

**John F. Povilaitis**

717 237 4825  
john.povilaitis@bipc.com

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

May 27, 2016

**VIA EFILING**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor  
Harrisburg, PA 17120

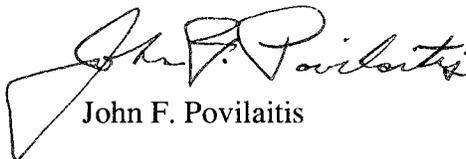
Re: WHEMCO-Steel Castings, Inc. v. Duquesne Light Company  
Docket No. C-2014-2459527

Dear Secretary Chiavetta:

On behalf of WHEMCO-Steel Castings, Inc., I have enclosed for electronic filing the Memorandum of WHEMCO-Steel Castings, Inc. in Support of Its Privilege Claims in the above-captioned proceeding. In accordance with the Interim Order of Administrative Law Judge (“ALJ”) Jeffrey A. Watson dated May 20, 2016, we are providing an un-redacted version of the January 6, 2011 email in a sealed envelope addressed as a confidential document to ALJ Watson.

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

Sincerely,

  
John F. Povilaitis

JFP/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>	:	

**MEMORANDUM OF WHEMCO-STEEL CASTINGS, INC.  
IN SUPPORT OF ITS PRIVILEGE CLAIMS**

WHEMCO-Steel Castings, Inc. (“Whemco”) is submitting this Memorandum to the presiding Administrative Law Judge (“ALJ”) in connection with and in support of its claim that certain contents of an email dated January 6, 2011 are subject to the attorney client privilege and attorney work product doctrine and cannot be turned over to Duquesne Light Company (“Duquesne”) in this proceeding. The ALJ directed the filing of this memorandum by no later than May 27, 2016 in the *Interim Order Granting the Motion of Duquesne Light Company for In Camera Review* dated May 20, 2016 (“Interim Order”). The Interim Order also directed Whemco to file the subject email of January 6, 2011 in an un-redacted version in a sealed envelope addressed as a confidential document to the ALJ. Whemco is filing this Memorandum and the un-redacted version of the January 6, 2011 email simultaneously.

**I. BACKGROUND**

The Interim Order contains the relevant background and history regarding this matter, the details of which will not be repeated entirely in this Memorandum.

In general, the Interim Order and this Memorandum are the result of Duquesne’s continuing efforts to ascertain the complete details of a single email dated January 6, 2011 (“January 2011 Email”) from Pamela Polacek, Esq. to Christian Slingluff, a representative of Whemco. Whemco has consistently asserted that portions of the January 2011 Email contain

material that is subject to the attorney client privilege and attorney work product doctrine and should not be provided to Duquesne in discovery. Toward that end, Whemco included the January 2011 Email in the privilege log submitted previously to Duquesne in Whemco's response to Duquesne Interrogatories Set IV-12 (Interim Order, p. 4).

The January 2011 Email has been the subject of previous discovery rulings by the ALJ in this proceeding. In an Interim Order dated April 5, 2016 ("April 2016 Interim Order"), the ALJ addressed portions of Duquesne's Sets IV and V Interrogatories to Whemco and in so doing accurately summarized why Whemco claims the January 2011 Email is subject to protection under the attorney client privilege and attorney work product doctrine:

According to Whemco, this email contains analyses from Pamela Polacek, Esq. performed during her representation of Whemco in its efforts to develop a contract under Rule 4 of Duquesne's tariff to ameliorate the impacts of the Rider No. 5 discount applicable to Rate L customer being eliminated by Duquesne effective January 1, 2011 and prove to Whemco's representative, Christian Slingluff, as her client. This confidential and privileged email updated and analyzed information that had previously been provided to Whemco by Duquesne's then account representative to Whemco, Kim Titley (who is referenced in the email), as part of the Rule 4 discussions.

(April 2016 Interim Order, p. 5).

The more recent Interim Order contained essentially the same analysis, restating Whemco's view that the January 2011 Email contains analyses from Pamela Polacek, Esq. at a time when she was providing legal services to her client, Whemco, in its then ongoing efforts to develop a contract under Duquesne's Tariff Rule No. 4 to ameliorate the rate impacts on Whemco as a direct result of the elimination of the Rider No. 5 time of day discounts then applicable to customers served under Rate Schedule L. (Interim Order, p. 5). The Rule No. 4 representation of Whemco by Ms. Polacek is completely separate from (i) the 2007 Default

Service Proceeding case at issue in this proceeding and (ii) Duquesne's 2010 base rate proceeding.

On April 13, 2016 Whemco provided Duquesne a Supplemental Response to Duquesne Interrogatory Set IV-12, which included a redacted version of the January 2011 Email. However, at no time has Whemco provided to Duquesne the entire text of the January 2011 Email.

As also noted in the Interim Order, Whemco has no objection to providing the January 2011 email to the ALJ for *in camera* review (Interim Order, p. 6). Indeed, confident of its position with respect to the substance of the email, *Whemco* initially proposed the *in camera* review of the January 2011 Email *before* Duquesne sought such relief.

## **II. ARGUMENT**

### **A. Applicable Legal Standards**

#### *1. Attorney Client Privilege*

The attorney-client privilege in Pennsylvania has long been codified by statute, which provides “[i]n a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.” 42 Pa.C.S. § 5928.

Pennsylvania law thus 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 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).

In February 2011, the Pennsylvania Supreme Court confirmed that “the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney to-client communications made for the purpose of obtaining or providing professional legal advice.” *Gillard v. AIG Ins. Co.*, 15 A.3d 44 (Pa. 2011).

## 2. *Attorney Work Product Doctrine*

In contrast to the attorney-client privilege, the work product doctrine in Pennsylvania is not statutory. It is a product of common law adopted by the Supreme Court in Pennsylvania’s civil discovery rules and, importantly for this proceeding, is reflected in the Commission’s regulations at 52 Pa. Code Section 5.323. Both the Pennsylvania Rule of Civil Procedure 4003.3 and the Commission’s regulations at 52 Pa Code § 5.323 preclude discovery of “the mental impressions of a party’s attorney or his conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.” The work product privilege broadly protects most aspects of an attorney’s work in representing a client.

The work product privilege, unlike the attorney-client privilege, is broad because “the underlying purpose of the work product doctrine is to shield “the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case.” *Gocial v. Independence Blue Cross*, 827 A.2d 1216, 1222 (Pa. Super. 2003), quoting *Lepley v. Lycoming Cty. Court of Common Pleas*, 481 Pa. 565, 573; 393 A.2d 306, 310 (Pa. 1978). The work product privilege enables attorneys to prepare cases without any risk that their own work will be used against their clients. *In re Estate of Wood*, 818 A.2d 568 (Pa. Super. 2003).

The work product doctrine provides even *broader protections* than the attorney-client privilege. *Comm. v. Noll*, 662 A.2d 1123, 1126 (Pa. Super. Ct. 1995). Pennsylvania courts have recognized that the work product doctrine protects material, regardless of whether it is

confidential, or prepared by an attorney in anticipation of litigation. *Nat'l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa.Commw. Ct. 2001).

## **B. Argument**

*The Redacted Portions of the January 6, 2011 Email from Pamela Polacek are Not Discoverable In this Proceeding.*

To assist the ALJ in resolving the *in camera* evaluation of the January 2011 Email and to provide the information specifically directed in the Interim Order (at page 7, Ordering Paragraph 4), Whemco is attaching to this Memorandum and incorporates herein the Affidavit of Pamela C. Polacek (“Affidavit”). The Affidavit, given by Ms. Polacek under oath, provides the context within which she wrote the January 2011 Email and her relationship to Whemco at the time the email was drafted and sent to Christian Slingluff, a Whemco representative.

Most of the content/text of the January 2011 Email has already been provided to Duquesne in discovery. In the part provided (attached to Duquesne’s April 27, 2016 Motion for *In Camera* Review) it is clear that the email:

- Was sent from Pamela Polacek, an attorney at law, to Chris Slingluff, known by Duquesne and the ALJ to be a representative of Whemco and a witness in this proceeding;
- Purports to address new Duquesne rates effective “April 1 for Rate L”;
- Contains dollar amounts for certain services relating to Rate Schedule L; and
- Refers to an “analysis” of some type by the email author, Pamela Polacek.

Even without seeing the full un-redacted version of the January 2011 Email, it is clear that it is dated January 6, 2011, which is just 5 days after the Rider No. 5 discount applicable to Rate L customers like Whemco became unavailable as part of Duquesne’s distribution service and caused Whemco’s distribution rates to increase substantially. (*See*, Whemco Formal Complaint, ¶¶ 29 and 30 and Duquesne’s Answer and New Matter, ¶¶ 29 and 30 which admit the

same). And, according to the Affidavit, Ms. Polacek wrote the January 2011 Email to her client Whemco in her capacity as an attorney at law providing legal services to Whemco. (Affidavit, ¶ 12).

Whemco has previously advised Duquesne and the ALJ that the redacted portion of the January 2011 Email “updated and analyzed information that had been previously provided to Whemco by Duquesne’s then account representative to Whemco, Kim Titley (who is referenced in the email), as part of the Rule No. 4<sup>1</sup> discussions.” (Interim Order, p. 5).

Whemco is confident that the ALJ upon review will be able to clearly discern the privileged and fully protected nature of the redacted portion of the January 2011 Email given the Affidavit and the context of the then-applicable communications between Whemco and Duquesne. Simply put, as a result of an email from Duquesne’s Account Representative Kim Titley, Whemco first became aware on December 8, 2010 that the Rider No. 5 discount applicable to Whemco as a Rate L customer would no longer be available as of January 1, 2011 (Whemco Statement No. 1 p. 5, lines 8-12; Whemco Exhibit No. CS-2). In response, Whemco sought immediate assistance from legal counsel, Pamela Polacek, to determine the steps that could be taken to ameliorate the rate shock associated with the massive increase Whemco was being billed effective January 1, 2011. As noted in the Affidavit, Ms. Polacek commenced her representation of Whemco in connection with the Rule No. 4 contract discussion in December 2010 (Affidavit, ¶ 11).

After becoming aware of the impending loss of the Rider No. 5 discount, Whemco immediately contacted its Duquesne Account Representative, Kim Titley, to discuss the options

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<sup>1</sup> “Rule 4” is a provision of Duquesne’s retail electric tariff that allows Duquesne to enter into “special contracts” with commercial or industrial customers having electric load of at least 100 kilowatts to address changing business needs or operations, for incremental sales of at least 100 kilowatts from existing or new industrial customers, or to address less expensive competitive alternatives for energy to be used for applications other than space heating.

available to address this situation. This is fully consistent with the direct testimony of Whemco witness Christian Slingsluff (Whemco Statement No. 1, page 5, lines 17-19). Mr. Titley provided Duquesne Rate L information to Whemco which Ms. Polacek evaluated for purposes – and within the clear scope of her legal representation -- of Whemco, i.e., to work with Duquesne to ameliorate the rate increase Whemco experienced as of January 1, 2011 by virtue of the elimination of the Rider No. 5 discount applicable to Rate L customers like Whemco. (Affidavit, ¶ 11). The results of her analysis of the previously supplied information from Duquesne's Account Representative Titley were the exact subject of the January 2011 Email, which is fully subject to and protected by the attorney client privilege and attorney work product doctrines. Such work was performed and the January 2011 Email was written by Ms. Polacek during the course and scope of her legal representation of Whemco in connection with its efforts to execute a Rule No. 4 contract or otherwise ameliorate the impact of the large distribution rate increase that occurred as of January 1, 2011 due to the elimination of the Rider No. 5 discount for Rate L customers.

Finally, Ms. Polacek's legal representation of Whemco in connection with the Rule No. 4 contract and efforts to address the January 1, 2011 rate increase terminated on or about October 23, 2013. (Affidavit, ¶ 13).

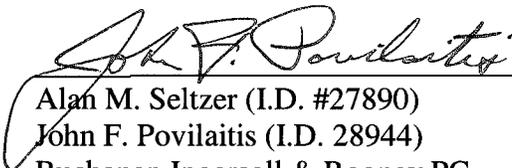
It is equally clear that the January 2011 Email had nothing to do with Whemco participating in Duquesne's then-pending 2010 base rate case, let alone using that base rate case to address the loss of the Rider No. 5 discount, which had just literally occurred as of the date of the January 2011 Email.

### III. CONCLUSION

For the reasons specified above, the portions of the January 2011 Email that have been withheld from disclosure by Whemco fall squarely within applicable Pennsylvania law that protects attorney client communications and/or attorney work product from dissemination to third parties like Duquesne in this proceeding. Accordingly, the ALJ should find that Whemco is not required under applicable Pennsylvania law to provide to Duquesne the un-redacted portions of the email dated January 6, 2011 from Attorney Pamela Polacek to her client Whemco.

Respectfully submitted,

Dated: May 27, 2016

  
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>	:	

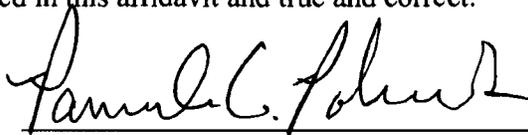
**AFFIDAVIT OF PAMELA C. POLACEK, ESQUIRE**

I, Pamela C. Polacek, provide this affidavit in the above referenced proceeding under penalty of perjury, and in connection therewith depose and say the following:

1. My name is Pamela C. Polacek, an attorney with the law firm of McNees Wallace & Nurick LLC.
2. My business address is 100 Pine Street, Harrisburg, PA 17101
3. I am a shareholder in the law firm of McNees Wallace & Nurick LLC. and practice in the Firm's Energy, Communications and Utility Law Practice Group.
4. I have been practicing law in the Commonwealth of Pennsylvania for 18 years.
5. I have extensive experience in implementing electric supply competition in Pennsylvania and other states. I also advise clients regarding commercial, legal, regulatory and legislative opportunities and risks in the electric and natural gas industries; assist clients in analyzing and negotiating wholesale and retail natural gas and electricity contracts, as well as addressing other utility service requirements. I also represent and advise cable telephony providers, local exchange carriers and interexchange carriers, before various state and federal administrative agencies and courts.
6. I submitted an affidavit earlier in this proceeding in support of Whemco's Motion for Summary Judgment filed on July 1, 2015 and direct testimony in support of Whemco's case in chief on January 19, 2016.
7. During the discovery phase of this proceeding, I was been deposed on two occasions by Duquesne Light Company, i.e., February 9, 2016 and February 24, 2016.

8. I am submitting this affidavit in connection with the presiding Administrative Law Judge's *Interim Order Granting the Motion of Duquesne Light Company for In Camera Review* dated May 20, 2016 ("Interim Order").
9. In the Interim Order, the ALJ directed that Whemco provide, among other things, information about the beginning and ending date of my attorney-client relationship with Whemco.
10. I understand that the subject of the Interim Order is a certain email dated January 6, 2011 ("January 2011 Email") from me to Christian Slingluff, an employee of Whemco.
11. Commencing in December 2010, I was retained by Whemco to provide legal advice and counsel with respect to Whemco's efforts to work with Duquesne to negotiate a contract under Rule No. 4 of Whemco's retail tariff to address the economic impact on Whemco from Duquesne's action eliminating the discount in Rider No. 5 of Whemco's tariff applicable to customers served under Rate Schedule L like Whemco. This scope of my legal representation in connection with this Rule No. 4/Rider No. 5 discount issue was discussed with Duquesne during my deposition on February 24, 2016 (Tr. at 86, lines 13-19).
12. I wrote and sent the January 2011 Email at the time I was providing legal services to Whemco as an attorney with respect to the matters identified in paragraph 11 above.
13. My legal representation of Whemco with respect to the matters identified in paragraph 11 above concluded on or about October 23, 2013.
14. This Affidavit is being made voluntarily and with the full knowledge of my law firm and Whemco.
15. The statements contained in this affidavit are true and correct.

Dated: May 26, 2016



Pamela C. Polacek



**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**WHEMCO-STEEL CASTINGS, INC.**

v.

**DUQUESNE LIGHT COMPANY**

:  
:  
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:

**DOCKET NO. C-2014-2459527**

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true and correct copy of the Memorandum of WHEMCO-Steel Castings, Inc. in Support of Its Privilege Claims upon the parties and in the manner listed below:

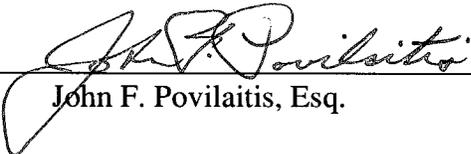
**Via Email and First-Class Mail**

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)

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)

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

Dated this 27<sup>th</sup> day of May, 2016.

  
\_\_\_\_\_  
John F. Povilaitis, Esq.