

To Duquesne Light Company:

You are hereby notified that a responsive pleading shall be filed within 20 days of the date of service of this motion..

  
Alan J. Charkey, Esquire  
White and Williams LLP

**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 CERTIFY  
THE COMMISSION'S INTERLOCUTORY ORDER OF OCTOBER 13, 2016  
FOR APPEAL TO THE COMMONWEALTH COURT**

Pursuant to 42 Pa.C.S. § 702(b) and 52 Pa. Code § 5.633, 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 to amend its interlocutory order of October 13, 2016, to include findings 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 to Commonwealth Court from the order may materially advance the ultimate termination of the matter. 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 late 2010, the Court of Common Pleas of Allegheny County (Lutty, J.) granted the motion and dismissed Hirsch's complaint.
4. On December 15, 2014, the Supreme Court affirmed the Superior Court's reversal of the granting of summary judgment.
5. After remand, Respondent moved to bifurcate the case so as to have the PUC adjudicate the question of Respondent's liability to Hirsch.
6. In spite of Hirsch's strenuous opposition to the motion, as wholly contrary to Pennsylvania law, the Court of Common Pleas (Lutty, J.) granted the motion in September 2015.
7. In January 2016, Hirsch filed a complaint in the PUC and immediately thereafter filed a preliminary objection to the PUC's jurisdiction as wholly contrary to Pennsylvania law, particularly given the opinion in Poorbaugh v. Pennsylvania Public Utility Commission, 666 A.2d 744 (Pa. Cmwlth. 1995), which is strikingly on-point legally and factually with the instant case.
8. On April 5, 2016, the Administrative Law Judge (the Hon. Conrad A. Johnson, A.L.J.) overruled Hirsch's preliminary objection in relevant part.
9. Despite Hirsch's numerous citations to Poorbaugh in its preliminary objection, the A.L.J.'s opinion never once mentioned Poorbaugh.
10. In his opinion, the A.L.J. also transformed Hirsch's claim for negligence into a proceeding to answer a hypothetical question about whether Respondent violated the reasonable and adequate service requirements of 66 Pa.C.S. § 1501 – a claim which Hirsch has never made – in violation of Pennsylvania's well-founded rule that litigated disputes must involve actual

cases or controversies. See Consol Pennsylvania Coal Co., LLC v. Dep't of Env'tl. Prot., 129 A.3d 28, 39 (Pa. Cmwlth. 2015).

11. Pursuant to 52 Pa. Code § 5.302, “Petition for interlocutory Commission review and answer to a material question,” on April 22, 2016 Hirsch petitioned the Commission for interlocutory review of the A.L.J.’s order and opinion of April 5.

12. In the petition, Hirsch requested the Commission to answer the following two material questions:

- 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?
- 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?

13. On May 2, 2016, Hirsch filed its brief in support of the petition.

14. Although Hirsch has been without remedy for its damages since January 2009, on October 13, 2016, the Commission issued an opinion declining Hirsch’s petition, because Hirsch allegedly did not show that the granting interlocutory review would prevent substantial prejudice.

15. In its opinion, the Commission also attributed the delay to Hirsch for having sought interlocutory review, as “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.”

Opinion and Order of October 13, 2016 at 31 – 32.

16. In support of the statement quoted in the paragraph above, the Commission cited to the orders of the Court of Common Pleas dated September 14, 2015 granting bifurcation and of October 13, 2015 denying certification and of the Superior Court dated December 16, 2015, denying Hirsch’s petition for review. Opinion and Order of October 13, 2016 at 31.

17. In its entirety, the order of the Court of Common Pleas dated September 14, 2015 stated the following:

AND NOW, to wit, this 14<sup>th</sup> 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.

See Exhibit A attached.

18. In its entirety, the order of the Court of Common Pleas dated October 13, 2015 stated the following:

AND NOW, to wit, this 13<sup>th</sup> 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.

See Exhibit B attached.

19. In its entirety, the order of the Superior Court dated December 16, 2015 stated the following: “The Court hereby DENIES the petition for review.” See Exhibit C attached.

20. Contrary to the Commission's Opinion and Order of October 13, 2016, not one of the three orders directed that the question of whether Duquesne Light violated its duty under the Pennsylvania Public Utility Code to provide safe and reasonable service be transferred to the Commission for a determination.

21. Moreover, the Superior Court's order of December 16, 2015 neither specifically 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 nor generally determined any substantive or jurisdictional question at all. "[A]n order granting a dismissal of an appeal does not amount to an adjudication of the underlying merits of the case." 17 Standard Pennsylvania Practice 2d § 92:9, citing Griffin v. Tedesco, 355 Pa. Super. 475, 513 A.2d 1020 (1986).

22. None of the orders cited by the Commission in its Opinion and Order of October 13, 2016 stated that the question of whether Duquesne Light violated its duty under the Pennsylvania Public Utility Code to provide safe and reasonable service was at issue in the instant controversy.

23. In none of the orders did the courts offer any reasoning or explanation of why the Commission would have jurisdiction over a claim for damages such as this, even for an adjudication of liability only, in the face of longstanding authority holding to the contrary. See Poorbaugh v. Pennsylvania Public Utility Commission, 666 A.2d 744 (Pa. Cmwlth. 1995); Schriner v. Pennsylvania Power and Light Company, 348 Pa. Super. 177, 501 A.2d 1128 (1985); DeFrancesco v. Western Pennsylvania Water Company, 499 Pa. 374, 453 A.2d 595 (1982); Elkin v. Bell Telephone Company of Pennsylvania, 491 Pa. 123, 420 A.2d 371 (1980); and Feingold v. Bell of Pennsylvania, 477 Pa. 1, 383 A.2d 791 (1977).

24. In fact, in its Opinion and Order of October 13, 2016, the Commission itself noted that “The Court’s order [of September 14, 2015] does not contain any reasoning in support of the decision to bifurcate.” Opinion and Order of October 13, 2016 at 31, n. 8.

25. During the hearing before the Commission on September 15, 2016 of Hirsch’s Petition for Interlocutory Review, in response to Commissioner Coleman’s motion that the Petition be denied, Commissioner Sweet dissented as follows:

[O]n the Commissioner's motion, I will be voting "no." I believe there has been a sufficient argument here for the granting of interlocutory review.

And were the Commission to agree with that position, I would have us vote "no" on the first question about jurisdiction.

And the second question posed, really would no longer be relevant were we to decline jurisdiction in the first place. As best I can understand the second question. Which I think is almost as muddled as the entire procedural history of this matter.

This has been through every level of the courts, common pleas courts, superior court, supreme court.

I believe that the action of, in effect, remanding this to administrative law judge will not expedite anything.

This is going to end up in the Allegheny County Court of Common Pleas anyway. And I believe in doing justice to the parties as best we can today. We would be better of [*sic*] having it go back to the court, I think, to handle this case consistent with the holdings of the Pennsylvania Supreme Court on the matter.

So this is an incident that occurred in January of 2009. The civil complaint was filed in August of 2009. And I think, checking my calendar, it's now 2016. And I believe that the best way to expedite this would be, in fact, to grant the interlocutory review, vote negative on question one.

See Exhibit D attached, the transcript of the Commission hearing of September 15, 2016, at 16:7

– 17:8.

26. In Feingold, the plaintiff sued the defendant for damages for, *inter alia*, allegedly having failed to tell callers that the plaintiff's telephone number had changed and allegedly having disconnected service because of the plaintiff's use of an unauthorized telephone answering machine.

27. In Feingold, the trial court dismissed the plaintiff's complaint on the basis that he had failed to exhaust his administrative remedies with the PUC.

28. The Supreme Court reversed, holding that the PUC did not have jurisdiction because it could not award damages to the plaintiff and therefore could not provide the plaintiff with an "adequate and complete" administrative remedy. 477 Pa. at 10 – 11, 383 A.2d at 795 – 96.

29. Because in the instant case the PUC cannot award damages to Plaintiff, it cannot provide Plaintiff with an adequate and complete administrative remedy and therefore lacks jurisdiction.

30. In the instant matter, Feingold is binding precedent.

31. Feingold mandated the Commission's granting of Petition By Alderwoods (Pennsylvania), Inc. For Interlocutory Review And Answers To Material Questions.

32. In Elkin, the plaintiff alleged that the defendant supplied the plaintiff with deficient telephone service.

33. In Elkin, the Supreme Court held that the plaintiff's complaints properly belonged before the PUC, as the plaintiff's claims involved deficient telephone service that did not cause property damage.

34. In Elkin, the Supreme Court also held that:

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.

Where . . . 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.

35. The PUC has no expertise with respect to what Respondent should have done under the circumstances of this case.

36. Under the standards set forth in Elkin, this matter should not have been transferred to the PUC for adjudication.

37. In the instant matter, Elkin is binding precedent.

38. Elkin mandated the Commission's granting of the Petition By Alderwoods (Pennsylvania), Inc. For Interlocutory Review And Answers To Material Questions.

39. In DeFrancesco, the Supreme Court held that when a utility's customer alleges that a utility's negligence damaged the customer's property, the claim may not be transferred to the Public Utility Commission.

40. In DeFrancesco, the Supreme Court held that the plaintiff's claims, concerning allegations of low water pressure, leading to fire damage to the customer's building, did not

involve considerations of “the general reasonableness, adequacy or sufficiency of a public utility's service is drawn into question.” 499 Pa. at 377, 453 A.2d at 596.

41. In DeFrancesco, the Supreme Court rejected that the plaintiff’s complaints implicated general PUC regulations regarding the plaintiff’s entitlement to water or water pressure. Id.

42. In DeFrancesco, the Supreme Court rejected that the controversy before it involved a question of service or facilities owed the general public, or a particular standard of safety or convenience articulated by the PUC Id.

43. In the instant matter, DeFrancesco is binding precedent.

44. DeFrancesco mandated the Commission’s granting of the Petition By Alderwoods (Pennsylvania), Inc. For Interlocutory Review And Answers To Material Questions.

45. In Schriner, the Superior Court held that the plaintiffs’ claims for damages to dairy cattle arising from stray voltage should not have been referred to the PUC

46. In Schriner, the Superior Court held that the complaint contained allegations which only remotely dealt with the reasonableness, adequacy, efficiency or safety of the services, facilities or rates provided by the defendant utility. 348 Pa. Super. at 182, 501 A.2d at 1130.

47. Following DeFrancesco, the Superior Court in Schriner held that “resolution of the Schriners' 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.

48. In the instant matter, Schriner is binding precedent.

49. Schriner mandated the Commission’s granting of the Petition By Alderwoods (Pennsylvania), Inc. For Interlocutory Review And Answers To Material Questions.

50. 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.

51. Observing that Poorbaugh's claim was that of one individual, not an entire geographic area, and that the claim did not raise any questions about how the utility's services or facilities affected the general public, the Commonwealth Court held that the PUC did not properly have jurisdiction, not even to adjudicate liability only. Id. at 750 – 51.

52. The facts of Poorbaugh are remarkably similar to those of the instant case.

53. Like Poorbaugh, the instant case involves no claims of property damage from anyone other than Plaintiff, the owner of the destroyed funeral home.

54. In the instant case, the funeral home was the only building receiving electric service from the utility pole damaged in the motor vehicle accident. Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 52 A.3d 347, 355 (Pa. Super. 2012).

55. The funeral home was the only customer affected by the overvoltage incident. Id.

56. In the instant matter, Poorbaugh is binding precedent.

57. Poorbaugh mandated the Commission's granting of the Petition By Alderwoods (Pennsylvania), Inc. For Interlocutory Review And Answers To Material Questions.

58. In the instant case, in the opinion above, the Supreme Court, echoing Elkin, reiterated that a jury has the ability to determine what was reasonable for Duquesne Light to have done under the circumstances. Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 106 A.3d 27, 42 (Pa. 2014).

59. The Supreme Court's opinion in Alderwoods as to the role of the jury in the instant matter is the law of the case. In re Estate of Elkins, 32 A.3d 768, 776 (Pa. Super. 2011).

60. As the law of the case, the Supreme Court's opinion in Alderwoods mandated the Commission's granting of the Petition By Alderwoods (Pennsylvania), Inc. For Interlocutory Review And Answers To Material Questions. In re Estate of Elkins.

61. In spite of the great weight of authority holding the PUC to be without jurisdiction to hear Hirsch's claims, and in spite of Commissioner Sweet's remarks, the Commission remanded the matter to the administrative law judge without ever addressing the fundamental question of whether the Commission even had the power to do so.

62. Hirsch has alleged no statutory or regulatory violation by Respondent, but rather only a breach of its common law duty, a duty owed by Respondent. Alderwoods (Pennsylvania), Inc. v. Duquesne Light Company, 106 A.3d 27 (Pa. 2014).

63. For the A.L.J. or the Commission to determine, as they have, that Hirsch's claim must necessarily implicate statutes or regulations is in complete disregard of the Supreme Court's opinion as to the existence of a common-law duty and violates Pennsylvania law barring adjudication of hypothetical controversies. Consol Pennsylvania Coal Co., LLC v. Dep't of Env'tl. Prot., 129 A.3d 28, 39 (Pa. Cmwlth. 2015).

64. Contrary to the Commission's characterization of them, none of the court orders which the Commission has cited on page 31 of its order of October 13, 2016 states that the instant matter involves "the question of whether Duquesne violated its duty under the Pennsylvania Public Utility Code to provide safe and reasonable service. . . ." Opinion and Order of October 13, 2016 at 31.

65. To the extent that the great weight of Pennsylvania authority holds that the PUC is without authority to adjudicate the instant dispute, and the Commission feels otherwise, there is a substantial ground for difference of opinion as to the PUC's jurisdiction.

66. To the extent that Commissioner Sweet has dissented from the majority of the Commission in noting the lack of PUC jurisdiction, there is a substantial ground for difference of opinion as to the PUC's jurisdiction.

67. Certification of an interlocutory appeal will materially advance the ultimate termination of this matter, given the high likelihood that upon conclusion of the proceedings before the administrative law judge, Hirsch will appeal to the Commonwealth Court irrespective of the Commission's October 13 order.

68. Contrary to the Commission's assertion, there is nothing more prejudicial than subjecting a litigant to the orders of an administrative body that has no jurisdiction under the law.

WHEREFORE, Petitioner-Complainant, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home, respectfully requests that the Commission's Opinion and Order of October 13, 2016 be amended to include findings 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 to Commonwealth Court from the order may materially advance the ultimate termination of the 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: October 13, 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 Certify The Commission's Interlocutory Order Of October 13, 2016 For Appeal To The Commonwealth Court 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: October 13, 2016