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April 14, 2016

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 Motion to Compel Answers to Interrogatories and Requests for Production of Documents Propounded by Duquesne Light Company on Whemco-Steel Castings, Inc., Set VII in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Anthony D. Kanagy', is written over a circular stamp or mark.

Anthony D. Kanagy

ADK/skr
Enclosure

cc: Honorable Jeffrey Watson
Certificate of Service

**CERTIFICATE OF SERVICE
(Docket No. C-2014-2459527)**

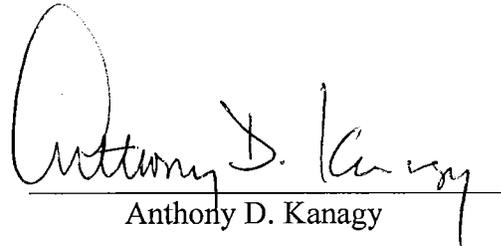
I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

VIA E-MAIL and REGULAR MAIL

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Date: April 14, 2016


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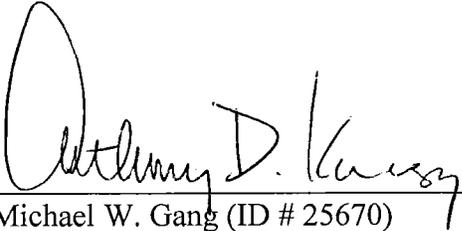
**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

NOTICE TO PLEAD

YOU ARE HEREBY ADVISED THAT, PURSUANT TO 52 PA. CODE § 5.342(g)(1), YOU MAY FILE A REPLY TO THE ENCLOSED MOTION TO COMPEL WITHIN FIVE (5) DAYS AFTER THE DATE OF SERVICE. YOUR REPLY SHOULD BE FILED WITH THE SECRETARY OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, P.O. BOX 3265, HARRISBURG, PA 17105-3265. A COPY OF YOUR REPLY SHOULD ALSO BE SERVED ON THE UNDERSIGNED COUNSEL.

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Date: April 14, 2016

Attorneys for Duquesne Light Company

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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

TO ADMINISTRATIVE LAW JUDGE JEFFREY A. WATSON:

As explained herein, Duquesne Light Company (“Duquesne Light” or the “Company”) hereby files, pursuant to 52 Pa. Code § 5.342, this Motion to Compel Answers to its Seventh Set of Interrogatories and Requests for Production of Documents (“Set VII Discovery”) directed to Whemco-Steel Castings, Inc. (“Whemco”). The Motion to Compel requests that Administrative Law Judge Jeffrey A. Watson (the “ALJ”) direct Whemco to provide full and complete responses to Questions 2 and 3 of the Set VII Discovery as is required by 52 Pa. Code § 5.342(a)(4).

As explained below, Whemco argues that it should not be required to respond to Questions 2 and 3 of the Set VII Discovery because the referenced emails are purportedly subject to attorney-client privilege and attorney work product doctrine. Duquesne Light disagrees that Questions 2 and 3 seek attorney-client privileged information or that the responses are protected by the attorney work product doctrine. Therefore, Duquesne Light is filing this Motion to Compel with respect to Whemco’s incomplete answers to Questions 2 and 3 of Set VII. In support of this Motion, Duquesne Light States as follows:

I. INTRODUCTION

1. On December 23, 2014, Whemco filed the above-captioned Complaint with the Pennsylvania Public Utility Commission (“Commission”) alleging that Duquesne Light improperly eliminated Rider No. 5 Time-of-Day Discounts (“Rider No. 5”) from the Company’s tariff.

2. 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.

3. On February 10, 2015, Whemco filed an Answer to Duquesne Light’s New Matter.

4. A prehearing conference was held before the ALJ on May 7, 2015.

5. On July 1, 2015, Duquesne Light and Whemco filed competing Motions for Summary Judgment.

6. On July 21, 2015, Duquesne Light and Whemco filed Answers to the respective Motions for Summary Judgment.

7. On September 10, 2015, the ALJ issued Interim Orders denying Duquesne Light’s and Whemco’s Motions for Summary Judgment.

8. A further prehearing conference was held before the ALJ on January 8, 2016.

9. On January 19, 2016, Whemco served the direct testimony of Pamela C. Polacek, Christian Slingluff and Robert A. Rosenthal.

10. Duquesne Light conducted the depositions of all three Whemco witnesses on February 9, 10 and 24, 2016.

11. The parties have engaged, and continue to engage, in discovery throughout this proceeding.

12. On February 23, 2016, Duquesne Light served its Set IV Discovery and Set V Discovery on Whemco.

13. On March 24, 2016, Duquesne Light filed a Further Motion to Compel Whemco to fully and completely respond to Question 12 of the Set IV Discovery and Question 11 of Set V Discovery.

14. The ALJ issued an Interim Order granting in part and denying in part Duquesne Light's Further Motion to Compel on April 5, 2016 ("*Interim Discovery Order*").

15. On April 13, 2016, Whemco filed Supplemental Responses to Question 12 of the Set IV Discovery and Question 11 of the Set V Discovery.

16. On March 30, 2016, Duquesne Light served its Set VII Discovery on Whemco.

17. On April 4, 2016, Whemco served its responses to the Set VII Discovery. As explained below, Whemco argues that it should not be required to respond to Questions 2 and 3 of the Set VII Discovery because the referenced emails are purportedly subject to attorney-client privilege and attorney work product doctrine. Duquesne Light disagrees that Questions 2 and 3 seek attorney-client privileged information or that the responses are protected by the attorney work product doctrine. Copies of Whemco's responses to Questions 2 and 3 of the Set VII Discovery are attached hereto as Appendix A.

18. Duquesne Light notes that Whemco did not file objections to Questions 2 and 3 of the Set VII Discovery.

19. Duquesne Light contacted Whemco's counsel on April 12, 2016 to attempt to resolve the discovery dispute. The parties have not resolved the dispute at this time.

20. Duquesne Light hereby files its Motion to Compel Whemco to fully and completely respond to Questions 2 and 3 of the Set VII Discovery.

II. ARGUMENT

A. **WHEMCO SHOULD BE COMPELLED TO PROVIDE A FULL AND COMPLETE RESPONSE TO QUESTION 2 OF THE SET VII DISCOVERY.**

21. Duquesne Light – Set VII Question 2 provides as follows:

Re Attachment to Duquesne Light Set IV-12: Did the e-mail correspondence dated 1/6/2011 advise Whemco about the settlement rates (or potential settlement rates) in Duquesne Light's 2010 base rate case?

- a. If no, what distribution rates were discussed?*
- b. If yes, did Whemco object to the settlement rates?*
- c. If Whemco objected, fully explain how Whemco objected and what actions were taken, if any.*
- d. If Whemco objected, provide a copy of all correspondence related to such objection.*

22. Duquesne Light – Set VII Question 2 references a prior response to a discovery request from Duquesne Light to Whemco, Set IV – Question 12, which asked Whemco to provide a privilege log of all communications/ documents in response to the Set IV Discovery that Whemco believed to be subject to the attorney-client privilege. One of the entries in the privilege log provided by Whemco in response to Duquesne Light – Set IV Question 12 identified an e-mail correspondence from Pam Polacek to Christian Slingluff dated 1/6/2011 regarding “New DLC rates for Rate L, effective 4/1/11.”

23. In Duquesne Light's March 24, 2016 Further Motion to Compel with regard to Question 12 of the Set IV Discovery, Duquesne Light explained that the 1/6/2011 email is not

privileged because Ms. Polacek did not represent Whemco in Duquesne Light's 2010 base rate proceeding and no attorney-client relationship existed.

24. In the ALJ's *Interim Discovery Order*, the ALJ concluded that "the interrogatory regarding the 1/6/11 email is proper and a response is appropriate to the extent that the response does not contain privileged information or attorney-client work product." *Interim Discovery Order*, p. 8. The ALJ further instructed Whemco to redact any privileged information and to provide a copy of the redacted email to Duquesne Light. *Id.* The ALJ further stated that: "In the event that Duquesne Light subsequently avers, in a timely and appropriate motion that Whemco has improperly redacted discoverable information related to the subject matter of this order, a request for a private confidential *in camera* review or a motion for sanctions consistent with the Commission regulations will be considered." *Id.*

25. On April 13, 2016, Whemco provided a Supplemental Response which included a redacted version of the 1/6/11 e-mail. A copy of this e-mail is provided as Appendix B. It is still unclear to Duquesne Light from reviewing the redacted version of the 1/6/11 e-mail what subjects have been redacted. Duquesne Light has only recently received this redacted e-mail and is currently considering whether to request an *in camera* review of the redacted content.

26. In Question 2 of the Set VII Discovery, Duquesne Light seeks additional non-privileged clarification regarding the 1/6/2011 email.

27. Whemco provided the following response to Duquesne Light – Set VII Question 2:

Whemco previously identified the referenced email dated 1/6/2011 as subject to the Attorney-Client Privilege and Attorney-Work Product Doctrine as noted on the Privilege Log submitted in response to Duquesne Set IV-2. The email dated 1/6/2011 is privileged since it was issued by Ms. Polacek to her client during the course of legal representation of Whemco in connection with

its efforts to negotiate a Rule 4 contract with Duquesne or other measure to ameliorate the substantial cost increase Whemco incurred in its electric distribution rates resulting from the loss of the Rider No. 5 discount applicable to Rate L customers like Whemco effective January 1, 2011. The email correspondence dated 1/6/2011 updated and analyzed information previously provided to Whemco by the Duquesne account representative referenced in the email, Kim Titley, as part of the Rule 4 contract discussions. If Duquesne continues to challenge any aspect of Whemco's privilege claims with respect to the subject email, Whemco is prepared to provide this response and the subject email to the presiding ALJ for an in camera review to confirm Whemco's claims.

28. Question 2 seeks additional clarification about the 2010 base rate case settlement distribution rates that were discussed. Duquesne Light disagrees that the information in the 1/6/2011 email regarding the 2010 base rate case is subject to the attorney-client privilege. The existence of an attorney-client relationship is a prerequisite to claiming that a communication is protected by the privilege. Ms. Polacek testified at her deposition that she did not represent Whemco in Duquesne Light's 2010 base rate case. (Polacek Deposition Tr., pp. 10-12.) Therefore, no attorney-client relationship existed between Ms. Polacek and Whemco with respect to Duquesne Light's 2010 base rate case, and Whemco cannot claim privilege to avoid disclosing information in the 1/6/2011 email about the 2010 base rate case.

29. Moreover, even if the 1/6/2011 email was subject to the attorney-client privilege, Question 2 of the Set VII discovery does not seek privileged information. Question 2 does not ask for the specific advice that Ms. Polacek provided to Whemco in the 1/6/2011 email. Question 2 simply asks whether the 1/6/2011 email advised Whemco about the settlement rates (or potential settlement rates) in Duquesne Light's 2010 base rate case. Whether the 1/6/2011 email advised Whemco about the settlement rates, or some other distribution rates, is not privileged information. Question 2, subpart (a) asks Whemco to identify the distribution rates

that are discussed in the email, if the rates discussed are not the settlement rates in Duquesne Light's 2010 base rate case. It does not ask Whemco to provide the actual advice Ms. Polacek provided to Whemco about the rates. Question 2, subparts (b)-(d) inquire as to whether Whemco objected to the settlement rates in Duquesne Light's 2010 base rate case. Whether Whemco objected to the settlement rates in Duquesne Light's 2010 base rate case is not subject to privilege. Whemco should be required to disclose the subject of the discussion between Ms. Polacek and Mr. Slingluff, i.e. what "new" rates were discussed, and whether Whemco objected to the settlement rates in Duquesne Light's 2010 base rate case.

30. To the extent Whemco argues that communications between Ms. Polacek and Mr. Slingluff regarding Duquesne Light's 2010 base rate case are privileged and that Set VII, Question 2 seeks privileged information, Whemco has waived any privilege by arguing that Ms. Polacek did not represent Whemco with respect to the 2010 base rate case.

31. In addition, Whemco states that the 1/6/2011 e-mail correspondence updated and analyzed information previously provided to Whemco by Duquesne Light. It is not clear from this statement that updating and analyzing Duquesne Light information is subject to privilege.

32. Whemco and Ms. Polacek cannot assert attorney-client privilege or attorney work product doctrine to avoid answering Set VII, Question 2 and Whemco and Ms. Polacek should be directed to provide a full and complete response to Set VII, Question 2.

B. WHEMCO SHOULD BE COMPELLED TO PROVIDE A FULL AND COMPLETE RESPONSE TO SET VII, QUESTION 3.

33. Duquesne Light Set VII, Question 3 provides as follows:

Re Attachment to Duquesne Light Set IV-12: Did either or both of the e-mail correspondence dated 1/4/2011 advise Whemco about the settlement rates (or potential settlement rates) in Duquesne Light's 2010 base rate case?

- a. *If no, what distribution rates were discussed?*
- b. *If yes, provide copies of both e-mail correspondence and all responses thereto.*
- c. *If yes, did Whemco object to the settlement rates?*
- d. *If Whemco objected, fully explain how Whemco objected and what actions were taken, if any.*
- e. *If Whemco objected, provide a copy of all correspondence related to such objection.*

34. Whemco provided the following response to Set VII, Question 3:

Whemco previously identified the referenced emails dated 1/4/2011 as subject to the Attorney-Client Privilege and Attorney-Work Product Doctrine as noted on the Privilege Log submitted in the response to Duquesne Set IV-12. The emails dated 1/4/2011 are privileged since they was [sic] issued by Ms. Polacek to her client (or vice versa) during the course of legal representation of Whemco in connection with its efforts to negotiate a Rule 4 contract with Duquesne or other measure to ameliorate the substantial cost increase Whemco incurred in its electric distribution rates resulting from the loss of the Rider No. 5 discount applicable to Rate L customers like Whemco effective January 1, 2011. If Duquesne continues to challenge any aspect of Whemco's privilege claims with respect to the subject emails, Whemco is prepared to provide this response and the subject emails to the presiding ALJ for an in camera review to confirm Whemco's claims.

35. Duquesne Light disagrees that the 1/4/2011 emails are privileged. According to the privilege log provided by Whemco in response to Duquesne Light Set IV, Question 12, the two emails dated 1/4/2011 contain information related to "distribution rates" and "Rule 4". To the extent that these emails contain information related to the settlement rates (or potential settlement rates) in Duquesne Light's 2010 base rate case, that information in these emails is not subject to privilege. No attorney-client relationship existed between Ms. Polacek and Whemco with respect to Duquesne Light's 2010 base rate proceeding because Ms. Polacek did not serve as legal counsel to Whemco in Duquesne Light's 2010 base rate case and Whemco did not

participate in that case. (Polacek Deposition Tr., pp. 10-12.) Therefore, Whemco cannot claim privilege to avoid disclosing emails between Ms. Polacek and Whemco regarding Duquesne Light's 2010 base rate case.

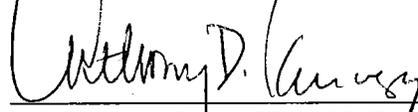
36. Even if the 1/4/11 emails were subject to privilege, Set VII, Question 3 does not seek privileged information. Set VII, Question 3 seeks to determine what rates were discussed in the 1/4/11 emails, i.e. the settlement rates in Duquesne Light's 2010 base rate case or other distribution rates. If the settlement rates in Duquesne Light's 2010 base rate case were discussed in the 1/4/11 emails, Set VII, Question 3 also seeks to determine if Whemco objected to those rates. Set VII, Question 3 does not ask for the specific advice Ms. Polacek provided to Whemco. Identifying what rates were discussed in the 1/4/11 emails is not information that is subject to privilege. Whether Whemco objected to the settlement rates in Duquesne Light's 2010 base rate case and what actions were taken in furtherance of Whemco's objection also is not subject to privilege.

37. Whemco and Ms. Polacek cannot assert attorney-client privilege or attorney work product doctrine to avoid answering Set VII, Question 3 and Whemco and Ms. Polacek should be directed to provide a full and complete response to Set VII, Question 3.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, Duquesne Light Company respectfully requests that Administrative Law Judge Jeffrey A. Watson grant this Motion to Compel and order Whemco Steel Castings, Inc. to fully answer Questions 2 and 3 of the Set VII Discovery.

Respectfully submitted,



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Date: April 14, 2016

Attorneys for Duquesne Light Company

Appendix A

Docket No. C-2014-2459527
Respondent: Pamela Polacek, Esquire
Position: Attorney, McNees Wallace &
Nurick LLC

WHEMCO-Steel Castings, Inc.
Response to Duquesne Light Company
Interrogatories and Requests for Production
of Documents, Set VII – 2

No. 2 - Re Attachment to Duquesne Light Set IV-12: Did the e-mail correspondence dated 1/6/2011 advise Whemco about the settlement rates (or potential settlement rates) in Duquesne Light's 2010 base rate case?

- a. If no, what distribution rates were discussed?
- b. If yes, did Whemco object to the settlement rates?
- c. If Whemco objected, fully explain how Whemco objected and what actions were taken, if any.
- d. If Whemco objected, provide a copy of all correspondence related to such objection.

Response:

Whemco previously identified the referenced email dated 1/6/2011 as subject to the Attorney-Client Privilege and Attorney-Work Product Doctrine as noted on the Privilege Log submitted in the response to Duquesne Set IV-12. The email dated 1/6/2011 is privileged since it was issued by Ms. Polacek to her client during the course of legal representation of Whemco in connection with its efforts to negotiate a Rule 4 contract with Duquesne or other measure to ameliorate the substantial cost increase Whemco incurred in its electric distribution rates resulting from the loss of the Rider No. 5 discount applicable to Rate L customers like Whemco effective January 1, 2011. The email correspondence dated 1/6/2011 updated and analyzed information previously provided to Whemco by the Duquesne account representative referenced in the email, Kim Titley, as part of the Rule 4 contract discussions. If Duquesne continues to challenge any aspect of Whemco's privilege claims with respect to the subject email, Whemco is prepared to provide this response and the subject email to the presiding ALJ for an *in camera* review to confirm Whemco's claims.

Docket No. C-2014-2459527
Respondent: Pamela Polacek, Esquire
Position: Attorney, McNees Wallace &
Nurick LLC

WHEMCO-Steel Castings, Inc.
Response to Duquesne Light Company
Interrogatories and Requests for Production
of Documents, Set VII – 3

No. 3 - Re Attachment to Duquesne Light Set IV-12: Did either or both of the e-mail correspondence dated 1/4/2011 advise Whemco about the settlement rates (or potential settlement rates) in Duquesne Light's 2010 base rate case?

- a. If no, what distribution rates were discussed?
- b. If yes, provide copies of both e-mail correspondence and all responses thereto.
- c. If yes, did Whemco object to the settlement rates?
- d. If Whemco objected, fully explain how Whemco objected and what actions were taken, if any.
- e. If Whemco objected, provide a copy of all correspondence related to such objection.

Response:

Whemco previously identified the referenced emails dated 1/4/2011 as subject to the Attorney-Client Privilege and Attorney-Work Product Doctrine as noted on the Privilege Log submitted in the response to Duquesne Set IV-12. The emails dated 1/4/2011 are privileged since they were issued by Ms. Polacek to her client (or vice versa) during the course of legal representation of Whemco in connection with its efforts to negotiate a Rule 4 contract with Duquesne or other measure to ameliorate the substantial cost increase Whemco incurred in its electric distribution rates resulting from the loss of the Rider No. 5 discount applicable to Rate L customers like Whemco effective January 1, 2011. If Duquesne continues to challenge any aspect of Whemco's privilege claims with respect to the subject emails, Whemco is prepared to provide this response and the subject emails to the presiding ALJ for an *in camera* review to confirm Whemco's claims.

Appendix B

Chris Slingluff

From: Polacek, Pamela [PPolacek@mwn.com]
Sent: Thursday, January 06, 2011 3:36 PM
To: Chris Slingluff
Subject: New DLC Rates April 1 for Rate L
Attachments: Pamela Polacek (PPolacek@mwn.com).vcf

Chris:

Here are the rates that will take effect on April 1:

Rate L

Distribution

First 5,000 KW or less	\$34,900.00
Next 10,000 KW	\$6.91
Additional KW	\$6.73
All kWh	\$0.000000

Subtotal

Untransformed Service Credit	\$0.75
Meter Fees	

Surcharges

Consumer Education, April-May, Bills	\$0.35
Consumer Education, June-March, Bills	\$0.35
Energy Efficiency, Bills (1)	\$795.00
Energy Efficiency, All kW (PLC) (1)	\$0.77

Subtotal

So, to round out the analysis:

Pam

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McNees Wallace & Nurick LLC
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The foregoing message may be protected by the attorney-client privilege. If you believe it has been sent to you in error, do not read it. Please reply to the sender that you have received the message in error, then delete it. Thank you.

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