

Comments of the Independent Regulatory Review Commission



Philadelphia Parking Authority Regulation #126-2 (IRRC #2943)

Electronic Testimony at Administrative Hearings

July 18, 2012

We submit for your consideration the following comments on the proposed rulemaking published in the May 19, 2012 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Philadelphia Parking Authority (PPA) to respond to all comments received from us or any other source.

1. § 1005.114 – Determination of whether the regulation is in the public interest; Economic impact; Feasibility and reasonableness of the regulation; Need; Clarity.

Section 5.2 of the Regulatory Review Act directs the Independent Regulatory Review Commission (IRRC) to determine whether a regulation is in the public interest. *See* 71 P.S. § 745.5b. When making this determination, IRRC considers criteria such as economic or fiscal impact, clarity, reasonableness and need. IRRC must also analyze the text of the Preamble and proposed regulation and the reasons for the new or amended language, and consider the information a promulgating agency is required to provide under Section 5(a) of the Act. *See* 71 P.S. § 745.5(a).

In the Preamble, PPA states that it can be difficult for a “primary complainant” who does not reside in the Philadelphia area “to take time away from work or family to appear at an administrative hearing.” Witnesses for drivers who are accused of improper behavior may also be unavailable to appear. Therefore, PPA explains, the use of electronic testimony may ease the burden of the parties.

Paragraph (a)(3) states this section applies to witnesses in enforcement actions. Paragraph (a)(4) excludes PPA employees and parties to an enforcement action (including drivers) and their employees, so they must always physically appear at a hearing. Does the term witness refer to anyone who testifies, including a party, non-party, petitioner or respondent? Who would be considered a non-party witness, as referenced throughout the Regulatory Analysis Form? Is a member of the public who files a complaint considered to be a petitioner, and therefore required to appear in person at an administrative hearing, or is that person just a witness? Would PPA ever be the party in an enforcement action in lieu of a member of the public who files a complaint? We recommend PPA define and clarify the term “witness.”

Under PPA's existing regulations, if a driver who is the subject of an enforcement action is found to be in violation of the Parking Authorities Law, that driver could face a monetary penalty in the range of \$25 to \$1,000 or a suspension or cancellation of his operating rights. *See* 52 Pa. Code § 1001.61. Consequently, the outcome of an enforcement action may have a significantly negative impact on an accused party, ranging from the payment of a large penalty to unemployment. PPA should explain how allowing a witness to testify by telephone against a driver is feasible, reasonable and in the public interest, particularly when a driver is facing a monetary penalty or a loss of livelihood.

2. § 1005.114(a)(3) – Clarity.

The existing regulations at Section 1001.10(a) define the phrase “enforcement proceeding” but not “enforcement actions” as used in this section. For clarity and consistency, PPA should either define “enforcement action” or use the defined term.

3. § 1005.114(b)(1) – Feasibility; Reasonableness; Need; Implementation procedures.

Paragraph (b)(1) states that PPA or the presiding officer may schedule electronic testimony on its own motion when the witness is located at least 25 miles from the hearing location. Conversely, paragraph (b)(2) provides that electronic testimony may only be scheduled at the request of a party when both parties consent, the witness is unable to appear in person for a specified reason, or the witness is a police officer testifying for a limited purpose. We have three concerns.

First, can a party object to the use of electronic testimony that was scheduled on the motion of PPA or a presiding officer? If not, why? If so, must a party have compelling grounds for requesting that the witness physically appear at the hearing instead of providing electronic testimony, or can a party simply object? The same questions relate to paragraph (b)(4). We recommend that PPA amend the language in the final-form regulation to address these questions.

Second, how will the presiding officer verify that a witness participating by telephone is in fact the actual witness to the events alleged in the complaint? This concern also applies to paragraph (d)(2). Similarly, how can the presiding officer or a party determine the veracity of a witness if that person cannot be seen?

Third, on what basis did PPA determine that 25 miles is a reasonable distance from which to allow witnesses to testify electronically on the motion of PPA or presiding officer?

4. § 1005.114(b)(4) – Clarity; Reasonableness.

Paragraph (b)(4) refers to a “reasonable attempt” to inform the parties of a request for electronic testimony and their rights to object. What constitutes a “reasonable attempt?” This phrase also appears in paragraph (c)(3). PPA should amend the final-form regulation to clarify this term.

5. § 1005.114(c)(1) – Clarity; Reasonableness.

Under paragraph (c)(1), PPA or the presiding officer will allow a party to withdraw consent to electronic testimony if the consent was not given freely and knowingly. Would a withdrawal be permitted if there are other valid reasons for a party to make the request? For example, what if a party is challenging whether the person actually witnessed the events alleged in a complaint and the person’s physical presence would be necessary for identification purposes? We recommend that PPA consider revising the language in the final-form regulation to provide clarity.

6. § 1005.114(c)(4) – Clarity; Reasonableness; Need.

Paragraph (c)(4) provides that if an objection to the use of electronic testimony is sustained, then PPA will reschedule the hearing at a later date, “either in person or by telephone or audio-visual . . .” This provision is unclear. Why would PPA reschedule electronic testimony when an objection to such testimony was sustained?

7. § 1005.114(d)(1)-(4) – Clarity.

Paragraphs (d)(1)-(4) refer to parties and witnesses who testify or appear by telephone or through audio-visual means. However, paragraph (a)(3) limits electronic testimony to witnesses in enforcement actions, and subparagraph (a)(4)(ii) states that the use of electronic testimony does not apply to proposed witnesses who are “parties to an enforcement action.” PPA should explain why these provisions refer to both parties and witnesses who may testify electronically.

8. § 1005.114(d)(4) – Clarity; Reasonableness; Need; Implementation procedures.

Paragraph (d)(4) states that the oath or affirmation administered to parties or witnesses testifying electronically shall indicate that the parties or witnesses will not testify from documents that are not in the record. How can the presiding officer verify that a party or witness participating by telephone is not testifying from documents that are not in the record?

9. Implementation procedures.

We ask PPA to explain how the regulation would be implemented in terms of notification requirements, which are not included in the proposed language. How and when would notice be given to a driver that a witness will be testifying electronically? How and when would a driver be notified of what documents that witness intends to use? The final-form regulation should set forth the notice requirements.