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August 28, 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 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.

This document has been served as indicated in the attached Certificate of Service.

Sincerely,



John F. Povilaitis

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>	:	

**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 the Pennsylvania Public Utility Commission (“Commission”) 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 July 17, 2015 (“Set III Discovery”).

2. Whemco initially objected timely to all eight interrogatories in the Set III Discovery on July 29, 2015, on three primary bases (“Objections”): (i) the discovery was premature in that it was directed solely to an affidavit of Pamela C. Polacek<sup>1</sup> submitted in support of Whemco’s presently pending Motion for Summary Judgment and *not* on any testimony submitted in the proceeding; (ii) one interrogatory of the Set III Discovery (No. 7) required Ms. Polacek to engage in a burdensome exercise of conducting legal research and to review her law firm’s files over many years; and (iii) one interrogatory of the Set III Discovery (No. 8) improperly sought information that may be subject to a privilege and therefore could not be the subject of discovery.

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<sup>1</sup>For convenience, Ms. Polacek’s affidavit submitted previously as part of Whemco’s Motion for Summary Judgment is attached to this Answer as Appendix A and made a part hereof.

3. As noted further below, the Motion is seeking to force responses to the *contents* of certain Duquesne documents the substance of which was not the subject of Ms. Polacek's affidavit. There is no legal or other basis on which an affiant – who has yet to (and may never need to) file written testimony in a proceeding, should be required by premature and improper discovery to provide substantive responses on the contents of documents whose contents *are not even addressed in the underlying affidavit*. Yet, that is exactly what Duquesne is seeking to do with three of the four interrogatories in the Set III Discovery that are the subject of the Motion.

4. While Whemco understands and acknowledges the general breadth and scope of the Commission's discovery regulations, their reach is not limitless, especially in the unique circumstances in play here. Accordingly, the Motion should be dismissed with prejudice.

## **II. BACKGROUND**

5. On July 17, 2015 Duquesne served the Set III Discovery upon Whemco. The Set III Discovery consisted of eight (8) interrogatories, all addressed to Pamela C. Polacek, Esq. in connection with an affidavit Ms. Polacek submitted in support of Whemco's Motion for Summary Judgment filed on July 1, 2015.<sup>2</sup>

6. Whemco timely filed the Objections to the Set III Discovery on July 29, 2015, together with the basis for the Objections.

7. Apparently not satisfied with the Objections, Duquesne filed a Motion to Compel on August 10, 2015 ("August 2015 Motion") seeking responses to the Set III Discovery.

8. After reviewing the August 2015 Motion, Whemco elected to file Answers to all of the Set III Discovery and did so on August 14, 2015, advising the Administrative Law Judge ("ALJ") that in light of Whemco's Answers to the Set III Discovery there would be no need to

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<sup>2</sup> Whemco's Motion for Summary Judgment, Duquesne's Motion for Partial Summary Judgment and the respective Answers thereto are awaiting disposition by the Presiding Officer.

rule on the August 2015 Motion. However, Duquesne was not satisfied with Whemco's Answers to certain of the Set III Discovery and filed the Motion.

9. The Motion seeks to compel "full and complete" answers to Interrogatory Nos. 4, 5, 6 and 8 of the Set III Discovery.

10. For ease of reference, the interrogatories in the Set III Discovery subject to the Objections ("Interrogatories"), along with Whemco's responses thereto, are set forth below:

**No. 4 - Re: Affidavit of Pamela C. Polacek, Esquire: Did Rider No. 5 of the pro forma tariff clearly state that it was applicable to Rate L?**

Response:

The document speaks for itself.

**No. 5 - Re: Affidavit of Pamela C. Polacek, Esquire: Does Ms. Polacek agree that Rider No. 5 in Exhibit NJDK-3 stated as follows:**

**"The availability and application of Rider No. 5 – Time of Day Discounts will terminate December 31, 2010."**

Response:

The document speaks for itself.

**No. 6 - Re: Affidavit of Pamela C. Polacek, Esquire: Was there any language in Rider No. 5 in Exhibit NJDK-3 stating that Rider No. 5 would be retained for any customer class or rate schedule past December 31, 2010? If yes, please explain.**

Response:

The document speaks for itself.

**No. 8 - Re: Affidavit of Pamela C. Polacek, Esquire: Please provide a copy of all communications, including but not limited to e-mails and memoranda, to and from both Whemco and Ms. Polacek (including all persons that are working with or worked with Ms. Polacek and all attorneys at Ms. Polacek's law firm) regarding:**

- a. Representation of Whemco in the DSP IV proceeding;
- b. Whemco's complaint; and
- c. Preparation of the Affidavit.

Response:

- a. See the documents provided in response to Duquesne, Set II-7. Those items are the only documents or communications from 2007 that could be confirmed through a review of available McNees files.
- b. In December of 2014, I provided comments to Mr. Bertram (in house counsel at WHEMCO) regarding a draft of the Complaint. In early 2015, Ms. Schmittberger (associate at McNees) and I assisted Mr. Bertram and Mr. Slingluff of WHEMCO regarding documents and factual issues needed to respond to Duquesne's prior interrogatories to WHEMCO. Any input or communications between myself and/or Ms. Schmittberger and WHEMCO regarding the Complaint and discovery are subject to attorney-client and work-product privileges between McNees and WHEMCO. Ms. Schmittberger and I have engaged in conversations with the McNees internal firm counsel (Mr. Freedenberg) regarding the Complaint and discovery, which are subject to attorney-client privilege.
- c. In May 2015, Mr. Freedenberg and I had a telephone call with WHEMCO's outside counsel regarding the potential provision of the affidavit. On June 18, 2015, I received a draft affidavit from WHEMCO's outside counsel based on information I had previously orally provided. I consulted with Mr. Freedenberg regarding the affidavit. I provided initial comments on June 25, 2015, and transmitted the final version to Mr. Bertram and WHEMCO's outside counsel on June 29, 2015. The substance of the communications between McNees and WHEMCO are subject to attorney-client and work-product privileges. The substance of the communications between Ms. Polacek and Mr. Freedenberg (the McNees firm counsel) are subject to attorney-client privilege.

### **III. ARGUMENT**

#### **A. The ALJ Has Substantial Discretion in Ruling on Discovery Issues**

11. The scope of permissible discovery in Commission proceedings is governed by the Commission's rules at 52 Pa. Code § 5.321. The ALJ 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."

12. In this case, we are confronted with the unique situation in which a party (i.e., Duquesne) is seeking discovery – not on testimony – but on an affidavit contained in a Motion for Summary Judgment. Indeed, if the ALJ agrees with Whemco's position in the pending

Motion for Summary Judgment that there is no issue of material fact and Whemco is entitled to a refund due to Duquesne's unlawful and improper elimination of the Rider No. 5 discount applicable to Whemco back in 2008, the affiant – Pamela C. Polacek – will *never* submit any testimony in this proceeding and any discovery directed to Ms. Polacek would be moot.

13. Given the unusual posture of the proceeding, the ALJ should be wary of and in fact should limit any discovery that is outside of reasonable bounds, such as the Interrogatories at issue in the Set III Discovery.

14. Therefore, based on the plain language of the Commission's discovery rules and the unique circumstances of this proceeding, Duquesne does not have unbridled discretion to conduct discovery and the ALJ has ample discretion – consistent with applicable law – to prohibit inquiry into the matters contained in the Interrogatories.

## **B. The Bases for Whemco's Objections**

### **(i). Interrogatory Nos. 4, 5 and 6**

15. Interrogatory Nos. 4, 5 and 6 have a common theme: all relate to Ms. Polacek's affidavit submitted in support of Whemco's Motion for Summary Judgment ("Polacek Affidavit") and all ask Ms. Polacek to interpret specific language and terms contained in Rider No. 5 submitted by Duquesne in its Default Service Plan Proceeding at Commission Docket No. P-00072247 in 2007-2008 ("DSP Proceeding").

16. First, if Duquesne desired to specifically address the language and terms of the Rider No. 5, it had an opportunity to file a counter-affidavit with its Answer to Whemco's Motion for Summary Judgment that alleged new "facts" but it *did not do so*.<sup>3</sup>

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<sup>3</sup> The absence of a counter-affidavit confirms Whemco's consistently-maintained position that Duquesne has no material facts that actually dispute Whemco's claim for legal relief in the Motion for Summary Judgment. Indeed, the travail and apparent controversy over the Set III Discovery is a thinly veiled effort to create a factual dispute where one simply *does not exist*.

17. Instead, Duquesne's tactic is obvious. It is seeking to extract from Ms. Polacek via discovery an interpretation of the Rider No. 5 document submitted by Duquesne in the DSP Proceeding when in fact the Polacek Affidavit never addresses the substance/contents of that rider.

18. Even a cursory reading of the Polacek Affidavit demonstrates that it contains no reference or assertions with respect to the *content* of Rider No. 5. Indeed, a major element of the Polacek Affidavit is her point that because the petition and testimony in support of Duquesne's DSP Proceeding never mentioned a change in Rider No. 5 affecting large Rate L customers such as Whemco, she did not discern that the filing was proposing to eliminate Whemco's discount in the form of an amended Rider No. 5. Duquesne now seeks to compel Ms. Polacek to make statements regarding the contents of a document, Rider No. 5, which she acknowledges she would not have a direct reason to examine as part of her original filing review, and that she did not rely upon for purposes of any testimony as a witness. Nor are there any averments in the Polacek Affidavit indicating that Ms. Polacek examined Rider No. 5. Indeed, Ms. Polacek's Affidavit and response to Interrogatories Set III No. 3 explain why she had no reason to review Rider No. 5 (i.e., among other reasons, neither the Duquesne petition nor the supporting testimony in the DSP Proceeding ever mentioned eliminating the Rider No. 5 discount for Rate L customers like Whemco).

19. Duquesne also claims that Whemco's responses to Interrogatory Nos. 4, 5 and 6 (i.e., "the document [Rider No. 5] speaks for itself") are inconsistent with Whemco's position in the earlier discovery dispute with Duquesne where Whemco asserted and the ALJ found similar Duquesne responses to Whemco's Requests for Admission to be inadequate. (Motion, ¶ 22). However, Duquesne's analysis has ignored critical differences between these two disputes.

20. In the dispute over Whemco's Requests for Admission, Whemco posed Requests for Admission to a respondent, Duquesne, that were not in the context of the testimony of any particular witness or the affidavit of any affiant. These Requests for Admission were directed to a "party" – not an individual -- based specifically upon prior information supplied by Duquesne to Whemco.

21. In contrast, in Interrogatory Nos. 4, 5 and 6 Duquesne has not asked *Whemco*, in the form of Requests for Admission, to admit or deny that specific content does, or does not appear in Rider No. 5. Rather, Duquesne has asked Ms. Polacek to answer questions about the contents of a document (i.e., Rider Not. 5) that the Polacek Affidavit explains she had no reason to review. In such circumstances, a statement that the document speaks for itself is entirely proper, complete and responsive.

22. Therefore, the ALJ's prior ruling with respect to Whemco's Requests for Admission, *Interim Order Granting in Part and Denying in Part, the Motion of Whemco-Steel Castings, Inc. To Determine Sufficiency of Duquesne Light Company Responses to Requests for Admission Set I*, dated June 1, 2015 has no relevance or applicability to the responses to Interrogatory Nos. 4, 5 and 6 provided by Ms. Polacek. Accordingly, the Motion to compel further answers to Interrogatory Nos. 4, 5 and 6 must be denied with prejudice.

**(ii) Interrogatory No. 8**

23. Duquesne has also moved to compel a further response to Discovery Set III Interrogatory No. 8 on the grounds that no privilege could possibly exist with respect to Ms. Polacek's prior communications concerning the DSP Proceeding, this proceeding or the Polacek Affidavit. (Motion, Section B).

24. Pennsylvania law (i.e., 42 Pa.C.S. § 5928) provides that confidential communications made to a lawyer by a client are privileged from disclosure unless waived by the client. The Pennsylvania Supreme Court has held that the privilege protects only confidential communications from a client to an attorney “made in connection with the providing of legal services or advice.” *Nationwide Mutual Insurance Company v. Fleming*, 605 Pa. 468, 992 A.2d 65 (2010) (citations omitted).

25. When evaluating any privilege claim, it is important to recall and distinguish Ms. Polacek’s relationship to Whemco and her law firm in connection with the (i) DSP Proceeding, (ii) this proceeding and (iii) the Polacek Affidavit. The Motion – consciously or otherwise – muddles these distinct time periods and relationships in its effort to carve out a single broad and unlawful waiver of the applicable privilege.

26. First, with respect to the DSP Proceeding, Ms. Polacek did not provide legal services to Whemco since, as noted in previous pleadings and discovery, Whemco did not participate in that proceeding. Paragraph 17 of the Polacek Affidavit clearly explains this point. Therefore, because Ms. Polacek did not represent Whemco in the DSP proceeding, no attorney-client relationship or privilege existed with respect to Ms. Polacek’s mental impressions of the DSP Proceeding. Consistent with that view, Whemco’s response to interrogatory No. 8(a) makes it clear that all documents relating to communications associated with the DSP Proceeding have been provided and *no claim of privilege* has been asserted with respect to that time frame or subject matter. It is important to recall that the Polacek Affidavit relates to Ms. Polacek’s actions and opinions based on her conduct in 2007 when initially evaluating the DSP Proceeding filing made by Duquesne to determine *if* any of the large commercial and industrial clients she

typically represents would be interested in receiving new legal services in connection with what was in 2007 the “new” Duquesne filing in the DSP Proceeding.

27. Second, in the response to interrogatory No. 8(b), Ms. Polacek explained that she reviewed Whemco’s draft complaint in this proceeding in late 2014 *as counsel for Whemco*, prior to her being identified as a possible witness and prior to her formulating the averments in the Polacek Affidavit. In addition, *as counsel to Whemco*, she assisted Whemco in connection with responses to previous Duquesne discovery. During these time periods, Ms. Polacek and her law firm (i.e., McNees, Wallace and Nurick), maintained an attorney-client relationship with Whemco. (*See* Polacek Aff. ¶¶ 6, 10.) That relationship and its attendant attorney-client communications and work product exchanged during that period were not waived by Ms. Polacek’s later preparation of averments for use in the Polacek Affidavit, because the substance and purpose of the Polacek Affidavit is to describe Ms. Polacek’s impressions and evaluation of Duquesne’s filings in the 2007 DSP proceeding (i.e., when she was not providing legal services to Whemco). The Polacek Affidavit *does not* refer to Ms. Polacek’s interactions with Whemco in December 2014 or in early 2015. The Polacek Affidavit *does not* refer to discussions related to its preparation. Thus, there is no disclosure in the Polacek Affidavit constituting waiver of any attorney-client privilege related to Ms. Polacek’s interactions with Whemco in December 2014 or in early 2015 or in preparation of the Polacek Affidavit. Moreover, Ms. Polacek asserted the attorney-client privilege at the first time it was available to do so -- in response to Duquesne’s Set III Discovery. Duquesne should not be allowed to ignore the attorney-client relationship between Whemco and Ms. Polacek/her law firm during those periods of time.

28. The privilege and waiver cases cited by Duquesne in the Motion do not apply here. Duquesne relies on *Polly Rost v. State Board of Psychology*, 659 A.2d 626 (Pa. Cmwlth.

1995) for the proposition that the attorney-client privilege is waived where “the client places the confidential information at issue in the case.” In *Polly Rost*, a negligence slip-and-fall case, a psychologist was found to have violated ethics rules when she released medical records of her patient (the plaintiff) without obtaining the patient’s consent. Duquesne fails to mention that in *Polly Rost*, the issue under review was whether the professional bound to confidentiality (the psychologist) had violated the privilege, not the client. As explained above, Whemco (via the Polacek Affidavit) did not place any confidential information at issue here. In fact, when that situation might have occurred, Ms. Polacek did the exact opposite -- she asserted the privilege. Both the Polacek Affidavit and this case are about the Duquesne’s improper conduct and/or omissions with regard to the DSP Proceeding, not about the legal advice Whemco received from Ms. Polacek in 2014 and 2015.

29. Similarly, Duquesne cites *Murray v. Gemphis Int’l, S.A.* 217 F.R.D. 362 (E.D. Pa. 2003) in the Motion for the proposition that when a party attempts to use privilege as both a sword and a shield, courts impose a “subject matter waiver” upon the privilege holder. In *Murray*, privileged material was disclosed to the opponent and the court found that the disclosure was not inadvertent, i.e., it was designed to benefit the disclosing party. Therefore, the court held that the disclosure waived the attorney-client privilege with respect to material claimed to be privileged and to the scope of the subject matter disclosed. Again, this case simply does not apply in this proceeding because Whemco has never claimed that the material disclosed in the Polacek Affidavit is privileged, because it is not. It is Duquesne that has intentionally sought otherwise privileged communications by arguing that Whemco (or Ms. Polacek) has somehow waived the attorney-client privilege in the Polacek Affidavit. In *Murray*, the *disclosure* of

privileged material constituted a waiver of the privilege. In this proceeding, however, there has been no disclosure of privileged material, and therefore there can be no waiver.

30. Finally, in the response to Interrogatory 8(c) in connection with the preparation of the Polacek Affidavit, Ms. Polacek invoked the attorney-client privilege with respect to communications between Ms. Polacek and her law firm's internal counsel, Mr. Freedenberg. It was entirely appropriate for Ms. Polacek to consult with counsel for McNees Wallace and Nurick with respect to the issue of her providing an affidavit and possible testimony in this proceeding, and assert (and reasonably expect to receive) the protections of the attorney-client privilege. This is precisely the confidential communication existing Pennsylvania law (i.e., 42 Pa.C.S. § 5928) is designed to protect. There is no legal basis for Duquesne to be provided with the substance of the communications between either Ms. Polacek and her client, Whemco, and Ms. Polacek and her firm's in-house counsel. The communications in each circumstance involve communications between a client and an attorney regarding legal services or consultation.

31. Duquesne's efforts to destroy valid privilege claims in the context of Interrogatory No. 8 based on alleged "contradictions" between the Polacek Affidavit and other discovery answers (Motion, ¶ 32) is completely erroneous and unsupportable. Ms. Polacek's averment in paragraph 14 of the Polacek Affidavit that she generally reviewed the DSP filing, including supporting exhibits and testimony is *not* inconsistent with her response to Set III Discovery, Interrogatory No. 3. Ms. Polacek reviewed the DSP Proceeding filing relative to its impact on her historic client base – large commercial and industrial customers. Since Duquesne did not identify changes to Rider No. 5 in the DSP Proceeding petition or testimony as applying to large commercial and industrial customers like Whemco, she does not recall reviewing the changes to Rider No. 5, which were reflected on one page of Duquesne's 150+ page filing.

Conversely, she can confirm that she reviewed Rider No. 9 in the same exhibit because it set forth the default service product for large customers like WHEMCO. This is neither an inconsistency nor support for voiding a valid claim for privilege which has been narrowly asserted in the responses to the Set III Discovery.

**IV. CONCLUSION**

32. Whemco should not be compelled to respond to Set III Discovery, Interrogatory Nos. 4, 5, 6 and 8 for the reasons specified herein.

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

Respectfully submitted,

Dated: August 28, 2015

  
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**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>	:	

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true and correct copy of 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, upon the parties and in the manner listed below:

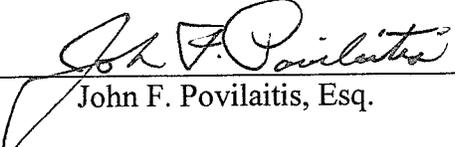
**Via Email and First-Class Mail**

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Dated this 28<sup>th</sup> day of August, 2015.

  
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John F. Povilaitis, Esq.