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December 16, 2016

By Electronic Filing

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

RE: Alderwoods (Pennsylvania), Inc. v. Duquesne Light Company  
Public Utility Commission Docket No. C-2016-2522634

Dear Ms. Chiavetta:

Enclosed for filing please find Complainant's Motion To Stay Case Pending Resolution Of Petitions For Review By The Commonwealth Court.

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 first class mail; and by first class mail and e-mail to:

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Counsel for Respondent,  
Duquesne Light Company,

The document was filed electronically on the Commission's electronic filing system.

Rosemary Chiavetta, Esq.

December 16, 2016

Page 2

Dated this sixteenth day of December, 2016.

**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

**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. C-2016-2522634

v.

DUQUESNE LIGHT COMPANY

**MOTION BY COMPLAINANT TO STAY CASE PENDING RESOLUTION OF  
PETITIONS FOR REVIEW BY THE COMMONWEALTH COURT**

Pursuant to Rule 1781(a) of the Rules of Appellate Procedure, 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 for a stay of the instant action pending resolution of Hirsch’s Petitions for Review now before the Commonwealth Court. In so moving, Hirsch avers as follows:

1. Over Hirsch’s objections, the Court of Common Pleas transferred the instant matter to the PUC for adjudication.
2. On January 7, 2016, Hirsch filed its complaint in the PUC.
3. On January 8, 2016, Hirsch filed a preliminary objection to the complaint for lack of jurisdiction.
4. On April 5, 2016, the Administrative Law Judge (Conrad A. Johnson, A.L.J.) in relevant part overruled Hirsch’s preliminary objection.
5. On April 22, 2016, Hirsch petitioned the Commission for interlocutory review.
6. On September 15, 2016, the Commission, with one Commissioner dissenting, voted to deny Hirsch’s petition.

7. On October 13, 2016, the Commission issued an opinion and order denying Hirsch's petition.

8. On October 14, 2016, Hirsch moved the Commission to amend its opinion and order so as to certify an interlocutory appeal of the jurisdictional question to the Commonwealth Court.

9. The Commission did not act upon the motion within thirty days, and the motion is therefore deemed denied. R.A.P. 1311(b); 52 Pa. Code § 5.633(a).

10. On December 8, 2016, Hirsch filed a Petition for Review with the Commonwealth Court, pursuant to the Note to R.A.P. 1311, seeking leave to file an interlocutory appeal of the Commission's refusal to certify an interlocutory appeal. See the Petition for Review of December 8, minus its exhibit, attached hereto as Exhibit "A".

11. On December 13, 2016, Hirsch filed a Petition for Review with the Commonwealth Court under the Court's original jurisdiction, ancillary to the December 8 petition, seeking declaratory judgment and an order in the nature of a writ of prohibition. See the Petition for Review of December 13, without its exhibits, attached hereto as Exhibit "B".

12. Under the standards governing relief in the nature of a stay pending petition for review, the applicant must establish (1) a likelihood of success on the merits of the appeal; (2) irreparable injury if a stay is denied; (3) issuance of a stay will not substantially harm other interested parties; and (4) issuance of a stay will not adversely affect the public interest.

Yatron by Yatron v. Hamburg Area Sch. Dist., 158 Pa. Commw. 204, 209, 631 A.2d 758, 761 (1993).

13. As to the first factor, the Supreme Court observed as follows:

The requirement that the applicant for a stay show that it is likely he will prevail on the merits should not be an inflexible rule. This criterion must be considered and weighed relative to the other three

criteria. Under Rule 1781 of the Pa.R.A.P., a petition for a stay is to be presented, in the first instance, to the tribunal which rendered the order being challenged. If the likelihood of success on the merits is a rigid standard, then the requirement of seeking the stay in the first instance would be a futile gesture. It is that very tribunal which has just rendered an adverse decision on the merits which would be required to consider the likelihood of success factor. It is extremely unlikely that the lower tribunal will find it likely that its order will be reversed on the merits. On the other hand, there are ample instances where the lower tribunal could find that the applicant has presented a substantial case on the merits even though it disagrees.

Pa. Public Utility Commission v. Process Gas Consumers Group, 502 Pa. 545, 554 n.8, 467 A.2d 805, 809 (1983), rev'd on other grounds, 511 Pa. 88, 511 A.2d 1315 (1986).

14. The instant motion should be granted because all four factors under the applicable test point in favor of a stay.

15. First, it is likely that Hirsch will successfully establish that the PUC has no jurisdiction to adjudicate a claim for damages, not even to adjudicate an assessment of liability. See Poorbaugh v. Pennsylvania Public Utility Commission, 666 A.2d 744 (Pa. Cmwlth. 1995). See also Feingold v. Bell of Pennsylvania, 477 Pa. 1, 383 A.2d 791 (1977); Elkin v. Bell Telephone Company of Pennsylvania, 491 Pa. 123, 420 A.2d 371 (1980); DeFrancesco v. Western Pennsylvania Water Company, 499 Pa. 374, 453 A.2d 595 (1982); and Schriner v. Pennsylvania Power and Light Company, 348 Pa. Super. 177, 501 A.2d 1128 (1985).

16. As to the second factor, Hirsch faces the prospect of irreparable injury if the stay is denied. Were the A.L.J. to determine liability before the Commonwealth Court resolved Hirsch's petitions, and the Commonwealth Court later held that the PUC has no jurisdiction here, Hirsch would have incurred time and expense in preparing for and litigating a hearing that was ultimately a nullity, and would only have to repeat the process for trial in the Court of Common Pleas, to Hirsch's great detriment.

17. With respect to the third factor, Respondent will not be harmed by a stay. To the contrary, Respondent would similarly be saved from the prospect of preparing for and adjudicating a hearing that would have no legal consequence.

18. With regard to the fourth factor, the public interest would be served by ensuring that the instant case is adjudicated in the proper forum according to Pennsylvania law. Litigating the case in the *wrong* forum would adversely affect the public interest by encouraging future litigants to do likewise.

WHEREFORE, Complainant, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home, respectfully requests that the instant matter be stayed until the Petitions for Review in the Commonwealth Court, docket nos. 1966 CD 2016 and 693 MD 2016, and all proceedings and appeals resulting therefrom, are fully and finally resolved.

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: December 16, 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 Complainant To Stay Case Pending Resolution Of Petitions For Review By 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: December 16, 2016

# **EXHIBIT “A”**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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

**PETITIONER**

**v.**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION,**

**RESPONDENT**

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**PETITION FOR REVIEW BY**

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

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**PETITION FOR REVIEW OF THE DENIAL BY THE PENNSYLVANIA PUBLIC UTILITY COMMISSION OF PETITIONER'S MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL OF THE OPINION AND ORDER OF THE PUBLIC UTILITY COMMISSION IN CASE NO. P-2016-2541570 ENTERED OCTOBER 13, 2016 DENYING PETITIONER'S PETITION TO THE PUBLIC UTILITY COMMISSION FOR INTERLOCUTORY REVIEW OF THE FIRST INTERIM ORDER OF THE ADMINISTRATIVE LAW JUDGE DENYING IN PART PETITIONER'S PRELIMINARY OBJECTION TO JURISDICTION**

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International, t/a Burton L. Hirsch Funeral  
Home

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

Petitioner

v.

PENNSYLVANIA PUBLIC UTILITY  
COMMISSION,

Respondent

IN THE COMMONWEALTH COURT  
OF PENNSYLVANIA

**NOTICE TO PARTICIPATE**

To Duquesne Light Company:

If you intend to participate in this proceeding in the Commonwealth Court, you must serve and file a notice of intervention under Pa.R.A.P. 1531 of the Pennsylvania Rules of Appellate Procedure within 30 days.

**WHITE AND WILLIAMS LLP**

/s/ Alan J. Charkey

By: Alan J. Charkey, Esquire

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

Date: December 8, 2016

In flagrant disregard of the Commonwealth Court’s opinion in Poorbaugh v. Pennsylvania Public Utility Commission, 666 A.2d 744 (Pa. Cmwlth. 1995), involving strikingly similar facts to those of the instant case, holding that the Public Utility Commission has no jurisdiction to adjudicate claims for damages, on October 13, 2016 the Pennsylvania Public Utility Commission (“PUC”) issued an Opinion and Order essentially refusing to relinquish jurisdiction in this damages case. Because the PUC has now declined to take action on Petitioner’s subsequent motion for certification of an interlocutory appeal, the motion is deemed denied. Erroneously ordered by the Court of Common Pleas to transfer its case to the PUC and now ensnared in the PUC’s *ultra vires* tentacles, Petitioner thus has no choice but to seek relief from the Commonwealth Court.

In denying Petitioner’s request for relief, the PUC flouts thirty-nine years of well-settled law holding that claims for damages cannot be adjudicated within the PUC. The Commonwealth Court should grant the instant Petition because whether a tort matter may be adjudicated by the PUC involves a controlling question of law as to which there is substantial ground for difference of opinion – between the Commonwealth Court and Pennsylvania’s other appellate courts on the one hand, and four of the five PUC commissioners on the other<sup>1</sup> – and because an immediate appeal from the order would save years of unnecessary procedural wrangling which would result from the PUC’s *ultra vires* orders, in a case which has already been to the state Supreme Court and which is already eight years old.

The adjudication of a claim for property damage against a utility by the PUC is manifestly contrary to the principle of *stare decisis*, particularly to this Court’s opinion in Poorbaugh. The PUC’s refusal to relinquish jurisdiction is in egregious contravention of

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<sup>1</sup> Commissioner David Sweet dissented from the PUC Commissioners’ refusal to grant Petitioner interlocutory relief, agreeing with Petitioner that the PUC lacks jurisdiction in this case.

appellate authority holding that under the circumstances of this case an adjudication may not take place within the PUC.

**I. STATEMENT OF JURISDICTION**

Plaintiff/Petitioner, Alderwoods (Pennsylvania), Inc., a Wholly Owned Subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home (“Hirsch”), files this Petition for Review pursuant to Subchapter A of Chapter 7 of Title 2 of the Pennsylvania Consolidated Statutes, 2 Pa.C.S. § 701, *et seq.*; 42 Pa. C.S. § 702(b); 42 Pa.C.S. § 763(a) and Rules 312 and 1311 of the Pennsylvania Rules of Appellate Procedure.

Hirsch seeks review of the PUC’s denial of Hirsch’s Motion to Certify the Commission’s Interlocutory Order Of October 13, 2016 For Appeal To The Commonwealth Court. The PUC took no action on the motion. Under Rule 1311(b) and 52 Pa. Code § 5.633(a), the motion is now deemed denied. The order for which the motion sought certification was issued by the PUC in response to Hirsch’s Petition for Interlocutory Review regarding the PUC’s lack of jurisdiction.

This Court has jurisdiction over the deemed denial of a motion for certification for interlocutory appeal under Chapter 15 of the Rules of Appellate Procedure. See Rule 1502 of the Pennsylvania Rules of Appellate Procedure (Petition for Review replaces former procedures, such as petitions for the prerogative writs of mandamus and prohibition) and *Note* to R.A.P. 1311 (“Where the administrative agency . . . refuses to amend its order to include the prescribed statement [for interlocutory review], a petition for review under Chapter 15 of the unappealable order of denial is the proper mode [of seeking review] . . .”).

The 2004 Amendments to the Rules of Appellate Procedure make clear that a petition for review may seek review of an order refusing to certify the appeal of an interlocutory order. See R.A.P. 1501(a)(4) (noting that Chapter 15 applies to “review of orders refusing to certify

interlocutory orders for immediate appeal”) and the *Note* thereto.<sup>2</sup>

Finally, pursuant to R.A.P. 1512(a)(1), a petition for review must be filed within thirty days after the entry of the order for which review is sought. The instant petition is timely because the PUC issued its opinion with respect to jurisdiction on October 13, 2016. Petitioner filed its motion for certification with the PUC on October 13, 2016; the thirtieth day after the filing of the motion – the date on which the motion was deemed denied under Rules 108(a)(2) and 1311(b) and 52 Pa. Code § 5.633(a) – was Monday, November 14, 2016.<sup>3</sup> Thirty days therefrom is December 14, 2016.

**II. THE NAME OF THE PARTY SEEKING REVIEW**

Plaintiff/Petitioner, Alderwoods (Pennsylvania), Inc., a Wholly Owned Subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home (“Hirsch”), seeks the review of the PUC’s deemed denial, effective November 14, 2016, of Hirsch’s motion for certification of the PUC’s order of October 13, 2016.

**III. THE NAME OF THE GOVERNMENT UNIT THAT MADE THE ORDER SOUGHT TO BE REVIEWED**

The Pennsylvania Public Utility Commission is the government unit whose order Hirsch seeks to be reviewed.

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\* \* \*

Subdivision (a)(4) was added in 2004 to recognize the references in various appellate rules and accompanying notes to petition for review practice. For example, the Notes to Rules 341 and 1311 direct counsel to file a petition for review of a trial court . . . order refusing to certify an interlocutory order for immediate appeal. . . .

R.A.P. 1501, *Note*.

<sup>3</sup> By operation of Rule 106 of the Rules of Civil Procedure, “Computation of Time,” the thirtieth day actually falling on Saturday, November 12, 2016.

#### **IV. THE ORDER TO BE REVIEWED**

In relevant part, the order to be reviewed is the effective denial of Hirsch's motion for certification of interlocutory appeal, deemed denied by the PUC on November 14, 2016 pursuant to Rules 108(a)(2) and 1311(b) of the Rules of Appellate Procedure and Rule 106 of the Rules of Civil Procedure. In essence, the order in question reaffirms the PUC's exercise of jurisdiction over Hirsch's claims for damages against Duquesne Light Company, manifestly contrary to Pennsylvania law. See "Statement of the Case" below for details.

#### **V. STANDARD AND SCOPE OF REVIEW**

The standard applicable to a petition for review is whether the administrative agency's refusal to certify an order for interlocutory appeal "is so egregious as to justify prerogative appellate correction of the exercise of discretion by the lower tribunal." R.A.P. 1311, *Note*. See also Silver v. Downs, 493 Pa. 50, 55, 425 A.2d 359, 362 (1981) (in the event the trial court refuses to certify an interlocutory appeal, the appellate courts may consider, and grant, a petition for review under R.A.P. 1311).

#### **VI. STATEMENT OF THE CASE**

Hirsch files the instant petition after the Supreme Court and Superior Court reversed the granting of Defendant's motion for summary judgment by the trial court (the Honorable Paul F. Luty, Jr.) in December 2010.

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 restoration of electrical service in the aftermath of a motor vehicle accident which disrupted power in the area.

The motor vehicle accident occurred on Forward Avenue in Pittsburgh, which ran behind the funeral home, which was situated on Murray Avenue nearby. The utility poles on Forward

Avenue carried high-voltage lines along their tops, with low-voltage lines running parallel to, and below, the high-voltage lines.

Hirsch commenced this action on August 25, 2009, by filing a Praeceptum to Issue Writ of Summons with the Court of Common Pleas of Allegheny County. On September 22, 2009, in response to Duquesne Light's Praeceptum for Rule to File Complaint, Hirsch filed the original complaint in this matter. The original complaint contained three counts, alleging negligence, breach of the implied warranty of hazard-free service and breach of the implied warranty of careful repair.

During discovery, when asked about potential causes of the fire, two of Duquesne Light's linemen testified that the fire may have been caused by an overvoltage condition – the high-voltage lines along Forward Avenue contacting the low voltage lines below, immediately after the motor vehicle accident, sending a surge of high-voltage current into the funeral home's equipment and compromising it, thereby causing the fire once power was restored hours later. The linemen's theory later became the theory of Hirsch's engineering expert, Richard W. Wunderley, P.E.

In late 2010, Duquesne Light moved for summary judgment, contending it had had no duty to Hirsch. On December 13, 2010, Judge Luty granted the motion and dismissed Hirsch's action. In an opinion issued on March 8, 2011 pursuant to R.A.P. 1925(a), Judge Luty opined that summary judgment was warranted because Duquesne Light had been under no duty to Hirsch.

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

347, 355 (Pa. Super. 2012) (Musmanno, J.)

In briefing before the Supreme Court, the PUC as *amicus* raised the question of transfer of the case to the PUC, but Duquesne Light did not address the issue. See Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 106 A.3d 27, 39 n. 13 (Pa. 2014).

In its opinion reversing Judge Luty, the Supreme Court held that Duquesne Light had been under a duty to Hirsch. 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.

The Supreme Court also found that Duquesne Light had not properly raised the question of whether Hirsch's Amended Complaint contained an allegation of failure to warn, as determined by the Superior Court. Id. at 40, n. 14.

After remand to the Court of Common Pleas, with leave of court Hirsch amended its complaint in May 2015 to expressly include an allegation of failure to warn.

On or about June 26, 2015, Duquesne Light moved to bifurcate – to transfer the adjudication of its liability to the PUC. Hirsch served its Memorandum of Law in opposition on the trial court and on Duquesne Light on or about August 14, 2015. Duquesne Light did not file

a brief in reply to Hirsch's Memorandum of Law.

Argument on the motion was held before Judge Luty in chambers on August 25, 2015. During argument, Judge Luty directed the court reporter, who was present in chambers, not to record the colloquy. Toward the end of argument, almost one hour later, the Court asked the court reporter to go on the record.

During argument, Duquesne Light's counsel asked for permission to file a supplemental brief. Judge Luty granted leave for Duquesne Light to file a supplemental brief and for Hirsch to file a response thereafter.

On August 31, 2015, Judge Luty issued an order denying Duquesne Light's motion to bifurcate. The next day, September 1, 2015, Judge Luty issued an order vacating the order he had issued the previous day.

On or about September 4, 2015, Duquesne Light served its supplemental brief. On or about September 11, 2015, Hirsch served its supplemental memorandum of law in response to Duquesne Light's supplemental brief.

On September 14, 2015, Judge Luty reversed his August 31 order and granted Duquesne Light's motion to bifurcate. On or about September 22, 2015, Hirsch served its Motion For Reconsideration of Order of September 14, 2015 Or, In The Alternative, For Amendment Of Order To Allow Interlocutory Appeal.

On October 13, 2015, Judge Luty heard arguments on the aforesaid motion in chambers. During argument, Judge Luty stated, among other things, that deciding the motion for reconsideration/for certification of interlocutory appeal was one of the toughest decisions he had had to make. Judge Luty directed the court reporter not to record the argument.

On October 13, 2015, Judge Luty denied Hirsch's motion for reconsideration/for

certification of interlocutory appeal.

On October 29, 2015 Hirsch filed with the Superior Court a petition for review of Judge Luty's October 13, 2015 order. On December 16, 2016, the Superior Court denied the petition in a one-sentence order.

On January 7, 2016, Hirsch filed a complaint with the PUC which contained substantially the same averments as its Second Amended Complaint. On January 8, 2016, after refileing its complaint with the PUC, Hirsch filed a preliminary objection based upon the lack of jurisdiction.

On April 5, 2016, Respondent, the Honorable Respondent Conrad A. Johnson, A.L.J., issued his opinion. In spite of this Court's holding in Poorbaugh, *supra*, that in damages claims the PUC does not have jurisdiction even to consider liability only, the A.L.J. found such jurisdiction anyway. In his opinion, the A.L.J. also 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 requirements of Section 1501 of the Code*" (emphasis added), even though Hirsch has never alleged any statutory violation in any of its complaints and even though the Supreme Court held that a *common law duty* exists in this case.

On April 22, 2016, pursuant to 52 Pa. Code § 5.302(a), Hirsch filed a Petition For Interlocutory Review And Answers To Material Questions with the PUC's Commission, (1) challenging the PUC's jurisdiction and (2) the A.L.J.'s authority to determine a hypothetical question not raised by the parties.

On September 15, 2016, Respondent, the Honorable John F. Coleman, Jr., moved the Commission to deny Hirsch's petition because Hirsch had not demonstrated substantial prejudice and because to the extent there had been any delay it arose from Hirsch's petitioning for interlocutory review. During the hearing before the Commission on that date, Commissioner

David 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 off [*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.

The majority of the commission voted to adopt Commissioner Coleman's motion as its opinion. The written opinion and order was issued on October 13, 2016, exactly one year to the day from Judge Luty's denial of Hirsch's motion for certification of an interlocutory appeal to the Superior Court. That same day, Hirsch moved the PUC to certify an interlocutory appeal to the Commonwealth Court. More than thirty days have passed from the date of filing without any action taken on the motion by the PUC.

**VII. GENERAL STATEMENT OF THE OBJECTIONS TO THE ORDER AND WHY THE APPEAL SHOULD BE PERMITTED**

Hirsch seeks review of PUC's denial of Hirsch motion for certification because the continued exercise of jurisdiction by the PUC is manifestly and egregiously contrary to the great weight of Pennsylvania authority holding that the PUC cannot adjudicate claims of property damage resulting from a utility's negligence.

Hirsch also seeks review of the PUC's denial because of the A.L.J.'s announced intent to litigate a hypothetical question – whether Duquesne Light violated the reasonable and adequate service requirement of 66 Pa.C.S. § 1501 – a claim which Hirsch has never asserted. Under well-settled Pennsylvania law, hypothetical questions may not be adjudicated.

Hirsch further seeks review of the denial because this case already suffered a four-year odyssey through the appellate courts as a result of Judge Luty's earlier holding that Duquesne Light Company was under no duty to Hirsch, a holding which the Superior Court and Supreme Court found to be error. Should the PUC continue to maintain jurisdiction over this case – in an environment so biased in favor of utilities that it is all but immune to the doctrine of *stare decisis* – the outcome is all but certain: exculpation of Duquesne Light Company by the A.L.J. Hirsch would then have no choice but to appeal to this Court anyway. Accordingly, immediate review “would materially advance the ultimate termination of the matter. . . .” 42 Pa.C.S. § 702(b).

Material advancement of the ultimate termination of the matter is one of Section 702(b)'s two prongs. The other prong has also been met. To the extent that the PUC felt that longstanding appellate authority did not control the outcome of Duquesne Light's motion to bifurcate, there was, at least from the PUC's standpoint, “a controlling question of law as to which there is substantial ground for difference of opinion.” This was particularly true given Commissioner Sweet's dissenting statement in which he opined that the PUC lacks jurisdiction

in this case.

**A. The PUC Cannot Adjudicate Claims For Damages**

The instant petition should be granted because under well-settled Pennsylvania law, including Poorbaugh, the PUC cannot hear a claim for damages arising on a single occasion from a single act or omission. There is now an abundance of case law holding that such claims for damages, arising from the furnishing of service, need not be routed to the PUC and are more appropriately handled by the courts.

The seminal case in this area is Feingold v. Bell of Pennsylvania, 477 Pa. 1, 383 A.2d 791 (1977). 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. The trial court agreed and dismissed the plaintiff's complaint because he had failed to exhaust his administrative remedies with the PUC.

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.<sup>4</sup>

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

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<sup>4</sup> 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).

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,

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. Even so, the Elkin court, acknowledging the technical expertise of administrative agencies under the doctrine of “primary jurisdiction,” 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.

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.) Because in Elkin, the plaintiff claimed damages arising from Bell’s directory assistance and from its allegedly deficient WATS service, the Court found the involvement of the PUC to have been appropriate. “The competence of the agency in these areas is substantially greater than the court’s, and the need for uniformity of policy is apparent.” 491 Pa. at 135, 420 A.2d at 377.

In DeFrancesco v. Western Pennsylvania Water Company, 499 Pa. 374, 453 A.2d 595 (1982), the Court again addressed the question of the proper forum for damages claims against public utilities. DeFrancesco concerned a fire loss which was exacerbated by allegedly low water pressure. 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.<sup>5</sup>

<sup>5</sup>. 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 Superior Court held that they should not have been referred. It held that the plaintiffs' claims 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,”<sup>5</sup> of the Public Utility Code, 66 Pa.C.S. § 101, *et seq.* Citing DeFrancesco, this 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. The Superior Court then held 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.

In Poorbaugh v. Pennsylvania Public Utility Commission, 666 A.2d 744 (Pa. Cmwlth. 1995), this Court found that with respect to the plaintiff’s claims, the PUC’s expertise would not have been helpful. Poorbaugh involved facts that are remarkably similar to the facts of the instant case: a high-voltage line contacting a lower-voltage line immediately beneath it, resulting in overvoltage damage, the interruption of electrical service, and subsequent fire damage to the customer’s structure. Id. at 746. This Court disagreed with the contention that the case should

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<sup>5</sup> 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.

have been adjudicated within the PUC.

[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. Feingold v. Bell of Pennsylvania, 477 Pa. 1, 10-11 n. 7, 383 A.2d 791, 796 n. 7. 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.

In its opinion, this Court distinguished the facts of Optimum Image, Inc. v. Philadelphia Electric Co., 410 Pa. Super. 475, 600 A.2d 553 (1991), in which the Superior Court approved the transfer of claims to the PUC and which Duquesne Light has cited in the instant controversy.

According to the Commonwealth Court,

In that case, Optimum Image sued Philadelphia Electric Company (PECO), claiming that its film processing machines and its cash register had been damaged by power surges that were a result of voltage fluctuations in PECO's electrical service. Optimum Image's complaint alleged that PECO delivered, over an extended period of time, unreasonably defective electrical power to its business premises. Also at issue were matters relating to the adequacy of the equipment used by PECO to investigate the

problems that were experienced by Optimum Image as well as PECO's compliance with the tariff it had filed with the PUC. Our Superior Court concluded that the expertise of the PUC was needed to decide Optimum Image's claims. Optimum Image, 410 Pa. Superior Ct. at 483, 600 A.2d at 557.

The Superior Court stated that, unlike the claims in DeFrancesco, the allegations of Optimum Image encompassed complex, technical claims relating to problems with the supply of electrical power over an extended period of time. Id. at 484, 600 A.2d at 557. Moreover, Optimum Image had also taken issue with the equipment used by PECO to investigate its problems as well as with PECO's compliance with its tariff. Id.

While Optimum Image is similar in some respects to the present case, we conclude that there are several important differences which make Optimum Image distinguishable. First, Poorbaugh's claims focus upon one specific instance of electrical problems, not electrical problems over an extended period of time. Second, as has already been discussed, we do not believe that Poorbaugh's case involves complex, technical issues. Unlike Optimum Image, Poorbaugh has not raised any issues relating to tariffs which would certainly require the expertise of the PUC. Given these considerations, we conclude that Optimum Image is not persuasive in the present case.

Poorbaugh, 666 A.2d at 751. Simply put, Poorbaugh's claim for damages belonged before the trial court, not the PUC.<sup>6</sup>

Following Poorbaugh, the Commonwealth Court again reviewed the doctrine of primary jurisdiction in Vertis Group, Inc. v. Pennsylvania Public Utility Commission, 840 A.2d 390 (2003). Like the plaintiff in Optimum Image, the plaintiff in Vertis Group complained of an irregular power supply over a period of time. The court held the complaint properly transferred to the PUC:

We note that our Superior Court's decision in Optimum Image, Inc.

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<sup>6</sup> In the trial court below, Duquesne Light absurdly distinguished Poorbaugh from the instant case, because Poorbaugh did not involve an allegation of failure to warn. Failure to warn is but one component of a negligence claim. That Poorbaugh did not involve a claim of failure to warn whereas the instant case does is a distinction without any meaningful difference.

was instructive on this issue, as the facts of that case are quite similar to the facts of the present case before this Court. Under this similar factual pattern, the Superior Court in Optimum Image, Inc. also held that bifurcation was appropriate. Moreover, in Poorbaugh, we distinguished the facts of that case from the facts of Optimum Image, Inc., noting that the former involved one specific instance of electrical problems whereas the latter, similar to the facts of the present case, involved electrical problems over an extended period of time. Further, unlike Optimum Image, Inc., we noted that the petitioner in Poorbaugh had “not raised any issues relating to tariffs which would certainly require the expertise of the PUC.” Poorbaugh, 666 A.2d at 751.

Vertis Group at 397 n. 15.

The lesson from the foregoing cases is clear. If the complainant alleges quality-of-service problems such as continually deficient telephone service or ongoing power surges or repeatedly irregular voltage, affecting a widespread geographic area, 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.

In the instant case, Hirsch does not allege in its Second Amended Complaint that Duquesne Light violated PUC rules or regulations, 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. 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.<sup>7</sup> This case involves no issue “falling arguably within the domain of the agency’s ‘expertise.’” Elkin, 491 Pa. at 134, 420

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<sup>7</sup> Duquesne Light has insisted that even though Hirsch has only claimed negligence, Hirsch’s complaints implicate the statutory mandate of adequate, efficient, safe, and reasonable service under 66 Pa.C.S. § 1501 anyway, requiring adjudication of such claims by the PUC. Were this true, tort causes of action against regulated utilities as extensively discussed in Alderwoods would practically be unavailable, and the entire Alderwoods opinion, addressing utilities’ duties in tort, would be mere surplusage.

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 negligence and the recognition of a duty to inspect or warn are manifestly outside the scope of the PUC’s authority and expertise.<sup>8</sup> DeFrancesco. Quite simply, there is nothing technical for the PUC to address.

**B. Hypothetical Questions May Not Be Adjudicated.**

As noted above, in his opinion partially overruling Hirsch’s preliminary objection to PUC jurisdiction, the A.L.J. offered that the case “may well constitute a violation of the reasonable and adequate service requirements of Section 1501 of the Code,” even though Hirsch has never alleged any statutory violation in any of its complaints.

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

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<sup>8</sup> Confirming the PUC’s lack of expertise, in its *amicus* brief to the Supreme Court the PUC could only cite irrelevant regulations. For example, the PUC cited regulations concerning reporting of service outages such as 52 Pa. Code § 67.1 and 52 Pa. Code § 69.1901 which do not mandate the restoration of service in the face of a grave threat of fire. Similarly, the PUC cited 52 Pa. Code § 57.198, intended to provide a certain minimum level of reliability, but failed to explain why such a standard is incompatible with fire prevention. If the PUC had the expertise which Duquesne Light has claimed it to have, the PUC failed to demonstrate that expertise during its opportunity to do so before the Supreme Court.

[O]ur courts have opined that where resolution of a party’s claim “... depend[s] 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”, then the court should not refer the matter to the Commission.

Ostrov v. I.F.T., Inc., 402 Pa. Super. 87, 97, 586 A.2d 409, 414 – 15 (1991), quoting DeFrancesco, 499 Pa. at 378, 453 A.2d at 597. (Editing marks within quotation supplied by the court.)

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.<sup>9</sup>

Moreover, as noted in footnote 7 above, were tort claims against regulated utilities automatically deemed to involve statutory violations, requiring the PUC's expertise, much of Pennsylvania law on the adjudication of damages, from Feingold to Alderwoods, would be rendered moot.

C. **The Supreme Court's Opinion As To the Role of the Jury is the Law of The Case. Transfer of the Case to the PUC Would Usurp the Role of the Jury.**

The petition should also be granted because in its opinion in this case, the Supreme Court

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<sup>9</sup> In his opinion, the A.L.J.'s statement that "Duquesne may ultimately face a civil penalty," 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, 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.

reaffirmed it is for the jury, not the PUC, to determine what was reasonable under the circumstances. The Court's opinion is the law of the case.

In disputing Justice Eakin's dissenting opinion, which questioned the effect of the Court's opinion and upon which Duquesne Light based its motion to bifurcate, the Court reaffirmed the role of the jury. "[T]hese 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."<sup>10</sup> Alderwoods, 106 A.3d at 42. (Emphasis added.)

The Supreme Court's opinion above, both as to the nature of the duty and the role of the jury, is the law of the case and must be applied to the resolution of the pending motion.

The law of the case doctrine sets forth various rules that embody the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter.

Among the related but distinct rules which make up the law of the case doctrine are that: (1) upon remand for further proceedings, a trial court may not alter the resolution of a legal question previously decided by the appellate court in the matter. . . .

In re Estate of Elkins, 32 A.3d 768, 776 (Pa. Super. 2011), quoting Ario v. Reliance Insurance Co., 602 Pa. 490, 980 A.2d 588, 597 (2009) (first paragraph) and Commonwealth v. Starr, 541 Pa. 564, 664 A.2d 1326, 1331 (1995) (second paragraph). (Quotation marks omitted.)

There is nothing for the PUC to consider. On the date of the fire, Duquesne Light was under a longstanding duty to avoid harm to Hirsch's property when Duquesne Light had either actual or constructive notice of a problem with Hirsch's equipment following an overvoltage

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<sup>10</sup> See the larger passage containing this quotation at page 6, *supra*.

incident. Under our judicial system, *how* Duquesne Light was to discharge that longstanding duty is to be decided by the jury. Alderwoods, 106 A.3d at 42. In light of Duquesne Light's professed confusion as to what would have been reasonable under the circumstances, the jury must address the question, not an administrative agency.

Ordinary care is the care a reasonably prudent person would use under the circumstances presented in this case. It is the duty of every person to use ordinary care not only for his own safety and the protection of his property, but also to avoid serious injury to others. *What constitutes ordinary care varies according to the particular circumstances and conditions existing then and there.* The amount of care required by law must be in keeping with the degree of danger involved.

Stewart v. Motts, 539 Pa. 596, 606 – 07, 654 A.2d 535, 540 (1995), quoting with approval the jury instructions of the trial court below. (Emphasis added.) “The charge properly instructed the jury that the level of care required changed with the circumstances. The charge also informed the jury that the level of care required increased proportionately with the level of danger in the activity.” 539 Pa. at 607, 654 A.2d at 540. See also S.S.J.I. 13.10 (Civ) (“You must decide how a reasonably careful person would act *under the circumstances of this case*”; emphasis added.) See also Alderwoods at 34 n. 6, discussing Stewart v. Motts; Bloomer v. Snellenburg, 221 Pa. 25, 28, 69 A. 1124, 1124 (1908) (in determining question of contributory negligence, what a reasonably prudent person would do under the circumstances is a question of fact for the jury, and not of law for the court); and Meyers v. Cent. R. Co. of New Jersey, 218 Pa. 305, 306, 67 A. 620 (1907) (jury could have inferred that train conductor should have reasonably anticipated fatal accident would result from his failure to give warning of train's approach).

As the Supreme Court observed at several points in Alderwoods, this case involves questions of actual *or* constructive notice or knowledge of a defect in Plaintiff's electrical equipment. See, e.g., 106 A.3d at 38. “Constructive knowledge” means “knowledge that one

using reasonable care or diligence *should* have, and therefore that is attributed by law to a given person.” Gleeson v. State Board of Medicine, 900 A.2d 430, 438 (Pa. Cmwlth. 2006), quoting Black’s Law Dictionary at 888 (8th ed. 2004). (Emphasis added.) Questions of whether a defendant had constructive knowledge are to be decided by the jury. See Franc v. Pennsylvania Railroad, 424 Pa. 99, 102, 225 A.2d 528, 529 (1967) (as railroad employees routinely walked across bridge, question of whether railroad was on constructive notice of defect in pedestrian walkway to be decided by the jury). See also, e.g., Shaw v. Thomas Jefferson University, 80 A.3d 540, 546 n. 6 (Pa. Cmwlth. 2013); Antonace v. Ferri Contracting Co., Inc., 320 Pa. Super. 519, 525, 467 A.2d 833, 836 – 37 (1983); and Naponic v. Carlton Motel, Inc., 221 Pa. Super. 287, 290, 289 A.2d 473, 475 (1972).

In the instant case, the testimony of Duquesne Light’s linemen as to the cause of the fire, in tandem with Duquesne Light’s having previously litigated a similar incident of overvoltage damage in Wivagg v. Duquesne Light Co., 73 D. & C.2d 694 (C.P. Allegheny County 1975) and the reported opinion of Poorbaugh v. Pennsylvania Public Utility Commission, 666 A.2d 744 (Pa. Cmwlth. 1995), also involving overvoltage damage, gives rise to the question of whether Duquesne Light had constructive knowledge, or was on constructive notice, of a problem with Plaintiff’s electrical equipment. The PUC could not decide the issue.

Duquesne Light would usurp the jury’s function by transferring the determination of reasonableness to its friends at the PUC. Our system does not work that way. It is for the jury, not a court, and certainly not an administrative law judge, to decide questions of constructive knowledge and of what was reasonable under the circumstances. Our Supreme Court has already said so *in this case*. 106 A.3d at 42. See also Bloomer v. Snellenburg, *supra*.

**C. Conclusion**

Aside from the Supreme Court's opinion above, of all the cases adverse to Duquesne Light's motion, Poorbaugh is probably the most directly on point. Like the instant case, it involved another overvoltage incident, leading Judge Musmanno to discuss it in some detail in his July 2012 opinion. Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 52 A.3d 347, 354 (Pa. Super. 2012). Like the instant case, Poorbaugh involved a single incident of fire damage to a single customer.

Moreover, adjudication by a PUC administrative law judge would never succeed in providing answers to most of the rhetorical questions appearing in Justice Eakin's dissenting opinion. The questions are simply irrelevant to this case, which is, or should be, about how Duquesne Light failed in its duty *to Hirsch* on January 10, 2009.

If controlling case law were not enough, the Supreme Court here has already disposed of the bifurcation issue in its opinion above. This case involves a longstanding duty. Juries determine what a reasonable person, or a reasonable electric utility, should have done in the face of a longstanding duty. 106 A.3d at 42. The Court's opinion is the law of the case and cannot be changed.

The PUC would not be helpful and would only delay this case before its inevitable return to the Court of Common Pleas.

Hirsch recognizes that the likelihood of the granting of a petition for review is small, particularly when the Commonwealth agency has refused to certify an interlocutory appeal. However, the PUC is fundamentally without any authority or discretion to do *anything* in this case. That it continues to maintain its grip over Hirsch's claims in egregious disregard of this

Court, our other appellate courts and of the principle of *stare decisis*.<sup>11</sup> To avoid the near certainty of an appeal to the Commonwealth Court at the conclusion of an A.L.J. adjudication, the Court should grant the instant petition, particularly when Hirsch has already waited nearly eight years for a remedy.

**VIII. RELIEF SOUGHT**

Plaintiff/Petitioner, Alderwoods (Pennsylvania), Inc., a Wholly Owned Subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home, respectfully requests that the Court grant interlocutory review of the PUC's exercise of jurisdiction over the adjudication of Duquesne Light Company's liability to Hirsch.

**IX. COPY OF ORDER OR OTHER DETERMINATION TO BE REVIEWED**

Not applicable, as the denial of Hirsch's motion for certification of an interlocutory appeal has been deemed denied by operation of law. However, the PUC's opinion and order dated October 13, 2016 which occasioned the deemed-denial is attached as Exhibit "A".

Respectfully submitted,

**WHITE AND WILLIAMS LLP**

/s/ Alan J. Charkey

By: Alan J. Charkey, Esquire

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

Date: December 8, 2016

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<sup>11</sup> "The rule of *stare decisis* declares that for the sake of certainty, a conclusion reached in one case should be applied to those which follow, if the facts are substantially the same, even though the parties may be different." Com. v. Tilghman, 543 Pa. 578, 588 n. 9, 673 A.2d 898, 903 n. 9 (1996).

**VERIFICATION**

I, Alan J. Charkey, Esquire, hereby state that I am counsel for Petitioner, 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 Petition for Review 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: December 8, 2016

# **EXHIBIT “B”**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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

**PETITIONER,**

**v.**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION, THE HONORABLE GLADYS M. BROWN, CHAIRMAN, THE HONORABLE ANDREW G. PLACE, VICE CHAIRMAN, THE HONORABLE JOHN F. COLEMAN, JR., COMMISSIONER, THE HONORABLE ROBERT F. POWELSON, COMMISSIONER, THE HONORABLE DAVID W. SWEET, COMMISSIONER, AND DUQUESNE LIGHT COMPANY,**

**RESPONDENTS**

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

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**PETITION FOR REVIEW, IN THE NATURE OF A COMPLAINT FOR DECLARATORY JUDGMENT AND IN THE NATURE OF AN ANCILLARY WRIT OF PROHIBITION, OF THE ORDER OF THE PUBLIC UTILITY COMMISSION, UNDER PUC DOCKET NO. P-2016-2541570, DATED OCTOBER 13, 2016, DENYING CERTIFICATION FOR INTERLOCUTORY APPEAL OF THE APRIL 5, 2016 ORDER BY THE ADMINISTRATIVE LAW JUDGE WHICH DENIED IN PART PETITIONER'S PRELIMINARY OBJECTION TO JURISDICTION AND FOR REVIEW OF THE APRIL 5, 2016 ORDER OF THE ADMINISTRATIVE LAW JUDGE, UNDER PUC DOCKET NO. C-2016-2522634**

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Home.

ALDERWOODS (PENNSYLVANIA), INC., a  
wholly owned subsidiary of SERVICE  
CORPORATION INTERNATIONAL, t/a  
BURTON L. HIRSCH FUNERAL HOME,  
2704 Murray Avenue  
Pittsburgh, PA 15217,

*Petitioner,*

v.

PENNSYLVANIA PUBLIC UTILITY  
COMMISSION,  
400 North Street  
Harrisburg, PA 17120,

THE HONORABLE GLADYS M. BROWN,  
CHAIRMAN,  
PENNSYLVANIA PUBLIC UTILITY  
COMMISSION,  
400 North Street  
Harrisburg, PA 17120,

THE HONORABLE ANDREW G. PLACE,  
VICE CHAIRMAN,  
PENNSYLVANIA PUBLIC UTILITY  
COMMISSION,  
400 North Street  
Harrisburg, PA 17120,

THE HONORABLE JOHN F. COLEMAN, JR.,  
COMMISSIONER,  
PENNSYLVANIA PUBLIC UTILITY  
COMMISSION,  
400 North Street  
Harrisburg, PA 17120,

IN THE COMMONWEALTH COURT  
OF PENNSYLVANIA

Docket No. \_\_\_\_\_

THE HONORABLE ROBERT F. POWELSON,  
COMMISSIONER,  
PENNSYLVANIA PUBLIC UTILITY  
COMMISSION,  
400 North Street  
Harrisburg, PA 17120,

THE HONORABLE DAVID W. SWEET,  
COMMISSIONER,  
PENNSYLVANIA PUBLIC UTILITY  
COMMISSION,  
400 North Street  
Harrisburg, PA 17120

and

DUQUESNE LIGHT COMPANY  
411 Seventh Avenue  
Pittsburgh, PA 15219,

*Respondents.*

### **NOTICE TO DEFEND**

#### NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

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Telephone: (717) 232-7536

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Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las páginas siguientes, usted tiene veinte (20) días de plazo al partir de la fecha de la demanda y la notificación. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomará medidas y puede continuar la demanda en contra suya sin previo aviso o notificación. Además, la corte puede decidir a favor del demandante y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede perder dinero o sus propiedades u otros derechos importantes para usted.

LLEVE ESTA DEMANDA A UN ABOGADO INMEDIATAMENTE. SI NO TIENE ABOGADO O SI NO TIENE EL DINERO SUFFICIENTE DE PAGAR TAL SERVICIO. VAYA EN PERSONA O LLAME POR TELEFONO A LA OFICINA CUYA DIRECCION SE ENCUENTRA ESCRITA ABAJO PARA AVERIGUAR DONDE SE PUEDE CONSEGUIR ASISTENCIA LEGAL.

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

ALDERWOODS (PENNSYLVANIA), INC., a  
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and

DUQUESNE LIGHT COMPANY  
411 Seventh Avenue  
Pittsburgh, PA 15219,

*Respondents.*

**PETITION FOR REVIEW, IN THE NATURE OF A COMPLAINT FOR  
DECLARATORY JUDGMENT AND IN THE NATURE OF AN ANCILLARY WRIT OF  
PROHIBITION, OF THE OPINION AND ORDER OF THE PUBLIC UTILITY  
COMMISSION, UNDER PUC DOCKET NO. P-2016-2541570, DATED OCTOBER 13,  
2016, DENYING CERTIFICATION FOR INTERLOCUTORY APPEAL OF THE APRIL  
5, 2016 ORDER BY THE ADMINISTRATIVE LAW JUDGE WHICH DENIED IN PART  
PETITIONER'S PRELIMINARY OBJECTION TO JURISDICTION AND FOR  
REVIEW OF THE APRIL 5, 2016 ORDER OF THE ADMINISTRATIVE LAW JUDGE,  
UNDER PUC DOCKET NO. C-2016-2522634**

Petitioner, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home, by and through its attorneys White and Williams LLP, complains against Respondents as follows:

**I. JURISDICTIONAL STATEMENT**

1. This Court has original jurisdiction over Hirsch's petition in the nature of a complaint for declaratory judgment pursuant to 42 Pa.C.S. § 761. This petition for review is

addressed to the Court's original jurisdiction and is partially in the nature of a complaint for declaratory judgment.

2. This Court has original jurisdiction over Hirsch's petition for an order in the nature of a writ of prohibition to 42 Pa.C.S. § 761(c), because the relief sought is ancillary to Hirsch's petition for interlocutory review already pending in this Court in the matter of Alderwoods (Pennsylvania), Inc. v. Pennsylvania Public Utility Commission, No. 1966 CD 2016. See Commonwealth Acting Through Unified Judicial System v. Vartan, 674 A.2d 1156 (Pa. Cmwlth. 1996), rev'd on other grounds, 557 Pa. 390, 733 A.2d 1258 (1999) and Schneller v. Judicial Conduct Board, 2014 Pa. Commw. Unpub. LEXIS 705 (Pa. Cmwlth. 2014).

3. The Commonwealth Court has original jurisdiction over the PUC. 42 Pa.C.S. § 761(a)(1); 42 Pa.C.S. § 102 (defining "Commonwealth government"); Energy Pipeline Co. v. Pennsylvania Public Utility Commission, 160 Pa. Cmwlth. 510, 635 A.2d 675 (1992), rev'd on other grounds, 541 Pa. 252, 662 A.2d 641 (1995).

4. The Commonwealth Court has original jurisdiction over Respondents Brown, Place, Coleman, Powelson and Sweet as officers of the Commonwealth government, acting in their official capacity. 42 Pa.C.S. § 761(a)(1); Opie v. Glasgow, Inc., 30 Pa. Cmwlth. 555, 375 A.2d 396 (1977).

5. The Commonwealth Court has original jurisdiction over Respondent, Duquesne Light Company, as an indispensable party whose rights are directly connected with and affected by the instant litigation, whose absence would render any order of the Court null and void for want of jurisdiction. See Columbia Gas Transmission Corp. v. Diamond Fuel Co., 464 Pa. 377,

379, 346 A.2d 788, 789 (1975). See also Section 7540(a), “Parties,” of the Declaratory Judgments Act, 42 Pa.C.S. § 7531, *et seq.*<sup>1</sup>

## **II. PARTY SEEKING RELIEF**

6. Plaintiff, Alderwoods (Pennsylvania), Inc., a wholly owned subsidiary of Service Corporation International, t/a Burton L. Hirsch Funeral Home (hereinafter, “Hirsch”), is a corporation organized under the laws of the Commonwealth of Pennsylvania which at all relevant times conducted business at 2704 Murray Avenue, Pittsburgh, Pennsylvania 15217.

## **III. GOVERNMENT UNIT AND OTHER INDISPENSABLE PARTIES**

7. Respondent, Pennsylvania Public Utility Commission (“Public Utility Commission” or “PUC”), is an independent administrative commission of the Commonwealth of Pennsylvania, established by Section 301 of the Pennsylvania Public Utility Code, 66 Pa.C.S. § 101, *et seq.*, having its principal place of business at 400 North Street, Harrisburg, Pennsylvania 17120.

8. Respondent, The Honorable Gladys M. Brown, is an adult individual and member and the designated chairman of Respondent, Pennsylvania Public Utility Commission, pursuant to 66 Pa.C.S. § 301, having her principal place of business at 400 North Street, Harrisburg, Pennsylvania 17120.

9. Respondent, The Honorable Andrew G. Place, is an adult individual and member and the elected vice chairman of Respondent, Pennsylvania Public Utility Commission, pursuant to 66 Pa.C.S. § 301, having his principal place of business at 400 North Street, Harrisburg, Pennsylvania 17120.

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<sup>1</sup> “When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. . . .” 42 Pa.C.S. § 7540(a).

10. Respondent, The Honorable John F. Coleman, Jr., is an adult individual and member of Respondent, Pennsylvania Public Utility Commission, pursuant to 66 Pa.C.S. § 301, having his principal place of business at 400 North Street, Harrisburg, Pennsylvania 17120.

11. Respondent, The Honorable Robert F. Powelson, is an adult individual and member of Respondent, Pennsylvania Public Utility Commission, pursuant to 66 Pa.C.S. § 301, having his principal place of business at 400 North Street, Harrisburg, Pennsylvania 17120.

12. Respondent, The Honorable David W. Sweet, is an adult individual and member of Respondent, Pennsylvania Public Utility Commission, pursuant to 66 Pa.C.S. § 301, having his principal place of business at 400 North Street, Harrisburg, Pennsylvania 17120.

13. Defendant, Duquesne Light Company, is a corporation organized under the laws of the Commonwealth of Pennsylvania, which at all relevant times has had its principal place of business at 411 Seventh Avenue, Pittsburgh, Pennsylvania 15219.

#### **IV. STATEMENT OF FACTS**

14. Hirsch's requested relief arises from the transfer to the PUC of Hirsch's claims for damages against Duquesne Light Company by the Court of Common Pleas of Allegheny County in October 2015.

15. This case arises from a fire which completely destroyed Hirsch's Pittsburgh funeral home on or about January 10, 2009.

16. Hirsch first filed a complaint against Duquesne Light in the Court of Common Pleas of Allegheny County on September 22, 2009. Exhibit A attached.

17. Hirsch alleges that after a motor vehicle hit a utility pole on Forward Avenue, 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.

18. The funeral home was the only building receiving electric service from the damaged pole, so no damage occurred at the time of the surge, as service was interrupted immediately thereafter.

19. 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.

20. 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 Amended Complaint which was filed with the Court of Common Pleas on May 28, 2010, attached hereto as Exhibit B.

21. 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.

22. The Court of Common Pleas granted the motion. See a copy of the court's order of December 13, 2010, Exhibit C, and its opinion of March 8, 2011, Exhibit D.

23. On appeal, the Superior Court reversed in July 2012, holding that at common law Duquesne Light had a duty to inspect the funeral home's circuit breakers and/or warn Hirsch that they had been compromised prior to restoring service. Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 52 A.3d 347 (Pa. Super. 2012).

24. In response to Duquesne Light's petition, the Supreme Court granted *allocatur* on May 14, 2013. Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 66 A.3d 763 (Pa. 2013).

25. On or about July 24, 2013, the PUC filed an *amicus* brief with the Supreme Court contending, *inter alia*, that the Superior Court had intruded on the PUC's statutory duty to regulate service duties of public utilities. Exhibit E attached at 26 – 27.

26. On December 15, 2014, the Supreme Court also reversed the Court of Common Pleas, finding a common law duty under the facts alleged. Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 106 A.3d 27 (Pa. 2014).

27. In its opinion, the court wrote that because the PUC as *amicus curiae* 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.

28. 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.

29. 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.

30. After remand to the Court of Common Pleas, with leave of court, on or about May 5, 2015, Hirsch filed its Second Amended Complaint to reflect developments in the Superior and Supreme Courts. Exhibit F.

31. On or about June 26, 2015, Duquesne Light moved for bifurcation under the doctrine of primary jurisdiction. See a copy of the motion attached as Exhibit G.
32. On or about June 29, 2015, the Court of Common Pleas issued an order scheduling the motion for hearing on August 25, 2015. Exhibit H.
33. On or about June 30, 2015, Duquesne Light served Hirsch with a revised motion for bifurcation. Exhibit I.
34. On or about August 14, 2015, Hirsch responded in opposition to Duquesne Light's revised motion. Exhibit J.
35. Prior to the August 25, 2015 hearing on the motion, Duquesne Light did not file a reply brief.
36. Most of the hearing on August 25, 2015 took place off the record at the direction of the Court (Lutty, J.).
37. During the hearing on August 25, 2015, Duquesne Light's counsel requested permission to file a supplemental brief. The Court granted the request and directed Hirsch to file a brief in response to Duquesne Light's supplemental brief. See Exhibit K, the transcript of that part of the hearing of August 25, 2015 held on the record.
38. On or about August 31, 2015, the Court of Common Pleas (Lutty, J.) issued an order denying Duquesne Light's motion to bifurcate. Exhibit L.
39. On or about September 1, 2015, the Court of Common Pleas (Lutty, J.) issued an order vacating its order of the previous day which denied Duquesne Light's motion to bifurcate. Exhibit M.
40. On or about September 4, 2015, Duquesne Light served its supplemental brief. Exhibits N.

41. On or about September 10, 2015, Hirsch served its brief in response to Duquesne Light's supplemental brief. Exhibit O.

42. In Hirsch's September 10 brief, Hirsch pointed out, *inter alia*, the irrelevance of the regulations cited by Duquesne Light to justify PUC jurisdiction, and argued that under Pennsylvania law juries, not administrative law judges, are to decide questions of constructive notice such as those present in this case. Id.

43. In spite of Hirsch's arguments in opposition that Pennsylvania does not permit damages claims to be referred to the PUC, on or about September 14, 2015 the trial court granted the motion without explanation or opinion. Exhibit P.

44. 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.

Id.

45. On or about September 22, 2015, Hirsch moved the Court of Common Pleas for reconsideration of the order of September 14, 2015, or, in the alternative, for amendment of the the order to allow an interlocutory appeal. Exhibit Q.

46. On or about October 6, 2015, Duquesne Light filed a response in opposition to Hirsch's reconsideration of the order of September 14, 2015, or, in the alternative, for amendment of the the order to allow an interlocutory appeal. Exhibit R.

47. On October 13, 2015, Judge Luty heard arguments on the aforesaid motion in chambers.

48. During argument, Judge Luty stated, among other things, that deciding the motion for reconsideration/for certification of interlocutory appeal was one of the toughest decisions he had had to make.

49. Judge Luty directed the court reporter not to record the argument.

50. On October 13, 2015, Judge Luty denied Hirsch's motion for reconsideration/for certification of interlocutory appeal without any opinion which might offer an explanation as to why longstanding authority was ignored. Exhibit S.

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

AND NOW, to wit, this 13th 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.

Id.

52. On October 29, 2015, Hirsch petitioned the Superior Court for interlocutory review. Exhibit T.

53. On or about November 12, 2015, Duquesne Light filed a response in opposition to Hirsch's petition for review to the Superior Court. Exhibit U.

54. On December 16, 2015, the Superior Court issued a *per curiam* order stating in its totality, "The Court hereby DENIES the petition for review." Exhibit V.

55. On January 7, 2016, Hirsch filed a complaint with the PUC which contained substantially the same averments as its Second Amended Complaint. Exhibit W.

56. In none of its complaints has Hirsch ever alleged violation of the reasonable and adequate service requirement of 66 Pa.C.S. § 1501 or violation of any other statute or regulation.

57. On January 8, 2016, after refileing its complaint with the PUC, Hirsch filed its preliminary objection based upon the lack of jurisdiction. Exhibit X.

58. In the objection, Hirsch explained that if the objection were sustained, it would move the Court of Common Pleas to reactivate the case. Id.

59. Given the PUC's filing of an *amicus* brief in 2013 in opposition to Hirsch's position, on or about January 11, 2016 Hirsch filed a motion to disqualify certain attorneys in the PUC's Law Bureau from participating in the decision on Hirsch's preliminary objection to jurisdiction. Exhibit Y.

60. On or about January 18, 2016, Duquesne Light filed its response in opposition to Hirsch's preliminary objection. Exhibit Z.

61. On or about January 27, 2016, Hirsch filed its reply to Duquesne Light's opposition. Exhibit AA.

62. On or about January 29, 2016, Duquesne Light filed an answer to Hirsch's PUC complaint. Exhibit BB.

63. On or about February 25, 2016, the PUC granted Hirsch's motion to disqualify certain attorneys in the PUC's Law Bureau. Exhibit CC.

64. On April 5, 2016, Respondent, the Honorable Conrad A. Johnson, A.L.J., issued his opinion in response to Hirsch's preliminary objection to jurisdiction. Exhibit DD.

65. In spite of the Commonwealth Court's holding in Poorbaugh that in damages claims the PUC does not have jurisdiction even to consider liability only, the A.L.J. found such jurisdiction anyway. Id.

66. In his opinion, the A.L.J. also 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 requirements of Section 1501 of the Code,*” Exhibit DD at 8 (emphasis added), even though Hirsch has never alleged any statutory violation in any of its complaints and even though the Supreme Court held that a *common law duty* exists in this case.

67. On April 22, 2016, pursuant to 52 Pa. Code § 5.302(a), Hirsch filed a Petition For Interlocutory Review And Answers To Material Questions with the PUC’s Commission. Exhibit EE.

68. In its petition, Hirsch set forth two material questions for response by the Commission:

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?

Id.

69. On May 2, 2016, Hirsch filed its brief in support of the petition and renewed its motion to disqualify certain PUC attorneys. Exhibits FF and GG, respectively.

70. In the brief, Hirsch asserted the following:

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.

Exhibit FF at 1.

71. On or about May 2, 2016, Duquesne Light filed its response in opposition to Hirsch's petition for interlocutory review. Exhibit HH.

72. On September 15, 2016, Respondent, the Honorable John F. Coleman, Jr., moved the Commission to deny Hirsch's petition because Hirsch had not demonstrated substantial prejudice and because to the extent there had been any delay it arose from Hirsch's petitioning for interlocutory review. See Exhibit II, the transcript of the Commission's hearing of September 15, 2016, at 14 – 15.

73. 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 off [*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 II attached, at 16:7 – 17:8.

74. The majority of the commission voted to adopt Commissioner Coleman's motion as its opinion. Id. at 17.

75. On October 13, 2016, the Commission issued an opinion declining to hear Hirsch's petition and referring the matter back to A.L.J. Johnson for an adjudication of Duquesne Light's liability to Hirsch. Exhibit JJ.

76. Although Hirsch has been without remedy for its damages since January 2009, the Commission declined Hirsch's petition, because Hirsch allegedly did not show that the granting interlocutory review would prevent substantial prejudice. Id.

77. In its opinion, the Commission also faulted Hirsch for the delay, 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, Exhibit JJ, at 31 – 32.

78. 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, Exhibit JJ, at 31.

79. Contrary to the Commission's Opinion and Order of October 13, 2016, not one of the three orders cited by the Commission at pages 31 – 32 of its opinion directed the transfer of 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. See Exhibits P, S and V.

80. 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).

81. 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.

82. In none of the orders cited by the Commission 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).

83. 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.

84. In its opinion, the Commission did not address Hirsch’s argument about the PUC’s lack of jurisdiction under well-settled Pennsylvania law.

85. In its opinion, the Commission did not address the fundamental question of whether it has the power to do anything in this case.

86. On October 13, 2016, Hirsch moved the Commission to amend its interlocutory order to certify it for appeal to the Commonwealth Court. Exhibit KK.

87. On November 2, 2016, Duquesne Light Company filed a response in opposition to Hirsch’s motion for certification. Exhibit LL.

88. The Commission declined to issue the requested certification. Pursuant to Rules 108(a)(2) and 1311(b) of the Rules of Appellate Procedure and 52 Pa. Code § 5.633(a), on or about November 14, 2016 Hirsch’s motion for certification was deemed denied by the Commission.

89. On December 8, 2016, pursuant to Rule 1501(b)(3) of the Rules of Appellate Procedure and the Note to Rule 1311 (regarding the refusal of an administrative agency to certify an interlocutory order for appellate review), Hirsch filed a petition for review of the Commission’s denial of certification. That petition is now pending before the Court at docket no. 1966 CD 2016.

**V. STATEMENT OF RELIEF SOUGHT**

90. Hirsch seeks a declaration from the Court that neither the PUC nor any of its members, administrative law judges or other agents, employees, branches, bureaus or departments is authorized to adjudicate or otherwise hear or consider claims alleging damages arising from the negligence of a utility subject to the Pennsylvania Public Utility Code, 66 Pa.C.S. § 101, *et seq.*, including determinations of liability only, pursuant to Poorbaugh v. Pennsylvania Public Utility Commission, 666 A.2d 744 (Pa. Cmwlth. 1995), specifically and Pennsylvania law generally.

91. In the instant action, Hirsch also seeks an order prohibiting the PUC, its members, administrative law judges and/or other agents and/or employees from adjudicating or otherwise hearing or considering claims alleging damages arising from the negligence of a utility subject to the Pennsylvania Public Utility Code, 66 Pa.C.S. § 101, *et seq.*, including determinations of liability only, pursuant to Poorbaugh v. Pennsylvania Public Utility Commission, 666 A.2d 744 (Pa. Cmwlth. 1995), specifically and Pennsylvania law generally.

**COUNT I – ALDERWOODS (PENNSYLVANIA), INC. V. ALL RESPONDENTS**  
**(Declaratory Judgment)**

92. Petitioner, Alderwoods (Pennsylvania), Inc., hereby incorporates paragraphs 1 through 68 above as if fully set forth at length herein.

93. Under Pennsylvania law, the Public Utility Commission has no jurisdiction to hear, adjudicate or otherwise make determinations in actions seeking damages from a utility regulated by the Public Utility Code, 66 Pa.C.S. § 101, *et seq.* 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); Feingold v. Bell of Pennsylvania, 477 Pa. 1, 383 A.2d 791 (1977); Poorbaugh v. Pennsylvania Public Utility Commission, 666

A.2d 744 (Pa. Cmwlt. 1995); Schriner v. Pennsylvania Power and Light Company, 348 Pa. Super. 177, 501 A.2d 1128 (1985).

94. Pennsylvania’s proscription of the aforesaid jurisdiction includes any determination of liability only by the PUC. Poorbaugh v. Pennsylvania Public Utility Commission.

95. The Court of Common Pleas’ transfer of Hirsch’s damages claims against Duquesne Light Company to the PUC was *ultra vires* and without authority under Pennsylvania law.

96. Administrative Law Judge Johnson’s finding that Hirsch’s complaint “may well constitute a violation of the reasonable and adequate service requirements of Section 1501” of the Public Utility Code is an effort to devise a statutory claim that does not exist and which Hirsch has never asserted, in an effort to exert jurisdiction and subvert the Supreme Court’s finding of a common law duty in Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 106 A.3d 27 (Pa. 2014).

97. For A.L.J. Johnson to determine, as he has, that Hirsch’s claim must necessarily implicate statutes or regulations is violative of 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. Cmwlt. 2015).

98. In an effort to justify its exercise of jurisdiction, the Commission mischaracterized 1) the trial court’s order of September 14, 2015 granting bifurcation, 2) the trial court’s order of October 13, 2015 denying reconsideration and certification, and 3) the Superior Court’s order of December 16, 2015, denying Hirsch’s petition for review (Exhibits P, S and V, respectively) as all directing “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,” Exhibit JJ at 31 – 32, when in fact none of the three orders said any such thing, a fact which the Commission’s opinion even acknowledges in part. Id. at 31, n. 8.

99. In fact, in this case there has never existed any “question of whether Duquesne violated its duty under the Pennsylvania Public Utility Code to provide safe and reasonable service.”

100. The exercise of jurisdiction over Hirsch’s damages claims against Duquesne Light Company by the PUC, including, but not limited to, Administrative Law Judge Johnson and Commissioners Brown, Place, Coleman, Powelson and Sweet is *ultra vires*, subverts the Supreme Court’s opinion in Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 106 A.3d 27 (Pa. 2014), permitting a plaintiff to litigate a common-law claim against a regulated utility before a jury, and is without authority under Pennsylvania law.

WHEREFORE, Petitioner, Alderwoods (Pennsylvania), Inc., respectfully requests that the Court issue an order declaring that 1) the Court of Common Pleas’ transfer of Hirsch’s damages claims against Respondent Duquesne Light Company to the PUC was *ultra vires* and without authority under Pennsylvania law, 2) that the exercise of jurisdiction over Hirsch’s damages claims against Respondent Duquesne Light Company by the PUC, including, but not limited to, Administrative Law Judge Johnson and Commissioners Brown, Place, Coleman, Powelson and Sweet is *ultra vires* and without authority under Pennsylvania law, 3) that an allegation of physical harm caused by a regulated service provider on one particular occasion in breach of a common law duty does not implicate, or allege violation of, statutes or regulations intended to ensure reasonable and adequate service, and that 4) Hirsch’s action against

Respondent Duquesne Light Company is to be remanded to the Court of Common Pleas of Allegheny County for adjudication.

**COUNT II – ALDERWOODS (PENNSYLVANIA), INC. V. ALL RESPONDENTS**  
**(Prohibition)**

101. Petitioner, Alderwoods (Pennsylvania), Inc., hereby incorporates paragraphs 1 through 77 above as if fully set forth at length herein.

102. Under Pennsylvania law, the Public Utility Commission has no jurisdiction to hear, adjudicate or otherwise make determinations in actions seeking damages from a utility regulated by the Public Utility Code, 66 Pa.C.S. § 101, *et seq.* 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); Feingold v. Bell of Pennsylvania, 477 Pa. 1, 383 A.2d 791 (1977); 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).

103. Pennsylvania’s proscription of the aforesaid jurisdiction includes any determination of liability only by the PUC. Poorbaugh v. Pennsylvania Public Utility Commission.

104. The Court of Common Pleas’ transfer of Hirsch’s damages claims against Duquesne Light Company to the PUC was *ultra vires* and without authority under Pennsylvania law.

105. Administrative Law Judge Johnson’s finding that Hirsch’s complaint “may well constitute a violation of the reasonable and adequate service requirements of Section 1501” of the Public Utility Code is an effort to devise a statutory claim that does not exist and which Hirsch has never asserted, in an effort to exert jurisdiction and subvert the Supreme Court’s finding of a common law duty in Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 106 A.3d 27 (Pa. 2014).

106. For A.L.J. Johnson to determine, as he has, that Hirsch's claim must necessarily implicate statutes or regulations 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).

107. In an effort to justify its exercise of jurisdiction, the Commission mischaracterized 1) the trial court's order of September 14, 2015 granting bifurcation, 2) the trial court's order of October 13, 2015 denying reconsideration and certification, and 3) the Superior Court's order of December 16, 2015, denying Hirsch's petition for review (Exhibits P, S and V, respectively) as all directing "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," Exhibit JJ at 31 – 32, when in fact none of the three orders said any such thing, a fact which the Commission's opinion even acknowledges in part. Id. at 31, n. 8.

108. In fact, in this case there has never existed any "question of whether Duquesne violated its duty under the Pennsylvania Public Utility Code to provide safe and reasonable service."

109. The exercise of jurisdiction over Hirsch's damages claims against Duquesne Light Company by the PUC, including, but not limited to, Administrative Law Judge Johnson and Commissioners Brown, Place, Coleman, Powelson and Sweet is *ultra vires*, subverts the Supreme Court's opinion in Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 106 A.3d 27 (Pa. 2014), permitting a plaintiff to litigate a common-law claim against a regulated utility before a jury, and is without authority under Pennsylvania law.

110. Because in its order of October 13, 2016, the Commission referred Hirsch's claims back to A.L.J. Johnson, the Court should issue an order in the nature of a writ of

prohibition, prohibiting the continued exercise of jurisdiction over this case by A.L.J. Johnson, as well as by the Commission and the remainder of the PUC.

WHEREFORE, Petitioner, Alderwoods (Pennsylvania), Inc., respectfully requests that the Court issue an order in the nature of a writ of prohibition, prohibiting the exercise of jurisdiction over this case by Administrative Law Judge Johnson, by the Commission, or by any other agent, employee, branch, bureau or department of the Pennsylvania Public Utility Commission, and remanding Hirsch's action against Respondent Duquesne Light Company to the Court of Common Pleas of Allegheny County for adjudication.

**WHITE AND WILLIAMS LLP**

/s/ Alan J. Charkey

By: Alan J. Charkey, Esquire

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

Date: December 13, 2016

**VERIFICATION**

I, Alan J. Charkey, Esquire, hereby state that I am counsel for Plaintiff-Petitioner, 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 Petition for Review 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: December 13, 2016