

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,

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 MOTION TO DISQUALIFY CERTAIN P.U.C. LAW BUREAU
ATTORNEYS AND TO IMPOSE AN ETHICAL WALL**

Pursuant to Section 5.1(a)(6) 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, moves the Commission for the disqualification of certain members of the P.U.C.'s Law Bureau and for the imposition of an ethical wall within the Law Bureau. In so moving, Complainant avers as follows:

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.

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

3. 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.)

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

5. The Supreme Court granted allocatur.

6. On or about July 24, 2013, the P.U.C. as *amicus*, represented by Law Bureau attorneys Kenneth R. Stark, Esq., Patricia T. Wiedt, Esq., Robert F. Young, Esq. and Bohdan R. Pankiw, Esq., filed a brief with the Supreme Court which raised, *inter alia*, the question of transfer of the case to the P.U.C., even though Duquesne Light did not address the issue as appellant. See Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 106 A.3d 27, 39 n. 13 (Pa. 2014). See also excerpts of the P.U.C.'s brief attached hereto as Exhibit "A".¹

7. In its *amicus* brief, the P.U.C. cited certain P.U.C. regulations as allegedly conferring jurisdiction to the P.U.C. – including some of the same regulations cited by Duquesne Light in its motion to bifurcate later filed with the Court of Common Pleas in June 2015. See Hirsch's Preliminary Objection, filed with the P.U.C. on January 8, 2016, at paragraphs 119 through 144.

¹ So as not to prejudice the A.L.J. with the particulars of the P.U.C.'s argument, Hirsch attaches only the first and last pages of the P.U.C.'s *amicus* brief.

8. In its Supreme Court brief, Hirsch as appellee disputed the P.U.C.'s contention that the P.U.C. had jurisdiction over Hirsch's claims against Duquesne Light Company and disputed that the regulations cited by the P.U.C. in its *amicus* brief in any way conferred jurisdiction by the P.U.C. over Hirsch's claims.

9. On or about September 6, 2013, the P.U.C., by and through the aforesaid Law Bureau attorneys, filed an application for permission to file a brief in reply to Hirsch's Supreme Court brief.

10. At the same time, the P.U.C. filed a brief in support of the application.

11. In spite of its title, the P.U.C.'s brief, which consisted of seven pages, consisted not of points in favor of the filing of a reply brief by an *amicus* but rather of arguments attempting to refute Hirsch's contentions which Hirsch had raised in response to the P.U.C.'s *amicus* brief.

12. On or about September 13, 2013, Hirsch filed a response in opposition to the P.U.C.'s application to file a reply brief. Hirsch also filed a brief in support of its response.

13. On October 4, 2013, the Supreme Court denied the P.U.C.'s application for permission to file a reply brief.

14. On the issues raised by Hirsch in its preliminary objection filed with the P.U.C. on January 8, 2016, the aforesaid Law Bureau attorneys have already enunciated a position at odds with Hirsch's position that the P.U.C. lacks jurisdiction to hear the instant case.

15. As Hirsch pointed out in 2013, and as Hirsch again points out in its pending preliminary objection, any position that the P.U.C. has jurisdiction over the instant claims is manifestly contrary to well-settled Pennsylvania law.

16. “The Law Bureau shall advise the commission on any and all matters.” 66 Pa. C.S. § 308(b).

17. It is consequently conceivable that the Administrative Law Judge assigned to this matter may choose to consult with the Law Bureau.

18. Section 308(b) further provides that “No counsel shall in the same case or a factually related case perform duties in the prosecutory and advisory functions, if such performance would represent a conflict of interest.”

19. Any involvement by the four aforesaid Law Bureau attorneys with respect to any issues arising in the instant matter would run afoul of the spirit, if not the letter, of Section 208(b)’s proscription of conflicts of interest, by involving attorneys who had already prejudged the issues relevant to Hirsch’s preliminary objections specifically and Hirsch’s claims against Respondent generally.

20. “[A]n administrative body, which necessarily includes its adjudicatory members, must avoid *even the appearance of possible prejudice*.” Kinter v. W.C.A.B. (R.D. Werner Co.), 134 Pa. Cmwlth. 541, 545 – 46, 579 A.2d 1010, 1012 (1990). (Emphasis supplied by the court.)

21. A showing of actual bias or prejudice is not necessary to establish a lack of procedural due process. Com., Dep’t of Ins. v. Am. Bankers Ins. Co. of Florida, 26 Pa. Cmwlth. 189, 191, 363 A.2d 874, 875 (1976) aff’d, 478 Pa. 532, 387 A.2d 449 (1978).

22. In a case concerning questions of prejudice by local agencies, rather than Commonwealth agencies, the Commonwealth Court observed that:

A showing of actual bias is unnecessary in order to assert a cognizable due process claim; the mere potential for bias or the appearance of non-objectivity may be sufficient to constitute a violation of due process. However, “while an appearance of non-objectivity is sufficient to trigger judicial scrutiny, the significant remedy of invalidation often depends on something more

tangible.” Recusal is required only where the record demonstrates bias, prejudice, capricious disbelief or prejudgment.

In re Arnold, 984 A.2d 1, 8 (Pa. Cmwlth. 2009). (Citations omitted.)

23. If any substantial diminution of a party's ability to properly present its case at an adjudication results, then prejudice can be said to have attached. Metz Contracting, Inc. v. Riverwood Builders, Inc., 360 Pa. Super. 445, 451, 520 A.2d 891, 894 (1987).

24. “Before it can be said that a judge should have recused himself, the record must clearly show prejudice, bias, capricious disbelief or prejudgment.” Dunn v. Bd. of Prop. Assessment, Appeals & Review of Allegheny Cty., 877 A.2d 504, 517 (Pa. Cmwlth. 2005).

25. A judge who relies upon counsel who have prejudged a legal issue pending before the judge may similarly be tainted by that prejudgment.

26. According to its organizational chart, the Law Bureau employs twenty-three attorneys, including six in the gas/electric unit who have never previously filed any documents in the instant dispute. “PUC Organizational Charts 1/5/16,” PDF page 23, retrieved at http://www.puc.pa.gov/general/pdf/PUC_Org_Chart.pdf on January 9, 2016.

27. The Public Utility Code does not mandate consultation with the same Law Bureau attorneys who have prejudged an issue between the same parties prior to the filing of a P.U.C. complaint by one of those parties. 66 Pa. C.S. § 308(b).

28. To avoid any possible prejudice, to the extent that the Administrative Law Judge seeks to consult the Law Bureau on any issue arising in the instant matter, the four aforesaid Law Bureau attorneys should be disqualified, and the consultation should be routed to Law Bureau attorneys who have had no prior involvement with the instant matter.

29. To the extent that the Administrative Law Judge seeks to consult the Law Bureau on any issue arising in the instant matter, the assigned attorneys should have had no involvement

in the matter of Alderwoods (Pennsylvania), Inc. v. Duquesne Light Company, pending before the Court of Common Pleas and the Superior and Supreme Courts in 2009 – 2015.

30. Furthermore, to the extent that the Administrative Law Judge seeks to consult the Law Bureau on any issue arising in the instant matter, an ethical wall should be imposed within the Law Bureau, so that a) the newly assigned attorneys, who have had no prior involvement in the instant matter, are barred from access to any records, documents, materials, communications or work product within the Law Bureau related to the matter of Alderwoods (Pennsylvania), Inc. v. Duquesne Light Company, pending before the Court of Common Pleas and the Superior and Supreme Courts in 2009 to 2015, including the filing of the P.U.C.'s *amicus* brief in 2013; b) the attorneys who were involved with the matter of Alderwoods (Pennsylvania), Inc. v. Duquesne Light Company, pending before the Court of Common Pleas and the Superior and Supreme Courts in 2009 to 2015, including the filing of the P.U.C.'s *amicus* brief in 2013, are barred from access to any records, documents, materials, communications or work product of the attorneys advising the Administrative Law Judge in the instant proceeding; and c) no communications of any kind relative to the dispute between the parties may take place between the attorneys advising the Administrative Law Judge in the captioned matter and the attorneys who were involved with the matter of Alderwoods (Pennsylvania), Inc. v. Duquesne Light Company, pending before the Court of Common Pleas and the Superior and Supreme Courts in 2009 to 2015, including the filing of the P.U.C.'s *amicus* brief in 2013.

WHEREFORE, Complainant, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home, respectfully requests that the Administrative Law Judge issue an order disqualifying Law Bureau attorneys Kenneth R. Stark, Esq., Patricia T. Wiedt, Esq., Robert F. Young, Esq. and Bohdan R. Pankiw,

Esq. from participating in any involvement in the instant matter, and that the ethical wall described in the previous paragraph be established, in the event that the A.L.J. seeks to utilize Law Bureau services in the instant matter.

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 11, 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 Complainant's Motion to Disqualify Certain P.U.C. Law Bureau Attorneys and to Impose an Ethical Wall 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 11, 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,

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v.

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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 Motion to Disqualify Certain P.U.C. Law Bureau Attorneys and to Impose an Ethical Wall, and any response thereto, it is hereby ORDERED and DECREED that the Motion is GRANTED.

P.U.C. Law Bureau attorneys Kenneth R. Stark, Esq., Patricia T. Wiedt, Esq., Robert F. Young, Esq. and Bohdan R. Pankiw, Esq. are hereby barred from any involvement in the instant matter.

P.U.C. Law Bureau attorneys who consult with the undersigned or who are otherwise involved in the captioned matter should have had no involvement in the matter of Alderwoods (Pennsylvania), Inc. v. Duquesne Light Company, pending before the Court of Common Pleas and the Superior and Supreme Courts in 2009 to 2015.

The P.U.C. Law Bureau is hereby directed to impose an ethical wall so that a) the attorneys who consult with the undersigned or who are otherwise involved in the captioned

matter are barred from access to any records, documents, materials, communications or work product within the Law Bureau related to the matter of Alderwoods (Pennsylvania), Inc. v. Duquesne Light Company, pending before the Court of Common Pleas and the Superior and Supreme Courts in 2009 to 2015, including the filing of the P.U.C.'s *amicus* brief in 2013; b) the attorneys who were involved with the matter of Alderwoods (Pennsylvania), Inc. v. Duquesne Light Company, pending before the Court of Common Pleas and the Superior and Supreme Courts in 2009 to 2015, including the filing of the P.U.C.'s *amicus* brief in 2013, are barred from access to any records, documents, materials, communications or work product of the attorneys advising the Administrative Law Judge or who are otherwise involved in the captioned matter; and c) no communications of any kind relative to the dispute between Alderwoods (Pennsylvania), Inc. and Duquesne Light Company may take place between the Law Bureau attorneys advising the Administrative Law Judge or otherwise handling the captioned matter and the Law Bureau attorneys who were involved with the matter of Alderwoods (Pennsylvania), Inc. v. Duquesne Light Company, pending before the Court of Common Pleas and the Superior and Supreme Courts in 2009 to 2015, including the filing of the P.U.C.'s *amicus* brief in 2013.

**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).

Krycia M. Kubiak, Esquire
Assistant General Counsel
Duquesne Light Company
Legal Department
411 Seventh Avenue
Pittsburgh, PA 15219

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

Counsel for Respondent,
Duquesne Light Company,

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 eleventh 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

EXHIBIT “A”

IN THE SUPREME COURT OF PENNSYLVANIA

Alderwoods (Pennsylvania), Inc., :
Appellee :
v. : No. 12 WAP 2013
Duquesne Light Company, :
Appellant :

**BRIEF OF *AMICUS CURIAE* PENNSYLVANIA PUBLIC UTILITY
COMMISSION IN SUPPORT OF
APPELLANT DUQUESNE LIGHT COMPANY**

On Petition for Allowance of Appeal from the Order of the Superior Court of Pennsylvania dated July 27, 2012 at No. 1967 WDA 2010, Reversing the Order of the Court of Common Pleas of Allegheny County, Civil Division, at No. GD-09-14720, dated March 8, 2011.

Kenneth R. Stark
Assistant Counsel

Patricia T. Wiedt
Assistant Counsel

Robert F. Young
Deputy Chief Counsel

Bohdan R. Pankiw
Chief Counsel

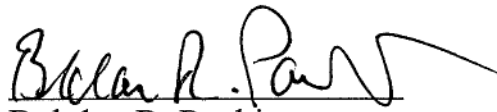
Counsel for Pennsylvania
Public Utility Commission

P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-5000
Dated: July 24, 2013

CONCLUSION

For the foregoing reasons, the Pennsylvania Public Utility Commission, acting as *Amicus Curiae*, respectfully request this Honorable Court to reverse the July 27, 2012 Order of the Superior Court.

Respectfully submitted,



Bohdan R. Pankiw
Chief Counsel
Attorney ID #24825

Robert F. Young
Deputy Chief Counsel

Kenneth R. Stark
Assistant Counsel

Patricia T. Wiedt
Assistant Counsel

Counsel for Pennsylvania Public
Utility Commission, *Amicus Curiae*

P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-5000

Date: July 24, 2013