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May 2, 2016

By Electronic Filing and Federal Express

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:

Pursuant to 52 Pa. Code § 5.302(a), enclosed for filing is the Brief in Support of Petition by Alderwoods (Pennsylvania), Inc. for Interlocutory Review and Answers to Material Questions, along with its exhibits.

In accordance with 52 Pa. Code § 1.54(b)(3)(ii)(C), enclosed with the copy of this letter sent by Federal Express is one hard copy of the exhibits only.

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

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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

**BRIEF IN SUPPORT OF PETITION BY ALDERWOODS (PENNSYLVANIA), INC.
FOR INTERLOCUTORY REVIEW AND ANSWERS TO MATERIAL QUESTIONS**

**PETITION FOR INTERLOCUTORY REVIEW OF THE FIRST INTERIM ORDER
SUSTAINING IN PART AND DENYING IN PART COMPLAINANT'S PRELIMINARY
OBJECTION, THE HONORABLE CONRAD A. JOHNSON, A.L.J.,
DATED APRIL 5, 2016**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. MATERIAL QUESTIONS INVOLVED 2

III. STATEMENT OF THE CASE..... 2

IV. ARGUMENT..... 4

 A. Summary 4

 B. The PUC Lacks Jurisdiction To Hear Hirsch’s Damages Claim Even For An
 Assessment of Liability..... 5

 C. The A.L.J. Seeks to Retain Jurisdiction to Adjudicate a Hypothetical Claim. 13

V. CONCLUSION..... 15

TABLE OF AUTHORITIES

	Page(s)
CASES	
<u>Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co.,</u> 106 A.3d 27 (Pa. 2014).....	3, 4, 12, 13
<u>Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co.,</u> 52 A.3d 347 (Pa. Super. 2012).....	3, 11
<u>Consol Pennsylvania Coal Co., LLC v. Dep’t of Env’tl. Prot.,</u> 129 A.3d 28 (Pa. Cmwlth. 2015)	14
<u>DeFrancesco v. Western Pennsylvania Water Company,</u> 499 Pa. 374, 453 A.2d 595 (1982)	7, 8, 9, 10, 12, 13
<u>DiSanto v. Dauphin Consolidated Water Supply Company,</u> 291 Pa. Super. 440, 436 A.2d 197 (1981).....	12, 13
<u>Elkin v. Bell Telephone Company of Pennsylvania,</u> 491 Pa. 123, 420 A.2d 371 (1980)	6, 7, 9, 10, 12
<u>Feingold v. Bell of Pennsylvania,</u> 477 Pa. 1, 383 A.2d 791 (1977)	5, 6, 10
<u>Honey Brook Water Co. v. Penna. Public Utility Commission,</u> 167 Pa. Cmwlth. 140, 647 A.2d 653 (1994)	14
<u>Lolly v. Duquesne Light Company,</u> Docket No. C-2010-2167824, at 6, 2011 WL 2113407 (Pa. P.U.C. May 9, 2011).....	11, 13
<u>Optimum Image, Inc. v. Philadelphia Electric Co.,</u> 410 Pa. Super. 475, 600 A.2d 553 (1991).....	11
<u>Pennsylvania Power Co. v. Township of Pine,</u> 926 A.2d 1241 (Pa. Cmwlth. 2007)	5
<u>Poorbaugh v. Pennsylvania Public Utility Commission,</u> 666 A.2d 744 (Pa. Cmwlth. 1995)	1, 5, 9, 10, 11, 12, 13
<u>Schriner v. Pennsylvania Power and Light Company,</u> 348 Pa. Super. 177, 501 A.2d 1128 (1985).....	8, 9, 13
<u>Vertis Group, Inc. v. Pennsylvania Public Utility Commission,</u> 840 A.2d 390 (Pa. Cmwlth. 2003)	11

<u>Williamson v. Duquesne Light Company,</u> Docket No. C-2009-2138578, at 7, 2011 WL 1210916 (Pa. P.U.C. February 10, 2011).....	11, 13
--	--------

STATUTES AND COURT RULES

42 Pa. C.S. § 763.....	11
66 Pa.C.S. § 1501.....	2, 4, 5, 9, 13, 14
66 Pa.C.S. § 3314.....	14
Act of May 28, 1937, P.L. 1053, 66 P.S. § 110, <i>et seq.</i> (1959 & Supp.1977-78)	5
The Public Utility Code, 66 Pa.C.S. § 101, <i>et seq.</i>	5, 9

REGULATIONS

52 Pa. Code § 5.21	12
52 Pa. Code § 5.303	2, 15

I. INTRODUCTION

On April 5, 2016, in a brief opinion that largely skirted meaningful discussion of the doctrine of primary jurisdiction as applied to this case, the Administrative Law Judge (the Honorable Conrad A. Johnson, A.L.J.) overruled the Preliminary Objection to Jurisdiction filed by Petitioner-Complainant Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home (“Hirsch”), and ordered the case to proceed to hearing to determine the liability of Respondent, Duquesne Light Company, to Hirsch. The A.L.J.’s opinion is egregiously at odds with well-settled Pennsylvania law holding that the PUC has no jurisdiction to hear a claim for damages which does not allege a failure to provide reasonable or adequate service – not for an assessment of damages and not even for a determination of liability. Moreover, in his opinion, the A.L.J. transformed Hirsch’s effort to adjudicate actual, concrete claims into a hypothetical exercise involving no actual case or controversy, depriving Hirsch of the ability to even frame its claim as it chooses. The A.L.J.’s order should be reversed.

The upshot of the instant Petition is that Poorbaugh v. Pennsylvania Public Utility Commission, 666 A.2d 744 (Pa. Cmwlth. 1995), an opinion which is strikingly on-point legally and factually, and which Hirsch extensively briefed in its Preliminary Objection below, very clearly bars any determination of liability by the PUC. Even so, the A.L.J.’s opinion never once even mentions Poorbaugh. The A.L.J.’s opinion holding that the PUC may adjudicate Duquesne Light’s liability is egregiously erroneous and should be reversed. Otherwise, Hirsch would be forced to litigate a hearing before the A.L.J. that would likely be reversed by the Commonwealth Court, but only after significantly more delay. Hirsch has already waited more than seven years for recompense of its damages.

A prehearing conference has been scheduled in this case for May 17, 2016. In accordance with 52 Pa. Code § 5.303(a)(1), Hirsch respectfully requests that the conference be stayed for at least thirty days thereafter, to allow the Commission to decide the instant Petition.

II. MATERIAL QUESTIONS INVOLVED

A. Under the doctrine of primary jurisdiction, does the PUC have jurisdiction to determine the liability of a utility to one customer who alleges property damage caused by the negligent restoration of electrical service to that one customer on one particular occasion, when the customer does not allege, and has never alleged, violation of the reasonable and adequate service requirements of 66 Pa.C.S. § 1501 or any other statutory or regulatory violation?

Suggested answer: No.

B. May the PUC adjudicate a hypothetical question, not involving an actual case or controversy, which has been raised by the Presiding Officer but not by the complainant, when doing so deprives the complainant of a stake in the outcome of the adjudication?

Suggested answer: No.

III. STATEMENT OF THE CASE

This case arises from a fire which completely destroyed Hirsch's funeral home on or about January 10, 2009. Hirsch alleges that after a motor vehicle hit a utility pole on Forward Avenue in Pittsburgh, behind Hirsch's funeral home, high-voltage lines contacted low-voltage lines, sending a surge of high-voltage power into the funeral home's panel box, damaging the circuit breakers so that they could no longer withstand the flow of electricity. The funeral home was the only building receiving electric service from the damaged pole. Hirsch alleges that before it restored service to the funeral home, Duquesne Light was on actual or constructive notice of the breakers' compromised condition, but Duquesne Light never attempted to inspect

the funeral home's equipment before restoration nor did Duquesne Light warn Hirsch that until the equipment was inspected and certified by a third party, service would not be restored. When service was restored to the funeral home, several hours after the motor vehicle accident, the current heated the funeral home's metal panel box containing the compromised electrical equipment, igniting the box's wood backing, destroying the building and everything inside it. See the complaint which was filed with the PUC attached hereto as Exhibit "A".

Hirsch first filed a complaint against Duquesne Light in the Court of Common Pleas of Allegheny County on September 22, 2009. Contending that it had been under no duty in tort to Hirsch when it restored service, in late 2010 Duquesne Light moved for summary judgment. The Court of Common Pleas granted the motion. On appeal, the Superior Court reversed. Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 52 A.3d 347 (Pa. Super. 2012), Exhibit "B".

On December 15, 2014, the Supreme Court reversed as well, finding a duty under the facts alleged. Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 106 A.3d 27 (Pa. 2014), Exhibit "C". The court also wrote that because the PUC but not Duquesne Light had raised the question of transfer of jurisdiction to the PUC, the question was not part of the appeal and that therefore the court would not consider it. 106 A.3d at 29 n. 13. However, later in its opinion, in refuting Justice Eakin's dissent, the court's majority wrote that:

While the dissent offers various inquiries about what actions Duquesne Light might have taken which would be considered reasonable under the circumstances, . . . these are precisely the sorts of considerations relegated to juries in cases in which a common-law duty exists and there are material factual questions concerning whether such obligation has been met.

106 A.3d at 42. The court also stated that "generally, courts establish the landscape of common-law duties as a matter of law, and juries decide, in individualized circumstances presented and

where there are material facts in dispute, whether such duties have been breached.” Id., n. 17.

After remand to the Court of Common Pleas, Duquesne Light moved for bifurcation under the doctrine of primary jurisdiction. Exhibit “D”. Hirsch responded in opposition, Exhibit “E”, and at the request of the Court, the parties also filed supplemental briefs. Exhibits “F” and “G”. In spite of Hirsch’s arguments in opposition that Pennsylvania does not permit damages claims to be referred to the PUC, the trial court granted the motion, and denied reconsideration, but without any opinion which might offer an explanation as to why longstanding authority was ignored. Exhibits “H” and “I”. In January, after refileing its complaint with the PUC, Hirsch filed its preliminary objection based upon the lack of jurisdiction. Exhibit “J”. In the objection, Hirsch explained that if the objection were sustained, it would move the Court of Common Pleas to reactivate the case. Duquesne Light filed a timely response, Exhibit “K”, and Hirsch followed with a reply. Exhibit “L”.

The A.L.J. issued his opinion on April 5, 2016. Exhibit “M”. In spite of Poorbaugh’s holding that in damages claims the PUC does not have jurisdiction even to consider liability only, the A.L.J. found such jurisdiction anyway. The A.L.J. has now scheduled a prehearing conference for May 17. Exhibit “N”.

At no time, in any of its forms, has Hirsch ever alleged in its complaints that Duquesne Light’s actions violated the statutory mandate of providing adequate, efficient, safe, and reasonable service and facilities per 66 Pa.C.S. § 1501.

IV. ARGUMENT

A. Summary

Interlocutory relief should be granted, and the A.L.J.’s order reversed, because Pennsylvania law clearly denies the PUC jurisdiction to hear damages claims – even just to

determine liability – by one customer arising from one incident on one occasion, when that customer does not allege, and has never alleged, violation of the reasonable and adequate service requirements of 66 Pa.C.S. § 1501 or any other statutory or regulatory violation. Interlocutory relief should also be granted because in his opinion the A.L.J. has transformed Hirsch’s claim for damages into a hypothetical exercise, one which the A.L.J. believes might, perhaps, eventually ripen into a question of reasonableness or adequacy of service, essentially misappropriating Hirsch’s cause of action in violation of Pennsylvania’s case-or-controversy requirement. The A.L.J.’s opinion is egregiously erroneous. The granting of the instant petition would expedite the ultimate resolution of this matter, because if a hearing were held before the A.L.J. anyway, Hirsch would only raise the same jurisdictional arguments again on appeal, at a later date.

B. The PUC Lacks Jurisdiction To Hear Hirsch’s Damages Claim Even For An Assessment of Liability.

The seminal case barring PUC jurisdiction is Feingold v. Bell of Pennsylvania, 477 Pa. 1, 383 A.2d 791 (1977). Poorbaugh extends the bar to liability-only assessments.

In Feingold, the plaintiff sued Bell of Pennsylvania for damages caused, *inter alia*, by its alleged failure to maintain a recording telling callers that his firm’s telephone number had been changed. Thus, callers could not reach the plaintiff and allegedly believed that his firm had gone out of business. Bell filed preliminary objections, contending that the claims had to be resolved by the PUC instead. Holding that the plaintiff had failed to exhaust administrative remedies, the trial court agreed, and dismissed the complaint.

The Supreme Court reversed. It noted that the statutes governing the PUC did not enable the commission to award damages – a conclusion supported by various sections of the Public

Utility Law.¹ It wrote that:

It is clear that the remedial and enforcement powers vested in the PUC by the Public Utility Law were designed to allow the PUC to enforce its orders and regulations but not to empower the PUC to award damages or to litigate a private action for damages on behalf of a complainant. The rule requiring exhaustion of administrative remedies is not intended to set up a procedural obstacle to recovery; the rule should be applied only where the available administrative remedies are adequate with respect to the alleged injury sustained and the relief requested. In the instant case, appellant could not have been made whole by the PUC, thus the administrative remedy was not “adequate and complete.”

477 Pa. at 10 – 11, 383 A.2d at 795 – 96. (Citations and footnotes omitted.)

Since deciding Feingold, the Supreme Court has clarified its holding in two subsequent cases. As in Feingold, the plaintiff in Elkin v. Bell Telephone Company of Pennsylvania, 491 Pa. 123, 420 A.2d 371 (1980), also alleged that his business suffered damages because of poor service. The Court affirmed that in light of Feingold, the PUC still has a place in deciding customer disputes. “The PUC has long been recognized as the appropriate forum for the adjudication of issues involving the reasonableness, adequacy and sufficiency of public utility services.” 491 Pa. at 128 – 29, 420 A.2d at 374. (Citations omitted.) However, the court added that:

In spite of the PUC's rather extensive statutory responsibility for ensuring the adequacy, efficiency, safety and reasonableness of public utility services, we recognized in Feingold . . . that the Courts of Common Pleas have original jurisdiction to entertain suits for damages against public utilities based upon asserted failure to provide adequate services, even though the subject matter of the complaint is encompassed by the Public Utility Law.

491 Pa. at 129 – 30, 420 A.2d at 375.

Acknowledging the technical expertise of administrative agencies under the doctrine of

¹ Act of May 28, 1937, P.L. 1053, 66 P.S. § 110, *et seq.* (1959 & Supp.1977-78), since repealed and supplanted by the Public Utility Code, 66 Pa.C.S. § 101, *et seq.* See Pennsylvania Power Co. v. Township of Pine, 926 A.2d 1241, 1251 n. 21 (Pa. Cmwlth. 2007) (noting repeal).

“primary jurisdiction,” the Elkin court established a mechanism in which the trial court could refer an issue to an administrative agency for adjudication so as to utilize “the agency’s special experience and expertise in complex areas with which judges and juries have little familiarity.” 491 Pa. at 132, 420 A.2d at 376. After such a referral, once the agency has spoken on the issue, it binds the parties and the court upon the case’s return to the trial court. 491 Pa. at 133, 420 A.2d at 376 – 77. The court cautioned that trial courts should not hesitate to retain jurisdiction and should not too easily resort to the referral procedure, because juries, with the help of expert testimony, are able to decide technical disputes:

Courts should not be too hasty in referring a matter to an agency, or to develop a “dependence” on the agencies whenever a controversy remotely involves some issue falling arguably within the domain of the agency's “expertise.” “Expertise” is no talisman dissolving a court's jurisdiction. Accommodation of the judicial and administrative functions does not mean abdication of judicial responsibility. The figure of the so-called “expert” looms ominously over our society – too much so to permit the roles of the court and jury to be readily relinquished absent a true fostering of the purposes of the doctrine of primary jurisdiction.

Therefore, where the subject matter is within an agency's jurisdiction and where it is a complex matter requiring special competence, with which the judge or jury would not or could not be familiar, the proper procedure is for the court to refer the matter to the appropriate agency. Also weighing in the consideration should be the need for uniformity and consistency in agency policy and the legislative intent. Where, on the other hand, the matter is not one peculiarly within the agency's area of expertise, but is one which the courts or jury are equally well-suited to determine, the court must not abdicate its responsibility. In such cases, it would be wasteful to employ the bifurcated procedure of referral, as no appreciable benefits would be forthcoming.

491 Pa. at 134 – 35, 420 A.2d at 377. (Footnote omitted.)

In DeFrancesco v. Western Pennsylvania Water Company, 499 Pa. 374, 453 A.2d 595 (1982), involving fire damage and complaints of low water pressure, the Supreme Court again

addressed the question of the proper forum for damages claims against public utilities. The plaintiffs initially obtained verdicts against the water company in the Allegheny County Court of Common Pleas. On appeal, the Superior Court reversed, holding that the PUC had had proper jurisdiction over the claims.

The Supreme Court reversed again. It reasoned that because the PUC was charged with enforcing its rules and regulations, cases involving the alleged disregard of those rules should be referred to the PUC. 499 Pa. at 377, 453 A.2d at 596 – 97.

The controversy now before us, however, is not one in which the general reasonableness, adequacy or sufficiency of a public utility's service is drawn into question. Resolution of appellant's claims depended upon no rule or regulation predicated on the peculiar expertise of the PUC, no agency policy, no question of service or facilities owed the general public, and no particular standard of safety or convenience articulated by the PUC. Rather, the gravamen of the allegations at trial was within the prescan [*sic*] authority of the courts, i.e., that the utility *negligently* failed to provide service required.

* * *

Involved here is not a question of whether appellants were entitled to water under agency regulations, or whether a certain general rule governing water pressure was disregarded. Resolving the essential question of whether the utility failed to perform its mandated duties requires no recondite knowledge or experience and falls within the scope of the ordinary business of our courts.⁵

⁵. We note that, just as the form of an action or the manner in which is titled does not automatically vest jurisdiction in the courts, the mere fact that a party to an action qualifies as a regulated public utility does not divest the courts of original jurisdiction. It is not to magic words, but to the essence of the underlying claims, we look in determining where jurisdiction properly lies.

499 Pa. at 378, 453 A.2d at 597. (Emphasis in original.)

The issue of PUC adjudication of claims against utilities was also the subject of Schriner v. Pennsylvania Power and Light Company, 348 Pa. Super. 177, 501 A.2d 1128 (1985), in which the Superior Court considered the question of whether the plaintiffs' claims for damages arising from stray voltage should have been referred to the PUC. The court held that they should not have been referred, as they only tangentially concerned the "reasonableness, adequacy, efficiency or safety of the services, facilities or rates provided by Appellant, PP&L." 348 Pa. Super. at 182, 501 A.2d at 1130, alluding, without attribution, to Section 1501, "Character of service and facilities,"² of the Public Utility Code, 66 Pa.C.S. § 101, *et seq.* Citing DeFrancesco, the court found that resolution of the claims "depends upon no rule or regulation predicated upon the peculiar expertise of the PUC, no agency policy, no question of service or facilities owed the general public, and no particular standard of safety or convenience articulated by the PUC." Id. It then held that because the PUC could not award damages, referral to the PUC would have been pointless.

. . . [W]e agree with Elkin that it would be wasteful to employ a bifurcated procedure of referral to the PUC, as that body is incapable of providing an adequate remedy should the Schriners' complaint be found to have merit. Resolving the essential question of whether PP & L failed to perform what is alleged to have been an affirmative duty requires no special knowledge or experience and falls within the scope of the ordinary business of our courts.

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

The next relevant appellate opinion, Poorbaugh v. Pennsylvania Public Utility Commission, 666 A.2d 744 (Pa. Cmwlth. 1995), involved facts remarkably similar to those of

² Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. . . .

66 Pa.C.S. § 1501.

the instant case. In Poorbaugh, the plaintiff sought money damages from the defendant utility after the plaintiff's building suffered fire damage following an overvoltage incident, in which high-voltage lines contacted low-voltage lines. 666 A.2d at 745 – 46. The trial court referred the adjudication of liability of the defendant electric company to the PUC, retaining jurisdiction to assess damages.³ Reversing, the Commonwealth Court found that with respect to the plaintiff's claims, the PUC's expertise would not have been helpful and that the PUC lacked jurisdiction.

[W]hile the subject matter of Poorbaugh's complaint against West Penn is encompassed by the Utility Code, we conclude that this case is not a complex matter requiring the special expertise of the PUC in order to resolve it. As such, the present case is distinguishable from Elkin. With the assistance of expert testimony, there is no reason why a judge or jury could not determine whether West Penn had breached a duty of care owed to Poorbaugh by allegedly causing an oversurge of electricity which resulted in a fire.

The present case is also distinguishable from Elkin in that it does not involve the need for uniformity and consistency of agency policy. Rather, it focuses only upon the supply of electricity to one West Penn customer on one particular occasion. As noted in Feingold, questions about the adequacy of utility service to an entire geographic area, rather than to one individual, could present problems which should be addressed by the PUC. . . . However, Poorbaugh's claim is that of one individual, not an entire geographic area. In addition, the present case does not raise any questions about how West Penn's services or facilities affect the general public. See DeFrancesco. In weighing the various considerations articulated by our Supreme Court with respect to the primary jurisdiction of the PUC, we conclude that jurisdiction over Poorbaugh's claims should have been vested in the trial court, not the PUC.

666 A.2d at 751. (Citation omitted.)

³ By order dated March 3, 1992, the trial court granted West Penn's preliminary objections and transferred to the PUC those issues relating to alleged violations of the standards of utility service under the Public Utility Code (Utility Code). *The trial court retained jurisdiction of Poorbaugh's suit for monetary damages* but stayed that proceeding pending the PUC's determination on the issues of utility service.

666 A.2d at 745. (Emphasis added; footnote omitted.)

In Poorbaugh, the court distinguished claims regarding irregular electrical service over an extended period of time from claims focusing on one specific instance of an electrical problem resulting in property damage, holding the latter as the province of the courts. Id. at 751. Simply put, according to the Commonwealth Court, Poorbaugh’s claim for damages belonged before the trial court, not the PUC, and that *the PUC lacked jurisdiction even for an adjudication of liability only.* Id.

In the briefing before the A.L.J., Duquesne Light contended that Poorbaugh is distinguishable from the instant case because in Poorbaugh the complainant raised the jurisdictional defense relatively late in the case and because the complainant alleged that the utility had failed to maintain its own equipment. The timing of the jurisdictional defense and the ownership of the device that failed are trivial distinctions, immaterial to the outcome of the case.

Like Poorbaugh, the instant case involves no claims of property damage from anyone other than Complainant, the owner of the destroyed funeral home. The funeral home was the only building receiving electric service from the utility pole damaged in the motor vehicle accident and the only customer affected by the overvoltage incident. Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 52 A.3d 347, 355 (Pa. Super. 2012).

The Commonwealth Court has jurisdiction over appeals from final orders of the PUC. 42 Pa. C.S. § 763. As such, Poorbaugh is binding precedent, could not have been ignored by the A.L.J. and mandated the sustaining of Hirsch’s preliminary objection.⁴

The lesson from the foregoing cases is clear. If the complainant alleges quality-of-

⁴ See also, e.g., Williamson v. Duquesne Light Company, Docket No. C-2009-2138578, at 7, 2011 WL 1210916 (Pa. P.U.C. February 10, 2011) (“Nothing in the Code . . . confers jurisdiction upon the Commission to award monetary damages. Accordingly, the Commission possesses no jurisdiction to consider any implied request for reimbursement for property damage.”) and Lolly v. Duquesne Light Company, Docket No. C-2010-2167824, at 6, 2011 WL 2113407 (Pa. P.U.C. May 9, 2011) (PUC does “not have jurisdiction to award monetary damages” in the absence of an allegation of violation of the Public Utility Code).

service problems such as continually deficient telephone service or ongoing power surges or repeatedly irregular voltage, affecting a widespread geographic area,⁵ or violations of the service provider's tariff, the complaint should be routed to the PUC. However, if the complainant alleges physical harm caused by a service provider on one particular occasion, the matter must remain in the trial court and must be submitted to the jury. See also Alderwoods, *supra*, 106 A.3d at 42, on the role of juries.

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

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

52 Pa. Code § 5.21(a). (Emphasis added.) In the instant case, Hirsch does not allege in its complaint that Duquesne Light violated the Public Utility Code or PUC rules or regulations or orders, nor does Hirsch allege that Duquesne Light's actions risked harm to the general public or that Duquesne Light failed to abide by its tariff. Any effort to divine such allegations from the complaint is a dalliance in the metaphysical.

This case has never concerned the "general reasonableness, adequacy or sufficiency of a public utility's service," DeFrancesco, 499 Pa. at 377, 453 A.2d at 596, nor any issue "falling arguably within the domain of the agency's 'expertise.'" Elkin, 491 Pa. at 134, 420 A.2d at 377. Instead, Hirsch's action "focuses only upon the supply of electricity to one" Duquesne Light "customer on one particular occasion." Poorbaugh at 751. The issues in this case regarding

⁵ See, e.g., Optimum Image, Inc. v. Philadelphia Electric Co., 410 Pa. Super. 475, 600 A.2d 553 (1991), involving a customer's claim of damage arising from voltage fluctuations, in which the Superior Court held the claim to be within the P.U.C.'s jurisdiction. Accord Vertis Group, Inc. v. Pennsylvania Public Utility Commission, 840 A.2d 390 (Pa. Cmwlth. 2003) (claims of irregular power supply within jurisdiction of PUC, in contrast to facts of Poorbaugh).

negligence and the recognition of a duty to inspect or warn are manifestly outside the scope of the PUC's authority and expertise, even for the limited purpose of assessing liability.⁶

DeFrancesco; Schriner; Poorbaugh; Williamson; Lolly.

Under well-settled Pennsylvania law, this case should never have been referred to the PUC by the Court of Common Pleas, and Hirsch's Preliminary Objection to the A.L.J. should have been sustained. The Court of Common Pleas has never explained itself, and the A.L.J.'s opinion sidesteps the pertinent issues.

Hirsch has now been denied compensation for over seven years. If the instant petition were denied, Hirsch would then have no choice but to endure an impermissible hearing assessing Duquesne Light's liability, the result of which would likely be in Duquesne Light's favor, given the A.L.J.'s manifest bias. Hirsch would then appeal to the Commission and, perhaps, to the Commonwealth Court thereafter, using the same arguments against jurisdiction that it asserts now. The granting of the instant petition and the reversal of the A.L.J. would prevent further substantial prejudice to Hirsch and would significantly expedite the ultimate resolution of the case.

C. The A.L.J. Seeks to Retain Jurisdiction to Adjudicate a Hypothetical Claim.

The A.L.J.'s order should also be reversed because the A.L.J. has impermissibly justified jurisdiction on the basis of a hypothetical contingency that does not exist. In his opinion, the A.L.J. wrote that "If Hirsch's allegations are proven by a preponderance of evidence at a hearing, the allegations *may well constitute* a violation of the reasonable and adequate service

⁶ DiSanto v. Dauphin Consolidated Water Supply Company, 291 Pa. Super. 440, 436 A.2d 197 (1981), cited by the A.L.J., applies only in the face of allegations of the failure to maintain reasonable or adequate service. As already noted, there is no such allegation here. Moreover, DiSanto 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 PUC. 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. DiSanto is inapposite.

requirements of Section 1501 of the Code.” Order, Exhibit “M”, at 8. (Emphasis added.)

To reiterate, Hirsch has *never* alleged a violation of Section 1501. Regardless, the A.L.J. opines that under circumstances that have yet to occur, such a violation might eventually be inferred, without even indicating just who might infer it. Retaining jurisdiction to adjudicate a hypothetical question runs afoul of the fundamental precept that only actual cases or controversies may be litigated.

The existence of a case or controversy requires a real and not a hypothetical legal controversy and one that affects another in a concrete manner so as to provide a factual predicate for reasoned adjudication, with sufficiently adverse parties to sharpen the issues for judicial resolution. The key inquiry in determining whether a case is moot is whether the court or agency will be able to grant effective relief and whether the litigant has been deprived of the necessary stake in the outcome of the litigation.

Consol Pennsylvania Coal Co., LLC v. Dep't of Env'tl. Prot., 129 A.3d 28, 39 (Pa. Cmwlth. 2015). (Citation, quotation marks and editing marks omitted.) In the instant case, litigating whether Duquesne Light failed to provide reasonable or adequate service in violation of Section 1501, an allegation that Hirsch has never made, would effectively hijack the litigation from Hirsch, and relegate Hirsch to bystander status in its own case. As a litigant, Hirsch's freedom to choose its claims must be respected and preserved. Moreover, the case the A.L.J. cites for his assertion that Hirsch's claims could constitute a violation of Section 1501, Honey Brook Water Co. v. Penna. Public Utility Commission, 167 Pa. Cmwlth. 140, 647 A.2d 653 (1994), involved customer complaints of inadequate water pressure and is clearly inapposite.⁷

⁷ The A.L.J.'s statement that “Duquesne may ultimately face a civil penalty,” Exhibit “M” at 8, is patently erroneous, in that the three-year statute of limitations on an enforcement action has long passed. 66 Pa.C.S. §§ 3301, 3314. Similarly, the A.L.J.'s assertion that Duquesne Light could be ordered to take remedial action, Exhibit “M” at 8, delves even further into the realm of conjecture, as there is no indication that the events of January 10, 2009 are anywhere on the radar screen of the PUC's enforcement arm. Duquesne Light never even reported the incident to the PUC. See Defendant's Responses to Plaintiff's Third Set of Interrogatories and Fifth Request for Production of Documents Relating to PUC Reports, Exhibit “O” attached, nos. 16 and 17.

V. CONCLUSION

Because Hirsch has been denied compensation for over seven years, because the PUC manifestly lacks jurisdiction and because Hirsch would only repeat the same jurisdictional arguments later on full appeal, Hirsch respectfully requests that the Petition be granted and that part of the A.L.J.'s April 5 Order finding jurisdiction be reversed.

In accordance with 52 Pa. Code § 5.303(a)(1), Hirsch also requests that the prehearing conference currently scheduled for May 17, 2016 be stayed for at least thirty days to allow the Commission to decide the instant Petition.

Respectfully submitted,

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Date: May 2, 2016