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December 26, 2018

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

**Re: Application of Duquesne Light Company filed Pursuant to 52 Pa. Code Chapter 57, Subchapter G, for Approval of the Siting and Construction of the 138 kV Transmission Lines Associated with the Universal-Plum Project in Penn Hills, Monroeville, and Plum Borough, Allegheny County, Pennsylvania
Docket Nos. A-2018-3000708, A-2018-3000732, A-2018-3000733, A-2018-3000743, A-2018-3000747, A-2018-3000754, A-2018-3000755, A-2018-3000756, A-2018-3000766, A-2018-3000768 and A-2018-3000769**

Dear Secretary Chiavetta:

Enclosed please find Duquesne Light Company's Reply Brief in the above-referenced proceedings. Copies of the Reply Brief will be provided as indicated on the Certificate of Service.

Sincerely,



Garrett P. Lent

GPL/kl
Enclosures

cc: Honorable Conrad A. Johnson
Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Duquesne Light Company	:	Docket No. A-2018-3000708
filed Pursuant to 52 Pa. Code Chapter 57,	:	Docket No. A-2018-3000732
Subchapter G, for Approval of the Siting and	:	Docket No. A-2018-3000733
Construction of the 138 kV Transmission	:	Docket No. A-2018-3000743
Lines Associated with the Universal-Plum	:	Docket No. A-2018-3000747
Project in Penn Hills, Monroeville, and Plum	:	Docket No. A-2018-3000754
Borough, Allegheny County, Pennsylvania	:	Docket No. A-2018-3000755
	:	Docket No. A-2018-3000756
	:	Docket No. A-2018-3000766
	:	Docket No. A-2018-3000769

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I. INTRODUCTION

On December 11, 2018, landowners Marie Palombo Aiello, Antoinette Cardinale and Anna Louise Aspden (collectively the “Palombo Property Owners”) filed the “Trial Brief of Owners Aiello, Cardinale and Aspden” at Docket No. A-2018-3000747 (“Trial Brief”). The Palombo Property Owners’ Trial Brief addressed limited issues related to the Palombo Property Owner’s proposal to relocate the right-of-way associated with Duquesne Light Company’s (“Duquesne Light”) Universal-Plum Project that traverses their property.¹ The Palombo Property Owners argue that the right-of-way traversing their property should be relocated to either the “extreme northern” or the “extreme southern” boundaries of their property. As explained herein, it is not reasonable to move the right-of-way to the “extreme northern” border or the “extreme southern” border due to the impacts on neighboring properties and/or increased costs.

II. SUMMARY OF ARGUMENT

Duquesne Light has demonstrated that the Universal-Plum Project is necessary and that its proposed route is reasonable. The Palombo Property Owners proposed two alternatives: either moving the proposed right-of-way to the northern border of their property or the southern border of their property. Both of the alternatives proposed by the Palombo Property Owners are unreasonable. If the Palombo Property Owners’ northern border proposal were adopted, it would cause the right-of-way to encroach on an existing structure for a neighboring property and increase the right-of-way impacts on neighboring properties. If the Palombo Property Owners’

¹ Duquesne Light notes that the Trial Brief filed with the Pennsylvania Public Utility Commission (“Commission”) contained inadmissible, extra-record confidential settlement negotiations between counsel for Duquesne Light and counsel for the Palombo Property Owners. On December 12, 2018, Duquesne Light submitted a letter to the Administrative Law Judge Conrad A. Johnson (the “ALJ”) and the Commission’s Secretary’s Bureau informing the ALJ and the Secretary that the Trial Brief contained confidential settlement negotiations, and requested that the Trial Brief be removed from the Commission’s public electronic docket. Duquesne Light also filed a Motion to Strike portions of the Trial Brief, which remains pending before the ALJ. The Secretary’s Bureau subsequently removed the Trial Brief from the public electronic docket.

southern border proposal were adopted, then it would require the transmission line to be constructed on unsuitable terrain, disrupt the location of right-of-way on neighboring properties and increase the right-of-way impacts on the Palombo property.

Moreover, Duquesne Light demonstrated that the alignment proposed by Duquesne Light does not, in fact, differ from the “extreme northern border” alignment agreed to by the Palombo Property Owners. The Palombo Property Owners’ confusion regarding the location of the proposed right-of-way is due to an inaccurate location of the northern boundary line of their property based on incorrect Allegheny County GIS data. Duquesne Light explained that this error was subsequently corrected and, while a portion of the northern property line of the Palombo property shifted on a subsequent corrected schematic, the location of the proposed right-of-way across their property did not. As such, the ALJ and the Commission should reject the alternative locations proposed by Mr. Alvi and the Palombo Property Owners and approve the locations proposed by Duquesne Light in the Siting Application.

Finally, Duquesne Light notes that the Palombo Property Owners’ improperly reference and disclose confidential settlement negotiations between their counsel and counsel for Duquesne Light as a part of the Trial Brief. Even if these references and disclosures are not struck from the Trial Brief, the facts disclosed are outside the scope of this proceeding, irrelevant and inadmissible, and constitute extra-record that cannot be relied upon by the ALJ or the Commission.

For the reasons explained below and in Duquesne Light’s Initial Brief, Duquesne Light requests that the ALJ and the Commission approve the Company’s applications necessary to permit the prompt construction of the Universal-Plum Project.

III. LEGAL STANDARDS

The Commission will consider “[t]he impact and the efforts which have been and will be made to minimize the impact, if any, of the proposed HV line upon...(i) Land use” and “[t]he availability of reasonable alternatives.” 52 Pa. Code § 57.75(e)(3), (4). The Commonwealth Court has held that a utility’s route for a proposed HV transmission line should be approved where the record evidence shows that the utility’s route-selection process was reasonable and that the utility properly considered the factors relevant to siting a transmission line:

[I]t is settled law that the designation of the route for a HV line is a matter for determination by [a utility's] management in the first instance, and the utility's conclusion will be upheld unless shown to be wanton or capricious. Thus, where the record establishes that the utility's route selection was reasonable, considering all the factors, its route will be upheld. The mere existence of an alternative route does not invalidate the utility's judgment.

Energy Conservation Council of Pennsylvania v. Pa. PUC, 25 A.3d 440, 449-450 (Pa. Cmwlth. 2011) (“*Susquehanna-Roseland*”) (quoting *Energy Conservation Council of Pennsylvania v. Public Utility Commission*, 995 A.2d 465, 479-80 (Pa. Cmwlth. 2010) (“*Trailco*”)).

Relatedly, on an application for condemnation, the Commission must determine whether the service—the transmission or distribution of electricity to or for the public that will be provided to the public if the subject property is condemned—is necessary or proper for the service, accommodation, convenience, or safety of the public. *See* 15 Pa. C.S. § 1511(c); *see also* *Duquesne Light I.B.*, pp. 20-21, 54-55. As such the basis of the legal authority, scope, validity, damages, or the willingness of a condemnee to negotiate or explicitly outside the scope of application proceedings seeking a Section 1511(c) determination by the Commission. *Duquesne Light I.B.*, pp. 20-21.

Pennsylvania Appellate Courts have interpreted Section 1511 as requiring a condemning utility to show that the proposed transmission line is necessary and that it has not acted wantonly,

capriciously, or arbitrarily in selecting the proposed right-of-way. *Dep't of Enviro. Res. v. Pa. PUC*, 335 A.2d 860 (Pa. Cmwlth. 1975), *aff'd.*, 473 Pa. 378, 374 A.2d 693 (1977); *Dickson v. Pennsylvania Service Commission*, 89 Pa. Super. 126 (1926). The selection of the right-of-way is a matter for the public utility in the first instance and, while the route selection must be reasonable, it need not be the "best alternative" in terms of reducing or eliminating inconvenience to particular landowners. *Stone v. Pa. PUC*, 162 A.2d 18 (Pa. Super. 1960).²

² For example, in *Paxtowne v. Pa. PUC*, 398 A.2d 254, 256 (Pa. Cmwlth. 1979), the route selected by the public utility was affirmed. In order to establish that the selected route was reasonable in comparison with two alternative routes, the public utility established the following:

"[T]hat the proposed route was selected over alternative routes because the topography of petitioner's property was superior with regard to land use, environmental and engineering considerations; and that the selection of other routes would be more costly in requiring rights-of-way from additional property owners."

Id. at 647-648. The Court went on to hold that, although the proposed route clearly impacted the petitioner's property, when balanced against the utility's evidence, there was no indication that the utility's selection of the proposed route was done wantonly, capriciously, or arbitrarily.

IV. ARGUMENT

The Palombo Property Owners argue that the ALJ and the Commission should adopt either their proposed “extreme northern border” or “extreme southern border” route because each of these routes is “just as reasonable” as the right-of-way proposed by Duquesne Light. Trial Brief, pp. 2-3; *see also* Trial Brief, Proposed Conclusion of Law 4. The Palombo Property Owners represent that “uncontradicted” record evidence regarding their right-of-way negotiations with Duquesne Light representatives, a comparison of the additional cost that Duquesne Light would incur to accommodate the Palombo Property Owners’ proposed “extreme southern border” alternative route to the total cost of the project, and the impacts of their proposed “extreme northern border” alternative route on a neighboring property somehow justify their proposed alternatives. Trial Brief, pp. 2-5.

On each of these assertions, the Palombo Property Owners either misrepresent or ignore record evidence, or attempt to raise issues outside the scope of this proceeding before the Commission. Therefore, and for the reasons more fully explained below, the Palombo Property Owners’ proposed alternative routes should be rejected and the right-of-way location proposed by Duquesne Light should be approved without modification.

A. THE PALOMBO PROPERTY OWNERS’ PROPOSED ALTERNATIVE ROUTES ARE UNREASONABLE AND SHOULD BE REJECTED

1. The Palombo Property Owners’ Proposed Northern Route Is Unreasonable.

The Palombo Property Owners also argue that their proposed “extreme northern border” alternative route is reasonable and should be adopted. Trial Brief, p. 4. While the Palombo Property Owners acknowledge that this alternative route would impact an existing structure on a neighboring property, *i.e.* the Cooper property, they argue “that it is reasonable to suggest that any impact on that shed will easily be compensated in due course, during the condemnation

proceeding. Indeed, the neighboring owners may find this to be a welcome windfall.” Trial Brief, p. 4.

As an initial matter, whether another landowner would be compensated by any impacts associated with the Palombo Property Owners’ alternative is irrelevant to whether Duquesne Light’s proposed location for the right-of-way traversing the Palombo property is necessary and reasonable. *See* 15 Pa. C.S. § 1511(c); *see also Dep’t of Enviro. Res.*, 335 A.2d at 865 (Pa. Cmwlth. 1975).

The Palombo Property Owners’ ignore undisputed record evidence that it is Duquesne Light’s policy to try to avoid running conducts over existing structures because the structures interfere with maintenance and operations activities, and would interfere with accessing the line in case of an emergency. Duquesne Light I.B., p. 49 (citing Hearing Tr. 142:19-23). Duquesne Light endeavors to avoid locating right-of-way in areas with existing structures to avoid conflicts with the owner’s right to maintain and alter the existing structure. Duquesne Light I.B., p. 50 (citing Hearing Tr. 196:19-197:7).³ Furthermore, in addition to being obstructed by an existing structure, Duquesne Light further demonstrated that the Palombo Property Owners’ “extreme northern border” alternative would: (1) increase the amount of right-of-way needed to traverse the neighboring Alvi property; and (2) increase the amount of right-of-way across the Cooper property, resulting in the majority of the Cooper property being traversed by the right-of-way. Duquesne Light I.B., pp. 50-51.

³ The Trial Brief mischaracterizes this structure as a “shed”. Trial Brief, p. 4. At hearing, Duquesne Light witness Jason Hartle testified that he had personal knowledge of the structure in question, which he identified as a garage of block construction. (Hearing Tr. 197:4-197:12; *see also* Duquesne Light I.B., p. 50.) Witnesses testifying for the Palombo Property Owners admitted that they had no personal knowledge of this structure. (*See* Hearing Tr. 203:22-204:7; 213:9-12; 217:8-15.)

For these reasons, and the reasons more fully explained in Duquesne Light's Initial Brief, the Palombo Property Owners' proposed "extreme northern border" alignment is unreasonable and should be rejected.

2. The Palombo Property Owners' Proposed Southern Route Is Unreasonable.

The Palombo Property Owners argue that their proposed "extreme southern border" alternative is "just as reasonable" as the route proposed by Duquesne Light. Trial Brief, p. 3. However, their Trial Brief concedes that the record evidence proves otherwise.

The Palombo Property Owners concede that the southern route would "involve dealing with steep slopes and otherwise difficult access" and would involve "additional construction." Trial Brief, p. 3. They also concede that this alternative would increase the cost of the Universal-Plum Project. Trial Brief, p. 3.⁴ Duquesne Light confirmed that the cost of the project would increase because an additional structure would be required to accommodate the steeply sloped terrain on along the southern border and to maintain the existing alignment and current clearances to ground on neighboring spans. Duquesne Light I.B., pp. 47-48 (citing Duquesne Light St. No. 3-R, pp. 2-3).

Along with these factors, Duquesne Light also demonstrated that the Palombo Property Owners' "extreme southern border" alternative would increase the amount of right-of-way traversing the Palombo property and increase the impacts to this property. Duquesne Light I.B., pp. 47-49. This alternative would also require the proposed right-of-way over the neighboring

⁴ The Palombo Property Owners misstate the proportion of such incremental costs in relation to the overall project cost. The Trial Brief argues, "If one applies fifth-grade math to this estimated additional cost [of \$445,000], divided by the project cost of at least \$26.2 million dollars, this would cause the applicant to incur an additional increase in cost of just less than two one-hundredths percent." Trial Brief, p.3. This statement is wrong as a matter of basic arithmetic; \$445,000 divided by \$26,200,000 equals approximately 1.7 percent.

Alvi property to be altered to accommodate the change. Duquesne Light I.B., p. 48 (citing Duquesne Light Exh. No. MH-3 (Palombo)).

Finally, the Palombo Property Owners' suggestion that it would be reasonable for Duquesne Light to incur the additional cost of the southern route to avoid condemnation damages associated with the proposed route should be disregarded. Trial Brief, pp. 4-5. This argument assumes facts not in evidence, *i.e.* the value of the Palombo property, to argue that the value of the property exceeds the additional cost that Duquesne Light would incur. In addition, even if such facts were in evidence, the value of the Palombo property is entirely outside the scope of and irrelevant to the Commission's determination in this proceeding.

For these reasons, and the reasons more fully explained in Duquesne Light's Initial Brief, the Palombo Property Owners' proposed "extreme southern border" alignment is unreasonable and should be rejected.

B. THERE IS NO DISCREPANCY BETWEEN DUQUESNE LIGHT'S PROPOSED ROUTE AND THE ROUTE ORIGINALLY AGREED TO BY THE PALOMBO PROPERTY OWNERS.

The Palombo Property Owners argue that the Direct Testimony of Antoinette Cardinale regarding prior negotiations between the Palombo Property Owners and Duquesne Light is "uncontradicted" and demonstrates a "discrepancy" between the Palombo Property Owners' proposed alternatives and Duquesne Light's proposed route. Trial Brief, pp. 2-3.

Duquesne Light witness Mark Hummel not only contradicted this testimony, but demonstrated that the "extreme northern border" alternative set forth in the Palombo Property Owners' Exhibit 2 to St. No. AC-1 shows the proposed right of way in the same location as set forth in Exhibit 3 to St. No. AC-1, but corrects a portion of the northern property line for the Palombo property. Duquesne Light I.B., pp. 51-52. Moreover, at hearing, Ms. Cardinale testified that it would be the Palombo Property Owners' preference that Duquesne Light the

segment of the 138 kV Universal-Plum transmission line traversing their property along the “northern edge” of their property, as set forth in Exhibit 2 to St. No. AC-1. Duquesne Light I.B., pp. 52-53.

The Palombo Property Owners appear to mischaracterize or at a minimum misunderstand the information set forth in Exhibit 2 and 3 to St. No. AC-1. *See* Trial Brief, pp. 2-3. As explained by Duquesne Light witness Mr. Hummel, a “ cursory comparison” of these exhibits and the landmarks set forth in each of them conclusively demonstrates that the location of the proposed right-of-way is the same. Duquesne Light I.B., pp. 51-53. By their own admission, the Palombo Property Owners had previously agreed to this proposed right-of-way location. *See* Trial Brief, p. 2. Therefore, the Palombo Property Owners’ claims regarding the location of the proposed right-of-way should be rejected.

C. DUQUESNE LIGHT’S PROPOSED RIGHT-OF-WAY IS REASONABLE

The Palombo Property Owners have failed to demonstrate that Duquesne Light “wantonly, capriciously, or arbitrarily” selected the location of the proposed right-of-way traversing their property. *See Dep’t of Enviro. Res.*, 335 A.2d at 865 (Pa. Cmwlth. 1975). The Palombo Property Owners appear to concede this point in their Trial Brief by representing that “the selection by the applicant itself of two easements along the extreme borders of the Owners’ property suggests that either of these routes is just as reasonable to the applicant as the route it attempted to secure through the middle.” Trial Brief, p. 3 (emphasis added).

Duquesne Light demonstrated that the proposed right-of-way traversing the Palombo property is reasonable. The proposed right-of-way constitutes a segment of Alternative 3. Duquesne Light showed that this alternative had the lowest/best final impact score of all the alternative routes and is the best overall alternative from an environmental, human/built, cultural, and engineering perspective. Duquesne Light I.B., Section VI.E.2.a. Importantly, Alternative 3

was the shortest route and crosses the least steep terrain. Duquesne Light I.B., Section VI.E.2.a. (citing Duquesne Light Exh. No. 1, Attachment 3, Section 5.0).

The proposed right-of-way traversing the Palombo property minimizes overall impacts consistent with these principles. It constitutes the most direct route across the property, minimizes the acreage of the property impacted, avoids the location of additional structures in sloped terrain, and minimized the impacts to neighboring properties. Duquesne Light I.B., Section VI.E.4.b. Duquesne Light also demonstrated that each of the Palombo Property Owners' proposed alternatives was not reasonable. Duquesne Light I.B., Section VI.E.4.b.

The Palombo Property Owners' proposed alternatives would increase the overall impacts of the Universal-Plum Project and/or increase the cost. *See* Section IV.A. *supra*; *see also* Duquesne Light I.B., Section VI.E.4.b. Contrary to these proposed alternatives, Duquesne Light's selection of the propose right-of-way traversing the Palombo Property reasonably balanced the topography of the parcel, engineering considerations and the impacts on neighboring property owners and, therefore, there is no indication that Duquesne Light's "wantonly, capriciously or arbitrarily" selected the proposed route. *See Paxtowne*, 398 A.2d at 256. Therefore, and for the reasons more fully explained in Duquesne Light's Initial Brief, the Palombo Property Owners' arguments should be rejected.

D. INFORMATION REGARDING THE VALUE OF THE RIGHT OF WAY OR PROPOSED SETTLEMENT OFFERS IS IRRELEVANT TO THIS PROCEEDING

The Palombo Property Owners further improperly argue that the value of prior offers made during settlement negotiations demonstrate that Duquesne Light's proposed route is

unreasonable.⁵ See Trial Brief, pp. 2, 4-5, Proposed Findings of Fact 10-12. This argument is outside the scope of these proceedings before the Commission, and relies exclusively irrelevant and inadmissible confidential settlement negotiations that, even if admissible, would constitute extra-record evidence.

As an initial matter any damages resulting from a proposed condemnation (*i.e.* compensation), or the willingness of a condemnee to negotiate are explicitly outside the scope of application proceedings seeking a Section 1511(c) determination by the Commission. Duquesne Light I.B., pp. 20-21. Indeed, the ALJ specifically informed the parties that the issue of compensation is not before the Commission and that it is a separate civil matter, at multiple times during the hearing. (Hearing Tr. 78:3-10, 81:2-5.)

Even if matters of compensation were properly before the Commission, which they are not, the Commission's regulations and case law make clear that confidential settlement negotiations are neither relevant nor admissible. Section 5.231(d) of the Commission's regulations provides that offers of settlement are not admissible in evidence against counsel or a party claiming the privilege. 52 Pa. Code § 5.231(d). Furthermore, the Commission has confirmed that "settlement negotiations are privileged, confidential and inadmissible into evidence..." *Pa. Pub. Util. Comm'n v. Pennsylvania Electric Company*, Docket Nos. R-80051197, C-80072106, 54 Pa. PUC 436, 442-43 (Order entered Dec. 4, 1980).

Moreover, even if the compensation offered during confidential settlement negotiations was relevant and admissible, which it is neither, these facts are extra-record and not properly before the ALJ. It is well-established that parties cannot present new evidence at the briefing stage. See, e.g., *Pa. PUC v. Nat'l Fuel Gas Distrib. Corp.*, 1993 Pa. PUC LEXIS 95, at *7-10

⁵ As explained in footnote 1 *supra*, Duquesne Light has filed a Motion to Strike the portions of the Trial Brief that contained inadmissible, extra-record confidential settlement negotiations between counsel for Duquesne Light and counsel for the Palombo Property Owners.

(Order entered July 30, 1993); *Petition of the Borough of Cornwall for a Declaratory Order*, 2016 Pa. PUC LEXIS 3, at *24-26 (Jan. 6, 2016) (Recommended Decision), *adopted as modified*, Docket No. P-2015-2476211 (Order entered Aug. 11, 2016); *see also* 66 Pa. C.S. § 332(c). Accordingly, extra-record evidence in briefs is commonly stricken⁶ because including extra-record materials in a party's brief "brings up hearsay problems and problems associated with the right to respond to evidence." *Pa. PUC v. Pa. Power & Light Co.*, 1995 Pa. PUC LEXIS 190, at *232 (July 28, 1995) (Recommended Decision).

For these reasons and the reasons more fully explained in Duquesne Light's pending Motion to Strike, the ALJ and the Commission should strike any reference to and disclosure of the settlement negotiations by and between Duquesne Light and the Palombo Property Owners set forth in the Trial Brief or, alternatively, disregard these facts as outside the scope of this proceeding, irrelevant and inadmissible, and improper extra-record evidence.

V. CONCLUSION

WHEREFORE, Duquesne Light Company respectfully requests that Administrative Law Judge Conrad A. Johnson and the Pennsylvania Public Utility Commission approve the Application of Duquesne Light Company filed Pursuant to 52 Pa. Code Chapter 57, Subchapter G, for Approval of the Siting and Construction of the 138 kV Transmission Lines Associated with the Universal-Plum Project in Penn Hills, Monroeville, and Plum Borough, Allegheny County, Pennsylvania.

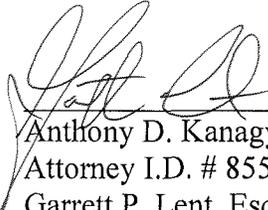
⁶ *See, e.g., Trucco v. PPL Elec. Utils. Corp.*, 2002 Pa. PUC LEXIS 21, at *5 (Order entered Mar. 29, 2002) (noting that ALJ Paist "struck those portions of the Complainants' Main Brief which referenced extra-record evidence, including those various exhibits attached to that Main Brief"); *Application of Kenneth Scott Cobb, t/a Kennys Transp. Serv.*, 2012 Pa. PUC LEXIS 1802, at *24 (Nov. 16, 2012) (Initial Decision) (granting motion to strike the applicant's brief "for attempting to introduce new facts and documents into evidence not previously offered or admitted into the record at the hearing of September 5, 2012"), *became final without further action*, Docket No. A-2011-2280175 (Order entered Jan. 7, 2013); *see also* 52 Pa. Code § 5.501(a)(2) (stating that briefs must contain "[r]eference to the pages of the record or exhibits where the evidence relied upon by the filing party appears").

Duquesne Light Company respectfully requests that Administrative Law Judge Conrad A. Johnson and the Pennsylvania Public Utility Commission approve the nine (9) remaining applications under 15 Pa.C.S. §1511(c) seeking findings and determination that the service to be furnished by the Company through its proposed exercise of the power of eminent domain to acquire rights-of-way and easements over the following lands for the siting and construction of transmission lines associated with the proposed Universal-Plum Project is necessary or proper for the service, accommodation, convenience or safety of the public:

Duquesne Light Company respectfully requests that Administrative Law Judge Conrad A. Johnson and the Pennsylvania Public Utility Commission grant such other approvals as are necessary or appropriate under all of the circumstances.

Respectfully submitted,

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Date: December 26, 2018

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