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File #: 161587

May 20, 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 of Duquesne Light Company Requesting Permission to Provide Oral Surrebuttal Testimony at Evidentiary Hearing 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: Honorable Jeffrey Watson
Certificate of Service

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

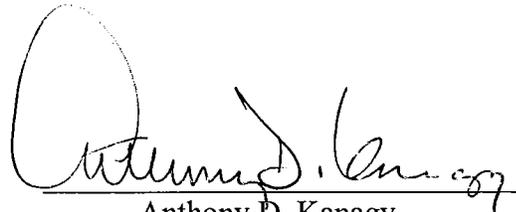
I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

VIA E-MAIL and REGULAR MAIL

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Date: May 20, 2016


Anthony D. Kanagy

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**MOTION REQUESTING PERMISSION TO PROVIDE ORAL
SURREBUTTAL TESTIMONY AT EVIDENTIARY HEARING**

TO ADMINISTRATIVE LAW JUDGE JEFFREY A. WATSON:

Duquesne Light Company (“Duquesne Light” or the “Company”) hereby files, pursuant to 52 Pa. Code §§ 5.103, 5.242 and the February 8, 2016 Second Prehearing Order, this Motion Requesting Permission to Provide Oral Surrebuttal Testimony at the Evidentiary Hearing. At the Prehearing Conference, Whemco-Steel Castings, Inc. (“Whemco”) opposed Duquesne Light’s request to provide oral surrebuttal testimony at the evidentiary hearing in this matter. As explained below, good cause exists to permit Duquesne Light to provide oral surrebuttal testimony in this proceeding because due process requires that Duquesne Light be given a full and fair opportunity to respond to the arguments presented in Whemco’s Rebuttal Testimony and to potentially address information that is the subject of an outstanding discovery dispute. 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. An initial prehearing conference was held before Administrative Law Judge Jeffrey A. Watson (the "ALJ") on May 7, 2015.

5. A further prehearing conference was held before the ALJ on January 8, 2016. At the prehearing conference, the parties agreed to all but one aspect of the litigation schedule in this proceeding. Duquesne Light requested that it be permitted to provide oral surrebuttal testimony at the evidentiary hearing, which Whemco opposed. The parties agreed at the prehearing conference that the issue would be reserved for a future ruling by the ALJ prior to the scheduled evidentiary hearing (Second Prehearing Order, p. 8).

6. On January 19, 2016, Whemco served the Direct Testimony of Pamela C. Polacek, Christian Slingluff and Robert A. Rosenthal.

7. The ALJ issued a Second Prehearing Order on February 8, 2016 establishing a litigation schedule. The Second Prehearing Order also provided for Duquesne Light to file a motion by May 20, 2016 setting forth its request for permission to provide oral surrebuttal testimony at the hearing. However, the schedule does not provide for the filing of Whemco's rebuttal until June 14, 2016 and for hearings on June 23 and 24, 2016. Due to the short time between rebuttal and hearings, Duquesne Light requests a decision prior to Whemco's Rebuttal Testimony date so that there is sufficient time for Duquesne Light to prepare for hearings.

8. Throughout the course of this proceeding, the parties have engaged, and continue to engage, in discovery. Further, the ALJ has ruled on various discovery motions.

9. On April 27, 2016, Duquesne Light filed a Motion for *In Camera* Review of an e-mail that was provided in redacted form in Whemco's supplemental response to Question No. 12 of Duquesne Light's Set IV Discovery to Whemco pursuant to the ALJ's April 5, 2016 *Interim Discovery Order*.

10. On May 20, 2016, the ALJ entered an Interim Order Granting The Motion of Duquesne Light Company for *In Camera* Review. The May 20 Interim Order requires Whemco to file a brief in support of its claims by May 27, 2016, and Duquesne Light to file a Reply Brief by June 3, 2016.

11. Duquesne Light submitted the Direct Testimony of William V. Pfrommer on May 2, 2016 in accordance with the litigation schedule.

12. Duquesne Light hereby files this Motion Requesting Permission to Provide Oral Surrebuttal Testimony at the Evidentiary Hearing, along with the proposed order attached as "Appendix A".

II. ARGUMENT

A. **DUQUESNE LIGHT SHOULD BE PERMITTED TO PROVIDE ORAL SURREBUTTAL TESTIMONY TO ADDRESS ANY NEW EVIDENCE OR ARGUMENTS THAT MAY BE RAISED IN WHEMCO'S REBUTTAL TESTIMONY.**

13. The procedural schedule established in this proceeding provides for Whemco to submit Rebuttal Testimony on June 14, 2016. (Second Prehearing Order, p. 6.) Because Duquesne Light has not had an opportunity to review Whemco's Rebuttal Testimony and cannot determine what contentions Whemco will make in its Rebuttal Testimony, Duquesne Light should be permitted to reserve its right to provide oral surrebuttal testimony at the evidentiary hearing.

14. Due process requires that Duquesne Light be given an adequate opportunity to respond to Whemco's Rebuttal Testimony, to the extent Whemco presents evidence or arguments that were not presented in its direct case. See *Smith v. Pa. PUC*, 192 Pa. Super. 424, 429 (1960) (due process and the principles of common fairness require parties to be provided with an opportunity to be heard on the issues and to offer evidence in explanation or rebuttal); *Hess v. Pa. P.U.C.*, 107 A.3d 246, 265-267 (Pa. Cmwlth. 2014) (parties have a right to respond to new evidence); see also *Enron Capital & Trade Resources Corp. v. The Peoples Natural Gas Co.*, 1998 Pa. PUC LEXIS 199, *46, Order entered August 24, 1998.

15. It is important to note that Duquesne Light's testimony that was submitted on May 2, 2016 contained Duquesne Light's Direct Case. Whemco will likely raise new evidence or arguments in response to Duquesne Light's Direct Case that Whemco did not raise in its Direct Testimony. Duquesne Light has a due process right to respond to any new evidence or arguments.

16. In addition, based upon the Direct Testimony that has been submitted in this case, it is likely that any surrebuttal testimony provided by Duquesne Light will be brief and will not negatively impact the time scheduled for hearing.

17. Oral surrebuttal testimony will allow Duquesne Light to address any new evidence and/or arguments that Whemco's witnesses may present in their Rebuttal Testimony. Surrebuttal testimony will also provide Duquesne Light the opportunity to present evidence if there are any changes in Whemco's position subsequent to the filing of Duquesne Light's Direct Testimony.

B. DUQUESNE LIGHT SHOULD ALSO BE PERMITTED TO PROVIDE ORAL SURREBUTTAL TESTIMONY TO ADDRESS EVIDENCE THAT IS THE SUBJECT OF AN OUTSTANDING DISCOVERY DISPUTE.

18. Information relevant to Duquesne Light's position in this proceeding is the subject of an outstanding discovery dispute.

19. On April 27, 2016, Duquesne Light filed a Motion for *In Camera* Review of an e-mail from Pam Polacek to Christian Slingluff dated January 6, 2011 regarding "New DLC rates for Rate L, effective 4/1/11", which was requested in Duquesne Light's Set IV Discovery to Whemco. The e-mail was the subject of a prior Further Motion to Compel filed by Duquesne Light on March 24, 2016 after Whemco initially refused to provide the e-mail in response to Duquesne Light's discovery request.

20. In ruling on Duquesne Light's Further Motion to Compel, the ALJ directed Whemco to provide the e-mail to Duquesne Light except for any privileged information contained therein. (*Interim Discovery Order*, p. 8.) The ALJ further instructed that a motion for sanctions or a motion for *in camera* review would be considered to the extent Duquesne Light believed that Whemco may have improperly redacted discoverable information. (*Interim Discovery Order*, p. 8.)

21. On April 13, 2016, Whemco provided Duquesne Light with a Supplemental Response to Question No. 12 of the Set IV Discovery which contained a redacted copy of the subject e-mail. Whemco and Duquesne Light disagree as to whether the redacted portion of the e-mail is protected by the attorney-client privilege and, consequently, whether the information is discoverable. Duquesne Light believes that the redacted portion of the e-mail may address rates in Duquesne Light's 2010 base rate case, which is directly relevant to Duquesne Light's position in the instant proceeding, as well as other discoverable information.

22. On May 9, 2016, Whemco filed an Answer to the Motion for *In Camera* Review, agreeing that the ALJ could review the January 6, 2011 e-mail.

23. As explained above, on May 20, 2016, the ALJ granted Duquesne Light's Motion for *In Camera* Review.

24. To date, Duquesne Light has been unable to review the full contents of the subject e-mail. As a result, Duquesne Light did not have an opportunity to review this evidence before submission of its Direct Testimony, which was timely submitted on May 2, 2016 pursuant to the litigation schedule established in this proceeding.

25. Because Whemco's responses to Duquesne Light's discovery requests were not complete prior to the filing of Duquesne Light's Direct Testimony, Duquesne Light did not have an opportunity to comment on this evidence or present evidence based upon a complete response to its interrogatory.

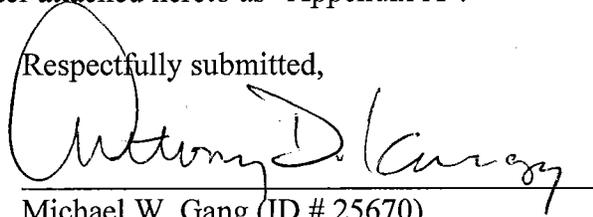
26. Duquesne Light should be permitted to provide oral surrebuttal testimony at the evidentiary hearing to address the evidence that Whemco is currently withholding, if the ALJ requires further release of the contents of the e-mail. See *Pa. PUC v. Pennsylvania-American Water Company*, 1989 Pa. PUC LEXIS 170, *167-169 (information provided well after it was sought in discovery and after the close of the opposing party's case denied opposing party of an opportunity to examine substantive issues raised by the evidence).

27. Further, Duquesne Light may not be able to respond to the information that is the subject of the outstanding discovery dispute at the briefing stage of this proceeding without conducting oral surrebuttal testimony. Doing so would deprive Duquesne Light of the opportunity to present evidence in response to the newly discovered information for the record in this proceeding.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, Duquesne Light Company respectfully requests that Administrative Law Judge Jeffrey A. Watson grant this Motion Requesting Permission to Provide Oral Surrebuttal Testimony in order to protect Duquesne Light's due process rights and further issue the proposed order attached hereto as "Appendix A".

Respectfully submitted,



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Date: May 20, 2016

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