ORIGINAL

L-840097

LAW OFFICES
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I. IRVING TUBIS
HARRY SCHWARTZ
RONALD ZIEGLER

May 8, 1984

Pennsylvania Public Utility Commission
Post Office Box 3265
Harrisburg, Pennsylvania 17120

Attention: Secretary

Re: Proposed Amendments
52 Pa. Code
Chapters 1, 3 and 5.

Dear Sir:

In accordance with Paragraph 5 of Order of the Commission dated February 3, 1984 appearing in Pennsylvania Bulletin, Volume 14, No. 17 dated April 28, 1984, enclosed herewith are my comments in original and 8 copies to the proposed Amendments to 52 Pa. Code Chapters 1, 3 and 5.

Very truly yours,

RONALD ZIEGLER

RZ/RLC/mb

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DOCKETED
MAY 10 1984

L-840097

I. IRVING TUBIS
HARRY SCHWARTZ
RONALD ZIEGLER

May 7, 1984

RECEIVED
MAY 10 1984
SECRETARY'S OFFICE
Public Utility Commission

Pennsylvania Public Utility Commission
ATTENTION: Secretary
P. O. Box 3265
Harrisburg, Pa., 17120

DOCUMENT FOLDER

Re: Proposed amendments to 52 Pa. Code Chapters 1, 3 and 5 establishing comprehensive rules of practice and procedure

Dear Sir:

The following represents those areas of the proposed rules which cause me some concern:

(1) Section 1.27 Suspension and Disbarment: It appears to me that the general denial of practice before the Commission should be the province of the State Disciplinary Board of the Supreme Court of Pennsylvania, in view of the fact that the Public Utility Commission is considered a quasi judicial agency. In any event, it would seem more appropriate for the Legislature to provide for this specific point.

(2) Section 1.72 (d)(2)(i). It seems to me that it is inappropriate in a rule to provide for informal requests made to File Room personnel. Query, whether the rule should provide only for those cases where a formal request is required and in those cases the request should be made of the Secretary's office.

(3) Section 1.96. Is this provision necessary, particularly where it relates to legal argument which may be made by counsel in a particular case, and where the Commission is in the same position as a Court and obviously not bound by dicta?

(4) Rule 3.2(b), 3.4 and 3.5. It seems to me that the delegation of authority to the Commission's Director of Operations

to issue an emergency order is questionable. It is difficult to conceive of a situation where one of the Commissioners would not be available to act in that situation.

(5) Paragraph 5.61(c). This provision appears to be internally inconsistent in that it provides for mandatory default and then provides for permissive admission of testimony.

(6) Paragraph 5.63, dealing with the issue of a Reply to Answers seeking affirmative relief, does not deal with the issue as to whether there is default in the absence of a reply.

(7) Paragraph 5.64 appears to have the same problem of inconsistency as noted in my concern with paragraph 5.61 above noted.

(8) Paragraph 5.66. Answers to petitions to intervene provides for waiver, the reason for which is not entirely clear. The Commission should ultimately rule on the issue of intervention without regard to a waiver of objection by the parties.

(9) Paragraph 5.201(b). In a case where the parties have not waived hearings, but have not filed the appropriate pleading, it would still appear that a hearing would be required if the Commission is to act upon studies and recommendations of the Staff. The importance which those rules place on pleadings and whether those pleadings really can narrow the issues are matters of concern.

(10) Paragraph 5.221, dealing with conferences between the participants appears to provide, by rule, for the very obvious. Is a rule necessary?

(11) Paragraph 5.224(b)(3), dealing with the issue of time limits for cross examination of witnesses is an unwarranted provision, and should be dealt with by the Examiner or Administrative Law Judge on a case by case basis after hearing the particular line of cross examination.

(12) Paragraph 5.224(f). To exempt the filing utility from filing a "Statement of Position," causes me some concern. In addition, if the purpose is to provide for areas of stipulation, those are matters for the attorneys for the parties to

determine, and should not be mandatory requirements. The parties may well not be in a position to delineate the issues until after extensive cross examination.

(13) Paragraph 5.233 creates additional penalties for failure to stipulate as to the truth of matters of fact and appears to be unwarranted.

(14) Paragraph 5.303 eliminates the oral argument in the case where there is a petition for review and answer. It seems to me that this is precisely the type of case which is extraordinary, and which may well require oral argument.

(15) Paragraph 5.348(e). I do not think it is wise to provide for the transmission of written interrogatories in a case where a deposition of the individual is being taken. Written interrogatories certainly are an appropriate alternate means of discovery, but in a case of a deposition, all parties should be on notice that the failure to participate in that deposition may preclude them, thereafter, from requesting similar information by other means.

Very truly yours,

RONALD ZIEGLER

RZ/rlc

CONRAIL ORIGINAL

RECEIVED

MAY 21 1984

SECRETARY'S OFFICE
Public Utility Commission

DOCKETED

MAY 21 1984

DOCUMENT FOLDER

L-84/C097

May 16, 1984

ATTENTION: Secretary
Pennsylvania Public Utilities
Commission
P. O. Box 3265
Harrisburg, PA 17120

Re: 52 PA. Code Chapters 1, 3, and 5, Comprehensive Rules of Practice and Procedure

Dear Sir:

The following comments are offered with respect to Sections 5.533, 5.534 and 5.535 of the Proposed Rules.

We appreciate that Section 332(h) of the Public Utility Code provides that any party to a proceeding referred to an Administrative Law Judge may file exceptions to the decision of the Administrative Law Judge within 15 days after such decision is issued in a form and manner to be prescribed by the Commission. Generally speaking, the letter we receive with respect to the filing of exceptions indicates they must be filed within 15 days of the day of the letter accompanying the initial decisions to which such exceptions are to be filed, and which further instructs that the exceptions must be received in care of the New Filing Section, Rm. B18, of the Commission on or before that fifteenth day.

We cannot be sure with any degree of certainty that the mailing takes place the date of the letter and further, the mail being what it is today, it sometimes takes as long as five days to reach our office in Philadelphia from the time of mailing in Harrisburg, which automatically eliminates five days of the allowable 15 day period. Further, unless the exceptions are hand delivered or sent Express Mail, there is no guarantee that they will be received in the Commission's office on or before the fifteenth day further cutting down the amount of time.

The situation with Conrail, and I'm sure the same prevails in any other large public utility in the same posture, is that exceptions are not the work product only of the attorney, but

others in the organization who must be contacted for their input. Under all these circumstances, the present method of computing time is really not fair to the party wishing to file exceptions and we would strongly recommend that the time of 15 days as required by the statute runs from the time the initial decision is received (this can be determined by a return receipt for certified mail) and that the date the exceptions are posted first class-mail in a mail box be used as the termination of the 15 days rather than the receipt of the filing in the Commission office.

With respect to Appeals to the Commission from rulings of the Administrative Law Judge the same rules should apply.

With respect to replies to exceptions which are now limited to five days, since the statute does not make provision for replies we firmly recommend that this period be extended to 10 days, again using the receipt date and the mailing date as the extreme ends of that time period.

Very truly yours,

Joel E. Mazor
General Attorney
1138 Six Penn Center Plaza
Philadelphia, PA 19103
(215) 977-5020

JEM/msb

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ROBERT H. YOUNG
DIAL DIRECT (215) 963-5297

June 25, 1984

Jerry Rich, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17120

Re: Proposed Comprehensive Rules of Practice and Procedure, Docket No. L-840097

Dear Secretary Rich:

In accordance with the procedures for public comment established in the Commission's February 3, 1984 Order at Docket No. L-840097, we offer the following comments on the Commission's proposed Comprehensive Rules of Practice and Procedure, 52 Pa. Code Chapters 1, 3 and 5. In general, we believe that the proposed rules are a careful and comprehensive effort to clarify and improve procedures before the Commission. However, we do have several specific concerns about the proposed rules, particularly with respect to the filing of Reply Exceptions and in the discovery area. We request that the Commission consider and implement these comments in its final action on the proposed rules.

1. Reply Exceptions.

Proposed 52 Pa. Code §5.535 would bar the filing of Reply Exceptions "except in rare cases upon the grant of a motion by the presiding officer or the Commission in the interest of justice and only to respond to arguments which were raised for the first time in Exceptions and as to which the responding participant had no notice and opportunity to respond." We strongly urge the Commission to delete this provision and to continue to allow the filing of Reply Exceptions. Reply Exceptions serve a number of useful functions other than simply responding to new arguments raised for the first time in Exceptions. For example, Reply Exceptions allow parties to respond to misstatements or misrepresentations of the evidence, which might otherwise go unanswered and could lead to erroneous Commission decisions. Thus, Reply Exceptions perform an important control function by deterring improper and misleading argument.

In addition, Reply Exceptions often provide additional or alternative arguments to support an Administrative Law Judge's decision. Occasionally, an ALJ's decision may be correct, but not for the reasons stated in his decision. Reply Exceptions are the appropriate mechanism to identify such problems.

More generally, the right to reply is an essential part of a full and fair opportunity to be heard. Parties who will be affected by Commission orders should be entitled to fully present their arguments to the Commission in their own words, and should not be required to rely solely on the ALJ's decision to support their position.

Finally, the filing of Reply Exceptions only upon special Commission or ALJ order is unworkable and impractical. Disputes will inevitably arise over what constitutes "new argument", and the Commission will be required to review pleadings and issue decisions on this issue, thereby increasing its already heavy workload. A simpler and more efficient process would be to permit the filing of Reply Exceptions, and to require parties to identify the portion of their Reply Exceptions which address arguments raised for the first time in Exceptions. The Commission can then review the Reply Exceptions and accord them whatever weight it wishes in reaching its final decision. In this manner, the parties will be afforded a full and fair opportunity to present their case to the Commission in a practical and efficient way.

2. Discovery.

a. General Comments. The goal of Chapter 3, Subchapter D of the proposed regulations appears to be to apply the general rules of discovery in civil litigation to proceedings before the Commission. While this may be appropriate in certain Commission proceedings, it is not practical in general rate cases, which because of their nature and timing do not lend themselves to strict application of discovery techniques employed in civil litigation. Several of our specific concerns are set forth below, but we also ask that the Commission carefully consider this general concern before adopting Subchapter D. At a minimum, the application of these discovery rules in general rate cases should be expressly left to the discretion of the ALJ.

b. Proposed 52 Pa. Code §5.342(c) establishes a 20 day time period for answering interrogatories. This time limit is inappropriate in general rate proceedings. Testimony by parties opposing utility rate increases is generally submitted approximately 14 days before the witness is scheduled for cross-examination. A 20-day time period for answering interrogatories therefore would preclude the utility from conducting meaningful discovery prior to cross-examination.

c. Proposed 52 Pa. Code §§5.324 and 5.372(b) would appear to require parties, upon request, to identify during discovery all expert witnesses to be presented at hearings. In general, this requirement may be desirable, but it should not be applied in general rate cases. Complaints in general rate proceedings are very general and often simply assert that the proposed rates are unjust, unreasonable and discriminatory. The specific issues and adjustments are not known until opposing parties file their testimony after the discovery process is completed. Issues raised in opposing parties' testimony may require the presentation of new expert witnesses in rebuttal. The identity of these witnesses obviously could not have been disclosed during discovery. Accordingly, parties should be permitted to reserve the right to present additional expert witnesses, if necessary, to respond to adjustments raised in opposing party testimony.

d. Proposed 52 Pa. Code §5.342(c) would require that interrogatory responses be served on "all participants". It is not unusual for a large number of customers to file complaints in general rate cases, but only a small number of these complainants actually participate actively in the discovery and hearing process. It would be burdensome, inefficient and wasteful to require parties to serve thousands of pages of interrogatory responses on "all participants." Arguably, the term "participant" is not intended to include all complainants, but to avoid confusion the proposed rule should be amended to require service of interrogatory responses on "all active participants as determined by the presiding officer."

e. Proposed 52 Pa. Code §5.342(c) also would appear to require parties to respond to another party's interrogatories in one filing. This would require the responding party to hold completed interrogatory responses until all responses are completed. Such a practice would needlessly delay the filing of interrogatory responses and therefore should be deleted.

If necessary, we would be happy to supply the Commission or its staff further information on the issues raised in these comments.

Sincerely,

Robert H. Young

COLUMBIA GAS of Pennsylvania

ORIGINAL

June 25, 1984

RECEIVED

JUN 27 1984

SECRETARY'S OFFICE
Public Utility Commission

Mr. Jerry Rich, Secretary
Pennsylvania Public Utility Commission
Post Office Box 3265
Harrisburg, Pennsylvania 17120

Re: Docket L-840097 - Comprehensive Rules of Practice and Procedure

Dear Mr. Rich:

Enclosed herewith for filing with the Commission are the original and eight copies of the Comments of Columbia Gas of Pennsylvania, Inc. in connection with the Proposed Rules of Practice and Procedure promulgated in the captioned docket.

Very truly yours,

W. U. Jacoby
Attorney

WUJ:ns

Enclosures

DOCUMENT FOLDER

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

In Re: Comprehensive Rules of Practice and Procedure) Docket No. L-840097

COMMENTS OF COLUMBIA GAS OF PENNSYLVANIA, INC.

At its public meeting held on February 3, 1984, the Pennsylvania Public Utility Commission adopted a proposal to significantly amend 52 Pa. Code Chapters 1, 3, and 5. As published in the Pennsylvania Bulletin on April 28, 1984, these amendments would consolidate the Commission's rules regarding procedure and practice, discovery, hearings and post-hearing practice, thereby unifying the rules which had previously appeared in 1 Pa. Code and 52 Pa. Code dealing with these matters. Columbia Gas of Pennsylvania, Inc. ("Columbia") submits the following written comments with respect to the proposed rules.

In general, Columbia believes the proposed rules embody significant improvements in the Commission's Rules of Practice and Procedure. However, there are certain specific areas where Columbia submits that further refinement to certain proposed rules will be helpful. These areas include the following:

1. §3.5 - Ratification of Emergency Orders.

The proposed rule provides:

> All emergency orders issued by a single commissioner or the Director of Operations shall be ratified, modified or rescinded by the Commission at the next scheduled public meeting after issuance of the order.

Columbia recommends that an absolute time limit be included in this proposed rule. Because of the nature of an emergency order, as defined in §3.1 of the proposed rule, i.e., "directly affecting the personal or property rights of a person or corporation and issued in response to an emergency", and because of the potential for irreparable harm springing from the continuation in effect of such an order, it is considered appropriate that an outside time limit of 21 days be placed upon the Commission's deliberation with respect to ratification, modification or rescission of an emergency order. This modification could be accomplished by adding to the quoted passage the following sentence: "However, in any event the Commission shall ratify, modify or rescind an emergency order within 21 days after issuance of the order."

2. §5.101 - Preliminary Motions.

As published, the proposed rule provides several available preliminary motions. All of the listed motions are appropriate. However, it is recommended that an additional preliminary motion be included to provide a mechanism for striking from any pleading any redundant, immaterial, impertinent or scandalous matter. This could be accomplished by modifying §5.101(2) as follows:

> A Motion to strike off a pleading that is insufficient as to form [.], redundant, immaterial, impertinent or scandalous in whole or in part.

This mechanism, which is common in state and federal courts, will help ensure that pleadings are concise, properly framed and focused on relevant issues.

3. §5.222 - Initiation of Prehearing Conferences.

At Subsection (b) it is indicated that the Commission or presiding officer, if after consideration it appears that beneficial results may be derived therefrom, may direct that a prehearing conference be held, and that the participants to the proceeding appear to consider the matters enumerated at Subsection (c). It is recommended that the prehearing conference mechanism be modified to permit telephonic prehearing conferences, upon agreement of all participants. A review of the matters to be considered as set forth in Subsection (c) of the proposed rule reveals that the matters to be addressed can, if the parties all agree, be dealt with effectively through the telephonic hearing mechanism. Columbia and other utilities have had substantial experience with this mechanism and have found it valuable in reducing unnecessary travel expense and providing maximum utilization of available time.

4. §5.224 - Prehearing Conferences in Rate Proceedings.

The comments set forth with respect to §5.222 are particularly applicable in the rate proceeding context addressed in §5.224(a)(1), a prehearing conference limited to the scheduling of discovery and tentative hearing dates in addition to the prehearing conference items contained in §5.222. Again, it is emphasized that the telephonic prehearing conference mechanism should be limited to those situations in which all of the participants agree to use of such mechanism.

5. §5.234 - Presentation and Effect of Stipulations.

At Subsection (b) it is provided that:

> The Commission may disregard in whole or in part stipulations of facts under this section but may grant further hearing if requested by a party to the stipulation within 15 days after issuance of a Commission order disregarding the stipulation of fact.

It is recommended that this proposed rule be amended by making it explicit that the issuance of an order by the Commission which disregards the stipulation of fact in whole or in part operates to relieve participants in the stipulation agreement from the binding effect of the stipulation if, and only if, a further hearing is requested by the party within 15 days of the order which disregards the stipulation. As presently framed, it is unclear what the effect will be of the additional hearing requested by the participants.

6. §5.244 - Supporting Data for Future Test Year.

In Subsection (a) it is directed, consistent with existing regulations, that data in support of a future test year be submitted, at the utility's option, for a period of twelve consecutive months "which shall begin on the day following the end of the required experienced 12-month [test] period." It is recommended that this requirement must be modified to permit the submission of supporting data with respect to a Fully Projected Test Year based upon the first full year in which rates finally approved by the Commission will be in effect, assuming a full suspension period under 66 Pa. C.S. §1308. Employment of a fully projected future test year would enable the utilities, and the Commission, to more closely approximate

operating conditions at the time relevant to the collection of rates determined in the proceeding. Moreover, the Commission would still have access to the updates of the period following the historic test year by virtue of Subsection (b), which would continue to require the quarterly reports within 30 days of the end of each quarter, or as soon thereafter as available.

7. §5.341 - Written Interrogatories to a Party.

It is provided in Subsection (c) of the proposed rule that, to the extent that a party seeks to use answers to written interrogatories for purposes other than contradiction or impeachment of the answering party as a witness, that such answers may be admissible into evidence only upon ten days written notice to other parties prior to their use. It is further provided that "answers shall not be admissible per se in a proceeding. The relevance and basis for admission must be demonstrated by the moving participant." Columbia recommends that this ten day written notice requirement, as well as the demonstration of relevance, be deleted from the proposed rule. So long as the answering party is submitted as a witness for cross-examination on the basis of the answer to interrogatory, it is appropriate that each answer to interrogatory be admissible into evidence without the demonstrations sponsored in the proposed rule. Particularly in the context of a formal proceeding, interrogatory practice along these lines has resulted in significant time savings. It is emphasized that the requirements for written notice and substantiation should only be deleted to the extent that the

answering party is a witness subject to cross-examination. In Columbia's view, an answer to interrogatory should not otherwise be admissible into evidence for purposes other than contradiction or impeachment without a demonstration of the reasons for the absence of the answering party as a sponsoring witness.

Columbia appreciates the opportunity to submit its comments on this significant rulemaking and urges the Commission to give these comments serious consideration before promulgating final comprehensive rules of practice and procedure.

Respectfully submitted,

William U. Jacoby

Andrew J. Sonderman

Counsel for Columbia Gas of Pennsylvania, Inc.

L-84/0097

Chessie System Railroads

Terminal Tower
P. O. Box 6419
Cleveland, Ohio 44101
216 623 ~~2208~~
2441

June 25, 1984

Mr. Jerry Rich
Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, Pennsylvania 17120

Dear Mr. Rich:

Re: Proposed Amendments to Commission Rules of Practice

I am writing on behalf of The Baltimore and Ohio Railroad Company and Western Maryland Railway Company and their subsidiaries with respect to the proposed amendments to the Commission Rules of Practice which were published in the April 28, 1984 Pennsylvania Bulletin.

First, we believe that the consolidation of the general rules of administrative practice with the Commission Rules will be most helpful in facilitating practice before the Commission. With respect to the proposed amendments, I offer the following comments:

1. Generally speaking, the emergency provision is much too broad and invites abuse. It should either be eliminated or restricted so persons or corporations will not be subject to the whims or inclinations of a Director of Operations or a single Commissioner. There must be a barrier to abuse of authority. More specifically:

A. Under Chapter 3, Subchapter A, EMERGENCY RELIEF, Section 3.1 defines "Emergency" as "A situation which presents a clear and present danger to life or property." This definition is too broad. it covers many ordinary situations encountered on a daily basis. For example, "smoking" presents a "clear and present danger" to life. The definition should set forth those things which the Commission considers to be a clear and present danger to life, property or some other terminology should be used which is not so broad and which does not have connotations of First Amendment rights. It should

specify that clear and present danger means danger amounting to more than normal and usual grade crossing peril, or highway peril, a critical mass of ordinary hazards or such flagrant acts or omissions of a person or corporation that normal conditions become imminently perilous. Otherwise, it invites the Commission to circumvent the normal Commission procedures. The Director, the Commission or single Commissioner must have guidelines defining clear and present danger; otherwise, the power to declare an emergency could become the subject of abuse. As it now exists, the "emergency" definition gives too much discretion.

B. Rule 3.4 provides that in the event of an emergency order, upon application by the person or corporation against whom the order is issued, an expedited hearing shall be conducted within 5 days. This rule does not indicate why a five-day time frame is used, when the five-day period of time commences, or whether it includes Sunday or holidays. Further, there is no provision for notifying the affected person or corporation of the hearing. To ignore this is to invite failure to reach the parties in adequate time for them to be present. Telegraphic notice, with requirement that the affected person or corporation acknowledge receipt of the notice by telegram, should be incorporated.

2. Section 5.222(d) provides for prehearing conferences. As phrased, this section could be interpreted to require the presence of counsel for participants. Under the current practice, the Commission often schedules field conferences as fact-finding missions which are generally attended by engineering-type representatives of the Commission and other participants. These usually occur before the matter has been assigned to an Administrative Law Judge. Many times agreements are reached and matters are settled without the need for adjudicative hearings. I believe that this practice should continue and that the Rules should be clarified to provide for such.

3. Section 5.402(b) provides that all exhibits which have been marked will be considered as being admitted into evidence. I believe that this places the onus on the wrong party by requiring objection to block admission rather than a motion to seek admission.

4. Section 5.533 and 5.535 prohibit replies to exceptions or appeals or briefs in support of exceptions. Although there is great merit to expedited consideration of such matters, there is even greater merit in the interests of due process in permitting opposing views to be heard.

5. Section 5.502(b) requires briefs to be filed within 30 days after the record is closed. However, as far as I can determine, the rules do not define when the record is closed. Thirty days from the date of a hearing would be problematic because it would not allow sufficient time to obtain and review the hearing transcript.

6. The proposed rules of discovery found in Subchapter D are, for the most part, taken from the Pennsylvania Rules of Civil Procedure. These rules were designed for cases which involve protracted litigation such as negligence, products liability, antitrust, contracts, etc. These were designed for court proceedings where testimony in the form of verified statements is not permitted and to narrow issues, reduce costs and promote settlement of cases. Most of the proceedings before the Pennsylvania Public Utility Commission are not susceptible to settlement prior to hearing. In addition, proceedings before the Commission should not involve protracted litigation. However, the breadth of these rules may result in lengthy, costly, time-consuming procedures without securing benefits. Actually, a requirement that testimony of Experts and other witnesses be reduced to writing and circulated at least 7 days in advance of hearing would eliminate the necessity for protracted discovery and expedite the length of hearings. If discovery is necessary, it is suggested the Commission adopt the rules of the Interstate Commerce Commission which are designed to fit within the administrative framework. For your convenience, I have enclosed a copy of the ICC's rules.

The proposed rules would apply to participants, not to parties. There is no justification for making these rules available to those not parties to the proceeding. It will increase the volume of work, the expense and the time involved with no tangible benefit to the parties or to the Commission. Discovery should be limited to parties alone.

In addition to the above comments, I would like to reiterate the following suggestions which were submitted to the Commission in July 1982:

1. Rather than requiring an answer to every complaint or petition on pain of default, 1 Pa. Code §35.35 (proposed §§5.61(c), 5.66(a)), the Commission should adopt the method used by other states' Commission, such as the Indiana Public Service Commission and the Illinois Commerce Commission, whereby in the absence of an answer within fifteen (15) days, the issues are deemed to be denied. This would be very helpful to practitioners because the time for answering is so short that there is insufficient time to undertake an investigation of a matter before an answer must be filed. Moreover, complaints and applications are often served upon non-attorney personnel. By the time the documents are forwarded to the attorneys, the answer period has often already expired.

2. If the Commission were to permit pleadings to be printed on both sides of the page irrespective of the length of the pleading and if parties were permitted to serve only one copy of a brief to each other party in the proceeding, a large savings in paper usage would be realized. See 1 Pa. Code §§33.2(a) and 33.37(1) (proposed §1.32(a)).

3. Hearings scheduled pursuant to 52 Pa. Code §3.151 (proposed §5.202(b)) should be conducted only in Harrisburg, Philadelphia or Pittsburgh. This would alleviate the difficulty and cost of traveling to other communities in the Commonwealth.

4. The Commission should adopt a regulation whereby an order does not become final until the period for filing and ruling on an application for rehearing or reconsideration has expired. 52 Pa. Code §3.291; 1 Pa. Code §35.241 (proposed §5.572). Under present practice, a party has fifteen (15) days in which to file such an application. The Commission then has thirty (30) days in which to act on the application. However, one must file an appeal within thirty (30) days from a final order. Accordingly, it is now necessary to file an application for rehearing and an appeal simultaneously in order to ensure timely filing. In most cases, the Commission's orders are not questioned. The rule could be phrased so that an order becomes final in fifteen (15) days for

purposes of appeal unless an application for rehearing or reconsideration is filed within that period. Since, under current practice, an order granting reconsideration renders a notice of appeal inoperative pursuant to Rule 1701(b)(3), Pa. R. App. P., the longest delay would be only forty-five (45) days.

5. The Commission should eliminate the requirement of posting notices for every change in status of a station, 52 Pa. Code §33.111. For instance, in the case of a non-agency station that is being abandoned, often there is no building and no traffic has initiated or terminated at the station for a long period. It is costly and unproductive to require railroad companies to send personnel to these locations to post notices that will probably be seen by no one.

6. For the abandonment of stations, the Commission should modify the procedure set out in 52 Pa. Code §33.111 and adopt a procedure similar to that used by the Railroad Division of the Michigan Department of Transportation whereby authority to effect the change is automatic if there are no protests or requests for hearing within forty-five (45) days after notice is filed with the Railroad Division and mailed to patrons and the appropriate local officials. Rule 460.72. This procedure would be less costly, less burdensome and more timely for both railroad companies and the Commission.

7. With regard to newspaper publication of Public Utility Commission notices, I would suggest that the Commission adopt the method used by the Public Service Commission of Indiana whereby the Commission arranges for the notices to be published and the party is then billed for the cost of such publication. See Ind. Code Ann. §8-1-1-8. As a practical matter, we have had some difficulty in getting the newspapers to publish the notices correctly and on the prescribed dates.

Thank you for the opportunity to comment on the proposed Rules of Practice.

Respectfully,

Rachel E. Geiersbach

REG:cc
Encl.

distances are computed. The routes over which the distances are computed need not be shown when such distances are specifically published in a tariff or schedule lawfully on file with the Commission, or definitely ascertainable from a tariff or schedule on file with the Commission showing rates prescribed by the Commission and based on short line distances, or short-highway distances, provided the exhibit makes specific reference to such tariff or schedules as provided by this section.

Subpart B -- Discovery

§1114.21 Applicability; general provisions.

(a) When discovery is available.

(1) Parties may obtain discovery under this subpart regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding other than an informal proceeding. For the purpose of this subchapter, informal proceedings are those not required to be determined on the record after hearing and include informal complaints and all proceedings assigned for initial disposition to employee boards (except the review boards) under 49 CFR 1011.6.

(2) It is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b) How discovery is obtained.

(1) In non-rail licensing proceedings governed by 49 CFR Part 1160, no discovery procedures may be used unless the Commission, upon its own motion or upon verified petition of a party, shall have entered a decision approving discovery.

(2) In other proceedings other than those governed by 49 CFR Part 1160, those discovery procedures providing for the service of written interrogatories and requests for admissions (49 CFR 1114.26 and 1114.27) may be used by parties without filing a petition and obtaining prior Commission approval. The other discovery procedures may be used only when the Commission, upon its own motion or upon verified petition of a party, has entered a decision approving discovery.

(3) Whenever possible a petition for discovery must be filed in sufficient time to allow for the filing of replies and for consideration by the Commission without requiring the postponement of any hearing or the submission of initial statements under modified procedure. Use of discovery in those circumstances where no petition is required must also be accomplished whenever possible without requiring any such postponement.

(c) Protective conditions. Upon motion by any party, by the person from whom discovery is sought, or by any person with a reasonable interest in the data, information, or material sought to be discovered and for good cause shown, any order which justice requires may be entered to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent the raising of issues untimely or inappropriate to the proceeding. Relief through a protective order may include one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time and place;

(3) That the discovery may be had only upon such terms and conditions as the Commission may impose to insure financial responsibility indemnifying the party or person against whom discovery is sought to cover the reasonable expenses incurred;

(4) That the discovery may be had only by a method other than that selected by the party seeking discovery;

(5) That certain matters not be inquired into or that the scope of discovery be limited to certain matters;

(6) That discovery be conducted with no one present except persons designated in the protective order;

(7) That a deposition after being sealed be opened only by order of the Commission;

(8) That a trade secret or other confidential research development or commercial information not be disclosed or be disclosed only in a designated way; and

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened only upon direction or order of the Commission.

If the motion for a protective order is denied in whole or in part, the Commission may, on such terms and conditions as it deems just, enter an order requiring any party or person to provide or permit discovery. A protective order under this paragraph may only be sought after, or in conjunction with, an effort by any party to obtain relief under 49 CFR 1114.24(a), 1114.26(a), or 1114.31.

(d) Sequence and timing of discovery. Unless the Commission upon motion, for the convenience of parties and witnesses and in

the interest of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, should not operate to delay any party's discovery.

(e) Stipulations regarding discovery. Unless otherwise ordered, a written stipulation entered into by all the parties and filed with the Commission may:

(1) Provide that depositions be taken before any person, at any time or place, upon sufficient notice, and in any manner and when so taken may be used like other depositions; and

(2) Modify the procedures provided by these rules for other methods of discovery.

§1114.22 Deposition.

(a) Purpose. The testimony of any person, including a party, may be taken by deposition upon oral examination.

(b) Petitions. The petition requesting an order to take a deposition and perpetuate testimony or to produce documents and materials:

(1) Should set forth the facts it desires to establish and the substance it expects to elicit;

(2) Should be served upon all parties to the proceeding and upon the person sought to be deposed and/or the custodian of the documents or materials sought to be produced;

(3) Should set forth the name and address of the witness, the place where, the time when, the name and office of the officer before whom, and the cause or reason why such deposition should be taken; and

(4) Should specify with particularity the documents and materials which the deponent is requested to produce.

(c) Order. If the Commission is convinced on its own initiative or by the petition requesting an order to take a deposition that the deposition will prevent a failure or delay of justice, it will serve an order upon the parties and the witness, naming the witness whose deposition is to be taken, specifying the time when, the place where, and the officer before whom the deposition is to be taken, and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The provisions for the taking of the deposition specified in the Commission's order may or may not be the same as requested in the petition. The deposition may then be taken in accordance with these rules, and the Commission may make orders of the character provided by 49 CFR 1114.31.

§1114.23 Depositions; location, officer, time, fees, absence, disqualification.

(a) Where deposition should be taken. Unless otherwise ordered or agreed to by stipulation, depositions should be taken in the city or municipality where the deponent is located.

(b) Officer before whom taken. Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions should be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held. Within a

foreign country, depositions may be taken before an officer or person designated by the Commission or agreed upon by the parties by stipulation in writing to be filed with the Commission.

(c) Fees. A witness whose deposition is taken pursuant to these rules and the officer taking same, unless he be employed by the Commission, shall be entitled to the same fee paid for like service in the courts of the United States, which fee should be paid by the party at whose instance the deposition is taken.

(d) Failure to attend or to serve subpoena; expenses.

(1) If the party who filed a petition for discovery fails to attend and proceed with the taking of the deposition and another party attends in person or by representative pursuant to an order of the Commission granting discovery the Commission may order the party who filed the petition to pay to such other party the reasonable expenses incurred by him and his representative in so attending, including reasonable attorney's fees.

(2) If the party who filed a petition for discovery fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by representative because he expects the deposition of the witness to be taken, the Commission may order the party who filed the petition to pay to such other party the reasonable expenses incurred by him and his representative in so attending, including reasonable attorney's fees.

(e) Disqualification for interest. No deposition should be taken before a person who is a relative or employee or representative or counsel of any of the parties, or is a relative

or employee of such representative or counsel or is financially interested in the proceeding.

§1114.24 Depositions; procedures.

(a) Examination. Examination and cross-examination of witnesses should proceed as permitted at a hearing and should be limited to the subject matter specified in the order granting discovery. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, should be noted by the officer upon the deposition. Evidence objected to should be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition, and shall transmit them to the officer, who shall open the sealed envelope, propound the questions to the witness, and record the answers verbatim.

(b) Use of depositions. At the hearings, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or

managing agent, or a person designated to testify on behalf of a public or private corporation, partnership, association or governmental agency (other than this Commission, except in those instances where the Commission itself is a party to the proceeding) which is a party, may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the presiding officer or Commission finds:

(i) That the witness is dead; or

(ii) That the witness is at a greater distance than 100 miles from the place of hearing or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(iii) That the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(iv) That the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(v) Upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witness orally at public hearing, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part

introduced, and any party may introduce any other parts. Substitution of parties does not affect the right to use depositions previously taken.

(c) Effect of taking or using depositions. A party should not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this should not apply to the use of an adverse party of a deposition under paragraph (b)(2) of this section. At the hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) Motions to protect. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the Commission may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in 49 CFR §1114.21(c). If the order made terminates the examination, it should be resumed thereafter only if so ordered. Upon demand of the objecting party or deponent, the taking of the deposition should be suspended for the time necessary to make a motion for an order.

(e) Recordation. The officer before whom the deposition is to be taken shall observe the provisions of 49 CFR §1113.6

respecting appearances and typographical specifications, shall put the witness under oath, and shall personnally, or by someone acting under his direction and in his presence, record and transcribe the testimony of the witness as required by these rules.

(f) Signing. When the testimony is fully transcribed or otherwise recorded, the deposition should be submitted to the witness for examination and should be read to or by him unless such examination and reading are waived by the witness and the parties. Any changes in form or substance which the witness desires to make should be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The witness shall then sign the deposition, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 15 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used fully as though signed, unless, on a motion to suppress, it is found that the reasons given for refusal to sign require rejection of the deposition in whole or in part.

(g) Attestation. The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness, and that the officer is: (1) not a relative, employee, representative

or counsel of any of the parties, (2) not a relative or employee of such representative or counsel, and (3) not financially interested in the proceeding.

(h) Return. The officer shall securely seal the deposition in an envelope endorsed with sufficient information to identify the proceeding and marked "Deposition of (here insert name of witness)" and shall either personally deliver or promptly send the original and one copy of all exhibits by registered mail to the Secretary of the Commission. A deposition to be offered in evidence must reach the Commission not later than 5 days before the date it is to be so offered.

(i) Notice. The party taking the deposition shall give prompt notice of its filing to all other parties.

(j) Copies. Upon payment of reasonable charges, the officer before whom the deposition is taken shall furnish a copy of it to any interested party or to the deponent.

§1114.25 Effect of errors and irregularities in depositions.

(a) As to disqualification of officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(b) As to taking of deposition. (1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the depostion, unless the ground of

the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(c) As to completion and return of deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under 49 CFR 1114.23 and 1114.24 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

§1114.26 Written interrogatories to parties.

(a) Availability; procedures for use. Subject to the provisions of 49 CFR 1114.21(b)(2), any party may serve upon any other party written interrogatories to be answered by the party served, or if the party served is a public or private corporation, partnership, association, or Governmental agency (other than this Commission, except in those instances where the Commission itself is a party to the proceeding), by any officer or agent, who shall furnish such information as is available to the party. Copies of any interrogatories served, and answers thereto, should also be

filed with the Commission. Each interrogatory should be answered separately and fully in writing, unless it is objected to, in which event the reasons for objection should be stated in lieu of an answer. The answers are to be signed by the person making them and subscribed by an appropriate verification generally in the form prescribed in 49 CFR 1112.9. Objections are to be signed by the representative or counsel making them. The person upon whom the interrogatories have been served shall serve a copy of the answers and objections within the time period designated by the party submitting the interrogatories, but not less than 15 days after the service thereof.

(b) Option to produce business records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficent answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies thereof, or compilation, abstracts, or summaries therefrom. If information sought is contained in computer runs, punchcards, or tapes which also contain privileged or proprietary information or information the disclosure of which is proscribed by the act, it will be sufficient response under

these rules that the person upon whom the interrogatory has been served is willing to make available to and permit an independent professional organization not interested in the proceeding and paid by the party serving the interrogatory to extract from such runs, punchcards, or tapes the information sought in the interrogatory that is not privileged or proprietary information or information the disclosure of which is proscribed by the act.

(c) Service of interrogatories in those proceedings not requiring a petition. In those proceedings not requiring a petition for interrogatories, and unless under special circumstances and for good cause, no written interrogatories shall be served within 20 days prior to the date assigned for commencement of hearing or the filing of opening statements of fact and argument under the modified procedure, and when the written interrogatories are to be served in a foreign country, they shall not be served within 40 days prior to such date.

§1114.27 Request for admission.

(a) Availability; procedures for use. Subject to the provisions of 49 CFR 1114.21(b)(2), a party may serve upon any other party a written request for the admission, for purposes of the pending proceeding only, of the truth of any matters within the scope of 49 CFR 1114.21 set forth in the request, including the genuineness of any documents described in the request for admission. Copies of documents should be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Copies of any requests for admission served, and answers thereto, should also be filed with the

Commission. Each matter of which an admission is requested should be separately set forth. The matter is admitted unless, within a period designated in the request, not less than 15 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or his representative or counsel. If objection is made, the reasons therefor should be stated. The answer should specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial should fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficent to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for hearing may not, on that ground alone, object to the request; he may, subject to the provisions of 49 CFR 1114.31, deny the matter or set forth reasons why he cannot admit or deny it. Copies of any answers or objections should be filed with the Commission.

(b) Effect of admission. Any matter admitted under this rule is conclusively established unless upon petition and a showing of good cause the Commission enters an order permitting

withdrawal or amendment of the admission. Any admission made by a party under this rule is for the purpose of the pending proceeding only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

(c) Service of written requests for admission in those proceedings not requiring a petition. In those proceedings not requiring a petition for requests for admission, and unless under special circumstances and for good cause shown, no requests for admission should be served within 20 days prior to the date assigned for commencement of hearing or the filing of opening statements of fact and argument under the modified procedure, and when requests for admission are to be served in a foreign country they should not be served within 40 days prior to such date.

§1114.28 Depositions, requests for admission, written interrogatories, and responses thereto: inclusion in record.

At the oral hearing, or upon the submission of statements under the modified procedure, depositions, requests for admission and written interrogatories, and respective responses may be offered in evidence by the party at whose instance they were taken. If not offered by such party, they may be offered in whole or in part by any other party. If only part of a deposition, request for admission or written interrogatory, or response thereto is offered in evidence by a party, any other party (where the matter is being heard orally) may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts. Such depositions, requests for admission and written interrogatories, and responses thereto should be

admissible in evidence subject to such objections as to competency of the witness, or competency, relevancy, or materiality of the testimony as were noted at the time of their taking or are made at the time they are offered in evidence.

§1114.29 Supplementation of responses.

A party who has responded to a request for discovery with a response that was complete when made is under a duty to supplement his response to include information thereafter acquired in the following instances:

(a) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to:

(1) The identity and locations of persons having knowledge of discoverable matters, and

(2) the identity of each person expected to be called as an expert witness at the hearing, the subject matter on which he is expected to testify, and the substance of his testimony.

(b) A party who knows or later learns that his response is incorrect is under a duty seasonably to correct his response.

(c) A duty to supplement responses may be imposed by order, agreement of the parties, or at any time prior to the hearing or the submission of verified statements under the modified procedure through new requests for supplementation of prior responses.

§1114.30 Production of documents and records and entry upon land for inspection and other purposes.

(a) Scope. Any party may be ordered and directed:

(1) To produce and permit the petitioning party to inspect any designated documents (including writings, drawings,

graphs, charts, photographs, phonograph records, tapes, and other data compilations from which information can be obtained, translated, if necessary, with or without the use of detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which are in the possession, custody, or control of the party upon whom the order is served, but if the writings or data compilations (including computer runs, punchcards, and tapes) include privileged or proprietary information or information the disclosure of which is proscribed by the act, such writings or data compilations need not be produced under this rule but may be provided pursuant to 49 CFR 1114.26(b); or

(2) to permit, subject to appropriate liability releases and safety and operating considerations, entry upon designated land or other property in the possession or control of the party upon whom the order is served for the purpose of inspecting and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon.

(b) Procedure. Any petition filed pursuant to this rule should set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The petition should specify a reasonable time, place, and manner of making the inspection and performing the related acts.

§1114.31 Failure to respond to discovery.

(a) Failure to answer. If a deponent fails to answer or gives an evasive answer or incomplete answer to a question

propounded under 49 CFR 1114.24(a), or a party fails to answer or gives evasive or incomplete answers to written interrogatories served pursuant to 49 CFR 1114.26(a), the party seeking discovery may apply for an order compelling an answer by motion filed with the Commission and served on all parties and deponents. Such motion to compel an answer must be filed with the Commission and served on all parties and deponents. Such motion to compel an answer must be filed with the Commission within 10 days after the failure to obtain a responsive answer upon deposition, or within 10 days after expiration of the period allowed for submission of answers to interrogatories. On matters relating to a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

(b) Failure to comply with order. (1) If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the Commission, such refusal may subject the refusing party or person to action by the Commission under 49 USC 10321(c)(3) and (d)(4) to compel appearance and compliance with the Commission's order.

(2) If any party or an officer, director, managing agent, or employee of a party or person refuses to obey an order made under paragraph (a) of this section requiring him to answer designated questions, or an order made under 49 CFR 1114.30 requiring him to produce any document or other thing for inspection, copying, testing, sampling, or photographing or to permit it to be done, or to permit entry upon land or other

property, the Commission may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or any other designated facts should be taken to be established for the purposes of the proceeding in accordance with the claim of the party obtaining the order:

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony:

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the proceedings or any part thereof.

(c) Expenses on refusal to admit. If a party, after being served with a request under 49 CFR 1114.27 to admit the genuineness of any document or the truth of any matter of fact, serves a sworn denial thereof, and if the party requesting the admission thereafter proves the genuineness of any such document or the truth of any such matter of fact the Commission may order the party making such denial to pay to such other party the reasonable expenses incurred in making that proof, including reasonable attorney's fees.

(d) Failure of party to attend or serve answers. If a party or a person or an officer, director, managing agent, or employee of a party or person willfully fails to appear before the officer

who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under 49 CFR 1114.26, after proper service of such interrogatories, the Commission on motion and notice may strike out all or any part of any pleading of that party or person, or dismiss the proceeding or any part thereof.

(e) Expenses against United States. Expenses and attorney's fees are not to be imposed upon the United States under this rule.

(20) Former §1100.98 is redesignated as Part 1115, and the newly redesignated Part 1115 is revised to read as follows:

PART 1115 APPELLATE PROCEDURES

Sec.
1115.1 Scope of rule.
1115.2 Initial decisions.
1115.3 Commission actions other than initial decisions.
1115.4 Petitions to reopen administratively final actions.
1115.5 Petitions for other relief.
1115.6 Exhaustion of remedies and judicial review.

AUTHORITY: 49 U.S.C. 10321, 10322, and 10377; 5 U.S.C. 559.

§1115.1 Scope of rule.

(a) These appellate procedures apply in cases where a hearing is required by law or Commission action. They do not apply to informal matters such as car service, temporary authority, suspension, special permission actions, or to other matters of an interlocutory nature except as specifically provided below. Except as provided in paragraph (c) of this section, these procedures do not apply to appeals from decisions of individual Commission employees in purely procedural matters made pursuant to

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Daniel T. Dineen
Vice President—General Counsel

June 25, 1984

Mr. Jerry Rich, Secretary
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17120

Re: Comprehensive Rules of Practice and Procedure
Docket No. L-840097

Dear Sir:

On April 28, 1984, the Public Utility Commission's proposed regulations for Rules of Practice and Procedure were published in the Pennsylvania Bulletin, Volume 14, No. 17, Page 1511. Interested parties were invited to submit written comments within 60 days regarding the proposed regulations. United compliments the Commission for taking steps to consolidate and revise the Rules of Practice and Procedure in 52 Pa. Code. United is submitting the following suggested revisions to the proposed rules and regulations:

§5.21--Formal Complaints Generally.

(b) In the event a formal on the record generic proceeding is pending before the Public Utility Commission and a Formal Complaint is filed which directly involves issues to be resolved in the generic proceeding, then the responding party may file a Motion To Stay The Formal Complaint pending the outcome of the Commission's generic proceeding. Said Motion will automatically stay said Formal Complaint in the absence of a ruling by the Commission within 15 days of service of the Motion.

Comment: The Commission by entering into a generic proceeding has recognized the need for an inquiry into an area of compelling concern. As a result of such generic hearings, the Commission will generally develop a Commission policy concerning the subject matter to be addressed. We therefore believe it is in the best interest of the Complainant, the Respondent and the public to stay any further proceedings in a formal complaint since the subject matter of the formal complaint necessarily relates to issues to be generally addressed in the generic proceeding. Such a stay would preserve equity, fair play and substantial justice for all concerned and would avoid an unjustifiable burden and expense upon the parties, the Commission and the public. Once a Commission

policy and/or guidelines concerning the subject matter of the generic proceeding have been developed, the parties in the formal complaint will be better able to address the relevant issues and thereby avoid hearings on issues or matters which the Commission may determine in its generic proceeding to be irrelevant or inappropriate. Moreover, a Commission developed policy resulting from a generic proceeding could ultimately obviate protracted hearings in the filed formal complaint.

§5.103(d)--Rulings on Motions

United suggests this language be rewritten as follows:

> The presiding officer is authorized to rule and shall rule upon all filed motions (not formally acted upon by the Commission) at least two weeks prior to the commencement of hearings where immediate ruling is essential in order to proceed with the hearing. The presiding officer by initial decision may render a final determination with regard to any motion filed or made after the commencement of the hearing and prior to the termination of hearings if in the opinion of the presiding officer a motion involves a question of jurisdiction, the establishment of a prima facie case or standing. . . .

Comment: United suggests that rulings on such motions be made at least two weeks prior to the commencement of hearings in order to give the parties adequate notice as to whether preparation for trial on the merits will be required. Rulings on such prehearing motions will serve the best interests of all parties by promoting judicial economy and by avoiding costly and wasted trial preparation should the ruling on the motions result in dismissals of the case prior to hearing.

§5.222 Initiation of Prehearing Conferences

United suggests the following revisions:

(a) In order to make possible a more effective use of hearing time in formal proceedings, and to otherwise expedite the orderly conduct and disposition of proceedings and to serve the ends to justice and the public interest, it is the policy of the Commission, <u>after all prehearing motions made have been ruled upon,</u> to arrange for conferences between the participants to proceedings prior to the commencement of hearings.

Comment: We suggest that prehearing conferences be scheduled and conducted only after all motions have been properly disposed of by the presiding officer. This is consistent with our suggestion for §5.103(d) above. Such motions, if successful, necessarily have an impact on the subject matter or possible need for a prehearing.

Accordingly, since prehearing conferences are a planning tool to ultimately use hearing time more efficiently, such motions should not be left unresolved prior to a prehearing conference since the resolution of said motions may render prehearing conferences unnecessary or inappropriate. Also, such motions can materially affect what issues must be resolved by hearing.

Thank you very much for considering our suggestions.

Respectfully,

Daniel T. Dineen

DTD/pan

L01/060584/2401

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COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
Room 1103 - State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222

July 12, 1984

Jerry Rich, Secretary
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17120

Re: Comments on Proposed Comprehensive Rules of Practice and Procedure

L-840097

Dear Secretary Rich:

The following are my comments on the proposed Comprehensive Rules of Practice and Procedure published in Volume 14 of the Pennsylvania Bulletin on April 28, 1984.

The idea of consolidating all of the rules governing practice before this Commission is obviously logical and desirable. However, the price exacted is high because the proposed rules are more complex, confusing and restrictive than the present ones.

Specifically:

§1.21 Despite the representation made in (b), this section is not identical to 1 Pa. Code §31.21. It adds the phrase in the second sentence: "In nonadversarial proceedings. . ." The result, if adopted, could preclude the president and majority shareholder of an incorporated motor carrier, for example, from representing his or her business in a Commission instituted complaint proceedings. It would prohibit an incorporated small business person from appearing in any adversarial Commission proceeding. I believe this to be unfair and unduly restrictive.

§§1.54, 1.59 There appears to be no provision or requirement that documents be served on the Secretary. It appears to me that §1.59 could be incorporated in §1.54.

Subchapter A In general this proposed subchapter contains many unnecessary provisions which could needlessly complicate Commission proceedings.

§5.1 In my opinion this is totally unnecessary, and with the incorporation of §5.101 will invariably lead to endless legalistic arguments such as consume so much time and energy in courts of general jurisdiction.

§5.101 Regardless of the admonition in subparagraph (b) jurisdiction can always be questioned. Subsections (a)(1)(2) and (3) are open invitations to attorneys to seek to intimidate each other (and the presiding officer) with heaps of paper. Modern pleading practice both in state and federal courts has been to move to notice pleading rather than common law fact pleading. The whole section on Motions is a backward movement, in my opinion.

§§5.61 5.66 Does §5.61(c) only apply to §5.61(a) and (b), or does it apply to §§5.62 5.66? §5.61(c) is saved by the use of the word may. However, it is susceptible of abusive application and totally ignores the primary purpose of this Commission to consider the public interest in all matters before it.

§5.102 This section would be disasterous both to consumers and this Commission if applied to Chaper 56 proceedings. While in some cases it would be desirable to be able to summarily dispose of the matter without creating a record, I believe this Commission will first have to seek legislation to empower it to do so.

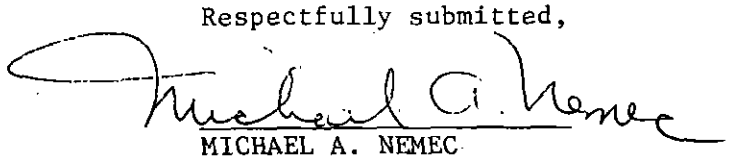
Subchapter B

5.201(b) In my opinion, this Section could cause confusion, delay and unfairness if strictly applied in Chapter 56 cases.

5.224 Complex, confusing and impossible of application in category 1 rate cases sum up my view of this long and, given subsection (g), meaningless section.

Subchapter D The rules here are obviously drawn from federal and state court rules of civil procedure designed to regulate disputes between private parties. Proceedings before administrative agencies are different because the primary goal of all such proceedings is to consider and make findings consistent with the public interest. Thus, the "sanction" set forth in §5.372(3) makes no sense. Requiring discovery to be complete before commencing hearings could result in excessive delay and make impossible compliance with deadline requirements on category 1 rate cases and Act 294 cases. The requirement of §5.331(b) is simply inapplicable and unworkable in most types of Commission proceedings with which I have had experience. If adopted, the rules of Subchapter D would subject presiding officers to a never ending stream of requests to interpret, enforce or modify the "rules."

Respectfully submitted,



MICHAEL A. NEMEC
Administrative Law Judge

cc: William H. Smith, Chief ALJ
(ATTN: Eric Rohrbaugh)

GENERAL WATERWORKS MANAGEMENT AND SERVICE COMPANY

ORIGINAL

June 26, 1984

Secretary
Pennsylvania Public
Utility Commission
North Office Building
Capital Complex
P. O. Box 3265
Harrisburg, PA 17120

RECEIVED
JUN 28 1984
SECRETARY'S OFFICE
Public Utility Commission

Re: Docket L-840097
Proposed amendments to 52 Pa. Code Chapters 1, 3 and 5 establishing comprehensive rules of practice and procedure

Dear Sir:

Enclosed herein are the executed original and two copies of the comments of the subsidiaries of General Waterworks Corporation.

Very truly yours,

Walton F. Hill

WFH/rd

Enclosure

DOCUMENT FOLDER

950 HAVERFORD ROAD / BRYN MAWR, PENNSYLVANIA 19010 / 215 527-6600

BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Proposed amendments to 52 Pa. Code Chapters 1, 3 and 5 establishing comprehensive rules of practice and procedure.	:	L-840097

COMMENTS ON BEHALF OF
Bethel Township Water Company, Clearview Water Supply Company, Dauphin Consolidated Water Supply Company, East McKeesport Water Company, Freeport Water Company, Galeton Eldred Water Company, Mechanicsburg Water Company, Octoraro Water Company, and Wrightsville Water Company ("Companies")

The Companies, all operating Pennsylvania water utility subsidiaries of General Waterworks Corporation hereby submit comments as requested in the Order of the Pennsylvania Public Utility Commission (PUC) at Docket No. L-840097 entered February 3, 1984.

A. 52 Pa. Code Chapter 1

Section 1.11: This Section deals with dates for filing and as proposed states that documents, other than Exceptions and Appeals, will be deemed filed on the date actually received or on the date deposited in the U.S. Mail as shown by Postal Form 3817. The option to file by mail is warranted by the statewide nature of PUC practice and the abbreviation of response time caused by the need to insure receipt of documents to meet filing

deadlines under current practice. We submit, however, that there is no need to verify delivery in the mail by use of Form 3817. This same verification can be made by a party or its counsel on a certificate of service without the need to add to the clerical tasks necessary to make a filing.

B. 52 Pa. Code Chapter 5

Section 5.22: This Section deals with formal complaints and as proposed permits combination of issues relating to rates and services in the same complaint. The prior prohibition of such joinder served to prevent already complex cases from becoming even more complicated through the concurrent hearing, argument and resolution of unrelated matters. This prohibition is necessary in light of the fact, recognized by the PUC, that administrative proceedings are becoming increasingly technical and complex, and because these issues must be resolved in time periods prescribed by statutes.

Section 5.27: This Section deals with satisfaction of formal Complaints and as proposed requires that the Complainant state in writing to the Commission that the Complaint has been satisfied. This could lead to long-standing open dockets since Complainants may not be compelled to file the required written statement. The rule should permit counsel for the Respondent to certify to the PUC that the Complaint has been satisfied.

Section 5.341: The proposed rule states that responses to interrogatories may be entered into evidence for impeachment

purposes only, unless a special motion of ten days written notice is made. We submit there is really no need for such a special motion. Generally, under the Pa. Rules of Civil Procedure, responses to requests for discovery are admissible, subject to the normal rules of evidence. Similarly, in hearings, responses to cross examination questions are evidence. Having requested the information, a party on receipt must live with the response. Responses to interrogatories are normally received well in advance of hearing, and should be admissible if consistent with the rules of evidence.

Section 5.412: This Section deals with written testimony and as proposed requires that written testimony be served on all parties no less than twenty days prior to the day the testimony would be formally presented and subject to cross-examination. This time period is not appropriate for rate cases, when on occasion written testimony may be presented on the same day as it is cross examined. In rate cases, such time period should be established by the parties and the ALJ at prehearing conference or as the hearing progresses.

Respectfully submitted,

Walton F. Hill
Attorney for the Companies
950 Haverford Road
Bryn Mawr, Pennsylvania 19010

Dated: June 26, 1984

ORIGINAL

PENNSYLVANIA UTILITY LAW PROJECT

213-A NORTH FRONT STREET
HARRISBURG, PA 17101

OTTO F. HOFMANN, ESQ (717) 232-0581

RECEIVED

JUN 28 1984

SECRETARY'S OFFICE
Public Utility Commission

June 26, 1984

Jerry Rich
Secretary
Public Utility Commission
North Office Building
P.O. Box 3265
Harrisburg, PA 17120

Re: Comprehensive Rules of Practice and Procedure
Docket No. L-840097

Dear Secretary Rich:

I have enclosed the original and eight copies of the comments of Branch 39 of the Utility Consumers Union of CEPA (CEPA) and the Pennsylvania Legal Services attorneys regarding the Proposed Comprehensive Rules of Practice and Procedure. Copies have been served upon Dan Delaney and the Office of Consumer Advocate.

Thank you for your attention in this matter.

Very truly yours,

Otto F. Hofmann
Attorney-at-Law

OFH:tk
Enclosures

COMMENTS OF THE PENNSYLVANIA UTILITY LAW PROJECT ON THE PENNSYLVANIA PUBLIC UTILITY COMMISSION'S PROPOSED COMPREHENSIVE RULES OF PRACTICE AND PROCEDURE

Docket No. L-840097

Otto F. Hofmann, Esquire
PENNSYLVANIA UTILITY LAW PROJECT
213-A North Front Street
Harrisburg, PA 17101

(717) 232-0581

June 27, 1984

I. Introduction

These comments are filed on behalf of Branch 39 of the Utility Consumers Union of CEPA (CEPA), the Pennsylvania Legal Services attorneys and paralegal who practice before the Commission, and the individual and group clients which they represent.

Initially, we would like to commend the Commission on the efforts made to develop the Rules of Practice and Procedure. For many years Commission practice has been governed by a "hodgepodge" of statutes and regulations which were frequently confusing, often incomplete and generally inadequate. For this reason, the efforts of the Procedure Committee, chaired by Mr. Delaney and the Commission staff, should be commended.

We are concerned, however, that some of the proposed regulations, while well intended, may adversely impact certain intervenors and signficantly prejudice their ability to participate in Commission formal proceedings.

II. Subchapter C. REPRESENTATION BEFORE THE COMMISSION

Sections 1.21-1.23 regulate representation before the Commission in formal proceedings. They permit an individual to appear on their own behalf in a proceeding but apparently restrict representation in adversarial proceedings to attorneys. We belive this provision is unduly restrictive and inconsistent

with current practice before both the Commission and other administrative agencies. We would propose that the Commission procedures permit representation in formal adversarial proceedings by qualified paralegal assistants under the supervision of an attorney. In addition, we would also request that individuals be permitted to select a representative who may be a non-attorney (the old lady who wants her son to help with her case) in formal proceedings involving billing disputes and matters governed by 52 Pa. Code, Chapter 56.[1] Many paralegals have developed significant expertise in their areas of specialization and are able to effectively represent individuals at administrative hearings, particularly in Chapter 56 cases.

---

[1]Section 1.21 refers to 52 Pa. Code, Chapter 56 implying an exception to the general rule regarding attorney representation. Section 56.163 does not permit non-attorney representation, however, it is limited to informal complaint procedures.

III. Subchapter D. DISCOVERY

We are very concerned about the proposed discovery rules, particularly the unreasonably long time periods between discovery requests, objections and answers. In most litigation in front of the Commission, the utility is in sole possession of virtually all of the data which is relevant and the proposed regulations place an unreasonable burden upon intervenors, greatly limiting their ability to participate fully. It appears that the discovery procedures are modeled upon the discovery rules used in civil proceedings in the Court of Common Pleas. Reliance upon civil procedure discovery rules for Commission practices is misplaced for several reasons:

1. There is no statutory time limit placed on civil litigation.

2. Parties in civil litigation are generally not in the same position as rate case litigants where one party, the utility, has the vast majority of relevant information.

3. Civil Practice fact pleading requirements are, in part, intended to minimize discovery requests.

For these reasons we think the proposed discovery rules should be substantially rewritten.

We strongly support the proposed changes in the discovery rules which have been suggested by the Office of

Consumer Advocate (OCA). OCA's recommendations, in our view, strike a reasonable balance between the interests of all parties.

In addition to the recommendations made by OCA we would specifically recommend the following:

1. Section 5.321 be amended to permit oral, on the record, data requests.

2. Section 5.323 be amended to exempt from discovery draft versions of expert witness testimony. To permit such discovery would unreasonably prejudice an intervenor's position, particularly since this type of discovery is not available to intervenors. In major rate cases most utility testimony is included in the rate filing thereby foreclosing any possibility of obtaining drafts.

3. Section 5.342(c) should be amended to require that objections to interrogatories be raised within five business days after receipt. There is no reason why objections cannot be raised within this time frame and to extend the objection period to twenty days is unreasonable, and unduly prejudicial to intervenors, particularly in light of the statutory time constraints in rate cases.

4. Section 5.342(c) should be amended to require that responses be made within ten business days of receipt. This is current Commission practice and appears to have

worked well in the past. To extend this time frame would be unfair to intervenors for reasons discussed previously.[2]

5. Section 5.361(a)(5) should be deleted. This proposed regulation would unfairly discriminate against intervenors in rate cases who participate to a limited extent generally with respect to a single issue or a limited number of issues. Such a proposed regulation is not only unfair and unreasonable, but also may violate due process. Any abuse of the discovery process can be adequately addressed through sanctions.

We would like to emphasize our support for flexibility in the discovery regulations permitting parties, by agreement, or the presiding officer by order, to modify the rules as needed. It is appropriate and necessary to insist that all parties participate in good faith and minimize controversy.

---

[2]We have no objection to the existing language in the regulations permitting an extension of these time frames by agreement of counsel or direction of the presiding officer. Flexibility must be maintained to permit additional time if the interrogatories are voluminous or a party needs, for good reason, additional time. Again this procedure has been used in the past on an informal basis and we see no reason why it cannot be continued.

IV. Proposed In Forma Pauperis Rules

The proposed Commission regulations do not provide for In Forma Pauperis procedures. We would request that the Commission adopt regulations permitting any party to have duplication or other fees waived upon a showing of an inability to pay costs. The Commission can design a simple affidavit which could be reviewed by and acted upon by the presiding officer. (See, generally, Pa.R.A.P. 551-561, Pa.R.C.P. 240)

V. Miscellaneous Comments

Sections 1.33, Incorporation by Reference and 5.408, Official Notice, raise issues of particular concern to intervenors. Section 1.33 permits any party to incorporate, by reference, certain documents on file with the Commission. While we have no objection to this provision in theory, we are concerned that intervenors may not have reasonable access to these documents. Although they are available for inspection in Harrisburg, they are effectively unavailable to many intervenors. Harrisburg may be an unreasonable distance from an intervenor's home or place of business. In addition, the current Commission charge for copying is $.75 per page, making duplication of the documents a financial burden. We have similar concerns with respect to the provisions in § 5.408 which permit the Commission to take official notice of certain documents or other evidence. These documents or other evidence are, again, essentially unavailable to many intervenors.

In order to assist intervenors we would recommend that the Commission amend the regulations to require that any party proposing to incorporate a document by reference under § 1.33 or ask the Commission to take official notice of evidence under § 5.408 be required:

1. To fully and completely describe and summarize the document.

2. To state concisely and completely the relevance of the document.

3. Provide copies free of charge to any party upon request.

Thank you for the opportunity to comment.

Respectfully submitted,

6/26/84
Date

Otto F. Hofmann, Esquire

ORIGINAL

THE PEOPLES NATURAL GAS COMPANY
TWO GATEWAY CENTER
PITTSBURGH, PA 15222 (412) 471-5100

ROBERT M. JACOB
Secretary and General Counsel

WILLIAM P. BOSWELL
Assistant Secretary and General Attorney

June 26, 1984

Mr. Jerry Rich, Secretary
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17120

Re: Comments of The Peoples Natural Gas Company to Docket L-840097, Comprehensive Rules of Practice and Procedure

Dear Sir:

The Peoples Natural Gas Company supports the proposed amendments to 52 Pa. Code Chapters 1, 3, and 5 to establish comprehensive rules of practice and procedure before the Pennsylvania Public Utility Commission.

Sincerely yours,

WPBoswell

WPB/mg

Enclosure

ORIGINAL

EXPRESS MAIL

EDWARD S. STITELER
Counsel

DREW J. KOVALAK
Attorney

JOHN L. MUNSCH
Attorney

DEBORAH M. DePAUL
Attorney

West Penn Power Company
Part of the Allegheny Power System
Cabin Hill, Greensburg, PA 15601 (412) 837-3000

June 26, 1984

Mr. Jerry Rich, Secretary
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17120

Re: L-840097 - Comments of West Penn Power Company to Proposed Rulemaking to Establish Comprehensive Rules of Practice and Procedure

Dear Mr. Rich:

Enclosed are an original and eight copies of comments concerning the above-captioned rulemaking submitted on behalf of West Penn Power Company.

West Penn Power Company expresses its hope that its comments will be helpful in further clarification of the proposed regulations.

Sincerely,

John L. Munsch

JLM:rjk
Enclosures

cc: James P. Murphy, Esquire
Pa. Independent Regulatory Review Commission

Vincent Butler, President
Pa. Electric Association

COMMENTS OF WEST PENN POWER COMPANY TO PROPOSED RULEMAKING TO ESTABLISH COMPREHENSIVE RULES OF PRACTICE AND PROCEDURE; L-840097

West Penn Power Company (West Penn) requests that the following comments be entered into the record of this rulemaking proceeding.

General Comments

West Penn is favorable to the rules of procedure as proposed and commends the Commission for this effort. With respect to the proposed discovery procedures, West Penn does not foresee significant problems with using the Pennsylvania Rules of Civil Procedure as the basis for the Commission's discovery procedures. Of course, the administrative law judge in each proceeding would have a large degree of discretion to override the rules, and this would provide the flexibility necessary in rate matters. In view of the fact that the discovery rules were disapproved by the Independent Regulatory Review Commission, however, West Penn will not make specific comments about the discovery procedures.

Specific Comments

1. Section 1.2 - "Substantial" should be "substantive."

2. Section 1.8 - The definition of "Date of Service" should refer to Section 1.56 (Date of Service), not to Section 1.55 (Service on Attorneys).

The definition of "Proof of Service" should refer to Section 1.57 (Proof of Service), not to Section 1.56.

3. Section 1.11 - The exception pertaining to exceptions to ALJ decisions and for appeals to the Commission should be removed. Practice with respect to ALJ decisions and Commission appeals should conform to other proceedings with respect to "date of filing." This exception serves no apparent benefit and could be a procedural pitfall.

4. Section 1.13 - On the date that the Commission "enters" an order, the Commission should be required to mail a copy of the order to the parties. This would help to prevent situations where a party is asked by the press to comment about an order which it has not yet received.

5. Section 1.27 - The disbarment provisions, especially as they relate to the prohibition of transacting any business with the Commission, may be overly broad and unconstitutional. The Pennsylvania Supreme Court has sole jurisdiction over attorneys' conduct and discipline.

6. Section 1.36 - The verification of facts by affidavit signed by an officer of the corporation is unnecessary since §1.35 (b) and (c) provide that signing by the corporation's attorney has the same effect as verification by affidavit.

7. Section 1.59 (b)(1) - The requirement that two copies of briefs must be filed on other parties is unnecessary. The proposed requirement creates additional paperwork which will rarely be useful.

8. Section 1.61 (a) - This is a broad and vague requirement which West Penn strongly recommends be removed. Most documents filed with a federal or state court contain matters which "may relate" to matters over which the

Commission "may" have jurisdiction. For example, any lawsuit against a utility involving personal or property damages could be construed to relate to adequacy of utility service and facilities. This requirement, if retained at all, needs precise specification as to what documents must be filed with the Commission.

9. Section 1.61 (b) - This probably violates the provisions of the Federal Bankruptcy Act. The Commission may not be authorized to approve or reject a bankruptcy plan.

10. Section 5.21 (a) - This subsection should be changed to conform with Section 701 of the Public Utility Code which permits only those persons "having an interest in the subject matter" to file a complaint. This will help to prevent confusion about whether or not the traditional rules of standing are applicable.

11. Section 5.61 (a) - This section is a great improvement over 1 Pa. Code §35.35 because it provides that the applicable time period runs from the date of receipt of service.

This concludes the comments of West Penn Power Company to the Commission's proposed Rules of Practice and Procedure.

ORIGINAL

The Bell Telephone Company of Pennsylvania

William L. Leonard
Vice President and General Counsel

One Parkway
Philadelphia, Pennsylvania 19102
Phone (215) 466-5457

June 27, 1984

RECEIVED

JUN 27 1984

SECRETARY'S OFFICE
Public Utility Commission

Jerry Rich, Secretary
Pennsylvania Public Utility Commission
Post Office Box 3265
Harrisburg, Pennsylvania 17120

Comprehensive Rules of Practice and Procedure
[52 Pa. Code Chapters 1, 3, and 5], L-840097.

Dear Mr. Rich:

Enclosed herewith for filing with the Commission are the original and eight true copies of Comments of The Bell Telephone Company of Pennsylvania with respect to the above matter.

Very truly yours,

William L. Leonard

Enclosures

cc: Mr. Dan Delaney,
Deputy Chief Counsel

DOCUMENT FOLDER

Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION

COMPREHENSIVE RULES OF PRACTICE AND PROCEDURE	:	L-840097
[52 Pa. Code Chapters 1, 3, and 5]	:	

COMMENTS OF
THE BELL TELEPHONE COMPANY OF PENNSYLVANIA

WILLIAM L. LEONARD
DONALD F. CLARKE
WILLIAM M. POSNER

Attorneys for:

THE BELL TELEPHONE COMPANY
OF PENNSYLVANIA

One Parkway
Philadelphia, PA 19102

On February 3, 1984, the Pennsylvania Public Utility Commission ("PUC") adopted a proposal to establish comprehensive rules of practice and procedure through the amendment of Chapters 1, 3, and 5 of Title 52 of the Pennsylvania Code (52 Pa. Code Chapters 1, 3, and 5).

The PUC's proposed rules were published, as required by law, in the Pennsylvania Bulletin, Vol. 14, No. 17, April 28, 1984. Interested persons were invited to submit comments within 60 days.

As a telephone public utility under the jurisdiction of the PUC, The Bell Telephone Company of Pennsylvania ("Bell") is, at virtually any time, an active party in numerous formal proceedings before the PUC. As such, Bell has a vital interest in the proposed rules of practice and procedure under current consideration.

Bell fully supports the overall objective of the proposed revision of the rules -- to establish a single, unified set of rules governing proceedings before the PUC. It is an undeniable fact that cases before the PUC have, in recent years, become increasingly complex. Moreover, given the complexity of major rate cases, they proceed from initial filing to final decision in relatively short time periods. The interests of all parties will be served well by the promulgation of rules which streamline the process as much as possible.

Bell is cognizant of the objections expressed by the Office of Consumer Advocate ("OCA") prior to the publication of the proposed rules. Primarily, the OCA's objections are directed

to those portions of the proposed rules governing the discovery process in rate cases -- i.e., Subchapter D. of Chapter 5. These comments will address those objections hereinafter.

However, Bell suggests that the controversy surrounding the discovery rules should not delay the adoption of those rules as to which there is no disagreement among the interested parties. Thus, the PUC could properly adopt proposed Chapters 1 and 3 and Chapter 5 (with the exception of Subchapter D.), while maintaining an open docket to further consider the adoption of discovery rules.

Also, Bell recommends that the rule relating to the use of a future test year in rate cases (i.e., §5.244) be revised so as to provide for a truly future test year.

With the foregoing as background, these comments will now turn to the specific proposals as published in the Pennsylvania Bulletin.

A. 52 Pa. Code, Chapter 1. Special Rules of Administrative Practice and Procedure.

To a large extent, the proposed rules set forth at Chapter 1. of 52 Pa. Code would recodify existing rules. Bell requests that the PUC consider the revisions to the proposed rules in Chapter 1. set forth in Appendix "A" hereto, some of which are dealt with more fully immediately below.

1. At §1.11, the proposed rules address a very real problem faced by parties before the PUC with respect to the timely filing of pleadings. Under current rules, responsive pleadings generally must be filed within 20 days of the

preceding pleading or order. Frequently, however, pleadings or orders are not received until five days or more after they are issued. Thus, it is not uncommon for parties to face time periods of 15 days or less within which to respond to prior pleadings or orders.

Moreover, current rules provide that a filing is not effected until the document has been actually received at the PUC's Harrisburg office. The additional option of meeting the timely filing requirement through the mailing process will undoubtedly be welcome by parties to PUC proceedings. The limitation of this option to pleadings other than exceptions and appeals is unwarranted. While §332(h) of the Public Utility Code provides that a party "may file exceptions . . . within 15 days" and "may appeal . . . within 15 days", it does not define when such "filing" or "appeal" may be deemed to have been effected. Therefore, the PUC is free to provide such definition, by the proposed rule, and there is no reason to distinguish exceptions and appeals from the other filings covered by this proposed rule.

Indeed, the Pennsylvania Rules of Appellate Procedure adopt the mailing approach for the filing of appeals and other pleadings in the Appellate Courts. Bell, therefore, suggests that §1.11 be amended to permit timely filing by mail for all pleadings filed with the PUC.

In the event that the foregoing suggestion is not adopted, Bell suggests that the PUC adopt an alternative rule which would permit filing to be accomplished not only at Harrisburg, but, also, at other offices maintained by the PUC (e.g., Philadelphia, Pittsburgh or Scranton).

2. At §1.15, the proposed rules set forth the accepted procedure for obtaining continuances of hearings and extensions of time for filing documents. The proposed rules require that such requests be in writing, or by oral motion during the course of a hearing. Bell suggests that this requirement is too inflexible to meet the needs of those who practice before the PUC. Frequently, continuances or extensions of time are matters agreed to between counsel. In such cases, the rules should allow for an oral request to the Presiding Officer, subsequently confirmed by a letter from counsel.

3. With respect to §1.21 Bell recommends addition of the phrase "by an attorney" to make it clear that parties other than individuals must be represented in an adversary proceeding by an attorney. In a recent hearing before an ALJ, the officer of a corporation argued that since §1.21 referred to §1.22, and §1.22 says "a person may be represented . . . by an attorney" (emphasis added), representation by an attorney is optional with a corporation, which, legally, is a "person".

4. While §1.35 allows an attorney for a party to sign and subscribe a pleading, submittal or other document, §1.36 requires that in the case of a corporate party, verification of a pleading, submittal or other document be made by an officer of the corporation. Bell suggests that this inconsistency be corrected by amending §1.36 to permit an attorney for a corporate party to verify a pleading, submittal or other document. This would permit greater efficiency in meeting the timely filing requirements of the rules.

5. §1.59 requires, inter alia, that two copies of each filed Brief be served on each participant to a proceeding. It has been the experience of Bell that where Briefs are extensive (usually in rate cases), the service of multiple copies of Briefs has been a burdensome and costly requirement. In today's environment, the parties to proceedings before the PUC undoubtedly possess the ability to reproduce within their own organizations such additional copies of filed Briefs as they may need. We, therefore, suggest that only one copy of a Brief be required to be served upon each participant to a proceeding.

6. At Subchapter H (i.e., §§1.71 through 1.77), the proposed rules establish the form of document retention by the PUC and the procedures by which the public may gain access to documents contained within PUC files. While Bell has no objections to the procedures set forth, we wish to emphasize the importance of non-disclosure of documents provided to the PUC, under Protective Orders or non-disclosure agreements. Frequently, public utilities submit proprietary information to the PUC during the course of rate cases. This information is intended to assist the PUC in its decision making process. Utilities, however

have the right to expect that such information will not be disseminated to the public at large. We encourage the PUC to be sensitive to these concerns, and to take the necessary internal steps to ensure that the public access covered under Subchapter H not result in the inadvertent disclosure of proprietary information to the public.

B. 52 Pa. Code, Chapter 3. Special Provisions.

Bell does not recommend any revision of the proposed rules in Chapter 3.

C. 52 Pa. Code, Chapter 5. Formal Proceedings.

Chapter 5 sets forth the rules governing practice in formal proceedings before the PUC, including general rate increase cases, as well as complaint proceedings involving existing rates and service matters. Formal proceedings also involve matters originally commenced in the Courts of Common Pleas and thereafter referred to the PUC under the doctrine of primary jurisdiction.

The proceedings covered by Chapter 5 tend to be adversarial in nature. Accordingly, the rules must satisfy the due process rights of the parties, while, at the same time, fostering the expeditious and efficient management of the case load. Bell requests that the PUC consider the revisions to the proposed rules in Chapter 5. set forth in Appendix "A" hereto, some of which are dealt with more fully immediately below.

1. At §5.22, the proposed rules substantially modify the existing rules governing the content of formal complaints. Under existing rules, complainants

are prevented from combining issues relating to rates and adequacy of service in the same complaint. Bell believes that this prohibition was well-founded, and that the proposed rules (enabling such joinder) will result in an increasing complexity of cases tried before the PUC's ALJs. Bell, therefore, suggests that proposed §5.22 be amended to reinstate the earlier restriction on joinder of issues in the same complaint.

2. §5.24 sets forth the rules governing the satisfaction of formal complaints. It is evident that the public interest is served where needless litigation can be avoided through the satisfaction of formal complaints prior to time-consuming and costly hearings. The proposed rules should encourage the settlement process. For ease of administration, Bell suggests that this rule be slightly modified to allow an alternative method of advising the PUC that a complaint has been satisfied. As an alternative to the filing of a statement signed by the complainant, the respondent, through its counsel, should be permitted to certify to the PUC that the complaint has been satisfied, and that the complainant has acknowledged satisfaction of the complaint to the respondent, and that a copy of the certification has been sent to the complainant.

   The foregoing suggestion is submitted to cover the situation in which the complainant has acknowledged satisfaction, but does not wish to be burdened with the process of advising the PUC of that fact.

3. §5.101(b) requires that preliminary motions be filed with the answer to a formal complaint. Undoubtedly, the intent of this rule is to expedite the processing of formal complaints. Frequently, however, preliminary motions, by their very nature, relate to the sufficiency of the complaint. In essence, a respondent may file preliminary motions because of its inability to answer the complaint as filed. In such cases, it makes no sense to require a respondent to file an answer. Indeed, it would be mutually inconsistent for a respondent to allege inability to answer at the same time that it, in fact, answers the complaint.

   Bell suggests that provision be made for the prompt disposition of preliminary motions by the assigned ALJ. Where the motion is denied, the respondent should be allowed an additional period of time to thereafter file a responsive answer. The

rule should, therefore, provide for the filing of preliminary motions in lieu of an answer.

D. The Discovery Rules.

The proposed rules governing discovery in formal proceedings are set forth at 52 Pa. Code, Chapter 5, Subchapter D, §§5.321 through 5.373. These rules are intended to replace the existing rules set forth at 1 Pa. Code, §§35.145 through 35.152.

The proposed discovery rules have generated comment from the OCA to the Independent Regulatory Review Commission (IRRC). Indeed, those comments appear to have played a substantial role in IRRC's disapproval of the proposed rules.

1. Bell believes that the objections interposed by the OCA should not serve to delay the adoption of the other proposed rules. At the very least, the proposed rules set forth at 52 Pa. Code, Chapters 1 and 3 and all of Chapter 5. except Subchapter D. should become effective, while the PUC and interested parties work out their disagreements with respect to the discovery rules.

2. As to the OCA's objections to the proposed discovery rules, Bell suggests that a viable solution would be the adoption for general rate cases of the discovery rules recommended in 1982 by the Rate Case Reform Committee. Those proposed rules (attached hereto as Appendix "B") appear to have met with the approval of all parties, including the OCA.

3. Whatever discovery rules are ultimately adopted by the PUC, they should contain a provision similar to that set forth at Section 5.321(a), which authorizes the presiding officer in a rate case to vary the discovery rules "as justice requires". Rate cases invariably include an early prehearing conference during which discovery issues are discussed among the parties to the proceeding. It is at that time that the presiding officer can adopt discovery

> rules tailored to the needs of the particular rate case then pending. Such procedure should go a long way in resolving the expressed concerns of the OCA that the proposed discovery rules are too inflexible to accommodate the needs of a general rate case.

E. §5.244. Supporting data for future test year.

Under the proposed future test year rule (which is identical to the existing rule), utilities are required, in meeting their burden of proof, to utilize data for an historic test year. In addition, a utility may utilize a "future" test year. Unfortunately, the existing (and proposed) rule requires that the "future" test year commence on the day following an experienced 12-month period. Therefore, the "future" test year "future" data becomes stale by the time the case is concluded and the approved rates go into effect. Thus, there is a mis-match between the utility's actual costs and the new rates.

One of the frequent complaints of utility customers is the perceived frequency of rate case filings with the PUC. One reason for the frequency of such filings is the current inability of utilities to use a fully projected test year. In its Report to the PUC, the Rate Case Reform Committee stated:

> "The majority of the Committee (OCA dissenting) believes that the Commission's present practice of employing the modified future test year procedure should be reformed. By employing stale data, which does not coincide with the period for which rates are set ('rating period'), chronic attrition will continue to erode the net operating income of utilities. Further, the present procedure forces the utilities into a merry-go-round of repeated rate requests in a futile attempt to mitigate the effect of attrition, straining the Commission's resources. The solution, and the recommendation of the

> Committee, is that the Commission permit the usage of a fully projected test year (FPTY) which coincides with the rating period. The FPTY procedure would be grafted onto the existing FTY Practice." (Rate Case Reform Committee's Final Recommendations to PUC, November 1982, p. 9.)

The use of a fully projected test year will greatly mitigate the problem of stale data. A basic premise of ratemaking is that the financial data used to determine the revenue requirements should be as representative of the first year of rates as possible. Thus, data that does not represent the financial position of the utility during the first year of rates is clearly stale.

In its dissent to the Rate Case Reform Committee's Report to the PUC, the OCA offered the view that the use of a fully projected test year would substitute a "no data" approach for a stale data one. This position is incorrect. Budget data by businesses and governmental entities is well recognized as a sound basis for determining their revenue requirements. Moreover, the accuracy of a company's budgeting process can be tested retrospectively. This was recognized by the Rate Case Reform Committee, as follows:

> "The Public Utility Code further provides, as a significant safeguard in the use of a forward looking test year, that the rates so set can be retroactively adjusted if actual data later shows the budgeted figures to be inaccurate. As the Kury/Ewing Committee stated:
>
> > 'We would add one important measure: Utilities now have the ability to forecast costs for the future with reasonable accuracy. But, as a safeguard, we feel that the utility in the year after the final decision should be required to demonstrate that its forecast was correct, and appropriate adjustments (up or down) should be made if the reliance upon predictions were faulty.'

> "(Id. at 55). The Rate Case Reform Committee recommends that this safeguard be employed by this Commission under the FPTY regulations."

Thus, the Rate Case Reform Committee's recommendation requires that the company file fully projected test year actual data as it becomes available. This data will provide all parties, including the OCA, with a test of the accuracy of a company's data in future cases.

It should be noted that the New York Public Service Commission allows fully projected test year data to be used in the ratemaking process. In a "Statement of Policy on Test Periods in Major Rate Proceedings" (November 23, 1977), the New York Public Service Commission adopted the fully projected test year concept, stating (at pages 4-5):

> "To avoid any further waste of valuable rate case time on this issue, we conclude that we must set a clear, specific policy on test years, designed to enhance our ability to set rates properly for the future. And we find that our deliberations will be served best by a rate case filing consisting of: (1) operating results, with normalizing adjustments for a twelve-month period expiring at the end of a calendar quarter no earlier in time than 150 days before the date of filing and (2) the projected operating results for the new 12-month rate period."

Subsequently, in Re New York Telephone Company, 32 PUR4th 353 (N.Y. Pub. Serv. Comm'n., 1979), the New York Commission stated:

> The purpose of our policy is to align the rates we set prospectively as closely as possible with the actual costs incurred in providing the utility service. We believe that use of a forecase test year is simply more likely to achieve that purpose than such alternatives as fully historic test years, supplemented by attrition and erosion allowances, or some combination of historic, actual, and forecast months of revenue and cost experience. The point is that no matter what basis we use to set rates, we are setting them to

> cover costs in a future period and we have an obligation to allow the company to earn revenues that cover, as accurately as possible, prudently incurred costs of doing business.

For the foregoing reasons, Bell suggests that the PUC consider the incorporation of a fully projected test year approach in the rules, as finally adopted. The PUC has -- in the Rate Case Reform Committee's report -- an adequate basis for proposing the adoption of this rule. But if further comments are deemed desirable, they, of course, may be elicited in this or a separate proceeding. Appendix "C" hereto contains the Rate Case Reform Committee's recommended rule.

CONCLUSION

Bell's comments with respect to the proposed rules can be summarized as follows:

1. The unification of the rules of practice and procedure is in the public interest, and will benefit all parties in proceedings before the PUC.

2. The proposed rules contained at 52 Pa. Code, Chapters 1 and 3 and most of Chapter 5 meet the objectives of the project, and are in the public interest. Bell encourages their adoption, as modified as set forth herein.

3. As proposed, 52 Pa. Code, Chapters 1 and 3 and most of Chapter 5 should be adopted, irrespective of whether objections associated with 52 Pa. Code, Chapter 5, Subchapter D. and §5.244 can be resolved quickly.

4. The objections of the OCA with respect to 52 Pa. Code, Chapter 5, Subchapter D. can be resolved through the adoption of the discovery rules recommended by the Rate Case Reform Committee.

5. Bell recommends that the PUC incorporate a fully projected test year approach in the rules, as recommended by the Rate Case Reform Committee.

Respectfully submitted,

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DATED: June 27, 1984

Revisions of the Proposed Rules
Recommended by
The Bell Telephone Company of Pennsylvania ("Bell")

Below are the proposed rules which Bell recommends be revised, showing recommended additions by underscoring and deletions by brackets, followed by reasons for the recommended revision.

§1.11. Date of filing.

(a) Pleadings, submittals, or other documents -- exceptions to the decision of an administrative law judge, and appeals to the Commission under section 332(h) of the act (relating to procedures in general) -- required or permitted to be filed under this title or by statute will be deemed filed on the date actually received in the office of the Commission or on the date deposited in the United States mail as shown on a United States Postal Service Form 3817 certificate of mailing attached to the cover of the original document. [Exceptions to the decision of an administrative law judge and appeals to the Commission under section 332(h) of the act, must be received for filing at the office of the Secretary within the time limits prescribed by statute for the filing.]

Comment: The exception in the proposed rule for exceptions to the decision of an administrative law judge and appeals to the Commission is proposed, we suspect, because of a mistaken belief that §332(h) of the Public Utility Code requires it. While §332(h) provides that a party "may file exceptions . . . within 15 days" and "may appeal . . . within 15 days", it does not define when such "filing" or "appeal" may be deemed to have been effected. Therefore, the PUC is free to provide such definition, by the proposed rule, and there is no reason to distinguish such filings from the other filings covered by this rule.

§1.21. Appearance in person.

(a) An individual may appear in his own behalf in a proceeding. In nonadversarial proceedings a member of a partnership may represent the partnership, a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association, and an officer or employe of another agency or of a political subdivision may represent the agency or political subdivision in presenting any submittal to the Commission subject to this chapter and Chapter 5. All participants, except individuals appearing in their own behalf and as otherwise provided in Chapter 56 (relating to standards and billing practices for residential utility service), shall be represented in adversary proceedings only by an attorney, qualified under §1.22 (relating to appearance by attorney).

Comment: The recommended revision (i.e., addition of the phrase "by an attorney, qualified"*) is intended to make it clear that parties other than individuals must be represented in an adversary proceeding by an attorney. In a recent hearing before an ALJ, the officer of a corporation argued that since §1.21 referred to §1.22, and §1.22 says "a person may be represented . . . by an attorney" (emphasis added), representation by an attorney is optional with a corporation, which, legally, is a "person".

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* The underscored words "bona fide" are in this rule as proposed by the PUC.

§1.59. Number of copies to be served.

(a) One copy of each document shall be served on each participant in a proceeding and the presiding officer if one has been designated.

[(b) The following number of copies of documents shall be served on each other participant in a proceeding:

(1) Briefs - two copies.
(2) All other documents - one copy.]

[(c)] (b) Subsection[s] (a) [and (b)] supersedes 1 Pa. Code §33.37 (relating to number of copies).

Comment: The change suggested is to obviate the necessity of serving two copies of briefs on parties to a proceeding, as a matter of economy. Most participants do not need more than one copy of a brief. Those few who do can readily reproduce it or obtain another copy from the party submitting it.

§1.72. Formal case files.

(a) Format. Format for filing records in formal cases shall conform with the following:

(1) The files for formal cases initiated prior to May 15, 1977, shall contain a records, correspondence, [and] testimony, and proprietary information folder.

(2) The files for formal cases initiated on or after May 15, 1977, shall contain a document, report, [and] testimony, and proprietary information folder.

Add a new paragraph to §1.72(b)(1) and to §1.72(b)(2) as follows:

(iv) Proprietary information folder. This folder shall contain information filed in the case which is subject to a protective order.

Add a new paragraph to §1.72(c) as follows:

(5) The material contained in the proprietary information folder shall not be available for public inspection except as described in §1.74 of this title.

§1.74. Disclosure of other documents.

For documents not made public under §§1.71-1.77 (relating to public access to Commission records) or by statute, access may be had only upon petition of the requestor made to and granted by the Commission. Notice of, and an opportunity to respond to, a request for access to information in the proprietary information folder must be given to the parties involved before the Commission may consider such a request.

Comment: There is no specific provision with respect to proprietary information in the proposed rules pertaining to public access to Commission records. The proposed rules would permit proprietary information to be commingled in files with non-proprietary information. To insure that protective orders of the Commission serve their intended purpose, we recommend the revisions shown above to §§1.72 and 1.74.

§5.22. Contents of formal complaint.

(a) Formal complaints shall set forth all of the following:

(1) The name and address of the complainant and the attorney of the complainant.

(2) The name and address of the respondent complained against and the nature and character of its business.

(3) The interest of the complainant in the subject matter.

(4) The act or thing done or omitted to be done or about to be done or omitted to be done by the respondent in violation, or claimed violation [or] of statutes which the Commission has jurisdiction to administer, or of any regulation or order of the Commission.

(5) A clear statement of the relief sought.

(b) Complaints against rates and service shall not be included in the same document.

(c) [(b)] Complaints by a public utility or other person or corporation subject to the act against any regulation or order of the Commission, which the complainant is or has been required to observe or carry into effect, shall be substantially in the form prescribed by subsection (a) and reference shall be made to the particular regulation or order or part thereof complained against and shall quote the pertinent portions thereof.

(d) [(c) Subsections (a) and (b)] This section supersedes 1 Pa. Code § 35.10 (relating to form and content of formal complaints).

Comment: See body of Bell's Comments at pages 5-6 for the reasons for Bell's above recommended revisions.

§5.24. Satisfaction of formal complaints.

(a) If the respondent satisfies a formal complaint either before or after a hearing, a statement to that effect signed by the complainant shall be filed with the Commission setting forth that the complaint has been satisfied and that the complaint is withdrawn. Except as requested by the parties, the presiding officer shall not be required to render a decision upon the satisfaction of a complaint.

(b) In lieu of the statement set forth in (a), the respondent may certify to the Commission that it has satisfied the complaint and that the complainant has acknowledged satisfaction to the respondent. In such case, the respondent shall serve a copy of its certification upon the complainant.

(c) [(b)] Subsections (a) and (b) supersede[s] 1 Pa. Code § 35.41 (relating to satisfaction of complaints).

Comment: See body of Bell's Comments at page 6 for the reasons for Bell's above recommended revisions.

§5.61. Answers to complaints and petitions.

(a) Answers to complaints and petitions shall be filed with the Commission within 20 days after the date of receipt of service, unless a different time is prescribed by law or by the Commission.

(b) The answer to a complaint shall set forth, in paragraphs numbered to correspond with the complaint, the facts upon which the respondent relies. Answers shall be in writing, and so drawn as fully and completely to advise the parties and the Commission as to the nature of the defense. They shall admit or deny specifically and in detail each material allegation of the pleading answered, and state clearly and concisely the facts and matters of law relied upon.

(c) A respondent failing to file an answer within the applicable period shall be deemed in default, and relevant [basic] and material facts stated in the complaint or petition may be deemed admitted.

(d) Subsections (a)-(c) supersede 1 Pa. Code §35.35 (relating to answers to complaints and petitions).

Comment: Bell recommends substitution of the phrase "material facts" for the phrase "basic facts", in subsection (c), because "basic facts" is vague and not a legal term of art with definitive meaning whereas "material facts" is a legal term of art with definitive meaning.

§5.101. Preliminary motions.

(a) Preliminary motions are available to participants. They shall state specifically the grounds relied upon, the standing of the party, and they shall be limited to the following:

(1) A motion questioning the jurisdiction of the Commission.

(2) A motion to strike off a pleading that is insufficient as to form.

(3) A motion to dismiss a pleading that is insufficient as to substance, that does not indicate on its face the standing of the party to participate in the proceeding, or the failure to join an indispensable party.

(4) A motion for a more specific pleading.

(b) Preliminary motions shall be filed [along with an answer,] within the time period prescribed by § 5.61 (relating to answers to complaints and petitions)[, except additional time may be allowed to file an answer where the motion goes to a request for a more specific pleading]. All preliminary motions shall be raised at the same time. Preliminary motions shall be ruled upon by an Administrative Law Judge within 15 days of receipt by the Commission.

(c) If a preliminary motion to strike is granted, the complaining participant shall have the right to file an amended pleading within 10 days.

(d) Where the preliminary motions of a respondent are denied, the respondent shall have the right to file an answer within 10 days.

(e) [(d)] Subsections (a)-[(c)](d) supersede 1 Pa. Code §§ 35.54 (relating to motions as to complaint) and 35.55 (relating to motions as to answer).

Comment: See body of Bell's Comments at pages 6-7 for the reasons for Bell's above recommended revisions.

X. DISCOVERY

A. Background

The PUC presently has no rules affecting discovery and establishment of rules in a rate case must await the assignment of an ALJ and a ruling by him, usually after the prehearing conference and just days before actual hearings.

The nature and complexity of rate proceedings inherently make discovery an extensive process. There is a need for coherent and realistic guidelines to make discovery as effective as possible without subjecting the process to delay or abuse. Discovery rules must recognize the specialized nature of ratemaking procedures and be designed to ensure that the objectives of the Commission are met.

The initiation of discovery conferences, the encouragement of informal discovery, stringent time limitations on responses to interrogatories, and use of depositions all combine to make the process less burdensome and more useful to all parties. The availability and use of discovery sanctions serves as a deterrent to discovery abuse and increases good faith compliance with established discovery guidelines. A meaningful discovery process results in more efficient, effective and knowledgeable ratemaking.

B. Description of Proposed Changes

The Committee recommends that the Commission establish, by formal regulation, standard rules of discovery as set forth below.

C. Proposed Regulations

Additions at 52 Pa. Code

DISCOVERY IN RATE CASES

§3.171. Informal Discovery

The presiding officer shall encourage the use of informal discovery conferences between the company and the parties wherever possible.

§3.172. Interrogatories

Any party may file and serve interrogatories, including requests for admissions and requests for documents, upon any other party, including the Commission's Prosecutorial Staff. The presiding officer may establish a reasonable date after which interrogatories directed to the information required to be furnished at the time of filing may not be served on the company, and time limitations for filing interrogatories on other parties.

§3.173. Responses to Interrogarories

Interrogatory responses shall be served on the requesting party no later than fifteen (15) days following receipt of the interrogatories by the party upon whom the interrogatories were served,

unless otherwise ordered by the Commission or presiding officer upon a showing that the time limits are inappropriate for the requested information.

§3.174. Objections to Interrogatories

Objections to interrogatories must be filed with the presiding officer by the party upon whom the interrogatories were served no later than five (5) days from receipt of the interrogatories unless otherwise directed by the presiding officer. The party which caused the interrogatory to be served may respond to the objection by filing a motion to compel an answer. No other written pleadings will be permitted. The presiding officer shall rule upon the objections and motion to compel within five (5) days after receipt of the motion to compel. Where the presiding officer issues an order compelling the answer to the discovery request not withstanding the objection, the objecting party shall respond to the interrogatory within the time limits directed by the presiding officer.

§3.175. Failure to comply and other sanctions

Upon failure of a party to the proceeding to comply with the rules of discovery or with an order by the presiding officer to compel an answer to a discovery request, the presiding officer may impose sanctions on the offending party. The sanctions include, but are not limited to:

(1) Establishing certain facts as true for purposes of the action;

(2) Striking designated issues, testimony and exhibits.

(3) Revision of the hearing and/or testimony submission schedule.

The presiding officer may limit or bar a party, who repeatedly and unreasonably abuses the discovery process, from propounding further discovery.

§3.176. Depositions.

Depositions may be taken following the submission of the witness' direct testimony and must be completed seven (7) days before the deposed person is scheduled to appear for cross examination. The

deposing party shall be responsible for the costs incurred for expert witness fees relating to the time of the deposition itself, and any reasonable travel costs, but shall not be responsible for fees relating to preparation for the deposition or testimony.

D. Existing Regulations and Statutes

66 Pa. C.S. §333. Prehearing procedures.

. . .

(a) Depositions. -- A party to the proceeding shall be able to take depositions of witnesses upon oral examination or written questions for purposes of discovering relevant, unprivileged information, subject to the following conditions:

(1) The taking of depositions shall normally be deferred until there has been at least one prehearing conference.

(2) The party seeking to take a deposition shall apply to the presiding officer for an order to do so.

(3) The party seeking to take a deposition shall serve copies of the application on the other party or parties to the proceedings, who shall be given an opportunity, along with the deponent to notify the presiding officer of any objections to the taking of the deposition.

(4) The presiding officer shall not grant an application to take a deposition if he finds that the taking of the deposition would result in undue delay.

(5) The presiding officer shall otherwise grant an application to take a deposition unless he finds that there is not good cause for doing so.

(6) The deposing of a commission employee shall only be allowed upon an order of the presiding officer based on a specific finding that the party applying to take the deposition is seeking significant, unprivileged information not discoverable by alternative means. Any such order shall be subject to an interlocutory appeal to the commission.

(7) An order to take a deposition shall be enforceable through the issuance of a subpoena ad testificandum.

. . .

(d) Interrogatories. -- Any party to a proceeding may serve written interrogatories upon any other party for purposes of discovering relevant, unprivileged information. A party served with interrogatories may, before the time prescribed either by commission rule or otherwise for answering the interrogatories, apply to the presiding officer for the holding of a prehearing conference for the mutual exchange of evidence exhibits and other information. Each interrogatory which requests information not previously supplies at a prehearing conference or hearing shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for the objections shall be stated in lieu of an answer. The party upon whom the interrogatories have been served shall serve a copy of the answers and objections within a reasonable time, unless otherwise specified, upon the party submitting the interrogatories. The party submitting the interrogatories may petition the presiding officer for an order compelling an answer to an interrogatory or interrogatories to which there has been an objection or other failure to answer. The commission shall designate an appropriate official on whom other parties to the proceeding may serve written interrogatories directed to the commission. That official shall arrange for agency personnel with knowledge of the facts to answer and sign the interrogatories on behalf of the commission. The attorney or employee appearing on behalf of the commission in the proceeding shall have the authority to make and sign objections to interrogatories served upon the commission. Interrogatories directed to the commission shall be allowed only upon an order of the commission based upon a specific finding that the interrogating party is seeking significant, unprivileged information not discoverable by alternative means.

(e) Requests for admissions. -- A party to a proceeding may serve upon any other party and upon the commission to the same extent permissible in subsection (d) a written request for the admission, for purposes of the pending proceeding and to conserve hearing time, of any relevant, unprivileged, undisputed facts, the genuineness of any document described in the request, the admissibility of evidence, the order of proof and other similar matters.

(f) Subpoena duces tecum. -- A party to a proceeding may obtain in accordance with commission rules a subpoena duces tecum requiring the production of or the making available for inspection, copying or photographing of relevant necessary designated documents at a prehearing conference or other specific time and place.

(g) Scheduling. -- The presiding officer shall have the authority to impose schedules on the parties to the proceeding specifying the periods of time during which the parties may pursue each means of discovery available to them under the rules of the commission. Such schedules and time periods shall be set with a view to accelerating disposition of the case to the fullest extent consistent with fairness.

. . .

2. Single Test Year.

Proposed revision at 52 Pa. Code See, following section.

3. Fully Projected Test Year.

Proposed replacement at 52 Pa. Code.

52 Pa. Code §3.271. Future and Fully Projected Test Years

(a) A public utility may submit and use data for a Future Test Year ("FTY"). Such submission shall be in addition to, and not in lieu of, any other data or material required under this title, including the submission requirements for an experienced twelve month test period. Where a FTY is used, it shall be based on estimates for a period of twelve (12) consecutive months, which shall begin on the day following the end of the experienced twelve month test period.

To the extent practicable, estimates for a FTY shall be of the same or similar type, quantum, and nature as required to be submitted for an experienced test year and shall include the methodology data, and material used as the basis for the estimates.

(b) A public utility may also submit and use data for a Fully Projected Test Year ("FPTY"). Such submission shall be in addition to, and not in lieu of, the data submission requirements for a FTY as set forth at sub-section (a) above. Where a FPTY is used, it shall consist of a period of twelve (12) consecutive months which shall begin no later than the day following the end of the FTY.

To the extent practicable, estimates for a FPTY shall be of the same or similar type, quantum, and nature as required to be submitted for an experienced test year and shall include a full and complete explanation of the methodology, data, and material used as the basis for the estimates. All FPTY claims shall be on a test year average basis, consisting of revenue and expense data as projected to occur during the test year and rate base data on a thirteen (13) month average.

(c) Where a public utility submits and uses data for a FTY or FPTY, it shall, during the course of the proceeding, submit for the record the per books results of its actual operating experience (income statement and balance sheet) in the FTY for each month starting with the day following the end of the required experienced twelve month test period. Such results shall be submitted within thirty (30) days of the end of the month.

(d) Any operational or other changes to the original estimated data and individual ratemaking adjustment(s) which form the basis of the FTY or FPTY shall be submitted by the utility for the record within thirty (30) days of such change.

. . .

(e) (This section provided at IV. Future Test Year Updates, infra.)

. . .

(f) Whenever a FTY forms the substantive basis for the final rate decision of the Commission, the utility shall provide the results of its actual experience during the FTY appropriate to evidence the accuracy of the estimated data included in the FTY, within forty-give (45) days of the end of the FTY. The Commission, in its discretion, may adjust the utility's rates on the basis of such data after reasonable notice and hearings.

(g) Whenever a FPTY forms the substantive basis for the final rate decision of the Commission, the utility shall provide the results of its actual experience in each quarter of the FPTY appropriate to evidence the accuracy of estimated data included in the FPTY, within forty-five (45) days of the end of such quarterly period. The Commission, in its discretion, may adjust the utility's rates on the basis of such data after reasonable notice and hearing.

(h) Absent permission from the Commission, a utility, where the FPTY forms the substantive basis for the final rate decision of the Commission, shall not place any further general rate increase (as defined at 66 Pa. C.S. §1308(d)) into effect, prior to the end of the FPTY upon which existing rates are set or twelve (12) months after such previous rates become effective, whichever comes first.

D. Existing Regulations and Statutes.

66 Pa. C.S. §315. Burden of proof.

(e) Use of future test year. -- In discharging its burden of proof the utility may utilize a future test year. The commission shall promptly adopt rules and regulations regarding the information and data to be submitted when and if a future test period is to be utilized. Whenever a utility utilizes a future test year in any rate proceeding and such future test year forms a substantive basis for the final rate determination of the commission, the utility shall provide, as specified by the commission in its final order, appropriate data evidencing the accuracy of the estimates contained in the future test year, and the commission may after reasonable notice and hearing, in its discretion, adjust the utility's rates on the basis of such data.

52 Pa. Code §3.271. Supporting data.

(a) In discharging its burden of proof pursuant to section 66 Pa. C.S. §315, a public utility may submit and use data for a future test year. Such submission shall be in addition to, and not in lieu of, any other data or material required under this title, including the submission requirements for an experienced 12-month test period. Where a future test year is used, it shall be based on estimates for a period of 12 consecutive months, which shall begin on the day following the end of

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June 27, 1984

Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, Pennsylvania 17120

Re: Proposed Rules of Practice and Procedure, 52 Pa. Code Chapters 1, 3 and 5

Dear Sir:

I enclose the original and 8 copies of comments to the proposed regulations of the Commission as published in the Pennsylvania Bulletin of April 28, 1984 (14 Pa. Bulletin 1511-1541). My comments, which are based on the text as contained in the Pennsylvania Bulletin, are as follows:

1. Section 1.2(a), seventh word from the end should be "affect" not "effect."

2. Section 1.4 should contain not only a post office address where filings can be mailed, but also an office where filings can be made personally. I would assume that for most filings this would be in Room B-18 of the North Office Building. (Compare §§5.502(a), 5.533(e)). This is particularly important where time limits exist for certain filings and the person making the filing is not totally familiar with Commission practice and therefore does not know where to file papers.

3. Section 1.8, the first sentence refers to subsection (a). There is, however, no subsection (a) in Section 1.8.

4. Section 1.8 - Date of Service. The reference to Section 1.55 makes no sense. I believe it should be to Section 1.56, which relates to date of service.

5. Section 1.8 - Formal record. Included among the items in the formal record are "references to the Commission." There is no definition of what this means and it is not a common term. It should therefore be defined or clarified.

6. Section 1.8 - Intervenors. The second sentence of this definition should be placed in Section 5.75 since it refers to the effect of intervention rather than the definition of an intervenor.

7. Section 1.8 - Proof of Service. The reference should be to Sections 1.57 and 1.58, not 1.56.

8. Section 1.11. There is no reason to distinguish between exceptions or appeals under Section 332(h) of the Act and all other documents. The Commission can define "filing" just as the Supreme Court has done in its Rules of Appellate Procedure with the use of U.S. Postal Service form 3817. A mailing file date is especially critical in the case of exceptions or appeals for which the

time begins to run from the date of the mailing of the order, which is ordinarily not received for several days, and yet which filings may take considerable time to prepare. Under the circumstances, the Commission should endeavor to assure that as much time, rather than as little time, is available to file.

9. Section 1.15(b). It is not clear what the term "during the course of a hearing" means in lines 10 and 11. It is customary that a matter is referred to an administrative law judge with notice to the parties well in advance of the initial hearing. It is appropriate after that time that such requests be made to the administrative law judge. Accordingly, I would suggest that instead of the words "except that during the course of a hearing in a proceeding," words be used such as "except that once a matter has been referred to a presiding officer, such requests may be made by written or oral motion before the presiding officer."

10. Section 1.25(a). In line 4 of the form, "public" is misspelled.

11. In Section 1.26(a), last line, the word "a" should be replaced by "the."

12. Section 1.31(c), line 4, the word "of" should be replaced with "or."

13. Section 1.35(b)(2). In line 2, a comma should appear after the word "trust."

14. Section 1.35(c), 4 lines from the end, the word "contests" should be replaced with "contents."

15. Section 1.36(b). The form of affidavit is unclear. I believe that it would be better to put the parentheses around the words "or are true and correct to the best of his knowledge, information and belief" since I assume that that is the alternative to stating that they are true and correct and that in each case the Commission desires that the affiant state that he expects to be able to prove the same at any hearing.

16. Section 1.43(e) appears redundant of the last two items in Section 1.43(b). Even if they are not technically redundant, §1.43(e) should in any event be combined with the last two items in §1.43(b) since the fees are the same and the scope identical.

17. Section 1.51. This gives the Secretary the authority to instruct regarding the required service of public notice. Is the Secretary's knowledge of this adequate? I am aware of at least one case where, after a case had proceeded to one hearing, a late intervention was allowed because the nature of the notice prescribed by the Secretary was not sufficient to apprise the intervening party.

18. Section 1.61(a). In line 2 I would replace the word "in" with the word "over."

19. Sections 1.61(b) through (d) should be the subject of a separate section specifically referring to "Bankruptcy Court Proceedings" since they go beyond the title of §1.61. Current §1.62 could be included or made new §1.63. In any event, the title of current §1.62 should be "Filing and record of security certificate in Bankruptcy Proceedings."

20. Section 1.61(c), line 4, insert the words "or its trustee in Bankruptcy," before the word "shall."

21. Section 1.61(d), 3 lines from the bottom, change "it" to "its."

22. Section 1.72(c)(4), line 5, after the word "in" insert "subsection (d)(2) and."

23. Section 1.181(a), the last word should be "orders."

24. Section 1.82(a), line 2, the word should be "or" not "of."

25. Section 3.1 - Emergency order. In line 4, the word should be "Operations."

26. Section 3.111(a). The last sentence is unclear. Perhaps the word "embrace" should be replaced with the word "include."

27. Section 5.12(a). In lines 3 and 4 the words "form set forth in" should be deleted and the words "provisions of" inserted. There is no form set forth in §5.12.

28. Section 5.21(a), line 8, insert the word "formal" before "complaint."

29. Section 5.22(a)(4). The last word in line 4 should be "of" not "or."

30. Section 5.42(a). The last sentence refers to notice being given in accordance with Commission instructions. There is no provision setting forth how this will be determined unless this refers to §1.51 about which we have commented upon in No. 17 above.

31. Section 5.62(a), at the end of line 4 insert ", in such case,"; in line 5 delete the word "his" and insert the word "its" or "the," in order to be consistent with the second word in this section.

32. Section 5.72(a)(2), line 4 insert the word "the" after "which" and change "petitioners" to "petitioner."

33. Section 5.72(b). I am not sure what this means and it should be clarified. In any event, insert "(a)" after the word "paragraphs" in line 4. It is not identical to 1 Pa. Code §35.28(b) which allows the Commonwealth to intervene as of right, but which also treats the word "subject" ambiguously. Does the Commonwealth

have to fall within (a)(1), (2) or (3), in which case its intervention is not "of right" and §5.72(c) is incorrect.

34. Section 5.74(a) is not clear. The first sentence requires the filing of a petition to intervene by a certain date. The second sentence indicates that a person may be allowed to file a petition even after that date, but does not state the circumstances, and then goes on to refer to a waiver of Section 5.409. It is not clear what the waiver refers to. Does it mean that the late intervenor receives no documents at all? Gets all the documents that have been filed, but late because he was not a party when they were filed? Only gets documents filed after intervention? Or something else? The exact nature of the waiver should be set forth.

35. Section 5.75(b), lines 3 and 4, the words "or default thereof" should be deleted. They add nothing since the "default" would only arise after the expiration of the 20-day period for filing an answer. I also suggest that the time for filing an answer to a petition to intervene should be less than the normal 20-day period provided in §5.61(a) because in many cases it is necessary for the Commission to determine intervention promptly.

36. Section 5.91(c) is not clear. What does it mean? Does no portion of §5.91(a) or (b) apply to such an upward revision in a general rate increase?

37. Section 5.101(b), is not a proper provision. A party should not be required to file both a preliminary motion and an answer since the preliminary motion may obviate the need for an answer. Very often, the issue in the preliminary motion may be dispositive of the whole case. If the concern of the Commission is that there will be undue delay, the Commission can obviate that problem by requiring preliminary motions to be referred to an ALJ with dispatch. The need to be excused from filing an answer is especially acute where the petition is deficient or non-specific. See §5.101(a)(3),(4) which indicate that it might be impossible to file an answer under the circumstances set forth. The proposal would resolve this problem by stating that additional time may be allowed to file an answer where a motion goes to a request for a more specific pleading. However, there is nothing in the proposal which states how a respondent ascertains whether the additional time will be granted. By the time the Commission would rule on the request, more than 20 days could pass. Finally, even as worded, line 7 should substitute "includes" for "goes."

38. Section 5.102(b)(3) should be deleted. The last sentence appears redundant of Section 5.102(b)(1). It is also placed in a strange position. This sentence should be deleted and Section 5.102(b)(1) should state:

"The opposing participant shall have the opportunity to respond and may present affidavits in response." The remainder of Section 5.102(b)(3) properly belongs in Section 5.102(c). It may appropriately be inserted as the second sentence of that subsection.

39. Section 5.202(b) is confused and should be worded as follows: "Proceedings pending on the calendar will be heard, so far as practicable, in their order of assignment to the calendar, at the times and places fixed...."

40. Section 5.202(d) appears to conflict with Section 1.15(b). In addition, it seems to state that if a request for continuance is submitted at least five days prior to the hearing date, it would not have to be for good cause, but would only have to be for good cause if within five days prior to the hearing date.

41. Section 5.203(b), last sentence should be deleted. Other administrative or court engagements of counsel must constitute grounds for a continuance.

42. Section 5.212(a), line 3, change "is" to "are."

43. Section 5.235(b), a sentence should be added at the end: "If a restrictive amendment is not accepted by the Commission, it shall remand the matter for appropriate proceedings." There is at least one instance where the Commission denied a restrictive amendment and granted all the authority requested even though the appli-

cant had not moved forward with proof and even though the protestants had not had the opportunity to cross-examine on the issues.

44. Section 5.245(b), 3 lines from the bottom after the comma, the phrase should be amended to read "including, where appropriate, dismissal of the complaint if the action is that of complainant."

45. Section 5.251(a), fifth and sixth lines from the bottom, the words "submitted after the close of testimony" are redundant since the beginning of the sentence states that the record has already been closed.

46. Section 5.252(b), 15 days is not ordinarily enough time to correct a lengthy transcript. Corrections should be allowed at the time briefs are filed. In addition, as worded, the language is unclear. The word "granted" should be inserted before the word "prior in the next to last line.

47. Section 5.253(a), the last word should be "therefor."

48. Section 5.302(c), line 4, substitute "its" for "the" and delete the comma in line 4.

49. Section 5.302 does not anywhere include the right of a presiding officer to certify an interlocutory appeal as set forth in Section 331(e) of the Act. The provisions of that section should be incorporated in the regulation.

50. Section 5.303(a)(2). It is unclear what it means to state that the petition was "improper." This subsection should be clarified or deleted.

51. Section 5.304(d)(2), line 2, the word should be "improvident" not "improper." See Section 333(h) of the Act.

52. Subchapter D. Discovery. In view of the fact that the IRRC has rejected these regulations, I am submitting no comments, although I would otherwise have comments to make to these proposals.

53. Section 5.404(a), line 1, insert the words "or thereafter" after "hearing."

54. Section 5.405(b) is unclear. It is not identical to 1 Pa. Code §35.125(d) as stated in §5.405(c). That provision does allow pleadings to be used as evidence where they are otherwise admissible under the rules, such as to show that they were filed or as admissions. To the extent that a pleading is disputed, it is obviously not "evidence."

55. Section 5.406. Where a participant does not have a copy of a report or other document on file with the Commission, the proponent of the document should be required to make a copy available of the relevant portions to that participant even though the report is on file and need not be produced or marked for identification.

56. Section 5.412(a), line 4, the word "witnesses" is misspelled.

57. Section 5.414(a), line 10, the word should be "proferred" not "preferred."

58. Section 5.431(a), three lines from the end, the reference should be to §5.252 and not to §5.302.

59. Section 5.485(a), line 4, change the word "of" before "participants" to "by."

60. Section 5.502(b), line 6, the word "burden" is misspelled. The time for filing briefs should be within 30 days after the transcript is filed rather than 30 days after the record is closed. Without a transcript, it is often impossible to prepare a brief.

61. Section 5.502(c), line 2, the word should be "therefor" and not "therefore."

62. Section 5.534(b), the reference in line 4 should be to §5.533(b).

63. Section 5.535. It is not appropriate to preclude replies to exceptions or appeals. A respondent should have the opportunity to focus a response to any pleading filed. Presumably the theory is that the exceptions or appeals will be determined based on prior briefs and filings. However, the victorious party should have the opportunity to direct an appropriate response to anything filed and not have to rely on previously filed papers.

It is grossly unfair to that party if the decision is overturned on exceptions or an appeal to which the party had no opportunity to respond. In addition, the ability to file a motion to request the right to file a reply is not meaningful in view of the time it would take to have that motion ruled upon.

64. Section 5.536(b), the reference in line 2 should be to §5.533(a); the reference in line 8 should be to §5.534(a) (in view of the fact that Section 5.534 refers to other types of appeals and exceptions).

65. Section 5.536(c), the reference in line 5 should be to Section 5.533(b).

66. Section 5.538(c), line 5, there is a typographical error in the last word.

67. Section 5.539 seems to present the possibility that an appeal could be withdrawn and the Commission thereby precluded from reviewing the matter which it might otherwise have reviewed under the 15-day rule but which it did not elect to review because the appeal or exceptions had been previously filed. If this could arise under Commission practice, this section should provide that the Commission will have an additional number of days to determine to review the matter on its own in accordance with Section 5.536(a), (b).

Thank you for the opportunity to comment on these rules and regulations. Please advise me of any further orders or hearings in this rulemaking proceeding.

Very truly yours,

Gerald Gornish

GG:lak

ORIGINAL

David M. Barasch
Consumer Advocate

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June 28, 1984

L-840097

Mr. Jerry Rich, Secretary
PA Public Utility Commission
Room G-18, North Office Bldg.
Harrisburg, PA 17120

Re: Comments on the Commission's Comprehensive Rules of Practice and Procedure

Dear Secretary Rich:

In accordance with the notice as published in the Pennsylvania Bulletin on April 28, 1984, enclosed please find an original and eight (8) copies of the Office of Consumer Advocate's comments on the above-captioned proposed rulemaking.

Sincerely,

David M. Barasch
Consumer Advocate

Enclosure
cc: Hon. Linda C. Taliaferro, Chairman
Hon. James H. Cawley, Commissioner
Hon. Michael Johnson, Commissioner
Hon. Frank Fischl, Commissioner
Hon. William R. Shane, Commissioner
Daniel Delaney, Assistant Counsel

L-840097

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

COMMENTS OF THE
OFFICE OF CONSUMER ADVOCATE REGARDING
COMPREHENSIVE RULES OF PRACTICE AND PROCEDURE
14 Pa. B. 1511, et seq.
APRIL 28, 1984

Docket No. L-840097

Office of Consumer Advocate
1425 Strawberry Square
Harrisburg, PA 17120
(717) 783-5048

DATED: June 28, 1984

INTRODUCTION

The Office of Consumer Advocate submits the following comments on the proposed rulemaking for comprehensive rules of practice and procedure for the Public Utility Commission. OCA commends the members of the PUC Staff, the private utility bar and other interested parties who have participated in the development of a much-needed set of comprehensive rules for practice before the Commission.

OCA actively participated during committee and subcommittee meetings on these rules, and representatives of this Office served on the Prehearing Subcommittee and were responsible for drafting and commenting upon major portions of the prehearing sections. In accordance with the first publication of the rules in the Pennsylvania Bulletin, however, OCA takes this opportunity to comment at length on all aspects of the rules.

Several parts of OCA's comments on these proposed rules deserve particular emphasis. Due to the significant impact of the proposed discovery rules upon OCA's abilty to represent consumers before the Commission, this Office has prepared extensive comments upon Chapter 5, Subchapter D along with an Appendix "A" attached to these comments, which proposes specific language changes which should be made to the discovery rules.

Other sections which deserve highlighting include §1.21 which involves representation before the Commission;

§1.43 regarding the schedule of fees payable for copying and certification; and §5.224 on prehearing conferences in rate proceedings.

SPECIFIC COMMENTS

Section 1.1 The last paragraph in this section should make it clear that these rules alone govern practice and procedure before the Commission by adding a sentence as follows:

> "The subpart also repeals generally the applicability of 1 Pa. Code to practice and procedure before the Public Utility Commission."

Section 1.2(a) In the last sentence, replace the word "effect" with "affect," and replace the word "substantial" with "substantive."

Section 1.4(b) Sexually exclusive language must be removed from these regulations. After the passage of the Equal Rights Amendment to the Pennsylvania Constitution, Pa. Const. Art. 1, §28, the Act of October 4, 1978 (P.L. 909 No. 173) was enacted to eliminate sexually exclusive language from the laws of this Commonwealth. 1 Pa. C.S. §2301. That Act, and similar Acts amending specific statutes, states specifically the equality between men and women and removes language from statutes which excluded either one sex or the other. Where applicable, certain sexually exclusive language, for instance, "men," "women," "he," and "she," was replaced with gender-neutral language such as "person." In

this and other sections of these regulations, the words "he" and "his" should not be used to designate both men and women.

Section 1.4(d) In the last line, replace the word "by" with "be."

Section 1.8 Replace the first sentence with the following sentence: "This section supersedes 1 Pa. Code §31.3 (relating to definitions)."

"Date of service." Replace this sentence with the following: "The date on which a document is served as provided in §1.56 (relating to date of service)."

"Person." The definition of "person" should remain as provided in 1 Pa. C.S. §1991 unless otherwise provided; therefore, replace this sentence with the following: "Except as otherwise provided in this Subpart or in the Act, the term includes a corporation, partnership and association, as well as a natural person."

"Proof of service" Replace "§1.56" with "§1.57."

Add a new definition to read as follows:

> "Rate proceeding--Any on the record proceeding brought by or before the Commission, the purpose of which is to determine the justness and reasonableness of a proposed or present rate for utility service, including, but not limited to, proceedings initiated pursuant to Sections 1307, 1308, 1310, and 1312 of the Act."

This definition is necessary for the amendments to the discovery rules (§5.321 et seq.) proposed herein by the OCA.

Section §1.15 As presently written, this section is not consistent with the provisions of §5.202 which deal with continuances of hearings. The OCA suggests that the provisions of §1.15(b) apply only to extensions of time, and that a new subsection (c) be added to deal with continuances of hearings. OCA also suggests that the current use of conference calls to resolve such matters be allowed. Subsection (b) should be amended to read as follows:

> "(b) Except as otherwise provided by law, requests [for continuance of hearings or] for extension of time in which to perform any act required or allowed to be done at or within a specified time by this title or order of the Commission, 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 hearing in] a proceeding, such requests may be made by oral motion in the hearing, or by oral request in other appropriate conferences before the Commission or the presiding officer, provided that all active participants have the opportunity to be heard."

A new subsection (c) should read as follows:

> "(c) Requests for continuances of hearings shall be made in accordance with subsection (a) above and will be granted in accordance with §5.202(d)."

Former subsection (c) should be redesignated as subsection (d) and amended as follows:

> "[(c)](d) Subsections (a) [and], (b), and (c) supersede 1 Pa. Code §31.15 (relating to extensions of time)."

Section 1.21(a) The OCA believes that this section ought to be amended; however, if it is not amended, the sexually exclusive language therein must be eliminated. See comment to §1.4(b).

Section 1.21(a) provides that only individuals, not corporate entities or associations, may represent themselves before the Commission. The OCA believes that small businesses, which may do business as corporations or partnerships, and small associations (e.g., trade or consumer groups) should be able to represent their interests before the PUC without incurring the expense of legal counsel.

The OCA further believes that such representation is permissible under the laws of this Commonwealth. 42 Pa. C.S. §2501(a) provides:

> In all civil matters before any tribunal every litigant shall have a right to be heard, by himself and his counsel, or by either of them.

42 Pa. C.S. §102 defines the key terms as used in §2501(a). Specifically, "tribunal" "includes a governmental unit, other than the General Assembly and its officers and agencies, when performing quasi-judicial functions." The Commission is such a governmental unit. Significantly, §102 defines "litigant" to be "a party or any other person legally concerned with the results of a matter" (emphasis added). A "party" is "a person who commences or against whom relief is sought in a matter" (emphasis added). Under the definition of "person" that appears in 1 Pa. C.S. §1991, corporations, partnerships, and associations are "persons;" therefore, 42 Pa.C.S. §2501(a) permits any corporation, partnership or association to represent itself in any quasi-judicial or judicial proceeding.

Additionally, there should be no question concerning who may speak for a corporation or similar entity. An officer of a corporation stands in a fiduciary relationship to the corporation, Act of July 20, 1968 (P.L. 459 No. 216) §24, as amended, 15 P.S. §1408, and may perform all actions authorized by the corporation. Id. §23, 15 P.S. §1406. See also Gillian v. Consolidated Foods Corp., 424 Pa. 407, 227 A.2d 858 (1967).

In summary, the OCA believes that the Commission cannot and should not restrict the right of any entity to represent itself before the Commission; therefore, section 1.21 should be replaced with the following:

> "(a) Persons may appear on their own behalves in any proceedings before the Commission.
>
> "(b) Subsection (a) supersedes 1 Pa. Code §31.21 (relating to appearance in person)."

Section 1.24(a), (b), and (c) Sexually exclusive language must be eliminated. See comments to section 1.4(b).

Section 1.27 Recent case law has suggested that only the Supreme Court of Pennsylvania may regulate the practice of law in this Commonwealth. Pa. PUC Bar Association v. Thornburgh, 498 Pa. 589, 450 A.2d 613 (1982). See also Pa. Const. Art. 5, §10. Similarly, only that Court may deny, temporarily or permanently, the right of an attorney to practice law in Pennsylvania. Pa. R.D.E. 201. The Commission's remedy for contemptuous conduct is appropriately limited and set forth

in §1.26; §1.27, therefore, should be stricken in its entirety as it likely goes beyond the Commission's authority to regulate the practice of law by attorneys appearing before it.

Section 1.31(c) In the second sentence replace the phrase "in whose behalf" with "on whose behalf."

Section 1.32 In order for individual consumers to be able to bring their concerns before the Commission, handwritten pleadings should be permitted. A new subsection (d) should be added, therefore, to read as follows:

> "(d) Handwritten. Pleadings, submittals or other documents may be submitted in handwritten form, subject to the requirements of §1.4, if the handwriting is sufficiently legible."

Former subsection (d) should be amended to read as follows:

> "[(d)](e) Supersession. Subsections (a)-(c) are identical to 1 Pa. Code §33.2 (relating to form). Subsection (d) is an additional provision which supersedes the otherwise contradictory provisions of 1 Pa. Code §33.2."

Section 1.33 Under the proposed provisions of this section, a party may incorporate by reference a document which is not available to those who do not have direct access to the Commission's files. Given the high cost and inconvenience of obtaining such documents from the Commission's files, the OCA believes that the party incorporating a document should make a copy available to any

participant upon request. The following subsection should be added to §1.33:

> "(c) Notwithstanding the provisions of §1.33(a) and (b), a party or participant who incorporates by reference any pleading, submittal, or other document shall provide a copy of such document to each party or participant who requests a copy thereof."

Former subsection (c) should be amended to read as follows:

> "[(c)](d) Subsection (a) [and], (b), and (c) supersede 1 Pa. Code §33.3 (relating to incorporation by reference)."

Section 1.35(a) and (c) Sexually exclusive language must be removed. See comments to §1.4(b).

Section 1.36(b) and (c) Sexually exclusive language must be removed. See comments to §1.4(b).

Section 1.43(a) This subsection sets forth the copying and certification fees to be charged by the Commission. The fees set out here are 75¢ per page for photocopying and $2.00 per page for certification. The Right To Know Law, Act of June 21, 1957, P.L. 390, 65 P.S. §66.1, et seq. sets forth the statutory requirement for public agencies' rules concerning copying documents. Section 3 of the Act, 65 P.S. §66.3, states that each agency "shall have the right to adopt and enforce reasonable rules governing the making of such extracts, copies, photographs or photostats" (emphasis added). The OCA believes that it is not reasonable to

charge more than the actual cost incurred by the Commission for making copies. This practice is generally followed by other agencies and presumably does not present a burden to them. The general fee schedule for other agencies is set out in 1 Pa. Code §33.23 which provides that an agency shall charge 25¢ per page for photocopying and $1.00 per page for certified copies. OCA suggests that the Commission's Director of Operations should determine the PUC's actual costs, and these amounts should be used in this subsection. In no event, however, should the Commission charge more than the fees set forth in §33.23.

Section 1.52(c) Section 1.52 also supersedes 1 Pa. Code §33.32; therefore, subsection (c) should be amended to read as follows:

> "(c) Subsection (a) and (b) supersede 1 Pa. Code §33.32 (relating to service by participant) and §33.32 (relating to effect of service upon an attorney."

Section 1.53(a) Sexually exclusive language must be removed. See comments to §1.4(b).

Section 1.54 The OCA believes that the intent of this section is to permit parties to serve documents only upon active participants, but OCA believes that even inactive participants should receive notice of documents not served upon them. Subsections (a) and (b), therefore, should both be amended. In subsection (a), the following phrase should

be added at the beginning of the first sentence: "Except as otherwise provided in §1.54(b),". Subsection (b) should be amended to read as follows:

> "(b) In a proceeding in which only some of the participants participate actively, the active participants, with the authorization of the presiding officer, may serve documents only upon the other active participants and [to] upon inactive participants [which] who state on the record, or request in writing, that they wish to be served with such documents. Inactive parties shall, however, receive notice of all documents not served upon them."

Section 1.58 The reference in this section to "§1.54" should be changed to read "52 Pa. Code §1.54."

Section 1.61(a) OCA, because of its statutory authority to represent the interest of utility consumers before any court or agency and corresponding regulatory agencies of the United States (see 71 P.S. §309-4. (a) and (a.1)), should also receive notice of filing and copies of pleadings before other tribunals. OCA suggests that the following sentence be added to §1.61(a):

> "Such documents or pleadings shall, at the same time, be served upon the Office of Consumer Advocate."

Additionally, the heading of section 1.61 should read:

> "Notice [and] of filing [of] and copies of pleadings before other tribunals."

Section 1.72 (d)(i)(ii) and (iv) These sections, which provide for a review by file room personnel, establish a

review period of 30 days. OCA believes that such a review can be accomplished in 15 days, and in some cases it may be necessary to expedite further that review process. The following language is suggested:

> "(ii) The review shall be made and the requestor notified as soon as possible or within [30] 15 days."
>
> "(iv) A [30-] 15-day period shall also apply to this second request for review."

Section 1.81(a) In the last sentence, the word "order" should be "orders."

Section 1.82(a) In the last sentence, the word "stricken" should be replaced with "withdrawn."

Section 3.112 OCA believes that access to informal complaints filed with the Commission is often important in service-related utility matters. For that reason, OCA proposes that the following subsection be added:

> (b) Upon the completion of the Commission's investigation of an informal complaint, the complaint and documents describing the action taken on the complaint shall be part of the public record and shall be accessible to the public in accordance with Subchapter H, relating to public access to Commission records."

Former subsection (b) should be redesignated as subsection (c) and amended as follows:

> "[(b)] (c) Subsections (a) and (b) supersede[s] 1 Pa. Code §§35.6 (relating to correspondence handling of informal complaints) and 35.7 (relating to

> discontinuance of informal complaints without prejudice) (concerning handling and discontinuance of informal complaints)."

Section 5.22(a)(4) The intent of this section is very unclear, especially to a layperson. It should be reworded to read as follows:

> "(4) A description of the act or omission by the respondent which is claimed to be in violation of the Act, or of any regulation or order of the Commission."

Section 5.42 This section should make clear that declaratory orders are an extraordinary and discretionary form of relief. Any person petitioning for a declaratory order should be required to show an actual, present controversy, coupled with a clear showing that the declaration will be of practical help in ending the controversy. See In re Lifter's Estate, 377 Pa. 227, 103 A.2d 670 (1954). Declaratory orders should not be used to decide future rights in anticipation of an event which may not happen (Philadelphia v. Philadelphia Transportation Company, 404 Pa. 282, 285-286, 171 A.2d 768 (1961)), or to aid a petitioner in another transaction. Capital Bank and Trust Company's Petition, 336 Pa. 108, 111 (1939).

Because such petitions are ex parte in nature, provisions for notice should include likely interested parties, such as all participants in a utility company's

last rate proceeding and the Office of Consumer Advocate. Subsection (a) should be amended to read:

> "(a) Petitions for the issuance of a declaratory order to terminate a present, actual controversy or to remove uncertainty, shall state clearly and concisely the actual controversy or uncertainty which is the subject of the petition, coupled with a clear showing that the declaration will be of practical help in ending the controversy. Such petitions also shall cite the statutory provision or other authority involved and shall include a complete statement of the facts and grounds prompting the petition, together with a full disclosure of the interest of the petitioner. Notice[, if appropriate,] shall be given in accordance with Commission instructions with respect to the individual petition, and shall be served upon all parties in a company's last rate proceeding, and copies of all petitions for declaratory orders shall be served on the Office of Consumer Advocate.

Section 5.61(a) The reference in this subsection to "date of receipt of service" should be to "date of service." The former term is not defined in the proposed regulations, while the latter is so defined. The superseded section, 1 Pa. Code §35.35, similarly refers to "date of service."

Section 5.65(a) The same change should be made here as was suggested in §5.61(a). See 1 Pa. Code §35.40.

Section 5.76 There could be some problem with limiting an intervenor's ability to retain and use its own attorney in a proceeding. Some protection should be included in this section which would allow an immediate interlocutory review

by the Commission if a participant objects to such consolidation. It is suggested that a subsection (b) be added as follows:

> "(b) Any intervenor who objects to the limitation of participation in heaings described in (a) shall have the right to petition the Commission for review under §5.302 (relating to petition for Commission review and answer to a material question.)."

Former subsection (b) should be amended to read:

> "[(b)] (c) Subsection (a) is identical to 1 Pa. Code §35.32 (relating to limitation of participation in hearings)."

Section 5.91(b) In the second line, the word "subsection" should be "subchapter."

Section 5.91(c) As proposed, this subsection does not make it clear that a company may not increase its rate request by merely amending the filing. This point could be clarified by changing subsection (c) to read as follows:

> "(c) This section [does] shall not [apply] be construed as authorizing or permitting [to] upward revisions in the aggregate amount of a general rate increase request."

Section 5.203(b) Sexually exclusive language must be removed. See comments to §1.4(b).

Section 5.222(a) This subsection should be amended to make it clear that it only applies to non-rate proceedings. This subsection should be amended to read as follows:

> "(a) In order to make possible a more effective use of hearing time in formal proceedings, other than rate proceedings which are governed by §5.224, and to otherwise..."

Section 5.222(d) As proposed, this subsection would require each participant to state its position on all issues before the conclusion of the discovery process. The OCA does not believe that this is reasonable; therefore, this section should be amended as follows:

> "(d) Participants, including principals and counsel, will be expected to attend the conference fully prepared for a useful discussion of the problems involved in the proceeding. [, both procedural and substantive, and fully authorized to make commitments with respect thereto.] Preparation should include...

Section 5.223(a) In the ninth line, the word "reasonable" should be replaced by "reasonably."

Section 5.224 Subsections (a)-(d) should be amended to make it clear that the timetable for discovery is governed by the discovery rules (§5.321, et seq.). It will not normally be necessary for the presiding officer to issue an order regarding discovery dates. Subsections (a) through (d), should be amended to read as follows:

> "(a) In [formal proceedings involving rate] rate proceedings the presiding officer may schedule all of the following:
>
> > "(1) A first prehearing conference to establish a schedule [for discovery and] of tentative hearing dates, as well as the matters enumerated in §5.222(c)

(relating to initiation of prehearing conferences).

* * *

"(b) The first prehearing conference [shall] should be held as soon as practicable after the entry of the order of investigation. Each participant shall come to the first prehearing conference prepared to discuss all of the following:

"[(1) A proposed plan and schedule of discovery.]

"[(2) Other proposed] (1) Proposed orders with respect to discovery.

"[(3)] (2) Tentative scheduling of evidentiary hearings, close of the record, filing of briefs and any other matters deemed appropriate.

"(c) At the first prehearing conference, [P]participants may submit a written statement addressing the issues in [paragraphs (1)-(3)] §5.224(b)(1) and (2), and other issues [at the time of the first prehearing conference].

"(d) Following the first prehearing conference, the presiding officer [shall] should enter an order establishing a tentative set of hearing dates [, establishing a plan and schedule for discovery,] and addressing other matters deemed necessary."

As proposed, Subsection (e) would establish time limits on each party's right to cross-examine witnesses before discovery is complete and before the parties' positions on the issues are finalized. The OCA believes this to be very unreasonable and that it could severely affect a participant's ability to present its case. Subsection (e) should be amended to read as follows:

(e) The second prehearing conference [shall] should be scheduled not fewer than 10 days prior to the first scheduled evidentiary hearings to do all of the following:

(1) Resolve outstanding discovery disputes.

(2) Schedule order of witnesses.

[(3) Establish time limits for cross examination of witnesses.]

[(4)] (3) Incorporate stipulations in record.

[(5)] (4) Resolve any other matters."

Subsection (f) of this section would require each participant to state its position on all issues before the conclusion of the discovery process and before the utility's case is subjected to cross-examination. The OCA believes that this is unreasonable and unrealistic. At the time of the proposed second prehearing conference, the OCA believes that each participant could outline the issues as they then appear; however, the OCA strongly opposes any attempt to limit the issues to those that appear prior to the testing of the utility's case in chief and prior to the conclusion of the discovery process.

The OCA recommends that subsection (f) be amended to read as follows:

> "(f) Combined with the second prehearing conference [shall] should be a settlement conference for the purpose of discussing settlement of the case or stipulation of certain issues. Participants, except the filing utility, must serve and file on other participants on or before the date of the conference, a statement of position [at least 5 days before the date scheduled for the second prehearing conference] which [fully and completely] identifies the issues as they then appear [and states the participant's position on each stated issue]. Included shall be a listing of the names and addresses of the witnesses each participant then intends to call and [the] their proposed area of testimony. [as they then appear.]"

In subsection (g), the sexually exclusive language must be removed. See comments to §1.4(b).

Section 5.233(a) Sexually exclusive language must be removed. See comments to §1.4(b).

Section 5.241(a) The phrase "in whose behalf" should be replaced with "on whose behalf."

Section 5.242(b) The phrase "in whose behalf" should be replaced with "on whose behalf."

Section 5.253(a) Replace the word "therefore" with "therefor."

Section 5.303 The OCA believes that the time limits provided in this section serve to delay substantially the resolution of a matter. The OCA believes that an appropriate time period would be 15 days, rather than the 30 days specified herein.

Section 5.304 The OCA believes that interlocutory review of discovery matters should be governed by the general provision for interlocutory review in sections 5.301 through 5.303, as discovery matters may affect the presentation of a party's entire case. The OCA does not see a justification for a special procedure for discovery matters; therefore, section 5.304 should be deleted in its entirety.

Sections 5.321 through 5.373-Discovery Rules.

OCA has proposed a set of comprehensive revisions to the PUC's proposed rules for discovery in PUC proceedings. These suggested changes are designed to take account of the special nature of litigation before the PUC and to revise rules applicable to civil proceedings to conform to the unique circumstances present in such proceedings. As has been more fully discussed in previous comments that OCA has submitted with respect to these discovery rules, the discovery rules applicable to general civil cases are inappropriate for application to PUC cases. In almost every PUC case one party is in possession of all or virtually all of the relevant data regarding the case and

the other party or parties must seek out those data. This means that any discovery rules that are overly formalistic and which create long time delays for the receipt of information will work a substantial prejudice to the party or parties without the information. Fairness requires that discovery rules applicable to PUC procedures recognize this fact.

Moreover, in many PUC proceedings, especially in rate proceedings, time deadlines are mandated by statute. This means that any delays in receiving relevant information, either because of unresponsive or overly technical answers to discovery or long battles over technical objections, will be detrimental to the party seeking information. Rules of discovery should be designed to minimize these potential problems and encourage an efficient and fair information gathering process.

For these reasons, OCA has attempted to revise the proposed rules to make them consistent with the realities of practice before the Public Utility Commission. The changes that OCA has made are designed to take account of special circumstances present in PUC proceedings and which, apparently, were not considered in the originally proposed draft of the rules.

The OCA has made these comments, or similar comments, in several previous submissions with respect to the PUC proposed rules on discovery. Comments in Opposition to the Proposed Rules were filed before the Commission at

the time they were submitted for publication, and to the House and Senate Consumer Affairs Committees when they reviewed the rules after they were released for publication. Similar comments were presented to the Independent Regulatory Review Commission at the time that they reviewed the Commission's procedural rules. As the Commission is aware, the IRRC rejected the Commission's proposed procedural rules because of its concerns with the proposed discovery sections.

OCA has set out the proposed changes in the present draft in a separate appendix to these comments (Appendix "A"). The following will provide a short description and justification for each of the changes that OCA is proposing in the discovery sections.

Section 5.321. Scope.

Section (a). This change would make the general statement that a presiding officer may vary the provisions of the discovery sections applicable to any case before the Commission. The present language restricts this to rate proceedings. There is no reason why the presiding officer should not have the discretion to vary discovery rules in all cases when justice requires.

Section 5.321(b). Scope Generally. This change would make clear that discovery is available for participants as well as against participants in a proceeding before the Commission.

Section 5.321(e). Purpose and Methods. OCA proposes that an additional type of discovery--on-the-record data requests--be added to the discovery section. The change in Section 5.321 simply acknowledges the additional method of discovery. This discovery method is further discussed in a proposed section 5.351.

Section 5.323. Trial Preparation Material. OCA has added language which would exempt from discovery preliminary or draft versions of written testimony submitted by expert witnesses as well as documents reflecting claims contemplated for inclusion in written testimony but not included in the final version. Because the proceedings before the Commission utilize written direct testimony of experts to a much greater extent than in civil proceedings, allowing discovery of drafts of testimony would inhibit the free exchange of ideas and information between parties and their expert witnesses.

Section 5.323(b). This change clarifies that the only written statements that are discoverable pursuant to this section are formal statements prepared by a party or a witness and signed by that individual.

Section 5.324. Discovery of Expert Testimony. OCA's proposed changes here limit the applicability of this section in rate cases to the first part only, which allows for the discovery of the names of expert witnesses who have participated or intend to testify in the proceeding. The second section dealing with discovery of summary of the

expert witness testimony is an overly technical and unnecessary process which would only further complicate the ratemaking process.

Subsection (d). OCA proposed the removal of this language in its entirety. While under OCA's proposal (see §5.324(a)) this section would no longer apply to rate proceedings, it would be inappropriate even in non-rate proceedings to limit an expert witness' ability to supplement his or her testimony only to situations where facts can be reasonably shown to have changed after the preparation of the testimony. There are other instances in which the need for changes in testimony arise which do not fall into this very limited category.

Section 5.331. Sequence and Timing of Discovery.

Section 5.331(a). This section has been changed to allow a participant, or a person who has formally applied to be a participant to initiate discovery without awaiting a formal ruling on the motion for party or participant status. This eliminates the ability of a respondent to block an interested person's discovery rights simply by opposing his or her participation in the proceeding.

Section 5.331(b). OCA has proposed changes in this section which are absolutely necessary for a rational and fair trial of rate proceedings. First, OCA has eliminated the admonition that all discovery must be completed as soon as possible. Language establishing the timely completion of discovery as a goal rather than a rule

has been substituted. Moreover, OCA has proposed a change to eliminate the requirement that all discovery be completed before hearings begin. This is simply unworkable in a rate proceeding and could easily lead to widespread prejudice to intervenors' due process rights. Instead, OCA has added language which would establish a reasonable limitation on discovery in rate proceedings, prohibiting, except in special circumstances, discovery directed to the initial filing material of a utility once evidentiary hearings have begun.

§5.341. Written Interrogatories To A Party.

Changes proposed by OCA here include elimination of the requirement that an original and two copies of written interrogatories be served upon a party and that interrogatories must be prepared in a fashion to "leave space" to respond to the interrogatory on the same sheet of paper. These rules appear to have no logical purpose, are unnecessary and would only serve to complicate unduly the discovery process. Moreover, in rate proceedings this requirement would be totally unworkable since interrogatories can be voluminous and interrogatory answers can be bigger still.

§5.341(b). This section has been changed to reflect the current practice before the Commission. Copies of interrogatories should be filed with the Secretary of the Commission and a copy should be filed with the presiding officer unless the presiding officer directs to the

contrary. Again, in rate and other types of proceedings, interrogatories themselves can be voluminous. In many cases a failure to provide copies initially to the Administrative Law Judge could needlessly delay actions on objections or other motions dealing with the discovery.

§5.341(c). Changes proposed in this section include specific recognition that interrogatories may ask for the production of documents, and that such a request will not be grounds for objecting to the interrogatory and refusing to respond. Requiring an overly formalistic separation between an "interrogatory" and a "request for production of documents" is irrational and would needlessly complicate and delay time-urgent proceedings.

The second major change proposed in this section is to eliminate the present proposal that interrogatories may only be introduced in the record for impeachment purposes and that if interrogatories are to be admitted for any other purpose, a motion "upon ten days written notice to other parties" must be made. Again, in rate proceedings, and in virtually every other type of information gathering case before the Commission, such a rule has little justification. Interrogatory answers are a valuable way of gleaning data and information about the Company's accounting and operations. Such information is crucial to the development of the intervening parties' cases. In many instances the only way to insert such data into the record is to move into the record the answers to interrogatories.

Requiring some formalistic motion and special notice in an expedited hearing process would create substantial prejudice to the parties seeking to have the information admitted into the record.

OCA does not propose to eliminate the language in this section which establishes that answers to interrogatories are not admissible per se. OCA does not believe that any interrogatory answer supplied by a party or a participant should be automatically moved into the record. Instead, OCA proposes that the rule be changed to make clear that the presiding officer may require that the relevance and basis for admission must be demonstrated before an interrogatory answer can be made part of the record.

§5.341(d). OCA proposes the elimination of this section in its entirety. Interrogatories are a crucial method of obtaining necessary data in order for parties to respond to the positions of utility companies in PUC proceedings. Any statement that interrogatories can be limited would create the potential that the discovery rights of OCA or other intervenors might be unfairly limited. Moreover, the discovery rules already contain a limitations section (see §5.361) which would provide to any participant the ability to object to an interrogatory or a set of interrogatories because they are burdensome; therefore, the language proposed in Section 5.341(d) is unnecessary.

Section 5.342. Answers Or Objections To Written Interrogatories By A Participant.

Section 5.342(a). The first change proposed by OCA is to eliminate references to responses to interrogatories being "inserted in the space provided by the requesting party on the interrogatories that are submitted to the respondent." Additional requirements for answers to interrogatories have been added to reflect both current practice before the Commission and the necessities of rate proceedings. First, the OCA proposes that answers should be required first to restate the interrogatory which is being answered. Secondly, in rate cases, the interrogatory should designate the person or persons who will be responsible for responding to future interrogatories with respect to that answer. While interrogatories should be required to be answered under oath and an affidavit should be attached, those affidavits many times do not provide an easy reference to the employee or employees of the respondent who are responsible for preparing the interrogatory and to whom additional questions can be addressed regarding that interrogatory. This requirement would be very simple for the respondent to comply with.

§5.342(b). OCA has proposed a number of changes with respect to objections to interrogatories. Most importantly, OCA proposes that objections be clearly identified as such and be separated from answers to interrogatories. This would prevent the practice that

sometimes occurs where the party responding to interrogatories waits for the full period of time in which to respond to discovery requests and then responds by objecting to a question. In many instances the objection is not even clearly identified and is buried in a multi-page answer to other interrogatories. This creates needless delays that can in many cases inhibit the ability of the requesting party to prepare its case.

The second change proposed by OCA is a requirement that objections must identify the interrogatory or part thereof deemed objectionable and the specific grounds for the objection. It also requires that the objection shall include a description of the facts and circumstances purporting to justify the objection. This requirement is necessary because in many instances objections are made by simply stating that the request is "burdensome" or that the request is made in "bad faith." In an expedited proceeding, where time is of the essence, such objections can cause needless delay and hinder the ability of the opposing party to respond to the objection in a meaningful way.

§5.342(c). OCA has proposed different time deadlines for responses to interrogatories and objections. OCA proposes that in rate proceedings, answers to interrogatories should be due within 15 calendar days, and for other proceedings such answers should be due within 20 days. OCA has also included a provision which would allow the presiding officer to modify such time periods when a motion is made to do so.

OCA has also proposed that a different time limit be imposed upon the submission of objections. OCA proposes that all objections be made within 7 days of the service of the interrogatory. There is no reason why a party would need the same amount of time to object to an interrogatory as it would to prepare a substantive answer. An objection based upon a legal position can be made fairly quickly. Once the objection is made, the requesting party can then be on notice that additional negotiations are necessary with the respondent, or that it must make a formal motion to the presiding officer to demand a response.

OCA has proposed some additional language which would make clear that a party answering interrogatories does not have the right to wait until the deadline to submit all answers at the same time. If some parts of a set of interrogatories can be answered sooner than others, those answers should be supplied as soon as possible.

§5.342(d). The major change made by the OCA in this section is to add language which would require a presiding officer to rule upon a motion to compel a response to interrogatories within 10 days after its filing. Again, because most proceedings before the Commission are time urgent, it is crucial that an expeditious resolution of any discovery controversy be made. While ALJ's normally respond expeditiously to motions to compel, this proposed change would establish an administrative right to such an expedited ruling. Again, this would insure that the parties seeking

information from utility companies would be able to receive it in a timely fashion and would not be unduly prejudiced by discovery battles initiated by utility companies.

OCA has also proposed the elimination of language which now states that a presiding officer may order that interrogatories may not be answered until after other designated discovery has been completed or until a prehearing conference or some later time. While this power is implicit to the presiding officer, OCA believes that such formal recognition of such right could encourage mischief. OCA does not believe it would be appropriate for the ALJ, for example, to order that discovery be stayed until a prehearing conference, at which time the presiding officer could delve into the final positions of the parties that would be put forth using the information sought in discovery.

§5.349. Request For Documents, Entry For Inspection And Other Purposes.

§5.349(d). OCA has changed the time limits applicable to responding to requests for production of documents, etc. to make them consistent with the time limits proposed to interrogatory answers. OCA has also added language to make any changes in those time limits consistent with the procedure for changes in time limits applicable to interrogatories. Objections to requests for documents would also be consistent with the procedure proposed for interrogatory answers. OCA has proposed additional language

which would make clear that a respondent could not object to an interrogatory solely because it did not clearly identify the fact that it was making a "request for production of documents." This is important if technical objections to interrogatory answers are going to be minimized.

§5.351 (Proposed). OCA is proposing the addition of a section to recognize a type of discovery which is regularly used in PUC proceedings and is an important method of obtaining data. OCA proposes that "on-the-record data requests" be formally recognized as a legitimate means of discovery in PUC proceedings. Such a method of discovery is necessary because of the limited time in which discovery may be conducted in virtually all PUC proceedings. When discovery is limited in such a way, there is a real possibility that there will be insufficient time to review interrogatory answers so as to clarify or make additional requests as a result of those answers. On-the-record data requests are a method of requesting data from a witness who is testifying on the stand, when there is no other reasonable method of obtaining that data discussed by the witness in answer to a question, considering the time limits that were applicable to the discovery.

This type of discovery is particularly necessary in rate proceedings where the respondent, the utility company, has access to and control of all data necessary for intervenors to try their cases. No matter how diligent and comprehensive initial discovery is, there invariably are

instances in which discovery requests are not answered completely by the respondent or are answered in a way that construes the question differently than what had been intended. During cross-examination, it frequently occurs that a witness then clarifies the interrogatory response and reveals that data, studies or information necessary to the preparation of a participant's case do indeed exist. It is perfectly appropriate, OCA submits, to, at that point, request that the witness provide those data in a timely fashion.

OCA has attempted to construct a framework for such on-the-record data requests which would clearly identify the instances in which such a procedural tool can be used and would limit the tool to appropriate instances. Under OCA's draft, on-the-record data requests would not be permitted to be directed at any part of the initial filing requirements for the utility. This would insure that a participant could not use on-the-record data requests as a means of circumventing the limitations on discovery that OCA has proposed be implemented for rate proceedings. (See §5.331(b)).

§5.361. Limitations of Scope, Discovery And Deposition.

OCA has proposed two major changes to this section as the PUC has proposed them.

§5.361(a)(5). OCA proposes the elimination of the language suggested by the PUC which would establish that

discovery could be limited when it was "sought by a person or entity that is not reasonably likely to actively participate in the proceedings." There is absolutely no reason for this kind of limitation. Any party or participant who has a right to participate in the proceeding is entitled to full and complete discovery rights. If a participant decides to limit its participation to simply one issue or part of an issue, there is absolutely no reason why it should not be permitted to do so without running the risk of having its ability to conduct discovery limited or eliminated.

In OCA's experience there are many instances in which a variety of parties participates on a very limited basis in rate proceedings. For example, consumer groups may participate on just one issue in a rate proceeding, and trade groups, industrial or commercial customers have also been known to participate on a very limited basis. Since there is no definition of "active participation" included in the rules, those groups could have their discovery rights eliminated if this part of the rule is allowed to be published as proposed. Moreover, if there is a legitimate reason for opposing the discovery of a particular party, for example, because the party is in fact going to use the information for some other proceeding, there are other limitations which would allow the utility to respond to the discovery.

§5.361(b) (Proposed). OCA proposes that additional language be added to the limitations to make clear that discovery cannot be limited solely because the discovery request requires the compilation of data or information which the answering participant does not maintain in the precise format requested. Many times utility companies will object to a request because it would require them to arrange data that is readily available and easily compiled in a way that is different from the manner in which they normally compile the data. If such a request is not unduly burdensome and oppressive, the utility should not be permitted to oppose such a request merely because it requires a different format.

Similarly OCA proposes language which would make clear that a participant would not be able to object to a discovery request solely because it requires that a special study or analysis be conducted. This is particularly important in instances in which a utility has presented evidence or positions based on the product of a computer model which is not available to other participants. Again, this would not mean that a participant could not object to such a discovery requests if it required a burdensome and costly study, only that the request to prepare such a study, in and of itself, would not be grounds for objection.

§5.372. Sanctions--Types.

§5.372(b). OCA has added a section which would make explicit a sanction which is commonly used in rate

proceedings. Since the most prejudicial consequence of a failure to respond to discovery requests within the time limits required is that the requesting party is denied the ability to prepare its case in a timely fashion, one sanction which should be available is that the requesting party's time deadlines for submitting testimony or cross-examination of respondent's witnesses be delayed.

Section 5.401(a) Sexually exclusive language must be removed. See comments to §1.4(b).

Section 5.402(b) The OCA does not believe that documents which are merely marked for identification should be admitted into evidence. In order for a document to be received in evidence, it ought to be specifically moved into evidence, thereby giving participants an opportunity to object to the admission of the document. Section 5.402(b) should be replaced with the following:

> "(b) In order to be received into evidence, an exhibit shall be marked for identification and moved into evidence in accordance with §5.402(a)."

Section 5.406 The OCA believes that this provision is much too broad. Public documents should only be received into the record when they are shown to be relevant to the proceeding. Additionally, such documents ought to be made available to participants when so requested. If such is not the case, many participants may not have access to items

placed in the record. This provision will also discourage any potential abuses of this rule. Paragraphs (a)(1) and (a)(2) should be amended, a new subsection (b) should be added, and former subsection (b) should be amended as shown below:

> "(1) A report or other document on file with the Commission which is relevant to the proceeding; or"
>
> "(2) An official report, decision, opinion, published scientific or economic statistical data or similar public document which is issued by any governmental department, agency, committee, commission or similar entity which is shown by the offeror to be reasonably available to the public and relevant to the proceeding."

> "(b) Notwithstanding the provisions of §5.406(a), a party or participant who offers into evidence a public document shall provide a copy of such document to each party or participant who requests a copy."
>
> "[(b) Subsection (a) supersedes] (c) Subsections (a) and (b) supersede 1 Pa. Code §§35.165 (relating to public documents) and 35.166 (relating to prepared expert testimony)."

Section 5.407(a)(1) Sexually exclusive language must be removed. See comments to §1.4(b).

In the fourth line, the words "the copies" should be replaced with "such copies."

Section 5.408(a) The OCA believes that official notice before the Commission should be limited to matters similar to those of which a court could take judicial notice. The

Commission has expertise on many matters which are the subject of litigation before it; however, it ought not to be permitted to take official notice of contested "facts." Subsection (a) should be amended to read as follows:

> "(a) Official notice may be taken by the Commission or the presiding officer of matters that might be judicially noticed by the courts of this Commonwealth [or any matters as to which the Commission, by reason of its functions, is an expert]. ..."

Section 5.412 OCA proposes that this section be amended to make clear that the requirement that written testimony be presented to all parties 20 days prior to the day on which the testimony would be subject to cross-examination or authenticated would not apply to rate proceedings. Such a time period is much too long for the expedited rate process. Such time limits should be established by the presiding officer based on the particular circumstances present in each case. The following language is proposed:

> §5.412. Written testimony.
>
> * * *
>
> (d) Except in rate proceedings [C]ross-examination of the witness presenting written testimony shall proceed at the hearing at which the testimony or exhibit is authenticated if, not less than 20 days prior to the hearing, service is made upon each participant of record, unless the presiding officer for good cause otherwise directs.
>
> In rate proceedings the presiding officer shall establish the schedule for the submission and presentation of written testimony and cross- examination."

Section 5.414(a) In the third sentence, the word "preferred" should be replaced with "proffered." In the fourth sentence, the word "proferred" should be replaced with "proffered."

Section 5.415(b) Sexually exclusive language must be removed. See comments to §1.4(b).

Section 5.482(a) Sexually exclusive language must be removed. See comments to §1.4(b).

Section 5.485(a) Sexually exclusive language must be removed. See comments to §1.4(b).

Section 5.501(a)(2) In order to facilitate the argument of a case, the OCA believes that the party with the burden of proof should address in its main brief the evidence presented by other parties in opposition to that party's proof. Because of the simultaneous briefing schedules usually adopted by the presiding officer, such arguments are often left for reply briefs, and thus, the other participants lose their right to respond to such arguments. Paragraph (a)(2) should be amended to read as follows:

> "(2) An argument preceded by a summary. The party with the burden of proof shall, in its main or initial brief, completely address, to the extent possible, every issue raised by the relief sought, [and] the evidence adduced at hearing, and all other parties' evidence presented in opposition to that party's proof."

Section 5.502 In subsection (b), the word "burdon" should be replaced with "burden." In subsection (c), the word "therefore" should be replaced with "therefor."

Section 5.535 The OCA believes that each party ought to have the right to file reply exceptions in all proceedings. Such a filing provides the only opportunity to respond to issues raised in exceptions to the initial or recommended decision. Before exceptions are filed, the parties cannot be certain of the grounds on which others will take exception to the decision; therefore, §5.535 should be replaced in its entirety with the following:

> "Each participant shall have the right to file replies to exceptions in all proceedings before the Commission. Such replies shall be filed within 5 days of the date of service of the exceptions."

Section 5.537 Where all participants do not join in a settlement, at the very least they should be given the right to file exceptions to the recommended decision. Only where all participants join in the proposed settlement can exceptions be waived. Section 5.537 should be replaced in its entirety with the following:

> "Except where all participants are parties to a settlement, settlements to rate proceedings will be subject to the same right to file exceptions and replies to exceptions provided in this Subchapter H."

Section 5.540 There should be some provision for a time period related to Commission action on initial decisions in accordance with 66 Pa.C.S. §335(a). That provision states:

> When the presiding officer makes an initial decision, that decision then shall be approved by the commission and may become the opinion of the commission without further proceeding within the time provided by commission rule.

OCA proposes that a new section be added to this subchapter which sets forth a specific, reasonable time period for such opinions to become opinions of the Commission, as follows:

> "§5.540. Initial decisions becoming a commission opinion.
>
> An initial decision issued by a presiding officer pursuant §335(a) of the Act shall become the opinion of the commission without further proceeding six months from the date of that decision, unless the commission orders otherwise.

Appendix "A"

OFFICE OF CONSUMER ADVOCATE

DRAFT REVISIONS TO PUC PROPOSED DISCOVERY RULES

Subchapter D. DISCOVERY

GENERAL

§5.321. Scope.

(a) Applicability. This chapter applies to on the record proceedings brought by or before the Commission. [In rate proceedings,] The presiding officer may vary provisions of this subchapter as justice requires.

(b) Scope generally. Subject to this subchapter, a participant may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it related to the claim or defense of the party seeking discovery or to the claim or defense of another party[,] or participant, including the existence, description, nature, contents, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

* * *

(e) Purpose and methods. A participant may obtain discovery for the purpose of preparation of pleadings or for

preparation or trial of a case or for use at a hearing upon petition or motion, or for any combination of these purposes, by one or more of the following methods:

(1) Depositions upon oral examination or written interrogatories.

(2) Written interrogatories to a participant.

(3) Production of documents and things and entry for inspection and other purposes.

(4) Requests for admission.

(5) On-the-record data requests.

* * *

§5.323. Trial preparation material.

(a) Generally. Subject to this subchapter, a participant may obtain discovery of any matter discoverable under §5.321(b) (relating to scope) even though prepared in anticipation of litigation or hearing by or for another participant or by or for that other participant's representative, including the participant's attorney, consultant or agent. The discovery shall not include disclosure of the mental impressions of a participant's attorney or the attorney's conclusions, opinions, memoranda, notes, summaries, legal research or legal theories. With respect to the representative of a participant other than the participant's attorney, discovery shall not include disclosure of the representative's mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics[.] or

preliminary or draft versions of written testimony or statements, exhibits, or claims contemplated for inclusion in written testimony, whether or not a final version of such testimony is submitted in the proceeding.

(b) Statements. Upon written request, a participant is entitled to immediate receipt of a photostatic copy or like reproduction of a statement concerning the action or its subject matter previously made by that participant, another participant party or a witness. If the statement is not provided, the participant may move for an order from the presiding officer. For purposes of this subsection, a statement previously made is one of the following:

(1) A written statement signed [or otherwise adopted or approved] by the person making it; or

* * *

§5.324. Discovery of expert testimony.

* * *

(ii) Except in rate proceedings, [T]he other participant to have each expert so identified state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The participant answering the interrogatories may file as an answer a report of the expert, have the interrogatories answered by the expert or provide written direct testimony of the expert. The answer, separate report or testimony shall be signed by the expert.

* * *

(c) To the extent that the facts known or opinions held by an expert have been developed in discovery proceedings under subsection (a), (1)(ii) the expert's direct testimony at hearing may not be inconsistent with or go beyond the fair scope of the testimony in the discovery proceedings as set forth in the expert's deposition, answer to an interrogatory, separate report, written direct testimony, or supplement thereto. The expert shall not be prevented from testifying as to facts or opinions on matters on which the expert has not been interrogated in the discovery proceedings.

* * *

[(d) The answering participant may supplement answers only to the extent that facts, or opinions based on those facts, can reasonably be shown to have changed after preparation of the answer.]

TIMING AND SUPPLEMENTAL

RESPONSES

§5.331. Sequence and timing of discovery.

[(a) In order to conduct discovery, a participant other than Commission staff must be a party in the proceeding as set forth in §5.361(e) (relating to limitation of scope of discovery and deposition).] Commission staff may initiate discovery at an earlier time but is subject to the limitation of subsection (b). Any participant or any

person who has formally applied to the Commission for party or participant status may conduct discovery.

(b) [Discovery shall be initiated] Participants shall endeavor to initiate discovery as early in the proceedings as reasonably possible. [In no event shall discovery be available after commencement of hearings, except upon demonstration, by the participant seeking discovery, that the subject matter on which discovery is sought could not reasonably have been known prior to hearing.] In rate proceedings, initial discovery directed to data or information supplied by the public utility at the time of the initiation of the proceeding shall be submitted to the respondent no later than the commencement of evidentiary hearings. Discovery directed to any other matter shall be available throughout the course of evidentiary hearings. In all other proceedings limitations upon the timing of discovery may be established by the presiding officer upon motion of a participant.

§5.332. Supplementing responses.

* * *

(3) A duty to supplement responses may be imposed by order of the presiding officer, agreement of the participants, or at a time prior to hearing through new requests to supplement prior responses.

TYPES OF DISCOVERY

§5.341. Written interrogatories to a party.

(a) Subject to the limitations provided by §5.361 (relating to limitation of scope of discovery and deposition), any participant may serve upon any other participant [the original and two copies of] written interrogatories to be answered by the participant served is a public or private corporation or similar entity or a partnership or association, by any officer or agent, who shall furnish such information as is available to the participant. [Interrogatories shall be prepared in such fashion that sufficient space is provided immediately after each interrogatory for insertion of the answer or objection, if answers reasonably may be expected to be short. Otherwise, space for an answer need not be provided.]

[(b) Interrogatories shall not be filed with the Commission nor shall a copy be served upon the presiding officer. A copy of interrogatories shall be served on all participants.] A copy of any interrogatories filed shall be filed with the Secretary of the Commission and upon the presiding officer unless the presiding officer directs to the contrary. A copy of interrogatories shall be served upon all the participants.

(c) Interrogatories may relate to any matters which can be inquired into under §§5.321, 5.323 and 5.324 (relating to scope, trial preparation material, discovery of expert testimony) and may include requests that the answering

party provide copies of documents without making a separate request for the production of documents pursuant to §5.349. [and] The answers may be used by any participant for [the] any appropriate purpose [of contradicting or impeaching the answering person as a witness. Otherwise, answers may,] so far as admissible under 42 Pa.C.S. §§6101-6112 (relating to rules of evidence) or other applicable rules of evidence. [be used or admitted only upon 10 days written notice to other parties prior to their use.] Answers shall not be admissible per se in a proceeding. The presiding officer may require that [T]he relevance and basis for admission [must] be demonstrated by the moving participant.

[(d) Interrogatories served by a participant on another participant shall be the minimum number necessary for trial preparation. A participant upon whom interrogatories are served, upon a showing that the interrogatories are burdensome or in bad faith, may request that the presiding officer limit the number of interrogatories.]

§5.342. Answers or objections to written interrogatories by a participant.

(a) Answers to an interrogatory shall be in writing and shall be submitted under oath. [If sufficient space has been provided, answers shall be inserted in the space following the interrogatory. If space is insufficient, answers provided shall be preceded by the full text of the interrogatory to which it responds.] Interrogatories shall

be answered fully and completely unless an objection is made. The answer should first restate the interrogatory which is being answered. The interrogatory answer must designate the person or persons who will be responsible for responding to future inquiries with respect to that answer.

(b) [If objected to, the reasons for the objection to an interrogatory shall be stated in lieu of an answer.] If a participant objects to an interrogatory such objection in lieu of answer shall be distributed in the same manner as an answer to an interrogatory, except that objections shall be distributed separately from answers to interrogatories. Objections shall identify the interrogatory or part thereof deemed objectionable and the specific ground for objection. The objection shall include a description of the facts and circumstances purporting to justify the objection. Objections shall be signed by the attorney making them. An interrogatory otherwise proper is not objectionable solely because an answer will involve an opinion or contention that related to a fact or the application of law to fact. The statement of an objection shall not excuse the answering participant from answering remaining interrogatories or subparts thereof to which no objection is stated.

(c) The answering participant shall file with the Secretary a copy [the original] of the answers to the interrogatories together with the number of copies required to be filed by the Secretary [of the interrogatories and answers and objections] within [20] 15 days for [Category 1] rate

proceedings [cases] and [30] 20 days after service of the interrogatories for all other cases. Time periods [shall] may be modified [extended] by the presiding officer, on motion, or upon agreement of the parties, as required by the volume of material and effort necessary to answer interrogatories. The answering participant shall at the same time serve a copy on all other participants. Objections filed in lieu of answers to interrogatories shall be filed with the Secretary within 7 days of service of the interrogatory except as agreed by the parties or ordered by the presiding officer. No participant may refrain from providing an answer or answers to interrogatories because other interrogatories propounded by the participant at the same time are not available for distribution. [Except as otherwise agreed by the participants or order of the presiding officer, the answers and objections to another participant's interrogatories shall be served simultaneously and in one filing rather than provided at different times or comingled with answers to interrogatories of other participants.]

(d) The participant submitting the interrogatories may move that the presiding officer dismiss an objection and direct that the participant be compelled to answer the interrogatory. [be answered.] [The presiding officer may also order that an interrogatory need not be answered, if at all, until after other designated discovery has been completed or until a prehearing conference or other later time.] The presiding officer shall rule on such motion within

10 days of its filing, unless the presiding officer proposes, and the party filing the motion agrees, that the time period be extended.

§5.343. Procedures in deposition by oral examination.

* * *

§5.349. Requests for documents, entry for inspection and other purposes.

* * *

(d) The participant upon whom the request is served shall serve a written response within [20] 15 days for [Category I] rate proceedings [cases] and [30] 20 days after service of the request for all other cases. Time periods shall be extended by the presiding officer, on motion, as required by the volume of material and efforts necessary to comply with the request. The response shall state that inspection and related activities will be permitted as requested. If the request is objected to, such objection shall be made consistent with §5.342(b). A participant may request another participant to produce and or inspect documents as part of an interrogatory filed pursuant to §5.342. No objection to a request for production of documents shall be permitted or entertained on the ground that the request was made as part of an interrogatory filed pursuant to §5.342 or that the request was not properly identified as a request for the production of documents under this section. [the reasons for objection shall be stated.] [If objection is made to part of an item or

category, the part shall be specified.] The participant submitting the request may move for an order under §5.371 (relating to sanctions--when applicable) with respect to any objection to or other failure to respond to the request or any part thereof, or failure to permit inspection as requested.

§5.350. Request for admissions.

* * *

§5.351. On-the-record data requests--During the course of a rate proceeding a participant 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. Such a request may be made orally or in writing so long as the written request is presented at the time the witness appears for cross-examination. An oral request may be confirmed in writing by the participant making the request. The procedures for written interrogatories in §5.342 shall be applicable to on-the-record data requests, except that answers shall be supplied as soon as possible after the request, but in any event no later than 10 days after the request is made, unless the presiding officer modifies the time period for good cause shown. Any objections to such a request must be made at the time that the request is made. Limitations established in or pursuant to §5.331(b) shall be applicable to on-the-record data requests.

LIMITATIONS

§5.361. Limitation of scope of discovery and deposition.

(a) No discovery or deposition shall be permitted which:

(1) Is sought in bad faith;

(2) Would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or participant;

(3) Relates to matter which is privileged;

(4) Would require the making of an unreasonable investigation by the deponent or a participant or witness; or,

[(5) Is sought by a person or entity that is not reasonably likely to actively participate in the proceedings.]

(b) In rate proceedings, discovery shall not be limited pursuant to paragraph a) solely because the discovery request requires the compilation of data or information which the answering participant does not maintain in the format requested, in the normal course of business. Nor shall discovery be limited solely because the discovery request requires that the answering participant make a special study or analysis, if such a study or analysis cannot reasonably be conducted by the participant making the request.

§5.363. Stay of proceedings.

The filing of a motion for a protective order shall [not] stay the deposition, production, entry on land

or other discovery to which the motion is directed [unless the] if the presiding officer rules on the request for protective order within the time prescribed for rulings on motions to compel responses to interrogatories established in §5.342(d), [unless the presiding officer shall, for good cause, so order.]

§5.372. Sanctions--types.

* * *

(b) In addition to the sanctions available in paragraph a), in rate proceedings, when a participant fails to file answers to discovery requests in the time required by this subchapter, or in the time authorized in the proceeding if the time periods have been amended by order of the presiding officer, the participant posing the discovery may request that the hearing schedule be delayed, or that the deadline for the filing of the participant's testimony be delayed, or that some other order be issued in order to insure that the requesting participant has a sufficient and reasonable opportunity to prepare its case, consistent with any time constraints for the trial of the proceeding established by statute, rule or order.

[(b)] (c) A witness whose identity has not been revealed as provided in this chapter shall not be permitted to testify on behalf of the defaulting party at hearing on the action. If the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting participant, the presiding officer may grant a continuance or other appropriate relief.

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JUL 2 1984
SECRETARY'S OFFICE
Public Utility Commission

Jerry Rich, Secretary
Pennsylvania Public Utility Commission
North Office Building
P. O. Box 3265
Harrisburg, PA 17120

In re: Comprehensive Rules of Practice
and Procedure - L-840097

Dear Secretary Rich:

In accordance with the proposed Rulemaking proceeding in the above entitled matter, as it appeared in the Pennsylvania Bulletin, dated April 28, 1984, we as private practitioners before the Commission submit our "Comments" per the Attachment hereto, an original and eight (8) copies being filed herewith. Charles F. Hoffman, Chief Counsel, granted an extension on June 27, 1984 until today.

If time permits, we would like to file additional and more detailed comments. We believe these regulations to be very important and given the extensive efforts exerted to date, they should not be finalized hastily without having been given full and complete review, including review of all comments.

Very truly yours,

THOMAS & THOMAS

By Charles E. Thomas
Charles E. Thomas

CET:G:W30

Enclosure

DOCUMENT FOLDER

ORIGINAL

Title 52. Public Utilities
Rules of Administrative
Practice and Procedure

Comments

General Comment: Throughout the proposed Rules of Administrative Practice and Procedure reference is made to the fact that a particular section supersedes a corresponding section in the General Rules of Administrative Practice and Procedure, 1 Pa. Code §31.1, et seq., or is identical to and/or is substantially identical to a corresponding section of the General Rules of Administrative Practice and Procedure. This reference can be misleading, particularly if changes occur, as can be expected, in the General Rules of Administrative Practice and Procedure. This has the potential for great confusion. Any reference to the General Rules should be deleted except as a drafters' explanation. Section 1.1 should be amended to state that these Rules supersede the General Rules of Administrative Practice and Procedure, 1 Pa. Code §31.1, et seq.

§1.8. Definitions

Complainants: The language should track that of a complaint in Section 701 of the Public Utility Code., i.e.,

> "Persons who complain to the Commission of any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission."

Date of service: Service of documents is treated fully under Subchapter F, §1.51, et seq. As written it refers only to service on attorneys. If reference is to be made to a section, it should be to all of Subchapter F.

Participant: Delete. This is the first time that status has been accorded to someone as a participant. There is a party to a proceeding, protestant, complainant, intervenor and an applicant, but there is no place, as we see it under the law for a participant. Reference might be made to a party as a participant. That is, it is a mere descriptive term or characterization and no more.

Pleading: This definition limits pleadings to an adjudicatory proceeding. Pleadings should be applicable to Rulemaking and Investigatory proceedings. Pleadings should include sundry documents in a Commission proceeding.

Proof of Service: Reference should be to §1.57.

Respondents: They are persons subject to a complaint proceeding or an investigation in a rate proceeding initiated by Commission. Otherwise, an Investigation is not an adversary proceeding.

Staff: The Public Utility Code defines the Staff. This definition is too restrictive and should be deleted.

Tentative decision: It would seem that this definition is the same as an Order Nisi, which also becomes final in the absence of Exceptions.

Definitions for Tentative Decision as well as Recommended Decision and Initial Decision should be tied to statutory reference to them in Section 335 of the Public Utility Code.

Subchapter B. Time

§1.11. Date of Filing

(a) A requirement for the use of a U.S. Postal Form 3817 certificate of mailing enclosed with the document makes a filing excessively cumbersome.

§1.15. Extension of Time

(a)(2) This provision requires a request for an extension of time to file a brief to be filed at least five days in advance. Given the short period of time for briefing, this requirement is too far ahead of the deadline.

(b) This provision requires a request for continuance of hearing to be made in writing. Such a requirement is unnecessary and will hamper the resolution of scheduling difficulties.

With respect to both (a) and (b) the presiding officer should retain flexibility to resolve scheduling difficulties without requiring formal writings.

Subchapter C. Representation Before The Commission

§1.26. Contemptuous Conduct.

This is inherent in any quasi judicial proceeding but to spell out these sanctions could encourage its use. The regulation is also not clear as to whether it includes the conduct of all present at a hearing, including the presiding officer.

§1.27. Suspension and Disbarment.

The rights and actions provided for herein are not within the jurisdiction of this Commission, but rather are within the exclusive province of the Pennsylvania Supreme Court.

Subchapter D. Documentary Filings

§1.32. Form of documents

These requirements are inconsistent with the appellate court rules. This regulation provides for variation in page size and too wide of margins and should incorporate Rule 124 of the Pa. Rules of Appellate Procedure.

§136. Affidavit Form Should Be no Different from Standard Form

The present form is generally ignored. There should also be a statement permitted as described in 42 Pa. C.S. §102 definition of Affidavit.

Subchapter F. Service of Documents

§1.52. Service Generally

Some clarification is necessary, in the light of subsequent sections. The requirement of service by registered or certified mail normally applied to service of individual complaints by Commission. In addition as herein discussed, there is a problem in determining the date of deposit in the mail and using the date of deposit will in some instances be burdensome and prejudicial.

§1.54. Service by a Participant

This regulation requires all documents filed to be served on all parties. Documents is an undefined term. Normally answers to complaint or pleading involving discovery by a single party are not served on all parties. This regulation merely requires excessive and unnecessary service of paper and increases the cost of the proceeding.

§1.56. Date of Service

The date of service is defined as the date of deposit in the U.S. Mail. The transmittal date on the letter is frequently, from experience, not the same as the date post marked on the envelope. The postal date is frequently illegible and cannot be readily found from the face of the document. Moreover, given the extensive time frequently consumed in the postal system, particularly where parties or their attorneys are scattered in various states, the date of deposit is prejudicial to any party

required to respond within a fixed time period. The regulations are also inconsistent and tend to confuse. For example, under §5.61, answers to complaints shall be filed within 20 days after the date of receipt of service. Is receipt of service different than date of service?

Subchapter 6. Matters Before Other Tribunals

§1.61. Notice and Filing of Copies of Pleadings Before Other Tribunals

This language is vague and refers to proceedings relating to matters in which the Commission may have jurisdiction. Conceivably this could include all proceedings before the FERC, NRC, FCC or any appeals therefrom or any litigation involving a public utility. Such a broad sweeping regulation is improper. The entire provision, particularly as it refers to bankruptcy proceedings has the potential to create conflicts of jurisdiction.

Subchapter I. Amendments and Withdrawal of Submittals

Use of the term "submittals" is in error. By definition a submittal includes only documents filed in an ex parte or non-adversary proceeding.

Subchapter K. Waiver of Rules

§1.96. Unofficial Statements and Opinions by Commission Personnel

An order or opinion once filed cannot be withdrawn or changed at any time, but only at certain times and subject to certain conditions. The statements are inherent parts of any order or opinion and whether such statements are dicta or not is left for later argument and resolution. Orders and opinions are binding until overruled, appropriately modified or held to contain dicta. Clearly rulings of presiding officers, although not necessary to the deciding of the case, are not subject to change at any time where such change adversely affects some party.

Chapter 5. Formal Proceedings

§5.21. Formal Complaints Generally

As is contained in the current rules, there should be a provision for separation of Rate Complaints and Service Complaints as presently provided in 52 Pa. Code §3.121(b).

¶5.52(b). Content of a Protest to an Application

Clarification is needed. A protest to an application other than the application of common carriers is entirely different than protests to motor carrier applications.

§5.61. Answers

As heretofore noted, the date the answer is due is unclear since the regulation refers to 20 days from receipt of service. Also it should be tied to service by the Commission rather than by the complainant. There could be a presumed three days for mailing rule as provided in Rule 121(E) of the Rules of Appellate Procedure.

§5.101. Motions

This Section requires Preliminary Motion and Answers at the same time, except for a more specific statement. If this Motion goes to a matter of substance, such as jurisdiction or no cause of action, such Motion should be disposed of first before an Answer is required.

§5.203(b). Hearings in Rate Proceedings

This provision is inconsistent and states that convenience of counsel should be considered but does not constitute grounds for continuance. Given the time-consuming nature of Commission proceeding and the frequent revisions to hearing schedules, flexibility must be maintained.

§5.233(a). Refusal to Make Admissions or Stipulate

This rule is a potential source of harrassment and should be deleted. If such a rule is necessary, it should copy Rule 4019(d) of the Rules of Civil Procedure.

§5.242. Order of Procedure

(a) Reference is made to investigations. However, no provision or reference is made to an investigation anywhere else in the regulations. An investigation should be used for the recognized purpose of investigation and not prosecuting or adjudicating. Perhaps a rule could affirm that.

Subchapter C. Interlocutory Review

This procedure appears cumbersome and subject to much abuse. It will also require more time of the Commission than the current procedure. Interlocutory review should be confined to that provision under the Public Utility Code: §331(e), that is, ALJ may certify a Question to Commission, or allow a party to file an Interlocutory Appeal.

§5.302(b). Petition for Commission Review and Answer to a Material Question

The requirement that the brief be limited to 15 pages is in certain instances inadequate to detail the magnitude of the certified issue.

Subchapter D. Discovery

Apparently, this Section incorporates Discovery Rules applicable to Civil Practice into administrative proceedings of the Commission. It is readily apparent that these rules are

exceedingly complex and can prolong litigation. In addition, these rules appear to run counter to the statutory procedures of §333 (Prehearing Procedures). Under the Code, the ALJ controls Depositions, Interrogatories, Subpoena Duces Tecum, etc.

§5.323 and 5.324

Both of these provisions encourage discovery in proceedings already overly burdened with discovery.

§5.331. Sequence and Timing of Discovery

The regulation precludes discovery after commencement of hearing. This should be tied to opposing parties. Generally the moving party will not have the opposing parties evidence in hand to engage in discovery prior to commencement of hearing.

§5.341. Written Interrogatories to a Party

This regulation requires further consideration before adoption. We note, for example, that subsection (c) permits answers to interrogatories to be used only upon 10 days written notice. Such a requirement will be unworkable in practice.

§5.342. Answers or Objections to Written Interrogatories by a Participant

The simultaneous filing of answers and objections does not promote expeditious resolution of the objection or disposition of the case. Piecemealing of interrogatory answers is the only reasonable way to move a proceeding along. By setting a time

limit for answers, the regulations again are impairing the flexibility which is necessary to the Administrative Law Judge and parties in a case. Based on experience, there are many instances, where 20 days is totally inadequate to obtain the answers.

§5.349. Requests for Documents, Entry for Inspection and Other Purposes

This provision is not consistent with §5.415 relating to subpoena. Again, this provision encourages overly broad and burdensome discovery.

Subchapter E - Evidence and Witnesses

§5.402(b). Eliminates the necessity to have Exhibits formally received into evidence. Exhibits should be formally offered for admission into the record at the close of hearing. This is especially true in big rate cases and other proceedings involving large records where a great deal of irrelevant information may be identified with no intent of admission. This regulation would require participants to state objections as to admissibility at the time of identification. The Administrative Law Judge, then, would be required to rule when the item is identified as to its admissibility, which normally is at the conclusion of a case.

§5.404. Additional Evidence

Evidence is the responsibility of the parties and their counsel, especially in an adversary proceeding. ALJ's should not be calling for additional evidence if a party neglects to offer what might be relevant and material evidence to the issues. This rule places the ALJ in control of the case and in the position of an advocate. Under the present procedure there are too many instances where the ALJ acts as an advocate rather than an unbiased presiding officer.

§5.412. Written Testimony

The twenty day filing requirement in practice will be unworkable as applied to rebuttal and surrebuttal testimony.

Subchapter H. Exceptions, Appeals and Oral Argument

§5.534. Appeal to the Commission

Given the complexity that may be involved in a section 332(g) case, it is impractical to limit an appeal to the Commission to one page and is a violation of the parties right to due process.

§5.535. Replies

It would be a violation of due process to preclude a participant from replying to another party's exceptions and to allow only one party's pleading (i.e., the appeal) to be before the Commission and to preclude a party from filing a brief.