

Alan M. Seltzer

717 237 4862  
alan.seltzer@bipc.com

409 North Second Street  
Suite 500  
Harrisburg, PA 17101-1357  
T 717 237 4800  
F 717 233 0852  
www.buchananingersoll.com

June 15, 2015

**VIA EFILING**

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 Brief of Whemco-Steel Castings, Inc. in Opposition to Certification of a Discovery Ruling for Interlocutory Review, in the above-captioned proceeding.

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

Sincerely,



Alan M. Seltzer

AMS/tlg  
Enclosure  
cc: Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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**BRIEF OF WHEMCO-STEEL CASTINGS, INC. IN OPPOSITION TO  
CERTIFICATION OF A DISCOVERY RULING FOR INTERLOCUTORY REVIEW**

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Alan M. Seltzer (I.D. #27890)  
John F. Povilaitis (I.D. 28944)  
Buchanan Ingersoll & Rooney PC  
409 North Second Street, Suite 500  
Harrisburg, PA 17101-1357  
Phone: 717 237 4800  
Fax: 717 233 0852  
E-mail: [john.povilaitis@bipc.com](mailto:john.povilaitis@bipc.com)  
E-mail: [alan.seltzer@bipc.com](mailto:alan.seltzer@bipc.com)

Ricky L. Bertram  
General Counsel  
Park Corporation  
6200 Riverside Drive  
Cleveland, Ohio 44135  
Telephone: 216 265 2658  
Facsimile: 216 265 2632  
E-Mail: [rbertram@parkcorp.com](mailto:rbertram@parkcorp.com)

Attorneys for WHEMCO-Steel Castings, Inc.

Dated: June 15, 2015

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## **I. INTRODUCTION AND SUMMARY**

Pursuant to 52 Pa. Code § 5.304(d), WHEMCO-Steel Castings, Inc. (“Whemco”) submits this Brief in opposition to the Petition of Duquesne Light Company (“Duquesne”) for Certification of a Discovery Ruling for Interlocutory Review filed on June 8, 2015 (“Petition”). Duquesne seeks the extraordinary relief of Commission review of the Administrative Law Judge’s (“ALJ”) interim order dated June 4, 2015 (“Interim Order”) finding that the information sought by two interrogatories served upon Whemco by Duquesne was not relevant to the issues involved in this proceeding, was not reasonably calculated to lead to the discovery of admissible evidence and that, under the circumstances, the “discovery sought by Duquesne Light is too speculative.”<sup>1</sup>

While the Petition identifies the question to be certified, it fails to address the more fundamental requirement for interlocutory review of discovery matters, i.e., the “ruling involves an important question of law or policy that should be resolved immediately by the Commission.”<sup>2</sup> Indeed, the issues involved in denying Duquesne’s Motion to Compel responses to the subject interrogatories relate to routine discovery matters that were properly dismissed by the ALJ due to lack of relevance to the allegations of the Complaint and on speculation grounds. There is nothing in this determination that constitutes important law or policy questions justifying the Commission’s time and resources at this stage of the proceeding.

In addition, the Interim Order thoroughly evaluated the subject interrogatories on the merits and correctly concluded that they did not seek (i) relevant information or (ii) data or information that would reasonably lead to the discovery of admissible evidence. And, since the interrogatories also required Whemco to speculate about its hypothetical participation in a

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<sup>1</sup> Interim Order, p. 11.

<sup>2</sup> 52 Pa. Code § 5.304(b); 66 Pa. C.S. § 333(h).

Commission proceeding seven years ago that it – as a matter of fact – did not participate in, the ALJ properly denied Duquesne’s Motion to Compel. There is simply no basis for (and Duquesne has failed to demonstrate a basis for) certifying to the Commission the following question posed by Duquesne:

Whether the substantive merits of eliminating Rider No. 5 Time of Day service for distribution service are relevant to this proceeding.<sup>3</sup>

## II. STATEMENT OF THE CASE

### A. General Case Background

On December 23, 2014 Whemco filed with the Commission a formal complaint against Duquesne (“Formal Complaint”) alleging, among other things, that Duquesne Light Company (“Duquesne”) (Whemco and Duquesne are collectively referred to as the “Parties”) wrongfully terminated as of December 31, 2010 for Rate L customers a certain distribution-rate related discount contained in Rider No. 5 of Duquesne’s then-prevailing and Commission approved retail electric service tariff as a result of the improper implementation of a settlement of a default service proceeding that covered the period January 1, 2008 through December 31, 2010 at Docket No. P-00072247 (“Default Service Proceeding”).

As a result of Duquesne’s improper and unlawful implementation of the settlement in the Default Service Proceeding and termination of the distribution-related rate discount contained in Rider No. 5 applicable to Rate L customers like Whemco, Whemco’s electric distribution service bills from Duquesne more than doubled as of January 2011. This caused Whemco’s demand, for billing purposes, to increase from a monthly average of 7,287 kilowatts (“kW”) in 2010 to a monthly average of 18,256 kW in 2011.

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<sup>3</sup> It is worth noting that neither the question certified by Duquesne nor the discussion in the Petition itself ties back to the underlying discovery dispute at all. The ALJ should not be persuaded by Duquesne’s thinly veiled effort to turn a routine discovery dispute into a generic issue on the merits of the Rider No. 5 discount at this stage of the proceeding.

The Formal Complaint seeks, among other things, a refund from Duquesne under Section 1312 of the Public Utility Code (“Code”) in the amount of \$2,480,374.16, plus interest on all unpaid amounts. On January 21, 2015, Duquesne filed an Answer and New Matter denying the material allegations in the Formal Complaint. On February 10, 2015, Whemco filed a Reply to Duquesne’s New Matter, denying the material allegations therein.

Prior to the appointment of the ALJ and the issuance of a Hearing Notice, the parties had commenced active discovery in this proceeding. On February 11, 2015, Whemco propounded its first set of interrogatories (“Interrogatories”) upon Duquesne. Duquesne provided answers to the Interrogatories in two separate filings – i.e., March 3, 2015 and March 10, 2015.

On March 9, 2015, Whemco propounded on Duquesne Requests for Admission in accordance with the provisions of 52 Pa. Code § 5. 350(a).

On March 27, 2014, the Commission issued a formal notice of an evidentiary hearing in this matter for May 7, 2015, along with the appointment of ALJ Jeffrey A. Watson as the presiding officer.

Duquesne filed responses to Whemco’s Requests for Admission on March 30, 2015. Based on its view that Duquesne’s responses to Whemco’s Requests for Admission were faulty and not in compliance with the Commission’s regulations, on April 17, 2015 Whemco filed with the Commission a Motion to Determine the Sufficiency of Duquesne’s Responses to Requests for Admission Set I.

The ALJ issued an order dated April 21, 2015 which, among other things, converted the May 7, 2015 evidentiary hearing into a prehearing conference and directed the parties to file a pre-hearing conference memorandum prior to 3:00 PM on May 4, 2015.

On April 23, 2015, the ALJ issued an Interim Order directing, among other things, that (i) the Parties attempt to resolve the matters raised in Whemco's Motion to Determine the Sufficiency of Duquesne's Responses to Requests for Admission and, failing such resolution, (ii) oral argument on said motion be conducted at the May 7, 2015 prehearing conference.

On May 7, 2015, the initial prehearing conference was conducted and, among other things, it was agreed that discovery would continue in the proceeding and any case dispositive motions would be filed on or before July 1, 2015. In addition, the parties argued issues relating to Whemco's Motion to Determine the Sufficiency of Duquesne's Responses to Requests for Admission. Following the initial prehearing conference, the Parties resolved their disagreements over several of the Requests for Admission. The ALJ was notified that a ruling would be necessary on the remaining disputed admission requests.

On June 2, 2015, Whemco served its second set of interrogatories on Duquesne. In an Interim Order dated June 1, 2015, the ALJ granted in part and denied in part Whemco's Motion to Determine Sufficiency of Duquesne's responses to its Requests for Admission Set I.

In a Prehearing Order dated June 2, 2015, the ALJ established, among other things, a tentative litigation schedule for the filing of preliminary case-dispositive motions, discovery protocols, etc.

#### B. Background Relating to Petition

The Petition has its genesis in a discovery dispute between Duquesne and Whemco regarding certain interrogatories propounded by Duquesne upon Whemco on April 29, 2015 ("Set II Discovery"). Whemco filed on May 8, 2015 timely objections to four interrogatories in the Set II Discovery (i.e., Nos. 2, 3, 5 and 9), primarily on the basis of relevance and the need for Whemco to speculate in developing answers to these interrogatories ("Objections").

While Duquesne agreed to withdraw two of the interrogatories subject to the Objections (Nos. 5 and 9), it refused to do so with respect to Nos. 2 and 3. On May 18, 2015, Duquesne filed a Motion to Compel Answers to Interrogatories and Requests for Production of Documents, and Whemco filed a timely Answer on May 26, 2015. The Interim Order at issue in this Petition was dated June 4, 2015.

Despite originating as a *discovery* dispute, being resolved in the Interim Order as a matter of *discovery*, and being filed under the Commission's regulations regarding interlocutory review of *discovery* matters, the Petition appears to seek certification of an issue that is broader than the discovery dispute at issue.

### **III. ARGUMENT**

#### **A. The Petition Fails to Acknowledge, let alone support, the Standard for Granting Interlocutory Review of a Discovery Matter.**

The standards for interlocutory review of discovery matters are set forth at 66 Pa. C.S. § 333(h) and 52 Pa. Code § 5.304. Under Section 5.304 of the Commission's regulations, the ruling for which certification and interlocutory review is sought should involve an important question of law or policy that should be resolved immediately by the Commission.

The Commission has recently reiterated the heavy burden placed on those seeking to obtain interlocutory review of a discovery ruling:

Review of discovery orders are generally disfavored and are only permitted in limited circumstances. *MCI WorldCom Communications, Inc. v. Verizon Pennsylvania Inc.*, Docket No. C-00015149 (Order entered November 13, 2001). If a petition for interlocutory review of a discovery matter is properly before the Commission for consideration, the same standards that apply to interlocutory review of material questions on non-discovery matters apply to interlocutory review of discovery matters. *MCI WorldCom Communications, supra*, at 15. The standards for interlocutory review are well established. The pertinent consideration is whether interlocutory review is necessary in order to prevent substantial prejudice - that is, the error and any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review process. *Joint Application of Bell Atlantic Corp. and GTE Corp.*, Docket No. A-

310200F0002, et al. (Order entered June 14, 1999); *Pa. PUC v. Frontier Communications of Pa. Inc.*, Docket No. R-00984411 (Order entered February 11, 1999); *In re: Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985).

Generally, petitions for interlocutory review are not favored, as the preferred approach is to permit proceedings to move forward in the normal course in order to provide all parties, the presiding officer, and the Commission with a full opportunity to develop the record, brief issues, and present arguments at each stage. *Re: Philadelphia Gas Works Universal Service and Energy Conservation Plan*, Docket No. M-00072021 (Order entered October 23, 2009), at 3. The correctness of the presiding officer's ruling involved in a request for interlocutory Commission review of a material question is not a determinative issue when we set out to examine whether a petitioner has fulfilled the regulatory requirements. *Saucon Creek Assoc., Inc. v. Borough of Hellertown*, 69 Pa. P.U.C. 467 (1989).

*Pennsylvania Pub. Util. Comm'n, Bureau of Investigation & Enforcement v. Lyft, Inc.*, Docket No. C-2014-2422713, 2014 WL 6386848, at \*5 (Final Order entered November 13, 2014).

There is nothing in the Petition that acknowledges the applicable legal standards contained in Code Section 333(h), 66 Pa. C.S. § 333(h), or the Commission's regulations at 52 Pa. Code § 5.304(b), let alone attempts to satisfy the requirement that the "ruling involves an important question of law or policy that should be resolved immediately by the Commission"<sup>4</sup> or otherwise overcomes the default standard that interlocutory review is not favored. On this basis alone the Petition should be dismissed.

The denial of Duquesne's Motion to Compel involved a routine discovery matter involving two interrogatories that were deemed to be not relevant to the issues in the case as framed by the Formal Complaint, Duquesne's Answer and New Matter and Whemco's Reply. The interrogatories were correctly found not reasonably likely to lead to admissible evidence in the proceeding and otherwise requiring Whemco to speculate about any answer. This hardly amounts to an important question of law or policy or compelling reason to support interlocutory

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<sup>4</sup> 52 Pa. Code § 5.304(b); 66 Pa. C.S. § 333(h).

review. There is nothing in the Interim Order suggesting any broader application of its conclusions other than to the specific interrogatories and parties in this proceeding.

Duquesne has provided nothing in the Petition to suggest that the relevant legal standard has been complied with in this proceeding.

B. This Proceeding is Not About the Substantive Merits of Rider No. 5 Time of Day Service.

The Petition filed by Duquesne seeks to turn a routine ruling on two clearly irrelevant and speculative interrogatories into a referendum on the substantive merits of Duquesne's former Rider No. 5 distribution rate discount that was improperly removed from Duquesne's tariff in its 2007-2008 default service proceeding at Docket No. P-00072247 ("Default Service Proceeding"). The Interim Order fully understood this issue and nothing has changed that can or should lead to a different result or support the extraordinary relief of granting interlocutory review of a discovery matter.

This proceeding is *not* about the justness or reasonableness of time of day discounts contained in Duquesne's former Rider No. 5, either as asserted by Whemco in its Formal Complaint or as a defense asserted by Duquesne.

*From Whemco's perspective*, Whemco seeks refunds in the Formal Complaint 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: (i) including distribution rate relief in a generation-related default service 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.<sup>5</sup>

No claim or requested relief in the Formal Complaint raises or is predicated upon Whemco's position on the merits of terminating 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 eliminated Rider No. 5, not what Whemco's position would have been had it participated in the Default Service Proceeding, or what the Commission might have decided if the issue of eliminating time of day rates for distribution service had been properly before it and fully litigated.

The Interim Order acknowledged that "Whemco argues it 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, which is not related to the Complaint and the relief requested therein. Therefore, Whemco argues it should not be required to create a substantive position on this issue."<sup>6</sup>

There can be little doubt that from Whemco's vantage point the merits of the Rider No. 5 discount have nothing to do with the Formal Complaint and the issues reasonably raised therein. Therefore, this issue is *not* "relevant to the subject matter involved in the pending action ..."<sup>7</sup> for

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<sup>5</sup> Interim Order, p. 4.

<sup>6</sup> Interim Order, p. 8.

<sup>7</sup> 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.

discovery purposes or otherwise. 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*, 502 418, 466 A. 2d 1022, 1034 (Pa. 1983). The merits of Rider No. 5 are not a fact at issue in this case. By this standard and based on Whemco’s allegations in the Formal Complaint, whether time of day discounts under Rider No. 5 for large commercial and industrial customers like Whemco are good, bad or otherwise do not tend to make any fact at issue raised in the Formal Complaint more or less probable. Therefore, there is no reason to grant the Petition. For that matter, the merits of eliminating Rider No. 5 for large Commercial & Industrial (“C&I”) customers such as Whemco were not even raised by Duquesne itself in the Default Service Proceeding, given that no evidence supporting termination of Rider No. 5 for large C&I customers was ever presented. Demanding hypothetical intervenor Whemco’s substantive position on the elimination of the Rider No. 5 discount for large C&I customers when Duquesne itself did not address the issue in testimony is clearly improper.

Whemco understands, as did the ALJ in the Interim Order, that for discovery purposes the Commission’s regulations allow a party to generally seek information relating to its defense.<sup>8</sup> The question is what is Duquesne’s “defense”? It is not enough for purposes of the Petition to make a completely unsupported assertion as Duquesne does in the Petition that it merely wants to “present its position regarding substantive reasons for eliminating Rider No. 5 so that the matter can be fully evaluated on the record in this proceeding.”<sup>9</sup>

The Commission’s regulations, in concert with the Pennsylvania Rules of Civil Procedure, establish a clear practice regarding the assertion of defenses. First, answers to complaints like the one at issue in this proceeding must “advise the parties and the Commission

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<sup>8</sup> 52 Pa. Code § 5.321(c).

<sup>9</sup> Petition, p. 2.

as to the nature of the defense.”<sup>10</sup> There is nothing in the Answer and New Matter filed by Duquesne in this proceeding that asserts any “defense” relating to the merits of eliminating the Rider No. 5 discount. Second, under the Commission’s rules, any affirmative defense “shall” (i.e., must) be pleaded in an answer or other responsive pleading under the heading of “New Matter.” Again, Duquesne’s actual Answer and New Matter does not plead such a defense at all. Importantly, Rule 1032 of the Pennsylvania Rules of Civil Procedure expressly provides that a party “waives all defenses and objections which are not presented either by preliminary objection, answer or reply. . .” {except for certain items not relevant here}.<sup>11</sup>

It is not clear that, to the extent Duquesne has any “defense” for purposes of discovery, it has even preserved that defense for purposes of this proceeding, let alone for demanding a right to compel discovery and or address the merits for eliminating Rider No. 5 time of day discount.

It appears that that the crux of Duquesne’s “defense” is that the ability to discuss the elimination of the Rider No. 5 discount on the merits – even when the Formal Complaint has absolutely nothing to do with the merits of the Rider No. 5 elimination – relates to the alleged power of the Commission to exercise discretion to award or not award refunds. On this point, it is important to again note that Duquesne *did not* raise this issue/defense in its New Matter, thus waiving it to the extent it is a valid defense.

Duquesne’s continued reliance in the Petition on *Pa.P.U.C. v. Pennsylvania Gas and Water Co.*, 1982 Pa. PUC LEXIS 48, 56 Pa. PUC 433, 49 P.U.R.4<sup>th</sup> 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, the ALJ found *PG&W* unpersuasive in the Interim Order. Second, *PG&W* is completely distinguishable from

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<sup>10</sup> 52 Pa. Code § 5.61(b)(2).

<sup>11</sup> Pa. R. Civ. Pro. 1032(a).

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. Third, the refunds at issue in *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. Allowing Duquesne's detour into a consideration of the merits of the elimination of the Rider No. 5 discount simply does not withstand analysis and the Interim Order properly dismissed this issue. There is clearly no reason to certify this phantom issue to the Commission now, usurping valuable time and resources to address a simple discovery matter properly decided in connection with a non-existent or questionable defense.

**IV. CONCLUSION**

For the reasons specified above, the Administrative Law Judge should deny certification and interlocutory review of the issue raised in Duquesne Light Company's June 8, 2015 Petition and grant WHEMCO-Steel Castings, Inc. such other relief as is just and reasonable under the circumstances.

Respectfully submitted,

Dated: June 15, 2015



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Alan M. Seltzer (I.D. #27890)  
John F. Povilaitis (I.D. 28944)  
Buchanan Ingersoll & Rooney PC  
409 North Second Street, Suite 500  
Harrisburg, PA 17101-1357  
Phone: 717 237 4800  
Fax: 717 233 0852  
E-mail: [john.povilaitis@bipc.com](mailto:john.povilaitis@bipc.com)  
E-mail: [alan.seltzer@bipc.com](mailto:alan.seltzer@bipc.com)

Ricky L. Bertram  
General Counsel  
Park Corporation  
6200 Riverside Drive  
Cleveland, Ohio 44135  
Telephone: 216 265 2658  
Facsimile: 216 265 2632  
E-Mail: [rbertram@parkcorp.com](mailto:rbertram@parkcorp.com)

Attorneys for WHEMCO-Steel Castings, Inc.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true and correct copy of the Brief of Whemco-Steel Castings, Inc. in Opposition to Certification of a Discovery Ruling for Interlocutory Review, upon the parties and in the manner listed below:

**Via Email and First-Class Mail**

Administrative Law Judge Jeffrey A. Watson  
Pennsylvania Public Utility Commission  
Piatt Place, Suite 220  
301 Fifth Avenue  
Pittsburgh, PA 15222  
[jeffwatson@pa.gov](mailto:jeffwatson@pa.gov)

Tishekia E. Williams  
Duquesne Light Company  
411 Seventh Avenue, 16<sup>th</sup> Fl.  
Pittsburgh, PA 15219  
[twilliams@duqlight.com](mailto:twilliams@duqlight.com)

Michael W. Gang  
Anthony D. Kanagy  
Post & Schell PC  
17 N. Second Street, 12<sup>th</sup> Fl.  
Harrisburg, PA 17101-1601  
[mgang@postschell.com](mailto:mgang@postschell.com)  
[akanagy@postschell.com](mailto:akanagy@postschell.com)

Dated this 15<sup>th</sup> day of June, 2015.



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Alan M. Seltzer, Esq.