WHITE AND WILLIAMS LLP
By: Alan J. Charkey, Esquire
Identification Number 77556
One Liberty Place
1650 Market Street, Suite 1800
Philadelphia, PA 19103
(215) 864-6312
(215) 789-7633 facsimile
charkeya@whiteandwilliams.com

Attorneys for Complainant, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home

ALDERWOODS (PENNSYLVANIA), INC., a wholly owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME 2704 Murray Avenue Pittsburgh, PA 15217, *Complainant,* v. DUQUESNE LIGHT COMPANY 411 Seventh Avenue Pittsburgh, PA 15219, *Respondent*	IN THE PENNSYLVANIA PUBLIC UTILITY COMMISSION Docket No. C-2016-2522634 AS TRANSFERRED BY THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNA., CIVIL ACTION NO. GD-09-14720

APPENDIX OF EXHIBITS TO COMPLAINANT'S PRELIMINARY OBJECTION TO JURISDICTION

EXHIBIT “A”

WHITE AND WILLIAMS LLP
By: Alan J. Charkey, Esquire
Identification Number 77556
One Liberty Place
1650 Market Street, Suite 1800
Philadelphia, PA 19103
(215) 864-6312
(215) 789-7633 facsimile
charkeya@whiteandwilliams.com

Attorneys for Complainant, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home

ALDERWOODS (PENNSYLVANIA), INC., a wholly owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME 2704 Murray Avenue Pittsburgh, PA 15217, *Complainant,* v. DUQUESNE LIGHT COMPANY 411 Seventh Avenue Pittsburgh, PA 15219, *Respondent*	IN THE PENNSYLVANIA PUBLIC UTILITY COMMISSION Docket No. _____ AS TRANSFERRED BY THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNA., CIVIL ACTION NO. GD-09-14720

COMPLAINT

Complainant, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home, by and through its attorneys White and Williams LLP, complains against Respondent, Duquesne Light Company, as follows:

1. Complainant, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home (hereinafter, "Hirsch"), is a corporation organized under the laws of the Commonwealth of Pennsylvania which at all relevant times conducted business at 2704 Murray Avenue, Pittsburgh, Pennsylvania 15217.

2. Respondent, Duquesne Light Company (hereinafter, "Duquesne"), is a corporation organized under the laws of the Commonwealth of Pennsylvania, which at all relevant times had its principal place of business at 411 Seventh Avenue, Pittsburgh, Pennsylvania 151219.

3. At all relevant times, Alderwoods (Pennsylvania), Inc. owned the Burton L. Hirsch Funeral Home at 2704 Murray Avenue, Pittsburgh, Pennsylvania 15217 (hereinafter, the "Funeral Home").

4. Duquesne is engaged in the business of transmitting and distributing electric power within the city of Pittsburgh, Pennsylvania.

5. At all relevant times, Duquesne owned and/or maintained electric transmission and distribution equipment along Murray and Forward Avenues within the city of Pittsburgh, including, but not limited to, utility poles, transformers and wires.

6. At all relevant times, Duquesne owned and/or maintained low-voltage, single-phase and high-voltage, three-phase electrical components for customers situated along Murray and Forward Avenues.

7. Up to and including January 9, 2009, Duquesne provided the Funeral Home with both single-phase and three-phase electrical service delivered to the Funeral Home via the low-voltage and high-voltage lines running along Forward Avenue.

8. Upon information and belief, on January 8, 2009 or January 9, 2009, a motor vehicle collided with a utility pole on Forward Avenue which was owned and/or maintained by Duquesne.

9. The collision caused the loss of electric power to customers on Forward and Murray Avenues, including, but not limited to, the Funeral Home.

10. In the immediate aftermath of the collision, the three-phase, high-voltage lines running across the tops of the utility poles along Forward Avenue contacted the single-phase, low-voltage lines running beneath them, sending a surge of high-voltage current into the Funeral Home's low-voltage equipment, rendering the Funeral Home's low-voltage equipment unable to safely regulate the flow of electricity.

11. On January 9, 2009 and/or January 10, 2009, after the collision and the resultant loss of power, Duquesne undertook to repair its equipment and to restore electric service to its customers on Forward and Murray Avenues, including, but not limited to, the Funeral Home.

12. At the time it restored electric service to the Funeral Home, Duquesne had actual and/or constructive knowledge that the Funeral Home's low-voltage equipment had been compromised and was no longer able to safely handle the flow of electricity.

13. Although it had actual and/or constructive knowledge that the Funeral Home's low-voltage equipment had been compromised and was no longer able to safely handle the flow of electricity, Duquesne restored electrical service to the Funeral Home anyway.

14. Prior to restoring electrical service to the Funeral Home, Duquesne did not warn Hirsch that the Funeral Home's electrical equipment may have been compromised.

15. Prior to restoring electrical service to the Funeral Home, Duquesne did not advise Hirsch to have the Funeral Home's electrical equipment inspected by a qualified third party.

16. Prior to restoring electrical service to the Funeral Home, Duquesne did not advise Hirsch that until the Funeral Home's electrical equipment was inspected and certified as safe by a qualified third party, Duquesne would not restore service.

17. Prior to restoring electrical service to the Funeral Home, Duquesne did not offer or attempt to inspect the Funeral Home's electrical equipment.

18. Prior to restoring electrical service to the Funeral Home, Duquesne did not offer or attempt to inspect the electrical equipment owned and/or maintained by Duquesne which was situated in the Funeral Home's basement.

19. When Duquesne restored electrical service to the Funeral Home, the current heated the Funeral Home's single-phase metal panel box containing the compromised electrical equipment, ignited the box's wood backing and caused the destruction of the Funeral Home by fire.

20. As a direct and proximate cause of Duquesne's failure to warn Hirsch of, and/or failure to inspect, the Funeral Home's compromised electrical equipment, the resulting fire totally destroyed all real and personal property at the Funeral Home, as well as causing additional losses related to extra expense.

21. The captioned matter was originally filed in the Court of Common Pleas of Allegheny County, Pennsylvania, under civil action no. GD-09-14720, on or about August 25, 2009.

22. On or about September 14, 2015, the Court of Common Pleas (Lutty, J.) ordered the matter bifurcated and transferred to the Public Utility Commission. See a copy of the order attached hereto as Exhibit "A".

COUNT I – NEGLIGENCE

23. Complainant hereby incorporates paragraphs 1 through 22 above as if fully set forth at length herein.

24. The aforementioned fire and subsequent property damage resulted from the negligent, careless and/or reckless acts and/or omissions and/or other liability-producing conduct of Duquesne, including, but not limited, to the following:

a) failing to assess whether high-voltage power had entered the Funeral Home's low-voltage electrical equipment and damaged it in the immediate aftermath of the motor vehicle accident;

b) failing to adequately examine or inspect the Funeral Home's electrical system prior to restoring service to it;

c) failing to contact Hirsch prior to the restoration of service to request access to the Funeral Home's electrical system for an inspection of the Funeral Home's electrical system;

d) failing to contact Hirsch prior to the restoration of service to request access to the Funeral Home's electrical system for an inspection of Duquesne's equipment situated in the Funeral Home's basement;

e) failing to warn Hirsch that the electrical equipment in the Funeral Home had been compromised;

f) failing to warn Hirsch that Duquesne would decline to restore electrical service until the Funeral Home's electrical equipment was inspected and certified as safe by a qualified third party;

g) failing to decline to restore electrical service until the Funeral Home's electrical equipment was inspected and certified as safe by a qualified third party;

h) failing to properly instruct its employees and/or agents in the proper methods of restoring service after high-voltage lines contact low-voltage lines;

i) failing to adequately supervise its employees and/or agents which performed the restoration to ensure the work was done safely and properly;

j) failing to adhere to generally accepted industry standards and practices during the course of the restoration;

k) failing to take reasonable measures to avert harm in a scenario in which Duquesne had actual or constructive knowledge of a dangerous condition impacting the Funeral Home's electrical system, occasioned by fallen and intermixed electrical lines proximate to the Funeral Home;

l) failing and omitting to do those things which were necessary to preserve Hirsch's property and render said premises safe.

25. The negligence of Duquesne was the direct and proximate cause of the fire and resulting damage to Hirsch's real and personal property, as well as the direct and proximate cause of Hirsch's additional losses for extra expense.

WHEREFORE, Complainant, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home, demands the entry of judgment in its favor and against Duquesne in an amount in excess of $1,000,000 (one million dollars), together with interest and such other relief as the Commission deems proper.

COUNT II – NEGLIGENCE – *RES IPSA LOQUITUR*

26. Complainant hereby incorporates paragraphs 1 through 25 above as if fully set forth at length herein.

27. In reconnecting and re-establishing electric service to the Funeral Home, Duquesne was negligent.

28. A fire caused by the restoration of power to a panel box which the electric company knows has been compromised by a high-voltage surge is an event that does not occur in the absence of negligence.

29. Other responsible causes of said fire are reasonably eliminated by the evidence.

30. Duquesne's negligent restoration of electrical service to the Funeral Home was within the scope of Duquesne's duty to Complainant.

WHEREFORE, Complainant, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home, demands the entry of judgment in its favor and against Duquesne in an amount in excess of $1,000,000 (one million dollars), together with interest and such other relief as the Commission deems proper.

Respectfully submitted,

WHITE AND WILLIAMS LLP

/s/ Alan J. Charkey
By: Alan J. Charkey, Esquire

Attorneys for Complainant,
Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home

Date: January 7, 2016

VERIFICATION

I, Alan J. Charkey, hereby state that I am attorney of record for Complainant, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home, that I have read the foregoing Complaint, and that the statements contained therein are true and correct to the best of my knowledge, information and belief.

I understand that this Verification is made pursuant to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

/s/ Alan J. Charkey
Alan J. Charkey

Date: January 7, 2016

EXHIBIT “B”

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY

BURTON L. HIRSCH FUNERAL HOME, INC.

and

SERVICE CORPORATION INTERNATIONAL, as managing company for Burton L. Hirsch Funeral Home, Inc.,

Plaintiffs

v.

DUQUESNE LIGHT COMPANY,

Defendant.

CIVIL DIVISION

Docket No. GD-09-14720

COMPLAINT WITH NOTICE TO DEFEND AND JURY DEMAND

Code No. 009 – Trespass-Other

Filed on behalf of Plaintiffs, Burton L. Hirsch Funeral Home, Inc. and Service Corporation International

Counsel of record for Plaintiffs:

Peter T. Parashes, Esquire
Pennsylvania Identification No. 22436
Alan J. Charkey, Esquire
Pennsylvania Identification No. 77556

WHITE AND WILLIAMS LLP
Firm No. 683
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103
Telephone: (215) 864-7178

Party Represented by Out-of-County Counsel Only

JURY TRIAL DEMANDED

FILED
09 SEP 22 AM 9:56
DEPT. OF COURT RECORDS
CIVIL/FAMILY DIVISION
ALLEGHENY COUNTY PA

WHITE AND WILLIAMS LLP
By: Peter T. Parashes, Esquire
Identification Number 22436
By: Alan J. Charkey, Esquire
Identification Number 77556
One Liberty Place
1650 Market Street, Suite 1800
Philadelphia, PA 19103
(215) 864-7000

Attorneys for Plaintiffs,
Burton L. Hirsch Funeral Home, Inc. and
Service Corporation International, as
managing company for Burton L. Hirsch
Funeral Home, Inc.

BURTON L. HIRSCH FUNERAL HOME, INC.
2704 Murray Avenue
Pittsburgh, PA 15217

and

SERVICE CORPORATION INTERNATIONAL,
as managing company for Burton L. Hirsch
Funeral Home, Inc.,
1929 Allen Parkway
Houston, TX 77019,

Plaintiffs,

v.

DUQUESNE LIGHT COMPANY
411 Seventh Avenue
Pittsburgh, PA 15219,

Defendant.

IN THE COURT OF COMMON
PLEAS OF ALLEGHENY COUNTY

CIVIL DIVISION

Docket No. GD-09-14720

NOTICE TO DEFEND

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other

AVISO

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las páginas siguientes, usted tiene veinte (20) dias de plazo al partir de la fecha de la demanda y la notificación. Hace falta asentar una comparencia escrita o en persona o con un abogada y entregar a la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se difiende, la corte tomará medidas y puede continuar la demanda en contra suya sin previo aviso o notificación. Además, la corte puede dicidir a favor del demandante y requiere que usted cumpla con todas las provisiones de esta

rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Lawyer Referral Service
Allegheny County Bar Association
11th Floor Koppers Building
436 Seventh Avenue
Pittsburgh, PA 15219
Telephone: (412) 261-5555

demanda. Usted puede perder dinero o sus propiedades u otros derechos importantes para usted.

LLEVE ESTA DEMANDA A UN ABOGADO INMEDIATAMENTE. SI NO TIENE ABOGADO O SI NO TIENE EL DINERO SUFFICIENTE DE PAGAR TAL SERVICIO. VAYA EN PERSONA O LLAME POR TELEFONO A LA OFICINA CUYA DIRECCION SE ENCUENTRA ESCRITA ABAJO PARA AVERIGUAR DONDE SE PUEDE CONSEGUIR ASISTENCIA LEGAL.

Lawyer Referral Service
Allegheny County Bar Association
11th Floor Koppers Building
436 Seventh Avenue
Pittsburgh, PA 15219
Telephone: (412) 261-5555

WHITE AND WILLIAMS LLP
By: Peter T. Parashes, Esquire
Identification Number 22436
By: Alan J. Charkey, Esquire
Identification Number 77556
One Liberty Place
1650 Market Street, Suite 1800
Philadelphia, PA 19103
(215) 864-7000

Attorneys for Plaintiffs,
Burton L. Hirsch Funeral Home, Inc. and
Service Corporation International, as
managing company for Burton L. Hirsch
Funeral Home, Inc.

BURTON L. HIRSCH FUNERAL HOME, INC.
2704 Murray Avenue
Pittsburgh, PA 15217

and

SERVICE CORPORATION INTERNATIONAL,
as managing company for Burton L. Hirsch
Funeral Home, Inc.,
1929 Allen Parkway
Houston, TX 77019,

Plaintiffs,

v.

DUQUESNE LIGHT COMPANY
411 Seventh Avenue
Pittsburgh, PA 15219,

Defendant.

IN THE COURT OF COMMON
PLEAS OF ALLEGHENY COUNTY

CIVIL DIVISION

Docket No. GD-09-14720

COMPLAINT

Plaintiffs, Burton L. Hirsch Funeral Home, Inc. and Service Corporation International, as managing company for Burton L. Hirsch Funeral Home, Inc., by and through their attorneys White and Williams LLP, complain against Defendant, Duquesne Light Company, as follows:

1. Plaintiff, Burton L. Hirsch Funeral Home, Inc. (hereinafter, "Hirsch"), is a corporation organized under the laws of the Commonwealth of Pennsylvania which at all

relevant times had its principal place of business at 2704 Murray Avenue, Pittsburgh, Pennsylvania 15217.

2. Plaintiff, Service Corporation International (hereinafter, "SCI"), is a corporation organized under the laws of the State of Texas which at all relevant times had its principal place of business at 1929 Allen Parkway, Houston, Texas 77019.

3. Defendant, Duquesne Light Company (hereinafter, "Duquesne"), is a corporation organized under the laws of the Commonwealth of Pennsylvania, which at all relevant times had its principal place of business at 411 Seventh Avenue, Pittsburgh, Pennsylvania 151219.

4. At all relevant times, Hirsch owned the Burton L. Hirsch Funeral Home at 2704 Murray Avenue, Pittsburgh, Pennsylvania 15217 (hereinafter, the "Funeral Home").

5. At all relevant times, SCI managed the Funeral Home pursuant to an agreement with Hirsch.

6. Duquesne is engaged in the business of transmitting and distributing electric power within the city of Pittsburgh, Pennsylvania.

7. At all relevant times, Duquesne owned and/or maintained electric transmission and distribution equipment along Murray and Forward Avenues within the city of Pittsburgh, including, but not limited to, utility poles, transformers and wires.

8. At all relevant times, Duquesne owned and/or maintained single-phase and three-phase electrical components for customers situated along Murray and Forward Avenues.

9. Up to and including January 9, 2009, Duquesne provided the Funeral Home with electrical service.

10. Upon information and belief, on January 8, 2009 or January 9, 2009, a motor vehicle collided with a utility pole on Forward Avenue which was owned and/or maintained by Duquesne.

11. The collision caused the loss of electric power to customers on Forward and Murray Avenues, including, but not limited to, the Funeral Home.

12. On January 9, 2009, after the collision and the resultant loss of power, Duquesne undertook to restore electric service to its customers on Forward and Murray Avenues, including, but not limited to, the Funeral Home.

13. In the process of restoring electric service to the Funeral Home, Duquesne, acting through its employees and/or agents, incorrectly and improperly reconnected the Funeral Home to Duquesne's transmission and distribution system.

14. Duquesne's incorrect and improper reconnection of the Funeral Home caused a fire which resulted in the total loss of all real and personal property at the Funeral Home, as well as additional losses related to business interruption and extra expense.

COUNT I - NEGLIGENCE

15. Plaintiffs hereby incorporates paragraphs 1 through 14 above as if fully set forth at length herein.

16. The aforementioned fire and subsequent property damage resulted from the negligent, careless and/or reckless acts and/or omissions and/or other liability-producing conduct of Duquesne, including, but not limited, to the following:

a) failing to correctly and properly reconnect the Funeral Home's electrical system to the Duquesne's transmission and distribution system;

b) failing to adequately examine the Funeral Home's system prior to the reconnection;

c) failing to contact Hirsch and/or SCI prior to the reconnection to request access to the Funeral Home's system for an examination of said system;

d) failing to properly instruct its employees and/or agents in the proper methods of reconnecting customers' electrical systems after an interruption of service;

e) failing to adequately supervise its employees and/or agents which performed the reconnection to ensure the work was done safely and properly;

f) failing to properly, adequately and safely test and inspect the reconnection;

g) failing to exercise the high degree of care required when dealing with an inherently dangerous substance;

h) failing to adhere to generally accepted industry standards and practices during the course of the reconnection;

i) failing and omitting to do those things which were necessary to preserve Hirsch's property and render said premises safe.

17. The negligence of Duquesne was the direct and proximate cause of the fire and resulting damage to Hirsch's real and personal property, as managed by SCI, as well as the direct and proximate cause of the plaintiffs' additional losses for business interruption and extra expense.

WHEREFORE, Plaintiffs, Burton L. Hirsch Funeral Home, Inc. and Service Corporation International, demand the entry of judgment in its favor and against Duquesne in an amount in

excess of $1,000,000 (one million dollars), together with interest and such other relief as the Court deems proper.

COUNT II – BREACH OF IMPLIED WARRANTY OF HAZARD-FREE SERVICE

18. Plaintiffs hereby incorporates paragraphs 1 through 17 above as if fully set forth at length herein.

19. At all relevant times, Duquesne impliedly warranted to Hirsch, as managed by SCI, that Duquesne's electrical service would be safe, hazard-free and would not cause damage to Hirsch's property.

20. Hirsch, as managed by SCI, relied upon said warranty in the operation of the Funeral Home.

21. In incorrectly and improperly reconnecting the Funeral Home's electrical system to Duquesne's transmission and distribution system, Duquesne breached said implied warranty.

22. Duquesne's breach of said implied warranty was the direct and proximate cause of the fire and resulting damage to Hirsch's real and personal property, as managed by SCI, as well as the direct and proximate cause of the plaintiffs' additional losses for business interruption and extra expense.

WHEREFORE, Plaintiffs, Burton L. Hirsch Funeral Home, Inc. and Service Corporation International, demand the entry of judgment in its favor and against Duquesne in an amount in excess of $1,000,000 (one million dollars), together with interest and such other relief as the Court deems proper.

COUNT III – BREACH OF IMPLIED WARRANTY OF CAREFUL REPAIR

23. Hirsch hereby incorporates paragraphs 1 through 22 above as if fully set forth at length herein.

24. At all relevant times, Duquesne impliedly warranted to Hirsch, as managed by SCI, that any repairs Duquesne performed to its transmission and distribution system would be done in a careful and workmanlike manner that would not cause damage to Hirsch's property, as managed by SCI.

25. Hirsch, as managed by SCI, relied upon said warranty in the operation of the Funeral Home.

26. In incorrectly and improperly reconnecting the Funeral Home's electrical system to Duquesne's transmission and distribution system in a manner that was neither careful nor workmanlike, Duquesne breached said implied warranty.

27. Duquesne's breach of said implied warranty was the direct and proximate cause of the fire and resulting damage to Hirsch's real and personal property, as managed by SCI, as well as the direct and proximate cause of the plaintiffs' additional losses for business interruption and extra expense.

WHEREFORE, Plaintiffs, Burton L. Hirsch Funeral Home, Inc. and Service Corporation International, demand the entry of judgment in its favor and against Duquesne in an amount in excess of $1,000,000 (one million dollars), together with interest and such other relief as the Court deems proper.

Respectfully submitted,

WHITE AND WILLIAMS LLP

By: Peter T. Parashes, Esquire
Alan J. Charkey, Esquire

Attorneys for Plaintiffs,
Burton L. Hirsch Funeral Home, Inc. and
Service Corporation International, as
managing company for Burton L. Hirsch
Funeral Home, Inc.

Dated: September 21, 2009

VERIFICATION

I, Curtis Briggs, hereby state that I am the Vice President for Plaintiff, Burton L. Hirsch Funeral Home, Inc. that I have read the foregoing Complaint, and that the statements contained therein are true and correct to the best of my knowledge, information and belief.

I understand that this Verification is made pursuant to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

Curtis Briggs

WHITE AND WILLIAMS LLP
By: Peter T. Parashes, Esquire
Identification Number 22436
By: Alan J. Charkey, Esquire
Identification Number 77556
One Liberty Place
1650 Market Street, Suite 1800
Philadelphia, PA 19103
(215) 864-7000

Attorneys for Plaintiffs,
Burton L. Hirsch Funeral Home, Inc. and
Service Corporation International, as
managing company for Burton L. Hirsch
Funeral Home, Inc.

BURTON L. HIRSCH FUNERAL HOME, INC. and SERVICE CORPORATION INTERNATIONAL, as managing company for Burton L. Hirsch Funeral Home, Inc., v. DUQUESNE LIGHT COMPANY	IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY CIVIL DIVISION Docket No. GD-09-14720

PLAINTIFFS' JURY DEMAND

To the Director, Department of Court Records, Civil/Family Division:

Kindly take note that Plaintiffs hereby demand trial by a jury as to all issues.

WHITE AND WILLIAMS LLP

By: Peter T. Parashes, Esquire
Alan J. Charkey, Esquire

Attorneys for Plaintiffs,
Burton L. Hirsch Funeral Home, Inc.
and Service Corporation International, as
managing company for Burton L. Hirsch
Funeral Home, Inc.

Dated: September 21, 2009

WHITE AND WILLIAMS LLP
By: Peter T. Parashes, Esquire
Identification Number 22436
By: Alan J. Charkey, Esquire
Identification Number 77556
One Liberty Place
1650 Market Street, Suite 1800
Philadelphia, PA 19103
(215) 864-7000

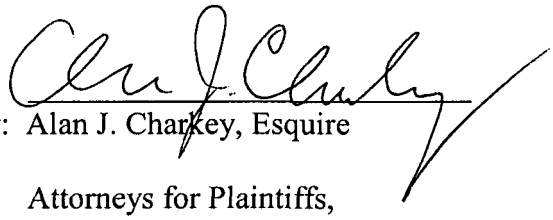
Attorneys for Plaintiffs,
Burton L. Hirsch Funeral Home, Inc. and
Service Corporation International, as
managing company for Burton L. Hirsch
Funeral Home, Inc.

BURTON L. HIRSCH FUNERAL HOME, INC., et al.	IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY
v.	CIVIL DIVISION
DUQUESNE LIGHT COMPANY	Docket No. GD-09-14720

CERTIFICATE OF SERVICE

I, Alan J. Charkey, Esquire, hereby certify that on the 21st day of September, 2009, I served copies of the plaintiffs' Complaint with Notice to Defend and Jury Demand upon counsel of record for the Defendant, Duquesne Light Company, Erin M. Beckner, Esquire, Tucker Arensberg, P.C., 1500 One PPG Place, Pittsburgh, PA 15222, by U.S. first class mail, postage pre-paid, and by facsimile to (412) 594-5619.

WHITE AND WILLIAMS LLP



By: Alan J. Charkey, Esquire

Attorneys for Plaintiffs,
Burton L. Hirsch Funeral Home, Inc. and
Service Corporation International, as
managing company for Burton L. Hirsch
Funeral Home, Inc.

EXHIBIT “C”

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

ALDERWOODS (PENNSYLVANIA), INC.,	
Plaintiff,	
v.	NO. G.D. 09-14720
DUQUESNE LIGHT COMPANY,	**OPINION**
Defendant.	
	The Honorable Paul F. Lutty, Jr.
	Copies to:
	Bradley S. Tupi, Esquire Tucker Arensberg, PC One PPG Place, Suite 1500 Pittsburgh, PA 15222 Counsel for Defendant
	Peter T. Parashes, Esquire Alan J. Charkey, Esquire White & Williams, LLP One Westlakes 1235 Westlakes Drive, Suite310 Berwyn, PA 19312 Counsel for Plaintiff

FILED
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DEPT. OF COURT RECORDS
CIVIL/FAMILY DIVISION
ALLEGHENY COUNTY PA

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

ALDERWOODS (PENNSYLVANIA), INC.,	)	
Plaintiff,	)	NO. G.D. 09-14720
v.	)	
DUQUESNE LIGHT COMPANY,	)	
Defendant.	)	

OPINION

Plaintiff has appealed from the Order of Court entered in this matter granting summary judgment in favor of Defendant, Duquesne Light Company. The facts in this matter reflect that a motor vehicle accident occurred on Forward Avenue in the Squirrel Hill section of the City of Pittsburgh on January 9, 2009. The vehicle crashed into and broke a Duquesne Light utility pole, causing interruption of electrical service to numerous customers near the intersection of Forward Avenue and Murray Avenue, including the Burton L. Hirsch Funeral Home. Neighboring customers to the funeral home were also out of power as a result of this accident.

Duquesne Light received a call that the power was out in this area around 8:30 p.m. on January 9, 2009. A Duquesne Light crew was sent out to assess the situation and to make necessary repairs in order to restore service. Service was ultimately restored to that neighborhood. The last building to have its power

restored was apparently the funeral home. The old utility pole was removed and a new pole installed. Replacement equipment was also installed on this pole, including a three phase transformer. Duquesne Light workers also connected a tri-plex, which consists of two energized (hot) wires and a neutral wire. The neutral conductor was correctly connected first, followed by the hot conductors. The procedure went smoothly, with no cause for concern for the crew. Restoration of power at a pole in this fashion is a typical job for Duquesne Light crews.

After making the connections at the pole, the Duquesne Light crew made the connections at the funeral home building, first connecting the neutral conductor and then the energized conductors. These connections were made on the roof of the funeral home without any difficulty. After the connections were made, power to the funeral home was turned on and the workers came down from the roof of the building. Shortly thereafter, a fire began inside the funeral home. The fire originated in the basement in the electrical panel number 1. The fire thus began in Plaintiff's own electrical equipment. The funeral home was locked at the time of the fire.

Evidence established that it is not Duquesne Light's practice to enter a customer's property and inspect the premises and the customer's electrical equipment prior to reinstating power. While this may be done on occasion, it is only done upon customer request as a courtesy to that customer. Duquesne Light's rules do not authorize the company to inspect customer-owned equipment such as the electrical panel where the fire started in this case.

Plaintiff initiated this lawsuit against Defendant on the theory that Defendant's employees must have made some improper connection. Plaintiff now concedes that Duquesne Light workers made all the proper connections in the proper sequence. Plaintiff now seeks to contend that Defendant Duquesne Light breached an implied warranty of hazard free service and of careful repair to Plaintiff. It is clear, however, that Duquesne Light owed no duty to enter and inspect Plaintiff's locked, unoccupied property before restoring electrical service. Absent a breach of duty, the negligence claim cannot be sustained. *Morena v. South Hills Health System*, 462 A.2d 680 (Pa. 1983). Utility companies have a duty to install their facilities properly, but there is "no duty of continuing inspection upon the power company." *Reed v. Duquesne Light Company*, 47 A.2d 136, 138 (Pa. 1946). Utility companies have a duty to maintain their equipment and conduct a reasonable inspection from time to time on their own facilities. See *Dunnaway v. Duquesne Light Company*, 423 F.2d 66, 70 (3d Cir. 1970); *Luketich v. Duquesne Light Company*, 132 A.2d 268, 270 (Pa. 1957).

In *Adams v. United Light, Heat & Power Company*, 69 Pa. Super 478 (Pa. Super 1918), the Pennsylvania Superior Court held that the electrical utility was not responsible for inspecting customer equipment. The *Adams* court stated

> When the current furnished to a house is such as may be safely used if the house is properly wired, and the appliances within the building are installed, owned and controlled by the customer, to hold that the duty developed upon the electrical company to look after the construction and maintenance of the wires installed and controlled by private persons would impose upon such companies burden so great as to render their existence impracticable, if not impossible.

69 Pa. Super at 486.

As the Public Utility Commission has noted, "traditionally, utilities, the [Public Utility] Commission, and the courts have recognized that the ownership and maintenance responsibility of an electric utility ends at the point of delivery to the customer; the point of delivery being the customer's meter. From that point on, the customer owns and assumes the responsibility for the maintenance and security of the internal wiring." *Hinline v. Metropolitan Edison Company and Pennsylvania Power and Light Company*, 1990 Pa.PUC LEXIS 156 (Pa.PUC 1990). Utility companies have no obligation to inspect customer equipment because requiring these inspections would "result in an increased cost to both the utility and the customers." *Craft v. Pennsylvania Electric Company*, 50 Pa.PUC 1, 7-8 (Pa.PUC 1976).

It is clear that Duquesne Light had no duty to inspect Plaintiff's equipment in this case. Plaintiff's attempt at imposing liability at Counts 4 and 5 under a breach of implied warranty theory are waived based on the tariff on record with the Pennsylvania Utility Commission. Section 19 of that tariff states as follows:

> The company will use all reasonable care to provide safe and continuous delivery of electricity but shall not be liable for any damages arising through interruption of the delivery of electricity or for injury to persons or property resulting from the use of the electricity delivered.

This waiver is effective, provided that Duquesne Light used reasonable care in providing safe and continuous service. See *Belotti v. Duquesne Light Company, 44 Pa. D & C 3d 425 (CP Alleg. 1987).* Our colleague Judge Wettick reasoned in that case as follows:

> Duquesne Light relies on the provision within Rule 19 that states the company "shall not be liable for any damages arising through

> interruption of the service or for injury to persons or property resulting from the use of the service." However, this provision would appear to exonerate Duquesne Light from liability only where the damages arising through disruption of the service or the injury to persons or property resulting from the use of the service was not caused by Duquesne Light's breach of its promise to use all reasonable care to provide safe and continuous service.

Id. at 428-29. The facts here establish that Duquesne Light used reasonable care in restoring power to the funeral home. Accordingly, Duquesne Light is entitled to the protection of the tariff waiver, based on the reasoning of the *Belotti* case.

BY THE COURT:

Dated 3-8-11

EXHIBIT “D”

KeyCite Yellow Flag - Negative Treatment
Affirmed But Criticized by Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., Pa., December 15, 2014

52 A.3d 347
Superior Court of Pennsylvania.

ALDERWOODS (PENNSYLVANIA), INC., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home, Appellant
v.
DUQUESNE LIGHT COMPANY, Appellee.

Argued Dec. 6, 2011. | Filed July 27, 2012. | Reargument Denied Sept. 27, 2012.

Synopsis

Background: Electric utility's customer brought action against utility, alleging that utility workers had caused fire in customer's building while reconnecting electric lines to building after interruption in electrical service due to traffic accident. The Court of Common Pleas, Allegheny County, Civil Division, No. GD–09–14720, Lutty, J., entered summary judgment in favor of utility, and customer appealed.

Holdings: The Superior Court, No. 1967 WDA 2010, Musmanno, J., held that:

[1] utility had a duty to inspect customer's equipment or warn customer prior to reconnecting lines, and

[2] utility's tariff with Public Utility Commission (PUC) did not bar action.

Reversed and remanded.

West Headnotes (8)

[1] Electricity
Defects, Acts, or Omissions Causing Injury
145 Electricity
145k12 Injuries Incident to Production or Use
145k16 Defects, Acts, or Omissions Causing Injury
145k16(1) In general
Electric utility did not breach any implied warranty of hazard-free service in having workers reconnect electric lines to customer's building after interruption in electrical service due to traffic accident, despite fact that fire had started in electric box in customer's building after reconnection of lines, absent any showing that utility's workers had made repairs in a less than workmanlike manner or that reconnection had been performed incorrectly.

Cases that cite this headnote

[2] Negligence
Elements in general
272 Negligence
272I In General
272k202 Elements in general
A prima facie negligence claim requires the plaintiff to show that: (1) the defendant had a duty to conform to a certain standard of conduct; (2) the defendant breached that duty; (3) such breach caused the injury in question; and (4) the plaintiff incurred actual loss or damage.

Cases that cite this headnote

[3] Negligence
Duty as question of fact or law generally
272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts
272k1692 Duty as question of fact or law generally
The existence of a duty, as an element of negligence, is a question of law for the court to decide.

Cases that cite this headnote

[4] **Negligence**
Necessity and Existence of Duty
272 Negligence
272II Necessity and Existence of Duty
272k210 In general
In determining whether the defendant owed a duty of care, as an element of negligence, a court weighs the following five factors: (1) the relationship between the parties; (2) the social utility of the defendant's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the defendant; and (5) the overall public interest in the proposed solution.

Cases that cite this headnote

[5] **Electricity**
Defects, Acts, or Omissions Causing Injury
145 Electricity
145k12 Injuries Incident to Production or Use
145k16 Defects, Acts, or Omissions Causing Injury
145k16(1) In general
Electric utility had a duty, as an element of negligence, to warn customer or inspect customer's electrical equipment prior to reconnecting electrical lines to customer's building after interruption in electrical service due to traffic accident, to prevent risk of fire in customer's electrical system following reconnection, since nature of risk and harm resulting from a power surge was reasonably foreseeable; utility had actual knowledge that contact between primary and secondary lines could ultimately short circuit customer's electrical equipment and that restoration of power under such circumstances could cause a fire.

Cases that cite this headnote

[6] **Negligence**
Foreseeability
272 Negligence
272II Necessity and Existence of Duty
272k213 Foreseeability
Duty, as an element of negligence, arises only when one engages in conduct which foreseeably creates an unreasonable risk of harm to others.

Cases that cite this headnote

[7] **Judgment**
Nature and requisites of former adjudication as ground of estoppel in general
228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(A) Judgments Conclusive in General
228k634 Nature and requisites of former adjudication as ground of estoppel in general
The doctrine of collateral estoppel applies when the following four conditions are present: (1) the issue decided in a prior adjudication is identical to the one presented in the current action; (2) there was a final judgment on the merits in the prior action; (3) the party to the current action was a party or in privity with a party to the prior adjudication; and (4) the party against whom a claim of collateral estoppel is asserted had a full and fair opportunity to litigate the issue in question in the prior adjudication.

1 Cases that cite this headnote

[8] **Electricity**
Nature and grounds of liability
145 Electricity
145k12 Injuries Incident to Production or Use
145k13 Nature and grounds of liability
Section of electric utility's tariff on record with Public Utility Commission (PUC), providing that utility was not liable for damages arising through interruption of

delivery of electricity or for injury to persons or property, did not bar customer's negligence action, arising when fire started in electrical box in customer's building after utility workers reconnected electrical lines to customer's building after interruption in electrical service due to traffic accident; tariff required utility's workers to act with reasonable care in reconnecting electricity.

Cases that cite this headnote

Attorneys and Law Firms

***348** Alan J. Charkey, Philadelphia, for appellant.

Bradley S. Tupi, Pittsburgh, for appellee.

***349** BEFORE: MUSMANNO, DONOHUE and COLVILLE*, JJ.

* Retired Senior Judge assigned to Superior Court.

Opinion

OPINION BY MUSMANNO, J.

Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home ("Hirsch"), appeals from the Order entering summary judgment against it and in favor of Duquesne Light Company ("Duquesne Light"). We reverse and remand for trial.

The trial court summarized the facts underlying the instant appeal as follows:

> The facts of this matter reflect that a motor vehicle accident occurred on Forward Avenue in the Squirrel Hill section of the City of Pittsburgh on January 8, 2009. The vehicle crashed into and broke a Duquesne Light utility pole, causing interruption of electrical service to numerous customers near the intersection of Forward Avenue and Murray Avenue, including [Hirsch]. Neighboring customers to [Hirsch] were also out of power as a result of this accident.
>
> Duquesne Light received a call that the power was out in this area around 8:30 p.m. on January 9, 2009. A Duquesne Light crew was sent out to assess the situation and to make necessary repairs in order to restore service. Service was ultimately restored to that neighborhood. The last building to have its power restored was apparently [Hirsch's funeral home]. The old utility pole was removed and a new pole installed. Replacement equipment was also installed on this pole, including a three[-]phase transformer. Duquesne Light workers also connected a tri-plex, which consists of two energized (hot) wires and a neutral wire. The neutral conductor was correctly connected first, followed by the hot conductors. The procedure went smoothly, with no cause for concern for the crew. Restoration of power at a pole in this fashion is a typical job for Duquesne Light crews.
>
> After making the connections at the pole, the Duquesne Light crew made the connections at the [Hirsch] building, first connecting the neutral conductor and then the energized conductors. These connections were made on the roof of [Hirsch] without any difficulty. After the connections were made, power to [Hirsch] was turned on and the workers came down from the roof of the building. Shortly thereafter, a fire began inside [Hirsch]. The fire originated in the basement in the electrical panel number 1.... [Hirsch] was locked at the time of the fire.

Trial Court Opinion, 3/8/11, at 2–3.

Hirsch subsequently filed a Complaint against Duquesne Light, followed by an Amended Complaint. Hirsch's Amended Complaint averred five counts against Duquesne Light: (1) Ordinary Negligence; (2) Negligence—Breach of Duty of Highest Degree of Care; (3) Negligence—*Res Ipsa Loquitur;* (4) Breach of Implied Duty of Hazard–Free Service; and (5) Breach of Implied Duty of Careful Repair. Amended Complaint at ¶¶ 13–33. At the close of discovery, Duquesne Light filed a Motion for Summary Judgment, which the trial court ultimately granted. Thereafter, Hirsch filed the instant timely appeal.

Hirsch presents eight claims for our review:

[1.] Whether [Duquesne Light] was entitled to summary judgment as to the implied warranty of hazard-free service, when under very similar circumstances, the Trial Court had previously held such a cause of action to exist[?]

***350** [2.] Whether the Trial Court erred by failing to follow the previous decision of a colleague on the same court[?]

[3.] Whether the Trial Court erred by failing to distinguish warranty from negligence in its Opinion[?]

[4.] Whether Pennsylvania's test for the existence of a duty indicated that [Duquesne Light] owed [Hirsch] a duty[?]

[5.] Whether [Duquesne Light], having previously litigated a nearly identical set of facts, was estopped to assert that the sequence of events leading to [Hirsch's] loss was not foreseeable[?]

[6.] Whether [Duquesne Light] was under a duty to prevent the events giving rise to [Hirsch's] damages, because the events were foreseeable, thereby precluding summary judgment[?]

[7.] Whether [Duquesne Light] was subject to the highest degree of care because it was in control of an inherently dangerous instrumentality[?]

[8.] Whether the Trial Court erred by citing to the non-binding, and unpersuasive, opinions of an administrative body[?]

Brief for Appellant at 4–5 (issues renumbered).

A party is entitled to summary judgment when they show there is no genuine issue of material fact and they are entitled to judgment as a matter of law. *Atlantic States Ins. Co. v. Northeast Networking Sys., Inc.,* 893 A.2d 741, 745 (Pa.Super.2006). Such allegations may be supported by the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits. *Stimmler v. Chestnut Hill Hosp.,* 602 Pa. 539, 981 A.2d 145, 154 (2009). Our standard of review of the grant of summary judgment is as follows:

> We view the record in the light most favorable to the nonmoving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law will summary judgment be entered. Our scope of review of a trial court's order granting or denying summary judgment is plenary, and our standard of review is clear: the trial court's order will be reversed only where it is established that the court committed an error of law or abused its discretion.

Daley v. A.W. Chesterton, Inc., 37 A.3d 1175, 1179 (Pa.2012) (citation omitted).

Hirsch's first two claims challenge the trial court's grant of summary judgment as to the counts of Hirsch's Amended Complaint averring breach of implied warranties. Hirsch first claims that the trial court erred in granting summary judgment because, in *Wivagg v. Duquesne Light Co.,* 73 D. & C.2d 694 (Allegheny Co.1975), the Allegheny County Court of Common Pleas confirmed the existence of such a cause of action for breach of implied warranty against an electric company. Brief for Appellant at 16. In conjunction with this claim, Hirsch asserts that the trial court misapplied a later decision of the Allegheny County Court of Common Pleas in *Bellotti v. Duquesne Light Co.,* 44 Pa. D. & C.3d 425 (Pa.Com.Pl.1987), as a basis for dismissing Hirsch's implied warranty counts. Brief for Appellant at 19.

Second, Hirsch claims that the trial court erred in not acknowledging or applying the decisions of the Allegheny County Court of Common Pleas in *Wivagg* and *Bellotti,* under the legal principle of *stare decisis. Id.* at 21. Basically, Hirsch claims that its case is indistinguishable ***351** from the circumstances presented in *Wivagg* and accordingly, the trial court erred in deeming its breach of implied warranty claims legally insufficient. Upon review, we conclude that

the decision of the common pleas court in *Wivagg* provides Hirsch with no basis for relief. [1]

1 We additionally note that this Court is not bound by decisions of the common pleas courts. *Stoloff v. Neiman Marcus Group, Inc.,* 24 A.3d 366, 372 n. 5 (Pa.Super.2011).

In *Wivagg,* the plaintiff printing shop alleged that Duquesne Light had breached its implied warranties of merchantability and fitness to provide safe and hazard-free electrical service. *Wivagg,* 73 D. & C.2d at 695. The plaintiff presented evidence that outside of its business, "the high voltage primary lead wire running to the transformer was loose and swayed in the wind." *Id.* at 703. A Duquesne Light lineman corroborated this fact. *Id.* During a windstorm, the loose lead wire came into contact with the "secondary service drop cable." *Id.* at 704. Witnesses heard a popping sound, and observed the transformer smoking. *Id.* at 703. When the wires came into contact, a surge of high voltage flowed through the service drop into the plaintiff's printing shop. *Id.* at 704. The momentary surge "tripped the circuit breakers inside the shop; and upon disassembly, [the plaintiff's expert] found their contacts arced, indicating that they had interrupted short circuits." *Id.* "[T]he electrical system short-circuited, the insulation of the wires in the crawl space broke down, and a fire smoldered unnoticed...." *Id.*

In holding that an implied warranty of fitness for an intended purpose applied to Duquesne Light's sale of electricity to the printing shop, the trial court explained that "[i]t was the alleged contact of the high voltage primary lead with secondary service drop which plaintiffs claim brought about a surge of high voltage into the brick dwelling." *Id.* at 702. The court opined that "[b]y the nature of [Duquesne Light's] electrical service, plaintiffs were unable to protect themselves from this happening and were forced to rely upon [Duquesne Light's] skill and electrical apparatus for providing safe and hazard-free electrical power." *Id.* Thus, the common pleas court held that "[a]n implied warranty of safe and hazard-free electrical service arises from the supply of electricity by [a] defendant public utility." *Id.*

[1] By contrast, Hirsch's breach of implied warranty claims in the instant case are based upon the actual repairs undertaken by Duquesne Light, not the initial surge of high-voltage electricity. Hirsch alleged in its Amended Complaint that "[i]n incorrectly and improperly reconnecting the Funeral Home's electrical system to Duquesne[Light's] transmission and distribution system, Duquesne [Light] breached said implied warranty." Amended Complaint at ¶ 27. Hirsch also claimed that Duquesne Light impliedly had warranted that any repairs would be done "in a careful and workmanlike manner that would not cause any harm to Hirsch's property." *Id.* at ¶ 30. Hirsch's evidence, taken as true, does not support this claim.

Hirsch's own expert, Richard W. Wunderley, P.E. ("Wunderly"), opined that "[t]he improper connection hypothesis at the single phase mast head *was eliminated* after the evidence examination and further discovery information was received." Report at 6 (emphasis added). Hirsch presented no evidence that the repairs were done in a less than workmanlike manner, or that the connections were improperly made. Even if we recognized an implied warranty cause of action, Hirsch's evidence does not support the allegations of its Amended Complaint in this regard. Accordingly, ***352** we discern no trial court error in the grant of summary judgment in favor of Duquesne Light on the implied warranty causes of action.

In its third claim of error, Hirsch argues that the trial court erred when it failed to distinguish Hirsch's breach of implied warranty counts from its counts alleging negligence. Brief for Appellant at 43. Quoting from the trial court's Opinion, Hirsch argues that the trial court "completely confused negligence and warranty." *Id.* While Hirsch is correct that the trial court improperly confused these legal theories, the trial court's error provides no basis for relief. As set forth above, we conclude that Hirsch is not entitled to relief on its causes of action asserting breach of an implied warranty.

Hirsch's remaining claims challenge the trial court's entry of summary judgment against Hirsch as to its negligence causes of action. Summarizing, Hirsch argues that (a) under Pennsylvania case law, Duquesne Light owed Hirsch a duty of care; (b) the events giving rise to Hirsch's damages were foreseeable; and (c) Duquesne Light owed Hirsch the highest degree of care because it was in control of an inherently dangerous instrumentality. *Id.* at 4–5.

In its Amended Complaint, Hirsch averred three negligence counts. Hirsch first averred ordinary negligence based on Duquesne Light's failure to adequately examine the funeral home's electrical system prior to restoring power; its failure to contact Hirsch requesting access to Hirsch's electrical system for examination prior to reconnection; its failure to instruct and supervise its employees in reconnecting electrical service; its non-adherence to accepted industry standards and practices; and Duquesne Light's failure to do those things which were necessary to preserve Hirsch's property and render said premises safe. Amended Complaint at ¶ 14. Hirsh additionally averred that Duquesne Light breached its duty of highest degree of care to avoid damage to Hirsch, as Hirsch is located near a high-voltage line. *Id.* at ¶¶ 17–18. Finally, Hirsch averred that

> [t]he creation of an electrical arc resulting in a catastrophic failure at a customer's electrical panel box upon an electric utility's reconnection of the customer's building to an electric utility's transmission and distribution system and/or upon the electric utility's re-establishment of the customer's electric service does not occur in the absence of negligence.

Id. at ¶ 21. In this regard, Hirsch asserted that Duquesne Light's negligent transmission and distribution system and/or negligent re-establishment of electrical service was within Duquesne Light's scope of duty to Hirsch. *Id.* at ¶ 23.

[2] In addressing Hirsch's claims, we recognize that "a *prima facie* negligence claim requires the plaintiff to show that: (1) the defendant had a duty to conform to a certain standard of conduct; (2) the defendant breached that duty; (3) such breach caused the injury in question; and (4) the plaintiff incurred actual loss or damage." *Krentz v. CONRAIL,* 589 Pa. 576, 910 A.2d 20, 27 (2006). "Of these four elements, the primary one is whether the defendant owed a duty of care." *Althaus v. ex rel. Cohen,* 562 Pa. 547, 756 A.2d 1166, 1168 (2000).

[3] **[4]** "The existence of a duty is a question of law for the court to decide." *R.W. v. Manzek,* 585 Pa. 335, 888 A.2d 740, 746 (2005). In determining whether the defendant owed a duty of care, we weigh the following five factors: "(1) the relationship between the parties; (2) the social utility of the [defendant's] conduct; (3) the nature of the risk imposed and ***353** foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the [defendant]; and (5) the overall public interest in the proposed solution." *Althaus,* 756 A.2d at 1169; *accord Bilt–Rite Contractors, Inc. v. The Architectural Studio,* 581 Pa. 454, 866 A.2d 270, 281 (2005). In applying the *Althaus* test, we remain cognizant that we are reviewing the entry of summary judgment. Accordingly, "[w]e view the record in the light most favorable to the non-moving party," and resolve all doubts as to the existence of a genuine issue of material fact "against the moving party." *Daley v. A.W. Chesterton, Inc.,* 37 A.3d at 1179.

[5] As to the first factor of the *Althaus* test, Hirsch averred a relationship between itself, as the purchaser of electricity, and Duquesne Light, as the provider and transmitter of electricity. Amended Complaint at ¶¶ 4–7. Thus, this factor weighs in favor of imposing a duty upon Duquesne Light in this case.

Next, we examine the social utility of Duquesne Light's conduct, namely, transmitting electricity and facilitating its transmission. The sale and transmission of electricity have obvious social utility, as does the prompt restoration of power to customers after an outage. These factors would weigh in Duquesne Light's favor. However, Hirsch presented averments which, taken as true, establish that the restoration and transmission of electricity *in a safe manner,* following a high voltage surge into a customer's electrical panel, is of higher social utility, as it would have prevented the destruction caused by the resulting fire. *See id.* at ¶ 15 (Duquesne Light's negligence was the direct and proximate cause of the fire and damage to Hirsch's real and personal property), ¶ 21 (stating that the creation of an electrical arc resulting in a catastrophic failure at a customer's electrical panel box, upon the reconnection of the customer's building to the electric utility's transmission and distribution system, or the reestablishment of electrical service normally does not occur in the absence of negligence); Wunderley Report at 3 (describing the damage to the

electrical panel at Hirsch's funeral home), 6 (stating that "[v]isible electrical activity blew a hole through the [electric] panel cover and severely damaged the hot leg connection on the left side" and that the damage was consistent with an over voltage/over current condition), 7 (stating that Hirsch's electric system was an extension and integral part of the electric service supply from Duquesne Light to the funeral home and that an inspection prior to energizing the electric panel would have identified the damage to the panel and averted the fire). Weighing the social utility of Duquesne Light's prompt restoration of power against Hirsch's claim that Duquesne Light did not safely restore power to the funeral home, we conclude that this factor weighs slightly in favor of imposing a duty upon Duquesne Light.

[6] **[7]** "Regarding the third factor, duty arises only when one engages in conduct which foreseeably creates an unreasonable risk of harm to others." *R.W.,* 888 A.2d at 747. Hirsch argues that it was reasonably foreseeable that a high voltage surge would follow the contact of a high voltage power line with a low voltage line, and that Duquesne Light is estopped to argue otherwise. Brief for Appellant at 22. In support, Hirsch directs our attention to the facts presented in *Wivagg,* a case also involving Duquesne Light, wherein a high-voltage power line contacted low-voltage lines, shorting out the customer's electrical equipment and ultimately causing a fire. *Id.* at 22–23. Citing *Wivagg,* Hirsch contends that Duquesne Light had actual knowledge that when a primary line breaks loose and contacts low-voltage ***354** lines, the customer's electrical equipment can be shorted out and compromised. *Id.* at 23. While we disagree with Hirsch's contention that the principles underlying the doctrine of collateral estoppel are applicable,[2] we agree that Hirsch has established the foreseeability of the harm alleged.

2 The doctrine of collateral estoppel applies when the following four conditions are present: (1) the issue decided in a prior adjudication is identical to the one presented in the current action; (2) there was a final judgment on the merits in the prior action; (3) the party to the current action was a party or in privity with a party to the prior adjudication; and (4) the party against whom a claim of collateral estoppel is asserted had a full and fair opportunity to litigate the issue in question in the prior adjudication. *Daley,* 37 A.3d at 1190 n. 22.

As set forth above, in *Wivagg,* a high voltage primary lead wire running to a transformer outside of the plaintiff's printing shop was loose and, during a windstorm, came into contact with a "secondary service drop cable [.]" *Wivagg,* 73 D. & C.2d at 703–04. This, in turn, sent a surge of high voltage through the service drop into the printing shop. *Id.* at 704. As a result of the surge, the circuit breakers tripped. *Id.* Disassembly revealed that the contacts had arced, "indicating that they had interrupted short circuits." *Id.* Thus, since the 1975 decision in *Wivagg,* Duquesne Light had knowledge that a short circuit may develop in a customer's electrical system as a result of a surge of high voltage, and that a surge may occur when a lead wire contacts a secondary service drop cable.

The Commonwealth Court addressed a similar scenario in *Poorbaugh v. Pennsylvania Pub. Util. Comm'n,* 666 A.2d 744 (Pa.Cmwlth.1995). In *Poorbaugh,* the plaintiff filed a civil complaint against West Penn Power Company in the court of common pleas. *Id.* at 745. The complaint alleged that Poorbaugh's barn was destroyed by fire caused by the negligence of West Penn Power Company. *Id.* The plaintiff asserted that during a storm, a West Penn subtransmission line and the distribution circuit came into contact with each other. *Id.* at 746. Following the creation of an overcurrent along the 12.5 kV distribution circuit, three protection/control devices (reclosers) failed. *Id.* Electricity going to Poorbaugh's farm was interrupted. *Id.* When West Penn restored power, Poorbaugh's equipment failed, resulting in an arcing of electricity, which led to a fire. *Id.* Although the Commonwealth Court was asked to rule upon a jurisdictional issue, the factual scenario demonstrates the foreseeability of the harm caused by an over current situation.[3]

3 The Commonwealth Court concluded that Poorbaugh's allegations against West Penn did not require a transfer from the court of common pleas to the Public Utility Commission. *Id.* at 751.

In the instant case, Hirsch's expert, Wunderley, reported that "Duquesne Light personnel on site were aware of the potential for the 4000 volt primary conductors to come in contact with the secondary

conductors due to the extensive damage to the pole." Wunderley Expert Report at 6. Wunderley opined that

> [t]he damage to the primary and secondary conductors on the pole on Forward Avenue coming in contact with each other would have resulted in the over voltage/over current condition and damage to the single phase electric panel in the funeral home.

Id. Further,

> [u]pon reenergizing panel # 1 from the single phase service[,] the short circuit condition resulted in heating of the metal ***355** panel box due to the short circuit current. The rapid heating due to the short circuit current ignited the wood backing the panel was mounted on....

Id.

Viewing the evidence in light most favorable to Hirsch, Hirsch has established that the nature of the risk and harm resulting from a power surge, following contact between the primary and secondary conductors, was reasonably foreseeable. Duquesne Light had actual knowledge that contact between the lines could ultimately short circuit Hirsch's electrical equipment and that the restoration of power under such circumstances could cause a fire. Accordingly, we conclude that the factor of foreseeability weighs in favor of imposing a duty upon Duquesne Light.

We next consider the consequences of imposing a duty upon Duquesne Light under the facts alleged by Hirsch. *See Manzek,* 888 A.2d at 747. Hirsch asserted Duquesne Light was negligent in, *inter alia,* not adequately examining the funeral home's electrical system prior to reconnection; failing to contact Hirsch prior to the reconnection to request access to the electrical system for an examination; failing to properly instruct its employees on the proper method for restoring power; and "failing and omitting to do those things which were necessary to preserve Hirsch's property and render said safe in the process of reconnecting the Funeral Home to the high-voltage line running along Forward Avenue." Amended Complaint at ¶ 18. Duquesne Light countered that it was under no duty and had no right to inspect a customer's electrical equipment prior to reconnecting power. Answer and New Matter to Amended Complaint at ¶ 18(b).

Duquesne Light presented evidence that it was not its practice to enter a customer's property and inspect the customer's equipment before restoring power. Deposition (Donald Lewis) at 73. By contrast, Wunderley opined that "[i]nspection of the electric panels **and Duquesne Light metering equipment** in the funeral home prior to reenergizing the single phase service would have revealed the electrical damages...." Wunderley Expert Report at 7 (emphasis added). Duquesne Light's schedule of rates permits company employees to enter the property of a customer

> ... at all reasonable times for the purpose of reading Company meters, for inspection and repairs, for removal of Company property, *or for any other purpose incident to the service....*

Brief for Appellant at 28 (emphasis added) (quoting Wunderley Report at 5, in turn quoting Duquesne Light Schedule of Rates at Supplement No. 10, Second Revised Page No. 24).

The consequences of imposing a duty upon Duquesne Light to inspect, or at a minimum, to warn a customer, *under the facts alleged,* does not place an undue burden upon Duquesne Light. Here, the funeral home was "the only building *[sic]* electric services attached to the broken pole." Wunderley Expert Report at 2. Viewing the record in a light most favorable to Hirsch, this factor weighs in favor of imposing a duty upon Duquesne Light to warn the single affected customer (Hirsch), and to inspect at least its own equipment prior to restoring electrical service.

Finally, we weigh the public interest in imposing a duty upon Duquesne Light. *See Manzek,* 888 A.2d at 747. The public interest in restoring electrical service in a

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safe manner, so as to prevent a fire, is readily apparent. However, the prompt restoration of power is likewise in the public's interest. We conclude that this factor ***356** does not tip the scales in favor of either party.

[8] Hirsch argues that Duquesne Light breached its duty of the highest degree of care. Brief for Appellant at 41. Duquesne Light challenges Hirsch's assertion, directing our attention to Section 19 of its tariff on record with the Public Utility Commission ("PUC").[4] Section 19 provides, in relevant part, as follows:

> *Continuity and Safety*
>
> The Company will use all reasonable care to provide safe and continuous delivery of electricity but shall not be liable for any damages arising through interruption of the delivery of electricity or for injury to persons or property resulting from the use of the electricity delivered.

Brief for Appellee at 5 (quoting Duquesne Light Schedule or Rates). Duquesne Light argues that the liability protection afforded by Section 19 is effective "as long as Duquesne Light exercises reasonable care in providing safe and continuous service." Brief for Appellee at 6.

In *Stewart v. Motts,* 539 Pa. 596, 654 A.2d 535 (1995), our Supreme Court explained that "negligence is absence or want of care under the circumstances." *Id.* at 538 (citation omitted). Our Supreme Court had held previously that

> [the fact that] a transmission line is a dangerous instrumentality is recognized everywhere. No matter where located it is a source of grave peril and the law requires that the possessor of such an instrumentality exercise a high degree of care: "Vigilance must always be commensurate with danger. A high degree of danger always calls for a high degree of care. The care to be exercised in a particular case must always be proportionate to the seriousness of the consequences which are reasonably to be anticipated as a result of the conduct in question."

Yoffee v. Pennsylvania Power & Light Co., 385 Pa. 520, 123 A.2d 636, 645 (1956) (quoting *MacDougall v. Penna. Power & Light Co.,* 311 Pa. 387, 166 A. 589, 592 (1933)).

Since its decision in *Yoffee,* our Supreme Court has explained that, when it referred to a "higher degree of care,"

> we were not creating a second tier of "extraordinary care" over and above ordinary or reasonable care. Instead, we were simply recognizing the general principle that under the reasonable care standard, the level of care must be proportionate to the danger involved. Our use of the language "higher degree of care" merely stated the common sense conclusion that the use of a dangerous agency would require the reasonably prudent person to exercise more care. In fact these cases rejected any formalistic higher standard of care in holding that "no absolute standard of care [could] be fixed by law."

Stewart, 654 A.2d at 538. Thus, "this Commonwealth recognizes only one standard of care in negligence actions involving dangerous instrumentalities—the standard of reasonable care under the circumstances." *Id.* at 539.

> ***357** It is well established by our case law that the reasonable man must exercise care in proportion to the danger involved in his act. Thus, when a reasonable man is presented with circumstances involving the use of dangerous instrumentalities, he must necessarily exercise a "higher" degree of care proportionate

[4] The Public Utility Law empowers the PUC to control the provision of public utilities in the best interests of the public. 66 Pa.C.S.A. § 501. The law allows utilities to develop tariffs that define the rules and regulations surrounding the provision of services to subscribers. *Id.* § 1501. The Public Utility Code defines "tariff" as "all schedules of rates, all rules, regulations, practices or contracts involving any rate or rates." *Id.* § 102. "Tariffs filed with a state regulatory agency, such as the PUC, are not mere contracts but have the force of law and are binding on the consumer and the utility." *Stiteler v. Bell Tel. Co.,* 32 Pa.Cmwlth. 319, 379 A.2d 339, 341 (1977).

> to the danger. Our case law has long recognized this common sense proposition that a reasonable man under the circumstances will exert a "higher" degree of care when handling dangerous agencies. Although no absolute standard can be fixed by law, [ ] every reasonable precaution suggested by experience and the known danger ought to be taken.

Id. at 539–40 (citations and quotation marks omitted). Duquesne Light's tariff requires the utility company to use "all reasonable care to provide safe and continuous delivery of electricity[.]" Brief for Appellee at 5 (quoting Duquesne Light Schedule or Rates). Thus, the tariff is not inconsistent with the standard of care set forth in *Stewart.* Hirsch's negligence cause of action avers that Duquesne Light breached its duty of care when it restored electricity to the funeral home without first contacting Hirsch and, at a minimum, inspecting its own equipment. Accordingly, Hirsch's cause of action is not barred by Section 19 of Duquesne Light's tariff.

Weighing the factors set forth in *Althaus,* in accordance with our standard of review, we conclude that the trial court erred in entering summary judgment against Hirsch as to its causes of action sounding in negligence. Hirsch has presented evidence which, taken as true, establishes that Duquesne Light owed a duty to Hirsch; Duquesne Light breached its duty of care under the circumstances presented; and that Duquesne Light's breach of its duty caused damages to Hirsch. On this basis, we reverse the Order of the trial court, which entered summary judgment in favor of Duquesne Light, and remand for further proceedings.

Order reversed; case remanded for further proceedings consistent with this Opinion; Superior Court jurisdiction relinquished.

All Citations

52 A.3d 347, 2012 PA Super 153

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EXHIBIT “E”

106 A.3d 27, Util. L. Rep. P 27,290
(Cite as: 106 A.3d 27)

Supreme Court of Pennsylvania.
ALDERWOODS (PENNSYLVANIA), INC., a Wholly Owned Subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home, Appellee,
v.
DUQUESNE LIGHT COMPANY, Appellant.

No. 12 WAP 2013.
Argued Oct. 15, 2013.
Decided Dec. 15, 2014.

Background: Electric utility's customer brought negligence action against utility, alleging that utility workers had caused fire in customer's building while reconnecting electric lines to building after interruption in electrical service due to traffic accident. The Court of Common Pleas, Allegheny County, Civil Division, No. GD–09–14720, Paul F. Lutty, Jr., J., entered summary judgment in favor of utility, and customer appealed. The Superior Court, 52 A.3d 347, Musmanno, J., reversed. Customer appealed.

Holdings: The Supreme Court, Saylor, J., held that:
(1) notwithstanding the service point rule, utility retained general common law duty to take reasonable measures to avert harm, such as warning customer, if the utility had actual or constructive knowledge of a dangerous condition impacting customer's electrical system, and
(2) genuine issue of material fact existed as to whether utility had constructive notice of dangerous condition inside customer's building, so as to trigger duty.

Order of Superior Court affirmed.

Eakin, J., dissented and filed opinion.

Todd, J., dissented and filed opinion.

West Headnotes

[1] Judgment 228 181(2)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(2) k. Absence of issue of fact. Most Cited Cases

A court of original jurisdiction may grant summary judgment only when the moving party demonstrates that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.

[2] Appeal and Error 30 934(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) k. In general. Most Cited Cases

Appeal and Error 30 949

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k949 k. Allowance of remedy and matters of procedure in general. Most Cited Cases

When reviewing a summary judgment ruling, the appellate court views the record in the light most favorable to the non-moving party and considers whether an error of law or abuse of discretion has occurred.

[3] Judgment 228 181(2)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(2) k. Absence of issue of fact.

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Most Cited Cases

The questions of whether there are material facts in issue on a motion for summary judgment, and whether the moving party is entitled to summary judgment, are matters of law.

[4] Appeal and Error 30 949

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k949 k. Allowance of remedy and matters of procedure in general. Most Cited Cases

On appeal from a summary judgment ruling, the abuse-of-discretion aspect has relevance only with regard to matters which lie within the discretion of the court of original jurisdiction, such as a subsidiary evidentiary ruling associated with the award.

[5] Electricity 145 16(5)

145 Electricity
145k12 Injuries Incident to Production or Use
145k16 Defects, Acts, or Omissions Causing Injury
145k16(5) k. Inspection and knowledge of defects or dangers. Most Cited Cases

Under Pennsylvania law, maintenance and inspection responsibilities generally are divided at the service point, such that an electric service provider does not have a freestanding duty to inspect customer-owned electrical equipment and services on the premises' side.

[6] Electricity 145 16(1)

145 Electricity
145k12 Injuries Incident to Production or Use
145k16 Defects, Acts, or Omissions Causing Injury
145k16(1) k. In general. Most Cited Cases

Electricity 145 16(5)

145 Electricity
145k12 Injuries Incident to Production or Use
145k16 Defects, Acts, or Omissions Causing Injury
145k16(5) k. Inspection and knowledge of defects or dangers. Most Cited Cases

Notwithstanding the service-point rule, allocating ownership and maintenance responsibility for electrical systems in two directions from point of delivery, electric utility retained general common-law duty, when restoring electrical power to customer's building, to take reasonable measures to avert harm, such as warning customer, if the utility had actual or constructive knowledge of a dangerous condition impacting customer's electrical system, occasioned by fallen and intermixed electrical lines proximate to customer's premises; service point rule did not wholly supplant utility's common-law duty.

[7] Judgment 228 181(33)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) k. Tort cases in general. Most Cited Cases

Genuine issue of material fact existed as to whether electric utility had constructive notice of a dangerous condition inside customer's building, at the time utility restored power to the building after an outage caused by fallen and intermixed electrical lines, as would trigger duty to warn customer or otherwise avert harm, precluding summary judgment in customer's negligence action against utility arising from fire that started in building's electrical system after power was restored.

***29** Erin Megan Beckner, Esq., Gary P. Hunt, Esq., Richard B. Tucker III, Esq., Pittsburgh, Bradley S. Tupi, Esq., Tucker Arensberg, P.C., for Duquesne Light Company.

Robert C. Heim, Esq., Philadelphia, Dechert LLP, for Energy Association of Pennsylvania.

Bohdan R. Pankiw, Esq., Harrisburg, Kenneth Riley Stark II, Esq., PA Public Utility Commission, Patricia Timmerman Wiedt, Esq., Robert Frank Young, Esq., for Pennsylvania Public Utility Commission.

Elisa Talora Wiygul, Esq., Dechert LLP, Philadelphia, for Energy Association of Pennsylvania.

Alan J. Charkey, Esq., White and Williams, L.L.P., Peter T. Parashes, Esq., Philadelphia, for Alderwoods (Pennsylvania), Inc.

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, STEVENS, JJ.

OPINION

Justice SAYLOR.

The main and controlling issue accepted for review, as framed by the appellant, is "[w]hether the Superior Court erred in imposing upon electric utilities a burdensome and unprecedented duty to enter customers' premises and inspect customers' electrical facilities before restoring power after an outage?" *Alderwoods (Pa.), Inc. v. Duquesne Light Co.*, 620 Pa. 214, 66 A.3d 763 (2013) (*per curiam*). It is material to bear in mind from the outset, however, that the appellant's portrayal of the issues fails to adequately address the Superior Court's formulation of electric-company duties, in the alternative, "to inspect, *or at a minimum, to warn a customer,* under the facts alleged[.]" *Alderwoods (Pa.), Inc. v. Duquesne Light Co.*, 52 A.3d 347, 355 (Pa.Super.2012) (emphasis adjusted).

I. Background

Appellant, Duquesne Light Company ("Duquesne Light" or "Duquesne"), is a Pennsylvania public utility engaged in the business of transmitting and distributing electric power in the city of Pittsburgh. Appellee, Alderwoods (Pennsylvania), Inc., trading as Burton L. Hirsch Funeral Home ("Hirsch"), conducted business at 2704 Murray Avenue in Pittsburgh. The electric company provided service to Hirsch at this location.

On Friday, January 9, 2009, after business hours, an unidentified motor vehicle crashed into and felled a utility pole carrying electric lines owned and operated by Duquesne Light. Several wires were connected to Hirsch's business premises, and at least one was stripped from the service point, *i.e.*, the attachment point to the building's electrical system located on the structure. In addition to the funeral home, a number of other local buildings lost power as a result of the incident, although no structure other than Hirsch's was connected directly to the downed pole.

Upon receiving word of the outage, Duquesne Light dispatched a line crew to make repairs. Over a period of several hours (about twelve, in Hirsch's estimation), linemen replaced the pole, installed new transformers, and restored power to the buildings. Finishing with the locked, unoccupied funeral home, crew members climbed onto the roof to connect the new external wiring to the building's electrical system at the service point.

Soon after the wires were connected and energized, a fire broke out at the location of an electrical panel box located in the ***30** basement of the premises and owned by Hirsch. The blaze spread, and the funeral home was destroyed.

Hirsch commenced a civil action against Duquesne Light, including two negligence counts, denominated "ordinary negligence" and "highest degree of care" attendant to the supply of electricity.[FN1] According to Hirsch's pleadings, the electric company's employees "incorrectly and improperly" reconnected the funeral home to the transmission and distribution system. Amended Complaint at ¶ 11. Hirsch contended that this triggered an electrical arc and catastrophic failure at the electrical panel box inside the funeral home, resulting in the fire. *See id.* at ¶ 12. The amended complaint

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also charged the utility with nonfeasance for not examining the funeral home's electrical system or contacting Hirsch to request access for inspection prior to restoring power, and, more generally, for failing to do those things necessary to maintain safety and preserve the business premises. *See id.* at ¶ 14.

> FN1. Although Hirsch included other counts in its pleadings, our treatment in the present appeal is limited to this negligence-based aspect of the litigation.

In an answer with new matter, Duquesne denied a number of the material allegations of the complaint and asserted that the fire was a result of the malfeasance of the unknown third-party motorist and/or defective electrical wiring or equipment owned and maintained by Hirsch. The electric company also indicated that it bore no duty to inspect the funeral home's—or any other customer's—privately-owned electrical equipment or system before restoring power after an outage. *See* Answer and New Matter to Amended Complaint at ¶ 43.

In discovery, Hirsch tendered the report of an electrical engineer, Richard W. Wunderley, P.E., who had been retained to render an opinion concerning Duquesne Light's role in the events giving rise to the funeral home's destruction. In his analysis, the engineer initially dismissed the hypothesis that the electric company's line crew had misconnected wires when restoring power. *See* Engineer's Report, EFI Global, dated August 23, 2010, at 6 ("The improper connection hypothesis at the single phase mast head was eliminated after the evidence examination and further discovery information was received."). Mr. Wunderley advanced another theory, however. He posited that, during the downing of the utility pole, a primary line consisting of wires (or conductors) carrying high-voltage electricity from a substation had contacted stepped-down secondary lines transmitting lower-voltage current to the funeral home, causing an "over voltage/over current condition" in the electrical system interior to the funeral home and touching off a short-circuit. *Id.* at 6. The engineer indicated that Duquesne Light's subsequent reenergizing of the damaged electrical system heated the metal panel box to an extreme temperature, igniting the attached wood backing. *See id.* at 2, 6.

According to Mr. Wunderley, "[i]nspection of the electric panels and Duquesne Light metering equipment in the funeral home prior to reenergizing the single phase service would have revealed the electrical damage caused by the contact between the primary and secondary conductors at the pole[.]" *Id.* at 7. Furthermore, Mr. Wunderley asserted that the extensive damage to the utility pole and lines at the crash site afforded Duquesne's line crew ample notice of a substantial likelihood that the high-voltage primary conductors contacted the lower-voltage secondary lines. *See id.* at 7 ("The potential for damage inside the funeral home ***31** due to the physical damage to the service connections and probable contact between the 4000 volt primary and secondary conductors was *a compelling reason and cause to inspect* the metering equipment in the funeral home prior to reenergizing the single phase service." (emphasis added)); Engineer's Supplemental Report, EFI Global, dated August 31, 2010, at 3 (referencing the conditions outside Hirsch's premises as presenting " *strong/compelling evidence ... that should have caused Duquesne Light to inspect* the electrical system in the funeral home prior to reenergizing the electric service." (emphasis added)). Moreover, had an inspection been undertaken prior to restoration of power, the engineer stated, the damage to the electrical panel would have been discovered and the fire averted. *See* Engineer's Report, EFI Global, dated August 23, 2010, at 7–8 ("Because Duquesne Light failed to inspect the electrical system, ... the above events/conditions resulted in a catastrophic failure and fire.").

At the close of discovery, Duquesne Light pursued summary judgment. The electric company rested its motion squarely on the premise that "*[t]he*

only basis asserted for liability is that before restoring power, the Duquesne Light crew should have entered the locked Funeral Home in the middle of the night, gone to the basement, and inspected the customer's electrical panel." Brief in Support of Summary Judgment at 4 (emphasis added). The company then set about disclaiming any such duty, on the part of an electric service provider, to affirmatively inspect privately-owned equipment and/or systems prior to restoring power after an outage. FN2

> FN2. In its motion, Duquesne Light also noted that Hirsch's pleadings were premised upon the assertion that the utility's line crew performed its work incorrectly on the outside of the building; whereas, Hirsch's expert had subsequently conceded that this simply was not the case. *See* Motion for Summary Judgment in *Alderwoods* at ¶¶ 15–16. Appeal was not allowed, however, to consider the appropriateness of summary judgment relative to variances between Hirsch's pleadings and proffers. *See Alderwoods (Pa.), Inc. v. Duquesne Light Co.*, 620 Pa. 214, 66 A.3d 763 (2013) (*per curiam*) (centering the allowance of appeal on the presence or absence of a relevant duty on Duquesne Light's part). Accordingly, we offer no assessment of the sufficiency of Hirsch's pleadings in laying a sufficient factual foundation for Mr. Wunderley's opinion.

Early on in its supporting brief, Duquesne Light observed the axiom that duty is an essential element of a negligence claim. *See, e.g., Althaus ex rel. Althaus v. Cohen*, 562 Pa. 547, 552, 756 A.2d 1166, 1168 (2000). The electric company's essential position was that the service point establishes a firm line of demarcation between the responsibilities of an electric service provider and the customer—if a failure occurs on the utility's side, it may bear responsibility, and certainly the company has the obligation to make reasonable inspections of its own equipment up to the service point. But if any failure occurs on the customer side, Duquesne asserted, it can be the customer's—and only the customer's—responsibility, and under no circumstances is an electric service provider obliged to inspect private electrical systems internal to serviced premises.

In support of this position, Duquesne Light relied prominently upon *Milton Weaving Co. v. Northumberland County Gas & Electric Co.*, 251 Pa. 79, 83, 96 A. 135, 136 (1915) (following "the view that [an electric service provider] is not bound to inspect such appliances [owned and maintained by its customers] and is not generally liable for injuries or damages caused by reason of defect therein"); and *Adams v. United Light, Heat & Power ***32** Co.*, 69 Pa.Super. 478, 1918 WL 2272 (1918) (applying the general rule articulated in *Milton* in support of a determination that an electric service provider had no duty associated with personal injury caused by a defective electrical extension cord inside a customer's premises). FN3 The electric company asserted that these cases and others in their line exemplified, in the application, a bright-line allocation of responsibility from the service point between an electric service provider and any customer.

> FN3. Duquesne Light also quoted an opinion of the Pennsylvania Public Utility Commission (the "PUC" or the "Commission"), as follows:
>
> > Traditionally, utilities, the [PUC], and the Courts have recognized that the ownership and maintenance responsibility of an electric utility ends at the point of delivery to the customer.... From that point on, the customer owns and assumes the responsibility for the maintenance and security of the internal wiring.
>
> Brief in Support of Summary Judgment at 6 (quoting *Hineline v. Metro. Edison Co.*, No. C–902777, 1990 Pa. PUC LEX-

IS 156, at *6 (Pa. PUC Oct. 5, 1990)).

Further, Duquesne Light presented policy arguments supporting this demarcation, including the following:

> It makes perfect sense for tort law to impose a duty upon a utility to install, inspect and maintain its own equipment in a safe condition. It makes no sense to extend the utility's duty to the customer's equipment. If Duquesne Light were to be required to enter the Funeral Home and inspect electrical facilities before restoring power, which items of equipment should it inspect? The panel box only? What about fuses and circuit breakers? Should Duquesne Light take the cover off the panel box and check the connections in the back? What about the wires carrying power throughout the building? What about the toaster in the kitchen? Once the line of demarcation between the utility's equipment and the customer's equipment is crossed, there is no logical limit to the utility's potential responsibility. Sensibly, Pennsylvania law has never imposed such unlimited liability on an electrical utility.
>
> * * *
>
> It would be impractical to require Duquesne Light, or any other utility, to enter and inspect.... Such a requirement would complicate and delay power restoration after storms and other outages. A number of [local] customers, not just the Funeral Home, were affected by the motor vehicle accident. Duquesne Light did not inspect those customers' electrical infrastructure prior to reapplying power, nor was the Company under any legal duty to do so.

Brief in Support of Summary Judgment at 5–7.

In response to the summary judgment motion, Hirsch relied on general negligence principles as establishing a duty to avert harm when one engages in conduct which foreseeably creates an unreasonable risk to others. *See* Memorandum of Law in Opposition to Summary Judgment at 15 (quoting *Commerce Bank/Pa. v. First Union Nat'l Bank*, 911 A.2d 133, 139 (Pa.Super.2006)). *See generally* Restatement (Second) of Torts § 302 cmt. a (1965) ("In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act."). To evidence notice, on Duquesne Light's part, of a dangerous condition within the funeral home, Hirsch referenced the circumstances which, in Mr. Wunderley's opinion, generated a "compelling reason" to inspect ***33** the meters inside the premises. Engineer's Report, EFI Global, dated August 23, 2010, at 7. These included the downed, broken high-voltage lines with which the electric company's work crew was confronted, as well as a tripped circuit breaker at a substation connected to the pole's transformer, indicative of a power surge. *See* Response in Opposition to Motion for Summary Judgment at ¶¶ 5, 11 (citing Deposition of Joseph G. Frankhauser dated March 31, 2010, at 27, and Deposition of Donald Lewis dated April 29, 2010, at 20–25, 53–56).

As to duty, Hirsch eschewed Duquesne Light's vision of a rigid line of demarcation between the responsibilities of an electric company and the customer. According to Hirsch, none of the cases relied upon by the electric company involved circumstances in which an electric service provider should have foreseen the sequence of events causing harm. In light of the circumstances known to the utility's line crew when members restored power to the funeral home, Hirsch argued that damage to the building's electrical system was eminently foreseeable to them. Along these lines, the funeral business owner stressed that Duquesne was a litigant in a prior case involving a line-crossing, overvoltage scenario. *See Wivagg v. Duquesne Light Co.*, 73 Pa. D. & C.2d 694 (C.P. Allegheny 1975). In response to Duquesne's protestations about entering customer premises, Hirsch highlighted a passage from the "Duquesne Light Schedule of Rates and Service Installation Rules" indicating that utility representat-

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ives have a right of access to customer premises to read meters, for inspection and repairs, and for any other purposes incident to service. *See, e.g.,* Appendix to Response in Opposition to Motion for Summary Judgment at Ex. I, Supplement No. 10, Second Revised Page No. 24.

Finally, Hirsch invoked a series of factors delineated in this Court's seminal decision in *Althaus ex rel. Althaus v. Cohen,* 562 Pa. 547, 756 A.2d 1166 (2000), relevant to whether the common law should impose duties not previously recognized.[FN4] These factors are: "(1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution." *Id.* at 553, 756 A.2d at 1169. In this regard, Hirsch highlighted that it and Duquesne Lighting maintained a business relationship beneficial to both parties, acknowledged the high social utility of electric service, stressed its proffer that the risk of an overvoltage scenario is foreseeable (including the expert report of Mr. Wunderley), alluded to the catastrophic consequences of an uncontrolled fire, indicated that the burden of conducting an electrical inspection is modest in comparison to the harm, and urged that the overall public interest in terms of the preservation of lives and property would be advanced by recognition of an affirmative duty to inspect. *See* Memorandum of Law in Opposition to Motion for Summary Judgment at 17–21.

> FN4. In the negligence arena, in the absence of a relevant statute, the determination whether to impose affirmative common-law duties as a predicate to civil liability is a matter of law. *See Seebold v. Prison Health Servs., Inc.,* 618 Pa. 632, 650, 57 A.3d 1232, 1243 (2012).

Upon consideration of the litigants' submissions, the common pleas court awarded summary judgment in Duquesne Light's favor. *See Alderwoods (Pa.), Inc. v. Duquesne Light Co.,* No. G.D. 09–14720, *slip op.,* 2011 WL 8614889 (C.P. Allegheny March 8, 2011). In a brief opinion, the court credited the utility's theory that, ***34** while an electric company has a duty to maintain its own equipment and conduct reasonable inspections of its own facilities, it has no duty to inspect equipment owned by its customers. In this regard, the common pleas court found the Superior Court's decision in *Adams* to be controlling and the PUC's remarks in *Hineline* to be persuasive. *See id.* at 4–6; *see also supra* note 3.

[1][2][3][4] On appeal, the Superior Court reversed in the relevant regard. *See Alderwoods,* 52 A.3d 347. After setting forth the standards governing an award of summary judgment and ensuing appellate review,[FN5] the court undertook an *Althaus* analysis on terms similar to those advocated by Hirsch in opposition to summary judgment. The intermediate court, in essence, concluded that Hirsch established a *prima facie* case that Duquesne Light was on constructive notice of the damage to the funeral home's electrical system and of the attendant risk of fire. *See id.* at 355. In such circumstances, the court reasoned, an electric company bears a duty to take reasonable measures to avert the harm. *See id.* at 357.[FN6]

> FN5. A court of original jurisdiction may grant summary judgment only when the moving party demonstrates that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *See, e.g., Smith v. Twp. of Richmond,* —— Pa. ——, ——, 82 A.3d 407, 414–15 (2013). The appellate court views the record in the light most favorable to the non-moving party and considers whether an error of law or abuse of discretion has occurred. *See, e.g., id.* at 415.
>
> Parenthetically, the questions of whether there are material facts in issue and whether the moving party is entitled to summary judgment are matters of law. *Accord Pyeritz v. Commonwealth,* 613

> Pa. 80, 88, 32 A.3d 687, 692 (2011) (delineating the applicable review standard only in terms of the legal-error component). The abuse-of-discretion aspect has relevance only with regard to matters which lie within the discretion of the court of original jurisdiction, such as a subsidiary evidentiary ruling associated with the award.

> FN6. Citing *Stewart v. Motts*, 539 Pa. 596, 654 A.2d 535 (1995), the Superior Court also correctly explained that there was no substantive difference between Hirsch's "ordinary negligence" and "highest degree of care" negligence counts, since the care to be exercised in any given case is proportionate to the seriousness of the consequences. *See id.* at 605, 654 A.2d at 539. In this regard, the intermediate court observed that electricity is universally recognized to be a dangerous instrumentality, thus implicating a high degree of care on a utility's part, *see Alderwoods*, 52 A.3d at 356–57, at least within the sphere of conventional duties.

The Superior Court, however, shied from recognizing such duty in terms of one to inspect customer equipment, which was the subject of the underlying summary judgment proceedings. Rather, the intermediate court repeatedly noted that the formulation of duty in the complaint included a catch-all, namely, an obligation "to do those things which were necessary to preserve Hirsch's property and render [the funeral home] safe in the process of reconnecting [it] to the high-voltage line[.]" *Alderwoods*, 52 A.3d at 355 (quoting Amended Complaint at ¶ 18). The court then formulated the relevant duty in terms of an obligation "to warn the single affected customer (Hirsch), and to inspect at least its own equipment prior to restoring electrical service." *Id.* (also describing Duquesne Light's obligation as "to inspect, *or at a minimum, to warn a customer*, under the facts alleged" (emphasis adjusted)). This reference in respect to Duquesne Light's "own equipment" was to the utility-owned electric meters in the basement of the funeral home.[FN7]

> FN7. Although the meters apparently did not manifest any damage which would suggest an electrical surge, the Superior Court appears to have relied upon Hirsch's proffer that the meters were close to the relevant electrical panel, so that inspection of the former would have revealed the damage to the latter. *See id.*

***35 II. Arguments**

In its main brief, Duquesne Light concentrates closely on the position that electric service providers have no obligation to inspect privately-owned electrical equipment and systems internal to customer premises, as a corollary to the service-point rule. Consistent with this focus, the electric company portrays the Superior Court's opinion only as holding that the utility "had a duty to enter and inspect," Brief for Appellant at 7, despite that the intermediate court actually framed the duty in the alternative to encompass a more modest option to warn. *See Alderwoods*, 52 A.3d at 355.[FN8]

> FN8. Duquesne does recognize that the Superior Court seems to have contemplated a duty to inspect the company's own meters located within the funeral home, as opposed to inspection of customer equipment or systems, but the electric company contends that its work crew simply had no reason to inspect the meters. *See* Brief for Appellant at 13 (asserting that the report submitted by the electrical engineer retained by Hirsch "gave no reason to inspect the meters, identified no malfunction in the meters, and offered no opinion that the meters had anything to do with the fire"). According to the utility, the intermediate court thus "transformed Duquesne Light's right to inspect *its own* equipment into a duty to inspect *the customer's* equipment." *Id.* at 14 (emphasis in original).

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Having so framed the issue, Duquesne Light advances its argumentation in much the same fashion as it has from the outset in its summary judgment motion and supporting brief. In this vein, the company remonstrates that there simply is no judicial precedent to support an affirmative duty to inspect. According to the utility, the intermediate court "sidestepp[ed] a century of precedent" by discarding the essential service-point rule. Brief for Appellant at 7–10 (citing, *inter alia*, *Milton*, 251 Pa. 79, 96 A. 135, and *Adams*, 69 Pa.Super. 478, 1918 WL 2272); *accord* Brief for *Amicus* Energy Association of Pennsylvania at 3–4 (contending that service-point demarcation "provides a considered, bright-line rule that has shaped utility companies' and consumers' conduct for generations" and advocating its continued longevity).

Duquesne Light explains that, on an annual basis, it must contend with many service outages precipitated by unpredictably inclement weather and other causes, requiring its personnel to work overtime, borrow workers from other companies, and strive to restore power for the public benefit as quickly as possible. The electric company reiterates that the imposition of a burden to inspect customer equipment would require the involvement of licensed electricians and an expenditure of untold man-hours. Moreover, according to the utility, the duty recognized by the Superior Court is untenably indefinite in terms of what it is that an electric service provider needs to inspect, so that company personnel will be faced with the "impossible quandary" in determining how far they should go to examine customer electrical equipment and systems. Brief for Appellant at 8. Duquesne also emphasizes that inspections internal to private customer premises will engender substantial delays in restoration of power after outages. *See id.* at 22 ("If electric customers are suddenly required to endure longer power outages than before, this should be determined by the Public Utility Commission, not the Superior Court.").

As to *Althaus*, Duquesne Light posits that "[i]n announcing this summary of the factors comprising legal duty, surely this Court did not intend to wipe the slate clean of prior precedents and erase longstanding principles of Pennsylvania tort ***36** law." Brief for Appellant at 15. In the event this Court might deem the *Althaus* factors relevant, the electric company discusses these, again weaving in the concerns with increased costs, delays, and uncertainties. Furthermore, the utility highlights the social utility of electrical distribution, downplays the foreseeability of damage to a structure's internal electrical system resulting from a downed utility pole, and characterizes the consequences of a duty in the present case as tantamount to making electric service providers insurers of the safety of private electrical systems and equipment.

The PUC has filed an *amicus* brief supporting Duquesne Light's position. Like the electric company, the Commission couches the duty recognized by the Superior Court as one on the part of an electric service provider to "inspect customer equipment after storms and outages," thus also disregarding the warning aspect of the intermediate court's determination. *Amicus* Brief for the PUC at 4. As to the asserted duty to inspect, the Commission supports the utility's position that its imposition is unprecedented and burdensome and urges this Court to reaffirm the longstanding service-point rule allocating ownership and maintenance responsibility for electrical systems in two directions from the point of delivery.

The PUC also offers a detailed overview of its regulatory responsibilities relative to electric service providers and its efforts to ensure speedy and efficient restoration of power after outages, in furtherance of the public interest. *See, e.g., id.* at 16 ("[I]mposing a duty on the electric utility to inspect customer wiring/equipment prior to service restoration after an outage is not only ... cost prohibitive and not in the public interest, but also is beyond the utility's jurisdiction and responsibility."). Additionally, the Commission offers its own *Althaus* assessment, again emphasizing factors such as the public

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interest in prompt, efficient, safe, and affordable restoration of power in the wake of an outage. Finally, the PUC suggests that the imposition of duties upon utilities should be left to its regulatory province and not to the field of the common law. *See id.* at 27 ("[T]he Superior Court intruded on the PUC's statutory duty to regulate service duties of public utilities.").

The Energy Association of Pennsylvania also filed an *amicus* brief supporting Duquesne. Like the electric company and its regulator, the Energy Association discusses the Superior Court's determination solely in terms of a duty to inspect, to the exclusion of the court's alternative formulation of a duty to warn. In substantial tension with the opinion expressed in Mr. Wunderley's report, the Association's position is also premised on the notion that, at the time the line crew restored power to the funeral home, its members had no reason to believe there was a dangerous condition inside the premises. *See, e.g.*, Brief for *Amicus* Energy Ass'n of Pa. at 2 ("This Court should reverse the Superior Court and clarify that Appellant Duquesne had no duty to inspect inside Appellee's locked and unoccupied facility, after hours *and in the absence of any indication of heightened fire danger*, before restoring power." (emphasis added)).

In addition to reinforcing the legal arguments presented by Duquesne Light, the Energy Association observes that power outages themselves, especially prolonged ones, create their own dangers. *See id.* at 7 (discussing such risks as encompassing "downed, live wires to fires caused by candles, to hypothermia in the winter and heat stroke in the summer," as well as potential spoilage of refrigerated medication and idling of powered essential medical equipment, such as respirators). The ***37** Association envisions that imposing a duty to inspect on electric service providers would cause untenable delays in power restoration and result in enormous costs to Pennsylvania utility companies and consumers. *See id.* at 12.

For Hirsch's part, it did not escape its attention that the Superior Court envisioned a "duty ... to inspect, or at a minimum, to warn[.]" Brief for Appellee at 4 (quoting *Alderwoods*, 52 A.3d at 355). In sharp contract to Duquesne Light's presentation and those of its *amici*, Hirsch returns regularly to the warnings issue throughout its brief.[FN9]

> FN9. *See also id.* at 10 ("It is important to note that in its Opinion, the Superior Court found a duty to inspect *or* a duty to warn the customer." (emphasis in original)); *id.* at 14 ("At a minimum, the duty involves merely warning customers of possible overvoltage damage rather than inspecting."); *id.* at 22–23 ("Duquesne Light and its *amici* neglect to report that under the circumstances of this case, the [Superior Court's] opinion requires inspections *or warnings to the customers.*" (emphasis in original)); *id.* at 29 ("In the alternative, much as the power industry does after flooding events, Duquesne Light could simply have contacted Hirsch to warn that Duquesne Light suspected overvoltage damage and would not restore service to the building until the building's equipment was inspected by a third party.").

In terms of the duty to inspect, Hirsch takes issue with Duquesne Light's portrayal of the precedent as establishing that under no circumstances does a utility have such an obligation. According to the funeral business owner, the decisions simply did not contemplate scenarios involving utilities with actual or constructive notice of a dangerous condition on the customer side of a service point. *See* Brief for Appellee at 14 ("Implicit in each case is the notion of foreseeability—that an electric utility can be under no duty to inspect a customer's faulty equipment when the utility has no reason to anticipate the fault."). In this regard, Hirsch invokes the axiom that the holding of a judicial decision is to be read against the factual circumstances under review. *See id.* at 16 (quoting *City of Pittsburgh v. WCAB (Robinson)*, 620 Pa. 345, 365, 67 A.3d 1194,

1206 (2013)). Further, it maintains that electric service providers, like all others, are subject to the duty of care not to harm others by their affirmative conduct, where such injury is reasonably foreseeable. *See id.* at 17–18 (citing *Seebold*, 618 Pa. at 654, 57 A.3d at 1246, and quoting *Mirnek v. W. Penn Power Co.*, 279 Pa. 188, 191, 123 A. 769, 770 (1924), for the proposition that electric companies "are bound to anticipate ... such combinations of circumstances and accidents and injuries therefrom as they may reasonably forecast as likely to happen").

Respecting Duquesne Light's and its *amici's* policy concerns about potential delay, expense, and hardship to utilities and the public at large, Hirsch regards them as "severely overblown." Brief for Appellee at 12; *see also id.* at 39 (positing that, particularly in light of the potential for fires to spread to other properties, "[t]he consequences of a fire caused by failing to inspect, or to warn of, a building with a suspected electrical fault dwarf those of delaying the restoration of service"). Against the present circumstances, the funeral business owner notes that an inspection would have encompassed only Hirsch's premises, since it was the sole building serviced directly by the demised utility pole and the only structure to have sustained direct damage, in the form of detached service lines. Further, Hirsch presents a discussion of the *Althaus* factors along the lines of its submission to the common pleas court, as discussed previously.

***38** Finally, responding to the position of Duquesne Light and its *amici* that there were no circumstances suggesting an unreasonable risk of harm to the funeral home when the work crew restored power, Hirsch relies on, *inter alia*, Mr. Wunderley's position to the opposite effect, based primarily on the condition of fallen and damaged lines at the crash site. *See* Brief for Appellee at 9, 53–54. Furthermore, the funeral business owner cites *Summers v. Certainteed Corp.*, 606 Pa. 294, 997 A.2d 1152 (2010), as exemplifying the consideration to be given to expert opinion proffers in summary judgment inquiries. *See id.* at 309, 997 A.2d at 1161 ("It has long been Pennsylvania law that, while conclusions recorded by experts may be disputed, the credibility and weight attributed to those conclusions are not proper considerations at summary judgment; rather, such determinations reside in the sole province of the trier of fact, here, a jury.").

III. Discussion

[5] At the outset, we agree with the legal position of Duquesne Light and its *amici* that, under Pennsylvania law, maintenance and inspection responsibilities generally are divided at the service point, such that an electric service provider does not have a freestanding duty to inspect customer-owned electrical equipment and services on the premises' side. *Accord Milton*, 251 Pa. at 83, 96 A. at 136. As amply reflected above, however, the Superior Court simply did not recognize such a freestanding obligation. Rather, the obligation envisioned by the intermediate court expressly encompassed an alternative entailing the more modest avenue of warning a customer proximate to downed lines prior to restoring power after an outage, where the utility has actual or constructive notice of a dangerous condition within the customer's premises. *Alderwoods*, 52 A.3d at 355. FN10

> FN10. The warnings option obviously mitigates the specter of broken-down doors and unauthorized trespass alluded to in various of Duquesne's submissions. Moreover, whereas the PUC observes, pointedly, that "Duquesne is Hirsch's electric utility; however, Duquesne is not Hirsch's electrician," Brief for *Amicus* the PUC at 19, the observation takes on a much different color if the electric company had actual or constructive knowledge of an unreasonable risk to the funeral home tied to power restoration and did not notify Hirsch so that it, in turn, could summon its electrician.

Part of the conceptual difficulty in this case lies

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in the litigants' very different approaches to the legal issues presented. As noted, Duquesne Light prefers to confine the discussion as closely as possible to the service-point rule; whereas, in Hirsch's estimation, the dispute more appropriately centers upon application of the common-law duty to take reasonable measures to avert harm occasioned by one's own conduct, in the face of actual or constructive knowledge of a danger. As the funeral business owner observes, the obligation it relies upon is reflected, in general terms, in Section 302 of the Restatement Second of Torts and the associated commentary. *See* Restatement (Second) of Torts § 302 cmt. a.

[6] In this regard, we find that the service-point rule has its limits and does not wholly supplant the salient common-law duty. As Hirsch develops amply, the service-point principle evolved in scenarios in which the courts were not focused on the presence of actual or constructive knowledge, on the part of utilities engaged in affirmative activities proximate to customer premises, of an unreasonable risk of harm arising from their conduct. FN11 Indeed, although Duquesne Light would clearly like to enjoy immunity from tort ***39** liability per a broad-scale application of the service-point rule, the electric company has itself refrained from stating, outright, that it is exempt from the application of the general tort-law duty to take reasonable measures to avert an unreasonable risk of harm to others occasioned by its own conduct. FN12

> FN11. While Duquesne Light and the dissenting opinion authored by Mr. Justice Eakin invoke the *Milton* line of decisions, they point to no statement or developed reasoning appearing in that opinion or any other Pennsylvania case reflecting an informed, judicial holding that the general service-point demarcation obviates the common-law duty to take reasonable measures to avert harm to others occasioned by one's own conduct in the face of actual or constructive knowledge of an unreasonable risk. Indeed, the Superior Court in *Adams* apprehended that this question simply is not addressed through application of the general service-point rule as articulated in *Milton. See Adams,* 69 Pa.Super. at 486, 1918 WL 2272, at *4 ("It may be that an electric company should be held responsible for injuries to third parties caused by defective wiring of a building if it continued to furnish current after knowledge of the defect in the wiring, but that question we are not here called upon to decide."). In this regard, moreover, Hirsch aptly references the principle that the holdings of the decisions must be read against their facts. *See, e.g., Maloney v. Valley Med. Facilities, Inc.,* 603 Pa. 399, 411, 984 A.2d 478, 485–86 (2009).
>
> Parenthetically, given that the *Adams* court cautioned that its opinion (and implicitly *Milton,* upon which *Adams* relied) should not be read to insulate electric companies from the common-law duty in issue, the dissent's basis for citing *Adams* as supporting the contrary proposition is unclear. *See* Dissenting Opinion, at 43–44 (Eakin, J.).

FN12. For example, as previously observed, when addressing Hirsch's efforts to invoke the common-law duty, the electric company rests its disclaimer on the position that there is no factual basis to support its application, then transitions immediately back to its discussion of the service-point rule. *See* Reply Brief for Appellant at 2–3. Nowhere in its submissions does the utility specifically deny that an electric service provider, on actual or constructive notice of a dangerous condition of electrical equipment inside a customer's premises proximate to downed wires, should refrain from restoring power, at least pending the undertaking of reasonable efforts to notify

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an affected customer.

Duquesne Light's treatment of the underlying duty dovetails with its approach to the warning aspect—quite simply, the electric company fails to deal squarely with either. Based on such a deficient presentation, we have no intention of exempting a company administering in a dangerous commodity from well-recognized duties of care, in the face of actual or constructive knowledge of a danger.[FN13] Moreover, the undertaking of reasonable efforts to avert harm prior to restoring power—at least some form of warning as envisioned by the Superior Court—represents a relatively modest measure in the face of an unreasonable risk of which a utility knows or should be aware.

> FN13. The PUC's position that we should leave this matter to its regulatory province is entirely detached from the summary judgment motion Duquesne Light filed and the limited review which was granted by this Court. As such, in the present context, we decline to consider the Commission's ability to diminish general common-law duties on the part of utilities.

We acknowledge the large-scale, indispensable public benefit administered by electric service providers, as well as the many challenges they face which are inherent in the daunting task of maintaining twenty-four-hour service over a large geographic area. In light of this value and responsibility and scale, it may well be that, upon a full and developed consideration of the landscape of the mixed policy considerations involved, such companies should enjoy some degree relief from exposure to the expense and uncertainties inherent in tort litigation and attendant jury determinations (by a preponderance of the evidence) concerning whether they have met their duties at common law in ***40** discrete scenarios as they may arise. We have recently explained, however, that such matters of immunity generally are best decided by the political branch, since the General Assembly is better positioned to make informed policymaking judgments reflecting an appropriate balancing among the respective interests involved. *See Lance v. Wyeth*, —— Pa. ——, ——, 85 A.3d 434, 454 (2014) ("[B]ecause the Legislature possesses superior policymaking tools and resources and serves as the political branch, we [have taken] the position ... that we would not direct the substantive common law away from well-established general norms in the absence of some clear predominance of policy justifications."); *see also Seebold*, 618 Pa. at 653, 57 A.3d at 1245. Moreover, we have reaffirmed that the treatment of these sorts of policy arguments should be on a developed record, including empirical information, which would support an informed, legislative-type judgment-subject, of course, to constitutional limitations. *See Lance*, —— Pa. at ——, 85 A.3d at 454.

It is therefore material that Duquesne Light never set out, in its summary judgment effort, to establish such a record or case. Rather, its position from the outset has been premised on the assumption that the longstanding service-point rule represents the be-all-and-end-all of an electric utility's obligations touching upon the customer side of the service point. Accordingly, our resolution of the present appeal begins and ends with the above response to this question as framed.[FN14]

> FN14. We note that many of *amici's* broader-scale policy arguments must fall by the wayside, in light of Duquesne's failure to pursue a full-scale public-policy assessment from the outset. Moreover, to the degree that the Superior Court's *Althaus* assessment appears to be abstract, conclusory, and debatable, this would seem to be attributable, at least in part, to the absence of a concrete record-based foundation to support an informed treatment of substantially mixed public policy considerations.
>
> Parenthetically in considering this litigation from an overview perspective, we do recognize there are fairness concerns on both sides. For example, on the one hand, Hirsch did not specifically focus

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its pleadings and submissions in the common pleas court on warnings, and, indeed, it has not sought to amend the complaint although it has pursued a substituted theory of liability resting on different factual premises. Furthermore, Mr. Wunderley's opinion about the probability of an overvoltage event is stated in somewhat conclusory terms, with nothing empirical to bolster his assessment as to the degree of likelihood.

On the other hand, Duquesne Light did not style its challenge as one to the sufficiency of the complaint, nor did it lodge an attack on the validity of Mr. Wunderley's opinion in terms of methodology or the adequacy of the factual premises he employed. Additionally, by virtue of its one-dimensional focus on a duty to inspect, the electric company seems to have simply ignored the complaint's broader assertion of an obligation "to do those things which were necessary to preserve Hirsch's property and render [the funeral home] safe in the process of reconnecting [it] to the high-voltage line." *Alderwoods*, 52 A.3d at 355 (citing Amended Complaint in *Alderwoods* at ¶ 18).

Contrary to the position advanced by way of dissent, our decision today is not that such catch-all language subsumes a warning. *See* Dissenting Opinion, at 45–46 (Eakin, J.). Rather, it is that Duquesne Light, as the appellant (and thus the litigant responsible for the framing of the questions presented to this Court) has in no way fashioned its own appeal in a manner which would allow for reasonable resolution of the issue at this time. *Accord supra* note 2.

As to the aspects of this litigation centered on the *Althaus* factors, we find these to be more relevant to the creation of new duties than to the vindication of existing ones. It is not necessary to conduct a full-blown public policy assessment in every instance in which a longstanding duty imposed on members of the public at large arises in a novel factual scenario. Common-law duties stated in general terms are ***41** framed in such fashion for the very reason that they have broad-scale application. To the extent that Hirsch wishes to pursue a theory at trial that a warning would have represented a reasonable measure to avert harm in the circumstances presented, nothing appropriately raised in this appeal would prevent it from doing so.[FN15]

FN15. In dissent, Madame Justice Todd emphasizes that the issues on which appeal was allowed do not directly encompass the warnings aspect; she attributes fault for such circumstance to this Court; and she advocates soliciting additional briefing on the warnings issue. *See* Dissenting Opinion, at 46–47 (Todd, J.).

The allocatur grant issues, however, were taken verbatim from Duquesne Light's own petition for allowance of appeal. *See Alderwoods*, 620 Pa. 214, 66 A.3d 763 (2013) *(per curiam)* ("The issues, *as stated by Petitioner*, are ..." (emphasis added)). As we have discussed above, Duquesne seeks a full-scale reversal of the Superior Court's ruling; the company obviously cannot be fairly surprised to see that this Court would engage in some treatment of such ruling on its actual terms. Along these lines, moreover, although we certainly would be constrained in our ability to *reverse* based on decisional aspects downplayed or overlooked by an appellant, *see, e.g., Konidaris v. Portnoff Law Assocs., Ltd.*, 598 Pa. 55, 63–64 n. 8, 953 A.2d 1231, 1235 n. 8 (2008)—which is a jurisprudential limitation that Justice Todd does not discuss in her propos-

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> al—an appellate court may *affirm* for any reason appearing as of record, *see, e.g., Commonwealth v. Moore,* 594 Pa. 619, 638, 937 A.2d 1062, 1073 (2007). This is precisely our approach here.
>
> We have also attempted to be conservative in terms of our discussion of the warnings matter. We do not foreclose the possibility that electric utilities might be treated differently from the wide range of entities and persons who are bound by the general duty not to create unreasonable risks of harm to others through affirmative conduct. We merely reiterate that no legal authority has been presented in this appeal to suggest that electric companies, in fact, presently enjoy such an exemption.

[7] For the sake of a rounder treatment of the arguments presented, we emphasize that Duquesne Light's and its *amici's* argumentation that the electric company lacked constructive notice of a dangerous condition inside the funeral home conflicts squarely with the expert opinion of Mr. Wunderley presented by Hirsch. In light of such a conflict, the utility cannot merely rest upon recitations of evidence supportive of its own position, since such differences present questions for a finder of fact and not a judge attending to a summary judgment motion. *See Summers*, 606 Pa. at 309–10, 997 A.2d at 1161. Furthermore, we will not consider, at a second-tier appellate-review stage, indirect attacks on Mr. Wunderley's opinion posed as an afterthought to Duquesne's advancement of its position that the service-point rule controls in all events. Rather, to challenge the engineer's opinion, in one fashion or another, Duquesne must deal more directly with the substance of Mr. Wunderley's reports on their salient terms. *Cf. Penn. DOT v. Patton,* 546 Pa. 562, 569, 686 A.2d 1302, 1305–06 (1997) ("The question of constructive notice was a major issue in this case, and there was substantial conflicting evidence on the issue. It was therefore not a question to be decided by the court [.]").[FN16]

> FN16. This Court has no idea how likely it is, when mixed-voltage utility lines fall proximate to a structure, that a power surge may impact the building's electrical system. Certainly, the probability may depend upon such factors as the position of the lines on the ground and the general efficacy of controls interposed in the electrical infrastructure, such as control switches and circuit breakers. *See, e.g.,* 17 AM.JUR. PROOF OF FACTS 2D § 643 (2014) (explaining that "[i]n view of the great destructive capabilities of electricity, it is to be expected that many controls would be imposed on distributors" and "[p]ole-top automatic switches and automatic circuit breakers have been in practical use since 1912"). According to Mr. Wunderley's report, however, the engineer considers a surge to be a materially likely outcome, and Duquesne Light's summary judgment effort simply was not orchestrated in a fashion which would reasonably put counter-considerations into play. The result is that the electric company and its *amici* have been relegated to countering Mr. Wunderley's opinion through mere denials in legal briefs (albeit premised in part on statements by Duquesne's own employees).

Finally, responding to Justice Eakin's position, the dissent is grounded on the ***42** notion that the *Milton* decision wholly relieved electric companies from the general common-law duty to take reasonable measures to avoid harming others through one's own affirmative conduct undertaken with actual or constructive knowledge of an unreasonable risk. As we strongly differ with such premise, *see, e.g., supra* note 11, we disagree just as firmly with the dissent's repeated assertion that our present opinion imposes a "new duty." Dissenting Opinion at 44–45 (Eakin, J.).[FN17] While the dissent offers

various inquiries about what actions Duquesne Light might have taken which would be considered reasonable under the circumstances, *see id.* at 44–45, these are precisely the sorts of considerations relegated to juries in cases in which a common-law duty exists and there are material factual questions concerning whether such obligation has been met. *See supra* note 17.

> FN17. This dissent also appears to regard the process of assessing the scope of common-law duties as a vehicle to render case-specific pronouncements of discrete obligations owed solely by particular litigants and applicable only in specific cases. *See* Dissenting Opinion, at 44–45 (Eakin, J.). To the contrary, however, common-law duties generally are stated in broad terms to apply to classes of cases, *accord Seebold,* 618 Pa. at 654, 57 A.3d at 1246, and ongoing expansions and contractions are to be carefully considered on a developed, legislative-type record capable of supporting the essential policy-based judgments, *see id.* at 658 & n. 24, 57 A.3d at 1248. The notion of an unwieldy process of perpetual, case-specific, common-law pronouncements is antithetical to the nature of the undertaking. Rather, generally, courts establish the landscape of common-law duties as a matter of law, and juries decide, in individualized circumstances presented and where there are material facts in dispute, whether such duties have been breached. *Accord Cabral v. Ralphs Grocery Co.,* 51 Cal.4th 764, 122 Cal.Rptr.3d 313, 248 P.3d 1170, 1176 (2011) (explaining that the legal duty determination centers on categories of negligent conduct, not the particular parties in narrowly-circumscribed sets of facts, and commenting that, "to base a duty ruling on the detailed facts of a case risks usurping the jury's proper function of deciding what reasonable prudence dictates under those particular circumstances.").

IV. Summary

Since Duquesne Light has failed to adequately confront the common-law duties invoked by Hirsch or the warnings dynamic tempering the Superior Court's ruling, we have little basis to assess whether the electric company might be accorded immunity from such duties, or whether a requirement to warn might be unreasonable. Against such background, we hold that the Superior Court did not err to the extent that it recognized a duty, on the part of an electric service provider, to take reasonable measures to avert harm in a scenario in which the utility has actual or constructive knowledge of a dangerous condition impacting a customer's electrical system, occasioned by fallen and intermixed electrical lines proximate to the customer's premises. Furthermore, we offer no opinion as to whether Duquesne Light had actual or constructive knowledge of an unreasonable risk in the present scenario, since the electric company's summary judgment effort was not staged in a fashion which would elicit an informed determination on such point.

Electric service providers are not insurers relative to the safety of their customers'***43** equipment, and subjugation to basic, common-law duties of care simply does not make them so.[FN18] To the extent they may seek relief from such obligations and immunity from conventional tort liability outside the sphere of existing judicial decisions, their arguments are best presented to the political branch.

> FN18. Rather, for better or for worse, and in the absence of considered, affirmative immunities, utilities are merely regulated to the exposure and uncertainty facing other entities and persons within our existing system of civil justice as it subsumes the range of common-law duties.

The order of the Superior Court is affirmed, albeit we find the intermediate court's *Althaus* assessment to have been unnecessary and express no opinion as to its sufficiency or merits.

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Former Justice McCAFFERY did not participate in the decision of this case.
Chief Justice CASTILLE and Justices BAER and STEVENS join the opinion.
Justice EAKIN files a dissenting opinion.
Justice TODD files a dissenting opinion.

Justice EAKIN, dissenting.

As I find the duty created by the Superior Court contravenes precedent from this Court—a duty that is unsupported by the allegations in appellee's complaint—I cannot join the majority in affirming that decision.

It has long been the law in Pennsylvania that an electric service provider is neither obligated to inspect its customers' equipment nor liable for damages relating thereto. *See Milton Weaving Co. v. Northumberland County Gas & Electric Co.,* 251 Pa. 79, 96 A. 135, 136–37 (1915); *see also Adams v. United Light, Heat & Power Co.,* 69 Pa.Super. 478 (1918).[FN1] Thus, while an electric utility must inspect its own equipment for defects or damage, its obligations end at the "service point," *i.e.,* where the lines connect to the customer's wiring system.

> FN1. Interestingly, the majority suggests *Adams* supports its holding—despite the fact that *Adams* reaffirmed *Milton* —because the court commented in *dictum* that it "may be" that an electric company should be liable if it furnishes electricity with *knowledge* of a defect in the wiring of a building. Majority Op., at 38–39 n. 11. The majority appears to couch this comment as a declaration by the Superior Court that its opinion (and, somehow, "implicitly," this Court's opinion in *Milton)* should not be read to preclude liability stemming from the "duty in issue"—presumably, the duty at issue in this case. However, we are not dealing here with the duty that accompanies *actual knowledge* of a defect in the customer's equipment—appellee did not plead actual knowledge in either complaint, and I have found no evidence of such knowledge in the record. Rather, appellee's claim is that Duquesne Light knew of a *risk* of harm that *could be* posed by reenergizing the system if an overcurrent condition had caused appellee's electric panel to fail, *i.e.,* it *should have known* of a dangerous condition inside the building. Respectfully, this case is far removed from the scenario the *Adams* court conjectured "may" give rise to liability.

Notwithstanding this well-established rule, the Superior Court found Duquesne Light had a duty to warn appellee of a possible dangerous condition with *appellee's* equipment. The majority affirms the Superior Court's holding, despite reaffirming that "maintenance and inspection responsibilities generally are divided at the service point, such that an electric service provider does not have a freestanding duty to inspect customer-owned electrical equipment and services on the premises' side." *Id.,* at 38 (citation omitted). Apparently, the majority finds the service-point rule inapplicable based on the allegation that Duquesne Light had *constructive* knowledge of an unreasonable risk of harm. *See* ****44** id.,* at 38. However, if an electric service provider's obligations end at the service point, then Duquesne Light owed appellee no duty to intuit hazards manifesting on appellee's side of that point. Whether couched as a duty to inspect, as appellee alleges, or the Superior Court's admittedly more "modest" duty to warn, any basis for liability stemming from the customer's own equipment runs afoul of the bright-line rule established by *Milton.*

To its credit, the Superior Court attempted to limit its holding to the peculiar facts of this case. Not only did it conduct an *Althaus*[FN2] analysis specific to these two parties, but within that analysis, it made clear that "[t]he consequences of imposing a duty upon Duquesne Light to inspect, or at a minimum, to warn a customer, *under the facts alleged,* does not place an undue burden upon Duquesne Light[,]" noting the funeral home was "

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'the only building ... attached to the broken pole.' " *Alderwoods (Pennsylvania), Inc. v. Duquesne Light Company*, 52 A.3d 347, 355 (Pa.Super.2012) (emphasis in original). The majority, however, broadens the scope of the intermediate appellate court's holding to include all electric service providers. *See* Majority Op., at 42–43 (imposing duty on electric service providers to take reasonable measures to avert harm where they have actual or constructive knowledge of dangerous condition impacting customer's electrical system caused by fallen power lines near property). There is also the problem that this new duty is not confined to single-pole situations, but applies when entire blocks of customers await return of service. I find this new duty not only unwise and generally unworkable, but also unwarranted, given appellee's failure to plead facts to support the newly created "failure to warn" theory, discussed *infra*.

> FN2. *Althaus v. Cohen*, 562 Pa. 547, 756 A.2d 1166 (2000).

The majority holds that electric service providers must "take reasonable measures to avert harm" when they have reason to know of a dangerous condition affecting the customer's electrical system. *Id.* While the majority appears to limit this obligation to a duty to warn, *see id.*, at 37–38, it fails to outline the peripheries of this new duty. To be sure, "reasonableness" is the standard by which allegedly negligent actions are judged, but it remains a duty ill-defined as it relates to the myriad situations electric service companies will face.

Some situations provide actual knowledge of a problem, but others do not. How is an electric company to know what are "reasonable measures to avert harm" when the problem is on property it does not control? The majority suggests Duquesne Light should have notified appellee so appellee could summon its own electrician, which is fine as far as it goes—but after it does so, must the company delay returning service to others until the customer finds and hires an electrician? Must the utility wait even longer while the electrician conducts the inspection before it reenergizes the system? The majority appears to assume every customer will receive the warning and immediately respond, but the delays inherent in these situations, shared by all affected customers, should not be exacerbated by placing the problems of each landowner in the lap of the utility. What if an affected customer cannot be reached at all? At what point is it reasonable for the utility to restore power to all despite the flaws in a customer's own equipment?

As the majority points out, "these are precisely the sorts of considerations relegated to juries[,]" *id.*, at 42, and perhaps a body of law will, eventually, develop on ***45** this new duty, as its ramifications are exposed by new cases. In the meantime, however, these uncertainties will result in significant delays in the restoration of power because if the electric service companies know they may be held liable for damages if they restore power prematurely, they will delay doing so until they are sure no such damage will occur. Depending on the severity and location of the storm that caused it, weather-related power outages impact thousands of customers, commercial and residential alike, in both urban and rural areas. While the outage here was relatively benign, as appellee was the only one connected to the affected pole, the new duty created is not limited to such situations—it must be applicable to all, and in most circumstances, a prolonged power outage would be not only a public inconvenience, but also a major safety concern.

In addition to these substantive objections, I must also disagree with the majority's decision on procedural grounds. As noted above, the "duty to warn" theory was not advanced by appellee. In the Superior Court, appellee did not argue Duquesne Light breached its duty to notify it of a potential hazard, instead arguing the trial court "should have concluded that Duquesne [Light] was under a duty to inspect [appellee]'s electrical apparatus before restoring power." Appellee's Superior Court Brief, at 41. Rather than confine its analysis to the theories proffered by the parties, the Superior Court *sua*

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sponte addressed a duty to warn appellee of possible dangers created by appellee's own equipment. In doing so, the court erred.

"[C]ourts should not recast a pleading in a way not intended by the parties." *Steiner v. Markel*, 600 Pa. 515, 968 A.2d 1253, 1260 (2009). "[W]hen a court decides issues *sua sponte*, it exceeds its proper appellate function and unnecessarily disturbs the processes of orderly judicial decisionmaking." *Id.* (citation omitted). The Superior Court ran afoul of these well-established principles of appellate review, and the majority does not account for this error.

Not only did the court err in addressing an issue not raised by the parties on appeal, but it reversed the trial court, in part, based on a theory that cannot be gleaned from appellee's pleadings. In its amended complaint, appellee claimed Duquesne Light was negligent for three things:

> (1) improperly reconnecting the lines between the funeral home and the distribution system;
>
> (2) failing to inspect the system; and
>
> (3) "failing and omitting to do those things which were necessary to preserve Hirsch's property and render said premises safe."

Amended Complaint, 5/28/10, at 4. Nowhere did appellee allege Duquesne Light was negligent for failing to warn the funeral home employees of a dangerous condition prior to reenergizing the system.[FN3] Moreover, if Duquesne Light's failure to warn appellee of a potential hazard is the basis for its negligence claim, it must allege and prove the failure to warn caused the harm it suffered, *i.e.*, that had it been notified, appellee would have inspected and remedied the defect prior to the company's reenergizing the system. Appellee's pleadings contained no such allegation.[FN4]

> FN3. In fact, the majority acknowledges as much. *See* Majority Op., at 40 n. 14 ("Hirsch did not specifically focus its pleadings and submissions in the common pleas court on warnings[.]").
>
> FN4. Appellee's expert did opine that "[n]otification to the funeral home by Duquesne Light would have resulted in a quick response from the funeral home employees[,]" noting the utility had appellee's contact information and appellee had an answering service for after-hours calls. Engineering Report, 8/23/10, at 7. Why these statements were included in an engineering report is unclear; moreover, power was restored at 3:00 a.m., and the expert makes no attempt to clarify when this "quick response" would have occurred. In any event, the report is not part of the amended complaint, and the statements therein were made in the context of Duquesne Light's failure to contact appellee to gain access so Duquesne Light could fulfill a duty to inspect, not a failure to notify appellee of a potential hazard.

***46** Both the Superior Court and the majority fail to clearly specify where they find support in appellee's pleadings for a cause of action against Duquesne Light for failing to warn it of a potentially dangerous condition manifesting in its panel box. Presumably, appellee's "failure to warn" claim is found embedded within its catchall allegation that Duquesne Light failed "to do those things which were necessary to preserve Hirsch's property and render said premises safe." Amended Complaint, 5/28/10, at 4. Since none of appellee's allegations relate to Duquesne Light's failure to warn, one must conclude this catchall allegation constitutes the gravamen of a negligence claim and sufficiently pleads the requisite elements of duty, breach, and causation. I know of no authority that would allow such a vague averment to serve as the factual predicate for establishing three of the four elements required for a legitimate negligence action.[FN5]

> FN5. Surely, in order to present evidence

> on Duquesne Light's failure to notify appellee of the alleged danger and how appellee would have responded to such a warning, appellee would need to amend its complaint to include factual averments pertaining to these issues. *See, e.g., Levin v. Van Horn*, 412 Pa. 322, 194 A.2d 419, 422 (1963) (finding general allegation charging nursing home staff with "fail[ing] to give proper, timely and adequate nursing care and attention" insufficient to allow evidence of a specific failure to notice symptoms of over-medication). However, as the majority notes, "[appellee] has not sought to amend the complaint although it has pursued a substituted theory of liability resting on different factual premises." Majority Op., at 40 n. 14. I find it troubling for an appellate court to adopt an unpresented theory of liability and remand with implicit instructions for the plaintiff to amend its complaint so it can pursue the theory the court devised on its behalf.

Accordingly, I dissent.

Justice TODD, dissenting.

While the majority has presented a thoughtful and reasonable legal analysis, I must respectfully dissent because the majority's affirmance of the Superior Court's decision is based on an issue outside of the scope of our grant of review.

The majority finds that Appellant—Duquesne Light—has a duty to take reasonable measures to avoid harm to one of its customers prior to restoring power, when it has actual or constructive knowledge of a danger created by an overvoltage triggered by downed power lines, and that this duty could entail warning the customer of the dangerous situation prior to restoring power to the customer's premises. I acknowledge that the Superior Court found Duquesne Light to have such a duty to warn under the particular circumstances of this case—in addition to a duty to inspect the premises of Appellee ("Hirsch Funeral Home")—prior to reconnecting power.

However, I deem it inappropriate to opine on the duty to warn at present, as we have not had the benefit of briefing from the parties with respect thereto—a situation which, in my view, is the probable result of the manner in which our Court structured the order granting allowance of appeal. Our Court granted allowance of appeal to address three specific questions, as stated by Duquesne Light:

> 1. Whether the Superior Court erred in imposing upon electric utilities a burdensome***47** and unprecedented **duty to enter customers' premises and inspect** customers' electrical facilities before restoring power after an outage?
>
> 2. Whether the Superior Court overlooked the deleterious effects of its ruling upon public health and safety, in that **by requiring utilities to inspect customers' premises before restoring power,** the new duty created by the Superior Court will delay utilities' efforts to restore power after storms and other outages?
>
> 3. Whether the Superior Court overlooked undisputed facts of record that undermine the rationale of its decision?

Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 620 Pa. 214, 66 A.3d 763–64 (2013) (order) (emphasis added).

The plain import of this order granting allowance of appeal was to inform the parties that our Court would be considering only the portion of the Superior Court decision in which it found Duquesne Light to have a duty to inspect its electrical equipment inside of the funeral home, prior to reconnecting power, because that equipment sustained potential damage due to the downed power lines. Thus, our order did not indicate that we would consider the secondary aspect of the Superior Court's holding that Duquesne Light had, in the alternative, a duty to warn Hirsch of the danger presented by its reconnection of electrical service to

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Hirsch's damaged electrical system. Consequently, I do not fault Duquesne Light for what the majority characterizes as a failure to adequately acknowledge this second basis of the Superior Court holding, and to address it in its brief. *See* Majority Opinion at 29 ("It is material to bear in mind from the outset, however, that [Duquesne Light's] portrayal of the issues fails to adequately address the Superior Court's formulation of electric-company duties, in the alternative, to ... *at a minimum, to warn a customer*, under the facts alleged." (emphasis original)); *id.* at 39 (observing that Duquesne Light "fails to deal squarely with" the issue of its duty to warn); *id.* at 42 ("Since Duquesne Light has failed to adequately confront the common law duties invoked by Hirs[c]h or the warnings dynamic tempering the Superior Court's ruling, we have little basis to assess whether the electric company might be accorded immunity from such duties, or whether a requirement to warn might be unreasonable."). Instead, I view such "failures" as reasonably attributable to the narrow parameters of our order granting allowance of appeal which did not encompass a duty to warn.[FN1]

> FN1. In its responsive brief, Hirsch referred to the Superior Court's finding of a duty to warn, and Duquesne Light acknowledged this in its reply brief. However, given the limited scope of our order granting allocatur, which did not obligate the parties to speak to this question, such cursory and superficial treatment does not, in my view, constitute the meaningful developed advocacy normally required by our Court when considering an issue on which we have expressly granted review.

Nevertheless, I consider the question of whether Duquesne Light had a duty to warn under these circumstances to be an important one and worthy of our review. For that reason, I would permit additional briefing by the parties on the failure to warn issue. This course of action would be consistent with our Court's long-standing adherence to the fundamental principle that every party to a matter must be given the full and fair opportunity to brief the issues that a court will ultimately be addressing. *See, e.g., Cranberry Twp. v. Builders Ass'n of Metropolitan Pittsburgh*, 533 Pa. 271, 621 A.2d 563, 565 (1993) (holding that it was error for the Commonwealth Court to deny reargument and rebriefing where the parties "never ***48** had an opportunity to address the matters upon which the court based its decision").[FN2]

> FN2. Although the majority suggests its course of action is consistent with the well-established legal principle that an appellate court may affirm a lower court ruling on any grounds, *See* Majority Opinion at 41 n. 15, I note that this jurisprudential maxim applies only when the specific issue on which we are affirming is properly before our Court. As a general matter, our Court does not ordinarily opine to issues which are outside our grant of allowance of appeal, and not fairly subsumed therein. *See, e.g., Six L's Packing Co. v. W.C.A.B.*, 615 Pa. 615, 44 A.3d 1148, 1151 n. 3 (2012) (refusing to consider aspect of ruling of WCJ which was beyond the scope of the grant of allocatur); *Commonwealth v. Watts*, 611 Pa. 80, 23 A.3d 980, 982 n. 2 (2011) (refusing to consider arguments relating to alleged errors in a prior decision of our Court, as they were not matters on which we granted allowance of appeal), *Malt Beverages Dist. Ass'n v. Pa.L.C.B.*, 601 Pa. 449, 974 A.2d 1144, 1152 n. 14 (2009) (refusing to consider arguments relating to factual considerations and the application of administrative agency rules which were outside of the scope of grant of allowance of appeal). We may do so, of course, where, as here, the issue is of substantial societal importance and there are vital interests of public safety at stake, but, in such circumstances, I deem it appropriate to direct additional briefing in order to

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> permit the parties to be heard on the issue. The question of whether Duquesne Light had a duty to warn the owners of the funeral home is, in my view, separate from the question of whether they had a duty to physically inspect the electrical equipment therein. Indeed, the question of whether Duquesne Light had a duty to warn under these circumstances was not specifically argued in the lower courts, and the prospect of the existence of such a duty was first broached in a brief paragraph in the Superior Court's opinion. Inasmuch as the competing views of the parties on this question have not been fully explored, either in the proceedings below or at present, I deem it beneficial, and in furtherance of the interests of fundamental fairness, to allow the parties the opportunity to provide a fuller, more developed exploration of this issue before our Court through additional briefing.

Accordingly, I must dissent.

Pa.,2014.
Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co.
106 A.3d 27, Util. L. Rep. P 27,290

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EXHIBIT “F”

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALDERWOODS (PENNSYLVANIA), INC. a wholly-owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,

Plaintiff,

v.

DUQUESNE LIGHT COMPANY,

Defendant.

CIVIL DIVISION

No. GD 09-14720

DEFENDANT'S MOTION TO BIFURCATE AND TRANSFER ACTION TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, WITH BRIEF IN SUPPORT AND PROPOSED ORDER

Filed on Behalf of the Defendant:
Duquesne Light Company

Counsel of Record for This Party:

Bradley S. Tupi, Esquire
Pa. Id. No. 28682

Erin M. Beckner, Esquire
Pa. Id. No. 94086

Jeremy V. Farrell, Esquire
Pa. Id. No. 316258

TUCKER ARENSBERG, P.C.
1500 One PPG Place
Pittsburgh, PA 15222
(412) 566-1212
(412) 594-5619 - FAX
btupi@tuckerlaw.com
ebeckner@tuckerlaw.com
jfarrell@tuckerlaw.com

LIT:583489-4 014657-139188

JUN 2 2015

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALDERWOODS (PENNSYLVANIA), INC. a wholly-owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,	CIVIL DIVISION No. GD 09-14720
Plaintiff,	
v.	
DUQUESNE LIGHT COMPANY,	
Defendant.	

MOTION TO BIFURCATE AND TRANSFER ACTION TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Defendant Duquesne Light Company ("Duquesne Light"), through its attorneys, Tucker Arensberg, P.C., files this Motion to Bifurcate and Transfer Action to the Pennsylvania Public Utility Commission ("PUC").

1. On January 9, 2009, an unidentified vehicle crashed into a utility pole on Forward Avenue in Pittsburgh. The pole carried Duquesne Light electrical lines. The crash broke the pole and caused several local buildings, including Plaintiff Burton L. Hirsch Funeral Home (the "Funeral Home"), to lose power. Soon after power was restored, a fire broke out in the Funeral Home.

2. The Funeral Home's insurer filed this subrogation action against Duquesne Light, claiming that the company's employees had incorrectly attached wires in restoring power to the funeral home. When discovery developed no evidence to support this theory, Plaintiff then claimed that Duquesne Light should have inspected the Funeral Home's internal electrical system before restoring service.

3. This case has a lengthy procedural and appellate history, which most recently resulted in the Pennsylvania Supreme Court issuing a decision about a utility's communications with its customers. Alderwoods v. Duquesne Light Co., 106 A.3d 27 (Pa. 2014). The implications of this ruling extend far beyond Plaintiff's claims, and will affect electrical utilities across Pennsylvania every time a summer thunderstorm, a winter snowstorm, or another circumstance interrupts electrical service.

4. The Supreme Court's holding provides no guidance to utility companies about several critical points. Questions arise concerning when and under what circumstances it is acceptable for the utility to delay restoration while contacting customers. The type and content of the warning, the acceptable response and who can make that response (owner, customer, tenant, etc.) are all open questions. The issues and questions that arise from the Supreme Court's decision directly affect the area of law that is overseen by the PUC. The circumstances in the field, the utility's communications to its customers, and the effect on response time and restorations, should be reviewed by the PUC.

5. These issues must be analyzed and resolved by the agency legislatively charged with making such determinations and with the special expertise needed to make such determinations -- the PUC.

6. The doctrine of primary jurisdiction provides that where an agency (like the PUC) has been established to handle a particular class of claims, a court should refrain from exercising jurisdiction until the agency has made a determination within the purview of its expertise, despite the fact that the court has concurrent jurisdiction over the claim. Elkin v. Bell Tel. Co. of Pa., 420 A.2d 371, 377 (Pa. 1980).

7. As the Pennsylvania Supreme Court has noted, "the PUC has long been recognized as the appropriate forum for the adjudication of issues involving the reasonableness, adequacy and sufficiency of public utility services." Elkin, 420 A.2d at 374; Duquesne Light Co. v. Monroeville Borough, 298 A.2d 252 (Pa. 1972).

8. Where the subject matter of an action is within the PUC's jurisdiction, and where it is a complex matter requiring special competence outside the experience of a judge or jury, the proper procedure is for the court to refer the matter to the PUC for a determination of liability. Elkin, 420 A.2d 371; Optimum Image, Inc. v. Phila. Elec. Co., 600 A.2d 553 (Pa. Super. 1991).

9. As noted above, this action involves complex and technical questions as to what circumstances are sufficient to put an electric utility on notice of a dangerous condition triggering a duty to warn a customer before restoring power, and the practical implementation of that warning. Because these issues relate to the reasonableness, efficiency, and safety with which Duquesne Light (and other Pennsylvania electric companies) must restore customers' power in light of the newly-created duty to warn, the need for the PUC's expertise is manifest.

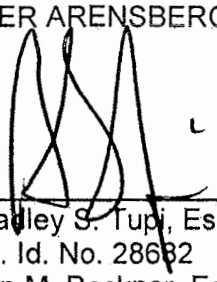
10. In cases where, as here, a customer sues a public utility for damages based upon the utility's purported failure to provide adequate, reasonable or safe service, the Pennsylvania Supreme Court has adopted a bifurcated procedure allowing the PUC to determine liability and, if necessary, the court to determine damages. See Elkin, 420 A.2d 371; Optimum Image, 600 A.2d 553.

11. Duquesne Light respectfully submits that, although this Court has jurisdiction over Plaintiff's claims, the question of liability should be transferred to the PUC for resolution.

WHEREFORE, Duquesne Light respectfully requests that this Court enter the attached Order bifurcating this matter and transferring it to the PUC for a determination of liability.

Respectfully submitted,

TUCKER ARENSBERG, P.C.



By: _____

Bradley S. Tupi, Esquire
Pa. Id. No. 28682
Erin M. Beckner, Esquire
Pa. Id. No. 94086
Jeremy V. Farrell, Esquire
Pa. Id. No. 316258

1500 One PPG Place
Pittsburgh, PA 15222

Counsel for Defendant,
Duquesne Light Company

LIT:583489-4 014657-139188

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALDERWOODS (PENNSYLVANIA), INC. a wholly-owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,	CIVIL DIVISION No. GD 09-14720
Plaintiff,	
v.	
DUQUESNE LIGHT COMPANY,	
Defendant.	

BRIEF IN SUPPORT OF MOTION TO BIFURCATE AND TRANSFER ACTION TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Defendant Duquesne Light Company ("Duquesne Light"), through its attorneys, Tucker Arensberg, P.C., files this Brief in Support of its Motion to Bifurcate and Transfer Action to the Pennsylvania Public Utility Commission ("PUC").

I. INTRODUCTION

This action involves the responsibilities an electrical company owes its customers prior to restoring service after a power outage, in light of a new duty the Pennsylvania Supreme Court imposed on such companies to provide "some sort" of warning about customers' internal electrical systems. Questions about when the electric company has notice sufficient to trigger a duty to warn and, if such duty is triggered, the scope of the warning, are well beyond the experience of the typical juror. For this reason, liability in this action should be determined by the PUC, the agency legislatively charged with regulating public utility service, and the agency with special expertise to answer the myriad practical questions that utility companies (and their customers) now face in light of the Supreme Court's decision.

II. BACKGROUND

On January 9, 2009, an unidentified vehicle crashed into a utility pole on Forward Avenue in Squirrel Hill. The pole carried Duquesne Light electrical lines. Alderwoods v. Duquesne Light Co., 106 A.3d 27, 29 (Pa. 2014). The crash broke the pole, and several local buildings lost power. Id. After learning of the outage, Duquesne Light sent a crew to replace the pole and associated electrical facilities. Id. Soon after power was restored to the Funeral Home, a fire ignited in the electrical panel in the basement. Id. at 29-30.

The Funeral Home brought this negligence action against Duquesne Light, originally claiming that Duquesne Light's employees failed to connect the electrical conductors properly, thereby triggering the fire. When discovery failed to support this claim, Plaintiff asserted that Duquesne Light should have inspected the Funeral Home's internal electrical equipment before restoring power.

Duquesne Light moved for summary judgment because it owed the Funeral Home no legal duty to enter or inspect the Funeral Home before restoring service and, therefore, as a matter of law it could not be found negligent. Id. at 31. Duquesne Light's argument rested on longstanding precedents establishing that the company only has a duty to inspect its own facilities and not the internal electrical systems of its customers. Id. This Court (Lutty, J.) granted Duquesne Light's motion for summary judgment. Id. at 33.

On appeal, the Superior Court reversed and, in so doing, imposed new duties to inspect and to warn prior to restoring service. Id. The Supreme Court granted Duquesne Light's petition for allowance of appeal.

The Supreme Court affirmed in part, holding that electrical service providers have a duty "to take reasonable measures to avert harm in a scenario in which the utility has actual or constructive knowledge of a dangerous condition impacting a customer's electrical system, occasioned by fallen and intermixed electrical lines proximate to the customer's premises." Id. at 42. According to the Supreme Court, this duty encompasses an obligation to provide "***some***

form of warning" to its customers prior to restoring power. Id. at 39 (emphasis added). The Court's opinion does not address what form such a warning should take, how it should be provided to customers who lose power, or any of the other practical issues associated with warning customers before restoring power. Id. at 44 (Eakin, J., dissenting).

The Supreme Court's opinion actually "broadens the scope of the intermediate appellate court's holding to include all electrical service providers" and raises the problem "that this new duty is not confined to single-pole situations, but applies when entire blocks of customers await return of service." Id. Justice Eakin's dissent cogently explained some of the practical problems that electrical service providers like Duquesne Light now face:

> The majority holds that electric service providers must "take reasonable measures to avert harm" when they have reason to know of a dangerous condition affecting the customer's electrical system. While the majority appears to limit this obligation to a duty to warn, it fails to outline the peripheries of this new duty. To be sure, "reasonableness" is the standard by which allegedly negligent actions are judged, but it remains a duty ill-defined as it relates to the myriad situations electric service companies will face.
>
> Some situations provide actual knowledge of a problem, but others do not. How is an electric company to know what are "reasonable measures to avert harm" when the problem is on property it does not control? The majority suggests Duquesne Light should have notified [Plaintiff] so [Plaintiff] could summon its own electrician, which is fine as far as it goes -- but after it does so, must the company delay returning service to others until the customer finds and hires an electrician? Must the utility wait even longer while the electrician conducts the inspection before it reenergizes the system? The majority appears to assume every customer will receive the warning and immediately respond, but the delays inherent in these situations, shared by all affected customers, should not be exacerbated by placing the problems of each landowner in the lap of the utility. What if an affected customer cannot be reached at all? At what point is it reasonable for the utility to restore power to all despite the flaws in a customer's own equipment?

Id., citations omitted.

Justice Eakin highlights some of the reasons for bifurcating this action and transferring the liability determination to the PUC.

III. ARGUMENT

This is not a simple negligence case of the sort a jury can readily comprehend. Plaintiff no longer contends that Duquesne Light misconnected wires in restoring power to the Funeral Home. Following two appellate decisions, the Funeral Home now asserts that Duquesne Light violated a newly-created duty to warn the Funeral Home of a potential danger in its internal electrical system before restoring service. The Supreme Court's new pronouncement will, of course, be binding upon all courts in the Commonwealth. It will apply beyond this action. Applying this new duty in individual cases will raise a plethora of practical questions that are unfamiliar to ordinary jurors.

If a new duty exists, the Supreme Court has not provided sufficient guidance to allow electric distribution companies to conduct themselves accordingly. Such guidance and regulation of the condition and character of service provided is appropriately reserved to the PUC.

The PUC has the special expertise to address such issues in a manner that best accommodates Duquesne Light's statutory obligation under the Public Utility Code to provide service that is "reasonably continuous and without unreasonable interruptions or delay." See 66 Pa. C.S.A. § 1501.

If this case were to be submitted to a jury, how would this Honorable Court charge the jury? What does the newly-imposed duty to provide "some sort" of a warning require, and how would a jury decide whether a warning was sufficient? The PUC is legislatively charged with defining the contours of the service that utility companies provide to their customers and alone possesses the special competence to answer these questions.

A. The Doctrine of Primary Jurisdiction Empowers the Court to Bifurcate This Action and Transfer It to the PUC to Determine Liability Issues Within Its Legislative Purview.

The doctrine of primary jurisdiction is a judicially-created rule that allows a trial court to transfer a case to the proper administrative agency where both the court and the agency have subject matter jurisdiction over the dispute. "[W]here the subject matter is within an agency's jurisdiction and where it is a complex matter requiring special competence, with which the judge or jury would not or could not be familiar, the proper procedure is for the court to refer the matter to the appropriate agency. Also weighing into the consideration should be the need for uniformity and consistency in agency policy and the legislative intent." Elkin v. Bell Tel. Co. of Pa., 420 A.2d 371, 377 (Pa. 1980).

The doctrine applies where the dispute "involves issues that are clearly better resolved in the first instance by the administrative agency charged with regulating the subject matter of the dispute." Ostrov v. I.F.T., Inc., 586 A.2d 409, 413 (Pa. Super. 1991). See also, Elkin, 420 A.2d 376 ("the doctrine [of primary jurisdiction] creates a workable relationship between the courts and administrative agencies wherein, in appropriate circumstances, the courts have the benefit of the agency's views on issues within the agency's competence"). The doctrine of primary jurisdiction therefore allows a trial court to refer a matter to the appropriate agency where the issues involved are within the jurisdiction of that agency and require its special competence.[1]

B. The PUC's Expertise Is Required to Create a Uniform and Consistent Approach to the New Duty Electric Service Providers Owe Their Customers Before Restoring Service.

This case revolves around the responsibilities a utility company owes to its customer before it can restore service. Such service-related issues are regulated by the PUC. The

[1] As described below, the appropriate procedure is to bifurcate the action, with the administrative agency (here, the PUC) deciding issues of liability. If liability is found, then the trial court would determine damages. See Optimum Image, Inc. v. Phila. Elec. Co., 600 A.2d 553, 555 (Pa. Super. 1991).

Supreme Court's ruling that electrical service providers have a duty to provide "some form" of warning to their customers is of little practical guidance to utility companies who now must confront these issues on a regular basis. A malleable, general tort duty established over time by an array of cases with different facts is insufficient to guide the behavior of the utility company towards its customers when power needs to be turned back on. For the sake of public safety and convenience, a consistent and uniform approach is needed. The PUC is best equipped and legislatively charged to decide this issue of critical importance and first impression.

The PUC is also adept at balancing the benefits to the public against the costs to the public. Since Duquesne Light's costs are paid for directly by its customers, the increased costs of doing business under this directive should be considered. In addition, a lack of clarity and certainty to the process increases the risk and leads to additional increased costs. These increased costs could be avoided if the PUC is given an opportunity to establish a clearly annunciated standard by which utilities can govern themselves.

According to the Pennsylvania Supreme Court, "the PUC has long been recognized as the appropriate forum for the adjudication of issues involving the reasonableness, adequacy and sufficiency of public utility services." Elkin, 420 A.2d at 374; Duquesne Light Co. v. Monroeville Borough, 298 A.2d 252 (Pa. 1972). The Public Utility Code, 66 Pa.C.S.A. § 101 et seq., places a broad range of subject matter under the control of the PUC, including the authority to enforce, execute and carry out the provisions of the Public Utility Code, and issues within the ambit of "services" that a utility company provides to its customers. 66 Pa.C.S.A. § 1501. "Service" is broadly defined by the Public Utility Code as follows:

> **Used in its broadest and most inclusive sense, including any and all acts done, rendered, or performed**, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities, or contract carriers by motor vehicle, **in the performance of their duties under this part to the patrons,** employees, other public utilities, and the public, as well as the interchange of facilities between two or more of them. . . .

66 Pa.C.S.A. § 102 (emphasis added). Under this broad grant of regulatory authority, clearly Duquesne Light's actions in this case are "services."

Section 1501 of the Public Utility Code provides:

> **Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service** and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees and the public. **Such service also shall be reasonably continuous and without unreasonable interruptions or delay.** Such services shall be in conformity with the regulations and orders of the commission.

66 Pa.C.S.A. §1501 (emphasis added). By commanding that electrical service be "reasonably continuous and without unreasonable interruptions or delay," the Public Utility Code creates a presumption in favor of restoring customers' power as soon as possible. It should be for the PUC -- the agency with the expertise governing the electric power industry -- and not a jury to reconcile utility companies' statutory duty to restore power promptly with the Supreme Court's newly-created duty to warn.

The circumstances under which an electrical service provider may restore "service" to its customer is within the PUC's jurisdiction, as are the duties that utility companies owe their patrons in providing their services -- which now include the newly-established duty to provide "some sort" of warning before resuming service. See 66 Pa.C.S.A. §§ 102, 1501. Under the Public Utility Code, electrical service companies like Duquesne Light have to provide their customers with efficient, safe, and reasonable service that is "reasonably continuous and without unreasonable interruptions or delay." 66 Pa. C.S.A. § 1501. The duty to warn created by the Supreme Court raises critically important practical questions as to how such a duty is to be fulfilled so that service can be resumed efficiently, safely, and without unreasonable delay.

The PUC currently has regulations that relate to the time required by a utility to restore service. In addition, the PUC tracks the amount of time that a residential service is restored after a storm. These requirements came under heightened review during hurricanes in recent years.

Requirements that mandate when a customer should NOT be restored due to communication barriers with the customer should be reviewed and decided by the PUC.

These are just a few of the issues that should be analyzed and resolved by the PUC, which is legislatively charged with making such determinations and has the special expertise needed to make them. Given the broad applicability of the Supreme Court's ruling, only the PUC can fashion a consistent and uniform approach that utility companies and their customers can rely upon in the real world. See Elkin, 420 A.2d at 377 (the "need for uniformity and consistency in agency policy" is a factor to be considered in determining whether to transfer a case to the PUC).

In DiSanto v. Dauphin Consol. Water Supply Co., 436 A.2d 197 (Pa. Super. 1981), the water company had a policy that it would not provide service to a customer unless the customer's service lines were constructed by an approved contractor. Id. at 446. In the customer's action in common pleas court, the water company filed preliminary objections arguing that the case was within the primary jurisdiction of the PUC. Id. The company argued that because the "contractual dispute is in essence a complaint concerning Dauphin's policy of requiring that installation of water service lines be done by its own approved contractors," which was a condition of extending water service, the subject contract was "inextricably interwoven with the reasonableness of Dauphin's method of providing utility service to the public -- a consideration which is uniquely within the province of the PUC." Id. Citing the prior versions of 66 Pa. C.S.A. §§ 102 and 1501, the court agreed and transferred the case to the PUC. Id. at 446-47.

This case demands a similar result. It deals with an electrical service provider's method of restoring service to its customers in light of the newly-created duty to warn. It requires a consideration of statutory mandates under the jurisdiction of the PUC and policy considerations within the unique province of the PUC. The PUC is the proper body to determine how to mesh the utility company's duty to provide service that is reasonably continuous and without

interruption with the duty to warn, while providing a consistent, uniform approach for Pennsylvania utility companies and their customers to rely upon in situations where power is lost. See DiSanto, 436 A.2d at 199 (when the claims against a utility company allege that reasonable and adequate service was not provided, "regardless of the form of the pleading in which the allegations are couched, it is for the PUC initially to determine whether the service provided by the utility has fallen short of the statutory standard required of it").

C. This Action Should Be Bifurcated and the Liability Portion Transferred to the PUC, with this Honorable Court Retaining Jurisdiction to Determine Damages, If Necessary.

Because the PUC has no authority to award damages, the Pennsylvania Supreme Court has adopted a bifurcated procedure where damages are sought in a matter involving the special expertise of the PUC. Elkin, 420 A.2d 371. Under this bifurcated procedure, the issue of liability is transferred to and decided by the PUC. If necessary, the trial court thereafter determines damages:

> Once the administrative tribunal has determined the issues within its jurisdiction, then the temporarily suspended litigation may continue, guided in scope and direction by the nature and outcome of the agency determination.

Elkin, 420 A.2d at 377. See also Optimum Image, 600 A.2d at 555 (bifurcated procedure provides for the issue of liability to be initially decided by the PUC after which the court of common pleas considers the issue of damages, if appropriate).

Although it acknowledged that the courts of common pleas have jurisdiction to entertain suits for damages against public utilities, and that the PUC cannot award damages, the Supreme Court rejected the notion that simply by seeking damages a plaintiff could avoid PUC jurisdiction. Elkin, 420 A.2d at 375. Rather, the Court approved the workable relationship created by the doctrine of primary jurisdiction, which allows courts to have the benefit of an agency's views on issues within the agency's competence. Id. at 376.

In the instant case, the doctrine of primary jurisdiction requires this Court to utilize the bifurcated procedure. The main issues of this case are within the PUC's jurisdiction and require the PUC's special expertise for proper determination. Therefore, while this Court has jurisdiction over Plaintiff's claims, the question of liability should be transferred to the PUC for resolution. If the PUC determines that Duquesne Light is liable, the case will be transferred back to this Honorable Court for a determination of damages.

IV. CONCLUSION

For the foregoing reasons, Defendant Duquesne Light Company respectfully requests that this Honorable Court bifurcate this action and transfer the question of liability to the Pennsylvania Public Utility Commission. A suitable order follows.

Respectfully submitted,

TUCKER ARENSBERG, P.C.

By: _____

Bradley S. Tupi, Esquire
Pa. Id. No. 28682
Erin M. Beckner, Esquire
Pa. Id. No. 94086
Jeremy V. Farrell, Esquire
Pa. Id. No. 316258

1500 One PPG Place
Pittsburgh, PA 15222

Counsel for Defendant,
Duquesne Light Company

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALDERWOODS (PENNSYLVANIA), INC. a wholly-owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,	CIVIL DIVISION No. GD 09-14720
Plaintiff,	
v.	
DUQUESNE LIGHT COMPANY,	
Defendant.	

ORDER OF COURT

AND NOW, this _____ day of _____, 2015, upon consideration of Defendant's Motion to Bifurcate and Transfer Action to the Pennsylvania Public Utility Commission, Plaintiff's opposition to the motion, and the arguments of counsel, it is hereby ORDERED, ADJUDGED and DECREED that the Motion is GRANTED. This case is hereby bifurcated, and the liability portion of this case is transferred to the Pennsylvania Public Utility Commission ("PUC") for determination. This Court shall retain jurisdiction of the damages component of this action, which shall be stayed pending a liability determination by the PUC.

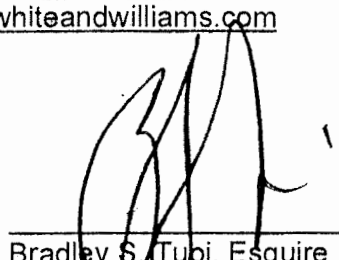
BY THE COURT:

_____,J.

CERTIFICATE OF SERVICE

I certify that I am this 25th day of June, 2015, serving a true and correct copy of Duquesne Light Company's Motion to Bifurcate and Transfer Action to the Pennsylvania Public Utility Commission upon the counsel indicated below by email and by First Class U.S. Mail, postage prepaid, addressed as follows:

Peter T. Parashes, Esquire
Alan J. Charkey, Esquire
White and Williams, LLP
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103
parashesp@whiteandwilliams.com
charkeya@whiteandwilliams.com



Bradley S. Tupi, Esquire
Erin Beckner Conlin, Esquire
Jeremy V. Farrell, Esquire

LIT:583489-4 014657-139188

EXHIBIT “G”

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY

ALDERWOODS (PENNSYLVANIA), INC., a wholly owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,

Plaintiff

v.

DUQUESNE LIGHT COMPANY,

Defendant.

CIVIL DIVISION

Docket No. GD-09-14720

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO BIFURCATE AND TRANSFER ACTION TO PENNSYLVANIA PUBLIC UTILITY COMMISSION

Code No. 009 – Trespass-Other

Filed on behalf of Plaintiff, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home

Counsel of record for Plaintiff:

Peter T. Parashes, Esquire
Pennsylvania Identification No. 22436
Alan J. Charkey, Esquire
Pennsylvania Identification No. 77556

WHITE AND WILLIAMS LLP
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103
Telephone: (215) 864-7178

Party Represented by Out-of-County Counsel Only

JURY TRIAL DEMANDED

CERTIFICATE OF SERVICE

I, Alan J. Charkey, Esquire, hereby certify that on August 14, 2015, I served a copy of Plaintiff's Response in Opposition to Defendant's Motion to Bifurcate and Transfer Action to Pennsylvania Public Utility Commission, with the memorandum of law and proposed order in support thereof, upon counsel of record for the Defendant, Duquesne Light Company, Bradley S. Tupi, Esquire and Erin Beckner Conlin, Esquire, Tucker Arensberg, P.C., 1500 One PPG Place, Pittsburgh, PA 15222, by first class U.S. mail, postage prepaid, and by e-mail to btupi@tuckerlaw.com and ebeckner@tuckerlaw.com.

WHITE AND WILLIAMS LLP

_____

By: Alan J. Charkey, Esquire

Attorneys for Plaintiff,
Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home

WHITE AND WILLIAMS LLP
By: Peter T. Parashes, Esquire
Identification Number 22436
By: Alan J. Charkey, Esquire
Identification Number 77556
One Liberty Place
1650 Market Street, Suite 1800
Philadelphia, PA 19103
(215) 864-7000

Attorneys for Plaintiff,
Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home

ALDERWOODS (PENNSYLVANIA), INC., a wholly owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME v. DUQUESNE LIGHT COMPANY	IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY CIVIL DIVISION Docket No. GD-09-14720

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO BIFURCATE AND TRANSFER ACTION TO PENNSYLVANIA PUBLIC UTILITY COMMISSION

Plaintiff, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home ("Plaintiff"), by and through its attorneys White and Williams LLP, hereby responds in opposition to Defendant's Motion to Bifurcate and Transfer Action to Pennsylvania Public Utility Commission:

1. Admitted.

2. Denied as stated. Although Plaintiff initially alleged that Duquesne Light had incorrectly re-wired Plaintiff's building, upon restoration of service, Plaintiff revised its theory of Duquesne Light's liability in response to deposition questions posed to Duquesne Light's linemen asking them what they thought had caused the fire and upon the report of Plaintiff's expert.

Moreover, in a larger sense, Plaintiff's original theory of liability remains correct. Duquesne Light's reattaching of wires to Plaintiff's building several hours after the motor vehicle accident – with the actual or constructive knowledge that the building's electrical equipment had been compromised by overvoltage damage during the motor vehicle accident and could not withstand the restoration of service – caused Plaintiff's damages.

3. Admitted in part and denied in part. Plaintiff admits that this case has a lengthy procedural and appellate history, which resulted in the Supreme Court's opinion, reported at 106 A.3d 27 (Pa. 2014). Plaintiff denies that the Supreme Court's opinion will have anything approaching the dire consequences suggested by Duquesne Light.

4. Denied. Plaintiff denies that the Supreme Court has provided utility companies no guidance about several critical points. In fact, the Supreme Court held that "the undertaking of reasonable efforts to avert harm prior to restoring power—at least some form of warning as envisioned by the Superior Court—represents a relatively modest measure in the face of an unreasonable risk of which a utility knows or should be aware." 106 A.3d at 39.

In its opinion reversing the granting of summary judgment in this case, the Superior Court more directly refuted Duquesne Light's implication that the duty articulated here by our appellate courts would have calamitous consequences:

> The consequences of imposing a duty upon Duquesne Light to inspect, or at a minimum, to warn a customer, under the facts alleged, does not place an undue burden upon Duquesne Light. Here, the funeral home was "the only building [sic] electric services attached to the broken pole." . . . . Viewing the record in a light most favorable to Hirsch, this factor weighs in favor of imposing a duty upon Duquesne Light to warn the single affected customer (Hirsch), and to inspect at least its own equipment prior to restoring electrical service.

52 A.3d 347, 355 (Pa. Super. 2012). (Citation omitted.) Contrary to Duquesne Light's doomsday scenario, both appellate courts held that a duty under the facts alleged would not entail any obligation to entire swaths of neighborhoods but rather involve inspection or warning to only the customers directly attached to broken utility poles.

The averment is further denied for a far more fundamental reason. It betrays a fundamental misunderstanding of the role of the jury in civil litigation. It is not for the Supreme Court, or the P.U.C., to say how a utility should carry out an obligation to warn under a certain set of circumstances. It is for the jury. Juries determine what is reasonable under the circumstances. Stewart v. Motts, 539 Pa. 596, 654 A.2d 535 (1995). See also S.S.J.I. 13.10 (Civ) ("You must decide how a reasonably careful person would act *under the circumstances established by the evidence in this case*."; emphasis added.) and DeFrancesco v. Western Pennsylvania Water Co., 499 Pa. 374, 378, 453 A.2d 595, 597 (1982), citing to Elkin v. Bell Telephone Co. of Pennsylvania, 491 Pa. 123, 420 A.2d 371 (1980), and holding that claims of fire damage resulting from low water pressure are to be submitted to a jury, not the P.U.C.

With respect to the role of the jury in this case, the Supreme Court has already weighed in. In response to the concerns of dissenting Justice Eakin as to the implementation of the Court's opinion – exactly the same concerns of Duquesne Light in the instant motion – the Court opined that "these are precisely the sorts of considerations relegated to juries in cases in which a common-law duty exists and there are material factual questions concerning whether such obligation has been met." Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 106 A.3d at 42. The Court's opinion is the law of the case and cannot be altered through the instant motion. In re Estate of Elkins, 32 A.3d 768, 776 (Pa. Super. 2011).

Under circumstances strikingly similar to those of this case, the court in Poorbaugh v. Pennsylvania Public Utility Commission, 666 A.2d 744 (Pa. Cmwlth. 1995), held that "With the assistance of expert testimony, *there is no reason why a judge or jury could not determine whether* West Penn [the utility defending against a customer's underlying claim] *had breached a duty of care* owed to Poorbaugh [the injured customer] by allegedly causing an oversurge of electricity which resulted in a fire." Id. at 748. (Emphasis added.) Moreover, in Wivagg v. Duquesne Light Co., 73 D. & C.2d 694 (C.P. Allegheny County 1975), which like Poorbaugh and the instant case also involved a claim of overvoltage damage, Duquesne Light let the issue of negligence go to the jury rather than divert it to the P.U.C. Duquense Light did not then complain that the jury was incapable of determining whether Duquesne Light had breach a duty to the customer. Moreover, in Wivagg the jury found in *favor* of Duquesne Light on the plaintiff's negligence count. Id. at 694.

The averment is also fundamentally mistaken in that it presupposes that an administrative law judge at the P.U.C. could utilize *this* case to answer questions about restoration of service following overvoltage incidents under *other* circumstances not present in this case. Under our judicial system such questions are utterly irrelevant here, and would be inadmissible. If these questions need to be examined by the P.U.C., as Duquesne Light submits, it must be in a regulation-setting forum altogether divorced from this case and from the A.L.J. See also paragraph 9, *infra*.

5. Denied. The courts of this Commonwealth have unilaterally rejected the premise of Paragraph 5. Whether on one particular occasion Duquesne Light acted reasonably vis-a-vis its customer must be decided by the court and jury, not by the P.U.C. See Poorbaugh at 748. See also Vertis Group, Inc. v. Pennsylvania Public Utility Commission, 840 A.2d 390, 397 n. 15 (Pa.

Cmwlth. 2003), in which the court, citing to Poorbaugh, once again underscored that a customer's claim for damage arising from the discrete act of a utility on a discrete occasion must go to the jury, and not to the P.U.C.

6. Denied. The doctrine of primary jurisdiction says no such thing. In the following passage, the Elkin court distinguished the types of claims which may be routed to the P.U.C. from the types of claims which cannot be and which must be adjudicated by judge and jury without the P.U.C.'s assistance:

> [W]here the subject matter is within an agency's jurisdiction and where it is a complex matter requiring special competence, with which the judge or jury would not or could not be familiar, the proper procedure is for the court to refer the matter to the appropriate agency. Also weighing in the consideration should be the need for uniformity and consistency in agency policy and the legislative intent. Where, on the other hand, the matter is not one peculiarly within the agency's area of expertise, but is one which the courts or jury are equally well-suited to determine, the court must not abdicate its responsibility.

Elkin, 491 Pa. at 134, 420 A.2d at 377.

Since Elkin was decided thirty-five years ago, Pennsylvania's appellate courts have refined this distinction. In a claim which *did* belong before the P.U.C., involving a customer's allegations of inconsistent voltage over a prolonged time period, the Superior Court noted that "Unlike the claims in DeFrancesco and Schriner,[1] we find these allegations encompass more complex, technical claims and that *the alleged problem* with the supply of electrical power *continued over an extended period of time*." Optimum Image, Inc. v. Philadelphia Elec. Co., 410 Pa. Super. 475, 484, 600 A.2d 553, 557 (1991). (Emphasis added.)

In Poorbaugh, the court held reference of the matter to the P.U.C. to be undesirable because the claim at issue there

[1] Schriner v. Pennsylvania Power & Light Co., 348 Pa. Super. 177, 501 A.2d 1128 (1985), holding that a customer's claim of damage to dairy cows caused by stray voltage was to be adjudicated by the court and jury, not the P.U.C.

> does not involve the need for uniformity and consistency of agency policy. Rather, it focuses only upon the supply of electricity to *one* West Penn *customer on one particular occasion*. As noted in Feingold, questions about the adequacy of utility service to an entire geographic area, rather than to one individual, could present problems which should be addressed by the PUC. Feingold v. Bell of Pennsylvania, 477 Pa. 1, 10 - 11 n. 7, 383 A.2d 791, 796 n. 7. However, Poorbaugh's claim is that of one individual, not an entire geographic area. In addition, the present case does not raise any questions about how West Penn's services or facilities affect the general public.

666 A.2d at 751. (Emphasis added.) The Poorbaugh court further distinguished the case before it from cases requiring the P.U.C.'s assistance because the claim before it did not involve a tariff. Id. at 751.

Like Poorbaugh, the instant case entails no ongoing service problem over an extended period of time, no claim regarding a large geographic area,[2] and no claim about violation of a tariff. This case instead involves *one* claim of damage from *one* particular act, or failure to act, on *one* occasion by *one* affected customer. As a matter of Pennsylvania law, this case cannot be diverted to the P.U.C.

7. Admitted in part and denied in part. It is admitted that the Supreme Court so stated in Elkin, a case in which the plaintiff-customer alleged having received inadequate telephone service. It is denied that the quoted excerpt from Elkin pertains to the instant case. Elkin involved no claim of physical damage to, or destruction of, the plaintiff-customer's property from an act or omission occurring on one particular occasion.

8. Denied as an oversimplification and misstatement of Elkin.

> We must enter a caveat, however. Courts should not be too hasty in referring a matter to an agency, or to develop a "dependence" on the agencies whenever a controversy remotely involves some issue

[2] "[N]o structure other than Hirsch's was connected directly to the downed pole." Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 106 A.3d 27, 29 (Pa. 2014)

> falling arguably within the domain of the agency's "expertise." "Expertise" is no talisman dissolving a court's jurisdiction. Accommodation of the judicial and administrative functions does not mean abdication of judicial responsibility. The figure of the so-called "expert" looms ominously over our society - too much so to permit the roles of the court and jury to be readily relinquished absent a true fostering of the purposes of the doctrine of primary jurisdiction.

Elkin, 491 Pa. at 134, 420 A.2d at 377. Optimum Image, Inc. v. Philadelphia Elec. Co., 410 Pa. Super. 475, 600 A.2d 553 (1991) involved a customer's complaint about irregular current over a period of time and is not on point, as the court in Poorbaugh, *supra*, noted. 666 A.2d at 751.

9. Denied. The averment is deficient in two respects. First, by statute the P.U.C. is charged with overseeing the "reasonableness, adequacy and sufficiency" of service, DeFrancesco v. Western Pennsylvania Water Co., 499 Pa. 374, 377, 453 A.2d 595, 596 (1982), not the "reasonableness, efficiency and safety" of service as averred by Duquesne Light. Second, when a utility's disregard of safety causes physical damage to a customer's property, the case is properly the province of a jury, not the P.U.C. The appellate courts of this Commonwealth have unanimously rejected the position that a customer's claim for physical damage arising from a single act or failure to act arises from the reasonableness, adequacy or sufficiency of service. In the fire-damage-from-low-water-pressure case before it, the Supreme Court stated that:

> The controversy now before us . . . is not one in which the general reasonableness, adequacy or sufficiency of a public utility's service is drawn into question. Resolution of appellant's claims depended upon no rule or regulation predicated on the peculiar expertise of the PUC, no agency policy, no question of service or facilities owed the general public, and no particular standard of safety or convenience articulated by the PUC. Rather, the gravamen of the allegations at trial was within the prescan [*sic*] authority of the courts, i.e., that the utility *negligently* failed to provide service required.
>
> We addressed precisely this sort of situation in Elkin*:*

> Where ... the matter is not one peculiarly within the agency's area of expertise, but is one which the courts or jury are equally well-suited to determine, the court must not abdicate its responsibility. In such cases, it would be wasteful to employ the bifurcated procedure of referral [to the PUC], as no appreciable benefits would be forthcoming.
>
> 491 Pa. at 134, 420 A.2d at 377 (footnote omitted). Involved here is not a question of whether appellants were entitled to water under agency regulations, or whether a certain general rule governing water pressure was disregarded. Resolving the essential question of whether the utility failed to perform its mandated duties requires no recondite knowledge or experience and falls within the scope of the ordinary business of our courts.

DeFrancesco v. Western Pennsylvania Water Co., 499 Pa. at 377 - 78, 453 A.2d at 597. (Emphasis in original.)

In Schriner v. Pennsylvania Power & Light Co., 348 Pa. Super. 177, 501 A.2d 1128 (1985), the plaintiffs-customers sought damages from their electric utility for injury to dairy cows allegedly caused by stray voltage energizing the ground, causing a decrease in milk production. The Superior Court rejected the defendant's assertion that the matter belonged before the P.U.C.:

> In the instant case, while the Schriners have ostensibly sued from the position of consumers, the complaint contains allegations which only remotely deal with the reasonableness, adequacy, efficiency or safety of the services, facilities or rates provided by Appellant, PP & L. Among the specific allegations of negligence, the Schriners have stated that PP & L, having exclusive control of its distribution system, allowed voltage to escape therefrom in large enough quantity to adversely affect the Schriners' dairy cattle; that PP & L failed to advise the Schriners of corrective measures which could have been taken by them to eliminate the stray voltage problem; and that PP & L undertook to advise and supervise corrective measures to eliminate the problem and did so negligently, allowing the problem to continue and eventually injure the Schriners. *These are traditional concepts of negligence which only tangentially address the reasonableness, adequacy and sufficiency of the electric service being provided by PP & L.*

PP & L argues, further, that the problem of "stray voltage" is so complex that it requires the special expertise of the PUC. However, *resolution of the Schriners' claims depends upon no rule or regulation predicated upon the peculiar expertise of the PUC, no agency policy, no question of service or facilities owed the general public, and no particular standard of safety or convenience articulated by the PUC.* DeFrancesco v. Western Pennsylvania Water Company, 499 Pa. 374, 378, 453 A.2d 595, 597 (1982).

The gravamen of the Schriners' complaint is that they sustained injury due solely to the negligence of PP & L in failing to deal with the problem of stray electricity on the Schriners' farm. It is important to note that a complaint brought before the PUC, seeking damages, may not result in an award by that body, even should the PUC determine the complaint to be meritorious, as the PUC lacks authority to make such an award. See Feingold v. Bell of Pennsylvania, supra. This was the type of situation addressed by our supreme court in Elkin, supra, where it was stated:

> Where ... the matter is not one peculiarly within the agency's area of expertise, but is one which the courts or jury are equally well-suited to determine, the court must not abdicate its responsibility. In such cases, it would be wasteful to employ the bifurcated procedure of referral [to the PUC], as no appreciable benefits would be forthcoming.

Elkin, supra, 491 Pa. at 134-35, 420 A.2d at 377 (footnote omitted).

Thus, we agree with the trial court that

> [w]hile the expertise of a member of the PUC would be helpful, this area of litigation is no more complex than many others which come before the Court. With the assistance of expert testimony, there is no reason why a judge or jury could not become familiar with the alleged problem of stray voltage injury to dairy cattle.

Opinion, 5/31/83 at 4. And, we agree with Elkin that it would be wasteful to employ a bifurcated procedure of referral to the PUC, as that body is incapable of providing an adequate remedy should the Shriners' complaint be found to have merit. Resolving the essential question of whether PP & L failed to perform what is alleged to have been an affirmative duty requires no special knowledge or experience and falls within the scope of the ordinary business of our courts. See DeFrancesco v. Western Pennsylvania Water Company, supra, 499 Pa. at 378, 453 A.2d at 597.

Schriner v. Pennsylvania Power & Light Co., 348 Pa. Super. at 182 - 83, 501 A.2d at 1130 - 31. (Emphasis added.) Like Schriner, this case would only have to return to the Court of Common Pleas to award damages if the P.U.C. found Plaintiff's claim to have merit. Such an odyssey would be wasteful and would further delay compensation of Plaintiff - compensation for which Plaintiff has already waited six years. As in Schriner, the jury here would be more than competent to hear a case involving intermixed wires. In Wivagg, *supra*, Duquesne Light did not feel otherwise. See also Poorbaugh, discussed above. In Poorbaugh, the Commonwealth Court rejected any relevance of Optimum Image, *supra*, cited here by Duquesne Light, because Optimum Image did not involve damage occurring on a specific occasion to a specific customer by a specific act or omission.

In its motion, Duquesne Light all but admits that damage claims resulting from intermixed wires are *not* within the P.U.C.'s expertise by seeking to have the P.U.C. establish *new* regulations regarding restoration of service after intermixed wires damage customer's equipment. Indeed, review of Title 52, Chapter 57 of the Pennsylvania Code, on Electric Service, confirms that the P.U.C.'s expertise is limited to matters such as recording accidents self-reported by regulated utilities, of service voltage, of service frequency, of maintaining records of system load and operation, of meter testing and of pole removal. A jury is better equipped to handle damage claims such as Plaintiff's than is the P.U.C.

What Duquesne Light actually seeks here is the imposition of new regulations governing claims such as Plaintiff's for accidents occurring in the future. Such an effort is properly directed to the P.U.C.'s Director of Regulatory Affairs, not to the P.U.C.'s Office of Administrative Law Judge. Moreover, an electric utility cannot seek to impose new regulations retroactively on an existing damage claim. Only regulations *that do not impair substantive*

rights may be applied retroactively. Pittsburgh Palisades Park, LLC v. Pennsylvania State Horse Racing Commission, 844 A.2d 62, 68 n. 2 (Pa. Cmwlth. 2004). (Emphasis added.) Here, Duquesne Light's quest for new regulations would have an impermissible, retroactive effect.

10. Denied. As shown above, the Supreme Court has adopted no such mechanism categorically. Where, as here, the customer seeks damages for physical injury arising from a specific instance of conduct, where the jury has the ability to understand the issues as presented by experts, where the issues are outside the expertise of the P.U.C., and where the trial court would be needed to assess damages anyway, our appellate courts have spoken with one voice: the matter must be handled by the trial court and the jury. Feingold; Elkin; DeFrancesco; Poorbaugh; Schriner. It is for a jury, not an administrative law judge, to say what would have been reasonable under the circumstances, Stewart v. Motts, *supra*, especially when, as here, the utility concedes that the administrative body has no regulations on point. See also the Supreme Court's opinion above as to the role of the jury. Alderwoods, 106 A.3d at 42.

11. Denied. For all the foregoing reasons, the question of liability cannot be transferred to the P.U.C.

WHEREFORE, Plaintiff, Alderwoods (Pennsylvania), Inc., respectfully requests that the motion be denied.

Respectfully submitted,

WHITE AND WILLIAMS LLP

_____

By: Alan J. Charkey, Esquire
Attorneys for Plaintiff,
Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home

Date: August 14, 2015

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

ALDERWOODS (PENNSYLVANIA), INC., a wholly owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME v. DUQUESNE LIGHT COMPANY	Docket No. GD-09-14720

ORDER

AND NOW, this _____ day of _____, 2015, upon consideration of Defendant's Motion to Bifurcate and Transfer Action to the Pennsylvania Public Utility Commission, and the response in opposition by Plaintiff, Alderwoods (Pennsylvania), Inc., it is hereby ORDERED that the Motion is DENIED.

BY THE COURT:

_____, J.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

No. GD-09-14720

ALDERWOODS (PENNSYLVANIA), INC., a wholly owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME

v.

DUQUESNE LIGHT COMPANY

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO BIFURCATE AND TRANSFER ACTION TO PENNSYLVANIA PUBLIC UTILITY COMMISSION

Peter T. Parashes, Esquire
Attorney Identification No. 22436
Alan J. Charkey, Esquire
Attorney Identification No. 77556
WHITE AND WILLIAMS LLP
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103
(215) 864-7000

Attorneys for Plaintiff,
Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home

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I. INTRODUCTION

In a motion which ignores the opinion of our Supreme Court and relies largely on that of a dissenting Justice, Defendant, Duquesne Light Company, moves to have the Pennsylvania Public Utility Commission, rather than a court and jury, determine Duquesne Light's liability for Plaintiff's damages. The motion disregards, and fails to address, numerous controlling decisions of our appellate courts holding that no such transfer could possibly take place. Under our system, a court and jury, rather than the P.U.C., must decide the question of whether Duquesne Light's actions or omissions on the day of Plaintiff's fire were unreasonable. Moreover, the motion implicitly concedes that the P.U.C. lacks the expertise to decide Duquesne Light's liability.

The instant motion is more noteworthy for what it doesn't say than what it does. In its opinion above, the Supreme Court repeatedly chastised Duquesne Light for failing to address the issues raised by its appeal. Here, again, Duquesne Light has confronted the issue of primary jurisdiction by completely avoiding any meaningful discussion of the doctrine. The paucity of any reference in the motion to most of the controlling decisions governing the issue raises the question of whether the motion has been filed for an improper purpose – of simply delaying the case.

The clincher here, however, comes from the Supreme Court itself. In its opinion issued last December, the Supreme Court already dispensed with Duquesne Light's argument that reference to the P.U.C. is needed to give Duquesne Light guidance, and additional certainty, in the event of overvoltage incidents. According to the Supreme Court, duties are necessarily expressed in general terms. It is for the jury to decide how that duty is to be exercised.

The Supreme Court also faulted Duquesne Light for attempting to litigate a policy

question without providing any developed record for a court to review. Duquesne Light makes another attempt to litigate policy here. The Supreme Court has already spoken to the inadequacy of such attempts.

The Supreme Court's opinion is the law of the case and must control the outcome of this motion.

II. PROCEDURAL HISTORY

Any briefing of the issues here would be incomplete without a discussion of this case's history, with respect to past briefings on the doctrine of primary jurisdiction and with respect to the Supreme Court's majority opinion on the nature of Duquesne Light's longstanding, well-established, *old* duty.

A. Prior Briefings on Primary Jurisdiction

The issue of primary jurisdiction and the P.U.C.'s authority has been raised on three previous junctures during the life of this case, primarily by Plaintiff.

Duquesne Light was actually the first party to raise the issue in December 2010, in its reply brief in support of its motion for summary judgment. At that time, Plaintiff's Amended Complaint consisted of three negligence counts and two warranty counts. Duquesne Light moved for summary judgment on the grounds that it had been under no duty to Plaintiff. Plaintiff responded to the motion by pointing out that even if Duquesne Light were correct, Plaintiff's warranty counts would remain undisturbed, and the action would stand, because warranty does not entail a duty. In its reply brief, for the first time, Duquesne Light contended that any remaining warranty claims should be transferred to the P.U.C. under the doctrine of primary jurisdiction. For support, Duquesne Light quoted from 66 Pa.C.S. §1501, which states that "Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable

service and facilities. . . ." Duquesne Light also cited Feingold v. Bell of Pennsylvania, 477 Pa. 1, 383 A.2d 791 (1977) for the same proposition, without any discussion of the facts of the case.

Before the Superior Court, in its brief, to refute the contention that the P.U.C. has any expertise in deciding claims for damages, Plaintiff as appellant addressed the issue of primary jurisdiction *in extenso*. In its Superior Court brief, Plaintiff cited, and discussed, Feingold; Elkin v. Bell Telephone Company of Pennsylvania, 491 Pa. 123, 420 A.2d 371 (1980); DeFrancesco v. Western Pennsylvania Water Company, 499 Pa. 374, 453 A.2d 595 (1982); Schriner v. Pennsylvania Power and Light Company, 348 Pa. Super. 177, 501 A.2d 1128 (1985) and Poorbaugh v. Pennsylvania Public Utility Commission, 666 A.2d 744 (Pa. Cmwlth. 1995). See Exhibit "A" attached, an excerpt of Plaintiff's Superior Court brief. In its brief in response, Duquesne Light did not address Plaintiff's argument and cited none of the foregoing cases.

In its brief filed with the Supreme Court, Duquesne Light, as appellant, did not raise the issue of primary jurisdiction. Of the cases cited in the preceding paragraph, Duquesne Light mentioned Poorbaugh, but only to contest the Superior Court's opinion that it was factually similar to the instant case. In its *amicus* brief filed in support of Duquesne Light, the P.U.C. also addressed Poorbaugh, in an attempt to distinguish its facts, noting, without discussion, that Poorbaugh concerned primary jurisdiction. It cited Elkin only for the proposition that an administrative agency's experience and expertise should be utilized in areas with which judges and juries have little familiarity, without any discussion of the facts of Elkin. It concluded its brief by complaining that "the Superior Court intruded on the PUC's statutory duty to regulate service duties of public utilities," without explaining why. See Exhibit "B" attached, a copy of the P.U.C.'s *amicus* brief.

In its response to Duquesne Light's Supreme Court brief, and the *amicus* brief by the

P.U.C., Plaintiff, as appellee, again took issue with the proposition that the P.U.C. has any particular expertise in matters demanding damages. Again Plaintiff briefed the doctrine of primary jurisdiction. Again Plaintiff discussed Feingold, Elkin, DeFrancesco, Schriner and Poorbaugh. See Exhibit "C" attached, an excerpt of Plaintiff's Supreme Court brief.

In its reply brief to the Supreme Court, Duquesne Light did not address the issue.

B. The Supreme Court's Opinion

In its opinion, issued on December 15, 2014, reported at 106 A.3d 27, the Supreme Court declined to directly address the question of primary jurisdiction because the issue had been raised only by the P.U.C. as *amicus* and not by Duquesne Light itself, and because the issue was beyond the scope of its grant of *allocatur*. The court did, however, state that regulation of Plaintiff's claim as proposed by the P.U.C. was in derogation of the common law.[1]

In its opinion, the Court had a lot more to say about the nature of common law duties by an electric utility. The Court made it abundantly clear that, notwithstanding Duquesne Light's aspersions to the contrary, there is nothing new about the duty which Duquesne Light owed to Plaintiff on the date of the fire. Duquesne Light had insisted that it owed Plaintiff no duty beyond the service point to Plaintiff's building. The Court disagreed.

> [W]e find that the service-point rule has its limits and does not wholly supplant the salient common-law duty.
>
> * * *
>
> [W]e have no intention of exempting a company administering in a dangerous commodity from well-recognized duties of care, in the

[1] The PUC's position that we should leave this matter to its regulatory province is entirely detached from the summary judgment motion Duquesne Light filed and the limited review which was granted by this Court. As such, in the present context, we decline to consider the Commission's ability to diminish general common-law duties on the part of utilities.

106 A3d at 39, n. 13.

> face of actual or constructive knowledge of a danger. Moreover, the undertaking of reasonable efforts to avert harm prior to restoring power—at least some form of warning as envisioned by the Superior Court—represents a relatively modest measure in the face of an unreasonable risk of which a utility knows or should be aware.

Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 106 A.3d 27, 38 – 39 (Pa. 2014).

In response to the Superior Court's application of the five-part test for the existence of a duty under Althaus v. Cohen, 562 Pa. 547, 756 A.2d 1166 (2000), the Supreme Court found the test unnecessary because Duquesne Light's duty here was "longstanding."

> As to the aspects of this litigation centered on the Althaus factors, we find these to be more relevant to the creation of new duties than to the vindication of existing ones. It is not necessary to conduct a full-blown public policy assessment in every instance in which a longstanding duty imposed on members of the public at large arises in a novel factual scenario. Common-law duties stated in general terms are framed in such fashion for the very reason that they have broad-scale application. To the extent that Hirsch wishes to pursue a theory at trial that a warning would have represented a reasonable measure to avert harm in the circumstances presented, nothing appropriately raised in this appeal would prevent it from doing so.

Id. at 40 – 41.

In its opinion, the Court refuted Justice Eakin's dissenting opinion, upon which Duquesne Light bases the instant motion, in which Justice Eakin erroneously accused the majority of having recognized a new duty:

> While Duquesne Light and the dissenting opinion authored by Mr. Justice Eakin invoke the Milton[2] line of decisions, they point to no statement or developed reasoning appearing in that opinion or any other Pennsylvania case reflecting an informed, judicial holding that the general service-point demarcation obviates the common-law duty to take reasonable measures to avert harm to others occasioned by one's own conduct in the face of actual or constructive knowledge of an unreasonable risk. Indeed, the

[2] Milton Weaving Co. v. Northumberland County Gas & Electric Co., 251 Pa. 79, 96 A. 135 (1915)

> Superior Court in Adams[3] apprehended that this question simply is not addressed through application of the general service-point rule as articulated in Milton. See Adams, 69 Pa. Super. at 486, 1918 WL 2272, at *4 ("It may be that an electric company should be held responsible for injuries to third parties caused by defective wiring of a building if it continued to furnish current after knowledge of the defect in the wiring, but that question we are not here called upon to decide."). In this regard, moreover, Hirsch aptly references the principle that the holdings of the decisions must be read against their facts. See, e.g., Maloney v. Valley Med. Facilities, Inc., 603 Pa. 399, 411, 984 A.2d 478, 485–86 (2009).

106 A.3d at 39 n. 11.

Toward the end of the opinion, the Court clearly rejected Justice Eakin's dissenting assertion that duties need to be narrowly articulated to address all possible contingencies and all potentially divergent facts and that such questions cannot be posed to a jury – a position mirrored by Duquesne Light in the instant motion:

> Finally, responding to Justice Eakin's position, the dissent is grounded on the notion that the Milton decision wholly relieved electric companies from the general common-law duty to take reasonable measures to avoid harming others through one's own affirmative conduct undertaken with actual or constructive knowledge of an unreasonable risk. As we strongly differ with such premise . . . , *we disagree just as firmly with the dissent's repeated assertion that our present opinion imposes a "new duty.*" Dissenting Opinion at 44–45 (Eakin, J.).[17] While the dissent offers various inquiries about what actions Duquesne Light might have taken which would be considered reasonable under the circumstances, see id. at 44–45, *these are precisely the sorts of considerations relegated to juries in cases in which a common-law duty exists and there are material factual questions concerning whether such obligation has been met.* See supra note 17.[4]
>
> [17] This dissent also appears to regard the process of assessing the scope of common-law duties as a vehicle to render case-specific pronouncements of discrete obligations owed solely by particular litigants and applicable only in specific cases. See Dissenting Opinion, at 44–45 (Eakin, J.). To the contrary, however, common-law duties generally are stated in broad

[3] Adams v. United Light, Heat & Power Co., 69 Pa. Super. 478 (1918).

> terms to apply to classes of cases, accord Seebold [v. Prison Health Services, Inc.], 618 Pa. [632] at 654, 57 A.3d [1232 (2012)] at 1246, and ongoing expansions and contractions are to be carefully considered on a developed, legislative-type record capable of supporting the essential policy-based judgments, see id. at 658 & n. 24, 57 A.3d at 1248. The notion of an unwieldy process of perpetual, case-specific, common-law pronouncements is antithetical to the nature of the undertaking. Rather, generally, courts establish the landscape of common-law duties as a matter of law, and juries decide, in individualized circumstances presented and where there are material facts in dispute, whether such duties have been breached. Accord Cabral v. Ralphs Grocery Co., 51 Cal.4th 764, 122 Cal.Rptr.3d 313, 248 P.3d 1170, 1176 (2011) (explaining that the legal duty determination centers on categories of negligent conduct, not the particular parties in narrowly-circumscribed sets of facts, and commenting that, "to base a duty ruling on the detailed facts of a case risks usurping the jury's proper function of deciding what reasonable prudence dictates under those particular circumstances.").

106 A.3d at 41 – 42. (Emphasis added.)

In one of its final observations, the Court acknowledged one of the eternal constants of the civil justice system – uncertainty.

> Electric service providers are not insurers relative to the safety of their customers' equipment, and subjugation to basic, common-law duties of care simply does not make them so.[18]
>
> [18] Rather, for better or for worse, and in the absence of considered, affirmative immunities, utilities are merely regulated to the exposure and uncertainty facing other entities and persons within our existing system of civil justice as it subsumes the range of common-law duties.

Id. at 42 – 43.

At several points in its opinion, the Court faulted Duquesne Light for failing to confront the question of duty. It noted that Duquesne Light had failed to address the underlying duty or the Superior Court's discussion of whether Duquesne Light could have issued Plaintiff a warning:

> Duquesne Light's treatment of the underlying duty dovetails with its approach to the warning aspect—quite simply, the electric company fails to deal squarely with either. Based on such a deficient presentation, we have no intention of exempting a company administering in a dangerous commodity from well-recognized duties of care, in the face of actual or constructive knowledge of a danger.

Id. at 39.

In response to Duquesne Light's arguments that as a matter of public policy a utility could not provide the sort of relief after a service outage sought by Plaintiff, the Court responded that Duquesne Light had not provided it with a proper record upon which to respond:

> [W]e have reaffirmed that the treatment of these sorts of policy arguments should be on a developed record, including empirical information, which would support an informed, legislative-type judgment-subject, of course, to constitutional limitations. See Lance [v. Wyeth], [624 Pa. 231], . . . , 85 A.3d [434] at 454 [(2014)].
>
> It is therefore material that Duquesne Light never set out, in its summary judgment effort, to establish such a record or case. Rather, its position from the outset has been premised on the assumption that the longstanding service-point rule represents the be-all-and-end-all of an electric utility's obligations touching upon the customer side of the service point.

Id. at 40.

In its summary, the Court once again noted that "Duquesne Light has failed to adequately confront the common-law duties invoked by Hirsch or the warnings dynamic tempering the Superior Court's ruling. . . ." Id. at 42.

III. ARGUMENT

The motion should be denied. It is wholly inconsistent with the great weight of Pennsylvania law – law which Duquesne Light never addresses. It should be denied because in our system a jury, not an administrative law judge, applies the facts before it to a broadly-stated

duty and then decides what is reasonable under the circumstances. It should be denied because the P.U.C. does not have the expertise to adjudicate this dispute, a fact which the motion implicitly recognizes, and because any retroactive application of new regulations by the P.U.C. would be inconsistent with Pennsylvania law. It should be denied because it fails to even minimally advise the Court of the relevant case law. And it should be denied because the law of the case doctrine vitiates its very basis *ab initio*.

A. The P.U.C. Cannot Adjudicate Claims for Damages.

The motion should be denied because under well-settled Pennsylvania law, the P.U.C. cannot hear a claim for damages arising on a single occasion from a single act or omission. There is now an abundance of case law holding that claims for damages arising from the furnishing of service need not be routed to the P.U.C. and are more appropriately handled by the courts.

The seminal case in this area is Feingold v. Bell of Pennsylvania, 477 Pa. 1, 383 A.2d 791 (1977). In Feingold, the plaintiff sued Bell of Pennsylvania for damages caused, *inter alia*, by its alleged failure to maintain a recording telling callers that his firm's telephone number had been changed. Thus, callers could not reach the plaintiff and allegedly believed that his firm had gone out of business. Bell filed preliminary objections, contending that the claims had to be resolved by the P.U.C. instead. The trial court agreed, and dismissed the complaint.

The Supreme Court reversed. It noted that the statutes governing the P.U.C. did not enable the commission to award damages – a conclusion supported by various sections of the Public Utility Law.[5]

It is clear that the remedial and enforcement powers vested in the

[5] Act of May 28, 1937, P.L. 1053, 66 P.S. § 110, *et seq*. (1959 & Supp.1977-78), since repealed and supplanted by the Public Utility Code, 66 Pa.C.S. § 101, *et seq.* See Pennsylvania Power Co. v. Township of Pine, 926 A.2d 1241, 1251 n. 21 (Pa. Cmwlth. 2007) (noting repeal).

> PUC by the Public Utility Law were designed to allow the PUC to enforce its orders and regulations but not to empower the PUC to award damages or to litigate a private action for damages on behalf of a complainant. The rule requiring exhaustion of administrative remedies is not intended to set up a procedural obstacle to recovery; the rule should be applied only where the available administrative remedies are adequate with respect to the alleged injury sustained and the relief requested. In the instant case, appellant could not have been made whole by the PUC, thus the administrative remedy was not "adequate and complete."

477 Pa. at 10 – 11, 383 A.2d at 795 – 96. (Citations and footnotes omitted.)

Since deciding Feingold, the Supreme Court has clarified its holding in two subsequent cases. As in Feingold, the plaintiff in Elkin v. Bell Telephone Company of Pennsylvania, 491 Pa. 123, 420 A.2d 371 (1980), also alleged that his business suffered damages because of poor service. The Court affirmed that in light of Feingold, the P.U.C. still has a place in deciding customer disputes. "The PUC has long been recognized as the appropriate forum for the adjudication of issues involving the reasonableness, adequacy and sufficiency of public utility services." 491 Pa. at 128 – 29, 420 A.2d at 374. (Citations omitted.) However,

> In spite of the PUC's rather extensive statutory responsibility for ensuring the adequacy, efficiency, safety and reasonableness of public utility services, we recognized in Feingold . . . that the Courts of Common Pleas have original jurisdiction to entertain suits for damages against public utilities based upon asserted failure to provide adequate services, even though the subject matter of the complaint is encompassed by the Public Utility Law.

491 Pa. at 129 – 30, 420 A.2d at 375. Even so, the Elkin court, acknowledging the technical expertise of administrative agencies under the doctrine of "primary jurisdiction," established a mechanism in which the trial court could refer an issue to an administrative agency for adjudication so as to utilize "the agency's special experience and expertise in complex areas with which judges and juries have little familiarity." 491 Pa. at 132, 420 A.2d at 376. After such a referral, once the agency has spoken on the issue, it binds the parties and the court upon the

case's return to the trial court. 491 Pa. at 133, 420 A.2d at 376 – 77.

The Court cautioned that trial courts should not hesitate to retain jurisdiction and should not too easily resort to the referral procedure.

> Courts should not be too hasty in referring a matter to an agency, or to develop a "dependence" on the agencies whenever a controversy remotely involves some issue falling arguably within the domain of the agency's "expertise." "Expertise" is no talisman dissolving a court's jurisdiction. Accommodation of the judicial and administrative functions does not mean abdication of judicial responsibility. The figure of the so-called "expert" looms ominously over our society – too much so to permit the roles of the court and jury to be readily relinquished absent a true fostering of the purposes of the doctrine of primary jurisdiction.
>
> Therefore, where the subject matter is within an agency's jurisdiction and where it is a complex matter requiring special competence, with which the judge or jury would not or could not be familiar, the proper procedure is for the court to refer the matter to the appropriate agency. Also weighing in the consideration should be the need for uniformity and consistency in agency policy and the legislative intent. Where, on the other hand, the matter is not one peculiarly within the agency's area of expertise, but is one which the courts or jury are equally well-suited to determine, the court must not abdicate its responsibility. In such cases, it would be wasteful to employ the bifurcated procedure of referral, as no appreciable benefits would be forthcoming.

491 Pa. at 134 – 35, 420 A.2d at 377. (Footnote omitted.) Because in Elkin, the plaintiff claimed damages arising from Bell's directory assistance and from its allegedly deficient WATS service, the Court found the involvement of the P.U.C. to have been appropriate. "The competence of the agency in these areas is substantially greater than the court's, and the need for uniformity of policy is apparent." 491 Pa. at 135, 420 A.2d at 377.

In DeFrancesco v. Western Pennsylvania Water Company, 499 Pa. 374, 453 A.2d 595 (1982), the Court again addressed the question of the proper forum for damages claims against public utilities. DeFrancesco concerned a fire loss which was exacerbated by allegedly low

water pressure. Plaintiffs initially obtained verdicts against the water company in the Allegheny County Court of Common Pleas. On appeal, the Superior Court reversed, holding that the P.U.C. had had proper jurisdiction over the claims.

The Supreme Court reversed again. It reasoned that because the P.U.C. was charged with enforcing its rules and regulations, cases involving the alleged disregard of those rules should be referred to the P.U.C. 499 Pa. at 377, 453 A.2d at 596 – 97.

> The controversy now before us, however, is not one in which the general reasonableness, adequacy or sufficiency of a public utility's service is drawn into question. Resolution of appellant's claims depended upon no rule or regulation predicated on the peculiar expertise of the PUC, no agency policy, no question of service or facilities owed the general public, and no particular standard of safety or convenience articulated by the PUC. Rather, the gravamen of the allegations at trial was within the prescan [*sic*] authority of the courts, i.e., that the utility *negligently* failed to provide service required.
>
> * * *
>
> Involved here is not a question of whether appellants were entitled to water under agency regulations, or whether a certain general rule governing water pressure was disregarded. Resolving the essential question of whether the utility failed to perform its mandated duties requires no recondite knowledge or experience and falls within the scope of the ordinary business of our courts.[5]
>
> [5.] We note that, just as the form of an action or the manner in which is titled does not automatically vest jurisdiction in the courts, the mere fact that a party to an action qualifies as a regulated public utility does not divest the courts of original jurisdiction. It is not to magic words, but to the essence of the underlying claims, we look in determining where jurisdiction properly lies.

499 Pa. at 378, 453 A.2d at 597. (Emphasis in original.)

The issue of P.U.C. adjudication of claims against utilities was also the subject of Schriner v. Pennsylvania Power and Light Company, 348 Pa. Super. 177, 501 A.2d 1128 (1985),

in which the Court considered the question of whether the plaintiffs' claims for damages arising from stray voltage should have been referred to the P.U.C.

The Superior Court held that they should not have been referred. It held that the plaintiffs' claims only tangentially concerned the "reasonableness, adequacy, efficiency or safety of the services, facilities or rates provided by Appellant, PP&L." 348 Pa. Super. at 182, 501 A.2d at 1130, alluding, without attribution, to Section 1501, "Character of service and facilities,"[6] of the Public Utility Code, 66 Pa.C.S. § 101, *et seq.* Citing DeFrancesco, it found that resolution of the claims "depends upon no rule or regulation predicated upon the peculiar expertise of the PUC, no agency policy, no question of service or facilities owed the general public, and no particular standard of safety or convenience articulated by the PUC." Id. It then held because the P.U.C. could not award damages, referral to the P.U.C. would have been pointless.

> . . . [W]e agree with Elkin that it would be wasteful to employ a bifurcated procedure of referral to the PUC, as that body is incapable of providing an adequate remedy should the Schriners' complaint be found to have merit. Resolving the essential question of whether PP & L failed to perform what is alleged to have been an affirmative duty requires no special knowledge or experience and falls within the scope of the ordinary business of our courts.

348 Pa. Super. at 183, 501 A.2d at 1131.

In Poorbaugh v. Pennsylvania Public Utility Commission, *supra*, the Court found that with respect to the plaintiff's claims, the P.U.C.'s expertise would not have been helpful.

> [W]hile the subject matter of Poorbaugh's complaint against West Penn is encompassed by the Utility Code, we conclude that this

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6 Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. . . . .

66 Pa.C.S. § 1501.

> case is not a complex matter requiring the special expertise of the PUC in order to resolve it. As such, the present case is distinguishable from Elkin. With the assistance of expert testimony, there is no reason why a judge or jury could not determine whether West Penn had breached a duty of care owed to Poorbaugh by allegedly causing an oversurge of electricity which resulted in a fire.
>
> The present case is also distinguishable from Elkin in that it does not involve the need for uniformity and consistency of agency policy. Rather, it focuses only upon the supply of electricity to one West Penn customer on one particular occasion. As noted in Feingold, questions about the adequacy of utility service to an entire geographic area, rather than to one individual, could present problems which should be addressed by the PUC. Feingold v. Bell of Pennsylvania, 477 Pa. 1, 10-11 n. 7, 383 A.2d 791, 796 n. 7. However, Poorbaugh's claim is that of one individual, not an entire geographic area. In addition, the present case does not raise any questions about how West Penn's services or facilities affect the general public. See DeFrancesco. In weighing the various considerations articulated by our Supreme Court with respect to the primary jurisdiction of the PUC, we conclude that jurisdiction over Poorbaugh's claims should have been vested in the trial court, not the PUC.

666 A.2d at 751.

In its opinion, the Commonwealth Court distinguished the facts of Optimum Image, Inc. v. Philadelphia Electric Co., 410 Pa. Super. 475, 600 A.2d 553 (1991), in which the Superior Court approved the transfer of claims to the P.U.C. and which Duquesne Light cites in its motion here. According to the Commonwealth Court,

> In that case, Optimum Image sued Philadelphia Electric Company (PECO), claiming that its film processing machines and its cash register had been damaged by power surges that were a result of voltage fluctuations in PECO's electrical service. Optimum Image's complaint alleged that PECO delivered, over an extended period of time, unreasonably defective electrical power to its business premises. Also at issue were matters relating to the adequacy of the equipment used by PECO to investigate the problems that were experienced by Optimum Image as well as PECO's compliance with the tariff it had filed with the PUC. Our Superior Court concluded that the expertise of the PUC was needed to decide Optimum Image's claims. Optimum Image, 410

> Pa. Superior Ct. at 483, 600 A.2d at 557.
>
> The Superior Court stated that, unlike the claims in DeFrancesco, the allegations of Optimum Image encompassed complex, technical claims relating to problems with the supply of electrical power over an extended period of time. Id. at 484, 600 A.2d at 557. Moreover, Optimum Image had also taken issue with the equipment used by PECO to investigate its problems as well as with PECO's compliance with its tariff. Id.
>
> While Optimum Image is similar in some respects to the present case, we conclude that there are several important differences which make Optimum Image distinguishable. First, Poorbaugh's claims focus upon one specific instance of electrical problems, not electrical problems over an extended period of time. Second, as has already been discussed, we do not believe that Poorbaugh's case involves complex, technical issues. Unlike Optimum Image, Poorbaugh has not raised any issues relating to tariffs which would certainly require the expertise of the PUC. Given these considerations, we conclude that Optimum Image is not persuasive in the present case.

Poorbaugh, 666 A.2d at 751. Simply put, Poorbaugh's claim for damages belonged before the trial court, not the P.U.C.

Following Poorbaugh, the Commonwealth Court again reviewed the doctrine of primary jurisdiction in Vertis Group, Inc. v. Pennsylvania Public Utility Commission, 840 A.2d 390 (2003). Like the plaintiff in Optimum Image, the plaintiff in Vertis Group complained of an irregular power supply over a period of time. The court held the complaint properly transferred to the P.U.C.:

> We note that our Superior Court's decision in Optimum Image, Inc. was instructive on this issue, as the facts of that case are quite similar to the facts of the present case before this Court. Under this similar factual pattern, the Superior Court in Optimum Image, Inc. also held that bifurcation was appropriate. Moreover, in Poorbaugh, we distinguished the facts of that case from the facts of Optimum Image, Inc., noting that the former involved one specific instance of electrical problems whereas the latter, similar to the facts of the present case, involved electrical problems over an extended period of time. Further, unlike Optimum Image, Inc., we noted that the petitioner in Poorbaugh had "not raised any issues

> relating to tariffs which would certainly require the expertise of the PUC." Poorbaugh, 666 A.2d at 751.

Vertis Group at 397 n. 15.

The lesson from the foregoing cases is clear. If the complainant alleges quality-of-service problems such as continually deficient telephone service or ongoing power surges or repeatedly irregular voltage, affecting a widespread geographic area, or violations of the service provider's tariff, the complaint should be routed to the P.U.C. However, if the complainant alleges physical harm caused by a service provider on one particular occasion, the matter must remain in the trial court and must be submitted to the jury.[7]

In the instant case, Hirsch does not alleged in its Second Amended Complaint that Duquesne Light violated P.U.C. rules or regulations, nor that Duquesne Light's actions risked harm to the general public nor that Duquesne Light failed to abide by its tariff. This case has never concerned the "general reasonableness, adequacy or sufficiency of a public utility's service." DeFrancesco, 499 Pa. at 377, 453 A.2d at 596. This case involves no issue "falling arguably within the domain of the agency's 'expertise.'" Elkin, 491 Pa. at 134, 420 A.2d at 377. Instead, Hirsch's action "focuses only upon the supply of electricity to one" Duquesne Light "customer on one particular occasion." Poorbaugh at 751. The issues in this case regarding negligence and the recognition of a duty to inspect or warn are manifestly outside the scope of the P.U.C.'s authority and expertise. DeFrancesco. Quite simply, there is nothing technical for the P.U.C. to address.

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[7] DiSanto v. Dauphin Consolidated Water Supply Company, 291 Pa. Super. 440, 436 A.2d 197 (1981), cited by Duquesne Light in its brief at 8 – 9, does not command a different result. DiSanto involved a dispute between the developer of a new housing subdivision and the local water utility over the cost of installing new water lines to service the houses. The court held that the dispute was properly referred to the P.U.C. DiSanto could not be factually further removed from the instant case. "[T]he holdings of . . . decisions must be read against their facts." Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 106 A.3d at 39.

B. There Is No New Duty. Transfer of the Case Would Usurp the Role of the Jury.

The motion must also be denied because it is for the jury, not the P.U.C., to determine what was reasonable under the circumstances.

The need for a jury is particularly apparent given that the entire premise of the motion – that the Supreme Court announced a new duty in its opinion above – is fundamentally false. As noted above, the Supreme Court's opinion has made it abundantly clear to anyone who reads it that the duty applicable to Duquesne Light on the date of the fire was "longstanding," 106 A.3d at 40, and thus quite old. Constant repetition of "new" in a motion does not make it so, *particularly when the Supreme Court has already rejected that very assertion*. 106 A.3d at 42.[8]

Under the law, duties are stated broadly, rather with such narrow specificity, tailored to one, unique set of facts, so as to render the duty inapplicable to other circumstances. 106 A.3d at 39 n. 11 and 40 – 41. Moreover, in disputing Justice Eakin's dissenting opinion, which questioned the effect of the Court's opinion and upon which the instant motion is based, the Court reaffirmed the role of the jury. "*[T]hese are precisely the sorts of considerations relegated to juries in cases in which a common-law duty exists and there are material factual questions concerning whether such obligation has been met.*[9] Alderwoods, 106 A.3d at 42. (Emphasis added.)

The Court's opinion above, both as to the nature of the duty and the role of the jury, is the law of the case and must be applied to the resolution of the pending motion.

> The law of the case doctrine sets forth various rules that embody the concept that a court involved in the later phases of a litigated

[8] Moreover, in light of the Supreme Court's opinion, it is puzzling why in its brief, Duquesne Light even now asserts that "it owed the Funeral Home no legal duty to enter or inspect the Funeral Home before restoring service and, therefore, as a matter of law it could not be found negligent." Brief at 2.

[9] See the larger passage containing this quotation at pages 6 – 7, *supra*.

> matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter.
>
> > Among the related but distinct rules which make up the law of the case doctrine are that: (1) upon remand for further proceedings, a trial court may not alter the resolution of a legal question previously decided by the appellate court in the matter. . . .

In re Estate of Elkins, 32 A.3d 768, 776 (Pa. Super. 2011), quoting Ario v. Reliance Insurance Co., 602 Pa. 490, 980 A.2d 588, 597 (2009) (first paragraph) and Commonwealth v. Starr, 541 Pa. 564, 664 A.2d 1326, 1331 (1995) (second paragraph). (Quotation marks omitted.)

Because there is no new duty, there is nothing for the P.U.C. to consider. On the date of the fire, Duquesne Light was under a longstanding duty to avoid harm to a customer's property when Duquesne Light had either actual or constructive notice of a problem with the customer's equipment following an overvoltage incident. Under our judicial system, *how* Duquesne Light was to discharge that longstanding duty is to be decided by the jury. Alderwoods, 106 A.3d at 42. In light of Duquesne Light's confusion as to what would have been reasonable under the circumstances, the jury must address the question, not an administrative agency.

> Ordinary care is the care a reasonably prudent person would use under the circumstances presented in this case. It is the duty of every person to use ordinary care not only for his own safety and the protection of his property, but also to avoid serious injury to others. *What constitutes ordinary care varies according to the particular circumstances and conditions existing then and there.* The amount of care required by law must be in keeping with the degree of danger involved.

Stewart v. Motts, 539 Pa. 596, 606 – 07, 654 A.2d 535, 540 (1995), quoting with approval the jury instructions of the trial court below. (Emphasis added.) "The charge properly instructed the jury that the level of care required changed with the circumstances. The charge also informed the jury that the level of care required increased proportionately with the level of danger in the

activity." 539 Pa. at 607, 654 A.2d at 540. See also S.S.J.I. 13.10 (Civ) ("You must decide how a reasonably careful person would act *under the circumstances of this case*"; emphasis added.) See also Alderwoods at 34 n. 6, discussing Stewart v. Motts; Bloomer v. Snellenburg, 221 Pa. 25, 28, 69 A. 1124, 1124 (1908) (in determining question of contributory negligence, what a reasonably prudent person would do under the circumstances is a question of fact for the jury, and not of law for the court); and Meyers v. Cent. R. Co. of New Jersey, 218 Pa. 305, 306, 67 A. 620 (1907) (jury could have inferred that train conductor should have reasonably anticipated fatal accident would result from his failure to give warning of train's approach).

Duquesne Light would usurp the jury's function by transferring the determination of reasonableness to its friends at the P.U.C. Our system does not work that way. There is no new duty for the P.U.C. to consider. Even if there were, it is for the jury, not a court, and certainly not an administrative law judge, to decide what was reasonable under the circumstances. Our Supreme Court has already said so *in this case*. 106 A.3d at 42. See also Bloomer v. Snellenburg, *supra*.

C. The P.U.C. Has No Expertise In This Area But Duquesne Light Does.

This case cannot be transferred to the P.U.C. because the P.U.C. has no expertise with respect to the duties of an electric company to a customer after an overvoltage incident.

Review of Title 52, Chapter 57 of the Pennsylvania Code, delineating the P.U.C.'s responsibilities with respect to electric service, confirms that the P.U.C.'s expertise is limited to matters such as recording accidents self-reported by regulated utilities, of service voltage, of service frequency, of maintaining records of system load and operation, of meter testing and of pole removal. It is thus not surprising that in Optimum Image and Vertis Group our appellate courts approved the reference of the customers' complaints of inconsistent current to the P.U.C.

Neither Chapter 57, Chapter 67 ("Service Outages") nor Chapter 69 ("General Orders, Policy Statements and Guidelines on Fixed Utilities") contains anything with respect to responding to overvoltage incidents. The P.U.C. has no such expertise.

Duquesne Light tacitly concedes the point. A necessary predicate of Duquesne Light's motion is that the questions for which it seeks answers *are questions that the P.U.C. has never before answered.* Accordingly, under DeFrancesco the motion must be denied:

> [O]ur courts have opined that where resolution of a party's claim "... depend[s] upon no rule or regulation predicated on the peculiar expertise of the PUC, no agency policy, no question of service or facilities owed to the general public, and no particular standard of safety or convenience articulated by the PUC", then the court should not refer the matter to the Commission.

Ostrov v. I.F.T., Inc., 402 Pa. Super. 87, 97, 586 A.2d 409, 414 – 15 (1991), quoting DeFrancesco, 499 Pa. at 378, 453 A.2d at 597. (Editing marks within quotation supplied by the court.) If an agency has no relevant rules or regulations, no relevant policies and no *particular* standards of safety or convenience – a necessary premise and tacit concession of the instant motion – the matter should not be referred to the agency. Moreover, rather than being technical in nature, Duquesne Light's questions are of a sort for which a jury could supply common-sense answers. Alderwoods, 106 A.3d at 42.[10]

On page 7 of its brief, Duquesne Light alludes, without citation, to P.U.C. regulations regarding time to restore service and the tracking of restoration times after hurricanes. Such regulations are inapposite – especially absent any citations enabling the Court or Plaintiff to comment on them. Here, Plaintiff's funeral home "was the sole building serviced directly by the demised utility pole and the only structure to have sustained direct damage, in the form of

[10] For example, "What if a customer cannot be reached at all?", posed by Justice Eakin in his dissenting opinion, 106 A.3d at 44, is a question eminently answerable by a jury.

detached service lines." Alderwoods, 106 A.3d at 37. This case has nothing to do with hurricanes.[11]

Confirming the P.U.C.'s lack of expertise, in its *amicus* brief to the Supreme Court the P.U.C. could only cite irrelevant regulations having nothing to do with this case. For example, the P.U.C. cited regulations concerning reporting of service outages such as 52 Pa. Code § 67.1 and 52 Pa. Code § 69.1901 which do not mandate the restoration of service in the face of a grave threat of fire. Similarly, the P.U.C. cited 52 Pa. Code § 57.198, intended to provide a certain minimum level of reliability, but failed to explain why such a standard such is incompatible with fire prevention. If the P.U.C. had the expertise which Duquesne Light claims it to have, it failed to demonstrate that expertise during its one opportunity in this case to do so. See Exhibit "B" attached.

What Duquesne Light actually seeks here is not the resolution of common-sense questions by an administrative law judge but rather the adoption of regulations regarding an electric provider's responsibilities after an overvoltage incident. Confirming the motion to be more a quest for the issuance of regulations than an effort to adjudicate this matter, Duquesne Light's motion seeks answers to questions, such as those posed by dissenting Justice Eakins, which the P.U.C. would *never* answer here and which are completely conjectural. Such questions are utterly irrelevant to this case.

Given the Supreme Court's admonition that policy as to overvoltage incidents is best set by the legislature, Alderwoods at 40, it is doubtful that the P.U.C. even has the ability to adopt such regulations absent a legislative mandate. However, assuming, *arguendo*, that it did,

[11] In the five years this case has been litigated, Duquesne Light has been wont to foretell widespread chaos as emanating from a duty to prevent just one building, having suffered overvoltage damage, from catching fire. As the Supreme Court above correctly observed, Plaintiff has been just as consistent in dismissing such sky-is-falling prognostications as "severely overblown." Alderwoods, 106 A.3d at 37.

Duquesne Light's efforts here are more properly directed to the P.U.C.'s Director of Regulatory Affairs for rule-making, not to a P.U.C. administrative law judge for adjudication.[12] Such rule-making would be prospective only and could have no retroactive application to this case. Only regulations *that do not impair substantive rights* may be applied retroactively. Pittsburgh Palisades Park, LLC v. Pennsylvania State Horse Racing Commission, 844 A.2d 62, 68 n. 2 (Pa. Cmwlth. 2004). (Emphasis added.)

Although Duquesne Light claims to need the assistance of the P.U.C., its self-professed status as ingénue is distinctly doubtful. Duquesne Light essentially proclaims its *own* inexperience with respect to overvoltage incidents. It all but confesses, at least with respect to overvoltage incidents, that it does not know what it is doing. In actuality, Duquesne Light's profession of naïveté may be more rhetorical than actual. As the Supreme Court pointed out, the electric power industry already has procedures in place after flooding events for warning customers to inspect their equipment for damage before service will be restored. 106 A.3d at 37 n. 9. See also Jan Ackerman, "Wanted: Flood of Volunteers," Pittsburgh Post Gazette, February 23, 2005, page A12, available through Westlaw at 2005 WLNR 2764512 and attached as Exhibit "D", about Duquesne Light's paying for third-party electrical inspections for about seventy-five low-income homes flooded by Hurricane Ivan.

Duquesne Light could simply have avoided this entire motion by applying what it does after a flood to future instances of suspected or known overvoltage damage. That Duquesne

[12] According to the P.U.C.'s Web site:

> The Director of Regulatory Affairs oversees the PUC's bureaus with regulatory functions, including the Bureau of Audits, the Bureau of Consumer Services, the Bureau of Technical Utility Services, the Office of Special Assistants and the Office of Administrative Law Judge. The Director of Regulatory Affairs also is responsible for planning, organizing, coordinating, directing and overseeing regulatory staff.

http://www.puc.state.pa.us/about_puc/bureaus_and_offices.aspx, accessed on August 11, 2015.

Light already has knowledge regarding warnings to customers owning damaged electrical equipment makes this motion all the more perplexing.

D. The Motion Fails To Even Minimally Advise the Court of the Relevant Law, Leading to the Conclusion That it Violates Rule 1023.1.

As noted above, Duquesne Light has failed to distinguish most of the controlling case law at issue with respect to the question of primary jurisdiction, such as Feingold, DeFrancesco, Schriner and Poorbaugh, having neglected even to bring those cases to the Court's attention. Moreover, Duquesne Light's discussion of Elkin is cursory at best and never confronts subsequent opinions' refinement of Elkin's P.U.C.-or-court dichotomy.

Considering the history of the briefings in this case, as detailed above, Duquesne Light could have confidently predicted that Plaintiff would address Feingold, DeFrancesco, Schriner and Poorbaugh if Duquesne Light did not. Accordingly, while Duquesne Light's silence as to those cases may not violate Rule 3.3(a)(2) of the Rules of Professional Conduct,[13] it is nonetheless troubling, raising the question of why the motion was filed. Without any discussion of controlling authority, authority of which Duquesne Light has been aware through past briefings, Duquesne Light should have had no reasonable expectation that its motion would succeed.

Pennsylvania law requires Duquesne Light to confront the adverse authority:

> (c) The signature of an attorney or pro se party constitutes a certificate that the signatory has read the pleading, motion, or other paper. By signing, filing, submitting, or later advocating such a document, the attorney or pro se party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the

[13] "A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. . . ."

> cost of litigation,
>
> (2) the claims, defenses, and other legal contentions therein *are warranted by existing law* or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law. . . .

Rule 1023.1 of the Pennsylvania Rules of Civil Procedure. (Emphasis added.)

> Rarely is there a case where the lawyer deliberately omits a cite to an adverse case. Absent an intent not to cite, courts will often apply a reasonableness standard to determine whether the lawyer should have found existing adverse cases. Often there may be times when there is undiscovered authority. Many courts simply ask if there has been a reasonable amount of research.

Stewart Howard, "The Duty to Cite Adverse Authority," 16 Journal of the Legal Profession 295, 297 (1991). (Citations omitted.) See also 4 Litigating Tort Cases § 49:40, "Commandment 37. Thou shalt cite all known pertinent cases, even the case that kills you," and In re Stewart, 473 B.R. 612, 640 (Bkrtcy. W.D. Pa. 2012) (warning of the imposition of sanctions for failing to advise the court of adverse authority even if such authority is raised by opposing counsel). Duquesne Light's neglect of adverse authority is consistent with its pattern, as noted by the Supreme Court, of avoiding obvious questions rather than confronting them.

Here, given the parties' prior briefings, it is difficult to believe that the motion's omission of adverse cases was inadvertent. That omission, coupled with Duquesne Light's knowledge of how to warn customers as discussed above, raises the prospect of the motion's having been filed for purposes, such as delay, other than the ostensible objective of transfer to the P.U.C.[14] The filing of a motion for an ulterior purpose, other than the stated reason, is prohibited by Rule 1023.1(c)(1).

[14] Adding to Plaintiff's concerns about delay is that as of this writing, Duquesne Light has yet to pay Plaintiff $654.77 in costs related to the Supreme Court appeal – costs which the Supreme Court ordered be paid on March 5, 2015. See Exhibit "E" attached. Since March 15, Plaintiff has followed up with Duquesne Light about the status of payment on multiple occasions, to no avail.

The motion also fails to confront why the law of the case doctrine does not bar this motion in the first place. In its opinion above, the Supreme Court already *squarely rejected* the assertions by dissenting Justice Eakin that 1) the Court had announced a new duty and 2) that a jury could not decide whether a utility has breached the longstanding duty of due care. In essence, Duquesne Light's motion is nothing more than a second attempt at reargument of the Supreme Court's opinion, directed not to the Supreme Court but rather to the Court of Common Pleas, which could not possibly grant such relief. On February 5, 2015, the Supreme Court dismissed Duquesne Light's previous request for reargument. See the Court's order, Exhibit "G" attached.

Accordingly, the instant motion is not warranted by existing law. Rule 1023.1(c)(2). Duquesne Light needs to provide the Court with a nonfrivolous argument "for the extension, modification or reversal of existing law or the establishment of new law." Id. In light of the Supreme Court's recent opinion and the Court's refutation of Justice Eakin's dissent, upon which the instant motion is based, that is a burden which Duquesne Light has not even begun to carry.

IV. CONCLUSION

Aside from the Supreme Court's opinion above, of all the cases adverse to Duquesne Light's motion, Poorbaugh is probably the most directly on point. Like the instant case, it involved another overvoltage incident, leading the Superior Court above to discuss it in some detail. Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 52 A.3d 347, 354 (Pa. Super. 2012). Like the instant case, Poorbaugh involved a single incident of fire damage to a single customer. Although a reported opinion, Poorbaugh is sufficiently important to be attached hereto as Exhibit "F" rather than merely being cited to.

Moreover, reference to an administrative law judge at the P.U.C. would never succeed in

providing answers to most of the rhetorical questions appearing in Justice Eakin's dissenting opinion. The questions are simply irrelevant to this case.

If controlling case law were not enough, the Supreme Court here has already disposed of the entire motion in its opinion above. This case involves a longstanding duty. Juries determine what a reasonable person, or a reasonable electric utility, should have done in the face of a longstanding duty. The Court's opinion is the law of the case and cannot be changed.

The P.U.C. would not be helpful and would only delay the case before its inevitable return to the Court of Common Pleas.

The motion should be denied.

Respectfully submitted,

WHITE AND WILLIAMS LLP

_____

By: Alan J. Charkey, Esquire

Attorneys for Plaintiff,
Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home

Date: August 14, 2015

EXHIBIT “H”

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALDERWOODS (PENNSYLVANIA), INC., a wholly-owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,

Plaintiff,

vs

DUQUESNE LIGHT COMPANY,

Defendant.

CIVIL DIVISION

GD No. 09-014720

ARGUMENT

DATE: August 25, 2015

Filed by:
Cheryl A. Chorba
Official Court Reporter

BEFORE:

HON. PAUL F. LUTTY, JR.

COUNSEL OF RECORD:

For the Plaintiff:

ALAN CHARKEY, ESQ.
WHITE AND WILLIAMS, LLP
1650 Market Street
One Liberty Place
Suite 1800
Philadelphia, PA 19103

For the Defendant:

BRADLEY S. TUPI, ESQ.
TUCKER ARENSBERG, P.C.
1500 One PPG Place
Pittsburgh, PA 15222

(Tuesday, August 25, 2015.)

(In chambers at 11:08 a.m.)

THE COURT: Off record.

(Discussion held off the record.)

THE COURT: On the record.

I have reviewed the various documents that have been submitted. I am going to allow ten days for Supplementals to be filed. And then a couple days? What? A week after that?

MR. CHARKEY: That would be better.

THE COURT: For any reply. Then you don't need to come back here, but I will make a decision at that time.

I want to review the Supreme Court and Superior Court Opinions on this thing because I don't recollect some of this stuff. Whatever it is, that will be the time when I'll make a decision. So you will have a decision on this roughly in 20 days, 21 days.

MR. TUPI: Thank you, Your Honor.

MR. CHARKEY: Thank you, Your Honor.

Your Honor, would it help if counsel

and I supplied you with our Supreme Court Briefs, which might have additional facts?

THE COURT: That's fine with me.

MR. CHARKEY: Okay.

MR. TUPI: Okay.

THE COURT: That's fine with me.

It's my understanding that should I rule in favor of the defense in this matter and bifurcate this matter, that would constitute an interlocutory order and be non-appealable.

MR. TUPI: Unless Your Honor were to certify it otherwise.

THE COURT: Right.

MR. CHARKEY: Yes.

THE COURT: If I ruled the other way, that would be interlocutory also because that would have to go to verdict before that would be appealable.

MR. TUPI: I think that's correct, Judge.

THE COURT: So, in other words, whatever decision I make would be the final decision in the case subject to the PUC or the jury making the decision.

MR. CHARKEY: Your Honor --
THE COURT: Is that about right?
MR. TUPI: Yes, Your Honor.
MR. CHARKEY: Since you broached the subject, no matter which way you rule, then one of the parties would be interested, perhaps, in pursuing an interlocutory appeal.
What is Your Honor's position as to whether you would be willing to supplement your Order with the magic words?
THE COURT: Certify it over?
MR. CHARKEY: Yes.
THE COURT: Well, I don't know. I've only done that once. That's very seldom done around here. I don't know that that happens that often. I've done it once I think on something.
MR. TUPI: The only -- the grounds that I recall from having requested that in the past, you have to show that allowing the interlocutory appeal would ultimately speed the resolution of the controversy.
I find it hard to believe that another

trip to the Appellate Courts would speed the resolution of the controversy.

THE COURT: Can you prepare some time a transcript of what we just said here.

(In chambers proceedings concluded at 12:08 p.m.)

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

CERTIFICATE OF REPORTER

I, Cheryl A. Chorba, do hereby certify that the evidence and proceedings are contained accurately in the machine shorthand notes taken by me at the trial of the within cause, and that the same were transcribed under my supervision and direction, and that this is a correct transcript of the same.

Cheryl A. Chorba
Official Court Reporter
Court of Common Pleas

- - - - -

EXHIBIT “I”

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALDERWOODS (PENNSYLVANIA), INC., a wholly-owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,

Plaintiff,

vs.

DUQUESNE LIGHT COMPANY,

Defendant.

CIVIL DIVISION

GD 09-014720

ORDER OF COURT

Hon. Paul F. Lutty, Jr.

Copies sent via First-Class Mail to:

Peter T. Parashes, Esquire
Alan J. Charkey, Esquire
White and Williams, LLP
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103

Bradley S. Tupi, Esquire
Tucker Arensberg, P.C.
1500 One PPG Place
Pittsburgh, PA 15222

RECORDS
DIVISION
COUNTY

2015 SEP -1 PM 12:45

FILED

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALDERWOODS (PENNSYLVANIA), INC., a wholly-owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,	CIVIL DIVISION GD 09-14720
Plaintiff,	
vs.	
DUQUESNE LIGHT COMPANY,	
Defendant.	

ORDER OF COURT

AND NOW, to wit, this 31st day of August, 2015, upon consideration of Defendant's Motion to Bifurcate and Transfer action to the Pennsylvania Public Utility Commission, Plaintiff's opposition to the motion and the arguments of counsel, it is hereby **ORDERED, ADJUDGED** and **DECREED** that the Motion is **DENIED.**

BY THE COURT:

PAUL F. LUTTY, JR., J.

EXHIBIT “J”

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALDERWOODS (PENNSYLVANIA), INC., a wholly-owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,

Plaintiff,

vs.

DUQUESNE LIGHT COMPANY,

Defendant.

CIVIL DIVISION

GD 09-014720

ORDER OF COURT

Hon. Paul F. Lutty, Jr.

Copies sent via First-Class Mail to:

Peter T. Parashes, Esquire
Alan J. Charkey, Esquire
White and Williams, LLP
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103

Bradley S. Tupi, Esquire
Tucker Arensberg, P.C.
1500 One PPG Place
Pittsburgh, PA 15222

2015 SEP -1 PM 1:36
COURT OF COMMON PLEAS

DEPT. OF RECORDS
CIVIL DIVISION
ALLEGHENY COUNTY

2015 SEP -1 PM 4:11

FILED

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALDERWOODS (PENNSYLVANIA), INC., a wholly-owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,	CIVIL DIVISION GD 09-14720
Plaintiff,	
vs.	
DUQUESNE LIGHT COMPANY,	
Defendant.	

ORDER OF COURT

AND NOW, to wit, this 1st day of September, 2015, it is hereby **ORDERED, ADJUDGED** and **DECREED** that this Court's Order of August 31st, 2015, entered in the above-captioned matter is **VACATED.**

BY THE COURT:

PAUL F. LUTTY, JR., J.

EXHIBIT “K”

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALDERWOODS (PENNSYLVANIA), INC. a wholly-owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,

Plaintiff,

v.

DUQUESNE LIGHT COMPANY,

Defendant.

CIVIL DIVISION

No. GD 09-14720

DEFENDANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO BIFURCATE AND TRANSFER ACTION TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Filed on Behalf of the Defendant, Duquesne Light Company

Counsel of Record for This Party:

Bradley S. Tupi, Esquire
Pa. Id. No. 28682

Erin Beckner Conlin, Esquire
Pa. Id. No. 94086

Jeremy V. Farrell, Esquire
Pa. Id. No. 316258

TUCKER ARENSBERG, P.C.
1500 One PPG Place
Pittsburgh, PA 15222
(412) 566-1212
(412) 594-5619 - FAX
btupi@tuckerlaw.com
ebeckner@tuckerlaw.com
jfarrell@tuckerlaw.com

LIT:592138-1 014657-139188

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALDERWOODS (PENNSYLVANIA), INC. a wholly-owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,	CIVIL DIVISION No. GD 09-14720
Plaintiff,	
v.	
DUQUESNE LIGHT COMPANY,	
Defendant.	

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO BIFURCATE AND TRANSFER ACTION TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Defendant, Duquesne Light Company ("Duquesne Light"), through its attorneys, Tucker Arensberg, P.C., files this Supplemental Brief in Support of its Motion to Bifurcate and Transfer Action to the Pennsylvania Public Utility Commission ("PUC").

I. INTRODUCTION

During argument of Duquesne Light's Motion to Bifurcate and Transfer Action to the PUC on August 25, 2015, the Court asked questions about the facts underlying Plaintiff's claims and whether the Supreme Court's 2014 decision in this case would affect the Court's decision whether to transfer liability for determination by the PUC. Counsel for Duquesne Light offered to submit this Supplemental Brief to address these questions and explain the PUC regulations that apply to customer outages and power restorations.

As an initial matter, Duquesne Light recognizes that the Supreme Court of Pennsylvania has held that electric service providers have a duty to take reasonable measures to avert harm in a scenario which the utility has actual or constructive knowledge of a dangerous condition impacting a customer's electric system, occasioned by fallen and intermixed electrical lines

proximate to the customer's premises. Alderwoods v. Duquesne Light Co., 106 A.3d 27, 41-42 (Pa. 2014). Duquesne Light respects this decision. However, this decision did not define the scope of the duty. The scope of this duty is a policy question that must be decided by the PUC as part of its exclusive jurisdiction to regulate the safety and reasonableness of public utility service. The determination of the scope of this duty will affect every electric service provider in the Commonwealth and will significantly impact the integrity of the PUC's regulatory scheme. As such, bifurcation is both required and necessary to promote consistency and uniformity of PUC policy. Elkin v. Bell Tel. Co. of Pa., 420 A.2d 371 (Pa. 1980).

Plaintiff argues that the PUC has no expertise to regulate safety issues. Plaintiff's Brief at 19-21. This argument is clearly incorrect and should be summarily dismissed. Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501, states as follows:

> Every public utility shall furnish and maintain adequate, efficient, **safe**, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and ***safety*** of its patrons, employees, and the public.

(Emphasis added.) Pennsylvania courts have long recognized that the PUC has exclusive jurisdiction to regulate utility facility safety issues. Elkin v. Bell Tel. Co of Pa., 420 A.2d 371 (Pa. 1980).

Plaintiffs have characterized this as an overvoltage case that only affects one customer. This is a mischaracterization of this case on several levels. This case does not involve an "overvoltage" issue but involves whether Duquesne Light violated its duty to provide safe and reasonable service under the Public Utility Code. In addition, a decision regarding the scope of Duquesne Light's duty will not just affect one customer. It will have significant ramifications for all electric utilities and their customers in the Commonwealth.

There are many factors to consider in determining the scope of the utility's duty before restoring electric service, including safety, reliability, and cost. There is a need for uniformity and consistency in agency policy on this issue. The PUC has been designated exclusive

authority by the legislature to regulate utility safety issues and this case should be bifurcated to allow the PUC to determine the scope of Duquesne Light's duty and whether Duquesne Light violated its duty. If the PUC determines that Duquesne Light violated its duty, it is then appropriate for the court to determine the damages issues.

II. FACTS

An unidentified motor vehicle crashed into one of Duquesne Light's utility poles near the intersection of Forward and Murray Avenues in Squirrel Hill, near the Burton L. Hirsch Funeral Home in January 2009. The crash broke the pole and interrupted power to several buildings around the intersection. The facts developed in discovery show that Duquesne Light had no reason to suspect that restoring electric service to the Funeral Home would cause the fire involved in this action.

After learning of the accident, Duquesne Light dispatched a troubleshooter, Joseph Frankhauser, to make the area safe. Mr. Frankhauser, the first Duquesne Light employee at the scene, testified:

> Q. All right. Did you see any signs of shorting or arcing in that vicinity, on the ground, at any location, where wires had arced and caused damage that would in your mind be a sign or arcing or shorting?
>
> A. I don't recall any, no arcing or shorting.

Frankhauser Deposition at 30-31. There was no testimony in Mr. Frankenhauser's deposition suggesting that he saw anything that would pose a hazard to the Funeral Home's electrical equipment.

After Mr. Frankenhauser had assessed the scene, Duquesne Light dispatched a line crew to make the necessary repairs to its utility pole and associated facilities so that power could be restored to the surrounding area. After arriving on scene, Duquesne Light dismantled the old, broken pole and installed a new one. Brian Novak Deposition ("Novak Depo") at 47, 50. The crew also installed replacement equipment on the pole itself, including a three-phase

transformer. Novak Depo. at 41. It is undisputed that, when the pole fell, it ripped away the wires (called a "service drop") connecting the Funeral Home to the pole. As a result, the crew installed a new "triplex" service drop, which consists of two energized (hot) wires and a neutral wire and carries electrical power from the pole to the customer's building. The crew correctly connected the neutral conductor first, then the hot conductors. Novak Depo. at 66-67. The procedure went smoothly; there was no cause for concern. Novak Depo. at 66-67.

After making those connections at the pole, the crew connected the new triplex service drop to the Funeral Home building. They connected all three conductors and experienced no problems. Robert Pierce Deposition ("Pierce Depo.") at 42-43. After the connections were made, Duquesne Light turned on power to the building. Shortly thereafter, the fire broke out.

In their depositions, Duquesne Light's crew members repeatedly denied having any foreknowledge of any conditions suggesting it would be dangerous to restore power to the Funeral Home. For example, crew member Brandon Boehm stated:

> Q. Now at the point that you were walking up those stairs, you could see the funeral home; correct?
>
> A. Yes.
>
> Q. Did you see anything that looked like it was a problem, that was an indication in any way at all that there may have been a fire or problem inside there?
>
> A. No.
>
> Q. Did you hear any strange noise coming out of there of any kind?
>
> A. No.
>
> * * *
>
> Q. All right. That's fine. While he was doing the work he was doing up there, up until the time that he stopped doing whatever work he was doing, okay up until the time he stopped doing whatever he was doing, did you smell anything unusual or hear anything unusual from the funeral home or anywhere around there?

A. No.

Brandon Boehm Deposition at 23, 27-28.

Robert Pierce, who connected the new triplex, likewise perceived no problems or concerns:

Q. When you were connecting the first hot leg, did anything at all happen that caused you any concern at all?

A. No.

Q. Did you see any sparking or spitting at all?

A. No.

Q. When you connected the last of the two hot legs, the same question. Any problems of any kind?

A. No.

Q. All right. Did you get to the point where all three conductors, the neutral and the two hot legs, were connected and taped?

A. Yes.

Q. Up until that time had there been any problems?

A. No.

Robert Pierce Deposition ("Pierce Depo") at 42-43.

Not only did Duquesne Light's crew members correctly make the repairs after the accident, the evidence is clear that the crew had no knowledge on the day of the fire that restoring service to the Funeral Home created a risk of harm. While the crew members speculated after the fact about the cause of the fire, their talk was just that -- speculation. As set forth below, they did not know what caused the fire.

Robert Pierce stated:

Q. Did you hear anybody just out of discussion about this stating anything about what had happened to explain this?

A. Not that I recall. Everyone was wondering how it happened.

Q. Did you ever formulate in your own mind any thoughts about what had happened there?

A. ***Could be a lot of things.***

* * *

Q. What I'm asking you is shortly after this happened, while you were at that scene and you were thinking about the work that you did and thinking about what had occurred there, as part of your thought process then did you reach any ideas in your head as to what might have happened in there?

A. No.

Q. ***It was only later that you reached ideas; is that what you are saying?***

A. ***Yes.***

Q. ***Do you have any knowledge of any kind as to what happened to cause this fire?***

A. ***No.***

Pierce Depo. at 54-55 (emphasis added).

Crew member Brian Novak repeatedly said that the crew did not know how the fire started:

Q. Did you speak with Bob Pierce and ask him anything, what happened or say anything?

A. ***We don't know what happened.***

Q. I'm just asking you, did you speak with him and ask him if he saw anything or if he knew what happened?

A. ***I can't talk for him, but as far as I know, neither one of us knows what happened.***

Q. You haven't had a fire like this before, have you?

A. Exactly. This is what I said. This was out of the ordinary for this to happen on a service. ***We don't know what happened.***

Novak Depo. at 81, 82.

III. ARGUMENT

A. The Decisions of the Superior and Supreme Courts in this Action Do Not Address Issues of Bifurcation and Transfer to the PUC.

There is no language in the opinions of either the Superior Court or the Supreme Court that would preclude this action from being bifurcated and transferred to the PUC for a determination of the scope of Duquesne Light's duty to provide safe and reasonable service.

The question before the Superior Court was whether Duquesne Light owed any duty to inspect the Funeral Home's internal electrical equipment. Alderwoods, Inc. v. Duquesne Light Co., 52 A.3d 347 (Pa. Super. 2012). The question of the PUC's jurisdiction was not presented.

The only time the Superior Court substantively referenced the PUC at all was when it explained via footnote the purpose of Duquesne Light's Tariff[1] in connection with its discussion of the whether the Tariff barred Plaintiff's claims. Id. at 356 n. 4. The remanding language of the Superior Court's opinion notes only that the case is to be remanded for further proceedings and contains no limitations or instructions regarding the conduct of those proceedings:

> On this basis, we reverse the Order of the trial court, which entered summary judgment in favor of Duquesne Light, and ***remand for further proceedings.***
>
> Order reversed; ***case remanded for further proceedings consistent with this opinion***; Superior Court jurisdiction relinquished.

Id. at 357 (emphasis added). There is nothing in the text of the Superior Court's decision or remand instruction that prevents this Court from transferring this action to the PUC for a determination of whether Duquesne Light violated its obligation under the Public Utility Code to provide safe service to Hirsch.

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[1] The Superior Court explained: "The Public Utility Law empowers the PUC to control the provision of public utilities in the best interests of the public. The law allows utilities to develop tariffs that define the rules and regulations surrounding the provision of services to subscribers. The Public Utility Code defines tariff as all schedules of rates, all rules, regulations, practices or contracts involving any rate or rates. Tariffs filed with a state regulatory agency, such as the PUC, are not mere contracts but have the force of law and are binding on the consumer and the utility." Id. (internal citations and quotations omitted).

The same can be said for the Supreme Court's decision. In the first sentence of its opinion the Supreme Court noted that the main, controlling issue it accepted for review was "whether the Superior Court erred in imposing on electric utilities a burdensome and unprecedented duty to enter customers' premises and inspect customers' electrical facilities before restoring power after an outage?" Alderwoods, Inc. v. Duquesne Light Co., 106 A.3d 27, 29 (Pa. 2014). After analyzing the merits of the parties' arguments on this narrow issue, the Supreme Court simply held that the Superior Court did not err "to the extent that it recognized a duty, on the part of an electric service provider, to take reasonable measures to avert harm in a scenario in which the utility has actual or constructive knowledge of a dangerous condition impacting a customer's electrical system, occasioned by fallen and intermixed electrical lines proximate to the customer's premises." Id. at 42. Simply put, nothing in the issue the Supreme Court confronted implicated the issues presented by Duquesne Light's Motion to Bifurcate and Transfer to the PUC. In fact, the Supreme Court expressly acknowledged as much:

> ***The PUC's position that we should leave this matter to its regulatory province is entirely detached from the summary judgment motion Duquesne Light filed and the limited review which was granted by this Court. As such, in the present context, we decline to consider the Commission's ability to diminish common-law duties on the part of utilities.***

Id. at 38 n. 13 (emphasis added).

Despite that frank statement, Duquesne Light anticipates that Plaintiff will argue that bifurcation and transfer is inappropriate given the Supreme Court majority's response to a series of well-reasoned questions posed by Judge Eakin in his dissent (which were noted in Duquesne Light's initial Brief) regarding how electric utilities are to know what constitutes a reasonable measure to avert harm when the problem is on property that it does not control. Id. at 44. The majority responded that "these are precisely the sort of questions relegated to juries in cases in which a common-law duty exists and there are material factual questions concerning whether such obligation has been met." Id. at 42.

To take that single, isolated statement by the majority position as an admonition that this case must be presented solely to a jury to the exclusion of the PUC would contradict the express statement of the Supreme Court highlighted above. The Supreme Court, in its own words, stated that whether the matter should be left to the PUC was "entirely detached" from Duquesne Light's motion for summary judgment on appeal and the limited review granted by the Court. Id. at 38 n. 13. As that statement makes clear, nothing in the Supreme Court's decision would prohibit transfer to the PUC for a determination of liability, especially since the Supreme Court merely affirmed the decision of the Superior Court without any additional instructions as to how the matter should proceed on remand.

This case involves issues regarding the restoration of utility service to customers, which encompasses both safety and reliability. The PUC has exclusive jurisdiction to regulate the duties of electric utilities with respect to the safe restoration of electric service. Elkin v. Bell Tel. of Pa., 420 A.2d 371 (Pa. 1980). In addition, the material question regarding the scope of the utility's duty has a broad impact on all electric utilities in the Commonwealth. Bifurcation and transfer are necessary to promote consistency and uniformity in PUC policy. Elkin v. Bell Tel. of Pa., 420 A.2d 371, 377 (Pa. 1980).

Plaintiff attempts to characterize this case as a single overvoltage incident affecting a single customer. This is a mischaracterization of this case. First, this is not an overvoltage case but a case regarding the duty of electric providers in restoring service. The definition of this duty will materially affect all electric utilities in the Commonwealth. Therefore, it is not appropriate to characterize this case as only affecting one customer. The PUC should define the scope of the duty because it will have a broad-ranging policy impact.

B. Issues Related To The Scope of Duty for Providing Safe and Reasonable Electric Service Are within the PUC's Exclusive Jurisdiction.

Issues regarding power interruptions and restorations are within the PUC's exclusive jurisdiction to regulate the safety and reasonableness of electric service. The Public Utility Code requires electric utilities to provide continuous service without unreasonable interruptions and delay in "conformity with the regulations and orders of the Commission." 66 Pa. C.S. § 1501. The PUC has special expertise in dealing with electrical service interruptions and restorations of power, and has developed a comprehensive set of regulations designed to insure that utilities restore power promptly after outages.

The PUC's mission is to ensure safe and reliable utility service at reasonable rates and to protect the public interest. The PUC regulates public utilities, including Duquesne Light, under the Public Utility Code, 66 Pa. C.S. §§ 501, 1501.

The PUC interprets the Public Utility Code and promulgates regulations under it. Aronson v. Pa. Public Utility Commission, 740 A.2d 1208 (Pa. Cmwlth. 1999), *appeal denied*, 751 A.2d 193 (Pa. 2000). Courts defer to the PUC's expertise in interpreting public utility statutes and regulations. Id. at 1211.

The Public Utility Code preempts the field of public utility regulation. In PECO Energy v. Twp. of Upper Dublin, 922 A.2d 996, 1005 (Pa. Cmwlth. 2007), a municipality passed an ordinance designed to regulate electric utilities' tree trimming practices. The Commonwealth Court held that the shade tree ordinance was void "because the legislature intended the Public Utility Code to preempt the field of public utility regulation." The court held that because "vegetation management is an essential part of providing safe, reliable electric service," the subject was "squarely within the PUC's regulatory jurisdiction." Id. at 1009. The same logic compels the conclusion that questions about whether and under what circumstances an electric utility should be required to warn a customer before restoring power should be determined by the PUC.

1. The PUC Has Developed a Comprehensive Regulatory Regime Pertaining to Electrical Outages and Prompt Power Restoration.

Section 1501 of the Public Utility Code states:

> Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities and shall make all such repairs, changes, [etc.] as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. ***Such service also shall be reasonably continuous and without unreasonable interruptions or delay.*** Such service and facilities shall be in conformity with the regulations and orders of the commission.

According to the PUC regulations:

> **§ 57.191. Purpose.**
>
> Reliable electric service is essential to the health, safety and welfare of the citizens of this Commonwealth. The purpose of this subchapter is to establish standards and procedures for continuing and ensuring the ***safety and reliability*** of the electric system in this Commonwealth. The standards have been developed to provide a uniform method of assessing the reasonableness of electric service reliability.

(Emphasis added).[2] The PUC has taken extensive steps to regulate electric safety. The PUC regulations require that electric utilities install, maintain and operate their distribution systems in conformity with the applicable requirements of the National Electric Safety Code ("NESC"). 52 Pa. Code § 57.194. The PUC's regulations were adopted under its quasi-legislative authority. Laurel Lake Ass'n, Inc. v. Pa. Fish & Boat Comm., 710 A.2d 129, 132 (Pa. Cmwlth. 1998). The PUC has established a separate Electric Safety Division for its Bureau of Investigation & Enforcement. The Electric Safety Division enforces the NESC, and performs field investigations when reportable incidents occur. The purpose of the Electric Safety Division is to ensure that electric utilities are operating safely and reliably.

---

[2] "Reliability" means delivering electrical power to customers without interruption. Affidavit of Patrick J. Conti, ¶ 7. To ensure reliability, the PUC regulates service outages and restoration. In doing so, the PUC emphasizes speedy restoration of service after outages, because customers expect their power to be restored as quickly as possible. Affidavit of Patrick J. Conti, ¶ 9.

In addition, the PUC has adopted inspection, maintenance, repair and replacement standards for electric utilities. 52 Pa. Code § 57.198. These regulations were designed to improve the PUC's ability to monitor electric utilities' safety and service reliability. Advance Notice of Proposed Rulemaking for Revision of 52 Pa. Code Chapter 57 Pertaining to Adding Neutral Connection Inspection and Maintenance Standards for the Electric Distribution Companies, Docket No. L-2008-2044821, Order entered March 1, 2010, p. 1.

The PUC has developed extensive regulations regarding the restoration of service to customers as part of its efforts to ensure reliable service. These regulations include:

> **§ 57.194. Distribution system reliability.**
>
> (a) An EDC [electric distribution company] shall furnish and maintain adequate, efficient, safe and reasonable service and facilities, and shall make repairs, changes, alterations, substitutions, extensions and improvements in or to the service and facilities necessary or proper for the accommodation, convenience and ***safety*** of its patrons, employees and the public. ***The service shall be reasonably continuous and without unreasonable interruptions or delay.***
>
> * * *
>
> (d) ***An EDC shall strive to prevent interruptions of electric service and, when interruptions occur, restore service within the shortest reasonable time.***
>
> (e) An EDC shall design and maintain procedures to achieve the ***reliability performance benchmarks and minimum performance standards*** established by the Commission.

52 Pa. Code § 57.194 (emphasis added); Affidavit of Patrick J. Conti, ¶ 9.

One of the ways the PUC assures compliance with its reliability standards is by requiring Duquesne Light and other electric utilities to submit system reliability information. Affidavit of Patrick J. Conti, ¶¶ 11, 29.

2. The PUC Has Regulatory Authority to Enforce Reliability Standards to Minimize Electrical Outages and Assure Prompt Power Restoration.

The PUC has regulatory authority to take enforcement actions if its reliability standards are not met:

> (h) An EDC shall take measures necessary to meet the ***reliability performance benchmarks and minimum performance standards*** established by the Commission.
>
> (1) The performance standard shall be the minimum level of EDC reliability performance allowed by the Commission for each measure for all EDCs. ***Performance that does not meet the standard for any reliability measure shall be the threshold for triggering additional scrutiny and potential compliance enforcement actions by the Commission's prosecutorial staff.***
>
> (i) The Commission will consider historical performance levels, performance trends, and the number and type of standards violated when determining appropriate ***additional monitoring and compliance enforcement actions.*** The Commission will consider other information and factors including an EDC's outage cause analysis, inspection and maintenance goal data, operations and maintenance and capital expenditure data, and staffing levels as presented in the quarterly and annual reports as well as in filed incident reports.
>
> (ii) Additional monitoring and enforcement actions that may be taken are engaging in additional remedial review, requiring additional EDC reporting, conducting an informal investigation, initiating a formal complaint, requiring a formal improvement plan with enforceable commitments, requiring an implementation schedule, and ***assessing penalties and fines.***
>
> (2) An EDC shall inspect, maintain and operate its distribution system, analyze reliability results, and take corrective measures as necessary to achieve performance benchmarks and performance standards.

52 Pa. Code § 57.194 (emphasis added); Affidavit of Patrick J. Conti, ¶ 25. The PUC may initiate investigations, require corrective action, impose penalties, and even revoke a utility's license as necessary to ensure system reliability, which includes the safe restoration of utility service:

§ 57.197. Reliability investigations and enforcement.

(a) The Commission staff may ***initiate an investigation***, or may do so upon complaint by an affected party, to determine whether an electric distribution company is providing service in accordance with §§ 57.193 and 57.194 (relating to transmission system reliability; and distribution system reliability).

(1) Based upon the record developed in such an investigation, the Commission may enter an order directing the electric distribution company to take reasonable ***corrective action*** necessary to improve the reliability of electric service.

(2) If the Commission directs an electric distribution company to make expenditures to repair or upgrade its transmission or distribution system, the electric distribution company may seek an exception to the limitations in 66 Pa.C.S. § 2804(4) (relating to electric utility rate caps).

(b) The Commission staff may initiate an investigation, or may do so upon complaint by an affected party, to determine whether an electric generation supplier is providing reasonable service in accordance with § 57.196 (relating to generation reliability).

(1) Based upon the record developed in such an investigation, the Commission may enter an order directing the electric generation supplier to take the ***corrective action*** the Commission deems necessary to improve the reliability of service.

(2) If the corrective action is not taken within the period of time designated by the Commission in an order entered under paragraph (1), the Commission may elect to impose a penalty up to and including the ***revocation, either temporarily or permanently, of the license*** of the electric generation supplier, obtained under 66 Pa.C.S. § 2809(a) (relating to requirements for electric generation suppliers).

52 Pa. Code § 57.197 (emphasis added); Affidavit of Patrick J. Conti, ¶ 26. These provisions are a further illustration of the PUC's expansive regulatory authority over all aspects of the safety and reliability of electric service.

The PUC adjudicates disputes concerning prompt restoration of power after an outage. *See, e.g.,* Gary Eckenrode v. PECO Energy Co., No. C-2012-2337839, 2014 WL 527260 (Pa. P.U.C. Feb. 6, 2014) (adjudicating customer's complaint that PECO failed to restore service promptly after Hurricane Sandy). Electric utilities can be fined by the PUC if they fail to restore power in a reasonable period of time. 66 Pa. C.S. § 3301.

In short, the PUC has an elaborate regulatory framework in place to assure that Duquesne Light delivers electric service that is safe, reasonably continuous and without unreasonable interruption or delay. Affidavit of Patrick J. Conti, ¶ 27. The PUC has exclusive regulatory authority to take enforcement actions against Duquesne Light if it fails to meet PUC benchmarks for system reliability.

3. In Regulating System Reliability, the PUC Balances Reliability Against the Cost of Compliance.

The PUC expects Duquesne Light to achieve or exceed PUC benchmarks, subject to legitimate concerns about the affordability of service. The PUC balances the reliability of service with the affordability of service. Some drastic measures could conceivably be taken to improve reliability, such as cutting down all the trees near power lines. But such measures would be unreasonably expensive and upsetting to customers. Affidavit of Patrick J. Conti, ¶ 28.

Another example will show how the PUC balances utility reliability against cost. In 2010, the PUC proposed a rulemaking that would have expanded an electric utility's duty to inspect its neutral connection wires. A neutral connection is a wire that provides a return path to complete the flow of electricity. A damaged neutral can cause voltage fluctuations and power surges. Advance Notice of Proposed Rulemaking for Revision of 52 Pa. Code Chapter 57, Commission Order, Docket No. L-2008-2044821 (Feb. 25, 2010) (Chapter 57 Rulemaking Investigation). The PUC ultimately concluded that adopting the proposed standards for neutral connections would be of minimal value in comparison to the annual cost of over $85 million for Pennsylvania utilities to comply. Id. The PUC found that these compliance costs would result in increased rates for customers with only a minimal increase in service reliability. Id. The PUC discontinued the Chapter 57 Rulemaking Investigation because imposing a heightened duty for utilities to inspect the neutral connections was not in the public interest. Id. As explained above, the PUC

has exclusive jurisdiction to determine what constitutes safe and reasonable electric service in the public interest.

4. In Regulating System Reliability, the PUC Encourages Communication about Prompt Restoration of Power.

Duquesne Light's customers are increasingly dependent upon reliable electricity for their homes and businesses. The customer's primary concern during an outage is the Estimated Time of Restoration (ETR). The PUC has enacted policies to encourage utilities to provide better public notification to customers regarding service outages and estimated restoration times. 52 Pa. Code § 69.1902. In the event of major storm events, the PUC encourages Duquesne Light to use mass media, the Duquesne Light website and other means to notify customers of the estimated time of restoration. These communications pertain to the functionality of Duquesne Light's equipment, and do not include warnings about customer equipment. Affidavit of Patrick J. Conti, ¶ 30. The scope of the duty to advise customers prior to restoring service is within the exclusive jurisdiction of the PUC.

5. The PUC Is the Proper Forum To Adjudicate Cases Dealing with Power Interruptions and Restorations.

The PUC has jurisdiction to adjudicate disputes regarding utility service. These adjudications have created a body of administrative law that draws a clear boundary between the responsibilities of the electric utility and the customer: "Inasmuch as [the utility's] ownership and maintenance responsibilities end at the point of delivery, it is [the customer's] sole responsibility for maintaining the internal circuitry and controlling his consumption of electrical energy." Craft v. Penna. Elec. Co., 50 Pa. P.U.C. 1, 7 (Pa. P.U.C. 1976).

In Hineline v. Metro. Edison Co. and Penna. Power & Light Co., No. C-902777, 1990 WL 10714871 (Pa. P.U.C. Oct. 4, 1990), Complainant asserted that to provide safe service, the electric utility should be required to perform inspections of customer wiring to assure compliance with the NEC. The PUC rejected this contention because "the ownership and maintenance

responsibility of an electric utility ends at the point of delivery to the customer." The PUC also noted that imposing a new duty would increase costs for the utility and the ratepayers.

In Maluchnik v. Penna. Elec. Co., No. C-2011-2245451, 2013 WL 1180372 (Pa. P.U.C. March 14, 2013), the PUC stated:

> It is clear from [the utility's] tariff, and supported in our Regulations, that ***there is a point where the responsibility of the utility ends and the responsibility of the customer begins***. At this point, it is the customer's responsibility to consult outside help beyond that of the utility to determine whether the causes of the problems being experienced are related to the customer's own electrical equipment and wiring or to the equipment of the utility serving the customer.

(Emphasis added.) To the extent Duquesne Light is to be judged for failing to warn the Funeral Home about the condition of the Funeral Home's own electrical equipment, that judgment should be made by the regulatory agency that is familiar with the longstanding demarcation of responsibility between the utility and the customer.

Plaintiff will emphasize that this case involves one event and one customer. But as the foregoing recitation of PUC jurisdiction makes clear, this case can only be correctly decided against the backdrop of statutes, regulations, adjudications and national codes that govern electric utilities. Properly deciding this case requires familiarity with the electricity distribution business, the service point demarcation between electricity provider and customer, and the regulatory balance that the PUC has struck between the ***reliability*** of utility service and the ***affordability*** of utility service.

To put it another way, for a jury to be permitted to assess liability in this action could impose (by operation of precedent) new duties that go beyond the requirements of PUC regulations and the NESC. This would impose new burdens that could upset PUC's balance between reliability and affordability.

6. Duquesne Light's Response to Floods Is Consistent with the Long-Established Regulatory Division of Responsibility.

Hirsch Funeral Home's argument about floods (Plaintiff's Brief at 21) confirms Duquesne Light's position: that even in situations where the risk of danger to customer equipment is obvious, Duquesne Light does not assume responsibility for the condition of customer equipment. According to the news accounts cited by Plaintiff, Hurricane Ivan caused widespread electric outages. Even in such a crisis situation, electric utilities did not assume any responsibilities for the safety of customer equipment. Customers had to have their own electricians certify the safety of the customers' equipment before power would be restored. This response built upon the longstanding demarcation between utility and customer responsibility at the service point. And a flood, unlike a pole hit, creates an obvious risk of short circuits. Nevertheless, the scope and appropriate circumstances of when a utility must notify a customer prior to restoration are fundamentally questions of safety, which are clearly within the exclusive statewide jurisdiction of the PUC.

IV. CONCLUSION

The PUC has a body of regulatory experience having to do with service interruptions and restorations, all designed to assure the prompt restoration of electric service after an outage. Any determination that Duquesne Light violated a duty to warn the Funeral Home could conflict with these regulatory provisions. For this reason, the liability determination should only be made by the regulatory agency familiar with the regulatory background, i.e., the PUC.

For the foregoing reasons, and for the reasons set for in Duquesne Light's original Brief, Defendant Duquesne Light Company respectfully requests that this Honorable Court bifurcate this action and transfer the question of liability to the Pennsylvania Public Utility Commission.

Respectfully submitted,

TUCKER ARENSBERG, P.C.

By: _____

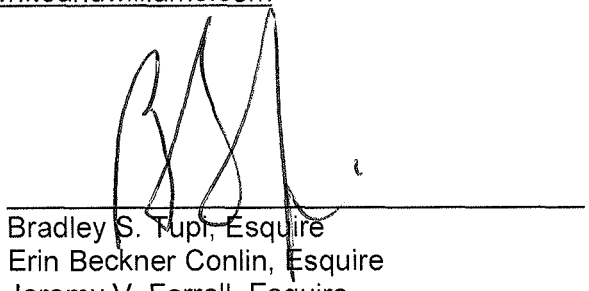
Bradley S. Tupi, Esquire
Pa. Id. No. 28682
Erin M. Beckner, Esquire
Pa. Id. No. 94086
Jeremy V. Farrell, Esquire
Pa. Id. No. 316258
1500 One PPG Place
Pittsburgh, PA 15222

Counsel for Defendant,
Duquesne Light Company

CERTIFICATE OF SERVICE

I certify that I am this 4th day of September, 2015, serving a true and correct copy of Duquesne Light Company's Supplemental Brief in Support of Motion to Bifurcate and Transfer Action to the Pennsylvania Public Utility Commission upon the counsel indicated below by email and by First Class U.S. Mail, postage prepaid, addressed as follows:

Peter T. Parashes, Esquire
Alan J. Charkey, Esquire
White and Williams, LLP
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103
parashesp@whiteandwilliams.com
charkeya@whiteandwilliams.com



Bradley S. Tupi, Esquire
Erin Beckner Conlin, Esquire
Jeremy V. Farrell, Esquire

LIT:592138-1 014657-139188

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALDERWOODS (PENNSYLVANIA), INC. a wholly-owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,

Plaintiff,

v.

DUQUESNE LIGHT COMPANY,

Defendant.

CIVIL DIVISION

No. GD 09-14720

AFFIDAVIT OF PATRICK J. CONTI IN SUPPORT OF MOTION TO BIFURCATE AND TRANSFER ACTION TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Filed on Behalf of the Defendant, Duquesne Light Company

Counsel of Record for This Party:

Bradley S. Tupi, Esquire
Pa. Id. No. 28682

Erin Beckner Conlin, Esquire
Pa. Id. No. 94086

Jeremy V. Farrell, Esquire
Pa. Id. No. 316258

TUCKER ARENSBERG, P.C.
1500 One PPG Place
Pittsburgh, PA 15222
(412) 566-1212
(412) 594-5619 - FAX
btupi@tuckerlaw.com
ebeckner@tuckerlaw.com
jfarrell@tuckerlaw.com

LIT:592349-6 014657-139188

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALDERWOODS (PENNSYLVANIA), INC. a wholly-owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,	CIVIL DIVISION No. GD 09-14720
Plaintiff,	
v.	
DUQUESNE LIGHT COMPANY,	
Defendant.	

AFFIDAVIT OF PATRICK J. CONTI IN SUPPORT OF MOTION TO BIFURCATE AND TRANSFER ACTION TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

COUNTY OF ALLEGHENY)
) ss:
COMMONWEALTH OF PENNSYLVANIA)

Patrick J. Conti, being duly sworn, deposes and says:

1. I am employed by Duquesne Light Company as the Director of the Operations Center, located in the Woods Run section of Pittsburgh. I have held this position since 2007. I make this affidavit on my own personal knowledge.

2. I have been employed by Duquesne Light Company since 1981. I began in the Engineering Department and was transferred to the Operations Center in 1985.

3. I hold a Bachelors of Science degree in electrical engineering from Penn State University.

4. The Operations Center is the 24/7 control center of Duquesne Light's electrical transmission and distribution grid supplying all customers. Personnel in the Operations Center monitor the entire transmission and distribution system by computer and receive customer

reports of outages. When outages are reported, the Operations Center dispatches personnel to remedy the situation and restore power as safely and quickly as possible.

5. An important part of my job is to act as the Company's liaison with the Pennsylvania Public Utility Commission ("PUC"), especially with respect to storms and outages. The PUC closely and comprehensively regulates electrical power outages and restorations.

6. The PUC regulates Duquesne Light under the Public Utility Code. Among other things, the PUC promulgates regulations requiring every public utility to furnish electrical service that is safe, reasonably continuous and without unreasonable interruptions or delay.

7. According to the PUC regulations,

> **§ 57.191. Purpose.**
>
> Reliable electric service is essential to the health, safety and welfare of the citizens of this Commonwealth. The purpose of this subchapter is to establish standards and procedures for continuing and ensuring the safety and reliability of the electric system in this Commonwealth. The standards have been developed to provide a uniform method of assessing the reasonableness of electric service reliability.

In the PUC regulatory context, "reliability" means delivering electrical power to customers without interruption.

8. The PUC has taken extensive steps to regulate electric safety. The PUC regulations require that utilities install, maintain and operate their distribution systems in conformity with the applicable requirements of the National Electric Safety Code ("NESC"). 52 Pa. Code § 57.194. The PUC has established a separate Electric Safety Division for its Bureau of Investigation & Enforcement. The Electric Safety Division enforces the NESC, and performs field investigations when reportable incidents occur. The purpose of the Electric Safety Division is to ensure that electric utilities are operating safely and reliably.

9. To ensure reliability, the PUC regulates service outages and restoration. In doing so, the PUC emphasizes speedy restoration of service after outages, because customers expect their power to be restored as quickly as possible. The regulations provide:

§ 57.194. Distribution system reliability.

(a) An EDC [electric distribution company] shall furnish and maintain adequate, efficient, safe and reasonable service and facilities, and shall make repairs, changes, alterations, substitutions, extensions and improvements in or to the service and facilities necessary or proper for the accommodation, convenience and safety of its patrons, employees and the public. **The service shall be reasonably continuous and without unreasonable interruptions or delay.**

(b) An EDC shall install, maintain and operate its distribution system in conformity with the applicable requirements of the National Electrical Safety Code.

(c) An EDC shall make periodic inspections of its equipment and facilities in accordance with good practice and in a manner satisfactory to the Commission.

(d) **An EDC shall strive to prevent interruptions of electric service and, when interruptions occur, restore service within the shortest reasonable time.**

52 Pa. Code § 57.194 (emphasis added).

10. The PUC has established regulatory benchmarks to assure system reliability:

(e) An EDC shall design and maintain procedures to achieve the **reliability performance benchmarks and minimum performance standards** established by the Commission.

(f) An EDC shall develop and maintain a program for analyzing the service performance of its circuits during the course of each year.

(g) An EDC shall maintain a 5-year historical record of all known customer interruptions by category of interruption duration, including the time, duration and cause of each interruption. An EDC shall retain all records to support the reporting requirements under § 57.195 (relating to reporting requirements) for 5 years.

52 Pa. Code § 57.194 (emphasis added).

11. The PUC enforces reliability standards by requiring Duquesne Light and other electric utilities to submit system reliability information. The regulations require:

(a) An EDC shall submit an annual reliability report to the Commission, on or before April 30 of each year.

* * *

(b) The annual reliability report for larger EDCs (those with 100,000 or more customers) shall include, at a minimum, the following elements:

(1) An overall current assessment of the state of the system reliability in the EDC's service territory including a discussion of the EDC's current programs and procedures for providing reliable electric service.

(2) A description of each major event that occurred during the year being reported on, including the time and duration of the event, the number of customers affected, the cause of the event and any modified procedures adopted to avoid or minimize the impact of similar events in the future.

* * *

(4) A breakdown and analysis of outage causes during the year being reported on, including the number and percentage of service outages, the number of customers interrupted, and customer interruption minutes categorized by outage cause such as equipment failure, animal contact, tree related, and so forth. Proposed solutions to identified service problems shall be reported.

(5) A list of the major remedial efforts taken to date and planned for circuits that have been on the worst performing 5% of circuits list for a year or more.

52 Pa. Code § 57.195.

12. Together with Operations Center staff and other Duquesne Light personnel, I participate in the preparation of annual and quarterly reliability reports to the PUC about outages and restorations, as required by § 57.195.

13. As noted above, the PUC has established reliability performance benchmarks and minimum performance standards pursuant to 52 Pa. Code § 57.194. These benchmarks are known by the acronyms SAIFI, SAIDI and CAIDI. Duquesne Light uses these acronyms in its annual and quarterly reliability reports to the PUC.

14. SAIFI refers to the SYSTEM AVERAGE INTERRUPTION FREQUENCY INDEX (SAIFI). SAIFI measures the average number of outages experienced by customers during a year. SAIFI indicates the average number of times that a typical customer experienced an outage over a period of time. SAIFI is calculated by summing all customers that were

interrupted by outages and dividing the sum by the total number of customers served. Customers that had multiple outages get added into the numerator multiple times to account for every outage. The denominator is the total number of customers on Duquesne Light's system.

15. The formula used to calculate SAIFI and report it to the PUC is:

$$\text{SAIFI} = \frac{\Sigma \text{ Customers Interrupted}}{\text{Total Customers}} = \frac{\Sigma \text{ KVA Interrupted}}{\text{System KVA (total system load)}} = \text{Interruptions per Customer}$$

16. Duquesne Light's most recent Annual Electric Reliability report to the PUC covered the year 2014. For that year, PUC's SAIFI benchmark for Duquesne Light was 1.17. Duquesne Light achieved a SAIFI Result of 0.62, meaning that on a system-wide basis 38% of Duquesne Light's customers experienced no outages at all during 2014. This was the best SAIFI result obtained by Duquesne Light in the last 20 years.

17. SAIDI refers to the SYSTEM AVERAGE INTERRUPTION DURATION INDEX. SAIDI measures the average number of minutes of service interruption that a typical customer experiences during a year. SAIDI tells the PUC the total duration of an outage for an average customer during a given time period. SAIDI is calculated by summing all customer-minutes of outage time during the measurement period and dividing this sum by the total number of customers.

$$\text{SAIDI} = \frac{\Sigma \text{ Customer Outage Minutes}}{\text{Total Customers}} = \frac{\Sigma \text{ KVA-Minutes Interrupted}}{\text{System KVA (total system load)}} = \text{Length of Customer's Average Outage}$$

18. In Duquesne Light's Annual Electric Reliability report to the PUC for 2014, PUC's SAIDI benchmark for Duquesne Light was 126. Duquesne Light achieved a SAIDI Result of 63, meaning that the average Duquesne Light customer had an outage of only 63 minutes in duration, which was considerably better than the 126-minute PUC benchmark. This is the best SAIDI result obtained by Duquesne Light in the last 20 years.

19. CAIDI refers to the CUSTOMER AVERAGE INTERRUPTION DURATION INDEX. CAIDI measures the average duration of an outage in minutes for customers that experienced an outage during a given time period, usually a year. CAIDI is calculated by dividing SAIDI by SAIFI.

20. For the year 2014, the PUC assigned Duquesne Light a CAIDI benchmark of 108. Duquesne Light achieved a CAIDI Result of 102, meaning that a Duquesne Light customer that had an outage in 2014 had an outage of 102 minutes in duration on average. This was 6 minutes shorter than the 108-minute PUC benchmark.

21. Duquesne Light's success in reducing outage duration can be seen in the steady decline in SAIDI over the last 4 years.

2011 SAIDI =	99 Minutes	
2012 SAIDI =	79 Minutes	*20% Improvement*
2013 SAIDI =	75 Minutes	*5% Improvement*
2014 SAIDI =	63 Minutes	*11% Improvement*

22. Duquesne Light has been especially successful in reducing outage times, which is measured in customer outages restored in 5 minutes or less.

Customer Outages Restored in 5 Minutes or Less

2010	10%
2011	31%
2012	45%
2013	44%
2014	55%

23. This improvement in the number of customers restored in 5 minutes or less has directly helped to reduce Duquesne Light's total number of customer outages, which has steadily improved SAIFI performance since 2010.

2010 SAIFI =	1.09	
2011 SAIFI =	0.93	*15% Improvement*
2012 SAIFI =	0.67	*30% Improvement*
2013 SAIFI =	0.62	*7.5% Improvement*
2014 SAIFI =	0.62	

24. These improvements were accomplished through the installation of state-of-the-art fault protection technologies and faster remote communication capabilities over a wireless network, reflecting Duquesne Light's long-term commitment to restore customers in a safe and timely manner in accordance with PUC regulatory guidelines.

25. The PUC has the power to enforce its reliability standards:

> (h) An EDC shall take measures necessary to meet the **reliability performance benchmarks and minimum performance standards** established by the Commission.
>
> (1) The performance standard shall be the minimum level of EDC reliability performance allowed by the Commission for each measure for all EDCs. **Performance that does not meet the standard for any reliability measure shall be the threshold for triggering additional scrutiny and potential compliance enforcement actions by the Commission's prosecutorial staff.**
>
> (i) The Commission will consider historical performance levels, performance trends, and the number and type of standards violated when determining appropriate **additional monitoring and compliance enforcement actions.** The Commission will consider other information and factors including an EDC's outage cause analysis, inspection and maintenance goal data, operations and maintenance and capital expenditure data, and staffing levels as presented in the quarterly and annual reports as well as in filed incident reports.
>
> (ii) Additional monitoring and enforcement actions that may be taken are engaging in additional remedial review, requiring additional EDC reporting, conducting an informal investigation, initiating a formal complaint, requiring a formal improvement plan with enforceable commitments, requiring an implementation schedule, and **assessing penalties and fines.**
>
> (2) An EDC shall inspect, maintain and operate its distribution system, analyze reliability results, and take corrective measures as necessary to achieve performance benchmarks and performance standards.

52 Pa. Code § 57.194 (emphasis added).

26. The PUC may initiate investigations, require corrective action, impose penalties, and even revoke a utility's license:

> **§ 57.197. Reliability investigations and enforcement.**
>
> (a) The Commission staff may **initiate an investigation**, or may do so upon complaint by an affected party, to determine whether an electric distribution company is providing service in accordance with §§ 57.193 and

57.194 (relating to transmission system reliability; and distribution system reliability).

(1) Based upon the record developed in such an investigation, the Commission may enter an order directing the electric distribution company to take reasonable **corrective action** necessary to improve the reliability of electric service.

(2) If the Commission directs an electric distribution company to make expenditures to repair or upgrade its transmission or distribution system, the electric distribution company may seek an exception to the limitations in 66 Pa.C.S. § 2804(4) (relating to electric utility rate caps).

(b) The Commission staff may initiate an investigation, or may do so upon complaint by an affected party, to determine whether an electric generation supplier is providing reasonable service in accordance with § 57.196 (relating to generation reliability).

(1) Based upon the record developed in such an investigation, the Commission may enter an order directing the electric generation supplier to take the **corrective action** the Commission deems necessary to improve the reliability of service.

(2) If the corrective action is not taken within the period of time designated by the Commission in an order entered under paragraph (1), the Commission may elect to impose a penalty up to and including the **revocation, either temporarily or permanently, of the license** of the electric generation supplier, obtained under 66 Pa.C.S. § 2809(a) (relating to requirements for electric generation suppliers).

52 Pa. Code § 57.197 (emphasis added).

27. In short, the PUC has an elaborate regulatory framework in place to assure that Duquesne Light delivers electric service that is safe, reasonably continuous and without unreasonable interruptions or delay.

28. The PUC expects Duquesne Light to achieve or exceed PUC benchmarks, subject to legitimate concerns about the affordability of service. The PUC balances the reliability of service with the affordability of service. Some drastic measures could conceivably be taken to improve reliability, such as cutting down all the trees near power lines. But such measures would be unreasonably expensive and upsetting to customers.

29. Duquesne Light's annual and quarterly reliability reports to the PUC reflect years of experience between Pennsylvania utilities and the PUC. All Pennsylvania utilities submit

annual reliability reports to the PUC, and all measure their performance against PUC benchmarks. Any substantial change in the handling of outages and restorations would affect the regulatory scheme developed over many years, and so any such change should be left to the PUC.

30. Customers are increasingly dependent upon reliable electricity for their homes and businesses. The customer's primary concern during an outage is the Estimated Time of Restoration (ETR). The PUC has enacted policies to encourage utilities to provide better public notification to customers regarding service outages and estimated restoration times. 52 Pa. Code § 69.1902. In the event of major storm events, the PUC encourages Duquesne Light to use mass media, the Duquesne Light website and other means to notify customers of the estimated time of restoration. These communications pertain to Duquesne Light's equipment and do not include warnings about customer equipment

31. The NESC demarcates responsibility at the point of delivery, known as the service point, which is the point of connection between the utility's distribution facilities and the customer's wiring. The service point is the jurisdictional line of demarcation between two national industry codes: (1) the NESC and (2) the National Electrical Code ("NEC"). The Public Utility Code adopts the NESC and requires electric utilities to adhere to the NESC maintenance and installation standards for transmission and distribution facilities.

Patrick J. Conti

Sworn to before me this 4th day of September, 2015.

Notary Public

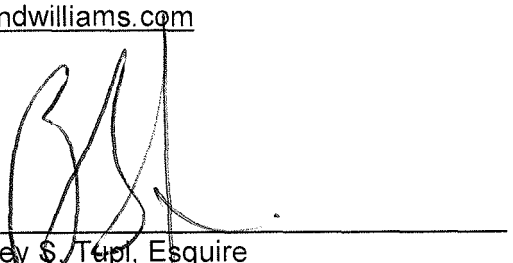
LIT 592349-6-D18657-139188

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
PAMELA L GIBEAU
Notary Public
PITTSBURGH CITY, ALLEGHENY COUNTY
My Commission Expires Jan 9, 2017

CERTIFICATE OF SERVICE

I certify that I am this 4th day of September, 2015, serving a true and correct copy of the Affidavit of Patrick J. Conti in Support of Duquesne Light Company's Motion to Bifurcate and Transfer Action to the Pennsylvania Public Utility Commission upon the counsel indicated below by email and by First Class U.S. Mail, postage prepaid, addressed as follows:

Peter T. Parashes, Esquire
Alan J. Charkey, Esquire
White and Williams, LLP
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103
parashesp@whiteandwilliams.com
charkeya@whiteandwilliams.com



Bradley S. Tupi, Esquire
Erin Beckner Conlin, Esquire
Jeremy V. Farrell, Esquire

EXHIBIT “L”

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY

ALDERWOODS (PENNSYLVANIA), INC., a wholly owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,

Plaintiff

v.

DUQUESNE LIGHT COMPANY,

Defendant.

CIVIL DIVISION

Docket No. GD-09-14720

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO BIFURCATE AND TRANSFER ACTION TO PENNSYLVANIA PUBLIC UTILITY COMMISSION

Code No. 009 – Trespass-Other

Filed on behalf of Plaintiff, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home

Counsel of record for Plaintiff:

Peter T. Parashes, Esquire
Pennsylvania Identification No. 22436
Alan J. Charkey, Esquire
Pennsylvania Identification No. 77556

WHITE AND WILLIAMS LLP
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103
Telephone: (215) 864-7178

Party Represented by Out-of-County Counsel Only

JURY TRIAL DEMANDED

CERTIFICATE OF SERVICE

I, Alan J. Charkey, Esquire, hereby certify that on Thursday, September 10, 2015, I served a copy of Plaintiff's Supplemental Memorandum of Law In Support of Plaintiff's Response In Opposition To Defendant's Motion To Bifurcate and Transfer Action To Pennsylvania Public Utility Commission, along with its exhibits, upon counsel of record for the Defendant, Duquesne Light Company, Bradley S. Tupi, Esquire and Erin Beckner Conlin, Esquire, Tucker Arensberg, P.C., by e-mail to btupi@tuckerlaw.com and ebeckner@tuckerlaw.com.

WHITE AND WILLIAMS LLP

By: Alan J. Charkey, Esquire

Attorneys for Plaintiff,
Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

No. GD-09-14720

ALDERWOODS (PENNSYLVANIA), INC., a wholly owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME

v.

DUQUESNE LIGHT COMPANY

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO BIFURCATE AND TRANSFER ACTION TO PENNSYLVANIA PUBLIC UTILITY COMMISSION

Peter T. Parashes, Esquire
Attorney Identification No. 22436
Alan J. Charkey, Esquire
Attorney Identification No. 77556
WHITE AND WILLIAMS LLP
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103
(215) 864-7000

Attorneys for Plaintiff,
Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home

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I. INTRODUCTION

In its Supplemental Brief in Support of Motion to Bifurcate and Transfer Action to the Pennsylvania Public Utility Commission, Defendant, Duquesne Light Company, argues that the regulations of the Pennsylvania Public Utility Commission require the transfer of this case to the P.U.C. In actual fact, the regulations which Duquesne Light cites are vague or tangential and have no direct bearing on the question of whether Duquesne Light should have inspected and/or warned after an overvoltage incident. One cited regulation is even more irrelevant, having been enacted after the date of loss.

Duquesne Light's supplemental brief is all the more puzzling given that it contests disputed, material facts and seems to be more in the nature of a motion for summary judgment than in support of its motion to bifurcate.

The supplemental brief is just as baffling for what it does not do. Nowhere in the supplemental brief does Duquesne Light finally confront the numerous cases which Plaintiff cited in its original brief, cases which make clear that a claim for damages such as Plaintiff's cannot be adjudicated by the P.U.C. – cases to which the Court adverted during argument on August 25.

Duquesne Light's supplemental brief contains a lot of distractions. None of them supersedes the overwhelming, well-settled authority constraining denial of the motion.

II. FACTS

For no apparent purpose, Duquesne Light has selectively presented the deposition testimony of some of its employees to establish that Duquesne Light had no notice of any fault with Plaintiff's electrical equipment. As Duquesne Light makes no attempt to apply these facts to its argument, the reason for stating them is mystifying. Facts tending to show that Duquesne

Light had no notice are irrelevant to the question of whether this matter should be transferred to the P.U.C.

Even so, Plaintiff is now compelled to point to contrary facts indicating that after the motor vehicle accident Duquesne Light was indeed on constructive, if not actual, notice of a problem with Plaintiff's electrical equipment. The motor vehicle accident on Forward Avenue, immediately behind the Funeral Home, snapped a utility pole and caused the wires it supported to droop and dangle and caused some to break. See, e.g., the transcript of the deposition of Duquesne lineman Donald Lewis, Exhibit "A" attached, at 18:14 – 25:13 and the transcript of the deposition of Duquesne lineman Brian Novak, Exhibit "B" attached, at 60:18 – 61:6. The force of the collision pulled one connection point of the single-phase service – where the single-phase service line was anchored to the building – out of the Funeral Home's brick wall. Exhibit "C" attached, the deposition of Duquesne lineman Robert Pierce, at 29:19 – 30:4.[1] The Funeral Home was the *only* building directly served by this damaged pole. Report of Richard W. Wunderley, P.E., dated August 23, 2010, Exhibit "E" attached, at 2 and 7.

The neighborhood lost power when a circuit breaker in a substation across the street from the accident scene opened. Deposition of Duquesne Light Senior Operator Joseph Frankhauser, Exhibit "F", at 27:10 – 29:20.

Donald Lewis, Duquesne Light's supervisor of its line construction crew, testified that when he arrived at the accident scene, he observed the pole snapped into three pieces, a leaking transformer and broken wires which would require splicing. Lewis Deposition, Exhibit "A", at 20:12 – 25:16. Mr. Lewis was asked at his deposition whether he considered there to have been

[1] In response to the Court's question on August 25, 2015, this fact was included in Plaintiff's response to Duquesne Light's summary judgment motion, having been stated on page 4 of Plaintiff's brief. Plaintiff's counsel also noted the damage to the building at oral argument on December 13, 2010. See the transcript of the oral argument, Exhibit "D" attached, at 14:24 – 15:5.

"any connection" between Duquesne Light's reinstatement of service and the fire. Lewis Deposition at 53:3 – 54:6. In response, he stated the following:

> . . . it could have been a short in their secondary breaker box, or their breaker box, due to the pole being hit.
>
> * * *
>
> Once a pole is hit and wires get mixed up, you have high voltage, and you have secondary voltage. If the primary voltage hit the neutral and/or secondary voltage wires, it can short out anything. Anything can happen. That was my thought process.
>
> * * *
>
> Once something gets shorted out, if it gets shorted out, and you go to re-energize it, I mean, it could cause other damage.

Exhibit "A", excerpts of the deposition of Donald Lewis, at 54:11 – 13, 55:14 – 19 and 56:3 – 5, respectively. (Emphasis added.) Asked similar questions, Mr. Pierce offered that "I heard that when the pole got hit that the primary wire contacted the neutral wire of the funeral home, which may have done damage in the building." Exhibit "C", deposition of Robert Pierce, at 56:5 – 8. This theory was expressed by Mr. Pierce's boss, Dave James. Id. at 56:9 – 57:13.

III. ARGUMENT

In addition to all the reasons set forth in Plaintiff's original response to the instant motion, the motion should be denied for a number of reasons: 1) questions of constructive knowledge must be presented to the jury; 2) the regulations cited by Duquesne Light have no bearing on this dispute; 3) assuming, *arguendo*, that this matter involved claims of negligence *per se*, such claims are not adjudicated by administrative agencies; and 4) Duquesne Light has once again evaded any meaningful discussion of contrary authority.

A. Questions of Constructive Knowledge Are To Be Decided By a Jury.

This case cannot be transferred to the P.U.C. because a jury must decide questions of constructive knowledge or notice.

As discussed above, it is puzzling why Duquesne Light has selectively presented facts supporting Duquesne Light's alleged lack of notice of a defective condition. The facts are not incorporated into Duquesne Light's argument and are well outside the scope of the pending motion. However, to counter the facts which Duquesne Light has presented indicating no notice, Plaintiff has above supplied other facts indicating that Duquesne Light did have notice of a defective condition, either actual or constructive.

As the Supreme Court observed at several points in its opinion, this case involves questions of actual ***or*** constructive notice or knowledge of a defect in Plaintiff's electrical equipment. See, e.g., 106 A.3d at 38. "Constructive knowledge" means "knowledge that one using reasonable care or diligence *should* have, and therefore that is attributed by law to a given person." Gleeson v. State Board of Medicine, 900 A.2d 430, 438 (Pa. Cmwlth. 2006), quoting Black's Law Dictionary at 888 (8th ed. 2004). (Emphasis added.) Questions of whether a defendant had constructive knowledge are to be decided by the jury. See Franc v. Pennsylvania Railroad, 424 Pa. 99, 102, 225 A.2d 528, 529 (1967) (as railroad employees routinely walked across bridge, question of whether railroad was on constructive notice of defect in pedestrian walkway to be decided by the jury). See also, e.g., Shaw v. Thomas Jefferson University, 80 A.3d 540, 546 n. 6 (Pa. Cmwlth. 2013); Antonace v. Ferri Contracting Co., Inc., 320 Pa. Super. 519, 525, 467 A.2d 833, 836 – 37 (1983); and Naponic v. Carlton Motel, Inc., 221 Pa. Super. 287, 290, 289 A.2d 473, 475 (1972).

In the instant case, the testimony of Duquesne Light's linemen as to the cause of the fire,

in tandem with Duquesne Light's having previously litigated a similar incident of overvoltage damage in Wivagg v. Duquesne Light Co., 73 D. & C.2d 694 (C.P. Allegheny County 1975) and the reported opinion of Poorbaugh v. Pennsylvania Public Utility Commission, 666 A.2d 744 (Pa. Cmwlth. 1995), also involving overvoltage damage, gives rise to the question of whether Duquesne Light had constructive knowledge, or was on constructive notice, of a problem with Plaintiff's electrical equipment. The P.U.C. could not decide the issue.

In presenting its lopsided recounting of facts, Duquesne Light tries to distract the Court from the immediate issue – whether to allow or deny bifurcation. This is not a motion for summary judgment.

B. The Regulations Cited By Duquesne Light Are Irrelevant to the Question of Bifurcation.

In its effort to divert this case to the P.U.C., Duquesne Light cites some vague regulations about ensuring the general safety and reliability of service. This case is manifestly *not* about the general safety and reliability of service or delays in restoration of service after an outage. It is about one customer whose unique situation was apprehended by Duquesne Light but then disregarded, leading to the total loss of the customer's building. Underscoring that this case has nothing to do with the general safety and reliability of service, to the best of Plaintiff's knowledge not one other customer in the Squirrel Hill area has filed any claim for property damage as a result of the service outage of January 9 – 10, 2009. The rest of the neighborhood that night had its power restored without incident because no building, other than Plaintiff's funeral home, was attached to the damaged pole, and no other customer was even in a position to suffer overvoltage damage.

The entire question of delay is all the more irrelevant because even though the funeral home was the *last* building in the area to have its service restored, Plaintiff has never complained

about the delay. In fact, had Duquesne Light given Plaintiff proper warning, so Plaintiff could have its building inspected by an electrician, the delay would have been even greater – yet it would have preserved Plaintiff's building and given Plaintiff no cause to complain. Section 1501 of the Public Utility Code, 66 Pa. C.S. § 101, *et seq.*, and 52 Pa. Code § 57.191, mandating reasonably continuous and uninterrupted service, are therefore patently inapposite to this case.[2] Sections 57.194, "Distribution system reliability" and 57.198, "Inspection and maintenance standards," are similarly irrelevant. Plaintiff has never contended that Duquesne Light's distribution system was unreliable or that the "*routine*"[3] inspections required by the P.U.C. were faulty.

52 Pa. Code § 57.197, "Reliability investigations and enforcement," is yet another red herring. Duquesne Light cites it as proof of the P.U.C.'s "expansive *regulatory* authority over all aspects of the safety and reliability of electric service." Supplemental Brief at 14. (Emphasis added.) Whether Duquesne Light investigated this incident properly or not in accordance with Section 57.197 does not determine whether Duquesne Light was negligent as to one customer and owes that one customer money damages.[4, 5]

Duquesne Light also cites 52 Pa. Code § 69.1902, a regulation which is part of the

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[2] Section 57.191 doesn't even rise to the level of a regulation. It merely introduces the regulations that follow in Subchapter N., "Electric Reliability Standards."

[3] 52 Pa. Code § 57.198(d) (emphasis added)

[4] It seems that Plaintiff and Duquesne Light can at least agree on one point. The P.U.C. has *regulatory* authority over Duquesne Light. It does not, however, have *adjudicatory* authority over *Plaintiff* or over Plaintiff's claim for fire damage. Feingold v. Bell of Pennsylvania, 477 Pa. 1, 383 A.2d 791 (1977); Elkin v. Bell Telephone Company of Pennsylvania, 491 Pa. 123, 420 A.2d 371 (1980); DeFrancesco v. Western Pennsylvania Water Company, 499 Pa. 374, 453 A.2d 595 (1982); Schriner v. Pennsylvania Power and Light Company, 348 Pa. Super. 177, 501 A.2d 1128 (1985) and Poorbaugh v. Pennsylvania Public Utility Commission, 666 A.2d 744 (Pa. Cmwlth. 1995).

[5] In August, Plaintiff requested from Duquesne Light, among other things, any reports which Duquesne Light filed with the P.U.C. with respect to this fire, but Duquesne Light has declined to produce them, instead moving for a protective order, contending that the document request is not relevant. See note 11, *infra*. If Duquesne Light were correct that the request is not even within the expansive scope of discovery, Section 57.197 could certainly not be relevant to the question of the P.U.C.'s alleged expertise.

P.U.C.'s "Utility Service Outage Response Recovery and Public Notification Guidelines – Electric Distribution Market." As the report entitled "Electric Distribution Company Service Outage Response and Restoration Practices Report, dated April 2009, Exhibit "G" attached, makes clear,[6] Section 69.1902 was enacted in response to customers' complaints of a lack of information from their utilities about service outages following Hurricane Ike in 2008. The regulation's objective is to make Pennsylvania's utilities more communicative to customers following mass outages. Section 69.1902 did not take effect until March 6, 2010, more than a year after the fire that destroyed Plaintiff's funeral home, and could not apply retroactively. Pittsburgh Palisades Park, LLC v. Pennsylvania State Horse Racing Commission, 844 A.2d 62, 68 n. 2 (Pa. Cmwlth. 2004). Even if it could apply retroactively, it would be irrelevant to the question of warning one customer about one known defect in the customer's equipment. The instant action has nothing to do with mass service interruptions, hurricanes or other mass catastrophes which arguably hinder a utility's ability to keep its customers informed *en masse* by Web sites or automatic dialers.[7]

Duquesne Light's arguments as to the relevance of vague P.U.C. regulations are all based upon a fundamentally flawed premise – that regulation and actions for damages are, necessarily, mutually exclusive. Such is not the case and never has been. If Duquesne Light were correct, by analogy, all "dram shop" litigation against licensees of the Pennsylvania Liquor Control Board, alleging the service of alcoholic beverages to visibly intoxicated patrons, would have to be adjudicated within the L.C.B., which, like the P.U.C., has its own administrative law branch. In fact, however, the victim of the negligence of an L.C.B. licensee may seek damages in the Court

[6] available through the P.U.C.'s Web site, through docket number M-2008-2065532

[7] Confirming the vacuousness of any contention that Section 69.1902 applies here, while the fire was still raging Duquesne Light had absolutely no trouble telephoning Plaintiff to report that its building was ablaze. See the transcript of James Runatz of Duquesne Light, Exhibit "H" attached, at 19:17 – 25:16.

of Common Pleas, while the L.C.B.'s administrative law branch contemporaneously determines whether the licensee violated various, pertinent statutes and regulations. That the licensee may have run afoul of the regulations governing the terms of its license in no way precludes an action for damages, in court, by the victim of the licensee's negligence. Here, too, though the P.U.C. may have the power to investigate the funeral home fire, and perhaps even to pursue corrective action as to Duquesne Light, those powers cannot possibly preclude Plaintiff's cause of action for damages in the Court of Common Pleas.[8]

If there were any P.U.C. regulation actually applicable to the instant dispute, Duquesne Light would have been sure to address it in its original brief. Duquesne Light did not do so. Its failure to support its own motion with citation to applicable regulations simply confirms that "[r]esolution of . . . [Plaintiff's] claims depend[s] upon no rule or regulation predicated on the peculiar expertise of the PUC, no agency policy, no question of service or facilities owed the general public, and no particular standard of safety or convenience articulated by the PUC," thereby barring referral to the P.U.C. DeFrancesco v. Western Pennsylvania Water Company, 499 Pa. 374, 378, 453 A.2d 595, 597 (1982). Referring damages claims against utilities, alleging negligence, to the P.U.C. would be akin to referring motor vehicle negligence claims to PennDOT because by statute all motorists must drive with reasonable care.

As Plaintiff noted in its original brief, Duquesne Light is free to petition the P.U.C. to issue new regulations should it feel uncertain in light of the Supreme Court's opinion.[9] No current regulations apply to Plaintiff's claim. The motion must be denied.

---

[8] At least with respect to the instant case, those powers of the P.U.C. seemingly exist more in theory than in practice. Only highlighting the need for a cause of action in court, and the irrelevance of the P.U.C.'s alleged oversight, is that in this case, save its filing of an *amicus* brief with the Supreme Court two years ago, the P.U.C. has never done anything to investigate or even consider the cause of Plaintiff's damages.

[9] Duquesne Light's comments as to the proposed rules on neutral connection wires, supplemental brief at 15, reinforce Plaintiff's previous argument that the P.U.C.'s demesne extends to complaints about irregular voltage and flickering lights. This case does not involve such complaints.

C. Juries, Not Administrative Law Judges, Decide Questions of Negligence *Per Se*.

Implicit among Duquesne Light's contentions is that Plaintiff must be alleging negligence *per se*, or that Plaintiff's claims are tantamount to such allegations, and that such claims must be adjudicated by the P.U.C. Plaintiff rejects any such characterization. Plaintiff's Second Amended Complaint cites no statute and no regulation. It seeks damages for plain negligence, minus the "*per se*." Even so, assuming, strictly for the purpose of argument, that Plaintiff were asserting negligence *per se*, such claims would have to be submitted to a jury, not to an administrative law judge.

> [T]here is a distinct difference between negligence and negligence *per se*. In a typical injury case, the plaintiff must prove all of the following elements of negligence: (1) the defendant owed the plaintiff a duty or obligation recognized by law; (2) the defendant breached that duty; (3) a causal connection existed between the defendant's conduct and the resulting injury; and (4) actual damages occurred. Negligence *per se* applies when an individual violates an applicable statute, regulation or ordinance designed to prevent a public harm. Proof that an applicable statute exists and that the defendant violated that statute establishes only the first two elements of negligence – duty and breach. The law is well settled, however, that even having proven negligence *per se*, a plaintiff cannot recover unless it can be proven that such negligence is the proximate or legal cause of the injury.

Sodders v. Fry, 32 A.3d 882, 887 (Pa. Cmwlth. 2011). (Citations and quotation marks omitted.)

> Violation of a statute may be negligence *per se* and liability may be grounded on such negligence if, but only if, such negligence is the proximate and efficient cause of the accident in question. . . . Ordinarily the question whether the negligence of a defendant is a proximate cause of the accident is for the fact-finding tribunal. . . .

Kaplan v. Philadelphia Transportation Co., 404 Pa. 147, 149 – 50, 171 A.2d 166, 167 (1961). (Citations and quotation marks omitted.) With the facts of Plaintiff's damages in dispute, even if Plaintiff had alleged Duquesne Light's violation of the Public Utility Code or a P.U.C.

regulation, the determination of proximate cause would be for the jury, not the P.U.C.[10]

D. Once Again, Duquesne Light Dodges Discussion of Relevant Case Law.

In its initial brief, Plaintiff noted Duquesne Light's palpable avoidance of any discussion of relevant case law holding that claims for damages against utilities must be adjudicated in the courts, not in the P.U.C. During argument on August 25, the Court also remarked that case law might require the denial of the instant motion and that the Court would be reviewing the case law. Certainly, it behooved Duquesne Light to address cases such as Feingold v. Bell of Pennsylvania, 477 Pa. 1, 383 A.2d 791 (1977); Elkin v. Bell Telephone Company of Pennsylvania, 491 Pa. 123, 420 A.2d 371 (1980); DeFrancesco v. Western Pennsylvania Water Company, 499 Pa. 374, 453 A.2d 595 (1982); Schriner v. Pennsylvania Power and Light Company, 348 Pa. Super. 177, 501 A.2d 1128 (1985) and Poorbaugh v. Pennsylvania Public Utility Commission, 666 A.2d 744 (Pa. Cmwlth. 1995), all holding that claims for damages brought against utilities must be adjudicated by a court and jury, rather than the P.U.C.

Consistent with its practice of dodging obvious questions, Duquesne Light has again missed the opportunity to distinguish these cases or to enlighten the Court. Instead, Duquesne Light again trots out its usual troika of P.U.C. administrative opinions, Hineline v. Metropolitan Edison Company, 1990 PA PUC LEXIS 156 (Pa. P.U.C. 1990); Craft v. Pennsylvania Electric Company, 50 Pa.P.U.C. 1 (1976); and Maluchnik v. Pennsylvania Electric Company, 2013 WL 1180372 (Pa. P.U.C. 2013), for the proposition that the "service point" marks the end of a utility's obligations to its customer.

The Supreme Court has already rejected that proposition.

[10] Similarly, a jury is more than capable of weighing risk-utility analyses, contrary to Duquesne Light's assertion otherwise. See, e.g., Tincher v. Omega Flex, Inc., 104 A.3d 328, 407 (Pa. 2014) (in product liability claims, the weight of evidence relevant to a risk-utility calculus is to be decided by the jury).

> [W]e find that the service-point rule has its limits and does not wholly supplant the salient common-law duty. As Hirsch develops amply, the service-point principle evolved in scenarios in which the courts were not focused on the presence of actual or constructive knowledge, on the part of utilities engaged in affirmative activities proximate to customer premises, of an unreasonable risk of harm arising from their conduct. Indeed, although Duquesne Light would clearly like to enjoy immunity from tort liability per a broad-scale application of the service-point rule, the electric company has itself refrained from stating, outright, that it is exempt from the application of the general tort-law duty to take reasonable measures to avert an unreasonable risk of harm to others occasioned by its own conduct.
>
> Duquesne Light's treatment of the underlying duty dovetails with its approach to the warning aspect—quite simply, the electric company fails to deal squarely with either. Based on such a deficient presentation, we have no intention of exempting a company administering in a dangerous commodity from well-recognized duties of care, in the face of actual or constructive knowledge of a danger. Moreover, the undertaking of reasonable efforts to avert harm prior to restoring power—at least some form of warning as envisioned by the Superior Court—represents a relatively modest measure in the face of an unreasonable risk of which a utility knows or should be aware.

106 A.3d at 38 – 39. (Footnotes omitted.) Here, P.U.C. opinions as to the service-point are as irrelevant as P.U.C. regulations as to the general reasonableness of service or *en masse* communication with customers following a widespread outage.

Duquesne Light needs to do more than dust off the same, tired, old tropes. Duquesne Light needs to confront Feingold, Elkin, DeFrancesco, Schriner and Poorbaugh. That Duquesne Light has not speaks volumes.

Duquesne Light also maintains that the Supreme Court's comments about the role of juries in its Alderwoods opinion does not constrain the denial of the instant motion. Plaintiff begs to differ. In rejecting Justice Eakin's dissenting opinion, which questioned the effect of the Court's opinion and upon which the instant motion is based, the Court reaffirmed the role of the

jury. "*[T]hese are precisely the sorts of considerations relegated to juries in cases in which a common-law duty exists and there are material factual questions concerning whether such obligation has been met.* Alderwoods, 106 A.3d at 42. (Emphasis added.)

Duquesne Light is apparently of the opinion that the Court's comments were *dicta.* In fact, the Court was responding to Justice Eakin's attack on the majority opinion for introducing uncertainty. After posing a series of hypothetical questions, Justice Eakin wrote:

> As the majority points out, "these are precisely the sorts of considerations relegated to juries[,]" id., at 42, and perhaps a body of law will, eventually, develop on this new duty, as its ramifications are exposed by new cases. In the meantime, however, these uncertainties will result in significant delays in the restoration of power because if the electric service companies know they may be held liable for damages if they restore power prematurely, they will delay doing so until they are sure no such damage will occur. Depending on the severity and location of the storm that caused it, weather-related power outages impact thousands of customers, commercial and residential alike, in both urban and rural areas. While the outage here was relatively benign, as appellee was the only one connected to the affected pole, the new duty created is not limited to such situations—it must be applicable to all, and in most circumstances, a prolonged power outage would be not only a public inconvenience, but also a major safety concern.

106 A.3d at 44 – 45. Mirroring Justice Eakin's hypothetical questions and his ensuing comments, in the instant motion Duquesne Light writes:

> The Supreme Court's holding provides no guidance to utility companies about several critical points. Questions arise concerning when and under what circumstances it is acceptable for the utility to delay restoration while contacting customers. The type and content of the warning, the acceptable response and who can make that response (owner, customer, tenant, etc.) are all open questions. The issues and questions that arise from the Supreme Court's decision directly affect the area of law that is overseen by the PUC. The circumstances in the field, the utility's communications to its customers, and the effect on response time and restorations, should be reviewed by the PUC.

Motion, paragraph 4.

Duquesne Light has hitched its motion wagon directly to the horse of Justice Eakin's dissenting opinion. According to Duquesne Light, because of the uncertainty created by the majority opinion, the P.U.C., rather than a jury, must decide this case. The Supreme Court majority has already, and directly, responded to that argument in the negative.

The Court's comments about juries are neither *dicta* nor irrelevant. However, even granting that the comments were *dicta*, they directly refute Duquesne Light's rationale for sending this case to the P.U.C.

E. Duquesne Light Concedes It Does Have Experience in Warning Customers.

In response to Plaintiff's comments in its earlier brief about flooding caused by Hurricane Ivan, Duquesne Light states that it did not assume responsibility for the safety of customer equipment. "Customers had to have their own electricians certify the safety of the customers' equipment before power would be restored." Supplemental brief at 18.

At some point, Duquesne Light had to have advised the customers affected by Hurricane Ivan that power would not be restored until Duquesne Light received the electricians' certifications. Plaintiff is looking for the same treatment.

Plaintiff disagrees that a flood differs from a pole hit. Although a flood creates a danger of short circuits, in this case Duquesne Light's linemen had constructive knowledge of a short circuit in the funeral home, too. See Section I., "Facts," above, at 3.

Confirming Plaintiff's argument in its earlier brief, the P.U.C. has no relevant regulation regarding warnings to customers that power will not be restored after a casualty, but Duquesne Light already has such a practice anyway.[11] Referral to the P.U.C. would therefore be pointless.

[11] In August, Plaintiff served Duquesne Light with extensive discovery requests intended to elicit additional

Duquesne Light doesn't need the P.U.C., which has no expertise on the issue, to tell it (Duquesne Light) whether its established procedures need to be changed. Plaintiff instead deserves the right to have the jury determine whether those established procedures should have been followed on the date of the fire.

IV. CONCLUSION

If negligence claims vaguely implicating Duquesne Light's statutory obligation to provide "adequate, efficient, safe, and reasonable service and facilities," 66 Pa. C.S. § 1501, required transfer to the P.U.C. for adjudication, then one would expect to Duquesne Light to move for bifurcation in every such instance. Yet a search of the Web site of the Allegheny County Department of Court Records discloses no motion to bifurcate in any other negligence action filed against Duquesne Light since January 1, 2010.

For example, in Mader v. Duquesne Light Company, Allegheny County C.C.P. No. GD-13-6249, the plaintiff has alleged Duquesne Light's negligence in the maintenance of power lines, leading to the plaintiff's electrocution. Duquesne Light has not moved to bifurcate. See a copy of the Mader complaint and docket attached as Exhibit "I". In Tekely v. Duquesne Light Company, Allegheny County C.C.P. No. GD-11-8132, the plaintiff alleged Duquesne Light's negligence in the maintenance of its facilities, leading to his injury from a blown manhole cover. Duquesne Light did not move to bifurcate. See a copy of the Tekely complaint and docket attached as Exhibit "J". Similarly, in Allstate Indemnity Company v. Duquesne Light Company, Allegheny County C.C.P. No. GD-11-022482, a claim brought by this office, the plaintiff alleged, *inter alia*, that Duquesne Light failed to detect an overvoltage condition – a claim that even involved flickering lights – yet Duquesne Light did not move to bifurcate. See a copy of

---

information about the contours of Duquesne Light's warnings to customers in flooded houses with suspected, compromised equipment. Duquesne Light has moved for a protective order, contending the information sought to be irrelevant. The motion is to be decided by Judge Wettick on Friday, September 11, 2015.

the Allstate complaint and docket attached as Exhibit "K". That Duquesne Light did not move to transfer these or other negligence cases to the P.U.C. is strong evidence that Duquesne Light felt the claims did not belong there. The instant case is no different.

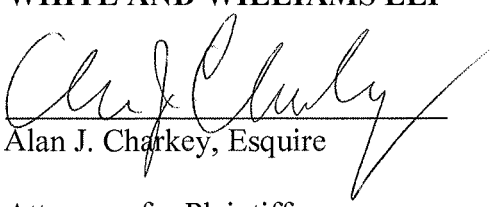
The motion should be denied. Under Pennsylvania law, it is very well-settled that damages claims such as Plaintiff's cannot be transferred to the P.U.C., and Duquesne Light has done nothing to refute that law. In the instant case, as well, the Supreme Court has again stated that damages claims against utilities are to be decided by juries. The P.U.C. has no expertise as to Plaintiff's claims, nor do any relevant statutes or regulations apply.

As to Duquesne Light's uncertainty as to hypothetical situations that do not pertain to this case, the P.U.C.'s A.L.J. could not address them. Such concerns are more properly directed to the legislature or to the rule-making branch of the P.U.C. rather than to an A.L.J. Also, questions of constructive knowledge and of negligence *per se* must be decided by juries.

As our appellate courts have amply pointed out, juries can decide technical questions with the aid of expert testimony. There is simply no good reason to grant Duquesne Light's request for relief.

Respectfully submitted,

WHITE AND WILLIAMS LLP



By: Alan J. Charkey, Esquire

Attorneys for Plaintiff,
Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home

Date: September 10, 2015

EXHIBIT “M”

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALDERWOODS (PENNSYLVANIA), INC., a wholly-owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,

Plaintiff,

vs.

DUQUESNE LIGHT COMPANY,

Defendant.

CIVIL DIVISION

GD 09-014720

ORDER OF COURT

Hon. Paul F. Lutty, Jr.

Copies sent via First-Class Mail to:

Peter T. Parashes, Esquire
Alan J. Charkey, Esquire
White and Williams, LLP
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103

Bradley S. Tupi, Esquire
Tucker Arensberg, P.C.
1500 One PPG Place
Pittsburgh, PA 15222

2015 SEP 15 AM 11:45
COURT OF COMMON PLEAS

DEPT. OF COURT RECORDS
CIVIL DIVISION
ALLEGHENY COUNTY

2015 SEP 15 PM 12:22

FILED

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALDERWOODS (PENNSYLVANIA), INC., a wholly-owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,	CIVIL DIVISION GD 09-14720
Plaintiff,	
vs.	
DUQUESNE LIGHT COMPANY,	
Defendant.	

ORDER OF COURT

AND NOW, to wit, this 14th day of September, 2015, upon consideration of Defendant's Motion to Bifurcate and Transfer Action to the Pennsylvania Public Utility Commission, Plaintiff's Supplemental Memorandum of Law in Support of Plaintiff's Response in Opposition to Defendant's Motion to Bifurcate and Transfer Action to Pennsylvania Public Utility Commission, and the arguments of all counsel, and all briefs submitted, it is hereby **ORDERED, ADJUDGED** and **DECREED** that the Motion is **GRANTED,** and case is hereby bifurcated and transferred to the Pennsylvania Public Utility Commission.

BY THE COURT:

PAUL F. LUTTY, JR., J.

EXHIBIT “N”

White and Williams LLP

Alan J. Charkey

1650 Market Street | One Liberty Place, Suite 1800 | Philadelphia, PA 19103-7395
Direct 215.864.6312 | Fax 215.789.7633
charkeya@whiteandwilliams.com | whiteandwilliams.com

September 22, 2015

By Federal Express

The Honorable Paul F. Lutty, Jr.
Allegheny County Court of Common Pleas
814 City-County Building
414 Grant Street
Pittsburgh, PA 15219-2419

RE: Alderwoods (Pennsylvania), Inc. v. Duquesne Light Company
Allegheny County Court of Common Pleas, No. GD-09-14720

Dear Judge Lutty:

In the captioned matter, enclosed please find Plaintiff's Motion For Reconsideration of Order of September 14, 2015 Or, in the Alternative, For Amendment of Order to Allow Interlocutory Appeal.

Thank you.

Very truly yours,

WHITE AND WILLIAMS LLP

Alan J. Charkey

Enclosures

cc: Bradley S. Tupi, Esquire (by e-mail and first class mail, w/ encl)
Erin Beckner Conlin, Esquire (by e-mail and first class mail, w/ encl)

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY

ALDERWOODS (PENNSYLVANIA), INC., a wholly owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,

Plaintiff

v.

DUQUESNE LIGHT COMPANY,

Defendant.

CIVIL DIVISION

Docket No. GD-09-14720

PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER OF SEPTEMBER 14, 2015 OR, IN THE ALTERNATIVE, FOR AMENDMENT OF ORDER TO ALLOW INTERLOCUTORY APPEAL

Code No. 009 – Trespass-Other

Filed on behalf of Plaintiff, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home

Counsel of record for Plaintiff:

Peter T. Parashes, Esquire
Pennsylvania Identification No. 22436
Alan J. Charkey, Esquire
Pennsylvania Identification No. 77556

WHITE AND WILLIAMS LLP
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103
Telephone: (215) 864-7178

Party Represented by Out-of-County Counsel Only

JURY TRIAL DEMANDED

CERTIFICATE OF SERVICE

I, Alan J. Charkey, Esquire, hereby certify that on September 22, 2015, I served a copy of Plaintiff's Motion For Reconsideration of Order of September 14, 2015 Or, in the Alternative, For Amendment of Order to Allow Interlocutory Appeal, with the proposed order in support thereof, upon counsel of record for the Defendant, Duquesne Light Company, Bradley S. Tupi, Esquire and Erin Beckner Conlin, Esquire, Tucker Arensberg, P.C., 1500 One PPG Place, Pittsburgh, PA 15222, by e-mail to btupi@tuckerlaw.com and ebeckner@tuckerlaw.com.

WHITE AND WILLIAMS LLP

By: Alan J. Charkey, Esquire

Attorneys for Plaintiff,
Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home

WHITE AND WILLIAMS LLP
By: Peter T. Parashes, Esquire
Identification Number 22436
By: Alan J. Charkey, Esquire
Identification Number 77556
One Liberty Place
1650 Market Street, Suite 1800
Philadelphia, PA 19103
(215) 864-7000

Attorneys for Plaintiff,
Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home

ALDERWOODS (PENNSYLVANIA), INC., a wholly owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME v. DUQUESNE LIGHT COMPANY	IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY CIVIL DIVISION Docket No. GD-09-14720

PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER OF SEPTEMBER 14, 2015 OR, IN THE ALTERNATIVE, FOR AMENDMENT OF ORDER TO ALLOW INTERLOCUTORY APPEAL

Plaintiff, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home ("Plaintiff"), by and through its attorneys White and Williams LLP, hereby moves the Court for reconsideration of the Court's order dated September 14, 2015, transferring the captioned matter to the Pennsylvania Public Utility Commission. In the alternative, Plaintiff moves the Court for amendment of the September 14 order pursuant to 42 Pa.C.S. § 702(b) to permit an interlocutory appeal from the order. In so moving, Plaintiff avers as follows:

1. On or about June 26, 2015, Defendant, Duquesne Light Company, served Plaintiff with its Motion to Bifurcate and Transfer Action to the Pennsylvania Public Utility Commission.

2. On or about August 14, 2015, Plaintiff served its response and supporting memorandum of law upon Defendant and upon the Court.

3. On August 25, 2015, the Court heard arguments in chambers.[1] The Court reserved judgment and asked the parties to submit supplemental briefs.

4. On August 31, 2015, the Court issued an order denying Defendant's motion.

5. On September 1, 2015, the Court issued an order vacating its August 31 order.

6. On or about September 11, 2015, Plaintiff submitted its supplemental brief.

7. On September 14, 2015, the Court issued an order granting Defendant's motion.

8. In the supporting memorandum of law, Plaintiff cited, *inter alia*, the opinions in Feingold v. Bell of Pennsylvania, 477 Pa. 1, 383 A.2d 791 (1977); Elkin v. Bell Telephone Company of Pennsylvania, 491 Pa. 123, 420 A.2d 371 (1980); DeFrancesco v. Western Pennsylvania Water Company, 499 Pa. 374, 453 A.2d 595 (1982); Schriner v. Pennsylvania Power and Light Company, 348 Pa. Super. 177, 501 A.2d 1128 (1985); and Poorbaugh v. Pennsylvania Public Utility Commission, 666 A.2d 744 (Pa. Cmwlth. 1995).

9. In Feingold, the plaintiff sued the defendant for damages for, *inter alia*, allegedly having failed to tell callers that the plaintiff's telephone number had changed and allegedly having disconnected service because of the plaintiff's use of an unauthorized telephone answering machine.

10. In Feingold, the trial court dismissed the plaintiff's complaint on the basis that he had failed to exhaust his administrative remedies with the P.U.C.

11. The Supreme Court reversed, holding that the P.U.C. did not have jurisdiction because it could not award damages to the plaintiff and therefore could not provide the plaintiff

[1] During argument, the Court directed the court reporter, who was present in chambers, not to record the colloquy. Toward the end of argument, almost one hour later, the Court asked the court reporter to go on the record. See Exhibit "A", the transcript, attached.

with an "adequate and complete" administrative remedy. 477 Pa. at 10 – 11, 383 A.2d at 795 – 96.

12. Because in the instant case the P.U.C. cannot award damages to Plaintiff, it cannot provide Plaintiff with an adequate and complete administrative remedy and therefore lacks jurisdiction.

13. In the instant matter, Feingold is binding precedent.

14. Feingold mandated the denial of Defendant's motion.

15. In Elkin, the plaintiff alleged that the defendant supplied the plaintiff with deficient telephone service.

16. In Elkin, the Supreme Court held that the plaintiff's complaints properly belonged before the P.U.C., as the plaintiff's claims involved deficient telephone service that did not cause property damage.

17. In Elkin, the Supreme Court also held that:

> Courts should not be too hasty in referring a matter to an agency, or to develop a "dependence" on the agencies whenever a controversy remotely involves some issue falling arguably within the domain of the agency's "expertise." "Expertise" is no talisman dissolving a court's jurisdiction. Accommodation of the judicial and administrative functions does not mean abdication of judicial responsibility. The figure of the so-called "expert" looms ominously over our society – too much so to permit the roles of the court and jury to be readily relinquished absent a true fostering of the purposes of the doctrine of primary jurisdiction.
>
> Where . . . the matter is not one peculiarly within the agency's area of expertise, but is one which the courts or jury are equally well-suited to determine, the court must not abdicate its responsibility. In such cases, it would be wasteful to employ the bifurcated procedure of referral, as no appreciable benefits would be forthcoming.

491 Pa. at 134 – 35, 420 A.2d at 377.

18. In the instant case, Defendant has failed to cite any P.U.C. rule or regulation bearing on the question of what Defendant should have done under the circumstance of this case.

19. The P.U.C. has no expertise with respect to what Defendant should have done under the circumstances of this case.

20. Under the standards set forth in Elkin, this matter should not be transferred to the P.U.C. for adjudication.

21. In the instant matter, Elkin is binding precedent.

22. Elkin mandated the denial of Defendant's motion.

23. In DeFrancesco, the Supreme Court held that when a utility's customer alleges that a utility's negligence damaged the customer's property, the claim may not be transferred to the Public Utility Commission.

24. In DeFrancesco, the Supreme Court held that the plaintiff's claims, concerning allegations of low water pressure, leading to fire damage to the customer's building, did not involve considerations of "the general reasonableness, adequacy or sufficiency of a public utility's service is drawn into question." 499 Pa. at 377, 453 A.2d at 596.

25. In DeFrancesco, the Supreme Court rejected that the plaintiff's complaints implicated general P.U.C. regulations regarding the plaintiff's entitlement to water or water pressure. Id.

26. In DeFrancesco, the Supreme Court rejected that the controversy before it involved a question of service or facilities owed the general public, or a particular standard of safety or convenience articulated by the P.U.C. Id.

27. In the instant matter, DeFrancesco is binding precedent.

28. DeFrancesco mandated the denial of Defendant's motion.

29. In Schriner, the Superior Court held that the plaintiffs' claims for damages to dairy cattle arising from stray voltage should not have been referred to the P.U.C.

30. In Schriner, the Superior Court held that the complaint contained allegations which only remotely dealt with the reasonableness, adequacy, efficiency or safety of the services, facilities or rates provided by the defendant utility. 348 Pa. Super. at 182, 501 A.2d at 1130.

31. Following DeFrancesco, the Superior Court in Schriner held that "resolution of the Schriners' claims depends upon no rule or regulation predicated upon the peculiar expertise of the PUC, no agency policy, no question of service or facilities owed the general public, and no particular standard of safety or convenience articulated by the PUC." Id.

32. In the instant matter, Schriner is binding precedent.

33. Schriner mandated the denial of Defendant's motion.

34. In Poorbaugh, the plaintiff sought money damages from the defendant utility after the plaintiff's building suffered fire damage following an overvoltage incident, in which high-voltage lines contacted low-voltage lines. 666 A.2d at 745 – 46.

35. Observing that Poorbaugh's claim was that of one individual, not an entire geographic area, and that the claim did not raise any questions about how the utility's services or facilities affected the general public, the Commonwealth Court held that the P.U.C. did not properly have jurisdiction. Id. at 750 – 51.

36. The facts of Poorbaugh are remarkably similar to those of the instant case.

37. Like Poorbaugh, the instant case involves no claims of property damage from anyone other than Plaintiff, the owner of the destroyed funeral home.

38. In the instant case, the funeral home was the only building receiving electric service from the utility pole damaged in the motor vehicle accident. Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 52 A.3d 347, 355 (Pa. Super. 2012).

39. The funeral home was the only customer affected by the overvoltage incident. Id.

40. In the instant matter, Poorbaugh is binding precedent.

41. Poorbaugh mandated the denial of Defendant's motion.

42. In the instant case, in the opinion above, the Supreme Court, echoing Elkin, reiterated that a jury has the ability to determine what was reasonable for Duquesne Light to have done under the circumstances. Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 106 A.3d 27, 42 (Pa. 2014).

43. The Supreme Court's opinion in Alderwoods as to the role of the jury in the instant matter is the law of the case. In re Estate of Elkins, 32 A.3d 768, 776 (Pa. Super. 2011).

44. As the law of the case, the Supreme Court's opinion in Alderwoods mandated the denial of Defendant's motion. In re Estate of Elkins.

45. A trial judge's disagreement with a particular rule of law is insufficent grounds for disregarding a clearly controlling precedent. Com. v. Ewansik, 360 Pa. Super. 476, 479, 520 A.2d 1189, 1190 (1987).

46. Should this matter be transferred to the P.U.C., Plaintiff will file preliminary objections with the A.L.J. on the basis of the aforementioned case law, on the basis of lack of jurisdiction.

47. Either on an interlocutory basis or after a hearing, Plaintiff intends to appeal the issue of jurisdiction to the Commission and to the Commonwealth Court, if necessary.

48. Given its holding in Poorbaugh, the Commonwealth Court would be constrained to hold that the P.U.C. lacks jurisdiction in the instant matter, resulting in the case's remand to the Court of Common Pleas, but only after a delay of many months, if not longer.

49. Transfer of this matter to the P.U.C. would therefore result in exactly the sort of waste, resulting in no appreciable benefits, which the Supreme Court cautioned against in Elkin. 491 Pa. at 134 – 35, 420 A.2d at 377.

50. In Schriner, the Superior Court held that it would be wasteful to employ a bifurcated procedure of referral to the P.U.C. when that body is incapable of providing an adequate remedy should the plaintiff's complaint be found to have merit. 348 Pa. Super. at 183, 501 A.2d at 1131.

51. In relevant part, Rule 1311(b) of the Pennsylvania Rules of Appellate Procedure provides that permission to appeal from an interlocutory order containing the statement prescribed by 42 Pa.C.S. § 702(b) may be sought from the prothonotary of the appellate court.

52. Rule 1311(b) also states in part that:

> An application for an amendment of an interlocutory order to set forth expressly the statement specified in 42 Pa.C.S. § 702(b) shall be filed with the lower court or other government unit within 30 days after the entry of such interlocutory order and permission to appeal may be sought within 30 days after entry of the order as amended.

53. 42 Pa.C.S. § 702(b) provides that:

> When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may

> thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

54. To the extent that the Court disagreed as to the applicability and binding nature of Feingold, Elkin, DeFrancesco, Schriner and Poorbaugh, or that the Supreme Court's opinion in Alderwoods as to the role of the jury in the instant matter is the law of the case, the Court's order of September 14, 2015 involves a controlling question of law as to which there is substantial ground for difference of opinion.

55. Because transfer of this matter to the P.U.C. will result in Plaintiff's preliminary objections and appeals, either interlocutory or otherwise, perhaps as far as the Commonwealth and/or Supreme Courts, an interlocutory appeal to the Superior Court at this juncture will materially advance the ultimate termination of this matter.

WHEREFORE, Plaintiff, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home, respectfully requests that the Court grant reconsideration of its order of September 14, 2015, or, in the alternative, that it amend the order of September 14 to state that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter.

Respectfully submitted,

WHITE AND WILLIAMS LLP

By: Alan J. Charkey, Esquire

Attorneys for Plaintiff,
Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home

Date: September 22, 2015

VERIFICATION

I, Alan J. Charkey, Esquire, hereby state that I am counsel for Plaintiff, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home, and that the statements contained in the foregoing Plaintiff's Motion For Reconsideration of Order of September 14, 2015 Or, in the Alternative, For Amendment of Order to Allow Interlocutory Appeal are true and correct to the best of my knowledge, information and belief.

I understand that this verification is made pursuant to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

Alan J. Charkey

Date: September 22, 2015

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

ALDERWOODS (PENNSYLVANIA), INC., a wholly owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME v. DUQUESNE LIGHT COMPANY	Docket No. GD-09-14720

ORDER

AND NOW, this _____ day of _____, 2015, upon consideration of Plaintiff's Motion For Reconsideration of Order of September 14, 2015 Or, in the Alternative, For Amendment of Order to Allow Interlocutory Appeal, it is hereby ORDERED that the Motion is GRANTED.

The Court's Order of September 14, 2015, transferring jurisdiction of this matter to the Public Utility Commission, is hereby VACATED, and Defendant's Motion to Bifurcate and Transfer Action to the Pennsylvania Public Utility Commission is hereby DENIED.

IN THE ALTERNATIVE, the Court's Order of September 14, 2015 is hereby AMENDED to include the following additional paragraph:

> This Order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the matter.

BY THE COURT:

_____, **J.**

15933497v.1

EXHIBIT "A"

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALDERWOODS (PENNSYLVANIA), INC., a wholly-owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,

Plaintiff,

vs

DUQUESNE LIGHT COMPANY,

Defendant.

CIVIL DIVISION

GD No. 09-014720

ARGUMENT

DATE: August 25, 2015

Filed by:
Cheryl A. Chorba
Official Court Reporter

BEFORE:

HON. PAUL F. LUTTY, JR.

COUNSEL OF RECORD:

For the Plaintiff:

ALAN CHARKEY, ESQ.
WHITE AND WILLIAMS, LLP
1650 Market Street
One Liberty Place
Suite 1800
Philadelphia, PA 19103

For the Defendant:

BRADLEY S. TUPI, ESQ.
TUCKER ARENSBERG, P.C.
1500 One PPG Place
Pittsburgh, PA 15222

(Tuesday, August 25, 2015.)

(In chambers at 11:08 a.m.)

THE COURT: Off record.

(Discussion held off the record.)

THE COURT: On the record.

I have reviewed the various documents that have been submitted. I am going to allow ten days for Supplementals to be filed. And then a couple days? What? A week after that?

MR. CHARKEY: That would be better.

THE COURT: For any reply. Then you don't need to come back here, but I will make a decision at that time.

I want to review the Supreme Court and Superior Court Opinions on this thing because I don't recollect some of this stuff. Whatever it is, that will be the time when I'll make a decision. So you will have a decision on this roughly in 20 days, 21 days.

MR. TUPI: Thank you, Your Honor.

MR. CHARKEY: Thank you, Your Honor.

Your Honor, would it help if counsel

and I supplied you with our Supreme Court Briefs, which might have additional facts?

THE COURT: That's fine with me.

MR. CHARKEY: Okay.

MR. TUPI: Okay.

THE COURT: That's fine with me.

It's my understanding that should I rule in favor of the defense in this matter and bifurcate this matter, that would constitute an interlocutory order and be non-appealable.

MR. TUPI: Unless Your Honor were to certify it otherwise.

THE COURT: Right.

MR. CHARKEY: Yes.

THE COURT: If I ruled the other way, that would be interlocutory also because that would have to go to verdict before that would be appealable.

MR. TUPI: I think that's correct, Judge.

THE COURT: So, in other words, whatever decision I make would be the final decision in the case subject to the PUC or the jury making the decision.

MR. CHARKEY: Your Honor --

THE COURT: Is that about right?

MR. TUPI: Yes, Your Honor.

MR. CHARKEY: Since you broached the subject, no matter which way you rule, then one of the parties would be interested, perhaps, in pursuing an interlocutory appeal.

What is Your Honor's position as to whether you would be willing to supplement your Order with the magic words?

THE COURT: Certify it over?

MR. CHARKEY: Yes.

THE COURT: Well, I don't know. I've only done that once. That's very seldom done around here. I don't know that that happens that often. I've done it once I think on something.

MR. TUPI: The only -- the grounds that I recall from having requested that in the past, you have to show that allowing the interlocutory appeal would ultimately speed the resolution of the controversy.

I find it hard to believe that another

trip to the Appellate Courts would speed the resolution of the controversy.

THE COURT: Can you prepare some time a transcript of what we just said here.

(In chambers proceedings concluded at 12:08 p.m.)

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

CERTIFICATE OF REPORTER

I, Cheryl A. Chorba, do hereby certify that the evidence and proceedings are contained accurately in the machine shorthand notes taken by me at the trial of the within cause, and that the same were transcribed under my supervision and direction, and that this is a correct transcript of the same.

Cheryl A. Chorba
Official Court Reporter
Court of Common Pleas

- - - - -

EXHIBIT “O”

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALDERWOODS (PENNSYLVANIA), INC., a wholly-owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,

Plaintiff,

vs.

DUQUESNE LIGHT COMPANY,

Defendant.

CIVIL DIVISION

GD 09-014720

ORDER OF COURT

Hon. Paul F. Lutty, Jr.

Copies sent via First-Class Mail to:

Alan J. Charkey, Esquire
White and Williams, LLP
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103

Bradley S. Tupi, Esquire
Tucker Arensberg, P.C.
1500 One PPG Place
Pittsburgh, PA 15222

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALDERWOODS (PENNSYLVANIA), INC., a wholly-owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,

Plaintiff,

vs.

DUQUESNE LIGHT COMPANY,

Defendant.

CIVIL DIVISION

GD 09-14720

ORDER OF COURT

AND NOW, to wit, this 13th day of October, 2015, upon consideration of Plaintiff's Motion For Reconsideration of Order of September 14, 2015, or, in the Alternative, For Amendment of Order to Allow Interlocutory Appeal, it is hereby **ORDERED, ADJUDGED** and **DECREED** that the Motion is **DENIED.**

BY THE COURT:

PAUL F. LUTTY, JR., J.

EXHIBIT “P”

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

ALDERWOODS (PENNSYLVANIA), INC., a wholly owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME

v.

DUQUESNE LIGHT COMPANY

PETITION FOR REVIEW BY ALDERWOODS (PENNSYLVANIA), INC., a wholly owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME

PETITION FOR REVIEW OF THE ORDER OF THE TRIAL COURT, THE HONORABLE PAUL F. LUTTY, JR., J., OF THE ALLEGHENY COUNTY COURT OF COMMON PLEAS, DATED OCTOBER 13, 2015, IN CIVIL ACTION NO. GD-09-14720, DENYING RECONSIDERATION OR CERTIFICATION FOR INTERLOCUTORY APPEAL OF THE SEPTEMBER 14, 2015 ORDER TRANSFERRING JURISDICTION TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Alan J. Charkey, Esquire
Attorney Identification No. 77556
WHITE AND WILLIAMS LLP
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103
(215) 864-7000

Attorneys for Petitioner,
Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home

In both its Order transferring jurisdiction of the instant tort matter to the Pennsylvania Public Utility Commission for adjudication, and in its subsequent Order refusing to certify an interlocutory appeal, the Court of Common Pleas has disregarded thirty-eight years of well-settled law holding that such matters cannot be adjudicated before the P.U.C. The Superior Court should grant the instant Petition because whether a tort matter may be adjudicated by the P.U.C. involves a controlling question of law as to which there is substantial ground for difference of opinion – between the trial court and this Commonwealth's appellate courts – and because an immediate appeal from the order would save years of unnecessary procedural wrangling which would result from the trial court's *ultra vires* order, in a case that has already been to the Supreme Court and is already seven years old.

The transfer of a claim for property damage against a utility to the P.U.C. is manifestly contrary to the principle of *stare decisis*. The trial court's refusal to certify the question of transfer to the P.U.C. is in egregious contravention of appellate authority holding such bifurcation may not take place under the circumstances of this case.

I. STATEMENT OF JURISDICTION

Plaintiff/Petitioner, Alderwoods (Pennsylvania), Inc., a Wholly Owned Subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home ("Hirsch"), files this Petition for Review pursuant to 42 Pa. C.S. § 702(b) and Rules 312 and 1311 of the Pennsylvania Rules of Appellate Procedure.

Hirsch seeks review of the October 13, 2015 order of the trial court denying Plaintiff's Motion For Reconsideration of Order of September 14, 2015 Or, In The Alternative, For Amendment Of Order To Allow Interlocutory Appeal.

This Court has jurisdiction over an order denying certification for interlocutory appeal under Chapter 15 of the Rules of Appellate Procedure. See Rule 1502 of the Pennsylvania Rules

of Appellate Procedure (Petition for Review replaces former procedures, such as petitions for the prerogative writs of mandamus and prohibition) and *Note* to R.A.P. 1311 ("Where the . . . lower court refuses to amend its order to include the prescribed statement [for interlocutory review], a petition for review under Chapter 15 of the unappealable order of denial is the proper mode [of seeking review] . . . .").

The 2004 Amendments to the Rules of Appellate Procedure make clear that a petition for review may seek review of an order refusing to certify the appeal of an interlocutory order. See R.A.P. 1501(a)(4) (noting that Chapter 15 applies to "review of orders refusing to certify interlocutory orders for immediate appeal") and the *Note* thereto.[1]

Finally, pursuant to R.A.P. 1512(a)(1), a petition for review must be filed within thirty days after the entry of the order for which review is sought. The instant petition is timely because the trial court denied Hirsch's request to certify its order for appeal on October 13, 2015.

II. THE NAME OF THE PARTY SEEKING REVIEW

Plaintiff/Petitioner, Alderwoods (Pennsylvania), Inc., a Wholly Owned Subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home ("Hirsch"), seeks the review of the trial court's October 13, 2015 order.

---

[1] * * *

> Subdivision (a)(4) was added in 2004 to recognize the references in various appellate rules and accompanying notes to petition for review practice. For example, the Notes to Rules 341 and 1311 direct counsel to file a petition for review of a trial court . . . order refusing to certify an interlocutory order for immediate appeal. . . .

R.A.P. 1501, *Note*.

III. THE NAME OF THE GOVERNMENT UNIT THAT MADE THE ORDER SOUGHT TO BE REVIEWED

The Court of Common Pleas of Allegheny County (the Honorable Paul F. Lutty, Jr., J.), is the government unit whose order Hirsch seeks to be reviewed.

IV. THE ORDER TO BE REVIEWED

In relevant part, the order dated October 13, 2015, denying Hirsch's Motion For Reconsideration of Order of September 14, 2015 Or, In The Alternative, For Amendment Of Order To Allow Interlocutory Appeal, states as follows:

ORDER OF COURT

> AND NOW, to wit, this 13th day of October, 2015, upon consideration of Plaintiff's Motion For Reconsideration of Order of September 14, 2015, or, in the Alternative, For Amendment of Order to Allow Interlocutory Appeal, it is hereby **ORDERED, ADJUDGED** and **DECREED** that the Motion is **DENIED**.
>
> BY THE COURT:
>
> /s/ Paul F. Lutty
> PAUL F. LUTTY, JR., J.

The order gave no explanation and provided no reasoning.

In essence, the order in question reaffirms the trial court's previous order of September 14, 2015, granting the motion by Defendant/Respondent Duquesne Light Company to bifurcate this case and transfer jurisdiction to the P.U.C. for adjudication of Duquesne Light Company's liability.

V. STANDARD AND SCOPE OF REVIEW

The standard applicable to a petition for review is whether the trial court's refusal to certify an order for interlocutory appeal "is so egregious as to justify prerogative appellate correction of the exercise of discretion by the lower tribunal." R.A.P. 1311, *Note*. See also Silver v. Downs, 493 Pa. 50, 55, 425 A.2d 359, 362 (1981) (in the event the trial court refuses to

certify an interlocutory appeal, the appellate courts may consider, and grant, a petition for review under R.A.P. 1311).

VI. STATEMENT OF THE CASE

Hirsch files the instant petition after the Supreme Court and Superior Court reversed Judge Lutty's granting of Defendant's motion for summary judgment in December 2010.

This case arises from a fire which completely destroyed Hirsch's funeral home on or about January 10, 2009. Hirsch alleges that the fire erupted as a result of Duquesne Light's restoration of electrical service in the aftermath of a motor vehicle accident which disrupted power in the area.

The motor vehicle accident occurred on Forward Avenue in Pittsburgh, which ran behind the funeral home, which was situated on Murray Avenue nearby. The utility poles on Forward Avenue carried high-voltage lines along their tops, with low-voltage lines running parallel to, and below, the high-voltage lines.

Hirsch commenced this action on August 25, 2009, by filing a Praecipe to Issue Writ of Summons with the Court of Common Pleas of Allegheny County. On September 22, 2009, in response to Duquesne Light's Praecipe for Rule to File Complaint, Hirsch filed the original complaint in this matter. The original complaint contained three counts, alleging negligence, breach of the implied warranty of hazard-free service and breach of the implied warranty of careful repair.

During discovery, when asked about potential causes of the fire, two of Duquesne Light's linemen testified that the fire may have been caused by an overvoltage condition – the high-voltage lines along Forward Avenue contacting the low voltage lines below, immediately after the motor vehicle accident, sending a surge of high-voltage current into the funeral home's equipment and compromising it, thereby causing the fire once power was restored hours later.

The linemen's theory later became the theory of Hirsch's engineering expert, Richard W. Wunderley, P.E.

In late 2010, Duquesne Light moved for summary judgment, contending it had had no duty to Hirsch. On December 13, 2010, Judge Lutty granted the motion and dismissed Hirsch's action. In an opinion issued on March 8, 2011 pursuant to R.A.P. 1925(a), Judge Lutty opined that summary judgment was warranted because Duquesne Light had been under no duty to Hirsch.

In July 2012, the Superior Court reversed, finding, under the facts alleged, that Duquesne Light either owed a duty either of inspecting Hirsch's equipment before restoring power or, at a minimum, of warning Hirsch. Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 52 A.3d 347, 355 (Pa. Super. 2012) (Musmanno, J.)

In briefing before the Supreme Court, the P.U.C. as *amicus* raised the question of transfer of the case to the P.U.C., but Duquesne Light did not address the issue. See Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 106 A.3d 27, 39 n. 13 (Pa. 2014).

In its opinion reversing Judge Lutty, the Supreme Court held that Duquesne Light had been under a duty to Hirsch. The court also wrote that because the P.U.C. but not Duquesne Light had raised the question of transfer of jurisdiction to the P.U.C., the question was not part of the appeal and that therefore the court would not consider it. 106 A.3d at 29 n. 13. However, later in its opinion, in refuting Justice Eakin's dissent, the court's majority wrote that:

> While the dissent offers various inquiries about what actions Duquesne Light might have taken which would be considered reasonable under the circumstances, . . . these are precisely the sorts of considerations relegated to juries in cases in which a common-law duty exists and there are material factual questions concerning whether such obligation has been met.

106 A.3d at 42. The court also stated that "generally, courts establish the landscape of common-

law duties as a matter of law, and juries decide, in individualized circumstances presented and where there are material facts in dispute, whether such duties have been breached." Id., n. 17.

The Supreme Court also found that Duquesne Light had not properly raised the question of whether Hirsch's Amended Complaint contained an allegation of failure to warn, as determined by the Superior Court. Id. at 40, n. 14.

After remand to the Court of Common Pleas, with leave of court Hirsch amended its complaint in May 2015 to expressly include an allegation of failure to warn.

On or about June 26, 2015, Duquesne Light moved to bifurcate – to transfer the adjudication of its liability to the P.U.C. Hirsch served its Memorandum of Law in opposition on the trial court and on Duquesne Light on or about August 14, 2015. Duquesne Light did not file a brief in reply to Hirsch's Memorandum of Law.

Argument on the motion was held before Judge Lutty in chambers on August 25, 2015. During argument, Judge Lutty directed the court reporter, who was present in chambers, not to record the colloquy. Toward the end of argument, almost one hour later, the Court asked the court reporter to go on the record.

During argument, Duquesne Light's counsel asked for permission to file a supplemental brief. Judge Lutty granted leave for Duquesne Light to file a supplemental brief and for Hirsch to file a response thereafter.

On August 31, 2015, Judge Lutty issued an order denying Duquesne Light's motion to bifurcate. The next day, September 1, 2015, Judge Lutty issued an order vacating the order he had issued the previous day.

On or about September 4, 2015, Duquesne Light served its supplemental brief. On or about September 11, 2015, Hirsch served its supplemental memorandum of law in response to

Duquesne Light's supplemental brief.

On September 14, 2015, Judge Lutty reversed his August 31 order and granted Duquesne Light's motion to bifurcate. On or about September 22, 2015, Hirsch served its Motion For Reconsideration of Order of September 14, 2015 Or, In The Alternative, For Amendment Of Order To Allow Interlocutory Appeal.

On October 13, 2015, Judge Lutty heard arguments on the aforesaid motion in chambers. During argument, Judge Lutty stated, among other things, that deciding the motion for reconsideration/for certification of interlocutory appeal was one of the toughest decisions he had had to make. Judge Lutty directed the court reporter not to record the argument.

On October 13, 2015, Judge Lutty denied Hirsch's motion for reconsideration/for certification of interlocutory appeal. See a copy of the order attached hereto as Exhibit "A".

VII. GENERAL STATEMENT OF THE OBJECTIONS TO THE ORDER AND WHY THE APPEAL SHOULD BE PERMITTED

Hirsch seeks review of the trial court's October 13 order because it is manifestly and egregiously contrary to the great weight of Pennsylvania authority holding that the P.U.C. cannot adjudicate claims of property damage resulting from a utility's negligence.

Hirsch also seeks review of the trial court's October 13 order because this case already suffered a four-year odyssey through the appellate court's as a result of Judge Lutty's earlier holding that Duquesne Light Company was under no duty to Hirsch, a holding which the Superior Court and Supreme Court found to be error. Should the trial court's October 13 order remain undisturbed, Hirsch would have no choice but to file preliminary objections and perhaps mount one or more interlocutory appeals – in an environment biased in favor of utilities – in an effort to reverse the effects of the trial court's latest error, thereby further substantially delaying Hirsch's right to a remedy. Accordingly, immediate review "would materially advance the

ultimate termination of the matter. . . ." 42 Pa.C.S. § 702(b).

Material advancement of the ultimate termination of the matter is one of Section 702(b)'s two prongs. The other prong has also been met. To the extent the trial court felt longstanding appellate authority did not control the outcome of Duquesne Light's motion to bifurcate, there was, at least from the trial court's standpoint, "a controlling question of law as to which there is substantial ground for difference of opinion." This was particularly true given the trial court's pronouncement during argument of its difficulty in deciding Hirsch's motion for reconsideration/ for certification of interlocutory appeal.

A. The P.U.C. Cannot Adjudicate Claims For Damages

The instant petition should be granted because under well-settled Pennsylvania law, the P.U.C. cannot hear a claim for damages arising on a single occasion from a single act or omission. There is now an abundance of case law holding that such claims for damages, arising from the furnishing of service, need not be routed to the P.U.C. and are more appropriately handled by the courts.

The seminal case in this area is Feingold v. Bell of Pennsylvania, 477 Pa. 1, 383 A.2d 791 (1977). In Feingold, the plaintiff sued Bell of Pennsylvania for damages caused, *inter alia*, by its alleged failure to maintain a recording telling callers that his firm's telephone number had been changed. Thus, callers could not reach the plaintiff and allegedly believed that his firm had gone out of business. Bell filed preliminary objections, contending that the claims had to be resolved by the P.U.C. The trial court agreed and dismissed the plaintiff's complaint because he had failed to exhaust his administrative remedies with the P.U.C.

The Supreme Court reversed. It noted that the statutes governing the P.U.C. did not enable the commission to award damages – a conclusion supported by various sections of the

Public Utility Law.[2]

> It is clear that the remedial and enforcement powers vested in the PUC by the Public Utility Law were designed to allow the PUC to enforce its orders and regulations but not to empower the PUC to award damages or to litigate a private action for damages on behalf of a complainant. The rule requiring exhaustion of administrative remedies is not intended to set up a procedural obstacle to recovery; the rule should be applied only where the available administrative remedies are adequate with respect to the alleged injury sustained and the relief requested. In the instant case, appellant could not have been made whole by the PUC, thus the administrative remedy was not "adequate and complete."

477 Pa. at 10 – 11, 383 A.2d at 795 – 96. (Citations and footnotes omitted.)

Since deciding Feingold, the Supreme Court has clarified its holding in two subsequent cases. As in Feingold, the plaintiff in Elkin v. Bell Telephone Company of Pennsylvania, 491 Pa. 123, 420 A.2d 371 (1980), also alleged that his business suffered damages because of poor service. The Court affirmed that in light of Feingold, the P.U.C. still has a place in deciding customer disputes. "The PUC has long been recognized as the appropriate forum for the adjudication of issues involving the reasonableness, adequacy and sufficiency of public utility services." 491 Pa. at 128 – 29, 420 A.2d at 374. (Citations omitted.) However,

> In spite of the PUC's rather extensive statutory responsibility for ensuring the adequacy, efficiency, safety and reasonableness of public utility services, we recognized in Feingold . . . that the Courts of Common Pleas have original jurisdiction to entertain suits for damages against public utilities based upon asserted failure to provide adequate services, even though the subject matter of the complaint is encompassed by the Public Utility Law.

491 Pa. at 129 – 30, 420 A.2d at 375. Even so, the Elkin court, acknowledging the technical expertise of administrative agencies under the doctrine of "primary jurisdiction," established a mechanism in which the trial court could refer an issue to an administrative agency for

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[2] Act of May 28, 1937, P.L. 1053, 66 P.S. § 110, *et seq.* (1959 & Supp.1977-78), since repealed and supplanted by the Public Utility Code, 66 Pa.C.S. § 101, *et seq.* See Pennsylvania Power Co. v. Township of Pine, 926 A.2d 1241, 1251 n. 21 (Pa. Cmwlth. 2007) (noting repeal).

adjudication so as to utilize "the agency's special experience and expertise in complex areas with which judges and juries have little familiarity." 491 Pa. at 132, 420 A.2d at 376. After such a referral, once the agency has spoken on the issue, it binds the parties and the court upon the case's return to the trial court. 491 Pa. at 133, 420 A.2d at 376 – 77.

The Court cautioned that trial courts should not hesitate to retain jurisdiction and should not too easily resort to the referral procedure.

> Courts should not be too hasty in referring a matter to an agency, or to develop a "dependence" on the agencies whenever a controversy remotely involves some issue falling arguably within the domain of the agency's "expertise." "Expertise" is no talisman dissolving a court's jurisdiction. Accommodation of the judicial and administrative functions does not mean abdication of judicial responsibility. The figure of the so-called "expert" looms ominously over our society – too much so to permit the roles of the court and jury to be readily relinquished absent a true fostering of the purposes of the doctrine of primary jurisdiction.
>
> Therefore, where the subject matter is within an agency's jurisdiction and where it is a complex matter requiring special competence, with which the judge or jury would not or could not be familiar, the proper procedure is for the court to refer the matter to the appropriate agency. Also weighing in the consideration should be the need for uniformity and consistency in agency policy and the legislative intent. Where, on the other hand, the matter is not one peculiarly within the agency's area of expertise, but is one which the courts or jury are equally well-suited to determine, the court must not abdicate its responsibility. In such cases, it would be wasteful to employ the bifurcated procedure of referral, as no appreciable benefits would be forthcoming.

491 Pa. at 134 – 35, 420 A.2d at 377. (Footnote omitted.) Because in Elkin, the plaintiff claimed damages arising from Bell's directory assistance and from its allegedly deficient WATS service, the Court found the involvement of the P.U.C. to have been appropriate. "The competence of the agency in these areas is substantially greater than the court's, and the need for uniformity of policy is apparent." 491 Pa. at 135, 420 A.2d at 377.

In DeFrancesco v. Western Pennsylvania Water Company, 499 Pa. 374, 453 A.2d 595 (1982), the Court again addressed the question of the proper forum for damages claims against public utilities. DeFrancesco concerned a fire loss which was exacerbated by allegedly low water pressure. Plaintiffs initially obtained verdicts against the water company in the Allegheny County Court of Common Pleas. On appeal, the Superior Court reversed, holding that the P.U.C. had had proper jurisdiction over the claims.

The Supreme Court reversed again. It reasoned that because the P.U.C. was charged with enforcing its rules and regulations, cases involving the alleged disregard of those rules should be referred to the P.U.C. 499 Pa. at 377, 453 A.2d at 596 – 97.

> The controversy now before us, however, is not one in which the general reasonableness, adequacy or sufficiency of a public utility's service is drawn into question. Resolution of appellant's claims depended upon no rule or regulation predicated on the peculiar expertise of the PUC, no agency policy, no question of service or facilities owed the general public, and no particular standard of safety or convenience articulated by the PUC. Rather, the gravamen of the allegations at trial was within the prescan [*sic*] authority of the courts, i.e., that the utility *negligently* failed to provide service required.
>
> * * *
>
> Involved here is not a question of whether appellants were entitled to water under agency regulations, or whether a certain general rule governing water pressure was disregarded. Resolving the essential question of whether the utility failed to perform its mandated duties requires no recondite knowledge or experience and falls within the scope of the ordinary business of our courts.[5]
>
> [5] We note that, just as the form of an action or the manner in which is titled does not automatically vest jurisdiction in the courts, the mere fact that a party to an action qualifies as a regulated public utility does not divest the courts of original jurisdiction. It is not to magic words, but to the essence of the underlying claims, we look in determining where jurisdiction properly lies.

499 Pa. at 378, 453 A.2d at 597. (Emphasis in original.)

The issue of P.U.C. adjudication of claims against utilities was also the subject of Schriner v. Pennsylvania Power and Light Company, 348 Pa. Super. 177, 501 A.2d 1128 (1985), in which this Court considered the question of whether the plaintiffs' claims for damages arising from stray voltage should have been referred to the P.U.C.

The Superior Court held that they should not have been referred. It held that the plaintiffs' claims only tangentially concerned the "reasonableness, adequacy, efficiency or safety of the services, facilities or rates provided by Appellant, PP&L." 348 Pa. Super. at 182, 501 A.2d at 1130, alluding, without attribution, to Section 1501, "Character of service and facilities,"[3] of the Public Utility Code, 66 Pa.C.S. § 101, *et seq.* Citing DeFrancesco, this Court found that resolution of the claims "depends upon no rule or regulation predicated upon the peculiar expertise of the PUC, no agency policy, no question of service or facilities owed the general public, and no particular standard of safety or convenience articulated by the PUC." Id. This Court then held because the P.U.C. could not award damages, referral to the P.U.C. would have been pointless.

> . . . [W]e agree with Elkin that it would be wasteful to employ a bifurcated procedure of referral to the PUC, as that body is incapable of providing an adequate remedy should the Schriners' complaint be found to have merit. Resolving the essential question of whether PP & L failed to perform what is alleged to have been an affirmative duty requires no special knowledge or experience and falls within the scope of the ordinary business of our courts.

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[3] Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. . . . .

66 Pa.C.S. § 1501.

348 Pa. Super. at 183, 501 A.2d at 1131.

In Poorbaugh v. Pennsylvania Public Utility Commission, 666 A.2d 744 (Pa. Cmwlth. 1995), the Commonwealth Court found that with respect to the plaintiff's claims, the P.U.C.'s expertise would not have been helpful. Poorbaugh involved facts that are strikingly similar to the facts of the instant case: a high-voltage line contacting a lower-voltage line immediately beneath it, resulting in overvoltage damage, the interruption of electrical service, and subsequent fire damage to the customer's structure. Id. at 746. The Court disagreed with the contention that the case should have been adjudicated within the P.U.C.

> [W]hile the subject matter of Poorbaugh's complaint against West Penn is encompassed by the Utility Code, we conclude that this case is not a complex matter requiring the special expertise of the PUC in order to resolve it. As such, the present case is distinguishable from Elkin. With the assistance of expert testimony, there is no reason why a judge or jury could not determine whether West Penn had breached a duty of care owed to Poorbaugh by allegedly causing an oversurge of electricity which resulted in a fire.
>
> The present case is also distinguishable from Elkin in that it does not involve the need for uniformity and consistency of agency policy. Rather, it focuses only upon the supply of electricity to one West Penn customer on one particular occasion. As noted in Feingold, questions about the adequacy of utility service to an entire geographic area, rather than to one individual, could present problems which should be addressed by the PUC. Feingold v. Bell of Pennsylvania, 477 Pa. 1, 10-11 n. 7, 383 A.2d 791, 796 n. 7. However, Poorbaugh's claim is that of one individual, not an entire geographic area. In addition, the present case does not raise any questions about how West Penn's services or facilities affect the general public. See DeFrancesco. In weighing the various considerations articulated by our Supreme Court with respect to the primary jurisdiction of the PUC, we conclude that jurisdiction over Poorbaugh's claims should have been vested in the trial court, not the PUC.

666 A.2d at 751.

In its opinion, the Commonwealth Court distinguished the facts of Optimum Image, Inc.

v. Philadelphia Electric Co., 410 Pa. Super. 475, 600 A.2d 553 (1991), in which the Superior Court approved the transfer of claims to the P.U.C. and which Duquesne Light cites in its motion here. According to the Commonwealth Court,

> In that case, Optimum Image sued Philadelphia Electric Company (PECO), claiming that its film processing machines and its cash register had been damaged by power surges that were a result of voltage fluctuations in PECO's electrical service. Optimum Image's complaint alleged that PECO delivered, over an extended period of time, unreasonably defective electrical power to its business premises. Also at issue were matters relating to the adequacy of the equipment used by PECO to investigate the problems that were experienced by Optimum Image as well as PECO's compliance with the tariff it had filed with the PUC. Our Superior Court concluded that the expertise of the PUC was needed to decide Optimum Image's claims. Optimum Image, 410 Pa. Superior Ct. at 483, 600 A.2d at 557.
>
> The Superior Court stated that, unlike the claims in DeFrancesco, the allegations of Optimum Image encompassed complex, technical claims relating to problems with the supply of electrical power over an extended period of time. Id. at 484, 600 A.2d at 557. Moreover, Optimum Image had also taken issue with the equipment used by PECO to investigate its problems as well as with PECO's compliance with its tariff. Id.
>
> While Optimum Image is similar in some respects to the present case, we conclude that there are several important differences which make Optimum Image distinguishable. First, Poorbaugh's claims focus upon one specific instance of electrical problems, not electrical problems over an extended period of time. Second, as has already been discussed, we do not believe that Poorbaugh's case involves complex, technical issues. Unlike Optimum Image, Poorbaugh has not raised any issues relating to tariffs which would certainly require the expertise of the PUC. Given these considerations, we conclude that Optimum Image is not persuasive in the present case.

Poorbaugh, 666 A.2d at 751. Simply put, Poorbaugh's claim for damages belonged before the trial court, not the P.U.C.[4]

[4] In the trial court below, Duquesne Light absurdly distinguished Poorbaugh from the instant case, because Poorbaugh did not involve an allegation of failure to warn. Failure to warn is but

Following Poorbaugh, the Commonwealth Court again reviewed the doctrine of primary jurisdiction in Vertis Group, Inc. v. Pennsylvania Public Utility Commission, 840 A.2d 390 (2003). Like the plaintiff in Optimum Image, the plaintiff in Vertis Group complained of an irregular power supply over a period of time. The court held the complaint properly transferred to the P.U.C.:

> We note that our Superior Court's decision in Optimum Image, Inc. was instructive on this issue, as the facts of that case are quite similar to the facts of the present case before this Court. Under this similar factual pattern, the Superior Court in Optimum Image, Inc. also held that bifurcation was appropriate. Moreover, in Poorbaugh, we distinguished the facts of that case from the facts of Optimum Image, Inc., noting that the former involved one specific instance of electrical problems whereas the latter, similar to the facts of the present case, involved electrical problems over an extended period of time. Further, unlike Optimum Image, Inc., we noted that the petitioner in Poorbaugh had "not raised any issues relating to tariffs which would certainly require the expertise of the PUC." Poorbaugh, 666 A.2d at 751.

Vertis Group at 397 n. 15.

The lesson from the foregoing cases is clear. If the complainant alleges quality-of-service problems such as continually deficient telephone service or ongoing power surges or repeatedly irregular voltage, affecting a widespread geographic area, or violations of the service provider's tariff, the complaint should be routed to the P.U.C. However, if the complainant alleges physical harm caused by a service provider on one particular occasion, the matter must

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one component of a negligence claim. That Poorbaugh did not involve a claim of failure to warn whereas the instant case does is a distinction without any meaningful difference.

Moreover, the adjudication of the instant case could never result in the issuance of any broad statement of policy about how to warn customers under various, divergent circumstances that did *not* occur on January 10, 2009. Instead, it could only result in a determination of how Duquesne Light breached its duty under the circumstances of *this* case. No enunciation of overarching principles about how to warn customers of suspected electrical faults would ever result from an adjudication before the P.U.C. See the Supreme Court's discussion in Alderwoods, 106 A.3d at 42 n. 17 and the discussion in Sections VII.B. and VII.C., *infra*.

remain in the trial court and must be submitted to the jury.

In the instant case, Hirsch does not allege in its Second Amended Complaint that Duquesne Light violated P.U.C. rules or regulations, nor does Hirsch allege that Duquesne Light's actions risked harm to the general public or that Duquesne Light failed to abide by its tariff. This case has never concerned the "general reasonableness, adequacy or sufficiency of a public utility's service." DeFrancesco, 499 Pa. at 377, 453 A.2d at 596. This case involves no issue "falling arguably within the domain of the agency's 'expertise.'" Elkin, 491 Pa. at 134, 420 A.2d at 377. Instead, Hirsch's action "focuses only upon the supply of electricity to one" Duquesne Light "customer on one particular occasion." Poorbaugh at 751. The issues in this case regarding negligence and the recognition of a duty to inspect or warn are manifestly outside the scope of the P.U.C.'s authority and expertise. DeFrancesco. Quite simply, there is nothing technical for the P.U.C. to address.

B. The Supreme Court's Opinion As To the Role of the Jury is the Law of The Case. Transfer of the Case to the P.U.C. Would Usurp the Role of the Jury.

The motion must also be denied because in its opinion in this case, the Supreme Court reaffirmed it is for the jury, not the P.U.C., to determine what was reasonable under the circumstances. The Court's opinion is the law of the case from which no trial court may digress.

In disputing Justice Eakin's dissenting opinion, which questioned the effect of the Court's opinion and upon which Duquesne Light based its motion to bifurcate, the Court reaffirmed the role of the jury. "*[T]hese are precisely the sorts of considerations relegated to juries in cases in which a common-law duty exists and there are material factual questions concerning whether such obligation has been met.*[5] Alderwoods, 106 A.3d at 42. (Emphasis

[5] See the larger passage containing this quotation at page 5, *supra*.

added.)

The Supreme Court's opinion above, both as to the nature of the duty and the role of the jury, is the law of the case and must be applied to the resolution of the pending motion.

> The law of the case doctrine sets forth various rules that embody the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter.
>
> > Among the related but distinct rules which make up the law of the case doctrine are that: (1) upon remand for further proceedings, a trial court may not alter the resolution of a legal question previously decided by the appellate court in the matter. . . .

In re Estate of Elkins, 32 A.3d 768, 776 (Pa. Super. 2011), quoting Ario v. Reliance Insurance Co., 602 Pa. 490, 980 A.2d 588, 597 (2009) (first paragraph) and Commonwealth v. Starr, 541 Pa. 564, 664 A.2d 1326, 1331 (1995) (second paragraph). (Quotation marks omitted.)

There is nothing for the P.U.C. to consider. On the date of the fire, Duquesne Light was under a longstanding duty to avoid harm to Hirsch's property when Duquesne Light had either actual or constructive notice of a problem with Hirsch's equipment following an overvoltage incident. Under our judicial system, *how* Duquesne Light was to discharge that longstanding duty is to be decided by the jury. Alderwoods, 106 A.3d at 42. In light of Duquesne Light's professed confusion as to what would have been reasonable under the circumstances, the jury must address the question, not an administrative agency.

> Ordinary care is the care a reasonably prudent person would use under the circumstances presented in this case. It is the duty of every person to use ordinary care not only for his own safety and the protection of his property, but also to avoid serious injury to others. *What constitutes ordinary care varies according to the particular circumstances and conditions existing then and there.* The amount of care required by law must be in keeping with the degree of danger involved.

Stewart v. Motts, 539 Pa. 596, 606 – 07, 654 A.2d 535, 540 (1995), quoting with approval the jury instructions of the trial court below. (Emphasis added.) "The charge properly instructed the jury that the level of care required changed with the circumstances. The charge also informed the jury that the level of care required increased proportionately with the level of danger in the activity." 539 Pa. at 607, 654 A.2d at 540. See also S.S.J.I. 13.10 (Civ) ("You must decide how a reasonably careful person would act *under the circumstances of this case*"; emphasis added.) See also Alderwoods at 34 n. 6, discussing Stewart v. Motts; Bloomer v. Snellenburg, 221 Pa. 25, 28, 69 A. 1124, 1124 (1908) (in determining question of contributory negligence, what a reasonably prudent person would do under the circumstances is a question of fact for the jury, and not of law for the court); and Meyers v. Cent. R. Co. of New Jersey, 218 Pa. 305, 306, 67 A. 620 (1907) (jury could have inferred that train conductor should have reasonably anticipated fatal accident would result from his failure to give warning of train's approach).

As the Supreme Court observed at several points in Alderwoods, this case involves questions of actual ***or*** constructive notice or knowledge of a defect in Plaintiff's electrical equipment. See, e.g., 106 A.3d at 38. "Constructive knowledge" means "knowledge that one using reasonable care or diligence *should* have, and therefore that is attributed by law to a given person." Gleeson v. State Board of Medicine, 900 A.2d 430, 438 (Pa. Cmwlth. 2006), quoting Black's Law Dictionary at 888 (8th ed. 2004). (Emphasis added.) Questions of whether a defendant had constructive knowledge are to be decided by the jury. See Franc v. Pennsylvania Railroad, 424 Pa. 99, 102, 225 A.2d 528, 529 (1967) (as railroad employees routinely walked across bridge, question of whether railroad was on constructive notice of defect in pedestrian walkway to be decided by the jury). See also, e.g., Shaw v. Thomas Jefferson University, 80 A.3d 540, 546 n. 6 (Pa. Cmwlth. 2013); Antonace v. Ferri Contracting Co., Inc., 320 Pa. Super.

519, 525, 467 A.2d 833, 836 – 37 (1983); and Naponic v. Carlton Motel, Inc., 221 Pa. Super. 287, 290, 289 A.2d 473, 475 (1972).

In the instant case, the testimony of Duquesne Light's linemen as to the cause of the fire, in tandem with Duquesne Light's having previously litigated a similar incident of overvoltage damage in Wivagg v. Duquesne Light Co., 73 D. & C.2d 694 (C.P. Allegheny County 1975) and the reported opinion of Poorbaugh v. Pennsylvania Public Utility Commission, 666 A.2d 744 (Pa. Cmwlth. 1995), also involving overvoltage damage, gives rise to the question of whether Duquesne Light had constructive knowledge, or was on constructive notice, of a problem with Plaintiff's electrical equipment. The P.U.C. could not decide the issue.

Duquesne Light would usurp the jury's function by transferring the determination of reasonableness to its friends at the P.U.C. Our system does not work that way. It is for the jury, not a court, and certainly not an administrative law judge, to decide questions of constructive knowledge and of what was reasonable under the circumstances. Our Supreme Court has already said so *in this case*. 106 A.3d at 42. See also Bloomer v. Snellenburg, *supra*.

C. The P.U.C. Has No Expertise In This Area But Duquesne Light Does. Duquesne Light Seeks the Drafting of New Statutes and New Regulations Which Is Beyond The Ability of the A.L.J. In This Case.

This case cannot be transferred to the P.U.C. because the P.U.C. has no expertise with respect to the duties of an electric company to a customer after an overvoltage incident. Also, the P.U.C.'s administrative law judge could not draft new regulations or new statutes in this case to satisfy Duquesne Light's professed quest to reduce uncertainty.

Review of Title 52, Chapter 57 of the Pennsylvania Code, delineating the P.U.C.'s responsibilities with respect to electric service, confirms that the P.U.C.'s expertise is limited to matters such as recording accidents self-reported by regulated utilities, of service voltage, of

service frequency, of maintaining records of system load and operation, of meter testing and of pole removal. It is thus not surprising that in Optimum Image and Vertis Group our appellate courts approved the reference of the customers' complaints of inconsistent current to the P.U.C. Neither Chapter 57, Chapter 67 ("Service Outages") nor Chapter 69 ("General Orders, Policy Statements and Guidelines on Fixed Utilities") contains anything with respect to responding to overvoltage incidents. The P.U.C. has no such expertise.

Duquesne Light's arguments as to the relevance of vague P.U.C. regulations are all based upon a fundamentally flawed premise – that regulation and actions for damages are, necessarily, mutually exclusive. Such is not the case and never has been. If Duquesne Light were correct, by analogy, all "dram shop" litigation against licensees of the Pennsylvania Liquor Control Board, alleging the service of alcoholic beverages to visibly intoxicated patrons, would have to be adjudicated within the L.C.B., which, like the P.U.C., has its own administrative law branch. In fact, however, the victim of the negligence of an L.C.B. licensee may seek damages in the Court of Common Pleas, while the L.C.B.'s administrative law branch contemporaneously determines whether the licensee violated various, pertinent statutes and regulations. That the licensee may have run afoul of the regulations governing the terms of its license in no way precludes an action for damages, in court, by the victim of the licensee's negligence. Here, too, though the P.U.C. may have the power to investigate the funeral home fire, and perhaps even to pursue corrective action as to Duquesne Light, those powers cannot possibly preclude Plaintiff's cause of action for damages in the Court of Common Pleas.[6]

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[6] At least with respect to the instant case, those powers of the P.U.C. seemingly exist more in theory than in practice. Only highlighting the need for a cause of action in court, and the irrelevance of the P.U.C.'s alleged oversight, is that in this case, save its filing of an *amicus* brief with the Supreme Court two years ago, the P.U.C. has never done anything to investigate or even consider the cause of Plaintiff's damages.

In the court below, Duquesne Light tacitly conceded the point that the P.U.C lacks expertise here. A necessary predicate of Duquesne Light's motion to bifurcate was that the questions for which it seeks answers *are questions that the P.U.C. has never before answered.* Accordingly, under DeFrancesco the motion must be denied:

> [O]ur courts have opined that where resolution of a party's claim "... depend[s] upon no rule or regulation predicated on the peculiar expertise of the PUC, no agency policy, no question of service or facilities owed to the general public, and no particular standard of safety or convenience articulated by the PUC", then the court should not refer the matter to the Commission.

Ostrov v. I.F.T., Inc., 402 Pa. Super. 87, 97, 586 A.2d 409, 414 – 15 (1991), quoting DeFrancesco, 499 Pa. at 378, 453 A.2d at 597. (Editing marks within quotation supplied by the court.) If an agency has no relevant rules or regulations, no relevant policies and no *particular* standards of safety or convenience – a necessary premise and tacit concession of Duquesne Light's motion to bifurcate – the matter should not be referred to the agency. Moreover, rather than being technical in nature, Duquesne Light's questions are of a sort for which a jury could supply common-sense answers. Alderwoods, 106 A.3d at 42.[7]

In its motion, Duquesne Light alluded to P.U.C. regulations regarding time to restore service and the tracking of restoration times after hurricanes. Such regulations are inapposite. Here, Plaintiff's funeral home "was the sole building serviced directly by the demised utility pole and the only structure to have sustained direct damage, in the form of detached service lines." Alderwoods, 106 A.3d at 37. This case has nothing to do with hurricanes.[8]

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[7] For example, "What if a customer cannot be reached at all?", posed by Justice Eakin in his dissenting opinion, 106 A.3d at 44, is a question eminently answerable by a jury.

[8] In the five years this case has been litigated, Duquesne Light has been wont to foretell widespread chaos as emanating from a duty to prevent just one building, having suffered

Confirming the P.U.C.'s lack of expertise, in its *amicus* brief to the Supreme Court the P.U.C. could only cite irrelevant regulations having nothing to do with this case. For example, the P.U.C. cited regulations concerning reporting of service outages such as 52 Pa. Code § 67.1 and 52 Pa. Code § 69.1901 which do not mandate the restoration of service in the face of a grave threat of fire. Similarly, the P.U.C. cited 52 Pa. Code § 57.198, intended to provide a certain minimum level of reliability, but failed to explain why such a standard such is incompatible with fire prevention. If the P.U.C. had the expertise which Duquesne Light claims it to have, it failed to demonstrate that expertise during its one opportunity in this case to do so.

What Duquesne Light actually seeks here is not the resolution of common-sense questions by an administrative law judge but rather the adoption of regulations regarding an electric provider's responsibilities after an overvoltage incident. Confirming the motion to be more a quest for the issuance of regulations than an effort to adjudicate this matter, Duquesne Light's motion to bifurcate sought answers to questions, such as those posed by dissenting Justice Eakins, which the P.U.C. could *never* answer here and which are completely conjectural. Such questions are utterly irrelevant to this case.

Given the Supreme Court's admonition that policy as to overvoltage incidents is best set by the legislature, Alderwoods at 40, it is doubtful that the P.U.C. even has the ability to adopt such regulations absent a legislative mandate. However, assuming, *arguendo*, that it did, Duquesne Light's efforts here are more properly directed to the P.U.C.'s Director of Regulatory Affairs for rule-making, not to a P.U.C. administrative law judge for adjudication.[9] Such rule-

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overvoltage damage, from catching fire. As the Supreme Court above correctly observed, Plaintiff has been just as consistent in dismissing such sky-is-falling prognostications as "severely overblown." Alderwoods, 106 A.3d at 37.

[9] According to the P.U.C.'s Web site:

making would be prospective only and could have no retroactive application to this case. Only regulations *that do not impair substantive rights* may be applied retroactively. Pittsburgh Palisades Park, LLC v. Pennsylvania State Horse Racing Commission, 844 A.2d 62, 68 n. 2 (Pa. Cmwlth. 2004). (Emphasis added.)

Although Duquesne Light claims to need the assistance of the P.U.C., its self-professed status as ingénue is distinctly doubtful. In its motion, Duquesne Light essentially proclaimed its *own* inexperience with respect to overvoltage incidents. It all but confessed, at least with respect to overvoltage incidents, that it does not know what it is doing. In actuality, Duquesne Light's profession of naïveté may be more rhetorical than actual. As the Supreme Court pointed out, the electric power industry already has procedures in place after flooding events for warning customers to inspect their equipment for damage before service will be restored. 106 A.3d at 37 n. 9.

In its response to Hirsch's motion for reconsideration/for certification of interlocutory appeal, Duquesne Light insisted that Hirsch had refused "to recognize the pervasive regulatory scheme triggered by its allegations." There is no "pervasive regulatory scheme" at issue in this case, never mind one that was "triggered" by Hirsch's allegations. If a "regulatory scheme" were at issue here, then cases such as DeFrancesco, Schriner and Poorbaugh, holding that

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> The Director of Regulatory Affairs oversees the PUC's bureaus with regulatory functions, including the Bureau of Audits, the Bureau of Consumer Services, the Bureau of Technical Utility Services, the Office of Special Assistants and the Office of Administrative Law Judge. The Director of Regulatory Affairs also is responsible for planning, organizing, coordinating, directing and overseeing regulatory staff.

http://www.puc.state.pa.us/about_puc/bureaus_and_offices.aspx, accessed on August 11, 2015.

ancillary regulations do not justify bifurcation, were all wrongly decided.

Duquesne Light could simply have avoided this entire case by applying what it does after a flood to future instances of suspected or known overvoltage damage. That Duquesne Light already has knowledge regarding warnings to customers owning damaged electrical equipment makes its motion to bifurcate all the more perplexing.

D. Conclusion

Aside from the Supreme Court's opinion above, of all the cases adverse to Duquesne Light's motion, Poorbaugh is probably the most directly on point. Like the instant case, it involved another overvoltage incident, leading Judge Musmanno to discuss it in some detail in his July 2012 opinion. Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 52 A.3d 347, 354 (Pa. Super. 2012). Like the instant case, Poorbaugh involved a single incident of fire damage to a single customer.

Moreover, reference to an administrative law judge at the P.U.C. would never succeed in providing answers to most of the rhetorical questions appearing in Justice Eakin's dissenting opinion. The questions are simply irrelevant to this case, which is about how Duquesne Light failed its duty *to Hirsch* on January 10, 2009.

If controlling case law were not enough, the Supreme Court here has already disposed of the bifurcation issue in its opinion above. This case involves a longstanding duty. Juries determine what a reasonable person, or a reasonable electric utility, should have done in the face of a longstanding duty. 106 A.3d at 42. The Court's opinion is the law of the case and cannot be changed.

The P.U.C. would not be helpful and would only delay this case before its inevitable return to the Court of Common Pleas.

Hirsch recognizes that the likelihood of the granting of a petition for review is small, particularly when the trial court has refused to certify an interlocutory appeal. However, in the instant case, the trial court was utterly without any authority or discretion to order this matter transferred to the P.U.C. The trial court's order of October 13, 2015 was in egregious disregard of our appellate courts and of the principle of *stare decisis*.[10] To avoid years of additional appeals within the P.U.C. and to the Commonwealth Court, the Superior Court should grant the instant petition, particularly when Hirsch has already waited nearly seven years for a remedy.

VIII. RELIEF SOUGHT

Plaintiff/Petitioner, Alderwoods (Pennsylvania), Inc., a Wholly Owned Subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home, respectfully requests that the Court grant interlocutory review of the trial court's transfer of this case to the Pennsylvania Public Utility Commission for adjudication of Duquesne Light Company's liability.

Respectfully submitted,

WHITE AND WILLIAMS LLP

By: Alan J. Charkey, Esquire

Attorneys for Plaintiff,
Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home

Date: October 29, 2015

[10] "The rule of *stare decisis* declares that for the sake of certainty, a conclusion reached in one case should be applied to those which follow, if the facts are substantially the same, even though the parties may be different." Com. v. Tilghman, 543 Pa. 578, 588 n. 9, 673 A.2d 898, 903 n. 9 (1996).

VERIFICATION

I, Alan J. Charkey, Esquire, hereby state that I am counsel for Plaintiff-Petitioner, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home, and that the statements contained in the foregoing Petition for Review are true and correct to the best of my knowledge, information and belief.

I understand that this verification is made pursuant to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

Alan J. Charkey

Date: October 29, 2015

EXHIBIT “Q”

Duquesne Light
Our Energy...Your Power

Legal Department
411 Seventh Avenue, 16-1
Pittsburgh, PA 15219

Tel 412-393-6505
Fax 412-393-1418
kkubiak@duqlight.com

Krysia Kubiak
Assistant General Counsel

December 6, 2010

Via Electronic Filing

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

RE: Barbara R. Lolly v. Duquesne Light Company
Docket No. C-2010-2167824

Dear Secretary Chiavetta:

Enclosed please find Duquesne Light Company's Exceptions. A copy of this document has been served upon Complainant in accordance with Commission regulations.

Sincerely,

Krysia Kubiak
Assistant General Counsel
Duquesne Light Company

encs

cc: Barbara R. Lolly (w/enclosure)
Administrative Law Judge Katrina L. Dunderdale (w/enclosure)

Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

BARBARA LOLLY	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. C-2010-2167824
	)	
DUQUESNE LIGHT COMPANY,	)	
	)	
Respondent.	)	

EXCEPTIONS
OF
DUQUESNE LIGHT COMPANY

Krysia Kubiak
Assistant General Counsel
PA Attorney ID #90619
Email: kkubiak@duqlight.com

Counsel for:
Duquesne Light Company

Duquesne Light Company
411 7th Ave., 16-1
Pittsburgh, PA 15219
Phone: 412-393-6505
Fax: 412-393-5897

Dated: December 6, 2010

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INTRODUCTION

Duquesne Light Company ("Respondent") files these Exceptions to the Initial Decision dated November 16, 2010, which assessed a penalty against Respondent. This matter arose following a denial of a claim for monetary damages that was submitted by Complainant.

A hearing was held on July 29, 2010 by telephone. A complete transcript of the hearing has been prepared. Complainant, Barbara Lolly, who was not present at the time of the incident, was the only witness to testify in support of her Formal Complaint. Respondent presented testimony from three witnesses, including the troubleshooter who investigated the claim and the third party claims administrator.

Respondent respectfully requests that the following Exceptions be granted and the Initial Decision be reversed as described more fully below.

ARGUMENT

Exception 1: The ALJ exceeded her authority by considering a claim for damages.

Respectfully, the ALJ erred when she reviewed the arguments of the Complainant concerning her request for damages in coming to her conclusions of law. The ALJ applied incorrect law in the section of the Initial Decision entitled "Complaint for credit due to damaged appliances." The Commission does not have jurisdiction to consider requests for monetary damages.

The Commission was created by the State Legislature and as a result, its jurisdiction and authority are limited to those areas which are granted to it by statute, in the Public Utility Code, 66 Pa. C.S. §§101, *et seq.* Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. Feingold v. Bell of Pa.,

477 Pa. 1, 383 A.2d 791 (1977); Allegheny County Port Authority v. Pa. P.U.C., 427 Pa. 562, 237 A.2d 602 (1967); Behrend v. Bell of Pa., 257 Pa. Superior Ct. 35, 390 A.2d 602 (1978); Harrisburg Taxicab and Baggage Co. v. Pa. P.U.C., 786 A.2d 288 (Pa. Cmwlth. 2001); and City of Erie v. Pa. Electric Co., 383 A.2d 575 (Pa. Cmwlth. 1978). Parties to an action may not confer jurisdiction upon a tribunal where none exists. Roberts v. Martorano, 427 Pa. 581, 235 A.2d 602 (1967).

Additionally, a challenge to subject matter jurisdiction is never waived; this jurisdictional question may be raised at any stage of the judicial process. Commonwealth v. Atlantic & Gulf Coast Stevedores, Inc., 422 Pa. 442, 221 A.2d 128 (1966). Furthermore, the mere fact that a party to an action qualifies as a regulated utility does not automatically confer subject matter jurisdiction upon the Commission. DeFrancesco v. Western Pennsylvania Water Co., 499 Pa. 374, 453 A.2d 595 (1982).

As directed by Section 501 of the Code, 66 Pa. C.S. §501, the Commission must "enforce, execute and carry out, by its regulations, orders or otherwise" all provisions of the Code. Section 701 of the Code, 66 Pa. §701, allows any person, having an interest in the subject matter, to file a formal complaint in writing with the Commission setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the Commission has jurisdiction to administer. *See also*, 52 Pa. Code §5.21(a). Nothing in the Code, however, confers jurisdiction upon the Commission to award monetary damages. Accordingly, the Commission possesses no jurisdiction to consider any implied request for reimbursement for property damage. *See*, DeFrancesco v. Western Pennsylvania Water Co., *supra*, Elkin v. Bell of Pa., 491 Pa. 123, 420 A.2d 371 (1980); Feingold v. Bell of Pa., *supra*.

Furthermore, the Commission does not have jurisdiction to consider a request for monetary damages. Commission Administrative Law Judge Corbett has held, "Nothing in the Code confers jurisdiction upon the Commission to award monetary damages. Accordingly, the Commission possesses no jurisdiction to consider the Complainant's request for monetary damages." William McLafferty v. Duquesne Light Company, C-2009-2101144, 2009 Pa. PUC LEXIS 158.

Complainant's Formal Complaint addressed reimbursement for property damage, and the Commission does not have jurisdiction to consider this issue. The main complaint is with the claims decision itself. It is not proper for the Commission to consider whether Respondent acted reasonably in its denial of Complainant's claim.

Although the ALJ first decided that Complainant failed to establish that Respondent violated the Commission's regulations with respect to providing reasonable and adequate customer service, the ALJ then stated:

> My review of the record evidence leads me to conclude Respondent provided unreasonable service ...when it failed to consider any material provided by Complainant during the complaint process before Respondent concluded its facilities were not at fault.... Respondent also failed to appropriately address the complaint when it set up a "claims process" and then "rubber stamped" its denial without considering any information or documentation from Complainant. In effect, the claim process Respondent established may look good in theory but it fails to deliver customer service. Initial Decision, *pg. 8.*

The Commission does not have jurisdiction to consider reimbursement for claims of property damage. Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. Hughes v. Pennsylvania State Police, 619 A.2d 390 (Pa. Comm. 1992) alloc denied 673 A.2d 293 (Pa. 1993).

Complainant spent the bulk of her testimony discussing her damages from an alleged surge. (Tr. pgs 9-14). Although the ALJ stated that Respondent did not consider "information"

from Complainant, the only information that Respondent did not receive before makings its decision was the information on Complainant's damages and the costs associated with replacing her appliances. (Tr. pg. 13). Complainant had no information about the surge, about the operation of the circuit, and she was not even an eye witness to the event. (Tr. pg. 31).

As the Commission lacks jurisdiction to decide the issue of whether Complainant is owed damages, the Commission also lacks jurisdiction over Respondent's claims process. Respondent has hired an outside vendor to respond to the claims filed by the public. (Tr. pg. 60). A claims department is a policy decision made by Respondent to assist customers, and is required by neither regulation nor law.

Moreover, Complainant received prompt attention during the claims process. She entered her claim with the company and received an acknowledgment letter shortly thereafter. (Tr. pg. 11 and 61). That letter stated that Duquesne Light will investigate the cause of the claim. (Tr. pg. 61). It also stated that if the claim is accepted, then a request for proof of damages will be mailed. (Tr. pg. 61). Shortly following the receipt of the first letter, Pittsburgh experienced a massive snow storm that shut down mail service for a long time. (Tr. pg. 12). Complainant did call and speak with the claims department and she was told that the investigation into Respondent's liability. (Tr. pg. 12). The claims representative reviewed the information from Duquesne Light's records prior to making a decision. (Tr. pg. 66-67). Within a month, on March 3rd, Complainant received a final decision on the claim. (Tr. pg. 13 and 62).

A review of the Complainant's testimony and all of the evidence of record reveals that the heart of the Formal Complaint is that Complainant's request for damages was denied. She neither complains about the actions of the troubleshooter nor the response time to the claim for monetary damages, only that the decision was not the one that she sought. Whether the claims

decision was valid is not an issue within the jurisdiction of the Commission; therefore, a finding about the claims process is improper.

Exception 2: The ALJ erred in finding that Complainant satisfied her burden of proof.

In order to prevail before the Commission, a Complainant must satisfy the burden of proof. As Judge Dunderdale wrote in the Initial Decision,

> "As the party seeking affirmative relief from the Commission, Complainant bears the burden of proof by substantial evidence. 66 Pa. C.S.A. §332(a). Substantial evidence is defined as such evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the evidence of a fact sought to be established. Norfolk & Western Ry. Company v. Pennsylvania Public Utility Commission, 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Board of Review, 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); Murphy v. Department of Public Welfare, 480 A.2d 382 (Pa. Cmwlth. 1984"

Section 1501 of the Code, 66 Pa. C.S. §1501, requires a public utility to furnish and maintain adequate, efficient, safe, and reasonable service and facilities. The ALJ stated that "Complainant has not met her burden of proving Respondent violated the Commission's regulations by failing to provide reasonable and adequate customer service when the power surge occurred." Initial Decision, pg. 6. However, she also stated, "Respondent provided unreasonable service to Complainant and her neighbors on February 3, 2010.... Respondent failed to investigate properly." Initial Decision, pg. 8.

Contrary to the ALJ's assertions, there is no evidence of record that Respondent failed to investigate properly. Complainant made no such assertions. Complainant was not complaining about the manner in which Duquesne Light responded to the service issue. In fact, Respondent was on her street investigating the incident before she arrived home and noticed that her lights were out or that there was damage. (Tr. pg. 9). She also detailed in a positive manner the way in

which the employee talked to her and explained the situation. (Tr. pg. 10). Respondent presented uncontroverted evidence of a thorough investigation. Therefore, Complainant did not meet her burden and establish that Respondent violated a regulation or statute.

In support of her conclusion, the ALJ made the following findings of fact:

> "13. Respondent's field representative inspected the facilities on February 3, 2010 after receiving complaints about a power surge and loss of electricity but did not see anything unusual or dysfunctional about the transformer or other facilities which service Complainant's residence. (Tr. 33-35).
> 14. The only problem noted by Respondent's field representative on February 3, 2010 was that the neutral on the primary side of the transformer 'spit a little' and appeared to be loose which could have caused a loss of voltage at the transformer." Initial Decision at 4.

It is on the basis of these findings of fact that the ALJ has determined that the investigation was insufficient.

There is additional uncontroverted information on the record that details the full investigation that Respondent performed. Gerald Paul, a Duquesne Light employee with approximately thirty years of experience with the company, was dispatched to Clearview Avenue on February 3, 2010, at 3:45 p.m. (Tr. at 33). His first act was to check the transformer. (Tr. at 34). He then checked the voltage. (Tr. at 34). He did not identify any problems with the transformer or the voltage, so his next step was to walk along the line. (Tr. at 34). This investigation did not identify any problems, so he then interviewed customers near the transformer to determine if they had witnessed anything unusual. (Tr. at 34).

Mr. Paul's investigation through interviews did reveal a possible cause of the problem in the neighborhood. A man who lived at the house near the pole with the transformer told Mr. Paul that dumpsters were being moved earlier that day near that pole. (Tr. at 35). When Mr. Paul returned to the pole, he saw green paint on the pole. (Tr. at 35). Mr. Paul testified that he assumed that a truck hit the pole and shook the line and perhaps caused the wires to come in

contact with one another. (Tr. at 35). This assumption explained the voltage spike. Therefore, although Mr. Paul did not see the truck collide with the pole, based upon his years of experience, that was his reasonable assumption of the cause of the trouble. (Tr. at 35).

Furthermore, Mr. Paul inspected the transformer. He found that the neutral on the primary side was loose in the primary bushing when he wiggled it. (Tr. pg. 39). Although he did not believe that that could cause a surge, he had the transformer replaced as a precaution. (Tr. pg. 38). Instead, it was possible that when the truck hit the pole, the high voltage wires banged together causing the surge. (Tr. pg. 37). This would have been a momentary condition, causing no permanent damage to the facilities, and not caused by a problem with the facilities. (Tr. pg. 34). At the time that Mr. Paul was investigating, all of the customers had power and there was nothing noticeably wrong with any of Respondent's facilities. (Tr. pg. 34).

Mr. Paul's failure to find a definitive cause to the problem does not amount to unreasonable service. Mr. Paul diligently reviewed the situation and talked to the customers involved. Even Complainant did not criticize Mr. Paul's work in investigating this problem.

The Public Utility Code does not require that the service provided be perfect, but that it be reasonable. O'Connor v. PECO Energy Company, PA PUC Docket No. C-00945774 (1994). The Commission approves the cost of providing a utility system that is designed to provide reasonable service at reasonable rates – not perfect service without regard to cost. In re: Tariff Provision of PECO Energy Co., PA PUC Docket No. M-00960882; R-0943065 (1997). Reasonable service may result in occasional loss of service or property damage. Id.

In order to establish a sufficient case against a utility to satisfy the burden of proof, a complainant must show the utility is responsible or accountable for the problem described in the complaint. David Lee v. Pennsylvania American Water Corp., PA PUC Docket No. C-2008-

2064234 (2010). Even pro se complainants must provide relevant and necessary information. Shank v. PPL Electric Utilities Corp., C-2009-2087300 (2009).

The only evidence of record is that the surge could have been caused by a third party's truck collision with the pole, which would have caused a momentary contact of the high voltage wires. No alternative scenarios were presented, and no evidence was presented which would undermine this theory. When Mr. Paul arrived to investigate, all of the neighbors had power and there were no observable problems with any of Respondent's equipment. Even so, Mr. Paul stayed to review the entire area and spent time talking to bystanders. He also ordered a replacement of a transformer out of an abundance of caution. It was the outage taken to replace the transformer that Complainant noticed when she returned home from work. Therefore, the bulk of the investigation and work was done before Complainant even noticed a problem.

CONCLUSION

Duquesne Light respectfully submits the Exceptions enumerated above. The Commission lacks jurisdiction to consider claims for monetary damages and Complainant has not met her burden of proof by introducing substantial evidence that Respondent's investigation was unreasonable. For these reasons, the penalties against Respondent were assessed in error. Respectfully requests that the Initial Decision be reversed insofar as it concludes that Respondent's claims process and investigation amounted to unreasonable service.

Respectfully submitted,

Krysia Kubiak
Attorney for Respondent
Duquesne Light Company
411 7th Avenue (16-1)
Pittsburgh, PA 15219
Telephone: (412) 393-6505
FAX: (412) 393-5897

Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

BARBARA R. LOLLY,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. C-2010-2167824
	)	
DUQUESNE LIGHT COMPANY,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the participant listed below in accordance with the requirements of 52 PA. Code § 1.54 (relating to service by a participant).

Barbara R. Lolly
5302 Clearview Avenue
Aliquippa, PA 15001

Dated this 6th day of December, 2010.

Krysia Kubiak

Krysia Kubiak
Pa. I.D. # 90619
Duquesne Light Company
411 Seventh Avenue
Mail Drop 16-1
Pittsburgh, PA 15219
Telephone: (412) 393-6505
FAX (412) 393-1418

EXHIBIT “R”

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held April 14, 2011

Commissioners Present:

Robert F. Powelson, Chairman
John F. Coleman, Jr., Vice Chairman
Tyrone J. Christy, Statement
Wayne E. Gardner
James H. Cawley

Barbara R. Lolly C-2010-2167824

v.

Duquesne Light Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Duquesne Light Company (Duquesne Light), filed on December 6, 2010, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Katrina L. Dunderdale, issued on November 16, 2010. Replies to Exceptions were not filed. For the reasons stated below, we grant the Exceptions, in part, and deny the Exceptions, in part, and modify the ALJ's Initial Decision, consistent with this Opinion and Order.

History of the Proceeding

On March 22, 2010, Barbara R. Lolly (Complainant) filed a Formal Complaint with the Commission against Duquesne Light, alleging that she had to replace her microwave and range due to a reliability or quality problem with Duquesne Light's provision of electrical service. The Complainant also alleged that Duquesne Light's claims department rejected her claim for reimbursement without considering any of the information she provided in support of her claim. She requested that the Commission require Duquesne Light to correct the problem and credit her for the cost of replacing her damaged appliances.

The Commission served Duquesne Light with the Complaint on April 5, 2010. Duquesne Light filed an Answer on April 30, 2010,[1] in which it admitted that there was an outage on February 3, 2010 and that it replaced a transformer. Duquesne Light generally denied the remainder of the allegations and requested that the Complaint be dismissed.

On July 29, 2010, the ALJ conducted a telephonic hearing during which the Complainant appeared *pro se* and testified on her own behalf. Duquesne Light was represented by counsel and presented the testimony of Joe Becker, Gerry Paul, and Carolyn Cingel. Duquesne Light offered one exhibit, marked Duquesne Light Exhibit "1", which was admitted into evidence. The transcript of the hearing contains seventy-five pages. The Complainant and Duquesne Light filed final statements on the hearing record in lieu of filing briefs.

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[1] We note that Duquesne Light's Answer was filed a few days late. We perceive no error in the ALJ's treatment of this late filing, however. To secure the just, speedy and inexpensive determination of cases, a presiding officer may disregard a defect of procedure that does not affect the substantive rights of the parties. 52 Pa. Code § 1.2(a). The ALJ's treatment of this late filing did not adversely affect the substantive rights of the Parties to this proceeding.

The ALJ issued her Initial Decision on November 16, 2010, in which she sustained the Complaint, in part, and denied the Complaint, in part. As noted above, Duquesne Light filed Exceptions to the Initial Decision on December 6, 2010. Replies to Exceptions were not filed.

Discussion

As the proponent of a rule or order, the Complainant bears the burden of proof pursuant to Section 332(a) of the Public Utility Code (Code). 66 Pa. C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant must show that Duquesne Light is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant's evidence must be more convincing, by even the smallest amount, than that presented by Duquesne Light. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by the Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence, to rebut the evidence of the Complainant, shifts to the Respondent, Duquesne Light. If the evidence presented by Duquesne Light is of co-equal weight, the Complainant has not satisfied her burden of proof. The Complainant would then have to provide some additional evidence to rebut the evidence presented by Duquesne Light. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

ALJ Dunderdale made fifteen Findings of Fact and reached seven Conclusions of Law. I.D. at 2-4, 9-10. We shall adopt and incorporate herein by reference the ALJ's Findings of Fact and Conclusions of Law, unless they are reversed or modified by this Opinion and Order, either expressly or by necessary implication.

Before addressing the Exceptions, we note that any issue or Exception that we do not specifically delineate has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally*, *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

In her Initial Decision, the ALJ denied the Complaint, in part, based on her determination that the Complainant failed to prove that Duquesne Light provided unreasonable or inadequate service in its provision of electric service to her residence on February 3, 2010. The ALJ stated that the testimony and evidence presented during the hearing demonstrated that a power surge occurred at the Complainant's residence on February 3, 2010, but it did not demonstrate how the power surge occurred or that the power surge occurred based on a malfunction or defective condition in Duquesne Light's equipment. I.D. at 6.

Additionally, the ALJ sustained part of the Complaint and assessed a civil penalty of $250 against Duquesne Light for violations of Section 1501 of the Code, 66 Pa. C.S. § 1501, for two reasons. First, she found that the Complainant proved that

Duquesne Light provided unreasonable service to the Complainant when it failed to properly investigate the Complainant's concerns regarding the power outage on February 3, 2010. I.D. at 8. The ALJ equated this to a failure to provide customer service. The ALJ stated that none of Duquesne Light's witnesses were able to provide any explanation regarding why Duquesne Light's transformer failed to function, how the power surge occurred, why the transformer was replaced if Duquesne Light believed it wasn't defective, and whether or not tests were performed on the old transformer. I.D. at 6. She noted that Duquesne Light also did not present evidence to show it uses safety protections in order to reduce damage that could result from power surges. I.D. at 6-7.

Second, the ALJ concluded that the Complainant proved that Duquesne Light provided unreasonable service because it did not consider any material provided by the Complainant during the claims process prior to its determination that its facilities were not at fault and its denial of her claim. I.D. at 8, 10. The ALJ found, "In effect, the claim process Respondent established may look good in theory, but it fails to deliver customer service." I.D. at 8.

In its first Exception to the Initial Decision, Duquesne Light avers that the ALJ exceeded her authority by considering the Complainant's request for reimbursement for property damages because the Commission does not have jurisdiction to consider a request for monetary damages or to award monetary damages. Exc. at 4-7. Duquesne Light further avers that, because the Commission lacks jurisdiction to decide whether the Complainant should receive monetary damages, the Commission also lacks jurisdiction over Duquesne Light's claims process. It states that its decision to have a claims department is a policy decision that is not required by regulation or law. Exc. at 7. It opines that the Complaint only addressed issues involving reimbursement and Duquesne Light's claims process, and, as such, the Commission does not have jurisdiction to consider the issues in the Complaint. Exc. at 6.

Duquesne Light also asserts that the Complainant received prompt attention during the claims process. It explained that it sent an acknowledgement letter to the Complainant shortly after receiving her claim, informing her that it would investigate the cause of the claim and, if the claim was accepted, it would mail her a request for proof of damages. The claims representative provided the Complainant with a final decision on March 3, 2010. Duquesne Light avers that the only information the claims representative did not receive before making a determination was information on the Complainant's damages and the costs associated with replacing her appliances as the Complainant did not have any information about the power surge and was not there when it occurred. Exc. at 7.

In response to Duquesne Light's first Exception, we agree that we do not have jurisdiction to award monetary damages. Nevertheless, we note that, when a complaint seeking monetary damages also alleges a violation of the Code, such as the failure to provide safe, adequate, reasonable, or efficient service, we have jurisdiction to consider these service issues. *DeFrancesco v. Western Pennsylvania Water Co.,* 453 A.2d 595 (Pa. 1982). As such, we conclude that the ALJ properly considered the Complaint in this proceeding because it involved allegations that Duquesne Light violated Section 1501 of the Code, 66 Pa. C.S. § 1501.

We also conclude that the ALJ correctly determined that Duquesne Light provided unreasonable service to the Complainant when she attempted to put in a claim for damages to her appliances. Every utility is required to furnish reasonable service to its customers. 66 Pa. C.S. § 1501. The term "service" is used in its broadest and most inclusive sense and includes all acts done by a public utility. 66 Pa. C.S. § 102. Moreover, "[i]nappropriate and unreasonable treatment to customers can be interpreted as inadequate service…." *See, Edward T. O'Toole v. Metropolitan Edison Company,* Docket No. C-20030854 (Order entered May 9, 2005). Duquesne Light argues that the Commission has no jurisdiction over its claims process because the Commission has no

authority to award damages. While it is true that the Commission cannot award damages, customer service falls squarely within our jurisdiction.

In this case, Duquesne Light's agent provided Ms. Lolly with a phone number and a claim form. Tr. at 11. Before she could submit all the required information for her claim, the claim was denied. Tr. at 13, 19, 61, 62. Duquesne Light's witness testified that Duquesne Light retains a law firm to handle these claims, that she did not remember the content of any of the conversations with Ms. Lolly, and that she relied solely on information sent to her from Duquesne Light to make a decision concerning the claim. Tr. at 67-70.

We agree with the ALJ that Duquesne Light failed to deliver even a modicum of customer service by establishing a claims process that was no process at all. I.D. at 9. Although the Complainant was sent a claim form and went through the effort to compare repair versus replacement costs of her appliances, her claim was summarily denied without considering any information or documentation from her. Quality customer service is expected of all regulated utilities. Because Duquesne Light violated Section 1501 by failing to provide reasonable or adequate customer service, we adopt the ALJ's decision to impose a $250 civil penalty. Accordingly, we deny Duquesne Light's first Exception.

In its second Exception, Duquesne Light states that the ALJ erred in finding that the Complainant satisfied her burden of proving that its investigation into the power surge on February 3, 2010 was unreasonable. It averred that the Complainant did not make any complaints about the manner in which it responded to the service issue. Exc. at 8. Additionally, Duquesne Light opined that the record provides uncontroverted evidence that it performed a full investigation. Although Mr. Paul, Duquesne Light's field representative who investigated the power surge, did not find a definitive cause for

the problem, he diligently reviewed the situation, talked to the customers involved, and replaced the transformer as a cautionary measure. Exc. at 10, 11.

We agree with Duquesne Light that it conducted a proper investigation into the power outage. The Complainant did not present any evidence during the hearing which demonstrated that Duquesne Light's investigation of the power outage was unreasonable. On the other hand, Duquesne Light presented evidence which demonstrated that it conducted a proper investigation. Mr. Paul inspected the facilities, and he did not initially find any problems with the transformer or the other facilities. Tr. at 33-35. Upon further inspection, Mr. Paul noted that the neutral on the primary side of the transformer "spit a little" and appeared to be loose, which could have caused a loss of voltage at the transformer. Tr. at 35, 38, 39.

We note that neither the Code nor our Regulations require that public utilities provide flawless service. Section 1501 of the Code requires public utilities to provide reasonable and adequate, not perfect, service. *A-Rize-N Management Co., LLC v. Pennsylvania American Water Co.*, Docket No. C-2009-2119162 (Order entered June 15, 2010). While Duquesne Light was not able to find a definitive cause for the power surge, the record demonstrates that it conducted a thorough investigation and took precautionary measures to prevent the problem from occurring in the future. Based on the information in the record, we grant Duquesne Light's second Exception.

Conclusion

For the reasons discussed herein, we shall grant Duquesne Light's Exceptions, in part, and deny the Exceptions, in part, and modify the ALJ's Initial Decision, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions of Duquesne Light Company, filed December 6, 2010, are granted, in part, and denied, in part, consistent with this Opinion and Order.

2. That the Initial Decision of Administrative Law Judge Katrina L. Dunderdale, issued November 16, 2010, is modified, consistent with this Opinion and Order.

3. That Duquesne Light Company shall pay a civil penalty in the amount of $250 by check or money order within twenty days from the entry date of this Opinion and Order. Said check or money order shall be made payable to:

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

4. That a copy of this Opinion and Order shall be served upon the Financial and Assessments Chief, Office of Administrative Services.

5. That, upon payment of the civil penalty assessed in this matter, the proceeding docketed at C-2010-2167824 shall be marked closed.

BY THE COMMISSION,

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: April 14, 2011

ORDER ENTERED: May 9, 2011

EXHIBIT “S”

ELECTRIC DISTRIBUTION COMPANY SERVICE OUTAGE RESPONSE AND RESTORATION PRACTICES REPORT

Report Responding to the Joint Motion of
Vice Chairman Tyrone J. Christy and Commissioner Pizzingrilli

Prepared by the
Bureau of Conservation, Economics and Energy Planning
Wayne Williams, Ph.D., Director
and the
Office of Communications
Tom Charles, Manager

April 2009

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Section 1 – Introduction and Overview

Background

On September 14, 2008, Hurricane Ike mixed with a cold front and produced 80-mph winds in Western Pennsylvania that left more than 300,000 customers without power and caused damage to the area's electric system. The last customer remaining out of service due to this event was restored on September 22, 2008.

Given the magnitude and duration of the event, the Commission found it necessary to conduct a statewide evaluation of aspects of electric distribution company (EDC) storm response, service restoration and customer communication practices. On September 25, 2008, pursuant to Section 331(b)(4) of the Public Utility Code, 66 Pa.C.S. § 331(b)(4), the Commission directed staff to undertake a study of these issues. All eleven EDCs regulated by the Commission provided responses to 10 directed questions relating to outage preparedness and communications. The Joint Motion of Vice Chairman Tyrone J. Christy and Commissioner Kim Pizzingrilli is attached as Appendix A.

At the Commission's direction, two public input hearings were held before Administrative Law Judge Mark Hoyer in Cranberry Township on October 9 and 10, 2008. The hearings were sparsely attended by members of the general public. About eight residents spoke at the two meetings. For the most part, the residents who did speak praised the efforts of the utilities and emergency responders in restoring service given the size of the storm and number of outages. However, the residents did say the utilities need to improve communications to the public.

On November 12, 2008, and January 6, 2009, supplemental responses to additional data requests were filed by several EDCs.

Section 2 – Responses to Questions

Question No. 1. All electrical distribution companies shall provide the number of personnel employed as line or substation repair crews for each of the years beginning with 1998 and up to and including 2007 and shall indicate whether those personnel are utility employees or utility contractor employees.

Appendix B contains each EDC's response to this question.

When we analyzed the data provided, we did so by not only reviewing the manpower magnitude and trends, but also by reviewing the data in the context of the restructuring rate cap and subsequent rate requests. Distribution rate increases occurred as follows: PPL Electric in January 2005 and January 2008, Duquesne Light in January 2007, Wellsboro in January 2008 and Citizens in February 2008. Distribution rate deceases were effective for Met Ed and Penelec in January 2007.

With this backdrop in mind, we must note that many of the EDC Lineman and substation worker counts were significantly lower after the EDCs completed restructuring. For example. PPL's lineman count dropped from 525 in 1998 to 420 in 2004. PPL attributed this drop to becoming more efficient under capped rates and a greater reliance on mutual assistance. PPL's lineman count has stayed fairly level since its distribution rate cap was lifted. In 2007, the Company reported 435 linemen on staff. PPL's level of staff electricians has been steady since 1998 as well. Initially, when PPL's reliability indices are reviewed in conjunction with the reduction in lineman data, there appears to be a decline in SAIFI and CAIDI performance. However, when an adjustment is made to account for the varying weather experienced over the years 1994 to 2007, PPL appears to be providing a fairly steady level of reliability performance.

Next, we turn to the three FirstEnergy companies. These three companies have been under Commission scrutiny for reliability related issues over the past several years. A review of the data filed by these three companies reveals that the number of lineman at Penelec dropped from 385 in 1999 to 291 in 2004, MetEd's lineman count dropped from 238 in 1999 to 207 in 2004 and Penn Power's lineman count dropped from 88 in 1999 to 76 in 2004. A concurrent reduction in substation workers occured for each company as well. Starting in 2005, we see an increase in both categories of employees for the FirstEnergy companies and recently (January 2009) all three FirstEnergy companies achieved their reliability standards for the first time in many years. It is no coincidence that FirstEnergy staffing levels increased in 2005 after the Commission Order in November 2004 at I-00040102 (Investigation regarding the Metropolitan Edison Company's, Pennsylvania Electric Company's and Pennsylvania Power Company's Reliability Performance).

In summary, while there was a decrease in the number of lineman and substation staff after rate caps went into place, it appears that all EDCs do at this time have sufficient lineman and substation workers to provide adequate and reliable electric service.

There is however an issue related to EDC staffing levels that is currently being addressed by the Commission's Bureau's of Conservation, Economics and Energy Planning (CEEP) and Audits and the EDCs themselves that we will simply note here. This is the issue of the aging workforce. When the age distribution of the EDCs' lineman and substation workers is reviewed, it is apparent that a large contingent of workers will be needed to replace those workers that are near eligibility for retirement. We believe the EDCs should continue to work with the Commission and its staff to ensure the adequacy of each EDC's lineman and substation employee levels.

Question No. 2. All electrical distribution companies shall provide the following details concerning mutual aid received for outage restoration for each of the years beginning with 1998 and up to and including 2007.

Appendix B contains each EDC's response to this question.

The utility crews that the EDCs utilize to supplement their restoration workforce typically come from companies that are members of the Mid-Atlantic Mutual Assistance (MAMA) group.

The MAMA group was formed during Y2K to review utility preparedness. The MAMA group's mission is to provide a forum to ensure safe, effective, coordinated regional restoration efforts in the best interest of the customers and to develop a better understanding and communications with first responders, local officials and regulatory agencies. Restoration assistance from the MAMA group utilities typically allows utilities to add a temporary complement to its workforce during times when its system capabilities are fully stressed. It is not cost effective for a utility to add a similar full time permanent complement to its workforce, since that additional complement would only be truly needed at times of severe weather and would be fairly idle the remainder of the time.

Commission staff does review a utility's workforce complement on a regular basis. As an example, the Commission's Bureau of Audits performed a Stratified Management and Operations Audit of PECO in June 2006. Audits incorporated a review and analysis of PECO's Electric Operations staffing levels relative to the trend of using full-time equivalent employees and contractors for Electric Operations into the PECO Stratified Management and Operations Audit.

Commission staff has found the use of the MAMA group to be a valuable asset to Pennsylvania EDCs. We do however wish to maintain the ability to monitor the use of Pennsylvania assets in the assistance of other states and ensure that our jurisdictional

EDCs are not relying too heavily on MAMA assistance for electric outage restoration. In order to facilitate this ongoing review process, we recommend the Commission consider amendments to the regulations at 52 Pa. Code § 67.1 relating to notification procedures.

Question No. 3. All electrical distribution companies shall provide for each of the years beginning with 1998 and up to and including 2007 the Pennsylvania inventory levels kept on utility property of the below listed equipment related to storm restoration.

a. Utility poles
b. Utility pole crossarms
c. Transformers used for the provision of residential service
d. Length of primary wire
e. Length of secondary wire
f. Length of service drop wire

Appendix B contains each EDC's response to this question.

As with the lineman and substation staffing data, when we analyzed the equipment data provided, we did so by not only reviewing the magnitude and trends, but also by reviewing the data in the context of the restructuring rate cap and subsequent rate requests.

Prior to discussing the responses to the inventory question, we must note that neither the PUC's emergency response team, nor the PUC's reliability review team can recall or document any storm situation where Pennsylvania's EDCs delayed restoration of customers due to a material shortage.

While Commission staff's experience and review of the supplied data suggests that there is not a shortage of outage restoration materials and supplies, some of the data trends raise questions.

The first trend of note is associated with Duquesne Light. Duquesne Light's inventory increased significantly in 2005 and 2006, the years that Duquesne Light would have used for historic test years in its rate proceeding that became effective in January 2007. Duquesne's outage numbers dropped correspondingly in 2005 – 2007. We find it statistically interesting that while Duquesne Light was providing service reliability at a benchmark level during its rate cap years, the level of investment and quality of service significantly increased in the years leading up to and after the distribution rate cap expired.

We note similar recent increases in the FirstEnergy companies' materials and supplies data. However, we attribute these increases more to the increased reliability oversight the Commission has exerted, beginning with the 2004 reliability investigation.

In contrast, PPL, Wellsboro and Citizen's each had distribution rate increases, but did not report inventory build ups prior to the rate proceedings. In fact, some of the asset groups for these companies actually have demonstrated a decline in recent years, while reliability indices have been maintained at acceptable levels.

In order to continue to review the restoration material and supply levels maintained by the EDCs, we recommend the Commission consider amending its regulations at 52 Pa. Code § 67.1.

Question No. 4. What method or methods of communication with customers was used in this outage, or if not affected by this storm, would have been used in the event of an outage?

The EDCs reported that during an outage they work with local officials and the local news media – print, radio and television. FirstEnergy and PECO use field operatives as well to communicate.

Most of the EDCs use a company Web site to provide regular updates to residents and if available an automated calling system. The utilities report a high volume of visits to the Web sites during outages suggesting that the media uses the Web site and residents may be checking the status of their home electrical service from another location such as work.

Methods used to communicate outage information:								
	Company Website	Contact Local Media	Operate Call Center	Automated Calling	Field Operatives	Radio	Contact Local Officials	IVR
Allegheny Power	X	X	X			X		
Citizens Electric	Planned	X	X	Planned		X	X	X
Duquesne	X	X	X			X	X	X
FirstEnergy	X	X	X	X	X	X	X	X
Orange & Rockland	X	X	X	X		X	X	X
PECO	X	X	X	X	X	X	X	X
PPL	X	X	X	X		X	X	X
UGI		X	X			X	X	
Wellsboro		X	X			X	X	X

We agree with their methods, but generally feel that more proactive, coordinated responses should be considered. This will be addressed further in the recommendations portion of this report.

Question No. 5. Have you considered use of 21st Century technology in reaching out to customers, keeping in mind that they are without electricity? Why or why not?

Due to the existence of an Ohio-based company named Twenty First Century Communications that offers utilities services in emergency communications and outage

management, many of the utilities answered the question related to use of that specific company rather than use of modern technology as was intended.

Those companies who addressed the use of modern technology did indicate that they do use newer technology related to customer communications including the ability to provide wake-up calls to customers who request the service. The more rural EDCs indicated that technologies such as e-mail or text messaging might be unreliable for their area. Some EDCs said they were evaluating new technology but thought it might be too challenging to acquire sufficient secondary contact information such as e-mail or wireless phone numbers.

Does company review 21st Century Technology for potential application?		Yes	No	
Allegheny Power		X		
Citizens Electric		X		
Duquesne		X		
FirstEnergy		X		*1
Orange & Rockland		X		*2
PECO		X		*3
PPL		X		
UGI		X		*4
Wellsboro		X		*5

1 - 21st Century Call Center, global messaging, reverse IVR
2 - Currently reviewing 21st Century's Mutual Assistance Routing System for possible implementation
3 - 21st Century telephone system to handle large volumes of customer calls, Automated Meter Reading to "ping" as tests during outages
4 - Due to rural territory, technologies such as email, texting, etc. may be unreliable and unusable, especially during outages
5 - Currently evaluating new technology but see potential challenge in customer acquiring email, cell phones, etc.

We agree with their methods, but generally feel that the EDCs should be exploring increased used of modern technology such as e-mail, text messaging and automated dialing when communicating with their customers during an outage. This will be addressed further in the recommendations portion of this report.

Question No. 6. Assess whether technological enhancements in communications can be made to keep the public better informed as utilities respond to the operational issues involved in resolving emergency situations such as reverse 911, e-mails or text messages.

Only two companies (FirstEnergy and PECO) reported use of an automated dialer system for communicating with customers. Pike County Light & Power is the only EDC to indicate the use of e-mail to communicate with customers while PECO was the only EDC to use text messaging. Three EDCs (Duquesne, PPL and Wellsboro) were researching the use of automated dialing systems, e-mail and text messages.

Does company utilize new communication tools such as:		Reverse 911	Email	Text Messages	
Allegheny Power		Researching			
Citizens Electric		No	No	Planned	
Duquesne		Researching			
FirstEnergy		Yes	No	No	
Orange & Rockland		No	Yes	No	
PECO		Yes	No	Yes	
PPL		Researching			
UGI		No	No	No	*1
Wellsboro		Researching			

1 - Piloting a webcam project to provide more information, considering retention of customer email and cell phone numbers

Again, we generally feel that the EDCs should be giving serious consideration to the increased used of modern technology such as e-mail, text messaging and automated dialing when communicating with their customers during an outage. This will be addressed further in the recommendations portion of this report.

Question No. 7. Do you have a crisis communications plan in writing for outages? If yes, please attach a copy.

All of the EDCs indicated that they have written crisis communications plans, which were provided.

	Company has a crisis communication plan	Plan is attached to company response
Allegheny Power	Yes	Yes
Citizens Electric	Yes	Yes *
Duquesne	Yes	Yes
FirstEnergy	Yes	Sample **
Orange & Rockland	Yes	Yes
PECO	Yes	Yes
PPL	Yes	Yes
UGI	Yes	Yes
Wellsboro	Yes	Yes

* Redacted Version (proprietary)
** Full database is 1,000+ pages (demonstration available upon request)

We recognize that the EDCs have crisis communications plans in writing, but from this review, it is unclear if any of the plans are National Incident Management Systems (NIMS) compliant or if they are in line with any other nationally-accepted standards set forth for communicating during an emergency. Recognizing that effective communication is critical, NIMS establishes nationally-accepted protocols for timely communication of accurate information during an incident. This will be addressed further in the recommendations portion of this report.

Question No. 8. What is the proactive outreach (i.e. direct contact or through media) conducted by your utility to keep customers informed of conditions, restoration times and tips for staying safe during an outage?

All of the EDCs use the media as a means of communicating with consumers and talk directly with local officials during an outage. Six EDCs (the FirstEnergy companies, Pike County Light & Power, PECO and PPL) will contact consumers

directly. While Seven EDCs (Duquesne, the FirstEnergy companies, Pike County Light & Power, PECO and PPL) provide updates for consumers using their Web site. The companies also indicated that they provide safety tips and outage preparation information in company newsletters distributed to customers.

Companies proactive outreach methods include:		Direct Contact	Media Communication	Website	Local officials	
Allegheny Power		Yes	Yes	Yes	Yes	
Citizens Electric		No	Yes	No	Yes	*1
Duquesne		No	Yes	Yes	Yes	
FirstEnergy		Yes	Yes	Yes	Yes	
Orange & Rockland		Yes	Yes	Yes	Yes	
PECO		Yes	Yes	Yes	Yes	
PPL		Yes	Yes	Yes	Yes	
UGI		No	Yes	No	Yes	*2
Wellsboro		No	Yes	No	Yes	

1 - Safety tips provided in company newsletters
2 - Periodic information for outage preparation provided in company newsletters

We agree with their methods, but generally feel that more proactive, coordinated responses should be considered. This will be addressed further in the recommendations portion of this report.

Question No. 9. How are restoration times communicated to the PUC, customers, county emergency management agencies and media? Do you have a single-point of contact for this information?

All of the EDCs indicated that they use common methods to communicate to consumers, the media and the PUC about restoration times (call centers, the media and direct contact with the PUC).

How is restoration data transmitted to customers, media, and PUC				
	Call center/ Hotline	Public Service Announcement/ Media	Direct Contact with PUC	Is there a single point of contact for restoration information?
Allegheny Power	Yes	Yes	Yes	Yes
Citizens Electric	Yes	Yes	Yes	Yes
Duquesne	Yes	Yes	Yes	Yes
FirstEnergy	Yes	Yes	Yes	Yes
Orange & Rockland	Yes	Yes	Yes	Yes
PECO	Yes	Yes	Yes	Yes
PPL	Yes	Yes	Yes	Yes
UGI	Yes	Yes	Yes	Yes
Wellsboro	Yes	Yes	Yes	Yes

While all of the EDCs reported a single point of contact for restoration information, this was not necessarily the experience during the September outages. For three of the EDCs affected in the September storm, seven different people were quoted in various newspapers over one day of coverage. This will be addressed further in the recommendations portion of this report.

Question No. 10. What is the procedure if a customer receives a busy signal on your outage line? On your customer service line? Are they called back? Do they receive an automated message? Are your customer-call systems tested to be able to receive and process calls from a significant number of your customer base in a short period of time and how many calls can your customer call center receive at one time?

While nearly all of the EDCs (with the exception of UGI) offer interactive voice response, only four EDCs (the FirstEnergy companies and PECO) track busy signals and offer to call the customer back if they receive a busy signal. Limited overflow service also is available (Duquesne, Pike County Light & Power and PECO) while four

companies (Duquesne, FirstEnergy, Pike County Light & Power and PPL) offer customized messages for consumers.

Response if customer receives busy signal:						
	Are busy signals tracked?	Are there company callbacks?	Overflow Service	Customized Messages	IVR - Interactive voice response	
Allegheny Power	No	No	IVR	Yes	Yes	
Citizens Electric	No	No	IVR	No	Yes	
Duquesne	No	No	Yes	Yes	Yes	*1
FirstEnergy	Yes	Yes	No	Yes	Yes	*2
Orange & Rockland	No	No	Yes	Yes	Yes	
PECO	Yes	Yes	Yes	No	Yes	
PPL	No	No	No	Yes	Yes	
UGI	No	No	No	No	No	*3
Wellsboro	No	No	No	No	Yes	*4

1 - Capacity rarely reached
2 - No busy signals received during Sept. 2008 event
3 - Capacity rarely reached
4 - Customers are called after restoration to ensure success

Again, we generally feel that the EDCs should be giving serious consideration to the increased use of modern technology that will allow them better tracking of customer calls during outages. This will be addressed further in the recommendations portion of this report.

Section 3 – Recommendations

General

While participation in the public input hearings held a month after the outages was limited, during the outages many residents were frustrated with a lack of answers from their utilities about when service would be restored or the conflicting information they were receiving. The Commission understands that it takes time to restore power after a severe unexpected storm. However, keeping an open, predictable line of communication with consumers could have gone a long way toward easing some of the frustrations expressed by the public.

The utilities did not utilize the principles of the National Incident Management System and its Incident Command System. These principles include making certain the message is consistent, using one spokesperson for an information release and providing predictability to the release of updated information. The EDCs should consider utilizing a Joint Information System/Joint Information Center that organizes all of the information throughout the utility into one unified message with one person to deliver that message at predictable timeframes to the public, media and others.

We understand that customer service representatives will be dealing with the public during outage situations. Also, linemen and other people working in the field will encounter customers with questions about restoration of service. The message to the public and media should be the same no matter which public service representative or department of the utility residents contact. During the September 2008 incident, we found that different information was being gleaned from different segments of the utility (consumer services representatives, linemen, field staff and media contacts). This caused confusion among consumers, media and the Commission.

A single set of talking points or informational sheets with a uniform message should be distributed to all within the EDC who may have contact with the public in any

capacity. The uniform message should be updated regularly at predictable/scheduled times. Media releases, talking points and other information should be shared with the Commission's Office of Communications, its Emergency Preparedness Coordinator and the local Emergency Management Agencies.

Also, it's evident that specific times should be established for release of information to the media with an opportunity for open dialogue and questions – possibly through an in-person media availability conducted by the EDC spokesperson. The PUC has established such protocols for receiving updates for outage information from the EDCs. The Commission's Office of Communications then uses those predictable times to share with the media when the next update on the number of people without service will be available. The same should be done by the EDCs in communicating with the public. Establishing a regular schedule for information updates allows the public and the media to know specifically when new, updated information will be available. Again, adherence to the NIMS standards for release of public information would alleviate these concerns.

Beyond a consistent message from the EDC, we see a benefit to working across jurisdictional boundaries. The NIMS-based Joint Information System/Joint Information Center would apply to efforts to work with other utilities in coordinating a message. According to the NIMS standard, those contributing to joint public information management "do not lose their individual identities or responsibilities. Rather, each entity will contribute to the overall unified message."

We also believe that modern technology is being under-utilized by the EDCs. Automated dialing systems, e-mail or text messaging would prove to be effective communication tools for customers. While we recognize these technologies are only recently emerging, they are tools that should be utilized. Customers could opt to provide cellular telephone or home telephone numbers for calling or the other information. Customers who opt to participate in such a program would then know that they can receive updated information at a set interval or if their estimated restoration

time has changed by more than two hours. With that said, we know that not everyone is plugged into the digital age. In focusing on the use of emerging technology, EDCs should not abandon outreach using traditional communication networks such as radio.

We understand that the success of the use of modern technologies such as e-mail and text messaging depends directly on the consumers' willingness to provide that secondary-contact information. However, we believe sufficient customer interest in receiving timely information during an outage exists, leading to a willingness by those customers to voluntarily provide secondary-contact information such as e-mail and text-messaging addresses to the EDC.

We also believe that the increased use of technology lends itself to the EDCs creating and maintaining a section of their Web site specifically dedicated to outages. While it is admirable that some of the EDCs are able to provide real-time, customer-specific outage-related data on their Web sites, we understand that type of specificity is too cumbersome for certain utilities. However, we recommend that the Commission require the EDC's to dedicate a part of their respective Web sites to presenting outage information where customers could at the very least get regular updates of the number of customers without service by geographic area and estimated restoration times.

Proposed Policy Statement

On November 9, 2006, the Commission finalized a policy statement relating to unscheduled water service interruptions and associated actions (52 Pa. Code §69.1602 adopted December 15, 2006, effective December 16, 2006, 36 Pa.B. 7624). The document and its advice applied only to jurisdictional water and wastewater utilities, but the information contained within the policy statement provided solid guidance for all jurisdictional utilities. While the information found during the investigation leading up to the policy statement was served on all jurisdictional utilities including the EDCs, the final policy statement was not. Given the communication methods and reaction of consumers

from the September 2008 outages, it seems the lessons learned from that investigation should be considered by EDCs.

Therefore, staff recommends that the Commission consider adopting a policy statement for the EDCs similar to the one adopted on November 9, 2006, for the jurisdictional water utilities.

The proposed policy statement outlined below will provide guidance to the industry regarding the types of public notice necessary to meet the reasonableness standard in the Public Utility Code at 66 Pa.C.S. § 1501. This proposed policy statement will help ensure that actual, timely notice to customers is provided by EDCs whenever any event disrupts service and/or potentially endangers public safety. The proposed policy statement includes a series of acceptable methods for improving the timeliness and effectiveness of notice to electric customers during an outage. In addition, the proposed policy statement provides guidelines for public notice templates and notice to Commission personnel.

§ 69.1901, Policy Statement of Utility Service Outage Public Notification Guidelines.

(a) In the event of a service interruption, the following acceptable methods of public notification should be considered and utilized as appropriate:

(1) Fax/e-mail notification to local radio and television stations, cable systems, newspapers and other print and news media as soon as possible after the event occurs. These notifications must provide relevant information about the event, such as the affected locations, its potential impact including the possible duration of the outage, and a description of actions affected ratepayers/occupants should take to ensure their safety, with updates as often as needed. Updates should be provided on a predictable, regular schedule for the duration of the event. The Commission's Office of Communications and Emergency Preparedness Coordinator should also receive these notifications

(2) Use of the utility's own Internet Web site and 24/7 emergency phone line and integrated voice response system to provide relevant information about the event, such as the affected locations, its potential impact and estimated duration, and a description of actions affected ratepayers/occupants should take to ensure their safety, with updates as often as needed.

(3) Automated dialer system (outbound dialing) notification to affected ratepayers'/occupants' landline or wireless phones. Updates should be provided at regular intervals or if the estimated restoration time should change by more than two hours.

(4) Other types of direct or actual notice, such as doorknob flyers distributed to affected ratepayers/occupants with actions affected ratepayers/occupants should take to ensure their safety, when feasible.

(5) E-mail and text message notification to affected customers who have opted to receive notice through use of these methods.

(6) Coordination with state and local emergency management agencies as needed to use the emergency alert system for qualifying situations.

(7) Create a section of the company Web site dedicated to presenting outage information where regular updates of the number of customers without service by geographic area and estimated restoration times are available. Depending on EDC-system limitations, this could be as simple as a PDF or spreadsheet file of information that is updated at regular intervals.

(b) Utilities should strive to adopt National Information Management Systems (NIMS) and its Public Information System that strives to organize all information throughout the utility into one, unified message.

(1) EDC crisis communications plans should be in writing and every attempt should be made to be consistent with the nationally-approved NIMS standards.

(2) If more than one EDC is affected in the same geographic region, strong consideration should be given to implementing the NIMS-based Joint Information System/Joint Information Center. This would allow for coordination and integration of information across jurisdictions, especially on universal messages such as actions residents should take to ensure safety.

(3) The EDCs should have public notice templates prepared in advance to be available when needed to avoid wasting critical time developing materials when confronted with an emergency situation. The notices should cover many possible scenarios from safety and shelter information, estimated restoration times and times when updated information will be provided.

(c) To ensure that the public is informed, if possible, utilities should consider having a knowledgeable contact person stationed in the area of the outage during the emergency to communicate to the public and media on behalf of the company. Regular media updates should be scheduled at predictable times.

(1) A single point of contact should be established as the sole media spokesperson for the utility for that time period. During extended outages, a secondary-media spokesperson could be utilized as the sole contact for a specific period of time.

(2) Talking points or informational sheets should be provided to customer service representatives, linemen and others who may come in contact with the public during the course of the outage to strive toward consistency of message. This information should also be shared with the Commission's Office of Communications and its Emergency Preparedness Coordinator.

Proposed Regulations

As stated previously in this report, we recommend revisions to Commission regulations on service outages at 52 Pa. Code 67.1, *et seq*. This section should be opened for review, specifically the written notification section § 67.1(b). Additional required information should be considered in § 67.1(b) This additional information is typically requested by the Bureau of Fixed Utilities Services (FUS) for major events. Much of this information is already reported to FUS on a consistent basis in the outage reports filed by certain EDCs, although voluntarily. Additional required information should include:

- The utilities' weather reports, outlooks or scenarios and forecasts for the day before, and day of the interruption of service incidence if the outage was caused by a weather event
- The total number of outage cases and trouble cases (non-outage) by county
- The number of utility and contractor crews and personnel received as mutual aid
- A description of damage to equipment (replaced transformers, poles, spans of wire, pipes or valves for water and gas utilities, electronic equipment for telephone utilities)
- A historical ranking of the outage in terms of the number and duration of outages and examples of two comparable storms or events and the outage number and duration of those storms or events.

This information is available to the EDCs and some of them already report this information voluntarily. We do however, recognize that 52 Pa. Code § 67.1 applies, not only to electric, but to gas, water and telephone utilities holding certificates of public convenience. We believe the additional information requested may be of use in reviewing the outage response of telephone, gas or water/wastewater utilities. The issue of whether the additional reporting requirements should be limited to EDCs can be addressed during the review procedure.

While not directly addressed in the Joint Motion, we also recommend reviewing the Commission's regulations on reportable accidents. This proposed change provides focused direction to the EDCs concerning the types of safety and emergency information that this Commission needs to ensure that safe and reliable service is provided to the citizens of this Commonwealth. The Commission's regulations at 52 Pa. Code § 57.11 (electric), § 65.2 (water/wastewater), and § 59.11 (gas), which deals with reportable accidents, should be opened for review with one expectation being a simpler, more uniform approach to reporting standards and a second expectation of closing the loop on the ultimate cause and result of reported accidents.

Further clarification on what is a reportable accident is needed as is a consistent approach for all utilities. For example, any injury involving utility facilities is reportable for water, but for electric utilities the injury must be such as to cause the person to be out of work for a certain amount of time. A simpler, more uniform approach would be to require reporting of any injuries that require an ambulance or emergency room visit. Also, in order to close the loop on the ultimate cause and result of reported accidents, in addition to the required UCTA-8 form, the Commission should require utilities to file a copy of the final internal investigation report (or other similar report) when it becomes available.

Section 4 – Conclusion

In the aftermath of Hurricane Ike, the Commission directed that its staff conduct a statewide evaluation of aspects of electric distribution company storm response, service restoration and customer communication practices.

Both the Commission staff and EDCs perform best practice reviews after each storm response to identify areas of improvement. Over the years, both parties have worked well together to improve emergency outage response to the citizens of the Commonwealth of Pennsylvania.

Commission staff believes that this Joint Motion is an opportunity to memorialize some reporting practices that have been developed between staff and the EDCs over the years and an opportunity to implement some new practices.

We recommend that the Commission consider acting on the general recommendations, the proposed policy statement and the proposed regulations discussed in the body of this report.

Appendix A – Motion

PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17105-3265

Electric Distribution Company Service Outage Response and Restoration Practices

PUBLIC MEETING
September 25, 2008
SEPT-2008-C-0008
Docket No. _____

JOINT MOTION OF VICE-CHAIRMAN TYRONE J. CHRISTY AND COMMISSIONER KIM PIZZINGRILLI

As the remnants of Hurricane Ike met a cold front, higher than predicted winds hit portions of Western Pennsylvania on September 14 and 15 that resulted in significant damage to the electric distribution system. The high winds brought down trees, which damaged numerous electric lines and poles and also caused other electric infrastructure damage. All of this resulted in an extended loss of electric service for more than 300,000 Pennsylvanians.

In the aftermath of this event, utilities moved to restore service, with priority being given to repairs that could restore critical care customers, such as hospitals and nursing homes, and the largest number of customers in the most prompt and responsible manner. Utilities also invoked mutual aid agreements, in which line repair personnel from unaffected utilities travel to the site of the outages and assist in the restoration of service. The Pennsylvania Emergency Management Agency, to which the Commission is a support agency under the State Emergency Operations Plan, monitored the scope of the outage and the progress of restoration, and provided regular updates to other government agencies. All customers had service restored as of September 22. The work efforts of the utilities to restore service were appreciated as they encountered numerous dangerous situations. Unfortunately, one New Jersey utility employee who was assisting as part of mutual aid died in the course of restoring service.

The Commission maintains and enforces standards and procedures for the safety and reliability of the electric transmission and distribution system in Pennsylvania. 52 Pa. Code § 57.191, *et seq.* Consistent with these regulations, the affected utilities will provide reports on their storm response to the Commission. These reports will include specific information on restoration times, restoration procedures, preparations in advance of the storm, response times, clean up, and remediation. As with any outage, the Commission reviews the reports and evaluates whether the utility responded to the outages appropriately, whether they were adequately prepared and whether they were in compliance with the Public Utility Code and regulations. Typically, the Commission evaluates these reports, and directs individual utilities to take any additional measures to improve reliability if appropriate.

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However, given the magnitude and duration of these recent outages, we find that it is necessary to conduct a statewide evaluation of aspects of electric distribution company storm response, service restoration, and customer communication practices. We will therefore, pursuant to Section 331(b)(4) of the Public Utility Code, 66 Pa.C.S. § 331(b)(4), direct staff to undertake a study of these issues. As an initial step in this proceeding, we will direct that all jurisdictional electric utilities review and respond to the attached questions within 15 days of the adoption of this motion.

We also find that it is appropriate to conduct a public input hearing on this matter. We will therefore direct the Office of Administrative Law Judge, with the assistance of the Office of Communications, to schedule at least one public input hearing in the area affected by the recent power outages within two weeks. This hearing will provide an opportunity for utilities, government agencies, and emergency service providers to share information. It will also provide an opportunity to affected customers to share their experiences and how they could best be notified of outage related information during future incidents.

THEREFORE, WE MOVE THAT:

1. The Law Bureau prepare a Secretarial Letter, with a copy of this motion, and the directed questions, to be served on all jurisdictional electric distribution companies.

2. Electric distributions companies file a response to these questions and data requests with the Commission's Secretary's Bureau within 15 days.

3. The Office of Administrative Law Judge, with the assistance of the Office of Communications, schedule a public input hearing to be held in the affected area within two weeks of today.

4. Upon the completion of the review of the information collected pursuant to this proceeding, the Bureau of Conservation, Economics and Energy Planning, with the assistance of other appropriate staff, will prepare a report on this matter that will include recommendations for future action, including changes in policies and regulations governing electric service reliability.

September 25, 2008
Date

Tyrone J. Christy
TYRONE J. CHRISTY, VICE-CHAIRMAN

Kim Pizzingrilli
KIM PIZZINGRILLI, COMMISSIONER

Directed Questions to Electric Distribution Companies

1. All electrical distribution companies shall provide the number of personnel employed as line or substation repair crews for each of the years beginning with 1998 and up to and including 2007 and shall indicate whether those personnel are utility employees or utility contractor employees.

2. All electrical distribution companies shall provide the following details concerning mutual aid received for outage restoration for each of the years beginning with 1998 and up to and including 2007.

    a. The company name and location of origin for each mutual aid provider for the year, whether from another utility or a utility contractor.

    b. The number of times each mutual aid provider was utilized during the year and the number and type of personnel provided for each incident.

3. All electrical distribution companies shall provide for each of the years beginning with 1998 and up to and including 2007 the Pennsylvania inventory levels kept on utility property of the below listed equipment related to storm restoration.

    a. Utility poles

    b. Utility pole crossarms

    c. Transformers used for provision of residential service

    d. Length of primary wire

    e. Length of secondary wire

    f. Length of service drop wire

4. What method or methods of communication with customers was used in this outage, or if not affected by this storm, would have been used in the event of an outage?

5. Have you considered use of 21st Century technology in reaching out to customers, keeping in mind that they are without electricity? Why or why not?

6. Assess whether technological enhancements in communications can be made to keep the public better informed as utilities respond to the operational issues involved in resolving emergency situations such as reverse 911, e-mails or text messages.

7. Do you have a crisis communications plan in writing for outages? If yes, please attach a copy.

8. What is the proactive outreach (i.e. direct contact or through media) conducted by your utility to keep customers informed of conditions, restoration times and tips for staying safe during an outage?

9. How are restoration times communicated to the PUC, customers, county emergency management agencies and media? Do you have a single-point of contact for this information?

10. What is the procedure if a customer receives a busy signal on your outage line? On your customer service line? Are they called back? Do they receive an automated message? Are your customer-call systems tested to be able to receive and process calls from a significant number of your customer base in a short period of time and how many calls can your customer call center receive at one time?

Appendix B - Responses

EDC Answers to Question No. 1:

Duquesne	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Overhead Workers	224	251	256	221	212	219	206	221	230	225
Underground Workers	61	62	60	69	60	60	51	52	51	50
Substation Workers	61	72	76	55	57	56	56	61	56	63
Troubleshooter & Traveling Operator	48	55	55	53	56	61	58	57	56	58

Penelec	1999	2000	2001	2002	2003	2004	2005	2006	2007
Linemen	385	374	323	321	308	291	301	297	319
Substation	101	102	97	95	89	73	73	76	79

MetEd	1999	2000	2001	2002	2003	2004	2005	2006	2007
Linemen	238	232	207	194	197	207	207	214	223
Substation	66	66	68	68	67	56	65	72	69

Penn Power	1999	2000	2001	2002	2003	2004	2005	2006	2007
Linemen	88	76	68	71	72	76	75	77	86
Substation	27	20	20	20	19	19	20	21	20

PECO	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Aerial Linemen	427	410	399	400	422	399	418	423	426	419
Underground Linemen	130	108	113	108	110	102	69	76	78	71
Transmission/Substation	136	131	126	132	134	127	119	116	119	131
Energy Technicians	165	101	100	100	98	101	97	97	93	99

EDC Answers to Question No. 1:

PPL	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Linemen	525	513	492	504	446	475	420	494	455	435
Electricians	221	224	221	223	213	235	223	228	237	219
Contractors						187	218	188	225	316

UGI	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Linemen	10	10	10	10	8	8	9	9	9	10
Substation	5	5	5	4	4	5	5	5	5	4
Contractor Linemen	21	22	23	21	24	24	21	21	21	21
Contractor Line Clearance	29	29	29	29	27	35	35	27	27	27

Wellsboro	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Linemen & Substation Workers	6	6	6	6	5	5	6	6	6	6

West Penn	2000	2001	2002	2003	2004	2005	2006	2007	2008
Linemen	332	323	311	308	302	302	293	289	276
Substation	63	59	60	60	63	64	63	67	68

Pike County	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Electric Operation Staff	176	168	163	159	157	165	175	178	172	183
Substation Operation Staff	41	38	41	46	37	41	38	40	41	37

Citizens	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Line & Substation Workers	9	9	9	9	9	9	9	9	9	9

EDC Answers to Question No. 2:

Number of Times the Company Utilized Mutual Aid*

Company	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Allegheny Power	n/a	n/a	n/a	n/a	n/a	n/a	13	18	17	26
Duquesne Light	0	0	2	0	8	2	0	0	0	4
MetEd	n/a	n/a	n/a	n/a	n/a	35	1	7	13	22
Penelec	n/a	n/a	n/a	n/a	n/a	10	0	15	7	15
Penn Power	n/a	n/a	n/a	n/a	n/a	0	0	0	0	1
FirstEnergy - PA**	n/a	n/a	n/a	n/a	n/a	0	14	18	1	0
PECO	7	24	2	10	17	11	8	22	42	15
PPL	2	5	0	0	9	11	3	6	1	20
UGI	0	0	0	0	0	0	0	0	0	0
Citizens	0	0	0	0	2	2	0	0	0	0
Pike	0	10	4	3	6	6	5	8	9	9
Wellsboro	0	0	0	1	0	5	3	0	0	1

* Number of times utilizing each mutual aid provider, not number of incidents per year utilizing mutual aid providers

**FirstEnergy could not break down the assistance provided by PA operating company for these mutual aid providers

EDC Answers to Question No. 3:

Citizens	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Poles	45	64	53	31	50	58	81	76	83	62
Crossarms	50	55	111	74	59	68	71	56	51	80
Transformers	54	71	65	70	48	54	48	47	44	64
Primary Wire (ft)	30375	31400	61560	25381	34494	49122	28143	17159	17793	38156
Secondary & Service Wire (ft)	11401	11360	10335	8933	5701	16640	9111	10754	9028	11422

Pike		1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Utility Poles (by type)											
	1254040 - 35'	48	48	48	48	48	48	48	48	48	48
	1254050 - 40'	40	40	40	40	40	40	40	40	40	40
	1254060 - 45'	96	96	96	96	96	96	96	96	96	96
	1254070 - 50'	48	48	48	48	48	48	48	48	48	48
Crossarms (by type)											
	1179020 - 6'	400	400	400	400	400	400	400	400	400	400
	1179025 - 8'	200	200	200	200	200	200	200	200	200	200
Transformers (by type)											
	1010105 120/240 - 25 kva	195	195	195	195	195	195	195	195	195	195
	1010107 120/240 - 50 kva	140	140	140	140	140	140	140	140	140	140
	1010121 120/240 dual voltage 25 kva	43	43	43	43	43	43	43	43	43	43
	1010123 120/240 dual voltage 50 kva	23	23	23	23	23	23	23	23	23	23
	1010153 120/240 dual bushing 25 kva	115	115	115	115	115	115	115	115	115	115
	1010155 120/240 dual bushing 50 kva	30	30	30	30	30	30	30	30	30	30
	1015212 120/240 padmount 25 kva	200	200	200	200	200	200	200	200	200	200
	1015214 120/240 padmount 50 kva	100	100	100	100	100	100	100	100	100	100
	1019004 120/240 19.9 - 25 kva	16	16	16	16	16	16	16	16	16	16
	1019005 120/240 19.9 - 50 kva	11	11	11	11	11	11	11	11	11	11
Primary Wire - 1150385 (in ft)		80,000	80,000	80,000	80,000	80,000	80,000	80,000	80,000	80,000	80,000
Secondary Wire - 1150230 (in ft)		20,000	20,000	20,000	20,000	20,000	20,000	20,000	20,000	20,000	20,000
Service Drop Wire - 1150125 (in ft)		20,000	20,000	20,000	20,000	20,000	20,000	20,000	20,000	20,000	20,000

EDC Answers to Question No. 3:

Duquesne	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Utility Poles	N/A	1,812	1,700	1,381	1,303	1,570	1,492	2,252	2,531	1,114
Crossarms	N/A	N/A	N/A	N/A	N/A	786	367	2,005	2,580	1,557
Transformers	1,000	2,099	2,345	1,610	1,095	1,291	518	932	1,124	1,036
Primary Wire (ft)	20,914	48,858	22,030	21,075	74,122	35,010	148,030	116,274	167,050	203,705
Secondary Wire (ft)	125,575	76,038	91,317	113,654	79,123	88,161	381,686	445,433	451,294	677,816
Service Wire (ft)	250,221	224,948	227,723	202,376	226,437	322,547	375,863	706,587	690,375	845,679

Wellsboro		1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Poles		38	105	39	63	56	85	63	59	43	75
Crossarms		69	169	47	45	48	47	37	76	71	116
Transformers		83	87	78	92	59	72	50	94	70	109
Primary Wire (ft)											
	Overhead	36,470	59,019	31,933	41,818	36,473	23,001	30,905	27,790	23,667	15,564
	Underground	14,790	32,400	26,747	21,744	21,370	17,751	14,520	13,480	15,685	16,554
Secondary Wire (ft)											
	Overhead	3,364	3,859	3,980	5,218	8,729	5,624	7,540	4,970	2,918	1,274
	Underground	2,105	2,995	1,800	420	600	2,106	1,575	2,180	1,040	3,150

Penn Power	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Poles	N/A	N/A	N/A	N/A	N/A	45	341	378	344	221
Crossarms	N/A	N/A	N/A	N/A	N/A	278	465	482	437	343
Transformers	N/A	N/A	N/A	N/A	N/A	214	387	475	366	203
Primary Wire (ft)	N/A	N/A	N/A	N/A	N/A	88,309	132,749	256,584	205,283	146,363
Secondary & Service Wire (ft)	N/A	N/A	N/A	N/A	N/A	45,938	68,149	39,410	35,396	250,620

EDC Answers to Question No. 3:

MetEd	1998	1999	2000	2001	2002	2,003	2,004	2,005	2,006	2,007
Poles	N/A	N/A	N/A	N/A	N/A	478	883	939	649	1,066
Crossarms	N/A	N/A	N/A	N/A	N/A	1,871	954	2,880	2,620	2,871
Transformers	N/A	N/A	N/A	N/A	N/A	1,302	1,158	1,453	1,429	705
Primary Wire (ft)	N/A	N/A	N/A	N/A	N/A	481,981	740,965	924,402	1,080,818	822,877
Secondary & Service Wire (ft)	N/A	N/A	N/A	N/A	N/A	122,089	112,833	119,264	155,104	145,203

Penelec	1998	1999	2000	2001	2002	2,003	2,004	2,005	2,006	2,007
Poles	N/A	N/A	N/A	N/A	N/A	937	1,328	2,716	1,877	1,425
Crossarms	N/A	N/A	N/A	N/A	N/A	1,817	1,962	3,080	5,990	4,918
Transformers	N/A	N/A	N/A	N/A	N/A	1,480	1,500	2,268	2,125	1,367
Primary Wire (ft)	N/A	N/A	N/A	N/A	N/A	2,188,372	1,144,986	1,457,540	1,736,557	1,060,321
Secondary & Service Wire (ft)	N/A	N/A	N/A	N/A	N/A	146,828	294,998	279,820	262,266	163,423

PECO	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Poles	700	700	700	700	700	700	700	700	700	700
Crossarms	2,600	2,800	2,600	2,700	3,000	2,600	2,600	2,700	3,000	2,600
Transformers	N/A	N/A	2,426	2,794	2,765	2,727	2,832	3,564	3,204	3,412
Primary Wire (ft)	N/A	N/A	1,140,145	1,419,401	1,144,512	1,136,531	1,401,367	1,424,072	1,400,353	1,429,009
Secondary Wire (ft)	N/A	N/A	236,715	233,764	227,681	191,156	167,789	168,286	211,390	176,816
Service Drop Wire (ft)	N/A	N/A	455,494	453,227	378,623	353,898	383,849	373,575	334,854	433,466

EDC Answers to Question No. 3:

PPL	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Poles	1,495	971	1,094	1,002	1,168	965	1,090	970	821	951
Crossarms	1,955	1,324	2,067	1,257	1,265	1,273	1,536	1,689	1,310	1,285
Transformers	4,192	3,315	3,057	2,861	2,906	3,026	1,750	2,778	2,647	2,632
Primary Wire (ft)	577,907	965,952	1,172,530	671,673	771,246	580,852	757,850	516,899	518,748	739,319
Secondary Wire (ft)	183,609	124,432	142,416	108,818	164,786	121,530	147,180	111,639	115,725	137,646
Service Drop Wire (ft)	579,823	602,432	631,598	386,440	400,407	235,991	290,364	215,445	263,657	420,520

UGI	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Poles	94	95	106	96	105	128	95	128	175	117
Crossarms	142	113	36	23	44	127	40	321	190	212
Primary Wire (ft)	96,573	70,075	52,506	61,645	111,169	125,620	88,083	95,475	107,471	107,750
Secondary Wire (ft)	12,740	12,404	27,227	18,421	17,243	15,423	24,766	16,693	21,155	19,175
Service Wire (ft)	8,598	20,003	11,832	13,315	13,637	11,849	15,195	21,129	7,392	4,827
Transformers	509	465	440	577	568	459	471	682	525	439

West Penn	2003	2004	2005	2006	2007
Poles	2,394	1,953	1,830	1,665	1,138
Crossarms	3,910	3,482	2,542	2,270	3,442
Primary Wire (ft)	558,214	688,043	588,488	426,650	526,315
Secondary Wire (ft)	503,185	461,366	503,185	253,055	293,293
Service Wire (ft)	101,749	84,775	175,475	112,828	125,280
Transformers	4,288	3,894	3,455	3,213	3,462

EXHIBIT “T”

1

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

- - - - -

BURTON L. HIRSCH FUNERAL HOME, INC. and SERVICE CORPORATION INTERNATIONAL, as managing company for Burton L. Hirsch Funeral Home, Inc.,

Plaintiffs,

vs.

DUQUESNE LIGHT COMPANY,

Defendant.

) CIVIL DIVISION
) No. GD-09-14720
) Deposition of JAMES ROBERT RUNATZ
) Filed on behalf of the Plaintiffs
) Counsel of Record for these Parties:
) Peter Parashes, Esq.
) White and Williams, LLP
) 1650 Market Street
) One Liberty Place
) Suite 1800
) Philadelphia, PA
) 19103-7395

- - - - -

January 15, 2010

- - - - -

2

DEPOSITION OF JAMES ROBERT RUNATZ a witness herein, called by the Plaintiffs for examination, taken pursuant to the Pennsylvania Rules of Civil Procedure, by and before Vivian D. Macurak, a Professional Court Reporter and a Notary Public in and for the Commonwealth of Pennsylvania, at the law offices of White and Williams, LLP, Frick Building, Suite 1001, 437 Grant Street, Pittsburgh, PA, on Friday, January 15, 2010, at 10:04 a.m.

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COUNSEL PRESENT:
For the Plaintiffs:
Peter T. Parashes, Esq.
White and Williams, LLP
One Liberty Place, Suite 1800
1650 Market Street
Philadelphia, PA 19103-7395
215-864-6334
parashesp@whiteandwilliams.com
For the Defendant:
Bradley S. Tupi, Esq.
Tucker Arensberg
1500 One PPG Place
Pittsburgh, PA 15222
412-594-5545
btupi@tuckerlaw.com

ALSO PRESENT:

Krysia Kubiak

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WITNESS: JAMES ROBERT RUNATZ

* (RETAINED BY COUNSEL)

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A. Our operations group.
Q. Who are they? Who are the people? That means some person or persons were unable to find the numbers.
A. The operations supervisor on duty. They are the ones that I guess receive calls.
MR. TUPI: Don't guess. His question was who was it.
A. It is the operations group.
Q. You don't know the names?
A. Who I talked to that day?
Q. Yes.
A. No. I do not remember.
Q. Do you remember this incident at all?
A. Very little of it.
Q. Did you read about it or hear about it after it happened?
A. Honestly, no.
Q. Well, before coming here today did you look at any materials or listen to anything or read anything in order to try to refresh your memory at all?
MR. TUPI: Aside from conference with counsel.

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A. No.
Q. Let's talk about what you do remember. As best as you remember, how did you first become aware that there was any kind of a problem at the Burton L. Hirsch Funeral Home back in January 2009?
A. I was called from our operations group.
Q. I think you told us you don't specifically remember who it was who phoned?
A. No.
Q. Regardless of who the person was, what did they tell you?
A. That I needed to try to contact the Hirsch Funeral Home as a courtesy call because while we were working in the area that we saw a fire, we notified the police or notified the fire department and the fire department was on their way. They wanted me as a courtesy call to notify the customer.
Q. Was it one person who was on the other end of the line as opposed to some sort of a conference call?
A. Yes.
Q. Was it a male?

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A. Yes.
Q. Did you understand it to be a person who was out in the field or a person in an office somewhere?
A. No. It was a person in an office.
Q. Did that person give you any information about what happened to cause the fire?
A. No.
Q. What did you do after you got that call from the operations person?
A. I tried to find the number.
Q. Of --
A. Of Hirsch Funeral Home, any kind of 24-hour number.
Q. And then?
A. I found the number, and it turned out to be an answering service.
Q. What did you do?
A. I notified them that the funeral home was on fire, and I gave them the address.
Q. I have a book here which has a number of documents in it. This may make life a little simpler. If you will pull this over, we will mark various ones as exhibits. If you

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pull it over and work with me, we will work through some of these things.
The documents that are in that book have Bates stamps on them. Would you please go to the one, if you just flip through --
MS. KUBIAK: They have numbers on the bottom of the page.
MR. TUPI: What page do you want? We will go to it.
Q. It is DLC-000001. Do you see that?
A. I see DLC.
MR. PARASHES: I will ask the court reporter to mark that as Runatz 1 please.
(Runatz Exhibit No. 1 was marked for identification.)
Q. Looking at that document that we have marked Runatz 1, let me ask you this. Have you seen it before?
A. No.
Q. Do you recognize any handwriting on that document?
A. No.
Q. Have you had a chance to look at it?
A. Yes.
Q. I'm going to ask you about some

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names. Tell me if you know them. There is an entry that says investigated by, and the name Don Lewis is there. Do you know who that is?
A. Yes.
Q. Who is that?
A. A supervisor for Duquesne Light Company.
Q. Having seen that name on there, does that change anything about your memory regarding who phoned you?
A. No.
Q. When you say he is a supervisor, to your knowledge does Mr. Lewis work in the field or in an office or both?
A. He is in the field.
Q. Do you know whether Mr. Lewis was in the field at the time that this fire was discovered?
A. I do not.
Q. Now there is a term here that refers to Penn Hills B/S. Do you see that?
A. Yes.
Q. Do you know what that B/S refers to?
A. That is back shift.
Q. Back shift? Please, what is a back

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shift?
A. It is the people that work off hours.
Q. Then below it says back shift hooking up 3 phase set. That refers to the same B/S. That is just an abbreviation for back shift, right, to your knowledge?
A. To my knowledge.
Q. At the bottom there is a signature on this document. Do you recognize the signature? First, do you recognize the signature?
A. No.
Q. Do you know who that is?
A. No. I can't read that.
Q. Is there someone with a name like Robert McTelvey or some similar name that you have heard of who is a DLC supervisor?
MR. TUPI: Objection. The question is vague. Don't guess. If you don't know, you don't know.
A. No.
Q. There is a title here, DLC supervisor. What does that stand for to your knowledge?

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A. He would be in the office at our Duquesne Light operations center.
Q. So OC is operations center?
A. Yes.
Q. The title of this document appears to be Report Of Accidents And Unusual Occurrences; correct?
A. That's what it looks like.
Q. Have you ever seen a Report Of Accidents And Unusual Occurrences filled out?
A. No.
Q. You never filled one out yourself or never had reason to?
A. No.
Q. Do you know anything about what the procedure or requirement is for the filling out of such a document?
A. No.
Q. There are a few other things I want to ask you, and you may or may not know them. Just tell me what you know.
There is a reference in this document to a pole number. It has Pole No. D.L. Co., and then it has 51673.
Do you know, do the poles have each

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individual numbers?
A. I don't know.
Q. Do you have a record of what time you were contacted by phone by whoever the person was who phoned you?
A. I don't have an exact time.
MR. TUPI: The question was do you have a record?
A. No.
Q. Is there a record to your knowledge?
A. To my knowledge --
MR. TUPI: Do you know, Jim?
THE WITNESS: No.
MR. TUPI: Then tell him no.
Q. Let me emphasize that, as Mr. Tupi is telling you, there are some things you are just not going to know, and that's an acceptable answer. Really. If you don't know, tell me. If you can approximate an answer, tell me you are approximating it.
Okay. Did I understand you to state that after you received the call from the individual notifying you that the customer had to be contacted, you had to make some effort to find the number? It wasn't at your fingertips;

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correct?
A. Yes.
Q. Can you just give me a rough approximation, a rough approximation as to how long it was between the time that you received the call and then found the number and then made the call?
A. 25 minutes, half hour.
Q. Because time was eaten up or time was used up trying to locate the number; is that fair?
A. Yes.
Q. As soon as you found the number, as fast as you could you made the call; is that fair?
A. Yes.
Q. Skip a couple of pages in that book. Actually, let's go to the next page for a moment, which is DLC 000002. We will mark that Runatz 2. While we are at it, we will mark the next one Runatz 3.
(Runatz Exhibit Nos. 2 and 3 were marked for identification.)
Q. Look at Runatz 2. That is another Report Of Property Damage To

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D.L. Co. Facilities. Do you see that?
A. Yes.
Q. Have you seen that before today?
A. No.
Q. Have you ever seen one of these?
A. No.
Q. There is a comment and an entry toward the middle about the ownership. It says joint Verizon DLCO title. Do you have any understanding as to what that means with regard to the pole?
A. Yes.
Q. Would you tell me what your understanding is.
A. That both Verizon and us have title to the pole.
Q. When you say the pole, are we talking about the wooden structure or more than that?
A. I don't know.
Q. Based on your experience at the Duquesne Light Company, when an incident occurs where there is damage to a pole and the componentry, the electrical componentry on the pole, does Verizon get notified of that by

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Duquesne Light to your knowledge?
A. Yes.
Q. Is that a routine procedure?
A. I don't know. Yes.
Q. To your knowledge -- again, just tell me what you know -- to your knowledge, did Verizon do any kind of an investigation of the incident involving the pole involved in this accident?
A. Could you repeat the question.
Q. Yes. Did Verizon, Verizon, the company, have any investigative people out --
A. I don't know.
MR. TUPI: Let him finish his question.
Q. Let's go to the next page, which is Runatz 3, please. Just flip a page. The title of this page is Supervisor Log.
Do you know what a Supervisor Log is?
A. No.
Q. Have you ever seen one?
A. No.
Q. If you look at the entries that are in there by hand, and, by the way, is it fair

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that you don't recognize any handwriting on here?
A. Yes.
Q. If you look at the entries, there is an entry for November 30 that is a little below the middle of the page. Do you see that?
A. Yes.
Q. It seems to say CONF call, and then it has names. It has a list of names. Included in those names is your name, Runatz. Do you see that?
A. Yes.
Q. Did you participate in a conference call with several other people who are listed in that entry at 11:30 a.m. on January 10?
A. Yes.
Q. Who was leading or overseeing that call, if anyone?
A. I don't know.
Q. Let me just ask you some names, and you will tell me please what you know about these people. There is a name K-U-P-U-C-E. I don't know how you pronounce it. Do you know that name, the first name listed in the conference call?

EXHIBIT “U”

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALDERWOODS (PENNSYLVANIA), INC. a wholly-owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,

Plaintiff,

v.

DUQUESNE LIGHT COMPANY,

Defendant.

CIVIL DIVISION

No. GD 09-14720

DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER OF SEPTEMBER 14, 2015, OR, IN THE ALTERNATIVE, FOR AMENDMENT OF ORDER TO ALLOW INTERLOCUTORY APPEAL

Filed on Behalf of the Defendant:
Duquesne Light Company

Counsel of Record for This Party:

Bradley S. Tupi, Esquire
Pa. Id. No. 28682

Erin M. Beckner Conlin, Esquire
Pa. Id. No. 94086

Jeremy V. Farrell, Esquire
Pa. Id. No. 316258

TUCKER ARENSBERG, P.C.
1500 One PPG Place
Pittsburgh, PA 15222
(412) 566-1212
(412) 594-5619 - FAX
btupi@tuckerlaw.com
ebeckner@tuckerlaw.com
jfarrell@tuckerlaw.com

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CIVIL DIVISION
ALLEGHENY COUNTY PA

LIT:593710-1 014657-139188

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALDERWOODS (PENNSYLVANIA), INC. a wholly-owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,	CIVIL DIVISION No. GD 09-14720
Plaintiff,	
v.	
DUQUESNE LIGHT COMPANY,	
Defendant.	

BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER OF SEPTEMBER 14, 2015, OR, IN THE ALTERNATIVE, FOR AMENDMENT OF ORDER TO ALLOW INTERLOCUTORY APPEAL

Defendant Duquesne Light Company ("Duquesne Light"), through its attorneys, Tucker Arensberg, P.C., files this Brief in Opposition to Plaintiff's Motion for Reconsideration of Order of September 14, 2015, or, in the Alternative, for Amendment of Order to Allow Interlocutory Appeal ("Motion for Reconsideration").

I. *The Motion for Reconsideration ignores the PUC's comprehensive regulatory scheme that governs an electric utility company's restoration of service.*

Plaintiff filed this Motion for Reconsideration asking this Honorable Court to overrule or allow an immediate appeal of its decision to bifurcate this action and transfer it to the Pennsylvania Public Utility Commission ("PUC" or the "Commission") for a determination of the scope of Duquesne Light's duty to notify customers prior to restoring electric service.[1] In doing

[1] A copy of Duquesne Light's Motion to Bifurcate and Transfer Action to the Pennsylvania Public Utility Commission and Brief in Support ("Motion to Bifurcate") along with its Supplemental Brief in

so, however, Plaintiff overlooks the significance of its recent reliance on a duty to warn theory.[2] The scope of the duty Plaintiff seeks to define is within the exclusive jurisdiction of the PUC and must be defined by the PUC.

As outlined at length in Duquesne Light's Supplemental Brief, and ignored in Plaintiff's Motion for Reconsideration, issues regarding service interruptions and restorations are within the PUC's exclusive jurisdiction to regulate the reasonableness and safety of electrical service and are the subject of a comprehensive regulatory scheme administered by the Commission. For example:

- The PUC requires electric utilities to provide continuous service without unreasonable interruption and delay in "conformity with the regulations and orders of the Commission." 66 Pa. C.S. § 1501.

- The PUC's regulations require that electric utilities install maintain and operate their distribution systems in conformity with the applicable requirements of the National Electric Safety Code. See 52 Pa. Code § 57.194.The Commission has created an Electric Safety Division in its Bureau of Investigation and Enforcement to ensure that electric utilities are operating safely and reliably.

- 52 Pa. Code § 57.194(d) provides that an electric distribution company like Duquesne Light "shall strive to prevent interruptions of electric service and, when the interruptions occur, restore service within the shortest reasonable time." The Code also provides that the EDC shall "design and maintain procedures to achieve the reliability performance benchmarks and minimum performance standards established by the Commission." Id. at 57.194(e).

- The PUC has the regulatory authority to pursue enforcement action if its reliability standards are not met. 52 Pa. Code § 57.194(h). The regulations specifically provide that "[p]erformance that does not meet the standard for any reliability measure shall be the threshold for triggering additional scrutiny and potential compliance enforcement actions by the Commission's prosecutorial staff." 52 Pa. Code § 57.194(h)(1). The PUC

Support of the Motion to Bifurcate ("Supplemental Brief") are attached respectively as Exhibits A and B and are incorporated by reference as is fully set forth.

[2] In its Motion for Leave to File Second Amended Complaint, Plaintiff stated: "In amending the complaint, Hirsch simply wishes to leave no doubt that it alleges a failure to warn as well as a failure to inspect. Hirsch therefore seeks to amend the subparagraphs of the paragraphs recounting the specifics of Duquesne Light's negligence -- paragraph 22 of the Second Amended Complaint -- to state the specifics of Duquesne Light's failure to warn, and to make clear that Duquesne Light's negligence was more in its overall restoration of service rather than mere physical reconnection." Id. at ¶ 19. A copy of the Motion for Leave, without exhibits, is attached as Exhibit C.

has the power to assess fines and penalties if the performance standards are not met. 52 Pa. Code § 57.194(h)(2).

- The PUC can initiate investigations, require corrective action, impose penalties, and even revoke a utility's license as necessary to ensure system reliability, which includes the safe restoration of utility service. 52 Pa. Code § 57.197.

- The PUC has also enacted policies encouraging utilities to provide better public notification to customers regarding service outages and estimated restoration times. 52 Pa. Code § 69.1902.

All that Duquesne Light requested in its Motion to Bifurcate was to allow the agency legislatively charged with enforcing those regulations to determine whether Duquesne Light violated the Public Utility Code with respect to Plaintiff's claims in the context of the comprehensive regulatory scheme within which Duquesne Light must operate when restoring power (and which Plaintiff essentially ignores). Plaintiff's duty to warn claim cannot be adjudicated in a vacuum. The overarching and fatal flaw in the Motion for Reconsideration is Plaintiff's willful refusal to recognize the pervasive regulatory scheme triggered by its allegations. Adjudicating Duquesne Light's duty for restoring service to the Funeral Home should be done by the agency that administers the Commonwealth's regulations governing restoration of service and with the special expertise necessary to make that determination in light of the practical, real-world implications of the duty sought to be imposed by Plaintiff.

II. ***The cases cited by Plaintiff are distinguishable and do not justify the reversal or immediate appeal of this Honorable Court's decision.***

The Motion for Reconsideration relies on the same cases Plaintiff cited in its opposition to Duquesne Light's Motion to Bifurcate, none of which compel the reversal or immediate appeal of this Court's decision. In light of the pervasive regulatory scheme regarding electrical service restoration that is administered and enforced by the PUC, the cases cited by Plaintiff actually *support* this Court's decision to bifurcate the liability phase of this action and transfer it to the PUC.

Plaintiff's reliance Feingold v. Bell of Pennsylvania, 383 A.2d 791 (Pa. 1977), is misplaced because it ignores that Duquesne Light only sought to transfer the issues regarding the scope of its duty to the PUC. Feingold is factually and procedurally inapposite because that decision arose out of preliminary objections arguing that the failure to exhaust administrative remedies warranted dismissal of the case -- *an argument Duquesne Light has not made here.* Feingold simply held that, because the PUC cannot award monetary damages, the doctrine of exhaustion of administrative remedies could not require dismissal of a civil action for damages. Id. at 795-96. Feingold had nothing to do with the question posed here -- whether a case should be transferred to the PUC for a determination on an issue that it comprehensively regulates.

Despite that clear difference, Plaintiff nevertheless blindly seizes on Feingold's recognition of the fact that the PUC cannot award monetary damages -- a point that Duquesne Light has never disputed. Motion for Reconsideration, ¶ 12. That is why Duquesne Light only asked that the determination regarding Duquesne Light's obligations to provide reasonable service under the Public Utility Code be transferred to the PUC. If the Commission ultimately determines that Duquesne Light violated the Public Utility Code or the PUC's regulations, then this action will be transferred back to this Honorable Court for a determination of damages -- just as Plaintiff wishes. See Motion to Bifurcate, ¶ 11. Plaintiff's worries are unfounded.

Furthermore, the policy rationale expressed in Feingold -- which is noticeably missing from the Motion for Reconsideration -- actually supports the temporary transfer this action to the PUC and undermines Plaintiff's argument:

> When the Legislature has seen fit to enact a pervasive regulatory scheme and to establish a governmental agency possessing expertise and broad regulatory and remedial powers to administer that statutory scheme, a court should be reluctant to interfere in those matters and disputes which were intended by the Legislature to be considered, **at least initially, by the administrative agency**. Full utilization of the expertise derived from development of various administrative bodies would be frustrated by indiscriminate judicial intrusions into matters within the various agencies' respective domains.

Id. at 793 (emphasis added). That is precisely what Duquesne Light's Motion to Bifurcate sought: the initial transfer of this case to the administrative agency that regulates the exact issue involved in this litigation -- restoration of electrical service.

The Pennsylvania Supreme Court has already rejected Plaintiff's interpretation of Feingold in Elkin v. Bell Telephone Co. of Pa. 420 A.2d 371 (Pa. 1980) -- another case relied upon by the Motion for Reconsideration and that actually *affirmed* a request to transfer the case to the PUC: "Initially, we address appellant's argument, the entire thrust of which is that Feingold has ousted the PUC for all purposes in any case involving an action for damages. Appellant's interpretation of Feingold is too broad and would 'virtually strip' the PUC of all jurisdiction merely by framing the allegations in contractual and/or trespassory terminology, and demanding damages." Id. at 375. The Court added:

> Since, as noted, the PUC had no authority to award damages, appellant in Feingold had no adequate administrative remedy, and thus we held he had no duty to first exhaust administrative procedures before resorting to the courts. We had no occasion in Feingold to address the issue presented here. **Feingold, therefore, poses no bar to the procedure adopted by the trial court in referring the standards of services issue to the PUC.**
>
> Appellant's simplistic notion ignores the reality that frequently both the courts and administrative agencies must each play roles in the adjudication of certain matters, and would have this Court ignore an adjudication of a competent Commonwealth administrative agency rendered after a full and fair evidentiary hearing and consideration of briefs and arguments of the parties, in an area peculiarly within the area of expertise entrusted to the agency by the legislature. This we will not do.

Id. at 375 (emphasis supplied) Not only did the Court expressly reject the very argument advanced by Plaintiff, it also approved of the decision to refer the case to the PUC, all the while touting the benefits of the procedure requested by Duquesne Light and ordered by this Honorable Court.[3]

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[3] For example, the Court stated: "To accommodate the role of the court with that of the agency, the doctrine of primary jurisdiction (or primary exclusive jurisdiction) has developed. Essentially, the doctrine creates a workable relationship between the courts and administrative agencies wherein, in

Plaintiff also cites DeFrancesco v. Western Pa. Water Co., 453 A.2d 595 (Pa. 1982), Schriner v. Pa. Power & Light Co., 501 A.2d 1128 (Pa. Super. 1985), and Poorbaugh v. Pa. Public Utility Comm'n, 666 A.2d 744 (Pa. Cmwlth. 1995), in support of its argument that this action should not be bifurcated and transferred to the PUC. Those cases, however, are all distinguishable. They neither dealt with a comprehensive regulatory scheme like the one involved in this litigation, nor the scope of the duty to warn allegations now advanced by Plaintiff. As summarized above and detailed at length in Duquesne Light's Supplemental Brief, the PUC extensively regulates service restoration as part of its mission to ensure reliable service.

None of the cases relied upon by Plaintiff involved such a comprehensive regulatory backdrop. That distinction is too important to be overlooked. Proper resolution of Plaintiff's allegations that Duquesne Light *should have denied service to its customer* until certain communications had taken place requires a nuanced understanding of not only the PUC regulations previously identified but also the practical circumstances under which electrical utility companies operate. The PUC has the unique expertise and industry knowledge needed to render a prudent decision on those issues.

DeFrancesco stemmed from allegations that a water company failed to provide adequate water service to a hydrant near the plaintiff's residence. Id. at 596. The only similarity between DeFrancesco and the instant matter is that both involved allegations of negligence. The similarity ends there. Unlike the instant case, resolution of the claims in DeFrancesco "depended upon no rule or regulation predicated on the peculiar expertise of the PUC, no agency policy, no question of service or facilities owed to the general public, and no particular standard of safety or convenience articulated by the PUC." Id. at 597.

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appropriate circumstances, the courts can have the benefit of the agency's views on issues within the agency's competence." Id. at 375.

In Schriner, plaintiffs sought damages from multiple defendants for loss of their dairy cattle arising from an infection supposedly caused by "stray voltage" coming from their milking equipment, which was powered by PP&L. Id. at 1129-30. The court determined that the PUC did not have primary jurisdiction over the dispute because, unlike the instant matter, that case only remotely dealt with the service PP&L provided to its customers. Id. at 1130. Though Plaintiff offers little by way of factual analogy in its Motion for Reconsideration, it seemingly believes that since referral to the PUC was not proper in Schriner, which involved damage stemming from stray voltage, it is also not proper in this case because this case allegedly involves damage from an overvoltage. Such an argument, however, misses the point.[4]

The issue that warrants the PUC's attention in this case is not the overvoltage. It is Plaintiff's allegation that Duquesne Light *cannot restore service to its customer* under certain circumstances without first warning the customer about potential problems in the customer's own equipment.

Poorbaugh is also distinguishable. That decision neither justifies this Court's reversal of its decision nor would compel the Commonwealth Court to reverse this Court's ruling, as the Motion for Reconsideration suggests. The allegation in Poorbaugh was entirely different from those advanced in this case, which renders Plaintiff's analogy invalid. In Poorbaugh, plaintiff alleged that West Penn was negligent because the company failed to take good care of its own equipment, by using improper wire and splicing the wire too often. Id. at 745-46. Critically, Poorbaugh did not involve a duty to warn, which is now the focus of Plaintiff's allegations. See Motion for Leave, ¶ 19. When Plaintiff's allegations *were* similar to those at issue in Poorbaugh -- that Duquesne Light physically misconnected its wires[5] -- Duquesne Light did not seek

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[4] The Schriner court specifically noted that the "[r]esolution of the [plaintiffs'] claims depends upon no rule or regulation predicated upon the peculiar expertise of the PUC, no agency policy, no question of service or facilities owed to the general public, and no particular standard of safety or convenience articulated by the PUC." Id. at 1130.

[5] Plaintiff abandoned this theory when its own expert, Rich Wunderley, conceded that Duquense Light made all proper connections.

bifurcation and transfer to the PUC. It was not until Plaintiff asserted (and the appellate courts sustained) an alleged duty to warn (as set forth in the Second Amended Complaint) that Duquesne Light sought to transfer to the PUC. This alleged duty to warn, which by Plaintiff's own admission places Duquesne Light's "overall restoration of service" directly at issue (Motion for Leave, ¶ 19), is what triggered the necessity of involving the Commission.

Since none of the cases cited by Plaintiff involved the same type of allegations that Plaintiff now relies upon, or implicated the same type of regulatory scheme as that governing an electric utility company's restoration of service, those cases do not warrant either the reversal or immediate appeal of this Court's decision to bifurcate the determination of the scope of Duquesne Light's duty to the PUC.

III. *The law of the case doctrine does not apply to this Honorable Court's decision to transfer the determination of the scope of Duquesne Light's duty to the PUC.*

Plaintiff contends that the following statement in the Supreme Court opinion, made in response to a series of questions raised in Judge Eakin's dissent, constitutes the law of the case: "While the dissent offers various inquiries about what actions Duquesne Light might have taken which would be considered reasonable under the circumstances, these are precisely the sorts of considerations relegated to juries in cases in which a common-law duty exists and there are material factual questions concerning whether such obligation has been met." Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 106 A.3d 27, 42 (Pa. 2014).

Plaintiff ignores, however, the rule that only those issues actually decided by the appellate court can be considered the law of the case. Tyro Industries, Inc. v. James A. Wood, Inc., 614 A.2d 279, 284 (Pa. Super. 1992) ("Law of the case means that whatever is once irrevocably established as the *controlling legal rule of decision* between the same parties in the same case continues to be the law of the case") (emphasis in original). The Supreme Court,

however, expressly stated that it was *not* deciding whether transfer to the PUC was appropriate or not:

> **The PUC's position that we should leave this matter to its regulatory province is *entirely detached* from the summary judgment motion Duquesne Light filed and the limited review which was granted by this Court. *As such, in the present context, we decline to consider the Commission's ability to diminish common-law duties on the part of utilities.***

Id. at 38 n. 13 (emphasis added).[6] The Supreme Court's decision incorporated the remand instruction of the Superior Court, neither of which contained any direction as to how or in what forum the matter should proceed on remand. Alderwoods, Inc. v. Duquesne Light Co., 52 A.3d 347, 357 (Pa. Super. 2012); Alderwoods, 106 A.3d at 43. Because the issue presented by Duquesne Light's Motion to Bifurcate was not considered by the Supreme Court, the law of the case doctrine does not apply.

IV. *Plaintiff has not established either of the requirements necessary to certify this Court's ruling on Duquesne Light's Motion to Bifurcate for immediate interlocutory appeal.*

Plaintiff alternatively asks the Court to certify its ruling on the Motion to Bifurcate for an interlocutory appeal. The statute governing permissive interlocutory appeals, 42 Pa. C.S. § 702(b), provides:

> When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may, thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

Id. The statute thus imposes two requirements: (1) the opinion must involve a controlling question of law as to which there is a substantial ground for difference of opinion; and (2) the

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[6] The Supreme Court noted in the first sentence of its opinion that the main, controlling issue it accepted for review was "whether the Superior Court erred in imposing on electric utilities a burdensome and unprecedented duty to enter customers' premises and inspect customers' electrical facilities before restoring power after an outage?" Id. at 29.

immediate appeal will advance the ultimate termination of the matter. Id. Neither requirement is met here.

With respect to the first issue, this Court's Order granting Duquesne Light's Motion to Bifurcate does not involve a controlling question of law. Mere disagreement with the precedential impact of the cases cited by Plaintiff does not constitute a controlling question of law. See Motion for Reconsideration, ¶ 54. The controlling question of law -- whether Duquesne Light may have duty to provide a warning to its customer before restoring service under certain situations -- has already been decided by the Supreme Court. That, however, was not the question Duquesne Light presented in the Motion to Bifurcate. The issue presented in the Motion to Bifurcate was: *now that the Supreme Court has declared the standard and Plaintiff has modified its allegations to conform to that decision, who should determine the scope of the duty under the standard set forth by the Supreme Court?* Because the Motion to Bifurcate did not involve a controlling question of law, allowing an interlocutory appeal under § 702(b) would be improper.

With respect to the second requirement, Plaintiff seems to believe that an immediate appeal of a non-controlling issue is somehow more expeditious than a potential appeal of an uncertain ruling in the future. Motion for Reconsideration, ¶¶ 47, 55. This is mere speculation. In fact, since the parties only recently returned from a four-year trip through the Superior and Supreme Courts,[7] it is inconceivable that yet another detour to the appellate circuit would advance rather than delay the ultimate resolution of this action. Thus, an interlocutory appeal is inappropriate for this additional reason.

[7] This Honorable Court granted Duquesne Light's Motion for Summary Judgment on December 14, 2010. The Supreme Court's decision was not rendered until four years later, on December 15, 2014. Alderwoods, 106 A.3d 27.

V. Conclusion

For the reasons set forth above, Duquesne Light respectfully requests that this Honorable Court deny in all respects Plaintiff's Motion for Reconsideration of Order of September 14, 2015, or, in the Alternative, for Amendment of Order to Allow Interlocutory Appeal.

Respectfully submitted,

TUCKER ARENSBERG, P.C.

By: _____

Bradley S. Tupi, Esquire
Pa. Id. No. 28682
Erin M. Beckner Conlin, Esquire
Pa. Id. No. 94086
Jeremy V. Farrell, Esquire
Pa. Id. No. 316258

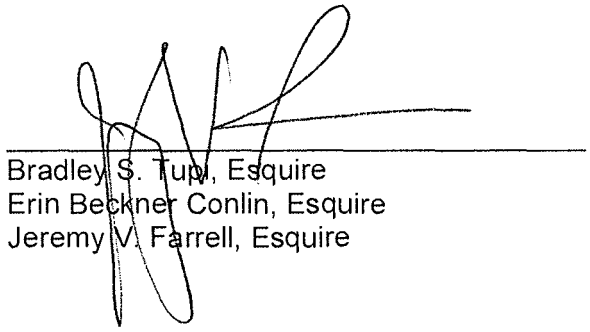
1500 One PPG Place
Pittsburgh, PA 15222

Counsel for Defendant,
Duquesne Light Company

CERTIFICATE OF SERVICE

I certify that I am this 6th day of October, 2015, serving a true and correct copy of Duquesne Light Company's Brief in Opposition to Plaintiff's Motion for Reconsideration of Order of September 14, 2015, or, in the Alternative, for Amendment of Order to Allow Interlocutory Appeal, upon the counsel indicated below by email and by First Class U.S. Mail, postage prepaid, addressed as follows:

Peter T. Parashes, Esquire
Alan J. Charkey, Esquire
White and Williams, LLP
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103
parashesp@whiteandwilliams.com
charkeya@whiteandwilliams.com



Bradley S. Tupi, Esquire
Erin Beckner Conlin, Esquire
Jeremy V. Farrell, Esquire

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