

Legal Department
2301 Market Street / S23-1
Philadelphia, PA 19103

Direct Dial: 215 841 6863

February 27, 2018

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Alexia McKnight v. PECO Energy Company
Docket No. C-2017-2621057

Dear Secretary Chiavetta:

PECO Energy Company's Reply to Complainant's Answer to PECO's Motion to Require In-Person Testimony by Complainant's Expert Witnesses is attached for filing.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Ward L. Smith".

Ward L. Smith
Counsel for PECO Energy Company

WS/adz
Enclosures

c: Honorable Darlene D. Heep, ALJ
Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Alexia McKnight :
 :
 v. : Docket No. C-2017-2621057
 :
 PECO Energy Company :

CERTIFICATE OF SERVICE

I, Ward L. Smith hereby certify that on February 27, 2018, I served a copy of PECO Energy Company's *Reply to Complainant's Answer to PECO's Motion to Require in-Person Testimony by Complainant's Expert Witnesses*, in the above matter, upon all interested parties via email and overnight delivery to:

Alexia McKnight
258 Heyburn Road
Chadds Ford, PA 19317
Alexia.mcknight@gmail.com

Dated: February 27, 2018



Ward L. Smith
Counsel for PECO Energy Company
2301 Market Street, S23-1
Philadelphia, PA 19103
Phone: (215) 841-6863
Fax: 215.568.3389
Ward.Smith@exeloncorp.com

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

ALEXIA MCKNIGHT	:	
Complainant	:	
v.	:	DOCKET NO. C-2017-2621057
	:	
PECO ENERGY COMPANY	:	
Respondent	:	

**PECO ENERGY COMPANY’S REPLY
TO
COMPLAINANT’S ANSWER
TO
PECO’S MOTION TO REQUIRE IN-PERSON TESTIMONY BY COMPLAINANT’S
EXPERT WITNESSES**

On February 16, 2018, PECO filed its Motion to Require In-Person Testimony by Complainant’s Expert Witnesses. In its Motion, PECO stated that:

[I]f normal procedure had been used, this issue would have come before Your Honor through a Motion from Dr. McKnight to allow remote testimony. In that case, before PECO answered it would have seen all of Dr. McKnight’s arguments. Because PECO has taken steps to initiate this discussion, all it has seen with respect to Dr. McKnight’s request for remote testimony is the sentence or two from her witness identification, as quoted above. If Dr. McKnight’s Answer to this Motion materially expands her rationale for requesting distant testimony, PECO expects to file a reply to that Answer and, at that time, to request that Your Honor accept and consider said reply.

PECO served its Motion on Your Honor and Dr. McKnight by email. Your Honor responded, by email, that Dr. McKnight was required to respond on or before February 26, 2018.

Earlier today, not having received any Answer by Dr. McKnight, PECO went on the Commission’s website docket and found that Dr. McKnight had filed her Answer on February 21, 2018 – but without serving PECO, even though she clearly had the email address of PECO’s counsel. (PECO also has not received hard copy through the mail.)

In her Answer, Dr. McKnight materially expanded her rationale for requiring distant testimony. PECO therefore requests that Your Honor accept and consider this reply.

1. Dr. McKnight no longer alleges that these witnesses are unable to travel

As to Dr. Rea, Dr. McKnight originally stated that “Dr. Rea is also in his 80s, unable to walk and is also only available to testify via teleconference.” In her Answer, she frankly admits that she never even asked Dr. Rea to travel. (“I did not ask him if he would travel.”) Given the fact that he is scheduled to travel to Scottsdale, AZ four days before the scheduled hearing – something that Dr. McKnight did not address in her Answer – Dr. Rea clearly is able to travel.

As to Dr. Milham, Dr. McKnight admits that he traveled to testify in Arizona in 2017, but that he is unwilling (not unable) to travel to Pennsylvania to testify. (He “isn’t traveling to Pennsylvania, but would be happy to testify remotely. . . . [Dr. Milham] has already stated that he would not travel to testify”)

2. Dr. McKnight admits that, while she originally stated that Dr. Rea would appear as her treating physician, she in fact intends to call him as an expert

In her Answer, Dr. McKnight states: “I included Dr. Rea on the expert witness list because I expected to call him to be my expert medical witness.”

In its Motion, PECO demonstrated that, for expert witnesses, Your Honor properly has always required the witness to appear in person.

3. Dr. McKnight’s is incorrect in her conclusion that distant testimony by these witnesses will not “deny PECO opportunity to cross-examine”

Dr. McKnight states that: “We have no intent on denying PECO opportunity to cross-examine. However, physical presence is not need to accomplish this. Teleconference allows real time question and answer . . . [and would allow one to] see faces and expressions In the

end, the essence of the testimony will be recorded on written form only, and details of facial expressions would not be documented under any circumstances.”

It is, of course, up to Your Honor whether she feels comfortable adjudging the credibility of witnesses in this matter – although PECO continues to urge Your Honor to see these witnesses in person. But Dr. McKnight’s comments do not address the concerns raised by PECO as to how distant testimony interferes with its due process rights. As PECO stated in its Motion:

PECO also believes that the ability to cross-examine these witnesses in person is important to protect its due process rights in this proceeding. As Your Honor is aware, proper cross-examination of these witnesses can take considerable time, and can require questions regarding multiple documents to determine whether the documents are consistent with the conclusions the witness draws from them. The documents have to be shown to the witness in real time; such cross-examination exhibits cannot be shared prior to trial, because the shape and exact nature of cross-examination is not known until the direct examination is complete, and indeed often changes materially during the course of the cross-examination itself. Moreover, cross-examination often involves having a witness state their views on a subject (on either direct or cross), and then attempting to impeach those views of cross; such impeachment often requires that the witness *not* be given cross-examination exhibits prior to the actual examination. Finally, because of the way microphones are set up in videoconferencing, it is virtually impossible for either Your Honor or PECO to affect the flow of testimony from a witness testifying by videoconference, with the result that it is very difficult to ask any structured set of questions of the witness. Indeed, experience in these cases shows that video testimony, on both direct and cross, can quickly become a free-flowing soliloquy on whatever subjects happen to come to the witness’s mind – the experience(s) with Dr. Talmor being a clear example of this phenomenon. The result of this combination of factors is that, when an expert testifies from a distance, PECO is unable to bring appropriate rigor to the cross-examination – so much so that PECO’s due process rights to confront the witness are substantially impaired by the use of distant testimony for first time experts.

Dr. McKnight’s Answer does not even address these concerns, much less lay them to rest.

4. Dr. McKnight's real rationale for distant testimony is that she doesn't want to spend the funds to bring the witnesses to testify in person, and that is not a sufficient reason to allow distant testimony of these witnesses

Throughout her Answer, Dr. McKnight states that her actual rationale for her request for distant testimony is cost – something she did not mention at all in her initial request.

According to Travelocity, round trip tickets from Dr. Rea's home base in Dallas to Philadelphia are available at the time of the hearing beginning at about \$259 round trip. From Dr. Milham's home base in Olympia, Washington, the nearby airport is Seattle/Tacoma, and Travelocity shows trips around hearing beginning at about \$350 round trip. Even adding hotel costs, that is far less than the cost of setting up a videoconference link (and certainly less than the cost of procuring a transcript). The witnesses will need to set aside the same amount of time to prep and appear, regardless of whether they appear remotely or in the hearing room. The claim that appearing in person is substantially more expensive is simply spurious.

Moreover, even if in-person testimony is somewhat more expensive, that does not mean that distant testimony should be allowed. PECO has demonstrated that distant testimony for experts would be highly disruptive to this proceeding and due process; that must be more important than the marginal cost of hotel rooms.

5. Conclusion

WHEREFORE, for the reasons set forth above, PECO continues to respectfully request that Your Honor (a) grant its Motion; and (b) rule that both Dr. Milham and Dr. Rea must appear in person at hearing and be subjected to live cross-examination.

Respectfully submitted,



Romulo L. Diaz, Jr., Vice-President and
General Counsel

Ward Smith, Assistant General Counsel
Shawane Lee, Assistant General Counsel
2301 Market Street, S-23
Philadelphia, PA 19103
215-841-6863

ward.smith@exeloncorp.com

Counsel for PECO Energy

Tom Watson
Watson & Renner
tw@w-r.com
202-258-6577

Counsel to PECO Energy Company

February 27, 2018