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June 3, 2016

VIA HAND DELIVERY

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

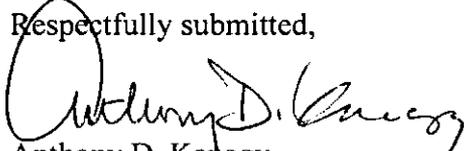
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PA PUC
SECRETARY'S BUREAU

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

Dear Secretary Chiavetta:

Enclosed for filing is the Memorandum of Duquesne Light Company in Opposition to Whemco's Privilege Claims, in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,


Anthony D. Kanagy

ADK/jl
Enclosures

cc: Honorable Jeffrey Watson (*via E-mail & First Class Mail*)
Certificate of Service

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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SECRETARY'S BUREAU
PA PUC

Whemco-Steel Castings, Inc.

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Docket No. C-2014-2459527

Duquesne Light Company

**MEMORANDUM OF DUQUESNE LIGHT COMPANY IN OPPOSITION TO
WHEMCO'S PRIVILEGE CLAIMS**

TO ADMINISTRATIVE LAW JUDGE JEFFREY A. WATSON:

As explained herein, Duquesne Light Company ("Duquesne Light" or the "Company") hereby files, pursuant to Administrative Law Judge Jeffrey A. Watson's (the "ALJ") May 20, 2016 *Interim Order Granting the Motion of Duquesne Light Company for In Camera Review*, this Memorandum of Duquesne Light Company In Opposition to Whemco's Privilege Claims. This Memorandum explains why Whemco-Steel Castings, Inc.'s ("Whemco") privilege claims with respect to the January 6, 2011 email from Pam Polacek to Christian Slingluff regarding "New DLC rates for Rate L, effective 4/1/11" appear to lack merit and why the ALJ should order that the subject email be released in its entirety. In support of this Motion, Duquesne Light States as follows:

I. BACKGROUND

The January 6, 2011 email has been the subject of previous discovery rulings by the ALJ. The email was initially identified by Whemco in response to Question No. 12 of Duquesne Light's Set IV Discovery to Whemco, which was served on February 23, 2016. Question No. 12 of the Set IV discovery requested that Whemco provide a privilege log of all communications and/or documents in response to the Set IV Discovery that Whemco claimed were privileged and therefore not discoverable. On March 14, 2016, Whemco filed its responses to the Set IV Discovery claiming that the January 6, 2011 email from Pam Polacek to Christian Slingluff

regarding “New DLC rates for Rate L, effective 4/1/11” was protected by the attorney-client privilege. On March 24, 2016, Duquesne Light filed a Further Motion to Compel Whemco to fully and completely respond to Question No. 12 of the Set IV discovery on the basis that the email is not protected by the attorney-client privilege because, based on the identified subject matter of the email, it appears to contain information related to Duquesne Light’s 2010 base rate case, not the potential negotiation of a Rule 4 contract.

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*”). In the *Interim Discovery Order*, the ALJ acknowledged that, based on the description that Whemco provided of the subject email, “New DLC rates for Rate L, effective 4/1/11”, that Duquesne Light’s interrogatory was proper and that the ALJ would consider a request from Duquesne Light for a “private confidential *in camera* review” of the email to the extent that Duquesne Light believes that “Whemco has improperly redacted discoverable information.” (*Interim Discovery Order*, p. 8.)

On April 13, 2016, Whemco filed a Supplemental Response to Question No. 12 of the Set IV Discovery in accordance with the *Interim Discovery Order* which contained a redacted version of the email. On April 27, 2016, Duquesne Light filed a Motion for *In Camera* Review of the January 6, 2011 e-mail, which was provided in redacted form as Attachment “Duquesne Set IV-12-2” to Whemco’s Supplemental Response to Question No. 12 of the Set IV Discovery. On May 20, 2016, the ALJ issued an *Interim Order Granting Duquesne Light’s Request for In Camera Review* and instructing the parties to file briefs or memoranda in support of their respective positions (“*Interim In Camera Review Order*”). Whemco filed its Memorandum in Support of its Privilege Claims on May 27, 2016. Duquesne Light is filing this Memorandum In

Opposition to Whemco's Privilege Claims in accordance with the ALJ's *Interim In Camera Review Order*.

II. ARGUMENT

A. IF THE REDACTED PART OF THE JANUARY 6, 2011 EMAIL ADDRESSES THE 2010 BASE RATE CASE, IT IS NOT PROTECTED BY ATTORNEY-CLIENT PRIVILEGE OR THE ATTORNEY WORK PRODUCT DOCTRINE.

In her deposition in this proceeding, Ms. Polacek stated that she did not represent Whemco with respect to Duquesne Light's 2010 base rate proceeding. (Polacek Deposition Tr., pp.10-12.) Therefore, if the redacted part of the January 6, 2011 email from Ms. Polacek to Whemco addresses the 2010 base rate case, it is not protected by attorney-client privilege or the attorney work product doctrine. *See Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259; 2007 Pa. Super. LEXIS 1193, *P19 (Pa. Super. 2007) (the existence of an attorney-client relationship is required in order for a party to claim privilege).

Whemco has failed to demonstrate that the redacted part of the subject email is protected by the attorney-client privilege or the attorney work product doctrine. Based on the information contained in the redacted version of the email, it is unclear to Duquesne Light that the redacted part of the email addresses anything other than the 2010 base rate case.

Duquesne Light has been unable to determine the content of the redacted part of the email. It is not clear from the context of the email that the redacted part of the email addresses Rule 4. There is no mention of Rule 4 in the part of the email that has been disclosed. In fact, the subject line of the email references Duquesne Light's 2010 base rate case and the disclosed part of the email contains information concerning rates from Duquesne Light's 2010 base rate case. Based on the information available to Duquesne Light, it appears that the part of the email Whemco has redacted could contain discoverable information.

If there is no mention of Rule 4 in the email, Whemco should be directed to disclose the email in its entirety because other information, particularly information related to the 2010 base rate case, is not protected by the attorney-client privilege or the attorney work product doctrine. Whemco has admitted that Ms. Polacek did not represent Whemco in Duquesne Light's 2010 base rate case, and therefore, no attorney-client relationship existed with respect to the 2010 rate case. (Polacek Deposition Tr., pp.10-12.) As a result, any information related to the 2010 rate case is not privileged and is properly discoverable.

B. EVEN IF THE JANUARY 6, 2011 EMAIL MENTIONS A RULE 4 CONTRACT, THE CONTENT OF THE EMAIL MAY NOT BE PROTECTED BY ATTORNEY-CLIENT PRIVILEGE OR THE ATTORNEY WORK PRODUCT DOCTRINE.

Even if it is determined, upon the ALJ's *in camera* review, that the email discusses the possible negotiation of a Rule 4 contract, Whemco is still required to demonstrate the information is protected by the attorney-client privilege or the attorney work product doctrine. *See Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259; 2007 Pa. Super. LEXIS 1193, *P19 (Pa. Super. 2007) (burden is on the party claiming the privilege to demonstrate that the information is protected). Certainly, not every piece of information exchanged in an attorney-client relationship is privileged. The attorney-client privilege is set forth in 42 Pa.C.S. § 5928. Section 5928 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.

Under Section 5928, four elements must be satisfied in order to successfully invoke the protection of attorney-client privilege: (1) the holder of the privilege must be a client or sought to become one; (2) the person to whom the communication was made is a member of the bar of a

court; (3) the communication relates to a fact of which the attorney was informed by his client for the purpose of securing legal services; and (4) the privilege has been claimed and is not waived. *Nationwide Mut. Ins. Co.*, 924 A.2d 1259, 1264 citing *Commonwealth v. Mrozek*, 441 Pa. Super 425, 657 A.2d 997, 998 (1995) (business communications devoid of any confidential communications made for the purpose of obtaining legal advice are not protected). *See also Red Vision Sys. v. Nat'l Real Estate Info. Servs., L.P.*, 108 A.3d 54; 2015 Pa. Super. LEXIS 7, **16 (Pa. Super. 2015) (acknowledging that the attorney-client “privilege is not absolute”).

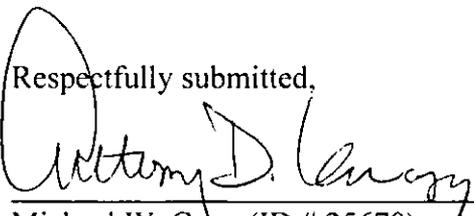
The attorney work product doctrine is governed by Pennsylvania Rule of Civil Procedure 4003.3 and Section 5.323 of the Pennsylvania Public Utility Commission’s regulations, 52 Pa. Code § 5.323, which provide that “discovery may not include disclosure of the mental impressions of a party’s attorney or his conclusions, opinions, memoranda, notes, summaries, legal research or legal theories.” Rule 4003.3 also notes that “the [attorney work product] doctrine falls in the event the attorney’s conclusions and opinions ‘becomes a relevant issue.’” *See In re Estate of Wood*, 818 A.2d 568; 2003 Pa. Super LEXIS 300, *P16 (Pa. Super. 2003) citing Pa.R.Civ.P. 4003.3 Explanatory Note (material prepared by an attorney that does not contain the attorney’s own conclusions or legal theories is discoverable).

Whether the attorney-client privilege or attorney work product doctrine protects a communication is a question of law to be decided by the court. *In re Estate of Wood*, 2003 Pa. Super LEXIS at *P8. Thus, it is appropriate for the ALJ to conduct an *in camera* review of the email and, if the information contained in the email refers to Whemco’s possible negotiation of a Rule 4 contract, to determine whether the information is protected by the attorney-client privilege or attorney work product doctrine. *In camera* review of the email will allow the ALJ to make a determination as to whether all of the required elements for protection under the

attorney-client privilege and/or attorney work product doctrine have been met, e.g. whether the email contains a statement that was made for the purpose of providing legal advice and/or whether the email contains legal theories or analyses. For example, if the redacted part of the email does not contain confidential communications about Rule 4 or does not contain Ms. Polacek's legal conclusions, opinions or theories about Rule 4, then the email should be fully released.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, Duquesne Light Company respectfully requests that Administrative Law Judge Jeffrey A. Watson require the January 6, 2011 email to be fully released to the extent that the redacted part is not protected by the attorney-client privilege or attorney work product doctrine.

Respectfully submitted,


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Date: June 3, 2016

Attorneys for Duquesne Light Company

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

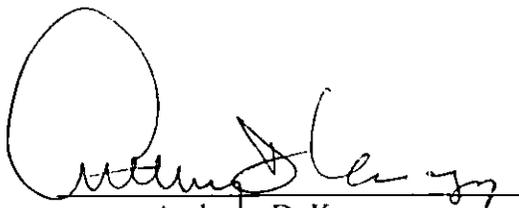
I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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Date: June 3, 2016


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