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January 17, 2020

**VIA ELECTRONIC FILING**

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

**Re: Eugene J. Bazan v. West Penn Power Company**  
**Docket No. C-2017-2640338**

Dear Secretary Chiavetta:

Enclosed please find the Motion of West Penn Power Company to Strike the written direct testimony of Mr. Zimmerman submitted by Eugene J. Bazan with regard to the above-captioned matter. This document has been served on the Complainant as shown in the Certificate of Service.

Please contact me if you have any questions regarding this matter.

Very truly yours,



Tori L. Giesler

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Enclosures

c: As Per Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**EUGENE J. BAZAN**

v.

**WEST PENN POWER COMPANY**

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**Docket No. C-2017-2640338**

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**NOTICE TO PLEAD**

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TO: Eugene J. Bazan

Pursuant to 52 Pa. Code § 5.103(c), you are hereby notified that, if you do not file a written response denying or correcting the enclosed Motion to Strike of West Penn Power Company within **twenty (20) days** from the service of the Notice, the facts set forth by West Penn Power Company in the Motion may be deemed to be true, thereby requiring no other proof. All pleadings, such as a Reply to Motion, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy service to counsel for West Penn Power Company, and where applicable, the Administrative Law Judge presiding over the case.

File with:

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

With a copy to:

Administrative Law Judge Jeffrey A. Watson  
Pennsylvania Public Utility Commission  
Office of Administrative Law Judge  
Piatt Place, Suite 220  
301 5th Avenue  
Pittsburgh, PA 15222

Lauren M. Lepkoski  
Tori L. Giesler  
West Penn Power Company  
2800 Pottsville Pike  
P.O. Box 16001  
Reading, Pennsylvania 19612-6001

Date: January 17, 2020



Lauren M. Lepkoski, Esquire  
Tori L. Giesler, Esquire

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**EUGENE J. BAZAN**

**v.**

**WEST PENN POWER COMPANY**

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**Docket No. C-2017-2640338**

**MOTION OF WEST PENN POWER COMPANY TO STRIKE  
THE WRITTEN DIRECT TESTIMONY  
SUBMITTED BY EUGENE J. BAZAN**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

West Penn Power Company (“West Penn Power” or the “Company”) by and through its attorneys, Lauren M. Lepkoski and Tori L. Giesler, and pursuant to 52 Pa. Code § 5.103, hereby files this Motion to Strike the written direct testimony of Wes Zimmerman submitted by Eugene J. Bazan (“Complainant”). In support thereof, the Company avers as follows:

**I. BACKGROUND**

1. On December 28, 2017, the Complainant filed a Formal Complaint with the Pennsylvania Public Utility Commission (“Commission”) regarding 244 Mary Street, Lemont, Pennsylvania 16851 (“Service Location”).

2. On January 18, 2018, the Company filed its Answer and New Matter denying the material allegations as well as Preliminary Objections.

3. On January 31, 2018, the Complainant filed a reply to the Company’s Preliminary Objections.

4. On February 28, 2018, the Complainant filed a reply to the Company’s Answer and New Matter.

5. On March 2, 2018, a Motion Judge Assignment Notice was issued assigning this matter to Administrative Law Judge Jeffrey A. Watson (“ALJ Watson”) for disposition.

6. On November 20, 2018, an Interim Order was issued by ALJ Watson denying the Company's Preliminary Objections.

7. On December 27, 2018, an Interim Order Establishing Initial Litigation Schedule was issued by ALJ Watson. The Interim Order directed a deadline of February 14, 2019 for the submission of anticipated factual and expert witnesses as well as a deadline of April 15, 2019 for the parties to conclude discovery.

8. On January 15, 2019, in accordance with 52 Pa. Code § 5.341, the Company forwarded to the Complainant interrogatories and document requests ("Company's Discovery Requests, Set I") via first class mail.

9. On January 23, 2019, Counsel for the Company agreed to grant the Complainant an extension to respond to the Company's interrogatories and document requests. Specifically, the Company agreed to deadlines of February 4, 2019 for the Complainant to provide any objections and February 25, 2019 for responses to be served upon the Company.

10. On January 23, 2019, the Complainant propounded Interrogatories and Requests for Production of Eugene J. Bazan to West Penn Power, Set I.

11. On January 30, 2019, the Company objected to Complainant's Discovery Requests, Set I.

12. By letter dated January 28, 2019, the Complainant propounded Interrogatories and Requests for Production of Eugene J. Bazan to West Penn Power, Set II.

13. By letter dated February 6, 2019, the Complainant propounded Interrogatories and Requests for Production of Eugene J. Bazan to West Penn Power, Set III.

14. On February 13, 2019, in accordance with the Interim Order Establishing Initial Litigation Schedule, the Company provided notification of its anticipated witnesses.

15. By letter dated February 14, 2019, in accordance with the Interim Order Establishing Initial Litigation Schedule, the Complainant provided notification of his anticipated witnesses. The Complainant advised that his anticipated factual witnesses consisted of Carol Rende and Mark Stewart and his anticipated expert witnesses consisted of William Bathgate and Tania M. Slawecki, Ph.D.

16. By letter dated February 15, 2019, the Complainant propounded Interrogatories and Requests for Production of Eugene J. Bazan to West Penn Power, Set IV.

17. On February 19, 2019, the Company provided responses to Complainant's Discovery Requests, Set II.

18. On February 25, the Company objected to Questions 1 through 11 of Complainant's Discovery Requests, Set IV.

19. On February 26, 2019, the Company provided responses to Complainant's Discovery Requests, Set III.

20. On March 4, 2019, the Complainant filed a Motion to Compel responses to Complainant's Discovery Requests, Set IV. That same day, the Complainant withdrew his Motion to Compel via electronic mail.

21. On March 7, 2019, the Company responded to Complainant's Discovery Requests, Set IV.

22. By letter dated March 19, 2019, the Complainant propounded Interrogatories and Requests for Production of Eugene J. Bazan to West Penn Power, Set V.

23. By letter dated March 25, 2019, the Complainant propounded Complainant's Discovery Requests, Set VI.

24. On April 4, 2019, the Company filed Objections to all nine interrogatories contained in Complainant's Discovery Requests, Set VI.

25. On April 11, 2019, the Complainant filed a Motion to Compel responses to Complainant's Discovery Requests, Set VI.

26. On April 12, 2019, the Complainant submitted correspondence to the Company which modified his factual witness list to remove Ms. Renda and Mr. Stewart and replace with the factual testimony of Lakshman Yapa, Ph.D., Alexia McKnight and Laura Sunstein Murphy, Ph.D., Esq. (retired), while stating that his expert witness list remained unchanged. The Complainant also provided the written testimony of the three factual witnesses identified.

27. On April 15, 2019, the Company responded to Complainant's Discovery, Set V.

28. Also on April 15, 2019, the Complainant submitted to the Company the written direct testimony of Dr. Slawecki.

29. On April 16, 2019, the Company filed an Answer to the Complainant's Motion to Compel responses to Complainant's Discovery Requests, Set VI.

30. On April 18, 2019, the Complainant filed a Response to the Company's Answer to the Complainant's Motion to Compel responses to Complainant's Discovery Requests, Set VI.

31. On May 2, 2019, the Company submitted a Status Report pursuant to the Interim Order Establishing Initial Litigation Schedule.

32. On May 3, 2019, the Complainant submitted a Status Report pursuant to the Interim Order Establishing Initial Litigation Schedule.

33. On May 13, 2019, ALJ Watson issued an Interim Order which denied the Complainant's Motion to Compel responses to the Complainant's Discovery Requests, Set VI.

34. On May 17, 2019, the Complainant filed a Letter in Response to Interim Order Denying Motion to Compel of Eugene J. Bazan.

35. On May 30, 2019, ALJ Watson issued an Interim Order Scheduling Prehearing Conference.

36. On June 3, 2019, the Complainant filed a “resubmittal” of his Reply to the Company’s Answer to the Complainant’s Motion to Compel.

37. On June 4, 2019, an Initial Call-In Telephonic Prehearing Conference Notice was issued which scheduled a prehearing conference for June 26, 2019.

38. On June 10, 2019, the Complainant filed a letter in reply to the Interim Order Scheduling Prehearing Conference.

39. On June 11, 2019, the Complainant filed a Petition for Existing Case directed to Commission Chairman Gladys Brown Dutrieuille.

40. On June 24, 2019, ALJ Watson issued an Interim Order requiring the attendance of the Complainant and counsel for the Company at the prehearing conference as well as a Supplemental Interim Order denying the Complainant’s Motion to Compel.

41. On June 26, 2019, the prehearing conference was held. The Complainant and counsel for the Company attended and participated. During the prehearing conference, the parties agreed to the submission of written testimony. The Complainant averred that all of his written direct testimony, for his fact and expert witnesses, along with copies of all exhibits or documents those witnesses intend to offer, authenticate, sponsor, or rely upon, were provided to the Company, with the exception of the corrected written testimony of his spouse, Dr. Slawecki.

42. On June 28, 2019, ALJ Watson issued a Prehearing Order Establishing Litigation Schedule. In this Prehearing Order, the Complainant was directed to serve upon the Company the

corrected written direct testimony of Dr. Slawecki, and, to the extent it has not already been completed, the Complainant was directed to submit Complainant's direct testimony and the testimony of Complainant's witnesses on or before July 22, 2019. Further, the Company was directed to complete discovery on or before September 9, 2019 and submit written rebuttal testimony of its witnesses on or before October 14, 2019. The parties were also directed to submit a status report on October 14, 2019.

43. On July 5, 2019, the Complainant filed a letter in response to ALJ Watson's Interim Order requiring the attendance of the Complainant and counsel for the Company at the prehearing conference.

44. On July 22, 2019, the Complainant submitted the corrected written direct testimony of Dr. Slawecki.

45. On August 7, 2019, in accordance with 52 Pa. Code § 5.341, the Company forwarded to the Complainant a second set of interrogatories and document requests ("Company's Discovery Requests, Set II")

46. On August 19, 2019, the Complainant submitted objections to the Company's Discovery Requests, Set II. The Complainant objected to Nos. 1-6 and 11.

47. On August 27, 2019, the Complainant provided responses Nos. 7-10 to the Company's Discovery Requests, Set II.

48. On October 1, 2019, the Complainant filed a Request for Discovery on the Company's Written Rebuttal Testimony.

49. On October 14, 2019, each of the parties filed a Status Report.

50. On October 15, 2019,<sup>1</sup> the Company served the Rebuttal Testimony of the witnesses previously identified by the Company: Mr. John C. Ahr, Dr. Christopher C. Davis, Ph.D. and Dr. Mark Israel, M.D.

51. On November 15, 2019, the Company submitted an updated Status Report.

52. On November 18, 2019, a 2-Day Initial Call-In Telephone Hearing Notice was issued scheduling a hearing for February 7, 2020 and March 10, 2020.

53. On December 5, 2019, ALJ Watson issued an Interim Order Confirming Requirements for Evidentiary Hearing.

54. On December 6, 2019, a Corrected Hearing Notice was issued which modified the hearings from telephonic to in-person.

55. On December 9, 2019, an Interim Order was entered which denied the Complainant's Motion to Reopen Discovery.

56. On December 10, 2019, the Company filed a Motion for Admission of Counsel Pro Hac Vice as well as a Notice of Appearance of Thomas Watson on behalf of the Company.

57. On December 14, 2019, the Complainant submitted a Reply to Interim Order Denying Motion to Reopen Discovery.

58. On December 16, 2019, the Complainant filed a Petition for Subpoena and Request for Surrebuttal which included a request for a third day of hearing.

59. On December 26, 2019, the Company filed a response objecting to the Complainant's Petition for Subpoena and Request for Surrebuttal.

60. On December 30, 2019, the Complainant submitted a reply to the Company's objections to the Petition for Subpoena and Request for Surrebuttal.

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<sup>1</sup> The Company wishes to note that Monday, October 14, 2019, was a federal holiday, Columbus Day, and the Commission was closed.

61. On December 30, 2019, counsel for the Commission submitted an objection to the Complainant's Petition for Subpoena of Shane Rooney and Kim Pizzingrilli.

62. On December 31, 2019, the Complainant filed a Letter with Questions on Your "Corrected Hearing Notice" and Other Matters of Hearing Procedure.

63. Also on December 31, 2019, ALJ Watson issued an Interim Order Granting Admission Pro Hac Vice.

64. On January 3, 2020, the Complainant submitted correspondence to ALJ Watson requesting admission of a second expert witness, Wes Zimmerman, as well as appending a copy of the written direct testimony of Mr. Zimmerman.

65. On January 7, 2020, the Complainant filed an Amended Formal Complaint.

66. On January 8, 2020, the Amended Formal Complaint was served upon the Company.

67. On January 8, 2020, the Company submitted correspondence seeking a second prehearing conference.

68. On January 9, 2020, the Complainant filed a letter in response to objections to subpoenas for Shane Rooney and Kim Pizzingrilli filed by counsel for the Commission.

69. On January 15, 2020, A Prehearing Conference Notice was issued which scheduled a further telephonic prehearing conference for January 22, 2020.

## **II. MOTION TO STRIKE**

70. Litigation of the Formal Complaint has been ongoing for over two years. The Complainant has been an active participant in the litigation process since its inception on December 28, 2017.

71. The Complainant provided notification of his anticipated witnesses on February 14, 2019, which he then updated on April 12, 2019.

72. On April 12, 2019 and April 15, 2019, the Complainant submitted the written direct testimony of three factual witnesses and one expert witness.

73. The Complainant actively participated in the discovery process propounding six separate sets of discovery upon the Company.

74. On June 26, 2019, the parties actively participated in a prehearing conference and the Complainant indicated that he had no additional changes to his witness list and, other than the corrected testimony of Dr. Slawewski, no additional written direct testimony would be submitted.

75. On November 18, 2019, the evidentiary hearing was scheduled to occur over two separate days.

76. On December 16, 2019, well beyond all deadlines established by ALJ Watson and less than sixty days prior to the first day of evidentiary hearings, the Complainant submitted a Petition for Subpoena, which has been objected to by the Company as well as counsel for the Commission. The Complainant further submitted a Request for Surrebuttal to which the Company objected given the untimeliness of the request.

77. On January 3, 2020, a little over a month prior to the first scheduled day of evidentiary hearings, the Complainant submitted correspondence updating his witness list and providing the written direct expert testimony of Wes Zimmerman, who was never previously identified by the Complainant.

78. The Complainant is attempting to untimely add additional witnesses in contradiction to multiple orders entered by ALJ Watson and in contradiction to his own statements and averments made at the prehearing conference on June 26, 2019.

79. The Complainant has provided no rationale explanation for his attempt to include additional witnesses so late into the litigation process.

80. While the Complainant is a lay person and not a lawyer, he is still required to abide by the Commission's rules of practice and procedure.<sup>2</sup>

81. The Complainant had multiple opportunities prior to the scheduling of evidentiary hearings to amend his witness list.

82. Additionally, the Complainant failed to request permission to late-file the written direct testimony of Mr. Zimmerman prior to his request and submission on January 3, 2020, approximately one month before the start of evidentiary hearings.

83. Given the untimeliness of the Complainant's Request for Subpoena, Request for Surrebuttal and submission of written direct testimony of Mr. Zimmerman, the Company is unable to submit additional discovery requests as the discovery deadline passed on September 9, 2019, well before the Complainant submitted his most recent witness notification and written direct testimony.

84. The inability of the Company to submit additional discovery relative to the untimely addition of witness at this late stage in the proceeding is a direct violation of its due process rights.

85. In accordance with Section 5.324(b): "[a]n expert witness whose identity is not disclosed in compliance with subsection (a)(1) will not be permitted to testify on behalf of the defaulting party at hearing. If the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the presiding officer may grant a continuance or other appropriate relief."<sup>3</sup>

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<sup>2</sup> See, e.g., *Commonwealth v. Lyons*, 833 A.2d 245, 251-52 (Pa. Super. Ct. 2003).

<sup>3</sup> 52 Pa. Code § 5.324(b).

86. The Company avers that the untimely submission of the Request for Subpoena, modified witness notification and written direct testimony of Mr. Zimmerman was not “beyond the control” of the Complainant as he has had an exorbitant amount of time to prepare his case since the filing of the Formal Complaint on December 28, 2017.

87. Therefore, the Complainant’s Request for Subpoena as submitted on December 16, 2019, as well as the request to amend his witness list which includes submission of written direct testimony of Mr. Zimmerman on January 3, 2020, should be stricken in its entirety.

WHEREFORE, West Penn Power Company respectfully requests that the Commission strike, in its entirety, the Request for Subpoena and the written Direct Testimony of Wes Zimmerman. In the alternative, if the Commission does not strike the untimely requests submitted by the Complainant in their entirety, West Penn Power Company respectfully requests that West Penn be afforded with an opportunity to submit additional discovery on the new witnesses, modify its previously submitted list of witnesses, as well as provide an opportunity for additional rebuttal testimony to be submitted once discovery has been completed.

Respectfully submitted,



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Counsel for West Penn Power Company

Dated: January 17, 2020

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**EUGENE J. BAZAN**

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**WEST PENN POWER COMPANY**

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**Docket No. C-2017-2640338**

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the Motion to Strike of West Penn Power Company upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Service by electronic mail and UPS overnight delivery, postage prepaid, as follows:

Eugene J. Bazan  
244 Mary Street  
P.O. Box 24  
Lemont, PA 16851  
[genebazan@aol.com](mailto:genebazan@aol.com)

Administrative Law Judge Jeffrey A. Watson  
Pennsylvania Public Utility Commission  
Piatt Place, Suite 220  
301 5<sup>th</sup> Avenue  
Pittsburgh, PA 15222  
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Dated: January 17, 2020



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