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May 26, 2016

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 Requesting Permission to Provide Oral Surrebuttal Testimony at Evidentiary Hearing by Duquesne Light Company in the above-captioned proceeding.

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

Sincerely,



Alan M. Seltzer

AMS/tlg
Enclosure
cc: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**ANSWER OF WHEMCO-STEEL CASTINGS, INC. TO MOTION REQUESTING
PERMISSION TO PROVIDE ORAL SURREBUTTAL TESTIMONY AT
EVIDENTIARY HEARING BY DUQUESNE LIGHT COMPANY**

WHEMCO-Steel Castings, Inc. (“Whemco”) hereby answers the Motion Requesting Permission to Provide Oral Surrebuttal Testimony at Evidentiary Hearing (“Duquesne Motion”) filed by Duquesne Light Company (“Duquesne”) on May 20, 2016, pursuant to the Pennsylvania Public Utility Commission (“Commission”) regulations at 52 Pa. Code § 5.103 as follows:

I. BACKGROUND AND DISCUSSION

1. The Duquesne Motion and this Answer have their genesis in Duquesne’s continuing efforts to obtain the additional right to “respond” via oral surrebuttal testimony at hearing to as yet unseen written Whemco rebuttal testimony that is due to be filed and served on June 14, 2016.

2. At the second prehearing hearing conference in this proceeding held on January 8, 2016, during which the parties and the presiding Administrative Law Judge (“ALJ”) established a tentative litigation schedule, Duquesne claimed a need/right to provide oral surrebuttal testimony at the hearings in response to Whemco’s written rebuttal testimony. Whemco objected to that request and, for the reasons specified below, continues to oppose oral surrebuttal testimony by Duquesne at the evidentiary hearings currently scheduled for June 23-24, 2016 in this proceeding.

3. The ALJ addressed Duquesne's request to provide oral surrebuttal testimony in the Second Prehearing Order dated February 6, 2016 ("Second Prehearing Order") by directing Duquesne to file any motion requesting such authorization on or before May 20, 2106. (Second Prehearing Order, p. 8). The Duquesne Motion was filed in accordance with the Second Prehearing Order, as is this Answer.

4. As also required by the Second Prehearing Order, Whemco and Duquesne have conferred on the relief requested in the Duquesne Motion. While Whemco suggested that Duquesne await the actual filing of Whemco's rebuttal testimony on June 14, 2016 and consider the actual substance of Whemco's testimony before pursuing the requested relief, Duquesne has declined that suggestion, despite the fact that Duquesne does not know *as of the current time* if it will even need or require oral surrebuttal testimony.

5. Duquesne's current request to submit surrebuttal testimony is even less meritorious than it was the first time it was raised by Duquesne at the prehearing conference. Since the time of its initial request, Duquesne has continued to conduct extensive discovery of Whemco, including depositions of all three of its witnesses. At this point, Duquesne is thoroughly familiar with Whemco's claims, and its evidence in support of those claims. If it elected to not fully rebut those claims in its testimony filed May 2, 2016, it should not be provided an additional opportunity to do so. For the reasons specified below, Duquesne is *not* entitled to provide oral surrebuttal testimony in this proceeding, and to allow it proceed on that basis would violate Whemco's due process rights in a case that simply does not warrant the type of extraordinary treatment Duquesne is seeking.

II. ARGUMENT

A. **Duquesne is Not Legally Entitled to any Oral Surrebuttal Testimony In this Proceeding and its Request to Reserve that Right Should be Denied.**

6. The Commission's regulations clearly establish the ground rules for the handling, presentation and order of evidence at hearings. First, the ALJ has complete control over the receipt of evidence at hearings as provided in 52 Pa. Code Section 5.403: "[t]he presiding officer shall have all necessary authority to control the receipt of evidence. . . ." 52 Pa. Code § 5.403.

7. Second, 52 Pa. Code § 5.403(a)(2) gives the ALJ the authority to impose appropriate "limitations" on various aspects of evidence at hearings, including "limitations on the production of further evidence" (52 Pa. Code § 5.403(a)(2)(iii)) and "other necessary limitations." (52 Pa. Code § 5.403(a)(2)(iv)). The ALJ has clear legal authority to prohibit Duquesne's claim to reserve the right to provide oral surrebuttal testimony at the scheduled June 23-24, 2016 hearings in response to Whemco's June 14, 2016 written rebuttal testimony.

8. The ALJ's broad authority to control all aspects of the evidentiary record should be exercised in the context of the Commission's regulations at 52 Pa. Code Section 5.242 (Order of Procedure) that provide in pertinent part that "[i]n a proceeding, the party having the burden of proof, shall open and close unless otherwise directed by the presiding officer." 52 Pa. Code § 5.242(a). There is no doubt as the complainant in this proceeding Whemco – and not Duquesne – has the burden of proof to support the allegations and relief requested in its complaint. Indeed, as the "proponent" of the demand for refunds associated with Duquesne's unlawful termination of the Rider No. 5 discount applicable to Rate L customers like Whemco in its 2007 default service proceeding at Docket No. P-00072247, Whemco has the burden of proof under Section 332(a) of the Public Utility Code, 66 Pa. C. S. § 332(a). If Duquesne is permitted to provide oral surrebuttal testimony, Whemco will be deprived of its right, as the party with the ultimate burden

of proof, to “close” as required by 52 Pa. Code § 5.242(a). Granting Duquesne’s request and still honoring Whemco’s right to close the evidentiary record is not a fair or practical alternative. For example, providing Whemco an oral rejoinder testimony immediately after Duquesne’s presentation of oral surrebuttal at hearing would result in Whemco being prejudiced. While Duquesne would have from June 14, 2016 to the start of hearings on June 23rd to plan and prepare its surrebuttal testimony, Whemco would be required to immediately respond to new Duquesne evidence with evidence of its own.

9. Duquesne’s suggestion (Duquesne Motion, ¶ 14) that failure to provide the extraordinary relief of oral surrebuttal testimony will deprive it of its procedural due process rights is unsustainable. Nowhere in the Public Utility Code or elsewhere is there a legal requirement for litigants to have a “right” to provide oral surrebuttal testimony. Such an assertion is inconsistent with the rights actually granted to litigants under the Public Utility Code:

Every party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

66 Pa. C. S. § 332(c).

10. The current litigation and procedural schedule – which allowed for Duquesne’s filing of rebuttal testimony in response to Whemco’s direct case and permits cross-examination of Whemco’s witnesses at the upcoming June hearings -- fully satisfies Duquesne’s due process rights and is completely consistent with the requirements of 66 Pa. C. S. § 332(c).

11. Duquesne’s argument in support of its request for oral surrebuttal is premised on its erroneous view that because it supplied self-described “direct testimony” in this proceeding it is entitled to oral surrebuttal to address “new claims” Whemco may raise in its upcoming June 14, 2016 written rebuttal (Duquesne Motion, ¶ 15). The procedural schedule in this case – as

reflected in the Third Prehearing Order -- refers to Duquesne's testimony as its "response" to Whemco and not as Duquesne's "direct testimony." This is completely consistent with Whemco having the burden of proof in this case and the right to "close" its case under existing Commission regulations. Duquesne cannot -- and should not be permitted -- to justify a claimed right to oral surrebuttal based upon its erroneous characterization of its own testimony that is inconsistent with the ALJ-established procedural schedule.

12. Duquesne's repeated concern that Whemco's written rebuttal will raise "new evidence or arguments" is both wrong and inconsistent with the expansive discovery the parties have engaged in for well over a year in this proceeding. The parties have issued and responded to numerous discovery questions and all three of Whemco's witnesses have undergone extensive examination in oral depositions conducted by Duquesne. Given this extensive discovery and the fact that both parties have already filed one round of testimony suggests that the parties' positions -- factual and legal -- are already known and have been thoroughly vetted. Therefore, the likelihood of "surprise" -- warranting oral surrebuttal at the hearing -- is extremely unlikely and not remotely justified. Duquesne's assertion that it expects new reasons in support of Whemco's claims or new claims to surface in Whemco's rebuttal testimony is not credible or plausible.

13. Indeed, Duquesne's request for oral surrebuttal completely contradicts its very position in filing its Motion for Partial Summary Judgment in which it asserted there are no material facts in dispute in this proceeding. Whemco agrees that the facts in this case are clearly known, have been thoroughly investigated in discovery and reflected in testimony. There is simply no need to further prejudice Whemco and its right to close its case by any suggestion it

must be required to address – right on the spot and on the fly – Duquesne’s oral surrebuttal during the June 23-24 hearings.

14. Finally, the ongoing dispute regarding a single email from Attorney Pamela Polaeck to Whemco employee Christian Slingluff during Ms. Polacek’s legal representation of Whemco to address the effects of the unlawful termination of the Rider No. 5 discount applicable to Whemco effective January 1, 2011 does not justify the relief sought in the Duquesne Motion. (Duquesne Motion, ¶¶ 18-27). The *in camera* review of the subject January 6, 2011 email will be addressed separately from any claimed right by Duquesne to conduct oral surrebuttal. Whemco is confident that its privilege and attorney work product claims with respect to the redacted portion of the January 6, 2011 will be sustained. If the ALJ finds otherwise, it is clearly premature *at this time* to allow Duquesne the extraordinary remedy of oral surrebuttal based on what is currently unknown and unknowable. At the very least, any final decision on Duquesne’s request to do oral surrebuttal can be made subject to the separate resolution of the status of the aforesaid January 6, 2011 email.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, Whemco respectfully requests that the ALJ (ii) deny the Duquesne Motion in its entirety, thereby prohibiting Duquesne from providing oral surrebuttal testimony at the upcoming June 23-24, 2014 evidentiary hearings, (ii) issue the form of Order attached hereto has Appendix A, and (iii) grant Whemco such other relief as is just and reasonable under the circumstances.

Respectfully submitted,

Dated: May 26, 2016



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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

**ORDER DENYING DUQUESNE LIGHT'S MOTION REQUESTING PERMISSION TO
PROVIDE ORAL SURREBUTTAL TESTIMONY AT EVIDENTIARY HEARING**

IT IS ORDERED:

1. That the Motion of Duquesne Light Requesting Permission to Provide Oral Surrebuttal Testimony at the Evidentiary Hearing is hereby denied.
2. That Duquesne Light shall not be permitted to provide oral surrebuttal testimony at the evidentiary hearing in this matter on June 23-24, 2016.

Jeffrey A. Watson
Administrative Law Judge

Date: _____, 2016

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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 Requesting Permission to Provide Oral Surrebuttal Testimony at Evidentiary Hearing 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 26th day of May, 2016.



Alan M. Seltzer, Esq.