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May 2, 2016

By Electronic Filing

Rosemary Chiavetta, Esq.  
Secretary, Pennsylvania Public Utility Commission  
400 North Street, Second Floor  
Keystone Building  
Harrisburg, PA 17120

RE: Alderwoods (Pennsylvania), Inc. v. Duquesne Light Company  
Public Utility Commission Docket No. P-2016-2541570

Dear Ms. Chiavetta:

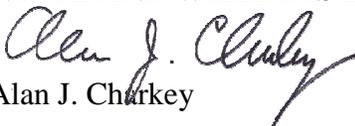
Enclosed for filing is Motion By Petitioner-Complainant To Disqualify Certain PUC Law Bureau Attorneys and To Impose An Ethical Wall, along with its exhibits.

If you have any questions, please let me know.

Thank you.

Very truly yours,

WHITE AND WILLIAMS LLP

  
Alan J. Charkey

Enclosures

cc: All Parties on Attached Certificate of Service (w/ encl., by method indicated)

**CERTIFICATE OF SERVICE**

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

The Honorable Conrad A. Johnson, A.L.J.  
Pennsylvania Public Utility Commission  
301 Fifth Avenue, Suite 220  
Piatt Place  
Pittsburgh, PA 15222,

by Federal Express; and

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 second day of May, 2016.

**WHITE AND WILLIAMS LLP**

/s/ Alan J. Charkey

By: Alan J. Charkey, Esquire

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

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

Docket No. P-2016-2541570

v.

DUQUESNE LIGHT COMPANY

**MOTION BY PETITIONER-COMPLAINANT TO DISQUALIFY CERTAIN PUC LAW  
BUREAU ATTORNEYS AND TO IMPOSE AN ETHICAL WALL**

Pursuant to 52 Pa. Code § 5.1(a)(6), Petitioner-Complainant, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home (“Complainant” or “Hirsch”), by and through its attorneys White and Williams LLP, moves the Commission for the disqualification of certain members of the PUC’s Law Bureau and for the imposition of an ethical wall within the Law Bureau. In so moving, Hirsch avers as follows:

1. This case arises from a fire which completely destroyed Hirsch’s funeral home on or about January 10, 2009. Hirsch alleges that the fire erupted as a result of Duquesne Light’s negligence in restoring electrical service in the aftermath of a motor vehicle accident which disrupted power in the area.

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

3. In July 2012, the Superior Court partially reversed, finding, under the facts alleged, that Duquesne Light either owed a duty either of inspecting Hirsch’s equipment before restoring power or, at a minimum, of warning Hirsch. Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 52 A.3d 347, 355 (Pa. Super. 2012) (Musmanno, J.)

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

5. The Supreme Court granted allocatur.

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

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

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

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

10. At the same time, the PUC filed a brief in support of the application.

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<sup>1</sup> So as not to prejudice the Commission with the particulars of the PUC's argument, Hirsch attaches only the first and last pages of the PUC's *amicus* brief.

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

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

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

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

15. As Hirsch pointed out in 2013, and as Hirsch again points out in its pending Petition for Interlocutory Review, any position that the PUC has jurisdiction over the instant claims is manifestly contrary to well-settled Pennsylvania law.

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

17. It is consequently conceivable that the Commission may choose to consult with the Law Bureau.

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

19. Any involvement by the four aforesaid Law Bureau attorneys with respect to any issues arising in the instant matter would run afoul of the spirit, if not the letter, of Section 208(b)'s proscription of conflicts of interest, by involving attorneys who had already prejudged

the issues relevant to Hirsch's pending Petition for Interlocutory Review specifically and Hirsch's claims against Respondent generally.

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

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

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

A showing of actual bias is unnecessary in order to assert a cognizable due process claim; the mere potential for bias or the appearance of non-objectivity may be sufficient to constitute a violation of due process. However, "while an appearance of non-objectivity is sufficient to trigger judicial scrutiny, the significant remedy of invalidation often depends on something more tangible." Recusal is required only where the record demonstrates bias, prejudice, capricious disbelief or prejudgment.

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

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

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

25. Any member of a tribunal who relies upon counsel who have prejudged a legal issue pending before the tribunal may similarly be tainted by that prejudgment.

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

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

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

29. To the extent that the Commission seeks to consult the Law Bureau on any issue arising in the instant matter, the assigned attorneys should have had no involvement in the matter of Alderwoods (Pennsylvania), Inc. v. Duquesne Light Company, pending before the Court of Common Pleas and the Superior and Supreme Courts in 2009 – 2015.

30. Furthermore, to the extent that the Commission seeks to consult the Law Bureau on any issue arising in the instant matter, an ethical wall should be imposed within the Law Bureau, so that a) the newly assigned attorneys, who have had no prior involvement in the instant matter, are barred from access to any records, documents, materials, communications or work product within the Law Bureau related to the matter of Alderwoods (Pennsylvania), Inc. v. Duquesne Light Company, pending before the Court of Common Pleas and the Superior and Supreme Courts in 2009 to 2015, including the filing of the PUC’s *amicus* brief in 2013; b) the attorneys who were involved with the matter of Alderwoods (Pennsylvania), Inc. v. Duquesne

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

31. On January 11, 2016, Hirsch filed a motion nearly identical to the instant motion in conjunction with its Preliminary Objection to Jurisdiction.

32. In response, in a letter dated February 25, 2016, the Secretary of the Law Bureau advised that "the four Law Bureau attorneys that worked on the *amicus curiae* brief will not provide advice to either OALJ or the Commission regarding the merits of the Complaint at Docket Number C-2016-2522634." See Exhibit "B" attached, at 1, last paragraph.

33. Hirsch moves for the same response with respect to its pending Petition for Interlocutory Review, as well as for the imposition of an ethical wall.

WHEREFORE, Complainant, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home, respectfully requests that the Commission issue an order disqualifying Law Bureau attorneys Kenneth R. Stark, Esq., Patricia T. Wiedt, Esq., Robert F. Young, Esq. and Bohdan R. Pankiw, Esq. from participating in any involvement in the instant matter, and that the ethical wall described in the

previous paragraph be established, in the event that the Commission seeks to utilize Law Bureau services in the instant matter.

Respectfully submitted,

**WHITE AND WILLIAMS LLP**

/s/ Alan J. Charkey

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

Date: May 2, 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 Motion by Petitioner-Complainant to Disqualify Certain PUC Law Bureau Attorneys and to Impose an Ethical Wall are true and correct to the best of my knowledge, information and belief.

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

/s/ Alan J. Charkey  
Alan J. Charkey

Date: May 2, 2016

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

Docket No. P-2016-2541570

v.

DUQUESNE LIGHT COMPANY

**ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2016, in consideration of Complainant's Motion to Disqualify Certain PUC Law Bureau Attorneys and to Impose an Ethical Wall, and any response thereto, it is hereby ORDERED and DECREED that the Motion is GRANTED.

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

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

The PUC Law Bureau is hereby directed to impose an ethical wall so that a) the attorneys who consult with the undersigned or who are otherwise involved in the captioned matter are barred from access to any records, documents, materials, communications or work product within the Law Bureau related to the matter of Alderwoods (Pennsylvania), Inc. v. Duquesne Light Company, pending before the Court of Common Pleas and the Superior and Supreme

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

**BY THE PENNSYLVANIA  
PUBLIC UTILITY COMMISSION**

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# **EXHIBIT “A”**

IN THE SUPREME COURT OF PENNSYLVANIA

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

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

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

Kenneth R. Stark  
Assistant Counsel

Patricia T. Wiedt  
Assistant Counsel

Robert F. Young  
Deputy Chief Counsel

Bohdan R. Pankiw  
Chief Counsel

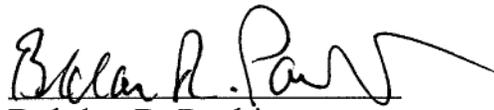
Counsel for Pennsylvania  
Public Utility Commission

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

## CONCLUSION

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

Respectfully submitted,



Bohdan R. Pankiw  
Chief Counsel  
Attorney ID #24825

Robert F. Young  
Deputy Chief Counsel

Kenneth R. Stark  
Assistant Counsel

Patricia T. Wiedt  
Assistant Counsel

Counsel for Pennsylvania Public  
Utility Commission, *Amicus Curiae*

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

Date: July 24, 2013

# **EXHIBIT “B”**



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE  
REFER TO OUR FILE

C-2016-2522634

February 25, 2016

Re: *Alderwoods et al. v. Duquesne Light Company*, C-2016-2522634  
Complainant's Motion to Disqualify Certain PUC Law Bureau Attorneys  
And To Impose An Ethical Wall

To All Parties:

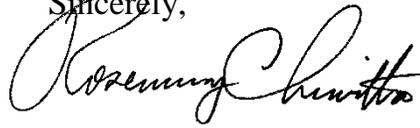
On January 11, 2016, Complainant Alderwoods (Pennsylvania), Inc. ("Alderwoods") filed a motion with the Office of Administrative Law Judge ("OALJ") of the Pennsylvania Public Utility Commission ("Commission") seeking to disqualify certain attorneys in the Commission's Law Bureau from advising OALJ on any and all issues pertaining to the Complaint at Docket No. C-2016-2522634 ("the Complaint") and its litigation history. The Complaint was filed pursuant to the order issued on September 14, 2015, by the Court of Common Pleas of Allegheny County, which granted a motion to bifurcate the proceeding and transfer certain issues to the Commission for adjudication.

Earlier, on July 24, 2013, the Law Bureau through four of its attorneys had filed an *amicus curiae* brief with the Pennsylvania Supreme Court regarding whether the matter should have been bifurcated and so transferred to the Commission. Alderwoods now contends that the Law Bureau's position and points raised in that *amicus curiae* brief requires the disqualification of those four Law Bureau attorneys from advising OALJ on the Complaint.

The Law Bureau does not ordinarily provide advice to OALJ regarding the merits of pending adjudications. Nevertheless, mindful of our duties under the Public Utility Code, 66 Pa. C.S. § 308.2, and out of an abundance of caution, the four Law Bureau attorneys that worked on the *amicus curiae* brief will not provide advice to either OALJ or the Commission regarding the merits of the Complaint at Docket Number C-2016-2522634.

Should you have any questions regarding this matter, please contact the Office of Special Assistants, Cheryl Walker Davis, Director. Your inquiry should be directed to Jonathan Nase, Deputy Director – Legal, at (717) 787-3490 or [jnase@pa.gov](mailto:jnase@pa.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive style with a large initial "R".

Rosemary Chiavetta  
Secretary

Cc: Chief Administrative Law Judge Rainey  
Director Cheryl Walker Davis