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**Re: PPA Final Form Regulation Regarding Electronic Testimony at Administrative Hearings # 126-2**

Total Pages Including Cover: **10**

Date: **April 2, 2013**

Comments:

**Attached comments of the Taxi Workers Alliance of Pennsylvania.**

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April 2, 2013

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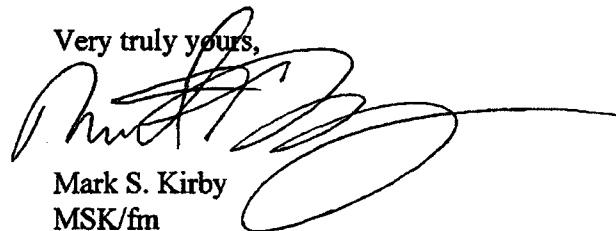
Honorable Silvan B. Lutkewitte, III, Chairman  
Independent Regulatory Review Commission  
333 Market St., 14th fl.  
Harrisburg, PA 17101

**Re: PPA Final Form Regulation Regarding Electronic Testimony at Administrative Hearings # 126-2**

Gentlemen:

Attached please find comments on behalf of the Taxi Workers Alliance of Pennsylvania regarding the above-referenced final form regulation by the Philadelphia Parking Authority.

Very truly yours,



Mark S. Kirby  
MSK/fm  
attachment

2943.

**Philadelphia Parking Authority Final Form Regulation for Electronic  
Testimony at Administrative Hearings, # 126-2**

**COMMENTS**

Mark S. Kirby, Esquire, on behalf of the Taxi Workers Alliance of Pennsylvania (the "Alliance"), hereby submits the following comments regarding the final form regulation by the Philadelphia Parking Authority (the "PPA") of a new subsection to 52 Pa. Code Subpart A. (General Provisions), Chapter 1005 (Formal Proceedings), Subchapter B. (Hearings) at § 1005.114.

It cannot be overemphasized how injurious to taxicab drivers the PPA's final form regulation would be. Whereas the PPA's earlier proposal regulation for electronic testimony was a bad variation on the telephone witness rules of the Unemployment Compensation Board of Review ("Unemployment Board"), the new final form regulation is a monster entirely of the PPA's own creation. It is far worse than the regulation originally proposed by the PPA. It will, effectively, mean the end of live passenger testimony during enforcement actions brought by the PPA. And drivers' due process rights will be trampled accordingly.

The Alliance's comments follow for the various sections of the final form regulation (please note that most, if not all, of the undersigned's comments submitted in response to the PPA's earlier proposed regulations still obtain simply because the PPA has done nothing to address them or has addressed them by making the final form regulation worse; accordingly, the undersigned will not here reiterate his earlier comments but will rather incorporate them by reference):

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*Section (b) Scheduling of telephone or audio-visual testimony.*

*(1) Scheduling of electronic testimony witnesses shall proceed as follows:*

*(i) The party seeking to present an electronic testimony witness must file a written notice with the Clerk. The notice must be filed more than 20 days before the scheduled hearing date. The notice must contain the name of the proposed electronic testimony witness, the reason an exemption from standard in-person testimony is requested and offer of proof as to the proposed testimony.*

**Alliance comment:** There is no requirement that this notice inform the other parties that they have a right to object to electronic testimony. Accordingly, drivers receiving the notice will not know, unless they learn of it elsewhere, that they even have a right to object..

*(ii) A party may file written objections to the use of an electronic testimony witness with the Clerk within 10 days of the filing of the notice required by paragraph (2)(1) [sic]. The objection shall set forth the reasons in support thereof.*

**Alliance comment:** The vast majority of taxicab drivers represent themselves without the benefit of counsel at PPA enforcement hearings. They do so not out of choice but because they cannot afford to hire counsel. Many drivers are immigrants for whom English is a second language and for whom the U.S. legal system, including PPA enforcement actions, is a complete mystery. How do these drivers begin to prepare written objections? How do they hope to know what is objectionable? How do they even know they have the right to object in the first place? Moreover, even for the tiny minority that does hire counsel to represent them, most of them do so at the last minute, within days of the hearing itself and

certainly not within ten days of the notice filing. These drivers, just like their brethren who forego counsel, will be unable to object to electronic testimony. Thus, requiring drivers to file written objections will have the practical effect of eliminating objections altogether, leaving the PPA free to present electronic witnesses unfettered.

*(iii) The notice required by this paragraph and any objection thereto, shall be served as provided in Chapter 1001, Subchapter F, (relating to service of documents) on the same day the document is filed with the Clerk. A certificate of service shall be filed with the Clerk.*

**Alliance comment:** Not content to allow the written objection requirement to do the job of eliminating objections to electronic testimony, the PPA adds further obstacles in the form of service and "certificate of service" requirements. How is a driver supposed to know the meaning of "*service as provided in Chapter 1001, Subchapter F*"? Even if the driver somehow knows where to look up Chapter 1001, Subchapter F, he will still not know -- because Chapter 1001, Subchapter F does not say -- where to serve his objection or upon whom to serve it. And what if the "Certificate of Service" is deficient in some way? What if it fails to specify the manner of service or some other detail? Will the objection be dismissed as a consequence of such a defect, even if the objection is otherwise sound?

*(iv) In the event a timely objection is not filed pursuant to this paragraph, all parties will be deemed to consent to the use of the electronic testimony witness.*

**Alliance comment:** The PPA is here saying to its poor, majority immigrant, mostly unsophisticated Philadelphia medallion cab drivers that they must file their objection in writing, file it within ten days, serve it pursuant to Chapter 1001, Subchapter F, and file a PPA-specified "Certificate of Service" and, if they do not, they will be deemed to have consented to electronic testimony. And they should not bother objecting at the time of the hearing. That will be too late.

*(v) The parties may mutually agree to waive the time limitations of this paragraph.*

**Alliance comment:** One can imagine an unrepresented and unknowing driver waiving any and all procedural failures of the PPA. One has difficulty imagining the reverse.

*(2) It is within the sole discretion of the presiding officer to permit the use of an electronic testimony witness in consideration of the notice and objection, if any, required by this section. The presiding officer shall also consider the following factors prior to scheduling the testimony of an electronic testimony witness:*

*(i) The value of the proposed witness in developing a full and complete record.*

(ii) *The reason the proposed witness is unable to testify. Particular consideration shall be given to reasonable conflicts or challenges associated with employment, childcare, transportation, mobility issues or health reasons.*

**Alliance comment:** In its earlier proposed regulation, the PPA eliminated any standard for assessing a witness's claim that they could not testify live. The PPA now attempts to mollify the Commission by adding the word "reasonable." It is a distinction without a difference. Imagining a "conflict" or "challenge" that would be deemed "unreasonable" -- especially because there is no opportunity to cross-examine on the issue -- is difficult. Imagining it ever happening more than once is impossible. Accordingly, and as was true for the earlier PPA proposed regulation, if this provision is allowed to stand, it is safe to predict that no taxicab passenger will ever again testify in person at a PPA enforcement hearing.

(iii) *The rebuttable presumption that a police officer within the definition of 234 Pa. Code Rule 103, should be permitted to testify by telephone or audio-visual means in matters related to the impoundment of a taxicab or limousine, or vehicle acting as a taxicab or limousine.*

(iv) *If the probative value of the proposed electronic testimony is substantially outweighed by the danger or [sic] any unfair prejudice to the opposing party.*

**Alliance comment:** Pennsylvania Rule of Evidence 403 precludes the admission of evidence where the probative value of that evidence is simply "outweighed" by the danger of unfair prejudice, confusion of the issues, or misleading of the jury. Apparently, this language did not tilt the playing field enough in the PPA's favor so it added "*substantially outweighed*" to make sure

none of its evidence is ever excluded. Like so much of this final form regulation and the proposed regulation that preceded it, this provision speaks volumes about the PPA's concern for its drivers' due process rights.

*Section (c) Hearing process.*

*(1) At the start of the hearing, the presiding officer will state on the record the time and telephone or audio-visual numbers at which the presiding officer initiates the contact with any electronic witness.*

*(2) The presiding officer will permit parties a reasonable opportunity to question electronic testimony witnesses for the purpose of verifying the identity of such witnesses.*

*Falsification of identity is prohibited.*

**Alliance comment:** Just as in its earlier proposed regulation, the PPA excludes the Unemployment Board's provision stating, "Falsification of [witness] identity may subject the parties or witnesses to prosecution and punishment." The PPA justifies this omission by pontificating that "*Lying under oath is a serious offense and does not require additional threatening language in this regulation.*"

If that is true, why is it necessary to include the seemingly self-evident proposition that falsifying one's identity is prohibited?

*(3) This section does not create special procedures or standards for the presentation, cross-examination, exclusion or weighing of the testimony of an electronic testimony witness or for establishing the credibility of such a witness once the witness is scheduled by the presiding officer.*

*(4) The oath or affirmation administered to an electronic testimony witness shall indicate that the witnesses will not testify from documents that are not in the record.*



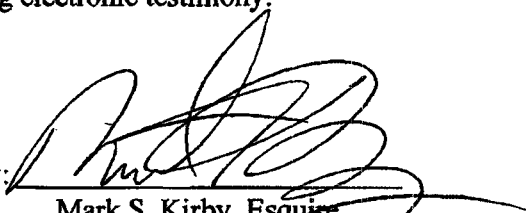
*(5) The presiding officer, the electronic testimony witness, and all persons in the room in which the presiding officer is present while telephone or audio-visual testimony is presented must be able to hear and speak to one another through the telephone or audio-visual connection used to submit testimony pursuant to this section.*

**Alliance comment:** One of the people in the room with the presiding officer must be the driver's attorney, should the driver be wealthy enough or – because of the sometimes life-changing consequences of losing an enforcement hearing -- desperate enough to have one. This attorney will be in the room because the PPA will not permit counsel to represent drivers by telephone. Why? Because allowing representation over the phone *"would needlessly expand the scope of this regulation."* And because *"the purpose of this regulation is to ease the challenges associated with those not in the taxicab and limousine industries to participate in administrative hearings."* Apparently, the challenges faced by those actually in the taxicab and limousine industry, such as cab drivers, are not the PPA's concern. But it should be. Allowing counsel to represent parties by telephone or video during PPA enforcement hearings -- just as the Unemployment Board does during unemployment compensation hearings -- could allow many more drivers to afford representation. With representation, the playing field at enforcement hearings will be made more level. Moreover, if the PPA is permitted to present electronic testimony of witnesses, the same technology that will allow that to happen is the very same technology that will permit attorney representation by telephone or video. Accordingly, the Alliance respectfully requests that if this Commission approves the pending final form regulation

regarding electronic testimony, it should also require the PPA to permit attorneys to represent parties by telephone or video at enforcement hearings.

In sum, the Alliance again asks the Commission to enjoin the PPA's attempt to curtail the already limited due process rights afforded taxicab drivers at PPA enforcement hearings and reject the PPA's final form regulations regarding electronic testimony.

By:



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