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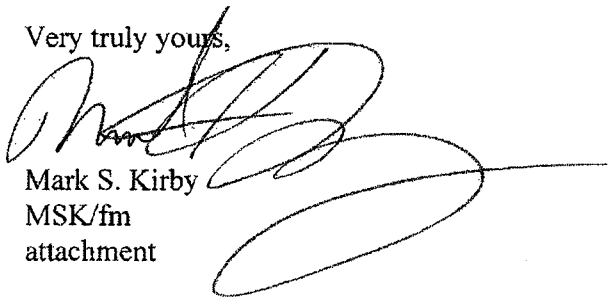
Honorable Silvan B. Lutkewitte, III, Chairman  
Independent Regulatory Review Commission  
333 Market St., 14th fl.  
Harrisburg, PA 17101

**Re: PPA Proposed Regulation Regarding Electronic Testimony at Administrative Hearings # 126-2 (IRRC # 2943)**

Gentlemen:

Attached please find comments on behalf of the Taxi Workers Alliance of Pennsylvania regarding the proposed regulation by the Philadelphia Parking Authority titled "Electronic Testimony at Administrative Hearings."

Very truly yours,

  
Mark S. Kirby  
MSK/fm  
attachment

## **Philadelphia Parking Authority Proposed 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 proposed regulation by the Philadelphia Parking Authority (the "PPA") titled "Electronic Testimony at Administrative Hearings."

The Alliance forcefully opposes the PPA's proposed regulation. Despite the PPA's assertions, the proposed regulations would severely and perhaps unconstitutionally curtail the rights of taxicab drivers attempting to defend themselves in enforcement actions brought by the PPA.

Initially, the Alliance directs the Commission's attention to the fact that much of the PPA's proposed regulation is lifted wholesale from a similar regulation of the Unemployment Compensation Board of Review (the "Unemployment Board").<sup>1</sup> (A copy of the Unemployment Board's telephone testimony regulation, 34 Pa. Code § 101.27 et seq., is attached.)

Unfortunately and tellingly, the PPA's proposed version makes changes to the Unemployment Board's regulations that render the PPA's version far less protective of due process rights.

Conducting a side-by-side comparison of the Unemployment Board's existing regulation with that proposed by the PPA reveals the following:

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<sup>1</sup>The Unemployment Board's regulations regarding telephone testimony were themselves the result of the Commonwealth Court disallowing the use of telephone testimony until the Unemployment Board instituted adequate due process safeguards. See *Knisley v. Unemployment Compensation Board of Review*, 501 A.2d 1180 (Pa. Cmwlth. 1985). The Unemployment Board adopted its telephone witness regulations in 1997.

**Unemployment Board existing regulation:** Permits the hearing tribunal to schedule telephone testimony on its own motion only when a party or witness is located at least 50 miles from the hearing location. § 101.128(a).

**PPA's proposed regulation:** The PPA or the hearing officer can schedule telephone testimony on their own motion when a party is located at least 25 miles from the hearing location. §1005.114(b)(1).

**Alliance comment:** The PPA's proposed regulation reduces the minimum mileage by half, thereby increasing the potential pool of witnesses eligible to testify by telephone. And the PPA can schedule the telephone testimony itself, without even having to make a request to the hearing officer.

**Unemployment Board existing regulation:** Allows a party to request telephone testimony -- even when the proposed witness is within 50 miles of the hearing -- but only if "the party or witness is reasonably unable to testify in person due to a *compelling* employment, transportation, or health reason, or other compelling problem." § 101.128(b)(2) (emphasis supplied).

**PPA's proposed regulation:** Omits the word "compelling" as a modifier for "employment, transportation, or health problem." § 1005.114(b)(2)(ii).

**Alliance comment:** Perhaps the most important and consequential PPA change to the Unemployment Board's regulation. With the critical word "compelling" omitted, the PPA's version allows for a witness to testify by telephone if that witness merely asserts a "problem" with employment, transportation, etc. Under such a minimal standard, how could any witness fail to qualify for telephone testimony? Consequently, if this proposed regulation is

approved, it is safe to predict that no taxicab passenger will ever again testify in person at a PPA enforcement hearing.

**Unemployment Board existing regulation:** Devotes an entire section to notice requirements. Under this section, titled "Notice of testimony by telephone and use of documents," the Unemployment Board requires a fourteen day written notice to all parties identifying who will be testifying by telephone and the documents they will be using during their testimony. § 101.130.

**PPA's proposed regulation:** The PPA omits this entire section.

**Alliance comment:** Under the PPA's proposed regulation, there is no notice requirement. Taxicab drivers will not know that a witness will be testifying by telephone until they arrive at the enforcement hearing. Nor will the drivers have any idea what documents the witness intends to use until -- and only if -- those documents are made part of the record. *See* § 1005.114(d)(4).

**Unemployment Board existing regulation:** Requires, at the outset of the hearing, the tribunal to advise all parties of their right to object to telephone testimony and request an in-person hearing. § 101.131(a).

**PPA's proposed regulation:** Omits this requirement entirely.

**Alliance comment:** The vast majority of taxicab drivers represent themselves without the benefit of counsel at PPA enforcement hearings. The PPA's omission of the requirement that drivers be notified of their right to object to telephone testimony speaks volume's about the PPA's concern for due process rights.

**Unemployment Board existing regulation:** Directs that, "Falsification

of [witness] identity may subject the parties or witnesses to prosecution and punishment.” § 101.131(e).

**PPA’s proposed regulation:** Omitted entirely.

**Alliance comment:** Why omitted? Does the PPA have an issue with subjecting parties who falsify their identities to prosecution and punishment?

**Unemployment Board existing regulation:** Directs that “A person may not prompt or direct the testimony of a witness testifying by telephone.” § 101.131(g).

**PPA’s proposed regulation:** Omitted entirely.

**Alliance comment:** Why omitted? Does the PPA want the ability to prompt or direct the testimony of telephone witnesses?

**Unemployment Board existing regulation:** Directs that “A document not provided as required by [the fourteen day notice requirement] may not be admitted nor testimony given or taken from it unless consent has been requested from and given by all parties. Testimony taken or given in violation of this subsection will be excluded from consideration, as will the document.” § 101.131(h).

**PPA’s proposed regulation:** Omitted entirely.

**Alliance comment:** Because the PPA’s proposed regulation contains no notice requirement, any provision such as this providing sanctions for ignoring the notice requirement is obviously moot for PPA purposes.

**Unemployment Board existing regulation:** Allows counsel to represent a party by telephone. § 101.132.

**PPA's proposed regulation:** Omitted entirely.

**Alliance comment:** Allowing counsel to represent taxi drivers by telephone during PPA enforcement hearings could allow many more drivers to afford representation.

**Unemployment Board existing regulation:** Requires the Board to "compile and maintain data on the scheduling and receipt of testimony by telephone." § 101.133.

**PPA's proposed regulation:** Omitted entirely.

**Alliance comment:** Why omitted? Is there a reason why the PPA would not want it known how many witnesses are testifying by telephone during enforcement hearings?

A review of the above-noted changes and omissions proposed by the PPA to the progenitor regulations of the Unemployment Board clearly illustrates one overriding theme: all of the PPA's changes and omissions are intended to give taxi drivers less due process protection than that afforded participants in Unemployment Board hearings. Put more bluntly, the PPA seeks to gut the most important of the Unemployment Board's due process protections -- the same protections that were put in place precisely because of the Commonwealth Court's concerns in the *Knisley* case -- and thereby further tilt the playing field at enforcement hearings in PPA's favor.

These efforts on the part of the PPA would be disturbing even if taxicab drivers merely required the *same* protections regarding telephone testimony as the participants in unemployment compensation hearings. But because of the serious consequences of many PPA enforcement hearings and because of the type of witnesses who participates in them (members of the traveling

public who file passenger complaints), taxicab drivers require *more* protection. Indeed, they require the protections that only in-person testimony of witnesses can provide.

In unemployment compensation hearings, the parties are for the most part at least passingly familiar with each other. The witness testifying by telephone may be the claimant's boss, or a fellow employee, or a doctor hired by one side or the other. They are, in other words, people who can be readily identified by voice, location, or background information, as being the person they say they are.

In PPA enforcement hearings, on the other hand, the situation is markedly different. The person testifying by telephone will invariably be a taxicab passenger who has filed a complaint against the taxicab driver. In almost all cases, the passenger and driver will have met each other exactly once and for a brief period of time. In such a situation, there is no way for the driver to know that the voice on the other end of the telephone belongs to the passenger he drove weeks or months before. And the driver (or his counsel, if represented) has no background information with which to verify the identity of the caller.

Of course, the same thing is true in reverse. The passenger witness has no way of knowing, or confirming for the hearing officer, that the driver sitting in a hearing room miles away is the same driver against whom the passenger made their complaint.

Moreover, there is often more at stake in a PPA hearing than in an unemployment compensation appeal. The PPA routinely requests the revocation of a driver's taxi license based on a single passenger complaint. If, on the basis of that single complaint, the driver's taxi license is revoked, that driver can never again drive a medallion cab in Philadelphia. It does not matter if the driver has been driving a taxicab twenty years and has never had a prior complaint. It does not matter if the driver knows no other way to make a living. It does not matter if the driver has a

wife and kids to support and a mortgage to pay. The license gets revoked as a result of a single passenger complaint and the driver deals with his sudden, unexpected, and perhaps long-term or permanent joblessness the best he can. In such a situation, the stakes for the driver -- and the need for due process protections that only in-person testimony can provide -- could not be higher.

In light of the above, the Alliance 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 proposed regulations regarding telephone testimony. While telephone testimony may have its place in the specialized context of unemployment compensation appeals where the witnesses are known and easily verifiable, it has no place in a PPA enforcement hearing where the witnesses are largely unknown, largely unverifiable, and where the consequences for the accused drivers are so great.

By 

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## Subchapter E. TELEPHONE HEARINGS

### Sec.

- 101.121—101.126. [Reserved].
- 101.127. Purpose and scope.
- 101.128. Scheduling of telephone testimony.
- 101.129. Procedures subsequent to scheduling.
- 101.130. Notice of testimony by telephone and use of documents.
- 101.131. Conduct of a telephone hearing.
- 101.132. Representation by telephone.
- 101.133. Data maintenance requirement.

### Authority

The provisions of this Subchapter E issued under sections 203 and 505 of the Unemployment Compensation Act (43 P. S. § § 763 and 825), unless otherwise noted.

§ § 101.121—101.126. [Reserved].

### Source

The provisions of these § § 101.121—101.126 adopted April 7, 1989, effective April 8, 1989, 19 Pa.B. 1550; corrected April 21, 1989, effective April 8, 1989, 19 Pa.B. 1731; readopted July 2, 1993, effective July 3, 1993, 23 Pa.B. 3125; reserved December 26, 1997, effective December 27, 1997, 27 Pa.B. 6809. Immediately preceding text appears at serial pages (207529) to (207533).

### § 101.127. Purpose and scope.

(a) In-person testimony is normally preferable to testimony by telephone; however, there can be reasons to justify receiving testimony by telephone. This subchapter is promulgated to provide the conditions under which testimony by telephone will be scheduled and received, to safeguard the due process rights of the parties, and to ensure that testimony by telephone is received under

uniformly applied rules. Testimony by telephone may be received only if specifically authorized by this subchapter.

(b) When the general rules of this chapter conflict with this subchapter, this subchapter controls.

#### Source

The provisions of this § 101.127 adopted December 26, 1997, effective December 27, 1997, 27 Pa.B. 6807.

#### § 101.128. Scheduling of telephone testimony.

(a) The tribunal may schedule, on its own motion, testimony by telephone of a party or witness when it appears from the record that the party or witness is located at least 50 miles from the location at which the tribunal will conduct the hearing, without regard to State boundaries.

(b) The tribunal may schedule testimony by telephone of a party or witness, at the request of one or more parties, when one of the following applies:

(1) The parties consent to the receipt of testimony by telephone.

(2) The party or witness is reasonably unable to testify in person due to a compelling employment, transportation, or health reason, or other compelling problem.

(c) Only a party or witness scheduled to testify by telephone, or identified prior to the taking of testimony in accordance with § 101.131(f) (relating to conduct of a telephone hearing), may testify by telephone, and the testimony of each other party or witness shall be received in person.

(d) The tribunal will promptly rule on a request that testimony be taken by telephone after a reasonable attempt has been made to inform the parties of the request, the basis for the request, the regulations under which telephone testimony can be taken, and the right of a party to object. The basis for the request, the position of the parties, if known, and the ruling will be documented on the record.

(e) A party or witness scheduled to testify by telephone will be permitted to testify in person.

#### Source

The provisions of this § 101.128 adopted December 26, 1997, effective December 27, 1997, 27 Pa.B. 6807.

#### § 101.129. Procedures subsequent to scheduling.

(a) If a party moves to withdraw consent to the receipt of testimony by telephone prior to the taking of testimony, the tribunal will allow the withdrawal if it is found that the consent was not freely and knowingly given.

(b) An objection to the receipt of testimony by telephone shall set forth the reasons in support thereof and shall be promptly communicated to the tribunal, but may not be asserted subsequent to the taking of testimony.

(c) The tribunal will promptly rule on objections to testimony by telephone after a reasonable attempt to obtain the position of the other party. The basis for the objection, the position of the other party, if known, and the ruling will be documented on the record.

#### Source

The provisions of this § 101.129 adopted December 26, 1997, effective December 27, 1997, 27 Pa.B. 6807.

#### **§ 101.130. Notice of testimony by telephone and use of documents.**

(a) When testimony by telephone is to be taken, the tribunal will mail the notice of hearing to the parties and, if known, to their counsel or authorized agent at least 14 days in advance of the hearing. The hearing notice will indicate:

(1) The date and time of the hearing in prevailing Eastern time.

(2) The names of counsel, authorized agent, parties and witnesses, if known, who are scheduled to appear or testify by telephone.

(3) The deadline by which the tribunal is to receive documents, if any, from all parties.

(4) The hearing will be tape recorded.

(b) When testimony by telephone is to be taken, the tribunal will send a copy of this subchapter with the notice of hearing. If the tribunal finds that an unrepresented party has not received a copy of this subchapter, a copy will be provided and the hearing will be rescheduled.

(c) A party intending to testify, to offer the testimony of witnesses, or to be represented by telephone, shall, in advance of the beginning of the hearing, supply the tribunal with the name, location and telephone number of the persons who will so appear.

(d) When scheduling a telephone hearing, the tribunal will enclose with the notice of hearing copies of the documents upon which the initial determination was based. These copies will accompany the notices of hearing to all parties, and their counsel or authorized agent, if known.

(e) When any testimony will be given from or with the aid of a document not previously distributed to the parties by the tribunal, the party expecting to introduce the document shall deliver it to the tribunal, and the tribunal shall distribute it to each other party and, if known, counsel or authorized agent before or at the beginning of the testimony. The tribunal may require that the documents be delivered up to 5 days in advance of the hearing. See § 101.131(h) (relating to conduct of a telephone hearing).

#### Source

The provisions of this § 101.130 adopted December 26, 1997, effective December 27, 1997, 27 Pa.B. 6807.

### **Cross References**

This section cited in 34 Pa. Code § 101.131 (relating to conduct of a telephone hearing).

#### **§ 101.131. Conduct of a telephone hearing.**

(a) Before testimony is received, the tribunal will advise all parties of the right to object to telephone testimony and to request an in-person hearing in compliance with Subchapter B (relating to provisions governing hearings before the Department or referee).

(b) A party may pursue an objection to telephone testimony at the hearing and shall set forth reasons in support thereof. If the objection is sustained, the tribunal will reschedule the hearing at a later date, either in person or by telephone, in accordance with Subchapter B or this subchapter. If the objection is not sustained, the tribunal may proceed with the hearing in accordance with this subchapter.

(c) At the start of the hearing, the tribunal will state on the record the time and telephone numbers at which the tribunal initiates the contact with any party, witness, legal counsel or authorized agent who is to testify or appear by telephone.

(d) The proceedings of the hearing will be tape recorded to preserve the record. A person testifying or appearing by telephone will be advised by the tribunal that the proceedings are being tape recorded.

(e) The tribunal will permit parties a reasonable opportunity to question other parties or witnesses testifying by telephone for the purpose of verifying the identity of the parties or witnesses. Falsification of identity may subject the parties or witnesses to prosecution and punishment.

(f) A party or witness not identified to the tribunal and all other parties before the beginning of the testimony will not be permitted to testify by telephone. Testimony taken or given in violation of this subsection will be excluded from consideration.

(g) A person may not prompt or direct the testimony of a witness testifying by telephone. Testimony taken or given in violation of this subsection may be excluded from consideration by the tribunal, with or without an objection from a party.

(h) A document not provided as required by § 101.130(e) (relating to notice of testimony by telephone and use of documents) may not be admitted nor testimony given or taken from it unless consent has been requested from and given by all parties. Testimony taken or given in violation of this subsection will be excluded from consideration, as will the document.

(i) The oath or affirmation administered to parties or witnesses testifying by telephone shall indicate that the parties or witnesses will not testify from documents that are not in the record and that their testimony will not be prompted or directed during the hearing by any other person.

### Source

The provisions of this § 101.131 adopted December 26, 1997, effective December 27, 1997, 27 Pa.B. 6807.

### Cross References

This section cited in 34 Pa. Code § 101.128 (relating to scheduling of telephone testimony); and 34 Pa. Code § 101.130 (relating to notice of testimony by telephone and use of documents).

### § 101.132. Representation by telephone.

The counsel or authorized agent of a party may appear at a hearing by telephone, with the approval of the tribunal.

### Source

The provisions of this § 101.132 adopted December 26, 1997, effective December 27, 1997, 27 Pa.B. 6807.

### § 101.133. Data maintenance requirement.

The Board will compile and maintain data on the scheduling and receipt of testimony by telephone.

### Source

The provisions of this § 101.133 adopted December 26, 1997, effective December 27, 1997, 27 Pa.B. 6807.

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