

ALJ Ruling on Remand from the Commission Clarifying the Effect of Admission of Wear Cross Exhibit 15

This matter comes before the Administrative Law Judge on remand from the Commission of an interlocutory appeal filed by the Citizens Utility Board, (“CUB”) the City of Chicago, (the “City”) and the Illinois Attorney General (“the AG”) of a ruling made during trial, admitting a certain document, Wear Cross Exhibit 15, into evidence, but, admitting it for the limited purpose of impeachment. These parties seek a ruling concluding that this piece of evidence is also a substantive party-admission. (Petition, at 2). Staff has filed a Response to the Petition for Interlocutory Review and Peoples Gas Light and Coke Company (“PGL”) does not oppose the Petition.

Normally, when a party contests an evidentiary ruling, that party must give the trier of fact the opportunity to correct itself, by making a post-trial motion, or, by raising the issue in a post-trial brief. (See, e.g., *People v. Ceja*, 204 Ill. App. 3d 332, 353, 789 N.E.2d 1228 (1st Dist. 2003)). This requirement can obviate the need for an appeal, which saves the parties from experiencing the delay and expense involved in an appeal. (*People v. Williams*, 109 Ill. 2d 369, 376, 488 N.E.2d 261(1995)). On remand, the Petition and the Responses thereto will be treated as if they were properly brought upon motion for reconsideration.

Wear Cross Exhibit 15 is a document that appears to be a four-year financial analysis. It was created in September of 1999, approximately one week before PGL executives signed the GPAA. The GPAA is the contract PGL entered into with Enron, by which, Enron supplied gas to PGL. (*Id.* at p. 2; Tr. 1010). It has two columns for those four years; one is entitled “Actual PGL” and the other is entitled: “Enron North America Proposal.” It appears to compare the price of gas pursuant to the GPAA with PGL’s actual gas costs, using historical data from October of 1995 through September of 1999. The amounts of gas purchases were the same; only the price of the gas purchases differ. (Wear Cross Ex. 15 at 1).

For approximately 11 months during this period, the figures in the “Enron North America Proposal” column are less than those in the “Actual PGL” column. For the remaining 37 months, the figures in the “Actual PGL” column are less than those in the “Enron North America Proposal” column. In short, purchases made through terms found in the GPAA cost more than what is represented to be past purchase practices. (*Id.*). And, all of the gas purchases made by PGL were passed on, in full, to the ratepayers, or, the consumers.

Wear Cross Exhibit 15 came from Mr. Wear’s computer. Mr Wear is the Manager of Gas Supply Administration at PGL. As such, he is responsible for negotiating, contracting and dispatching the assets that make up PGL’s gas supply portfolio. (Respondent’s Exhibit B at 1; Tr. 1036). Also, Mr. Wear was

one of the persons at PGL who was involved in discussions with Enron prior to execution of the GPAA with Enron. (See, e.g., Tr. 1009).

At trial, Counsel for the City of Chicago (“the City”) moved to admit Wear Cross Exhibit 15 into evidence. It was admitted into evidence for purposes of impeachment only. (Tr. 1232). At that time, Counsel for PGL represented that by seeking to enter this document into evidence, Counsel for the City was asserting a new legal theory, requiring disclosure prior to trial pursuant to the Commission’s rules of discovery. (*Id.*). However, PGL’s representation that it does not oppose the Petition for Interlocutory Review constitutes an abandonment of this theory. And, the City and other parties have maintained that management at PGL believed that the GPAA would cost the ratepayers more money than its existing arrangement for the procurement of gas, but, management at PGL signed the GPAA anyway. (See, e.g., Staff Group Ex. 1, Aruba Analysis). As will be set forth below, Wear Cross Ex. 15 fits into this theory. Therefore, no new evidentiary theory was pursued by Counsel for the City through this document.

At trial, Mr. Wear stated that he did not recall creating Wear Cross Exhibit 15. (Tr. 1024).¹ However, the record reveals the following facts: Wear Cross Exhibit 15 is a PGL record; Counsel for PGL tendered it to Counsel for the City during discovery. (Tr. 1114, 1031). This document generated from Mr. Wear’s computer. Mr. Wear’s computer is user-named and password-protected. (Tr. 1036-1046). Mr. Wear’s user name is “WEARD,” which appeared on the electronic file path for Wear Cross Ex. 15. (Wear Cross Ex. 15 at 2). Mr. Wear does not have an administrative assistant; only Mr. Wear and PGL technology support personnel have access to Mr. Wear’s computer. (Tr. 1036).

The electronic file folder, from which, Wear Cross Ex. 15 was procured was created by Mr. Wear. (Tr. 1041). Additionally, according to Mr. Wear, only PGL business documents were on his computer. (*Id.*). Finally, Wear Cross Exhibit 15 has some of the terms of the GPAA, such as the discount PGL received on first-of-the-month gas. Only a limited number of PGL employees were aware of the terms of the GPAA at the time Wear Cross Exhibit 15 was created. (Tr. 1039-41).

While there is no question that Wear Cross Exhibit 15 is an authentic PGL document, there was a question, at trial, at to whether the foundation has been properly laid for Wear to sponsor that document for purposes of admission into evidence. There was some question as to whether Mr. Wear authored the document, as he claimed, at trial, that he did not remember creating it. (Tr. 1036-1046).

¹ Later, when asked if he did any price comparisons during the time PGL was negotiating with Enron, Mr. Wear testified, “This may be my document, it may not be my document. But I don’t recall routinely doing price comparisons as a part of the negotiation process.” (Tr. 1047).

An adequate foundation is necessary for a document to be admitted into evidence. (*National Wrecking Co. v. the Industrial Comm.*, 352 Ill. App. 3d 561, 568, 816 N.E.2d 722 (1st Dist. 2004)). To be admissible, documents must be authenticated. (*National Wrecking*, 352 Ill. App. 3d at 568). A finding of authentication is merely a finding that there is sufficient evidence to justify presentation of the proffered evidence to the trier of fact. (*People v. Downin*, 2005 Ill. App. Lexis 402 at *23 (3rd Dist 2005)). A document may be authenticated by direct or circumstantial evidence. (*Id.*). Circumstantial evidence of authenticity includes such factors as appearance, content and substance. (*People v. Towns*, 157 Ill. 2d 90, 104, 623 N.E.2d 269 (1993)). *Prima facie* authorship of a document can be established by showing that the writing contains knowledge of a matter sufficiently obscure so as to be known to only a small group of persons. (*People v. Munoz*, 70 Ill. App. 3d 76, 88, 388 N.E.2d 133 (1st Dist. 1979)).

In *People v. Munoz*, the Appellate Court concluded that a letter written by the defendant, Mr. Munoz, to a woman who participated in an armed robbery with Mr. Munoz, Ms. Schak, was properly authenticated. That letter revealed information about the robbery that would only be known by the robbers. The Appellate Court reasoned that the fact that the letter appeared to emanate from Munoz' jail cell, coupled with a signature using Munoz' nickname, and the fact it included information known to Munoz, but not known to many others, established a *prima facie* connection between the letter to Munoz. (*Munoz*, 70 Ill. App. 3d at 88).

And so it is here. The document was generated from Mr. Wear's computer, to which, very few PGL employees have access. It was stored in a computer folder created by Mr. Wear. These two facts are some indicia that Mr. Wear is the author of this document. Finally, Mr. Wear is the Manager of Gas Supply Administration at PGL, and he was one of the persons involved in the negotiations with Enron prior to PGL's decision to execute the GPAA. The information on the document, the gas-buying practices of PGL for the previous four years, and, terms present in the GPAA (*i.e.*, the discount PGL received for first-of-the-month gas) were unique matters known by few persons, but known by Mr. Wear. Wear Cross Exhibit 15 was properly authenticated.

To be admitted as evidence, an authenticated document must still comport with other rules, such as the rule against hearsay. An out-of-court statement used to prove the truth of the matter asserted (hearsay) is nevertheless admissible if it is an admission of a party-opponent. (*See, e.g., People v. Campbell*, 332 Ill. App. 3d 721, 734, 773 N.E.2d 776 (4th Dist. 2002)). An admission is a statement of a party that is inconsistent with his position at trial. (*Bafia v. City of International Trucks*, 258 Ill. App. 3d 4, 9, 629 N.E.2d 666 (1st Dist. 1994)). Any statement, whether oral or written, made by a party to an action, or attributable to a party to an action, which tends to dispute any material fact asserted by that party, is an admission, and, it is competent evidence against that party. (*Id.*).

The requisite foundation for party-admissions against a corporate entity is: a) the person who made the statement was an agent or employee of the corporation; b) the statement was made about a matter, over which, he had actual or apparent authority; and c) he spoke by virtue of that authority. (*Bafia*, 258 Ill. App. 3d at 9). Mr. Wear is an employee of PGL. Mr. Wear had at least apparent authority to make financial analysis and the financial analysis occurred by virtue of that authority—he testified that he was one of the persons at PGL involved in the negotiations with Enron prior to the time when PGL executives signed the GPAA and agreed to use Enron as its gas supplier. (Tr. 1009). Then, too, Wear Cross Exhibit 15 was created during the time when PGL was negotiating the terms of the GPAA.

PGL has consistently asserted that it conducted no financial analysis to determine whether the GPAA might have a negative effect (excess cost) on the ratepayers. (See, e.g., PGL Ex. N at 14; Tr. 1009-10). Wear Cross Exhibit 15 is analysis, generated from Mr. Wear's computer, of the costs imposed by the GPAA on the ratepayers. Wear Cross Exhibit 15 is some evidence contradicting PGL's assertion that no financial analysis took place. It disputes a material fact asserted by PGL.

Therefore, the petitioner-movants are correct that Wear Cross Exhibit 15 is not just a document that impeaches Mr. Wear's Credibility. Wear Cross Exhibit 15 was properly authenticated and it is a party-admission.