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

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

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

COMPLAINANT'S REPLY TO RESPONDENT'S ANSWER IN OPPOSITION TO COMPLAINANT'S PRELIMINARY OBJECTION TO JURISDICTION

Complainant, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home ("Complainant" or "Hirsch"), by and through its attorneys White and Williams LLP, submits the instant Reply to Respondent's Answer In Opposition To Complainant's Preliminary Objection To Jurisdiction.

In its Response, Respondent confirms its refusal to accept the holdings of Feingold v. Bell of Pennsylvania, 477 Pa. 1, 383 A.2d 791 (1977); Elkin v. Bell Telephone Company of Pennsylvania, 491 Pa. 123, 420 A.2d 371 (1980); DeFrancesco v. Western Pennsylvania Water Company, 499 Pa. 374, 453 A.2d 595 (1982); Schriner v. Pennsylvania Power and Light Company, 348 Pa. Super. 177, 501 A.2d 1128 (1985) and Poorbaugh v. Pennsylvania Public

Utility Commission, 666 A.2d 744 (Pa. Cmwlth. 1995), as to the varying roles of the courts and the P.U.C. in adjudicating claims. Moreover, because it serves Respondent's purpose, Respondent strains to see allegations by Hirsch of regulatory and statutory violations that just aren't there.

Respondent insists that bifurcation is acceptable, and not at odds with Feingold and progeny, because bifurcation only involves an assessment of liability, not an assessment of liability and an awarding of damages. See, e.g., Respondents answer to Paragraph 96 of Hirsch's Preliminary Objection. Thus, Respondent posits, the principle that the P.U.C. has no ability to consider property damage claims is inapposite to Hirsch's objection to the bifurcation procedure.

Such an assertion could only be made through the wholesale lack of familiarity with the cases expressly addressing bifurcation: Elkin, DeFrancesco, Schriner and Poorbaugh. In Poorbaugh, for example, the Commonwealth Court was well aware of the concepts of bifurcation and primary jurisdiction. "Primary jurisdiction" appears six times in the Poorbaugh opinion; within the opinion, references to Elkin are even more numerous. The Commonwealth Court was accordingly more than cognizant that under primary jurisdiction, "[o]nce the administrative tribunal has determined the issues within its jurisdiction, then the temporarily suspended civil litigation may continue, guided in scope and direction by the nature and outcome of the agency determination." Elkin, 491 Pa. at 133 – 34, 420 A.2d at 377. Yet in Poorbaugh, the Commonwealth Court nevertheless held that the P.U.C. did *not* have primary jurisdiction "to determine whether a public utility is responsible for damages sustained by one of its customers on one particular date. . . ." Poorbaugh, 666 A.2d at 748. Consequently, the Commonwealth Court concluded that when there is a claim for property damage, in which no statutory or

regulatory violation is alleged, there shall be no adjudication of any sort within the P.U.C., not for damages and not even for an assessment of liability.

Respondent's attempts to distinguish Poorbaugh are unconvincing. It is immaterial that the complainant in Poorbaugh only raised the jurisdictional defense relatively late in the course of his case. It is immaterial that in Poorbaugh the claim focused on the utility's failure to maintain its own equipment. The complainant in Poorbaugh, like Hirsch here, alleged negligence. Who owned the device that failed is of no consequence, nor did the Commonwealth Court say otherwise.

It is similarly specious to maintain, as Respondent does, that an allegation of failure to warn somehow triggers the doctrine of primary jurisdiction, whereas allegations of other types of negligence do not.[1] In fact, in December 2010, years *before* it moved to bifurcate in June 2015, and long before Hirsch amended its complaint to make the allegation of failure to warn explicit, Respondent first feebly attempted to raise the defense of primary jurisdiction.

The issue of primary jurisdiction arose in 2010 because in its 2010 Motion for Summary Judgment, Respondent insisted it was entitled to summary judgment because it had been under no duty to Hirsch. Hirsch responded to the motion by noting, *inter alia*, that even if everything Respondent asserted were true, the complaint's warranty counts would still stand, as the concept of duty had no part in a warranty calculus.[2] Apparently oblivious to the presence of the warranty counts when it first moved for summary judgment, Respondent then argued in its reply brief, for the first time, that any surviving warranty claims should be routed to the P.U.C. under the doctrine of primary jurisdiction. See the reply brief, attached hereto as Exhibit "V", at 3 – 4.

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[1] "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." Respondent's Response to Paragraph 132 of the Preliminary Objection.

[2] See the original complaint, attached to the Preliminary Objection as Exhibit "B".

Respondent's assertion that it chose to assert primary jurisdiction only after Hirsch amended its complaint in May 2015 to include an explicit allegation of failure to warn – and that such an allegation of failure to warn somehow cast Hirsch's claims in a different light – is directly at odds with the history of this case.

Respondent's efforts to divine statutory and regulatory claims from Hirsch's complaint also fall short. The complaint alleges negligence and nothing but. In essence, Respondent contends that notwithstanding the plain text of the complaint, statutory and regulatory claims must lurk within the complaint anyway, because Respondent operates under the aegis of the Public Utility Code and the regulations promulgated thereto. As Hirsch has already amply pointed out, the regulations which Respondent insists must be involved here – regulations which Hirsch has never invoked – have nothing to do with Hirsch's claims. *Reductio ad absurdum*, by Respondent's logic a personal injury claim against a motorist for running a red light must necessarily be litigated in tax court, because the offending motorist is undoubtedly subject to the Internal Revenue Code. In reality, however, the offense of disobeying a traffic signal has nothing to do with, and does not implicate, the Internal Revenue Code. So, too, do Hirsch's claims here have nothing to do with the Public Utility Code or its regulations. Our appellate courts have already said so, several times over. The mere existence of regulations governing certain aspects of public utility operation does not constrain the referral of all negligence claims against utilities to the P.U.C. Respondent's visions of regulatory apparitions will not make them magically appear.

Underscoring the irrelevance of regulations to this case is that in Poorbaugh, the complainant, unlike Hirsch, did allege certain violations of P.U.C. regulations, including 52 Pa.

Code § 57.18(a), requiring periodic inspections of utilities' equipment. 666 A.2d at 747.[3] Even then, the Commonwealth Court held the P.U.C. to lack jurisdiction. Further undermining Respondent's contention that Hirsch's complaint implicates P.U.C. regulations is that the P.U.C. has now proposed new regulations expressly in response to the Alderwoods opinion. See Proposed Rulemaking Order, P.U.C. docket no. L-2015-2500632 (November 19, 2015), at 6. If Hirsch's complaint already implicated regulations, such rulemaking would not be taking place.

Contrary to Respondent's assertion, DiSanto v. Dauphin Consolidated Water Supply Company, 291 Pa. Super. 440, 436 A.2d 197 (1981),[4] is factually far afield from the instant case and Poorbaugh. DiSanto involved a dispute between the developer of a new housing subdivision and the local water utility over the cost of installing new water lines to service the houses. The court held that the dispute was properly referred to the P.U.C. Neither the instant case nor Poorbaugh involves the installation of new infrastructure over a wide area. "[T]he holdings of . . . decisions must be read against their facts." Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 106 A.3d at 39.

Preliminary objection practice before the Commission is analogous to Pennsylvania civil practice generally. Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa. PUC LEXIS 69, *2 - *3, docket no. C-00935435 (July 18, 1994). A case should be dismissed on preliminary objection if such dismissal is clearly warranted and free from doubt and if the moving party prevails as a matter of law. Id., citing, *inter alia*, Interstate Traveller Services, Inc. v. Com., Dept. of Environmental Resources, 486 Pa. 536, 406 A.2d 1020 (1979) and Rok v. Flaherty, 106 Pa. Cmwlth. 570, 527 A.2d 211 (1985). Hirsch is confident that after the A.L.J. reviews the applicable case law, from Feingold to Poorbaugh, as well as the Supreme

[3] Section 57.18 was reserved in 1998, after the Poorbaugh opinion.

[4] cited by Respondent in its response to Paragraph 85 of the Preliminary Objection

Court's Alderwoods opinion, with its comment on the role of juries, the A.L.J. will agree that the complaint must be dismissed.

Respectfully submitted,

WHITE AND WILLIAMS LLP

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

Date: January 27, 2016

VERIFICATION

I, Alan J. Charkey, Esquire, hereby state that I am counsel for Complainant, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home, and that the statements contained in the foregoing Complainant's Reply to Respondent's Answer in Opposition to Complainant's Preliminary Objection to Jurisdiction are true and correct to the best of my knowledge, information and belief.

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

/s/ Alan J. Charkey
Alan J. Charkey

Date: January 27, 2016

CERTIFICATE OF SERVICE

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

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

Counsel for Respondent,
Duquesne Light Company,

by first class U.S. mail, postage prepaid, and by e-mail to btupi@tuckerlaw.com, ebeckner@tuckerlaw.com and jfarrell@tuckerlaw.com.

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

Dated this twenty-seventh day of January, 2016.

WHITE AND WILLIAMS LLP

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

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

EXHIBIT "V"

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 REPLY BRIEF TO PLAINTIFF'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT

Filed on Behalf of the Defendant:
Duquesne Light Company

Counsel of Record for This Party:

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

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

TUCKER ARENSBERG, P.C.
Firm No. 287
1500 One PPG Place
Pittsburgh, PA 15222
(412) 566-1212
(412) 594-5619 - FAX
btupi@tuckerlaw.com
ebeckner@tuckerlaw.com

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.	

DEFENDANT'S REPLY BRIEF TO PLAINTIFF'S
<u>RESPONSE TO MOTION FOR SUMMARY JUDGMENT</u>

Defendant Duquesne Light Company ("Duquesne Light") files the following Reply Brief to Plaintiff's Response to Motion for Summary Judgment.

I. Plaintiff's Warranty Claims Are Barred by the PUC Tariff.

Plaintiff's Brief in Response to Duquesne Light's Motion for Summary Judgment takes the position that Plaintiff's claims cannot be dismissed in their entirety due to Plaintiff's claims for breach of implied warranty of hazard-free service (Count 4) and breach of implied warranty of careful repair (Count 5). Plaintiff is incorrect because these claims have already been waived by Duquesne Light's tariff on record with the Public Utility Commission. Section 19 of the tariff provides:

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

See Duquesne Light Schedule of Rates, attached in pertinent part as Exhibit J (emphasis supplied).

The case law provides that the waiver contained in Section 19 is not effective unless Duquesne Light exercises reasonable care in providing safe and continuous service. *Belotti v. Duquesne Light Co.,* 44 Pa. D. & C. 3d 425 (C.P. Alleg. 1987). In that opinion, Judge Wettick reasoned:

> Duquesne Light relies on the provision within rule 19 which states that the company 'shall not be liable for any damages arising through interruption of the service or for injury to persons or property resulting from the use of the service.' **However, this provision would appear to exonerate Duquesne Light from liability only where the damages arising through disruption of the service or the injury to persons or property resulting from the use of the service was not caused by Duquesne Light's breach of its promise to use all reasonable care to provide safe and continuous service.** Any other reading of rule 19 would give no meaning to the provisions of the rule in which Duquesne Light agrees to use reasonable care to provide safe and continuous service.

Id. at 428-29 (emphasis supplied).

Here there is no dispute that Duquesne Light exercised reasonable care in restoring power to the Funeral Home following the service disruption. Defendant's own expert, Mr. Wunderley, admits that Duquesne Light made all proper connections. See Wunderley Report, previously attached to Duquesne Light's Appendix as Exhibit F. Consequently, Mr. Wunderley's concession operates to trigger the protections of the tariff waiver offered by Section 19 and falls squarely into the scenario contemplated by *Belotti.* As a matter of law, Plaintiff's warranty claims are precluded by the tariff because Duquesne Light made all proper connections at the scene. Therefore, entry of summary judgment is proper as to all of Plaintiff's claims, including the warranty counts.

II. All of Plaintiff's Claims Must be Dismissed because the Standard of Reasonable Care is Identical Under Tort and Warranty.

As *Belotti* makes clear, Duquesne Light's liability under negligence or warranty depends upon Plaintiff showing that Duquesne Light failed to exercise reasonable care. Plaintiff has cited no cases imposing a duty on Duquesne Light to enter and inspect the customer's locked premises before restoring power. Plaintiff has offered no precedent for the proposition that

Duquesne Light had an obligation to inspect the Funeral Home's own electrical equipment before restoring power. Plaintiff has not refuted the weight of authority cited in Duquesne Light's Brief. Irrespective of whether Plaintiff couches its arguments in terms of negligence or warranty, the legal standard of care is identical. Under either scenario, Duquesne Light made all proper connections and exercised reasonable care while restoring service. If this Honorable Court grants Duquesne Light's Motion for Summary Judgment on the negligence claims, then the warranty claims must also be dismissed as a matter of law. Accordingly, Duquesne Light incorporates the arguments of its Brief in Support of Summary Judgment and seeks a dismissal of Plaintiff's Amended Complaint in its entirety, including the warranty claims.

III. If Plaintiff's Warranty Claims Survive, Those Claims Should Be Transferred to the Public Utility Commission.

In the alternative, if the negligence claims are dismissed and the warranty claims are allowed to proceed, then this Honorable Court should relinquish jurisdiction over the warranty claims. The Public Utility Code, 66 Pa.C.S.A. §101 *et seq.*, has placed a broad range of subject matter under the jurisdiction of the Public Utility Commission ("PUC"), including the responsibility for ensuring the adequacy, efficiency, safety and reasonableness of public utility services, facilities and/or rates. *See* 66 Pa.C.S.A. §1501; *see also Feingold v. Bell of Pennsylvania*, 383 A.2d 791 (Pa. 1977).

The Funeral Home's warranty claims specifically relate to the "service" provided by Duquesne Light, which falls squarely within the jurisdiction of the PUC. 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 supplied).

The Public Utility Code sets forth a utility's duties to its customers, and in order for the PUC to sustain a complaint relating to "service," the utility must be in violation of its duty under this section. 66 Pa.C.S.A. §102; *West Penn Power Co. v. Pennsylvania Public Utility Com'n*, 478 A.2d 947 (Pa. Cmwlth. 1984). As a matter of law, the PUC retains original jurisdiction to determine whether Duquesne Light's service to the Funeral Home was reasonable, and to adjudicate Plaintiff's claims for implied warranty of hazard-free service and implied warranty of careful repair. "When a utility's failure to maintain reasonable and adequate service is alleged, 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." *DiSanto v. Dauphin Consolidated Water Supply Co.*, 436 A.2d 197 (Pa. Super. 1981); *Bell Telephone Co. of Pa. v. Sanner*, 375 A.2d 93 (Pa. Super. 1977).

Accordingly, if Plaintiff's warranty claims survive Duquesne Light's Motion for Summary Judgment, then those claims should be dismissed due to this Court's lack of subject matter jurisdiction and transferred to the PUC for determination.

IV. Conclusion.

The facts are undisputed that Duquesne Light made all proper connections to the Funeral Home. Because Duquesne Light breached no legal duty to Plaintiff, under warranty or negligence, Duquesne Light is entitled to summary judgment as a matter of law on all of Plaintiff's claims.

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

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