

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

No: C-2016-2522634

Complainant,

vs.

DUQUESNE LIGHT COMPANY,

Respondent.

**RESPONDENT'S ANSWER IN
OPPOSITION TO COMPLAINANT'S
PRELIMINARY OBJECTIONS TO
JURISDICTION**

Filed on Behalf of the Respondent,
Duquesne Light Company

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Pursuant to 52 Pa Code § 5.101(f), Respondent Duquesne Light Company ("Duquesne Light" or the "Company") submits its Answer in Opposition to Complainant's Preliminary Objections to Jurisdiction:

OVERVIEW

Refusing to accept that the Allegheny County Court of Common Pleas ordered (twice) that this action be bifurcated and transferred to the Commission, Complainant makes a jurisdictional argument it has already lost time and again. Strangely, it does so by filing preliminary objections *to its own complaint*. Complainant's Preliminary Objections obscure the well-settled law and straightforward reasons rendering bifurcation and transfer to the Commission appropriate.

***The primary jurisdiction rule authorizes
bifurcation and transfer of this action to the Commission.***

Duquesne Light's request that this case be bifurcated and transferred to the PUC was based on the primary jurisdiction rule, which has been accepted law in the Commonwealth for more than three decades. Elkin v. Bell Tel. Co. of Pa., 420 A.2d 371 (Pa. 1980). Since most of the arguments in Complainant's Preliminary Objections ignore or misunderstand that rule, a brief overview of the doctrine and the purposes it serves is necessary.

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. 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 ("[T]he 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").

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 and, 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). The Supreme Court rejected the notion that a party could avoid PUC jurisdiction simply by seeking damages. Elkin, 420 A.2d at 375.

The PUC has jurisdiction to adjudicate the service-related issues involved in this action.

This case revolves around the responsibilities a utility company owes to its customer before restoring service after an outage. The thrust of Complainant's claim is that it was unsafe and unreasonable for Duquesne Light to restore service to the Funeral Home without first engaging in certain communications with its customer. Such service-related issues are within the exclusive jurisdiction of the PUC. The Pennsylvania Supreme Court has long recognized the PUC "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).

As the Commission is well aware, the Public Utility Code, 66 Pa.C.S.A. § 101 et seq., grants the PUC the authority to carry out the provisions of the Public Utility Code and address 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:

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).

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). Under this broad grant of authority, the actions at the heart of Complainant's case fall within the realm of "service."

To further illustrate that point, the Commission has already resolved cases involving two crucial subjects involved in this case -- power interruptions and restorations as well as the scope of a utility's responsibilities regarding issues with its customer's equipment. 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); Maluchnik v. Penna. Elec. Co., No. C-2011-2245451, 2013 WL 1180372 (Pa. P.U.C. March 14, 2013) ("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."); Hineline v. Metro. Edison Co. and Penna. Power & Light Co., No. C-902777, 1990 WL 10714871 (Pa. P.U.C. Oct. 4, 1990) (noting that "the ownership and maintenance responsibility of an electric utility ends at the point of delivery to the customer" and that imposing duties beyond that line of demarcation would increase costs for the utility and the ratepayers); Craft v. Penna. Elec. Co., 50 Pa. P.U.C. 1, 7 (Pa. P.U.C. 1976) ("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"). The fact that Complainant seeks monetary damages does not diminish the Commission's authority to resolve the service-related issues involved in this litigation. See, e.g., Lolly v. Duquesne Light Co., Docket No.C-2010-2167824, 2011 WL 2113407 (Pa. P.U.C. May 9, 2011) ("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").

***The PUC extensively regulates
the safety and reliability of electric service.***

Further evidence of the PUC's jurisdiction over this matter lies in the extensive regulations the Commission enforces regarding the restoration of service to customers as part of its efforts to ensure safe and reliable service. For example:

§ 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).

The PUC is empowered to take, and has taken, extensive steps to regulate electric safety. See 52 Pa. Code § 57.191. To that end, the PUC regulations require that Duquesne Light install, maintain, and operate its distribution system 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 within 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.

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. 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. Conti Affidavit, ¶¶ 11, 29, attached as Exhibit D to Duquesne Light's Answer to Preliminary Objections.

The PUC has regulatory authority to demand that electric distribution companies like Duquesne Light meet reliability performance benchmarks and minimum performance standards. The PUC may take enforcement action if its reliability standards are not met. 52 Pa. Code § 57.194 (h). Failure to meet the PUC's benchmarks carries adverse consequences for Duquesne Light: it can result in additional monitoring by the Commission as well as the imposition of fines and penalties. 52 Pa. Code § 57.194 (h)(1). 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. See 52 Pa. Code § 57.197.

Additionally, 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, for example, 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. The scope of the duty to advise customers prior to restoring service is within the exclusive jurisdiction of the PUC.

In short, Complainant's theory of liability hinges on matters within the Commission's jurisdiction, namely, restoration of electrical service and communications the Company should have with customers about the customers' electrical equipment before restoring service. Complainant's duty to warn claim cannot be adjudicated in a vacuum. The overarching and fatal flaw in the Funeral Home's position is its refusal to recognize that its allegations depend on matters within the exclusive jurisdiction of the Commission. 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 has the special expertise necessary to make that determination in light of the practical implications of the duty sought to be imposed by Complainant.

ANSWER TO COMPLAINANT'S PRELIMINARY OBJECTIONS

I. STATEMENT OF THE CASE/PROCEDURAL HISTORY

1. Duquesne Light admits that, on January 9, 2009, an unidentified vehicle crashed into a utility pole on Forward Avenue in Pittsburgh. The pole carried Duquesne Light's lines. The crash broke the pole and caused several local buildings, including the Burton L. Hirsch Funeral Home ("Complainant" or the "Funeral Home"), to lose power. Soon after power was restored, a fire broke out in the Funeral Home. Duquesne Light denies that it was negligent and also denies that its actions caused the fire at the Funeral Home. Duquesne Light made all the proper connections (as conceded by Complainant) prior to restoring power. The fire started in Complainant's own panel box. Despite conducting thorough and lengthy discovery in the civil action, Complainant has been unable to adduce any facts demonstrating that Duquesne Light had foreknowledge of any problem in Complainant's panel box before it restored service.

2. Admitted.

3. The Funeral Home's original Complaint is a written document that speaks for itself and Complainant's representations regarding that document are denied.

4. The Funeral Home's Amended Complaint is a written document that speaks for itself and Complainant's representations regarding that document are denied.

5. Duquesne Light's Motion for Summary Judgment is a written document that speaks for itself and Complainant's representations regarding that document are denied. By way of further response, Duquesne Light moved for summary judgment because, under a century of Pennsylvania precedent, it had no legal duty to enter the locked Funeral Home in the middle of the night, go into the basement, and inspect the customer's electrical panel. Duquesne Light's Motion also argued that its duty to inspect pertained only to its own equipment and not to its customers'. A copy of Duquesne Light's Motion for Summary Judgment is attached as Exhibit A.

6. Judge Luty's December 13, 2010, Order is a written document that speaks for itself and Complainant's representations regarding that document are denied. By way of further response, Judge Luty granted Duquesne Light's Motion, ruling that Duquesne Light had no duty to inspect Complainant's equipment, and that the undisputed facts established that Duquesne Light used reasonable care in restoring power to the Funeral Home.

7-8. The Superior Court's opinion is a written document that speaks for itself and Complainant's representations regarding that document are denied.

9. Admitted.

10. Admitted.

11. Duquesne Light admits that it did not raise the issue of bifurcation and transfer to the PUC in briefing submitted to the Pennsylvania Supreme Court.

12. The Supreme Court's opinion is a written document that speaks for itself and Complainant's representations regarding that document are denied.

13. The Supreme Court's opinion is a written document that speaks for itself and Complainant's representations regarding that document are denied. By way of further response, Duquesne Light admits that the question of bifurcation and transfer to the PUC was not part of its appeal to the Supreme Court. The Supreme Court explicitly refused to address the issue, stating:

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.

Alderwoods, Inc. v. Duquesne Light Co., 106 A.3d 27, 38 n. 13 (Pa. 2014) (emphasis added).

14-16. The Supreme Court's opinion is a written document that speaks for itself and Complainant's representations regarding that document are denied. By way of further response, Duquesne Light reiterates that the question of bifurcation and transfer to the PUC was not part of its appeal to the Supreme Court. The Supreme Court did not address the issue, a fact conceded by Complainant. See Complainant's Preliminary Objections, ¶ 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.").

17. Complainant's Second Amended Complaint is a written document that speaks for itself and Complainant's representations regarding that document are denied. By way of further response, the Funeral Home's rationale for filing a Second Amended Complaint is enlightening and demonstrates why its current theory of liability¹ necessitates the Commission's involvement. In seeking leave to file the Second Amended Complaint, the Funeral Home represented as follows to the Court of Common Pleas:

¹ As Complainant acknowledges, the allegations in the Second Amended Complaint filed with the Court of Common Pleas are "substantially identical" to the allegations in the Complaint the Funeral Home filed with the Commission. Complainant's Preliminary Objections, ¶ 42.

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.**

Complainant's Motion for Leave to File Second Amended Complaint, ¶ 19 (emphasis added).

18. Duquesne Light admits that, in response to the allegations in Plaintiff's Second Amended Complaint, it moved to bifurcate the action and transfer the liability determination to the Commission because it has exclusive jurisdiction to define the scope of utility service and must balance the need to restore utility service with the need for safety in doing so. Duquesne Light sought only to transfer that portion of the case to the Commission *and not the damages phase*. The procedure requested by Duquesne Light and approved by the Court of Common Pleas contradicts a fundamental premise of Complainant's Preliminary Objections, that the Commission lacks jurisdiction over this matter because it cannot award monetary damages. See Complainant's Preliminary Objections, ¶¶ 52(a) and 89 as well as its Heading to Section II(A). Complainant's argument about damages is a red herring; the Commission will not be asked, and was not ordered, to award monetary damages.

The procedure employed in this case -- known as the primary jurisdiction rule -- was established by the Pennsylvania Supreme Court over 35 years ago in Elkin v. Bell Tel. Co. of Pa., 420 A.2d 371 (Pa. 1980). Under that procedure, the issue of liability is transferred to and decided by the PUC. If necessary, the matter returns to the Court of Common Pleas to determine 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.

19. Duquesne Light's Motion to Bifurcate and Transfer Action to the Pennsylvania Public Utility Commission ("Motion to Bifurcate and Transfer") is a written document that speaks

for itself and Complainant's representations regarding the document are denied. The Motion to Bifurcate and Transfer relied up on the well-settled doctrine of primary jurisdiction, which empowered the Court to bifurcate the action and transfer to the PUC those liability issues within its regulatory purview. A copy of Duquesne Light's Motion to Bifurcate and Transfer Action to the Pennsylvania Public Utility Commission is attached as Exhibit B.

20-21. Admitted. The Funeral Home's response to Duquesne Light's Motion to Bifurcate and Transfer is a written document that speaks for itself and Complainant's representations regarding the document are denied.

22. It is admitted that Duquesne Light did not file a reply brief to Plaintiff's response to Duquesne Light's Motion to Bifurcate, but, with the consent of the Court of Common Pleas, Duquesne Light did submit a Supplemental Brief in Support of its Motion to Bifurcate and Transfer.

23. Admitted.

24. Admitted.

25. Duquesne Light admits that Judge Luty agreed to accept supplemental briefing from both Parties given the complex issues involved.

26. Admitted.

27. Judge Luty's August 31, 2015, Order is a written document that speaks for itself and Complainant's representations regarding the document are denied. By way of further answer, the August 31 Order was issued in error.

28. Judge Luty's September 1, 2015, Order is a written document that speaks for itself and Complainant's representations regarding the document are denied. By way of further answer, the court issued the September 1 Order because the August 31 Order was issued in error.

29. Duquesne Light admits that it served and filed its Supplemental Brief on September 4, 2015. Duquesne Light's Supplemental Brief set forth pertinent parts of the

deposition testimony showing that Duquesne Light had no notice of or reason to suspect a defect in the Funeral Home's electrical equipment prior to restoring power. The Supplemental Brief pointed out, in response to Judge Luty's inquiry, that neither the decision of the Superior nor Supreme Court precluded the bifurcation of this action and transfer of the liability phase to the PUC. Duquesne Light explained that issues related to the scope of duty for providing safe and reasonable service are within the PUC's exclusive jurisdiction and also outlined the comprehensive regulatory regime relating to electrical outages and power restoration. A copy of Duquesne Light's Supplemental Brief in Support of its Motion to Bifurcate and Transfer Action to the Pennsylvania Public Utility Commission is attached as Exhibit C.

Supporting Duquesne Light's Supplemental Brief was the Affidavit of Patrick J. Conti, Director of Duquesne Light's Operations Center. The Conti Affidavit described the Commission's oversight of Duquesne Light's operations regarding service restoration as well as the steps that the Company takes to comply with the PUC's regulations. A copy of Mr. Conti's Affidavit is attached as Exhibit D. The Funeral Home has yet to respond to the merits of Mr. Conti's Affidavit.

30-31. Admitted. Complainant's Supplemental Memorandum is a written document that speaks for itself and Complainant's representations regarding the document are denied.

32. Admitted. By way of further response, Judge Luty had already vacated his August 31 Order the day after it was filed, as Complainant acknowledges in paragraph 28 of the Preliminary Objections.

33. Admitted.

34. Denied as stated. It is not correct to say that Judge Luty reversed his August 31 Order; the August 31 Order was issued by mistake. Judge Luty's September 14 Order was the first to address the merits of the Motion to Bifurcate and Transfer.

35. Denied. Any off-the-record statements by Judge Luty have no bearing on the question posed by Complainant's preliminary objections.

36. Admitted.

37. Denied. Judge Luty issued two Orders rejecting the same arguments now asserted by Complainant.

38-39. Admitted. Complainant's Petition for Review is a written document that speaks for itself and Complainant's representations regarding the document are denied. A copy of Duquesne Light's Answer in Opposition to Complainant's Petition for Review is attached as Exhibit E.

40. Admitted.

41. Admitted.

42-45. The Funeral Home's Complaint is a written document that speaks for itself and Complainant's representations regarding the document are denied.

46-48. The Funeral Home's complaint is a written document that speaks for itself and Complainant's representations regarding the document are denied. By way of further response, no witness testified to seeing anything before the fire suggesting any danger to the customer's equipment inside. The Funeral Home's frequent references to actual or constructive notice have no evidentiary foundation. The Funeral Home's case relies on after-the-fact theories about how the fire might have started, not on any evidence of Duquesne Light's foreknowledge of any danger. These theories amount to nothing more than surmise, speculation, and conjecture. Under the facts of record, Duquesne Light owed Plaintiff no duty to take the actions described in paragraphs 47 and 48 of the Preliminary Objections.

49-50. The Funeral Home's Complaint is a written document that speaks for itself and Complainant's representations regarding the document are denied. By way of further response, Duquesne Light admits that the fire started in the Funeral Home's own equipment. Additionally, no witness testified to seeing anything before the fire suggesting any danger to the customer's equipment inside. The Funeral Home's frequent references to actual or constructive notice have no evidentiary foundation. The Funeral Home's case relies on after-the-fact theories about

how the fire might have started, not on any evidence of Duquesne Light's foreknowledge of any danger. These theories amount to nothing more than surmise, speculation, and conjecture. Duquesne Light specifically denies that it was negligent and that its actions on January 9-10, 2009, were the proximate cause of the damage to the Funeral Home.

II. LEGAL GROUNDS OF COMPLAINANT'S PRELIMINARY OBJECTIONS

51. Duquesne Light denies that Complainant's Preliminary Objections to its own Complaint are proper. This is now the fourth time -- and the third tribunal to which -- Complainant has raised the arguments asserted in its Preliminary Objections. Complainant's position was twice rejected by the Allegheny County Court of Common Pleas and once by the Superior Court, which dismissed the Funeral Home's attempted interlocutory appeal of Court of Common Pleas' orders. Complainant's insistence on re-litigating legal questions that have already been resolved does not make its arguments any more valid. Duquesne Light incorporates the arguments asserted in its Motion to Strike Complainant's Preliminary Objections as if fully stated here.

52. Complainant's objections fail for the following reasons:

a. Complainant's argument about damages is a red herring. Duquesne Light acknowledges that the PUC cannot award damages. So did the Pennsylvania Supreme Court when it adopted the doctrine of primary jurisdiction. See Elkin, 420 A.2d at 375. If the Commission finds that Duquesne Light violated its duty to its customer, then the Court of Common Pleas will hear the Funeral Home's claim for damages. The Pennsylvania Supreme Court has summarily rejected the Funeral Home's argument that a party can avoid the PUC simply by seeking monetary damages. Id. In short, Duquesne Light did not ask, and the Court of Common Pleas did not order, the PUC to adjudicate a claim for damages. All that Duquesne Light requested, and all the Court ordered, as to allow the agency legislatively charged with

enforcing regulations governing restoration of electric service to determine the scope of and circumstances under which Duquesne Light's duty arises.²

b. Complainant's judicial estoppel argument is as far-fetched as it is legally erroneous. Judicial estoppel does not apply under the present facts. The case Complainant relies upon actually *confirms* that the Commission has the authority to resolve this dispute despite the fact that it lacks the power to award monetary damages. See Lolly v. Duquesne Light Co., No. C-2010-2167824, 2011 WL 2113407 (P.U.C. May 9, 2011) ("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 those service issues.")

c. Denied. To the contrary, the Pennsylvania Supreme Court actually stated that the question of bifurcation and transfer to the PUC was "entirely detached" from the narrow issues presented on appeal and, as a result, it "decline[d] to consider" whether bifurcation and transfer to the Commission was appropriate. Alderwoods, 106 A.3d at 38 n. 13.

d. Denied. 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. Complainant's theory of liability directly implicates that scheme.

e. This case does not involve allegations of negligence *per se*. Complainant's argument is irrelevant and does not deprive the Commission of jurisdiction.

² The Supreme Court of Pennsylvania 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). However, this decision did not define the scope of the duty, nor attempt to reconcile it with existing PUC regulations. The scope of the duty is a policy question that falls within the PUC's exclusive jurisdiction to regulate the safety and reliability of public utility service. The determination of the scope of this duty will affect every electric service provider in the Commonwealth and the integrity of the PUC's regulatory policy. Elkin, supra.

f. Not only are Complainant's arguments regarding constructive knowledge completely lacking in evidentiary support, Duquesne Light reiterates that the Pennsylvania Supreme Court stated that the question of transfer to the PUC was "entirely detached" from the narrow issues presented on appeal and, as a result, it "decline[d] to consider" whether bifurcation and transfer to the Commission was appropriate. Alderwoods, 106 A.3d at 38 n. 13. Complainant's argument is essentially that the doctrine of primary jurisdiction cannot apply in any case that involves an issue that has, in other cases, been considered a jury question. Complainant cites no authority for such a broad proposition. The argument, if accepted, would essentially render moot the doctrine of primary jurisdiction, which, per the directive of the Pennsylvania Supreme Court, has been well-settled law in this Commonwealth for more than three decades. Elkin, supra.

g. The Court of Common Pleas has twice rejected the exact relief now sought by Complainant. Complainant's disagreement with the Court's decision is insufficient to render the decision erroneous. In fact, the "plainly erroneous" standard Complainant attempts to establish is remarkably similar to the standard it failed to meet when presenting these exact same arguments to the Superior Court. Complainant's Petition for Review to the Superior Court sought the ultimate reversal of the Court of Common Pleas' decision to bifurcate and transfer this action to the PUC.³ Even a cursory review of Complainant's arguments in its Petition for Review reveal that they are substantially identical to those raised in Complainant's objections to its own Complaint. The Superior Court rejected Complainant's arguments. So too must the Commission.

A. The Commission is not adjudicating damages, so Complainant's argument is irrelevant and meritless.

³ The standard of review applicable to Complainant's Petition for Review is as follows: In order for Complainant's Petition for Review to be granted, the Court of Common Pleas' refusal to amend its Order to include the permissive appeal language set forth in 42 Pa. C.S. § 702(b) "must be so egregious as to justify prerogative appellate correction of the exercise of discretion by the lower tribunal." See Pa. R.A.P. 1311, note.

53. Denied. To the contrary, the cases cited by the Funeral Home actually support the Commission's authority to determine the scope of Duquesne Light's duty.

54 -57. 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 to the PUC issues regarding the scope of its duty. 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 never made in this case*. 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 the PUC has the authority to make a determination on an issue it comprehensively regulates.

The Funeral Home blindly seizes on Feingold's recognition of the fact that the PUC cannot award monetary damages -- a point that Duquesne Light has never disputed. 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 provided unreasonable service, then this action will be transferred back to the Court of Common Pleas for a determination of damages -- just as Complainant wishes. See Exhibit B, ¶ 11.

Furthermore, the policy rationale expressed in Feingold -- which is noticeably missing from the Preliminary Objections -- actually *supports* the temporary transfer this action to the PUC:

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.

58. Denied. To the contrary, the Pennsylvania Supreme Court has explained its decision in Feingold in language that summarily rejects the position advanced by Complainant.

59-65. Denied. To the contrary, the Pennsylvania Supreme Court rejected Complainant's interpretation of Feingold in Elkin v. Bell Telephone Co. of Pa. 420 A.2d 371 (Pa. 1980) -- another case relied upon by Complainant's Preliminary Objections -- and one which *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 added). Not only did the Court expressly reject the very argument advanced by the Funeral Home, it also approved of the decision initially to refer the case (which

also sought monetary damages) to the PUC, all the while touting the benefits of the procedure requested by Duquesne Light and ordered by the Court of Common Pleas.⁴

66-68. Denied. To the contrary, DeFrancesco v. Western Pa. Water Co., 453 A.2d 595 (Pa. 1982), does not support Complainant's position. 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. 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. That is not the case here. Similarly, as Complainant notes, DeFrancesco did not involve "the question of whether appellants were entitled to [service,]" but this action does. 453 A.2d at 597. Complainant's fundamental position is that Duquesne Light *cannot provide service to its customers* until certain communications and/or inspections take place. Complainant's allegations take dead aim at the circumstances under which its customers are entitled to service.

69-72. Denied. To the contrary, Schriner v. Pa. Power & Light Co., 501 A.2d 1128 (Pa. Super. 1985), does nothing to support Complainant's argument. 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. Complainant seemingly believes that

⁴ 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

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.⁵ The issue that warrants the PUC's attention in this case is not the overvoltage. It is Complainant'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.

73-85. Denied. To the contrary, Poorbaugh v. Pa. Public Utility Comm'n, 666 A.2d 744 (Pa. Cmwlth. 1995), neither justifies this Commission's reversal of the Court of Common Pleas' decision nor would compel the Commonwealth Court to reverse the Commission's ruling, as the Preliminary Objections suggest. While both cases involve a building damaged by fire, plaintiff's theory of liability in Poorbaugh was entirely different from those advanced by Complainant, which renders the attempted analogy completely 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 Complainant's allegations.

When Complainant's allegations *were* similar to those at issue in Poorbaugh -- *i.e.* that Duquesne Light physically misconnected its wires⁶ -- the Company did not seek bifurcation and transfer to the PUC. It was not until Complainant changed its theory to assert an alleged duty to warn that Duquesne Light sought to transfer to the PUC. This duty to warn, which by Complainant's own admission places Duquesne Light's "overall restoration of service" directly at issue, is what triggered the necessity of involving the Commission.

appropriate circumstances, the courts can have the benefit of the agency's views on issues within the agency's competence." Id. at 375.

⁵ 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.

⁶ The Funeral Home abandoned this theory when its own expert, Richard Wunderley, conceded that Duquesne Light made all proper connections.

The allegations that Complainant chose to prosecute, which Duquesne Light must defend and this Commission must adjudicate, render DiSanto v. Dauphin Consol. Water Supply Co., 436 A.2d 197 (Pa. Super. 1981), a far more apt analogy than Poorbaugh. There, 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 service*, the 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 the conditions under which an electrical service provider can restore service to its customer. 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").

86. Denied. To the contrary, Complainant incorrectly interprets the cases cited in its Preliminary Objections. Those cases are all distinguishable because they neither dealt with a

comprehensive regulatory scheme like the one involved in this litigation, nor the scope of duty to warn allegations such as those advanced by the Funeral Home. The distinctions are critical. Resolution of the Funeral Home's allegations that Duquesne Light ***should have denied service to its customer*** until certain communications had occurred 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.

87-89. Again, Duquesne Light acknowledges (and has never disputed) that the Commission has no authority to award monetary damages. Complainant's reliance on that undisputed principle, however, to argue that the Commission lacks jurisdiction to consider the scope of an electrical utility's duty in restoring service to its customers is an unwarranted inferential leap. The well-settled doctrine of primary jurisdiction, which has been approved by the Supreme Court of Pennsylvania for more than 35 years, contemplates the very scenario involved in this case. Under that doctrine, 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 determines damages. See Optimum Image, Inc. v. Phila. Elec. Co., 600 A.2d 553, 555 (Pa. Super. 1991).

90-95. Denied. To the contrary, despite the fact that it directly challenges Duquesne Light's procedures in restoring service to its customers and seeks to prevent Duquesne Light from providing service to its customers until certain communications take place, Complainant confusingly contends this action does not involve the "general reasonableness, adequacy or sufficiency of a public utility's service." Preliminary Objections, ¶ 92 (citing DeFrancesco, 453 A.2d at 596). Complainant ignores, however, that 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). 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 duty to provide some sort of warning, under certain circumstances, before resuming service. See 66 Pa.C.S.A. §§ 102, 1501. The duty to warn 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 utility takes to restore residential service 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. Given the broad applicability of the Supreme Court's ruling in Elkin, 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).

96. Denied. To the contrary, this case does not involve an implied request for reimbursement for property damages. It involves an overt one that will be resolved by the Court of Common Pleas (just as Complainant wishes) if Complainant can establish that Duquesne Light violated its duty. If Complainant’s argument that determining liability constitutes an implied determination of damages were followed, then the entire doctrine of primary jurisdiction would be rendered moot. Determining liability and damages are distinct considerations.

97. Denied. To the contrary, this action was properly transferred to the Commission pursuant to the well-established doctrine of primary jurisdiction. See Elkin, supra.

B. The judicial estoppel doctrine does not apply.

98-109. Complainant confuses the Commission’s inability to award monetary damages with its ability to consider disputes relating to the service that Duquesne Light provides to its customers. Far from constituting grounds for the assertion of judicial estoppel, Lolly v. Duquesne Light Co., No. C-2010-2167824, 2011 WL 2113407 (P.U.C. May 9, 2011), actually *confirms* that the Commission has the power to adjudicate the issues transferred to it by the Court of Common Pleas.

Because Complainant seizes on the Commission’s inability to award monetary damages as the focal point of its argument, Duquesne Light must again reiterate that it has never argued that the Commission has the power to award monetary damages. Duquesne Light did not ask, and the Court of Common Pleas did not order, the Commission to resolve Complainant’s request for damages. Nor did Duquesne Light argue that Complainant should be altogether prevented from seeking damages simply because Complainant’s allegations fall within the ambit of service-related issues in the Commission’s jurisdiction.

Duquesne Light's Exceptions in Lolly are not inconsistent with the Company's position in the instant matter. In Lolly, the complainant alleged that she had to replace some household appliances due to a power surge caused by Duquesne Light's equipment; she also alleged that Duquesne Light denied her claim for reimbursement without considering the information she provided in support of her claim. 2011 WL 2113407 at *1. After the ALJ's Initial Decision came down partly in complainant's favor, Duquesne Light filed Exceptions which argued, in part, that because the "Commission lacks jurisdiction to decide the issue of whether Complainant is owed damages, the Commission also lacks jurisdiction over Respondent's claims process." See Duquesne Light's Exceptions attached as Exhibit F. The Commission agreed with the well-settled and undisputed principle that it cannot award monetary damages, but disagreed that it did not have jurisdiction to resolve questions relating to Duquesne Light's claims process. Importantly for this action, the Commission stated: "[W]e 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 those service issues.**" Id. at *3 (emphasis added). Lolly thus confirms that, even where a complainant like the Funeral Home seeks monetary damages, the Commission still has jurisdiction to consider issues relating to the safety, adequacy, reasonableness, and efficiency of service. That is precisely what is at issue in this action.

The doctrine of judicial estoppel prevents a party from assuming a position that is inconsistent with its assertion in a previous action if that position was successfully maintained. Morris v. S. Coventry Twp. Bd. Of Supervisors, 898 A.2d 1213, 1218 (Pa. Cmwlth. 2006). Neither requirement is met here. Duquesne Light's position in this action is consistent with its position in Lolly because it has never contended that the Commission has the power to award monetary damages. Second, the Commission did not agree with Duquesne Light's position in

Lolly that it lacked jurisdiction to consider the Company's claims handling process. Simply put, the doctrine of judicial estoppel does not apply.

C. The Supreme Court's decision did not prevent bifurcation and transfer to the PUC, an issue the Supreme Court stated was "entirely detached" from the narrow ones it addressed.

110. Denied. The Commission routinely considers whether the "service" provided by a utility company such as Duquesne Light was reasonable under the circumstances. See, Lolly, supra.

111-114. Complainant's arguments regarding the Supreme Court's comment about the role of a jury are nothing more than misdirection. The Supreme Court explicitly stated that it was not resolving whether bifurcation and transfer to the PUC was appropriate:

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.

Alderwoods, Inc., 106 A.3d at 38 n. 13. If Complainant's argument were accepted, then the doctrine of primary jurisdiction could not apply in any case that involves an issue that other courts in other cases have ruled to be a jury question, which is essentially every tort case. Complainant cites no legal authority for such a broad proposition.

115. Complainant contends that the following statement in the Supreme Court opinion, made in response to a series of questions raised in Justice 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, Inc., 106 A.3d at 42. Complainant ignores, however, that the law of the case doctrine applies only to those issues actually decided by the appellate court. 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 expressly stated that it was *not* deciding whether transfer to the PUC was appropriate or not, so the law of the case doctrine does not apply. Complainant concedes as much in its Preliminary Objections. Complainant’s Preliminary Objections, ¶ 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”).

116-119. Complainant’s remarks regarding the role of the role of the jury cast a blind eye to the doctrine of primary jurisdiction. 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 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.⁷ The Commission’s adjudication would not usurp the jury’s role, as Complainant argues; it would merely constitute adherence to the doctrine of primary jurisdiction which has been well-settled law in this Commonwealth for more than three decades.

⁷ 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).

D. Issues related to the scope of duty for providing safe and reasonable electric service are within the PUC's exclusive jurisdiction.

119. This action has to do with the circumstances giving rise to and scope of the duty that an electrical utility company owes to its customers before restoring service after a power outage, a subject that is regulated by the PUC. The Funeral Home's characterization of this case as a single overvoltage incident affecting a single customer is a gross oversimplification of the ramifications of its allegations. While the Funeral Home would like the Commission to believe that restoration of electric service takes place in a vacuum, the proper resolution of the Funeral Home's allegations demands an understanding of the regulatory atmosphere in which electric service is restored.

120. Complainant's argument that this case has nothing to do with the safety or reliability of electric service is disingenuous given Complainant's assertion that it was Duquesne Light's decision to restore service that caused the fire that burned down its building. The thrust of Complainant's entire case is that it was unsafe for Duquesne Light to provide service to its customer and that Duquesne Light restoration of service to the Funeral Home was unreasonable.

121. Again, Complainant's myopic view of the impact of its allegations on the operations of Duquesne Light is startling. This incident, and this litigation, does not take place in a vacuum, but in the context of a comprehensive regulatory regimen governing the restoration of service. Complainant's position that delay is irrelevant to this case ignores, for example, that Duquesne Light has a statutory obligation to provide service that is "reasonably continuous and without unreasonable interruptions or delay." 66 Pa. C.S. § 1501 (emphasis added).

122-127. Complainant misses the forest for the trees by arguing that the PUC's regulations that relate to the very issue Complainant has placed at issue in this dispute --

restoration of electric service -- are irrelevant. 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 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 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.

128-131. Duquesne Light has never asserted that regulation and actions for damages are mutually exclusive. Complainant either ignores or fails to understand that bifurcation and transfer to this Commission does not deprive Complainant of an action for damages. If Complainant can establish before the PUC that Duquesne Light violated its duty (as it would have been required to do in the Court of Common Pleas anyway), then Complainant will have the opportunity to present the Court of Common Pleas with evidence of causation and damages. Complainant's attempted analogy about the liquor control board is irrelevant and does not merit a response.

132-136. Duquesne Light incorporates its response to paragraphs 122 – 127 as if fully restated and reiterates that it did not hastily seek transfer to the Commission the instant that this case was filed. It was not until Complainant's theory of liability changed to a duty to warn that Duquesne Light sought bifurcation and transfer to the PUC. The duty to warn that Complainant seeks to impute to Duquesne Light – by Complainant's own admission – places Duquesne Light's "overall restoration of service" directly at issue. That alleged duty to warn would prevent Duquesne Light from providing service to its customers until certain undefined communications take place and runs counter to Duquesne Light's statutory and regulatory obligations under the Public Utility Code. See, e.g., 66 Pa. C.S. § 1501. The Commission has the exclusive jurisdiction to regulate such issues.

137. Complainant's analogy again misses the mark. Duquesne Light has never taken the position that every case alleging negligence against a utility company should be referred to the Commission, as plainly evidenced by the fact that Duquesne Light did not seek to transfer this case until Complainant modified its theory of liability.

138-144. Complainant's arguments about what it believes Duquesne Light seeks are nothing more than speculation. All that Duquesne Light sought was the initial transfer of this action to the administrative agency that regulates the exact issue involved in this litigation – restoration of electrical service.

E. This action does not involve a claim of negligence *per se*.

145-149. Duquesne Light has never contended – explicitly or implicitly – that Complainant’s allegations assert a claim of negligence *per se*. Complainant’s preliminary objection revolving around a claim it never asserted is as confused as it is irrelevant. It merits no other response.

F. Complainant’s contention that the Commission lacks jurisdiction because juries typically resolve questions of constructive notice ignores the doctrine of primary jurisdiction.

150-154. Complainant’s argument that this Commission lacks jurisdiction over matters within its legislative mandate because juries have resolved questions of constructive notice in the past ignores the doctrine of primary jurisdiction. 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). 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).

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). If Complainant’s argument were accepted, then

primary jurisdiction would be thwarted in every case involving issues that have been considered by juries in other cases. The primary jurisdiction rule contains no such limitation. The fact that the doctrine permits transfer from a court to an administrative tribunal (which never utilize juries) is itself an implicit rejection of Complainant's argument.

This action involves complex and technical questions as to what circumstances are sufficient to put an electric utility on notice of a dangerous condition in customer equipment triggering a duty to warn 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 duty to warn, the need for the PUC's expertise is manifest. 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.

G. The relief sought in Complainant's Preliminary Objections to its own Complaint has already been denied by the Allegheny County Court of Common Pleas.

155. This is now the fourth time Complainant has raised the same arguments asserted in its Preliminary Objections – twice before the Court of Common Pleas and once in the Superior Court. Complainant's position has been rejected on each occasion. Complainant's continual reassertion of previously rejected arguments now borders on abuse of process.

Despite Complainant's conclusory allegations to the contrary,, the doctrine of coordinate jurisdiction does apply to this case. That doctrine is a well-recognized principle of jurisprudence and provides that, upon transfer between judges of coordinate jurisdiction, the transferee

tribunal may not alter the resolution of a legal question previously decided by the transferor court. Commonwealth v. Starr, 664 A.2d 1326, 1331 (Pa. 1995) (noting that “judges of coordinate jurisdiction sitting in the same case should not overrule each others’ decisions.”).⁸ The rule is designed to prevent Complainant from incessantly re-litigating the same legal questions that have already been resolved against Complainant. Id. (noting that the coordinate jurisdiction rule “is a rule of sound jurisprudence based on a policy of fostering the finality of pre-trial applications in an effort to maintain judicial economy and efficiency”). The Court of Common Pleas ruled on two separate occasions that this action should be bifurcated and transferred to the PUC. Copies of the Court of Common Pleas’ Orders are attached as Exhibits G and H. The Superior Court refused to consider Complainant’s interlocutory appeal, so the Court of Common Pleas’ decision is final. A copy of the Superior Court’s Order is attached as Exhibit I. The coordinate jurisdiction and law of the case doctrines prevent Complainant from re-litigating that legal question any further. Id.; Tyro Industries, Inc., 614 A.2d at 284 (“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).

156-157. This action does not present the sort of “exceptional” circumstances that allow a party to avoid the coordinate jurisdiction rule. Cossell v. Cornish, 797 A.2d 981, 983 (Pa. Super. 2002) (“Only in exceptional circumstances can [the coordinate jurisdiction] rule be disregarded”). The two “exceptional circumstances” that can justify departure from the rule -- a substantial change in the facts or evidence giving rise to the dispute or where the prior holding was “clearly erroneous and would create a manifest injustice” -- do not apply to the instant case. Id. The operative facts have not changed since the Court of Common Pleas’ rulings and the foregoing paragraphs show that the decisions were correct and do not meet the clearly

⁸ The Court of Common Pleas and the Commission are certainly coordinate tribunals; otherwise, the primary jurisdiction doctrine would make little sense.

erroneous standard Complainant is required to meet. In fact, Complainant was subjected to a nearly identical standard when making the very same arguments to the Superior Court. Not surprisingly, the Superior Court rejected Complainant's position.

158. Apparently seeking to obfuscate that it has now made the arguments asserted in its Preliminary Objections for the fourth time, Complainant next asserts that its position should be reconsidered because the case is at a new procedural posture than it was at the time of the Court of Common Pleas' rulings. Complainant's argument is patently flawed. While an exception to the coordinate jurisdiction exists when a case reaches a distinctly different procedural posture, that exception is confined to the obvious procedural shifts in civil litigation; in other words, the coordinate jurisdiction doctrine would not prevent a party from raising arguments in a motion for summary judgment that were overruled on preliminary objections, nor would it preclude a party from making arguments at trial that were denied at the summary judgment stage. See Nat'l R.R. Passenger Corp. v. Fowler, 788 A.2d 1053, 1060 (Pa. Cmwlth. Ct. 2001).⁹ No such procedural distinction exists here. Despite the recent change in venue, this case is in exactly the same procedural posture as it was when Duquesne Light filed its Motion to Bifurcate and Transfer.

159-164. The coordinate jurisdiction and law of the case doctrines are designed to promote judicial efficiency and to prevent Complainant from continually raising the same legal arguments that have already been rejected. Cossell, 797 A.2d at 983. The Court of Common Pleas has twice resolved the exact question presented in Complainant's preliminary objections. Exhibits H and I. That decision is the law of the case and must be affirmed. See 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*

⁹ "Where the motions differ in kind, as preliminary objections differ from motions for judgment on the pleadings, which differ from motions for summary judgment, a judge ruling on a later motion is not precluded from granting relief although another judge has denied an earlier motion. However, a later

between the same parties in the same case continues to be the law of the case”) (emphasis in original).

III. CONCLUSION

165-169. The fundamental flaw in Complainant’s Preliminary Objections is a misunderstanding of the primary jurisdiction doctrine. Duquesne Light not ask, and the Court of Common Pleas did not order, the Commission to resolve a claim for property damage. All that was ordered was that the Commission – the agency that administers the Commonwealth’s regulations governing restoration of service and that has the expertise necessary to make that determination in light of the practical, real-world implications of the duty sought to be imposed by Complainant – make the initial determination regarding the scope of Duquesne Light’s duty in this case. Such a procedure neither strips Complainant of its claim for monetary damages nor usurps the role of the jury.

Finally, the closing paragraph of Complainant’s Preliminary Objections (to its own Complaint) reveals the true oddity of its pleading. If the Commission were to grant the Complainant’s Objections, then Complainant would ask the Court of Common Pleas to reinstate the matter, *which has already refused (twice) to do what Complainant seeks*. The Court of Common Pleas’ rulings are the law of the case and cannot be overturned by the Commission.

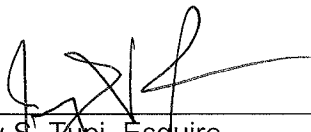
WHEREFORE, Respondent Duquesne Light Company respectfully requests that the Commission deny Complainant’s Preliminary Objections.

motion should not be entertained or granted when a motion of the same kind has previously been denied, unless intervening changes in the facts or the law clearly warrant a new look at the question.” *Id.*

Respectfully submitted,

TUCKER ARENSBERG, P.C.

By: _____


Bradley S. Tupi, Esquire

Pa. Id. No. 28682

Erin Beckner Conlin, Esquire

Pa. Id. No. 94086

Jeremy V. Farrell, Esquire

Pa. Id. No. 316258

Counsel for Respondent,

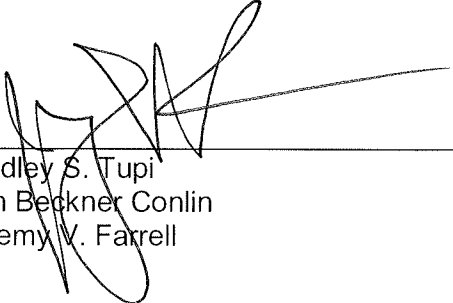
DUQUESNE LIGHT COMPANY

CERTIFICATE OF SERVICE

I certify that on this 18th day of January , 2016, I served a true and correct copy of Respondent's Answer to Complainant's Preliminary Objections Based on Lack of Jurisdiction upon the counsel listed below, in accordance with the requirements of §1.54 (relating to service by a party) by email and first class, U.S. mail, postage prepaid, as follows:

Peter T. Parashes, Esquire
Parashesp@whiteandwilliams.com
Alan J. Charkey, Esquire
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The document was filed electronically on the Commission's electronic filing system.



Bradley S. Tupi
Erin Beckner Conlin
Jeremy V. Farrell

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

**MOTION FOR SUMMARY JUDGMENT
AND BRIEF IN SUPPORT**

Filed on Behalf of the Defendant:
Duquesne Light Company

Counsel of Record for This Party:

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FILED

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DEPT OF COURT RECORDS
CIVIL/FAMILY DIVISION
ALLEGHENY COUNTY PA

2010 NOV -1 AM 11:29
COURT OF COMMON PLEAS

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,

CIVIL DIVISION

No. GD 09-14720

Plaintiff,

v.

DUQUESNE LIGHT COMPANY,

Defendant.

NOTICE OF PRESENTATION

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

TAKE NOTICE that the undersigned will, on December 13, 2010, at _____
____.m., or as soon thereafter as suits the convenience of the Court, present the following
Motion to Judge _____ in the Court of Common Pleas of
Allegheny County, Pennsylvania.

TUCKER ARENSBERG, P.C.

By: 

Bradley S. Tupi, Esquire
Pa. ID No. 28682
Erin M. Beckner, Esquire
Pa. ID No. 94086
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Pa. ID No. 207078
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.

MOTION FOR SUMMARY JUDGMENT

Defendant Duquesne Light Company files the following Motion for Summary Judgment.

1. A motor vehicle crashed into a Duquesne Light utility pole on Forward Avenue in Squirrel Hill on January 9, 2009. Deposition of Brian Novak ("Novak Depo."), Exhibit A, 26:14-25. Neither the vehicle nor its driver were identified.

2. The crash broke the pole. Novak Depo., 29:13-17; 32:12-16.

3. The vehicle's crash into the pole interrupted electrical service to many customers near the intersection of Forward and Murray Avenues, including the Burton L. Hirsch Funeral Home ("Funeral Home"). Deposition of Robert Pierce ("Pierce Depo."), Exhibit B, 24:4-6; Novak Depo., 33:25; 34:10; Deposition of Don Lewis ("Lewis Depo."), Exhibit C, 19:20-25; 20:2-4.

4. In addition to the Funeral Home, neighboring customers were out of power. Novak Depo., 33:25; 34:1-10; Lewis Depo., 19:20-25; 20:2-4.

5. Sometime before 8:30 p.m., Duquesne Light received a call that power was out. A Duquesne Light line crew went out to assess the situation and make the repairs necessary to restore service. Novak Depo., 29:3-7; Lewis Depo., 36:16-25; 37:1-2.

6. Duquesne Light successfully restored power to the neighborhood. Novak Depo., 89:9-15.

7. By the time it was light outside, the Funeral Home was the last building left without power. Novak Depo., 89:16-18; Pierce Depo., 24:4-6.

8. Duquesne Light dismantled the old, broken pole and installed a new one. Novak Depo., 47:19-24; 50:7-9; Deposition of Tim Shields ("Shields Depo."), Exhibit D; 27:5-15.

9. Duquesne Light line workers installed replacement equipment on the pole, including a three-phase transformer. Novak Depo., 41:1-6.

10. As part of this process, Duquesne Light workers connected the triplex, which consists of two energized ("hot") wires and a neutral wire. The crew correctly connected the neutral conductor first, then the hot conductors. Novak Depo., 66:2-25; 67:1-13.

11. This procedure went smoothly; there was no cause for concern. Novak Depo., 66:2-25; 67:2-7.

12. Restoring power at a pole is an unremarkable event for Duquesne Light line crews. This particular job was a typical one for Mr. Novak and his crew. Novak Depo., 82:15-17.

13. After making the connections at the pole, the Duquesne Light line workers made the connections at the Funeral Home building. They connected the neutral and then the energized conductors. Pierce Depo., 42:5-25; 43:1-7.

14. The workers had no problems making these connections on the roof of the Funeral Home. Pierce Depo., 42:18-25; 43:1-10.

15. Plaintiff initiated this action based on the hypothesis that Duquesne Light employees must have made an improper connection. Plaintiff's Amended Complaint, ¶¶ 11, 12, Exhibit E.

16. In fact, Plaintiff now concedes that Duquesne Light workers made all the proper connections in the proper sequence. Engineer's Report of Richard W. Wunderley, P.E. ("Wunderley Report"), Exhibit F, pg. 6.

17. Plaintiff has no evidence to suggest Duquesne Light made any erroneous connections. Wunderley Report, pg. 6.

18. After making the connections on the Funeral Home roof, Duquesne Light crew member Bob Pierce shouted to another crew member, Brian Novak, to turn on the power to the Funeral Home. Pierce Depo., 44:14-18.

19. After connecting the conductors at the Funeral Home, the Duquesne Light crew came down from the roof of the building. Pierce Depo., 44:23-25; 45:1-8.

20. Shortly after the power was turned on, a fire began inside the Funeral Home. It originated in the basement in electrical panel number 1. Fire Investigation Report of Brian L. Gray ("Gray Report"), Exhibit G, p. 9; Plaintiff's Response to Duquesne Light Company's Third Set of Interrogatories and Requests for Production and Second Set of Requests for Admissions ("Supplemental Discovery Responses"), Exhibit H, Request 1.

21. Plaintiff admits that the fire originated in Plaintiff's own electrical equipment. Electrical panel 1 was owned by Plaintiff at the time of the fire. Supplemental Discovery Responses, Request 1.

22. The fire began at approximately 7:11 a.m. Deposition of Detective John Gilkey ("Gilkey Depo."), Exhibit I, 88:14-17.

23. The Funeral Home was locked at the time of the fire. Supplemental Discovery Responses, Request 3.

24. It is not Duquesne Light's practice to go into a customer's property and inspect the premises and its electrical equipment prior to reinstating power. This is only done rarely, upon customer request, and as a courtesy. Lewis Depo., 73:8-22.

25. Duquesne Light's Service Installation Rules permit, but do not require, Duquesne Light to enter a customer's property to inspect Duquesne Light equipment, such as a meter. These rules do not authorize the Company to inspect customer-owned equipment, such as

electrical panel number 1, the source of the fire in this case. Wunderley Report, pg. 5 (*quoting* Duquesne Light Service Installation Rules).

26. Based upon the undisputed facts, Duquesne Light owed Plaintiff no duty to enter and inspect Plaintiff's locked, unoccupied building in the middle of the night before restoring electrical service. Plaintiff cannot establish a negligence cause of action against Duquesne Light. Duquesne Light is entitled to judgment as a matter of law.

WHEREFORE, Defendant, Duquesne Light Company, respectfully requests this Honorable Court enter an Order granting summary judgment in favor of the Defendant, Duquesne Light Company, and against Plaintiff, Alderwoods (Pennsylvania), Inc. a wholly-owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home, with prejudice.

Respectfully submitted,

TUCKER ARENSBERG, P.C.

By: 

Bradley S. Tupi, Esquire
Pa. ID No. 28682
Erin M. Beckner, Esquire
Pa. ID No. 94086
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.

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant Duquesne Light Company files the following Brief in Support of its Motion for Summary Judgment.

I. FACTS

An unidentified motor vehicle crashed into a Duquesne Light utility pole on Forward Avenue in Squirrel Hill on January 9, 2009. Novak Depo., 26:14-25. The crash broke the pole. *Id.* 29:13-17; 32:12-16. The accident disrupted electrical service to many customers at the intersection of Forward and Murray Avenues. Pierce Depo., 24:4-6; Novak Depo., 33:25; 34:1-10; Lewis Depo., 19:20-25; 20:2-4. The Funeral Home and neighboring customers in Squirrel Hill were out of power. *Id.*

Duquesne Light received a call that power was out. A Duquesne Light line crew went out to assess the situation and make the repairs necessary to restore service. Novak Depo., 29:3-7. Duquesne Light successfully restored power to the neighborhood. Novak Depo., 89:9-15. The Funeral Home was the last building left without power. Novak Depo., 89:16-18; Pierce Depo., 24:4-6.

The Duquesne Light workers dismantled the old, broken pole and installed a new one. Novak Depo., 47:19-24; 50:7-9; Shields Depo., 27:5-15. The crew installed replacement

equipment on the new pole, including a three-phase transformer. Novak Depo., 41:1-6. As part of this process, Duquesne Light workers connected the triplex, which consists of two energized ("hot") wires and a neutral wire, at the pole. The triplex carries electrical power from the pole to the customer's building. The crew correctly connected the neutral conductor first, then the hot conductor. Novak Depo., 66: 2-25; 67:2-13. This procedure went smoothly; there was no cause for concern. Novak Depo., 66:2-25; 67:2-7.

Restoring power at a pole is an unremarkable event for a Duquesne Light crew. This particular job was typical for Mr. Novak and the rest of the crew. Novak Depo., 82:15-17. After making the connections at the pole, the crew made the connections at the Funeral Home building. They connected all three conductors. Pierce Depo., 42:5-25; 43:1-7. The workers had no problems making these connections on the roof of the Funeral Home. Pierce Depo., 42:18-25; 43:1-10.

Plaintiff initiated this action based on the hypothesis that Duquesne Light employees must have made an improper connection while restoring power. Plaintiff now concedes that Duquesne Light workers made all the proper connections in the proper sequence. Wunderley Report, pg. 6. Plaintiff has no evidence to suggest Duquesne Light made any erroneous connections.

After the connections were made on the roof, Duquesne Light crew member Bob Pierce shouted to another crew member, Brian Novak, to turn on the power to the Funeral Home. Pierce Depo., 44:14-18. After connecting the conductors at the Funeral Home, the Duquesne Light crew came down from the roof of the building. Pierce Depo., 44:23-25; 45:1-8.

Shortly after the power was turned on, a fire began inside the locked, unoccupied Funeral Home. It originated in the basement in electrical panel number 1. Gray Report, pg. 9; Supplemental Discovery Responses, Request 1. Plaintiff admits that the fire originated in Plaintiff's own electrical equipment. The panel where the fire started was owned by Plaintiff at the time of the fire. *Id.* The fire began at approximately 7:11 a.m. Gilkey Depo., 88:14-17. The

Funeral Home was locked at the time the fire began. Supplemental Discovery Responses, Request 3.

It is not Duquesne Light's practice to go into a customer's property and inspect the premises and its electrical equipment before restoring power. This would only be done rarely, upon customer request, and as a courtesy. Lewis Depo., 73:8-22. Duquesne Light's Service Installation Rules permit, but do not require, Duquesne Light to enter a customer's property to inspect Duquesne Light's own equipment, such as an electric meter. These rules do not authorize the Company to inspect customer-owned equipment, such as electrical panel number 1, the source of the fire in this case. Wunderley Report at pg. 5 (*quoting* Duquesne Light Service Installation Rules).

II. ISSUE PRESENTED

Where electrical power is interrupted by a vehicle crashing into a utility pole, and where the utility company makes all the correct connections to restore power, does the utility company have a duty to enter a customer's locked, unoccupied premises and inspect the customer's electrical panel box before turning power back on?

Suggested Answer: No.

III. SUMMARY JUDGMENT STANDARD

Summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Swords v. Harleysville Ins. Co.*, 883 A.2d 562, 566 (Pa. 2005); *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 468 (Pa. 1979); *see also* Pa.R.Civ.P. 1035.2. The Court must view the record in a light most favorable to the non-moving party, but when the facts are so clear that reasonable minds cannot differ, an entry of summary judgment is proper. *Kvaerner Metals Div. of Kvaerner United States, Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888, 895-96 (Pa. 2006).

Based upon the undisputed facts outlined above, Duquesne Light is entitled to summary judgment as a matter of law. Plaintiff is unable to establish a cause of action for negligence against Duquesne Light. To establish a cause of action for negligence, a plaintiff must plead and prove the existence of a legal duty and a breach of that duty being the proximate cause of the harm alleged. *R.W. v. Manzek*, 888 A.2d 740, 746 (Pa. 2005). Following Plaintiff's own concession that Duquesne Light properly made all connections, the Funeral Home cannot establish that Duquesne Light owed a duty to Plaintiff to enter the locked Funeral Home in the middle of the night and inspect the customer's own electrical equipment prior to restoring power. There is no Pennsylvania precedent for imposing such a duty upon an electric utility. To do so would produce an absurd result.

IV. ARGUMENT

A. Duty Is a Necessary Element of Negligence.

Absent a breach of duty, a negligence claim cannot be sustained. *Morena v. South Hills Health System*, 462 A.2d 680 (Pa. 1983). The fire in the Funeral Home began at the customer's electrical panel box in the basement of the building. Gray Report, p. 9. It did not begin in any Duquesne Light equipment. It was not triggered by any improper connection by the Duquesne Light line crew. Wunderley Report, p. 6. The 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. Neither logic nor Pennsylvania law imposes any duty upon Duquesne Light to do this. Without establishing duty, Plaintiff cannot state a claim for negligence and Duquesne Light is entitled to summary judgment as a matter of law.

B. Duquesne Light's Duty to Inspect Only Pertains to Its Own Equipment.

Utility companies like Duquesne Light have a duty to install their facilities properly, but there is "no duty of continuing inspection upon the power company." *Reed v. Duquesne Light Co.*, 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." *Matlack v. Pennsylvania Power and Light Co.*, 167 A. 37, 38 (Pa. 1933). However, this duty applies to the company's own facilities. *Dunnaway v. Duquesne Light Co.*, 423 F.2d 66, 70 (3d Cir. 1970) (citing *Reed*, 47 A.2d at 139); *Luketich v. Duquesne Light Co.*, 132 A.2d 268, 270 (Pa. 1957). Under limited circumstances, a utility may have liability for failure to inspect its own equipment and discover defects of the sort that would be identified during regular maintenance inspections. *Lix v. Duquesne Light Co.*, 121 P.L.J. 221, 222 (C.P. Allegh. Co. 1973).

In *Adams v. United Light, Heat & Power Co.*, 69 Pa. Super. 478 (Pa. Super. 1918), the Superior Court held that the electric utility was not responsible for inspecting customer equipment. Plaintiff in that case argued a theory of excessive current akin to the "over current" hypothesis being proposed by Mr. Wunderley in this case. The Superior Court rejected the obligation to inspect and explained,

[w]hen 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.**

Id. 486 (emphasis supplied).

It makes perfect sense for tort law to impose a duty upon a utility company 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 upon an electrical utility. Plaintiff cannot establish that Duquesne Light was under a duty to inspect the Funeral Home's electrical equipment, so Duquesne Light is entitled to judgment as a matter of law.

C. Duquesne Light Only Has a Duty to Inspect Up to the Point of Demarcation.

There is no legal authority in the Commonwealth of Pennsylvania for the proposition that a utility company has a duty to inspect a customer's electrical facilities. The Pennsylvania Public Utility Commission ("PUC") explains:

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 Co. and Pennsylvania Power & Light Co., 1990 Pa. PUC LEXIS 156 (Pa. P.U.C. 1990) (citing *Craft v. Pennsylvania Electric Co.*, 50 Pa. P.U.C. 1 (Pa. P.U.C. 1976)). Utility companies have no obligation to inspect customer equipment because requiring these inspections would "result in increased costs to both the utility and the customers." *Id.* at *7-8.

The record is clear that the fire originated in electrical panel box 1. Gray Report at pg. 9; Wunderley Report at pg. 6. Plaintiff admits that the Funeral Home owned the panel. Supplemental Discovery Responses at Request 1. It is undisputed that the fire did not start in Duquesne Light equipment. Duquesne Light has no legal duty to enter a customer's locked property, nor does the Company have a legal duty to call a customer in the middle of the night

for permission to enter and inspect. Duquesne Light has no legal duty to inspect a customer's wiring, panel box, or other electrical equipment. *Hinline*, 1990 Pa. PUC LEXIS at *5.

In its Service Installation Rules, Duquesne Light reserved a *right*, not a *duty*, to enter customer property to examine Duquesne Light's own equipment. These rules provide:

Company representatives, who are properly identified, shall have the full and free access to the Customer's premises at all reasonable times for the purpose of reading meters, for inspection and repairs, for removal of company property, or for any other purpose incident to service. The Customer should immediately check with the Company if the credentials of Company representative are in question.

See Wunderley Report at pg. 5 (*quoting* Duquesne Light Service Installation Rules). These Rules permit, but do not require, Duquesne Light to enter a customer's property to inspect the utility's own equipment, such as a meter. They do not authorize the Company to inspect customer-owned equipment, such as the electrical panel number 1, the source of the fire in this case.

To require a utility company to perform this type of inspection produces an absurd result. It would be impractical to require Duquesne Light, or any other utility, to enter and inspect customer electrical equipment before restoring power. Such a requirement would complicate and delay power restoration after storms and other outages. A number of Squirrel Hill 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. Duquesne Light had no duty to inspect the Funeral Home's electrical panel 1.

Pennsylvania courts have held that electric utility companies are not required to inspect customer equipment. See, e.g., *Norris v. Philadelphia Electric Co.*, 5 A.2d 114 (Pa. 1939) (electric utility had no duty to inspect the lamp that caused fatal electric shock); *Adams v. United Light, Heat & Power Co.*, 69 Pa. Super. 478 (Pa. Super. 1918) (utility was not responsible for death due to defective extension cord).

In *Milton Weaving Co. v. Northumberland County Gas and Electric Co.*, 96 A.135 (Pa. 1915), Plaintiff alleged that a fire resulted from a short circuit in a defective wire. Plaintiff argued that "even if the wire were constructed by plaintiff's workmen, defendant still owed the duty of inspection because the defect, which lay between the outside service wire and the meter which was under the direct control of defendant, although inside plaintiff's building was readily discoverable by proper inspection." *Id.* at 136. In deciding that the utility had no obligation to inspect the customer's wire, the Supreme Court reasoned:

Although there is conflict of authority on the question of extent of duty to electric companies in regard to the safety of appliances owned and maintained by its customers, the weight of authority in other jurisdictions supports the view that the company is not bound to inspect such appliance and is not generally liable for injuries or damages caused by reason of defect therein.

Id. at 136 (emphasis supplied). The court went on to say, "[h]ere the question arises between the company and the consumer, the very person who erected, owned and controlled the defective wire, and towards whom no duty on the part of defendant has been shown to exist in so far as inspection of the consumer's appliances is concerned." *Id.* at 137. Likewise, the electrical panel where the Funeral Home fire started was owned and controlled by the customer. Duquesne Light was under no obligation to inspect the customer's electrical system prior to re-energizing power.

In *Adams*, the Superior Court applied analogous logic in rejecting the contention that an electric utility company is under a duty to inspect. The court noted that the utility company did not have "anything to do with the installation of the extension cord or any of the wires in the building, it had never controlled them in any matter, and there was no evidence that the company or any of its agents or employees had any knowledge of any defect therein." *Adams*, 69 Pa. Super. at 484.

Duquesne Light did not install, own or control the panel where the Funeral Home fire originated. The Company satisfied its obligation to restore power following the motor vehicle accident by making all of the proper connections in the correct sequence. Wunderley Report at

pg. 6. The Company was under no obligation to inspect the customer's electrical equipment. Because Plaintiff cannot establish that a duty was owed, Plaintiff cannot state a claim for negligence against Duquesne Light. Therefore, summary judgment is proper.

D. Plaintiff is Attempting to Extend Duquesne Light's Duty to Customer-Owned Equipment Because Plaintiff's Original Liability Theory Failed.

Plaintiff has resorted to a strained, unprecedented theory of liability because discovery did not support Plaintiff's original hypothesis. Plaintiff sued Duquesne Light claiming that the line workers made improper connections. Amended Complaint, ¶¶ 11-12. After taking 14 depositions, Plaintiff has no evidence to support the original theory of liability. All witnesses testified that the connections were done properly. All connections were made in the correct sequence. Novak Depo., 66:2-25; 67:2-13; 82:15-17; Pierce Depo., 42:18-25; 43:1-10. Plaintiff's expert, Richard Wunderley, concedes this: "[t]he improper connection hypothesis at the single phase mast head was eliminated after the evidence examinations and further discovery information was received." Wunderley Report at 6.

Because Plaintiff's own expert concludes that the original negligence theory is no longer viable, Plaintiff resorts to its fallback position, that Duquesne Light is liable because the line crew failed to enter the locked Funeral Home -- in the early morning hours when no one was there -- and inspect the building's electrical facilities. Wunderley Report at pg. 7. Mr. Wunderley opines, "[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 caused by the contact between the primary and secondary conductors at the pole on Forward Avenue." *Id.* In this way, Plaintiff implicitly assigns to Duquesne Light a duty to inspect customer equipment that, after the fact, was determined to be the source of the fire. As shown above, such a duty exists nowhere in Pennsylvania law. For

this reason, Plaintiff cannot maintain a negligence claim against Duquesne Light. Summary judgment should be granted as a matter of law.

V. CONCLUSION

Plaintiff's claim of negligence against Duquesne Light must be dismissed for a failure to state a cause of action upon which relief can be granted. The facts are undisputed that Duquesne Light made all proper connections to the Funeral Home. Pennsylvania law does not impose a duty on an electric utility to inspect a customer's electrical facilities before restoring power after an outage. Because Duquesne Light breached no legal duty to Plaintiff, Plaintiff's negligence claim must be dismissed with prejudice.

Respectfully submitted,

TUCKER ARENSBERG, P.C.

By: 

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CERTIFICATE OF SERVICE

I certify that true and correct copies of this Motion for Summary Judgment and Brief in Support were served upon the following counsel of record via email and first class U.S. mail at the address set forth below, on this 1st day of November, 2010:

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Erin M. Beckner

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, to wit, this _____ day of _____, 201____,
upon consideration of Defendant Duquesne Light Company's Motion for Summary Judgment, it
is hereby ORDERED, ADJUDGED, and DECREED that the Motion is GRANTED. Judgment is
entered in favor of the Defendant, Duquesne Light Company, and against the Plaintiff,
Alderwoods (Pennsylvania), Inc. a wholly-owned subsidiary of Service Corporation International,
t/a Burton L. Hirsch Funeral Home, with prejudice.

BY THE COURT:

_____, 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,

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

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LIT:583489-4 014657-139188

EXHIBIT B

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: 

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Pa. Id. No. 28682
Erin M. Beckner, Esquire
Pa. Id. No. 94086
Jeremy V. Farrell, Esquire
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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.

**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.

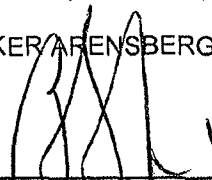
In the instant case, the doctrine of primary jurisdiction requires this Court to utilize the bifurcated procedure. The main issues of this case are within the PUC's jurisdiction and require the PUC's special expertise for proper determination. Therefore, while this Court has jurisdiction over Plaintiff's 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 AFBENSBERG, P.C.



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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.

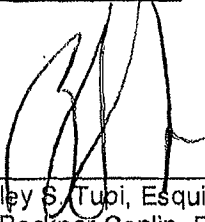
BY THE COURT:

_____, 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:

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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:

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EXHIBIT C

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. Frankhauser's deposition suggesting that he saw anything that would pose a hazard to the Funeral Home's electrical equipment.

After Mr. Frankhauser 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 Tariff¹ in connection with its discussion of 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.

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 forth 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,

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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:

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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

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EXHIBIT D

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:

$$\text{SAIFI} = \frac{\sum \text{Customers Interrupted}}{\text{Total Customers}} = \frac{\sum \text{KVA Interrupted}}{\text{System KVA (total system load)}} = \text{Interruptions per Customer}$$

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.

$$\text{SAIDI} = \frac{\sum \text{Customer Outage Minutes}}{\text{Total Customers}} = \frac{\sum \text{KVA-Minutes Interrupted}}{\text{System KVA (total system load)}} = \text{Length of Customer's Average Outage}$$

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.

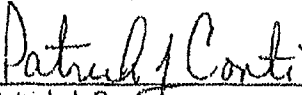
28. The PUC expects Duquesne Light to achieve or exceed PUC benchmarks, subject to legitimate concerns about the affordability of service. The PUC balances the reliability of service with the affordability of service. Some drastic measures could conceivably be taken to improve reliability, such as cutting 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.

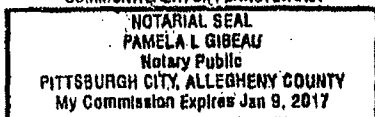

Patrick J. Conti

Sworn to before me this 4th day of
September, 2015.



Notary Public

LIT 592349.6 014657.139183
COMMONWEALTH OF PENNSYLVANIA



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:

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In The
SUPERIOR COURT OF PENNSYLVANIA

Case No. 82 WDM 2015

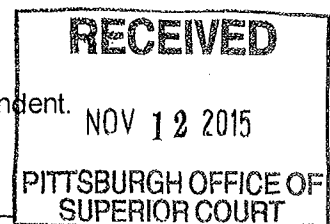
ALDERWOODS (PENNSYLVANIA), INC., a wholly owned subsidiary of SERVICE CORPORATION INTERNATIONAL, t/a BURTON L. HIRSCH FUNERAL HOME,

Petitioner,

v.

DUQUESNE LIGHT COMPANY,

Respondent.



**ANSWER IN OPPOSITION TO
PETITION FOR ALLOWANCE OF APPEAL**

On petition for review of the Order of the Trial Court, the Honorable Paul F. Luty, Jr., J., of the Allegheny County Court of Common Pleas, dated October 12, 2015, in Civil Action No. GD-09-14720, Denying Reconsideration or Certification for Interlocutory Appeal of the September 4, 2015 Order Transferring Jurisdiction to the Pennsylvania Public Utility Commission

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EXHIBIT E

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INTRODUCTION

The Pennsylvania Public Utility Commission ("PUC") comprehensively regulates the central subject of this litigation: restoration of electrical service. The PUC has the jurisdiction to balance the need to restore service and the need for safety. The agency has established regulatory benchmarks to measure essentially all aspects of how electric utilities like Duquesne Light restore power after outages. See Affidavit of Patrick J. Conti, ¶¶ 5 - 30 (attached as Appendix A). Since the PUC has exclusive jurisdiction to define the scope of utility service, the Trial Court was correct to follow Elkin v. Bell Tel. Co. of Pa., 420 A.2d 371 (Pa. 1980), and direct that the action be bifurcated and transferred to the PUC.

Under that procedure, the action was bifurcated and referred to the PUC to determine the scope of and circumstances under which Duquesne Light has a duty to warn its customers about potential dangers in the customers' equipment before restoring power. If the PUC determines that Duquesne Light violated that duty, the case will be transferred back to the Court of Common Pleas for a determination of damages.

The Funeral Home now seeks interlocutory review. Because the Supreme Court has approved the procedure adopted by the Trial Court, and because the PUC has adopted a comprehensive regulatory scheme governing restoration of electric service, the Trial Court's decision was correct. Surely the Trial Court's decision did not constitute the egregious abuse of discretion required for interlocutory review.

STANDARD OF REVIEW

The comments to Rule 1311 of the Pennsylvania Rules of Appellate Procedure set a high standard for the interlocutory review sought. For the Petition for Review to be granted, the Court of Common Pleas' refusal to amend its Order to include the permissive appeal language set forth in 42 Pa. C.S. § 702(b) "must be so egregious as to justify prerogative appellate correction of the exercise of discretion by the lower tribunal." See Pa. R.A.P. 1311, note.

STATEMENT OF THE CASE

The Pennsylvania Public Utility Commission (“PUC”) comprehensively regulates the central subject of this litigation. Because Plaintiff’s claim directly implicates a longstanding PUC regulatory regimen, the Trial Court was correct to follow Elkin v. Bell Tel. Co. of Pa., 420 A.2d 371, 377 (Pa. 1980), and transfer this action to the PUC. Since the PUC has exclusive jurisdiction to define the scope of utility service, it is the PUC that must balance the need to restore utility service with the need for safety in doing so.

This action has to do with the circumstances giving rise to and scope of the duty that an electrical utility company owes to its customers before restoring service after a power outage, a subject that is regulated by the PUC. The Funeral Home’s characterization of this case as a single “overvoltage” incident affecting a single customer is a gross oversimplification of the issues presented by its allegations. While the Funeral Home would like this Court to believe that restoration of electric service takes place in a vacuum, the proper resolution of the Funeral Home’s allegations demands an understanding of the regulatory atmosphere in which electric service is restored. That is why the Trial Court was correct in transferring the action to the PUC.

The PUC’s Regulations Govern Restoration of Electric Service.

The Public Utility Code requires electric utilities to provide continuous service to customers without unreasonable interruptions and delay in “conformity with the regulations and orders of the Commission.” 66 Pa. C.S. § 1501.¹ 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.***

¹ Pursuant to Pa. R.A.P. 1312(a)(7), a copy of all cited statutes and regulations are attached collectively as Appendix B.

As the emphasized language demonstrates, the PUC's role is to ensure that the service provided by utility companies is safe, reliable, and reasonably continuous. The PUC's regulations elaborate:

§ 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); Conti Affidavit, ¶ 9.

The PUC is empowered to take, and has taken, extensive steps to regulate electric safety. 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.

52 Pa. Code § 57.191 (Emphasis added.) To that end, the PUC regulations require that Duquesne Light install, maintain, and operate its distribution system 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 within 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.

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. 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. Conti Affidavit, ¶¶ 11, 29.

The PUC has regulatory authority to demand that electric distribution companies like Duquesne Light meet reliability performance benchmarks and minimum performance standards. The PUC may take enforcement action if its reliability standards are not met. 52 Pa. Code § 57.194(h). See also, Conti Affidavit, ¶ 25. Failure to meet the PUC's benchmarks carries adverse consequences for Duquesne Light: it can result in additional monitoring by the Commission as well as the imposition of fines and penalties. 52 Pa. Code § 57.194(h)(1). 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. See 52 Pa. Code § 57.197. The Affidavit of Patrick Conti, unrefuted in the Trial Court record, explains the PUC's comprehensive regulation of power interruptions and service restorations and the efforts that Duquesne Light must take to comply with the PUC regulations.

The Funeral Home's Theory of Liability Triggers the Regulatory Scheme.

While a detailed factual recitation is not necessary to the resolution of the Petition for Review, two facts are important. The first is that the fire that ignited this litigation began in the

Funeral Home's own electrical equipment. Alderwoods v. Duquesne Light Co., 106 A.3d 27, 30 (Pa. 2014). The second is that no witness testified to seeing anything before the fire suggesting any danger to the customer's equipment inside. Accordingly, the Funeral Home's frequent references to actual or constructive notice have no evidentiary foundation. The Funeral Home's case relies on after-the-fact theories about how the fire may have started, not on any evidence of Duquesne Light's foreknowledge of any danger. These theories amount to nothing more than surmise, speculation, and conjecture.

Duquesne Light's Motion to Bifurcate and Transfer to the PUC ("Motion to Bifurcate") was not made hastily the instant this litigation was commenced. As the Funeral Home acknowledges, Duquesne Light did not seek the PUC's involvement until after the Funeral Home amended its complaint following the Supreme Court's ruling. Petition for Review at 6. Duquesne Light did so because the Funeral Home's new theory of liability placed at issue subjects that are comprehensively and exclusively regulated by the PUC; namely, restoration of electrical service and communications the Company must have with customers before restoring service.

The Funeral Home's own words in seeking to amend its complaint explain why the new theory of liability necessitated the PUC's involvement: "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." Motion for Leave to File Second Amended Complaint, ¶ 19 (emphasis added).

**The Trial Court Carefully Considered and Correctly Decided
Duquesne Light's Motion to Bifurcate.**

Prompted by the Funeral Home's new theory of liability, Duquesne Light filed its Motion to Bifurcate. After the Funeral Home's opposition brief, the trial court scheduled the motion for argument. During the hearing, several matters were raised that warranted supplemental briefing, which the Trial Court permitted. Duquesne Light submitted a Supplemental Brief explaining in detail the regulatory scheme governing service restoration outlined above. Duquesne Light also filed the Affidavit of Patrick J. Conti, the Director of Duquesne Light's Operations Center, who serves as the Company's liaison with the PUC with respect to power outages. Conti Affidavit, ¶¶ 1, 4. In response, the Funeral Home also submitted a supplemental brief. After review and analysis of two briefs from each party and hearing oral argument, the Trial Court granted Duquesne Light's Motion to Bifurcate.

The Funeral Home filed a motion seeking reconsideration of the Trial Court's order or, in the alternative, for amendment of the order to allow an interlocutory appeal. Duquesne Light timely opposed the Funeral Home's motion. Again, the Trial Court scheduled the motion for oral argument. After argument and consideration of the briefs, the Trial Court denied the Funeral Home's motion. That ruling prompted the pending Petition for Review.

The procedural history of Duquesne Light's Motion to Bifurcate demonstrates that the Trial Court's decision rested on thorough deliberation, thoughtful analysis, and due consideration of the parties' positions. It was not, as Plaintiff asserts, an egregious abuse of discretion.

REASONS FOR DENYING THE PETITION

- I. **The Court of Common Pleas correctly bifurcated the action and transferred it to the PUC.**
 - A. **The Pennsylvania Supreme Court has endorsed the procedure requested by Duquesne Light and adopted by the Court of Common Pleas.**

The Pennsylvania Supreme Court first approved the rationale underlying the Trial Court's decision to bifurcate and transfer this action to the PUC over 35 years ago. The doctrine of primary jurisdiction is now well-settled Pennsylvania law. It 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 "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." Elkin, 420 A.2d 376.

Because the PUC has no authority to award damages, the Pennsylvania Supreme Court adopted a bifurcation procedure in those cases in which damages are sought in a matter involving the special expertise of the PUC. Elkin, 420 A.2d 371. Under that procedure, the issue of liability is transferred to and decided by the PUC. If necessary, the matter returns to the Trial Court to determine 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.

A fundamental premise of the Funeral Home's Petition for Review is that transfer was improper because the PUC cannot adjudicate a claim for monetary damages. Petition for Review at 1, 7, 8, 20. This is a red herring. Duquesne Light freely acknowledges that the PUC cannot award damages. So did the Pennsylvania Supreme Court when it adopted the doctrine of primary jurisdiction. See Elkin, 420 A.2d at 375. If the PUC finds that Duquesne Light violated its duty, then the Trial Court will hear the Funeral Home's claim for damages. The Supreme Court flatly rejected the Funeral Home's argument that a plaintiff can avoid the PUC simply by seeking monetary damages. Id.

Duquesne Light did not ask, and the Trial Court did not order, the PUC to adjudicate a claim for damages. All that Duquesne Light requested in its Motion to Bifurcate, and all the Trial Court ordered, was to allow the agency legislatively charged with enforcing the regulations governing restoration of electric service to determine the scope of and circumstances under which Duquesne Light's duty to warn arises.²

B. The cases cited by the Funeral Home support the bifurcation procedure adopted by the Court of Common Pleas.

Plaintiff cites cases such as DeFrancesco v. Western Pa. Water Co., 453 A.2d 595 (Pa. 1982), Poorbaugh v. Pa. Public Utility Comm'n, 666 A.2d 744 (Pa. Cmwlth. 1995), and Schriner v. Pa. Power & Light Co., 501 A.2d 1128 (Pa. Super. 1985), in support of its argument that this action should not be bifurcated and transferred to the PUC. Those cases are all distinguishable. They neither dealt with a comprehensive regulatory scheme like the one involved in this

² The Supreme Court of Pennsylvania 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). However, this decision did not define the scope of the duty, nor attempt to reconcile it with existing PUC regulations. The scope of the duty is a policy question that falls within the PUC's exclusive jurisdiction to regulate the safety and reliability of public utility service. The determination of the scope of this duty will affect every electric service provider in the Commonwealth and the integrity of the PUC's regulatory scheme. As such, bifurcation is necessary to promote consistency and uniformity of PUC policy. Elkin, supra.

litigation, nor the scope of duty to warn allegations such as those advanced by the Funeral Home. The distinctions are critical.

Resolution of the Funeral Home's allegations that Duquesne Light ***should have denied service to its customer*** until certain communications had occurred 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.

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 Pennsylvania Power & Light. 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. The Funeral Home 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. The issue that warrants the PUC's attention in this case is not the alleged 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. This allegation directly implicates the existing PUC regime for power restoration.

Poorbaugh is also distinguishable because the theory of liability in that case was entirely different from that advanced by the Funeral Home. 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 it too often. *Id.* at 745-46. Poorbaugh did not involve a duty to warn, which is the focus of the Funeral Home's case. Notably, when the allegations in this case **were** similar to those at issue in Poorbaugh -- that Duquesne Light physically misconnected its wires³ -- Duquesne Light did not seek bifurcation and transfer to the PUC. It was not until the Funeral Home asserted and the appellate courts sustained an alleged duty to warn before restoring power that Duquesne Light sought the transfer to the PUC. This belatedly-alleged duty to warn, which by the Funeral Home's own admission places Duquesne Light's "overall restoration of service" directly at issue, triggered the necessity of involving the Commission.

The PUC has a body of regulatory experience having to do with service interruptions and restorations and has exclusive jurisdiction over the issues implicated by the Funeral Home's allegations -- the need to restore service and the need for safety in so doing. For this reason, the liability determination should only be made by the regulatory agency familiar with the regulatory background and that has the exclusive jurisdiction to define the scope of utility service -- the PUC. None of the cases cited by the Funeral Home change that. They actually support it. The Trial Court was correct.

³ Plaintiff abandoned this theory when its own expert conceded that Duquesne Light made all proper connections. Alderwoods, 106 A.3d at 30.

II. The Funeral Home's disagreement with the Trial Court's decision is insufficient to warrant interlocutory appeal.

The Trial Court correctly concluded that an interlocutory appeal was not permissible because the two elements necessary to justify such an appeal are absent. The statute governing interlocutory appeals by permission, 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 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 immediate appeal will advance the ultimate termination of the matter. Id.

The Funeral Home mistakenly contends that the first element is met because the Trial Court disagreed with the Funeral Home's preferred interpretation of the case law cited in its motion for reconsideration. Petition for Review at 8. By that flawed logic, immediate interlocutory appellate review would be appropriate any time that a court disagrees with a case cited by a litigant. Certainly that is not the case. More importantly, resolution of Duquesne Light's Motion to Bifurcate did not involve a controlling question of law; it merely decided where a particular issue in the action will initially be litigated. And, as plainly evidenced by the cases discussed above, the doctrine of primary jurisdiction is well-settled in Pennsylvania law. Elkin, supra. It is not a legal concept about which there is a substantial ground for difference of opinion.

The Funeral Home's argument about the second element is equally unconvincing. The Funeral Home would have this Court believe that an interlocutory appeal materially advances the ultimate resolution of the matter simply because the Funeral Home threatens to continue to object to the Court of Common Pleas' decision and to appeal decisions that it may lose in the

future. Petition for Review at 7 (threatening to file preliminary objections to its own complaint should this action be transferred to the PUC and subsequently mount more interlocutory appeals). But the Funeral Home's threat to file more appeals down the road does not justify the Petition for Review. The Funeral Home grounds its argument in speculation as to what rulings might be issued in the future and how the Funeral Home might choose to respond to those rulings at a later stage in the litigation. Simply put, since the parties only recently returned from a four-year trip through the Superior and Supreme Courts, it is inconceivable that yet another detour to the appellate circuit would advance rather than delay the ultimate resolution of this action.

III. The law of the case doctrine does not apply to an issue that the Supreme Court stated was “entirely detached” from the narrow question presented on appeal.

It is undisputed that the Supreme Court did not address whether bifurcation and transfer to the PUC was appropriate. Since that issue was not decided by the Supreme Court, as a matter of Pennsylvania law it cannot constitute 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).

In the first sentence of its opinion the Supreme Court noted that the 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 that 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.

Nothing in the issue the Supreme Court confronted implicated the issues presented by Duquesne Light's Motion to Bifurcate. The Supreme Court has already said so:

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). The Funeral Home's argument that a general comment about the role of juries made in response a series of questions raised by the dissent constitutes the law of the case is erroneous. This dictum does not supersede the Supreme Court's plain and explicit statement that it "decline[d] to consider" something that it found to be "entirely detached" from the narrow issue presented on appeal. Because the Supreme Court did not render a decision on whether transfer to the PUC was appropriate or not, the law of the case doctrine cannot apply.

CONCLUSION

The Pennsylvania Public Utility Commission has enacted a comprehensive regulatory scheme that governs restoration of electric service after a power outage. The PUC has the jurisdiction to balance the need to restore service with the need for safety. The PUC, as the regulator of utilities, alone has the expertise, industry knowledge, and jurisdiction to balance all the interests in defining the scope of utility service. As a result, the Allegheny County Court of Common Pleas, following a procedure that has been endorsed by the Pennsylvania Supreme Court for over 35 years, correctly bifurcated this case and transferred the liability portion to the PUC, which has the expertise and industry knowledge to determine the scope of Duquesne Light's duty to warn and whether the circumstances present on the night of the fire were sufficient to give rise to that duty. The Court of Common Pleas retained jurisdiction to determine the extent of the Funeral Home's damages if Duquesne Light is found to be liable. Nothing in the Funeral Home's Petition for Review justifies interlocutory review of the Court of Common Pleas' ruling. The Petition for Review should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I certify that that I am this 12th day of November, 2015, serving a true and correct copy of Respondent's Answer in Opposition to Petition for Review upon counsel persons indicated below by first-class mail addressed as follows:

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LIT:596009-1 014657-139188

APPENDIX A

Affidavit of Patrick J. Conti in Support of Motion to Bifurcate and Transfer Action to the Pennsylvania Public Utility Commission.

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:

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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:

$$\text{SAIFI} = \frac{\sum \text{Customers Interrupted}}{\text{Total Customers}} = \frac{\sum \text{KVA Interrupted}}{\text{System KVA (total system load)}} = \text{Interruptions per Customer}$$

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.

$$\text{SAIDI} = \frac{\sum \text{Customer Outage Minutes}}{\text{Total Customers}} = \frac{\sum \text{KVA-Minutes Interrupted}}{\text{System KVA (total system load)}} = \text{Length of Customer's Average Outage}$$

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

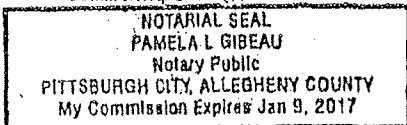
31. The NESC demarcates responsibility at the point of delivery, known as the service point, which is the point of connection between the utility's distribution facilities and the customer's wiring. The service point is the jurisdictional line of demarcation between two national industry codes: (1) the 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 592349.0 014657-139183
COMMONWEALTH OF PENNSYLVANIA



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:

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APPENDIX B

Cases Cited in LexisNexis

LEXSTAT

PENNSYLVANIA STATUTES, ANNOTATED BY LEXISNEXIS(R)

* Pa.C.S. documents are current through 2015 Regular Session Act 41, Enacted July 31, 2015 *

* P.S. documents are current through 2015 Regular Session Act 41, Enacted July 31, 2015, except for Acts 33, 39 *

Pennsylvania Consolidated Statutes
Title 42. Judiciary and Judicial Procedure
Part II. Organization
Subpart A. Courts and Magisterial District Judges
Article B. Appellate Courts
Chapter 7. Jurisdiction of Appellate Courts
Subchapter A. General Provisions

[Go to the Pennsylvania Code Archive Directory](#)

42 Pa.C.S. § 702 (2015)

§ 702. Interlocutory orders.

(a) *Appeals authorized by law.* --

An appeal authorized by law from an interlocutory order in a matter shall be taken to the appellate court having jurisdiction of final orders in such matter.

(b) *Interlocutory appeals by permission.* --

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.

(c) *Supersedes.* --

Except as otherwise prescribed by general rules, a petition for permission to appeal under this section shall not stay the proceedings before the lower court or other government unit, unless the lower court or other government unit or the appellate court or a judge thereof shall so order.

HISTORY: Act 1976-142 (S.B. 935), P.L. 586, § 2, approved July 9, 1976, See section of this act for effective date information; Act 1978-53 (H.B. 825), P.L. 202, § 10, approved Apr. 28, 1978, eff. in 60 days.



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*** This document is current through the October 2015 supplement ***
*** Changes effective through 45 Pa.B. 4746 (August 8, 2015) ***

TITLE 52. PUBLIC UTILITIES
PART I. PUBLIC UTILITY COMMISSION
SUBPART C. FIXED SERVICE UTILITIES
CHAPTER 57. ELECTRIC SERVICE
SUBCHAPTER N. ELECTRIC RELIABILITY STANDARDS

52 Pa. Code § 57.191 (2015)

§ 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.

NOTES:

Notes of Decision

Notes of Decisions

Preemption

The Public Utility Code preempted the field of public utility regulation such that township's shade tree ordinance did not control the public utility's vegetation management practices. *PECO Energy v. Township of Upper Dublin*, 922 A.2d 996, 1004 (Pa. Cmwlth. 2007)

HIERARCHY NOTES:

Part Note

Chapter Note

Subchapter Note



2 of 4 DOCUMENTS

PENNSYLVANIA ADMINISTRATIVE CODE
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Pennsylvania Codes
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*** This document is current through the October 2015 supplement ***

*** Changes effective through 45 Pa.B. 4746 (August 8, 2015) ***

TITLE 52. PUBLIC UTILITIES
PART I. PUBLIC UTILITY COMMISSION
SUBPART C. FIXED SERVICE UTILITIES
CHAPTER 57. ELECTRIC SERVICE
SUBCHAPTER N. ELECTRIC RELIABILITY STANDARDS

52 Pa. Code § 57.194 (2015)

§ 57.194. Distribution system reliability

(a) An EDC 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. If service must be interrupted for maintenance purposes, an EDC should, where reasonable and practicable, attempt to perform the work at a time which will cause minimal inconvenience to customers and provide notice to customers in advance of the interruption.

(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

52 Pa. Code § 57.194

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.

(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.

AUTHORITY:

The provisions of this § 57.194 amended under the Public Utility Code, *66 Pa.C.S. § 501*; and the Electric Generation Customer Choice and Competition Act, *66 Pa.C.S. §§ 2801 -- 2812*.

SOURCE:

The provisions of this § 57.194 amended September 17, 2004, effective September 18, 2004, *34 Pa.B. 5135*. Immediately preceding text appears at serial pages (246399) to (246400).

NOTES:

Cross References

This section cited in *52 Pa. Code § 57.195* (relating to reporting requirements); and *52 Pa. Code § 57.197* (relating to reliability investigations and enforcement).

HIERARCHY NOTES:

Part Note
Chapter Note
Subchapter Note



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PENNSYLVANIA ADMINISTRATIVE CODE
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*** Changes effective through 45 Pa.B. 4746 (August 8, 2015) ***

TITLE 52. PUBLIC UTILITIES
PART I. PUBLIC UTILITY COMMISSION
SUBPART C. FIXED SERVICE UTILITIES
CHAPTER 57. ELECTRIC SERVICE
SUBCHAPTER N. ELECTRIC RELIABILITY STANDARDS

52 Pa. Code § 57.197 (2015)

§ 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).

HIERARCHY NOTES:

- Part Note
- Chapter Note
- Subchapter Note



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TITLE 52. PUBLIC UTILITIES
PART I. PUBLIC UTILITY COMMISSION
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CHAPTER 57. ELECTRIC SERVICE
SUBCHAPTER N. ELECTRIC RELIABILITY STANDARDS

52 Pa. Code § 57.198 (2015)

§ 57.198. Inspection and maintenance standards

(a) *Filing date and plan components*. Every 2 years, by October 1, an EDC shall prepare and file with the Commission a biennial plan for the periodic inspection, maintenance, repair and replacement of its facilities that is designed to meet its performance benchmarks and standards under this subchapter. EDCs in Compliance Group 1, as determined by the Commission, shall file their initial plans on October 1, 2009. EDCs in Compliance Group 2, as determined by the Commission, shall file their initial plans on October 1, 2010. Each EDC's biennial plan must cover the 2 calendar years beginning 15 months after filing, be implemented 15 months after filing, and must remain in effect for 2 calendar years thereafter. In preparing this plan, the following facilities are critical to maintaining system reliability:

- (1) Poles.
- (2) Overhead conductors and cables.
- (3) Transformers.
- (4) Switching devices.
- (5) Protective devices.
- (6) Regulators.
- (7) Capacitors.
- (8) Substations.

(b) *Plan consistency* . The plan must be consistent with the National Electrical Safety Code, Codes and Practices of the Institute of Electrical and Electronic Engineers, Federal Energy Regulatory Commission Regulations and the provisions of the American National Standards Institute, Inc.

(c) *Time frames* . The plan must comply with the inspection and maintenance standards in subsection (n). A justification for the inspection and maintenance time frames selected shall be provided, even if the time frame falls within the intervals prescribed in subsection (n). However, an EDC may propose a plan that, for a given standard, uses intervals outside the Commission standard, provided that the deviation can be justified by the EDC's unique circumstances or a cost/benefit analysis to support an alternative approach that will still support the level of reliability required by law.

(d) *Routine inspection and maintenance* . The plan must specify for the standards in subsection (n) the routine inspection and maintenance requirements, and emergency maintenance plans and procedures.

(e) *Reduction of risk of outages* . The plan shall be designed to reduce the risk of outages by accounting for age, condition, technology, design and performance of system components and by inspecting, maintaining, repairing, replacing and upgrading the system.

(f) *Clearance of vegetation* . The plan must include a program for the maintenance of clearances of vegetation from the EDC's overhead distribution facilities.

(g) *Consistency with reliability reports* . The plan must form the basis of, and be consistent with, the EDC's inspection and maintenance goals and objectives included in subsequent annual and quarterly reliability reports filed with the Commission under §§ 57.193(c) and 57.195 (relating to transmission system reliability; and reporting requirements).

(h) *Review procedure* . Within 90 days of receipt of the plan, the Commission or the Director of the Bureau of Conservation, Economics and Energy Planning (CEEP) will accept or reject the plan in writing.

(i) *Deemed acceptance* . Absent action by the Commission or the Director of CEEP to reject the plan within 90 days of the plan's submission to the Commission, the plan will be deemed accepted.

(j) *Plan deficiencies* . If the plan is rejected, in whole or in part, by the Commission or the Director of CEEP, the EDC will be notified of the plan's deficiencies and directed to submit one of the following:

(i) A revised plan, or pertinent parts of the plan, addressing the identified deficiencies.

(ii) An explanation why the EDC believes its plan is not deficient. The revised plan is deemed accepted absent any action by the Commission within 90 days of the filing.

(k) *Appeal procedure* . An EDC may appeal the Commission staff's determination under subsection (h) by filing an appeal under § 5.44 (relating to petitions for appeal from actions of the staff) within 20 days after service of notice of the action. A final Commission determination is appealable to the Commonwealth Court. Absent having a granted stay, the EDC is obligated to comply with the Commission's directives regarding its inspection, maintenance, repair and replacement plans.

(l) *EDC updates* . An EDC may request approval from the Commission for revising its approved plan. An EDC shall submit to the Commission, as an addendum to its quarterly reliability report under §§ 57.193(c) and 57.195, prospective and past revisions to its plan and a discussion of the reasons for the revisions. Within 60 days, the Commission or the Director of CEEP will accept or reject the revisions to the plan. The appeal procedure in subsection (k) applies to the appeal of a rejection of revisions to the plan.

(m) *Recordkeeping* . An EDC shall maintain records of its inspection and maintenance activities sufficient to demonstrate compliance with its distribution facilities inspection, maintenance, repair and replacement programs as required by subsection (n). The records shall be made available to the Commission upon request within 30 days. Examples of sufficient records include:

(1) Date-stamped records signed by EDC staff who performed the tasks related to inspection.

(2) Maintenance, repair and replacement receipts from independent contractors showing when and what type of inspection, maintenance, repair or replacement work was done.

(n) *Inspection and maintenance intervals* . An EDC shall maintain the following inspection and maintenance plan intervals:

(1) *Vegetation management* . The Statewide minimum inspection and treatment cycle for vegetation management is between 4-8 years for distribution facilities. An EDC shall submit a condition-based plan for vegetation management for its distribution system facilities explaining its treatment cycle.

(2) *Pole inspections* . Distribution poles shall be inspected at least as often as every 10 -- 12 years except for the new southern yellow pine creosoted utility poles which shall be initially inspected within 25 years, then within 12 years annually after the initial inspection. Pole inspections must include:

(i) Drill tests at and below ground level.

(ii) A shell test.

(iii) Visual inspection for holes or evidence of insect infestation.

(iv) Visual inspection for evidence of unauthorized backfilling or excavation near the pole.

(v) Visual inspection for signs of lightning strikes.

(vi) A load calculation.

(3) *Pole inspection failure* . If a pole fails the groundline inspection and shows dangerous conditions that are an immediate risk to public or employee safety or conditions affecting the integrity of the circuit, the pole shall be replaced within 30 days of the date of inspection.

(4) *Distribution overhead line inspections* . Distribution lines shall be inspected by ground patrol a minimum of once every 1-2 years. A visual inspection must include checking for:

(i) Broken insulators.

(ii) Conditions that may adversely affect operation of the overhead transformer.

(iii) Other conditions that may adversely affect operation of the overhead distribution line.

(5) *Inspection failure* . If critical maintenance problems are found that affect the integrity of the circuits, they shall be repaired or replaced no later than 30 days from discovery.

(6) *Distribution transformer inspections* . Overhead distribution transformers shall be visually inspected as part of the distribution line inspection every 1-2 years. Above-ground pad-mounted transformers shall be inspected at least as often as every 5 years and below-ground transformers shall be inspected at least as often as every 8 years. An inspection must include checking for:

(i) Rust, dents or other evidence of contact.

(ii) Leaking oil.

(iii) Installation of fences or shrubbery that could adversely affect access to and operation of the transformer.

(iv) Unauthorized excavation or changes in grade near the transformer.

(7) *Recloser inspections* . Three-phase reclosers shall be inspected on a cycle of 8 years or less. Single-phase reclosers shall be inspected as part of the EDC's individual distribution line inspection plan.

(8) *Substation inspections* . Substation equipment, structures and hardware shall be inspected on a cycle of 5 weeks or less.

AUTHORITY:

The provisions of this § 57.198 adopted under the Public Utility Code, 66 Pa.C.S. §§ 501, 57.191 -- 57.197 and Chapter 28.

SOURCE:

The provisions of this § 57.198 adopted September 26, 2008, effective September 27, 2008, 38 Pa.B. 5273.

HIERARCHY NOTES:

Part Note
Chapter Note
Subchapter Note

LEXSTAT

PENNSYLVANIA STATUTES, ANNOTATED BY LEXISNEXIS(R)

* Pa.C.S. documents are current through 2015 Regular Session Act 41, Enacted July 31, 2015 *

* P.S. documents are current through 2015 Regular Session Act 41, Enacted July 31, 2015, except for Acts 33, 39 *

Pennsylvania Consolidated Statutes
Title 66. Public Utilities
Part I. Public Utility Code
Subpart C. Regulation of Public Utilities Generally
Chapter 15. Service and Facilities
Subchapter A. General Provisions

Go to the Pennsylvania Code Archive Directory

66 Pa.C.S. § 1501 (2015)

§ 1501. Character of service and facilities.

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 service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. Any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the commission as to service and extensions, with the same force and in like manner as if such service were rendered by a public utility. The commission shall have sole and exclusive jurisdiction to promulgate rules and regulations for the allocation of natural or artificial gas supply by a public utility.

HISTORY: Act 1978-116 (H.B. 489), P.L. 598, § 1, approved July 1, 1978, eff. in 60 days.

LEXSTAT

* Pennsylvania State Court Rules reflect amendments received July 1, 2015 *

PENNSYLVANIA RULES OF APPELLATE PROCEDURE
ARTICLE II. APPELLATE PROCEDURE
CHAPTER 13. INTERLOCUTORY APPEALS BY PERMISSION

Pa. R.A.P. 1311 (2015)

(a) General rule. An appeal may be taken by permission under 42 Pa.C.S. § 702(b) (interlocutory appeals by permission) from any interlocutory order of a lower court or other governmental unit. See Rule 312 (interlocutory appeals by permission).

(b) Petition for permission to appeal. Permission to appeal from an interlocutory order containing the statement prescribed by 42 Pa.C.S. § 702(b) may be sought by filing a petition for permission to appeal with the prothonotary of the appellate court within 30 days after entry of such order in the lower court or other government unit with proof of service on all other parties to the matter in the lower court or other government unit and on the government unit or clerk of the lower court, who shall file the petition of record in such lower court. 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. Unless the trial court or other government unit acts on the application within 30 days after it is filed, the trial court or other government unit shall no longer consider the application and it shall be deemed denied. If the petition for permission to appeal is transmitted to the prothonotary of the appellate court by means of first class, express, or priority United States Postal Service mail, the petition shall be deemed received by the prothonotary for the purposes of Rule 121(a) (filing) on the date deposited in the United States mail, as shown on a United States Postal Service Form 3817 Certificate of Mailing, or other similar United States Postal Service form from which the date of deposit can be verified. The certificate of mailing or other similar Postal Service form from which the date of deposit can be verified shall be cancelled by the Postal Service, shall show the docket number of the matter in the lower court or other government unit and shall be either enclosed with the petition or separately mailed to the prothonotary. Upon actual receipt of the petition for permission to appeal the prothonotary of the appellate court shall immediately stamp it with the date of actual receipt. That date, or the date of earlier deposit in the United States mail as prescribed in this subdivision, shall constitute the date when permission to appeal was sought, which date shall be shown on the docket. The prothonotary of the appellate court shall immediately note the appellate docket number assignment upon the petition for permission to appeal and give written notice of the docket number assignment in person or by first class mail to the government unit or clerk of the lower court, to the petitioner and to the other persons named in the proof of service accompanying the petition.

(c) Fee. The petitioner upon filing the petition for permission to appeal shall pay any fee therefor prescribed by Chapter 27 (fees and costs in appellate courts and on appeal).

(d) Entry of appearance. Upon the filing of the petition for permission to appeal the prothonotary of the appellate court shall note on the record as counsel for the petitioner the name of his counsel, if any, set forth in or endorsed upon the petition for permission to appeal, and, as counsel for other parties, counsel, if any, named in the proof of service. The prothonotary shall upon praecipe of any such counsel for other parties, filed at any time within 30 days after filing of the petition, strike off or correct the record of appearance. Thereafter a counsel's appearance for a party may not be withdrawn without leave of court, unless another lawyer has entered or simultaneously enters an appearance for the party.

Pa. R.A.P. 1311

Note: Based on 42 Pa.C.S. § 702(b) (interlocutory appeals by permission). See note to Rule 903 (time for appeal). Compare 42 Pa.C.S. § 5574 (effect of application for amendment to qualify for interlocutory appeal).

See the Official Note to Rule 1112 (appeals by allowance) for an explanation of the procedure when Form 3817 or other similar United States Postal Service form from which the date of deposit can be verified is used.

Where the administrative agency or lower court refuses to amend its order to include the prescribed statement, a petition for review under Chapter 15 of the unappealable order of denial is the proper mode of determining whether the case is so egregious as to justify prerogative appellate correction of the exercise of discretion by the lower tribunal. If the petition for review is granted in such a case, the effect (as in the Federal practice under 28 U.S.C. § 1292(b)) is the same as if a petition for permission to appeal had been filed and granted, and no separate petition for permission to appeal need be filed.

The 1997 amendment to subdivision (b) provides for a deemed denial where the trial court or other governmental unit fails to act on the application within 30 days. Under such circumstances, a party may need to file a praecipe for entry of the deemed denial pursuant to Rule 301(d).

With regard to subdivision (d) and withdrawal of appearance without leave of the appellate court, counsel may nonetheless be subject to trial court supervision pursuant to Pa.R.Crim.P. 904 (relating to Appointment of counsel; *forma pauperis*).

With respect to appearances by new counsel following the initial docketing of appearances pursuant to Subdivision (d) of this rule, please note the requirements of Rule 120.

NOTES:

PENNSYLVANIA ADMINISTRATIVE CODE REFERENCES.

1. 210 Pa. Code Part I, Art II, Ch 13, Rule 1311 (2013), PART RULES OF APPELLATE PROCEDURE.
2. 210 Pa. Code Part I, Art II, Ch 13, Rule 1316 (2013), PART RULES OF APPELLATE PROCEDURE.

LexisNexis (R) Notes:

CASE NOTES

1. Appeal of interlocutory administrative agency orders is by permission under Pa. R. App. P. 1311. Pittsburgh Bd. of Pub. Educ. v. Pa. Human Rels. Comm'n, 820 A.2d 838, 2003 Pa. Commw. LEXIS 181 (Pa. Commw. Ct. 2003).

2. Although a teacher's request for the trial court to certify its interlocutory order for appeal, arising from a school district's challenge to a grievance arbitration award, was refused, the appellate court allowed the interlocutory appeal under Pa. R. App. P. 1311. Pleasant Valley Sch. Dist. v. Schaeffer, 31 A.3d 1241, 2011 Pa. Commw. LEXIS 592, 192 L.R.R.M. (BNA) 2892 (Pa. Commw. Ct. 2011).

3. As the denial of both an initial petition to intervene in an appeal of a zoning matter, as well as a second petition to intervene in the same ongoing litigation, were not appealable collateral orders under Pa. R. App. P. 313, the appeal was quashed; the trial court had denied the property owners' motion to amend the order to allow for an interlocutory appeal by permission under 42 Pa.C.S. § 702(b) and Pa. R. App. P. 1311, delay in review presented no danger, and the property owners had an adequate remedy through an action under 53 Pa. Stat. Ann. § 10617 of the Pennsylvania Municipalities Planning Code, 53 Pa. Stat. Ann. §§ 10101-11202 Fayette County Office of Planning v. Fayette County Zoning Hearing Bd., 981 A.2d 336, 2009 Pa. Commw. LEXIS 1478 (Pa. Commw. Ct. 2009).

4. In a medical malpractice action, a trial court denied a hospital's motion for immediate appellate certification because the hospital failed to articulate how an immediate appeal would materially advance the ultimate termination of the litigation since its argument relied upon proposed changes to the Certificate of Merit procedures set forth in Pa.R.C.P. No. 1042.3, and only the Supreme Court of Pennsylvania may amend or modify its rules. Thach v. Abington Mem. Hosp., 2014 Phila. Ct. Com. Pl. LEXIS 285 (Sept. 9, 2014).

5. Board of assessment's denial of class certification for taxpayers' assessment appeals was an interlocutory order and not appealable by right under Pa. R. App. P. 311, but taxpayers were required to file a petition for permission to appeal pursuant to 42 Pa. Con. Stat. § 702(b) and Pa. R. App. P. 1311. In re Class Action Appeal of Kelly, 704 A.2d 172, 1997 Pa. Commw. LEXIS 869 (Pa. Commw. Ct. 1997).

6. Trial judge's unwillingness to recuse himself was a discretionary decision subject to interlocutory appeal under 42 Pa.C.S. § 702(b) and Pa. R. App. P. 1311(a); recusal could not have been specifically ordered by writ of mandamus or writ of prohibition. United States Steel Corp. v. Papadakos, 63 Pa. Commw. 213, 437 A.2d 1044, 1981 Pa. Commw. LEXIS 1937 (1981), criticized by Municipal Publications, Inc. v. Snyder, 322 Pa. Super. 464, 469 A.2d 1084, 1983 Pa. Super. LEXIS 4431 (1983).

7. When an alleged injured party sought to appeal the denial of the party's motion to compel discovery, the party did not

comply with the requirements for bringing an interlocutory appeal because, (1) while the party filed an application to amend the trial court's order to include a statement that the order involved a controlling question of law as to which there was substantial ground for difference of opinion and that an immediate appeal from the order might materially advance the ultimate termination of the litigation, under 42 Pa.C.S. § 702, which was denied, the party sought no permission to appeal the interlocutory order, and (2) such a finding was not justified, as the appeal involved a moot request for information, and the party's requests were thinly-veiled attempts to receive disputed information in his Right to Know Act, 35 Pa. Stat. Ann. § 7301 et seq., requests that were the subject of litigation. Crockett v. Septa, 2012 Phila. Ct. Com. Pl. LEXIS 70 (Feb. 13, 2012).

8. Court recommended its discovery order be affirmed because the order was limited in location, time, and incident, and stipulated the redaction of all confidential identifying information. As defendant's interlocutory appeal of the discovery order under Pa. R. App. P. 1311 was an attempt to stall the judicial proceedings, it should be denied. Massarelli v. Elwyn, Inc., 2007 Pa. Dist. & Cnty. Dec. LEXIS 233 (July 18, 2007).

9. Appeal of an order denying an inmate's motion for judgment on the pleadings was recommended to be quashed because such an order was an interlocutory, rather than a final, order under Pa. R. App. P. 341 and could not be appealed as of right under Pa. R. App. P. 311; the inmate also failed to ask for permission to appeal under Pa. R. App. P. 312 and Pa. R. App. P. 1311. Byrd v. Paris, 2005 Phila. Ct. Com. Pl. LEXIS 541 (Dec. 14, 2005).

10. In a Pa.R.A.P. 1925 opinion, where defendants' summary judgment motion was denied in part, defendants' appeal was procedurally improper because the appeal was interlocutory for which certification was not granted, it was not an appeal as of right, it was not an appeal from a final order, and it did not constitute a collateral issue since the issue of immunity was not separable from the rest of the action; also, summary judgment was inappropriate as to an employee's claims because, inter alia, defendants were not high public officials for the purpose of absolute immunity. Pescatore v. Sch. Dist. of Phila., 2014 Phila. Ct. Com. Pl. LEXIS 317 (Aug. 26, 2014).

11. Appellate court lacked jurisdiction to review a summary judgment in favor of an account holder because, inter alia, as a codefendant bank had filed a timely and meritorious motion to open a default judgment, that default judgment was not final; therefore, the summary judgment did not dispose of all claims and of all parties because the claims involving the bank had not been disposed of and was not a final order. Further, the estate did not file a petition seeking permission to appeal. Estate of Matthew Considine v. Wachovia Bank, 2009 PA Super 21, 966 A.2d 1148, 2009 Pa. Super. LEXIS 26 (Pa. Super. Ct. 2009).

12. In a negligence action, there was no valid jurisdictional basis for the insurance carrier's appeal because even though the carrier purported to appeal from the summary judgment order, that order did not apply to the carrier where the certified portion related to the insureds' appeal, and the carrier failed to obtain permission to appeal. Wisniski v. Brown & Brown Ins. Co., 2004 PA Super 211, 852 A.2d 1206, 2004 Pa. Super. LEXIS 1319 (Pa. Super. Ct. 2004), vacated by, remanded by 585 Pa. 44, 887 A.2d 1238, 2005 Pa. LEXIS 2927 (2005).

13. A corporate owner improperly sought review of a trial court order directing him to supply an accounting of corporate benefits or profits in response to his partner's suit to enjoin the owner from wasting corporate assets; the court quashed the appeal without prejudice because an order directing an accounting was not among the interlocutory appeals allowed as of right under Pa. R. App. P. 312, and because the owner had not petitioned for permission to take such an

appeal pursuant to Pa. R. App. P. 1311. Sanders v. Seay, 301 Pa. Super. 342, 447 A.2d 998, 1982 Pa. Super. LEXIS 4538 (1982).

14. The court quashed the fraternal order of police's (FOP) appeal of the trial court's contempt order on the ground that the FOP had failed to request permission to appeal the interlocutory order; because the FOP had no automatic right to appeal the contempt order, the court lacked jurisdiction to hear the appeal. Hurst v. Shaw, 121 Pa. Commw. 1, 549 A.2d 1349, 1988 Pa. Commw. LEXIS 854 (1988), appeal denied by 522 Pa. 621, 563 A.2d 889 (1989).

15. In a Pa.R.A.P. 1925 opinion, where defendants' summary judgment motion was denied in part, defendants' appeal was procedurally improper because the appeal was interlocutory for which certification was not granted, it was not an appeal as of right, it was not an appeal from a final order, and it did not constitute a collateral issue since the issue of immunity was not separable from the rest of the action; also, summary judgment was inappropriate as to an employee's claims because, inter alia, defendants were not high public officials for the purpose of absolute immunity. Pescatore v. Sch. Dist. of Phila., 2014 Phila. Ct. Com. Pl. LEXIS 317 (Aug. 26, 2014).

16. In support of an affirmance on appeal under Pa. R. App. P. 1925, it was opined that as a consolidation order was not a final order and it did not dispose of all claims and all parties under Pa. R. App. P. 341(a), the order was not separable from and collateral to the main cause of action under Pa. R. App. P. 313(a), and permission was not sought to file the appeal from the order, which was interlocutory, under Pa. R. App. P. 1311 and 311, quashing the appeal was warranted. City of Phila. v. Lerner, 2012 Phila. Ct. Com. Pl. LEXIS 353 (Oct. 19, 2012).

17. Court recommended that its denial of corporations' preliminary objections to a hotel's joinder complaint in a negligence action be affirmed because, inter alia, pursuant to Pa. R. App. P. 1311(a) an appeal may have been taken by permission from an interlocutory order, but the corporations failed to follow the proper procedure for filing an interlocutory appeal. Bentzley v. Hilton Hotels Corp., 2011 Phila. Ct. Com. Pl. LEXIS 291 (Oct. 14, 2011).

18. Although the trial court refused to certify for interlocutory appeal the question of disqualification of the township solicitor from representing two township supervisors who were defendants in a recall action, the supreme court did not lack jurisdiction to consider the present petition. Silver v. Downs, 493 Pa. 50, 425 A.2d 359, 1981 Pa. LEXIS 602 (1981).

19. Although school entities' petitions for review of discovery orders in an action by a student, alleging negligent supervision of employees and related claims, were denied under Pa. R. App. P. 1311, the law of the case did not prevent review under the collateral order doctrine of Pa. R. App. P. 313 because it was possible that such denial was based on the anticipated collateral order review. T.M. v. Elwyn, Inc., 2008 PA Super 113, 950 A.2d 1050, 2008 Pa. Super. LEXIS 1109 (Pa. Super. Ct. 2008).

20. In support of an affirmance under Pa. R. App. P. 1925, it was opined that an appeal from a decision regarding the striking of exhibits in a statutory appeal of a decision of the Philadelphia Board of Labor Standards should be quashed because the appeal was interlocutory, and was not within the category of appealable interlocutory orders by permission because neither condition was met. Lp Group 2, Inc. v. Phila. Labor Stds. Unit, 2015 Phila. Ct. Com. Pl. LEXIS 74

(Feb. 3, 2015).

21. In this Pa. R. App. 1925(a) proceeding, the trial court recommended that an owner's appeal of an order overruling his preliminary objections be quashed as: (1) the order appealed was interlocutory as it did not dispose of all claims for all parties and was not a final order under Pa. R. App. P. 341; (2) the order was not a collateral order under Pa. R. App. P. 313(b); and (3) the owner did not have the right or permission to appeal the interlocutory order under Pa. R. App. P. 311 and 1311. Bank of N.Y. Mellon v. Taggart, 2012 Phila. Ct. Com. Pl. LEXIS 386 (Nov. 14, 2012).

22. Court recommended that its judgment be affirmed because, inter alia, the court's dismissal of the claimant's exceptions to a bill of costs did not dispose of all claims and all parties and was not a final appealable order for Pa. R. App. P. 341 purposes; also, the claimant's exceptions to a bill of costs sought relief that was inseparable from the main cause of action and the claimant did not seek permission to appeal an interlocutory order. Wilson v. Travelers INS. Co., 2012 Phila. Ct. Com. Pl. LEXIS 179 (June 1, 2012).

23. Petitioners' appeal was quashed because it appealed a final order by petition for permission to appeal when they were obligated to file a notice of appeal within 30 days of the final order pursuant to Pa. R. App. P. 902 and Pa. R. App. P. 903; the court held that it could not permit a party to appeal a final order by means of the procedure established for appealing interlocutory orders by permission under Pa. R. App. P. 1311. Womeldorf by Womeldorf v. Cooper, 654 A.2d 238, 1995 Pa. Commw. LEXIS 58 (Pa. Commw. Ct. 1995).

24. On a complaint in mortgage foreclosure brought by a bank against a building company, the building company's appeal of an order of the trial court that granted the bank's preliminary objections to the building company's new matter and counterclaim to the bank's complaint was quashed because the building company's appeal was not an appeal from a final order under Pa. R. App. P. 341, from a collateral order under Pa. R. App. P. 313, from an interlocutory order by permission under Pa. R. App. P. 313 and 1311 and 42 Pa. Cons. Stat. Ann. § 702(b), or from an interlocutory order as of right under Pa. R. App. P. 311. Continental Bank v. Andrew Bldg. Co., 436 Pa. Super. 559, 648 A.2d 551, 1994 Pa. Super. LEXIS 2846 (1994).

25. Court treated an order of the Board of Claims as a final order and appealable as a matter of right under Pa. R. App. P. 341(a) where the order of the board granted preliminary objections, and dismissed a petitioner's complaint and thereby put the petitioner out of court, and where the board intended to certify to the commonwealth court under Pa. R. App. P. 1311. Vartan v. Commonwealth, 151 Pa. Commw. 86, 616 A.2d 160, 1992 Pa. Commw. LEXIS 626 (1992), appeal denied by 535 Pa. 627, 629 A.2d 1386 (1993).

26. Trial court's order appointing a common law arbitrator was not a final, appealable order and, because the insurer failed to seek leave to appeal pursuant to Pa. R. App. P. 1311 and 42 Pa.C.S. § 702, the appeal was dismissed. Cassidy v. Keystone Ins. Co., 297 Pa. Super. 421, 443 A.2d 1193, 1982 Pa. Super. LEXIS 3833 (1982), vacated by 322 Pa. Super. 168, 469 A.2d 236, 1983 Pa. Super. LEXIS 4453 (1983).

27. In support of an affirmance under Pa. R. App. P. 1925, it was opined that an appeal from a decision regarding the striking of exhibits in a statutory appeal of a decision of the Philadelphia Board of Labor Standards should be quashed because the appeal was interlocutory, and was not within the category of appealable interlocutory orders by permission because neither condition was met. Lp Group 2, Inc. v. Phila. Labor Stds. Unit, 2015 Phila. Ct. Com. Pl. LEXIS 74 (Feb. 3, 2015).

28. In a medical malpractice action, a trial court denied a hospital's motion for immediate appellate certification because the hospital failed to articulate how an immediate appeal would materially advance the ultimate termination of the litigation since its argument relied upon proposed changes to the Certificate of Merit procedures set forth in Pa.R.C.P.

No. 1042.3, and only the Supreme Court of Pennsylvania may amend or modify its rules. Thach v. Abington Mem. Hosp., 2014 Phila. Ct. Com. Pl. LEXIS 285 (Sept. 9, 2014).

29. In support of an affirmance on appeal under Pa. R. App. P. 1925, it was opined that a mortgagor's motion to quash a motion to stay was not appealable, as it was a non-final, interlocutory order pursuant to Pa. R. App. P. 1311 and 311; the order was not final and it was not a collateral order pursuant to Pa. R. App. P. 341 and 313(b), as it was improperly filed as a motion rather than an answer, such that it was denied as procedurally defective. Third Fed. Bank v. Slafman, 2013 Phila. Ct. Com. Pl. LEXIS 90 (Apr. 15, 2013).

30. Pursuant to 42 Pa.C.S. § 762(a)(4), the Commonwealth Court had exclusive jurisdiction of a mother's interlocutory appeal from an order of a trial court, wherein her challenge to charges against her regarding compulsory school attendance of her daughters pursuant to 24 P.S. § 13-1326 was denied; her petition for permission for an interlocutory appeal pursuant to Pa. R. App. P. 1311 had been granted. Commonwealth v. Kerstetter, 62 A.3d 1065, 2013 Pa. Commw. LEXIS 49 (Pa. Commw. Ct. 2013), affirmed by 2014 Pa. LEXIS 1500 (Pa. June 16, 2014).

31. In this Pa. R. App. 1925(a) proceeding, the trial court recommended that an owner's appeal of an order overruling his preliminary objections be quashed as: (1) the order appealed was interlocutory as it did not dispose of all claims for all parties and was not a final order under Pa. R. App. P. 341; (2) the order was not a collateral order under Pa. R. App. P. 313(b); and (3) the owner did not have the right or permission to appeal the interlocutory order under Pa. R. App. P. 311 and 1311. Bank of N.Y. Mellon v. Taggart, 2012 Phila. Ct. Com. Pl. LEXIS 386 (Nov. 14, 2012).

32. In a proceeding pursuant to Pa. R. App. P. 1925(b), in an action brought by a city seeking to collect on a delinquent business privilege tax owed by a taxpayer, the trial court held that the taxpayer waived all issues raised in his Rule 1925(b) statement for failing to comply with the rule and recommended that the appeal be quashed because the order appealed from was interlocutory and he failed to request permission to appeal that interlocutory order. City of Phila. v. Lerner, 2012 Phila. Ct. Com. Pl. LEXIS 206 (July 2, 2012).

33. Court recommended that its judgment be affirmed because, inter alia, the court's dismissal of the claimant's exceptions to a bill of costs did not dispose of all claims and all parties and was not a final appealable order for Pa. R. App. P. 341 purposes; also, the claimant's exceptions to a bill of costs sought relief that was inseparable from the main cause of action and the claimant did not seek permission to appeal an interlocutory order. Wilson v. Travelers INS. Co., 2012 Phila. Ct. Com. Pl. LEXIS 179 (June 1, 2012).

34. When an alleged injured party sought to appeal the denial of the party's motion to compel discovery, the party did not comply with the requirements for bringing an interlocutory appeal because, (1) while the party filed an application to amend the trial court's order to include a statement that the order involved a controlling question of law as to which there was substantial ground for difference of opinion and that an immediate appeal from the order might materially advance the ultimate termination of the litigation, under 42 Pa.C.S. § 702, which was denied, the party sought no permission to appeal the interlocutory order, and (2) such a finding was not justified, as the appeal involved a moot request for information, and the party's requests were thinly-veiled attempts to receive disputed information in his Right to Know Act, 35 Pa. Stat. Ann. § 7301 et seq., requests that were the subject of litigation. Crockett v. Septa, 2012 Phila. Ct. Com. Pl. LEXIS 70 (Feb. 13, 2012).

35. Court recommended that its denial of corporations' preliminary objections to a hotel's joinder complaint in a negligence action be affirmed because, inter alia, pursuant to Pa. R. App. P. 1311(a) an appeal may have been taken by permission from an interlocutory order, but the corporations failed to follow the proper procedure for filing an interlocutory appeal. Bentzley v. Hilton Hotels Corp., 2011 Phila. Ct. Com. Pl. LEXIS 291 (Oct. 14, 2011).

36. Appellate court lacked jurisdiction to review a summary judgment in favor of an account holder because, inter alia, as a codefendant bank had filed a timely and meritorious motion to open a default judgment, that default judgment was

not final; therefore, the summary judgment did not dispose of all claims and of all parties because the claims involving the bank had not been disposed of and was not a final order. Further, the estate did not file a petition seeking permission to appeal. Estate of Matthew Considine v. Wachovia Bank, 2009 PA Super 21, 966 A.2d 1148, 2009 Pa. Super. LEXIS 26 (Pa. Super. Ct. 2009).

37. Although school entities' petitions for review of discovery orders in an action by a student, alleging negligent supervision of employees and related claims, were denied under Pa. R. App. P. 1311, the law of the case did not prevent review under the collateral order doctrine of Pa. R. App. P. 313 because it was possible that such denial was based on the anticipated collateral order review. T.M. v. Elwyn, Inc., 2008 PA Super 113, 950 A.2d 1050, 2008 Pa. Super. LEXIS 1109 (Pa. Super. Ct. 2008).

38. Court recommended its discovery order be affirmed because the order was limited in location, time, and incident, and stipulated the redaction of all confidential identifying information. As defendant's interlocutory appeal of the discovery order under Pa. R. App. P. 1311 was an attempt to stall the judicial proceedings, it should be denied. Massarelli v. Elwyn, Inc., 2007 Pa. Dist. & Cnty. Dec. LEXIS 233 (July 18, 2007).

39. In response to defendant's petition under Pa. R. App. P. 1311 for permission to appeal an order that granted defendant's petition to open a default judgment, the trial court opined that leave should be denied; the order did not contain the 42 Pa.C.S. § 702(b) language that was a jurisdictional prerequisite, and defendant had been given all the relief she sought. Seymour Krupnick v. Vega, 2007 Phila. Ct. Com. Pl. LEXIS 268 (Mar. 8, 2007).

40. Trial court found that the order barring plaintiff from filing a complaint as an open pleading was not an interlocutory order subject to appeal under Pa. R. App. P. 1311 because 42 Pa.C.S. § 702(b) was not implicated in the case; plaintiff had not filed any petition, there was no controlling question of law open to any substantial difference of opinion, and the appeal did not materially advance the resolution of the case. Green v. Firsttrust Bank, 2006 Phila. Ct. Com. Pl. LEXIS 307 (July 14, 2006).

41. Appeal of an order denying an inmate's motion for judgment on the pleadings was recommended to be quashed because such an order was an interlocutory, rather than a final, order under Pa. R. App. P. 341 and could not be appealed as of right under Pa. R. App. P. 311; the inmate also failed to ask for permission to appeal under Pa. R. App. P. 312 and Pa. R. App. P. 1311. Byrd v. Paris, 2005 Phila. Ct. Com. Pl. LEXIS 541 (Dec. 14, 2005).

42. While the trial court order which found that the parties' antenuptial agreement was a valid enforceable contract presented a controlling question of law as to which there was substantial ground for difference of opinion, an immediate appeal would not materially advance the ultimate termination of the case, so an interlocutory order by permission, pursuant to Pa. R. App. P. 312, Pa. R. App. P. 1311, and 42 Pa.C.S. § 702(b), was denied. Kensey v. Kensey, 2005 PA Super 232, 877 A.2d 1284, 2005 Pa. Super. LEXIS 1513 (Pa. Super. Ct. 2005).

43. Wife's appeal of an interlocutory order declaring the validity of an antenuptial agreement was quashed; although the trial court had certified the order for appeal under 42 Pa.C.S. § 702(b), the wife failed to perfect her appeal by filing a petition for permission to appeal as required by Pa. R. App. P. 1311(b), and therefore, the appeal could not be considered under Pa. R. App. P. 312. Kensey v. Kensey, 2004 PA Super 441, 2004 Pa. Super. LEXIS 4417 (Pa. Super. Ct. 2004), substituted opinion at 2005 PA Super 232, 877 A.2d 1284, 2005 Pa. Super. LEXIS 1513 (Pa. Super. Ct. 2005).

44. In an interlocutory appeal pursuant to 42 Pa.C.S. § 702(b) and Pa. R. App. P. 1311(a) and (b), the trial court erred in affirming an appraisal of property by a county board of assessment; the owners had not applied for a zoning change of the agricultural land, so the possibility of rezoning should not have been considered in the assessment pursuant to 72 P.S. § 5020-402. ENF Family P'ship v. Erie County Bd. of Assessment Appeals, 861 A.2d 438, 2004 Pa. Commw. LEXIS 826 (Pa. Commw. Ct. 2004), appeal denied by 584 Pa. 681, 880 A.2d 1241, 2005 Pa. LEXIS 1763 (2005).

45. Where, on the same day the trial court granted summary judgment pursuant to Pa. R. Civ. P. 1035.2 in favor of the insured party and spouse finding that the insurer, as a matter of public policy, could not deny underinsured motorist coverage to the spouse based upon a named driver exclusion, where an appellate court issued a decision in another case stating that it was not inconsistent with public policy for an insurer to deny underinsured motorist benefits based upon a named driver exclusion, and where the trial court, consequently, had to vacate its previous award of summary judgment, the trial court granted the parties permission to file an interlocutory appeal pursuant to 42 Pa.C.S. § 702(b); it found that its decision vacating summary judgment involved a controlling question of law as to which there was a substantial ground for difference of opinion and that an immediate appeal of the trial court's order pursuant to Pa. R. App. P. 1311(a) could materially advance the ultimate termination of the matter. Hart v. State Farm Mut. Auto. Ins. Co., 67 Pa. D. & C.4th 24, 2004 Pa. Dist. & Cnty. Dec. LEXIS 147 (2004).

46. Although the trial court's denial of a city's preliminary objections to plaintiff's trespass action, which claimed that the statute of limitations had run before the claim was filed and that proper service was not effected until more than two years after the incident, was an interlocutory order and not appealable, the court permitted the city's appeal. McCreech v. City of Phila., 839 A.2d 1206, 2003 Pa. Commw. LEXIS 930 (Pa. Commw. Ct. 2003), reversed by, remanded by 585 Pa. 211, 888 A.2d 664, 2005 Pa. LEXIS 3083 (2005).

47. Insurer sought and obtained an appellate court's permission to appeal a trial court's interlocutory order pursuant to 42 Pa.C.S. § 702(b) and Pa. R. App. P. 1311(a); the trial court erred by compelling arbitration of the injured party's underinsured motorist (UIM) claim because there was no agreement to arbitrate the claim where the insurance policy's arbitration provision did not apply to UIM claims. Neuhard v. Travelers Ins. Co., 2003 PA Super 275, 831 A.2d 602, 2003 Pa. Super. LEXIS 2322 (Pa. Super. Ct. 2003).

48. Where the trial court's order merely denied the group home's preliminary objections, it did not dismiss the home and the home thereafter failed to follow the appeal procedures in the parent's negligence action. F.D.P. ex rel S.M.P. v. Ferrara, 2002 PA Super 223, 804 A.2d 1221, 2002 Pa. Super. LEXIS 2870 (Pa. Super. Ct. 2002), appeal denied by 577 Pa. 721, 847 A.2d 1286, 2004 Pa. LEXIS 412 (2004).

49. Township's interlocutory appeal of a public utility commission decision was quashed where the proper procedures were not followed pursuant to Pa. R. App. P. 1311(b). Township of Middletown v. Pennsylvania PUC, 729 A.2d 640, 1999 Pa. Commw. LEXIS 233 (Pa. Commw. Ct. 1999).

50. If the court refuses to amend its order to include the requisite certification as requested under 42 Pa.C.S. § 702(b), it must do so by order denying the amendment; the appealing party must then challenge the order denying the amendment by filing a petition for review pursuant to Pa. R. App. P. ch. 15, rather than a petition for permission to appeal under Pa. R. App. P. ch. 13. Borough of Mifflinburg v. Heim, 705 A.2d 456, 1997 Pa. Super. LEXIS 4020 (Pa. Super. Ct. 1997), appeal denied by 568 Pa. 642, 794 A.2d 359, 1999 Pa. LEXIS 714 (1999).

51. Board of assessment's denial of class certification for taxpayers' assessment appeals was an interlocutory order and not appealable by right under Pa. R. App. P. 311, but taxpayers were required to file a petition for permission to appeal pursuant to 42 Pa. Con. Stat. § 702(b) and Pa. R. App. P. 1311. In re Class Action Appeal of Kelly, 704 A.2d 172, 1997 Pa. Commw. LEXIS 869 (Pa. Commw. Ct. 1997).

52. Pa. R. App. P. 1311(a) governs interlocutory appeals by permission and provides, in part, that an appeal may be taken by permission under 42 Pa. Cons. Stat. § 702(b) from any interlocutory order of a lower court or other government unit. Hanselman v. Consolidated Rail Corp., 664 A.2d 680, 1995 Pa. Commw. LEXIS 409 (Pa. Commw. Ct. 1995), appeal denied sub nomine Hanselman v. Pennsylvania DOT, 543 Pa. 732, 673 A.2d 337, 1996 Pa. LEXIS 230 (1996).

53. Petitioners' appeal was quashed because it appealed a final order by petition for permission to appeal when they were obligated to file a notice of appeal within 30 days of the final order pursuant to Pa. R. App. P. 902 and Pa. R. App. P. 903; the court held that it could not permit a party to appeal a final order by means of the procedure established for appealing interlocutory orders by permission under Pa. R. App. P. 1311. Womeldorf by Womeldorf v. Cooper, 654 A.2d 238, 1995 Pa. Commw. LEXIS 58 (Pa. Commw. Ct. 1995).

54. On a complaint in mortgage foreclosure brought by a bank against a building company, the building company's appeal of an order of the trial court that granted the bank's preliminary objections to the building company's new matter and counterclaim to the bank's complaint was quashed because the building company's appeal was not an appeal from a final order under Pa. R. App. P. 341, from a collateral order under Pa. R. App. P. 313, from an interlocutory order by permission under Pa. R. App. P. 313 and 1311 and 42 Pa. Cons. Stat. Ann. § 702(b), or from an interlocutory order as of right under Pa. R. App. P. 311. Continental Bank v. Andrew Bldg. Co., 436 Pa. Super. 559, 648 A.2d 551, 1994 Pa. Super. LEXIS 2846 (1994).

55. Court treated an order of the Board of Claims as a final order and appealable as a matter of right under Pa. R. App. P. 341(a) where the order of the board granted preliminary objections, and dismissed a petitioner's complaint and thereby put the petitioner out of court, and where the board intended to certify to the commonwealth court under Pa. R. App. P. 1311. Vartan v. Commonwealth, 151 Pa. Commw. 86, 616 A.2d 160, 1992 Pa. Commw. LEXIS 626 (1992), appeal denied by 535 Pa. 627, 629 A.2d 1386 (1993).

56. Insurer's appeal from a motion compelling arbitration was an interlocutory appeal, not appealable by right, and the court quashed it because the insurer neglected to seek permission to appeal from the interlocutory order as required by Pa. R. App. P. 1311. Patton v. Hanover Ins. Co., 417 Pa. Super. 351, 612 A.2d 517, 1992 Pa. Super. LEXIS 2744 (1992).

57. In an interlocutory appeal pursuant to Pa. R. App. P. 1311, the court determined that a city zoning board did not have jurisdiction over objectors' challenge to a zoning ordinance because landowners had not yet attempted to use the property in a manner consistent with the amended zoning. Hermitage v. Zoning Hearing Bd., 149 Pa. Commw. 488, 613 A.2d 612, 1992 Pa. Commw. LEXIS 522 (1992), appeal denied by 533 Pa. 637, 621 A.2d 582 (1993).

58. Remand orders are interlocutory and are not appealable except by permission. Macaluso v. Workmen's Compensation Appeal Bd. (Philadelphia College of Osteopathic Medicine), 142 Pa. Commw. 436, 597 A.2d 730, 1991 Pa. Commw. LEXIS 519 (1991).

59. An appeal may be taken by permission from any interlocutory order of a lower court or other government unit. Department of Environmental Resources v. Winn, 142 Pa. Commw. 375, 597 A.2d 281, 1991 Pa. Commw. LEXIS 509 (1991), appeal denied by 529 Pa. 654, 602 A.2d 863 (1992).

60. Where former employer, under Pa. R. App. P. 1311, sought permission to appeal seeking review of a final order appealable as of right, where the proper procedure would be to file a notice of appeal, the matter was treated as a notice of appeal in an action to enforce a restrictive covenant. Thermo-Guard, Inc. v. Cochran, 408 Pa. Super. 54, 596 A.2d 188, 1991 Pa. Super. LEXIS 2499 (1991).

61. The court quashed the fraternal order of police's (FOP) appeal of the trial court's contempt order on the ground that the FOP had failed to request permission to appeal the interlocutory order; because the FOP had no automatic right to appeal the contempt order, the court lacked jurisdiction to hear the appeal. Hurst v. Shaw, 121 Pa. Commw. 1, 549 A.2d 1349, 1988 Pa. Commw. LEXIS 854 (1988), appeal denied by 522 Pa. 621, 563 A.2d 889 (1989).

62. Petitioner workmen's compensation claimant's appeal of respondent workmen's compensation appeal board's partial supersedeas order was quashed because petitioner failed to request permission to file an interlocutory appeal as required

under Pa. R. App. P. 1311(b) and 42 Pa. Cons. Stat. § 702(b), and the court was without jurisdiction to hear the appeal. Knisch v. Workmen's Compensation Appeal Bd. (Jerome Enterprises), 113 Pa. Commw. 204, 536 A.2d 856, 1988 Pa. Commw. LEXIS 89 (1988), quashed by 520 Pa. 609, 553 A.2d 971 (1988).

63. An appeal from an order directing an accounting must normally be quashed when no petition has been filed in the lower court for permission to take such an appeal as required by Pa. R. App. P. 1311. Levin v. Barish, 314 Pa. Super. 347, 460 A.2d 1174, 1983 Pa. Super. LEXIS 3132 (1983), affirmed in part and reversed in part by 505 Pa. 514, 481 A.2d 1183, 1984 Pa. LEXIS 308 (1984).

64. A corporate owner improperly sought review of a trial court order directing him to supply an accounting of corporate benefits or profits in response to his partner's suit to enjoin the owner from wasting corporate assets; the court quashed the appeal without prejudice because an order directing an accounting was not among the interlocutory appeals allowed as of right under Pa. R. App. P. 312, and because the owner had not petitioned for permission to take such an appeal pursuant to Pa. R. App. P. 1311. Sanders v. Seay, 301 Pa. Super. 342, 447 A.2d 998, 1982 Pa. Super. LEXIS 4538 (1982).

65. Trial court's order appointing a common law arbitrator was not a final, appealable order and, because the insurer failed to seek leave to appeal pursuant to Pa. R. App. P. 1311 and 42 Pa.C.S. § 702, the appeal was dismissed. Cassidy v. Keystone Ins. Co., 297 Pa. Super. 421, 443 A.2d 1193, 1982 Pa. Super. LEXIS 3833 (1982), vacated by 322 Pa. Super. 168, 469 A.2d 236, 1983 Pa. Super. LEXIS 4453 (1983).

66. Trial judge's unwillingness to recuse himself was a discretionary decision subject to interlocutory appeal under 42 Pa.C.S. § 702(b) and Pa. R. App. P. 1311(a); recusal could not have been specifically ordered by writ of mandamus or writ of prohibition. United States Steel Corp. v. Papadakos, 63 Pa. Commw. 213, 437 A.2d 1044, 1981 Pa. Commw. LEXIS 1937 (1981), criticized by Municipal Publications, Inc. v. Snyder, 322 Pa. Super. 464, 469 A.2d 1084, 1983 Pa. Super. LEXIS 4431 (1983).

67. Where the trial court dismissed only one of two counts of a complaint, the plaintiff could not appeal the dismissal on the grounds that the order was not a final order and that there was no basis upon which to appeal the interlocutory order as of right, or by statute or general rule, or by permission under Pa. R. App. P. 1311. Esh v. Awglis, 291 Pa. Super. 528, 436 A.2d 242, 1981 Pa. Super. LEXIS 3627 (1981).

68. Although the trial court refused to certify for interlocutory appeal the question of disqualification of the township solicitor from representing two township supervisors who were defendants in a recall action, the supreme court did not lack jurisdiction to consider the present petition. Silver v. Downs, 493 Pa. 50, 425 A.2d 359, 1981 Pa. LEXIS 602 (1981).

69. Employer and insurer were unable to appeal an order of the Workmen's Compensation Board reinstating the claimant's total disability benefits because such remand order was interlocutory and unappealable. York Hospital & Pennsylvania Mfrs. Asso. Ins. Co. v. Workmen's Compensation Appeal Board, 52 Pa. Commw. 434, 415 A.2d 1005, 1980 Pa. Commw. LEXIS 1561 (1980).

70. Appellate court was without authority to grant the education association's petition for interlocutory appeal by permission, where, pursuant to 43 P.S. § 1101.1003, the court below had enjoined it from a work stoppage; the statement pursuant to Pa. R. App. P. 1311(b) was a condition precedent to the appellate court's allowance of an interlocutory appeal by permission and the court below refused to amend its decree to provide such a statement. Butler Education Asso. v. Butler Area School Dist., 34 Pa. Commw. 143, 382 A.2d 1283, 1978 Pa. Commw. LEXIS 891 (1978).

71. Appellate court declined to entertain the petition of education association for review of lower court's denial of its

motion to amend lower court's decree enjoining a work stoppage; the thrust of the association's petition for review was its request for "'prerogative appellate correction," pursuant to Pa. R. App. P. 1311, of the decree, and the lower court's denial was not so egregious as to warrant the appellate court's review. Butler Education Asso. v. Butler Area School Dist., 34 Pa. Commw. 143, 382 A.2d 1283, 1978 Pa. Commw. LEXIS 891 (1978).

72. Wife's appeal of an interlocutory order declaring the validity of an antenuptial agreement was quashed; although the trial court had certified the order for appeal under 42 Pa.C.S. § 702(b), the wife failed to perfect her appeal by filing a petition for permission to appeal as required by Pa. R. App. P. 1311(b), and therefore, the appeal could not be considered under Pa. R. App. P. 312. Kensey v. Kensey, 2004 PA Super 441, 2004 Pa. Super. LEXIS 4417 (Pa. Super. Ct. 2004), substituted opinion at 2005 PA Super 232, 877 A.2d 1284, 2005 Pa. Super. LEXIS 1513 (Pa. Super. Ct. 2005).

73. In support of an affirmance on appeal under Pa. R. App. P. 1925, it was opined that as a consolidation order was not a final order and it did not dispose of all claims and all parties under Pa. R. App. P. 341(a), the order was not separable from and collateral to the main cause of action under Pa. R. App. P. 313(a), and permission was not sought to file the appeal from the order, which was interlocutory, under Pa. R. App. P. 1311 and 311, quashing the appeal was warranted. City of Phila. v. Lerner, 2012 Phila. Ct. Com. Pl. LEXIS 353 (Oct. 19, 2012).

74. Trial court found that the order barring plaintiff from filing a complaint as an open pleading was not an interlocutory order subject to appeal under Pa. R. App. P. 1311 because 42 Pa.C.S. § 702(b) was not implicated in the case; plaintiff had not filed any petition, there was no controlling question of law open to any substantial difference of opinion, and the appeal did not materially advance the resolution of the case. Green v. Firsttrust Bank, 2006 Phila. Ct. Com. Pl. LEXIS 307 (July 14, 2006).

75. In support of an affirmance on appeal under Pa. R. App. P. 1925, it was opined that a mortgagor's motion to quash a motion to stay was not appealable, as it was a non-final, interlocutory order pursuant to Pa. R. App. P. 1311 and 311; the order was not final and it was not a collateral order pursuant to Pa. R. App. P. 341 and 313(b), as it was improperly filed as a motion rather than an answer, such that it was denied as procedurally defective. Third Fed. Bank v. Slafinan, 2013 Phila. Ct. Com. Pl. LEXIS 90 (Apr. 15, 2013).

76. In a proceeding pursuant to Pa. R. App. P. 1925(b), in an action brought by a city seeking to collect on a delinquent business privilege tax owed by a taxpayer, the trial court held that the taxpayer waived all issues raised in his Rule 1925(b) statement for failing to comply with the rule and recommended that the appeal be quashed because the order appealed from was interlocutory and he failed to request permission to appeal that interlocutory order. City of Phila. v. Lerner, 2012 Phila. Ct. Com. Pl. LEXIS 206 (July 2, 2012).

77. Where former employer, under Pa. R. App. P. 1311, sought permission to appeal seeking review of a final order appealable as of right, where the proper procedure would be to file a notice of appeal, the matter was treated as a notice of appeal in an action to enforce a restrictive covenant. Thermo-Guard, Inc. v. Cochran, 408 Pa. Super. 54, 596 A.2d 188, 1991 Pa. Super. LEXIS 2499 (1991).

78. An appeal from an order directing an accounting must normally be quashed when no petition has been filed in the lower court for permission to take such an appeal as required by Pa. R. App. P. 1311. Levin v. Barish, 314 Pa. Super. 347, 460 A.2d 1174, 1983 Pa. Super. LEXIS 3132 (1983), affirmed in part and reversed in part by 505 Pa. 514, 481 A.2d 1183, 1984 Pa. LEXIS 308 (1984).

79. Order quashing a charge is final, entitling the State to appeal the order, because a trial on the remaining charges would permanently preclude a trial on the quashed charge since double jeopardy would protect the defendant. Commonwealth v. Karetny, 583 Pa. 514, 880 A.2d 505, 2005 Pa. LEXIS 1710 (2005).

80. Where defendant failed to follow the procedures set forth in Pa. R. App. P. 1311(b), which required that he petition the trial court to amend its pretrial order denying his request for suppression in order to include a statement pursuant to 42 Pa.C.S. § 702 as to certification, the appellate court had no jurisdiction to consider the issue on appeal. Commonwealth v. Strong, 2003 PA Super 157, 825 A.2d 658, 2003 Pa. Super. LEXIS 788 (Pa. Super. Ct. 2003), appeal denied by 577 Pa. 702, 847 A.2d 59, 2004 Pa. LEXIS 513 (2004), writ of certiorari denied by 544 U.S. 927, 125 S. Ct. 1652, 161 L. Ed. 2d 489, 2005 U.S. LEXIS 2560, 73 U.S.L.W. 3556 (2005).

81. Order denying lawyers' motion to withdraw in a criminal case was an appealable collateral order because, pursuant to the third prong of the Pa. R. App. P. 313 test, the lawyers' claim would have been lost if review was postponed until after final judgment; once a final judgment was reached in the underlying action, the right of counsel to withdraw would have become moot. Because the order fell under Pa. R. App. P. 313, an immediate appeal may have been taken as of right simply by filing a notice of appeal, and the procedures set forth in Pa. R. App. P. 341(c) and Pa. R. App. P. 1311 did not apply. Commonwealth v. Reading Group Two Props., Inc., 922 A.2d 1029, 2007 Pa. Commw. LEXIS 200 (Pa. Commw. Ct. 2007).

82. As a post conviction order granting appellee inmate's request for DNA testing pursuant to 42 Pa.C.S. § 9543.1 was not final, collateral, or an interlocutory order appealable by right, and the Commonwealth did not seek permission to file an interlocutory appeal, the order was not appealable and the appellate court had no jurisdiction to entertain the appeal. Commonwealth v. Scarborough, 2010 Pa. Commw. LEXIS 606 (Nov. 4, 2010).

83. As a post conviction order granting appellee inmate's request for DNA testing pursuant to 42 Pa.C.S. § 9543.1 was not final, collateral, or an interlocutory order appealable by right, and the Commonwealth did not seek permission to file an interlocutory appeal, the order was not appealable and the appellate court had no jurisdiction to entertain the appeal. Commonwealth v. Scarborough, 2010 Pa. Commw. LEXIS 606 (Nov. 4, 2010).

84. Where defendant failed to follow the procedures set forth in Pa. R. App. P. 1311(b), which required that he petition the trial court to amend its pretrial order denying his request for suppression in order to include a statement pursuant to 42 Pa.C.S. § 702 as to certification, the appellate court had no jurisdiction to consider the issue on appeal. Commonwealth v. Strong, 2003 PA Super 157, 825 A.2d 658, 2003 Pa. Super. LEXIS 788 (Pa. Super. Ct. 2003), appeal

denied by 577 Pa. 702, 847 A.2d 59, 2004 Pa. LEXIS 513 (2004), writ of certiorari denied by 544 U.S. 927, 125 S. Ct. 1652, 161 L. Ed. 2d 489, 2005 U.S. LEXIS 2560, 73 U.S.L.W. 3556 (2005).

85. Appeal filed by the Commonwealth of a pre-trial order compelling disclosure of a trooper's disciplinary file in a criminal case was deemed interlocutory and unappealable because the Commonwealth failed to request certification of the order under 42 Pa.C.S. § 702(b), or file a petition for permission to appeal pursuant to Pa.R.A.P. 1311. Commonwealth v. Brister, 2011 PA Super 35, 16 A.3d 530, 2011 Pa. Super. LEXIS 42 (Pa. Super. Ct. 2011).

86. Defendant was not entitled to nunc pro tunc certification of an underlying trial court order in order to obtain review of the trial court's denial of defendant's petition to transfer defendant's case from the adult criminal system to the juvenile system. Allowing defendant to do so would thwart the 30-day time limit of Pa. R. A. P. 1311(b) for obtaining a proper amendment of the order. Commonwealth v. McMurren, 2008 PA Super 34, 945 A.2d 194, 2008 Pa. Super. LEXIS 158 (Pa. Super. Ct. 2008).

87. Although the lower court included a 42 Pa.C.S. § 702(b) statement, because defendant failed to file a petition for permission to appeal with the reviewing court, but instead erroneously chose to file a notice of appeal, defendant did not trigger the reviewing court's jurisdiction as to the appeal of the interlocutory issue. Commonwealth v. Yingling, 2006 PA Super 319, 911 A.2d 572, 2006 Pa. Super. LEXIS 3762 (Pa. Super. Ct. 2006).

88. Commonwealth has an ability to seek review of a pre-trial ruling in favor of a defendant by proceeding with an interlocutory appeal by permission pursuant to Pa. R. App. P. 1311, which is done by requesting that a trial court certify the order in accordance with Section 702(b) of the Judicial Code, 42 Pa.C.S. § 702(b). Commonwealth v. Cosnek, 575 Pa. 411, 836 A.2d 871, 2003 Pa. LEXIS 2186 (2003), overruled in part by Commonwealth v. White, 589 Pa. 642, 910 A.2d 648, 2006 Pa. LEXIS 2274 (2006).

89. When a Pa. R. App. P. 1311 petition is incorrectly filed within 30 days of the order to be reviewed, Pa. R. App. P. 905(a) requires it be treated as a timely filed notice of appeal. Commonwealth v. Shull, 2002 PA Super 348, 811 A.2d 1, 2002 Pa. Super. LEXIS 3248 (Pa. Super. Ct. 2002), appeal denied by 572 Pa. 756, 818 A.2d 504, 2003 Pa. LEXIS 316 (2003).

90. Where defendant was charged with criminal mischief and ethnic intimidation, he incorrectly filed a petition for permission to appeal the interlocutory order pursuant to Pa. R. App. P. 1311, as a petition for permission to appeal under Pa. R. App. P. 1311 can be filed only when the trial court certifies the issue as a controlling question of law under 42 Pa.C.S. § 702(b). Commonwealth v. Shull, 2002 PA Super 348, 811 A.2d 1, 2002 Pa. Super. LEXIS 3248 (Pa. Super. Ct. 2002), appeal denied by 572 Pa. 756, 818 A.2d 504, 2003 Pa. LEXIS 316 (2003).

91. If the court refuses to amend its order to include the requisite certification as requested under 42 Pa.C.S. § 702(b), it must do so by order denying the amendment; the appealing party must then challenge the order denying the amendment by filing a petition for review pursuant to Pa. R. App. P. ch. 15, rather than a petition for permission to appeal under Pa. R. App. P. ch. 13. Borough of Mifflinburg v. Heim, 705 A.2d 456, 1997 Pa. Super. LEXIS 4020 (Pa. Super. Ct. 1997), appeal denied by 568 Pa. 642, 794 A.2d 359, 1999 Pa. LEXIS 714 (1999).

92. Defendant was not entitled to nunc pro tunc certification of an underlying trial court order in order to obtain review of the trial court's denial of defendant's petition to transfer defendant's case from the adult criminal system to the juvenile system. Allowing defendant to do so would thwart the 30-day time limit of Pa. R. A. P. 1311(b) for obtaining a proper amendment of the order. Commonwealth v. McMurren, 2008 PA Super 34, 945 A.2d 194, 2008 Pa. Super.

LEXIS 158 (Pa. Super. Ct. 2008).

93. Order denying lawyers' motion to withdraw in a criminal case was an appealable collateral order because, pursuant to the third prong of the Pa. R. App. P. 313 test, the lawyers' claim would have been lost if review was postponed until after final judgment; once a final judgment was reached in the underlying action, the right of counsel to withdraw would have become moot. Because the order fell under Pa. R. App. P. 313, an immediate appeal may have been taken as of right simply by filing a notice of appeal, and the procedures set forth in Pa. R. App. P. 341(c) and Pa. R. App. P. 1311 did not apply. Commonwealth v. Reading Group Two Props., Inc., 922 A.2d 1029, 2007 Pa. Commw. LEXIS 200 (Pa. Commw. Ct. 2007).

94. Appeal filed by the Commonwealth of a pre-trial order compelling disclosure of a trooper's disciplinary file in a criminal case was deemed interlocutory and unappealable because the Commonwealth failed to request certification of the order under 42 Pa.C.S. § 702(b), or file a petition for permission to appeal pursuant to Pa.R.A.P. 1311. Commonwealth v. Brister, 2011 PA Super 35, 16 A.3d 530, 2011 Pa. Super. LEXIS 42 (Pa. Super. Ct. 2011).

95. Order quashing a charge is final, entitling the State to appeal the order, because a trial on the remaining charges would permanently preclude a trial on the quashed charge since double jeopardy would protect the defendant. Commonwealth v. Karetny, 583 Pa. 514, 880 A.2d 505, 2005 Pa. LEXIS 1710 (2005).

96. Pursuant to 42 Pa.C.S. § 762(a)(4), the Commonwealth Court had exclusive jurisdiction of a mother's interlocutory appeal from an order of a trial court, wherein her challenge to charges against her regarding compulsory school attendance of her daughters pursuant to 24 P.S. § 13-1326 was denied; her petition for permission for an interlocutory appeal pursuant to Pa. R. App. P. 1311 had been granted. Commonwealth v. Kerstetter, 62 A.3d 1065, 2013 Pa. Commw. LEXIS 49 (Pa. Commw. Ct. 2013), affirmed by 2014 Pa. LEXIS 1500 (Pa. June 16, 2014).

97. Although a teacher's request for the trial court to certify its interlocutory order for appeal, arising from a school district's challenge to a grievance arbitration award, was refused, the appellate court allowed the interlocutory appeal under Pa. R. App. P. 1311. Pleasant Valley Sch. Dist. v. Schaeffer, 31 A.3d 1241, 2011 Pa. Commw. LEXIS 592, 192 L.R.R.M. (BNA) 2892 (Pa. Commw. Ct. 2011).

98. While the trial court order which found that the parties' antenuptial agreement was a valid enforceable contract presented a controlling question of law as to which there was substantial ground for difference of opinion, an immediate appeal would not materially advance the ultimate termination of the case, so an interlocutory order by permission, pursuant to Pa. R. App. P. 312, Pa. R. App. P. 1311, and 42 Pa.C.S. § 702(b), was denied. Kensey v. Kensey, 2005 PA Super 232, 877 A.2d 1284, 2005 Pa. Super. LEXIS 1513 (Pa. Super. Ct. 2005).

99. Where, on the same day the trial court granted summary judgment pursuant to Pa. R. Civ. P. 1035.2 in favor of the insured party and spouse finding that the insurer, as a matter of public policy, could not deny underinsured motorist coverage to the spouse based upon a named driver exclusion, where an appellate court issued a decision in another case

stating that it was not inconsistent with public policy for an insurer to deny underinsured motorist benefits based upon a named driver exclusion, and where the trial court, consequently, had to vacate its previous award of summary judgment, the trial court granted the parties permission to file an interlocutory appeal pursuant to 42 Pa.C.S. § 702(b); it found that its decision vacating summary judgment involved a controlling question of law as to which there was a substantial ground for difference of opinion and that an immediate appeal of the trial court's order pursuant to Pa. R. App. P. 1311(a) could materially advance the ultimate termination of the matter. Hart v. State Farm Mut. Auto. Ins. Co., 67 Pa. D. & C.4th 24, 2004 Pa. Dist. & Cnty. Dec. LEXIS 147 (2004).

100. On a complaint in mortgage foreclosure brought by a bank against a building company, the building company's appeal of an order of the trial court that granted the bank's preliminary objections to the building company's new matter and counterclaim to the bank's complaint was quashed because the building company's appeal was not an appeal from a final order under Pa. R. App. P. 341, from a collateral order under Pa. R. App. P. 313, from an interlocutory order by permission under Pa. R. App. P. 313 and 1311 and 42 Pa. Cons. Stat. Ann. § 702(b), or from an interlocutory order as of right under Pa. R. App. P. 311. Continental Bank v. Andrew Bldg. Co., 436 Pa. Super. 559, 648 A.2d 551, 1994 Pa. Super. LEXIS 2846 (1994).

101. In an interlocutory appeal pursuant to Pa. R. App. P. 1311, the court determined that a city zoning board did not have jurisdiction over objectors' challenge to a zoning ordinance because landowners had not yet attempted to use the property in a manner consistent with the amended zoning. Hermitage v. Zoning Hearing Bd., 149 Pa. Commw. 488, 613 A.2d 612, 1992 Pa. Commw. LEXIS 522 (1992), appeal denied by 533 Pa. 637, 621 A.2d 582 (1993).

102. As the denial of both an initial petition to intervene in an appeal of a zoning matter, as well as a second petition to intervene in the same ongoing litigation, were not appealable collateral orders under Pa. R. App. P. 313, the appeal was quashed; the trial court had denied the property owners' motion to amend the order to allow for an interlocutory appeal by permission under 42 Pa.C.S. § 702(b) and Pa. R. App. P. 1311, delay in review presented no danger, and the property owners had an adequate remedy through an action under 53 Pa. Stat. Ann. § 10617 of the Pennsylvania Municipalities Planning Code, 53 Pa. Stat. Ann. §§ 10101-11202 Fayette County Office of Planning v. Fayette County Zoning Hearing Bd., 981 A.2d 336, 2009 Pa. Commw. LEXIS 1478 (Pa. Commw. Ct. 2009).

103. Employer and insurer were unable to appeal an order of the Workmen's Compensation Board reinstating the claimant's total disability benefits because such remand order was interlocutory and unappealable. York Hospital & Pennsylvania Mfns. Asso. Ins. Co. v. Workmen's Compensation Appeal Board, 52 Pa. Commw. 434, 415 A.2d 1005, 1980 Pa. Commw. LEXIS 1561 (1980).

TREATISES AND ANALYTICAL MATERIALS

1. 1-36 Pennsylvania Civil Practice § 36.04, CHAPTER 36 APPEALS, Interlocutory Orders Appealable by Permission.
2. 14-231 Dunlap-Hanna Pennsylvania Forms P 231.01, CHAPTER 231 Appeals to Appellate Courts, Scope of Pennsylvania Rules of Appellate Procedure.

3. 14-231 Dunlap-Hanna Pennsylvania Forms P 231.10, CHAPTER 231 Appeals to Appellate Courts, Notice of Appeal to Superior or Commonwealth Court (Pa. R.A.P. 901-908).
4. 14-231 Dunlap-Hanna Pennsylvania Forms P 231.13, CHAPTER 231 Appeals to Appellate Courts, Petition for Permission to Appeal--Interlocutory Appeals by Permission (Pa. R.A.P. 1301-1323).
5. 14-231 Dunlap-Hanna Pennsylvania Forms P 231.14, CHAPTER 231 Appeals to Appellate Courts, Petition for Review--Review of Governmental Determinations Generally (Pa. R.A.P. 1501-1571).
6. 14-231 Dunlap-Hanna Pennsylvania Forms P 231.19, CHAPTER 231 Appeals to Appellate Courts, Applications for Ancillary Appellate Relief (Pa. R.A.P. 123)).
7. 14-244 Pennsylvania Transaction Guide--Legal Forms § 244.30, Division 1 Individuals and Families, Proceedings for Delinquent or Dependent Children.
8. 2 P.L.E. APPEALS § 21, Pennsylvania Law Encyclopedia, Finality, Copyright 2013, Matthew Bender & Company, Inc., a member of the LexisNexis Group.
9. 2 P.L.E. APPEALS § 195, Pennsylvania Law Encyclopedia, Application, Copyright 2013, Matthew Bender & Company, Inc., a member of the LexisNexis Group.
10. 2 P.L.E. APPEALS § 246, Pennsylvania Law Encyclopedia, -- Interlocutory Appeals, Copyright 2013, Matthew Bender & Company, Inc., a member of the LexisNexis Group.
11. 19 P.L.E. CRIMINAL LAW § 895, Pennsylvania Law Encyclopedia, -- Interlocutory Orders, Copyright 2013, Matthew Bender & Company, Inc., a member of the LexisNexis Group.
12. 2-112 Pennsylvania Benchbook for Criminal Proceedings § 112.01, Chapter 112, Governing Law.
13. 2-112 Pennsylvania Benchbook for Criminal Proceedings § 112.14, Chapter 112, Outline--Appellate Procedural and Substantive Issues.
14. 1-12 Pennsylvania Domestic Relations Forms § 12.1, CHAPTER 12 APPEALS TO THE SUPERIOR COURT, Practice Considerations.
15. 1-22 Pennsylvania Domestic Relations Forms § 22.1, CHAPTER 22 MISCELLANEOUS FORMS, Practice Considerations.



1 of 1 DOCUMENT

PENNSYLVANIA RULES OF COURT, ANNOTATED BY LEXISNEXIS(R)

* Pennsylvania State Court Rules reflect amendments received July 1, 2015 *

PENNSYLVANIA RULES OF APPELLATE PROCEDURE
ARTICLE II. APPELLATE PROCEDURE
CHAPTER 13. INTERLOCUTORY APPEALS BY PERMISSION

Pa. R.A.P. 1312 (2015)

Rule 1312. Content of the Petition for Permission to Appeal

(a) General rule. The petition for permission to appeal need not be set forth in numbered paragraphs in the manner of a pleading, and shall contain the following (which shall, insofar as practicable, be set forth in the order stated):

(1) A statement of the basis for the jurisdiction of the appellate court.

(2) The text of the order in question, or the portions thereof sought to be reviewed (including the statement by the lower court or other government unit that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter), and the date of its entry in the court or other government unit below. If the order is voluminous, it may, if more convenient, be appended to the petition.

(3) A concise statement of the case containing the facts necessary to an understanding of the controlling questions of law determined by the order of the lower court or other government unit.

(4) The controlling questions of law presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of questions presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition, or fairly comprised therein, will ordinarily be considered by the court in the event permission to appeal is granted.

(5) A concise statement of the reasons why a substantial ground exists for a difference of opinion on the questions and why an immediate appeal may materially advance the termination of the matter.

(6) There shall be appended to the petition a copy of any opinions delivered relating to the order sought to be reviewed, as well as all opinions of lower courts or other government units in the case, and, if reference thereto is necessary to ascertain the grounds of the order, opinions in companion cases. If whatever is required by this paragraph to be appended to the petition is voluminous, it may, if more convenient, be separately presented.

(7) There shall be appended to the petition the verbatim texts of the pertinent provisions of constitutional provisions, statutes, ordinances, regulations or other similar enactments which the case involves, and the citation to the volume and page where they are published, including the official edition, if any.

(b) Caption and parties. All parties to the proceeding in the lower court or other government unit other than petitioner shall be named as respondents, but respondents who support the position of the petitioner shall meet the time schedule for filing papers which is prescribed in this chapter for the petitioner, except that any response by such respondents to the petition shall be filed as promptly as possible after receipt of the petition.

(c) No supporting brief. All contentions in support of a petition for permission to appeal shall be set forth in the body of the petition as prescribed by Paragraph (a)(5) of this rule. Neither the briefs below nor any separate brief in support of a petition for permission to appeal will be received, and the prothonotary of the appellate court will refuse to file any petition for permission to appeal to which is annexed or appended any brief below or supporting brief.

(d) Essential requisites of petition. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.

(e) Multiple petitioners. Where permitted by Rule 512 (joint appeals) a single petition for permission to appeal may be filed.

Note: Based on former Commonwealth Court Rule 114. Subdivision (a)(2) of this rule makes clear that the order of the tribunal below must contain a statement that the order involves a controlling question of law as to which there is a difference of opinion.

Interlocutory appeals as of right may be taken by filing a notice of appeal under Chapter 9 (appeals from lower courts), rather than by petition under this rule. See Rule 311 (interlocutory appeals as of right).

LexisNexis (R) Notes:

CASE NOTES

Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

BARBARA LOLLY)	
)	
Complainant,)	
)	
v.)	Docket No. C-2010-2167824
)	
DUQUESNE LIGHT COMPANY,)	
)	
Respondent.)	

**EXCEPTIONS
OF
DUQUESNE LIGHT COMPANY**

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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 making 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,

A handwritten signature in cursive script that reads "Krysia Kubiak".

Krysia Kubiak
Attorney for Respondent
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411 7th Avenue (16-1)
Pittsburgh, PA 15219
Telephone: (412) 393-6505
FAX: (412) 393-5897

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. Luty, Jr.

Copies sent via First-Class Mail to:

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ALLEGHENY COUNTY

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EXHIBIT G

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.

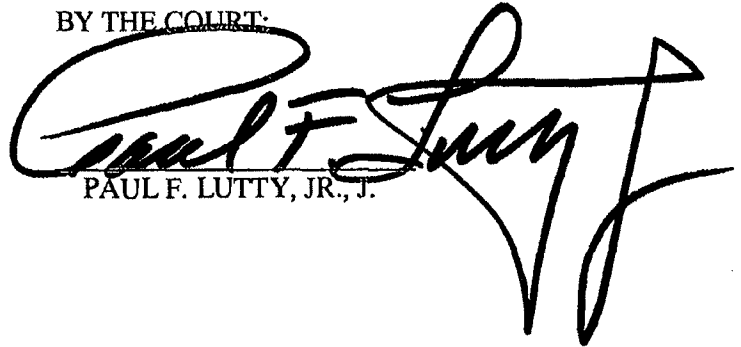
DUQUESNE LIGHT COMPANY,

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.

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. Luty, Jr.

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CIVIL/FAMILY DIVISION
ALLEGHENY COUNTY

2015 OCT 13 PM 4:13

FILED

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,

CIVIL DIVISION

GD 09-14720

Plaintiff,

vs.

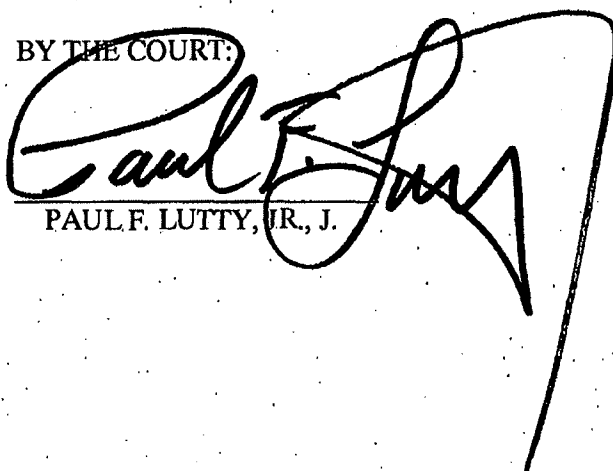
DUQUESNE LIGHT COMPANY,

Defendant.

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:

A large, stylized handwritten signature in black ink, appearing to read "Paul F. Luty, Jr.", is written over the printed name below. The signature is highly cursive and extends significantly to the right of the printed name.

PAUL F. LUTTY, JR., J.

ALDERWOODS (PENNSYLVANIA),
INC.,

V.

DUQUESNE LIGHT

:
:
:
:
:
:
:

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 82 WDM 2015

ORDER OF COURT

The Court hereby DENIES the petition for review.

PER CURIAM

EXHIBIT I