

November 2, 2016

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed for filing is Respondent's Answer to Complainant's Motion to Certify the Commission's Interlocutory Order of October 13, 2016, for Appeal to the Commonwealth Court.

Please feel free to contact me if you have any questions.

Sincerely,



Jeremy V. Farrell
Attorney for Duquesne Light Company

Enclosure

c: Bradley S. Tupi, Esq. (w/ encl., via email)
Erin Beckner Conlin, Esq. (w/ encl., via email)
Anthony D. Kanagy, Esq. (w/ encl., via email)
Krysia M. Kubiak, Esq. (w/ encl., via email)
Alan J. Charkey, Esq. (w/encl., via email and first class mail)
Administrative Law Judge Conrad A. Johnson (w/ encl., via first class mail)

LIT:613583-1 014657-139188

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

Complainant,

v.

DUQUESNE LIGHT COMPANY,

Respondent.

No: P-2016-2522634

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

Filed on Behalf of the Respondent
Duquesne Light Company

Counsel of Record for This Party:

Bradley S. Tupi, Esquire
Pa. Id. No. 28682
Erin Beckner Conlin, Esquire
Pa. Id. No. 94086
Jeremy V. Farrell, Esquire
Pa. Id. No. 316258

TUCKER ARENSBERG, P.C.
1500 One PPG Place
Pittsburgh, PA 15222
(412) 566-1212
(412) 594-5619 - FAX
btupi@tuckerlaw.com
ebeckner@tuckerlaw.com
jfarrell@tuckerlaw.com

Anthony D. Kanagy, Esq.
Pa. Id. No. 85522

POST & SCHELL PC
17 North Second Street
12th Floor
Harrisburg, PA 17101
(717) 731-1970

**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

Complainant,

vs.

DUQUESNE LIGHT COMPANY,

Respondent.

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

Respondent Duquesne Light Company ("Duquesne Light") hereby files this Answer to Complainant's Motion to Certify the Commission's Interlocutory Order of October 13, 2016, for Appeal to the Commonwealth Court (the "Commission's Order"):

I. COMPLAINANT'S MOTION SHOULD BE DENIED.

Refusing to accept that the Allegheny County Court of Common Pleas correctly applied the doctrine of primary jurisdiction and correctly ordered that this action be bifurcated and transferred to the Pennsylvania Public Utility Commission ("Commission"), Complainant's Motion to Certify the Commission's Order for Appeal to the Commonwealth Court ("Complainant's Motion") seeks yet another interlocutory appeal based on the same jurisdictional argument it has already lost five times. Complainant's Motion obscures the well-settled law and the straightforward reasons justifying bifurcation and transfer to the Commission.

A. COMPLAINANT HAS NOT MET THE STANDARD REQUIRED FOR INTERLOCUTORY APPEAL.

The standard for obtaining interlocutory appeal to the Commonwealth Court is a high one. Complainant must show that the Commission's 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." 52 Pa. Code § 5.633(a). That is identical to the standard Complainant could not meet in October 2015 when seeking interlocutory Superior Court review of the same jurisdictional arguments. See 42 Pa. C.S. § 702(b). The same result is warranted here.

Complainant mistakenly contends that its Preliminary Objections to its own Complaint involve a controlling question of law as to which there is a substantial ground for a difference of opinion because the Commission, Administrative Law Judge ("ALJ") Johnson, the Superior Court, and the Allegheny County Court of Common Pleas all have disagreed with Complainant's preferred interpretation of the case law cited in its Preliminary Objections. By Complainant's logic, immediate interlocutory appellate review would be appropriate any time that a court disagrees with case law cited by a litigant. Certainly that is not the case. See Shryock Bros., Inc., 104 Pa. P.U.C. 28 (Feb. 5, 2009) ("The mere fact that the Township did not prevail on its arguments does not equate to a finding that substantial grounds for difference of opinion exist").

More importantly, the Preliminary Objections do not involve a controlling question of law, but instead deal only with the question of where a particular issue in the action will initially be litigated. As plainly evidenced by the cases discussed below, the doctrine of primary jurisdiction is well-settled in Pennsylvania law. Elkin, infra. It is not a legal concept about which there is a substantial ground for difference of opinion. In addition, the substantive question of law in this case -- whether Duquesne Light may have duty to provide a warning to its customer before restoring service under certain situations -- has already been decided by the Supreme Court. That, however, was not the question Complainant presented in its Preliminary Objections, which

was: *now that the Supreme Court has declared the standard (and Complainant has modified its allegations to conform to that decision), who should determine the scope of the duty under that standard?* Because a controlling question of law is not involved, interlocutory appeal would be improper.

Complainant's argument that further interlocutory appeal would somehow hasten the disposition of this matter is equally unconvincing. As the Commission has already determined, "Alderwoods has not shown that granting interlocutory review expedites the conduct of the proceeding. To the contrary, pursuing interlocutory review seems to have unnecessarily prolonged the proceeding, as the civil courts already have decided that the Commission has primary jurisdiction in this case." Opinion and Order entered October 13, 2016. The Allegheny County Court of Common Pleas bifurcated this matter in September 2015. Complainant has spent the last 13-plus months relitigating the same procedural issue. Another appeal on a procedural issue would delay, not advance, the ultimate resolution of this action.

Respondent has already incurred prejudice as a result of Complainant's delay. One of its expert witnesses has died, one of its fact witnesses has died, and one of its fact witnesses has retired.

Complainant has not demonstrated that there is a controlling question of law at issue in this proceeding nor has the Complainant demonstrated that appeal to the Commonwealth Court will advance the ultimate termination of this matter as are required under 52 Pa. Code § 5.633. For these reasons, Complainant's Motion should be denied.

B. THE PRIMARY JURISDICTION RULE AUTHORIZES BIFURCATION AND TRANSFER OF THIS ACTION TO THE COMMISSION.

Duquesne Light's request that this case be bifurcated and transferred to the PUC was based on the primary jurisdiction rule, which has been accepted law in the Commonwealth for more than three decades. Elkin v. Bell Tel. Co. of Pa., 420 A.2d 371 (Pa. 1980). Because most

of Complainant's arguments either ignore or misinterpret that rule, a brief overview of the doctrine and its purposes is necessary.

The doctrine of primary jurisdiction is a judicially-created rule that allows a trial court to transfer a case to the proper administrative agency where both the court and the agency have subject matter jurisdiction over the dispute. The doctrine applies where the dispute "involves issues that are clearly better resolved in the first instance by the administrative agency charged with regulating the subject matter of the dispute." Ostrov v. I.F.T., Inc., 586 A.2d 409, 413 (Pa. Super. 1991). See also, Elkin, 420 A.2d 376 ("[T]he doctrine [of primary jurisdiction] creates a workable relationship between the courts and administrative agencies wherein, in appropriate circumstances, the courts have the benefit of the agency's views on issues within the agency's competence").

Because the PUC has no authority to award damages, the Pennsylvania Supreme Court has adopted a bifurcated procedure where damages are sought in a matter involving the special expertise of the PUC. Elkin, 420 A.2d 371. Under this bifurcated procedure, the issue of liability is transferred to and decided by the PUC and, if necessary, the trial court thereafter determines damages:

Once the administrative tribunal has determined the issues within its jurisdiction, then the temporarily suspended litigation may continue, guided in scope and direction by the nature and outcome of the agency determination.

Elkin, 420 A.2d at 377. See also Optimum Image, 600 A.2d at 555 (bifurcated procedure provides for the issue of liability to be initially decided by the PUC, after which the court of common pleas considers the issue of damages, if appropriate). The Supreme Court rejected the notion that a party could avoid PUC jurisdiction simply by seeking damages. Elkin, 420 A.2d at 375.

C. THE PUC HAS JURISDICTION TO ADJUDICATE THE SERVICE-RELATED ISSUES INVOLVED IN THIS ACTION.

This case revolves around the responsibilities a utility company owes to its customer before restoring service after an outage. The thrust of Complainant's claim is that it was unsafe and unreasonable for Duquesne Light to restore service to the Funeral Home without first engaging in certain communications with its customer. Such service-related issues are within the exclusive jurisdiction of the PUC. The Pennsylvania Supreme Court has long recognized the PUC "as the appropriate forum for the adjudication of issues involving the reasonableness, adequacy and sufficiency of public utility services." Elkin, 420 A.2d at 374; Duquesne Light Co. v. Monroeville Borough, 298 A.2d 252 (Pa. 1972).

As the Commission is well aware, the Public Utility Code, 66 Pa.C.S.A. § 101 et seq., grants the PUC the authority to carry out the provisions of the Public Utility Code and address issues within the ambit of "services" that a utility company provides to its customers. 66 Pa.C.S.A. § 1501. "Service" is broadly defined by the Public Utility Code:

Used in its broadest and most inclusive sense, including any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities, or contract carriers by motor vehicle, **in the performance of their duties under this part to the patrons**, employees, other public utilities, and the public, as well as the interchange of facilities between two or more of them. . . .

66 Pa.C.S.A. § 102 (emphasis added).

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 added). Under this broad grant of authority, the actions at the heart of Complainant's case fall within the realm of "service."

To further illustrate that point, the Commission has already resolved cases involving two crucial subjects involved in this case -- power interruptions and restorations as well as the scope of a utility's responsibilities regarding issues with its customer's equipment. See, e.g., Gary Eckenrode v. PECO Energy Co., No. C-2012-2337839, 2014 WL 527260 (Pa. P.U.C. Feb. 6, 2014) (adjudicating customer's complaint that PECO failed to restore service promptly after Hurricane Sandy); Maluchnik v. Penna. Elec. Co., No. C-2011-2245451, 2013 WL 1180372 (Pa. P.U.C. March 14, 2013) ("It is clear from [the utility's] tariff, and supported in our Regulations, that there is a point where the responsibility of the utility ends and the responsibility of the customer begins"); Hineline v. Metro. Edison Co. and Penna. Power & Light Co., No. C-902777, 1990 WL 10714871 (Pa. P.U.C. Oct. 4, 1990) (noting that "the ownership and maintenance responsibility of an electric utility ends at the point of delivery to the customer" and that imposing duties beyond that line of demarcation would increase costs for the utility and the ratepayers); Craft v. Penna. Elec. Co., 50 Pa. P.U.C. 1, 7 (Pa. P.U.C. 1976) ("Inasmuch as [the utility's] ownership and maintenance responsibilities end at the point of delivery, it is [the customer's] sole responsibility for maintaining the internal circuitry and controlling his consumption of electrical energy"). The fact that Complainant seeks monetary damages does not diminish the Commission's authority to resolve the service-related issues involved in this litigation. See, e.g., Lolly v. Duquesne Light Co., Docket No.C-2010-2167824, 2011 WL 2113407 (Pa. P.U.C. May 9, 2011) ("Nevertheless, we note that, when a complaint seeking monetary damages also alleges a violation of the Code, such as the failure to provide safe, adequate, reasonable or efficient service, we have jurisdiction to consider these service issues"). The Commission plainly has jurisdiction over the key subject matter involved in this complaint -- *i.e.*, what communications are required before a utility may restore power to its customers?

Further evidence of the PUC's jurisdiction over this matter lies in the regulations the Commission enforces regarding the restoration of service to customers as part of its efforts to ensure safe and reliable service. For example:

§ 57.194. Distribution system reliability.

(a) An EDC [electric distribution company] shall furnish and maintain adequate, efficient, safe and reasonable service and facilities, and shall make repairs, changes, alterations, substitutions, extensions and improvements in or to the service and facilities necessary or proper for the accommodation, convenience and **safety** of its patrons, employees and the public. ***The service shall be reasonably continuous and without unreasonable interruptions or delay.***

* * *

(d) ***An EDC shall strive to prevent interruptions of electric service and, when interruptions occur, restore service within the shortest reasonable time.***

(e) An EDC shall design and maintain procedures to achieve the ***reliability performance benchmarks and minimum performance standards*** established by the Commission.

52 Pa. Code § 57.194 (emphasis added).

The PUC is empowered to take, and has taken, extensive steps to regulate electric safety. See 52 Pa. Code § 57.191. To that end, the PUC regulations require that Duquesne Light install, maintain, and operate its distribution system in conformity with the applicable requirements of the National Electric Safety Code ("NESC"). 52 Pa. Code § 57.194. The PUC has established a separate Electric Safety Division within its Bureau of Investigation & Enforcement. The Electric Safety Division enforces the NESC and performs field investigations when reportable incidents occur. The purpose of the Electric Safety Division is to ensure that electric utilities are operating safely and reliably.

In addition, the PUC has adopted inspection, maintenance, repair and replacement standards for electric utilities. 52 Pa. Code § 57.198. These regulations were designed to improve the PUC's ability to monitor electric utilities' safety and service reliability. Advance Notice of Proposed Rulemaking for Revision of 52 Pa. Code Chapter 57 Pertaining to Adding Neutral Connection Inspection and Maintenance Standards for the Electric Distribution Companies, Docket No. L-2008-2044821, Order entered March 1, 2010, p. 1. One of the ways

the PUC assures compliance with its reliability standards is by requiring Duquesne Light and other electric utilities to submit system reliability information.

The PUC has regulatory authority to demand that electric distribution companies like Duquesne Light meet reliability performance benchmarks and minimum performance standards. The PUC may take enforcement action if its reliability standards are not met. 52 Pa. Code § 57.194 (h). Failure to meet the PUC's benchmarks carries adverse consequences for Duquesne Light: it can result in additional monitoring by the Commission as well as the imposition of fines and penalties. 52 Pa. Code § 57.194 (h)(1). The PUC may initiate investigations, require corrective action, impose penalties, and even revoke a utility's license as necessary to ensure system reliability, which includes the safe restoration of utility service. See 52 Pa. Code § 57.197.

Additionally, in regulating system reliability, the PUC encourages communication about prompt restoration of power. Duquesne Light's customers are increasingly dependent upon reliable electricity for their homes and businesses. The customer's primary concern during an outage is the Estimated Time of Restoration (ETR). The PUC has enacted policies to encourage utilities to provide better public notification to customers regarding service outages and estimated restoration times. 52 Pa. Code § 69.1902. In the event of major storm events, for example, the PUC encourages Duquesne Light to use mass media, the Duquesne Light website and other means to notify customers of the estimated time of restoration. The scope of the duty to advise customers prior to restoring service is within the exclusive jurisdiction of the PUC.

Perhaps most indicative of the Commission's power over the service-related issues involved in this action is Commission's recent Proposed Rulemaking Order at Docket No. L-2015-2500632. The Commission promulgated this Rulemaking Order to "add electric safety regulations to clarify the applicable electric safety standards. . . ." Rulemaking Order at 3. Specifically, the Commission proposed Section 57.28(a) to "clarify and explain the duties and

responsibilities between the customer and the electric utility.” Rulemaking Order at 6. That section is intended to “explain that an electric utility shall use every reasonable effort to properly protect the public from danger and to reduce hazards to the public due to its provision of electric distribution service and its associated equipment and facilities.” Rulemaking Order at 7. It provides:

An electric utility shall use every reasonable effort to properly warn and protect the public from danger, and shall exercise reasonable care to reduce the hazards to which employees, customers, the general public, and others may be subject to by reason of its provision of electric distribution service and its associated equipment and facilities.

Rulemaking Order at 13. This proposed section, designed to explain and clarify existing duties, makes it explicit that the Commission’s power includes the service-related issues involved in this action.

In short, Complainant’s theory of liability hinges on matters within the Commission’s jurisdiction, namely, restoration of electrical service and communications that Duquesne Light must have with customers about the customers’ electrical equipment before restoring service. Complainant’s duty to warn claim cannot be adjudicated in a vacuum. The overarching and fatal flaw in Complainant’s position is its refusal to recognize that its allegations depend on matters within the exclusive jurisdiction of the Commission. Adjudicating Duquesne Light’s duty for restoring service to Complainant should be done by the agency that administers the Commonwealth’s regulations governing restoration of service and has the special expertise necessary to make that determination in light of the practical, real-world implications of the duty sought to be imposed by Complainant.

II. ANSWER TO SPECIFIC PARAGRAPHS IN COMPLAINANT’S MOTION

1. Duquesne Light admits that, on January 9, 2009, an unidentified vehicle crashed into a utility pole on Forward Avenue in Pittsburgh. The pole carried Duquesne Light’s lines. The crash broke the pole and caused several local buildings, including the Burton L. Hirsch

Funeral Home (“Complainant” or the “Funeral Home”), to lose power. Soon after power was restored, a fire broke out in the Funeral Home. Duquesne Light denies that it was negligent and also denies that its actions caused the fire at the Funeral Home. Duquesne Light made all the proper connections (as conceded by Complainant) prior to restoring power. The fire started in Complainant’s own panel box. Despite conducting thorough and lengthy discovery in the civil action, Complainant has been unable to adduce any facts demonstrating that Duquesne Light had foreknowledge of any problem in Complainant’s panel box before it restored service.

2. Duquesne Light’s Motion for Summary Judgment is a written document that speaks for itself and Complainant’s representations regarding that document are denied. By way of further response, Duquesne Light moved for summary judgment because, under a century of Pennsylvania precedent, it had no legal duty to enter the locked Funeral Home in the middle of the night, go into the basement, and inspect the customer’s electrical panel. Duquesne Light’s Motion also argued that its duty to inspect pertained only to its own equipment and not to its customers’.

3. The Court of Common Pleas’ December 13, 2010, Order is a written document that speaks for itself and Complainant’s representations regarding that document are denied. By way of further response, the Court of Common Pleas granted Duquesne Light’s Motion for Summary Judgment, ruling that Duquesne Light had no duty to inspect Complainant’s equipment, and that the undisputed facts established that Duquesne Light used reasonable care in restoring power to the Funeral Home.

4. The Supreme Court’s opinion is a written document that speaks for itself and Complainant’s representations regarding that document are denied.

5. Duquesne Light admits that, in response to the allegations in Plaintiff’s Second Amended Complaint, it moved to bifurcate the action and transfer the liability determination to the Commission because the Commission has exclusive jurisdiction to define the scope of utility service and must balance the need to restore utility service with the need for safety in doing so.

Duquesne Light's Motion to Bifurcate and Transfer Action to the Pennsylvania Public Utility Commission ("Motion to Bifurcate and Transfer") is a written document that speaks for itself and Complainant's representations regarding the document are denied. The Motion to Bifurcate and Transfer relied up on the well-settled doctrine of primary jurisdiction, which empowered the Court to bifurcate the action and transfer to the PUC those liability issues within its regulatory purview.

6. It is admitted only that the Court of Common Pleas granted Duquesne Light's Motion to Bifurcate and Transfer over Complainant's opposition, but denied that the Court's decision was contrary to Pennsylvania law. The authority for the bifurcation requested by Duquesne Light and approved by the Court of Common Pleas -- the primary jurisdiction rule -- was established by the Pennsylvania Supreme Court over 35 years ago in Elkin v. Bell Tel. Co. of Pa., 420 A.2d 371 (Pa. 1980). Under that procedure, the issue of liability is transferred to and decided by the PUC. If necessary, the matter returns to the Court of Common Pleas to determine damages. Id. at 377.

7. Duquesne Light admits only that Complainant filed a complaint with the Commission and then filed preliminary objections to its own complaint. Duquesne Light denies all remaining allegations in paragraph 7 of Complainant's Motion and specifically denies that Poorbaugh v. Pa. Public Utility Comm'n, 666 A.2d 744 (Pa. Cmwlth. 1995), deprives the Commission of jurisdiction in this matter. To the contrary, Poorbaugh would not compel the Commonwealth Court to reverse the Commission's ruling. While both cases involve a building damaged by fire, plaintiff's theory of liability in Poorbaugh was entirely different from that advanced by Complainant, which makes Poorbaugh inapplicable here. In Poorbaugh, plaintiff alleged that West Penn was negligent because the company failed to take good care of *its own* equipment, by using improper wire and splicing the wire too often. Id. at 745-46. Critically, Poorbaugh did not involve a duty to warn, which is now the focus of Complainant's allegations. When Complainant's allegations in this case *were* similar to those at issue in Poorbaugh -- *i.e.*,

that Duquesne Light physically misconnected its wires¹ – the Company did not seek bifurcation and transfer to the PUC. It was not until Complainant changed its theory to assert an alleged duty to warn that Duquesne Light sought to transfer to the PUC. This duty to warn, which by Complainant's own admission places Duquesne Light's "overall restoration of service" directly at issue, is what triggered the necessity of involving the Commission.

8-10. ALJ Johnson's April 5, 2016, Opinion and Order is a written document that speaks for itself. Complainant's representations regarding the document are denied. By way of further response, ALJ Johnson's ruling did not transform Complainant's claim for negligence "into a proceeding to answer a hypothetical question." To the contrary, ALJ Johnson specifically indicated that the Commission "has authority to determine Duquesne's duty in providing service to Hirsch." First Interim Order at 7. There is nothing hypothetical about what Duquesne Light has asked, and the Court of Common Pleas ordered, the Commission to determine.

11-13. Duquesne Light admits only that Complainant filed a Petition for Interlocutory Commission Review and Answer to Material Question and Brief in Support, which is a written document that speaks for itself. Complainant's representations regarding the document are denied.

14-16. Duquesne Light admits only that the Commission issued an Opinion and Order on October 13, 2016, that properly denied Complainant's Petition for Interlocutory Commission Review and Answer to Material Question. The Commission's Order is a written document that speaks for itself. Complainant's representations regarding the document are denied.

17-22. Duquesne Light admits only that the Allegheny Court of Common Pleas entered orders on September 14, 2015, and on October 13, 2015, and that the Superior Court entered an order on December 16, 2015, all of which rejected the arguments Complainant now raises for the fifth time in its Motion. The orders of the Allegheny County Court of Common Pleas and

¹ Complainant abandoned this theory when its own expert, Richard Wunderley, conceded that Duquesne Light made all proper connections.

Superior Court are written documents that speak for themselves. Complainant's representations regarding those documents are denied.

23. The referenced Orders of the Allegheny County Court of Common Pleas and the Superior Court are written documents that speak for themselves. Complainant's representations regarding those documents are denied. By way of further response, Duquesne Light specifically denies that the cases cited in paragraph 23 of Complainant's Motion defeat the Commission's jurisdiction to render a liability decision in this matter. Complainant incorrectly interprets those cases. Those cases are all distinguishable because they neither dealt with a comprehensive regulatory scheme like the one involved in this litigation, nor the scope of duty to warn such as those advanced by the Funeral Home. The distinctions are critical. Resolution of the Funeral Home's allegations that Duquesne Light ***should have denied service to its customer*** until certain communications had occurred requires a nuanced understanding of not only the PUC regulations previously identified but also the practical circumstances under which electrical utility companies operate. The PUC has the unique expertise and industry knowledge needed to render a prudent decision on those issues.

24. The Commission's Order is a written document that speaks for itself. Complainant's representations regarding that document are denied.

25. The allegations in paragraph 25 of the Motion attempt to characterize a written transcript that speaks for itself. Complainant's representations regarding that document are denied. By way of further response, the Commission decided by a 4-1 vote to adopt ALJ Johnson's First Interim Order.

26-31. Denied. Complainant's reliance Feingold v. Bell of Pennsylvania, 383 A.2d 791 (Pa. 1977), is misplaced because it ignores that Duquesne Light only sought to transfer to the PUC issues regarding the scope of its duty. Feingold is factually and procedurally inapposite because that decision arose out of preliminary objections arguing that the failure to exhaust administrative remedies warranted dismissal of the case -- *an argument Duquesne Light has*

never made in this case. Feingold simply held that, because the PUC cannot award monetary damages, the doctrine of exhaustion of administrative remedies could not require dismissal of a civil action for damages. Id. at 795-96. Feingold had nothing to do with the question posed here -- whether the PUC has the authority to make a determination on an issue it comprehensively regulates.

Complainant blindly seizes on Feingold's recognition of the fact that the PUC cannot award monetary damages -- a point that Duquesne Light has never disputed. That is why Duquesne Light only asked that the liability determination regarding Duquesne Light's obligations to provide reasonable service under the Public Utility Code be transferred to the PUC. If the Commission ultimately determines that Duquesne Light provided unreasonable service, then this action will be transferred back to the Court of Common Pleas for a determination of damages -- just as Complainant wishes.

Furthermore, the policy rationale expressed in Feingold -- which is noticeably missing from the Motion -- actually *supports* the temporary transfer this action to the PUC:

When the Legislature has seen fit to enact a pervasive regulatory scheme and to establish a governmental agency possessing expertise and broad regulatory and remedial powers to administer that statutory scheme, a court should be reluctant to interfere in those matters and disputes which were intended by the Legislature to be considered, **at least initially, by the administrative agency.** Full utilization of the expertise derived from development of various administrative bodies would be frustrated by indiscriminate judicial intrusions into matters within the various agencies' respective domains.

Id. at 793 (emphasis added). That is precisely what Duquesne Light's Motion to Bifurcate sought: the initial transfer of this case to the administrative agency that regulates the exact issue involved in this litigation -- restoration of electrical service. For those reasons, Feingold did not mandate that the Commission grant Complainant's Petition for Interlocutory Review and Answers to Material Questions.

32-38. Denied. The Pennsylvania Supreme Court's decision in Elkin v. Bell Telephone Co. of Pa. 420 A.2d 371 (Pa. 1980), supports the Commission's jurisdiction to determine the

scope of Duquesne Light's duty in this matter. In Elkin, the Supreme Court *affirmed* a request to transfer the case to the PUC, while at the time rejecting the argument that the Commission has no place for cases involving monetary damages: "Initially, we address appellant's argument, the entire thrust of which is that Feingold has ousted the PUC for all purposes in any case involving an action for damages. Appellant's interpretation of Feingold is too broad and would 'virtually strip' the PUC of all jurisdiction merely by framing the allegations in contractual and/or trespassory terminology, and demanding damages." Id. at 375. The Court added:

Since, as noted, the PUC had no authority to award damages, appellant in Feingold had no adequate administrative remedy, and thus we held he had no duty to first exhaust administrative procedures before resorting to the courts. We had no occasion in Feingold to address the issue presented here. **Feingold, therefore, poses no bar to the procedure adopted by the trial court in referring the standards of services issue to the PUC.**

Appellant's simplistic notion ignores the reality that frequently both the courts and administrative agencies must each play roles in the adjudication of certain matters, and would have this Court ignore an adjudication of a competent Commonwealth administrative agency rendered after a full and fair evidentiary hearing and consideration of briefs and arguments of the parties, in an area peculiarly within the area of expertise entrusted to the agency by the legislature. This we will not do.

Id. at 375 (emphasis added). Not only did the Court expressly reject the very argument advanced by the Funeral Home, it also approved of the decision initially to refer the case (which also sought monetary damages) to the PUC, all the while touting the benefits of the procedure requested by Duquesne Light and ordered by the Court of Common Pleas.² Therefore, Elkin supports the Commission's jurisdiction and did not mandate that the Commission grant Complainant's Petition for Interlocutory Review and Answers to Material Questions.

39-44. Denied. To the contrary, DeFrancesco v. Western Pa. Water Co., 453 A.2d 595 (Pa. 1982), does not support Complainant's position. DeFrancesco stemmed from allegations

² For example, the Court stated: "To accommodate the role of the court with that of the agency, the doctrine of primary jurisdiction (or primary exclusive jurisdiction) has developed. Essentially, the doctrine creates a workable relationship between the courts and administrative agencies wherein, in appropriate circumstances, the courts can have the benefit of the agency's views on issues within the agency's competence." Id. at 375.

that a water company failed to provide adequate water service to a hydrant near the plaintiff's residence. *Id.* at 596. The only similarity between DeFrancesco and the instant matter is that both involved allegations of negligence. Unlike the instant case, resolution of the claims in DeFrancesco "depended upon no rule or regulation predicated on the peculiar expertise of the PUC, no agency policy, no question of service or facilities owed to the general public, and no particular standard of safety or convenience articulated by the PUC." *Id.* at 597. That is not the case here. Similarly, as Complainant notes, DeFrancesco did not involve "the question of whether appellants were entitled to [service,]" but this action does. 453 A.2d at 597. Complainant's fundamental position is that Duquesne Light *cannot provide service to its customers* until certain communications and/or inspections take place. Complainant's allegations take dead aim at the circumstances under which its customers are entitled to service. Therefore, DeFrancesco is neither binding precedent nor did it mandate that the Commission grant Complainant's Petition for Interlocutory Review and Answers to Material Questions.

45-49. Denied. To the contrary, Schriner v. Pa. Power & Light Co., 501 A.2d 1128 (Pa. Super. 1985), does not support Complainant's argument. In Schriner, plaintiffs sought damages from multiple defendants for loss of their dairy cattle arising from an infection supposedly caused by "stray voltage" coming from their milking equipment, which was powered by PP&L. *Id.* at 1129-30. The court determined that the PUC did not have primary jurisdiction over the dispute because, unlike the instant matter, that case only remotely dealt with the service PP&L provided to its customers. *Id.* at 1130. Complainant seemingly believes that since referral to the PUC was not proper in Schriner, which involved damage stemming from stray voltage, it is also not proper in this case because this case allegedly involves damage from an overvoltage. Such an argument, however, misses the point.³ The issue that warrants the PUC's attention in

³ The Schriner court specifically noted that the "[r]esolution of the [plaintiffs'] claims depends upon no rule or regulation predicated upon the peculiar expertise of the PUC, no agency policy, no question of

this case is not the alleged overvoltage. Rather, it is Complainant's allegation that Duquesne Light *cannot restore service to its customer* under certain circumstances without first warning the customer about potential problems in the customer's own equipment. Therefore, Schriner is neither binding precedent nor did it mandate that the Commission grant Complainant's Petition for Interlocutory Review and Answers to Material Questions.

50-57. Denied. To the contrary, Poorbaugh v. Pa. Public Utility Comm'n, 666 A.2d 744 (Pa. Cmwlth. 1995), neither justifies this Commission's reversal of the Court of Common Pleas' decision nor would compel the Commonwealth Court to reverse the Commission's ruling, as Complainant's Motion suggests. While both cases involve a building damaged by fire, plaintiff's theory of liability in Poorbaugh was entirely different from those advanced by Complainant, which renders the attempted analogy completely invalid. In Poorbaugh, plaintiff alleged that West Penn was negligent because the company failed to take good care of *its own* equipment, by using improper wire and splicing the wire too often. Id. at 745-46. Critically, Poorbaugh did not involve a duty to warn, which is now the focus of Complainant's allegations.

When Complainant's allegations *were* similar to those at issue in Poorbaugh -- *i.e.* that Duquesne Light physically misconnected its wires -- the Company did not seek bifurcation and transfer to the PUC. It was not until Complainant changed its theory to assert an alleged duty to warn that Duquesne Light sought to transfer to the PUC. This duty to warn, which by Complainant's own admission places Duquesne Light's "overall restoration of service" directly at issue, is what triggered the necessity of involving the Commission.

The allegations that Complainant chose to prosecute, which Duquesne Light must defend and this Commission must adjudicate, render DiSanto v. Dauphin Consol. Water Supply Co., 436 A.2d 197 (Pa. Super. 1981), a far more apt analogy than Poorbaugh. There, the water company had a policy that it would not provide service to a customer unless the customer's

service or facilities owed to the general public, and no particular standard of safety or convenience articulated by the PUC." Id. at 1130.

service lines were constructed by an approved contractor. Id. at 446. In the customer's action in common pleas court, the water company filed preliminary objections arguing that the case was within the primary jurisdiction of the PUC. Id. The company argued that because the "contractual dispute is in essence a complaint concerning Dauphin's policy of requiring that installation of water service lines be done by its own approved contractors," *which was a condition of extending service*, the contract was "inextricably interwoven with the reasonableness of Dauphin's method of providing utility service to the public -- a consideration which is uniquely within the province of the PUC." Id. Citing the prior versions of 66 Pa. C.S.A. §§ 102 and 1501, the court agreed and transferred the case to the PUC. Id. at 446-47.

This case demands a similar result. It deals with the conditions under which an electrical service provider can restore service to its customer. It requires a consideration of statutory mandates under the jurisdiction of the PUC and policy considerations within the unique province of the PUC. The PUC is the proper body to determine how to mesh the utility company's duty to provide service that is reasonably continuous and without interruption with the duty to warn, while providing a consistent, uniform approach for Pennsylvania utility companies and their customers to rely upon in situations where power is lost. See DiSanto, 436 A.2d at 199 (when the claims against a utility company allege that reasonable and adequate service was not provided, "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").

58-60. Denied. Complainant apparently contends that the following statement in the Supreme Court opinion, made in response to a series of questions raised in Judge Eakin's dissent, constitutes the law of the case: "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.” Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 106 A.3d 27, 42 (Pa. 2014).

Complainant ignores, however, the rule that only those issues actually decided by the appellate court can be considered the law of the case. Tyro Industries, Inc. v. James A. Wood, Inc., 614 A.2d 279, 284 (Pa. Super. 1992) (“Law of the case means that whatever is once irrevocably established as the *controlling legal rule of decision* between the same parties in the same case continues to be the law of the case”) (emphasis in original). The Supreme Court expressly stated that it was *not* deciding whether transfer to the PUC was appropriate or not:

The PUC’s position that we should leave this matter to its regulatory province is *entirely detached* from the summary judgment motion Duquesne Light filed and the limited review which was granted by this Court. *As such, in the present context, we decline to consider the Commission’s ability to diminish common-law duties on the part of utilities.*

Id. at 38 n. 13 (emphasis added).⁴ The Supreme Court’s decision incorporated the remand instruction of the Superior Court, neither of which contained any direction as to how or in what forum the matter should proceed on remand. Alderwoods, Inc. v. Duquesne Light Co., 52 A.3d 347, 357 (Pa. Super. 2012); Alderwoods, 106 A.3d at 43. Because the issue presented by Duquesne Light’s Motion to Bifurcate was not considered by the Supreme Court, the law of the case doctrine does not apply.

61. The Commission’s Order is a written document that speaks for itself. Complainant’s representations regarding that document are denied. By way of further response, the Commission does have the jurisdiction to determine the scope of Duquesne Light’s duty to Complainant, as set forth above.

62-63. The allegations in paragraph 62 of Complainant’s Motion attempt to characterize the Formal Complaint, which is a written document that speaks for itself. Complainant’s

⁴ The Supreme Court noted in the first sentence of its opinion that the main, controlling issue it accepted for review was “whether the Superior Court erred in imposing on electric utilities a burdensome and unprecedented duty to enter customers’ premises and inspect customers’ electrical facilities before restoring power after an outage?” Id. at 29.

representation regarding that document is denied. By way of further response, Complainant's repeated and confused references to some hypothetical controversy misconstrue the primary jurisdiction rule and distort Duquesne Light's request to transfer the liability phase of this case to the PUC. Duquesne Light does not seek an advisory opinion on a hypothetical question, nor will the Commission issue one. Duquesne Light sought bifurcation so that the Commission can determine the scope of its duty to Complainant. Complainant's overtures about actual cases and controversies and the Commission's ability to answer hypothetical questions have nothing to do with the ultimate resolution of this matter. ALJ Johnson's First Interim Order makes clear this perfectly clear. He specifically indicated that the Commission has "authority to determine *Duquesne's duty in providing service to Hirsch.*" First Interim Order at 7 (emphasis added). There is nothing hypothetical about the issue before the Commission in this matter.

64. The orders of the Allegheny County Court of Common Pleas and Superior Court referenced in paragraph 64 of the Motion are written documents that speak for themselves. Complainant's representations regarding those documents are denied.

65. Denied. To the contrary, the weight of Pennsylvania authority demonstrates that the Court of Common Pleas properly transferred the liability portion of this matter to the Commission pursuant to the primary jurisdiction rule, which was been adopted and approved by the Pennsylvania Supreme Court for more than three decades. Elkin, 420 A.2d 376. There is no difference of opinion between the Commission's Order and that case law.

66. Denied. To the contrary, the high hurdle required to obtain interlocutory review cannot be cleared simply because one Commissioner dissented. The Commission -- by a commanding 4-1 vote -- properly rejected Complainant's Petition for Interlocutory Review and Answer to Material Questions.

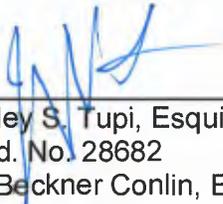
67. Denied. To the contrary, the parties having already spent four years in the appellate courts,⁵ and another year in the Commission, it is simply incorrect that yet another detour to the appellate circuit would advance rather than delay the ultimate resolution of this action.

68. Denied. Complainant's argument that the Commission lacks jurisdiction over this matter has been repeatedly rejected and is unfounded. The Commission has jurisdiction to determine the scope of Duquesne Light's duty pursuant to the well-settled primary jurisdiction rule, which has been the law of Pennsylvania for more than 35 years. Elkin, 420 A.2d 376.

WHEREFORE, Respondent Duquesne Light Company respectfully requests that the Commission deny Complainant's Motion to Certify the Commission's Interlocutory Order of October 13, 2016, for Appeal to the Commonwealth Court.

Respectfully submitted,

TUCKER ARENSBERG, P.C.



Bradley S. Tupi, Esquire
Pa. Id. No. 28682
Erin Beckner Conlin, Esquire
Pa. Id. No. 94086
Jeremy V. Farrell, Esquire
Pa. Id. No. 316258
Anthony D. Kanagy, Esq.
Pa. Id. No. 85522

Counsel for Respondent
DUQUESNE LIGHT COMPANY

⁵ This Honorable Court granted Duquesne Light's Motion for Summary Judgment on December 14, 2010. The Supreme Court's decision was not rendered until four years later, on December 15, 2014. Alderwoods, 106 A.3d 27.

CERTIFICATE OF SERVICE

I certify that on this 2ND day of November 2016, I served a true and correct copy of Respondent's Answer to Complainant's Motion to Certify the Commission's Interlocutory Order of October 13, 2016, for Appeal to the Commonwealth Court as follows:

Via Email and First Class Mail

Alan J. Charkey, Esquire
Charkeya@whiteandwilliams.com
White and Williams, LLP
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103

Via First Class Mail

Administrative Law Judge Conrad A. Johnson
Pennsylvania Public Utility Commission
301 Fifth Avenue, Suite 220
Piatt Place
Pittsburgh, PA 15222

This document was also filed on the Commission's electronic filing system.



Bradley S. Tupi
Erin Beckner Conlin
Jeremy V. Farrell