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March 22, 2019

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

Re: Janice DeNito Branagh v. PECO Energy Company
Docket No. C-2016-2576738

Dear Secretary Chiavetta:

A copy of PECO's *Reply to Objection to Motion to Admit Counsel Pro Hac Vice* is attached for filing.

Very truly yours,



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

Janice DeNito Branagh :
 :
 v. : Docket No. C-2016-2576738
 :
 PECO Energy Company :

CERTIFICATE OF SERVICE

I, Ward L. Smith hereby certify that on March 22, 2019, I served a copy of PECO Energy Company's Reply to Objection to Motion to Admit Counsel Pro Hac Vice upon all interested parties via email and U.S. first class mail to:

Janice DeNito Branagh
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Norristown, PA 19403
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Dated: March 22, 2019



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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Janice Denito Branagh	:	
	:	
v.	:	C-2016-2576738
	:	
PECO Energy Company	:	

**PECO Energy Company’s
Reply to Objection
to
Motion to Admit Counsel *Pro Hac Vice***

On February 28, 2019, the Commission issued an Opinion and Order in which the Commission noted *sua sponte* that PECO had not filed a motion for *pro hac vice* admission of its outside counsel, Thomas Watson, Esq. The Order remanded this matter to the Office of Administrative Law Judge for the limited purpose of addressing Mr. Watson’s *pro hac vice* admission. On March 1, 2019, PECO filed a Motion to Admit Mr. Watson *Pro Hac Vice*. On March 21, 2019, PECO was served with Ms. Branagh’s Objection. PECO provides this reply to Ms. Branagh’s objection:

1. Throughout her Objection, Ms. Branagh attacks the testimony of PECO’s witnesses Dr. Israel and Dr. Davis, variously claiming that it was “outrageous,” (¶ 6); “not supported . . . (¶7); “perjury” (¶24) and the ilk. None of those characterizations are supported by the record evidence; indeed, Your Honor accepted and relied upon the testimony of Drs. Israel and Davis in finding, in your Initial Decision (p. 24) that “The Complainant has not met her burden of proof of establishing with substantial evidence that PECO committed

an offense in violation of the Public Utility Code, the Commission's regulations or an outstanding order of the Commission with respect to health concerns regarding PECO meters.”

2. Ms. Branagh also claims (§24) that, in proffering the testimony of Drs. Israel and Davis, Mr. Watson and Mr. Smith did not exhibit candor toward this tribunal because, she claims, they knowingly proffered perjured testimony. This claim also fails due to lack of proof. The record evidence and Your Honor’s Initial Decision establish that the testimony of Drs. Israel and Davis was credible, expert testimony upon which Your Honor relied. It was not perjured.
3. Ms. Branagh also appears to be making a request that Your Honor not only deny *pro hac vice* admission for Mr. Watson, but also strike the testimony of Drs. Israel and Davis because Mr. Watson asked them questions to elicit their testimony. Your Honor rejected a similar request in *McKnight v PECO*, C-2017-2621057 (Order issued August 17, 2018, p. 7) stating that:

By opposing the Motion, the Complainants appear to want to have any evidence introduced through Mr. Watson disregarded, i.e., all testimony and exhibits introduced through Dr. Davis and Dr. Israel be excluded. Such a ruling is form over substance and will not be made here.

4. Ms. Branagh discusses appearances made by Mr. Curtis Renner, who is Mr. Watson’s law partner, in cases involving other Pennsylvania utilities. Recent Commission jurisprudence provides extremely targeted, on-point, guidance on this issue. Mr. Watson’s partner, Mr. Renner, is assisting PPL with its AMI/health cases. He sought *pro hac vice* admission in those cases, including *Willard and Elsbeth Sunstein v PPL Electric*

Utilities Corporation, C-2018-3000078. In the *Sunstein* proceeding, ALJ Barnes granted Mr. Renner's *pro hac vice* admission on a *pro forma* basis, and the Complainants then filed an objection¹ to his admission *pro hac vice* on grounds nearly identical to those pled by Ms. Branagh. The Sunsteins argued (p. 20):

In addition, on the basis of the perhaps partial list of already 14 cases Mr. Renner has appeared or is scheduled to appear in, on the basis of those numerous cases, attorney Renner is already guilty, in fact, or practicing law in without a Pennsylvania license in the Commonwealth of Pennsylvania. This is clearly prohibited by the laws of the Pennsylvania Supreme Court, and his entry into our PA PUC case *pro hac vice* should be denied.

In her *Second Interim Order*, ALJ Barnes re-affirmed her grant of his *pro hac vice* admission, stating:

Mr. Renner has 29 years' experience practicing law and is a Partner in the Washington, D.C. law firm of Watson & Renner. He has been a member in good standing of the Bar of the District of Columbia since 1995. Mr. Renner has appeared before the Commission in numerous proceedings including cases involving complaints against Respondent similar to the instant complaint. Second, Attorney Ryan is already licensed to practice law in the Commonwealth and has been a member in good standing of the Pennsylvania Bar since 2013. He may enter an appearance and may move for the admission *pro hac vice* of Attorney Renner. 52 Pa. Code §§ 1.22(a), 1.24. There is insufficient evidence to show Attorney Ryan is incapable of supervising Attorney Renner in this proceeding.

Sunstein v PPL, C-3000078 (*Second Interim Order*, June 19, 2018).

It is difficult to conceive of guidance that could be any more on-point. Simply, the law in Pennsylvania is that, for the type of specialized practice engaged in by Mr. Watson (and Mr. Renner), when they appear under the supervision of members in good standing of the

¹ Sunstein "Reply to Motion of PPL lawyer, Devin Ryan, which he filed with the PA PUC on April 23, 2018, for Pro Hac Vice admission of Curtis S. Renner, Esq.," filed by the Sunstein's in Docket C-300078 on May 11, 2018.

Pennsylvania bar, then sequential *pro hac vice* admission is an accepted form for their representation.

5. Ms. Branagh claims (§ 26), without proof, that Mr. Watson has appeared in cases representing Met Ed, West Penn Power, and PPL. He has not, and so attested in his verified statement in support of PECO's Motion.

6. In PECO's Motion (p. 5), it cited the case of *Varner v Roberts*, 1988 Pa. Dist. & Cnty. Dec. LEXIS 274, in support of its request for admission *nunc pro tunc*. Ms. Branagh argues that *Varner* is not applicable, and suggests reliance instead on *Hadley v Pike*, 2014 WL 3744717 (Ohio Ct. of Appeals 2014).

The Ohio court's decision in *Hadley* is best understood by reading it together with the Pennsylvania court's decision in *Varner*. In both cases, an out-of-state attorney filed a complaint prior to being admitted *pro hac vice*. In both cases, the court had to decide (1) whether to admit the attorney *pro hac vice*, even though he had filed late; and (2) the procedural effects of the attorney having made a substantive filing prior to *pro hac vice* admission.

In *Varner*, the Pennsylvania court answered the first question by admitting the attorney *pro hac vice* notwithstanding his late filing for *pro hac vice* admission. Similarly, in *Hadley*, the complaint was filed in October 2013, the attorney's *pro hac vice* Motion was filed in November 2013, and the Ohio trial court admitted the attorney *pro hac vice* on

December 26, 2013. In both jurisdictions, therefore, the outcome on the first question was to admit the *pro hac vice* candidate notwithstanding a late-filed motion.

The two courts differed as to the consequences of the late filing. In *Hadley*, the Ohio appeals court held that, since the attorney had not been admitted *pro hac vice* on the date he filed the complaint, the action should be dismissed. The appeals court did not reverse the *pro hac vice* admission. In *Varnier*, which establishes Pennsylvania law on the issue, the court allowed the complaint to stand, even though it had been filed prior to the grant of *pro hac vice* status. That outcome could only have occurred if, as a matter of Pennsylvania law, late filing of a *pro hac vice* Motion is not considered to be inherently prejudicial.

7. Ms. Branagh's Objection (§ 25) also refers to the case of *Pennsylvania Public Utility Commission v Metropolitan Edison Company*, R-2016-2537349) (Order Granting Admission Pro Hac Vice, July 13, 2016). The *Metropolitan Edison Order* actually demonstrates rather powerfully that the nature and extent of Mr. Watson's work does not warrant denial of PECO's *pro hac vice* Motion.

In *Metropolitan Edison*, Mr. Finnigan's *pro hac vice* Motion² stated that, in the 21 months prior to filing the *pro hac vice* Motion in that case³, he had appeared in 11

² Mr. Finnigan's *pro hac vice* Motion was filed on June 30, 2016 and is available on the Commission's website. <http://www.puc.state.pa.us/pcdocs/1455498.pdf>.

³ Mr. Finnigan's first request for *pro hac vice* admission, in the 2014 West Penn base rate case, was filed on October 3, 2014. See <http://www.puc.state.pa.us/pcdocs/1317237.pdf>. His request for admission in *Metropolitan Edison*, which was the subject of ALJ Long's Order, was filed about 21 months later, on June 30, 2016. ALJ Long was thus evaluating Mr. Finnigan's appearances over the prior 21 months.

Commission proceedings. Review of Mr. Finnigan's *pro hac vice* Motion reveals that six of those 11 cases were base rate proceedings, which necessarily involve multiple parties' examination of all policy, financial, ratemaking, and operational aspects of a utility. Five of those 11 cases dealt with Long-Term Infrastructure Improvement Plans and Distribution Service Improvement Charges, which necessarily involve a company's long-term plans for improving its distribution system, as well as the question of who will pay for those improvements. In all 11 cases, therefore, the scope of issues was extremely broad.

Moreover, Mr. Finnegan's Motion demonstrates that his 11 prior *pro hac vice* appearances cases involved seven different utilities (Metropolitan Edison, PECO Energy, Pennsylvania Electric, Pennsylvania Power, Philadelphia Gas Works, PPL Electric, and West Penn Power) that geographically span the Commonwealth from east to west.

Review of the dockets in those cases further reveals that, in those 11 cases, he appeared before seven different administrative law judges. (ALJ's Buckley and Dunderdale in the 2014 base rate cases of MetEd, Penelec, Penn Power, and West Penn; ALJ Jones in the 2015 PECO base rate case; ALJ Colwell in the 2015 PPL base rate case; ALJ's Pell and Guhl in the 2015 PGW DSIC case, and ALJ Cheskis in the 2016 western DSIC cases).

By virtue of the *pro hac vice* Motion to admit Mr. Finnigan, ALJ Long reviewed the nature and the extent of Mr. Finnigan's prior *pro hac vice* representations to determine whether they had exceeded the acceptable nature and extent that would warrant denial of

the request for *pro hac vice* admission in the case before her. In less than two years, Mr. Finnigan had appeared in 11 major cases, including six base rate cases, appearing before seven different judges in cases involving seven utilities covering the entire state, and *ALJ Long nonetheless admitted Mr. Finnigan to appear pro hac vice in yet another major base rate case*. She stated:

While this participation lends itself to the conclusion that Attorney Finnigan has become familiar with the procedural rules of the Commission, it also calls into question the continued propriety of granting Attorney Finnigan *pro hac vice* admission. Pennsylvania Bar Rule [301], provides that an out-of-state attorney may be “*specially* admitted to the bar of this Commonwealth for purposes *limited to a particular case*.” The rule is not intended to permit a practitioner who intends to practice in the Commonwealth on a regular basis to avoid admission to the Pennsylvania Bar. Indeed, the Pennsylvania Rules of Civil Procedure note that a court may deny a motion for admission *pro hac vice* where “the candidate is, in effect, practicing as a Pennsylvania attorney, in light of the nature and extent of the activities of the candidate in the Commonwealth” While I will grant the petition to allow Attorney Finnigan’s admission pro hac vice in this matter, he is strongly urged to seek admission to the Pennsylvania Bar, and on notice that future petitions may not be granted.⁴

Pennsylvania Public Utility Commission v Metropolitan Edison Company, R-2016-2537349 (Order Granting Admission Pro Hac Vice, July 13, 2016) (footnotes omitted, emphasis added).

By comparison, in the 21 months prior to the *Branagh* hearing (in June 2017), Mr. Watson appeared *pro hac vice* in less than 10 cases (less if the omnibus hearings in the *Sunstein Murphy*, *Povacz*, and *Randall-Albrecht* matters are counted as one appearance, rather than three). He appeared on behalf of one utility – PECO – on a single, limited,

⁴ As Ms. Branagh notes (¶ 25, p. 9), as Mr. Renner’s sequential representations continued, he followed the procedure recommended by ALJ Long and has been admitted to the Pennsylvania Bar.

subject matter in which he has special expertise. During that period, he appeared before a single ALJ – Your Honor.⁵ He was closely supervised by an experienced Pennsylvania regulatory attorney (Mr. Smith), who himself appeared at every moment of every hearing and clearly filled the role of lead counsel for PECO, and who closely supervised Mr. Watson’s appearances.

Mr. Finnigan was admitted *pro hac vice* even though the nature and scope of his prior *pro hac vice* representations was quite broad and deep; the lesson of Judge Long’s *Metropolitan Edison Order* is that the nature and extent of Mr. Watson’s *pro hac vice* appearances over the last several years falls well within the bounds that are appropriate for continued *pro hac vice* admission.

8. Ms. Branagh also refers (§ 30) to the District of Columbia Rules on *pro hac vice* admission. District of Columbia rules do not apply in Pennsylvania. ALJ Long’s *Metropolitan Edison* opinion is a much better guide to Pennsylvania law and Commission practice.

9. Ms. Branagh also refers (§ 38) to the Commonwealth Court case of *Vermeychuck v PaPUC*, 143 C.D. 2016.⁶

⁵ ALJ Pell’s participation in its AMI/health cases had ended by approximately August 2016.

⁶ The case summary quoted in Ms. Branagh’s filing is from the Commission’s website. See http://www.puc.state.pa.us/filing_resources/2016_summaries_of_puc_court_decisions.aspx)

The *Vermeychuck* case involved the timing of an appeal to the Commonwealth Court, Mr. Vermeychuck missed the required 30-day deadline for filing his appeal of a Commission Opinion and Order, and the Commonwealth Court refused to grant him latitude to file his appeal after that deadline. That is not unusual; appeal deadlines create finality in review of an underlying order. Delay in bringing that closure is viewed by the courts as being inherently prejudicial to the parties, the courts, and administrative efficiency. Courts therefore will rarely allow late-filed appeals because of the prejudicial effect on closure of the dispute.

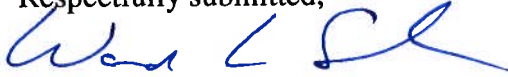
10. Ms. Branagh did not show a parallel prejudicial effect of PECO's late-filing of its Motion. Indeed, all of Ms. Branagh's arguments regarding prejudice are based on a view that allowing Mr. Watson to appear in this case would have been prejudicial *no matter when* PECO requested it. (For the reasons described above and in PECO's Motion, none of those arguments should be accepted.) But Ms. Branagh does not offer any independent reason to believe that the *timing* of PECO's filing created an additional, independent, prejudicial effect on her. Moreover, Your Honor has already rejected that claim in your August 17, 2018 *McKnight Order*, in which you concluded (p. 8):

There is nothing prejudicial to the Complaints in granting the admission of Mr. Watson *Pro Hac Vice Nunc Pro Tunc* and it would be inefficient and wasteful of the resources of the Commission and the parties to set this matter for another hearing, or deny the Motion, because of the curable and technical time of filing error.

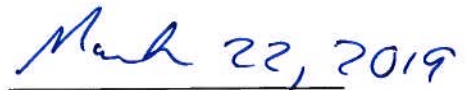
Ms. Branagh has provided no reason that the conclusion in the McKnight proceeding should not apply to her proceeding.⁷

PECO therefore respectfully requests that Your Honor overrule Ms. Branagh's Objection to PECO's Motion to Admit Thomas Carl Watson to appear as counsel for PECO, *pro hac vice*, and grant that Motion.

Respectfully submitted,



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⁷ Indeed, rather than differentiating herself from the arguments made and conclusions reached in *McKnight*, virtually all of Ms. Branagh's arguments repeat arguments that were made by the McKnights and rejected by Your Honor.