To Duquesne Light Company:

You are hereby notified that an answer to the Preliminary Objections below shall be filed within ten (10) days from service hereof.

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ALDERWOODS (PENNSYLVANIA), INC., a wholly owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME, *Complainant*, v. DUQUESNE LIGHT COMPANY, *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

COMPLAINANT'S PRELIMINARY OBJECTION TO JURISDICTION

Pursuant to Section 5.101(a)(1) of Title 52 of the Pennsylvania Code, Complainant, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home ("Complainant" or "Hirsch"), by and through its attorneys White and Williams LLP, files the instant Preliminary Objections to jurisdiction by the Pennsylvania Public Utility Commission over Complainant's claims against Respondent, Duquesne Light Company. In objecting, Complainant avers as follows:

I. STATEMENT OF THE CASE/PROCEDURAL HISTORY

1. 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 negligence in restoring electrical service in the aftermath of a motor vehicle accident which disrupted power in the area. See Exhibit "A", a copy of the complaint which Hirsch filed with the P.U.C.

2. 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.

3. On September 22, 2009, in response to Duquesne Light's Praecipe for Rule to File Complaint, Hirsch filed the original complaint in this matter in the Court of Common Pleas. 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. Exhibit "B".

4. On May 28, 2010, with leave of Court, Hirsch filed an Amended Complaint. To the original complaint, the Amended Complaint added counts for "negligence – breach of duty of highest degree of care" and "negligence – res ipsa loquitur." It retitled the original negligence count as "ordinary negligence" and also corrected the name of the plaintiff.

5. In late 2010, Duquesne Light moved for summary judgment, contending it had had no duty to Hirsch.

6. On December 13, 2010, Judge Paul F. Lutty of the Allegheny County Court of Common Pleas 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. Exhibit "C".

7. In July 2012, the Superior Court partially 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.) Exhibit "D".

8. The Superior Court affirmed the granting of summary judgment as to Hirsch's warranty counts. Id.

9. On October 26, 2012, Duquesne Light petitioned the Pennsylvania Supreme Court for allowance of appeal.

10. Hirsch did not appeal the Superior Court's affirmance of the granting of summary judgment of the warranty counts of Hirsch's complaint.

11. 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). Exhibit "E".

12. In its opinion reversing Judge Lutty, the Supreme Court held that Duquesne Light had been under a duty to Hirsch. Exhibit "E".

13. 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.

14. 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.

15. 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.

16. 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.

17. After remand to the Court of Common Pleas, with leave of court, Hirsch filed its Second Amended Complaint on or about May 19, 2015, to expressly include an allegation of failure to warn and to delete the warranty counts as to which the Superior Court had affirmed the granting of summary judgment.

18. On or about June 26, 2015, Duquesne Light moved to bifurcate – to transfer the adjudication of its liability to the P.U.C. Exhibit "F".

19. In its motion, Duquesne Light contended that the case should be transferred to the P.U.C. for an adjudication of its liability and for clarification of the Supreme Court's opinion, which, according to Duquesne Light, enunciated a "new duty" by electric utilities to warn customers of problems with their electrical equipment which are known to or suspected by electric utilities. Id.

20. Hirsch served its Revised Response in Opposition to the Motion and its supporting Memorandum of Law in opposition on the trial court and on Duquesne Light on or about August 14, 2015. Exhibit "G".

21. In its Response and Memorandum of Law, Hirsch argued, among other things, that under well-settled Pennsylvania law, the P.U.C. has no jurisdiction to adjudicate claims for

damages; that the Supreme Court took great pains in its opinion to point out that it was not announcing a new duty, but rather was clarifying a longstanding duty; and that the P.U.C. has no expertise with respect to the duties of an electric company to a customer after an overvoltage incident. Id.

22. Duquesne Light did not file a brief in reply to Hirsch's Memorandum of Law.

23. Argument on the motion was held before Judge Lutty in chambers on August 25, 2015.

24. 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. See Exhibit "H".

25. During argument, Duquesne Light's counsel asked for permission to file a supplemental brief.

26. Judge Lutty granted leave for Duquesne Light to file a supplemental brief and for Hirsch to file a response thereafter.

27. On August 31, 2015, Judge Lutty issued an order denying Duquesne Light's motion to bifurcate. Exhibit "I".

28. The next day, September 1, 2015, Judge Lutty issued an order vacating the order he had issued the previous day. Exhibit "J".

29. On or about September 4, 2015, Duquesne Light served its supplemental brief. Exhibit "K".

30. On or about September 11, 2015, Hirsch served its supplemental memorandum of law in response to Duquesne Light's supplemental brief. Exhibit "L".

31. In its supplemental memorandum of law, Hirsch argued, *inter alia*, that questions of constructive knowledge are to be decided by a jury; that the regulations cited by Duquesne Light allegedly in support of bifurcation were irrelevant to the issue; that juries, rather than administrative law judges, must decide questions of negligence *per se*; and that Duquesne Light had experience in warning customers of suspected electrical faults. Id.

32. On September 14, 2015, Judge Lutty reversed his August 31 order and granted Duquesne Light's motion to bifurcate. Exhibit "M".

33. 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. Exhibit "N".

34. On October 13, 2015, Judge Lutty heard arguments on the aforesaid motion in chambers.

35. 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.

36. 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 "O".

37. Judge Lutty has never issued any opinion explaining his orders transferring this matter to the P.U.C.

38. On October 29, 2015, Hirsch filed a petition for review with the Superior Court. Exhibit "P".

39. In the petition for review, Hirsch contended that Judge Lutty had egregiously disregarded longstanding Pennsylvania precedent holding that claims for damages cannot be adjudicated before the P.U.C. Id.

40. On December 16, 2015, the Superior Court denied Hirsch's petition for review.

41. On January 7, 2016, pursuant to Judge Lutty's orders and in light of the Superior Court's denial, Hirsch filed its complaint with the P.U.C.

42. The allegations of the complaint filed with the P.U.C. are substantially identical to those of the Second Amended Complaint which Hirsch filed with the Court of Common Pleas on or about May 19, 2015. See the complaint filed with the P.U.C., Exhibit "A" attached.

43. In the complaint filed with the P.U.C., Hirsch alleges that the motor vehicle accident which led to Hirsch's fire damage 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. Id., paragraphs 7 – 10.

44. The complaint alleges that 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. Id., paragraph 10.

45. The complaint alleges that on January 9, 2009 and/or January 10, 2009, after the collision and the resultant loss of power, Duquesne Light 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. Id., paragraph 11.

46. The complaint alleges that at the time it restored electric service to the funeral home, Duquesne Light 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, yet Duquesne Light restored electrical service to the funeral home anyway. Id., paragraphs 12 – 13.

47. The complaint alleges that prior to restoring electrical service to the funeral home, Duquesne Light did not advise Hirsch to have the Funeral Home's electrical equipment inspected by a qualified third party, nor did Duquesne Light advise Hirsch that until the funeral home's electrical equipment was so inspected and certified, Duquesne Light would not restore service. Id., paragraphs 15 – 16.

48. The complaint alleges that prior to restoring electrical service to the funeral home, Duquesne Light did not offer or attempt to inspect the funeral home's electrical equipment, nor did Duquesne Light offer or attempt to inspect the electrical equipment owned and/or maintained by Duquesne Light which was situated in the funeral home's basement. Id., paragraphs 17 – 18.

49. The complaint alleges that when Duquesne Light 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, and that as a direct and proximate cause of Duquesne Light'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. Id., paragraphs 19 – 20.

50. The complaint contains two counts, for negligence and negligence – *res ipsa loquitur*, for Duquesne Light's allegedly negligent acts and omissions in restoring electrical

service to the funeral home which contained a compromised electrical system unable to withstand such restoration, a condition of which Duquesne Light had actual or constructive notice. Id., paragraphs 21 – 28.

II. LEGAL GROUNDS OF PRELIMINARY OBJECTION

51. Hirsch objects to the P.U.C.'s jurisdiction pursuant to 52 Pa. Code § 5.101(a)(1).

52. Hirsch's objection should be sustained for the following reasons:

a) Under very well-settled Pennsylvania law, the P.U.C. cannot adjudicate claims for damages.

b) Duquesne Light is judicially estopped to assert that the P.U.C. has jurisdiction, having previously argued to the contrary.

c) Contrary to Duquesne Light's assertion in its motion to bifurcate filed with the Court of Common Pleas, the Supreme Court announced no new duty in its opinion of December 2014 which the P.U.C. could clarify. In the instant case, the Supreme Court has already held that it is for a jury, not the P.U.C., to determine what was reasonable under the circumstances.

d) The regulations cited by Duquesne Light as justifying bifurcation are completely irrelevant, and the P.U.C. lacks expertise as to overvoltage incidents. Duquesne Light actually seeks the issuance of new regulations, which cannot be the product of this adjudicatory proceeding.

e) Juries must decide questions of negligence *per se*.

f) Questions of constructive knowledge must be decided by juries.

g) The P.U.C. need not defer to a plainly erroneous decision of the Court of Common Pleas.

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

53. 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.

54. The seminal case in this area is Feingold v. Bell of Pennsylvania, 477 Pa. 1, 383 A.2d 791 (1977).

55. 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.

56. 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.[1]

57. The Supreme Court wrote that:

> 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.)

[1] 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).

58. Since deciding Feingold, the Supreme Court has clarified its holding in two subsequent cases.

59. 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.

60. 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.)

61. However, the Court added that:

> 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.

62. Acknowledging the technical expertise of administrative agencies under the doctrine of "primary jurisdiction," the Elkin court 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.

63. 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.

64. 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.)

65. 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.

66. 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.

67. DeFrancesco concerned a fire loss which was exacerbated by allegedly low water pressure. The 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.

68. 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.
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> * * *
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> 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]
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> [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.)

69. 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.

70. 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,"[2] of the Public Utility Code, 66 Pa.C.S. § 101, *et seq.*

71. 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.

72. The Schriner 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.

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

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[2] 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.

73. 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.

> [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.
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> 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.

74. In Poorbaugh, the court distinguished claims regarding irregular electrical service over an extended period of time from claims focusing on one specific instance of an electrical problem resulting in property damage, holding the latter as the province of the courts. Id. at 751.

75. In Poorbaugh, the court also observed that claims related to tariffs might require the expertise of the P.U.C. Id.

76. Simply put, according to the Commonwealth Court, Poorbaugh's claim for damages belonged before the trial court, not the P.U.C. Id.

77. The facts of Poorbaugh are remarkably similar to those of the instant case.

78. 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.

79. Like Poorbaugh, the instant case involves no claims of property damage from anyone other than Complainant, the owner of the destroyed funeral home.

80. 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).

81. The funeral home was the only customer affected by the overvoltage incident. Id.

82. The Commonwealth Court has jurisdiction over appeals from final orders of the P.U.C. 42 Pa. C.S. § 763.

83. In the instant matter, Poorbaugh is binding precedent.

84. Poorbaugh mandates the sustaining of Hirsch's preliminary objection.

85. By contrast, in Optimum Image, Inc. v. Philadelphia Electric Co., 410 Pa. Super. 475, 600 A.2d 553 (1991), involving a customer's claim of damage arising from voltage fluctuations, the Superior Court held the claim to be within the P.U.C.'s jurisdiction. Accord Vertis Group, Inc. v. Pennsylvania Public Utility Commission, 840 A.2d 390 (Pa. Cmwlth. 2003) (claims of irregular power supply within jurisdiction of P.U.C., in contrast to facts of Poorbaugh).

86. 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.

87. On the question of primary jurisdiction, the P.U.C.'s own opinions adhere to the case law established by Pennsylvania's appellate courts.

88. According to the Commission:

> As directed by Section 501 of the [Public Utility] Code, 66 Pa. C.S. § 501, the Commission must "enforce, execute and carry out, by its regulations, orders or otherwise" all the provisions of the Code. Section 701 of the Code, 66 Pa. C.S. § 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 Company,* 499 Pa. 374, 453 A. 2d 595 (Pa. 1982); *Elkin v. Bell of Pa.,* 491 Pa. 123, 420 A.2d 371 (Pa. 1980); *Feingold v. Bell of Pa., supra.*

Williamson v. Duquesne Light Company, Docket No. C-2009-2138578, at 7, 2011 WL 1210916 (Pa. P.U.C. February 10, 2011). (Emphasis added.)

89. According to the Commission, the P.U.C. does "not have jurisdiction to award monetary damages" in the absence of an allegation of violation of the Public Utility Code. Lolly v. Duquesne Light Company, Docket No. C-2010-2167824, at 6, 2011 WL 2113407 (Pa. P.U.C. May 9, 2011).

90. 52 Pa. Code § 5.21, "Formal complaints generally," provides that:

> A person complaining of an act done or omitted to be done by a person subject to the jurisdiction of the Commission, in violation, or claimed violation of a *statute* which the Commission has jurisdiction to administer, or of a *regulation* or *order* of the Commission, may file a formal complaint with the Commission.

52 Pa. Code § 5.21(a). (Emphasis added.)

91. In the instant case, Hirsch does not allege in its complaint that Duquesne Light violated the Public Utility Code or P.U.C. rules or regulations or orders, 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.

92. 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.

93. 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.

94. Instead, Hirsch's action "focuses only upon the supply of electricity to one" Duquesne Light "customer on one particular occasion." Poorbaugh at 751.

95. 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; Schriner; Poorbaugh; Williamson; Lolly. Quite simply, there is nothing technical for the P.U.C. to address.

96. Even the exercise of limited authority by the P.U.C. so as to determine a respondent's liability, rather than liability and damages, constitutes the attempted exercise of authority for the "implied request for reimbursement for property damage," Williamson, *supra*, which the P.U.C. does not have.

97. The P.U.C. consequently lacks jurisdiction in this case.

B. Duquesne Light is Judicially Estopped to Assert That The P.U.C. Has Jurisdiction.

98. Duquesne Light is judicially estopped to assert that the P.U.C. has jurisdiction to consider a request for money damages because Duquesne Light has previously asserted to the P.U.C. that it (the P.U.C.) does *not* have jurisdiction to consider a request for money damages.

99. According to Duquesne Light Company,

> . . . . Nothing in the [Public Utility] Code . . . 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., . . . , Elkin v. Bell of Pa., 491 Pa. 123, 420 A.2d 371 (1980); Feingold v. Bell of Pa., *supra*.
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> 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. . . . .

Exceptions of Duquesne Light Company, Lolly v. Duquesne Light Company, P.U.C. Docket No. C-2010-2167824, dated December 6, 2010 (Krysia Kubiak, Esq., Duquesne Light Asst. Gen'l Counsel), at 5 – 6, Exhibit "Q" attached.

100. In response to Duquesne Light's Exceptions in the Lolly matter, the Commission agreed with Duquesne Light that "we do not have jurisdiction to award monetary damages" in the absence of an allegation of violation of the Public Utility Code. Lolly v. Duquesne Light

Company, Docket No. C-2010-2167824, at 6, 2011 WL 2113407 (Pa. P.U.C. May 9, 2011). Exhibit "R" attached. See also 52 Pa. Code § 5.21(a).

101. Hirsch's complaint contains no allegation of violation of the Public Utility Code. Exhibit "A".

102. "As a general rule, a party to an action is estopped from assuming a position inconsistent with his or her assertion in a previous action, if his or her contention was successfully maintained." In re Adoption of S.A.J., 575 Pa. 624, 631, 838 A.2d 616, 620 (2003), quoting Trowbridge v. Scranton Artificial Limb Company, 560 Pa. 640, 644, 747 A.2d 862, 864 (2000).

103. The purpose of the doctrine of judicial estoppel is "to uphold the integrity of the courts by 'preventing parties from abusing the judicial process by changing positions as the moment requires.'" Trowbridge, 560 Pa. at 645, 747 A.2d at 865.

104. The doctrine of judicial estoppel applies to positions asserted in administrative law actions as well as before the courts. See Makoroff v. Commonwealth of Penna., Dept. of Transportation, Docket No. 3426, Conclusion of Law ¶ 23, 2007 WL 3324725, *14 (Pa. Board of Claims Jan. 12, 2007).

105. Because Duquesne Light has previously asserted to the P.U.C. that the P.U.C. has no jurisdiction to hear claims for damages, and because the P.U.C. agreed with Duquesne Light's assertion in the absence of any claim of statutory violation, as here, Duquesne Light is now judicially estopped to assert that Hirsch's claim must be adjudicated by the P.U.C.

106. Krysia Kubiak, Esq., the author of Duquesne Light's Exceptions in the Lolly matter, has participated in Duquesne Light's defense in the instant case. See, e.g., Exhibit "T" at 3.

107. "Krysia Kubiak is Assistant General Counsel in charge of federal energy regulatory issues and litigation at Duquesne Light in Pittsburgh, PA." http://www.legalspan.com /catalog2/faculty.asp?UserID=D20040726516314681435 06%20%20%20&OwnerColor=%2300 3366&recID=20140721-229194-135619, accessed on January 6, 2016.

108. Duquesne Light's insistence of jurisdiction in the instant case, in diametric contradiction of its position in the Lolly case, mocks and besmirches the integrity of the P.U.C. Trowbridge v. Scranton Artificial Limb Company.

109. Because Duquesne Light is judicially estopped to argue the P.U.C.'s jurisdiction in the instant matter, Hirsch's preliminary objection must be sustained.

C. The Supreme Court Announced No New Duty For the P.U.C. to Clarify. The Supreme Court Held In This Case That It Is For a Jury, Not the P.U.C., to Determine What Was Reasonable Under the Circumstances.

110. 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.

111. The need for a jury is particularly apparent given that the entire premise of Duquesne Light's motion to bifurcate – that the Supreme Court announced a new duty in its opinion above – is fundamentally false.

112. In its opinion, the Supreme Court made it abundantly clear 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.

113. 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.

114. 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.* Alderwoods, 106 A.3d at 42. (Emphasis added.)

115. The Supreme Court's opinion, 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 preliminary objection.

> 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.)

116. 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.

117. In light of Duquesne Light's confusion as to what would have been reasonable under the circumstances, the jury, not an administrative agency, must address the question.

> 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).

118. Adjudication by the P.U.C. would usurp the jury's function by transferring the determination of reasonableness, in a property damage case, to the A.L.J. 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*. The preliminary objection should therefore be sustained.

D. The Regulations Cited by Duquesne Light As Justifying Bifurcation Are Completely Irrelevant, and the P.U.C. Lacks Expertise As To Overvoltage Incidents. Duquesne Light Actually Seeks the Issuance of New Regulations, Which Cannot Be the Product of An Adjudicatory Proceeding.

119. In its motion to bifurcate, Duquesne Light cited 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 the 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.

120. Underscoring that this case has nothing to do with the general safety and reliability of service, to the best of Complainant's knowledge not one other customer in the Squirrel Hill section of Pittsburgh 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 Complainant's funeral home, was attached to the damaged pole, Alderwoods, 106 A.3d at 37, and no other customer was even in a position to suffer overvoltage damage.

121. 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, Hirsch has never complained about the delay. In fact, had Duquesne Light given Hirsch proper warning, so Hirsch could have its building inspected by an electrician, the delay would have been even greater – yet it would have preserved Hirsch's building and given Hirsch no cause to complain. Consequently, 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, cited by Duquesne Light in its supplemental brief of September 4, 2015, Exhibit "K", are therefore patently inapposite to this case.[3]

122. Sections 57.194, "Distribution system reliability" and 57.198, "Inspection and maintenance standards," also cited in Duquesne Light's supplemental brief, are similarly irrelevant. Complainant has never contended that Duquesne Light's distribution system was unreliable or that the "*routine*"[4] inspections required by the P.U.C. were faulty.

123. 52 Pa. Code § 57.197, "Reliability investigations and enforcement," also cited by Duquesne Light, is yet another red herring. Duquesne Light cited 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.[5,6]

124. Duquesne Light also cited 52 Pa. Code § 69.1902, a regulation which is part of the P.U.C.'s "Utility Service Outage Response Recovery and Public Notification Guidelines –

[3] 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."

[4] 52 Pa. Code § 57.198(d) (emphasis added)

[5] It seems that Complainant 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 *Complainant* or over Complainant'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). See also 52 Pa. Code § 5.21(a), providing that formal complaints before the P.U.C. pertain only to claims of violations of a "statute . . . or regulation or order of the Commission. . . ." Hirsch makes no such claim.

[6] In fact, Duquesne Light has admitted that it never filed any report about the subject incident with the P.U.C.

Electric Distribution Market." As the report entitled "Electric Distribution Company Service Outage Response and Restoration Practices Report, dated April 2009, Exhibit "S" attached, makes clear, 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.

125. The objective of Section 69.1902 is to make Pennsylvania's utilities more communicative to customers following mass outages.

126. Section 69.1902 did not take effect until March 6, 2010, more than a year after the fire that destroyed Complainant'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).

127. Even if Section 69.1902 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]

128. 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.

[7] Confirming the irrelevance of any contention that Section 69.1902 applies here, while the fire was still raging Duquesne Light had absolutely no trouble telephoning Complainant to report that its building was ablaze. See the transcript of James Runatz of Duquesne Light, Exhibit "T" attached, at 19:17 – 25:16.

129. 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.

130. That an L.C.B. 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.

131. 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 Complainant's cause of action for damages in the Court of Common Pleas.

132. 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 motion to bifurcate. Duquesne Light did not do so.

133. In opposing Hirsch's motion for reconsideration filed with Judge Lutty, rather than cite apposite regulations, Duquesne Light instead insisted that there existed a "pervasive regulatory scheme triggered by [Hirsch's] . . . allegations." Exhibit "U".

134. 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 ancillary regulations do not justify bifurcation, were all wrongly decided.

135. An allegation of negligence against a utility cannot "trigger" regulations.

136. Duquesne Light's failure to support its own motion with citation to applicable regulations simply confirms that "[r]esolution of . . . [Complainant'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).

137. 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.

138. That Duquesne Light has been unable to cite relevant regulations underscores the P.U.C.'s lack of expertise with respect to overvoltage incidents.

139. What Duquesne Light actually seeks here is not the resolution of common-sense questions by an administrative law judge but rather the adoption of new regulations regarding an electric provider's responsibilities after an overvoltage incident.

140. 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, 106 A.3d at 44 – 45, which the A.L.J. could *never* answer here and which are completely conjectural. Such questions are utterly irrelevant to this case.

141. Given the Supreme Court's admonition that policy as to overvoltage incidents is best set by the legislature, 106 A.3d at 40, it is doubtful that the P.U.C. even has the ability to adopt regulations about the duties following overvoltage incidents absent a legislative mandate.

142. However, assuming, *arguendo*, that the P.U.C. did have such ability, 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.[8]

143. 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.)

144. No current regulations apply to Complainant's claim. The objection must be sustained.

E. Juries, Not Administrative Law Judges, Decide Questions of Negligence *Per Se*.

145. In its motion to bifurcate, implicit among Duquesne Light's contentions was that Hirsch must be alleging negligence *per se*, or that Hirsch's claims are tantamount to such allegations, and that such claims must be adjudicated by the P.U.C.

146. Hirsch rejects any such characterization. Complainant's 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 Hirsch were asserting negligence *per se*, such claims would have to be submitted to a jury, not to an administrative law judge.

> 147. [T]here is a distinct difference between negligence and negligence *per se*. In a typical injury case, the Plaintiff must prove all of the

[8] 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.

> 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.)

> 148. 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.)

149. With the facts of Complainant's damages in dispute, even if Complainant 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. [9]

F. Questions of Constructive Knowledge Must Be Decided By Juries.

150. The P.U.C. also lacks jurisdiction because a jury must decide questions of constructive knowledge or notice.

151. Among the issues in this case is whether Duquesne Light had constructive knowledge or notice of an electrical fault in Hirsch's funeral home before restoring electrical

[9] Similarly, a jury is more than capable of weighing risk-utility analyses, contrary to Duquesne Light's assertion otherwise in its motion to bifurcate. 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).

service. See the complaint, Exhibit "A", at paragraphs 12 – 13. See also, e.g., Alderwoods, 106 A.3d at 39.

152. "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.)

153. 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).

154. 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 Complainant's electrical equipment. The P.U.C. could not decide the issue. Hirsch's objection should be sustained.

G. The P.U.C. Is Not Bound By the Order of the Court of Common Pleas.

155. The P.U.C. is not bound by the coordinate jurisdiction rule to adhere to the Court of Common Pleas' order transferring this matter to the P.U.C.

156. Even assuming, *arguendo*, the Courts of Common Pleas and the P.U.C.'s administrative law department to be "coordinate" – an assumption which Complainant rejects – the orders of a coordinate court need not be followed when those orders are plainly erroneous.

157. "[D]eparture from the rule of coordinate jurisdiction is allowed 'where the prior holding was clearly erroneous and would create a manifest injustice if followed.'" Gerrow v. John Royle & Sons, 572 Pa. 134, 141, 813 A.2d 778, 782 (2002), quoting Com. v. Starr, 541 Pa. 564, 576, 664 A.2d 1326, 1332 (1995).

> 158. Moreover, the rule does not apply where two motions differ in kind, then a second judge is not precluded from granting relief though another judge has denied an earlier motion. The rule does not apply when distinct procedural postures present different considerations, then a substituted judge may correct mistakes made by another judge at an earlier stage of the trial process, or, perhaps more accurately, may revisit provisional rulings made earlier in the litigation.

Gerrow v. John Royle & Sons, 572 Pa. at 141, 813 A.2d at 782. (Citations omitted.)

159. "[A]pplication of the [coordinate jurisdiction] rule can 'thwart the very purpose the rule was intended to serve, *i.e.*, that judicial economy and efficiency be maintained.'" Id., quoting Salerno v. Philadelphia Newspapers, Inc., 377 Pa. Super. 83, 546 A.2d 1168, 1170 (1988).

160. As our appellate courts, the Commission and even Duquesne Light itself have previously, and correctly, apprehended, property damage litigation against a Pennsylvania utility does not belong before a P.U.C. administrative law judge.

161. As noted above, the order of the Court of Common Pleas transferring this matter to the P.U.C. for adjudication was plainly, and egregiously, erroneous. Feingold; Elkin; DeFrancesco; Schriner; Poorbaugh; Williamson; Lolly, *supra*.

162. The order of the Court of Common Pleas transferring this matter to the P.U.C. for adjudication therefore need not be followed, particularly in the absence of any explanation by the Court of Common Pleas as to why the great weight of Pennsylvania law on the question of jurisdiction is to be ignored.

163. Moreover, the judge who ordered the case transferred to the P.U.C. did so in response to a procedural posture distinct from the instant objections, in a different forum altogether, under a rule other than 52 Pa. Code § 5.101, "Preliminary objections."

164. Because the coordinate jurisdiction rule does not require the P.U.C. to concede jurisdiction over Hirsch's claims, the preliminary objection should be sustained.

III. CONCLUSION

165. The decisional law of the Commonwealth's appellate courts and of the Commission are in accord that the P.U.C. lacks jurisdiction over a claim for property damage against a regulated utility.

166. Moreover, since Duquesne Light previously advocated that very proposition to the P.U.C., it is now judicially estopped to assert otherwise.

167. There is no new duty for the P.U.C. to clarify. Even if there were, such a clarification would necessarily entail the P.U.C.'s regulation-making procedures and could not occur within the confines of this adjudication.

168. Adjudication in the P.U.C. would also usurp the role of the jury, on the determination of 1) negligence per se and 2) whether Duquesne Light had constructive notice of the compromised condition of Hirsch's electrical equipment prior to service restoration.

169. The instant action is pending in the instant forum over the strenuous objections of Complainant in the Court of Common Pleas and against the great weight of Pennsylvania law. Should the instant preliminary objection be sustained, Hirsch will move the Court of Common Pleas to reinstate the matter.

WHEREFORE, Complainant, Alderwoods (Pennsylvania), Inc., a Wholly Owned Subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home, respectfully requests that its Preliminary Objection be sustained and that its complaint be dismissed without prejudice.

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 8, 2016

VERIFICATION

I, Alan J. Charkey, Esquire, hereby state that I am counsel for Complainant, 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 Preliminary Objection to Jurisdiction 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 8, 2016

IN THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

ORDER

AND NOW, this _____ day of _____, 2016, in consideration of Complainant's Preliminary Objection to Jurisdiction, and any response thereto, it is hereby ORDERED and DECREED that the Preliminary Objection is SUSTAINED.

The Public Utility Commission is without jurisdiction to hear this matter.

The Complaint in this matter is hereby dismissed, without prejudice.

BY THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

_____, A.L.J.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

Krysia M. Kubiak, Esquire
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by first class U.S. mail, postage prepaid, and by e-mail to kkubiak@duqlight.com, btupi@tuckerlaw.com and ebeckner@tuckerlaw.com.

The document was filed electronically on the Commission's electronic filing system.

Dated this eighth day of January, 2016.

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