

October 9, 2017

*Via Electronic Filing*

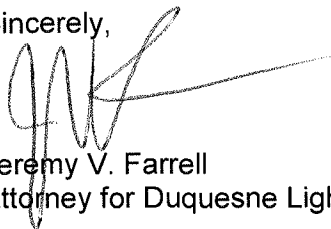
Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Keystone Bldg. 2nd Floor W  
400 N. Street  
Harrisburg, PA 17120

**RE: Robert Kuhn, Jr. v. Duquesne Light Company**  
**Docket No. C-2017-2610584**

Dear Secretary Chiavetta:

Duquesne Light Company's Reply to Exceptions is enclosed for filing. A copy of this document has been served upon Complainant in accordance with Commission regulations.

Sincerely,



Jeremy V. Farrell  
Attorney for Duquesne Light Company

Enclosure

cc: Robert Kuhn, Jr. (with enclosure)  
Office of Special Assistants (OSA), via email (with enclosure)

LIT:629934-1 014657-158498



## THE COMPLAINT'S ALLEGATIONS

Duquesne Light operates a transmission circuit that runs through Complainant's property. Formal Complaint Letter, pp. 1-2.<sup>1</sup> Complainant acknowledges that Duquesne Light relies upon a right of way agreement that permits it to trim or remove any trees or shrubbery which threaten to interfere with the transmission system. Id., p. 1. In pertinent part, that right of way agreement grants Duquesne Light the right to "enter upon said tract of land at any time for said purposes, together with the further **right to trim or remove any trees, shrubbery or obstructions which at any time the said party of the second part, its successors or assigns, may deem necessary to prevent interference or threatened interference with the construction, maintenance, repair, renewal, use or operation of said transmission system.**"<sup>2</sup>

Complainant takes issue with the vegetation management activity that Duquesne Light plans to undertake on Complainant's property, asserting that Duquesne Light's proposed actions would fall outside of its easement. Id., p. 1. For example, Complainant alleges that "DLC intends to **increase the width of the established right-of-way (ROW)** running across my property by an estimated 40 feet on each side." Id. (emphasis added). Complainant also contends that Duquesne Light's right of way is only 32.5 feet wide even though there is no defined width specified in the right of way agreement attached to the Complaint as Exhibit 3. Id. He contends that Duquesne Light is planning to remove trees outside of the surveyed easement. Id., p. 3.

## ARGUMENT

The Commission lacks jurisdiction to adjudicate the issues presented in the Formal Complaint because they relate exclusively to the scope of validity of Duquesne Light's right of

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<sup>1</sup> Duquesne Light accepts the allegations in the Complaint as true for purposes of this brief since Complainant's appeal emanates from the grant of Preliminary Objections.

<sup>2</sup> Duquesne Light has already produced its right of way agreement in this case. See Exhibit A to Duquesne Light's Answer and New Matter.

way over the Property.<sup>3</sup> Simply put, it is Complainant's position that Duquesne Light's planned vegetation maintenance action is not permitted by its right of way agreement and, therefore, is impermissible. Formal Complaint Document, pp. 1-3. Complainant asks this Commission to rule that the removal of the trees in question is beyond the scope of the right of way agreement. The Commission, however, lacks jurisdiction to do so.

In Fairview Water Co. v. Pa. Pub. Util. Comm'n., 502 A.2d 162 (Pa. 1985), the Pennsylvania Supreme Court explicitly held that the Commission does not have jurisdiction to determine the scope and validity of an easement. Following the Supreme Court's precedent, the Commission has repeatedly determined that it is not the proper forum for resolving property rights controversies because those matters must be decided by courts of general jurisdiction. See, e.g., Perrige v. Met. Ed. Co., Docket No. C-00004110, 2003 WL 21916400 (Pa. P.U.C. July 10, 2003); Milliard v. Nat'l Fuel Gas Dist. Corp., Docket No. C-2013-2398065, 2014 WL 466622, at \*4 (Pa. P.U.C. Jan. 24, 2014) (Salapa, ALJ) ("The Commission has no jurisdiction to adjudicate real property issues such as the scope of the Respondent's easements **and what activities the Respondent can engage in within its right of way, pursuant to its right of way agreements**. Such a determination is solely within the jurisdiction of the courts of the Commonwealth.") (emphasis added). The Complaint suffers the same flaws as Complainant is trying to limit what activities Duquesne Light can engage in within its right of way – removing trees. Commission precedent requires the dismissal of such complaints.

For example, in Boczar v. PPL Elec. Utilities Corp., Docket No. C-20016332, 2003 WL 1738952 (Pa. P.U.C. Feb. 6, 2003), the complainant alleged that the utility was not authorized to place its poles, transformers, and cable lines on his property. The Commission stated that since the utility company produced right of way agreements for the facilities in question (and it is undisputed that Duquesne Light has such an agreement here), it was without jurisdiction to

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<sup>3</sup> Duquesne Light's Preliminary Objections were filed pursuant to 52 Pa. Code § 5.101(a)(1), which allows a party to file preliminary objections due to "lack of commission jurisdiction."

determine property rights concerning those easements. Similarly, in Amati v. West Penn Power Co., Docket No. C-00945842 (Order entered on Oct. 25, 1995), the Commission stated that real property issues, such as trespass and whether utility facilities were located pursuant to a valid easement are within the exclusive jurisdiction of the courts of common pleas. See also, Fiorillo v. PECO Energy Co., Docket No. C-00971088, 1999 WL 33592799 (finding that complainant's assertion that a power line was not properly on her property "must be pursued as a civil action in trespass and/or ejectment" because those "issues deal with the proper use of real property" which is "within the exclusive jurisdiction of the courts of common pleas of this Commonwealth.").

While Complainant challenges Duquesne Light's right of way agreement as being ambiguous, he admits that the agreement exists and that Duquesne Light relies on it as the basis for its proposed vegetation maintenance actions. Formal Complaint Letter, pp. 1-3. The undisputed fact that Duquesne Light does have a right of way agreement upon which it relies, regardless of whether Complainant disputes whether the scope of that agreement authorizes Duquesne Light to remove the trees within that right of way, deprives the Commission of jurisdiction in this matter.

The Commission's decision in Stavnicky v. PPL Utilities, Inc., Docket No. C-20043368, 2005 WL 1651882 (Pa. P.U.C. May 23, 2005) (Melillo, ALJ) (Final Order entered on July 13, 2005), illustrates that point. In that case, the complainant alleged that PPL was not authorized to place a pole and associated facilities on his property and requested that the Commission order that those facilities be removed. Id. at \*1. In response, PPL produced written documentation of an easement relating to the complainant's property and argued that the Commission lacked jurisdiction to determine the validity of that easement. The presiding ALJ agreed, holding: "Accordingly, I conclude that subject matter jurisdiction in right-of-way disputes extends only to cases wherein there is no written documentation of an easement. **If PPL produces a document purporting to show a grant of authority for a right-of-way**

**concerning Complainant's property, then the Commission's inquiry should be at an end."**

Id. at \*11 (emphasis added).

A similar result was recently reached in Vale Vista Associates, LP v. West Penn Power Co., Docket No. C-2015-2517345, 2016 WL 826759 (Pa. P.U.C. Feb. 16, 2016) (Salapa, ALJ) (Final Order entered on March 29, 2016). There, the presiding ALJ granted preliminary objections based on lack of jurisdiction where the complaint related to the utility's attempt to remove trees from the complainant's property pursuant to a written easement agreement. Following the holding of Stavnicky, the ALJ held:

**Accepting as true all the facts alleged in the complaint, the Complainants are not entitled to relief as a matter of law. The dispute alleged in the complaint is whether the Respondent may remove trees from its easement pursuant to its easement agreements. Since the parties have produced easement agreements, the Commission's decision in Stavnicky requires that the Commission dismiss the Complainant's complaint.**

As set forth above, the Commission lacks subject matter jurisdiction to adjudicate real property disputes, including the scope and validity of easements. Since the Commission's jurisdiction does not extend to adjudicating real property disputes, I will sustain the preliminary objections. . . .

Id. at \*7 (emphasis added).

The Commission's decision in Tomb v. Penn. Electric Co., Docket No. C-2008-2036378, 2008 WL 5786615 (Pa. P.U.C. Dec. 4, 2008), is particularly instructive. In that case, the complainant requested that the Commission order Penelec to cease and desist cutting down trees on her property on the grounds that the trees fell outside of Penelec's right of way. Id. at \*1. The complainant argued that Penelec's "unauthenticated 1921 company document, which is neither notarized nor recorded in the county courthouse as part of any land deed is not valid...." Id. (internal quotations omitted). Penelec filed preliminary objections arguing that the Commission lacked subject matter jurisdiction over the dispute. The presiding ALJ granted the preliminary objections and the Commission affirmed because the "Commission lacks subject

matter jurisdiction to determine the scope and validity of the instant easement.” Id. at \*2.<sup>4</sup> As relevant to the instant dispute, the Commission stated:

The Complainant next asserts that her Complaint challenged the existence, as opposed to the validity, of an easement which would allow Penelec a 100-foot right-of-way. Exc. at 2. **We note that the Complaint acknowledged the existence of an easement recorded in 1945. Complaint at 2. Penelec also produced a copy of an easement. Penelec Preliminary Objections, Exh. 3. As such, it is clear that the instant controversy is not regarding the existence of the easement, it is about the scope of the easement. This Commission is not the proper forum to resolve a controversy which will determine property rights, that is a matter for a court of general jurisdiction. See Anne E. Perrige v. Metropolitan Edison Co., Docket No. C-00004110 (July 11, 2003) (holding that, in a dispute regarding the location of a right-of-way, the Commission had no jurisdiction to interpret the meaning of the written right-of-way). See also Fiorillo v. PECO Energy Co., Docket No. C-00971088 (September 15, 1999) (citing Lou Amati/Amati Service Station v. West Penn Power Co. and Bell-Atlantic-Pennsylvania, Inc., Docket No. C-00945842 (October 25, 1995) where the Commission stated that real property issues such as trespass and whether or not utility facilities are located pursuant to valid easements or rights-of-way are within the exclusive jurisdiction of the Courts of Common Pleas of the Commonwealth). Shedlosky v. Pennsylvania Electric Co., Docket No. C-20066937, slip op. at 6-7 (May 28, 2008). Accordingly, the Complainant's Exception on this issue is denied.**

Id. at \*3 (emphasis added; internal quotation omitted).

The instant case presents the same issues as Stavnicky, Vale Vista, and Tomb. Complainant is challenging Duquesne Light's right to take certain actions (removing trees) within its right of way. Duquesne Light has a written right of way agreement that it claims grants the company the right to take the actions challenged in the Complaint. Like the Complainant in Tomb, Complainant acknowledges the existence of Duquesne Light's written documentation of the right of way. Formal Complaint Letter, pp. 1-3. This matter squarely implicates the scope and validity of the right of way agreement. The Commission lacks the jurisdiction to hear such a dispute.

Complainant's reference to a Duquesne Light Letter of Notification, filed in 2005 for the conversion of an existing 69 kilovolt (kV) transmission line to 138 kV, does not change the

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<sup>4</sup> The Commission “has only those duties, powers and responsibilities as were expressly or by necessary implication given to it by the Legislature.” Id. “Jurisdiction may not be conferred by the parties where none exists.” Id.

nature of the Complaint. Exceptions, p. 1. That Duquesne Light had negotiated rights of way agreements with other former landowners of varying widths, represented that its past vegetation management practices conformed to applicable NESC and OSHA standards, or stated it was not changing existing right of way agreements by increasing the circuit's voltage, do not make Complainant's allegations any less of a property rights dispute. *Id.* at pp. 1-2. Nor does the fact that the Commission ultimately granted Duquesne Light's request to increase the circuit voltage.

This Complaint remains a challenge to what activities Duquesne Light can and cannot undertake in its right of way – where the right of way agreement (the existence of which is undisputed) expressly grants Duquesne Light the right to do what it plans to do. That Duquesne Light had previously pruned some of the trees it now intends to remove does not alter the substance of Complainant's allegations or confer jurisdiction over this dispute.

### **CONCLUSION**

Since the Commission lacks jurisdiction to resolve the issues involved in the Formal Complaint, the Initial Decision correctly granted Duquesne Light's Preliminary Objections pursuant to 52 Pa. Code § 5.101(a)(1). Duquesne Light respectfully requests that the Commission affirm the Initial Decision and dismiss the Formal Complaint in its entirety.<sup>5</sup>

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<sup>5</sup> Since the Initial Decision granted Duquesne Light's Preliminary Objections on jurisdictional grounds, Duquesne Light's supplemental arguments in its Preliminary Objections relating to Complainant's request for monetary damages and that Duquesne Light be ordered to commission an environmental assessment need not be discussed here. This is not intended to be, and should not be interpreted as, a waiver of those arguments.

TUCKER ARENSBERG, P.C.

A handwritten signature in black ink, appearing to read 'PSM', written over a horizontal line.

Jeremy V. Farrell, Esquire  
Paul Shane Miller, Esquire  
Counsel for Duquesne Light Company



AUG - 4 1926 41544  
RIGHT OF WAY DEED

JOHN FRANCIS ET UX.,

Vol. 2291 to Page 247

DUQUESNE LIGHT COMPANY

D. L. Co. R. of W.  
FILE NO.  
1673

Perpetual easement and right  
of way across land situate in  
Shaler Township, Allegheny  
County, Pa.

Dated August 2, 1926.

RECORDED  
AUG 12 1926  
RECORDS OF DEEDS  
ALLEGHENY COUNTY  
PITTSBURGH, PA.

AUG 4 2 19 1926

PITTSBURGH  
PENNSYLVANIA

MAIL TO:

A. W. STEVENSON,

435 SIXTH

PITTSBURGH, PA.  
**PLAIN**

EXHIBIT

A

tabbler

THIS INDENTURE

MADE this 2<sup>nd</sup> day of August, in the year of our Lord one thousand nine hundred and twenty-six (1926),

BETWEEN

JOHN FRANCIS and ELIZABETH FRANCIS, his wife, of Warrendale, Allegheny County, Pa., parties of the first part,

A N D

DUQUESNE LIGHT COMPANY, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, having its principal office in the City of Pittsburgh, County of Allegheny and Commonwealth of Pennsylvania, party of the second part,

W I T N E S S E T H,

That the said parties of the first part, for and in consideration of the sum of One thousand (\$1,000.00) Dollars, to them now paid by the said party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey unto the said party of the second part, its successors and assigns, a perpetual easement and right of way, ~~across~~ ~~the~~ across that certain tract of land situate in Shaler Township, Allegheny County, Pa., bounded and described as follows:-

On the North by land now or formerly of W. J. McNeal; on the East by land now or formerly of Mary A. Burns and land now or formerly of Bernard Burns; on the South by Elfinwild Road; and on the West by land now or formerly of Lucinda L. Hieber, land now or formerly of Emma H. Crooks, land now or formerly of Phillip Hieber, land now or formerly of T. W. Hieber and land now or formerly of John H. Hieber;

for a transmission system for the conveyance, distribution and use of electric current, consisting of wires, cables and cross-arms, supported on steel towers or columns, with the necessary fixtures and apparatus, on such foundations, if any, as the said party of the second part, its successors or assigns, may deem necessary or proper for use in connection with said trans-

D. L. Co. R. of W.  
FILE NO.  
1673

mission system, with the right, privilege and authority to erect, construct, use, operate, maintain, repair, renew and finally remove the same, and to enter upon said tract of land at any time for said purposes, together with the further right to trim or remove any trees, shrubbery or obstructions which at any time the said party of the second part, its successors or assigns, may deem necessary to prevent interference or threatened interference with the construction, maintenance, repair, renewal, use or operation of said transmission system.

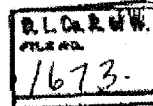
The said easement and right of way across the land herein before described to extend from said land now or formerly of Lucinda L. Hieber to said land now or formerly of Bernard Burns, and to be located substantially as indicated by the red line on the blueprint attached hereto and made a part hereof. Not more than one (1) tower shall be erected on said land.

TOGETHER with all and singular the said rights and privileges, and such others as may be reasonably necessary to fully enjoy and use the same.

TO HAVE AND TO HOLD the same unto and for the use of the said party of the second part, its successors and assigns.

The land ~~herein~~ across which said easement and right of way is granted may always be used by the said parties of the first part, their heirs or assigns, for such uses and purposes as will not interfere with the construction, maintenance, repair, renewal, use or operation of said transmission system, and are not inconsistent therewith; provided, always, that the said parties of the first part, their heirs or assigns, in the use of said land shall not damage or injure any of the property of the said party of the second part, its successors or assigns, on said right of way, nor interfere in any manner with the construction, maintenance, repair, renewal, use or operation of said transmission system.

The said party of the second part shall pay for all damages done to growing crops and fences on said land resulting



from the construction and maintenance of said transmission system.

WITNESS the hands and seals of the said parties of the first part, the day and year first above written.

WITNESS:

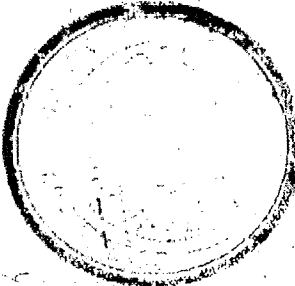
B. A. Llewellyn John Francis (SEAL)  
B. A. Llewellyn Elizabeth Francis (SEAL)

COMMONWEALTH OF PENNSYLVANIA )  
COUNTY OF ALLEGHENY ) SS:

Before me, a Notary Public in and for said Commonwealth and County of Allegheny, personally appeared John Francis and Elizabeth Francis, his wife, and acknowledged the foregoing Indenture to be their act and deed and desired the same to be recorded as such.

WITNESS my hand and Notarial seal this 2<sup>nd</sup> day of August, A.D. 1926.

B. A. Llewellyn  
Notary Public.  
B. A. LLEWELLYN, Notary Public  
MY COMMISSION EXPIRES  
APRIL 2, 1927

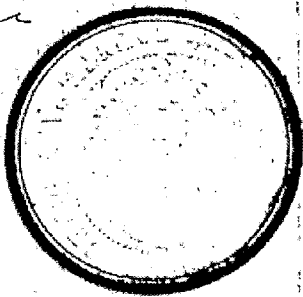
RECEIVED DEPARTMENT OF REVENUE PITTSBURGH, PA. AUG 2 1926 REGISTERED COMMONWEALTH OF PENNSYLVANIA	
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D. L. Co. R. of W.  
FILE NO.  
1673

1913  
RECORDED  
BY G. C. B. M.

*Deed & Plan*

COMMONWEALTH OF PENNSYLVANIA, )  
 COUNTY OF ALLEGHENY ) SS.  
 RECORDED ON THIS 4th DAY OF August  
 A. D. 1913, IN THE RECORDER'S OFFICE OF SAID COUNTY  
 IN Deed Book, Vol. 2291 PAGE 247  
 GIVEN UNDER MY HAND AND THE SEAL OF THE SAID  
 OFFICE THIS DAY AND DATE ABOVE SAID.  
*John D. Graham* RECORDER



MA COMMISSION EXHIBIT  
BY INSTRUMENT NO. 1111  
MORLEY 111111

*13-0-111111*

*111111* V.D. 11111

WITNESSES my hand and notary seal this 4th day of August 1913, recorded as above.

Indenture to be there set and deed and certified the same to be Elizabeth Francis, his wife, and acknowledged the foregoing and copy of aforesaid, personally subscribed John Francis and before me, a notary public in and for said Commonwealth

COMMISSIONER OF REVENUE )  
 COMMONWEALTH OF PENNSYLVANIA ) SS:

*John D. Graham* RECORDER  
*John D. Graham* RECORDER

WITNESSES:

These facts, the day and year first above written.

WITNESSES the hands and seals of the said parties of the second part.

From the construction and maintenance of said transmission

RECEIVED of Duquesne Light Company, a corporation of the State of Pennsylvania, the sum of One (\$ 100 ) Dollars, in consideration of which, as well as in consideration of the covenants and agreements hereinafter mentioned, we do hereby give and grant unto the said Duquesne Light Company, its successors and assigns, the exclusive right or option to purchase at any time within 7 months from the date hereof, a perpetual right of way or easement, upon ~~over~~ Cherry land situate in Cherry Township, Washington County, Pa., and bounded and described as follows:

On the North by lands of \_\_\_\_\_;  
On the East by lands of \_\_\_\_\_;  
On the South by lands of \_\_\_\_\_;  
On the West by lands of \_\_\_\_\_;

for a transmission system for the conveyance, distribution and use of electric current, consisting of wires and cables, supported on poles, or on steel towers or columns on concrete or stone foundations not more than thirty (30) feet wide by thirty (30) feet long, and crossarms, anchors, guys, brace poles and other fixtures and apparatus which the Duquesne Light Company, its successors or assigns, may deem necessary or proper for use in connection with the said transmission system, with the right, privilege, and authority to erect, construct, use, operate, maintain, repair, renew and finally remove the same, and to enter upon said tract of land at any time for said purposes, together with the further right to trim or remove any trees, shrubbery or obstruction which at any time may interfere or threaten to interfere with the construction, maintenance, repair, renewal or operation of said transmission system; FOR THE CONSIDERATION OR SUM OF One thousand (\$ 1000 ) Dollars, in cash, upon delivery of deed for said right of way or easement, and privileges as aforesaid; PROVIDED, the said Duquesne Light Company, its successors or assigns, shall, within 7 months from the date hereof, notify John Francis Elizabeth Francis heirs, administrators, executors or assigns, in writing that or they will take, accept and purchase said right of way or easement and privileges for a transmission system as above described at the price and terms aforesaid.

The sum of One (\$ 100 ) Dollars, paid at the time of signing this option, the receipt whereof is hereby acknowledged, shall be credited on the purchase price in the event that this option is accepted.

The land upon, over, ~~under~~ which said right of way is granted, may always be used by John Francis Elizabeth Francis heirs or assigns, for such uses and purposes as will not interfere with the construction, maintenance, repair, renewal or operation of said transmission system and are not inconsistent therewith; provided, always, that John Francis Elizabeth Francis heirs or assigns, in the use of said land shall not damage or injure any of the property of Duquesne Light Company, its successors or assigns, on said right of way nor interfere in any manner with the construction, maintenance, repair, renewal or operation of said transmission system.

Line to be run as shown on blue print in a westerly direction and only one line to be placed on premises shown and to conform to plan to pass all damage to except and fence.

In case notice of acceptance is given as aforesaid John Francis Elizabeth Francis heirs or assigns, agree to make, execute and deliver forthwith to Duquesne Light Company, its successors or assigns, a good and satisfactory grant or conveyance of said right of way or easement for a transmission system and privileges as aforesaid, free and clear of all incumbrances, subject to the approval of Duquesne Light Company, its successors or assigns.

This option, if accepted as herein provided, is the agreement between the parties hereto, and it is agreed and understood that all previous communications, representations or understandings between the parties, either verbal or written, contrary to the provisions hereof, are hereby abrogated and withdrawn.

Time is of the essence of this option, and if the said Duquesne Light Company, its successors or assigns, shall not notify John Francis Elizabeth Francis heirs or assigns, by written notice delivered to me or us, on by delivering said written notice to John Francis Elizabeth Francis, who is hereby constituted agent for that purpose, that it or they elect to take, accept and purchase said right of way or easement and privileges at the price and terms aforesaid, at or before the expiration of \_\_\_\_\_ from the date hereof, then this option shall forthwith become null and void and of no effect.

WITNESS our hands and seal this 7<sup>th</sup> day of April, A. D. 1926.

ATTEST:  
B. A. Llewellyn (SEAL)  
P. O. Address Elizabeth Francis (SEAL)  
\_\_\_\_\_  
P. O. Address \_\_\_\_\_ (SEAL)  
\_\_\_\_\_  
P. O. Address \_\_\_\_\_ (SEAL)  
\_\_\_\_\_  
P. O. Address \_\_\_\_\_ (SEAL)  
\_\_\_\_\_  
P. O. Address \_\_\_\_\_ (SEAL)

D. L. Co. R. of W.  
FILE NO.  
1673

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

ROBERT KUHN, JR.,

Complainant,

vs.

DUQUESNE LIGHT COMPANY,

Respondent.

No: C-20172610584

**CERTIFICATE OF SERVICE**

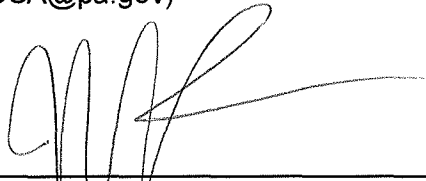
I hereby certify that I have this day served a true copy of the foregoing document upon the participant listed below in accordance with the requirements of 52 PA. Code § 1.54 (relating to service by a participant):

Robert Kuhn, Jr.  
3705 Aurelia Drive  
Allison Park, PA 15101

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Keystone Bldg. 2nd Floor W  
400 N. Street  
Harrisburg, PA 17120  
(Via Electronic Filing)

Pennsylvania Public Utility Commission Office of Special Assistants  
(Via email at: ra-OSA@pa.gov)

Dated this 9<sup>th</sup> day of October, 2017

  
\_\_\_\_\_  
Jeremy V. Farrell, Esquire  
PA I.D. No. 316258  
1500 One PPG Place  
Pittsburgh, PA 15222  
(412) 594-3938  
(412) 594-5619 (fax)  
jfarrell@tuckerlaw.com  
Counsel for Respondent Duquesne Light  
Company