

PROPOSED RULEMAKING

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 5]

[L-2014-2406251]

Electronic Access to Pre-Served Testimony

The Pennsylvania Public Utility Commission (Commission), on March 20, 2014, adopted a proposed rulemaking order proposing regulations regarding procedures to be followed for the electronic submission of testimony.

Executive Summary

On November 8, 2012, the Commission issued a Secretarial Letter proposing that parties serving pre-served testimony be required to either electronically file (eFile) with or provide to the Secretary's Bureau a compact disc (CD) containing all testimony furnished to the court reporter during an adjudicatory proceeding. On January 10, 2013, the Commission issued an Implementation Order regarding Electronic Access to Pre-Served Testimony at Docket No. M-2012-2331973 which specifically provided that parties serving pre-served testimony in proceedings pending before the Commission pursuant to 52 Pa. Code § 5.412(f) shall be required, within thirty days after the final hearing in an adjudicatory proceeding, to either eFile with or provide to the Secretary's Bureau a CD containing all testimony furnished to the court reporter during the proceeding. The requirement to electronically submit pre-served testimony was implemented for a one-year pilot period beginning January 10, 2013 and ending January 10, 2014.

On December 23, 2013, the Commission issued a Secretarial Letter extending the initial one-year pilot period for the electronic submission of pre-served testimony for an additional year, ending January 10, 2015. Having become satisfied with our procedures regarding the electronic submission of pre-served testimony, the Commission initiates this rulemaking to propose regulations regarding the procedures to be followed for the electronic submission of testimony. Implementing these proposed regulations will allow Commission staff, as well as parties of record in an adjudicatory proceeding, to have electronic access to parties' pre-served testimony through the Commission's case and document management system.

Public Meeting held
March 20, 2014

Commissioners Present: Robert F. Powelson, Chairperson; John F. Coleman, Jr., Vice Chairperson; James H. Cawley; Pamela A. Witmer; Gladys M. Brown

Electronic Access to Pre-Served Testimony;
Doc. No. L-2014-2406251

Proposed Rulemaking Order

By the Commission:

The Pennsylvania Public Utility Commission (Commission) proposes to implement new regulations to require parties serving pre-served testimony to, within thirty days after the final hearing in an adjudicatory proceeding, either electronically file (eFile) with or provide to the Commission's Secretary's Bureau a compact disc (CD) or other technology as prescribed by the Commission con-

taining all testimony furnished to the court reporter during the proceeding. Implementing these proposed regulations will allow Commission staff, as well as parties of record in an adjudicatory proceeding, to have electronic access to parties' public pre-served testimony through the Commission's case and document management system. The proposed regulations contained in Annex A will set forth the specific procedures to be followed for the electronic submission of pre-served testimony.

Background

The Commission's regulations prescribe the method by which pre-served testimony is to be handled during an adjudicatory proceeding as follows:

§ 5.412. Written Testimony.

(f) *Service.* Written testimony shall be served upon the presiding officer and parties in the proceeding in accordance with the schedule established by this chapter. At the same time the testimony is served, a certificate of service for the testimony shall be filed with the Secretary.

52 Pa. Code § 5.412(f). Pursuant to this regulation, pre-served testimony is served on the parties and the presiding officer involved in an adjudicatory proceeding, but is not filed with the Commission at the time of service. *Id.* At the time of service, parties merely file a certificate of service for the pre-served testimony with the Secretary's Bureau. *Id.* The Commission then receives only paper copies of admitted testimony from the court reporter following the close of the record in adjudicatory proceedings. Due to the voluminous nature of the testimony provided to the Commission and the fact that it is usually bound or stapled, the Commission is unable to efficiently scan testimony documents into the Commission's database.

On November 8, 2012, the Commission issued a Secretarial Letter (November 8th Secretarial Letter) proposing that parties serving pre-served testimony in proceedings pending before the Commission pursuant to 52 Pa. Code § 5.412(f) be required, within five (5) days after the final hearing in an adjudicatory proceeding, to either eFile with or provide to the Secretary's Bureau a CD containing all testimony furnished to the court reporter during the proceeding. The November 8th Secretarial Letter also proposed that parties would not be required to serve other parties in the proceeding with electronically submitted testimony again when it is eFiled or a CD is provided to the Secretary's Bureau because the parties would have already previously received a copy of such testimony during the initial filing made pursuant to 52 Pa. Code § 5.412(f). The November 8th Secretarial Letter specifically noted that this proposed practice would provide Commission staff with electronic access to parties' testimony through the Commission's case and document management system.

The November 8th Secretarial Letter also solicited comments from interested parties and stakeholders. Comments to the November 8th Secretarial Letter were filed by the Pennsylvania Department of Transportation; the Office of Consumer Advocate; PECO Energy Company; Eckert Seamans Cherin & Mellott, LLC; and, jointly, Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company.

On January 10, 2013, the Commission issued an Implementation Order regarding Electronic Access to Pre-

Served Testimony at Docket No. M-2012-2331973 (January 10th Implementation Order) which addressed the comments provided in response to the November 8th Secretarial Letter. The January 10th Implementation Order provided that parties serving pre-served testimony in proceedings pending before the Commission pursuant to 52 Pa. Code § 5.412(f) shall be required, within thirty days after the final hearing in an adjudicatory proceeding (unless such period is otherwise modified by the presiding officer), to either eFile with or provide to the Secretary's Bureau a CD containing all testimony furnished to the court reporter during the proceeding. This requirement to electronically submit pre-served testimony was implemented for a one-year pilot period beginning January 10, 2013 and ending January 10, 2014.

On December 23, 2013, the Commission issued a Secretarial Letter extending the initial one-year pilot period for the electronic submission of pre-served testimony for an additional year, ending January 10, 2015. In that Secretarial Letter, the Commission provided that if the electronic submission of pre-served testimony continues to function well, the Commission will initiate a proposed rulemaking to propose regulations regarding the procedures to be followed for such electronic submission of testimony. Having become satisfied with our procedures regarding the electronic submission of pre-served testimony, the Commission initiates this rulemaking.

Discussion

Consistent with the January 10th Implementation Order, the Commission proposes that parties serving pre-served testimony in proceedings pending before the Commission pursuant to 52 Pa. Code § 5.412(f) be required, within thirty days after the final hearing in an adjudicatory proceeding (unless such period is otherwise modified by the presiding officer), to either eFile with or provide to the Commission's Secretary's Bureau a CD containing all testimony furnished to the court reporter during the proceeding. By this rulemaking, the Commission proposes to implement new regulations to outline the details of such electronic submission requirement for pre-served testimony as follows:

1. Submission of Testimony Modified During an Adjudicatory Proceeding

The purpose of the electronic submission of testimony is to provide Commission staff and parties of record with electronic versions of the testimony that the Commission currently only receives in paper form from the court reporter after the final hearing in an adjudicatory proceeding. With that purpose in mind, the testimony electronically submitted to the Commission should be an exact copy of the testimony that was submitted to the court reporter during the hearing(s) in an adjudicatory proceeding.

The Commission is aware that the presiding officers maintain different practices regarding the submission of testimony containing words and/or provisions that have been modified or stricken at hearing. As such, the testimony required to be electronically submitted to the Commission should match exactly the copy of the testimony that the presiding officer has required to be submitted to the court reporter during the hearing. For example, if a presiding officer requires parties to make hand-marked modifications to testimony to reflect that which was stricken during the hearing before submitting such testimony to the court reporter, the parties should electronically submit to the Commission a copy of the

testimony reflecting such modifications.¹ Similarly, if a presiding officer does not require parties to make modifications to testimony even though portions of the testimony are stricken during the hearing before submitting the testimony to the court reporter, the parties should electronically submit to the Commission a clean copy of the testimony.² Testimony that is not admitted during the hearing should not be electronically submitted to the Commission.

In addition to the testimony that is electronically submitted to the Commission either by eFiling or by the submission of a CD, the Commission proposes to continue to require parties to submit two paper copies of testimony to the court reporter at hearing. Parties will not, however, be required to serve other parties in the proceeding with the electronically submitted testimony again when it is eFiled or a CD is provided to the Secretary's Bureau because parties in the proceeding would have already previously received a copy of such testimony during the initial filing made pursuant to 52 Pa. Code § 5.412(f). Also, we note that parties of record will be able to view the electronic submissions.³

Additionally, parties are not required to file or provide the relevant transcript pages that correspond with the corrections, if any, made to the electronically submitted testimony. Similarly, parties are not required to file or provide an "errata sheet" showing any corrections, if any, that have been made to the testimony during the hearing. We note that parties may, however, file with the Commission and/or provide such transcript pages and/or errata sheets to other parties in the proceeding on a voluntary basis.

2. Form of Testimony Documents for Electronic Submission

The requirement for electronic submission, either by eFiling or the submission of a CD or other technology as prescribed by the Commission, is limited to pre-served testimony documents.⁴ Any and all exhibits that are physically attached to pre-served testimony documents may be electronically submitted to the Commission on a voluntary basis. Exhibits not electronically submitted to the Commission with the pre-served testimony document(s) must be submitted to the court reporter during the hearing in physical/paper form.

Pre-served testimony must be electronically submitted, either by eFiling or submitting a CD to the Secretary's Bureau, in Portable Document Format (PDF). Currently, documents may only be filed on the Commission's eFiling system in PDF format.⁵ The Commission will similarly require all testimony electronically submitted on CD to the Secretary's Bureau to be in PDF format.⁶

Consistent with the Commission's current eFiling procedures, parties must upload one eFiled document at a

¹ Prior to electronic submission of testimony documents, we request that parties revise testimony to reflect that which was stricken at hearing by either making hand-marked strikethroughs or electronic strikethroughs on the testimony. Parties should not, however, completely electronically delete testimony that has been stricken at hearing. This practice will allow the stricken text of the electronically submitted testimony documents to remain on the same page as it appears on the testimony documents submitted to the court reporter.

² Commission staff is aware of the need to consult the transcript for purposes of determining which testimony has been admitted into the official record.

³ Although parties of record will be able to view electronic submissions of public testimony, parties will not have electronic access to confidential or proprietary testimony.

⁴ The electronic submission requirement does not apply to discovery requests or responses. Additionally, the electronic submission requirement does not apply to "pre-filed" testimony (for example: direct testimony filed pursuant to 52 Pa. Code § 53.53(c) (relating to initial direct testimony filed by a utility as part of a rate case)).

⁵ The Commission has created a qualified document labeled "testimony" for the purpose of eFiling pre-served testimony.

⁶ We note that all PDF documents can be converted electronically to become searchable documents.

time. As such, each piece of pre-served testimony should be separately eFiled on the Commission's website. In contrast, parties electronically submitting pre-served testimony on a CD to the Secretary's Bureau may load all testimony documents onto one CD (pending file size limitations).⁷ For consistency, all pre-served testimony, whether eFiled or submitted by CD, should be labeled as follows: "___ St. No. ___ Direct Testimony of _____," "___ St. No. ___-R Rebuttal Testimony of _____" and/or "___ St. No. ___-SR Surrebuttal Testimony of _____" (if permitted to be filed).

3. *Time of Electronic Submission*

Parties serving pre-served testimony shall either eFile with or provide to the Secretary's Bureau a CD containing all testimony furnished to the court reporter within thirty days after the final hearing in an adjudicatory proceeding, unless such time period is otherwise modified by the presiding officer. Allowing thirty days after the final hearing to electronically submit pre-served testimony to the Commission alleviates any concern that transcripts of the proceeding may not necessarily be available immediately following a final hearing. Additionally, requiring parties to electronically submit their testimony within thirty days after the final hearing provides parties sufficient time to consult the transcript and accordingly make any necessary modifications to testimony, if required by the presiding officer, before electronically submitting such testimony to the Commission.⁸ This thirty-day electronic submission deadline also does not impact the Commission's internal need for electronic access to this testimony by advisory staff.

Further, the Commission proposes that the electronic submission time period may be modified by the presiding officer. This modification procedure will allow presiding officers to appropriately accommodate for situations which would require a modified time period for obtaining electronic access to testimony (including but not limited to access to testimony during expedited proceedings).

4. *Electronic Submission of Confidential or Proprietary Testimony*

The Commission recognizes the need to limit electronic access to confidential and proprietary testimony to the appropriate internal advisory staff within the Commission. As the Commission does not currently have the capability to limit internal access to eFiled documents, the Commission will require parties to submit confidential or proprietary testimony on a separate CD or other technology prescribed by the Commission to the Secretary's Bureau. Such CD should be clearly labeled "CONFIDENTIAL" or "PROPRIETARY."

As previously mentioned, the purpose of the electronic submission is to provide Commission staff and parties of record with electronic versions of the public testimony documents that the Commission currently receives in paper form from the court reporter after the final hearing in an adjudicatory proceeding. Accordingly, whatever measures are currently being taken by parties prior to

⁷ Due to file size restrictions, parties may be required to submit multiple CD's containing testimony documents. Additionally, pursuant to 52 Pa. Code § 1.32(b)(3) and the Commission's Secretarial Letter regarding the Size of Qualified Documents and Paper Copy Requirements issued on August 16, 2012, testimony documents exceeding 10 megabytes in size may not be eFiled and must be electronically submitted to the Commission on a CD.

⁸ This practice contemplates a situation in which the presiding officer requires a party to make hand-marked changes to testimony prior to submitting such testimony to the court reporter. In the event the party does not have an additional copy of such testimony, to be used for electronic submission purposes, on which to make hand-marked changes, the party will need to consult the transcript to make hand-marked changes to testimony (matching those changes made at hearing) prior to electronic submission.

submitting confidential testimony to the court reporter should be followed when electronically submitting testimony.

5. *Confirmation and Verification that Proper Testimony Documents have been Electronically Submitted*

As parties of record will have electronic access to publicly available pre-served testimony through the Commission's case and document management system,⁹ parties will have the capability to review the testimony electronically submitted by other parties in the proceeding to ensure that it is consistent with what was admitted into the official record.¹⁰ If a party discovers that another party has electronically submitted improper testimony documents to the Commission, that party may raise such concern with the presiding officer in the proceeding.¹¹ In addition to being able to review testimony that has been electronically submitted, parties of record are also able to receive daily action alerts and to review daily action records on the Commission's database to ensure that other parties in the proceeding have electronically submitted testimony within the required time period.¹²

In addition to confirmation and notification considerations, the Commission considered whether parties should be required to submit a verification with their electronically submitted testimony to ensure that such testimony is consistent with the testimony admitted into the official record. Because all parties of record in the proceeding will have electronic access to verify that electronically submitted testimony from other parties is consistent with that admitted into the record, we do not anticipate there will be any issues with parties submitting improper testimony documents. Accordingly, parties will not be required to submit a verification with electronically submitted testimony.

6. *Access to Electronically Submitted Testimony*

The Commission proposes that both Commission staff and all parties of record in an adjudicatory proceeding will have electronic access to public versions of pre-served testimony. The Commission's advisory staff is aware of the need to consult the transcript for purposes of determining which testimony has been admitted into the official record. Similarly, the Commission is confident that parties of record in an adjudicatory proceeding are equally aware of the need for such consultation.¹³ Therefore, the Commission does not anticipate any issues resulting from providing Commission staff or parties of record with electronic access to testimony.

As previously mentioned, any party desiring to electronically view testimony that has been electronically submitted to the Commission must obtain an eFiling account. If a party is incapable of obtaining an eFiling account with the Commission, that party would need to consult with the other parties in the proceeding to make arrangements for obtaining electronic access, whether by CD or other electronic transmission, to electronically submitted testimony.¹⁴

⁹ Parties of record wishing to view electronically submitted testimony will need to have an eFiling account with the Commission.

¹⁰ We note that under the current practice of only submitting paper copies of testimony to the court reporter at the hearing, parties do not have the opportunity to ensure that such paper copies of testimony are consistent with what was admitted into the record.

¹¹ Even if a party were to improperly electronically submit testimony that was not admitted into the record, both Commission staff and parties of record are aware of the need to consult with the transcript for purposes of determining which testimony was actually admitted into the official record.

¹² In order to receive such alerts, parties must have an eFiling account with the Commission.

¹³ Parties of record are able to obtain copies of the official transcript in all adjudicatory proceedings.

¹⁴ Electronically submitted testimony will be an exact copy of the testimony submitted to the court reporter. Accordingly, all parties in the proceeding would have

Although the Commission is confident that Commission staff and parties of record in an adjudicatory proceeding are aware of the need to consult the transcript for purposes of determining which testimony was admitted into the official record, we are not certain that the public is similarly aware of the need for such consultation. As a result of this concern, the Commission has determined not to extend electronic access to testimony to the public at this time.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on May 1, 2014, the Commission submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Consumer Affairs Committee and the Senate Consumer Protection and Professional Licensure Committee. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Commission, the General Assembly and the Governor of comments, recommendations or objections raised.

Conclusion

Requiring parties, within thirty days after the final hearing in an adjudicatory proceeding (unless such time period is otherwise modified by the presiding officer), to either eFile with or provide to the Secretary's Bureau a CD containing all testimony furnished to the court reporter during an adjudicatory proceeding will accommodate the need to provide Commission staff and parties of record electronic access to pre-served testimony through the Commission's case and document management system. By this Proposed Rulemaking Order, the Commission proposes to implement the foregoing regulations to set forth the specific procedures to be followed for such electronic submission of testimony. The Commission, therefore, formally commences its rulemaking process to implement proposed regulations consistent with Annex A to this Proposed Rulemaking Order.

Accordingly, under sections 332, 333 and 501 of the Public Utility Code (66 Pa.C.S. §§ 332, 333 and 501) and sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202), and the regulations promulgated thereunder at 1 Pa. Code §§ 7.1, 7.2 and 7.5; section 204(b) of the Commonwealth Attorneys Act (71 P. S. § 732.204(b)); section 745.5 of the Regulatory Review Act (71 P. S. § 745.5); and section 612 of The Administrative Code of 1929 (71 P. S. § 232), and the regulations promulgated thereunder at 4 Pa. Code §§ 7.231—7.234, we are considering adopting the proposed regulations as set forth in Annex A; *Therefore,*

It Is Ordered That:

- 1. A proposed rulemaking be opened to consider the regulations set forth in Annex A.
- 2. The Secretary shall submit this Proposed Rulemaking Order and Annex A to the Office of Attorney

been previously served with such testimony and would have access to consult the transcript to determine which testimony was admitted into the official record.

General for review as to form and legality and to the Governor's Budget Office for review of fiscal impact.

3. The Secretary shall submit this Proposed Rulemaking Order and Annex A for review and comments to the Independent Regulatory Review Commission and the Legislative Standing Committees.

4. The Secretary shall certify this Proposed Rulemaking Order and Annex A and deposit them with the Legislative Reference Bureau to be published in the *Pennsylvania Bulletin*.

5. An original of any written comments referencing the docket number of the proposed regulations be submitted within 30 days of publication in the *Pennsylvania Bulletin* to the Pennsylvania Public Utility Commission, Attn: Secretary, P.O. Box 3265, Harrisburg, PA 17105-3265.

6. A copy of this Proposed Rulemaking Order and Annex A shall be served on the Bureau of Investigation and Enforcement, the Office of Consumer Advocate, the Office of Small Business Advocate, and jurisdictional public utility industry and licensee trade associations.

7. The contact person for legal matters for this proposed rulemaking is Krystle J. Sacavage, Assistant Counsel, Law Bureau, (717) 787-5000. Alternate formats of this document are available to persons with disabilities and may be obtained by contacting Sherri DelBiondo, Regulatory Coordinator, Law Bureau, (717) 772-4597.

ROSEMARY CHIAVETTA,
Secretary

Fiscal Note: 57-303. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart A. GENERAL PROVISIONS

CHAPTER 5. FORMAL PROCEEDINGS

Subchapter E. EVIDENCE AND WITNESSES

WITNESSES

§ 5.412. Written testimony.

* * * * *

(f) *Service.* Written testimony shall be served upon the presiding officer and parties in the proceeding in accordance with the schedule established by this chapter. At the same time the testimony is served, a certificate of service for the testimony shall be filed with the Secretary. **All pre-served testimony furnished to the court reporter during an adjudicatory proceeding before the Commission shall be filed with the Commission as required under § 5.412a (relating to electronic submission of pre-served testimony).**

* * * * *

(Editor's Note: The following section is new and printed in regular type to enhance readability.)

§ 5.412a. Electronic submission of pre-served testimony.

(a) *General requirement for electronic submission.* Parties serving pre-served testimony in proceedings pending before the Commission under § 5.412(f) (relating to written testimony) are required, within 30 days after the final hearing in an adjudicatory proceeding, unless the time period is otherwise modified by the presiding officer, to electronically file with, under § 1.32(b) (relating to filing

specifications), or provide to the Secretary's Bureau a compact disc or technology prescribed by the Commission containing the testimony furnished to the court reporter during the proceeding.

(b) *Form of electronic submission.* Electronically submitted testimony must be limited to pre-served testimony documents and be in Portable Document Format. Exhibits attached to pre-served testimony documents may be electronically submitted to the Commission in accordance with subsection (a). Exhibits not electronically submitted with pre-served testimony shall be submitted in paper form to the court reporter at hearing.

(1) *Electronic submission.* Each piece of pre-served testimony filed through the Commission's electronic filing system shall be uploaded separately. Each piece of pre-served testimony submitted to the Secretary's Bureau on a compact disc or other technology as prescribed by the Commission may be uploaded onto one compact disc, pending file size limitations.

(2) *Electronic submission of testimony modified at hearing.* Pre-served testimony submitted to the Commission must match exactly the version of testimony the presiding officer has required to be submitted to the court reporter at hearing. When a presiding officer requires a party to make hand-marked modifications to testimony during the hearing before submitting the testimony to the court reporter, the pre-served testimony electronically submitted to the Commission shall be marked to reflect the modifications. When a presiding officer does not require a party to make modifications to testimony at hearing before submitting the testimony to the court reporter, the pre-served testimony electronically submitted to the Commission may not be marked. Testimony not admitted into the record during a hearing may not be electronically submitted to the Commission.

(3) *Labeling of electronically submitted testimony.* Pre-served testimony electronically submitted to the Commission must be labeled as follows:

(i) "___ St. No. ___ Direct Testimony of ____."

(ii) "___ St. No. ___-R Rebuttal Testimony of ____."

(iii) "___ St. No. ___-SR Surrebuttal Testimony of ____."

(c) *Submission of paper copies of pre-served testimony to the court reporter.* Two paper copies of pre-served testimony shall be provided to the court reporter at hearing.

(d) *Electronic submission of confidential or proprietary testimony.* Electronically submitted testimony confidential or proprietary in nature shall be submitted to the Secretary's Bureau on a compact disc or other technology as prescribed by the Commission. The compact disc must be labeled "CONFIDENTIAL" or "PROPRIETARY." Confidential or proprietary testimony may not be filed through the Commission's electronic filing system. Electronically submitted testimony confidential or proprietary in nature must match exactly the version of the confidential or proprietary testimony submitted to the court reporter at hearing.

(e) *Electronic submission of improper testimony.* If a party in an adjudicatory proceeding discovers that improper testimony documents have been electronically submitted to the Commission, the party may raise the improper submission with the presiding officer assigned to the adjudicatory proceeding. The presiding officer or the Commission will make a determination regarding the submission of improper testimony.

[Pa.B. Doc. No. 14-1037. Filed for public inspection May 16, 2014, 9:00 a.m.]