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PECO Energy Company*

**IN THE COMMONWEALTH OF PENNSYLVANIA  
BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
Bureau of Investigation and Enforcement,	:	
	:	
Complainant,	:	
	:	DOCKET NO. C-2015-2511928
v.	:	
	:	
PECO Energy Company,	:	
Respondent.	:	

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**NOTICE TO PLEAD**

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Pursuant to 52 Pa. Code § 5.103, you are hereby notified that, if you do not file a written response to the enclosed MOTION IN LIMINE of PECO Energy Company within 20 days from service of this notice, a decision may be rendered against you. Any Response to the Motion in Limine must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for PECO Energy Company, and where applicable, the Administrative Law Judge presiding over the issue.

File with:  
Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, Second Floor  
Harrisburg, PA 17120

With a copy to:

Christopher A. Lewis, Esquire  
Melanie S. Carter, Esquire  
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One Logan Square  
Philadelphia, PA 19103

Dated: August 4, 2017

**BLANK ROME LLP**



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**MOTION IN LIMINE OF PECO ENERGY COMPANY  
TO PROHIBIT THE SUBMISSION OF TESTIMONY  
OF U.S. DEPARTMENT OF TRANSPORTATION EMPLOYEE,  
MR. CHRIS MCLAREN**

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TO DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE CHRISTOPHER P. PELL:

Pursuant to the Pennsylvania Public Utility Commission’s (the “Commission’s”) regulations at 52 Pa. Code §§ 5.103 and 5.403, PECO Energy Company (“PECO” or the “Company”) hereby files this Motion in Limine to prohibit the Bureau of Investigation and Enforcement (“I&E”) from submitting testimony from Mr. Chris McLaren, a Transportation Specialist in the State Programs Division of the Pipeline and Hazardous Materials Safety Administration (“PHMSA”), because 49 C.F.R. Part 9 prohibits U.S. Department of Transportation (“USDOT”) employees from providing expert or opinion testimony on matters arising out of their official duties in legal proceedings where the United States is not a party.<sup>1</sup> This federal regulation requires the Commission to exclude testimony from Mr. McLaren, whom

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<sup>1</sup> 49 C.F.R. § 9.9(c) (2016). For the Commission’s convenience, a copy of 49 C.F.R. Part 9, which governs the ability of USDOT employees, including PHMSA personnel, to testify in legal

I&E has identified in its March 22, 2017 Prehearing Conference Memorandum as a witness I&E intends to call.

## **I. INTRODUCTION**

1. The federal Pipeline Safety Laws authorize the Secretary of the USDOT to establish and enforce federal safety standards for natural gas and hazardous liquid pipelines and liquefied natural gas (“LNG”) facilities.<sup>2</sup> The USDOT has delegated that authority to the Administrator of PHMSA, an agency within the USDOT.<sup>3</sup> PHMSA administers a national pipeline safety program, which is applicable to most pipelines and LNG facilities. PHMSA has exclusive authority to regulate the safety of all interstate pipeline facilities.<sup>4</sup>

2. The Pipeline Safety Laws permit a state to regulate intrastate pipeline facilities subject to that state’s jurisdiction, if the state certifies to PHMSA that the state has adopted the Federal Gas Pipeline Safety Regulations and meets other program requirements.<sup>5</sup> In Pennsylvania, PHMSA regulates interstate gas pipelines and the Commission regulates intrastate gas pipelines. The Commission’s gas pipeline safety regulations for public utilities are codified at 52 Pa. Code § 59.33(b) and essentially incorporate by reference the federal requirements, including 49 C.F.R. Part 192, which sets forth safety standards applicable to gas pipelines.<sup>6</sup>

3. Although the Commission’s implementation and enforcement of the federal gas safety regulations with respect to natural gas distribution public utilities in Pennsylvania is subject to PHMSA oversight, an enforcement proceeding brought by I&E is considered a “legal

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proceedings, is attached hereto as Exhibit A.

<sup>2</sup> 49 U.S.C. §§ 60101-140 (2012 & Supp. II 2014), *amended by* Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2016, Pub. L. 114-183, 130 Stat. 514.

<sup>3</sup> 49 C.F.R. § 1.53. For convenience, references in this document to PHMSA include any of its predecessor agencies.

<sup>4</sup> 49 U.S.C. § 60104(c).

<sup>5</sup> 49 U.S.C. § 60105.

proceeding between private litigants” under 49 C.F.R. § 9.3 because it is a proceeding in which neither the USDOT nor the United States is a party.<sup>7</sup> The relationship between PHMSA and the Commission does not authorize a PHMSA employee to testify on behalf of I&E as an expert or opinion witness. *See* 49 C.F.R. §§ 9.9 - 9.17.

## II. PROCEDURAL HISTORY

4. On November 4, 2015, I&E filed a Formal Complaint in this proceeding, alleging, among other things, that PECO fails to comply with applicable regulations governing the establishment of the maximum allowable operating pressures (“MAOP”) for the pipelines located in PECO’s medium pressure natural gas distribution systems (operating between 12 and 60 psig). I&E alleged that PECO operates segments of its steel and plastic pipelines in its medium pressure gas distribution system at pressures exceeding MAOP because PECO cannot substantiate or verify the MAOP of the pipelines in those systems with design calculations, pressure test records, or documentation of the highest actual operating pressures during the five years before July 1, 1970. In addition, I&E alleges that PECO fails to ensure that MAOP does not exceed MAOP plus 6 p.s.i. because PECO did not account for pressure buildup or losses at 72 regulator stations; and 2) sets its regulator station relief valves at 6 p.s.i. over the MAOP. The Formal Complaint also recommended that PECO adopt several corrective actions.

5. On December 21, 2015, PECO filed an Answer denying the allegations in the Formal Complaint. PECO stated that in 1970, it established the MAOPs for the pipelines in its

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<sup>6</sup> 49 C.F.R. Part 192.

<sup>7</sup> Section 9.3 defines a “Legal proceeding” as “any case or controversy pending before any federal, state, or local court (including grand jury proceedings), any administrative proceeding pending before any federal, state, or local agency, or any legislative proceeding pending before any state or local agency. 49 C.F.R. § 9.3. A “Legal proceeding between private litigants” is defined as “any legal proceeding in which neither the Department of Transportation nor the United States (including any federal agency or officer of the United States in his or her official

medium pressure gas distribution systems in accordance with new federal pipeline safety regulations adopted by USDOT in its August 19, 1970 final rule.<sup>8</sup> PECO explained that the Formal Complaint provided no legal authority to support the proposition that a pipeline operator has an obligation to create and maintain records before the effective date of the original Federal Gas Pipeline Safety Regulations. PECO also explained that the pipelines in its medium pressure distribution systems operate at pressures between 12 and 60 psi. Accordingly, section 192.619(a)(2) of the Federal Gas Pipeline Safety Regulations,<sup>9</sup> which requires pressure testing for pipelines that operate at 100 psi or more does not apply to the steel pipelines in PECO's medium pressure distribution systems because they operate at pressures below 100 psi. Rather, the steel lines in these systems are subject to the leak test requirements of section 192.509<sup>10</sup> which are not used for determining MAOP and have no relevance under section 192.619(a)(2). Leak test records must be kept for only five years under section 192.517(b).<sup>11</sup> Records documenting leak tests of plastic pipelines, which are performed under section 192.513, also are required to be kept for only five years.<sup>12</sup>

6. PECO's Answer also explained that, even though the MAOPs of its medium pressure gas distribution systems are 25 psi and 33 psi, PECO conservatively operates these systems at much lower "supply the burn" pressures between 5 and 20 psi. PECO uses these lower pressures to establish the set points on relief devices, resulting in set point values that are always lower than MAOP plus allowable pressure buildup. Accordingly, these relief device set

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capacity) is a party. *Id.*

<sup>8</sup> Transportation of Natural and Other Gas by Pipeline: Minimum Federal Safety Standards, 35 FED. REG. 13,248 (Aug. 19, 1970).

<sup>9</sup> 49 C.F.R. § 192.619(a)(2).

<sup>10</sup> 49 C.F.R. § 192.509.

<sup>11</sup> 49 C.F.R. § 192.517(b).

<sup>12</sup> 49 C.F.R. §§ 192.513 and 192.517(b).

points are far below the level permitted under the regulations, which permit the allowable build up in emergency situations to equal MAOP plus 6 psi.

7. Finally, PECO explained that its records provide detailed information regarding the practices and procedures used to design, construct, and test all of the pipelines in its medium pressure gas distribution systems. In addition, a third party consultant reviewed PECO's existing records, procedures, standards and data and determined that PECO's existing MAOP levels are appropriate and that PECO has been operating its system at the lowest possible pressures needed to meet customer demands. PECO explained that all of this information, combined with the systems' safe operating history, provided more than adequate basis to substantiate the MAOPs of the pipelines in its medium pressure gas distribution systems.

8. PECO's Answer further averred that PECO has operated its medium pressure gas distribution systems without a MAOP incident throughout the ensuing 46 years, during which time the Commission's Gas Safety Division ("GSD") engaged in active oversight and performed audits of the PECO system, all the while raising no issue respecting PECO's compliance with MAOP regulations.

9. Furthermore, PECO's Answer also explained that the Formal Complaint's proposal to require that PECO reduce the MAOP levels for the pipelines in its medium pressure gas distribution systems would not enhance safety. Instead, such measures would force PECO to choose between either reducing operating pressures and placing over 27,500 customers at risk of a supply curtailment during winter peak periods or avoiding a non-compliance order. PECO also stated in its Answer that the Commission does not need to and should not grant I&E's proposal because safety is fully addressed by PECO's practices, procedures and standards. PECO has consistently designed, operated, and maintained its medium pressure systems according to the



safest, most reliable and conservative procedures, standards and practices, which align with and exceed federal requirements.

10. On February 13, 2017, a Hearing Notice issued in this case, which scheduled a Prehearing Conference for March 28, 2017.

11. On March 22, 2017, both PECO and I&E filed Prehearing Conference Memoranda in this proceeding.

12. On page 3 of its Prehearing Conference Memorandum, I&E stated that it intends to call as a witness Mr. Chris McLaren, whom I&E identifies as a Transportation Specialist in PHMSA's State Programs Division.

13. To the best of PECO's knowledge, Mr. McLaren has no personal knowledge regarding either PECO's medium pressure natural gas distribution systems, GSD's MAOP investigation, or I&E's Formal Complaint. Accordingly, the only purpose for his testimony would be to provide expert testimony or opinions regarding the Federal Gas Pipeline Safety Regulations and matters arising out of his official duties or functions of PHMSA and USDOT.

14. On April 11, 2017, Deputy Chief Administrative Law Judge Christopher P. Pell issued Prehearing Order #1, which requires I&E's prepared direct testimony to be submitted by August 29, 2017.

15. PECO files this Motion in Limine to preclude I&E from submitting prepared direct testimony (as well as any subsequent testimony) from Mr. McLaren because he is prohibited from doing so under 49 C.F.R. §§ 9.3, 9.9(c).

### III. DISCUSSION

#### A. **ALJ PELL HAS AUTHORITY TO LIMIT THE ADMISSION OF TESTIMONY.**

16. Pursuant to 52 Pa. Code § 5.403, the Public Utility Commission's Administrative Law Judges ("ALJs") are tasked with the responsibility and authority to control the scope of the evidence admitted to the record. Section 5.403 provides:

(a) The presiding officer shall have all necessary authority to control the receipt of evidence including the following:

(1) *Ruling on the admissibility of evidence.*

(2) *Confining the evidence to the issues in the proceeding and impose, where appropriate:*

- (i) Limitations on the number of witnesses to be heard.
- (ii) *Limitations of time and scope for direct and cross examinations.*
- (iii) Limitations on the production of further evidence.
- (iv) *Other necessary limitations.*

(b) The presiding officer will *actively employ these powers to direct and focus the proceedings consistent with due process.*

52 Pa. Code § 5.403 (emphasis added).

17. The authority conferred on ALJ Pell by Section 5.403 includes the power to limit evidence that is repetitious, cumulative, or presents an undue delay; to limit the number of witnesses to be heard and the production of further evidence; and to impose such other limitations as may be necessary. *Application of Artesian Water Pennsylvania, Inc.*, Docket No. A-2014-2451241 (Opinion and Order entered October 1, 2015). ALJs have employed the authority granted in Section 5.403 to exclude evidence that is beyond the proper scope of Commission proceedings to focus the evidence on the matters properly at issue. *See, e.g., Pa. PUC v. PPL Electric Utilities Corporation*, Docket Nos. R-2015- 2469275, *et al.* (ALJ Colwell Sixth Prehearing Order issued July 14, 2015) (granting a motion in limine to exclude

evidence on issues that were not properly within the scope of a distribution base rate case); *Pa. PUC v. Pennsylvania-American Water Co.*, Docket No. R-00932670 *et al.*, 1994 Pa. PUC LEXIS 120 at \*158 (Final Order entered July 26, 1994) (adopting the ALJ's conclusion that the issues raised by the Office of Consumer Advocate ("OCA") were outside the scope of the rate case and would be better addressed in a statewide rulemaking proceeding); *Re Gas Cost Rate No. 5*, 57 Pa. P.U.C. 158 (1983) ("The testimony stricken by the ALJ addresses, in part, matters broader than the scope of the instant proceeding."); *Joint Application of PECO Energy Company and Public Service Electric and Gas Company For Approval of the Merger of Public Service Enterprise Group, Inc. with and into Exelon Corp.*, Docket No. A-110550F0160, pp. 8-9 (Initial Decision entered April 25, 2005) (denying a Petition to Intervene where, among other things, the issues sought to be raised by petitioner were outside the scope of that proceeding); *Re Structural Separation Of Bell Atlantic-Pennsylvania, Inc. Retail And Wholesale Operations*, Docket No. M-00001353, 2000 Pa. PUC LEXIS 59 at \*7-9 (Final Order entered September 28, 2000) (affirming the decision of the ALJ in that case to exclude certain evidence as "beyond the scope of the proceeding").

18. In this proceeding, excluding the testimony of Mr. McLaren is appropriate because it is mandated by federal law.

**B. 49 C.F.R. PART 9 PROHIBITS USDOT EMPLOYEES FROM TESTIFYING IN THIS PROCEEDING.**

19. USDOT restricts the ability of its employees to participate in legal proceedings (including state administrative proceedings) where the United States is not a party. 49 C.F.R. §§ 9.9 - 9.17 (setting forth rules and procedures applicable to seeking testimony of DOT employees in legal proceedings between private litigants).

20. In particular, a USDOT employee is prohibited from providing expert or opinion testimony on matters arising out of his/her official duties or the functions of USDOT:

(c) An employee shall not testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of the Department. An employee who is asked questions that call for expert or opinion testimony shall decline to answer on the grounds that it is forbidden by this part. Agency counsel shall advise the employee on how to proceed if the presiding officer directs the employee to provide expert or opinion testimony.

49 C.F.R. § 9.9(c). *See Rookaird v. BNSF Railway Company*, No. C14-176RSL, 2016 WL 1533542, at \*1 (W.D. Wash. Mar. 28, 2016) (confirming that a proposed expert witness and USDOT employee could not testify as an expert under 49 C.F.R. § 9.9); *Brown v. Teledyne Continental Motors, Inc.*, No. 1:06-CV-00026, 2007 WL 838918, at \*4 (N.D. Ohio Mar. 15, 2007) (excluding the expert testimony of USDOT employees as being barred by 49 C.F.R. § 9.9).

21. The purpose of this regulation is to conserve USDOT resources, to minimize the possibility of involving the USDOT in controversial issues not related to its mission, to maintain the USDOT's impartiality among private litigants, and to enhance the USDOT's ability to respond more efficiently to requests for testimony and documents. 49 C.F.R. § 9.1(b). *See also* Testimony of Employees of the Department and Production of Records in Legal Proceedings, 57 FED. REG. 9224, 9225 (Mar. 17, 1992) (notice of proposed rulemaking).

22. Inasmuch as Mr. McLaren has been identified as a witness by virtue of his official duties at PHMSA, Mr. McLaren is forbidden by 49 C.F.R. § 9.9(c) from providing expert or opinion testimony with regard to those duties or any other functions of USDOT. This prohibition necessarily covers any testimony by Mr. McLaren regarding the scope or interpretation of the Federal Gas Pipeline Safety Regulations or PHMSA policies.

23. The Commission should not violate USDOT regulations by allowing I&E to submit prohibited testimony.<sup>13</sup>

24. Rather, pursuant to the authority conferred upon it to control the admissibility of evidence, and given that the testimony of Mr. McLaren is inadmissible by federal regulation, Deputy Chief Administrative Law Judge Christopher Pell should exercise this authority and exclude any testimony from Mr. McLaren in this proceeding.

#### IV. CONCLUSION

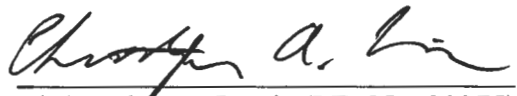
**WHEREFORE**, PECO Energy Company respectfully requests that Deputy Chief Administrative Law Judge Christopher P. Pell:

- (1) Grant this Motion in Limine; and
- (2) Prohibit the submission of any testimony by Mr. Chris McLaren in this proceeding.

Respectfully submitted,

**BLANK ROME LLP**

Dated: August 4, 2017



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<sup>13</sup> Even if Mr. McLaren were not prohibited from submitting testimony in this Formal Complaint proceeding, section 9.15(a) requires that any party seeking such testimony submit a written request to PHMSA's Office of Chief Counsel at least 30 days before the testimony is intended to be received. 49 C.F.R. § 9.15(a). The request must contain a declaration that the party "will not seek expert or opinion testimony from the witness or seek the testimony of the witness at hearing or trial in the proceeding." *Id.* To PECO's knowledge, I&E counsel has not complied with section 9.15(a).



# **EXHIBIT “A”**

# ELECTRONIC CODE OF FEDERAL REGULATIONS

**e-CFR data is current as of July 31, 2017**

Title 49 → Subtitle A → Part 9

Title 49: Transportation

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## **PART 9—TESTIMONY OF EMPLOYEES OF THE DEPARTMENT AND PRODUCTION OF RECORDS IN LEGAL PROCEEDINGS**

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- §9.13 Legal proceedings between private litigants: Procedures to request records.
- §9.15 Legal proceedings between private litigants: Procedures to request testimony.
- §9.17 Legal proceedings between private litigants: Procedures for taking testimony.
- §9.19 Acceptance of service on behalf of Secretary.

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AUTHORITY: 5 U.S.C. 301; 45 U.S.C. 41-42; 49 U.S.C. 322; 49 U.S.C. 504(f); 23 U.S.C. 409.

SOURCE: 58 FR 6724, Feb. 2, 1993, unless otherwise noted.

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### **§9.1 Purpose.**

(a) This part sets forth procedures governing the testimony of an employee in legal proceedings in which the United States is a party. It also sets forth procedures to be followed when an employee is issued a subpoena, order or other demand (collectively referred to in this part as a "demand") by a court or other competent authority, or is requested by a private litigant, to provide testimony or produce records concerning information acquired in the course of performing official duties or because of the employee's official status. It also prescribes the policies and procedures of the Department with respect to the acceptance of service of legal process and pleadings in legal proceedings involving the Department.

(b) The purposes of this part are to:

- (1) Conserve the time of employees for conducting official business;
- (2) Minimize the possibility of involving the Department in controversial issues not related to its mission;
- (3) Maintain the impartiality of the Department among private litigants;
- (4) Avoid spending the time and money of the United States for private purposes; and
- (5) To protect confidential, sensitive information and the deliberative processes of the Department.

(c) Agency counsel, in his or her discretion, may permit an exception from any requirement in this part. The exception may be granted only when the deviation will not interfere with matters of operational or military necessity, and when agency counsel determines that:

- (1) It is necessary to prevent a miscarriage of justice;
- (2) The Department has an interest in the decision that may be rendered in the legal proceeding; or

(3) The exception is in the best interest of the Department or the United States.

For Office of Inspector General employees and documents, the Inspector General, in conjunction with the General Counsel of the Department, may permit an exception from any requirement of this part if the Inspector General determines, based on the Inspector General Act of 1978, as amended, that application of the requirement would be inappropriate.

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## **§9.2 Applicability.**

This part applies to the testimony of an employee in legal proceedings in which the United States is a party. It also applies in legal proceedings between private litigants to requests or demands for testimony or records concerning information acquired in the course of an employee performing official duties or because of the employee's official status. This part does not apply to any legal proceeding in which an employee is to testify as to facts or events that are in no way related to the employee's official duties or the functions of the Department. Nor does it apply to Congressional demands for testimony or documents.

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## **§9.3 Definitions.**

For purposes of this part:

*Department* means the Department of Transportation (DOT), including the Office of the Secretary (which encompasses the Office of the Inspector General) and the following operating administrations while they are part of DOT:

- (a) The U.S. Coast Guard.
- (b) The Federal Aviation Administration.
- (c) The Federal Highway Administration.
- (d) The Federal Railroad Administration.
- (e) The Federal Transit Administration.
- (f) The St. Lawrence Seaway Development Corporation.
- (g) The National Highway Traffic Safety Administration.
- (h) The Maritime Administration.
- (i) The Research and Special Programs Administration.
- (j) Any DOT operating administration established after the effective date of this part.

*Legal proceeding* means any case or controversy pending before any federal, state, or local court (including grand jury proceedings), any administrative proceeding pending before any federal, state, or local agency, or any legislative proceeding pending before any state or local agency.

*Legal proceeding between private litigants* means any legal proceeding in which neither the Department of Transportation nor the United States (including any federal agency or officer of the United States in his or her official capacity) is a party.

*Employee of the Department or Employee* means any current or former officer or employee of the Department; any active duty, retired, or former officer or enlisted member of the Coast Guard; or any current or former contractor (including any corporation or other entity and any employee or subcontractor).

*Agency counsel* means the General Counsel of the Department or the Chief Counsel of any operating administration of the Department concerned, any person to whom the General Counsel or Chief Counsel has delegated authority, or any person who is authorized to represent the Department in a specific legal proceeding.

*Testimony* means any written or oral statement by a witness, including depositions, answers to interrogatories, affidavits, declarations, and statements at a hearing or trial.

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### **§9.5 General prohibition of production or disclosure in legal proceedings.**

No employee of the Department may provide testimony or produce any material contained in the files of the Department, or disclose any information relating to, or based upon, material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that employee's official duties or because of that employee's official status unless authorized in accordance with this part, or by other applicable law.

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### **§9.7 Testimony by employees before the Department or in other legal proceedings in which the United States is a party.**

In any legal proceeding before the Department or in which the United States (including any federal agency or officer of the United States) is a party:

(a) Agency counsel shall arrange for an employee to testify as a witness for the United States whenever the attorney representing the United States requests it.

(b) An employee may testify for the United States both as to facts within the employee's personal knowledge and as an expert or opinion witness. Except as provided in paragraph (c) of this section, an employee may not testify as an expert or opinion witness, with regard to any matter arising out of the employee's official duties or the functions of the Department, for any party other than the United States in any legal proceeding in which the United States is a party. An employee who receives a demand to testify on behalf of a party other than the United States may testify as to facts within the employee's personal knowledge, provided that the testimony be subject to the prior approval of agency counsel and to the Federal Rules of Civil Procedure and any applicable claims of privilege.

(c) An employee may testify as an expert or opinion witness on behalf of an officer or enlisted member of the Coast Guard in any legal proceeding conducted by the Coast Guard.

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### **§9.9 Legal proceedings between private litigants: General rules.**

In legal proceedings between private litigants:

(a) The proper method for obtaining testimony or records from an employee is to submit a request to agency counsel as provided in §§9.13 and 9.15 of this part, not to serve a demand on the employee. Whenever, in a legal proceeding between private litigants, an employee is served with a demand, or receives a request, to testify in that employee's official capacity or produce records, the employee shall immediately notify agency counsel.

(b) If authorized to testify pursuant to these rules, an employee may testify only as to facts within that employee's personal knowledge with regard to matters arising out of his or her official duties.

(1) When the proceeding arises from an accident, an employee may testify only as to personally known facts, not reasonably available from other sources, observed by the employee or uncovered during the employee's investigation of the accident or observed by the employee even if he or she did not investigate the accident. The employee shall decline to testify regarding facts beyond the scope of his or her official duties.

(2) The employee shall not testify to facts that are contained in a report, or any part of a report, unless the employee has obtained permission from agency counsel to disclose the information.

(3) The employee shall not disclose confidential or privileged information unless the employee has obtained permission from agency counsel to disclose the information.

(4) The employee shall not testify as to facts when agency counsel determines that the testimony would not be in the best interest of the Department or the United States if disclosed.

(c) An employee shall not testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of the Department. An employee who is asked questions that call for expert or opinion testimony shall decline to answer on the grounds that it is forbidden by this part. Agency counsel shall advise the employee on how to proceed if the presiding officer directs the employee to provide expert or opinion testimony.

(d) An employee shall not provide testimony at a trial or hearing. An employee's testimony shall be limited to a single deposition, affidavit, or set of interrogatories, concerning the circumstances (e.g. an accident) from which the proceeding arose. Where multiple legal proceedings concerning those circumstances are pending, or can occur, it shall be the duty of the private litigant seeking the testimony to ascertain, to the extent feasible, the identities of all parties, or potential parties, to those proceedings and notify them that a deposition has been granted and that they have the opportunity to participate. The private litigant shall submit an affidavit or certification describing the extent of the search for parties and potential parties and listing the names of the parties and potential parties notified.

(e) Where an employee has already provided testimony, any party wishing to obtain further testimony from that employee concerning the same matter or occurrence, whether in the same or a different private legal proceeding, may submit a request to agency counsel to waive the restrictions of paragraph (d) of this section. The request shall, in addition to meeting the requirements of §9.15 of this part, state why the requester should be permitted to gather additional information despite not having previously requested the information when it had an opportunity to do so, and why the additional testimony is now required and the prior testimony or previously supplied documents are insufficient.

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#### **§9.11 Legal proceedings between private litigants: Demands.**

(a) If an employee receives a demand that has not been validly issued or served, agency counsel may instruct the employee not to comply with the demand.

(b) If an employee receives a demand (validly issued and served) to testify or produce records, agency counsel, in his or her discretion, may grant the employee permission to testify or produce records only if the purposes of this part are met or agency counsel determines that an exception is appropriate.

(c) If a demand is issued to an employee, agency counsel shall contact the requester of the demand, inform that person of the requirements of this part, and may, in agency counsel's discretion, ask that the demand be withdrawn.

(d) If the requester of the demand refuses to have it withdrawn or fails to comply with this part, the Department may seek to quash the demand.

(e) If the court or other competent authority declines to grant the Department's motion to quash, agency counsel shall instruct the employee whether to testify or produce documents pursuant to the demand. Agency counsel may permit the testimony under §9.1(c) of this part. If response to a demand is required before the court or other competent authority rules on the motion to quash and the court fails to stay the demand, the employee must appear at the stated time and place, produce a copy of this part, and respectfully refuse to provide any testimony or produce any documents. Agency counsel shall take steps to arrange for legal representation for the employee. Agency counsel shall advise the employee how to respond, including not to testify, if the court or other competent authority rules that the demand must be complied with irrespective of these regulations.

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#### **§9.13 Legal proceedings between private litigants: Procedures to request records.**

(a) In a legal proceeding between private litigants, a party who wishes to obtain records from the Department shall submit to agency counsel a request for the records. The request will ordinarily be handled in accordance with the Department's procedures concerning requests for records found at 49 CFR part 7. If the party does not follow the procedures specified in that part, the request must be accompanied by a statement setting forth the relevance of the records to the proceeding. The request should be resolved before any request for testimony under §9.15 is submitted. Where a request for testimony includes a request for additional records, it shall indicate precisely how this new request differs in scope from any previous request in order to avoid agency duplication of effort. Agency counsel shall notify the requester of the approval or denial of the request.

(b) [Reserved]

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#### **§9.15 Legal proceedings between private litigants: Procedures to request testimony.**

(a) Any party seeking the testimony of an employee in a legal proceeding between private litigants, concerning facts within the employee's personal knowledge with regard to matters arising out of the employee's official duties, shall, rather than serving a demand for the testimony, request the testimony at least 30 days before it is intended to be taken or received. The request must be submitted to agency counsel and must include:

- (1) The title of the case, docket number, and the court, or otherwise clearly identify the legal proceeding involved;
- (2) A statement setting forth the basic facts in the proceeding, such as the type, date, and location of an accident;
- (3) A summary of the unresolved issues applicable to the testimony sought;
- (4) A summary of the testimony sought and its relevant to the proceeding;

(5) A certification with support, that the information desired is not reasonably available from other sources, including Departmental documents;

(6) Pursuant to §9.9(d) of this part, an affidavit or certification describing the extent of a search of parties and potential parties and listing the names of the parties and potential parties notified; and

(7) A declaration that the party will not seek expert or opinion testimony from the witness or seek the testimony of the witness at a hearing or trial in the proceeding.

The request shall specify which form of testimony (deposition, affidavit, declaration, or answers to interrogatories) is desired and the date by which it is desired; however, only one form, the one least burdensome to the Department that will provide the needed information, will be permitted for each witness.

(b) The party seeking the testimony shall include with its request for testimony a copy of any prior request(s) made by the same requester to the Department or other agency of the United States for records pertaining to the matter being litigated and of the response (not including the records themselves) to the request(s). The party seeking the testimony shall also comply with any agency counsel request that copies of the records previously disclosed by the Department, or a list of those records, be furnished.

(c) In accordance with the requirement of this section and the general provisions of this part, agency counsel shall notify the requester of the approval or denial of the request. Agency counsel may attach special conditions to its approval.

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#### **§9.17 Legal proceedings between private litigants: Procedures for taking testimony.**

(a) Testimony of an employee of the Department may be taken only at the office to which the employee is assigned, or any other place designated by agency counsel. Additional conditions may be specified under §9.15(c) of this part. The time shall be reasonably fixed to avoid substantial interference with the performance of the employee's or agency counsel's official duties.

(b) Upon completion of the testimony of an employee of the Department, a copy of the transcript of the testimony shall be furnished, at the expense of the party requesting the testimony, to agency counsel for the Department's files.

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#### **§9.19 Acceptance of service on behalf of Secretary.**

In any legal proceeding, at the option of the server, process or pleadings may be served on agency counsel, with the same effect as if served upon the Secretary or the head of the operating administration concerned, as the case may be. The official accepting service under this section shall acknowledge the service and take appropriate action. This section does not in any way abrogate or modify the requirements of Rule 4(d)(4) and 4(d)(5) of the Federal Rules of Civil Procedure regarding service of summons and complaint.

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Dated at Philadelphia, Pennsylvania, August 4, 2017.

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