

**PUBLIC SERVICE COMMISSION**

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## PUBLIC SERVICE COMMISSION PRACTICE

### I. INTRODUCTION

#### A. Description Of Public Service Commission And Organizational Structure

The Public Service Commission of West Virginia was created in 1913 and was patterned after the Interstate Commerce Commission. In addition to utility regulation, its activities in its early days were primarily regulation of railroads, toll bridges, wharves and ferries. In 1937, the Commission's jurisdiction was extended to motor carriers of passengers and property for hire. The Public Service Commission law is found in Chapters 24, 24A and 24B of the Code, although familiarity with Chapter 16 (public service districts) and Chapter 8 (municipalities) is required for practitioners representing those entities.

The Commission is comprised of three members who serve six-year staggered terms. They are appointed by the Governor and confirmed by the Senate. The Chairman serves as such at the will and pleasure of the Governor. Not more than two of the Commissioners may be members of the same political party, and at least one of the members must be a lawyer with ten years' experience at the Bar. W.Va. Code §24-1-3.

The Commission's offices are located at 201 Brooks Street, Charleston, West Virginia, where most of its hearings are held. Its mailing address is P. O. Box 812, Charleston, West Virginia, 25323; its main telephone number is (304) 340-0300, FAX (304)

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340-0325. A significant number of hearings are held throughout the State in the service territory of the utility or motor carrier involved. The Commission has approximately 240 employees and a \$16.5 million budget as of 2000. Its funds are raised by special assessments against the property and revenues of the entities its regulates. W.Va. Code §§24-3-6, 24A-6-6, 24B-5-3.

The Commission is organized into adjudicatory, advocacy and support groups.<sup>1</sup> The adjudicatory group is comprised of the Commissioners and their staffs and the Division of Administrative Law Judges. This group conducts hearings and makes decisions in the cases. The advocacy group is comprised of four divisions, Legal, Utilities, Water & Wastewater and Transportation Divisions, each of which has one or more sections specializing in a particular area. This group collects evidence and presents staff testimony and exhibits in hearings and oversees the transportation safety responsibilities of the Commission. The support group is comprised of the Executive Secretary (the "court clerk" of the Commission), and the Administrative Office (responsible for data processing, general plant, personnel and fiscal affairs).

Finally, the Consumer Advocate Division operates as a financially and operationally separate division which seeks its budget separately from the Legislature and whose function is to intervene in all PSC cases that significantly affect residential

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<sup>1</sup>See Organizational Chart, Appendix A.

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customers. The Consumer Advocate is appointed by the Commission for a two-year term and, in turn, administers that Division independently of control by the Commission.

The Commission has promulgated Rules of Practice and Procedure and Rules and Regulations for each of the major industries it regulates.<sup>2</sup> It is not bound by the technical rules of pleading and evidence; must make findings of fact and conclusions of law, with specific reference to the evidence in the record; and while its hearings are open to the public, its adjudicatory deliberations are not. W.Va. Code §24-1-7. Except for certain rule-making requirements, the State Administrative Procedures Act does not apply to Commission proceedings. W.Va. Code §29A-1-3.

### B. Jurisdiction

The jurisdiction of the Commission extends to all privately (corporations, partnerships, limited partnerships, sole proprietorships and associations) and publicly (public service districts and municipalities) owned utilities furnishing cable TV, gas, electric, telephone, solid waste disposal, water and sewer services, and extends in transportation to individuals and companies operating oil pipelines, gas pipelines, ferries, railroads, toll bridges, taxicabs and motor carriers of passengers, solid waste, and household goods for hire. W.Va. Code §24-2-1. The Commission has jurisdiction over the rates and

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<sup>2</sup>See Appendix B.

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charges of these utilities, their quality of service, entry and exit, and major new construction, including new extensions of service. It has jurisdiction over the acquisition of one utility by another, contracts between utilities, transfers or other assignments of utility franchises, equipment or business, mergers, abandonments, contracts between utility affiliates and purchases and issuance of utility stock. W.Va. Code §§24-2-12, 24-2-12a. The Commission has limited economic jurisdiction over the rates of municipalities and cooperative utilities (W.Va. Code §24-2-4b), as well as intrastate rail carriers (W.Va. Code §24-2-4d), but extensive jurisdiction over public service districts, including authority to order their creation, consolidation, merger, expansion or dissolution (W.Va. Code §16-13A-16), to approve engineering contracts and to approve the issuance of bonds or acceptance of loans or grants (W.Va. Code §16-13A-25). It may, under certain circumstances, waive its jurisdiction over certain borderline customers. W.Va. Code §24-2-1. It enforces the Federal Railroad Safety Act, the Uniform Motor Carrier Identification Act, the National Gas Pipeline Safety Act of 1968 and the Hazardous Liquid Pipeline Safety Act of 1979. It may enter and inspect certain property (W.Va. Code §§24-2-1a, 24-2-5), make rates, eliminate discriminatory rates and practices, review management efficiency and investigate transactions between utilities and affiliates. W.Va. Code §24-2-3. It may decide that inefficient utilities should be placed under the control of

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a receiver and petition Circuit Court for such an order, W.Va. Code §24-2-7; require accounts to be kept under a uniform system, W.Va. Code §24-2-10; and require utilities to conform to the laws of the State and the Rules of the Commission and may prohibit discontinuance of service by any utility. W.Va. Code §§24-3-1, 24-3-7. It may require gas pipelines to carry gas as common carriers, W.Va. Code §24-3-3, and regulates the statutory right of open access to railroad tracks, W.Va. Code §24-3-3b. It may enforce its orders through civil or criminal proceedings, W.Va. Code §24-4-1, et seq., and its orders are reviewable directly by the Supreme Court of Appeals. W.Va. Code §24-5-1, et seq.

## II. INITIATING THE CASE AND FIRST STEPS

### A. Filing

Cases are commenced by the entry by the Commission of an order on its own motion (show cause proceedings, investigations and rulemakings) or by the filing of a petition, application or complaint by a party.<sup>3</sup>

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<sup>3</sup>Forms for various pleadings are provided as part of the Commission's Rules of Practice and Procedure, but the practitioner may vary the pleading to conform to the exigencies of the case. Two checklists, one for applications for municipal and public service district utility certificates of convenience and necessity and for approval of rates and another for filing motor carrier applications, are attached as appendices to the Rules of Practice and Procedure but should be used with caution, as the law and several Commission rules have changed since the checklists were drafted.

Certain types of cases require a "prefiling" notice to be given the Commission. Utilities intending to file a general rate

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All pleadings, motions, responses and other papers are to be filed in the Executive Secretary's Office with sufficient copies as may be specified by the rules<sup>4</sup> and, if the pleading or document is filed after interventions have been granted, must be served on all parties. Certain motor carrier non-rate case filings must be accompanied by a filing fee. Rule 3.02, Rules and Regulations for the Government of Motor Carriers of Passengers and Property.

### B. Response

If the filing is a complaint, it need not be served on the defendant; the Executive Secretary will immediately issue an order requiring the defendant to answer or satisfy the complaint within ten days. Rules of Practice and Procedure 7. If the filing is for the issuance amendment or transfer of a motor carrier certificate or permit, the Executive Secretary will immediately issue an order requiring the applicant to publish notice of the application in appropriate newspapers.

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case or an application for a certificate of public convenience and necessity must give the Commission at least 30 days' advance notice of such filings, although such notice, upon application, may be waived by the Commission (W.Va. Code §§24-2-3a, 24-2-11(a)). Public service districts must prefile plans for extraordinary construction projects 30 days before making application for a certificate of public convenience and necessity (W.Va. Code §16-13A-25).

<sup>4</sup>See, e.g., Rules of Practice and Procedure 6.2(c) and 10 and Tariff Rules 1, 19 and 25.

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### C. Referral to Staff and Staff Comment

Filings in utility cases are immediately referred to the various staff divisions for initial comment on the sufficiency of the filing and a preliminary recommendation. Complaint cases are usually referred after the defendant answers, unless interim relief is requested.

### D. Initial Disposition

After the defendant has answered (complaint cases) and the staff initial recommendations are returned to the Secretary, the Secretary refers the case to the full Commission for either referral to the Division of Administrative Law Judges or retention by the Commission. All cases referred to the Division of Administrative Law Judges will have a specific decision due date set by the Commission which is binding on the parties and Commission personnel. Possible dispositions include: decide the case on the pleadings; schedule it for pretrial conference; or set for hearing. In motor carrier cases, solid waste and utility cases involving construction requiring a certificate of convenience and necessity or certificate of need if no protest is received after proper newspaper publication, the authority sought is frequently granted without a hearing. However, if a protest is received, the case is set for hearing. W.Va. Code §§24-2-11, 24A-2-5.



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### III. INVESTIGATIVE STAGE

#### A. Audit

All rate cases are referred to the Utilities or Water & Wastewater Division for an audit. The staff conducts either a field audit or desk audit and prepares a report on its findings. The other Commission divisions may undertake their own investigations of the filing which may include preparation of data requests, on-site inspections, preparation of class cost of service studies and other matters.

#### B. Discovery

The Commission and its staff have broad statutory authority to conduct investigations into the rates, methods and practices of public utilities and to require such information as may be desired relating to such investigations. W.Va. Code §24-2-2.

Discovery for parties to PSC proceedings is limited by the Rules of Practice and Procedure generally to interrogatories, and then only in complaint cases. Rules of Practice and Procedure 13(f). Long-standing practice and precedent, however, have established that the discovery rules applicable to cases in the Circuit Courts of West Virginia will be used at the Public Service Commission, including requests for admissions of fact, depositions and interrogatories. Appalachian Power Company, Case No. 79-140-E-42T, "Order Resolving Dispute" (1981); Virginia

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Electric and Power Company, Case No. 82-391-E-42T, "Order on the Joint Petition" (1983).

### C. Preparation of Staff Case

The various recommendations and reports of the staff investigation are compiled into a unified staff position and sent to the Executive Secretary for the case file. Pursuant to Rule 2 of the Rules of Practice and Procedure, the Executive Secretary of the commission makes available copies of the staff position to the parties.

## IV. PREHEARING AND HEARING STAGES

### A. Conferences, Stipulations and Settlements

In the process of moving a case from the initial filing to a hearing, the statute (W.Va. Code §24-1-9(f)), Commission Rules (Rule 11, Rules of Practice and Procedure) and practice provide for prehearing conferences, similar to those in Circuit Courts, for the purposes of narrowing issues and eliminating uncontested matters from the litigation. In recent years, the use of written stipulations between the Commission's staff, the utility company, and frequently other parties has eliminated the need to litigate many issues. Prehearing conferences are generally called in more complicated cases to enable the presiding officer to establish an orderly manner of presentation of evidence in the hearing and in

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minor cases to see if matters can be resolved without a formal hearing.

Rule 11 of the Commission's Rules of Practice and Procedure, "Prehearing Conference," provides that a Commissioner or an Administrative Law Judge may call a prehearing conference either on his own initiative or upon petition by any party, to consider simplification of issues, amendments to the pleadings, admissions of fact or documents, limitations on the number of witnesses and the number of parties to cross-examine each witness, or settlement of the case. Discussions in the prehearing conference are privileged, and disclosures cannot be used in a hearing unless established by other competent evidence. Such conferences are of record and transcribed.

Rule 11.2 provides for a "Proposed Form of Notice of the Formal Hearing" to be circulated among the parties before it is published as a public notice, although this is not usually done. Rule 11.3 provides that the presiding officer, at a hearing, may call a prehearing conference immediately prior to the beginning of the hearing or may recess the hearing for such a conference. This most often happens in complaint cases, especially where the issue is minor and where the utility and the complaining customer have not had a chance to sit down face-to-face to discuss the matters complained of in a calm atmosphere. Such discussions often lead to settlements which are mutually beneficial to the utility and the complaining customer.

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As mentioned briefly above, the use of stipulations between the Commission's staff and the utility has arisen in recent years as a device to settle large, contested rate cases. This most often occurs in rate increase applications filed by larger utilities. Stipulations are usually the result of extended negotiations between the utility company, various elements of the Commission's staff and intervenors.

In such a case, the company and the Commission's staff offer the written stipulation as an exhibit at the hearing and only offer testimony as to the reasonableness of the stipulation. They generally do not offer oral testimony as to the underlying issues which have been settled in the stipulation. The prefiled testimony is generally made part of the record; however, generally no cross-examination is had thereon except by a party contesting the stipulation and making its own case.

Stipulations generally contain language to the effect that the stipulation is made without prejudice to any position that either the utility company or the staff might adopt during other proceedings before the Commission. One should not expect a party to be bound by what, to another party, may seem to be a declaration of principle in a stipulation when the issue arises again in a subsequent case. The interest of the staff in settling a case by stipulation is generally an interest in reducing the dollar amount of the rate increase. Therefore, if the dollar effect of a matter compromised in a past stipulation

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should change, increasing its significance, the staff may well alter its position on that issue.

Stipulations also normally contain language that the stipulation is "conditional and non-severable and shall have no force and effect unless adopted in its entirety by the Commission." Such language is intended to require the Commission to either accept the settlement of the case as provided in the stipulation in its entirety, or to reject the stipulation in its entirety, putting the parties back at the starting gate, enabling them to litigate the issues as if there had been no stipulation. However, in Hope Gas, Inc., Case No. 84-738-G-42T, Order of August 30, 1985, the Commission indicated that it would not be bound by such non-severability clauses. To date, this issue has not been litigated, since the changes the Commission has made to stipulations have not been significant enough to cause either the utility or the other parties to object.

### **B. Direct and Rebuttal Testimony and Exhibits**

Most hearings in Public Service Commission practice are held before an Administrative Law Judge. Currently, the Commission itself hears only cases involving major utility or serious complaints. It is important to note that the Commission is not "bound by the technical rules of pleading and evidence, but in that respect it may exercise such discretion as will facilitate its efforts to understand and learn all the facts bearing upon

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the right and justice of the matters before it." W.Va. Code §24-1-7; see also Rule 13.1, Rules of Practice and Procedure. In practice, this means that very often evidence will be admitted in a proceeding before the Commission which would not be admitted in a Circuit Court. However, such questionable evidence is usually admitted by the presiding officer with the proviso that he or she will "give it such weight as it deserves." In effect, the presiding officer can avoid possible grounds of exception to this ruling or appeal by allowing all the evidence in, but in effect disregarding it when making a decision.

The preparation of testimony and exhibits varies widely, depending upon the type of case being litigated. In rate cases for all major and many smaller utilities, the filing of prepared, written direct and rebuttal testimony is required by procedural order. Specific dates are set for the filing of such testimony, usually two to four weeks in advance of the hearing. Such testimony is prepared in question and answer form. At the hearing, the witness is then asked whether or not he would give the answers contained therein if asked the questions. Similarly, prepared written rebuttal testimony, with exhibits, is required to be filed, usually several days before the hearing, but sometimes not until the night before the hearing or even the morning of the hearing.

There are several purposes behind the filing of written testimony. One involves the nature of the issues litigated

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before the Commission. Since rate cases involve primarily accounting and financial issues, and sometimes engineering issues, testimony is often very technical and full of figures and calculations and is often supported by many pages of technical or accounting exhibits. It is, therefore, helpful to have such testimony well in advance of the date upon which one is to cross-examine a witness thereon. Such litigation is often reduced to a battle between accountants, financial analysts, engineers or other experts, so the practitioner needs to have sufficient time to study the testimony and consult with his own expert to prepare meaningful cross-examination. Likewise, the presiding officer needs to have sufficient time to digest the material presented by both sides and to prepare her own examination of the witnesses.

### C. The Hearing

Several statutory provisions govern Public Service Commission hearings. W.Va. Code §24-1-6 provides that "hearing and the taking of evidence may be had at such times and places and in such manner in each particular case as the Commission may designate." W.Va. Code §24-2-4a provides, in part, that "the commission shall, whenever practicable and within budgetary constraints, conduct one or more public hearings within the area served by the public utility making application for such increase or change, for the purpose of obtaining comments on the matter from local ratepayers." Rule 12 of the Rules of Practice and

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Procedure also covers hearing procedure. Of note is the distinction between "protestants" and "intervenors." Intervenors are persons "having a legal interest in the subject matter of any hearing or investigation pending before the Commission." A potential intervenor must petition, either in writing, or orally at the hearing, for such status. If the petition is granted, the petitioner becomes a party to the case, with the right to present evidence, cross-examine, file briefs, be served with any document filed by another party, take Exceptions to an Administrative Law Judge's Decision and appeal to the Supreme Court of Appeals.

On the other hand, protestants have none of these rights. Protestant status is generally granted to utility customers who appear at rate case hearings to complain about the utility. Anyone who wishes to participate fully in a case should be an intervenor, not a protestant. Protestants are not "parties" to the case.

In practice, the Commission prefers to hold rate hearings at its headquarters in Charleston. In major cases involving utilities with wide service areas, the Commission generally holds a series of hearings in the service area to allow members of the public to voice their opinions on the rate increase. Following such series of hearings, the main hearing is held in Charleston, when the utility, staff and intervenor witnesses are presented and cross-examined. In small rate cases, the Administrative Law



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Judge will generally hold a single, full hearing in the location served by the utility.

Hearings before the Public Service Commission are generally less formal than a hearing one might have in a Circuit Court. This is due, in part, to the fact that the Commission is not bound by technical rules of evidence (W.Va. Code §24-1-7) and that there is no jury involved. Since the presiding officer normally already has a familiarity with the subject matter, and the ability to disregard irrelevant, immaterial or otherwise objectionable evidence, the procedure is generally loose.

In cases in which prepared written testimony has been filed, the parties will call a witness to the stand; identify the witness and ask the witness if the prepared written testimony was prepared by the witness; is true and accurate to the best of the witness' knowledge and belief; whether there are any additions, corrections or deletions; and whether the witness would, if asked the question contained therein, give the same answers as are contained therein. After this inquiry, the party offering the witness then moves for the admission of the testimony as an exhibit and offers the witness for cross-examination. The order of cross-examination is generally for any intervenors to go first, then the Commission staff, and finally the examination by the presiding officer. Provision is then made for redirect, and if redirect is offered, recross. However, presiding officers generally will allow a party to go beyond the scope of redirect

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on recross, or to add a missed or forgotten question out of order, and to ask follow-up, cross-examination questions relating to matters brought out on cross-examination by other parties (who made their cross-examination after that party).

Obviously, the party with the burden of proof in any particular case presents its evidence first. This is generally the utility company. The evidence of any intervenors, including the Consumer Advocate Division, is then presented, with the Commission staff generally going last. Sometimes witnesses are cross-examined on both their direct and rebuttal testimony in one session. At other times, witnesses are presented for direct and later recalled for rebuttal. In cases in which no prepared written testimony is filed, witnesses are presented, qualified, examined and cross-examined in typical fashion. However, most objections to evidence are overruled, as the Commission is not bound by the technical rules of evidence. The standard practice is for the presiding officer to overrule any evidentiary objection and allow the evidence into the record, usually with the presiding officer's statement on the record that the evidence will be given such weight as it deserves.

At the conclusion of the hearing, the case is usually deemed submitted, pending filing of briefs. However, on occasion, a witness will be asked to file a "post-hearing exhibit." These exhibits are considered to be a part of the record, if all of the parties agree.

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### D. Briefs and Arguments

W.Va. Code §24-1-9(b) provides that the parties shall be afforded an opportunity to submit, within a prescribed time period, proposed findings of fact and conclusions of law and briefs. Rule 17 of the Rules of Practice and Procedure also relates to the filing of proposed findings of fact and conclusions of law and briefs. When time allows, the general practice is for the presiding officer to allow 20 days after the parties have received the transcript for the filing of simultaneous initial findings, conclusions and briefs. Parties are then given ten days to submit reply briefs.

Section 24-1-9 makes provisions for oral argument of cases before the Commission. Rule 18 of the Rules of Practice and Procedure also provides that oral argument may be presented either to supplement or in lieu of filing briefs. In practice, however, oral argument before the Commission is rare. Oral argument before Administrative Law Judges is even more unusual. The oral arguments of which the authors are aware have arisen mainly in cases pending before the Commission on Exceptions to an ALJ's decision, usually when there is a novel or unusual question of law involved and rulemaking or other major cases in which important public policy questions must be resolved. However, occasionally the Commission will hear oral argument on motions, discovery disputes or other issues. Such arguments generally only take place in major cases.

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Briefs and proposed findings of fact generally should contain explicit references to the testimony at hearing (by transcript page) or to exhibits (by exhibit number and page) since W.Va. Code §24-1-7 requires that all Commission orders set forth separately findings of fact and conclusions of law, with "specific reference to the evidence in the record which support such findings."

### V. DECISIONS

#### A. Time Deadlines

The law currently requires the Commission to enter Final Orders within a specified amount of time in certain types of cases, which deadlines are strictly observed. These are:

<u>TYPE OF CASE</u>	<u>TIME DEADLINE</u>
Utility Rate Cases on Notice: <sup>5</sup>	
Up to 2,500 customers	120 days*
2,501 to 5,000 customers	150 days*
5,001 to 7,500 customers	180 days*
More than 7,500 customers	270 days*
Utility Applications for Certificates of Public Convenience and Necessity:	
Total Cost Less Than \$50 Million	270 days**
Total Cost More Than \$50 Million	400 days**

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<sup>5</sup>Rate cases may be filed "on application" (governed by Rules 19-21 of the Rules and Regulations for the Government of the Construction and Filing of Tariffs of Public Utilities and Common Carriers by Motor Vehicle) or "on notice" (governed by Rules 22-27). Rate cases filed under the former procedure do not have time deadlines; accordingly, most utilities file under the notice provision to avoid potential delays in completing the case.

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Appeals of Municipal Rate Cases<sup>6</sup>

120 days\*

\*After date rates would go into effect without suspension

\*\*After filing date

All cases referred to Administrative Law Judges will also have an arbitrary decision due date set by the Commission and made part of the Commission Order referring the case. A decision due date can only be amended by a formal motion to the Commission, but such motions are routinely granted upon good cause and where no statutory deadline is violated.

### B Administrative Law Judges' Decisions and Recommended Orders

Cases referred to Administrative Law Judges (ALJs) are decided by recommended decisions entered within the time frame set by the Commission. Certain cases are frequently decided on the initial pleadings and staff recommendations if hearings are not requested.

In cases that are referred to an Administrative Law Judge, a decision known as a "Recommended Decision" will be issued. The standard format for such decision is (1) a recitation of the procedural history of the case, including filing dates, date and summary of any prior orders in the case, date of hearing, and appearance of counsel; (2) a recitation of the evidence presented

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<sup>6</sup>Municipalities and co-ops are permitted in the first instance to make rates for the utilities they operate, but customers are permitted, under certain circumstances, to appeal such rates to the Public Service Commission. Such appeals are governed by W.Va. Code §24-2-4b and PSC General Order Series 200.

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at the hearing, with citations to page numbers in the transcript or to exhibit numbers; (3) a discussion of the evidence, with the ALJ's comments on the credibility, weight, relevance and materiality of the evidence presented; (4) Findings of Fact; (5) Conclusions of Law; and (6) the "ordering paragraphs." Obviously, the "ordering paragraphs" are the most important, as it is those paragraphs only which impose legal requirements and obligations upon the parties.

After the ordering paragraphs, there will appear language providing that any party may, within 15 days of the date of the order, file exceptions to the recommended decision and a brief in support thereof. W.Va. Code §24-1-9(c). If no exceptions are filed, the ALJ's Decision becomes the order of the Commission by operation of law (W.Va. Code §24-1-9(e)), unless stayed or postponed by the Commission itself. On occasion, a party will request that the period for filing exceptions be extended beyond 15 days. If good cause is shown therefor, such as a situation where a small utility appeared without counsel, received an adverse decision, and then retained counsel to take exceptions, such a request generally will be granted by the Commission. Similarly, if for some reason a party needs an order to become final before the normal time, an application to the Commission to waive the period for filing exceptions will be considered.

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### C. Commission Decisions

In major cases, that is, those heard by the Commission itself, it issues a decision which is a final order of the Commission upon issuance. Such order is then immediately appealable to the Supreme Court of Appeals.

In some very large rate cases, the Commission will divide the issues into two groups and conduct two series of hearings. This is done in situations where a decision on the first group of issues will greatly affect the manner in which the parties approach the second group of issues. In these cases, the Commission will issue what is styled an "Interim Decision." However, it is an open question as to whether such an interim decision constitutes a final order of the Commission for purposes of appeal. The practitioner, when faced with such an interim order,, would be wise to consider it a final order of the Commission on those issues and time any appeal to the Supreme Court of Appeals accordingly. Certain procedural question, discovery matters, or requests for emergency or interim relief may also result in an "Interim Recommended Decision" from an ALJ. Exceptions may be taken to such orders, but the Commission is hesitant to consider such interlocutory matters.

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### VI. POST-DECISION PROCEEDINGS

#### A. Exceptions

When an Administrative Law Judge's Recommended Decision and Order is issued in a case, the decision will provide that any party may file Exceptions to the decision, supported by a brief, within 15 days from the date the ALJ's Decision is mailed to the parties. W.Va. Code §24-1-9(c). Exceptions must be served on all other parties. Upon the filing of Exceptions, the ALJ's Decision is stayed and the case goes before the Commission for review. There is no time period established for this review. In practice, the Commission generally applies a similar test to review Recommended Decisions as the Supreme Court of Appeals applies to review of Commission decisions. However, the Commission is authorized to review and consider all issues presented in a case de novo, particularly where significant matters of public policy are implied. (See, Harrison Rural Electrification Assn., Inc. v. P.S.C., 438 S.E.2d 782). See the Appeal section, infra. The Commission may adopt the ALJ's Decision, modify it, set it aside, remand it, or take any other action it may deem proper. On rare occasions, the Commission will schedule oral argument on Exceptions. While not provided for by statute or rule, many parties have made it a practice to file a response to any exceptions filed by another party.



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### B Petitions for Reconsideration

Rule 19 of the Rules of Practice and Procedure provides for further hearing, reopening or rehearing of cases. Applications for reconsideration or reopening are made only to orders of the Commission and to an Administrative Law Judge's Recommended Decision that has gone final. If a party has failed to timely file exceptions to an ALJ's Recommended Decision and it has become a Final order of the Commission by operation of law, a timely Petition for Reconsideration is then the proper pleading to obtain Commission review.

An application for reconsideration must be made by petition, duly verified, within ten days after the final order was mailed by the Commission to the parties. The filing of a petition for reconsideration does not serve to stay or render ineffectual an order of the Commission. This is in contrast to the filing of Exceptions to an ALJ's Recommended Decision. However, filing of a petition for reconsideration does stay the running of the 30-day period for appeal to the Supreme Court of Appeals. Atlantic Greyhound Corporation v. Public Service Commission, 132 W.Va. 650, 54 S.E.2d 169 (1949).

The granting of a petition for reconsideration is rare. However, a petition for reconsideration seeking to correct typographical, technical, mathematical or other simple errors is granted if well founded. A petition for reconsideration should be as concise and to the point as possible and should point out

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as plainly as possible the Commission's specific error, or other grounds for reconsideration.

The filing of a petition for reconsideration is not a prerequisite to the taking of an appeal to the Supreme Court of Appeals.

### **C. Appeal**

Review of final orders of the Public Service Commission may be had in the Supreme Court of Appeals. See W.Va. Code §§24-5-1 and 24A-8-1. A petition for appeal to the Supreme Court of Appeals must be filed within 30 days after the entry of a final order of the Commission. This time period is jurisdictional. However, if a party files a petition for rehearing or reconsideration, the statutory appeal period runs from the date upon which the petition for reconsideration or rehearing is acted upon. Atlantic Greyhound Corporation v. Public Service Commission, 132 W.Va. 650, 54 S.E.2d 169 (1949). When a petition for appeal is filed in the Supreme Court of Appeals, the statute requires that a copy of the petition be delivered to the Secretary of the Commission. The Secretary then files the entire Commission file with the Clerk of the Supreme Court of Appeals.

The Supreme Court of Appeals will then schedule a date for the parties to make oral presentation of the case. In contrast to appeals from decisions of Circuit Courts, the Commission, the party against whom the appeal is prosecuted, is afforded an

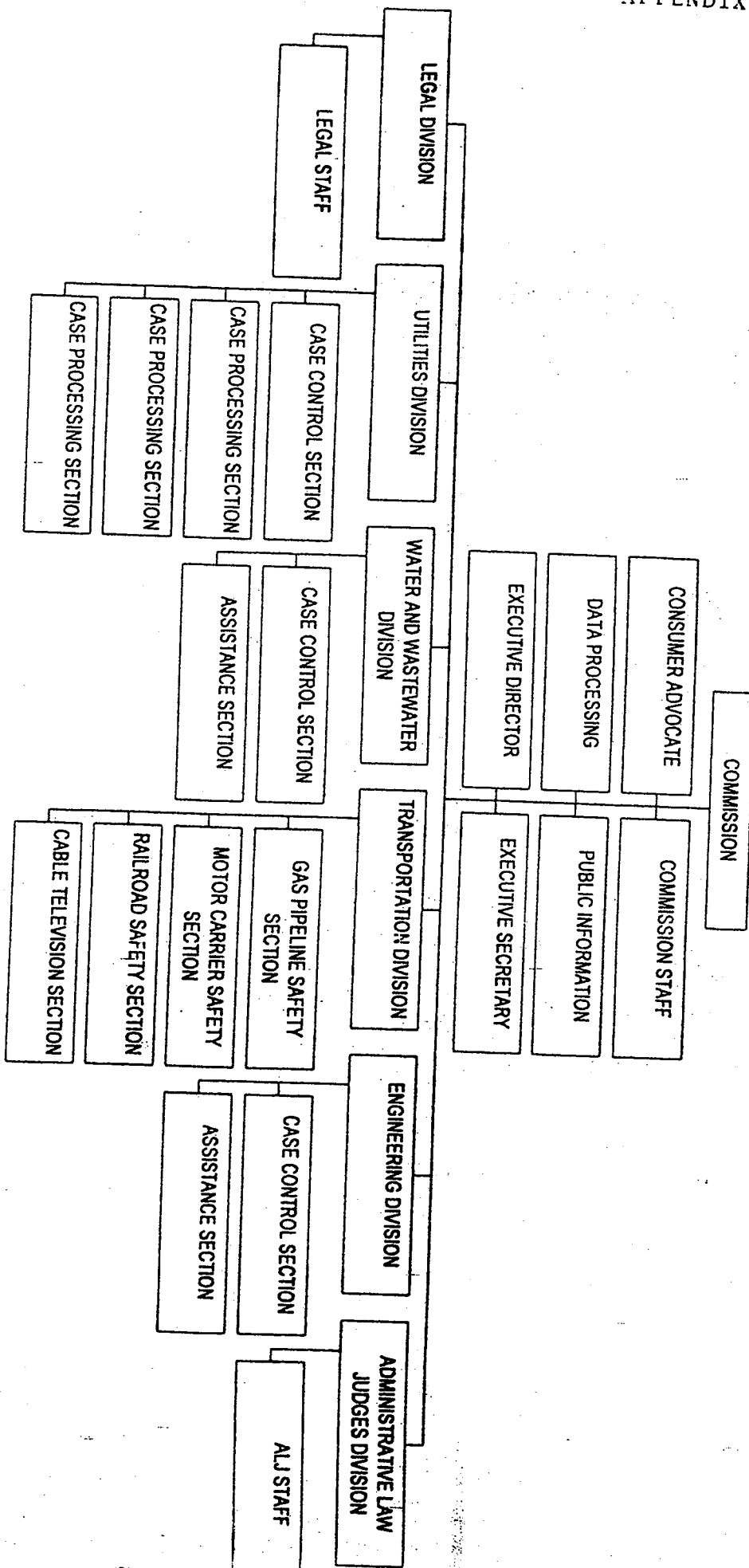
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opportunity to make an oral presentation before the Supreme Court of Appeals. The Commission is required by statute to file with the Court, before the day of the hearing, a "written statement of its reasons for the entry of such order." Practice has been for the Commission to file such statements of reasons several days before the hearing in the Supreme Court of Appeals. At the hearing, the party appealing the order of the Commission is given ten minutes to argue his petition. The Commission's counsel is then afforded a ten-minute period to tell the Court why it should not hear the case. In the Supreme Court of Appeals, an order of the Commission will not be reversed unless it is contrary to the evidence presented in the case, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles. Virginia Electric and Power v. Public Service Commission, 242 S.E.2d 698 (W.Va. 1978); C & P Telephone Company v. Public Service Commission, 300 S.E.2d 607 (W.Va. 1982); Pittsburgh and West Virginia Gas Company v. Public Service Commission, 101 W.Va. 63, 132 S.E. 497 (1926). In practice, the Supreme Court of Appeals defers to the Commission's judgment on disputed issues of fact. In fact, the Supreme Court of Appeals agrees to review very few Public Service Commission cases.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA  
ORGANIZATION CHART

AS OF JULY 1, 2000

APPENDIX A



## PUBLIC SERVICE COMMISSION PRACTICE

APPENDIX B  
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### WEST VIRGINIA PUBLIC SERVICE COMMISSION RULES AND REGULATIONS

New rules and regulations are promulgated from time-to-time. It is suggested that the practitioner check with the Commission's Executive Secretary's Office for new or changed rules on any specific area of P.S.C. jurisdiction.

#### RULES OF PRACTICE AND PROCEDURE

RULES AND REGULATIONS FOR THE GOVERNMENT OF THE CONSTRUCTION AND FILING OF TARIFFS OF PUBLIC UTILITIES AND COMMON CARRIERS BY MOTOR VEHICLE

RULES AND REGULATIONS FOR THE GOVERNMENT OF ELECTRIC UTILITIES

RULES AND REGULATIONS FOR THE GOVERNMENT OF GAS UTILITIES AND GAS PIPELINE SAFETY

RULES AND REGULATIONS FOR THE GOVERNMENT OF MOTOR CARRIERS OF PASSENGERS AND PROPERTY

RULES AND REGULATIONS FOR THE GOVERNMENT OF RAILROAD SAFETY AND SANITATION

RULES AND REGULATIONS FOR THE GOVERNMENT OF SEWER UTILITIES

RULES AND REGULATIONS FOR THE GOVERNMENT OF TELEPHONE UTILITIES

RULES AND REGULATIONS FOR THE GOVERNMENT OF WATER UTILITIES

PROCEDURAL RULES FOR COMMISSION REVIEW OF ELECTRIC COOPERATIVES, TELEPHONE COOPERATIVES AND MUNICIPAL UTILITY RATE CHANGES PURSUANT TO W.VA. CODE §24-2-4b

RULES AND REGULATIONS GOVERNING THE USE OF BROADCAST AND STILL PICTURE PHOTOGRAPHIC EQUIPMENT IN PUBLIC HEARINGS OF THE WEST VIRGINIA PUBLIC SERVICE COMMISSION

RULES AND REGULATIONS GOVERNING THE FILING AND APPROVAL OF SURETY BONDS, POLICIES OF INSURANCE, QUALIFICATIONS AS A SELF-INSURER OR OTHER SECURITIES AND AGREEMENTS BY MOTOR CARRIERS SUBJECT TO THE MOTOR CARRIER LAW, CHAPTER 24-A OF THE CODE OF WEST VIRGINIA, 1931, AS AMENDED

RULES OF THE COMMISSION FOR REORGANIZATION

**PUBLIC SERVICE COMMISSION PRACTICE**

**APPENDIX B  
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**SUPPLEMENTAL RULE FOR REORGANIZATION**

**RULE ESTABLISHING A CONSUMER ADVOCATE DIVISION TO BE MADE PART OF  
A SUPPLEMENTAL RULE FOR REORGANIZATION AS REQUIRED BY WEST  
VIRGINIA CODE §24-1-1a**

**RULE GOVERNING COGENERATION AND SMALL POWER PRODUCTION**

**RULE ADOPTING AN EMERGENCY TELEPHONE SYSTEM PLAN**

**RULES AND REGULATIONS GOVERNING THE TRANSPORTATION OF HAZARDOUS  
WASTE BY RAIL**

**RULES AND REGULATIONS FOR THE GOVERNMENT OF INTRASTATE RAIL  
TRANSPORTATION**

**RULES AND REGULATIONS GOVERNING THE TRANSPORTATION OF NATURAL GAS  
(GENERAL ORDER NO. 228, STATE IMPLEMENTATION OF NATURAL GAS  
TRANSPORTATION POLICIES)**

**RULES AND REGULATIONS FOR THE GOVERNMENT OF PUBLIC SERVICE  
DISTRICTS**

**RULES AND REGULATIONS GOVERNING CARRIER ACCESS TO THE LINES AND  
FACILITIES OF RAIL CARRIERS (GENERAL ORDER NO. 237)**

**RULES AND REGULATIONS GOVERNING SHIPPER ACCESS TO THE LINES AND  
FACILITIES OF RAIL CARRIERS (GENERAL ORDER NO. 238)**

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## APPENDIX E

## WEST VIRGINIA PUBLIC SERVICE COMMISSION

## OUTLINE OF MOTOR CARRIER LAW

West Virginia Code § 24A-1-1 confers upon the Public Service Commission the power and duty to supervise and regulate the transportation of persons and property for hire by motor vehicle upon or over the public highways of this State so as to protect the safety and welfare of the traveling and shipping public in their use of transportation agencies by motor vehicle; to preserve, foster and regulate transportation and permit the coordination of transportation facilities; and to provide the traveling and shipping public with transportation agencies rendering stabilized service at just and reasonable rates. However, federal law has now deregulated the transportation of all property except "household goods" and vehicles towed by third parties.

West Virginia Code § 24A-2-5 provides, in part, that it shall be unlawful for any common carrier by motor vehicle to operate within West Virginia without first having obtained from the Commission a certificate of convenience and necessity. Said section provides that upon the filing of an application for such certificate, after the giving of notice, hearing or waiver thereof, the Commission, if it finds from the evidence that public convenience and necessity require the proposed service or any part thereof, shall issue the certificate as prayed for, or issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the right granted such terms and con-

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APPENDIX D

REFERENCE BOOKS AND PUBLICATIONS

Annual Reports of the American Bar Association, Section of Utility Law

Hollister, Kenneth, "Utilities," Financial Analyst's Handbook II, Dow-Jones-Irwin, Inc., 1975

Public Utilities Fortnightly

Public Utility Reports

Suelflow, James E., Public Utility Accounting: Theory and Application, Michigan State University, 1973

Trebing, Harry M., Issues In Public Utility Regulation, Michigan State University, 1979

Trebing, Harry M., New Dimensions In Public Utility Pricing, Michigan State University, 1975

Welch, Francis X., Conduct Of The Utility Rate Case, Public Utilities Reports, Inc., 1955

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ditions as in its judgment the public convenience and necessity may require. Said section further provides that before granting a certificate to a common carrier by motor vehicle the Commission shall take into consideration existing transportation facilities in the territory for which a certificate is sought, and in case it finds from the evidence that the service furnished by existing transportation facilities is reasonably efficient and adequate, the Commission shall not grant such certificate.

Before commencing operation, all common carriers are required to obtain a certificate of convenience and necessity from the Commission as required by and pursuant to the provisions of W. Va. Code § 24A-2-5. An applicant for a certificate of convenience and necessity has the burden of proof to establish that public convenience and necessity require the proposed service. Weirton Ice & Coal Supply Company v. Public Service Commission, 240 S.E.2d 686, 689 (W. Va. 1977). The law provides that there must be a showing of both "convenience and necessity," not "convenience or necessity," the language being conjunctive, not disjunctive. Charleston Transit Co. v. Public Service Commission, 142 W. Va. 750, 758, 98 S.E.2d 437 (1957).

The Commission has interpreted these requirements to mean that the applicant must demonstrate that he or she has the financial ability, experience and fitness to provide a needed, useful and responsive public service, as well as that the public convenience and necessity require the proposed service. Ford Brothers, Inc.,

M.C. Case No. 18152, April 9, 1981. The applicant must produce public witnesses who are able to testify that the proposed service is needed in the area of application. Harless Excavating Company, Inc., M.C. Case No. 21256, April 23, 1982. If the evidence of record in the case reveals that there is some kind of need in the proposed area of application, the applicant has established a prima facie case that public convenience and necessity require the proposed service and that the service furnished by existing transportation facilities is not reasonably efficient and adequate. Ford Brothers, supra.

Once the applicant has presented satisfactory evidence that public convenience and necessity require the proposed service, the burden then shifts to those persons who are protesting the application. The protestants must demonstrate by a preponderance of the evidence that the service furnished by existing transportation

facilities is reasonably efficient and adequate and that entry into the field by the applicant would adversely affect or be detrimental to the public (because, for example, additional competition would be ruinous to all competing common carriers), not merely harmful to existing carriers, and that all reasonable needs in the area of application are being met. Harless, supra at page 3. The protestants must establish that the granting of the requested authority would affect the operations of existing common carriers to an extent contrary to the public interest, and this evidence must be demonstrated by other than self-serving statements of the protestants. (Id.)

