

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17120**

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

**Public Meeting September 15, 2016
2541570-OSA
Docket Nos. P-2016-2541570
C-2016-2522634**

v.

Duquesne Light Company

MOTION OF COMMISSIONER JOHN F. COLEMAN, JR.

Before the Pennsylvania Public Utility Commission (Commission) for disposition is a Petition for Interlocutory Review and Answer to Material Question filed by Alderwoods (Pennsylvania), Inc., (Alderwoods).¹ The Petition seeks Commission review of an April 5, 2016 Order from the Presiding Officer denying Alderwoods' Preliminary Objection to dismiss its own Formal Complaint filed at the above C-docket.

In August 2009, Alderwoods filed a civil complaint against Duquesne Light Company (Duquesne) alleging negligent restoration of electric service to Burton L. Hirsch Funeral Home in January 2009 following a vehicle accident that damaged Duquesne's electric facilities. After Duquesne restored electric service to the funeral home, a fire originated in the property's electric panel and consumed the property. Following the appellate court's decision on the nature and extent of the duty owed by Duquesne to Alderwoods here, Duquesne filed a motion with the trial court to bifurcate the liability portion of the complaint and transfer it to the Commission. The trial court granted the motion, which was upheld by the Pennsylvania Superior Court.

On January 7, 2016, Alderwoods filed a Formal Complaint at the Commission against Duquesne alleging negligent restoration of electric service related to the January 2009 incident. One day later, Alderwoods filed a Preliminary Objection *to its own Complaint* alleging the Commission does not have jurisdiction to award money damages and does not have jurisdiction over the subject matter of the Complaint. On April 5, 2016, the Presiding Officer by Order sustained in part and denied in part the Preliminary Objection. The Order sustained the Preliminary Objection as to the claim for money damages but denied the Preliminary Objection that the Commission lacks jurisdiction over the Complaint.

In the Petition, Alderwoods seeks answers to the following two material questions:

- 1) 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 electric service to that one customer on one particular occasion, when the customer does not allege, and has never alleged,

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violation of the reasonable and adequate service requirements of 66 Pa. C.S. § 1501² or any other statutory or regulatory standard.

- 2) 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 state in the outcome of the adjudication?

Alderwoods has proposed that each question be answered in the negative.

Interlocutory Review Standard

The legal standards governing interlocutory review are governed by 52 Pa. Code § 5.302(a) and by Commission precedent. Section 5.302(a) of our regulations requires that the petitioning party “state . . . the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.”³ Moreover, the Commission has determined that granting interlocutory review is appropriate when it would prevent substantial prejudice or expedite the proceeding.⁴ Upon review, I do not believe there are compelling reasons to grant interlocutory review and answer the material questions here.

First, Alderwoods has not shown that granting interlocutory review will prevent substantial prejudice. The pertinent consideration is whether the error and any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review process.⁵ The only prejudice alleged by Alderwoods is that which is associated with having to litigate the Complaint if the Commission denies its Petition. However, the Commission has found that the time, effort, and expense associated with having to litigate a case does not typically amount to substantial prejudice for purposes of granting interlocutory review.⁶

Second, Alderwoods has not shown that granting interlocutory review expedites the conduct of the proceeding. To the contrary, pursuing interlocutory review seems to unnecessarily have prolonged the proceeding, as the civil courts already have decided that the Commission has primary jurisdiction in this case.⁷ The court decisions are as follows:

² Public utilities operating in Pennsylvania are required under Section 1501 of the Public Utility Code to provide adequate, safe, efficient and reasonable electric service.

³ 52 Pa. Code § 5.302(a).

⁴ *Pa. Pub. Util. Comm'n v. Philadelphia Gas Works*, Docket Nos. P-2009-2097639, *et al.* (Order entered April 15, 2010).

⁵ *Joint Application of Bell Atlantic Corp. and GTE Corp.*, Docket No. A-310200F0002, *et al.* (Order entered June 10, 1999); *Pa. PUC v. Frontier Communications of Pa. Inc.*, Docket No. R-00984411 (Order entered February 11, 1999); and *In re: Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985).

⁶ *See, e.g., Mobilfone of Northeastern PA, Inc. v. Paul Kelly d/b/a American Teletronix*, 67 Pa. P.U.C. 256 (1988).

⁷ Because the question of the Commission's jurisdiction has already been decided, Duquesne argues it is “law of the case” and cannot be disturbed. *Tyro Industries, Inc. v. James A. Wood, Inc.* 614 A.2d 279, 284 (Pa. Super. 1992).

- An order entered by the Allegheny Court of Common Pleas granting the motion of Duquesne requesting bifurcation of the Code Section 1501 service issue to the Commission on primary jurisdiction grounds.⁸ Alderwoods opposed the bifurcation.
- An order entered by the Allegheny Court of Common Pleas denying Alderwoods' motion for reconsideration of the court's bifurcation order.
- An order of the Pennsylvania Superior Court denying Alderwoods' petition for review of the lower court's bifurcation decision.

Thus, two civil courts, on three separate occasions, have directed that the question of whether Duquesne violated its duty under the Pennsylvania Public Utility Code to provide safe and reasonable service be transferred to the Commission for a determination.⁹ I see no reason to reject the courts' decisions and refuse to accept the transfer.

For these reasons, I do not believe Alderwoods has shown compelling reasons to grant interlocutory review. Therefore, in accordance with Section 5.303 of our regulations,¹⁰ I propose that we decline to answer the questions presented in the Petition. With this decision, the Presiding Officer's April 5, 2016 Order ruling on Alderwoods' Preliminary Objection remains in effect.

THEREFORE, I MOVE THAT:

1. The Commission decline to answer the questions presented in the Petition for Interlocutory Review and Answer to Material Question filed by Alderwoods consistent with this Motion.
2. This matter be returned to the presiding Administrative Law Judge for such further proceedings as may be appropriate.

⁸ The Court's order does not contain any reasoning in support of the decision to bifurcate. However, the order notes that the Court considered all arguments of counsel, and Duquesne's Motion requesting bifurcation specifically identified primary jurisdiction as a basis to bifurcate the liability piece and transfer it to the Commission. Therefore, it is reasonable to conclude the Court, in granting the Motion, agreed with the reasoning in the Motion.

⁹ The Commission granted interlocutory review regarding several Formal Complaints filed by the Pennsylvania Office of Attorney General and the Pennsylvania Office of Consumer Advocate against certain Electric Generation Suppliers in Pennsylvania. The Complaints arose out of numerous customer contacts and complaints that were received related to the variable rates for electric supply service charged by the suppliers. The Commission granted interlocutory review in the proceedings involving Blue Pilot Energy, LLC (Docket No. C-2014-2427655) and IDT Energy, Inc. (C-2014-2427657), in part, because it would expedite the conduct of the proceedings by providing guidance on the scope of the Commission's subject matter jurisdiction and authority in the cases. However, no such guidance is needed here, in light of the civil court decisions.

¹⁰ 52 Pa. Code § 5.303. Under Section 5.303, the Commission can take the following action in response to a petition for interlocutory review and answer to material question: (1) continue, revoke or grant a stay of proceedings if necessary to protect the substantial rights of the parties; (2) determine that the petition was improper and return the matter to the presiding officer; (3) decline to answer the question; (4) answer the question.

3. The Office of Special Assistants prepare an Opinion and Order consistent with this Motion.

Date: September 15, 2016



JOHN F. COLEMAN, JR.
COMMISSIONER