

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17120

**Regulations Governing the PA Public
Utility Commission's General Provisions
at 52 Pa. Code Chapters 1, 3, and 5**

**Public Meeting held November 9, 2023
LAW-3041347
Docket No. L-2023-3041347**

MOTION OF VICE CHAIR KIMBERLY BARROW

The general provisions regarding practice before the Commission were last revised in 2006. Since then, our jurisdiction and responsibilities have changed considerably. In the first quarter of 2016, the Commission announced its intention to revise the Commission's rules of practice and procedure, 52 Pa. Code Chapters 1, 3 and 5, by convening a series of informal stakeholder meetings wherein Commission Staff and attorneys representing clients that regularly practice before the Commission began to identify issues and concerns with the existing rules as well as recommend amended language for the PUC's consideration. Commission staff offers detailed proposals for changing the rules which I believe will clarify expectations for practice and procedure before the Commission. Today, I offer additional proposals to be issued for comment.

1. Dismissals With Prejudice

The Commission often relies on Section 316 and 332(f) of the Public Utility Code, 66 Pa.C.S. §§ 316 and 332(f), respectively, to dismiss proceedings with prejudice when litigants fail to appear. The Commission began doing that in the recent past based on concerns about abuse of process and expenditure of scarce resources in repeat litigation.

Section 332(f) addresses the failure to be at a scheduled conference or hearing. Section 332(f) holds that the failure to secure counsel and appear precludes that party from participating, seeking a rehearing, or a recall unless it was unavoidable, and the other party is not prejudiced. This general rule and exception seem to be limited to those circumstances where a party is required to have legal counsel before the Commission. This has also been relied on to dismiss unrepresented *pro se* litigant cases with prejudice when they fail to appear.

Section 5.245 of our rules addresses failure to appear and the circumstances in which failure to be represented at a hearing may constitute a waiver to participate in the hearing.

Proposal: Revise Section 5.245 of the rules to prohibit this provision's applicability to a party who is not required to be represented as set forth in the statute if there is no finding that the party has committed an abuse of process.

2. Res judicata/Collateral Estoppel interplay with dismissal with prejudice

Section 316 of the Code governs *prima facie* evidence of facts found which are conclusive unless set aside. This provision does not address *stare decisis* or dismissals with prejudice. This provision creates a presumption that prior facts, such as tariffed rates, are reasonable and

precludes collateral attacks upon those facts absent a showing of changed circumstances. *McLaughlin v. DQE*, Docket No. C-20065798 (2009); *Duquesne Light Co. et al. v. Pa. PUC*, 715 A. 2d 540 (Pa. Cmwlth. 1998); *Popowsky v. Pa. PUC*, 669 A. 2d 1029, 1037 n. 14 (Pa. Cmwlth. 1995), rev'd in part on other grounds, 706 A. 2d 1197 (Pa. 1997); *Zucker v. Pa. PUC*, 401 A. 2d 1377, 1380 (Pa. Cmwlth. 1979); *Schellhammer v. Pa. PUC*, 629 A. 2d 189, 193 (Pa. Cmwlth. 1993).

The Commission often relies on Section 316 of the Code and the ancillary *res judicata* or collateral estoppel. However, Pennsylvania law holds that *res judicata* should not apply if a matter is dismissed on procedural matters, like a failure to appear, because there has been no substantive determination on the merits. *Scharf v. DeCou Company*, 183 A.41, 41-42 (1936); *Farabiugh Chevrolet v. Covenant Management, Inc.*, 522 A.2d 100, 101 (Pa. Super. 1987); *Gutman v. Giordano*, 557 A.2d 782, 783 (Pa. Super. 1989); *Acobacey v. Acobacey*, 22 Phila. 333, 191 Phila. Cty. Rptr. LEXIS 42 (1991); *Monroeville v. Liberatore*, 736 A.2d 31, 34 (Pa. Cmwlth. 1999). For collateral estoppel to apply, there must be an identity of parties yet often a matter is raised by separate spouses at different times on very different facts.

Proposal: Prohibit the application of *res judicata* and collateral estoppel based upon a litigant's failure to appear at hearing.

3. Representation of Corporations and Partnerships

Sections 1.21 through 1.23 of our current rules operate to preclude a corporation or partnership from appearing before the Commission in an adversarial proceeding unless they have legal counsel. This rule relies on case precedent holding that a corporation may appear in court only through an attorney at law admitted to practice before the court. See *Walacavage v. Excell 2000*, 480 A.2d 281 (Pa. Super. 1984), citing *Simbrow, Inc. v. United States*, 367 F.2d 373 (3rd Cir. 1966); *MOVE Organization v. Department of Justice*, 555 F. Supp. 684 (E.D.Pa. 1983); *MacNeil v. Hearst Corp.*, 160 F. Supp. 157 (D.Del. 1958); *Merco Construction Engineers, Inc., v. Municipal Court*, 581 P.2d 636 (Ca. 1978); *Oahu Plumbing Sheet Metal, Ltd. v. Kona Construction, Inc.*, 590 P.2d 570 (Haw. 1979).

However, Rule 207 in the Rules of Procedure of the Magisterial District Judges in Pennsylvania allows corporate or partnership entities to appear *pro se* although, as noted that is not the case with the Court of Common Pleas and higher courts.

It may be that Commission proceedings are more akin to MDJ proceedings, albeit at an administrative level, given the rights of appeal to Pennsylvania courts set out in the Public Utility Code. I believe that a more permissive approach to representation could better facilitate the ability of small Pennsylvania businesses to operate and seek redress before the Commission.

Proposal: Revise the rules to permit small business corporations or partnerships to appear through an authorized corporate official. We seek comments on the appropriate definition of small business corporations or partnerships, including factors such as size or revenue or the potential adoption of an appropriate definition contained in other law.

4. Representation of Individuals

Various administrative agencies permit a party to be represented by a nonlawyer in some circumstances. For example, an individual claiming unemployment compensation may be represented by a duly authorized agent before the Pa. Department of Labor and Industry, the Unemployment Compensation Board of Review, and a UC referee. *See Harkness v. Unemployment Compensation Bd. of Rev.*, 920 A.2d 162 (Pa. 2007). Also, nonlawyer representatives are permitted to appear on behalf of individuals appearing before the Pa. Department of Human Services, Office of Hearings and Appeals. *See Nolan v. Department of Public Welfare*, 673 A.2d 414 (Pa. Cmwlth. 1995); and 55 Pa. Code §§ 275.2, 275.3(a), and 275.4(a)(1)(iv). Additionally, the Pa. Department of Revenue, Board of Appeals, specifies that a taxpayer filing an appeal may appear on his own behalf or be represented by someone else with the required technical knowledge who is not necessarily an attorney.

I believe that a more permissive approach to representation similar to other administrative agencies would better facilitate the development of evidentiary records in complaint proceedings involving individual consumers.

Proposal: Revise the rules to permit an individual consumer to be represented by a non-attorney third-party representative holding their power of attorney during periods of disability and/or incapacity.

5. Indispensable Parties

Section 5.81 of the current rules expressly authorizes an Administrative Law Judge (ALJ) or the Commission to consolidate a common question of law or fact. The current rules contain no provision authorizing the ALJ or the Commission to identify an indispensable party and interplead that party.

Proposal: Develop a rule addressing the identification of, and participation by, an indispensable party, both utilities and non-utilities, when it will result in a better record and comprehensive consideration of the parties, facts, and issues in a proceeding.

6. Commission file access policies

Sections 1.71-1.77 of the Commission's regulations relate to 1) what documents should be kept for inspection at the Secretary's Bureau's public filing office, and 2) the process for getting non-confidential documents from the Commission and challenging determinations under those provisions. Under the Right to Know Law (RTK Law) that was in place at the time these regulations were last amended, agencies had to have their own processes for responding to written requests for records. Now that process is unified under the RTK Law and within the OOR appeal process. It is still useful to have a regulation listing what must be kept for public inspection and processes for addressing informal requests for records, but regulations about written requests for review of public documents are now moot, and also potentially in conflict with the RTK Law. The RTK Law specifically provides that written requests for records are to be forwarded to the Open Records Officer, 65 P.S. § 67.703, and then provides for specific

deadlines for written requests for access to records. 65 P.S. §§ 67.901, 67.902. In addition, most documents from formal proceedings are hosted electronically and are publicly accessible from the Commission's website.

Proposal: Revise sections 1.71-1.77 to remove those aspects of the regulations which provide a procedure for written requests for access to Commission records. Seek comment on whether the regulations for written requests for access to Commission files are needed given the RTK Law and the publicly accessible Commission docketing system on its website?

7. Time of filing protests

Various Commission regulations provide for a 60-day period in which to file protests, unless otherwise specified. The 60-day period commences from the date of publication in the *Pennsylvania Bulletin*. See 52 Pa. Code § 5.14(c) (indicating that the time for filing protests to applications is governed by Section 5.53); and 52 Pa. Code § 5.53 (related to Time of filing).

Executive Order 2023-07, building Efficiency in the Commonwealth's Permitting, Licensing, and Certification Processes, which was issued on January 31, 2023, instructs executive agencies to examine the type of permits, licenses, or certifications they issue, which would then be subject to recommended efficient application processing times.¹ As a best practice, the Commission should also take this opportunity to examine whether the Commission's application processes may be improved while still affording interested parties with notice and an opportunity to be heard.

Proposal: Revise Section 5.53 to provide for a 30-day period from the date of publication in the *Pennsylvania Bulletin* in which to file protests, with modifications to this protest period being granted for good cause shown.

§ 5.53. Time of filing.

A protest shall be filed within the time specified in the published notice of the application. If no protest time is specified, the protest shall be filed within [60] 30 days of publication of the notice **except upon good cause shown.**

8. Time of filing petitions to intervene

Section 5.74(b) of the Commission's regulations allows for the filing of a petition to intervene to occur no later than the date fixed for the filing of responsive pleadings in an order or notice with respect to the proceedings but not less than the notice and protest period established under §§ 5.14 and 5.53, absent good cause shown.

Proposal: The language in the existing regulation at Section 5.74(b) should be retained noting that the outer limit for filing a petition to intervene would be aligned with proposed shortened

¹ Executive Order 2023-07 – Building Efficiency in the Commonwealth's Permitting, Licensing, and Certification Processes (pa.gov)

time for filing protests of 30-days from the date of publication in the *Pennsylvania Bulletin*, as indicated above.

§ 5.74. Filing of petitions to intervene.

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(b) Petitions to intervene shall be filed:

(1) No later than the date fixed for the filing of responsive pleadings in an order or notice with respect to the proceedings but not less than the notice and protest period established under §§ 5.14 and 5.53 (relating to applications requiring notice; and time of filing) absent good cause shown.

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9. Regulating the course of the proceeding

The Commission provides its administrative law judges (ALJs) who preside over Commission proceedings with the authority to regulate the course of the proceeding, pursuant to 52 Pa. Code § 5.483. Nevertheless, there are several existing Commission regulations that either impair ALJ control or do not reflect what occurs in practice.

For example, the Commission’s regulation at Section 1.15(b) provides that requests for a continuance of hearings should be filed at least 5 days prior to the hearing date. However, it is not always possible for a party to submit a request for continuance at least 5 days prior to the hearing date, especially in the event of illness, and judges are oftentimes faced with requests for a continuance less than 5 days before the start of a hearing.

Likewise, presiding ALJs often address service of documents by parties during prehearing conferences. A party may express a preference as to how he or she wishes to be served during the course of the proceeding. Therefore, it is recommended in Sections 5.222 (related to Initiation of prehearing conferences in nonrate proceedings) and 5.224 (related to Prehearing conference in rate proceedings) that the presiding officer be afforded with the authority to address and determine the method of service on parties.

Similarly, Section 1.59 delineates the number of hard copies that shall be served on the presiding officer as well as the parties. Presiding officers should be afforded with control to determine the appropriate number of copies that should be served in a proceeding, especially since serving hard copies may be unnecessary due to electronic service.

Proposal:

Revise the last sentence in 52 Pa. Code § 1.15(b) to state as follows: “The requests for a continuance should be filed at least 5 days prior to the hearing date to the extent possible.”

§ 1.15. Extensions of time and continuances.

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(b) Except as otherwise provided by statute, requests for continuance of hearings or for extension of time in which to perform an act required or allowed to be done at or within a specified time by this title or by order of the Commission or the presiding officer, shall be by motion in writing, timely filed with the Commission, stating the facts on which the application rests, except that during the course of a proceeding, the requests may be made by oral motion in the hearing before the Commission or the presiding officer. Only for good cause shown will requests for continuance be considered. The requests for a continuance should be filed at least 5 days prior to the hearing date **to the extent possible.**

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Revise 52 Pa. Code §§ 5.222 and 5.224 to allow the presiding officer to address and determine the manner of service on parties in rate and nonrate proceedings.

§ 5.222. Initiation of prehearing conferences in nonrate proceedings.

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(c) The following matters shall be considered at prehearing conference:

- (1) The possibilities for settlement of the proceeding, subject to the approval of the Commission.
- (2) The amount of hearing time which will be required to dispose of the proceeding and the establishment of a schedule of hearing dates.
- (3) Arrangements for the submission of direct testimony of witnesses in writing in advance of hearing to the extent practicable, and for the submission in advance of hearing or written requests for information which a party contemplates asking another party to present at hearing.
- (4) Other matters that may aid in expediting the orderly conduct and disposition of the proceeding and the furtherance of justice, including the following:
 - (i) The simplification of the issues.
 - (ii) The exchange and acceptance of service of exhibits proposed to be offered in evidence.
 - (iii) The obtaining of admissions as to, or stipulations of, facts not remaining in dispute, or the authenticity of documents which might properly shorten the hearing.
 - (iv) The limitation of the number of witnesses.
 - (v) A proposed plan and schedule of discovery which may include specific limitations on the number of written interrogatories and requests for admissions a party may propound on another party.
 - (vi) **The method of service by a party.**

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§ 5.224. Prehearing conference in rate proceedings.

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(b) The first prehearing conference shall be held as soon as practicable after the entry of the order of investigation. The parties shall come to the first prehearing conference prepared to discuss the following:

(1) A proposed plan and schedule of discovery, which may include specific limitations on the number of written interrogatories and requests for admissions a party may propound on another party.

(2) Other proposed orders with respect to discovery, including the establishment of sanctions (in addition to those provided by § § 5.371 and 5.371 (relating to sanctions – general; and sanctions – types)) against any party failing to respond to discovery in a timely manner.

(3) Tentative scheduling of evidentiary hearings, clos of the record, filing of briefs and other matters deemed appropriate, **such as the method of service by a party.**

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Revise 52 Pa. Code § 1.59 to provide the presiding officer with the discretion to determine the appropriate number of copies to be served on the presiding officer and other parties in a proceeding.

§ 1.59. Number of copies to be served.

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(b) The following number of copies of documents shall be served on other parties in a proceeding **as deemed appropriate by the presiding officer:**

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10. Liberal construction

Section 1.2 provides for the liberal construction of the regulations governing practice and procedure before the Commission. The current rule reads: “The Commission or presiding officer at any stage of an action or proceeding may waive a requirement of this subpart when necessary or appropriate, if the waiver does not adversely affect a substantive right of a party.” In order to align the section more closely with Pennsylvania Rule of Civil Procedure 126, “substantive” should be changed to “substantial” which both allows the Commission to draw upon the body of

case law interpreting and applying section 126, and also makes clear, through that case law, that the section does not apply when due process rights are affected.

Proposal: For consistency, it is recommended that “substantive” be changed to “substantial” in 52 Pa. Code § 1.2(a) and (c).

§ 1.2. Liberal construction.

(a) This subpart shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which it is applicable. The Commission or presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the **[substantive] substantial** rights of the parties.

(b) The singular includes the plural, and the plural, the singular. Words used in the masculine gender include the feminine and neuter. Words used in the past or present tense include the future.

(c) The Commission or presiding officer at any stage of an action or proceeding may waive a requirement of this subpart when necessary or appropriate, if the waiver does not adversely affect a **[substantive] substantial** right of a party.

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11. Petitions for interim emergency orders

Section 3.6(a) requires that petitions for interim emergency orders be filed with the Secretary and contemporaneously service on the Chief Administrative Law Judge and on the parties.

Proposal: To ensure service of a petition for interim emergency order on the statutory advocates, it is proposed that 52 Pa. Code § 3.6(a) require service on the statutory advocates.

§ 3.6. Petitions for interim emergency orders.

(a) A party may submit a petition for an interim emergency order during the course of a proceeding. The petition shall be filed with the Secretary and served contemporaneously on the Chief Administrative Law Judge, **the statutory advocates** and on the parties.

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12. On the record data requests

Section 5.351(a) allows a party to request that a witness provide information or documents at a later time as part of the witness’ response to a question posed during cross-examination in the course of a rate proceeding.

Proposal: It is proposed that 52 Pa. Code § 5.351(a) be revised to permit on the record data requests in all Commission proceedings and not only in rate cases.

§ 5.351. On the record data requests.

(a) A party may request that a witness provide information or documents at a later time as part of the witness' response to a question posed during cross-examination [**in the course of a rate proceeding**]. The request may be made orally or in writing and shall be presented at the time the witness appears for cross-examination.

13. Official and judicial notice of fact

Section 5.408 allows the Commission or presiding officer to take official or judicial notice of fact. If a decision rests on official or judicial notice of a material fact not appearing in evidence in the record, the parties must be notified. Upon such notification, Section 5.408(c) allows a party that is adversely affected to have the opportunity upon timely request to show that the facts are not properly noticed or that alternative facts should be noticed.

Proposal: It is proposed that 52 Pa. Code § 5.408(c) be revised to add to the existing regulation that an aggrieved party has the opportunity to present counter evidence prior to the decision of the presiding officer being issued if the decision relies upon the noticed fact.

§ 5.408. Official and judicial notice of fact.

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(c) Upon notification that facts are about to be or have been noticed, a party adversely affected shall have the opportunity upon timely request to show that the facts are not properly noticed or that alternative facts should be noticed. **A presiding officer shall afford an adversely affected party the opportunity to show that the facts are not properly noticed or that alternative facts should be noticed prior to the close of the record and the issuance of an initial decision or recommended decision.**

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14. Written testimony

Section 5.412(g) instructs counsel for the witness to provide two copies of written testimony to the court reporter at hearing. On occasion, testimony is admitted *via* stipulation by the presiding officer when there is no court reporter present.

Additionally, in any proposed repeal of Section 5.412a, interested parties should be encouraged to address the submittal of pre-served written testimony that was modified at hearing.

Proposal: Recognize in 52 Pa. Code § 5.412(g) that written testimony may be admitted *via* stipulation with no court reporter present. Solicit comments on how pre-served written testimony that is modified at hearing may be filed in the event that 52 Pa. Code § 5.412a is repealed.

§ 5.412. Written testimony.

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(g) *Copies.* At the hearing at which the testimony is authenticated, counsel for the witness shall provide two copies of the testimony to the court reporter or to the presiding officer if no court reporter is present.

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THEREFORE, I MOVE THAT:

1. The Law Bureau modify the Notice of Proposed Rulemaking Order to include the proposals outlined in this Motion.

November 9, 2023
DATE



Kimberly Barrow, Vice Chair