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December 30, 2016

Via Electronic Filing

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

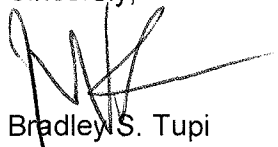
RE: Alderwoods (Pennsylvania), Inc. v. Duquesne Light Company
PUC Docket No. C-2016-2522634

Dear Secretary Chiavetta:

Enclosed for filing is Respondent's Opposition to Complainant's Motion to Stay Case Pending Resolution of Petitions for Review by the Commonwealth Court.

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

Sincerely,



Bradley S. Tupi
Erin Beckner Conlin
Jeremy V. Farrell
Attorneys for Duquesne Light Company

Enclosure

c: The Honorable Conrad A. Johnson (w/enc.)
Alan J. Charkey, Esquire (w/enc.)
Michael Gang, Esquire (w/enc.)
Anthony Kanagy, Esquire (w/enc.)

LIT:616666-1 014657-139188

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

Docket No. C-2016-2522634

Complainant,

vs.

DUQUESNE LIGHT COMPANY,

Respondent.

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

Respondent Duquesne Light Company ("Duquesne Light"), by its attorneys, files this Opposition to Complainant's Motion to Stay Case Pending Resolution of Petitions for Review by the Commonwealth Court ("Motion to Stay"):

OVERVIEW

The fire that underlies this litigation happened in 2009, this action was remanded by the Pennsylvania Supreme Court in 2014, and yet there has been no hearing or trial as the calendar turns to 2017. The delay has been to Duquesne Light's detriment. One of its witnesses has passed away and another has retired.

The delay since the Supreme Court's remand is attributable primarily to Complainant's repeated challenges to the Commission's jurisdiction to render a liability determination. Complainant has now made the same jurisdictional argument eight times to five different forums. It has not won yet.

Chronology of Complainant's Attempts to Evade the Commission's Jurisdiction		
<i>Complainant's Filing</i>	<i>Forum</i>	<i>Result</i>
Response in Opposition to Motion to Bifurcate and Transfer Action to Pennsylvania Public Utility Commission	Allegheny County Court of Common Pleas	Denied. Motion to Bifurcate granted.
Motion for Reconsideration of Order of September 14, 2015, or, in the Alternative, for Amendment of Order to Allow for Interlocutory Appeal	Allegheny County Court of Common Pleas	Denied.
Petition for Review	Superior Court of Pennsylvania	Denied.
Preliminary Objections to Jurisdiction	Administrative Law Judge Conrad A. Johnson	Denied in relevant part.
Petition for Interlocutory Review and Answers to Material Questions	Pennsylvania Public Utility Commission	Denied.
Motion to Certify the Commissions Interlocutory Order of October 13, 2016 for Appeal to the Commonwealth Court	Pennsylvania Public Utility Commission	Deemed denied.
Petition for Review	Commonwealth Court of Pennsylvania	Denied.
Petition for Review in the Nature of a Complaint for Declaratory Judgment and in the Nature of an Ancillary Writ of Prohibition	Commonwealth Court of Pennsylvania	Pending.

Complainant cannot make the showing required to obtain the requested stay simply by filing duplicative Petitions for Review with the Commonwealth Court -- one of which has already been denied -- based on the same argument that has been rejected time and again (and again). It is time to move on to the merits.

ANSWER TO COMPLAINANT'S MOTION

1. Admitted in part and denied in part. The Allegheny County Court of Common Pleas ("Trial Court") bifurcated this action and transferred the liability phase to the Commission pursuant to the primary jurisdiction rule established by the Pennsylvania Supreme Court more than 35 years ago. See Elkin v. Bell Tel. Co. of Pa., 420 A.2d 371 (Pa. 1980). Duquesne Light denies Complainant's implication that the Trial Court transferred the entirety of the instant action to the Commission for adjudication. To the contrary, the action was referred to the Commission to determine the scope of and circumstances under which Duquesne Light has a duty to warn its customers about potential dangers in the customers' equipment before restoring power (which is the heart of Complainant's claim). If the Commission determines that Duquesne Light violated that duty, the case will be transferred back to the Trial Court for a determination of damages.

2. Admitted.

3. Admitted.

4. Duquesne Light admits that ALJ Johnson denied Complainant's Preliminary Objections to the extent they challenged the Commission's jurisdiction over the portion of the action transferred to it by the Trial Court.

5. Admitted.

6. Admitted.

7. Admitted.

8. Denied. To the contrary, Complainant's motion was dated October 13, 2016.

9. Admitted.

10. Admitted. By way of further response, the Commonwealth Court has already denied Complainant's December 8, 2016 Petition for Review. A copy of the Commonwealth Court's order is attached as Exhibit A. Duquesne Light's Answer in Opposition to the Petition for Review, without appendices, is attached as Exhibit B.

11. Duquesne Light admits that Complainant filed a second Petition for Review with the Commonwealth Court, which seeks the same relief sought in the first Petition. Duquesne Light denies that Complainant is entitled to the relief requested in the Petition and is preparing an appropriate response, which is due on January 11, 2016.

12-14. Duquesne Light admits that, to obtain a stay pending a petition for review, Complainant must establish: (1) a likelihood of success on the merits of the appeal; (2) irreparable injury if a stay is allowed; (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., 631 A.2d 758, 761 (Pa. Cmwlth. 1993). The decision to grant or deny a stay pending appeal is vested in the Commission's discretion "and will not be reversed absent a clear abuse of that discretion." Id. Complainant cannot establish any of the four factors, so the Motion for Stay should be denied.

15. The procedural history outlined above undermines Complainant's contention that its jurisdictional argument has a likelihood of success on the merits. Complainant's objection to the Commission's jurisdiction has been rejected several times. The cases cited in paragraph 15 of the Motion for Stay are the same five cases that Complainant cited in support of each of its challenges to the Commission's jurisdiction. As set forth in Duquesne Light's Answer in Opposition to the December 8 Petition for Review, those cases simply do not defeat the Commission's jurisdiction. See Exhibit B, pp. 17-26.

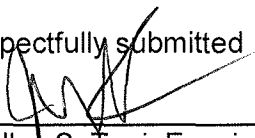
16. Hirsch does not face irreparable injury if the Motion for Stay were denied. In fact, Hirsch's alleged injury is conjectural since it had to speculate on two fronts in order to demonstrate that alleged injury: (1) that the Commission would rule against it as to liability; and (2) that the Commonwealth Court will grant the relief requested in Complainant's Petitions for Review when the Trial Court, Superior Court, ALJ Johnson, the Commission, and the Commonwealth Court have already rejected Complainant's jurisdictional argument.

17. Duquesne Light would be harmed by the requested stay; indeed, it has already been prejudiced by the delay caused by Complainant's jurisdictional challenges. One of its witnesses died and another retired. Further delay could increase the harm to Duquesne Light.

18. The public interest would not be served by the requested stay. The public has a right to expect that its disputes will be adjudicated promptly and that the adjudication will not be delayed simply because one of the litigants continually seeks interlocutory review of an adverse ruling. Hirsch's argument incorrectly presumes that the Commission is the wrong forum to render a liability determination when it has failed many times to establish that very proposition.

WHEREFORE, Respondent Duquesne Light Company respectfully requests that the Commission deny Motion to Stay Case Pending Resolution of Petitions for Review by the Commonwealth Court.

Respectfully submitted



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Counsel for Respondent,
DUQUESNE LIGHT COMPANY

CERTIFICATE OF SERVICE

I certify that on this 30th day of December 2016, I served a true and correct copy of Respondent's Opposition to Complainant's Motion to Stay Case Pending Resolution of Petitions for Review by the Commonwealth Court to as follows:

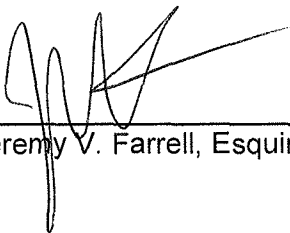
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Via First Class Mail

The Honorable Conrad A. Johnson
Pennsylvania Public Utility Commission
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Pittsburgh, PA 15222

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



Jeremy V. Farrell, Esquire

LIT:616666-1 014657-139188

EXHIBIT "A"

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

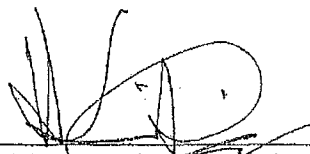
v. :

No. 1966 C.D. 2016

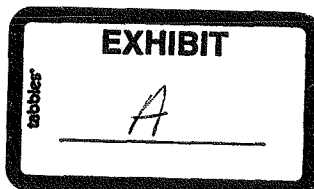
Pennsylvania Utility Commission, :
Respondent :

ORDER

NOW, December 29, 2016, upon consideration of petitioner's petition for review, which was filed pursuant to the note to Pa. R.A.P. 1311 because the Pennsylvania Public Utility Commission declined to certify the order pursuant to 42 Pa. C.S. §702(b), and the answers in opposition thereto, and it appearing that the failure of the agency to certify the interlocutory order for immediate appeal is not so egregious as to justify prerogative appellate correction of the exercise of discretion, the petition for review is denied.



Keith B. Quigley, Senior Judge



Certified from the Record

DEC 29 2016

And Order Ext

EXHIBIT "B"

**In The
COMMONWEALTH COURT OF PENNSYLVANIA**

Case No. 1966 CD 2016

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

Petitioner,

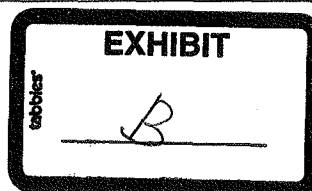
v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondent.

**INTERVENOR'S ANSWER IN OPPOSITION TO
PETITION FOR REVIEW**

**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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INTRODUCTION

This Petition marks the seventh time -- in the fifth different forum -- that Petitioner, Alderwoods (Pennsylvania), Inc., ("Petitioner" or the "Funeral Home") has argued that the Pennsylvania Public Utility Commission ("PUC" or the "Commission") lacks the jurisdiction to make a liability determination in this action. The Funeral Home's argument has been correctly rejected each time: twice by the Allegheny County Court of Common Pleas; once by the Superior Court; once by Administrative Law Judge Conrad Johnson; and by the Commission. Petitioner's latest challenge to the Commission's jurisdiction should be rejected for the same reasons as before and as an improper collateral attack on the Superior Court's determination that Petitioner's objection to the PUC's jurisdiction is not appropriate for interlocutory appeal.

Petitioner continues to obscure the well-settled law and the straightforward reasons justifying bifurcation and transfer to the Commission. The PUC comprehensively regulates the central subject of this litigation: restoration of electric service. The PUC has the jurisdiction to balance the need to restore service and the need for safety. Since the PUC has exclusive jurisdiction to define the scope of utility service, the Trial Court was correct to follow Elkin v. Bell Tel. Co. of Pa., 420 A.2d 371 (Pa.

1980), and direct that the action be bifurcated and transferred to the PUC for a determination of liability. And the Commission was correct to reject Petitioner's attempts to disturb that decision.

Under the procedure adopted by the Trial Court and followed by the Commission, the action was bifurcated and referred to the PUC to determine the scope of and circumstances under which Duquesne Light has a duty to warn its customers about potential dangers in the customers' equipment before restoring power (which is the heart of Petitioner's claim). If the PUC determines that Duquesne Light violated that duty, the case will be transferred back to the Court of Common Pleas for a determination of damages.

Despite the manifest reasons for the Commission to exercise jurisdiction over a matter within its special regulatory expertise, the Funeral Home seeks interlocutory review yet again. Because the Supreme Court has approved the procedure by which this action was transferred to the PUC and because the PUC has adopted a comprehensive regulatory scheme governing restoration of electric service, the Commission's denial of Petitioner's requests to overturn the Trial Court's decision was correct. Surely it did not constitute the egregious abuse of discretion required for interlocutory review.

STANDARD OF REVIEW

The comments to Rule 1311 of the Pennsylvania Rules of Appellate Procedure set a high standard for the interlocutory review sought. For the Petition for Review to be granted, the Commission's refusal to amend its Order to include the permissive appeal language set forth in 42 Pa. C.S. § 702(b) "must be so egregious as to justify prerogative appellate correction of the exercise of discretion by the lower tribunal." See Pa. R.A.P. 1311, note.

STATEMENT OF THE CASE

The Funeral Home's current theory of the case¹ is that before restoring power after the outage, Duquesne Light should have contacted the Funeral Home and issued some sort of warning about dangers that might lurk in the Funeral Home's electrical equipment. The Pennsylvania Public Utility Commission comprehensively regulates the restoration of power after an interruption. Because Petitioner's claim directly implicates a longstanding PUC regulatory regimen, the Trial Court was correct to follow Elkin v. Bell Tel. Co. of Pa., 420 A.2d 371, 377 (Pa. 1980), and transfer this action to the PUC for a determination of liability, and the PUC was correct in refusing to disturb the Trial Court's decision. Since the PUC has exclusive jurisdiction to define the scope of utility service, it is the PUC that must balance the need to restore utility service with the need for safety in doing so.

This action has to do with the circumstances giving rise to and scope of the duty that an electrical utility company owes to its customers -- and communications a utility should have with its customers -- before restoring service after a power outage, a subject that is exclusively regulated by the

¹ The Funeral Home's original theory was that the Duquesne Light line workers caused the fire by connecting wires incorrectly. When discovery failed to support this contention, the Funeral Home adopted its new theory.

PUC. Petitioner's characterization of this case as a single overvoltage incident affecting a single customer is a gross oversimplification of the implications of its allegations. While Petitioner would like this Court to believe that restoration of electric service takes place in a vacuum, the proper resolution of Petitioner's allegations demands an understanding of the regulatory environment in which electric service is restored. That is why the Trial Court was correct in transferring the action to the PUC and it is why the Superior Court, an Administrative Law Judge of the PUC, and the PUC itself refused to disturb the Trial Court's decision.

The PUC's Regulations Govern Restoration of Electric Service.

Electric customers expect reliable, continuous electric service. For this reason, the Public Utility Code requires electric utilities to provide continuous service to customers without unreasonable interruptions and delay in "conformity with the regulations and orders of the Commission."

66 Pa. C.S. § 1501.² Section 1501 of the Public Utility Code states:

Every public utility shall furnish and maintain ***adequate, efficient, safe, and reasonable service*** and facilities and shall make all such repairs, changes, [etc.] as shall be necessary or proper for the accommodation, convenience, and ***safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable***

² Pursuant to Pa. R.A.P. 1312(a)(7), a copy of all cited statutes and regulations are attached collectively as Appendix A.

interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission.

As the emphasized language demonstrates, the PUC's role is to ensure that the service provided by utility companies is safe, reliable, and reasonably continuous. The PUC's regulations elaborate:

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

* * *

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

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

52 Pa. Code § 57.194 (emphasis added).

The PUC is empowered to take, and has taken, extensive steps to regulate electric safety. According to the PUC regulations:

Reliable electric service is essential to the health, safety and welfare of the citizens of this Commonwealth. The purpose of this subchapter is to establish standards and procedures for continuing and ensuring the **safety and reliability** of the electric system in this Commonwealth. The standards have been developed to provide a uniform method of assessing the reasonableness of electric service reliability.

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

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

March 1, 2010, p. 1. One of the ways the PUC assures compliance with its reliability standards is by requiring Duquesne Light and other electric utilities to submit system reliability information that shows whether Duquesne Light provides electric power consistently and whether Duquesne Light restores power after an outage quickly.

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

Petitioner's Theory of Liability Triggers the Regulatory Scheme.

While a detailed factual recitation is not necessary to the resolution of the Petition for Review, two facts are important. The first is that the fire that commenced this litigation began in the Petitioner's own electrical equipment. Alderwoods v. Duquesne Light Co., 106 A.3d 27, 30 (Pa. 2014). The second is that no witness testified to seeing anything before the fire suggesting any danger to the customer's equipment inside. Petitioner's case relies on after-the-fact theories about how the fire may have started, not on any evidence of Duquesne Light's foreknowledge of any danger.

Duquesne Light's Motion to Bifurcate and Transfer to the PUC ("Motion to Bifurcate") was not made hastily the instant this litigation was commenced. As Petitioner acknowledges, Duquesne Light did not seek the PUC's involvement until after the Funeral Home amended its complaint following the Supreme Court's ruling to allege a failure by Duquesne Light to notify customers of potential hazards prior to reconnecting service. Petition for Review at 6-7. Duquesne Light did so because the Funeral Home's new theory of liability placed at issue subjects that are comprehensively and exclusively regulated by the PUC; namely,

restoration of electrical service and communications that Duquesne Light should have with customers before restoring service.

Petitioner's own words in seeking to amend its complaint explain why the new theory of liability necessitated the PUC's involvement: "In amending the complaint, Hirsch simply wishes to leave no doubt that it alleges a failure to warn as well as a failure to inspect. Hirsch therefore seeks to amend the subparagraphs of the paragraphs recounting the specifics of Duquesne Light's negligence -- paragraph 22 of the Second Amended Complaint -- to state the specifics of Duquesne Light's failure to warn, ***and to make clear that Duquesne Light's negligence was more in its overall restoration of service*** rather than mere physical reconnection." Petitioner's Motion for Leave to File Second Amended Complaint, ¶ 19 (emphasis added). Because the Funeral Home's theory of liability directly involves Duquesne Light's restoration of service, and because restoration of service is comprehensively regulated by the PUC, the PUC properly exercises jurisdiction here.

**The Trial Court Carefully Considered and Correctly Decided
Duquesne Light's Motion to Bifurcate.**

Prompted by the Funeral Home's new theory of liability after remand from the Supreme Court, Duquesne Light filed its Motion to Bifurcate. After

the Petitioner's opposition brief, the Trial Court scheduled the motion for argument. During the hearing, several matters were raised that warranted supplemental briefing, which the Trial Court permitted. Duquesne Light submitted a Supplemental Brief explaining in detail the regulatory scheme governing service restoration outlined above. Duquesne Light also filed the Affidavit of Patrick J. Conti, a copy of which is attached as Appendix B, the Director of Duquesne Light's Operations Center, who serves as the Company's liaison with the PUC with respect to power outages. The Funeral Home also submitted a supplemental brief. After review and analysis of two briefs from each party and hearing oral argument, the Trial Court granted Duquesne Light's Motion to Bifurcate.

Since that time, the Funeral Home has repeatedly filed pleadings asking various forums to reverse the Trial Court's decision to transfer the liability determination to the Commission. The Funeral Home's central argument has been the same each time: that the primary jurisdiction doctrine does not apply and the Commission lacks jurisdiction to determine Duquesne Light's liability.

The Funeral Home filed its first challenge to the Trial Court's decision by filing a motion seeking reconsideration of the Trial Court's order or, in the alternative, for amendment of the order to allow an interlocutory appeal.

Duquesne Light timely opposed the Funeral Home's motion. After argument and consideration of the briefs, the Trial Court denied the Funeral Home's motion.

The Superior Court, ALJ Johnson, and the PUC correctly refused Petitioner's repeated requests to disturb the Trial Court's ruling.

The Funeral Home's response was to file a Petition for Review with the Superior Court. That Petition was subject to the exact same standard of review as the pending Petition and involved the same arguments involved here. The Superior Court, in a single sentence *per curiam* order, dismissed the appeal. A copy of Petitioner's Petition for Review filed with the Superior Court and the Superior Court's Order denying that Petition are collected in Appendix C.

The Funeral Home then filed its Complaint with the Commission, to be shortly followed by its Preliminary Objections *to its own Complaint*. Petitioner argued yet again that the Commission lacked jurisdiction to adjudicate Duquesne Light's liability. ALJ Johnson correctly overruled the Preliminary Objections, reasoning that the Commission had jurisdiction "to determine Duquesne's duty in providing service to Hirsch." First Interim Order at 7, 8.

Next came the Funeral Home's Petition for Interlocutory Review and Answers to Material Questions to the full PUC, which the Commission

denied by a commanding 4-1 vote. Commission Opinion and Order dated October 13, 2016. Petitioner then filed a Motion to Certify the Commission's interlocutory decision for appeal to the Commonwealth Court. The Petition was deemed denied after the Commission did not act on it within 30 days. 52 Pa. Code § 5.633(a). The present Petition for Review followed.³

Petitioner's arguments have not gotten better with age. The Funeral Home's seventh attempt to elude the Commission's jurisdiction must meet the same fate as its prior six.

Petitioner has fallen far short of establishing that the Commission's determination was "so egregious as to justify prerogative appellate correction of the exercise of discretion by the lower tribunal," Pa. R.A.P. 1311, note., which is the same standard Petitioner failed to meet when seeking interlocutory review of its challenge to the Commission's jurisdiction before the Superior Court. The Petition is nothing more than an improper collateral attack on the Superior Court's determination that Petitioner's objection to the Commission's jurisdiction is not appropriate for interlocutory review.

³ On December 13, 2016, the Funeral Home also filed a Petition for Review with this Court under its original jurisdiction, seeking the same relief.

REASONS FOR DENYING THE PETITION

- I. **This action was correctly bifurcated, transferred to, and retained by the PUC.**
 - A. **The Pennsylvania Supreme Court has endorsed the procedure requested by Duquesne Light and adopted by the Court of Common Pleas and the PUC.**

The doctrine of primary jurisdiction is well-settled Pennsylvania law. The Pennsylvania Supreme Court first approved it over 35 years ago. The doctrine of primary jurisdiction allows a trial court to transfer a case to the proper administrative agency where both the court and the agency have subject matter jurisdiction over the dispute.

“[W]here 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 into the consideration should be the need for uniformity and consistency in agency policy and the legislative intent.”

Elkin v. Bell Tel. Co. of Pa., 420 A.2d 371, 377 (Pa. 1980). The doctrine “creates a workable relationship between the courts and administrative agencies wherein, in appropriate circumstances, the

courts have the benefit of the agency's views on issues within the agency's competence." Elkin, 420 A.2d 376.

Because the PUC has no authority to award damages, the Pennsylvania Supreme Court adopted a bifurcation procedure in those cases in which damages are sought in a matter involving the special expertise of the PUC. Elkin, 420 A.2d 371. Under that procedure, the issue of liability is transferred to and decided by the PUC. If necessary, the matter returns to the trial court to determine damages:

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

Elkin, 420 A.2d at 377.

A fundamental premise of the Petition for Review is that transfer was improper because the PUC cannot adjudicate a claim for monetary damages. Petition for Review at 1, 11-19. This is a red herring. Duquesne Light freely acknowledges that the PUC cannot award damages. So did the Pennsylvania Supreme Court when it adopted the doctrine of primary jurisdiction. See Elkin, 420 A.2d at 375. If the PUC finds that Duquesne Light violated its duty of care, then the Trial Court will hear the Funeral Home's claim for damages.

The Supreme Court flatly rejected the Funeral Home's argument that a plaintiff can avoid the PUC simply by seeking damages. Id. at 375. That is why the Pennsylvania Supreme Court adopted a bifurcation procedure in those cases in which damages are sought in a matter involving the special expertise of the PUC. Elkin, 420 A.2d 371. Under that procedure, the issue of liability is transferred to and decided by the PUC. Elkin, 420 A.2d at 377. Commission precedent is in accord. See Lolly v. Duquesne Light Co., Docket No.C-2010-2167824, 2011 WL 2113407 (Pa. P.U.C. May 9, 2011) ("Nevertheless, we note that, when a complaint seeking monetary damages also alleges a violation of the Code, such as the failure to provide safe, adequate, reasonable or efficient service, we have jurisdiction to consider these service issues").

Duquesne Light did not ask the PUC to adjudicate a claim for damages, and the Trial Court did not order the PUC to do so. All that Duquesne Light requested in its Motion to Bifurcate, and all the Trial Court ordered, was to allow the agency legislatively charged with enforcing the

regulations governing restoration of electric service⁴ to determine the scope of and circumstances under which Duquesne Light's duty to warn arises.⁵

B. The cases cited by Petitioner actually support the bifurcation procedure adopted in this matter.

Petitioner's reliance on Feingold v. Bell of Pennsylvania, 383 A.2d 791 (Pa. 1977), is misplaced because it ignores that Duquesne Light only sought to transfer the issues regarding the scope of its duty to the PUC.

Feingold is factually and procedurally inapposite because that decision arose out of preliminary objections arguing that the failure to exhaust

⁴ Petitioner's criticisms questioning the Commission's expertise and impartiality are unfounded, unpersuasive, and need not be addressed further. See Petition at 1 (Petitioner colorfully claiming that it is "ensnared in the PUC's *ultra vires* tentacles"), at 10 (calling the PUC an "environment so biased in favor of utilities that it is all but immune to the doctrine of stare decisis" and stating that, if the case were litigated before the PUC, "the outcome is all but certain: exculpation of Duquesne Light Company by the ALJ."), and at 19 ("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").

⁵ The Supreme Court of Pennsylvania held that electric service providers have a duty to take reasonable measures to avert harm in a scenario which the utility has actual or constructive knowledge of a dangerous condition impacting a customer's electric system, occasioned by fallen and intermixed electrical lines proximate to the customer's premises. Alderwoods v. Duquesne Light Co., 106 A.3d 27, 41-42 (Pa. 2014). However, this decision did not define the scope of the duty, nor attempt to reconcile it with existing and/or pending PUC regulations. The scope of the duty is a policy question that falls within the PUC's exclusive jurisdiction to regulate the safety and reliability of public utility service. The determination of the scope of this duty will affect every electric service provider in the Commonwealth and the integrity of the PUC's regulatory scheme. As such, bifurcation is necessary to promote consistency and uniformity of PUC policy. Elkin, *supra*. That further distinguishes the present case from Poorbaugh, where the plaintiff's theory of liability presented no such determination and raised no questions about how Duquesne Light's service affects the general public. Poorbaugh, 666 A.2d at 751. Petitioner's whole case is that Duquesne Light cannot provide service to its customers until certain communications are made.

administrative remedies warranted dismissal of the case - *an argument Duquesne Light has not made here*. Feingold simply held that, because the PUC cannot award monetary damages, the doctrine of exhaustion of administrative remedies could not require dismissal of a civil action for damages. Id. at 795-96. Feingold had nothing to do with the question posed here -- whether a case should be initially transferred to the PUC for a determination on an issue that it comprehensively regulates.

Despite that clear difference, Petitioner blindly seizes on Feingold's recognition of the fact that the PUC cannot award monetary damages -- a point that Duquesne Light has never disputed. Petition for Review at 11. That is why Duquesne Light only asked that the determination regarding the scope of its duty be transferred to the PUC. If Petitioner prevails on the issues to be heard by the Commission, then this action will be transferred back to the Trial Court a determination of damages -- just as Petitioner wishes.

Furthermore, the policy rationale expressed in Feingold actually supports the temporary transfer this action to the PUC:

When the Legislature has seen fit to enact a pervasive regulatory scheme and to establish a governmental agency possessing expertise and broad regulatory and remedial powers to administer that statutory scheme, a court should be reluctant to interfere in those matters and disputes which were intended by the Legislature to be considered, **at least initially**,

by the administrative agency. Full utilization of the expertise derived from development of various administrative bodies would be frustrated by indiscriminate judicial intrusions into matters within the various agencies' respective domains.

Id. at 793 (emphasis added). That is precisely what Duquesne Light sought: the initial transfer of this case to the administrative agency that regulates the exact issue involved in this litigation: restoration of electrical service.

The Pennsylvania Supreme Court has already rejected Petitioner's interpretation of Feingold in Elkin v. Bell Telephone Co. of Pa. 420 A.2d 371 (Pa. 1980) -- a case in which the Supreme Court actually *affirmed* a request to transfer the case to the PUC: "Initially, we address appellant's argument, the entire thrust of which is that Feingold has ousted the PUC for all purposes in any case involving an action for damages. Appellant's interpretation of Feingold is too broad and would 'virtually strip' the PUC of all jurisdiction merely by framing the allegations in contractual and/or trespassory terminology, and demanding damages." Id. at 375. The Court added:

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

trial court in referring the standards of services issue to the PUC.

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

Id. at 375 (emphasis supplied). Not only did the Court expressly reject the very argument advanced by Petitioner, it also approved of the decision to refer the case to the PUC, all the while touting the benefits of the procedure requested by Duquesne Light, ordered by the Trial Court, and confirmed by the Commission.⁶

Petitioner cites cases such as DeFrancesco v. Western Pa. Water Co., 453 A.2d 595 (Pa. 1982), Poorbaugh v. Pa. Public Utility Comm'n, 666 A.2d 744 (Pa. Cmwlth. 1995), and Schriner v. Pa. Power & Light Co., 501 A.2d 1128 (Pa. Super. 1985), in support of its argument that this action should not have been bifurcated and transferred to the PUC. Those cases do not support Petitioner. They neither dealt with a comprehensive

⁶ For example, the Court stated: "To accommodate the role of the court with that of the agency, the doctrine of primary jurisdiction (or primary exclusive jurisdiction) has developed. Essentially, the doctrine creates a workable relationship between the courts and administrative agencies wherein, in appropriate circumstances, the courts can have the benefit of the agency's views on issues within the agency's competence." Id. at 375.

regulatory scheme like the one involved in this litigation, nor the scope of duty to warn allegations such as those advanced by Petitioner. The distinctions are critical because resolution of the Petitioner's allegations that Duquesne Light ***should have denied service to its customer*** until certain communications had occurred requires a nuanced understanding of not only the PUC regulations previously identified but also the practical circumstances under which electrical utility companies operate. The PUC has the unique expertise and industry knowledge needed to render a prudent decision on those issues.

DeFrancesco stemmed from allegations that a water company failed to provide adequate water service to a hydrant near the plaintiff's residence. Id. at 596. The only similarity between DeFrancesco and this case is that both involved allegations of negligence. The similarity ends there. Resolution of the claims in DeFrancesco "depended upon no rule or regulation predicated on the peculiar expertise of the PUC, no agency policy, no question of service or facilities owed to the general public, and no particular standard of safety or convenience articulated by the PUC." Id. at 597. More importantly, DeFrancesco did not involve "the question of whether appellants were entitled to [service,]" 453 A.2d at 597, *but this action does*. Petitioner's fundamental position is that Duquesne Light

cannot restore service to its customers after an interruption until certain communications and/or inspections take place. Petitioner's allegations take dead aim at the circumstances under which a regulated utility's customers are entitled to service.

In Schriner, plaintiffs sought damages from multiple defendants for loss of their dairy cattle arising from an infection supposedly caused by "stray voltage" coming from their milking equipment, which was powered by Pennsylvania Power & Light. Id. at 1129-30. The court determined that the PUC did not have primary jurisdiction over the dispute because, unlike this case, Schriner only remotely dealt with the service PP&L provided to its customers. Id. at 1130. Petitioner seemingly believes that since referral to the PUC was not proper in Schriner, which involved damage stemming from stray voltage, it is also not proper in this case because this case allegedly involves damage from an overvoltage. Such an argument, however, misses the point. The issue that warrants the PUC's attention in this case is not the alleged overvoltage. It is Petitioner's allegation that Duquesne Light ***cannot restore service to its customer*** under certain circumstances without first warning the customer about potential problems in the customer's own equipment. This allegation directly implicates the existing PUC regime for power restoration.

Poorbaugh, the case upon which Petitioner principally relies, is also distinguishable because the theory of liability in that case was entirely different from that advanced by Petitioner here. In Poorbaugh, plaintiff alleged that West Penn was negligent because the company failed to take good care of its own equipment, by using improper wire and splicing it too often. Id. at 745-46. Poorbaugh did not involve a duty to warn, which is the focus of the Funeral Home's case.

Notably, when the allegations in this case **were** similar to those at issue in Poorbaugh -- that Duquesne Light physically misconnected its own wires⁷ -- Duquesne Light did not seek bifurcation and transfer to the PUC. It was not until Petitioner asserted and the appellate courts sustained an alleged duty to warn before restoring power that Duquesne Light sought the transfer to the PUC. This belatedly-alleged duty to warn, which by Petitioner's own admission places Duquesne Light's "overall restoration of service" directly at issue, triggered the necessity of involving the Commission.

The allegations that Petitioner chose to prosecute, Duquesne Light must defend, and the Commission must adjudicate, render DiSanto v. Dauphin Consol. Water Supply Co., 436 A.2d 197 (Pa. Super. 1981), a far

⁷ Petitioner abandoned this theory when its own expert conceded that Duquesne Light made all proper connections. Alderwoods, 106 A.3d at 30.

more apt analogy than Poorbaugh. There, the water company had a policy that it would not provide service to a customer unless the customer's service lines were constructed by an approved contractor. Id. at 446. In the customer's action in common pleas court, the water company filed preliminary objections arguing that the case was within the primary jurisdiction of the PUC. Id. The company argued that because the "contractual dispute is in essence a complaint concerning Dauphin's policy of requiring that installation of water service lines be done by its own approved contractors," *which was a condition of extending service*, the contract was "inextricably interwoven with the reasonableness of Dauphin's method of providing utility service to the public -- a consideration which is uniquely within the province of the PUC." Id. The court agreed and transferred the case to the PUC. Id. at 446-47.

This case demands a similar result. It deals with the conditions under which an electrical service provider can restore (*i.e.* provide) service to its customer. It requires a consideration of statutory mandates under the jurisdiction of the PUC and policy considerations within the unique province of the PUC. The PUC is the proper body to determine how to mesh the utility company's duty to provide service that is reasonably continuous and without interruption with the duty to warn, while providing a consistent,

uniform approach for Pennsylvania utility companies and their customers to rely upon in situations where power is lost. See DiSanto, 436 A.2d at 199 (when the claims against a utility company allege that reasonable and adequate service was not provided, “regardless of the form of the pleading in which the allegations are couched, it is for the PUC initially to determine whether the service provided by the utility has fallen short of the statutory standard required of it”).

The PUC has a body of regulatory experience having to do with service interruptions and restorations and has exclusive jurisdiction over the issues implicated by the Funeral Home’s allegations -- the need to restore service and the need for safety in so doing. For this reason, the liability determination should only be made by the agency familiar with the regulatory background and having the exclusive jurisdiction to define the scope of utility service. None of the cases cited by the Petitioner change that. They actually support it.

The Petition for Review is an impermissible collateral attack on the Superior Court’s determination that Petitioner’s challenge to the Commission’s jurisdiction is not appropriate for interlocutory review. Utilizing the same standard of review that applies to this Petition, the Superior Court explicitly denied Petitioner’s attempts to seek interlocutory

appeal of the same jurisdictional arguments asserted in the Petition. CITE. Under the doctrine of coordinate jurisdiction, the Commonwealth Court should not second-guess the Superior Court's decision. Gerrow v. John Royle & Sons, 572 Pa. 134, 140-42 (Pa. 2002) ("Judges of coordinate jurisdiction sitting in the same case should not overrule each others' decisions"). Since Superior Court has already determined that interlocutory review of the Commission's jurisdiction is not appropriate, the Commonwealth Court should not overrule that decision.

II. The law of the case doctrine does not apply to an issue that the Supreme Court stated was "entirely detached" from the narrow question it reviewed on appeal.

It is undisputed that the Supreme Court did not address whether bifurcation and transfer to the PUC was appropriate. Since that issue was not decided by the Supreme Court, as a matter of Pennsylvania law it cannot constitute the law of the case. Tyro Industries, Inc. v. James A. Wood, Inc., 614 A.2d 279, 284 (Pa. Super. 1992) ("Law of the case means that whatever is once irrevocably established as the **controlling legal rule of decision** between the same parties in the same case continues to be the law of the case") (emphasis in original).

In the first sentence of its opinion the Supreme Court noted that the controlling issue it accepted for review was "whether the Superior Court

erred in imposing on electric utilities a burdensome and unprecedented duty to enter customers' premises and inspect customers' electrical facilities before restoring power after an outage?" Alderwoods, Inc. v. Duquesne Light Co., 106 A.3d 27, 29 (Pa. 2014). After analyzing that narrow issue, the Supreme Court simply held that the Superior Court did not err "to the extent that it recognized a duty, on the part of an electric service provider, to take reasonable measures to avert harm in a scenario in which the utility has actual or constructive knowledge of a dangerous condition impacting a customer's electrical system, occasioned by fallen and intermixed electrical lines proximate to the customer's premises." Id. at 42.

Nothing in the issue the Supreme Court confronted the issues presented by Duquesne Light's Motion to Bifurcate. In fact, the Supreme Court said so:

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

Id. at 38 n. 13 (emphasis added). Petitioner's statement that the Supreme Court has already disposed of this question is a patent misrepresentation of the Court's opinion. Petition for Review at 24.

More importantly, a general comment about the role of juries made in response a series of questions raised by the dissent does not constitute the law of the case. This dicta does not supersede the Supreme Court's plain and explicit statement that it "decline[d] to consider" something that it found to be "entirely detached" from the narrow issue presented on appeal. Because the Supreme Court did not render a decision on whether transfer to the PUC was appropriate or not, the law of the case doctrine cannot apply.

III. The Commission will determine the scope of Duquesne Light's duty to the Funeral Home, not resolve a hypothetical question.

Petitioner's argument about the resolution of hypothetical questions distorts ALJ Johnson's ruling on its Preliminary Objection as well as Duquesne Light's request to transfer the liability phase of this case to the PUC. Duquesne Light does not seek an advisory opinion on a hypothetical question. It seeks a ruling as to whether it is liable to the Funeral Home. The Funeral Home's commentary about actual cases and controversies and the Commission's ability to answer hypothetical questions have

nothing to do with the ultimate resolution of this matter. ALJ Johnson's First Interim Order makes clear this perfectly clear. He specifically indicated that the Commission has "authority to determine *Duquesne's duty in providing service to Hirsch.*" First Interim Order at 7 (emphasis added). There is nothing hypothetical about what the Commission will do.

IV. Petitioner's disagreement with the Commission's decision is insufficient to warrant interlocutory appeal.

The Commission correctly concluded that an interlocutory appeal was not permissible because the two elements necessary to justify such an appeal are absent. The statute governing interlocutory appeals by permission, 42 Pa. C.S. § 702(b), provides:

When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may, thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

Id. The statute imposes two requirements: (1) the opinion must involve a controlling question of law as to which there is a substantial ground for difference of opinion; and (2) the immediate appeal will advance the ultimate termination of the matter. Id.

Petitioner mistakenly contends that the first element is met because the Commission (as did the Trial Court, the Superior Court, and ALJ Johnson) disagreed with the Petitioner's preferred interpretation of the case law cited in the Petition or, alternatively, because one of the five PUC commissioners dissented from the Commission's ruling. Petition for Review at 1, 10. By that flawed logic, immediate interlocutory appellate review would be appropriate any time that a court disagrees with a case cited by a litigant. Certainly that is not the case. More importantly, a controlling question of law is not involved. The Commission merely decided where a particular issue in the action will initially be litigated. And, as plainly evidenced by the cases discussed above, the doctrine of primary jurisdiction is well-settled in Pennsylvania law. Elkin, supra. Primary jurisdiction is not a legal concept about which there is a substantial ground for difference of opinion.

Petitioner's argument about the second element is equally unconvincing. The Funeral Home would have this Court believe that an interlocutory appeal materially advances the ultimate resolution of the matter simply because it threatens to file more appeals should it receive unfavorable decisions in the future. Petition for Review at 10. But the Funeral Home's threat to file more appeals to uncertain rulings down the

road does not justify the Petition for Review. The Funeral Home grounds its argument in speculation as to what rulings might be issued in the future and how the Funeral Home might choose to respond to those rulings at a later stage in the litigation. Simply put, it is incorrect that yet another detour to the appellate circuit will advance rather than delay the ultimate resolution of this action. This action is over seven years old and has not yet reached a hearing on the merits. Petitioner's repeated protests over jurisdictional issues have delayed the case, to Duquesne Light's substantial prejudice. So far, one of Duquesne Light's witnesses, Don Lewis, has died, and another, Tim Shields, has retired.

Petitioner falls far short of establishing the egregious circumstances warranting interlocutory review under the Commission's regulations. The Funeral Home simply threatens to continue to appeal if it loses again, which taken to its logical conclusion, would allow immediate interlocutory review of every ruling unfavorable to one of the parties. Such a position promises interminable litigation and defies reason. Because the question of the PUC's jurisdiction has already been decided, it is now the law of the case and cannot be disturbed. Tyro Industries, Inc. v. James A. Wood, Inc., 614 A.2d 279, 284 (Pa. Super. 1992) ("Law of the case means that whatever is once irrevocably established as the controlling legal rule of

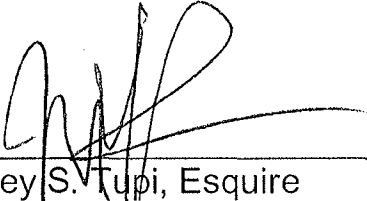
decision between the same parties in the same case continues to be the law of the case”).

CONCLUSION

The Pennsylvania Public Utility Commission has enacted a comprehensive regulatory scheme that governs restoration of electric service after a power outage. The PUC has the jurisdiction to balance the need to restore service with the need for safety in a case such as this one. The PUC, as the regulator of utilities, alone has the expertise, industry knowledge, and jurisdiction to balance all the interests in defining the scope of utility service. As a result, the Allegheny County Court of Common Pleas, following a procedure that has been endorsed by the Pennsylvania Supreme Court for over 35 years, correctly bifurcated this case and transferred it to the PUC, which has the expertise and industry knowledge to determine the scope of Duquesne Light's duty to warn and whether the circumstances present on the night of the fire were sufficient to give rise to that duty. The Court of Common Pleas retained jurisdiction to determine the extent of the Funeral Home's damages if Duquesne Light is found to be liable. The Commission correctly refused to disturb that procedure. Nothing in the Funeral Home's Petition for Review justifies interlocutory review of that ruling. The Petition for Review should be denied, together with any other relief the Court may deem just.

Respectfully submitted,

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PROOF OF SERVICE

I certify that that I am this 22nd day of December, 2016, serving a true and correct copy of Intervenor's Answer in Opposition to Petition for Review upon the persons indicated below by first-class mail addressed as follows:

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