco to provide any substantive reasons it has opposing the elimination of Rider No. 5 – which is the core issue in this proceeding. Moreover, in order to address Whemco’s concerns regarding speculation, Duquesne Light agreed to withdraw questions 2 and 3 if Whemco simply answered the following question:

“Explain all of Whemco’s substantive objections to the elimination of Rider No. 5.”

This question is clearly not speculative. Whemco is alleging that Duquesne Light improperly eliminated Rider No. 5 on procedural grounds. It is not speculative for Whemco to answer

questions regarding its substantive objections to the elimination of Rider No. 5. Moreover, if there was no substantive basis for retaining Rider No. 5, Whemco would not have prevailed in retaining Rider No. 5 and should not be entitled to refunds.

C. DUQUESNE LIGHT WILL BE SUBSTANTIALLY PREJUDICED IF WHEMCO IS NOT REQUIRED TO ANSWER QUESTIONS RELATED TO THE SUBSTANTIVE REASONS FOR ELIMINATING RIDER NO. 5.

As explained above, the substantive reasons for eliminating Rider No. 5 is a relevant issue for the Commission to consider in determining whether to award refunds in this proceeding. Duquesne Light believes that it was unreasonable and contrary to sound ratemaking principles for customers to receive distribution rate discounts for using electricity at different times of the day. The substantive reasons for eliminating Rider No. 5 are relevant to this proceeding and Whemco should be required to answer substantive questions related to Rider No. 5.

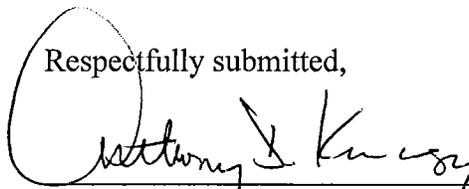
IV. STAY OF THE PROCEEDING

Under Section 5.304(d)(3), parties writing a Responsive Brief to a Petition for Certification must address whether a stay of the proceedings is required to protect the substantial rights of a party. 52 Pa. Code § 5.304(d)(3). Duquesne Light does not believe that a stay of the proceedings is necessary in order to protect the substantial rights of the parties. The parties have not established a full litigation schedule for this proceeding at this time. Rather, the parties have established a date of July 1, 2015 for filing preliminary motions and a date of July 21, 2015 for filing answers to preliminary motions. A further litigation schedule will be established upon disposition of the preliminary motions. Therefore, there is time for the Commission to rule on the certified question before a full litigation schedule is established.

V. **CONCLUSION**

WHEREFORE, Duquesne Light Company respectfully requests that Administrative Law Judge Jeffrey A. Watson certify the questions presented herein for interlocutory review by the Pennsylvania Public Utility Commission.

Respectfully submitted,



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Date: June 15, 2015

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